any relevancy in a question of this nature, and we are invited to affirm the proposition, not that the pursuer has a right to a share of the money as a beneficiary under the trust, but that an application of the money which the Presbytery are not proposing to make, is lawful. I am very clearly of opinion that the pursuer has no right to such a declarator, and therefore that the action is bad on the ground of want of relevancy.

I propose that we should only sustain the third plea-in-law, which is sufficient for the disposal of the case, and that with this variation we should adhere to the Lord Ordinary's interlocutor.

LORD ADAM and LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court sustained the third plea-in-law for the defenders, and *quoad ultra* adhered.

Counsel for Pursuer—C. K. Mackenzie—J. R. Christie. Agents—Simpson & Marwick, W.S.

Counsel for Defenders—Cheyne—C. N. Johnston. Agents — Menzies, Black, & Menzies, W.S.

Tuesday, March 17.

FIRST DIVISION.

[Sheriff of Perthshire.

HENDERSON *v.* GRANT.

Diligence — Poinding — Bankruptcy — Preference.

A creditor who had poinded her debtor's goods but had not completed the diligence by sale of the poinded goods, *held* not entitled to a preference in the debtor's cessio granted eighteen months after the execution of the poinding.

Process—Sheriff—Appeal—Value of Cause —Affidavit and Claim in Cessio.

The competency of an appeal under the Sheriff Court Act 1876, sec. 26, sub-sec. 4, and the Debtors Act 1880, sec. 9, sub-sec. 4, to cessio is, as regards the the Court of Session in a process of value of the cause, to be determined by the debt alleged to be due in the affidavit and claim upon which the deliverance appealed from is pronounced.

Observations by Lord M'Laren on the right of appeal by reclaiming-note under 6 and 7 Will. IV. cap. 56, in processes of cessio.

This was an appeal against a judgment of the Sheriff of Perth by which he sustained a deliverance of the respondent, the trustee in the cessio of Robert Laing, refusing a preferable ranking to the appellant.

On the 11th March 1892 the appellant obtained decree against Robert Laing for the inlying expenses and aliment of an illegitimate child, with the expenses of process, and on the 13th July thereafter he was duly charged to make payment thereof. On the 25th July 1893 certain goods belonging to him were poinded at her instance, and the execution of poinding was duly reported by the sheriff officer on the 29th July thereafter. In the report of the poinding the value of the goods was stated to be £18.

On the 3rd August 1893 the appellant obtained a warrant to sell the poinded goods, but this warrant was inept in respect that it did not specify the date at which the sale should take place, as required by the Personal Diligence Act 1838 (1 and 2 Vict. c. 114), secs. 25 and 26.

No further proceedings took place in the process of poinding, but the poinded goods were sold by the respondent, the trustee in the cessio, who was appointed on 15th December 1884, under reservation of the pleas of parties.

The appellant lodged an affidavit and claim in the cessio for £42, and claimed a preference to the effect of receiving full payment of the debt out of the effects poinded by the deponent on 25th July 1893.

The trustee issued a deliverance in which he rejected the claim to a preferable ranking, but admitted it to an ordinary ranking.

The claimant objected to this deliverance.

On 17th May 1895 the Sheriff-Substitute (GRAHAME) sustained the deliverance of the trustee.

The claimant appealed to the Sheriff (JAMESON), who on 14th December adhered to the interlocutor of the Sheriff-Substitute.

Note.—"Notwithstanding the very high authority of Professor Bell (Com., 7th ed. pp. 61, 62), I feel bound by decided cases to hold that a poinding is not completed so as to operate as a transference of the property of the poinded effects until a sale has taken place under the poinding, although when such sale has taken place, the effect of the poinding goes back to the date of execution. In my opinion this doctrine is established by the cases of *Tullis* v. *White*, June 18, 1817, F.C.; *Samson* v. *M'Cubbin*, 1 S. 407; *Lyle* v. *Greig*, 5 S. 845; and *Scoullar* v. *Campbell*, 3 S. 77. I may also refer to Lord Ivory's note to Erskine on this subject. As no sale took place under the poinding founded on by the appellant, her objection to the trustee's deliverance must be disallowed."

The claimant appealed to the First Division of the Court of Session. The respondent objected to the competency of the appeal.

