COURT OF APPEAL—21 AND 22 FEBRUARY 1977

HOUSE OF LORDS—7 AND 8 NOVEMBER AND 1 DECEMBER 1977

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_In re_ Herbert Berry Associates Ltd. (in liquidation)
Herbert Berry Associates Ltd. (in liquidation) _v._ Commissioners of Inland Revenue[1]

C *P.A.Y.E. (Employer's Liability) income tax and national insurance graduated contributions unpaid—Preferential debts in Company's winding-up—Distress by Collector of Taxes under Taxes Management Act* 1970 (*c* 9), *s* 61—*Within three months of distress, but before sale of distrained goods, Company went into creditors' voluntary liquidation—Whether Collector can retain benefit of distress as against liquidator—Companies Act* 1948 (11 & 12 *Geo* 6, *c* 38), *ss* 307, 319(1), (5), (7).

D On 29 January 1975 the Collector of Taxes distrained on the Company's goods at its premises pursuant to s 61, Taxes Management Act 1970, for unpaid P.A.Y.E. (Employer's Liability) tax and national insurance graduated contributions, which would be preferential debts in a company's winding-up under s 319, Companies Act 1948, and the Company entered into a "walking possession" agreement with the Collector. On 3 March the Company dispatched notices under s 293, Companies Act 1948, convening meetings of creditors with a view to a creditors' voluntary liquidation, and a resolution to wind up the Company was passed on 20 March. The distrained goods were sold by the liquidator on 27 March by prior agreement between him and the Collector, without prejudice to their strict legal rights.

F The liquidator issued a summons under s 307 of the 1948 Act for an order that all further proceedings on the distress be stayed and that the proceeds of sale of the distrained goods were the property of the Company available for distribution amongst the creditors. The liquidator contended (i) that the Collector could not, by distraining, obtain priority over other preferential creditors because by s 319(5) all preferential debts were required to be treated *pari passu*; G (ii) that s 319(7) should be construed to apply both to a compulsory and to a voluntary winding-up; (iii) that a distinction should be drawn between a distress by a landlord, which was a form of execution, and a distress by the Crown; and (iv) that the Collector had prejudiced his right of distress by accepting the "walking possession" agreement.

(1) Reported (Ch D) [1976] 1 WLR 783; [1976] 3 All ER 207; 120 SJ 538; (CA) [1977] 1 WLR 617; [1977] 3 All ER 729; 121 SJ 252; (HL) [1978] 1 WLR 1437; [1978] 1 All ER 161; 121 SJ 829.

The Chancery Division, dismissing the summons, held (1) that the Collector in relying on his statutory rights of distress, was entitled to complete the distress by sale (and he had not abandoned or prejudiced his rights of distress by the "walking possession" agreement), notwithstanding the fact that by so doing he obtained for the Revenue priority over other preferential creditors; the Court would not interfere with the Collector's rights of distress in the absence of any special circumstances relating to the inequitable conduct on his part in seeking to complete the distress; (2) that the property of a company which is directed by s 302 of the 1948 Act to be applied for the benefit of the creditors subject to preferential payments is the property subject to such rights as were exercised prior to the date of winding up; and that in the present case the distrained goods were already in the possession of the Collector on that date and he had power to sell them to discharge unpaid taxes, and thus the Company's property at that date comprised its right to any surplus realised on that sale; (3) that s 319(7) was limited in its application to a compulsory winding-up. The liquidator appealed.

In the Court of Appeal the liquidator further contended that s 319(7) did not apply to the Crown, or, alternatively, if it did apply, the Crown could only get any benefit under its distress after the rights of the preferential creditors, including the Crown, had been satisfied, but did not pursue the "walking possession" point.

The Court of Appeal, unanimously dismissing the appeal and affirming the decision of the High Court, held (1) that s 319(7), which was limited to a compulsory winding-up, applied to the Crown by virtue of the words "or other person"; (2) that the Collector was entitled to retain the proceeds of the distress levied before the winding-up commenced as the Crown was not restricted to the preferential rights contained in s 319(1), nor was it confined to participation in the Company's winding-up under s 319(5) *pari passu* with the other preferential creditors; *Food Controller* v. *Cork* [1932] AC 647 distinguished; (3) that where distress had been levied but not completed before the commencement of a voluntary winding-up, the Court's discretion to deprive the distrainor of the fruits of that distress would only be exercised if the liquidator could show special circumstances rendering it inequitable to allow the distraint to continue; there was nothing in the Revenue's conduct to suggest that it should not receive the benefit of the distraint to the extent of the tax debt; In re *Roundwood Colliery Co.* [1897] 1 Ch 373 applied; (4) that the Court's decision under s 307 could not be exercised to modify the Crown's rights in relation to the distress in this case to accord with the position if the Company were compulsorily wound up. The liquidator appealed.

In the House of Lords the liquidator further contended that, if the distraint was not the exercise of a prerogative power, the statutory powers of distraint were incompatible with the priority rules in s 319, but did not contend either that s 319(7) applied other than in a compulsory winding-up or that the Crown did not fall within the words "any other person" in that subsection.

Held, in the House of Lords, unanimously dismissing the appeal, (1) that the distress was the exercise not of a prerogative but of a statutory right: *Food Controller* v. *Cork* [1932] AC 647 distinguished; (2) that the terms of s 61, Taxes Management Act 1970, and s 319 of the 1948 Act could stand together, and further, if there was any such repugnancy as contended, the Taxes Management Act 1970 would prevail as a later Act; (3) that the House would not exercise its discretion to deprive the Revenue of the benefits of the distress. It was not

A accepted that there was any lacuna revealed in s 319(7) as the 1948 Act frequently distinguished between compulsory and voluntary winding-up, and s 319(7) was only intended to apply to the former.

Quaere: Whether a distraint was a "proceeding" for the purposes of s 226(*b*), Companies Act 1948.

B The case came before Templeman J. in the Chancery Division on 19 and 20 May 1976, when judgment was reserved. On 28 May 1976 judgment was given in favour of the Crown, with costs.

Alan Heyman Q.C. and *Michael Crystal* for the liquidator.

Peter Gibson for the Crown.

The following cases were cited in argument in addition to those referred to
C in the judgment:—In re *Margot Bywaters Ltd.* [1942] Ch 121; In re *Caidan* [1942] Ch 90; In re *Eros Films Ltd.* [1963] Ch 565; In re *Centrebind Ltd.* [1967] 1 WLR 377; *Murray* v. *Epsom Local Board* [1897] 1 Ch 35; In re *Overseas Aviation Engineering (G.B.) Ltd.* [1963] Ch 24; *Westbury* v. *Twigg & Co. Ltd.* [1892] 1 QB 77.

D **Templeman J.**—By s 61 of the Taxes Management Act 1970, a Collector of Taxes is entitled to distrain on the goods of a taxpayer and to sell the goods in satisfaction of the unpaid taxes. By s 319(1) and (5) of the Companies Act 1948 certain debts, including unpaid taxes, are designated preferential debts, and on the liquidation of a company all those preferential debts must be paid in full and *pari passu* before any payment is made to any other unsecured creditor. The
E question in the present case is whether the Collector, and thus the Revenue, can retain the benefit of a distress which was levied but not completed by sale before the date when the Company, Herbert Berry Associates Ltd., went into creditors' voluntary winding-up.

On 29 January 1975 the Collector distrained on the goods of the Company, at the Company's premises, for about £9,500 of unpaid taxes—P.A.Y.E. and
F national insurance graduated contributions. On the same day the Company entered into what is known as a "walking possession" agreement with the Collector whereby, for the personal convenience of the Company, and in consideration of the Collector not leaving a man in possession of the goods upon which he had distrained, the Company agreed, firstly, that by not leaving a man in possession the Collector had not abandoned the distraint and, secondly, that
G they would not, without the written authority of the Collector, remove or allow to be removed from the premises the goods which had been distrained. They also agreed, although I do not think it matters in the present case, that they would tell anybody else who visited the premises that the goods were already in the possession of the Collector and that they would warn the Collector of any such visit.

