pirates, and though soon retaken, a number of papers were lost, among them the will. The testator while at Bolivar was attacked with illness, and fearing to die intestate he sent for a notary and four witnesses, and made a nuncupative will in their presence, leaving everything to his wife. Mrs Moresby proved the nuncupative will in Lima, and administered the deceased's effects in Peru. The will which was supposed to be lost was subsequently found. The question was whether the nuncupative will superseded a prior written will executed in England. The Court granted probate, as both the wills contained nearly the same disposition, and gave the whole property to the wife. I think that the facts of that case somewhat resemble those of the present, and accordingly upon the whole matter I think we ought to adhere to the Lord Ordinary's interlocutor.

The Court adhered.

Lord Deas was absent.

Counsel for Pursuer—Lord Adv. Balfour, Q.C. —J. P. B. Robertson—Graham Murray. Agents —Graham, Johnston, & Fleming, W.S.

Counsel for Defenders—Sol.-Gen. Asher, Q.C. —Mackintosh — Pearson. Agents — John Clerk Brodie & Sons, W.S.

Friday, February 6.

FIRST DIVISION.

[Lord Fraser, Ordinary.

MACALPINE *v.* LANG AND ANOTHER.

Apparent Heir—Act 1661, *c.* 24—*Bond and Assignation in Security—Creditors of Ancestor.*

An apparent heir granted a bond and assignation in security over heritable estate which he inherited from his father. The bond was for a full advance immediately made, and was dated after the expiry of one year but before the expiry of three years after the father's death. *Held* that the bond, being onerous was not reducible, under the Act 1661, c. 24, at the instance of one of the father's creditors.

This was an action of reduction, under the Act 1661, c. 24, of a bond and assignation in security.

The Act 1661, c. 24, provides—"That the creditors of the defunct shall be preferred to the creditors of the appearand heir in time coming as to the defunct's estate; providing 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 predecessor's death, in prejudice of his predecessor's creditors, 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."

The pursuer of this action, Thomas Macalpine, was a creditor for £165 of the deceased James Smart, brick and tile manufacturer, his debt being constituted by a promissory-note dated 27th July 1878, payable two years after its date.

James Smart died on 4th February 1879. On his death, Mrs Smart, his widow, and James Smart, his eldest son, entered into possession of the brick and tile works, a dwelling-house in Edinburgh, and generally the whole estate of the deceased. No title was made up by James Smart junior, the heir, to the dwelling-house. Mrs Smart and James Smart junior thereafter carried on the brick and tile works, along with Campbell Murray, under the firm of Smart & Murray.

By bond and assignation in security dated 3d August and 27th September and recorded 1st October 1880, Mrs Smart, James Smart junior, and Campbell Murray acknowledged themselves to have borrowed from John Lang and James Mitchell, for the use and behoof of the firm of Smart & Murray, the sum of £600, and in security James Smart junior, as eldest son and heir-at-law of the deceased James Smart, with consent and concurrence of Mrs Smart, disponed the dwelling-house in Edinburgh, which was already bonded but over which he had a reversionary right. The £600 was a full advance for the security given.

The estates of the firm of Smart & Murray, and of the individual partners, were sequestrated on 13th December 1880.

This action was raised by Macalpine on 20th October 1882. The pursuer contended, *inter alia*, that the bond was reducible under 1661, c. 24. Defences were lodged by John Lang and James Mitchell, the grantees of the bond.

The Lord Ordinary (Fraser), on 2d July 1884, found that the bond was not challengeable under the Act 1661, c. 24, and assoilzied the defenders.

"*Opinion.*—It is said by the pursuer that this bond is challengeable under the Act 1661, c. 24, in respect that it was granted within three years of the father's death, to the prejudice of the pursuer, a creditor of the father. The father died on 4th February 1879, and the bond was recorded on 1st October 1880—thus being within the three years, but beyond one year from the father's death. The Lord Ordinary is of opinion that the bond being granted for an instant advance more than one year after the father's death, though within the three years, it is not challengeable under the Act. The clause of the Act bearing upon this case is not the first part of it but the second. The first enactment is—'That the creditors of the defunct shall be preferred to the creditors of the appearand heir in time coming as to the defunct's estate; providing 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.' This clause refers to a competition between the general creditors of the ancestor and the general creditors of the apparent heir—which is not the present case. It falls under the next enactment, which is as follows:—'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 predecessor's death, in prejudice of his predecessor's creditors, 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.' In the interpretation of this Act it has been found that a disposition by the heir, even granted after the year, to one of his general creditors, may be set aside 'in competition with diligences used by the ancestor's creditors within the three years' (Ersk. iii. 8, 102, and 1 Bell's Com. 736). 'This,' says Professor Bell, 'is laid down by Harcarse as held by the Court soon after the date of the Act. It is an extension of the Act for which there is no warrant in the express words of the law; but it seems to be supported by its spirit and intendment, since the heir would otherwise have it in his power by a private deed to destroy that preference which the Legislature had been at so much pains to establish. The doctrine is accordingly approved by Erskine and all our other authors.' But this decision does not rule a case like the present, where there is no conveyance made after the year to general creditors. The present is a case where there is an instant advance made. The only writer who seems to have expressed an opinion on this subject is Mr Sandford (Heritable Succession, ii. p. 89), who after laying down the law as Erskine and Bell did it, proceeds thus:—'But the case may be different where the heritable bond is granted for an instant advance. The argument in such a case would be, that the creditor in the heritable bond is in fact the purchaser of the security, and therefore ought to be in the same situation as a purchaser of property, who certainly would not be struck at by the statute if his purchase were not made within the year.' This seems the sound construction, and the Lord Ordinary adopts it."

