nearest blood relations of the parties as at the date then mentioned. I think that was the intention, and that construction is strengthened by the considerations which your Lordship has stated as to what has been held in the general case; and I have only to say, that taking all these considerations into view I have no doubt that the parties who are to share in this succession are the nearest in blood to the testators who should be alive at the date of the death of the survivor of them. I therefore concur with your Lordship.

Lord Mure—The simple question which we have here to decide is, Who under a mutual settlement executed in 1852 are to be considered as falling under the words by which the residue is made over to "the nearest-in-kin of us both who shall be alive at the time of the death of the survivor of us two?" Do these words mean the nearest in the ordinary sense, or the heirs and successors under the Act of 1855? I agree with your Lordship in thinking that they cannot be held to include the parties who are brought into the succession under the operation of the Act, for by the words of that Act there is a plain distinction between next-of-kin in the ordinary sense and the parties who are to succeed by the operation of the Act; for one main object of the Act was to introduce representation in moveables, which did not exist previously. The words next-of-kin are very distinctly defined by Erskine when he says (Inst. iii. 9, 2)—"It is a universal rule in the legal succession of moveables that the next in degree of blood to the deceased, or the next-of-kin, succeeds to the whole, and if there be two or more equally near, all of them succeed by equal parts;" and he goes on to say—"The right of representation in heritage by which remoter heirs represent their ascendants has no place in the succession of moveables." Therefore next-of-kin by the law of Scotland meant nearest in degree of blood, and there was no representation in moveables. But since the Act of 1855 representation is introduced, and a different class of persons called in. There is therefore a plain distinction between next-of-kin in the common-law sense and under the statute.

With regard to the case of *Ferrier*, the expressions used both by your Lordship and myself, to the effect that next-of-kin was equivalent to heirs *in mobilibus*, might perhaps be misleading, but they must be looked at in reference to the circumstances of that case, where the question really was in regard to the point of time which was to be taken into account in determining who were the nearest-of-kin.

Lord Shand—I entirely concur with your Lordships. It appears to me to be clear that the primary sense and natural meaning of the words next or nearest-of-kin is nearest in blood, and therefore, assuming that we were now deciding it for the first time, I should have no doubt that the meaning of the words in this settlement was to favour the nearest relatives of the testators. The Lord Ordinary appears to have held the same view, but to have considered that from the authorities which have been referred to, and certain expressions of the Judges in previous cases, he was tied up to interpret the words as meaning those entitled to take in the order of succession, including those who are called in under the 1855 Act. But I agree with the view which your Lordships have taken of these cases. I think the expression here used — nearest-in-kin — implies relationship in blood; while the words which occur in the other cases seem to refer not so much to relationship as to right of succession. The only case in which the Court have had the expression nearest-of-kin before them is, I think, that of *Connell*, in which there is a very instructive note by the Lord Ordinary, Lord Kinloch. His interlocutor, it is true, was reversed, but on the ground that the case dealt with was heritable estate, and that the rules of succession in heritage must come in, but still giving the succession to the nearest in blood.

In deciding this case I desire to keep open the question to which your Lordship referred in the concluding part of your opinion—Whether if the nearest relative in blood was not also the nearest in line, the one or the other would be held to be the next-of-kin? The question does not here arise, as the nephew who was alive at the opening of the succession was both nearest in blood and nearest in line of succession to the moveable estate.

The Court pronounced judgment, in which after recalling the operative finding of the Lord Ordinary's interlocutor, quoted above, they, in place thereof, "Find that said half of the residue, according to the sound construction of the deed of settlement of the spouses, vested at the death of the said Peter Young on 28th September 1864 in the now deceased Robert John M'Adam, being a nephew, and as such the sole nearest-in-kin of the said Mrs Young then alive, and belongs to the claimants W. D. B. Janes and others as his representatives, to the exclusion of the other claimants Mrs Margaret Harris and others as representatives of William Thackwray, another nephew of the said Mrs Young, who predeceased the said Peter Young."

