daughter on her father for services rendered by her to him. It was proved that she had acted as her father's servant, and kept a lodging-house, and supported him in that way. That being so, there was no device or fraudulent intention on the part of the father, but a just, true, and necessary cause—*Shepherd* v. *Meldrum*, January 23, 1812, Hume's Decisions, 394; *Grant* v. *Grant*, November 10, 1748, M. 952; *Adam* v. *Peter*, February 3, 1842, 4 D. 599.

At advising—

Lord Rutherfurd Clark—This case was heard by Lord Young, Lord Craighill, and myself some time ago. The question is whether the respondent Miss Dawson is proprietor of certain articles of furniture mentioned in the prayer of the petition. She claims the property of these articles by virtue of a disposition which she received from her own father dated 6th January 1887. These articles admittedly belonged to the father before his bankruptcy, and the daughter's only claim to them is through the disposition I have referred to. The defender and appellant, on the other hand, is a creditor of the father, and he claims them as belonging to his estate, because he alleges that this assignation was granted contrary to the provisions of the Act 1621, cap. 18. It therefore comes to this issue, whether this disposition was without "just, true, and necessary cause," for it is not disputed that the father when he granted the deed was insolvent, and of course it cannot be disputed that the pursuer by her relation to him was a "conjunct and confident person." The only question therefore is a question of fact, whether there is a "just, true, and necessary cause" to sustain this disposition. The cause alleged is, that at the time of granting the disposition the father was the debtor of the daughter to the amount of £100 for services rendered by her to him in the keeping of his house. I am not going to say that that if proved would not be a perfectly good cause. It is quite possible that for such services a daughter might become the creditor of her father, but when a deed of this kind has been granted it is necessary for the person pleading the deed to give sufficient evidence of that fact, as of course that only can sustain the deed. I think that she has failed to do so. There is no evidence of it except her own testimony. The father was unfortunately not in a condition to allow of his being examined, and it is a great misfortune for her that his evidence on the subject is not available. There is some other evidence produced, but I think we must lay that aside. She is in fact the only witness who supports the view that there was a "just, true, and necessary cause." Therefore I am forced to the conclusion that there is no just, true, or necessary cause to support the deed. And therefore I think that we must assoilzie the defender, although I confess I am brought to this conclusion with some reluctance.

Lord Young—I have come to the same conclusion, and I have not much to add. I would wish to express my concurrence not only with the result at which Lord Rutherfurd Clark has arrived, but also my own regret in arriving at it. It is not because I think that the creditor has acted otherwise than properly and indeed generously. But I am sorry for this young woman, I think she is about 34, and am satisfied that she has been useful to her father for some years past. She aided him in keeping a house for lodgers, and the old gentleman was supported through her exertions. But I cannot think that the relation of debtor and creditor was thereby established between them at all. Then the case stands thus—The father was absolutely insolvent. He first borrowed the sum of £850 from one creditor upon the security of the house, and then he borrowed a sum of £125 upon the same security, upon a postponed bond of course. The house was brought to sale by the first bondholder, and realised less than was sufficient to pay off his debt. Then he poinded the ground to make up the balance of his debt, and the daughter paid the deficiency herself—£19, 17s. 8d. —and took an assignation to the poinding. The furniture was then clear, and the second bondholder poinded the furniture for his debt. I think he was quite an honest creditor. The agent for the defender states in his evidence—"In December 1886 I was wishing to compromise this claim of the defender's by any payment which I could get from Dawson's friends, and I believe it might have been settled then for £25 or £30." They would not do that, and then the father, not having a shilling in the world, makes a present of this furniture to his daughter. I am not surprised that Mr Thorburn, not getting any part of his debt paid, should have objected to this. He poinded the furniture, which I think he was entitled to do, and cannot be stopped.

Lord Young intimated that Lord Craighill, who was absent through illness, concurred in the judgment.

The Court pronounced this interlocutor:—

"Find that the pursuer has failed to prove that the disposition granted to her by William Dawson, her father, was granted for a just and necessary cause: Therefore sustain the appeal; recal the judgments of the Sheriff and Sheriff-Substitute appealed against; dismiss the petition: Find the defender entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for the Appellant — Gloag — Shaw. Agents—Wishart & Macnaughton, W.S.

