[29*th April* 1839.]

(Appeal from Court of Session, Scotland.)

(No. 8.) Mrs. BARBARA STUART or HERRIOT, Widow, and others, Trustees of the late ROBERT HERRIOT, Appellants.—*Buchanan.*

JAMES CARNEGIE and others, the only acting Trustees of the late ALEXANDER STEVENS, and H. M. GIBB and others[1], Respondents.—*John Stuart.*

Inhibition—Arrestment.—Circumstances in which (affirming the judgment of the Court of Session) inhibitions and arrestments used against trust estates were simpliciter recalled.

2D DIVISION.

Lord Ordinary Moncreiff.

THE late Mr. Alexander Stevens, on occasion of his sister's marriage with Mr. James Fyffe, and being a party to their marriage contract, conveyed to them in conjunct fee and liferent for the husband's liferent use certain heritable subjects in the town of Ayr; and by a subsequent conveyance on the 31st March 1796, he conveyed to the same parties other heritable subjects in the town of Leith in the same terms.

Mr. Stevens, who had no family of his own, previously to his death in the year 1825, executed a trust settlement, whereby he conveyed his whole real and personal property to his wife Margaret Stout, her brother John Stout, merchant in Lancaster, James

[1] 14 D., B., & M., 670.

Fyffe, and John Rhind, writer in Edinburgh, and the survivors or survivor of them accepting, any two to be a quorum while two are in life, to be held for the uses and purposes declared by the deed, which were, in the first place, the payment of the truster's debts; secondly, to apply the free annual proceeds of the property for behoof of his wife during her life.

After the wife's death, and on failure of children of the marriage then existing, the trustees were directed "to apply the free annual produce of my heritable "and moveable estate to the aliment, maintenance, and "support of Jean Stevens, spouse of the said James "Fyffe, my sister, and the aliment and education of "her children of the present or any subsequent "marriage, in such way and manner as shall appear "to my said trustees best suited to the comfort and "advantage of her and her family." The legal rights of the husband in virtue of his jus mariti or otherwise in the rents and annual proceeds of the property were excluded.

The deed also declared, that "after the decease of "the said Jean Stevens, my sister, my said trustees "shall convert my whole subjects and effects into cash, "and divide the free proceeds thereof equally amongst "the children procreate or to be procreated of the "body of the said Jean Stevens of her present or any "subsequent marriage, equally betwixt them, share and "share alike; whom failing before majority or mar-"riage, my said trustees shall make over the whole "residue of my means and effects to my own nearest "heirs or assignees whatsoever. And it is hereby "specially provided and declared, that my said trus-

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" tees, and survivors or survivor of them, and fore-
" saids, shall have full power and liberty, in the event
" of my leaving no children of my own body, to sell
" any part of my heritable subjects or uplift any debts
" due to me for the purpose of fitting out any of the
" said Jean Stevens's children in life, putting them to
" apprenticeships, or such like, or laying out the same
" in any other way advantageous to her family;
" on this condition always, that the said Margaret
" Stout's consent be previously had thereto, and she
" fully and completely satisfied and secured as to her
" liferent of the sums so uplifted and applied in man-
" ner foresaid." The deed farther contains powers of sale generally of the heritable subjects, authority to name factors for collecting the rents, and various other powers and clauses.

Mr. Stevens died in 1825 without issue, and Mr. Rhind and Mrs. Stevens both died in 1826.

On Mr. Stevens's death, in May 1825, Mr. Stout came from England to attend the funeral, and on that occasion signed, along with Mr. Rhind and Mr. Fyffe, a minute containing a pro formâ acceptance of the trust by them.

Mr. Fyffe had a brother John Fyffe, a Baron of the Austrian Empire, who resided in Vienna, but was possessed of considerable property in houses situated in Edinburgh. He died in 1826, leaving a last will and disposition and settlement, by which he named certain persons as his executors; and among other bequests made the following in favour of Mr. Fyffe:—" I hereby
" give, grant, bequeath, and dispone to my brother
" Captain James Fyffe, his wife Jane Fyffe, and chil-

" dren, two third parts of all my houses, shops, and " tenements lying in Union Place, Picardy Place, " Broughton Place, and Drummond Street."

