VOL. XVI.—PART X.

No. 821.—High Court of Justice (Chancery Division).—30th May and 17th June, 1930, and 3rd May, 1932.

Court of Appeal.—17th and 18th November and 9th December, 1930.

House of Lords.—26th and 27th November, 1931, and 22nd February, 1932.

In re Cockell,
Jackson *v.* Attorney-General.(1)

Income Tax and Super-tax—Insolvent estate—Tax assessed upon deceased—Preferential claim of Crown—Right of retainer of executor—Preferential year—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* V, *c.* 59), *Section* 33 (*i*) (*a*); *Administration of Estates Act*, 1925 (15 *Geo.* V, *c.* 23), *Sections* 34 *and* 57.

The sole executrix and universal legatee under the will of a testator who died on the 19th June, 1929, *claimed that she was entitled to retain out of the estate, which was insolvent, sums in respect of debts due to her. A preferential claim for arrears of the deceased's Income Tax and Super-tax for the year* 1920–21 *had been made on behalf of the Crown under Section* 33, *Bankruptcy Act*, 1914. *The amount of the executrix's claim was such that, if it were met, the Crown's claim could not be satisfied.*

The executrix took out an Originating Summons to have it determined:—

(1) *Whether her right of retainer could be maintained against the Crown's claim under Section* 34 (1) *of the Administration of Estates Act*, 1925, *and Section* 33 (1) (*a*) *of the Bankruptcy Act*, 1914.

(2) *Whether the Crown's preferential claim for Income Tax could be made only for tax assessed for the year ending on the 5th April next before the testator's death or for any year before the testator's death.*

Held, *in the House of Lords, that the executrix could not exercise her right of retainer in priority to the Crown's preferential claim.*

(1) Reported (Ch. D. and C.A.) [1931] 1 Ch. 389 and (H.L.) [1932] A.C. 365.

Held, *in the Chancery Division, following the decision in* Gowers and Others *v.* Walker and Others(1), *that the Crown's preferential claim for Income Tax could be made for tax assessed for any one year ending before the testator's death.*

ORIGINATING SUMMONS.

LET His Majesty's Attorney-General, on behalf of His Majesty, who claims to be a preferential creditor of the above-named testator Norman Alexander Lindsey Cockell (hereinafter called "the "Testator", within Eight Days after service of this Summons on him inclusive of the day of such service, cause an Appearance to be entered for him to this Summons, which is issued upon the application of Emily Elizabeth Jackson of 56, Rodney Court, Maida Vale, in the County of London, Widow, who is the sole Executrix and Universal Legatee under the Will of the Testator for the following relief, namely :—

(1) THAT it may be determined whether the Plaintiff's right of retainer may be exercised against His Majesty and in priority to His Majesty's preferential claim for property or Income Tax under Section 33 (1) (*a*) of the Bankruptcy Act, 1914, and Section 34 of the Administration of Estates Act, 1925, and the first Schedule to that Act.

(2) THAT it may be determined whether the preferential claim of His Majesty for property or Income Tax can be made (*a*) for property or Income Tax assessed for the year ending the 5th April next before the Testator's death and no other year or (*b*) for property or Income Tax assessed for any one year ending on any 5th April before the Testator's death.

(3) IF and so far as may be necessary, but not further or otherwise, that the Testator's estate be administered under the direction of this Honourable Court.

(4) THAT the costs of this application may be provided for.

(5) THAT such further or other order may be made in the premises as to this Honourable Court shall seem fit.

DATED the 25th day of January, 1930.

[For convenience of reference, Section 34 and Part I of the First Schedule, Administration of Estates Act, 1925, are reproduced below.

Administration of assets.

34.—(1) Where the estate of a deceased person is insolvent, his real and personal estate shall be administered in accordance with the rules set out in Part I of the First Schedule to this Act.

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(1) 15 T.C. 165.

(2) The right of retainer of a personal representative and his right to prefer creditors may be exercised in respect of all assets of the deceased, but the right of retainer shall only apply to debts owing to the personal representative in his own right whether solely or jointly with another person.

Subject as aforesaid, nothing in this Act affects the right of retainer of a personal representative, or his right to prefer creditors.

(3) Where the estate of a deceased person is solvent his real and personal estate shall, subject to rules of court and the provisions hereinafter contained as to charges on property of the deceased, and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part II of the First Schedule to this Act.

FIRST SCHEDULE.

PART I.

RULES AS TO PAYMENT OF DEBTS WHERE THE ESTATE IS INSOLVENT.

1. The funeral, testamentary, and administration expenses have priority.

2. Subject as aforesaid, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities respectively, and as to the priorities of debts and liabilities as may be in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt.]

The Originating Summons came before Clauson, *J.*, in the Chancery Division on the 30th May and the 17th June, 1930, and on the latter date judgment was given against the Crown, with costs, on the first point in the Summons.

Mr. F. D. Morton, K.C., and Mr. Norman Daynes appeared as Counsel for the executrix and the Attorney-General (Sir W. A. Jowitt, K.C.) and Mr. J. H. Stamp for the Crown.

JUDGMENT.

Clauson, J.—The testator in this case died on the 19th June, 1929, having appointed the plaintiff, Mrs. Jackson, his sole executrix, and, as I understand, his universal legatee and devisee.

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She has since taken out probate. The position of the estate is this, that it consists at the present moment of a sum of about £920 cash and 100 shares of the value of about £100. I rather assume that that means after payment of the whole of the funeral expenses, which is a small matter with which I need not for the moment trouble. There are debts which are far larger than the amount of the estate available to pay them. The plaintiff, the executrix, has a claim for two sums of £400 and £600, that is, £1,000, with, I gather (though I am not quite clear about this) some interest upon that as well: at all events a claim for about £1,000. As Respondent to this summons I have the Attorney-General, the reason for his presence being that the Crown has a claim to be a preferential creditor in accordance with the terms of the Bankruptcy Act for a sum in respect of Income Tax and Super-tax. There may be a question as to the exact amount in respect of which that preference can be claimed, but the first question which has to be determined is this: Has the plaintiff in respect of her claim for £1,000 the right to retain that out of the assets in priority to any payment to the Crown in respect of the preferential debt that I have mentioned? It would seem fairly clear that the plaintiff's claim, together with the necessary costs, will amount to such a figure that if the plaintiff has the right to retain in priority to the Crown's preferential debt, there will be nothing left for the Crown's preferential debt.

In order to ascertain whether or not the plaintiff has that right of retainer, I have to turn to the Administration of Estates Act, 1925, which repealed a number of Acts which dealt with the administration of estates, and has enacted that which is of the nature of a code in regard to the administration of estates. The representative of the Crown being Respondent to the summons, I turn first to Section 57 of the Act in order to ascertain whether the Crown is by this Statute left in the somewhat advantageous position in which the Crown was at common law in regard to various claims against the estates of deceased persons, and I find this: " The provisions of this Act bind the Crown . . . as respects " the estates of persons dying after the commencement of this Act, " but not so as to affect " certain provisions relating to limitation of actions, with which I have nothing to do. I understand that to mean that where in the Act I find a general reference to creditors, I am to construe that as including the Crown, and where I find rules of administration laid down in general terms I am to treat those rules as rules which bind the Crown in just the same way as they would bind any subject.

I now have to turn to Section 34 of the Act, and I find under Sub-section (1) this provision: " Where the estate of a deceased " person is insolvent,"—and this is quite admitted in this case—

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" his real and personal estate shall be administered in accordance " with the rules set out in Part I of the First Schedule to this " Act ". Part I of the First Schedule is in these terms : " 1. The " funeral, testamentary, and administration expenses have priority. " 2. Subject as aforesaid, the same rules shall prevail and be " observed as to the respective rights of secured and unsecured " creditors and as to debts and liabilities provable and as to the " valuation of annuities and future and contingent liabilities " respectively, and as to the priorities of debts and liabilities as " may be in force for the time being under the law of bankruptcy " with respect to the assets of persons adjudged bankrupt."

The first point to be observed is this, that if the estate is insolvent those are the rules which are to be applied, whether there is a proceeding for the administration of the assets of the deceased, a proceeding in the Court, or not; that seems quite clear, and I only mention that in order to show why, if that be the true view of the Act, it is unnecessary to deal in any way with the decision *In re Laycock*, [1919] 1 Ch. 241, because assuming *In re Laycock* to be rightly decided, as I am bound to assume, the position in that case, which was that the rules which the Judicature Act laid down as rules of administration in the case of an insolvent estate applied only where there was an administration proceeding in the Court and did not apply where there was no such administration proceeding, is a matter which is now of no importance.

The next point to observe is this : so far as this Sub-section is concerned, it is clear, reading into it the provisions of the law of bankruptcy, with which I can treat myself for this purpose as sufficiently familiar, that subject to the payment of funeral, testamentary and administration expenses, the Crown will come first in priority of payment in respect of these claims which it has for a certain amount of Income Tax and Super-tax; and as to that there is no dispute. So far the matter is quite clear. The executrix can, so far as I have read the Act at the present moment, have no claim whatever to come in in front of the Crown.

But that is not the whole story. I have to deal with the next Sub-section. The next Sub-section says this : " The right of " retainer of a personal representative and his right to prefer " creditors may be exercised in respect of all assets of the deceased, " but the right of retainer shall only apply to debts owing to the " personal representative in his own right whether solely or jointly " with another person. Subject as aforesaid, nothing in this Act " affects the right of retainer of a personal representative, or his " right to prefer creditors." Then the third Sub-section is in these terms : " Where the estate of a deceased person is solvent his real " and personal estate shall, . . . be applicable " according to rules which I do not pause to state here.

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The first observation to be made on Sub-section (2) appears to me to be this, that it is quite clear from the context that that rule applies to the case where the estate of a deceased person is insolvent. I cannot conceive that that Sub-section would find itself in its present position, namely, immediately after a statement of the rules dealing with an insolvent estate and immediately before a statement of the rules dealing with a solvent estate, unless the Sub-section were intended to apply certainly to the case of an insolvent estate as well as (no doubt) to the case of a solvent estate; and I have approached the consideration of the Section with that in mind.

Now the first point to be observed is this, that the right of retainer—and it is with the right of retainer only that I have to deal in this particular case—may in accordance with the Sub-section be exercised in respect of all the assets of the deceased. It is perfectly true that that has the effect, from the time of the passing of this Act and in cases to which it applies, of extending the right of retainer from a right to retain in respect of legal assets to a right to retain in respect of equitable assets. It has no doubt that effect. It has further, as it seems to me, this effect, that in respect of this right of retainer, all assets of the deceased are placed on the same footing, and that is material for this reason, that apart from this Act, or certain preceding legislation with the details of which I will not trouble, the right of retainer of an executor did not apply to all assets of the deceased, not even to all legal assets, but only to such legal assets as were available after provision had been made for creditors of a superior degree to meet the liabilities of creditors of that degree in which the executor in respect of the debt which he claimed to retain ranked. It appears to me, on the plain meaning of the language, that when the Legislature enacts that the right of retainer may be exercised in respect of all assets of the deceased, the Legislature with reasonable plainness lays it down that there shall be no such distinction as that which at some time prevailed in regard to creditors of varying degrees. Then there are words which to some extent diminish the right of retainer: "but the right of retainer shall only apply "to debts owing to the personal representative in his own right "whether solely or jointly with another person". Those words I am not concerned with in this particular case, because the claim in respect of which the executrix claims to retain is a claim for a debt owing to her in her own right. The Section then continues: "Subject as aforesaid, nothing in this Act affects the right of "retainer of a personal representative, or his right to prefer "creditors." I understand that to mean this: Notwithstanding any inference which you might have drawn from other Sections of the Act, if you looked at them, the right of retainer remains as it was before the Act, subject to this, that it is enlarged to the extent to which in this Sub-section you find it enlarged, and it is

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diminished to the extent to which in this Sub-section you find it diminished; and accordingly I understand that to mean this, that in the case of an insolvent estate there is still the right of retainer which will have to be brought into account and harmonised as best you can with the rules laid down in Part I of the Schedule—there is still that right of retainer, modified by way of increase or diminution in the way I have stated.

