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

erected works and machinery in Aberdeen expressly for manufactures similar to the complainers. . . . With regard to the contents of the said publications by the respondents, the method adopted by them was as follows:—They were aware of the novelty and great value to the trade of the complainers' publications, it being the fact that prior to the issue by the complainers of their said circulars and catalogue, separate estimates and relative calculations of the most elaborate description had to be made with reference to the items of every order, the consequent loss in time, labour, and money in the trade being very heavy, and that all this had been saved by the highly useful publications of the complainers. Instead of proceeding in an independent manner to prepare for themselves price lists, measurements, catalogues, &c., they procured copies of the complainers' publications, laid these before servants and others employed by them, with deliberate instructions to make up catalogues, lists, calculations, drawings, &c., from them, taking such occasion as they conveniently could to make now and again certain trifling alterations thereon, such as, that when proportions of one-third, one-half, one-fourth, &c., were mentioned in complainers' catalogue, these proportions should in the respondents' catalogue be inserted as percentages. The contents of the respondents' catalogues were thus inserted without independent investigation or calculation, and the chief or sole labour of the whole productions was in the effort to avoid exact identity of language. Both the respondents and their said employees were throughout said operations cognisant that the object of the respondents' efforts was to pirate the results of the complainers' labour, time, outlay, and skill."

They pleaded — "(1) The complainers' catalogue and circulars being the product of their labours, outlay, and experience, and the complainers being the owners of the copyright therein, the respondents are not entitled to use and appropriate the same, or any material parts thereof, for their own benefit, and to the damage of the complainers. (2) The respondents having printed, published, issued, and circulated the price list and catalogue complained of without the consent of the complainers, and in violation of their proprietary rights, the complainers are entitled to interdict as craved."

The respondents averred—"The contents of the complainers' circulars are mainly derived from sources common and well-known to the trade. In particular, the complainers have, in addition to the ordinary and familiar works on mechanical engineering and mill-gearing, used in the preparation of their circulars the following works"— . . .

And pleaded—"(2) In respect that the respondents have not in any way violated the rights of the complainers, interdict ought to be refused. (3) The complainers' alleged copyright is invalid in respect of want of novelty in the said catalogue and circulars."

The Lord Ordinary (Low) allowed a proof, the substance of which appears from his Lordship's subsequent note, and from the opinion of Lord M'Laren. It practically established the statements made by the complainers.

Upon 5th March 1892 Lord Low granted interdict in identical terms with the prayer *supra*.

"*Opinion.*—There is no doubt that the respondents' catalogue is substantially a copy of that of the complainers. That is established by the evidence of Aberdein, Tyre, Milne, and Little, who made up the respondents' catalogue, and who describe what they did. It is true that the prices are not the same in the two catalogues, but it is not disputed that the prices in the complainers' catalogue formed the basis upon which the prices in the respondents' catalogue were fixed. Those who compiled that catalogue cannot, on the view of the evidence most favourable to the respondents, be said to have applied their minds to the matter to any greater extent than that (1) they considered how much they could take off the complainers' prices in respect that their improved tools and machinery enabled them to manufacture somewhat more cheaply than the complainers could do; and (2) they slightly raised the prices of some of the heavier articles, because they thought, from the experience which some of their number had had in the complainers' works, that the latter had been in the habit of charging a price for these articles which was too low and did not pay. That is the full extent to which the respondents' catalogue represents independent mental labour. In other respects it is practically a copy of the complainers' catalogue.

"The contents of the complainers' catalogue may be conveniently considered under three heads. It contains (1) a list of the articles manufactured by the complainers, with the price of each article; (2) certain rules whereby the price of an article if a size not specified in the list may be ascertained. These are called 'extension rules;' and (3) certain rules whereby the amount of horse-power which a pulley or gear-wheel of a particular size will transmit may be calculated. These are called 'power-rules.'