In 1827 Mr. Fraser became agent under Mr. Stevens's trust, and continued to act until the year 1830, during the whole of which period Mr. Fyffe was the sole acting trustee under the trust; and Mr. Fraser made advances to Mr. Fyffe to the amount of 4,600*l.* besides accounts incurred for business done to the amount of near 400*l.*

No title to the property was ever made up in the person of the trustees, and Mr. Fraser having agreed to advance certain sums to Mr. Fyffe obtained from him the absolute conveyance of a house in Charlotte Square, Edinburgh, part of the trust estate of which Mr. Stevens had died seised. The conveyance contained an acknowledgment from Mr. Fyffe of the receipt of 2,500*l.*, but as this sum was not in fact paid, but was intended to pay debts of Mr. Fyffe at that time unascertained, Mr. Fraser granted to Mr. Fyffe a letter in the following terms:—" You have this " day granted me a receipt for 2,500*l.*, being price of " house No. 1, Charlotte Square, sold to me by you as " sole trustee of the late Alexander Stevens; and I " oblige myself, in the event of its turning out, upon " the examination of the cash account of Mr. Stevens's " trust estate, that the amount of cash advances to you " as trustee as aforesaid does not amount to 2,500*l.*, to " pay you the difference."

On the 1st May 1830 Mrs. Fyffe, under the advice of Mr. Fraser, executed in his favour, with consent of her husband, a bond and disposition in security for the sum of 2,500*l.* over the house in Charlotte Square as

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sister and heir of the late Mr. Stevens; and the disposition bears as its consideration that the said James Fyffe and three of his children had "instantly bor-" rowed and received from James John Fraser the sum " of 2,500*l.*" The personal obligation in the bond was undertaken by these four persons in addition to the heritable security granted by Mr. and Mrs. Fyffe. Mr. Fraser immediately took out from the superiors, the magistrates of Edinburgh, a precept of clare constat in favour of Mrs. Fyffe as heir at law of her brother; upon which infeftment followed on the 23d June 1830.

In November 1830 Mr. Fraser having obtained an advance of 2,500*l.* from the late Mr. Robert Herriot, the husband of the appellant, assigned and conveyed over to him by a regular deed of assignment the sum of 2,500*l.* being a part of the debt due to him by Mr. Fyffe.

Differences having arisen between Mr. Fraser and Mr. Fyffe, and Mr. Herriot having demanded payment of the debt contained in the assignation to him, and payment having been refused, Mr. Herriot brought an action before the Court of Session for the purpose of obtaining payment, but before any progress had been made in that action he died, leaving a trust deed under which the appellants were appointed his trustees.

In these circumstances an agreement was entered into between Mr. Fraser and the appellants, by which there was the following arrangement as to the proceedings already instituted: " and it is also agreed, that the " proceedings for recovery of debts due to Mr. Fraser " and assigned by him to Mr. Herriot, and for which " suits have been commenced, shall be carried on by

" Mr. Fraser in the name of Mr. Herriot's trustees, he " relieving them of the expenses."

In pursuance of this agreement Mr. Fraser, who had acted as the late Mr. Herriot's agent, continued to take charge of that action, and had the conduct and superintendence of the proceedings under it, though these were carried on in the name of the late Mr. Herriot's trustees.

During the dependence of this action the appellants applied for and executed against the defenders in the action the diligence of inhibition, by which they were legally prohibited from selling, alienating, or in any way disposing of any of the heritable subjects comprehended under the settlements of Mr. Stevens or Baron Fyffe to the prejudice of the appellants or of the debts sued for. They also obtained the diligence of arrestment, which was duly executed against the tenants of these different subjects, by which the rents payable by them were legally attached till the issue of the action.

The trust deed conferred no power on the trustees of resigning, but by it an authority is given to the " trus- " tees and the survivors or survivor of them, if they " think proper, to assume any person or persons to be " joined with themselves in the management of the " affairs committed to their care by this deed;" and under this clause Captain Fyffe and Mr. Stout assumed, as sole trustees, Mr. James Carnegie, a clerk in the Commercial Bank, and two persons of the names of Richardson and Anderson, writers in Edinburgh, and upon them they devolved the whole trust powers, rights, and duties. They then resigned their own offices as trustees.

