bound to relieve the pursuer of one-half of the loss which has been incurred.

Some English authorities were quoted for the purpose of showing that payment by an employer in a contract such as the present, to the contractor, of money which the employer was entitled to retain as security for the due completion and maintenance of the work, had the effect of freeing the contractor's surety or cautioner, at all events to the amount so paid. These authoties would have been directly applicable to the present case had the Town Council of Selkirk paid away the 20 per cent. which under the contract they were entitled to retain—one-half till the completion of the work and the balance till the expiration of the period of maintenance, but in my judgment they have no application to the £400 in question, which was not a security fund under the contract, but a sum which, although it had been certified as due and payable to the contractor, the Council would have been entitled to retain if a condition of matters had arisen which in fact never did arise.

The only other question is in regard to one item in the account lodged by the pursuer, bringing out the loss sustained in completing the contract. That item is a charge of £75, being fee for superintending the work for nine months. It is proved that if a fee for superintendence is allowable at all the amount charged is moderate. I am of opinion that the charge must be allowed. It was necessary that someone should superintend the work, and if the pursuer had not done so himself he would have required to employ and pay someone else. I think, however, that the pursuer was quite right to supervise the work himself, because the attitude taken up by the defender had placed him in a very delicate position, and he was bound to see that the work was conducted as economically and efficiently as possible. To superintend the work, however, took up time which the pursuer would otherwise have devoted to his own business, and caused him additional expense in carrying on that business to an amount apparently, at all events, equal to the fee charged.

Upon the whole matter I am of opinion that the appeal should be dismissed and the interlocutor of the Sheriff affirmed.

LORD JUSTICE-CLERK—That is the opinion of the Court (the Lord Justice-Clerk, Lord Stormonth Darling, Lord Low, and Lord Ardwall).

Counsel for the Pursuers (Respondents)—Hunter, K.C. — Jameson. Agents—Fyfe, Ireland, & Co., S.S.C.

Counsel for the Defender (Appellant) — Morison, K.C. — Macmillan. Agents — P. Morison & Son, S.S.C.

Wednesday, December 4.

SECOND DIVISION.

[Lord Dundas, Ordinary.

LIQUIDATOR OF JAMES DONALDSON & COMPANY, LIMITED *v.* WHITE & PARK.

Company—Winding-up—Production of Documents—Lien—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 115.

On a note for the official liquidator of a company in liquidation, the company's law-agents may be ordered, under section 115 of the Companies Act 1862, to produce all books, title-deeds, and other documents relating to the company, without prejudice, however, to their lien for their account.

The judgment of Lord Hatherley in *South Essex Estuary and Reclamation Company*, L.R., 1869, 4 Ch. Ap. 215, *followed*.

Opinion per Lord Dundas (Ordinary) that the mere production and inspection of the documents by the liquidator will not, *per se*, impose any liability upon him for payment of the law-agent's account.

The Companies Act 1862 (25 and 26 Vict. cap. 89) enacts:—Section 115—"The Court may, after it has made an order for winding up the company, summon before it any officer of the company, or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the Court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company; and the Court may require any such officer or person to produce any books, papers, deeds, writings, or other documents in his custody or power relating to the company; and if any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, having no lawful impediment (made known to the Court at the time of its sitting and allowed by it), the Court may cause such person to be apprehended and brought before the Court for examination; nevertheless in cases where any person claims any lien on papers, deeds, writings, or documents produced by him, such production shall be without prejudice to such lien, and the Court shall have jurisdiction in the winding up to determine all questions relating to such lien." Section 117—"The Court may examine upon oath, either by word of mouth or upon written interrogatories, any person appearing or brought before them in manner aforesaid concerning the affairs, dealings, estate, or effects of the company. . . ."

Messrs Thomas White & Park, W.S., Edinburgh, were the law-agents of James Donaldson & Company, Limited. The company went into liquidation, and James Maxtone Graham was appointed officia.

liquidator. He presented a note to the Lord Ordinary (DUNDAS), under sections 115 and 117 of the Companies Act 1862, craving him, *inter alia*, to ordain Messrs Thomas White & Park to appear before the Court "for the purpose of being examined upon oath concerning the affairs, dealings, estate, and effects of the said James Donaldson & Company, Limited; and to produce all books, title-deeds, papers, writings, or other deeds or documents in their custody or power relating to the said James Donaldson & Company, Limited."

