Thursday, January 7, 1875.

FIRST DIVISION.

[Lord Craighill, Ordinary.

HENDERSON *v.* WALLACE AND OTHERS.

Process—Poinding the Ground—Competency—Maills and Duties—Heritable Creditor.

Held that a creditor infeft on a bond and disposition in security, who had obtained a decree of maills and duties, could competently bring an action of poinding the ground.

This was an action of poinding the ground, brought by Mr Henderson, the creditor, in a bond and disposition in security over land and houses belonging to the defenders, Mr and Mrs Wallace, in which he was infeft. By the bond and disposition, which was dated and judicially ratified on 16th May 1853, Mr and Mrs Wallace acknowledged to have borrowed and received £350, and bound themselves, and their heirs, executors, and representatives whomsoever, to repay the same, and in security of this personal obligation they disponed certain land and houses. Mr Bruce, who was tenant of the subjects when this action was brought, did not appear.

The pursuer averred:—"The said principal sum of £350, liquidate penalty above mentioned, and the interest due on the said principal sum from the 23d day of May in the year 1870, and amounting together to the sum of £416, 6s. 6d. sterling, are unpaid, and resting owing to the pursuer. The defender, the said Alexander Bruce, is the tenant and occupant of the subjects and others disponed in security by the said bond and disposition; and although the pursuer has often desired and required the defenders, the said Robert Wallace and Marjory Miller or Wallace, who are the proprietors thereof, and the said Alexander Bruce, their tenant, to make payment to him of the said sums of money, yet they not only refuse so to do, but will not suffer the ground to be poinded for the same, and the present action has therefore become necessary. The decree of maills and duties mentioned in the answer is referred to; and it is admitted that the pursuer has received under the same various sums of rent from the tenant. *Quoad ultra,* the statements in the answer are denied."

The defenders' answer was as follows:—"Admitted that Alexander Bruce is tenant of the subjects in question. Denied that the action is necessary; and averred that it is oppressive and vexatious, and that there are no just grounds therefor. Explained further, that the pursuer has been since the year 1866, and still is, in possession of said subjects, under a decree of maills and duties obtained by him. Since said date the subjects have been let by him to Bruce, and the whole rents thereof have been regularly paid to and received by him. There is no moveable property belonging to the defenders on or connected with the said subjects, nor have they possession of any part thereof. For a number of years the said rents, paid by the defender Bruce, as tenant, amounted to £42 per annum, under a lease between the present defenders and him; but since Whitsunday 1870, when said lease expired, it is alleged by the pursuer that he has only received the largely reduced rent of £30, 11s. 3d. per annum. Since the said term of Whitsunday 1870 the said subjects have been let by the pursuer to the defender Bruce without his having advertised the same to let, or in any way invited competition therefor; and if his said allegation be true, they have been so let at a rent considerably below the real annual value of the subjects, and what could be obtained for the same, and for this illegal proceeding on the part of the pursuer he will be liable to the present defenders in damages. The real annual value of the subjects is not less than £50 sterling, and this sum could be obtained therefor."

The pursuer pleaded:—"(1) The pursuer, in respect of the foresaid bond and disposition in security, and assignation thereof in his favour, condescended on, is entitled to decree as concluded for."

The defenders pleaded:—"(1) The pursuer being in possession of the subjects under a decree of maills and duties, the present action of poinding the ground is incompetent and cannot be maintained. (2) The pursuer having the right and title under his decree of maills and duties to the rent payable by the tenant, which is the only extent to which, in the present case, a decree of poinding the ground, were it otherwise competent, could be enforced, he is not entitled to raise or insist in this action. (3) The pursuer having regularly obtained payment under his decree of maills and duties of the whole rents of the said subjects since the date thereof, and being entitled under that decree to uplift and enforce payment of the rents to become payable, the present action is unnecessary and oppressive, and ought to be dismissed with expenses."

On 17th June 1874 LORD MURE pronounced this interlocutor and note:—

"17*th June* 1874.—The Lord Ordinary having heard parties' procurators, and considered the closed record and productions, repels *hoc statu* the plea to competency, and before further answer allows the parties a proof of their averments, and to each a conjunct probation; and appoints the proof to be taken before the Lord Ordinary on a day to be fixed.

