The Court accordingly recalled the Lord Ordinary's interlocutor, and found under the conclusions of the summons that the pursuer was entitled to recover from the defender a reasonable sum in name of expenses, and they made a remit to the Auditor to examine the whole accounts and report. The question of expenses was reserved.

Counsel for Pursuer (Reclaimer)—Asher—Keir. Agents—J. & R. D. Ross, W.S.

Counsel for Defender (Respondent)—Fraser—Scott. Agent—John Galletly, S.S.C.

Friday, July 6.

FIRST DIVISION.

[Bill Chamber.

ROYAL BANK OF SCOTLAND *v.* BAIN (BROWN'S TRUSTEE).

Bankrupt—Preference—Diligence—Poinding of the Ground—Conveyancing Act 1874, *sec.* 55—*Bankruptcy Act* 1856, *secs.* 102 *and* 118.

Held that the effect of the 55th section of the Conveyancing Act of 1874, which repeats the 118th section of the Bankruptcy Act of 1856, is to leave the 102d section of that Act as the rule for determining the preferences of the trustee and prior heritable creditors, and that by that clause a prior heritable creditor who executes a poinding of the ground after sequestration, but before confirmation of the trustee, has all his common law rights left to him, and therefore a right to the moveables upon the ground preferable to that of the trustee.

Thomas Brown, tailor in St Andrews, was sequestrated on 10th June 1876. The Royal Bank were heritable creditors of the bankrupt, conform to bond and disposition in security (dated and recorded in April 1872) in their favour over certain heritable subjects in St Andrews. On 16th June 1876 the Bank executed a summons of poinding the ground. On 30th June 1876 Mr James Bain was confirmed trustee on the bankrupt estate. He sold the heritable subjects and the moveables thereon.

The Bank made a claim against the bankrupt estate for £1049, 3s. 11d., as the balance due on a cash-credit account kept in their books in name of the bankrupt.

The trustee pronounced a deliverance in the following terms:—

"*First*, the Bank claim to be ranked and preferred upon (1) the price of the heritable subjects in the bond after deducting all claims thereon preferable to their claim; and (2) the price of the goods and effects upon the ground, which were, it is said, legally attached by the poinding of the ground in security of the debt, but to the effect of receiving full payment of the debt, with interest at the rate of 5 per cent. 'upon £1013, 10s. 5d. thereof, being principal, till payment.'

"With reference to the first part of this claim, that is, to be ranked preferably upon the price of the heritable property, the trustee, subject to the reservations in the last paragraph hereof, admits the same to the extent of £1000, and interest thereon from 10th June 1876, and rejects it to the extent of £49, 3s. 11d. The grounds of this rejection are these:—The account made up and certified in terms of the bond of credit and disposition in security sets out that the balance due to the Bank as at 10th June 1876 is £1049, 3s. 11d. The bond is for £1000 only, and interest thereon, but the account produced, with certificate appended, shows that the interest had been added to the principal. The effect of this was to convert the whole balance due into principal, and as that balance exceeds the sum for which the bond was granted, the claim falls to be rejected, as above mentioned. See the case of *Reddie* v. *Williamson*, 9th January 1863, 1 Macph. 228.

"With reference to the second part of this claim, that is, to be ranked preferably on the price of the moveable goods and effects upon the heritable subjects in virtue of the poinding of the ground, the trustee rejects the same, for these reasons—(1) The first deliverance in the sequestration is dated 10th June 1876, while the poinding of the ground was executed upon the 17th of the same month. The trustee regards the poinding as an attempt to create a preference or security after the sequestration, and he has not been referred to and knows of no authority which renders it competent to create such a preference or security. . . . .

