Friday, January 9.

FIRST DIVISION.

RAMSBOTHAM *v.* SCOTTISH AMERICAN INVESTMENT CO., LIMITED.

Process—Special Case—Court of Session Act 1868, *sec.* 3.

A limited company and one of its shareholders presented a special case for the opinion and judgment of the Court on a question which affected the shareholders in general, namely, whether it was within the company's powers to increase its capital by the creation of new stock of a certain character. *Held* that the special case was competent, as the question raised therein could have been tried between the parties thereto in some other form of process.

Samuel Ramsbotham, M.D., a shareholder in the Scottish American Investment Company, Limited, and the said Scottish American Investment Company, submitted a special case to the First Division of the Court as first and second parties thereto respectively.

The question on which the opinion of the Court was desired was, Whether the increase of the company's capital by the creation of a number of new shares of a certain character was within the company's powers, and whether certain special resolutions purporting to increase the capital by the creation of such shares were valid?

When the case was called in Single Bills some doubt was expressed from the bench whether the question raised in the case, affecting as it did the whole body of shareholders, could competently be tried in the form of a special case to which the company and only one shareholder were parties, and the case was continued to allow the parties to look into the matter.

When the case was again called, it was submitted for the parties that the case stood the test of competency laid down in the case of *The Parochial Board of Bothwell* v. *Pearson*, February 6, 1873, 11 Macph. 399, as the question raised could have been tried between the parties in some other form of process; and reference was also made to the following cases—*Commissioners of Kirkintilloch* v. *M'Donald and Others*, October 31, 1890, 28 S.L.R. 57; *Bruce* v. *Ratepayers of Fordoun*, March 7, 1889, 16 R. 568.

At advising—

LORD PRESIDENT—I rather think that Mr Lorimer is right in saying that the present case stands the test of which he spoke, and that a single shareholder has a good title to challenge the proceedings of the company by suspension, declarator, or other form of process, and therefore that the provisions of the 63rd section of the Court of Session Act 1868 apply.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The case was sent to the roll.

Counsel for the First Party—D.-F. Balfour, Q.C.—H. Johnston. Agents—Crombie, Bell, & Bannerman, W.S.

Counsel for the Second Parties—Lorimer. Agents—Menzies, Black, & Menzies, W.S.

Tuesday, January 13.

SECOND DIVISION.

[Sheriff of the Lothians.

WOOD *v.* CRANSTON & ELLIOT AND OTHERS.

Bankruptcy — Notour Bankruptcy — Pari passu Ranking—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 12—*Debtors (Scotland) Act* 1880, *sec.* 6.

Under the Debtors (Scotland) Act 1880, sec. 6, notour bankruptcy is constituted "by insolvency concurring with a duly executed charge for payment, followed by the expiry of the days of charge without payment."

The Bankruptcy (Scotland) Act 1856, sec. 12 provides — "Arrestments and poindings which shall have been used within sixty days prior to the constitution of notour bankruptcy, or within four months thereafter, shall be ranked *pari passu* as if they had all been used of the same date," . . . provided "that any creditor judicially producing in a process relative to the subject of such arrestment or poinding liquid grounds of debt or decree of payment within such periods shall be entitled to rank as if he had executed an arrestment or a poinding."

A creditor charged his debtor on a decree under the Debts Recovery Act, and the charge expired without payment upon 7th February. He then poinded his debtor's goods, and carried through a sale of them upon 27th May. Upon 20th June following other creditors of the common debtor judicially produced liquid grounds of debt against him, but *held* that they were not entitled to a *pari passu* ranking, as the date of the notour bankruptcy was 7th February, and they had failed to produce their grounds of debt within four months thereof.

Under the Debtors (Scotland) Act 1880, sec. 6, notour bankruptcy is constituted "by insolvency concurring with a duly executed charge for payment, followed by the expiry of the days of charge without payment."

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79), provides, sec. 9—"Notour bankruptcy shall be held to commence from the time when its several requisites concur, and when it has once been constituted shall continue in case of a sequestration till the debtor shall obtain his discharge, and in other cases until

insolvency cease, without prejudice to notour bankruptcy being anew constituted within such period." Sec. 12—"Arrestments and poindings which shall have been used within sixty days prior to the constitution of notour bankruptcy, or within four months thereafter, shall be ranked *pari passu* as if they had all been used of the same date;" . . . "that any creditor judicially producing in a process relative to the subject of such arrestment or poinding liquid grounds of debt or decree of payment within such period shall be entitled to rank as if he had executed an arrestment or a poinding." . . .

