the course of carrying on the farm he incurred very considerable losses.

Prima facie, the pupil children are in no way liable for these proceedings. If the appellant had been in a position as executor to pay over a free balance to himself as *curator bonis*, he might as *curator bonis* very properly have received that free balance, because it would certainly have belonged to his wards. But there being no such balance, there is no connection between the estate in Inverness-shire, which he holds as executor, and the estate in Dumfriesshire, which he holds as *curator bonis*. Therefore I quite concur in the result arrived at the by the Sheriff and Sheriff-Substitute, that Mr Matheson must not be allowed to mix up the two things when he comes here to obtain his discharge as *curator bonis*.

The interlocutor of the Sheriff-Substitute of 12th February, as I propose to alter it, will stand thus:—"Finds that, in accounting for his intromissions with the estate under his charge as *curator bonis* for the respondents, the petitioner is not entitled to take into account his intromissions with the estate under his charge as executor-dative *qua* factor under the appointment made by the Sheriff of Inverness-shire and confirmation following thereon: Therefore sustains the second plea-in-law for the respondents, and decerns; and appoints the petitioner to lodge an account, framed with reference to the above finding, of his intromissions with the curatory funds within ten days; and allows the respondents to lodge objections thereto, if they any have, within ten days thereafter."

Now, the second plea-in-law for the respondents is in these terms:—"The estate coming to the defenders in their own right not being liable to their father's debts, the defenders are entitled to an account of the pursuer's intromissions therewith, apart from his intromissions with their father's executory estate, and the pursuer is not entitled to his discharge until he has made payment to them of the balance ascertained to be due on such account." I think that is quite a sound plea, and it has been given effect to by the Sheriff-Substitute. The result is therefore that Mr Matheson must lodge a statement of his accounts as *curator bonis*, and if he attempts to bring into that account any losses he may have sustained as executor, that will no doubt be objected to.

LORD SHAND—I am of the same opinion. In August 1882 the petitioner was appointed *curator bonis* to these three girls. This is an application on his part to be discharged of that office and his intromissions therein. *Prima facie*, there is no question that when a *curator bonis* is asking his discharge his account should embrace only his transactions as *curator bonis*. But here he proposed to bring into the account a number of intromissions relative to matters which as executor he thought fit to undertake as representative or factor for these children, his object being to recoup himself for losses sustained in his capacity of executor. I am of opinion that he cannot bring in these items. It is quite true that if in his character of executor he held a free and unencumbered fund, which was also the property of these young women, he might as curator assume possession of that fund and bring it into his account, but if he is in possession of a liability and not a fund, he cannot bring that into his account as curator in order to relieve himself of liability as executor. The case may be illustrated by supposing that another brother had taken the office of executor. There was a certain amount of moveable property on the farm, and, on the other hand, heavy obligations. These circumstances would make it matter for consideration whether the farm should be meddled with. But if he, assuming the character of executor, were to take the farm, and loses money in carrying it on, he cannot be allowed to throw the burden of that upon the children, but must bear it himself.

It has been argued that the children were not really injured by giving up their legacy if against that large obligations had to be set. But if an executor takes upon himself to act for young children, he cannot be allowed to throw on them the loss he may incur. Suppose, as I have said, that the executor is a different person from the curator, and he comes to the *curator bonis* and demands half the children's legacy for losses incurred in carrying on the farm, it would be the duty of the *curator bonis* to pupil children to say, "Pay the loss yourself." That being my view if the executor and curator are different persons, I cannot see that it makes any difference if they are the same person. If as executor that person, it may be from motives of kindness, chooses to do certain acts, still it is as *curator bonis* that he must give account for his actions here, and he is not entitled to mix up therewith proceedings undertaken by him in his capacity of executor.

LORD ADAM concurred.

LORD MURE was absent.

The Court pronounced the following interlocutor:—

> "... Vary the said interlocutor [of Feb. 12, 1889] by deleting the words 'factor *loco tutoris*'... and substituting therefor the words 'executor-dative *qua* factor,' and also by inserting after the word 'Inverness-shire' the words 'and confirmation following thereon:' *Quoad ultra* adhere to the said interlocutor; ... *quoad ultra* refuse the appeal."

Counsel for the Petitioner — Shaw—Walton. Agent—Thomas White, S.S.C.

Counsel for the Respondents—Law—Dudley Stuart. Agent—R. C. Gray, S.S.C.

Tuesday, June 4.

SECOND DIVISION.

[Lord Lee, Ordinary.

FRASER (M'DOUGALL'S TRUSTEE) *v.* GIBBON.

Bankruptcy—Illegal Preference—Act 1621, *c.* 18 *—Act* 1696, *cap.* 5*—Reduction.*

A trader being indebted to a creditor arranged with a friend to join him in giving a promissory-note to the creditor. This friend was not at the time his creditor in any sum, and in security of his obligation on the

note, he obtained from the trader a disposition to certain heritages, and gave him a back-letter bearing that the disposition was intended to secure him if he should become liable on the promissory-note.