"*Secondly*, the claim states that 'in the event of the said prices' (that is, the prices of the heritable property and moveable goods and effects attached by the poinding of the ground) 'not being sufficient to satisfy and pay the amount of the said debt and interest as aforesaid, the said Bank claim to rank upon the said sequestrated estate for the balance of the same which may remain unpaid.' The trustee, of course, admits the claimants' right to rank upon the sequestrated estate for any balance of the said sum of £1000 which may not be satisfied and paid out of the price of the heritage, and he would also have been willing to have admitted the claimants to a ranking on the sequestrated estate for the sum of £49, 3s. 11d. above mentioned, but he considers himself precluded from doing so by the terms of the claim. It is only in the event of the prices of the heritable and moveable property being insufficient to meet the debt of £1049, 3s. 10d. that the Bank claims to rank on the sequestrated estate, and the above sum of £49, 3s. 11d. must be rejected as a preferable claim whether there is a sufficient balance of said prices to meet it or not. It will, however, be open to the claimants to lodge an additional claim, and as there is not to be a dividend paid before next statutory period, they will not be prejudiced by not being ranked in the sequestrated estate now for the said sum of £49, 3s. 11d."

Against this deliverance the Bank appealed.

They pleaded—"(2) The appellants are entitled to be ranked and preferred, in terms of their affidavit and claim, upon the price of the goods and effects situated upon or within the said heritable subjects in St Andrews, in respect of the execution of their summons of poinding of the ground on 17th June 1876, and the trustee's deliverance rejecting their claim should be recalled. (3) The appellants are entitled to be ranked and preferred as ordinary creditors for the balance of their debt remaining unsatisfied out

of the prices of the said heritable subjects and goods and effects."

The trustee pleaded—"(4) The appellants are not entitled to any preference over the price of the moveable property under or in virtue of the summons of poinding the ground executed by them, in respect that the poinding having been executed after the date of the sequestration, was illegal and inept."

The Lord Ordinary on the Bills (ADAM) pronounced the following interlocutor:—

"*Edinburgh, 3d April* 1877.—The Lord Ordinary having heard counsel for the parties—(1) Sustains the deliverance of the trustee in so far as he has rejected the claim of the appellants to be ranked preferably on the price of the heritable property mentioned in the claim to the extent of £49, 3s. 11d.; (2) Recals the said deliverance in so far as the trustee has rejected the claim of the appellants to be ranked preferably on the price of the moveable goods and effects situated upon the said heritable subjects, in virtue of the poinding of the ground mentioned in the claim; and (3) in so far as he has not admitted their claim to be ranked on the sequestrated estate for the balance of the sums claimed which may remain unpaid in the event of the prices of the said heritable property and moveable goods being insufficient to satisfy the amount thereof, and ordains the trustee to rank the appellants in terms of their claim, except in so far as the trustee's deliverance has been sustained as aforesaid: Finds the appellants entitled to expenses, but subject to modification: Allows an account thereof to be lodged, and remits the same to the Auditor to tax and report; and decerns.

"*Note.*—I. The appellants are heritable creditors of the bankrupt Thomas Brown, conform to bond and disposition in security by him and others in their favour over certain heritable subjects in St Andrews, dated the 1st, 25th, and 26th, and registered the 29th, of April 1872. The bankrupt was sequestrated upon 10th June 1876. The appellants executed a summons of poinding the ground on the 16th of June 1876. The respondent was confirmed trustee on the sequestrated estates on the 30th of June 1876.

"It will be observed, accordingly, that the summons of poinding the ground was executed after the date of the sequestration, but before the date of the confirmation of the trustee, and the question is, Whether the appellants have thereby acquired a right preferable to that of the trustee over the moveables on the ground forming the subject of their heritable security?

"Had this case occurred prior to the Bankruptcy Act of 1839 (2 and 3 Vict. cap. 41), it is quite settled by the case of *Campbell's Trustees* v. *Paul*, 13th January 1855, 13 S. 237, that the appellants would have acquired a preferable right. That case decided that an heritable creditor who had raised and executed a summons of poinding the ground against his debtor in the natural possession of the estate after the sequestration, but before the confirmation of the trustee, had a real right in the moveables as accessories in the lands, and was entitled to a preference over the moveables, in competition with the trustee, to the full extent of his debt, principal and interest, covered by the heritable security. As this preference over the moveables was found in some instances to be extremely prejudicial to the interest of personal creditors, it was thought expedient to limit the heritable creditor's right to poind the ground and place it under proper regulations when the Bankruptcy Act of 1839 was passed—*Barstow* v. *Mowbray*, 18 D. 846, March 11, 1856.

"This was effected by the 78th, 79th, and 95th sections of that Act. That Act was repealed by the 2d section of the Bankruptcy (Scotland) Act 1856. The clauses in question, however, were substantially re-enacted by the later Act, of which they form sections 102 and 118.

