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Thursday, November 5.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

HART'S TRUSTEES *v.* ARROL.

Landlord and Tenant—Lease—Rei interitus—Loss of Licence—Right of Tenant to Renounce Lease—Public-House.

A lease of licensed premises was entered into for a period of ten years, with a provision that the tenant should not be entitled to use the premises for any other purpose than that of carrying on the business of wine and spirit merchant. When the lease had still several years to run the Licensing Court refused to renew the licence. The landlord having intimated that he did not insist on the condition above mentioned, *held* (*aff.* judgment pf Lord Kyllachy, Ordinary) that the loss of the licence did not constitute *rei interitus* so as to entitle the tenant to resile from the lease.

This was an action at the instance of the trustees of the late William Hart, proprietor of a shop at 69 Shields Road and 1 Houston Street, Glasgow, which until 15th May 1902 was licensed as a public-house, against Archibald Tower Arrol, brewer, and John Urquhart, publican, the tenants of the said shop.

The action raised questions as to the validity of the lease which it is not necessary to report, and also as to the obligation of the defenders to continue their tenancy after the licence of the premises was withdrawn. The material facts relative to the latter question, as they were disclosed after a proof, were as follows:—The lease was for a period of ten and a-half years from the term of Martinmas 1895 at an annual rent of £49. The subjects let were described as "All and Whole that shop situated (*address*), all as formerly occupied by J M Picken, wine and spirit merchant there, and now occupied by the second parties" (Arrol and Urquhart). The subjects were let "allenarly for the purpose of the second parties carrying on therein the business of wine and spirit merchants." The lease contained the following clause:—"But it is hereby specially provided and declared that the second parties (the tenants) and their foresaids shall not be at liberty, without the previous written consent of the first parties or their successors, to assign this lease or any part thereof, or to sub-let the premises hereby let or any part thereof, or to leave the premises in whole or in part vacant or unused, or to use the same or any part thereof for any other purpose than that of the said business of wine and spirit merchants." The premises let had been licensed as a public-house for a considerable period, but at the Licensing Court held in April 1902 an application by Urquhart (who was then the licence holder) for a renewal of the licence was refused.

The present action, which was raised before the licence of the premises was withdrawn, concluded, *inter alia*, that the defenders were bound to stock and plenish the shop, and to carry on there the business of wine and spirit merchants. By an amendment of the summons, dated February 20th 1903, the following conclusion was added:—"And that said lease is binding upon the defenders, and that the defenders are liable conjunctly and severally to make payment of the said rent of £49 (so far as not already paid) half-yearly, by equal portions at the terms of Whitsunday and Martinmas, for said shop during the period of said ten and a-half years from and after the term of Martinmas 1898."

By minute for the pursuers, dated 20th February 1903, it was stated "that the pursuers did not insist on the defenders using the shop forming 69 Shields Road and No. 1 Houston Street, or any part thereof, for no other purpose than that of the business of wine and spirit merchants, and that the pursuers assented to the defenders using said shop for any lawful purpose, and that the pursuers accordingly withdrew any part of the conclusions of the summons to the effect that the defenders were bound to carry on in said shop the business of wine and spirit merchants therein till the expiry of said lease."

Defences to the action were lodged by Arrol, but not by Urquhart, against whom decree in absence was taken. In his defences Arrol offered to pay the rent of the premises up to Whitsunday 1902.

He pleaded, *inter alia*—"(6) It having been a condition of this defender's contract of yearly tenancy of the premises that the business to be carried on therein should be that of wine and spirit merchants, and performance of the said condition having been rendered impossible by the lapse of the licence, the said contract was terminated without notice as at 15th May 1902. (8) *Esto* that the alleged lease be held to be valid, this defender is entitled to absolvitor, in respect that he was bound under such lease to carry on the business of wine and spirit merchants in the premises let, and that performance of that obligation has without fault upon his part been rendered impossible by the refusal of the Licensing Magistrates to renew or transfer the licence."

Proof was allowed and led. On 12th March 1903 the Lord Ordinary (KYLLACHY) pronounced an interlocutor by which he decerned and ordained the defender Arrol "to stock and plenish, within six months from the date hereof, the premises in question to an extent at least sufficient to afford security to the pursuers for the rent thereof, and thereafter to maintain

the same in a sufficient state of repair during the currency of the lease."

