HOUSE OF LORDS.

Monday, November 24.

(Before the Lord Chancellor, Lord Blackburn, and Lord Watson.)

SMALL AND OTHERS (SHIELL'S TRUSTEES) *v.* LIQUIDATORS OF SCOTTISH PROPERTY INVESTMENT COMPANY BUILDING SOCIETY.

(*Ante*, vol. xx., p. 794 and 10 R. 1199—13th July 1883.)

Friendly Society—Building Society — Building Societies Act 1874 (37 *and* 38 *Vict. c.* 42), *sec.* 13—*Powers of Directors*—Ultra Vires—*Right in Security—Bond of Corroboration.*

The directors of a building society which had lent money on a postponed security, granted to a prior bondholder, in order to induce him to refrain from exposing the subjects to sale under the powers in his bond, a bond of corroboration, by which the society undertook along with the debtor the personal obligation for the debt due under the prior bond. The rules of the society gave no express power to grant such bonds. The society afterwards went into liquidation, and the liquidators sought to reduce the bond on the ground that it was *ultra vires* of the directors to grant it. *Held* (*aff.* judgment of Second Division) that the bond of corroboration fell to be reduced.

This case is reported *ante*, vol. xx., p. 794, and 10 R. 1199—13th July 1883.

The defenders (Shiell's trustees) appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—My Lords, the material facts in this case are these:—Under the rules of this building society, formed under the statute of 1874, the society in 1876 made an advance of £1000 to Mr Macdonald, one of their members, and he gave them security upon certain building property belonging to him. It appears very distinctly upon the face of the deed, in the appendix, that the property was at that time subject to a charge in favour of the present appellants, or those through whom they claim, amounting to £3000, and by the contract it is stated to be a condition of the advance "That the society should have the right transferred to them to pay off the heritable burden, amounting to the sum of £3000, already affecting the subjects." Then it goes on to say that he bound himself to repay to the society the expenses of discharging the security. That was the contract between Mr Macdonald and the society.

My Lords, I think that we must abstain from taking notice of anything which we are not informed of by the admissions which the parties have agreed to in their cases. I therefore cannot make any assumption as to the circumstances which led to the transaction of 1879 beyond what the record states; but it appears that at that time the prior incumbrancers, who are mentioned in the deed to the society, had given notice that they proposed to exercise the power of sale incidental to their security, which, if exercised, of course would result in producing more or less—it might or might not be enough to pay off their security. If it were more than sufficient for that purpose, no doubt the surplus would be applicable to the society's security—if it were less, the society's security would be lost.

In those circumstances some communings took place between the parties, which were pleaded in the Court below in a manner which, I must confess, appears to me to explain the use of the word "gratuitous" by Lord M'Laren in his judgment. The parties were not absolutely agreed in their way of pleading the facts, although they were not very far apart; but nothing more was averred, even on the part of the defenders, than this—that the solicitors, Messrs Shiell and Small, who acted for the bondholders, agreed not to proceed on their notice of sale, and that in consideration of getting the bond of corroboration they departed from their intimation of calling up their bond, which they otherwise would have persisted in; so that, as far as that goes, no definite forbearance—no definite giving of any particular period of time at all—appeared upon the record, although that has now been supplied by the letters in the appellants' case, of which we are entitled to take notice. That, I think, explains the fact that Lord M'Laren did not really look beyond the corroboration bond itself, on the face of which I think his Lordship was perfectly justified in saying that it was gratuitous, because there is no consideration proceeding from the prior incumbrancers referred to on the face of it, and there is no contract by them contained in that instrument or in any other document which then appeared upon the record.

