[*5th August* 1839.]

(Appeal from the Court of Session, Scotland.)

(No. 28.) JAMES BEVERIDGE and JOHN WRIGHT WILLIAMSON, Appellants.[1]

[*Lord Advocate (Rutherfurd) — John Stuart.*]

ALEXANDER SMITH, Respondent.

[*Pemberton — James Anderson.*]

Bona fides — Competition. — Circumstances in which Held (affirming the judgment of the Court of Session) that an arrangement had been entered into by the general creditors of an insolvent debtor, including a party holding a prior heritable security and parties holding postponed heritable securities, which would make it a breach of good faith in the parties to adopt separate proceedings; and the postponed heritable creditors having, subsequent to said arrangement, poinded the ground, Held, further, in a question with the prior heritable creditor, that such proceedings could not have effect, and that it was immaterial whether a preference at law had been thereby gained, since it could not equitably be used.

1ST DIVISION. Lord Ordinary Cockburn.

IN December 1829 Thomas Thomson, innkeeper in Kinross, granted a bond and disposition in security for 1,800*l.* over certain heritable subjects to Alexander

[1] 16 D., B., & M., 381.

Statement.

Smith the respondent. In 1830 he granted to Smith another bond over the same subjects for 1,100*l.*; and on both securities Smith was infeft. In 1831 Thomson granted a bond and disposition in security for 300*l.* to the appellant, James Beveridge, and another bond and disposition in security for 1,261*l.* to Skelton and others, who subsequently conveyed it to the other appellant, John W. Williamson, a writer in Kinross.

In the beginning of 1832 Thomson became insolvent, and several personal creditors proceeded to do diligence against him. Thomson called a general meeting of his creditors, which was held at Kinross on 21st March 1832. Among others, the respondent, and Skelton, and Williamson as acting on behalf of Beveridge, attended on this occasion, and concurred in the resolutions adopted at the meeting. The minutes bear, that Thomson laid before the meeting a state of his affairs, and that "the meeting having taken into consideration the "above state of debt, along with the circumstances of "the business carried on by Mr. Thomson, are of "opinion, that in the meantime it is most advisable, "and for the interest of all concerned, that the estab-"lishment should be kept open, under the control of "the creditors; and that, for this purpose, a committee "should be named to superintend the management of "Mr. and Mrs. Thomson, to see all monies regularly "and periodically lodged in the bank in name of said "committee, or of one or more of their number, and to "pay out such sums as are necessary for carrying on "the business." It is then stated, "that the meeting "accordingly resolve to manage the business in the "manner above mentioned, and appoint the following

BEVERIDGE and another v. SMITH.

5th Aug. 1839.

Statement.

"a committee for this purpose, four to be a quorum, "namely, Messrs. Smith, Steedman, Dowie, Brown, "Hardie, Williamson, Curror, and Skelton; Mr. Skel- "ton to be convener." The committee were directed to report their proceedings to a general meeting of the creditors to be called for that purpose. And the minutes farther bear, that "as some of the creditors have exe- "cuted poindings of the furniture, and used arrest- "ments, in the hands of Mr. Pyper and others, the "committee are authorized to take measures to render "these steps ineffectual, as preferences, in such a way "as they may deem advisable, either by paying the "expenses of these poindings, &c., or by making "Mr. Thomson bankrupt."

The committee of management met on 4th April 1832, and the minute bears, that, "in consequence of "some of the creditors having poinded some of the "horses, the sale of which is advertised for to-morrow, "the committee consider that if the same is persisted "in it will be necessary to purchase back the horses, "and take measures for reducing all preferences, and "obtaining for the other creditors a share of the "poinded effects corresponding to their debts." Immediately after this resolution, by Williamson's advice, actions of poinding the ground were raised, in the names of Beveridge, Skelton, Steedman, and Dowie, the postponed heritable creditors, in which decrees were obtained on 15th May 1832.

At a meeting held on 24th July 1832, Williamson was authorized by the committee to receive payment of money due by Mr. Pyper to Thomson for coaching business, and, in order to prevent arrestments from

being used, he was instructed, at a subsequent meeting held on 1st February 1833, "to obtain an assignation "to the mail and coach drawing and profits, as trustee "for the general behoof."

Statement.

Of the last meeting of the committee, held on 2d December 1833, the minute bears that the respondent was instructed "to wait upon Williamson, and receive "from him for our information all his accounts relative "to Mr. Thomson's matters, that we may thereby be "enabled to judge what farther procedure shall be "necessary to be adopted in the regulation for the "future of Mr. Thomson's matters."

