

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 custodian justifying his withholding them. Now the custodian 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-

toun the reservations quoted *supra* in rubric.

The leases also contained this clause as to compensation to the tenants for land resumed—"Declaring that the proprietor shall be bound always to keep properly enclosed any land resumed for any of these purposes, and that the tenants shall receive for any land so resumed an abatement from the rent in the proportion that the extent of ground resumed bears to the extent of the whole subjects hereby let; and also shall receive payment for the value of any crop which may be growing on, or unexhausted manure in, the ground when resumed; and generally for all loss and damage which the tenants hereunder may sustain through the proprietor himself working the said mines and minerals and other substances, as the same shall be ascertained by arbitration."

In 1902 the first parties acquired the lands of Rosyth, Orchardhead, and Hilton by private agreement from Lord Hopetoun for the erection of a Naval Base at Rosyth. In connection with its construction they found it necessary to form a road through parts of the farms of Rosyth and Hilton, and also to take land for other purposes from each of the three farms. The total areas of the land so taken (exclusive of that required for the road) were as follows—Twenty-three acres out of a total of 243 from Rosyth farm, 27 acres out of a total of 206 from Orchardhead farm, and 21 acres out of 186 from Hilton farm.

The Case further stated—"The first parties have resumed the lands referred to, and the second, third, and fourth parties have consented to the resumption without prejudice to the whole rights and pleas of all parties, and under reservation of all claims for compensation of any kind whatsoever. The first parties require the said lands for the purposes of their works in connection with the construction of the Naval Base of the Government at Rosyth. These works consist chiefly of buildings and machinery in connection with the construction of piers, docks, &c. The possible construction of a Naval Base at Rosyth was not within the knowledge of the parties to the said respective leases at the time of their execution.

"Questions have arisen between the first parties and the second and fourth parties as to the items of compensation payable in respect of the land resumed from their respective farms for the construction of the said road.

"The second parties have lodged claims for—(1) Loss of tenants' profits. (2) Severance damage. (3) Disturbance. The fourth party claims for loss of tenant's profits and severance.

"The first parties have intimated their willingness to allow to the second and fourth parties the items of compensation specified in their leases, viz., abatements from their respective rents in the proportion that the extent of ground resumed bears to the extent of the whole subjects let to them, and payment for unexhausted manures, there being no growing crops on

the ground when resumed. The first parties have in addition, without prejudice, offered to allow to the second parties the items for severance damage, and to perform certain operations on the fourth party's farm in order to obviate damage by severance. These offers have, however, been declined by the second and fourth parties, who maintain that they are entitled to the additional items of compensation claimed by them.

"Further questions have further arisen between the parties as to the right of the first parties to resume land from the respective farms of the second, third, and fourth parties for the erection of buildings and plant in connection with the construction of said Naval Base. The first parties have made offers of compensation in regard to the land resumed for the latter purpose similar to those made in respect of the land resumed for the construction of the road, but these have been declined.

"The second, third, and fourth parties have intimated claims for—(1) Loss of tenant's profits; and (2) Loss to business."

The first parties maintained that upon a sound construction of the leases in favour of the second, third, and fourth parties, they were (*first*) entitled to resume, for the purpose of construction of said new road, the portions of land referred to; and (*second*) entitled to resume the portions of land specified for the erection of buildings and plant in connection with the construction of the piers, docks, &c., required for the Naval Base, and that upon the footing of allowing only to the second, third, and fourth parties an abatement of rent proportionate to the portions of the land so resumed, together with the value of any growing crops or unexhausted manures, all as specified in the leases.

The second, third, and fourth parties maintained that the expression "for any other purpose" occurring in the clauses of the leases, and founded upon by the first parties, must be construed to mean purposes *ejusdem generis* with those enumerated in the said clauses, and reasonably within the contemplation of the parties at the time said leases were entered into, and that, accordingly, the construction of said road and Naval Base not being within any of the specified purposes, and not being *ejusdem generis* with any of these purposes, or within the contemplation of the parties at the date when the said leases were entered into, the first parties had no power under the said leases to resume land for the purposes of the construction of the said road or Naval Base.

The questions of law were—"1. Were the first parties entitled to resume under the leases the said lands required by them for making the said road upon compensating the second and fourth parties in terms of their leases? 2. Were the first parties entitled to resume under the leases the said lands required by them for the erection of buildings and plant in connection with the Naval Base upon compensating the second, third, and fourth parties in terms of the said leases?"

