can understand objections on the part of the buyer. But the statement clearly is a true one, and I think the attempt has entirely failed by which it was sought to make this statement not merely one of an obligation of £9, but a prospective obligation that the feu-duty should not exceed £9. If the defender has been led into all this by mere laxity in not examining the titles, we cannot allow the pursuer to suffer, all the more so as he was *in bona fide*, and showed that he was so by offering the titles for the purchaser's inspection. I cannot in any way think it possible for your Lordships to enforce the notice in this advertisement as a guarantee.

LORD ORMIDALE—I fear that this house will cost the defender a good deal more than it had done when he first entered on this transaction, but it is all his own fault, for he did not go, as suggested in the advertisement, and make the necessary inquiries from Mr Buchan as to the titles. To say the least of it, this was an imprudent mode of dealing. Both the pursuer and defender are non-professional men, and probably know little or nothing about titles and allocation or non-allocation of feu-duty. Perhaps the object was to save a little expense—if so, the defender has paid dearly for the economy. Looking at the contract so far as it was constituted, I think it may fairly be said that the advertisement will bear the meaning given to it, viz., that everything is under reference to the title-deeds. How, for instance, without such an inquiry, could the composition at entry be ascertained and many other essential points as to the feu? I concur with your Lordships in thinking the interlocutor reclaimed against should be recalled.

LORD GIFFORD—In this case I have had much doubt, and even now I concur with some feelings of difficulty. In the case of *Paton* v. *Steuart* there are certain differences, and those considerable. Had the feu-duty here been much understated, it would have rendered the seller's position a bad one. But Mr Smith here is to take the exact position of the seller, his predecessor. The whole feu-duty on 6½ acres is £32, 19s., or roughly, on one acre about £5. Again, the ground-annual on 3½ acres is £14, or on one acre £4. These two sums give the £9 named in the advertisement. Suppose that advertisement had said, "proportion of feu-duty and ground-annual effeiring to the house, and paid by me since I became proprietor, £9"—that would, I think, undoubtedly have been enough. If, then, every time that feu-duty has not been allocated the purchaser is entitled to call on the seller for his personal guarrntee in all time, it would never do. It is enough, I think, that the proportion be stated, as was here done.

The Court recalled the interlocutor of the Lord Ordinary, and decerned in terms of the first conclusion of the summons, with expenses.

Counsel for Pursuer (Reclaimer)—Balfour—Rhind. Agent—R. P. Stevenson, S.S.C.

Counsel for Defender (Respondent)—Asher—Alison. Agents—J. W. & J. Mackenzie, W.S.

Tuesday, June 6.

FIRST DIVISION.

[Sheriff of Edinburghshire.

GALLACHER *v.* BALLANTINE.

Diligence—Decree—Implement of Decree—Notice to Debtor—Bankruptcy (Scotland) Act 1856, *sec.* 12.

A got decree against B for £8, 1s. 1d., of which payment was made upon a decree of furthcoming, after arresting in the hands of C, a creditor of B. Thereafter, B having been meantime made notour bankrupt, B, another creditor, got decree against A for £7, 15s., the proportion of the £8, 1s. 1d. due to him, comparing his debt against B with A's. A then proceeded to get further payment of his debt by executing a poinding of B's goods under the former decree. In a petition at B's instance for interdict against a sale of the poinded goods, on the ground (1) that the original decree had been implemented by the diligence of arrestment, and that the poinding was therefore wrongous; (2) that no notice of the poinding had been given to B; and (3) that under the statute, section 12, D had not been *in titulo* to recover from A.—*Held* (1) that the decree had not been implemented, and that A merely held as a trustee for other creditors; (2) that no notice was necessary; and (3) that the merits of the question between A and D could not be opened up.

This was an appeal from the Sheriff Court of Edinburghshire in a petition at the instance of John Gallacher, slater, West Calder, against L. H. Ballantine, draper there (respondent) praying for warrant to prohibit the respondent "from carrying away, selling, or disposing of, or interfering with" certain articles of furniture belonging to the pursuer, which had been poinded under the following circumstances:—

On 6th January 1875 Ballantine obtained a small-debt decree against Gallacher for £8, 1s. 1d.; and on 16th January he used arrestments upon that decree in the hands of a person named Taylor, a debtor to Gallacher, and having pursued a furthcoming, on 5th March he got decree. On 13th March Gallacher, having been incarcerated by Field & Allan, another creditor, was made notour bankrupt. Three days thereafter Taylor, the arrestee, paid Ballantine £8, 1s. 1d. under the decree of furthcoming. Upon 18th June Field & Allan, relying on the provisions of the 12th section of the Bankruptcy Act, took proceedings against Ballantine, for the purpose of compelling him to give them a share of the fund which he had recovered, proportioned to £114, 18s. 1d., the amount of their debt against Gallacher, the ground of this proceeding, which was also in the Small Debt Court, being the notour bankruptcy of Gallacher. The Sheriff decided in favour of Field & Allan, and against Ballantine, and on 30th June Ballantine was compelled on that decree to part substantially with the whole amount which he had recovered. In these circumstances Ballantine, having in the result obtained no more than 8s. 8d., proceeded to use further diligence and execute a poinding

of Gallacher's furniture, which the latter was now by this petition endeavouring to stop.

