Thursday, February 4.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

MILLAR'S TRUSTEES *v.* HORSBRUGH (MILLER & SON'S TRUSTEE).

Bankruptcy — Heritable Security — Ancestor's Creditor—Poinding of the Ground—Right of Trustee in Sequestration—Conveyancing (Scotland) Act 1874 *Amendment Act* 1879 (42 *and* 43 *Vict. cap.* 40), *sec.* 3—*Bankruptcy (Scotland) Act* 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 102.

The limitation, in competition with a bankrupt's trustee, of a creditor's right of poinding the ground, which is introduced by sec. 3 of the Conveyancing (Scotland) Act 1874 Amendment Act 1879 (re-enacting sec. 118 of the Bankruptcy Act 1856), applies only to the bankrupt's heritable creditor, and does not affect the right of the heritable creditor of his ancestor.

James Miller, ironmonger, Princes Street, Edinburgh, in 1877 and 1878 granted two bonds and dispositions in security over his heritable property in Edinburgh in favour of the persons mentioned in the deeds. The pursuers of this action, the trustees of James Millar, of Fisherrow, were in right of one of these bonds, and of the other to the extent of £500, and were secured over Mr Miller's property to the extent of £3500. Mr Miller died in 1883, leaving a trust-disposition and settlement in which he, *inter alia*, directed certain provisions to be made for his widow, and provided for division of the residue of his estate among his three children, and for the interim management and the disposal of his business.

After Mr Miller's death a minute of agreement was entered into by his widow, his two sons, and his daughter, which gave effect to the terms of his settlement, and arranged for the carrying on of the business under the name of James Miller & Son by one of the sons on behalf of himself and the other children. This agreement provided that the heritable property vested in Mr Miller's trustees, and his moveables should be held and applied for the business, and the children agreed to take their shares in the business as in full of their shares in the estate.

In April 1885 the affairs of James Miller & Son being embarrassed, a trust-deed for behoof of creditors was granted in favour of H. M. Horsbrugh, C.A., by which deed the heritable subjects in question were conveyed to him. He paid to the pursuers (Millar's trustees) the interest on their bonds down to 15th May 1885. In that month the firm and the children of Mr Miller were sequestrated, and H. M. Horsbrugh was appointed judicial factor *ad interim*, and eventually was confirmed trustee.

The interest on the bonds held by the pursuers Millar's trustees amounted at Martinmas 1885 to £87, 10s., and was not paid.

They (Millar's trustees), as heritable creditors under the bonds and dispositions in security granted by Mr Miller, raised this action of poinding of the ground in order to operate payment thereof, calling as defenders Mr Miller's trustees, the individual partners of the firm of James Miller & Son in Mr Miller's business, and Henry Moncreiff Horsbrugh, C.A., the trustee for behoof of the creditors of James Miller & Son, and the individual partners thereof.

The pursuers averred that Alexander Miller and James Andrew Miller (the sons of the deceased James Miller) were now, as their father's trustees, the obligants under the personal obligation contained in the said bonds and dispositions in security, and that (as above stated) the principal of the debt under their bonds now amounted to £3500, and the interest unpaid at Martinmas 1885 to £87, 10s.

They pleaded that by virtue of the bonds libelled they were entitled to decree of poinding of the ground.

Mr Horsbrugh lodged defences. He set forth the agreement to carry on the business of James Miller & Son, above narrated, and averred that the heritable property in Princes Street, over which the pursuers were secured, formed part of the copartnership assets of James Miller & Son under that agreement, and that "the said heritable property was conveyed to the defender Mr Horsbrugh as trustee for behoof of the creditors of James Miller & Son by the trust-deed of 8th April 1885. By the sequestration of the said firm and individual partners the said heritable property passed to Mr Horsbrugh as trustee on their sequestrated estates. Acting under the trust-deed, and subsequently under the sequestration, Mr Horsbrugh has managed the said heritable property since 8th April 1885, and on 17th April 1885 he paid to the pursuers the interest due for the half-year ending Whitsunday 1885, being the half-year current at the date of the sequestration of the estates of James Miller & Son and individual partners."