Opinion.—"The summons in this case has now been put in shape by the amendment made by the pursuers—an amendment not opposed by the appearing defender. And the decision has been simplified by the minute for the pursuers by which they restrict the conclusion with respect to the mode of occupation of the premises. There has also been a decree in absence taken against the defender Urquhart, so that the only question is as to the liabilities of Mr Arrol, the joint-tenant and sole appearing defender. As to these liabilities, my opinion is generally as follows:—

"In the first place, I am of opinion, and see no reason to doubt, that a valid contract of lease in terms of the correspondence which passed in September 1898, the draft lease adjusted in the following year, and the extension of the lease signed by the pursuers and the appearing defender in the year 1901, was constituted as between the pursuers and the defender by the said writings and the possession which followed upon them. It was suggested that that possession was not necessarily referable to the writings, and might be ascribed to a yearly tenancy. But it is in my opinion clear that the possession was in fact unequivocally referable to the said writings as constituting a tenancy for a term of years. I am further of opinion that if any question on that head exists it is sufficiently obviated by the execution of the extended and formal lease by the pursuers to Mr Arrol and the decree in absence obtained against the defender Urquhart.

"In the next place, I am also of opinion that the lease so constituted subsists, and that the joint-tenants, and particularly the defender Mr Arrol, are still liable to implement its obligations, subject only (by reason of the pursuer's minute) to the removal of the restrictions against occupation for other purposes than the sale of exciseable liquors.

"It is not, I think, possible to contend, nor was it in the end so contended, that the mere loss of the licence extinguished or put an end to the lease. The authorities are against that suggestion, and on principle I can see no reason why—apart from express agreement—a failure of the purpose for which a tenant leases a house or shop should, even if the purpose is expressed in the lease, liberate the tenant from his obligations.

"For these reasons I am of opinion that the pursuers must have decree in terms of their first and declaratory conclusion as amended and also in terms of their second conclusion so far as it seeks merely for an order upon the defenders to stock and plenish the shop in question so as to afford security for the rent, and to put and thereafter maintain the premises in a good and sufficient state of repair. In other words, Mr Arrol must pay the rent and keep the subjects in order, and also stock them (if that is required) sufficiently to afford security for the rent. Subject to that he may occupy the premises as he pleases until the termination of the lease." [*His Lordship then dealt with the other questions in the case.*]

Arrol reclaimed, and argued—The lease was terminated by the loss of the licence, on the principle of *rei interitus*. The *res* which formed the subject of the lease was a licensed house, and as that no longer existed there was nothing to which the lease could apply. When the subject let ceased to exist the tenant was no longer bound by the lease—Stair, i. 15, 2; Bell Prin., section 1208; *Duff* v. *Fleming*, May 18, 1870, 8 Macph. 769, 7 S.L.R. 480; *Gowans* v. *Christie*, February 8, 1871, 9 Macph. 485, 8 S.L.R. 341, February 14, 1872, 11 Macph. (H.L.) 1. *Donald* v. *Leitch*, March 17, 1886, 13 R. 790, 23 S.L.R. 585, was not an authority to the contrary, because there what was decided was that a tenant had no right to keep on the lease and refuse to pay the whole rent.

Argued for the respondent—The doctrine of *rei interitus* had no application. The subject of the lease was the shop, and it remained unaffected. The restriction to a publican's business was a condition in favour of the landlord, and he had waived it, so that the tenant could not even plead that he was called upon to perform the impossible. The tenant took the risk of the loss of the licence making the lease unprofitable, just as he took the risk of a change in the law having the same effect—*Goldie* v. *Williamson*, 1796, Hume, 793; *Holliday* v. *Scott*, May 28, 1830, 8 S. 831; *Donald* v. *Leitch*, *cit. supra*; *Newby* v. *Sharpe*, 1877, 8 Ch. Div. 39.

LORD PRESIDENT—Three questions in this case were argued before us—first, whether a lease of the premises to which the action relates was ever constituted; second, if a lease was constituted, does it still subsist, or was it brought to an end by *rei interitus* or otherwise; and third, whether any liability for damages has been established against the compearing defender Mr Arrol. [*His Lordship then dealt with the question of the validity of the lease.*]

The next question is whether that lease is still subsisting so as to be binding upon Mr Arrol, and I consider that it is. The main arguments submitted on behalf of Mr Arrol on this part of the case appear to be that there was *rei interitus*, in respect that the licence held for the premises was not renewed by the licensing authority. The answer to this contention appears to me to be that defenders did not and could not warrant that the licence would be renewed; that was a thing as to which Mr Arrol necessarily took his chance. In maintaining that there was *rei interitus* Mr Arrol appears to me to be in error as to the thing which was let. His contention is that the subjects let were licensed premises, and that the subjects of the lease ceased to exist when the licence was not renewed; but it appears to me that this contention is not well founded. It was known to both the parties that the continuance of the licence depended on the will of the licensing authority, and if the defender Mr Arrol

desired that the lease should terminate with the loss of the licence he should have introduced a stipulation to that effect into the documents constituting the lease.