"*Note.*—This is an action of poinding of the ground, proceeding upon a bond and disposition in security, and it is directed against the proprietor and tenants of the ground in the usual style, with a view to obtain authority to attach and poind the moveable goods and effects situated upon the ground, and belonging to the proprietor and his tenants, in payment of the pursuer's debt. It was explained at the debate that one main object which the pursuer had in resorting to the action was in order to lead an adjudication, which, seeing that one of the debtors in the bond was a married woman, could not be done except upon a poinding of the ground; and the authorities referred to by the pursuer appear to the Lord Ordinary to be distinct to that effect. In this view, therefore, the action is, in the circumstances, a necessary one at the instance of the pursuer. The tenants, moreover, have not appeared to defend it, and have probably no material interest to do so, as the conclusions against them are restricted to the

amount of the rents, and as against them the pursuer is, it is thought, at present entitled to decree. *Buchan*, 20th January 1829, 7 Shaw, 296.

"The competency of the action is, however, objected to on the part of the proprietors, the debtors in the bond, because the pursuer has obtained decree in an action of maills and duties, under which it is alleged that he has entered into actual possession of the property; and authorities were referred to, and more particularly a passage in Ersk. iv, 1, 11, as shewing that such actions were not competent to an heritable creditor in possession. But the allegation that the pursuer was in the actual possession of the property, and that there were no moveable effects belonging to the defenders situated upon it, is denied on the part of the pursuer, so that the simple question raised for decision at this stage of the case is, whether an heritable creditor who has taken decree against the debtor's tenants in a petitory action of maills and duties is thereby precluded from taking proceedings by way of a poinding of the ground against the proprietor, the debtor in the bond, in order to attach his effects in payment of his debts. Now the Lord Ordinary has been unable to come to the conclusion that there is any incompetency in such a proceeding; for the object of the one action is to obtain a remedy against the tenants, while that of the other is to attach the effects of the landlord, and, if necessary, those of the tenants, to the extent of the rents due by them, as explained by Lord Corehouse in his note to the case of *Railton*, June 20, 1834, referred to at the debate; and the Lord Ordinary has not been able to find any decision to the effect that the heritable creditor who has adopted the one remedy is thereby precluded from having recourse to the other.

"Cases may, it is thought, not unfrequently occur where an heritable creditor may find it necessary to proceed against tenants by an action of maills and duties; but where it is not at that time necessary, although it may afterwards become so, to take proceedings by poinding of the ground against the landlord, and although Mr Erskine's words are very general, the Lord Ordinary does not think that they must necessarily be held to imply that, in such circumstances, the effects of the proprietor situated upon the property could not be reached under a process of poinding of the ground at the instance of the party holding the decree of maills and duties against the tenants. No doubt as to this was raised in the case of *Railton*, and as the Lord Ordinary does not find that any such rule is laid down either by Lord Stair, or by Mr Erskine in his Principles, or by Mr Bell's in his Com., ii, 58-59, he is not, as at present advised, prepared to give effect to it to the extent now pleaded by the defenders. But he has made the proof, as to the facts on which the parties are at issue, one before answer, so that it may still be open to the defenders to raise the question, if it should be ascertained that the pursuer is in the actual possession of the property, and that there are no effects belonging to the defenders upon it."

The parties thereafter renounced probation.

The Lord Ordinary (CRAIGHILL) pronounced this interlocutor:—

"*Edinburgh, 29th October* 1874.—The Lord Ordinary having heard parties' procurators on the closed record, documents put in evidence, and minute for the parties, No 15 of process, by which probation *quoad ultra* is renounced, and considered the debate and whole process—Repels the defences, and decerns and ordains in terms of the conclusions of the summons: Finds the pursuer entitled to expenses, of which allows an account to be given in, and remits that account, when lodged, to the Auditor for his taxation and report.

"*Note.*—This is an action of poinding the ground, and the question raised in the defences is, Whether, in the circumstances, such an action is competent?

"The pursuer is creditor in a bond and disposition in security over land and houses belonging to the defenders Mr and Mrs Wallace, in which he has been infeft. The subjects forming the security are in the tenancy and occupation of Alexander Bruce, a defender who has not appeared in the action; and the pursuer has taken decree in a petitory action of maills and duties, in virtue of which the rents payable by Bruce have for several years been drawn by the pursuer. The defenders, Mr and Mrs Wallace, contend that this is such possession on the part of the pursuer as renders a poinding of the ground at his instance an incompetent proceeding. That is the defence, and the only defence, to the present action.