"The bulk of the catalogue falls under the first head, and I shall, in the first place, consider how the case stands in fact and in law in regard to the price-lists.

"The respondents contended that there could not be copyright in a price-list. If, they argued, a manufacturer had articles for sale, he was entitled to say so, and to publish a list of the articles with their prices, and if he chose to advertise them at the same prices as a rival manufacturer, he had a perfect right to do so. As a general statement, I think that these propositions are sound, but the question is, whether they are applicable to the circumstances of this case?

"There is this peculiarity in the price-list in this case, that before the complainers' catalogue was issued, no manufacturer of

the articles contained in the price-lists (with a few exceptions, the principal being pulleys of less than 7 feet in diameter) could tell a proposing purchaser what the price of a piece of machinery would be without a somewhat complicated calculation. It appears that articles of the kind dealt with in the catalogue are not kept in stock, but are invariably made to order. When an order was received, or, I should rather say, when a quotation of prices was asked, a cost-sheet of the machinery required had to be made up. In the first place, a drawing had probably to be made, and, at all events, the weight of the pulley or wheel, or whatever the machine might be, had to be calculated. Then the foreman of each department—moulder, engineer, wheelwright, and so on—had to estimate how much time the work in his department would take. The *data* thus supplied were then given to a skilled clerk, who worked out the price, adding to the cost of production a sufficient sum to give a reasonable profit and cover oncost charges, the cost of carriage, and matters of that sort. Of course a cost sheet once made up might serve for subsequent orders for a similar article, but except in so far as the manufacturer had cost sheets made up in his own works, the process which I have described had to be gone through before he could tell a customer what the price of the article wanted would be. This seems to me to involve an important distinction between the price-lists in this case and a price-list of articles constituting the ordinary stock of a shop or warehouse.

"Mr Harper's object in preparing his catalogue was to get rid of the necessity of constantly making up cost sheets, and he hoped to derive (and says that he has in fact derived) various advantages from an accurate and exhaustive price-list. The chief advantages claimed by the complainers are the following:—In the first place, the price-list saves the time, and therefore the expense, which was formerly occupied in making up the cost-sheets. In the second place, the price of each article specified in the list being carefully worked out and checked, is accurate and reliable, whereas the price brought out in a cost sheet was not so reliable, as the foremen are apt to make mistakes in their estimate of time. In the third place, a catalogue enables a person proposing to fit up machinery to see at once what the cost will be, thus saving him the trouble and delay of communicating with the manufacturer as to the kind of machinery which he requires and getting an estimate of cost made out.

"These are undoubtedly great advantages, and if they have been obtained by the complainers' catalogue, it is a work of very considerable practical utility. Although the respondents tried to insinuate that cost sheets are still made up by the complainers, there is a great weight of evidence to the effect that the complainers' catalogue has been found of great use, not only to themselves as the manufacturers of the machinery, but to engineering firms who supply and erect machinery but do not themselves make it, and to consulting engineers who advise mill-owners and the like as to the kind of machinery which they should use. It is to these classes of persons that manufacturers like the complainers must to a great extent look to bring them business, and it is obvious that a catalogue which would be useful to such persons would be likely to prove a great advantage to the complainers.

"Then it was said that the price-lists do not represent in any proper sense original work, and that anyone with reasonable experience in the business—for example, clerks like Tyre and Aberdein—could without much difficulty have compiled the price-lists with the aid of published catalogues of other firms, text-books of engineering, a few cost sheets to serve as guides, and a moderate knowledge of arithmetic. Now, certainly Mr Harper did not find it such an easy matter to make up the price-lists in the complainers' catalogue. He may have fallen into some exaggeration as to the number of hours a day which he devoted to the preparation of the catalogue, but it undoubtedly cost him a great deal of labour. In order that he might give his whole time to the preparation of the catalogue, he engaged a competent manager to look after the works in Aberdeen, and took up his residence in the neighbourhood of London, where he worked continuously at the catalogue for a period of some six months. Mr Harper has had great experience of the business, and he is evidently a man of considerable intelligence, and I do not believe that he wasted his time in unnecessary work. In order to attain the object which he had in view, it was obviously necessary that the results which he brought out should be accurate. A very little overstating or understating of prices might have been attended with serious consequences, because if the prices had been put too high, it would have had the tendency to drive away business; and if they had been put too low, it would have cut down the profits of the firm. He says that he therefore calculated and checked the price of every article carefully, and that the great bulk of the prices were deduced from actual cost sheets or from calculations made upon a similar basis.

