ment of the amount of such proceeds to the pursuers and the other creditors, under deduction only of such charges and expenses as may be found in the course of the proceedings to be proper charges against the said proceeds. In the abstract no one could take any exception to that. It seems a right enough conclusion, but it has no application to the facts of the case, and ought therefore to be dismissed.

The next conclusion, which is for consignation, I should dismiss as being unintelligible.

LORD CULLEN—*Prima facie* the proceeds of the pictures formed part of the general trust estate of the truster, and were *in pari casu* with other parts of the general estate over which the security of particular creditors did not extend. The pursuers in this action say that at the time of the Special Case there was a special agreement entered into to the effect that the proceeds in question should not go to the creditors by passing under the trust administration in the ordinary way, but should be set aside and be straightway distributed among the creditors without reference to any charges or burdens which the administration would otherwise lawfully impose upon them. I agree with your Lordships in thinking that there is no evidence of any such agreement having been entered into, and that the answer given in the Special Case—read in light of the opinions of the judges and the contentions of parties—does not involve the result which the pursuers contend for.

LORD PRESIDENT—We practically affirm the third, fifth, and sixth pleas-in-law for the defender, which, as Lord Skerrington has pointed out, leads to the dismissal of the action.

The Court dismissed the action.

Counsel for the Pursuers (Reclaimers)—Brown, K.C.—Cooper. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defender (Respondent)—Chree, K.C.—D. P. Fleming. Agents—John C. Brodie & Sons, W.S.

Saturday, March 20.

FIRST DIVISION.

[Sheriff Court at Stirling.

KELLY'S TRUSTEE *v.* MONCREIFF'S TRUSTEE.

Right in Security—Heritable Security—Process—Diligence—Poinding of the Ground—Partnership—Subjects Attached.

The two partners of a firm were infeft in heritable subjects as individual partners of the firm and as trustees for the firm. Under the partnership agreement one of them was to reside in the premises without paying rent or taxes. A poinding of the ground was used by a heritable creditor, and the household furniture, which belonged to the individual partner in occupation, was included in the inventory. *Held* that those moveables had been validly attached, as the partner in question was in substance owner of the ground though not sole owner.

Bell's Com., 7th ed., vol. ii, p. 57, and Ersk. Inst. iv, i, 13, *commented on and explained.*

John Craigen, advocate, Aberdeen, sole surviving trustee acting under an indenture prior to marriage of John Davidson Kelly and Annie Barnes, *pursuers*, brought an action of poinding of the ground in the Sheriff Court at Stirling against Braidwood & Moncreiff, Stanley House School, Bridge of Allan, and Thomas Braidwood and Lord Moncreiff, the partners of the firm of Braidwood & Moncreiff, as trustees for the firm and as individuals, *defenders*. In the course of the proceedings which followed John Stuart Gowans, C.A., who had been appointed trustee on the sequestrated estates of Lord Moncreiff, *minuter*, presented a minute seeking to have certain furniture excluded from the diligence.

The *inventory* of the sheriff officer of the goods secured included the household furniture of Lord Moncreiff, who resided at Stanley House School.

The *disposition* under which the heritable subjects in question were held provided—"I, John Davidson Kelly, . . . heritable proprietor of the subjects and others hereinafter disponed, considering that Thomas Braidwood, Master of Arts, Meadow Park, Bridge of Allan, and the Honourable James Arthur Fitzherbert Moncreiff, residing at Hillview, Saint Andrews Road, Henley-on-Thames, as individuals and as partners of and as trustees for the firm of Braidwood & Moncreiff, Stanley House School, Bridge of Allan, have agreed to free and relieve me of the *cumulo* sum of Five thousand, five hundred pounds contained in the bonds and dispositions in security after set forth, viz. (first) bond and disposition in security for Two thousand, five hundred pounds sterling granted by me in favour of John Craigen of One hundred and ninety-three Union Street, Aberdeen, Scotland, solicitor, and John Stanwell Birkett of four Raymond Buildings, Grays Inn, in the county of London, solicitor, trustees appointed by and acting under an indenture dated the Twenty-seventh day of July Eighteen hundred and ninety-eight, made between me, the said John Davidson Kelly of the first part, Annie Barnes of nine Park Place, Weston-super-Mare, in the county of Somerset, then spinster (now my wife) of the second part, and the said John Craigen and John Stanwell Birkett of the third part, being a settlement made prior to the marriage of me and the said Annie Barnes, dated said bond and disposition in security twelfth, and recorded in the Division of the General Register of Sasines applicable to the county of Stirling eighteenth, both days of April Eighteen hundred and ninety-nine . . . Therefore, in consideration of the obligation of relief and other clauses hereinafter contained with reference to the said respective bonds and dispositions in security, I the said John

