out requiring the respondent to make his right clear, either by reference to the lease or, if necessary, by producing evidence of the landlord's consent to the proposed operations. But Mr Guthrie stated at the bar that he did not maintain that the terms of the lease presented any obstacle to the proposed operations, and I am therefore in a position to dispose of the case by recalling the interim interdict and refusing the note."

The complainers reclaimed.

At advising—

LORD JUSTICE-CLERK—The question in this case which has been principally discussed in the Outer House and before us was whether freestone falls under the definition of minerals in the Act of Parliament, so that the railway company by means of the restrictions mentioned in the Act can prevent the respondent from working the freestone under the railway line. The words of the Act are these—[*Here his Lordship read the words of the statute*].

Now, it is plain that these words were intended to include a great many other things as minerals than are actually mentioned, and that these which are mentioned are intended to show the kind of thing which includes very numerous things which are held to be minerals in the sense of the statute. Mention is made of slate, which is certainly not what is commonly called a mineral. It is quarried out and used directly for building purposes just as stone is, and accordingly in the case of *Farie* in the House of Lords it seems to have been held impossible to exclude freestone and limestone strata when slate was included. On that part of the case, then, I adhere to the judgment of the Lord Ordinary.

It turns out now that the railway company have two other pleas which they wish to found upon now. These pleas are (1) that the rock underneath the railway line is not in the respondent's lease, and (2) that the tenant of the quarry in giving notice that he is going to work this stone is not going to engage in a *bona fide* process of work which would be valuable to him, and for which the railway company should compensate him if they prevent him going on with his work, but is merely putting pressure on the company so as to induce them to buy him off. We cannot decide these questions without proof, and therefore I think we should remit the case back to the Lord Ordinary.

LORD YOUNG—I agree with the Lord Ordinary with regard to the freestone under the railway, that it is not in the title of the railway company. I construe the Act of Parliament as he does. The only other point I shall notice is as to the *bona fides* of the respondent in giving the notice he did to the railway company. That point was insisted in before the Lord Ordinary, and he gives a special finding about it in his interlocutor. The Lord Ordinary finds that the complainers have not made on record any averments relevant to be admitted to probation.

I am of opinion that the complainers have made averments relevant to be admitted to probation, and I therefore think we should send them to proof.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

The Court found in terms of the first finding of the Lord Ordinary's interlocutor; *quoad ultra* recalled the same; remitted to the Lord Ordinary to allow the parties a proof of their averments as to (1) the minerals not being within the lease assigned to the respondent, and (2) the respondent not having a *bona fide* intention to work the said minerals in terms of section 71 of the Railway Clauses Act 1845. . . .

Counsel for the Reclaimers — Guthrie. Agents—John C. Brodie & Sons, W.S.

Counsel for the Respondent—W. Campbell—M'Clure. Agents—Tait & Crichton, W.S.

Wednesday, November 15.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

DUNLOP (OFFICIAL LIQUIDATOR OF DONALD'S CHLORINE COMPANY, LIMITED) *v.* DONALD.

Company—Agreement—Vendor—Retention—Winding-up by Court—Companies Act 1862 (25 *and* 26 *Vict. c.* 89), *sec.* 100—*Officer of Company.*

Under the 100th section of the Companies Act 1862, the Court, after pronouncing a winding-up order, may require "any officer of the company" to deliver to the official liquidator any effects of the company "which happen to be in his hands for the time being, and to which the company is *prima facie* entitled.

A patentee agreed to sell and assign his patents to a company about to be formed, the consideration to be given by the company being the allotment of a certain number of fully paid-up deferred shares, and the payment of £700 within thirty days of the company's registration, and of £500 when 100 tons of bleaching powder, under the patents, had been manufactured and *bona fide* sold by the company. The agreement also contained a provision that the patentee should enter the employment of the company on its incorporation as managing director, and should principally take charge of the technical and manufacturing department.

The company was duly incorporated, and adopted the agreement with the patentee, but its capital became exhausted before the necessary buildings were completed, and a winding-up

order was pronounced by the Court at a creditor's instance. At this date the patents had not yet been assigned by the patentee to the company, there had been no manufacture under the patents, and the £500 was still unpaid. The patentee claimed a right to retain the patents.

