parties consenting to the sale of the grain and to the consignation of the free proceeds, pending the determination of the rights of parties. So that, in these circumstances, nothing remained to prevent the pursuers, if they prevailed, putting that fund at once into their pockets. It is difficult then to see the difference between this and a petitory action.

If that be so, the question comes to be, whether in this mutual contract the fact that on both sides the contract arises on implication in place of being express excludes the counter claim in defence of damages. It is very true that the defenders admit, to a certain extent, the charges against them, and it is quite right to say that that account comes near to a liquidation of the sum demanded, even without the admission of its correctness. But there are the items of £21, 7s. 6d. for turning the grain, and of £70, 13s. 4d., neither of which are admitted. These are left to implication, and we are not dealing with a case where there is an admission of the whole accounts sued for. Besides, admissions of such a nature must be taken with their qualifications. I think the counter claim of damages is legitimate.

As to the difference from the excess of the damage over the sum concluded for, I confess I should be slow to say that it would have made any difference to my mind though the restriction agreed to by the minute had not been made. We are familiar with the practice of allowing damage to be pleaded as a defence where the amount of the damage exceeds the pursuers' claim. But we have not to deal with that now, and it is not before us.

Upon the merits of the case I agree with your Lordship.

Lord Ardmillan—There is some nicety in the preliminary question raised in this case. My humble opinion is that if the claim of the petitioners, who are substantially the pursuers, had rested on a written contract, then, unless the defenders could bring their claim within the same contract, that claim must be excluded. In the present case the parties must go to proof. The defenders, who say that out of the same contract so proved there arose an obligation on the part of the pursuers that the grain should be so stored as not to suffer damage, are quite entitled to plead this defence, and to have it held good.

Whether the respondents could have pleaded damage beyond the limited amount to which they have restricted their claim by minute, it is not necessary to decide. I merely mention this to guard against the inference that but for the reservation it could or could not have been pleaded.

After the best consideration of the case, both on this point and upon the merits, I have come to be of the opinion of your Lordships.

Lord Mure—I have no difficulty on either point in this case. The authorities before us of mutual contracts were all under the express written agreement of parties. But the present circumstances, when the verbal contract has to be set forth in proof, make no difference in the application of the rule. This case is identical with that of *Taylor* v. *Forbes*, and the pursuers here, as owner of the storing lofts, are, to my mind, in no different position from the owner of the ship there. It was in that instance laid down that the plea of set-off was competent, and the present case is, I think, in a more favourable position, because neither claim was here liquid at the time of the closing of the record. There the amount of the freight was liquid. That is my view on the competency of the plea, and on the merits I also agree.

The Court adhered.

Counsel for Petitioners (Appellants)—Asher —Brand. Agent—Duncan & Black, W.S.

Counsel for Respondents—Balfour—Jameson. Agents—J. & R. D. Ross, W.S.

Friday, January 14.

FIRST DIVISION.

[Lord Craighill.

THE SCOTTISH HERITABLE SECURITY COY. (LIMITED) *v.* ALLAN, CAMPBELL, & COY., AND THE SCOTTISH HERITABLE SECURITY COY. (LIMITED) *v.* JOHN WATSON & SONS.

Poinding the Ground—Heritable Creditor—Proprietor —Right in Security.

A debtor in security of a sum advanced granted a personal bond in favour of the creditor, in which it was provided that he (the creditor) should have "all the rights and power of absolute proprietors" in and over certain lands also conveyed to him in security of the advance by the creditor. The disposition by which these lands were conveyed was *ex facie* absolute, and the deed was duly recorded, but a back-letter which was granted by the creditor was not recorded. Upon the debtor's failure to pay under the stipulations of the bond, the creditor, having first prepared and recorded a duplicate back-letter, raised an action of poinding of the ground in satisfaction of his claim.—*Held* (1) that the title of the creditor being the said *ex facie* absolute disposition, was that of a proprietor, not of a creditor, and (2) that the sum claimed was therefore not a *debitum fundi*, and was no foundation for an action of poinding of the ground.

Observed (*per* Lord President) that the back-letter must be held as not recorded, notwithstanding the duplicate, but that, had it been recorded, it would not have been material to the case.

In the first of these two actions the Scottish Heritable Security Co. (Limited) were pursuers, and Allan, Campbell, & Coy., manufacturers, Newburgh, Fifeshire, and John Carmichael Allan, the only individual partner of that firm, were defenders.

