not been given sixty days before the said date, shall (except to the extent hereinafter provided) be available in any question with the trustee, provided that no creditor who holds a security over the heritable estate preferable to the right of the trustee shall be prevented from executing a poinding of the ground or obtaining a decree of maills and duties after the sequestration, but such poinding or decree shall, in competition with the trustee, be available only for the interest on the debt for the current half-yearly term, and for the arrears of interest for one year immediately before the commencement of such term." When the Conveyancing Act of 1874 repealed the 118th section it appears to me that it left as the regulating enactment the vesting clause of 102, except that it took out of it the reference to section 118, which it does upon its face contain, there being no longer any 118th clause.

How stands the matter under section 102? The trustee is to be in the same position "as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment and in security of debt," had been pronounced and recorded in his favour, and as if a poinding of the ground had been executed. But prior heritable securities are saved, as all this is to be done "subject always to such preferable securities as existed at the date of sequestration." The trustee is to be in this favourable position, that he is to have right to the moveables as if he had executed a poinding of the ground; but that will not prevent a prior creditor from executing a poinding of the ground. The creditor would have been entitled to poind in virtue of his prior heritable right, and having executed his poinding, the trustee cannot compete with him. Stripped of the1 18th section, the common law right of the creditor revives. I am therefore satisfied with the interlocutor of the Lord Ordinary.

Lord Deas was of opinion that creditors entitled to resort to poinding of the ground, being preferable according to the dates of their real rights, and the trustee being constituted by the Bankruptcy Act a real creditor as at the date of the sequestration, those creditors who execute a poinding of the ground upon a prior real right before the trustee's confirmation must be preferred to him—Bankton, ii. 5, secs. 7 and 22; Stair, iv. 23, secs. 5, 19, and 20; Erskine, iv. 1, secs. 11, 12, 13. These common law rights were suspended but not taken away by the 118th section of the Act of 1856, and when that was repealed the common law rights revived under the 102d section of the Act of 1856. It is not now necessary to decide what would be the effect of the trustee's confirmation. Up to that date, at all events, the prior creditors' rights can be made preferable.

Lord Mure concurred, quoting Lord Mackenzie's opinion in the case of *Campbell's Trustees* v. *Paul*, Erskine, ii. 8, 32, and the cases of *Aiton* v. *Watt* and *Whitingham*, M. 3487-8, as illustrations of the common law rights of creditors poinding the ground.

Lord Shand concurred.

The Court adhered.

Counsel for Bank—Balfour—Mackay. Agents—Dundas & Wilson, C.S.

Counsel for Trustee—Kinnear—Strachan. Agents—Davidson & Syme, W.S.

Tuesday, July 10.

FIRST DIVISION.

[Sheriff of Aberdeen.

BURNETT *v.* MURRAY, *et e contra.*

Process—Caution—Bankrupt.

Circumstances in which the Court *refused* to order an undischarged bankrupt to find caution for expenses.

Observed that when a litigant becomes bankrupt the opposite party ought to move for intimation to his trustee.

These were cross actions, by which the parties sought each to obtain payment from the other of sums alleged to be due in respect of a partnership that had subsisted between them. The result of the Sheriff-Substitute's judgment was in favour of Murray, and the Sheriff adhered. The case was appealed to the Court of Session, and when it appeared on the Single Bills the respondent Murray asked that the appellant Burnett should be ordered to find caution for expenses, in respect that he was an undischarged bankrupt. It appeared that he had been sequestrated in 1867, but had been engaged in the partnership out of which this action arose since 1873. No intimation had been made to his trustee.

At advising—

Lord President—When a litigant becomes bankrupt he is no longer in a position to carry on a litigation, because he is divested of his whole estate and his trustee is vested in it. The proper course in such circumstances is to give notice to his trustee, that he may become a party to the suit, and carry it on if he sees fit. If he declines to do so, that is equivalent to an abandonment of that asset, which the bankrupt may then deal with as he pleases; but as that is the only thing he has in the world, he cannot be allowed to carry on the litigation without finding caution for expenses. That is the rule in the ordinary case, but here the circumstances are peculiar. The bankrupt was sequestrated in 1867, and has since that time been carrying on business for several years, and, in particular, has entered into a joint-adventure with the other party to this action, from which joint-adventure the cross actions now under appeal arise. Then, when a partnership accounting is brought, is it to be allowed that his partner should turn round and say "You were sequestrated in 1867, and have not been discharged, and you must find caution for expenses here?" The proper motion for the respondent's counsel to have made would have been for intimation to the trustee. Instead of that he comes suddenly with this motion, which is as irregular in form as it is unfounded in substance.

The other Judges concurred.

Motion refused.

Counsel for Appellant—Shaw Agents—Rhind & Lindsay, W.S.

Counsel for Respondent—Mackintosh. Agent—Alexander Morison, S.S.C.