On the application of the official liquidator under the 100th section of the Companies Act, the Court *held* that the patentee was an officer of the company within the meaning of that section, and *required* him to transfer the patents to the liquidator within twenty-one days, *reserving* to the patentee any claim which he might make in the liquidation to a preference in respect of said sum of £500.

William Donald was the inventor of certain processes for the manufacture of chlorine, for which he took out patents in the United Kingdom and other countries. On 18th December 1890 he concluded an agreement with a party acting as trustee for a company which was intended to be incorporated for the purpose of taking over and working these processes.

This agreement provided, *inter alia*—"(2) The vendor agrees to sell to the company, and the second party acting on behalf of the company agrees to purchase the said inventions and letters-patent, and the exclusive benefit thereof, and of all extensions of the said letters-patent, and also of all improvements and additions to the said inventions or new discoveries useful for the manufacture of chlorine, or any of the objects of the company in the possession of the vendor or which may hereafter be made by him. (3) The consideration to be given by the company to the vendor for the said inventions, letters-patent, and others, and for the obligations hereby undertaken by him, so far as not paid for by the salary and commission to be paid him under article twelfth hereof, shall be the sum of £20,000 which shall, to the extent of £18,800, be satisfied by the allotment to him or his nominees of 1880 fully paid-up deferred shares of ten pounds each of the company, having the rights specified in the said memorandum and articles of association, and to the extent of twelve hundred pounds sterling by payment to him of (1st) a sum of seven hundred pounds sterling within thirty days after the registration of the company; (2nd), the further sum of five hundred pounds sterling when one hundred tons of bleaching powder, under the said letters-patent, shall have been manufactured and *bona fide* sold by the company, but declaring that it shall be in the power of the company to make the said payment of five hundred pounds at an earlier date if they should be satisfied with the prospects of the company. . . . (6) The vendor shall show a good title in his own name to the letters-patent agreed to be transferred, and shall, at the expense of the company, execute an assignation or assignations, and do all such assurances and things as may be necessary or may reasonably be required for transferring and vesting the letters-patent in company, and shall also, at the expense of the company, from time to time, grant all such further assignations and deeds, and do all such things as may be necessary for giving full effect to these presents, declaring always that the company shall be bound to make all the payments which may be necessary for keeping up and completing the patents obtained by the vendor as aforesaid, the vendor being bound to make all payments in respect of the said patents up to the date of this agreement. (8) The vendor shall with all due despatch furnish to the company all plans and drawings of plant in existence, and any others which may be required for working the said invention so far as the vendor may be capable of preparing the same. . . . Further, the vendor shall give, or cause to be given, advice, instruction, or information for the erection of the necessary plant, and the working of the said inventions. By article 10 the directors were given power, with the consent of the shareholders holding a majority of the company's shares, to sell the patents, property, and assets of the company to an individual or other company, and provision was made for the distribution of the price obtained among the preferred and deferred shareholders.

The agreement further provided—"11. In the event of a winding-up being resolved on in consequence of its being found that the business cannot be carried on with profit, or in any other case than that of a sale having been made of the patents, property, and assets of the company under the preceding article, the patent or patents shall be reconveyed to the vendor without any price being paid by him therefor, but all expenses connected with such reconveyance shall be borne by him. . . . In such event the directors shall have right to sell the works as a going concern if they think proper, with right to use the patents in connection therewith, but subject to the condition that the vendor shall have a right of pre-emption at the price proposed to be taken from any third party. 12. The vendor shall enter the employment of the company on the same being incorporated as manager or as managing director, in the option of the company, and shall devote his whole time to the business of the company, and shall principally take charge of the technical and manufacturing department, and any other manager or secretary to be appointed by the company shall principally take charge of the commercial and financial department." . . .

The company was incorporated under the name of Donald's Chlorine Company, Limited, on 22nd December 1890. By the memorandum of association the object for which the company was formed was declared to be, *inter alia*, to acquire, work, and develop Donald's inventions and patents for the manufacture of chlorine, and power was taken to adopt and carry out the agreement which had been concluded with him. After its incorporation the company adopted that agreement, and in terms of article 3 thereof 1880

fully paid-up deferred shares were allotted and a sum of £700 paid to Donald. On 6th June the Court, on the application of a creditor, ordered the company to be wound up by the Court, and appointed Wm. Dunlop, C.A., Glasgow, to be official liquidator. At the date of the liquidation the patents had not been assigned by Donald to the company, and he declined to transfer them to the liquidator.

