[HEARD 1st *July*—JUDGMENT 5th *August* 1850.]

The GLOBE INSURANCE COMPANY OF LONDON, and MANDATORY, *Appellants*.

16 Feb 1849
11 D 615.

THOMAS MCKENZIE, of Applecross, W.S., *Respondent*.

Diligence.—Arrestment.—Competition.—Arrestment, used by a creditor on the dependance of an action against the executors confirmed of his debtor, which was brought after the lapse of six months from the death of the debtor, for the purpose of attaching a debt given up in the inventory of the deceased's estate, will give the arresting creditor a preference over the other creditors, who have only cited the executors.

Trust.—Will.—A will, being in form for the settlement of the testator's estate on the assumption of solvency, does not become a trust for creditors by the emerging fact of insolvency, and the circumstance that the first purpose of the trust is payment of debts.

Personal Objection.—Waiver.—Preference.—Circumstances in the conduct of a creditor held not to bar him from taking steps to secure a preference over the creditors of his debtor, or to a waiver of his preference after he had secured it.

JAMES SCOTT, accountant in Edinburgh, died on the 6th day of March, 1830, leaving a trust disposition and settlement, whereby "for the better settlement and disposal of my affairs in "the event of my decease," he conveyed to Mary Scott, his spouse; Andrew Rutherford, advocate; Roger Aytoun; Thomas McKenzie (the Respondent); and Alexander Dallas, William A. Turner, and Ralph E. Scott, as trustees, his whole real and personal estate, "And to afford the greater facility in the "execution of this trust," he appointed the trustees to be his sole executors.

The purposes of the trust were, First the payment of the truster's debts.—Second, mournings for his widow and family and a specified payment to the widow, until the term at which she would be entitled to the first half-yearly payment of the interest of the funds afterwards provided to her.—Third, for delivery of his household furniture &c., to his widow as her absolute property, should she continue such, and an arrangement for payment of the value by her and her second husband, should she again marry.—Fourth, for payment to his widow of the interest of the free residue of his estate, for the benefit of her and his children. —Fifth, for restriction of payment of the interest to 200*l.* per annum, in case his widow should again marry.—Sixth, for payment upon the death or marriage of his widow, of his estate among his children in specified proportions.—Seventh, for payment of the interest of his estate in case his widow should remain unmarried, and all their children have died without issue, between her and his father, and of the capital among his brothers and sisters.

Rutherford and the Respondent did not accept the trust given by this deed, but the other trustees and executors did accept, and in the month of January, 1831, confirmed the will, and gave up an inventory of the estate, in which they included as part of it a balance, due to the defunct as trustee for D. Forbes of Culloden, amounting to 7,831*l.* 2*s.* 9*d.*, with periodical interest from March, 1830. This debt was the subject of the competition to be afterwards noticed. The trustees appointed Turner, one of their number, to act as factor in the management of the estate.

Soon afterwards, it appeared to be very problematical how the trust estate would turn out, owing to the circumstance that Scott had in the year 1825 bound himself to pay the Appellants interest at the rate of 4 per cent. upon a loan of 125,000*l.*, to Tait, of Harvieston, and that, as judicial factor on the estate of Cromarty, he was indebted to that estate in upwards of 10,000*l.*, for which the Respondent was his cautioner.

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Shortly after accepting the trusts of Scott's Will, Turner drew up a sketch of the estate, from which it was made to appear that, without taking into account the large liability on account of Tait's debt, the immediate liabilities of the estate would be 18,305*l.* 4*s.* 4*d.*, while the assets immediately available would be 17,112*l.* 0*s.* 5*d.*, leaving a balance against the estate of 1,693*l.* 3*s.* 11*d.* This sketch showed another view, by which it appeared that there would still be other debts to be provided for, amounting to 4,221*l.* 0*s.* 6*d.*, while there would remain other assets in the hands of the trustees, amounting to 26,283*l.* 7*s.* 8*d.*, leaving a balance between these two amounts in favour of the estate, of 22,062*l.* 7*s.* 1*d.* Both of these views were framed on the supposition that Forbes, of Culloden, on whose estate Scott had been trustee, would be able to carry through an arrangement for paying off his debts, and among the rest that which he owed to Scott. The sketch showed a *second* view of the estate, on the supposition that Culloden would not be able to carry through his arrangement. According to this, a reversion of 20,369*l.* 3*s.* 2*d.* was brought out. A *third* view gave a more favourable prospect, in the anticipation of a speedy release from the liability in respect of the loan on Harvieston, and payment of Culloden's debt, by an early and favourable sale of both of these estates. On the 27th March, 1830, Turner submitted this sketch to a meeting of Scott's trustees, which was attended only by Aytoun and R. Scott. At this meeting it was stated that the sketch had been communicated to the Respondent McKenzie, who had declined accepting the trust, in the meanwhile.

On the 5th of July the trustees resolved to pay off the small creditors under Robertson of Lude's trust, to which Scott had been a debtor at his death, the payment being confined to sums under 50*l.*, unless an obligation were given by the creditors whose debts exceeded that amount, to pay back, in case there should ultimately be a deficiency in Scott's trust estate to pay all its liabilities.

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On the 10th August, 1830, the trustees altered their resolution to take an obligation for repayment from Robertson's creditors, being of opinion, "that while, on the one hand, they "are entitled to take this obligation from the creditors, under "the circumstances in which these dividends were to be paid, "before almost any of the other burdens upon the trust-funds "were discharged, yet they, on the other hand, conceived, that "as there was every appearance of the funds being more than "sufficient to meet all possible demands upon them; and also "that, by the payment, unconditionally, of these creditors, it "might give confidence in the trust-management, and thereby "prevent others from urging their claims until the funds had "been realized."

