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-

cumstances the accounts are not under the annual audit of the Accountant of Court.

From the opinions delivered by the Court in the previous case it appears that we all considered that we had the right at common law, and without the intervention of any Act of Parliament, to deal with the question of caution, both as to its nature and amount.

I think, following that decision, that we are entitled to do the same here, and indeed the only question of importance relates to the amount of caution which ought to be accepted. There is not in the present case, as I have already observed, the annual official audit which takes place in the case of a *curator bonis*, and accordingly I think that the sum of £5000 named in the petition is too small, but that the amount offered at the bar, viz., £7500, meets the necessities of the case. With this alteration I am for granting the prayer of the petition. This same association had as lately as March last the approval of the Accountant of Court, who in his report described it as a well-conducted association, and one which in his opinion might well be allowed to stand in place of a private cautioner. In future applications of this kind the Clerk of Court will of course satisfy himself that the association continues to maintain a good financial position.

Lord Shand—This application is the natural sequel of the case which we had before us in March last, in which we decided that we were entitled not only to limit the amount of caution, but also to accept the bond of an association of this kind in room of a private cautioner. There will not in the present case be any official audit of accounts, but that does not to my mind affect the question. I think that as far as the interests of the estate are concerned it is much better that it should have an association of this kind in good repute as cautioner than any private individual. I think also that the sum now offered by the Guarantee Association as caution is sufficient, especially as we are informed that the position of this association is substantially what it was when reported upon by the Accountant of Court in March last. I agree with what your Lordship said, that in any future application of this kind the then financial position of the company will require to be considered by the Clerk of Court.

Lord Adam—I concur, and only desire to add that in accepting bonds of caution by associations of this kind I think it is essential that they should be Scottish companies, or at any rate companies under the jurisdiction of this Court.

Lord Mure—I concur in this.

Lord Shand—I am of the same opinion, and omitted to refer to that point in my opinion.

The Lord President was absent.

Lord Deas was absent.

The Court granted the prayer of the petition, the amount of caution to be found being fixed at £7500.

Counsel for Petitioner—Mackintosh—Begg. Agents—Morton, Neilson, & Smart, W.S.

Wednesday, November 26.

FIRST DIVISION.

SMITH *v.* SMITH'S TRUSTEES.

Husband and Wife — Delivery — Husband Custodian of his Wife's Writs—Donation.

A husband executed a settlement making provisions for his wife, and she signed the settlement in token that she accepted it in lieu of all legal claims against his estate. After his death there was found in his repositories a cash-book containing an account headed, "Note of Sums due by me" to his wife and family. The entries therein corresponded with the amount of the rents of a property which belonged to her, and which he had managed for her before the marriage, and continued to manage after it. The existence of this account had been known to the wife before her husband's death. *Held* that her right to the sums contained in the account was not affected by her acceptance of the settlement as in full of legal claims.

The question raised by this Special Case related to a series of entries in the private cash or memorandum book of the late James Smith, spinner and merchant, Dundee, who died at Broughty Ferry, on May 28, 1882. The inventory of his personal estate amounted to upwards of £109,000, while his heritage consisted of his villa and grounds at Broughty Ferry, valued at £8000, and ground-annuals in Dundee of the value of £800.

Mr Smith left a trust-disposition and settlement, and codicil thereto, both of which were subscribed by his wife as well as by himself.

The trust-deed provided that the trustees should pay to the widow Mrs Jane Nicoll or Smith £500 for interim aliment, from the testator's death till her annuity commenced; it directed them to allow her an annuity (to cease if she married again) of £1000 a-year, also the liferent of his house in Dundee, and his furniture. The settlement also contained the following clause:—"And I, the said Mrs Jane Nicoll or Smith, do by my subscription of these presents, declare my approval and acceptance of the provisions in my favour above specified, and terminable in the event of my entering into a second marriage after the death of the said James Smith, my husband, as in full of all claims of terce and *jus relictæ* and other legal claims which I, as widow of the said James Smith, could otherwise demand from his estate and representatives by and through his death."

By the codicil Mr Smith substituted a liferent of Ballinard, Broughty Ferry (to which he had gone to reside), for the liferent of the house in Dundee. He also bequeathed to her certain specific articles, and increased her annuity to £1100. Mrs Smith accepted its provisions in these terms—"And I, the said Jane Nicoll or Smith, by my subscription hereof, declare my satisfaction with the foregoing provisions in my favour."

Mrs Smith and her sister, Mrs Elizabeth Nicoll or Smith, wife of Thomas Smith, the truster's brother and one of his trustees, were *pro indiviso* proprietors of the lands of Kinclune, in Forfarshire, and of certain feu-duties payable from subjects in Kirriemuir, and of shares in the