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The cause proceeded (Mr. Stout having been called by a supplementary summons), and a record being prepared and closed, the following interlocutor was pronounced by the Lord Ordinary, "20th January 1836.—"The Lord Ordinary having considered the closed "record, and heard parties procurators thereon, and "made avizandum, finds it admitted that the pur-"suers, Herriot's trustees, can only maintain this action "as in the right of James John Fraser, from whom "they derive right by assignation, and subject to all "pleas and defences competent against him: Finds, "that the defender John Stout, called by the supple-"mentary summons, having accepted of the trust under "the deed of Alexander Stevens and acted therein, "must be considered as having been still a trustee "during the whole period within which the debt by "advances of money is stated to have been contracted "to the said James John Fraser: Finds, that by the "terms of the trust deed, in the event which occurred, "the whole 'annual produce' of the trust estate was "applicable 'to the aliment, maintenance, and sup-"'port of Jean Stevens, spouse of the said James "'Fyffe, my sister, and the aliment and education of "'her children of the present or any subsequent mar-"'riage, in such way and manner as shall appear to "'my said trustees best suited to the comfort and "'advantage of her and her family,' with an express "exclusion of the jus mariti of her husband, and of all "right in him or his creditors to interfere with the "'rents or annual proceeds' thereof: Finds, that in "so far as advances might be made by the said James "John Fraser to the extent of the rents or annual "proceeds which were applied to the aliment of the

" said Jean Stevens, or the aliment or education of her " children, such advances might become just and law- " ful debts exigible from the said trustees, and effectual " against the alimentary fund under their management " in each year. But finds, that it was not competent " to the trustees, or a quorum of them, except in virtue " of the special power conferred on them and by a " regular trust act in conformity thereto, and altogether " incompetent to one trustee acting by himself, to " pledge either the fee or reversion of the said trust " estate or the future annual rents thereof for advances " made generally on the order of the said James Fyffe, " or of others of the family, in whatever manner the " same might be applied, without prejudice always to " the personal liability of the parties giving such " orders or receiving such advances; and that no " third party cognizant of the terms of the trust can " be held to have made any such advances on the faith " of the trust estate except to the extent above ex- " pressed: Finds, that the said trust deed contains a " special power to the trustees ' to sell any part of my " ' heritable subjects or uplift any debts due to me for " ' the purpose of fitting out any of the said Jean " ' Stevens's children in life, putting them to appren- " ' ticeships or such like, or laying out the same in any " ' other way advantageous to her family,' on condition " of the consent of Margaret Stout, the testator's " widow, being obtained: Finds, that this power could " only be exercised by a regular act of a quorum of " the trustees, and to the effect and according to the " precise terms so expressed. And in respect that no " such act of the trustees was done or executed, and " that no such sale or uplifting did take place by

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" authority of the trustees, finds it unnecessary to " determine how far the power fell or subsisted after " the death of Margaret Stout: Finds, that in so far as " the said James John Fraser may have made advances " for making up titles to the trust estate, or in the " necessary management of the trust, according to the " terms and qualities thereof, such advances are just " debts against the trustees and the trust estate itself. " Therefore finds, that in so far as this action and " supplementary action conclude against James Fyffe " and John Stout as trustees of Alexander Stevens, or " is insisted in against the other trustees now sisted, it " cannot be maintained against them, or to the effect " of adjudging the trust estate, except to the extent " expressed in the previous findings: Finds, that in so " far as the summons concludes against Mrs. Fyffe " personally, as proprietrix of an heritable estate, for " the purpose of attaching that estate, it was incumbent " on the pursuer to show by some act or deed legally " effectual that the said Mrs. Fyffe did bind or pledge " her said separate estate for the payment of such " debt: Finds, that the pursuers have not conde- " scended on any such act or deed: and finds, that " Mrs. Fyffe, as a married woman residing with her " husband, cannot be made liable either in her person " or in her separate estate for personal debts con- " tracted by her husband, whether for the support of " his family or for other purposes: but finds, that in so " far as any advances may have been made in the " management or for the preservation of the subjects " belonging to Mrs. Fyffe in her own right, such " advances will constitute a just debt against her and " her said estate: Finds, that in so far as by the set-

" tlements of Baron Fyffe there was any right and " interest vested in the said James Fyffe in the estate " left by him, the pursuers are entitled to obtain " decree in this action against the said James Fyffe for " any debt or debts which shall appear to have been " legally contracted by him personally, and to the " effect of attaching such right or interest in the estate " of the said Baron Fyffe: but finds, that in so far as " the rights and interests in the estate of the said " Baron Fyffe are vested in the children of the said " James Fyffe, there is no competent conclusion in the " summons under which any judgment can be pro- " nounced to affect the said children, or their rights " and interests in the said estate; and with these " findings, before farther answer, excepting as after " expressed, remits to to examine " the accounts and vouchers referred to in the deed of " assignation as constituting the debt now sued for, " and to report whether or to what extent there was a " good and subsisting debt in the person of James " John Fraser comprehended in the said accounts in " conformity to the principles laid down in this " interlocutor, with power to him to call for all books " or writings necessary for explaining the transactions " to which the said accounts relate, and to call for and " receive all explanations from either of the parties," &c.