Now if I am right in approaching this Section with the view that it does apply to an insolvent estate, if I am right in approaching this Section with the view that in construing it I am to treat the Crown as in exactly the same position as a subject, except of course in so far as there is some express provision to the contrary, the question propounded to me in this summons seems to me to answer itself. The Crown has such priority as is given to it by what I have spoken of as the bankruptcy scale laid down in Part I of the Schedule—a priority in respect of certain amounts of Income Tax and Super-tax; but everything in that scale has to be harmonised with—and I see no difficulty in harmonising it with—the express provision in Sub-section (2), which gives the right of retainer to the personal representative. It is true that so far as that right of retainer operates it to some extent contradicts, and in so far as the Section gives a right to prefer it may be true that to a great extent the Sub-section may turn out to nullify, the rules, or at least some of the rules, which are laid down in Sub-section (1); but if that is the result, let it be the result; I see no difficulty in reading the two together in that way. It is said, however, that I can only reach that conclusion by bringing into my mind something else in the Act, namely Section 57, which puts the Crown on the same footing as the subject—that by reason of the words, " Nothing " in this Act . . . affects the right of retainer ", I must not treat Section 57 as being operative in any way to affect the law in regard to retainer; in other words, that I must treat the Crown's rights as untouched by these statutory provisions in regard to retainer. That view I find myself wholly unable to take. I do not think that can be what the Legislature meant. I think Mr. Morton's argument is a sound one, that Section 34 (1) necessarily involves this: when read with Section 57, Section 34 (1) necessarily involves that the order of application laid down in Part I—what we have spoken of as the Bankruptcy scale—is consistent, and consistent only, with the Crown's privilege of priority being cut down to the particular priority specified by the bankruptcy legislation; and when I come to Sub-section (2) I must treat Sub-section (1) as having that operation, and that the words " Subject as aforesaid, nothing " in this Act affects the right of retainer " necessarily involve this, that I must have regard to the position in which the Crown has been put by reason of the joint operation of Section 34 (1) and Section 57.

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However that may be, it seems to me clear that I must read this Section of the Act with this in view, that the Legislature is setting out to make a comparatively simple scheme for the administration of estates which comprises certainly one feature, namely that the Crown is to lose what I may call its general priority, and secondly has this feature, that an executor's right of retainer is, with such modifications only as appear expressly in Sub-section (2), to be operated in respect of the whole extent of the assets of the deceased, and as between the executor and the whole body of creditors, including the Crown; and I so decide.

Accordingly, I must answer the first question by determining that the plaintiff's right of retainer may be exercised against His Majesty and in priority to His Majesty's preferential claim for property or Income Tax under the relevant Sections of the Bankruptcy Act, the Administration of Estates Act, and the first Schedule to that Act.

Mr. Morton.—With regard to Question (2), my Lord, I think that becomes of no practical importance. Perhaps your Lordship would give us liberty to apply in case it should ever be necessary?

Clauson, J.—Yes. If it is of no practical importance, we had better leave it so, but of course it is perfectly obvious, having regard to Mr. Justice Eve's decision, that I should have had to decide it one way.

Mr. Morton.—Yes, my Lord, quite so.

Clauson, J.—I only say that to save any further trouble about the matter; but I quite agree; you shall have liberty to apply.

The Crown having appealed against the decision in the Chancery Division the case came before the Court of Appeal (Lord Hanworth, *M.R.*, and Lawrence and Romer, *L.JJ.*) on the 17th and 18th November, 1930, when judgment was reserved. On the 9th December, 1930, judgment was given against the Crown (Romer, *L.J.* dissenting), confirming the decision of the Court below.

The Attorney-General (Sir W. A. Jowitt, K.C.) and Mr. J. H. Stamp appeared as Counsel for the Crown and Mr. F. D. Morton, K.C., and Mr. Norman Daynes for the executrix.

JUDGMENT.

Lord Hanworth, M.R.—This is an appeal from a decision of Mr. Justice Clauson given on the 17th June, 1930. The testator died on the 19th June, 1929, having by his will, dated 5th June, 1919, appointed the Respondent, Mrs. Jackson, his sole executrix.

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Probate of the will was granted on the 2nd August, 1929, and by the terms of it the testator devised to the executrix the whole of his estate and effects absolutely.

The estate, which was valued for probate at £1,378 19*s.* 1*d.* was found to be insolvent, for the debts stated in the Inland Revenue affidavit amounted to £3,344. Some questions arise as to these debts which it is unnecessary to go into. The executrix has paid the funeral expenses of the testator and certain fees for nursing him in his last illness, and there remains in her hands a sum of about £920 and some shares of no large value which have not yet been realised. Against this amount the executrix claims to exercise her right of retainer in respect of £1,000 for money lent by her to the testator.

It seems that the testator had not paid his Income Tax or Super-tax for several years before his death, and the Inland Revenue Commissioners for whom the Attorney-General appears, claim to select, as the one year in respect of which a right of priority for assessed taxes is given under Section 33 (1) of the Bankruptcy Act, 1914, a year in which the assessment upon the testator in respect of Income Tax and Super-tax exceeded £1,000.

The point, therefore, to be determined is whether the executrix can exercise her right of retainer as against the priority given to the Crown under the Bankruptcy Act; for this priority, if allowed, would exhaust the estate, equally as the right of retainer, if allowed, would prevent there being any surplus to meet the claim for assessed taxes.

The point is an important one and requires an interpretation to be put upon a Section contained in a recent Act, namely, upon Section 34 of the Administration of Estates Act, 1925. It should be stated that in view of the general importance of the matter, the Attorney-General has undertaken in any event to pay the costs incurred by the Respondent upon this appeal.

Before dealing with Section 34, it will be convenient to consider how the law stood with regard to an executor's right of retainer before the Administration of Estates Act was passed. It has been decided for a long time that, as one of his privileges, he has a right to retain assets in payment of his own debt due to him from the deceased, in preference to all other creditors of equal degree. This right has in effect been enlarged in his favour by Hinde Palmer's Act (32 & 33 Vic. c. 46) of 1869 under which all specialty and simple contract debts of deceased persons are to stand in equal degree after the 1st January, 1870.

The effect of this Act as decided in *re Harris*, [1914] 2 Ch. 395—and see also *In re Samson*, [1906] Ch. 584—has been to enlarge an executor's right of retainer in respect of a simple contract debt,

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by enlarging the class of debts with which that debt competes, and over which it may accordingly be given a preference, namely, over what would have been a specialty debt.

The right of retainer was limited, and extended only over legal as distinguished from equitable assets, though the executor could retain in respect of both legal and equitable debts due to him; and his right was not restricted to a debt due to him personally which he claims beneficially, but also extended to those to which he was entitled as trustee.

The Administration of Estates Act by Section 34, Sub-section (2), affects the retainer in both the above matters. Under it, the right of retainer may be exercised over all the assets of the deceased—whether legal or equitable—a very noteworthy extension; but it is restricted and applies only to debts owing to the executor in his own right. Subject to these two changes, one enlarging and one restrictive, the right of retainer remains.

Previously to the Act of 1925 so far as the principles of bankruptcy were applied to the distribution of a deceased insolvent's estate, they applied only in cases where the estate was being wound up by the Court—see Section 10 of the Judicature Act, 1875, and see *re Heywood*, [1897] 2 Ch. 593 and *re Laycock*, [1919] 1 Ch. 241. Now by Section 34, Sub-section (1) of the new Act the rules of bankruptcy set out in the First Schedule are to apply in all cases where the estate of a deceased person is insolvent, whether or not it is administered by the Court, and correspondingly Section 10 of the Judicature Act, 1875, is repealed.

Debts due to the Crown from an insolvent have gradually been brought within statutory limitations. Under the Bankruptcy Act, 1869, an order of discharge did not release a bankrupt from debts due to the Crown (Section 49), and by Section 32 (1) the amount of the taxes assessed upon the bankrupt not exceeding in the whole one year's assessment was to be treated as a preferential debt and given priority in the distribution of assets. But the Crown was held not to be bound by that Act except by the Sections in which it was referred to. See *re Bonham* 10 Ch.D., 595.

In the Bankruptcy Act, 1883, Section 150, it is expressly provided that its provisions as to the remedies against the property of the debtor, the priorities of debts and the effect of a discharge shall bind the Crown.

By Section 40 a priority in the payment of one year's assessed taxes was given as in the Act of 1869, but no more; and the order for his discharge released the bankrupt from all debts provable in the bankruptcy, the only exception made being in respect of a debt chargeable at the suit of the Crown for an offence against a statute relating to any branch of the public revenue. After this statute,

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it seems impossible to say that the Crown had left to it any prerogative right against the estate of the bankrupt. Its right was curtailed and limited by the terms of the Act. As Lord Dunedin said in *The Attorney-General* v. *De Keyser's Hotel*, [1920] A.C. at page 526 : " None the less, it is equally certain that if the whole " ground of something which could be done by the prerogative is " covered by the statute, it is the statute that rules."

Section 151 of the present Bankruptcy Act, 1914, is in the same terms as Section 150 of the earlier Act.

The reasoning of Lord Birkenhead in *Food Controller* v. *Cork*, [1923] A.C. 647, in relation to two Sections of the Companies' Act, 1908, is applicable : " It would have been plainly impossible to " adopt this form of legislation if it had been intended that other " Crown debts should retain a priority inconsistent alike with the " general language of Section 186 and with the motive which led " to the specification of admitted exceptions contained in " Section 209." (Preferential payments.)

New South Wales Commissioners v. *Palmer*, [1907] A.C. 179, is not in conflict with this view—indeed it confirms it. It was held there that the Crown was entitled to preferential payment over all other creditors, but on the ground that the Crown's prerogative had not been curtailed. Lord Macnaghten expressly points out that there was no provision in the relevant statute in New South Wales to the same effect as Section 150 of the Bankruptcy Act, 1883. " It is admitted," he says, " that the Bankruptcy Act, 1898, does " not bind the Crown. It would therefore seem, on principle, that " in the administration of the assets under the direction of the " Court it was the duty of the Court to give effect to the Crown's " prerogative." If there had been a Section binding the Crown in the statute, its claim by way of prerogative would have been held to be curtailed.

It seems clear, therefore, that the Crown cannot claim more than its priority in respect of one year's assessed taxes, and the question is whether the right of retainer is effective against those debts which are to be paid in priority to others of the bankrupt.

It is obvious that the right of retainer is valuable to an executor only if the estate is insufficient to pay all the creditors and the table of debts (in Section 33, Sub-section (1)) which are entitled to priority, is a long one. It includes, with certain specified limits of amount, parochial and local rates, four months' salary to clerks, wages of labourers, payments under the Workmen's Compensation Act, 1906, contributions due under the National Insurance Act ; and all these, with the debt for assessed taxes, are to rank equally between themselves. Taxes are in no better position than the others.