The Sheriff-Substitute (HALLARD) pronounced the following interlocutor:—

"Finds that the poinding, of which complete execution by sale is now proposed to be stopped by interdict, proceeds on a decree pronounced *in foro* at the respondent's instance against the petitioner: Finds that the petitioner has failed to instruct *aliunde* payment of the debt due by him to the respondent under said decree except to the extent of the difference (being 8s. 8d.) between the sum of £8, 1s. 1d. arrested and recovered by the respondents in the hands of Taylor, a debtor of the petitioner, and the sum of £7, 12s. 5d., paid by the respondent out of said arrested sum to Field & Allan, a creditor of the petitioner, as verified by the decree and receipt thereunto appended, No. 8 of process: Finds that the petitioner has failed to shew that by selling the goods under the present poinding the respondent will recover more than will amount to the respondent's just debt against him after crediting him with the 8s. 8d. still remaining in the respondent's hands as aforesaid: Therefore refuses the prayer of the petition, dismisses it, and decerns.

"*Note.*—When the petitioner applied *ex parte* for interim interdict to stop his creditor's diligence against him on the ground of payment, he was told that unless he could instantly instruct his averment the diligence must be allowed to take its course. No interim interdict therefore was granted.

"A warrant of service, however, was given, and a record has now been closed. The result is, that while by the respondent's admission the petitioner instructs his averment of payment *aliunde*, he is obliged to take that admission with its qualification that the respondent having recovered £8, 1s. 1d. from the petitioner's debtor, Taylor, had immediately thereafter to pay £7, 12s. 5d. thereof to the petitioner's creditors, Field & Allan, leaving the difference, 8s. 8d., at the petitioner's credit in the hands of the respondent. Even without the production of any document, the petitioner founding on the respondent's admission would be bound to take its qualification along with it; but the documents are in process. It appears that Field & Allan incarcerated the petitioner, and then (under section 12 of the Bankrupt Act) made the respondent account to them for the fund arrested by him in proportion to the excess of their debt over his. Their debt was £114, 18s. 1d., while his was £8, 1s. 1d. The *pari passu* ranking left no more in his hands than 8s. 8d. It is not pretended that this small residue, when added to the value of the poinded goods, will more than pay the respondent's debt."

On appeal by the petitioner to the Sheriff, the foregoing interlocutor was adhered to.

Thereupon the petitioner appealed to the First Division of the Court of Session, and argued—The action of the poinder was wrongous, because the decree had been implemented by the payment upon the decree of furthcoming, and the petitioner should have been convened or notice sent him before a poinding was executed. Field & Allan were not creditors "judicially producing liquid grounds of debt in terms of the 12th section of the Bankruptcy (Scotland) Act 1856," and were not therefore entitled to recover from Ballantine.

Authorities—*Shiell* v. *Mossman*, November 7, 1871, 10 Macph. 58; *Rowan* v. *Mercer*, May 12, 1863, 4 Irvine 377; *Railton, &c.* v. *Gray*, February 4, 1837, 15 S. 487.

At advising—

LORD PRESIDENT—In [this case the facts are simple, but the order of the dates is very important. [*His Lordship then narrated the facts as above.*]

The first objection taken by the appellant is, that the original decree obtained by Ballantine against Gallacher was implemented and the debt paid. I think that is a bad objection; the debt was not paid, except to the extent to which it ultimately turned out that Ballantine was entitled to retain the sum paid to him. I agree with the argument of Mr Thorburn, that upon the 5th March, when Ballantine was paid the £8, 1s. 1d., he got payment, as trustee, for any creditor who might come in afterwards to make a claim under the operation of the statute.

The second objection is, that Ballantine was not entitled to go on with his diligence without some preliminary proceeding in the way of giving notice to Gallacher. I cannot find any authority for that in the statute, and the common law does not make it necessary. When a man gets a small-debt decree—the debtor being personally present—no charge requires to be given, but the decree operates as a warrant for every species of diligence, and if one kind of diligence is not sufficient, another may be used on the same warrant. The diligence of furthcoming has been insufficient in this case, and therefore the creditor requires to have recourse to the second diligence of poinding.

But, then, it is said, lastly, that Ballantine did wrong in paying away money to any extent, and that Field & Allan were not entitled to a *pari passu* preference in terms of the 12th section of the statute. That question entirely depends on the construction of the statute. The section is as follows—"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, if such arrestments are used on the dependence of an action or on an illiquid debt, they be followed up without undue delay; provided further, 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, and in case the first or any subsequent arrester shall in the meantime obtain a decree of forthcoming and preference, and thereupon shall recover payment, or a poinding creditor shall carry through a sale, he shall be accountable for the sum recovered to those who, by virtue of this Act, may be eventually found to have a right to a ranking *pari passu* thereon, and shall be liable to an action at their instance for payment to them proportionally, after allowing out of the fund the expense of recovering the same." The question is, whether Field & Allan are in the situation of creditors,

