fore, on the whole matter I come to the conclusion that the defences must be sustained, and the defender assoilzied from the conclusion of the action.

Lord Craighill—I am of the same opinion. I think that if we were to pronounce a different judgment from that which Lord Young proposes we should be introducing uncertainty and confusion, and possibly great hardship, into the administration of sequestrated estates. It is admitted that the deliverance of the trustee on the individual claims, and the distribution of the estate in accordance with these deliverances are absolutely final. The money is paid and cannot be got back. Therefore, if the pursuer here is to be found entitled to succeed in his application, the money must come out of the pocket of the trustee by whom it was paid away. Of course I should have no sympathy with a trustee who has been acting collusively and fraudulently in the interest of certain of the creditors, but on the present occasion the honesty and good faith of the trustee are not in the slightest degree impugned, and could not well be so, for there is no allegation on this record in regard even to one of the claims that the debt was not a debt which was truly due, and accordingly it would come to this if we sustained an action like the present under the 86th section, that after the trustee has paid away the sums which he has considered to be due to the several creditors, in the honest belief that he was acting in the proper administration of the sequestrated estate, and at the end of the day when the body of creditors have declared themselves satisfied, an individual creditor can come forward and raise the question whether or not there is sufficient evidence to justify the deliverance of the trustee, and ask the Sheriff—and on appeal this Court—to take up the case as if it were an appeal against these deliverances, with the result, however, that if the trustee is found to be in the wrong he will have to make good personally the money which he has erroneously paid away. It would be a monstrous hardship that every penny which the trustee has paid away should be at his own risk, while every judgment he has pronounced should be good against the world. That can never have been the result contemplated by the statute, and certainly has never been sanctioned by any judgment of this Court.

Lord Rutherfurd Clark — I am of the same opinion. I regard this application as one in which the complainer asks the Sheriff to review on their merits all the deliverances that the trustee pronounced on the creditors' claims. There is nothing more than that in the case, and I think it incompetent to entertain such a complaint under the 86th clause of the Act.

Lord Justice-Clerk—I concur in the opinions delivered, and I only make this further remark, that I rather think the object of the 86th clause of the statute has been to a certain extent misunderstood. Its main purpose (and it is an important one) is, I think, to provide that the trustee and commissioners and judicial factor shall be officers of Court, and amenable to the Lord Ordinary and Sheriff, the meaning plainly being that there shall be jurisdiction on the part of the Sheriff as well as of the Lord Ordinary to consider any petition presented against them for malversation in office.

It could never have been intended to provide a new procedure of review when there were already other sections in the statute dealing with the matter.

The Lords recalled the judgment, assoilzied the trustee, and found him entitled to expenses in the Sheriff Court and Court of Session.

Counsel for Defender (Appellant)—Hon. H. J. Moncreiff—Pearson. Agent—Robert Menzies, S.S.C.

Counsel for Pursuer (Respondent)—J. P. B. Robertson — Dickson. Agents — Martin & M'Glashan, S.S.C.

Thursday, December 18.

FIRST DIVISION.

CLARK AND OTHERS *v.* HINDE MILNE & COMPANY.

Public Company—Notour Bankruptcy—Poinding — Voluntary Winding-up continued under Supervision—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 7, 12—*Companies Act* 1862 (25 *and* 26 *Vict. c.* 89), *secs.* 130, 163.

A public company registered under the Companies Acts, though it cannot be wound up by sequestration, but only under the Companies Acts, may yet be rendered notour bankrupt in terms of the Bankruptcy Acts.

A creditor of a joint-stock company registered under the Companies Acts, executed a poinding of certain of their effects, and obtained a warrant of sale. The sale was interdicted by another creditor, who presented a petition to have the company wound up by the Court. The shareholders resolved that the company should be wound up voluntarily. Thereafter, but within four months of the poinding, other creditors lodged in the process of poinding minutes of compearance, and produced their grounds of debt, claiming to be ranked *pari passu* on the price of the poinded goods when sold, in terms of section 12 of the Bankruptcy Act 1856. The liquidation was ultimately placed under the supervision of the Court. The poinding creditor compounded his claim with the liquidator for a certain sum, and the compromise was sanctioned by the Court, but the fact of other creditors being interested was not before the Court. The poinded goods had meanwhile been sold. The creditors who had compeared in the poinding and sale lodged a note in the liquidation, claiming a *pari passu* ranking along with the poinding creditor for the sum for which he had settled his claim. *Held* that they were entitled to such ranking, because (1) the compromise did not prejudice them; (2) the company was made notour bankrupt by the poinding, and within four months thereof they had compeared in the process of poinding in terms of sec. 12 of the Bankruptcy Act 1856; (3) the com-

pearance was not an "attachment, sequestration, distress, or execution" in the sense of section 163 of the Companies Act 1862, as it was merely a claim to share in a diligence already executed.