"The respondents further say that the complainers' catalogue is to a great extent merely a compilation from sources common and well-known to the trade, such as trade catalogues, circulars, and hand-books of engineering. The respondents furnished a long list of catalogues and circulars which they averred were the sources from which the complainers' catalogue was compiled, but in the end only a very few were founded on as containing price-lists like those of the complainers, and chiefly Vaughan's, Richard's, and Carter's. No doubt in these catalogues there are price-lists of articles contained in the complainers' catalogue, and indeed part of Carter's price-list was supplied by Mr Harper himself, but it is plain that when the complainers' catalogue was published, it alone gave a complete and exhaustive

price-list of the machinery for the transmission of power with which it deals. From no published works could the information given in the complainers' price-lists be obtained without calculations of a more or less complicated description, and in many cases without having cost sheets made up by persons possessing the necessary skill and knowledge.

"I am therefore of opinion that the price-lists of the complainers were to a great extent novel, that they were of practical utility to the complainers by giving them a great advantage in the prosecution of their business, and that they were the product of experience, knowledge, and labour on the part of Mr Harper. The question is, whether the mere fact that the catalogue is one of articles which anyone may make, and which many manufacturers do make, and which anyone may sell, and advertise for sale at any price he chooses, excludes the price-lists from the privilege of copyright? I am of opinion that the question must be answered in the negative, both upon authority and principle. It has been held that illustrations of articles of everyday use, such as tables, chairs, and bedsteads, and which are sold in every upholsterer's shop, are protected — *Maple & Company* v. *Junior Army and Navy Stores*, 21 Ch. Div. 369; that a directory of the names and designations of the occupants of the houses and shops in a town cannot be copied— *Kelly* v. *Morris*, 1 Eq. 697; and that lists of registered bills of sale and deeds of arrangement fall under the provisions of the Copyright Act—*Trade Auxiliary Company* v. *Middlesborough Protection Association*, 40 Ch. Div. 425. The principle underlying all these cases is that a person is entitled to reap the benefit of his own skill and labour, and that a publication, which is not a mere collection from sources open to all but the product of mental labour, entitles the author to a copyright. Of course the respondents are entitled to issue a catalogue of the articles which they manufacture, and if they like to offer these articles for sale at the same price, or at a lower price than the complainers, they are entitled to do so. Further, if the respondents think that the scheme of the complainers' catalogue is a good one, they may, I apprehend, compile a catalogue upon the same system, but they must do it for themselves, and are not, in my judgment, entitled simply to copy a work which is the product of the knowledge and labour of the complainers. Vice-Chancellor Sir W. Page Wood states the law in *Kelly* v. *Morris* in terms which appear to me to be entirely applicable to the present case— 'In the case of a dictionary, map, guide-book, or directory, when there are certain common objects of information which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the first compiler has done. In the case of a road-book, he must count the mile-stones for himself. In the case of a map of a newly discovered island, he must go through the whole process of triangulation just as if he had never seen any former map, and generally he is not entitled to take one word of the information previously published without independently working out the matter for himself, so as to arrive at the same result from the same common sources of information, and the only use which he can legitimately make of a previous publication is to verify his own calculations and results when obtained.'

