them by their father's settlement. The conclusion consequently to which I have come is, that the first and second queries ought to be answered in the affirmative conditionally, and our answer to the third and fourth should be a simple affirmative.

The LORD JUSTICE-CLERK, LORD YOUNG, and LORD RUTHERFURD CLARK concurred.

The Court pronounced this interlocutor:—

"The Lords having considered the Special Case and heard counsel for the parties thereon, Answer in the affirmative each of four questions therein put: Find and declare accordingly: Find that the parties to the Special Case are entitled to payment out of the estate of the testator Joseph Mitchell of the expenses incurred by them in relation to said case: Remit to the Auditor to tax the same and to report; and decern."

Counsel for Parties of the First Part—Mackintosh—Lyell. Agents—Horne & Lyell, W.S.

Counsel for Parties of the Second Part—Brand—Guthrie. Agents—J. & A. Peddie & Ivory, W.S.

Wednesday, May 27.

SECOND DIVISION.

[Lord Fraser, Ordinary.

BLACK *v.* CURROR & COWPER.

Agent and Client—Instructions to Invest Money on Heritable Security—Act 1696, *c.* 5.

A lady entrusted to her law-agent a sum of £800 which had previously been invested by him on heritable security in her name, to be reinvested on heritable security. The agent informed her that he had lent the sum again to the same borrower on the security of certain house property, adding that the whole sum to be lent to him was £4000, of which her sum was a portion. The agent took a bond from the borrower for £4000 acknowledging the money to have been lent by him (the agent) out of funds in his hands belonging to other parties, but the money was not then paid to him, but advanced in different sums at various dates after the date of the bond. On the back of the bond the agent, some time after it was granted, wrote a docquet to the effect that the bond was held by him in trust for certain parties in certain proportions, and among others the client in question to the extent of £800. The borrower became insolvent, and the property turned out insufficient to meet the loans. In an action by the client against her agent for payment of the £800, *held* that the agent had failed duly to invest the client's money on heritable security according to her instructions, and was therefore bound to account to her therefor, and (*per* Lord Fraser, Ordinary) that the loan being granted for money not yet paid was invalid under the Act 1695, c. 5.

This was an action for payment of a sum of £800 raised by Mrs Jane Christie or Black, a widow, against Curror & Cowper, S.S.C. The following narrative of the facts of the case is taken from the opinion appended to the interlocutor of the Lord Ordinary:—"The pursuer of this action obtained in the year 1873 an assignation to a bond for £2000 to the extent of £800 thereof, which bond had been granted to Milne's trustees—the cedents—by Thomas Hope over certain property in Castle Street, Edinburgh. The defenders acted as agents for the pursuer in obtaining this assignation.

"The bond for £2000, and consequently the pursuer's right to £800 thereof, were paid off in 1877. The sum of £800 was paid on behalf of the pursuer to the defenders as her agents. They by letter dated 28th May 1877 intimated this fact to her in the following terms:—'The £800 invested in your behalf was paid up at this term, and we now send you an assignation of it, in order that you may sign it before witnesses in terms of the printed note of instructions. We have reinvested the sum for you at five per cent over property at Moncrieff Terrace.' No further intimation of the mode in which this investment was made was given to the pursuer.

"The new investment was made over property in Moncrieff Terrace, Edinburgh, belonging to Alexander Finnie, builder, who granted a bond and disposition in security, dated 25th June 1877, whereby he acknowleged to have borrowed the sum of £1600, 'and that from Mrs Jane Christie or Black, residing at Seton Hill, Longniddry, to the extent of £800; and from Mrs Mary Simpson or Welsh, wife of Matthew Welsh, lately merchant in Melbourne, Australia, now residing in Edinburgh, to the extent of the remaining sum of £800.' The property in Moncrief Terrace was disponed in security of this loan—in favour of the two lenders, the pursuer and Mrs Welsh.

