Friday, June 9.

FIRST DIVISION.

[Lord Craighill.

PEARSON (M'ALL'S TRUSTEE) *v.* FERGUSON, DAVIDSON, & CO.

Bankrupt—Statute 19 *and* 20 *Vict. cap.* 79, *Sec.* 111 *—Sequestration.*

A bankrupt after the date of his sequestration, but before it had been advertised or made known in any way, paid a debt and got from his creditor a bill (which was the ground of that debt), accepted by the bankrupt and several co-acceptors, and a letter of guarantee from another party. In an action by the bankrupt's trustee for repetition of the money so paid—*Held* that the trustee by merely restoring said bill and letter of guarantee to the creditor might not "replace him in the situation in which he stood" in the terms of the 111th section of the Bankrupcy Act, in respect that it was alleged that the co-acceptors had subsequently become insolvent and that the guarantor had left the country, and inquiry ordered as to the truth of the said allegations.

On 31st July 1874 Mr Joseph M'All and six other co-acceptors granted to Mr William Brodie a bill for £289, payable three months after date, in payment of some joiner work done for the Rose Building Association. Of the same date he received from Mr John Kerr Brydon a letter of guarantee, that in the event of the bill not being paid by the acceptors on maturity, he (Mr Brydon) would pay it. The bill was afterwards endorsed to the defenders, and with it the letter of guarantee was handed to them. In November, the bill not having been paid, the defenders began to press Mr Brydon for payment, and about this time M'All fell into difficulties. On 5th February 1875 he was sequestrated, and the pursuer appointed trustee. On 7th February Mr Garson, S.S.C., agent for the bankrupt and partner of Mr Brydon, paid to the defenders' agents the amount due under the bill and expenses, in all £294, 1s. 2d., and got up from them the bill and letter of guarantee. At this time the bankrupt's sequestration had not been made public, and the defenders and their agents were all ignorant of it. They averred Mr Garson took the receipt in name of Mr George Mill, the bankrupt's brother-in-law, but Garson stated in his evidence that the money actually was the bankrupt's. The defenders averred that they believed that Mr Brydon was the party who was paying the money under the letter of guarantee granted by him. The trustee raised this action for recovery of the £294, 1s. 2d., and pleaded—"The sum libelled having been paid by the bankrupt to the defenders after the date of sequestration, the pursuer is entitled to decree, with expenses as concluded for."

The defenders pleaded that the pursuer's statements were unfounded. The money not having been the bankrupt's; and "(2) The defenders having acted in perfect *bona fides* in the transaction in question, and having delivered up their said documents of debt in return for said payment, cannot now be called upon to make restitution of said sum."

The Lord Ordinary, after proof had been led, pronounced the following interlocutor:—

"*Edinburgh, 20th December* 1875.—The Lord Ordinary having heard parties' procurators on the closed record, productions, and proof; and having considered the debate and whole process—In the first place finds, as matters of fact—(1) That the estates of Joseph Robertson M'All, upon which the pursuer is trustee for the creditors, were sequestrated on 5th February 1875. (2) That the sum of £294, 1s. 2d., being the £289 contained in the bill referred to in the record, and the relative expenses, was paid to the defenders through Mr J. B. Sutherland, of the firm of P. S. Beveridge, S.S.C., Leith, the law-agents of the defenders, on 8th February 1875. (3) That the said sum of £294, 1s. 2d. was so paid by the hands of Mr W. R. Garson, S.S.C., the agent of the bankrupt, in the presence of the bankrupt, and with the money of the bankrupt. (4) That at the time when the said payment was received as aforesaid, the sequestration of the estates of the said Joseph M'All had not been gazetted, and both the defenders and their said agents were ignorant that it had been awarded. (5) That in exchange for the said payment there were delivered up by the said J. B. Sutherland the said bill, as well as the relative letter of guarantee and the receipt, both likewise referred to on the record. (6) That the said bill, letter of guarantee, and receipt, have been produced in the present process; and should the said sum of £294, 1s. 2d. be repaid to the pursuer, these documents, *simul ac semel*, will, according to the offer made by the pursuer at the debate, be returned by the pursuer to the defenders, that the defenders may be replaced in the situation in which they stood when the said sum of which repetition is sued for was received. And (7) That it has not been proved that any loss or damage which the defenders would have escaped had the said payment not been received, and the said documents not been delivered as aforesaid, has been, or in case decree as concluded for be pronounced, will be sustained by the defenders: In the second place, finds, as matter of law, that, the facts being as above set forth, the pursuer is entitled to recover the sum sued for, on condition that the said bill, the said letter of guarantee, and the said receipt shall *simul ac semel* be returned: Therefore repels the defences, and decerns the defenders to make payment to the pursuer of the said sum of £294, 1s. 2d., with interest at the rate of 5 per cent. per annum from the date of citation, being the 3d day of July 1875, until payment, the pursuer upon receiving payment returning the said bill, relative letter of guarantee, and receipt to the defenders as their own proper documents: Finds the pursuer entitled to expenses, of which allows an account to be given in, and remits that account, when lodged, to the auditor for his taxation and report.

