his wife and one daughter Mrs Euphemia Richardson Spinks or Simpson, who left one daughter Mary Ramsay Simpson, who along with the two daughters mentioned in the will survived the testator.

A special case was presented by (1) the executors, (2) the grandchild and her father as administrator-in-law for her, and (3) the surviving daughters, for the opinion of the Court on the following questions of law—"(1) Whether the third parties are entitled to immediate payment and conveyance of the deceased's whole estate, share and share alike, in fee; or whether the right of the third parties in the said estate is limited to a liferent. (2) Whether, in the event of it being held that the right of the third parties in the said estate is limited to a liferent, the survivor of these parties, on the death of one of them, is entitled to liferent the whole estate; or (3) Whether, in the event foresaid, on the death of each of the third parties, the share liferented by her will pass to the testator's grandchild, the said Mary Ramsay Simpson; or (4) Does the fee of the estate, on the death of either or both liferentrices, fall into intestacy; and in that event are the third parties entitled to two-thirds thereof."

Cases cited—*Mackinnon's Trustees*, July 19, 1892, 19 R. 1051; *Jamieson* v. *Lesslie's Trustees*, June 19, 1889, 16 R. 807; *Sanderson's Executors* v. *Kerr, &c.*, December 21, 1860, 23 D. 227; *Clouston's Trustees* v. *Bullock*, July 5, 1889, 16 R. 937.

At advising—

LORD YOUNG—The testator by his settlement wills and disposes of his money, household property, and all his earthly possessions "in favour of my daughters," naming them, "during their lifetime, share and share alike," and then he appoints certain persons as trustees. Now, I think it is impossible to disregard these words "during their lifetime" as being a limitation on the gift, and to read the clause as if it was an absolute gift to his daughters. In my opinion the will gives only a liferent to the daughters; their interest during their lifetime is protected by the appointment of trustees and there is intestacy as regards the fee. Had the will gone on, "I give all my property to A, B, and C, after my daughters' death," that would have been disposing of the fee, but he dies intestate as regards the fee and the law of the matter is not doubtful.

The testator had three daughters, one of whom predeceased him but left a child. They are his heirs and must take the fee of his estate. Upon the decease of the two surviving daughters their two-thirds share of the fee will go as they may please to direct. With respect to the other third, upon the termination of the life interests that will go to the grandchild.

Each sister takes the liferent of one-half of the estate, and upon the death of one of them the half liberated will have to be disposed of as fee.

LORD RUTHERFURD CLARK—I concur.

LORD TRAYNER—I also concur. I confess I have had more difficulty in the matter than your Lordships, but I do not dissent.

The Court pronounced this interlocutor:—

"Answer the first alternative in the first question in the negative, and the second alternative of said question in the affirmative: Answer the second question in the negative and the fourth question in the affirmative: Find it unnecessary to answer the third question: Find and declare accordingly, and decern."

Counsel for First and Third Parties—C. J. Guthrie. Agent—W. Marshall Henderson, L.A.

Counsel for Second Party—G. L. Macfarlane. Agents—Tait & Crichton, W.S.

Friday, February 16.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

CUTHILL *v.* STRACHAN.

Bankruptcy — Cautioner — Cash - Credit—Cautioner's Bankruptcy—Composition—Payments into Principal Debtors' Account after Discharge of Cautioner.

C, S, and F were cautioners in a cash-credit bond in favour of a bank for a credit upon account-current in name of the principal debtor for £600. In September 1888, when a balance of £599, 7s. 6d. was due to the bank, the estates of S were sequestrated. He paid under contract a composition of 7s. 6d. in the pound. The bank did not claim, nor did they demand a new cautioner. They continued the cash-credit until June 1891, when the principal debtor granted a trust-deed for his creditors. The cash-credit was then closed. C was forced by the bank to pay £615, 5s. 8d., the amount of principal and interest due under the bond. He then sued S for the amount of the composition at the rate of 7s. 6d. in the pound, on one-third of the amount of the overdraft at the date of the defender's composition contract. It appeared that between the date of the defender's sequestration and the closing of the account, the principal debtor paid into the account sums equal to the amount for which the defender was liable at the date of his sequestration.

Held (following the case of *Laing* v. *Brown*, December 2, 1850, 22 D. 113), that on the principle that unappropriated payments of a debtor in an account-current extinguish the items of debt in order, the payments of the principal debtor, after the defender's sequestration, had extinguished the debt of the defender.