On the 1st of September, 1830, Turner communicated to the trustees that interest upon the Harvieston debt, amounting to 2,400*l.*, had been demanded; that he had in his hands 1,800*l.* of the Harvieston rents wherewith to pay it, and that Harvieston had been put up for sale, but no part of it had been purchased, and as the rents were insufficient to pay the interest, the deficiency, if the lands should not be sold, would have to be made up out of Scott's estate. The trustees authorized Turner to pay the present deficiency out of Scott's estate, but expressed their expectation that a sale of Harvieston, when re-exposed, would render a repetition of this unnecessary.

At a meeting of the trustees held on the 31st January, 1831, a general account of the trust affairs was given; from this it appeared that a second payment of interest on the Harvieston debt was called for, and would have to be made out of the trust estate, and that the estate was in embarrassment for want of funds to settle this and other demands.

At a meeting of the trustees held on 3rd March, 1831, it was communicated to them that the Appellants had agreed to take Turner, the factor's, bills for 2,000*l.* of the interest due on

the Harvieston debt, upon the bills being guaranteed by the trustees. This arrangement was acceded to by the trustees, and the required guarantee was given.

At a meeting held on the 29th of March, 1831, Turner submitted to the trustees a correspondence between him and the Bank of Scotland, who were urgent for payment of a debt owing to them by Scott, and expressed an expectation that, as they understood the trustees were making payments out of Scott's estate, the trustees would pay to the bank a sum corresponding to the payments made to the other creditors. The minute of the trustees bore that "with regard to the obser-"vations by the Bank of the trustees having made payments to "other creditors of Mr. Scott, in preference to them, the very "contrary is the fact; and that while they have only made such "payments as were indispensably necessary for the proper "management of the trust, excepting in the case of Robertson "of Lude's creditors, which the trustees authorized their factor "to pay, from the peculiar circumstances of the case, as "explained in former minutes, the obligations of the Bank "have, on the other hand, been all settled or arranged, "excepting in the case of the Harvieston trust, and the "balance of the 700*l.* in Elibank's affairs. The trustees like-"wise approve of the explanations given by Mr. Turner, and "authorize him to continue to afford every information to the "Bank which they may require. At the same time they are "of opinion that the Bank should be satisfied with the expla-"nations which they have already received."

At a meeting held on the 5th August, 1831, Turner explained that the bills for the interest on the Appellants' debt, due at the preceding 6th March, had not yet been provided for, but would probably be met by returns from the lands of Harvieston, but that another half-year's interest was falling due, for which there were no funds in hand. Upon this subject the minutes of the meeting were thus expressed:—"With

" regard to the interest now falling due, the trustees, while they
" are deeply sensible of the vital importance which it is of, in the
" arrangement of Mr. Scott's affairs, that no alarm should be
" allowed to arise, find it impossible, in the present situation of
" matters, to make any immediate payment; they, however,
" anxiously hope that the Globe Insurance Company will
" equally consider it for their interest to avoid bringing matters
" to such a crisis as the proceeding against Mr. Scott's estate
" would lead to, and that they will readily allow of some delay.
" With this view, the trustees request Mr. Aytoun and Mr.
" Turner to see Mr. Gibson-Craig on the subject, and if
" necessary after doing so, request Mr. Turner to call another
" meeting of the trustees."

This subject of the interest on the Appellants' debt and the difficulties in the way of meeting its payment, were resumed by the trustees at a meeting on the 22nd August, 1831, and again at a meeting held by them on the 6th of December, 1831, when the following minute was made.

" With regard to the demand by Sir James Gibson-Craig,
" on the part of the Globe Insurance Company, that no security
" will be given to the Bank of Scotland, or otherways, that can
" tend to create any preference on Mr. Scott's funds, to the
" prejudice of the Company, the trustees can have no objection
" to declare as they now do, that they will give no security to
" the Bank of Scotland, or otherways, that can tend to create
" any undue preference over Mr. Scott's funds; and if any such
" preference is attempted to be obtained, they will give notice
" thereof to the agents for the Globe Insurance Company."

On the 30th January, 1832, the Respondent wrote Mr. Turner in these terms.

" Mr. Scott's trustees cannot accuse me of acting prema-
" turely, if I now call, as I do, for a state of the trust transac-
" tions and management, from their commencement to the
" present time. The large balance due under the Cromarty

"judicial factory gives me much and unceasing uneasiness, and "the aspect of Mr. Scott's affairs will regulate my future "conduct in that matter."

Mr. Turner wrote him in answer, that he would bring his letter before the trustees so soon as he returned to Edinburgh, whence he would be absent for eight or ten days.

On the 6th of March, 1832, the trustees prepared a vidimus of the estate, which showed that the funds would be 33,964*l.* 10*s.* 8*d.*, and that the liabilities would be 17,018*l.* 6*s.* 10*d.*, leaving a surplus of 16,946*l.* 3*s.* 10*d.*, without taking into account the liability for the interest on the Appellants' debt.

In the month of March, 1832, the Appellants raised an action of constitution against Scott's trustees, founded on Scott's obligation to pay the interest of their debt on Harvieston, and on the dependance of the action used inhibition. On the 10th of April the trustees held a meeting, at which they expressed a desire that Turner should communicate to the Respondent the vidimus prepared on 6th March preceding.

In the month of May 1832, the Respondent, hearing of the step which had been taken by the Appellants, brought an action against Scott's trustees for relief of his obligation as cautioner for Scott's intromissions as factor on the Cromarty estate.

At a meeting of the trustees held on the 1st of May, 1832, Turner stated to them that hostile proceedings had been commenced by the Appellants, with the view of interfering with his management of the Harvieston trust, and that the Bank of Scotland had also been urgent upon the subject of the debt owing to them, and that both of these parties required an obligation from the trustees that they would not make any payment out of Scott's estate to their injury. The minutes of the trustees upon the two subjects contained the following entries.