The prior incumbrancers having given the notice, and the communings having taken place, of which we now know more than the Court below did, this corroboration bond was given; and, my Lords, it certainly is rather a remarkable instrument, on the face of it, to have been given on behalf of a society of this description without a clear and express power authorising it; for it says, that it has been agreed between the accepting trustees of Mr Shiell (the prior incumbrancers) and the building society, at the request of the building society, that the debt due to the prior incumbrancers "shall constitute a debt and burden upon us, the Scottish Property Investment Building Society, and our successors and assignees, and that the personal obligations contained in" the prior security "shall subsist and be effectual not only as against William Macdonald," the mortgagor, "and his foresaids, but also against" the building society, and so on, and that the security at the same time shall be in full force in favour of the prior mortgagees, and that the building society "shall grant their personal bond," and so on; and they proceed to do so—to give a personal bond binding themselves and the whole funds and property of the society to make payment to the prior incumbrancers "of the foresaid sum of £2500 of principal" at Martinmas then next (this transaction being in May, and Martinmas being in the autumn of the same year, six months off), and the interest, and they bind themselves to insure the buildings to the extent of £2500 sterling. There are all those absolute obligations.

My Lords, I pause to observe upon what I

understood to be the effect of these obligations if valid. They impose the debt of Mr Macdonald, for £2500 and interest, as a direct and immediate debt payable at six months upon the whole funds and property of the building society. No consideration for that is given except the forbearance which collaterally appears by letters to have been an agreement to give time for six months. If at the end of those six months, assuming the validity of this bond of corroboration, the creditors had thought fit to demand immediate payment at Martinmas of this large sum of money from the building society, whether it was more convenient for them to redeem than it had been in May or not, whether they had funds in hand or not, whether it would drive them into insolvency or not—this, if it was a valid obligation, enabled the creditors to transfer the debt against Mr Macdonald, and to compel the society to pay it, convenient or inconvenient, advantageous or ruinous, at their own will and option, to say nothing about the obligation to insure. Well, I do not rest any part of the opinion which I have formed in this case upon the question of the prudence or imprudence of such a transaction. I merely say that, on the face of it, it appears to me to be a transaction which does not justify itself *prima facie*, and which throws upon the person setting it up the burden of showing that these trustees for the building society who entered into it were really authorised to do so by the nature of their own trust.

Now, I entirely adhere to what was said in this House in the case mentioned at the bar—of the *Attorney-General* v. *The Great Eastern Railway Company*, July 14, 1873, L.R., 6 H. of L. 367—that when you have got a main purpose expressed, and ample authority given to effectuate that main purpose, things which are incidental to it and which may reasonably and properly be done, and against which no express prohibition is found, may, and ought *prima facie*, to follow from the authority for effectuating the main purpose by proper and general means. I think it is quite right to invite your Lordships to apply that principle to the present case. In order to see how it applies, we must ascertain first of all what the main purpose here is, then what are the general powers of the directors, then what are their special powers, and then, supposing that this is not within the natural meaning either of their general powers or of their special powers, whether it can be brought in as incidental to the main purpose, and a thing reasonably to be done for effectuating it.

Now, with regard to the main purpose, the statute under which the society was formed expresses it in the 13th section—"Any number of persons may establish a society under this Act, either terminating or permanent, for the purpose of raising by the subscriptions of the members a stock or fund for making advances to members out of the funds of the society upon security of freehold, copyhold, or leasehold estate by way of mortgage." That is the main purpose of the society. There are some subordinate provisions in the Act itself, but none, as it appears to me, which are not subsidiary to that main purpose. *Prima facie*, the assuming the direct liability of another man's debt without anything coming into the funds or coffers of the society is not a thing conducive to "raising by the subscriptions of the members a stock or fund for making advances to members out of the funds of the society."

Well, there are detailed rules, and the general powers of the directors which have been referred to are in the 96th rule:—"The directors shall have power to act for the society in accordance with these rules in all matters that may arise." Manifestly they are to be bound by the rules, and you must collect from the rules, either directly or by legitimate inference, the authority for anything which they are to do.

