possible, but with a carter leading a cart it is not all that is possible, because he is at his horse's head, and, when he comes to the line of the gate, by looking past his horse's head or under its neck, he can see before he emerges upon the street at all whether it is safe to do so. I am of opinion that if, in a dangerous place like this, he neglected that ordinary and simple precaution, that amounts to contributory negligence.

In this case I think it is plain that the carter took no heed where he was going at all, because he says himself that when he came to the gateway "I was looking back to see that my lorry was going to clear the gate," and I take that as meaning that just at the time when he should have looked up the road to see whether traffic was coming or not he was looking back. I cannot understand why he should have had to look back to see whether he was going to clear the gateway or not, because the photograph produced shows that the gateway is a very wide one, and that close up to the gate there are tramway lines upon which the lorry must have been running which would bring him out exactly in the centre of the gate. It is really an admission on the part of the carter that he was not taking any heed at all of what was going on in the road. Then he says that on account of the incline he could not have stopped his horse, I suppose, either to look along the road or to wait until the motor car passed. There was no necessity for him to stop his horse before looking along the road. He could have looked along the road while leading his horse, and if there was nothing coming he would never have had to stop it at all. In regard to the idea that he could not stop his horse because there was an incline and it was necessary to put blocks behind the wheels, that is obviously untenable. I quite agree that in the case of a prolonged stop it might be proper to block the wheels in order to ease the strain on the horse, but it is absurd to suggest that the horse could not hold the lorry by itself for the few moments which would be required in order to let the motor car pass. The incline is not very steep at any part, and apparently before the gate is reached the ground is almost level, and in so far as it is slightly up-hill that only means that the horse could the more quickly be brought to a standstill.

Upon the whole matter I think this is clearly a case of contributory negligence, and that the interlocutor of the learned Sheriff ought to be affirmed.

LORD ARDWALL—I also concur, although I had some difficulty, because in my view there was much grosser negligence on the part of the motor driver who ran down the horse which he ought to have seen coming out of the entry than on the part of the pursuer. But while that is so, I cannot absolve the carter from fault, because I think it was his duty, not only with regard to his own safety, but with regard to the safety of traffic on the street, to have taken some means or another to ascertain whether there was traffic approaching before he took the horse and lorry out across the road. As pointed out by your Lordship in the chair, the horse and the lorry together would stretch very far across this road, and in taking a vehicle like that out of an entry opening directly on a public street I think there was a duty to ascertain, as it would not have been difficult to do, whether there was traffic approaching. I therefore concur in holding that there was contributory negligence on the part of the carter which disentitles him to damages.

LORD DUNDAS concurred.

The Court dismissed the appeal.

Counsel for the Pursuers (Appellants)—Wilson, K.C.—Paton. Agents—Inglis, Orr, & Bruce, W.S.

Counsel for the Defender (Respondent)—Crabb Watt, K.C.—J. A. T. Robertson. Agents—Wishart & Sanderson, W.S.

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*Friday, March* 18.

## FIRST DIVISION.

## FINDLAY (LIQUIDATOR OF THE SCOTTISH WORKMEN'S ASSURANCE COMPANY, LIMITED) *v.* WADDELL.

*Company — Winding-up — Production of Documents — Lien — "Officer" — Auditor — Accountant's Right to Retain Books Belonging to Company — Companies Consolidation Act* 1908 (8 *Edw. VII, c.* 69), *secs.* 164, 174 *and* 193.

The liquidator of a company which was being wound up voluntarily claimed delivery of certain books and papers belonging to the company which had been placed in an accountant's hands to write up the books and to prepare a balance-sheet. The accountant having refused to hand them over unless the liquidator either paid his fees or recognised his lien therefor, the liquidator presented a petition to the Court under sections 164, 174, and 193 of the Companies Consolidation Act 1908 for their delivery, but that "*without prejudice*" to any right of lien competent to the respondent.

*Held* that while delivery without prejudice to an alleged right of lien did not involve its admission, it did not in any way prejudice it if it existed, and that as delivery of the books was necessary for liquidation purposes the petitioner was entitled to the delivery craved.

*Opinion* that the respondent had a good right of retention on the ground of implied contract, though not a good right of lien properly so called.

*Opinion* (*per* Lord Johnston) that an auditor is not an "officer" of a com-

pany within the meaning of section 164 of the Companies Consolidation Act 1908.

