The defence is a denial that the pursuers have truly performed their part of the agreement. Now to say that pursuers have not truly performed their part of a bargain is an assertion which may mean various things, and here it does not mean that they did not insert the advertisements in question, but that they did not place them on cars which truly corresponded to the cars mentioned in the contract. The contract was an agreement to take six glass slides on the electric cars running at Dumbarton, and the defence is that owing to a change in the arrangements the cars upon which the advertisement was confessedly put were not, in the true sense of the words, electric cars "running at Dumbarton."

The real controversy, accordingly, between the parties is the question, what is in law the true construction of the contract; and one sees that though the sum sued for is under £50 the real question is not as to this sum of less than £50, but as to the meaning of a contract which extends over a period of five years and obviously involves a much larger sum than £50. That being so, the question before us is whether (the Sheriff having giving judgment) an appeal to this Court is competent.

It is urged that no appeal is competent, on the ground that this is a summary cause, and under section 8 of the Sheriff Courts (Scotland) Act 1907 an appeal in such causes is competent only on questions of law and where leave has been given by the Sheriff to appeal; and the Sheriff has not given leave here. The section, however, on which the matter really turns is the definition clause, section 3 (i) (1), which defines summary cause as including actions "for payment of money exceeding twenty pounds, and not exceeding fifty pounds, exclusive of interest and expenses." Now I do not think that this is an action for payment of money alone, and I think that a summary cause in the sense of that section must mean an action for payment of money and nothing else. I am of opinion, therefore, that it follows by analogy that there is involved the long series of decisions we have given on the question of value, namely, that the true value cannot always be found on the face of the conclusions of the summons or other writ. Accordingly I am of opinion that this is not properly a summary cause, and that under section 28 of the Sheriff Courts Act the appeal to this Court is competent.

LORD KINNEAR—I agree.

LORD JOHNSTON—I also agree. I think the present case is governed by the case of *Stevenson* v. *Sharp* (1910 S.C. 580), to which it is very similar. The ground of my opinion in that case equally I think applies here. That action was founded upon a letter of obligation, and what I said there was this—"When the letter on which this claim is founded is looked at, it is at once apparent that it governs not merely the pursuer's claim of interest for the half-year ending Martinmas 1908, but that for subsequent half-years. The pursuer cannot succeed in her claim without obtaining a favourable interpretation of the letter of obligation founded on." And on such interpretation more depended than the mere sum sued for in the action. In the present case I think the pursuers cannot get decree in their favour without obtaining a favourable interpretation of the contract on which they sue, and equally more turns on that interpretation than the mere sum sued for in the action. I am of opinion, therefore, that the two cases are on all fours, and that the decision in *Stevenson* v. *Sharp* should be followed here.

LORD MACKENZIE—I agree with your Lordship in the chair.

The Court repelled the objection.

Counsel for Pursuers (Appellants)—Wilton. Agents—Henderson & Mackenzie, S.S.C.

Counsel for Defender (Respondent)—J. R. Christie. Agents—Simpson & Marwick, W.S.

Tuesday, December 13.

FIRST DIVISION.

[Lord Dewar, Ordinary on the Bills.

CAMPBELL *v.* WILLIAM TURNER & SONS' TRUSTEE AND OTHERS.

Bankruptcy — Revenue — Poor — School — Right in Security—Sequestration—Diligence—Poinding of the Ground—Poinding of the Ground Subsequent to Sequestration—Order of Preference of Collector of Customs and Excise, Collector of Poor and School Rates, and Superior—Revenue Act 1884 (47 *and* 48 *Vict. cap.* 62), *sec.* 7 (2) *—Poor Law Amendment* (*Scotland*) *Act* 1845 (8 *and* 9 *Vict. cap.* 83), *sec.* 88—*Education* (*Scotland*) *Act* 1872 (35 *and* 36 *Vict. cap.* 62), *sec.* 44.

The Revenue Act 1884, sec. 7 (2), enacts — "No moveable goods and effects belonging to any person in Scotland at the time any of the duties or land tax became in arrear or were payable shall be liable to be taken by virtue of any poinding, sequestration, or diligence whatever, or by any assignation, unless the person proceeding to take the said goods and effects shall pay the duties or land tax so in arrear or payable, provided such duties or land tax shall not be claimed for more than one year. . . ."

The Poor Law Amendment (Scotland) Act 1845, sec. 88, enacts—"The whole powers and rights of issuing summary warrants and proceedings, and all remedies and provisions enacted for collecting, levying, and recovering the land and assessed taxes, or either of them, and other public taxes, shall be held to be applicable to assessments imposed for the relief of the poor; . . . and all assessments for relief of the

poor shall in case of bankruptcy or insolvency, be paid out of the first proceeds of the estate, and shall be preferable to all other debts of a private nature due by the parties assessed."

The Education (Scotland) Act 1872, sec. 44, puts school rates in the same position as poor rates.

