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,

and on February 21st 1902 lodged a competing petition for confirmation.

The Sheriff (JOHNSTON) on 5th March 1902 pronounced the following interlocutor:—"Having made avizandum finds that the general trust-disposition and settlement by Mrs Elizabeth Hutton or Boath and Miss Ann Boath, dated 31st December 1884, and registered in the Books of Council and Session 8th April 1892, was a valid mutual settlement of these ladies, and contractual in all its terms, including the nomination of executors to the survivor of them; that therefore it was incompetent for the survivor Miss Ann Boath to supersede such appointment by her trust-disposition and settlement dated 7th July 1899, and registered in the Books of Council and Session 2nd December 1901: Therefore refuses the prayer of the original petition at the instance of Alexander MacHardy, Town-Clerk, Forfar, and others, trustees and executors nominated under the last-mentioned settlement, and grants warrant in terms of the competing petition at the instance of David Steele and others, trustees and executors-nominate of the survivor Miss Ann Boath of the granters of the said first-mentioned settlement: Finds no expenses due to or by either set of competing petitioners, and decerns."

"*Note.*—Mrs Elizabeth Boath and her daughter executed on 31st December 1884 a joint if not a mutual settlement. Mrs Boath died in 1892 leaving Miss Ann Boath the survivor. Miss Boath in 1893 executed a general settlement revoking all previous settlements, which has, I think, no bearing on the present question, because for what it was worth it was superseded by a later settlement.

"Miss Boath in 1899 executed a second general settlement.

"She died in November 1901.

"There is a competition for the office of executors between the executors-nominate to the survivor in the joint or mutual deed of 1884 and those nominated by Miss Boath in her deed of 1899. I am of opinion that the former are to be preferred.

"I. It was maintained that both the deed of 1884 and that of 1899 were nominations of executors to Miss Ann Boath, and that I was bound to sustain the nomination last in date (1) because it was the rule in competition to disregard the prior deed; (2) because I could not sustain the nomination of the prior deed without a reduction of the deed last in date; and (3) because to decide between the parties on any other footing involved the question on the merits as to which was the ruling deed to all effects, which it was not competent for me to entertain in a mere application to the commissary jurisdiction of my Court.

"In support of these contentions three cases were cited to me, all of which I think are clearly distinguishable and afford no guide. *Grahame* v. *Bannerman*, 1 S. 362. But there was not a competition between two sets of executors-nominate, but between executors-nominate and a next-of-kin claiming appointment as executor-dative. There were two deeds. But the executors-nominate under the one would be bound to give effect to the provisions of the other if they were found obligatory, and its existence formed no objection to their confirmation. *Hamilton*, 16 R. 192, where the competition was between executors-nominate and a next-of-kin, who alleged that the testamentary deed was reducible, and *separatim* that the deceased was domiciled in England, but who merely objected to confirmation going out without initiating any counter proceedings; and *Cranston*, 17 R. 410, where there was no opposition, and the question was merely whether an untested will bearing to be holograph justified confirmation *de plano* of executors nominated by it. None of these cases appear to me to touch the present question, which is a proper competition between rival nominations.

"If the competition involved not merely the question of confirmation, but incidentally the merits of the testamentary dispositions contained in the rival deeds, I cannot see that that is any reason why I should not decide in the competition. I am bound to dispose of the competition, and I cannot do so on any other footing. It is not often that competition for confirmation involves incidentally questions of succession depending on rival deeds, but competing services often do. And if the incidental determination of such questions does not deter from the decision of the case of competing services, I do not think that it should do so in the case of competing confirmations.

"II. A very astute argument was submitted to me on behalf of the trustees under the settlement of 1899 to the effect that the so-called mutual deed was really three wills bound up under the same cover; that the mutuality ended with the first two, and that the third, which was the will of the survivor of the granters, was a mere testamentary document without contractual characteristics, and revocable by the survivor like any other will. I do not, however, think that this argument however specious is sound. I think that one is bound to look not merely to the outward form but to the substance, and looking to the substance I think that this joint-settlement is mutual in all its parts, and that the nomination of executors to the survivor is as contractual as any other part. There are a number of indications that this is so. But as specially touching the present question, I would notice that while the dispositive clause in the final disposition runs in the name of the survivor, whichever of the granters that might be, the nomination of executors to the survivor is a joint act—'And *we* do hereby nominate and appoint the said,' &c.

