

the petitioners state that the amount of tolls due by the firm of J. & G. Pendreigh, brewers, was £161, 1s. 7d. Can it be maintained that a demand to pay £852, said to be payable by it and another firm between them, was such a demand of tolls due by this firm that, on failure to pay this sum of £852, the railway company were entitled immediately to sell this firm's goods. It appears to the Sheriff that a railway company intending to avail itself of the privilege and power given by the 90th section of the statute is bound to make a precise demand of the exact amount of tolls due by the individual on whom the demand is made for the carriage of particular goods stated, and that it is the failure to pay such a demand only that entitles the company to retain and sell the goods belonging to him in their hands. That the petitioners could have made such a distinct demand, either from their own books or otherwise, seems obvious enough from the particulars afterwards stated in their condescendence. But if they carry on their business in such a way that they cannot make a proper demand of the exact amount of tolls due by any of the several parties for whom they act as carriers, they are not in such cases able to do that which the statute requires for the exercise of this special power of immediate sale. It is not alleged that these two firms were in fact one, so that all the goods conveyed were for both, and the property of both equally, so that both were equally liable in full payment of all tolls. That would have been another case."

The petitioner appealed to the Court of Session.

The SOLICITOR GENERAL and KEIR for them.

WATSON and TRAYNER in answer.

At advising—

The LORD PRESIDENT said that at common law the railway company were entitled, as carriers, to retain goods in their hands only till carriage or tolls applicable to these goods were paid. The statute introduced two novelties—(1) a right of retention for charges on other goods; (2) a power to sell the goods so retained if payment is not made after demand. In order to have this privilege, the company must strictly comply with the condition—viz., that a previous demand shall be made. It was not provided, however, that the demand should be made in any particular way, or that the failure to pay should be ascertained in any particular manner. It was clear that if, without any judicial proceeding, the company proceeded to sell without a previous demand, or upon an imperfect demand, the sale would be null, and the proceeds would belong to the debtor. This case was somewhat different from that supposed. A judicial proceeding was not contemplated by the statute, but it was no doubt judicious and proper. The railway company accordingly presented a petition to the Sheriff, and asked service of it on the respondent, as trustee on both estates, and it was contended that that was equivalent to a demand. A good deal might be said for that view. What the trustee required was sufficient notice, and it might well be contended that that was given. It was not necessary, however, to go on that ground for recurring to the judgment of the Sheriff-Substitute. It might be said that, if the service was not equivalent to a demand in terms of the statute, it might reasonably be held that the parties had dealt with it before the Court as such, and could not now resile and say it was a bad demand. That defence must have been stated on 24th June when parties came into Court, and before the Sheriff ordered

a condescendence. What effect ought to be given to the clause in the interlocutor "reserving all rights and pleas of parties?" If the plea that no demand had been made had then been stated, and if the trustee consented to the sale, it is not now possible for him to say that the sale was unwarranted and illegal. But could it have been stated on the 24th June? Certainly not in the terms in which it was now stated, because it would be inapplicable to the then state of facts. It was suggested that another plea could have been stated, that the petition was bad, because no demand had been made; but it was not conceivable that, if so, the railway company would have gone on, having it in their power to make a demand for payment, which could have been done then in the presence of the Sheriff, so as to satisfy the statute. It was impossible to give effect to such an objection when the respondent came into Court knowing of it, and yet consenting to the warrant of sale. It must be held, therefore, that he had waived this objection. His Lordship was also of opinion that the objection that no proper demand had been made in respect of the debt due by the two firms had not been distinguished, was not good. The trustee no doubt was the true debtor for the whole sum claimed.

LORD DEAS differed. He said that the question decided by the Sheriffs was of great general importance, viz., whether, in order to entitle a railway company to the benefit of the statute, it is enough to make an implied demand in the petition in which they apply for a warrant. His Lordship thought that could not be done. The statute gave a power beyond the common law, and the question he had put could not be answered merely by showing that the company were entitled at the date of the petition to sell the goods if they had not asked a warrant. The question was, whether at the date of presenting the petition they were entitled to get a warrant? They had no right to bring a man into court on the footing that service was sufficient demand of payment. He ought to have had an opportunity to pay, because it was a serious thing to bring a man into court. His Lordship was therefore of opinion that no proper demand had been made. He was also of opinion that the plea of no proper demand had not been waived, but was reserved. The pleadings and the judgments showed this, and the idea that it had been waived was never suggested till it was mooted by this Court in the course of the discussion.

LORDS ARDMILLAN and KINLOCH concurred with the Lord President.

The Court reversed the judgment of the Sheriff, and substantially affirmed that of the Sheriff-Substitute.

Agents for Appellants—Dalmahoy & Cowan, W.S.

Agents for Respondents—Waddell & M'Intosh, W.S.

Saturday, July 16.

GOLD v. HOLDSWORTH.

*Lease—Prohibition—Penalty—Additional Rent.* By a clause in a tack the lessee was prohibited from keeping a public-house without consent of the lessor, "otherways to pay £10 sterling of additional rent for each time they shall be

found guilty of keeping such house." *Held*, on a construction of this clause, that there was an absolute prohibition against keeping a public-house, and that the tenant had not the option of doing so upon payment of £10 additional rent.