In July 1834 Beveridge and Williamson, having previously raised on each of their heritable bonds a summons of poinding the ground before the sheriff of Kinross, and having obtained decree, and raised and executed letters of poinding, obtained warrants of sale of the moveables on the ground in the natural possession of the debtor. They did not execute these warrants, but in June 1834 they obtained a fresh warrant, and advertised a sale. The respondent obtained an interdict of the sale, and raised a summons of poinding the ground in the Court of Session (Thomson being dead, and his heir abroad). Beveridge and Williamson entered appearance to the action, and were allowed by the Lord Ordinary (Corehouse) to state their defences, in which they maintained that the respondent had lost his right as a prior creditor, while they by their proceedings had gained a preference.

The Lord Ordinary (Cockburn, before whom the case came in place of Lord Corehouse, who had taken his seat in the Inner House,) pronounced the following interlocutor:—"Edinburgh, 2d June 1837.—The Lord

BEVERIDGE and another v. SMITH.

5th Aug. 1839.

Statement.

" Ordinary having considered the process, and heard " parties, Finds that all parties have renounced further " probation: Finds, that the defenders, under their " decrees of poinding the ground, executions of letters " of poinding and warrants of sale, have a preference to " the extent of obtaining payment of their respective " debts of three hundred pounds sterling, and of one " thousand two hundred and sixty-one pounds three " shillings and five-pence sterling, over the poindable " moveables appraised in the inventories upon which " the warrants of sale proceeded, and to this extent " sustains their defences, and decerns. Quoad any other " poindable moveables belonging to the children of the " deceased Thomas Thomson, or to his widow, to the " extent of the rents due by her, which are or may be " on the ground, decerns in terms of the libel: Finds " the defenders entitled to expenses; appoints an " account thereof to be given in, and when lodged, " remits the same to the auditor to tax and to report."

" *Note.*—The pursuer having the prior right, might " by due measures have made it effectual. But having " done nothing with this view, and the defenders, though " their right be posterior in date, having obtained " decrees of poinding, which were executed and fol- " lowed by extracted warrants of sale, the Lord Ordinary " is of opinion that these proceedings gave them a pre- " ference, and that there is no authority for now holding " that the preference must depend on the mere priority " of the right in point of time.

" The pursuer no doubt states two personal objections " to the right of one or either or both of the defenders " to use the advantage they have gained; but neither " of these are well founded.

" 1. It is said that they were bound to go along with " the rest of the creditors, and that this was the special " duty of the defender Williamson, who had not only " agreed to abstain from separate measures, but was the " agent of the creditors. But these averments are not " supported by the evidence in process; and the objec- " tion, instead of being stated by or for the general " body of the creditors, is brought forward by the pur- " suer individually, who wishes to exclude the defenders, " merely in order to enable him to use the very separate " measures which he condemns.

" 2. It is stated that the defenders have lost the " benefit of their diligence by mora. The Lord Ordi- " nary does not think so. A long period has certainly " followed their warrants, and no actual sale has hitherto " taken place. But the first part of this delay, extend- " ing to nearly a year, arose from their desire to accom- " modate the creditors, and the pursuer as one of them, " by not turning the widow of the tenant out of pos- " session, and was acquiesced in by them and by him. " During the subsequent part of it, they were prevented " from proceeding by an interdict at the pursuer's " instance, which he afterwards abandoned. Nor did " the pursuer ever do any thing in furtherance of his " own right during these pauses.

" The Lord Ordinary gives the defenders their ex- " penses, because in so far as they are concerned, the " pursuer was wrong. He has got decree quoad any " moveables that may be on the ground after the de- " fenders debt is paid; but this they never resisted, or " had any thing to do with."

The respondent reclaimed.

After advising minutes of debate the Court pro-

BEVERIDGE and another *v.* SMITH.

5th Aug. 1839.

Statement.

nounced the following judgment: — " 26th January " 1838.—The Lords having resumed consideration of " this reclaiming note, and having also considered " the minutes of debate, and heard counsel for the " parties, in respect of circumstances involving a per- " sonal objection to the defenders, recal the interlocutor " reclaimed against, and find that they are in conse- " quence barred from obtaining any preference in virtue " of their diligence; therefore decern, and declare in " terms of the conclusion of the libel: Find the pursuer " entitled to expenses; allow an account thereof to be " given in, and remit to the auditor to tax the same " and to report."

Judgment of Court, 26th (signed 27th) Jan. 1838.

Messrs. Beveridge and Williamson appealed.

Appellants Argument.

Appellants. — There is no evidence of any agreement between the appellant Mr. Beveridge and the cedents of the appellant Mr. Williamson on the one hand, and the general body of creditors on the other, to institute and use the poindings of the ground for behoof of the general body of creditors; and even assuming that there had been such an agreement, the respondent, who does not represent the personal creditors, was not in titulo to enforce it or to oppose the appellants preference; at all events, the effect of such an agreement could only be to compel the appellants to communicate the benefit of their poindings of the ground to the general body of creditors, and could never entitle the respondent to obtain a judgment in the terms of that now appealed from, giving him a preference over and the sole right to the whole moveables on the ground.

