intended as a mere vidimus, and not to limit Hamiltons in procuring vessels. The ice appears to have set in earlier than usual, and no fault is ascribable to Hamiltons. I had some difficulty at first as to the allegation that she had been detained in order to put the goods of other people on board; but that is now satisfactorily explained. Mar. 22, 1826.

Lords Hermand and *Balgray* concurred.

The defender appealed, and, in addition to his former pleas, maintained, that the decree of the Judge-Admiral was ultra petita, because it decerned for sterling money, whereas the conclusion of the summons was limited to Halifax currency.

Lord Gifford, after observing that he had heard nothing to impeach the judgments on the merits, but as there had been an inaccuracy in relation to the sum decerned for, no costs ought to be allowed to the respondents, moved, and the House of Lords ordered and adjudged, 'that the several interlocutors complained of in the said appeal, except as to the amount of the damages decerned for, be, and the same are hereby affirmed; and the Lords find that the claims of damages by the respondents (the pursuers) were for a sum in Halifax currency, with interest, whereas, by the interlocutors complained of, such damages have been decerned for in sterling money; and therefore, it is ordered that the cause be remitted back to the Court of Session in Scotland, to review the interlocutors complained of in this respect, and to find what sum in sterling money the pursuers ought to receive in respect of the damages decerned for: And it is farther ordered, that the several interlocutors be varied accordingly.'

J. Campbell—Spottiswood & Robertson, Solicitors.

Elizabeth W. French, or Hay, and Trustees; and A. Neish, Appellants.—*Buchanan—Tindal.* J. Marshall, (Hay's Trustee,) Respondent.—*Keay—Menzies.* No. 10.

Competition—Right in Security—Poinding—Bankrupt—Held (affirming the judgment of the Court of Session) That the holders of heritable bonds, who had not used poinding of the ground, had no preference over the proceeds of the moveables found on the ground, in a question with personal creditors claiming under a sequestration of the estates of the proprietor.

By an antenuptial contract, between Miss Elizabeth Wellwood French and Mr Hay, her own fortune was secured to her- Mar. 22, 1826. 1st Division.

Mar. 22, 1826. self in liferent, and to the children of the marriage in fee, excluding her husband's jus mariti. Mr Hay having purchased the estate of Balmekewan, uplifted his wife's fortune, applied it in part payment of the price of the land, and granted Mrs Hay an heritable bond over the estate, in terms of the contract of marriage.

Mr Neish also held an heritable bond with infeftment over the same lands.

Mr Hay was thereafter sequestrated as an individual, and as a partner of David Lindsay and Co., and Mr Marshall was appointed trustee. The estate of Balmekewan was sold under the sequestration, but the price proved insufficient to pay all the heritable debts secured upon it; and particularly that of Mrs Hay and Mr Neish.

The lands of Balmekewan, at the date of Mr Hay's sequestration, were chiefly in Mr Hay's natural possession, and there were found on them moveable property, such as horses, sheep, cattle, and other farming stock, grain, potatoes, hay, turnips, &c. of crop 1822. The crop then upon the ground, with household furniture, plate, books, &c. (after deducting expenses of sale, reapers' wages, and general expenses of sequestration), amounted to above £3000.

This sum the trustee proposed to apportion to the postponed heritable creditors pari passu with the personal creditors; but Mrs Hay and Mr Neish contended, that in virtue of the heritable bond and infeftment, they had a preferable right to the moveables, and consequently to the free price for which the moveables sold. In these circumstances, the trustee, in the scheme of ranking and division which he issued, stated, that 'he 'is advised that the claim of preference over this part of the funds 'made by the above heritable creditors is not well founded, par-'ticularly for this reason, that prior to the sequestration no 'steps whatever had been taken by the said heritable creditors, 'by poinding of the ground, or otherwise, to secure their alleged 'preference; and consequently, that in the present case the 'debts due to the personal creditors of Mr Hay are entitled to 'be ranked upon the produce of the effects in question pari 'passu with any balance remaining due to the postponed herit-'able creditors, in the same manner as upon any other fund be-'longing to the sequestrated estate.' The trustee therefore repelled the claim of preference, and ranked the debts due to the personal creditors pari passu with the debts claimed by the postponed heritable creditors.