"Accordingly, holding as I do that the nomination of executors to the survivor of the granters of 1884 was a matter of contract between them, I do not think that I can avoid preferring these executors to confirmation, because it may follow as a necessary sequence that the settlement under which they act though prior in date, by reason of its mutuality, renders

the later settlement *ultra vires* and nugatory."

The petitioners Alexander MacHardy and others appealed to the First Division, and argued—They were nominated in the last executed deed, and were therefore entitled to the office till a contract could be shown which disabled the deceased from making this nomination. It was the duty of the Sheriff to determine on the face of the deeds who was entitled to the office, and not to go into the question who had the best right to the property when it came to be distributed, which must necessarily be done if the effect of the first deed was to be considered—*Martin* v. *Ferguson's Trustees*, February 16, 1892, 19 R. 474, 29 S.L.R. 401. Any decision as to the effect of part of the prior deed would have a most unfortunate result when the real question at issue between the two sets of beneficiaries came to be determined. They were not represented here, and there were many facts without a knowledge of which the Court could not pronounce a finding as between the two deeds. Accordingly, while the decision of the Court would not be *res judicata* against the beneficiaries, it would certainly be very inconvenient to pronounce in favour of the executors named in the first deed, while by taking the ordinary course of appointing those last named to carry out their purely administrative functions this inconvenience could be avoided.

Argued for the respondents—There was certainly no universal rule that the latest dated nomination of executors must prevail if the making of the second nomination constituted a manifest breach of trust. Seeing that the executors named in the earlier deed were alive and willing to act, they had adopted the proper course of presenting a competing petition—*Hamilton* v. *Hardie's Executors*, December 7, 1888, 16 R. 192, 26 S.L.R. 140. It was clear on the face of the earlier deed that Miss Boath had no power to appoint other executors than those named therein, and accordingly the respondents and not the appellants had an *ex facie* good title to confirmation. There would be no inconvenience in preferring their claim to administrate, for it would not be *res judicata* against the beneficiaries, and would in no way affect their rights.

Argument was advanced by both parties as to whether the earlier deed was of a contractual nature or not, but in view of the decision of the Court it is unnecessary to state it.

LORD KINNEAR—I am unable to agree with the Sheriff in this case. I think the Sheriff-Substitute took the proper course, and that his reasoning is sound. In his note he says—"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." I agree with this view. The argument we have heard has made it plain to us that there is a question between the persons interested under what is called the mutual settlement of the deceased and her mother and under the last settlement of the deceased as to which of the two is the ruling settlement.

I express no opinion upon this question except that there is an arguable question upon which parties differ and as to which they are entitled to have their differences determined in any proper action which may be raised for that purpose before a competent tribunal.

The Sheriff considered that the question was properly before him and that he was bound to determine it, and accordingly he does determine it in terms in his judgment of 5th March 1902. He finds that the mutual settlement by Miss Boath and her mother "was a valid mutual settlement of these ladies and contractual in all its terms." That is a decision on the merits between parties interested in the mutual settlement and parties interested in the subsequent settlement of the surviving daughter, but it is pronounced in a process to which they were not parties, and is therefore in no way binding upon them. He goes on to say in his note—"If the competition involved not merely the question of confirmation but incidentally the merits of the testamentary dispositions contained in the rival deeds, I cannot see that that is any reason why I should not decide in the competition. I am bound to dispose of the competition, and I cannot do so on any other footing."

Now, I am not prepared to dispose of the merits of the question between the rival deeds in this competition, and if the Sheriff is right in saying he could not have pronounced the interlocutor which he has pronounced without deciding the merits, that is a reason for saying that he ought not to have pronounced that interlocutor. The true position of the case appears to me to be this, the surviving daughter is found in possession of an estate which admittedly belongs to her, and she leaves a will disposing of her own property and appointing executors who undoubtedly have *prima facie* a good title to claim confirmation. This settlement is assailed on the ground that the testatrix had made a contract during her life which disabled her from making it. This may or may not be well founded, but it is a contention which can only be made good in an action proper for that purpose, whether by way of reduction or of declarator we need not consider. In the meantime this lady has appointed executors, and this appointment is liable to challenge on grounds which the Court must decline to consider in the present process, because we have not the proper parties before us, and no judgment in this process would be *res judicata*. The only courses open are thus to confirm the executors named by the deceased in her last will so that they may ingather the estate, or else to leave the estate without administrators. No one suggests that the latter course should be taken. It would be inconvenient and injurious to the interests of the beneficiaries, whoever these may turn out to be.

