Lord Shand—I am of the same opinion. I should be for refusing this petition simply on the ground that it is unnecessary. As your Lordships have observed, it is usual to make changes of name without judicial sanction, and it would serve no good end to alter that practice. With reference to the case referred to, which occurred in 1841, I may observe that the petitioners who then asked sanction stated that they stood on the commission of the peace under the former name, and it may have been that fact which induced the Court to grant the application.

The Court refused the petition.

Counsel for Petitioner—Darling. Agents—Morton, Neilson, & Smart, W.S.

Tuesday, June 15.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

MOLLESON (RENTON & GRAY'S TRUSTEE) *v.* SMITH'S TRUSTEES AND ANOTHER.

Bankruptcy—Fraud—Reduction—Act 1696, *c.* 5.

In August 1878, R., a partner of R. & G., law-agents, induced a client D., who had borrowed money from the trustees of S., also clients of the firm, to pay up his bond between terms. D. did so, receiving at the time no discharge, and the money was put to his credit in the books of R. & G. On 22d October 1878, R. & G. being on the verge of bankruptcy, the trustees of S. granted a discharge of the bond to D., receiving therefor a bond over the house of G. R. & G. being immediately thereafter sequestrated, both as a firm and as individuals, their trustee brought an action to reduce both the bond and the discharge. *Held* that both deeds were granted for value, and that neither was reducible at common law or under the Act 1696, cap. 5.

This was an action of reduction at the instance of James Molleson, C.A., trustee on the sequestrated estate of Renton & Gray, S.S.C., Edinburgh, and trustee on the private estates of the partners, against (1) George Dickison, provision dealer in Edinburgh; and (2) William Bain, Patrick Don Swan, and James Renton jr., S.S.C., one of the partners of the firm of Renton & Gray, trustees of Peter Smith. The summons concluded for reduction of a bond and disposition in security for £300 dated 22d October 1878, granted by Robert Collie Gray, S.S.C., a partner of Renton & Gray, in favour of the defenders Smith's trustees over his house at Palmerston Road, Edinburgh, and also for reduction of a discharge granted by Smith's trustees on the same day and recorded on the next day (23d October), by which they discharged a bond and disposition in security for £400 in their favour over a house in Leven Terrace, Edinburgh, granted by the defender George Dickison on 14th July 1877.

The deeds thus brought under reduction were granted in the following circumstances:—In May 1877 the defender Dickison borrowed from the defenders Smith's trustees £400, and in security of this loan disponed to them his dwelling-house in Leven Street, Edinburgh. The bond was recorded on 14th May, and Messrs Renton & Gray were agents of both parties. The senior partner, Renton, who was one of Smith's trustees, took charge of the whole business connected with the loan. In August 1878 Renton called on Dickison, and represented to him that Smith's trustees were in need of the money, and were very anxious to have it paid up at once. By these representations he induced Dickison to make arrangements for at once repaying the money. These representations were false, and were made by Renton without the knowledge of his co-trustees. Dickison granted and endorsed bills in pursuance of his arrangement with Renton for £381, 8s. 3d., and handed them to Renton, who discounted them and placed the proceeds to Dickison's credit in the books of Renton & Gray. These bills were at three and four months, and were all duly retired by the debtors in them. The balance of £20 was paid by Renton & Gray from funds in their hands belonging to Dickison. In the same month of August 1878 Renton wrote to Mr Bain—one of his co-trustees on Smith's estate—that Dickison was anxious to pay up his bond in September. The letter was in these terms:—

"*Smith's Trust.*

"Dear Sir,—Mr George Dickison, 4 Leven Terrace, to whom the trustees lent at Whitsy. 1877 the sum of £400, has called to-day and intimated that he is to pay the same at Martinmas first. We accepted the intimation. So soon as suitable investment for the money appears we will submit it to you for your approval.—Yours truly,

Renton & Gray."

