spect between real estate situated within the territory and real estate situated beyond the territory. Therefore I am unable to give effect to the contention of the executors.

The other question raised by the heir-at-law appears to me to be virtually settled by the previous judgment affirmed by the Second Division, because the principle upon which that went was this, that where a debtis charged upon a heritable estate the heir taking up that estate is liable for payment of the debt, and his liability is not limited to the amount of the particular estate charged, provided he takes up at the same time other estate belonging to the deceased ancestor upon the same title. That being decided in a question between the heir-at-law and the executors, I think the same principle is directly applicable to the present question between the heir-of-line and the heir of another denomination, that is to say, the heir of the particular real estate situated beyond the territory which is carried by the law of the place where it happens to be situated, and a different heir from the Scottish heir-of-line. Therefore I ought to say that the cases which have been cited do not appear to me to have really any direct bearing or any bearing at all upon the question in dispute. The case of *Ogilvie* v. *Dundas*, proceeded entirely upon the construction of the particular marriage settlement upon which the question arose, and the judgment of the House of Lords reversing the judgment of the Court here proceeded exclusively upon the terms of that settlement. Therefore it does not appear to me to be an authority for any other case, and certainly not an authority for a case in which the rights and liabilities of the heir are not regulated by the testamentary settlement of the deceased but by the ordinary rules of law. The cases in which heirs of a different denomination have been held bound to contribute rateably to the payment of the debts appear to me to be all cases falling under one or other of two categories. Either they are cases where the debts to the payment of which they were to contribute have been charged by the deceased on their constitution upon the several estates which have descended to different heirs, or else they are debts the payment of which he has regulated by a testamentary settlement. I have found no case, and no case was cited to me, in which that principle was applied in such a case as the present where there is nothing to affect the debt specially charged upon one estate. Therefore I have not been able to see any ground for excepting this from the general principle to which I have referred. The result will be to sustain the claim of Mr Perston.

"I think Mr Perston is certainly entitled to the expenses properly incurred in the discussion of the question that was really litigated with him; but that he is bound to establish his propinquity and right according to the law of Burmah. He cannot have the expenses applicable to that part of the discussion."

Counsel for Perston—Pearson—W. Campbell. Agent—J. B. Mackintosh, S.S.C.

Counsel for other Claimants—Mackintosh—Dickson. Agent—William Finlay, S.S.C.

Saturday, March 7.

OUTER HOUSE.

GALBRAITH (BUCHANAN'S TRUSTEE) *v.* CAMPBELL'S TRUSTEES.

Bankruptcy—Cessio superseded by Sequestration—Bankruptcy and Cessio Act 1881 (44 *and* 45 *Vict. c.* 22), *sec.* 11—*Bankruptcy Act* 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 29 *and* 42.

On 14th April 1884 a petition for decree of *cessio bonorum* against a debtor was presented by a creditor, and the Sheriff pronounced a deliverance on the same date. On 9th May, on a motion made in the *cessio* process the Sheriff awarded seqestration of the debtor's estates in terms of sec. 11 of the Bankruptcy and Cessio Act 1881. *Held* that 9th May and not 14th April was in the winding up of the debtor's affairs to be held as the date of sequestration.

Bankruptcy—Diligence—Poinding—Sequestration—Pari passu *Ranking—Bankruptcy Act* 1856, *secs.* 12 *and* 108.

Decree was obtained by a creditor against a debtor on 15th February 1884. The days of charge on the decree having expired without payment, the debtor, who was insolvent, was rendered notour bankrupt, and a poinding was executed on 1st March, the poinded effects being afterwards sold. On 14th April a petition for *cessio* was presented by another creditor, and in the *cessio* process on 9th May the Sheriff awarded sequestration. *Held* that the 9th May being the date of the sequestration, the creditor's poinding was effectual, because it had been executed more than sixty days prior thereto, but that the sequestration being equivalent to an executed poinding fell by operation of sec. 12 of the Bankruptcy Act 1856 to be ranked *pari passu* therewith in the proceeds of the sale of the poinded effects.

