signee is unable to produce the bill of lading for no other reason except that it has not yet arrived in the ordinary course of post. Much argument was also expended upon the question whether in the absence of the bills of lading it was not the pursuer's duty to land the goods subject to his lien, as was permitted by the terms both of the bills of lading and of the Merchant Shipping Act 1894. The power to land goods subject to the shipowner's lien is primarily a right which is created in the interests of the ship, but I do not doubt that in special circumstances a shipowner might find himself precluded from claiming demurrage or damages for detention if he unreasonably refused to exercise this right. Having regard, however, to the very short periods of time with which we are concerned in the present case, it would, I think, be unsafe to hold that the pursuer prejudiced his position by not adopting somewhat earlier the course which his agent ultimately adopted, viz., to deliver the goods to the North British Railway Company as wharfingers.

For the foregoing reasons I am of opinion that the Lord Ordinary's interlocutor ought to be affirmed.

LORD MACKENZIE was sitting in the Extra Division.

The Court adhered.

Counsel for the Pursuers and Reclaimers — Horne, K.C. — Lippe. Agents — Martin, Milligan, & Macdonald, W.S.

Counsel for the Defenders and Respondents — Dean of Faculty (Dickson, K.C.)— Carmont. Agents—Beveridge, Sutherland, & Smith, W.S.

Friday, March 12.

EXTRA DIVISION.

TRAILL'S TRUSTEES *v.* TRAILL'S CREDITORS.

Bankruptcy — Voluntary Trust Deed for Creditors—Right in Security—Poinding —Ancestors' Creditors—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 102.

J. C. T. died after executing a trust-deed for his creditors. On a construction of the terms of the deed, *held* that the provision in the Bankruptcy Act 1856, sec. 102, that the Act and warrant of a trustee should operate in favour of ancestors' creditors as a complete diligence, was not imported into the trust-deed, and consequently that ancestor's creditors holding heritable bonds over property conveyed by the trust deed, not having poinded, had in a competition with the truster's creditors no preferential claim over the moveables which had been on it.

Opinion per Lord Cullen that the term "complete diligence" in the Act 1856 did not include poinding of the ground.

Prescription — Bankruptcy — Succession — Preference of Ancestors' Creditors over Heir and his Creditors after Forty Years.

The rights, in a sequestration, of ancestors' creditors to a preference over the heir and his creditors, which arises from the common law rule that the heir takes the property subject to his ancestors' debts, may be cut off by the negative prescription, unless the ancestors' creditors follow up their claims within forty years. *Circumstances* in which ancestors' creditors' rights to a preference *held* to have been so cut off.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79), sec. 102, enacts, *inter alia* —"The act and warrant of confirmation in favour of the trustee shall *ipso jure* transfer to and vest in him . . . the whole property of the debtor to the effect following: —. . . (2nd) . . . Provided always that such transfer and vesting of the heritable estate shall have no effect upon . . . the rights of the creditors of the ancestor (except that the act and warrant of confirmation shall operate in their favour as complete diligence). . . ."

John Little Mounsey, W.S., sole surviving trustee under the trust-disposition granted by the late James Christie Traill of Rattar, *first party*, the creditors of the said James Christie Traill, and the creditors of his ancestors James Traill and George Traill, presented a Special Case to have determined the rights of the respective creditors to the proceeds of two of the family portraits taken from Castlehill House and sold. The portraits belonged originally to James Traill, who owned Castlehill and other properties, and subsequently in succession, along with James Traill's properties, to George Traill and James Christie Traill. The *second parties* to the case consisted of the heritable creditors of James Traill, who held bonds over properties other than Castlehill; the *fourth parties* were the holders of bonds over Castlehill granted by George Traill; the *fifth parties* were holders of bonds over Castlehill and other properties granted by George Traill, and also creditors of James Christie Traill, holding bonds over the whole estates; the *sixth parties* were the holders of bonds granted by George Traill over estates other than Castlehill; and the *seventh parties* were the unsecured creditors of James Christie Traill.

The Special Case set forth, *inter alia*— "1. By *inter vivos* trust-disposition, dated 5th January 1887, the deceased James Christie Traill, Esq. of Rattar, on the narrative that he was indebted and owing to various persons certain sums of money, partly upon heritable securities over his estates therein disponed, and partly on bonds, bills, accounts, and otherwise, and that for further security and more ready payment to his whole lawful creditors at the date of the said trust-disposition, and being desirous that the said debts should be paid off as speedily as practicable, he had resolved to grant the said trust-disposition, gave, granted, alienated, disponed, and assigned to John Clerk Brodie, Thomas

Dawson Brodie, David Wardlaw, and John Little Mounsey, all Writers to the Signet, Edinburgh, and to the survivors and survivor of them, . . . all and sundry his whole means, estate, and effects, heritable and moveable, real and personal, of whatever kind and wherever situated, then belonging to him, or which might belong and accrue to him during the subsistence of the trust. . . .

"2. The said disposition was declared to be in trust for, *inter alia*, the following purposes:— . . . (*Thirdly*) For payment to the truster's creditors of the interest due and to become due on the debts due by him, whether secured or unsecured, and of the annuities payable by him (the secured creditors being paid their interests and annuities according to the order in which their securities were recorded): (*Fourthly*) For payment to the truster's creditors foresaid of the whole debts due by him to them, according to the several rights, interests, and preferences of the said creditors, and conform to a scheme or schemes of division to be made out and authenticated by the trustees.