"*Note.*—The present action is raised by the pursuer as trustee in the sequestration of Joseph Robertson M'All, for repetition of the sum of £294, 1s. 2d., the contents of a bill and relative expenses due by the bankrupt, paid after his sequestration. The record has not been satisfactorily framed on the part either of the pursuer or of the defenders. The action really is rested on the 111th section of the Bankruptcy (Scotland) Act, 1856; but, on the one hand, the pursuer in

stating his case overlooked the provision that a person in the position said to be occupied by the defenders "shall not be liable to repay to the trustee the amount so received unless the trustee shall replace him in the situation in which he stood; and, on the other hand, the defenders in stating their case omitted to refer to the condition that, even should they be so replaced, they are not liable in repayment unless they shall be reimbursed 'for any loss or damage.' Things, however, were so far put right at the proof, and the case must consequently be decided on the assumption that all the provisions of this section of the Act were in the view of the parties, and are to be taken into account in the decision. Three questions were raised at the debate. The first is, Whether the sum received by the defenders was the money of the bankrupt? the second, Whether the defenders, when they received the payment, were ignorant of the sequestration? and the third, Whether the conditions on which alone the defenders canbe held liable in repetition have been or can be fulfilled.

"As to the first of these questions, the Lord Ordinary entertains no doubt. He thinks it proved that the money received by the defenders was the money of the bankrupt. All which was suggested in opposition to this view was a conjecture that the money might have come from Brydon, by whom payment of the bill had been guaranteed to Brodie, the drawer. But none of the facts which have been proved is corroborative of this supposition; and the way in which the settlement was effected is, in the opinion of the Lord Ordinary, real evidence that the sum received by the defenders did not come from Brydon. There is, as the Lord Ordinary thinks, only one conclusion for which there is warrant in the evidence, and this conclusion is, that the money was the money of the bankrupt.

"On the second question there was no controversy at the debate. The evidence indeed rendered controversy on this point almost impossible, and the consequence was that the counsel for the pursuer conceded that the case must be decided on the footing that the defenders, as well as their agents, when they received payment of the sum of which repetition is sued for were in ignorance of the sequestration of the estates of the bankrupt.

"The third question presents two points for consideration. The first is, whether by restoration of the documents to be returned the defenders will be replaced in the situation in which they stood? and the second is, whether loss or damage of which they must be reimbursed has been proved? With reference to the former, the fact is, that the documents delivered up when the money was received by the defenders are to be returned, and this, the Lord Ordinary thinks, is all which, in this case, is necessary to replace the defenders 'in the situation in which they stood'—taking these words in what the Lord Ordinary thinks their true acceptation. The counsel for the defenders, indeed, argued that inasmuch as Brydon, the granter of the letter of guarantee, had left this country in the interval, the defenders could not and would not be replaced in their former situation. But what was thus urged is, as the Lord Ordinary thinks, an argument misapplied. The facts relied on may or may not afford evidence that there is loss or damage which must be reimbursed, but they have no bearing on the question whether the defenders will, when repossessed of the documents which are to be returned, be replaced in the situation in which they stood. The defenders were creditors before; they are by virtue of the restitution of the documents which were the vouchers of their debt to become creditors again; and this the Lord Ordinary considers is all which is required to replace them in the situation to which, before they can be held liable in repetition, they must be restored.

