parents; and that the division of the said fee among the said third parties is to be made *per capita;* and the Court answer questions 3, 4, 5, and 6 in the negative, and decern."

Counsel for Second Parties—Wallace. Agents—Russell & Dunlop, C.S.

Counsel for Curator *ad litem*, Third Party (Mrs Muchall-Viebrook's Child)—Macfarlane. Agent—J. P. Wood, W.S.

Counsel for other Third Parties (Curator *ad litem* for Children of Mrs Von Mosch)—C. N. Johnston. Agent—James Marshall, S.S.C.

Counsel for Fourth Parties—Lorimer. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Curator *ad litem* for Fifth Parties—Sym. Agent—J. P. Bannerman, W.S.

Counsel for First, Sixth, and Seventh Parties—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Saturday, June 16.

FIRST DIVISION.

[Lord M'Laren, Ordinary on the Bills.

URQUHART *v.* ANDERSON.

Heritable Creditors—Diligence—Poinding of the Ground.

The effect of an action of poinding of the ground is to attach only those moveables which are actually on the ground at the time of the serving of the summons.

Bankruptcy—Judicial Factor—Heritable Creditor—Preference.

A trader was sequestrated, and a judicial factor at the date of the sequestration was appointed by the Sheriff. In order to prevent any preference being established by heritable creditors, he forthwith removed a quantity of machinery and moveable goods from the premises, and being thereafter elected and confirmed trustee he sold them. After the sequestration, but before the confirmation of the trustee, a heritable creditor executed a summons of poinding of the ground. *Held* (*diss.* Lord Shand) that the heritable creditor had not secured any preference over the moveables belonging to the bankrupt estate which had been removed by the judicial factor before the action was served—*reserving* to him any claim he might have against the judicial factor for so removing them.

The Bankruptcy (Scotland) Act 1856 provided by sec. 118 that no poinding of the ground not carried into execution by sale of effects sixty days before the date of sequestration should be available in question with the trustee, provided that no creditor holding a security over the heritable estate preferable to the right of the trustee should be prevented from executing a poinding of the ground, such poinding to be available only for the interest on the debt for the current half-year, and arrear for one year immediately preceding the commencement of such half-year. By sec. 55 of the Conveyancing Act 1874 this provision was repealed, and it was provided that "all heritable creditors who have been in possession under their securities, and whose right to the rents collected by them has not been challenged by action previous to the commencement of this Act, shall be entitled to claim and apply all rents collected by them in such manner as they might have done if the provisions of the section held repealed had not been enacted."

David Hay Macleod, baker, Dundee, granted in favour of David Urquhart, also residing there, a bond and disposition in security for the sum of £495, dated 14th May 1877. The subjects over which the bond was granted were situated in Forfar. The bond and disposition in security was registered on behalf of Urquhart on the 16th May 1877.

Macleod's estates were sequestrated by the Sheriff of Forfarshire upon the 19th July 1882, and at the same time David Anderson, corn merchant, Dundee, was appointed judicial factor upon the sequestrated estate.

On the 21st July 1882 the petition in an action of poinding of the ground against Macleod in the Sheriff Court of Forfarshire was served at Urquhart's instance.

David Anderson, the judicial factor, was elected trustee on Macleod's sequestrated estates on 20th July, and was duly confirmed in that office by act and warrant of confirmation by the Sheriff on 1st August 1882. The action of poinding of the ground was duly intimated to him. On 14th August 1882 the Sheriff-Substitute, in respect of no appearance for either Macleod or Anderson, granted decree in absence against them.

At the date of the petition for sequestration the moveables upon the said ground consisted of a quantity of flour in bags, machinery, baking utensils, vans, and other effects. These Anderson, immediately after his appointment as judicial factor on 19th July, proceeded to remove, and a great portion of them was removed prior to the service of the petition in the action of poinding of the ground on 21st July. After Anderson's confirmation as trustee he proceeded to sell from time to time the various moveables, and the proceeds of these sales amounted to £365, 4s. 8d.