"But the respondents maintain that if any part of the price-lists are protected, it can only be the prices, because there can be no copyright in a list of articles, and that the prices in their lists are not copied from the complainers, but were arrived at by independent calculation. I doubt if it is a legitimate way of looking at the matter, to split the price-lists up into a list of articles and a list of prices. But assuming that the prices only can be taken into consideration, I am of opinion that the respondents did not arrive at their prices by independent calculation in any proper sense of the term, but copied the complainers' prices with only slight and colourable alterations. I have already stated what appears to me to be the fullest amount of independent mental labour with which the respondents can be credited, and I do not think that it amounts to much. They took the complainers' prices as their standard, and, in the general case, simply cut a little off these prices, and in a few cases added on a little. But unless they had had the complainers' prices to work upon they could not have arrived at their prices without a great amount of labour. They took advantage of the labour of the complainers to save themselves trouble, and the only calculations which they can suggest that they made were (1) what percentage in the cost of production was saved by their improved appliances, and (2) whether, in the case of a few of the heavier articles, the manufacture of which is attended with various contingencies, they should not allow a larger margin than the complainers had done. But that, in my judgment, is not sufficient to make the respondents' price-lists original work, nor, if the views which I have expressed are sound, to prevent their lists being treated as an infringement of the complainers' copyright.

"Passing now to the extension rules and power rules, the respondents contend that there is no copyright in them, because they are simply a statement of old and well-known rules. They admit, however, that the form in which the rules are expressed is new. Now, as regards the extension rules, they are no doubt rules of practice known generally and recognised in the trade, but they are expressed in the complainers' catalogue in very neat and comprehensive terms, and must have cost altogether a good deal of thought and trouble. If, however, these rules had only stood alone, the question whether they are protected would have been one of considerable difficulty. They do not, however, stand alone, but are just one of many

matters which the respondents have thought it worth their while to copy, and may therefore, I think, be legitimately taken into consideration as showing the wholesale way in which the respondents have availed themselves of the complainers' work.

"The power rules seem to me to stand in a different position from the extension rules, and are more favourable for the complainers. These rules are not claimed by the complainers as new in the sense that they are discoveries of Mr Harper. It is admitted that the scientific truths which the rules embody were known and applied in practice. What is claimed is that the statement of the rules is original, and that they are put in a simple, practical form, which renders them easy of application, and also available to a class who have not the education required to make use of them in any form in which they had previously been stated. I think that this is proved to be the case, and the respondents, at all events, cannot say that the way in which the complainers state the rules is not a good and useful way, because they have copied it, instead of adopting some other form in which the rules had previously been or might be stated.

"The rule which the respondents chiefly founded on is that on page 9 of the catalogue. That rule is admittedly what is called Tullis' rule, although the complainers state the rule in a somewhat although not materially different way from that in which Tullis states it. I do not think, however, that the respondents can maintain that there is not merit in the complainers' way of stating the rule, seeing that they have adopted it.

"The rule upon page 17 is Hanson's rule, but he expressed it in the shape of a page of figures, and I think that to reduce the principle contained in that page of figures into a simple statement of two lines constitutes original work.

"The rules in pages 25 and 32, although the principle involved was known and acted upon, were never before, I understand, formulated in the shape of rules.

"I am therefore of opinion that the complainers have a copyright in the power rules. The fact that the principle set forth in the rules is not new seems to me to be of no moment. If that was a sufficient ground for holding that there was no copyright, then I do not think that such work as elementary treatises upon scientific subjects or text-books upon grammar or arithmetic would in the general case be protected, because such works do not happen to contain anything new in the sense that it was not known before, but to put known truths and principles in a new shape.

"I am therefore of opinion that the complainers have a copyright in all the important parts of their catalogue, and as these parts have been copied by the respondents, either literally or only with colourable alterations, the complainers are, in my judgment, entitled to be protected by interdict."

The respondents reclaimed, but expressed their willingness to acquiesce in the interdict pronounced if their price-list which was struck at by the interdict against Nos. 14, 16, 18, and 32 was excluded from it.