Tuesday, July 10.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

AIKMAN *v.* CALEDONIAN RAILWAY CO.

Railway—Compensation—Way-leave.

A., through whose lands a public line of railway passed, gave to G., an adjoining proprietor, and to G.'s mineral tenants, a lease for twenty-one years of ground to make a private line leading from the mineral pits on G.'s estate to the public railway line. Afterwards the railway company having obtained an Act of Parliament for a new branch line, took portions of A.'s and of G.'s lands for that purpose. The effect of this was to do away with the necessity for the private line through A.'s lands. G. accordingly took advantage of a break and terminated the lease. *Held* that the loss of profit derivable from the said way-leave could not be taken into computation in fixing the compensation due to A. for the land taken by the railway company.

The following narrative is taken from the Lord Ordinary's note:—

"The pursuer is curator to George Robertson Aikman, the heir of entail in possession of the estate of Ross, situated in the parish of Hamilton and county of Lanark, and bounded on the west by the estate of Haughhead, belonging to Mr Gardner. The Lesmahagow Junction Railway, belonging to the defenders, intersects part of the estate of Ross, but does not at any point touch or pass through Haughhead. Access, therefore, from Haughhead to that railway could not be had—at all events, conveniently—except by passing over the lands of Ross. In 1861 Mr Gardner let the minerals in Haughhead to Messrs Merry & Cuninghame, and in order to obtain access to said railway he and his mineral tenants entered into a contract of lease with the pursuer, as curator foresaid, whereby the latter let to them for nineteen years from Whitsunday 1861 (with breaks in the option of the tenants at the end of the fifth, tenth, and fifteenth years) whichever of two specified pieces of ground they might select on the estate of Ross, each extending to about an acre, for the purpose of forming therein and using a private railway and lye from the said railway to the lands of Haughhead. By the lease it was agreed that the tenants should pay £150 per annum of fixed rent for the privilege of making and using such railway, or, in the option of the proprietor, certain lordships specified in the lease. Thereafter Mr Gardner and his mineral tenants constructed a line of railway from their pits at Haughhead to the defenders' railway, the total length of which was about 840 yards, whereof about 160 yards were constructed upon the piece of ground selected by them on the lands of Ross, the remainder being constructed on the lands of Haughhead. The line so formed has until recently been used by Mr Gardner and his tenants for the transport of the Haughhead minerals, and for the way-leave over Ross they have duly paid the stipulated lordships. The defenders, by the 'Caledonian Railway (Lanarkshire and Midlothian Branches) Act, 1866,' acquired power to make a line of railway to connect their line at Hamilton with the said Lesmahagow line, the junction to be formed at a point on the lands of Ross; and for the purposes of the said Act, and of a later Act, entitled the 'Caledonian Railway (Additional Powers) Act, 1872,' the defenders, by virtue of their statutory powers, took from the pursuer, as curator foresaid, several portions of the lands of Ross, extending in all to upwards of eleven acres, which are contiguous to the lands of Haughhead belonging to Mr Gardner. The defenders also took sundry portions of the contiguous parts of Haughhead; and upon the ground so taken from the estates of Haughhead and Ross they constructed their new junction railway and certain other works. Mr Gardner was thus enabled, and became entitled, to connect his own branch railway from his pits at Haughhead directly with the defenders' new railway, which passed through the ground taken from himself, without the necessity of passing through any part of the lands of Ross, or of using the private railway and lye which he and his mineral tenants had formed on the lands of Ross in virtue of their lease from the pursuer; and they have recently formed the connection by constructing, at their own expense, a line of railway from their own original private line, at a point within the lands of Haughhead, to the defenders' new line of railway, at a point within the ground taken by the defenders from the pursuer.

"The pursuer, as curator foresaid, and the defenders in March 1875, referred to arbitration in terms of the 'Lands Clauses Consolidation (Scotland) Act 1845;' the amount of purchase money and compensation to be paid by the latter to the pursuer as curator foresaid, in respect of the land, amounting in all to 11·122 acres imperial measure, taken from the estate of Ross under the said Acts, and also in respect of any damage that might be sustained by him as curator foresaid by reason of the execution of the works authorised by the said Acts. It appears that the pursuer anticipated that as Mr Gardner and Messrs Merry & Cuninghame would no longer require to make use of their way-leave over the estate of Ross, they would construct a new private railway on the lands of Haughhead, and would take advantage of the break which would occur at Whitsunday 1876, and terminate the lease as from that date. The pursuer accordingly maintained before the arbiters that he was entitled to compensation from the defenders for the loss of profit under the lease, occasioned, as he alleges in the present record, by the defenders 'having constructed, partly upon the lands taken from him, and partly upon Haughhead, a line of railway which would enable his tenants to reach the Lesmahagow Railway without passing over the ground let to them by the lease.' The arbiters held that it was not within their competence to decide whether the pursuer was entitled to compensation on this account. It was thereupon agreed be-