Urquhart claimed in the sequestration that he was entitled to be ranked preferably to the extent of the principal sum of £495 contained in the bond and disposition in security on the prices of the moveable goods which were upon the subjects at the date of the said sequestration, and were removed therefrom by Anderson, all under reservation of a claim of damages in respect of the wrongful interference with and removal of the said moveables. Anderson, the trustee, admitted him to a preferable ranking to the extent of £45, 12s. 6d., "the nett proceeds of the bankrupt's moveable goods, gear, and effects of every denomination which the trustee has learned were upon the subjects referred to in the claimant's claim and relative extract decree at the date of service of the claimant's action of poinding the ground referred to in the said claim," and *quoad ultra* he rejected the claim.

Urquhart appealed against this deliverance to the Sheriff-Substitute, pleading that "the summons in the action of poinding of the ground having been duly executed prior to the election

and confirmation of the said David Anderson as trustee on the sequestrated estate of the said D. H. Macleod, the whole of the moveables which belonged to the said D. H. Macleod, and which were upon the subjects at the date of the sequestration of the estates of the said D. H. Macleod, were duly attached thereby; and the same having since said sequestration been wrongously and illegally removed by or under the instructions of the said David Anderson as condescended on, the appellant as heritable creditor, and in respect of his poinding of the ground, is entitled to be ranked preferably on the prices and proceeds of the said moveables to the extent of his claim, as condescended on, and so craved by him in his affidavit and claim."

Anderson pleaded — "The appellant's said action of poinding of the ground not having attached the moveables, which had been removed from the ground prior to the date of service thereof, the appeal should be dismissed."

The Sheriff-Substitute, by interlocutor of 2d April 1883, "before further answer, allowed Urquhart a proof to show the value of the moveables which were upon the subjects over which his security extended at the date of the service of the action of poinding of the ground, and to the respondent a conjunct probation."

"*Note.*—It may be (though I must not be understood as indicating any opinion one way or another upon the point) that the appellant has, in a certain event, a good claim against those who were parties to or authorised the removal of the effects from the subjects between the award of sequestration and the service of the action of poinding of the ground, but I entertain no doubt that, so far as ranking upon the estate is concerned, his preference is limited to the value of the moveable effects actually on the ground at the date when the action was served. It is quite clear on the authorities (see especially *Hay* v. *Marshall*, 1824, 3 S. 223, *aff.* 1826, 2 W. & S. 71) that the mere *debitum fundi* of an heritable creditor does not give him a preference on the moveables over the personal creditors in a sequestration, and that in order to give him such preference he must seize the moveables by executing a poinding of the ground. But by the very terms of the summons the poinding applies, and can only apply, to moveables actually on the ground at its date. Only these are apprehended or seized, and over these only, therefore, can the heritable creditor claim a preference. I am accordingly prepared to affirm the principle of the trustee's deliverance. But as the appellant maintains that he has not been allowed the full value of the effects which were on the ground at the date when this petition was served, the appeal cannot be disposed of without a proof."

After taking the proof he found that the value of the moveables which were upon the subjects at the date when the appellant's action of poinding of the ground was served, "cannot, owing to the way in which the respondent dealt with them, be precisely fixed, but may fairly be taken to be £100: Therefore sustains the appeal, recals the deliverance appealed against, and remits to the trustee to give the appellant a preferable ranking in respect of his poinding for the sum of £100."

Urquhart appealed.

The Lord Ordinary on the Bills (Lord M'Laren) dismissed the appeal and sustained the deliverance appealed against.

"*Note.*—This is an appeal against the interlocutor of the Sheriff-Substitute of Forfarshire fixing £100 as the value of the moveables on the bankrupt's heritable estate at the date when the appellant, a heritable creditor, executed a summons of poinding of the ground. The Sheriff at the time of awarding sequestration had made an appointment of a judicial factor, under section 16 of the Bankruptcy (Scotland) Act 1856, for the preservation of the bankrupt's estate. The judicial factor, in the assumed exercise of his ordinary powers, gave directions for the immediate removal of the machinery and effects of the bankrupt from his business premises to a store in Dundee, with a view to their conservation and ultimate sale; but before these effects were completely removed a summons of poinding of the ground was served, which, it was admitted, had the effect of attaching, for the benefit of the heritable creditor, such effects as were actually within the premises. These the Sheriff-Substitute, after taking a proof, has estimated to be of the value of £100, and it is admitted by counsel on both sides that the sum so ascertained fairly represents the value of that part of the bankrupt's moveable estate.