In October 1878 the City of Glasgow Bank closed its doors. Renton & Gray both held stock in the bank. They had been long insolvent, though enjoying good credit, and the failure of the bank made their position irretrievable. On 21st October they dissolved partnership. On 22d October there was written out and signed the bond and disposition by Gray which it was sought to reduce in this action. The evidence of Gray as to this bond in a proof allowed by the Lord Ordinary was as follows:—"On the 22d October 1878 Renton applied to me to sign a document. Renton had been engaged on the Friday and Saturday previous to the 21st, partly at home and partly at the office, looking into the affairs of the firm. On the Monday he showed me a bit of paper with memoranda of several sums which he said were due by the firm to clients, and opposite these sums he had noted several bonds which he proposed that he and I should grant, with the view of securing those clients. The bond referred to in this action was one of these. This bond was recorded on the same day, 22d October. On that day Renton called on Mr Bain and represented that Dickison wished to pay up the money which had been lent to him by Smith's trustees. Mr Bain refused to receive the money between terms. Renton then said that he had a security ready, and would give a bond over Gray's house for £300. Mr Bain, who knew the house over which Smith's trustees had another bond, was satisfied with the security and signed the discharge. The other trustee on Smith's estate (Mr Swan) took no part in the affairs of the trust, and the discharge was signed by Bain and Renton as a majority and quorum of the trustees. The difference of £100

between Dickison's bond and Gray's was due to this, that Renton & Gray had paid £100 to account of the share of one of the beneficiaries in Smith's trust. The discharge was recorded on 23d October, the day after it was signed. The estates of Renton & Gray were sequestrated on 14th November 1878, and the pursuer of this action became trustee on their estates.

He pleaded—"(1) The pursuer is entitled to decree of reduction as concluded for, in respect (1st) that by the execution of the said bond and disposition in security and discharge sought to be reduced, a preference for a prior debt due to him by the said firm of Renton & Gray was secured by the said George Dickison within sixty days of bankruptcy, in contravention of the Act 1696, c. 5; and (2d) that the said deeds were fraudulently granted for the purpose of defeating the rights of the creditors of the said Robert Collie Gray and the firm of Renton & Gray. (2) The said deeds sought to be reduced being null and void, both under the statute and at common law, the pursuer is entitled to decree of reduction as concluded for, with expenses."

Smith's trustees and Dickison lodged separate defences. Both pleaded that no relevant reasons of reduction were set forth.

The Lord Ordinary allowed a proof, and thereafter on 26th November 1879 pronounced this interlocutor:—"The Lord Ordinary having considered the cause, assoilzies the defender George Dickison from the conclusions of the libel, and decerns: Finds him entitled to expenses: Further, reduces the bond and disposition in security granted by Robert Collie Gray in favour of the defenders William Bain, Patrick Don Swan, and James Renton junior, as concluded for: Finds these defenders liable to the pursuer in expenses," &c.

"*Note.*—(1) The Lord Ordinary sees no ground for reducing the discharge granted by Smith's trustees in favour of the defender Dickison. The trustees who granted it do not challenge it; and they alone seem to have the necessary title. Further, in the opinion of the Lord Ordinary, Dickison was not a party to a fraud of any kind. It is strange, no doubt, that he made no difficulty about paying up his bond between terms. But the Lord Ordinary thinks that his evidence is true. Indeed, the pursuer did not attempt to throw any imputation upon his honesty.

"(2) The disposition granted by Gray was granted when he was irretrievably insolvent to his own knowledge, and he got nothing for it. In these circumstances it cannot, it is thought, be effectual against his creditors.

"It is true that Smith's trustees thought that they were getting a good security in exchange for that which they discharged. But the meaning of that just is, that they were defrauded by Renton, who was their agent and one of their number."

The defenders Bain and others reclaimed.

At advising—

Lord Gifford—In this case the trustee on the sequestrated estate of Robert Collie Gray, S.S.C., seeks to reduce and set aside two deeds—(1) a bond and disposition in security by Robert Collie Gray to Peter Smith's trustees for £200, dated 22d October 1878, and recorded same day; and (2) a discharge by Smith's trustees in favour of George Dickison, dated 22d October 1878, and recorded 23d October 1878, whereby Smith's trustees discharged a bond due to them by George Dickison for £400.