"After considering all that has been urged, the Lord Ordinary has come to be of opinion that the plea of incompetency should be repelled, and decree pronounced in terms of the conclusions of the summons. He adopts the views presented by Lord Mure, the former Lord Ordinary, in the note to his interlocutor of 17th June last, by which proof was allowed; and these, taken in connection with the observations about to be submitted, seem to be all that are required to explain the grounds of the prefixed interlocutor.

"The authorities which were cited by the defenders in support of their contention that the action is incompetent, were Erskine's Institutes, b. iv, t. 1, sec. 11; More's Notes, p. 211; Menzies' Lectures (3d ed.) p. 877; Montgomerie Bell's Lectures, p. 1099; Ross' Lectures, p. 430: and *Garthland* v. *Lord Jedburgh* (Mor. 10,545-46). These may all be taken together, for the statement of the law by Erskine is rested on the decision in *Garthland* v. *Lord Jedburgh*, and the later writers named and simply adopt and repeat in substance the dictum of Erskine. The controversy at the debate turned upon the meaning of the passage founded on, and not on the credit to which these authorities were entitled.

"The law laid down in *Garthland* v. *Lord Jedburgh*, and in the works of the text writers cited by the defenders, is, that it is incompetent for real creditors, who are possessors of the subjects conveyed, as security for their debts, to poind the ground, and therefore it is necessary to inquire whether a party in the situation of the pursuer is to be regarded as a real creditor in possession. That he is a real creditor is certain, for he is infeft in the lands, which are the security for his debt. But is he in possession? That is to say, have the defenders, the proprietors, gone out or been put out; and has the pursuer entered in their room? The Lord Ordinary thinks that such a result was not accomplished by the taking of decree in a petitory action of maills and duties and the subsequent receipt of rents from the tenant of the subjects in virtue of that warrant. The statement in Pro-

fessor Montgomerie Bell's Lectures, vol. ii, at p. 1075, he takes to be correct. What is there said is, that the 'creditor thereby comes for the time in the place of the landlord, as regards the tenants. But his right being only in security the landlord's right as proprietor is only encumbered, not taken away by the debt and security.' The creditor, in other words, does not even in form become the landlord. He neither appears nor possesses nor acts as such. The tenants continue the tenants of the debtor, and all which the creditor gets is a power to levy the rents as these become due in payment *pro tanto* of his debt secured upon the land. Accordingly, by the decrees of maills and duties which the pursuer obtained, all that he got was a decerniture, whereby the tenant Alexander Bruce was ordained 'to make payment to the pursuer of the rents, maills, and duties of the foresaid lands.' &c., 'and that during his possession,' &c. &c., 'at least so much of the said rents as will satisfy and pay the pursuer the principal sum,' &c., 'due under the bond' upon which the pursuer libelled. The right and the possession which the Court, in *Garthland* v. *Lord Jedburgh* (Mor. 10,545-46), found to be incompatible with the pursuit of a poinding of the ground, were in marked contrast with those held by the present pursuer. In that case a person had wadset his lands, and taken a back tack of them, binding himself to pay to the wadsetter a yearly rent equal to the interest of the sum borrowed. The wadsetter, considering himself a creditor, brought an action for payment of the back-tack duty, and added a conclusion for poinding the ground in time coming. This was refused 'because the pursuer, being infeft in the property, could not ask his own ground to be poinded for any sum due to him out of the said lands.' This means no more than that a poinding of the ground may not be pursued by one whose connection with the subject, according to his title, is that of proprietor, subject though he be to an obligation to reconvey on fulfilment of a condition, and there is nothing in the decision which suggests that a creditor in the situation of the pursuer is affected by a similar incompetency. Erskine's statement (iv, 1, 11), as understood by the Lord Ordinary, means no more than was expressed in the decision of *Garthland* v. *Lord Jedburgh*, which he cites as his authority. Those to whom, as he says, a poinding of the ground is incompetent, are proprietors, possessors, though not strictly proprietors as adjudgers, liferenters, or other real creditors, who possess on their different titles. But a creditor in a bond and disposition in security, though holding a decree of maills and duties, is not a member of the class here described. His possession, such as it is, is not on his titles, but on his decree of maills and duties, and further, neither his titles nor his decree give him the character or the rights, or even the name of proprietor. He is in fact, and in form too, only a creditor. This construction of the words used by Erskine is borne out by the view of the law which is presented by Mr Walter Ross in his Lectures, vol. ii. p. 431. He there lays it down, 'that no title upon which a man may enter into the natural possession of land can be a foundation for the diligence of poinding the ground, and hence the holders of adjudications, liferent rights, wadsetters, and others of that class, cannot demand the ground to be poinded. They must enter like other landlords; and if the tenants will not pay them, the possessory action of maills and duties is the proper step to be taken.' The pursuer is not the holder of an adjudication of a liferent right, of a wadset, or of any right of that class. He is only the holder of a right which in form is but a burden on the proprietory rights of the defenders, his debtors, and, remaining as he does simply a creditor, he, though holding a decree of maills and duties upon which he levies the rents of the subjects constituting his security, is not precluded from suing the present action of poinding the ground. This at least is the opinion of the Lord Ordinary, and accordingly the preceding interlocutor has been pronounced."

