as were reasonably possible for the child's safety. Upon that ground I am of opinion we have a sufficiently relevant case for a jury.

I think, however, that to establish fault it will be necessary for the pursuer to prove that the defenders' servants knew of the danger to the child, and failed to take reasonable precaution for its safety. If they had no reason to know that it was exposed to danger from their action, or if they did not know in time to prevent the accident, they would not in my opinion be liable. But I think there is sufficient averment to make it necessary that the facts should be inquired into.

LORD PRESIDENT—Like Lord M'Laren and Lord Kinnear, I have a poor opinion of the pursuer's record, and I am much in sympathy with the general observations which Lord M'Laren has made.

I think, however, that the last sentence of the minute of amendment states what, if sufficiently specific as regards the persons accused, is a good ground of action. If that sentence is to be read as imputing to the persons in charge of the shunting knowledge that when they proceeded to shunt, the children were upon the line, then I should say the pursuer is entitled to an issue. My own impression was, that as the pursuer has, with full consideration, abstained from saying this, and had contented himself with an averment relating to the company and its servants, the indulgent reading of the record which I have referred to was not legitimate. That impression has not been removed; but this is a matter of pleading, and does not seem to me one sufficiently broad to make it worth while to prevent the case going to trial without further discussion.

The interlocutor will therefore be to approve the issue.

The Court held the amended averments of the pursuer relevant, but found him liable in the expenses of the action up to the date when the amendment was proposed, and postponed consideration of the issue until these expenses should have been paid.

Counsel for Pursuer and Appellant—Burnet—Craigie. Agent—William Balfour, Solicitor.

Counsel for Defenders and Respondents—Sol.-Gen. Asher, Q.C.—Baxter. Agent—James Watson, S.S.C.

Tuesday, November 15.

FIRST DIVISION.

[Lord Low, Ordinary.

ALLAN *v.* LIQUIDATOR OF WEST LOTHIAN OIL COMPANY, LIMITED, AND OTHERS.

Company — Winding-up by the Court — Poinding Subsequent to the Commencement of the Winding-up—Companies Acts 1862, *secs.* 87 *and* 163, *and* 1886, *sec.* 3 *—Preference for County Rates.*

The Companies Act 1862 (25 and 26 Vict. c. 89), by sec. 163, enacts that "where any company is being wound up by the Court, . . . any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents;" and by section 87, "that when an order has been made for winding up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court;" while the Companies Act 1886 (49 Vict. c. 23), by sec. 3, enacts that "in the winding-up by the Court of any company whose registered office is in Scotland, . . . no arrestment or poinding of the funds or effects of the company, executed on or after the sixtieth day prior to the commencement of the winding-up, shall be effectual." *Held* that diligence by poinding after the commencement of the winding-up of a company by the Court was of the nature of an "attachment," "and not of a "suit, action, or other proceeding," that consequently it was void, and could not be authorised by the Court, especially looking to the provisions of the Companies Act of 1886.

Exception taken to the English construction (see *Lancashire Cotton Spinning Company*, 1887, L.R., 35 Ch. Div. 656) of secs. 87 and 163 of the Act of 1862, and case of *Athole Hydropathic Company*, March 19, 1886, 13 R. 818, *distinguished.*

Held, therefore, that although a collector might claim to rank preferably for county rates in the liquidation of a company being wound up by the Court, he was not entitled, by virtue of that preference, to poind the effects of the company. Case of *North British Property Investment Company*, July 12, 1888, 15 R. 885, *distinguished.*

Under a petition dated 21st November 1891 the West Lothian Oil Company, Limited (incorporated under the Companies Acts 1862-1880) was, by interlocutor of the First Division dated 24th February 1892, ordered to be wound up by the Court, and John Gourlay, C.A., Glasgow, was appointed official liquidator.

Upon 3rd February 1892 Charles Allan, solicitor, Bathgate, Collector of the County

Council Assessments for the Bathgate district of the county of Linlithgow, obtained a warrant from the Sheriff-Substitute at Linlithgow to poind and distrain the goods and effects of the said company for payment of county rates due by them. Under this warrant the collector poinded certain goods and effects of the company upon 11th February 1892, and got them valued. Thereafter in June 1892 he presented a note to the Court for authority "(first) to sell by auction the poinded goods and effects narrated in the said valuation . . . (second), to apply the proceeds of said sale to the extinction of (*primo*) the sum due to the said Charles Allan as collector foresaid, with interest, . . . (*secundo*) the expenses of this note, . . . (third), to pay the balance, if there be any left over, . . . to the official liquidator."