In March 1887 George Cuthill junior,

Arbroath, William Cuthill, Dundee, Joseph Strachan, and Jonathan Forbes became co-obligants in a cash-credit bond granted to the British Linen Company in favour of George Cuthill junior for £600 sterling. George Cuthill junior operated on the credit under an account-current kept in the books of the bank at Arbroath. On 4th September 1888 the estates of Joseph Strachan were sequestrated. The sequestration was closed under a composition contract of 7s. 6d. in the pound on all debts and obligations contracted by him, or for which he was liable at the date of the sequestration, and that in three equal instalments at three, six, and nine months from the date of his discharge. That composition was duly accepted by the creditors, and Strachan was discharged finally on 2nd November 1888. At 4th September there was a balance due to the bank on the cash-credit account of £599, 7s. 6d. The bank did not lodge any claim in the sequestration, and no payment under the composition arrangement was made to them in respect of the bond.

George Cuthill junior continued to operate upon the account as before until 22nd June 1891, by which time the amount of the credit was exhausted; and Cuthill's affairs being embarrassed, of the same date he granted a trust-deed for behoof of his creditors, in favour of Robert Meldrum Brodie, Dundee, and the cash-credit was closed. In October 1891 the bank compelled William Cuthill, Dundee, to pay the sum of £615, 5s. 8d., the whole amount of the principal and interest then due under the bond.

William Cuthill then brought an action against Jonathan Forbes and Joseph Strachan to recover the share due by them as co-cautioners in the cash-credit bond. The amount claimed from Strachan was £74, 18s. 4d., being the amount of a composition at the rate of 7s. 6d. in the pound on the sum of £199, 15s. 10d., being one-third of the sum of £599, 7s. 6d., the amount due under the cash-credit bond at the date of his sequestration (restricted by minute to £37, 9s. 2d. after Forbes had repaid his share to the pursuer).

The defender averred—"Explained that between the date of the defender's sequestration and the closing of the account, sums were paid into the account by the principal debtor, equal to the amount for which the defender was liable at the date of the sequestration, assuming a claim to have been then made against him by the bank. The claim against the cautioners under the said bond only emerged and became exigible at the closing of the said account, and long before that time the present defender had been relieved of all liability in reference thereto. . . . Denied that the present defender was liable to his co-cautioners for any sum at the date of his sequestration, or that the pursuer paid the balance then due to the bank. Explained that the bank was the only party who could then make any claim against the defender under the said bond, and that in place of doing so, the account was continued after the sequestration, with the consent of the remaining cautioners, on the footing of their being alone liable therefor, and that on the account being closed the pursuer and the other defender were the only parties liable for the balance then ascertained and exigible by the bank."

The pursuer pleaded—"(1) The cash-credit bond condescended on having been granted by the parties thereto, conjunctly and severally, they were each liable for the whole debt due under the same in a question with the bank; and the pursuer having paid the said debt, the solvent co-obligants are bound to pay and free and relieve him of their rateable proportion of the loss. (2) The said cash-credit bond having been granted for behoof and for the benefit of the said George Cuthill junior, the other parties to the said bond were merely cautioners for him, and in questions *inter se* are liable for the loss *pro rata*. (5) The defender Joseph Strachan, being one of the co-obligants under the said bond, is liable for one-third of the loss sustained in respect of the same, and the pursuer is accordingly entitled to decree against him, with expenses as concluded for."

The defender pleaded—"(2) The pursuer has no claim against the present defender under or in respect of the said cash-credit bond, in respect (1) that the present defender's obligation under the said bond terminated, and was extinguished by his discharge under the sequestration, and that thereafter he was under no liability in respect thereof; (2) that the account was continued under the said bond after the pursuer's discharge on the footing of the remaining cautioners being alone liable therefor, and sums were thereafter paid to the credit thereof by the principal debtor in excess of the present defender's liability at the date of his discharge; (3) that if any claim had been made against this defender at the date of his sequestration, he would have been able to operate relief against the principal debtor, who was then solvent; and (4) that on the account being closed, and the balance exigible by the bank being ascertained, the pursuer and the other defender were the only cautioners therefor."

From minutes lodged by the bank it appeared that between 4th September 1888 and the closing of the cash-credit, George Cuthill had paid in to his credit sums amounting to £6266, and had in the same period drawn out sums amounting to £6291, 17s. 11d.

Upon 24th November 1893 the Lord Ordinary decerned against the defender Strachan for £37, 9s. 2d., with interest thereon, as the composition of 7s. 6d. in the pound on one-half of one-third of £599, 7s. 6d., the remaining half, in the Lord Ordinary's opinion, being exigible by the co-cautioner Forbes.

"*Opinion.*—The sum in dispute here is only £37, 9s. 2d., but it has given rise to an ingenious argument on the liability of a discharged bankrupt under a composition contract, and on the application of *Devayne's* case to a cash-credit account. . . . . .