The Universal Electric Company, Limited, was incorporated under the Companies Acts, 1862 to 1880, on 29th December 1881. The registered office of the company was in Glasgow.

On 11th October 1882, while the company was carrying on business, William Muir & Company, Manchester, obtained decree in the Sheriff Court of Lanarkshire against the company for £353, 11s. 6d. with interest and expenses. In all, with interest and expenses, the debt for which decree was obtained amounted to £396, 11s. A charge was given on 24th November 1882, and payment not having been made a poinding of certain moveable effects of the company was executed on 5th December 1882.

On 14th December 1882 the New Glenduffhill Coal Company, Limited, as creditors of the said company, presented a petition to have the company wound up by the Court, and for interdict against William Muir & Company selling the poinded effects. On the following day, 15th December, interim interdict was granted. On the next day, 16th December, William Muir & Company compeared and moved to have the interim interdict recalled, but the Court refused the motion, without prejudice to any right of preference or other right acquired by the poinding creditors, William Muir & Company, by virtue of their diligence.

On 18th January 1883 the shareholders of the company resolved that the company should be wound up voluntarily, and that Thomas Wilson, accountant, Glasgow, and Alexander Murray, chartered accountant there, should be appointed joint-liquidators. On 3d March 1883 the Court directed the voluntary winding up to be continued subject to the supervision of the Court.

In the months of February and March 1883 minutes of compearance were lodged by William Clark, John Burns, James Taylor, J. & L. Baird, and James Hall, creditors of the company, in the hands of the Clerk of Court at Glasgow, in terms of the 12th section of the Bankruptcy (Scotland) Act 1856, craving to be ranked *pari passu* with William Muir & Company upon the proceeds of the sale of the articles poinded by them. These minutes proceeded upon certain promissory-notes lodged therewith which had been granted by the company. Section 12 provides—"Arrestments and poindings which shall have been used within sixty days prior to the constitution of notour bankrupty, or within four months thereafter, shall be ranked *pari passu* as if they had all been used of the same date . . . . provided further that any creditor judicially producing in a process relative to the subject of such arrestment or poinding, liquid grounds of debt or decree of payment within such period, shall be entitled to rank as if he had executed an arrestment or a poinding." . . .

In October 1883 an action of multiplepoinding was brought in the Sheriff Court at Glasgow, the real raisers being the said William Clark and others. The object of the action was alleged to be the distribution among the claimants of the price obtained for the articles poinded by the said William Muir & Company which had been sold along with the other effects of the debtor company by the liquidators, and which price, it was stated, amounted to upwards of £900. The action was opposed by the said William Muir & Company as incompetent, and was on 27th December 1883 dismissed on that ground by the Sheriff-Substitute. An appeal having been taken to the Sheriff-Principal, the judgment of the Sheriff-Substitute was affirmed on 10th April 1884.

Negotiations having been entered into between the liquidators and William Muir & Company, a compromise was effected by which the latter agreed to accept, subject to the approval of the Court, and on condition of immediate payment, the sum of £337, 10s. (being at the rate of about 17s. 6d. per £) in full of their claim. The liquidators applied to the Court to sanction the compromise, and on 19th July the compromise was sanctioned by the Court. The note then presented by the liquidators, as originally framed, contained a statement to the effect that claims by other creditors on the fund were not to be prejudiced thereby, but on an amendment being allowed this was deleted at the bar, so that the fact of there being other claims on the fund was not before the Court when they sanctioned the compromise.

On 1st August 1884 the said William Clark and others lodged claims with the liquidators claiming in respect of the debts due to them under the company's promissory-notes in their favour a *pari passu* ranking along with William Muir & Company upon the said sum of £337, 10s., and an ordinary ranking upon the assets of the company for the balance that might remain after applying the sum obtained by the said *pari passu* ranking.

