break at the end of each year in favour of the lessees.

This in substance was the agreement entered into between these two companies, and the only thing which it appears to me that the Caledonian Company secured was time. Their great object was if possible to prevent the prior bondholder from selling, lest they should lose their security, and it was with that object that they entered into possession of these subjects for the purpose of granting the lease I have referred to.

It does not appear to me however to be of any importance for the purposes of this decision to consider whether or not this was a judicious arrangement. If I had to express any opinion upon it I should say it was not. It has in my opinion many objections upon the face of it, and there was apparently no reasonable prospect of the Caledonian Company ever deriving any benefit from it.

But the question which we have to determine is whether in entering into such an agreement the directors exceeded their powers. I am of opinion that they did.

It is well settled as a principle of common law that unless a company is formed for the purpose of granting guarantees or for such purposes as necessarily imply a power to make guarantees, no partner entering into such an arrangement could possibly bind the firm. There are many English authorities upon this matter, and although we have no direct decision upon the point, it has always been assumed that that is the state of the law. It illustrates the doctrine that the granting of cautionary obligations by a company is not a thing which can be done at common law unless it be within the memorandum of association.

Now, here we are dealing with a company whose line of business is very clearly defined in its articles of association, from which it clearly appears that the main object of the company was to advance money on certain classes of securities and of heritage, as in the case of the present bond, and of course all that is incidental or conducive to such advances is also lawful.

But the question comes to be, was the entering into an agreement of this kind incidental or conducive to a loan already made and secured?

It was said in the course of the discussion that the Caledonian Company were doing their best to realise this property, and that this arrangement was really conducive to the object for which this company was formed.

Now, that was exactly the argument which was submitted to the Court in the case of *Shiell's Trustees*. It was said that in that case the Court had to deal with a building society, and that there was a material difference between it and a society like the present. That society had however as part of its business the lending of money on heritage, and it was while they were in the act of realising these securities that they were called in question. That makes the case of *Shiell's Trustees* and the present case the same.

In his opinion in that case Lord Watson says:—"The real test is to consider whether the act is authorised by the statutory rules of the society, which perform a twofold function; in the first place they define the powers of the directors, and in the second place they ensure that all who deal with the directors shall have notice of the precise limits of their authority." And again, "It is said, however, that they have that power by implication in the special case of realisation whenever it becomes expedient and desirable on the part of the society that they should purchase time from a prior bondholder. Now, I quite admit that circumstances might render that a very proper and a very expedient step in the case of an individual *sui juris*, or in the case of directors who have unlimited powers to conduct business according to the rules which guide individuals; but that is not the question here. Is it in any fair sense of the word incidental in the sense of being necessarily incidental to the realisation of the security? The rules, as the Lord Chancellor has pointed out, contain a great many very specific provisions upon the subject of realisation. None of these provisions point to the exercise of such a power as this, and it humbly appears to me that the purchase of time by granting an obligation of guarantee is a transaction altogether independent and quite separate from the realisation of a security."

Now, I cannot distinguish the present from that case, and I entirely concur in the opinion of Lord Watson in *Shiell's Trustees*.

LORD SHAND and LORD ADAM concurred.

LORD MURE was absent.

The Court refused the note.

Counsel for the Caledonian Company and Liquidator—Guthrie Smith—Strachan. Agents—Morton, Neilson, & Smart, W.S.

Counsel for the Life Association—Gloag—Thorburn. Agents—Melville & Lindesay, W.S.

Saturday, February 6.

FIRST DIVISION.

STUART *v.* MOSS.

(*Ante*, Dec. 5, 1885, *supra*, p. 231.)

Process—Expenses—Effect on Original Action of Decree for Expenses in Accessory Action.

The defender in an action in a Sheriff Court for damages for breach of contract was assoilzied with expenses. The pursuer subsequently brought an action in the Court of Session for damages for slander alleged to have been committed in the course of the correspondence by which the contract was broken off. *Held* (distinguishing from *Irvine* v. *Kinloch*, Nov. 17, 1885, *supra*, p. 112) that the two actions being distinct, the defender was not entitled to have payment of the taxed expenses in the first made a condition of the pursuer proceeding with the second.

Expenses—Compensation—Agent-Disburser.

The defender in an action of damages for breach of contract was assoilzied with expenses. The pursuer subsequently brought another action for damages for slander alleged to have been committed in the course of the correspondence by which the contract was broken off. Decree for expenses to

which pursuer was found entitled in the second action *pronounced* in name of the agent-disburser, although the taxed expenses in the first action had not been paid.