Now, let us look at the particular provisions. The first set of provisions are those which relate to the advances to be made to members on security. Your Lordships have heard a good deal of argument as to the nature of the security which the society may accept, and after hearing that argument you have thought that nothing in this case will turn upon the prudence or the imprudence of taking originally from Mr Macdonald, a member, when the advance of £1000 was made to him, property already subject to this prior incumbrance. It may have been an imprudent thing, but your Lordships, I believe, are all satisfied that the authority to consider the sufficiency of the security was given to the directors by the 34th rule, and that they in making the advance on this security which they considered sufficient (whether they acted in that respect prudently or imprudently) did not act *ultra vires* in any manner which can affect the present question. But still that merely touches the first transaction of the advance to Mr Macdonald upon a second mortgage—it in no degree whatever tends to show that when they are not advancing to their own member at all, or taking security from a member, they can assume a debt of a member to a third person—that special power is not given to them at all.

Then comes the special power as to sale or redemption contained in the 13th head. The first rule under that head is the 66th, but the 68th rule is this—"Any member may redeem the property on which he has obtained an advance at any time "upon certain terms." That has nothing to do with this matter, so that that does not advance the case of the appellants.

But then there come the borrowing powers. So far from their helping the appellants, it appears to me that some very just observations were made upon that subject by Mr Strachan, as shewing that all the inferences to be drawn from the borrowing powers are adverse to the appellants; for in the first place, of course those borrowing powers must be exercised for the purposes of the rules and not for other purposes. They could not be exercised so as directly or indirectly to effectuate this particular transaction, because your Lordships have held in a case which was before you last session that such a provision as that which we have here at the end of the 86th rule, namely, "The sums so borrowed shall form a preferable charge against the funds, claims, and effects of the society," is in effect a provision that all persons lending to the society under that rule are to stand *pari passu* as creditors upon the funds, and are not to compete with each other by taking special securities upon particular property. But an observation of more importance than that was made by Mr Strachan, which was this—This power of borrowing is both by the statute which

authorises it, and in fact gives it, and by this 86th rule, which down to that last sentence is almost transcribed from the statute, a limited power:—"The total sum of money"—borrowed money that is—"to be received or borrowed under this rule shall not at any one time exceed two-thirds of the amount for the time being secured by mortgage from its members to the society;" and the money is to be applied to the purposes of the society. Mr Strachan very pertinently observed that it would be wholly inconsistent with the principles indicated by that rule, which strictly limits with reference to the assets of the society available for legitimate purposes and the amount for the time being secured by its members to the society, the *quantum* of the loans to be taken, and at the same time provides strictly for the application of those loans to the purposes of the society—it would be wholly inconsistent with that principle that there should be an unlimited power of charging the funds of the society with other men's debts, from which the society derives no direct benefit at all events, which add nothing to its funds, and which cannot be applied to its purposes. That provision, therefore, as far as it goes, indicates a principle by no means favourable to the appellants' argument.

Then the appellants fall back upon the general words in the 61st rule. That rule contemplates the failure of an advanced member to make the payments due from him; and undoubtedly that rule is more relevant to the present subject than any of the others to which I have referred, because it does contemplate the case of the society having to do something to take and get the benefit of its security. Now, what is the society to do? When a member fails to make his payments, the society without notice may "enter into possession of the property in respect of which the advance has been made, and draw, uplift, and discharge the rents or feu-duties payable therefrom," and may turn out the member if he is in occupation, or they may recover the rent by sequestration or other legal process. There is that remedy. And then later on, in the 63d rule, it is provided that they may sell the property. Therefore, what they are to do so far is pointed out; they may enter into possession, they may realise what they can from the rents and profits, they may charge all the expenses of doing it against the member, and they may after a certain length of arrears sell the property by public auction or otherwise as they please. They have not done any of those things, and these powers do not by any means carry by implication any power to enter into such a transaction as the present.

But then it was said (and really the whole argument appears to me to turn upon this) that when the society do so enter into possession, or when default is made, "in general the society shall have full power to act in every respect as absolute proprietors of the property." That of course means as between the society and the advance member—it cannot mean as against anybody else who has a prior title; nor can it possibly mean that when the society enters into possession by its trustees it is to act as absolute proprietor without reference to the rules and without reference to the contract. To put an illustration—could they give the thing away? Of course it is absurd to enter into any such speculation. The nature of the property in the subject and the incidents of it are limited by the purposes of the society, and by the rules they have made as to the things which they can do.