On 25th August 1884 the said William Clark and others presented a note to the Lord President, praying his Lordship to move the Court "(1) To interdict the liquidators from making payment of the said sum of £337. 10s. to the said William Muir & Company; and (2) To ordain the said liquidators to rank the said William Clark, John Burns, James Taylor, J. and L. Baird, and James Hall *pari passu* with the said William Muir & Company upon the said sum of £337, 10s., in terms of their respective claims."

Answers were lodged for Hinde Milne & Company, solicitors, Manchester, assignees of William Muir & Company, in which they quoted the deliverance of the liquidators on this claim. It was as follows—"Claim for £353, 11s. 6d., as per decree, with interest and expenses. The liquidators admit the claim to a preferable ranking to the extent of £337, 10s., as authorised by an extract decree of the Court of Session, of date the 19th July 1884, but in respect there have been lodged with the liquidators declarations and claims by certain other creditors claiming to be ranked *pari passu* with Messrs William Muir & Co. on the above sum of £337, 10s.; and in respect, further, that a note has been presented to the Court on behalf of some of the aforesaid creditors, praying the Court (1) to interdict the liquidators from making payment of the said sum of £337, 10s. to Messrs William Muir & Co.; and (2) to ordain the liquidators to rank the said creditors *pari passu* with Messrs Muir & Co. upon the said sum of £337, 10s., in

terms of their respective claims—the liquidators retain the amount subject to the further orders of the Court. Claim admitted for £337, 10s."

The respondents stated that there was no process in dependence at the time the minutes of compearance were lodged by the petitioners with the Clerk in the Sheriff Court. They did not admit that the petitioners were in right of properly constituted claims of debt against the company, and submitted that the prayer of the note ought to be refused for the following reasons:—"(1) The compromise of the claim at the instance of William Muir & Company against the debtor company having received judicial sanction, and the said claim having been validly assigned to the respondents, the application is incompetent; (3) No right on the part of creditors of the debtor company to rank *pari passu* with the said William Muir & Company or their assignees on the said sum exists, or can be pretended at common law, or under the Companies Acts; and the provisions of the 12th section of the Bankruptcy (Scotland) Act 1856 are inapplicable to the circumstances."

Section 163 of the Companies Act 1862 provides—"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." And section 130 provides that "a voluntary winding-up shall be deemed to commence at the time of the passing of the resolution authorising such winding-up."

Argued for the petitioners—The company having been made notour bankrupt in terms of sec. 7 of the Bankruptcy Act, the petitioners in respect of their minutes of compearance and liquid grounds of debt, lodged in terms of sec. 12 within four months in the hands of the Clerk of Court, were entitled to a *pari passu* ranking on the proceeds of the sale of the poinded goods. Section 163 of the Companies Act of 1862 did not apply, because this was not an attachment, sequestration, distress, or execution put in force against the estate or effects of the company, but a claim against the poinding creditor to share in a diligence already executed. The compromise having been carried through behind their backs, could not prejudice their rights.—*Sdeuard* v. *Gardner*, March 10, 1876, 3 R. 577.

The respondent replied—This application for interdict, in any view of it, came too late; owing to the delay of the petitioners the liquidators were entitled to assume that their claims were to be abandoned, and relying on this had obtained the sanction of the Court to the compromise which excluded their claims. Section 12 did not apply to the case of a joint-stock company registered under the Companies Act, because such a company could not be made notour bankrupt. Section 12 did not apply to the circumstances of the present case—*M'Farlane* v. *Greig*, Mar. 2, 1831, 9 S. 529; *The Standard Investment Company* v. *Whitson* (*Trustee on the Sequestrated Estate of the Dunblane Hydropathic Company*), Dec. 12, 1884, *supra*, p. 215. There was no "process" in which creditors could compear in the Sheriff Court, because the poinding did not become a process until after the report of the sale; and, besides, there could be no room for competition at the date of compearance, because there was no fund then in existence. Previous to the lodging of the minute of compearance in February and March 1883, which was founded on, a resolution to wind-up voluntarily had been passed. That was on 18th January. The subsequent supervision order, pronounced on 3d March, drew back to the date of the resolution to wind-up voluntarily, and therefore the compearance of the petitioners, which was in effect a diligence against the estate of the company, was void, in terms of sections 163 and 130 of the Companies Act of 1862.—Lindley on Partnership, p. 1474, and cases cited; Buckley on the Companies Act, p. 302; *Sdeuard* v. *Gardner*, Mar. 10, 1876, 3 R. 577; *Gardner, &c.* v. *Hughes*, July 11, 1883, 10 R. 1138; *Liquidators of the Benhar Coal Company* v. *Turnbull*, Feb. 6, 1883, 10 R. 558; *Clarke, &c.*, v. *West Calder Oil Company, &c.*, June 30, 1882, 9 R. 1017; *Colborne* v. *Strawbridge*, Jan. 17, 1871, L.R., 11 Eq. 478 and 499.