Held by the Lord President and Lord Kinnear (Lord Johnston *reserving* his opinion) (1) that a poinding of the ground fell within the category of "diligence whatever," and (2) that the right of the Crown to claim payment of its taxes out of the proceeds of a poinding of the ground in priority to the superior had been communicated to the collector of poor and school rates; but *opinions reserved* as to the extent of the right of the Crown and of the collector of poor and school rates to enforce payment by interference with the diligence of the superior or of a heritable creditor where there were sufficient funds to meet their claims without prejudicing such creditor's right to his own security.

North British Property Investment Company v. *Paterson*, July 22, 1888, 15 R. 885, 25 S.L.R. 641, *followed*.

Bankruptcy — Burgh — Police — Right in Security — Superior and Vassal — Diligence—Poinding of the Ground—Burgh Assessments — Water Rates—Edinburgh Municipal and Police (Amendment) Act 1891 (54 *and* 55 *Vict. cap.* cxxxvi), *sec.* 71—*Edinburgh and District Water-Works (Additional Supply) Act* 1895 (58 *Vict. cap.* xxvii), *sec.* 48.

The Edinburgh Municipal and Police (Amendment) Act 1891, sec. 71, enacts—"All rates and assessments imposed under the Edinburgh Municipal and Police Acts shall, in the case of bankruptcy, insolvency, or liquidation, be a preferable claim to all debts of a private nature due by the person or persons assessed, or by the person or persons liable in such assessments." The Edinburgh and District Water-Works (Additional Supply) Act 1895, sec. 48, makes similar provisions regarding the water rates.

The estates of a firm and of the individual partners thereof were sequestrated, and a trustee was appointed conform to act and warrant of the Sheriff. At the date of sequestration the feu-duties due by the firm in respect of certain plots of land were in arrear for several terms, and that for the current term was also unpaid, and the bankrupts were also in arrear with the taxes and rates payable to the collectors of burgh assessments and of water rates. After the act and warrant of the Sheriff the superior raised a summons of poinding of the ground, and called, *inter alios*, the trustee. No defences were lodged and decree was pronounced. The superior and the trustee then agreed that the moveable plant on the ground should be sold by the trustee, and that he should give effect in the sequestration to any preference competent to the superior in virtue of the poinding of the ground.

Held that the superior's claim for the current half-year's feu-duty and for one year's arrears was preferable to the claims of the collector of burgh assessments and of the collector of water rates, because the preference given to them over debts of a private nature was only in the sequestration, whereas the vesting clause only transferred the estate of the debtor to the trustee subject to preferential securities, of which the right of the superior to attach by a poinding of the ground so long as the goods were on the ground was one.

Bankruptcy—Superior and Vassal—Diligence—Poinding of the Ground—Conveyancing (Scotland) Act 1874 *Amendment Act* 1879 (42 *and* 43 *Vict. cap.* 40), *sec.* 3—*Conveyancing (Scotland) Acts* (1874 *and* 1879) *Amendment Act* 1887 (50 *and* 51 *Vict. cap.* 69), *sec.* 2.

The Conveyancing (Scotland) Act 1874 Amendment Act 1879, sec. 3, enacts—"Notwithstanding the repeal of section one hundred and eighteen of the Bankruptcy (Scotland) Act 1856 by section fifty-five of the Conveyancing (Scotland) Act 1874, it is provided that . . . 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."

The Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act 1887 sec. 2, enacts—"Notwithstanding anything contained in the Bankruptcy (Scotland) Act 1856, the provisions of section three of the Conveyancing (Scotland) Act 1874 Amendment Act 1879 shall be applicable to all poindings of the ground by which moveables forming part of or belonging to a bankrupt estate, whether administered in Scotland or furth thereof, are sought to be attached or affected, and that whether the debts or securities in respect of which such poindings of the ground shall be brought shall have been constituted or granted by the bankrupt, or by any ancestor or predecessor of the bankrupt, or by any other person."

Held that the limitation of the effect of a poinding of the ground to the interest of the current half-yearly term

and one year's arrears applied to a poinding of the ground by the superior for feu-duties.

The Poor Law Amendment (Scotland) Act 1845 (8 and 9 Vict. cap. 83), sec. 88; the Education (Scotland) Act 1872 (35 and 36 Vict. cap. 62), sec. 44; the Conveyancing (Scotland) Act 1874 Amendment Act 1879 (42 and 43 Vict. cap. 40), sec. 3; the Revenue Act 1884 (47 and 48 Vict. cap. 62), sec. 7 (2); the Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act 1887 (50 and 51 Vict. cap. 69), sec. 2: Edinburgh Municipal and Police Amendment Act 1891 (54 and 55 Vict. cap. cxxxvi), sec. 71; and Edinburgh and District Water-Works (Additional Supply) Act 1895 (58 Vict. cap. xxvii), sec. 48, are quoted *supra in rubrics*.