Argued for first parties—The first parties were entitled to resume on the terms stipulated in the leases either under the clause reserving the minerals or under their reserved power to resume lands for planting, feuing, &c. *Esto* that the former clause was more restricted, it included the right to resume for the erection of buildings, machinery, &c. And that was enough. Alternatively the power to resume lands for “planting, feuing . . . or for any other purpose,” was amply sufficient, for the concluding words were wide enough to cover anything. The rule of *ejusdem generis* founded on by the tenants was inapplicable where, as here, there was no specific *genus*. The following cases were cited—*Pew v. Mercer*, (1737) Elch. Presumption, 10; *Stewart v. Lead*, (1825) 1 W. & S. 68; *Caledonian Railway Company v. Smith and Nimmo*, June 5, 1877, 14 S.L.R. 510; *Trotter v. Torrance*, May 27, 1891, 18 R. 848, 28 S.L.R. 651; *Robertson v. Ross & Company*, July 8, 1892, 19 R. 967, 29 S.L.R. 853; *Johnson v. Edgware, Highgate, & London Railway Company*, (1865) 35 L.J. Ch. 322.

Argued for the second, third, and fourth parties—The clause reserving the minerals was limited to purposes connected therewith. There was no general reservation of power to resume lands for any purpose whatever; the words “for any other purpose,” on which the first parties relied, referred to purposes *ejusdem generis* with those mentioned, and could not be so extended as to cover the erection of a Naval Base. To construe these words as meaning any purpose whatever would enable the first parties to nibble away the whole of the subjects let. Reservations in a lease were to be construed against the landlord. The following authorities were referred to—*Rankine on Leases* (2nd ed.) 283; *Thames and Mersey Marine Insurance Company v. Hamilton, Fraser & Company*, (1887) L.R. 12 A.C. 484; *Glasgow Corporation v. Glasgow Tramway and Omnibus Company*, [1898] A.C. 631; *Tillmans & Company v. s.s. “Knutsford,” Limited*, [1908] 2 K.B. 385, *aff.* [1908] A.C. 406, *per Lord Dunedin* at p. 410.

At advising—

LORD KINNEAR—The first parties to this case are the Lords of the Admiralty, and the second parties are tenants of certain farms on the estate concerned, which the Admiralty acquired by purchase from the late Lord Hopetoun in 1903. The leases under which the second parties hold were current at the date of the purchase, and the question is whether the Admiralty, as coming in place of the lessor, are entitled to take advantage of a condition under which the landlord is enabled to resume portions of the farms for purposes described in the lease, the tenants receiving compensation by way of abatement, and also damages in respect of growing crops or unexhausted manure which they may lose. The second parties are willing to surrender the ground, but they maintain that they are not bound to do so on payment of the stipulated compensation, be-

cause the purposes for which the first parties require it do not fall within the scope of the clause of resumption—I should say the clauses of resumption, because there are three leases and three tenants; but as the leases are all in identical terms, I take it as if we were dealing with one clause in one lease.

