[6*th April* 1841.]

(No. 6.) ROYAL BANK of SCOTLAND, Appellants.[1]

[*Lord Advocate (Rutherfurd) — Sir W. Follett.*]

ADAM CHRISTIE and others, Respondents.

[*Pemberton — A. Wood — Hoskins.*]

Apparent Heir — Stat. 1661, *c.* 24. — *Partnership — Caution — Guarantee.* — A company having granted to a bank, in security of a cash credit, a bond and disposition in security, whereby, in addition to the obligations on the company and the individual partners thereof, two landed estates, in which one of these partners was infeft as ex facie absolute proprietor, were conveyed to the bank; and within a year after the death of that partner, a second bond and disposition in security having been granted, in consideration of an advance by the bank, whereby the eldest son and apparent heir of the deceased partner conveyed the same estates to the bank in security of that advance, and in corroboration of the first bond: — Held, (affirming the judgment of the Court of Session, proceeding on the opinions of a majority of the whole judges,) (1.) That these estates were, in the circumstances, the private property of the deceased partner, and were not held in trust by him for the firm in which he was a partner: (2.) That by the death of the partner, the firm, as it had up to that period existed, was dissolved, so far as it affected the bank, notwithstanding any special agreement between the partners that the business was to be considered as going on as before for the purpose of settling between the surviving partners and the estate of the

[1] Fac. Coll., 17th May 1839.

partner deceased: (3.) That the first bond and disposition in security having been given by the deceased partner to the bank to secure the repayment of advances made to the firm in which he was a partner, could not be used as a security for advances made after his death to a firm in which he was not a partner: (4.) That the cash credit having been operated upon subsequently to the death of the partner, in the same manner, and by the same continuing firm as before, and the account being kept by the bank as a continuous account, a balance standing against that firm at the date of the partner's death was extinguished by subsequent payments made by the surviving partners, and could not be again reared up in consequence of later drafts upon it to a greater amount: And therefore, (5.), that the second bond and disposition in security over the said estates, by the son and apparent heir of the partner, was null and void under the Act 1661, c. 24, in respect that the same was granted within a year of his father's death, not to a creditor of his father in security of any debts due by the father, but for the purpose of providing a credit for the apparent heir himself, and securing a debt of his own upon property derived by him from his father.

Observed, per Lord Chancellor, "The question, whether "under the Statute 1661, c. 24, an apparent heir can, "within a year of his ancestor's death, effectually prefer "one of the ancestor's creditors to another, by giving "him a security upon the ancestor's estate? does not, in "the circumstances of the present case, arise."

2D DIVISION.

Lord Ordinary Cockburn.

Statement.

MR. Thomas Allan, now deceased, was a partner of a banking company, which carried on business in Edinburgh, under the firm of Robert Allan and Son. The partners of this company were originally Mr. Thomas Allan and his father, Mr. Robert Allan senior, who latterly assumed as a partner Mr. Alexander Wight. and on Mr. Robert Allan's death in 1818 the business

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was carried on by Messrs. Thomas Allan and Wight, under the same firm.

In 1812 a cash credit to the extent of 8,000*l.* was granted by the company to Mr. David Betson, Messrs. Anderson and Wilkins, London, being his cautioners; and in further security Betson granted to the company a bond and disposition in security over the lands of Campse in the county of Fife. This disposition, on which infeftment followed, was in favour of Robert Allan and Thomas Allan, the partners of the company, and the survivor and his heirs, as trustees for the company. The account opened in the company's books of the operations on the cash credit was in name of David Betson, and Anderson and Wilkins. Betson having been sequestrated under the Bankrupt Act in 1814, the lands of Campse were sold in 1816, at the price of 7,000*l.*, to Mr. Francis Walker, W. S., who declared that he made the purchase for Thomas Allan, to whom they were disponed, on 21st November and 2d December 1820, by the trustee on Betson's sequestrated estate, with consent of a majority of the commissioners and of Mr. Walker. The disposition narrated the security in favour of Robert Allan and Son, and that there was due on the cash account for which it was granted 8,587*l.* 0*s.* 3*d.*, with interest from the 16th July 1819, on account of which the creditors therein were entitled to the full price of the lands, which had accordingly been paid by Thomas Allan to Robert Allan and Son, as the receipt thereof was acknowledged by them in a disposition and assignation of the security in their favour, granted by Thomas Allan, as surviving trustee for the company, to himself as an individual and the purchaser of the lands, for the purpose of fortifying his

title to them, upon which narrative Betson's trustee discharged Thomas Allan of the price of the lands, and disponed them to him. The disposition and assignation to the security was granted on 13th December 1820, under a reservation to the company to claim the balance of the debt from Betson's personal effects. Thomas Allan took infeftment on the disposition to the lands, but not on the disposition and assignation to the security.

The price of the lands was not paid by Thomas Allan to the company. The account of the debt to the full amount was continued in the company's books, in the name of David Betson and Anderson and Wilkins, as formerly, credit being given for the proceeds and sundry bills by Anderson and Wilkins, till 11th November 1823, when there remained a balance due to the company of 8,909*l.* 10*s.*, which was, of that date, transferred to the debit of any account of the company's books, under the title of "Estate of Campse, "near Dunfermline." In making this transference, this balance was stated to be the "real cost of Campse "at this date." This account was continued, under the same title, during the whole period of the existence of the company, there being brought to the credit of it the rents received from the estate, and to its debit the outlay connected with the estate, and the expense of the title, in Thomas Allan's person, with progressive interest on the account. It was balanced annually, and the balance entered to the credit of the company's stock in the year's balance sheet, under the title of "Estate "of Campse."

In 1824 Thomas Allan acquired the estate of Lauriston in the neighbourhood of Edinburgh. The nego-

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tiations for the purchase commenced in 1823, and were conducted by Thomas Allan himself as in his own name. The missives of sale were in his own name, in which also a litigation as to the validity of the title was conducted. The disposition of the lands was to Thomas Allan individually, on which he expede a crown charter and was duly infeft. He was enrolled (on the Old Roll) as a freeholder in the county of Edinburgh under his infeftment; he arranged an excambion of part of the lands as proprietor with an adjoining proprietor, and acted and corresponded as holding the absolute property of the estate. He made extensive improvements on it, and large additions to the mansion-house, which, when finished, he occupied with his family.

In October 1823 an account was opened in the company's books, under the title of "Estate of Lauriston, "near Edinburgh." The price of the lands, which was 26,000*l.*, was provided for by the funds of the company, and the money necessary for Thomas Allan's improvements was also furnished by them. In this account the price and expenses of the sale were debited, and also payments made on account of outlay at Lauriston. In August 1825 two other accounts were opened in the company's books, the one entitled "improvements at "Lauriston," and the other "expenses at Lauriston," the former being charged with all sums paid by the company in the nature of improvements, and the latter with payments for furniture, servants wages, taxes, &c. These two accounts were annually balanced; the balance of the improvement account being carried to the debit of the "estate of Lauriston," and that of the expenses account to the debit of the account of "Thomas Allan." The estate account was also debited with public and

parochial burdens, insurance, &c., and with progressive interest stated annually; and it was credited with the sums annually received for rents; but no account was taken of the rents of the house and garden occupied by Mr. Allan. In the annual balance sheets of the company the estate of Lauriston was regularly inserted as part of their stock, according to the balance of the estate account of each year.

In August 1831, Mr. Robert Allan junior, eldest son of Thomas Allan, was assumed as a partner of the banking company, thus forming a new company under the original firm, in which the interest of the several partners were fixed on the footing that Thomas Allan was to have one half, and Alexander Wight and Robert Allan junior each one fourth share. Articles of agreement were drawn up and signed, by a clause in which it was stipulated that Lauriston be taken as Thomas Allan's own speculation, he paying the company three per cent. interest upon the cost, and upon what is or may be laid out upon the said property. It was also provided, (12th,) that in the event of the death of any partner, his heirs shall not be entitled to examine the books of the company; but the survivors shall make up a statement of the deceased's account, counting up to the first balance after the decease, and attest the same by their signatures, or oath if required; and such statement, signed and attested, shall be held as sufficient, and shall preclude any right to further examination by the heirs or others.

In March 1832 the company obtained from the Royal Bank (appellants) a cash credit to the extent of 20,000*l.*, and in addition to the obligation then granted by the partners, binding themselves as a company and

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as individuals, Thomas Allan disponed to the appellants the estate of Lauriston, in security of their advances, under the usual conditions of cash credit bonds.

Thomas Allan died on the 12th September 1833, but the business continued to be carried on by the surviving partners under the same firm. Shortly after his father's death, Robert Allan made up titles to and was infeft in the estates of Lauriston and Campse. At the date of Thomas Allan's death the debt due by the company to the appellants on the cash credit was 8,800*l.*; and on the 31st December thereafter, the date of the first annual balance of the company's accounts after Thomas Allan's decease, the debt stood at 6,765*l.* 12*s.* 1*d.* The credit was operated upon in the same manner, and under the same account in the appellants books, after Thomas Allan's death, as previously. At 29th July 1834, the balance against the company was reduced to 400*l.*, exclusive of interest; and during the intermediate period it was averred by the pursuers, that, at least at one date, there was no balance at all against the company.

In July 1834 the company applied to and obtained from the appellants an additional advance of 22,000*l.* over and above the cash credit, in security of which an heritable bond and bond of corroboration and disposition in security was granted, being made applicable to the sums already advanced or to be advanced on the cash credit, which was thereby agreed to be continued, as well as to the new loan; and, in addition to the personal obligation undertaken by the creditors as individuals, Robert Allan disponed to the appellants, under the usual conditions, the lands of Lauriston and the lands of Campse, in security of the sum of 22,000*l.*

instantly advanced and paid to the company, and also in security and in further corroboration of the former bond for the cash credit. On this bond the appellants were infeft.

The sum of 22,000*l.*, advanced to Robert Allan and Son, was immediately paid in by them to the credit of the above cash account. The firm stopped payment in the end of August 1834, and were sequestrated under the Bankrupt Act on 2d September following. The result of the operations on the cash credit, conjoined with the advance of 22,000*l.*, was to leave the company, at the date of the failure, debtors to the appellants in the sum of 42,000*l.*, exclusive of interest. Mr. Robert Christie, accountant, was chosen trustee on the sequestrated estates both of Robert Allan and Son, and of the individual partners; and on 6th October 1834 a decreet of adjudication was pronounced in his favour, as trustee, of the lands of Lauriston and Campse.

The respondents Adam Christie and others, who are creditors of Thomas Allan as an individual, or of the banking company of Robert Allan and Son previous to Thomas Allan's death, and of him as a partner thereof, with the concurrence of Robert Christie, the trustee on the sequestrated estates, brought an action in the Court of Session for reducing the bond and disposition in security of July 1834 as null and void, in terms of the provision of Stat. 1661, c. 24., against an heir making a voluntary disposition of his ancestor's estate, to the prejudice of the ancestor's creditors, before a full year had elapsed after the ancestor's death; and also for declaring that the debt due to the defenders, under the first bond and disposition of March 1832, at Thomas

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Allan's death had been paid up, and that the lands thereby conveyed were no longer burdened therewith.

In defence, it was pleaded that the estates of Lauriston and Campse were not the property of Thomas Allan as an individual, but the property of the company of Robert Allan and Son, and held by him as their trustee,- in which case there were plainly no grounds for the reductive or declaratory conclusions of the action. And even on the assumption that these estates were the private property of Thomas Allan, the security in question could not be challenged under the Statute 1661, c. 24., because it was not made to the prejudice of his creditors, but was in fact granted in favour of creditors of his, the money raised on it being paid to the company, who were such creditors, and appropriated to the extinction of debts for which he was responsible, and also because the Statute 1661 was not intended to avail creditors of the ancestors in any competition inter se. In any view of the case the security was effectual to cover the debt due at Thomas Allan's death, as it did not depend on his life, but was framed to continue after his death; and there was no dissolution of the company by his death, nor any thing to limit the application of the security by the defenders to transactions previous thereto.

The Lord Ordinary having heard parties on the closed record, pronounced the following interlocutor, adding thereto the subjoined note[1]:—

"25th March 1836.—The Lord Ordinary having

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[1] "*Note.*—Under the reductive conclusion, the Lord Ordinary thinks "it clear that Campse and Lauriston must be considered as having been "the property of Thomas Allan individually. He stood as the sole

" considered the closed record and productions, and
" heard parties, finds that the petitory conclusion for
" rents, mails, duties, and interest was abandoned by
" the pursuers at the bar; repels the defences against
" owner on the titles and on the record; and although his having
" obtained or taken the money of his partners to make the purchases
" caused accounts to be opened between them and these estates, these
" accounts do not contradict the titles, but, on the contrary, in some
" respects confirm them; so that, however the company might have
" compelled him to pledge or sell the estates, in order to pay their
" advances for the original prices, if they had claimed them as their
" own during his life, this would have been a demand in which they
" would have had no right to succeed.

" If this be assumed to be the fact, the question, how far the creditors
" of Thomas Allan, who dealt on the faith of his apparent ownership,
" are liable to be affected by any latent equities to which he may have
" been subject, does not arise. He was not in the situation of trustee,
" but in that of an absolute owner, liable to no such equities.

" And if so, the Lord Ordinary holds that the disposition of his pro-
" perty to the defenders by his son, within a year after his death, was
" an infringement of the Act 1661, c. 24. The defenders say that this
" disposition was granted to one of his creditors, and that this excludes
" the statute. The Lord Ordinary differs both as to the view of the
" fact and of the law.

" This disposition was not to a creditor of Thomas Allan, but to the
" defenders, who once were, but who had ceased to be, his creditors. On
" the security of this conveyance, the defenders no doubt made advances,
" which went to the house kept up by the surviving partners; and this
" house was a creditor of Thomas Allan. But the advances were not
" made, or meant to be made, to the house in its character of a creditor
" of Thomas Allan; and the son, in disposing the estates in security,
" had no view but to raise funds for the use of his own company.
" Even assuming, therefore, that the debt due by Thomas Allan was de
" facto diminished exactly according to the amount of these advances
" (which, however, was not the case), the use to which the borrowers
" chose to turn their loan cannot alter the legal character of the original
" transaction.

" But even although the arrangement had been all along intended as
" a pure bonâ fide conveyance of the estate, in order to raise funds for
" the direct payment of one of Thomas Allan's creditors, still it would
" have been struck at by the Act; at least the Lord Ordinary can dis-
" cover no authority or principle for holding that that valuable statute,
" which forbids an heir to affect his predecessor's estate within a year
" after his death, to the prejudice of the predecessor's creditors, can be

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" the other conclusions, both reductive and declaratory,
" and decerns in terms of these conclusions; finds the
" defenders liable in expenses, appoints an account
" thereof to be given in, and, when lodged, remits the
" same to the auditor, to tax and report."

The appellant reclaimed.

The Court pronounced the following interlocutor:—
" 6th July 1836.—The Lords having heard counsel,
" before further advising, appoint the parties to state
" their arguments in mutual cases, to be prepared,

" held to be complied with by the heir's giving it all away to a single
" creditor of the ancestor. It is true that a separation of the ances-
" tor's creditors from those of the heir, and not any distribution between
" the former inter se, forms the chief description of the general object
" of the Act; but the result is an enactment, declaring that 'no right
" 'or disposition made by the said appearand heir' shall be lawful, 'in
" 'so far as it may prejudge his predecessor's creditors.' Can it be said
" that these creditors, as a body, are not prejudged by a conveyance of
" the whole property by the heir to a favoured creditor, as for example,
" to a company of which he himself is a partner.

" The main declaratory conclusion, which is, that the debt due by
" Thomas Allan under a prior bond was paid before the second one was
" granted by the son, requires that it should be fixed, whether, in con-
" sequence of the death of Thomas Allan on 12th September 1833, the
" company to which he belonged was dissolved, either then or at the
" next balance on 31st December thereafter. The Lord Ordinary holds
" that there is nothing in the twelfth clause of their 'Notes of Agree-
" ment,' which excludes the operation of the established rule, that the
" death of a partner dissolves a company. The settlement with that
" partner's heirs is declared to be delayed till the next balance; but,
" quoad the public, the usual result is allowed to take place. And if
" the partnership was dissolved by Thomas Allan's death, the defenders
" don't and can't pretend that they required notice of it.

" If this shall be held to be the correct view, the principles of the case
" of Devaynes v. Noble, 1 Merivale, 530, as explained by Mr. Bell, vol. ii.
" p. 638, apply here; and if they do, it was agreed at the debate that
" the balance due by Thomas Allan to the defenders under the first bond
" was all paid prior to the granting the second one."

" lodged, and interchanged by the first box day of the " ensuing vacation, and thereafter revised, printed, " boxed, and lodged finally, for advising of the Court, " by the second box day thereof."

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Cases having been lodged, the Court then pronounced the following interlocutor: — " 19th January " 1837. — The Lords having advised the case, and " heard counsel, before answer, remit to Mr. Donald " Lindsay, accountant, to reconsider the books and " other documents of the late banking house of Ro- " bert Allan and Son, and to report to the Court what " evidence the said books and documents afford as " to the actual right of property in the lands of Campse " and Lauriston. Recommend to Mr. Lindsay to make " his report quam primum."

In terms of this interlocutor, Mr. Lindsay lodged a report; and upon advising the same, their Lordships appointed the following queries to be prepared for the opinions of the Judges of the First Division and permanent Lords Ordinary :—

Questions for Consulted Judges.

" 1. Whether, keeping in view the state of the feudal " titles, the evidence afforded by the company's books " and other documents, and the conduct of the parties " generally, the estates of Campse and Lauriston, or " either of them, were acquired and vested in the per- " son of Thomas Allan as his own individual property; " or whether they were held by him in trust or for " behoof of the company of Robert Allan and Son, or " subject to their disposition, down to the period of his " death?

" 2. Assuming the said estates, or either of them, to " have been vested in Thomas Allan in trust or for

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" behoof of the company, or subject to their dispo-
" sition, is the bond and disposition in security of 29th
" July 1834, under all the circumstances appearing on
" the record in this process, reducible in whole or in
" part—and if in part, to what extent is it reducible—
" under the Act 1661, as a conveyance granted by the
" heir within year and day of the ancestor's death, and
" to the prejudice of the ancestor's creditors?

" 3. Assuming the said estates, or either of them, to
" have been originally the private property of Thomas
" Allan as an individual, or to have become so by any
" subsequent arrangement or conveyance in his favour,
" is the said bond of 29th July 1834, with reference to
" the whole circumstances of the case, reducible, as
" above, under the Act 1661?