Davidson Kelly, hereby sell and dispone to the said Thomas Braidwood and the Honourable James Arthur Fitzherbert Moncreiff, the individual partners of the said firm of Braidwood & Moncreiff, and the survivor of them, and the heir-male of the survivor, as trustees and trustee for behoof of the said firm and the partners thereof, present and future, and to the assignees whomsoever of the said trustees or trustee, heritably and irredeemably, all and whole the various subjects and others hereinafter described, videlicet—In the first place, all and whole . . . [the subjects in question.] . . . And the said Thomas Braidwood and the Honourable James Arthur Fitzherbert Moncreiff as individuals and as partners and trustees foresaid by their subscriptions hereto agree and bind themselves conjunctly and severally to free and relieve me of the said respective bonds and dispositions in security so far as undischarged amounting to the *cumulo* sum of Five thousand five hundred pounds, principal sums therein contained, and interest thereof, from the date of entry after mentioned (all prior interest having been paid and discharged), and the said Thomas Braidwood and the Honourable James Arthur Fitzherbert Moncreiff as individuals and as partners and trustees foresaid further agree that the personal obligations to pay principal, interest, and penalties and fire insurance premiums therein contained shall transmit against them and be a burden upon their title in the same manner that it is upon mine without the necessity of a bond of corroboration or other deed or procedure, and that the said personal obligations may be enforced against them by summary diligence or otherwise in the same manner as against me, all in terms of the forty-seventh section of the Conveyancing (Scotland) Act, Eighteen hundred and seventy-four."

The *warrant for registration* was — "Register on behalf of Thomas Braidwood, Master of Arts, Meadow Park, Bridge of Allan, and the Honourable James Arthur Fitzherbert Moncreiff, residing at Hillview, Saint Andrews Road, Henley-on-Thames, the individual partners of and as trustees for the firm of Braidwood & Moncreiff, Stanley House School, Bridge of Allan, in the register of the county of Stirling."

The *contract of copartnery* between Braidwood and Lord Moncreiff contained the following—"Art. 5.—The said James Arthur Fitzherbert Moncreiff shall act as resident principal of the school, and shall take the active management thereof, and shall occupy the headmaster's portion thereof without payment of rent or taxes, which shall be met by the copartnery. The said Thomas Braidwood shall be joint principal and shall take whatever part in the management as may be arranged between the partners."

The *procedure* in the cause was—The firm of Braidwood & Moncreiff became insolvent and was dissolved, Braidwood undertaking as one of the terms of the dissolution that he should obtain a release of Lord Moncreiff's furniture from the poinding of the ground. On 7th January 1918 Lord Moncreiff was sequestrated, and John Stuart Gowans, C.A., was appointed trustee upon his sequestrated estates. On 11th February 1918 a stay of diligence was granted in the action of poinding of the ground under the Courts (Emergency Powers) Acts. Thereafter Braidwood failed to carry out the terms of the dissolution, and the pursuer lodged a minute craving reconsideration of the stay of diligence in so far as it affected Lord Moncreiff's furniture. Certain postponed bondholders who had been made defenders in the action supported the crave of the minute. Lord Moncreiff had not entered appearance in the action of poinding of the ground, but the *minuter*, the trustee in his sequestration, lodged a *minute* which, after referring to the disposition of the heritable subjects, set forth—"The said subjects are still held by Mr Braidwood and Lord Moncreiff as trustees foresaid. The articles of furniture detailed in the inventory referred to in the minute for the pursuer, which the pursuer now desires to be allowed to proceed to sell, were the property of the said Lord Moncreiff personally, and the right thereto is now vested in the said John Stuart Gowans as trustee in Lord Moncreiff's sequestration. The said articles of furniture are therefore not attachable by the diligence of poinding of the ground at the instance of the pursuer as creditor in the said bond and disposition in security, such diligence being limited to moveables on the ground belonging to the said firm of Braidwood & Moncreiff. Leave should accordingly not be granted to proceed with the said diligence so far as regards the said articles now vested in Lord Moncreiff's trustee."