"As to the condition relative to reimbursement of loss or damage, the Lord Ordinary thinks that loss or damage has not been proved, and consequently that the relative provision of the statute is not in this case brought into operation. The view upon this subject presented for the defenders was that recourse upon Brydon, which in February 1875 was open, is now cut off, and in consequence that the debt in question, which but for the payment received by the defenders might have been, cannot now be recovered from Brydon. The error which is here committed, as the Lord Ordinary thinks, lies in assuming that the adoption of proceedings against Brydon in February 1875 would have resulted in his payment of the debt. The facts of the case do not lead to this conclusion. His circumstances were, and for a time had been, embarrassed. Many of his obligations, events have shewn, were of a peculiarly embarrassing character. Day by day his creditors were becoming more urgent, and to escape from demands which he could not meet, and from proceedings which in consequence were about to be taken against him, he, about the middle of March, secretly left this country for America. The counsel for the defenders argued as if the defenders' diligence against him was at the beginning of February already ripe for execution. But this is a misapprehension. In the first place, the guarantee from Brydon had not at the time in question been assigned, though the letter containing the guarantee had been delivered to the defenders. And, in the second place, the guarantee did not render Brydon liable to summary diligence. An ordinary action was indispensable; and it seems to the Lord Ordinary to be certain that, in the natural course of events, decree would not have been obtained by the defenders in time for his incarceration upon it before the time at which he absconded. Things, therefore, so far as the defenders are concerned, appear to be in the same situation now as that in which they were at the time when the sum of which repetition is claimed was received by the defenders. In other words, this payment has not been shewn to be the cause of loss or damage which must be reimbursed.

"Brodie, the drawer of the bill, it may be added, and several of the acceptors, have become bankrupt since the beginning of February, but upon this circumstance little or no stress was laid by the counsel for the defenders. The fact is, that the persons referred to were as unable to pay their debts at the period in question as they were when their insolvency was avowed; and whatever may now be recoverable from their estates is as much as could have been recovered if the defenders had continued in possession of the bill, upon which they were debtors.

"These are the views upon which the Lord Ordinary has come to the conclusion that there is no loss or damage of which the defenders must be reimbursed under the concluding words of the 111th section of the Bankruptcy (Scotland) Act 1856, before being forced to repay the sum sued for in the present action."

The defenders reclaimed, and argued—(1) That the money was not paid out of the bankrupt's funds, but out of Brydon's; (2) the defenders having paid in *bona fide*, come under the provisions of the 111th section, and cannot now, by the mere return of the documents of debt, be placed in the position in which they stood at the date when the money was paid. Mr Brydon, then solvent, had now fled the country, and several of the co-acceptors on the bill were now insolvent. The 3d section is as follows:—"All payments and preferences and securities obtained by or granted to prior creditors, and all acts done or deeds granted by the bankrupt after the date of the sequestration, and before his discharge, out of or in relation to the estate—unless with the consent of the trustee—shall, in the event of sequestration being awarded, be null and void; but if the possessor of any bill or promissory note, which is payable by the bankrupt, with recourse on other parties, or of a security for a debt due by the bankrupt, shall have received payment of his debt from the bankrupt in ignorance of the sequestration, and given up such bill or promissory note or security to the bankrupt, such person shall not be liable to repay to the trustee the amount so received, unless the trustee shall replace him in the situation in which he stood, or reimburse him for any loss or damage."

The pursuers argued—(1) The money certainly was the bankrupt's. He was the first acceptor, and the only one charged to pay, and was said by Garson to have paid the money. (2) The defenders are fully replaced by having the grounds of debt handed to them. The co-acceptors were in difficulties in February 1875, although perhaps not bankrupt, and Brydon was not solvent at that time either.

