widow, and become part of the residue of Admiral Popham's estate?"

At advising—

LORD JUSTICE-CLERK—The present is a case turning on the question, whether a declaration by a testator that a legacy shall not vest or become payable until a certain event takes place, suspends vesting, or only postpones payment? The general rule is that the postponement of the term of payment of a legacy does not prevent vesting, when the object of the postponement is to secure an intermediate benefit to a third party, the presumption always being that legacies vest *a morte testatoris*. In my opinion, the words "vest or become payable" in this case are used synonymously, seeing that a legacy which has not vested cannot become payable. It is certain that in this as in other clauses of his settlement the intention of Admiral Popham was to secure the full enjoyment of the liferent of his estate to his widow, and that he had nothing else in view in postponing the term of payment, and that the apparent postponement of vesting was not intended by him to produce any benefit to any other of the beneficiaries. The provision made for the special legacies of £250 to his brothers-in-law, which was referred to as indicating a regard for the residuary legatees, was only intended to postpone these legacies until the others were satisfied. I think we must answer the question in the Special Case in this sense.

LORDS YOUNG and CRAIGHILL concurred.

LORD RUTHERFURD CLARK—I wish I was quite as clear about this case as are your Lordships. It seems to me that the words in the principal deed "vest and be payable" are not explanatory, but rather are contradictory, one of the other. If I had been called on to give my opinion alone in the case, I should have been inclined to give effect to the ordinary meaning of the word "vest," and to hold that the period of vesting dated from the death of the liferenter. As, however, your Lordships are against my view, it is unnecessary for me to give my reasons.

The Court answered the fisrt question in the affirmative, and found that the legacy of £500 bequeathed by Admiral Popham under the sixth head of his trust-disposition and settlement to Miss Pakenham, vested in Miss Pakenham prior to her death, and was now payable to the third parties as her executors.

Counsel for First Parties—H. Johnston. Agents—J. & A. Peddie & Ivory, W.S.
Counsel for Second Parties—Dickson. Agents—J. & F. Anderson, W.S.
Counsel for Third Parties—Gillespie. Agents—J. & A. Forman & Thomson, W.S.

Wednesday, May 30.

SECOND DIVISION.

[Sheriff of Lanarkshire.

NELMES & COMPANY *v.* GILLIES.

Heritable Creditor — Diligence — Poinding — Inclusion in Schedule of Poinding of Goods belonging to Third Party—Relevancy.

The owner of goods which had been included in a poinding by a heritable creditor of the person to whom the owner had lent them on hire, after having interdicted the creditor from selling or disposing of them, brought an action against him in which he concluded for a sum of money as damages for the illegal use of poinding. It appeared from the pursuers' averments that the goods thus included in the poinding remained in the premises, and continued to be used by the tenant of the debtor. *Held* that the mere fact of their having been included in the schedule of poinding did not found an action of damages, and that the action was therefore *irrelevant*.

Maills and Duties.

The creditor having also obtained decree in an action of maills and duties against the debtor and his tenant, the owner of the goods also concluded against the creditor for the hire of the goods, alleging that he had uplifted and intromitted with the rent payable for them by the tenant in virtue of his decree of maills and duties. *Held* that this ground of action also was *irrelevant*, since the taking of the decree would not make the creditor liable for the rent payable by the tenant to the debtor for the use of the goods.

The pursuers in this case, Messrs Nelmes & Company, billiard table manufacturers in Glasgow, in November 1881 let on hire to Thomas Moore, auctioneer, three billiard tables and appurtenances at a weekly rent of thirty shillings. The tables were placed by Moore in certain premises of which he was proprietor, and which he had let as a billiard saloon to two tenants on a five and a-half years' lease. On 22d February 1882 Moore was sequestrated, but his trustee did not enter into possession of the premises nor adopt the lease. On 17th March following, Miss Gillies, who was a heritable creditor of Moore, holding a bond and disposition in security over property belonging to him of which the billiard-room formed part, the interest on which bond was then several terms in arrear, executed a poinding of the ground in virtue of decree obtained by her in an action in the Sheriff Court of Lanarkshire. In the schedule of poinding the billiard tables were included. She had also raised an action of maills and duties, calling *inter alios* the tenants of the premises, in which on 20th March she obtained decree in absence, ordaining the tenant of the billiard-room to pay to her the rent of £3 a-week due to Moore under the lease. The pursuers of last-mentioned date raised an action to interdict her from selling, removing, or in any way interfering with the billiard tables, on the ground that they belonged to them and not to Moore. In this process they obtained decree on 28th May. In consequence of the fact that Moore's proprietorship of the billiard tables was denied, and of her belief that the tenants had made certain disbursements which they were entitled to set against the rent, Miss Gillies did not uplift any rent from the tenants under her decree of maills and duties, and on 12th June her law agents intimated to the pursuers that they might, if they thought fit, remove their tables.

The pursuers brought this action against Miss Gillies for £25, 10s., as the rent of the tables for seventeen weeks, at £1, 10s. per week, the rent at which they had let them to Moore. They averred that the defender, in virtue of the decree in her favour in the action of maills and duties, had entered upon possession of the premises and uplifted and intromitted with the rents, including the said sum of thirty shillings a-week. They also averred that by the defenders' illegal use of the poinding they had suffered loss and damage to the amount sued for.

