of a sum of money. That was not accepted, and I think the result is that the attitude taken by the defender at that time was perfectly right, and once for all puts an end to any idea of recompense.

Upon the whole matter I confess I have no hesitation in coming to the result that here there is no relevant claim for recompense because the facts do not raise it, and that accordingly, contract also having failed, the defender ought to be assoilzied.

LORD KINNEAR—I am of the same opinion and have nothing to add.

LORD MACKENZIE—I concur.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

The Court recalled the Lord Ordinary's interlocutor, assoilzied the defender from the pecuniary conclusions of the summons, *quoad ultra* dismissed the action, and decerned.

Counsel for Pursuers (Respondents)—Graham Stewart, K.C.—Wilson. Agents—Davidson & Syme, W.S.

Counsel for Defender (Reclaimer)—Blackburn, K.C.—Hon. W. Watson. Agent—James Reid, W.S.

Wednesday, October 31.

FIRST DIVISION.

[Sheriff Court at Dunoon.

ARGYLL COUNTY COUNCIL *v.* WALKER.

Local Government — Rates—Insolvency — Maills and Duties — Preference — Local Government (Scotland) Act 1889 (52 *and* 53 *Vict. c.* 50), *sec.* 62, *sub-sec.* (5).

The Local Government (Scotland) Act 1889, enacts—sec. 62—"The following provisions shall be made with respect to the levy of the consolidated rates; —that is to say, . . . (5) . . . and all rates imposed under any powers transferred or conferred by this Act shall, in the case of bankruptcy or insolvency or liquidation, be preferable to all debts of a private nature due by the parties assessed."

Held that an action against a heritable creditor who had obtained decree of maills and duties, and in virtue thereof collected the rents of the heritable subjects, for payment of rates due by the owner (the debtor in the bond), who had become insolvent, was incompetent, and must be dismissed.

North British Property Investment Co., Limited v. *Paterson*, July 12, 1888, 15 R. 885, 25 S.L.R. 641, *distinguished.*

In July 1907 the County Council of Argyll brought an action against R. S. Walker, solicitor, Greenock, for payment of £34, 14s. 9d., being the amount of assessments for the year 1906-1907 due by Peter Nicolson in respect of the ownership of certain heritable subjects within the county — Walker having in virtue of a decree of maills and duties collected the rents due to Nicolson from the said subjects.

The following *narrative* is taken from the opinion of the Lord President:—"Peter Nicolson, feuar, Bannockburn Buildings, Tarbert, was entered in the valuation roll of the county of Argyll for the year 1906-7 as the proprietor of two tenements, and in respect of his ownership of these properties was assessed in the sum of £34, 14s. 9d. Demand notes were duly served upon Nicolson in terms of the Local Government Act of 1889, but he failed to pay, and on 12th March 1907 he granted a trust deed in favour of a chartered accountant in Glasgow. On 7th March 1907 Nicolson's name was included in a summary warrant granted by the Sheriff of Argyllshire, but beyond this the County Council took no steps for payment of the rates.

"There was a bond and disposition in security over Nicolson's properties in Tarbert in favour of Walker, and on 25th February 1907 the heritable creditor presented a petition and obtained a decree of maills and duties. No rents were due at that date, so that the creditor could not then get payment, but at the following Whitsunday term he collected the rents in virtue of his decree. These rents exceeded the amount of the rates due in respect of Nicolson's properties.

"The present action was brought by the County Council against the heritable creditor in July 1907, and the conclusion of the summons is for payment of the amount of these rates."

The pursuers pleaded, *inter alia*—"(3) The rates sued for are public burdens imposed by statutory authority upon said heritable properties, and are preferable to the said bond and disposition in security, and defender having refused to pay pursuers, this action has been rendered necessary, and the defender should be found liable to pay the sum sued for with expenses. (4) The said Peter Nicolson being insolvent, the rates imposed by pursuers are preferable to the said bond and disposition in security, which is a debt of a private nature, and decree should be granted in favour of pursuers with expenses."

