Counsel for Third Parties—Low. Agents—W. & J. Cook, W.S.

Counsel for Fourth Party—Shaw. Agents—Curror & Cowper, S.S.C.

Friday, January 23.

FIRST DIVISION.

[Lord Adam, Ordinary.

THE SCOTTISH HERITAGES COMPANY (LIMITED) *v.* MILLER AND OTHERS.

Superior and Vassal—Arrears of Feu-Duty—Poinding of the Ground—Title to Poind the Ground after Parting with Superiority.

Held (*diss.* Lord Shand) that a person who had been formerly superior of certain lands but had parted with the superiority, was not entitled by means of poinding the ground to recover feu-duties which had fallen into arrear while he held the superiority.

In November 1876 the Scottish Heritages Company (Limited) by feu-contract conveyed to John Wright, builder, who was erecting buildings thereon, certain subjects at Abbeyhill, Edinburgh. The feu-duty payable to them as superiors was £47, 17s. yearly. Of the same date as the feu-contract (14th Nov. 1876), Wright conveyed the subjects to the North British Property Investment Company (Limited), who by disposition, dated and recorded in November 1877, conveyed them to James Miller, under the burdens and conditions of the feu-contract, and particularly under burden of the feu-duty therein contained. Wright had erected certain buildings on the subjects.

The Scottish Heritages Company (Limited) were from Whitsunday 1876 to Whitsunday 1880 superiors of the subjects.

The Scottish Heritages Company conveyed the superiority to the Scottish Imperial Insurance Company, who were infeft therein on 26th November 1880. It was admitted in this action that the feu-duty payable at Martinmas 1878, Whitsunday and Martinmas 1879, and Whitsunday 1880 had not been paid. The amount of arrears at the last date was £95, 14s.

This was an action of poinding the ground at the instance of the Scottish Heritages Company against Miller, the proprietor of the subjects, and against various heritable creditors therein, including the North British Property Investment Company, the only defenders who appeared. The pursuers sought by poinding the ground to recover the £95, 14s. of arrears of feu-duty. The action was also one of maills and duties against Miller and the tenants of the subjects.

The pursuers pleaded that the arrears of feu-duty being due and unpaid, they were entitled to decree of poinding the ground and of maills and duties.

The North British Property Investment Company pleaded — "(1) No title to sue. (3) In respect that the pursuers are neither superiors of the subjects condescended on, nor heritable creditors with a title preferable to the defenders, the action is incompetent, and should be dismissed with expenses."

On 27th March 1884 the Lord Ordinary (ADAM) assoilzied the defenders from the conclusions of the action.

"*Note.*—This is an action of poinding the ground, and of maills and duties, brought at the instance of the Scottish Heritages Company against James Miller, the proprietor of certain subjects at Abbeyhill, Edinburgh, and also against the tenants of the said subjects and certain heritable creditors infeft therein. The North British Property Investment Company, who are the only defenders who have appeared and lodged defences, are heritable creditors.

"The pursuers were superiors of the subjects in question prior to Whitsunday 1880. They then sold the superiority to the Scottish Imperial Insurance Company, conform to disposition and assignation dated 16th, and recorded in the Division of the General Register of Sasines applicable to the County of Edinburgh 26th November 1880. The pursuers now propose to poind the moveable effects of the proprietor and tenants of the subjects for payment of four sums of £23, 18s. 6d. each, being the half-year's feu-duty payable for the said subjects at the terms of Martinmas 1878, Whitsunday and Martinmas 1879, and Whitsunday 1880, and to have the tenants ordained to make payment to them of the maills and duties due for the term current at the date of raising the action, and to become due at Martinmas 1883—that is to say, the pursuers seek to attach the moveables now on the ground, and the rents now due to the proprietor, for payment of arrears of feu-duty alleged to be due to them for the period during which they were superiors of the subjects.