The general purpose for which the first parties require the land is said to be for works in connection with the construction of a Naval Base at Rosyth; and it is stated in the case that the possible construction of a Naval Base was not within the knowledge of the parties to the said respective leases at the time of their execution. Although that is stated as a fact upon which the parties are agreed for raising the question of law before us, it does not appear to me to be a relevant fact. Stipulations regarding contingencies which are to extend over a considerable period of years are expressed in general terms just because the particular cases which they are intended to cover are not known to or foreseen by the parties to the contract. The question therefore is not whether the design of the Admiralty's operations for the construction of a Naval Base was or was not anticipated by the parties, but whether the specific purposes for which they propose to apply the land are within the scope of the particular powers reserved. These purposes are (1) the making of a road through parts of the farms of Rosyth and Hilton, described in the seventh article of the case; and (2) the erection of buildings and machinery in connection with the construction of the piers and docks which are to subserve the main purpose of the Naval Base. There are, as I read the lease, two separate and distinct provisions enabling the landlord to resume in different circumstances; but I think it is the second of these provisions only which requires our consideration, because the first, as I read it—and I cannot say it appears to me to be at all doubtful—is limited to operations which the landlord may desire to execute for the purpose of working minerals. This part of the lease begins by reserving to the proprietor what would have been reserved at common law without any express reservation—“the whole mines, minerals, and metals of every description in the subjects 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 thereby let which he may think proper, and to resume the land he may think necessary for these purposes.” I think everything that is contained in that clause is necessarily limited by reference to the avowed purpose of working the landlord's minerals. But the second clause begins in terms which to my mind make it perfectly clear that it is a distinct and additional power for which the landlord intends to stipulate—“reserving also full powers at all times to take off land from any part or parts of the subjects thereby 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." It was argued by the second parties that these last words "or for any other purpose," must be limited by reference back to the first power for the resumption of land for working minerals, but that appears to me to be entirely inconsistent both with the formal language and with the plain intention of the clause, because the meaning of the word, "also" is not doubtful, and when a landlord has stipulated for one power and then goes on to stipulate also for another power, the second is plainly stipulated as something in addition to the first, and not as something which is to be governed by the first. But then I think also the notion of any reference to the first power is excluded by the nature of the powers themselves which are specified in the second clause, because "planting, feuing, letting on building leases, or for making, altering, or widening roads, or for making railroads or canals," has no kind of relation in fact to the working of minerals. People do not plant the mineral strata beneath their lands, nor can they grant feus for building upon them, and therefore the two clauses seem to me to be quite separate. But that being so, and reading this second as a distinct clause, I am of opinion that the first of the two purposes for which the Admiralty require the land, namely, that of making roads, is within the plain meaning of the specific powers stipulated for. It is said that whatever may be thought about the other specific powers in this case, power to make roads or canals must be restricted with reference to the power to work minerals. I think that argument is excluded, not only for the reasons I have already mentioned, but because in the clause applicable to the working of minerals there is express power to make roads for that purpose. The lease goes on in the next clause to stipulate generally that the landlord may make roads. That stipulation would be perfectly useless if it applied only to the making of roads for minerals, since that had been already provided for, and the natural implication is that these roads are for more general purposes.

But then that does not dispose of the more difficult question whether it is within the scope of the clause that the first parties should use the land for the erection of buildings and machines in connection with the construction of piers and docks. The words of the reserved power are certainly wide enough to cover this or any other purposes; but then it is said that since the stipulation is for certain enumerated and specified purposes, the general words which follow the specific enumeration must be construed to cover only other purposes which are *ejusdem generis* with those specified. That this is a rule of construction nobody disputes, but it is a rule of construction only—that is to say, it is a canon which must be used to guide the Court in construing a written instrument in order to find out what is the true intent

and meaning of the language used, and I think we must be cautious in applying it as if it were an abstract rule of law which could be used to force a meaning upon the words of the contract irrespective of other indications of what is the true intention of the parties. This is really, as it seems to me, only a particular illustration of the general rule for the interpretation of written instruments, that doubtful words must be read with reference to the context and with reference to the general intent and purpose of the instrument under construction. I think that view is in conformity with the doctrines laid down in the House of Lords in the case of the *Thames and Mersey Marine Insurance Company v. Hamilton, Fraser, & Company*, 1877, 12 A.C. 484. I do not think the decision in that case and the decision in the case of *Tillmanns & Company v. s.s. "Knutsford" Limited*, [1908] 2 K.B. 385, also cited to us by the second parties, are authorities for the decision of the present case. They are not in my opinion really in point, because they concern the construction of contracts of a totally different kind from that with which we are concerned, and contracts which were required to be interpreted with reference to considerations which have no application to this particular case. The case of *Tillmanns* was a case involving the construction of a bill of lading, and that of the *Thames and Mersey Marine Insurance Company* was upon the construction of a contract of marine insurance, and both of these contracts, as was very clearly pointed out by the noble and learned Lords in the case of the *Thames and Mersey Marine Insurance Company*, have been the subject of judicial construction for so long a period that the persons entering into them must be presumed to have accepted the meaning imposed by a series of decisions both upon particular words and upon general words in such contracts. The decisions therefore are not in my opinion in point. But then I think the observations which are made by the noble and learned Lords in the case of the *Thames and Mersey Marine Insurance Company* with regard to the true meaning and effect of construction of the canon in question are of the highest value. Lord Halsbury, who was then Lord Chancellor, puts it in this way. After saying that the words of the clause then in question, which is one of the ordinary clauses insuring against perils of the sea, were in themselves wide enough to include the particular risk which was in question in that case, he goes on to say—"Two rules of construction now firmly established as part of our law may be considered as limiting those words. One is that words, however general, may be limited with respect to a subject-matter in relation to which they are used. The other is that general words may be restricted to the same *genus* as the specific words that preceded them." What I observe in this sentence is that the learned Lord Chancellor says the general words may be so restricted, and not that there is a rule of

