LORD CAIRNS.—My Lords, I entirely concur in the course which has been proposed. It may not be absolutely necessary, but it may perhaps save some future litigation, if your Lordships thought right to add to the dismissal of the appeal the costs, without prejudice to the question as to the right to the interest or annual proceeds of the legitim funds reserved by any of the interlocutors appealed from.

LORD WESTBURY.—That, my Lords, will be a very wholesome addition, and may perhaps prevent your Lordships' order being made a peg on which to hang further litigation.

Interlocutors affirmed, and appeal dismissed with costs, without prejudice to the question as to the right to the interest or annual proceeds of legitim funds reserved by any of the interlocutors appealed from.

Appellant's Agents, Gibson and Ferguson, W.S.; Loch and Maclaurin, Westminster.—*Respondents' Agents*, W. Officer, S.S.C.; Holmes, Anton, Greig, and White, Westminster.

JUNE 16, 1870.

WILLIAM TAYLOR KEITH, *Appellant*, *v.* MARGARET REID, *Respondent.*

Lease—Premises to be used as Shop—Sale of Goods by Auction—Inversion of Possession—*Where premises are let for a shop without any specific stipulation on the subject:*

HELD (reversing judgment), *That there is no implied condition, that no sale of goods by auction shall take place in such shop; and it lies on the landlord to make an express stipulation to that effect, if he wishes to prohibit sales by auction during the lease.*[1]

This was an appeal from a decision of the Second Division of the Court of Session. Miss Reid, the proprietor of a shop in Union Street, Aberdeen, in 1862, presented a petition to the Sheriff to interdict and prohibit Mr. Keith, the occupier of the shop, from selling goods on the premises by public auction. In her condescendence she set forth, that the shop had been let to Mr. William Fraser as a grocery and wine business, for two years from Whitsunday 1861, and that it was a condition between the parties, that assignees and subtenants should be excluded, unless such as should be approved of by the landlord. Mr. Fraser, after occupying the premises some time, removed to another shop, and the appellant Keith applied to take the respondent's shop for a china and glass shop, but expressly stating, as was alleged, that he did not intend to hold any auction there. Ultimately the appellant arranged with Mr. Fraser to take the lease off his hands, and agreed with the respondent to get a new lease prepared, and meanwhile he obtained possession. When he entered, he at once began to use the shop for sales by auction, and Miss Reid objected to execute the lease. The appellant, in answer, stated, that all through the negotiations the landlord well knew the purpose for which he intended to use the premises, and that her agent consented to this use. The Sheriff allowed a proof, and dismissed the petition. On appeal, the Lord Ordinary (Jerviswoode) held, that Miss Reid had failed to prove, that any condition against sales by auction was annexed to the letting, and that there was nothing to prevent the tenant holding such sales, and that they did not amount to an inversion of the possession. The Second Division unanimously reversed this interlocutor, and held, that no such use of the shop had been consented to by the landlord, and that she was entitled to have the interdict. The present appeal was then brought.

Sir R. Palmer Q.C., and *J. T. Anderson*, for the appellant.—The appellant, on succeeding to the lease of Fraser, took the premises on the terms on which Fraser held. In Fraser's lease there was no express prohibition of sales by auction, nor any restriction to a particular trade. And the appellant was not an auctioneer in the common sense of the term, but merely sold off his old stock by auction. Whether he entered into a special stipulation not to sell off his stock by auction, as he did, was a question of fact, and the Sheriff and Lord Ordinary found, that the appellant had not entered into any such stipulation, and that the respondent knew, that he intended to do what he did. There is no presumption of law on the subject one way or the other —1 Hunter, L. & T. 235. In the law of England the *onus* of making a specific covenant to prevent such a sale would clearly be on the landlord, and unless there was a covenant to the con-

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[1] See previous report 6 Macph. 768; 40 Sc. Jur. 393. S. C. L. R. 2 Sc. Ap. 39; 8 Macph. H. L. 110: 42 Sc. Jur. 425.

trary, the tenant could hold a sale by auction of his furniture or of his old stock on the premises. The interlocutor ought therefore to be reversed.