Counsel for the Respondent—A. J. Young—Forsyth. Agent—James Forsyth, S.S.C.

---

*Thursday, July* 12.

## SECOND DIVISION.

[Sheriff of Midlothian.

## NORTH BRITISH PROPERTY INVESTMENT COMPANY, LIMITED, *v.* PATERSON.

*Poinding of the Ground—Preference—Personal Poinding—Recovery of Poor's Assessment—Poor Law Act Amendment (Scotland) Act*, 1845 (8 *and* 9 *Vict. cap.* 83), *sec.* 88.

A heritable creditor of a company which had gone into voluntary liquidation obtained decree in an action of poinding of the

ground. Thereafter the collector of poor's rates obtained a warrant of personal poinding for payment of assessment which had been due by the company before the liquidation, though the last day for payment was not until after the liquidation. The heritable creditor then brought an action to interdict the collector from selling the poinded goods, maintaining that in virtue of the poinding of the ground he had a preferable right to them.

*Held* that the poinding of the ground had not created any preferable right, and that under the 88th section of the Poor Law Act of 1845 the poor's assessment was preferable to the debt due to the heritable creditor, which was of a "private nature." Action *dismissed.*

The North British Property Investment Company were creditors of the Morningside College Company under bonds and dispositions in security granted by the company over their property.

The Morningside College Company were assessed for the relief of the poor within St Cuthbert's Combination, Edinburgh, for the period from Whitsunday 1887 to Whitsunday 1888 in the sum of £34, 9s. 0½d. The assessment notices were issued, and the assessment became due in October 1887, and the last day of payment was 28th January 1888.

On 12th January 1888 the North British Property Investment Company, as heritable creditors of the company, presented a petition of poinding of the ground. On 13th January 1888 the Morningside Company went into voluntary liquidation. On 27th January 1888 decree in absence was pronounced in the action of poinding the ground.

On 5th April 1888 James Paterson, Collector of Poor and School Rates for St Cuthbert's Combination, obtained a warrant to poind and distrain the goods and effects of the Morningside College Company for payment of the poor's assessment. On 14th April 1888 Daniel Mackay, justice of peace constable, in virtue of this warrant, proceeded to poind and distrain certain articles of furniture, belonging to the Morningside College Company for payment of the sum of £34, 9s. 0½d.

The North British Property Investment Company then brought this action in the Sheriff Court at Edinburgh against James Paterson and Daniel Mackay to have them interdicted from proceeding to sell the poinded effects.

The pursuers pleaded—"(1) By the service of the petition in the said action of poinding the ground, and decree following thereon, the pursuers have acquired a real and preferable right to the articles of furniture condescended on, and interdict should be granted as prayed for. (2) The said articles not being poindable or distrainable by the defenders, in respect of the execution of the petition in the action of poinding the ground, interdict should be granted, with expenses."

Defences were lodged for Paterson, who pleaded—"(1) The pursuers' statements are irrelevant. (3) The poor rates sought to be recovered by the defender Paterson being preferable to the debt alleged to be due to the pursuers, and his diligence for the recovery thereof being orderly proceeded, he is entitled to have the interdict refused, with expenses."

The Poor Law Amendment (Scotland) Act, 1845 (8 and 9 Vict. cap. 83), sec. 88, provides—"And be it enacted that the whole powers and right of issuing summary warrants and proceedings, and all remedies and provisions enacted for collecting, levying, and recovering the land and assessed taxes, or either of them, and other public taxes, shall be held to be applicable to assessments imposed for relief of the poor. . . . And all assessments for the relief of the poor shall, in case of bankruptcy or insolvency, be paid out of the first proceeds of the estate, and shall be preferable to all other debts of a private nature due by the parties assessed."

The Taxes Management Act, 1880 (43 and 44 Vict. cap. 19), sec. 88, provides—"(1) No goods or chattels whatever belonging to any person at the time any of the duties or the land tax become in arrear shall be liable to be taken by virtue of any execution, or other process, warrant, or authority whatever, or by virtue of any assignment on any account or pretence whatever except at the suit of the landlord for rent, unless the party at whose suit the said execution or seizure shall be sued or made, or to whom such assignment shall be made, shall before the sale or removal of such goods or chattels pay or cause to be paid to the collector all arrears of the said duties or land tax which shall be due at the time of seizing such goods or chattels or which shall be payable for the year in which such seizure shall be made, provided such duties and land tax shall not be claimed for more than one year."

