seems to me merely to come to this, a consent merely that so long as matters remained in the same position as they then were those windows might be used and the shutters put on. But really that is not an element in the case here at all, because there is no evidence whatever that the secretary of the directors of the Assembly Rooms had any right to grant the permission which he did, and without a proof of that it is not to be implied as an authority belonging to the office of the secretary of such an institution.

I am therefore clearly of opinion that this appeal should be refused, and the case remitted to the Dean of Guild.

Lord Shand—It is quite true that for upwards of 100 years the property which now belongs to Mr Blair has been upon its west side lighted, so far as regards several of its rooms, by windows some of which were originally built with the building—that is, put in when the building was erected, and one of which at least was inserted at a more recent time. But having got that fact in the case, I think there is in the case nothing else to which Mr Blair has appealed which will support this alleged right of servitude. He holds his property by one title, the directors of the Assembly Rooms hold their property from the same superior on another and separate title. There is no condition in either of these titles which can be held to create a servitude of any kind as between these two properties. The only suggestion that has been made of something of the kind being implied is, that in describing the property of the Assembly Rooms on the west Blair's title contains as a western boundary the lane or passage between it and the adjoining property—that is, the passage into the Assembly Rooms—but that passage is entirely the property of the directors of the Assembly Rooms. It is entirely for their use and for nothing else, and it was quite properly described as the western boundary of the subject. It is not like a lane or passage which was open to the public or to which Mr Blair or his predecessors had any right whatever. The case therefore appears to me to be a very simple one, and must be determined on the broad principle, that although persons may take the benefit of a vacant space adjoining their property for the purpose of having windows into it and light derived in that way so long as that property is not built upon, that cannot in any way hinder the proprietor from building on his property and blocking those lights. In short, as your Lordship has stated, a negative servitude must be specially constituted by an obligation in writing. Then in regard to the opening of a window at a comparatively recent date, it is said that the consent of the directors of the Assembly Rooms was given to that proceeding. But it appears to be quite plain that there has been no proof that the directors gave any such consent. And I rather am disposed to concur with your Lordship that, even if such consent had been given in the ample terms in which we have it, it could not confer a right permanently to keep a window there. I think the consent might be in such terms as to show that the adjoining proprietor was therein agreeing to give a permanent right to light by that particular window so opened up. I do not think this case upon the consent which was given would amount to that. Accordingly I agree with your Lordship in thinking that we must hold that no good objection has been stated on the part of Mr Blair to the erection of the buildings which it is proposed to erect.

Lord Adam—There are no restrictions in the titles of either party to this case prohibiting them from doing what they liked with their own property, or building to the verge of it if they choose. The claim therefore of the appellant simply comes to this, a claim of servitude *ne luminibus officiatur* over the respondent's property. That claim is founded entirely upon his having had windows opening out on this passage for a period extending over nearly 100 years—that is his whole case. He has produced no writing constituting such a servitude, and none such exists, and I hold it to be perfectly clear that no such negative servitude can be proved or constituted without writing. The only suggestion of writing here is the alleged consent given by the secretary of the respondents to the opening of a window looking into this close. Now, even assuming authority to have been given by the directors to Mr Stewart, I should have been far from thinking that was sufficient to constitute such a servitude. All that was done was this. Certain proposed alterations to be made by the appellant on his own ground were shown to the secretary of the Assembly Rooms, and all that official did was to give a general consent to those buildings, as he says himself, looking to the fact that they did not encroach on the property, which they did not. He also says that he did not notice anything about the window, but he knew he could not object to it. Now, in such circumstances to spell out the constitution of a grant of servitude from proposed alterations containing the simple element of a window looking out upon this lane is quite hopeless.

I have therefore no difficulty in concurring with your Lordships.

The Court refused the appeal and remitted the case to the Dean of Guild.

Counsel for Appellant — Pearson — Dickson. Agent—George Barrie, Solicitor.

Counsel for Respondents—D.-F. Mackintosh, Q.C.—Ure. Agents—Mackenzie, Innes, & Logan, W.S.

Friday, March 12.

FIRST DIVISION.

THE LIFE ASSOCIATION OF SCOTLAND *v.* CALEDONIAN HERITABLE SECURITY COMPANY AND LIQUIDATOR.

Public Company—Powers of Directors—Guarantee—Liquidation—Ultra vires.

The directors of a heritable company which had lent a sum of money upon a postponed heritable security, in order to prevent an immediate sale of the subjects by the prior bondholder, entered into an agreement with him guaranteeing to him the interest of his bond, and payment of certain incidental expenses. In the liquidation of the company, which occurred shortly after this

arrangement was entered into, the bondholder claimed the value of his security with the unpaid interest. *Held* that the granting of guarantees was not the purpose for which the company was formed, nor was it incidental or conducive to their legitimate business; that the directors by entering into this agreement with the bondholder had acted *ultra vires;* and the deliverance of the liquidator rejecting the bondholder's claim *sustained.*

This was a question in the liquidation of the Caledonian Heritable Security Company (Limited). It arose out of the rejection by the liquidator of that company of a claim for £14,484, 6s. 2d. made by the Life Association of Scotland.