Counsel for Reclaimers — Lord Advocate (M'Laren, Q.C.)—Martin. Agents—J. & F. J. Martin, W.S.

Counsel for Respondents—Trayner—Campbell. Agents—Murray, Beith, & Murray, W.S.

Friday, December 10.

FIRST DIVISION.

[Sheriff of Forfarshire.

RITCHIE (GIBSON'S TRUSTEE) *v.* STEWART.

Process—Poinding of the Ground—Diligence for Interest Current but not yet Due—Competency.

A poinding of the ground may competently be used in security of interest current but not yet due, provided payment be not demanded till it has become due.

The creditor in a real burden of £2000, the principal sum of which was payable to him only contingently, brought a petition in the Sheriff Court for poinding of the ground against the debtor and his trustee in bankruptcy, the

prayer of which was for warrant to poind for payment "to account of or to the avail and quantity of the principal sum of £2000, being the amount of the real burden . . . . and the interest of the said principal sum at the rate of £4, 10s. per cent. per annum from and after Martinmas last, the terms of payment thereof being always first come and byegone." The Sheriff-Substitute granted warrant as craved, with this variation, that he ordered the free proceeds of the poinding and sale to be consigned in Court, to be dealt with as thereafter should seem just. The execution of the poinding bore that decree had been obtained for recovery of principal as well as interest. The goods were sold and proceeds consigned, and the Sheriff-Substitute granted warrant on three successive occasions for payment to the pursuer of the interest as it fell due. The defender appealed. *Held* that the poinding had proceeded competently, and that the *ex facie* irregularity of the prayer of the petition had been cured by the Sheriff-Substitute's reservation and subsequent course of dealing.

Superior and Vassal—Composition—Poinding of the Ground—Debitum fundi.

A creditor in a real burden having obtained warrant to poind the goods of his debtor, and the proceeds of sale having been consigned in Court—*held* that he was entitled to pay out of the consigned fund a composition due to the superior on the death of the last vassal in the subjects on which the burden was constituted, said sum being a *debitum fundi* and not a mere personal claim.

Observation (*per* Lord Shand) that objections raised by an appellant in the Court of Session which have not been put forward or insisted in by him in the Court below will not be received with favour.

By disposition dated 26th and recorded 29th May 1876, William Stewart, nurseryman, Dundee and Broughty-Ferry, in consideration, *inter alia*, of the sum of £2000 sterling, with interest and penalty as therein mentioned, which was declared to be a real burden upon and affecting the lands and subjects thereby conveyed, disponed to Henry Gibson, solicitor in Dundee, certain heritable subjects situated near Broughty-Ferry, in the county of Forfar. By minute of agreement between the parties, dated 11th March 1876, and referred to in said disposition, and held to form part thereof, and also by a personal bond granted by Gibson to Stewart of date 26th March 1876, it was provided that the said sum of £2000 should remain a real burden on the subjects until Gibson's title should be made unchallengeable. In February 1879 Gibson's estates were sequestrated, and Robert Bower Ritchie, accountant in Dundee, was appointed trustee thereon.

Stewart brought a petition before the Sheriff-Substitute of Forfarshire, praying him to grant warrant to poind and distrain All and Sundry the readiest moveable goods, &c., of the said Henry Gibson, or forming part of his estates or sequestrated estates, and to "make payment thereof to account of or to the avail and quantity of the principal sum of £2000, being the amount of the real burden created and constituted in favour of the pursuer on and over the said lands, subjects, and others by disposition granted by the pursuer in favour of the defender, and specified in the said condescendence, penalty specified in the said disposition, and the interest of the said principal sum at the rate of £4, 10s. per centum per annum from and after the term of Martinmas last, the terms of payment thereof being always first come and byegone." Gibson's trustee entered appearance, and a record was made up in the action. The defender made this statement—"That the interests of the pursuer may be fully protected, and that there may be no pretext for asking decree in this action, the defender is prepared, and now offers, on his being allowed, to sell the whole effects which belonged to the said Henry Gibson, situated within or upon the said heritable subjects, for behoof of whom it may concern, and that at the sight and to the satisfaction of any person to be named by the Court to hold the proceeds, subject to any claim which the pursuer may lodge in the sequestration, to be adjudicated upon by the defender, or under appeal from his judgment, all in terms of the Bankrupt Statute."