The Sheriff-Substitute (HAMILTON) on 25th April 1888 granted interim interdict, and on 28th May pronounced this interlocutor—"Sustains the first plea-in-law for the defender Paterson, recals the interdict previously granted, dismisses the petition and decerns, finds the defender Paterson entitled to expenses."

"*Note.*—The pursuers are not entitled to the interdict craved, for two reasons—(1) Because their debt, being 'of a private nature,' cannot compete with that due by the Morningside College Company, mentioned on record, to the defender Paterson as Collector of St Cuthbert's Combination (Poor Law Act (8 and 9 Vict. cap. 83, sec. 88); and (2) because the said company is being wound up voluntarily, and there is consequently no power, even in the Court of Session, to stay the diligence of creditors of the company—*Sdeuard* v. *Gardner*, March 10, 1876, 3 R. 577."

On appeal the Sheriff (CRICHTON) on 21st June 1888 pronounced this interlocutor:—"Sustains the said appeal; recals the interlocutor of the Sheriff-Substitute of 28th May 1888: Finds in point of fact (1) that the pursuers the North British Property Investment Company are creditors of the Morningside College Company, Limited, under bonds and dispositions in security granted by the Morningside College Company over an area of ground in the south side of Edinburgh, extending to 11 acres, and the buildings thereon, known as the Morningside College; (2) that the Morningside College Company were assessed for the relief of the poor within St Cuthbert's Combination for the period from Whitsunday 1887 to Whitsunday 1888 in the sum of £34, 9s. 0½d.; (3) that the assessment notices were issued and the assessment became due in October 1887, and the last day of payment was 28th January 1888; (4) that on 12th January 1888 the pursuers presented a peti-

tion of poinding of the ground, praying for warrant to officers of Court to poind and distrain the moveable goods, household furniture, and other effects belonging to the Morningside College Company upon the said area of ground; (5) that on 13th January 1888 the Morningside College Company went into voluntary liquidation, and Andrew Scott, C.A., was appointed liquidator; (6) that on 27th January 1888 decree was pronounced in absence in the action of poinding of the ground at the pursuer's instance against the Morningside College Company; (7) that on 5th April 1888 the defender James Paterson, Collector of Poor and School Rates for St Cuthbert's Combination, obtained a warrant to poind and distrain the goods and effects of the Morningside College Company for payment of the said assessment; (8) that on 14th April 1888 the defender Daniel Mackay, in virtue of the said warrant, proceeded to poind and distrain the articles mentioned in the prayer of the petition for payment of the said sum of £34, 9s. 0½d., and intimated that if the said sum and £3, 8s. 11d. of expenses were not paid within five days thereafter, the articles poinded would be valued and sold: Finds in point of law that by the service of the action of poinding of the ground the pursuers acquired a legal and preferable right to the articles of furniture mentioned in the prayer of the petition in this action: Therefore grants interdict as craved, and decerns: Finds the defender James Paterson liable to the pursuers in the expenses of this action.

"*Note.*—The pursuers, who are heritable creditors of the Morningside College Company, obtained decree against the company in an action of poinding of the ground on 27th January 1888.

"On 5th April 1888 the defender James Paterson, who is Collector of Poor and School Rates for the Combination of St Cuthbert's, obtained warrant to poind the goods and effects of the College Company in payment of the poor and school rates then due, and proceeded to carry out the said warrant by poinding the articles mentioned in the prayer of the petition. The pursuers now ask that the defender be interdicted from carrying away the said articles or advertising them for sale.