Within 60 days of the transaction the trader was sequestrated. His trustee raised an action to reduce the disposition as having been indirectly a further security for the creditor. He did not, however, seek to reduce the promissory-note itself or make the creditor a party to the conclusion for reducing the disposition. *Held* (Lord Lee *diss.*) that in the absence of the creditor, whom it was alleged that the transaction was intended to benefit, the disposition was not reducible.

The estates of James M'Dougall & Son, wood merchants, Bellfield Street, Glasgow, and James M'Dougall, the only surviving partner of the said firm, were sequestrated on 23rd April 1887. Robert Dick Fraser, C.A., was appointed trustee.

This was an action of reduction by the trustee against Edward Gibbon, joiner, Glasgow, to reduce a disposition dated 31st March and recorded 1st April 1887, whereby the bankrupt and the defender, as trustees and individuals, disponed to the defender certain subjects at Springburn, Glasgow. The action was raised in the following circumstances: — For some time before the bankruptcy the bankrupt firm had obtained goods from Brownlee & Company, timber merchants, Glasgow. He had become indebted to them in the sum of £701, 11s. 8d., consisting partly of a past due bill and partly of a sum as open account. The defender had been associated with M'Dougall in building speculations. They were engaged in building certain subjects in Avenue Street and Springburn Road. On 31st March 1887, the same date as the disposition brought under reduction, they granted a promissory-note for £701, 14s. 1d., and payable three months after date to Brownlee & Company. Upon 1st April the defender executed a back-letter addressed to M'Dougall. By it on the narrative that he had signed the note along with M'Dougall for the letters-accommodation, and that by the disposition they had, as trustees and as individuals, conveyed to him the subjects at Springburn, "And whereas, although the said disposition bears *ex facie* to be an absolute and irredeemable conveyance of the subjects therein contained, yet the same was truly granted, so far as regards the beneficial interest of the said James M'Dougall therein, to secure me in the event of my being called upon to pay the principal sum contained in the said promissory-note, and to secure me against all sums of money advanced or lent or paid, or which may hereafter be advanced or lent or paid by me to the said James M'Dougall, or for which I may become bound on his behalf by bill, promissory-note or otherwise, . . . I bind myself and my foresaids to reconvey to the said James M'Dougall one-half *pro indiviso* of the said subjects acquired by me under the foresaid disposition, and for that purpose to grant, subscribe, and deliver to and in favour of the said James M'Dougall, at his expense, a formal reconveyance of one-half *pro indiviso* of said subjects." It was in respect of the transaction thus arranged that the action of reduction was brought. The pursuer concluded also in the action as originally brought for reduction of certain other bills and of an alleged cash payment granted to Brownlee & Company, but these conclusions were settled extra-judicially, and need not be further alluded to. He did not conclude against Brownlee & Company for reduction of the promissory-note for £701. It had not been paid at maturity, and Brownlee & Company were claiming it in the sequestration. The grounds of reduction of the disposition stated against the defender were thus stated by the pursuer—"The said disposition was arranged for and granted in pursuance of a fraudulent and collusive scheme between them to defeat the just claims and debts of prior creditors of M'Dougall and his firm by withdrawing the property from them and transferring it to Gibbon. The said disposition is struck at by and is reducible under the Act 1696, cap. 5, and is reducible also at common law. . . . Further, the said disposition conveyed a very valuable interest, and was granted without true, just, and necessary cause, and without a just price really paid. It was made to the prejudice of prior creditors of M'Dougall and his said firm to Gibbon, who is a conjunct and confident person in relation to M'Dougall, and it is reducible under and in virtue of the Act 1621, cap. 18."

The pursuer pleaded—"(2) The disposition challenged is reducible, both at common law and under the Act 1696, c. 5, as having been made and granted, in satisfaction or security of prior debts, within sixty days of notour bankruptcy, in preference to other creditors. (3) The disposition challenged is reducible, under the Act 1621, cap. 18, as having been granted to a conjunct and confident person, in prejudice of the rights of prior creditors, without true, just, and necessary cause, and without payment of a just price therefor. (4) The said disposition having been granted by a person in a state of insolvency, fraudulently to defeat the claims of his just creditors, under arrangement therefor with the grantee, is reducible at common law."

The defender pleaded—"(3) The said disposition dated 31st March 1887, not being reducible in virtue of the Statutes 1621, c. 18, and 1696, c. 5, or at common law, the present defender is entitled to be assoilzied from the conclusions of the summons."

After a proof the Lord Ordinary (Lee) pronounced this interlocutor:—"Finds it proved that the disposition called for in the summons was granted by the bankrupt James M'Dougall in favour of the defender Edward Gibbon as part of an arrangement in which the defender was participant to enable the said James M'Dougall and Edward Gibbon to use the bankrupt's share of the subjects conveyed by said disposition as a security for a prior debt due by the said James M'Dougall to Messrs Brownlee & Company, timber merchants, and for which the said Edward Gibbon became liable as a cautioner under the promissory-note for £701, 14s. 1d., then granted and payable at three months' date: Finds that the whole transaction was within sixty days of the sequestration of the said James M'Dougall's estates under the Bankrupt Statutes, and finds that the said disposition was granted, though not directly in their favour, for the further security of the said Brownlee & Company contrary to the Act 1696, c. 5: Therefore repels the defences of

the said Edward Gibbon: Reduces, declares, and decerns in terms of the reductive conclusions of the summons, and finds the said Edward Gibbon liable to the pursuer in the expenses of process as between him and the pursuer, &c.