There was nothing in the facts or law of the case to raise a plea of personal exception against the appellant Williamson, in his character of assignee of Messrs. Skelton, Steedman, and Dowie, either on the ground of agency or otherwise. Neither the alleged agreement, nor the plea of personal exception, could be urged against or affect the appellant Mr. Beveridge, for he was no party to that alleged agreement, and his interests could in no shape be injured by the plea of personal exception proponed against Williamson. By the law of Scotland it is clear, that by raising their actions of poinding the ground, obtaining decrees therein, executing and reporting poindings of the ground, obtaining and extracting warrants of sale, and advertising a sale to take place, all without the respondent having taken any step to assert his alleged right over the moveables on the ground in virtue of his bonds; the appellants had obtained and secured a preference over these moveables, which the respondent was no longer entitled to defeat. Even if an actual sale should be held to be necessary to complete the appellants preference over the moveables on the ground, the present question must be viewed as if a sale had taken place, such sale having been prevented solely by delay granted at the respondent's request, and by the wrongous interdict obtained by the respondent, and kept in force by him for nearly a year on the dependence of an action which he thereafter abandoned as incompetent.

Appellants Argument.

Respondent.—In the circumstances of this case, the claims of the appellants ought to be rejected as groundless and untenable, and there is no room even for admitting them to the benefit of a pari passu ranking;

Respondent's Argument.

BEVERIDGE and another v. SMITH.

5th Aug. 1839.

Respondent's Argument.

the respondent never directly or indirectly renounced his right to a preference, and, at any rate, the proceedings adopted and contemplated by the general body of the creditors had become inoperative, and the rights of the present competitors must be determined, according to the priority of their infeftments, in the same way as if no such proceedings had taken place.

All the measures adopted by the respondent, as the holder of the first heritable securities, were conducted in a legal and formal manner, and there are no grounds either in fact or in law to bar him from asserting his right to a preference, and obtaining a decree of poinding the ground, in terms of the conclusions of the summons.

Independently of these fair and equitable grounds, the appellants in point of law had not established a preference. Even although they had acquired a complete right to the moveables under their diligence, they were barred, personali exceptione, from claiming a preference over the respondent, in respect of their accession to the resolutions adopted at the general meeting of Thomson's creditors, and of the arrangement whereby they became bound to use their poindings of the ground solely for the purpose of defeating the diligence of the nonacceding personal creditors. And in any view, the appellant Mr. Williamson, by acting throughout the whole proceedings as the agent and legal adviser of the respondent and the other creditors, was precluded from claiming any benefit in this competition, and had rendered himself responsible for any loss which might be sustained by his failure to take the necessary steps to protect the respondent's interests.

LORD CHANCELLOR.—My Lords, this case in a court of equity would not have afforded room for discussion; and it is fortunate that the principle adopted by the Court below is the same with that which would have been prescribed in a court of equity.

My Lords, the facts of this case appear to be these: Mr. Smith had the first heritable security. He and the other creditors met in March 1832, and it was arranged that the business should be carried on, and a committee of management was appointed, of whom Mr. Williamson was one. Mr. Williamson acted for Beveridge and other creditors. The former part of the resolution, as set out in the appellants case, states, that as "some of "the creditors executed poindings of the furniture, and "used arrestments, in the hands of Mr. Pyper and "others, the committee are authorized to take measures "to render these steps ineffectual, as preferences, in such "a way as they may deem advisable, either by paying "the expenses of these poindings, or by making "Mr. Thomson bankrupt." The mode they prescribed was not that which was afterwards adopted on another occasion, to which I will presently refer; but the object was necessarily the object of all parties interested in the estate,—to prevent possession of the estate being obtained by diligence being pursued by a particular creditor: that took place on the 21st of March. On the 4th of April the committee of management had another meeting, in which this appears as their minute:—"In consequence of some of the creditors "having poinded some of the horses, the sale of which "is advertised for to-morrow, the committee consider "that if the sale is persisted in it will be necessary to "purchase back the horses, and take measures for

BEVERIDGE and another v. SMITH.

5th Aug. 1839.

Ld. Chancellor's Speech.