"The defender contended that the pursuers were not entitled to interdict, because under section 88 of the Poor Law Act (8 and 9 Vict. cap. 83), and section 33 of 43 George III. cap. 150, his right to the moveable goods and effects belonging to the College Company was preferable to that of the pursuers. The 88th section of the Poor Law Act provides that 'all remedies and provisions enacted for collecting, levying, and recovering the land tax and assessed taxes, or either of them, and other public taxes, shall be held to be applicable to assessments imposed for relief of the poor.' The 44th section of the Education Act (35 and 36 Vict. cap. 62) provides that 'the school rate shall in all cases be levied and collected in the same manner as poor's assessment, and the laws applicable for the time to the imposition, collecting, and recovery of poor's assessment shall be applicable to the school rates.' The provision with regard to the recovery of taxes is contained in section 33 of 43 George III. cap. 150, which enacts 'that no moveable goods or effects whatever belonging to any person or persons, at the time any of the said duties assessed under the regulations of this Act become in arrear, shall be liable to be taken by virtue of any arrestment, poinding, sequestration, or diligence whatever, or by virtue of any assignation, on any account or pretence whatever, unless the party at whose instance the said diligence shall be used, . . . . shall, before the sale or removal of such goods or effects, pay or cause to be paid to the collector or collectors of the said duties so due all arrears of the said duties which shall be due at the time of arresting, poinding, or seizing such goods or effects, or which shall be payable for the year in which such diligence shall be used, provided the duties shall not be claimed for more than one year.' It is clear from these enactments that any creditor of the College Company is precluded from taking the moveable goods or effects belonging to the company by 'arrestment, poinding, or sequestration,' except on payment of the arrears of the poor and school rates not exceeding one year. It appears to the Sheriff, however, that the poinding mentioned in the statute means a personal poinding. No doubt the words 'or diligence whatever,' are used, but this, it is thought, refers to diligence of the same kind as 'arrestment, poinding (that is, personal poinding), or sequestration,' and does not include poinding of the ground. It has been said that there are few things which have the same descriptive name, and yet are so essentially different in their nature as the process of poinding the ground, and that of poinding for a personal debt. With regard to the effect of a poinding of the ground, the observations by the Lord President in the recent case of *The Athole Hydropathic Company, Limited, in Liquidation* v. *The Scottish Provincial Assurance Company*, 19th March 1886, 13 R. 818, are of importance. In that case his Lordship said—'The security which a heritable creditor holds over moveables is of exactly the same nature, and has the same effect as that which he holds over the *fundus* itself. In extent of course it varies with the amount of moveables on the ground, but his right to them is secured by his infeftment, not by his action of poinding of the ground. A heritable creditor therefore in raising his action is not seeking to obtain a preference, but to give effect to a preference which is already his. A poinding of the ground is a proceeding merely for the purpose of giving effect to a creditor's security, and it is analogous to those other remedies open to heritable creditors, such as adjudication, or sale, or maills and duties. These are all diligences open to an heritable creditor to give effect to his preference which has already been secured to him. He has a preference against all the world. No one can compete with him, and therefore, as far as his security extends, he is entitled to make it effectual.' These observations seem to be applicable to the present case, and the interdict prayed for has accordingly been granted."

The defender appealed, and argued—The Sheriff had decided the case upon the statute of Geo. III., but that had been repealed by the Taxes Management Act, 1880 (43 and 44 Vict. cap. 19). The Poor Law Act, 1845, sec. 88, provided that assessments for relief of the poor should in the case of bankruptcy or insolvency be paid out of the first proceeds of the estate, and be preferable to debts of a private nature. The

debt due to the Investment Company was a private debt, and the assessment was therefore preferable to it. The Act of 1880, sec. 88, provided that no goods should be taken by virtue of any execution, except at the suit of the landlord for rent, unless the arrears of the taxes were paid. The case of the *Athole Hydropathic Company*, referred to by the Sheriff, was not an authority in this case at all, because there the competition was between the liquidator and a private creditor of the company, so that the question of the public taxes did not come into the case.

The respondent argued—Under a poinding of the ground the moveables upon the ground became accessories to it, and it was not in the power of the rate collector to sell the heritage to pay the rates, but only the moveables. But here there were no moveables to sell—*Campbell's Trustees* v. *Paul*, January 13, 1835, 13 S. 237; *Lyons* v. *Anderson*, October 21, 1880, 8 R. 24. The execution of the summons in a poinding of the ground fixed the date of the attachment—*Benston* (*Mowbray's Trustee*) v. *Mowbray*, March 11, 1856, 18 D. 846. The respondent had therefore a completed security over the moveables in the College, and the rate collector could not by a personal poinding which was later in date have a preferable claim. If it were true that the poor law assessments were assimilated to the public taxes, then the argument would apply that the taxes must be in arrear before a warrant could be obtained. Here the last day of payment was 28th January 1888, and taxes could not be said to be in arrears until the last day for payment had passed. The assimilation of poor law assessments and public taxes by the 88th section of the 1880 Act was limited to the mode of collecting the rates, and did not give them all the privileges of public taxes—*Bell* v. *Cadell*, December 3, 1831, 10 S. 100.