"By the 102d section it is enacted that the act and warrant of confirmation in favour of the trustee shall *ipso jure* transfer to and vest in him, absolutely and irredeemably, as at the date of the sequestration, the whole property of the debtor, to the effect therein set forth. As regards the heritable estate, it is enacted that it shall be vested 'to the same effect as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment and in security of debt, subject to no legal reversion, had been pronounced in favour of the trustee and recorded at the date of the sequestration, and as if a poinding of the ground had then been executed, subject always to such preferable securities as existed at the date of the sequestration, and are not null and reducible, and the creditor's right to poind the ground, as is hereinafter provided.'

"The right reserved to the creditor to poind the ground is to be found in the 118th section of the statute, which provides 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, and no decree of maills and duties on which a charge has not been given sixty days before the said date, 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, or of obtaining a decree of maills and duties *after* the sequestration; but such poinding or decree shall, in competition with the trustee, be available for the interest only on the debts for the current half-yearly term, and for the arrears of interest for one year immediately before the commencement of such term.'

"The result of these enactments as regards poindings of the ground would appear to be to enlarge the rights of the trustee as against the heritable creditor, to the extent of giving him a preference which he had not before, in all cases where the poinding had not been carried into execution sixty days before the date of the sequestration, and of restricting the preference which the heritable creditor could acquire by poinding after sequestration, or within sixty days of it, to the interest on the debt for the current half-yearly term, and for the arrears of interest for one year preceding.

"Had this continued to be the law, the Lord Ordinary does not doubt that in respect of the execution of the summons of poinding the ground by the appellants in this case their right over the moveables on the ground would have been preferable to that of the trustee, but only for the interest on their debt for the current term, and for the arrears of interest for the preceding year

(*Budge* v. *Brown's Trustees*, 10 Macph. 958, July 12, 1872).

"But the 118th section of the Bankruptcy Statute was repealed by the 'Conveyancing (Scotland) Act 1874,' section 55 of which enacts that 'section one hundred and eighteen of "The Bankruptcy (Scotland) Act 1856" is hereby repealed; and it is provided that all heritable creditors who have been in possession under their securities, and whose rights to the rents collected by them has not been challenged by action previous to the commencement of this Act, shall be entitled to retain and apply all rents collected by them in the same manner as they might have done if the provisions of the section hereby repealed had not been enacted.'

"The repeal of the 118th section is unfavourable to the trustee, in respect that it deprives him of the preference which he might have acquired over a creditor whose poinding of the ground had not been carried into execution sixty days before the date of the sequestration.

"The question at issue between the parties in this case is, whether (as maintained by the appellants) the repeal of the 118th section has also the effect of restoring the law, as regards the rights of a creditor executing a poinding, to the state in which it was prior to the Bankruptcy Act of 1839, and so of enabling him to acquire or assert a preference for the whole amount of his debt by poinding after the date of sequestration? Or, whether (as maintained by the respondent) its effect is not to deprive the creditor of the right of acquiring or asserting any preference whatever by poinding after the date of the sequestration?

"The question appears to the Lord Ordinary to turn upon the construction of the vesting clauses of the Bankruptcy Act of 1856. The Act provides (section 102) that the whole heritable estate shall be vested in the trustee absolutely and irredeemably, as at the date of the sequestration, to the same effect as if a decree of adjudication for payment and in security of debt subject to no legal reversion had been pronounced in his favour and recorded at the date of the sequestration, 'and as if a poinding of the ground had then been executed.'

"But the right thus conferred on the trustee is given subject to such preferable securities as existed at the date of the sequestration and the creditor's right to poind provided by the 118th section. It was maintained by the respondent that the only limitation on the trustee's right to the moveables (as regards an heritable creditor) was the restricted right of poinding reserved to the heritable creditors by section 118; and that, as this restricted right is afterwards taken away by the Conveyancing (Scotland) Act, the result is that it leaves the right of the trustee without any qualification.