The facts of the case, so far as material, were as follows:—By a bond dated the 13th Apri

1874, the defenders acknowledged that the sum of £1500 had been advanced to them by the pursuers, and, *inter alia*, bound themselves to pay interest at the rate of 6 per cent. upon that sum from the date of the bond. They further bound themselves to pay the capital sum of £1500, with interest, by half-yearly instalments of £103, 10s. by Whitsunday 1884. The deed specially provided and declared that the pursuers should have "all the rights and powers of absolute proprietors in and over the said subjects and others conveyed by the said disposition," so long as any part of the loan remained unpaid, and should have full power, at any time during the continuance of the said loan, "to enter into possession of the said subjects and others, to draw the rents thereof, to output and input tenants, to grant tacks or leases of the said subjects, or any part thereof, at such rents and for such periods of endurance as they may think proper, to appoint factors, and generally to exercise the whole rights of absolute proprietors in and over the said subjects and others; provided always, that before entering into possession of the said subjects and others as aforesaid," the pursuers should be bound through their manager to give to the defenders "fourteen days' previous intimation of their intention so to do." By the said bond it was also specially provided and declared that in the event of the defenders allowing one full half-year's payment of £103, 10s., or any part thereof, to remain unpaid for two months after the date when it fell due, then, and in that event, it should be lawful to and in the power of the pursuers, upon giving to the defenders "one month's intimation in writing under the hands of their manager without further intimation or process of law whatever, to sell the said subjects, and that either by public roup or private bargain," and to grant dispositions thereof in favour of the purchaser or purchasers. Of the same date with the bond, viz., on 13th April 1874, the defenders, as heritable proprietors of certain subjects in Newburgh, granted an *ex facie* absolute disposition of these subjects in favour of the pursuers. This deed, which was recorded on 16th April 1874, was qualified by a back-letter, also dated 16th April, and granted by the pursuers to the defenders, by which it was declared that the disposition, though *ex facie* absolute, was truly granted, and the subjects and others thereby conveyed were to be held by the pursuers as in security only of the advance of £1500, and binding the pursuers to reconvey the subjects upon payment of the sums due under the bond. The pursuers never entered into possession of the subjects, which remained in the hands of the defenders or their trustee John Gilroy, in whose favour John Carmichael Allan executed, on 17th November 1874, a general trust-disposition for behoof of his creditors, and who was accordingly sisted as a defender in the process. The interest due under the bond at Whitsunday 1874 was duly paid, but at Martinmas of the same year the defenders failed to pay the instalment of £103, 10s. then due, thus leaving a debt to the pursuers of the whole sum of £1500. The pursuers accordingly intimated to the defenders on 11th January 1875, in terms of the provisions of the bond, that they were to enter into possession of the subjects on the expiry of fourteen days, and to sell them whenever they thought proper after the expiry of one month. The fourteen days expired on 25th January 1875, but instead of entering into possession the pursuers proceeded to poind the ground, a proceeding which the defenders refused to allow. Thereupon this action of poinding of the ground was raised, in answer to which the defenders pleaded, *inter alia*—"(1) The action is incompetent in respect the pursuers are barred by the nature of their titles from having recourse to poinding the ground. (2) The debt due by the defenders Allan, Campbell, & Company, and John Carmichael Allan, to the pursuers, not being *debitum fundi*, an action of poinding the ground is incompetent. (3) The recording by the pursuers at their own hands, on 2d February 1875, of a duplicate of the back-letter granted by them on 16th April 1874, without the consent of the defenders Allan, Campbell, & Company and John Carmichael Allan, was illegal, and did not create the debt due by the said defenders to the pursuers a *debitum fundi*, and an action of poinding the ground is therefore incompetent thereon. (4) Under the whole deeds constituting their security the pursuers had, at the date of raising the action, all the rights and powers of absolute proprietors in and over the subjects embraced in the conclusions, and the action is therefore incompetent."

