LORD ATKINSON—I have had the advantage and pleasure of reading both the judgments which have been delivered, and I concur with the result.

LORD PARMOOR—I concur, and for the same reasons.

Their Lordships dismissed the appeal with expenses.

Counsel for the Appellants—Roberton Christie, K.C.—Ingram—Archer. Agents—P. Adair & Co., S.S.C., Edinburgh—D. Graham Pole, S.S.C., London.

Counsel for the Respondents—The Lord Advocate (Clyde, K.C.)—R. C. Henderson—Bateman. Agents — J. H. Campbell & Lamond, C.S., Edinburgh—Wm. Robertson & Co., Westminster.

COURT OF SESSION.

Friday, February 16.

OUTER HOUSE.

ROBERTSON DURHAM (LIQUIDATOR OF ROBERTSON, SANDERSON & COMPANY, LIMITED) *v.* INCHES.

Company—Winding-up—Preference Shares—Arrears of Dividend—Profits Earned but not Declared at Date of Liquidation—"Assets."

The articles of association of a company provided—"Upon the dissolution of the company the assets remaining after payment of the debts and obligations of the company shall be applied, first, in repaying to the holders of the preference shares respectively the whole amount paid up on such shares; and the balance remaining thereafter shall be distributed among the holders of the ordinary shares in proportion to the amount paid up on such shares."

Held (*per* Lord Cullen, Ordinary) that "assets" meant "all the things of one kind or another belonging to the company which passed under the administration of the liquidator," and that in the liquidation of the company the preference shareholders were not entitled to payment in priority of any repayment of capital to the ordinary shareholders, of the arrears of the cumulative preferential dividend on their shares out of an alleged profit, arising out of an appreciation of stock-in-trade earned but not declared prior to the liquidation.

In July 1916 A. W. Robertson Durham, C.A., as liquidator of Robertson, Sanderson, & Company, Limited, the voluntary winding-up of which company was being continued under the supervision of the Court, presented a note for the determination of this *question*—"Whether the preference shareholders are entitled to payment of the arrears of the cumulative preferential dividend in priority to any repayment of capital to the ordinary shareholders?"

Answers were lodged on behalf J. H. Inches and others, in which it was stated—"In point of fact a profit and loss account as at the date of the liquidation on a true valuation of the stock-in-trade would show that trading profits available for dividend were earned by the company prior to liquidation to an amount at least sufficient to pay said arrears of dividend on the preference shares, and such profits fall to be applied primarily in payment of said arrears of dividend."

The *facts* are given in the opinion of the Lord Ordinary (CULLEN), which was as follows:—

Opinion.—"The holders of preference shares in this company, which is in liquidation, in common with the other preference shareholders, received payment of a 5 per cent. preferential dividend on their shares declared by the directors out of profits down to 31st March 1914, but for the period after that date they received no further payments of dividend.

"The winding-up is a voluntary one placed under the supervision of the Court. The statutory date for the commencement of the winding-up is 6th January 1916.

"It is alleged by the preference shareholders that between 31st March 1914 and the date of the winding-up there was a great appreciation in the value of the stock of whisky held by the company, with the result that if a profit and loss account were made up as at the date of the winding-up there would be disclosed a large profit earned during said period. The last profit and loss account made up while the company was a going concern was made up as at 30th September 1915, and showed no divisible profit. The preference shareholders, as I understand, do not criticise this account. It was between the date of it and the date of the winding-up that the great appreciation in the value of the whisky stock on which they found took place. Since the date of the winding-up the liquidator has made realisations of said stock at prices which, the preference shareholders say, corroborate their allegation of the fact of appreciation in value prior to the winding-up.

"If the averments made by the preference shareholders are true, the profits which might have been, but were not, while the company was a going concern, ascertained to have been made between 30th September 1914 and 6th January 1916, were on the latter date represented by an aliquot part of the value of the assets of the company which passed into the hands of the liquidator. And their contention is that there should now be made up as at 6th January 1916 an account bringing out the amount of these alleged undrawn and undeclared profits, so that the corresponding aliquot part of the value of the assets which passed into the hands of the liquidator may be separated and set aside for treatment in the character of profits earned before the winding-up liable to their recourse for payment of a 5 per cent. preferential dividend

on their preference shares for the period between 31st March 1914 and 6th January 1916.

"I have so far stated the general nature of the question at issue. The rights of the holders of preference shares depend necessarily on the qualities and incidents of these shares as they are defined *ex contractu* in the constitution of the company.