"The effect of this view of the repeal of the 118th section is, that it would restore to a creditor who has carried a poinding of the ground into execution, even if within sixty days of the date of sequestration, the preference which he would thereby have acquired before the Bankruptcy Act of 1839; while, on the other hand, it would put it out of the power of a creditor to acquire a preference if his poinding shall not have been carried into execution before the date of sequestration. It appears to the Lord Ordinary that this would be a very reasonable state of the law.

"The Lord Ordinary, however, thinks that the sounder view of the law is, that a preferable security existed over the moveables in question in favour of the heritable creditor at the date of the sequestration. This right required, no doubt, to be asserted by the creditor, and might be lost if not timeously asserted, but if timeously asserted the creditor was preferred to the trustee. There is no doubt that this was the law before the Bankruptcy Statute of 1839. Lord Deas says in *Barstow's* case that that statute made no change in the law except in limiting the preference to the current term's interest and one year's arrears. The Lord Ordinary concurs in that view, and he thinks that the effect of the repeal of the 118th section is to destroy the limitation and to restore the law to the position in which it was prior to the Statute of 1839.

"If, then, the heritable creditor had a preference at the date of the sequestration, which was capable of being afterwards declared or asserted, the Lord Ordinary does not think that there is anything in the Act to prevent the assertion of the right as against the trustee after sequestration. The Act says that the estate shall be vested in him 'as if a poinding of the ground had been executed.' But preference among heritable creditors does not depend on the priority of diligence, but on the priority of their infeftments. The Lord Ordinary does not think that a trustee is in a better position than an ordinary heritable creditor; and he thinks that the fact that a creditor had executed a poinding of the ground would not prevent a prior creditor from asserting his preference, and it is settled law that the execution of a summons of poinding is sufficient for this purpose. The Lord Ordinary is therefore of opinion that the trustee's deliverance is wrong on this point.

"II. The appellants also appeal against the deliverance of the trustee in so far as he has rejected their claim to be ranked preferably on the price of the heritable property to the extent of £49, 3s. 11d.

"The question arises in this way. The bond is a cash-credit bond, and is in the usual form of such documents. It contains the usual clause that an account should be kept in the books of the Bank, and that a stated account, signed by an officer of the Bank, should be sufficient to ascertain and constitute a balance and charge against the granters. The heritable subjects are disponed in real security to the appellants for payment of the principal sum of £1000, or such part or parts thereof as might at any time be due upon the said cash account, and interest of the same, but under the provision that the amount of the principal sum, with interest which might become due on the foresaid credit and cash account, should be limited to the sum of £1150.

"The amount claimed by the appellants is £1049, 16s. 5d., and it is not disputed that this sum is due by the bankrupt. The question, however, is as to what extent the heritable subjects are held in security for that sum.

"It appears from the account kept under the bond that it was in use to be balanced on the 17th of September yearly; and that on the 17th of September 1875 a sum of £50, 10s. 1d. of interest is placed to the debit of the account, and

a balance of £1049, 0s. 1d. is carried forward. On the 10th of June 1876 the account is closed in the books, when another sum of £35, 13s. 6d. of interest is placed to the debit of the account, and a balance of £1049, 3s. 11d. is brought out as due to the appellants.

"It is maintained by the trustee that the effect of adding these sums of interest to the principal was to convert them into principal sums also, and that as the bond is only granted for £1000 of principal, it does not cover the balance of £49, 3s. 11d. On the other hand, it is maintained by the appellants that the balance of £1049, 16s. 5d. claimed by them consists of £963, 0s. 4d. of principal and £86, 16s. 1d. of interest (being the before-mentioned sum of £50, 10s. 1d. of interest debited on 17th September 1875, and a further sum of £36, 6s. of interest to 15th 1876), and that it is all covered by the bond, which is granted in security for £1000 of principal and £150 of interest.

"The Lord Ordinary is of opinion, on the authority of the case of *Reddie* v. *Williamson*, January 9, 1863, 1 Macph. 228, that the trustee is right. He thinks that the sums of interest added to the account on 17th September 1875 and 10th June 1876 respectively thereby became principal sums, and that it is incompetent for the appellants now to re-state the account so as to reconvert these sums into sums of interest.

"The Lord Ordinary thinks that the appellants are entitled to expenses, but subject to a slight modification, in respect that they have not been successful as regards one part of the appeal."

The trustee reclaimed.

