Tuesday, March 11.

SECOND DIVISION.

[Lord Shand, Ordinary.

SCOTT *v.* SCEALES.

Bankruptcy—Concealment—Equity

A obtained a loan of £500 from an Assurance Company, and granted bond and assignation in security therefor over a fund to which his wife had right. He was thereafter sequestrated, but obtained a further advance of £700 from a second company, in ignorance of the sequestration. The second company obtained a discharge from the first company, and a new bond and assignation in security for the full sum of £700. In a competition between the trustee in bankruptcy and the second company—*held* that the trustee could not be benefited by the concealment of the bankrupt, so as to claim the £500 assigned in security of the advance.

This was a competition arising out of a multiplepoinding about which there had previously been a great deal of litigation. The facts of the case are briefly these:—Miss Ritchie was found entitled by interlocutor of the Second Division of the Court of Session, dated 20th July 1865, to the sum of £3000, but subject to her mother's liferent of £1000 thereof. The £3000 was settled upon Miss Ritchie in liferent, and upon her children in fee. She was further found entitled to the sum of £500 in fee, with interest at the rate of 4 per cent. from the term of Martinmas 1860. Miss Ritchie was married in July 1867 to Mr John Mackay, writer, Edinburgh. In April 1868 Mr and Mrs Mackay borrowed a sum of £500 from the City of Glasgow Life Assurance Company, and granted a bond and assignation in security, whereby they assigned (1) a policy of insurance on the life of Mrs Mackay in favour of John Mackay for £550; (2) the beneficial right and interest of Mrs Mackay in the £3000; and (3) the husband's whole right in the sum of £500. On 27th October 1869 Mackay's estates were sequestrated, and Mr Molleson, C.A., Edinburgh, was elected trustee on the same. On 23d June 1871 the General Life and Fire Assurance Company advanced a sum of £700 to Mackay in ignorance of his bankruptcy, £500 of which was applied in paying off the loan by the City of Glasgow Life Assurance Company. The General Assurance Company took a new bond from the bankrupt and his wife for repayment of the loan, obtained a discharge of the security by the City of Glasgow Company, and had assigned to them the same securities as were held by the City of Glasgow Company. In these circumstances, Mr Molleson came forward and claimed the £500, which, with interest, had increased to £740, on the ground that that sum was vested in him as trustee on the bankrupt's estate on the burden in favour of the City of Glasgow Company being discharged. The General Assurance Company also claimed the £500, on the ground that they had advanced the £700 in ignorance of the bankruptcy. The arrangement was, they averred, that they were to receive the whole rights and securities held by the City of Glasgow Company, and contended that their money having been taken to pay off the loan to that company, they were entitled to be preferred.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 27th January* 1873.—The Lord Ordinary having considered the cause, sists the said James Alexander Molleson, and the said Thomas Challis and others, trustees of the said General Fire and Life Assurance Company, as parties to the action, in terms of their minutes and claims Nos. 204 and 208 of process, and in the competition between these parties, repels the claim of the said James Alexander Molleson, and ranks and prefers the said Thomas Challis and others, trustees of the said General Fire and Life Assurance Company, as representing the said Euphemia Ritchie, now Mackay, and John Mackay, her husband, for his interest, to the said sum of £500, and interest thereon, to which the said Euphemia Ritchie, now Mackay, was ranked and preferred by the preceding interlocutor of 20th July 1865: Finds the said Thomas Challis and others, trustees foresaid, entitled to the expenses incurred by them in the competition with the said James Alexander Molleson; allows an account thereof to be given in, and remits the same, when lodged, to the Auditor to tax and to report.

"*Note.*—By interlocutor of 20th July 1865, in this case, the Court ranked and preferred the claimant Miss Euphemia Ritchie to the sum of £500, with interest from Martinmas 1860. In July 1867, Miss Ritchie married Mr John Mackay, now residing at Inverleith Row.