The defender pleaded, *inter alia*—"(2) The action is incompetent."

On 7th November 1907 the Sheriff-Substitute (PENNEY) decerned against the defender as craved.

Note.—"Apart from the preliminary pleas the parties seem to be practically at one upon the facts, and I have therefore disposed of the case by final judgment. I am of opinion that this case is ruled by that of the *North British Property Investment Company, Limited* v. *Paterson*, July 12, 1888, 15 R. 885. In that case the late Lord Moncreiff said—'We are not in the category of competing creditors at all. The property must pay the rates, no matter into whose hands it may happen to pass' —and I think the same may be said here.

There the collector of rates, having failed to obtain payment thereof, did diligence by poinding, although certain heritable creditors had already obtained decree in an action of poinding of the ground, and was held entitled to carry out his diligence. Here a County Council having failed to obtain payment of rates with respect to certain properties from the person whose name stands on the valuation roll, sues the heritable creditor who has obtained a decree of maills and duties entitling him to draw the rents of these properties.

"The concluding words of section 62 of the Local Government (Scotland) Act 1889 (52 and 53 Vict. c. 50) enact that 'all rates imposed under any powers transferred or conferred by this Act (as the rates here in question admittedly are) shall, in the case of bankruptcy or insolvency or liquidation, be preferable to all debts of a private nature due by the parties assessed,' but I very much doubt whether, having regard to Lord Moncreiff's judgment, bankruptcy, insolvency, or liquidation is necessary. If it is, then I am prepared to hold that there is insolvency here of the person assessed evidenced by his failure to pay the rates due when required, and by his granting a trust deed upon the narrative that it was granted 'in consequence of his being unable to pay the several debts due by him to his creditors.'

"I have no difficulty in repelling the argument that debts due to a heritable creditor if published by registration in a public register are not private debts. I have always regarded the distinction between private debts and public ones to be that the former whether, published or not, are due to a private or personal creditor, whereas the latter are those due to the Crown, a burgh, a county council, or other public authority levying taxes or rates under anthority of an Act of Parliament. This opinion is explicitly expressed by Sheriff Erskine Murray in the case of the *Commercial Bank of Scotland, Limited* v. *Lyle*, November 13, 1896, 13 Sheriff Court Reports 70, and is undoubtedly implicitly that of Judges of the Supreme Court as may be gathered from the way they speak of debts of a public character. Really the only questions of difficulty here are, I think, whether the defender comes under the description of 'one into whose hands the property has happened to pass,' and whether his liability (if any) is to pay the rates in whole or only in part.

"There can, in my opinion, be no doubt that if the properties in question had been sold by the heritable creditor under a power of sale contained in his bond, and the proceeds had formed a fund *in medio* (as in the cases of *Lyle* (*supra*), and of the *Edinburgh Parish Council* v. *Forsyth's Trustees*, March 6, 1907, reported in Poor Law Magazine for August 1907, p. 225), or if the whole rents derived from the properties were such a fund, and sufficient to pay all the rates effeiring to them, the pursuers would require to be paid out of it in preference to a heritable creditor such as the defender. To the extent therefore to which the defender has ingathered the rents of such properties he must clearly pay the rates effeiring to each property respectively. This disposes of the claim with regard to Otterburn Buildings, because the defender admits having collected rent from them greater in amount than the rates due in respect of such buildings. In regard to Bannockburn Buildings, on the other hand, the rates sued for amount to £19, 0s. 6½d., whereas the defender only admits collecting rent to the amount of £12, 7s. But I do not think the amount of rent actually received is the measure of the defender's liability.

"He chose to enter into possession of the subjects under a decree of maills and duties. He need not have done so, but by doing so I think he became liable for the rates effeiring to the properties of which by his decree he was entitled to draw the rents.

"I may add a few words upon the three cases in the Court of Session which were referred to.