"It appears to the Lord Ordinary that the pursuers have no title to insist in this action. An action of poinding the ground and maills and duties is a real action, and can only be insisted in by a person who has a real right to the subjects. It appears to the Lord Ordinary that when the pursuers sold the subjects and the superiority to the Scottish Insurance Company, and that Company took infeftment therein, the pursuers ceased to have any proper connection with the subjects. They then became completely divested of the subjects, and can have no right to attach the rents now becoming due, or the moveable effects now thereon. It was maintained by the pursuers that their disponees were the only parties who could maintain this plea; but it appears to the Lord Ordinary that the defenders, who are heritable creditors infeft in the subjects, have a title and interest to see that the rents of the subjects shall not be carried off by persons who have no title to them, but shall be available for payment of their debt.

"The Lord Ordinary was referred to the cases of *Jeffrey*, 21 D. 492; *Lyons*, Oct. 21, 1880, 8 R. 24; and *Walker*, 5 D. 453; but he was not referred to any case where such an action as this was sustained."

The pursuers reclaimed, and argued—It was admitted that the pursuers' claim was for *debita fundi*, and that it was unpaid. No one else was in a position to recover these arrears. In parting with the superiority the pursuers did not part with the right to recover arrears. The defenders were only postponed bondholders; they had not even the position of the present superior. Superiority and a right to feu-duties were separable; see Bell's Prin. secs. 687, 688, 703, 875, and Duff's

Feudal Conveyancing, p. 83, sec. 56; from these authorities it appeared that in order to recover feu-duties it was not necessary to be in the position or rights of a superior. It was not only the superior that could poind the ground, and a completed feudal title was not necessary—Bell's Prin. 2285; *Tweedie* v. *Beattie*, Jan. 22, 1836, 14 Sh. 337; Ross' Lectures, ii., 438-9; *Sandeman* v. *Scottish Property Investment Co.*, June 8, 1881, 8 R. 790; 1 Bell's Com. 731; Ersk., iv. 1, 11. There was nothing in the feu-duties claimed being arrears; when due they were *debita fundi*, and as such did they not rest upon infeftment? An assignee would have been entitled to sue—*Martin* v. *Agnew*, 1755, M. 5457; *Waugh* v. *Jamieson*, M. 5453; Elchies' Stair, p. 147-8-9; *Marquis of Ailsa* v. *Jeffrey*, Feb. 15, 1859, 21 D. 492.

Argued for defenders—The defenders as heritable creditors had a good title and interest to defend. It must be admitted that the case of the *Prudential Assurance Co.* v. *Cheyne*, June 4, 1883, 11 R. 871, was against the pursuers in the conclusion for maills and duties. When the superiority changed hands by sale, the right to enforce payment of arrears as a *debitum fundi* flew off, and a personal right to recover alone remained. To found an action of this kind there must be a *debitum fundi*, and a right to enforce it—*Henderson* v. *Wallace*, Jan. 7, 1875, 2 R. 272. A superior could irritate the feu *ob non solutum canonem* against the pursuers on their conclusion for maills and duties. The pursuers, who affected to have all the rights of superiors in respect of the time they were such, could hardly maintain that they had that feudal remedy. The fatal objection to the present action was, that being a real action it was yet insisted in by one who had no real title.

The argument in this case was held to apply to the case of *The Scottish Heritages Co.* v. *Rodgers and Others*, including the *North British Property Investment Co.* (*Limited*), in which the Lord Ordinary had also assoilzied the defenders, and the decisions in the former case were held to rule the latter.

At advising—

Lord Lee—The question in this case is, whether the reclaimers have a sufficient title to enable them to claim the right of poinding the ground? It is incumbent on them to show that they have right to that remedy. For although at one time superiors were in use to poind without authority the moveables upon their vassals' land for the duties and services owing by them, it has long been necessary that they should obtain the aid of the Crown in the shape of a warrant for letters of poinding. "At first (according to Mr Walter Ross, vol. ii. p. 423) these letters passed of course upon production of the complainer's infeftment." But, as explained by the same author, a previous decree has long been necessary to serve as a warrant for the letters, the reason being that "it behoved the party judicially to show that he had a right to the aid of the diligence."

