Division of the Court of Session in time of session, or to the Lord Ordinary sitting on Bills in time of vacation, by summary petition, and the Court or single Judge, as the case may be, to whom such application shall be made, shall hear and determine such application, and for that purpose shall have power to make or direct to be made all such inquiries, and receive and entertain all such statements and evidence on oath or by affidavit, as such Court or Judge may consider necessary or desirable, or as may be produced before them or him; and if upon a consideration of all the circumstances, such Court or Judge shall be of opinion that the commissioners should entertain and proceed upon such application, an order shall be made authorising and requiring them to proceed thereon, and to deal with the same according to the provisions of this Act authorising them in that behalf, notwithstanding such . . . circumstances as aforesaid." An heir of entail in possession of estates to which his two pupil children were next heirs after him, presented a petition to the Court for authority to proceed with an application under the said Act to charge the said estates with £8000. The Court ordered intimation and service on the three next heirs of entail, and remitted to the Lord Ordinary on the Bills to proceed with the petition during vacation.

Counsel for Petitioner — Dundas. Agents—Dundas & Wilson, C.S.

Wednesday, July 20.

SECOND DIVISION.

[Sheriff of Lanarkshire.

CLAPPERTON, PATON, & COMPANY *v.* ANDERSON.

Cautionary Obligation—1696, *c.* 25—*Act* 19 *and* 20 *Vict. c.* 60 (*Mercantile Law Amendment Act (Scotland)* 1856), *sec.* 6—*Creditor in Obligation not Named.*

A cautionary obligation for payment of instalments of composition by a debtor named and designed is not void by reason of the grantees not being named, it being plain from the terms of the writ who they were.

Todd & M'Laren, drapers, Lanark, suspended payment in November 1876. Their largest creditors were Clapperton, Paton, & Company, Glasgow, to whom they were indebted in the sum of £797, 13s. 3d. Mr Tolmie, accountant in Glasgow, prepared for the creditors a state of affairs. Thereafter the creditors accepted an offer of composition of 15s. per £1 on their respective debts, to be paid by James S. M'Laren, the other partner J. S. Todd being allowed to retire from the concern. The composition was to be paid by four equal instalments at three, six, nine, and twelve months from 15th December 1876. For the last of these instalments John M'Laren, Donald M'Laren, and Adam Anderson, the defender in this action, agreed to become cautioners, the liability of Anderson being restricted to £135. The cautionary obligation was in these terms—"We, John M'Laren, farmer, Ballindalloch, Comrie, Perthshire, Donald M'Laren, cattle dealer, Colinsburgh, Fife, and Adam Anderson, travelling draper, 47 Castlegate, Lanark, hereby agree to become jointly and severally sureties for payment of the last of four instalments of a composition of fifteen shillings per pound offered by James S. M'Laren on the debts due by his firm of Todd & M'Laren, drapers, Lanark, said instalments being payable at three, six, nine, and twelve months from 15th December 1876; moneys to be lodged by him fortnightly, for behoof of the creditors, to meet the several instalments as they fall due; Mr John S. Todd, his partner, to retire from the firm without consideration, he receiving his discharge under the composition settlement; but the subscriber Adam Anderson hereby restricts his liability under this obligation to the sum of One hundred and thirty-five pounds and no more." M'Laren failed to pay the instalments as agreed on, except the first, and this action was raised against Anderson as being liable under the obligation just quoted. The petition concluded for £49, 11s. 8d., as the proportion of the sum of £135 secured by the defender to which the pursuers were entitled in respect of the last instalment of composition on their debt, amounting to £149, 11s. 3d. The defender averred that it was the duty of the creditors, and of Mr Tolmie as acting on their behalf, to insist on M'Laren's punctually lodging fortnightly instalments to meet the instalments of composition and that he had relied and was entitled to rely on their doing so, but that they had neglected to fulfil this condition of the obligation. He pleaded that he was therefore freed from his obligation; also that the cautionary obligation was defective and insufficient.

The Sheriff-Substitute (GUTHRIE) pronounced this interlocutor—"Finds that by agreement, dated 18th December 1876, the defender guaranteed to the creditors of Todd & M'Laren, drapers, Lanark, to the extent of £135, that James S. M'Laren would pay the last instalment of a composition of fifteen shillings per pound to them, due upon 15th December 1877: Finds that James S. M'Laren failed to pay the instalments of the said composition, and that consequently his estates were sequestrated on August 24, 1877: Finds that the last instalment of said composition is still unpaid; and that the sum sued for is the proportion of the pursuers' share thereof corresponding to the said sum of £135: Finds that the defender has failed to instruct any fault or omission on the part of the pursuers of such a nature as to discharge him from his liability under the said guarantee: Therefore repels the defences and decerns as craved," &c. With this note—. . . . . "The guarantee is in favour of 'the creditors' of a party named, and I think it does not fall within the terms or the intention of the statute anent blank writs. There is a description of the grantees in which *constat de personis*, and that is all that the law requires—Ersk. iii., 2-6."

The Sheriff (CLARK) adhered on appeal.