"In that of the *Athole Hydropathic Company, Limited* v. *Scottish Provincial Assurance Company*, March 19, 1886, 13 R. 818, there is a dictum by Lord President Inglis relied on by the pursuers, viz.—'A poinding of the ground is a proceeding . . . analogous to those other remedies open to heritable creditors, such as adjudication, or sale, or maills and duties.' If maills and duties is analogous to a poinding of the ground, they say, and if, in the *North British Property Investment Company's* case, a poinding of the ground did not prevent the collector getting his rates, neither will an action of maills and duties, and this argument I think sound.

"Another dictum in the same case is found in the words immediately succeeding those just quoted, and is as follows:—'These are all diligences open to a heritable creditor to give effect to his preference which has already been secured to him. He has a preference against all the world, no one can compete with him . . .' Therefore, says the defender, here the pursuers cannot compete with me.

But it was pointed out in argument in the case of the *North British Property Investment Company* that the Lord President was not there speaking of public debts. That is evident, and this view was undoubtedly taken by the Court in that case.

"The case of the *Greenock Board of Police* v. *Liquidator of the Greenock Property Investment Society*, March 13, 1885, 12 R. 832, turned upon the construction of a special Act of Parliament, but so far as it has any bearing upon the present case it seems to me corroborative of the views I have expressed."

The defender appealed to the Sheriff (M'Clure), who on 30th January 1908 recalled his Substitute's interlocutor and allowed a proof before answer.

Note.—"I regret I do not see my way to decide this case merely upon the record, for if my opinion (which I express now) be well founded, that the pursuer's debt in the event of the debtor's bankruptcy or insol-

vency is preferable to that of the defender —there is probably very little of substance left in the case.

"My view of the case shortly is this—It is provided, *inter alia*, by section 62 of the Local Government (Scotland) Act 1889 that 'All rates imposed under any powers transferred or conferred by this Act shall in the case of bankruptcy, insolvency, or liquidation, be preferable to all debts of a private nature due by the parties assessed.' The words of the section, it will be observed, make no distinction between private debts, for which the creditor holds heritable security, and private debts which are unsecured. The preference of the rates to all private debts is absolute if the party assessed is bankrupt or insolvent, and (although the contrary was argued) there is no doubt that the debt due to the defender is a debt of a private nature. Publication by recording of the security does not affect the quality of the debt as a private debt. In my opinion accordingly the only open question upon the terms of the section is whether or not the debtor Nicolson is bankrupt or insolvent. Upon this crucial matter the parties unfortunately are at variance. The pursuers on record affirm insolvency; the defender denies it. At the debate the parties maintained the same position. It was, however, asserted that the trust deed referred to on record contains *in gremio* Nicolson's admission of insolvency. This circumstance *per se* is obviously insufficient to prove the fact in the face of the defender's constant denial, but even so the document is not produced. I think therefore that pursuers must prove insolvency to establish the preferable character of their debt.

"I think I should add that if insolvency on the part of the debtor be established, it is my opinion that the rents of the subjects, so far as ingathered or recoverable under defender's decree of maills and duties, would be answerable for the pursuers' rates as a first charge. I do not think (as was suggested) that a larger claim could be made on the defender by reason of his having entered into possession, for the preferable creditor, if himself in possession, could not get more than the yield of the subjects. But in this case, where the security under the bond consists of two rent-bearing subjects, I think the rates would not be chargeable upon the rents severally, but that the total rents collected (£46, 2s.) would be chargeable with the total rates (£34, 14s. 9d,) affecting the security-subjects as a whole. The question therefore is academic so far as the present case is concerned."

On 28th February 1908 the defender lodged a minute admitting that, at the date when the action was raised, Nicolson was insolvent, and thereafter on 9th March 1908 the Sheriff decerned against the defender as craved.