The second action was one of the same nature, at the instance of the same pursuers against John Watson & Sons, coalmasters near Bathgate, and in Glasgow, who had borrowed money from the pursuers in circumstances precisely similar to those narrated in the case of Allan, Campbell, & Company, except that in this case the defenders had not prepared and recorded a duplicate back-letter. William Mackinnon, trustee on the sequestrated estate of John Watson & Sons, was also called as defender. The defenders stated pleas in law in terms similar to those stated by Allan, Campbell, & Company, and in addition pleaded—"(3) Under the 102d and 108th sections of the Bankruptcy (Scotland) Act, 1856, the defender, as trustee, acquired an absolute preference over the whole of the bankrupts' effects situated in and upon the said heritable subjects qualified only by a reference to the creditors' right to poind the ground, as defined in the 118th section, and the said 118th section being repealed, the defender's right is preferable to that of a creditor poinding the ground after the date of sequestration. (4) In the circumstances the pursuers' preference is limited to the specific subjects conveyed to them under the *ex facie* absolute title, in so far as the same may be found to be of an heritable nature, and to the rents thereof, so far as the same may lawfully be attached, and the pursuers cannot, by poinding the ground after the date of the sequestration, acquire a preference over the bankrupt's moveable estate."

The Lord Ordinary pronounced the following interlocutor in the action against Allan, Campbell, & Company:—

"*Edinburgh, 2d July* 1875.—The Lord Ordinary having heard parties' procurators on the closed record and productions, and considered the debate and whole process—Finds (1) that the sum for which the pursuers conclude that warrant for poinding the ground should be granted is not *debitum fundi*; and *separatim* (2), that the title of the pursuers to the ground, the moveables on

which are the subjects to be attached by the proposed diligence, being a disposition *ex facie* absolute, is that not of creditors but of proprietors, and consequently is not a foundation for the diligence of poinding the ground: Therefore sustains the second plea in law, and also the first plea in law for the defenders, dismisses the action, and decerns: Finds the defenders 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.*—The pursuers are creditors under a personal bond for £1500, and they are infeft in the heritable subjects described in the summons on an *ex facie* absolute disposition. The reality of the situation, however, is that they are not out-and-out proprietors, but must reconvey the property on receiving payment of their debt. A back-letter establishing this obligation was granted immediately after infeftment was taken, but this document never was recorded. A duplicate, however, written out and signed by the manager of the pursuers' company, was recorded by the pursuers the day before the present action was instituted. No authority for this proceeding was given by the defenders, who, consequently, contend that the pleas of parties relative to the competency of poinding the ground must be disposed of as they would have been if the back-letter had not been recorded. The Lord Ordinary thinks that the solution of this question is not necessary for the decision of the cause.

"1. There is no doubt that a debt for which the ground can be poinded must be *debitum fundi*, and hence the first question here is, Whether that due to the pursuers is a debt of this description? The bond for £1500 is only a personal bond, and the disposition is not the constitution of any debt whatever. Nor would the recording of the back-letter accomplish that which the disposition leaves unperformed, all which would thence ensue being merely the limitation of the sum for which the property conveyed could be retained to the debt as it stood when the back-letter was recorded. The amount of that debt behoved to be otherwise established. Quite true, through the instrumentality of the disposition security is in effect afforded. But how? Not by the imposition of the debt as a burden upon subjects belonging to the debtors, but by the right to withhold these subjects from the debtors till the debt is paid or otherwise extinguished. They can demand retrocession only after this condition has been fulfilled, but till payment and retrocession the subjects are not theirs but their creditors. This, as the Lord Ordinary thinks, involves the conclusion that the debt is in legal acceptance not *debitum fundi*, because the opposite view would make the debt a burden or charge upon the property, not of the debtors, but of the creditors.

"2. Proprietors cannot poind their own ground, and if the pursuers are proprietors in the sense of this rule, they as such are excluded from recourse to that diligence. In a matter of this kind the actual title, the Lord Ordinary thinks, is all that can be regarded. In heritable securities properly so called, the debtor is proprietor and the creditor only incumbrancer. But where an *ex facie* absolute disposition has been granted the property no longer remains with the debtor. He has been feudally divested, his creditor has been invested, and there must be a formal reconveyance before the estate can be restored. The ground according to the title, is the ground of the disponee, the tenants are his tenants, and if he refrains from doing all that an owner might in the levying of rents and in the management of the property, all that can be said is that he refrains from doing things which are within his competency. His infeftment gave him real, actual, and corporal possession, and there is no other sasine of the property. This is the view of the law which received the sanction of the Court in the well-known case of *Garthland* v. *Lord Jedburgh*, March 2, 1632, Mor. 10,545-6. That decision is the foundation of all the *dicta* to be found in the books on this subject, and the Lord Ordinary is of opinion that the doctrine for which it is the authority is well explained in Ross' Lectures, vol. ii. p. 431, where it is laid 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 mails and duties is the proper step to be taken.' Analogous passages are to be found in other books of authority, as, for example, in Erskine, b. iv. t. i. s. 11. What is thus presented is, as the Lord Ordinary conceives, the law by which, in so far at least as the first of the defenders' pleas is concerned, the present action must be determined.