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To this judgment the Inner House, on disposing of a reclaiming note for the pursuers of the action, adhered on the 8th March 1836.

Judgment of Court, 8th March 1836.

In the month of June following the respondents presented a summary petition, praying the Court " to " recal the said inhibition, loose and discharge the said " arrestments, and all other arrestments used at the

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" instance of the said trustees, in virtue of the said " letters of arrestment, in the hands of the persons " above named, or of any others in whose hands " they may have been used to affect sums belonging " to the petitioners, and that without caution or con- " signation; to prohibit and discharge the said trustees " or their agents from troubling or molesting any " of the persons in whose hands such arrestments may " have been used as aforesaid, and from using any new " inhibition or arrestment in virtue of said letters " of inhibition and arrestment or of any other upon " the dependence of said action; to grant warrant " to the keeper of the register of inhibitions to mark " the recal of the said inhibition in the record of " inhibitions; to find the said Mrs. Barbara Stuart " or Herriot liable in the expenses of this application, " proceedings to follow hereon, and of such other " expense as may be necessary to get the incumbrance " and nexus on the petitioners property and funds " by said inhibition and arrestments completely re- " moved, reserving to the petitioners any claim of " damages they may have against the said trustees " on account of the said diligence; or to do otherwise " in the premises as to your Lordships shall seem " proper."

A joint petition to the same effect was presented by the respondent Mr. Gibb, who was a creditor in respect of a bond of 1,954*l.*, and six of the children of Captain Fyffe, who had regularly assigned their interest to Mr. Gibb.

These petitions also prayed for an order of service both on the appellants and on Mr. Fraser, as being the original creditor in the debts, and the party truly

interested in the subsistence of the diligence; and accordingly the Court, on the 23d June 1836, made the following order:—"The Lords grant warrant for "serving this petition on the persons within named "and designed, and allow them to give in answers "thereto within eight days after service."

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At the time when these petitions were presented Mr. Fraser was absent in London on business, and a note was put in to the Court in the name of Mr. Herriot as acting trustee and factor for the other appellants, stating the circumstances and craving time for giving in the answers.

When the case was advised by the Court, no answers had been put in for the appellants or for Mr. Fraser, and no appearance was made for the latter. In that situation the Court, on the 7th July 1836, pronounced the following ex parte judgment upon the petition for the respondents Carnegie and others:—"The Lords "having considered this petition, with the note for "Mrs. Barbara Stuart or Herriot, and other proceed-"ings, and heard counsel thereon, recal the inhibition "within mentioned so far as regards Captain James "Fyffe as a trustee; loose and discharge the arrest-"ments also within mentioned, and all other arrest-"ments used at the instance of the said trustees, in "virtue of the said letters of arrestment, in the hands "of the persons within named, or of any others in "whose hands they may have been used to affect "any sums belonging to the petitioners, and that "without caution or consignation; prohibit and dis-"charge the said trustees or their agents from "troubling or molesting any of the persons in whose "hands such arrestments may have been used, and

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" from using any new inhibition or arrestment in " virtue of the said letters of inhibition or arrestment, " or of any other upon the dependence of said action; " grant warrant to the keeper of the register of in- " hibitions to mark the recal of the said inhibition " on the record of inhibitions: Find the said Mrs. Bar- " bara Stuart or Herriot liable in the expense of this " application and the proceedings following thereon, " and in such other expense as may be necessary " to get the incumbrances and nexus on the petitioners " property and funds by said inhibition and arrest- " ments completely removed; allow an account thereof " to be given in, and remit the same when lodged to " the auditor to tax and report; reserving to the " said Mrs. Barbara Stuart or Herriot all claims for " relief against James John Fraser, writer to the signet, " as accords." On the same day the Court pronounced the following ex parte judgment on the petition for Gibb and others:—" The Lords, having considered this " petition and the note for Mrs. Barbara Herriot, loose " and discharge the arrestments within mentioned, " and all other arrestments used at the instance of " the said trustees, in virtue of the said letters of " arrestments, in the hands of the persons within " named, or of any other in whose hands they may " have been used to affect sums belonging to the " petitioners, and that without caution or consignation; " prohibit and discharge the said trustees or their " agents from troubling or molesting any of the " persons in whose hands such arrestments may have " been used, and from using any new arrestment " by virtue of the said letters of arrestments or of " any other upon the dependence of said action against

" the petitioners: Find the said Mrs. Barbara Stuart " or Herriot liable in the expense of this application " and proceedings following thereon, and of such other " expense as may be necessary to get the incumbrance " and nexus on the petitioners property and funds " by said arrestments completely removed; allow an " account thereof to be given in, and remit the " same when lodged to the auditor to tax and report; " reserving to the said Mrs. Barbara Stuart or Herriot " any claim for relief against James John Fraser, W. S., " as accords."

