statute again in motion in order to satisfy his creditors and get his discharge.

If this insolvent bankrupt had come forward to say—"I have made money, and I have no new creditors who desire to interfere; I want to distribute it among my creditors; I cannot give them 20s. in the pound, but a considerable portion of that sum"—could it be suggested that there was any other course to be adopted than to revive the sequestration and appoint a new trustee? The only objection stated here is, that the bankrupt is able to pay his creditors in full. Why his readiness to pay 20s. in the pound should debar him from the benefit of bringing his sequestration to an end I am unable to see.

By their interlocutor the Court remitted to the Sheriff of Lanarkshire to call a meeting of creditors for the election of a new trustee, granted warrant to the Sheriff-Clerk to deliver the Sederunt Book, and allowed the expenses of the discussion against the respondent, which they modified to five guineas.

Counsel for the Petitioner—Ure. Agents—Miller & Murray, S.S.C.

Counsel for the Respondent—W. Campbell. Agents—Gill & Pringle, W.S.

Tuesday, November 29.

FIRST DIVISION.

[Sheriff-Substitute at Airdrie.

HAUGHTON *v.* NORTH BRITISH RAILWAY COMPANY.

Reparation — Relevancy — Special Duty of Railway Company towards Children — Expenses.

In an action of reparation against a railway company for the death of a child aged five, who was run over by an engine engaged in shunting operations, averments in an amended record which stated that the shunting lye was a dangerous place; that children of tender age were in the habit of frequenting it; that the servants of the defenders knew that, and also knew that on the occasion in question the pursuer's child was upon the line; that it was their duty to take the precaution, before proceeding to shunt, of seeing that the child was warned off, and that they had failed to do so, were *held* relevant (*diss.* Lord M'Laren, who thought no duty incumbent upon the defenders but which they had failed to perform had been set forth). The pursuer was found liable in the expenses of the action up to the date of the amendment, and approval of the issue was delayed until these should have been paid.

William Haughton, miner, 104 Nimmo's Square, Longriggend, brought an action in the Sheriff Court at Airdrie against the North British Railway Company for reparation for the death of a child, in which he averred — "Nimmo's Square adjoins Meadowfield Square. A fence separates Meadowfield Square from the Moss lye, which belongs to the defenders, and in this fence is a large wooden gate for the purpose of allowing carts to pass from and to the lye. The said wooden gate opens from the public square, and the rails are close on the other side. The gate is placed there for the purpose of protection during shunting operations. . . . On or about 10th March 1892 a child of the pursuer's, five years of age, named Alexander Haughton, was playing about Meadowfield Square, near his parents' door, and the said wooden gate between the square and the lye having been open, he went on the rails with a number of other children, and was run over by defenders' waggon, and sustained such injuries that he died in the Royal Infirmary two days afterwards. The said occurrence was due to the negligence of the defenders, or those for whom they are responsible, in not seeing that the gate was properly shut, so as to protect the line during shunting operations, or further, in not having a man in charge of the gate during the time it was standing open, it being in a public place, and known to defenders to be dangerous, or in failing to warn the child off the line during said shunting operations, or to give warning when shunting the train, it being in the knowledge of defenders, or those for whom they are responsible, that children were on the line at the time."

The defenders "denied that Meadowfield Square is near the pursuer's house, which is situated in Nimmo's Big Square, and some distance from Meadowfield Square. Admitted that a boy of the pursuer's, five years of age, having been allowed by his parents or guardians to wander or stray from the pursuer's at Nimmo's Big Square, improperly and illegally, and to the imminent danger of its life, entered into and trespassed on the defenders' said railway sidings, and went on the rails where waggons were, and was run over by one of them, it is believed, while amusing himself under or among the waggons, and thereby sustained injuries from which he afterwards died. Explained that at the time of the accident the gate leading into the sidings was necessarily open to allow carts conveying coals from the Longriggend Station siding to Messrs William Black & Sons' workers. It was well known to the parents of the injured child that this gate required to be open for the purpose of receiving and giving out the goods traffic. Further, the child was not attended by any proper guardian, and was wilfully trespassing on the defenders' private property at the time, and exposed himself to imminent danger."

The defenders pleaded, *inter alia*—"(1) The pursuer has not set forth facts relevant to support the conclusions of the action, which action will therefore fall to be dismissed. (2) The pursuer's child not having been injured through any fault of the defenders, or of anyone for whom they are

responsible, the defenders should be assoilzied, with expenses."