The defender appealed, and argued—The County Council had mistaken their remedy. They should have arrested the rents, for if they had done so their diligence would have been preferable to the appellant's decree of maills and duties—Bell's Com. ii. 51; Goudy on Bankruptcy (3rd ed.), 563, 589; Court of Exchequer (Scotland) Act 1856 (19 and 20 Vict. cap. 56), section 30. Not having done so they had lost their remedy. A creditor who had duly completed his diligence and carried off the subject would not be compelled to hand it over to a preferential creditor who had failed to make his preference effective—Preferential Payment in Bankruptcy Act 1888 (51 and 52 Vict. cap. 62), sec. 1; *Athole Hydropathic Company, Limited (in liquidation)* v. *Scottish Provincial Assurance Company*, March 19, 1886, 13 R. 818, 23 S.L.R. 570. The Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), sec. 62, relied on by the respondents, gave no security over any specific portion of the debtor's estate—*Allan* v. *Cowan*, November 15, 1892, 20 R. 36 (*per* Lord Kinnear at p. 41), 30 S.L.R. 114. The case of the *North British Property Investment Company, Limited* v. *Paterson*, July 12, 1888, 15 R. 885, 25 S.L.R. 641, on which the respondents founded, was inapplicable, for the enactment there in question created a good real security over the goods of the ratepayer. There was no such enactment with reference to the rent of land. Taxes and rates were personal debts, not *debita fundi* —Bell's Com. i., 739; *Macfarlane* v. *Monklands Railway Company*, January 29, 1864, 2 Macph. 519 (*per* L.J.-C. Inglis at p. 532; Local Government (Scotland) Act 1889 (*cit. supra*), sec. 27 (1) and (2). They were recoverable by poinding in accordance with statutory provisions—Local Government (Scotland) Act 1889 (*cit. supra*), sec. 62; Taxes Management Act 1880 (43 and 44 Vict. cap. 19), sec. 97. The appellant was not in the valuation roll. He had neither been assessed nor had he received notice that the assessments were unpaid.

Argued for respondents—The rates in question were preferable debts—Local Government (Scotland) Act 1889 (*cit. supra*), sec, 62; *North British Property Investment Co. Limited* v. *Paterson cit. sup.* There was no other course open to the County Council, for the rents were not payable till Whitsunday 1907. The appellant had due notice that he would be held liable for the rates, and was therefore barred from founding on technical objections.

At advising—

LORD PRESIDENT—. . . [*After the narrative, ut supra*] . . . Now, I am unable to understand on what legal principle this action can be sustained, but I think I can perceive the idea underlying it, namely, that a rate is of the nature of a *debitum fundi*. That idea is quite fallacious. You can only tax persons, not property, although if a person has property it will be made available for payment of the rates due by him, and a rate is nothing more than a personal debt. It is true that very exceptional privileges are given to this debt, one of these privileges being that the debt can be summarily recovered without the necessity of constituting it. Another privilege is that given by section 62 of the Local Government Act of 1889, which provides

that "all rates imposed under any powers transferred or conferred by this Act shall, in the case of bankruptcy, or insolvency, or liquidation, be preferable to all debts of a private nature due by the parties assessed." It is, I think, owing to an erroneous view as to the meaning of this section that decree in favour of the County Council was pronounced by the Sheriff-Substitute. The error seems to me so obvious that it is difficult to avoid pleonasm in stating the inapplicability of the section and the objections to this action. No doubt a preference is given by the section to rates, but the use of the word "preference" implies that there is some competition as to the fund. Here there is no competition whatsoever. The claim in this case is made against a person who has nothing to do with the debt due to the pursuers. The only connection between Nicolson and Walker which the pursuers can aver—and even this averment is not strictly accurate—is that Walker has in his hands money which at one time belonged to Nicolson. Now, if this were sufficient to sustain an action of this nature, where would the matter end? The same thing might be said of every debt paid by Nicolson during his lifetime. Upon this principle, if Nicolson had paid £5 out of the rents received by him from the property for a pair of shoes, an action would lie against the shoemaker supplying the shoes. This is, of course, an absurd example, but there is no distinction in substance between that case and the present. The point may be illustrated also by reference to another preference in bankruptcy, namely, that allowed to workmen and servants' wages. In that case, if the preferential creditor instead of coming forward and claiming his preference allows other creditors to carry away the fund, it would be out of the question that he should be entitled to bring a petitory action against those other creditors for the purpose of reclaiming the amount of his debt.