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The Courts have respected carefully an executor's right of retainer. Thus in *re May*—which was subsequently approved in *re Ambler* in the Court of Appeal, [1905] 1 Ch. 697—in the course of the administration of the estate of an insolvent husband by the Court, his widow was allowed to retain out of the assets in her hands as administratrix, the amount of a loan made to him in his business, although under Section 3 of the Married Women's Property Act, 1882, her claim for the debt in bankruptcy was postponed to the claims of the other creditors. In *re Rhoades* she was held entitled to exercise her right, even after payment over to the Official Receiver, for the right of retainer is that the executor can discharge the debt to himself, and only the balance of the assets after that has been done, passes to, and vests in the Official Receiver—see per Lord Lindley (Master of the Rolls), [1899] 2 Q.B. at page 355.

In *Davies* v. *Parry*, [1899] 1 Ch. 602, Mr. Justice Romer felt compelled to allow the claim of retainer of an administrator, in spite of his reluctance to do so, and notwithstanding the terms of the administrator's bond to distribute rateably, and the fact that the assets came into his hands after the decree.

That case was approved in the Court of Appeal in *re Belham*, [1901] 2 Ch. 52. The latter case is relevant to the present question. The Defendant—the administrator of a deceased insolvent's estate—claimed to exercise his right of retainer to an amount which exhausted the assets except as to £16 1*s*. 10*d*. The Plaintiff in a creditor's action moved to vary the administrator's bond given by the Defendant so that it would read " not preferring his own debt " or the debts of any other of the creditors of the . . . . deceased " by reason of his being an administrator " and claimed that this should be done " so as to carry out the true intention of this " Honourable Court " that is to say, he asked that the Respondent should administer the estate of the deceased by paying all and singular the debts which the deceased owed—rateably—and without preferring or giving advantage to the Respondent as administrator, and founded his case upon what he conceived to be the true intention of the Court.

Mr. Justice Gorell Barnes in a reserved judgment refused the motion and felt bound by Mr. Justice Romer's decision in *Davies* v. *Parry*.

The Court of Appeal affirmed this decision. Lord Justice Collins said the administration bond wrote out at large what is the duty of an administrator, and said that *Nunn* v. *Barlow*, 1, Simons & Stuart 588 distinctly decided that an administration decree is not incompatible with the legal right of an administrator to retain his debt. Lord Justice Stirling referred to the bond under which the duty is imposed upon the administrator " of paying the debts

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" ' rateably and proportionably, and according to the priority " required by law, and not unduly preferring his own debt ' " and discussing what is meant by " unduly preferring his own debt " he said the words mean that " he may not pay his own debt in " priority to any debt which, according to law, ought to be paid " before it " and he affirms that the administrator is entitled to use assets that come into his hands to meet his debts, and that such use is not an undue preference on his part.

Later, *re Ambler*, [1905] 1 Ch. 697, was decided, and the Court of Appeal approved of *re May* supra.

Consideration of these cases appears to make it clear that the right of retainer is one which enables the executor to dip into the assets to meet his debt before he begins to distribute the assets to any other creditor, subject to this, that he cannot retain his debt as against a debt of a higher degree. Now, however, the distinction between simple contract and specialty debts in administration has been abolished, and all debts are to be treated as of equal degree.

While of equal degree some debts are to be allowed a priority, but that does not abolish the right of retainer—which was expressly affirmed to remain even though the administrator's bond in terms required the payment of debts according to the priority required by law and thus recognised that there was a priority.

Bearing in mind this privilege of retainer and the priority of certain debts—among them that of the Crown for assessed taxes—I turn to Section 34 with its two Sub-sections. It is said that these cannot be read separately, but are conflicting—that Sub-section (2) is to read as subservient to Sub-section (1). I confess that I do not follow this argument. The Crown is bound by Section 57 of the Act. Its common law prerogative cannot be successfully claimed. In my judgment Sub-section (1) is effective in its plain terms to apply the rules of bankruptcy which are set out in the Schedule to all insolvent estates of deceased persons whether administered by the Court or not.

Then Sub-section (2) makes the two alterations in the right of retainer which have been already noticed, but it does not expressly diminish the right which the above cases prove has been from time to time—even if reluctantly—admitted and preserved. Sub-section (2) might have made a change in the effective right of retainer by postponing it to Crown or other debts, but it has not done so in terms, and I do not find a reason for saying that the Court must hold that it has impliedly done so.

There remains one further point to be noticed. By Rule I in the part of the Schedule applied to the administration of insolvent estates by Section 34 (1), " The funeral, testamentary, and

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" administration expenses have priority." It is said that this ignores the right of retainer, and thus it is argued that it cannot be supposed that the right of retainer takes precedence of the debts in this Rule—therefore the right of retainer is not recognised, but altered by Section 34 and the Schedule.

I think Mr. Morton's answer meets this point—namely, that the executor or administrator must incur the testamentary expenses before he can get a legal title to the assets, and that reasonable funeral expenses are to be allowed out of the goods of the deceased before any debt or duty whatsoever—see Coke's Institutes, 3, 202.

The Rule merely recognises what has been the practice for many years, and no inference from it can be drawn in reference to the interpretation to be placed on Sub-sections (1) and (2) of Section 34.

In my judgment the decision of Mr. Justice Clauson is right and the appeal must be dismissed.

Lawrence, L.J.—The question in this case whether the Plaintiff is entitled to exercise her right of retainer as against the Crown depends upon the true meaning and effect of Sub-sections (1) and (2) of Section 34 of the Administration of Estates Act, 1925.

Sub-section (1), which replaced (in an amended form) Section 10 of the Judicature Act, 1875, applied the bankruptcy rules for the time being in force to the administration of insolvent estates both when conducted by the Court and when conducted by the personal representative out of Court. The effect of this enactment was to bring the administration of insolvent estates by a personal representative out of Court into line with the administration of such estates by the Court and in bankruptcy, and, incidentally, to overrule the decision of Mr. Justice Astbury, in *re Laycock*, [1919] 1 Ch. 241, that Crown debts had common law priority in respect of legal assets when an insolvent estate was being administered out of Court, thus rendering it unnecessary in the future for the personal representative, when administering such an estate, to distinguish between legal and equitable assets in so far as Crown debts are concerned.

Sub-section (2) recognised and amended the right of retainer and the right to prefer creditors theretofore enjoyed by a personal representative.

Before the Act it was settled law that the personal representative had the right to appropriate a sufficient part of the legal assets of the deceased in satisfaction of a debt due to himself (whether in his own right or in a representative capacity) in preference to all other creditors of equal degree; but this right did not extend to assets which the personal representative had not got in and which were not in his possession, nor did it extend to equitable assets. It was also well settled that before a creditor had obtained judgment

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or before an administration decree had been made or before notice had been given of the presentation of a bankruptcy petition the personal representative had the right, among creditors of equal degree, to pay one in preference to another.

Further, it had been decided that neither Section 10 of the Judicature Act, 1875, nor Section 125 of the Bankruptcy Act, 1883, had deprived the personal representative of his right of retainer; see *re May*, 45 Ch.D. 499, and *re Rhoades*, [1899] 2 Q.B. 347. Section 125 of the Bankruptcy Act, 1883, is now replaced by Section 130 of the Bankruptcy Act, 1914, which last mentioned Section was repealed (apparently by mistake) by the Administration of Estates Act, 1925, but was revived and made permanent by the Expiring Laws Act, 1925.

It had also been decided that the effect of Hinde Palmer's Act(1) (which abolished the distinction as to priority of payment between specialty and simple contract debts) was to enlarge the right of retainer and the right to prefer creditors so as to enable a personal representative to retain a simple contract debt as against a specialty creditor (*re Harris*, [1914] 2 Ch. 395) and to pay a simple contract creditor in preference to a specialty creditor (*re Samson*, [1906] Ch. 584).

Sub-section (2) on the one hand extended the right of retainer so as to enable it to be exercised in respect of all the assets of the deceased, thus enlarging the range of assets which might be retained and doing away with the necessity (so far as the right of retainer is concerned) of making any distinction between legal and equitable assets, but on the other hand, limited the right of retainer to debts owing to the personal representative in his own right so that a personal representative could no longer retain a debt owing to him in a representative capacity.

Mr. Stamp contended that the provisions of Sub-section (1) operated to confine the right of retainer and the right to prefer creditors mentioned in Sub-section (2) to cases in which the estate of the deceased either was in fact solvent or appeared to the personal representative from the assets in sight to be solvent, and that except in such cases the personal representative (at all events when an insolvent estate was being administered out of Court) could not any longer exercise either of those rights. In my judgment this contention is not well-founded. It is hardly necessary to point out that the rights in question are of real importance only when an estate is insolvent and that if the effect of the Sub-section were to abolish those rights in cases of insolvent estates their practical value would be gone. The evident intention of the Legislature as expressed in Sub-section (2) in my opinion is that the amended

(1) Administration of Estates Act, 1869.

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rights therein referred to should be enjoyed to the same extent as the unamended rights were formerly enjoyed and that the words " subject as aforesaid " at the commencement of the concluding paragraph of the Sub-section, are referable only to the alterations in the right of retainer and in the right to prefer creditors effected by the preceding provisions of the Sub-section and do not embrace the provisions of Sub-section (1).

The question then arises how the two Sub-sections are to be reconciled and given practical effect to when an insolvent estate is being administered by the personal representative out of Court. *Prima facie* no doubt it would appear anomalous that whilst Sub-section (1) imposes upon the personal representative the duty of administering an insolvent estate in accordance with the bankruptcy law, Sub-section (2) recognises and preserves not only the right of retainer but also the right to prefer creditors, the latter right especially enabling him to disregard that duty. In my judgment, however, the true effect of Sub-section (2) is that the rights of the personal representative (as amended) are recognised as being what, before the Act, they had been held to be, namely, paramount rights, and that the provisions of Sub-section (1) only come into operation if and so far as those rights are not exercised. As already pointed out, the legal personal representative had not lost his right of retainer or his right to prefer creditors by reason of Section 10 of the Judicature Act, 1875, or by reason of Section 130 of the Bankruptcy Act, 1914, and the right to prefer creditors could, before the Act of 1925, and still can, be put an end to by an order for administration by the Court or by the presentation of a bankruptcy petition. The scheme of Sub-sections (1) and (2) of Section 34 as I understand it, is to place the administration of insolvent estates out of Court so far as possible on the same footing as the administration of such estates by the Court and, in both cases, to preserve to the personal representative the right of retainer and the right to prefer creditors as amended by Sub-section (2).