" 4. Whether, and to what extent, the bond of 30th
" March 1832 remained in force as a continuing
" guarantee and security over the estate of Lauriston,
" to cover advances, or any balance due upon advances,
" made by the defenders to the company of Robert
" Allan and Son, at or after Thomas Allan's death, and
" down to the date of the final sequestration of the
" company; or if it did not so remain in force, at what
" period did it cease to operate as a continuing guarantee
" and security over the estate of Lauriston; and
" whether the balance, if any, that may have been
" due when the said bond ceased so to operate as afore-
" said, was paid, or wholly or partially extinguished
" subsequently?"

Thereafter their Lordships pronounced the following interlocutor:—" 6th July 1837.—The Lords having " resumed consideration of this case, and heard counsel,

" approve of the foregoing queries, and appoint the " parties to give in cases upon the whole cause for " the consideration of the whole Court, and that " on the second box day in the ensuing vacation, to " be interchanged, seen, revised, and lodged on " the first sederunt day in November next; and " request the Judges of the First Division and per- " manent Lords Ordinary to give their opinions on " the whole cause, as stated in the said queries and " cases."

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Interlocutor, 6th July 1837.

The following opinions were returned by the Consulted Judges:—

Opinions of Consulted Judges.

Lord Moncreiff,—Lords Gillies and Jeffrey concurring.—Query 1.—I am of opinion, that giving due attention to the state of the feudal titles of the estate of Lauriston, and to all the evidence afforded by the books of Robert Allan and Son, and the other documents produced, and to the whole conduct of the parties, that estate must be held to have been vested in the late Mr. Thomas Allan as his own property, personally or individually, and that there is no competent or sufficient evidence to establish that it was held by him in trust for the company of Robert Allan and Son, or for their behoof, or subject to any power of disposal by them, at any time preceding the period of his death. It is no doubt apparent, on the facts disclosed, that Mr. Thomas Allan had provided for the payment of the price of that estate, and the advances connected with it, by means of money withdrawn from the funds of the company, of which he was the principal partner, and that he became debtor for the amount to the company, except in so far as there might be other sums at his credit in his private account in their books. But as such a transaction will not in itself prove a trust, in opposition to the express terms of the titles by which the property was held for years, but, on the contrary, is really inconsistent with that state of the rights between

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the company and the individual, I am satisfied, from the whole evidence before the Court, that the purchase of the estate of Lauriston was from the beginning a private and individual speculation of Mr. Thomas Allan himself, and that he held it as his individual property till the day of his death. Indeed, it is not easy for me to conceive that it could be otherwise. In the state of the affairs of Robert Allan and Son it is very difficult to imagine that, as a company, they should have ever entertained the idea of entering on such a speculation, which was entirely foreign to their trade as bankers, or of permanently sinking so large a part of their capital in the purchase of a land estate, more especially where the titles of it were necessarily involved in perplexity, and where there was no call or inducement for them to interfere with it; and I think it still more improbable that they should have proceeded to make extensive improvements and alterations on the property, requiring large advances of money, and only reconcileable with an intention of permanent occupancy. But, on the other hand, as the purchase actually did take place by Mr. Thomas Allan individually, as the titles were completed in his person, and as he personally possessed and administered the property as his own till his death, the natural probability is very great, in consistency with the fact as it appears to me to be disclosed, that he did from the first purchase the estate for himself, notwithstanding that, from the command which he necessarily had over the affairs of Robert Allan and Son, he chose to become debtor to them for the price and advances regarding it, while he still kept his general credit with them for other purposes; and that it naturally followed, from this state of the transaction, that the accounts regarding the purchase and management of it should be entered in the company's books, and that the debt arising on it should be stated as part of their funds or assets. I see little room for doubt on this part of the case.

I have had more doubt as to the estate of Campse. There was originally no speculation whatever for the purchase of that estate, either by Mr. Thomas Allan or by the company. The company had held an heritable security over it for debt.

Upon a bankruptcy of their debtor, either they or Mr. Allan at last found it for their advantage to take the property for the debt, otherwise bad. The conveyance was taken to Mr. Thomas Allan; and if the entries in the books as to this estate had stood by themselves, though not correctly agreeing with the idea of a right of property in the company, there might perhaps have been strong ground for inferring that the real meaning was that he should hold in trust for the company. But when I observe the very strong fact, that a disposition and assignation of the heritable security which the company held was executed by their trustee in favour of Mr. Thomas Allan, in corroboration of his title as proprietor, in terms very strongly importing the acquisition to have been made as for himself,—a measure altogether unnecessary and inconsistent, if the title was a trust for the company,—I am not able to arrive at that inference; while, at the same time, the entries in the books being nearly the same with those regarding Lauriston, must be liable to a similar explanation as in the other case. Although with some hesitation, therefore, I think that the estate of Campse also must be considered as having been the individual property of Mr. Thomas Allan, there being no evidence of a trust sufficient, in my opinion, to control the state of the titles.

Query 2.—This question seems to assume hypothetically the point to which the third query more particularly relates, namely, that the Statute 1661, c. 24. is effectual to annul the bond and disposition in security of 29th July 1834, on the supposition that the estates, or either of them, did stand in the person of Mr. Thomas Allan as his private property. And I understand the question to import this inquiry, whether, supposing the statute to be applicable in that case, its application would be excluded, if the estates, or either of them, were held to have been vested in Mr. Allan in trust for the company?

It is evident that this question will be entirely superseded if it shall be held that both estates were the property of Mr. Allan individually. But, in order to exhaust the questions on which the opinions of the consulted Judges are

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asked, it may be necessary to answer the question hypothetically, notwithstanding the opinion above expressed. And, without entering into detail, I am of opinion, that if it should be held that the estates of Campse and Lauriston were truly the property of the company of Robert Allan and Son, and only vested in Thomas Allan as in trust for that company, or if either of them was so, the statute founded on would to that extent be altogether inapplicable to affect the validity of the bond and disposition in security to which the question relates. For if either estate was held in trust for the company, the heir of Thomas Allan, the trustee, in granting that bond and disposition in security, would be only applying the trust estate to the purpose for which it was held, and fulfilling the special duty and obligation of his ancestor, by making the estate available to the company, whose property it truly was. And I apprehend that, however the statute may be construed in other respects, it never could be intended to prevent the heir from duly implementing the trust obligations to which his ancestor was liable for that precise end.

It may be right, however, here to observe, that there is no question raised in the present case upon any of the other bankrupt statutes, or upon the common law. And therefore it appears to me that a great deal of argument, attempted to be sustained in the revised case for Christie and others, by reference to various well-known cases, is altogether inapplicable to the case now before the Court. No question is or could be raised, as in the event of a bankruptcy of Thomas Allan holding this estate in trust, or even as in the case of a bankruptcy of Robert Allan, his heir, at the date of the bond and disposition in security, or within any statutory time thereafter, because no such event or case has existed. The question is only on the peculiar statute 1661. And I am decidedly of opinion, that that act never could, on any construction, be applied to a deed of the heir, by which he bonâ fide gave simple implement of a special trust which had stood in the person of his ancestor.

Query 3.—This question appears to me to be of very great importance, and to be attended with considerable difficulty.

Before the Act 1661, c. 24. was passed there was no law by which the creditors of an ancestor deceased had any preference over the creditors of his heir on the estate which had belonged to his ancestor. The estate becoming the property of the heir was open to the diligence of all alike, without any limitation of time, subject to the bankrupt laws then existing. Neither was there any law which restrained the heir from granting any disposition, whether within the annus deliberandi or not, either to an onerous creditor of himself, or to an onerous creditor of the ancestor. And certainly there was no law which rendered it incompetent for any one creditor of the ancestor to obtain from the heir a disposition, either in security or in payment of his debt, in the same manner as he might have obtained such a deed from the ancestor himself. That act 1661 made certain provisions in regard to the two first of these cases. But the question is, whether it made any provision in regard to the last?

It appears to me to be very necessary to attend to the whole words of the statute. The enacting words in all parts must surely be considered, with reference to the preamble, in which the inductive causes, and the evils to be remedied, are set forth. To judge correctly, therefore, of the effect of it, the whole words ought to be constantly before us. The Estates of Parliament, "taking into consideration, that ap-
"pearand heirs, immediately after their predecessor's death,
"do frequently dispone their estate, in whole or in part, in
"prejudice of their predecessor's lawful creditors, before
"their death come to their knowledge, or before they can
"do lawful diligence against the saids appearand heirs, and
"which dispositions the said appearand heirs do often make
"before they be served heiris and infeft; or otherwayes by
"collusion they suffer their predecessor's estates to be com-
"prised or adjudged from them for payment of their own
"proper debts, real or simulat, without respect to their pre-
"decessor's creditors; and his Majesty, considering how
"just it is that every man's own estate should be first liable
"to his own debt before the debts contracted by the appear-
"and heirs; therefore his Majesty, with consent foresaid,
"declares that the creditors of the defunct shall be pre-

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" ferred to the creditors of the appearand heir in time " coming, as to the defunct's estate, provided always, that " the defunct's creditors do diligence against the appearand " heir, and the real estate belonging to the defunct, within " the space of three years after the defunct's death: And " because it were most unreasonable that the appearand heir, " when he is served and retoured heir and infeft respective, " should, for the full space of three years, be bound up " from making rights and alienations of his predecessor's " estate; and yet it being as unreasonable that he should " dispone thereupon immediately, or shortly after his pre- " decessor's death, in prejudice of his predecessor's credi- " tors, he having year and day to advise whether he will " enter heir or not; therefore it is hereby declared, that no " right or disposition made by the said appearand heir, in so " far as may prejudge his predecessor's creditors, shall be " valid, unless it be made and granted a full year after the " defunct's death."

I find it exceedingly difficult to discover in the whole scope of this statute, that it had any other object than to secure a preference to the creditors of the ancestor over the ancestor's estate, against the creditors of the heir or others transacting with him. There are two ways mentioned in the preamble, by which the heir might unduly apply the estate in payment of his own debts. One was by granting dispositions to the prejudice of the predecessor's creditors; the other was by collusively suffering the estate to be adjudged for his own debts, without respect to the predecessor's creditors. Contemplating these two cases, the Legislature specially, because it is just that every man's estate should be first liable for his own debt before the debts of his heir, enacts generally, " that the creditors of the defunct shall be " preferred to the creditors of the appearand heir in time " coming," &c. under the condition, that the former do diligence within three years. This provision secured the creditors of the ancestor against any diligence to be used by the creditors of the heir; and it has been held, though there might have been and was doubt on the words, that it secured them also, if their diligence were used within the

three years, against any disposition to a creditor of the heir, even though granted beyond the annus deliberandi. But the act, in regulating the first point referred to in the preamble, on the narrative that it would be unreasonable that the heir should be tied up from disponing for the full period of three years, and yet unreasonable also that he should dispone immediately or shortly after the predecessor's death, in prejudice of his predecessor's creditors, provides that no right or disposition by the heir, in so far as may prejudge his predecessor's creditors, shall be valid, unless it shall be made a full year after the predecessor's death.

The natural construction of this last part of the act seems to be, that it is the mode of giving effect to the first part of the preamble, taken in connection with the general enactment, "that the creditors of the defunct shall be preferred "to the creditors of the heir in time coming;" and it seems to be scarcely reconcileable to any principle for construing such a statute, to assume, that the last part of it was directed to an entirely different object, of creating an absolute equality amongst the creditors of the ancestor themselves, or preventing the heir from satisfying the debt of any one of them. It is very clear that, in the point of diligence, it presents no obstacle whatever to one creditor of the ancestor obtaining a preference over the rest, by completing diligence within the year or within the three years; and I find it very difficult to infer the design of creating such an obstacle in regard to the powers of the heir, from the words of a statute, which in its plain purpose and intention contemplates only prejudice to the creditors of the ancestor with reference to the heir and his creditors.

I am well aware, that the application of the statute has not been confined to deeds done directly for the benefit of the heir's creditors. A sale of the estate has been found liable to challenge under it, at least if the price has been paid and is not extant. I know also that though Lord Stair[1], in his first edition, had said that after the year dispositions in favour of the heir's creditors would not be excluded by

[1] 1 More's Stair, 375.

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diligence of the ancestor's creditors used within the three years, the contrary was early decided, or at least held, according to the note of Harcarse to the case of Arniston against Lord Ballenden; and that the passage is accordingly left out in the second and following editions of Stair's work; and the point has been so held by all later authorities. It further appears that though at first it was decided in the case of Ballenden v. Murray, March 1685, Mor. 3127, that a disposition granted by the heir to one of his own creditors after the year, but within the three years, was preferable to creditors of the deceased, who had not obtained complete diligence within the three years, the contrary was long ago ruled, and may be considered as clear law. Taylor v. Lord Braco, 26th November 1747, Mor. 3128.

But these points do not at all touch the present question. In all of them there was a clear contemplation of that which was the object and design of the statute, the protection of the creditors of the ancestor generally against the application of the estate by the heir to other purposes before their debts were paid, or before they had a reasonable time for making them effectual. I have looked in vain for any authority, either in the institutional writers prior to Mr. Bell, or in any distinct judgment of the Court, for any recognition of this point, that this statute renders it incompetent for the heir within the year to satisfy or secure a creditor of the ancestor, by means of the ancestor's estate.

This Act of Parliament is adverted to by M'Kenzie, without indicating any such idea. It is treated of in three or four different parts of Lord Stair's Institute, and in none of them is it said that the act was intended to regulate any thing among the creditors of the ancestor themselves, or that a disposition to one of them within the year, not challengable upon fraud, could be reduced in virtue of it. Lord Bankton also speaks of it in different places, but nowhere expresses the idea. On the other hand, the authority of Mr. Erskine is quite clear and express, that the act "does not bar the "heir from disponing, even within the year, any part of the "ancestor's estate to a creditor of that ancestor." Ersk. b. iii. t. 8. § 102. There is a case referred to at the end of

the sentence which has other matter in it. I shall advert to that case. But in the meantime this is the doctrine explicitly laid down by Mr. Erskine, our highest modern institutional writer, in the full knowledge undoubtedly of all that had been written and decided before his time. He gives it as the law of the statute; and the weight of it as authority in the question lies in the high authority of the writer himself. But the strength of it becomes still much greater, when it is considered that the law so laid down has stood absolutely uncontradicted from that day to this by any one decision of the Court; and it is indeed scarcely conceivable that the question should not have arisen if it had not been understood and believed that the law was so settled.

Any opinion delivered by Mr. Professor Bell, who has rendered such inestimable service to the law of Scotland, is undoubtedly entitled to the most grave and deliberate consideration, and I certainly am very far from treating lightly what he has said on this subject. But I must observe, that it was not till a late period that that most learned and able commentator took up the view on which the pursuers now rely. For even in his third edition, published in 1819, he assumes the point to be perfectly clear, in the same manner as Erskine states it. He there says, "It need scarcely be "added, that the rule of this statute has no application "either, 1, where the security is granted to a creditor of the "ancestor; or, 2, where the challenge is maintained only by "the creditors of the heir[1];" and he quotes the very case in Harcarse referred to by Erskine, as having decided "both "points." The fourth edition of Mr. Bell's Commentaries was published in 1821. Mr. Bell there expresses only a doubt whether Mr. Erskine may not have too much extended the doctrine in the case reported by Harcarse; and adds this sentence,—"I should be inclined to expect, that if such a "conveyance to a single creditor were challenged by the "body of the creditors of the ancestor the act would be "found to apply."[2] But no authority for this is referred to;

[1] 2 Bell's Comm. 404. (3d ed.)
[2] 1 Bell's Comm. 633. (4th ed.)

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nor does the learned author proceed on the idea that any direct authority for it existed.

By the time, however, that Mr. Bell came to publish his last edition in 1826, although it does not appear that any case on the subject had intervened, he had, no doubt under a feeling of full conviction, taken up a stronger view of the point. For he there expresses himself thus,—that "it seems "very doubtful whether Erskine had not too indiscriminately "extended the doctrine of the court as laid down by "Harcus, when he says that a conveyance to a creditor of "the ancestor is unexceptionable. If such a conveyance "to a single creditor were challenged by the body of "creditors of the ancestor, the act would unquestionably "entitle the rest to challenge the deed."[1] With all possible respect, I must think that this is advancing rather too rapidly, as there is certainly no adjudged case yet which impeaches the doctrine laid down by Mr. Erskine, and repeated by Mr. Bell himself at the distance of forty-six years.

Now, whatever views may be entertained as to the expediency of establishing some such rule of law as that contemplated, the question to be determined is, whether this statute, entirely directed, as I think, to a different object, has given that rule. I am not able to find it either in the words or in the spirit of the statute; and though there might be expediency in the arrangement of some law on the subject, I think that it would require a good deal of consideration of the peculiarities of the case, before such an unbending and unqualified rule as that which is now said to have existed for centuries in this statute, though altogether unknown to our institutional writers, should be laid down.

Two cases have been alluded to as having some relation to the point. One is that which is mentioned at the end of the passage in Erskine, Lord Ballenden v. Murray, March 1685 (Mor. 3127.) It will be observed, that there are two points in the sentence of Erskine to which the reference is subjoined. One is, that the act does not bar the heir from disponing within the year to one of the ancestor's creditors.

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[1] 1 Bell's Comm. 736. (5th ed.)

The other is, that no creditor of the heir has any interest to object to a right granted to another creditor of the heir within the year. The case referred to distinctly supports the last proposition, but it has been thought not to make out the first. Whether it was referred to with that view may be doubtful. Mr. Erskine might express his own decided opinion on the effect of the statute in that point, as he here does, without meaning to say that it had been precisely decided. But though the words of the report may not seem to bring out the point, it does not follow that it may not have been perfectly well known to Erskine, that that was the nature of the case, and that it was so understood by the profession in his time. The words of the report are:— "In this process it was also found, that a disposition granted "by the heir to the defunct's creditors, within a year after "the defunct's decease, was not quarrellable, seeing the "clause of the Act of Parliament is conceived in favour of "the defunct's creditors." It is not a usual thing for an heir to execute a disposition in favour of the whole body of his predecessor's creditors; and I think it very improbable that such was the fact in that case. The case is not so stated in the report, the party engaged in it being described simply as an individual. And indeed if such a disposition to the body of creditors had been granted, I should have thought it so clear that no objection could have been taken to it under the statute, that no discussion on such a question could well have arisen, seeing that no one could have a title to challenge it; and therefore I should rather infer, notwithstanding the generality of the terms of the report, that the real meaning was, that a disposition to any of the defunct's creditors was unchallengable, as Mr. Erskine may have understood it. But if a deed to all the creditors could be challenged with any apparent relevancy, and if any sort of prejudice could be qualified, the judgment must import at least, that the words of the statute "that no right or dispo-"sition," &c. "shall be valid," &c. were not understood in the absolute sense now maintained by the pursuers. At all events, there is nothing in the report in the slightest degree

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adverse to the doctrine delivered by Mr. Erskine, as what he held to be the clear law on the subject.