Answers were lodged by the official liquidator, by James Henry Cowan, the owner of the ground on which the company's works were placed, and by the trustees for the debenture-holders.

The liquidator denied that the proceedings taken by the petitioner had been valid, and explained that they were instituted and proceeded in without the sanction of the Court, and after the commencement of the liquidation, and also in part after the appointment of the liquidator. He further explained that a large part of the articles alleged to be poinded consisted of fixed machinery attached to the ground, and only a part of ordinary moveables.

The trustees for the debenture-holders averred that all the articles enumerated in the execution of poinding, with two or three paltry exceptions, were heritable, and that they belonged to them by virtue of an assignation. Mr Cowan also claimed a heritable character for many of the subjects poinded, as being of the nature of fixed machinery, and the proprietorship thereof.

The liquidator pleaded—"(2) The proceedings at the instance of the petitioner are inept, as instituted and carried on after the commencement of liquidation without the sanction of the Court. (3) The proceedings as against the company are excluded by the Companies Act 1862, and especially by section 163 thereof. (4) The poinding of heritable estate, or of plant forming part only of heritable estate, is inept. (5) The poinding and sale under a poinding of part of fixed plant of which it forms a part is incompetent."

The debenture-holders pleaded — "The whole articles included in said poinding and valuation, with the exceptions foresaid, having been conveyed to and being heritable estate vested in these respondents, the prayer of the note ought to be refused, and these respondents found entitled to expenses."

Mr Cowan adopted the liquidator's pleas, and pleaded further that "(2) The greater part of the machinery alleged to be poinded being the property of the respondent, the petitioner as a creditor in the liquidation is not entitled to do diligence against the same."

The Companies Act of 1882 (25 and 26 Vict. c. 89), by sec. 163, enacts—"Where any company is being wound up by the Court, or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents." Section 87 enacts "that when an order has been made for winding-up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court, and subject to such terms as the Court may impose."

And the Companies Act of 1886 (49 Vict. c. 23), by sec. 3, enacts that "in the winding up by or subject to the supervision of the Court of any company under the Companies Acts 1862 to 1886, whose registered office is in Scotland, where the winding-up shall commence after the passing of this Act . . . no arrestment or poinding of the funds or effects of the company, executed on or after the 60th day prior to the commencement of the winding-up by the Court, . . . shall be effectual, and such funds or effects, or the proceeds of such effects if sold, shall be made forthcoming to the liquidator." . . .

Upon 4th August 1892 the Lord Ordinary on the Bills (Low) pronounced this interlocutor — "Having heard counsel for the parties on the note for Charles Allan, grants the first head of the prayer thereof, and *quoad ultra* supersedes further consideration of the same, and decern *ad interim*."

"*Opinion.*—By section 62, sub-section 5, of the Local Government Act of 1889 it is provided that 'All rates imposed under any powers transferred or conferred by by this Act shall in the case of bankruptcy or insolvency or liquidation be preferable to all debts of a private nature due by the parties assessed.' The rates therefore referred to in the note are preferable debts of the company.

"In the *North British Property Investment Company* v. *Paterson*, 15 R. 885, it was held that a poinding brought by the collector of poor-rates after the date of the liquidation of the company was not only competent, but was preferable to a previous poinding of the ground by a heritable creditor. In the case of the *Athole Hydropathic Company*, 13 R. 818, it was held that a heritable creditor was entitled to proceed with a poinding of the ground after liquidation, because he had already a preference, which he only sought to make available by the poinding.

"I am therefore of opinion that it was competent for the collector to poind the moveable property of the company.

"It is, however, said that part of the machinery which the collector desires warrant to sell is fixed machinery which belongs to the landlord. The lease under which the company worked the shale was produced, and from it it seems to be clear that the company had at the termination of the lease right to remove all the machinery unless the landlord gave certain notices and bought the machinery at a certain price. The landlord has done neither

the one nor the other, and therefore the machinery is *prima facie* the property of the company.