"The reasons which have now been explained are those by which the Lord Ordinary has been led to pronounce the prefixed interlocutor."

A similar interlocutor was pronounced in the action against John Watson & Sons, and the Lord Ordinary further referred to the note annexed to the previous interlocutor.

The pursuers reclaimed in both actions, and argued:—The Lord Ordinary had dealt with the case as if the disposition were the only deed to be looked at. The three deeds, when taken together, showed the pursuers to be creditors merely, not absolute proprietors, and their remedies were therefore only those of creditors. The case of *Garthland* (No. 10,545 and 10,546) proceeded on the footing that the party seeking to poind had entered into possession; and was not an authority for the proposition that a creditor with an absolute disposition, who had no possession, might not poind. The fact that the creditor might enter into possession should not exclude his right to poind.

Authorities—*Garthland* v. *Lord Jedburgh*, March 2, 1632, M. 10,545 and 10,546; *Henderson* v. *Wallace*, Jan. 7, 1875, 2 R. 272; *Wylie* v. *Scottish Heritable Securities Investment Company*, Dec. 22, 1871, 10 Macph. 253; *Nelson* v. *Gordon, &c.*, June 26, 1874, 1 R. 1093; *Gardyne* v. *The Royal Bank*, March 8, 1851, 13 D. 912; 1 Macq. App. 358; and with reference to *Watson's* case, 2 and 3 Vic., c. 41, §§ 78, 95, and 118; *Campbell's Trs.* v. *Paul*, Jan. 13, 1835, 13 S. 237; *Barston* v. *Mowbray*, March 11, 1856, 18 D. 846.

The defenders argued — There was no precedent for the remedy proposed by the pursuers.

They had founded in their summons on an absolute disposition, and in order to arrive at a sum for which to sue, they had to refer to a personal bond. Poinding of the ground was only competent on what was *debitum fundi*, which this sum was not. It was not the back-letter but a duplicat, not of the same date, which was recorded. Even if the back-letter were held to be recorded, the recording did not alter the title nor make the debt a *debitum fundi*. The title of the pursuers was an *ex facie* absolute disposition.

Authorities—Ross' Lectures, p. 431; Erskine's Inst., iv. 1, 2.

Watson & Co. further argued — By 37 and 38 Vic., c. 94, § 55, it was declared that sequestration now operated as if poinding of the ground had taken place. That did away with the limited right which the creditor had of poinding the ground after sequestration. As their rights now stood, the trustee had by the Act of Sequestration the same right over the ground as if the poinding of the ground had taken place at the date of the sequestration.

At advising—

Lord President — This is an action of poinding the ground which the Lord Ordinary has dismissed upon two grounds—in the first place, that the sum for which the pursuers conclude that warrant for poinding should be granted is not *debitum fundi*; and secondly, that the title of the pursuers to the ground, the moveables on which are to be attached, being a disposition *ex facie* absolute, is that not of creditors but of proprietors, and consequently is not a foundation for the diligence of poinding the ground. I agree with his Lordship in both grounds of judgment.

The writings which constitute the relation between the two parties, and which define their rights and liabilities, are three in number. The first is a personal bond by the defenders in favour of the Scottish Heritable Security Co., acknowledging receipt of a bond of £1500, and binding themselves to repay that loan. That bond contains no disposition of heritable subjects, and nothing in the shape of a heritable security at all. Therefore, in so far as the bond itself is concerned, it is nothing but a personal bond. No doubt it contains certain statements and declarations about an absolute disposition which is at the same time granted by the defenders in favour of the pursuer. But that does not in the least degree affect the character of the obligation itself which is contained in the bond for repayment of the money, which, being clothed with no heritable security of any kind, remains, as I have already said, a purely personal obligation. Now, that of itself furnishes sufficient ground for the judgment of the Lord Ordinary under the first head of his interlocutor. This is not *debitum fundi*, and therefore it cannot be the foundation of a process of poinding the ground.