The grounds upon which these deeds are challenged are that they constituted a fraud against the creditors of the said Robert Collie Gray, and that they were granted in order to secure a prior debt due by the said Robert Collie Gray, and within sixty days of his bankruptcy, in contravention of the Act 1696, cap. 5, and that the deeds were also fraudulent at common law. The Lord Ordinary has refused to reduce the discharge by Smith's trustees to Mr Dickison, but he has pronounced decree of reduction of the bond granted by Robert Collie Gray to Smith's trustees of the same date, and it is this judgment which is brought under review.

A proof has been led which discloses the exact circumstances under which these deeds were granted, and although the case is attended with some nicety, yet after full consideration I have ultimately come to be of opinion that the trustee upon Gray's sequestrated estate is not entitled to set aside either of the deeds in question. I think that neither of the deeds is challengeable either at common law or under the provisions of the Act 1696, cap. 5.

The circumstances are a little peculiar, and require to be closely attended to, and there are three parties who occupy separate positions, and who have or may have separate and independent rights. There are first Smith's trustees; second, George Dickison; and third, Robert Collie Gray, and the trustee upon his sequestrated estate as representing his creditors. It is not to be lost sight of also that Renton, Gray's partner in business and one of the bankrupts, was as an individual one of Smith's trustees, who were in all three in number.

The history begins in May 1877, when Smith's trustees lent to George Dickison £400, and received therefor a bond with a valid security over Mr Dickison's property in Leven Street. This transaction was perfectly onerous and unchallengeable. Smith's trustees were undoubtedly onerous creditors of Dickison for £400, and they were amply secured. Renton & Gray happened to be agents both for Dickison, the debtor, and for Smith's trustees, the creditors in this bond.

In August 1878, Renton & Gray, or rather Renton, by whom alone the transactions were managed, told Dickison that Smith's trustees had called up payment of their bond for £400. This statement was false, as well as several other statements that Renton seems to have made. I am willing to assume, as the pursuer alleges, that Renton's statements were fraudulent, and made for purposes of his own, but I do not think that this affects in any degree either the interests or rights of George Dickison or of Smith's trustees. Neither of these parties were participant in the slightest to Renton's designs, whatever these were, and none of them were privy to his false statements, or were bound thereby in any way. I agree with the Lord Ordinary that Dickison was not a party to a fraud of any kind. His statements are all true, and there is no imputation upon his honesty. But I think the same remark applies to Smith's trustees, who were represented in this matter by Mr Bain—Mr Swan taking no part in the trust management. No doubt Mr

Renton as an individual was a trustee, and he may have deceived and misled his co-trustee, but the trustees as a body, and Messrs Bain and Swan, the majority of them, were not parties to any fraud at all, and neither they nor the trust under their charge can in any sense be made liable for Renton's statements. At the same time, I must say that although Renton seems to have said what was not true, I do not think fraud is very distinctly brought home even to him in this action. I doubt if it is proved that he misled his partner and fraudulently induced him to grant the bond.

When Dickison was told, then, in August 1878, that Smith's trustees had called up their bond, he remonstrated against such procedure. He said his stock was heavy, and his ready cash exhausted, and that he would have great difficulty in raising £400 at that particular time. Renton pressed him, however, and he ultimately granted bills to Renton, and assigned bills amounting in all to upwards of £380. These bills were all ultimately paid by Dickison, or by the acceptors, who were Dickison's debtors, and that at maturity. They had a currency of three to four months, and did not ultimately fall due till after Renton & Gray's sequestration. They were all discounted, and Renton & Gray got the full value. The balance, about £20, making up the full £400 in the bond, was paid by Renton & Gray from funds in their hands belonging to Dickison.