The other case mentioned is that of the Laird of Arniston v. Lord Ballenden, November 1685 and March 1686, (Brown's Supplement, ii. p. 92.) Though the report of that case is by no means luminous, I cannot help thinking that the very existence of it goes far to demonstrate that the disposition referred to in the case of Ballenden v. Murray could not have been a disposition in favour of the whole creditors of the deceased; for the party challenging Lord Ballenden seems to have been the same; and this later case relates to another disposition in favour of other creditors of the father. However this may be, the facts of Murray's case not being stated, the question with Lord Arniston certainly did touch the point. There was a separate defence against the reduction; viz., that the granter of the disposition was not an heir-apparent, having taken the estate per præceptionem hæreditatis fifteen years before his father's death. But, on the supposition that that ground might not avail, the plea was first distinctly stated, that "the act prohibiting "dispositions within year and day of the predecessor's "decease in prejudice of their creditors is not designed to "make a party amongst them, but only to prefer them to "the creditors of the heir." The Court at first sustained the defence, that the son had been infeft in his father's life-time, "but waived to give answer to the first reason; viz., "If any of the father's creditors could be gratified." The debate was afterwards resumed on the point decided in the defender's favour. The Court were then divided in opinion on that point, and Lord Ballenden found it necessary to consent to Arniston's preference for his proper debts, so that "the first interlocutor stood as to him; but the Lords "reduced, quoad the other creditors, whom Arniston had "some time after his disposition assumed." The reporter adds, "which seems somewhat inconsequential."

As the first interlocutor stood as to Arniston, it certainly stood on the same ground on which it had proceeded, that the son had taken per præceptionem; and in this view the

other point remained as it had been before, waived by the Court; and, accordingly, it is not at all mentioned in the abstract of the resumed debate. The judgment of reduction as to the other creditors does not affect it, as it evidently must have proceeded on the ground, so far as I can understand the case, that those other creditors had not been validly assumed into the benefit of the disposition,—in other words, that there was no effectual disposition in their favour, though there was a valid disposition to Arniston, who was no more a creditor of the ancestor than they were. As this appears to me to be the truth of the case, I think that the judgment does not affect the present question; but indeed, if it could be viewed in any other light, the proceeding would be altogether unintelligible, and certainly would not aid the pursuer's argument; for it would come to this, that because Lord Ballenden, a single creditor of the ancestor, consented to Arniston, another creditor, being preferred, the Court gave judgment sustaining that preference, to the exclusion of all the other creditors of the deceased, who were parties litigants before them. It is impossible that this could be the state of the case, unless the very question here in discussion had been decided in favour of the single creditor holding the disposition. I do not think that it was so, and have no doubt that the case must be explained in the way I have mentioned.

On the whole matter, seeing no authority for any other construction of the statute, I am of opinion that, according to the terms and spirit of it, the law on the question is that laid down by Mr. Erskine. And it does also appear to me, that the other construction maintained, which holds all dispositions whatever by the heir within the year to be invalid, would lead to very extraordinary consequences, as it would imply that the heir, even when he had completed his title within the year, could not give implement even of the most onerous obligations of his ancestor, without waiting till diligence should be used against him; and that any disposition granted even for such a purpose would be liable to reduction, at the instance of any unknown creditor of the ancestor who might lie by, at any time within forty years,

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a thing which I cannot think was contemplated by the statute.

If the Act of Parliament does not apply to dispositions in favour of a creditor of the ancestor, I am of opinion that the bond of 29th July 1834 is not reducible under that Act; for that deed was evidently a deed granted in security of money advanced to pay the debt pro tanto which Thomas Allan owed to the company of Robert Allan and Son; and, as far as I can judge of the matter, if it were necessary to go farther, I am convinced that the facts brought out in the accountant's report would establish that the money was in a great measure, if not wholly, employed by the company in the payment of debts for which Thomas Allan himself was responsible.

Query 4.—This question also appears to me to be attended with considerable difficulty.

I am of opinion that the company of Robert Allan and Son, which was constituted by the minute or notes of agreement of 29th August 1831, must be considered as having been dissolved, in regard to any question concerning the estate or the proper representatives of Thomas Allan, by his death on the 12th September 1833, or at least at the 31st December thereafter. The contract was not of such a nature that the parties severally contracted for themselves and their heirs. It is indeed indefinite in endurance; but, so far from supposing that the company was to continue unchanged on the death of one of them, it expressly provides that the heirs of the deceasing partner shall not even be entitled to look into the books, and that their interest in its funds shall be at once determined by the balance to be made up by the survivors at the time appointed. It may probably be true that the surviving partners must be considered as still the members of a subsisting company between themselves. There is no question here as to their obligation to continue partners with one another; though, in an agreement of indefinite endurance like this, this might admit of much doubt. But the question before the Court is of a more limited nature, relating merely to the change in the state of the company produced by

Thomas Allan's death, in regard to him, or the rights of others with relation to him or to his estate.

Neither can I think that the company must be considered as unchanged in this question, because the same firm was continued, and there was no notification of a dissolution. Death operates a dissolution of itself; and being a public fact, all men are bound to know it. See the doctrine laid down by Lord Eldon, as quoted by Mr. Bell, vol. ii. p. 639. But in the present case, surely the Royal Bank cannot plead want of notice of Thomas Allan's death, when they took their disposition of his estates from his son and heir; and knowledge of the death must presume notice of the dissolution, unless the fact had stood otherwise by the contract. But though the son was still a partner of the succeeding company, he was so, not as heir of Thomas, but in his own capacity in terms of the contract; and of this also the deeds executed gave the Bank full notice.

It may be doubtful whether the dissolution should be considered as having taken place at the moment of Thomas Allan's death, or not till the 31st December 1833, when the balance of the books was made. I have had hesitation on this point; but, on the whole, I am inclined to think that the company, though in the process of winding-up, must be considered as having gone on till the time for striking the balance; because till that time the representatives of Thomas Allan, as such, had still an interest in the transactions.

But assuming that there was a dissolution of the company of which Thomas Allan was a partner, this does not exhaust the subject of the query put to us. Two points remain of considerable nicety.

The defenders maintain that the special security given by the deed of 30th March 1832, having been so given upon a cash credit to the company trading by the firm of Robert Allan and Son, must subsist to the effect of covering the operations under that credit, notwithstanding that by Thomas Allan's death the actual company had come to be different from what it was before. I do not think it a good answer to this plea to say that it would be enabling the

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heir to apply the estate of the ancestor within the year to the payment of his own debts; because this does not stand on any disposition by the heir, but on the disposition by the ancestor himself; and if he chose to convey his estate in security of debts to be contracted even by third parties, there is no doubt that it would be effectual to the creditor, whether the granter was alive or dead, as for a debt arising on the credit of that special security given by him. The question, therefore, is not free from difficulty.

On the whole, however, I am inclined to think that the bond of security granted by Thomas Allan ought not to be construed as having been truly intended as a security for any cash credit except to the company of which he himself was a partner; and that therefore it should be held to have ceased to be a fund of credit, as soon as his death dissolved the connexion between him and the company bearing the firm. It was in reality an obligation of guarantee—an impledging of his security for a special object. He happened to be a partner of the company in whose behalf it was given; but he might not have been so, and still might have given such a security. In such a case, there can scarcely be a doubt that a guarantee or security, given for Robert Allan and Son, while A. B. was a partner of that house, would not have been effectual to cover advances made to a company bearing the same firm after that person had ceased to be a partner of it. The principles of the case of Houston's Executors v. Spiers, &c., 4th March 1820, seem to imply this.

But, besides this view of the matter, it is to be observed, that if there was a dissolution of the first company, or a change which rendered the firm of Robert Allan and Son in reality a new company, the personal obligation in the original bond by the old company must truly have fallen as to Thomas Allan, however it might subsist against the new or continued company, and the individuals who still operated on the credit. And if the personal obligation of the company for whom Thomas Allan interposed the security of his heritable estates had fallen, it cannot be held on any sound principle that the special security so interposed could

subsist, for advances made after this essential change on the effect of the credit had taken place.

The second point maintained by the defenders in this part of the case appears to be more important; and I am inclined to think that it is well founded.

The pursuers very anxiously maintain, that this case is altogether within the principle of the well known case of Devaynes; and that if they can show that at any time after the death of Thomas Allan the payments made by the surviving firm into the cash account were sufficient to pay all the balance which was due at the time of his death, or at the striking of the balance, that debt must be held to be swept away, and all the debt remaining at the time of the bankruptcy must be taken as the debt of the new company, and so the debt of the heir, and not of the ancestor. It appears to me, that there is considerable confusion in the argument of both parties on this question; and my opinion is, that the case of Devaynes does not apply in the circumstances in the extent pleaded. In that case, a private party had money deposited with a company of bankers; at a certain point of time, one of the partners of that company died. This was taken clearly as a case of dissolution; but the party went on to deal with the new company on the same account, and from them he received all that had been due at the death of the partner. After that he made further deposits; and then a bankruptcy of the new company took place, while the balance was considerably in favour of the depositor. The claim made was against the representatives of the deceased partner; and this was held to be inadmissible, because the first payments made, after the creditor had acknowledged by his deposits and drafts the continued account with the new company, were considered as applicable to the debt as it stood at the death of the partner, and therefore to have extinguished it.

It is very difficult to assimilate the present case to that case. There is a puzzle in the argument of the defenders, not altogether sound, arising from the circumstance of there being here two banks, constituting the debtors and creditors in the account. But still there is a real difficulty.

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The claim arises on the account kept in the Royal Bank. But they are not the debtors as in the case of Devaynes, but the creditors; nor was Mr. Thomas Allan the partner of that corporation, whose death could have raised any question. The Royal Bank are creditors of Robert Allan and Son, not upon any money simply deposited with them, but on payments made in answer to draughts which were recognized only in respect of the special security held from Thomas Allan. Now, if there was a dissolution of the company for whose behoof that security was granted, and if the Royal Bank, erroneously believing that the security was still available for new advances to a different company, allowed the account to go on without closing it, and afterwards came to be greatly in advance to the new company, it would be contrary to all equity that the accounts should still be blended together, and that the bank should be deprived of the benefit of their security, derived specially from the deceased partner, even for that part of the debt which was truly due to them at the time of his death. On the most common principles, since the security has been found unavailable for the subsequent advances, they are entitled, when the accounts come finally to be adjusted, to impute the payments to the debt least secured, and to resort to their security for that debt to which it is clearly applicable.

I am sensible that the judgments pronounced by the Court and the House of Lords, in the second branch of the case of Houston's Executors v. Spiers and others, may also deserve attention. But it rather appears to me that there is also an important difference between that case and the present. The payments, which this Court held might at certain points of time diminish the debt existing when the change in the mode of transacting was made, which had been held to liberate the cautioners from the subsequent drafts, were all payments by the same party who had contracted the first debt. He made the remittances, and all the drafts both before and after the change were his; and the Court were of opinion that such remittances made by him might justly be imputed to any part, or the earliest part, of his drafts. But the state of the matter is quite different here. The first

debt was contracted by one company, that of which Thomas Allan was a partner, and for that the Bank held the security of his estate. The payments which are now said to have extinguished it were made by another company on their own account; and on the faith of those payments, if not on that of the special security, that other company received credit for the further drafts made by them. This is a very different affair from that of one party making drafts and making payments. If the companies are found to be different parties, their payments, no more than their drafts, can be confounded. There is a special security for the debts of the one; none for those of the other. Is it just at once to take away the security from the debts of the new company, and to make their payments liquidate the debt of the old company, while the debts contracted by themselves to the same party are left unpaid and unsecured? There is plainly an essential difference between this case, and both the cases of Devaynes and Houston; and, I think, a difference entering into the essential equity of the whole matter. Nevertheless, I feel all the doubt attending the question.

But, on the whole, I am inclined to think, that the principle of the cases of Devaynes and Houston cannot in this point be made to apply to the present case; and that the defenders are entitled to the benefit of the security for whatever debt was due at the time of striking the balance on the 31st December 1833, after the death of Mr. Thomas Allan.

Lord Corehouse.—I concur with Lord Moncreiff in the answers which he has given to the first two questions.

The third question appears to me, as it did to his Lordship, to be of great importance, and attended with difficulty.

Mr. Erskine has said, "that the Act 1661 does not bar the "heir from disponing any part of the ancestor's estate to a "creditor of that ancestor[1];" and if he had stated this on his own authority alone, it would have been entitled to great weight, as the opinion of a very learned and experienced

[1] Ersk. 3. 8. 102.

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lawyer; but he rests it on the authority of a decision, in a cause in which the creditors of Lord Preston and of his son John Preston were parties. In the competition which occurred on that occasion various judgments were pronounced; and on a careful examination of the reports in Harcarse and Fountainhall, it occurs to me, that while the judgment to which Mr. Erskine particularly refers gives no countenance to this dictum, the others are directly opposed to it.

Lord Preston disponed his lands of Preston and Auchindinnie to his eldest son John Preston, with the burden of his debts. The disposition was dated fourteen or fifteen years before Lord Preston's death, and infeftment was expeded by the disponee under the great seal in his father's lifetime. After Lord Preston's death, some of his creditors proceeded to do diligence, and they had gone so far as to obtain decree cognitionis causâ within three years from that event, but their decree of apprising was not pronounced till afterwards. It appears that John Preston, the son, had granted a disposition to Murray, one of his own creditors, within the three years; and that he had also granted a disposition to his uncle, Dundas of Arniston, one of his father's creditors, for the behoof of Arniston himself, and such other of the father's creditors as he chose to admit to the benefit of it. Arniston granted a back bond, acknowledging the trust, and assuming a certain number of creditors.

The first question that arose was between Lord Ballenden, one of the father's creditors, and Murray the son's creditor, who had obtained the disposition; and it was found, "that "the defunct's creditors ought to do exact and complete "diligence against his estate, within three years after his "death, unless they could make it appear that their diligence "was retarded without any fault of theirs, by opposition "from the heir or other creditors, or the surcease of justice, "or the like; and preferred a disposition by the heir to one "of his creditors, even within three years after the defunct's "decease."[1]

[1] Harc. 219.

The next question was, whether a disposition granted by John Preston to his father's creditors, within a year after his father's death, was effectual against his own creditors, on the ground that the Act 1661 prohibits all dispositions within that period? The Court found, that the son's creditors had no title to challenge that disposition, "seeing the clause in "the act is conceived in favour of the defunct's creditors, "and not of the creditors of the heir." [1] It was also found, on the same principle, that a disposition by the heir to one of his own creditors could not be challenged by another of his creditors. This ended the competition between Lord Preston's creditors and those of his son. It is the only case to which Erskine refers, and it has manifestly no relation whatever to the present question. Indeed this is now admitted on all hands.

A second competition then commenced of the father's creditors inter se. After disposing of an objection to an inhibition used by Lord Ballenden, one of the number, which was held effectual only to a certain extent, the question arose, whether John Preston's disposition to his uncle Arniston, with power to assume other creditors, was exposed to challenge at the instance of the remaining creditors not assumed under the Act 1661? Lord Ballenden argued,—"The act is clearly conceived in favour of the defunct's "whole creditors, as appears from the motives therein ex-"pressed, viz. that it takes some time before his death can "come to their knowledge; and it is but just, that as the "apparent heir is secure for year and day against all dili-"gence at the instance of the defunct's creditors, so it "should not be in his power to prejudge them during that "space by preferring some to others." [2] No answer was made to that argument. Arniston rested his defence on a totally different ground; he maintained, that John Preston being put into the fee many years before his father's death, the Act 1661 did not apply to him at all. "The act," he says, "is "expressly in the case of apparent heirs disponing, and the "son being in the fee cannot be served heir to his prede-

[1] Harc. 219.

[2] Harc. 29.

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" cessor, who was deceased (denuded) before his death; " and as the father might have preferred such creditors as he " pleased, there being no diligence used against him, the " son might do the like in the father's life, or immediately " after his decease, the power of disponing being the effect " of dominion." [1] The interlocutor on that debate is given verbatim by Fountainhall: " The Lords found that John " Preston was not in the case of an apparent heir, but of a " qualified fiar, under the provisions and obligements con- " tained in the disposition made to him by his father, and " so (notwithstanding the 24th Act of Parliament 1661) he " might sell and dispone on his lands within year and day of " his predecessor's death; and that the disposition was not " quarrellable on that head, the son being always infeft on " the said disposition before his father's death." [2] Some of the Judges doubted of that interlocutor, because John Preston was not an absolute but a qualified fiar, his father having burdened him with all debts he should contract even in articulo mortis; and it was said, that since " the son is " declared liable as if he entered heir, so he cannot more " than an heir dispone within the year." But no doubt whatever was expressed, if he was to be held not as a fiar, but as an heir, and therefore within the provision of the Act 1661, that the disposition granted by him to Arniston and the assumed creditors, in prejudice of the other creditors of Lord Preston, would have been null, as falling under the prohibition.

Lord Ballenden waived his plea that John Preston was an heir and not a fiar; and the interlocutor in favour of Arniston stood on the ground on which it was originally placed. But another question occurred with the assumed creditors, which did not rest on the Act 1661—it had no connection with that Act. If it had been held that John Preston, being an heir, could dispone effectually to Arniston without contravention of the Act, it would have followed necessarily that he could have disponed to any other creditor he chose, or any whom he had empowered Arniston to choose. But in the question

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[1] Harc. 29.

[2] 1 Fount. 367.

with them the challenge was laid not on the Act 1661, but on the Act 1621. Fountainhall reports[1], that "the third "point represented against Arniston's disposition was, that "it was from a nephew to an uncle, without adequate "causes; that by his posterior back bond he had gratified "some of the creditors to the prejudice of others who had "done diligence, which was found unlawful, as Stair ob-"serves: 8th January 1669, Preston; 24th July 1669, "Young." The result of that discussion is given by Fountainhall[2]:—"The Lords thought the reason relevant on the "Act of Parliament 1621, that Arniston could not assume "personal creditors before Ballenden, nor prefer any debts "paid by himself since the disposition, but only those to "which he had a right at that time, and therefore preferred "Ballenden, who had inhibited to the rest, although the "inhibition was found null quoad one of his debts. There "was cited for Ballenden these decisions from Stair: 8th Ja-"nuary 1669, Newman; and 24th July 1669, Crawford. "The words of the interlocutor were:—'The Lords found "'that Arniston by his back bond could not prefer one "'creditor of Preston's to another, but conform to their "'diligence. But that as he might have received payment "'of all his own sums, so he might prefer himself as to all "'debts due to himself at the time of the disposition of the "'lands of Preston, or at the time of the disposition of the "'lands of Auchindinnie, which were both anterior to his "'back bond; and therefore sustain the reason of reduc-"'tion at my Lord Ballenden's instance against Stobs and "'the other creditors therein called, founded upon Ballen-"'den's prior diligence; and in respect thereof prefer him "'to them, notwithstanding of the preference given to "'them by the foresaid back bond, and ordain the Lord "'Ballenden to be ranked accordingly.'"