The pursuer reclaimed, and argued—It had been held that a conveyance by the heir to one of his own creditors, though granted after the year, was reducible in a competition with one of the ancestor's creditors who had done diligence within the three years—Bell's Com. i. 736; Ersk. Inst. iii. 8, 102; *Arniston* v. *Ballenden*, reported by Harcarse, 2 B. Supp. 93; *Taylor* v. *Bruce*, M. 3128; *Lord Bellenden* v. *Murray*, M. 3127; *Paterson* v. *Bruce*, M. 3126. The effect of the sequestration was the same as if diligence had been done by the ancestor's creditor within the three years—*M'Lachlan*, 4 S. 712, 3 W. and S. 449; 19 and 20 Vict. c. 39, sec. 102, sub-sec. 2; Murdoch on Bankruptcy, sec. 102. A bond and disposition in security was in the same position as a conveyance. The statute would be evaded altogether if bonds were excepted.

The defenders argued—It was to be implied from the second part of the statute that an onerous disposition granted after the expiry of the year was not reducible. If the heir could not after the expiry of the year deal with the estate as its proper owner, for onerous causes, then he could not make it available even for satisfying the creditors of the ancestor—Sandford on Heritable Succession, ii. 89; Stair, ii. 12, 29, iii. 5, 23, iv. 35, 16; M'Laren on Wills, ii. 468; *Magistrates of Ayr* v. *Macadam*, M. 3135.

At advising—

Lord President—The first conclusion of this action is directed to set aside a bond and assignation in security, dated 3d August and 29th September and recorded 1st October 1880, on various grounds, which are set forth in the pleas-in-law for the pursuer. Some of those grounds were, however, abandoned in argument. It was pleaded —"1. The pursuer is entitled to decree—(1) In respect the said pretended bond and assignation in security was granted by an apparent heir while in minority, without consideration and in defraud of the ancestor's creditor." The second plea-in-law is—"The deed in question being null and reducible at common law, and under the Statutes 1621, c. 18, and 1696, c. 5, as condescended on, the pursuer is entitled to decree as craved." It is now admitted that these grounds of action are no longer applicable to the facts of the case. It has been clearly proved that the bond and assignation in question was granted for the sum of £600 immediately advanced, and that this was a very full advance for the security given. There is no room for the allegation of fraud, or want of consideration, on which any challenge under the Statutes of 1621 and 1696 must be founded.

That reduces the case, then, to the third plea-in-law for the pursuer, which is founded on the Act 1661, cap. 24. The facts of the case as applicable to that plea are as follows—The pursuer was a creditor of the ancestor of James Smart junior, the granter of the bond and assignation in security, and his debt was constituted by a promissory-note dated 27th July 1878, having a currency of two years. Smart's father died in February 1879. The son does not appear to have made up a title to the estate, and during the year which followed the father's death nothing occurred to prejudice the pursuer as his creditor. But in September 1880 the bond and assignation in security in question was granted; it was granted for a sum presently advanced, so that it was an onerous deed.

The question is, whether it is reducible under the Act 1661, cap. 24? That raises a question upon the construction of the statute, which appears in some respects to be a question of novelty.

The Act is divided into two parts, the first of which provides—"That the creditors of the defunct shall be preferred to the creditors of the appearand heir in time coming, as to the defunct's estate: Providing alwayes, that the defunct's creditor's 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." If the statute had gone no further its effect would have been that the apparent heir, though he had made up a title, could not have dealt with the estate until the lapse of three years, during which it would have been liable to the diligence of the ancestor's creditors. Such an enactment would obviously have been productive of injustice and inconvenience, and therefore the second part of the Act provides a remedy. The injustice and inconvenience which would have occurred is very apparent if the case is taken

of an heir succeeding to heritable estate, and nothing else, who has no fund of credit out of which to satisfy his ancestor's creditors. An heir in that position would have been helpless, and the estate would have been torn to pieces by the ancestor's creditors during the three years after the ancestor's death.