The pursuer pleaded—"(1) The sums condescended on, and in any event the interest of the real burden mentioned in the petition, being in the circumstances presently exigible, or at least not being a contingent but a certain debt, the pursuer is entitled to the warrant and decree craved. (2) In any event, pursuer having the rights condescended on, is entitled to have the goods and others sought to be poinded, or the proceeds thereof, applied or set apart in payment or security *pro tanto* of the sums due and to become due to him."

The defender pleaded—"(2) The pursuer has not averred, or at least has not produced, any title warranting him to ask a decree of poinding the ground as prayed for. (7) The claim of the pursuer being contingent, as before mentioned, and the contingency not having been purified, the sequestration of the bankrupt affords no pretext for the raising of this action, and the same ought to be dismissed as incompetent, or at least as prematurely raised by the pursuer, and the pursuer found liable in expenses. (8) In any event, procedure under this action ought to be sisted till the pursuer shall have purged the contingency hereinbefore mentioned, and in the meantime the defender ought to be allowed to proceed with a sale of the moveables in question at the sight of the Court, and under reservation of the claim of the pursuer and all concerned to the proceeds of the sale, and under reservation also in the meantime of all questions of expenses. (9) At the utmost, decree in this action can only go out in terms of the prayer of the petition, on the understanding that the proceeds of the poinded effects when sold shall be consigned in the hands of the Clerk of Court, under reservation of the claims of all concerned, and subject to the orders of the Court in this action, and under reservation also in the meantime of all questions of expenses."

On 22d May 1879 the Sheriff-Substitute (CHEYNE) pronounced this interlocutor:—"Grants warrant as craved in the prayer of the petition, with this variation—that instead of making payment as craved, the officer who carries out the warrants shall consign the free proceeds with the Clerk of Court, to abide the orders of Court, and decerns *ad interim* to this effect, reserving to dis-

pose of the money that may be consigned, and to pronounce further as may be just." The Sheriff (HERIOT) on appeal adhered. The warrant to poind the ground was accordingly executed, the execution bearing that the decree had been obtained against the defender for not making payment of the principal sum of £2000 and the interest thereof, and the Sheriff-Substitute having granted a warrant of sale, "the proceeds of the sale to be consigned in terms of the order of Court," the goods were thereafter sold, and the pursuer duly reported the sale.

On 1st October 1879 the defender lodged a minute in which he submitted that the poinding and sale following thereon were irregular and illegal, in respect the officer in many instances appraised in one sum various articles which were of different kinds and values, thus leading to the effects being exposed in corresponding lots, to his consequent loss and injury, and he therefore craved that the officer at whose sight the poinding was executed be not allowed the expenses of the poinding and sale, and that in the meantime he should be ordained to consign with the Clerk of Court the full amount of the roup roll, including the value of effects adjudged over to the poinding creditor, except in so far as consignation had already been made.

On 13th October the Sheriff-Substitute pronounced this interlocutor:—"Finds that the proceeds of the sale amounted to £163, 10s., whereof the sum of £13 is still in the pursuer's hands, being the value of articles knocked down to him as the poinding creditor at the appraised values . . . Finds that there is now in the hands of the Court the sum of £128, 7s. 8d., and that this sum may be taken as representing the free proceeds of the sale exclusive of the £13 above mentioned, less the dues of the consignation. . . . . Grants warrant to the Clerk of Court to pay out of the consigned fund . . . to the pursuer the sum of £31, 1s. 3d., being the balance of the half-year's interest due at Whitsunday last on the bond mentioned in the proceedings after deducting income-tax, and also the above-mentioned sum of £13, and decerns *ad interim;* and *quoad ultra* continues the cause."