The liquidator accordingly presented a note under the 100th section of the Companies Act 1862, craving the Court to require Donald to transfer the patents to him.

He founded in particular upon articles 2 and 6 of the agreement with Donald, and stated, *inter alia*—"In pursuance of the objects of the company, the directors have expended the whole of the subscribed capital of the company (£20,000), together with about £11,000 of borrowed money, upon the construction of works for the manufacture of chlorine upon Mr Donald's patented process. These works are not quite complete, but they can be completed now at a very trifling cost. It is very important in the interest of the creditors and shareholders that these works should be sold immediately as a whole, together with the absolute right to the patents, without which it will not be possible to obtain a full price for the undertaking of the company. . . . The said William Donald held the post of managing director of the said company from its commencement to the date of liquidation, and he is thus an officer of the company within the meaning of the said section."

William Donald lodged answers, in which he made the following statements—"It is admitted that the company was erecting works at Longford, Kilwinning. These works, which are the only works of the company, were not complete at the date of the liquidation. The respondent's patented invention had not been tried by the company, and no products had been manufactured or sold under his processes. . . . The patents now in question were not part of the estate of the company at the commencement of the winding-up. The personal claim of the company thereto under the said agreement was conditional and defeasible. The company have not paid the full price, at least £500 thereof remaining at this date unpaid, and have not fulfilled the inherent condition of the said agreement requiring *bona fide* manufacture and sale under the respondent's processes. . . . The said (11th) article . . . secures to the respondent the exclusive right to the patents in the cases therein provided for, one of which has now arisen. . . . During the progress of the works now stopped the respondent acted for the company as technical adviser and works manager under the provisions of article 8th of the agreement. The respondent, whose qualifications are those of a practical chemist only, was a director of the company, and he was under article 12th of the agreement to have acted as manager in the technical and manufacturing department, . . . but there has been no manufacture to manage."

The respondent pleaded—"(1) That the note was incompetent, as the present case was not within the purview of section 100 of the Companies Act 1862. (3) That he was entitled, under the agreement and in the circumstances set forth in the answers, to refuse compliance with the demand of the liquidator."

Section 100 of the Companies Act 1862 provides—"The Court may at any time, after making up an order for winding-up a company, require any contributory for the time being settled on the list of contributories, trustee, receiver, banker, or agent or officer of the company to pay, deliver, convey, surrender, or transfer forthwith, or within such time as the Court directs, to or into the hands of the official liquidator any sum or balance, books, papers, estate, or effects which happen to be in his hands for the time being, and to which the company is *prima facie* entitled."

On 20th July 1893 the Lord Ordinary (STORMONTH DARLING) pronounced this interlocutor:—"The Lord Ordinary having heard parties, and considered the note for the official liquidator, and answers thereto by William Donald, requires the said William Donald, within twenty-one days, to transfer to the official liquidator the patents specified in the prayer of the said note, together with his rights and interests in the inventions for which applications have been made for patents, also as specified in said prayer, and decerns; and decerns and ordains the said William Donald, within the period before mentioned, to execute assignations with regard to the patents to which the same are applicable, and similar assignations with regard to the other patents before referred to, such assignations to be adjusted at the sight of James M'Caul, S.S.C., and that at the expense of the official liquidator: Remits to the said James M'Caul to adjust the said assignations in terms of this interlocutor, reserving to the respondent William Donald any claim which he may make in the liquidation to a preference in respect of the unpaid balance of £500 mentioned in article 3rd of the agreement, as if he had retained possession of the patents in question, and to the liquidator his answer to such claim: Finds the said William Donald liable to the official liquidator in the expenses caused by his opposition to the said note, &c.

"*Opinion.*—In order to justify an application under the 100th section, all that is necessary is that there should be estate or effects in the hands of any one of a certain number of persons, including the officers of the company, to which the company is *prima facie* entitled. Now, I am very clearly of opinion that the patent rights which form the subject of the present application fall within that description. They are in the hands of Mr Donald, the original patentee, and he is an officer of the company, because he was its managing director. The company's right to these patents stands on an agreement between them and Mr Donald, which, by its second

and third sections, provides for the sale of these inventions to the company at a certain price. The price was to be £20,000, and was to be satisfied to the extent of £18,800 by an allotment to Mr Donald of fully paid-up deferred shares, and by an immediate payment of £700. Both of these things have been done; the shares have been issued, and the £700 has been paid. To the extent of the remaining £500, the payment was made conditional on a certain quantity of bleaching powder being manufactured and *bona fide* sold by the company. That event has not taken place, because the company has been wound up on the application of a creditor before it proceeded to manufacture anything.