Mrs Hay and Mr Neish brought this decision under the review of the Court of Session by petition and complaint, but the Court,

on the 15th of June 1824, refused the petition without answers, Mar. 22, 1826.
and, on advising a reclaiming petition, also without answers,
adhered on the 7th July thereafter.*

The Judges were unanimously of opinion that there was not the slightest foundation for the claim of preference, and refused to allow the petitions to be answered, lest it should be supposed that the slightest doubt existed on the point.

Mrs Hay and Mr Neish appealed.

Appellants.—Every debt secured by infeftment may be made effectual by the process of poinding the ground, and the heritable creditor may sell, in satisfaction of his debt, all moveables found upon the lands, absolutely, if the moveables belong to the proprietor; and to the extent of the rent current or in arrear, if they belong to the tenant. But although poinding of the ground be the executive process, by which the heritable creditor enforces payment of the debitum fundi, yet his preference over the effects found upon the land, and which form the proper subject of real poinding, is not created by that process, but exists previously and independently of it. His preference is constituted by his infeftment alone, and the poinding the ground is in aid of his preference, not the cause of it. No doubt, this preference may be defeated, by an absolute sale of the moveables, or by perfected diligence at the instance of personal creditors; but a completed poinding of the ground by the heritable creditor would render the preference of the heritable creditor altogether indefeasible. Where, therefore, competition arises for moveable subjects found upon the land, an heritable creditor infeft will be preferred in opposition to any personal creditor who has executed only preventive or imperfect diligence by arrestment or poinding not completed—and the reason is, that the right of the latter is created by his diligence, whereas that of the former exists previously and independently. That the heritable creditor's preference is thus in some instances defeasible, does not affect the appellant's argument. For a superior or heritable creditor's right is not like the landlord's hypothec, which (under certain restrictions) follows the moveables. Besides, in the case under discussion, the moveables were still on the lands, and no complete diligence had been used by the personal creditors.

It is of no importance as affecting the present question, that the debtor's estate was sequestrated under the bankrupt act.

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* See 3 Shaw and Dunlop, No. 167.

Mar. 22, 1826. That can never be held equivalent to a completed diligence. A sequestration may be considered as a congeries of diligences; but it operates as such only to the effect of preventing future preferences. With certain exceptions, (none of which apply here,) legal existing securities are not touched. But by the judgment complained of, a preference is given to the personal, and taken away from the heritable creditors. If this preference be given on the principle that the sequestration has the effect quoad the personal creditors of a personal poinding of the goods, by a parity of reasoning it must have the effect of a real poinding of the ground quoad the heritable creditors; and if so, the heritable creditors should be preferred.

Respondent.—An heritable creditor, in order to make his right available over the moveables on the lands, must use the diligence of real poinding. The personal creditor resorts to personal poinding. Both are adjudications of the moveables for debt. The heritable creditor requires this diligence to carry the moveables, just as much as the personal creditor requires it. The mere completion of the real right by the infeftment of the heritable creditor does not carry them. Something more, namely, poinding, must be done to give a separate and special right to them. To hold that the infeftment creates a nexus over the moveables, is inconsistent with the legal notion of the origin and efficacy of seisin. Infeftment is a symbolical transference of the solum, but not of the moveables, which are not partes soli. The seisin may naturally bring, as an incident to it, a power to obtain a preference by attaching the moveables, but eo ipso of the seisin, they are not attached. Accordingly, there is, in the law of Scotland, no authority for a pre-existing preferable right to the moveables on the ground, vested in an heritable creditor, antecedent to and independent of any diligence of poinding. If there had been such an antecedent right, it would have operated to the effect of protecting the moveables from being carried off by personal creditors, or being transferred voluntarily by the owner—but it is admitted that in both these ways the heritable creditor can be disappointed. It is obvious, therefore, that the seisin does not possess the virtue ascribed to it by the appellants. If it did, and thereby vested in the heritable creditor a preference over the moveables, neither the act of the owner, nor diligence of the creditor, could be of any avail.