Everything, therefore, in the special words of the rules is silent upon this matter, and no implication can be drawn as to a power to enter into a transaction of this kind. But the argument really is, that because the rules permit this kind of security to be taken—that is to say, give very large and general powers as to securities, which do not exclude the taking of a security on which there is a prior mortgage, therefore there is a potential necessity for entering into a transaction of this kind to protect that security, and therefore there is a reasonable implication that there is power to do it. But, my Lords, I wholly deny that there is any potential necessity at all. If this were a proper consequence of the relation constituted between mortgager and mortgagee, or of the relation constituted between a first mortgagee and a second mortgagee—if it were one of those things which by working out the legal rights or remedies already existing on the one side or the other would or might result—the argument would be perfectly sound, but there is no potential necessity for doing this in order to meet a temporary inconvenience than there is for doing anything else in the world which in the opinion of the directors might tend to obviate that inconvenience. For example, supposing that they had no credit by which they could borrow money, and that they were entitled to borrow money to redeem this prior mortgage, could they or could they not make reckless sales unauthorised by the trust-deed, of any part of the assets or property of the society? That would be a very improper thing to do at all events, and no one can possibly say that any such thing is to be implied. The grounds of such an implication must be found in the nature of the situation, and the reasonable consequences of that situation, and not in what a man who may do what he pleases with his own may or may not consider proper to do under such circumstances. To say that because a man is a second mortgagee for £1000 it is a natural consequence of that situation, or a potential necessity, that when a notice of sale is given by the prior mortgagee he shall make himself liable to him for £2500 which was not his own debt before—to represent that as in any sense whatever reasonably growing out of, or consequential upon, the situation in which the company was placed by what had been done under the rules is going beyond all bounds of reason.

Now let me exemplify that by putting an illustration. There happens to be in these rules an express provision for a case different from that which has here arisen. The 42nd rule relates to the case in which advances have been made to enable a person to build upon land which is included in a security. In that case he is to specify the buildings which he proposes to erect, and the society is to approve of them; and the 42nd rule says this—"Should any member, after receiving an advance or an instalment thereof, leave the building unfinished or not proceeded with for one calendar month, unless upon satisfactory cause shown," then after a certain notice the society "shall be at liberty to enter upon and take actual possession

of such building and premises, and to sell the same either by public auction or private contract, or to employ persons to provide the requisite materials and labour, and to finish and complete the same at the cost of such member, and to advance the sums requisite for this purpose out of the funds of the society." Well, for that purpose that is an express rule. Let me suppose that there had been no such rule; could it seriously have been argued that because the company took a security upon land, the value of which they expected to be improved by building, the directors could lay out the whole or any amount they pleased of the funds of the society in an expensive building speculation—in building upon the property those houses which the debtor had been expected to build? It was thought desirable that that power should be expressly given; but could any reasonable man have implied it if it had not been given? I am speaking, of course, not of a case of some little work to be done after taking possession in order to complete a building already partially erected upon the land. I am supposing a total failure to build at all, and that the land which constituted the security had no buildings erected upon it, and was not in the state of land covered with houses, although it ought to have been so if the member had fulfilled his contract. I think that there would have been in that case more ground than there is in the present case to imply the power to do it, because at least it would have been said that the erection of such buildings was in the contemplation of both parties at the time when the society advanced the money. But here nothing of this kind was in their contemplation at all. The only provision made in the deed of 1876 on the subject of this prior mortgage is the natural one, that the company may redeem it, and if they do, may charge the expenses which they have been put to as against Mr Macdonald.

I think, my Lords, that without subverting all the principles of the authorities which have been cited as to the limits of the powers of building societies and their managers in cases of this sort, it would be impossible for your Lordships to allow this appeal; and I therefore move that it be dismissed with costs.