The Sheriff-Substitute (MAIR) allowed a proof before answer. The pursuer appealed to the Court of Session for jury trial. The defenders argued that the statements were not relevant, and the pursuer then craved to be allowed to make the following addition at the beginning of condescendence 4— "The said gate is generally kept shut by the defenders. The said lye immediately adjoins the main line of the defenders' railway, upon which trains are constantly passing and repassing. There is no fence of any kind between the said lye and the said main line. It was the defenders' duty to have kept the said gate closed, and if it required to be opened at any time, to have placed a watchman at the opening to prevent children and others from going on said lye, more especially as they, or those for whom they are responsible, well knew that children of tender years were in the habit of frequenting said lye. It was at least their duty to see that no strangers were on the said lye before and whilst shunting operations were carried on. The defenders entirely failed in these duties. In particular, on said date the defenders or their servants knew that the pursuer's child and other children were upon the line, and it was their duty before proceeding with shunting operations to see that the children were warned off the line, but they did not do so."

The defenders argued that the averments were still irrevelant. It was not said any statutory duty as to fencing or watching had been neglected. This place did not require special precautions to be taken— *Stubley* v. *London and North-Western Railway Company*, November 18, 1865, L.R., 1 Exch. 13; *Matson* v. *Baird & Company*, November 9, 1877, 5 R. 87; *Archibald* v. *North British Railway*, November 6, 1883, 21 S.L.R. 60 (Lord M'Laren). It was not said that the defenders' servants saw the child and ran it down, but only that they knew it and other children were thereabouts—where they had no right to be. This was just the case of young trespassers not looked after by their parents. It would be strange if a parent could recover against the consequences of his own negligence. The cases of *Grant* v. *Caledonian Railway Company*, December 10, 1870, 9 Macph. 258; *Morran* v. *Waddell*, Oct. 24, 1883, 11 R. 44; and *Royan* v, *M'Lennan*, November 20, 1889, 17 R. 103, were in point.

Argued for the pursuer—This was a specially dangerous place, where special precautions should have been taken in the way of watching and fencing. Further, the defenders had a special duty to protect young children whom they knew were there, as was specifically averred. *Archibald's* case (*supra*), 2nd part, was directly in favour of the pursuer. So were the opinions of the judges in *Stubley's* case (*supra*), and in *Morran's* case (*supra*). In the latter case the defenders were assoilzied after a proof, which brought out that they had stationed a policeman to watch while shunting operations were going on. The precautions necessary depended upon the place, and it was for the jury to say whether sufficient precautions had been taken.

At advising—

LORD ADAM—This is an action of damages raised by the pursuer against the defenders in respect of the death of his son Alexander Haughton. The question is, whether the pursuer's averments disclose a relevant ground of action? It is averred that Alexander Haughton, a child five years of age, was on 10th August 1892 run over and killed by a waggon belonging to the defenders at Mosslye Goods' Sidings at Longriggend. It is further averred that the child lived at Nimmo Square, adjoining Meadowfield Square in that village. It is further averred that a fence separates Meadowfield Square from Mosslye, and that the rails are close on the other side of the fence. It is further averred that there is a large gate in this fence, which requires to be open from time to time for railway purposes, and that no one was left in charge of this gate when so left open to prevent children and others from straying on the rails.

These being generally the averments in the case, the pursuer further avers—[*read minute for pursuer*].

These being the pursuer's averments, it appears to me that it is sufficiently averred (1) that this lye was a dangerous place; (2) that the defenders knew that children of a tender age were in use to frequent it, and thereby exposed themselves, to use the defenders' language, to imminent danger of their lives. In these circumstances it appears to me that it was the duty of the defenders to take all due precautions for the safety of these children before commencing shunting operations by warning them off the rails or otherwise. It is averred, however, that at the time in question the defenders knew that the child Alexander Haughton and other children were upon the line, but that they did not, before commencing shunting operations, warn them off the line, and that in consequence Alexander Haughton was run over and killed.

Such being the averments, I am of opinion that the pursuer has stated a relevant case, and is entitled to an issue.