The Sheriff-Substitute (DEAN LESLIE) allowed that minute to be received, and on 21st January 1919 the Sheriff-Substitute refused the minute for the pursuer.

Note.—". . . At the hearing what was discussed was the question of whether moveables belonging to Lord Moncreiff as an individual were liable to the diligence.

"The pursuer's contention is based upon the terms of the disposition. . . .

"The argument for the pursuer was that having as an individual agreed in the disposition to free and relieve the disponer of the bonds affecting him (the disponer) and the heritable subjects, Lord Moncreiff has rendered his moveables liable to the diligence of poinding of the ground. All that Lord Moncreiff has done is qualified by the reference to the 47th section of the Conveyancing Act 1874. By that section a security duly constituted upon an estate in land shall together with any personal obligation transmit against any person taking such estate by conveyance, when an agreement to that effect appears *in gremio* of the conveyance, and shall be a burden upon his title in the same manner as it was upon that of his author. Now the persons who have taken this estate by conveyance are the trustees for the firm of Braidwood & Moncreiff.

"A poinding of the ground is described by Graham Stewart, p. 493, as that diligence by which the creditor in a *debitum fundi* can attach the moveables on the ground in

so far as these belong to or are available to his debtor or his successor in the lands. The debtor was John Davidson Kelly, and his successors in the lands are the trustees for the firm of Braidwood & Moncreiff. Though the individual Moncreiff has undertaken that the burden in the bond and disposition in security should transmit against the lands and the persons of the successors he has not undertaken more than that. He as an individual is not the successor in the lands. If the disponer had intended that the moveables of the individuals composing the firm should be liable under a poinding of the ground he would have made the conveyance to them as individuals and not as trustees only.

"It is possible that the moveables of the individuals who are partners of the firm of Braidwood & Moncreiff may be available to the successors in the land, but the pursuer has no averment to that effect, and the terms of the copartnery are not disclosed.

"There is an averment in the minute that the firm is insolvent and was dissolved, but this is vague, and so wanting in specification as not to justify a remit of probation.

"On these grounds, I think that the pursuer and the postponed bondholders have failed to show that the moveables belonging to Lord Moncreiff as an individual are liable to the poinding of the ground. I have therefore refused the application."

An appeal was taken to the Sheriff (MACPHAIL), who adhered to the Sheriff-Substitute's interlocutor refusing the minute of the pursuer craving reconsideration of the stay of diligence, and as the real question, viz., the competency of attaching the furniture, had not been dealt with by the Sheriff-Substitute, remitted the cause to him.

On 8th April 1919 the Sheriff-Substitute withdrew the articles in question from the poinding.

An appeal was taken, and on 26th June 1919 the Sheriff adhered to the interlocutor of the Sheriff-Substitute.

Note. — "The question for decision is whether certain moveables within the subjects known as Stanley House, Bridge of Allan, which were the property of Lord Moncreiff and now belong to the trustee in his sequestration, are or are not affected by a poinding of the ground at the instance of a bondholder over these subjects. The Sheriff-Substitute has decided the question in the negative, and against that decision the pursuer in the action and one of the defenders who is a postponed bondholder have taken this appeal.

"Two propositions were maintained by the appellant—1. That the personal obligation in the bond transmitted against Lord Moncreiff as an individual, and 2. That as he was a partner of the firm of Braidwood & Moncreiff, the moveables were liable to the poinding. (1) I am not disposed to think that the personal obligation did transmit against Lord Moncreiff as an individual. But even if it did, the position is not affected. A personal action—or a claim in the sequestration—might no doubt be based on such a transmission. This, however, is not a personal action but a real diligence, proceeding not upon the personal liability of anyone but on a *debitum fundi*. And the only question is, do the moveables on the ground pertain to the owners of the ground or their tenants or to some third party. (2) As a partner of the firm of Braidwood & Moncreiff, Lord Moncreiff as an individual is no doubt liable for the debts of the firm. The firm has, however, a legal *persona* of its own entirely distinct from its individual members. Though the premises are held by trustees the firm is their beneficial owner, and its moveables therein may therefore be poinded—*Mackenzie's Trustees* v. *Smith*, 20 S.L.R. 351. As an individual Lord Moncreiff does not own or occupy the premises, and is not the tenant thereof. It therefore appears to me that the moveables belonging to him as an individual are not liable to this diligence, and that the contention of the trustee in his sequestration must receive effect."