The Companies Consolidation Act 1908 (8 Edw. VII, c. 69), enacts—Section 164—"The Court may, at any time after making a winding-up order, require . . . any trustee, receiver, banker, agent, or officer of the company to pay, deliver, convey, surrender, or transfer forthwith, or within such time as the Court directs, to the liquidator any money, property, or books and papers in his hands to which the company is *prima facie* entitled."

Section 174—"(1) The Court may, after it has made a winding-up order, summon before it any officer of the company or person known or suspected to have in his possession any property of the company. . . . (3) The Court may require him to produce any books and papers in his custody or power relating to the company; but where he claims any lien on books or papers produced by him, the production shall be without prejudice to that lien, and the Court shall have jurisdiction in the winding-up to determine all questions relating to that lien."

Section 193 enacts—"(1) Where a company is being wound up voluntarily the liquidator . . . may apply to the Court . . . to exercise . . . all or any of the powers which the Court might exercise if the company were being wound up by the Court."

On 18th December 1909 James Findlay, C.A., Edinburgh, liquidator of the Scottish Workmen's Assurance Company, Limited, then being wound up voluntarily, presented a petition to the Court under sections 164, 174, and 193 of the Companies (Consolidation) Act 1908, for delivery of certain cash books and papers belonging to the company, then in the possession of the respondent William Waddell, C.A., Glasgow, "but that without prejudice to any lien" that might be competent to the respondent.

The petitioner stated that in order to proceed with his duties as liquidator he had written to the respondent requesting delivery of the cash books and documents in question (which had been placed in the respondent's hands in order that he might write up the books and thereafter prepare a balance sheet), but that he (the respondent) had declined to deliver them unless the petitioner either paid his fees for balancing the books or recognised his lien therefor. He further stated—"That of this date, 2nd December 1909, the petitioner informed the said William Waddell that he was prepared to accept the said books and papers subject to any lien the said William Waddell might have, and that when the question of said lien came to be considered the petitioner would treat the books and papers as still being in the said William Waddell's hands, and requested the said William Waddell to deliver to him the said books and papers on that footing, but of this date, 3rd December 1909, the said William Waddell replied that he could not comply with the petitioner's request.

"The petitioner is unable to proceed with his duties as liquidator until he obtains delivery of said cash books and papers, and loss to the company may accrue through the delay occasioned by the said William Waddell. The petitioner is not at present in a position to admit any right of lien over said cash books and papers in favour of the said William Waddell, but he is willing, as stated above, that any such lien shall not be prejudiced by the delivery to him of said cash books and papers."

The respondent lodged answers, in which he stated that his fees for preparing a profit and loss account and balance sheet, which had been adopted by the directors of the company, were still unpaid, and that while he claimed a right to retain the books and papers, he was willing to hand them over on the liquidator either making payment of his fees, or recognising that in respect of his lien he had a preference therefor.

Argued for petitioner—The petitioner as liquidator of the company was entitled to delivery—Companies (Consolidation) Act 1908 (8 Edw. VII, c. 69), secs. 164, 174, 193. The respondent's right to a preference (if any) would not be prejudiced, for decree was only craved subject to reservation of his rights—*Renny and Webster* v. *Myles and Murray*, February 8, 1847, 9 D. 619. In any event the petitioner was entitled to inspect the books. Reference was made to the following authorities—*Robertson* v. *British Linen Company*, December 12, 1890, 18 R. 1225; *Reid, Petitioner*, October 31, 1893, 1 S.L.T. 273; *Liquidator of Donaldson & Company, Limited* v. *White and Park*, 1908 S.C. 309, 45 S.L.R. 231; *Rorie* (*Liquidator of Lochee Sawmills Company, Limited*) v. *Stevenson*, 1908 S.C. 559, 45 S.L.R. 469; Buckley on Companies (9th ed.), p. 407; *In re South Essex Estuary and Reclamation Company* (1869), L.R., 4 Ch. App. 215.

Argued for respondent—The order craved would not be granted unless it were "just and beneficial"—Companies (Consolidation) Act 1908, sec. 193. It could not be so here, for the order if granted would destroy the respondent's right of lien. The respondent was not an "officer" of the company in the sense of section 164 of the Act of 1908, for he was only employed to balance the books. *Esto* that he had no general right of lien, he was entitled to retain in virtue of implied contract arising out of his employment — *Meikle and Wilson* v. *Pollard*, November 6, 1880, 8 R. 69, 18 S.L.R. 56. The case of the *South Essex Reclamation Company* (*cit. supra*) did not apply where, as here, the liquidator was a *voluntary*, not an *official*, liquidator. As to the petitioner's right to inspect the books, reference was made to *Stewart and Others, Petitioners* (1742), M. 6248, and *Finlay* v. *Syme*, (1773) M. 6250.