The cases of Newman and Crawford, here referred to, are reported at length by Stair; and there is an able commentary upon them in M'Kenzie's Observations on the Act 1621. That author gives the substance of them in these words:—

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[1] 1 Fount. 403.

[2] 1 Fount. 481.

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"As no bankrupt can prejudge his creditors who have done "diligence by preferring one of them to another, so neither "can he make a disposition to any confident person, with "power to him to pay the debt due to himself in the first "place, and his creditors in the next place."[1] Both cases were exactly parallel to that of Lord Preston's creditors. The dispositions were to conjunct and confident persons, with power to assume other creditors; and they were sustained in so far as the disponees themselves were onerous creditors, but set aside in so far as the disponees had exercised a power of assumption, and thereby created preferences.

Some doubts, entertained with regard to the import of Harcarse's report, which is not very distinct, are entirely removed by viewing it in connexion with that of Fountainhall. It is questioned whether the disposition in Murray's case was to all the creditors of the defunct, or to some of them only; and it is said, that if it had been to all of them it is clear that no objection would have been taken to it, and that no discussion could have arisen upon the subject. But it will be remembered that in the case of Murray, which was "a competition, as Harcarse tells us, between the cre-"ditors of the defunct and the creditors of the heir," and not of the creditors inter se, it was of no consequence whether the disposition was to one or to all of the defunct's creditors; for if Murray's plea had been well founded, every disposition granted within the year would have been null, whether to the one or to the other. But it was found that Murray, as a creditor of the son, had no title to insist under the statute at all. Another difficulty is resolved, viz. that the disposition in favour of Arniston was sustained for his own debt, but not in favour of the creditors he had assumed. We have seen that that distinction did not proceed upon the Act 1661, but solely upon the Act 1621. If Arniston's disposition had been sustained upon the Act 1661, which it was not, it must necessarily have been sustained quoad the creditors he had assumed also.

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[1] Vol. II. 39.

The result of this inquiry is, that the only judgment on which Erskine founds does not touch the present question at all; and that the other judgments in the cause decide, not indeed in express terms, but by plain and necessary implication, that a disposition in favour of one of the ancestor's creditors within the year is unavailing in a question with his other creditors. In so far, therefore, as precedent goes, Erskine's opinion is not only unsupported, but it evidently proceeds from his mistaking the circumstances of the case.

If we consider the statute itself, it appears to me fully to justify the view taken of it by the Court in Arniston's case. There are two remedies given by the statute. The one is a prohibition on the heir to sell intra annum deliberandi, which is pure and absolute, and the ground and nature of it is well explained by Lord Kames, in reporting the case of Taylor[1]:—"During the annus deliberandi an heir apparent "is protected from diligence, that he may have time for "deliberating whether he will undertake the succession, yea "or not. It is neither just nor expedient that in the mean-"time he should have liberty, by disposing of the predeces-"sor's estate, to withdraw from the creditors the subject of "their payment." The other remedy is the separation of the ancestor's estate from that of the heir, according to the rule of the Roman law, and reserving it for three years to be attached by the ancestor's creditors exclusively. With the second remedy we have no concern here.

With regard to the first, it is just as prejudicial to the body of the ancestor's creditors to allow the heir to dispose of the estate to one of them before the death of the ancestor has come to the knowledge of the rest, as if he had disposed of it to a stranger. It is settled law that, although the heir has no creditors of his own whatever, he cannot sell the estate within the year and spend the price. Such a sale may be challenged by any of the ancestor's creditors, even in a question with the onerous purchaser, on the ground that the heir stands inhibited under the statute; and, on the same principle, the inhibition should be available to all the

[1] 26th Nov. 1747.

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other creditors against one of their number who is preferred. Throughout the whole system of our law, and particularly in reference to the Statutes 1621 and 1696, every deed of the bankrupt bestowing a preference is termed an alienation in prejudice of his creditors, though it is in favour of one of them. Why the same words in the Statute 1661 should receive a different construction I am not aware. But it is unnecessary for me to pursue this argument at greater length, as it is illustrated, in my humble opinion, so fully and so well in Mr. Bell's Commentary on the Statute 1661.[1] It is very natural, I think, that the learned author, in the first three editions of the work, following the dictum of Erskine, should have held a disposition to one of the ancestor's creditors unchallengeable by the rest, and that he should have retracted that opinion when he found that the dictum not only rested upon no authority whatever, but was in opposition to the very case quoted in its support.

With regard to the fourth question, I am inclined to concur in the opinion of Lord Fullerton. Neither the case of Devaynes nor that of Houston is exactly in point, though the principles there laid down, I think, must be attended to, having to a certain extent an application to this case. But, as is remarked by Lord Fullerton, if at any one moment the balance outstanding at the expiration of the guarantee was actually cleared off, it seems extremely difficult to hold that a new balance could be reared up against the cautioner by subsequent transactions.

Lord Mackenzie.—I concur with the opinion of Lord Moncreiff on the first two questions, and also on the 4th. On the 3d question, I now concur with the opinion of Lord Corehouse.

Lord President and *Lord Fullerton.*—Question 1.—"Keeping in view the state of the feudal titles, the evidence "afforded by the company's books and other documents, "and the conduct of the parties generally," we are of

[1] 1 Bell's Comm. 729, et seq.

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opinion that the estates of Campse and Lauriston "were "acquired and vested in the person of Thomas Allan as his "own individual property," and that they were not "held "by him in trust or for behoof of the company of Robert "Allan and Son, or subject to their disposition."

The titles forming, in every question of this kind, the most important and, in general, a conclusive element of evidence are clear and unqualified. From these titles, Thomas Allan appears to be the absolute proprietor; and in regard to one of the estates, that of Campse, the deeds by which the transaction was finally concluded bring directly into contrast the character of Thomas Allan as trustee for the company of Robert Allan and Son, and Thomas Allan in his individual character. Upon that occasion the heritable security previously held over the estate by Robert Allan and Son was made over to Thomas Allan, the purchaser of the estate, in order to fortify his title. The security had been held by Thomas Allan, as trustee for the company; and the deed granted on that occasion, signed both by Thomas Allan and Alexander Wight, subscribing by the company firm, bears that Thomas Allan, as surviving trustee for the said company of Robert Allan and Son, disponed and made over the said security to the said Thomas Allan as "pur-"chaser foresaid," the purchase being described in the previous part of the deed to have been made by Thomas Allan as an individual.

It is unquestionable then, that, ex facie of the titles and the records, Thomas Allan as an individual was the absolute proprietor of the lands in question; and indeed his right in that character, and in that character alone, is recognised in those very securities on which the defenders found. From the heritable bond granted to the Royal Bank in March 1832 over the lands of Lauriston, and that granted by his son Robert Allan, on the 29th July 1834, over the estates of Campse and Lauriston, it is clear that in each of those transactions respectively, Thomas Allan and Robert Allan were dealt with, in so far as the heritable securities were concerned, as the absolute proprietors of those estates.

Such being the state of the evidence afforded by the titles

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and the records, we consider it to be incumbent on the defenders, in order to establish a trust in opposition to that evidence, to make out their case by complete legal proof; and even admitting the competency of a reference to the books of Robert Allan and Son, as being constructively the "writ" of Thomas Allan, in consequence of his partnership, it appears to us that the evidence falls very far short of that standard. The books and the other documents referred to no doubt do contain some entries and passages which, in the balancing of mere probabilities, might seem more easily reconcileable with the notion of a trust in the person of Thomas Allan than that of a right of absolute property. In other particulars the inferences from those entries and documents might tend the other way. But without going into any minute examination of the evidence as if this were an open question of probability, we think it enough to state that in our opinion it is insufficient to take off the effect of that legal attestation of Thomas Allan's right of property which is afforded by the titles.

Question 2.—Holding the opinion expressed in the preceding answer, we might perhaps be dispensed from answering this second question, which, on the supposition of that answer being correct, becomes unnecessary. But, "assuming the said estates, or either of them, to have been "vested in Thomas Allan in trust or for behoof of the com-"pany, or subject to their disposition," we should have great difficulty in holding that the bond and disposition in security of 29th July 1834 was reducible under the Act 1661. Our difficulty does not arise from the supposed effect of a latent trust, in qualifying the rights completed by third parties, and flowing from one who appears to be the absolute proprietor. Indeed, it does not appear to us that the circumstances of this case are such as to raise that question; for here the disposition 1834 is the first completed right flowing from the party who is supposed to have held under the latent trust, and is founded on by the very party who pleads that latent trust. It is in itself necessarily preferable, unless it can be reduced; and the only question is, whether it can be reduced under the Act 1661.

The pursuer maintains the affirmative, on the ground that, in applying this statute, an estate, appearing from the titles to be unqualified in the person of the ancestor, must, even although a trust be proved, be treated precisely in the same way as if it had been his absolute property. Now this is a point on which we entertain very great doubt.

Upon the assumption here made that Thomas Allan held the estates in trust for the company, he was evidently under the obligation to denude when required. On his death the estates, on that assumption, must have been taken up by his son, Robert Allan, under similar obligations to the new company, upon which all the rights of the former company had devolved. Robert Allan then, holding the estates under that obligation, and disponing them in security to the Royal Bank on the requisition of the company, the true proprietors, only did that which he was in law bound to do; and we are rather inclined to think that such an act does not fall under the operation of the statute. It appears to us, that the enactment proceeding on the preamble, that "appearand heirs, and heirs immediately after their prede-"cessor's death, do frequently dispone their estate, in whole "or in part, in prejudice of their predecessor's lawful "creditors, before their death come to their knowledge, or "before they can do lawful diligence against the saids "appearand heirs," contemplated only the voluntary acts of the heir, as distinguished from those which he was under an obligation to perform. In the first place, in construing a statute of this kind, passed for the special purpose of protecting the equitable rights of creditors, we think the term "their estate" can hardly be understood to comprehend estates held by the ancestor or the heir in trust for other parties. But, secondly, looking at the whole tenor of the statute, it rather appears to us that it was intended to supply in some measure the place of lawful diligence by inhibition against "the saids appearand heirs," the only diligence which could be adopted against appearand heirs during the annus deliberandi; and it would seem difficult, agreeably to the obvious spirit of the statute, to extend it beyond the effect of the analagous diligence, of which the

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operation is confessedly confined to voluntary deeds, i. e. to deeds "granted by a party to which he is not obliged "anterior to the inhibition[1];" a description which clearly could not comprehend a conveyance granted by a trustee in obedience to the requisition of the trustor.

Question 3.—Holding the said estates to have been the private property of Thomas Allan as an individual, we think that the bond of 29th July 1834 is reducible under the Act 1661. The only ground upon which we understand this conclusion to be denied by the defenders is, that the bond was not, in the sense of the statute, granted to the prejudice of the creditors of Thomas Allan, inasmuch as, although not granted directly to any one of those creditors, it was granted at the requisition of Robert Allan and Son, who were large creditors of Thomas Allan, to the Royal Bank, and must have the effect of diminishing, to the amount drawn by the Royal Bank under it, the gross amount of the debt due by Thomas Allan to Robert Allan and Son. In short, although the defenders do not undertake to "show "precisely that the money raised upon this security was "paid by the company to parties who but for such pay-"ment would now be claiming as creditors of Thomas "Allan," they argue, as we understand, that, as Thomas Allan's estate must get credit in accounting with Robert Allan and Son to the amount drawn by the Royal Bank from that estate under the security, the case is exactly the same as if the security had been granted directly to Robert Allan and Son. It is unnecessary to inquire into the soundness of this view, because we cannot adopt that construction of the statute, upon which the relevancy of it must depend. Considering the spirit as well as the letter of the statute, we think that even if the disposition in security had been granted directly by Robert Allan to the company, it would have fallen under the prohibition of the statute, as being a disposition to the prejudice of his predecessor's lawful creditors; for, in our opinion, these expressions embrace all dispositions which prejudiced all or any of the creditors of

[1] Ersk. 2. 11. 11.

the ancestor, and must be held to apply to a deed or disposition, which, like the present, had the effect of benefiting one creditor to the prejudice of all the others. Neither does it appear to us, that in sound construction the effect of these expressions can be affected by the consideration of the other object contemplated by the statute, namely, the protection of the rights of the creditor of the ancestor in competition with those of the heir. This last object was attained by the provision that the creditors of the ancestor should be preferred, if they did diligence against the estate within three years after the ancestor's death. But the enactment now in question is a distinct one, and rests upon the separate preamble applicable to it, "that appearand "heirs do frequently dispone their estates to the prejudice "of their predecessor's lawful creditors, before the death of "the ancestor comes to their knowledge, and before they "can do lawful diligence against the said appearand "heirs."

It is true that in a subsequent part of the statute, fixing the precise endurance of the heir's disqualification to dispone, it is said to be unreasonable that it should last during the same period of three years, within which the creditors of the ancestor had a right to obtain, by diligence, a preference over those of the heir himself; but this does not appear to us to control the express terms in which the disqualifying clause is framed. It is not and cannot be maintained, that the heir's disqualification was limited to conveyances granted to his own creditors. In the first place, on that view, the disqualification would have been unnecessary; because, according to the received construction of the statute, the diligence of the ancestor's creditors used within the three years is, by the force of the special enactment, sufficient of itself to frustrate any disposition granted by the heir within that period to his own creditors; and, secondly, it is also a fixed point in the construction of the statute[1], that the disqualification operates not merely against the creditors of

[1] Taylor v. Lord Braco, Mor. 3128; Magistrates of Ayr v. M'Adam, 14th June 1780, Mor. 3135.

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the heir, but against third parties acquiring from the heir within the year, and that although the ancestor's creditors have not done any diligence within the three years. It would seem to follow, then, that the enactment debarring the heir from disponing, though forming part of a statute containing another enactment giving a preference to the creditors of the heir over those of the ancestor by the use of diligence within three years, and although confined, for the reasons there assigned, to a shorter period than that within which such statutory preference was to last, must be viewed as a substantive and independent enactment, of which the force is to be sought for exclusively in the terms by which it is expressed. But the express terms of the enactment prohibit all dispositions within the year, "to the "prejudice of the creditors of the ancestor," which we must hold to embrace dispositions to the prejudice of all or any one of those creditors. No doubt it did not exclude, nor does it appear from the preamble to have been its intention to exclude, the possibility of preference among those creditors, in so far as that preference could be gained by legal diligence. Its declared and very reasonable object was, to prevent preferences by the voluntary act of the heir in behalf of a favoured creditor, before the others had the means of using diligence to secure their rights; and, accordingly, the effect of it when so construed is not to prevent preference by diligence amongst the creditors of the ancestor, but to secure to them equal facilities of using diligence, independently of any voluntary and partial interference of the heir.

From the preamble, then, as well as the enactment, it is evident, that its effect was to disqualify the heir from doing any voluntary act within the year and day, by which the predecessor's creditors, i.e., as we read it, any one of his creditors, would be prejudiced; and in many supposable cases the opposite construction would lead to those very consequences which it appears from the preamble to have been in the contemplation of the Legislature to prevent. Thus, if one creditor of the ancestor had used inhibition against him, which diligence, of course, fell by his death,

the right of such inhibiting creditor might have been entirely defeated by the voluntary conveyance by the heir to a favoured creditor of the ancestor, before the death of the ancestor had come to the inhibitor's knowledge, and before he could renew his diligence; nay, it might have happened that all the ancestor's creditors but one had used inhibition, and yet it might have been in the power of the heir, immediately on the ancestor's death, to grant a preference to that one creditor who, but for the ancestor's death, would have been excluded by preferable diligence. This was an evil which might very reasonably attract the attention of the Legislature. It appears to us that it was the very evil, or at least one of the evils, which it was the object of the statute, as declared in the preamble, to prevent, and which it did effectually prevent by the special enactment.

We are quite sensible of the weight due to the authority of Mr. Erskine; but it is clear, indeed it is admitted by the defenders, that the decision referred to in the passage, that of Ballenden, March 1685, does not support the proposition there laid down. On the other hand, although the final judgment in the other case of Arniston v. Ballenden[1] does seem to countenance the view of the statute maintained by the pursuers, the report is so imperfect, and the judgment in some respects so difficult to be reconciled with any principle, that we do not think it can be considered as an authority. Holding this question as still open, however, we are of opinion, for the reasons already assigned, that on a sound construction of the statute, a disposition by the heir to one or more creditors of the ancestor, to the exclusion of the others, does fall under its prohibitions.

Question 4.—We think that the bond of 30th March 1832 did not "remain in force as a continuing guarantee "and security over the estate of Lauriston, to cover "advances, or any balance due upon advances, made by the "defenders for the company of Robert Allan and Son, "down to the date of the final sequestration of the com-

[1] 2 Brown's Sup. 92.

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" pany." It was granted in security of advances to be made to the company of Robert Allan and Son, consisting then of the individual partners, Thomas Allan, Robert Allan, and Alexander Wight. Such a security could not cover advances made to a different company, though carrying on business under the same firm. The security, therefore, necessarily fell at the dissolution of the company in whose behalf it was granted; and it appears to us that that dissolution took place on the death of Thomas Allan, on the 12th of September 1833. That event had the same effect in a question of this kind as if Thomas Allan had withdrawn his name from the company and given due intimation; the notoriety of the death of a partner being held sufficient to supply the place of such intimation. Neither do we think that the point is affected by the twelfth article of the notes of agreement, providing that in the event of the death of any partner, the right of the heirs or representatives should be determined by the state of the deceased's account at the first balance after the decease, as attested by the survivors, and excluding the right of the heirs to examine the books of the company. This very article seems quite conclusive against the supposition of the continuance of the company in the person of the heirs or representatives of Thomas Allan, particularly in a question of this kind, in which the continuance of the security is held to depend on the continuance of that control to be exercised by the different individual partners, in reliance on whose discretion it is presumed to have been made. We do not think, therefore, that, consistently with the strict interpretation of all obligations of this kind, the defenders were entitled to make advances on the security subsequently to the death of Thomas Allan. But really this point is of very little importance, considering the admissions made by the defenders, in reference to the matters falling under the concluding part of this question.

The remaining part of the question, " whether the " balance, if any, that may have been due when the said " bond ceased so to operate as aforesaid, was paid, or " wholly or partially extinguished subsequently," does not

seem to present much difficulty. For it is very fairly admitted, not only that at the date of the second bond "the whole of the defender's advances to the company "were satisfied and paid, with the exception of about 400*l.*, "but that between the date of Mr. Allan's death and the "date of the second bond, periods might even be pitched "upon when, in consequence of the sums paid in by the "company, and standing at their credit, there was no "balance whatever due."