"3. By said trust-disposition it was, *inter alia*, declared with reference to said fourth purpose that every creditor 'who holds a security over any part of the trust estate, heritable or moveable, shall be bound to value and deduct such security from the amount of his claim before ranking and specify the balance, and the trustees shall be entitled to a conveyance or assignation of such security at the expense of the trust estate on payment of the value so specified; and that acquiescence in or accession to this trust shall not preclude any such creditor from continuing to hold such security or from exercising all the powers (except the power of doing diligence against me) which they at present have in connection therewith, including, *inter alia*, the power of selling or disposing of the same as freely in all respects as if this trust-disposition had not been granted, or they had not acquiesced in or acceded thereto, they being always bound to give in writing to the trustees three months' notice of such intended sale as regards the heritable estate, and eight days' as regards the moveable estate, such creditors being in that event bound to impute to the amount of their claims the net sums realised on such sale and to account to the trustees for the balance, if any; but providing that so long as the trustees shall regularly pay the interests on the various secured debts as they fall due, none of the secured creditors shall, during the period of five years from the date hereof, be entitled to poind the ground or enter into possession of the security-subjects by maills and duties or otherwise; and also declaring that in the event of the trust estate being insufficient to pay to my creditors the full amounts of their respective debts and interest thereon, the trustees shall pay and divide the proceeds thereof, by one or more dividends, among all my creditors rateably and proportionally and according to their legal rights and preferences, such payment and division being made upon the same rules and principles as if made in a process of sequestration under the Scotch Bankruptcy Statutes, according to which rules and principles the trustees shall be guided in regard to the admission or rejection of all claims, the ranking of creditors, payment of dividends, and distribution of the trust estate generally; all questions of ranking and preference being determined on the same footing as if an award of sequestration of my estate had been made under the said Bankruptcy Statutes as at the date of execution hereof, but the trustees shall not be bound, except so far as they shall see fit, to adopt any of the formal procedure of a sequestration.' . . .

"7. At the date of the said trust-disposition the heritable estates of the said James Christie Traill thereby conveyed consisted of, *inter alia*, the lands of Rattar, Bowermadden, Castlehill and Murkle, Hollandmake, in the county of Caithness, and Hobbister and Elsness in Orkney. . . .

"9. There are, in addition to the creditors holding heritable securities before referred to, various unsecured creditors of the said James Christie Traill. These creditors are the seventh parties hereto, and their claims, which have not yet been adjudicated on by the first party, amount to a large sum. None of these creditors is a creditor of Sheriff James Traill of Hobbister, the original owner of the pictures after mentioned, and granter of the first four bonds mentioned in the state, or of his son George Traill or his (the latter's) testamentary trustees.

"10. It was understood from the commencement of the trust that some of the family portraits in Castlehill House, which stands on the lands of Castlehill, were painted by Sir Henry Raeburn, R.A., but at the inception of the trust they were not believed to be of great value. In 1911, however, arrangements were made by the first party for having two of these portraits, being those of Sheriff James Traill and Lady Janet Traill, removed to Edinburgh from Castlehill House for examination by experts and for safe keeping. From the time when they were painted till they were so removed to Edinburgh, the said two portraits were kept in and formed part of the plenishing of Castlehill House. After they had been examined by experts, who reported that they were genuine Raeburns, and of considerable value, the first party decided to consult the creditors as to selling them. He therefore reported the position to a meeting of creditors held on 3rd July 1911. . . .

"11. At the meeting of creditors held on 3rd July 1911 the said report was considered and the following resolution was come to, as appears from the minute of the meeting:—'It was agreed that the portraits of Sheriff Traill and Lady Janet Traill by Raeburn, which had been removed to Edinburgh from Castlehill House, should be forthwith despatched to Messrs Christie, Manson, & Woods, auctioneers, London, for public sale at their rooms on 14th curt., with such reserve prices as shall be fixed by the auctioneers, and the agents were

directed to insure the pictures against transit risks to the extent of £4000. It was further agreed that the price or prices realised by the pictures, under deduction of all expenses connected with the transaction, should be held by the trustee until the rights of all parties concerned should be definitely ascertained or agreed upon.' In accordance with these instructions, the first party exposed the pictures for sale in London on 14th July 1911, when they realised together £18,375. After deduction of auctioneers' commission and other expenses and charges, the net proceeds amounted to £16,626, 9s. 6d. . . .