Lord Blackburn—My Lords, I am of the same opinion. I may first deal with one point which Mr Davey took, which we did not require the Lord Advocate to answer (I do not feel much doubt upon it, indeed I feel no doubt), viz., that a Scotch second heritable security is a proper enough security on which to lend money if the margin be sufficient. In England there are technical reasons why a second security, the mortgage being an equitable estate only, however large the margin may be, is not as good a security and as satisfactory as a first security; but in Scotland these reasons do not exist. The effect of its being a second or third security is merely that the margin is less—in fact a good deal less—because there is the amount of the prior mortgage before it. Where there is a property worth, I will suppose £100,000, which has upon it heritable bonds of half the amount, that is to say, £50,000, the apparent margin is £50,000, but I do not think that a prudent man would lend upon the £50,000 which is over after the first mortgage as much as he would upon property valued at £50,000 where his was the first security. For this reason, a fall in the value of the property would obviously, in the case of the figures which I have supposed, act twice as much upon the deferred £50,000, and bear with twice as great a percentage upon it as it would upon the whole £100,000. That is one reason. Another reason is that the holder of the prior heritable bonds would be able to come in before you and hamper you in attempting to realise your property. For these reasons I do not think that a prudent man would lend as much upon heritable property valued at a certain amount which was subject to a prior mortgage of half that amount as he would upon heritable property of half the amount which was not subject to a prior mortgage. I think that that is sufficient for me to say upon that point. I think it is very likely that in this case the directors when they lent Mr Macdonald this sum were very imprudent indeed, and lent upon a margin which was far too little, but I cannot tell that judicially, and I do not in the slightest degree act upon any opinion as to whether it was so or not. The directors held a security for the society upon a bond for this amount, and the appellants had a prior bond upon the same property to a considerably larger amount.

Now, that being so, the next thing which happens is this—when Macdonald had stopped payment—and the security was evidently a defective one at this time—what were the directors entitled to do? I do not doubt at all that a merchant—a person *sui juris*—without any restriction at all, has very often made advances to somebody until he has got to the point that he is afraid of losing what he has advanced unless he takes steps to carry the man on, and unless a further advance is made. I believe that such a thing is very common. It is more common, in cases which I have seen, that the attempt fails and brings down the man who has bolstered up the other than that it succeeds; but there have been cases I believe, which have not come into Court, where such a desperate attempt has succeeded, and the man has ultimately been solvent and a large fortune has been made by the parties concerned. That may be so, and I do not myself at all doubt that a person who was *sui juris* might for the purpose of securing payment of his claim against a debtor, say, "I wish to keep the debtor afloat, and I will bargain with you to give him time—you shall not press him for some time," thinking that at the end of that time he would be well afloat. A guarantee as a consideration for giving time in those circumstances would be one which a person who was *sui juris* might undoubtedly take upon himself to give. I will not even say that he might not give it prudently, because the effect might be to tide over the evil day, so that the person whom he desired to keep afloat would be kept afloat. But this is not that case at all. Does it follow from that that the directors had power or authority to do it? I certainly do not think so. The Lord Justice-Clerk seems to say that he thinks that if it had been shown affirmatively that this was a prudent and judicious thing, and a natural thing for them to do, to give time, it might have made them valid; but I do not think, as far as I understand this record, that it was competent for anybody to

