these counties or not. I do not entertain any doubt upon the whole case, and I merely make these observations in order to indicate my view.

Lord Young—I am of the same opinion, and have really nothing further to add. Section 67 contains a general provision regarding the allocation of debts between the landward parts of counties and burghs, and that shall be applicable generally where the statute contains no special provision. But section 89 contains special provisions limited in their application to the counties of Lanark and Renfrew. The introductory words are—"Whereas it is expedient to make special provisions in this Act in regard to the highways within the counties of Lanark and Renfrew," . . . and then it proceeds to make special provision for the division of the debt between the burghs and landward parts of Lanark and Renfrew. I cannot for a moment think that this special provision is limited to roads wholly situated in Renfrew or Lanark, or to roads which before the passing of this Act were under trusts locally limited to those counties. No reason could be suggested for, nor could any object be served by, establishing a distinction between roads under trusts beyond and roads under trusts within these limits.

Lord Craighill and Lord Rutherfurd Clark concurred.

The Court adhered, and remitted the case to the Lord Ordinary.

Counsel for Defenders (Reclaimers)—J. P. B. Robertson—Lang. Agents—Campbell & Smith, S.S.C.

Counsel for Pursuers (Respondents)—Mackintosh—Pearson. Agents — Dove & Lockhart, S.S.C.

Wednesday, October 22.

SECOND DIVISION.

[Lord Lee, Ordinary.

DOUGLAS *v.* TAIT AND ANOTHER.

Diligence — Poinding of the Ground—Process—Instance — Joint Summons of Poinding the Ground at the instance of Two Heritable Creditors holding Separate Grounds of Debt—Community of Interest—Personal Bar.

Two creditors of the same debtor, holding separate bonds and dispositions in security granted over the same subjects, combined in raising against their debtor a summons of poinding of the ground. The debtor made no appearance, and decree having been pronounced against him in absence, letters of poinding and, in due course, a warrant of sale of the moveables on the ground were obtained. He thereupon sought to suspend the warrant and to have the threatened sale interdicted on the ground that the poinders not having that community of interest which made it competent for them to combine their diligences in one summons, the poinding of the ground and proceedings following thereon were inept. The Court (*diss.* Lord Rutherfurd Clark) *repelled* the ground of suspension, being of opinion that the debtor having allowed decree to go against him without objection in the action of poinding the ground, was barred from challenging the proceedings following thereon on a technical objection.

On 26th December 1883 Mrs Tait and William Donaldson raised in the Court of Session an action of poinding of the ground against Miss Barbara Douglas. Mrs Tait's title consisted of two several bonds and dispositions in security over Miss Douglas' property at Corstorphine, one of which was granted by Miss Douglas' father in 1871 for the sum of £100, the other having been granted by Miss Douglas herself in 1878 for the sum of a further £150. William Donaldson's title consisted of a bond and disposition in security granted over the same property by Miss Douglas in 1882 for the sum of £54. Miss Douglas paid £30 to account of Mrs Tait's debt, and the interest in that debt up to Martinmas 1883. She did not enter appearance in the action, and on the 15th January 1884 decree was obtained against her directing letters of poinding at the instance of the poinders to be issued and executed, and the same were accordingly obtained. Under these letters, in terms of the decree and letters, the moveable goods, gear, and effects belonging to Miss Douglas, situated on the ground of the subjects described in the said several bonds, and of which she was proprietor, were poinded in payment of the debts. The schedule of poinding was dated 1st February 1884. On the 11th of February the pursuers obtained the warrant of the Sheriff of the Lothians for the sale by public roup of the poinded effects.

On 14th February the usual statutory notice calling up the bonds and giving notice of sale of the subjects failing payment was given.

Miss Douglas on 22d February presented this note of suspension and interdict, the prayer of which was "to interdict, prohibit, and discharge the said respondents and each of them from proceeding or acting upon a warrant of sale, dated 11th February 1884, granted by the Sheriff of the Lothians at the instance of the respondents, the said Mrs Marion Brodie or Tait and William Donaldson, against the complainer, for the sale of certain goods, gear, and effects belonging to the complainer, and which were poinded by the said respondents in virtue of letters of poinding obtained by them under a decree in an action of poinding of the ground raised at their instance against the complainer."

