is therefore, I hold, within the meaning of the terms of the statute. But apart from the statute, I think this Court has a discretionary power to limit the liability of a cautioner. In like manner, at common law this Court in appointing its own officers has a latitude in fixing not only the amount but also the nature of the caution which it may require to be found.

The Court pronounced the following interlocutor:—

"On the report of the Junior Lord Ordinary, having heard counsel, remit to his Lordship to grant the prayer of the petition to the effect of accepting as sufficient caution a bond or policy of the National Guarantee and Suretyship Association (Limited) for £10,000."

Counsel for Petitioner—Sol.-Gen. Asher, Q.C. —Begg. Agents—Morton, Neilson, & Smart, W.S.

Tuesday, March 11.

SECOND DIVISION.

[Sheriff of Argyllshire.

BANNATYNE *v.* M'LEAN.

Process—Expenses.

Decree having been given in a Sheriff Court appeal for a sum of damages and expenses, pursuer moved for approval of the Auditor's report and decree for the taxed amount. The defender stated that payment of expenses in full had been already tendered coupled with a personal undertaking to pay the expenses of extract should that become necessary, and moved for deduction of the expense of the motion. The Court, following the case of *Allan* v. *Allan's Trustees*, July 1, 1851, 13 D. 1270, gave decree for the amount of the account as taxed, less the expense of the motion for approval and decree.

Tuesday, March 11.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

M'FADYEAN (TODD'S TRUSTEE) *v.* CAMPBELL AND OTHERS.

Bankruptcy—Sequestration—Motion for Removal of Trustee—Notice of Meeting—Bankruptcy Act 1856 (19 *and* 20 *Vict. c.* 91), *secs.* 74, 98, *and* 99.

Held that a meeting of creditors called by a commissioner on a bankrupt estate for the purpose of removing the trustee under section 74 of the Bankruptcy (Scotland) Act 1856, must be specially intimated to the trustee at least not later than the date of the advertisement calling the meeting.

Opinion that the special intimation to the trustee must precede the advertisement.

A trustee having obtained interim interdict against a commissioner—who had given notice of a motion for his removal—holding, or constituting, or taking part in the meeting, certain of the creditors held the meeting and passed a motion for removal of the trustee; other creditors, forming a majority in value, and the trustee, absented themselves, relying on the fact that the interim interdict had been granted. *Held* that they were justified in doing so, and that the resolution for the removal of the trustee must be recalled.

The estates of John Todd, manure merchant, Stranraer, were, on his own petition, with concurrence of the Royal Bank as a creditor, sequestrated by the Lord Ordinary on the Bills in November 1883. At the first meeting of creditors Andrew M'Fadyean, solicitor, Newton-Stewart, was, after a competition with William M'Harrie, accountant, Stranraer, elected trustee, and three creditors residing in or near Stranraer were at the same time elected commissioners. The election was duly confirmed by the Sheriff, who on 21st December fixed the 31st December as the diet for the bankrupt's examination. On the date of the Sheriff's deliverance the trustee received a letter from Mr W. G. Belford, solicitor, Stranraer, dated the previous day, as follows:—"*John Todd's Sequestration.*—Dear Sir,—As agent for, and authorised by the three commissioners on this sequestrated estate, I send you on the other side copy of a notice which will appear in the *Edinburgh Gazette* to-morrow."—and enclosing a copy of a notice which appeared in the *Edinburgh Gazette* on 21st December, signed by the three commissioners, intimating that a general meeting of the creditors was to be held within the Court-house, Wigtown, on 29th December 1883, "for the purpose of removing Andrew M'Fadyean, solicitor, Newton-Stewart, from his office as trustee on the above sequestrated estate, in terms of section 74 of the Bankruptcy (Scotland) Act 1856." The meeting was held accordingly, and the motion to remove the trustee was negatived by a majority in value of the creditors present.

