Saturday, February 8.

SECOND DIVISION.

[Lord Johnston, Ordinary.

LIQUIDATOR OF THE LOCHEE SAWMILLS COMPANY, LIMITED *v.* STEVENSON & JOHNSTON.

Agent and Client—Company—Sequestration—Hypothec—Agent's Lien—The Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 115.

The law agents of a company in liquidation claimed a lien over the title-deeds of the heritable subjects belonging to the company. The subjects were burdened by bonds, the company's law-agents acting as agents for the lenders, and had also, subject to the bonds, been conveyed to trustees, namely, the same law-agents, in security for a debenture issue of the company. On 18th January 1907 the Lord Ordinary to whom the liquidation proceedings had been remitted ordained the law agents to produce the title-deeds in terms of the Companies Act 1862, sec. 115, without prejudice to any lien they might have over them. On 28th January the debenture holders unanimously resolved to leave their interests in the hands of the liquidator. Thereafter the liquidator made use of the title-deeds for the purpose of advertising and selling the subjects, and after unsuccessfully exposing these at a price which would have extinguished the debt due under the bonds, but not that under the debentures, he eventually, with the consent of those in right of the bonds, sold the subjects at a price not sufficient even to pay the bonds in full.

The law-agents, in respect of the foresaid reservation as to the lien, having claimed a preferential ranking over the general assets in liquidation for the amount of their business account, *held* that as either the bond holders or debenture holders could have insisted on delivery of the titles for the purpose of realising their security, and as it was clear there could be no reversion after satisfying their claims, there was nothing against which the lien could have been made effectual, and that accordingly the law-agents were not entitled to the preference claimed.

The Companies Act 1862 (25 and 26 Vict. cap. 89) enacts, sec. 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 . . . 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 . . . 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."

On 9th November 1906 the shareholders of the Lochee Sawmills Company, Limited, passed an extraordinary resolution to wind up the company voluntarily, and J. H. B. Rorie, chartered accountant, was appointed liquidator. Thereafter a petition was presented for a supervision order. This was pronounced on December 6, 1906, and the liquidation proceedings were remitted to Lord Johnston.

Messrs Stevenson & Johnston, solicitors, Dundee, who had for some time prior to the liquidation of the company acted as its agents, made a claim (referred to subsequently as No. 36) in the liquidation for a preference for their business accounts, amounting to £216, 13s. 9d. On 23rd August 1907 the liquidator made a deliverance whereby he disallowed certain items of the account, reduced others, and granted only an ordinary ranking for £144, 16s. 8d., subject to taxation. Thereafter he presented a note to Lord Johnston in which he sought approval for, *inter alia*, this deliverance. Messrs Stevenson & Johnston lodged answers, in which they objected, *inter alia*, to the disallowance of a preference.

The circumstances in which the claim was made are thus narrated by the Lord Ordinary (JOHNSTON):—"In regard to claim No. 36, apart from questions of taxation, there arises a question of agent's lien which it is requisite that I should at once dispose of. The claimants Stevenson & Johnston, solicitors, Dundee, claim a preference for business accounts amounting to £216, 13s. 9d., in respect that the benefit of a lien, which they allege they had over the titles to the heritage of the company in liquidation was reserved to them when they were ordered to hand over the titles to the liquidator.

"The circumstances were these—Messrs Stevenson & Johnston were for some time prior to the liquidation the law agents of the company, and at the date of the liquidation they were in possession of the title-deeds. While they were agents and in possession of the title-deeds the firm made an advance to the company of £750, in security of which the company granted to Mr Stevenson and Mr Johnston, as trustees for the firm, a heritable security over their heritage containing an assignation to the writs in the ordinary short statutory form, but I understand without an inventory. At the same time, Mr Alfred Stevenson, a gentleman not connected with the firm, made another advance to the company of £800, and also obtained security over the company's heritage with the same assignation of writs. Messrs Stevenson & Johnston were, of course, in the position of agents for the lenders in relation to their own advance, and they were likewise agents for Mr Alfred Stevenson. Although the writs were assigned there was no change in their custody. Early in the liquidation

a note was presented to me craving that I should ordain Mr Stevenson and Mr Johnston, and Mr Alfred Stevenson, or such of them as might have the custody of the title-deeds of the company's heritage, to produce and exhibit the same to the liquidator in order that he might allow them to be examined by intending purchasers of the heritage, and in order that he might be in a position to meet a threatened claim by the over-superior. The parties appeared before me, and it was very soon seen, as stated in the note to my interlocutor of 18th January last, 'that if the property of the company in liquidation is not to be sacrificed the parties concerned must meet one another with more reason than they have hitherto shown,' and accordingly I ordained Mr Stevenson and Mr Johnston, and Mr Alfred Stevenson, or such of them as might have the custody of the title-deeds, not exactly in the terms of the prayer to the liquidator's note, but in terms which the discussion before me showed were necessary in the interest of all concerned, 'forthwith to produce the same in terms of section 115 of "The Companies Act 1862," without prejudice to any lien which the said John Laurence Stevenson, or Peter Reid Johnston, or their firm of Stevenson & Johnston, may have over the said title-deeds, as provided by said section.' And they have been produced accordingly.