Statement.

Against these judgments the appellants appealed.

Appellants Argument.

Appellants.—1. The judgments under review having been pronounced ex parte, and in absence of the appellants and of Mr. Fraser, they are therefore entitled to have them set aside.

It was impossible for Mr. Fraser to have his answers lodged within the time, while any extension of the time, though specially required by the appellants, was not granted, and the judgments under review were taken by the respondents at their own risk. They are, in every view, judgments in absence of the party having the real interest, and cited as such; and this absence, or the ex parte character of the judgments, was wholly occasioned by the fault of the respondents or their agents in pressing and precipitating the order for answers in Edinburgh within so limited a time.[1]

2. The respondents Carnegie and others not being legally appointed trustees by the truster, or in virtue of

[1] Ersk. tit. i. sec. 69.

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powers derived from him or contained in the trust deed, have no legal title to assume the office or powers of trustees, or to act in any matter as such, or to sue or insist in that character in any suit, action, or proceedings at law whatever.

The trust deed contains a power to the trustees named of assuming other trustees to act with them in the management, and so it makes provision for the case of the trustees named not all accepting, or; where they do accept, of their numbers being diminished by death; but the trustees to be thus assumed were not to come in place of those named by the testator or to supersede or set aside their nomination, and far less was it contemplated that the trustees making the assumption were to withdraw themselves from all farther charge and from all past responsibility, and to surrender the whole trust management into new hands; and no power is given to resign, and much less to make an entire devolution on strangers.

But even if it were true that the respondents had a good title, they have failed to show any legal, just, or relevant ground for the interference of the Court, in summarily recalling the legal diligence used by the appellants as creditors for the recovery or security of their debt.

According to the authorities inhibition or arrestment in security can only be recalled where the diligence is used oppressively, or where it is a superfluous and vexatious precaution; and the instances to which reference is made are, in the first place, where the diligence is resorted to when the debtor is in good credit and his means remain unimpaired; and, secondly, where the creditor is already secured by prior diligence, by

some lien over property or effects accessible to him, or by good and sufficient caution. Where the debt sued for is plainly, on the showing of the creditor himself, fictitious or groundless, or exposed to objections instantly verified, the Court will and ought to take into view the character of the claim in judging of the question as to the recal or modification of the diligence. But the Court have seldom or never recalled the diligence without caution or consignation, and the more common course is to restrict the sum for which caution is required, and only to recal on condition of such caution being found.[1]

Appellants Argument.

Respondents.—The judgments appealed from were substantially pronounced with the consent of the appellants, who have judicially waived all opposition to the petitions the prayers of which were granted by these judgments; and in as far as the diligences recalled by the interlocutors appealed from had been used against the trust estate of Mr. Stevens, they were rightly and justly recalled, because they were radically void and inept, inasmuch as they were not directed against the proper party, but only against one trustee; while it was found by the final judgment in the action that there was an existing quorum of accepting and acting trustees, who alone were entitled to represent and bind the trust estate.

Respondents Argument.

To establish the validity of such diligence it must

[1] Bell's Principles of the Law of Scotland, p. 668, 669. 671, 672. 680; Duncan, 22d January 1822, 1 Shaw's Rep. 257; Todd, 21st November 1823, 2 Shaw's Rep. 513; Jeffrey, 11th March 1824, 2 Shaw's Rep. 797; Herbertson, 19th February 1830, 8 Shaw's Rep. 564.; Rose v. Macleay, 4 Shaw's Rep. 812; affirmed on appeal, 2 Shaw and Maclean, 958.

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be directed against the proper debtor. In the present case part of the subjects against which the diligence was executed consisted of the trust estate of Mr. Stevens, vested in his trustees for the purposes of the trust; and the diligence could be legally used only by a person who had become a creditor of the trust estate; and no person could be such a creditor except in respect of a debt contracted by persons entitled to bind the trust estate, that is, by the trustees acting in terms of the trust settlement.

In order to make the debts said to have been contracted by Mr. Fyffe as a trustee good claims upon the trust property, it was necessary that Mr. Fyffe should have had power to burden and bind that estate. Whatever may be the effect of deeds done or debts contracted by a whole body of trustees, or by a majority or a quorum of that body, no single trustee is entitled to usurp these powers, unless the settlement which constitutes the trust were to contain a provision that every one of the trustees should have all the powers of the whole body. Unless all the powers of Mr. Stevens's trustees had either been given to Mr. Fyffe by the trust deed, or had come to be vested in him by the death or refusal to accept of all the other trustees, he could no more bind and dispose of the estate as a single trustee than as an individual not a trustee; and those who deal with a person professedly acting as a trustee, are bound to satisfy themselves as to his powers, and that he is acting within them.

