Tuesday, May 16.

FIRST DIVISION.

[Lord Low, Ordinary.

FRASER *v.* ROBERTSON-DURHAM AND ANOTHER.

Process — Competency — Company—Bankruptcy—Preference—Poor Rates—Action in which Question does not Properly Arise—Application by a Preferential Claimant in a Liquidation who is Offered Payment in Full for Order Giving him Preferential Ranking.

The liquidators of a company presented a note in which they showed a balance in their hands sufficient to pay all the preferential claims, and asked authority, after deduction of their remuneration and the law expenses of the liquidation, to pay these claims in full and to distribute the balance *pro rata* amongst the ordinary claimants. Among the claims admitted to a preferential ranking was a claim for unpaid poor rates. The collector of poor rates lodged answers craving the Court to ordain the liquidators to pay his claim preferably to all debts of a private nature and in particular preferably to the liquidators' fees and law expenses incurred by them and to rank his claim accordingly. *Held* that, as the liquidators had admitted the claim for poor rates to a preferential ranking and tendered payment thereof in full, there was no proper question presented to the Court for adjudication on the answers.

Bankruptcy — Company —Liquidation — Preferential Payments — Poor Rates — Poor Law (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 83), *sec.* 88—*Preferential Payments in Bankruptcy Act* 1888 (51 *and* 52 *Vict. cap.* 62), *sec.* 1—*Statute.*

Opinion (*per* Lord Low, Ordinary) that the Preferential Payments in Bankruptcy Act 1888 is applicable to Scotland in the case of companies being wound up under the Companies Acts, and that, in accordance with the provisions of the Act, the remuneration of the liquidator and the law expenses of the liquidation, as costs of administration, fall to be provided for before payment of parochial rates.

J. A. Robertson-Durham, C.A., and James Craig, C.A., both of Edinburgh, were appointed on the 19th February 1904 official liquidators of the Scottish Drug Depot, Limited, which was ordered to be wound up under the provisions of the Companies Acts 1862 to 1900. On the 10th January 1905 they presented a note with a view to having the liquidation closed, and produced therewith a schedule of the claims lodged, with their deliverances thereon. Amongst the claims to which it was proposed to give a preferential ranking was that of the Collector of Poor and School Rates for the City Parish of Edinburgh, where the company had carried on its business, for unpaid poor and school rates due at the commencement of the winding-up from certain premises, amounting to £20, 0s. 6½d. The note stated that the liquidators' account showed a balance in hand of £925, 18s. 10d., out of which fell to be paid (1) the liquidators' remuneration and their law expenses; (2) the preferable claims which, as admitted, amounted to £117, 9s. 4d.; and (3) the balance to the ordinary creditors, *pro rata* on their admitted claims, which amounted to £4708, 3s. 11d. The prayer of the note was, *inter alia*, "(3) to fix the remuneration of the liquidators; (4) to authorise them to take credit therefor and to pay the law expenses incurred by them as these may be taxed by the Auditor of Court; (5) to approve of the deliverances of the liquidators in the said schedule, or to make such alteration on such deliverances as may be required, and to rank the said claims of such creditors accordingly; (6) to authorise the liquidators to pay the said preferable claims as the same may be allowed by your Lordships, and to divide the surplus funds thereafter in the hands of the liquidators among the ordinary creditors *pro rata* of their claims as the same may be allowed by your Lordships."

Alexander Fraser, Collector of Poor and School Rates for the City parish of Edinburgh, lodged answers, which, after reciting the Poor Law (Scotland) Act 1845, sec. 88, stated—"The liquidators, in the prayer of this petition, crave the Court, *inter alia*, to authorise them to pay the liquidators' fees and the law expenses of the liquidation preferably to the said Alexander Fraser's claim for poor rates, and the said Alexander Fraser accordingly objects to said claims being preferred to his in the order of payment, and maintains that the Court should direct and ordain the said liquidators to pay the above-mentioned poor rates 'out of the first proceeds of the estate, and preferably to all debts of a private nature,' and in particular preferably to the liquidators' fees and law expenses incurred by them, and to rank the said Alexander Fraser's claim accordingly."

The liquidators in their replies, *inter alia*, referred to the Preferential Payments in Bankruptcy Act 1888 as regulating the matter in dispute.