At advising—

LORD JOHNSTON — The Scottish Workmen's Assurance Company, Limited, went into liquidation on 22nd November 1909,

and James Findlay, C.A., Edinburgh, was appointed liquidator. The liquidation was voluntary and is not under supervision.

William Waddell, C.A., Glasgow, had, as alleged, been employed by the directors of the company to write up the books and prepare a balance sheet, and for that purpose had been placed in possession of certain books and papers of the company. These he claimed right to retain until paid his fees. The liquidator demanded delivery that he might proceed with his duties. Mr Waddell asserted a right to retain.

The attitude adopted by the parties was this—the liquidator offered to accept the books and papers subject to any lien Mr Waddell might have, and when the question of lien came to be considered undertook to treat the books and papers as still in Mr Waddell's possession. Mr Waddell declined, but intimated his readiness to deliver either on payment of his fees or on the liquidator recognising his lien and in respect thereof undertaking to admit his claim as preferential.

The liquidator has presented this petition under the Companies Act 1908, sections 164, 174, and 193, for an order on Mr Waddell to deliver the books and papers without prejudice to any lien competent to him. It was conceded that Mr Waddell was really employed in the position of auditor of the company. It is a question which has not been authoritatively settled, and which may depend upon circumstances, whether an auditor is an officer of the company in the sense of certain other sections of the Act. But I think that there can be no doubt that he is not among the officers intended to be covered by section 164. It is therefore necessary in the present matter to have recourse to section 174, under which, by virtue of section 193, the Court can act in a voluntary as well as in a judicial winding up. Section 174 applies not merely to officers of the company, but to any person known or suspected to have in his possession any property of the company, or any person whom the Court deems capable of giving information concerning the trade dealings, affairs, or property of the company, and the Court (sub-section 2) may examine him on oath concerning the same, and (sub-section 3) may require him to produce any books and papers in his custody or power relating to the company. But then the sub-section adds, "but where he claims any lien on books or papers produced by him, the production shall be without prejudice to that lien, and the Court shall have jurisdiction in the winding-up to determine all questions relating to that lien."

There are two practical questions which appear to me to arise. First, is Mr Waddell entitled to have the matter of his lien admitted before he hands over the books and papers. In other words, is "without prejudice to" equivalent to the admission to a preferential ranking. I think not. It means what it says, without prejudice to his lien such as it is, leaving open the question whether it is good or bad and of its extent. It is only equivalent to a right to a preferential ranking if his lien is established, as it may be established, within the liquidation. For preferential ranking is the limit of the lien-holder's right—*Adam* v. *Winchester*, 11 R. 863.

It is a matter of convenience and circumstances when that question should be determined. The determination of the question is not as of right to stay the liquidator getting possession of necessary books and papers. The latter may be urgent, the former may take time and involve inquiry, as in the case of the *Lochee Sawmills Company*, 1908 S.C. 559. But where circumstances admit of its being immediately determined, then I think it ought to be immediately determined, expedition in incidental matters being in the interest of the liquidation. Such a case is the present. The admissions of parties give the Court all necessary information. Whether Mr Waddell was merely an accountant employed by the company to do certain work, or was in the full sense of the term auditor of the company, or whether he was auditor of the company and something more, the authority of the case of *Meikle & Wilson* v. *Pollard*, 8 R. 69, appears to be directly in point. I do not think that an accountant employed to audit or do any other piece of work, whether for an individual or a company, has any general lien such as a law-agent. But he has a right of retention of papers put into his hands for the purpose of the work on which he is employed until he is paid the counterpart of his employment. The matter "resolves itself into a case of the relative duties of parties under a contract." That case was followed—*dubitante* Lord Rutherfurd Clark—in *Robertson* v. *Ross*, 15 R. 67. I am inclined to think that that case might have been distinguished on the facts. Because it would rather appear that the factor who claimed a lien had in his hands papers placed with him generally, and not for the purpose of and necessary for his particular work as factor; and I rather think that this may explain the grounds of Lord Rutherfurd Clark's doubt. But be that as it may, as authorities for a case of the circumstances of the present these two decisions are binding, and to that extent I see no reason to doubt their soundness. I therefore think that Mr Waddell is entitled to the right of retention he claims, though he may not have a lien properly so called.

