mediately upon the death of both parents; and John Rogerson had no power whatever to defeat the marriage-contract by directing that if his son Samuel should die before the age of thirty then the moneys were to go to his appointees.

"It is said, however, that Samuel Rogerson homologated and acquiesced in his father's settlement, and in support of this it is averred that he took payment of the income and did not claim the capital after his father's death. His own settlement indicates the view which he and his advisers took as to his rights. It sets forth as follows:—'And with regard to the succession to the estate of my deceased father John Rogerson, which has already opened to me, but the funds of which I am not entitled to receive until I have reached the age of thirty years, I direct that the same shall be paid over to the said William Rogerson, to whom I bequeath the same.' The postponement of the payment is here recognised as a legitimate exercise of the power by the father; and Samuel, acting upon this view, took payment of the annual income paid to him by his father's trustees. This, however, cannot be considered as homologation and acquiescence in the distribution of the estate which the father made, in the event, which happened, of Samuel not attaining the age of thirty. If he had a vested interest on the father's death in the property, which the father could not defeat by a testamentary deed, his right or that of his executor to insist upon such right being given effect to would not be barred by the fact that he had taken payment from the trustees of the income given to him."

The trustees having reclaimed, the Lords adhered.

Counsel for Reclaimers—R. Johnstone—A. J. Young. Agents—J., C., & A. Steuart, W.S.

Counsel for Respondent — Trayner — C. J. Guthrie. Agents—Paterson, Cameron, & Co., S.S.C.

Wednesday, June 29.

FIRST DIVISION.

[Lord Fraser, Lord Ordinary on the Bills.

MITCHELL *v.* SCOTT (MOIR'S TRUSTEE).

Bankruptcy—Preference.

Held that arrestment on the dependence of an action creates a preference although sequestration of the debtor's estate be awarded before decree has been obtained in the action.

Observed per curiam—That if Mr Erskine's opinion (iii. 6, 18) as to the right of an arrester upon a dependence be supposed to be applicable to the case of insolvency it is unsound.

Judicial Factor—Factor loco absentis—*Arrestment on the Dependence.*

Arrestment on the dependence of an action is competent in the hands of the debtor's factor *loco absentis.*

Miss Janet Wingate claimed to be ranked preferably on the sequestrated estate of James Moir, writer, Alloa. The trustee admitted her claim, but to an ordinary ranking only. The following deliverance by him explains the circumstances of the case:—"On 3d November 1879 a summons was raised in the Court of Session at the instance of the claimant as pursuer against the bankrupt James Moir, and also against George Dalziel, W.S., Edinburgh, factor *loco absentis* to Mr Moir, for any interest he might have in the premises, defenders. The summons contained warrant to arrest the defender's readiest rents, goods, and gear, and upon the dependence of the action the pursuer used arrestments of the dates under mentioned in the hands of the arrestees after-named:—

"Name and Designation of Arrestee.	Date of Arrestment.
"1. George Dalziel, W.S., Edinburgh, factor *loco absentis* to the bankrupt.	5th November 1879."

[Then follow the names of certain other arrestees not necessary to be referred to.]

"On 23d April 1880 the estates of the said James Moir were sequestrated by the Court of Session, the first deliverance upon the petition being dated 25th April 1880. The trustee was thereafter duly appointed to his office in terms of the statute, and duly confirmed by the Sheriff of the county of Midlothian, conform to act and warrant in his favour dated 5th May 1880.

"The trustee has not uplifted or received any funds or moveable estate from any of the arrestees above named, with the exception of Mr George Dalziel, as factor *loco absentis* foresaid. Upon 10th May 1880 the trustee received payment from him of the sums of money in his hands or under his control as factor *loco absentis* foresaid, which sums exceeded the amount of £2500. Mr Dalziel has been discharged by the Court of his intromissions as factor.

"After various steps of procedure in said action, the claimant upon 18th December 1880 obtained decree therein, of which the extract is produced as aforesaid. By this decree she is entitled to rank as a creditor of the bankrupt for principal sums amounting to £2274, 2s. 2d., with interest at 5 per cent. upon £1769, 8s. 7d. thereof from 3d November 1879 to the date of sequestration. The said debt, together with the sum of £41, 13s. 10d., being the amount of the said interest, amounted at the date of the sequestration to £2315, 16s.