Sir Archibald Spencer Lindsey Campbell of Succoth, Bart., a creditor in the sequestration of William Turner & Sons, builders, Edinburgh, carrying on business at Queen's Bay Hotel, Joppa, and of Gardiner Turner, James Turner, Andrew Scott Turner, and Alexander Turner, the individual partners thereof, appealed to the Lord Ordinary officiating on the Bills (DEWAR) against a deliverance, dated 11th March 1910, of Speirs Paton Sinclair, C.A., Edinburgh, the trustee on the sequestrated estates of the said firm and its said partners.

Answers were lodged for (1) the Collector of Poor and School Rates, (2) the Collector of Burgh Assessments, and (3) the Collector of Water Rates. Thereafter the trustee lodged a minute (No. 15 of process) in which he stated that as his deliverance was supported by the above respondents he was advised it was unnecessary for him to lodge answers or to intervene actively in the process.

The following narrative of the *facts* in the case is taken from the opinion of the Lord President—"The appellant, Sir Archibald Campbell of Succoth, is the superior of two plots of ground of respectively some twelve and two acres in extent, lying in the City of Edinburgh and within the City Parish thereof. The vassal of these plots of ground was Andrew Scott Turner, but he truly held them for behoof of his firm of William Turner & Sons. That firm also held numerous other properties in various parts of the City of Edinburgh.

"On 12th March 1909 the estates of the firm and the individual partners were sequestrated, and Sinclair was appointed trustee in the sequestration, conform to act and warrant of the Sheriff of date 14th April 1909. At the date of the sequestration the feu-duty payable in respect of the said plots was in arrear for several terms, and the current term was unpaid. Accordingly in the end of May or beginning of June Sir Archibald Campbell raised an action of poinding of the ground to which he called the trustee. No defences were lodged, and decree was obtained on 26th June 1909. It was then agreed between Sir Archibald Campbell and the trustee that the moveable plant on the ground should be sold by the trustee, and that he should give effect in the sequestration to any preference competent to Sir Archibald Campbell in virtue of the poinding of the ground. Such an agreement was eminently proper, and has been sanctioned by the Court in many cases. It leaves the matter, however, to be dealt with precisely as if Sir Archibald Campbell had gone on to sell the plant and had been interdicted by the trustee, or as if the trustee had advertised the plant for sale and had been interdicted by Sir Archibald Campbell. The sum realised by the trustee was some £1400, the claim of Sir Archibald Campbell £873 odds. The bankrupts were, at the time of the sequestration, in arrear with their taxes and rates due in respect of the various properties held by them in Edinburgh. The collectors of these taxes and rates are (1) the Collector of Customs and Excise, (2) the Collector of Poor and School Rates, (3) the Collector of Burgh Assessments, and (4) the Collector of Water Rates. All these persons appeared before the trustee and claimed a preferential ranking.

"The trustee issued a deliverance, against which the present appeal has been taken. First of all, he discriminated between the two parts of the appellant's claim. The sum due for the current half-year and for one year before—in other words, three half-years' feu-duties—together with the expenses of the poinding of the ground, amounting in all to £549, 11s. 4d., he admitted to be preferable as against ordinary creditors, the balance of £324, 14s. being entitled only to an ordinary ranking. Secondly, the preferable creditors he ranked in the following order—first, Customs and Excise, and Poor and School Rates; second, Burgh Assessments and Water Rates; third, the appellant. The result of this was to exhaust the fund of £1400 and to leave £270, 14s. 4d. of the appellant's preferential claim unsatisfied.

"The appellant complains of this result; but the deliverance is upheld by (1) the Collector of Poor and School Rates, and (2) the Collector of Burgh Assessments and Water Rates. The Crown does not appear."

On July 15th 1910 the Lord Ordinary on the Bills (DEWAR) pronounced this interlocutor—"Refuses the appeal: Sustains the deliverance of the trustee in bankruptcy, and decerns: Finds the appellant liable to the creditor respondents in expenses, and to the trustee for expenses of process to the date of lodging the minute, and thereafter for the expense incurred by him in watching the case on behalf of the estate," &c.

Opinion.—"The appellant is superior of certain areas of ground which were feued to William Turner & Sons, builders, Edinburgh. A portion of said ground was appropriated as a building yard.

"On 12th March 1909 the estates of the said firm were sequestrated, and Mr Speirs Paton Sinclair, C.A., was appointed trustee.

"The appellant raised an action of poinding of the ground against the trustee and the said firm and individual partners thereof, for arrears of feu-duties due to him. The action was not defended, and the appellant obtained decree. The trustee

agreed to sell the moveable effects, and to give effect in the sequestration process to any preference over the proceeds acquired by the appellant by virtue of his decree.

"The appellant lodged an affidavit and claim with the trustee, claiming arrears of feu-duty due up to and including the term of Martinmas 1909. The amount of said claim is £875, 5s. 4d. The trustee has ranked £549, 11s. 4d. of it preferentially, and the balance (£324, 14s.) as an ordinary claim.