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On 3 March 1975 the Company sent out notices under s 293 of the Companies Act 1948 convening meetings of creditors with a view to going into creditors' voluntary liquidation. The statement of affairs as at 18 March 1975 showed an overall deficiency of £91,000 and that there were preferential creditors of £31,000 and assets of £25,000, including the distrained goods, which have since been sold for £10,500. Accordingly, if the Collector is entitled to the proceeds of sale of the distrained goods, the unpaid taxes will be paid in full and the other preferential creditors will receive a dividend of only roughly 70p. in the pound. If the Collector cannot claim the proceeds of sale of the distrained goods so that they are thrown into the pool to provide for all the preferential debts, including the unpaid taxes *pari passu*, then all the preferential creditors, including the Collector in respect of the unpaid taxes, will receive a dividend of about 80p. in the pound.

Before the Company went into creditors' voluntary winding-up on 20 March 1975 the Collector had arranged for the distrained goods to be sold on 27 March 1975. The distrained goods were subsequently and sensibly sold by agreement between the liquidator and the Collector without prejudice to the legal rights of the parties. So this is a case where the remedy of distress was exercised on 29 January and, without any undue delay or other prejudicial omission or action by the Collector, the Company went into creditors' voluntary winding-up on 20 March, before the distrained goods had been sold and the distress completed.

In In re *Roundwood Colliery Co.* [1897] 1 Ch 373, Stirling J., at page 381, referred to the judgment of Turner L.J. in In re *Great Ship Co. Ltd.* (1863) 4 De G, J & S 63, at page 69, which was a case dealing with execution, and continued, on page 381:

> "The result, as I understand it, is this: that a creditor who has issued execution, or a landlord who has levied a distress, before the commencement of the winding-up will be allowed to proceed to sale unless there is established the existence of special reasons rendering it inequitable that he should be permitted to do so."

Mr. Heyman, who appeared for the liquidator in the present case, sought to distinguish In re *Roundwood Colliery Co.* on the grounds that the Collector in the present case, unlike a landlord, is distraining for a preferential debt. He submitted that the Collector cannot, by distraining, obtain priority over the other preferential creditors because by s 319(5) of the Companies Act 1948 all the preferential debts are required to be treated *pari passu* and, if necessary, to abate *pari passu*. He referred to *Food Controller* v. *Cork* [1923] AC 647. In that case the Crown was not allowed to assert a right under the Crown prerogative to require payment in full of a debt owed to the Crown, but was bound by the predecessor of s 319 to accept payment *pari passu* with the other preferential creditors, and by the predecessor of s 302, which provided for all other unsecured debts to be paid *pari passu*. Similarly, says Mr. Heyman, the Crown cannot in the present instance assert its right to distrain in order to secure payment in full, but is bound by s 319, which provides for unpaid taxes to be dealt with *pari passu* with other preferential debts.

In my judgment, all that *Food Controller* v. *Cork* decided was that the Crown surrendered its prerogative rights to require payment in full when it accepted the provisions of the Companies Act which gave the Crown limited, specified

priority rights. In the present case the Collector and the Crown are relying on the rights of distress conferred on the Collector by s 61 of the Taxes Management Act 1970. Those rights have never been surrendered. In re *Roundwood Colliery Co.*(1) demonstrates that the Collector is entitled to complete distress by sale provided he has asserted his statutory right to distrain by taking possession prior to the date of the winding-up. In this respect there is no distinction between distraint by a landlord and distraint by the Collector. The fact that the unpaid taxes, if not recovered in full by distress, rank as a preferential debt under s 319 is not in itself, it seems to me, a special circumstance which renders it inequitable for the distress to be completed.

Mr. Heyman then submitted that In re *Roundwood Colliery Co.* was wrong because in that case, and in all cases which followed, the provisions of what is now s 319(7) were overlooked. Section 319(7) provides: "In the event of a landlord or other person distraining or having distrained on any goods . . . within three months next before the date of a winding-up order", the preferential debts "shall be a first charge on the goods . . . so distrained on, or the proceeds of the sale thereof." Mr. Heyman submitted that on its true construction s 319(7) applies not only to a compulsory winding-up where a winding-up order is made by the Court but also to a voluntary winding-up when a resolution for winding-up is passed by the company. It would be perverse, he submitted, to have one rule for a compulsory winding-up and another rule for a creditors' voluntary winding-up. I see the force of that argument, but s 319(8)(*d*), and other sections of the Act—for example, s 326(1)—show that the draftsman was well aware of the distinction between the two kinds of winding-up. Section 319(7) is expressly limited to a company ordered to be wound up compulsorily. The section can be extended to a company wound up by resolution only by Parliamentary or judicial legislation. Both types of legislation are beyond my ken.

Mr. Heyman further submitted that there is a distinction between distress by a landlord and distress by the Crown. Distress by a landlord, he submitted, is a form of execution, and by s 325 of the Companies Act 1948 it is provided:

> "Where a creditor has issued execution . . . or has attached any debt due to the company, and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution or attachment against the liquidator in the winding up . . . unless he has completed the execution or attachment before the commencement of the winding up."

Mr. Heyman relied on the statement in *MacGregor* v. *Clamp & Son* [1914] 1 KB 288, where, at page 291, Bray J., following Lord Mansfield, said that a distress was really in the nature of execution and that, in particular, "the right of distress by the Crown for taxes was really by way of execution". In *MacGregor* v. *Clamp & Son* the Court was deciding only that implements of trade could not be seized under a distress for rent, but that limitation did not apply to a distress for unpaid taxes, which was, as it was put, "really by way of execution".

The Companies Act 1948 distinguishes between distress, whether by a landlord or the Crown, and execution. Thus s 228 refers to the four remedies of attachment, sequestration, distress and execution. Section 319(7) deals with

(1) [1897] 1 Ch 373.

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distress by landlords or other persons, and s 325 deals with execution or attachment. In my judgment, it is not possible to extract distress by the Crown from distress in general in s 319 and include it somehow or other in s 325, which is not dealing with distress.

Finally, Mr. Heyman argued that the Collector had abandoned or prejudiced his right of distress by accepting the "walking possession" agreement. In my judgment the express terms of that agreement are inconsistent with the submission. The agreement was freely entered into by the Company for its own benefit before the date of the winding-up, and both the Company and the liquidator, and the other creditors, are bound thereby. In my judgment, the property of a company, which is directed by s 302 to be applied for the benefit of the creditors subject to preferential payments, is the property subject to such rights as were exercised prior to the date of the winding-up. At the date of the winding-up in the present case the goods in question were in the possession of the Collector and he had power to sell them in order to discharge unpaid taxes. The property of the Company at the date of the winding-up consisted only of its right to any surplus realised on that sale.

Mr. Gibson, who appeared for the Crown, accepted that the Collector's right to sell and complete the distraint was subject to the power of the Court, by injunction, to prevent the exercise of that right in special circumstances; that is to say, if it was inequitable to allow the distress to be completed. In In re *Great Ship Co. Ltd.*, to which I have already referred and which is reported in (1863) 4 De G, J & S 63, Turner L.J., at page 69, said that the then Companies Act did not give the general creditors any right to have their interests consulted in preference to the interests of the particular creditor whose case may come before the Court. In that case it was a creditor seeking to complete execution. Similarly, in the present case the Companies Act 1948 does not give the preferential creditors any right to have their interests consulted in preference to the interests of the particular preferential creditor who is now seeking to complete distress. In In re *Roundwood Colliery Co.*(1), to which I have already referred, Stirling J. stated that it was the duty of the Court to allow a creditor to complete distress unless there were special circumstances which rendered such a course inequitable. Similarly, here, it seems to me, the Court is under an obligation to allow the creditor to complete distress unless there are special reasons.

In *Venner's Electrical Cooking and Heating Appliances, Ltd.* v. *Thorpe* [1915] 2 Ch 404 the Court held that it was not inequitable to allow a landlord to complete a distress for rent payable in advance. Lord Cozens-Hardy M.R., in giving illustrations of the circumstances in which the Court would refuse to allow a distress to be completed, instanced fraud or unfair dealing as possible grounds for depriving a landlord of the right to complete the distress he had begun. In Re *G. Winterbottom (Leeds), Ltd.* [1937] 2 All ER 232 Simonds J. restrained landlords from completing a distress for rent which was 5¼ years in arrears because the landlords were also the directors of the company and should not have postponed collecting their money or exercising their remedies for such a long time while allowing the company to incur further debts from unsecured creditors.

