Wednesday, November 23.

CITY OF GLASGOW UNION RAILWAY CO. *v.* GLOVER.

Obligation—Agreement—Construction—Ultra Petita—*Expenses.* Where a Railway Company had purchased the site of a theatre in Glasgow, and a clause in the minute of agreement and subsequent disposition bore that there was excepted from the sale, and from the conveyance "the whole materials and fittings of the theatre, except the stonework, the outside walls, the roof, and such woodwork as is necessary for the stability of the roof—in two conjoined actions, brought in consequence of a dispute between the parties, as to what was included under this clause, *held* that it must be construed according to the original purpose contemplated by the parties to the transaction; that that purpose was to give on the one hand, and acquire on the other, the mere shell of the building, but not with the immediate object of its being pulled down; that accordingly the above-mentioned clause did include certain ornamental statues and coats of arms of stucco, on the front of the building, these being proper fittings of a theatre, together with certain flies, and the timber and fittings of the upper gallery. But that it did not include the outside doors and windows, and certain iron rods and pillars, which tended to support the roof, though only the wooden supports of the roof had been specially excepted.

Where the finding of expenses depended upon a clause in the Sheriff's judgment which was *ultra petita*—in recalling that part of his interlocutor, *held* that the finding of expenses must also be recalled.

This was a double appeal, from the Sheriff-court of Glasgow, in two cases between the same parties, William Glover, late proprietor of the Theatre-Royal, Glasgow, and The City of Glasgow Union Railway Company.

It appeared that the Railway Company had purchased the site of the theatre from Mr Glover and his partner in the year 1866, for the purposes of their railway; that it was not immediately required for the execution of their works, and that the parties to the sale had entered into a minute of agreement, whereof the following are the two most important clauses relating to the present actions;—"*Fourth*, The first party shall allow the second party to take down, remove, and retain, as their own property, on and after the twenty-eighth of May Eighteen hundred and sixty-seven, the whole materials and fittings of the Theatre-Royal, except the stonework, the outside walls, the roof, and such woodwork as is necessary for the stability of the roof. *Fifth*, The second party shall be bound to have the whole of said materials and fittings taken down and removed, and the site cleared for occupation by the first party, not later than first August Eighteen hundred and sixty-seven."

The time for removing the said materials and fittings was subsequently extended to 1st August 1869.

In September 1869 Glover presented the following petition to the Sheriff, showing:—

"That the ground and buildings of the Theatre-Royal, Dunlop Street, Glasgow, were some time ago sold by the petitioner and the late Charles James Houghton, residing in Glasgow, to the respondents, the City of Glasgow Union Railway Company, under the stipulation and condition, that the respondents should allow the sellers to retain as their own property, on and after the 28th May 1867, the whole materials and fittings of the Theatre-Royal, except the stonework, the outside walls, the roof, and such woodwork as was necessary for the stability of the roof.

"That the petitioner has acquired sole right to the materials so reserved to the sellers.

"That the following articles belonging to the petitioner, viz., the five statues and the coat of arms erected and standing upon the front of the theatre building, facing Dunlop Street; four flies within the theatre; and the whole timber and fittings of the upper gallery, are threatened by the respondents to be sold by them at a public sale advertised to take place this day at twelve o'clock; and the respondents only issued their catalogue of the sale yesterday, the 14th of September 1869, when the petitioner first became aware that his property was to be sold as proposed, most unwarrantably and illegally."

And the prayer of the petition was that it might therefore please his Lordship to "interdict, prohibit, and discharge the respondents and all others from selling, or in any way disposing of the articles before specified as belonging to the petitioner, or any part thereof, and to grant *ad interim* interdict as craved."