The Poor Law (Scotland) Act 1845 (8 and 9 Vict. cap. 83), section 88, provides—"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 the relief of the poor; and the sheriffs, magistrates, justices of the peace, and other judges may grant the like warrants for the recovery of all such assessments in the same form and under the same penalties as is provided in regard to such land and assessed taxes and other public taxes: Provided always that it shall nevertheless be competent to prosecute for and recover such assessments by action in the Sheriff's Small Debt Court;

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 Preferential Payments in Bankruptcy Act 1888 (51 and 52 Vict. cap. 62) provides, section 1 (1)—"In the distribution of the property of a bankrupt, and in the distribution of the assets of any company being wound up under the Companies Act 1862 and the Acts amending the same, there shall be paid in priority to all other debts—(*a*) All parochial or other local rates due from the bankrupt or the company at the date of the receiving order, or as the case may be, the commencement of the winding up, and having become due and payable within twelve months next before that time, and all assessed taxes, land tax, property, or income tax assessed on the bankrupt or the company up to the fifth day of April next before the date of the receiving order, or as the case may be, the commencement of the winding-up and not exceeding in the whole one year's assessment; .... (3) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, the foregoing debts shall be discharged forthwith so far as the property of the debtor or the assets of the company, as the case may be, is or are sufficient to meet them."

Upon the 3rd March 1905 the Lord Ordinary (Low) issued an interlocutor in which he found that the poor rates due from the said company at the commencement of the winding-up thereof did not fall to be paid preferably to the liquidators' fees and law expenses incurred by them, but fell to be paid in terms of section 1 (3) of the Preferential Payments in Bankruptcy Act 1888, and in respect that the liquidators had admitted the claim for said poor rates to a preferable ranking and tendered payment thereof in full, found it unnecessary to pronounce further upon the answers, and dismissed them with expenses.

Opinion.—[*After narrating the purport of the note and answers and the collector's contention based upon section* 88 *of the Poor Law* (*Scotland*) *Act* 1845]—"Even if that enactment was the statutory provision now in force in the case of companies in liquidation, it would be necessary to consider how far it supported the claim of the collector that poor rates fall to be paid before any provision is made for the expenses of the liquidation. But it is unnecessary to consider that question if, as the liquidators contend, the matter is now regulated by the Preferential Payments in Bankruptcy Act 1888 (51 and 52 Vict. c. 62).

"In regard to that Act I think that there are strong reasons for holding that it is not applicable to Scotland so far as sequestrations under the Bankruptcy Acts are concerned, but I see no sufficient ground for affirming that it does not apply to Scotland in the case of companies which are being wound up under the Companies Acts.

"*Prima facie* the Act applies to Scotland, because Ireland is excluded from its operation while Scotland is not excluded, and further, I do not think that there is any difficulty in applying its provisions, so far as companies in liquidation are concerned, to Scotland. It is also worthy of observation that the Act was amended in 1897 by an Act (60 and 61 Vict. cap. 19) which makes provision in certain cases for the payment of the debts declared to be preferable by the Act of 1888 in priority to the claims of holders of debentures under a floating charge created by the company. These provisions are not appropriate in the case of Scotch companies, and accordingly it is provided that the Act shall not extend to Scotland. The Act, however, is made applicable to Ireland, which was excluded from the Act of 1888, and it is so made applicable by declaring that in its application to Ireland the Preferential Payments in Bankruptcy (Ireland) Act 1889 shall be substituted for the Act of 1888. That shows that the Legislature had in 1897 considered the position of the Act of 1888 as regards both Scotland and Ireland, and had deliberately allowed the Act to remain, as it bore to be, an Act applicable to Scotland.

"It was argued, however, that if the Act had been intended to apply to Scotland the 88th section of the Poor Law Act would have been repealed. If the Act of 1888 does not apply to sequestrations, that argument is not of much weight, because the terms of the 88th section are more appropriate to cases falling under the bankruptcy laws than to insolvent companies, for the winding-up of which a special code was provided by the Companies Act of 1862. If, as I think was the case, the Act of 1888 applied only to companies in Scotland, that would account for the 88th section of the Poor Law Act not being to any extent repealed.

"I am therefore of opinion that the Act of 1888 applies, and it provides that the parochial rates and the debts specified shall, 'subject to the retention of such sums as may be necessary for the costs of administration or otherwise, be discharged forthwith so far as the assets of the company are sufficient to meet them.'

"That enactment does not support the collector's contention that the parochial rates fall to be paid preferably to the liquidators' fees, and the expenses incurred by them. These appear to me to fall within the words 'the costs of administration.' The rates, however, are, subject to retention of the amount necessary to meet the costs of administration, to be paid 'forthwith.' That I take to mean that they shall be paid out of the first funds available for division.