To remedy this the statute sets forth—"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 predecessor's death, in prejudice of his predecessor's creditors, 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."

The reason which runs through this part of the statute is perfectly clear. The heir has his *annus deliberandi* to consider whether he will enter or not, and no diligence is competent at the instance of his ancestor's creditors against him unless he does make up a title; therefore the statute ties up his hands for the same period, and declares that anything done by the heir within a year after his ancestor's death in the way of alienating or burdening the estate is to be invalid. So far, then, there is no room for doubt as to the effect of the statute. But reading the statute as a modern statute, when it declares 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," one would be inclined to say that after a year the heir is entitled to alienate and to burden the estate as he pleased, notwithstanding the previous enactment that the ancestor's creditors are given three years in which they must do diligence against the estate. That, however, is not the construction which has been put upon the statute, for very soon after its enactment, in a case reported by Harcarse, it is laid down that a disposition by the heir to one of his own creditors, executed beyond the year, is ineffectual to defeat the diligence of the ancestor's creditors within three years of the death of the ancestor. Mr Bell in his Commentaries (i. 736) says this is an extension of the Act for which there is no warrant in its express words—"But it seems to be supported by its spirit and intendment, since the heir would otherwise have it in his power by a private deed to destroy that preference which the Legislature had been at so much pains to establish." And accordingly this doctrine has been universally received by the text writers and followed in practice. But this extension of the Act by interpretation is not a thing to be rashly carried further. And the question is, whether the pursuer does not want a further and more unreasonable extension of the statute?

He contends that the bond and assignation in security, though granted more than a year after the ancestor's death, for onerous causes, and not in favour of one of the heir's own creditors, so as to give a preference over the ancestor's creditors, is nevertheless reducible. I cannot find any warrant for that in the statute. I think it would be not only an extension of its express words, which was done in the former case, but would also be contrary to the spirit of the statute. It would amount to this, that during the period of three years after his ancestor's death the heir could not, even for onerous causes, grant any deed to a third party which would have the effect of prejudicing his ancestor's creditors. In short, it would be to repeal the second part of the statute and leave the first; it would leave the injustice which would result from the first part standing alone and which the second part was intended to remove.

There is no room for any third reading of the statute—either the creditors of the ancestor are during the three years to have a complete right to the ancestor's estate, and the heir is to remain tied up, or, giving effect, to the second part, the heir is, after the first year, to be allowed, not to prejudice the ancestor's creditors by preferring his own, but in other respects to deal with the estate as its proper owner, and for onerous causes to convey it away or burden it as he sees fit. I think the latter construction is to be preferred. The second part of the statute has no meaning at all, unless the heir, after the lapse of a year, is to be entitled to sell the estate; and in argument it was almost conceded that if after the year the heir had sold the estate for an adequate price, and in good faith, such a sale would have been effectual. But it was said that this was not a sale, but the creation of a burden; and that although the burden was only created after the year yet it had just the effect of setting up a creditor of the heir to compete with the creditor of the ancestor. There is no doubt a certain plausibility in stating the case thus, but I do not think it will bear examination. If it is competent for the heir to sell the estate after the lapse of a year for an adequate price, surely it would be inconsistent to hold that he is not entitled to alienate it under a redeemable conveyance for money presently advanced. The one is not so strong as the other. A bond and disposition in security is an alienation of the estate, just as a sale is, the only difference being that the one is redeemable while the other is irredeemable. The reason of the thing as shown in the second part seems to justify the one just as much as the other. The reason why the heir's lands are not to be tied up after the year is that he must be allowed means for making the estate available for paying his ancestor's creditors, and for other purposes, or otherwise he would be quite helpless. If the estate is to be made available for such a purpose, the heir must either sell it or make it a fund of credit by borrowing on it. The one method is as legitimate as the other.

I have therefore without much difficulty come to the conclusion that the contention of the pursuer as regards the bond and assignation in security cannot receive effect, and that the defenders must be assoilzied from the first conclusion.

That being so, I understand that the interest of the pursuer is at an end, and so it is unnecessary to deal with the other conclusions of the summons. I think therefore that we should adhere to the interlocutor of the Lord Ordinary.

Lord Mure and Lord Shand concurred.

The Court adhered.

Counsel for Pursuer—Scott. Agents—Rhind, Lindsay, & Wallace, W.S.

Counsel for Defenders—Keir—G. Wardlaw Burnet. Agents—Maconochie & Hare, W.S.

Friday, February 6.

SECOND DIVISION.

[Sheriff of Lanarkshire.

ROBERTSON *v.* RUSSELL.