"13. The two portraits in question originally belonged to the said Sheriff James Traill of Hobbister, who was owner of the whole estates mentioned in the foregoing list of heritable debts except the small estate of Hollandmake. The said Sheriff James Traill died in 1843. He was succeeded in the estates by George Traill, his son, to whom he had previously by *inter vivos* conveyances disponed his heritable estates, but who did not complete his title to the said estates until after his father's decease. The said George Traill was executor and residuary legatee under a general disposition and assignation executed by the said Sheriff James Traill on 8th April 1811, and on his death succeeded to his moveable property, which included the portraits in question, and to which the said George Traill confirmed, conform to testament-testamentar in his favour by the Commissariot of Caithness dated and sealed 25th October 1844. The said George Traill purchased the estate of Hollandmake prior to 27th March 1845, the date of his infeftment therein. The said George Traill died on 29th September 1871, leaving a trust-disposition and settlement dated 27th May 1870, and registered in the Books of Council and Session 13th October 1871, under which he conveyed to his trustees therein mentioned his whole estates, heritable and moveable, including the furniture and plenishing in the mansion-house of Castlehill, and after making certain directions as to payment of debts, annuities, &c., and for the sale of certain portions of his estate, he directed his trustees to make over and convey his whole estates so far as not sold to and in favour of his brother James Traill of Hayes, and his heirs, but always under burden of any heritable securities which might then affect the said estates, and under the declaration that notwithstanding the said James Traill of Hayes should predecease the said George Traill, or die before obtaining a conveyance to the said estates, he should have power by any writing under his hand to dispose of or burden for behoof of his younger children, or otherwise, the whole or any part of the said estates thereinbefore directed to be conveyed to him, as he might see fit, and his trustees were thereby directed to dispone or convey the same in terms of such disposal. Under the said trust-disposition and settlement the said George Traill appointed his trustees to be his executors, and they subsequently obtained confirmation by testament-testamentar in favour of their commissioner expede before the Commissary of Caithness on 12th January 1872. The said James Traill of Hayes survived the said George Traill, but died before the said trustees had divested themselves, leaving a deed of settlement dated 1st November 1871, and, with codicil thereto, recorded in the said Books of Council and Session 27th October 1873, under which he requested and appointed the trustees of the said George Traill to make over, assign, convey, and dispone to and in favour of his eldest son James Christie Traill the said estates so far as not sold. In accordance with said request the said trustees of the said George Traill, on the narrative of the said trust-disposition and settlement of the said George Traill, conveyed the whole heritable estates to which he had succeeded from the said Sheriff James Traill, along with the estate of Hollandmake purchased by the said George Traill, 'and also all and whole the furniture and plenishing in the mansion-house of Castlehill, and the whole other personal estate of the said George Traill in so far as not sold or disposed of,' to the said James Christie Traill, the truster, by disposition dated 2nd and 5th, and recorded 24th August 1880. The said disposition contains warrandice from facts and deeds, but excluding from said warrandice all debts or securities affecting or which might be made to affect the said lands and others prior to the date of entry (Martinmas 1879).

"14. The heritable securities over the estate date from 1820 onwards, and were granted at various times by the respective proprietors. . . . Bonds of corroboration of the bonds and dispositions in security by the said Sheriff James Traill were granted by George Traill or his trustees, and George Traill's trustees also granted bonds of corroboration in connection with certain of the bonds and dispositions in security granted by the said George Traill. . . . The said James Christie Traill never granted any bonds in corroboration of the bonds and dispositions in security granted by the said Sheriff James Traill or by the said George Traill or by his commissioners or his trustees. . . . The various bonds granted by George Traill's trustees or commissioners were granted in respect of debts of George Traill. None of the creditors in the various bonds and dispositions in security ever discharged the personal obligations therein contained. The creditors of Sheriff James Traill and of George Traill have not hitherto made any claim against the personal estate of either Sheriff James Traill or George Traill, but have for many years acquiesced in and taken the benefit of the management of the estate by the trustees under the said trust-disposition by James Christie Traill, through whom they have periodically received payments of interest. Until the matter was brought under their notice by the sale of the said portraits, they were not aware of the existence of personal property in the hands of the trustee identifiable as having belonged to the said Sheriff James Traill or George Traill. . . . . .

"17. The second parties contend (*a*) that

as creditors of the ancestor Sheriff James Traill they are entitled to a preference, along with other creditors of the said Sheriff James Traill, *pari passu* among themselves, over the creditors of subsequent owners, upon the fund which can be identified as being the proceeds of personal estate which belonged to their debtor, the said Sheriff James Traill; or alternatively, that if it be found that they have no such preference, then as creditors of the ancestor George Traill they are entitled to such a preference along with his creditors over the creditors of his trustees and the creditors of James Christie Traill; and (*b*) that no diligence having been used by the creditors on the estate of Castlehill, such creditors are not entitled to any preference to the prejudice of these parties. In case these contentions should be repelled they concur in the contention of the seventh parties. . . . .

"19. The fourth parties contend (1) that the portraits in question formed part of the security of the heritable creditors holding securities over the estate of Castlehill, and that under and in terms of the trust-disposition of 1887 the proceeds of the portraits fall to be paid to these creditors according to the ranking of their bonds; and (2) in the event of it being held that the portraits did not form part of their specific security, that the portraits, being part of the moveable estate of the truster's ancestors, Sheriff James Traill and George Traill, still capable of identification, the proceeds thereof fall to be distributed among the creditors of George Traill preferably to the creditors of the truster.

"20. The fifth parties contend (*a*) that the pictures in question at the date of their removal by the trustee formed part of the security of the heritable creditors holding securities over the estate of Castlehill, and that under and in terms of the trust-disposition of 1887 the proceeds of the pictures as a surrogatum therefor fall to be paid to these creditors according to the ranking of their bonds; or otherwise (*b*) that the said pictures formed part of the security of the said heritable creditors as at the date of the trust-disposition, and if an award of sequestration of the said James Christie Traill's estate had been granted at said date would have vested, in terms of section 102 of the Bankruptcy (Scotland) Act 1856, in the trustee for behoof of the heritable creditors on Castlehill so far as such creditors were creditors of James Christie Traill's ancestors, and that accordingly in terms of said trust-disposition the prices of the pictures belonged to these creditors according to the ranking of their bonds; or otherwise (*c*) in respect that said pictures belonged to and formed part of the estates of Sheriff James Traill and George Traill, the ancestors of James Christie Traill, (1) that the creditors on the estate of the said James Traill have lost any right to claim by reason of the negative prescription, and (2) that the price of said pictures falls *primo loco* to be applied for behoof of the creditors of the said George Traill, and (3) that these creditors are bound to value and deduct their securities in order to rank.