"The trustee has examined the documents lodged by the claimant, and admits her claim to be ranked in the sequestration for a debt of £2315, 16s., and to draw a dividend thereon as an ordinary creditor; but he cannot admit her claim to receive full and preferable payment of the sums claimed by her, having already given her an opportunity of producing any further evidence or authority in support of her claim to a preference in virtue of said arrestments or any of them. He rejects said claim to a preference upon the following grounds:—

"1. That no funds or moveable estate have been uplifted or received by him from said arrestees, other than from the said George Dalziel as factor *loco absentis* foresaid.

"2. That the arrestment in the hands of the said George Dalziel, as factor foresaid, was incompetent and invalid in respect that he was a defender in the action and not a third party.

"3. That the arrestments, even if competent

and valid, being used upon the dependence of an action in which decree was not obtained until long after the date of the sequestration, were cut down and rendered ineffectual to create any preference in favour of the claimant by the sequestration of the effects of the said James Moir."

The claimant appealed. The Lord Ordinary (FRASER) sustained the appeal, and ranked the appellant preferably on the funds arrested on 5th November 1879 in the hands of George Dalziel, fomerly factor *loco absentis* on the bankrupt's estate.

His Lordship added the following note:—"In this case the question to be determined comes out very clearly upon the note of appeal and the deliverance of the trustee, and further written pleading is unnecessary.

"The appellant is a creditor of the bankrupt James Moir, who left Scotland for Jamaica or other foreign parts, and upon whose estate a factor *loco absentis* was appointed by the Court in the person of Mr George Dalziel. While Mr Dalziel was in the administration of the absent man's property the appellant raised on 3d November 1879 an action against Moir and Dalziel to recover payment of the debt due to her. Upon the 5th November 1879 the appellant used arrestments on the dependence in Dalziel's hands as against Moir. On the 25th of April 1880 the estates of Moir were sequestrated, and the factory in favour of Dalziel thereby in consequence came to an end. The pending action was in usual course intimated to the trustee, who sisted himself as a party to it; and decree therein was obtained by the appellant on 18th December 1880 against both Moir and the trustee in the sequestration.

"The appellant claims, in virtue of her arrestment, to be ranked preferably on the estate of Moir, and this claim has been rejected as a preferable claim, but admitted on an ordinary ranking, the deliverance of the trustee being placed upon two grounds—*First*, that the arrestment was inept in consequence of its being laid in the hands of a person who was a party to the action; and *secondly*, because an arrestment upon the dependence not followed up by decree till long after the date of the sequestration could not compete with the statutory rights of the trustee. And to these two grounds another was added at the debate before the Lord Ordinary, viz., that an arrestment in the hands of a factor *loco absentis* was incompetent.

"The Lord Ordinary is of opinion that all these grounds are untenable in law. In regard to the first, the debtor was James Moir, and it was against him and his estate that decree was sought. Whether it was necessary to have made Dalziel a defender in the action may be doubted; but the fact that he was formally made so will not alter the rights of the creditor of Moir to attach moneys in the factor's hands belonging to Moir. The latter having left the country, and his estates being thus unprotected, the Court appointed an officer of their own for its protection, and for the administration of any moneys which the factor might collect. Such moneys Moir could at any time call upon the factor to account for; and such being the case, there can be no doubt that the fund was arrestable at the instance of his creditors. If the factor be a trustee, then the very point was decided in *Kyle's Trustees* v. *White* (14th November 1827, 6 S. 40), the rubric of which is—'Competent to arrest in the hands of a trustee on the dependence of an action against the truster personally and the trustee himself *qua* trustee.' The office of factor *loco absentis* is one of trust, although the appointment be made by the Court. This disposes of the new points started at the debate, to the effect that an arrestment in such an officer's hands was incompetent, because, it was argued, he and the *absens* were identical, and that it was just as idle to lay an arrestment in the factor's hands as it would be in the hands of Moir himself. This is a misapprehension as to the character of the office. The factor is not identical with the *absens*, although he is accountable for the money he collects to that person. He is an officer of Court, bound to manage the estate according to the rules laid down by the Pupils Protection Act, and he is amenable to the Accountant of Court as well as to the *absens*.

