Thursday, March 20.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

COLQUHOUNS' TRUSTEE *v.* CAMPBELL'S TRUSTEES.

Bankruptcy—Vesting of Property in Trustee—Tantum et tale—Fraud by Bankrupt—Breach of Trust—Agent and Client—Fiduciary Relation—Trust.

A client lent a sum of money through his agents, and as security therefor took a bond and disposition in security over certain heritable subjects. The agents wilfully failed to record the bond, and subsequently obtained a security in their own favour over the same subjects, which they duly recorded. The agents thereafter became bankrupt, and the subjects having been sold at the instance of a prior bondholder, a multiplepoinding was raised with regard to the balance of the price, in which claims were lodged by the trustee in bankruptcy and by the client. The Court *preferred* the claim of the client, upon the ground that the agents in failing to record the bond and taking and recording a subsequent conveyance in their own favour had committed a fraudulent breach of trust, and that the trustee could not take advantage of this fraudulent breach of trust to the effect of obtaining for the general creditors a priority over the client.

This was an action of multiplepoinding brought by John Wilson, C.A., Glasgow, as trustee on the sequestrated estates of James Colquhoun and of David Turnbull Colquhoun and of the firm of J. & D. T. Colquhoun, writers in Glasgow, as real raiser, in name of the National Bank of Scotland, Limited, as pursuers and nominal raisers. The fund *in medio* was a sum of £653, the balance of the purchase price of certain subjects in Glasgow formerly belonging to one John M'Phail, which had been sold by the City Commercial Restaurant Company, Limited, under the power contained in a bond and disposition in security in their favour dated in July and recorded in August 1885. These bondholders, after deducting the sums due to themselves under their bond, and paying the sums due to another *pari passu* bondholder, had consigned the fund *in medio* in the hands of the nominal raisers.

Claims were lodged (1) by Colquhouns' trustee the real raiser, (2) by the trustees of the late Mrs Catherine M'Callum or Campbell, and (3) by Alexander Reid.

Colquhouns' trustee founded upon an *ex facie* absolute conveyance of the subjects sold as above mentioned dated 17th and duly recorded in the Register of Sasines 20th, both days of February 1899, granted by M'Phail in favour of the bankrupts, in respect of which he claimed a preference to the extent of a sum of £1768 alleged to be due by M'Phail to the bankrupts' estate at the date of their bankruptcy. The claimants Mrs Campbell's trustees founded upon a bond and disposition in security in her favour over the subjects above mentioned dated 24th September 1896, which had been carried through by the bankrupts as law-agents for both parties to the transaction, and which they had, in breach of their duty, failed to record in the Register of Sasines. The claimant Alexander Reid claimed upon a bond over, *inter alia*, the subjects above mentioned dated 10th September 1877, which had also been carried through by the bankrupts as agents, and which also in breach of their duty they had failed to record in the Register of Sasines.

Proof *habili modo* was allowed, reserving therefrom all questions of mere accounting.

On 20th July 1901 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor:—"Repels the claim for John Wilson (Colquhouns' trustee), and sustains the claims for Mary Campbell and others, and Alexander Reid; and, of consent of said last-mentioned claimants, ranks and prefers them upon the fund *in medio* rateably and in proportion to the amounts due under their respective bonds, and decerns: Finds the said John Wilson, as trustee foresaid, liable to the said other last-mentioned claimants in expenses, including all expenses formerly reserved; and remits," &c.

Opinion.—"The question in this multiplepoinding relates to a competition which has arisen between the trustee for the creditors of the Messrs Colquhoun, writers in Glasgow, and two of the firm's former clients who had lent money through the Colquhouns to a certain Mr M'Phail upon bonds and dispositions in security. The fund *in medio* is the balance of the price realised on the sale of the subjects of the security after paying the debt due to a previous bondholder. There could have been no question as to the preference of the two clients if their bonds and dispositions in security had been duly recorded, as of course they ought to have been. But on Messrs Colquhoun's bankruptcy it appeared that, contrary to their instructions and to their duty, and contrary also to their assurances to their clients, they (the Colquhouns) had refrained from recording the two bonds, and had subsequently taken a security in their own favour from the same debtor over the same subjects, which security took the form of an absolute disposition which they duly recorded. On that disposition the trustee now founds as giving him a preference over the fund to the extent of a sum of £1768, which he alleges to have been due by the granter (M'Phail) to the Colquhouns at the date of their bankruptcy; and if that preference is made good there can be no doubt that the trustee must carry off the whole fund, which it appears only amounts to £653, 14s. 1d.