Besides, by the sequestration, the estate and effects of the bankrupt were transferred and adjudged to the trustee for behoof of the creditors, and thereby are protected from any preference, not existing before the date of the deliverance in the sequestration, or set aside by the statute—and here the appel-

lants held no preference before that date. It is even admitted by the appellants, that the preference for which they contend, is one defeasible by the voluntary act of the owner, or completed diligence of his personal creditors. If so, the preference is destroyed by the judicial transference under the statute. A sequestration has been truly described to be a congeries of diligences. It is therefore equivalent to a completed personal poinding—and consequently excludes the heritable creditor—and if, by parity of reasoning, it at the same moment operates as a real poinding in favour of the heritable creditor, the result is, that both parties come in pari passu—which is the mode of ranking that the respondent, as trustee, has adopted. Mar. 22, 1826.

The House of Lords ordered and adjudged that the interlocutors be affirmed with £150 costs.

Lord Gifford.—My Lords, the case of French and Marshall, which was heard before your Lordships a short time ago, is an appeal from certain interlocutors pronounced by the Court of Session, and I will shortly state to your Lordships the circumstances under which this appeal has been brought before the House. It appears that Mr Hay, on the 19th September 1822, was sequestrated, and that the respondent was duly elected and regularly confirmed as trustee on the sequestrated estate. It also appears that Mrs Hay's fortune, to which she became entitled under the settlement of her grandfather, was, by a contract of marriage between her and Mr Hay, secured to herself in life-rent, and to the children of the marriage in fee. The trustees under the settlement having denuded of the trust, Mr Hay afterwards received the sum of £10,000 sterling to enable him to pay part of the price of the estate of Balmekewan, and for this sum he granted an heritable security over that estate, in favour of Mrs Hay, in the terms of the contract of marriage. In this manner Mrs Hay became an heritable creditor of her husband. The respondent, as trustee, sold the lands of Balmekewan, and also the moveable estate, which consisted of cattle, household furniture, wines, books, and pictures, which were upon the lands, and were taken possession of under the sequestration. The Case then states the amount for which these effects were sold; and there not being sufficient funds to discharge the heritable debts, some of the heritable creditors were postponed; and amongst them, the appellants, who, conceiving that their heritable securities extended not only to the rents and to the price of the lands, but likewise to the moveables found upon the lands in Mr Hay's natural possession at the date of sequestration, they claimed to be preferred upon the produce, to the exclusion of the personal creditors, who individually had used no diligence. The claim of the appellants was resisted by the trustee, the respondent, who says, he is advised that the claim of preference over this part of the funds made by the above heritable creditors, is not well founded; particularly for this reason, that prior to the sequestration, no steps whatever had been taken by the said heritable creditors, by poinding of the ground

Mar. 22, 1826. or otherwise, to secure their alleged preference; and consequently, that in the present case, the debts due to the personal creditors of Mr Hay are entitled to be ranked upon the produce of the effects in question pari passu with any balance remaining due to the postponed heritable creditors, in the same manner as upon any other fund belonging to the sequestrated estate. The trustee, therefore, repelled the claim made by the postponed heritable creditors above mentioned to the proceeds of the effects above described; and ranked and preferred the debts due to the personal creditors of the said Philip Hay thereon pari passu with the debts remaining due to the postponed heritable creditors.

In consequence of the trustee having determined against this claim of preference on the part of Mrs Hay and her trustees, the matter was brought before the First Division of the Court of Session by petition, under a provision of the Scotch bankrupt law, 54 George III., cap. 137, sect. 45, upon which petition of the appellants the Court expressed a decided opinion that the respondent's judgment was well founded, and therefore refused the petition, without requiring any written answer. The case was again submitted to the Court upon a second petition, upon which occasion this interlocutor was pronounced: 'The Lords having heard this petition, 'refuse the desire thereof, and adhere to the interlocutor reclaimed against;' and they thought the claim so ill founded, and so little warranted by the law of Scotland, that the second petition, as well as the first, as I have already stated, was dismissed without requiring answers. The Court seemed to think it quite a novel claim, and quite new in the law of Scotland; and I will now shortly state to your Lordships its nature.