The pursuer and one of the postponed bondholders appealed, and argued—Poinding of the ground was originally a process by which a heritable creditor could attach all moveables whatever which he found upon the ground, and at one time he could proceed *brevi manu*. It was enough that the owner of the goods should be in possession of the lands; he need have no connection whatever with the debt. In course of time recourse to the Courts was enforced, and the universality of the attachment was limited; a tenant's goods could only be attached for the amount of rent due by him—Act 1469, c. 36; the goods of strangers were excepted—*Collet* v. *The Master of Balmerinoch*, 1679, M. 10,550. Apart from those limitations it had still universal effect. The action was rather declaratory of a real right than of the nature of diligence, and was based upon the heritable creditor's infeftment; the moveables were regarded as accessories of the land—*Bell* v. *Cadell*, 1831, 10 S. 100, *per* Lord Mackenzie at pp. 102 and 103; *Campbell's Trustees* v. *Paul*, 1835, 13 S. 237, *per* Lord Balgray at p. 241 and Lord Mackenzie at p. 242. In considering whose goods were liable to be attached the substance of the matter must be looked at and feudal title could be ignored—*Mackenzie's Trustees* v. *Smith*, 1883, 20 S.L.R. 351, *per* Lord President Inglis at p. 354. It was enough if the person whose goods were in question had an interest in the lands—Ersk. Inst. iv, i, 13. The goods of anyone in possession could be attached—Graham Stewart on Diligence, p. 493. Possession need not be *qua* owner—*Brown* v. *Scott*, 1859, 22 D. 273, *per* Lord President M'Neill at p. 276—but certainly possession *qua* owner was enough—*per* Lord Curriehill and Lord Deas at p. 277. Lord Curriehill regarded the law as fluid at the date of Erskine and Bell. The Styles were in favour of the appellants—Juridical Styles, vol. iii, p. 202, *et seq.* Here the respondent's case was based upon pure technicality. The disposition to Braidwood and Lord Moncreiff was to them as individual partners of the firm and as trustees for the firm; the warrant of registration was in the same terms. No

doubt a firm had technically a separate *persona*, but in substance Braidwood and Lord Moncreiff had the beneficial interest. But apart from that under article 5 of the contract of copartnery Lord Moncreiff was entitled to occupy the headmaster's house as resident principal without payment of rent or taxes. The moveables in question were the furniture in that house. The Sheriff had come to a wrong conclusion, and the furniture was validly attached. *Athole Hydropathic Company, Limited* v. *Scottish Provincial Assurance Company*, 1886, 13 R. 818, *per* Lord President Inglis at p. 822 and Lord Shand at p. 823, 23 S.L.R. 570; and *Traill's Trustees* v. *Free Church of Scotland*, 1915 S.C. 655, *per* Lord Mackenzie at p. 671, 52 S.L.R. 524, were referred to.

Argued for the minuter—Lord Moncreiff was not true owner, joint owner, beneficial owner, or tenant of the subjects in question. The disposition was in favour of the firm. Lord Moncreiff paid no rent or taxes, and consequently was not a tenant. He could be most accurately described as a lodger. If so, his moveables upon the ground could not be attached, for the goods only of owners or tenants or those in the position of tenants could be attached—Ersk. iv, i, 13; Bell's Prin. sec. 2285; Bell's Dictionary, *s.v.* Poinding of the Ground, p. 811; Bell's Comm. vol. ii, p. 57, which Lord M'Laren as editor had accepted as a correct statement; Graham Stewart on Diligence, pp. 491 *et seq.*, 493, and 499; *Collet's* case. *Brown's* case was distinguished, for there there was a right which could be converted into ownership. *Campbell's* case (*cit.*), *per* Lord Balgray at p. 241, was in favour of the respondent, and also was consistent with Erskine. In *Mackenzie's* case the title had not been feudalised, but otherwise there was ownership of the lands. *Thomson* v. *Scoular*, 1882, 9 R. 430, 19 S.L.R. 349, and *Nelmes* v. *Gillies*, 1883, 10 R. 890, 20 S.L.R. 596, were referred to.