The *Lord Advocate* (Young), and *Pearson* Q.C., for the respondent.—It is not contended, that the appellant carried on the business of an auctioneer, or that there was any implied prohibition against carrying on an occasional sale by auction of his old stock such as took place; but the evidence established, that such a condition was expressly attached by the landlord to the assignation of the lease. If so, then the interlocutor of the Inner House was right.

LORD CHANCELLOR HATHERLEY.—My Lords, that your Lordships' time should have been occupied, to the great detriment of other suitors whose cases are now pending before the House, with such a case as the present, is perhaps one of the least grievances of this sadly grievous case. This litigation has been going on now for about seven years and a half, and the result of it, as brought before this House, is clearly this, that no human being can be benefited by it—I mean among the litigants now.

The case originated thus: A lady, a Miss Reid, the owner of a house in Aberdeen, let it to a Mr. Fraser. The house had been occupied immediately before by a watchmaker. Mr. Fraser himself was a grocer, and some time before that, there had been a bookseller, and at one time it appeared, that some exhibition had taken place there. In short, it had been used for a great variety of purposes. The lease would terminate in June 1863, and there was no provision whatever contained in the lease restrictive of the rights of the lessee, beyond a restriction upon his assignment without permission of his landlord, the lessor.

What might be the construction according to the law of Scotland in a case where a total change was about to be made in the character of the property, I do not think it is necessary, that we should inquire, because nothing of the kind has really taken place here in fact.

The only thing that occurred here was this: Mr. Keith, the appellant, understanding, that this lease had come nearly to an end, finding in fact, that the tenant had already vacated the premises in October 1862, (that being about seven or eight months before the termination of the lease itself,) was minded to obtain a lease of the property for five years, to commence on the termination of Mr. Fraser's lease. The appellant had been a bookseller, and was at that time about to become a dealer in china. He negotiated, therefore, with Mr. Edmond, the law agent of the respondent, for a lease for five years, to commence at the termination of Fraser's lease, and he submitted to certain terms, contained in the lease, which imposed on him the obligation of carrying on the china trade, and not allowing any sale by auction to take place on the premises —an obligation not found in Fraser's lease, which contained (as I said before) no stipulation except one with regard to assignment.

In this treaty with Edmond, it being the fact that Fraser had actually ceased to occupy the premises, it was natural enough, that Keith should also intimate his desire of having, if he were permitted to do so by Edmond on behalf of the lessor, the benefit of at once entering into possession of the property in order to make all his arrangements for carrying on his new business. For that purpose it was important that he should have early possession of the property. Whereupon it seems quite clear to my mind, that what took place was this—I give this merely as a summary of the evidence—I am not going into any detailed examination of it, but the impression which the evidence adduced on the part of Edmond and Keith has produced on my mind, is simply this: Keith went to Edmond to negotiate the new lease which was to come into operation when the other had expired: that was his primary object. In the course of that negotiation he said, I should like to enter into immediate possession. Edmond saw no objection to that. It was desirable, of course, for him to make arrangements to get his new stock into the shop. It naturally did not occur to Edmond, that there was anything particular about this arrangement for the fag end of the lease, and he said, I leave you to settle it with Mr. Fraser. Of course you must have my consent on the part of the landlord, but you have my consent. You go and settle the matter with Mr. Fraser as best you can. You will of course have to pay him, if he gives you a few months' tenancy.

What was said by Mr. Pearson is perfectly true. Mr. Edmond had no reason to suppose, that in the few months that were about to intervene before the new lease came into operation, there would be any sale by auction upon the premises of the old stock of books which the new tenant was anxious to get rid of. I dare say, if he had thought about it, and had thought that the sale was only intended to be all that really did take place, namely, a sale for a few nights which was not likely to be repeated with regard to the books, they having been disposed of, and which could not be repeated with regard to the stock of china, because the sale by auction was entirely forbidden in the new lease—I say, if he had thought at all about it, he might probably, under these circumstances, have thought it very unimportant, but there appears to be every reason for supposing, that Mr. Edmond thought nothing at all about it. That I think is the result of the evidence.