"The trustees are of opinion, that the Globe Company "should, in the meantime, remain satisfied with the pledge

" which they have already received, that no payments will be
" made by them which can in any way tend to interfere with
" or injure any claim that they may have upon Mr. Scott's
" funds; and they hereby renew their pledge to that effect
" accordingly.

" The trustees, while they believe that the Bank are satisfied
" of the particular hardship of the case, have no hesitation in
" pledging themselves, and they hereby do so accordingly, not
" to give or allow any preference, so far as they can prevent it,
" from being obtained over Mr. Scott's funds, at the instance
" of any individual creditor, and not to pay away any part of
" the funds but by equal division among his whole creditors."

The minutes also bore the following paragraph in regard to the Respondent's claim upon Scott's estate.

" The trustees thereafter, upon a full consideration of the
" whole affairs, consider it right that a communication should
" be had with Mr. Thomas McKenzie, who has such an interest
" in the result, as cautioner for the Cromarty balance; and they
" remitted to Mr. Aytoun to call upon that gentleman, and to
" explain to him generally the present state of matters, and,
" should he wish it, to fix a meeting with the trustees, in order
" that every information may be afforded to him, which the
" trustees consider he is well entitled to receive, from the for-
" bearance which he has shown in not before now pressing for
" relief from his obligation."

These entries were communicated to the Respondent and Appellants respectively.

On the 8th of May the Respondent wrote Turner in these terms:

" I told you at our last interview, that, in consequence of
" my previous conversation with Mr. Aytoun, and of the steps
" taken by the agents for the Globe Insurance Company against
" the representatives and property of the late Mr. Scott, I felt
" it to be my duty to consider what course I should follow for

" ultimate security as regards my imprudent cautionary engage-
" ment for Mr. Scott. I accordingly explained the state of
" matters, in so far as known to myself, to a legal friend of
" eminence, and, by his advice, I have raised an action of relief
" against Mr. Scott's trustees and representatives, and directed
" arrestments to be used in your hands as trustees, &c., but for
" the present nowhere else. My clerks and the messenger are
" strictly enjoined not to speak of these proceedings, nor will I
" execute the summons sooner than is absolutely necessary; but
" to remain quiescent while others are almost in Court, would
" injure me and my family, without benefiting Mr. Scott's heirs."

On the same day the Respondent used arrestments in the hands of Turner, who was factor for the trustees, on the estate of Forbes of Culloden, of whatever sums might be owing from it to Scott.

On the 5th of June, 1832, Scott's trustees "after anxiously
" considering the aspect of the whole affairs under their manage-
" ment, the proceedings which have been already adopted against
" them, and are further threatened at the instance of other
" creditors," resolved to call a meeting of Scott's creditors, and to hold it after the first step, which would soon be taken, in the Appellants' action against them.

At a meeting of Scott's trustees held on the 5th of October, 1832, Turner stated to them that decree for an interim sum had been given against the trust in the proceedings of the Cromarty trust, and that the Respondent had raised an action of relief against the Trustees in respect of his cautionary obligation for this debt, but "the summons had not been called last session,
" as Mr. Turner had understood from Mr. McKenzie that his
" object was merely to keep himself on a footing of equality
" with Mr. Scott's other creditors, and that he would not
" proceed with his action until the winter session, and that the
" trustees might have the advantage of the vacation to realize
" the trust-funds."

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The minute, after noticing other subjects of difficulty connected with the estate, concluded thus:

" *Lastly,* With regard to calling a meeting of Mr. Scott's " creditors for the purpose of taking their directions as to the " future management, the trustees consider this to be now a " step, not of choice, but almost of necessity; and though those " having claims against Mr. Scott are aware generally of the " impediments and embarrassments to which the affairs have " been subjected, from their entanglement with Mr. Tait's " affairs, still the trustees view it not only as proper towards the " creditors, but as necessary for their own exoneration, to call " them together, so as they may be made exactly aware of the " present state of matters, and give such directions as they may " think proper for the extrication of the affairs and the realizing " of the trust-estate. As, however, it would be very difficult to " have a full meeting at present, the trustees delay fixing any " day, but they feel anxious that it should take place before the " meeting of the Court in November."

On the 10th of December, 1832, a meeting of the creditors was called for the 13th of December, and the meeting was held on that day. This meeting was attended by the solicitor for the Appellants, and by " Henry Simpson, Esq., for Mr. " Mackenzie, W.S." *i. e.,* the Respondent. Mr. Turner produced to the meeting a report of the trustees upon the state of Scott's affairs, with a separate vidimus of the funds as at Martinmas, 1832. The meeting, having considered these, deferred coming to any resolution on the subjects brought under their notice, but appointed a committee, of which the Respondent was to be a member, to examine and report generally upon the trust matters.

In the report submitted to this meeting a detail was given of the actions against the trustees by the Appellants and the Respondent, which concluded thus:

" These are the whole of the actions which have been raised

" by the creditors; and the object which the trustees have now " in view, is to put matters upon such a footing as to prevent " any undue preference being obtained by one creditor over " another."

The vidimus, also submitted to the meeting, brought out an estimated surplus of funds after providing for the liabilities of the estate, with the exception of the debt due to the Appellants.

These documents were read to the meeting, and were afterwards communicated to the Appellants and the Respondent, among others, in the course of the months of December, 1832, and January, 1833.

On the 31st of January, 1833, the Respondent returned the papers, and added: " as illness will prevent my attending the " meeting of a committee of creditors convened for Friday next, " it is perhaps better, for this and other reasons, that I should " at once decline, as I now do, being a member of that com- " mittee. I am, &c."