"Now, the only ground, so far as the agreement goes, upon which the respondent resists this application is that he has certain rights under the 10th and 11th articles. By the 10th article the directors have power, with the consent of a majority of the shareholders, to sell the patents, and it does not seem to me that that clause in any way affects the present question, no sale having in point of fact taken place. By the 11th article it is provided that in the event of a winding-up being resolved on, in consequence of its being found that the business cannot be carried on with profit, or in any other case than that of a sale having been made of the patents and assets of the company under article 10, the patents are to be reconveyed to the vendor without any price being paid. If this had been a voluntary liquidation a question of some difficulty might have arisen. But it is not a voluntary liquidation. I must assume that it was in the coutemplation of both parties to the agreement that there might be a winding-up of a different kind. And that is what has happened. Creditors have stepped in, and have procured an order from the Court for the compulsory winding-up of the company; and accordingly the event contemplated by article 11, and upon which its whole provisions depend, has not taken place. In short, it seems to me that the agreement affords very clear *prima facie* evidence of the company's right to these patents, and that neither article 10 nor article 11 affords any answer to the liquidator's demand.

"It is further maintained by the respondent that at all events he has a right of retention of these patents at common law as security for payment of the balance of £500 of the purchase price. Now, it seems to me that that question does not arise at the present stage, and it is not an impediment to my granting an order under the 100th section. It may be that the respondent has the right for which he contends, although on that point I express no opinion at all. But that is a question which may hereafter be raised in the liquidation, and the only concession which I think the respondent is entitled to at the present stage is that his right to make that claim, notwithstanding his parting with the possession of the patents, should be reserved."

The respondent reclaimed, and argued—The application was incompetent, and should be refused. The respondent was a practical chemist, and employed by the company only in practical work. He was not an officer of the company in the sense of the 100th section of the Companies Act, and the patents were not in his hands as an official of the company, but as undivested seller—*Hollingsworth's* case, 3 De G. & Sm. 102; *Imperial Land Company of Marseilles, in re National Bank*, L.R., 10 Eq. 298; *in re Llangennech Coal Company*, February 1, 1887, 22 W.N. 22. Nor were the company "*prima facie* entitled" to the patents. They were the property of the respondent, who was an undivested seller. It was an essential condition of his contract with the company that there should be *bona fide* manufacture and sale under the respondent's processes, and the respondent was under no obligation to assign until that condition had been fulfilled—*Mackay* v. *Dick & Stevenson*, March 7, 1881, 8 R. (H. of L.) 37, and L.R., App. Cas. 57. The condition never had been fulfilled. Further, part of the agreed-on price, viz., £500, was still unpaid, and there was nothing in the statute to compel a vendor to surrender his lien. The object of the liquidation appeared to be to deprive the respondent of all share in the proceeds of his own inventions, and there was no reason for giving the company any privilege beyond its strict legal rights. Again, under the 11th article of the agreement, the respondent was entitled to a reconveyance of the patents in the event of a winding-up or "in any other case," and he could not be bound to convey subjects of which he was entitled to demand a reconveyance. The averments of the respondent could not be disposed of without proof, and where proof was necessary the 100th section was inapplicable.

The petitioner argued—The respondent was an officer of the company in the sense of the 100th section of the Companies Act, and that section applied to the circumstances of the case—*Oakwell Collieries Company*, 1859, W.N. 65; *Robertson* v. *British Linen Company Bank*, July 18, 1891, 18 R. 1225. The respondent mistook his position under the agreement. He was not entitled under article 6 to retain the patents until payment of the £500. Besides, payment of the £500 was not rendered impossible by the Lord Ordinary's judgment. On the contrary, his right to that sum, if he had any, was preserved. If he had a preference he could only make it good in the liquidation—*Adam & Winchester* v. *White's Trustee*, May 30, 1884, 11 R. 863. Article 11 of the agreement clearly could not apply to a winding-up by the Court.