LORD M'LAREN—I am always unwilling in a case in which we are not pronouncing a final judgment to express a difference of opinion, but in the present instance it seems to me that a point of principle is involved. It appears to me that we are not merely considering the question of sufficiency of specification but of relevancy in the proper sense. I think there is in this record no relevant statement of a duty incumbent on the North British Railway Company which has been neglected by their servants. I agree that if such a case should occur as that of an engine-driver and guard who see a child crossing the line, and from nervousness or inattention fail to take the neces-

sary precautions for stopping the train, or otherwise avoiding the danger, they would subject their employers to damages for the consequences of their negligence. But there is no such case here. In the passage to which Lord Adam referred, it is merely said that the defenders well knew that children of tender years were in the habit of frequenting this place, and that they ought to have taken precautions accordingly. Because the defenders knew of this habit on the part of children, did a duty arise of seeing that children were warned off, or of keeping some-one on the spot to act as nursery-maid and take care that the children did not trespass? I thought it was settled that there was no universal obligation upon a railway company to provide watchmen wherever there happened to be a gate or a siding. I should be surprised if Parliament ever cast such a duty upon railway companies as the prevention of trespass on their lines, for it would render the carrying on of the railway systems of the country almost impossible.

I asked counsel to refer me to any case where such a duty had been held to be laid upon a railway company, and we were referred to the observations of certain English judges, and of the Judges in one case in this Court, to the effect that special circumstances of danger may impose a special duty upon a railway company of guarding against it, with liability for the consequences if they fail to do so. No illustration was given by the Judges in their observations as to what special circstances would raise the duty of guarding a siding. I should desiderate such illustrations, because in the case of the larger and more important railway stations the number of crossings is very great, and it is just there where it is impossible to prevent people, if so disposed, crossing the lines and thus putting their lives in jeopardy. The railway company may put up notices that passengers must only cross by the bridge, but they cannot prevent people crossing otherwise.

Well, I shall accept the expression of opinion that there may be a case where a railway company can only discharge its duty to the public by stationing a watchman at a crossing—of course, I am not referring to those level-crossings which by Act of Parliament must be watched. But to constitute a relevant case of liability for not doing so, I should imagine it would be necessary to set forth the special circumstances raising this duty. Here I do not find such a statement, but only an averment that children were in the habit of freqenting this place. It would probably be easy in any case to say as much as that, because children will run into danger when they can. It would have been more to the point if it had been said they did so with the consent or under the encouragement of the railway company. I fail to see how the habit of people trespassing can create an obligation on the part of a railway company of paying men to keep them off. On that ground, which is a general one, I think this case is not relevant nor proper to be submitted to a jury.

LORD KINNEAR—This is a very narrow case, but upon the amended averments I think there is a sufficiently relevant case for inquiry, and I am not prepared to withhold it from going to a jury. I desire to guard myself by two explanations. First, I think it clear enough that this child and others were in law in the position of trespassers. They were in a place which they ought not to have been allowed to enter, and in which they were in great danger. I agree in thinking there is no sufficient averment to enable us to refer the presence of the children there to the failure on the part of the railway company to guard this place. If the case had turned exclusively upon the averments about the unfenced condition of the line at this place, I think there would have been very great difficulty indeed in sustaining the averments as relevant. It seems to me that on the pursuer's statement the presence of the children there is rather to be ascribed to the antecedent carelessness of their parents than to the fault of the railway company. Secondly, it is clear enough upon the pursuer's averments that there is no relevant charge against the defenders' servants to the effect that those in charge of the shunting operations acted with such negligence as to expose adults to a risk which they could not avoid with ordinary care. But setting aside these two general grounds of action, there remains the complaint that the defenders or their servants neglected a special duty which they are said to owe to children of too tender years to take care of themselves. There is no doubt that persons engaged in dangerous operations may have a special duty towards those too young to understand the danger, or too infirm effectively to take care of themselves. But in order to raise such a case there must be specific averments as to the facts which create the duty. The special duty to take unusual precautions to meet an exceptional case must necessarily be measured by the knowledge of the person charged with such duty that a special risk has arisen. I think therefore it is indispensable in a case of this kind that the pursuer should aver knowledge on the part of the defenders' servants of the especial risk which he says they might have avoided and failed to avoid. I agree in thinking the averments here, even as amended, are rather wanting in precision, but I think they do disclose such a special case. It appears to me that the pursuer has averred that the servants of the defenders engaged in conducting or superintending the operations of shunting knew that a child was at the time upon the rails and exposed to danger from the shunting operations. If that be the meaning of the averment, I think it is a relevant averment of fault, because if the defenders' servants knew that a child of tender years, incapable of taking care of itself, was exposed to imminent danger from their operations, it was their duty to take such precautions

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