On the 17th December 1894 Goldsmith had obtained from the Clyde Bonding Company warrants for the whisky in these terms, *mutatis mutandis*: "Warrant for ten hogsheads whisky transferred in our books and held to the order of Walter C. Goldsmith or assigns by endorsement hereon." These warrants he endorsed to the respondent as security for the advance.

No notice was given to the Clyde Bonding Company by the respondent of the endorsement to him. The question is whether in these circumstances his claim is superior to that of the arresting creditors.

It was admitted on behalf of the appellant that, apart from the provisions of the Factors Act 1889, which were extended to Scotland by an Act of the year 1890, the claim of the respondents as arresting creditors must prevail. The question turns then on the construction of certain provisions of the Act of 1889. The section mainly relied on is the third, which is in these terms—"A pledge of the documents of title to goods shall be deemed to be a pledge of the goods."

I think that in the present case there was a pledge of documents of title to goods. They were endorsed and handed to the appellant as security for an advance, and he was clearly entitled to hold them until the advance had been repaid. This appears to me to have constituted a pledge of the documents, and I fail to see how it was any the less a pledge because the agreement of the 18th of December was at the same time executed by Goldsmith. But it is not necessary in the view I take to express an opinion upon the point so much discussed in the judgments in the Court of Session, whether the effect of the enactment is to put the pledgee of the documents of title in the same position as if he had received possession of the goods to which the documents relate. I think the enactment has no application to the present case, inasmuch as the pledge was not a disposition by a mercantile agent, and in my opinion it is to such dispositions only that the section applies. It is true that it is general in its terms, but it is one of a group of sections headed, "Dispositions by Mercantile Agents." The Act is divided into parts, The first, headed "Preliminary," consists of a definition clause. The last part, headed "Supplemental," contains provisions as to the mode of transfer "for the purposes of this Act," and certain savings. The other two parts are headed respectively "Dispositions by Mercantile Agents" and "Dispositions by Buyers and Sellers of Goods." These headings are not, in my opinion, mere marginal notes, but the sections in the group to which they belong must be read in connection with them and interpreted by the light of them. It appears to me that the Legislature has clearly indicated the intention that the provisions of section 3 should not be treated as an enactment relating to all pledges of documents of title, but only to those effected by mercantile agents.

The only other section relied on by the appellant is the 9th. I think this section also is inapplicable to the case before your Lordships. I am not satisfied, as at present advised, that the section applies in any case where no right to the goods or the documents of title remains in the seller who has parted with possession of them. But I do not decide this point. The possession of the documents of title which were pledged was obtained from the warehouse-keeper by the appellant by virtue of his ownership of the goods. They had already been transferred into his name by the warehouse-keeper, and were held for him before the warrants were delivered. I think in these circumstances it cannot properly be said that he obtained possession of them "with the consent of the seller."

For these reasons I think the judgment appealed from should be affirmed and the appeal dismissed with costs.

LORD MACNAGHTEN—I agree.

LORD MORRIS—I am of the same opinion.

Appeal *dismissed* with costs.

Counsel for the Appellants—Pyke, Q.C.—E. Martin—Wooten. Agents—Irvine & Borrowman.

Counsel for the Respondents—Upjohn, Q.C.—R. T. Younger—T. T. Robertson. Agents—F. W. Reynolds, for Morton, Smart, & Macdonald, W.S.

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*Monday, July* 11.

(Before the Lord Chancellor (Halsbury) and Lords Watson, Herschell, and Shand.)

## GLASGOW CORPORATION *v.* GLASGOW TRAMWAY AND OMNIBUS COMPANY, LIMITED.

(*Ante*, March 4th 1897, 34 S.L.R. 460, and 24 R. 628.)

*Lease—Lease of Tramway—Conditions of Lease—Tenant's Right of Relief from Landlord in respect of Owner's Rates and Taxes.*

By lease entered into in 1871, the Corporation of Glasgow let to the Glasgow Tramway and Omnibus Company, Limited, the sole right to use, for the sole purpose of the Glasgow Street Tramways Act 1870, carriages with flange wheels on the whole of the tramways authorised to be formed by that Act, for 23 years from 1st July 1871. The terms of this lease were (amongst others) that the Corporation should make the tramway out of moneys to be raised or borrowed by them, and that the company should pay half yearly to the Corporation the amount actually paid or payable on the money borrowed by them and expended on the tramways and on certain other expenses which were to be regarded as expenditures on capital account. The company undertook the whole cost of maintenance and repair during the

period of their tenure, and agreed to pay 3 per cent. per annum on the gross sum from time to time expended by the Corporation on capital account, which percentages were to form a sinking fund to be applied ultimately by the Corporation towards reduction or extinction of the cost of constructing the tramways.