"But there are other claimants, and as the sums admitted to a preferential ranking exceeded the sum in the trustee's hands for distribution (£1400) he was obliged to frame a scheme of ranking. In said scheme he has ranked and preferred in the following order:—

I (1) The Collector of Customs and Excise, Edinburgh . . .	£288	19	0
(2) The Collector of Poor and School Rate, Edinburgh	356	8	9
II (1) Burgh Assessments, Edinburgh	444	1	0
(2) Edinburgh and District Water Trust Rates .	31	14	3
III The appellant for feu-duty, to meet whose admitted claim of £549, 11s. 4d. there was only left the sum of	278	17	0
	£1400	0	0

"The appellant maintains that the trustee has erred in not ranking him preferentially in terms of his whole claim, and that *in primo loco*.

"I am of opinion that this contention is not well founded.

"The clauses of the various Acts of Parliament to which the trustee gave effect, and upon which the respondents now found, are all to the same effect, viz., that in the case of bankruptcy, insolvency, or sequestration, all rates and taxes shall be preferable to all other debts of a private nature due by the party assessed.

"The appellant maintained in argument that his claim was different in character from that of all other creditors; that it did not spring from the debtor, but arose out of his right as superior in the land; that it was not a private debt, and that accordingly the sections upon which the respondents founded did not apply, and he referred me to the following authorities:—Bankton, ii, 5, 18, 22; Erskine, ii, 5, 2; *Royal Bank* v. *Bain*, 4 R. 985.

"These authorities show that creditors whose debts are *debita fundi*, and who have executed poindings, are preferable *inter se*, not according to the priority of their poindings, but according to the date of their infeftments. The superior poinding for feu-duties is preferred, because his right is founded on the original grant. But this does not appear to me to assist the appellant's argument. His debt is preferred, not because it is different in character from the others, but because his right in security is earlier in date. And even if it were different in character, it is still a debt of a 'private nature due by the party assessed,' and that I think is sufficient for the decision of this case.

"I am therefore of opinion that the trustee's deliverance is right and ought to be affirmed."

The appellant reclaimed, and argued—(1) The preferences given to poor rates, school rates, burgh assessments, and water rates over "debts of a private nature" had no application in a competition with a poinding of the ground by the superior, for his right over the moveables on the land was not a debt of a private nature but a *debitum fundi* reserved by him when the grant was made, the moveables on the land being mere accessories of the land—*Royal Bank* v. *Bain*, July 6, 1867, 4 R. 985, 14 S.L.R. 612, especially Lord Deas' opinion; *Sandeman* v. *Scottish Property Investment Co.*, June 29, 1885, 12 R. (H.L.) 67, 22 S.L.R. 850, Lord Watson's opinion; *Campbell's Trustees* v. *Paul*, January 13, 1835, 13 S. 237, especially Lord Mackenzie's opinion at 243; *Bell* v. *Cadell*, December 3, 1831, 10 S. 100; Bankton, ii, 5, 18, and 22; Ersk. ii, 5, 1 and 2; iv, 1, 10-12; Stair, iv, 23, 5. (2) The additional argument made by the poor and school rates, namely, that they had been put in the same position by the Poor Law Amendment Act 1845 (8 and 9 Vict. cap. 83), sec. 88, as the Crown were, and could take advantage of "any poinding, sequestration, or diligence whatever" was a startling proposition, because it might be prejudicial to the Crown, and the Poor Law Act of 1845 could hardly have contemplated the subsequent Revenue Act of 1884 (47 and 48 Vict. cap. 62). In any case, a poinding of the ground did not fall within the category, for it was not a poinding, nor even, they submitted, was it a diligence at all—*Campbell's Trustees* v. *Paul* (*cit. sup.*); *Bell* v. *Cadell* (*cit. sup.*); *Athole Hydropathic Co.* v. *Scottish Provincial Insurance Association*, March 19, 1886, 13 R. 818, 23 S.L.R. 570—where "execution" was under construction, and which was followed in *Anderson's Trustees* v. *Donaldson & Co., Limited*, 1907 S.C. 39, 45 S.L.R. 26; *Allan* v. *Cowan*, November 15, 1892, 20 R. 36, 30 S.L.R. 114. They asked the Court to review the *North British Property Investment Co., Limited* v. *Paterson*, July 12, 1888, 15 R. 885, 25 S.L.R. 641, as being inconsistent with the *Athole Hydropathic Company* (*cit. sup.*) (3) The preferable right of the superior was not limited to the rent of the current half-year and one year's arrears. The history of the matter was that the Bankruptcy Act 1856 (19 and 29 Vict. cap. 79), sec. 118, limited the poinding of the ground of a heritable creditor within sixty days of bankruptcy to one and a half year's interest on the debt. That was repealed by the Conveyancing Act 1874 (37 and 38 Vict. cap. 94), sec. 55. The Conveyancing Amendment Act 1879 (47 and 48 Vict. cap. 40) practically re-enacted section 118 of the Bankruptcy Act. That was followed by the Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act 1887 (50 and 51 Vict. cap. 69), sec. 2, which was passed in consequence

of *Millar's Trustees* v. *Miller & Son's Trustees*, February 5, 1886, 13 R. 543, 23 S.L.R. 363, which had held that the limitations with reference to poindings of the ground applied only to the heritable creditors of the bankrupt and not to the creditors of the ancestors of the bankrupt. The Act of 1887 had made the limitation apply also to heritable creditors of ancestors of the bankrupt, but it was not intended to affect and did not affect the rights of the superior. The proviso in favour of the superior in section 102 of the Bankruptcy Act still stood unaffected.