On 10th January 1884 Mr M'Fadyean received from Mr Belford, as agent for Mr M'Math, one of the commissioners, the following letter dated 9th January:—"*John Todd's Sequestration.*—Dear Sir,—At the request of Mr M'Math, one of the commissioners on this estate, I send you annexed copy of a notice that appeared in yesterday's *Gazette*, to which you will no doubt attend." The *Gazette* notice, which was signed by M'Math, intimated that a general meeting of Todd's creditors would be held on 16th January for the purpose of removing M'Fadyean from his office of trustee in terms of section 74 of the Bankruptcy (Scotland) Act 1856.

The Bankruptcy (Scotland) Act 1856 provides (section 74)—"A majority in number and value of the creditors present at any meeting duly called for the purpose may remove the trustee or accept of his resignation." . . . Section 98 provides—"The trustee, or any commissioner, with notice to the trustee, may at any time call a meeting of the creditors." . . . Section 99 provides—"Notice of the day, hour, place, and purpose of all meetings of creditors under this Act shall be advertised in the *Gazette* seven days at least before the day of the meeting." . . .

Mr M'Fadyean thereupon presented a note in the Bill Chamber craving the Court to interdict M'Math, "or anyone on his behalf, or acting under his instructions, from holding, constituting, or taking part in a meeting of the creditors of the said John Todd at Stranraer on Wednesday the 16th day of January 1884." On 14th January the Lord Ordinary on the Bills granted interim interdict in these terms. Notwithstanding the interdict a meeting of creditors was held on the 16th. The minute of meeting bore that there was laid on the table by the clerk of the meeting the following letter addressed to him:—"*Stranraer, 16th January* 1884.—Dear Sir,—I beg to enclose service copy interdict prohibiting me from taking part in the meeting to-day. I enclose you copy of *Edinburgh Gazette*, and certificate of postage, as they are of no use to me. You will at once understand that it is impossible for me, or anyone in my behoof, to attend the meeting. — Yours faithfully (Signed) WILLIAM M'MATH."—The minute further bore that a motion for the removal of the trustee was made and carried unanimously. The creditors who composed the meeting were all creditors for small amounts in or near Stranraer. Certain other creditors outside of Stranraer, who formed a majority in value, were not represented at the meeting.

Mr M'Fadyean then appealed to the Lord Ordinary on the Bills against the resolution of the meeting, craving that it might be recalled.

He averred—The commissioners were nominees of the bankrupt's relatives, and their object in desiring to have him removed was to put in his place Mr M'Harrie, who had been supported as candidate for the office at the first meeting by certain relatives of the bankrupt who alleged themselves to be creditors. The creditors, forming a majority in value of the whole, who supported his (appellant's) nomination as trustee relied on the interdict of the meeting of 16th January being respected, and so absented themselves. The creditors who attended were those who were co-operating with the bankrupt and his relatives, and whose object was to impede the winding-up of the estate.

The respondents averred—The bankrupt estate was wholly situated in Stranraer, and the great majority of creditors were resident there, while the appellant resided twenty-four miles away. They desired a trustee where the estate was situated, but Mr M'Harrie was not a candidate for the office. The appellant's removal would lead to a more economical and expeditious procedure in the winding-up. They also averred that they had really a majority in number and value of the creditors, but that they had deemed it more economical and expedient to proceed by way of removing the appellant than to enter on a litigation with regard to the rejection of the vote tendered by one creditor who would have voted with them if his vote had not been rejected.

The appellant pleaded—"(1) The meeting at which the resolution appealed against was adopted having been called without notice to the trustee, in terms of the 98th section of the Bankruptcy (Scotland) Act 1856, the said resolution ought to be recalled. (2) The said meeting not having been properly constituted, or *separatim*, having been constituted and held in breach of an interdict of Court, the said resolution ought to be recalled. (3) The appellant and the creditors who desire that he should remain trustee having absented themselves from the said meeting, in reliance on and in respect of the interdict thereagainst, and having been entitled to rely on the said interdict being observed, the said resolution ought to be recalled, as having been passed *ex parte* by creditors conjunct and confident with the bankrupt or his friends, and not by a properly constituted meeting of creditors. (4) The resolution appealed against, and the other proceedings for the appellant's removal, having been nimious, oppressive, and an abuse of the provisions of the Bankrupt Statute, and there being no legitimate ground existing or alleged for the removal of the appellant from the office of trustee, the resolution ought to be recalled. (5) The sole object of the said resolution being to prevent or obstruct the proper conduct of the sequestration, the same should be recalled with expenses."