He added this note—"While disposed to think that there have been some irregularities in the way in which this poinding has been carried out, which would have entitled the trustee or anyone interested to interdict the sale, I do not see how, when matters have been allowed to go so far, I can possibly treat the sale as null and void; nor do I feel justified in entertaining the trustee's motion that in respect of these irregularities all the expenses incurred in connection with the sale should be disallowed. It seems to me that the trustee's remedy, if he has one, must be sought by an action of damages against the officer." . . . .

On 12th November 1879 the pursuer lodged a minute craving the Court to grant decree for payment to him out of the balance of the consigned fund of the interest due to him on his bond for £2000 for half-year ending at Martinmas 1879, amounting, less income-tax, &c., to £40, 8s. 3d., and the Sheriff-Substitute decerned accordingly.

On 10th March 1880 the pursuer lodged a further minute, in which he stated, *inter alia*—(1) That the heritable subjects in question were recently sold for £2050, *i.e.*, for £50, under burden of the debt of £2000 and consequents from date of entry. (2) That the interest on the said £2000 from Martinmas 1879 to Candlemas 1880, amounting to £20, 0s. 9d., was unpaid and payable out of the consigned fund. (3) That he had had to pay certain sums to the superior of said subjects to prevent declarator of irritancy of the feu *ob non solutum canonem*, viz., certain feu-duties, and a sum of £8, being a composition payable on death of last vassal of said subjects. To this minute answers were lodged by Mr Ritchie. Answers 1 and 2 were, "Believed to be true." 3. The payments to the superior were objected to, and it was explained that "the superior had no right to full or preferable payment of that sum, the same being simply a personal claim."

The Sheriff-Substitute on 30th March 1880 pronounced the following interlocutor:—"Finds that the heritable subjects to which the action relates were recently exposed to sale by the liquidators of the City of Glasgow Bank in virtue of an absolute disposition by the bankrupt in favour of the said bank, and were purchased, under burden of the pursuer's debt of £2000 and consequents from the date of the purchaser's entry (which was at Candlemas last), for the sum of £50, which sum did not cover the expenses of the sale and the conveyance to the purchaser: Finds that the interest due to the pursuer for the period from Martinmas 1879 to 2d February 1880 is unpaid, and that said interest amounts, after deducting income-tax, to £20, 0s. 9d. . . . Finds that the pursuer has recently made the following payments to the superior of the subjects, viz., the sum of £29, 5s. 10d., being the amount of the feu-duties payable therefrom for the period from Whitsunday 1876 to Martinmas 1879, with progressive interest, and the sum of £8, being the composition payable on the death of the last entered vassal, and that in virtue of the assignation by the superior in his favour he is entitled to have these sums repaid to him out of the proceeds of the moveables sold under his poinding, now *in manibus curiæ*, under deduction, however, of the following sums (amounting together to £3, 9s. 11d.) of which under the feu-contract the superior was bound to relieve the vassal . . . . And as the result of these findings, Finds that the pursuer is now entitled to an order to uplift from the consigned fund the sum of £48, 15s. 11d. (forty-eight pounds, fifteen shillings, and elevenpence sterling); and grants warrant to the Clerk of Court to make payment to him of that sum accordingly."

This note was added—"It is quite true that the feu-contract in the case of *Morrison's Trustees* v. *Webster* (16th May 1878, 5 R. 800) contained a declaration, which does not occur in the one before me, that the entry-moneys stipulated for on the entry of heirs or singular successors should be real burdens on the subjects, and recoverable as *debita fundi;* but a perusal of the opinions delivered by the Lord Justice-Clerk and Lord Gifford, who formed the majority in that case, has satisfied me that the judgment would have been the same though the specialty to which I have referred had been absent, for both these learned judges were, as I read their opinions, prepared to hold, that where in an old feu-contract the vassal undertakes as one of his obligations to pay, say, a duplicand of the feu-duty as composition on the entry of each heir or singular successor, the composition so agreed to be paid forms

an integral condition of the grant, just as much as the feu-duty itself does, and is *ex sua natura* a real burden without any clause declaring it to be such. The case in question is, therefore, in my opinion, a direct authority for negativing the defender's contention that the composition of £8 which the pursuer paid, and *quoad* which he is now in the superior's place, is not a *debitum fundi*, but merely a personal debt of the vassal."

