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.

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*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

Kirriemuir Gas Company, yielding in all about £500 per annum. The truster and Mrs Smith were married in October 1859. No marriage-contract was entered into by them. Prior to their marriage an account was kept in the name of Miss Jane Nicoll (afterwards the truster's wife) with the late firm of Henry Smith & Company, spinners and merchants, Dundee, of which the truster was a partner, by which firm certain rents of Kinclune were collected for her and her sister, Mrs Thomas Smith. The balance at the credit of that account—£279, 11s. 7d.—was, on 1st February 1860, after the annual balance of the firm's book's, transferred to the truster's private account in the said firm's ledger, to which account Mrs Smith's share of rents from Kinclune and feu-duties were thereafter credited till the truster's death.

The truster kept a separate cash or memorandum book, in the first page of which was written, holograph of him, "Note of Sums due by me to Mrs Smith and my family, as stated in each of their accounts.—JAS. SMITH.—Fernbank, Dundee, 1 Nov., 1872." On the same page was written, also holograph of the truster, the names of Mrs Smith and of his six children, and opposite each name the number of the page in said cash-book where the account of each began. All the accounts in this cash-book were holograph of Mr Smith. Mrs Smith's account began on January 1, 1865, with an entry, "To cash, £860," and this sum corresponded approximately with the total amount credited in the firm's ledger, as at 31st December 1864, to Miss Jane Nicoll's account. The amount credited to Mrs Smith in this account as at January 1878 was £6179, 14s. 9d. There were also in the book certain small sums entered to the credit of the children. Mr Smith kept this private cash-book in his repositories at his residence. Its existence was well known both to Mrs Smith and the family, and the mode in which the sums due to each of them would be spent was a frequent topic of conversation in the family. The book was mislaid during the removal of the family from Dundee to the villa of Ballinard in 1878, but it was discovered shortly before Mr Smith's death in 1882.

The parties to this Special Case were—Mrs Smith of the first part, and Mr Smith's trustees and executors of the second part.

The first party contended that the second parties were bound to pay her the sum of £6179, 14s. 9d. (as before mentioned), with interest at 5 per cent. from 1st January 1878, and she maintained that her right to this sum was in no way affected by her acceptance of the provisions in her favour contained in the trust-disposition and settlement and codicil as in full of all claims of terce and *jus relictæ* and other legal claims which she could demand through the death of her husband.

The second parties maintained the negative of these propositions.

The following questions were submitted for the opinion of the Court:—"(1) Is the sum of £6179, 14s. 9d., with interest thereon at the rate of 5 per centum per annum from 1st January 1878 . . . a debt against the truster's estate due to the first party? (2) Is the first party's right to the said sum and interest discharged by her acceptance of the provisions in the said trust-disposition and settlement and codicil as in full of all claims of terce, *jus relictæ*, and other legal claims which she as widow of the truster could otherwise demand from his estate and representatives by and through his death?"

Argued for the first party—The sum claimed was composed of her share of the rents of Kinclune. This was a debt constituted *scripto*, for Mr Smith had acknowledged it in the heading on the first page of the pass-book—Dickson on Evidence, 1183. The entries in the book constituted and recorded the argument which had been made. (2) Alternatively, it was a case of donation *inter virum et uxorem* unrevoked, and there was nothing in her discharge appended to the codicil which excluded the present claim.

Authorities—Fraser on Husband and Wife, ii. 925; *Gibson* v. *Hutchison*, July 5, 1872, 10 Macph. 923; *Crosbie's Trustees* v. *Wright*, May 28, 1880, 7 R. 823; *M'Gregor's Executors*, January 23, 1884, 11 R. 453.

Argued for the second parties—There was wanting here any overt act of donation. The alleged donations rested entirely upon the entries in the pass-book. There was no evidence of any kind in support of these. Besides, the book was kept by Mr Smith—this made the case of donation defective. The money of husband and wife had been mixed up and used promiscuously for household expenses.—*Ross* v. *Mellis*, December 7, 1871, 10 Macph. 197; *Robertson* v. *Taylor*, June 12, 1868, 6 Macph. 917.

At advising—

LORD MURE—I am clearly of opinion that in this case the first party is entitled to prevail. The question which we have to determine, as raised by the facts of the case, is, What was the intention of the deceased as to the disposal of the various sums entered by him in his private cash-book? It is of importance to keep in mind in answering this question that these entries were all holograph of Mr Smith, and that they extended from 1865 to 1878. The first page of the book also contained the following important heading, "Note of Sums due by me to Mrs Smith and my family as stated in each of their accounts. JAMES SMITH. Fernbank, Dundee, 1st Nov. 1872." Now, this is a very distinct statement by Mr Smith that the sums of money entered in the pages of that book were truly the property of the parties under whose names they appeared.

