Ewing's estate, we took the course of sequestrating the estate, and appointed Mr Jamieson judicial factor on the said estate and effects, "with power to him to take full and complete possession of the said estate and effects, and to hold and administer the same till the further orders of the Court, with all the usual powers," and we granted interdict against the defenders "until the said estate and effects are fully vested in and taken possession of by the said judicial factor, from removing the said estate and effects, or any part thereof, or of the titles, writs, and evidents of the same, beyond the jurisdiction of this Court, and from delivering, paying, or accounting therefor to any person or persons other than the said judicial factor." We abstained from pronouncing any order ordaining the defenders to deliver up the writs or evidents of the estate to the factor. We are now asked to do that, and that I am not prepared to assent to. The form of our previous interlocutor, and the sequestration of the estate, was a course we took in the interest not only of the pursuers of the action but also of the defenders, the object of the Court being to do as little as possible to aggravate the difficulties in which the defenders find themselves placed. And if we did grant the prayer of this note in so far as it asks for an order against the defenders to deliver up the estate, we should be doing that very thing which we purposely abstained from doing in the interlocutor of 29th February. Therefore I am against the order asked in the second branch of the prayer of this note, but as regards the remainder of the prayer, I think the judicial factor is quite entitled to get the warrant and authority therein asked. Indeed, it is impossible for him to perform his duties without having it. The sequestration would be a mere farce, and the appointment of the judicial factor would be of no avail at all so far as the conservation and administration of the estate is concerned, unless he has given him the means of carrying out our judgment in such a manner. Therefore, as regards the first portion of the first part of the prayer of the note, authorising the factor to take full and complete possession of all sums of money belonging to the trust-estate, and of the whole writs concerning the same, that is in some degree a repetition of what has been done already, for our interlocutor authorises him to take possession of the estate, and the addition is thereby to take possession of the writs, titles, and securities, books, papers, and documents, which I think is a power indispensable to the performance of his duties.

As regards the remainder of the prayer, the defenders do not profess to have any interest to oppose the granting of that part of the prayer. There is a warrant asked for as against banks to deliver up money deposited with them belonging to the trust-estate, and against companies to transfer shares and debentures belonging to the trust-estate into the name of the judicial factor, and as regards that I think it is only a proper carrying into execution of the order we have already pronounced.

Lord Deas being absent during the argument gave no opinion.

Lord Mure concurred.

Lord Shand—I entirely concur in the course proposed by your Lordship.

It appears to me to be merely a necessary result of the last part of the order of 29th February, by which we sequestrated this estate and appointed a judicial factor thereon, that we should give him the means of taking possession of the estate. I agree with your Lordship that a warrant should be granted authorising Mr Jamieson to take possession of money belonging to the estate held by the banks, and of stocks in the various companies named in the note. As to that part of the prayer which asks the Court to ordain the defenders actively to assist in the delivery of the estate to the judicial factor, by themselves granting transfers to enable Mr Jamieson more easily to carry out the orders of the Court, I wish to add that I should have been disposed to grant that also, had it not been for the fact which was brought under our notice by the letter from the agents of the plaintiff in the Chancery proceedings, that if the trustees divested themselves of the trust-estate without having previously obtained the authority of the Chancery Division they would be committing a contempt of Court.

In these circumstances, and in consequence of the embarrassing position in which the trustees would be placed, or at any rate those who are residing in England, I think that warrant ought not to be granted.

The prayer of the note was amended by deleting that portion of it which asked for warrant on the defenders, and the Court then granted the prayer.

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

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

Saturday, March 8.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

M'KINNON, PETITIONER.

Judicial Factor—Curator Bonis—*Cautioner—Public Company—Company Incorporated by Act of Parliament—Pupils Protection Act* 1849 (12 *and* 13 *Vict. c.* 89), *sec.* 27—*Companies Act* 1862 (25 *and* 26 *Vict. c.* 89).

A *curator bonis* proposed as cautioner a public company registered with limited liability under the Companies Acts and carrying on guarantee business. The Accountant of Court reported the company to be in a good financial position. *Held* (1) that such a company was a public company incorporated by Act of Parliament in the sense of the Pupils Protection Act, section 27, and that its bond might be accepted as caution for the petitioner, and (2) that apart from the Pupils Protection Act the Court had discretion to accept such security for its officer.

Lauchlan M'Kinnon junior, advocate, Aberdeen,

was upon 15th February 1876 appointed *curator bonis* to Mr Alexander Adam, papermaker, who had become insane. His cautioner as curator was John Manson of Fingask. Mr Manson having died, the present petition was presented by Mr M'Kinnon to have the new caution restricted to £5000, and further, craving the Court to authorise a bond or policy of the National Guarantee and Suretyship Association, Limited, to be accepted and taken instead of a bond of caution by a private individual.