"The other ground upon which it is contended that no preference was acquired by the arrestment derives some countenance from the doctrine laid down by Erskine (iii. 6, 18), where he says—'If an arrester upon the dependence shall not have got his debt constituted by decree when preference is to be determined between him and the other arresters whose debts are constituted, those other arresters must be preferred to him from the nature of the debt itself; for one who has not yet made it appear that any sum is truly due to him can claim no preference.' Assuming this to be sound law, let us see how it can be applied to the present case. The 108th section of the Bankrupt Act 1856 no doubt says that 'the sequestration shall, as at the date thereof, be equivalent to an arrestment in execution and decree of furthcoming;' and the fact is relied upon that the sequestration in this case took place in the month of April 1880, whereas decree was not obtained in the action at the appellant's instance until December of that year. There was thus, it is contended, the very case stated by Erskine, of an arrestment in execution followed by a decree of furthcoming, eight months before the appellant had obtained a decree upon which execution could follow. This point arose under the former Bankrupt Statute in a case of *M'Geachy* v. *Mellis* (not reported, but stated in 2 Bell's Com. p. 79, note), where the Court found 'that the act of the Court awarding sequestration on the first deliverance on the petition for sequestration cannot be held as an arrestment in the question with arrestors whose diligences were used sixty days or more before the sequestration.' It must, however, be kept in mind that the former Bankrupt Act (33 Geo. III. cap. 74), under which the case of *M'Geachy* arose, did not contain a clause such as section 108 in the Act of 1856, declaring the effect of sequestration to be as above quoted. Still section 108 must be read along with section 102 of the Act of 1856, which enacts that the act and warrant of confirmation in favour of the trustee shall transfer to and vest in him as at the date of the sequestration the property of the debtor to the effect following—*First*, The moveable estate and effects of the bankrupt wherever situated, so far as attachable for debt, to the same effect as if actual delivery or possession

had been obtained, or intimation made at that date, subject always to such preferable securities as existed at the date of the sequestration and are not null or reducible. Now, the arrestment used by the appellant was undoubtedly a security which she had at the date of the sequestration, and it was not null and reducible; and section 108 must therefore be read as meaning that the sequestration shall operate as arrestment in execution followed by decree of furthcoming in regard only to property so far as free from preferable securities. If there had been undue delay in following up the action by the obtaining decree, which there was not, it might be argued from section 12 that an objection could be stated against the arrestment; but not being open to any such challenge, it must stand as a good security which the trustee was bound to respect and to give effect to.

"It is not intended by this interlocutor to decide any question as to the amount of the appellant's claim. No argument was submitted to the Lord Ordinary on this matter. The only point here determined is, that the appellant is entitled te be ranked preferably and not merely as an ordinary creditor."

The trustee reclaimed, and argued—A factor *loco absentis* was *eadem persona* with the absentee. An arrestment therefore in the hands of the factor was incompetent. Secondly, the arrestment did not found a preference because it was not followed up by decree till after the date of payment.

Authorities—*Brodie* v. *M'Lellan*, June 14, 1710, M. 816; *Nairne* v. *Brown*, Jan. 1724, M. 820; *Watkins* v. *Wilkie*, Jan. 2, 1738, M. 820; *Campbell* v. *Hog*, Feb. 15, 1729, M. 820; *Carmichael* v. *Mosman*, June 22, 1742, M. 2791; *Wilson* v. *Fleming*, June 26, 1823, 2 S. 383, 430; Ersk Inst. iii. 6, 18; Bell's Comm. ii. 68, 72.

Replied for Respondent—[The Court did not desire argument on the competency of an arrestment in the hands of a factor *loco absentis*.] Except the passage in Erskine, the authorities and the Bankruptcy Statute were in favour of the preference contended for. Were it otherwise, debtors might collusively allow preferences to be established by permitting decrees in absence.