"In the present case the circumstances were these—The company had carried on business as chemists and druggists, having their principal place of business at Nicolson Street, Edinburgh, and having seven branches in various places in Edinburgh and Leith. The liquidators deemed it to be advisable in order that the assets of the company might be realised to the best advantage to carry on the business for a certain time, and the Court authorised them to do so until Whitsunday 1904. The

present note was presented on 10th January 1905, and the liquidators stated that they had then realised the businesses and all other assets of the company.

"The winding-up order was not pronounced until 19th February 1904, so that I do not think, considering the nature of the assets, that there has been any delay in realisation, and I am not surprised that the liquidators did not deem it expedient to make any division of the funds until the whole estate was realised.

"It may be that the liquidators were at a somewhat earlier date in possession of funds out of which the rates and other debts which the Act of 1888 directs to be paid 'forthwith' might have been paid, and it may be that to have paid them at an earlier date would have been more in accordance with the directions of the statute. I have, however, no information upon that point, and I do not think it necessary to inquire, as all the preferable debts will be paid in full.'

The collector reclaimed, and argued—Section 88 of the Poor Law Act 1845 gave an absolute preference which had never been taken away. The Preferential Payments in Bankruptcy Act 1888 did not take away this preference and could not have been intended to do so, for it would in that case have repealed the section of the 1845 Act as it repealed certain other Acts. The true position was that that statute did not apply to Scotland at all. While it might be said that in this case the question was not of importance, inasmuch as payment in full was tendered, payment had been unduly delayed, and the collector was entitled to have his position recognised by the Court. That would then establish a rule for other cases of a similar nature, which had of recent years been very numerous—*Northern British Property Investment Company, Limited* v. *Paterson*, July 12, 1888, 15 R. 885, 25 S.L.R. 641, was referred to.

Counsel for the liquidators were not called upon.

LORD PRESIDENT—I do not think that this case presents any difficulty. It is a case where the liquidators of the Scottish Drug Depot have presented a note in ordinary form to your Lordships' Court, in which they ask that the Court should fix their remuneration and authorise them to take credit therefor, and to pay the law expenses of the liquidation, and further, that it should approve of their deliverances as set forth in the schedule, and authorise the payment of the preferential claims and the distribution of the surplus, and finally, grant them their discharge. In the schedule appended to the note they set forth that they have admitted to a preferential ranking £117, 9s. 4d. of preferential claims, and among them is included the claim of the Collector of Poor Rates for the City Parish of Edinburgh, who had put in a claim for unpaid poor rates payable on certain property which had been occupied by the company. The liquidators set forth that they have sufficient funds, and propose to pay all the preferential claims in full. The collector has put in answers in which he sets forth this claim, amounting to £20, 0s. 6½d., and then sets forth the clause from the Poor Law Act of 1845 providing for the preferential payment of such claims. He then states that he has put in a claim for preferential payment, and goes on to refer to the prayer of the liquidators' note, and asks the Court to ordain the liquidators to pay his claim "out of the first proceeds of the estate, and preferably to all debts of a private nature, and in particular preferably to the liquidators' fees and law expenses incurred by them, and to rank" his claim accordingly. He therefore not only asks for payment of his debt, but asks for it with the epithetical addendum, that it should be paid out of the first proceeds of the estate. I call it an epithetical addendum, because it is distinctly stated by the liquidators in their replies, and not denied by the collector's counsel, that the collector was informed that he would be paid in full before he lodged his answers to the note. I think the question of payment out of first proceeds can only arise when there is a competition as to the funds, but cannot arise here, where payment in full of all their claims is tendered. I do not think a litigant can come here and ask us to answer a question which does not arise in his case, but which may arise in some other case. I consider that is a preposterous request. I further think that as the applicant has driven the liquidators into litigation, both here and in the Outer House, he must pay the expenses of both discussions. The question having been raised in the Outer House, the Lord Ordinary has been induced to make a pronouncement on the question of preferential payments, though it was unnecessary for the decision of the point before him. I would propose that we should recall the Lord Ordinary's interlocutor in so far as it deals with the Bankruptcy Act of 1888, as such a finding is unnecessary for the disposal of this case, and I think it better that a finding should not be allowed to stand which deals with a point that does not arise on the facts of the case that the Court has to decide.

LORD ADAM—I am of the same opinion, and have no doubt at all. The claimant Fraser may have an interest to have the question now raised settled, but he can have no interest to have it decided in this particular case. The question should be determined in a case where it properly arises for decision. I do not think that a collector who desires to have some legal question decided is entitled to fix upon a particular estate, where the liquidator has plenty of funds and no objection to pay the debt, and to burden it with the expenses of carrying on an unnecessary litigation for the benefit of the community.