"It was urged for the landlord, and for certain trustees for debenture-holders, that it would be most prejudicial to their interests if the machinery was separated and sold by the collector. If so, these persons can pay the rates, and thus prevent the sale of the machinery. If they do that, they will have a claim of relief against the liquidator. Under the Taxes Management Act 1880 it is provided (section 88) that no goods or chattels belonging to any person who is in arrear of duties or land tax shall be subject to diligence unless the person desiring to proceed with diligence shall pay the duties or land tax. The provision is applicable to rates levied by the County Council; and although this is not a case of a private creditor seeking to do diligence, it seems to me that it is consistent with the principle of the enactment to allow the sale to proceed. There is certain machinery *prima facie* belonging to the company which the collector desires to sell. The landlord and the trustees for debenture-holders claim part of the machinery, but upon what ground does not clearly appear. In such circumstances I do not think that I can refuse the warrant which is asked. The rates are preferable debts, and must be paid, and it is for the landlord and the trustees to consider whether their interest is sufficiently large to make it worth their while to prevent this sale by paying the rates, and then to claim relief from the liquidator, and take such steps as may be necessary to determine in a question with him their respective rights in the machinery."

Mr J. H. Cowan reclaimed, and argued—1. The diligence done by the collector was not competent, but void to all intents under the 163rd section of the Act 1862, and could not be validated by the Court under the 87th section. These sections applied to different things—the 87th to suits and actions which the Court could authorise to proceed, and the 163rd to diligence which was declared void. The cases cited by the Lord Ordinary were not in point. The *Athole Hydropathic Company* case, March 19, 1886, 13 R. 818, was that of a heritable creditor making a preference he undoubtedly had effectual by poinding. This was the case of one with a personal right seeking to do diligence by poinding, so as to secure a preference over specific articles. The *North British Property Investment Company* case, July 12, 1888, 15 R. 885, was in a voluntary liquidation, to which the sections in question did not apply. Any preference the collector had would be given effect to in the ranking in the liquidation. 2. The articles included in the execution of poinding were not subject to that form of diligence, being heritable. They belonged to him as owner of the ground.

The trustees for the debenture-holders stood upon their plea, *supra*.

It was argued for the liquidator—If the subjects were heritable, they were not poindable. If moveable, they belonged to him under the universal prior poinding implied in the winding-up order by virtue of the Companies Act 1886 (49 Vict. c. 23), sec. 3.

Argued for the collector (petitioner and respondent)—1. By the Local Government Act 1889 he had an absolute and undoubted preference for payment of the rates, which he was merely seeking to make good. Accordingly, the *Athole Hydropathic Company* case was in his favour. 2. "Diligence" was a "proceeding" under the 87th section which the Court could authorise. That section must be read along with the 163rd in construing the latter. That was now authoritatively settled—*Exhall Coal Mining Company*, 1864, 4 De Gex, Jones, & Smith, 377; *Lancashire Cotton Spinning Company*, May 5, 1887, L.R., 35 Ch. Div. 656; Buckley's note to section 163.

At advising—

Lord Kinnear—This is an application by the Collector of County Council Assessments for the county of Linlithgow for authority to sell certain goods and effects belonging to the West Lothian Oil Company, in liquidation, which he alleges he has poinded for payment of rates. There is no question as to the existence of the debt, but it is maintained on various grounds that the goods are not poindable, or at least that they are not poindable at the instance of the collector. We had a great deal of argument as to the legal character of the poinded effects, and as to the conflicting rights and interests of the petitioner and certain heritable creditors. But in the view I take, it is neither necessary nor fitting to consider that argument. The first question is, whether the poinding is not inept under the Companies Acts, and if that be decided against the petitioner, his application must be refused. If that depended on the Act of 1862 alone, I should have been disposed to hold that the poinding was ineffectual. The company is being wound up by order of the Court. The petition on which this order was made was presented on the 21st of November 1891, which is the date of the commencement of the winding-up. The warrant to poind was obtained on the 3rd of February, and partly executed on the 11th of February 1892. The poinding is therefore subsequent to the commencement of the winding-up. But the 163rd section of the Companies Act of 1862 provides that "where any company is being wound up by the Court . . . any attachment, sequestration, distress, or execution against the estate or effects of the company after the commencement of the winding up shall be void to all intents." I do not think it doubtful that a personal poinding is an execution in the sense of this enactment. But then it is said that this section must be read with and controlled by the 87th section, which provides that "when an order has been made for winding up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company with-