On appeal the Sheriff adhered.

Ritchie appealed to the Court of Session, and argued—The £2000 had not been well constituted a real burden; the minute of agreement had not been put on record, and the burden on the land was therefore not sufficiently definite—1 Bell's Com. (M'Laren's ed.) 727, 728; 37 and 38 Vict. c. 94 (Conveyancing (Scotland) Act 1874), sec. 30. The case must be treated very strictly, as it was a competition between a heritable creditor and a trustee in sequestration. It was incompetent to poind the ground for a contingent debt—*Lady Ednam*, 1628, M. 8128 and 10,545; Stair, ii. 5, 7, 8; Ersk. iv. 1, 2, ii. 8, 32. The action was clearly incompetent as regarded the principal sum of £2000; and at the date when the petition was presented no interest was due—2 Ross' Lectures, 429, 439; Stair, iv. 23, 18; *Raploch*, 1625, M. 1277. There was nothing in the execution of the poinding or the warrant of sale to show that the poinding was not for principal as well as interest. The interim payments of interest were incompetent. The payment out of the consigned fund of £8 to the superior as composition was incompetent; it was merely a personal claim—*Morrison's Trustees* v. *Webster*, 16th May 1878, 5 R. 800. The form in which the poinding had been carried out was also incompetent, and was sufficient to invalidate the whole proceedings, articles having been slumped together and their value being thereby grossly depreciated—*M'Knight* v. *Green*, 27th Jan. 1835, 13 S. 342.

The respondent (pursuer) answered—The principal sum had been well constituted as a real burden. The pursuer did not insist on this poinding as for the principal, and he had never done so, as was clear from the interlocutor of 22d May 1879 and subsequent proceedings. A heritable creditor was entitled to poind for payment of a debt not yet due if he did not ask for payment till it was due—*Lady Ednam*, 1628, M. 8128, 8129; *Douglas of Morton*, 1662, M. 1282 and 8130; *Lady Pitfoddels*, 1674, M. 10,548. He was in this case bound to come forward before his debt became due in order to preserve his preference over the trustee in sequestration—*Royal Bank* v. *Bain*, July 6, 1877, 4 R. 985; *Campbell's Trustees* v. *Paul*, Jan. 13, 1835, 13 S. 237; *Hay* v. *Marshall*, July 7, 1824, 3 S. 157, *aff.* 2 W. and S. 71; *Barstow* v. *Mowbray*, March 11, 1856, 18 D. 846. The interim payments of interest were competently awarded, and the appellant's pleadings in the Sheriff Court showed that he had not there disputed this—he had no right to do so now. The composition of £8 had rightly been paid out of the consigned fund; it was a condition of the tenure just as much as the feu-duty—*Morrison's Trustees* v. *Webster*, N.S. 2 Ross' Lectures, 302. As to the mode in which the sale was carried out, it was admittedly somewhat irregular, but not sufficiently so to invalidate the proceedings. The objection taken by the defender in the Sheriff Court was only that the officer's fees should not be paid on that account; his proper remedy was to have interdicted the sale.