"But it is contended for the appellant that the removal of the machinery, &c., was *ultra vires* of the judicial factor, that the judicial factor was not entitled in a due course of administration to remove the machinery from the bankrupt's premises, and that its removal without authority left it exposed to the diligence of poinding the ground, as if it had been *in situ* at the time when the summons was executed.

"The Sheriff-Substitute has found in effect that whether the judicial factor was within or without the scope of his authority in ordering the removal of the machinery, in either view the heritable creditor can recover no more from the bankrupt's estate than the value of the subjects actually poinded. I agree with the Sheriff-Substitute for the reasons stated in his note.

"But as the action of the judicial factor has been called in question by the appellant, I think it fair to add that I see no reason for doubting the propriety of his proceedings. I think that the powers of the judicial factor include the power of removing moveables from one place to another, and it is not, in my opinion, an objection to the exercise of this power that it has prevented the heritable creditor from acquiring a preference over the moveables.

"It is the recognised right of a trustee in bankruptcy to use prompt and effective measures, in the interest of the general body of creditors, for cutting down preferences or preventing their acquisition, and it appears to me that what is right and proper when done by a trustee cannot be wrong when instituted by a judicial factor. In the present case it is evident that unless an immediate removal had been directed by the judicial factor the whole moveable estate would have been carried off by the heritable creditor, and the objects of the sequestration would have been defeated.

"The rights of the heritable creditor are, of course, entitled to full and fair protection. He has his heritable security and his right to the rents, which he can secure by an action of maills and duties. His security, however, gives him no preference on the moveables; and while he has the

power of acquiring a preferential right to the moveables by the diligence of poinding the ground, yet just because they are moveables, capable of carriage from one place to another, the trustee or judicial factor has the power of intercepting the preference in the way carried out in the present sequestration. If the heritable creditor has a right to object to the removal of the machinery immediately on the award of sequestration, his objection must, as it seems to me, be equally good at whatever time the trustee might remove the goods to an auction-room for sale, because in either case his objection would be the same—that the trustee had prevented him from executing a poinding of the ground. I cannot understand how a trustee can owe a duty to a heritable creditor to leave moveables on the ground for a sufficient time to enable the heritable creditor to execute his diligence."

Urquhart reclaimed, and argued that he was entitled to get back these moveables, which had been wrongfully removed by an officer of Court, or alternatively to recover the price thereof. The goods were removed by the order of the judicial factor, and sold by his orders when he became trustee, for the sole object of removing was to defeat the rights of the heritable creditor. —See Bankruptcy Act 1856, section 16. The respondent, as judicial factor, had here clearly exceeded his duties.—*M'Creadies* v. *Douglas*, November 4, 1882, 10 R. 108; 37 and 38 Vict. cap. 96, sec. 55; *Royal Bank* v. *Bain*, July 6, 1877, 4 R. 985; Bell's Prins., 60.

Argued for the trustee—A summons of poinding the ground could attach nothing but what was upon the ground at the time. The heritable creditor was clearly not entitled to a preference over the moveables on the ground at the time of the sequestration; if he was a loser in the present case, he was so by his own negligence, and his claim if good might be made available in some other way than by claiming in the sequestration —Bankruptcy Act 1856, sec. 118.

At advising—

Lord President—The present appeal is brought by a heritable creditor, under a bond and disposition in security which is dated May 14, 1877, and which was made real by registration upon the 16th of the same month.