(1) [1897] 1 Ch 373.

A These cases seem to show that there must be some inequitable conduct on the part of the person seeking to complete distress if the Court is to interfere with his rights. The mere fact, in the present case, that the Collector will obtain priority over the other preferential creditors is no more relevant, it seems to me, than the fact that a landlord who is allowed to complete distress thereby obtains priority over all the unsecured creditors in the liquidation.

B Mr. Heyman rightly points out the anomalies and different results which are achieved by the exercise of the power of distress if the company goes into voluntary winding-up, or by the exercise of the power of distress if the company is compulsorily wound up by the Court so that s 319 applies, or by the exercise of the power of execution or attachment so that s 325 applies. It is not possible for me to clear up these anomalies or difficulties. It may be that the Law Com-
C mission can be encouraged to give further consideration to these matters, and perhaps even to recommend the abolition of execution, distress, attachment and sequestration against a company, provided the Companies Court gives up the pretence of not allowing a winding-up petition to be employed to enforce the payment of a debt. If winding-up were the proper remedy, then either the creditor would be paid in full if the company were solvent or the company
D would be wound up and all the preferential and other rights of creditors would be maintained *pari passu* and would apply, whatever the reason for the winding-up or the steps by which the winding-up was achieved.

Summons dismissed with costs.

Leave to appeal.

E The liquidator having appealed against the above decision, the case came before the Court of Appeal (Buckley, Goff and Shaw L.JJ.) on 21 and 22 February 1977, when judgment was given unanimously in favour of the Crown, with costs.

Alan Heyman Q.C. and *Michael Crystal* for the liquidator.

Peter Gibson for the Crown.

F The following cases were cited in argument in addition to those referred to in the judgment:—*MacGregor* v. *Clamp & Son* [1914] 1 KB 288; In re *Centrebind Ltd.* [1967] 1 WLR 377; In re *Margot Bywaters Ltd.* [1942] Ch 121; *Westminster Corporation and United Travellers Club Co. Ltd.* v. *Chapman* [1916] 1 Ch 161; In re *Caidan* [1942] Ch 90; In re *Caribbean Products (Yam Importers) Ltd.* [1966] Ch 331.

G **Buckley L.J.**—This is an appeal from a judgment of Templeman J. of 28 May 1976 relating to a distress levied by the Commissioners of Inland Revenue under the Taxes Management Act 1970, s 61, in the following circumstances: The Company (which had been incorporated in the year 1956) carried on the business of joiners. It became indebted to the Crown in substantial sums
H for P.A.Y.E. tax and for national insurance contributions, and on 29 January 1975 the Commissioners of Inland Revenue levied a distress upon the goods of

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the Company in a sum of £9,500. The assets which were taken into the possession of the Commissioners, or of the bailiffs, were estimated to produce £10,500. Subsequently, some part of that debt was discharged in cash, and the amount which is now outstanding in respect of P.A.Y.E. is £4,121.88 and for national insurance contributions £1,453.04, making a total of £5,574.92.

On 3 March 1975 notices were served to lead to a meeting and the passing of a resolution for a voluntary winding-up of the Company in a creditors' voluntary liquidation. The appropriate resolution was passed on 20 March 1975. The Company then went into voluntary winding-up. There was a walking possession agreement between the Commissioners of Inland Revenue and the liquidator. The liquidator intimated that he proposed to make application to the Court to restrain any sale by the Commissioners of Inland Revenue, but, by agreement between the parties, the goods in question were in fact sold in a sale conducted by the liquidator and produced about £10,500, their estimated value. The question then arose as to how those proceeds should be applied, and the liquidator applied to the Court by originating summons on 5 May 1975 for an Order that all further proceedings on the distress might be stayed and for a declaration that the property and chattels, the subject-matter of the distress, were available for distribution by the liquidator amongst the creditors of the Company in accordance with the provisions of the Companies Act 1948. When that summons was issued I think the sale could not yet have taken place, but it would, of course, apply equally to the proceeds of sale as to the actual assets seized under the distress. The learned Judge dismissed the application, holding that the Commissioners were entitled to the fruits of their distress to the extent necessary to discharge the debts for taxes to which I have referred. From that decision the liquidator appeals. It has been urged upon us, on a variety of grounds, that the decision of the learned Judge was wrong.

The first of the liquidator's submissions is that s 319(7) is a section which does not apply to the Crown at all. Section 319 is the section which prescribes what claims against the Company shall rank as preferential claims in the winding-up. It derives from sections in earlier Companies Acts, first the Preferential Payments in Bankruptcy Act of 1882, s 1, which was later replaced by s 209 of the Companies Act 1908. It now finds its place in s 319 of the Act of 1948.

Subsection (7) is in these terms:

> "In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months next before the date of a winding up order, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof: Provided that, in respect of any money paid under any such charge, the landlord or other person shall have the same rights of priority as the person to whom the payment is made."

Mr. Heyman, appearing for the liquidator, has urged that that subsection is one which is liable to give rise to remarkable anomalies between a compulsory winding-up and a voluntary winding-up, because it only applies, as its language shows, for it contains a reference to the winding-up order, in a compulsory winding-up. In a compulsory winding-up the preferential creditors have the advantage of a charge upon the proceeds of any such distress, as is mentioned in the subsection, for the amount of their preferential debts in priority to any rights of the distrainor. But he says in fact that that subsection has no application

A to the Crown, because the Crown is not to be treated as falling within the words "a landlord or other person". So that the Crown is remitted to its preferential rights under subs (1) and has no other rights of advantage over other creditors than it can secure by reference to subs (1). In my judgment, that is not a contention which can succeed. Mr. Heyman has said that the words "or other person" should be read *ejusdem generis* with the word "landlord", so that the B subsection would not apply to a distress under a statutory power for recovering arrears of tax. I can see no justification, with deference to Mr. Heyman, for that view. There is here no series of words from which one can discover any genus to which the words "other person" could be construed as *ejusdem generis*; and I do not see any reason for thinking that the words "or other person" ought to be limited in any way. They mean, I think, any person other than a C landlord. Accordingly, I think the subsection is one which is capable, in proper circumstances, of applying to the Crown.

Then Mr. Heyman has said that the distress is ineffective as against the liquidator because, upon authorities which he cited to us, he contends that the Crown has no preferential rights except those conferred upon it by s 319(1) and so must have lost the right to retain the fruits of the distress.

D The cases to which he has referred us are In re *H. J. Webb & Co.* (*Smithfield, London*) *Ltd.* [1922] 2 Ch 369 and the same case on appeal in the House of Lords under the name *Food Controller* v. *Cork* [1923] AC 647. In that case there had been no distress. The company, H. J. Webb & Co., were indebted to the Food Controller (a Minister of the Crown) in respect of moneys due relating to dealings in frozen rabbits undertaken by the company as agent for the E Controller. The company went into liquidation and the Controller made it plain in the liquidation and asserted that the Crown was entitled to an entire priority over all other creditors, founding that claim upon prerogative rights which had prevailed in earlier days, under which the Crown could claim payment in full of any debt to the Crown in priority to the satisfaction of the debts to any other creditors. In the Court of Appeal and in the House of Lords it F was held that the combined effect of, I think it was, s 186, anyhow, the section which provided that the assets should be divided amongst the ordinary creditors *pari passu* and s 209 of the Companies Act 1908, being the progenitor of s 319 of the 1948 Act, relating to preferential claims, were binding upon the Crown and, being binding upon the Crown, the Crown could claim no other preferential rights in the winding-up than the rights accorded by s 209 of the 1908 Act. The G matter was concisely stated, I think, by Lord Birkenhead in the House of Lords, at page 657, where his Lordship said:

> "At the time when the Act of 1908 became law it was fairly arguable that under the general law of prerogative, and in virtue of various statutory provisions, Crown debts were entitled to a general priority on the winding up of the company. No such claim can survive the particular enumeration H contained in s. 209."

In my judgment, that case decided this, and no more, that the Crown's right to priority in the winding-up of any company was regulated by s 209 and it was not open to the Crown to claim in a winding-up any other preferential position than that. The decision, in my judgment, had no bearing upon the question of I what effect a winding-up has upon a distress levied before the commencement of the winding-up, and that is the problem which we have to consider.

(Buckley L.J.)