At advising—

Lord Shand—The note and answers in this case raise questions arising in the liquidation of the Universal Electric Company, Limited, which is a voluntary winding-up, but in which the Court on 3d March 1883 pronounced an order that the liquidation should be continued subject to the supervision of the Court.

There is this peculiarity, that the questions are not raised between the compearers and the liquidators, but between the compearers as creditors of the company, and other creditors who have admittedly acquired a preference, the question being whether the compearers have right to share in that preference. The respondents are Hinde Milne & Company, as assignees of William Muir & Company, who are engineers in Manchester, and who were creditors of the Universal Electric Company. William Muir & Company, the authors of the respondents here, having obtained a decree against the Universal Electric Company, charged them on 24th November 1882 to pay the debt, amounting to £353, 11s. 6d., with interest and expenses. The company was then carrying on business, and following on the charge the respondents' authors executed a poinding on 5th December 1882 of certain moveable effects of the company, including some valuable machinery. Thereafter they obtained a warrant of sale, and were about to sell the machines under that document when another creditor interposed to have the company judicially wound up; and on 15th December interim interdict was granted against William Muir & Company carrying the contemplated sale into effect. On the following day, the 16th of December, after hearing counsel for William Muir & Company, an interlocutor was pronounced refusing the motion "without prejudice to any right of preference or other right acquired by the said poinding creditors by virtue of their diligence." So matters stood on the 16th of December. Then on 18th January 1883 the company resolved to wind-up voluntarily, and on 3d March 1883 an order was granted directing the voluntary liquidation to be continued subject to the supervision of the Court.

The liquidation thus became a voluntary liquidation under the supervision of the Court, and a question arose between William Muir & Company and the liquidators in regard to the preference of William Muir & Co. over the effects poinded. The liquidators maintained that in the circumstances which had occurred there was no effectual preference, whilst the creditors maintained that their diligence was good, and that they were entitled to a preferable ranking on the price of the articles which had meanwhile been sold. It is enough, so far as the present question between the parties is concerned, to say that this difference ended in a compromise, which was sanctioned by the Court on 19th July 1884, on the footing that the creditors were entitled preferably to the sum of £337, 10s. in full of their claim, which was to be immediately paid. The present question is whether the compearers are entitled to share in that sum of £337, 10s., which may be considered as a *surrogatum* for the value of the poinded articles, although I shall have something to say on that point further on. Taking it, however, in the meantime as a *surrogatum*, the compearers' claim is stated to be founded on the 12th section of the Bankruptcy Act of 1856, which provides that "arrestments and poindings which shall have been used within sixty days prior to the constitution of notour bankruptcy, or within four months thereafter, shall be ranked *pari passu* as if they had all been used of the same date . . . provided further, that any creditor judicially producing in a process relative to the subject of such arrestment or poinding liquid grounds of debt, or decree of payment within such period, shall be entitled to rank as if he had executed an arrestment or poinding." It is said here that notour bankruptcy had occurred because of the charge for payment and the execution of poinding; it is said, further, that within four months from the date of the poinding the petitioners, in terms of section 12, lodged minutes of compearance, producing their decrees or documents of debt. With reference to that the respondents say that the Bankruptcy Act gives no preference, because (1) there was no notour bankruptcy, since a joint-stock company registered under the Companies Acts could not be made notour bankrupt, and because (2), apart from the liquidation process, the petitioner had not produced their grounds of debt in a "process," and therefore had no right to share in the proceeds of the poinded goods.