At advising—

LORD PRESIDENT—I think the Lord Ordinary's interlocutor is right. In the first branch of the reclaimer's argument he has maintained that the 100th section of the

Companies Act 1862 does not apply. But when his own position is ascertained it becomes clear enough that he is one of the officers of the company, and his duties and functions do not seem at all to present any material element of difference from those of the class of officials enumerated in the words of the 100th section. I think that he, being the managing director of the company, is clearly within the section. I may observe that the case of the *Oakwell Collieries* shows that in the English Courts a director has been treated as falling within that section.

The next contention of the reclaimer is, assuming this application to be competent, that he is not bound to part with these letters-patent except on payment of £500, which is the balance of the price remaining unpaid, the other portion of the price having been made good to him in the prescribed form of the contract—that is to say, partly in shares and partly in cash.

Now, I note that the reclaimer has not contended that in the event which has happened he is entitled to hold the contract as rescinded, because his argument was founded solely upon his position in relation to this outstanding balance of the price. But then it seems to me that the course taken by the Lord Ordinary affords the appropriate solution of the question thus raised. The Lord Ordinary grants the prayer of the petition for delivery of the letters-patent, but he reserves "to the respondent William Donald any claim which he may make in the liquidation to a preference in respect of the unpaid balance of £500 mentioned in article 3rd of the agreement, as if he had retained possession of the patents in question, and to the liquidator his answer to such claim."

Now, that is a very careful and full reservation of the rights of the seller which he has urged at the bar, and for the course which the Lord Ordinary has taken of granting the prayer under that reservation, his Lordship seems to have a very good precedent in the decision of the Second Division in the case of *Robertson*, and also in the decision of Vice-Chancellor Hall in the case of the *Oakwell Collieries* to which I have already referred. These cases make it sufficiently clear that the Court will grant an order of this kind notwithstanding that there may have been made a claim of preference or security, the solution being found in the reservation of those claims for discussion, and if need be satisfaction, in the course of the liquidation.

In my view the rights of the parties under the contract stand thus—I think it is manifest that when the agreement was entered into, and the company were in a position to make forthcoming those 1880 fully paid-up shares, they were entitled to have the letters-patent assigned over to them.

It seems to be clear that their operations are in the contemplation of the contract to commence on their getting the patents, and being in a position therefore to set agoing the working of the patents, and this £500 seems to me to be due at that stage of the proceedings when, *ex hypothesi* of the contract, the letters-patent are in the hands of the company.

But then an alternative argument is founded by the reclaimer upon the 11th section of the agreement, but it seems to me that that section does not apply to the case which has here occurred. His demand under the 11th section is that he is entitled, or would have been entitled, if the patents had been already conveyed to the liquidator of the company, to get them back, because he says that, in some sense which is not very clearly explained, a winding-up has been resorted to.

Now, it appears to me that the 11th section plainly contemplates the case of a winding-up resolved upon by the company. That section, looking back to the 10th, speaks thus—"You may resolve to sell the patents, and in that case I shall assign, but if you have not decided to hand them over to some one else, but should have resolved by yourselves to stop working by winding-up, in that case the provision of section 11 cannot apply."

But I cannot apply the terms of section 11 to the case which has happened, for the company has not resolved to go into voluntary liquidation, and they have not sold. It seems to me that this is a case unprovided for by the 11th section, and that the claim of the respondent cannot be given effect to. I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD ADAM—I am of the same opinion. The respondent seems to have been an inventor, and amongst other things to have invented processes for the manufacture of chlorine, and he seems to have persuaded, and probably quite rightly, the company now in liquidation that the processes were of great value.

He entered into an agreement to sell the letters-patent which he had obtained to the company with the view that they should find the funds necessary for their development. We have the agreement set forth at length in the appendix.

Now, it appears to set out that the one party agreed to sell and the other to purchase, that the price was to be paid in fully paid-up shares of the company, and a sum of £1200 in money, of which sum £700 was to be immediately payable on completion of the agreement, and £500 was postponed until the results of the working of the patents should show that they were successful by the production and sale of a certain amount of the manufactured article. Upon that event occurring this additional £500 was to be paid. We are told that the sum of £20,000 has been expended by the company in the erection of works for the purpose of manufacturing chlorine. That was the position of matters when an application was made for the compulsory winding-up of this company, and it is now in process of being compulsorily wound up. In these circumstances I should say that it was part of the agreement—a necessary part—that the vendor should make up a title to his patents,