"It only remains for me to notice the defender's argument founded on *Devayne's* case, 1 Merivale 585, and the cases of *Houston* v. *Spiers*, 3 W. & S. 392; and *Royal Bank* v. *Christie*, 2 Rob. 118. The principle of *Devayne's* case is simply this, that in an account-current where no special appropriation has been made by the parties, the law appropriates payments to the various debts in their order, so that the first item on the credit side discharges the first item on the debit side, and so on. In *Houstoun's* case (which was one of suretyship), there was a change in the mode of dealing which was held to liberate the cautioners after a certain time. The balance against them at that time was afterwards entirely extinguished if the payments which they subsequently made were applied to the debit entries in their order, and it was held that they must be so applied. So in *Christie's* case (which was one of partnership dissolved by death), the balance against the deceased partner at the date of his death was afterwards entirely extinguished if the subsequent payments by the surviving partners were applied to the debit entries in their order. But what the defender wishes to do here is, not to set one entry against another in order of time, but to pick all the credit entries out of the account and by adding them up and disregarding the debit entries altogether, to show that they exceeded the sum of £599, 7s. 6d. This seems to me quite inadmissible. The actual debit balance on the account from day to day was never reduced below £550 or thereby. Once there was an apparent reduction to £444 by a credit payment of £149, but there were drafts on the same day which restored the balance to £599. Substantially the state of the account remained unaffected from September 1888 to June 1891. It seems to me, therefore, that the principle of these cases would not apply, even if it could be said that the defender had no control over the account after his sequestration. But I think he had, because, as I have said already, he could have called upon the bank to stop it if he had chosen. I shall therefore give decree for the restricted sum, but with interest only from the date of citation."

The defender reclaimed, and argued—It was admitted that the defender was due the sum of £599, 7s. 6d. to the bank under the cash credit at the time of his sequestration. The bank had not claimed a ranking on his estate at the time, but had gone on allowing the principal debtor to operate upon his account. From the time of his sequestration until the closing of the cash-credit the principal debtor had paid in sums which exceeded the debt for which the defender was liable, and as there was no special appropriation of these sums the defender's debt was therefore extinguished —*Devaynes* v. *Noble*, &c., July 26, 1816, 1 Merivale 585; *Houston's Executors* v. *Spiers*, May 22, 1829, 3 W. & S. 392; *Royal Bank* v. *Christie and Others*, April 6 1841, 2 Rob. Appeals 118; *Lang* v. *Brown*, December 2, 1859, 22 D. 113; *Scott's Trustees* v. *Alexander's Trustees*, January 10, 1884, 11 R. 407.

The respondent argued—The reclaimer admitted he was liable to pay the bank the whole sum of £599, 7s. 6d. at the date of the sequestration, he was therefore liable to the pursuer in his proportion of that sum as a co-guarantor. It was true that sums had been paid into the bank larger in total amount than the whole amount under the cash-credit, but these were specially appropriated, because the amount which was put in between the date of the sequestration and the closing of the cash-credit, and the amount drawn out by the principal debtor, were almost exactly the same; these two sums must therefore be put against each other, and when that was done the debt due to the bank was even greater than at the date of the defender's sequestration. The sums put in were in fact put in only to be drawn out the next day or shortly afterwards.

At advising—

LORD YOUNG—The rule of law stated in the case of *Lang* v. *Brown*, December 2, 1850, 22 D. 113, is conclusive, and it is stated as a principle held by the Court to be well settled—"that the account was an account-current to which the principle was applicable that where payments are made by a debtor and not appropriated by the parties the law appropriates them to the extinction of the items of debit in their order in the account."

Applying that principle to the facts of the present case, I think that the various entries by the principal debtor after the sequestration of the defender settles the debt just as clearly as if the first payment had been an entry by the principal debtor of £600 which admittedly would have extinguished the debit-balance on the account. He had no doubt the intention of continuing to operate upon the account, and as circumstances arose he might thereafter continue to draw on his account, thereby making himself a debtor to the bank, or by paying in a larger sum make himself a creditor, but at the date of the sequestration the defender's cautionary obligation was extinguished for the future.

What the condition of the cash-credit was when it came to an end does not signify.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

The LORD JUSTICE-CLERK was absent.

The Court recalled the Lord Ordinary's interlocutor and assoilzied the defender.

Counsel for the Reclaimer—Salvesen—Graham Stewart. Agents—T. F. Weir & Robertson, S.S.C.

Counsel for the Respondent—Chisholm. Agent—David Milne, S.S.C.