The bankrupt's estates were sequestrated upon the 19th of July 1882, and the present trustee was then appointed to the office of judicial factor. Now the estates of the bankrupt consisted at that time of valuable moveable property, and it appears that the heritable creditor seemed to have thought that his security was not sufficiently good, for he proceeded to raise an action of poinding of the ground. The summons was served upon the 21st of July and it is not disputed that the effect of that action was to attach all the moveables then on the ground, and to give to the heritable creditor a preference over them. But the heritable creditor says that the judicial factor, acting for behoof of the personal creditors, has, since the date of the sequestration, removed the greater portion of the valuable moveables, and that thereby he has not obtained from his poinding the benefit which he would otherwise have derived. The appellant says that in this way he is wronged by the removal of the moveables in the interval, and he claims to be ranked and preferred in the sequestration just as if his poinding had secured all the moveables upon the ground at the date of the sequestration. I assume for the purposes of this decision that the judicial factor was quite in the wrong in what he did in removing these moveables, and that the heritable creditor is to the extent to which they were so removed damnified; but then the question comes to be whether the heritable creditor is on that account entitled to have his claim preferred? From the very nature of this claim it is clearly one for a preference on a part of the bankrupt's estate over which no preference as far as I can see has been secured. But I am not, however, to be taken as expressing any opinion as to any claim which the heritable creditor may have in respect of the wrong which he alleges has been committed against him. All that we have to decide at present is, that he cannot claim a preference over the moveables, or on the price of them, to the same extent as if the poinding had attached them, when confessedly the poinding had attached them only to the limited extent admitted by the Sheriff. I am not in a position to tell the heritable creditor exactly in what form he should proceed in vindicating his claim arising out of the injustice which he alleges has been done to him by the judicial factor. But it is clear that that claim can be prosecuted in some form, and I think that it would be right in our interlocutor, adhering, as I propose to your Lordships that we should do, to the interlocutor of the Lord Ordinary, to insert some reservation of that right. But with such a reservation I am disposed to adhere to the interlocutor reclaimed against, as I do not think that such a claim as is here attempted to be set up could be made good under the Bankruptcy statutes.

Lord Deas concurred.

Lord Mure—I am also of the same opinion. The question is no doubt one of considerable importance and interest, and as a general rule I think it is quite settled that by an action of poinding only those goods which happen to be upon the ground at the date of the serving of the summons can be attached. Here the heritable creditor claims to be ranked preferably to the extent of the principal sum of £495 contained in the bond and disposition in security upon the prices of the moveable goods and gear which were upon the subjects at the date of the sequestration, and which were removed under the instructions of the judicial factor prior to the date of the action of poinding. Now, I think such a claim ought to be repelled. But the heritable creditor should have reserved to him any claim of damages he may have for the wrongful removal and sale of these moveables, which were to a certain extent perishable in their nature, and also for the taking down and removing of the machinery, which he maintains should not have been done. I do not wish to say anything as to the powers of a judicial factor in a case such as this—for it is possible that in removing perishable goods he may have acted quite rightly, but the taking down of valuable machinery, and the selling of it piecemeal, thereby lowering the value of the whole, is quite another matter, and one upon which I desire to reserve my opinion, as also the question as to the effect of such actings in a claim of damages.

On the main question I am prepared to adhere to the interlocutor of the Sheriff and of the Lord Ordinary.

Lord Shand—I am not sorry that your Lordships have decided to affirm the judgment of the Sheriff and the Lord Ordinary, because the result of coming to an opposite conclusion would undoubtedly be to give to the heritable creditor a preference which, speaking for myself, would, I think, be most undesirable, although, no doubt, the law does sanction such preferences. While, therefore, I would most willingly agree with your Lordships, I find myself unable to do so.