The practical difficulty realised by the Legislature of abolishing the right to prefer creditors in cases where an insolvent estate is administered by the personal representative out of Court was no doubt that pointed out by Lord Justice Vaughan Williams in the following passage of his judgment in *In re Samson*, [1906] 2 Ch. at page 589 : " the practical effect . . . . would be that in every " case an executor, if he wished to be safe, would have to take " care not to pay anybody until there had been an administration " judgment, with the result that everyone must be paid *pari* " *passu* ; but one knows that cases constantly arise in which a " prudent man may hope and expect that the estate will turn " out solvent, but he may feel that it is possible that it may not, in " which case a prudent executor would hold his hand. What

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" would be the result? Some of the creditors of the testator would " probably begin to sue him in the hopes of getting a judgment " which might enable them to realise 20*s.* in the pound, and the " administration of the estate would immediately be conducted " under an administration judgment, because some one creditor, " for the protection of himself and all the other creditors, would " take care to put an end to the possibility of one of their number " getting 20*s.* in the pound by starting an administration action." In my opinion there is nothing in the Act of 1925 to lend colour to the contention of the Crown that if the personal representative were to exercise his rights under Sub-section (2) instead of administering the estate according to the bankruptcy law under Sub-section (1) the common law right of priority of the Crown would revive either as regards the full amount of the debt or as regards the amount in respect of which priority was given to it by Section 33 of the Bankruptcy Act, 1914. Mr. Stamp was compelled to admit that if this contention were to prevail the Crown would by virtue of the provisions of Sub-section (1) have to share the benefit of any priority thus obtained *pari passu* with the other preferential creditors mentioned in Section 33 of the Bankruptcy Act, 1914, with the result that a novel and somewhat curious method of distributing assets would be introduced into the administration of insolvent estates. The true answer to any such contention, however, is that in assenting to be bound by the Administration of Estates Act, 1925, (see Section 57) and by the relevant provisions of the Bankruptcy Act, 1914, (see Section 151) the Crown has now waived its prerogative right of priority in the administration of insolvent estates out of Court in the same manner as it had already waived that right in the administration of such estates by the Court and in bankruptcy, with the result that such prerogative right of priority is now completely abrogated and that the only right remaining in the Crown in respect of its debt is the statutory right under the bankruptcy law. The correctness of this view is borne out by the decision of the House of Lords in *The Food Controller* v. *Cork*, [1923] A.C. 647, a case in which the right of priority of the Crown to the payment of its debts in a voluntary winding-up was negatived and the nature and extent of the Crown's prerogative rights of priority were considered and explained.

The effect of the total extinction of the Crown's prerogative right of priority in the administration of insolvent estates in my judgment is that the Crown can no longer by reason of that right claim to be a creditor of a higher degree than the personal representative. Consequently, unless the limited preferential right of payment conferred by Section 33 of the Bankruptcy Act, 1914, upon the Crown (*pari passu* with the other creditors therein mentioned) constitutes the Crown (and presumably those other

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creditors) creditors of a higher degree than the personal representative, the effect of Sub-section (1) is to enlarge the right of retainer in cases of administration of insolvent estates out of Court and to enable the personal representative in such cases to retain his debt as against the Crown in the same way as he could have done before the Act when an estate was being administered by the Court or in bankruptcy. This result may have been unforeseen, but it follows logically from the abolition of the last remnant of the prerogative right of priority in the administration of insolvent estates. An analogous unexpected enlargement of the right of retainer was brought about by Hinde Palmer's Act; see *In re Harris*, [1914] 2 Ch. 395.

There only remains the question whether the preferential right to payment conferred by Section 33 of the Bankruptcy Act, 1914, constitutes those entitled to priority thereunder creditors of a higher degree as against whom the personal representative is not entitled to exercise his right of retainer. The priority in which debts are directed by the Bankruptcy Acts to be paid in the distribution of the property of a bankrupt has apparently not hitherto been considered by the Court as affecting or interfering in any way with the exercise of the right of retainer of a personal representative either by the Court under Section 10 of the Judicature Act, 1875, (*In re May*, 45 Ch.D. 499; *In re Leng*, [1895] 1 Ch. 657; and *In re Ambler*, [1905] 1 Ch. 697) or in bankruptcy under Section 125 of the Bankruptcy Act, 1883, (*In re Rhoades*, [1899] 2 Q.B. 347). In the case of *In re Ambler*, the widow and executrix of the testator was held to be entitled to retain a loan made by her to him for the purpose of his business notwithstanding that under the joint operation of Section 3 of the Married Women's Property Act, 1882 (since replaced by Section 36, Sub-section (2) of the Bankruptcy Act, 1914) and Section 10 of the Judicature Act, 1875, she was prevented from proving for such loan in the administration by the Court of her deceased husband's insolvent estate in competition with his creditors for value. Counsel for the creditors opposing the widow's claim contended that the preference given to their debts in the administration of the insolvent estate constituted them creditors of a higher degree than the widow, but the Court did not accede to that contention, deciding the case in the widow's favour on the ground that Section 10 of the Judicature Act, 1875, had not altered the right of retainer and that Section 3 of the Married Women's Property Act, 1882, was not addressed to the subject of retainer.

In the case of *In re Rhoades* the question arose whether the personal representative of the deceased whose estate was being administered in bankruptcy could retain his debt in view of the provisions of Sub-section (5) of Section 125 of the Bankruptcy Act, 1883, which vested the property of the deceased in the Official

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Receiver as trustee thereof and directed that he should forthwith realise and distribute it in accordance with the provisions of the Act. The Court upheld the personal representative's right of retainer on the ground that only the balance of the property remaining after the personal representative had retained sufficient to pay his debt could be treated as the testator's assets vesting in the Official Receiver and distributable by him. Lindley, *M.R.*, at page 354, states: "It is true that an executor with a right of "retainer has not all the rights of a secured creditor: see *Lee* v. "*Nuttall*, (12 Ch.D. 61). He has no right to retain against "creditors of a higher degree than himself; but his right to retain "is a right to withdraw from the assets in his hands and distribut- "able amongst himself and other creditors of equal degree enough "to pay himself in full. His right to retain does not extend to "assets which he has not got in and which are not in his posses- "sion, nor to equitable assets."

The effect of these cases is that where an insolvent estate is being administered by the Court or in bankruptcy the personal representative can intercept and retain sufficient assets to satisfy his debt and that only the balance of the estate falls to be distributed in the order of priority laid down in Section 33 of the Bankruptcy Act, 1914, the Crown sharing in that balance *pari passu* with the other preferential creditors. It follows that when an insolvent estate was being administered by the Court or in bankruptcy the personal representative could before the Act of 1925 have retained his debt as against the Crown.

Now that Section 34 of the Act of 1925 makes the bankruptcy rules applicable to the administration of an insolvent estate by the personal representative out of Court and at the same time provides that such application is not to affect the right of retainer I am of opinion that the principles laid down in the above-mentioned cases are applicable to the administration of insolvent estates out of Court as well as to the administration of such estates by the Court, with the result that a personal representative administering an insolvent estate out of Court is entitled in exercise of his right of retainer to withdraw from the assets to be administered by him under Sub-section (1) enough to pay his debt in full and that the real and personal estate to be administered by him under that Sub-section is the balance (if any) remaining after such withdrawal.

If this be the right view, it follows that the provisions of the bankruptcy law as to priority of debts in the distribution of the assets are not addressed to the subject of retainer, and do not operate to constitute the creditors entitled to preferential payments thereunder creditors of a higher degree than the personal representative.

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If the contention of the Crown on this point were well-founded, Sub-section (1) would have effected a serious alteration and curtailment of the right of retainer theretofore enjoyed by the personal representative, and this, in my opinion, would be contrary to the letter and spirit of Sub-section (2)

For the reasons stated, I agree that this appeal fails and should be dismissed.

Romer, L.J.—The question that has to be determined in this case is as to the effect of Section 34, Sub-sections (1) and (2) of the Administration of Estates Act, 1925, upon an executor's right of retainer in the case of an insolvent estate. Before referring to the terms of the Section, it will be convenient to consider the rights of retainer possessed by an executor in such a case before the date of the coming into operation of the Act.

The right was one that enabled a legal personal representative who was himself the creditor of the testator or intestate to pay himself out of the legal assets the debt due to him in preference to the claims of creditors of the same class but not so as to defeat the claims against such assets of creditors of a higher class. An executor, if a simple contract creditor of his testator, could therefore only retain his debt out of the testator's legal assets after making provision for all debts that would rank in priority to the simple contract debts in the due course of administration of the testator's estate. Subject to this right and to the somewhat analogous right of preferring one debt of the testator to debts of the same class, his duty was to apply those assets in payment of all the testator's creditors in accordance with their respective priorities. Now, by Hinde Palmer's Act it was provided that in the administration of the estate of every person dying after the 1st January, 1870, no debt or liability of such person should be entitled to any priority or preference by reason merely that the same was secured by or arose under a bond, deed or other instrument under seal or was otherwise made or constituted a specialty debt, but that all the creditors of such person as well specialty as simple contract should be treated as standing in equal degree and be paid accordingly out of the assets of the deceased person whether such assets were legal or equitable, any statute or other law to the contrary notwithstanding. After the coming into operation of this Act, the question naturally arose as to whether it had or had not enlarged the executor's right of retainer, that is to say, whether an executor who was a simple contract creditor of his testator could retain his debt out of his testator's legal assets without making provision for payment of the testator's specialty debts, and it was held by Mr. Justice Kay in *In re Jones*, 31 Ch.D. 440, that the Act ought not to be so considered as to give to an executor in such a case the power to defeat specialty as well as simple contract creditors.

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This decision appears to have been followed in the Courts of first instance until the Court of Appeal in the case of *In re Samson*, [1906] 2 Ch. 584, held that the effect of the Act was to enable an executor to prefer simple contract creditors to the prejudice of specialty creditors. Lord Justice Buckley, in delivering judgment in the case, said this: "The question for our decision is "whether in administration it was right, after Hinde Palmer's "Act, for the executor to pay the simple contract creditors in full, "leaving a specialty creditor to some extent unpaid. To my mind "the true construction of Hinde Palmer's Act is simply this. It "begins by a recital which recognises that at the date of the Act "there were creditors of two classes, of which the one class had a "priority over the other class: the operative part of the Act "provides that there shall not be two classes in future; that a "specialty shall give no priority or preference; that all creditors, "specialty and simple contract, shall stand in equal degree."

The members of the Court expressly refrained from deciding as to whether the executor's right of retainer had been similarly enlarged, though the decision and the reasons given for it would seem logically to indicate that it had been. Accordingly, in *In re Harris*, [1914] 2 Ch. 395, it was held by Mr. Justice Sargant, notwithstanding the earlier decisions in Courts of first instance, that the result of the Act was to enlarge the executor's right of retainer in respect of a simple contract debt so as to enable him to exercise it as against specialty creditors as well as simple contract creditors, being of opinion that this result followed from the decision in *In re Samson*. The result of Hinde Palmer's Act therefore was to enlarge the executor's right of retainer and his right of preference not by any express words but merely by reason of the fact that it had altered the order of priority in which the testator's debts had to be paid by putting specialty debts upon the same footing as simple contract debts.

I may now turn to Section 34 of the Administration of Estates Act, 1925. That Section provides by Sub-section (1) that where the estate of a deceased person is insolvent his real and personal estate shall be administered in accordance with the rules set out in Part I of the First Schedule to the Act, and Part I of that Schedule provides as follows:—

"1. The funeral, testamentary, and administration expenses "have priority.

"2. Subject as aforesaid, the same rules shall prevail and be "observed as to the respective rights of secured and unsecured "creditors and as to debts and liabilities provable and as to the "valuation of annuities and future and contingent liabilities "respectively, and as to the priorities of debts and liabilities as may "be in force for the time being under the law of bankruptcy with "respect to the assets of persons adjudged bankrupt."

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Now the rules under the law of bankruptcy as to priority of debts and liabilities will be found in Section 33 of the Bankruptcy Act, 1914. By that Section it is provided, so far as seems to be material for the present purpose, that the debts mentioned in Sub-section (1) are to have priority over all other debts and as between themselves shall rank *pari passu* and that all other debts are to rank *pari passu*.