"21. The sixth parties contend (1) that the creditors holding bonds over the estate of Castlehill are not entitled to a preference; (2) that after the creditors of Sheriff James Traill of Hobbister they as creditors of George Traill of Rattar are entitled to the fund along with the other creditors of George Traill.

"22. The seventh parties contend that the whole creditors, secured and unsecured, are entitled to be ranked on the proceeds of the said pictures *pari passu*, the secured creditors being bound to value and deduct their securities in order to rank."

The following *questions of law* were submitted:—"1. Do the proceeds of the sale of the said portraits fall to be distributed among such of the parties as hold bonds over Castlehill, and are also creditors of the truster's ancestors Sheriff James Traill or George Traill, in the order of their bonds? or 2. Do the said proceeds fall to be distributed among the whole of the parties holding bonds over Castlehill in the order of their bonds? or 3. Do the said proceeds fall to be distributed (*a*) *primo loco* among the whole creditors of Sheriff James Traill *pari passu*, and *secundo loco* among the whole creditors of George Traill *pari passu*, or (*b*) among the whole creditors of George Traill *pari passu*? or 4. Do the said proceeds fall to be distributed among the whole creditors, secured and unsecured, of the truster and of his ancestors or predecessors in title *pari passu*? 5. In the event of either of the foregoing questions Nos. 3 and 4 being answered in the affirmative, are the creditors of Sheriff James Traill or George Traill, or the secured creditors of the truster, as the case may be, bound to value and deduct their securities before ranking?"

Argued for the fifth parties—The law as it stood at the date of the granting of the trust deed was stated in the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), secs. 102 and 118, and the Conveyancing (Scotland) Act 1874 Amendment Act 1879 (42 and 43 Vict. cap. 40), sec. 3. Accordingly at that time the act and warrant of a trustee was the equivalent of a completed diligence in favour of ancestors' creditors—*Millar's Trustees* v. *Horsburgh*, February 5, 1886, 13 R. 543, 23 S.L.R. 363. It was true that the law was afterwards amended by the Conveyancing (Scotland) Acts 1874 and 1879 Amendment Act 1887 (50 and 51 Vict. cap. 69), but that statute was subsequent to the trust deed and so did not affect the present case. By the terms of the trust deed it was to be held equivalent to a sequestration, and so under section 2 of the 1856 Act (*cit.*) the creditors who had bonds over Castlehill must be treated as if they had poinded the ground and thereby attached the moveables on it. This right of poinding was not struck at by the terms of the trust deed—*Athole Hydropathic Company* v. *Scottish Provincial Assurance Company*, March 19, 1886, 13 R. 818, 23 S.L.R. 570. Alternatively as ancestors' creditors these parties had a preferential right over the truster's creditors over any property which could be identified as belonging to the ancestors, for the heir only took what the ancestor died possessed

of, and held the estate as a trustee for ancestors' creditors—Stair, Inst., iii, 8, 71; Ersk. Inst., iii, 9, 42; Bell's Comm., vol. ii, p. 85; M'Laren on Wills, pp. 866, 1299; *Kelhead* v. *Irving*, December 16, 1674, M. 3124; *Tait* v. *Kay*, 1779, M. 3142; *Bell* v. *Campbell*, November 28, 1781, M. 3861; *Murray of Kinninmond's Creditors*, 1744, Elchies, *voce* "Execution," No. 13; *Kinloch* v. *Blair*, December 1721, M. 3836. The creditors of James Traill, however, not having taken any steps to establish their preference were now excluded by the negative prescription—*Parishioners of Abersherder* v. *Parish of Gemrie*, December 7, 1633, M. 10,972.

Argued for the fourth parties—[*Counsel adopted the arguments of the fifth parties*]—The trustee was barred from removing the pictures by the terms of the trust deed, and so they must be regarded as still part of the Castlehill bondholders' securities. In regard to the question of valuing and deducting the securities, George Traill was never a bankrupt, and so his estate was set aside for his creditors and did not fall under James Christie Traill's trust deed. Accordingly his creditors divided his estate equally, and did not need to value and deduct their securities—Bell's Comm., vol. ii, p. 419; Goudy on Bankruptcy (new ed.), 505-6, (3rd ed. 553-4); *Kirkaldy* v. *Middleton*, December 8, 1841, 4 D. 202; *The Heritable Reversionary Company* v. *Millar*, August 9, 1892, 19 R. (H.L.) 43, 30 S.L.R. 13; *Kinloch* v. *Blair* (*cit.*). While the preference of James's creditors was cut off by the negative prescription, the preference of George's was not, because the trust deed was a taking of document on their preference, and so interrupted the prescription against them.

Argued for the second parties—The Castlehill bondholders had no right to a preference here, for they had not poinded, which was the only way in which they could have obtained one—*Royal Bank* v. *Bain*, July 6, 1877, 4 R. 985, 14 S.L.R. 612; *Campbell* v. *Edinburgh Parish Council*, 1911 S.C. 280, 48 S.L.R. 193; *Sinclair* v. *Edinburgh Parish Council*, 1909 S.C. 1353, 46 S.L.R. 973; *Hay* v. *Marshall*, March 22, 1826, 2 W. & S. 71; Bell's Comm., i, pp. 766-9. The case of *Sinclair* (*cit.*) in particular was fatal to the argument that diligence had been done by the trust deed As personal creditors of James these creditors were entitled to a preference over the creditors of George and James Christie, who had only taken the estate subject to James's debts—*Bell* v. *Campbell* (*cit.*); *Bain* v. *Assets Company*, March 13, 1904, 6 F. 692, 41 S.L.R. 517. In virtue of the personal obligation in the bonds they were entitled to ask anybody who was in right of James to pay these at once without diligence. They were not bound by their bonds to go only against the heritable estate, but could go against heritage or moveables as they chose—M'Laren on Wills, secs. 2387, 2417, and 2431. The negative prescription did not apply to them, because as long as the personal representatives were paying interest they had no need to assert their right—*Jamieson* v. *Clark*, January 24, 1872, 10 Macph. 399, 9 S.L.R. 233.