and then and there transfer and assign these to the company. That *de facto* never was done; but nevertheless the company, as I have said, went on spending money as they did for the development of these patent rights. It was in that position of matters that the present application was made. It happens that *de facto* the patents have never been transferred to the company and they remain in the name of Mr Donald, and it is in these circumstances that the liquidator betakes himself to the powers given him by the 100th section of the statute, and prays for an order to compel Mr Donald to transfer these patent rights to him which happen to be in his hand, and which the petitioner says he is *prima facie* entitled to. No doubt they happen to be in Mr Donald's hands, but I have little doubt in this case that the company is *prima facie* entitled to the patents. I do not see how it could be held otherwise. Mr Donald was bound under his agreement to assign to them, and they have expended all this money in developing them, and in that position of matters I think it is quite futile to say that these patents do not *prima facie* belong to the company.

It is contended by the respondent that the 100th section of the Companies Act 1862 only applies to officers of the company, that Mr Donald is not an officer of the company, and therefore that his application is incompetent in so far as it applies to him. I concur with your Lordship in thinking there is no doubt that Mr Donald is an officer of the company in the sense of section 100. He is the managing director under the articles of the association, and in fact that has been made public. No doubt as manager his powers are limited to the technical or manufacturing department, but I see no reason why the manager of a company is not an officer of that company. I think the case of the *Oakwell Collieries* is a direct authority upon that point. Therefore I have no doubt that Mr Donald here is an officer of the company in the sense of the 100th section. But then he says—"I must be paid the full price of the articles sold; there is £500 of the price not yet paid which ought to be paid to me; I have a claim for that." I think that the interlocutor of the Lord Ordinary protects any rights which Mr Donald may have in respect of his claim for £500.

The only other matter to which I must refer is the argument as to the construction of the 11th section of the agreement. Upon that I entirely agree with your Lordship that it applies to the case of voluntary liquidation, and not to the case of compulsory liquidation, which this is. Upon these grounds I agree with your Lordships that the interlocutor should be affirmed.

LORD M'LAREN — The relation of Mr Donald to the Chlorine Company which bears his name is one of a nature with which we are very familiar in company cases.

Mr Donald was the proprietor of various patent rights which he had taken out as his inventions. He entered into an agreement with a trustee for a company to be formed, and in the second article he agrees to sell to the company, and the second party, as trustee for the company, agrees to purchase these patent rights. Then the price of the patents is to be paid chiefly in the form of fully paid-up shares of the company to be formed, Mr Donald undertaking that 20,000 preferred shares shall be applied for and taken up by individuals, companies or corporations, and being also bound to pay all the expenses incident to the formation of the company.

Now, I think Mr Campbell was well entitled to claim for Mr Donald all the protection which the law can give to any vendor who disposes of his right under such circumstances, because the inventor of the patents in this case must have had great confidence in the success of his process, when for so small a sum as £1200 in cash he took upon himself this large expense with nothing more than a chance of sharing along with the other members of the company, if successful, the profits of the undertaking. Out of that £1200, £700 was to be paid at once, or within 30 days of the registration of the company, for the purpose as explained at the bar of enabling Mr Donald to repay the preliminary expenses. The remaining £500 was to be paid after the manufactory was established and the business of the company in operation. Now, after the expenditure of all the capital that has been raised in putting up the necessary buildings and chemical apparatus, the company was brought to a stand by an application for a winding-up order at the instance of a creditor. In the liquidation this application is presented for an order under the 100th section of the Companies Act 1862 to transfer to the liquidator the patent rights which are the subject of the agreement. Under the sixth article of the agreement the vendor guarantees his own title and gives an absolute undertaking to assign and make over these patent rights. Mr Donald could have had no answer to the demand of the company as soon as it was formed and registered to execute the necessary transfers of the patent rights. But doubtless because Mr Donald and the company had confidence in each other, he was not immediately called upon to assign the patents, and in point of fact the patents had not been assigned at the time when the company went into liquidation.

It seems to me that much may be said for the case of the patentee to the effect that he is not bound to grant the required assignation to the liquidator of an insolvent company, except on the condition of receiving the counterpart of his obligation to assign, viz., the £500, which was to be paid to him in cash. But whether he is entitled to put forward this condition in answer to a demand under the 100th section is a different question. I agree with your Lordships that the policy of the 100th section is a policy which we find running through the various statutes relating to England and Scotland which give facilities for the winding-up of estates of insolvent

persons and companies, and the meaning of the section is that the representative of the creditor is to be put into immediate possession of property to which the company has a substantial right, reserving if necessary all preferential claims which may affect it.