law by which such words must be restricted irrespective of other considerations; but he goes on to lay down the more general rule that it is to be remembered that what the Courts have to do in the construction of written documents is to reach the meaning of the parties through the words they have used. Then he goes on to consider what is to be presumed was the meaning of persons entering into a contract of marine insurance with reference to the accepted meaning of the words employed. Lord Herschell says—"It is contended on behalf of the appellants that these general words following a specific enumeration must be limited to perils *ejusdem generis* with those specified, or to put it in another way, that they must be construed with reference to the scope and purpose of the instrument in which they occur, viz., a policy of marine insurance." Now I think the view of the law stated by both these noble and learned Lords makes it clear that we are not to apply this canon as an abstract rule of law which by itself would enable us to put a meaning on the contract, but that we are to begin by reading the contract itself, taking it as a whole, considering the true meaning of the particular clause with reference to its language, to its place in the contract, and to the general scope and purpose of the contract itself.

Now there are two observations which appear to me to occur upon the construction of the clause itself. In the first place, with reference to the language of the clause, I observe that the general words which are intended to cover the purposes unspecified are not only in themselves wide enough to cover the particular purpose in question, but that they are as wide as the form of language can make them, because the words of the reservation are "full power to take off land (for certain purposes) or for any other purpose." I do not think that it is proper in the construction of a clause to deny all force to terms such as the word "any." "Any purpose" does not in ordinary language mean for certain purposes or for purposes of a certain kind; it means any other purpose, whatever it may turn out to be. "Any purpose" is any you please. But although I make that observation on the phraseology, I do not think it at all conclusive, both because in other cases a similar phrase has been found, and yet the canon of *ejusdem generis* has been held to apply, and still more because of the principle of the rule itself, which assumes from the beginning that words are to be restricted within a narrower range than would naturally belong to them taken by themselves; but as far as the phraseology goes, it is, I think, an indication that what the parties to the contract intended is an unlimited general reservation. But the second observation is perhaps of more importance, and it is this, that if you are to limit general words by holding that they must cover only things that are *ejusdem generis* with preceding specific words, you must find that these specific words themselves are *ejusdem generis* with one another. The question is,

whether the enumerated purposes have such a common characteristic as to make a *genus*, because if they have not, the contract does not disclose a particular category by reference to which the general words are to be limited. Now I confess I have great difficulty in seeing what is the common characteristic which is said to be expressed in all the specific purposes for which the landlord is to reserve the land under this contract. He may reserve for planting, for granting feus, without any restriction as to the uses to which the feuar may put his property, for letting on building leases, without any restriction as to the character of the buildings, for making railroads or making canals, or any other purpose. I confess I do not see what the *genus* is which is to limit the construction of these last general words. I do not wish to put too much weight upon that circumstance either, because the point arose in the *Thames and Mersey Insurance Company* case, and did not receive effect in the House of Lords, but then I think that the reasons for which it failed to receive effect are not such as to prevent the necessity for our considering it in the present case. In the first place, the meaning of the general words under consideration in that case, as Lord Halsbury and Lord Herschell both pointed out, have been fixed by a series of decisions, and therefore the force of them was well understood; secondly, Lord Macnaghten, who alone deals specially with the point, declined to give effect to it on grounds which I rather think not only do not exclude our considering it, but make it necessary that we should do so. What he says is—"It was objected by Mr Cohen that the rule of *ejusdem generis* does not apply unless you can find a common characteristic running through or underlying the previous words. I do not know that this is so, at any rate where several distinct cases are enumerated leading to a common result, or intended to be met by a common remedy." Now the common result which all the distinct cases in the clause under construction led to was sea damage, and accordingly there was no difficulty in applying the general rule so as to exclude anything which did give rise to sea damage. But that leads one to consider what is the common result to which the several and distinct cases that are enumerated in the present clause lead. I cannot say that I can find any other than this, that they all necessarily lead to the result of the land being diverted from the purposes of an agricultural lease. But then if that is the common result, that covers the Admiralty's case. Their object in taking the land is to apply it to purposes which would divert it from the agricultural purposes for which it was let. I should be disposed to agree that if a landlord attempted to use a clause of this kind for the purpose of taking land in order that he might use it himself or let it to somebody else to use for growing crops or for grazing, the tenants might be very well entitled to say that such a purpose would not fall within the general