The complainer pleaded, *inter alia*—"The summons of poinding the ground and the proceedings following thereon are incompetent and inept in respect the same are at the instance of two pursuers having separate grounds of action."

The Lord Ordinary (Lee) pronounced this interlocutor:—"Finds that the poinding in question was irregular and incompetent: Thereupon suspends the proceedings complained of: Interdicts, prohibits, and discharges the respondents each of them as craved: Declares the interdict formerly granted perpetual, and decerns."

"*Opinion.* — The complainer objects to the sale of certain moveable effects belonging to her, and alleged to have been poinded by the respondents in virtue of letters of poinding the ground,

dated the 15th, and signeted the 31st January, obtained by them under a decree of poinding of the ground of date 15th January, all in 1884. The execution of poinding bears date 1st February, and the warrant of sale is dated the 11th February.

"It appears that one of the poinding creditors (Mrs Tait) is in right of two bonds and dispositions in security over the complainer's property at Corstorphine—the first granted by the complainer's father in 1871 for £100; the second granted by the complainer herself in 1878 for £150. The other respondent (Mr Donaldson) holds a bond and disposition in security granted by the complainer in 1882 for £54. These securities are in the form provided by the Titles to Land Consolidation Act.

"The first of the complainer's objections is, that the execution of poinding proceeds upon letters expede at the instance of two creditors holding separate grounds of debt. It is objected that such a combination of diligences is incompetent, and that the warrant for the letters being a decree of poinding the ground granted in absence and obtained at the instance of two pursuers having no common ground of action or community of interest, was inept.

"The objection is not entirely technical, for the use of such diligences may give rise to different defences in the case of the different bondholders, and in this case it seems to me that the debtor had a legitimate interest to have the rights of the heritable creditors separately and distinctly brought forward. It is only on default in payment that the holder of a bond and disposition in security is entitled to enter into possession of the lands and uplift the rents (Titles to Land Consolidation Act 1868, sec. 119). It is admitted that the arrears of interest on Mrs Tait's bond had been paid before the execution of the poinding, and with regard to the principal sums in the several bonds, the statutory requisition or intimation of a demand for payment was not made until 14th February. With regard to arrears of interest on Mr Donaldson's bond, the allegation is that he had money in his hands more than sufficient to meet the whole interest due at Martinmas 1883, and this seems to be supported by the state of debt produced. The principal sum in this bond was not called up until the date of the requisition already mentioned. The respondents' allegations that there were certain conditions as to the time of payment not contained in the bonds, appear to me to be irrelevant in a question concerning the use of diligence.

"Holding therefore that the complainer is entitled to have her first objection considered upon its merits, the question is whether such an accumulation of actions and diligences was competent.

"The rule which I have always understood to be well settled is, that although persons aggrieved by the same act, or having a community of interest in the grounds of action, may prosecute in one suit their claims against a common defender, or against several defenders having a common interest in the action, it is not competent for them to do so, in the absence of any community of interest, on a common ground of action. I think that the rule was recognised in the case of *Gibson* v. *Macqueen*, 5 Macph. 113, and that it is specially applicable to a process such as poinding of the ground, the decree following on which is carried out without the necessity of any charge by simply expeding and executing the letters of poinding.

"It may be said that in the case of *Gibson* v. *Macqueen* the objection was accentuated by the fact that only one sum of damages was concluded for, and that in the case of *Harkis* v. *Mowat*, 24 D. 701, two persons were allowed to sue for separate sums of damage. But in the case of *Harkis* v. *Mowat* both claims of damage arose out of the same act, and the rule laid down in the case of *Gray* v. *Stewart*, M. 11,986, and followed in practice, was therefore in no degree infringed. In the present case the objection applies in like manner as in the case of *Gibson* v. *Macqueen*. For the conclusion of the action of poinding the ground is for one warrant of poinding at the instance of both pursuers, and that that warrant is to be executed by poinding the same moveable goods for payment (1) of the debt of Mrs Tait, and (2) of the debt of Mr Donaldson. Accordingly, the diligence was so executed. The whole of the complainer's moveable goods in the schedule and execution of poinding (appraised at a sum exceeding the amount of the debt alleged to be due to Donaldson) were poinded upon one warrant. So that if the poinding was objectionable at the instance of Mrs Tait, it was necessarily bad *in toto*. The impossibility of separating the goods poinded on behalf of Mr Donaldson from those poinded on behalf of Mrs Tait is just as obvious as the impossibility of apportioning between the two pursuers in the case of *Gibson* v. *Macqueen* the damages concluded for.