At advising—

Lord President—There can be no doubt of the general rule that if a bankrupt pays the debt of any creditor after he has been declared bankrupt the payment is invalid, and the bankrupt's trustee can recover the amount so paid.

But an exception, or rather some exceptions, have been introduced by the 111th section of the Bankruptcy Act, and one of these exceptions is thus expressed—"If the possessor of any bill or promissory note which is payable by the bankrupt, with recourse on other parties, or of a security for a debt due by the bankrupt, shall have received payment of his debt from the bankrupt in ignorance of the sequestration, and given up such bill, promissory note, or security to the bankrupt, such person shall not be liable to repay to the trustee the amount so received, unless the trustee shall replace him in the situation in which he stood, or reimburse him for any loss or damage."

Now, in the present case the pursuer brought his action for repayment of this sum of money, (the pursuer being trustee in the sequestration of M'All) simply on the footing that it was paid by the bankrupt in extinction of a debt after the date of the sequestration.

Now, this he was certainly entitled to do if the case did not fall within this 111th section of the statute, and he plainly assumed that it did not, for we find nothing in his condescendence or plea in law but the assertion that this is a case of payment after the bankrupt's sequestration.

But the allegations of the defenders introduce an entirely new element into the case. They explain the circumstances that occurred in connection with the payment of this money. They point out that the discharge bears to be not to the bankrupt, but to another person, and that the money was not paid by the bankrupt, but by a person who was his agent, and who represented that it was paid for the bankrupt by a friend. They also say that although "they have since ascertained that the estates of M'All were sequestrated on his own petition on 5th February 1875, the defenders knew nothing of this when said money was paid. No notice of said petition for sequestration or of the deliverance thereon had appeared in the *Edinburgh Gazette* or any public print; and no notice of said sequestration did appear until the month of March."

Now, the payment having been made in return for the delivering up of a bill of exchange, upon the face of which not only the bankrupt but several other parties were liable, and of a letter of guarantee by another party, altogether this seems to me to bring the case within the 111th section of the Act, because the defenders were in possession of a bill payable by the bankrupt, with recourse on other parties, and also in possession of a security for a debt due by him in the shape of the letter of guarantee, and were also, they allege, in ignorance of the sequestration. They have also, I think, probable grounds for asserting that the money did not come out of the funds of the bankrupt. I do not by any means say that that is the conclusion to be drawn from the proof; indeed, the contrary seems to be the truth, but they had plausible reasons for making that defence.

The other ground was, however, a good defence to the action unless the trustee offered to replace the defenders in the same situation in which they stood before payment was made, or to reimburse them for any loss they might have sustained by giving up these documents. The pursuer makes no such offer on record, nor does the clause of the Act appear to have been noticed till the case was debated on the proof. Now the record contains a statement that the defenders received payment in ignorance of the sequestration and believing that the bankrupt was still *in foro*. That avowal certainly seems to me to be made in good faith, and there is no reason whatever to suppose that they had any knowledge of the sequestration.

In these circumstances, although according to the strict justice of the case we should perhaps assoilzie the defenders, I am unwilling to do so without some further inquiry that we may adjudicate between those parties according to their real rights, and therefore unfortunately we are not now in a position to dispose of it.

I cannot agree with the Lord Ordinary that the trustee sufficiently complies with the conditions of the statute by returning the documents delivered up when the money was received by

the defenders, for it is plain that although the documents might have been at that date perfectly good and sufficient, they may now be worthless from various reasons. For instance, take the letter of guarantee: when that was granted there was a solvent party to fulfil the obligation it contains. He was open to the diligence of the defenders, but when they had received payment their hands were tied, the debt was extinguished, and they could recover from nobody.

That gentleman, we are told, has now left the country, but it is not said that he is insolvent; therefore returning this document does not replace Messrs Ferguson, Davidson, & Co. in the position in which they stood, nor reimburse them for whatever loss or damage they may have sustained. They can make nothing of that letter now, but there is no reason why they might not have done so then. Then, on the bill there are several co-acceptors with the bankrupt; some of them, as we can see from this proof, are now insolvent, but of some we have heard nothing and know nothing.