The defenders reclaimed.

Argued for them—The bond and disposition in security was a good disposition of the property, although it was the property of the wife, and under it the creditor had a complete, if redeemable, right to the property. In default of payment he was entitled to enter on the lands, and the only way of doing that was by an action of maills and duties. In this case the creditor had used the remedy, and was in possession of the lands in virtue of the decree. All the authorities pointed to this, that possession of lands similar to that of a proprietor barred the possessor from bringing an action of poinding the ground. Here the creditor had a complete title in virtue of the bond and disposition in security and his infeftment following thereon, and he had possession in virtue of the decree of maills and duties. It was therefore incompetent for him to bring this action.

Argued for the pursuers—The action of poinding the ground had been brought for two reasons. First, it was in this case necessary in order to enable the pursuer to bring an adjudication, because an adjudication on a wife's personal bond was not competent unless poinding of the ground supervened. The poinding of the ground came in place of the obligation, and constituted the debt against the property. Second, a poinding the ground made accumulations of interest a *debitum fundi*, and was the only proper action for accumulating arrears of interest into capital so as to bear compound interest. The contention that the decree of maills and duties barred the action of poinding the ground was unsound. The creditor in this case was not in virtue of his decree of maills and duties put in such possession of the land as to bar him from bringing a poinding of the ground. The sort of possession referred to by the authorities was possession of a proprietory nature, such as that of an adjudger, or liferenter or wadsetter. Apart from that, there was no reason why the possessor of a decree of maills and duties should not also bring a poinding of the ground, for the two remedies were directed against totally different things. An action of maills and duties was only to recover rent, whereas a poinding of the ground was directed against any debtor's moveables on the land.

Authorities—Shand's Practice, iii., 688; Ross' Lectures, p. 430; Juridical Styles, iii., 393 (Note); Menzies' Lectures on Conveyancing, pp. 849 and 877; Parker on Adjudication, p. 16; *Hutchison* v. *Gordon*, 11 S. 395; Hunter (Landlord and Tenant) ii., 333, 536; *Watson* v. *Robertson*, M. 5976; *Watson* v. *Henderson*, Hume, p. 208; *Ranken* v. *Russell*, Nov. 19, 1868, 7 Macph. 126; 2 Bell's Com., 258; Bell's Lectures, (Conveyancing), ii

1075; *Wylie* v. *Heritable Securities Investment Company*, Dec. 22, 1871, 10 Macph. 253; Stair iv., 22, 1–17, and 26, 2–10; *Aird* v. *Forsyth*, Dec. 13, 1853, 16 D. 197; Duff's Feudal Conveyancing, 274–6; *Hutchison* v. *Gordon*, Feb. 14, 1833, 11 S. 395; *Robertson* v. *Ferrier*, 12 S. 203; *Bridge* v. *Broun's Trs.*, July 12, 1872, 10 Macph. 958; *Hay* v. *Marshall*, July 7, 1824, F.C.; *Neill* v. *Wright*, 2 Macph. 168.

At advising—

LORD PRESIDENT—This is an action of poinding the ground by a creditor infeft upon a bond and disposition in security in ordinary form.