"This loan was paid up in the year 1878, the intention to do which was communicated by the defenders to the pursuer by a letter dated 3rd June 1878, wherein they say as follows:—'The £800 which you had lent over property in Moncrieff Terrace requires to be paid up, the greater part of the houses having been sold. We have lent the money again to the same person, Mr Finnie, over seven houses at Moncrieff Terrace, and over a large tenement at Morningside. The large tenement is to cost fully £4000, while the houses still remaining in Moncrieff Terrace will be worth from £1200 to £1500. The whole sum to be lent to Mr Finnie is £4000, of which your sum is a portion. Will you be so good as sign the enclosed discharge and return it to us at your early convenience, with information for the testing clause.' The discharge was duly signed by the pursuer, and thus this second security was brought to an end. The £800 thus came once more into the hands of the defenders, and they proceeded to lend the money of new over property belonging to Finnie at Morningside and Moncrieff Terrace, Edinburgh.

"This new investment was made in a way somewhat peculiar. On the 27th February 1878, four months before the £800 under Finnie's bond above-mentioned was paid up (which was at Whitsunday 1878), Finnie granted a bond in favour of the defenders, whereby he acknow-

ledged to have borrowed and received from them 'partners of and trustees for the firm of Currer & Cowper, solicitors, Supreme Courts, Edinburgh, out of funds in the hands of said firm, belonging to other parties, the sum of £3000,' which he bound himself to pay to the defenders as trustees foresaid, and their and his assignees whomsoever. In security of this obligation Finnie disponed certain pieces of ground at Morningside, with the houses erected and to be erected thereon, also five dwelling-houses in Moncrieff Terrace, Edinburgh. At the time when this bond and disposition in security was granted no money was advanced by the defenders to Alexander Finnie, the grantor.

"On the 12th of June Finnie executed another bond and disposition in security in favour of the defenders, whereby he acknowledged to have borrowed from them 'the individual partners and trustees of the said firm of Currer & Cowper, solicitors, Supreme Courts, Edinburgh, out of funds in the hands of said firm in trust for other parties the sum of £1000,' which he bound himself to repay to them as trustees, and their or his assignees, and he conveyed certain areas or pieces of ground at Maxwell Street, and five houses in Moncrieff Terrace, and also two other dwelling-houses in Moncrieff Terrace, Edinburgh, belonging to him. In this bond it was declared that this sum of £1000 'shall, in so far as regards the subjects and others hereinbefore disponed in the first and second places, be ranked and preferred *pari passu* on these subjects along with the sum of £3000 secured over the same' by the bond already mentioned of 27th February 1878.

"It was in this state of the title that the defenders wrote their letter to the pursuer of 3d June 1878. No bond or disposition in security was granted to the pursuer for her money, nor any assignation to an existing bond. What the defenders did was to engross upon each of the bonds which was granted in their favour as trustees, a minute which is without a date, but which appears from the proof to have been in June 1878, whereby they 'declare that the foregoing bond and disposition in security, along with another bond and disposition in security, granted by the within designed Alexander Finnie in our favour, dated 12th, and recorded 13th June 1878 for £1000, is held by us in trust for the following parties, viz., Mrs Jane or Black to the extent of £800; Mrs Nicolas Cossar or Stewart, now Smith, for behoof of Hugh and Helen Stewart to the extent of £450; Mrs Mary Simpson or Welsh to the extent of £800; George Smith to the extent of £1000; Miss Margaret Stevenson to the extent of £500; and the trustees of the late Charles Stewart to the extent of the remaining £450; that the said sums are entitled to be ranked *pari passu* notwithstanding the order in which they are here specified, and that we are bound to execute whenever required an assignation of said bonds and dispositions in security to the above effect in favour of the said parties for their respective rights and interests foresaid.' No such assignation has hitherto been executed in favour of the pursuer, although the defenders have always been ready and willing to execute such a deed if the pursuer desires it.

"Finnie was not paid £3000 and £1000 by the defenders when he granted these bonds in their favour as trustees. It appears from their account-current that they, as his agents, paid sums of money on his account, and advanced sums of money when he needed it, crediting him with any sums belonging to him which were paid to them. They in like manner dealt with the £3000 and £1000 in the way shown by the minutes, by giving off portions of the moneys said to have been borrowed by these bonds to their various clients mentioned in the minutes, and the right which the clients have obtained under these minutes is the only heritable security which they possess.

"The properties over which the money was lent have turned out to be insufficient to meet the burden thus laid upon them. The feu-duties are heavy, the properties have been badly let, and the interest upon the borrowed money has consequently not been paid. The question is thus raised whether the defenders—the agents who managed the business on behalf of the pursuer—must account to her for the £800 which they were employed to invest upon her account."