"*Opinion.*—I am unable to distinguish this case from that of *Miller* v. *Duncan*, December 8, 1825, 4 S. 283, and my opinion is that the conveyance in favour of the defender Gibbon is reducible under the Act 1696, c. 5.

"The evidence shows that the defender was jointly interested with the bankrupt, not only in the various building speculations mentioned on record, but also in sundry bill transactions between the bankrupt and Messrs Brownlee & Company, of the City Saw-Mills, with whom the bankrupt had dealings in connection with their building operations. In March 1887 the bankrupt was due to Brownlee & Company a sum of £701, 14s. 1d., partly on open account and partly on a bill which became due on the 25th of that month. He was pressed for payment by Brownlee & Company, and it appears from the correspondence with Messrs Hill that he was being pressed at the same time for payment of a debt of £2000 heritably secured over certain subjects in King Street of Glasgow. It is established by the proof that the disposition under reduction in this action, though *ex facie* absolute, was granted as part of an arrangement between the defender and the bankrupt and Messrs Brownlee & Company, the object of which was to enable bankrupt to satisfy the claims of Brownlee & Company through the intervention of the defender. This was not done by a cash payment in respect of which the defender at once extinguished the debt due to Brownlee & Company, and became himself immediately the creditor of the bankrupt, taking the disposition in question as his security. The arrangement was that as Brownlee & Company refused to be satisfied with a disposition to the Springburn Road subjects in their favour the defender (who was joint proprietor of these subjects along with the bankrupt) should join the bankrupt in a promissory-note, payable in three months, to Brownlee & Company, and should take from the bankrupt a disposition to his *pro indiviso* half of the subjects 'to secure me (Edward Gibbon) in the event of my being called upon to pay the principal sum contained in the said promissory-note.' (See back-letter, No. 21 of process.)

"This transaction was arranged, and the promissory-note and disposition were executed on 31st March, but the arrangement appears not to have been completed until the delivery of the promissory-note on 7th April. The disposition was delivered and recorded on 1st April, but delivery of the promissory-note to Brownlee & Company was withheld for a time owing to the defender's desire to have an express undertaking from them that the promissory-note should be held as contingent on the security over the property being effectual. (See Messrs Brownlee, Watson, & Beckett's account, No. 33, and the letters in No. 110 of process.) But the whole transaction was within sixty days of the bankrupt's sequestration, the date of which was 23rd April 1887.

"It is said that Brownlee & Company were not parties to any agreement that the promissory-note should be enforceable against the defender only in the event of the disposition in the defender's favour being effectual. This appears to be the case, although it is worthy of notice that in fact the note never has been put in force against the defender by Brownlee & Company, who have claimed in M'Dougall's sequestration without valuing the obligation of the defender, 'the bankrupt being the primary debtor in said debt.' But the material question under the Act 1696 is as to the footing on which the defender entered into the transaction with the bankrupt. This appears clearly enough from the evidence already referred to. He trusted that there would be no sequestration, but he took his chance of it. He accepted the position of becoming answerable for Brownlee & Company's debt on the security of the disposition in question. But he acknowledged that the disposition was only to secure him in the event of his being called upon to pay the promissory-note. In that event he would acquire right to Brownlee & Company's debt, and would of course, become a creditor of the bankrupt in place of Brownlee & Company. In short, the substance of the transaction was that the disposition was given to the defender as a substitute for Brownlee & Company, and in satisfaction of or security for the debt of Brownlee & Company, which he undertook to pay, and for payment of which previously there was no security over the bankrupt's heritable estate.

"It was urged that the Act 1696 could not apply, because the defender was not a creditor before he obtained the disposition in question. If that were true, it would be a question whether the disposition was not granted contrary to the Act 1621 in favour of a conjunct and confident person, without true, just, and necessary cause, and without just price really paid. But in the view I take of the case, it is not true that the defender, under the arrangement by which he obtained the conveyance, became creditor in a new debt. What he did was to interpose himself as security for an old debt, upon obtaining a conveyance in relief which could not have been granted to the creditor directly without being struck at by the Act 1696; and I think that the conveyance is not the less struck at by the Act 1696 when granted in favour of one who so interposed. The statute expressly applies to deeds granted 'directly or indirectly' in favour of creditors. The observation of Lord Gillies in the case of *Miller* v. *Duncan* appears to be applicable to the present case with the alteration of the name. 'This was just a security for a prior debt, and it is proved that Patrick Duncan was participant in and a party to the arrangement, so that it must be set aside as to all the parties in order to do justice to the other creditors.'

"The case of *Miller* v. *Duncan* does not stand alone as an authority for setting aside a conveyance granted, not to the original creditor, but to one who interposes as cautioner. I think, notwithstanding the observation of Professor Bell (vol. ii. p. 227, 5th ed.), that the point was tried and decided in the case of *Swinton's Creditors*, M. 1181. It appears from the report that the Lord Ordinary's judgment, so far as setting aside the vendition obtained by the cautioner, was acquiesced in by the cautioner, and that it was only as regards the validity of the promissory-note in the hands of the creditor that his interlocutor

was altered. But it is unnecessary in this case to decide the abstract point referred to by Professor Bell, as there is evidence that the arrangement to which the defender was a party was a device for the purpose of granting a security which could not have been granted to the original creditor, by granting it in favour of a cautioner who paid no money, but obtained the conveyance as a security against the contingency of his being called on to meet the obligation which he undertook by signing the joint promissory-note, payable at three months' date.

