did not fall within the operation of this provision, but this argument appears to me to be untenable. The language used is as wide as possible. It is undoubted that the right which the bankrupt has under his father's trust-disposition and settlement is one which he could convert into money at once. He could sell his contingent right and grant a perfectly good title to the purchaser, who would be vested in the right subject to the contingency. This right appears to me to fall within the definition of property under section 168. It is a contingent interest in the trust estate of the bankrupt's father which the bankrupt could himself have assigned. If he had granted an assignation this would have been an exercise by him of a power which he had in respect of that property. This by virtue of section 44 (2) passes to his trustee in bankruptcy, who in my opinion can sell and assign the contingent right in the same way as the bankrupt could have done.

There was a considerable amount of criticism of the conclusions of the summons, which was said to contain a bare declarator with no operative conclusion. It was argued that it would have been necessary for the pursuer to ask a decree of adjudication, and that this was what a Court in Scotland would not grant. The conclusive answer is that the pursuer comes here asking merely what he says the statute has given him. If, as I think, the statute does give him this right, he is entitled to the declarator that he asks. This will enable him to satisfy any intending purchaser that he can grant a valid assignation of the bankrupt's contingent right.

I am accordingly of opinion that the pursuer is entitled to the decree of declarator that he asks.

The LORD PRESIDENT was absent.

The Court recalled the interlocutor of the Lord Ordinary.

Counsel for Pursuer and Reclaimer—Graham Stewart, K.C.—Hamilton. Agents—Rutherfurd & Turnbull, W.S.

Counsel for Defender and Respondent William Tod — Horne, K.C. — Moncrieff. Agent—Henry Smith, W.S.

Counsel for Defenders and Respondents David Tod's Trustees — C. H. Brown. Agents—Smith & Watt, W.S.

Thursday, July 13.

FIRST DIVISION.

[Lord Cullen, Ordinary.

TODD (LIQUIDATOR OF MILLEN & SOMERVILLE, LIMITED), PETITIONER.

Company — Winding-up — Ranking — Claims—Bonded Property Held by Trustee for Company—Conveyance Taken by Company Exclusive of Personal Obligation under Bond—Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 69), *sec.* 287—*Companies Act* 1862 (25 *and* 26 *Vict. cap.* 89), *secs.* 133 (1) *and* 158.

A private firm sold its business to a limited company under a minute of agreement by which the company bound itself to take over certain heritable property which was subject to a bond. The company went into liquidation prior to the commencement of the Companies (Consolidation) Act 1908, and the bondholders called on the firm to pay under their personal obligation under the bond. The firm thereupon claimed to be ranked in the liquidation for the amount of the bond, which claim the liquidator refused. The company having subsequently taken a conveyance of the subjects exclusive of the personal obligation, *held* (1) that the claimants were entitled to be ranked in terms of their claim, and (2) that even if they had a security they were not bound to value it.

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), sec. 287, enacts—"The provisions of this Act with respect to winding-up shall not apply to any company of which the winding-up has commenced before the commencement of this Act, but every such company shall be wound up in the same manner and with the same incidents as if this Act had not passed, and for the purposes of the winding-up, the Act or Acts under which the winding-up commenced shall be deemed to remain in full force."

The Companies Act 1862 (25 and 26 Vict. cap. 89) enacts, sec. 133 (1)—"The property of the company shall be applied in satisfaction of its liabilities *pari passu*. . . ." Section 158—"In the event of any company being wound up under this Act, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as is possible, of the value of all such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value."

Alfred Alison Todd, C.A., liquidator in the voluntary winding-up of Millen & Somerville, Limited, presented a note seeking approval, *inter alia*, of his deliverances on claims. Messrs Millen & Somerville

and James Alexander Millen and others, the individual partners of the firm, as such partners and as individuals, lodged answers. In their answers the respondents, whose claim was for the amount of certain bonds and dispositions in security over the property of the company under which they were personally liable, and who had been refused a ranking, craved the Court "to refuse approval of the said deliverances on their claim, to recal the same, and to admit the respondents to a ranking for the full amount of their claim, or otherwise to direct the liquidator to set aside a dividend on the full amount of their claim to await the contingency of the security subjects held by the creditors under the said bonds and dispositions in security not realising the amount of the respondents' obligations thereunder, of which the company is bound to free and relieve them."