At advising—

LORD PRESIDENT—This is an action of poinding of the ground brought by a heritable creditor against the debtors in the bond. The security subjects consist of Stanley House and Prospect House, Bridge of Allan, commonly known as Stanley House School. The moveables sought to be poinded consist of articles of household furniture, the property of the bankrupt. These articles are said to embrace substantially the whole furnishings in the premises. But it is contended by the trustee in bankruptcy that they are not liable to poinding, because the bankrupt to whom they belonged was neither owner nor rentpaying tenant of Stanley House. This contention was sustained by the Sheriffs, who directed the furniture in question to be withdrawn from the poinding. I am unable to agree with this view. On the contrary, I hold that the bankrupt was owner, although not sole owner, of Stanley House School, and if not, that he was in lawful occupancy of the house by arrangement with the owners. In either case the moveables on the ground are liable to the poinding. The infeftment in the property is taken in the name of Thomas Braidwood and the bankrupt, the individual partners of the firm of Braidwood & Moncreiff and as trustees for that firm; and it is admitted that Mr Braidwood and the bankrupt agreed that the latter should occupy the property rent free. That simply means that the two partners of the firm who were duly infeft in the property arranged between themselves that one of them should be occupant. It signifies nothing in my opinion that Stanley House may have belonged to the firm and that the firm is a separate *persona* in law. None the less the two partners and no one else owned the property. They are the true owners, and I cannot think, having regard to the scope and character of a poinding of the ground, that any mere technicality can stand in the way of its receiving effect. If, then, the bankrupt be owner of the property, it is not disputed that the sheriffs' judgment cannot stand. For the argument of the trustee in bankruptcy was rested solely on the broad proposition that the moveables of owners or rentpaying tenants are alone open to the diligence. The moveables of all others, it was argued, are excluded, being the property of "strangers." This argument was supported on the authority of the text writers. Thus Bell (Comm., 7th ed., vol. ii, p. 57) lays it down that "Nothing can be included in the operation of this diligence which does not belong either to the owner of the ground or to his tenant," and Erskine (Inst., iv, 1, 13) says that "Nothing can be poinded upon a decree for poinding the ground which doth not belong either to the owner of the ground or his tenant"; and Erskine adds—"Therefore goods brought on the land by strangers are not subjected to that diligence." Now I am unable to read those passages from those two very eminent writers in the narrow sense contended for; and I cannot think that having regard to the true legal character of the diligence they intended to exclude from it moveables belonging to persons in occupation of the lands by permission of the owners, or under some subordinate title derived from the owners. When they speak of tenants it is obvious that they do not mean merely tenants who pay rent, but occupants of the ground whatever be the terms of their occupancy. Indeed, in other passages of the Institutes Erskine uses language consistent only with the broader view of the scope of the right. Thus he lays it down (iv, i, 11) that "Every person who has a debt secured upon land, or as it is commonly expressed, a *debitum fundi*, . . . is entitled to an action for poinding *all* the goods on the lands burdened in order to his payment." And speaking of the defenders to be called in the action he says (iv, 1, 13) they "are made parties to the suit, not as debtors to the pursuer . . . but as *having interest in the lands* affected by the diligence." When he speaks of "strangers" therefore I take him to mean persons who are not interested in the lands. But persons in lawful occupancy of the lands deriving their right from the owner, whatever be the nature of their right, are certainly inter-