In the month of January, 1842, Renton, as trustee on the estates of Culloden, raised a summons of multiplepoinding of a sum of 12,301*l.* 13*s.*, which he admitted to have been owing from the estate to Scott. To this action he called as Defenders, the Appellants, the Bank of Scotland, and the Respondent, for himself and as factor on the Cromarty estate.

The Appellants appeared as claimants in this action in respect of the collateral bond given by Scott, for payment of arrears of interest upon their loan of 125,000*l.* to Tait, of Harvieston, which amounted at the 6th of March, 1839, to the sum of 40,506*l.* 19*s.* 6*d.* For this sum the Appellants claimed to be ranked *pari passu* with the other creditors of Scott.

The Respondent also appeared as a claimant in respect of his obligation as cautioner for Scott, in his office of judicial factor on Ross of Cromarty's estates, and of a decree of relief which he had obtained in the action which he had brought against

Scott's trustees. In satisfaction of his relief the Respondent claimed to be preferred *primo loco* on the fund *in medio*, in virtue of his arrestments.

The trustees of Scott also appeared, and claimed to be preferred *primo loco* on the fund *in medio*, as made over to them for payment of Scott's debts in the first place.

After the record had been closed upon condescendences and answers, the Lord Ordinary (Cuninghame) ordered cases to be boxed to the Court, and on the 31st May, 1848, the Court pronounced the following interlocutor:

"Find, that the arrestment at Thomas McKenzie's instance, "dated 8th May, 1832, is valid and effectual, and sustain his claim "of preference in virtue thereof for the debt contained in the action "on the dependance of which the said arrestment was used, as "the same shall be ultimately ascertained, and in the meantime "rank and prefer him on the fund *in medio*, for the sum of "8,662*l.* 2*s.* 8*d.*, with the legal interest thereof from the 15th "day of May, 1833, contained in the *interim* decree, dated 17th "July, 1847, but deducting from the said interest the sum of "533*l.* 6*s.* 2*d.*, being the dividend received from Mr. Scott's "trustees on the 2nd day of August, 1839, and decern: Find "the trustees of the said James Scott, appearing as claimants "in this action, and the trustees of the Globe Insurance Com-"pany of London, and Sir James Gibson-Craig, Bart., their "factor and commissioner, also claimants, liable in expenses to "the said Thomas McKenzie."

The appeal was taken against this interlocutor.

Mr. Solicitor-General, Mr. R. Palmer, and *Mr. Goldsmid* for the Appellants.—1. Arrestment is not a competent mode of acquiring a preference over the creditors of a deceased person where it is used to attach funds already confirmed by his executors, but outstanding in the hands of third parties to the effect of establishing any preference for the arrester. An heir

is *eadem persona cum defuncto* and liable universally for his debts, unless, under the Act 1695, he limit his liability by an inventory. But an executor is a mere representative of the defunct; no further liable than for the estate taken possession of by him. So soon as he does take possession he is, in the language of the case Bell *v.* Campbell, *Kaimes*, 893, "trustee "for all concerned, and cannot withdraw the fund." See also *Bell's Com.*, 286 : *Dirleton's Do.*, 31 : Ellis *v.* Hall, *Dirl.* 148. The executor's title, when completed, carries the property out of the defunct and vests it in the executor upon the trusts of his office. If the executor has not confirmed, the creditor may himself confirm in his character of executor-creditor, and then, the fund being vested in him, he may pay himself as an ordinary executor, and as to the surplus remaining in his hands after doing so, he is like an ordinary executor-trustee for those entitled. Such a confirmation as executor-creditor would give a preference over an arrestment used in the life of the defunct, because after his death and before confirmation, the title is not in any one, but by the confirmation, the right is taken up by the party using it, because confirmation operates as a transfer of the property. Carmichael, *Mor.* 2,741 : Wilson *v.* Fleming, 2 *S. & D.*, 230. Accordingly in Rutherford, *Mor.* 774, it was found that arrestment used after the debtor's death was not a habile mode of diligence, and did not give any preference over creditors expeding confirmation, who as to their own debts have effected an absolute transfer of the property concerned.

The property being transferred to the executor by confirmation, he holds it for payment of his own debt in the first place, if he have any, and afterwards for the other creditors of the defunct, but arrestment in his hands is not competent. *Stair.* iii. 8, 67. Citation and decree are the only means by which payment by the executor can be enforced, for arrestment would prevent the diligence by the executor spoken of by *Stair.* Originally the duty of the executor was to pay *primis venientibus*,

but to prevent injurious preferences, the Act of Sederunt, 28th February, 1662, declared that creditors using diligence within six months of the debtor's death by citation of the executor, or obtaining themselves confirmed executors-creditors, or citation of other executors-creditors, should come in *pari passu* with creditors who might have used more timely diligence by obtaining confirmation or otherways. Confirmation, or citation of those who may have confirmed, was the only remedy of a creditor after this Act was passed, for if arrestment had still been competent, the object of the Act of Sederunt would have been entirely defeated, that object being to remedy the prejudice sustained by creditors obtaining themselves to be decerned "executors-cre-" ditors to the defunct, to the prejudice of other creditors, who, " either dwelling at a far distance, or being out of the country, " or otherways not knowing of the death of their debtors, are " postponed, and others using sudden diligence are preferred." And there is no instance in the books of any attempt to establish a preference within the six months by means of arrestment.