He pleaded — "(1) The heritable property over which the bonds and dispositions in security libelled were granted having formed part of the copartnership assets of James Miller & Son, passed under the sequestration of their estates to the defender Henry Moncreiff Horsbrugh as trustee thereon. (2) The defender Henry Moncreiff Horsbrugh having, as trustee foresaid, paid to the pursuers the interest due under the bonds libelled for the half-year current at the date of the sequestration of the estates of James Miller & Son, the pursuers are, in respect of section 3 of the Act 42 and 43 Vict. cap. 40, not entitled to decree of poinding of the ground as concluded for."

The enactment founded on, viz., section 3 of the Conveyancing (Scotland) Act 1874 Amendment Act 1879 (re-enacting the provisions of section 118 of the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79, which had been repealed by sec. 55 of the Act of 1874), provides that "from and after the commencement of this Act no poinding of the ground which has not been carried into execution by sale of the effects sixty days before the date of the sequestration, shall (except to the extent hereinafter provided) be available in any question with the trustee: Provided that no creditor who holds a security over the heritable estate preferable to the right of the trustee shall be prevented from executing a poinding of the ground after the sequestration, but such poinding shall in competition with the trustee be available only for the interest on the debt for the current half-yearly term, and for the arrears of interest for one year immediately before the commencement of such term."

On 12th December 1885 the Lord Ordinary (KINNEAR) repelled the second plea-in-law for the defenders, and decerned in terms of the conclusions of the summons.

"*Opinion.*—The pursuers are heritable creditors infeft in the subjects described in the summons by virtue of two bonds and dispositions in their favour in 1877 and 1878, granted by the late Mr Miller, who was then proprietor of the subjects, and the interest due at Martinmas 1885 not having been paid, they bring this action of poinding of the ground to recover the amount out of the moveables.

"Mr Miller, the granter of the bonds, died in 1883, leaving a trust-disposition and settlement. The only beneficiaries under the trust now in existence are his widow and the defenders, James and Alexander Miller, his sons, and Miss Adamina Miller, his daughter; and by an agreement, to which all these beneficiaries were parties, it was arranged that the business of the deceased should be carried on by the defender Alexander Miller for the joint behoof of his brother and sister, and that the heritable property, and with some exceptions the moveable property also, should be held and applied for the purposes of the business. The affairs of the firm became embarrassed, and the partners on the 8th of April 1883 executed a trust-deed for behoof of creditors, in favour of the defender Mr Horsbrugh, and conveyed the heritable subjects in question to him for the purposes of the trust. The estates of the firm, and the partners, were afterwards sequestrated, and since the present action was raised Mr Horsbrugh has been appointed trustee on the sequestrated estates. In these circumstances it is maintained by the trustee that the heritable estate is vested in him for behoof of the creditors, and that as the half-year's interest current at the date of the sequestration has been paid, the pursuers are prevented from poinding the ground by the operation of the statute 42 and 43 Vict. cap. 40 [Conveyancing (Scotland) Act 1874 Amendment Act 1879].

"There is no defence to the action except that founded upon this statute, which appears to me to be inapplicable. Prior to the sequestration the firm and its partners were owners and possessors of the heritable subjects, although the title still stood in the person of the trustee, and there can be no doubt that the moveables on the ground belonging to them were liable to be attached by the pursuers' poinding. Their right under their infeftment as heritable creditors covered not only the lands, but also the moveables upon the lands as accessories, and it is settled law that the right remains good against the moveables after the lands have passed into the hands of singular successors or disponees *mortis causa*. It is not in my opinion in any way affected by the sequestration. If the pursuers were creditors of the bankrupts, and seeking to poind the ground in that character, the action would be excluded by the Bankruptcy Act and the Act of 42 and 43 Vict., except to the limited extent allowed by the latter Act. But they are not creditors of the bankrupts, but of the deceased Mr Miller. They are not seeking to enforce any liability arising from representation, and although they have called the bankrupts and their trustee as defenders, that is not for the purpose of directing any conclusion against them personally (which indeed would be quite inappropriate in an action of poinding the ground), but in respect of their interest in the lands as the present owners and possessors. I should have had great difficulty in adopting any construction of the Bankruptcy Act which should operate to cut down or restrict the heritable rights of persons who are not creditors of the sequestrated estate. But the only clauses in the Bankruptcy Act affecting poindings of the ground are the 102d [quoted *infra*] and the 118th, which for sometime stood repealed, but is now re-enacted by the 42 and 43 Vict. cap. 40, and the operation of these clauses to affect a poinding of the ground at the instance of persons in the position of the pursuers appears to me to be expressly excluded by a very distinct proviso in the 102d section.