About the same time that Renton falsely told Dickison that Smith's trustees had called up the bond for £400, he equally falsely told Smith's trustees that Dickison wanted to pay up the bond in August 1878. This intimation was made in writing on 22d August 1878, and it was also made verbally to Mr Bain, who acted for Smith's trustees. Bain replied that he would not take payment between terms, for he would only get bank interest for the money, to which Renton rejoined—"Oh, but I have a bond ready for you;" and he then said he would get a bond over Gray's House in Palmerston Road for £300. The difference between the two bonds for £100 was needed, and was actually paid to one of the beneficiaries under Smith's trust. Mr Bain, acting for Smith's trustees, agreed to Renton's proposal—that is, he agreed that Smith's trustees should discharge their bond over Dickison's property on condition of at the same time getting a new bond for £300 over Gray's property in Palmerston Road. Now, there was nothing unfair or improper, or even unusual, in this proposal. Such transactions occur and are carried out every day, and most certainly no improper motive, and no illegal act, far less any fraudulent act or design, can be ascribed either to Smith's trustees or to Mr Dickison, and that is enough for the purposes of the present case. It should be mentioned that at this time—August, September, and October 1878—Renton & Gray, although it now turns out that they were really insolvent, were not known to be so, but were in large and reputable practice, and were carrying on large business transactions, involving large sums passing through their hands every week. They were not notour bankrupt till on or about their sequestration on 14th November 1878.

Now, the transactions so agreed to were regularly and formally carried through on 22d October 1878 by the new bond by Gray to Smith's trustees for £300 of that date, and recorded the same day, and by the counterpart discharge of the old bond granted by Smith's trustees to Dickison, also dated 22d October 1878. It is noticeable, however, that although the discharge and the bond are dated the same day, 22d October, and although the bond was recorded on that date, the discharge was not recorded till the day after 23d October, the meaning of this being that Smith's trustees, or those acting for them, were so careful that they would not put the discharge by them on record until they had got the new bond in their favour made real and complete to them by recording. This was quite right, and although the legal effect might and would have been the same though both deeds had been completed on the same day, the delay of a day in recording the discharge emphasises the position of Smith's trustees, that they would not part with the good bond which they had till they made certain that they had got a good and completed new one.

And now, why should any of these deeds be reduced as in a question either with Dickison or with Smith's trustees? Both of these parties were perfectly honest—both gave complete and full value for the deeds which they respectively received. In reference to both, the transactions into which they entered were in the sense of the law new transactions—*nova debita*—in which full value was instantly given for full value received then and there, or what the law holds to be *unico contextu* therewith. There is, when the meaning of the transactions is fully seen, no pretence for securing a prior debt due to anybody—there is no giving security for a prior debt within sixty days of the bankruptcy of the debtor—that was not the nature of the transaction at all, and it is only by a fallacy, by losing sight of the real transaction, that it can be even plausibly so described.

Take first the case of Dickison. His case is simply that of a debtor paying up his bond and getting a discharge therefor, and the only question is—Did he really pay his debt and timeously get and complete his discharge? and the answer is, he did. The sums in the bill granted and bills endorsed by Dickison, with a small balance of cash in his agent's hands, amounted to the full sum in the bond, and he undoubtedly paid his bond debt; and these bills being discounted, he virtually paid it in cash in August 1878, the bills being all retired at maturity. Why should he not keep his discharge therefor? No doubt the formal discharge was not got till October 22d, and was not recorded till October 23d, and this was within sixty days of Renton & Gray's bankruptcy—but this is nothing to the purpose. A discharge granted for cash is not a security for a prior debt, and is not a fraud upon creditors in any sense whatever. Besides, as noticed by the Lord Ordinary, the discharge is not granted by the bankrupts Renton & Gray, but by their clients Smith's trustees, and it is difficult to see what title the trustee in Gray's bankruptcy has to reduce it.

Next, the case of Smith's trustees is equally clear. They have got no security from a bankrupt for a prior debt due by him. Gray was not their prior debtor at all. All that they have done is to exchange onerously and in *optima fide* one good bond for another, and, as I have already noticed, they took care not to quit the first bond till they had fully got the second. All that they

had to do with Gray was this, that in consideration of the money paid up by Dickison, and which money he or his firm got, he onerously and *unico contextu* granted a new bond over his property; but this was not in contravention of the Bankrupt Act, and was no fraud at all against anybody, and here the fallacy of the pursuers pleading that Gray got no value for this bond is obvious. Gray did get value for the bond, or his firm got it, which is exactly the same thing. In law Gray got every sixpence that Renton & Gray got, and was liable just as if he had been sole partner. Now, Renton & Gray got Dickison's money—the money wherewith he paid off his bond—and it was that very money to the extent of £300 which formed the value in Gray's bond. It is nonsense to say that Gray got no value for it, or gave the bond for nothing. His firm had the money in their bank account. But I may say that even if Gray had not got the money this would make no difference, provided the creditor in the bond gave full value. This would validate the bond in a question with Gray. It was his own fault if he suffered Renton, or Renton & Gray, to misapply the money.