It is said by Mr. Stamp, on behalf of the Crown, that Sub-section (1) of Section 34 of the Act of 1925, if standing by itself, would necessarily destroy the executor's right of retainer and the executor's right of preference. That this would be the effect of Sub-section (1) standing alone, if it provided that where the estate of a deceased person is insolvent it shall be administered in bankruptcy or as though it were a bankrupt's estate, must, I think, be conceded. The Bankruptcy Act, 1914, makes no provision for any such rights, which rights would be inconsistent with the scheme of the Act. The Sub-section does not however provide for an administration in bankruptcy or as though the testator or the deceased person were a bankrupt. It merely provides in effect that the executor or other personal representative shall, in administering the estate of an insolvent testator or intestate observe, amongst other things, the rules as to the priority of debts and liabilities contained in the Bankruptcy Act. Just, therefore, as before the Act of 1925 the legal personal representative had, in administering the estate, to observe certain rules as to the priority of debts and liabilities, so now he has to administer the estate observing other rules as to the priorities of the debts and liabilities; and, just as the old rules as to priorities did not prevent him from retaining his own debt as against creditors of his own class, or from preferring one creditor over other creditors of the same class, so, I should have thought, had Sub-section (1) stood by itself, he would have still retained, after the coming into operation of the Act of 1925, the right of retaining his debt as against creditors of the same class and of preferring one creditor to other creditors of the same class, though the creditors are now divided into different classes from those into which they were divided before.

It is no doubt provided by Section 33, Sub-section (7) of the Bankruptcy Act, 1914, that subject to the provisions of that Act all debts proved in the bankruptcy shall be paid *pari passu*. This provision for payment is not however introduced into the administration of insolvent estates by the Act of 1925 as I read it. The Bankruptcy Act must be referred to in administering an insolvent estate for the purpose of ascertaining the priorities of the debts and liabilities. But the obligation of the executor to pay the debts and liabilities comes, not from the Bankruptcy Act, but from Section 34, Sub-section (1) of the Administration of Estates Act, 1925, which provides that the estate shall be administered. In

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that administration all the debts to which priority is not given by the Bankruptcy Act are to rank *pari passu*, just as before 1926 all debts of the same class ranked *pari passu*. But there would seem to be no greater obligation imposed on the executor to pay them *pari passu* than there was before. The Bankruptcy Act must also be looked at for the purpose of ascertaining " the respective rights " of the secured and unsecured creditors." But this, I think, means no more than the " relative " rights of the two classes. I cannot read it as though it said " the rights of the creditors " whether secured or unsecured." If that had been the intention of the Legislature, there could have been no object in the subsequent reference to the priorities of debts and liabilities.

I ought to add that it was held by Mr. Justice Astbury in *In re Laycock*, [1919] 1 Ch. 241, that Sub-section (5) of Section 33 of the Bankruptcy Act does not apply to an administration of a deceased's insolvent estate out of Court. We were not asked to review this decision and we heard no argument upon the point. I therefore assume for the purposes of this judgment that the case was rightly decided. I will only add that as at present advised I see no reason for thinking that it was not.

It is now necessary, however, to refer to Sub-section (2) of Section 34 of the Administration of Estates Act, 1925. It begins as follows :—" The right of retainer of a personal representative " and his right to prefer creditors may be exercised in respect of all " assets of the deceased, but the right of retainer shall only apply " to debts owing to the personal representative in his own right " whether solely or jointly with another person."

It was contended by Mr. Stamp that this Sub-section does not apply at all to insolvent estates. I cannot agree with that contention. Coming, as it does, immediately after the Sub-section that deals with insolvent estates, and before Sub-section (3) that deals with solvent estates, the argument appears untenable. But it was argued by Mr. Morton, on behalf of the executrix, and this argument prevailed before Mr. Justice Clauson, that the effect of these words is that the executor's right of retainer and right of preference have now been enlarged and that the rights can now be exercised to the prejudice of any creditor of the testator of any class. This result, it is said, follows from the fact that the right of retainer and right to prefer may now be exercised in respect of " all assets " of the deceased. Mr. Justice Clauson in his judgment dealt with this point as follows. He said that in respect to the right of retainer all assets of the deceased are placed on the same footing—and that, inasmuch as before the Act the right of retainer of an executor did not apply to all assets of the estate, not even to all legal assets but only to such legal assets as were available after provision had been made for creditors of superior

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degree to that in which the executor's debt ranked, the Legislature in Sub-section (2) had with reasonable plainness laid it down that there should be no such distinction as that which at some time prevailed in regard to creditors of varying degrees. But, with all respect to the learned Judge, I doubt if it was correct to say that under the old law the whole of the legal assets were not subject to the executor's right of retainer. It would, I think, be more accurate to say that all such assets were subject to the right, but that the right could not be exercised to the prejudice of creditors of superior degree. In my opinion the only effect of the first part of Sub-section (2) is to enable the right of retainer and the right to prefer to be exercised out of all the assets of the testator to the same extent, and to the same extent only, as, but for the Sub-section, it could have been exercised out of legal assets, with this exception, that the right of retainer is now restricted to debts owing to the personal representative in his own right and no longer extends to debts owing to the executor as trustee for others and the like.

If, therefore, Sub-section (2) ended there, I should have been of opinion that the rights of retainer and of preference remained as they were before the Act with the following exceptions. (1) The rights could henceforth be exercised in respect of all assets whether legal or otherwise; (2) In exercising the rights the priority of debts to be observed is that specified in the Bankruptcy Act; (3) The right of retainer can only be exercised in respect of a debt owing to the personal representative in his own right. But the Sub-section continues as follows:—" Subject as aforesaid, " nothing in this Act affects the right of retainer of a personal " representative or his right to prefer creditors." If the words " Subject as aforesaid " be treated as referring only to the earlier provisions of Sub-section (2) this addition to the Sub-section creates some difficulty. For if the construction I should have put on Sub-sections (1) and (2) if this addition had been omitted be the right one, the right of retainer and the right of preference would certainly be affected, in some cases for the better, in other cases for the worse. It is suggested that the word " prejudicially " should be read into the Sub-section before the word " affects ". But I can see no justification for doing this. The words " Subject " as aforesaid " must at any rate be referring to the provisions of the earlier part of the Sub-section, and one of those provisions alters the rights for the better and not for the worse.

But do these words " Subject as aforesaid " relate only to the earlier part of the Sub-section, or do they relate also to the provisions of Sub-section (1)? In my opinion they do also refer to the provisions of Sub-section (1) which, as I have construed it, do affect the rights both of preference and retainer. If this be not so, then the rights of retainer and preference which are not to be

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" affected " must be those that would have existed but for the Act, except to the extent that they are modified by Sub-section (2). The result of this would be that for the purpose of exercising those rights the order of priority of debts existing before the Act would have to be observed, and a different order of priority, *videlicet*, that introduced by virtue of Sub-section (1), would apply to the administration of the rest of the estate after the rights had been exercised. This construction would lead to a somewhat fantastic result and is not therefore one that should be adopted unless the words of the Act leave no alternative. In my judgment, there is the alternative that I have indicated, and it is a construction that does not affect the rights existing before the Act to any greater extent than is necessary to adapt them to the new scheme of administration. The construction for which the Respondent contends on the other hand would result in those rights being affected to a much greater extent, and one that is less in accord with the scheme of the Bankruptcy Act. It would enable the personal representative to exercise his right of preference so as to deprive the Crown of any dividend in respect of debts due to it from an insolvent estate, and I think that Mr. Stamp was justified in saying that it is only too probable that the right in many cases would be exercised in this way. The right of preference can no doubt be put an end to by obtaining an order for administration of the estate by the Court. But the harm might be done before the Crown or any other preferential creditor was in a position to apply for such an order.

I am not prepared to adopt a construction that would result in so great an extension of the right of preference unless the words of the Act permit of no other. In my opinion, the Act does permit of the other construction which I have indicated. With great deference, therefore, to the other members of the Court who have arrived at a different conclusion, I think that the Order of Mr. Justice Clauson should have been discharged and a declaration made that the Plaintiff's right of retainer may not be exercised to the prejudice of any preferential claim of His Majesty under Section 33, Sub-section (1) (*a*) of the Bankruptcy Act, 1914, and Section 34 of the Administration of Estates Act, 1925, and the First Schedule to that Act.

I only wish to add one or two words about some of the authorities cited to us dealing with Section 10 of the Judicature Act, 1875. Speaking for myself, I do not think that they assist in construing the Administration of Estates Act, 1925, inasmuch as the Section only related to an administration by the Court and contained a reference to the Rules in Bankruptcy in language different from that employed in Part I of the First Schedule to the Act of 1925. There was, for instance, at one time some doubt whether Section 10 of the Act of 1875 imported the Bankruptcy

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Rules as to priority of debts *inter se* at all, and it was not until the decision of the Court of Appeal in the case of *In re Leng*, [1895] 1 Ch. 652, that it was settled that those priority rules were so imported. In the meantime it had been held by Mr. Justice North in *In re May*, 45 Ch.D. page 499, that a widow as administratrix of her insolvent husband was in an administration action entitled to retain a debt due to her which in Bankruptcy would have been postponed to other creditors by virtue of Section 3 of the Married Women's Property Act, 1882. For it had been held by the Court of Appeal in *Lee* v. *Nuttall*, 12 Ch.D. 61, that Section 10 of the Judicature Act had not affected an executor's right of retainer on the ground apparently that the sole object of the Section was to get rid of the rule in Chancery under which a secured creditor could prove for the full amount of his debt and realise his security afterwards. Now in *In re Leng*, the Court of Appeal took a different view of the Section, and held that in such a case the widow could not prove in competition with other creditors. In other words, it held that the Section had altered the rules of priority. The Court, nevertheless, distinguished *In re May* on the ground that that case was dealing not with the question of proof but of retainer, and Lord Justice Lindley said :— "The Legislature has not yet thought proper to alter the law "of retainer, and sect. 3 of the Married Women's Property "Act is not addressed to that subject." In consequence of this the Court of Appeal in *In re Ambler*, [1905] 1 Ch. 697, held that in a similar case a widow executrix might retain. If Section 10 of the Judicature Act, 1875, had not introduced the Bankruptcy Rules as to the priorities of debts, as was thought in *Lee* v. *Nuttall*, obviously there was nothing in the Section that prevented an executrix retaining in such circumstances. But if, as the Court of Appeal held in *In re Leng*, these rules had been so introduced, it was arguable, at any rate, that the right of retainer was affected, inasmuch as such a right cannot be exercised so as to defeat claims of creditors of a superior degree. This aspect of the matter was not dealt with by the Court, and they treated the old rule that the right of retainer could be exercised notwithstanding a decree for administration as being unaffected by the Section. Now, the right of preferring creditors was always defeated by such a decree even before the Judicature Act, inasmuch as the payment of the creditors was taken out of the hands of the legal personal representative and was vested in the Court. The right of retainer, however, was not so defeated. This was decided in *Nunn* v. *Barlow*, 1, Simons and Stuart's, page 588, on the ground that a decree for administration did not affect the legal priorities of creditors; and in *Davies* v. *Parry*, [1899] 1 Ch. page 602, and in *In re Belham*, [1901] 2 Ch. 52, this decision was held to be unaffected by the terms of a creditor's administration bond, and

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was applied in cases which came within Section 10 of the Judicature Act. The retainer, it was held, was not an " undue " preference by the administrator of his own debt. But the fact is that the rule of equality amongst creditors of the same degree was only applied by the Courts of Equity to the assets which the Court could distribute, and if any legal assets passed through the hands of the legal personal representative on their way to the Court, all that reached the Court was the residue of such assets after the right of retainer had been exercised. This is the ground upon which it was held that a right of retainer was not defeated by an administration in Bankruptcy under Section 125 of the Bankruptcy Act—see *re Rhoades*, [1899] 2 Q.B. 347, and *re Gilbert*, [1898] 1 Q.B. 282. All that passed to the Official Receiver under that Section were the assets coming to the hands of the legal personal representative after he had exercised his right of retainer. But Section 34, Sub-section (1) of the Administration of Estates Act, 1925, relates to an administration by the legal personal representative as well as to an administration by the Court. I am, therefore, unable to see what bearing the cases I have referred to have upon the question now to be determined. The administration in the present case is in the hands of the executrix, and the rules of Bankruptcy as to priority of debts applies to the assets to be administered by her. In the view that I take those rules must now be regarded by her as taking the place for the purposes of retainer and preference of the rules of priority of debts that prevailed before the Act came into force.