Now it rather appears to me that the defenders having had parties bound to them thus at the date of payment, are entitled to say, 'You cannot replace me in my former position by merely giving up these documents; you must do something more than that." It is for the pursuers to show, if they can, that the defenders could make nothing of these documents at that time. I am not inclined to lay down an absolute rule as to the *onus* of proof, but in this case it is evidently not compliance with the statute merely to deliver up the documents.

I am clear there must be an inquiry, and I shall be glad if your Lordships agree with me to hear what parties can arrange as to how this is to be conducted, or whether they cannot ascertain the facts by arrangement without the necessity of formal proof.

Lord Deas—I am of the same opinion as your Lordship. There are two points in the case that are perfectly clear: first, that the money paid was the money of the bankrupt, for I think that he would have been a very adventurous man that paid it for him; the second is, that the money was received by the defenders in *bona fide*. Now what are the consequences of this? I agree with your Lordship that it would not be sufficient for the trustee merely to give up the documents; he must in the circumstances replace the defender in as good a position as he was in before. Unfortunately we have no averments going to solve this question. There is no statement, on the one hand, as to the state of the party who gave the letter of guarantee, nor, on the other, as to the parties who accepted the bill along with the bankrupt. The matter of fact ought to be ascertained, but how is this to be done? As to that, I had rather not say anything till I see if the parties can agree to some way of doing it.

Lord Ardmillan—This case falls under sec. 111 of the Bankruptcy Act, and there are two facts in it beyond all doubt:—The first is perfectly plain, and is practically admitted, that Ferguson, Davidson, & Company were just creditors, and received payment of this debt *in bona fide*. The second is not admitted, and although after reading all the evidence I think it is the case, it is perhaps a little doubtful, viz., that the debt was paid out of the funds of the bankrupt. I am satisfied, I say, from the proof that that is so, but it is not so clear.

The pursuer, trustee on M'All's estate, which was sequestrated on his own petition on 5th February 1875, seeks to recover a sum of money in circumstances which bring him under this 111th section—that section introduces a provision that he can recover only on condition of replacing the creditor who has received payment *in bona fide* in the same position as that in which he stood. The word "unless" seems to have the object of showing that he must replace him. I cannot hold that in this case to hand him these papers is to replace him in as good a position as he held before payment was made. It is plain there must be some inquiry. One or two of the parties to the bill here are not accounted for; we cannot say they could have paid at the date of payment, and we cannot say that they are insolvent now. We cannot therefore do more than order an inquiry into the present solvency of parties as compared with their solvency at the date of payment.

If there has been any loss by insolvency, that is the loss and damage contemplated in the section of the statute, and the trustee cannot cut down this transaction without reimbursing the defenders for it.

Lord Mure—I entirely concur with your Lordship in thinking there must be further inquiry here. It is plain from the statute that the pursuer in a simple petitory action like this cannot recover unless he can replace the defender in the situation in which he stood before, and how he is to replace him must be ascertained by inquiry.

The Lord Ordinary's interlocutor was recalled, and further consideration of the case superseded till parties should agree upon admissions of a course of inquiry.

Counsel for the Pursuers — Balfour — Keir. Agents—T. & W. A. M'Laren, W.S.

Counsel for the Defenders — Trayner—Maclean. Agent—P. S. Beveridge, S.S.C.

Saturday, June 10.

FIRST DIVISION.

[Lord Young, Ordinary.

NELSON, DONKIN & CO. *v.* BROWNE AND OTHERS.

Process—Competency—Summons—Value of Cause—Act 50 *Geo. III. cap.* 112, *sec.* 28.

A number of underwriters were sued for payment of £60, 13s. 1d., the sum due upon a policy of insurance, "and that according to the several proportions for which the said policy was underwritten by them, viz., the sum of £1, 4s. 3½d. sterling each."—*Held* that the objection that the process was not