Mr. Heyman has further submitted that under s 319(5) of the Companies Act 1948 the Crown is confined to participation *pari passu* with other preferential creditors in the winding-up of a company. In the winding-up of a company that is perfectly true, but the right asserted by the Crown here is under a distress which was levied before the winding-up commenced, and the problem for decision is whether it can retain the fruits of that distress notwithstanding the winding-up of the company and whether it has rights under the distress which override the rights which arise in the winding-up of the company.

Then Mr. Heyman has submitted that, if s 319(7) is applicable to the Crown, the Crown can only get any benefit under its distress after the rights of the preferential creditors, including the Crown, so far as it is itself a preferential creditor, have been satisfied. As I have already mentioned, subs (7) is only applicable in a compulsory winding-up and we are concerned here with a voluntary winding-up, but Mr. Heyman places reliance upon the fact that under s 307 of the Act a liquidator may apply to the Court to determine any question arising in a voluntary winding-up and to exercise, as respects any matter, all or any of the powers which the Court might exercise if the company were being wound up compulsorily. He says that the Court ought, in the exercise of the discretion conferred by that section, in some way or other to modify the Crown's rights in relation to this distress so as to bring the position into line with what it would be if the company were being compulsorily wound up.

It may be, I think, that the provisions of the Act do produce some rather odd anomalies, if one compares the position where a company is in compulsory liquidation with the position where a company is not in compulsory liquidation, but it is not the function of the Court to fill in apparent lacunae in legislation by an exercise of a discretion, and, in my judgment, we have to give effect to the Act as we find it and we ought not to invent for ourselves rules for the administration of the assets of a company in liquidation which are not to be found in the Act because we think it would have been appropriate that they should have been found in the Act.

It is quite clear on authority, I think, that the Court has a discretion to deprive someone who has levied a distress which is not complete at the commencement of the winding-up of the fruits of that distress, or of some part of them, if equity so requires. We were referred to a decision of Stirling J. in In re *Roundwood Colliery Co.* [1897] 1 Ch 373 where, at page 381, after a reference to In re *Great Ship Co. Ltd.* (1863) 4 De G, J & S 63, and various other authorities, the learned Judge said:

> "The result, as I understand it, is this: that a creditor who has issued execution, or a landlord who has levied a distress, before the commencement of the winding-up will be allowed to proceed to sale unless there is established the existence of special reasons rendering it inequitable that he should be permitted to do so."

That view was affirmed in the later case of *Venner's Electrical Cooking and Heating Appliances, Ltd.* v. *Thorpe* [1915] 2 Ch 404, in this Court, and was acted upon by Simonds J. in Re *G. Winterbottom (Leeds), Ltd.* [1937] 2 All ER 232. We are told that the decision of Simonds J. is the only reported case to be found in the books in which the Court has in fact found it appropriate to interfere with the full enjoyment of a distraint by the person making the levy. In that case two directors of a company (who were also the landlords of the property occupied by the company) had allowed the rent to get into arrear for 5¼ years.

A They levied a distress upon the goods of the company, which was not completed when the company went into voluntary winding-up. The liquidator sought to prevent the completion of the distress and the learned Judge, in the exercise of his discretion, granted an injunction restraining the landlords from proceeding further with the distress than the extent necessary to meet two years' arrears of rent due at the date of the winding-up, he having taken the view that the land-
B lords, being in the position of directors, had allowed the company to get unduly into arrear and that it really was not fair to allow them to have the full benefit of a distress in preference to other creditors of the company. I mention for the sake of completeness the very recent decision of Oliver J., reported in [1977] 1 All ER 319, of Re *Bellaglade Ltd.* merely to show that we are not ignorant of its existence.

C Mr. Heyman very persuasively has contended before us that equity requires that in a voluntary winding-up the assets of a company should be distributed in the same manner as they would be distributed if the winding-up was a compulsory winding-up, and he says that it would be wrong in the present case to allow the Crown to retain the benefit of this distress, which will enable it to recover the whole of the Crown debts distrained for in full, whereas if they proved for
D them in the winding-up, and ranked *pari passu* with other preferential creditors, they would only receive a dividend. But for myself I do not see anything inequitable in that respect. The Crown levied this distress some five weeks before the Company went into liquidation. There was nothing in the least sharp or underhand. Of course there was not. There was nothing in the conduct of the Commissioners of Inland Revenue in any way to suggest that it would be unfair
E to allow them to get the full benefit of their activity in protecting the Crown in respect of this particular debt. In my judgment, the distraint should be allowed to proceed, and the learned Judge was right in taking the course which he took of dismissing the application.

I would dismiss this appeal.

Goff L.J.—I agree. Mr. Heyman first argued that s 319(7) does not apply
F to the Crown. It does not in any event apply to this case because that subsection is dealing with compulsory winding-up. The reason why he advanced that argument was no doubt that otherwise it might possibly prejudice his main submission, founded on the *Food Controller* case[1]; and when it came to the argument on discretion, he relied upon subs (7) as applying. I agree with my Lord that the subsection does extend to the Crown. The only argument to the
G contrary was the *ejusdem generis* rule, but there is no genus and therefore no basis for that rule. I would refer to Craies on Statute Law, 7th edn (1971), at page 181, where it is said:

> "To invoke the application of the *ejusdem generis* rule there must be a distinct genus or category. . . . Where this is lacking the rule cannot apply, but the mention of a single species does not constitute a genus."

H I then turn to Mr. Heyman's main argument, founded, as I have said, upon the case of *Food Controller* v. *Cork* [1923] AC 647. There it was held that the Companies Act—then the Act of 1908—binds the Crown, and therefore it could no longer rely on its prerogative or any prerogative writ to gain for

(1) [1923] AC 647.

(Goff L.J.)

itself a preference or priority other than that prescribed, as it then was, by s 209, and now is by s 319 of the 1948 Act. I agree with my Lord that that case is distinguishable. It was dealing with the prerogative which the Crown sought to rely upon when proving in the winding-up and was not concerned with any statutory right of distress. Indeed, there was no such right in respect of the debt in question in that case. It would only have a bearing on the present case by analogy if we were able to say that the distress is equivalent to the old writ of extent and the same principles ought to be applied. Mr. Heyman relied upon a passage in the speech of Lord Atkinson, at page 661, where he said(1):

> "To take a familiar instance by way of illustration. A lessor is entitled to receive from his lessee the rent reserved by the lease when it becomes due. If the lessee should not pay his rent, the lessor may distrain (seizing under a writ of extent has been styled by Cotton L.J. a distraint), or he may sue the lessee on the latter's covenant to pay the rent."

I do not think that we should apply the *Food Controller* case to the present case on any such analogy, which, in my judgment, is not a true one.

In support of his argument Mr. Heyman referred us in his reply to In re *Henley & Co.*(2) 9 Ch D 469, not as being now good law—it obviously is not, because at that time the Act did not bind the Crown—but he relied on it in this way: he said it appeared that if the present problem had been before the Court of Appeal they would have decided that the statutory power of distress is cut down by the Act. In that case, however, the point did not arise. Secondly, no distress had actually been levied, and I do not think that we ought to be influenced by anything that was said by the Lords Justices about distress in that case.

In my judgment, therefore, there is nothing in the *Food Controller* case to cut across the statutory right given to the Crown by the Taxes Management Act of 1970 to levy a distress, and we have to consider simply how the matter stands, that distress having been levied before the commencement of the winding-up, though not completed by sale. As it had not been so completed, it appears, certainly in this Court, by the joint effect of s 226, which enables the Court to restrain pending proceedings after petition and before a winding-up order, and s 307, which enables the liquidator in a voluntary winding-up to apply to the Court to exercise any powers it would have in compulsory winding-up, that the Court has a discretion, if it thinks right, to restrain the distress. Mr. Gibson concedes that for the purposes of this case, but he reserves the right to argue elsewhere that a distress is not a proceeding within the meaning of s 226. On the premise that we have a discretion, and having disposed of the point on the *Food Controller* case, it seems to me that we have to apply the ordinary rule, which is quite clearly established, that where the distress has been levied before the commencement of the winding-up, the Court will only restrain it if the liquidator shows special circumstances rendering it inequitable that it should be allowed to proceed. I need not refer in detail to the authorities, but in *Venner's Electrical Cooking and Heating Appliances, Ltd.* v. *Thorpe* [1915] 2 Ch 404 Neville J. interjected, at page 405:

> "It seems to me that where the distress is levied before the winding-up the liquidator must show that it is inequitable to allow the landlord to proceed, but where the distress is levied after the winding-up the lessor must show that it is equitable that he should be allowed to proceed";

(1) [1923] AC 647. (2) (1878) 1 TC 209.