"Mr and Mrs Mackay, in April 1868, borrowed a sum of £500 from the City of Glasgow Life Assurance Company, and on the 27th of that month granted a bond and assignation in security, being No. 212 of process, by which, after acknowledging receipt of the amount of the loan, and binding themselves for repayment in the terms in which such obligations are usually granted by married persons, they assigned in security of repayment the beneficial right and interest of every description of Mrs Mackay, and of her husband through her, in the trust-estate and effects of the late Andrew Sceales, being a liferent right in a sum of £3000, which she then held, and now holds, exclusive of the *jus mariti* of her husband, and her right to the said sum of £500, over which her husband's *jus mariti* extended.

"In November 1869, the estates of Mr Mackay were sequestrated under the bankrupt statutes, and the claimant Mr Molleson, C.A., was elected and confirmed trustee in the sequestration.

"The security in favour of the City of Glasgow Assurance Company continued to subsist until 23d June 1871. On that date a sum of £700 was advanced by the claimants, the General Life and Fire Assurance Company, £500 of which was applied in paying off the loan by the City of Glasgow Company, and the balance paid to Mr and Mrs Mackay. In place of taking an assignation to the subsisting security, the claimants, the General Assurance Company, obtained a discharge of the security by the City of Glasgow Company, and a new bond and assignation in security by Mr and Mrs Mackay, in their own favour, for the full sum of £700, and by this deed in security of the personal obligations by the granters for repayment of the money there was assigned to the lenders *inter alia* the same beneficial right and interest of Mrs Mackay, and her husband through her, in the trust-estate and effects of Mrs Sceales, in the same terms as these rights had been assigned to the City of Glasgow Company.

"In this state of the facts, Mr Molleson, the trustee on Mr Mackay's estate, has come forward, and by minute and claim, lodged on 18th October last, he asks decree in his favour for the sum of £500 above mentioned, with the interest which has accrued on it. The argument for the trustee in support of his claim is shortly this, that at the date of the sequestration Mr Mackay's right through his wife to the sum of £500 became vested in the trustee in his sequestration for behoof of his creditors, subject only to the burden of the assignation in security which had been granted to the City of Glasgow Company, and that although this security subsisted to the exclusion of any benefit or advantage to the creditors down to 23d June 1871, yet on that date, by the discharge of the security granted by that company, the only burden which affected the right was extinguished, while an absolute right to the money remained in the trustee. It is maintained that the new assignation in security then granted in favour of the other claimants, the General Assurance Company, is ineffectual, because Mr Mackay, having been divested of his estates, had no power thereafter to grant a valid assignation to the sum of £500.

"The other claimants, the General Assurance Company, maintain that by the transaction entered into by them, as now explained, and the relative deeds, they have acquired right to the money, and that the trustee in the sequestration cannot effectually found upon that transaction as having enlarged the bankrupt's estate for division among his creditors. The Lord Ordinary is of opinion that the Assurance Company are right in their contention. It may be assumed that if Mr Mackay, from funds to which he had acquired right by succession or otherwise, or even which he had borrowed without coming under an obligation to give the lender the benefit of the subsisting security in favour of the City of Glasgow Company, had paid off the loan to that company and taken a discharge of it, and had some days thereafter borrowed the amount which he had obtained from the General Assurance Company, any assignation of the fund now in dispute would have been worthless, because the absolute right to the fund, discharged of the security which had subsisted over it, would in the interval have vested in the trustee in the sequestration.

"But the case which has occurred, and in fact raised the present question, is, in the opinion of the Lord Ordinary, essentially different from this.