The respondents pleaded—"(1) The appeal is incompetent. (3) The meeting having been duly called and held in terms of the statute, the appeal should be refused."

The Lord Ordinary sustained the appeal and recalled the resolution of creditors appealed against.

"*Note.*—The appellant was elected trustee in November 1883, and was duly confirmed. On the 21st of December he received notice that a meeting had been called by the commissioners for the 29th of that month, for the purpose of removing him from office. The meeting, which appears to have been duly called, was held accordingly, and the result was that a statutory majority of the creditors resolved that he should not be removed.

"On the 10th of January following the appellant received a notice from one of the commissioners, Mr M'Math, that he had called another meeting for the same purpose by an advertisement in the *Edinburgh Gazette*, which had been published on the 8th. This second meeting was called for the 16th January, and the appellant maintains that the notice which he received on the 10th was not sufficient to satisfy the requirements of the 98th section of the Bankruptcy Act 1856.

"I cannot assent to the appellant's argument that no meeting can be validly called by a commissioner without previous notice to the trustee. I think the enactment would be satisfied by giving notice to the trustee simultaneously with the calling of the meeting by advertisement. But the statute requires, by the 99th section, that notice shall be given by advertisement in the *Gazette* seven days at least before the day of the meeting, and by the 98th section, that besides the public notice by advertisement, special notice shall be given to the trustee; and there appears to me to be great force in the appellant's contention that the trustee is entitled to the same notice as the statute requires to be given by advertisement to the creditors. He would thus be entitled to at least seven days' notice, and he only received five days' notice, if the period is to be reckoned in terms of the 5th section of the statute. But if I were prepared to hold that the notice to the trustee was sufficient, I should still be of opinion that the proceedings were irregular, and that the resolution complained of could not be sustained.

"The appellant, conceiving that he had not received due notice of meeting, presented a note of suspension and interdict, and on the 14th of January he obtained interim interdict in the terms stated in the condescendence. The application for interdict was based upon averments that the meeting had been called by relatives of the bankrupt for indirect purposes, and particularly for the purpose of obstructing the examination of the bankrupt, for which a diet had been fixed; and it was urged (and I thought with reason) by the counsel for the complainer, that if these averments were unfounded in fact, no prejudice could arise from the granting of the interdict, because it was at least questionable whether the meeting had been duly called; and if the creditors really desired to remove the trustee, it was plainly for the interest of all parties concerned that the question of his removal should be considered at a meeting to which no such objection could be taken. The commissioner could have no difficulty in calling a meeting, with due notice to the trustee, and it might be anticipated that this course would be followed, if there were no indirect motive for pressing on the meeting called for the 16th.

"It appears, however, that certain of the creditors, assuming that the interdict was effectual only to prevent Mr M'Math from taking part in the meeting, persisted in holding it, and passed the resolution of which the appellant complains. I do not think it necessary to consider whether that construction of the interdict was technically correct, nor to inquire into the truth of the appellant's averments as to their motives in holding the meeting, or as to the part which Mr M'Math may have taken in enabling them to do so. Assuming that they acted in good faith, I am of opinion that the resolution complained of is ineffectual. The appellant avers that he, and the creditors who desired that he should continue in office, abstained from attending the meeting because they knew of the interdict, and relied upon it being respected. I think they were entitled to assume that the meeting would not be held, and were justified in absenting themselves. It is averred by the appellant that the respondents who support the resolution are a minority in value of the creditors, and I did not understand this to be disputed at the bar.