If these views be well founded, then the third question would not arise, because no ground for claiming damages could be established; and on the whole matter, without going through the letters in further detail, it appears to me that the Lord Ordinary's view of them is a sound one, and that his Lordship's interlocutor should be adhered to.

LORD ADAM—[*After stating the facts and holding that a valid lease had been entered into*]—It is said that nevertheless, though it might have been entered into by a written lease followed by possession, that it is now not enforceable because the lease contained a condition that the shop was to be occupied, I think as a public-house, though that is not the exact term, but occupied in the same way, but that it cannot be so occupied because they cannot get a licence for it. But that stipulation as to the mode of occupation of this shop was a stipulation entirely in favour of the landlord, and one which he can dispense with at any time and which he has dispensed with. It is not a case where there is a total or partial destruction of the premises let. The premises are as perfect as ever, and all that has happened is that the landlord agreed to dispense with that condition which is impossible. He has consented to modify the terms of the lease to meet that change, and I think there is a lease, and that the Lord Ordinary is right.

LORD M'LAREN.—I agree in all respects with the reasoning of the Lord Ordinary, and have little to add. [*His Lordship then dealt with the question of the validity of the lease.*]

I have only a word to say upon the second question, whether, in consequence of the licence having been taken away under the exercise of the discretionary powers of the magistrates the defender Arrol is liberated from his obligations as tenant. It has been attempted to assimilate Arrol's position to that of a tenant of a subject which is destroyed by fire or some convulsion of nature. I think the Lord Ordinary has put the answer to that contention shortly and sufficiently when he says:—"The authorities are against that suggestion, and on principle I can see no reason why, apart from express agreement, a failure of the purpose for which a tenant leases a house or shop should, even if the purpose is expressed in the lease, liberate the tenant from his obligations." A tenant may take a lease of business premises intending to apply them to purposes of a highly speculative character with which the landlord has nothing to do. The landlord is only bound by what is expressed in the agreement with him, and if the speculation should fail that is the misfortune of the person who enters into the speculation. I therefore agree that the interlocutor should be adhered to.

LORD KINNEAR.—I am entirely of the same opinion. [*His Lordship then dealt with the question of the validity of the lease.*]

But then, if there is a lease, however constituted, it is said not to be binding because the purpose for which the subject of the lease (which happened to be a shop in Glasgow) was let can no longer be fulfilled, and I think that defence was put on two somewhat different grounds. In the first place, it is said that as the subject of lease is described as a shop now occupied for carrying on a wine and spirit business, and as it is stipulated that the shop should be occupied in the same way by the new tenant, the loss of a licence, which makes it impossible to carry on the business in that shop in the manner contemplated, is equivalent to *rei interitus*, and, the subject-matter being thus destroyed by some external force for which the parties are not responsible the lease is at an end. I think, with your Lordship, that doctrine is entirely inapplicable, and that failure to obtain the licence can only be assimilated to the destruction of the subject by some confusion of thought. The doctrine of *rei interitus* is well settled. The lessor lets the specific subject, and he thereby undertakes, as the law is stated in all our authorities, and particularly by Lord Stair [Stair i. 15, 2], who states it as clearly as any other writer on this subject, that the subject exists because the risk which the tenant undertakes "is not of the being but of the value thereof." But if the purpose for which a subject is taken in lease cannot be carried out, although the subject itself remains in its integrity, then I, like the Lord Ordinary, know no authority for saying that that in itself should terminate the obligations of the parties. If one undertakes an obligation, and performance of that obligation afterwards becomes impossible, that does not relieve the debtor of the obligation; he still remains bound by what he has undertaken. The remedy may be different in different cases. It may result in damages, or it may not; but the obligation itself will stand, unless it can be shown against the other party to the contract that he has failed to do something that he has undertaken and so disabled himself from enforcing the obligation. That is the doctrine which I think is very clearly brought out in the case cited yesterday of *Gowans* v. *Christie* (11 Macph. (H.L.) 1), where both Lord Selborne and Lord Cairns, especially Lord Cairns, point out that the only ground on which the tenant can get rid of his lease in respect of the failure of the subjects of the lease is an implied warranty on the part of the landlord. If there is no warranty there is nothing of which the tenant has been deprived contrary to the undertaking of the lessor, and therefore the question must always be, when it is said that a purpose has failed, whether the landlord's warranty contains something to enable the tenant to plead that failure or not. That must, of course, depend on the construction of the contract of lease; and as matter of construction I