The petitioner stated that the value of the estate under his charge was £73,225, 4s., and that with the exception of about £2000 the whole was invested in heritable security under sixteen separate bonds and dispositions in security. The gross annual income was £2373, 18s. 10d.

The petitioner referred to the Pupils Protection Act of 1849, and especially to section 27, which provides—"It shall be lawful for the Court of Session or Court of Exchequer, as the case may be, to limit, upon cause shown, the caution to be found by factors and tutors and curators to a specified amount, and also to authorise, if they should deem it expedient, bonds or policies of the British Guarantee Association, or other public company incorporated by Act of Parliament or royal charter carrying on guarantee business within Scotland, to be accepted and taken instead of bonds of caution by private individuals."

The petitioner stated that the extent of the estate made him unwilling to apply to any private friend to become his cautioner in the curatory, and that he desired to take advantage of the provisions of section 27 for the limitation in any event of the caution to be found; that the British Guarantee Association referred to in section 27 was, after the date of the enactment, amalgamated with an insurance company, and had ceased to grant bonds of suretyship, and that the company with which it was amalgamated did not now exist.

No answers were lodged.

The Lord Ordinary (KINNEAR) remitted the petition to the Accountant of Court, who reported:—"The National Guarantee and Suretyship Association (Limited), named by the petitioner, is not a company incorporated by Act of Parliament or royal charter, but is formed under the Limited Liability Acts. From the report of the directors presented to the twenty-first general meeting of the association, held on 18th July 1883, it appears that the capital of the company consists of 25,000 shares of £20 each, representing £500,000; that of this amount £2 per share has been paid up, representing £50,000 0 0
while the reserve and other funds held by the company amounted to 40,114 1 10

making the assets . . £90,114 1 10
besides the uncalled capital of £450,000. The Accountant has no doubt that the company is in a good and safe financial position, and quite good for the amount of liability which the petitioner proposes should be undertaken by it.

"An application very similar to the present was made to the Court in 1863, and reported on by the Accountant (*Sim*, December 1863, 2 Macph. 205). The case was reported to the First Division by the Lord Ordinary (Barcaple), who was favourable to the application, but the Court remitted to his Lordship to refuse it, partly on the ground that the system of limited liability was then untried, and partly from doubts whether a company registered under the Companies Acts could be said to be incorporated under Act of Parliament in the sense of the Pupils Protection Act. Since then twenty years have elapsed, and the principle of limited liability has had a longer trial, but the other objection stated remains in the same position.

"As to restricting the amount of caution to £5000, the Accountant would point out, that although this sum is about equal to about two years' revenue, yet the capital of the estate, which exceeds £70,000, is under the control of the factor, and can be intromitted with by him, so that the full amount of the estate has to be considered, and not only the revenue.

"There are two points involved in the application—*First*, Whether it is competent for the Court to authorise acceptance of a bond of caution by such a company as the National Guarantee and Suretyship Association (Limited); and *Second*, If competent, whether a bond for £5000 is adequate in the circumstances of this case.

"The first is a question for the decision of the Court; but if your Lordships rule that it is competent to sanction acceptance of such a bond as that offered, the Accountant is of opinion that there is no reason to doubt the financial position of the National Guarantee and Suretyship Association (Limited), or their responsibility for such an obligation as proposed.

"On the second point, the Accountant is of opinion, that if caution be restricted to a limited sum, the amount should, having regard to the very large amount of the funds under the control of the factor, be fixed at a higher sum than £5000."

The Lord Ordinary reported the petition with the Accountant's report to the Inner House.

"*Note.*—If the Lord Ordinary had thought it proper to dispose of this application, he would have been inclined to authorise the acceptance of the proposed bond. The Accountant of Court reports that the company is 'in a good and safe financial position, and quite good for the amount of liability' proposed to be undertaken. It appears from the report of the Accountant in the case of *Newell Burnett* (31 Scott. Jurist. 637), that the sufficiency of the cautioner is more readily ascertainable in the case of a company than in the case of a private person; and if this be so, the security of a company, with regard to which the Accountant is able to report in the terms quoted, would appear to the Lord Ordinary to be at least as satisfactory as that of an individual cautioner. The case of *Sim*, 2 Macph. 205, cannot be regarded as a conclusive authority to the contrary, both for the reasons indicated by the Accountant, and because in that case caution had been already found, and there was not thought to be sufficient reason for disturbing the existing arrangement. But having regard to the opinions expressed in that case, the Lord Ordinary thinks it right to report the application to the Court.

"The Accountant points out that the amount proposed is insufficient, and the Lord Ordinary understands that the petitioner does not dissent from the Accountant's view, and is prepared to find caution for a larger sum."