words of the reservation, because the whole purpose of the reserved power was to take the subject away from agricultural purposes altogether. But then I think that this is exactly the purpose for which the Lords of the Admiralty propose to use it. At all events I do not doubt that the generality of the power must be limited by reference to the purpose and scope of the contract, and therefore the landlord could not take back ground to such an extent or for such purposes as would prevent the tenant from making a profitable use of the remainder for the purpose for which it was let. But no objection of that kind is taken in the present case.

If it were necessary—and I again confess I have a little difficulty in grasping the principle upon which it should be necessary—to relate the purpose for which the power of resumption is exercised, not to the whole category of specified cases, but to one or other of the particular cases enumerated, I should say that that purpose for which the Admiralty proposes to use the land is *ejusdem generis* with the specified purpose of granting leases for building. That is a destination in which the tenant has no interest whatever. If the landlord granted a lease of this ground for building or for a feu, his lessee or his vassal is not required by the clause to be put under any restriction as to the kind of building he may erect. He may erect what he pleases. He may build houses, he may build factories. I see nothing to prevent him erecting the buildings and machinery necessary for the construction of piers. But the construction of these works by the landlord himself is, for all purposes of the contract, exactly the same kind of thing as the construction of such works by his tenants or by his vassals. The tenant under the lease has no interest whatever in the question whether they are constructed by his landlord or by persons whom his landlord enables to do so.

I am therefore of opinion that the case of the Admiralty is well founded, that they are entitled to take these lands for the purposes specified, and that in the general words under which they claim there is no such limitation as would exclude their so doing. The result is that we ought to answer both the first and the second questions in the affirmative.

LORD JOHNSTON—The Earl of Hopetoun, as proprietor of lands at Rosyth, let the farms of Hilton, Rosyth, and Orchardhead to three tenants, with power of resumption of land for certain purposes, expressed in identical terms. Thereafter the Commissioners of the Admiralty acquired Lord Hopetoun's, then Lord Linlithgow's, lands at Rosyth for the purposes of a projected Naval Base, which is understood to include docks and their appurtenances, and, specially with reference to Admiralty purposes, all that is necessary in the way of machinery and machine shops for the repair and fitting out of ships and for their supply.

The question in this case relates to the

rights of the Commissioners of the Admiralty, as coming in place of the Earl of Hopetoun, to resume lands for the purposes of their works, paying therefor merely the compensation provided by the leases.

The purpose of the resumption was, first, for a new road through the property; second, for the erection of buildings and plant in connection with the construction of the said Naval Base.

Now there is a twofold provision in the leases for resumption. I do not think that it is necessary to consider the first, as it is clearly limited to land required in relation to the working of reserved minerals, and the smelting or otherwise treating or working up into other products such minerals when won. And it can hardly be pretended that, as the works of the Commissioners of the Admiralty cannot be brought under this category, they are entitled to the benefit of certain general powers conferred in relation thereto.

But the second provision is as follows—“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.” This power of resumption is not restricted by any reference to minerals.

The power to make roads is general and in no way restricted by its collocation with the preceding purposes of resumption, viz. planting, feuing, or letting on building leases. Though the road in question would never have been made but for the projected dockyard works, there can, I think, be no doubt of the power of the Commissioners to resume the land necessary for it, extending to about six acres, from two of the farms in question. It is not material, but it was explained that its object is not directly or exclusively to give access to the Admiralty works, but to relieve the traffic on an existing road.

For the farther purpose of works an average of twenty-five acres is required from each of the three farms, out of total areas averaging about two hundred acres, and the ground in question is all on the seashore, extending from the present high-road on the north to the sea on the south. There is therefore no question of a wholesale resumption, such as might be regarded as in fraud on the lease.