It appears from the statement of facts in the case that Mrs Smith, the first party, was, along with her sister, *pro indiviso* proprietor of the estate of Kinclune in Forfarshire. She was thus entitled to one-half of the rents of that property, and it appears that she regularly received them. Her husband's firm seems, prior to her marriage, to have acted as factors on the estate, and to have collected the rents; and after her marriage Mr Smith appears regularly to have entered the sums of money thus coming in, in the private cash-book I have just referred to, under the heading "Mrs James Smith." Now, the existence and contents of this private memorandum-book seems to have been quite well known both to Mrs Smith and her family, as appears from the following passage in article 9 of the case—"The fact of this book being kept was well known to the truster's wife and children, a frequent subject of conversation among them being how the sums due to them

were increasing, and what they should do with the same. In the removal from Fernbank to Ballinard in 1878 this private cash-book was mislaid. The book was found sometime before the truster's death, but he was then seriously ill, and did not make any further entries in it." Such was the nature of the account, and as to the deceased's intention with regard to the sums entered in it I do not see that there can be much room for doubt.

Besides, for eighteen years these entries were regularly made, and I see in that circumstance quite sufficient evidence of an intention to make a donation *mortis causa*. Accordingly, I am for answering the first question in the affirmative, and the second question in the negative.

LORD SHAND—I am of the same opinion, and do not consider this to be a case attended with any great difficulty. The settlement of the late Mr Smith was dated 10th March 1875, and in it he made certain provisions for his wife which he considered reasonable, but no mention was made in it of the sum which is the subject of this Special Case.

There was no marriage-contract between the parties, but it appears that Mr Smith took charge of his wife's property, and kept an account of the various sums which she received as the interest both of her heritable and moveable property, and that he entered the sums thus received in an account headed "Mrs James Smith." The question which we have to decide is, whether Mrs Smith has made out that at the date of her husband's death he was debtor to her in the amount standing at her credit in the pass-book? or otherwise, whether the sum is to be viewed as a donation *inter virum et uxorem*.

Now, the entries in this cash-book show it to have been a carefully kept account, and the sums thus entered appear to have been the interest periodically falling due upon Mrs Smith's heritable and moveable estate. Besides entries under Mrs Smith's name various sums are noted under the names of the different children, and such entries would only be made, I think, as a record of debt. But we have it stated, as part of the facts of the case, that the existence of this cash-book was well known to the different members of the family, and it is a fair supposition, I think, that this information was communicated to them by their father. Had the book been in Mrs Smith's possession the present question would not, I presume, have been raised. What, then, is to be the effect of this book being found in Mr Smith's repositories after his death? The entries in the book, and the heading or note which is prefixed to it, are of importance in considering the question of delivery in a case of this kind. The sums themselves are the fruits of the wife's property, and the book begins with an acknowledgment of debt in these terms—"Note of Sums due by me to Mrs Smith and my family as stated in each of their accounts;" and this is signed by Mr Smith. In such circumstances I do not think that the absence of delivery can affect Mrs Smith's claim. Her husband was undoubtedly the proper custodier of her writs, and taking it that there is no presumption of delivery either on one side or the other, I consider this book to be in the position of a delivered writ which the deceased held for behoof of his wife and family. The note at the beginning of the book is, to my mind, conclusive of the matter. I therefore consider the sum claimed by Mrs Smith as a donation to her by her husband unrevoked, and therefore effectual.

I accordingly agree with your Lordship that the first question should be answered in the affirmative, and the second in the negative.

LORD ADAM concurred.

The LORD PRESIDENT was absent.

LORD DEAS was absent.

The Court answered the first question in the affirmative, and the second in the negative.

Counsel for First Party—Mackintosh—Baxter. Agents—Stuart & Stuart, W.S.

Counsel for Second Parties — Keir — Shaw. Agent—George Andrew, S.S.C.

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*Wednesday, November 26.*

## SECOND DIVISION.

[Sheriff of the Lothians.

## SCOTT *v.* ROY.

*Process—Sequestration—Bankruptcy (Scotland) Act* 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 146 *and* 170.

*Held* that an application by a trustee under section 149 of the Bankruptcy Act 1856 to have a portion of a pension enjoyed by the bankrupt taken by the trustee for the purpose of paying the bankrupt's debts must be intimated to the bankrupt.

In March 1884 the estates of James Gibson Scott were sequestrated under the Bankruptcy Act 1856, and W. G. Roy, S.S.C. was appointed trustee. At the time of his sequestration Scott was in receipt of a pension of £46 a-year from the Post Office.

The Bankruptcy Act 1856, section 149, enacts that "the . . . Sheriff may order such portion of the . . . pension of any bankrupt as on communication from the . . . Sheriff to . . . the chief officers of the department to which such bankrupt may belong, or have belonged, . . . they respectively may . . . consent to, in writing, to be paid to the trustee in order that the same may be employed in payment of the debts of such bankrupt." . . .

On 7th May 1884 Mr Roy presented a petition in the Sheriff Court at Edinburgh, reciting the 149th section of the Bankruptcy Act and praying the Sheriff to recommend the Postmaster-General to consent to the half or some other proportion of Scott's pension being paid to him as trustee, and on receiving such consent to order such portion to be paid as aforesaid. The petition was not served on the defender, nor was any intimation made to him of the intended procedure under it.

On 8th May the Sheriff-Substitute (HAMILTON) issued an interlocutor recommending to the Postmaster-General to make payment of one-half of the pension as craved

On 2nd June the Surveyor-General of the Post Office wrote to Messrs Richardson & Johnston, W.S., the agents in the sequestration, stating