A. G. Buchanan, distiller, was tenant, under the trustees of the late Sir George Campbell of Succoth, of (1) the farm of Tambowie near Milngavie, at a rent of £280; (2) of Tambowie Distillery there, at a rent of £20.

On 29th January 1884 Campbell's trustees pursued Buchanan in the Sheriff Court of Stirlingshire for payment of (1) £596, 10s., with interest from Martinmas 1883, that sum being made up of rent and arrears of rent; (2) £140, with interest from Whitsunday 1884, but superseding extract till said term of Whitsunday.

On 15th February 1884 decree was obtained for the £596, 10s. and interest amounting to £12, 9s. 9d. This decree was extracted, and Buchanan charged to pay it on 22nd February 1884. He did not pay it, and on 1st March 1884, the charge having expired, Campbell's trustees executed a poinding of his stock and other effects, which was reported on 5th March.

On 5th April the poinded effects were sold. According to the roup roll the proceeds were £587, 17s. 7d., out of which expenses and preferable charges fell to be paid. Campbell's trustees maintained in this action that the sum received amounted, after proper deductions, to £503, 18s. 5d.

On 14th April 1884 Hugh Baird & Co., brewers, Glasgow, presented a *cessio* petition, under the Cessio Act 1881, against Buchanan, to have him ordained to execute a disposition *omnium bonorum* for behoof of his creditors. They held a decree against him for £16, 10s. The deliverance of the Sheriff of the same date (14th April) appointed creditors to appear in Court on 9th May for the public examination of the debtor.

On 9th May the agent for Baird & Co., the agent for Campbell's trustees, the agent for the bankrupt and his sister, who alleged herself to be a creditor, and the agent for ten other creditors to whom Buchanan owed small sums, attended the meeting. Buchanan's agent moved that in respect of the poinding and sale by Campbell's trustees the distribution of the estate should be under the Bankruptcy Act 1856, in order that the trustee should have the power of reducing the preference thereby obtained or attempted. This motion was concurred in by the agent for the ten creditors, and the Sheriff, after hearing the agent for Campbell's trustees in opposition to it, pronounced this interlocutor:—"The Sheriff-Substitute having considered the said motion and heard the agent for the late Sir George Campbell's trustees in opposition thereto, and in respect it appears from the state of affairs in the process that the liabilities of the debtor exceed the sum of £200 sterling, and that it would be expedient, having regard to the whole circumstances of the case, to give effect to said motion, therefore, and in terms of section 11 of 44 and 45 Victoria, chapter 22, sequestrates the estates which now belong, or shall hereafter belong, to the debtor and defender Alexander Graham Buchanan, distiller, Tambowie, by Milngavie, before the date of his discharge, and declares the same to belong to his creditors, for the purposes of the Bankruptcy (Scotland) Act 1856, and Acts explaining and amending the same." He appointed 20th May as the date of the meeting to elect a trustee.

This notice was advertised by the bankrupt's agent in the *Gazette*, the advertisement stating that the first deliverance was dated 9th May 1884.

On 20th May the meeting was held (the agent for Campbell's trustees not attending), and W. B. Galbraith, accountant, was elected trustee.

This was an action by him, as trustee, against Campbell's trustees, for decree against them to exhibit an account of their intromissions with the proceeds of the sale under the poinding, and for payment of £600 as the balance thereof.

He averred that Buchanan was insolvent when the charge on the decree obtained by Campbell's trustees expired, and that therefore by insolvency concurring with expiry of the charge he was rendered notour bankrupt as on 1st March 1884, in terms of the Debtors (Scotland) Act 1880 (43 and 44 Vict. c. 34), the 6th section whereof provides —"In any case in which, under the provisions of this Act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment followed by the expiry of the days of charge without payment." . . .

In answer to this averment the defenders denied that Buchanan was insolvent at the date of the expiry of the charge, and averred that he had estate of sufficient value to satisfy the charge and meet the other *bona fide* claims then competent against him, which it was averred did not amount to more than £120.