"The only question, therefore, is, whether the pursuers of the diligence can shew any community of interest to justify their proceedings? and I am of opinion that they have failed to do so. No doubt they allege themselves to be creditors of the same debtor, and they hold securities over the same subjects. But this, as explained in *Gibson* v. *Macqueen*, is no ground for saying they have a community of interest. It is rather a source of conflict of interest. The rule of *Gray* v. *Stewart* expressly applies to the case of one debtor. It is intended, if it has any meaning, to save that debtor from the difficulty of contesting in one action a variety of claims. The pursuers in this case founded upon separate grounds of debt. They had no common ground of action. Each was independent of the other, and neither was entitled to use diligence unless his own individual rights justified such diligence.

"I therefore hold that the respondents could not competently combine as they did, and that the execution of poinding was inept.

"I may add that, in my view, there is nothing in the Esk Pollution Case—*Duke of Buccleuch and Others* v. *Cowan and Others*, 4 R. (H.L) 13—(which was not cited before me) at all conflicting with the rule which I think must be applied. The decision there was rested upon the ground that in the special circumstances the complaining proprietors had a community of interest in the purity of the river, and in preventing the particular kind of pollution which was alleged.

"This is sufficient for the disposal of the case. But as other objections were argued before me, it is right that I should indicate my opinion upon them.

"1. It is pleaded that Mrs Tait had no title to sue the action of poinding the ground without concurrence of her husband. But it was not disputed at the debate that the bonds and dispositions in security on which she sued formed a part of the estate possessed by her, exclusive of the *jus mariti* and right of administration of her husband; and I think that on the authority of the case of *Hay Primrose* (12 D. 917), and other cases cited in Fraser on Husband and Wife, p. 813, her title to sue was sufficient. Indeed, I understood the objection to be ultimately given up.

"2. It is pleaded that poinding of the ground is competent only in respect of arrears of interest, and is not competent for payment of the principal sum, or of interest to become due."

"The fact is that the poinding bears to be for non-payment in the case of each bond (1) of the principal sum, and (2) of the interest from Whitsunday 1883, 'and in all time coming during the not-payment.' The interest due on Mrs Tait's debt is admitted to have been paid up to Martinmas 1883, prior to the execution of poinding; and I am of opinion that the poinding was bad, in so far as applicable to interest 'in time coming,' and as to which there had been no default.

"With regard to the competency of poinding the ground for payment of the principal sum in a bond and disposition in security such as those produced, my opinion is that the objection stated in the abstract is untenable. The objection was founded upon *dicta* of Lord Stair and Mr Walter Ross, which I think are applicable to heritable creditors infeft only in an annual-rent. Where the principal is made a burden on the land these *dicta* have no application. Such poindings may be used upon all *debiti fundi;* and where the creditor holds a bond and disposition in security in the modern form, there is both law and practice for the use of such real diligence for the recovery of the principal as well as interest in case of non-payment (Duff's Feudal Rights, 273; Menzies' Lect., part III., cap. 4 sec. 2; Bell's Lect. on Cov., 2nd ed., 1158; *Henderson* v. *Wallace*, 2 Rettie; *Scot. Herble. Securities Co.*, 3 Rettie, 333; and the Juridical Styles). Professor Menzies, in treating of the heritable bond, states in a few words the condition of the law on the subject. After explaining that the old heritable bond did not carry the property of the lands as a security for the principal sum, but merely charged the annual rent as a real burden, he says, 'As it is the interest only which forms a burden upon the land, the capital cannot be recovered by diligence against the tenants. . . . The deed may, however, be so framed as to embrace in the security the principal as well as the annual rent, and in that case the creditor would have the benefit of the same real diligence for recovery of the principal which he has for recovery of the annual rent. But the bond and disposition in security is the proper writ for charging both principal and interest upon the lands.