think it clear that the landlord undertakes no obligation whatever as to the continuance of the licence or as to the continuance of the purpose for which the lease is granted. In the first place, the lease is no doubt a lease of a subject which is described as being occupied by a spirit merchant. There is nothing about a public-house or about licensed premises, but I am inclined to think that the argument should be taken on the assumption that what was really intended was that the subject should be occupied as licensed premises. But then the way in which that purpose is expressed is this—that the subject is let to the lessee for the purpose of the second parties—that is, the lessee—carrying on therein the business of wine and spirit merchants. Now, that is no undertaking by the proprietor; from the necessity of the case it is an undertaking by the tenants in favour of the landlord, because it is a stipulation regarding the use and occupation to be made by the tenants. The landlord could not fulfil that—it is the tenants who are to fulfil that. And therefore if they have undertaken to occupy the premises as licensed premises or a public-house, it is for them to perform that obligation and to take all the steps that are necessary to enable them to do so. The landlord could not take the licence; he could not ensure the continuance of a licence. The licence is transferred to the tenant; and if they allowed the licence to lapse, it may be that their obligation has become impracticable, but the landlord is not responsible. And therefore it seems to me clear enough that the loss of the licence has no effect whatever on the continuance of the contract, except that the mere fact of such loss having taken place puts it on the landlord to consider how far he will or ought to insist on the stipulation that his shop is not to be used for any other purpose except that of a public-house. He has considered that and relieves his tenants of that obligation; and how that release of the party should destroy the contract altogether I am unable to understand. I think, therefore, with your Lordships, that the Lord Ordinary's judgment is perfectly right.

The Court adhered.

Counsel for the Pursuers and Respondents—Craigie—C. D. Murray. Agents—Campbell & Smith, S.S.C.

Counsel for the Defender and Reclaimer—Guthrie, K.C.—A. Moncreiff. Agent—Arthur B. Paterson, W.S.

Thursday, November 12.

SECOND DIVISION.

[Lord Low, Ordinary.

COATS *v.* CALEDONIAN RAILWAY COMPANY.

Railway—Compulsory Powers—Deposited Plan—Delineated—Notice to Take Land which not "Delineated"—Notice Bad in Part wholly Bad.

A railway company gave notice to treat for the acquisition under statutory powers of certain lands which lay outside their limits of deviation. One of the plots of ground specified in the notice was marked on the deposited plan as bounded only on three sides, the lines marked on two of the sides ending abruptly, leaving the fourth side open. The company maintained that the plot in question was "delineated," and proposed to draw a a line, which was not on the plan, joining the termini of the lines which ended abruptly. In a note of suspension at the instance of the owner of the plot of ground referred to, whereby he sought to have the company interdicted from proceeding under the notice, *held* that the ground referred to was not "delineated," and so could not be taken, and that the notice being thus bad in part was wholly bad, and interdict *granted*.

Dowling v. *Pontypool Railway Company* (1874), L.R., 18 Eq. 714, *distinguished* and *commented on*.

Railway—Company—Compulsory Powers—Notice to Take Lands Part of which had been Included in Earlier Notice which had been Withdrawn.

A railway company gave notice to treat for the acquisition of certain lands under statutory powers. Having, under a misapprehension, included in the notice a smaller portion of the lands of a certain proprietor than they required, they withdrew the notice and served a second one, including additional lands belonging to that proprietor as well as those belonging to him which were included in the first notice. In a note of suspension at the instance of the proprietor in question, whereby he sought to have the company interdicted from proceeding under their notice on the ground that by the first notice a contract had been concluded which could not be varied except with the consent of both parties thereto, *held* that the second notice was not bad though it included lands with reference to which the previous notice had been served.

This was an action of suspension and interdict at the instance of James Coats junior, of Ferguslie, Paisley, and Sir Thomas Glen Coats, Bart., of Ferguslie Park there, against the Caledonian Railway Company, and the Paisley and Barrhead District Railway Company, whereby the