ested in the lands. And they ought to be called as defenders because their moveables are open to the diligence. It is certain that there is no decision or dictum to the contrary of this view. Both principle and judicial dicta support it. Indeed, it is to judicial opinions we must turn if we are to obtain a full and clear exposition of the nature and scope of a poinding of the ground. Confessedly none of the text writers has explored the subject. The earliest decision to which our attention was drawn is *Bell* v. *Cadell*, 1831, 10 S. 100. There the Lord Ordinary (Mackenzie), whose judgment was affirmed by the Second Division, in the course of a full and clear exposition of the law, points out that the diligence is confined to the moveables on the *fundus* in which the poinder is infeft as accessories thereof, that it proceeds on a decree against the land, that it "will operate directly against the moveables of whoever becomes possessor of the land," and that it may be that the party interested in the *fundus* is not at all bound personally for the debt. Lord Mackenzie goes on to point out that the real right is liable to be excluded by all completed alienations of the moveables "to persons who have no connection with the land." He there gives us a distinct clue to the meaning of the expression "strangers" as used in relation to the diligence. A stranger whose moveables are free from the diligence is one who has no connection with the land, as in the old case of *Collet*, 1679, M. 10,550. The exclusion of moveables completely alienated, says Lord Mackenzie, "is absolutely necessary to any management whatever of the *fundus*, as well as to the safety of the public, and has been introduced by customary law." Equally instructive are the opinions expressed in this Division of the Court in the case of *Campbell's Trustees*, 1835, 13 S. 237. There is a valuable exposition of the law on this subject, touching on its historical development, given by Lord Balgray. Speaking of the defenders called to the action, they are, he says, "the owners and possessors of the ground," and are called "in respect of their interest in the lands," and "the goods of any such owner or possessor . . . are liable to the heritable creditor." In the same sense Lord Mackenzie in the course of a very learned opinion said—"Where the land was made subject to a real debt, that *debitum fundi* covered not only the land but also the moveables on the land as accessories. And even when the authority of a court is employed to give effect to this right, it is to give effect to an existing real right inherent in the infeftment, and though limited to the moveables on the land which is contained in the infeftment, good against all the moveables (with some qualifications) on that land." Lord Mackenzie then proceeds to discuss the limitations and qualifications of the right, making quite clear that all the moveables on the land belonging to owners or possessors were clearly within the right and not within the limitations. Perhaps the most instructive case of all is that of *Brown* v. *Scott* (1859, 22 D. 273), because there this Division of the Court would certainly but for a technicality have held that the right applies to moveables belonging to a possessor of the ground who had entered into an abortive agreement to purchase. "The action," said Lord President M'Neill, "might be directed against him so as to reach his goods if he were proprietor, or as occupant, whether proprietor or not." And Lord Curriehill in the course of his opinion said that the whole moveables of this possessor, "whatever their amount, would have been attachable to the full extent of the debt." I refer also to the opinion of Lord Deas for a very explicit statement of the law. He too held that the occupant's moveables would have been liable for the whole debt. In the present case I do not think it would be possible for us to decide in favour of the trustee in bankruptcy without disregarding the clear and unanimous opinions expressed in *Brown* v. *Scott*.

Both on principle and authority, therefore, I come to the conclusion that as the bankrupt was in lawful occupancy of these premises by agreement with the owner (on the assumption that the firm owns the house) his furniture is open to a poinding of the ground at the instance of the heritable creditor. In short, I see no reason, having regard to the nature and scope of the heritable creditor's right, to except from a poinding of the ground the furniture of one who is in lawful occupancy of the subjects whether as owner, or by agreement with the owner whatever the character of the agreement for occupancy may be. The law is as laid down by Lord Curriehill in *Brown* v. *Scott* when he says—"It is now quite settled in law that the moveables upon ground — the subject of an heritable security — are held, in a question with the creditor, to be an accessory of the subject, and are covered by his infeftment." To the comprehensiveness of this statement I know of no limitation save as regards the moveables on the ground belonging to persons who have no connection with the ground. They alone are "strangers" in the sense spoken of by Erskine.

I propose that we should recal the interlocutors of the Sheriffs, and find that the furniture of the bankrupt in Stanley House is liable to the pursuer's diligence.

LORD SKERRINGTON—The firm of Braidwood & Moncreiff carried on business as school teachers at Stanley House School, Bridge of Allan, from 1913, when they purchased the property, until 1917, when the firm became insolvent. The junior partner was sequestrated on 7th January 1918, and his trustee raises the question whether it is competent for the pursuer, a heritable creditor, to attach by the process of poinding the ground any moveables on the property except those which belong to the firm. The bankrupt resided in the school house in virtue of a provision to that effect in the contract of copartnery, but the contract did not make him the firm's tenant. The pursuer alleges that with a few unimportant exceptions the pointed articles are the whole furnishings in the premises. He does not dispute that they belonged to the bankrupt.

I agree with the learned Sheriff in thinking that the effect of the disposition, which was the firm's title to its property, was to make Mr Braidwood and his partner trustees for the firm, that the firm was the beneficial owner of the property, and that in ordinary circumstances a title in this form confers upon the individual partners nothing more than a moveable *jus crediti* which they can enforce against the firm. The Sheriff has however overlooked the fact that Mr Braidwood and the bankrupt were the disponees of the property and had the legal title to it, and that although their title was a trust title and therefore qualified in point of form, it was in reality unqualified, because they had the sole control of and interest in the firm which was the only beneficiary under the trust. I do not see what more is needed in order to constitute these two persons joint owners of the property seeing that they had the full and complete *jus disponendi*. It is unnecessary to cite authority to the effect that in a question like the present, substance and not form is the determining factor. I am accordingly of opinion that all the moveables on the ground which belonged either to the firm or to one or other of the partners were subject to the pursuer's accessory security and were liable to his diligence. The situation would of course have been different if an additional partner had been assumed into the firm (an event contemplated by the disposition), as in that case it would not have been true that Mr Braidwood and the bankrupt held the property in trust for themselves and for no one else. Nor is it necessary to consider what would have been the position if the trustee could have maintained that the bankrupt had been placed by the contract of copartnery in the position of the firm's tenant, and that he had brought his furniture into the house in that capacity, and if the question had been whether the pursuer's diligence must be restricted to the amount of the rent due to the firm.