who by virtue of the Act have right to a ranking *pari passu* upon the arrested fund. Parties in the position of creditors of a notour bankrupt, if they have used the diligence of arrestment or poinding within sixty days before or four months after the constitution of the bankruptcy, are entitled to a *pari passu* ranking, but there is another class entitled to come in, viz., "parties 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." Now, what Feld & Allan did was to raise an action in the Small-Debt Court against Ballantine, and after the manner of a Small-Debt Court action, their complaint was in itself a printed form, but along with it there was produced an account which contained the substance of the pursuer's claim, and also the view in point of law upon which that claim was supported. They produced an extract registered protest for £86, 8s. 3d. and a decree for £28, 9s. 11d. against Gallacher, both certainly liquid grounds of debt, and in respect of these they claimed to be entitled to recover the portion of the £8, 8s. 1d. which corresponded to their debt, in comparison with the debt due by the pursuer. This summons was opposed by Ballantine, but the Sheriff gave decree in favour of Field & Allan, and affirmed the proposition that they, in respect of their liquid grounds of debt and by the operation of the 12th section of the statute, were entitled to recover £7, 15s., under deduction of 2s. 7d. of expenses. That sum represented the share of the fund of £8, 1s. 1d. to which Field & Allan were entitled in a *pari passu* ranking with Ballantine. That decree decided the question raised under the 12th section of the statute, and the decree is now final, and cannot be opened up.

I am therefore of opinion upon the whole matter that this diligence of poinding must be allowed to proceed, and that the Sheriff's interlocutor should be affirmed.

Lord Deas, Lord Ardmillan, and Lord Mure concurred.

The Court adhered.

Counsel for Petitioner (Appellant)—M'Kechnie. Agent—William Paterson, L.A.

Counsel for Respondent—Thorburn. Agents —Wallace & Foster, L.A.

Thursday, June 1.

FIRST DIVISION.

Sheriff of Roxburghshire.

APPEAL—DUKE OF ROXBURGHE AND OTHERS.

(Before Seven Judges.)

Church—Allocation of Area—Quoad sacra *Parish—Heritors—Act* 7 *and* 8 *Vict. c.* 44, *secs.* 8 *and* 9.

The parish of E. was disjoined *quoad sacra* from the parish of J. In a petition to allocate the area in the reseating of the parish church of J.—*held* (*diss.* Lord Deas, *dub.* Lord Mure) that the heritors of the *quoad sacra* parish were not entitled to claim an allotment corresponding to the territorial extent of their lands, but their claim for family sittings reserved.

Question, whether the *quoad sacra* heritors would still be liable for the maintenance and erection of the parish church?

Observations on case of *Drummond* v. *Heritors of Monzie, &c.*, 1773, M. 7920.

The parish of Jedburgh includes within it the royal burgh of Jedburgh and a large landward district. The parish church was the Abbey Church of Jedburgh, but that structure having fallen into disrepair, and requiring renewal, the late Marquis of Lothian agreed to be at the whole expense of building a new church on the virgin glebe of Jedburgh, of such size as to satisfy the heritors and presbytery of Jedburgh, which church, when completed, was to be handed over to the heritors to be held as the parish church of Jedburgh, the old Abbey Church becoming the property of the Marquis, to be kept as a preserved ruin.

Accordingly in November 1874 a contract of excambion was entered into between the present Marquis of the one part, and the heritors of the parish of Jedburgh of the other part, whereby the Marquis conveyed the newly-erected church, and the piece of the virgin glebe which he had feued from the presbytery, to the heritors, and received in exchange the old Abbey Church, under the obligation of preserving it as aforesaid.

A petition was thereupon presented to the Sheriff praying him to allocate the area of the new church. The only question of general importance, and which gave rise to the present appeal, was, whether the heritors of the *quoad sacra* parish of Edgerston, which had been disjoined from the parish of Jedburgh, were entitled to any share in the sittings of the new parish church.

The finding of the Sheriff as regards that matter was as follows:—"Finds that by decree of the Court of Teinds, dated the 21st day of February 1855, the church of Edgerston, situated within the parish, was, under and in terms of the Statutes 1707, c. 9, and 7 and 8 Vic., c. 44, sections 8 and 9, erected into a parish church in connection with the Church of Scotland, and a considerable portion of what was then the parish of Jedburgh was disjoined *quoad sacra* from the said parish, and along with small portions of the parishes of Oxnam and Southdean, —the whole constituting a district about seven miles in length by about three miles in breadth— erected into a parish *quoad sacra* in connection with the Church of Scotland, to be called now and in all time coming the church and parish of Edgerston: Finds that, in so far as regards the dividing and apportioning of the area and seatings of the new parish church of Jedburgh recently erected, the heritors of the lands so disjoined and erected into the parish of Edgerston *quoad sacra* are not to be considered as heritors of the parish of Jedburgh."

His note as regards that finding was as follows:—"Now, what is the effect of disjoining lands from a parish *quoad sacra*, erecting them into another parish, and attaching them to another church? The church of Edgerston is declared to be a parish church, and the minister and elders are to have and enjoy the status and all the powers and privileges of ministers and elders of such. No doubt this is only *quoad sacra*.