Argued for the sixth parties—The Castlehill bondholders not having poinded had no preference over other ancestors' creditors—*Hay* v. *Marshall* (*cit.*). Because a debt was an ancestors' debt it did not follow that the creditor was to be considered for all time an ancestors' creditor. Once the heir was infeft in the land the heritable debts were his debts, and so the Castlehill bondholders could no longer be considered ancestors' creditors in virtue of their bonds over the estate after the estate had changed hands. The 1856 Act, sec. 102, had therefore no application to the fourth and fifth parties, who could only claim on the same grounds as George's other creditors. James Christie Traill was the universal legatee of George, and so was responsible for his debts, and so George's creditors had a right to a preference over James Christie's, while James's creditor's preference was cut off by the negative prescription.

Argued for the seventh parties—No preference could be claimed here by ancestors' creditors. The Castlehill bondholders to obtain a preference would have had to poind, for section 102 of the 1856 Act would not bear the interpretation they sought to put upon it. The real intention of the section was shown in *Bennet* v. *M'Lachlan*, June 15, 1829, 3 W. & S. 449. Ancestors' creditors had no right *ipso facto* to poind unless they had a real right, and if the fourth and fifth parties had poinded it would not have been as ancestors' creditors but as people who were infeft in the land—*Bell* v. *Cadell*, December 3, 1831, 10 S. 100; Bell's Comm., ii, 56. Further, section 102 dealt only with heritage, not with moveables. The pictures in any event were now removed from the ground, so that the fourth and fifth parties had no claim to them—*Urquhart* v. *Anderson*, June 16, 1883, 10 R. 991, 20 S.L.R. 670. Accordingly the Castlehill creditors were in no better position than the other ancestors' creditors, and could only claim a preference under the common law rule that the heir took the estate subject to his ancestors' debts. This preferential right of ancestors' creditors was, however, subject to the negative prescription, and as nothing had been done by any of the creditors of James and George to establish their right for more than forty years the right had been cut off. Even apart from the effect of the negative prescription they could not now claim preference in virtue of a debt which they should have claimed before—Stair, iii, 8, 71; Ersk. Inst., iii, 9, 42, 46; *Wyllie* v. *Black's Trustee*, December 13, 1853, 16 D. 180; *Thriepland* v. *Campbell*, February 23, 1855, 17 D. 487; *Stewart's Trustees* v. *Evans*, June 9, 1871, 9 Macph. 810, 8 S.L.R. 549; *Taylor & Ferguson* v. *Glass's Trustees*, 1912 S.C. 165, 49 S.L.R. 78; *Magistrates of St Andrews* v. *Forbes*, November 28, 1893, 31 S.L.R. 225 (O.H.); *Jamieson* v. *Clark*, January 24, 1872, 10 Macph. 399, 9 S.L.R. 233. If, however, the parties claiming as ancestors' creditors were entitled to a preference they were certainly bound to value and deduct their securities when claiming. James Christie Traill had no fiduciary relationship to his ancestors' creditors—*Fleeming* v. *Howden*, July 19, 1868, 6 Macph. (H.L.) 113, 5 S.L.R. 698; *Robertson* v.

Strachans, 1760, M. 8087—but held the property over which they had securities as his own. The property therefore fell under the trust deed, which must be held equivalent to a sequestration of the debtor at the date when it was delivered, and in any event by its terms imposed the necessity of valuing and deducting. The sum in question accordingly fell to all the parties equally. Counsel also referred to *H. M. Advocate* v. *Hay*, April 24, 1758, 2 Pat. 266; *Fenton Livingston* v. *Crichton's Trustees*, 1908 S.C. 1208, 45 S.L.R. 896; *Heritable Securities Investment Company* v. *Miller's Trustees*, December 17, 1892, 20 R. 675, 30 S.L.R. 354.

At advising—

LORD MACKENZIE—In my opinion the whole creditors, secured and unsecured, claiming in this case are, as creditors of James Christie Traill, entitled to be ranked on the proceeds of the pictures in the hands of the trustee *pari passu*, the secured creditors being bound to value and deduct their securities before ranking.

The trustee under the terms of the trust deed is trustee for the creditors of James Christie Traill and no one else; the trust was constituted by him, and the deed expressly bears that its purpose is for payment of "my creditors." It was not in the contemplation of the trust that the moveables should be kept on the ground, and as regards certain of them there are express directions to sell. The trustee is to carry on his administration subject to the right of the creditors to do diligence, and there is an express provision that the trustee might be suspended by an award of sequestration. The argument that the effect of the trust deed was to vest the estate in the trustee to the same effect as an act and warrant under section 102 of the Bankruptcy Act 1856 is, in my opinion, unsound. It is not possible to read into the deed all the vesting clauses of the Bankruptcy Act. The deed is a bargain between the trustee and the creditors of James Christie Traill; the creditors of the ancestors are not within the consideration of the deed. They must claim on the proceeds of the pictures as creditors of James Christie Traill, who is personally liable for the debts of both Sheriff James Traill and George Traill.