"I am of opinion that the appeal must be sustained, not only because of a technical irregularity in the proceedings, but because it would be unjust to the trustee, and the absent creditors, to hold them bound by a resolution passed in such circumstances. But this judgment will not prevent the commissioners from bringing the question, if they think fit to do so, before a meeting, duly called, and which all parties interested may have an opportunity of attending."

The respondents reclaimed, and argued—The resolution was valid and regular. All that the Act directed was "notice" to the trustee, without specifying when it should be made with reference to the *Gazette* notice. Here it was to all intents simultaneous, and was reasonable and sufficient notice to the trustee to prepare himself for the meeting, and that was all he could ask. The interdict should therefore not have been granted, and even if it should, it did not apply to the creditors who attended the meeting, but only to M'Math. The absenting creditors remained away at their own risk.

The appellant replied—The trustee was entitled under section 98 to notice apart from and prior to the *Gazette* notice. The public notice was meant for the body of creditors, and was a separate enactment from that prescribed for the trustee. The meeting was held in breach of interdict; but even if it were not in breach of interdict, it was otherwise irregular, in respect that certain creditors who were justified in absenting themselves were not represented.

At advising—

Lord Justice-Clerk—I think the Lord Ordinary has taken the right view of this case. In the first place, in regard to the length of time required for the notice directed to be given to the trustee, the question under the clause of the statute is a narrow one. I think at least that the *Gazette* notice cannot be said to be notice to the trustee in the sense of the statute, which requires notice to be given to him individually, though perhaps a separate notice to him simultaneously with the *Gazette* notice would be sufficient compliance with it. But it is not necessary to decide that point. In the second place, the meeting was held after an interdict at the instance of the trustee was served on the commissioner who gave the notice of the meeting, and he, instead of at once giving notice to put off the meeting, writes a letter which substantially encourages the creditors to go on in the absence of some important creditors who abstained from attending in consequence of the interdict. On the whole matter, and for the reasons given by the Lord Ordinary, I am of opinion that the proceedings at that meeting cannot be sustained.

Lord Young—I am of the same opinion. If it were necessary to decide the point, I should be prepared, as at present advised, to hold that the notice to the trustee must precede, by however short a time, the publication of the notice calling the meeting in the *Gazette*. And therefore that the notice given to this trustee was not in terms of the statute, and that the meeting was illegal, and was properly met by an interdict. And if it were necessary to determine the point, I should be prepared to hold that the meeting was held in breach of interdict, and the proceedings therefore ineffectual; but this is unnecessary, for we have enough in the circumstances of the meeting—in the fact that certain creditors were prevented by the interdict from attending—to enable us—as we have done before where it appeared to be for the interest of all concerned—to sustain the appeal, and allow the matter to be reconsidered at another meeting.

Lord Craighill—I am also of opinion that the Lord Ordinary's judgment should be affirmed for the reasons which he has stated in the note to his interlocutor. If it were necessary to decide the point, I should be prepared to agree with Lord Young that the true reading of the statute is that private notice to the trustee must precede the public notice to the creditors in the *Gazette*, in order to enable him to provide himself with the information and documents necessary to be produced at the meeting.

LORD RUTHERFURD CLARK concurred.

The Court adhered.

Counsel for Appellant (Respondent)—J. P. B. Robertson—Jameson. Agents—Dundas & Wilson, C.S.

Counsel for Respondents (Reclaimers)—Trayner—W. C. Smith. Agent—P. Adair, S.S.C.

Wednesday, March 12.

FIRST DIVISION.

ORR EWING AND OTHERS *v.* ORR EWING'S TRUSTEES (NOTE FOR GEORGE AULDJO JAMIESON, JUDICIAL FACTOR).

(*Ante*, pp. 423 and 475).

Judicial Factor—Possession of Estate—Diligence.

A judicial factor presented a note to the Court stating that he was unable to obtain possession of the trust-estate on which he had been appointed factor, and craved the Court to grant warrant to messengers-at-arms to open lockfast places and recover and deliver to him the documents belonging to the estate. Circumstances in which the Court *granted* the prayer of the note.