The question for the Court is whether, accepting the guidance of the rule of construction known as *ejusdem generis*, the purpose in question comes under the same category as any of those mentioned (*Tillmans & Co.*, [1908] 2 K.B. 385, *per* Farwell, L.J.) These are, speaking generally, purposes of land development, but in certain specific directions. What the Admiralty have in contemplation has, of course, nothing in common with planting or making, altering or widening roads, or even making railroads. But there are other purposes enumerated, viz. feuing, letting on building leases, and making canals. Feuing in its ordinary acceptation

contemplates building, and certainly letting on building leases does so. And if a proprietor may resume for the purpose of enabling other persons to build, I think that resumption for the purpose of himself building falls under the same category. Now there is no restriction on the class of building. Equally a factory as a dwelling-house is covered by the general terms used. And if the proprietor could resume to give off ground to another for erecting what is commonly termed a public work, I think he could equally resume for the purpose of starting a manufacturing business himself. It could hardly be maintained *in pari casu* that the Duke of Buccleuch could resume ground at Caroline Park to feu off to the town of Edinburgh for their great gasworks, and could not resume for the purpose of any business enterprise in which he himself might wish to engage. And the purpose for which the land in this case is wanted is for building, and for buildings of the same character as a factory or public work. It is not for the docks themselves, which are necessarily to seaward on this line of coast, if not always of high watermark, but for shore adjuncts of such docks. I do not, therefore, require to consider whether the docks themselves would fall under the same category as canals, though there would be much to say in favour of the contention.

I think, therefore, that the questions submitted both fall to be answered in the affirmative.

LORD SALVESEN—This question arises between the present proprietors of the farms of Rosyth, Orchardhead, and Hilton, which they acquired by private agreement in 1903 from the former owner the Earl of Hopetoun. The three farms in question had been previously let on agricultural leases to the other parties to the case. The Commissioners of Admiralty desire to resume possession of part of the lands included in each of these leases for the erection of buildings and plant in connection with a proposed Naval Base; and the question we have to determine is, whether they are entitled to do so on compensating the tenants in terms of the leases, or whether they must pay compensation on the same footing as if they were acquiring the land under compulsory powers. This question depends entirely on the construction of the clauses printed in the appendix.

The first clause founded on by the Commissioners does not in my opinion empower them to resume possession of the lands in question for the purposes of a Naval Base. The clause starts by a reservation of the minerals, and confers power on the landlord to search for and work them; to sink pits, make roads, erect buildings and machinery, "and carry on all works within the subjects hereby let which they may think proper; and to resume the lands they may think necessary for this purpose." It was argued that this clause gave the landlord an unqualified right to resume land for the purpose of erecting buildings

and machinery, but I think it cannot be so construed. No doubt there is a power to resume land for these purposes, but, in my opinion, only so far as reasonably necessary for the proper development of the minerals in the estate. We were told that, as regards one portion of the lands sought to be resumed, the intention of the present owners is to utilise it in connection with a quarry; but by far the greater area is not in that position, and there is no attempt to draw any distinction, in the questions of law stated for our decision, between this relatively small area and the other lands.

The second clause founded on is in these terms—"Reserving also full power at all times to take all 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." This clause must be construed with reference to the subject-matter of the lease, and consistently with the farm continuing to be tenanted as an agricultural subject. To take an extreme case, it is obvious that Lord Hopetoun could not under this clause have resumed possession of the bulk of the agricultural land, leaving only the steading and its immediate surroundings in the possession of the tenant. A power so exercised would have defeated the purpose for which the lease was entered into. Apart from such an extreme case, it must be a question of circumstances whether the land sought to be resumed forms so material a part of the subjects let that it cannot be reasonably regarded as within the contemplation of, and would be against the good faith of, the bargain embodied in the lease. No such question arises in the present case upon the facts, for it is only proposed to take 23 acres out of a total of 243 from Rosyth Farm, 27 acres out of a total of 206 from Orchardhead Farm, and 21 acres out of 186 from Hilton Farm; and it cannot be said that these areas are so large in relation to the acreage let as to make the farms substantially unworkable as agricultural subjects. Further, no such case is made on the pleadings.