Authorities—*Macdonald* v. *Elder*, Jan. 14, 1805, F.C.; *Symington* v. *Symington*, Dec. 3, 1865, 3 R. 205; *Todd* v. *Smith*, July 16, 1851, 13 D. 1371; *Wyper* v. *Carr & Company*, Feb. 2, 1877, 4 R. 444; *Globe Insurance Company* v. *Scott's Trustees*, Feb. 16, 1849, 11 D. 618, and August 5, 1850, 7 Bell's App. 296.

At advising—

Lord President—In this case the appellant is a creditor of a James Moir who left Scotland some time ago, and on whose estate a factor *loco absentis* was appointed by the Court. While the estate of the absentee was being administered by the factor the appellant raised an action against Moir, and also against the factor *loco absentis*, and on 5th November 1879 she used arrestments on the dependence of this action in the hands of the factor *loco absentis*. After this Moir's estate was sequestrated, and of course that put an end to the factory granted by the Court. The action was intimated to the trustee, who sisted himself as a party to it. Thereafter decree was obtained, but not until after the sequestration.

The appellant claims to be ranked preferably in the sequestration in respect of her arrestment in the hands of the factor *loco absentis*, and to this claim the trustee has made two objections. He says, in the first place, "that the arrestment in the hands of the said George Dalziel, as factor aforesaid, was incompetent and invalid, in respect that he was a defender in the action, and not a third party." And the trustee pleads, secondly, "that the arrestments, even if competent and valid, being used upon the dependence of an action in which decree was not obtained until long after the date of the sequestration, were cut down and rendered ineffectual to create any preference in favour of the claimant of the sequestration of the effects of the said James Moir." The Lord Ordinary has refused to give effect to either of these objections, and I agree with him.

As regards the first objection, it is hardly necessary to say anything. It is too plain for argument. There cannot be the least doubt that the factor *loco absentis* was under an obligation to account to the absentee, and that was sufficient to make him liable as arrestee. The other objection is more important, but I cannot say that I entertain any doubt as to the fact of a party who has arrested on the dependence of an action, but who has not obtained decree, being entitled to a ranking on a bankrupt estate as a preferable creditor as regards the estate which his arrestment covers, and the only difficulty arises from a passage in Erskine's Institutes, to which the Lord Ordinary has referred. Mr Erskine says—"If an arrester upon a dependence shall not have got his debt constituted by decree when the preference is to be determined between him and the other arresters whose debts are constituted, those other arresters must be preferred to him from the nature of the debt itself; for one who has not made it appear that any sum is truly due to him can claim no preference; and in the same manner, if the term of payment of a debt on which arrestment has been used be not yet come at the time of the competition in the forthcoming, the creditor in that case can claim no preference; nay, he could not obtain a forthcoming though there were no competition, because no creditor is entitled to payment till the term of his payment be come." Now, if this doctrine is intended to apply to a case in which there is no insolvency, and to that case only, I do not know that any exception can be taken to it; but I am afraid that a competition of arrestments where there is no insolvency is hardly a possible case. It is insolvency which gives arrestments their value. Therefore, if Erskine's doctrine is limited to cases in which there is no insolvency, it is one of very little importance. On the other hand, if it is intended to apply to the ranking of creditors on a bankrupt estate, I must say that I think it inconsistent with the fundamental principles of our system of bankruptcy. I am therefore prepared to adopt what Mr Bell says—that "if Mr Erskine's opinion be supposed applicable only to the case where there is no insolvency it is unobjectionable, if to the case of insolvency it seems to be unsound" (1 Bell's Comm. 316). And the unsoundness of the doctrine as applicable to the case of insolvency becomes very apparent when we consider those words in the passage from Erskine