They pleaded — "(1) The defender having entered into possession of Moore's property, and uplifted or intromitted with the rents thereof, including the amount of hire payable by the tenant under the lease for the effects belonging to the pursuers, decree as craved ought to be granted. (2) The defender having, by the use of an illegal poinding, prevented the pursuers from removing or making other arrangements as to the effects hired from them, the pursuers are entitled to decree against her for the hire payable to them from 13th February to 12th June 1882, being the sum concluded for; or otherwise (3) The pursuers having suffered loss and damage through the illegal use of poinding by the defender, she is liable in reparation therefor, and the sum sued for being fair and reasonable, decree as craved ought to be granted therefor."

The defender denied having uplifted any rents under the decree of maills and duties. She averred that the billiard tables were erroneously included in the schedule of the poinding, she being *bona fide* in the belief that they were the property of Moore, and that the pursuers had not during the whole proceedings made any attempt to remove the tables, which were in the possession and custody of the tenants, or applied to her for permission to do so, until they learned that the remaining tenant had thrown up his lease, which he did in June 1882, nor intimated to her that they were suffering any damage.

She pleaded, *inter alia*, "The action is irrelevant."

The Sheriff-Substitute (LEES) found the action irrelevant and dismissed it.

"*Note.*—The defender is a heritable creditor of Thomas Moore, auctioneer in Glasgow, whose estates were sequestrated on 22d February last. Moore had hired from the pursuers three billiard tables and relative appurtenances in November 1881, and sublet the premises in which he carried on his business, together with the tables, to a man Hardie for the period of 5½ years. In March the defender executed a poinding of the ground, and it being thought that the tables were the property of Moore they were scheduled in the poinding. The defender also in that month obtained a decree of maills and duties, under which it is said she recovered from Hardie the rent payable by him for the rooms and tables to Moore. In the end of June it was settled by decision of Court that the tables had not been bought by Moore, but were the property of the pursuers, and only lent to him on hire. They now claim from the defender the hire which Moore owes them for the tables during the time they were tied up by the poinding, and alternatively that amount is asked as the amount of damages which the pursuers have suffered. Now, Hardie's rent was due to Moore, and not to the pursuers. Therefore, so far as the question is one of rent, it is obvious that the pursuers have no ground of action against the defender arising from the enforced payment of the sub-rent to her under the decree of maills and duties. That was a perfectly competent step for the defender to take. Then as regards damages for having poinded the pursuers' tables, though it was decided that the tables were not owned by Moore, it is not surprising that the defender thought so, and there is no relevant allegation in the condescendence that the defender in acting on this belief caused loss to the pursuers. If Moore had paid the hire to them they would have had no ground of complaint, and yet the defender would not be in the wrong. It is the default of Moore that causes the difficulty. Now the tables were hired to him, and sublet by him to Hardie for 5½ years. There is thus nothing in the case to show that the tables were detained from the pursuers by the act of the defender beyond the period for which they were let on hire, and still further there is no allegation that the pursuers applied to the defender for permission to remove the tables and were refused. In fact, for all that appears the tables may be in the premises to this day. In this way there is nothing condescended on which if proved would show that the defender had caused loss to the pursuers."

The pursuers appealed to the Sheriff, who for the reasons assigned by the Sheriff-Substitute adhered.

They then appealed to the Court of Session, and argued—The tables not having been the property of the defender's debtor, her poinding could lay no *nexus* upon them; for the creditor by mere attachment of the debtor's estate could take no higher right than the debtor himself had — *Fleeming* v. *Howden*, July 16, 1868, 6 Macph. (H.L.) 113. The inclusion of the tables in the poinding was unwarranted, for the circumstances were sufficient to warn the defender that she was proceeding at her own risk. It was therefore unnecessary to make any specific averment of loss. The Sheriff-Substitute had confounded relevancy of averment with measure of damages—*Meikle* v. *Sneddon*, March 5, 1862, 24 D. 720; *Wilson* v. *Blackie*, October 22, 1875, 3 R. 18. The question was, whether the diligence here being a real diligence made any difference, for there was no doubt that had the action been an ordinary one that the pursuers would have had a relevant ground of action; Ersk. iv. 1, 13; *Thomson* v. *Scoular*, January 18, 1882, 9 R. 430. A duty lay on the poinding creditor to find what on the ground of the debtor was or was not poindable. There was no general presumption that all moveables found there were the property of the debtor—*Stead* v. *Cox*, January 20, 1835, 13 S. 280; *Duncanson* v. *Jefferies' Trustees*, March 4, 1881, 8 R. 563. Though there might be some such presumption as to household furniture, there was none as to billiard tables, which were machinery of trade—*Robinson* v. *North British Railway Company*, March 10, 1864, 2 Macph. 841; *Miller* v. *Hunter*, March 23, 1865, 3 Macph. 740. The action was therefore relevant.

The defender replied—The action of maills and duties could not transfer the property.