The question whether the reclaimers have such right is not solved, in my opinion, by saying that the bygone feu-duties for which they seek to poind have never been discharged, and that the debt in its origin was a *debitum fundi*. For the question is not one of debt but of remedy, and it depends on the nature of the security, if any, at present held by the creditor. It is certain, I think, that the pursuers do not possess all the remedies to which superiors are entitled in recovering their feu-duties. For it is admitted that they sold the superiority in 1880, and that their successors were infeft. Having thus been divested of all right to the subject by a conveyance which is not said to contain any reservation in their favour, I think it impossible to maintain, and I did not understand it to be maintained, that they could pursue a declarator of irritancy.

It seems to me to be a startling proposition that a superior who has parted with his right to the land, without qualification or reservation, can claim to poind the ground for feu-duties alleged to have been in arrear at the date of his divesture. The effect of the proposition, if sound, is that although all feu-duties exigible by the existing superior may have been paid, the feu-duties for years long gone by may be founded on as *debita fundi*, in respect of which a divested superior may claim the land as his debtor and poind the ground. This is not only to run up a debt against the land which does not appear upon the records, but, if sound, would give to such a debt preference over heritable securities constituted by infeftment since the change of superiority. For in poindings of the ground the preference is given to that which proceeds on the first infeftment (Stair, ii. 5, 12; *Bell* v. *Cadell*, 10 S. 100; *Campbell's Trustees* v. *Paul*, 13 S. 237). So that if the pursuers have not lost their right to this remedy, they might step in before a real creditor who has advanced money upon the security of the lands after satisfying himself that all feu-duties due to the superior since 1880 were paid. On this point I refer to the opinions of Lord Mackenzie in *Bell* v. *Cadell*, and Lord Balgray in *Thomson's Trustees* v. *Paul*.

The reclaimers, in my opinion, have failed to show any principle on which their claim to the remedy of poinding the ground can be sustained. The theory on which poindings of the ground proceed is, that the pursuer has a real right in the land, and by virtue of that right has a title to the moveables upon the land as accessory thereto. This is the ground upon which real creditors have been held to gain a preferential right to the moveables without actual execution of a poinding, by merely raising and executing a summons of poinding of the ground, and it is the only ground upon which the decisions could stand. I refer again to the case of *Campbell's Trustees* v. *Paul*, and to the recent case in the other Division of *Lyons* v. *Anderson*, 8 R. 24.

In the case of *Campbell's Trustees* v. *Paul* (which was followed in the case of *Lyons*) Lord Mackenzie explained at length that it is because the real creditor's infeftment carries with it a real right in the moveables as accessories of the land that he must be preferred to the moveables so long as no completed alienation of them, voluntary or judicial, had been effected. "When the land," he said, "was made subject to a real debt, that *debitum fundi* covered not only the land but also the moveables on the land as accessories . . . All the limitations of the real right of the creditor infeft are consistent with the existence of a real right in the moveables as accessories of the land." Lord Balgray also puts the right of a real creditor to use this remedy upon the

same footing as that of a proprietor who was by the old law in the practice of seizing moveables on the land in payment of rent, and he states his opinion to be that a poinding of the ground now is "not so much a diligence as it is a real action —a declaratory real action containing no personal conclusions whatever."

In the previous case of *Bell* v. *Cadell*, where the Court (after ordering cases) adhered to the Lord Ordinary's judgment on the grounds stated in his note, it is clearly demonstrated that it is not possible to account for the peculiar qualities of poindings of the ground in any other way than by admitting that they are founded on a real right, which not only affects the *fundus* but the moveables thereon as accessories thereof.

In accordance with the same theory it will be found that poindings of the ground are referred to by the highest authorities as an exercise of property. It is so stated by Lord Kames in his Law Tracts—"Poinding for payment of debt secured upon land is an exertion of property. The effects are poinded or distrained by the landlord's order or warrant, and the execution can reach no effects but what are understood to be his property" (2d ed., p. 169).