The lease contained further the following provision:—"And the company shall also pay to the Corporation the expenses of borrowing, management, &c.; and this provision shall be so construed as to keep the Corporation free from all expenses whatever in connection with the said tramway."

*Held* (*rev.* the judgment of the First Division), on a construction of the above clause of indemnity, that the company, and not the Corporation, were liable for the owner's share of the rates and taxes levied on the tramways.

The case is reported *ante ut supra.*

The Corporation of Glasgow appealed.

At delivering judgment—

LORD CHANCELLOR—In this case the whole question turns upon the true construction of the contract between the appellant Corporation and the Glasgow Tramway Company.

The City of Glasgow agreed to construct certain tramways and leased the undertaking to the respondent company. It is clear that but for the stipulation in the agreement the respondent company would have had a right to claim indemnity against the City of Glasgow in respect of owners' assessments, rates, and taxes, whether local or imperial. But the answer to that claim is that the respondent company has undertaken to bear those burdens themselves, and the sole question is, as I have said, the construction of the particular stipulation which has thus been made.

Now, that stipulation is in these terms: "And the company shall pay to the Corporation the expenses of borrowing, managment, etc."; and it proceeds thus: "This provision shall be so construed as to keep the Corporation free from all expenses whatever in connection with the said tramways."

That the rates and taxes levied upon the tramways as such, and the expenses involved in making payments in respect of them, are "expenses" within the strictest meaning of those few words appears to me to be beyond doubt; and the words "free from all expenses whatever in connection with the said tramways" appear to me to be so wide in their application that I should have thought it impossible to qualify or cut them down by their being associated with other words, on the principle of their being *ejusdem generis* with the previous words enumerated.

"Expenses," I presume, is itself a very general word; but the construction which limits that word would be strange indeed which should strike out the word "all" and the word "whatever" from the sentence. Neither does it appear to me very intelligible why where the assessment is upon the tramway itself it is not an "expense in connection with the tramway."

For these reasons I am of opinion that the judgment of the Court of Session was erroneous, and I think it ought to be reversed, and I move your Lordships accordingly.

LORD WATSON—The appellant Corporation having obtained statutory authority to construct tramways upon the streets of the city of Glasgow, entered in May 1871 into an agreement with the respondent company, which was then in course of formation, by which the Corporation undertook, upon the terms and conditions therein specified, to construct certain tramways, and thereafter to grant a lease of the said tramways to the company for the period of twenty-three years. The Corporation proceeded to construct the tramways; and effect was given to the agreement by embodying its stipulations in a contract of lease between the parties, which was duly executed by the Corporation and by the company upon the 16th and 17th days of November in the year 1871. By the lease the Corporation demised to the company "the sole right to use, for the sole purposes of 'The Glasgow Street Tramways Act 1870,' carriages with flange wheels, or other wheels specially adapted to run on a grooved rail, on the whole tramways authorised to be formed by the said Act, and that for the space of 23 years from and after the 1st day of July 1871."

The tenure of the respondent company being for a period exceeding 21 years, the assessor, following the provisions of section 6 of the Valuation Act 1854, entered their names in the current valuation rolls as "proprietors," with the result that the company became primarily liable to pay, and regularly paid, the assessments yearly levied in respect of the tramways, whether for imperial or for local purposes, during the whole term of the lease, which expired in July 1894. Section 6 provides that a tenant whose name has been so entered "shall be entitled to relief from the actual proprietor thereof, and to deduction from the rent payable by him to such actual proprietor, of such proportion of all assessments laid upon the valuation of such lands and heritages made under this Act, and payable by such lessee as proprietor in the sense of this Act as shall correspond to the rent payable by such lessee to such actual proprietor as compared with the amount of such valuation." During the currency of their lease, the company, although they intimated a claim against the Corporation, did not make any deduction from the rents which they paid to the Corporation, in compliance with the conditions of the lease.