But the second question is—Can the liquidator demand exhibition of books and documents the subject of lien before taking up his attitude of requiring delivery of them? If by operation of this section the claimant of a lien over books and papers can, with a view to giving inspection to a liquidator, be compelled to produce the books and papers, it is very difficult to understand how this can in many cases be "without prejudice to that lien" except on the footing that the call to produce on that condition involves the concession of the lien and the admission to a preference. On the other hand, there are many cases

in which the liquidator may think it his duty to call for papers of the contents of which he is necessarily ignorant and which are entirely useless to him, and it would be a hardship to the general creditors that the production should involve admission to a preference. This question has often given trouble in liquidations. It has in different circumstances been before the other Division of the Court in *Donaldson & Company, Limited*, 1908 S.C. 309. But the disposal of that case leaves the question where it was and affords no guide or assistance to liquidators. And I venture to think that the subject requires further consideration should a suitable case arise. The present is not such, for the books and papers are of such a nature that the liquidator must require delivery of them, and accordingly it is delivery and not purely production that he claims. In such circumstances "without prejudice" to the lien can mean nothing except the admission to a preference if the lien is sustained.

LORD KINNEAR stated that the LORD PRESIDENT concurred in Lord Johnston's opinion.

LORD KINNEAR—I concur in Lord Johnston's conclusion on the simple ground that the books which the liquidator wishes to obtain are the property of the company in liquidation, and that he is therefore entitled to obtain them unless an adverse right can be set up by their custodier justifying his withholding them. Now the custodier avers a right of lien or right of retention. But the practical operation of his right of retention, if it exists, is to serve as an instrument for securing a preference to which, *ex hypothesi*, the respondent is entitled. It appears to me irrespective of previous decisions that the liquidator is acting reasonably when he demands delivery of the books without prejudice to the lien. That means that whatever right the respondent may be entitled to found upon his possession shall not be prejudiced by his handing over the books to the liquidator, but will be allowed him in the course of the liquidation if established. I think that is all that the liquidator can be called upon to do. To insist that before he obtains the materials necessary to enable him to ascertain the position of the estate and of the claims which may be brought against it, he should bind himself to sustain the respondent's claim to a preference would I think be unreasonable.

LORD LOW, who was sitting in the Division at the advising, gave no opinion, not having heard the case.

LORD M'LAREN was absent.

The Court granted the prayer of the petition.

Counsel for Petitioner—Fenton. Agents—Cowan & Stewart, W.S.

Counsel for Respondent—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

*Wednesday, March 16.*

## FIRST DIVISION.

## COMMISSIONERS OF ADMIRALTY *v.* BURNS AND OTHERS.

*Lease—Power to Resume—Construction—Ejusdem generis Principle—"Planting, Feuing, Letting on Building Leases; Making, Altering, Widening Roads; Making Railroads or Canals, or for any Other Purpose"—Erection of Naval Base.*

A lease of agricultural subjects contained, *inter alia*, the following reservations in favour of the landlord—"Reserving always to the proprietor from the subjects hereby let the whole mines, minerals, and metals of every description, coal, shale, marl clay, gravel, sand, sandstone, ironstone, limestone, and slate, and other quarries in the subjects hereby let, with full power to search for, work, win, smelt, burn, and manufacture, and to carry off the same, and to sink pits, form levels, make roads, railroads, canals, erect buildings and machinery, and carry on all works within the subjects hereby let which they may think proper, and to resume the land they may think necessary for these purposes: Reserving also full power at all times to take off land from any part or parts of the subjects hereby let for the purpose of planting, feuing, or letting on building leases, or for making, altering, or widening roads, or for making railroads or canals, or for any other purpose."

*Held* that the words "or for any other purpose" occurring in the second clause were wide enough to cover any purpose whatever, including the erection of a Naval Base, with its docks, buildings, machinery, and other necessary appurtenances.

*Observations per curiam* as to the meaning and effect of the principle of construction known as *ejusdem generis*.

On 26th January 1910 the Commissioners for executing the office of Lord High Admiral of the United Kingdom (*first parties*); Andrew Burns and another, farmers, Rosyth, Fife (*second parties*); James Robertson, farmer, Orchardhead, Fife (*third party*); and Robert Kellock, farmer, Hilton of Rosyth, Fife (*fourth party*), presented a Special Case for the determination of certain questions as to the right of the first parties to resume land from the farms of the second, third, and fourth parties respectively in connection with the construction of a Naval Base at Rosyth.

The Case set forth that by leases dated in 1895, 1902, and 1896 there were let on behalf of the Earl of Hopetoun to the second, third, and fourth parties respectively the farms of Rosyth, Orchardhead, and Hilton of Rosyth in the county of Fife. The leases, which were all in similar terms, contained in favour of Lord Hope-