In this petition for interdict the final interlocutor of the Sheriff (GLASSFORD BELL) was as follows:—"Finds it instructed by the minute of agreement, No. 5/1, and the admitted copy disposition, No. 15 of the other process, that what the defenders agreed to purchase from the pursuer, and what they hold under the said disposition, is 'the stonework, the outside walls, the roof, and such wood-work as is necessary for the stability of the roof' of the Theatre-Royal, Dunlop Street, whilst the pursuer retained as his own property 'the whole materials and fittings' of said theatre: Finds that the pursuer became bound by said minute of agreement—and the obligation is repeated in said disposition—to have the whole of the 'materials and fittings' taken down and removed by 1st August 1867, which period was afterwards extended to 1st August 1869, and the defenders contend that, as the articles here in question were not taken down by said date, the property in them passed to them; but finds that the undertaking to remove by a specific date is not coupled with any such penalty or forfeiture in case of failure, and only gave the defenders a right to have the materials and fittings removed thereafter at the pursuer's expense . . . Finds that the defenders admitted at the debate, though they deny in their minute of defence, that the 'four flies' referred to in the petition were among the materials and fittings retained by the pursuer as his own: Finds that on a just construction of said minute of agreement, the five statues, three of which are stone and two stucco, and the coat of arms, as also the whole timber and fittings of the upper gallery which were not necessary for the stability of the roof, also belong to the pursuer: Therefore repels the defences, and continues and makes perpetual the interim interdict formerly granted: Finds the defenders liable in expenses, allows an account thereof to be given in,

and remits the same to the Auditor of Court to tax and report, and decerns."

Pending the decision of the case, the petitioner Glover presented a second petition to the Sheriff, setting forth that he, as now in right "of the sole interest originally belonging to him and the said Charles George Houghton, now deceased, in the materials and fittings of the Theatre-Royal, reserved to them as aforesaid, is now about to take down and remove the said materials and fittings, with the exception of 'the stonework, the outside walls, the roof, and such woodwork as is necessary for the stability of the roof.' The respondents, or others for whom they are responsible, having advertised for sale part of the said materials and fittings belonging to the petitioner, he applied for and obtained interdict from this Court against such sale, and warrant was at same time granted for taking down and removing to a place of safety, *pendente lite*, the following articles claimed by the petitioner, and which had been advertised for sale as aforesaid, viz., 'The fives statues and the coat of arms erected and standing upon the front of the theatre facing Dunlop Street, four flies within the theatre, and the whole timber and fittings of the upper gallery.' But, besides these, there are many articles belonging to the petitioner under the foresaid agreement which the petitioner proposes to take down and remove, but which the defenders threaten to oppose by force his interfering with." The prayer of the petition was:—

"May it therefore please your Lordship to find that the proprietors of the theatre, Messrs Glover and Houghton, being entitled, under the foresaid agreement, to the whole materials and fittings of the theatre, except the stonework, the outside walls, the roof, and such woodwork as is necessary for the stability of the roof, the petitioner, now in the sole right thereof, is entitled to take down and remove the same so far as not already authorised to be taken down by order of the Court in the process of interdict before referred to; and to grant warrant to, and authorise him to remove the same at sight of some competent tradesman, if it shall appear to the Court necessary to appoint such inspector, and to interdict, prohibit, and discharge the respondents, their servants, contractors, and all others, from obstructing said removal; lastly, to find the respondents liable in expenses."

In this case the Sheriff (GLASSFORD BELL) pronounced the following final interlocutor:—

