plea that Ogilvy could have been sued on the original bills. For this fact shows that they were not extinguished, and if not extinguished, the defender must be liable upon them.

Nor, in my opinion, has the plea of delegation any better foundation. In this case it means that the pursuers agreed to take for the unpaid balance the sole obligation of Ogilvy in lieu of the joint obligation of Ogilvy and the defender. But the defender must prove this agreement, and I do not think that he has offered any proof of it. It is admitted that there were no communications between the defender and the pursuers, and I cannot infer the existence of such an agreement from any facts and circumstances which were proved in this case.

The argument of the defender is based on the fact that the pursuers accepted the renewal bills, and entered the balance to the debit of an account-current between them and Ogilvy. They could not do otherwise if they chose to accept the renewal bills instead of insisting, as was their right, for payment of the whole debt at once. But, if it be the case that Ogilvy remained liable on the original bills, I see no reason for inferring that the pursuers accepted him as their sole debtor. The entry in their books was a mere memorandum made by them for their own purposes. It was not made under any concert or arrangement with the defender. It was not even evidence in any proper sense against Ogilvy, and the original bills remained the only obligations on which he could be sued. If so, he could be sued as a joint debtor, and therefore there is no reason for holding that the pursuers have taken him as their sole debtor.

There can be no doubt that the defender was, in substance, a cautioner for Ogilvy. But the pursuers did not give time to the latter, so as to relieve the defender from his obligation as a cautioner. It is true that they did not enforce immediate payment. But in the language of the law, to give time does not consist in refraining from suing, but in the creditor putting himself under a disability to sue by agreeing to postpone payment of his debt. There is nothing of this kind here.

A somewhat general argument was urged to the effect that the pursuers were barred from maintaining that the defender was liable on the bills. It was said that the renewal bills were signed by the defender in the belief that he was to be relieved of the original bills. I do not doubt that this was his belief, but he was bound to see that his wishes were carried out, either by insisting on the delivery of the original bills, or by giving notice to the pursuers that if they accepted the renewal bills he was to be relieved of his obligations in the former. He did nothing of this kind. He trusted in Ogilvy alone, and had no communication with the pursuers. I do not think that the pursuers were under any duty to the defender, or that they are bound to take into consideration what might be the inducements which led him to accept the renewal bills. They did nothing to increase the amount of his debt to them. It remained as it was, though standing in two sets of documents instead of one.

The Lord Justice-Clerk and Lord Young concurred.

Lord Craighill was absent on circuit during the argument.

The Court affirmed the Sheriff's judgment.

Counsel for Pursuers (Respondents)—Darling—Watt. Agent—David Milne, S.S.C.

Counsel for Defender (Appellant).—D.-F. Mackintosh, Q.C.—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Friday, March 19.

SECOND DIVISION.

THE ATHOLE HYDROPATHIC COMPANY AND LIQUIDATOR *v.* THE SCOTTISH PROVINCIAL ASSURANCE COMPANY.

Public Company—Winding-up—Commencement of Liquidation—Heritable Creditor—Poinding of the Ground—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 163.

Held that section 163 of the Companies Act 1862, which provides that "where any company is being wound up by the Court, or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents," does not apply to prevent a heritable creditor from proceeding to carry off the moveables by a poinding of the ground, because the object of the section is to prevent the obtaining of preferences after liquidation is begun, and the action of the heritable creditor is only the making available of an existing preferable security.

The Athole Hydropathic Company was incorporated under the Companies Acts 1862 and 1867 on 18th June 1873.

On 8th August 1876, 11th October 1876, and 3d October 1877, the company granted in favour of the Scottish Provincial Assurance Company three heritable bonds for £7000, £7000, and £6000 respectively over the heritable property belonging to the company. These bonds were respectively recorded on 12th August 1876, 16th October 1876, and 4th October 1877.

On 7th August 1885 the Assurance Company called up the bonds at Martinmas 1885. At Martinmas 1885 neither principal nor interest was paid.

At an extraordinary general meeting of the company, held on 23d January 1886, a resolution was passed that the company should be wound up voluntarily, and that Mr Morison, Perth, be the liquidator. This resolution was intimated in the *Gazette* in terms of the Companies Acts.

On Monday, 1st February 1886, a petition was boxed by the company and the liquidator, and by creditors and a shareholder, to the First Division, praying that the voluntary winding-up should be continued under the supervision of the Court. The object of the petition, as set forth therein, was to avoid difficulties through the separate action of creditors.

On Saturday 30th January the Assurance Company, as heritable creditors, had signeted a sum-

mons of poinding the ground against the company, which was served on the company at the registered office in Perth on Monday 1st February.

On Tuesday 2d February the petition for a supervision order was in the Single Bills and order for advertisement was pronounced.