"The articles of association of the company in the articles which I proceed to quote provide, *inter alia*, as follows:—'6. The original capital of the company shall be £350,000, divided into 15,000 preference shares of £10 each, and 20,000 ordinary shares of £10 each. 7. The holders of the said preference shares shall be entitled to a cumulative preferential dividend at the rate of five per cent. per annum on the amount paid up for the time. 8. The residue of the profits shall belong to the holders of the ordinary shares. . . . 115. No dividend shall be payable except out of the profits of the company, and the declaration of the board as to the amount thereof shall be conclusive. . . . 118. The board may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserve fund for improving, repairing, maintaining, and insuring the works or property of the company or any part thereof, or for meeting losses, or for equalising dividends, or for any other purpose whatsoever that may seem to them proper. . . . 138. Upon the dissolution of the company the assets remaining after payment of the debts and obligations of the company shall be applied, first, in repaying to the holders of the preference shares respectively the whole amount paid up on such shares; and the balance remaining thereafter shall be distributed among the holders of the ordinary shares in proportion to the amount paid up on such shares."

"Putting aside for the moment article 138, it is to be observed (1) that the residual right to profits of the company resides in the holders of the ordinary shares, (2) that this residual right is charged with the burden of a *cumulo* preferential dividend of 5 per cent. to the holders of preference shares. (3) that any dividend was to be paid out of profits only, (4) that the directors were made the sole judges for ascertaining profits, and (5) that when profits had been so ascertained these were not necessarily to be used in paying dividend, but might, in whole or part, be applied by the directors to other objects which they should deem more expedient in the interests of the company. Accordingly, on the assumption of the correctness of the allegations for the preference shareholders, if the company being still a going concern, the directors had made up an account as at 6th January 1916, and ascertained a profit earned through appreciation in the value of stock, it would remain a matter of speculation how the directors would have dealt with the profit so ascertained and to what company purposes they might legitimately have resolved, under article 118, to devote it in whole or in part.

"But the short and final answer to the contention of the preference shareholders, as it appears to me, is to be found in article 138. This article is specifically directed to the contingency of a winding-up of the company. It provides the rule for application in that contingency of the company's assets remaining after payment of its debts and obligations as among the shareholders. It says that the said remaining assets are to be devoted, in the first place, to paying out to the preference shareholders the paid-up amounts of their shareholdings, and that the residual balance is to be paid to the holders of ordinary shares in proportion to the respective amounts of their holdings. Now the assets of the company in liquidation—taking the word 'assets' in its natural sense—mean all the things of one kind or another belonging to the company which passed under the administration of the liquidator in consequence of the winding-up. And from this point of view section 138 is adverse to the claim now made, inasmuch as it does not provide for but excludes the devotion of any part of the said residual assets in liquidation towards any purpose other than payment out to the shareholders *in ordine* of their capital rights.

"The preference shareholders argue that the word 'assets' as used in article 138 is to be read in an artificial and secondary sense, derivable from the terms in which their rights as preference shareholders are conceived in the articles. According to this view the assets of the company which are subject to the rule of article 138 fall to be regarded as exclusive of such portion of the value of them as might, under an account made up at 6th January 1916, be ascertained as profits earned prior to that date. I have given my best consideration to this view so presented, but I am unable to accept it. I think the word 'assets' in article 138 falls to be taken in its natural meaning. I can find no context in the articles capable of altering it to the effect for which the preference shareholders contend.

"And, indeed, if the contention of the preference shareholders were logically followed out it would, I think, lead to a result which they might not welcome. They say that the amount of alleged profit earned between 30th September 1914 and 6th January 1916 falls to be disentangled and separated from the total value of the assets which on the occurrence of the winding-up passed under the administration of the liquidator, and to be labelled as profits of the going company effeiring to the said period, and so liable to their recourse for payment of their 5 per cent. preferential dividend. I do not, of course, know at this stage and in the absence of inquiry what amount might be brought out as profits earned by the company between 30th September 1914 and 6th January 1916 as on accounts made up at the latter date. From what passed at the discussion, however, I gathered that on the preference shareholders' point of view of the facts the amount probably would be so largely in excess of the amount required to meet their present claim that if the excess did not

fall under the application of article 138, but fell under the application of article 8, these shareholders would be losers. They cannot blow hot and cold on the articles. If, as they say, the amount of profits earned but undeclared for the period between 30th September 1914 and 6th January 1916 falls to be set aside out of the realised value of the assets in the liquidation, and treated distinctively as such profits, then the residual amount of them, after meeting their present claim, would under article 8 fall to the ordinary shareholders before article 138 began to apply.