"*Glasgow, 9th June* 1870.—Having heard parties' procurators on the pursuer's appeal, and made avisandum with the proof, productions, and whole process, recals the interlocutor appealed against: Finds that, by interlocutor pronounced of this date by the sheriff in the interdict process between the parties to the present action, it has been held, for the reasons therein stated, that the articles enumerated in the petition for interdict are the property of the pursuer, and interdict has been granted against the defenders interfering with them: Finds that, in virtue of a judicial warrant granted in said process, the said articles, consisting of five statues, a coat of arms, four flies, and the timber and fittings of the upper gallery, were removed to the premises of John Lamb, builder or joiner, West Graham Street, there to remain subject to the future orders of Court: Finds that no other articles are specifically condescended on in this action as claimed by the pursuer, and that he has failed to prove that the defenders are unlawfully detaining any other articles which now belong to him: Finds, however, that the foresaid articles in Mr Lamb's premises are the pursuer's, and authorises the said John Lamb to deliver them up to the pursuer, on being paid whatever store rent may be due thereon, reserving to the pursuer his claim against the defenders for repayment of said store rent in so far as the same is advanced by him: *Quoad ultra*, sustains the defences and dismisses the action: Finds no expenses due to or by either party, in respect that, although the pursuer has been partially successful, he has been also to a considerable extent unsuccessful, and there has been an unnecessary *cumulatio actionum* by him, seeing that the insertion of a conclusion for delivery in the original action of interdict would have obviated any occasion for this action, and decerns."

The respondents, the Railway Company, appealed in both cases to the First Division of the Court of Session.

The cases were dealt with there chiefly as a question of expenses.

WATSON and MILROY for the appellants.

MILLAR, Q.C., and SCOTT for the respondents.

At advising—

LORD PRESIDENT—I have no doubt that the ground upon which this theatre stood, was taken by the railway for the purpose of removing the building, and erecting upon the site a station or other proper railway works. But at the same time this is not in the least inconsistent with the idea of intermediate and temporary use. This was what the Company were arranging for in the agreement with the proprietors of the theatre. They buy the site, and arrange for the removal of some articles, and the retaining of others. The 4th article of the agreement says, "The first party shall allow the second party to take down, remove, and retain, as their own property, on and after the twenty-eighth of May Eighteen hundred and sixty-seven, the whole materials and fittings of the Theatre-Royal, except the stone-work, the outside walls, the roof, and such wood-work as is necessary for the stability of the roof." The plain meaning of that is, that the sellers were to be allowed to remove all but the walls and the roof. The question is whether they were attempting to take more? Now, as to the subject of the first action, it appears to me that the four statues on the front of the building, &c., were not necessary to be left in order to give the Railway Company what they contracted for, namely, an empty shell of a building, and that the proprietor was justified in seeking to recover them, and more particularly as they are in their very nature proper fittings of a theatre. As to the timber fittings, also subjects of the said first action, I think it is perfectly clear that they were not necessary for the support of the roof; and therefore, *in this first action*, I hold the petitioner, the respondent in this court, to have been out and out right. But when we come to the second action it is quite a different question. Its object was to get possession of and remove certain other things, not contained in the first. Now what are these things? They seem to consist of iron columns, beams and rods, outside doors and windows, as well as a quantity of brickwork and wood remaining inside—this I take from the proof led for the petitioner—which was perhaps more than he was entitled to, as his averments on record did not state any specific articles at all. However, we have his proof by two witnesses, and it seems to me that they both

disprove his case. The first is perhaps doubtful, but the second is distinctly and directly against him. Everything apparently claimed here, except the windows and doors, is necessary for the stability of the roof. But, says the petitioner, even though what is claimed here is necessary for the support of the roof, yet wooden supports only are mentioned as reserved in the agreement; and I am entitled to take away iron work even if I endanger the stability of the roof. That, I think would be a most unjust and inequitable construction of the clause in the agreement regulating this question. Then, as to the doors and windows, so far as they are outside doors and windows, and these, I believe, are all that are left to claim, I am of opinion that the petitioner is wrong here too. They are parts of the outside walls, and the building would not be complete as a shell without them. The petitioner was therefore as much out and out wrong in this second action as he was right in the previous one. I do not, therefore, quite agree with the Sheriff, when, after finding "that no other articles are specifically condescended on in this action as claimed by the pursuer, and that he has failed to prove that the defenders are unlawfully detaining any other articles which now belong to him," —in which finding he is right; he yet proceeds to find, "however, that the foresaid articles in Mr Lamb's premises are the pursuer's, and authorises the said John Lamb to deliver them up to the pursuer on being paid whatever store rent may be due thereon, reserving to the pursuer his claim against the defenders for repayment of said store rent in as far as the same is advanced by him: *Quoad ultra*, sustains the defences and dismisses the action: Finds no expenses due to or by either party, in respect that, although the pursuer has been partially successful, he has been also to a considerable extent unsuccessful, and there has been an unnecessary *cumulatio actionum* by him, seeing that the insertion of a conclusion for delivery in the original action of interdict would have obviated any occasion for this action, and decerns." That last finding and warrant are *ultra petita*, and fall therefore to be recalled, and the defences should simply be sustained without any *quoad ultra*. There follows, of necessity, also an alteration in the finding of expenses; as the partial success upon which the Sheriff founds in giving no expenses to either party depends upon a mistake upon his part.