So also Mr Walter Ross says—"If poinding the ground upon an infeftment be, as we have endeavoured to show, much the same thing with poinding upon a tack, and exactly the same with the English distress, then it is no more than an exercise of property; and accordingly we find that the superiors of old poinded the feuars and their vassals under them indiscriminately for their dues'"(vol. ii. p. 422). And at another place he states:—"A poinding of the ground is an exercise of property; it is a different person acting as landlord. Now, there is no doubt that the landlord himself can poind his own tenant for the whole arrears due; therefore the very same power is competent to his creditors by infeftment" (p. 438).

It is needless to say that these writers were not ignorant of the law laid down by the case of *Garthland* v. *Lord Jedburgh* [Spottiswood, p. 232], and which excludes a proprietor from poinding ground possessed by himself. For the case is referred to by Mr Ross, at p. 430, and he explains (p. 439)—"The poinding of the ground is the diligence of a proprietor not in the possession."

All the authorities, in short, treat of poindings of the ground as proceedings upon a real right in the lands; and accordingly "in case no moveables are found (upon the ground) to be poynded, then the ground itself is apprysed in obedience to that decreet."—(Elchies' Notes on Stair, p. 202).

There is only one case in which the privilege of poinding the ground is allowed to a creditor who has no infeftment, viz.—the case of a disposition of land burdened with a particular debt in favour of a third party. But that case is exceptional, and is so referred to by the authorities. It is quite different from the case of a person claiming as superior to poind for arrears of feuduties after he has parted with the superiority. Lord Kames refers to such poindings upon real burdens declared in favour of third parties as follows:—"A clause burdening a disposition of land with a sum to a third party is in our practice made effectual by poinding the ground. A right thus established strongly resembles a rent-charge. The power which in this case the creditor hath to poind the ground can have no other foundation to rest on than a clause of distress, which is exprest in a rent-charge, and is implied in the right we are speaking of." Lord Kilkerran refers to it in like manner as an exception, sanctioned by practice, to the general rule. His note is (M. 10,550)—"When a disposition is granted with the burden of this or that particular debt, although the creditor in that debt has no infeftment, yet the practice is for poinding of the ground to proceed upon such debts."

It must be observed, however, that in the case of such a debt the infeftment of the disponee is the infeftment also of the creditor whose debt is declared in the disposition to be a burden on it, and such creditor is in a situation to assert a real right in the lands against the disponee, and all deriving right from him, to the effect of recovering his debt.

The case of a superior who has parted with all right to the lands is different. It is not the case of a creditor in a particular debt burdening the proprietor's title. The feuar, though his title specifies the annual *reddendum* payable to the superior, has ceased to be dependent on the pursuer as superior, and holds now from another superior by a title which does not declare the alleged arrears to be a burden in favour of anybody.

The question therefore is, whether the pursuers, as formerly superiors, can allege any right to the lands, implying a right to the moveables as accessory thereto, or any clause in their favour implying a right of distress for the arrears as a sum ascertained to be a burden in their favour upon the lands? I confess myself entirely unable to find any principle for answering that question in the affirmative. Having neither a right to the land, nor a clause in the proprietor's right declaring the arrears to be a burden on his infeftment, I think that they have no title which either principle or practice sanctions as warranting a poinding of the ground.

But certain authorities were founded on as supporting the pursuers' claim.

The case of *Douglas of Kelhead*, M. 9306, scarcely requires notice. It was not a poinding of the ground, but a declarator of non-entry at the instance of a donator of the superior, and was only sustained as regards the maills and duties from the date of citation.

In the case of *Tweedie*, 14 S. 337, the pursuer had not only a personal right to the land—a feature entirely absent in this case—but also right as assignee to the heritable debt for which the poinding was to be used, and which was secured by infeftment. All that was decided was that as he had all the rights of his author he was entitled to stand upon his author's infeftment, which was plainly sufficient against the granter of the heritable security or anyone deriving right from him.