In May 1876 the Life Association of Scotland lent to John Wilson & Co., callenderers in Glasgow and Partick, the sum of £14,000 on the security of certain subjects in Partick, for which sum a bond and disposition in security over these subjects was granted. The Caledonian Heritable Security Company (Limited) held a second bond and disposition in security for £10,500 over the same subjects. Both bonds were duly recorded.

In June 1879 Wilson & Co.'s estates were sequestrated.

Both the bondholders shortly thereafter executed poindings of the ground.

To prevent a sale of the poinded effects, and also to preserve their security, the Caledonian Company entered into an agreement with the Life Association, by which the Life Association agreed, *inter alia*, to allow the Caledonian Heritable Security Company to enter into possession of the subjects, and to grant a lease of them, with the whole fixed and moveable machinery and plant, to a company to be called John Wilson & Co. (Limited), for five years from Whitsundy 1879, and further agreed that so long as the lease subsisted they should not be entitled to exercise the power of sale in their bond, provided the interest and premiums of insurance were regularly paid. On the other hand the Caledonian Heritable Security Company, *inter alia*, guaranteed payment to the petitioners of the interest due and to become due on said sum of £14,000 from and after the term of Whitsunday 1879, and also of the premiums of insurance stipulated by said bond to be paid to the company, and undertook to pay the feu-duties to the superior of said subjects.

In pursuance of this agreement the Caledonian Company entered on possession of the subjects, and granted a lease of the business premises, machinery, and plant to a new firm called John Wilson & Company (Limited). This company went into liquidation in November 1881.

In July 1880 the shareholders of the Caledonian Heritable Security Company resolved on voluntary liquidation, and Peter Couper, accountant, Edinburgh, was appointed liquidator. On December 11th 1880 a supervision order was pronounced by the First Division.

On 1st February 1884 a claim was made by the Life Association for £14,484, 6s. 2d., being the amount which they alleged to be due to them at the date of the liquidation. They calculated the value of the obligation for payment of interest under the agreement at 20 years' purchase of the interest due under the bond and disposition in security. The effects poinded by them were sold by the liquidator, and the proceeds paid to him.

Upon this claim the liquidator upon 18th March 1885 pronounced the following deliverance:—"The liquidator rejects the claim for the Life Association, in respect that it was *ultra vires* of the Caledonian Company and of the directors thereof to enter into the agreement founded on, and that the said agreement does not constitute a valid obligation against the company."

The Life Association presented this note to the Court, in which they stated that their claim was well founded, and was constituted by the agreement above referred to, which they alleged was lawfully entered into by the Caledonian Heritable Company, and constituted a valid obligation against that company.

The Life Association accordingly prayed the Court to ordain the liquidator to rank them on the estate of the Caledonian Heritable Security Company for the amount of their claim, and to make payment to them of the dividend corresponding thereto.

By interlocutor of 11th June 1885 the Court appointed the liquidator of the Caledonian Heritable Company to condescend on the facts which he averred and offered to prove in support of his challenge of the agreement founded on by the Life Association, and the Life Association were appointed to lodge answers to this condescendence.

It appeared from the documents put in by the parties in obedience to this interlocutor that the Caledonian Company was incorporated in March 1872 in order "to advance or lend money on security of all kinds of heritable property, or for the purpose of building, draining, enclosing, or otherwise improving the same; to make advances for the execution of works undertaken in virtue of powers conferred by any public or local Act of Parliament on the securities thereby authorised, and also on the security of annuities and other assignable properties, and on or for the purchase of reversionary interests heritably secured; to receive money by way of loan by cash-credit, debenture-deposit, or otherwise; and the doing of all such other things as are incidental or conducive to the attainment of the above objects."

It further appeared that the estates of John Wilson & Co. were sequestrated first in March 1878 and again in June 1879.

The liquidator of the Caledonian Company averred that in 1879, owing to the failure of the City of Glasgow Bank, property was so depressed in Glasgow that the subjects in question were unsaleable, and that they were not worth the money lent upon them by the Life Association. He also alleged that their own manager Mr Richard Wilson had about July 1879 succeeded in forming a joint-stock company to carry on the works under the management of Mr John Wilson (partner of John Wilson & Co.), who at that time was an undischarged bankrupt, and that none of the copartners had any knowledge of the business; that after various reports from valuators and others it was ultimately arranged between the Life Association and the Caledonian Company that a lease should be granted to the firm of John Wilson & Co. (Limited), for five years from Whitsunday 1879, with a break at the end of each year in favour of the lessees—the rent being £800 for the first, £900 for the second, and £1000 for the last three years. It was this arrangement which

resulted in the formal agreement between the Caledonian Company and the Life Association already referred to. The liquidator of the Caledonian Company further averred that by this agreement that company received nothing, and the Life Association surrendered nothing, while the obligation to guarantee the interest of the bond until payment was *ultra vires* of the directors, and wholly without consideration, and that at the time when the agreement was entered into there was no reasonable probability of any delay in the enforcement of their debt by the Life Association being of any advantage to the Caledonian Company.

