tion is this. He had a debt secured over certain real property in Shanghai, which turned out insufficient to pay his full debt. According to the law of England, which prevailed at Shanghai, he was not only entitled, like a heritable creditor, to rank for his unsecured balance, but he was preferable for that balance, on the ground of his being what is called in English law a "specialty creditor." Mr Smith, acting on behalf of the trustees, seems to have disregarded Croom's debt altogether. He chose to assume that the mortgage was sufficient to provide for payment of the debt in full, and on that assumption he paid the ordinary unsecured creditors in Shanghai, and remitted the balance to the trustees in this country. An executor who pays postponed creditors and leaves a preferable creditor unpaid, does this at his own risk, just as if he had paid beneficiaries before creditors. Mr Smith was aware of the existence of the "specialty debt," and chose to take his risk, and has thus landed himself in liability to the unpaid creditor. The question then arises, whether the other trustees are involved in this liability, and therefore whether they are bound to replace in the fund *in medio* the sum thus improperly paid away by Smith. This depends upon the relation between them and him. He was furnished with a power of attorney from them in the amplest terms —in fact, he was employed to act for them just as if they had been present in Shanghai. The question rather belongs to the law of principal and agent, how far the trustees are liable for the acts of Smith on their behalf? If Smith had committed a fraud, it would be a question of delicacy how far they are answerable for it. But we have no case of fraud here. Smith was acting in accordance with his powers, and his error was one in judgment. For any such act, done within the general scope of his authority, his principals are answerable. They are as much bound to replace to Mr Croom the sum paid away by Mr Smith to his prejudice, as if they had been themselves acting in Smith's place. It has been argued in defence of the trustees that the trust-deed contains a clause of immunity. In a question with creditors that clause is of no avail. Their ground of liability is, that they, having the only proper title to intromit with the effects of the deceased, have paid away a considerable part to wrong parties, and Mr Croom has thus suffered a wrong. Their liability is that of representatives and intromitters. Mr Croom has no concern with them in their proper trust character. Lord Mackenzie's interlocutor must therefore be, in substance, adhered to.

The other Judges concurred.

Agent for Mr Smith—Thomas White, S.S.C.

Agent for the other Trustees—J. & R. Macandrew, W.S.

Agent for Mr Croom—Lawrence M. Macara, W.S.

Friday, March 10.

MARIANSKI *v.* WISEMAN (M'LAY'S TRUSTEE).

Trust — Accession — Personal Bar — Diligence. A party to whom a trust for behoof of creditors had been intimated, and who expressed his approval thereof to the agent of the trustee, attended a sale of the truster's effects by the trustee, and took a share in its management—*held* to have acceded to the trust so as to be barred from attempting to acquire a preference by separate diligence.

By a trust-deed, dated 6th December 1869, the Rev. Walter M'Lay, formerly United Presbyterian minister at Strathaven, who was then insolvent, conveyed his whole estate to the defender for behoof of his creditors. The pursuer was a creditor of M'Lay for £499, in security of which he held an assignation of a policy of assurance on M'Lay's life for £500. On the 9th December the pursuer received a letter from M'Lay, intimating that he had granted the trust-deed, and that he expected the pursuer's concurrence. Next day he received a circular from the trustee's agent. He thereupon sent for the agent, and expressed his approval of the trust-deed. M'Lay's debts amounted to about £5000, and his whole estate consisted of his household furniture. All the other creditors acceded to the trust. After due advertisement the trustee proceeded to sell the furniture by public roup on the 16th and 17th December. The pursuer not only attended the sale, and made considerable purchases, but took a leading part in the management of the sale. The sum realised by the sale amounted to £429, 10s. 6d., which sum was arrested on the 1st January 1870 by the pursuer in the hands of the defender, as trustee on M'Lay's trust-estate, on the dependence of an action, in which he obtained decree for £499. He now brought an action of furthcoming.

The Lord Ordinary (MACKENZIE) found that in the circumstances above stated the pursuer was barred from attempting to acquire a preference by diligence over the other creditors; assoilzied the defender, reserving to the pursuer his right to be ranked with the other creditors. His Lordship added the following:—

"*Note.*—Prior to the use of the arrestment founded on, the trust had been constituted, the trustee had been in possession of the trust-estate, and he had fully realised the same. The pursuer also was fully aware of all this. Previous to the sale of the debtor's furniture and plenishing, which were, as the pursuer knew, the only assets, the pursuer had expressed to the agent of the trust-estate his approval of the trust; and in the knowledge that these effects were sold by the trustee for behoof of the whole creditors, he attended the sale, and made considerable purchases from the trustee of the trust effects, and otherwise acted as an acceding creditor. The Lord Ordinary considers that it is proved that the pursuer not only acquiesced in the trust, but also so acceded to it as to prevent him from attempting to gain a preference by diligence over the other creditors of the truster, all of whom have acceded. In the case of *Croll* v. *Robertson*, 7th February 1791, Dict. 12,404, as the report bears, "Accession to a trust was found sufficiently proved by the creditor having attended a roup of the bankrupt's effects, called by the trustees, bought several articles, and given his bill, payable to the trustees, for the price." That case, it is thought, rules the present.