"The case of *Speir* v. *Dunlop* (5 Sh. 729) went even further, and sustained the application of the statute to a cash payment made to an endorser of a bill not then due, as a provision for payment of the bill when it become due. I think it unnecessary, however, to proceed upon that case in deciding the present.

"I have not thought it necessary in explaining the grounds of my judgment to go over the evidence in detail. But the evidence of the bankrupt shows that he knew his difficulties, and explained them to the defender. This is not contradicted by the defender. These difficulties were such that Mr Young, on behalf of Brownlee & Company, asked to see his books, and that the defender refused to interpose his security without getting a conveyance of the Springburn Road subjects in relief. They arose not only from the pressure of Brownlee & Company, who were the principal trade creditors, but also from the pressure of an heritable creditor; and it must have been obvious to the defender, as well as to the bankrupt, that the effect of the arrangement by which he obtained a conveyance to the Springburn Road subjects was to satisfy the largest of the trade creditors in a manner which must prejudice the other creditors who held no securities, and also those heritable creditors whose securities were insufficient."

The defender reclaimed, and argued—It was proved that the defender had not entered into this transaction knowing and having in view that M'Dougall was insolvent, and taking his chance that he did not become bankrupt within the sixty days. If then the parties did not negotiate with bankruptcy in view the case did not come within the Act 1696, cap. 5, and could not be cut down by the Act. But even if the proceedings had been taken with a view to M'Dougall's insolvency the granting of the disposition was not struck at by the Act. The granting of the disposition made Gibbon a new creditor. It gave him no preference over any other creditors. Although he became security to Brownlee & Company for their debt, if that was a preference to them, although that was not admitted, it was no preference given to Gibbon. This case was ruled by that of *Monteith's Trustees* v. *Douglas*, December 10, 1794, Bell's Folio Cases, 127. In both the cases of *Duncan* and *Swinton*, cited against the defender, the final decisions which had been quoted as upholding the principle that a cautionary obligation might be sustained while the cautionary security was cut down, the decision had been given in the upper Courts, where only a part and not the whole of the case was before the Court—*Low* v. *Bell*, June 12, 1827, 2 W. and S. 579; *Miller* v. *Low*, December 11, 1822, 2 S. 77; *Campbell* v. *Macgibbon*, August 10, 1780, M. 1139; *Blaikie* v. *Robertson*, March 9, 1781, M. 887.

The pursuer argued—It was plain from the proof that the arrangement was a scheme or device to enable Brownlee & Company to get their debt paid in full at the expense of the other creditors. The defender knew that M'Dougall was insolvent; he was a partner in the joint-adventure with him, and at least must be taken as having known. He therefore could not object if he is left to bear the burden of the debt although his security should be cut down. The Act of 1696 struck at any arrangement between the debtor and one of his creditors that tended to disturb the equality of distribution among the creditors. The arrangement between M'Dougall, Gibbon, and Brownlee had done that, and was therefore cut at by the Act although Brownlee was not present as a defender. It could not be pleaded that the conveyance to Gibbon constituted a *novum debitum*, because the estate got no value for the obligation that was incurred; all that was done was that Gibbon intervened to pay off an old debt due by the debtor to Brownlee & Company, therefore that was giving a security for an old debt in the meaning of the Act. The case of *Miller* v. *Duncan* was a direct authority in favour of the pursuer. As regards the case of *Monteith*, there was nothing shown in that case of a collusive design and desire to evade the statute —*Carter* v. *Johnstone*, March 5, 1887, 13 R. 698; *Barbour* v. *Johnstone*, May 30, 1823, 2 S. 351; *Miller* v. *Duncan & Low*, December 8, 1825, 4 S.283; *Swinton's Trustees* v. *Forbes*, February 19, 1790, M. 1181.

At advising—

Lord Young—The pursuer is trustee in the sequestration of James M'Dougall, wood merchant, Glasgow, and the action contains both declaratory and reductive conclusions. The declaratory conclusions are, I think, superfluous, and had better have been omitted. The only reductive conclusion with which we have to deal regards a disposition of date 31st March 1887 by the bankrupt of part of his property in favour of the defender Edward Gibbon, who is now the only defender in the case. There were others, and among them Messrs Brownlee & Company, but they have been assoilzied, the case so far as they were concerned having been settled to the pursuer's satisfaction and theirs.