The interest on the pursuer's loan was paid regularly up to Whitsunday 1883, and the present action was raised in August thereafter.

The pursuer stated that she never agreed to accept the declaration above narrated as security for her money, or authorised the manner of investment which had been made.

The defenders stated that she was informed prior to the loan that the security was an interest in a £4000 loan to the extent of £800, and that the bonds were taken to them in trust merely for convenience.

They pleaded—"(3) The defenders having, prior to the loan being effected, disclosed to the pursuer the particulars of the security are not liable in the sum sued for. (4) The defenders not being in possession of any money belonging to the pursuer, are not liable in the sum sued for."

A proof was led, the evidence in which was confined chiefly to an averment by the pursuer in her condescendence that the subjects over which the £3000 was lent were not a sufficient security for that amount.

The Lord Ordinary on 15th July 1884 pronounced this interlocutor:—"Finds that the pursuer entrusted £800 to the defenders in order to invest the same upon heritable security: Finds that the defenders did invest the same upon security, but not of such a character as they were justified in taking: Finds that they must account to the pursuer for the said sum of £800: Decerns against them to make payment to the pursuer of said sum of Eight hundred pounds sterling, with interest thereon at two per cent. from Martinmas 1882."

"*Opinion*—[*After the narrative already quoted*]—There are two questions thus raised—First, whether in law the pursuer has obtained any security at all over the properties in question; and second, whether in point of fact the defenders carried out their instructions to obtain for her an heritable investment?

"Now, as regards the first question, there can be no doubt that in any competition with creditors the first bond in February and the second bond in June in favour of the defenders were null as being for a future debt, and for money to

be advanced after the infeftment. See 2 Bell's Com. 234; *Dempster* v. *Kinloch*, 2 Ross' Lead. Cas. 623; M. 10,290. The rubric in the case of *Dempster* is as follows: — 'An infeftment in security will cover only the sum actually advanced at the date of the infeftment, unless at the same date an absolute obligation for the balance of the whole sum secured has been granted to the debtor.' Now, there was no absolute obligation granted by the defenders to Finnie. They were merely to make advances to him according as he needed them, and if it suited the business relations between them. It was, in short, a bond for a future debt in the very purest shape, and was therefore ineffectual under the statute 1696. This is an objection that could not be stated by Finnie himself as against the payment of the bond—as appears, at all events, from the rubric of *Brown, &c.* v. *Bedwell, &c.*, December 3, 1830, 9 S. 136. But Finnie has become bankrupt, or at least he has compounded with his creditors, and they may challenge the bond unless it is valid under the Act 19 and 20 Vict. cap. 91, sec. 7. This statute enacts that 'It shall be lawful for any person possessed of lands or other heritable property, and desiring to pledge the same in security of any sums paid, or balances arising, or which may arise upon cash accounts or credits, or by way of relief to any person who may become bound with him for the payment of such sums or balances although paid, or arising posterior to the date of the infeftment, to grant heritable securities accordingly upon his lands or other heritable property containing procuratory of resignation and precept of sasine, for infefting any bank or bankers, or other persons who shall agree to give such cash accounts or credits, or for infefting such persons as shall become cautioners for him, or jointly bound with him in such cash accounts or credits.' It is clear that this Act of Parliament has no reference to the present case. The account between the defenders and Finnie was not a cash account in the sense of the Act, and therefore the question here raised must be determined according to the law independent of this Act of Parliament.

"The next question is one of fact, as to whether the instructions of the pursuer to invest her money upon heritable security ever were carried into effect. It is said that they were, in respect that they were carried out in accordance with the views of Mr John Black, advocate, her nephew, who it is said represented her. This is not accurate. From Mr Black's letters and evidence it would appear that he was rather against the notion of obtaining a right, along with a number of other persons, to one bond, and he suggested that his aunt, the pursuer, should obtain an assignation in her own favour, to be kept by her as her own writ, and this was done in the first case by the assignation by Milne's trustees in the pursuer's favour. Mr Black had nothing to do with the subsequent investments. Then, so far as regards the pursuer herself, no explanation was given to her that the money was to be lent in any other way than in the ordinary form of a bond and disposition in security. It was not explained to her that her right was that, not of a creditor entitled to claim directly against the estate held in security, but of a person having only a *jus crediti* against a trustee. This might be a very convenient mode of lending money upon heritable security—at all events it would not be costly, in respect that the cost of separate bonds would thus be saved. But then the peculiar character of this security required to be explained, and if this were not done, then the client is entitled to say that his orders have not been carried out, and that the money must be accounted for by the agents into whose possession it passed. There is no evidence that the pursuer was ever informed of the precise mode in which the defenders did the work intrusted to them, and therefore the defenders must account for the £800 as being uninvested.