I am of opinion that neither of these pleas can be sustained. No doubt in the case we disposed of the other day with regard to the *Dunblane Hydropathic Company*, Dec. 12, 1884 [*supra*, p. 215], it was held that a joint-stock company such as this, registered under the Companies Acts, was not liable to be sequestrated, and that the only mode in which a joint-stock company could be wound up in the event of insolvency or bankruptcy was under the Joint-Stock Companies Acts. The judgment there rested on the broad ground that within the statute itself there are provisions forming a complete code, excluding the provisions of the Bankruptcy Act; the conclusion therefore was that the winding-up must be in the mode provided by the statute. That decision, however, does not touch or bear upon the present question, which is, whether a joint-stock company can be made notour bankrupt?—a very different question.

With regard to that, I find, in the first place, that very important results follow from notour bankruptcy, whether followed by sequestration or liquidation or not. Section 12 of the Bankruptcy Act of 1856, which regulates the equalisation of diligences, does so not with reference to the date of the sequestration or of the order for winding-up, but exclusively with reference to the occurrence of notour bankruptcy. In the next place, the date of the constitution of notour bankruptcy is of importance under the Act 1696 for regulating preferences, and I have no doubt that the Act 1696 applies to companies of this sort just as to any others. Moreover, the Bankruptcy Act by section 7 specially provides that notour bankruptcy shall be constituted in the circumstances mentioned, and amongst other ways, by insolvency concurring with a duly executed charge for payment, followed, when imprisonment is incompetent or impossible, by execution of poinding of the debtor's moveables. And in section 4 the word "company" is defined in this way, "the word 'company' shall include bodies corporate, politic, or collegiate, and partnerships."

Taking these two sections together, it is plain that corporations such as this are within the meaning of the Act, and therefore although they cannot be sequestrated, if they are registered under the Companies Act, yet they may be made notour bankrupt, so that the provisions of the Bankruptcy Act for equalising diligences may receive effect, and preferences may be cut down under the Act of 1696. I think therefore that the plea that this company was not notour bankrupt must be repelled.

The second point for the respondents was rested on these words of section 12, "provided further, that any creditor judicially producing in a process relative to the subject of such arrestment or poinding liquid grounds of debt, or decree of payment, within such period, shall be entitled to rank as if he had executed an arrestment or a poinding." What occurred here was that in the proceeding under which the warrant of sale was got, and which was intimated, these parties, the petitioners here, compeared. The argument that was maintained was that a diligence is not a "process." I do not know what would be a definition of the word "process," but certainly it appears to me that an application to the Sheriff for warrant to carry out a diligence is a "process." If it was a "process," then there can be no doubt that it was one relative to the poinded effects, and therefore if nothing has resulted from what took place in the liquidation, then the creditors who compeared, assuming that their grounds of debt were liquid, will be entitled to share in the poinded effects, or in their price as a *surrogatum*.

Taking the case as one in which the company did go into liquidation, there are two points to be observed. In the first place, any diligence done against a registered company after a liquidation has begun is void; here it was resolved on the 18th January 1883 that the company should be wound up voluntarily, but the compearers did not lodge their minute until February or March following. Therefore it was maintained that the minute of compearance being practically a diligence, it was void as against the effects of the company. This argument was rested mainly on

two sections of the Act of 1862, the 163d and 130th. Section 163 provides:—"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.' And section 130 provides that "a voluntary winding-up shall be deemed to commence at the time of the passing of the resolution authorising such winding-up."

Now, if it could have been shown that the lodging of this minute of compearance was, within the meaning of section 183, an "attachment, sequestration, distress, or execution," put into force after the date of the resolution to wind up, I should have felt it difficult to resist the argument. There have been no cases in Scotland, so far as I am aware, in which it was necessary to consider at what point of time a liquidation begun voluntarily, but continued under the supervision of the Court, is to be held to commence. There was an important case as to the shutting of the register of shareholders, so that there should be no change in the condition of the register after the company had issued a virtual declaration of insolvency—the case of *Alexander Mitchell* v. *The City of Glasgow Bank*, 21st Dec. 1878, 6 R. 439. *affd.* 20th May 1879, 6 R. (H.L.) 60—and it was there held that the proprietor's name must remain on the register. But I do not think that any decision has touched the question how far diligence or any analogous proceeding can be used after a resolution to wind up voluntarily when that is followed by a supervision order. In England there was an important case, that of the *Colonial Insurance Company*, 15 Ch. Div. 472, in which the Court of Appeal held that the date of a voluntary winding-up continued under supervision of the Court should date back to the date of the resolution to wind up. And it seems to follow from the language of section 163 that diligence commenced after the resolution to wind up would be ineffectual. I may refer on this point to Mr Buckley's very useful work on the Companies Acts, and to his references under section 130.