As the summons which is the foundation of the diligence was exclusively directed against Mr. Fyffe as the sole accepting and acting trustee, it was only

as against him that inhibition and arrestment could be used.

The arrestments recalled by the interlocutors, having been used to attach the rents of Baron Fyffe's property, were rightly and justly recalled, because the respondents, who were owners of that property, not only were not debtors to the appellants, but were not said to be debtors, and the action on the dependence of which the arrestments were used was neither directed against them nor contained any conclusion against them.

Arrestment of the rents of this property could be used only on debts due by the proprietors, and no arrestment at the instance of a creditor of one of the proprietors could be valid to attach any thing more than the share of the rents belonging to that one. But not one of the children, neither the respondents nor any of their brothers and sisters, were so much as named as defenders in the summons, which proceeded exclusively against Mr. and Mrs. Fyffe, for whose debts, if they had contracted such debts, the children were not responsible, and their property could not be attached; neither was there any conclusion for payment against any of the children, simply because the appellants could not aver that any one of them had contracted a debt; and even the summons was not executed against any of the children, nor were they called as defenders in the action. Accordingly, the final judgment in the cause has found that, "in so far "as the rights and interests in the estate of the said "Baron Fyffe are vested in the children of the said "James Fyffe, there is no competent conclusion in the "summons under which any judgment can be pro-

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"nounced to affect the said children, or their rights "and interests in the said estate."

As Mr. and Mrs. Fyffe and six of the children had conveyed their shares of Baron Fyffe's property to the respondent Mr. Gibb as a heritable security for money advanced by him to them, and that security was granted and completed by a recorded infeftment before the arrestments at the instance of the appellants were used, these arrestments were of no effect as in a question with him, and therefore were rightly and justly recalled at his instance by the interlocutor under appeal.

Under these circumstances the respondents submit that the judgments appealed from ought to be affirmed, because, as the inhibition and arrestments thereby recalled had been used on the dependence of an action to constitute certain alleged claims as debts against the trust estate of Mr. Stevens, and the shares of Baron Fyffe's property belonging to Mr. Fyffe's children, and it was found and decided that these claims did not form good debts against the one property or the other, the diligences themselves necessarily fell to be discharged.[1]

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, this case, which is very much connected with that upon which your Lordships gave judgment last week, was heard before that case, but I thought it expedient to postpone the consideration of the judgment in this case until that had been disposed of. My Lords, I think the result has

[1] Bell, ii. 151.

proved that to be a good arrangement, inasmuch as the decision to which your Lordships came in that case will no doubt weigh very much upon your minds in the present.

This was an appeal against an order "recalling the "inhibition as far as regarded Captain James Fyffe as "a trustee, discharging the arrestment mentioned, and "all other arrestments used at the instance of the "trustees by virtue of the said letters of arrestment in "the hands of the person therein named." But then it reserved to Mrs. Barbara Stuart or Herriot all claims of relief against James John Fraser, writer to the signet, and so on. The result of this was, that after an interlocutor declaring the rights of the parties in this suit of intromission, the attachments which had been obtained pending the suit on the application of the parties against whom they were obtained were discharged in the manner stated in the interlocutor. The nature of the suit was a claim on behalf of those who claimed originally through Mr. Fraser as the party actually pursuing, but claiming through him in respect of a trust estate which had been given by Mr. Stevens in trust for the separate use of the wife, and after her death to the children, excluding the husband. By that trust deed the husband was made a trustee with several other persons; it also affected certain estates which had descended from Baron Fyffe, which he gave to his brother James Fyffe and his wife and their children in equal portions. My Lords, it has been argued that that gave an estate to James Fyffe which he had power to dispose of. I apprehend it is quite immaterial for the present purpose that your Lordships should consider that question, inasmuch as it is a point not made

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Ld. Chancellor's Speech.

by the pursuers here; and it is a question not only not made by the pursuers, but the interlocutor as it stands assumes that the children had an immediate interest in that property. The summons states the title of the parties in these words:—"That Baron Fyffe died, and "the said James Fyffe, Mrs. Jean Stevens or Fyffe, "and their children on that event by virtue of the said "last-mentioned will or deed of settlement succeeded "to the two third parts or shares of the different pro-"perties." And in the interlocutor which is appealed from, and which declares the rights of the parties to the suit which is the subject of the present appeal, the interlocutor of the Lord Ordinary, which is affirmed on reclaiming to the Inner House, states, "that so far as the rights and interests in the "estate of Baron Fyffe are vested in the children of "James Fyffe, there is no competent conclusion in "the summons under which any judgment can be "pronounced to affect the said children, or their "rights or interests in the said estate." The children were in fact not made parties to that suit.