In these circumstances, there is no necessity to resort to the full extent of the rule adopted in the case of Devaynes; for whatever difficulty there might be in holding the subsequent successive payments to be applicable to the reduction of the balance as it stood at the date of the termination of the guarantee, while the gross balance of the account, viewed as a continuous account, and taken at any one period, remained undiminished, it seems to us clear that, if at any one moment the balance outstanding at the expiration of the guarantee was actually cleared off, a new balance could never be reared up against the cautioner by subsequent transactions.

In regard to this point, the case is much less favourable to the defenders than that of Houston v. Speirs[1], which, in all its essential particulars, nearly resembles the present. There, as here, a question occurred regarding a claim for advances made on a current account against the cautioners; a change having taken place in the modes of drawing, which was held to extinguish the guarantee from the particular date of that change. The Court of Session there took what appears to be a very equitable view, and held that the cautioners were not entitled to derive benefit from the subsequent remittances made to the credit side of the account, except in so far as those remittances, when compared at any one period of the account with the drafts, had the effect of reducing the balance below the amount for which the cautioners were bound at the date of the expiration of the guarantee. It is evident that the principle of

[1] 3 W. & S. App. 392.

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this judgment would, in consequence of the above-quoted admissions, be quite sufficient to support the case of the pursuer. But the cautioners appealed against this judgment of the Court, and the result was a reversal,—a judgment giving full effect to the principle of the decision in the case of Devaynes. At least this seems to us the fair inference from the judgment, which is our only source of information on the subject, as the report contains no statement of the special grounds on which it was pronounced.

And we may add, that we see no room for distinguishing between that case and the present. It is true that the circumstance which, in the present case, extinguished the operation of the security from a particular period of the account, was the dissolution of the old company of Robert Allan and Son, by the death of one of the partners. But that did not necessarily break the continuity of the account, unless the parties chose to close it; for though the former balance had been contracted by the old company, yet as the new company confessedly adopted all their rights and responsibilities, the balance just became as much the debt of the new company as if it had been originally contracted by them; and the effect of their subsequent dealings on that balance must depend on the very same principle. The defenders might have closed the old account, and probably would have done so, had they foreseen the actual result. But as they did not close it, and as payments were made by the new company to their credit in that continued account, the effect of those subsequent payments, in regard to the former balance, as at a particular date, was not a matter within the discretion of the defenders, but is exclusively determinable by the legal principles applicable to the case. If these principles had admitted of any equitable modification, and if it had been held competent, after the event, to split the account into two portions, at the date of a particular balance, from a consideration of what the party would in all probability have done had he contemplated the result, there could not be stronger grounds for applying that equitable modification than in the case of Houston v. Speirs.

There the guarantee had been granted to the house of

Fraser and Company, for drafts to be drawn on them by H. and R. Baird, and to be replaced by remittances from time to time. Transactions took place on this footing till the close of the year 1809, when the balance unquestionably covered by the guarantee stood at about 7,000*l.* In the end of December 1809, Fraser and Company changed their firm to Fraser, Houston, and Company, the partners remaining the same. They intimated this to H. and R. Baird, at the same time desiring them to draw not directly on the new firm, but on a banking-house in which they were partners, "Value in account with Fraser, Houston, and Company." Under this new arrangement the subsequent drafts were drawn, and the remittances were made to Fraser, Houston, and Company; they, however, continuing the account as one current account, which was not closed till the bankruptcy of H. and R. Baird in 1811, at which time there was a balance against them of 5,739*l.* For this balance the action was brought, Fraser, Houston, and Company against the guarantees. By the first judgment in the cause, the Court[1] found that the drafts drawn subsequently to the 1st January 1810 were not covered by the guarantee, in consequence of the change of the mode of drawing. But then arose the very question which arises here; viz. how the balance as it stood at the end of the year 1809, which the guarantee undoubtedly covered, was affected by the subsequent remittances to the credit side of the current account. If the account had admitted of being separated at the date of the balance, the case of the pursuers would have been clear. The equitable considerations supporting that view were strong, so strong as to force themselves on the attention of the accountant, to whom a reference on this point of the case had been made. "It is with deference that the account-
"ant submits his opinion, that as the Court have found that
"the defenders are not liable for Mr. Logan's drafts on the
"banking house, because they were not made in terms of
"the guarantee, they are not entitled to derive benefit from
"remittances made to a different firm from that to which

[1] 4th March 1820.

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"this letter of guarantee is addressed; and but for which "remittances, it is not probable the new firm would have "authorized the banking house to accept Mr. Logan's "drafts."[1]

These considerations were disregarded, however, both by the Court of Session and the House of Lords, who, although differing in one point, viz. the precise mode in which the subsequent remittances affected the balances at the end of the year 1809, concurred in treating the account as one current and continuous account; being the form of dealing adopted by the parties at the time, without any regard to the mere probability that one of the parties would have closed the account at a particular date, if he had attended to all the consequences of keeping it open.

It does appear to us, then, that the case of Houston v. Spiers, following on that of Devaynes, in the first place, establishes, that in the case of a current account it is not competent for a party to select a particular balance at a particular date, as distinct and not affected by the subsequent operations; and, secondly, determines the effect of those subsequent operations on any balance of a particular date, on principles which are conclusive against the defenders on this branch of the cause.

Lord Cockburn.—I have already given my opinion on this case, and I adhere to it; and have only to add, that on the special questions that have been put, I agree with and adopt the preceding answers.

The investigation and discussion that have taken place since the case was before me as Lord Ordinary have satisfied me the more, not only of the shock that would be given to the law by admitting such evidence as we have here to control the formal and unequivocal titles, but that, even though admitted, this evidence is insufficient for this purpose. Taking the titles and the other evidence together, I think it proved that both Lauriston and Campse were the property of Thomas Allan personally.

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[1] 3 W. & S. 398.

On the important question, Whether, assuming this to be the case, the bond of 29th July 1834 be reducible under the Act 1661? I cannot, except in the fact that there is a division of opinion upon it in the Court, discover ground even for a doubt. I think that it is reducible; and that the circumstance of the security having been in effect granted indirectly to one creditor of the ancestor does not take the transaction beyond the operation of the statute. If it did, it would follow that a son, who happened to be a creditor of his father, might lawfully defeat the Act, and disappoint all the deceased's other creditors, provided only that he took the estate to himself. It would also follow, that though the statute prohibits all deeds by which the creditors of the ancestor may be prejudiced, the rest are to be held as not prejudiced by a conveyance which withdraws the estate from them and gives it to a single one of their number. Whatever the occasion of the Act was, or whatever evil may have at first directed the attention of the Legislature to this general subject, both the enacting words and the obvious spirit of the statute seem to me to strike at every such transaction. There are, no doubt, some casual indications of an opposite opinion, but certainly nothing which fixes the point. And reviewing the question as quite open, it appears to me, now that we are called upon for the first time directly to declare the meaning of the statute, that both its obvious policy, and the plain rules of construction, require us to put down an interpretation which amounts to a practical abrogation of the act.

Lord Cuninghame. — Question 1.— It is with great hesitation and reluctance, that I find myself constrained to differ from the other consulted Judges, on the first question put to us in the present case. But I am unable to explain and reconcile the continuous entries in the books of the company from 1824 till Mr. Allan's death, relative to the estates of Lauriston and Campse, with any other supposition than that it was intended and agreed between the partners, inter se, that these estates be held by Mr. Allan (at least in the

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first instance, and till some ulterior arrangement was made) as company property.

No doubt the estates were purchased apparently in Mr. Allan's name; he alone appeared before the world as proprietor, and exercised all the rights and did all the duties of ownership in the counties in which they were situated, during the years that he survived the purchases.

But these or similar circumstances have been often found combined in other cases, where real estates vested in individual partners have been claimed as partnership property. In adjusting the affairs of partnerships and their creditors, the most difficult duty imposed on Courts has been to determine the true character and ownership of property, notwithstanding the terms of the former title, and the ostensible acts of the individual in whose name it is vested. In some instances, the title so procured has been taken by single partners in their own name, from views of fraud towards their copartners—sometimes from motives of conveniency—and sometimes from a desire to conceal from the world the fact that any part of the proper copartnery funds are so invested and withdrawn from the copartnery stock. Hence various cases have arisen (generally after the death of the nominal proprietor) as to the true character and purpose of the title vested in the individual. The cases tried in Scotland have generally arisen between heir and executor; as in the case of Sime and Balfour, Fac. Col. 1st March 1804; Murray against Murray, 5th February 1805, and other cases. In the case of Sime, which was carried to appeal, and remitted back to this Court, 22d July 1811, there seems to have been much discussion as to the effect of entries in copartnership books to qualify title taken in an individual partner's name; and perhaps their pleadings, both in the House of Lords, and latterly in this Court, deserve attention. There have been other cases, also, of the same nature tried, which do not seem to have entered our printed reports.

In like manner questions of this class seem occasionally to have given rise to much discussion in courts of equity in

England, as exemplified in the cases of Foster v. Hall, 3 Vesey, 895, and Smith v. Smith, 5 Vesey, 189, and other cases; and, generally, it is laid down by Mr. Montagué, in his Treatise on Copartnership, vol. i. p. 101. "If the partnership property is invested in real estates, the property is "not separated, because the conveyance is made only to "one partner."

In the present instance there is no allegation of fraud, and not even a surmise of any such charge, against the deceased Mr. Allan, for having the title to these estates made up in his own name; but nevertheless the evidence appears to me quite insuperable, to show that these estates were held by him in trust for the company, and that they were in all arrangements and accountings between the partners understood and treated as partnership property.

1st. It is proved irrefragably by the books of the company, that the estates were purchased by the company funds.

2d. Separate accounts were opened in the books of the company for each of the estates, the price and expenditure were charged in accounts kept specially under the heads of "Estate of Lauriston" and "Estate of Campse;" which accounts, as increased by periodical expenditure, were carried each year into the annual balance sheets of the company, as part of their assets or stock.

3d. The purchase of one of these estates (Campse) was made by Mr. Allan for behoof of the company, in consequence of a prior heritable security or mortgage which the company held over the property; and as the price at which the estate was exposed was considerably less than the amount of the company's debt, it was a matter of prudence for the company to make the purchase to save further loss.

4th. While the price of and the expenditure upon these estates were thus treated as part of the company's stock, there were other accounts in the ledger, embracing private charges and expenditure connected with Mr. Allan's family and domestic establishment; and these were not carried to the balance sheet as stock, but to Mr. Allan's private account.

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Finally, even if the preceding circumstances were in any respect ambiguous, the clause in the articles of agreement, subscribed in 1831 by Mr. Thomas Allan and Mr. Wight, then the only partners of Robert Allan and Son, when they assumed Mr. Robert Allan junior as partner of the banking house, appears to me to be decisive of this inquiry. By that clause it was declared, "8th, that Lauriston be taken "as Thomas Allan's own speculation, he paying the price, "3 per cent. interest on the cost, and on what is or may be "laid out on the said property." This was an agreement subscribed only in 1831, seven years after the purchase. But why this stipulation if Lauriston was ab initio the private property of Thomas Allan, as the title and his ostensible acts of ownership indicated? In that point of view the preceding clause would have been unnecessary and preposterous.

In opposition to the entries in the books here referred to, there is hardly one counterbalancing circumstance to be gathered from the books. No doubt it has been stated, that in the accounts entered in the company's ledger at to Lauriston, Mr. Allan was charged with no rent for the occupation of the house. But this seems to me to be an immaterial circumstance, as the rent may either have been overlooked or reserved for a final arrangement; or possibly the parties may have agreed between themselves that Mr. Allan should have the temporary possession of the house without rent, in consideration of the great extra trouble that he must have had in managing the estate as the ostensible proprietor.

The whole chain of the evidence has impressed me with a conviction quite irresistible, that the two partners of Robert Allan and Son privately understood each other as to these estates, and secretly arranged that the properties should be held for behoof of the company, although undoubtedly they seem to have had reasons of their own for not declaring this openly to the world.

The report of the accountant also has confirmed me in this conclusion. He states very distinctly in this report, that, "with regard to Campse, the whole tenor of the entries in "the company's books is inconsistent with the supposition "that it was the individual property of Thomas Allan;"

and with regard to Lauriston, he adds, "The title 'Estate "of Lauriston,' under which the transactions in relation "thereto were entered in the company's books, and under "which the balance due thereon was included among the "assets of the company in their annual balance sheets, "would likewise indicate that the estate was the property of "the company." He, no doubt, adds, that "if it be com-"petent to control or explain the meaning of that title by "a reference to other documents, then it does not appear "that the entries made in this account would in other re-"spects be inconsistent with the supposition that the estate "was the individual property of Thomas Allan."

Now, it humbly appears to me that there is great fallacy in this latter remark; though, in fact, the whole case of the pursuers, on the first and fundamental point of the case, turns on it. It is argued, that when the title and external acts of Thomas Allan, and the entries in the books, are at variance with and opposed to each other, a preference in point of evidence should be given to the title. But this appears to me to be clearly contrary to the principles which ought to regulate such a case. It is thought that the evidence of the books, the private and confidential records of the partners, and of their real arrangements with each other, ought far to outweigh the formal title and ostensible acts of the individual partner. There were many reasons which might induce the partners to allow Mr. Allan to act as the apparent owner of these estates, when they belonged to the company of which he was the principal partner; but there was no probable or intelligible reason for opening accounts in the company's books as to these properties, and thereafter including them each year in the balance sheets as part of the stock, if they were not partnership property. Even a single document or entry in such books, if explicit, is sufficient to qualify the title; far more the series of entries for a tract of years, which here occur.

It is a matter of notoriety that the books of a merchant, and entries therein known to him, have ever been viewed in Scotland as equivalent to his writ, and as such they may be received to control a title vested in his person, and to prove

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a latent trust in terms of the Act 1696, cap. 24. Accordingly, such evidence is every day received to support bills, which have undergone statutory prescription; and it is apprehended that this must form evidence equally competent in the present case.

With regard to the object of the parties in vesting these estates in Mr. Allan's name alone, as both the partners had died before the present discussion arose, it is very difficult now to ascertain all the reasons and views which influenced the parties in their arrangement. At the same time some of these may probably be gathered from the nature of the company's business and their position in trade. Such investments of company property by merchants and bankers have notoriously been very common during the last twenty years, when it has been difficult to find other modes of employing capital safely and profitably; and though it is probably correctly stated in the paper of the pursuers, that some bankers of eminence and in high credit, in similar cases, have been in use to take the titles to one of their own (number), the partners formally and explicitly setting forth on the face of the parchments that the properties were held for behoof of the company; yet this, it is believed, is not an invariable usage, and it is obvious, that it might not be so prudent for a small banking establishment like Messrs. Allan and Son so to take the title. It might not have improved the credit of such a bank to have had it openly proclaimed, that the property of or deposits with the company were invested to a great extent in land, not capable in emergencies of immediate liquidation.

I am not aware that there is any peculiarity in the law of heritable property in Scotland, founded either on our system of registration, or on any other principle, which is adverse to the trust supposed to have been constituted in the present case. The law of heritable property is not like the statutory law of shipping, which, on well known grounds of policy, renders any trust for behoof of parties not named in the register null and void. The system of registration of land rights is chiefly for the protection of purchasers, or of those who obtain real securities from the ostensible owners.

These, from the faith due to the records, must always be safe, when there is an unlimited title in the disponer's person on the record. But to other effects it is indisputable that trusts of land held by individuals for behoof of others, or for specific purposes not appearing on record, are every day sustained, without regard to the claims of personal creditors, if the parties beneficially interested in the estate get a conveyance to or security over it before other creditors do diligence against the estate.

If indeed it were alleged in an action that any class of personal creditors gave credit to a party on the faith of his having certain estates of which he was ostensible proprietor, that they made advances to him on that footing, and that the property was afterwards fraudulently represented as not belonging to him, when it was truly his all along, the law would give redress against this fraud, as exemplified in the old case of Strutt (Mor. Dict. p. 4911), and in the late case of Dougal (11 Shaw, 1028). But it is unnecessary to observe that no such case is raised here. The pursuers do not allege that they gave credit to Mr. Allan on the faith of his estates, it is not said that their money was applied to the estates, nor is it alleged that the company concealed their investment from any fraudulent views towards the pursuers. According to my view the only parties really misled were the creditors of the company.

In giving effect, therefore, to the trust in the present instance, as declared in the company's books, no party is entitled to raise any plea of hardship. On the contrary, if the bond now under challenge had not been granted, the creditors of the company would have had good ground to complain, that the title held by Mr. Allan, as an individual, was truly made up to their prejudice, and in defraud of their rights. Justice, however, was in some measure done to them by the security granted for behoof of the company now under reduction; and when this large bond was granted for behoof of the company, and when the personal creditors allowed that bond to remain unchallenged for ten months after it was granted, and down to the sequestration of the the company, it is in vain to say that they were deceived by

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the records, or were led by Mr. Allan's title to rely in any respect on these estates, in the credit which they gave to him.

It may possibly occur, however, that at least after the articles signed in 1831, when it was agreed that Lauriston should be held as the "speculation" (private property) of Mr. Thomas Allan, this estate at least should thereafter be considered as his private property. And unquestionably, if he had been able to pay up his large balance to the company, he was entitled to have it taken out of the company's stock. But as he never was in a condition to do so, that estate (as well as Campse) was properly continued in the balance sheets after 1831, apparently till he could repay the advances. As he never could do so, but on the contrary, as Mr. Thomas Allan died very largely indebted to the company, the estate of Lauriston as well as Campse, in my opinion, continued part of the company's stock down to the date of sequestration.

Questions 2, 3, 4. — On the other questions I concur entirely with the answers of Lord Moncreiff.

Judgment of Court, 17th May 1839.

Thereafter the Second Division, upon advising these opinions, pronounced the following interlocutor: —

"17th May 1839. — The Lords having resumed consideration of the reclaiming note for the defenders, report of Donald Lindsay, and mutual revised cases, with the opinions of the consulted Judges, and heard counsel for the parties, refuse the desire of the reclaiming note, and adhere to the interlocutor of the Lord Ordinary submitted to review, of new find expenses, and also additional expenses due, subject to modification; allow an account thereafter to be given in, and remit the same, when lodged, to the auditor to tax and report."