"The object in the whole transaction was a very reasonable and proper one in the interests of the pursuer, and a court of law would have been desirous to uphold it if the statute law would have permitted it. When a builder or any other person wishes to borrow £4000 or £5000, of course he is desirous to save expense in the matter of conveyancing, and would rather borrow from one lender than from several; he would rather pay the expense of one bond than four or five. Finnie wanted to borrow £4000, and he naturally objected to borrow £800 from one person, and £1000 from another, and so on, when he could get the whole money from one lender. The defenders wished to save expense to their client Finnie, and also to their client the pursuer, and to secure to her also what she very much wished — five per cent. upon heritable security. The mode adopted for attaining these objects was one, however, which the law does not sanction, and therefore the Lord Ordinary must find that liability for the money has been established against the defenders."

The defenders reclaimed, and argued—The minute on the bond constituted a valid heritable security to the pursuer as far as the defenders were concerned. That they did not undertake to procure her a security of the first rank was shown by the rate of interest. Such a declaration of trust was as good as an assignation—Mont. Bell's Lect. p. 1175 *Lamb's Trustees* v. *Reid*, Nov. 9, 1882, 11 R. 76. Such a trust was different from, and higher than, a mere agency, as in the case of *Ronaldson* v. *Drummond & Reid*, June 7, 1881, 8 R. 767. The Lord Ordinary was in error as to the effect of the Act 1696, c. 5, for it appeared from the case of *Dempster*, 2 Ross's Leading Cases, Land Rights, and Fulton, *ib.* 636, that the bankruptcy required to bring the Act into operation was notour bankruptcy, and not mere insolvency. The Act gave relief only to creditors to whose prejudice the security was granted, and therefore could only be pleaded by a prior creditor.

The pursuer replied—The instructions of a client in such circumstances, unless express stipulation otherwise could be shown, clearly meant that a heritable security should be obtained in his own name. He was not bound to be satisfied with the personal obligation of his agent, for in the event of the security failing there was nothing more here. Besides, the Act 1696 invalidated the whole transaction; it struck at every debt not contracted at the date of the infeftment—*Maxwell* v. *Drummond's Trustees*, July 2, 1825, 4 S. 137; *Smith* v. *Bedwell*, Dec. 3, 1830, 9 S. 136; *Pickering* v. *Smith*, 2 Ross's

Leading Cases, Land Rights, 647; *Dempster* (*supra*); *Clark* v. *Sim*, July 1, 1833, 6 W. & S. 453.

At advising—

LORD JUSTICE-CLERK—The pursuer of this action, Mrs Black, sues Messrs Curror & Cowper, the defenders, who acted as her law-agents, for repayment of the sum of £800 which they received from her with instructions to invest it on heritable security. The money had been previously invested, and was paid up at Whitsunday 1878. The pursuer alleges that it never was invested by the defenders in accordance with her instructions, and that the defenders are bound to repay it.

The defence is that the money was duly invested on heritable security by being advanced to a builder of the name of Finnie, and that it was secured over certain houses or building lots by two bonds and dispositions in security, taken in favour of the individual defenders as trustees for certain of their clients, and *inter alios* for the pursuer to the extent of £800.

That is the substance of the defence. The real transaction however was rather more complicated. The Lord Ordinary has explained it very fully and clearly, and I shall only refer to its leading features.