Taking then the clause as it stands, it seems to me impossible to contend that Lord Hopetoun would not have been entitled to feu or let on building leases to the Commissioners of Admiralty the areas of the respective farms which are here in question. There is no limitation whatever as to the purposes to which the land feued or let on building leases is to be applied; and I take it to be clear that Lord Hopetoun would have been entitled to have resumed the several areas in question for the purpose of feuing them to persons who desired to erect factories or similar buildings upon them. It was contended that while this might be so in the case of private feuars, it does not follow that a landlord would be entitled to resume lands upon the same terms for the benefit of a company possessing parliamentary powers. It is true that a railway company acquiring the ground compulsorily would have required to com-

pensate the tenants upon an entirely different footing from that upon which the landlord could himself resume possession of the land; but the clause contemplates the right of the landlord to resume land for the making of railroads, and I think that cannot be limited to a private undertaking. I see nothing to have prevented Lord Hopetoun from resuming the areas in question for the purpose of selling them to a railway company to be used in connection with their undertaking; and if so, the concluding words of the clause, "for any other purpose," are sufficiently broad to have entitled him to have feued the lands to the Commissioners of Admiralty for the purpose of making a Naval Base.

The Commissioners, however, do not propose to feu or let on building leases the area in question, but to erect buildings and machinery upon them, retaining in their own hand the *dominium utile* of the ground. They are therefore not within the express purposes enumerated in the clause except in so far as regards the making, altering, or widening of roads. Reliance, however, is chiefly placed upon the general words to which I have referred. In my opinion Lord Hopetoun under these words would have had power to resume lands for the purpose of himself erecting buildings and machinery upon them, just as he was entitled to feu or let them on building leases for the same purpose. If so, I cannot see how the Commissioners are in any worse position. It may be assumed that neither party, at the time when the lease was entered into, contemplated the particular use to which the land is now about to be put; but the question is not as to the contemplation of parties, but as to the fair meaning of the reserved power. I think that question is not free from difficulty, but I have come to the conclusion that the clause cannot be construed so as to exclude the Commissioners, as the present owners, from resuming land for the purpose for which they desire to use it. To the tenant it is immaterial in what way the area which is taken from the farm is utilised. The loss which he suffers arises from his being deprived of the occupation; and while this may involve a certain hardship which he did not contemplate when he entered into the lease, it was one of the risks which he contracted to take. I am therefore of opinion that both questions of law must be answered in the affirmative; and I would only add that, even if I had come to a different conclusion as regards the second, I can see no ground whatever why the Commissioners should not resume lands necessary for making the road referred to in the first question, as express power is by the lease conferred upon them of doing so.

The LORD PRESIDENT gave no opinion, not having heard the case.

LORD M'LAREN was absent.

The Court answered the questions of law in the affirmative.

Counsel for the First Party—The Lord

Advocate (Ure, K.C.)—Pitman. Agent—Thomas Carmichael, S.S.C.

Counsel for the Second, Third, and Fourth Parties—Morison, K.C.—Wilton. Agent—D. R. Tullo, S.S.C.

Wednesday, March 16.

FIRST DIVISION.

(COURT OF EXCHEQUER.)

VALLAMBROSA RUBBER COMPANY, LIMITED v. INLAND REVENUE.

Revenue—Income Tax—"Balance of the Profits or Gains"—Deductions of Expenditure when Profit not Reaped within the Year—Capital or Income Expenditure?—Property and Income Tax Act 1842 (5 and 6 Vict. cap. 35), Schedule D, Case I, Rules 1 and 3.

The mere fact that expenditure is incurred in order to earn profits in future years, and is not solely referable to a profit which is reaped within the year, does not show that that expenditure is not a proper deduction in estimating the profits of the year. *Prima facie*, an expense which recurs each year, such as weeding on a rubber plantation, is income expenditure, and is not a "sum employed as capital."

A rubber company made a profit in its second year, but a loss in its first year. In arriving at the amount of that loss for the purpose of income tax assessment, the assessor only allowed one-seventh of the general expenditure, such as superintendence and weeding, on the ground that at that time only one-seventh of the plantation was in bearing. *Held* that the assessor had erred, and the whole general expenditure allowed.

The Property Tax Act 1842 (5 and 6 Vict. cap. 35), sec. 100, enacts—"And be it enacted that the duties hereby granted, contained in the schedule marked D, shall be assessed and charged under the following rules, which rules shall be deemed and construed to be a part of this Act, and to refer to the said last-mentioned duties as if the same had been inserted under a special enactment."

Schedule D, which as amended in the Act of 1853 deals, *inter alia*, with annual profits and gains not charged by virtue of any of the other schedules, under the heading "Rules for ascertaining the said last-mentioned duties in the particular cases herein mentioned," enacts—"First case—Duties to be charged in respect of any trade, manufacture, adventure, or concern not contained in any other schedule of this Act.

"Rules.

"First.—The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern, upon a fair and just average of three