"Now there are two other circumstances which require to be noticed. The two bonds for £750 and £800 respectively were guaranteed by the General Accident Insurance Corporation, Limited, and as it was perfectly clear that there was to be a deficiency in the heritable security that Corporation paid up the sums contained in the bonds to the bondholders, and took from them assignations thereof covering, of course, the right of the bondholders to delivery of the writs. It was also the case that the company's heritage, subject to the bonds in question, was conveyed to Mr Stevenson and Mr Johnston as trustees for a debenture issue by the company."

In addition to the facts narrated by the Lord Ordinary the following facts must be noted—The debenture issue referred to by the Lord Ordinary amounted to £1130. The debenture holders at a meeting held by them on 28th January 1907 resolved unanimously "to leave their interests in the liquidation in the hands of the liquidator and concur, the liquidator bringing to sale the heritable property and others of the company over which the debentures are secured." The subjects in question having been damaged by fire the liquidator paid the sum which he recovered under insurance policies, namely £465, to the General Accident Fire and Life Assurance Corporation, Limited, who were then in right of the bonds, thus reducing the debt to them from £1550 to £1085. On 19th February 1907 the subjects were exposed to public roup at the price of £1250 without any offer being made. On 3rd May 1907 they were, with the consent of the said Assurance Corporation, re-exposed at the price of £950, but without result. On 14th June 1907 they realised £902, and this sum less expenses the liquidator paid to the Assurance Corporation. The balance the Assurance Corporation recovered from certain co-obligants, who in respect thereof lodged claims in the liquidation.

On 20th November 1907 the Lord Ordinary pronounced an interlocutor whereby, with reference to the claim in question, he found that in the circumstances in which the heritable property of the company was realised there was no lien available to the firm of Stevenson & Johnston as law agents of the company over the titles to the company's heritage, and to that extent and effect approved of the liquidator's adjudication on said claim; before dealing further with said claim remitted to the Auditor of the Court of Session to tax the accounts of Messrs Stevenson & Johnston forming the basis of the claim and to report, and granted leave to reclaim.

Opinion. — ". . . [*After the narrative above quoted*] . . .—Now the liquidator could do nothing in the way of selling the heritage except under burden of the bonds, unless by arrangement with the bondholders—that is, he could only sell the company's reversion. Had there been any reversion to realise, and had the liquidator realised it, there can be no doubt that as against him Messrs Stevenson & Johnston's lien would have been good, and that in respect of the condition under which the titles were handed over he must have given Messrs Stevenson & Johnston a preference in lieu of their lien not only over the proceeds of the reversion but over the general assets in liquidation — *Skinner* v. *Henderson*, 1865, 3 Macph. 867. But there was no reversion to realise, and the liquidator could do nothing without the consent of the bondholders. The original bondholders having no longer any interest, but having transferred their interest to the Assurance Corporation, the liquidator, with consent and concurrence of the corporation as assignees, and also of the debenture holders of the company whom I caused to be consulted independently of their trustees Messrs Stevenson & Johnston, who had a hostile interest, has now realised the heritage and applied the net proceeds in payment *pro tanto* of the sums due to the Insurance Corporation as assignees of the original bondholders. There proved on realisation to be a considerable deficiency even to pay the Insurance Corporation. They have a considerable claim as ordinary creditors in the liquidation for the balance due them. [*The claim was by the co-obligants in the bonds, from whom the balance had been recovered by the corporation.*] And of course there was nothing from the proceeds of the heritage for the debenture holders and *a fortiori* for the general creditors.