But the answer which the petitioners make is that the compearance in the Sheriff Court was not an "attachment, sequestration, distress, or execution," and I am of opinion that this answer is sound. Under section 12 of the Bankruptcy Act the only "attachment" is the arrestment or poinding, and the creditor knows he may be using it for himself and for others. Because though the poinding is at his instance, any other creditor may compear, though he has not himself executed any diligence, and claim to take the benefit of the poinding, "as if he had executed an arrestment or a poinding." That is very different from an arrestment or poinding by that creditor himself. The first creditor is the poinder, and taking the view that he poinds for himself and the other creditors, I do not think sec. 163 applies to the present case, as there was no diligence done after the winding-up.

The only other point founded on by the respondents was that which arises out of the compromise entered into between the liquidator and William Muir & Company. It was maintained by the respondents, that they having compromised with the liquidator, on the footing that they were to get immediate payment of £337, 10s., the petitioners are bound by that compromise. It was extremely unfortunate that the petitioners allowed matters to go so far before appearing. The resolution to wind-up voluntarily was in January 1883, then the supervision order was pronounced by the Court in March 1883, and it was not until August 1884 that there was any compearance in this Court by the petitioners. In the interval they had raised what was plainly an incompetent process, viz., a multiplepoinding in the Sheriff Court, which was finally dismissed in April 1884. After that they allowed the liquidator to enter into this compromise with William Muir & Company in July 1884 without appearing to maintain their claim. This course of proceeding has been quite irregular, and has occasioned a good deal of expense.

But although I think parties with rights such as these should have appeared earlier, yet I do not think there has been such delay as to shut them out altogether. On the question of the compromise, I am quite clear from the papers laid before the Court, that while its sanction was asked for a compromise as between William Muir & Company and the liquidators, no notice was given that third parties had claims. The only question then before the Court was one between the liquidators and the poinding creditor, whether the latter was entitled to the proceeds of the poinded goods, and the Court had no intention to prejudice the rights of third parties. If the money had been paid away it might have been difficult to deal with the petitioner's interests, but as the fund is still *in manibus curiæ* as it were, in the hands of the liquidators, I think the petitioners ought to be allowed to vindicate the rights which, on the grounds stated, I think they have.

There still remain two points on which the parties would require to be heard, unless they can come to an agreement with regard to them. In the first place, it lies on the petitioners to show that what they produced in the process of poinding were liquid grounds of debt; and in the second place, it appears only reasonable that as the respondents only agreed to take £337, 10s. in full of their claim, on condition of instant payment, they should not be bound by that sum. If they are not willing to take that sum as a *surrogatum* for the poinded articles, then intimation would require to be made to the liquidators, but I should hope that parties will arrange these matters.

Lord Adam—We are here asked to do two things—(1) To interdict the liquidators of this company from making payment of £337, 10s. to William Muir & Company; and (2) To ordain the liquidators to rank the petitioners *pari passu* with William Muir & Company on the sum of £337, 10s.

This sum of £337, 10s. is the result of a compromise entered into between the liquidators and the respondents on 19th July 1884, by which, on condition of receiving immediate payment, William Muir & Company agreed to give up 2s. 6d. per £1 of their claim against the company. Their claim being for £396, 11s., they thus gave up £59, 1s. It is clear that if we do not interdict the liquidators paying away this money, the claims of the petitioners will be prejudiced, and therefore the first question is, whether this compromise is to be set aside.

Now, although no doubt the parties, having agreed upon certain terms, came to the Court for its sanction, yet material facts were not brought under the notice of the Court. That is clearly seen, because whereas the original agreement bore to be under reservation of all claims by other creditors, William Muir & Company when they came into Court said that was not the agreement, and accordingly the liquidators were allowed to amend the proposed agreement, and struck out all reference to claims by the compearers. Thus the agreement as amended merely set forth that William Muir & Company had agreed to take £337, 10s. on condition of immediate payment.

But the material fact that other parties were maintaining claims to this fund was not brought under the notice of the Court, and it is impossible to say that this compromise, approved of by the Court in ignorance of this material fact, can stand.