Lord Deas as a shareholder of the Royal Bank, proposed a declinature. By joint-minute parties consented to his Lordship judging in the cause.

The trustee argued—It is in consequence of the repeal of the 118th section of the Bankruptcy Act of 1856 by the Conveyancing Act of 1874, section 65, that this difficulty has arisen. Now, that clause is the foundation of the decision in the case of *Budge* v. *Brown's Trustees*. The object of its repeal was not to give a creditor such as we have here a preference over other creditors. The question was to be determined by reference to the 102d section of the Act of 1856, and we must, in order to interpret that, inquire what are the rights that would have been acquired by one who had executed a poinding of the ground at the date of the sequestration—that is declared by the statute to be the measure of the trustee's right. Now, an unexecuted right to poind the ground is not a preferable right (Bell's Com. ii. p. 57 of Mr M'Laren's ed., 60 of 5th ed.) It must be put into execution before it can attach anything (Bell's Princ. 699; *Tullis* v. *White*, June 18, 1817, F.C.) The poinding of the ground therefore, which the statute declares that the trustee must be held to have executed at the date of the sequestration, gives him a preference over the prior heritable creditor, whose poinding is not executed till a later date. That is consistent with the spirit of the Bankruptcy law, and, besides, it cannot be held that a creditor who had an unexecuted power of poinding could acquire a right over moveables which might have been removed from his reach at any time. Barton on Bankruptcy, ii. 543; *Hay* v. *Marshall*, 7th July 1824, 3 S. 233, aff. 22d Nov. 1826, 2 W. and S. 71, especially Lord Gifford's opinion, p. 76.

The Bank argued—In the case of *Hay* v. *Marshall* the trustee was confirmed, and that places matters in a very different position, as was noticed by Lord Mackenzie in the case of *Campbell's Trustees*, quoted by the Lord Ordinary. This point that is raised here must be decided by reference to the common law rights of persons in this position. It is abundantly settled that creditors who resort to poindings of the ground are preferable by the dates of their infeftments, and not of the execution of their summons (Stair, iv. 23, secs. 5, 19, and 20; Lord Balgray in *Campbell's Trustees* v. *Paul*; *Barstow's* case, quoted by Lord Ordinary; *Bell* v. *Cadell*, 3d Dec. 1831, 10 Shaw, 102). It is certainly not until his confirmation that the trustee can compete with the creditor who has executed a poinding of the ground.

At advising—

Lord President—The question we have to decide arises on the second part of the Lord Ordinary's interlocutor, in which he recals the said deliverance in so far as the trustee has rejected the claim of the appellants to be ranked preferably on the price of the moveable goods and effects situated upon the said heritable subjects, in virtue of the poinding of the ground mentioned in the claim. The facts are these—The appellants, the Royal Bank, held an heritable security over the property of the bankrupt which was long prior to the date of sequestration. Sequestration was awarded on 10th June 1876. The appellants on 16th June executed a poinding of the ground. The respondent James Bain was confirmed as trustee on the sequestrated estates on the 30th of the same month. The Lord Ordinary has sustained the poinding of the ground to the full extent, and his judgment is based on the 55th section of the Conveyancing Act of 1874, which repeals the 118th section of the Bankruptcy Act of 1856. If it had not been for that repealing clause, the Lord Ordinary expressly states that he could not have sustained this poinding of the ground. As regulated by the Act of 1856, the heritable estate of the bankrupt, under section 102, is vested in the trustee "to the same effect as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment and in security of debt, subject to no legal reversion, had been pronounced in favour of the trustee and recorded at the date of the sequestration, and as if a poinding of the ground had then been executed, subject always to such preferable securities as existed at the date of the sequestration, and are not null and reducible, and the creditors' right to poind the ground, as hereinafter provided." Now, no prior creditor could have any available security over the moveables on the heritable estate of the bankrupt except by a poinding of the ground, and the section would have left the law as it stood before but for the words "as hereinafter provided;" and what is there referred to is the 118th section, which has the effect of limiting the right of the poinding creditor — "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, and no decree of maills and duties on which a charge has

not been given sixty days before the said date, 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 or obtaining a decree of maills and duties after the sequestration, but such poinding or decree 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." When the Conveyancing Act of 1874 repealed the 118th section it appears to me that it left as the regulating enactment the vesting clause of 102, except that it took out of it the reference to section 118, which it does upon its face contain, there being no longer any 118th clause.

