to the case of property held *pro indiviso*, but the parties before us are not at all in that position. The feudal fee is vested in two individuals, but all these various corporations are beneficially interested in the trust, and are all more or less interested in its maintenance. There is no allegation here that the trust has failed, but just that there is a desire on the part of some of the corporations, or the individual members, to have the subjects sold and the proceeds divided. On the whole matter I quite agree with the Lord Ordinary. I do not think it necessary to say what might be done in an action brought in a different form, and with different consents. I agree with the Lord Ordinary that the action ought to be dismissed.

Lord Mure, Lord Shand, and Lord Adam concurred.

The Court dismissed the action.

Counsel for Pursuers — Graham Murray. Agents—J. & A. Hastie, S.S.C.

Wednesday, June 3.

FIRST DIVISION.

[Sheriff of Lanarkshire.

CRAWFORD & COMPANY *v.* THE SCOTTISH SAVINGS INVESTMENT AND BUILDING SOCIETY.

Process—Competency—Sheriff—Poinding of the Ground—Competent and Omitted.

In an action of poinding of the ground, brought in the Sheriff Court by a person holding a bond and disposition in security over certain subjects, decree was pronounced on 15th August 1883 against the tenant of the subjects to the extent of one year's rent. In December 1884 the defenders in that action brought an action in the Sheriff Court to have the creditor interdicted from selling the articles poinded. They founded upon receipts for the said year's rent, dated, two on 11th November 1882, one on 15th May 1883, and one on 12th June 1883. These receipts were not founded on or produced in the action of poinding the ground. Action *dismissed* as incompetent on the grounds —(1) that it was an attempt to review the decree in one action in a Sheriff Court by means of another; and (2) that the payment of rent was a competent defence to the original action which had been omitted.

Crawford & Company were the proprietors of certain heritable subjects in Glasgow over which they had granted two bonds and dispositions in security.

In May 1882, Wallace, the first bondholder, raised an action of poinding of the ground, and subsequently entered into possession under a decree of maills and duties.

Crawford & Company thereafter became tenants of the subjects under an arrangement with Wallace.

In August 1882 the Scottish Savings Investment and Building Society, the postponed bondholders, raised a poinding of the ground in the Sheriff Court at Glasgow, in which Crawford & Company, as tenants of the subjects, appeared as defenders.

After a considerable amount of litigation decree was pronounced on 15th August 1883, but was limited to £40, being the amount of rent due by Crawford & Company for the year from Whitsunday 1882 to Whitsunday 1883.

In August 1884 this decree was extracted, and on 25th December 1884 the Savings Investment Society obtained a warrant of sale.

This action was thereupon raised in the Sheriff Court at Glasgow by Crawford & Company to have the Savings Investment Society interdicted from carrying away, selling, disposing of, or interfering with the articles poinded. The pursuers averred that before the decree of poinding was pronounced on 15th August 1883 they had paid to Wallace, the prior bondholder, the rent due by them for the year from Whitsunday 1882 to Whitsunday 1883. They produced receipts for the rent, dated two on 11th November 1882, one on 15th May 1883, and one on 12th June 1883. These receipts had not been founded on or produced in the original action.

The defenders pleaded—(1) That the action was incompetent in the Sheriff Court, being an action to review a Sheriff Court decree, and (3) Competent and omitted.

The Sheriff-Substitute (Erskine Murray) on 7th February 1885 sustained the defenders' first plea-in-law and dismissed the action.

"*Note.*—This action is one of interdict, and is to interdict the sale, under a poinding of the ground obtained by defenders in an action against the pursuers and others, of a number of specified articles. In that case the pursuer appeared, stated, and fought several defences, and an expensive proof ensued, and the proceedings lasted for a considerable time. Finally, on 16th June 1884 decree was given against the present pursuers, but in so far as concerned the liability of the articles poinded, to the extent of £40 only, being the rent due by pursuers for the year from Whitsunday 1882 to Whitsunday 1883. No plea of payment had ever been taken by them. But they now plead that they paid the rent to a prior bondholder, who had also poinded the ground, and produce receipts, dated, two on 11th November 1882, one on 15th May 1883, one on 12th June 1883, all long before the date of decree in question. If the Sheriff-Substitute had not sustained the first plea, he would have been inclined to sustain the defence of competent and omitted, as this point ought certainly to have been raised if they were going to defend the other case at all. But it seems clear that this action is simply equivalent to a suspension, and as such is incompetent in the Sheriff Court." . . .

On appeal the Sheriff (Clark) affirmed the foregoing interlocutor.