These trustees of Mrs Hay were heritable creditors of the bankrupt, and they contended, that although no steps had been taken by them previous to the sequestration, with a view to attach the moveables upon this estate, yet that they had, by means of this heritable security, a lien over this estate, that entitled them to a preference against the personal creditors of the bankrupt. It was not disputed on the part of the respondent, nor could it be, that an heritable creditor, if he used the diligence of poinding, as it is termed in Scotland, might make that right available over the ground over which the security extends; and, on the part of the appellants, it was contended, that though it were necessary to use that sort of diligence in order to obtain the value of moveable goods in satisfaction of a debt; and although they admitted, that until such diligence was completed, the debtor might dispose of the property bona fide to a third person; or that a personal creditor, if he used diligence against the property, and it was completed, would acquire a right in preference of the heritable creditor; yet they contended that the diligence to be used by the heritable creditor was not a process that gave them a right to the property, but merely corroborated their antecedent title which was vested in them by the heritable security; that the heritable security not only gave them a right over the moveables on the heritable estate, but that it gave them a sort of floating lien over the moveables that might be placed upon that farm; and that they were entitled, at the time of the bankruptcy, by means of this supposed lien, to a preference over the general creditors of the bankrupt. My Lords, if

such a right existed in the law of Scotland, one should have expected to have found it clearly laid down, as a right belonging to heritable creditors, in all the institutional writers, and to have found decisions affirming such a right. Mar. 22, 1826.

My Lords, it was not from any difficulty that I felt at the conclusion of the argument, that I postponed the determination of this case, because I was perfectly satisfied that the decision of the Court of Session was right; but from an anxious desire that I might not ask your Lordships to affirm that judgment, till I had an opportunity of considering the very ingenious arguments, used on the part of the appellants, and examining the authorities that bore upon this question. Since the case was argued, I have looked through the institutional writers, and I can find in none of them any such right stated to belong to heritable creditors.

The strongest passage relied upon, on the part of the appellants, in support of this claim, was a passage from Erskine's Institutes (2. 8. 32), in which he states, 'Yet the preference of a right of annual-rent in 'a competition with other creditors, depends not on the annual-renter's 'actual poinding, for he is entitled to the poinding, by the antecedent 'preference which his seisin had acquired to him; of which he cannot be 'deprived, though he should not exercise his right; which is meræ facul-'tatis, as to the annual-renter, and quite unnecessary, if payment can be 'otherwise got. Hence,' Erskine says, 'in a competition between an 'annual-renter and an arrester, the annual-renter was preferred, though he 'had only insisted in a personal action, as if he had been pursuing upon 'a poinding of the ground.'—Falc. 2. 1.

It is remarked, in the respondent's case, upon this passage, that Erskine here refers only to the case of Holland; and the respondent states, that it is evident that the learned author carried his views no farther than to a competition for the rent of lands under lease; that he is not there considering what the right of an heritable creditor would be to the moveables upon the heritable estate; and I find, upon referring to his smaller work, where the corresponding passage is to be found, namely, book 2d, title 8, section 15, that the view taken by the respondent in this case, that the author was considering merely a competition for the rents, is quite clearly established from the passage I am about to read. He says, talking of the right of annual-rent, 'And in a competition for those rents, 'the annual-renter's preference will not depend on his having used a 'poinding of the ground, for his right was completed by the seisin; and 'the power of poinding the ground arising from the antecedent right, is 'meræ facultatis, and need not be exercised, if payment can be other-'wise got.' Then he refers to the case of Holland, which was a case of competition for rents; and he says, 'As it is only the interest of the 'sum lent, which is a burden upon the lands, the annual-renter, if he 'wants his principal sum, cannot recover it, either by poinding, or by a 'personal action against the debtor's tenants, but must demand it from 'the debtor himself, on his personal obligation in the bond, either by re-'quisition, or by a charge upon letters of horning, according as the right 'is drawn.'