How stands the matter under section 102? The trustee is to be in the same position "as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment and in security of debt," had been pronounced and recorded in his favour, and as if a poinding of the ground had been executed. But prior heritable securities are saved, as all this is to be done "subject always to such preferable securities as existed at the date of sequestration." The trustee is to be in this favourable position, that he is to have right to the moveables as if he had executed a poinding of the ground; but that will not prevent a prior creditor from executing a poinding of the ground. The creditor would have been entitled to poind in virtue of his prior heritable right, and having executed his poinding, the trustee cannot compete with him. Stripped of the1 18th section, the common law right of the creditor revives. I am therefore satisfied with the interlocutor of the Lord Ordinary.

Lord Deas was of opinion that creditors entitled to resort to poinding of the ground, being preferable according to the dates of their real rights, and the trustee being constituted by the Bankruptcy Act a real creditor as at the date of the sequestration, those creditors who execute a poinding of the ground upon a prior real right before the trustee's confirmation must be preferred to him—Bankton, ii. 5, secs. 7 and 22; Stair, iv. 23, secs. 5, 19, and 20; Erskine, iv. 1, secs. 11, 12, 13. These common law rights were suspended but not taken away by the 118th section of the Act of 1856, and when that was repealed the common law rights revived under the 102d section of the Act of 1856. It is not now necessary to decide what would be the effect of the trustee's confirmation. Up to that date, at all events, the prior creditors' rights can be made preferable.

Lord Mure concurred, quoting Lord Mackenzie's opinion in the case of *Campbell's Trustees* v. *Paul*, Erskine, ii. 8, 32, and the cases of *Aiton* v. *Watt* and *Whitingham*, M. 3487–8, as illustrations of the common law rights of creditors poinding the ground.

Lord Shand concurred.

The Court adhered.

Counsel for Bank—Balfour—Mackay. Agents—Dundas & Wilson, C.S.

Counsel for Trustee — Kinnear — Strachan. Agents—Davidson & Syme, W.S.

Tuesday, July 10.

FIRST DIVISION.

[Sheriff of Aberdeen.

BURNETT *v.* MURRAY, *et e contra.*

Process—Caution—Bankrupt.

Circumstances in which the Court *refused* to order an undischarged bankrupt to find caution for expenses.

Observed that when a litigant becomes bankrupt the opposite party ought to move for intimation to his trustee.

These were cross actions, by which the parties sought each to obtain payment from the other of sums alleged to be due in respect of a partnership that had subsisted between them. The result of the Sheriff-Substitute's judgment was in favour of Murray, and the Sheriff adhered. The case was appealed to the Court of Session, and when it appeared on the Single Bills the respondent Murray asked that the appellant Burnett should be ordered to find caution for expenses, in respect that he was an undischarged bankrupt. It appeared that he had been sequestrated in 1867, but had been engaged in the partnership out of which this action arose since 1873. No intimation had been made to his trustee.

At advising—

Lord President—When a litigant becomes bankrupt he is no longer in a position to carry on a litigation, because he is divested of his whole estate and his trustee is vested in it. The proper course in such circumstances is to give notice to his trustee, that he may become a party to the suit, and carry it on if he sees fit. If he declines to do so, that is equivalent to an abandonment of that asset, which the bankrupt may then deal with as he pleases ; but as that is the only thing he has in the world, he cannot be allowed to carry on the litigation without finding caution for expenses. That is the rule in the ordinary case, but here the circumstances are peculiar. The bankrupt was sequestrated in 1867, and has since that time been carrying on business for several years, and, in particular, has entered into a joint-adventure with the other party to this action, from which joint-adventure the cross actions now under appeal arise. Then, when a partnership accounting is brought, is it to be allowed that his partner should turn round and say "You were sequestrated in 1867, and have not been discharged, and you must find caution for expenses here?" The proper motion for the respondent's counsel to have made would have been for intimation to the trustee. Instead of that he comes suddenly with this motion, which is as irregular in form as it is unfounded in substance.

The other Judges concurred.