The following narrative of the *facts* of the case is taken from the opinion of Lord Johnston:—"The firm of Messrs Millen & Somerville carried on business in Glasgow as constructional engineers, but in the spring of 1907 they transferred their business to a limited company, registered under the style of Millen & Somerville, Limited. The claim in question arises out of the agreement of sale which was duly adopted by the company. By this agreement it was provided, firstly, that the firm should sell and the company purchase the business and the goodwill thereof of Messrs Millen & Somerville, together with their works and all their assets, including book debts, current orders, &c., as at 31st December 1906, 'subject always to payment by the company of the whole debts and liabilities of the business outstanding' at said date or since contracted, the consideration being entirely in shares of the company. Now one of the liabilities of the firm was a debt of £1800, secured over their works and other heritable property.

"As bearing upon this particular liability two further clauses of the agreement require to be considered. It provided, fifthly, that the company on the transfer of the works and business should 'undertake to perform and execute in exoneration of the first parties,' that is, the firm and its members, all obligations, contracts, and engagements connected 'with the said business current on the said 31st December 1906 or since entered into,' while it provided eighthly that the firm should 'exhibit and deliver a good title to the property so to be made over to the company, free from all claims except a bond and disposition in security for £1800.' In point of fact the debt stood on sundry bonds amounting in all to £1800.

"Delivery and possession was given as from 15th February 1907, although I understand that the company's title to the heritable property was not made up till recently in the liquidation, and then in such form as to avoid the assumption of the personal obligation under the bonds for £1800. But the situation created by the agreement was this, that while the firm were not bound to clear the heritage of the bonds in question, but, on the other hand, the company undertook to do what was necessary 'in exoneration' of the firm from the obligation thereunder, the company did not undertake to pay off the bond on obtaining a title to the property, or at any other specific time.

"The company carried on business for some time, but on 6th April a resolution to wind up voluntarily was passed, and the voluntary liquidation was subsequently placed under supervision. The bondholders had already entered into possession of the security subjects, but it has as yet been found impossible to realise them at a price to pay the bonds, and the holders have therefore called upon the firm and its members to make payment under their personal obligation.

"In these circumstances the firm and its partners have lodged a claim in the liquidation for the sum of £2121, being the amount of principal in the bonds and arrears of interest in respect of the obligations undertaken by the company in the agreement above narrated, and in respect of the personal obligations resting upon the claimants in respect of the bonds, of which obligations the company and the liquidator were bound to relieve the claimants. This claim the liquidator rejected on the ground that the security subjects were not valued."

On 12th November 1910 the Lord Ordinary (CULLEN) refused the respondents' crave.

The respondents reclaimed, and the case on coming up in the First Division was dropped after being partly heard in order that the liquidator might decide whether he was to take a conveyance to the property. On the case again appearing in the rolls, counsel for the liquidator intimated that a conveyance had been taken but exclusive of the personal obligation under the bond.

Argued for respondents (reclaimers)—The liquidator and the Lord Ordinary were wrong in refusing to allow the claimants a ranking on their claim. The claimants were entitled to be relieved within a reasonable time of their personal obligation—*Doig* v. *Lawrie*, January 7, 1903, 5 F. 295, 40 S.L.R. 247, *per* Lord Low. The present debt was not a contingent claim, and the claimants were not bound to wait till they paid before they were ranked. They were bound to pay the debt in the bond. Further, the claimants held no security at all, and therefore section 65 of the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict., cap. 79), as to valuation of securities, could not apply. But even if they had a security, it was in their option to waive it and offer it to the liquidator, who was bound to take it. In any event, the Lord Ordinary under section 51 of the above Act should have ordered the claimants to rectify their claim. The minute of agreement made it clear that the limited company were bound to relieve the claimants of all obligations under the bond. The following cases were also referred to—*Assets Company* v. *Jackson*, April 27, 1889, 26 S.L.R. 592; *Latta* v. *Dall*, November 28,

1865, 4 Macph. 100; *Ritchie's Trustees* v. *M'Call's Trustees*, June 25, 1904, 6 F. 883, 41 S.L.R. 642.

Argued for the petitioner (respondent)—The claimants must be debtors in a liquid sum before they could be admitted to a ranking, and they were not proved to be that. Their claim might be a present debt as between them and the creditors, but it was only a contingent claim in a question with the liquidator. The claimants might be liable for a debt to a third party, but they could only get from the petitioner what they actually paid. What they claimed was not a sum of money but a right of relief, and they ought to call on the liquidator to value their claim accordingly—Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), section 208, applying the Bankruptcy (Scotland) Act 1856, section 53. In any event, the claimants held a security here, and they should be compelled to value that security before claiming a ranking—Bankruptcy (Scotland) Act 1856, section 65.