The heritable creditors had no security over the pictures until they put out their hand by poinding of the ground—*Royal Bank* v. *Bain*, 4 R. 985. The argument *contra* is founded on a misconstruction of what was said by the Lord President in the case of the *Athole Hydropathic Company*, 13 R. 818. Just as a heritable creditor can make his security effectual as regards the rent by an action of maills and duties, so he can make his security effectual as regards the moveables on the ground by poinding. If there is no action of maills and duties the granter of the bond uplifts the rents; if there is no poinding then the owner may take away the moveables. The conveyance in security by itself creates a floating charge which affects only the moveables on the ground at the time the diligence is done. In this connection it is of no moment that the moveables were the property of the ancestor who granted the security. They are in the same position as cattle on the ground. The test is what is on the ground at the time diligence is done. The answers therefore to the claims by the heritable creditors for a preference are these—(1) Poinding of the ground was necessary in order to assert a right to the moveables on the ground and no poinding has been executed; (2) the pictures were removed by the trustee, as he was entitled to do, from the ground, and the creditors' right in regard to them cannot now be brought into active operation; (3) the trust deed does not operate as if a completed poinding had been executed in favour of any of the secured creditors.

The next question is as to the rights of the ancestors' creditors to a preference in virtue of their right to follow the moveables. This alleged right is founded on the view that the pictures (or their proceeds) are capable of identification and must therefore be made available for payment of the ancestors' debts in preference to those of the truster. There are in my opinion two answers to this—In the first place the authorities cited do not warrant the view that creditors of an ancestor can lie by indefinitely and then come forward, even after the years of prescription have run, and claim such a preference. In the present case there is no suggestion that the estates of Sheriff James Traill and George Traill were not perfectly solvent at the date of their respective deaths, or that the pictures were improperly handed over. The lapse of time taken in connection with the circumstances of the case would warrant the inference that the creditors who stood aside and did nothing had lost, by acquiescing in the pictures becoming and being regarded as the property of their debtor's successor, any right they may have had to vindicate them as subjects originally available for payment of their debts. In the second place, the claim of the creditors is cut off by the operation of the negative prescription. The debts themselves are no doubt not prescribed, and the right to do diligence upon them continues as an incident of the debt being kept alive. But what the ancestors' creditors are claiming here is to establish a preference over the creditors of the truster. This right, it appears to me, may be lost by the operation of the negative prescription, even though the debt has not been extinguished. The definition of the negative prescription in Ersk. Inst. iii, 7, 8, is "the loss or forfeiture of a right by the proprietor's neglecting to exercise or prosecute it during that whole period which the law hath declared to infer the loss of it." The right to follow the moveables was not *res mercæ facultatis*. In the case of both Sheriff James and George Traill a period of more than forty years has expired since the death of each without any attempt to prosecute the claim. The right to do so has therefore in my opinion been lost. Nor do I think that the argument submitted by Mr Christie prevents this conclusion being reached. The pictures

became the property of James Christie Traill, and in this connection it does not matter whether he took by special title or as the representative of his father or grandfather. The ownership of his immediate predecessor George Traill ceased at his death in 1871, outwith the years of prescription, and it was a mere accident that the actual conveyance was not made for some years later. Nor does the fact that the ownership of the pictures and the personal liability for the debt were in the same person keep alive the right to follow the pictures. This was a right which required to be actively prosecuted, and as this was not done for more than forty years after George Traill's death the right to do so as regards him and also as regards Sheriff James Traill has been cut off.

As regards the obligation of the heritable creditors to value and deduct, if the proceeds of the pictures are to be distributed under the trust-deed, this necessarily follows, as there is an express direction to that effect in the trust-deed.

The result is that the first three questions should be answered in the negative. The fourth question as amended and the fifth question should be answered in the affirmative.

LORD CULLEN—I do not think it necessary to recite here the facts stated in the Special Case which have given rise to the questions submitted for our decision. I venture, however, to repeat the observation which it occurred to us to make in the course of the hearing to the effect that the procedure by way of special case adopted by the parties is in some aspects of the questions raised not a very suitable one.

The first question to which I direct myself is whether the parties holding bonds and dispositions in security over Castlehill are in virtue of such securities entitled to be preferred to the proceeds of sale of the portraits, which I may call the fund *in medio*.

These heritable creditors state their claims for such preference in alternative ways. In the first place they say (1) that as the portraits were removed from Castlehill without their consent the question must be dealt with in the same way as if the portraits were still there, and (2) that on this footing they are entitled to the preference they claim by virtue of their security infeftments apart from any poinding of the ground by them. The answers, which I think sound, made to this line of argument are (1) that the portraits were lawfully removed by the trustee from Castlehill in the course of his duty as administrator of the trust estate, and (2) that while a creditor holding a bond and disposition in security has what may be called a floating security over the moveables of his debtor on the ground, no actual *nexus* is put upon any particular moveables without a poinding of the ground executed while they are on the ground.

The alternative basis of claim advanced by the Castlehill creditors is as follows. They point to the clauses of the trust-deed which, stating them shortly, provide that questions of ranking and preference in the distribution under the trust are to be determined in the same way as if there had been an award of sequestration of James C. Traill's estates at the date of the trust-deed; they say that there is thus imported into the trust the effects of the vesting section (section 102) of the Bankruptcy (Scotland) Act 1856; that while this section enacts that the act and warrant of confirmation of a trustee in sequestration shall vest him with the bankrupt's heritable estate as therein stated, it declares that such vesting "shall have no effect . . . upon the rights of the creditors of the ancestor (except that the act and warrant of confirmation shall operate in their favour as complete diligence)"; and they further say that such "complete diligence" means or includes poinding of the ground at the instance of heritable creditors of the ancestor, so that, although none of such creditors have poinded the ground, the act and warrant puts them in the same position as if they had all poinded the ground at the date thereof.

