enable them to effect their relief. That technical objection may therefore be set aside, and the case determined according to the equities between the parties." There was a question raised at the bar as to how far this statement was warranted, but it was explained that the bank could obtain such an assignation at once, and we have since been informed that an assignation has been prepared, and is in the course of being signed and executed. Having got that assignation, the only point which could be possibly pleaded in defence I think would be obviated, namely, that payment of itself would not give a title. This plea, even if well founded, is obviated by the assignation which gives the respondents the superior right to enforce payment. I see no answer to the claim so presented, for the parties who have paid the feu-duty demand payment in the superior's right, and the respondents as primary obligants cannot refuse payment merely because the respondents were also liable to the superior. I put my judgment on these two separate grounds—first, I think the first bondholder in possession intromitting with the rents is liable for the feu-duty to a party who has paid the superior the amount, even without special title; and second, even assuming a special title to be necessary, the respondents in this appeal have such a title which gives them both the right and title of the superior.

Lord President — To prevent misunderstanding I think it right to say that I attach no importance whatever to any assignation by the superior. If the bank has the right of relief which it seeks here, it has it independently of the superior. It cannot derive any such right from the superior. And I may add, that I have considerable doubt of the competency of a superior granting an assignation to his vassal on payment of the feu-duty.

Lord Deas—I desire the same explanation to be introduced into my opinion. I am clearly of opinion that there is no room for an assignation at all.

The Lords dismissed the appeal.

Counsel for Pursuers — Gloag — Lorimer. Agents—Davidson & Syme, W.S.

Counsel for Defenders—Trayner—Robertson. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, March 3.

FIRST DIVISION.

[Sheriff of Aberdeenshire.

FERGUSON *v.* BOTHWELL.

Process — Diligence — Poinding — Arrestment — Suspension.

A creditor who had obtained a decree against his debtor, and followed it up by a charge, proceeded to execute a poinding of the debtor's effects. Between the date of the poinding and the sale following thereon, in consequence of an arrestment of funds due to the poinding creditor used in his hands by a third party, the debtor raised a process of multiplepoinding to have it ascertained to whom he should pay the amount contained in the decree. The poinding creditor proceeded with his diligence notwithstanding the multiplepoinding, and sold the pointed effects. *Held* that an action at the instance of the debtor for damages was irrelevant, the poinding creditor being entitled to proceed with his diligence, which was unaffected by the multiplepoinding.

George Bothwell sued Robert Ferguson for a sum of £16 in the Sheriff Court of Aberdeenshire, and got decree for a sum, including expenses, of £6, 6s. 10d.; on 13th December 1880 he charged Ferguson to make payment of this sum. On 22d January 1881 the sum was arrested in the hands of Ferguson on the dependence of an action at the instance of William Keith, who had or pretended to have a claim against Bothwell. This arrestment was intimated to Bothwell, who took no notice of it, but on 9th April caused an entire horse belonging to Ferguson to be poinded. On 22d April Ferguson raised a process of multiplepoinding in the Sheriff Court, and alleged that he was doubly distressed in consequence of the charge and poinding and of Keith's arrestment. Notwithstanding this process Bothwell caused the diligence at his instance to proceed, and on 9th May the horse was sold for £8.

Ferguson then raised this action for £100 of damages against Bothwell, averring that the defender had illegally sold the horse after he had been duly interpelled by the process of multiplepoinding. He also averred that the poinding was otherwise incompetently and irregularly executed, with the result that the horse had been sold for a sum greatly under its real value. The defender maintained that he was not bound to stop his diligence because of the multiplepoinding. He denied that there was any double distress, and further alleged that the arrestments were merely collusive, and had been used by Keith in consequence of a pretended claim in an action of which Ferguson was the real *dominus*.

The pursuer pleaded—"(1) The pursuer being lawfully interpelled from paying the sum due to the defender, the defender acted illegally in carrying out the warrants obtained by him in the knowledge of such legal interpellation."

The Sheriff-Substitute (Comrie Thomson) allowed a proof. He added this note to his interlocutor:—"The pursuer has not specified any irregularity in the procedure adopted by the defender in carrying out diligence under the decree which the latter had obtained against the former; but I am unable to disregard the allegation that the defender proceeded in disregard of the *ex facie* regular arrestment used in the pursuer's hands at the instance of a person claiming to be a creditor of the defender, and of the action of multiplepoinding. It may turn out that the defender's averments as to the use of that arrestment being a mere trick are well founded, and it may also be that even if there be *damnum* there is no *injuria*; but I am not at liberty to assume this."