I cannot doubt that the peculiar course adopted by the defenders in regard to this sum of money had for its object as far as their clients were concerned to obtain a high rate of interest and to diminish the expense of conveyancing. What was done was this—The defenders were agents for Finnie, who was carrying on some building adventures in the south side of Edinburgh, mainly by means of advances made by his agents. These advances again came partly from defenders' own funds, and partly from money of their clients in their hands. The system was that the funds were not advanced, and were not intended to be advanced, when the alleged securities were granted, but were to be made at intervals afterwards as the work proceeded and the requirements of the builder might render necessary. The alleged heritable security in which the pursuer's £800 is said to have been invested is of a nature very unsound. It is said to be constituted by the two bonds and dispositions in security dated respectively in February and June 1878. The pursuer is not named in either of these conveyances. By the first of these Finnie acknowledges to have received from the individual defenders, out of money belonging to other parties who are not named, the sum of £3000, and in security of this sum certain subjects are conveyed to the individual defenders as trustees for their firm. At this date no part of the pursuer's £800 was in the hands either of Finnie or the defenders. The second bond in June 1878, which is for an additional £1000, only differs from the first by the conveyance being taken to the defenders in trust both for their firm and for other persons who are not named.

It is needless to remark that these instruments by themselves constituted no real right in the pursuer, indeed vested in her no right of any kind, even against the defenders.

But then there is written on the back of these conveyances an undated docquet in the following terms—[*His Lordship read the docquet quoted in the opinion of the Lord Ordinary*]—and these constituted or completed the alleged real security.

No part of the £800 which was paid up to Mrs Black at Whitsunday 1878 had been advanced to Finnie at the date of either of these conveyances. The Lord Ordinary assumes that these docquets were appended in June 1878. Mr Cowper does not say so, nor does he state specifically when this was done.

Finnie suspended payment in February 1879, and Mr Cowper entered into possession. No interest has been paid on the debt since 1888.

The question which now arises is whether these proceedings amount to sufficient implement of the admitted obligation to invest the sum in question.

It is maintained by the defenders that these two conveyances did constitute a valid security to them to the extent of the sums therein acknowledged; that by the docquets written on these bonds the defenders became validly bound to assign the security thereby created to the pursuer; and that such an assignation when granted would have been as effectual to the pursuer as if it had been originally granted to herself.

As far as this action is concerned, the first question is, whether on their own pleading the course adopted by the defenders by which they seem to have assumed the character of debtor, creditor, law-agent, and banker in the same transaction, was due implement of their simple obligation to invest the sum of £800. In the absence of the express sanction of their client to this unusual course, I am of opinion that it was not such implement, and that the defender had no authority to interpose their personal credit or to set up a separate trust, or to stipulate for advances to be made on the pursuer's account by instalments. Even if the defenders should turn out in the end to hold a preferable security for these sums, these devices exposed the client to questions which the agent should have avoided by an investment in ordinary form.

In this view it becomes unnecessary to consider whether these conveyances are struck at by the Act 1696 as securities for a future debt. Whether these bonds were granted by Finnie for a present or for a future debt is more than I have been able to ascertain. They were certainly not granted for any debt in which Mrs Black was the creditor, and it was not within the defenders' instructions to deal with her money on any other footing. Mr Cowper's own account of the transaction leaves the matter in great obscurity—"That £3000 did not belong to any person at the date of the bond, because it had not been given in any way. . . . Finnie granted the bond for £3000, and he was entitled to get £3000 from us, and my account shows that he got it from time to time as the buildings advanced. . . . The reason why we came to take those two bonds in trust was because we were not very sure whose money would require to be appropriated. I expected to have clients' money to lend, and to have their consent to do so. Accordingly, to put the thing in shape, we took the bonds in our own names. When the money was advanced, I put on the declaration that is upon the bonds. That put the whole money in the bonds beyond our control. The sums in the bonds were stated in them to be paid out of trust moneys, and the trust was afterwards declared." So that when these conveyances

were granted no consideration had been given for them. No money had been advanced, and no debt had been incurred by any of the parties. The bonds remained in the hands of Curror & Cowper, to operate as a security to any of their clients whose money they might happen to have in their hands. In fact, not only the debt, but the whole transaction, was future, unless indeed by the conception of the instrument the defenders became bound to advance the money at some indefinite time. I need not point out the hazards of such an arrangement; but if the defenders bound their client to such an undertaking, they acted entirely without authority; and if it be said that they only bound themselves, it might be a question whether any such obligation for the future was personally undertaken by them under the terms of the conveyances. I remark in conclusion that in any view the bonds could only be available for sums actually advanced under them, and that of the whole sums advanced from money of clients credited after Whitsunday 1878, amounting to £4000, not above £1000 seems to have been advanced before Finnie's stoppage in February 1879, of which Mrs Black's proportional share would not exceed £200.