"The questions, however, are (1) whether M'Phail was really due the Colquhouns the said sum of £1768, or any sum? and (2)

whether, assuming that proved, the trustee can, any more than the bankrupts, take advantage of the breach of trust which the latter committed by failing to record their client's securities and then recording their own subsequent security, so as to obtain a preference for themselves? The first question cannot, it is conceded, be determined at this stage or without further inquiry. Upon the account between M'Phail and the bankrupts, as it stands in the latter's books, M'Phail appears to be not their debtor but their creditor for a large amount. But the trustee has prepared, from an examination of the books generally and other materials, a corrected account, by which the balance is turned the other way, and which brings out as due to the bankrupts the sum of £1768, which I have already mentioned. The competing claimants dispute the correctness of this account, and do so on *prima facie* strong grounds. But the matter is of course one for full inquiry, and it cannot be said that the inquiry is as yet complete.

"It appears to me, however, that the competition between the parties may be determined by the decision of the second question, which is a question of law, and may be decided without further inquiry. And having considered the argument which I heard the other day, I have come to the conclusion that the decision must be against the trustee and in favour of the competing claimants.

"It appears to me that if a law-agent, being employed and having undertaken to make an investment for a client upon a certain security, and being bound as part of his duty to complete the security, omits to do so or refrains from doing so, and thereafter proceeds to obtain a preference over the subject of the security for a debt of his own—I say it appears to me, and I cannot doubt, that he thereby puts himself in the position of a trustee who has committed a breach of trust; and that if he becomes bankrupt the trustee for his general creditors is equally with himself disabled from taking the benefit of his breach of trust. In the case of a security over moveables, completed by intimation or arrestment or other diligence, this principle has been expressly affirmed in the case of *More* (*Graeme's Trustee*) v. *Giersberg*, 15 R. 691. And it does not appear to me to make any difference although the subject of the competing securities is a heritable estate. The affirmative might perhaps have been argued prior to the decision of the House of Lords in the case of the *Heritable Reversionary Company* v. *Miller*, 19 R. (H.L.) 43, but it is not in my opinion maintainable now. For it being once conceded that as between a law-agent and his client there is a fiduciary relation, the result of what took place here was in law really this. The bankrupts being bound under their trust to complete their clients' security by recording their bonds, must be held in law to have taken and recorded the subsequent absolute disposition primarily for their clients, and only in reversion for themselves. In short, they must be held to have done in the matter what it was their duty to do. In that view, the absolute disposition was at the date of their sequestration held primarily in trust for the two competing claimants, and the case accordingly falls not only substantially but precisely within the rule affirmed and applied by the House of Lords in the latter case.

"The result is that the claim of the trustee will be repelled and the claims of Campbell's trustees and of Alexander Reid sustained. Expenses will of course follow the result."

The claimant and real raiser, Colquhouns' trustee, reclaimed, and argued—The trustee for creditors was not bound by the omission of a bankrupt to record a bond. Where a security had been perfected at the date of bankruptcy it would avail an individual creditor against the trustee in bankruptcy as representing the general creditors, but where it was subject to any defect, or required something to be done for its completion, it could not be made good after bankruptcy. No mere personal liability or obligation on the part of the bankrupt would affect the heritable estate vested in his trustee. Accordingly, even if the absolute conveyance to the Colquhouns were swept away the other claimants would have had no preference at the date of the bankruptcy — *Miller* v. *Wright*, July 5, 1836, 14 S. 1087.

Counsel for the respondents were not called upon.

At advising—

LORD PRESIDENT—The competition in this case is between a client and the representatives of a deceased client of J. & D. T. Colquhoun, writers in Glasgow, on the one part, and John Wilson, the trustee on the sequestrated estates of J. & D. T. Colquhoun on the other part. The claimant Alexander Reid on 10th September 1877, by the Messrs Colquhoun acting as his law-agents, lent to John M'Phail, upon a bond and disposition in security over property belonging to him, a sum of £1500, of which £100 was afterwards repaid but the remaining £1400 of which is still due. The now deceased Andrew Campbell, represented by the claimants Mary Campbell and others, in or about June 1880, by the Messrs Colquhoun acting as his law-agents, lent to John M'Phail a sum of £2000 in respect of which a bond and disposition in security dated 24th September 1896 is now held by these claimants. The Messrs Colquhoun had been employed to effect the loans in the ordinary way, and to obtain proper heritable securities for their clients in respect of them, but upon their bankruptcy it was ascertained that they had, in violation of their duty to their clients, abstained from recording the bonds and dispositions in security which they had taken for their clients, and had subsequently obtained a security in their own favour from John M'Phail over the same subjects in the form of an absolute disposition which they had duly recorded. The trustee claims a preference under that disposition in respect of certain sums of money which he alleges to have been due by John M'Phail, the granter,

to Messrs Colquhoun at the date of their bankruptcy, and if that claim was sustained nothing would remain for the other claimants.