The first answer offered to this line of reasoning is, that *esto* the construction of section 102 is as the Castlehill creditors maintain, the terms of the trust-deed do not import into it the effects under that section of a trustee's act and warrant in sequestration. I think this answer sound. Poinding of the ground is the subject of special provision in the trust-deed. It is therein provided that no secured creditor shall be entitled to poind the ground for five years after its date if the interest on his debt is regularly paid, and also that in the event of any secured creditor poinding, the trustee shall be bound, if called on by an unsecured creditor holding debts exceeding £150, to apply for sequestration. In view of these provisions it cannot I think have been intended that the trust-deed should in itself be equivalent to a poinding of the ground as at its date in favour of the Castlehill creditors.

The second and alternative answer made to the claim of the Castlehill creditors is that the "complete diligence" operated by the trustee's act and warrant in sequestration in favour of "creditors of the ancestor" does not mean poinding of the ground at the instance of creditors holding bonds and dispositions in security granted by the ancestor. I think this answer equally sound. It is to be observed that under the earlier part of section 102 the vesting of the bankrupt's heritable estate in the trustee under his act and warrant takes place "subject to such preferable securities as existed at the date of the sequestration, and are not null and reducible." This saving of securities holds place whether the preferable securities have been granted by the bankrupt himself or by his predecessors in title. And the position of these securities as being superior to the trustee's right being thus saved, I am unable to read the provision as to "complete diligence" in the latter part of the section as meaning that the trustee's act and warrant, as his title to the residual interest in the lands, is to

involve, *fictione juris*, an operation of such securities by way of poinding of the ground. As to what is meant by the "complete diligence" operated by the act and warrant, I respectfully adopt the view expressed by Lord President Inglis in the case of *Millar's Trustees* v. *Miller's Trustee*, 13 R. 543.

I am accordingly of opinion that the special claim advanced by the Castlehill creditors, as such, is not well founded.

On this footing the next question is whether the two groups of parties whose bonds—viewing these as personal obligations—were granted by Sheriff James Traill and by George Traill respectively are, both or either of them, entitled to be preferred to the fund *in medio* to the exclusion of the parties whose claims of debt stand on the obligation of James C. Traill only.

There is here a conflict between the group of creditors who hold bonds of Sheriff James Traill and the group of creditors who hold bonds of George Traill. The latter say that the claim for preference by Sheriff James Traill's creditors is cut off by the negative prescription, but that their own claim is not so cut off. Sheriff James Traill's creditors say that the negative prescription has no application either to the claims of preference advanced by them or by George Traill's creditors, and on this footing that they as the creditors of the earlier ancestor are entitled to be preferred to the fund *in medio* over the creditors of George Traill, the later ancestor, and *a fortiori* over the ordinary creditors of James C. Traill.

Apart from this particular conflict, the view on which the creditors of Sheriff James Traill and the creditors of George Traill both proceed, as against the creditors of James C. Traill, is this. They regard themselves in the first place as being outside the scope of the trust deed and as advancing claims superior to it, in the capacity of creditors of the truster's two ancestors respectively; and from this point of view they found on the common law rule in favour of an ancestor's creditors. This rule, they say, is to the effect that where the ancestor's moveable succession has been taken up by confirmation his creditors are entitled to enforce, as against the executor or successors on gratuitous title, a preference over the moveable assets of the ancestor included in the confirmation so long as these can be traced and identified as having been the property of the ancestor.

The common law rule thus appealed to is mentioned by various institutional writers. Among these I may refer in particular to the statement of it made by Mr Bell in his Commentaries, vol. ii, pp. 85, 86. It is to the effect that the limit of year and day enacted by the Act 1695, cap. 41, only applies where no one has confirmed to the deceased's moveable succession, that where there is a confirmation the creditors of the deceased have preference over these funds of the deceased which can be distinguished and identified, and that this preference "will subsist, even after the expiration of the year, in whatever way the executry funds may have been taken up, provided the fund can be clearly identified." It will be observed that while Mr Bell states that this preference will subsist "even after the year," he says nothing further on the subject of the duration of the preference. From which the true inference is said to be that there is no limit to its duration so long as the ancestor's debt itself does not prescribe or otherwise terminate. On this subject no further light is, I think, to be got from the references to the common law rule in other institutional writers or from the one or two reported cases which exemplify it.

In the discussion which we heard there was an attempt at an argument to the effect that the personal obligations of Sheriff James Traill and of George Traill respectively under the bonds granted by them had prescribed; but this argument was abandoned, it being ultimately conceded that the Special Case did not contain a proper statement of the facts relevant to the question. I assume, therefore, that all these personal obligations still subsist; and on this footing the question for determination is whether in this Special Case the parties founding on these subsisting personal obligations are entitled to have it affirmed that as matters stand the trustee of James C. Traill is bound to pay over the fund *in medio* to them to the exclusion of the parties who found only on obligations of James C. Traill.