Mr. Fergus Morton.—My Lord, I apprehend that there will be no need for any Order as to costs, in view of my learned friend's statement.

Mr. J. H. Stamp.—Except for taxation.

Lord Hanworth, M.R.—Do you want that Order for taxation?

Mr. J. H. Stamp.—I dare say it will not be necessary to tax, but I think we ought to have an Order for taxation. The ordinary rule will do.

Lord Hanworth, M.R.—No; we do not do that. You do not want an Order against you, because the undertaking is sufficient, Mr. Stamp.

Mr. J. H. Stamp.—If your Lordship pleases.

The Crown having appealed against the decision in the Court of Appeal, the case came before the House of Lords (Lord Atkin and Lords Warrington of Clyffe, Tomlin, Macmillan and Buckmaster) on the 26th and 27th November, 1931, when judgment was reserved. On the 22nd February, 1932, judgment was given

unanimously in favour of the Crown on the first point in the Originating Summons, reversing the decision in the Court below. The case was remitted to the Chancery Division to determine the second question on the Summons.

The Attorney-General (Sir W. A. Jowitt, K.C.) and Mr. J. H. Stamp appeared as Counsel for the Crown and Mr. F. D. Morton, K.C., and Mr. Norman Daynes for the executrix.

JUDGMENT.

Lord Atkin.—My Lords, the question in this case is as to the executrix's right of retainer. The testator died on 19th June, 1929. By his last will he bequeathed the whole of his estate to the Respondent whom he appointed his sole executrix. The estate was obviously insolvent. In round figures the assets were worth about £1,000. The Crown had a claim for arrears of Income Tax and Super-tax amounting to over £4,000; there were other creditors for about £4,000, including a claim by the executrix for about £1,000 for money lent. The executrix claims to retain the whole of the assets to satisfy her debt. The Crown dispute the right to retain any assets against their debt, claiming that the right of retainer does not operate against any part of their debt, or, alternatively, does not operate against so much of their claim as is given priority by the provisions of the Bankruptcy Act, 1914, Section 33, read with the Administration of Estates Act, 1925, Section 34, which is limited as " not exceeding in the whole one year's assessment." The meaning of the limitation does not arise on the appeal to this House.

Mr. Justice Clauson and the majority of the Court of Appeal have decided in favour of the executrix, Mr. Justice Clauson on the ground that the terms of the legislation place the Crown in the same position as any other creditor, and as the right of retainer is expressed to be exercisable as to " all assets of the deceased " the retainer must be available against the Crown. The majority of the Court of Appeal, the Master of the Rolls and Lord Justice Lawrence, have held that the prerogative right of the Crown to priority is now regulated by the Bankruptcy Act, and that the result is that, in administration, the Crown cannot claim to be a creditor of higher degree than the personal representative. Lord Justice Romer, on the contrary, has held that the executor can only exercise his right of retainer subject to the priorities constituted by the Bankruptcy Act and that the retainer is subject in the present case to the claim of the Crown for taxes " not exceeding in the whole one year's " assessment."

I think that the question can be solved by a short consideration of the common law right of retainer. The reason for it is to be found in the report in Plowden at page 184 of the opinions of the judges of both the King's Bench and the Common Pleas in the case

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of *Woodward* v. *D'Arcy* given in 1547 after discussion in several previous terms. The explanation is that without the right the executor would be bound to pay the other debts of the testator and to leave the testator's debt to himself unpaid : " But our law is not " so unreasonable or uncharitable, for the executor may retain " assets to pay himself notwithstanding he may not bring an action " to recover it, for true it is that the action is gone by the act of " administration." The reporter states : " This was the clear " opinion of all the Justices of the one Bench and of the other " except Brook (Chief Justice of the Common Pleas) who was " strongly of opinion against them and it was the opinion of all " the Serjeants also as well as the rest of them as of Catline at last " who was of counsel for the plaintiff." The case shows the right of retainer well established, but does not refer to the limitation of the right to retain only against debts of equal degree. It did not arise in that case, where the action was in debt and the plea averred a retainer of a debt due on a recognisance of the force of a statute staple. The limitation is, however, also well established. As stated by Blackstone : " The law allows the executor to retain so " much as will pay himself before any other creditors whose debts " are of equal degree." We therefore are brought to consider what is meant by debts of equal or higher degree. " In payment of debts " the executor must observe the rules of priority otherwise on " deficiency of assets if he pays those of a lower degree first he " must answer those of a higher out of his own estate." For the purpose of administration the order of degree of debts was the order in which they were entitled to priority of payment. Such an order was established by common law. It was of course capable of being varied by statute and, accordingly, in the order of degrees there found place debts which have been given priority by statute. Thus Blackstone in stating the order says : " First funeral and testa- " mentary expenses. Second debts due to the King on record or " specialty. Thirdly such debts as are by particular statutes to be " preferred to all others, as the forfeitures for not burying in woollen " (30 Car. II, c. 3), money due on poor rates (17 Geo. II, c. 38)," —this refers to money due from overseers of the poor—" for letters " to the Post Office by 9 Anne, c. 10 "—I cannot find this in the statute cited—" and some others. Fourthly debts of record as " judgments statutes and recognisances. Fifthly debts due on " special contracts as for rent or upon bonds, covenants and the like " under seal. Lastly debts due on simple contracts." And it may be noted that as to the last class he adds : " among these simple " contracts servants' wages are by some with reason preferred to " any other and so stood the ancient law according to Bracton and " Fleta."

The same order is substantially maintained in Williams on *Executors*. In the first edition by Sir Edward Vaughan Williams in 1832, Volume 2, page 654, the order of priority is set out. Next

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after debts due to the Crown by record or specialty appear " Certain " specific debts, which are, by particular statutes, to be preferred to " all others." He cites the statutes referred to by Blackstone and adds The Friendly Society Act of 1793, 33 Geo. III, c. 54, and the Local Metropolis Act, 57 Geo. III, c. XXIX, in respect of money due from the deceased as collector to paving commissioners. The same order of degrees is maintained in succeeding editions. In the 11th edition, 1921, the only effective additions to the statutes are the Saving Bank Act, 1863, and the Workmen's Compensation Act, Section 5 (3), so far as it relates to priority in bankruptcy.

Such statutes as have been referred to are instances where the legislature has thought fit to exalt simple contract debts to a higher degree of priority. Similarly, debts of higher estate may be abased. This was the result of Hinde Palmer's Act, 1869, which, in administration, put specialty debts in the same degree as simple contract debts. The necessary result was, as held by Mr. Justice Sargant in *re Harris*, [1914] 2 Ch. 395, that an executor could retain for a simple contract debt against a specialty debt. Applying the above rules to the present facts it appears to me reasonably plain that the result of the priority section in the Bankruptcy Act when applied to the administration of estates by the Administration of Estates Act, 1925, is to place all the priority debts to the extent of their priority in the degree of debts " which are, by particular statutes, " to be preferred to all others." The Bankruptcy Act alone would not have been sufficient; but once the priorities there mentioned are incorporated into law as to administration and the duty to observe them is imposed upon the personal representative, the debts to which preference is given appear to me at once to rise in the scale. The same result would necessarily follow in respect of the corresponding right of the executor to prefer creditors, which is similarly limited to a preference amongst creditors of equal degree. If this view be correct it appears not to be of great importance how we construe the words appended to the Administration of Estates Act, 1925, s. 34 (2), " Subject as aforesaid, nothing in this Act affects the right of retainer " of a personal representative, or his right to prefer creditors." The right still remains as before, the right to retain against debts of equal degree. Some debts have been put in a higher degree than they were before; but the executor's right always has been subject to changes of that description. What has been affected is not the right, but the classes in respect of which the right is exercised. But if that is not the true meaning, then, in order to give any effect to the first words of the Section, it becomes necessary to read " subject " as aforesaid " as referring to Subsection (1), just as in the First Schedule the same words in Rule 2 obviously refer to Rule 1. I attach great importance to the fact that the saving applies to the right to prefer creditors in the same words as it applies to the right of retainer, and nothing will persuade me that it is consistent with the intention of the legislature, as deduced from the language of the statute, to

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give power to the administrator of an insolvent estate, before any administration order, to pay ordinary debts in preference to rates or taxes, wages of servants or workmen's compensation, the priority of which is now by the Workmen's Compensation Act of 1925, Section 7 (3), unlimited in amount subject to the provision of the Act as to insurance.

The question whether the personal representative can exercise his right of retainer against the debts which are directed to be paid *pari passu* will only arise in the present case if the Crown are wrong in their construction of the words "not exceeding one year's "assessment." But as that event is at least possible, I think it right to say that in my opinion there are now only two or possibly three degrees of priority of debts, being firstly, those which are by the Bankruptcy Act expressly given priority, secondly, those which are expressly directed to be paid *pari passu* and, possibly, thirdly, those mentioned in Section 36 of the Bankruptcy Act and in Section 3 of the Partnership Act, the effect of the latter Section being expressly retained in the Bankruptcy Act, Section 33. It follows that the balance of any Crown debt in excess of that portion which is given priority is now of the same degree as the debt of the executrix in the present case and that she can retain against such balance.

The difficulty which the Courts below experienced in deciding this matter was the line of authority *Lee* v. *Nuttall*, *re May*, *re Leng*, culminating in *re Ambler*, which decided that, notwithstanding the terms of the Married Women's Property Act, 1882, which would postpone in bankruptcy a wife's proof for a debt lent by her to her husband for the purposes of his trade, the wife, if executrix of her husband, could retain such a debt against trade creditors. It is a curious instance of how a series of decisions, none of which are of binding force on this particular matter, gradually assume authoritative influence. *Lee* v. *Nuttall*, 1879, 12 Ch. D. 61, had nothing to do with degrees of debts. It only decided that the executor was not a secured creditor and that Section 10 of the Judicature Act, 1875, did not make him a secured creditor and in that sense did not apply to retainer. In fact Section 10 did not incorporate any provisions of the Bankruptcy Act as to priorities, and no question of priority or even of proof arose. *Re May*, 45 Ch. D. 499, was a case where the widow executrix had lent money to her husband for the purposes of his trade. There had been an administration order. The estate was insolvent and the bankruptcy rules as to priority had been introduced into such an administration by the Preferential Payments in Bankruptcy Act, 1888, Section 5. Mr. Justice North held that the executrix could retain, relying on the supposed decision in *Lee* v. *Nuttall* that the Judicature Act, 1875, Section 10, did not affect the right of retainer. In *re Leng*, [1895] 1 Ch. 652, it was held that the effect of the Married Women's Property Act, Section 3, and the Judicature Act, 1875, Section 10,

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in the administration of an insolvent estate after an administration order, was to postpone the claim of the widow in respect of a loan to which the Married Women's Property Act applied. No question of retainer arose, but Lord Justice Lindley said that the decision of the Court was not inconsistent with *re May*, that the law of retainer had not been altered and that Section 3 of the Married Women's Property Act was not addressed to that subject. In *re Ambler* the judges followed the dicta in *re Leng*, though both Mr. Justice Farwell and Lord Justice Stirling would have themselves decided otherwise. I do not think that there was any decision constraining the Court of Appeal to decide *re Ambler* as they did. It may be that the decision can be supported by reference to the more restricted rules as to the effect of the Bankruptcy Act governing the administration of estates under an order of the Court before the Act of 1925. And it is possible that the position of debts covered by Section 36 of the Bankruptcy Act which by Sub-section 2 takes the place of the Married Women's Property Act, Section 3, may at some future time be held not to be in a lower degree than the debts to which they are postponed, though I cannot foresee the reason for so holding. But I am satisfied that unless *re Ambler* can be distinguished in some such way, it should not be followed in this House so as to defeat what appears to me to be a very plain application of the well-established law relating to retainer. I am of opinion that to the extent to which the Crown claim for taxes is given priority in bankruptcy, it is a debt of higher degree than that of the executrix in this case and that she cannot exercise her right of retainer in priority to such claim and that the first question in the summons should be answered accordingly. The appeal should be allowed and the judgments below should be set aside and a declaration should be made as above stated.