A and the Court of Appeal, referring to the origin of the matter in In re *Great Ship Co. Ltd.*(1) and the decision of Stirling J. in In re *Roundwood Colliery Co.*(2) clearly laid down that rule. At the foot of page 407, Lord Cozens-Hardy M.R. said:

> "Applying that to the present case, here the landlord is exercising his legal rights, and I think it is indisputable that no equitable ground has
B ever been made out for restraining the landlord from levying the distress, unless there have been some circumstances outside the levying, such as fraud, or unfair dealing, which would entitle the tenant to an injunction."

Pickford L.J. agreed and Warrington L.J. gave a judgment to the same effect. In this case there is no ground whatever for suggesting that the conduct of the Revenue has been in any way inequitable and, indeed, that has not been repre-
C sented to us in any way.

The only other point which has been urged on the matter of discretion is that, taking subs (7) as applicable, if this were a compulsory winding-up then, by virtue of the doctrine of relation back for three months, the Inland Revenue could be defeated because there would be a charge on the proceeds of the sale under that subsection. It is submitted that we ought so to exercise our discretion
D as to produce the same result in a voluntary winding-up and it is submitted that this discloses a lacuna in the Act. I am not satisfied that it does. It may have been an intentional difference drawn between the two types of winding-up, but even assuming that it does, I do not see how we can, in the exercise of our discretion to restrain the proceeding—that is the distress—in effect alter the terms of the Statute.

E For these reasons I agree that this appeal fails.

Shaw L.J.—There is nothing I wish to add to the judgments which have been given. I agree with them and I would dismiss the appeal.

Appeal dismissed, with costs. Leave to appeal to the House of Lords refused.

The liquidator having been granted leave by the Appellate Committee of
F the House of Lords to appeal against the above decision, the case came before the House of Lords (Viscount Dilhorne, Lords Morris, Simon, Russell and Scarman) on 7 and 8 November 1977, when judgment was reserved. On 1 December 1977 judgment was given unanimously in favour of the Crown, with costs.

Alan Heyman Q.C. and *Michael Crystal* for the liquidator.

G *Peter Gibson* for the Crown.

Re *Henley & Co.* (1878) 1 TC 209; 9 Ch D 469 was cited in argument in addition to the cases referred to in the speeches.

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(1) 4 De G, J & S 63. (2) [1897] 1 Ch 373.

Viscount Dilhorne—My Lords, I have had the advantage of reading in draft the speehes of my noble and learned friends, Lord Simon of Glaisdale and Lord Russell of Killowen. I agree entirely with them and for the reasons they give, in my opinion this appeal should be dismissed.

Lord Morris of Borth-y-Gest—My Lords, I have had the advantage of studying in draft the speeches prepared by my noble and learned friends Lord Simon of Glaisdale and Lord Russell of Killowen.

I fully agree with them and, for the reasons they set out, I would dismiss the appeal.

Lord Simon of Glaisdale—My Lords, this is an appeal from an Order of the Court of Appeal ([1977] 1 WLR 617) affirming a judgment and order of Templeman J. ([1976] 1 WLR 783) whereby he dismissed the Appellants' application by originating summons dated 5 May 1975. By that originating summons the Appellants had applied for an order that all further proceedings in a distress levied by the Crown on certain property and chattels of the Appellants should be stayed, and for a declaration that such property and chattels were available for distribution by the Appellants amongst their creditors in accordance with the provisions of the Companies Act 1948.

The Appellants were incorporated in 1956 and carried on the business of joiners; their authorised and issued capital was £1,000. In January 1975 they were indebted to the Crown for income tax which, under the P.A.Y.E. provisions, they had deducted from the emoluments of their employees for the months of April to December 1974, and for national insurance contributions for the same period. By letter dated 22 January 1975 the Collector of Taxes informed the Appellants that distress would be levied if the debt was not paid by 29 January 1975. The Appellants made some payment to the Collector of Taxes; but there was a balance of £9,513.71 still due to the Crown on 29 January 1975. On that day the Crown therefore levied distress on the goods of the Appellants for the sum of £9,676.19 (made up of £6,838.57 income tax, £2,675.01 national insurance contributions and £162.48 the costs of the distress). The distress was accompanied by a "walking possession" agreement whereby, for the convenience of the Appellants and in consideration of the Collector not leaving a man in possession of the distrained goods, the Appellants agreed, *inter alia*, that the Crown had not abandoned the distraint by not thus leaving a man in possession. By notices dated 3 March 1975, pursuant to s 293 of the Companies Act 1948, the Appellants convened a meeting of creditors for 20 March 1975, with a view to going into a creditors' voluntary liquidation. By 20 March 1975 the debt owed by the Appellants to the Crown had been reduced to £5,751.78 as a result of payments made by the Appellants. On 20 March 1975 the Appellants went into a creditors' voluntary liquidation. The statement of affairs prepared by the Appellants' directors showed assets (including the distrained goods) estimated by the directors at £25,741, preferential creditors (including the Crown in respect of the debt for which they had distrained) in the sum of £31,247.26 and unsecured creditors in the sum of £85,655. The Crown had arranged before the beginning of the liquidation that the distrained goods should be sold on 27 March 1975; but, on being informed that the Appellants intended to start the instant proceedings, cancelled the sale; and, at the request of the Crown, the goods were sold by the Appellants' liquidator on terms (*inter alia*) that the Crown retained against the proceeds of sale such rights as it had against the goods themselves.

(Lord Simon of Glaisdale)

A The main issue that arises upon this appeal is whether the Crown, who duly levied distress on the goods of the Appellants in purported exercise of the statutory rights conferred on the Crown, is entitled to retain the benefit of that distress notwithstanding that the Appellants went into a creditors' voluntary liquidation after the levying of the distress but before it was completed by sale. The provision giving the Crown power to distrain in such circumstances as those B in the instant case is now contained in s 61 of the Taxes Management Act 1970 (although your Lordships were informed from the Bar that statutory authority for distress by a revenue authority goes back to the 18th century; and s 80 of the Taxes Management Act 1880 is substantially the precursor of s 61 of the 1970 Act).

Section 60 of the 1970 Act provides that the Collector of Taxes should make C demand for payment of tax. Section 61 reads as follows:

> "61.—(1) If a person neglects or refuses to pay the sum charged, upon demand made by the collector, the collector shall, for non-payment thereof, distrain upon the lands, tenements and premises in respect of which the tax is charged, or distrain the person charged by his goods and chattels, and all such other goods and chattels as the collector is hereby D authorised to distrain. (2) For the purpose of levying any such distress, a collector may, after obtaining a warrant for the purpose signed by the General Commissioners, break open, in the daytime, any house or premises, calling to his assistance any constable. Every such constable shall, when so required, aid and assist the collector in the execution of the warrant and in levying the distress in the house or premises. (3) A levy or warrant to E break open shall be executed by, or under the direction of, and in the presence of, the collector. (4) A distress levied by the collector shall be kept for five days, at the costs and charges of the person neglecting or refusing to pay. (5) If the person aforesaid does not pay the sum due, together with the costs and charges within the said five days, the distress shall be appraised by two or more inhabitants of the parish in which the F distress is taken, or by other sufficient persons, and shall be sold by public auction by the collector for payment of the sum due and all costs and charges. The costs and charges of taking, keeping, and selling the distress shall be retained by the collector, and any overplus coming by the distress, after the deduction of the costs and charges and of the sum due, shall be restored to the owner of the goods distrained."

G It will be noted that subs (1) is in mandatory terms. It was common ground that this statutory power of distraint extended to the unpaid P.A.Y.E. deductions and also to the unpaid national insurance contributions.