show it, and they certainly did not try to show it. I do not say whether they could show it or could not. But as at present advised I do not think that the directors had any power at all to do it. It is not a case of persons acting for themselves and being *sui juris*, who may make any bargain, wise or foolish, which they please, but it is the case of persons acting by authority. We must see what the authority is. The authority which is given to the directors is to manage all the affairs of the society according to the nature of its business—according to these rules. I think that according to that they might do very much the same things which by common law a partner in a business limited in the same way would be entitled to do; it is not one of the powers which a partner has to give a guarantee. He may do it, of course, so as to bind himself, but he cannot do it so as to bind the firm. That, I think, has been decided several times. I would refer to a case in the fourth volume of the Exchequer Reports as immediately proving it—[*Brettel* v. *Williams*, Dec. 4, 1849, 4 Exchequer Reports (Welsby, Hurlstone, & Gordon) 623]. I have mislaid the case, and cannot give the name of it at the moment. That is borne out by many other cases. I mention it merely as an illustration of the principle. Even granting that a person who was *sui juris* might under similar circumstances give a guarantee, and might possibly find that he had done wisely in doing it (I must own that I think it very improbable that he would so find), does it follow from that that the directors would be able to give such a guarantee? There certainly is no express power given to them to do so, and I can find no reason why they should be able to do it. So far from its being an ordinary and regular part of the business, I think, so far as one can make out from reading the rules expressing what the parties who drew these rules thought was the course of business, there is no indication whatever that they thought that anything of the sort would be done; and it seems to me that just as a partner's apparent authority is limited to what is usual and customary and proper and right in that particular business, and does not extend to giving a guarantee, exactly in the same way and for the same reason the directors' powers here exclude their giving any guarantee. If that be so, it is enough to determine the whole case. The directors had no power to bind the society by this guarantee (for it is a guarantee in substance and effect), and consequently it must be set aside. Had it turned out well and properly I daresay that the directors would never have been quarrelled with for having done this; but that is quite another thing. It having turned out badly, if they have got into any difficulties themselves in consequence, that is their look out, but the society is not bound, and consequently I think that the liquidators are entitled to the relief which they seek by this deed being set aside.

Lord Watson—My Lords, I also am of opinion that the granting of the bond in question in 1879 was an Act not, as has been supposed, within the scope of the authority committed to these directors either by the Statute or by the rules. I desire to state the grounds of my opinion very shortly.

It appears to me that the true test to apply in such a case is not to consider whether the act is one which might have been competently performed by an individual or by directors who were not fettered by any regulations or by articles or a memorandum of association. The real test in a case like this is to consider whether the act is authorised by the regulations of the society and by its statutory rules, which perform a two-fold function; in the first place, they limit the power of the directors, and in the second place, they provide that all who deal with the society shall have notice of what is being done. We are not entitled to assume that the directors have power to do everything which may be usually done by unfettered directors or by individuals. We must consider whether the rules confer, either expressly or by any fair implication, authority upon the directors to grant such a deed binding the society.

Now, undoubtedly, the directors in the present case had by the rules power to hold bonds, whether first bonds or postponed bonds and dispositions in security; and they had undoubtedly not only the power but the duty laid upon them of realising those bonds and dispositions in security. It is said that it is within the power of the directors under these rules to redeem prior bonds for the purpose of protecting the interests of the society as the postponed bondholders. I am quite prepared to concede that proposition, but upon this condition only, that the funds of the society are at the time in the state described in rule 84. In that case the act of acquiring these preferable bonds could be justified under rule 84, because it would be an investment sanctioned by that rule of funds which at the time were idle—that is to say, not required for the purpose of being advanced to members of the society. But I entirely demur to the proposition that they would be entitled to swell those idle funds not required for the main purposes of the society by exercising their borrowing powers in terms of rule 86. What they could do in the way of redeeming prior securities does not appear to me to be in the least degree relevant to or decisive of the question which has to be determined in the present case. They have a general power to realise—they have no general power, and no special and express power, to grant obligations of guarantee binding the society or its funds.

It is said that they have that power by implication in the special case of realisation, the course of realisation rendering it expedient and desirable on the part of the society that they should purchase time from the prior bondholder. Now, I quite admit that circumstances might render that a very proper and a very expedient course 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 necessarilyincidental, 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 those provisions point to the exercise of such a power as this; but it humbly appears to me that the purchase of time by granting an obligation of guarantee is a transaction not altogether independent of, but quite

separate from, the realisation of a security. If it were a step in the procedure incidental to it, then I apprehend it would be a step competent to every agent who was employed by a principal to realise any security upon landed property in Scotland—that is to say, if it were properly and necssarily incidental to the realisation. But I think it is impossible to suppose that an agent to whom is entrusted the duty of realising a debt heritably secured is entitled to do anything more than adopt all those proceedings which the law permits by virtue of the deed itself, or in the present case such proceedings as are expressly warranted and directed by the rules. I cannot conceive that the two transactions are so much connected that a direction to realise—an agency to realise—would imply a right on the part of the agent to bind his constituent in an independent personal obligation.