In the view which I take of this case it is unnecessary to decide whether Erskine, Inst. iv, 1, 13, and Bell, Comm. 7th ed., ii, 57, were right when they laid it down that nothing can be poinded upon a decree for poinding the ground which does not belong either to the owner of the ground or to his tenant. As, however, the question was carefully and ably argued, I may say that I see no reason to suppose that these great jurists either made a mistake in regard to an important point of practice or alternatively expressed themselves with unpardonable laxity and included in the category of tenants any person who happens to be in lawful occupation of a heritable subject even though he is in no sense a tenant, *i.e.*, neither expressly bound to pay a definite rent in money or money's worth, nor yet impliedly bound to pay a fair rent as fixed by the Court. If that was the opinion of Erskine and Bell (which I do not for a moment believe), I disagree with it. Why should the goods of a lawful occupant who is not a tenant (either express or implied) be confiscated for payment of money charged upon property which does not belong to him, when the goods of a tenant (express or implied) are carefully protected provided he pays his rent? The only authorities which the pursuer's counsel was able to adduce in support of his contention were certain *obiter dicta* to be found in the opinions of the Lord President (M'Neill) in *Brown* v. *Scott*, 1859, 22 D. 273, at p. 276, and of Lord Balgray in *Campbell's Trustees*, 1835, 13 S. 237, at p. 240. These dicta were said to support the proposition that every person in lawful occupation of heritable property, though neither the owner nor a tenant, is liable to have his goods seized and sold at the instance of the superior or of a person in right of a *debitum fundi*. Such was undoubtedly the law in early days, but it seems to me so inconsistent with notions of justice and expediency prevalent at the present day that I should desiderate clear authority for the proposition that it is still good law. In 1676 and 1679 it was laid down contrary to what had been decided half a century before—*Ednam* v. *Ednam*, 1628, M. 8129, 10,545—that the Act 1469, cap. 36, must be deemed to apply to real diligence whether used in the country or in a burgh—*Powrie Fortheringham* v. *Balmerinoch*, 1676, M. 10,547; *Collet* v. *Balmerinoch*, 1679, M. 10,550. In other words, so far as regards the goods of a tenant, poinding of the ground was converted from what we should regard as an act of oppression into a convenient and not inequitable device by which a superior or incumbrancer could attach the rent due by the tenant to his landlord. Even if these decisions do not go the whole length required in order to support Erskine and Bell, they are a good foundation for the falling into desuetude of a practice which had come to be regarded as unjust and inexpedient. I may mention that in the present case there would be no injustice in sustaining the pursuer's diligence even if it were decided that the bankrupt was neither the owner nor the tenant of the property because it so happens that he undertook personal liability for the pursuer's bonds, but I attach no importance to this accidental specialty in considering the validity and effect of a diligence which can proceed only upon a *debitum fundi*.

LORD CULLEN — On the purchase of the heritable subjects here in question by Mr Braidwood and the bankrupt, the title was taken in name of themselves as the individual partners of, and as trustees for, the firm of Braidwood & Moncreiff, of which they were the only partners. The trust is a bare trust, necessitated by the requirements of the feudal law, which forbids the direct infeftment in land of the legal *persona* of a firm. It is matter of decision that where a title is taken in trust for behoof of a firm, it is competent to poind moveables on the ground belonging to the firm in respect of the firm's beneficial interest in the ground under the trust. The state of the feudal tide is not conclusive. It is legitimate to look beyond the form of the title to the substance of beneficial interest which that title subserves. The question here is

whether, *pari ratione*, moveables on the ground in question belonging to one of the said two partners, occupying as such partner, may be competently poinded. I think that the question should be answered in the affirmative. While the firm has a separate *persona* in law, and is conceived as the direct and sole beneficiary under the bare trust, the truth and substance of the matter is that Mr Braidwood and the bankrupt, being the only partners of the firm, have the *jus disponendi* and the complete control of the subjects, and, subject to the obligations, if any, of the firm, they have the radical beneficial interest therein. This being so, it appears to me to be in accordance with the authorities that such control of and radical beneficial interest in the subjects is sufficient to sustain the poinding of the moveables on the ground belonging to the bankrupt.