This action was brought in January 1896, and the first, and the only, conclusion of the summons to which the present appeal relates, is for payment by the Corporation

to the company of the sum of £14,246, 5s. 0½d. sterling, or of such other sum as may be ascertained to be the amount of owner's assessments, rates, and taxes, whether local or imperial, paid by the company for the period between 1st July 1871 and 1st July 1894 in respect of the tramways leased to them, or the proportion of such payments of which the Corporation were bound to relieve them. In defence to that conclusion the Corporation pleaded (1) that by the conditions of the lease the respondent company were bound to free and relieve them of those assessments; (2) that upon a sound construction of section 6 of the Valuation Act the only right of recovery given to the company as tenants was by deducting the amount of such assessment from the rent payable by them to the Corporation under the lease, a remedy which the company had failed to pursue, and had therefore lost; and (3) that assuming the company to have had, under section 6 of the Act of 1854 the alternative remedy of recovering these assessments by legal process, their claim was, in the circumstances of the case, barred by taciturnity and *mora*. If any of these three pleas in defence be sustained, the claims for relief made by the company must necessarily fail.

After a proof had been led, the Lord Ordinary (Kyllachy), on 2nd December 1896, found that the Corporation were bound to relieve the company of the owners' assessments, rates, and taxes, whether local or imperial, paid by them in respect of the tramways during the period from 1st July 1871 to 1st July 1894. He made various subordinate findings bearing upon the proportion of assessments chargeable to the Corporation; and seeing that further inquiry was necessary upon one point, he directed the cause to be enrolled for further procedure. His interlocutor was, on the 1st March 1897, affirmed *simpliciter* by the First Division of the Court.

The first plea urged in defence by the Corporation depends upon the just construction of a single sentence in the second article of the lease of November 1871. That clause enumerates various payments which are to be made by the lessees to the lessors, and then proceeds thus—"And the company shall also pay to the Corporation the expenses of borrowing, management, &c.; and this provision shall be so construed as to keep the Corporation free from all expenses whatever in connection with the said tramways." The question therefore comes to be, whether the proportion of assessments payable by the Corporation as owners of the tramways under section 6 of the Valuation Act are expenses of the Corporation "in connection with the said tramways," within the meaning of the second article, and are therefore within the respondent company's obligation of indemnity.

In my opinion the conditions of the second article which I have just quoted ought to be construed in connection with the whole stipulations of the lease in so far as these relate to the considerations passing between the Corporation and the company. Viewed in that light, the general scheme of the lease is, that the obligation of constructing the tramways was to rest upon the Corporation, it being in the contemplation of both parties that the Corporation was to raise money for that purpose by borrowing upon its own credit. On the other hand, the company (article 6) undertook the whole cost of maintenance and repair during the period of their tenure; they (article 3) agreed to pay half-yearly 3 per cent. per annum on the gross sum from time to time expended by the Corporation on capital account, which percentages were to form a sinking fund to be applied "ultimately" by the Corporation towards reduction or extinction of the cost of constructing the tramways; by the first part of article 2 the company agreed to pay half-yearly during the term of their lease the whole interest falling due upon the money from time to time borrowed by the Corporation on capital account; by the second part of the same article they agreed to pay interest on the expenses incurred by the Corporation and by the Board of Police in obtaining statutory power of construction in the year 1870, or incident to the execution of the lease, it being declared that the obligation of the company for the payment of such interest was not to be affected by any payment made to the Corporation through the medium of the sinking fund.

The substance of the scheme as embodied in these stipulations appears to me to have been that no pecuniary obligation was to attach to the Corporation beyond that of borrowing funds in order to pay for the construction of the tramways, and that the company during the currency of their right were to relieve the Corporation of all other outlays connected with or incident to the performance of the obligation to construct, or incident to their position as proprietors of that which they had constructed. I have had no difficulty in coming to the conclusion that payment of assessments, whether imperial or local, levied from the owner in respect of a tramway or other erection *in solo* is an expense connected with such tramway or erection. But for the construction of the tramway no such liability would have arisen.

I am for these reasons of opinion that the first plea is well founded, and that the company are suing for a sum of which they were bound by their lease to relieve the Corporation. In that view it is neither expedient nor necessary to express any opinion with regard to the other pleas maintained in defence by the Corporation. I think that, in so far as they relate to the first conclusion of the summons, the interlocutors of 2nd December 1896 and 14th March 1897 ought to be reversed, and the Corporation assoilzied from that conclusion. I also think that the interlocutors of 14th March and 20th March 1897, in so far as they relate to expenses of process, ought to be reversed, and that the appellant Corporation ought to have the expenses incurred by them before the Court of Session, and their costs of this appeal.