which I have read, but which are not quoted by the Lord Ordinary, for it is plain that in Erskine's opinion future and contingent creditors would not be entitled to rank in sequestration; but, as we all know, future and contingent creditors are just as much entitled to a ranking as present creditors, in a different way no doubt, and subject to different rules, but they are all entitled to claim in a sequestration. This does not depend on statute, but on the common law—on the fundamental rules of equity which underlie our whole system. If future creditors, *i.e.*, those whose date of payment has not yet come, and contingent creditors, *i.e.*, those whose debts are not yet payable and may never become payable, were not entitled to claim in the sequestration, their debt would be gone for ever, because the bankrupt's discharge would finally put an end to it. The statute therefore allows future and contingent creditors to claim just as much, and no more than as much, as justice requires. Future debtors are allowed to rank subject only to a deduction of interest for the period between the date of sequestration and of the payment of their debt. In the case of contingent creditors, a sum is set apart to meet their claim, should the condition upon which it depends become purified. If, therefore, the doctrine of Erskine applies to cases of insolvency, it would exclude this whole class of cases. Indeed, I cannot think that that learned writer refers to competitions in bankruptcy. The whole scope of the Bankruptcy Statutes is opposed to such a view. In particular, I may notice that equalising of diligence which is provided for by the 12th section. Before the process of sequestration was made applicable in the case of all debtors this equalising process was one of great importance. It is dealt with in the whole series of statutes in very much the same way, and the general effect is that all diligences used within sixty days of notour bankruptcy are equalised. We hear little of this now, because almost all estates are wound up by sequestration. But where there is no sequestration, how does the statute deal with this very subject of arrestment in dependence? The 12th section provides that "arrestments and poindings which shall have been used within sixty days prior to the constitution of notour bankruptcy, or within four months thereafter, shall be ranked *pari passu* as if they had been used of the same date, provided that if such arrestments are used on the dependence of an action or on an illiquid debt they be followed up without undue delay." Now, therefore, it is clear that the statute here contemplates that arrestment on the dependence is just as good a diligence as arrestment in execution, provided that there is no delay in following out the diligence. This provision seems to me directly in point in the present case. I am therefore of opinion that if the arrestment is used sixty days before sequestration, and is followed up without undue delay, and is in other respects unimpeachable, it will entitle the creditor to a preferable ranking, although sequestration of the debtor's estate has been awarded before following out the arrestment. I am for adhering.

Lord Deas, Lord Mure, and Lord Shand concurred.

The Court adhered.

Counsel for Reclaimer — Mackay — Low. Agents—Macandrew & Wright, W.S.

Counsel for Respondent—Trayner — Pearson. Agent—Alexander Morison, S.S.C.

Wednesday, June 29.

SECOND DIVISION.

[Sheriff of Lanarkshire.

RAEBURN AND OTHERS *v.* MULHOLLAND.

Shipping—Stevedore—Damage to Cargo—Responsibility of Stevedore appointed by Charterers for Damage to Goods for which Owners of Ship had been made liable by Consignees of Cargo.

By charter-party, dated 17th November 1879, between William Raeburn and others, the owners of the steamship "Escurial," and Messrs James Dunn & Sons of Glasgow, that vessel was chartered to take a cargo at Glasgow to Pernambuco, and or certain other South American ports, the ship being paid a lump sum of £2450 sterling as freight, the charter bearing that the owners of the vessel were to be responsible for improper stowage. The loading of the cargo was conducted by James Mulholland, who was appointed by the charterers, Messrs Dunn & Sons, as stevedore. On the arrival of the vessel at Rio some of the cargo was found to be so much damaged that the captain was compelled, in order to stop a threatened arrestment of the vessel, to pay the consignees, Messrs Finnie & Co. of Rio, the sum of £96, 7s. 1d. sterling. In these circumstances the owners raised this action against Mulholland for the sum which they said had had to be paid in consequence of the culpable and careless or negligent stowage of the vessel by the defender. The defender pleaded that not having been employed by the pursuers to stow the said cargo, nor paid by them, he was not responsible to them for any alleged defect in the stowage. The Sheriff-Substitute (Spens) sustained this plea and dismissed the petition. On appeal the Lords of the Second Division were of opinion that this plea could not be sustained, as although the charterers, Dunn & Co., had given the defender his appointment as stevedore, the work for which he was appointed was work done in the pursuers' interest, and, besides, it was clear on the evidence that the defender was aware of this when he took the appointment.

In these circumstances they sustained the appeal, recalled the judgment, repelled the defender's plea-in-law, and remitted to the Sheriff to proceed with the case.

Counsel for Pursuers (Appellants)—Solicitor-General (Balfour, Q.C.)—Jameson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Defender (Respondent)—Dickson. Agent—Thomas Carmichael, S.S.C.