Ante, pp. 423, 475. This was a further application by Mr Auldjo Jamieson, as judicial factor on John Orr Ewing's trust-estate, in which he stated that he had exhibited to Messrs M'Grigor, Donald, & Co., the defenders' agents, an extract of the decree of 7th March, and requested delivery of the several documents belonging to the trust-estate; that the documents were shown to him and a list of them made, but that delivery had been refused, and that he then took instruments in the hands of a notary-public; that the Royal Bank had refused payment, on the ground that they could only pay the balance on the current-account on the cheque of Messrs M'Grigor, Donald, & Co., and the sums contained in the deposit-receipts on delivery thereof duly endorsed; that the several companies in which stocks and shares were held had refused to make the transfers required, and to issue any certificate in favour of the factor without delivery to them of the certificates or other vouchers of their respective stocks, shares, and debentures.

The judicial factor therefore craved the Court "to grant warrant to messengers-at-arms to search for, recover, and take possession of the several books, certificates, bonds, and other documents specified in the schedule hereto annexed, and, if necessary for that purpose, to open all shut and lockfast places, and to deliver the said several books, certificates, bonds, and other documents, when recovered, to the said George Auldjo Jamieson, judicial factor foresaid, and to decern; to allow interim extract of the deliverance to be pronounced hereon, and to dispense with the reading in the minute-book, and allow extract to be issued forthwith."

The trustees contended that there was no precedent for such a prayer. A warrant to open lockfast places was only granted as a means of enforcing a decree, but no decree had been here pronounced against them.

At advising—

LORD PRESIDENT—As to the difficulty suggested by Mr Pearson, that this order is not sought for the ordinary purpose of enforcing implement of a decree against the respondents, I do not see that there is any difficulty at all. We instructed the judicial factor to take possession of all "sums of money belonging to the trust-estate, and of the whole writs, titles, and securities, books, papers, and documents of and concerning the same, wheresoever or in whose hands soever the same might be found." He now reports to us that he has ascertained where they are, that he has seen them, and demanded delivery of them from the persons in whose custody they are. Delivery was refused, and thereupon he took instruments in the hands of a notary-public. He now asks us to give him the means of compelling the delivery that was refused, and I do not see how we can possibly refuse his request. If we did, the effect, as Lord Shand has pointed out during the argument, would simply be, that after having ordered him to take possession of these things, he is not to do so, and that is a result that we cannot contemplate for a moment. I am for granting the prayer.

LORD MURE and LORD SHAND concurred.

The Court granted the prayer of the note.

Counsel for Judicial Factor—J. P. B. Robertson—G. Wardlaw Burnet. Agent—F. J. Martin, W.S.

Counsel for Respondents — Pearson—W. C. Smith. Agents—Murray, Beith, & Murray, W.S.

Counsel for Royal Bank (Compearers)—Mackintosh—Dundas. Agents—Dundas & Wilson, W.S.

Wednesday, March 12.

FIRST DIVISION.

[Exchequer Cause.

LLOYD *v.* INLAND REVENUE.

Revenue — Income Tax — Residence in United Kingdom—Foreign Merchant—Property Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 1, *sched. D—Income Tax Act* 1853 (16 *and* 17 *Vict. cap.* 34), *sec.* 2, *sched. D—Customs and Inland Revenue Act* 1882 (45 *and* 46 *Vict. cap.* 41), *secs.* 9 *and* 10.

A person was assessed for the year 1883-84 under sec. 2, sched. D, of the Income Tax Act 1853, in respect of his profits from trading as a merchant in Italy. He was the proprietor of an estate in Scotland, which he had purchased in 1875, and where he and his family resided during the year of assessment from 6th July till 31st October. He and his family had been settled at Leghorn for many years, where he had a town and a country house, and where he carried on business. He had no place of business in Britain. *Held* that he was a person "residing in the United Kingdom" within the meaning of schedule D, and that the assessment had been properly made.

Observations (*per* Lord President and Lord Shand) on section 39 of the Property Tax Act 1842 (5 and 6 Vict. cap. 35).