"*Note.*—I have had very much difficulty in deciding this case, but have ultimately come to the conclusion that the Sheriff-Substitute is right. It would not be possible to entertain the action of interdict while the decree in the poinding of the ground stands unreduced, and it is not possible to reduce in this Court a decree which, in so far as this Court is concerned, has become final, without reviewing the same, which is *ultra vires* of the Sheriff. It is also observable that the pursuers, who made themselves parties

to and defended in the poinding of the ground, allowed the decree to pass in the form which it bears without taking any objection, which they might have done on the very intelligible ground that the rent in question had already been paid. In these circumstances I am afraid the only remedy competent to the pursuers is by suspension, or some such procedure, in the Supreme Court."

The pursuers appealed, and argued—A decree of poinding the ground was in a different position from other decrees, and was merely issued for what it was worth. In this case it was worth nothing as the tenants had paid their rents before decree was pronounced. The date of litiscontestation in the original action was 12th October 1882, when the record was closed, and at that date the facts on which the pursuers were founding in the process of interdict had not emerged. Therefore they did not constitute a defence which was competent and omitted.

The respondents argued—(1) This was merely an attempt to obtain review of one action in the Sheriff Court by means of another. This could not be done in the Sheriff Court unless there were *res noviter—Thom*, 10 D. 1254. (2) The defence was competent and omitted in the original action of poinding of the ground.

At advising—

LORD PRESIDENT—The Sheriff in this case on 15th August 1883 decerned as craved, "but only in so far as concerns the liability of the articles poinded to the extent of £40, being the rent due as foresaid by the said W. Crawford & Co." That interlocutor is founded on the assumption that that was the amount of rent due by William Crawford & Company to the landlord, and the poinding was restricted accordingly, but under that qualification the decree goes out as craved, and in the ordinary course would have been followed by instant execution—that would have been the immediate effect.

The matter in the present instance was hung up by appeals to the Sheriff, but in August 1884 the decree was extracted, and it is only on 31st December 1884 that the present pursuers bring this action. What they ask is that execution of the decree should be interdicted—that is to say, that the operative effect of the judgment of the Sheriff-Substitute and the Sheriff should be permanently and finally stopped, and I agree with the Sheriff-Substitute and the Sheriff in thinking that that would be equivalent to reviewing and setting aside by way of suspension or reduction the decree which they had pronounced, and I do not think that would be competent in the Sheriff Court.

It is further worthy of remark that the pursuers should have allowed extract decree to go out without taking an appeal, for if they had had any good ground for appealing they could have done so up to the time of extract. Surely they were in knowledge of the fact that the effect of the decree would be to make them pay the rent twice over. But instead of appealing, they come into Court by means of a process which, coinciding with the Sheriff-Substitute and the Sheriff, I consider quite incompetent. I am therefore for affirming the judgment appealed against.

LORD SHAND—If this appeal had been taken in consequence of circumstances emerging after the date of the decree, on the footing that at that date the pursuers in the action of poinding had a right to obtain decree, but that because of payments which had been subsequently made the creditors were not entitled to go on and put the decree in force, I should have held that an action of interdict was competent either here or in the Sheriff Court.

But we have not got such a case here, because all the facts had emerged several weeks before decree was pronounced in the original action. In these circumstances I am of opinion that the action cannot be sustained. I hold that the action is excluded by the plea of competent and omitted. I think there was a plain duty on the party who paid the rent—if he meant to found upon that circumstance—to interpose before decree was pronounced.

On the ground therefore that at the date of the decree of poinding all the facts upon which the pursuers in the present action found had emerged, I agree with your Lordship, and am of opinion that the action is incompetent since it is an attempt to get the Sheriff to review his own judgment.

LORD MURE and LORD ADAM concurred.

The Court affirmed the interlocutor appealed against.

Counsel for Pursuers (Appellants)—Lang—Crole. Agents—Smith & Mason, S.S.C.

Counsel for Defenders (Respondents)—Mackintosh—Graham Murray. Agent—J. Smith Clark, S.S.C.

Wednesday, June 3.

SECOND DIVISION.

[Sheriff of Forfar.

CLARKE & COMPANY *v.* MYLES (MILLER'S TRUSTEE).

Sale—Suspensive Condition—Delivery—Bankrupt—Fraud.

The terms of a contract of sale of flax were contained in this sale-note of 11th July:—"We confirm sale to you of *circa* 30 tons Kashin Seretz flax at £30, 10s. per ton. Payment by draft at 3 months." The goods were delivered on 4th August. On the previous day, 3d August, the buyers had found their position critical, and on the 5th they decided to stop payment. No invoice or bill for acceptance had then been sent, and in consequence of the suspension none were sent. *Held* (1) that there was in the circumstances no fraud in accepting delivery, and (2) that the granting of their bill by the buyers was not a suspensive condition of the sale, and therefore that the property passed by delivery to the bankrupts, and fell under their sequestration which subsequently took place.

Case distinguished from *Brandt & Co.* v. *Dickson*, January 18, 1876, 3 R. 375, on the ground that in that case the proof showed that the granting of the bill was a suspensive condition of the sale.