"But while I think that there is no incompetency, in the abstract, in poinding the ground for the principal as well as for the interest due upon a bond and disposition in security in default of payment, I think that in the case of Mrs Tait's bond there was admittedly no ground for a poinding for payment of arrears of interest; and as regards the principal, that there had been no failure to make payment, seeing that the requisition for payment had not only not expired but had not been intimated.

"I hesitate, however, to give judgment upon this ground, as it was not presented in argument, and is not pleaded. It is a very different thing from an objection in the abstract to the competency of poinding the ground for the principal sum in the bond and disposition in security.

"3. The only other objection which I think it necessary to notice is that expressed in the 4th plea-in-law, viz., that it was incompetent to proceed upon the poinding until the lapse of fifteen days from the execution.

"I think it impossible to hold the procedure upon such poindings to be regulated by the Personal Diligence Act. For it is well settled that these poindings are not personal but depend upon the infeftments of the creditors (*Bell* v. *Cadell*, 10 Sh., 100, Stair, iv. 47, 24). The doctrine of Stair however is, not that fifteen days must elapse after the date of the execution, but that the letters of poinding cannot proceed 'till 15 days after the decreet of poinding the ground, which are the days of law within which parties may satisfy or procure suspension.' In this case the decree of poinding was on 15th January, and the letters were not expede until 31st January, and were not executed until 1st February. It is true that there was only one day between the date of expeding the letters and the date of the execution, and that there was, as usual, no charge on the decree of poinding. But the defenders called in the poinding had the legal days for procuring suspension; and my opinion is that this was all they were entitled to, and the objection is ill-founded. I know of no authority for the proposition that there must be fifteen days after the execution before a warrant of sale is applied for.

"On the whole, however, and for the reasons stated, I think that the diligence was irregular, and that the complainer is entitled to suspension and interdict as craved, with expenses."

The respondents reclaimed, and argued as follows:—Admitted that the Lord Ordinary was right in holding that there must be a community of interest or a common ground of action to enable two or more persons aggrieved by the same act to raise a joint action against a common defender. The proposition applied only to ordinary actions, and had no application in such an action as the present, which was a declaratory real action to assert a common interest in certain moveables on the ground in which both creditors have a common real right in order to division according to their respective rights—*Hay* v. *Marshall*, July 7, 1824 3 S. 223, March 12, 1826, 2 W. & S. 71; *Campbell's Trustees* v. *Paul*, January 13, 1835, 13 S. 237 (Lord Mackenzie, 234). 2. An examination of the cases cited by the Lord Ordinary showed that they were each decided on arbitrary grounds, and no rule could be drawn from them. It was simply a matter of legal etiquette and of what was convenient and becoming. No absolute nullity was involved in it, and at most only a possible defence. 3. If the objection was taken in time it might be obviated—*Gray* v. *Stewart*, June 5, 1741, M. 11,986, in which the Court allowed the pursuers to make election at whose instance the action should proceed, but here no appearance was made for the complainer,

decree was passed, and she was therefore too late in bringing forward the objection in her suspension. Her argument as to the competency of the procedure, presented at this stage, was exactly the same as though in any ordinary action of debt the debtor had failed to appear, decree had been given and diligence used therein, and then he had come forward and challenged the proceedings as following on a nullity in procedure. The objection, then, did not apply to the category of actions to which poinding of the ground belonged, and in any case the complainer was too late in bringing it forward.

The complainer replied — It was clearly established by decided cases that two creditors holding separate grounds of debt could only combine their diligences against a common defender if they could show a common ground of action —*Gibson* v. *Macqueen*, December 5, 1866, 5 Macph. 113; *Harkis* v. *Mowat*, March 4, 1862, 24 D. 701; *Gray* v. *Stewart*, *supra*. Here the poinders could show none whatever. They had separate grounds of debt, each independent of the other, and the bonds did not run *pari passu*. The fact that they held securities over the same subjects was against the idea of community of interest. This objection, then, involved a nullity which rendered null the whole proceedings. Further, after decree had been given it was not competent to have the summons restricted so that the action should lie at the instance of one pursuer, the other going out— M'Glashan's Sheriff Court Practice, p. 150, section 827.

At advising—

LORD YOUNG—The circumstances of this case are numerous, but I think I can state them briefly and clearly.