At advising—

Lord President—The pursuer of this action in the Sheriff Court is a party who is in right of a real burden to the extent of £2000 which is secured over certain subjects in Forfar under a disposition by himself in favour of Henry Gibson, and it is not necessary to refer to that deed further than to say that the £2000 was by it effectually secured as a real burden over the subjects conveyed. At the same time, the pursuer was restrained from demanding payment of it till a certain event occurred, for in a relative agreement and a relative personal bond it was provided that notwithstanding the foresaid term of payment the principal sum shall remain unpaid till Gibson's title was made unchallengeable; till all difficulty as to the title was cleared up the real burden was to continue. Now, that difficulty had not been removed before this poinding of the ground was used, nor has it yet for aught we know, and so the pursuer is not entitled to be paid the principal sum. But the prayer of the petition does conclude that the proceeds of the poinding should be applied "to account of or to the avail and quantity of the principal sum of £2000, being the amount of the real burden created and constituted in favour of the pursuer on and over the said lands, subjects, and others, . . . and the interest of the said principal sum at the rate of £4, 10s. per centum per annum from and after the term of Martinmas last, the terms of payment thereof being always first come and byegone." Now, the Sheriff-Substitute on 22d May 1879 granted warrant as craved in the prayer of the petition. He added, however—"with this variation, that instead of making payment as craved, the officer who carries out the warrants shall consign the free proceeds with the Clerk of Court, to abide the orders of Court, and decerns *ad interim*, reserving to dispose of the money that may be consigned, and to pronounce further as may be just." This warrant was granted after Gibson's trustee—for he had become bankrupt in the meantime—was sisted as defender in the action. The warrant was executed and the poinding was laid on so as to secure payment of principal as well as interest, but the Sheriff's reservation is of considerable importance, especially as to what follows, for the money was not paid to the poinding creditor and allowed to be applied by him in terms of the warrant, but was consigned, and so we can now see what was done with the proceeds of the poinding. The warrant of sale, which is dated 25th July, is in the same terms as the warrant of 22d May 1879. But the sale having been effected, we have on 13th October an interlocutor which is very important as showing what the Sheriff-Substitute intended by his reservation in the interlocutor of 22d May. He "finds that the proceeds of the sale amounted to £163, 10s., whereof the sum of £13 is still in the pursuer's hands, being the value of articles knocked down to him as the poinding creditor at the appraised values"—that is, there having been no competitors for the goods so sold, they were knocked down to the poinding creditor; then follow findings as to expenses, and then the Sheriff-Substitute "finds that there is now in the

hands of the Court the sum of £128, 7s. 8d., and that this sum may be taken as representing the free proceeds of the sale, exclusive of the £13 above mentioned, less the dues of the consignation;" then he deals with some claims for poor-rates, &c., and awards a sum on that account; and then he awards to the pursuer "the sum of £31, 1s. 3d., being the balance of the half-year's interest due at Whitsunday last on the bond mentioned in the proceedings, after deducting income-tax, and also the above-mentioned sum of £13, and decerns *ad interim*, and *quoad ultra* continues the cause." This interlocutor was issued on 13th October. The first half-year's interest which became due after the petition was presented was at Whitsunday preceding, and this explains the terms used. Then on 12th December 1879 the Sheriff-Substitute "grants warrant to the Clerk of Court to pay to the pursuer out of the consigned fund the further sum of £40, 8s. 3d. sterling, being the balance of the half-year's interest due at this term on the bond mentioned in the proceedings, after deducting income-tax."

Now, what was the effect of these proceedings? The proceeds of the sale of the poinded goods were applied, first, in payment of the half-year's interest due at Whitsunday 1879, being the half-year's interest current at the date when the petition was presented, and then part of the balance was paid for the second half-year's interest, which had fallen due at 12th November 1879. I have no doubt, as regards this application of the proceeds, that it was quite regular and proper. No part of the proceeds was applied in discharge of the principal sum, and no effect was given to the part of the prayer which asked that. The course taken by the Sheriff-Substitute in making the reservation on 22d May, and the way in which he carried it out, had the effect of removing the objection, which there would otherwise have been, to the terms of the prayer and of the warrant, for nothing was done but applying the price in payment of interest, not only of the current interest, but also of the second term's interest, with regard to which there seems to be no practical objection. The whole matter was wound up by an interlocutor of 30th March 1880, in which the Sheriff-Substitute "Finds that the heritable subjects to which the action relates were recently exposed to sale by the liquidators of the City of Glasgow Bank in virtue of an absolute disposition by the bankrupt in favour of the said bank, and were purchased, under burden of the pursuer's debt of £2000 and consequents from the date of the purchaser's entry (which was at Candlemas last), for the sum of £50, which sum did not cover the expenses of the sale and the conveyance to the purchaser: Finds that the interest due to the pursuer for the period from Martinmas 1879 to 2d February 1880 is unpaid, and that said interest amounts, after deducting income-tax, to £20, 9d."—and the Sheriff-Substitute then proceeds to make certain deductions, and brings out a balance, for which he gives the pursuer credit, and finds him "now entitled to an order to uplift from the consigned fund the sum of £48, 15s. 11d., and grants warrant to the Clerk of Court to make payment of that sum to him accordingly." Now, the interest for that period was also well secured by the poinding, and payment of it regularly ordered by the Sheriff-Substitute, for the same reason as that of the interest which became due at Martinmas 1879.