Now, I do not go into the evidence in detail for two or three reasons. The principal reason is this: What has happened in this unfortunate litigation is, that the Sheriff, upon an application to him for an interdict, declined to grant the interdict upon hearing the witnesses *vivâ voce*

After having both the appellant and the respondent before him, and seeing their demeanour, and being able, therefore, to form a better judgment than we can of the weight which ought to be attributed to the evidence given by them, he came to the conclusion, that the case was not made out which was attempted to be made out in support of the interdict. The case which he thought was required to be made out, was not made out, namely, an express and distinct agreement or condition imposed upon Mr. Keith, before he should be allowed to take the assignment of the lease, or before Mr. Fraser should be allowed to grant the assignment of that lease which he was prohibited from assigning without consent, that he was not to have that assignment of the lease unless he agreed on his part not to have any sale by auction on the premises. It appears to me that the Sheriff was perfectly right in that conclusion.

The Lord Ordinary had further evidence before him, and he came to the same conclusion. He had before him the further evidence of some witnesses examined by commission. That evidence, of course, was of much less value than the evidence given before the Sheriff, because it was given at a later period, when the parties knew better where the difficulties and gaps were which had to be filled up, and when, without imputing anything positively fraudulent to parties who came forward to give evidence in that state of the case, one cannot help feeling on all such occasions, that the same weight cannot be given to evidence produced under those circumstances as you give to it where it is fresh, and where the witness gives you his first clear and distinct recollection of what took place.

This being the finding of the Sheriff, and this being the finding of the Lord Ordinary, no other tribunal has quarrelled with those findings. The Court of Session has found no fault whatever with them.

But the decision of the Court of Session proceeded upon this, that by the terms of the original lease to Fraser, it was not competent to him, or to his sub-lessee, to have a sale by auction upon the premises. That is rested solely upon the point of law, that the property having been let as a property upon which divers businesses had been carried on, that of an auctioneer was not one of the businesses, and that it was a more detrimental business to be carried on, upon the premises, than those businesses for which they appeared to have been let.

Something to that effect appears to have been the view taken by the learned Lords of the Court of Session. But that is a view, I apprehend, wholly incapable of being supported. And the Lord Advocate was certainly only discharging his duty in declining to support that view of the learned Judges in the Court below.

That being so, there is no decision at all adverse to the finding of the Sheriff, or to the finding of the Lord Ordinary.

But it is necessary to add another word to that, simply to say, that the correspondence which took place when these proceedings were threatened, indicates to my mind very clearly, that there was no such express agreement as has now been set up; because if there had been any such agreement, there was an immediate answer to any possible excuse that Keith could have offered for breaking so soon, within a very few days of his having entered into it, a solemn engagement of that kind. It might have been said—This conduct of yours is scandalous: You came to me upon a treaty according to which we distinctly and expressly agreed, that as the lady to whom the property belongs was very averse to a sale by auction, none should take place. You are now about to do that which three or four days ago you distinctly stipulated with me should not be done.

The bringing forward of the petition is another matter which weighs with me much in the same way, because I do not think it altogether immaterial that you do not find in the petition that which the Sheriff's acuteness suggested to his mind should be found in it, namely, a distinct averment that there was any such agreement. You do not find any such averment in the letters, but you find only the statement that there was an "understanding," which is a word which is always extremely ambiguous—it may mean an understanding of one party, the other party taking a very different view. To make it an agreement which can have legal effect given to it, it must be an agreement embodying the intention of the parties in legal words.

But that was the mode in which it was brought forward originally, and when your Lordships see the mode in which it was brought before the Sheriff, and the evidence given before the Sheriff, it appears to me, without making any minute criticism upon it, that the Sheriff's conclusion was perfectly right and just, and that the Lord Ordinary was justified in adhering to it.

I do not agree with one of the Lords in the Court of Session who said, that he was not expressing any definite opinion upon it, but who intimated clearly the inclination of his mind to the contrary view, which inclination of his mind does not seem to have been participated in by the other Judges.

It appears to me, therefore, my Lords, that in this case this lady, whose utmost injury originally would have been to have had for a few days upon her premises an auction which would never be repeated, and for which she might have been amply recouped in damages, if any damages had been incurred in these few days, has now been dragged into these seven and a half years' litigation. We have had produced before us a mass of evidence, none of which has been thought

relevant to be brought before us in argument, except the correspondence and the evidence of the two parties. I can, therefore, only say, that this lady is greatly to be pitied for the course into which she has been dragged, evidently without any consciousness on her part of the extreme folly of these proceedings.