The case chiefly relied upon, however, was *Jeffrey* v. *Marquis of Ailsa*, 21 D. 492. The point really decided in that case was that a declaratory adjudication was effectual to complete the pursuers' title. But the opinion of Lord Deas was referred to as containing a *dictum* going beyond that point. In so far as Lord Deas' opinion asserts generally the doctrine that a completed feudal title is not necessary, there is no doubt that it is supported by the case of *Tweedie*, and I see no difficulty on principle in holding

that it is sufficient if the pursuer, as in the case of an assignee to a bond and disposition in security, can plead the benefit of his author's infeftment.

But Lord Deas also expressed an opinion that the executor of a deceased heritable creditor or superior was entitled to poind the ground for arrears of annual rent or feu-duties to which they have right as moveable succession. I am not prepared to assent to that doctrine, but I think it unnecessary in this case to give any opinion upon it. It may be that such executors, through the heir of the heritable creditor or superior, have it in their power to establish a title to poind the ground. But the point was not decided in the case of *Waugh*, to which Lord Deas refers, and no decision to that effect has been shown to exist. The point decided in the case of *Waugh* was, that although there was an heritable security for the bond in question, a part of the sum was to be regarded as moveable. The Judges are no doubt reported to have given an opinion that "it was consistent that a sum should be moveable, and yet that it should be secured by an heritable security, as in the case of bygone annual rent, and of bygone feu-duties or taxations, the same being unquestionably moveable *ex sua natura*, and yet there being a real security for the same, and a real action for poinding the ground competent even to executors." But that opinion does not apply to the case of the pursuers, because it assumes that there is a real security, and in my view the pursuers have no such security for the alleged arrears. They do not stand in the same relation to the present superior as the executors of a deceased superior to his heir. Therefore, even if such executors could obtain the benefit of the diligence of poinding the ground, it does not follow that the pursuers have right to that diligence. The only way in which, so far as I can see, the executors could poind the ground, would be by claiming the benefit of the heir's infeftment, he of course being bound, as representing the deceased superior, to vindicate the claim of the executors to feu-duties *in bonis* of the deceased at the time of his death.

I am of opinion that the Lord Ordinary's interlocutor is right.

Lord Shand—I regret that I find myself quite unable to concur in the opinion of the Lord Ordinary or in that just delivered by my brother Lord Lee. It appears to me that the pursuers are in a position to proceed with this action of poinding the ground, and that their title to insist is good. The defenders who have appeared are also well qualified to raise this question, inasmuch as what the pursuers propose to do is to attach the moveables now on the ground, and the rents now due to the proprietor, in payment of arrears of feu-duty alleged to be due to them for the period which they were superiors of the subjects. As security-holders the North British Property Investment Company have a substantial interest to defend the action. The facts of the case may be thus briefly stated. The pursuers were, as is admitted, superiors of the subjects from 1876 to 1880, and the right which they thus held was a real right constituted by conveyance and infeftment. In so far, then, as the feu-duties became due they were real rights or burdens constituted in favour of the pursuers by infeftment.

At Whitsunday 1880 the feu-duties on the subjects were two years in arrear, and being feu-duties they were undoubtedly *debita fundi*. In this state of matters the pursuers conveyed the superiority to the Scottish Imperial Insurance Company, but there was nothing said in the conveyance about the feu-duties then in arrear, nor was any conveyance of them made to the new superiors. They remained as real burdens on the land. There can be no doubt, therefore, that before the disposition to the Scottish Imperial Insurance Company was granted there was a *debitum fundi* due by the land, that the pursuers had the right to this *debitum fundi*, and could do diligence to recover it. The question, therefore, really comes to be this, whether having conveyed the superiority without conveying the arrears, the pursuers have thereby lost what I conceive to be their only proper and applicable remedy to secure this *debitum fundi?*

In the condescendence there is narrated the various conveyances of the subjects to the North British Property Investment Company, to John Wright, and to James Miller, and in the answers we have the explanation made that the superiority of the subjects was in 1880 sold to the Scottish Imperial Insurance Company, who were duly infeft and seised in the superiority. And reference is made in the condescendenee to the feu-duties in arrear, and it is said, "These arrears and the interest thereon are *debita fundi*, and preferable to the whole claims of the defenders on the property in question." The only answer to this is a simple denial, while at the same time it is admitted that the arrears in question have not been paid.