Moore as against Nelmes & Company could not have pleaded the decree in that action as a discharge. The pursuers had taken their remedy, and should not have had their interdict Their proper procedure was to have appeared at the application for warrant to poind, and have had the tables removed from the schedule. It had been so held in the analogous case of a landlord's sequestration. The principle of the diligence of poinding was that the creditor was entitled to sweep everything he found on the ground into his net, subject only to the right of a third party to vindicate any articles belonging to him.

Authorities—*Lady Ednam* v. *Lord Ednam*, 1628, M. 10,545; *Collet* v. *Marquis of Balmerinoch*, 1679, M. 10,550; *Lindsay* v. *Earl of Wemyss*, May 18, 1872, 10 Macph. 708; 1469, c. 36.

Counsel for the defender was not called on.

At advising—

Lord Craighill—There is brought before us by this appeal an action at the instance of the appellants against the respondent Miss Gillies. The Sheriff-Substitute dismissed the action on the ground of irrelevancy, and this judgment was affirmed by the Sheriff. We have heard parties on these interlocutors, and the question now to be determined is, whether the decision complained of ought to be adhered to? Upon consideration of all that has been said, the conclusion to which I have come is, that cause has not been shown why the interlocutors should be interfered with. The case of the pursuers is this—They say (Cond. 1) that in November 1881 they let on hire to Mr Moore, the owner of the premises 22 Argyle Street, three billiard tables with appurtenances at a weekly rent of 30s.; that (Cond. 2) the articles were sent by Moore's orders to the premises that they might be used by a tenant or tenants by whom the place was to be occupied as a billiard-room; that (Cond. 7) the estates of Moore were sequestrated under the Bankruptcy Act on 22d February 1882; that (Cond. 3) the defender was a creditor of Moore under a bond over the heritable subjects; and that on 17th March she caused a poinding of the ground to be executed, by which the billiard tables were attached; that (Cond. 4) the pursuers, in consequence of this interference with their property, raised an action of interdict on 20th March 1882 against the defender to prevent her disposing of these articles under her diligence, in which action decree as prayed for was pronounced on 28th May 1882, till which "time the billiard tables and other property, pending said action, remained in said premises and were used all along by the tenant;" that (Cond 5) besides this poinding of the ground the defender also raised an action of maills and duties on 8th March 1882 calling as defenders, *inter alios*, the tenants of said premises, who by their lease from Moore had become bound to pay Moore a rent of £3 per week, one half being for the premises occupied by him, and the other half for the use of the furnishings therein, being the same amount as Moore had become bound to pay to the pursuers for the hire of the said tables. The pursuers then aver (Cond. 6) that the defender obtained decree in the action of maills and duties, and in virtue thereof entered on the premises and uplifted the rents, including the £1, 10s., which was the weekly hire of the pursuers' property; and (Cond. 9) that the amount of rent payable for the period from 13th February to 12th June 1883 uplifted or intromitted with by the defender and payable to the pursuers is £25, 10s., the sum now sued for; and finally, that (Cond. 10) by the use of said poinding the pursuers have suffered loss and damage to the amount of £25, 10s.

These are the grounds on which the pursuers impute liability to the defender—First, because the billiard tables were poinded; and secondly, because the rent payable for the tables by the tenants was uplifted by the defender. The latter is a relevant cause of action. The former is insufficient, because the pursuer's statement is inconsistent with his allegation of consequent damage. The tables though poinded remained in the premises, and were used by the tenants as they would have been if they had not been poinded. On this head, therefore, the claim for £25, 10s. is untenable. The second ground of alleged liability is also on the face of it untenable. In the first place, the taking of the decree in the maills and duties, and the recovery of the rent, was not in legal result an adoption by the defender of the contract with Moore, and the defender consequently is not as in Moore's room liable for the amount of rent of the furniture. In the second place, the rent recovered from the tenants was not recovered from persons who were debtors to the pursuers. There was no contract between them and the tenants. And, in the third place, the liability of Moore, the hirer of the furniture, and the pursuers' only debtor for the hire, was not affected by the proceedings of the defender. These are the grounds on which the Sheriffs decided the case, and I do not think the pursuers have shown that they are unsound.

Lord Rutherfurd Clark—I am also of opinion that the appeal should be dismissed and the Sheriff's interlocutor affirmed.

Lord M'Laren—I also concur, and only wish to say that I do not assume a relevant case of wrongous poinding to be here stated. In cases of this kind there is always required a statement of wrong, and the issue if the case is sent to a jury always puts the question whether the goods were wrongfully poinded. I do not find here either the word "wrongful" or any allegation equivalent to the use of it, which is the foundation of all such actions. Though no doubt the distinctions are somewhat fine, at least the statement required in cases of this kind is something amounting to civil wrong or delict, and to more than a mere statement that the goods of the party complaining were among those poinded, which might happen by innocent mistake.

The Court dismissed the appeal and affirmed the judgment of the Sheriff.

Counsel for Pursuers (Appellants)—M'Lennan. Agent—James Skinner, Solicitor.

Counsel for Defender (Respondent)—Murray. Agent—David Turnbull, W.S.