Lord Warrington of Clyffe.—My Lords, I have had the advantage of reading the opinion of my noble and learned friend on the Woolsack and that of my noble and learned friend Lord Tomlin, which is about to be read; I concur therein and cannot usefully add anything.

Lord Tomlin (read by Lord Macmillan).—My Lords, the question to be determined in this case is whether an executrix can retain out of the insolvent estate of her testator her own simple contract debt as against a Crown debt for taxes.

To find the answer it is, I think, necessary to examine a series of statutes beginning with the Administration of Estates Act, 1869 (commonly called Hinde Palmer's Act), and ending with the Administration of Estates Act, 1925.

It would have been noteworthy if a number of statutes extending over so many years had not generated some cases upon their construction. They have, in fact, done so and these cases also require consideration.

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Now the right of retainer, as it stood before it was affected by statute, was a right on the part of the legal personal representative to retain out of legal assets, actually or constructively in his possession, any debt due to him from the deceased as against all creditors whose debts were of equal degree with or of lower degree than his own. The priority in which debts by law fell to be paid determined the degrees.

The Crown had priority over the subject in respect of specialties and debts of record. Other Crown debts had priority over the debts of the subject of equal degree.

Subject to the rights of the Crown the order of priority of the payment of debts was as follows :—(1) Debts to which particular statutes give priority. (2) Judgments in Courts of Record. (3) Recognisances and statutes; for example, statutes merchant. (4) Debts by specialty. (5) Debts by simple contract.

The right of retainer, unlike in this respect the right to prefer, was not interfered with by a decree for administration and the legal personal representative could retain out of legal assets come to his hands after decree, for it was said that this decree did not affect the legal priorities of creditors and that there was therefore no distinction between assets possessed prior to the decree and assets possessed subsequent to it (see *Nunn* v. *Barlow*, 1 Simons and Stuart, 588).

In 1869 the first material change was made. By Section 1 of the Administration of Estates Act, 1869, it was enacted as follows :— " In the administration of the estate of every person who shall die " on or after the first day of January one thousand eight hundred " and seventy no debt or liability of such person shall be entitled to " any priority or preference by reason merely that the same is " secured by or arises under a bond, deed, or other instrument under " seal, or is otherwise made or constituted a specialty debt; but all " the creditors of such person, as well specialty as simple contract, " shall be treated as standing in equal degree, and be paid accord- " ingly out of the assets of such deceased person, whether such assets " are legal or equitable, any statute or other law to the contrary " notwithstanding : Provided always, that this Act shall not " prejudice or affect any lien, charge, or other security which any " creditor may hold or be entitled to for the payment of his debt." This Section does not in terms refer to or purport to deal with the right of retainer. It does, however, alter priorities in administration by abolishing the existing priority of specialties and by making specialties and simple contract debts of equal degree. It also directs that these debts shall be paid out of the assets accordingly.

It has been held that as a result of this Section a simple contract debt can be retained as against a specialty, not, as I understand it, because there has been any alteration in the right of retainer itself, but because a change has been made in the field in which the retainer operates and because the effect of the direction for payment out of

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the assets *pari passu* of specialties and simple contract debts was to convert creditors on specialty and simple contract into creditors of equal degree (see *re Samson*, [1906] 2 Ch. 584, and *re Harris*, [1914] 2 Ch. 395).

In the Bankruptcy Act, 1869, provision was made (Section 32) for payment in bankruptcy of specified debts including certain assessed taxes in priority to all other debts, the preferred debts ranking equally *inter se*, and it was enacted that subject to these preferences all debts should be paid *pari passu*. The order of priorities prescribed by this Act differed from the order of priorities in administration. In particular, there was no priority for Crown debts beyond that in respect of some assessed taxes. The Act also provided (see Section 49) that an order of discharge should not release a bankrupt from debts due to the Crown. Under the Act it was held that the Crown was not bound except by the Sections in which it was referred to (see *re Bonham*, 10 Ch. D. 595).

The next step was that certain of the rules in bankruptcy were by Section 10 of the Supreme Court of Judicature Act, 1875, introduced into the administration by the Court of insolvent estates of deceased persons.

That Section, so far as material, was as follows :—" In the " administration by the Court of the assets of any person who may " die after the commencement of this Act, and whose estate may " prove to be insufficient for the payment in full of his debts and " liabilities, and in the winding up of any company under the " Companies Acts, 1862 and 1867, whose assets may prove to be " insufficient for the payment of its debts and liabilities and the " costs of winding up, the same rules shall prevail and be observed " as to the respective rights of secured and unsecured creditors, " and as to debts and liabilities provable, and as to the valuation of " annuities and future and contingent liabilities respectively, as " may be in force for the time being under the Law of Bankruptcy " with respect to the estates of persons adjudged bankrupt; and " all persons who in any such case would be entitled to prove for " and receive dividends out of the estate of any such deceased person, " or out of the assets of any such company, may come in under the " decree or order for the administration of such estate, or under the " winding up of such company, and make such claims against " the same as they may respectively be entitled to by virtue of this " Act." It is to be noted (1) that this Section applies to the administration of insolvent estates only when they are being administered by the Court (see *re Laycock*, [1919] 1 Ch. 241), so that thereafter the rules governing an administration by the Court differed from those governing an administration by the legal personal representative out of Court and (2) that the rules of bankruptcy introduced into a Court administration were limited to those relating to certain specified matters not in terms covering the priorities of debts.

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There followed conflicting decisions as to whether the rules as to bankruptcy priorities were introduced by this Section (see *re Albion Steel & Wire*, 7 Ch. D. 547, and *re Association of Land Financiers*, 16 Ch. D. 373). The question was later on treated as set at rest by the Preferential Payments in Bankruptcy Act, 1888, the provisions of which I shall presently mention.

The only other case up to this point requiring notice is *Lee* v. *Nuttall*, 12 Ch. D. 61, which, in my view, notwithstanding an expression of opinion to the contrary by Mr. Justice North in *re May*, 45 Ch. D. 499, decided nothing more than that the legal personal representative was not, by reason of his right of retainer, in the position of a secured creditor in the administration by the Court of an insolvent estate.

In 1882, the Married Women's Property Act was passed. Section 3 of that Act was as follows : " Any money or other estate " of the wife lent or entrusted by her to her husband for the purpose " of any trade or business carried on by him, or otherwise, shall be " treated as assets of her husband's estate in case of his bankruptcy, " under reservation of the wife's claim to a dividend as a creditor " for the amount or value of such money or other estate after, but " not before, all claims of the other creditors of the husband for " valuable consideration in money or money's worth have been " satisfied." This Section purported to regulate the position in the bankruptcy of the husband of the wife who had lent money to the husband for the purposes of his business.

The position of the wife under the combined effect of this Section and Section 10 of the Act of 1875 fell to be considered in some later cases to which I shall hereafter refer.

The next relevant Act was the Bankruptcy Act, 1883, which replaced the Act of 1869. This Act, by Section 10, in effect re-enacted the provisions of the Act of 1869 as to priorities, with some modifications, and provided that subject to the provisions of the Act all debts proved in the bankruptcy should be paid *pari passu*. It also provided (Section 30) that, with certain exceptions, which covered a limited class of Crown debts, all debts should be released by the order of discharge. By Section 125, power was given to the Court in bankruptcy to administer in bankruptcy the estate of a deceased debtor where the Court was not satisfied that there was a reasonable probability that the estate would be sufficient for the payment of the deceased's debts. By Section 150, it was provided that the provisions of the Act as to (*inter alia*) the priorities of debts and the effect of an order of discharge should bind the Crown.

At this stage in the history of the legislation it is to be observed (1) that the Crown was clearly bound by the priority provisions in any bankruptcy proceedings, (2) that there was nothing to introduce into the administration of insolvent estates by the Court, outside the bankruptcy jurisdiction, the bankruptcy rules as to the priorities

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of debts if such rules were not introduced by Section 10 of the Supreme Court of Judicature Act, 1875, and (3) that, nevertheless, where an order was made under Section 125 for the administration in bankruptcy of a deceased person's estate, the bankruptcy rules as to priorities of debts undoubtedly applied.

In this state of affairs, the question was bound to arise, and did, in fact, later on arise, as to the effect upon retainer of an administration under Section 125. The answer given was that the executor still had the right of retainer and that the Official Receiver could not take as against the executor more than the creditors could have taken (see *re Rhoades*, [1899] 2 Q. B. 347). It is to be observed, however, that in this case there was not any question of priorities. There is nothing therefore in this decision inconsistent with the view that though the right of retainer continued as against the Official Receiver, the field in which it operated was determined by the priorities prevailing in the bankruptcy administration.

Next came the Preferential Payments in Bankruptcy Act, 1888. By Section 1 (1), some further modification was made in bankruptcy priorities. By Section 1 (6), it was provided that Section 1 of the Act should apply in the case of a deceased person who died insolvent as if he were a bankrupt and as if the date of his death were substituted for the date of the receiving order. By Section 3, the Act is made to apply only in the case of receiving orders and orders for the administration of the estates of deceased debtors according to the law of bankruptcy made after the commencement of the Act.

In *re Leng*, [1895] 1 Ch. 652, referred to more fully later on, the Court of Appeal took the view that Section 1 (6) of the Act of 1888 extended the bankruptcy priorities of debts to the administration in the Chancery Division of insolvent estates.

The position had now developed to a point at which the question might arise as to how the legal personal representative stood in regard to his retainer where the estate was being administered in the Chancery Division, the priorities of debts in bankruptcy being regarded as applicable to that administration.

In *re May*, 45 Ch. D. 499, where the administration order in the Chancery Division was made after this Act of 1888 had come into force, it was held by Mr. Justice North that a widow, the executrix of her deceased husband, was entitled to retain a debt which would have been postponed in bankruptcy by reason of Section 3 of the Married Women's Property Act, 1882. This decision appears to have been based upon three grounds, namely :— (1) that Section 3 did not apply at all because the event referred to therein, that is, the husband becoming bankrupt, had not occurred; (2) that Section 10 of the Act of 1875 only imported certain rules which were not wide enough to cover the particular case; (3) that the last-mentioned Section did not affect the right of retainer. The effect of the Act of 1888 does not appear to have been considered.