But it is quite right that we should proceed, as his Lordship has done, to consider what is the title of the pursuers here, whether that title is not the title of absolute proprietors, and so is not a title which can afford him the remedy that he here seeks to use. I have already said that the personal bond contains reference to the disposition in favour of the pursuers, and it provides a number of things which are exceedingly unnecessary because they would have been all implied or effected by means of the absolute disposition which was granted in favour of the pursuers, without being expressed, as they are on the face of this personal bond. For example, it is specially provided and declared that the Scottish Heritable Security Company shall have "all the right and powers of absolute proprietors in and over the said subjects and others conveyed by the said disposition so long as any part of the loan remains unpaid, and shall have full power at any time during the continuance of the said loan or any part thereof, and without any other or future authority than is herein contained, to enter into possession of the said subjects and others, to draw the rents thereof, to output and input tenants, to grant tacks or leases of the said subjects or any part thereof at such rents and for such periods of endurance as they may think proper, to appoint factors, and generally to exercise the whole powers of absolute proprietors in and over the said subjects and others." Then it is further provided that in the event of their running into arrear of the annual payments of interest it shall be in the power of the pursuers to sell the subjects; and there are some other clauses of a similar tendency and effect. Now, it seems to me that these were very unnecessary clauses to introduce into this personal bond, because the whole of the powers thereby expressly given to the pursuers were given them by the disposition of the subjects *ex facie* absolute which was at the same time executed. When infeftment was taken upon that disposition, or when the equivalent proceeding of recording the conveyance in the Register of Sasines had been completed, the pursuers became avowedly the proprietors of these subjects, and entitled to use all the powers of proprietors. They could do anything with the subjects they pleased. They had an absolute right of ownership of the subjects. Nor was this in the slightest degree affected, in so far as powers were concerned, by the back-bond which was granted by the pursuers in favour of the defenders, and which declared that the subjects, although conveyed by a disposition *ex facie* absolute, were in truth conveyed as in security only of the advance of £1500 made by the Coy., *i. e.* by the pursuers to the defenders, and for the due fulfilment of the whole obligations contained in the bond granted to the Company. And by that same back-letter the pursuers undertake that upon the advances and all sums that may become due under the said bond being repaid, and the whole claims of the Coy under the same being fully satisfied, the Coy shall redispone the said subjects and others to the defenders. It is said that this back-bond was recorded, and that the recording of the back-bond so qualified the infeftment upon the absolute disposition that the pursuers were no longer upon the face of the records absolute proprietors of the subjects, but only heritable creditors. Now, that I consider to be quite unsound in law, on the assumption that the back-bond was recorded. But I take leave to doubt whether this back bond was recorded at all. The back-bond remained naturally, and as it was intended to do, in the hands of the defenders, in whose favour it was granted, and to whom it was delivered, and that back-bond so delivered to them was never recorded. But it seems that the manager of the Company executed

a duplicate of it and sent that to the record. Now, that was not the back-bond which had been granted and delivered to the defenders, and which is the only proper back-bond in this transaction. And therefore I am humbly of opinion that the back-bond was not recorded. But, for the reason I have already given, I do not think it of any consequence whether it was recorded or not. The back-bond did nothing more than this—it showed that under certain conditions the present proprietors of the subjects, the Heritable Security Company, were bound to convey the subjects to somebody else; but it did not make them one bit the less for the time absolute proprietors of the subjects. They were no doubt under an obligation to reconvey them to the party from whom they had acquired, but the mode of their acquisition remained the same; it was by disposition absolute. That is not an incumbrance upon lands that is created by such a disposition, because an incumbrance can be discharged, but this infeftment of the pursuers cannot be discharged. It can only be extinguished by a conveyance, and if by a conveyance to the original owner to whom the money has been advanced, it is a reconveyance no doubt, and it is a reconveyance in terms of an obligation contained in the back-bond. But that does not in the slightest degree affect the position of the pursuers as proprietors of the subjects. By means of their infeftment they are put in possession of the subject, because infeftment is the solemn and legal mode of taking possession of heritage, and if they refrained from drawing the rents, that was of their own accord, for they were just as much entitled to draw the rents payable by tenants as any other absolute proprietor was. They were entitled, without any of the provisions in that personal bond, to let leases of the subjects, and to deal with the estate in every respect as their own. They required no process of law to enable them to enter into possession as it is called, and if they had proposed an action of mails and duties, for example, for the purpose of enabling them to uplift the rents, it would have been an idle formality, and indeed incompetent, because it is only an incumbrancer that requires to use a process of mails and duties in order to give him a title in a question with the tenant to uplift the rents. But these absolute holders were just as much entitled to uplift the rents of these subjects as any singular successor deriving his right from the owner. Now, that being the nature of their title, the question comes to be, whether a party so situated can poind the ground? and I am humbly of opinion, with the Lord Ordinary, that he cannot. The authorities upon that subject are perfectly clear and distinct. Poinding the ground is not a diligence proper to an owner at all. He cannot poind his own ground, as it is expressed, and therefore upon that second reason assigned by the Lord Ordinary for his judgment I am entirely in accordance with him also. I am for adhering to the interlocutor.