My Lords, we can do nothing else than reverse this decision, which has been come to by the Second Division of the Court of Session. The appellant succeeds in the controversy he has entered upon, and the whole of this foolish and idle controversy, now brought to an end, shews that this lady, if she had been only well advised at first, might have been spared all the expense and mortification from which I fear she must have been suffering during all these years of litigation, being engaged in that which is always a subject of anxiety, an expensive lawsuit, for no earthly purpose or good to her whatsoever. I shall, therefore, propose to your Lordships to reverse the interlocutor complained of.

LORD CHELMSFORD.—My Lords, I cannot help agreeing with my noble and learned friend on the woolsack, in his expression of regret, that such litigation should have occurred upon this subject, and that the parties have been subjected to so much expense upon a matter which really seems hardly worth a contest. The utmost injury that the premises could possibly have received would have been confined to the period between October 1862 and June 1863, and that injury could only have been the bringing the shop into disrepute during that period by having an auction carried on upon the premises. Supposing even that it had been converted into an auction room, (which there appears to have been no intention on the part of Keith to do,) and if there had been daily auctions carried on there, any stain which the premises might have received from those proceedings would have been entirely wiped out by the five years' lease which would follow upon that occupation, under which lease the party was prohibited expressly from having auctions upon the premises.

Now this being the nature of the injury, is it not lamentable, that there should have been all this litigation upon the subject? In the first place, a petition to the Sheriff for an interdict, witnesses examined upon that petition, and the interlocutor of the Sheriff finding that there was no ground for the interdict. Then letters of advocation to the Court of Session; then proceedings before the Lord Ordinary; a great number of witnesses examined under a commission; the interlocutor of the Lord Ordinary to the effect that the Sheriff was perfectly right, and that there was no ground for the interdict; a Reclaiming Note to the Court of Session; argument before the Court of Session; and at last an interlocutor reversing the decisions of the Sheriff and the Lord Ordinary; and then an appeal to your Lordships' House against that interlocutor.

And all this upon a question which was exhausted in the year 1863, because the interdict could have no effect after the month of June 1863. Therefore here we are, after all this expense, to consider whether the Court of Session was right in overruling the decision of the Sheriff and of the Lord Ordinary.

Now it is a curious circumstance, that the respondent before your Lordships has argued the question upon a totally different ground from that, upon which it was decided by the Court of Session. The Court of Session took no notice of the question of fact, except by an incidental observation on the part of Lord Cowan; but they decided entirely upon the law, and they considered, that under the terms of Fraser's lease there was an absolute prohibition against converting these premises to the use which was proposed by the appellant. The Lord Justice Clerk says —"The shop was let to a Mr. Fraser, merchant in Aberdeen, for the purpose of carrying on a wine and grocery busines by private sale." Then he says—"I think, without consent, he could not have turned it into an auction room, such a use of a shop being in my opinion essentially different in character from its use as a place for carrying on a regular business of sales by retail." And Lord Cowan says—"I hold that where a shop is let to a merchant, it is let for the carrying on of a proper sale business, and that the tenant is committing an illegal inversion of the possession, if he uses the shop as an auction room without the landlord's express consent."

My Lords, I do not know what the law of Scotland may be upon this subject, but if this were an English lease I apprehend that it would be the duty of the landlord, if he meant to prohibit any particular trades or businesses being carried on on the premises, to have inserted covenants to that effect, binding the tenant not to carry on those trades. That would be the law undoubtedly in England. Your Lordships, I have no doubt, are perfectly familiar with leases of that description. I remember myself being the lessee of a very considerable house, with respect to which there was a covenant in the lease, that there should be no auction upon the premises—a stipulation which was not for the purpose of preventing its being used as an auction room, but to prevent the outgoing tenant selling his furniture upon the premises when he went out. Therefore, I cannot help a little doubting the law which has been laid down by their Lordships of the Second Division of the Court of Session.

But, however that may be, we will consider the question now as it has been argued before your Lordships on behalf of the respondent.