At advising—

Lord Justice-Clerk—I confess I see no difficulty in this case. The Sheriff seems to have gone off on a case which seems to me to have no application. The pursuers have applied for an interdict against Paterson interfering with certain property belonging to Morningside College, the owners of which are bound to pay the rates which he is authorised to collect, the poor rate and the school rate—rates which undoubtedly are public as distinguished from private debts. The Poor Law Act, by its 88th section, substantially enacts that the collector of rates shall have a preference over any ordinary creditor's diligence against the property. The poinding of the ground is not an ordinary diligence, but it would be a strong thing to say that it shall have a preference over the rates. There is here no question of competing diligence. The property must pay the rates in whosoever hands it happens to be, and the preference is given to the collector so that he may have the power to collect them.

Lord Young—I am of the same opinion, and confess I was surprised that the Sheriff should have decided this case in the manner he did, for the case of the poinder, the appellant, seems to me to be too clear to be disputed. He is the collector for the rates of the current year, and these rates "became due and were exigible on and after the 1st day of October 1887." The rate was imposed upon this Morningside College, and was payable by the proprietor thereof. The College went into voluntary liquidation in January 1888—that is, a few months after the rates became due and exigible, but there is a certain latitude given to parties for their convenience, and in the case of any considerable property with perfect safety, because the property is liable for the rate.

When that time had expired, the College Company being in liquidation, the collector applied to the liquidator to pay the rates due. The liquidator refused, because he said he had no money, and then the collector proceeded to do execution by distress warrant against the furniture in the house. Then this money-lending creditor, the North British Property Investment Company, Limited, comes forward, and says that they have a heritable security over the property, and that they do not intend to pay any rates. They had poinded the ground, and now they seek to prevent the sale of the furniture by the appellant because of their poinding, which they say is preferable to the claims of the rate collector. The rates must be paid either by the owners of the property or by the other tax payers, and that is really the ground of the preference which the statute confers.

Now, what is the pretence for this. It is that a poinding of the ground is a sort of attachment which will give to the creditor a different right than any other diligence would give. The case of the *Athole Hydropathic Company* was founded on in support of this, and especially the opinion of the Lord President. Apparently the question there was under the Liquidation Act, and was whether a poinding of the ground after the liquidation entitled the poinding creditor to a preference over the other competing creditors. I am humbly of opinion that it did not, but we have not to do with that case here, and therefore we may assume that it was properly decided. The Lord President said —"The security which a heritable creditor holds over moveables is of exactly the same nature and has the same effect as that which he holds over the *fundus* itself. In extent, of course, it varies with the amount of moveables on the ground, but his right to them is secured by his infeftment, not by his action of poinding of the ground. A heritable creditor therefore in raising his action is not seeking to obtain a preference, but to give effect to a preference which is already his. A poinding of the ground is a proceeding merely for the purpose of giving effect to a creditor's security, and it is analagous to those other remedies open to heritable creditors, such as adjudication, or sale, or maills and duties. These are all diligences open to an heritable creditor to give effect to his preference which has already been secured to him. He has a preference against all the world. No one can compete with him, and therefore, as far as his security extends, he is entitled to make it effectual." I should have thought that a poinding of the ground was, to use an English expression, just an impounding of what was on the ground. There must be some antecedent right for doing that, but what is done is just to seize or impound what is on the ground. Before it is so seized or impounded the creditor may have had no right to it. It may only have been on the ground five minutes. It may have been put

upon the ground the day before, and it may have been seeing it there that made the creditor think it would be worth his while to apply for a warrant of poinding. But he has no right of attachment before he has poinded it. Then in virtue of that antecedent right he applies for a warrant for poinding. I should have thought that the date of the application was the date of the attachment, and that the right of the poinding creditor to the moveables did not draw back to the date of the bond. But we do not need to consider that here. Take any date you like for the poinding—and it was on a question of date that the Lord President was speaking—it is a poinding of goods in the house subject to the preferable right of the tax collector for rates. I have thought it right to say this as, however clear the case may appear to us, when a learned Sheriff has given his judgment in another view, I think it only right that we should state where we differ from him.