"By that enactment the heritable estate of the bankrupt is vested in the trustee 'to the same effect as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment and in security of debt, subject to no legal reversion, had been pronounced in favour of the trustee, and recorded at the date of the sequestration, and as if a poinding of the ground had then been executed, subject always to such preferable securities as existed at the date of the sequestration, and are not null and reducible, and the creditors' right to poind the ground as after mentioned.' In the case of *Bain* v. *The Royal Bank* [*cited infra*] the Lord President pointed out that 'no prior creditor could have any available security over the moveables on the heritable estate of the bankrupt except by a poinding of the ground, and the section would have left the law as it stood before but for the words "as hereinafter provided," and what is there referred to is the 118th section, which has the effect of limiting the right of the poinding creditor,' in competition with the trustee, as the defenders say the pursuers' right is limited by the statute, which re-enacts the provisions of that section. The two sections, taken together, therefore give the trustee the same right as if he had executed a poinding of the ground, and limit the right of any creditor poinding the ground in competition with him. But then it is provided by the 102d section that 'the transfer and vesting of the heritable estate,' which gives this right to the trustee, 'shall have no effect upon the rights of the creditors of the ancestor, except that the act and warrant of confirmation shall operate in their favour as complete diligence.'

"Now, the pursuers are in the position to which this proviso relates. They are the creditors not of the bankrupts but of the bankrupts' ancestor, and therefore the indispensable condition for bringing into operation the limitations of the 118th section, or of the statute by which it is now replaced, is excluded, and the limitation is of no effect as against the pursuers. The trustee cannot maintain that their poinding must be restricted in competition with him, because he has no title to compete with them. He has no poinding of the ground in a question with them, and although the heritable estate has for other purposes been transferred to and vested in him by the statute, he is prevented by the proviso from using his statutory title for the purpose of interfering with the operation of their infeftments. It is said that the Act of 1879 applies in terms to all poindings of the ground, irrespective of the right on which they may pro-

ceed. But although the first clause of the third section is in general terms, it is obvious from the second clause that the poindings to which the Act relates are poindings at the instance of creditors holding securities over the heritable estate, which can only mean creditors of the bankrupt holding securities over estate that has fallen within the sequestration. It is not an independent enactment, but it is to be read as part of the Bankruptcy Act, and can have no wider scope than when it stood in its original place as the 118th section of that statute. It must be read, therefore, as a provision for equalising, so far as it goes, the rights of creditors on the sequestrated estate; and cannot affect the heritable rights of persons who are not in that position, and whose infeftments are not derived from the bankrupt, but from his predecessors or authors.

"It is unnecessary to consider the argument maintained for the pursuers, that in the state of the titles the 103d section is insufficient of itself to vest a real right in the trustee; because assuming the bankrupts' title to be complete, so as to give their trustee the full benefit of the statutory transference, his right is qualified by the proviso already cited, so as not to be pleadable against the pursuers."

The defenders reclaimed, and argued—The heritable estate was vested in the trustee for behoof of the creditors of James Miller & Son, and in any question with him the pursuers were bound to restrict their poinding. The pursuers were entitled to all the rights of an heritable creditor; they could poind for three terms' rents. In 2 Bell's Comm. p. 57, it was laid down that when an ancestor's creditor had no security over the ancestor's estate, then the sequestration of the successor preserved the estate for the benefit of his (the successor's) creditors. That was just the position of the pursuers here; they were heritable creditors under a bond granted by an ancestor of the present defenders. As to the rights of creditors poinding for an ancestor's debt in competition with a trustee on the sequestrated estate of the successor, see *Hay* v. *Marshall*, July 7, 1824, 3 S. 157 and 2 Wil. and Sh. p. 71; *Bell* v. *Caddell*, December 3, 1831, 10 S. 100; *Campbell's Trustees* v. *Paul*, January 13, 1835, 13 S. 237; *Royal Bank* v. *Bain*, July 6, 1877, 4 R. 985; *Dick's Trustees* v. *White*, January 28, 1879, 6 R. 586; Bankruptcy Act 1856, sections 102 and 118; *M'Lachlan* v. *Bennet*, June 15, 1826, 4 S. 712; and 3 Wil. and Sh. 449; Act 1661, cap. 24; 2 Bell's Comm. pp. 57, 85, and 86; Stair IV. 35, 16.