The pursuer also founded on sec. 42 of the Bankruptcy (Scotland) Act 1856, which enacts, that "in all questions under this Act, or preceding Acts, regarding sequestration of the estate of debtors, the sequestration shall be held to commence and take effect on and from the date of the first deliverance on any petition for sequestration, which shall be held to be the date of sequestration although the sequestration be not actually awarded until a later date;" and on sec. 108, which enacts that "the sequestration shall, as at the date thereof, be equivalent to an arrestment in execution, and decree of forthcoming, and to an executed or completed poinding; and no arrestment or poinding executed of the funds or effects of the bankrupt on or after the sixtieth day prior to the sequestration shall be effectual; and such funds or effects, or the proceeds of such effects if sold, shall be made forthcoming to the trustee, provided that any arrester or poinder who shall thus be deprived of the benefit of his diligence shall have preference out of such funds or effects for the expense *bona fide* incurred by him in such diligence;" and on sec. 12, which enacts *inter alia*, "that arrestments and poindings which shall have been used within 60 days prior to the constitution of notour bankruptcy or within four months thereafter shall be ranked *pari passu* as if they had been all used of the same date."

He averred and maintained that the poinding by Campbell's trustees was used and executed after the completion of the notour bankruptcy of Buchanan; that the date of Buchanan's sequestration was the 14th April, which was the date of the first deliverance in the *cessio* process, and that the poinding being thus executed after the 60th day prior thereto, was ineffectual; or at all events, even if effectual to any extent, that the sequestration fell to be ranked *pari passu* with it under sec. 12 above quoted, and that the proceeds of the sale must be made forthcoming to him as trustee, subject to any other preference which Campbell's trustees could instruct.

Campbell's trustees maintained that the poinding having been used on 1st March, and the date of sequestration being 9th May, the poinding was executed 69 days before the sequestration, and was effectual, and further, that on a sound construction of the Bankruptcy Act 1856 the sequestration was not equalised with it, and that they were entitled to retain the proceeds of the sale.

Authorities—2 Bell's Comm. 5th ed. 79, 80 (7th ed. 75, 76); Bell's Comm. on the Sequestration Statutes, 49 and 67; Burton on Bankruptcy, 104 and 306 *et seq.*; Kinnear on Bankruptcy, 18, 20, 52; *Adam & Son* v. *Kinnes*, 10 R. 670; *M'Farlane* v. *Greig* (1831), 9 S. 529; *Nicolson* v. *Johnston & Wright*, December 6, 1872, 11 Macph. 179; *M'Ewan* v. *Young*, May 27, 1817 F.C.

The Lord Ordinary pronounced this interlocutor:—"Finds that in terms of the Bankruptcy Act 1856 the Sequestration is equivalent to a poinding executed of the same date, and entitled to be ranked *pari passu* with the poinding at the instance of the defenders on the proceeds of the sale mentioned in the libel: Finds that the de-

fenders are bound to account to the pursuer for his share of the said proceeds, and ordains them to lodge an account thereof," &c.

"*Opinion.*—The action is maintained upon two separate grounds:—(1st), that the defenders' poinding is ineffectual by reason of its having been executed within sixty days of sequestration; and (2d), that if it be effectual the sequestration is equivalent to a poinding executed within four months of notour bankruptcy, and is therefore entitled to be ranked *pari passu* with the defenders' poinding as if both had been used of the same date.

