machinery, making roads, and otherwise in the development of the quarry from the year 1863 to the 16th November 1869, amounted, with interest, to the sum of £10,418, 5s. 10d., conform to accounts thereof herewith produced and referred to. It would further appear from accounts produced by Mr Lloyd that the outstanding liabilities of the concern at that date amounted to the sum of £188, 11s. 11d.

"The *Curator Bonis* having been advised that, in terms of the arrangement between Mr Bontine and Mr Lloyd, he was bound to concur with the other partners in defraying the necessary expenses of developing and working the quarry, paid, after due inquiry and under the authority of the Court, the following sums to Mr Lloyd:—

1868, August 3, . .	£1799	17	4
1869, March 2, . .	98	17	0
	£1898	14	4

This included the sum of £550, part of the purchase price of the shares. It would appear that a further sum of £75, 10s. 3d. is due by Mr Bontine as at 16th November 1869, being his share of the expense of working the quarry, &c., to that date." "The curator became extremely desirous to free Mr Bontine's estate from the liability of contributing year after year indefinitely towards the expense of developing aud working this quarry. He therefore urged on Mr Lloyd and the other partners the necessity of having a joint-stock company (limited) established, as appears to have been originally contemplated by the partners, by means of which sufficient capital could be procured for the development of the quarry, and Mr Bontine relieved from the liability under which he lay to contribute further to that purpose." The joint-stock company was accordingly founded and registered. The old company was to receive 3000 shares of the new company's shares. "The *Curator Bonis* believes that if he were authorised to concur, and did concur, with the other owners of the quarry in assigning their interests therein to the new company, accepting in lieu thereof fully paid up shares in that company, Mr Bontine's estate would be entirely free from any future liability in respect of the said quarry, or of the said shares in the new company. He herewith produces the copy of a release and indemnity which Mr Lloyd, in the event of the foresaid proposed arrangement being carried out, is ready to grant."

SOLICITOR-GENERAL and ADAM for the petitioner.

The Court granted the petition. It was unprecedented in its nature, and could only be granted where it was absolutely necessary for the judicious management of the ward's estate. This was such a case; and the application was to be viewed the more favourably that the curator was a director of the new company.

Agents—A. & A. Campbell, W.S.

Friday, July 15.

BROWN, PETITIONER.

Amendment—Citation—Messenger's Execution. Clerical error in messenger's execution of a citation *allowed* to be amended.

James Brown having presented a petition for the custody of his children, the Court pronounced an interlocutor ordering the requisite intimation. A certified copy of this interlocutor was written on the petition by the Assistant Clerk of Court. The messenger's execution was on the third page of the petition, and referred to it, but omitted to state that the citation proceeded in virtue of the deliverance of the Court.

GRANT, for the petitioner, maintained that, this being a clerical error, made *per incuriam*, and not affecting the citation itself, amendment should be allowed.

The Court allowed the amendment, as the blunder was not in the body of the deed, but was a clerical error in the description of the warrant.

Agent—James Barton, S.S.C.

Friday, July 15.

NORTH BRITISH RAILWAY COMPANY *v.* CARTER.

Railway Clauses Consolidation (Scotland) Act 1845, *section* 90—*Tolls—Demand for Payment—Service of Petition.* By section 90 of the Railways Clauses Consolidation (Scotland) Act 1845 it is enacted, "if *on demand* any person fail to pay the tolls due in respect of any carriage or goods, it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods, or if the same shall have been removed from the premises of the company, to detain and sell any other carriages or goods within such premises belonging to the party liable to pay such tolls, and out of the monies arising from such sale to retain the tolls payable as aforesaid, and all charges and expenses of such detention and sale, rendering the overplus, if any, of the monies arising by such sale, and such of the carriages or goods as shall remain unsold, to the person entitled thereto; or it shall be lawful for the company to recover any such tolls by action at law." Two firms carrying on different businesses under the same name became bankrupt; and at the date of bankruptcy they owed a considerable sum to a railway company for carriage of goods. Without making any formal *demand* for payment of the tolls due, the railway company presented a petition for a warrant to sell goods in their possession belonging to the bankrupts, under the above statute. *Held* (Lord Deas diss.) that service of this petition was a sufficient *demand* for payment of the tolls in the sense of section 90.