The 102d section of the Bankruptcy Act of 1856 provides for the vesting of the estate of the debtor in the trustee as at the date of the sequestration, and the 118th section provides that poindings of the ground which had not been carried into execution by sale sixty days before sequestration, and poindings of the ground after sequestration, were to be made available in competition with the trustee only for the interest on the debt for the current half year, and for one year's arrears of interest. In the case of the *Royal Bank* v. *Bain* the Court held that the repeal of the 118th section of the Bankruptcy Act of 1856 by the Conveyancing Act of 1874 left the right of the poinding creditor to be regulated by section 102 and the common law. The heritable creditor here should have proceeded to the ground and poinded the goods upon it at the time of the sequestration. He delayed to do so, and before his summons was executed some of the goods and machinery had been removed by order of the judicial factor. No doubt a judicial factor is entitled to carry on a going business if he considers it desirable to do so, or he may sell goods of a perishable character, but all this is for the conserving of the estate, and for the purpose of preventing loss; but here the judicial factor appointed for the benefit of the general body of creditors had removed articles in order to defeat a preference which I think might be legitimately secured by a heritable creditor. This, I am of opinion, was a proceeding which the judicial factor was not entitled to take. I do not dispute that if wrong has been done, that wrong may be vindicated by an action of damages, but I am clearly of opinion that the rights of the heritable creditor have been defeated by an act of an officer of Court. As the judicial factor avows he was acting in the interest of the general body of creditors, and as the general body of creditors has adopted that manner of acting, he has sold the articles, and the proceeds of the sale of those articles are retained for them. I am of opinion that the heritable creditor is entitled to follow these proceeds into the hands of the creditors who have retained them, and that he is entitled to be ranked in the sequestration in terms of his claim.

The Court pronounced this interlocutor:—

"In respect the appellant as an heritable creditor has not secured any preference over the moveables belonging to the bankrupt estate beyond what has been sustained by the interlocutor of the Sheriff-Substitute, and cannot, in the form of a claim for a preference on the said moveables or their price, obtain a remedy for the wrong and injury which he alleges was committed against him by the judicial factor, Adhere to the interlocutor of the Lord Ordinary reclaimed against, but reserving to the appellant all other remedy competent to him for redress of said alleged wrong and injury, and decern."

Counsel for Appellant — Lorimer — Moody Stuart. Agents—Henderson & Clark, W.S.

Counsel for Respondent—Pearson — Salvesen. Agents—Murray & Miller, S.S.C.

Tuesday, June 19.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

BROWN AND OTHERS (BARBOUR'S TRUSTEES) *v.* HALLIDAY.

(See *Barbour* v. *Halliday*, July 3, 1840, 2 D. 1279.)

Evidence—Proof of Right to Long Lease—Competency of Parole Evidence.

In a suspension of a decree in absence finding and declaring that the respondents had right to a lease for 999 years of certain heritable subjects, the respondents produced the lease (which was not, however, their writ, but was recovered by them under a diligence, and formed part of a process of removing in which their author had been ordained to remove from the subjects), and also a letter from the heir-at-law of the original tenant, from which it appeared that he had been willing to sell to their author his right under the lease. They also produced an account showing that this sum had been paid, and certain receipts for "feu-duty" of exactly the amount payable as rent under the long lease. No assignation to the lease was produced. They offered parole proof that their predecessors had possessed and had been acknowledged as tenants under the lease. The Court (*diss.* Lord Rutherfurd Clark) *held* that the evidence was incompetent, and *suspended* the decree.

In 1881 the trustees of the late William Barbour of Dunmuir House, Castle-Douglas, raised an action of declarator against James Halliday for the purpose of having it found and declared that the pursuers "had the only good and undoubted right to a lease or tack (for 999 years) dated the 18th day of July 1814, granted by the deceased John M'Intyre, slater in Castle-Douglas, in favour of the deceased Samuel Halliday, who resided in Castle-Douglas, and to the subjects thereby leased," and described in the conclusions of the summons. They averred—"The said Samuel Halliday occupied the subjects let to him by the said tack until his death, which took place on or about the 8th day of May 1829. Thereafter his heir-at-law, Samuel Oliver, residing in Dumfries, sold the said lease or tack to the deceased James Barbour of Dunmuir, sometime writer in Castle-Douglas, conform to assignation in his favour. The said James Barbour continued in the possession of the said leasehold subjects down to the date of his death on 29th August 1845, when he was succeeded in