Lord Deas—(after narrating the facts)—There can be no doubt that there is in this bond very much as there was in the case of *Wylie* v. *The Heritable Securities Investment Association*, 22d December 1873, 10 Macph. 251, very stringent conditions made against the debtor, and with the very obvious effect, whether successful or not, of putting themselves in a very different position from all ordinary creditors, and obtaining very large advantages over all ordinary creditors. I say nothing as to whether they may not be fairly entitled to do that if they can, but that is obviously what is here attempted. And when we find that that is proposed to be carried out by a sort of mongrel combination of, I may say, all the different kinds of securities known to the law of Scotland, it is the duty of the Court to be very cautious and careful before they sanction novelties of that description not hitherto known in our practice, and by which it is attempted not only to put debtors in a position in which they may be most harshly used, but to put the creditors in a position in which no other heritable creditors have ever been able or have ever attempted to place themselves. Now this, as I have said, was a loan, and without saying anything about judicial securities, which this is not, but confining one's attention to voluntary heritable securities, we all know that there are two classes into which these voluntary securities may be divided. The one class is that in which the security is avowedly and on the face of it in the form of an heritable security. The old form of a bond of annual rent and an heritable bond were both used as a bond and disposition in security, but in whichever of these forms a voluntary security may be used they are all on the face of them securities. But there is another mode which our law has recognised, and which is in many respects much more favourable for the creditors and less favourable for the debtors than those other forms in which it appears *ex facie* as a security, and that other mode is by executing an absolute disposition of the heritable subject generally, though not always accompanied by a back-letter or back-obligation, declaring that the deed, which on its face is absolute, is merely intended for a security. I say that is the most comprehensive and the most favourable form of constituting a voluntary heritable security that has ever been known in our law, because it sets all other creditors at defiance. They not only cannot interfere until that particular debt is fully satisfied, but there may be other debts of any amount contracted either before or after, and either connected with the loan or not connected with the loan, contracted by the debtors to the creditors, and for all these the creditor holding a security in the form of an absolute disposition with a back-bond is perfectly secure against all the world. There are other advantages which I need not enumerate of having that form of security. Debtors are, however, generally not willing to give that form of security, for no man likes to divest himself absolutely of his estate in favour of a creditor by a deed which has effects like these, and consequently it is not often conceded by the debtor. But it may be done, and when it is done the creditor has the advantages which I have mentioned, and various other advantages arising from that form of security. But I take it that while the law allows all that, it holds that he can only have the advantages which have been immemorially recognised by our law and practice as attending that form of security. The law does not hold that he can make a combination at his own hand of a form of security never known in practice or recognised before, so that he shall have at one and the same time all the advantages of a creditor who holds a bond and disposition in security followed by infeftment,