While it is sufficient for the disposal of this case that the superior's rights are based upon his title of superiority, yet there can be no doubt that this feu-duty is a *debitum fundi*, and so a real burden upon the lands, for we have it stipulated in the deed constituting the feu-duty that the obligations contained in it "are hereby declared real liens or burdens affecting the said piece of land." If this be so, what change has taken place upon the rights of parties since this disposition was granted? In order to have the land discharged from the debt these arrears must be paid or the land will continue a debtor. Now, as to the creditor. No change is alleged to have taken place in the condition of the creditor, and it is not suggested that there has been any conveyance of these bygone feu-duties. It might have been better, but was not necessary, to insert a reservation of the arrears in the disposition to the Insurance Company. Therefore they are *debita fundi*, and the question comes to be, Why should not the party entitled to these arrears be able to recover them? No doubt this right to the arrears would have been lost to the pursuers if it could have been shown to have been included in the conveyance, but there is no suggestion to that effect in the judgment of the Lord Ordinary, the ground of which seems to be that by the infeftment of the Scottish Insurance Company the pursuers became completely divested of the subjects and superiority, and ceased to have any proper connection therewith, and that they had no right to attach the rents now becoming due or the moveable effects now thereon. Near the end of his opinion the Lord Ordinary further says—"But it appears to the Lord Ordinary that the defenders, who are heritable creditors infeft in the subjects,

have a title and interest to see that the rents of the subjects shall not be carried off by persons who have no title to them, but shall be available for payment of their debt." No doubt in order to constitute real rights infeftment is required, but when that infeftment is once obtained and when you have a creditor in the debt, what more is wanted? The view of the Lord Ordinary seems to be, that in order to enforce the debt infeftment is necessary. For the original constitution of the debt infeftment is no doubt necessary, but not for its enforcement.

Some authorities were quoted with the view of showing that this diligence of poinding of the ground is inherent in the proprietor To this I demur. It is a diligence in its essence, and may be used by a security-holder. I think that the parties who may be pursuers in an action of this kind are properly described in Mackay's Practice, vol. ii. p. 314, where he says—"The pursuer may be a superior or any heritable creditor who is not in possession of the subjects, but not a proprietor or an heritable creditor who has obtained possession." It is a diligence, therefore, suited for a security-holder, and I cannot agree in thinking that where there is a *debitum fundi* and a creditor in the debt, that the property cannot be conveyed and the debt retained. In order to keep alive a real burden the creditor is not obliged to convey or assign the real burden to another party, for if he can completely convey he is surely entitled to enforce his claims. Real burdens in favour of third parties can be enforced, and there can be no doubt that the assignee under an assignation would be entitled to sue an action of this kind.

In the case of *Waugh* v. *Jamieson*, M. 5453, the point actually decided was that arrears of feu-duty are moveable *quoad* succession. But though dealing with these arrears as moveable for the purposes of succession, the Court yet viewed them as *debita fundi*, and came to the opinion formulated (according to the report) "in the resolutions, that it was consistent that a sum should be moveable and yet that it should be secured by an heritable security, as in the case of bygone annual rents due upon infeftments of annual rents, and of bygone feu-duties or taxations, the same being unquestionably moveable *ex sua natura;* and yet there being a real surety for the same, and a real action for poinding the ground competent even to executors, and likeways in the case of wadsets loosed by requisition and bearing a provision that notwithstanding of requisition the real right should stand unprejudged till payment, in which case the sum would be moveable though still secured by infeftment." This is no doubt an old case, but it has the high authority of Lord Deas' approval in the more recent case of *Marquis of Ailsa* v. *Jeffrey* (21 D. 492), for his Lordship there agrees with these resolutions, and says at p. 504—"A completed feudal title is unquestionably not necessary to pursue a poinding of the ground. There must be a *debitum fundi* duly constituted in the person of the original creditor. But the pursuer of the poinding of the ground may connect himself with the *debitum fundi* by a personal title."