Their Lordships delivered the following opinions at the final advising: —

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Lord Justice Clerk.—Having considered the new cases that were ordered for the purpose of obtaining the opinions of the other Judges, and having had the advantage of the opinions of their Lordships, we are now called upon to state our views of this case. I formerly stated, on the 6th of June 1837, the impression which the report of Mr. Lindsay, with the cases then before us, had made on my mind, as to the substance of the first query submitted afterwards by this Division; but, upon deliberate consideration, and again attending to that report, and the evidence resulting from the books and correspondence of the parties, with the state of the titles of the estates of Campse and Lauriston, I have now come to be of opinion, with the large majority of the Judges, that both of these estates must be held as the private property of Mr. Thomas Allan, and that the distinction contemplated by the accountant, and which at first I was disposed to adopt, between the situation of the two estates, is not sufficiently established.

I am free, however, to admit, that from the original connexion of the company of Robert Allan and Son with the estate of Campse, in having lent away money on the security of it, and the different steps taken with regard to it previous to the disposition being executed in favour of Mr. Thomas Allan, and his acts as proprietor, down to the period of his death, along with the state of the company's books, there may be greater room to doubt than in regard to the estate of Lauriston; but still there does not appear to me to be full and sufficient evidence that the estate of Campse was held by Thomas Allan only in trust for the company, although there is no doubt that he was liable to the company for the cost and expenses attending his purchase of that property, as well as of the estate of Lauriston. With the latter property the company had originally no connexion whatever; the steps as to the purchase of it—the improvements upon it—the use and enjoyment of it—having been entirely participated in by Mr. Thomas Allan alone. The fact of his being the head of the banking house, and the holder at one time of three

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fourths, and afterwards of one half of its whole stock and property, gave him that preponderating influence that enabled him to command the most extensive loans of its funds, for the security of the company, in regard to which it held only the amount of the credit of his private account. These loans Thomas Allan applied in the acquisition of the two estates of Campse and Lauriston, which there is undoubted evidence he all along used as his exclusive property; and as there is nothing amounting to any acknowledgment on his part, or even a statement on the part of his copartners, or of the company, that though the titles clearly bore the estates to be Thomas Allan's individual property, they were in reality held only by him in trust for the company, it appears to me quite impossible to resist the conclusion, that these estates must be held to have been the private property of Thomas Allan.

In the Appendix of the Report as to Campse, there are letters from Mr. Wight, the then only partner of Mr. Allan, in writing, which he had the fairest opportunity, if the fact had been that that property in reality belonged to the company, of indicating his concern in it. But he there writes in a style clearly indicating that the property was exclusively that of Mr. Thomas Allan, and as to which he could do nothing in his absence.

Query 2.—If the opinion is well founded, that the two estates of Campse and Lauriston were the exclusive property of Thomas Allan, it is hardly necessary to enter upon the question put upon the hypothesis that they were both or either held in trust by him, and, if so, whether a conveyance of them by Thomas Allan was a contravention of the Act 1661. But my opinion in regard to that question will be better understood by adverting first to the point embraced in the third query.

Query 3.—I agree in holding this to be an important question, and certainly far from being unattended with difficulty, especially after the division of opinions among the consulted Judges. But I remain, after the fullest consideration, of the opinion I originally formed, and which

coincides with that delivered by Lord Corehouse on this point, and with all deference to those opinions of an opposite nature that are now before us.

I agree entirely as to its being our duty to take the whole of the Act 1661 into view, to attend to its preamble, and to observe particularly its enacting words; and when I do so, I feel myself exactly in the situation of Lord Corehouse, as to what was the true intendment of that Act; and as he has in the clearest manner demonstrated, from comparing the reports of Harcarse and Fountainhall, which I have also carefully looked into, that the decision referred to by Mr. Erskine as the foundation of his opinion gives no authority for it, while the argument maintained as to the true meaning of the Act is not resisted, I must concur entirely in the conclusion to which Lord Corehouse arrived, that the Act 1661 does apply to a disposition granted by an apparent heir within the year after his ancestor's death, which, as preferring one or more creditors of the defunct to the rest, is undoubtedly to their prejudice, and consequently is expressly prohibited by that Statute.

On the supposition that both or either of the estates of Campse and Lauriston should be considered as held in trust by Thomas Allan for behoof of Robert Allan and Son, as he undoubtedly had right to one half as a partner, I must be of opinion, from the view I entertain of the operation of the Act 1661, that the disposition by his son and apparent heir within a year after his death, of the interest that his father held in favour of the defenders, creditors of the defunct, was invalid under that Statute. Whatever beneficial interest Thomas Allan held in those estates was taken up by his son Robert Allan, and his act of disponing or giving away that interest to the prejudice of any one creditor of his father, within the period of a year from his death, appears manifestly to me to be what is declared invalid by the Act 1661.

Query 4.—In reference to this query I am of opinion, that the company of Robert Allan and Son was dissolved by his death, according to the established rule of law, and that there is nothing in the article in the new agreement of copartnery, which was merely to regulate how the interests of

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the partners inter se were to be adjusted, that can affect the application of that rule. No notification of the dissolution so occasioned by Thomas Allan's death was requisite, but at any rate it seems impossible for the defenders to be listened to in stating want of notification, seeing the way in which they transacted with his son in reference to his death, and the new security obtained by them for a continuation of the credit formerly allowed.

The question then remains, whether the principle established by the decision in the case of Devaynes, and subsequently followed out in that of Houston's Executors v. Speirs and others, applies to the state of accounts between Robert Allan and Son and the defenders. It appears to me that by the death of Thomas Allan and the consequent dissolution of the company, the security granted by him could no longer be available to the defenders, as being strictly applicable only to a credit for the benefit of a company, of which Thomas Allan was a partner. If, then, the account kept by the defenders, and still allowed by the defenders to be operated upon by Robert Allan and Son after Thomas Allan's death, is to be held as a continuous account, and no pause in it or resting place is stated to have occurred, it seems difficult to deny the application of the principle of the case of Devaynes, that if the balance existing at the time of Thomas Allan's death was afterwards wholly or nearly extinguished, by payments made previous to the grant of the new security, which is fully admitted in fact by the defenders, that balance cannot be again reared up as being covered by the security granted by Thomas Allan, in consequence of posterior advances made on the drafts of the company of Robert Allan and Son.

If the circumstance of the account in this case not being a deposit one, as that in Devaynes' case was, and that the defenders are creditors and not debtors, is to be held as rendering the cases essentially different, as assumed in the opinions of Lord Moncreiff and others, the effect of the decision in Devaynes' case may be got rid of; but I feel myself more disposed to concur in the view that is taken in the opinion subscribed by the Lord President and Lord Ful-

lerton, particularly when the decision of the House of Lords in the case of Speirs v. Houston's Executors, as reported in Wilson and Shaw, vol. iii. p. 393, is attended to.

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Lord Meadowbank.—Question 1.—The opinion I originally gave, respecting the estates of Lauriston and Campse, I adhere to. Both, I think, must be held to have been the property of Thomas Allan.

Question 2.—I am of opinion that the Statute 1661 never could be applied to a deed by the heir, by which he bonâ fide gave implement of a special trust standing in the person of his ancestor. Upon these points I concur with Lord Moncreiff, and have nothing to add.

On the 3d question I was originally of the opinion given by Lord Moncreiff; but, after full consideration of the opinion of Lord Corehouse, I have altered my view of the case, and I am now obliged to say that I think the heir, without contravening the provisions of the Act 1661, cannot dispone, even within the year, any part of the ancestor's estate to a creditor of that ancestor. This view is chiefly based on the (to me satisfactory) explanation Lord Corehouse has given of the only decision on which Erskine founds an opposite opinion, and of the satisfactory evidence his Lordship has given, that the import of the other decisions referred to lead directly to a result altogether the reverse.

Upon the 4th question, I am inclined to concur with the Lord President, Lord Fullerton, and Lord Corehouse.

Lord Medwyn.—Adam Christie and others, creditors of Thomas Allan, have raised a reduction against the Royal Bank, for setting aside the heritable bond and bond of corroboration and disposition in security, granted 29th July 1834, as being reducible under the Act 1661; and for having it declared, that the sums advanced by the Bank under the former bond of 30th March 1832, of which this was a corroboration, had been all paid up prior to the granting of the said bond.

The main question is, whether Thomas Allan was abso-

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lute proprietor of Campse and Lauriston, or if he held these estates as trustee for the company of Robert Allan and Son.

Before adverting to this matter I may observe, that at one period in this cause much learning was brought forward in support of the plea, that the statutory adjudication in favour of the trustee completes the real right of Thomas Allan's creditors, and vests it in him for their behoof, unaffected by the latent trust in his person, assuming that there is such a trust. There cannot be any question, that the case of Duncan v. Wylie fixes the law wherever the competition is between the creditors of the ex facie proprietor and the truster, or person for whom he is trustee; the real right secured by the adjudication must prevail over the latent personal right pleaded against it. The creditors have the records shewing their debtor to be proprietor, and this right cannot be defeated by any latent personal back bond. But that is not the case here; the competition is between a public exercise of this latent trust (if there be a trust) made real by infeftment, and the subsequent adjudication of the subject; and the question is, whether this latter real right will invalidate the prior real right. If these creditors, personal till the adjudication of the statutory trustee, trusted to the records, these same records also showed the bond by the trustee as an exercise of the trust in his person. About this there really seems no doubt, notwithstanding the very elaborate argument we have in some of the papers.

Now, then, was Thomas Allan a trustee for the company, as to both or either of Campse and Lauriston, when the titles in both instances were in his name individually?

Notwithstanding the nearly unanimous opinion of our brethren, I cannot say I think it so easy to arrive at the conclusion that he was proprietor of both as they have done.

It is always treated as if this were the ordinary case of one appearing, ex facie of the titles, proprietor of an estate, and that a third party maintains that he holds it as trustee for him. Very pregnant proof, and by writ or oath of the alleged trustee, would be required in such a case. The claim is ex facie improbable, and statute requires that species of evidence to get the better of it; for no one would allow

his estate to stand in the name of another person, without securing evidence of the trust by a regular back bond or letter. But it must be considered here who is the apparent proprietor, and for whom he is said to be trustee, and why it is held in that way.

1. It is law in this country that a company cannot hold heritable property, and that such can only be held by a trustee for them.

2. That here the alleged trustee is the senior partner of the company of Robert Allan and Son, from whom a regular back bond was not likely to be taken, when the books of the company, unquestionably equivalent to his writ, can supply evidence of the trust.

3. The only act of ownership by Thomas Allan, beyond mere management of the property, was an exercise of the trust for the benefit of the company; for these two bonds were for behoof of the company, and the only instances in which money was raised upon it.

Now, keeping these things in view (so that this is in fact a transaction inter socios), let us consider the import of the evidence we have indicative of the true character in which Thomas Allan held these estates.

1. Of Campse, for they require separate discussion, and I think the differences between the two have not been sufficiently attended to by our brethren:—

Robert Allan and Son having granted a cash credit to David Betson, with two cautioners, for 8,000*l.*, and a security over Campse, Betson was sequestrated September 1814.

Campse was sold and purchased in name of Thomas Allan for 7,000*l.* This purchase was made by desire and for behoof of the cautioners Anderson and Wilkins, who, however, were unable to discharge the claim under the bond, notwithstanding repeated calls upon them by Robert Allan and Son, and complaints for the inconvenience occasioned to them.

On 1st March 1820 (no title having yet been taken from the trustee), they intimate to Anderson and Wilkins that they "had determined to take Campse to themselves, at the "price it was purchased by Mr. Walker, in order to keep

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" ourselves free from risk;" and add, " we beg you may " distinctly understand that we have no wish or intention of " keeping the estate, but will make it over to you as soon as " you are in a situation to complete the purchase." And accordingly, on 7th March, evidently in fulfilment of the intention expressed in this letter, as the company could not hold it in their own name, but must do so by a trustee, Thomas Allan desires it to be made out in his name.

On 20th March 1820, they again write, " We beg to " assure Mr. Anderson we have no wish whatever to possess " Campse;" so still it is the company, and not Mr. Allan individually, that is to possess this property.

A disposition is granted in favour of Thomas Allan; and to show distinctly that this was not from any change of intention as to the proprietorship, but that the purchase was taken for the company, they thus write, 13th February 1821, to Anderson and Wilkins: " We can have no objection to " credit your account for 7,000*l.* of the date we resolved to " retain the Campse estate, viz. 1st March last year."

While it was yet uncertain whether Anderson and Wilkins would complete the purchase, the account is kept in the books under Betson's and their names, credited with sums paid by them, and with the rents of the estate; and, on the other side, with any expenses and interest. It is closed on 11th November 1823, when all hope of their being the purchasers is abandoned, and 8,909*l.* 10*s.* is the balance of the account; and of that date an account is opened " Estate of " Campse near Dunfermline," of which the above is the first entry, with this addition, " being the real cost of Campse at " this date." Now nothing can more distinctly mark that this was still a purchase of the company. To whom was it the real cost? Not to Thomas Allan if he was the purchaser, for the purchase money was just 7,000*l.* But if the company were the acquirers, then this was the sum it cost them; and it was right in them to commence the account as against the estate of Campse with this sum, to show, when they disposed of it, as their whole correspondence shows they meant to do, they might ascertain their ultimate loss. If they could have sold it for 8,000*l.* the loss would have

been about 1,000*l.*; if they got 9,000*l.* for it, it would have been less, perhaps nothing. But if Thomas Allan had been the purchaser, and even although he wished to keep up a separate account for Campse, and although it would have been more regular to have opened it as Thomas Allan for Campse, I lay no stress on its being otherwise, except that this was the regular way of entering it, if it was the purchase of the company with the view of selling again.

The old account would have been closed by making him pay the price, and then the excess should have been entered as a bad debt against the company; and it is distinctly stated that at that time he had more than credit for that sum in his account with the bank, so that it might and would have been set against this credit if it was truly his purchase. But even if he did not wish to draw upon his private account for the price, but wished the company to advance this sum for him, as it is plain, on this supposition, that whether he gained or lost by a resale of this estate, the loss or the profit, as it fell short of 7,000*l.* or exceeded it, would accrue to himself individually, and not to the company; and, on the other hand, as he individually was not to suffer the loss, in so far as the real cost exceeded the sum he undertook to pay for it, in this view also the account should have been closed quite differently. For the price Thomas Allan should have been debited, and the difference was just loss for ever to the company, in the same way as if any third party had been purchaser; and then the account for the estate of Campse should have commenced with the price advanced by the company to Thomas Allan, and by keeping the subsequent portion of the account in the books, would show the actual cost to Thomas Allan as the purchaser. That this has not been done is the most satisfactory proof that he was not purchaser and proprietor, but only trustee for the company.

Since the feudal title was in Thomas Allan's name, it was necessary that any lease to be granted or rent to be received should be in his name; and as the senior partner of the house, and the person most interested, it was quite natural that he should also correspond with the factor in his individual name; but if he was the purchaser, and the firm had

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no concern with it, it is quite inconceivable that Robert Allan and Son should take any concern or management of this estate. They were bankers, and not land-agents; yet they correspond about a sale of the property (Nos. 18 and 19, Feb. 1822), also about a new lease (Nos. 19, 20, 21, and 22, March 1822). They admit payment for miscropping (No. 31, August 1823), and Mr. Wight gave instructions and acted as proprietor (Nos. 17 and 26, February 1822). This can only be accounted for on the idea that the estate was the property of the company, thus corresponding entirely with the entries in their books, which, as stated by the accountant, lead to the conclusion that it was company property.

For this account of Campse is continued till the failure of the company, charged on one side with sums laid out and interest, and credited with rents received; so that on 1st January 1834, after Thomas Allan's death, it is still so stated, and amounts now to 10,216*l.* 11*s.* 11*d.* Even then, although there are sums due to Thomas Allan on two accounts, they are not set off against the other, but the estate of Campse still is entered as debtor to stock, as part of the assets of the company.

It is mentioned as a very important feature in the case, that when the titles to Campse are made out, they bring directly into contrast the character of Thomas Allan as trustee for the company, and Thomas Allan in his individual character; for the security previously held over the lands by Thomas Allan as trustee for the company is made over to Thomas Allan "as purchaser foresaid," in confirmation of his title. Now this to me is one of the strongest points in the case in favour of the view I take. If Thomas Allan was purchaser of Campse on his own account, what earthly occasion was there for him to confirm his title from the trustee by an assignation to the security of the heritable creditor. He was the heritable creditor himself. He was the surviving partner of the company in whose favour it was granted; he was the senior of the two partners of the new company. What injury could he suffer if he had not acquired right to this bond in

fortification of his title? It is plain he did not require this, and got no confirmation of his title by it. But if the company were compelled to take this estate to themselves, because Anderson and Wilkins could not pay their debt, and their object was of course to dispose of it when they could do so to advantage—and it was necessary to have the titles made out in name of a trustee,—it was fit that the title should be complete in him, such as a purchaser would require, and that all the usual security of a sale under such circumstances should be ready to be afforded to a purchaser. The assignation is made out at the same time with the title by the trustee, and, no doubt, just under the idea of the company disposing of the lands as soon as possible, in which case alone it could be of any use. And we see accordingly, that in 1822 the company corresponded about a sale, as of their own property. If the sale had then taken place, the title was completed in all respects, in the person of their trustee, to suit the most scrupulous purchaser. This strongly confirms my view of Campse being company property.

Another circumstance leading to the same conclusion arises out of the new arrangement in 1831, when Robert Allan was assumed as a partner. In the articles of agreement then drawn up for settling the interests between the new and the former concern, the 4th article provides, "That "previous to 1st January 1832, such debts as are wholly "desperate be written off, and the stocks and doubtful "accounts be taken at a reasonable yet full valuation into "the new books." Now by this time it was perfectly ascertained that Anderson and Wilkins were to pay no more; there was nothing for the balance due except the estate. Hence, if Thomas Allan was the purchaser of it on his own account, the difference between the price and the amount at which the account stood should have been written off as a desperate debt, and the balance only should have been stated as "the estate of Campse" in the company stock account, as due by the proprietor of it to the company; whereas, by keeping the account on the former footing, on the supposition that this was equivalent to an entry, "Thomas "Allan for the estate of Campse," of which he was the

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proprietor, which must be the supposition of the majority of the Court, he in fact takes upon himself the whole of the debt, and makes himself debtor to the new company for what it cost the company, which was then 9,966*l.* 19*s.* 5*d.*, getting in return only an estate purchased for 7,000*l.*, making a present of the difference to the new company, without any equivalent or reason of any kind.

The whole, however, is quite intelligible if Thomas Allan was still merely the trustee for the company, and held these lands till an eligible time for disposing of them occurred; and moreover this view is fully confirmed by the explanation given by the surviving partners in their examination under the Bankrupt Act, that Campse was always reckoned by them to be company property.

That Thomas Allan was appointed a commissioner of supply in Fife, and also enrolled under the Reform Act, seems of little moment. The first was to protect the interest of the estate of which he was ostensibly and feudally the owner, and the other was a very reasonable advantage given to the senior partner, whose interest, though joint with Mr. Wight, was far beyond the requisite qualification.