There is no ground for reflecting on the perfect good faith of the defenders. The temptation to incur these risks was for their clients, not for themselves. They got further involved with Finnie than probably they ever intended, but that is an ordinary result of such erratic proceedings.

Lord Young, Lord Craighill, and Lord Rutherfurd Clark concurred.

The Court adhered.

Counsel for Pursuer (Respondent)—Sol.-Gen. Asher, Q.C.—Strachan. Agents—Mack & Grant, S.S.C.

Counsel for Defenders (Reclaimers)—J. P. B. Robertson—M'Kechnie. Agents—Party.

Wednesday, May 27

FIRST DIVISION.

[Dean of Guild of Edinburgh.

JOHNSTON (PROCURATOR-FISCAL OF THE CITY OF EDINBURGH) *v.* THE EDINBURGH GAS-LIGHT COMPANY.

Burgh — Dean of Guild — Jurisdiction — Edinburgh Municipal and Police Act 1879 (*42 and 43 Vict. cap.* 132), *secs.* 5, 154.

The Dean of Guild Court of Edinburgh has jurisdiction over the regality of the Canongate, in respect that the regality of the Canongate is situated within the police boundaries of Edinburgh as defined by the Edinburgh Municipal and Police Act 1879.

The Procurator-Fiscal of the City of Edinburgh presented a petition in the Dean of Guild Court of Edinburgh praying to have the Edinburgh Gas-Light Company interdicted from proceeding with the erection of certain buildings in Gladstone Court, Canongate.

He averred that the Gas Company were about to erect a building to be used as a meter testing-house, and that in contravention of the Edinburgh Municipal and Police Acts of 1879 and 1882, as no plans had been submitted to or warrant for the erection of these premises obtained from the Dean of Guild Court.

He also alleged that a complaint had been made to him by a proprietor contiguous to the company, and that the present petition had been presented to ensure that the proposed building should not encroach upon the rights of others, or be attended with danger to the public. It was therefore necessary, he averred, that the respondents should submit plans to the Dean of Guild Court and obtain the usual warrant before proceeding with their operations.

The respondents denied that their operations would be attended with danger or inconvenience to the public, or that they would encroach upon the rights of others. They also denied that any Dean of Guild warrant was necessary.

They averred that their Act of Parliament (3 Vict. c. 13) gave them power to execute the works contemplated; that they had executed similar works without the Dean of Guild's authority upon previous occasions; and that in 1875 the then Dean of Guild had pronounced an interlocutor finding that the company's engineering works were not within the cognisance of his Court, or subject to its control. The Act founded on provides by section 11—"That it shall be lawful for the said Committee of Management . . . . to make and erect such retort-houses, gasometer-houses, receivers, and other buildings; to construct and erect retorts, gasometers, cisterns, engines, and other apparatus, cuts, drains, sewers, water-courses, reservoirs, and all other works; and to sink and lay pipes of such dimensions and construction, and in such manner, and at and in such parts and places, within the bounds of the said recited Acts and this Act as the said Company or the said Committee of Management shall think necessary or proper for carrying the purposes of said recited Acts and this Act into execution."

The respondents pleaded—"(1) That they were entitled by virtue of this provision to carry through the works complained of without any warrant by the Dean of Guild."

On 11th February 1885 the Dean of Guild pronounced the following interlocutor:—"Finds that the building proposed to be erected by the respondents is, as shown on the plan, on ground immediately adjoining that of several other proprietors: Finds that the respondents proceeded to erect the building without a warrant, and have maintained that the jurisdiction of this Court is excluded by virtue of the Act 3 Vict. c. 13, sec. 11: Finds that the jurisdiction of the Court is not excluded by the Act, either expressly or by implication: Therefore repels the first plea-in-law stated for the respondents: continues the interdict against the respondents proceeding further with the operations complained of until the warrant of Court shall be obtained: Therefore finds them liable to the petitioner in expenses, &c.

"*Note.*—The respondents maintained that they were entitled to erect all buildings connected with their works by virtue of section 11 of the Act 3 Vict. c. 13, without requiring any warrant from this Court. The petitioner main-