My Lords, the law of Scotland as relating to this subject is, I believe, very accurately stated in the case of the appellants. I have referred to the authorities there cited, and I see no reason to doubt the accuracy of it; and taking the law as there laid down, I think your Lordships will have very little difficulty in applying it to the present case. It is stated in the eighth page of their case:—"But arrestments on inhibitions in "security, or in other words used for securing debts, "either future or contingent, according to their own "nature, or, like the debt in the present instance, "actually claimed to be due but not yet constituted

" by decree, the diligences are liable to be abused,
" and creditors are occasionally found employing them
" for the purposes of vexation or oppression. In these
" cases the Court of Session, in the exercise of their
" equitable powers, are authorized to grant a remedy
" by either recalling the diligence in toto or on caution
" to a limited extent. But in all applications of that
" nature by the debtor, it lies upon him to make out a
" case of vexation or oppression, and to show sufficient
" cause for the interference of the Court, as the recall
" or modification of diligence is an extraordinary exer-
" cise of power, to be applied only in cases of excess or
" abuse of legal remedies.[1] Thus it is also observed by
" Professor Bell that arrestment in security may be
" recalled without caution or loosed on caution in the
" following cases: first, where arrestment in security is
" used oppressively, and even where used nimiously
" (*i. e.* where it is a superfluous and vexatious precau-
" tion), the Lord Ordinary on the bills seems entitled
" to recall it, or restrict it, or grant warrant for loosing
" without caution, as in a future or contingent debt,
" where there is no change in the debtor's credit, or
" where the creditor is already secured by diligence,
" caution, &c., and there is no ground to suspect the
" security: second, loosing on caution when the time
" of payment has not arrived or the debt is not
" yet constituted, or when it is under suspension;
" the arrestment may be loosed on caution, and the
" arrestee authorized to deliver up the subject or pay the
" debt. This is done on a bill for loosing the arrestment
" in the Court of Session, on an application to the Judge

[1] Bell's Principles of the Law of Scotland, p. 680.

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"by whose warrant the arrestment has been used. The "proceeding is either, first, for a special loosing of some "particular arrestment, or, second, for a general loosing "of all arrestments used or to be used by the creditor.[1] "In like manner as to inhibition the same author "observes, that inhibition may be recalled, if injurious "or oppressive, where the debt is future, contingent, "or not yet constituted; not where the debt is due.[2]"

Now, my Lords, assuming that to be a correct representation of the law of Scotland, it is only necessary to call your Lordships attention to the facts of the case, and to see whether this is not a case in which the Court was bound to recall these attachments. My Lords, the claim, as I have stated, was made by the party pursuing, claiming in the right of Fraser, upon the inhibition and arrestment having issued. No application was made to get rid of them until the interlocutor to a certain extent had adjudicated upon the rights of the parties. When that interlocutor had been pronounced application was made to get rid of these proceedings. The only party in the cause, (Fraser having parted with his interest) was Mrs. Stuart, claiming in the right of Fraser, and therefore of course affected by all the equities which might affect Fraser.

The first objection to this order was, that there was not a proper service; that Fraser himself, being no party to the record, was at the time in England, and there was no regular service of the order; that, though regular in point of form, in substance it was no notice to Fraser. Now, what was the proceeding which was

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[1] Bell's Principles of the Law of Scotland, pp. 671, 672.

[2] Ibid. p. 680.

adopted by the parties pursuing, against whom the application was made? They certainly applied in the first instance for time to communicate with Fraser; then this representation was made to the Court:— "The respondent begs farther to state, that, although "in consequence of the arrangement which her son "made with Mr. Fraser, she is not yet perhaps in a "situation to prevent the latter from using her name, "if he thinks proper, in answering this petition, "notwithstanding steps which she is adopting in order "to get rid of the predicament of allowing her name "to continue to be used in this manner. She herself "has no intention to trouble the Court with opposition "to the petition upon its merits if Mr. Fraser shall "not so oppose it in her name; she presumes that in "that event petitioners would not demand expenses "from her." Though the parties were to go on in the name of Fraser, she forbids their going on in her name; but he was the only party with whom the other parties could deal, and the only party with whom they were contending upon the record. In point of fact, she does not make any resistance to the order so obtained.