There is not a single allegation that Thomas Allan exercised any act of ownership different from what he would have done as trustee for the company; and the most important he did exercise, granting the bond in 1832, was for behoof of the company.

Upon the whole, I am satisfied that it was company property at the date of the bond in July 1834; and therefore, in that view of the case, in concurrence with the unanimous opinion of the consulted Judges, I hold that, so far as extends to a security over this estate, this bond is not challengeable under 1661, chapter 24.

Again, with regard to Lauriston, I must own that I have at different times entertained different opinions, and that, as a question inter socios, it is very difficult to reconcile the entries in the books to the supposition, that at first, at least, Thomas Allan was more than trustee for the company; but, upon the whole, I now concur with the view taken by the great majority of the consulted Judges. I think there is a

sufficient distinction between the case of these lands and Campse to induce me to hold that Lauriston, at least at the date of the security in 1832, was the private property of Thomas Allan.

The chief differences are these:—

1. The company had no previous connexion with Lauriston, and that Thomas Allan appears alone making the purchase in 1823.

2. That he was enrolled as a freeholder on it under the old system.

3. That after making extensive improvements, the money for which, as well as the price, was no doubt advanced by the company, Thomas Allan used it as a residence, without stating any rent for it and the pleasure grounds.

4. He excambed a part with Muirhouse, and acted in all respects as proprietor, the company never interfering, so far as is seen, even in the management.

No doubt the price was not taken from Thomas Allan's account, although it is said that at the time there was 23,591*l.* at his credit; but an account was opened for it in the books of the company under the head of "Estate of "Lauriston," commencing with the original price, 24,000*l.*, and continued till it amounted to 46,000*l.*; and this was always stated as stock due to the company, certainly a very false mode of stating this account, and true only in the event of Thomas Allan having funds to pay it, or that the estate itself was worth this sum; but this is so far different from the account for Campse (and this may be stated as a fifth difference between Lauriston and it), that on the arrangement for the new company there was no part of this account which could be written off as a desperate debt, the whole arising from the price and improvements on it, and the account being stated accurately if Thomas Allan was purchaser, and borrowed both the price and the expense for improvements from the company, and of course stood their debtor for the amount.

It is difficult to account for the purchase and extensive improvements on this estate on either supposition of its being a company or individual purchase. Robert Allan and Son

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were insolvent in 1834. The only object could be the very blameable one of keeping up a false credit with the public; and the mode of entering this and Campse as stock gave a fallacious view of the affairs of the company, if possible, to deceive themselves; for it was only their real marketable worth that should have been so entered. If Thomas Allan was the purchaser, it seems just as difficult to account for the purchase.

In August 1831 a new company was formed by the assumption of young Allan. By this time Mr. Wight, the only other partner besides Thomas Allan, probably saw that this was a bad adventure, and accordingly an arrangement was made about it in the articles of agreement, in these words, "That Lauriston be taken as Thomas Allan's own "speculation, he paying the firm three per cent. interest "upon the stock, and upon what is or may be laid out upon "that property."

Now this is the sixth circumstance which distinguishes this case from Campse, for there is no such declaration as to the latter; and as the circumstances which indicated Thomas Allan as proprietor of it are not near so strong as those which show him proprietor of Lauriston, if it was fit to ascertain his title to this last, still more would it have been necessary to do so as to Campse, if it had really been Thomas Allan's private property.

From the date of these articles of agreement I think that Lauriston became, though it may not have been before, Thomas Allan's "own speculation." This term is remarkable; and the circumstance that only three per cent. was to be charged on so large an advance to a partner, contrary to the usage of the house, for all such advances are distinctly stated in the same articles to be at the usual rate of discounting bills, looks very like as if it was a speculation which might have been thrown upon the company, and from which, now that it was likely to prove a bad one, Mr. Wight was glad to purchase a release by this accommodation as to interest. There seems no other reason for this. There is no such abatement of the rate of interest on the price of Campse.

In truth, there was no occasion for saying any thing about whose speculation it was to be if it had all along been Thomas Allan's own; and if there was any ground for charging only three per cent., this is all that would have been mentioned in this article, as it was all that was necessary in such a state of the case.

But be this as it may, at least from this date I hold it private property; this being a sufficient discharge of a trust for the company, if it existed, which was latent and merely verbal, leaving the ex facie absolute titles unfettered and uncontrolled; for I do not hold that it was necessary to effect such a transfer, that Thomas Allan should also pay the price.

We have next to consider whether the bond of 1834 is affected by the Act 1661, c. 24.

We have the consulted Judges very nearly equally divided, there being only a majority of one for extending the Act to the case of a disposition by an heir within the year, granted to one of the creditors of the ancestor. We have two very able opinions containing the opposite views of this question by the Court. Upon the fullest consideration of the point, I incline to assent to the view taken by Lord Moncreiff.

I understand perfectly, that in interpreting a statute of our Scottish Parliament, it is competent to give a liberal construction of it, so as to give it the due effect intended by it, and that the Court, in regard to this Statute, have acted on this view; but that it is not competent so to interpret it as to introduce a remedy against another evil not noticed in the Act, which might have made this branch of the law more complete, by obviating other real or supposed defects in our practice. Now, looking to the preamble and inductive clause of the statute, it was to secure a preference to the creditors of the ancestor over the ancestor's estate, against the creditors of the heir, or others contracting with him. This was defeated either by the heir granting dispositions to the prejudice of the ancestor's creditors, or by suffering the estate to be adjudged for his own debt.

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Now the Act has been extended so as to apply to a disposition selling the estate where the price is not extant, although this is not a disposition directly to a creditor; also that it is not confined to an apparent heir, but applies equally to an heir entered; and further, that diligence within the three years, though not completed by the ancestor's creditor, is sufficient. In all of these there was a clear contemplation of the object and design of the statute. But it would be quite different to convert it into an enactment for regulating the competition of the ancestor's creditors inter se, as to which there is not a word in the preamble. Before this Act there was nothing to prevent them obtaining a preference by diligence against the ancestor's estate, either by using diligence or obtaining a disposition from the heir. The first real right obtained either by a voluntary act or by diligence would be preferable. Is this taken away by this Act? Are any of the rights of the ancestor's creditors abridged by it? On the contrary, is not the only object of it to extend their privilege, by preventing, for a period of three years, any interference by the creditors of the heir with their diligence, and during the first year absolutely any act of the heir to prejudice them? It is well remarked, that neither M'Kenzie, nor Stair, nor Bankton say that the operation of this statute extends to the case supposed; and Erskine directly says it does not. I do not think he founds on either of the decisions so well analysed and explained by Lord Corehouse; and I do not consider the point decided by the Court on either of them. They waived deciding it in the one, and I do not see distinctly that it occurred in the other; so that there probably is some inaccuracy in the note of Lord Harcarse. But at all events the Court did not then hold that a creditor of the ancestor could not be gratified. None of our institutional writers say this was the effect of the Statute, and Erskine distinctly says that it does not apply to this case; so that I am inclined to hold that the Act 1661 does not meet the present case.

But, after all, I do not very distinctly perceive how this point arises in the present case. The allegation is, that the

bond was given to a creditor of the ancestor. In so far as it is a bond of corroboration of the former bond, it might be so; but in so far as it was a new bond for a further sum of 22,000*l.*, which was instantly advanced, I do not see how this can be said to have been advanced to a creditor of the ancestor. The bank was not directly a creditor of Thomas Allan's, neither was the money directly applied to pay off any debt of his. It might have been used to pay off debts for which he was liable as a partner of the company; but the company was the principal debtor, and he only subsidiary; and even this the bank do not undertake to show, for they say, "It might perhaps be difficult to show pre-" cisely how far the money raised upon this security was " paid by the company to parties, who, but for such pay-" ment, would now be claiming as creditors of Thomas " Allan." If it had been credited to Thomas Allan's account as a discharge of so much of the debt he owed the company, this would have raised the question; but this was not the application of the money; the money was advanced to, and applied to the use of, the existing company for their subsequent transactions. But this is a point which has attracted little attention, and perhaps there may be nothing in the observation I have made; I throw it out merely as a difficulty, and, according to the opinions given, it can have no influence on the judgment.

The next point is, whether the views in the case of Devaynes, and the judgment in the case of Houston, as reversed by the House of Lords, compel us to find that the balance due under the bond in 1832, at Thomas Allan's death, was discharged by the payments into the account, without taking into view the corresponding drafts on the other side.

I hold that the copartnery expired at the death of Thomas Allan, notwithstanding the clause for regulating the interests of the representatives of a deceased partner in the stocks of the company. I further hold, that the bond of 1832 was only for the transactions of the company of which Thomas Allan was a partner, contrary to what, in practice at least, was at one time held to be the effect of a company con-

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tinuing under the same firm, and undertaking all the responsibilities, and succeeding to all the claims, of the original company; but I entirely adopt the view of Lord Moncreiff, and a majority of the consulted Judges, on this part of the case. I have always considered it the most palpable misapplication of a principle, to hold that the judgment of Sir William Grant in Clayton's case should regulate this, which is just the opposite case, and deprive the creditor of his privilege of applying an indefinite payment in the manner he thinks most favourable to himself, more especially when it is perfectly obvious that the payments the bank continues to make are on the faith and the security of the payments made to it on the opposite side of the account; and nothing can be so unjust as to apply these to discharge the balance secured under the bond, and leave the payments on the other side not only unsecured by the bond, but not even in so far diminished by the payments which have been made into the account, which, in fact, were the inductive cause of the subsequent payments by the bank.

In Clayton's case the account is always in favour of Devaynes and Company, that is, they always have money of Clayton's in their hands. Devaynes dies, the company continues, and Clayton continues to deal with them, to draw his money out and pay it in. The first transaction is a draft showing he was drawing his own money; soon after, the banking house fails, and Clayton claimed the balance due at Devaynes' death from Devaynes' representatives. Sir William Grant held that the customer drawing out his money had not the privilege of appropriating it as an indefinite payment, but that, in such a current bank account, the draft must be applied to the oldest deposit; so that he could not say I have drawn out the sums subsequently paid in, but have left untouched the balance due to me at Devaynes death.

That is sound. But the principle is totally inapplicable in this case. There the payments by the bankers were made because it was the customer's own money deposited with them. They were indebted to him; they were thus

bound to pay his drafts, and these drafts discharged the debt due by them. Here the bank owed Allan and Son nothing; on the contrary, the bank was their creditors, and when the bank answered these drafts, it was not that the bank was paying a debt it owed, but, on the contrary, was making a further advance on the faith of the payments to be made by Allan and Son; and when such payments are made, being indefinite payments, I cannot see why the bank should not have the usual privilege of a creditor to place them to the discharge of the debt least secured, more especially when the advances are made on the faith of these very payments.

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But then I doubt if my view of the law will much assist the defenders; for it seems admitted, that prior to the date of the bond 1834, the debt under the former bond had been reduced to 400*l.*, and the interest due on the account. Now I do not think that, under the bond granted by Robert Allan within the year of his father's death, the balance could be increased. So far as it is a bond of corroboration, it cannot have greater effect than the original bond; it is only to confirm it, and I think the effect of it can only be to cover the original balance under it, in so far as it remained unreduced by payments, taking into view the payments on both sides of the account; and this, as already said, leaves only a balance of 400*l.*, and the interest due on the account, to be recovered under the bond of 1832, which to that effect still subsists and requires no corroboration.

So far as payments were made under it, so as to raise the debt which, at its date, was only 400*l.* up to 20,000*l.*, it is an advance made under this new bond to the new company; and the bond to that extent must be reducible if the estates are held to have been individual property, and that the Act 1661 applies.

The defenders appealed.

Appellants. — The respondents have not instructed that the estates of Campse and Lauriston were the pro-

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perty of Thomas Allan individually. On the contrary, it sufficiently appears from the evidence in the cause, commented on by the minority of the consulted Judges, that these estates were not the absolute property of Thomas Allan as an individual, but truly belonged to the company of Robert Allan and Son, although the formal title was made up in the name and person of Thomas Allan, the principal partner of the company.

The security which the appellants got under the bond of 1832 continued as an effectual guarantee even after the death of Thomas Allan; and, at all events, it is effectual for the balance which was due at Thomas Allan's death, or at the 31st of December thereafter, and the appellants are not precluded, by any thing that has happened, from still striking the balance at one or other of these dates, if it shall be held that they were in error in supposing that they had an effectual security down to the date of the bankruptcy.

No dissolution of the company of Robert Allan and Son took place in consequence of the death of Thomas Allan, either as at the date of his death, or of the balance following thereafter, or at any subsequent period; and consequently the bond of 30th March 1832 remained in force, as a continuing guarantee and security over the estate of Lauriston, to cover all advances, or balance due upon advances, made by the appellants to the company, down to the date of its final sequestration on the 2d of September 1834. Or, alternatively, supposing it were held that a dissolution did take place, either at the 12th September 1833, when Mr. Allan died, at at the 31st December thereafter, when the annual balance of the books was made, the appellants are entitled, in the circumstances, to remodel

their account, and to make a separation between their transactions with the old and the new companies, so as to leave any balance due upon the old company's account in the same situation as at the time when such dissolution may be held to have taken place; and for all such balance, at least, with interest, the bond over the estate of Lauriston remains in force as a security.

There are material particulars distinguishing this from Devaynes' case[1]; and this House ought not to enforce the principle there laid down, which is evidently carried out to its fullest extent, unless in a situation where there can be no doubt of the perfect parity of the circumstances in which it is to be applied. The first point of difference which presents itself is in the nature of the two accounts, and the manner in which they were respectively operated upon. In the case of Devaynes it was a deposit account, in which the bankers, of course, were always debtors, or at the best on even squares with their customer. When after Devaynes' death Clayton, the customer, proceeded to make drafts upon this account, he had nothing to draw out except the sum at his credit at the date of the death. The bankers were never to be his creditors for advances beyond the amount of his deposits, but were always to be his debtors for the sums actually deposited; so that when he began to operate on his account after Devaynes' death, he must be held to have commenced a course of drawing on the sum then due, and to have continued in the same course by all his subsequent drafts, until the whole of it was truly paid to him. The case of De-

[1] 1 Merivale, 604.

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vaynes was one betwixt the parties themselves, and does not apply. The case of Pease v. Hearn and others[1] may be referred to as more applicable. In the present case, however, the account was not a deposit account, depending on the personal credit of the party in whose hands a deposit is made. The transaction was of the nature of voluntary payments made by a bank to parties to whom they had allowed a cash credit for the very purpose of being afterwards drawn upon; and there was also this further difference, that the basis of the operations all along was not a mere personal credit, but a special, tangible security, to which both parties looked throughout the whole course of their dealings. The company relied upon it as the source of the credit they obtained, and the bank held it as a certain guarantee for repayment of all their advances. It was not a security for a debt already contracted, or for the result of a set of transactions previously begun, but it was the original foundation of every thing that took place subsequently to its date; and it was only on the faith of its being still in subsistence that the company continued to draw, and the bank to make advances, after the event which must now be assumed to have had the effect of operating a dissolution of the company.

If the account be taken as one unbroken and continuous state of debt and credit between the parties, and the question is to be ruled by the principle of Devaynes' case, without reference to the existence of the security, it cannot be disputed that at the date of the said second bond the whole of the appellants advances to the company were satisfied and paid, with the excep-

[1] 5 Barn. & Cress.

tion of about 400*l.* and interest. By the very nature of the transactions, indeed, the balance on the account was constantly fluctuating; and the appellants have no hesitation in admitting that, between the date of Mr. Allan's death and the date of the second bond, periods might even be pitched upon when, in consequence of the sums paid in by the company, and standing at their credit, there was no balance whatever due. But these facts will not determine the question, which stands in such peculiar circumstances as to render the rule of Devaynes' case altogether inapplicable in the way and to the extent to which the respondents would apply it.

On the supposition that the estates, or either of them, truly belonged to Thomas Allan himself and not to the company, the Statute 1661, c. 24, would not apply to the present case; because the conveyance challenged was truly a conveyance in favour of creditors of Thomas Allan the ancestor, and the statute does not strike at such a conveyance as that in question. None of the Judges, with the exception of Lord Medwyn, doubted that the conveyance in question must be held to have been a conveyance truly in favour of creditors of Thomas Allan; but the doubt was, whether a conveyance made by the heir, within the year, in favour of a limited number, one or more, of the creditors of the ancestor, to the exclusion of the other creditors of the ancestor, was reducible under the provisions of the Act 1661. The appellants contended that it was not; that the statute did not apply. Four of the Judges, viz. Lords Moncreiff, Gillies, Jeffrey, and Cuninghame, held that the conveyance was not reducible, thereby giving effect to the argument of the appellants. Five of the Judges, viz. the Lord President, the Lord Justice Clerk, Lords

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Corehouse, Fullerton, and Cockburn, held that the conveyance was reducible, thereby giving effect to the view of the statute taken by the pursuers. Two of the Judges, viz. Lords Meadowbank and Mackenzie, at first held that it was not reducible, and afterwards held that it was reducible. One Judge, Lord Medwyn, was of opinion that the conveyance was not to be held as a conveyance in favour of any creditors of the ancestor, and therefore that it was reducible; but was of opinion, that if the conveyance was in favour of creditors of the ancestor, it would not be reducible. His Lordship's opinion, therefore, rested on a view of the fact not adopted or concurred in by any of the other Judges; but his opinion, on the abstract point of law, was favourable to the view of the statute contended for by the appellants. There is no case in which a conveyance in favour of one or more of the creditors of the ancestor has been cut down as contrary to the provisions of the statute, or has been held to be within the range or contemplation of the statute; in short, the statute has never before been applied or held by the Court to apply to such a case. With the exception of an opinion expressed by Professor Bell, in a recent edition of one of his works, contrary to the opinion expressed in former editions of the same work, no text writer, from the date of the Statute 1661 downwards, has said that it strikes at a conveyance in favour of a creditor or creditors of the ancestor, though all of these writers have commented upon the statute and explained its bearing, and what conveyances it does strike at, according to their understanding of its enactments. The absence of the expression of any opinion, by any text writer or commentator, in favour of the application or extension of the statute

to a class of cases, so large and so obvious, is indeed a pregnant negative. It goes far to show that the statute was not understood to apply to that class of cases, and that the extension of it now attempted by the pursuers is beyond its true and received purpose and meaning. But there is more than negative testimony in favour of the appellants view. There is the positive expressed opinion of Mr. Erskine [1] in his Institute.