They argued—The complainers and the Lord Ordinary had confused two things—(1) Whether the publications were capable of being made the subject of copyright, and (2) whether there had been infringement of the copyright. The Lord Ordinary had made the amount of trouble involved, and not the result, the test of whether a publication was subject of copyright. Price-lists were not proper subjects for the protection of copyright—*Cobbett* v. *Woodward*, 1872, L.R., 14 Eq. 407. A man is entitled to sell what he manufactures at any price he pleases, to say at what price he will sell, and to publish his prices—*Singer Manufacturing Company* v. *Loog*, 1882, 8 App. Cas. 15. Grocers advertise co-operative store prices although they have not gone through the store calculations. It is no matter how the seller has reached these prices. Further, the sources of information were open to all, and the results depended upon mathematical methods of calculation, in which the complainers had no monopoly. Also, the price-lists were not identical, intermediate sizes of pulleys having been interjected, and considerable reductions made upon the articles common to both.

Argued for the complainers—If these price lists were a good subject for copyright, as they were, being the result of literary skill and labour, the infringement was virtually admitted. The mistake made by the appellants was in regarding these lists as price lists in the ordinary sense of the term. They were quite unique. They were not lists of prices well known in the trade and easily calculated. They represented months of labour and much mental ability. Such price lists had never been produced in the trade before, and yet the appellants, a newly founded firm, were able to start with a complete list but only by deliberately copying theirs. The deduction of 5 per cent. and the interpolated pages did not make the list an independent production. The appellants were entitled to make the calculations for themselves if they could, but the results would not be the same, for the calculations depended on trade experience as well as on mathematics. They were even entitled to send out circulars saying they would undersell the complainers by 5 per cent., and to use these price lists in their business, but not to issue them as their own price lists. It was always possible to get behind results to the method by which these results had been reached, and so to determine whether there had been fair independent work or only copy—*Maidman* v. *Tegg*, 1826, 2 Russell, 385; *Lewis* v. *Fullarton*, 1839, 2 Beav. 6; *Hotten* v. *Arthur*, 1863, 1 Hemming & Miller, 603. There is copyright in a catalogue unless a mere dry list of names—*Kelly* v. *Morris* (directory), 1866, L.R., 1 Eq. 697; *Scott* v. *Stanford*,

1867, L.R., 3 Eq. 718; *Grace* v. *Newman* (advertising catalogue), 1875, L.R., 19 Eq. 623; *Maple & Company* v. *Junior Army and Navy Stores* (illustrated catalogue, which overruled *Cobbett*), 1882, L.R., 21 Ch. Div. 369; *Trade Auxiliary Company* v. *Middlesborough Protection Association*, L.R., 40 Ch. Div. 425.

At advising—

LORD M'LAREN—This is a process of suspension and interdict, in which the complainers pray that the respondents may be restrained from printing and publishing or selling copies, whether exact and literal, or colourably altered and modified, of the complainers' trade catalogue, and certain trade circulars which are embodied in said catalogue, and are also separately issued as trade publications. The works in question are registered in Stationers' Hall in conformity with the provisions of the Copyright Act, and the case raises two questions—whether the respondents' publications are in substance a republication of the complainers' catalogue and circulars, and whether the complainers' catalogue and circulars are proper subjects of copyright privilege.