This was a petition presented to the Sheriff of Edinburgh in virtue of section 90 of the Railways Clauses Consolidation Act 1845, at the instance of the North British Railway Company against F. H. Carter, C.A., trustee on the sequestrated estates of J. & G. Pendreigh, grain merchants in Edinburgh and Leith, and also of the firm of J. & G. Pendreigh, brewers, Abbeyhill, Edinburgh. The petitioners alleged that they had been largely employed by the bankrupts as carriers; and that at the date of their sequestration the bankrupts owed the petitioners £852, 2s. 2d., while there was in their possession, at their stations and stores, a considerable quantity of goods belonging to both bankrupts' firms. They accordingly craved a warrant of sale of these articles in virtue of section 90 of the above Act.

The trustee pleaded—"(1) The 90th section of the Railways Consolidation (Scotland) Act 1845

not being applicable to the circumstances of the present case, the petition is incompetent and irrelevant, and falls to be dismissed. (2) The petitioners, being common carriers of goods, have no such privilege of general lien or retention over the goods in question as that contended for. (3) Assuming that the petitioners had such right of lien or retention, they are not entitled to enforce it in the present instance, in respect that their procedure by the detention and sale of the goods in question had not been in terms of, or warranted by, the statute founded on. (4) The petitioners not having, before the detention and sale, made demand for the payment of the tolls, in terms of section 90 of the statute, they are not entitled to the privilege thereby given, and the petition should be dismissed. (5) A demand of the sum of £852, 2s. 2d., as being due by two firms, and as being made up of two debts, is not a demand in the meaning of section 90, of either debt. Farther, the petitioners are not entitled to obtain warrant for delivery of the consigned money, or any part of it, in respect that they were not creditors of the said firms of J. & G. Pendreigh in the two sums of £688, 5s. 5d. and £161, 1s. 7d. mentioned in the condescendence. (6) The petitioners were not entitled to retain goods belonging to one of the firms of J. & G. Pendreigh for an alleged claim against the other firm of J. & G. Pendreigh, but were bound (assuming the statute to apply, which is denied) to have kept the goods and claims and the proceedings in reference to each firm separate and distinct. (7) The respondent being now, as he has all along been, ready and willing to pay all proper charges effeiring to the particular goods of which he was to get delivery, the present application was unnecessary, and ought to be dismissed, with expenses; and warrant ought to be granted to the respondent to uplift the consigned money."

The Sheriff-Substitute (HALLARD) pronounced this interlocutor:—"The Sheriff-Substitute having considered the proceedings, productions, and closed record, and having heard counsel thereon, finds it admitted that the two firms of same name, now represented by the respondent as trustee on their sequestrated estates, largely employed the petitioners in the carriage of goods: Finds, as matter of inference from the statements *hinc inde* in the petition and closed record, that in the course of said employment no distinction was made or information given to the petitioners as to the respective ownership of the said two firms in the goods so intrusted to the petitioners for carriage along their lines of railway: Finds that in the petition, which is the first step of the present proceedings, a claim of £852, 2s. 2d. in name of charges for carriage as aforesaid was made by the petitioners against the respondent as trustee foresaid, and that judicial sale of the goods mentioned therein as goods in the petitioners' hands belonging to the said two firms was thereafter carried through of consent and under reservation of all rights and pleas of parties: Finds that service of said petition on the respondent as trustee foresaid was sufficient demand for payment of tolls due in respect of said goods under section 90 of the Railways Clauses Consolidation (Scotland) Act 1845, founded on by the petitioners: Finds, therefore, that the petition and sale following thereon are valid procedure under said enactment for recovery of the tolls claimed by the petitioners for carriage as aforesaid: But in respect the amount so claimed is disputed by the respondent, appoints the cause to be enrolled in order that said disputed amount may be ascertained.