and all the advantages of a creditor who holds his security in the form of an absolute disposition and back-bond. I know no law for that, and it is perfectly plain that that would not only give him the power of oppressing the debtor beyond that which is reasonable, but it would give him a preference to all other creditors holding heritable securities, voluntary or judicial—a preference over all such creditors which might be unjust to other creditors, and most prejudicial to the commercial interests and rights of the public in general. Now, that is what is proposed to be done here, and I know no law for that whatever. I agree with your Lordship in thinking that when a party chooses to take his security in this most powerful of all ways by an *ex facie* absolute disposition and back-bond, while he is entitled to all the benefits the law allows to that, he cannot combine with it all the benefits which will attend the other form of security, namely, that which is a security declared upon the face of it. The only answer to all that is, that while the deed which follows that bond, and the infeftment following upon it, make these parties *ex facie* absolute owners, they are after all mere security holders, and therefore are entitled to the benefits of security holders, for that is the real nature of the transaction. That may be plausible enough if it had not been settled for centuries that it cannot be done. The undoubted law, which holds that a proprietor cannot poind his own ground, is applicable to a creditor who is in reality an heritable creditor, but who holds his security in the form of a disposition and back-bond. It is not necessary to go further back than the case of *Garthland*, Mor. 10,545, in order to see that that has been settled for a great deal more than 200 years. In that case, in March 1632, Spottiswoode's report is this—"The Lord Jedburgh having wadset to the laird of Garthland some land, received a back-tack for payment of 1200 merks yearly, Garthland raised a summons against him for payment of the back-tack duty, wherein he concluded likewise to have the ground poinded for it for all years to come; which conclusion the Lords would not sustain, for the pursuer being infeft in the property could not seek his own ground to be poinded for anything due to him out of the said lands." There is a much longer and fuller report on the next page by Durie, in which, among other explanations, it is mentioned—"This cause being called *in præsentia Dominorum*, the decision here noted was renewed, and it was found that the heritor could not desire the goods of his tacksman nor of his subtenant to be poinded by this pursuit for the tack-duty, but that he might and ought to pursue personally therefor." Now the whole practice and the whole authorities for these past centuries have been conform to that, and whatever might be said about this being a mere form of title, it is settled that in this very question of poinding the ground, the heritable creditor is exactly in the same position as if he were the undoubted and out-and-out proprietor, and there was no loan transaction at all. If he could poind the ground he would be in a position to exclude all other heritable creditors as well as personal creditors as long as he thought proper to exercise that right, because, as was decided in several of the cases, and laid down by Lord Stair, the poinding of the ground gives a man a paramount right. It is not only good against all debts and past parties, but it is good against singular successors, and does not require even to be transferred against heirs. It is a constant continuing right that sets all the world at defiance in favour of that particular creditor. The poinder of the ground is preferable to all singular successors, and is preferable to all other creditors not only of his own debtor but of all other creditors. I am clearly of opinion with your Lordship that it is beyond all doubt that those parties who choose to take this form of their title, while they are entitled to all the rights and diligence belonging to such form of title, are not entitled to the inconsistent position of having the rights and remedies also of an heritable creditor. The Lord Ordinary puts that question second, but I think it is truly the first question, because it goes to show that this debt is not a *debitum fundi*. In order to a debt being a *debitum fundi* it must be a debt upon the face of the titles due to a creditor. If this were an ordinary heritable security it would be *debitum fundi*, but it is just because this is not an ordinary heritable security, because the party is not here in the position or an heritable creditor, being in the position of a proprietor, that it is perfectly clear that this is not a *debitum fundi* upon which he can proceed in this way. It is laid down by Lord Stair and all the authorities that a *debitum fundi*, that is to say, a debt made real upon the property, is necessary to found the diligence of poinding the ground. An heritable creditor has a *debitum fundi*, but to say that a man whose title is in the form of a proprietor has a right of poinding the ground is just at the same moment to say that he is a proprietor and that he is not. The one form of proposition follows from the other, and I am most clearly of opinion with your Lordship that either of these grounds, though I think they resolve into one and the same ground, is conclusive.

Lord Ardmillan—I feel rather reluctant also to separate the two grounds. I do not by any means venture to differ from your Lordship's view that this is not a *debitum fundi*, and I rather think that the grounds for holding that it is not a *debitum fundi* very much depend upon the other question, which is one of much interest. I am unable to see anything to distinguish the principle of this case from the principle laid down in the case of *Garthland*, so long ago as 1632. If there had been no recorded back-bond, this was an absolute disposition by the borrower of the money to the lender of money of the premises. The recording the back-bond is the mode by which the borrower who has given an absolute bond protects himself from the effects of giving an absolute disposition—protects himself by recording the back-letter, which qualifies and makes the apparent proprietor in the position truly of an heritable creditor. In this case the proceeding in regard to the matter is a very singular one. I impute not the slightest blame to this Company. They are doing a business which is in itself perfectly fair and honourable, and which they are quite entitled to conduct, and they are quite entitled to make their securities as perfect as they can make them, but when they had got the heritable disposition, and granted a back-bond, which they did on 16th April 1874,