Mar. 22, 1826. My Lords, I only read this passage to show, that in this section those words occur, which are not to be found in the large work, namely, 'in competition for the rents;' and certainly he is only considering, what will be the case in a competition for rents; and it is to be observed, that the cases referred to by the appellants, almost all of them, relate to a competition for rents, and not to a preference for the moveables upon the farm.

If the arguments on the part of the appellants were correct, this singular consequence would follow. By the Scotch bankrupt law, section 5th, it is enacted, 'That when a person has been rendered legally bankrupt, 'as aforesaid, no poinding of the moveables belonging to such bankrupt, 'used within sixty days before the bankruptcy, or within four calendar 'months thereafter, shall give a preference to such poinder; but that every 'other creditor of the bankrupt, having liquidated grounds of debt, or de-'crees for payment, and summoning such poinder, or judicially produ-'cing the same in any process or competition relative to the goods or 'price thereof, before the said four months are elapsed, shall be entitled 'to a proportional share of the price of the goods so poinded, effeiring to 'the debt, deducting always the expense of such poinding, which the 'poinder shall retain in preference to the other creditors.' By this section, your Lordships will perceive, that no poinding of the moveables belonging to the bankrupt will be effectual under a subsequent bankruptcy, unless the poinding has been completed sixty days before the bankruptcy. Now, it was admitted, in the course of the discussion, and is distinctly stated in the papers, that if an heritable creditor use the diligence of poinding against the moveables upon an estate, over which another person has a personal security, it would be available over the moveables. Supposing, therefore, Mrs Hay had used and completed the diligence of poinding against the moveables upon this estate, it would be effectual against a personal creditor; but then a poinding by a personal creditor, if it were not more than sixty days before the bankruptcy, would be ineffectual under the bankrupt statute. If that were so, then this consequence would follow, that if the creditor had used such a diligence, and that diligence was perfected against the heritable creditor, yet, being within sixty days of the bankruptcy, it would be ineffectual under the bankrupt law. What would be the effect, I would ask, between the heritable creditors and the creditors under the bankruptcy? The heritable creditor could not have said, 'I have an antecedent lien upon this property, and by means of the 'bankruptcy I am to be referred to that lien;' because the trustee under the sequestration would have answered, this is an effectual and good poinding, and it is only by means of the bankruptcy it is rendered ineffectual against that creditor, and has not the effect to do away with the lien, but to distribute the effects among the creditors. If this lien had also existed, as was remarked at the Bar, one has great difficulty in seeing how questions have arisen between heritable creditors and a trustee on a sequestrated estate, as to fixtures. The case referred to, of Arkwright, to be found in the Faculty Collection, was a question between an heritable cre-

ditor and the assignees of a bankrupt's estate, the heritable creditor con- Mar. 22, 1826.
tending that certain property upon the estate ought to be considered in the nature of freehold, and consequently, as passing to him under the heritable security. On the other hand, on the part of the general creditors, it was contended that they were moveables, not affected by the heritable security, but passing under the sequestration for the benefit of the general creditors. If the heritable creditors had this lien over the moveables of the estate, it was quite unnecessary to raise that question, because he had a right of preference to all the moveables upon the estate thus secured to him. Therefore, to consider whether they were to be deemed fixtures or not, was quite unnecessary for him, because if he had this preference, it extended not only to the fixtures, but the moveables. I mention these cases to show, what appears to me as necessarily resulting from them, namely, a general opinion in the law of Scotland that this claim did not exist in practice; and so clear was the opinion of the First Division of the Court of Session upon this case, when it came before them, that in the first instance, as I have stated to your Lordships, they refused the petition without answers; and when it came before them a second time, from the short notes we have of what passed, it appears that one of the Judges was so surprised at such a claim being set up, that he asked whether there was anything certain in the law of Scotland; and as to the other Judges, the Lord President and Lord Gillies, they were all of opinion that this claim was wholly unfounded, and so unfounded that they were unwilling to give countenance to it by suffering the petition to be answered, lest it should be supposed that any doubt existed upon the law of Scotland upon the subject; and where a case has been thus treated, it has not been usual to ask your Lordships to affirm the interlocutors without costs, lest it should be supposed that your Lordships entertained any doubt upon the question, and thought it a fit subject to be discussed.

