ring. I think the practical effect of the argument for the widow would be to carry away the whole of this small estate, consisting of a policy of insurance, for her benefit, and to the detriment of the children of the marriage. But I see nothing to put her in a more favourable position than the children. The only money left by Mr Hutcheson was this sum of £500, which is put in trust for the children and the widow, and I think she can only claim the liferent of it. The case to my mind very much resembles that of *Wilson's Trustees* v. *Pagan*, 18 D. 1096.

Lord Shand—When this case was opened I confess I had a somewhat different opinion, and was under the impression that the whole right to this policy was in the widow. That impression was founded upon the clause by which the policy is conveyed in security in implement *pro tanto* of the foregoing provisions, one of which is the annuity of the wife. But when one goes on to read the subsequent clause there can be no doubt that though the policy is conveyed in security *pro tanto*, it is yet, so far as the wife is concerned, conveyed only so as to give her the annual interest of the proceeds of the policy.

Lord Adam concurred.

The Court found that the second party was not entitled to receive, and the first party was not bound to pay out of the trust funds, first, the allowance of £30 for mournings, or second, the annuity of £100, except as regarded the interest accruing upon the proceeds of the policy of insurance.

Counsel for First Parties—Gloag—Black. Agents—Ronald & Ritchie, S.S.C.

Counsel for Second Party—Shaw. Agent—James Skinner, S.S.C.

Saturday, June 5.

FIRST DIVISION.

[Lord Trayner, Ordinary.

SCOTTISH UNION AND NATIONAL INSURANCE COMPANY *v.* FINNIE AND OTHERS.

Diligence—Poinding of the Ground—Right in Security—English Bankruptcy—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 118—*Conveyancing Act Amendment Act* 1879 (42 *and* 43 *Vict. c.* 40), *sec.* 3.

Held that the Conveyancing Act Amendment Act 1879, limiting the effect, in competition with a trustee in bankruptcy, of a poinding of the ground executed by a creditor holding a security over the bankrupt's heritable estate preferable to the trustee's right, so as to make it available only for the interest on the debt for the current half-yearly term and arrears of interest for one year prior to the commencement thereof, applies only to a Scottish sequestration, and cannot, where the debtor has become bankrupt in England, be made available by the trustee in the English bankruptcy.

Heritable Creditor—Poinding of the Ground.

A person in right of a liferent of heritage incurred debt and granted in security thereof an assignation to his liferent right. An action of poinding the ground being thereafter brought against him, his trustee in bankruptcy maintained it to be incompetent because the creditor was by the bond surrogated into the full rights of the bankrupt with power to enter into possession and sell, and had in fact entered into possession, and so was in the position of a proprietor and could not poind the ground. Objection *repelled* because the title of the creditor was not one of property but of security.

The Conveyancing (Scotland) Act Amendment Act 1879 (42 and 43 Vict. cap. 40), sec. 3, provides —. . . "No poinding of the ground which has not been carried into execution by sale of the effects sixty days before the date of the sequestration 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 after the sequestration, but such poinding 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.

By bond and assignation and disposition in security dated and recorded 17th May 1883, William Finnie, liferent proprietor of the lands of Newfield and Peatland in the county of Ayr, acknowledged himself to have borrowed, and bound and obliged himself, his heirs, executors, and representatives whomsoever, to pay to the Scottish Union and National Insurance Company the principal sum of £7000, with interest at five per cent. till payment. In security of these obligations Finnie assigned his liferent interest in the lands of Newfield and others in the county of Ayr. Finnie also assigned certain policies of assurance on his life binding himself to pay the premiums, and to do nothing to infringe the conditions of the certificates.

In consequence of the irregularity in payment of the interest upon the principal sum, and of the premiums of insurance, the Assurance Company called up the loan, and as they were unable to obtain payment they, on 17th December 1885, raised the present action of poinding of the ground against Finnie and Mrs Jessie Moffat, tenant or occupant of Newfield House.

The pursuers averred that there was due to them the principal sum of £7000 above referred to with interest since Martinmas 1885, along with penalties and premiums of insurance.

The defender averred that the disposition and assignation in favour of the pursuers was not an ordinary bond and disposition in security, but one under which they were surrogated and substituted in his full liferent rights, with all the powers incident thereto. He also averred that the pursuers had some time prior to the raising of the action entered into possession and were in possession still, that they held ample security for their debt, and that no interest was due at that date.