Master and Servant—Reparation—Liability of Employer for Injuries to Servant of Contractor—Employers Liability Act (43 *and* 44 *Vict. c.* 42), *sec.* 1, *sub-secs.* 1 *and* 2.

A workman while engaged in working at the sinking of a shaft in a mine was killed by the fall of a stone from the side of the shaft at a place where it had been insufficiently wooded. At the time of his death he was working in the employment of a firm of pit-sinkers who had a contract with the mine-owner for sinking the shaft, and had undertaken to put in all the wood that was necessary during the sinking of the pit. He was engaged and paid by these pit-sinkers; he did not sign the rules of the colliery. His widow sued the mine-owner for compensation for her husband's death, both at common law and under the Employers Liability Act. It being proved that the cause of the accident was the fault of the pit-sinkers, the Court *assoilzied* the mine-owner.

Observed that as the deceased was not in the employment of the defender, but of the pit-sinkers, at the time of the accident, the pursuer had in no view a claim against the defender under the Employers Liability Act.

Archibald Russell, owner or lessee of the Barncleuth Colliery at Hamilton, contracted with Robert and Hugh Muir, pit-sinkers, Blantyre, to sink a shaft for him in No. 1 pit Barncleuth Colliery, from the main to the splint coal, of a certain size, at £8 per fathom. By the contract, which was in writing, the Muirs were bound to put in all necessary wood that might be required during the sinking of the shaft, and to provide powder and fuse and a "hillman," while Russell was bound to supply them with all the tools required for that purpose, and to provide an engineman. The Muirs undertook liability for any accidents that might occur through the sinking operations.

Wood was supplied by Russell, and put in by the Muirs where they thought it necessary. The Muirs worked themselves, and employed 12 or 13 workmen in various "shifts." These men were engaged and paid by the Muirs. They were not entered in Russell's books. They did not sign the colliery rules. No "off-takes" were made from their wages for sharpening picks and the like, such as Russell's miners had to pay. The Muirs paid a chargeman or gaffer to take charge when they were not there. Russell's oversman was daily in the shaft which the Muirs were sinking, to see and to report that it was sunk according to the contract size, and was well done. Russell's fireman was also sent down by him to watch against fire and attend to the lamps. An explosion in the shaft which was being sunk would have been dangerous to the other workings, and to the miners in Russell's employment there.

On the 19th of May a large stone or stones fell from the side of the shaft upon James Robertson, one of the Muirs' men, while he was working at sinking the shaft, and killed him.

His widow (along with his minor and pupil children) raised this action in the Sheriff Court at Hamilton, against Russell, at common law and under the Employers Liability Act, for compensation for his death, alleging that he had been "employed by the defender, or those for whom he is responsible."

She averred that the cause of the accident was insufficient "wooding" of the shaft. "(Cond. 6) It was the duty of the defender, or of his overseer, or of some other person having superintendence within the meaning of the Employers Liability Act 1880, and for whom the defender is responsible within the meaning of said Act, to see that there was sufficient wood or other propping or supports at the sides of said shaft, or, at all events, it was the duty of the defender or his overseer, or some other person having superintendence as aforesaid, and for whom the defender is responsible, to see that sufficient wood or other propping was supplied to the workmen engaged in sinking shafts when so engaged. (Cond. 7) Specially it was the duty of the defender or his overseer, or some other person having superintendence as aforesaid, and for whom the defender is responsible, or otherwise, to see not only that the said James Robertson was supplied with a sufficient quantity of wood or other propping for the sides of said shaft, but also to put in said wood or propping so as to effectually support the sides of said shaft and prevent the sides from falling in, and it was their duty not to allow the said James Robertson to work at said shaft while the sides thereof remained unsecured by propping."

The defender admitted that the accident was caused by insufficiency of wood or other propping at the part of the shaft from which the stone fell. He maintained that the deceased was then working in the employment of the Muirs, and was not and never had been in his (defender's) employment.

He pleaded — "(2) The deceased James Robertson not having been in the employment of the defender at the time when the accident occurred, the pursuers have no claim against the defender."

The Sheriff-Substitute (BIRNIE) pronounced this interlocutor—"Finds (1) that on 19th May 1883 the deceased James Robertson was killed by a fall of stones or other material from the side of a shaft which he was sinking at No. 1 pit, Barncleuth Colliery, belonging to the defender, and that the pursuers are his widow and children; (2) that he was in the employment of Robert and Hugh Muir, the contractors for sinking said shaft: Finds in law that he was not killed through the fault of the defender; assoilzies the defender from the conclusions of the action; finds him entitled to expenses," &c.

"*Note.*—The Muirs were the contractors for sinking the shaft, the defender or his manager having no right to interfere except to see that the contract was carried out. The defender