"Now in effecting the sale the liquidator was acting, as it appears to me, by reasonable arrangement primarily as agent for the secured creditors, though in his capacity as liquidator, and Messrs Stevenson & Johnston' lien must be considered as in a

question with the secured creditors and not as in a question with the company, who were the debtors. From the moment the bonds were granted Messrs Stevenson & Johnston were holding the titles both as agents for the company, the debtors, and as agents for the bondholders, their creditors, in respect that they were agents for both borrower and lender. They might plead their lien to effect against their clients the borrowers, but they could not plead their lien to effect against their clients the creditors — *Drummond* v. *Muirhead & Guthrie Smith*, 1900, 2 Fr. 585. The fact of their double agency, which is not affected by the further fact of their personal interest as one of the lenders, makes an exception from the ordinary rule. If this exception holds it is impossible that they should be heard to set up their lien against their own assignees and the assignees of their client. In the circumstances of the actual realisation, therefore, Messrs Stevenson & Johnston had in my opinion no effectual lien to reserve, and I am unable to listen to the contention that the mere fact of reserving a law agent's lien under the 115th section of the Companies Act 1862 *ipso facto* gives the law agent a preference over the general assets of the company irrespective of such circumstances as I have narrated. I shall therefore sustain the liquidator's deliverance on claim No. 36 so far as the principle of his determination is concerned. But before I can deal with his deliverance in detail there must be an audit of the various business accounts involved. . . . . .

"Counsel for Messrs Stevenson & Johnston craved leave *ob majorem cautelem* to reclaim. I do not think it necessary, but it can do no harm to grant it, but I should hope that a reclaiming note will not be allowed to delay the obtempering of the remits made, which are necessary in any event."

The respondents reclaimed, and argued—They had on February 18 a lien on the title-deeds; that was a right to retain them till their business accounts were paid—*Ferguson & Stewart* v. *Grant*, February 8, 1856, 18 D. 536; Bell's Prin., secs. 1438 and 1441. They admitted that had the bondholders, failing payment, demanded the titles they would have had no lien against them—*Drummond* v. *Muirhead & Guthrie Smith*, February 13, 1900, 2 F. 585; 37 S.L.R. 433—but neither they nor their assignees the corporation had demanded the titles, and both had been fully paid. As to the co-obligants, they could not have got an assignation of writs from the corporation, and in any case had not got one, and so would not have been entitled to demand the titles. As to the debenture holders, they had no title to demand the title-deeds unless and until the bondholders were fully paid. In any case they had made no demand. As the liquidator had received the title-deeds under reservation of the lien and had made use of them, *e.g*, in advertising the subjects, he was bound to give a preferential ranking — *Renny & Webster* v. *Myles & Murray*, February 8, 1847, 9 D. 619, Lord President Boyle at p. 625. Reference was also made to *Liquidator of James Donaldson & Company, Limited* v. *White & Park*, December 4, 1907, 45 S.L.R. 231. (2) Assuming a lien, it entitled the law agents to retain title-deeds until their business account was settled—Bell's Prin., sec. 1438—and the effect was that the lien, or, if a reservation under it were made, the preference, extended over the whole assets of the company, and was not limited to the subjects to which the title-deeds related—*Skinner* v. *Henderson*, June 2, 1865, 3 Macph. 867; *Paul* v. *Mathie*, February 2, 1826, 4 S. 420, Bell's Prin., sec. 1441.

Argued for the petitioner (respondent)—(1) There was no effective lien to reserve at 18th January 1907. In selling the subjects the liquidator was acting primarily for the secured creditors, and they could have demanded the title-deeds. If the bondholders, the lenders, had asked for production of the titles the agents must have complied—*Drummond* v. *Muirhead & Guthrie Smith* (*cit. sup.*) Again, the liquidator had prior to advertisement and exposure been authorised to act for the debenture-holders, and they were entitled to demand the title-deeds. Moreover, the co-obligants in the bonds, who had repaid the bondholders' assignees, the Assurance Corporation, could have demanded an assignation of their rights and requisitioned the titles, and against them a lien could not have been pled. The unsecured creditors, against whom alone the lien could have been pled, had in fact no interest in the sale, as it was manifest they could get nothing from it. In these circumstances there had been no effective lien to reserve, and there was no preference. (2) Even if the reclaimers had a lien, it was limited to the subjects to which the title-deeds related—Bell's Prin., 1441; Goudy on Bankruptcy (3rd ed.), p. 600; Gloag & Irvine on Rights in Security, p. 392; *Skinner* v. *Henderson* (*cit. sup.*)

The opinion of the Court (the LORD JUSTICE-CLERK, LORD STORMONTH DARLING, LORD LOW, LORD ARDWALL) was delivered by LORD ARDWALL—On 18th January 1907 the Lord Ordinary in this liquidation required the reclaimers Stevenson & Johnston, who are a firm of solicitors in Dundee, to produce the title-deeds of the heritable subjects which belonged to the company, in terms of the 115th section of the Companies Act 1862, without prejudice "to any lien which the claimants or their said firm might have over the said title-deeds as provided by the said section," and the question raised by this reclaiming note is whether in respect of the said lien so reserved the reclaimers are entitled to a preferable ranking in the liquidation. The Lord Ordinary held that they had not, and I agree with him in that opinion.