The complainers are makers of belt-pulleys, shafting, and gearing, such as is in general use for the transmission of power from a steam-engine or other motor to the special machinery, whatever that may be, by which work is to be done; and the chief feature of their catalogue is that it contains, suitably arranged with reference to the purposes of their trade, a system of tables for enabling an intending purchaser to find by inspection the proper sizes and prices of the pulleys or other gearing which he requires for the transmission of power in his works. It is in evidence that the preparation of these tables was a work of considerable labour. Mr Harper states that the work occupied his whole time for at least six months, during which period he had to employ a skilled manager to take his place as superintendent of his establishment. In the preparation of the catalogue Mr Harper was assisted by skilled clerks acquainted with the business, who made the preliminary calculations by which he was enabled to fix the prices applicable to the labour and material used in the production of each article, and he states that the revision of their work, and its reduction into a systematic catalogue of prices and of power transmission, was a work of much labour and responsibility. The respondents have not attempted to prove that their price-lists are the result of independent research or computation. On the contrary, it is proved by the evidence of Aberdein, the person employed by them to prepare their catalogue and price-lists, that their papers were prepared directly from those of the complainers, the only differences being that in some cases intermediate sizes were interpolated from the sizes given in the complainers' lists, while in other cases a certain percentage was taken off the prices stated in the complainers' catalogue, because the respondents judged that by means of their improved machinery they could be able to supply the goods at a somewhat lower quotation—"Somebody mooted the idea that it was time we were getting a price-list out; I think it was Mr Guild who did so. Mr Milne undertook to get that done. It was arranged to get a catalogue out at once. There was to be a temporary catalogue at first, because the London agent was to make up a proper one. Mr Milne instructed me to make up a temporary catalogue. He told me to make it the same as Harper's, but to make it appear as if it was not the same as Harper's. I don't remember the exact words which he used, but that was the import of them. In consequence of those instructions I made up a catalogue. (Shown No. 12 of process)—That is the catalogue to which I refer. It is a lithograph of my handwriting. I made up the list No. 12 of process, with the exception of the gear wheels. It is a correct lithograph of my handwriting. Mr Milne told me to keep the prices about 5 per cent. below those of Harper's catalogue. I took the list No. 12 of process from Harper's. (Q) Did you just copy it?—(A) Yes. I have seen No. 129 of process, which is another copy. (Q) Is it page for page copied from Harper's by you?—(A) As it is written by me. (Q) Is there any original work in it by either you or anybody connected with the respondents' office, except taking off 5 per cent. or about that?—(A) Nothing original. When I had made a copy of Harper's catalogue, Mr Milne, the manager, and I checked it. Mr Milne looked over the prices to see if they were right, and that I had not made any errors in the deduction of the 5 per cent. I was obeying Mr Milne's orders in taking 5 per cent. off Harper's." It is unnecessary that I should refer further to the evidence relating to the fact of infringement, because the whole evidence is reviewed in the Lord Ordinary's opinion, in which I agree. The evidence leads directly and irresistibly to the conclusion that the respondents' price-lists are in fact and substance a republication of the complainers' catalogue. In the argument addressed to us the respondents' counsel did not attempt to challenge the conclusions of fact which the Lord Ordinary has deduced, but sought to avoid these conclusions by maintaining that such price-lists as are the subject of consideration in this case were not proper subjects of copyright protection. This argument was maintained with reference to the circulars Nos. 14, 16, 18, and 32, which are enumerated amongst others in the decree.

It may be taken for granted that the primary purpose of copyright legislation is the protection of literary work, but it is not made a condition of giving such protection that the work should be offered for sale; and if a manufacturer or tradesman thinks he can promote his business by circulating useful information gratis to his customers, I see no reason why he should not be protected against the republication of the results of his literary labour like any

other author. The condition of the complainers' right to obtain interdict must be that the published matter if offered for sale in the usual way would be protected by the statute. The author or publisher, I need hardly say, has no copyright in the ideas or facts which he puts into circulation. Every reader who is lawfully in possession of a copy of the work may make such use as he pleases of the information which he thus acquires, whether for the purposes of study or for use in his profession or business. The one thing which he is prohibited from doing is the publication of these facts and ideas in identical form and sequence, or in a form which he cannot show to be independent of the work in which the facts or ideas in question are first made public. In the cases which have come before the Courts, it has not been found that there is any real difficulty in distinguishing between cases of literary piracy and cases of fair use of existing literary material in the preparation of what is in substance an independent work. But the peculiarity of the present case is, that the matter which is claimed as copyright work is tabular matter. The tables furnish, in the case of belt-pulleys for instance, the prices applicable to any given diameter of pulley and breadth of face, and they also give rules according to which the size of pulley best suited to transmission of so many units of power may be estimated. It is admitted that the idea of such a table is not original, but the evidence is to the effect that the complainers' catalogue is the first publication of a systematic and complete set of tables applicable to appliances for the transmission of motive-power, and it will not be disputed that a systematic and complete arrangement of known facts, or facts ascertainable by observation and computation, is a proper subject for copyright protection.