Answers were lodged for Messrs Thomas White & Park, in which they, *inter alia*, stated that they had "all along been willing and have informed the liquidator of their willingness to hand him over the papers relating to the limited company, under reservation of all questions of security and preference, so as to preserve to them their rights of lien. The liquidator has declined to take delivery of the papers on these terms."

The Lord Ordinary reported the case to the Inner House, with the following

Opinion.—"The liquidator presents this note under sections 115 and 117 of the Companies Act 1862 (25 and 26 Vict. cap. 89). The prayer of the note, so far as the present question is concerned, craves the Court to ordain certain law-agents to appear before the Court 'for the purpose of being examined upon oath concerning the affairs, dealings, estate, and effects of the said James Donaldson & Company, Limited, and to produce all books, title-deeds, papers, writings, or other deeds or documents in their custody or power relating to the said James Donaldson & Company, Limited.' The first branch of this prayer echoes the language of section 117, while the second is based upon section 115, but omits, oddly enough, any reference to its proviso in regard to lien, which raises the point here at issue. Any order which is made would require to be expressly 'without prejudice to such lien.' The liquidator's counsel proposed to restrict his crave at this stage to the first branch above quoted, with the frankly professed object of endeavouring, if possible, to obtain sufficient information in the course of the examination as to the nature and contents of the various documents without incurring any liability for the law-agents' account, which he apprehended might possibly arise if an order to produce was executed. A precedent for this course was said to exist in the Outer House case of *Fergusson* (*Barr & Company's Liquidator*), 10 S. L.T. 456. But that case is not, in my opinion, in point as a precedent; for I observe from the report that 'counsel having agreed that the examination should not be used to obtain a *précis* of the titles, the respondents did not oppose the motion.' I think the proposal to restrict the crave is inexpedient and unnecessary. It was explained during the discussion that the apprehensions entertained by the liquidator were based upon an analogy derived from the law of bankruptcy. It may, I think, be taken as settled that if a trustee in sequestration obtains possession, upon his own demand, of documents under reservation of a lien, he will be liable for payment of the amount secured by the lien, even though he should find upon investigation that they are of no value whatever to the estate or the creditors—*Renny & Webster*, 1847, 9 D. 619. I see that in the recognised text-book on bankruptcy, Goudy, 3rd ed., p. 600, the learned author, after referring to *Renny & Webster's* case, thinks 'it is doubtful if the same results would arise were the trustee simply to inspect the titles in the agent's office, exercising his right to examine all the bankrupt's deeds and securities so as to judge if it will benefit the estate to take up the property to which they relate. It is thought that the agent would have no claim for a preference in such a case if the trustee declined to take up the property.' I am disposed, as at present advised, to agree with the opinion embodied in the sentence last quoted. But it is, in my judgment, unnecessary to pursue the topic; for we are here dealing not with a sequestration but with a statutory liquidation. It has been decided in England, with reference to section 115 of the Act of 1862, that where the solicitors of the company have a lien for costs on documents relating to the company in their possession, the official liquidator may nevertheless compel their production without prejudice to the lien, though in many instances this would render the lien valueless. *In re South Essex Estuary Company*, 1869, 4 Chan. 215—I should be prepared to follow this case, which I think is directly in point, and to grant the crave of both branches of the prayer of the note, already referred to, adding the words 'without prejudice to any lien which the respondents or any of them may have or claim over the same.' I may add that I think the examination and production would in this case be competently and most conveniently conducted by a commissioner, and not by the Court itself. The liquidator is, in my judgment, entitled to the production craved, in order to see whether the documents or any of them are such as he desires to acquire in the interests of those whom he represents; and in my opinion that production and inspection of them by him will not, *per se*, impose any liability upon him for payment of the law agent's account. The validity of the lien and the ultimate effect of it in relation to what the liquidator may see fit to do after production has been made, are matters which do not appear to rise at this stage. The question raised is one of general importance, and has not, so far as I know, been decided in Scotland. I have therefore reported it to the Court, to obtain their instruction and guidance, and in doing so I have thought it right to state my own opinion upon the matter."