"The first question depends upon the date of the sequestration. The poinding was executed on the 1st of March 1884. A petition for decree of *cessio bonorum* was presented on the 14th of April, and on the 9th of May the Sheriff, on a motion to that effect in the process of *cessio*, awarded sequestration in terms of the 11th section of the Act 44 and 45 Vict. cap. 22. The effect of this deliverance was that thereupon the provisions of the Bankruptcy Acts applied as if sequestration had been awarded upon a petition in terms of section 29 of the Bankruptcy Act 1856. But the deliverance awarding sequestration, and the motion upon which it was pronounced, were both subsequent to the sixtieth day after the execution of the poinding, and it follows that the 108th section of the Act of 1856 which thereupon came into operation cannot have the effect of cutting down the poinding unless some earlier date can be taken as the date of the sequestration in the sense of that section. The pursuer maintains that the first deliverance in the process of *cessio* is to be taken as the first deliverance in the sequestration, and therefore as the date of the sequestration under the 42d section of the Bankruptcy Act. I cannot assent to this contention. The process of *cessio bonorum* differs from a sequestration in many respects, and particularly in this, that it has not the same effect in cutting down preferences which individual creditors may have obtained by the use of diligence, and it is just because of this difference that it may be expedient or necessary in such a case as the present that the *cessio* should be dismissed—to use the words of the marginal title—and sequestration awarded. The process of *cessio* may thus be superseded by a sequestration, but they are not one and the same but two different processes. If it had been intended that the award of sequestration should have a retroactive operation so as to give to the previous proceedings in the *cessio* the same effect in law as if they had been proceedings in a sequestration with the result of cutting down rights already perfected and untouched by the *cessio*, this must in my opinion have been expressly enacted. I conceive therefore that the deliverances before the 9th of May, when the Sheriff was for the first time asked to sequestrate, were deliverances in a process of *cessio bonorum* and not in a sequestration, and that the first deliverance in the sense of the 42nd section was that by which sequestration was awarded.

"But although the poinding is not cut down, I am of opinion that under the 12th section of the Bankruptcy Act the sequestration must be regarded as a poinding to be ranked *pari passu* upon the proceeds of the sale. The enactment of the 108th section that the sequestration shall be equivalent to an executed poinding is absolute and unqualified. It is not for any limited or special purpose, but generally for the purposes for which a poinding may be effectual, that the sequestration is made equivalent to a poinding. There appears to me, therefore, to be no sufficient ground for denying to the sequestration the effect which the 12th section of the same statute gives to poindings in general. The result is that the defenders' poinding is not cut down by the sequestration, but that since it was used at the same date when notour bankruptcy was established, all other poindings within four months thereafter, including the sequestration, are brought up to the same level, and must be ranked *pari passu* on the proceeds of the sale. This is in accordance with the opinion expressed by Lord Deas in *Nicolson* 11 Macph. 179, and although the point was not decided his Lordship's opinion on the construction of the statute is of high authority. It is said that the bankrupt was not insolvent at the expiry of the charge, and therefore that notour bankruptcy was not duly constituted. But the notour bankruptcy is conclusively established by the proceedings in the *cessio* and by the award of sequestration.

"The form of action is in conformity with the provisions of the 12th section of the Bankruptcy Act."

Counsel for Pursuer—Pearson. Agents—Cairns, Mackintosh, & Morton, W.S.

Counsel for Defenders—Trayner—Macfarlane. Agents—Tait & Crichton, W.S.

Monday, March 30.

OUTER HOUSE.

[Lord Kinnear, Ordinary on Teind Causes.

MACECHERN *v.* HERITORS OF INVERNESS.

Church — Obligation of Heritors to Repair or Renew.

Where it appeared from the report of a man of skill to whom the Sheriff remitted to examine the fabric of a church that it could be substantially repaired for much less than the cost of a new church, the Court *refused* to ordain the heritors to rebuild, but ordered them to repair.

This was an appeal to the Lord Ordinary on Teind Causes under the Ecclesiastical Buildings and Glebes Act 1868.

In September 1883 the appellant, the Rev. C. MacEchern, minister of the Gaelic Church, Inverness (who had received from an architect a report stating that the church was in a dangerous and unhealthy state), presented a petition to the Presbytery of Inverness praying for a visitation of that church, and for a finding by the Presbytery as to its condition, and that thereafter the Presbytery appoint the necessary repairs and alterations to be made by the heritors. The petition stated that the seats and woodwork generally were ruinous, insufficient and uncomfortable, and in part unsafe, that the plaster of the roof threatened to fall, that the church was damp and unhealthy owing to part of it at the south-