At advising—

LORD JOHNSTON—[*After the foregoing narrative*]—I have stated the claim of Messrs Millen & Somerville and partners. What, then, was the situation in which it was made? The claimants were personally liable on the bonds in question. But by the agreement the limited company were (section 5) bound to perform in their "exoneration" all current obligations connected with the business. I think that it is a necessary inference that when the limited company took a conveyance of the property, which they were bound to do, but were (section 8) entitled to do under burden of the bonds, they were bound to take the conveyance in such terms as would by virtue of the Conveyancing Act 1874, section 47, transmit against them the personal obligation in the bonds. I think, further, that they were bound, if not on demand, which it is not necessary to decide, at any rate whenever the creditors sought to enforce it, to obtain the claimants' discharge from such personal obligation. Now at the date of the liquidation the limited company had not taken the conveyance, and therefore had accepted no liability by transmission for the personal obligation in the bonds. They have since taken a conveyance, but have purposely avoided such transmission. The claimants were therefore at the date of the liquidation trustees of the property for the limited company, and under a personal obligation for the debt secured therein, of which the limited company were bound to relieve them. They have ceased to be trustees of the property, but remain under the personal obligation. The creditors have called on them to fulfil it. And they claim in the liquidation for the amount they are called on to pay. The liquidator seems to think that the claimants have no claim until they have paid. This I cannot understand. It seems to me that in the circumstances it was the duty of the limited company to pay or to supply the claimants with the means to pay, and not to delay until the claimants had paid their (the limited company's) debt and could produce the creditor's discharge. The case is very analogous to that of the *National Financial Company* (L.R., 3 Ch. 791), and the words of Lord Hatherley, then Sir W. Page Wood, L.J., aptly describe the situation here—"The position of a trustee so situated is not that he is to wait till he is thrown into prison in consequence of his *cestui que* trust not paying what it is their bounden duty to pay; he has the right to say, 'Provide me with the funds which are necessary to meet this difficulty.' . . . . He is called upon to make the payment, and he is entitled to rank as a creditor of the National Company for this sum . . . . he undertaking not to pocket the money, but to hand it over in discharge of the liability, against which he is entitled to be indemnified." That exactly describes the right of the claimants. As the limited company are bankrupt, and unable to fulfil their obligation, the claimants are entitled to be ranked in the liquidation, but are bound to admit of the dividend they may receive being applied in discharge *pro tanto* of the liability, against which they are entitled to be indemnified. I do not think that their having ceased in course of the liquidation to hold the property in trust, by the transfer of the legal title to the liquidator, at all affects their rights.

But the liquidator further thinks that the claimants' claim is bad, because they have not valued their security, and the Lord Ordinary has sustained his award. But I question whether the claimants held any security. When they held in trust they would have had a right of retention if they had paid off the debt. Now that this title to the property is taken out of their person, they have no longer a right of retention, but on paying the company's debt they may get an assignation of the bond, for what it is worth, from the creditors, and so obtain security. But a right of retention gives no right to realise. And now even the right of retention is gone. In neither case could they effect their relief until they had paid the whole of the company's debt. That is no security, which they can or are bound to value in the liquidation.

I think therefore that the reclaiming note must be sustained, and the liquidator directed to rank the claimants in terms of their claim, subject to the condition that any dividends declared shall be applied by him in reduction of the heritable debt.

LORD MACKENZIE—It appears to me that the difficulty in this case is mainly one of procedure. For the reasons explained by Lord Johnston, I think the method proposed is the best in the circumstances.

The LORD PRESIDENT concurred.

LORD KINNEAR was absent.

The Court recalled the interlocutor reclaimed against, and remitted to the Lord Ordinary to direct the liquidator to rank and prefer the claimants James A.

Millen and Somerville and others in terms of their claim, and further authorised and directed the liquidator to apply any dividends that might be declared in respect of said claim in reduction of the heritable debt to which the claim referred.

Counsel for the Petitioner (Respondent) — Sandeman, K.C. — Hon. W. Watson. Agents—Watt & Williamson, S.S.C.

Counsel for the Respondents (Reclaimers) —Macmillan—Gentles. Agents—Ronald & Ritchie, S.S.C.

HIGH COURT OF JUSTICIARY.

Saturday, July 22.

(Before the Lord Justice-Clerk, Lord Dundas, and Lord Skerrington.)

RONALDSON *v.* WILLIAMSON.

Justiciary Cases — Suspension — Burgh — Commissioners — Bye-Law — Ultra vires —Nuisance—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict.* c. 55), *sec.* 316, *sub-sec.* (*a*) *for General Purposes* (1).