I am of opinion, therefore, that the parties are entitled to their expenses in the actions in which they have been respectively successful; the petitioner in the first, the defender in the second.

Lord Deas—If we were to go directly by the proof, it would be very difficult to extricate the rights of either party. We must take the question according to the plain intention of parties. They looked upon the building as one to be taken down. We must construe the agreement as one of that kind, and not affecting a house to be inhabited. In the first action I agree with your Lordship that the petitioner was entirely in the right. In the question of the second action, however, I am not so clear. It was brought for the delivery of certain articles, different from those which were the subject of the first action. If the Sheriff has made a mistake in the warrant of delivery which he granted, I confess it is a mistake which I would have made too. As to the outside windows and doors, I think the question is a very narrow one, and depends entirely upon the construction which is put upon the agreement. If it was the intention to keep up the house, I would answer it in one way, if it was not, in another. Then again, as to the iron pillars, I do not see it at all clearly brought out in the proof that they were necessary for the stability of the roof. I therefore find it very difficult to decide the question of this second action either one way or another, though on the whole I must agree with your Lordship.

Lords Ardmillan and Kinloch concurred.

Agents for Respondents and Appellants—Murray Beith & Murray, W.S.

Agents for Petitioner and Respondent—

Friday, November 25.

SECOND DIVISION.

COLVIN *v.* DUNBAR.

Lease—Minute of Reference—Penalty—Miscropping.

Circumstances in which *held* that a minute of reference in a lease was valid, though the award was not probative; and that the tenant was not liable in the penalties in the lease for miscropping, in consequence of his not having left a certain field in grass at the renunciation of his lease, in respect that there had been no miscropping,—reserving to the landlord his right to sue for damages for breach of agreement.

This action arose in the following circumstances:—By agreement dated 4th February 1859, the defender, Sir George Dunbar, let to Mrs Colvin and Andrew Colvin the farm of Shorelands for nineteen years. In the agreement there was a stipulation in these terms:—"The tenant must at all times cultivate the lands according to the most approved rules of good husbandry. The proprietor will leave it, however, to the tenant until the last five years of his lease, to choose whatever rotation of cropping he may consider best, provided he does not plough up any of the brae grass, and that he has each year of his lease at least one-sixth of the whole lands in green crop properly manured, two-sixths in properly laid down sown grass, and that he never take more than two white or corn crops in succession out of any portion of the lands. But during the last five years of the lease, the tenant must engage and bind himself to labour the fields on a seven crop shift, and in all respects, as to fields and the crop on each field, precisely as shown on a plan of the farm indicating the rotation at entry; and in particular, he must have three grass fields, two of which, along with the brae grass, shall be left at his removal for pasture to the proprietor or incoming tenant, one of the fields to be so left to be that field in which the houses are situated. And it is expressly stipulated, that should the tenant infringe any of the preceding stipulations as to cropping, he shall be bound to pay an additional rent of £5 sterling per acre for each acre which he may so miscrop, which additional rent shall be payable along with and in addition to his first half-yearly payment which may next become due, and this yearly and termly during the remainder of his lease, and over and above performance of the stipulated rotation, to which the lands must be restored as soon as practicable." The tenants possessed under this lease until having got into difficulties, in 1864, they granted