The respondent Mrs Tait is a creditor of the present complainer for two sums of £100 and £150, and the other respondent Mr Donaldson is creditor for a sum of £54, and both are heritable creditors, their debts being secured by bonds and dispositions in security. In order to make their debts available by diligence they brought an action of poinding of the ground in this Court, which, of course, was regularly served on their debtor, who was called as defender. He did not choose to appear in the process, and we have no explanation of his non-appearance, and in his absence, therefore, decree was pronounced against him on the 15th January 1884. That decree was extracted, and it ordered the proper officers to issue letters of poinding of the ground at the instance of the pursuers against the defender, and in obedience to that extracted decree letters of poinding of the ground were issued in the same month of January, and poinding followed on the 1st February. On the 11th February the Sheriff was applied to to grant warrant of sale of the goods which had been poinded on the 1st, and he did so as a matter of course, there being no opposition, on the 11th February. Eleven days after, on the 22d, the defender for the first time appeared, and raised this suspension, the prayer of which is, "to interdict, prohibit, and discharge the said respondents, and each of them, from proceeding or acting upon a warrant of sale dated 11th February 1884 granted by the Sheriff of the Lothians," &c. The decree in the action of poinding of the ground was not, I have already said, opposed, for the defender made no appearance in the action, and I should be greatly disposed to hold, although it is not necessary, that that decree is not assailable in this process. It is a formal decree of this Court in an action of poinding of the ground, without objection by the defender, who might have appeared, extracted, and regularly acted on, assuming it is a good decree, to the stage of the Sheriff's issuing a warrant to sell. We are now asked to interrupt that warrant on the ground that the decree is bad, and bad on the ground that two pursuers were combined in the summons, and that it ordered letters of poinding of the ground to be issued at the instance of both. Now, I am of opinion that this is a purely technical objection, though I think the authorities go to this, that if the defender had seen fit to appear in the action and object to its being laid at the instance of both respondents the Court would have restricted it to one or other of them. It is unnecessary to examine the law further or the authorities on which it stands, but it seems that as a rule the Court will not, in face of objections stated by the defender, allow an action to proceed at the instance of several independent pursuers, but then the authorities only go to this, that the Court will give effect to it and limit the case to the effect of having it presented by one pursuer only if the objection is stated by the defender. There is no authority to this effect, that if an action at the instance of two or more pursuers is allowed to go on without objection, then that any decree following thereon is a nullity, and in the particular case here I shall not say whether we should not have allowed the action to proceed at the instance of both pursuers. Obviously, every consideration of utility, convenience, and economy tends to its being to the interest of all that the action should proceed at the instance of both. It is not necessary, however, to determine this, for no objection was in point of fact stated by the defender, who had every opportunity, and has given no excuse for not doing so. Decree has been pronounced, and the whole proceedings are at an end, and I am not prepared to sustain an objection raised in this suspension on purely technical grounds. I am of opinion that the suspension ought to be *de plano* refused.

LORD RUTHERFURD CLARK—I am disposed to think it incompetent for the respondents to join in raising one summons of poinding of the ground, and therefore that the diligence cannot go against the complainer at their joint instance. I entertain great doubts as to whether after decree has been taken, the decree can be restricted so as to permit the diligence to proceed at the instance of one respondent. But, on the whole matter, as I understand your Lordships entertain a different opinion, I think it unnecessary to add more.

LORD JUSTICE-CLERK—I concur so entirely with the opinion of Lord Young that I deem it unnecessary to say more than a few words. Here the debt was constituted by bonds and dispositions in security duly recorded, and they formed the warrant for the action of poinding of the ground at the instance of either of the respondents. It is said that this action proceeded on a false instance because there was a combination of two pursuers in the same summons. I rather think if this had been stated before decree had

been given, the Court might have refused to allow the summons to go at the instance of both, but no such objection was stated, and decree was passed. If the combining of two pursuers in an action for their separate debts were a nullity, no doubt there might be a great deal to say for the incompetency of the whole diligence following on the decree; but there is no nullity whatever; there is only a technical incompetency in combining two pursuers in the same summons—only an incompetency in the forms of process—and therefore I am inclined to hold that after decree of poinding of the ground was pronounced it was too late to plead such incompetency. I am therefore of opinion that no ground has been presented for suspension here.