The disposition in question is challenged on the Act 1696, c. 5. It is also challenged on the Act 1621, c. 18, and at common law, but as the Lord Ordinary has decided the case only on the Act 1696 I shall confine my observations, in the first place at least, to that ground of challenge. And the disposition being on 31st March and the sequestration of the disponer on 23rd April following, the disposition is undoubtedly reducible on the Act 1696, provided the disponee received it in satisfaction or security of a debt then owing to him by the disponer. It is, however, admittedly not the fact that the disponee (the defender Gibbon) so received it. It was granted subject to a back-letter, which expresses the history of it with admitted truth, viz., that it was for the defender's security and relief of a promissory-note for £701, 14s. 1d., which he of the same date signed and delivered for the disponer's accommodation. This promissory-note was granted by the defender in conjunction with the bankrupt in favour of Messrs Brownlee & Company, who were at the time creditors of the

bankrupt to the amount of it. It is plain, *resipsa loquitur*, that Brownlee & Company were pressing their debt, which the bankrupt was unable to meet, and that the defender Gibbon was induced to join in the promissory-note to them on the condition of receiving the disposition to secure his relief.

It was contended by the pursuer that an undue preference contrary to the Act 1696 was thus given to Brownlee & Company, and that the defender, being a party to the proceeding by which they got it, thereby exposes his security to a reduction on that Act. Any creditor is entitled to demand and receive security or satisfaction from his debtor, no fraud being practised. Should the debtor become bankrupt within sixty days it will be set aside—that is to say, he will be deprived of it however honest he may have been in taking it, and his debtor in giving it. So here if the delivery to Brownlee & Company of this promissory-note for £701, 14s. 1d. was an undue preference to them for their satisfaction or security within sixty days of their debtor's bankruptcy the pursuer is at liberty to challenge it accordingly, and if the challenge is successful all virtue will be taken out of the disposition to the defender, which he holds only for his relief of the obligation upon him by that promissory-note, which will thereupon cease to exist. But in the absence of Brownlee & Company, and they are not parties to the case before us, we cannot possibly hold that they received any undue preference, and, on the contrary, must assume that they not only honestly but lawfully and regularly received the promissory-note signed by the bankrupt and the defender, and are entitled, as the holders, to enforce payment of it, or to transfer it by indorsation (which for aught I know they may have already done) to any other, it being a negotiable document of debt.

I must therefore deal with the case on the footing that the only defender before us is no otherwise connected with the bankrupt M'Dougall than as the grantee of the disposition in question, and as an obligant on the promissory-note which he gave in return, and which was the only consideration for it. The idea of satisfaction or security for prior debt is thus excluded, and with it challenge on the Act 1696. The only debt of the bankrupt to the defender was the contingent debt arising on the promissory-note, which the defender signed for his accommodation on the condition of receiving the disposition in question delivered in return for it, and the legal aspect of the case would not in my opinion have been different had it been a promissory-note to the bankrupt himself or to bearer, so that the bankrupt might use it by discounting it in a bank or indorsing it to any one he pleased, or holding it in his own hands. The notion of reducing the disposition and leaving the promissory-note, which was given in exchange for it, to stand as a valid document of debt against the defender, is I think inadmissible. If the transaction is challengeable it must, I should think, be challenged as a whole, and restoration made to both the parties to it against the obligations which it involves *hinc inde*.

The pursuer plainly cannot invoke the provision of the Act 1696 without referring to some creditor of the bankrupt as having received an undue advantage in preference to other creditors, directly or indirectly by and through the deed which he challenges. He accordingly refers to Brownlee & Company as the creditor thus preferred. I shall return to this topic, which I notice now only to observe that it not alleged that Gibbon, the only defender before us, is such a creditor. The disposition to him was for a consideration given at the time, and he was therefore, to use the language of Professor Bell, "in no sense a creditor at the time of entering into the transaction," in pursuance of which the disposition was given, and so not a creditor receiving satisfaction or security "in preference to other creditors." But to return to the reference made by the pursuer to Brownlee & Company, it is averred that the preference designed, and effected, if the transaction shall be allowed to stand, was to Brownlee & Company for a prior debt due by the bankrupt to them, that Mr Gibbon was participant in this design, and that the disposition to him was, "though not directly in their favour, for the further security of the said Brownlee & Company, contrary to the Act 1696, c. 5." I quote these words from the Lord Ordinary's interlocutor affirming the pursuer's contention, and notice that his Lordship says in the note to his interlocutor that "the disposition was granted as part of an arrangement between the defender and the bankrupt and Messrs Brownlee & Company, the object of which was to enable the bankrupt to satisfy the claims of Brownlee & Company through the intervention of the defender;" and again, "in short, the substance of the transaction was that the disposition was given to the defender as a substitute for Brownlee & Company, and in satisfaction of or security for the debt of Brownlee & Company, which he undertook to pay." Now, if this be all true, and the decision of the Lord Ordinary proceeds on the footing that it is, and on no other, it is I think clear law that the whole transaction is reducible on the Act 1696, and that Brownlee & Company cannot be permitted to retain the promissory-note for £701, 14s. 1d., which the bankrupt delivered to them signed by himself and by the defender Gibbon, a result which, as I have pointed out, would at once terminate the defender's interest in and right or even desire to retain the disposition in question.

But can we, behind the back of Brownlee & Company, in an action to which they are not parties, affirm these alleged facts to any effect? I am humbly of opinion that we cannot, and that as we cannot it is prudent to abstain from forming, or at least expressing, any opinion on the import of the evidence respecting them which I think ought not to have been taken in the absence of Brownlee & Company.