What seems to have misled the Sheriff-Substitute in this case is a dictum of Lord Justice-Clerk Moncreiff in the case of *North British Property Investment Company, Limited* v. *Paterson*, to the effect that "the property must pay the rates, no matter into whose hands it may happen to pass." But that dictum must be read with reference to the facts of that case, and the property there was moveable property attached under a poinding. Now the Taxes Management Act of 1880 and the older Act of 43 George III, cap. 150, provide that if a person is owing the duties or land tax his goods shall not be liable to be taken in virtue of any execution or other process, unless the party at whose suit the execution or seizure is sued or made shall, before the sale or removal of the goods, pay all these duties or land tax. It was the application of these sections in a competition as to poinded goods that was under consideration in *North British Property Investment Company Limited* v. *Paterson*, but of course these sections are quite inapplicable to the case of rents not yet due and which may be made available under a decree of maills and duties.

It was said in the course of the argument that there was no proceeding open to the County Council other than that adopted here. That however is not the case. The County Council knew that Nicolson had not paid his rates, and also that the rents of his property would shortly fall due and be payable to them. Now nothing would have been easier than for the County Council to take decree in absence, and on that decree to use arrestments in the hands of Nicolson's tenants. That would have created a competition as to the rents, and then, of course, the section would have come to the aid of the County Council and they would have had their preference. Accordingly it cannot be said that if an action of this nature is not sustained the County Council will be left without a remedy.

On the whole matter I think that this action is quite incompetent and should be dismissed.

LORD KINNEAR—I am of the same opinion. I think the learned Sheriffs have erred in consequence of confusing between a right of preference in ranking, and a real security over the lands of an insolvent. This is evident from the note of the Sheriff-Substitute where he says, quoting Lord Justice-Clerk Moncreiff,—"The property must pay the rates no matter into whose hands it may happen to pass." In his application of these words the Sheriff-Substitute can only mean that the rates are a real burden on the property now in question,—to wit, the heritable subjects belonging to the ratepayer—so that this heritable property must always be liable no matter into whose hands it may come. There is no authority for that. The rate is not *debitum fundi*. It is a personal debt, and if it is to be recovered out of the land that can only be done by the ordinary methods by which personal creditors may attach the rent or the real property of their debtor. The Sheriff-Substitute seems to have been misled by a statement of the law made by Lord Moncreiff, which may perhaps have been expressed in somewhat general terms, but which must of course be read with exact reference to the particular case, and which when it is so read will be seen to be at once sound in itself and altogether inapplicable to the present question. In the case before him Lord Moncreiff was giving effect to an Act of Parliament by virtue of which any creditor taking in execution goods or chattels belonging to a person in arrear with the duties therein referred to, shall not be allowed to take away the goods without paying the arrears. That is equivalent to a good real security over the goods of a ratepayer. There is no such enactment with reference to land or the rents of land. The statute on which the learned Sheriff and Sheriff-Substitute found provides that all rates imposed in virtue of its powers shall, in the case of a bankruptcy or insolvency, be preferable to all debts of

a private character due by the parties assessed. The learned Sheriff-Substitute goes on to say that he does not think that bankruptcy or insolvency is necessary to bring that enactment into play, but that is simply a recurrence to his assumption that a rate is a *debitum fundi*. Insolvency is the necessary condition of the question arising at all. For there can be no preference of one creditor before another, when every creditor is to be paid in full. I agree therefore with the Lord President's observation that the question of preference cannot arise except on the distribution of an estate which is not sufficient to pay everybody twenty shillings in the pound. But a right to a preference in competition will not prevent a creditor, with whom nobody is competing, from taking payment if he can get it, or recovering his debt by diligence.