I regret if the result of the present judgment should be to cast any doubt upon the authority of these decisions. If not in the pursuers, in whom is the title to enforce these duly constituted real burdens? It is not in the disponees, and it must therefore be in the granter of the deed, who did not by the disposition make any conveyance of these bygone feu-duties. Upon the whole matter, then, I consider these arrears of feu-duty to be a *debitum fundi*—a real burden on the lands—and that the parties in right of the real burden are entitled to use their remedy against the debtor the land.

The burden is not indefinite in amount—it is stated at £47 per annum—and intending purchasers of subjects like those we are dealing with must take the risk that prior feu-duties may not have been paid; indeed, they are put on their guard to make due inquiry. The case of a declarator of irritancy again is essentially different from an action like the present. It must be brought by a superior who desires to extinguish the right of property, and such an action could not competently be brought by a creditor.

In so far as the present action is one of poinding of the ground, I think it is competent.

Lord Mure—This is an important and somewhat difficult case, but after giving it my most careful attention I have come to be of opinion that the view taken by the Lord Ordinary and Lord Lee is the right one, and the effect of our judgment will substantially be to sustain the third plea-in-law for the defender, and to hold that as the pursuers are neither heritable creditors with a preferable title nor superiors of the subjects, the action is incompetent.

It appears that for four years prior to 1880 the pursuers were superiors of the ground in question, and that in that year they sold the superiority to the Scottish Imperial Insurance Company. There was no reservation of past feu-duties in the disposition, and no explanation is offered in the record of how it was that the feu-duties were allowed to run into arrear, and why no attempt was made to recover them until nearly four years had elapsed from the date of the sale of the superiority. The present action is one of poinding of the ground. It is a special and privileged form of action, and one only competent in the case of real rights or burdens existing on the lands to be poinded. It exposes the occupier to have his goods seized in payment of debts which are not his, and it is thus described by Mackay vol. ii. p. 313. "It is not a mere diligence, but a declaratory action whose object is to declare that the pursuer's real right under his title as superior or heritable creditor covers the moveables as accessory to the land which is the immediate subject of the security." The action need not necessarily have any personal conclusions against the defender, but infeftment is necessary to enable the pursuer of the action to proceed with it. That being so, in order to enable anyone to make use of this form of action, and to entitle him to attach the moveables upon the land, it is necessary that he should show that he holds an infeftment. If, therefore, we were to hold that this form of action was available for a superior who has some years previously parted with his estate of superiority, we should, I think, be going further than any warrant could be found for in the books. If the pursuers in the present case suffer any loss they are themselves alone to blame, in respect that they did not sooner assert their rights and avail

themselves of their remedy.

The Court adhered.

The LORD PRESIDENT and LORD DEAS were absent.

Counsel for Pursuers (Reclaimers)—Pearson—Dickson. Agents—Pearson, Robertson, &Finlay, W.S.

Counsel for Defenders (Respondents)—Comrie Thomson—Wallace. Agents—Welsh & Forbes, S.S.C.

Friday, January 23.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

STEUART *v.* REE.

Process—Citation — Citation Amendment (Scotland) Act 1882 (45 *and* 46 *Vict. c* 77), *sec.* 3.

Delivery of a registered letter, containing the copy of the writ to be served, to a servant of the person on whom service is to be made, who calls at the post-office for it by his master's authority, and grants a receipt, constitutes a valid citation under the Citation Amendment Act 1882.