I have therefore, my Lords, come to the conclusion that however reasonable it might have been for the society when it had the matter in view to confer these powers, they are not conferred, they are not incidental, in that sense which was requisite in order to give these directors power to bind the society and its funds; and that being the legal inference fairly derivable from these rules, it humbly appears to me that the respondents in this case are entitled to have the decree of declarator which the Court below has given them.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Counsel for Pursuers (Respondents)—Davey, Q.C.—Strachan. Agents—Faithfull & Owen for Davidson & Syme, W.S.

Counsel for Defenders (Appellants)—Lord Adv. Balfour, Q.C.—Collins, Q.C.—Don. Agents—Neish & Howell for Henderson & Clark, W.S.

COURT OF SESSION.

Wednesday, November 26.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

M'KINNON, PETITIONER.

(*Ante*, vol. xxi., p. 476.)

Judicial Factor—Cautioner—Public Company—Company incorporated by Act of Parliament.

A judicial factor proposed as cautioner a public company registered with limited liability under the Companies Acts, and carrying on guarantee business. The Accountant of Court had some months previously reported that the company was in a good financial position, and it was stated that there was no material alteration in its position. *Held* (following *M'Kinnon*, March 8, 1884, 21 Scot. Law Rep. 476, 11 R. 676) that the company might be accepted as cautioner.

Observed (1) that in all future applications of this kind the Clerk of Court would require to satisfy himself that the financial position of the company was satisfactory; (2) that only the bonds of associations subject to the jurisdiction of the Court of Session would be accepted.

Lauchlan M'Kinnon jun., advocate, Aberdeen, was on September 9, 1884, appointed judicial factor upon the trust-estate of the deceased George Alexander Grainger, of Aberdeen, with the usual powers, he finding caution before extract. He presented this petition praying that the caution to be found by him might be restricted to £5000, or such other sum as the Court should fix, and that a bond of the National Guarantee and Suretyship Association (Limited) should be accepted instead of a bond of caution by a private individual.

The petitioner alleged that he was unwilling, on account of the largeness of the estate, to apply to any of his private friends to be cautioners for him in the factory. The value of the estate was £35,385, and the annual income £1210, and the petitioner submitted that the amount of the bond of caution offered by him (£5000) being more than five times the income of the estate, and a larger sum than was ever likely to be in his hands, would form a proper limit to the caution to be found.

The Lord Ordinary (Lord Kinnear) reported the petition to the First Division.

Argued for the petitioner—The question of the expediency of granting an application of this kind had been before the Court in the recent case of *M'Kinnon*, March 8, 1884, 21 Scot. Law Rep., 476, 11 R. 676, when the same petitioner, as *curator bonis* on the estate of Alexander Adam, received the sanction of the Court to substitute a bond of the same association for a bond of caution by a private individual. The only difference between that case and the present was that the accounts of a *curator bonis* were annually audited by the Accountant of Court, while in the case of a judicial factor there was not the same protection to the estate. The association provided an auditor for its own interests in the case of judicial factors, and charged an extra premium. The standing of the association had been fully inquired into in the previous case, and there was no material alteration in its position since then.

Authorities—*Burnet*, July 6, 1859, 31 Jurist, 637; *Keating*, 24 D. 1266.

The petitioner, upon the suggestion of the Court, increased his offer of caution to £7500.

At advising—

Lord Mure—The question raised by this application is one of very general importance, and is substantially the same point which we previously decided on 8th March of this year, and in which the same association was accepted by this Court as cautioner for the sum of £10,000. While the value of the estate in that case was about £72,000, it is stated in the application now before us that its value is estimated to be £35,000. There was this further difference between the earlier case and that now before us that in it the application was one by a *curator bonis* who supported his claim by the provisions of sec. 27 of the Pupils Protection Act, while in the present case it is as judicial factor that the application is made, in which cir-