"In my opinion, however, article 138 on its own terms excludes the claim of the preference shareholders. I shall accordingly pronounce judgment by answering in the negative the first question submitted by the liquidator in his note, and finding it unnecessary to deal with the second question."

On February 16, 1917, his Lordship issued an interlocutor answering the question in the negative.

Counsel for the Liquidator—Macmillan, K.C.—Wilton. Agents—Davidson & Syme, W.S.

Counsel for the Preference Shareholders—Hon. W. Watson, K.C.—MacRobert. Agents—Boyd, Jameson, & Young, W.S. And the Solicitor-General (Morison, K.C.)—Morton. Agents—W. &. F. Haldane, W.S.

Tuesday, November 6.

SECOND DIVISION.

(COURT OF SEVEN JUDGES.)

DISTRICT BOARD OF RIVER DON *v.* BURNETT.

Fishings—Rates and Assessments—Valuation Roll—Entry of "Fishings" Averred to Refer to Trout and not Salmon Fishings—Salmon Fisheries (Scotland) Act 1862 (25 *and* 26 *Vict. cap.* 97), *sec.* 23—*Salmon Fisheries (Scotland) Act* 1868 (31 *and* 32 *Vict. cap.* 123), *sec.* 5.

A Salmon Fisheries District Board assessed a proprietor on a rental of £100, being the annual value of various "fishings" as entered in the valuation roll. The proprietor, who had a title to salmon fishing, objected on the ground that the salmon fishings were only of a nominal value, and that the entry in the valuation roll was for trout fishings.

Held in a Court of Seven Judges (*dis.* the Lord Justice-Clerk and Lord Guthrie) that the Board were entitled to treat the entries in the valuation roll of "fishings" as referring to the salmon fishings, and to assess the proprietor accordingly.

The Salmon Fisheries (Scotland) Act 1862 (25 and 26 Vict. cap. 97) enacts—Section 2—"The following words and expressions in this Act shall have the meanings hereby assigned to them unless such meaning be repugnant to or inconsistent with the context. . . . 'Fisheries' and 'Fishery' shall mean Salmon Fisheries." Section 23—"The district board shall have power to impose an assessment for the purposes of this Act, to be called the fishery assessment, on the several fisheries in each district, according to the yearly rent or yearly value of such fisheries as entered in the valuation roll . . . and such fishery assessments may be imposed, collected, and recovered by the district board in the same manner as police assessments may be imposed, collected, and recovered by the commissioners of supply. . . ."

The Salmon Fisheries (Scotland) Act 1868 (31 and 32 Vict. cap. 123) enacts—Section 5—"Where any fishery is not entered in the valuation roll, or where any fishery is entered in the valuation roll along with or as a part of other subjects, the county assessor shall, on being required by the clerk to the district board, value and enter such fishery in the valuation roll, separately from other subjects. . . ."

The District Board of the District of the River Don, *pursuers*, brought an action against John Alexander Burnett of Kemnay, Kemnay House, Aberdeenshire, *defender*, whereby they sought to recover with interest the sum of £30, to which sum the fishery assessments laid by the pursuers on the defender's fishings for the years 1915 and 1916 amounted.

The pursuers averred—"(Cond. 2.) The defender is the proprietor of the estate of Kemnay in the parish of Kemnay and county of Aberdeen, and, *inter alia*, of the following, as per the valuation roll of the county of Aberdeen, namely, 'Fishings Middle Water,' 'Fishings Upper Water,' 'Fishings Lower Water,' these being valued at the annual rent or value of £40, £30, and £30 respectively. *These fishings are ex adverso of the defender's said estate and he is the proprietor of the salmon fishings thereof.* The defender's explanations *so far as not coinciding herewith* are denied, and are irrelevant. During the protracted correspondence which took place between the pursuers' clerk and the defender's agents, the latter were repeatedly invited—prior to the making up of the valuation roll for the current year—to get the assessor to split up the entries regarding the defender's fishings, if in point of fact there were any distinction—which is not admitted—but this the defender neglected or failed to do."

The defender averred—"(*Ans.* 2) Admitted that the defender is the proprietor of the estate of Kemnay, which includes certain fishings or fisheries in the river Don, and that these fishings are entered in the valuation roll at the values stated. *Quoad ultra* denied. Explained and averred that these fishings are not salmon fisheries in the sense of the statutes condescended on, and that the defender was not entered in the valuation roll as the owner of 'salmon fisheries' during the period in question. Explained that the defender has the right of fishing for salmon in the Don *ex adverso* of his estate, but that the value of the right is and was during the period in question only a negligible amount. The whole value of the defender's fishings is and