they gave one back-letter only to the borrowers of the money. The borrowers did not record that back-bond, and what did the lenders do? On the 1st of February they signed another letter, and that other letter, which they called a duplicate, they recorded on the 2d February. Now, I don't blame them for the motive, which is very obvious. If they had not signed that back-letter and recorded it, they would have held an absolute disposition to this property, and they could not have poinded the ground upon that. They do not themselves profess that they could have done so; and so they first grant and then record a new back-letter, which they call a duplicate; and this they did in order to give them the rights of a creditor in addition to the rights of a proprietor, which they previously had, for as the proprietor they could not have used the diligence of poinding the ground. Therefore this granting and recording the back-letter by them was simply done to combine in their persons the inconsistent rights of a proprietor and of a creditor. Now, that I do not think they can do according to law. The case of *Garthland* was very well considered very long ago, and all our recent authorities. Mr Ross, Mr Bell, and Mr Duff, allude to the case as a standard authority, which I never in the least doubted. As Mr Ross says in his Lectures, "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," or, as it is put in the judgment itself, the owner of the ground cannot poind his own ground. Now, these parties were truly the owners of the ground, unless the borrower of the money held the back-letter and recorded the back-letter to qualify the right. The recording of their own back-letter was an attempt which I think the law cannot sanction to clothe themselves with the two inconsistent rights. That view I think really disposes of both points, because clearly there could be no *debitum fundi* when the party who calls himself the creditor held the rights to the subjects himself. There was no burden upon the property of another. The lender of the money and the holder of the bond was also the proprietor, and there could be no *debitum fundi*. Therefore I think that truly the two questions turn on the one point, and taking it in that composite view, I am very clearly of the same opinion as your Lordship.

Lord Mure—In the discussion of this case it was not disputed by either party, and it may be assumed as settled law—(1) That an heritable creditor, as holder of a *debitum fundi* burdening the land of his debtor, is entitled to have recourse to a poinding of the ground in order to operate payment of his debt; and (2) that this remedy is not open to a proprietor, because it is held to be incompetent for a party to poind ground belonging to himself. The law is so laid down by Mr Erskine in the passage which has been referred to by the Lord Ordinary in his note; and there are other authorities to the same effect.

In the present case the pursuer's title is not that of an heritable creditor by bond and disposition in security in the ordinary form, but is *ex facie* that of an absolute proprietor, with a separate back-bond or letter of reversion. The parties do not seem to be at one as to the date when the back-letter was granted, or as to whether it has been duly recorded. But it was not disputed by the defenders that such a letter had been granted; and it seems to be admitted that the transaction was substantially that of a security for debt, and intended to be so. Such being the nature and character of the transaction, it has been strongly contended on the part of the pursuers that they were entitled to the same remedies for recovery of their debt as other heritable creditors, including that of an action for poinding the ground.

The question thus raised is, in a general point of view, one of very considerable importance, and is, I think, attended with nicety; and if the matter were still open I should have had some difficulty in coming to the conclusion that the substance of this transaction was to be disregarded, and that because the title of the creditor was *ex facie* that of a proprietor he was not in a position to sue a poinding of the ground. But the question is, in my opinion, no longer an open one. For it seems to have for long been held that parties whose titles are *ex facie* absolute, although they may not be out-and-out proprietors, such as liferenters and wadsetters, are not entitled to have recourse to a poinding of the ground, but must operate payment of their debts in some other way. That was decided as regards a wadsetter in 1632, in the case of *Garthland*, referred to by the Lord Ordinary. Now, a wadset is defined to be "a conveyance of land in pledge for or in satisfaction of a debt or obligation, with a reserved power to the debtor to recover the lands on payment or performance;" and that I apprehend is substantially the position of the pursuers in this case. Upon the authority of the case of *Garthland*, therefore, I have come to the conclusion that the interlocutor of the Lord Ordinary ought to be adhered to.

The Court adhered in both actions.

Counsel for the Pursuers—Dean of Faculty (Watson)—Keir. Agents—Stuart & Cheyne, W.S.

Counsel for Allan, Campbell, & Co., Defenders — Kinnear — H. Johnston. Agents — Leburn, Henderson, & Wilson, S.S.C.

Counsel for John Watson and Others, Defenders —M'Laren—M'Lean. Agents — Millar, Allardice, Robson, & Innes, W.S.

Saturday, January 15.

FIRST DIVISION.

[Lord Curriehill.

LORD BLANTYRE *v.* THE LORD ADVOCATE.

Process—Party—Sist.

In an action of declarator of property, *held* that a third party claiming a right of property in the subject of the litigation was entitled to be sisted as a defender.

This was an action at the instance of Lord Blantyre and his son against the Crown, for declarator that "the ground forming the shores and banks of the river Clyde between high-water mark