Then we are asked to rank the petitioners *pari passu* on this fund, but that is not the sum in which they are entitled to rank, unless the respondents are willing to take it as a *surrogatum* for the poinded goods, for if the compromise is to be set aside, William Muir & Company must be replaced in their former position. That, however, is a question which must be settled between themselves and the liquidators. I am therefore of opinion that the case should go back to the liquidators with the findings proposed.

Lord Mure—I agree with the result at which your Lordships have arrived, and I think that, looking to the answers for Hinde Milne & Company, which contain an excerpt from the liquidators' deliverance on the respondents' claim, there will not be any difficulty about the liquidators interfering with the petitioner's rights. That passage in the answers to which I refer is as follows:—"The liquidators admit this claim to a preferable ranking to the extent of £337, 10s., as authorised by an extract decree of the Court of Session, of date the 19th July 1884, but in respect there have been lodged with the liquidators declarations and claims by certain other creditors claiming to be ranked *pari passu* with Messrs William Muir & Company on the above sum of £337, 10s., and in respect, further, that a note has been presented to the Court on behalf of some of the aforesaid creditors, praying the Court (1) to interdict the liquidators from making payment of the said sum of £337, 10s. to Messrs William Muir & Company; and (2) to ordain the liquidators to rank the said creditors *pari passu* with Messrs William Muir & Company upon the said sum of £337, 10s. in terms of their respective claims, the liquidators retain the amount subject to the further orders of the Court." So that I do not think there will be any difficulty about that matter.

Then as regards section 12 of the Bankruptcy Act. That regulates the rights of poinders and arrestees in the case of notour bankruptcy, whether there is a sequestration or not, and I am quite satisfied that it applies to the present case. This claim of Clark and the others, when lodged, entitled them to come in *pari passu* upon the value of the poinded goods. But that was not a diligence struck at by the Act of 1862; it was merely a claim to get the benefit of a diligence which already existed. The poinding was good at the date of its execution on 5th December 1882, and what the parties who put in claims did, was to claim to rank on funds already attached by the diligence. Therefore there is no difficulty arising from the terms of section 163 of the Act of 1862. This was not a diligence, but merely a way of getting the benefit of another's diligence. As to what have might been the effect if the diligence had been commenced after the date of the resolution to wind-up, I wish to reserve my opinion.

I also agree in regard to the question of the compromise, and think that it cannot preclude other creditors from claiming their rights. I am also quite clear that as William Muir & Company suffered an abatement from their claim in order to get immediate payment, if they do not get immediate payment they are entitled to rank for the whole amount of their claim, and to add the 2s. 6d. per £1 which they deducted. What the precise fund is in which they are to be ranked depends upon how the fund stands in the hands of the liquidators. They must explain what amount of funds they have in their hands with a view to the *pari passu* ranking being given effect to.

The Lord President and Lord Deas were absent.

The Court pronounced this interlocutor—

"The Lords having resumed consideration of the note for William Clark and others, and having heard counsel for the compearers (other than Messrs J. & L. Baird, who have withdrawn from the proceedings), and for the respondents Hinde Milne & Company, assignees of William Muir & Company: Find that such of the compearers as judicially produced within the period of four months from the 5th December 1882, liquid grounds of debt, or decrees of payment against the Universal Electric Company (Limited) in the process of poinding against the company in the Sheriff Court at Glasgow, under which Messrs William Muir & Company in the beginning of December 1882 obtained a warrant of sale of the moveable effects of the said Universal Electric Company (Limited), poinded by them on or about the said 5th December 1882, are entitled to rank *pari passu* with the respondents for the amount of their said decrees or liquid debts on the *surrogatum* for the poinded goods, as the same has been or may be fixed in a question between William Muir & Company or their said assignees, and the said Universal Electric Company (Limited) and the liquidators thereof, and that in the same way as if the said company had also executed poindings of said goods, but after allowing *primo loco* out of the fund for ranking, the expense incurred by the respondents or the said William Muir & Company of recovering said fund: *Quoad ultra* continue the cause, and find no expenses due to or by either party to this date."

Counsel for Petitioners—Mackintosh—Goudy. Agents—Dove & Lockhart, S.S.C.

Counsel for Respondents — Gloag — Lang. Agent—R. W. Wallace, W.S.