It would serve no purpose to express any opinion on the true question in this process, because it would not be *res judicata* in a question between the parties having the real interest. On the ordinary principles of judicial procedure it would be wrong to express an opinion which would not be binding upon the parties or on the Court itself. I therefore express no opinion one way or the other as to the validity of the will, but I think that in the meantime the estate should be administered for the benefit of whatever persons may ultimately turn out to be entitled to it, and that the administration must be committed to the executors who have a good title to administer until it is set aside in some competent process.

For these reasons I think we ought to recal the judgment of the Sheriff and affirm that of the Sheriff-Substitute.

LORD ADAM—The question in this case is, which of two sets of executors are to be preferred to confirmation. Now, it is to be observed that the question is between the executors alone, and that the beneficiaries are not here. Accordingly the inconvenience in the case is that if a mistake is made in the construction of the two deeds appointing the executors the result may be to appoint executors to administer the estate under a trust to which in reality they were not appointed. But though there is this inconvenience it is clear that the rights of the beneficiaries who are not here will not be affected by the mere appointment of executors. At the same time it is clear that the Court should not, if possible, give any opinion as to which of the two deeds should prevail. The course taken by the Sheriff-Substitute avoids this because he does not consider the question of validity. The Sheriff on the other hand has taken the opposite course. My view of the case is that taken by your Lordship. Miss Boath admittedly died in full possession of her estate, and left a will *ex facie* quite valid, by which she appointed executors to administer her estate. Why should that appointment not be valid? The answer is that a certain prior deed deprived her of the power of testing. I do not say that if the meaning of that deed were admittedly so clear as to be indisputable that we might not hold the last will to be beyond doubt invalid. But that is not the case here, because the deed produced is one which may or may not have the effect of barring Miss Boath from appointing other executors. I am not prepared to come to any decision as to its validity. I think if the beneficiaries under the first deed are of opinion that the second is invalid, they must endeavour to get it set aside, and have the question of its validity settled by a competent Court. But standing as it does we have not in my opinion any power to pronounce in favour of the executors appointed under the first deed.

The LORD PRESIDENT concurred.

LORD M'LAREN was absent.

The Court pronounced this interlocutor:—

"Recal the interlocutors of the Sheriff dated respectively 3rd and 5th March 1902: Affirm the interlocutor of the Sheriff-Substitute dated 23rd January 1902, and remit to the Sheriff-Substitute to proceed as may be just: Find the appellants entitled to expenses since said 23rd January 1902, and remit," &c.

Counsel for the Appellants—C. K. Mackenzie, K.C. — Cullen. Agents — Macrae, Flett, & Rennie, W.S.

Counsel for the Respondents — MacLennan — Craigie. Agents — Miller & Murray, S.S.C.

Thursday, March 20.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

PRIMROSE *v.* WATERSTON.

Reparation—Slander—Privilege—Judicial Privilege—Inferior Judge—Magistrate in Police Court.

A judge is not liable in damages in respect of any words which he utters in the course of judicial proceedings with reference to the case before him; and the privilege of an inferior judge and of a superior judge are the same.

Per LORD MONCREIFF—"The only sound rule is to grant the protection of judicial privilege unless it can be demonstrated—that is, shown so clearly that no man of ordinary intelligence and judgment could honestly dispute it—that the words used had no connection with the case in hand."

Allardice v. *Robertson*, April 8, 1830, 4 W. & S. 102 is not a binding authority against the proposition that an inferior judge has the same absolute privilege as a judge of the supreme court.

In an action of slander brought against a magistrate the pursuer averred that his son, a boy of nine, was charged with theft; that the defender being a person who had a strong prejudice against working men's clubs and the use of intoxicants generally, and being aware that the pursuer was the clubmaster of a working man's club, for the purpose of gratifying his feelings of malice against the pursuer and the club of which he was master, and of taking advantage of his magisterial position to vilify him in public, sent for the pursuer, and before the boy had been tried, said to the pursuer—"Well, I have to tell you that not only are you ruining other people, but you are ruining the boy. I know several families who are going straight to the devil from your club. You take their money, then send them out, while