The object of the Act of Sederunt then was to accomplish equal distribution within the period of six months after the debtor's death, but the decisions extended the equalization beyond the six months, for in Gray *v.* Callender, *Robertson's App. Ca.* 483, it was decided that even after the six months, priority of citation and of decree did not give any preference, and in Russell *v.* Symes, *Bells Oct. Ca.* 217,—a creditor who had not cited the executor until *after* the six months, was ranked *pari passu* with another who had cited him *within* the six months, and likewise obtained the first decree, the fund being still in the hands of the executor.—That case shows that a citation within the six months will not give a preference over one used beyond the six months, so long as the fund is *in medio*, and by necessary consequence, an arrestment beyond the six months cannot give a preference over a citation and decree beyond the six months, and thus the Respondent's arrestment

in the present case, cannot give him a preference, as it was posterior to the citation of the Appellants. This view is further confirmed by McDougall *v.* Stevenson, 13 *S. & D.* 55, where it was found that creditors, using arrestment of funds of their debtor, deposited in a bank by his heir served *cum beneficio inventarii*, and executor confirmed *qua* nearest of kin, (the arrestment being with the knowledge that there was a deficiency of funds,) had not gained any preference over the other creditors. There the executor had confirmed, *suo jure*, while here he did so under a trust-deed, showing the present to be a still stronger case.

No doubt in Atkinson, Mure, &c., *v.* Bogle and Learmouth, *Mor. Service and Confir. App.*, No. 3, arrestment of a sum of 100*l.*, which had been confirmed, was sustained; but that sum formed a mere fraction of the amount in dispute, and was not the subject of any discussion, or of any reference to the previous authorities. The only other case which gives any apparent support to the Respondent's contention, is Swayne *v.* Fife Bank, but the question there decided was that arrestment against executors "was not an inhabile diligence," and neither it is, to the effect of securing the fund arrested, as was shown in Bell *v.* Campbell, *Mor.* 3,861, where the object of the arrestment was to prevent the executrix assigning away the fund in payment of *her own* debt. But it is altogether another question whether the arrestment is good to give a preference over other creditors, that question was not decided in Swayne *v.* Fife Bank. In Henderson's Trustees *v.* Drummond, 9 *S. & D.* 618, the successful creditor held a bond from the trustees of the defunct, who had thereby made themselves directly liable to him; and in Dunlop *v.* Weir, 2 *S. & D.* 150, the only question decided was whether arrestment in the hands of *the factor* of the executrix was competent. The arrestment there was diligence in the hands of the executor, and was sustained as such without the question of preference having arisen at all.

But whatever other observation these cases may be open to,

this must be observed of all, that in none of them was arrestment sustained where there had been a prior citation of the executor. If this be so, then the law, as it existed prior to 1790, still remains.

II. But, moreover, arrestment was out of the question, inasmuch as the trust-deed by Scott, being for creditors, had carried the fund out of his estate, and vested it for behoof of the creditors as a body, so as to be no longer liable to attachment by any single creditor. Whatever doubt there may have been originally as to the character of the trustees, this is certain, that before the Respondent had used his arrestment, it had become notorious that the estate would not be solvent, and that there would not be any reversionary benefit for the family. The trustees, therefore, by the trust-deed and subsequent confirmation, vesting the estate in them, had a good and perfect title before the diligence of the creditors began.

III. The Respondent, at all events, was barred, by personal exception, from taking steps to establish a preference in his own person. He attended meetings of the trustees, and received information from them, on the assumption that nothing was to be done by him to gain a preference. Their minute, communicated to him, expressed this in so many words, and no dissent was uttered by him. The effect of this conduct was to mislead the trustees and the creditors into the belief that he assented to this representation of his intentions, and to induce them to refrain from taking those steps which would have protected their interests. He was participant in measures based on the assumption that he would not secure a preference for himself; and by his silence he not only misled the trustees, but induced the creditors also, to believe that the assumption was correct, and to sleep upon their rights. The law will not allow a party thus to take advantage of his own duplicity. In Evans *v.* Bicknell, 6 *Ves.*, 183, Lord Eldon said, "It is a very old head of equity that if "a representation is made to another person going to deal in a "matter of interest, upon the faith of that representation, the

"former shall make that representation good if he knows it to "be false." The Respondent, by standing by, was as much a party to the statement, made to the creditors, as if he had made it by his own mouth; that his proceedings were intended "merely to keep him on a footing with Mr. Scott's other "creditors;" and Henderson *v.* Cheyney, 2 *Vern.*, 150; Raw *v.* Pope, 2 *Vern.*, 239; and Hobbs *v.* Norton, 1 *Vern.*, 136, show instances of cases in which a party inducing others, or allowing them to act upon a false belief, was compelled to make good the belief; and E. India Coy. *v.* Vincent, 2 *Atk.*, 83; Berrisford *v.* Milward, 2 *Atk.*, 49; Nevill *v.* Wilkinson, 1 *Bro. Ch. Ca.*, 46; Dalbiac *v.* Dalbiac, 16 *Ves.*, 116, show that if a man, having a latent right, stands by and allows money to be laid out or anything to be done whereby other parties may be prejudiced he will not be allowed to set up his right. The cases in English law upon this subject are numerous, but the same principle was recognized by the Judges in McDougall *v.* Stevenson, 13 *Sh.*, 55, before alluded to.

Sir F. Kelly and *Mr. Bethell* for the Respondent. I. The deed by Scott was not one for creditors generally, which excluded separate diligence by individual creditors. The deed was *mortis causâ*, and not more or less than a will, the provision for payment of debts in the first place being mere superfluity, or *quod inest in jure*. There was nothing, then, in the nature of the deed, to prevent the course taken by the Respondent. No doubt, where there is a trust for creditors, each has a *jus quæsitum* in the estate, which no creditor can, by his separate diligence, defeat. But here the trustees were mere *hæredes in mobilibus* of Scott—his representatives in respect of it, and nothing more, and the deed in their favour was "not to "tie up the hands of creditors," Thomson *v.* Butler, *Mor.* 1224.