This was a suspension of a charge at the instance of Mr Holdsworth of Coltness. In 1815 a tack was entered into between the former proprietor of Coltness and the predecessor of Gold, whereby the latter became lessee of a small piece of ground in the parish of Cumbusnethan for 999 years.

The tack contains, *inter alia*, a clause in the following terms:—"Declaring always, as it is hereby expressly provided and declared, that the said Janet Wilson and her foresaids are hereby prohibited and debarred and discharged from keeping a public house, or selling liquor of any kind at any time during this lease, without a special licence or authority in writing, from year to year, from the said General Sir James Stewart Denham, Baronet, or his foresaids, for that purpose, otherwise to pay £10 sterling of additional rent for each time they shall be found guilty of keeping such house, or selling any kind of liquor, and that at the first term of Whitsunday or Martinmas which may occur thereafter, with interest thereof after said term, and a fifth part farther of additional penalty in case of failure."

The question turned on the proper construction of this clause.

The suspender pleaded, *inter alia*,—"According to the true meaning and construction of the said clause, the lessee is entitled to keep a public-house, if he chooses to do so, and obtains the necessary licence from the authorities, on paying the additional rent stipulated."

The respondent pleaded, *inter alia*,—"On a sound construction of the clause of the tack quoted in the second reason of suspension, the prohibition therein set forth is an absolute prohibition against keeping a public-house, or selling liquor of any kind, without special licence from the lessor; the £10 additional rent therein stipulated is a penalty for each infringement of the said prohibition; and, under the said clause the suspender has not the option of contravening the prohibition on payment of £10 additional rent."

The Lord Ordinary (ORMIDALE) pronounced this interlocutor:—"The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, sustains the second plea in law for the respondent, and in respect thereof repels the reasons of the suspension: Finds the letters and charge orderly proceeded, and decerns: Finds the respondent entitled to expenses; allows an account thereof to be lodged, and remits it, when lodged, to the auditor to tax and report.

*Note*.—The only question that was discussed before the Lord Ordinary, and it may also be said the only real question in the case, is that involved in the respondent's second plea in law, which has now been sustained.

"The Lord Ordinary has found it impossible to adopt the construction contended for by the complainant of the clauses in the lease in question upon which the controversy turns. He cannot think that it was either the intention of the parties to the lease, or that it is the sound construction of the terms in which their contract is expressed, that the tenant was to have the election or option, just as he pleased, of keeping a public-house on the premises, with or without the leave of the land-

lord, provided he paid an additional rent of £10. On the contrary, the Lord Ordinary thinks it clear, on a consideration of the lease, and especially of the clause more immediately in dispute, that the latter contains, and was intended to contain, an absolute prohibition against the tenant keeping a public-house without a special licence or authority in writing from the proprietor, and that the stipulation as to the payment of £10 additional rent for each time the tenant should 'be found guilty of keeping such house,' was intended, and can only be construed as a means of enforcing obedience to the prohibition. In any other view, the prohibitory terms of the clause would be altogether useless and unmeaning; for, according to the complainant's contention, it must be read in the same way as if it had been expressed to the effect that the tenant was to pay a rent of £2, 13s. 4d. so long as he did not keep a public-house, and £10 during the time he did so.

"That, however, is not the way in which the contract of parties is expressed. The tenant is, in the most emphatic terms, 'prohibited, debarred, and discharged' from keeping a public-house without the special licence or authority in writing of the landlord; and the Lord Ordinary cannot think that this prohibition so expressed must go for nothing, in the option of the tenant, his heirs and assignees, in consequence of the expressions which are used,—'or otherwise to pay £10 of additional rent for each time they shall be found guilty' of keeping a public-house. The complainant might as well contend that, under the clause which immediately follows, binding him and his dependants to fit and remove at the end of the lease 'or otherwise,' to pay the landlord '£50 sterling of additional rent for each year they shall hold possession of any part thereof thereafter, until removed,' he would, in his option, be entitled to continue in possession so long as he paid the additional rent of £50. But any such contention would be untenable, as has been settled by the decisions of the Court in the cases of *Cross v. Muirhead*, 23d May 1813, Hume 860; *Campbell v. M'Laren*, 13th June 1814, Hume 864.

"Various other cases were cited by the parties in the course of the debate before the Lord Ordinary, but he thinks it sufficient, in addition to the cases already mentioned, to refer to that of *Mackenzie v. Craigies*, 18th June 1811, F.C., where the Court held that a clause in a tack binding a tenant to a certain mode of management, or to pay an additional rent, did not give the tenant an option to violate the stipulated condition at pleasure, the stipulation being interpreted to import a penalty, and not an additional rent, in the ordinary sense of that expression. This is the principle now adopted and given effect to by the Lord Ordinary, in circumstances which appear to him much more favourable for its adoption than those of the case now referred to."

The suspender reclaimed.

MILLAR, Q.C., and BURNET for him.

SOLICITOR-GENERAL and MONCRIEFF in answer.

The Court unanimously adhered.

Agent for Suspender—M. Macgregor, S.S.C.

Agents for Respondent—Murray, Beith & Murray, W.S.