It is clear that the Messrs Colquhoun were guilty of a gross breach of professional duty, and also of a gross fraud, in abstaining from recording the bonds and dispositions in security obtained by them for the clients above mentioned from John M'Phail, and thereafter obtaining and recording the absolute disposition so as to give them a preference over the clients. It appears to me that they stood in a fiduciary relation to these clients, and that the breach of professional duty which they thus committed was, in legal character and estimation, a breach of trust, so that if the question had arisen between the claimants, or representatives of the claimants, and the Messrs Colquhoun, they could not have maintained as against these clients the advantage which they got by recording the subsequent security in their own favour. This being so, the question comes to be whether a trustee in bankruptcy is in a better position than the bankrupts in this matter, so that he can take advantage of their fraudulent breach of duty and of trust to their clients to the effect of obtaining for their general creditors a priority over the clients and their representatives. I concur with the Lord Ordinary in thinking that the trustee in bankruptcy cannot in this matter be in a better position than the bankrupts, and that consequently his Lordship is right in sustaining the claim of the clients and their representatives in a question with the trustee. Messrs Colquhoun, in their character of law-agents, placed themselves in a fiduciary position towards their clients, and were guilty of a breach of trust in a question with them, and I consider that the trustee in bankruptcy, claiming in the interest of the general creditors, cannot be in a better position than the bankrupts themselves. I think with the Lord Ordinary that the absolute disposition must, in the circumstances, be held to have been obtained primarily for their clients, and only secondarily for themselves and anyone claiming through them.

In the case of *Graeme's Trustee* v. *Giersberg*, 15 R. 691, it was held that a trustee in bankruptcy had no higher right than the bankrupt, who could not have taken benefit from his failure to intimate a marriage-contract trust to the testamentary trustee to the prejudice of the beneficiaries under the trust, whose interests it was his duty to protect. The general doctrine upon which that decision proceeded is in my opinion applicable to the present case. I also agree with the Lord Ordinary in thinking that the case of *The Heritable Reversionary Company, Limited* v. *Millar*, 19 R. (H.L.) 43, is an important authority for the same doctrine. The case of *Millar* v. *Wright*, relied upon by the trustee, does not appear to me to have any application to the present case.

For these reasons I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

LORD KINNEAR—I agree and have very little to add. I may say, however, that I think it highly satisfactory that we should have heard a forcible argument from Mr Craigie, because the judgment of the Lord Ordinary is so obviously just that there might perhaps have been some risk of its being assumed too hastily that there was nothing to be said against it. Mr Craigie's argument, however, showed that there was a point entitled to consideration. But after considering it with the attention it deserved, I am satisfied with your Lordship that no valid ground has been stated for interfering with the judgment of the Lord Ordinary. The argument was that a trustee in bankruptcy takes the estate as it stood in the person of the bankrupt for distribution among all the creditors, and that accordingly where securities are already perfected they will avail an individual creditor, but where a security is subject to some defect or requires something to be done for its completion, it cannot be made good after bankruptcy. The rule relied on is that the trustee takes the heritable estate of the bankrupt subject to the conditions which affect the constitution of the real right in his person, but free from personal liabilities or engagements which would have bound the bankrupt himself if he had been solvent. That is a correct statement of the law, but the decision in *The Heritable Reversionary Company v. Millar*, 19 R. (H.L.) 43, shows that it is subject to this qualification, that the estate must honestly belong to the bankrupt, and that the creditors cannot enlarge the estate for distribution by adopting a fraud on the part of the bankrupt, or doing something which would have been a fraud if it had been done by him when solvent. That is consistent with the decision in *Mansfield* v. *Walker's Trustees*, 11 S. 813, which is perhaps the best illustration of the general rule on which Mr Craigie relied. In that case a Writer to the Signet had borrowed money on the security of an estate known by the general name of Hillside, and disponed not the whole estate but merely a small part of it, described as Hillside proper, so as in effect to give the lender a perfectly ineffectual instead of a valuable security. When he became bankrupt he proposed to grant a bond of corroboration, giving in form the security which he had contracted and was bound in common honesty to give. But it was held that after bankruptcy he was no longer in a position to do this, because his estate had passed to his creditors subject to the general rule which I have stated. But both in this Court and in the House of Lords it was held to be proved that there was no fraud on the part of the borrower, and the conclusive evidence of his good faith was that if the omission of great part of his land from the security had been intentional, its only purpose must have been to enable him to resort to the land afterwards as a fund of credit, and though five years elapsed during which he was in embarrassed circumstances, he never tried to avail himself