Such being the position of the trustees, arrestment against

them in the hands of debtors to the estate was a competent mode of diligence. *Bank*, III. 1, 50, lays it down expressly that debts due to a defunct must either be confirmed or attached by arrestment in the hands of the executor confirmed. In Atkinson *v.* Mure & Bogle, *Mor. Serv. & Con. App.*, No. 3, it was found, so long back as the year 1808, that arrestment used against an executrix of a debt which had not been confirmed by her was an inept proceeding, because it had been used "before the executrix had, by confirmation, vested "any proper right in herself to the fund in question," but in regard to a particular debt which had been confirmed, the arrestment was sustained. The principle of that case was, that, until confirmation had been expede by some one, executor or creditor, there was no title to the fund in any one. If the creditor of the defunct himself expede confirmation, then he has made himself the creditor of the defunct's debtor, in addition to his previous character of creditor of the defunct, and may proceed to make the claim effectual, as in the ordinary case of debtor and creditor. So on the other hand, if the executor expede the confirmation, he thereby gains a title as in the case of the creditor, he makes himself the creditor of the defunct's debtor—but he has not done more—he has not gained possession as well as right—he also must proceed against the debtor in the ordinary way, and then, the relation of debtor and creditor being established between the executor of the defunct and his debtor, the creditor of the defunct may step in by arrestment and prevent the executor having the benefit of his proceeding to recover payment.

This is well shown in the case of Henderson's Trustees *v.* Drummond, 9 *Sh.* 618, where the competition was between arrestments used *before* and arrestments used *after* confirmation, and the latter were preferred.

No doubt the Act of Sederunt 1662 precludes the creditor taking this course within six months of the defunct's death, to

the effect of establishing for himself any preference over creditors who have, "within that period," used the diligence spoken of by the Act; but, as said by *Ersk.* III. 9, 45, "questions of competition among those who have used no "diligence till afterwards, must be determined by the legal "rules of preference, as if the Act of Sederunt had "never been made." Here the proceedings, both of the Respondent and of the Appellants, were long subsequent to the six months.

Accordingly, in Dunlop *v.* Weir, 2 *S.*, 150, where arrestments had been used by one creditor within the six months, in the hands of a factor to an executrix confirmed, and by another after the lapse of the six months, so well was the law of preference of the two diligences considered to be fixed, that no question was raised by the posterior arrester upon that point; the contest was confined to showing that arrestment in the hands of a factor was no better than if used in the hands of the executor himself. So, in McDougall *v.* Stevenson, Lord Glenlee said, "In Dunlop *v.* Weir, the only point raised "was, whether the arrestments competing were competent in "the hands of a factor; but how came that to be the only thing, "unless on the assumption that if the arrestment were formal "and valid in itself, it would have given a preference."

The current of authorities therefore shows that arrestments after lapse of the six months, and after confirmation expede, are not to be set aside for the benefit of creditors at large. Were it otherwise, if persons using diligence after the six months were to be in no better situation than if they were within the six months, it would be difficult to say what could have been the use of the Act 1662. No doubt in McDougall *v.* Stevenson, 13 *Sh.*, 55, arrestments used after the six months were not given effect to; but that was upon a ground no way affecting their efficacy as a mode of diligence, or of acquiring a preference; the objection given effect to was, that the party had barred him-

self from the benefit of his individual diligence by acquiescence in a course of management for behoof of the creditors at large.

II. The objection that the Respondent is barred from the benefit of his arrestment, must be founded entirely upon his own acts. If the Respondent had at the outset known that the estate was insolvent, such knowledge would not have barred him from the use of diligence for his own protection; but the evidence negatives any such knowledge, and shows that he did not interfere in the trust in any way, and had no knowledge of the insolvency until he used the arrestments, but that he was, on the contrary, led to believe by the statements of the trustees, that there would eventually be a surplus. If the facts would support the Appellants' argument, the Respondent would not dispute the principle they contend for, but inasmuch as the facts do not do so, the cases from the law of England on which they rely, have no application to the present; for there is no pretence for saying that the Respondent lulled the creditors into any idea of security, while he was secretly gaining a preference over them. So far from this, the Appellants were themselves taking such measures as they thought prudent for their own security.

[*Lord Brougham.*—The Appellants rely on this, that though the Respondent declined to be trustee, he was all along cognizant of the state of the trust.]

There is no evidence of such knowledge, or of the Respondent having seen anything to belie the hopes held out by the trustees of an ultimate surplus.

LORD BROUGHAM.—My Lords, this case has been argued as one of considerable importance in itself, which it unquestionably is, and as bearing upon an important branch of the law of Scotland. It has been argued with the ability which is usually observed in the arguments of the learned Counsel who attend at

your Lordships' bar. I certainly have a strong inclination of opinion in favour of the judgment which has been pronounced below with perfect unanimity by the learned Judges of the Inner House. There is an absence of hesitation on the part of those learned Judges, as if they entertained no doubt whatever about it, either with respect to the law or with respect to the fact, disputes upon both the one and the other of those heads being involved in the argument at the bar. One of the most able of those learned Judges, Lord Fullerton, expressed, indeed, great surprise at hearing a matter mooted for the first time, as he seems to think; at all events, mooted for the first time to his knowledge, which appeared so perfectly clear as to be, he conceives, beyond the reach of confutation. Nevertheless, I shall take time to look into the authorities, and into the facts of the case; for this reason, that we not unfrequently have to consider most elaborate and most able opinions, supported by admirable reasoning, in which the learned Judges are led away to deal more with the law than with the facts. Accordingly, I find in this case that the very able opinion of Lord Fullerton, which has been eulogized at the bar, and in that panegyric I entirely concur, nevertheless deals much more with the disputed points of law than with the equally disputed matters of fact. It is, therefore, necessary, in order that no mistake may be committed, remediless in this Court of last resort, that our attention should be directed closely to the facts as well as the law, upon which facts possibly the decision may ultimately turn. For this reason I crave permission of your Lordships to delay moving the judgment in this case until to-morrow; and if I should still find that I wish further time for consideration, I shall postpone it until Saturday morning, whether we sit here in causes or not on that day. At all events we may come here for this cause, if it should not be finally disposed of to-morrow.