Some of the arguments which had been advanced to Templeman J. and the Court of Appeal were abandoned before your Lordships. In particular, it was no longer contended on behalf of the Appellants that the Crown did not fall H within the words "any other person" in s 319(7) of the Companies Act 1948 (quoted hereafter), and it was accepted that that subsection applies only to a compulsory winding-up (not to a creditors' voluntary liquidation). On the other hand one argument was advanced which was not raised in the Courts below. The Appellants put forward three main arguments before your Lordships:

I (1) Any right of the Crown to distrain for debts due to it and any right of the Crown to claim preferential payment of debts due to it are prerogative powers. But *Food Controller* v. *Cork* [1923] AC 647, affirming the decision

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the Court of Appeal *sub nom.* In re *H. J. Webb & Co. (Smithfield, London) Ltd.* [1922] 2 Ch 369, established that the rights of the Crown against the property of an insolvent company are governed by the provisions of the Companies Acts, and that there is now no place for the exercise by the Crown of either of the prerogative powers to which I have referred.

(2) Alternatively, if the right of the Crown to distrain for debts arising from failure to make over to the Inland Revenue tax deducted under P.A.Y.E. payments and national insurance contributions is a statutory (not a prerogative) power, the statutory power (now contained in s 61 of the consolidation Taxes Management Act 1970) is ultimately a re-enactment of s 80 of the Taxes Management Act 1880. But such a statutory provision cannot stand with the provisions of the later Preferential Payments in Bankruptcy Act 1888, s 1, (subsequently consolidated in s 209 of the Companies (Consolidation) Act 1908 and now appearing in s 319 of the Companies Act 1948), whereby all preferential creditors (including the Crown) rank equally, so that, unless they can be paid in full, they are to abate in equal proportions.

(3) In the further alternative, the Court has a discretion to restrain an uncompleted distress from proceeding to completion by sale; and such discretion should be exercised against the Crown in the instant case.

I turn to consider each of these arguments in turn.

The argument based on the prerogative. The Appellants relied strongly on *Food Controller* v. *Cork* [1923] AC 647. In that case, during the 1914-18 war the Food Controller, an organ of the Crown, in exercise of statutory power appointed a company to sell certain foodstuffs on commission. In 1920 the company went into voluntary liquidation and was found to be insolvent. At that date the company owed the Food Controller over £9,000, representing purchase moneys which had been collected by the company on account of the Food Controller but not paid over to him. The Food Controller lodged a proof for the debt and claimed to be paid in priority to the other creditors of the company on the ground that it was a Crown debt. The liquidator admitted the debt but denied priority; whereupon the Food Controller issued a summons in the winding-up proceedings, claiming priority. The learned trial Judge upheld the claim to priority by virtue of the prerogative ([1921] 2 Ch 276); but the Court of Appeal ([1922] 2 Ch 369) reversed his decision, holding that the combined effect of ss 186 and 209 of the Companies (Consolidation) Act 1908 was to extinguish the priority of the Crown in respect of debts due to it by an insolvent company in a winding-up, except so far as priority was expressly conferred upon the Crown by s 209. Section 186 dealt with the immediate legal consequences of a voluntary winding-up. Section 209 (corresponding to s 319 of the 1948 Act) dealt with preferential payments in a winding-up (i.e., what debts should be paid in priority to all other debts): they included certain rates and taxes and debts for wages or salaries. Your Lordships' House [1923] AC 647 upheld the Court of Appeal. In effect your Lordships' House applied the principle established in *Attorney-General* v. *De Keyser's Royal Hotel, Ltd.* [1920] AC 508—namely, that, where Parliament has provided by Statute for powers previously within the prerogative being exercised in a particular manner and subject to the limitations and provisions contained in the Statute, those powers can only be so exercised. While the Statute is in force the prerogative power is

A "merged in it" (Swinfen Eady M.R. [1919] 2 Ch 197, at page 216) or "in abeyance" (Lord Atkinson [1920] AC 508, at pages 539–40). On this last page Lord Atkinson continued:

> "Whichever mode of expression be used, the result intended to be indicated is, I think, the same—namely, that after the statute has been passed, and while it is in force, the thing it empowers the Crown to do can
B thenceforth only be done by and under the statute, and subject to all the limitations, restrictions and conditions by it imposed, however unrestricted the Royal Prerogative may theretofore have been."

That this was the *ratio decidendi* of *Food Controller* v. *Cork*(1) appears most clearly from the judgments in the Court of Appeal of Lord Sterndale M.R. [1922] 2 Ch, at page 386, and Younger L.J., at page 404, and in your Lordships'
C House from the speech of Lord Wrenbury, [1923] AC at page 669:

> "The Crown by virtue of its prerogative is entitled to say: 'In payment of debts I have the right to come first—and to enforce that right I can proceed by way of writ of extent.' I should not myself describe this as two prerogative rights, of which one is larger than the other, but rather as one prerogative right and a prerogative remedy to enforce the right. I can
D understand that the Crown might surrender the latter while retaining the former, but not that it could surrender the former while retaining the latter. If that right to come first is surrendered, the prerogative remedy to enforce that right by writ of extent must have been surrendered also. The question for decision, therefore, I think is, and is only, whether the Crown has surrendered the prerogative right to come first."

E Lord Wrenbury then examined the effect of s 209 of the 1908 Act and continued, at page 670:

> "It follows from what I have said that the Crown is no longer in a position to say 'I come first.' It does not come first. Some debts have been raised by s. 209, sub-s. 1, to a position in which they rank with the specified Crown debts, and that class comes first. Other debts have been raised by
F s. 186 to a position in which they rank with the unspecified Crown debts, and these are to be postponed and to be paid pari passu. By assenting to an Act which altered the rights of the Crown in manner above stated, the Crown surrendered its prerogative right to come first, and necessarily surrendered also its prerogative right to enforce by writ of extent a right of priority which existed no longer."

G My Lords, I respectfully agree with Templeman J. and the Court of Appeal that *Food Controller* v. *Cork* is distinguishable from the instant case. First, in the instant case the Crown had distrained before the liquidation started, whereas there was no distress in the *Food Controller* case. Distraint in relation to winding-up proceedings is expressly dealt with in s 319(7) of the Companies Act 1948, which (by the use of the word "order") is limited to compulsory winding-up.
H The subsection reads:

> "In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months next before the date of a winding up order, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof: . . ."

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(1) [1923] AC 647.

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Secondly, as I have ventured to point out, the *Food Controller* case(1) turned on the relationship between the exercise of prerogative powers and statutory enactments dealing with the subject-matter of the prerogative. Prerogative powers are those which the Crown legally exercises without parliamentary authority (see Swinfen Eady M.R. in the *De Keyser Hotel* case [1919] 2 Ch, at page 216). In the instant appeal the Crown are not relying on prerogative powers, but precisely on the statutory powers given by s 61 of the Taxes Management Act 1970. That section is really a classic example of the way a prerogative merges in, or is superseded by, statutory provisions, as described by Swinfen Eady M.R. and Lord Atkinson. Nor can any distinction be drawn in the instant context between, on the one hand, a prerogative right and, on the other, a prerogative remedy as a method of enforcing such right. Section 61(1) deals with the right; the ensuing subsections stipulate that the right shall be, in the words of Swinfen Eady M.R. (*loc. cit.*)(2), "exercised in a particular manner and subject to the limitations and provisions contained in the statute."

In my judgment, therefore, the primary argument of the Appellants—namely, that the Crown are seeking by use of prerogative powers to gain a priority not vouchsafed by the Companies Act, a course denied by *Food Controller* v. *Cork*—fails on the ground that the Crown have distrained by virtue of statutory, and not prerogative powers.

The argument based on statutory incompatibility. If the Appellants were wrong, as I venture to think that they were, in arguing that the Crown were distraining under prerogative powers, it was alternatively argued on their behalf that the statutory powers of distraint were incompatible with the priority rules established in the Companies Act. This contention was put forward in neither of the Courts below; and it was put forward before your Lordships, understandably, in no great detail and with no particular enthusiasm. It is true that if two Acts are inconsistent or repugnant, the latter will be read as having impliedly repealed the earlier: see Craies on Statute Law, 7th edn (1971), at page 366. But the Court leans against implying such a repeal: unless the two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied: *loc. cit.*, citing authorities.