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A few years later in *re Leng*, [1895] 1 Ch. 652, the widow of an insolvent testator having lent money to her husband for his business was held by the Court of Appeal to be postponed to other creditors in a Chancery administration action on the ground that Section 3 of the Act of 1882 constituted one of the rules as to debts provable in bankruptcy and was therefore imported into the administration by Section 10 of the Act of 1875. Here there was no question of retainer and in distinguishing *re May*, Lord Justice Lindley said : " The Legislature has not yet thought proper to alter the law of " retainer, and section 3 of the Married Women's Property Act is " not addressed to that subject." It may be observed that in this case Lord Justice Lindley assumes that Section 1 (6) of the Act of 1888 had introduced bankruptcy priorities into the administration of an insolvent estate in the Chancery Division. The effect of Section 3 of the Act of 1888 does not seem to have been considered, but Mr. Justice Stirling, in *re Heywood*, [1897] 2 Ch. 593, treated himself as bound to regard the decision in *re Leng* as one made upon consideration of Section 3 of this Act of 1888.

Finally in *re Ambler*, [1905] 1 Ch. 697, the Court of Appeal, basing themselves to some extent upon dicta in *re Leng*, held that by the combined effect of Section 3 of the Married Women's Property Act, 1882, and Section 10 of the Act of 1875, a widow's debt due from her husband in respect of his business was postponed in proof and distribution, but that her right of retainer was not affected.

The Bankruptcy Act, 1914, replaced the Acts of 1883 and 1888 without material alteration so far as concerned the matter under consideration. Section 33 of the new Act regulated debt priorities, the assessed taxes to which priority is given being limited to those " not exceeding in the whole one year's assessment." Section 130 was substituted for Section 125 of the Act of 1883.

Now the position at this stage upon the statutes and the decided cases may, it seems to me, be summarised as follows :—(1) The bankruptcy priorities were introduced into the administration of the estate of a deceased insolvent both in an administration in bankruptcy and in an administration in the Chancery Division, but were not introduced into such an administration conducted by the legal personal representative out of Court. (2) If the administration of a deceased's insolvent estate began out of Court, but was at a later stage continued under an order for administration, the order of the priorities of debts would change in said administration. (3) The Crown in administration in bankruptcy and in the Chancery Division had lost its priority under the general law and was only entitled to the limited priority conferred by the bankruptcy rules. (4) The right of retainer continued to be exercisable whether the administration took place out of Court, in bankruptcy or in the Chancery Division. (5) The priorities of debts, by reference to which the retainer operated, were, in the case of administration out

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of Court, the old order of priorities, but in the case of administration in bankruptcy or in the Chancery Division there was room for doubt. There was no decision in connection with administration in bankruptcy as to the priorities by reference to which the right of retainer was to be exercised, but *re Ambler* is, I think, only consistent with the view that in an administration in the Chancery Division regard must be had to the old priorities in exercising such right.

In this position of affairs the Administration of Estates Act, 1925, was passed. The Act provided as follows:—Section 34. "(1) Where the estate of a deceased person is insolvent, his real "and personal estate shall be administered in accordance with the "rules set out in Part I of the First Schedule to this Act. (2) The "right of retainer of a personal representative and his right to prefer "creditors may be exercised in respect of all assets of the deceased, "but the right of retainer shall only apply to debts owing to the "personal representative in his own right whether solely or jointly "with another person. Subject as aforesaid, nothing in this Act "affects the right of retainer of a personal representative, or his "right to prefer creditors. (3) Where the estate of a deceased person "is solvent his real and personal estate shall, subject to rules of "court and the provisions hereinafter contained as to charges on "property of the deceased, and to the provisions, if any, contained "in his will, be applicable towards the discharge of the funeral, "testamentary and administration expenses, debts and liabilities "payable thereout in the order mentioned in Part II of the First "Schedule to this Act." Section 57:—"(1) The provisions of this "Act bind the Crown and the Duchy of Lancaster, and the Duke of "Cornwall for the time being, as respects the estates of persons "dying after the commencement of this Act, but not so as to affect "the time within which proceedings for the recovery of real or "personal estate vesting in or devolving on His Majesty in right of "His Crown, or His Duchy of Lancaster, or on the Duke of "Cornwall, may be instituted." First Schedule. Part 1:— "Rules as to Payment of Debts where the Estate is insolvent. "1. The funeral, testamentary, and administration expenses have "priority. 2. Subject as aforesaid, the same rules shall prevail "and be observed as to the respective rights of secured and unsecured "creditors and as to debts and liabilities provable and as to the "valuation of annuities and future and contingent liabilities "respectively, and as to the priorities of debts and liabilities as "may be in force for the time being under the law of bankruptcy "with respect to the assets of persons adjudged bankrupt."

It will be observed (1) that Section 34 (1) in effect reproduces Section 10 of the Supreme Court of Judicature Act of 1875 with the modifications resulting from the Act of 1888 and extends the operation of the provisions as to the bankruptcy rules, expressly including those relating to debt priorities, to all classes of administration of

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insolvent estates whether in Court or out of Court and (2) that the first paragraph of Section 34 (2) enlarges the right of retainer and the right to prefer so as to be capable of exercise in respect of all assets, that is, equitable as well as legal, but limits the right of retainer to debts owing to the legal personal representative in his own right. The first three words of the second paragraph of Sub-section (2), namely, " subject as aforesaid ", in my opinion, refer only to the provisions of the first paragraph of that Sub-section. To my mind, the position of these words is conclusive on this point.

As the new Act applies the bankruptcy rules to the whole area of administration, that is, both in Court and out of Court, there cannot be any case of an insolvent estate where the administration will be governed by any other rules. In all cases all debts (with the exceptions to which priority is given) must be paid *pari passu*. The Crown has lost its old priority and can now only claim the limited priority conferred by the exceptions from the general equality. In other words, there has been a complete alteration by statute of the priorities and therefore of the degrees of debts in the whole field of insolvency, the only field in which the rights to retain and to prefer have any importance or value.

In these circumstances, I think that the principle applied in construing Hinde Palmer's Act (where words directing payment similar to those of the Bankruptcy Act are to be found) should be applied in construing the Act now under consideration (see *re Harris, ubi supra*).

The right to retain or to prefer has not been altered, but the degrees in which debts are ranged have been changed and it is in the field as so changed that the rights in question must to-day operate.

The result is that all debts fall within one or other of two degrees. There are no other degrees where the Act of 1925 applies. If, therefore, a legal personal representative is a creditor for a debt in the higher of the two degrees, he can retain against all creditors of whichever degree they may be. If, however, his debt falls within the lower degree, he can retain against all creditors of such degree but against none in the higher degree.

This is not, I think, inconsistent with my reading of the second paragraph of Section 34 (2), inasmuch as Section 34 (2) deals only with the nature of the rights themselves. This view of the matter avoids the many difficulties which would arise if the rights to retain and to prefer (and in this respect the two rights cannot, I think, be distinguished) were to be governed by priorities differing from those which determine payment of debts.

It is, however, difficult to reconcile with the decision in *re Ambler*. It is true that that case was decided upon different statutes, and at a time when the whole field of insolvency was not occupied by

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the bankruptcy rule of priorities of debts, and on these grounds some distinction may be founded. I am satisfied, however, that, whether distinguishable or not, it ought not to afford a guide to your Lordships' House in resolving the question now under consideration.

My conclusion, therefore, is that in the present case there was no right to retain against the Crown so far as the Crown has priority under the bankruptcy rules affecting debt priorities. The point raised by the second question of the originating summons as to how much of the Crown's debt is covered by the priority given by those rules has not yet been considered by the Courts below.

It is proper at this point to add a word with regard to the judgments given in the Court of first instance and in the Court of Appeal. With all deference to Mr. Justice Clauson, I am unable to accept his view as to the effect of extending to all assets the right to retain and to prefer. This extension seems to me to do nothing more than for the purposes of these rights to put legal and equitable assets on the same footing.

Again, with all respect, I am unable to accept the reasoning of the majority of the Court of Appeal by which they reach the conclusion that the right of retainer is available against the Crown. The matter must, I think, be regarded in the way which I have indicated, with the result that in my opinion the appeal should be allowed. There should be a declaration that to the extent of the priority conferred by the Bankruptcy Act upon Crown debts the right of retainer cannot be exercised and the case should be remitted to the Chancery Division to determine the second question on the originating summons as to the extent to which the Crown debt has priority.

Lord Macmillan.—My Lords, for myself, I desire to express my entire concurrence with the judgment of my noble and learned friend, Lord Tomlin, which I have just read, and also with the judgment of my noble and learned friend Lord Atkin.

Lord Atkin.—My Lords, I am asked to say that my noble and learned friend, Lord Buckmaster, concurs in the judgments which have been delivered.

Mr. Fergus Morton.—My Lords, I would ask leave to make one observation as to the form of your Lordships' Order. Of course, if the judgment of Mr. Justice Clauson were reversed in its entirety, the liberty to apply which he gave for the purpose of raising the second question would go. I would like just to put that question before your Lordships. The other point is this: There was an undertaking by the Crown to pay the Respondent's costs and in the Court of Appeal the course taken was to rest upon that undertaking but to direct taxation.

Lord Atkin.—As far as taxation is concerned, it seems to me that if that undertaking is recorded as an undertaking by consent in the draft of the Order of this House, that Order will be sufficient and there will be no difficulty.

Mr. Fergus Morton.—If your Lordship pleases.

Lord Atkin.—Is that right, Mr. Stamp?

Mr. Stamp.—If your Lordship pleases.

Lord Atkin.—In the Order we make remitting it, we can put in liberty to apply and that will meet the point.

Mr. Stamp.—If your Lordship pleases.

Questions put :—

That the Order appealed from be reversed.

The Contents have it.

That to the extent of the priority conferred by the Bankruptcy Act upon Crown debts the right of retainer cannot be exercised, that the case be remitted to the Chancery Division with a direction to determine the second question on the Summons, and that there be liberty to the parties to apply.

The Contents have it.

The case came again before Bennett, *J.*, in the Chancery Division on the 3rd May, 1932, to determine the second question on the Originating Summons. The decision was given in favour of the Crown.

Mr. F. D. Morton, K.C., and Mr. W. Hunt appeared as counsel for the executrix and the Attorney-General (Sir T. Inskip, K.C.) and Mr. J. H. Stamp for the Crown.

NOTE OF DECISION.

Mr. Morton.—I have put those cases (*Gowers* v. *Walker*, [1930] 1 Ch. 262, 15 T.C. 165; and *In re* E. W. Campbell, Deceased, 10 T.C. 585) before your Lordship. Your Lordship has my submission on them, that the point is entirely open to your Lordship. There is no reasoning in either decision. One is merely dictum, but if your Lordship feels that in view of those cases your Lordship could not decide in my favour, however much you might be convinced by my argument, then I do not desire to take up your Lordship's time.

Bennett, J.—Well, I do feel that. I do not think I have any alternative. What is it I am to do on that?

Mr. Morton.—What your Lordship would do on that view of the authorities would be to determine on question 2 that the preferential claim of His Majesty for property or Income Tax can be made (under alternative (*b*) of the summons) "for property or Income "Tax assessed for any one year ending on any 5th April before "the Testator's death."

Bennett, J.—Yes, I must follow that.

The Attorney-General.—I hope your Lordship will not give any encouragement. I hope your Lordship will not indicate at all, even if your Lordship is not bound to follow the other decisions, that my learned friend's argument is the right one.

Mr. Morton.—I have not put forward any argument.

Bennett, J.—I have indicated nothing. I will say nothing more than I have said. I simply follow Mr. Justice Eve's decision.

The Attorney-General.—If your Lordship pleases.

[Solicitors :—Keene, Marsland, Bryden and Besant; Solicitor of Inland Revenue.]