The construction contended for by the respondents proceeds upon the assumption, that the statute was intended to regulate questions between the creditors of the ancestor, while no such purpose is disclosed in the preamble, or expressly stated anywhere; and also, upon the assumption that the statute contains a "pure and "absolute prohibition" on the heir, to sell intra annum deliberandi, for any cause, or under any circumstances, whereas the statute contains no such pure and absolute prohibition. The prohibition it does contain bears express reference to the protection of the interests of the ancestor's creditors against the heir and his creditors; and so far from saying that every right and disposition shall be invalid, there is the express limitation to dispositions which prejudice the predecessor's creditors. It is said that the reason of the statute, and in particular the reference which it makes to dispositions by the heir, before the ancestor's creditors have come to the knowledge of the death, shows that it was intended to preserve matters entire and without change, until the creditors of the ancestor should have an opportunity of hearing of his death, and taking steps to attach his estate. But it must be remembered that the ancestor,

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[1] Ersk. 3. 8. 102.

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while in life, had power to convey the estate to one or more of his creditors, and that the heir doing so puts the other creditors in no worse situation. It is not pretended that the statute was intended to prevent some of the creditors of the ancestor from attaching the estate by diligence to the prejudice of the rest of the ancestor's creditors, and therefore it could not have been intended to preserve that absolute equality which the respondents contend for. The object of the statute was to make every man's estate go to satisfy his own debts rather than to satisfy the debts and extravagance of his heir, and that is the view which has hitherto been taken of it by all the writers.

The construction contended for adversely might lead to very extravagant consequences, which certainly could not have been within the purview of the statute. Put the case that, before the expiry of the year, the heir, with the consent of all the known creditors of his ancestor, sells the estate and divides the price among them, but that afterwards a creditor of the ancestor, not at the time known to have been so, comes forward and brings a reduction of the sale as contrary to the statute, according to the view of the statute taken by the respondents, that reduction would be successful; and yet it is difficult to figure anything less clearly implied, or more clearly not expressed in the words used. If the price of the estate be applied to debts of the ancestor, no matter how the ancestor's creditors dispose of the money.

[*Lord Chancellor.*—Then the argument is, that within year and day the heir may borrow money for the ancestor's creditors.]

Yes; more especially if not for the heir himself.

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[*Lord Chancellor.*—But here the object of the son was to get advances for his own firm.]

Certainly; but only to enable that firm to pay the debts of the ancestor.

Respondents.—The estates of Campse and Lauriston, to both of which an absolute feudal title was completed in the person of Thomas Allan, were not held in trust by Thomas Allan for the company of Robert Allan and Son, of which he was a partner, but were the private property of Thomas Allan as an individual, not only at the period of his death, but long prior to it.

The first cash credit bond in favour of the appellants, of date the 30th March 1832, by which Thomas Allan interposed the security of the estate of Lauriston as a security to the appellants, being a bond, the personal obligation in which was an obligation by the then subsisting company of Robert Allan and Son, and by the individual partners thereof (namely, Thomas Allan, Alexander Wight, and Robert Allan,) for cash advances to be made by the appellants to that company, the personal obligation fell upon the dissolution of that company, or upon any change which rendered the firm of Robert Allan and Son in reality a new company, and the personal obligation of the company for which Thomas Allan thus interposed the security of his estate falling, the special security he so interposed could not afterwards subsist as a continuous security, so as to cover any advances which might be subsequently made; and because the said first cash credit bond, in so far as it gives a security to the appellants over the estate of Lauriston, cannot, in the circumstances, be construed as having been intended to create, or as having created,

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a security for any cash credit or advances, except to the said company of Robert Allan and Son, of which Thomas Allan was a partner; and therefore the security must be held to have ceased to be a fund of credit as soon as the said company was dissolved, and Thomas Allan's connexion therewith put an end to.

For it is clear in law that the firm of Robert Allan and Son, of which Thomas Allan, Alexander Wight, and Robert Allan were the individual partners, was dissolved by the death of Thomas Allan, on the 12th of September 1833; so that the responsibilities of Thomas Allan, and his estate and representatives, to the appellants, under the said first cash credit bond in their favour, by which they held the estate of Lauriston as a security for their cash advances, terminated as on the said 12th day of September 1833; or if the said company was not dissolved on the said 12th day of September 1833, so as to terminate, as at that date, the foresaid responsibilities, these responsibilities terminated either as at the 31st day of December 1833, being the first balance thereafter of the books of Robert Allan and Son, or at the 29th July 1834, being the date of the second bond granted to the appellants by the company of Robert Allan and Son, of which Alexander Wight and Robert Allan alone were the individual partners.

In the first place, taking the responsibilities of Thomas Allan and his estate and representatives under the foresaid first cash credit bond to have been limited to the balance due on the cash account with the appellants as at the 12th September 1833, the date of Thomas Allan's death, or to the balance due, striking it upon the whole account, as at the 31st day of December following, being the date of the first balance of the com-

pany's books after Thomas Allan's death, the said balances were, with reference to the subsequent state of that account, paid off prior to the 29th July 1834, the date of the foresaid second bond in favour of the appellants, and the said first bond and security therein contained extinguished; in respect that no new cash account was opened by the appellants after Thomas Allan's death, the account being continued to be kept as one continuous account, in which the transactions before and after the death of Thomas Allan were blended together, and placing the payments made into the account subsequent to the 12th September 1833, without looking at the subsequent drawings out, against the balance due on the 12th September 1833, or, in other words, applying these payments to the first articles on the debit side of the account, the whole of the said balance was not only cleared off before the 29th July 1834, the date of the second bond, but there would have been a large balance against the appellants; and, in the same way, placing the payments made into the account subsequent to the 31st December 1833, without looking at the subsequent drawings out, against the balance due at the 31st December 1833 (the balance being struck upon the whole operations on both sides of the account down to that date), or, in other words, applying these payments to the first articles at the debit side, the whole of the said balance was wiped off before the 29th July 1834, the date of the new bond.

And in the second place, taking the responsibilities of Thomas Allan and his estate and representatives under the foresaid first cash credit bond to have been limited to the balance due on the cash account with the appellants at either of the foresaid dates, and having reference to

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the subsequent state of the account, these balances, if not wholly extinguished, were at all events paid off, except to a very small amount, prior to the 29th July 1834, the date of the second bond; in respect that no new cash account was opened by the appellants after Thomas Allan's death, the account being continued to be kept as one continuous account, in which the transactions before and after the death of Thomas Allan were blended together; and taking both sides of the account as a continuous account from the first, down to the 23d July 1834, and including both the payments made to the appellants by the company of Robert Allan and Son after the death of Thomas Allan, and the payments made by the appellants to the company upon their orders, the whole sum due to the appellants at the 23d July 1834 amounted only to 400*l.* exclusive of interest.

As to the authorities applicable to this, the most important branch of the case, the respondents relied below mainly on the case of Devaynes (already cited), the application of which, even yet, the appellants dispute, and now found rather on Pease v. Hearn[1], which clearly has no application. But the respondents may, in addition, refer to Simson v. Ingham[2], Pemberton v. Oakes[3], Aiken v. Knight, before the Lord Chancellor, on appeal from the Rolls, and where it was held that such an account, if once balanced, cannot be opened up, and Bodenham and Phillips v. Purchas.[4]

In so far as either both Campse and Lauriston, or one or other of them, were the private property of

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[1] 5 Barn. & Cress.

[2] 2 Barn. & Cress. 65.

[3] 4 Russ. 154.

[4] 2 Barn. & Ald. 39.

Thomas Allan, the conveyance of them by Robert Allan, the eldest son of Thomas Allan, within a year and day of his father's death, by the second bond and disposition in security, of date the 29th July 1834, in favour of the appellants, in security of the sums therein mentioned, was a conveyance by the heir to the prejudice of the predecessor's creditors, reducible under the Act 1661; and this whether the appellants were or were not creditors of Thomas Allan, or of the company of which he was a partner, at the date of the said second bond: —1st, in respect that, even supposing the appellants could be stated to have been creditors of Thomas Allan, any deed by the heir in favour of any one particular creditor of the predecessor is a deed which, in the sense of the Act 1661, prejudges the predecessor's creditors, and consequently, in terms of its enactment, is not valid, "unless it be made and granted a full year "after the defunct's death;" and, 2d, in respect that, assuming that a deed granted within a year and day of the predecessor's death, directly in favour of a particular creditor of the predecessor, did not fall within the statutory sanction of invalidity, still the deed in question would not be valid, seeing that the appellants were not creditors of Thomas Allan, the predecessor of Robert Allan the heir, the granter of the deed; and, that (although it were correct in point of fact, but which is not admitted) it is not a relevant answer to a challenge on the Act 1661, of a deed granted by the heir within year and day of the predecessor's death, to say that the effect of that conveyance was, that by the ultimate application of the money thereby obtained, debts of the predecessor were in some roundabout and circuitous way paid off, and the burdens upon the predecessor's

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estate diminished by its having been relieved of claims which might otherwise have come against it; and that the answer is the more especially irrelevant, where, as in the present instance, it is not and cannot be disputed, that the conveyance by the heir of the predecessor's estate, and the transactions which the appellants entered into with the company carrying on business under the firm of Robert Allan and Son, after the predecessor's death, of which that conveyance was a part, had no connexion with or reference to the predecessor or his creditors, or as respects the transaction itself with his estate, that estate, although conveyed, being conveyed not as his estate, but as the estate of the heir, and conveyed according to the terms of the deed directly, in order to promote the interests of the heir, or of the said company of Robert Allan and Son, of which he was a partner.

Judgment deferred.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, the first question which occurs in this case is, whether the estate of Lauriston and Campse ought to be considered as the property of the late Thomas Allan, or as held by him in trust for the firm in which he was a partner; and upon that question I have not been able to find any substantive difficulty.

The negotiation and contract for the purchase of Lauriston was conducted by Mr. Thomas Allan, and in his own name; the title to that property was made up in his own person; he was, in respect of that estate, enrolled as a freeholder of the county of Edinburgh. He enlarged the house, and made extensive improve-

ments on the estate, and lived in the house with his family, for which there is no trace of his having been charged with any rent to the firm. It appears, however, that the purchase money was paid by the firm, and the amount, together with other expenditure in respect of the estate, was not placed to the debit of Mr. Thomas Allan, but was the subject of a separate account, to which all such payments were carried as debits, and all receipts on account of the estate were placed as credits.

That such an account should have been opened proves nothing; for it appears, that other private accounts of Mr. Thomas Allan were kept in the books of the firm, such as the education account of his children; but why the balance was placed to the account of the stock of the firm, and not to the private account of Mr. Thomas Allan, is not explained. It may have been so done because the firm had advanced the money for the purchase of the estate; and it may therefore have been thought right that the property itself should, in their books, be treated as belonging to the firm, till the payment of the purchase money and other expenditure on the estate had been arranged between Mr. Thomas Allan and his partners, although it does not appear that the firm had any security upon the property. But, however that may be, all ambiguity which that mode of keeping the account otherwise might have produced is removed by the notes of agreement entered into upon the admission of Mr. Robert Allan in 1831, the 8th article being, "That Lauriston "be taken as Thomas Allan's own speculation, he "paying the firm 3*l.* per cent. interest upon the cost, "and on what is or may be laid out on the said pro-

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"perty." This has been considered in the argument for the appellants as a new contract, giving to Thomas Allan what before belonged to the firm. But it was probably entered into only for the purpose of guarding against the new partner supposing or concluding from the entries in the books that Lauriston was to be considered as the property of the firm; and it does not appear that any change in the mode of keeping the account was adopted on this memorandum being made. The result of a careful examination of the evidence is, that the whole history of the purchase—the title taken —and the declaration of the partners, prove that Lauriston was the private property of Mr. Thomas Allan.

The case of Campse is so far different that the firm had originally an heritable security upon it. The debtor on the bond having been subjected to a sequestration, this property was sold; and it seems doubtful on whose account it was purchased. But in December 1820 it was conveyed by the trustee under the sequestration to Thomas Allan; and soon after by a deed, to which the firm were parties, it was declared that the purchase was made for Thomas Allan as an individual, and the firm assign their security upon the estate to him as the purchaser, acknowledging the receipt of 7,000*l.*, the purchase money.

It is true that the accounts show, in the case of Campse, as in the case of Lauriston, that the purchase money was not paid by Thomas Allan, and that the accounts of the property were kept in the same way as was adopted with respect to Lauriston. But the parties interested have acknowledged that the property belonged to Thomas Allan, and his title was made up as beneficial owner or real proprietor of the estate; and

all his dealings with the property were consistent with his being so. There is not, therefore, I think, sufficient evidence to convert him into a trustee for the firm; so far therefore, I think the judgment of the Court below was clearly right, and in this judgment ten out of the twelve Judges concurred.

The question which it seems expedient to consider, in the next place, is, whether at the time of the date of the second bond any thing was due to the Royal Bank, the appellants, from the estate of Thomas Allan alone. The bond of the 30th of March 1832 was to secure repayment to the Bank of any balance to the extent of 20,000*l.*, which might be due to the Bank from Robert Allan and Son, in which Thomas Allan was a partner, in respect of advances and accommodation to be afforded to them by the Bank. Thomas Allan died in September 1833, and, beyond all doubt, by that event the firm of Robert Allan and Son, as it had up to that time existed, was dissolved, so far as it affected the Bank. That the business was to be considered as going on as before, for the purpose of settling between the surviving partners and the estate of the partner deceased, by special agreement between the partners, cannot affect the question. And it is also quite clear that the security which Thomas Allan so gave to the Bank to secure the repayment of advances made to the firm in which he was a partner,—that is, to himself and his partners,—could not be used as a security for advances made after his death to a firm in which he was not a partner,—that is, to the persons who had been his partners, whether they continued the old style and firm or adopted another.

Now it is not in dispute that the payments made by

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the surviving partners, with whom the account was continued after Thomas Allan's death to the Bank, without any specific appropriation prior to the date of the second bond, exceeded the amount of the debt due to the Bank at the time of Thomas Allan's death; and the appellants admit (as appears on the 59th page of their case) that there were periods between the time of Thomas Allan's death and the date of the second bond at which there was no balance due to the Bank; and that at the date of the second bond there was only a balance of 400*l.* and interest due. So that there is no ground upon which it can be maintained that the debt due at the death of Thomas Allan was not paid at the date of the second bond, except that of the bond of 1832 being available to secure advances made after the death of Thomas Allan, for which there is no pretence.

It seems to have been supposed by some of the learned Judges that the case of Devaynes[1] was not applicable to the present, because this was a case of credit and not of deposit. Those learned Judges recognize the law in Devaynes' case as applicable to Scotland, as indeed the case of Speirs v. Houston[2] assumes it to be. It is to be regretted that the subsequent decisions which have taken place in England upon that subject were not brought under the consideration of those learned Judges. If they had been, I have no doubt but the application of the principle in its full extent to this case would have been recognized by them. Many cases have occurred in this country, but it is sufficient to mention Pemberton v. Oakes,

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[1] Ante, p. 197.

[2] 3 W. & S.; 4 Bligh, 215.

4 Russell, 154; Bodenham v. Purchas, 2 Barnewall and Alderson, 39; and Simson v. Ingham, 2 Barnewall and Cresswell, 65; because in one or other of those cases all the circumstances occurred which have been supposed to distinguish this case from Devaynes' case.[1]

Without, therefore, calling in aid the fact that the whole debt at the time of Thomas Allan's death was destroyed by the balance due to the Bank from the continuing firm having ceased to exist, such debt so due at Thomas Allan's death would have been discharged by the application of the subsequent payments to such debts,—such payments having been made without any appropriation by the parties paying, and having been carried by the parties receiving such payments to the account kept by them consisting of the old and new transactions, and constituting therefore a continuing account; and from which appropriation it was not competent for the Bank to remove such payments at a subsequent time, when the consequences were seen; as was decided in Bodenham v. Purchas[2], one of the cases I have just referred to.

When therefore Robert Allan, the son of Thomas, executed the second bond to induce the Royal Bank to continue to himself and his then partner the floating credit to the amount of 20,000*l.*, and to advance 22,000*l.* for their use, he was not dealing with a creditor of his father, or giving to any such creditor a security for any debt of his father, but he was providing for a credit to himself, and securing a debt of his own, upon the security of property derived by him from his father, and that within one year of his father's death,

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[1] Ante, p. 197.

[2] 2 Barn. & Ald. 39.

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which is precisely the case guarded against by the Statute of 1661, c. 24.

In what way this transaction might operate upon the state of the account between Thomas Allan's estate and the surviving partners does not appear to me to be in the least material. That was not the object or immediate effect of the transaction, and it is not proved that what was advanced by the Bank was applied in payment of the debt due from Thomas Allan to the firm. The question therefore does not arise, whether within the Statute an heir can within the year effectually prefer one of his ancestor's creditors to another, by giving to him a security upon the ancestor's estate. The ground upon which I rest my opinion is, that the bond and security of 1834 was not given to secure or pay any debt of the father.

This case has been most laboriously argued below, and at the bar of this House, and it seems to have engaged very largely the attention of the learned Judges. I cannot say I have felt the difficulties which seem to have been entertained by some others. I think it sufficiently proved that Lauriston and Campse belonged to Thomas Allan individually; that the debt due to the Bank at the time of his death was discharged before the date of the second bond; that the security of 1832 cannot be applied to secure any debt contracted after the death of Thomas Allan; and that his son Robert had no power, by his bond of 1834, to affect the lands for his own benefit, and to secure his own creditors, to the prejudice of the creditors of his father. It follows from this, that, in my opinion, the judgment in the Court below was right, and ought to be affirmed.

Taking this view of the case, it is unnecessary to

consider what the effect of the bond of 1834 would have been upon the liability of Thomas Allan's estate to the Bank, if any debt had remained due upon the bond of 1832. The surviving partners of Thomas Allan would have been primarily liable for the debt, and by the bond of 1834 the creditors took a new security for the 20,000*l.*, and continued the credit for that sum for an indefinite period, which by the bond of 1832, and the law applicable to it, had determined at the death of Thomas Allan.

As to costs, it is true that upon some of the questions considered by the Judges there was a very even balance of opinion; but if a majority had been in favour of the appellants upon some of the questions, it would not have influenced the decision of the cause, a majority upon others of the questions being against them. It does not appear to me that there is in this case sufficient to induce the House to depart from the rule (which I always do with reluctuance) of making an unsuccessful appellant pay the costs of the respondents, who in this case are unsatisfied creditors, who have been under the necessity of instituting these proceedings, and of incurring the great expenses attending their progress, for the purpose of obtaining relief against an act under which the appellants claim, and by which an attempt was made to deprive them of those means of obtaining payment of their debts to which they are entitled. I therefore shall move the House, that the interlocutors appealed from be affirmed, with costs.

Judgment.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors, therein complained of, be and the same are hereby affirmed: And it is further or-

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dered, That the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

RICHARDSON and CONNELL — ALEXANDER DOBIE, Solicitors.