Argued for the respondents, the Parish Council of Edinburgh, and the Collector of Poor and School Rates of the said parish—(1) The superior was precluded from taking the moveables on the ground by virtue of "any poinding, sequestration, or diligence whatever"—Revenue Act 1884, sec. 7 (2)—except on payment of poor and school rates, for these were by the Poor Law Amendment (Scotland) Act 1845, and the Education (Scotland) Act 1872, respectively, put in the same position as Crown taxes. A poinding of the ground might not be a poinding but it certainly came under "diligence whatever." The case was ruled by *North British Property Investment Company* v. *Paterson* (*cit. sup.*), the Revenue Act 1884, sec. 7 (2) coming in place of the Taxes Management Act 1880 (43 and 44 Vict. cap. 19), sec. 88. In fact the words of the later statute more clearly covered a poinding of the ground than those of the earlier. They accordingly maintained they were entitled to rank *pari passu* with the Crown. The opinions of the Lord President and Lord Kinnear in *Argyll County Council* v. *Walker*, 1909 S.C. 107, 46 S.L.R. 107, showed that they regarded the decision in *North British Property Investment Company* v. *Paterson* (*cit. sup.*) as applicable to any poinder of the ground. (2) In any event the superior's claim was for "debts of a private nature"—Bell's Prin., secs. 697, 699, and 2284; *Royal Bank* v. *Bain* (*cit. sup.*). (3) In any case the limitation of the effect of a poinding of the ground to the interest of the current half-yearly term and one year's arrears of interest in the Conveyancing (Scotland) Act 1874 Amendment Act 1879, sec. 3, was by the Conveyancing (Scotland) Act (1874 and 1879) Amendment Act 1887, sec. 2, made applicable to the poinding of the ground of a superior, for he fell under the last words "any other person."

Argued for the Collector of Burgh Assessments and for the Collector of Edinburgh and District Water Trust—(1) The claim of the superior was for a debt—Bankton, ii, 5, 18-22; *Hyslop* v. *Shaw and Others*, March 13, 1863, 1 Macph. 535, Lord Deas at 580 and 581—and for a debt of a private nature, because what gave rise to the superior's claim was the vassals failure in the personal obligation—*Maguire* v. *Burges*, 1909 S.C. 1283, Lord President Dunedin at 1289, 46 S.L.R. 925; *Aiton* v. *Russell's Executors*, March 19, 1889, 16 R. 625, Lord President Inglis at 629, 26 S.L.R. 478; Bell's Prin., sec. 700. (2) In any event the superior's right was limited to the interest of current half-year and one year's arrears as argued for the Collector of School Rates (*supra*).

Counsel for the trustee intimated that he was merely watching the case and presented no argument.

At advising—

LORD PRESIDENT—[*After narrating the facts ut supra*]—The Collector of Poor and School Rates bases his claim on section 88 of the Poor Law Act of 1845 (8 and 9 Vict. c. 83), and section 44 of the Education Act of 1872 (35 and 36 Vict. c. 62). Section 88 is in the following terms:—[*quoted in the rubric, supra*]. The Education Act puts school rates in the same position as poor rates.

It will be at once noticed that the privileges here given are twofold. First, there is a privilege by reference to the powers of the Crown, and second, there is a direct enactment that in bankruptcy and insolvency all assessments shall be paid out of the first proceeds of the estate, and shall be preferable to all debts of a private nature.

It will be convenient to direct attention to the latter of the provisions first, because it is analogous to the provision on which the collectors for the burgh assessments and water rates based their claims. It will be sufficient to quote the terms of section 71 of the Edinburgh Municipal Act of 1891 (54 and 55 Vict. c. cxxxvi), which is as follows:—"All rates and assessments imposed under the Edinburgh Municipal and Police Acts shall, in the case of bankruptcy, insolvency, or liquidation, be a preferable claim to all debts of a private nature due by the person or persons assessed, or by the person or persons liable in such rates and assessments." The clause in the Water Company's Act is practically the same.

It is clear from the enactments that this preference is given in bankruptcy, insolvency, or liquidation—that is to say, in a process of distribution. Therefore if effect is to be given to it the property must fall into the process of distribution, *i.e.*, in this case into the sequestration. Counsel for the rate collectors admitted this, and I think the admission was right, for otherwise, if the mere existence of insolvency was enough to set up the claim as against any property of the bankrupt, the claim would be good if made against a heritable creditor selling a property under a bond and disposition in security—an idea that has never occurred to anyone during the 150 years since sequestration in bankruptcy was introduced. It would also be distinctly in the face of the recent judgment of this Division in *Argyll County Council* v. *Walker* (1909 S.C. 107).