Replied for respondents — The provisions of the Act 42 and 43 Vict. cap. 40, sec. 3, applied solely to questions arising between creditors of the bankrupt and poinding creditors. In the present case the question arose between creditors of the ancestor and the successor's trustee, and such questions fell to be determined by the Act 1661, cap. 54. If in the present case moveables were attached, it was only as accessories of the heritage—Sections 102 and 118 of Bankruptcy Act 1856. If an ancestor's heritable creditors did diligence within three years of the ancestor's death, they could seize on the moveables of a successor (or tenant) as accessories of the land, and there was nothing in the statute which cut out this rights. Prior to the sequestration the heritable creditors here might have executed a poinding and carried off the moveables for three terms' rents, and the Act of 1856 expressly reserved to such creditors their right. The Act 42 and 43 Vict. c. 40, simply re-enacted the provisions of the Act of 1856. The Lord Ordinary's decision was right, and ought to be adhered to.

Section 102 of the Bankruptcy Act 1856 provides—"The act and warrant of confirmation in favour of the trustee shall, *ipso jure*, transfer to and vest in him . . absolutely and irredeemably as at the date of the sequestration, with all right, title, and interest, the whole property of the debtor to the effect following. . . (2) The whole heritable estate belonging to the bankrupt in Scotland to the same effect as if a decree of adjudication in implement of sale, as well as a decree of adjudication in payment and in security of debt, subject to no legal reversion, had been pronounced in favour of the trustee and recorded as at the date of sequestration, and as if a poinding of the ground had then been executed, subject always to such preferable securities as existed at the date of sequestration, and are not null and reducible, and the creditors right to poind the ground as hereinafter provided . . provided always that such transfer and vesting of the heritable estate shall have no effect upon the right of the superior and executors of any creditor claiming in the sequestrated estate, nor upon the rights of the creditors of the ancestor, except that the act and warrant of confirmation shall operate in their favour as complete diligence."

At advising—

Lord President—I am of opinion, with the Lord Ordinary, that the restriction of the heritable creditor's right to poind the ground by the 118th section as it stood originally in the Bankruptcy Act of 1856, and as it is repeated in the recent Statute 42 and 43 Vict. cap. 40, applies to the heritable creditor of the bankrupt and not to the heritable creditor of his ancestor, and that for the plain reason that in the section of the Bankrupt Statute vesting the heritable estate as well as the moveable estate of the bankrupt in the trustee in the sequestration there is an express exception of the rights of the creditors of the ancestor. The heritable estate is to vest in the trustee to the same effect as if a decree of adjudication and in implement of sale, as well as a decree of adjudication for payment and in security of debt, subject to no legal reversion, had been pronounced in his favour, and as if a poinding of the ground had been executed, subject to any preferences that may have been acquired by particular creditors. The proviso is in these terms, that such transfer and vesting of the heritable estate—that is, a transfer and vesting having the effect of the two sets of diligences of adjudication and poinding—shall have no effect upon the rights of the superior, nor upon any question of succession between the heir and executor of any creditor, claiming on the sequestrated estate, nor upon the right of the creditors of the ancestor, and then follow the words within brackets, "except that the act and warrant of confirmation shall operate in their favour as complete diligence." Now, I construe the last words and the first together for the purpose of clearing away any ambiguity that may be supposed to arise from their use. I think these last words mean nothing more than that it shall not be necessary to do diligence within three years in terms of the Act 1661. The act and