Upon 27th January 1890 George Wood obtained a decree under the Debts Recovery Act against Samuel Calcraft. Upon 28th January he charged Calcraft upon this decree, and the charge expired upon 7th February 1890 without payment. Upon 21st May, Wood executed a poinding of Calcraft's goods, and upon 27th May he carried through a sale of the goods under the poinding. The sum realised was £37, 1s. 10d.

Upon 20th June 1890 Cranston & Elliot, drapers, Edinburgh, and others, raised an action of multiplepoinding in the Sheriff Court in Wood's name, and produced liquid grounds of debt against Calcraft, claiming to be ranked *pari pussu* with the nominal raiser on the sum realised. The pursuer and nominal raiser averred that upon 7th February 1890, when his charge expired without payment, "the common debtor was insolvent, and by the expiry of the said charge without payment he was then rendered notour bankrupt." The defenders averred that they had produced liquid grounds of debt "within sixty days of the date of said poinding, and, at all events, within four months after the constitution of the notour bankruptcy of the common debtor."

The defenders and real raisers pleaded—"(2) The common debtor being notour bankrupt, and the claimants having produced liquid grounds of debt, are entitled to a share of the free proceeds of the sale of the common debtor's effects in terms of section 12 of the Bankruptcy (Scotland) Act 1856."

The pursuer and nominal raiser pleaded—"(3) The real raisers and claimants not having, within four months after the constitution of the common debtor's notour bankruptcy, judicially produced liquid grounds of debt or decree of payment in any process relative to the subject of the poinding, and not having been within said period in a position to arrest or poind the estate of the common debtor, they are not entitled to a *pari passu* ranking with the nominal raiser on the proceeds of the sale carried through by him."

Upon 21st July 1890 the Sheriff-Substitute (HAMILTON) repelled the defences for the nominal raiser, sustained the competency of the multiplepoinding, &c.

"*Note.*—It appears that the common debtor was rendered notour bankrupt on 7th February last, on which day the charge given on the nominal raiser's decree expired without payment—Debtors (Scotland) Act 1880, sec. 6. He was again rendered notour bankrupt on 27th May, when a sale was carried through under the poinding executed by the nominal raiser—Bankruptcy (Scotland) Act 1856, sec. 7 (*b*); see also sec. 9. As the real raisers and other claimants have produced liquid grounds of debt in this action within four months of the latter date—Bankruptcy Act 1856, sec 12—it is thought that they are entitled to be ranked on the fund *in medio pari passu* with the nominal raiser; in other words, that the competency and relevancy of the action must be sustained."

Upon appeal the Sheriff (CRICHTON) founding upon sections 7 and 12 of the Act of 1856 dismissed the appeal and adhered to the judgment, being of opinion that the Debtors Act 1880 was not intended to affect the rights of creditors *inter se*, and accordingly that the four months must run from the date of the poinding.

The pursuer appealed.

At advising—

LORD TRAYNER—The appellant in this case obtained a decree against his debtor Calcraft in January 1890, upon which a charge of payment was given. That charge expired on 7th February following without payment having been made. The appellant's decree being one on which but for the provisions of the Debtors Act 1880 he could have operated personal diligence, the lapsing of the charge without payment constituted notour bankruptcy against the debtor. Following up his charge, the appellant poinded the goods of his debtor and carried through a sale thereof in the month of May. The respondents, who are also creditors of Calcraft, claim to rank *pari passu* with the appellant on the proceeds of the sale, on the ground that they have within four months from the constitution of the debtor's notour bankruptcy judicially produced a liquid ground of debt against the debtor, as provided by section 12 of the Bankruptcy Act 1856. The judicial production by the respondents of their liquid ground of debt on which their claim is based is said by them to have been made on 20th June. From this statement of the facts it appears to be clear enough that the respondents' claim cannot be sustained if the notour bankruptcy of the debtor Calcraft constituted on 7th February is taken as the *terminus* from which the four months are to be computed. Accordingly the respondents maintain that notour bankruptcy was again constituted against Calcraft in May by the poinding which was then executed of his goods by the appellant, and that they are entitled to the *pari passu* ranking which they claim as having produced this liquid ground of debt within four months of that date. This is the view which the Sheriff and Sheriff-Substitute have taken, but I think it is not a sound view of the law.