The whole point therefore comes to turn on whether the poinder of the ground is bound to claim in the bankruptcy or liquidation at all. If he is, it is, I think, reasonably clear that the debt due to the proprietor is a debt "of a private nature." I have already pointed out that the question is only raised in the sequestration in the

strict sense of the word for convenience and by agreement. Strictly, it is raised as between the proprietor seeking to carry off the goods and the trustee seeking to retain them, and to make good the value for distribution in the sequestration.

I am of opinion that this question is settled by an unbroken chain of authority in favour of the superior. I need not examine too minutely the nature of the ancient diligence of poinding of the ground. It is enough to say that originally the superior in right of his infeftment seized at his own hand the moveables on the ground. In process of time he was so far restrained as to be obliged to make good his right by resort to process of law, namely, a poinding of the ground. If he did that his right was good against any form of mere personal diligence not already carried to a final conclusion at the instance of an ordinary creditor. The whole matter is most exhaustively treated in one of his lectures by Walter Ross, who admits, while he deplores, the extent of the remedy to which the creditor in a *debitum fundi* was entitled.

I may pass at once to the time when the sequestration statutes were introduced and when actually a competition arose between the superior—to avoid repetition I shall assume that "superior" here includes heritable creditors in a *debitum fundi*—and the trustee in the sequestration. One of the first attempts made by a poinder of the ground to assert extravagant rights was unsuccessful. In the case of *Hay* v. *Marshall* (1824, 3 S. 223 (157)), where the estate had been sold by the trustee, the heritable creditor tried to assert a preference in the bankruptcy without ever having executed a poinding at all. He based his argument on the ancient nature of the heritable creditor's right, but in this contention he was unsuccessful, and the judgment was affirmed on appeal (1826, 2 W. & S. 71).

Soon after this the case of *Bell* v. *Cadell* (1831, 10 S. 100) was tried. In that case poinding of the ground had been raised and decree obtained before the date of, but within sixty days of, the sequestration. It was decided that the clause of the then current statute cutting down poindings within sixty days of the sequestration did not apply to poindings of the ground, and the poinding creditor was preferred.

Next came the case of *Campbell's Trustees* v. *Paul* (1835, 13 S. 237). Here a summons of poinding of the ground was raised and executed after the sequestration and the appointment of the trustee, but before confirmation. The trustee accordingly relied, not on the cutting down of diligence, a point which was foreclosed by *Bell's* case, but on the vesting clause in his own favour, a clause which is essentially the same as section 102 of the Act under which we are at present, viz., the Bankruptcy Act of 1856 (19 and 20 Vict. cap. 79).

The same judgment was followed in the case of *Barstow* v. *Mowbray* (1856, 18 D. 846). The value of that judgment is twofold. In the first place, the case of *Campbell's Trustees* v. *Paul* was determined under the very old Bankruptcy Statutes and before the Statute of 2 and 3 Vict. cap. 41, whereas *Barstow* v. *Mowbray* was determined in precisely the same way under the latter statute. But there is also a very valuable judgment of Lord Deas in *Barstow* v. *Mowbray* to the effect that the vesting clause, whether you take it in relation to the heritage or to the moveables, is equally useless for the trustee in a competition with a poinder of the ground—in other words, that the preferable securities which are there spoken of apply precisely to the right a creditor has who executes a poinding of the ground while the moveables are still on the ground.

A case of precisely the same sort—that is to say, a poinding of the ground executed after the appointment of a trustee but before confirmation—was raised under the Bankruptcy Act of 1856 in the *Royal Bank* v. *Bain* (1877, 4 R. 985), and Lord Deas gave a long and weighty judgment, in which he reviewed the whole law and came to the same result. In that case the poinding creditor was a heritable creditor and not a superior, and there was therefore another point, which turned upon the combined effect of the 118th section of the Bankruptcy Act and the 55th section of the Conveyancing Act of 1874 (37 and 38 Vict. cap. 94), but as these sections practically cross each other out, the decision in *Bain* becomes a simple following out of *Campbell's Trustees* v. *Paul*, with the additional authority of Lord President Inglis and Lord Deas.

And, finally, in the case of *Dick's Trustees* v. *Whyte's Trustee* (1879, 6 R. 586), it was determined that the poinding of the ground, even if it was executed after the confirmation—the moveables being still on the ground—was good against the trustee. Lord Young specially pointed out that as the statute made the effect of the confirmation draw back to the date of the sequestration, the present case was the necessary corollary of the *Royal Bank* v. *Bain*.