On appeal the Sheriff recalled this interlocutor, and dismissed the action as irrelevant, adding this note:—[*After stating the facts*]—"This is an action of damages at Ferguson's instance, because he says that on 22d January he was interpelled from paying the debt by its being ar-

rested at the instance of one Keith. Bothwell replies that Keith and Ferguson are all one, and the arrestment was a trick to keep him out of his money, the action on which it was used having been afterwards dismissed as without foundation. Keith has thus no complaint, and assuming the *bona fides* of the arrestment, as without proof to the contrary must be done, the question as to Ferguson is whether he did enough for his own protection after receiving notice of the poinding. He appears to have brought a multiplepoinding pleading that between the creditor and the arrester he was suffering double distress. But the case of *Mitchell* v. *Strachan*, 18th November 1869, 8 Macph. 154, decides that this was wrong. A single arrestment does not constitute double distress, and a multiplepoinding brought in such an event was described by the Judges as a 'perfect abuse of the process,' the arrestee's proper course being either to interdict the poinding or 'to bring a suspension as of a threatened charge.' Any other course would obviously lead to great inconvenience. The creditor has his diligence. He can do nothing to test the validity of the arrestment. It is either for the arrester or arrestee to stop him by some judicial act—which a simple arrestment certainly is not; and until he is so stopped he is entitled to assume that he is safe to proceed with the execution of his diligence. It follows that the pursuer is seeking damages for an act which he himself has negligently allowed, and for which therefore no damages are due. The action has accordingly been dismissed with costs."

The pursuer appealed to the First Division of the Court of Session, and argued — There was here double distress, for the pursuer was interpelled by the arrestment from paying to the creditor. The sale was therefore illegal and the pursuer was entitled to damages.

Authorities—*Mitchell* v. *Strachan*, quoted in Sheriff's note; *Blair's Trustees* v. *Blair*, 12th Dec. 1863, 2 Macph. 284; *Scott* v. *Drysdale*, 22d May 1827, 5 S. 643; *Miller* v. *Ure*, 23d June 1838, 16 S. 1204; *Middleton* v. *Mitchell*, 21st Dec. 1843, 6 D. 316; *Clydesdale Bank* v. *Russell & Johnston*, 1st June 1859, 21 D. 886.

Argued for defender—The diligence was good and regular, and a multiplepoinding was not the proper way to stop it. The proper remedy of an arrestee in such circumstances was to have the matter discussed in a suspension — *Connell's Trustees* v. *Chalk*, 5 R. 735; Bell's Comm., 5th ed., vol. ii. 299, and 7th ed. 278; 2 Shand's Practice, p. 586.

At advising—

Lord President—I think that if the allegations of this pursuer are true in point of fact he is subjected to considerable hardship, and I am sorry for him. But I say that on the assumption of course that his averments are true. But even on that assumption I do not see my way to differ from the Sheriff. It is no doubt hard that a man should be compelled to pay under the diligence of poinding a debt found due by decree, and then again to pay the same amount to a party who has arrested the money before it was paid to the holder of the decree. But the mere circumstance that these *quasi* competing claims exist does not entitle the debtor to remain still and do nothing. He is bound to protect himself. The obvious way to do so is to suspend the charge and interdict the proceedings by process of suspension and interdict, in the course of which consignation of the sum may be made.

Lord Deas and Lord Mure concurred.

Lord Shand—I am of the same opinion. If we were to sustain this appeal I think we should be interfering very seriously with the efficacy of the diligence of poinding. The appellant's argument comes to this, that when a creditor is ready to realise by a sale property which will cover his debt the whole proceedings may be superseded because a creditor or alleged creditor of his lodges an arrestment with the debtor. The plain course is, if there are good grounds for not paying to the poinding creditor, to go to the Court and suspend the diligence. Then the matter can be inquired into, and the probability is that as a condition of proceeding in the suspension consignation will be required. That was the only course open to the appellant, and the existence of a multiplepoinding was no bar to the diligence being proceeded with.

The Court refused the appeal.

Counsel for Pursuer—Chisholm. Agent—R. C. Gray, S.S.C.
Counsel for Respondent — Jameson — Orr. Agents—Boyd, Macdonald, & Jamieson, W.S.

Saturday March 4.

FIRST DIVISION.

[Sheriff of Lanarkshire.

KELSO *v.* LITTLEJOHN AND ANOTHER (KELSO'S TRUSTEES).

Husband and Wife—Acquiescence—Personal Bar.

A wife during the subsistence of her marriage succeeded to certain moveable property, but died before it had been made over to her, leaving a trust-disposition and settlement conveying her whole estate in general terms, and survived by her husband. The wife's trustees made certain payments in terms of the trust-deed, and to the husband *inter alios*. The husband subsequently, being in knowledge of his legal rights, offered to abide by the terms of his wife's trust-settlement on certain conditions. These conditions were not fulfilled. *Held* that the trust-deed of the wife carried no part of the succession which had fallen to her, that it belonged to her husband *jure mariti*, and that he was not barred by his conduct from claiming it.

This was an action of multiplepoinding raised by the testamentary trustees of the late Alexander Brand, miner, Wishaw, for the purpose of determing the right to a share of heritable property held by them under a minute of agreement, after referred to, the value of which it was by joint minute agreed was £600 or thereby. There were two claimants for the fund—(1) Robert Kelso, and (2) Littlejohn and another, the testamentary trustees of Kelso's wife. The history of the fund was as follows:—Robert Brand, coalmaster,