Certainly so far as voluntary winding-up is concerned there is nothing repugnant. By s 302 of the Companies Act 1948 the property of a company must, on its voluntary winding-up, be applied in satisfaction of its liabilities *pari passu*. But this provision is "Subject to the provisions of this Act as to preferential payments". Among those provisions is s 319(7) which, as I have pointed out, is limited to compulsory winding-up. I would add that it seems to have occurred to neither of the distinguished counsel concerned in In re *Margot Bywaters Ltd.* [1942] Ch 121, nor to Simonds J., who tried that case, that there was any inconsistency between the analogous statutory power of distraint vested in the Commissioners of Customs and Excise and the provisions of the Companies Act as to the distribution of the assets of a company under a voluntary winding-up. In my view s 61 of the Taxes Management Act 1970 and s 319 of the Companies Act 1948 can quite easily stand together. Section 61 imposes on the Collector a statutory duty to distrain. If the distraint (even completed) is followed within three months by a winding-up *order*, s 319(7) applies; and the goods or effects distrained on (or the proceeds of their sale) are available for distribution amongst the preferential creditors generally. But, except in such

(1) [1923] AC 647. (2) [1919] 2 Ch 197, at p 216.

A circumstances, the distrainor may retain the goods or effects (or the proceeds of their sale)—subject only to the discretion of the court to restrain a distress uncompleted by sale from proceeding further.

There is, however, a far more formidable difficulty in the way of the Appellants in this part of their argument. That argument proceeded on the basis that s 80 of the Taxes Management Act 1880 (the precursor of s 61 of the 1970 Act) B was irreconcilable with the provisions of s 1 of the Preferential Payments in Bankruptcy Act 1888 (the precursor of s 319 of the 1948 Act): so that s 80 of the 1880 Act must be considered to have been impliedly repealed by s 1 of the 1888 Act. But the current legislation is the Companies Act 1948 and the Taxes Management Act 1970. If, therefore, there were really such repugnancy between the two codes, it would be the provisions of the Companies Act which would C yield to those of the Taxes Management Act.

The discretion. It has throughout been common ground between the parties that the Court has a discretion to enjoin the Crown from proceeding to complete their distress by sale. The Appellants argued that, unless the discretion of the Court was so exercised, the Crown would—anomalously—be in a more favourable position in a creditors' voluntary liquidation than in a compulsory D liquidation; because in the latter any rights of distress the Crown might have are made subject to the rights of the preferential creditors by virtue of the provisions of s 319(7) of the Companies Act 1948 so far as concerns any distress levied within three months before the date of the winding-up order.

There seems, however, to be a long-standing practice how the Court should exercise discretion to enjoin a distrainor from proceeding to sale: see In re E *Great Ship Co.* (1863) 4 De G, J & S 63; In re *Roundwood Colliery Co.* [1897] 1 Ch 373; *Venner's Electrical Cooking and Heating Appliances, Ltd.* v. *Thorpe* [1915] 2 Ch 404; Re *Bellaglade Ltd.* [1977] 1 All ER 319. In the *Roundwood Colliery* case Stirling J. said, at page 381:

> "a creditor who has issued execution, or a landlord who has levied a distress, before the commencement of the winding-up will be allowed F to proceed to sale unless there is established the existence of special reasons rendering it inequitable that he should be permitted to do so."

(cited with approval by Warrington L.J. in the *Venner* case at page 408). In that case Lord Cozens-Hardy M.R. said, at pages 407–8:

> "I think it is indisputable that no equitable ground has ever been made out for restraining the landlord from levying the distress, unless G there have been some circumstances outside the levying, such as fraud, or unfair dealing, which would entitle the tenant to an injunction. Apart from that, it does not appear to me to be inequitable that the landlord should exercise his right of distress even though there be a subsequent winding up of the company."

In In re *Margot Bywaters Ltd.* [1942] Ch 121 Simonds J. seems to have H accepted that in voluntary winding-up the Court would stay distress proceedings unless there were extraordinary reasons or exceptional circumstances which justified their continuance. But in fact in that case distress had not been started, merely threatened; and the question of the onus was not in contention. Moreover, in Re *G. Winterbottom (Leeds) Ltd.* [1937] 2 All ER 232 Simonds J. purported to apply what had been said in the *Great Ship* case, the *Roundwood* I *Colliery* case and the *Venner* case. He held that a distress levied by two directors

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of the company (who were also the landlords of the premises occupied by the company) for rent five and a quarter years in arrears could proceed to sale, but only in respect of the arrears for a period of two years before the date of the winding-up, that being the amount in arrears which might conceivably have been allowed by the indulgence of landlords other than directors.

Presumably the reason why the discretion has been exercised in such a way as to allow the distress to proceed to sale unless it is inequitable that it should not do so is that the Court of Chancery did not interfere by injunction with the exercise of a legal right unless that right was being exercised unconscionably. I would myself in these days prefer to regard the discretion as unfettered, the fact that the distrainor is exercising a legal right being regarded as an important factor for consideration in the exercise of the discretion. Templeman J. and the Court of Appeal both addressed their minds to the exercise of the discretion. They noted that the Crown were exercising a legal right. They could find no countervailing factor. It would, I think, be a strong thing for your Lordships to review such exercise of a discretion coincidentally by Templeman J. and the Court of Appeal, unless there were some misdirection relating to the exercise of the discretion. Counsel for the Appellants argued that the cases on the discretion cited by Templeman J. and the Court of Appeal all related to distress by a landlord. But distress by the Collector of Taxes under a statutory duty seems to me to be *a fortiori*. I can see no ground for interfering with the judgments of Templeman J. and the Court of Appeal on this point. Templeman J. and the Court of Appeal were urged by the Appellants that the exercise of this direction to halt the distress would cure "a lacuna" in the Companies Act—namely, that s 319(7), anomalously, dealt with distress in relation to compulsory winding-up but not in relation to a voluntary liquidation. Both Courts refused to exercise their discretion in order, in effect, to amend the Act of Parliament—rightly, in my respectful opinion. But I do not think that s 319(7) is correctly described as "anomalous" or disclosing "a lacuna". The draftsman has in numerous places distinguished between compulsory and voluntary winding-up; and I cannot but think that the limitation of s 319(7) to compulsory winding-up was advertent and advised. If it is to be extended to voluntary winding-up, that would be an act of legislative policy.

I would therefore dismiss the appeal.

"*Proceeding*" *in the Companies Act* 1948, *s* 226. In several cases it seems to have been assumed that a distress falls within the words "any other action or proceeding . . . pending against the company" in s 226(*b*) of the Companies Act 1948. In the *Bellaglade* case[1] Oliver J. expressed surprise at this. In the instant case Counsel for the Crown reserved in the Courts below the right to argue before your Lordships that a distress was not a "proceeding" within the meaning of this section. In the event he did not avail himself of the opportunity. In these circumstances it would be inappropriate to express a concluded opinion. But as at present advised I presume to share the surprise of Oliver J. The Companies Act 1948 is a Statute dealing with technical matters; and one would expect the words therein to be used in their primary sense as terms of legal art. The primary sense of "action" as a term of legal art is the invocation of the jurisdiction of a Court by writ; "proceeding" the invocation of the jurisdiction of a Court by process other than writ. Furthermore, "action or proceeding" in s 226(*b*) must presumably have the same meaning as the same words in s 226(*a*), where they undoubtedly refer to the invocation of the jurisdiction of a court.

(1) [1977] 1 All ER 319.

A **Lord Russell of Killowen**—My Lords, the questions in this appeal are whether the Crown is entitled in the creditors' voluntary winding-up of the Appellant Company to the benefit of a distress levied by the Crown against the goods of the Company: and if so whether the Court on the application of the liquidator should deprive the Crown of that benefit or any part thereof. Under s 61 of the Taxes Management Act 1970 on failure by a subject to pay a sum
B charged upon him for taxes the Collector shall for non-payment thereof distrain the person charged by his goods and chattels.