Now against all this weight of authority there is really nothing except some expressions of opinion by Lord Young in the case of *North British Property Investment Company, Limited* v. *Paterson* (1888, 15 R. 885), in which he speaks as if a poinding of the ground subsequently executed cannot compete with the title of a trustee or of a liquidator. Not only is the whole weight of authority, as I have traced it, against these results, but his Lordship had for the moment entirely forgotten his own judgment nine years before in the case of *Dick's Trustees*, which was unfortunately not quoted by counsel, and which is diametrically opposed to his opinion. The case itself can be supported on other grounds, as I shall presently show.

It follows, therefore, that the collectors of the burgh rates and water rates have no right of preference over the superior, because their preference is only in the sequestration, whereas the vesting clause only transfers the estate of the debtor to

the trustee subject to preferential securities, of which the right of a superior to attach by a poinding of the ground, so long as the goods are on the ground, is one. In other words, the goods, so far as poinded for a just debt, never fall into the sequestration.

This principle would apply also in the case of the Collector of Poor and School Rates, if he had only the general clause at the end of the section I have quoted to rely on. He has, however, the earlier part of the section, and upon this two questions arise. First, are they given all the preferences of the Crown? The words are so wide that I think they are. In so far as authority goes, I think the case is covered by the decision in the *North British Property Investment Company* v. *Paterson*, though not by some of the reasons assigned for it; and also by the assumption on which the judgment is given in the case of *Sinclair* v. *Edinburgh Parish Council* (1909 S.C. 1353)—a judgment in which I did not take part, but in which I concur—because the whole of the argument in *Sinclair's* case turned upon this clause, and was directed to the competing claims for what I may call the actual management of the sale, between the trustee on the one hand and the Collector of Poor Rates on the other. Now one of the remedies of the Crown is the very peculiar one of taking advantage, without any question of insolvency, of anyone else's diligence on the moveables belonging to the Crown's debtor. This was given by an Act of George III, and continued in practically the same words by the Taxes Management Act of 1880 (43 and 44 Vict. cap. 19), and finally was regulated again in practically the same words by the Revenue Act of 1884 (47 and 48 Vict. cap. 62), sec. 7 (2). It was argued that a poinding of the ground did not fall within the enumerated diligences. I should be ready to hold that it was not covered by the simple word "poinding," but I cannot get myself freed from the generality of the expression "diligence whatsoever." It might perhaps have been debatable in old times, — though even as upon Stair's definition of what "diligence" is, there would be a great deal to be said for including it—and it may be more truly correct to call a poinding of the ground a real action rather than a diligence; but long before the days of the Taxes Management Act and the Revenue Act a poinding of the ground was spoken of by lawyers as a diligence and handled as such in treatises on the subject. It seems to me, therefore, that the right of the Crown to step in and say "Pay my debt out of the proceeds of your poinding," is communicated to the Collector of the Poor and School Rates. It is a very drastic remedy, and goes far beyond the right inaccurately described by Lord Moncreiff in the *North British Property Investment Company* v. *Paterson*, where he says, "The property must pay its taxes into whosoever hands it goes," for it applies to the debts due to the Crown or the collector of taxes in all cases, and even in this case the great bulk of the rates are exigible, not in respect of this property in which the goods are poinded, but of other property of the debtor; but the words are, I think, unambiguous, and the Act of Parliament must be given effect to. I wish, however, distinctly to reserve my opinion on the question whether in a case where there are other assets in a sequestration to which the otherwise preferential claim might be asserted, the Crown or the Poor Rates Collector can be allowed to exercise the right to the prejudice of the superior or the creditor whose preference extended only to the poinded goods. The same equities which are enforced in the matter of catholic securities might well be given effect to; but in this case we have been informed by minute that there are no such funds, and the question therefore does not arise. The effect of my judgment therefore is that the order of preference stated by the trustee is wrong, and that it ought to be, first, the Crown and poor and school rates; second, the superior; and third, the burgh assessments and water rates.

It remains, however, to consider the amount of the superior's claim which is entitled to preference as above. At common law it would be for all arrears and for the current term—that is to say, for the whole claim as made. It is, however, in my view, regulated by 50 and 51 Vict. cap. 69, section 2, which is in these terms—[*His Lordship read the section above quoted*]. I have no doubt that the genesis of that Act had to do with the heritable creditor alone, but here again I cannot avoid the generality of the words explicitly used, and I think, therefore, that it applies to the superior—in other words, that the trustee's determination in this matter was right. The effect, therefore, of my judgment is that the superior can only claim for the preferential amount as allowed by the trustee, but that he comes in front of the burgh assessments and the water rates.

LORD KINNEAR—I agree with your Lordship upon both points for the reasons stated, and I have nothing to add except that I agree also with the reservation by which your Lordship has qualified your opinion in favour of the Poor Law Collector and the Crown. I desire to express no opinion as to the extent of the Crown's right and the Poor Law Collector's right to enforce payment by interference with the diligence of a heritable creditor when there are sufficient funds to meet their claims without prejudice to such creditor's specific right to his own security.