LORD RUTHERFURD CLARK—I concur.

LORD CRAIGHILL was absent from illness.

The Court pronounced the following interlocutor:—

"Recal the judgment of the Sheriff appealed against: Affirm the judgment of the Sheriff-Substitute: Of new recal the interdict granted *ad interim* and dismiss the petition: Find the defender entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for the Appellant—Guthrie Smith—C. S. Dickson. Agents—Smith & Mason, S.S.C.

Counsel for the Respondents — Moncreiff — Guthrie. Agents—Welsh & Forbes, S.S.C.

---

*Thursday, July* 12.

## FIRST DIVISION.

### SMILES (SURVEYOR OF TAXES) *v.* THE AUSTRALASIAN MORTGAGE AND AGENCY COMPANY, LIMITED.

*Revenue—Property and Income-Tax Act,* 1842 (*5 and 6 Vict. cap.* 35), *sec.* 100, *Schedule D, First and Fourth Cases—Trade Profits.*

A Scottish company, carrying on principally a wool broking business in connection with Australia, were in the habit of making advances or loans on securities upon the properties of their customers, which were in part secured by second mortgages over real property in the colony, and in part by liens or charges upon stock, wool, and other produce. These advances were, with trifling exceptions, not of fixed amount, but were of the nature of banker's advances, fluctuating from time to time according as produce was realised or other payments were made.

*Held* that this was the case of a company making profits by the use of its capital in mercantile transactions, and not the case of a company having a fund laid aside for the purpose of investment in foreign securities, and that its profits, including the interest received from its investments in colonial securities, were therefore liable to assessment for income-tax under the *First* case of Schedule D of the Income-Tax Act, 1842.

The Australasian Mortgage and Agency Company, Limited, incorporated under the Companies Acts, was formed in 1880, and had its head office in Edinburgh. There was also a board of directors in Melbourne.

The objects for which the company was formed, as set forth in their memorandum of association, were, *inter alia*, as follows:—"2. To carry on the business of wool brokers and stock and station agents, and to sell wool, sheepskins, tallow, horns, hides, bark, grain, and other produce on commission, or make shipments of the same respectively for sale on commission. . . . 6. To lend money, or to give the guarantee or acceptances or promissory-notes of the company upon the security of any description of property, real or personal, including stock and stations, and liens on wool, or on bonds or other obligations, or any other kind of personal security." The company carried on business as specified in the said objects.

The company was assessed by the Surveyor of Taxes for the sum of £669, 6s. 8d.—an "additional first assessment" for the year 1885-86—being duty on the sum of £20,080 arrived at in the manner stated below, under the rule contained in the *Fourth* case, Schedule D, of 5 and 6 Vict. c. 35.

The *Fourth* case, Schedule D, sec. 100, of 5 and 6 Vict. cap. 35, is—"The duty to be charged in respect of interest arising from securities in the British plantations in America, or in any other of Her Majesty's dominions out of the United Kingdom, and foreign securities, except such annuities, dividends, and shares as are directed to be charged under Schedule C of this Act. *Rule.*—The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the sums (so far as the same can be computed) which have been or will be received in the United Kingdom in the current year, without any deduction or abatement."

The *First* case, Schedule D, is—"Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade not contained in any other schedule of this Act. *Rule First.*—The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern, upon a fair and just average of three years, ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade, manufacture, adventure, or concern shall have been usually made up, or on the fifth day of April preceding the year of assessment, and shall be assessed, charged, and paid without other deduction than is hereinafter allowed."

The company appealed, and the Commissioners sustained the appeal, being of opinion that the profits of the business carried on by the company were chargeable with income-tax under the rule applicable to the *First* case of Schedule D.

At the request of the Surveyor of Taxes a case was stated by the Commissioners, which set forth the following facts:—"7. The company has carried on its business since its