" reducing all preferences, and obtaining for the other " creditors a share of the poinded effects corresponding " to their debts." That is in complete accordance with the arrangement previously made; and there can be no doubt that all the creditors who were parties to these proceedings came into the arrangement that no steps should be taken which should have the effect, among those who were parties to the arrangement, of stopping the business; that steps should be taken to prevent any creditor gaining a preference, and that for that purpose those creditors who might attempt to gain preferences should be stopped in the various ways which were suggested. One way of effecting this purpose (those being mere personal creditors) was to institute proceedings on behalf of some heritable creditor, in order that the personal creditors might not obtain the property, and defeat the object of all the creditors present. Now, the proposition contended for by the appellants is, that it was not inconsistent with the good faith pledged between the heritable creditors and all parties to that meeting of the 21st of March, that proceedings should be adopted by the second heritable creditor for getting priority over the first. If your Lordships can suppose that that was the intention of the parties, or if your Lordships feel any doubt as to that not having been contrary to the intention of the parties, then some weight may be given to that argument; but, my Lords, in what situation was the first heritable creditor? If he had thought proper, he might at the meeting of the 21st of March have taken measures to secure the payment to himself. He might have helped himself by virtue of his prior claim; but that he did not think proper to do, probably thinking there was enough

to pay himself. He was willing that the property should be taken care of, for the purpose of providing such means as could be found to pay as many creditors as possible. He abstained therefore from using that diligence which it was open to him to use. But can it be supposed that it was his intention not to protect himself against the chance of the second heritable creditor gaining priority over himself? That is quite inconsistent with the whole arrangement between the parties, and quite irreconcilable with any intention that the first heritable creditor could have. Now, that some proceedings were necessary seems universally admitted. They were necessary for the purpose of carrying into effect that resolution of all the creditors, as expressed in the minute of the 21st of March 1832, for preserving the property for the benefit of all who were interested in it. Accordingly, proceedings were instituted for obvious reasons in the name of Smith. It was quite immaterial which heritable creditor was made a party, if the intention was to preserve the relative situation of all the creditors, but by no means immaterial if the object was to gain priority on the part of one over the other. But the object being to prevent the personal creditors gaining an advantage over all the others, it was immaterial which heritable creditor was made a party to prosecute the proceedings. Accordingly, by the direction of Mr. Williamson, proceedings were instituted in the name of Beveridge and others, having such heritable securities. Under these circumstances the proceedings continued until April 1836, when it is quite clear, for the reasons which have been stated at the bar, that at that time Mr. Williamson was agent for Smith; and if the question turned on that, no doubt it would be to be considered how far priority had

BEVERIDGE and another v. SMITH.

5th Aug. 1839.

Ld. Chancellor's Speech.

actually been gained before that connexion subsisted between Smith and Williamson. But I consider it quite sufficient that there was that connexion between Smith and Williamson, and that all the creditors were parties to that arrangement; and it was the bounden duty of Williamson, not only between himself and all parties to that arrangement, (of course if he was acting for himself the case would be still stronger against him,) —but it is quite sufficient for the present purpose that, being one of the parties to the arrangement, and one of the parties to carry it into effect, it was not competent to him to lend his aid to or permit any one of those creditors who were parties to that arrangement to use the delay to which the first heritable creditor had consented so as to make it operate to the prejudice of that first heritable creditor, he abstaining from using his diligence, and thereby giving an opportunity to the second heritable creditor to obtain priority over him; it was quite a breach of that good faith which must have been the ground of the proceedings by all those who were parties to the transaction of the 21st of March 1832. I abstain from entering into the question of priority, which in point of law is one which the Court below has considered as not arising, and which undoubtedly cannot arise. If then your Lordships are of opinion that the Court below was right, whatever may be the legal priority obtained by the second heritable creditor, the question is, whether he was precluded by the transaction that took place and the situation he filled from availing himself of that priority. If he gained it,—it is immaterial whether he gained it at law or not,—i. e. if your Lordships are of opinion that supposing he has gained it, he cannot equitably use it.

Those are the grounds upon which the Court below have proceeded. My opinion on this subject is, independently of the act of agency by Williamson on behalf of Smith, founded on that arrangement to which all the creditors were parties on the 21st of March 1832, explained by the subsequent proceedings of the 4th of April 1832,—that after that arrangement it was a breach of faith in the parties to adopt those proceedings, and that it is the duty of every court exercising an equitable jurisdiction to confine the parties to that situation to which they ought to have confined themselves, if they had acted with good faith towards each other and consistently with the arrangement they had made.

My Lords, that is the foundation of the interlocutor appealed from; and if it had not been for the difference of opinion among the Learned Judges in the Court below, it appears to me to be a case so entirely established by the resolutions of the creditors in March 1832, regard being had to the subsequent proceedings, that perhaps some of your Lordships time might have been saved, after hearing the appellants; but, under these circumstances, it is more satisfactory that you should have heard the whole case. I need hardly say, that being of that opinion, I should recommend your Lordships to affirm the interlocutor of the Court below, with costs, because it is a case in which an attempt was made, in breach of good faith, according to the opinion I have formed, to gain an advantage, which attempt, in my opinion, ought not to have been made.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House,

BEVERIDGE and another *v.* SMITH.

5th Aug. 1839.

and that the said interlocutor therein complained of be and the same is hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

G. & T. WEBSTER—DEANS and DUNLOP, Solicitors.