Argued for the petitioner—The liquidator was entitled to an order in the terms he asked, with the addition perhaps of the words suggested by the Lord Ordinary, "without prejudice to such lien."—*South Essex Estuary and Reclamation Company*, L.R. 1869, 4 Ch. Ap. 215. The mere fact,

however, of the liquidator's examining the documents, &c., to see if they would be of use to him, would not make him liable for the agent's account of expenses, unless he actually used the documents, and a finding to that effect should be embodied in the Court's interlocutor. The Lord Ordinary was right in distinguishing between a trustee in a sequestration (*Renny & Webster* v. *Myles Murray*, February 8, 1847, 9 D. 619), and the liquidator of a company under the Companies Acts in this matter. If the Court were of opinion that the mere examination of the documents by the liquidator involved him in liability, he would in that case restrict his crave to an order for the appearance of the law agents for examination upon oath under section 117.

Argued for the respondents—The petitioner was undoubtedly entitled to an order for the production of the documents in the precise terms of section 115, *i.e.*, with the qualification "without prejudice to their lien," provided always it was understood that the mere inspection of the books, etc. constituted prejudice and *ipso facto* made the liquidator liable for the respondents' account. Otherwise their lien would be prejudiced, for, generally speaking, it was the examination of documents and not their retention which was of value. Lord Hatherley's opinion in *South Essex Estuary and Reclamation Company*, *cit. sup.*, was wrong and self-contradictory.

LORD JUSTICE-CLERK—The Court will follow the judgment of Lord Hatherley in the case of the *South Essex Estuary Company*, and will direct the Lord Ordinary accordingly.

LORD STORMONTH DARLING, LORD LOW, and LORD ARDWALL concurred.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties on the report by Lord Dundas to them of date 22nd November 1907, direct the said Lord Ordinary to proceed in the liquidation by granting the crave of both branches of the prayer of the note without prejudice to the lien claimed by the respondents, in accordance with the opinion expressed by him in the said report: Find no expenses due by or to either party since the date of the Lord Ordinary's interlocutor reporting the cause."

Counsel for the Petitioner—The Dean of Faculty (Campbell, K.C.)—Constable Agents—Davidson & Syme, W.S.

Counsel for the Respondents—Graham, Stewart, K.C.—Sandeman. Agents—The Parties.

HIGH COURT OF JUSTICIARY.

Wednesday, December 4.

(Before Lord M'Laren, Lord Kinnear, and Lord Pearson.)

GREIG *v.* MACLEOD.

Justiciary Cases—Licensing Laws—Sale of Exciseable Liquors to Child under Fourteen Years of Age—Sale by Servant who has not Received Special Instructions—"Knowingly Allows Any Person to Sell"—Licensing Act 1903 (3 *Edw. VII, cap.* 25), *sec.* 59.

The Licensing (Scotland) Act 1903 (3 Edw. VII, cap. 25), section 59 (1), enacts—"Every holder of a certificate who knowingly sells or delivers, or allows any person to sell or deliver, save at the residence or working place of the purchaser, any description of exciseable liquor to any person under the age of fourteen years, for consumption by any person on or off the premises, excepting such exciseable liquors as are sold or delivered in corked and sealed vessels in quantities not less than one reputed pint for consumption off the premises only, shall be liable to a penalty. . . . . ."

Held that a licence-holder was rightly convicted where he had failed to instruct his servant as to compliance with the Act, and such servant had, outwith his master's knowledge and presence, sold to a child under fourteen years of age.

Andrew Patterson Greig, licence-holder for premises at 23 Bridge Street, Leith, was charged in the Burgh Police Court there, on 18th July 1907, at the instance of John Macleod, Burgh Prosecutor, on a complaint under the Burgh Police (Scotland) Act 1892 and the Criminal Procedure (Scotland) Act 1887. The complaint set forth that he, on 29th June 1907, "did knowingly allow David Inglis, an assistant in said premises, to sell and deliver exciseable liquor, namely, a half-pint of ale and a half-pint of porter, to Beatrice Nicholson, an orphan, . . . who was then eleven years and two months, and under fourteen years of age, for consumption off the said premises, such exciseable liquor not being sold and delivered to the said Beatrice Nicholson in corked and sealed vessels in quantities not less than one reputed pint, for consumption off the said premises only, contrary to the Licensing (Scotland) Act 1903, section 59. . . ."

The accused pleaded not guilty, but, after evidence had been led, was found by the Magistrate guilty as charged, and fined £1, and in default of payment sentenced to seven days' imprisonment.

A case was stated for appeal in which the Magistrate set forth the following facts as proved—"On the evening of Saturday, 29th June, between 9 and 10 o'clock, the said Beatrice Nicholson entered the appellant's licensed premises, mentioned in the complaint, by the jug bar. The jug bar is entered from the street by a separate door