LORD MACKENZIE was absent.

The Court recalled the interlocutors of the Sheriffs, found the articles of furniture in question fell within the poinding of the ground at the instance of the pursuer, and remitted the cause to the Sheriff-Substitute to proceed as accords.

Counsel for the Pursuer (Appellant) — Fraser, K.C.—R. Macgregor Mitchell. Agents —Cumming & Duff, W.S.

Counsel for the Minuter (Respondent) — Brown, K.C.—Maconochie. Agents—Guild & Shepherd, W.S.

Friday, March 19.

SECOND DIVISION.

MILNE'S TRUSTEES *v.* MILNE AND OTHERS.

Succession—Trust—Testament—Construction—Direction to Trustees to "Allow" Wife "to Possess" House "Rent Free"—Right of Wife to Let House—Incidence of Proprietor's Burdens.

A testator directed his trustees in the event of his wife's surviving him "to allow my said wife to possess, rent free, during the whole period of her survivance of me," the family dwelling-house along with the whole furniture and furnishings therein, and after the payment of certain legacies to realise and divide the remainder of his estate between his children.

Held that the wife was (1) entitled to let the house furnished or unfurnished during her lifetime, and (2) liable for payment of the feu-duty, proprietor's rates and taxes, repairs, and insurance.

James Milne (*secundus*), the testamentary trustee of his father James Milne (*primus*), who resided at Broomhead, Ballater Road, Aboyne, *first party;* Mrs Mary Jane Walker or Milne, widow of James Milne (*primus*), *second party;* and James Milne (*secundus*) and others, the children of James Milne (*primus*), *third parties*, brought a Special Case for the opinion and judgment of the Court as to the second party's right under the settlement to let the family dwelling-house, and her liability for the feu-duty, proprietor's rates and taxes, repairs, and insurance.

The Case set forth—"(1) James Milne, who resided at Broomwood, Ballater Road, Aboyne, in the county of Aberdeen (hereinafter referred to as 'the testator'), died on 20th April 1919. He left a deed of settlement dated 23rd December 1918, and registered in the Books of Council and Session on 25th April 1919. . . . (4) In the third purpose of his said *deed of settlement* the testator declared—'That my trustees shall, in the event of my said wife surviving me, allow my said wife to possess, rent free, during the whole period of her survivance of me, the heritable property known as Broomwood, Aboyne, along with the whole furniture and furnishings therein.' The testator's said wife did survive him and is the second party. (5) By the fourth purpose of the said deed of settlement the testator provided that on the death of his said wife his trustees should dispone and convey his said heritable property known as Broomwood with the furniture therein to his son George Milne and his heirs. The said George Milne is one of the third parties. (6) After providing in the fifth purpose for delivery as soon as convenient after his death of certain small specific legacies, the testator by the sixth purpose of the said deed of settlement directed that his trustees should realise the whole of the rest and remainder of his said estates including certain heritable properties, and pay and divide the whole free proceeds thereof equally, share and share alike, to his six children, whom he appointed to be his sole residuary legatees, 'declaring, however, that the furniture in Broomwood shall not be sold but be given to my son George Milne with the property.' The testator was survived by his said six children. . . . (8) Approximately the moveable estate left by the testator amounted to £6632. His heritable estate consisted of—1. Business premises in Aboyne valued at £550; 2. Two cottages in Aboyne valued at £770; and 3. Broomwood aforesaid valued at £855. The said estate (except Broomwood aforesaid and the furniture therein) has now been almost entirely realised for division in terms of the provisions of the said deed of settlement. (9) The second party has elected to accept the said testamentary provisions in her favour in lieu of her rights at common law in the testator's estate. Since his death she has enjoyed possession of Broomwood aforesaid and the furniture therein. The assessed annual rental of Broomwood is £40, but it can be readily let furnished in summer at rents varying from £25 to £30 monthly. Aboyne, in which Broomwood is situated, has for a number of years been a favourite holiday and health resort, and there has been and still is a great demand for houses during the months from June to the end of September. Broomwood is in the most popular part of the village, and is well suited for letting to summer visitors. As