I have thought it necessary just to throw out these few observations upon the subject of this claim, because, being perfectly convinced that the claim is not founded on anything to be found in the institutional writers, and still less in any decision upon the subject, I should without any hesitation, at the conclusion of the argument, have asked your Lordships to affirm the judgment, were it not that upon this as well as upon every other occasion, I am always desirous of not acting upon the first impressions, but rather to take time to ascertain whether those impressions are well founded, and that I may satisfy myself that nothing has escaped my attention. After forming the best opinion I can upon this case, it does appear to me that not only is this claim unfounded, but so unfounded that I think your Lordships ought not to suffer the respondent, who represents a bankrupt's estate, to be put to any expense. I should therefore move your Lordships that these interlocutors be affirmed, and that they be affirmed with costs; because where the Court below have considered this so clear as to decide it in the manner in which they have done; and when your Lordships find upon consideration that you concur in their judgment,

Mar. 22, 1826. and where there is no reason to doubt upon the subject, I think these are cases in which your Lordships cannot do justice to the parties, without you take care, as far as you can, that the respondent, who comes to support the judgment, should not be put to any unnecessary expense. I should therefore move your Lordships to affirm these interlocutors, and to affirm them with costs.

Appellant's Authorities.—3 Ersk. 6. 20. 2 Ersk. 8. 32. 33—4 Ersk. 1. 11. 12, 13. Mack's Ob. on Statute, 1469. c. 37.—2 Bankton, 5. 7, 8.—4 Stair, 23. 10. 14—2. St. 5—3. St. 2. 13—4. St. 23.—Kames' Law Tracts, No. 4. 2 Ross's Lectures, p. 320 et seq. and 392 et seq.—Kilkerran, p. 405.—Lady Kilhead, Nov.' 2, 1748 (2785.) Webster, July 13, 1780 (2902.) Parkers, Feb. 5, 1783 (2868.) Tullis *v.* White, June 18, 1817, (F. C.) 2 Bell, p. 66 and 69, notes.

Respondent's Authorities.—3 Ersk. 6. 20—4 Ersk. 1, 2. 12.—2 Bell, 65, 66. 69. 2 Ross's Lectures, p. 442. 2 Bankton, 5. 7.—Hope's Major Practics, voce poinding ground, 28th June 1622. Gray, Mar. 24, 1626 (565.) Lady Mary Bruce, Feb. 15, 1707 (14092.)

SPOTTISWOOD and ROBERTSON—J. RICHARDSON, Solicitors.

No. 11. W. HILL and Others, Appellants.—*Warren—Robertson.*
Rev. J. BURNS and Others, Respondents.—*Keay—Menzies.*

Testament—Trust—Implied Will—Mortification.—Held (affirming the judgment of the Court of Session) in a question with the next of kin, That a bequest to trustees was valid, whereby a testatrix appointed 'the residue of her estate to be applied by 'my said trustees and their foresaids, in aid of the institutions for charitable and benevolent purposes established, or to be established, in the city of Glasgow or neighbourhood thereof; and that in such way and manner, and in such proportions of 'the principal or capital, or of the interest or annual proceeds of the sums so to 'be appropriated, as to my said trustees and their foresaids shall seem proper; declaring, as I hereby expressly provide and declare, that they shall be the sole 'judges of the appropriation of said residue for the purposes aforesaid.'

April 14, 1826.

1st DIVISION. Lord Meadowbank.

ALEXANDER HOOD, of the Island of Mountserrat, after bequeathing certain legacies, conveyed the residue of his estate, real and personal, amounting to about £30,000, to his sister, Mary Hood, of Glasgow, and her heirs for ever.

Thereafter she executed a trust-settlement in favour of the respondents as trustees, in which, after leaving legacies to different individuals, she appointed the residue of her estate to be applied to charitable purposes, in these terms:—'I appoint the 'residue of my said estate to be applied by my said trustees and 'their foresaids in aid of the institutions for charitable and benevolent purposes, established, or to be established in the city