Argued for respondent—An appeal in a process of cessio was subject to the same restrictions as to the value of the cause as that in an ordinary Sheriff Court action—Sheriff Court Act 1876 (39 and 40 Vict. cap. 70), sec. 26, sub-sec. 4; Sheriff Court Act 1853 (16 and 17 Vict. cap. 80), sec. 22. The sum contained in the report on the appellant's poinding formed the real fund in dispute between the parties, and was therefore the true value of the cause. The true test of such value was the amount which the pursuer might hope to get out of the

cause, and in this case it was only £18. Accordingly, the appeal was incompetent. In the case of *Dobbie* v. *Thomson, &c.*, June 22, 1880, 7 R. 983, the value of the claim originally made was £53, but the proceeds of the sale of the bankrupt's property having been reduced, after payment of the expenses of process, to £17, an appeal was held to be incompetent. That case was analogous to the present.

Argued for appellant—The true test of the value of a cause was the amount claimed in the initial writ, not, as the respondent argued, the value of the security as brought out by the report on the poinding. There might be other property apart from it to meet the claim. The case of *Dobbie* v. *Thomson* was essentially different, as there the only possible sum in dispute was £17.

LORD ADAM—This is an appeal from a judgment in the Sheriff Court at Perth on the deliverance of a trustee in a process of cessio.

I have no doubt that appeals in a cessio presented under the 1876 Act are entirely similar to, and are treated precisely as if they were, ordinary Sheriff Court actions. That is not the course which we might have expected to be followed in cessio appeals, because they are more analogous to appeals under the Bankruptcy Acts than to ordinary actions, but it is the case.

Now, the objection made to the competency of this appeal is that the cause is under the value of £25, and that accordingly it is not subject to appeal. The question therefore is, whether or not the value of the action is £25? I have always understood that the value of a cause is to be determined from the conclusions of the summons or petition, and that we do not go outside of them to ascertain the value, and although the claim is not before us in the shape of a summons or petition but in an affidavit, I think that this must be treated precisely as if it were a summons or petition, and that the value of the cause must be determined by the amount claimed therein. Now, as Mr Stewart has pointed out, the amount of the claim is £42. It may be that it may ultimately turn out that there is no discussion or dispute between the parties except as to whether or no the creditor has a preferential right over the poinded goods, but none the less the fact is that the claim is for £42, and is so treated by the parties, for the trustee in his deliverance "rejects this claim to a preferential ranking but admits it to an ordinary ranking," *i.e.*, admits the whole claim of £42. It may be, from all that appears, that there will be ample funds to meet the claim, but however that may be, the claim made was for £42, and therefore the appeal is competent.

LORD M'LAREN—The question of appeal to the Court of Session from judgments in cessio proceedings is left by the Legislature in an unsatisfactory position. We must keep in view that the process of *cessio bonorum* was an extraordinary remedy for poor debtors and was originally competent only in the Court of Session. There was a right of review at that time by way of reclaiming petition, the form being afterwards altered to reclaiming-note. When the Act of King William (6 and 7 Will. IV. c. 56) was passed, it was thought proper, because of the smallness of the bankrupt's estate, to give jurisdiction to the Sheriff, but without depriving the parties of the right of proceeding in the first instance in the Court of Session. The mode of appealing from the Sheriff was by reclaiming-note to the Inner House. The reason of this is evident; if the appeal had been in the form of advocation, which at that time was the ordinary mode of bringing a case to the Court of Session from the inferior judicatory, the case would have had to go through the Bill Chamber and then to a Lord Ordinary before coming to the Inner House, and so the summary process of coming at once to the Inner House by reclaiming-note was established to facilitate the disposal of this class of small bankruptcies. I am by no means satisfied that this right of coming to the Inner House by reclaiming-note has ever been taken away. I do not find any reference to it in the later statutes, and it is not in accordance with principle to hold that a right of review is taken away by implication arising from the silence of subsequent legislation. I should have hesitated to hold that the Act of 1876 was meant to substitute a new appeal for the old reclaiming-note to the Inner House, because the words of the section can be read as meaning an appeal within the Sheriff Court. But then I think that the provision in the Act of 1880 (The Debtors Scotland Act 1880, 43 and 44 Vict. c. 34) means that cases of cessio originating in the Sheriff Court might be brought here by appeal according to the same rules as an ordinary Sheriff Court action.

I concur in the opinion which has been expressed, that the test of value is the sum claimed in the initial writ by which the creditor brings his case into Court. That has always been the test, and the initial writ here is the affidavit and claim. I agree that it would be more in accordance with bankruptcy practice to give an unqualified right of appeal as under the Bankruptcy Act of 1856, but there may be reasons for limiting it in the case of small estates, and at all events the Statute is clear, and appeal is limited to cases in which the value is not less than £25.

LORD KINNEAR—I have no doubt that this appeal is subject to the condition which applies to appeals from the Sheriff Court in ordinary Sheriff Court actions. That is to say, that we cannot hold it to be competent if the value of the cause is below £25.