It is, I think, sufficient for the decision of the case that in this action of reduction on the Act 1696, the only creditor of the bankrupt who is alleged to have received and to retain contrary to the Act a document for his satisfaction or security in preference to other creditors is not called as a defender, and that the document which he so received and retains is not challenged or sought to be reduced.

The law on the subject of a security given to a cautioner for such a debt as the Act 1696 applies to is, I think, rightly and satisfactorily stated by Professor Bell (2 Comm. 215–227). The case of *Monteith* v. *Douglas*, December 12th,

1794 (Bell's Folio Cases, 127) which he cites, distinctly supports his opinion, and it appears from a statement made in that case by the then Solicitor-General (afterwards Lord President Blair) that a corresponding question which arose in the case of *Swinton's Trustees* v. *Sir W. Forbes*, February 19th, 1790, "was not before the Court so that no decision could be given on it, and was afterwards settled and never received a judicial decision."

The reports of the case of *Miller* v. *Duncan*, both here and in the House of Lords, require examination, and I have read them carefully. In that case two actions were brought at the instance of the trustee in bankruptcy. The one against the Dundee Bank, the creditor alleged to have been unduly favoured by the indorsation and delivery of a bill for £615, and of which reduction was asked under the Act 1696; and the other against Patrick Duncan, who had joined with the bankrupt as acceptor of the bill on receiving from the bankrupt a disposition in security for his relief, of which reduction was asked under the Act 1696. The Court of Session pronounced decree of reduction in both actions, and ordered the bank to deliver up the bill to the trustee. Now, this was in accordance with the law as stated by Professor Bell, and the opinion which I have expressed, assuming the facts to be as found by Lord Eldon, whose interlocutor was affirmed, viz., "that the bond and disposition in security was granted in pursuance of a collusive plan to which Patrick Duncan was a party, intended for the purpose of giving a partial preference to the Dundee Bank to the prejudice of the other creditors of James Duncan at a time when he was insolvent and in bankrupt circumstances, and within sixty days of the sequestration of his estate." Now, this judgment reducing the disposition to Patrick Duncan was not appealed, or the action in which it was pronounced ever before the House of Lords in any way. The two actions appealed (apparently by two appeals) were, first, that in which decree was pronounced reducing the indorsation to the bank of the bill for £615, and ordering its delivery to the trustee, and second, a Sheriff Court action by the bank on this bill directed against Patrick Duncan, in which, reversing the judgment of the Sheriff, the Court of Session assoilzied the defender. In the *first* of these appeals Patrick Duncan was not a party, while the trustee in the bankruptcy was no party to the second. Both appeals appear to have been heard and decided in the House of Lords indeed, but by the then Chief Baron, Sir William Alexander. The result was that in the *first* appeal—that against the reduction of the indorsation of the bill and order to deliver it to the trustee—the decree was affirmed, except in so far as the bill was thereby ordered to be delivered up; and in the *second* the decree of absolvitor was reversed, with a declaration that the bank were at liberty to sue on the bill, "for as much as it does not appear, either by admission or evidence, that the cashier of the Dundee Banking Company, or any other person authorised on their behalf, did concert with James Duncan (the bankrupt) or the said Patrick Duncan that the said James should give to the said Patrick the heritable security mentioned in the proceedings in consideration of his the said Patrick's accepting the bill of exchange for £615 in question." I notice that the Chief Baron pointedly asked the question—"Have we before us the question as to the heritable bond, except in so far as it may be used in argument," and was of course answered in the negative.

I cannot regard this as an authority adverse to the statement of the law by Mr Bell in his Commentaries, or to the decision in the case of *Monteith* v. *Douglas*, or to the legal views which I have expressed in this case. I rather incline to think that the Chief Baron, holding the views in point of fact which are expressed in the judgment of the House of Lords (and which contrast strikingly with those of the Lord Ordinary in this case), would have set aside the reduction of the bond and disposition in security, as well as the indorsation of the bill, had the question as to its validity been before him.

I have only to say further that I think the pursuer has no case either on the Act 1621 or at common law.

Lord Rutherfurd Clark concurred.

Lord Lee—I remain of opinion that the disposition in question was granted by the bankrupt as part of an arrangement to which the defender Gibbon was a party, and the effect and purpose of which was to give a security to Brownlee & Company in preference to other creditors; and I still think that the security is struck at by the Act 1696, c. 5.

It does not affect my opinion that the security was not granted directly to Brownlee & Company, but was granted to Gibbon in consideration of his becoming liable along with the bankrupt for the debt due by him to Brownlee & Company. For I consider it clear that the debt which was being secured was Brownlee & Company's debt, and that Gibbon was aware that the security was conveyed to him to enable him to pay Brownlee & Company. I think it unnecessary under the statute to make out fraudulent collusion. The statute was not required to cut down fraudulent transactions. The question is, in my opinion, whether such an arrangement entered into for the purpose of defeating the statute, though in the belief that it was a legitimate mode of doing so, is struck at, and this is the question which I think must be answered in the affirmative.

I accept the law as stated by Professor Bell (5th ed. vol. ii., 226)—"Where the security is granted not to the creditor in a prior debt, but to a cautioner who becomes bound to that creditor, it would appear that whenever the creditors" (or trustees) "cannot establish that there was a device to defeat the statute, and in which the cautioner is participant, or at least of which he has notice, they will not succeed against the cautioner."