out the leave of the Court." It is said that when these two sections are read together they give power to the Court to authorise an execution or distress, because although these are proceedings which are made void by the express words of the 163rd section, they are also proceedings within the meaning of the 87th section, which the Court may sanction if it thinks fit. There is high authority in support of this construction. It was so decided by Lord Justice Turner in 1864, and the rule then laid down has since been followed in England. But in the more recent case of the *Lancashire Cotton Spinning Company*, that construction of the statute has been disapproved by three very eminent Judges, the Lords Justices Cotton, Lindley, and Bowen, although their Lordships thought that they were bound to accept it in deference to the authority of previous decisions. But then these decisions, although they are entitled to the highest respect, are not binding upon this Court, and therefore do not absolve us from the duty of construing the statute for ourselves, and giving effect to its provisions according to our own judgment. Now, if I am right in thinking that a poinding is an execution in the sense of the 163rd section, and is therefore void to all intents under the peremptory words of that enactment, I have the greatest difficulty in seeing how it can also be a proceeding which the Court may authorise under the 87th section. The two sections appear to me to be distinct and independent, dealing differently with different matters. The first of these two sections refers to suits and actions and proceedings of a like kind, and these are not allowed to go on without the sanction of the Court. The second refers to what we call diligence, and every proceeding of that kind is made absolutely void, and the Court has no power or discretion to authorise it and make it effectual.

But the validity of a poinding does not depend exclusively on the Act of 1862. For it is provided by the Companies Act 1886, section 3—[*His Lordship quoted this section given above*]. Now, no doubt this Act is to be construed as one with the Act of 1862 so far as may be consistent with its tenor. But so construing it, I find nothing in section 87 of the earlier Act which can in any way qualify or control the peremptory enactment of the later. The first of these two sections deals generally with suits, actions, and proceedings against the company which are not to be commenced or proceeded with except with leave of the Court. The second deals specifically with two particular forms of diligence against the funds and effects of the company, and enacts that no arrestment or poinding shall be effectual—not unless the leave of the Court be obtained, but absolutely and without reference to the Court. The possibility of reading into the latter clause by transference from the former, a power to the Court to validate the diligence which the enactment nullifies, is absolutely excluded, not only by the clear language but by the nature of the enactment, because it applies not only to diligence begun after the liquidation when there might be an opportunity for appealing to the discretion of Court, but also to diligence which may have been completed and carried out to a sale of goods attached by it before liquidation began, provided it has been executed within sixty days of the winding-up. In any such case, the goods themselves or their proceeds, if they have been sold, are to be made forthcoming to the liquidator. The language of this last enactment is peremptory—although not more so than that of the previous clause which makes poindings and arrestments ineffectual—and if we were to authorise this diligence to proceed, which I think we have no power to do, the poinding creditor would still require to make over the proceeds of the sale to the liquidator to be distributed in the liquidation. Whatever preference he may have otherwise, he would acquire no preference by the execution of his diligence.

I am therefore of opinion that the poinding is altogether ineffectual, and that we have no power to make it effectual, and no power to order a sale.

The cases quoted by the Lord Ordinary do not appear to me to be apposite. In the case of *The North British Property Investment Company*, the liquidation was voluntary, and the enactments we are to construe do not apply to voluntary liquidations at all. In the case of *The Athole Hydropathic Company*, the liquidation was under supervision of the Court. But I find nothing in that decision to countenance the respondent's argument that the creditor in a privileged debt may use diligence against the funds of a company notwithstanding the 163rd section of the statute. All that was decided was that poinding of the ground was not an execution or attachment within the meaning of that section, because the moveable goods were already attached by the infeftment of the heritable creditor, and not by his action of poinding the ground. It is said that the collector has a preference under the Local Government Act. But that is a preference in ranking which must be made effectual through the trustee in bankruptcy or the liquidator in a winding-up. The statute gives no security over any specific portion of the debtor's estate. What the collector seeks to obtain is a preference by diligence in addition to the preference which is given by the statute. I do not doubt that he may use diligence to recover rates. But he can only do so subject to the law which regulates diligence, and which in the present case excludes it altogether.

I need hardly add that in the view I have taken of the case we cannot consider the questions which are raised on record between the collector and certain heritable creditors, or between the collector and the landlord.

All that we can do is to refuse the application for authority to sell. The competing claims of the collector and other

creditors must be determined in the liquidation.