I agree that it is settled by a series of decisions which cannot be questioned, that for this purpose the value of the cause must be measured by the amount of the claim contained in the conclusions of the summons, or other initial writ, and not by the value determined as a result of the judgment brought under review. In applying

this rule to the present appeal we must look for some writ which may be considered to take the place of a summons, since otherwise the provisions of the statute would be inoperative, and I have no doubt your Lordships are right in holding that the initial writ is to be found in the affidavit of claim in which the creditor sets out her alleged rights against the debtor. Now the creditor makes a claim for £42, 11s. 4d. There can be no question that if the trustee had rejected it *in toto*, the creditor would have been entitled to appeal. In point of fact he has not rejected it *in toto*, but only in part, by refusing to allow her a preference, but I agree that this in no way affects the value of the cause, as fixed by the creditor's demand, and that accordingly the appeal is competent.

The LORD PRESIDENT was absent.

The Court repelled the objection to the competency of the appeal.

Argued for appellant—The appellant was entitled to a preference. The execution of the poinding created such a *nexus* over the goods as to entitle her to an absolute preference, since she could at any time have made it effectual. She had never abandoned the poinding, and had merely stopped the sale for the convenience of the debtor. The fact that the warrant was defective did not affect the question, for she could at any time have obtained a valid warrant, there being no limit of time fixed by sections 25 and 26 of the Personal Diligence Act 1838 (1 and 2 Vict. c. 114) within which application for a warrant must be made. The voluntary assignation of his estate by the debtor to the trustee in the cessio could not defeat this diligence. The position of a trustee in a cessio was in no way analogous to that of a trustee in a sequestration, the former having no higher rights than his author, and there being nothing in his appointment to prevent a poinding creditor going on with his diligence — *Simpson* v. *Jack*, November 23, 1888, 16 R. 131. The diligence of poinding was a stronger one than that of arrestment, but yet in the case of *Mitchell* v. *Scott*, June 29, 1881, 8 R. 875, arrestment on dependence was held to confer a preference, although the defender was sequestrated before the arrester obtained decree in the action, and the present case therefore was *a fortiori—Nicolson* v. *Johnstone & Wright*, December 6, 1872, 11 S.L.R. 179. (2) There had been no undue delay in following up the poinding; no such delay "as can reasonably infer abandonment" — Ersk. iii. 6, 18. The delay here had been granted at the request of the debtor, and was therefore not unreasonable. In *Kerr* v. *Barbour*, May 30, 1837, 15 S. 1041, there was an interval of three years.

Argued for respondent — (1) The transference to a trustee in a cessio was not necessarily a voluntary assignation making him subject to the same exceptions as his author. While not precisely in the same position as a trustee in sequestration, he was in an analogous position, and had higher rights than his author — *Gray* v. *Gray's Trustees*, January 29, 1895, 22 R. 326. (2) Poinding was a strict diligence, and required a strict compliance with the statutory rules. There had been here a breach of these rules, the warrant being admittedly bad, and there having been undue delay in carrying out the sale. A poinder was not entitled to indefinitely postpone the sale, but must sell upon a date to be fixed by the Sheriff, on receipt of the report. Accordingly the appellant's diligence was incomplete at the time she made her claim, and was not then capable of being completed, and she had therefore no claim to a preference—2 Bell's Com. (7th ed.), pp. 59 and 61; *Tullis* v. *White*, June 18, 1817, F.C.

At advising—

LORD ADAM—[*After narrating the facts as given above*]—The question is whether the appellant, in respect of these proceedings, has a right to a preferable ranking in the cessio to the extent of the value of the goods poinded.

It appears to have been maintained in the Sheriff Court that the effect of the execution of poinding was *per se* to transfer the property of the poinded goods to the poinding creditor, and that a sale was not necessary to complete the diligence, but that plea was not insisted on before us. It was admitted that a sale was necessary for that purpose, but it was maintained that the execution of poinding created a *nexus* on the poinded goods, which the poinding creditor was entitled to make effectual at any time thereafter, so long as it could not be shown that he had abandoned the poinding. I do not know any authority for such a proposition, the effect of which would be to place poinded goods *extra commercium*, so to speak, for an indefinite period.