The mere reservation of a law agents' lien under the section above quoted does not give them a preference over the general assets of the company unless it can be shown that had the titles not been ordered

to be delivered up by the Lord Ordinary they would have had an effectual lien over them for their account.

Now, as pointed out by the Lord Ordinary in his opinion, which clearly and carefully recapitulates the whole circumstances of the case, Messrs Stevenson & Johnston held these titles not only as agents for the company but also as agents for certain bondholders who had granted loans over the security of the subjects to which the titles refer. There were two bonds for £750 and £800 respectively, and these were granted by the General Accident and Assurance Corporation, Limited, and when it became perfectly clear that there was to be a deficiency in the heritable security that Corporation paid up the sums contained in the bonds, and took assignations from the bondholders some time after the date of the liquidation. In addition to these bonds the company had issued certain debentures, and in security of these the said subjects had been conveyed to trustees, of course under burden of the bonds. It appears that Messrs Stevenson & Johnston also acted as trustees for these bondholders, so here again they were holding the titles for postponed heritable creditors. Now, as pointed out by the Lord Ordinary, it is settled by the case of *Drummond* v. *Muirhead and Guthrie Smith*, 1900, 2 F. 585, that Stevenson & Johnston, though they might plead their lien with effect against their clients the borrowers, could not plead their lien with effect against their clients the lenders. Accordingly, either the bondholders or debenture-holders could have insisted on delivery of the titles at the date of the liquidation for the purpose of realising their security, and indeed the bondholders had taken steps towards such realisation by serving a schedule of intimation, requisition, and protest upon the liquidator on the 6th of February 1907. It was evident therefore that it was in the interest of all parties, both in the way of saving expense and otherwise, that the liquidator should be entrusted by the heritable creditors and bondholders with the realisation of these properties. With regard to the debenture-holders, they put all their rights and interests in the hands of the liquidator at a meeting held on 28th January 1907, and the subjects were exposed by the liquidator with the consent and concurrence of the said Corporation as heritable creditors, as appears from the minutes of exposure, But in so exposing them he was acting not for the general body of creditors in the liquidation but for these secured creditors, it being absolutely clear that there would be no reversion after satisfying their claims, so that the fact that the liquidator did make use of the titles in selling the properties does not in any way strengthen the reclaimers' case, and the suggestion that the properties were originally exposed at a price which would have left a reversion really does not matter, and, as I understand, is contradicted by the information which has been supplied to us since the discussion, and which shows that in addition to bonds the subjects were burdened with the debt due to the debenture-holders, amounting in all to apparently £1500.

Applying the principle of the case already quoted, it would appear that after the secured creditors were satisfied there was nothing against which the reclaimers' lien over the titles could be made effectual, as after the heritable creditors were satisfied neither the liquidator nor the shareholders nor the ordinary creditors of the company had any interest whatever in the titles, nor could they have made any use of them. The right of lien as existing in Messrs Stevenson & Johnston would have therefore become of no effective value whatever; for a law agent's lien confers no active right, but merely entitles him to retain the papers until either his account shall be paid or a preferable ranking given him in case of bankruptcy or liquidation (Bell's Prin. 1441). And supposing there had never been an order pronounced ordaining the law agents to deliver up the titles, they must have delivered them up to the bondholders and debenture holders to enable them to effectuate a sale of the properties, and after that, as the titles were of no value whatever, either to the liquidator or those interested in the remaining assets of the company as creditors or shareholders, the liquidator would have left them alone, and would never have come under an obligation to give Stevenson & Johnston a preferable ranking in return for the delivery of them. The lien would accordingly have been valueless, and it cannot now be treated as ever having been anything else. I am therefore of opinion that the reclaiming note should be refused, with expenses since the date of the Lord Ordinary's interlocutor.

The Court refused the reclaiming note and adhered to the interlocutor reclaimed against.

Counsel for the Petitioner (Respondent)—T. B. Morison, K. C.—Hendry. Agents—Taylor & Rorie, W.S.

Counsel for the Respondents — Graham Stewart, K.C.—D. Anderson. Agent—T. F. Weir & Robertson, S.S.C.