GLOBE INSURANCE COMPANY *v.* MCKENZIE.—5th August, 1850.

5th August.

LORD BROUGHAM.—My Lords, In this case I craved your leave to have a short delay, in order that I might examine, if it was possible that so much attention had been given to a very important point of law, as prevented sufficient consideration being had of the disputed matters of fact; for this case, involving no doubt an important question of law, presents also some particulars of fact which behove to be disposed of before we can apply the law, and safely decide the case.

I find, my Lords, that the original impression which I had during the greater part, if not the whole of the argument, is entirely confirmed by a more full consideration of the whole case; and I am prepared now, to submit the result of that consideration to your Lordships, and to move that the judgment which has been pronounced in the Court below, be affirmed.

Three questions are raised on this appeal.—First, Had the Respondent any right in law by his arrestment of a debt due to Mr. Scott deceased, and on suing his executor confirmed, to obtain as the fruits of the arrestment, a preference over other creditors, the estate being insolvent, or assumed to be insolvent? Secondly, Had the deed, the trust disposition and settlement of Mr. Scott of the 17th of September, 1827, the force and effect of a trust disposition for distribution among his creditors, so as to cut down any arrestment, or to prevent any preference, to which, but for this, the Respondent might be entitled? Thirdly, Has the Respondent, by his conduct in Mr. Scott's affairs, and towards the other creditors, excluded himself from the benefit of his diligence of arrestment, supposing that both the former questions are decided in his favour—that is to say, supposing him to be neither excluded by the general law of distribution, nor by the deed of 17th September, 1827? These three questions exhaust the case entirely.

Globe Insurance Company *v.* McKenzie.—5th August, 1850.

First, a person dies, and we will assume his estate to be insolvent, either at present or in prospect; for this insolvency is the ground of the question being material. His will is confirmed in the usual way, by a proceeding answering to our probate. One of his creditors brings his action against his executor, who has been confirmed, or, as we should say, has proved the will and accepted the executorship. Also he (the creditor) arrests a debt due to the estate in the hands of the debtor. The question is, can this party, the creditor of the deceased testator and of his executor, thus obtain a preference? The importance of this question in any country, especially any commercial country, is manifest, and it would be difficult to conceive the possibility of such a question still remaining undecided. But we are accustomed in this Court of Appeal, to have such cases brought before us, as show that the fact of a point having been clearly and long since decided by the Courts of Scotland, is no reason for it not being again disputed, and again appealed, when again decided.

The feeling under which this observation is made by me, appears to have forcibly presented itself to the learned Judges below. For though Lord Jeffrey seems to have wavered in his opinion on this important and well settled position, the doubt which he states appears to have arisen from what he terms "a "natural leaning to the equal principle of rateable distribution "of the Insolvent Estate." A leaning which, however natural it may be, would exclude the undoubted Scotch rule of an executor paying *primo venienti* before the Act of Sederunt, and in cases of administration not falling within that Act—a leaning which however natural, would entirely exclude the undoubted right given to executors by the law of England, of electing what debts of the same degree they shall prefer—to which I must really add, that, (as Lord Fullerton justly observes), there can no more be discovered a reason for requiring an equal division among creditors after a debtor's death, than for requiring the

same equal division during his lifetime—which prior to his declared insolvency or bankruptcy cannot be effected without his consent. But all these doubts of Lord Jeffrey become immaterial to my view of this matter, when I find that after closely examining the question, and especially it must be supposed the authority of decided cases, his Lordship expresses an entire and unhesitating concurrence in opinion with all his learned brethren—an avowal of somewhat altered view, to be expected from the known candour of that most excellent and most distinguished person.

Come we then to Lord Fullerton, who prefaces his able and luminous judgment with this remark, "The negative of the "proposition," (that is, the negative of the first proposition I have propounded) "has been maintained with very great ability, "and a degree of earnestness which I must fairly say surprised "me, as I conceived the point to be settled, not only on "principle, but by repeated judgments of the Court." It forms but little excuse for the raising of questions upon points already oftentimes disposed of, that the zeal of the disputants is accompanied with ability, or with great ability, or even with very great ability. Such vain contentions are to be lamented as a mere waste of such ability, and they are still more to be reprobated as a waste of valuable time to the Courts of the country where the useless display is made, and to this Court of review in the last resort.

Upon the first point, then, I agree with the Court below, entirely and without any hesitation; and this both upon principle and upon authority. First, upon principle. An executor is not a trustee for either creditors or legatees, though he is bound to satisfy the claims of both, just as a testator is bound to satisfy the claims of his creditors during his lifetime. He is in the shoes of the testator deceased, and his capacity being representative, and not fiduciary, is the ground of all the duties imposed on him, and all the equities against him. It is a man's

duty to pay his debts during his lifetime. He does a wrong if he spends the money wherewith he should satisfy all, in paying one, and leaving the others unpaid,—no question of that. Comes his decease; comes his executor in his shoes to represent him after his decease; and the executor has that very duty which the testator in his lifetime had, and which every honest man ought to perform,—the duty of paying his creditors equally. But he is not bound to pay them equally prior to his bankruptcy, or the distribution of his estate under the bankrupt law, or under the insolvent law; he may give a preference to any he pleases. So may the executor, past all doubt, so he does not prefer debts of a lower to those of a higher kind, a distinction, however, which is unknown in the law of Scotland.