It was further averred that Finnie committed an act of bankruptcy in England on 27th November 1885, that he was adjudicated bankrupt on 8th February 1886, and that A. A. James was chosen trustee. Mr James compeared, and was sisted as a party to the process.

The pursuers pleaded—"(1) The said principal sum, interest and penalties, and premiums of insurance being resting owing to the pursuers by the principal debtor, and being *debita fundi*, on the subjects and others libelled, the pursuers are entitled to decree as concluded for, with expenses. (2) The provisions of 42 and 43 Vict. c. 40, sec. 3, had no application to the present case, in respect that the compearing defender is not a trustee under the Scottish Bankruptcy Statutes."

The defender Finnie and compearer James pleaded, *inter alia*—"(1) The action is incompetent. (4) Mr Finnie's estate having vested in the trustee on his estate, the pursuers are not entitled to have the same poinded and sold. (5) In any view, any decree to be obtained by the pursuers should be limited to the interest for the current half-year, as provided by 42 and 43 Vict. c. 40, sec. 3."

On 29th March 1886 the the Lord Ordinary repelled the defences and decerned in terms of the conclusions of the summons.

"*Note.*—The defender's first plea is based upon the view, which he maintained, that the pursuers' title is one of property, and not merely a security. I think this cannot be successfully maintained, looking to the terms of the deed, No. 13 of process. It bears in express terms that the real right disponed is in security and for more sure payment of the personal obligation. This case is thus essentially different from that of the *Heritable Securities Co.*, 3 R. 333, on which the defender relied.

"The estates of Mr Finnie no doubt vested in his trustee, but only subject to the rights acquired therein by the pursuers in consequence of the service of this summons. I do not think these rights are restricted by the application of the 3d section of the Act 42 and 43 Vict. cap 40, as that section, in my view, refers to the effect of a Scotch sequestration only. I can find no authority, and was referred to none, for holding that a foreign sequestration affects preferences acquired or being acquired by a Scotch creditor over Scotch estate at the time the foreign sequestration is granted."

The defenders reclaimed, and argued—The pursuers here were really proprietors, and a poinding of the ground was therefore incompetent. They were real creditors in possession—*see* Menzies' Lectures, p. 847. The Assurance Company could enter into possession under their deed without any further formality. The case was substantially the same as *The Scottish Heritable Security Company* v. *Allan, Campbell, & Co.*, 3 R. 333.

Counsel for the respondents were not called on.

At advising—

LORD PRESIDENT—'Two objections have been taken to this action of poinding the ground; the first of these is that the pursuers are in the position of heritable proprietors of the lands, and the second is that the trustee is entitled to take the benefit of the provisions of the Conveyancing Act Amendment Act 1879, and to restrict the rights of the heritable creditor. As to the first of them it depends upon the answer to be given to the question—What is the nature of the pursuers' infeftment? An heritable right requires infeftment, and the extent of the right is measured by the nature of the infeftment. In the present case the pursuers were infeft in security, because the deed bore to be in security only. If the disposition had been taken in absolute terms, and that had been recorded, the Assurance Company would then have been infeft as proprietors.

In the one case there is infeftment in security only, in the other infeftment in property, and while the former right may be terminated by payment of the debt in respect of which the security was granted, nothing in the latter can take away the right to the property but a formal re-conveyance.

As to the second objection stated by the reclaimers it is hardly necessary to refer to it. We have nothing here of the nature of a trustee in a Scottish sequestration entering into competition with a security-holder, and in the absence of this the defenders cannot offer any reasonable objection to the course proposed by the pursuers.

LORD MURE concurred.

LORD SHAND—I am of the same opinion. The simple answer to the defenders' objections is that the creditor's title here is not one of property but one of security only, and it is that which distinguishes the present case from that of *The Scottish Heritable Security Company* referred to by the Lord Ordinary and relied on by the defenders. All that would be required to reinvest the defender would be a simple discharge of this security by the creditor in the bond.

With reference to the second point I have nothing to add.

LORD ADAM—When this case was opened I formed the opinion that it was unarguable, and I have not heard anything since to cause me to change my mind.

The Court adhered.

Counsel for Pursuer — Jameson — Guthrie. Agents—Cowan & Dalmahoy, W.S.

Counsel for Defenders—J. Burnet—Lorimer. Agents—Smith & Mason, S.S.C.