LORD HERSCHELL—The only question which has to be determined in this appeal is, whether the appellants are bound to relieve the respondents of the landlords' or owners' assessments, rates, and taxes, whether local or imperial, paid by the respondents in respect of the tramways leased by the appellants to the respondents during the period from 1st July 1871 to the 1st July 1874, to the extent of such proportion of those assessments, rates, and taxes as corresponds to the rent payable by the respondents to the appellants in respect of the tramways, as compared with the amount of the valuation of the tramways under the Valuation Acts.

The question turns, in my opinion, on the construction to be put on a provision in the lease granted to the respondents in November 1871. By this instrument the appellants let to the respondents the sole right to use, for the sole purposes of the Glasgow Street Tramways Act 1870, carriages with flange wheels on the whole of the tramways authorised to be formed by that Act, for twenty-three years from the 1st July 1871. The terms of this lease were (amongst others) that the appellants should make the tramways out of moneys to be raised or borrowed by them, and that the respondents should pay half-yearly to the appellants the amount actually paid or payable on the moneys borrowed by them and expended on the tramways, and on certain other expenses which were to be regarded as expenditure on capital account. It contained further the following provision:—"And the company shall also pay to the Corporation the expenses of borrowing, management, &c., and this provision shall be so construed as to keep the Corporation free from all expenses whatever in connection with the said tramways."

The duration of the lease exceeding twenty-one years, the respondents were, pursuant to the terms of the Valuation of Lands (Scotland) Act 1854, treated as the proprietors of the heritages, and paid the assessments yearly levied in respect of the tramways, whether for imperial or local purposes, down to the termination of their lease in 1894. The 6th section of the Act referred to provides that the lessee under such a lease "shall be entitled to relief from the actual proprietor thereof, and to deduction from the rent payable by him to such actual proprietor of such proportion of all assessments laid upon the valuation of such lands and heritages made under this Act, and payable by such lessee as proprietor in the sense of this Act as shall correspond to the rent payable by such lessee to such actual proprietor as compared with the amount of such valuation."

The respondents during the currency of their lease made no deductions in respect of the assessments for rates and taxes paid by them, but they claimed at the termination of the lease to recover from the appellants a proportion of the sums paid by them, in conformity with the provisions of the section of the Act just quoted.

I am of opinion that their claim cannot be sustained. I base this opinion solely upon the construction of the clause of the lease upon which the appellants mainly rely, read of course in the light afforded by all the provisions of the instrument. Several other points were made by the appellants, and questions of some nicety were discussed at the bar, but I do not find it necessary to express any opinion upon these. In the judgment of the Lord Ordinary and in the Inner House stress is laid upon the point that the agreement to pay "the expenses of borrowing, management, &c.," cannot cover the sums now in question, inasmuch as the Corporation have not "expended" anything, and "the taxes paid by the owner of property in respect of his ownership are not identical or *ejusdem generis* with expenses of borrowing or expenses of management." It is not requisite to consider what the proper conclusion would have been if the agreement had contained only the words "pay the expenses of borrowing, management," &c., for the parties to the lease have not left the matter to be determined on the use of these words alone. They have gone on to indicate how the provision just alluded to is to be construed. The learned Judges have made no allusion to the words, to my mind all important, which require this construction. They have treated them as of no effect. It is, however, competent for the parties to a contract to agree that the language they use shall be so construed as to cover more than would be conveyed by it according to its strict interpretation, or, in other words, to give to it a conventional meaning. If they have done so, the Courts must give effect to their bargain. In the present case the words to which alone allusion is made in the judgment below are followed by the words "and this provision shall be so construed," &c. Why, then, should they not be so construed as to effect the object which the parties to the bargain say they had in view, even if this be not their natural construction? I can see no sound reason for failing to give effect to the expressed intention of the parties. The provision is to be so construed "as to keep the Corporation free from all expenses whatever in connection with the said tramways." Nothing could be wider than "all expenses whatever;" they seem to me necessarily to exclude any limitation of the expenses to those *ejusdem generis* with expenses of "borrowing" or "management." If the sums sought to be recovered have to be paid by the appellants, will they be expenses "in connection with the said tramways?" I cannot doubt it. If the tramways had not been made, none of the assessments which have given rise to this controversy could have been imposed. The Corporation, so long as the site of the tramway was merely part of the road, were not liable to taxation in respect of it. That liability has arisen only because by virtue of the agreement under consideration the tramways were brought into existence by the Corporation. It seems to me therefore clear that if the contention of the respondents were to prevail, the appellants would not have been kept free from all expenses