"The creation of the new loan took place simultaneously with the settlement with the former lenders. The claimants, the General Assurance Company, in their negotiations with Mr and Mrs Mackay agreed to lend the sum of £700 only on condition that the money advanced by them should to the extent necessary be applied in payment of the debt to the City of Glasgow Company, with a view to their own security, and that they should get the benefit of the securities which that company held. In virtue of this agreement, it is not disputed that, on paying the debt due to the City of Glasgow Company, they were entitled to the benefit of the securities which that company held. If they had thought fit, they might have taken an assignation to these securities, in which case the trustee could have had no possible claim; but it is said that by the form in which they carried through the transaction, taking a discharge of the old security, the trustee's right has emerged. The Lord Ordinary cannot adopt the view that the form of the transaction, rather than its substance, is to determine the rights of the parties, or hold that, because the new lender, through ignorance or want of care, completed the transaction in the particular way in which he did, when an assignation would have secured him, the trustee—who had no personal concern with the transaction—is to reap the large benefit claimed, to the detriment of the creditors advancing the money. The case is not like that of a creditor who has *per incurium* failed to complete a security by registration or otherwise before bankruptcy. In such a case the trustee founds merely on the omission of the creditor to do an act necessary to complete his own right, while here the trustee further claims the entire benefit of a payment made by the creditor with his own funds.

"Accordingly, even in the form in which the transaction was carried through, the Lord Ordinary is of opinion that the trustee's claim is excluded. It is not said that in the transaction the bankrupt, Mr Mackay, intervened in any way. On the contrary, the claimants, the General Assurance Company, with their own funds paid the City of Glasgow Company directly, and took the discharge from them, with which they have never parted, but which they obtained as their writ or voucher for the payment, and still hold. Having made this payment, the balance of the loan only was handed over to the borrowers, Mr and Mrs Mackay. This state of the facts is not disputed, but if any question on the subject had arisen, then it would have been competent to ascertain the actual circumstances by proof *prout de jure*. See *Fairbairn*, 6 Macph. 640.

"Can the trustee, in the circumstances now stated, plead on the discharge as conferring a benefit on him? The Lord Ordinary is of opinion that he cannot. The new transaction was conditional on the creditor getting the benefit of the old security. The discharge was not delivered to the bankrupt, and if several days had elapsed after the date of the discharge, and before the completion of the transaction, Mr Mackay could not, in the meantime, have insisted on delivery of the discharge, or taken the benefit of it to the effect of obtaining payment of the money from Mrs Sceales' trust. He was equally precluded from taking such benefit when the transaction was completed, and the Lord Ordinary is of opinion that, in the circumstances, the trustee is in no better a position."

The trustee reclaimed.

At advising—

LORD JUSTICE-CLERK — (After narrating the facts)—I am clearly of opinion that the trustee in the sequestration cannot take advantage of a discharge acquired by the fraud of the bankrupt; but we cannot decide the question arising between the parties without affecting the interests of the wife, and I think her interests should be represented before going further.

LORD COWAN—The fund in competition in this multiplepoinding is a sum of £500, with interest at 4 per cent from Martinmas 1860, amounting now to upwards of £740.

The competitors are—1st, the trustee on the sequestrated estate of John M'Kay, to whom the legacy *jure mariti* belonged, as in right of his wife, his sequestration having occurred in November 1869; and 2d, the trustees of the General Assurance Co., who claim the fund as assigned to them by Mr M'Kay in June 1871 in security of a loan

of £700 then made to these parties by the said Company. At the date of this loan there subsisted an assignation to the said fund in favour of the City of Glasgow Assurance Co., in security to them of the sum of £500, borrowed by Mr M'Kay in April 1868 before his sequestration. At the date of the transaction with the second company, M'Kay was an undischarged bankrupt, a fact which he did not make known to them when he effected the loan for £700; and, accordingly, while they stipulated for and obtained a discharge for the loan of £500, in security of which the City of Glasgow Co. held an assignation to the fund *in medio*, they took a new assignation from M'Kay to this fund in security of their then loan for £700. As, however, the fund, subject to the burden of the security held by the City of Glasgow Co., had passed to the trustee on M'Kay's sequestration in 1869, the bankrupt had no right or power to deal with the fund in 1871, and hence, on the documents founded on by the General Assurance Co. as they stand, they have no legal claim to the fund in competition with the trustee, to whom the fund had passed, subject to the security held by the City of Glasgow Co. The security having been discharged in 1871, the right of the creditors to the fund had become absolute by the extinction of the only security by which it was burdened at the date of the sequestration. It is therefore on grounds of equity alone that the General Assurance Co. can maintain their claim to the fund, and their contention is, that having entered into the transaction and carried it through in ignorance of the sequestration, and of M'Kay being an undischarged bankrupt, and through the concealment of that fact by him, they are entitled to be dealt with in this competition on the same footing as if, instead of taking a deed of discharge from the City of Glasgow Co., they had obtained an assignation to the debt of £500 and the securities for repayment thereof held by that Company.