The argument against the right claimed by the complainers is twofold. First, it is said that the relation of size of pulleys to prices is a mere matter of arithmetic, and that the person who first computes and publishes the prices applicable to sets of pulleys has not the right to prevent another person from doing the same thing, and publishing or circulating the results obtained. Secondly, it is said that the respondents' circular is a trade circular, and that its prohibition amounts to an interference with trade which is outside the scope of copyright law.

It is no doubt true of arithmetical or mathematical tables, which are founded on absolute *data*, or *data* which have been accepted as true, that any skilled computer who uses the same methods may by independent computation obtain identical results. Without wishing to express a definite opinion on a question not before us, I shall assume that copyright does not protect the first publisher of tabular matter against re-computation. But in the present case the respondents did not compute their own tables. If they had done so the results would not have been such as we see, because in the calculation of the cost of labour and material applicable to so simple a matter as the casting of a pulley, there is still room for the exercise of judgment, and two independent compilers would not obtain the same results, or results differing only by a constant multiplier. On this point analogy is against the respondents' contention. For example, in the cases which have been tried with reference to the copyright of maps, it has been held that a second map-maker may make use of the same geographical facts or *data* which were used by the first maker, but that if he simply copies a previously published copyright map by a mechanical process, he infringes the copyright. Again, in the cases cited by the Lord Ordinary, it has been held with respect to such compilations as directories or dictionaries, in which the information conveyed by different works is substantially the same, and is presented in the same order, that the second compiler is not entitled to copy from the first, but may justify his publication by showing that he has taken his facts from sources open to both. The distinction here taken has been criticised, on the ground that the question of infringement is made to depend entirely on evidence as to the manner in which the map, table, or digest was compiled, and not on a comparison of results. But the answer is, that evidence as to the mode of preparation of the work challenged is always competent (although it is not the only evidence), even in questions of infringement of works of literature which are copyright in the strictest sense. Can it be doubted that if a question should arise as to whether a magazine article or a play were a colourable reproduction of a copyright work or an original work founded on the same story, the recovery of the manuscript, or the product of scissors and paste, as the case may be, might furnish the most convincing evidence that the second publisher had made use of the copyright work without contributing anything of his own which could be recognised as having an independent value.

In such cases as the present the test of *comparatio literarum* is inconclusive, because the second work may be the result of independent labour and thought. We have, then, to consider whether the copyright work has in fact been copied, and this appears to me to be a quite legitimate and relevant kind of inquiry—indeed, in a case like the present, the only kind of inquiry by which the truth can be ascertained.

On the second head of the respondents' argument, in which the interdict is resisted in so far as directed against the four circulars named, I do not conceive that the judgment of the Lord Ordinary strikes at the issue of such trade circulars or price-lists as the respondents may honestly prepare without making use of the complainers' work. It has not been shown that any of the price-lists issued by the respondents are the result of independent labour; all that is said is, that in these particular cases the complainers' circulars have not the same claim to originality as those in respect to