whatever in connection with the tramways. On the contrary, they would have been compelled to expend a large sum directly in connection with them, and due solely to their existence, and to make this expenditure by means of a payment to the respondents, who were to keep them free from all such expenses.

The conclusion at which I have arrived appears to me in complete harmony with the general scheme of the lease and the other provisions contained in it. I do not think it would be giving its true effect to the contract between the parties to hold that, though the respondents would be bound to pay to the appellants all expenditure they had incurred in connection with the tramways, the respondents could claim to be repaid by the appellants expenditure they had themselves made in connection with the tramways.

LORD SHAND—I am also of the same opinion.

The case raises no matter of general interest, but involves merely a question of construction—a question as to what is the meaning of the particular terms used in the lease between the parties. I agree in thinking that on the grounds stated by your Lordships, taking the provisions of that lease as a whole, and having regard to the special clause as to expenses, the result is that the appellants are not liable for the sums sued for. I think the word "expense" would have been a better term to be used than "expenses," but that the effect of the word "expenses" results in the judgment which your Lordships are now about to pronounce.

*Ordered* that, in so far as they relate to the first conclusion of the summons, the interlocutors of 2nd December 1896 and 14th March 1897 be reversed, and the Corporation assoilzied from that conclusion, and that the interlocutors of the 14th March and 20th March 1897, in so far as they relate to the expenses of process, be reversed, and that the appellant Corporation have the expenses incurred by them before the Court of Session, and their costs of this appeal.

Counsel for the Appellants—Haldane, Q.C. — Cripps, Q.C. Agents — Martin & Leslie, for Simpson & Marwick, W.S.

Counsel for the Respondents—Balfour, Q.C.—W. Campbell. Agents—Grahames, Currey, & Spens, for Webster, Will, & Ritchie, S.S.C.

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*Thursday, July* 28.

(Before Lord Watson (in the Chair) and Lords Shand and Davey.)

## HOPE *v.* HOPE'S TRUSTEES.

(*Ante*, February 19, 1896, 33 S.L.R. 352, and 23 R. 513.)

*Insanity—Succession—Testamentary Capacity—Sufficiency of Averments of Insane Delusion.*

A testator who died at the age of 86, and who during his life carried on a successful business as a Writer to the Signet, and took an active part in municipal affairs, left his estate for certain charitable purposes, and in particular for the promotion of teetotalism and the prevention of the spread of the doctrines of the Church of Rome, objects to which he had largely devoted his time and means during his life.

The pursuer in an action of reduction of the will on the ground of insanity admitted these facts, but averred that "upon both the said topics he (that is, the testator) was subject to insane delusions. He believed that he had a special and imperative duty to further the cause of total abstinence and to oppose the Church of Rome by devoting his pecuniary resources to these objects, in consequence of commands which he conceived he had received from the Deity by direct communication upon various occasions; these insane delusions dominated his mind and overmastered his judgment to such an extent as to render him incapable of making a reasonable and proper settlement of his means and estate, or of taking a rational view of the matters to be considered in making a will."

*Held* (*rev.* the judgment of the First Division—*diss.* Lord Davey) that these averments were relevant, and that the pursuer was entitled to a proof.

*Process—Summons—Pleading—Relevancy.*

*Observed* (by Lord Watson and Lord Shand) that where there is an alternative averment of fact, relevancy must depend on the weaker alternative.

*Observed*, further, that in Scotch cases of relevancy the technical rules of construction which were sometimes applied by the law courts in England in cases on demurrer are not to be followed, but the primary and ordinary meaning is to be given to the words.

The case is reported *ante ut supra.*

The pursuers appealed to the House of Lords.

At delivering judgment—

LORD WATSON—Whether the averments made by the pursuers in support of their action would, if proved or admitted, be sufficient to entitle them to decree is the only question raised in this appeal.

The action is brought by the heir-at-law and next of kin of a gentleman deceased,