I am of opinion that, on principles of equity, the General Assurance Co. are entitled to have the redress which they claim, subject to the condition after explained. Had the Company been aware of the position in which M'Kay stood at the time, they never would have allowed the transaction with him to have assumed the form which it did, the effect of which was to make the security on which they calculated in lending the £700 useless and effete so far as the fund *in medio* was concerned, and to leave the fund, unburdened by the money which they advanced to pay the loan to the City of Glasgow Co., to be claimed by the creditors. The concealment or fraud practiced on the General Assurance Co. by the bankrupt alone led to the form which the transaction in 1871 assumed, under which—instead of an assignation from the City of Glasgow Co. of their security when the loan of £500 was paid—a deed of discharge was taken from them, by which means alone the inequitable position in which the parties are relatively placed has been effected. Equity forbids that such a result should be allowed to stand. The trustee and creditors cannot be allowed to be benefited by the fraudulent conduct of the bankrupt. In so far as the General Assurance Co. have suffered loss, and the creditors of the sequestrated estate got benefit, by the transaction as it stands, the Court are entitled and bound to give restoration or redress.

While I am of the opinion now expressed, I am not satisfied that the Lord Ordinary has fully appreciated and properly applied the equitable principle now explained. He has decerned for payment of the fund to the General Assurance Co. in absolute and unconditional terms, without adverting to the fact that the General Assurance Co., and also the City of Glasgow Co., held other securities for payment of their respective loans, in addition to the assignation of the fund *in medio*—1st, an assignation by Mrs M'Kay of her liferent interest in the sum of £3000, subject to the deduction therein stated, to which she was entitled under the settlement of Mr Sceales, free of her husband's *jus mariti* or right of administration; and 2d, policy of insurance effected on Mrs M'Kay's life, the premiums on which, if not paid by her, the Company were entitled to pay to themselves, charging the same in accounting with Mrs M'Kay for their intromissions with her liferent interest in said sum. There were thus two securities besides the policy of insurance held by the Assurance Company for their respective loans; and the question is, how, on equitable principle, the respective rights of the two competitors should be adjusted? On the one hand, it does not seem consistent with sound principle that the Assurance Co. should be at once preferred, as the interlocutor does, to the whole fund *in medio*, to the entire defeat of the claim advanced by the trustee under the sequestration. And, on the other hand, the creditors cannot be preferred to the fund which has been liberated through inadvertence, the effect of which admits of being redressed, free of the security with which the fund was burdened at the date of the sequestration. There must be an equalization effected of the burden attaching to each of the two securities held by the Company. At least this is a matter requiring consideration, and to which the argument of the parties was not addressed, and probably this part of the case may require farther discussion.

The other Judges concurred.

Counsel for Reclaimer—Solicitor-General and Trayner. Agent—J. C. Irons, S.S.C.

Counsel for Respondent—Watson and Strachan. Agent—J. S. Mack, S.S.C.

Tuesday, March 11.

SECOND DIVISION.

JAMES COLQUHOUN GRIEVE AND OTHERS, PETITIONERS.

Petition — Removal of Trustee — Appointment of Judicial Factor.

A trustee furth of Scotland, and of whom nothing had been heard for nine years, *removed* from his office, and a judicial factor appointed to administer the trust-estate.

This was a petition at the instance of all the surviving children of the late Robert Grieve, town clerk of Dumbarton, who are now resident in this country. Four of the family reside furth of Scotland, and edictal citation of the petition on them was prayed. Certain trustees were appointed by the trust-disposition of Mr Grieve, and they assumed one of his sons, Thomas Grieve. All the trustees, except the said Thomas Grieve, are now dead, and he has been for upwards of nine years abroad, in New Zealand or elsewhere, without