There is no doubt that a party with such a title is justified in poinding the ground, unless something has occured to render the poinding improper, or unless there is oppressive or nimious use of diligence.

The question was argued before the Lord Ordinary only on the ground of incompetency, and the other plea of oppression was for the first time propounded before us. With regard to that plea, it is enough to say that a creditor is entitled to use poinding of the ground to make out payment of a debt, or a portion of it, and unless it can be shown that the diligence is useless for that purpose the Court will not stop the diligence.

As to the plea of incompetency, I agree with the Lord Ordinary. The ground upon which that plea is maintained is that the creditor is already in possession under a decree of maills and duties, and it is said that a person in possession of land cannot poind it. The authorities on this point are nearly all in the same terms, and have, I think, been misunderstood by the defenders. Mr Erskine on this matter says—"This action is competent to an annual renter for the arrears of interest due upon his infeftment to a superior for his feu-duties, or for the retoured duties due to him before citation of his vassal's heir in an action of declarator, according to the distinction already stated, and, in general, to all creditors in debts which constitute a real burden or lien upon the lands. But it is not competent to proprietors, nor even to possessors, though not strictly proprietors, as adjudgers, liferenters, or other real creditors, who possess under their different titles, for there is a natural impropriety in poinding the ground of lands possessed by the poinder himself. The only process competent to such, for the recovery of their rents, is that of maills and duties."

It is the exception stated in the last two sentences of the passage which I have read that the defender founds upon. Now, in the first place, I think it clear that the possession here referred to is possession which, though not strictly that of a proprietor, is for the time equivalent thereto.

An adjudger or liferenter or wadsetter is, for the time, almost complete proprietor of the lands. So, when Erskine speaks of creditors who are in possession he means that class of creditors who are very nearly proprietors for the time. That is very different from the case of a creditor infeft on a bond and disposition in security, which gives him only the character of an encumbrancer, as distinguished from a proprietor. So the possession meant is the full possession of the ground which it is proposed to poind, and that sort of possession is had by an adjudger, and wadsetter, and liferenter. Their titles give them access to the ground. But that is not the case of the creditors here. An action of maills and duties, although a high-sounding name, is only a process for recovery of rent, and carries nothing more with it. The proprietor who let the lease was entitled to possess all that was not let to the tenant. But has the creditor, merely from holding a decree of maills and duties, the right to any such possession? Could he, for example, go on the ground and shoot the game, or could he work the minerals?

I am therefore of opinion that the decree of maills and duties has not deprived this creditor of his right to poind the ground.

LORD DEAS concurred.

LORD ARDMILLAN—I think we can decide this case without touching on the more difficult questions which surround it. What the institutional writers say in regard to proprietors is not applicable to a heritable creditor who is not a *quasi* proprietor, like an adjudger or wadsetter.

There are two modes open to him to enforce his right. First, an action of maills and duties, which is just a warrant to draw the rents; and secondly, a poinding of the ground, which enables him to reach moveables of the debtor on the ground, whether it is let or not. I cannot see that the one remedy deprives the creditor of his right to use the other; and so I do not think that this action is incompetent.

LORD MURE—I concur. When the case was before me in the Outer House I allowed a proof, but I said in my note that I thought there was no actual incompetency in a creditor holding a decree of maills and duties bringing an action of poinding the ground. I do not see any reason why a creditor who has a decree of maills and duties should not have recourse to poinding of the ground, even to reach the effects of a tenant refusing to obey a decree of maills and duties. At all events, it is competent to use poinding of the ground to reach moveables of the landlord.

On the broader question, I agree that a heritable creditor is not a *quasi* proprietor of the class referred to by Erskine.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel on the reclaiming note for the defenders against Lord Craighill's interlocutor, dated 29th October 1874, Adhere to the said interlocutor and refuse the reclaiming note; find the pursuer entitled to additional expenses; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Pursuer—Mackintosh and Henderson. Agents—Horne, Horne & Lyell, W.S.

Counsel for Defender—Lee and Strachan. Agens—Walls & Sutherland, S.S.C.

Thursday, January 14.

SECOND DIVISION.

[Lord Gifford, Ordinary.

AULD *v.* SHAIRP.

Reparation—Slander—Title to sue.

A widow, also the executrix of her husband, brought an action of damages against a person