Henry Stuart, pantomimist, sued H. E. Moss in the Sheriff Court at Edinburgh for damages for breach of a contract by which Stuart was to have performed at Moss' (defender's) theatre. Stuart was unsuccessful in this action, and was found liable in expenses, which were taxed at £35. Moss in the course of the correspondence by which he broke off the engagement with Stuart made use of certain expressions which were founded on by Stuart as slanderous, and for which he raised the action of damages reported *supra*, p. 231. After issues had been adjusted on a reclaiming-note, and the case remitted for trial to the Outer House, Moss moved the Lord Ordinary (LEE) to postpone the trial until Stuart had paid the expenses in the Sheriff Court action. The Lord Ordinary refused the motion.

"*Note.*—In the event of the defender intimating to-morrow his intention to reclaim, the pursuer offered to consent to a delay to the 19th February to enable the reclaiming-note to be disposed of. My reason for refusing the motion as made in the present action is entirely independent of and unconnected with the Sheriff Court action for breach of contract. The case in this respect is different from *Irvine* v. *Kinloch*, November 17, 1885, 13 R. 172, and cases there cited."

Moss reclaimed.

At advising—

LORD JUSTICE-CLERK—This case is not at all in the same category as *Irvine* v. *Kinloch*. Here the two actions are totally distinct. One is an action of damages for breach of contract, and apparently one of the parties to that action wrote a letter to the effect that the other party was of no use in his profession. He professed to be manager of a troupe of actors, and the statement was that they were not up to the mark, and for this alleged slander he has brought the present action of damages. He was unsuccessful in the other action, and has been found liable in expenses, and the motion now is that payment of these expenses should be a condition of proceeding to trial in the action founded on the alleged slander. I can see no ground for sisting this action till these expenses have been paid when the two actions are so completely different, and therefore think we should adhere to the Lord Ordinary's interlocutor.

LORD YOUNG, LORD CRAIGHILL, and LORD RUTHERFURD CLARK concurred.

The Court adhered, found the pursuer entitled to the expenses of the reclaiming-note, and remitted the same for taxation.

Decree for the taxed expenses, amounting to £15, was moved for in name of the pursuer's agent as agent-disburser. The defender resisted the motion, pleading that he was entitled to set off the expenses to which he had been found entitled in the Sheriff Court. Authorities—*Portobello Pier Company* v. *Clift*, Nov. 16, 1877, 4 R. 685; *Paterson* v. *Wilson*, Dec. 20, 1883, 11 R. 358.

The Court granted decree in name of the agent-disburser.

Counsel for Pursuer—A. S. D. Thomson. Agent—M. J. Brown, S.S.C.

Counsel for Defender—Rhind—Baxter. Agent—Robert Menzies, S.S.C.

Tuesday, March 16.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

MILLER AND OTHERS *v.* DENHAM AND OTHERS (GALBRAITH'S TRUSTEES).

Succession—Legitim—Election of Testamentary Provisions—Election—Consent of Husband to Wife's Election—Married Women's Property (Scotland) Act 1881 (44 *and* 45 *Vict. cap.* 21).

After the death of a truster his two married daughters at a meeting of his trustees, which they had been asked to attend, signed a minute of the meeting bearing that after the whole circumstances had been explained they had accepted the provisions made by the will in their favour. They had not consulted their husbands as to their position in the matter. They subsequently brought an action of accounting against the trustees, concluding also for reduction (if necessary) of the minute. *Held* (1) that the minute was not binding, because it was signed without their consulting their husbands as to their position, and (2) that it did not form a bar to the action of accounting, and need not be reduced as a condition of proceeding with the action of accounting.

John Galbraith, iron-broker, Glasgow, died on 15th September 1883 leaving a trust-disposition and settlement and codicil thereto dated respectively 4th and 9th September 1883. By this settlement he conveyed to trustees, named therein, in trust, all and sundry the whole means and estate, heritable and moveable, of which he might die possessed. The purposes of the trust were, *inter alia*, for payment of the testator's debts and funeral expenses and certain legacies, and payment to his daughter Miss Margaret Galbraith of a free alimentary annuity of £20 during her life. The trustees were directed to hold the residue of his estate for the benefit of his two married daughters Mrs Jane Miller and Mrs Mary Martin, one-half to each for their respective liferent uses allenarly, and payable on their own receipts alone, the shares of each to be payable equally among their respective children in fee. The settlement declared that the provisions in favour of his children "shall be accepted by them in full of legitim, and all other claims competent to them, or any of them, against my estate; declaring that, in the event of any of my children claiming legitim, the child or children so claiming, and the issue of such child or children (except the said Jeanie Livingstone [a natural child of one of his daughters]), shall forfeit the whole provisions herein conceived in favour of such child or children or their issue."

The testator left no heritage. The moveable