But the interlocutor contains a number of items on both sides of the account, to none of which any objection is made save one—viz., a payment made by the pursuer, as poinding creditor, of £8, being a composition to the superior of the subjects payable on the death of the last entered vassal. I think the poinding creditor was bound to pay this sum. If it had been a case of an untaxed entry, it might have been a very different matter; but this is a composition the amount of which is fixed by the feu-contract, and is therefore a real burden on the feu just as much as the feu-duty is. I concur with the Sheriff-Substitute's view of the law on this matter, and I think this was just as much a real burden as any other stipulation in favour of the superior in the feu-contract.

On the whole matter, though there was certainly an inherent vice in the original prayer and warrant of poinding as granted, I think that was covered by the Sheriff-Substitute's subsequent course of dealing; and I am for adhering to the interlocutors appealed against.

Lord Deas—The only point in the opinion of your Lordship on which I entertained any doubt is whether this poinding of the ground was not equally well and competently executed for the principal sum as for the other items included in it. That principal sum was well constituted as a real burden. It is not necessary to decide the question; but I am disposed to think that there is nothing to prevent a poinding of the ground being executed for a principal sum to await the event of whether it is payable or not, on the same principle as terms of interest current and not yet come may be rightly included in a poinding to await that event. At the same time, it is matter of little moment whether it is so or not.

In all other particulars I entirely agree with your Lordship, and having come to the same conclusion it is unnecessary for me to go into detail.

Lord Mure—I have come to the same conclusion. The main question which was argued to us was the competency of having a poinding of the ground for interest on a sum not payable at the date when the action was raised. As regards the first objection, that you cannot have a poinding for a contingent debt, it is plain from your Lordship's explanation of the proceedings that though the terms of the warrant might be held to cover the principal sum of £2000, yet in point of fact the matter was restricted by the terms of the Sheriff-Substitute's interlocutor, and we are therefore relieved from the necessity of deciding that question. In point of fact, no steps were taken to carry out the poinding as regarded the principal sum. Another point was strongly pressed, and authority cited to show that a poinding might be brought for interest current but not due. I think the cases quoted by the Sheriff-Substitute show that such a poinding may be brought. And in the Juridical Styles (vol. iii. tit. 1, sec. 7) I find that the usual form of summons of poinding and letters of poinding contains these words—"to make payment thereof to the account of the said principal sum of £ stg., liquidate penalty above specified, and interest of the said principal sum from the said term of , and in time coming during the not-

redemption, the terms of payment thereof being always first come and byegone." These are the usual words of style in a summons of poinding, and the letters are in similar terms. It is therefore clear that at the time these Styles were written that was the recognised form in practice. On looking into M'Glashan's Sheriff Court Practice (p. 136, ed. 1854; p. 135, ed. 1868) I find it laid down that such is the practice, and reference is there made to the case of *Kennedy* v. *Buik*, Feb. 17, 1852, 14 D. 513. And on looking at that case I find there were then no less than nine conclusions of reduction; these came eventually to be reduced to one, as to the question of competency; and the form of summons there contained the words I have read from the Styles. I am therefore of opinion that the proceedings here have been conform to practice.

On the point also as to the composition I concur with your Lordship.