The Lord Ordinary has reserved to Mr Donald his claim, and to the liquidator his answers, and it does not appear to me that Mr Donald's right of retention, if he has such a right, is in any way prejudiced by the order which the Lord Ordinary has pronounced.

On the other hand, I am unable to accept the argument founded on the 11th section of the agreement to the effect that in the event that has occurred Mr Donald was entitled to be retrocessed. I do not read this section as contemplating the case of a creditor's liquidation at all, and if it had, I should have had the very gravest doubt whether an undertaking of this kind could stand, because I cannot conceive that it is in the power of the parties to an agreement to provide that in case of insolvency the property of one of them shall be passed to the other for the purpose of preventing its being distributed amongst creditors.

For these reasons I am also of opinion that the Lord Ordinary's interlocutor should be affirmed.

LORD KINNEAR was absent.

The Court adhered.

Counsel for the Petitioner—H. Johnston—Burnett. Agents—Carmichael & Miller, W.S.

Counsel for the Respondent — Vary Campbell — Macaulay Smith. Agents — Kirk, Mackie, & Elliot, S.S.C.

Thursday, November 16.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

THE MARQUESS OF BREADALBANE *v.* J. WHITEHEAD & SONS AND OTHERS.

Landlord and Tenant—Lease—Exclusion of Assignees except with Consent of Landlord—Right of Landlord.

A landlord let a granite quarry to a company. The lease expressly excluded assignees, legal or conventional. The company having gone into liquidation, the landlord wrote to the liquidators, whom he had permitted to continue the company's possession, intimating that he was willing to consent to the lease being sold, but on the condition, *inter alia*, that the assignee must be a person approved by him. The liquidators thereafter sold the lease and granted an assignation to the purchasers, but the landlord refused to accept them as tenants.

In an action by the landlord for reduction of the lease and removal of the assignees who had entered into possession, the latter averred that the sole reason of the landlord's refusal to accept them as tenants was that he had come under an obligation to grant a lease to another party.

Held that the defence was irrrelevant, in respect that the landlord was entitled under the lease to withhold his consent without assigning any reason, and that he had not surrendered his right by his letter.

Duke of Portland v. *Baird & Company*, November 9, 1865, 5 Macph. 10, *followed.*

Opinion (by Lord M'Laren) that after consenting to a sale of the lease the landlord was bound to consider the qualifications of any tenant who might be presented, and that an averment that he had granted a lease to another party without awaiting the result of the sale would have been a relevant defence to the action.

By lease dated 11th and 25th May 1885 the Marquess of Breadalbane let a granite quarry, of which he was the proprietor, to the Ben Cruachan Granite Company, Limited, "but expressly excluding (except with the consent of the proprietor in writing) assignees, legal or conventional, and sub-tenants, also creditors or managers for creditors in any way or shape (including liquidators)." . . . The lease was to endure for twenty years.

On 7th January 1892 the company went into liquidation, and liquidators were appointed. With the consent of the Marquess the liquidators remained in possession of the subjects let until March 1893. On the 11th of that month Messrs Davidson & Syme, the agents of the Marquess of Breadalbane, wrote to the liquidators that "while his Lordship is willing to consent to the lease being sold, it must be on the conditions which we are now to state—1, The assignee must be a person approved by him or his factor, and the assignee must, of course, undertake the whole obligations and conditions of the lease. . . . On 15th March 1893 the liquidators exposed their whole right and interest under the lease for sale, and it was purchased by J. Whitehead & Sons, to whom the liquidators granted an assignation of the lease dated 30th April and 1st May. The Marquess of Breadalbane refused thereafter to approve of the assignees or consent to a transfer of the lease to them, but nevertheless they entered into possession of the quarry, and asserted a right to continue working it.

The Marquess of Breadalbane accordingly raised the present action against the Ben Cruachan Company and its liquidators, and also against J. Whitehead & Sons, for reduction of the assignation, and for decree of removing against Whitehead & Sons.

He averred that he had rejected Whitehead & Sons as tenants after inquiry and consideration.

The defenders J. Whitehead & Sons made averments to the following effect:—