The present case does not present a competition of diligence. It is a Special Case stating certain agreed-on facts, and asking the decision of the Court on specified questions of law stated as arising on these facts; and the first answer made to the preferential claims of the creditors of the two ancestors is that the fund *in medio* is in the hands of the first party as trustee for distribution under the trust deed among the creditors of the truster James C. Traill, that *esto* the ancestors' creditors are also creditors of James C. Traill they are not in the latter capacity entitled to any preference, and that *qua* ancestors' creditors claiming adversely to the trust deed they have done no diligence against the fund *in medio* in assertion of their alleged preferable right, and are not here as claimants in any proper legal process of competition against the creditors of James C. Traill. This argument seems to me to present a serious difficulty in the way of the ancestors' creditors in seeking to have it affirmed by the answers to the questions in the case that the trustee for James C. Traill's creditors is bound to pay over the fund *in medio* to them without more ado. I am, however, willing to waive this difficulty, and to take the matter on the footing that the right of the ancestor's creditors to assert a preference over the fund *in medio* is before us in a proper process of competition between them and the ordinary creditors of James C. Traill.

Now it appears to me that the common law rule which is invoked must be so applied as to reconcile in a reasonable way the rights of the creditors of the ancestor and the rights of the creditors of the ancestor's successor. On the one hand there is the principle that the creditors of the ancestor to whom the assets originally belonged should be entitled

to a preference. On the other hand this right of preference should admit of the reasonable protection of the interests of creditors of a successor in whose possession the assets have been allowed to remain undisturbed. Under the Act 1695, cap. 41, the creditors of the ancestor lose their right unless they do diligence within year and day of his death. But this enactment is, as I have said, limited to the case of no confirmation being taken out. Where there is a confirmation the limit of year and day does not apply. The reason for the difference as stated in the books is that the ancestor's assets included in the confirmation are thereby identified and to be regarded as set aside and held by way of quasi-trust for satisfaction of the ancestor's debts. I do not think, however, that the successor can be said to have only a trust title to the assets. These are no longer *in bonis* of the deceased, but have become the property of the successor. No doubt his right of property is subject to a qualification or burden in the shape of the adverse right which the law gives to the creditors of the deceased of having recourse against these assets for their satisfaction; and to say that the successor holds the assets by way of trust does not seem to me to imply more than the existence of this adverse right which burdens the successor's right of property in them. Now I am unable to see any sufficient reason for holding that this adverse right is a kind of right which is not susceptible of the forty years' negative prescription. I do not mean to say that nothing short of this long prescription will cut off the claims of ancestors' creditors. In many cases these may be cut off by a plea of bar arising on the facts. But I think that such claims, if not followed up, will at least fall on the lapse of forty years; and on this footing I am of opinion that the preferable claims advanced both by the creditors of Sheriff James Traill and by the creditors of George Traill have prescribed. Sheriff James Traill died in 1843, and the period of forty years from his death expired in 1883. George Traill died on 29th September 1871, and the period of forty years from then runs to 29th September 1911. George Traill's creditors contend that in their case, differing, they say, from that of Sheriff James Traill's creditors, the running of prescription was interrupted. The only thing which they point to, however, is the meeting of creditors held on 3rd July 1911. At that meeting it was resolved that the portraits should be sold, and that the prices realised "should be held until the rights of all parties concerned shall be definitely ascertained or agreed upon." I am unable to see that this arrangement involved even an assertion by George Traill's creditors of the preferable right which they now contend for; and if I am right in so thinking, it remains that during the period of forty years from the death of George Traill, his creditors, who are represented in this case, took no steps of any kind to enforce or assert the preferable claim which they now advance. I am therefore of opinion that the preferable claim advanced by George Traill's creditors is, equally with the preferable claim advanced by Sheriff James Traill's creditors, cut off by the negative prescription.

If this be so, the parties who are creditors of Sheriff James Traill and the parties who are creditors of George Traill are relegated to such claims as they may have on the fund *in medio* as creditors of James C. Traill, the granter of the trust deed of 1887. For the purposes of the present case their claims *qua* creditors of James C. Traill fall to be regulated by the terms of that trust deed. The only remaining question is whether these parties, if they claim on the fund *in medio* under the trust deed as creditors of James C. Traill, are bound to value and deduct their heritable securities in stating their claims. I am of opinion that they are. The trust deed under which, *ex hypothesi*, they claim as creditors of James C. Traill so provides.

LORD DUNDAS concurred.

The Court answered the first, second, and third questions in the negative, and the fourth and fifth in the affirmative.

Counsel for the First Party—Chree, K.C.—Wilton. Agents—J. C. Brodie & Sons, W.S.

Counsel for the Second Parties—Christie, K.C.—M. J. King. Agents—Simpson & Marwick, W.S.

Counsel for the Fourth Parties—Hamilton—Cowan. Agents—Stuart & Stuart, W.S.

Counsel for the Fifth Parties—Watson, K.C.—Normand. Agents—Horne & Lyell, W.S.

Counsel for the Sixth Parties—Blackburn, K.C.—Lord Kinross. Agents—Dundas & Wilson, C.S.

Counsel for the Seventh Parties—Macphail, K.C.—D. P. Fleming. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, March 20.

SECOND DIVISION.

GLASGOW AND WEST OF SCOTLAND SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, PETITIONERS.

Charitable Bequest — Administration — Scheme—Charity out of Jurisdiction.

In the settlement of a scheme for the disposal of moneys under a charitable bequest, in which the petitioners craved the Court to divide the legacy between two societies, one of which was Scottish and the other English, the Court *preferred* the Scottish society, on the ground, *inter alia*, that the trusts of the scheme must be carried into effect within the jurisdiction of the Court.

In re Mirrlees Charity, [1910] 1 Ch. 163, *approved and followed.*

The Glasgow and West of Scotland Society for the Prevention of Cruelty to Animals, and Robert Latta, Professor of Logic and