LORD JOHNSTON—I entirely agree with your Lordship's judgment in so far as it deals with the rights of the superior in a question with the trustee in bankruptcy, and also in so far as it gives the superior a preference for the three half-years' feu-duty over the Burgh Assessor and the Collector of Water Rates. So far the judgment is in the circumstances all that is necessary for the full payment of all that the superior can claim as a preference. I therefore desire to reserve my opinion on the relative positions of the superior and

the Collector of Poor and School Rates and Customs.

LORD SALVESEN was sitting in the Second Division.

LORD MACKENZIE had not yet taken his seat in the Inner House.

The Court pronounced this interlocutor—

"Recal said interlocutor [of 15th July 1910]: Recal also the deliverance of the trustee in bankruptcy appealed against: Remit to him to rank and prefer the respective claimants as follows, viz.: *Primo loco*, (1) The Collector of Customs and Excise, Edinburgh, in the sum of £288, 19s., and (2) the Collector of Poor and School Rates, Edinburgh, in the sum of £356, 8s. 9d., together £645, 7s. 9d.; *secundo loco*, the appellant and reclaimer in the sum of £549, 11s. 4d.; and *tertio loco*, (1) the Burgh Assessments, Edinburgh, in the sum of £444, 1s., and (2) the Collector Edinburgh and District Water Trust Rates, Edinburgh, in the sum of £31, 14s. 3d., each to rank *pari passu* on any balance which may be available, and decern: Find the appellant and reclaimer entitled to the expenses of the appeal against the Collector of the Burgh Assessments and the Collector Edinburgh and District Water Trust conjunctly and severally: (2) Find the Parish Council of the City Parish of Edinburgh and the Collector of the Assessments for the Relief of the Poor and of the School Rates of said parish, entitled to expenses against the appellant to the extent of one-half, and against the said Collector of the Burgh Assessments and the said Collector of the Edinburgh and District Water Trust Rates conjunctly and severally to the extent of one-half: And (3), lastly, Find the trustee in bankruptcy entitled to the expenses of process to the date of lodging the minute No. 15 of process, and thereafter of watching the appeal, as a charge in the sequestration, and remit the accounts of said expenses respectively," &c.

Counsel for the Appellant and Reclaimer—Maclennan, K.C.—Mercer. Agents—Tait & Crichton, W.S.

Counsel for the Trustee in Wm. Turner & Sons' Sequestration — Mair. Agent—James Ayton, S.S.C.

Counsel for Parish Council of the City Parish of Edinburgh, and the Collector for the Assessments for the Relief of the Poor and of the School Rates of said Parish—Graham Stewart, K.C.—Kemp. Agents—R. Addison Smith & Company, W.S.

Counsel for the Collector of Burgh Assessments—Cooper, K.C.—W. J. Robertson. Agent—Thomas Hunter, W.S.

Counsel for Collector Edinburgh and District Water Trust—Cooper, K.C.—W. J. Robertson. Agent—William Boyd, W.S.

Friday, December 16.

FIRST DIVISION.

[Lord Dewar, Ordinary.

HENDERSON *v.* PATRICK THOMSON, LIMITED.

Process—Proof—Precognitions—Facilities for Taking Precognitions.

In an action of damages for slander against a firm of shopkeepers, before the record was closed, a motion was made before the Lord Ordinary for an order that facilities be granted to the pursuer for precognoscing the defenders' employees outwith the presence of any representative of the defenders. The Lord Ordinary having reported the point to the Inner House, *held* that the motion should be refused.

Observations (*per* the Lord President) upon the question whether such an order as that sought could be pronounced by the Court; and upon the propriety of pronouncing such an order upon an open record, *reference* made to granting diligence for recovery of documents at that stage, which would not be granted except in very special circumstances.

Opinion (*per* the Lord President) that employers have no right to insist that employees who are precognosced in a cause to which they are parties should be so precognosced in the presence of their agents.

On 14th November 1910 Miss Katherine Henderson, 1 Woodhall Terrace, Juniper Green, raised an action of damages for slander against Patrick Thomson, Limited, 15 North Bridge, Edinburgh.

Parties' averments upon the open record were as follows:—"(Cond. 2) On the afternoon of Tuesday, 8th November 1910, the pursuer visited defenders' shop at No. 15 North Bridge, Edinburgh, for the purpose of doing business in their millinery department, which is on an upper floor. At the same counter as the pursuer were one or more ladies, whose names and addresses are to the pursuer unknown, and which the defenders refuse to disclose although known to them. . . . (Cond. 3) After the pursuer had left the said counter, and while at the door making her way out of the shop, she was followed by one of the defenders' employees, William James Crear, who is believed to be in charge of said millinery department, and he there and then requested her to come back to 'clear' herself. The pursuer did not understand what he meant, and so informed him. He then explained about the loss of a purse, and asked her to accompany him back to the millinery counter, which, in compliance with his request, she did. It was thereupon explained to her by or on behalf of the defenders, that one of the ladies before referred to had lost her purse, and that she the pursuer was the only other person