The defender appealed to the Court of Session, and argued—The cautionary obligation founded on was not addressed to anyone. The party entitled to found on such an obligation must be named in it. Or if there were a number of such persons, a trustee for them must at least be named. The Mercantile Law Amendment Act,

which made it indispensable that cautionary obligations should be in writing, clearly implied that the person to whom the obligation was given should be named. The cases on this subject under the corresponding section of the English Statute of Frauds were therefore applicable—*Williams* v. *Lake*, 2 Ellis and Ellis, 349; *Duncan's Trustees* v. *Shand*, July 19, 1872, 10 Macph. 984 (opinions of Lords Neaves and Benholme); Act 1696 c. 25; Act 19 and 20 Vict. c. 60; Mercantile Law Amendment Act (Scotland) 1856; Ersk. iii. 2-6. The evidence showed that the debtor had not been so well looked after by the creditors as they had undertaken to do by the clause in the obligation (assuming it to be a good obligation), which related to fortnightly payments. That was a stipulation inserted in the defender's interest.

The pursuers' counsel was not called on.

At advising—

LORD JUSTICE-CLERK—I am unable to see any ground for recalling the Sheriff's judgment. As to the constitution of the obligation, the appellant's counsel did not maintain that the English Statute of Frauds applied to Scotland, but he said that by the Mercantile Law Amendment Act such obligations must be in writing. This one is in writing. But then he says it is blank in name of the creditors under it. That is a mistake. It is not so. It is quite clear who is creditor under it. The case cited from English law is a totally different case. I think that under the Mercantile Law Amendment Act this is a good cautionary obligation, and that there can be no doubt as to who the persons are on whom it constitutes a right. On this matter I may refer parties to the note of the Editor in M'Laren's edition of Bell's Commentaries, vol. i. 402, *et seq.*

As to the appellant's second point, I am unable to read the obligation as imposing on the creditors the duty which it is said was laid upon them. I am for adhering to the judgment of the Sheriffs.

LORD YOUNG and LORD CRAIGHILL concurred.

The Court adhered.

Counsel for Appellant — Campbell Smith — Rhind. Agent—W. Officer, S.S.C.

Counsel for Respondents—Ure. Agents—Cairns, M'Intosh, & Morton, W.S.

Wednesday, July 20.

FIRST DIVISION.

[Sheriff of Lanarkshire.

CENTRAL HALLS COMPANY (LIMITED) *v.* FERGUSON (YUILL'S TRUSTEE).

Public Company — Calls — Right to Notice of Call in terms of Articles of Association where Shares have been Forfeited but Liability for Call remains.

The articles of association of a public company provided—"Twenty-one days' notice at least shall be given of the time and place appointed by the directors for payment of every call;" provision was also made for penal interest where calls remained unpaid, and for the forfeiture of the shares of parties in default of payment. On 14th June a call was made, payable in equal instalments on 21st July and 23d August. On 28th June the shares of a shareholder were duly forfeited in respect of the non-payment of former calls. No notice of the call of 14th June, in terms of the above provision, was sent to the shareholder in question, and the first intimation he received was a demand for payment made on 13th August. On his sequestration, *held* that the company were entitled to rank on his estate for the amount of the call, but not for penal interest—*per* Lord President (Inglis) and Lord Mure, on the ground that having ceased to be a shareholder more than twenty-one days before the day appointed for the payment of the first instalment of the call, he was no longer entitled to the twenty-one days' notice provided by the articles of association—*question* as to his position had he remained a shareholder; *per* Lord Shand, on the ground that even as a shareholder all that he was entitled to was twenty-one days' actual notice before being called on to pay the call; *per* Lord Deas, on the ground stated by the Lord President and Lord Mure, but *opinion* that in the absence of that ground his Lordship was prepared to concur with Lord Shand.

The articles of association of the Central Halls Company (Limited) contained the following provisions with reference to the making of calls—"12. The directors may from time to time, but subject to the directions hereinafter mentioned, make such calls on the shareholders, in respect of all moneys unpaid on their shares, as the directors think fit; and every shareholder shall be bound to pay the amount of every call to the persons, and at the time and place, appointed by the directors. 13. Twenty-one days' notice at least shall be given of the time and place appointed by the directors for payment of every call. 14. At least one month shall intervene between the time appointed for the payment of two successive calls. 15. A call shall be deemed to have been made at the time when the resolution of the directors authorising such a call shall have been passed. 16. If any call payable in respect of any share is not paid on or before the day appointed for payment thereof, the holder for the time being of such share shall be liable to pay interest for the same at the rate of 10 per cent. per annum from the day appointed for the payment thereof to the time of the actual payment."

With reference to the forfeiture of shares the articles contained the following further provisions—"25. If any shareholder fails to pay any call on the day appointed for payment thereof, the directors may, at any time thereafter, during such time as the call remains unpaid, serve a notice on him requiring him to pay such call, together with interest and any expenses which may have accrued by reason of such non-payment. 26. The notice shall name a further day on or before which such call, and all interest and ex-