"*Note.*—The question debated was, whether valid procedure had been taken by the railway company (petitioners) under the enactment founded on, whereby a special remedy and privilege is conferred upon them in the recovery of tolls for the carriage of goods. The statute confers this remedy on the petitioners 'if on demand any person fail to pay tolls due in respect of carriage.' A demand must therefore be made, but no form for making it is prescribed by this enactment. The petitioners aver in article 8 of their condescendence that a formal demand was made. It is not said whether this was done verbally or in writing, neither is any detail given of time, place, or circumstance. So indefinite an averment amounts to little; it is too vague to be remitted for proof, and thus the point arises for decision whether service of the petition is sufficient demand in terms of the statute. The Sheriff-Substitute thinks that it is, although questions of expenses might arise if the tolls claimed were excessive, or if it were made clear that payment, if asked extrajudicially, would at once have been made so as to supersede the necessity of a petition and judicial sale. At the debate it was strongly contended that this procedure at the instance of the railway company is of the nature of a diligence; moreover, that being a statutory modification of the common law in their favour, it was on that ground also liable to strict construction. This view seems undoubtedly sound, and had any regulation been given prescribing the form in which the demand for tolls must be made, such regulation must have been strictly enforced. But no such regulation exists. Service of the petition was surely a demand to pay tolls; indeed it may be called a very formal and precise demand. At all events no statutory criterion exists upon which it can as a demand be declared invalid. The next point arises from a circumstance in the constitution of the two firms represented by the respondent, and the manner in which they contracted with the petitioners for the carriage of their goods. There was a firm of J. & G. Pendreigh, grain merchants, and there was a firm of J. & G. Pendreigh, brewers; two of the partners of the one firm were the only two partners of the other. The connection between the two firms was therefore very close, but in fact and in law they were different from one another. The trade was different, the creditors were different, and on bankruptcy there was a separate sequestration of each, although in both sequestrations the respondent, from obvious considerations of convenience, was named trustee. Now as to these two firms, thus closely connected and trading under the same name, it is distinctly averred in the original petition that 'no distinction was made or information given to the petitioners as to which of the said firms of J. & G. Pendreigh the said goods respectively belonged.' Farther, it is averred in the same writ that 'the petitioners got no information and are not aware as to what proportions of said sum (of tolls claimed) was incurred by said firms respectively.' These averments are very precise, and there is no counter averment. The inevitable inference is that these averments in the petition are true. If these averments be true, the question presented for decision is not one of any difficulty. Although as a diligence or as a purely statutory remedy this procedure at the instance of the railway company is *stricti juris*, this strictness

cannot be enforced to the exclusion of a very obvious plea in equity relied on by the petitioners. They have acted on such knowledge as they had. It was owing to the peculiar mode of trading adopted by these two firms, in concert with one another, that such knowledge was not greater. The railway company have done nothing to incur forfeiture of their rights, nor does it seem fair that in this question the two firms should take advantage of their own acts for the defeasance of the petitioners' rights. If with the railway company they dealt not as two firms but as one firm, the company are surely not bound to distinguish between them as a condition of obtaining their statutory remedy against both. Neither does the position of the petitioners seem weakened by subsequent separation in the record of the claims made by them against each firm. When they acquired sufficient knowledge to separate the claims they separated them. The trifling excess of the tolls claimed in the petition over the claims in the record may be susceptible of explanation. No argument was addressed to the Sheriff-Substitute on the counter claims set forth in article 3d of the respondents' statement—claims which are met in detail in the petitioners' answer. No finding, therefore, on this subject is contained in the foregoing interlocutor."