of that resource, which, if he had been fraudulent, it was the sole object of his fraud to obtain. There was accordingly no element of fraud, and the creditors took advantage of the general rule. But in the present case the note of fraud, which was absent in *Mansfield* v. *Walker*, is conspicuously manifest, because the bankrupts showed their purpose by taking a conveyance in their own favour. There was a gross fraud, and the creditors cannot take advantage of it without making themselves act and part in the crime. It is a general rule of law and morals that nobody can wilfully take advantage of a fraud for his own benefit without making himself *particeps criminis*, and therefore a trustee cannot claim for creditors the advantage of a fraud by the bankrupt. I therefore agree with the judgment of the Lord Ordinary.

LORD M'LAREN concurred.

LORD ADAM was absent.

The Court adhered.

Counsel for the Claimant Colquhouns' Trustee—Clyde, K.C.—Craigie. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Claimants Campbell's Trustees—Graham Stewart. Agents—J. & W. Mackenzie, W.S.

Counsel for the Claimant Alexander Reid—Younger. Agents—Hamilton, Kinnear, & Beatson, W.S.

Thursday, March 20.

FIRST DIVISION.

[Sheriff Court of Forfarshire.

MACHARDY *v.* STEELE.

Executor—Appointment—Competition.

A mother and daughter executed a mutual trust-disposition and settlement in which they reserved power to alter the deed with mutual consent only, and in which each disponed her whole estate to the survivor, and the survivor disponed the whole estate belonging to the survivor to trustees for certain purposes. They also nominated certain persons to be the executors of the survivor. The mother having predeceased, the daughter thereafter executed a trust-disposition and settlement in which she nominated other persons as executors. In a competition between the persons nominated in these two deeds respectively for the office of executor, the persons nominated in the mutual deed maintained that it was a contractual settlement, under which the daughter was barred from nominating other executors or disposing of her property in any different way. *Held* that the claim of the persons nominated in the deed of later date must be preferred in respect that they had *ex facie* a good title, the objections to which could not be dealt with in this process.

In 1884 a mutual general trust-disposition and settlement was executed by Mrs Elizabeth Hutton or Boath, a widow, and her daughter Miss Ann Butchart Boath. The settlement bore that each of the parties disponed her whole estate under certain burdens, declarations, and reservations to the survivor, and the survivor disponed the whole estate belonging to the survivor at the time of her death to trustees for certain purposes thereafter set out. It contained the following clause:—"And we do hereby nominate and appoint the said William Borthwick, William Thom, and David Steele, and the acceptors or acceptor, survivors or survivor of them, to be the sole and only executors or executor of the survivor of us." It also contained a clause by which the parties reserved to themselves "full power with mutual consent only to alter, innovate, or revoke these presents in whole or in part as we may think proper."

Mrs Boath died in 1892 survived by Miss Boath.

Miss Boath died in 1901 leaving a trust-disposition and settlement dated 7th July 1899, by which she conveyed her whole estate to certain trustees whom she nominated and appointed to be her executors. She also revoked all settlements and writings of a testamentary nature, and declared this trust-disposition to be effectual as her last will and settlement.

On 6th January 1902 a petition for confirmation as executors-nominate was presented in the Sheriff Court of Forfarshire by Alexander Machardy and others, the executors appointed in Miss Boath's settlement.

A caveat was lodged against this application for David Steele and others, the executors nominated under the mutual settlement.

On 23rd January 1902 the Sheriff-Substitute (LEE) granted confirmation in favour of the petitioners.

Note.—"Mr M'Nicoll for the objectors refers to a previous deed by Miss Boath, which bears to have been irrevocable by her, and under which his clients are nominated as executors. I cannot consider what the effect of the clause in the earlier deed may be, or whether the objections to the latter deed are well or ill-founded. These are questions which, as they cannot be effectually answered here, cannot be relevantly considered. It is enough for the matter now on hand that the deed on which the petitioners rely until it be reduced gives to them an *ex facie* good title to administer the late Miss Boath's estate. It is admitted that the petitioners are responsible and trustworthy, and therefore as they must account for their intromissions and remain liable to have their deed set aside their appointment for the immediate management of the estate can in no way prejudice the objectors."

The executors nominated under the mutual settlement appealed to the Sheriff,