Lord Craighill was absent.

The Court recalled the interlocutor of the Lord Ordinary, repelled the reasons of suspension and interdict, and found the warrant of sale complained of orderly proceeded.

Counsel for Respondents (Reclaimers)—Mackintosh—Omond. Agent—Wm. Donaldson, Solicitor.

Counsel for Complainer (Respondent)—Nevay—T. Rutherfurd Clark. Agent—Robert Broatch, L.A.

Tuesday, October 28.

OUTER HOUSE.

[Lord M'Laren.

FRŒBEL *v.* FRŒBEL AND LIDDELL.

Husband and Wife—Divorce—Process—Expenses against Wife having Separate Estate.

This was an action by Ernst William George Otto Frœbel against his wife, concluding for divorce on the ground of adultery with the co-defender Liddell. No appearance was made for the defender or co-defender. The summons concluded against the defender and co-defender, conjunctly and severally, for the expenses of process. The facts averred in the condescendence were proved, and the Lord Ordinary granted decree of divorce. The pursuer moved the Lord Ordinary to find the defender and co-defender jointly and severally liable in expenses as concluded for. He stated that the defender had separate estate. He referred to *Milne* v. *Milne*, L.R., 2 P. & D. 204; Fraser on Husband and Wife, vol. ii. p. 1231.

The Lord Ordinary, "in respect it is stated that the said Bessie Reid Kerr or Frœbel has separate funds of her own, and Robert Liddell, the other defender, having failed to appear," found "both these defenders liable, conjunctly and severally, in expenses, as the same shall be taxed," &c.

Counsel for Pursuer—Sym. Agent—J. P. Bannerman, W.S.

Wednesday, October 29.

FIRST DIVISION.

ROBERTSON *v.* WILSON.

Process—Appeal—Competency—Cessio—*Debtors Scotland Act* 1880 (43 *and* 44 *Vict. cap.* 34)—*Search Warrant.*

Where, in a process of *cessio* at the instance of a creditor under the Debtors (Scotland) Act 1880, the first deliverance issued by the Sheriff, finding that there was *prima facie* evidence of notour bankruptcy, appointing the creditor to follow out the procedure required by the Act, and the debtor to appear for public examination, contained also a warrant to open lockfast places and to search the dwelling-house and person of the debtor, the Court *held* that this special warrant did not take the case out of the rule of *Adam & Sons* v. *Kinnes*, February 27, 1883, *ante*, vol. xx. p. 436, and 10 R. 670, and therefore that the deliverance could not competently be appealed to the Court of Session.

Counsel for Appellant—Low. Agent—J. Barton, S.S.C.

Counsel for Respondent—Lang. Agent—D. H. Wilson, S.S.C.

Wednesday, October 29.

FIRST DIVISION.

WATSON *v.* THE BOARD OF TRADE.

Ship—Loss of Ship—Master—Duties of Master—Shipping Casualties Investigations Act 1879 (42 *and* 43 *Vict. cap.* 72)—*The Shipping Casualties (Appeal and Rehearing) Rules.*

Circumstances in which the Court, acting upon the advice of nautical assessors, *found* that the sailing ship "Vicksburg" was not lost through improper or unseamanlike navigation on the part of the master, but owing to violent weather and to abnormally overpowering tides, of which the sailing directions for the course which he was taking contained no special warning, and *restored* to the master his certificate, which had been suspended by the deliverance of the Inferior Court.

The Shipping Casualties Investigations Act 1879 (42 and 43 Vict. cap. 72), section 2, sub-section 1, provides—"Where an investigation into the conduct of a master . . . or into a shipping casualty has been held under the Merchant Shipping Act 1864, or any Act amending the same;" . . . and sub-section 2—"Where in any such investigation a decision has been given with respect to the . . . suspension of a certificate of a master . . . an appeal shall lie from the decision to . . . (*b*) If the decision is given in Scotland, either Division of the Court of Session."

The Shipping Casualties (Appeal and Rehearing) Rules 1880, by rule 6, sub-section (*d*), provide—"The court of appeal shall be assisted by not less than two assessors, to be selected in the