Lord Shand—I have come to the conclusion that there are not sufficient grounds for disturbing the judgments of the Sheriff and the Sheriff-Substitute.

If the case had been persisted in as one of diligence for the principal sum in this bond, or had not practically been treated as a diligence for securing interest only, I think we could not have sustained the judgment, for a poinding of the ground for a real burden, of which the term of payment is indefinite and may be perhaps not for many years, or ultimately not at all, is not a proper diligence. Such a case is different from one where interest is payable in any event, and stipulated to be paid at definite terms. But I think that in this case the petitioner made it clear from the first that he intended the diligence to apply to interest alone, and on that footing it was treated by the Sheriffs. That being so, the interlocutors of the Sheriff-Substitute authorising payment, certainly of the first and second half-years' interest, were entirely unobjectionable; and I may say generally as to a number of the objections argued there, that I am not disposed to receive them with favour, because I think there was a considerable amount of acquiescence on the part of the defender in these proceedings in matters on which he now seeks to raise objections. I think it is extremely hard in a litigation of this sort, and after parties have taken up a particular attitude before the Sheriff, that one of them should be allowed in this Court to turn round and take exception to all that has occurred, and with perhaps very serious consequences. The same thing seems to run through the whole of these proceedings. I cannot better illustrate it than by adverting to what occurred when the third payment of interest was asked. There might have been a grave objection to such a demand, but the way in which it was treated was this:—A minute was lodged for the petitioner stating that interest for this period was due, and the amount of it; and the defender admitted that it was so due, for his answer to that part of the minute is simply, "believed to be true." In addition to this, in these same answers he does not object to the proceedings *in toto*, but merely says that a less sum than is demanded is due. Now, I hold that in respect of his condescendence he is not now entitled to raise the objection, and so far as the third payment of interest is concerned I wish to rest my judgment on that ground alone.

An objection was taken to the mode in which the poinding was carried out. If the attitude here assumed by the appellant had been maintained before the Sheriff, and persisted in, I think the poinding might have been open to considerable objections. I should be sorry to sanction any such slumping of articles together as that which seems to have taken place here. But the objection taken in the Court below was merely that the officer should not get his fees, and not that the poinding should be cut down entirely. I do not think the latter objection can now be raised.

On the point as to the composition, it is a very trifling sum, and I should not be disposed to differ from the opinion which your Lordships have expressed.

On the whole matter, I am not satisfied, on the argument for the appellant, that enough has been said to entitle us to disturb the judgments here appealed from.

The Court refused the appeal.

Counsel for Appellant (Defender)—Kinnear—M'Kie. Agents—Drummond & Reid, W.S.

Counsel for Respondent (Pursuer)—Mackintosh—Wallace. Agents—Rhind, Lindsay, & Wallace, W.S.

Friday, November 26.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

THE MAGISTRATES AND TOWN COUNCIL OF FORTROSE *v.* MACLENNAN

Church—Manse—Repairing Church—Union of Parishes.

The kirks of C. and R., both in the parish of R., were united by decree of the Commissioners of Teinds in 1670, and the minister of R. appointed to serve the cure in both kirks on alternate Sundays, and the parishioners of R. declared free of the support of the kirk of C., which was the ancient cathedral kirk of the diocese, *et e contra*. Thereafter, it having become necessary to build a new kirk at R., an assessment was laid upon the heritors of the parish of R., with the exception of those within the district lying around and attached to the kirk of C. In 1873 a district nearly coinciding with the said district was erected into the *quoad sacra* parish of F., and a separate kirk built therein. Further repairs having become necessary and been executed upon the kirk and manse and offices of R., for which the heritors within the district of C. and F. denied liability—*held* they were still bound, along with the whole heritors of R., for the repairs and maintenance of the manse and offices, though not of the kirk of R.

Act 7 and 8 Vict. c. 44, sec. 8—Liability quoad civilia *of Heritors of* Quoad sacra *Parish.*

Held that disjunction and erection into a *quoad sacra* parish does not free the owners of lands and heritages so disjoined from their