The LORD PRESIDENT, LORD ADAM, and LORD M'LAREN concurred.

The Court recalled the interlocutor of the Lord Ordinary and refused the prayer of the note.

Counsel for the Petitioner and Respondent—Guthrie—M'Clure. Agent—J. Smith Clark, S.S.C.

Counsel for the Reclaimer (Cowan)—H. Johnston — C. N. Johnston. Agents — Dalgleish & Bell, W.S.

Counsel for the Trustees for the Debenture-Holders—Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Official Liquidator — Cooper. Agents—Drummond & Reid, W.S.

Tuesday, November 29.

FIRST DIVISION.

[Lord Low, Ordinary.

HARPERS, LIMITED *v.* BARRY, HENRY, & COMPANY, LIMITED.

Copyright—Trade Catalogue—Price Lists Involving Elaborate Calculations.

Held that a trade catalogue issued by an engineering firm, which contained convenient rules for calculating the sizes of pulleys required for the transmission of power in any particular work, and tables of belt pulleys, with their prices calculated according to the width of diameter and breadth of face, and which involved months of elaborate calculation, was a good subject of copyright; and that it was not open to other engineers to issue virtually the same catalogue and price lists without independent calculation, on the ground that the rules were merely simplifications of known mathematical methods of calculation, and that lists of prices, however reached, could not in the interests of trade be protected.

In July 1891, Harpers, Limited, engineers, Albion Iron Works, Aberdeen, brought an action of suspension and interdict against Barry, Henry, & Company, Limited, engineers, Aberdeen, to have them interdicted "from printing, or otherwise multiplying, and also from publishing, issuing, or circulating, or selling and exposing to sale, a book or catalogue of transmission power appliances titled as follows, 'Barry, Henry, & Company, Limited, Founders, Engineers, and Millwright Transmission of Power Appliances,' and recently published, issued, and circulated by the respondents; and further, from printing, publishing, issuing, or circulating or selling and exposing to sale any copies, whether exact and literal copies, or colourably altered and modified, of a book entitled 'Catalogue VI., Harpers, Limited, Albion Iron Works, Aberdeen, Scotland,' being a catalogue of accessories for the transmission of power, or of circulars Nos. 1, 2, 28, 31, 14, 16, 18, 32, embodied in said catalogue, or any of said circulars; which book or catalogue and circulars are duly entered at Stationers' Hall, in terms of the Act 5 and 6 Vict., cap. 45, and of all which the copyright belongs to the complainers as registered proprietors thereof."

The complainers stated that they had "for about twelve years past carried on a large and increasing business, particularly in the manufacture of pulleys and shafting, in Aberdeen. In connection with the said business, and for the furtherance thereof, the complainers commenced the preparation of illustrated circulars, and they engaged in connection with the preparation thereof several of their most skilled employees, with the view of having the results of the highest practical and scientific skill embodied in the designs, and specially in the calculations of weight, dimensions, strength, cost, &c., of numerous elaborate appliances for the transmission of power, specified in the said circulars and in the book after mentioned. Very great labour, time, and expense were bestowed in the preparation of said circulars and book, and the same have proved of the greatest value in the trade, and the result of the issue and publication thereof by the complainers has been a very large accession to the business done at their said foundry, which business has increased at a most rapid rate from the date of said publication until the issue of the colourable imitation thereof by the respondents as after mentioned. The costs incurred in connection with the printing, issuing, and advertising said circulars and catalogues, were upwards of £3000, and the same embody the fruits of almost continuous labour of the highest and most skilled kind which could be procured for a period of about eight months continuously. The said book or catalogue and circulars are those specially referred to in the note of suspension. . . . They are issued by the complainers gratuitously to their customers, and to the trade generally, for the purpose and with the effect of obtaining orders for goods and promoting their business. An announcement of the fact that they are entered at Stationers' Hall, and that they are copyright, appears upon each page of the publications. The complainers have recently discovered and aver that the respondents have prepared and issued to the trade the book or catalogue mentioned in the note of suspension, and circulars, price lists, and others, which are truly copies of, and in many parts identical with, or only colourably different from said book or catalogue and circulars, the copyright of which is the property of the complainers. . . . The said piracy has been accomplished by the respondents in the following circumstances. The respondents' company was formed about twelve months ago by four of the leading employees of the complainers, along with a capitalist, and they