The Company carried on the business of joiners. By January 1975 the Company was liable for a substantial sum in respect of unpaid P.A.Y.E. tax and national insurance graduated contributions. On 29 January 1975 the Crown levied a distress on the Company's goods at its premises pursuant to s 61 by
C taking possession of them and this distress was continued under a "walking possession" agreement. It is not contended that this was not a perfectly valid distress, after which the Crown was entitled—unless paid—to sell the goods by public auction to satisfy the amount due and the costs, as s 61 provides. On 3 March 1975 the Company sent out notices under s 293 of the Companies Act 1948 ("the 1948 Act") convening creditors' meetings with a view to a creditors'
D voluntary winding-up, and on 20 March 1975 the Company duly so resolved. The goods were in fact sold by agreement between the Crown and the liquidator, the proceeds to abide the result of proceedings intended by the liquidator. On 5 May 1975 the liquidator issued an originating summons in the Chancery Division Companies Court asking for a stay to be ordered of all further proceedings on the distress levied by the Crown and a declaration that the goods were
E the property of the Company available for distribution amongst its creditors in accordance with the 1948 Act. On 28 May 1976 Templeman J. dismissed that summons but gave leave to appeal. On 22 February 1977 the Court of Appeal dismissed the liquidator's appeal. The present appeal is by reason of leave of the Appellate Committee of your Lordships' House.

The application by summons by the liquidator was under s 307 of the 1948
F Act which applies to a voluntary winding-up. By that section he may apply to the Court to determine any question arising in the winding-up. Hereunder the point made may be shortly stated: the liquidator contends that the distress in the present case was an exercise of prerogative powers, and that following, or by analogy with, *Food Controller* v. *Cork* in this House [1923] AC 647 the claim of the Crown under the distress cannot survive the winding-up and the
G statutory provisions of ss 319 and 302 of the 1948 Act as to application of the property of the Company in paying preferential creditors and otherwise *pari passu*. I am satisfied, as was the Court of Appeal, and for the same reasons, that that argument does not hold water. The distress was not pursuant to the prerogative, it was pursuant to the statutory powers and requirements of the 1970 Act. Moreover it is clear from the 1948 Act that a distress is a special case. Section
H 319(7) deals (in a winding-up by the Court) with distraint by a landlord or other person, by providing (in effect) that if it be levied within three months next before a winding-up order the rights of the distrainor thereunder shall not take priority over the statutory preferential debts: before your Lordships' House it was not contended that the Crown was not within the words "other person": and it was accepted that this subsection relates only to a case of winding-up
I by the Court or (by reason of other provisions of the 1948 Act) a supervision order. Section 228 avoids any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the winding-up: but in terms this applies only to a case of winding-up by the Court, and in any event the present distress could not be said to have been

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put in force (i.e., levied) after the commencement of the winding-up. Finally, s 325 cannot avail the liquidator: it applies to a voluntary liquidation and disentitles a creditor who has issued execution or attached any debt from retaining the benefit thereof against the liquidator unless he has before the commencement of the winding-up completed the execution (by seizure and sale) on the attachment (by receipt of the debt): moreover for this purpose in a creditors' voluntary winding-up the commencement is antedated to the date when the creditor received notice that a meeting has been called at which a resolution to wind up was to be proposed. It was suggested that distraint was a form of execution: but Parliament has quite clearly distinguished distress and execution: see s 228 of the 1948 Act.

Granted therefore that neither s 319(7) nor s 228 nor s 335 can operate to weaken the rights conferred on the Crown by its distress, adverse as they are to preferential creditors or other preferential creditors, and granted that the distress was not in exercise of the prerogative so as to be subjected to the statutory priorities of the 1948 Act (*Food Controller* v. *Cork*(1), *supra*) the next question is whether there is a discretion in the Court to abrogate those rights in whole or in part, and whether in the circumstances that discretion should be exercised against the Crown.

I have already noticed that by s 307 the liquidator in a voluntary winding-up is empowered to apply to the Court to determine any question arising in the winding-up: and have dealt with that question. Section 307(1) also enables application to the Court for it to exercise, as respects any matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court. That provision leads back to s 226 which is in the following terms:

> "226. At any time after the presentation of a winding-up petition, and before a winding-up order has been made, the company, or any creditor or contributory, may—(*a*) where any action or proceeding against the company is pending in the High Court or Court of Appeal in England or Northern Ireland, apply to the court in which the action or proceeding is pending for a stay of proceedings therein; and (*b*) where any other action or proceeding is pending against the company, apply to the court having jurisdiction to wind up the company to restrain further proceedings in the action or proceeding; and the court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit."

To complete s 307: it provides that the Court if satisfied that the exercise of the power will be "just and beneficial" may accede wholly or partially to the application on such terms and conditions as it thinks fit or may make such other order on the application as it thinks just.

My Lords, I share with Oliver J. his surprise in Re *Bellaglade Ltd.* [1977] 1 All ER 319 that a distraint, whether by a landlord or by the Crown in this case, is properly to be regarded as a "proceeding" within s 226. If I were to consider the question *de novo* I would say that it was not; though I need not set out my reasons. There is a consistent stream of authority over a very long period of time based upon the assumption that for present purposes a distress when levied is a proceeding, a stream which it is not sensible to assume Parliament did not observe and adopt in the series of re-enactments of company law:

(1) [1923] AC 647.

A and for that reason the Crown did not contest the point in this appeal. Consequently the Court is given power in discretion by ss 307 and 226 to stay or restrain retention by the Crown in whole or in part of the fruits of its distress. The question is whether on principle or authority that discretion should be exercised adversely to the Crown. Both Templeman J. and the Court of Appeal considered that it should not, and I agree with them. The Crown exercised its B undoubted right to distrain, without any question of unfair conduct or sharp practice or of negligence in not pursuing the Company for its liabilities sufficiently promptly, and did so well before the winding-up was mooted by a notice. To use a phrase previously used, is there any ground for depriving the Crown of the fruits of its diligence? My Lords, I need not set out the passages from decided cases on this point since they are sufficiently discussed in the judgments C in the Court of Appeal: those cases are (*inter alia*) In re *Roundwood Colliery Co.*[1]; In re *Great Ship Co. Ltd.*[2]; *Venner's Electrical Cooking & Heating Appliances, Ltd.* v. *Thorpe*[3] and Re *G. Winterbottom (Leeds) Ltd.*[4]. Expressing in the most general terms the content of the statement of principle in those cases it seems to me that there is nothing inequitable in the retention by the Crown in the instant case of the benefit of the distress levied. A point was made that those D were cases of distraint by a landlord: but I see therein no ground of distinction from the instant case. I wish to add that I find it difficult to understand the case of In re *Margot Bywaters Ltd.* [1942] Ch 121 or the course which it took in argument: it appears to be out of the general stream and, I dare say for that reason, was not relied upon in the Court of Appeal. In my opinion it is not to be relied upon in this corner of the law.

E Mention has been made of there being a lacuna in the 1948 Act and its predecessors in relation to a matter such as this when it arises in a creditors' voluntary liquidation. I do not find the word satisfactory: it has the colour of an accidental omission, of a legislative slip: and I see no ground for thinking that over successive Companies Acts there have been relevant accidents or slips, the picture conjuring up the presence of a permanent banana skin. Moreover, in F order to recognise a lacuna one should be able to say what operation would fill it. I cannot. To mould s 319(7) of the 1948 Act to apply some comparable concept to a creditor's voluntary winding-up would require considerable thought and might give rise to differences of opinion. What would be an appropriate substitute for the date of the winding-up order? There seems no firm date for selection unless it be the commencement of the voluntary winding-up: but G s 319(7) does not pick on commencement as a suitable date. To extend s 228 to a creditors' voluntary winding-up would not of course touch the instant case: and maybe Parliament was content in the case of a creditors' voluntary liquidation to leave a distress levied after the commencement of the winding-up as a matter to be considered in the exercise of discretion under ss 307 and 226. So far as concerns s 325 I cannot conceive a more deliberate restriction to two only H of methods of proceeding—I use the word in a non-technical sense—against the property of a company. It may be that there is matter raised in this appeal to give food for thought by the Law Commission: but it is not for your Lordships' House in its judicial capacity to say that defects have been revealed: still less to suggest remedies if defects there be.

I would dismiss this appeal.

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(1) [1897] 1 Ch 373. (2) (1863) 4 De G, J & S 63. (3) [1915] 2 Ch 404.
(4) [1937] 2 All ER 232.

Lord Scarman—My Lords, I have had the advantage of reading in draft the speeches delivered by my noble and learned friends, Lord Simon of Glaisdale, and Lord Russell of Killowen. For the reasons they give I would dismiss this appeal. A

Appeal dismissed, with costs.

[Solicitors:—A. Kramer & Co.; Solicitor of Inland Revenue.]

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