The respondents appealed to the Sheriff (DAVIDSON), who pronounced the following interlocutor:—"The Sheriff having considered the appeal for the respondent, with the process, and heard counsel, recalls the interlocutor appealed against: Finds that this application of the petitioners is founded on the 90th section of the Railway Clauses Consolidation (Scotland) Act 1845: Finds that it is not alleged in the petition that a demand for payment of tolls due by the respondent, or by the firm of J. & G. Pendreigh, grain merchants and mill masters, or by the firm of J. & G. Pendreigh, brewers, on the sequestrated estate of each of which firms the respondent is trustee, was made by the petitioners prior to the date of the petition, or the date of the warrant of sale, granted under it of consent, and under reservation of the rights and pleas of parties: Finds that no such demand was made: Therefore finds that the petitioners were not entitled to sell the goods belonging to the respondent as trustee aforesaid: Dismisses the petition: Ordains the clerk of court to pay over to the respondent the sum of £397, 7s. 10d., consigned in the process: Finds the respondent entitled to expenses; appoints an account thereof to be lodged for taxation, and remits to Mr Robert Barclay Selby, solicitor, to tax and report.

"*Note.*—This is an application founded on the statute. The 90th section provides, that 'if on demand any person fail to pay the tolls due in respect of any carriage or goods, it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods.' It is admitted that before this power to detain and sell can be exercised, a demand to pay the tolls due must have been made, and that the person on whom such a demand has been made has failed to pay tolls due which have been so demanded.

"The statute does not provide that the railway company shall obtain judicial authority for the exercise of this power of sale; but it is not maintained that there is any incompetency in an application for judicial authority. The railway company have in this instance made such an application. Founding on the statute, they ask a warrant to sell. The question is, Were they at the date of the application entitled to get the warrant? or, in other words, were they then entitled to sell if they had not asked a warrant?

"A warrant was granted of consent, and under reservation of all rights and pleas of parties—that is, of the rights of parties as at the date of the warrant. The sale has taken place, and the produce is in Court.

"The petition does not aver that a demand of payment was made by the railway company before presentation of the petition. It does not set forth the existence of the condition in respect of which the company are entitled to sell. They do not say the respondent failed to pay on demand. What they do say is that the respondent has not asked delivery of the goods, 'or tendered payment of the sum of carriage and charges due to them.' But that is not what the statute requires. The petitioners argue that the petition, or the service of it, is itself a demand. It is doubtful if the petition can be fairly so construed. Certainly there is no demand of payment expressed in the petition. There is only a prayer for a warrant to sell. Before such a warrant was applied for, and as the condition of getting it, a demand was necessary.

"But supposing the petition, or the service of it, could be taken as a demand of payment, is the payment thus made such a demand as the statute requires?

"No accounts were lodged with the petition or prior to the warrant of sale. The respondent is trustee on the sequestrated estates of two separate and distinct firms. The names of these firms are the same, but they have different partners and different creditors, and have carried on their respective businesses at different places (as appears from their designations as set forth in this petition), and they are as distinct from each other as if their names also were different. The petition states that at the date of the sequestration of these two firms there was due to the railway company the sum of £852, 2s. 2d. for carriage and charges on goods conveyed by the Company, and the petitioners say that 'they got no information, and are not aware as to what proportion of said sum was incurred by the said firms respectively; that in their employment of and dealing with the petitioners no distinction was made or information given to the petitioners as to which of the said firms of J. & G. Pendreigh the said goods respectively belonged.' This is a strange statement for the petitioners to make, particularly as the places of business were different, and it is not consistent with the statements made by the petitioners in their condescendence, which was lodged after the sale under the warrant had taken place. This statement so made in the petition is not admitted to be true. At the stage of the cause at which warrant of sale was granted, the respondent had no opportunity of answering the petition; and of course in every case a compearing respondent is presumed to deny all the averments of his opponent. But such is the statement in the petition, and the effect and meaning of it is this, that in the demand of payment supposed to be made by the petitioners, or in any demand of payment made before (though no previous demand is averred), both firms, or the respondent, as representing each of them, were called on to pay the lump sum of £852, 2s. 2d.; if not each the sum of £852, 2s. 2d., at least that sum in such proportions as they or their respective creditors might settle among themselves. In their subsequent condescendence

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 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