I cannot regard the case of *Monteith's Trustees* v. *Douglas*, Bell's Folio Cases, 127, as having settled the law otherwise. That case has never been so regarded. It was not so regarded in the case of *Miller* v. *Duncan and Low*, 4 S. 282, and I think that it proceeded upon an erroneous view of the case of *Swinton's Trustees* v. *Sir William Forbes & Company*, which is reported in Morrison's Dict. p. 1181, as having turned on the question whether there had been any concert for giving a preference, not whether there had been any fraudulent concert to that effect.

The judgment of the Court in *Miller* v. *Duncan and Low* setting aside the heritable security granted to the cautioner was not appealed, and I find nothing in the report of the proceedings in the appeal relating to the bills which should suggest that the learned Chief Baron who heard that appeal gave any opinion against the soundness of the decision of the Court of Session in the case which was not before him.

The question then is, was there any concert in this case between the parties for the purpose of giving a preference to Brownlee & Company? According to my view of the evidence the proof on this subject is clear. The evidence of M'Dougall and Gibbon and Young, as well as the documents, and particularly the entries in the agent's accounts, show that Gibbon knew the involved position of the bankrupt's affairs, and obtained the disposition in question to enable him to meet the promissory-note in the event of his being called on to pay it. He even asked a promise that the promissory-note should not be put in force in the event of the disposition proving invalid. No doubt Brownlee & Company declined to give such an undertaking. But the fact that it was asked proves Gibbon's view of the transaction, and his knowledge that he was receiving this disposition to enable him to give on behalf of M'Dougall a preference to Brownlee & Company.

On the whole therefore my opinion is that the Statute of 1696 applies to this disposition, because it applies to any deed granted by a bankrupt for the satisfaction or further security of a creditor, if it be directly or indirectly, in preference to other creditors, and within sixty days of bankruptcy.

With regard to the question as to Brownlee & Company's claim upon the promissory-note, I assume that Gibbon will be liable to pay it. He will thereby acquire right to Brownlee & Company's debt. But the fact that reduction of his security will have the effect of leaving him without any further security than could have been given to Brownlee & Company, is in my opinion no reason why he should be allowed contrary to the statute to retain M'Dougall's property, conveyed to him within sixty days of bankruptcy, for the purpose of securing or enabling him to pay Brownlee & Company's debt.

It is said that Brownlee & Company were absent, and that we cannot decide in their absence that this was a preference. I notice that there is no such plea on record, and I think this not surprising. For in point of fact Brownlee & Company were called, and all we know of their absolvitor and absence is that it was in respect of a minute in which they concurred in stating that they had "acceded to the pursuer's claims as contained in the said summons." My opinion, however, is that the pursuer was entitled to challenge the only deed granted to the prejudice of the bankrupt estate, and if that deed be bad on the ground I have stated, I think it can afford no defence to Gibbon that Brownlee & Company were not called, and that Gibbon has not attempted to reduce his promissory-note, or to make such reduction a condition of this action being entertained.

Gibbon's plea has been that the transaction was *novum debitum*, and I think that plea is not well founded upon the facts.

Lord Justice-Clerk — The bankruptcy to which this case relates took place upon the 23rd April, 1887, and it is undoubted that the whole transaction by which the defender joined with the bankrupt in granting a promissory-note to Brownlee & Company, thus accommodating the bankrupt, and received a disposition to the bankrupt's *pro indiviso* share of certain heritable subjects, to secure him for his risk in giving the accommodation, took place within the sixty days preceding the bankrupt's sequestration.

It is also quite certain that the defender Gibbon had no interest or advantage to secure in the way of securing debt due by thus mixing himself up with the bankrupt's obligations. He was not a creditor of the bankrupt, and it is not alleged that prior to the sixty days before the sequestration Gibbon and the bankrupt stood to one another directly or indirectly in the relation of creditor and debtor. The transaction into which the defender entered was not one by which he, being then a creditor, sought to obtain a preference over the other existing creditors of the bankrupt for a debt due. What he did was to bring himself under obligation to a firm who were creditors of the bankrupt by becoming joint obligant in a promissory-note, and in respect of his doing so securing himself if he should be called on to pay the amount or any part of the amount in the promissory-note to the bankrupt's creditor, by taking a disposition to the bankrupt's share of heritable subjects.

It appears that the defender was anxious to obtain from the bankrupt's creditor an undertaking that the promissory-note was to be held as contingent upon the security over the property being effectual. Ultimately the defender did not withhold the note but delivered it, and as it is described in the lawyer's account, left himself in the creditors, Messrs Brownlee's, hands. Thus Brownlee & Company were no parties to any arrangement by which the promissory note was to be held by them on any other footing than the ordinary one, as regards enforcement of it against the obligants whose names were attached. There was thus in my opinion no collusive arrangement, no concert to give a preference in favour of a prior creditor.

The real question in this case is, whether the words of the Statute of 1696 apply, and whether the transaction which the defender Gibbon desires to uphold must be cut down as being directly or indirectly a preference to a prior creditor in defraud of the interests of the other creditors of the bankrupt?