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My Lords, with respect to the merits of the case; first of all, as to Stevens's estate. Here is a trust under which, by some strange arrangement, the husband, against whom a provision was made, was constituted a trustee for the wife, the property being settled on the wife and children to the exclusion of the husband. The husband, in his character of trustee, to a certain degree deals with this property. That is decided by the interlocutor which is appealed from to be improper, —that there was no right of dealing with the rents of

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this estate, which were to be applied yearly to the aliment of the wife and family. There was a power in the trustees, in an event which never took place, of raising money; but that power not only never was exercised, but never could be exercised so as to interfere with the property. There, therefore, in regard to that estate was nothing which could be constituted a debt except the year's rent. In the summons there is no other claim; but the interlocutor of the Lord Ordinary opens a door to the possibility of a further claim, namely, that by possibility there may have been expenses incident to the trust, that is, in executing the trust to which Captain Fyffe as trustee may have a claim against the estate. There is no such statement in the summons. It is a possibility, according to the interlocutor of the Lord Ordinary, which might affect the rights of the parties; and if such a claim did arise, it might affect the corpus of the estate. Now, first of all, there is an extreme improbability of the parties making out a claim which they never thought of suggesting upon the record, but still the interlocutor leaves it open to them, if they care to make it out.

With regard to the estate of Baron Fyffe, the interlocutor, without referring at all to the will under which the question must arise, states that quoad the interests of the children, they, not being parties to the proceeding, could not possibly be affected by the proceedings which took place between the parties. The claim of Fraser is through James Fyffe acting as trustee for Baron Fyffe's estate; there was no trust, so far as James Fyffe might be a debtor to Fraser. No doubt, any interest he might have in the estate might be subject to the proceedings; but as far as the wife and children

are concerned, which is affirmed in the interlocutor, and is assumed indeed by the language of the summons itself, they cannot be affected by any proceedings which have taken place in this cause.

My Lords, under these circumstances the interlocutor which has been adhered to in the Inner House has declared, that quoad the trust estate there was no right in Fraser beyond a possibility, which does not touch the present question; for there is no question as to the current year's rent; the proceeding is in respect of future years rent; and as to the interest of the wife and children in Baron Fyffe's estate, there is no question which can arise as to any right existing in Fraser claiming through James Fyffe to so much as may belong to James Fyffe himself. Under these circumstances, there being nothing against the trust estate but this possibility of a claim—so little likely to succeed as not to be included in the summons, the whole of the trust property and the whole of Baron Fyffe's property are subjected to this process of attachment upon the application of the parties who were appellants. According to the authorities referred to by the appellants themselves the court thought proper to recall this attachment, and, if there were nothing else, it would be quite clear that the Court made a proper adjudication of the rights as far as the interlocutor goes. Under the adjudication of those rights there is very little which by possibility can remain to the pursuer to recover in that case. If no more were shewn, I should have thought the Court had exercised a sound discretion in recalling the attachment in respect of this property. But, my Lords, there are other circumstances in the case to which I have not alluded,

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but which are perfectly conclusive. This all proceeds upon the ground that Fraser is a creditor upon the trust estate; your Lordships have had before you an interlocutor of the Court of Session which makes him a debtor of 2,500*l.* upon the same estate. In the case which stood immediately after the one now under consideration, there is the judgment of the Court of Session in favour of that demand against Fraser, and your Lordships have affirmed that interlocutor. The demand therefore is finally established, and instead of being a creditor he is proved to be a debtor to the estate. That fact is quite conclusive in this case; the parties who appear here as respondents come here not only to protect their interest against the demand of Fraser but to establish a claim against Fraser. It is unnecessary to go further into the case, because when you find, independently of the merits of the case as established upon this record, the party claiming the benefit of these proceedings by his appeal is by the judgment of your Lordships House proved to be a debtor instead of a creditor, there must be an end of any debt which would entitle him to be paid out of this supposed security which is the subject of the proceedings now under discussion. There are now, therefore, additional reasons beyond those which appeared to the Court of Session for this interlocutor, and I cannot help saying that in my opinion there never was a case which has come before your Lordships in which it was more clearly shewn that the interlocutor of the Court of Session ought to be affirmed, and affirmed with costs.

The House of Lords 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 appellant, the said James John Fraser, do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal since he so sisted himself as appellant as aforesaid, the amount of such costs 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 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.

THOMAS C. KER—ROBERT SCOTT, Solicitors.