The Burgh Police (Scotland) Act 1892 enacts — Section 316 — "The Commissioners may from time to time make bye-laws as they think fit for the purposes after mentioned, *videlicet* — (*a*) For General Purposes—(1) for preventing nuisances and annoyances in any street or any other place within the burgh. . . ." Section 317 enacts that bye-laws so made may be enforced by the imposition of penalties.

By a bye-law made by the commissioners of a burgh it was enacted—"(1) No person shall convey material of any description along the streets or courts in the burgh in carts or carriages so loaded that any part of the load fall on any street or court within the burgh."

Held (1) that the bye-law was not invalid and *ultra vires* as being unreasonable and too sweeping, and (2) that a complaint under it need not aver annoyance to anyone, the act charged constituting a nuisance in itself.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 316, is quoted *supra in rubric.*

David Ronaldson, farm servant, Smeaton Farm, Kirkcaldy, was charged in the Burgh Police Court there, on 23rd June 1911, at the instance of David Williamson, Burgh Prosecutor, on a summary complaint which set forth that "on 8th June 1911, on Thistle Street, in said burgh, you did convey material, *videlicet*, manure, along Thistle Street aforesaid in a cart so loaded that part of said load fell on said Thistle Street, contrary to bye-law one of the bye-laws made by the Commissioners of the Burgh of Kirkcaldy on 10th May 1897, in virtue of the powers contained in section 316 of the Burgh Police (Scotland) Act 1892, sub-sec. (*a*) for General Purposes, and sec. 317 of said Act." The accused was found guilty and sentenced.

Thereafter he brought a bill of suspension, in which, *inter alia*, he stated—"4. The conviction and sentence were incompetent and invalid. The bye-law on which they are founded is unreasonable, illegal, invalid, and *ultra vires*. The bye-law is one of a number of bye-laws which bear to have been made on 10th May 1897 by the Commissioners of the Burgh of Kirkcaldy in virtue of the powers contained in section 316 of the Burgh Police (Scotland) Act 1892, sub-sec. (*a*) for General Purposes, and sec. 317 of said Act. Said bye-laws, and particularly the bye-law in question, are beyond the scope and objects of the said sections and are invalid. Further, the said bye-law is too vague, general, and indefinite in its terms to receive effect."

He pleaded — "(1) The said complaint being irrelevant and lacking in specification, the sentence complained of ought to be suspended as craved. (2) The bye-law alleged to have been contravened being unreasonable, illegal, invalid, and *ultra vires*, and the terms thereof being, in any event, too vague and indefinite to receive effect, the conviction complained of should be suspended."

Argued for the complainer—(1) The bye-law was unreasonable, and therefore unenforceable—*Eastburn* v. *Wood*, July 14, 1892, 3 Wh. 300, 19 R. (Jus.) 100, 29 S.L.R. 844; *Dunsmore* v. *Lindsay*, December 19, 1903, 4 Adam 286, 6 F. (Jus.) 14, 41 S.L.R. 199. (2) The complaint was irrelevant and wanting in specification, in that the prosecutor did not state that there was a "nuisance" committed, nor specify anyone who suffered from the "nuisance." (3) The mere putting of manure upon a street was not in itself a nuisance, and in order that the bye-law be competent the act prohibited thereby should be *per se* a nuisance — *Johnson* v. *Mayor, Aldermen, and Burgesses of Croydon*, March 2, 1886, 16 Q.B.D. 708; *Everett* v. *Grapes*, 1861, 3 L.T. (N.S.) 669.

Argued for the respondent—(1) The bye-law was not repugnant to the general statute. The act complained of was always a nuisance, and even if not, then the powers of the Magistrates in deciding the degree of the act which made it a nuisance were sufficient—*Slowby* v. *Threshie*, June 7, 1901, 3 Adam 379, 3 F. (Jus.) 73, 38 S.L.R. 799; *Davies* v. *Jeans*, March 16, 1904, 4 Adam 336, 6 F. (Jus.) 37, 41 S.L.R. 426; *Gentel* v. *Rapps*, [1902] 1 K.B. 160. (2) The bye-law need not mention "nuisance" if the act complained of involved an infringement of public interest or of a private right—*Kruse* v. *Johnstone*, [1898] 2 Q.B. 91.

LORD JUSTICE-CLERK — This suspension raises a question as to the conviction of the complainer for contravention of a bye-law made by the Commissioners of the burgh of Kirkcaldy under the Burgh Police Act of 1892. That bye-law, which was confirmed by the Sheriff-Substitute and by the Secretary for Scotland, is a very simple one, and is not, I think, badly expressed. It is to the effect that any