It was said by Mr Pitman that if the method of recovery adopted were ineffectual there was nothing else which the collector could do. I cannot assent to that, having regard to what your Lordship has said. But if the remedies given by the statute are ineffective it is immaterial to consider whether there are other remedies or not, for the argument is this that all the remedies given by law are ineffective. But if they are, that would not justify this Court in going beyond its jurisdiction and giving other remedies not conferred by Parliament, and which are altogether outside the statute.

LORD MACKENZIE—I am of the same opinion.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

The Court recalled the interlocutors of the Sheriff and Sheriff-Substitute dated 9th March 1908 and 7th November 1907 respectively, and dismissed the action as incompetent.

Counsel for Pursuers (Respondents) — Blackburn, K.C.—Pitman. Agents—Pearson, Robertson, & Finlay, W.S.

Counsel for Defender (Appellant)—A. M. Anderson. Agents—Balfour & Manson, S.S.C.

Tuesday, November 3.

FIRST DIVISION.

[Sheriff Court at Edinburgh.

MACANDREW *v.* TILLARD.

Reparation—Negligence—Motor Car—Collision—Public Safety—Duty of Driver in Approaching Main Road.

The driver of a motor car, while attempting to cross a very frequented and main thoroughfare from a side road at right angles to it, collided with another car coming from his left along the main road.

Held, in the circumstances, that the collision was due to the fault of the driver of the first-mentioned car, in respect that (1) he had approached the main road without having his car, in such an operation, sufficiently under control, and (2) he had failed, on finding he could not cross, to turn at once to his left where there was ample room.

Observations (*per* the Lord President) as to the duties of drivers of motor cars in approaching main roads with an intention to cross.

On 25th October 1907 C. D. Macandrew, engineer, 22 London Street, Edinburgh, brought an action against C. H. Tillard, Cargilfield, Cramond Bridge, in which he claimed £39, 9s. 2d. as damages on account of injuries to, and temporary deprivation of, his motor car.

The *facts* as stated in the interlocutor of the First Division were as follows: — "The pursuer's Humber motor car was on 17th July 1907, about 2 p.m., being driven by Thomas Macdonald, motor engineer, at the request of the pursuer, along the road from Edinburgh to Queensferry. At the same time the defender's Albion motor car was being driven by George Cox, his chauffeur, along the road from Davidson's Mains intending to cross the Edinburgh and Queensferry Road and proceed into the road by Craigcrook to Murrayfield. Neither car was being driven at what under the circumstances was an excessive speed. The cars collided opposite the entrance to Craigcrook road."

The defender pleaded, *inter alia* — "(3) Decree of absolvitor should be pronounced in respect (*a*) that the accident resulted without fault on the part of the defender; and (*b*) that the accident was caused, or in any event was contributed to, by the fault of the pursuer or those for whom he is responsible."

The nature of the evidence sufficiently appears from the opinion (*infra*) of the Lord President.

On 2nd March 1908 the Sheriff-Substitute (GUY) sustained the second branch of the defender's third plea-in-law and assoilzied him, holding that both drivers were in fault.

The pursuer appealed, and argued—The evidence showed that the collision was due to the defender's driver losing his head. The pursuer was on the main road, and the defender therefore should have allowed him to pass. It was the duty of the defender to have turned to the left on entering Queensferry Road. The pursuer was not guilty of contributory negligence. If there was any negligence on his part it in no way contributed to the collision.

Argued for the respondent—The appellant was to blame for the accident. He so acted as to mislead the respondent, inducing him to cross in front of the appellant. Drivers on a main road were not entitled to delay the traffic on the side roads. In any event, the appellant was guilty of contributory negligence in not slackening speed.