LORD M'LAREN—I think that every unprejudiced person would be ready to admit that in a bankruptcy or liquidation, where there are funds sufficient to pay 20s. in the £, no question of preferential payment can arise. But, further, where there are degrees of ranking among those entitled to preferential payment, if there are sufficient

funds to pay all the preferential debts in full, no competition can arise between the preferential creditors of different orders. That is precisely the case we have to consider, and I therefore think the collector's contention is untenable.

I agree with your Lordship that, although the Lord Ordinary has given his opinion on the question of the order of the preferential payments, that part of his Lordship's interlocutor is not necessary for the disposal of the matter of the action and should be recalled. If it were to stand, the judgment might be cited as an authority on the point, and I do not think that a decision should be allowed to go out as an authority when the point it purports to decide does not really arise on the facts of the case.

LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

"Recal the said interlocutor [of 3rd March 1905]: Find that in respect that the liquidators have admitted the claim for poor rates to a preferential ranking and tendered payment thereof in full, there is no proper question presented to the Court for adjudication on the answers, and remit to the Lord Ordinary to proceed: Find the reclaimer liable in expenses of the reclaiming-note and also the expenses incurred by the liquidators in the Outer House in connection with the answers and the replies."

Counsel for the Reclaimer—Lees, K.C.—Addison Smith. Agents — R. Addison Smith & Co., W.S.

Counsel for the Respondents—Graham Stewart — W. J. Robertson. Agents — Davidson & Syme, W.S.

HOUSE OF LORDS.

Tuesday, April 11.

(Before Lord Macnaghten in the Chair, Lord Davey, Lord Robertson, and Lord Lindley.)

DUNBAR'S TRUSTEES *v.* DUNBAR.

(*Ante*, December 3, 1902, 40 S.L.R. 146, 5 F. 191.)

Marriage-Contract — Conquest — Conveyance of Estate which Wife might Conquest and Acquire—Accumulations of Income.

By an antenuptial marriage-contract executed in 1848 the wife bound herself to convey to the trustees the whole funds and estate, real and personal, which she then had or might thereafter "conquest and acquire by purchase, succession, or otherwise." The trustees were directed to pay the annual income of the trust estate to the wife during her life for her separate use, exclusive of the *jus mariti*. *Held* that the clause of conquest did not extend to estate which consisted of, or was purchased with, savings made by the wife from her separate income during the subsistence of the marriage.

The case is reported *ante ut supra.*

William Allardes and others (Mrs Dunbar's testamentary trustees) and the Reverend John Archibald Dunbar Dunbar appealed.

At delivering judgment—

LORD MACNAGHTEN—The questions involved in this appeal depend upon the terms of an antenuptial contract, dated the 13th of October 1848, made in contemplation of a marriage then intended, and shortly afterwards solemnised, between Captain Edward Dunbar and Miss Phœbe Dunbar of Seapark. Miss Phœbe Dunbar was heiress in possession of the entailed estate of Seapark, and a lady of considerable means besides. The settlement effected by the contract was a settlement of property which belonged to her at the time, but it also contained a clause of conquest and *acquirenda*. Mrs Dunbar, who survived her husband, is now dead. In addition to the fortune which was hers at the date of the marriage she became entitled to a life interest in a large sum of money under the will of a brother who died in 1862. At her death she was possessed of personal estate of the value of more than £100,000, made up of savings or accumulations of income derived from her life interest under her brother's will, and the interests of the funds specifically comprised in her marriage settlement. By her will she left the moneys which she had thus accumulated away from the appellant, the Rev. John Archibald Dunbar, who was the only surviving child of the marriage, but apparently in her opinion amply provided for otherwise.

It was contended on behalf of Mr John Archibald Dunbar that these accumulations of income, as and when laid out on investments of a permanent character, or at any rate as from Mrs Dunbar's death, became by virtue of the clause of conquest and *acquirenda* subject to the trusts of the settlement of 1848, and that consequently it was not competent for Mrs Dunbar to deal with them by will. That was the principal claim advanced on behalf of the appellant. There was also a claim to a property called the Glen of Rothes, and there was a claim to legitim under the Married Women's Property (Scotland) Act 1881. On these three questions, and on some minor points which were not raised at your Lordships' Bar, the learned Judges in Scotland unanimously rejected the appellant's claim. Agreeing as I do in the result at which they have arrived, I will not trouble your Lordships by dealing with the case at any length.

As regards clauses in marriage contracts providing for the settlement of after-acquired property, I quite agree that effect must be given to the intention of the parties apparent on the face of the contract construed fairly, although the result may seem to be whimsical or even unreasonable. But still there are some considerations which it is as well to bear in