which the respondents submit to interdict. It is said that circulars containing similar tables had been previously issued by other makers and were public property. But the complainers did not copy from previously published tables, but in every instance prepared these tables from private sources of information, and it is open to the respondents to do the same thing if they have the skill to do so and are willing to undertake the labour. On the question of the originality of the complainers' catalogue and circulars, I think there is a fallacy in considering the case as if each circular were a work complete in itself. The circulars no doubt were issued separately, but they form part of a series, and when exception is taken to parts of this series on the ground that something of the kind had been done before, it is fair to remember that every part of the complainers' publication is honest work, the result of independent study, and that the work as a whole is original in the sense of being the first complete publication of a set of tables of the required description. For these reasons I am of opinion that we should adhere to the Lord Ordinary's interlocutor.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Complainers—Sol.-Gen. Asher, Q.C.—Shaw. Agent—Philip, Laing, & Company, S.S.C.

Counsel for the Respondents and Reclaimers — Graham Murray, Q.C. — Ure. Agents—T. J. Gordon & Falconer, W.S.

Tuesday, November 29.

SECOND DIVISION.

MACDOUGALL *v.* THE DUKE OF PORTLAND.

Church—Parliamentary Church under Act 5 Geo. IV. c. 90—Repair of Wall Surrounding Church.

Where no pew rents were available for the repairs of a Parliamentary church erected under the provisions of the Act 5 Geo. IV. c. 90, *held* that it was not necessary for the heritor liable for the repair of the church in terms of the statute to get the consent of the minister before proceeding with repairs on the wall surrounding the church.

The Act 5 Geo. IV. c. 90, was passed for the purpose of providing for the erection of additional places of worship in the Highlands and Islands of Scotland. The churches erected under its provisions are commonly called Parliamentary churches.

By section 16 of the Act it is enacted—"That it shall and may be lawful for the minister and kirk-session of the parish or parishes to which the district attached to any such place of worship belongs, to make such provision for the attendance of members of the said kirk-session or kirk-sessions (being inhabitants of the district attached to the additional place of worship) to officiate as elders at the said place of worship as to them shall seem necessary and expedient, and as is customary by the practice and forms of the Church of Scotland for the attendance of elders at parish churches, and that the minister of the district, together with these elders, shall give direction in all things relative to the additional church of the district."

By section 18 it is provided that "Whereas it is necessary that effectual provision should be made for the repair of the said additional place of worship . . . after they shall have been built or provided, be it further enacted, that with respect to every such additional place of worship, the heritor or any two of the heritors applying for the same, his or their heirs and successors in the lands situated within the district for which such additional place of worship shall be set apart to be specified and described for that purpose, shall by such application be and become bound to keep and maintain such additional place of worship in good and sufficient repair to the extent hereinafter enacted, that is to say—Provided always, that the pew rents of such additional place of worship shall be applied towards the repair of such additional place of worship, . . . in the first instance under the direction of the surveyor appointed by the commissioners, and in default of his giving such directions during one whole year, then under the directions of the heritor or heritors undertaking for the repair of such additional place of worship, of the minister and of the officiating elders, who are also hereby empowered to give direction for small repairs at any time when requisite; and provided further, that after the application of the pew rents, the expense to be defrayed by the said heritor or heritor so applying, his or their heirs or successors as aforesaid, shall not in any one year exceed the sum of one per centum upon the amount of the money originally expended in building or purchasing and completing such additional place of worship (or in case of gift of any building for that purpose, in like manner not exceeding one per centum upon the original value of the same as estimated by the surveyor of the commissioners), to which extent, and no further, the said heritor or heritors shall be compellable to repair the same in such manner as heritors are compellable by law to repair parish churches in Scotland."

In 1827 the church of Berriedale, Caithness-shire, was erected as a Parliamentary church under the Act 5 Geo. IV. c. 90, on a piece of ground conveyed to the Commissioners under the Act by James Horne of Langwell. The church was surrounded by a stone wall. As early as 1833 interments had been made in the ground enclosed by the wall, and immediately surrounding the church, and since then a few other interments had been made in that ground.

In 1846 the Parliamentary church and district were erected into the *quoad sacra* parish of Berriedale.