Section 3 of the Citation Amendment (Scotland) Act 1882 provides—"In any civil action or proceeding in any court, before any person or body of persons having by law power to cite parties or witnesses, any summons or warrant of citation of a person, whether as a party or witness, or warrant of service or judicial intimation, may be executed in Scotland by an officer of the court from which such summons, warrant, or judicial intimation was issued, or other officer who, according to the present law and practice, might lawfully execute the same, or by an enrolled law-agent, by sending to the known residence or place of business of the person upon whom such summons, warrant, or judicial intimation is to be served, or to his last known address, if it continues to be his legal domicile or proper place of citation, . . . a registered letter by post containing the copy of the summons or petition, or other document required by law in the particular case to be served, with the proper citation or notice subjoined thereto, . . . and such posting shall constitute a legal and valid citation, unless the person cited shall prove that such letter was not left or tendered at his known residence or place of business, or at his last known address, if it continues to be his legal domicile or proper place of citation."

On 2d July 1884 the Rev. Stephen Ree, minister of the parish of Boharm in Banffshire, obtained a decree in the Sheriff Court there against Andrew Steuart, Esq. of Auchlunkart, for (1st) £11, 6s. 7d., being fiars' prices of victual stipend due to him for crop and year 1883, and payable to him by the defender on 3d March 1884 in terms of a decree of augmentation, &c., of 1818; (2d) £32, 18s. 10d., being the half-yearly money stipend payable at Whitsunday 1884; and (3d) £3, 10s. 3d. of expenses of process. On this decree he charged Steuart, who suspended the charge in the Bill Chamber.

The material statements of the complainer and the answers of the respondent were as follows:—"(Stat. 2) The alleged decree, of date 2d July 1884, in the Sheriff Court of Banffshire, which the complainer has been charged to implement, was not preceded by the service on him of any petition for such decree, either by an officer of Court or by citation in terms of the Citation Amendment (Scotland) Act 1882. No registered letter by post containing copy of the alleged petition was received by the complainer, or anyone authorised on his behalf, and if any acknowledgment of receipt is alleged to have been granted by the complainer or anyone authorised by him, such acknowledgment is false, the complainer having granted no such receipt, and no authority having been granted by him to anyone to act for him in so acknowledging. The counter statement is denied. (Ans. 2) Denied. Explained that the petition at respondent's instance against the complainer was served under the provisions of the Citation Act of 1882 by the respondent's agent, Mr John Grant Fleming, solicitor, Keith, on 3d June 1884. An execution of service in terms of said Act was endorsed on the petition by Mr Fleming, and the usual certificate of registration produced to the Court along with said petition. Thereafter the decree sought to be suspended was pronounced, and upon 17th July, payment not having been made of the sums contained therein, the charge also sought to be suspended was given. The whole proceedings were orderly and regular. (Stat. 3) The petition on which the decree charged on bears to proceed was not duly served. The registered letter required by the Citation Act was not left or tendered at the complainer's known residence in terms of the said Act. The complainer has endeavoured through the post-office to trace the registered letter now in question, and he finds it alleged to have been left with his gamekeeper (Falconer), or his said gamekeeper's son, but neither of these parties was a house-servant, nor in any way entitled to receive a letter for the complainer, and the same was not delivered to nor seen by him. The complainer desires an opportunity of establishing these averments. (Ans. 3) Denied. Explained that, by instructions from suspender, James Falconer rode regularly to the post-office, Blackhillock, for the Auchlunkart letters, and in the case of registered letters, granted the usual receipts on suspender's behalf. The receipt for the citation in question is signed by the said James Falconer. The registered letter containing the same was duly taken by him to the suspender's residence at Auchlunkart, was left there, and was received by suspender. The decree and proceedings founded on are referred to for their terms. Explained that the debt contained in said decree is most justly due. Explained that the suspender has taken no proceedings under the provisions of the Sheriff Court Acts for having himself reponed against said decree."

The complainer pleaded—"(1) The alleged decree being inept, in respect the same was not preceded by legal service on the complainer of any petition for payment of the sums alleged to be due, the complainer is entitled to have the charge suspended. (2) The registered letter required under the Citation Act not having been left or tendered at the complainer's known residence in terms of that Act, the complainer ought