I have only one other remark to make, and it is this, that I think the strongest equity protests against the view which the Lord Ordinary has taken. It seems plain that both the deeds must go or neither. It will never do to hold the discharge good, and at the same time reduce the new bond, in consideration of which alone the discharge was granted. There is no principle for that. But although the case was perplexing and embarrassing in its first presentment, I have come at last very clearly to see, and I trust I have made myself intelligible in explaining, the grounds on which I think both deeds are good and valid, and on which I think the whole reasons of reduction should be repelled.

Lord Justice-Clerk—We delayed pronouncing judgment in this case until the decision in the analogous case of *Rose* against *Spaven*. There is certainly a strong similarity in the circumstances connected with the fraud committed by Renton in both cases. In both he acted as agent for all the parties concerned. In both, being in want of money, and unable to provide it because hopelessly insolvent, he procured it by pretending to one client that a loan for which another client held a security was to be called up. In both, long after the money had been paid, he obtained a discharge of the loan from the creditor; and in both he induced another person to grant a security without receiving any value whatever, excepting what the discharge so granted might be supposed to give him. I was of opinion in the case of *Rose*, and had the present case presented no additional features should have been of opinion here, as the Lord Ordinary has found, that no value whatever had been given for the second security. I was, however, in the minority in the case of *Rose*, and although but for the authority of that decision I should have thought it abundantly clear that as Renton & Gray had been hopelessly insolvent for six months before, no previous debt due by them could constitute value to a third party in a new transaction, I might yet have felt myself bound to give that effect to it. The discharge granted by Smith's trustees only made Renton debtor to Smith's trustees instead of to Dickison for the sum paid for it, and if the debtor had been able to pay might have been value as an assignation to a good debt, but of course a debt due by Renton was of no value. But the present case embraces one element to which I think the Lord Ordinary has not attached sufficient weight, but which seems to alter, and indeed to reverse, the legal aspect of the facts. Gray was not a third party in any sense. He received the payment made by Dickison, which was carried to the credit of the firm in his own books, and he became bound to obtain the discharge from Smith's trustees; and the discharge which he was thus bound to obtain was executed on an express undertaking by him to grant this security. In this way Smith's trustees gave full value to Gray, not through Renton, but directly to himself; and as the security was thus granted in fulfilment of a prior onerous obligation, the Act 1696 can have no application to the transaction.

As regards Dickison, therefore, the case is quite clear. He paid his money to the agent for his creditor, and the creditor adopted the transaction and discharged him. As regards Smith's trustees, the same man, or one of the men, who received the money, undertook to give a new security on this discharge being executed, and he does so. Doubtless Gray was cheated by his partner, but this could never entitle either Gray or his creditors to challenge a transaction for which full value was given, and which took place in fulfilment of a prior onerous obligation.

Lord Ormidale concurred.

Counsel for Pursuer — Asher — Strachan. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Dickison—J. P. B. Robertson—Wallace. Agents—Welsh & Forbes, S.S.C.

Counsel for Bain and Others (Smith's Trustees)—R. Johnstone. Agents—J. & J. Galletly, S.S.C

Tuesday, June 15.

FIRST DIVISION.

[Bill Chamber—Lord Shand, Ordinary.

LINDSAY (CHRISTIE'S TRUSTEE) *v.* HENDRIE.

(*Ante*, 11th July 1879, vol. xvi., p. 730, 6 R. 1246.)

Bankruptcy — The Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 125, 152, 169—*Trustee—Power of Commissioners to Fix and Vary Trustee's Remuneration—Appeal—Competency.*

The commissioners on a bankrupt estate at five successive statutory meetings fixed the trustee's commission at 5 per cent., but at the sixth raised it to 6½ per cent. on his whole recoveries since the beginning of the sequestration. No appeal was taken (under section 169 of the statute) within fourteen days, but on the trustee presenting his petition for discharge a creditor objected thereto, *inter alia*, on the ground of the above charge