The 12th section of the Act of 1856 appears to me to contemplate and to deal with one constitution of notour bankruptcy, and one only. From the date of that con-

stitution the sixty days before and the four months thereafter are to be reckoned. If it was not so, then creditors who did diligence within four months after the second or third or fourth constitution of notour bankruptcy would all be entitled to rank *pari passu* with those who had done diligence within four months of the first constitution, which would result in this, that creditors would rank *pari passu* who had done diligence within sixteen months after the constitution of notour bankruptcy, a result not provided for by the statute. In the present case notour bankruptcy was constituted, in my opinion, on 7th February, when the charge of payment given by the appellant expired. The subsequent poinding was not a reconstitution of notour bankruptcy, but merely an ordinary step in the course of following up the diligence already commenced. No doubt a poinding following upon an expired charge is in itself a mode of constituting notour bankruptcy, but it was not in this case the constitution of notour bankruptcy against his debtor by the appellant, for that had already been done. As regards his notour bankruptcy, the poinding executed by the appellant did not affect the debtor's position; he was neither more nor less notour bankrupt after the poinding than before it. I do not think the respondents can take any benefit from the provisions of section 9 of the Act of 1856. It is there provided that notour bankruptcy being once constituted shall continue in the case of a sequestration until the debtor is discharged, and in other cases until insolvency ceases "without prejudice to notour bankruptcy being anew constituted within such period." If I read that clause alone, and apart from the other sections of the statute, I should have some difficulty in understanding the purpose of its concluding proviso. If notour bankruptcy, once constituted, is to continue in a sequestration till the debtor's discharge, and in other cases till insolvency ceases, there would appear to be no room—and indeed no reason—for providing that during that period notour bankruptcy might be constituted anew. But the difficulty disappears, and the importance and value of this provision becomes clear, when the terms of the 15th section are taken into account. I think the renewed constitution of notour bankruptcy provided for by section 9 has reference to an application for sequestration, and has no bearing or effect upon the question of the equalisation of diligence.

I am of opinion that the interlocutor appealed against should be recalled.

LORD YOUNG, LORD RUTHERFURD CLARK, and the LORD JUSTICE-CLERK concurred.

The Court pronounced the following interlocutor:—

"Find in fact that Samuel Calcraft, the common debtor, was rendered notour bankrupt on 7th February 1890 by the expiry, without payment, of the charge given him upon the appellant's decree; that a poinding of the common debtor's effects was executed at the instance of the appellant on 21st May 1890; that a sale of the poinded effects was carried through on 27th May 1890; and that the respondents and claimants produced in the process decree of payment or other liquid grounds of debt on 20th June 1890: Find in law that the respondents are not entitled to a *pari passu* ranking with the appellant on the proceeds of the sale carried through by him: Therefore sustain the appeal, recal the interlocutor of the Sheriff appealed against, and assoilzie the nominal raiser and appellant from the conclusions of the petition, and decern," &c.

Counsel for the Appellant — Salvesen. Agent—John W. Deas, S.S.C.

Counsel for the Respondents—Goudy. Agent—Peter Morison, S.S.C.

Tuesday, January 13.

SECOND DIVISION.

CLELAND AND ANOTHER.

Succession—Settlement—Conditional Institution—Heirs and Assignees.

By disposition and settlement executed in 1859 a husband, upon the narrative that there was a duty incumbent upon him to settle his affairs in case of his death, gave, granted, assigned, and disponed to and in favour of his wife, and her heirs, executors, and assignees whomsoever, certain heritable property. He also left her his whole estate and effects, heritable and moveable, and appointed her his sole executor. The wife having died in 1884, he married again, and died in 1889 survived by his second wife, leaving the disposition of 1859 unaltered as his only settlement.

Held that that settlement was still operative, and that the heir-at-law of his first wife was entitled to the heritable property (subject to the widow's terce) in preference to his own heir-at-law.

By disposition and settlement prepared by John Torrance, writer in Hamilton, dated 20th December 1859, Gavin Allan, sometime grocer in Motherwell, on the narrative that it was a duty incumbent on him to settle his affairs in the case of his death, "and for the love, favour, and affection I have and bear to Elizabeth Cleland or Allan, my spouse," gave, granted, assigned, and disponed to and in favour of the said Elizabeth Cleland or Allan, his spouse, "her heirs, executors, and assignees whomsoever, heritably and irredeemably," certain heritable property (valued at about £1200), and in general his whole estate and effects, heritable and moveable, real and personal, of what kind or denomination soever, or wheresoever situated, then belonging or