Next upon authority—where decided cases leave no doubt, it is superfluous to cite text-writers. Here there is no doubt on the decisions. Swayne's case, Atkinson and Boyle, Dunlop v. Weir, Cricken's creditors v. Macdouall, it is sufficient to name. But the very point was decided apparently in Thomson v. Butler, and in the case of Sibbald's trustees. Those cases throw material light upon the second question, with which I am not now dealing. Great stress has, in different stages of this case been laid on the Appellant's behalf, upon the case of McDougall v. Stevenson. On that case two observations arise. First, as remarked by the learned Lord President, in his very able judgment, Lord Mackenzie's opinion did not receive the concurrence of the Second Division, before which the cause came; and besides, it proceeded mainly upon a special ground, namely, the conduct of the party, which comes under our third head, and cannot affect the general question upon which I am now arguing. Secondly, Lord Mackenzie himself had that case of McDougall v. Stevenson brought to his notice fully, in disposing of the present question, and it did not affect his full concurrence with the rest of the Court, in their judgment upon that question. He stated the special grounds of difference, and

gave his clear opinion for the proposition maintained by the Respondent, and sanctioned by their Lordships. It is quite hopeless to rely on a decision thus repudiated by the judge himself who pronounced it; repudiated, at least, as wholly inapplicable to the case at bar; and such a contention is futile as well as hopeless.

As to the bearing of the Act of Sederunt, 1662, I really cannot see, any more than the learned judges below, how it enters into this discussion; for its operation is confined to six months, beyond which time here both the confirmation and arrestment took place.

2. But secondly, though the law is clear in the general case, the party may be excluded by a trust. An executor may be also trustee for the distribution; he may be under the obligation of other duties than those of a representative; or he may have a double duty cast on him, and may thus be precluded from giving up the fund *primo venienti*, or, as here, he may be precluded from yielding to the diligence of the arrester, and protected from that diligence. Is there such a trust in this case? I am very clearly of opinion that there is not. A trust for a family purpose, or a testamentary purpose, or both, does not become a trust for the payment of creditors, merely because the deed constituting it contains a direction to pay the maker's debts. This direction is frequently and superfluously added to such instruments; frequently, it may be, only to show on the maker's part, an intention of obeying the law; superfluously, because that law would impose the duty, whether the deed laid it on or not. Here the purpose of the deed is set forth. It is a *mortis causâ* deed, to regulate and settle Scott's affairs. Testamentary arrangements are its substance; and it contains a clause of revocation. It can give no kind of right to any one creditor, beyond what he would have had were there no such clause respecting creditors in the deed. The Court, in Cricken's creditors v. Macdouall, held it clear that a clause imposing on

the executor the payment of the testator's debts, imported no more than *quod inerat de jure*. Then the rule of law applies, *expressio eorum quæ tacite insunt neque nocet neque prodest*. The case of Sibbald's trustees, already referred to, is another decision clearly to the same purpose; and it arose upon a competition of arrestments.

3. On the third question I need not long dwell. I entirely agree with Lord Fullerton and Lord Jeffrey in their remarks upon this portion of the case. After stating how far, at the date of the arrestment, anything had been done which could have barred Mr. McKenzie from resorting to diligence in order to obtain a preference, Lord Fullerton says: "It would require "some very strong evidence indeed to prove that he had aban- "doned, by a subsequent waiver, that right of preference which "on this view he had already obtained. Mere acquiescence in "the proceedings of the trustees would most certainly not be "sufficient. The supposed accession of Mr. McKenzie to the "trust, as a proper trust for creditors, is at best but an accession "by implication." Lord Jeffrey says: "Then as to the extra- "vagant proposition that Mr. McKenzie, having acquired a "preference, afterwards renounced it, I must say that that would "require a very express renunciation. But instead of this, and "in order to prevent such an inference, he takes a protest "against it being supposed that he had done so."

My Lords, I have hitherto treated this case as if it were a manifestly unanimous judgment of the Court below. It may be said that the opinion of Lord Cuninghame, the learned and very able Lord Ordinary, forms an exception. This I take leave to doubt, if not to deny. When his Lordship, instead of giving his interlocutor with his reasons, takes the case to report to the Court, he must mean by this course of proceeding to imply that he has not made up his mind upon the case. If he had, he ought to have given the decision, and then let the party against whom he decided take it to the Court; but he

takes it to the Court himself, because he has not fully made up his mind. I do not deny that he shows a leaning, and makes, as he always does, an able and luminous note upon it, the first sentence of which, however, suffices to show us that really—and I speak it with great deference to that learned Judge—he begins by begging the question, or at least he begs so large a portion of the question as is quite sufficient to decide the case: "The record and revised cases prepared by the parties, show "that the present is a competition between *trustees*, who are "confirmed executors *under a general disposition* and settlement "of a defunct debtor, *for behoof of his creditors at large*, and an "individual creditor." If you grant that, you go very far to granting the whole matter in dispute. I deny it. I have stated the reasons why, agreeing with the Court below, I do, and have a right to deny that it is such a deed; and therefore it is not such a competition as his Lordship states, between the trustees for the payment of the debts at large, and any one creditor.

My Lords, expressing my surprise, in common with the learned Judges below, that the case should have been so contentiously argued against the authorities (because as to saying that Lord Stair has a doubt upon the matter, cases have been decided again and again, long since, which leave no doubt) I have no hesitation in advising your Lordships to affirm the interlocutors appealed from, with costs.

It is Ordered and Adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutors therein complained of, be, and the same are hereby affirmed: And it is further Ordered, That the Appellants do pay or cause to be paid to the said Respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk-Assistant: And it is also further Ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month

from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the Bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

J. C and H. FRESHFIELD—SPOTTISWOODE and ROBERTSON.