In terms of the Accountant's report, the petitioner expressed in the Inner House his readiness to obtain a bond from the association for £10,000.

It was argued for the petitioner that no technical objection arose from the terms of section 27 of the Pupils Protection Act, for the association suggested as cautioner was by its registration under the Companies Act a "public company incorporated by Act of Parliament." The bond tendered was better in point of security than private caution, and the Court had a discretion apart altogether from the statute, to grant an application such as this if it was reasonable, and it was eminently so in the present case, for the sufficiency of the caution was apparent from the Accountant's report. The petitioner offered to procure a bond for £10,000 in place of £5000 as suggested in the petition.

Authorities—Cases cited by Lord Ordinary; and *Saunders* v. *Saunders' Trustees*, Nov. 7, 1879, 7 R. 157.

At advising—

Lord President — There are two questions raised by the petition reported to us by the Lord Ordinary. The first of these has reference to the amount of caution proposed to be found by the petitioner, and the second to the nature and character of the caution offered. The petitioner now proposes to increase his bond of caution from £5000 to £10,000—a course which, looking to the terms of the Accountant of Court's report, as well as to the extent of this estate, I consider to be quite right.

The second question referred to us by the Lord Ordinary is, however, of much more importance, because our decision upon it will regulate the procedure in petitions of this class in the future.

If the present application falls to be dealt with by section 27 of the Pupils Protection Act, then I think all difficulty connected with it is at an end. That section provides—[*His Lordship here read the section*]. Now, it is clear that when that Act was passed the kind of question which we have here to deal with could not by any chance have arisen, because no statute had been passed providing for the incorporation of companies by means of registration. The mode of obtaining incorporation at that time was either by means of a private Act of Parliament or by a royal charter; and therefore we find the words "incorporated by Act of Parliament or royal charter" introduced into this section of the statute. But this has been changed by the recent legislation, and especially by the Companies Act of 1862, and the question for our consideration comes to be whether a company such as the "National Guarantee and Suretyship Association, Limited," now proposed to us is not a "public company incorporated by Act of Parliament" within the meaning of section 27 of this statute. It cannot be said that a company is not incorporated by Act of Parliament because it has not a private Act all to itself, for it used to be common to include several companies under one Act. But now under the provisions of the Companies Act a joint-stock company by regulation secures incorporation, and thus becomes incorporated by Act of Parliament. I therefore think that there is authority under this 27th section of the Pupils Protection Act for granting the present application.

But I desire to add, that even if no such provision as I have referred to had existed, still I should have been inclined to hold that the present question was one for the discretion of the Court, whether in the interests of this estate it is not more desirable to substitute the security here offered to us for that of a private individual. Looking to the terms of the Accountant's report, there can be no doubt that the security offered by the petitioner is better than that of a private individual, and I am therefore prepared to accede to this part of the prayer of the petition.

It is also to be observed that we are not hampered by precedent in this matter. In the case which seems most unfavourable to the present application—the case of *Sim*—it must be kept in mind that at that time the whole matter of registered joint-stock companies and of limited liability was very new to the Court, and the Lord President put that circumstance forward as one of his reasons for refusing the petition. But since then the Court has had a very great deal of experience upon these matters, and, besides, the tendency at present seems to be to turn all concerns into limited liability companies; in that respect therefore I do not think that we are in the position in which the Court was in 1863. Nor does the case of *Saunders* in any way affect the present judgment. The language there used occurred in a trust-deed, and the question was whether the trustees were not precluded by the terms of that deed from investing the trust funds in any but a "chartered bank," and we then found that the term "chartered bank" applied only to the three banks in Scotland incorporated by statute or by royal charter.

On the whole matter, I am prepared to accede to the present application and to accept the caution offered.

Lord Deas concurred

Lord Mure—I agree with your Lordships that we ought to grant this application. Apart from the provisions of this 27th section of the statute, I think that in a question of competency we would have been prepared to accede to the prayer of this petition, and I am not at all clear that it requires this clause of the statute to warrant us in following the course your Lordship proposes.

As your Lordship has shown, at the time when this statute was passed, incorporation by registration was impossible; but if a public Act is passed like the Companies Act of 1862, superseding incorporation by private Act or royal charter, then I think that it is only a fair construction of that Act to hold that a company incorporated under it by registration is a public company incorporated by Act of Parliament.

Lord Shand—I think with your Lordship that this application ought to be granted if that can be competently done, and on the question of competency I also concur. No doubt at the time when the Act was passed the words in section 27 must have been applicable only to companies having a private Act of Parliament, because there was no public Act allowing incorporation. But with the Act of 1862 all this was changed, and registration under that statute creates incorporation, and through the statute it becomes incorporation by Act of Parliament. This company

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." . . .