I do not see how this question could have arisen prior to the Act 54 Geo. III., cap. 137, because prior to that statute the officer at the time of executing the poinding, failing payment of the debt, handed over the *ipsa corpora* of the goods poinded to the poinding creditor at the appraised value. It was by that statute that the goods were, for the first time, directed to be left in the hands of the debtor, and provision made for the sale of the goods and completion of the poinding. The matter is now regulated by the Act 1 and 2 Vict. cap. 114. It appears to me that the provisions of both statutes clearly indicate that the poinding shall be completed without undue delay. Thus by sec. 25 of the last-named statute the officer is directed to report the poinding to the sheriff within eight days of its execution. Then by the next section, on the execution being reported to the sheriff, he is directed, if required, to grant warrant to sell the goods by public roup, at such time and with such public notice of the sale as may appear to him most expedient for all concerned, at the sight of a judge of the roup to be named by him, and by the 28th section the judge of the roup must make a report

of the sale to the sheriff, and lodge in the hands of the sheriff-clerk the roup rolls, also within eight days of the sale.

Thus it will be observed that short and definite periods are appointed for the various steps of procedure necessary to complete the poinding. Then, again, it is not left in the discretion of the poinding creditor to determine when the goods poinded shall be sold; that is to be done by the sheriff, who is to fix the time most expedient for all concerned, and it is to be done on the execution being reported to him. That does not appear to me to mean that he may do so at any time, no matter how long after the execution has been reported to him. If it were so, it would put it largely in the power of the creditor to determine when the sale should take place, and at a time most expedient for himself, which is not what I think the Act intended. I am therefore of opinion that if the appellant were now to apply, or had applied at any time after lodging her affidavit and claim in the cessio for a warrant to sell the poinded goods, the Sheriff could not competently have granted it. Her inchoate diligence, it appears to me, cannot now be completed, and therefore can afford no ground for a preferable ranking.

If undue delay in carrying through the sale of the poinded goods be a relevant consideration at all in such cases, there can be no doubt of its application in this case.

I therefore think the appeal should be dismissed.

LORD M'LAREN—I agree. I think the principle that regulates cases of this kind is, that while an executed poinding does in a certain sense give a preference, it is only to this extent, that the creditor, notwithstanding bankruptcy, is entitled to follow out his inchoate diligence and thus make his preference secure. But it is a condition that he follows it out in accordance with the provisions of the statutes regulating personal diligence and without undue delay. In the present case the delay has been such as to make it altogether inequitable that any such preference should be recognised.

LORD KINNEAR—I am of the same opinion. I do not think it necessary to determine whether Mr Bell's criticism of the case of *Tullis* v. *Whyte*, which was referred to in the course of the argument, is correct or not, both because that decision proceeded upon the construction of regulations which are not identical with those of the statute now in force, although they are very similar to them, and also because in either view of the question discussed by Professor Bell the appellant's diligence is inept. The decision was that the property of poinded goods was not transferred until the sale was completed and a note of sale thereafter lodged with the sheriff-clerk. Mr Bell thought that the messenger's execution was an adjudication of the property, and therefore that it was the completion of the diligence, the subsequent sale not being so much the point of completion as a necessary adjunct, without which everything which had gone before became useless. But in either view it was indispensable for the efficacy of the diligence that the goods should be sold or judicially delivered within the appointed time. There may be cases in which the distinction may be material, but in the present case it appears to me to be of no importance whether the transference of property in the poinded goods was still incomplete when the officer's execution was reported, or whether, being provisionally complete, it was defeated by the invalidity of the subsequent steps of the diligence, or by the appellant's delay in obtaining a valid warrant of sale. There can be no question at all that the warrant of sale which he did obtain was inept, because it did not satisfy the provisions of the statute. I think with the Sheriff-Substitute that it is unnecessary to decide whether that defect might have been remedied if it had been discovered within a reasonable time. The question would have been whether the application for a new and valid warrant in place of the inept warrant that had been granted, was or was not made in such circumstances as to be fairly within the condition of the statute, that the warrant must be granted upon the report of the execution. But however that may be, I entirely agree with your Lordships, for the reasons stated by Lord Adam, that the application for a new warrant more than a year afterwards is too late, and that to grant a warrant at the time when the arrangement was made by the appellant and the trustee with the holder of the goods could have been altogether beyond the powers conferred upon the Sheriff by the statute.

It appears to me, therefore, that at that time the property of the poinded goods had not been transferred to the creditor but still remained with the debtor, and that it was too late for him to convert his inchoate diligence into a complete adjudication by obtaining a new warrant.

The appellant's counsel argued that it was not necessary that there should be an adjudication and transference of the property in order to a valid poinding, but that the poinded goods were affected by what he described as a *nexus* by virtue of which they must be detained in the hands of the owner, subject to the creditor's right to sell whenever he might think fit to apply to the sheriff for a warrant. Now, I agree with what Lord Adam has said, that there is no authority for that proposition, and I think it altogether inconsistent with the nature and operation of the diligence of poinding, because it is elementary that poinding operates as an adjudication or transference of the debtor's goods to the creditor, and if the creditor does not succeed in obtaining an effectual transference he takes nothing by his proceedings.