warrant of the trustee shall operate as an adjudication in their favour, and dispenses with the necessity of their doing separate diligences within the three years. Now, to return to the important words of the exception, that the vesting of the heritable estate in the trustee shall have no effect on the rights of the creditor of the ancestor, it seems to me that it would have been difficult to find words of more comprehensive application than these. It is not simply a saving of the rights, but it is that all these effects vesting in the trustee to the effect of an adjudication in implement and in security, and of a poinding as in this case, are to have no effect upon the rights of the creditor of the ancestor. Now, then, whether the creditors of the ancestor be personal or secured creditors upon the heritable estate, they are to stand just exactly in the same position as they would have done if this estate had not been vested in the way here provided in the trustee in the sequestration. That saves to them therefore not merely their rights in the same restricted sense of the term, but it reserves to them also all their diligences, because the right would be very much affected if the remedy by which it is enforced is taken away. It would be a very serious matter if the trustee's confirmation was to have that effect. But the confirmation of the trustee is to have no effect upon their rights, and therefore their rights must not merely subsist as rights of creditors, but they must subsist with all the proper remedies that belong to these rights. And accordingly a creditor secured by an heritable conveyance of whatever kind over the estate of the ancestor in security of debt must have all the rights that he would have had if this sequestration had never taken effect, and amongst these is the right to poind.

Now, if that be so, I think the Lord Ordinary's reasoning *quoad ultra* is quite logical and unimpeachable when he says if that be so then the creditor of the ancestor is entitled to poind the moveables on the ground, just as he would have been entitled to do if there had been no sequestration at all, and therefore I can see no fault in this interlocutor or in the reasoning by which it was supported.

Lord Mure—I have come to the same conclusion, and very much on the same grounds as the Lord Ordinary has given in his note, and the grounds which your Lordship has expressed, and have nothing to add.

Lord Shand—I have come to be of the same opinion.

By the 102d section of the Bankruptcy Act 1856 the vesting of the estate of the bankrupt in the trustee to the same effect as if diligence had been done, is limited by the proviso to which your Lordship has referred, which practically enacts that the section shall have no effect upon the rights of the creditor's ancestor. One of these rights is to execute such a poinding as we have here, and therefore I think that right is saved. The enactment proceeds—"except that the act and warrant of confirmation shall operate in their favour as complete diligence." It may be unnecessary by way of decision to construe these words now. But I should be disposed to hold that they are to be read as meaning that the Act and warrant of confirmation shall operate as diligence, to the effect of vesting the trustee with the general estate of the ancestor for behoof of the ancestor's creditors generally, and to no other effect, so that the moveables in question, which never were the property of the ancestor, but were poinded as being within the property and belonging to the owners of the property, were not carried by the statute to the trustee for behoof of the ancestor's creditors.

Lord Adam—I am entirely of the same opinion.

The Court adhered.

Counsel for Pursuers—Mackintosh—J. A. Reid. Agents—Mitchell & Baxter, W.S.

Counsel for Defender — Moncreiff — Ure. Agent—Geo. Andrew, S.S.C.

Thursday, February 4.

SECOND DIVISION.

BROWN AND ANOTHER *v.* LENNOX AND OTHERS.

Partnership—Unincorporated Company—Sale of Business—Dissolution—Burghs (Scotland) Gas Supply Act 1876 (39 *and* 40 *Vict. cap.* 49), *secs.* 20 *and* 21—Ultra vires.

A joint-stock company was formed in 1859 to supply the burgh of Kilsyth with gas, the second article of the deed of copartnery providing that it was to continue for the space of twenty-one years, at the end of which period, it was further provided, under article 30, that the partners might prorogate the period to any number of years they should think proper, or in their option dissolve sooner, but neither the prorogation nor the dissolution was to take place unless proposed by a motion made and not negatived at two meetings duly advertised in certain specified newspapers, and by circular to all the shareholders advising them of the business to be taken up, with a month's interval between them, which two meetings must sanction the dissolution by a two-thirds majority of those present or voting by proxy. The contract was never prorogated, but the company continued to carry on the business till 1884, when the Police Commissioners of the burgh proposed, and subsequently agreed with the directors, to take over the whole plant of the company conform to minute of sale, which proceeded on the narrative that the Commissioners were about to adopt the Burghs Gas Supply (Scotland) Act 1876, which in fact they subsequently did adopt. Sections 20 and 21 of the latter Act empower the commissioners to buy such a concern on condition that the company agree by at least three-fourths of the shareholders. The sale was confirmed by the company at two meetings, which were not called under the provisions of section 30 of the contract. Two of the shareholders of the company raised action of reduction of the minute of sale on the grounds (1) that there being no power of sale in the original contract of copartnery,