"The pursuer contended that the trust-deed contained conditions upon the creditors with regard to the decision of the trustee and the effect of accession, to which no creditor who had not expressly acceded can be held bound. But as Mr Bell (Com. 2, 498) points out, there is a distinction between such accession as will bar a creditor from acquiring a preference by separate measures, and that accession which is necessary to bind him to the judgment of the trustee and the discharge

of the debtor. In ascertaining whether a creditor is so barred, the evidence is favourably construed for the general body of creditors, so as to secure equal distribution, and to prevent partial preferences. On a fair and reasonable construction of the proof in this case, the Lord Ordinary is of opinion that the pursuer must be held to have recognised and acceded to the trust, and to be barred by personal exception from acquiring a preference by the arrestment libelled on over the whole other creditors."

Marianski reclaimed.

PATTISON for him.

SCOTT and REID in answer.

At advising—

LORD PRESIDENT—I am satisfied that the Lord Ordinary has not only reached a sound conclusion, but has put it on true grounds. Mr Marianski was a creditor of M'Lay for £499. The debt was constituted by bill, and he further held an assignation of a policy of insurance on M'Lay's life. To a certain extent, then, he was a secured creditor. He seems to have been pretty intimate with the state of M'Lay's affairs, and to have known that he had no other property but his household furniture. If Marianski had thought that he was imperfectly secured, the obvious course would have been to 'poind his debtor's furniture. But he knew that if he had proceeded to poind, other creditors would have got themselves conjoined. So he waits till the trustee has sold the furniture, and then arrests the proceeds in his hands. He has not been successful in securing a preference, for in the meantime his conduct has been such as to bar him from resorting to separate measures. The trust-deed was intimated to him. He attended the sale, and stated to the trustee that he intended to accede to the trust. This circumstance makes the case a far stronger one than that of *Croll*. He sees other creditors at the sale, and acts throughout as if he had acceded to the trust, and it is not till the proceeds of the sale are in the trustee's hands that he uses arrestments. I have great doubt whether, in any view, arrestment in the hands of the trustee was a competent proceeding. I do not think that the trustee was the debtor of the bankrupt. But it is not necessary to decide this.

LORD DEAS—I am of the same opinion. The last objection would, I think, be sufficient in itself. The furniture was the whole estate of the bankrupt, while the amount of his debts was many times its value. There could not possibly be any reversion for which the trustee could be called to account to the bankrupt. Yet this arrestment is laid on as if the trustee had been debtor to the bankrupt. But I agree with your Lordship that the personal bar is sufficient to determine the case.

The other Judges concurred.

The Court adhered.

Agents for Pursuer—Keegan & Welsh, S.S.C.

Agent for Defender—John Walls, S.S.C.

Friday, March 10.

CHAPMAN *v.* COUSTON, THOMSON & CO.

Sale—Rejection—Disconform to Sample—Retention by Buyer—Auction. Circumstances in which it was *held* (*diss.* Lord Deas) that purchasers had failed in the duty incumbent upon them by law to return the goods delivered if they objected to them as disconform to sample, or otherwise differing from the thing bought; and that therefore they were liable in the contract price.

Opinion by Lord Deas, that the article purchased being of a very peculiar nature, and the seller having taken up a wrong position from the beginning, the buyers were liberated from immediate observance of the above mentioned legal obligation, and had made their rejection and offer of return in time.

Held by the whole Court that in a sale by auction the disposal of each lot forms a distinct and completed transaction or contract of sale; and that actual corporeal return of goods objected to was not in all cases necessary, nor even (altering Lord Gifford's interlocutor) was the placing of them in neutral custody; but that the nature and quality of the goods in each case determined the duty of the buyer in dealing with them, if he intended to reject them.

This was an action at the instance of Thomas Chapman, auctioneer in Edinburgh, against Messrs Couston, Thomson & Co., wine merchants, Leith, concluding for the sum of £699 as the price of several lots of wine bought by them at an auction sale held by the pursuer upon 19th March 1870. The pursuer had been instructed to sell a large quantity of the wines belonging to Messrs Aitken, Campbell & Turnbull, under a *del credere* commission. And of these wines the defenders purchased eleven lots. Being large purchasers, for their own convenience, and that of the sellers, they did not take delivery until about a fortnight after the sale. Delivery was given from the cellars of Messrs Aitken, Campbell & Turnbull. By the conditions of the sale, which were printed and prefixed to the catalogue of wines to be sold, and which were well known to the defenders before the sale took place, it was specially stipulated that purchasers were to pay the prices of the wines bought by them "before or on delivery." The pursuer however allowed the defenders as old customers to obtain delivery of the wines which they had purchased without previous payment, on the understanding that they would immediately thereafter pay to him the price thereof. The defenders did not make payment as the pursuer expected, but it was not till 6th May that they gave notice to the pursuer that some of the clarets were faulty and disconform to sample and to the descriptions in the sale catalogue, and they claimed deductions from the price accordingly. Much correspondence between the parties ensued, the following excerpts from which will disclose the position taken up by the pursuer and defenders respectively:—

"*Leith, April* 7, 1870.

"Dear Sirs—For lot 19 you have sent us down wine differently sealed. One portion is sealed 1864, the other has no year upon it. The wines are quite different; so you must have made some mistake. You will have to get back the latter portion, and replace it with the wine sealed 1864 as per samples.—Yours truly,—COUSTON, THOMSON & Co."

On April 18th the defenders received a communication from a customer in Reading, to whom they had sent samples of lots 24 and 51, to the effect that the wine was unsound, they accordingly communicated this fact to Mr Chapman on May 6th, and on the same day Mr Chapman wrote to