The notion that the goods can be subject for an indefinite period to an attachment which is ineffectual to give them to the creditor, but effectual to prevent the debtor dealing with them, or to prevent other creditors obtaining right to them, appears to me to be entirely inconsistent with all authority. It is quite true that the Per-

sonal Diligence Act, like the previous statute of George III, prohibits the owner of the goods, the debtor, from disposing of them during the period for which they are left in his possession between the execution of the poinding and judicial delivery of the goods or the execution of the warrant for sale, and during that time it makes all unlawful intromitters liable to imprisonment, and to pay double the appraised value of the goods if they are not made forthcoming. But then that is a statutory provision for the purpose of preventing the regulations which the statute introduces for the better protection of the debtor, and his other creditors, from defeating the diligence altogether, by preventing the goods from being carried away from the poinding creditor during the prosecution of the various steps of procedure which the statute introduced for the purpose of making his right effectual with greater safety to other interests. But that provision necessarily falls if the provisions of the statute for the execution of the diligence itself are not rigidly complied with. The efficacy of the prohibition depends entirely upon the efficacy of the procedure for adjudging the goods; and if the creditor has failed to carry out that procedure so as to obtain a good adjudication, the incidental provision against interference in the meantime with the poinded goods can have no effect whatever in giving him any other right which could come in place of the right which a complete adjudication would have given him. I have no doubt at all, for these reasons, that the poinding in this case was inept, and that the Sheriff's judgment was right.

The LORD PRESIDENT was absent.

The Court dismissed the appeal.

Counsel for the Appellant—W. Campbell—Graham Stewart. Agents — Carmichael & Miller, W.S.

Counsel for the Respondent — Hunter.

VALUATION APPEAL COURT.

Wednesday, February 19.

(Before Lord Moncreiff and Lord Kyllachy.)

ST CUTHBERT'S CO-OPERATIVE ASSOCIATION *v.* ASSESSOR FOR EDINBURGH.

Valuation Cases — Composite Building — Valuation by Percentage of Cost.

Premises in the occupation of the proprietors contained in the same building a bakery, workshops, stables, and a refrigerator. There was no other building of an analogous construction in the burgh. The assessor valued the premises as a *unum quid*, by taking a percentage of their cost. The proprietors maintained that the several portions should be valued as separate subjects, by comparison with the value of similar subjects in the burgh. *Held* that the principle adopted by the assessor was right.

This was an appeal by the St Cuthbert's Co-operative Association, Edinburgh, against a determination of the Magistrates and Council of Edinburgh, whereby premises belonging to the Association, and situated at High Riggs, were entered in the Valuation Roll as of the yearly value of £1200.

The premises in question, which were in the occupation of the proprietors, consisted of a range of buildings, including a bakery, workshops, stables, a refrigerator, and all other requirements necessary for carrying on the varied business of the Association. There was no other similar or analogous building in Edinburgh by comparison with which the yearly value might be ascertained.

The Assessor for Edinburgh fixed the value of the premises at £1625, a sum which he arrived at by taking 4 per cent. on the cost of the site, 7 per cent. on the cost of the buildings, and 7 per cent. on the cost of the fixed machinery. The Co-operative Society appealed against this valuation, and led evidence before the Magistrates to show the yearly value of similar bakeries, workshops, stables, and refrigerators as separate subjects. They contended that the proper principle of valuation was to ascertain the value of each of these separate portions of the premises by comparison with similar though independent structures in other parts of the town, and to add together the four values thus obtained.

The Magistrates preferred the principle adopted by the Assessor, but considering that, in the circumstances of the case, the valuation fixed by him was too high, they reduced it to £1200.

The Co-operative Society appealed.

Argued for the appellants—The Assessor had adopted a wrong principle. The various parts of the premises were really separate industries, and should be valued by comparison with similar subjects. It was a mere coincidence that they were combined in the same premises, and it was no advantage to the appellants to have them so combined. A percentage on the cost of the subjects was not an admissible principle of valuation—*Annandale & Son*, March 14, 1867, 11 Macph. 977; *Kinross and Milnathort Gas Light Company* v. *Assessor for Kinross*, May 30, 1890, 17 R. 850, *per* Lord Trayner.

The respondent was not called upon.

At advising—

LORD KYLLACHY—I see no reason to doubt that the decision of the Magistrates in this case was right. I cannot affirm that they were wrong in declining to break up this building into sections, and to value each of these sections separately. Nor can I say that in the circumstances they were wrong in valuing the subject by taking a percentage upon the cost. It does not appear that any other or better means of