On 3d February the company and liquidator presented a note to the Lord President setting forth the service of the Assurance Company's summons of poinding the ground, and the desirability of restraining the heritable creditors from acquiring after the commencement of the liquidation a preference over the general body of creditors contrary to the provisions of the Companies Acts, and craving his Lordship to move the Court to restrain them "from taking any further proceedings in the said action of poinding the ground or in any other action, suit, or proceeding against the company having for its object to attach or affect the property of the company." Reference was made in the note to the power given to the Court by section 85 of the Companies Act 1862, at any time after the presentation of a petition for winding up, and before making a winding-up order, upon the company's application, to restrain proceedings in any action, suit, or proceeding against the company.

Section 148 was also referred to. It provides that "a petition praying wholly and in part that a voluntary winding-up should continue, but subject to the supervision of the Court, and which winding-up is hereinafter referred to as a winding-up subject to the supervision of the Court, shall, for the purpose of giving jurisdiction to the Court over suits and actions, be deemed to be a petition for winding-up the company by the Court."

Section 163 was also referred to. It provides that "where any company is being wound up by the Court or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up, shall be void to all intents."

By section 130 a voluntary winding-up shall be deemed to commence at time of the passing of the resolution authorising such winding-up.

The Assurance Company lodged answers. They maintained "that a poinding of the ground at the instance of a heritable creditor is not a proceeding which, under the Companies Acts, the Court should restrain. Further, the heritable subjects disponed to the respondents in security of their loan to the company consist principally of an enormous building intended to be used for the business of a hydropathic establishment, but which experience has shown to be much too large for the purpose of carrying on such a business to a profit. The respondents believe that it will be next to impossible to find a purchaser for the said subjects at the price which will cover their bonds and interest. There are other similar buildings in Scotland at present in the market, which have been, and are, unable to find purchasers, and the respondents believe that it will be long before they recover any portion of their loan and interest from a sale of the heritable subjects disponed to them in security. In these circumstances the respondents submit that they ought to be allowed to proceed to make effectual their right to the moveables on the said security subjects, in ordinary form of law, and that the prayer of the note ought to be refused."

Argued for the liquidator—The proceedings of the heritable creditor ought to be restrained, and the Court could competently restrain them, because as the commencement of the winding-up was (section 130) the date of the resolution to wind up voluntarily, the effect was to make the supervision order draw back to the date of this resolution. In the present case the effect of this supervision order was to cut down the proceedings of the heritable creditor, because by the 163d section "any attachment, sequestration, distress, or execution" put in force against a company being wound up under the supervision of the Court was declared to be null and void. The present action was of the character of those struck at by this section—*Clark* v. *Hinde Milne & Company*, December 18, 1884, 12 R. 347; *Emperor Life Association*, L.R., 31 Ch. Div. 78; *Traders Carrying Company*, L.R., 19 Eq. 60; *Imperial Land Company*, L.R., 11 Eq. 478; *Colonial Trusts Company*, L.R., 15 Ch. Div. 365. The commencement of the liquidation was the date of the resolution to wind up voluntarily, and it was all one liquidation though begun by the company and ultimately completed under supervision — *Universal Disinfector Company*, L.R., 20 Eq. 162; *Gardiner* v. *Hughes*, July 11, 1883, 10 R. 1138. The diligence not having been saved in the supervision order (which it might competently have been) had fallen.—Ersk. iv. 1, 11; *Campbell's Trustees* v. *Paul*, January 13, 1835, 13 Sh. 237; *Royal Bank* v. *Bain*, July 6, 1877, 4 R. 985; *Lyons* v. *Anderson*, October 21, 1880, 8 R. 24.

Argued for the Assurance Company—Poindings of the ground were outwith the class of diligences struck at by the 163d section. Poinding of the ground did not create a preference; it merely made an existing preference available. A poinding of the ground was *pari passu* with an action of mails and duties. The moveables were accessories of the *solum*, and the heritable creditors were merely by their action declaring their right to the moveables which were secured to him by his infeftment.—*Dick's Trustees* v. *Moncrieff*, January 28, 1879, 6 R. 586.

Other authorities—*Lloyd*, L.R., 6 Ch. Div. 339; *Longdendale Cotton Company*, L.R., 8 Ch, 150; *Mitchell* v. *Scott*, June 29, 1881, 8 R. 875.