The Life Association averred that John Wilson & Company at the time when they purchased the works in 1875 for £22,265 had them valued by competent valuators at the sum of £34,644. They denied that if the properties had been brought to sale in 1879 they could not have fetched a sum sufficient to clear off their bond, and stated that they would have sold the subjects under their powers but for the agreement which they entered into with the Caledonian Company, for whose advantage the arrangement was entered into, and that if they had sold them they would have realised their loan, but there would have been but a small surplus for the Caledonian Company, who therefore proposed the scheme for carrying on the works.

They also alleged that the agreement between the two companies was a reasonable and expedient act on the part of the directors, and was necessary to avoid the complete loss of the money advanced by the Caledonian Company, that the agreement was *intra vires* of the company and its directors, and that the Life Association by entering into this agreement, which they had duly implemented, gave up the power of sale for a period of five years, and thus lost the opportunity of realising the subjects and machinery in 1879. They also alleged that the subjects were not now worth the amount of their debt, but if they had been sold in 1879 they would have realised upwards of £14,000.

The terms of the agreement which have any bearing on the present question are, so far as not already referred to, quoted in the opinion of the Lord President.

Argued for the liquidator of the Caledonian Company—The agreement was *ultra vires* of the company, because it was undertaken for a third party, and it was outwith the scope of the ordinary business of the company. It really was the undertaking of a gratuitous obligation for the debt of another which was not the business of the Caledonian Company, and it was the pledging of the property of the company without any money consideration. The decision in the case of *Scottish Property Investment Building Society* v. *Shiell's Trustees*, July 13, 1883, 10 R. 1198 and 12 R. (H.L.) 14, ruled the present case.

Authorities — *Brown* v. *Joint-Stock Discount Company*, L.R. 3 Eq. 139; *Riche* v. *Ashbury Railway Carriage Company*, 11 L.R., 7 Eng. & Ir. App. 684; 2 Bell's Comm. 506.

Argued for the Life Association—This transaction fell under the last head of the memorandum of association, and was "conducive to the interests of the business of the company;" it was to protect the investments of the company that it was entered on, and at the time the money was lent it was believed that there was a margin of £20,000. The transaction was laid before the directors of the Caledonian Company, and it must be assumed that they considered it on its merits. The case of *Shiell's Trustees* was peculiar, and was decided entirely on the rules of the society, while the present company was much more like a bank than a building company. The transaction was in every way a reasonable one.

Authorities—*Western Bank* v. *Baird*, March 20, 1862, 24 D. 859; *Asiatic Banking Company*, L.R., 4 Ch. 260; *Paterson's Trustees* v. *Caledonian Heritable Company*, December 17, 1885, 13 R. 369.

At advising—

Lord President—The decision of the question raised by this liquidation depends entirely upon the agreement entered into between the Life Association of Scotland and the Caledonian Heritable Security Company dated 30th July 1879. It is necessary therefore that the circumstances of that agreement be first taken into account, though ultimately a question of law will have to be determined also.

It appears that the Life Association held a security over these heritable subjects for £14,000, and that the Caledonian Company were second bondholders for a sum of £10,500. Wilson had bought the subjects in 1875 and had paid £22,265 for them, and these securities were constituted in 1876. It thus appears that the bonds over the property exceeded its value, so far at least as that was shown by the purchase price. When taken, then, upon this footing the investment of the Caledonian Company (the second bondholders) was not a good one, and by 1879 matters had become so much worse that they became apprehensive that they would lose the whole of their bond, and they accordingly by way of protecting themselves entered into the agreement now before us.

Now, that agreement, after narrating the facts to which I have just referred, proceeds to tell how both parties holding securities over these subjects executed poindings of the ground (the first in date being that of the Life Association). It was thereupon arranged that the Caledonian Company should pay up the whole arrears of interest due to the Life Association, also the premiums of fire insurance, which together amounted to about £454. The Caledonian Company further guaranteed payment to the Life Association of the interest on the £14,000, and to pay the premiums of fire insurance stipulated by the bond; also to relieve the Life Association of the feu-duties to become due to the superior. It was also arranged that any surplus rents after meeting all these payments were to go towards the reduction of the bond for £14,000.

The agreement then provided that the Caledonian Company was not in respect of these payments to be entitled to any assignation, or to acquire any preference whatever over the moveables poinded, and in return for all this the Life Association were, so long as the interest was duly paid to them, not to exercise their right of sale during the currency of the lease.

Now, the lease here referred to was one which the Caledonian Company were to enter into with a joint-stock company who were to carry on and work this bleaching business. It was to last for five years from Whitsunday 1879, but with a

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

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

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

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

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

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

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

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

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

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

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

Lord Shand and Lord Adam concurred.

Lord Mure was absent.

The Court refused the note.

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

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

Saturday, February 6.

FIRST DIVISION.

STUART *v.* MOSS.

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

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

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

Expenses—Compensation—Agent-Disburser.

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