I am unable to see how in a question solely between Gibbon and the pursuer it can be held that the granting of a disposition of the heritable property in question to Gibbon, subject to a back-letter, can be held to be a preference given to a prior creditor. It is only when the transaction with Brownlee & Company, by which they received from the bankrupt the promissory-note for £701 with Gibbon's endorsation upon it, is introduced into the inquiry, that any question of preference to a prior creditor can arise. Brownlee & Company were undoubtedly creditors of the bankrupt prior to the time when the sixty days preceding bankruptcy began to run. It is a question which does not arise here whether the granting of this promissory-note is open to attack under the Act, on the ground that

the delivery of that note to Brownlee & Company placed them in a position of preference. This may or may not be, but there is nothing of the nature of preference apart from the promissory-note. For the disposition which Gibbon received had no force or effect independently of the promissory-note. For unless Gibbon was compelled to pay the sum in the note he was debarred by the back-letter he had granted from obtaining any benefit by the disposition. If the note can be challenged as an illegal preference, the whole virtue—as Lord Young has expressed it—is taken out of the disposition which the pursuer is attacking, and it falls as a matter of course. The defender has no interest to maintain it.

Now, we have no parties before us but the pursuer and Gibbon. There can therefore be no challenge of the validity of the note. Gibbon's position is that not being a creditor he exchanged his obligation on the note for a disposition of property. There was in this no giving by the bankrupt of satisfaction for a prior debt. He owed Gibbon nothing. Gibbon's right to demand anything depended upon his being called on to pay the sum in the note. The debt was not existing but contingent. If M'Dougall succeeded in retiring the note with his own funds all right in Gibbon ceased, and under the back-letter he would have been compelled to recovery. The whole case therefore turns upon the note—not upon who is the debtor in the note, but upon who is creditor in the note. The pursuer has clearly no case unless he can establish that he is suing some one who at the time of the transaction challenged was already a creditor of the bankrupt, and was by the transaction receiving "satisfaction or security" for his debt in preference to other creditors. But is there here any such creditor? I think it is clear that there is not. And if there is as such creditor here we have no basis for the application of the Act of 1696. To deal with the disposition to Gibbon by reduction apart from the counterpart of the transaction in the promissory-note would be in my judgment unjust in itself, and would be applying the Act of 1696 to a case to which it has no application.

On these grounds I concur in the opinion expressed by Lord Young, and have only to add that I also concur in his views upon the cases referred to in the Lord Ordinary's note, and in the opinion that the pursuers have no case here either at common law or upon the Act of 1621.

The Court recalled the interlocutor and assoilzied the defender.

Counsel for the Pursuer—Sol.-Gen. Darling—A. S. D. Thomson. Agent—W. Elliot Armstrong, S.S.C.

Counsel for the Defender—D.-F. Mackintosh—Baxter. Agent—F. J. Martin, W.S.

Friday, June 4.

FIRST DIVISION.

[Lord Fraser, Ordinary.

HASTIE *v.* THE FOREIGN MISSION COMMITTEE OF THE CHURCH OF SCOTLAND.

Church—Foreign Mission—Power of Mission Committee to Dismiss Missionary—Induction by Presbytery—Munus publicum.

H was appointed by the Foreign Mission Committee of the Church of Scotland to be Principal of that Church's Institution at Calcutta, which was supported by voluntary subscriptions. At the request of the committee he was ordained to the office of the ministry by the Presbytery of Edinburgh, but the minute of the Presbytery which recorded the fact of the ordination bore further that he was "inducted to the office of Principal of the General Assembly's Institution at Calcutta." H performed the duties of his office for several years till he was summarily recalled by the Foreign Mission Committee.

In an action by H against the Foreign Mission Committee the pursuer sought to have it declared that in virtue of his induction by the Presbytery he became entitled to the salary attached thereto till he demitted the office, or was legally removed therefrom in accordance with the laws of the Church of Scotland, and that he had been wrongfully removed therefrom; and to have the defenders ordained to pay the salary to him, and also to pay him a sum as damages. The Court *assoilzied* the defenders from the conclusions of the action, in respect that (1) it was established on the evidence that the appointment had been made subject to certain regulations, under which the defenders had power to recal the appointment of the pursuer at any time; (2) that in its nature the office was not such that a life appointment was necessarily implied; and (3) that the induction by the Presbytery had no such effect as to alter the terms of his appointment and make it one for life.

In the year 1878 William Hastie, Bachelor of Divinity, was appointed by the Foreign Mission Committee of the Church of Scotland to be Principal of the Institution of that Church at Calcutta, an institution supported by voluntary contributions. Towards the close of that year he entered on the duties of his office, which he continued to discharge till December 15, 1883, when he was recalled by the committee without notice, but receiving from the committee six months' salary in lieu thereof.

This was an action by Mr Hastie against the Rev. John M'Murtrie, convener, and John Thomson Maclagan, secretary of the Foreign Mission Committee of the Church of Scotland, who by agreement between the parties were taken as representing the committee and its whole individual members. The pursuer sought to have it found and declared—"(First) that upon the 16th day of October 1878 the pursuer was by the Presbytery of Edinburgh ordained and set apart to