At advising

Lord President—The respondents, the Scottish Provincial Assurance Company, are creditors of the Athole Hydropathic Company, now in liquidation, in two bonds, each for £7000, and also in a bond for £6000, granted in 1876 and 1877, and upon these bonds infeftment was duly taken by registration in ordinary form. The creditors gave notice in August 1885 that payment of the bonds would be required at Martinmas of that year, and that intimation was accepted by the company, through their secretary, as sufficient. When the term of Martinmas arrived, not only was the sum in the bonds not forthcoming, but there were also arrears of interest. In these circumstances the bondholders naturally resorted to all the remedies competent to them by law, and among others they upon 1st February 1886 raised an action of poinding of the ground. The liquidator has applied to the

Court to prevent this action of poinding the ground being carried any further, and he moves the Court "to restrain the said Scottish Provincial Insurance Company from taking any further proceedings in the said actions of poinding the ground or in any other action, suit, or proceeding against the company having for its object to attach or affect the property of the company." He founds upon the 163d section of the Act of 1862, which provides that "where any company is being wound up by the Court or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up, shall be void to all intents."

Now, it appears that the order for supervision was pronounced by the Court on a petition presented on the same day upon which the summons of poinding of ground was served, and an argument upon this point was addressed to us in the course of the discussion. But I do not think it necessary for the purposes of the present decision to determine that point, or to consider whether in a voluntary liquidation continued under the supervision of the Court the commencement of the winding-up is to be held to be the date of the resolution to wind up voluntarily, because I am clearly of opinion that the proceedings which are here sought to be restrained are not within the scope of the 163d section. An action of poinding of the ground is like an adjudication, or the sale of an estate under the powers of a bond, or an action of maills and duties. These are all diligences which are open to a heritable creditor in order to enable him to give effect to his secured preference, and so far as that security extends he can make it effectual even against a trustee in a sequestration, and all the more against a liquidator in a liquidation.

The security which the heritable creditor holds over the moveables is the same as the security which he holds over the *fundus* of which the moveables are accessories. It may vary, no doubt, from time to time as the moveables vary, but it is secured to him by his infeftment, and accordingly his action of poinding of the ground has not the effect of creating any preference of new, but only of giving effect to a preference already in existence, while in competing actions of poinding of the ground it is priority of infeftment which secures a preference.

It would be an entire misconstruction of the 163d section if it was held to apply to a case such as the present. The object of that section is to prevent anyone in a liquidation under supervision of the Court from acquiring a preference, but as that is not the object of the present action of the respondents I think this note for the liquidator falls to be refused.

Lord Shand—This is only one of a series of cases which have been recently before this Court in which the heritable creditor has by means of his diligence been successful in carrying off the whole moveables on the land with the result of leaving nothing to meet the claims of the general body of creditors. The property of these companies consists chiefly in their buildings and furnishings, and it has repeatedly occurred that the heritable creditors have stepped in after the liquidation of the company has commenced and carried off the whole of the furniture in the buildings to the loss of the other creditors. This evil I have repeatedly referred to, and it has been remedied so far as bankruptcies are concerned. I can only say that I wish a similar remedy was provided in liquidations.

With this observation I agree entirely in what your Lordship has said as to the present application. A poinding of the ground cannot in any sense be said to be an "attachment, sequestration, distress, or execution" in the sense of section 163, and in that view of the matter I agree with your Lordship that we must refuse the note for the liquidator.

Lord Adam—I am entirely of the same opinion. The heritable creditor here has not, by means of his poinding of the ground, acquired a preference over the moveables. All that he has done has been to make an existing security available.

Lord Mure was absent.

The Court refused the note.

Counsel for Liquidator—J. P. B. Robertson, Q.C.—Lorimer. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for Scottish Provincial Assurance Co.—D.-F. Mackintosh, Q.C.—Jameson. Agents—Auld & Macdonald, W.S.

Saturday, March 20.

SECOND DIVISION.

RITCHIE *v.* CLYDESDALE BANK, LIMITED.

Bank—Banker's Obligation to Customer—Overdraft.

It is not a relevant ground of action for damages against a bank for having dishonoured a cheque which there were not funds to meet, that the bank had been in the practice of frequently allowing the account to be overdrawn, and had thereby incurred by implication an obligation to allow a similar overdraft, or at least not to refuse to honour the cheque without notice.

An action was brought against a bank for having suddenly refused to allow an overdraft, and thereby injured the credit of its customer, the pursuer, and so conduced to his sequestration. No express agreement to allow the overdraft was proved, and the pursuer relied on the previous custom of the bank and on a conversation by which he had been led, as he averred, to believe that the manager would allow a certain overdraft. *Held* (1) that no such obligation could be inferred from the fact that previous overdrafts had been allowed; (2) on the proof, that the pursuer had not been led to believe that it would be allowed, and (3) that, in any view, the overdraft he made was greater than that which he averred he had been led to believe he might have.

Defenders therefore *assoilzied.*

From October 1884 to 28th March 1885 John Sibbald Ritchie, the pursuer of this action, and