There is no doubt whatever that Fraser was prohibited by his lease from assigning except with the consent of the landlord, and the landlord might have refused that consent, or he might have

given his consent upon certain conditions. The question raised by one of the learned Judges in the Court of Session is, upon whom the *onus* lay of proving the terms upon which the consent of the landlord was given. Their Lordships seem to be of opinion, that it was incumbent upon the appellant to shew, that the consent had been given unclogged by any conditions. Now I apprehend that is a mistake; because it being proved by Miss Fraser that consent was given to the assignment, I apprehend that the obligation is thrown upon the landlord to shew, that that consent was given upon certain conditions which were imposed.

It is contended on the part of the respondent, that there was an express condition imposed upon the consent to the assignment, that no books should be sold by auction upon the premises. But the Sheriff was of opinion, that there was no such stipulation accompanying the consent, and as my noble and learned friend has observed, the Sheriff had a much better opportunity of judging upon that subject than your Lordships can have; because he had the witnesses before him, and he could judge of the credit which was due to their evidence much better of course than we can by seeing it merely upon the depositions before us.

The Lord Ordinary also was distinctly of opinion, that the advocator, that is, the respondent, "has failed to prove as matter of fact, that it was a condition of the consent given by her on her behalf to the occupation by the respondent" (appellant as he is now) "of the shop, No. 88, Union Street, Aberdeen, of which she was the proprietrix," and that has not been overruled by the Court of Session. The Court of Session decided the question upon a totally different ground.

Now let us see for one moment, whether there is any proof whatever that there was this condition imposed upon the consent to the assignment. The only evidence, it is admitted, upon the subject, is the evidence of Mr. Edmond. In April 1863, which was the first occasion upon which he gave evidence, and which was nearer to the time of the transaction by three years than his subsequent evidence, he says this: "The respondent spoke about so many things he wanted to do that I cannot say whether he spoke of selling goods by auction, as I have no recollection of his having done so. I am sure if he had done so I would have refused it, either by a negation in words, or by a gesture of dissent." Now what would any one accustomed to weigh and consider evidence gather from a statement of this kind? Why most certainly that there was no prohibition imposed as to selling goods by auction, because of course the party imposing the prohibition would have recollected it. This evidence is to me most conclusive upon that subject, that no such prohibition was imposed.

Then three years afterwards Mr. Edmond rather improves, though not very much, upon his recollection. He says, "No. 10 of process contains the conditions which were agreed to between me and the respondent in regard to the mode in which the subjects were to be occupied by the respondent from October to Whitsunday, as well as for the term to which the lease bears to apply." No. 10 of process is the lease to Mr. Keith. But, upon his cross examination, being asked, "At your communing with the respondent about his taking the premises, did you specially inform the respondent, that the conditions of the lease with him from Whitsunday 1863 as to sales by auction were to be binding upon him during the months which were yet to run of Fraser's lease?" he depones, "There was no reference to the lease which was to be entered into for the conditions which were to regulate the possession up to Whitsunday. The conditions were fixed for the whole period from October 1862." And then in his subsequent evidence he says, "I am unable to say, that I ever specially directed the respondent's attention to that fact," (as to the conditions applying to the balance of the lease,) "but I am quite sure that the terms of the written lease arose out of the bargain which began with the respondent's entering on Fraser's lease, and which was to continue for five years after the following Whitsunday."

Now what is the secret of this evidence? It is quite clear, that it is that which has been suggested by my noble and learned friend. There had been advertisements issued of a sale by auction of the books on the premises No. 16. Nobody ever contemplated the probability even of there being a sale upon the premises No. 88. And, therefore, as it did not enter into the contemplation of the parties, no stipulation was likely to be made with regard to the prohibition of a sale by auction upon the latter premises. And upon the evidence it is, I think, perfectly clear, that no such prohibition was given.

Under these circumstances I entirely agree with the view taken by my noble and learned friend on the woolsack, that this decision of the Court of Session must be reversed, and that the appeal must be sustained.

LORD WESTBURY.—My Lords, we have now to deal with this matter in the state in which it now is; and this case appears to me to be so instructive to the people of Scotland, as to the lamentable consequences of their having such a state of procedure in their law courts, and the abuses made of that procedure, that it may be desirable to examine the case even still further for the purpose of deriving from it some conclusions as to what ought to be done to prevent these consequences.

The strict question before the House is simply this, whether, as regards the lease of a shop, a back shop and cellar granted to Mr. Fraser by the present advocator, the respondent, it is a conclusion of law, that the word "shop" should mean a shop for the private sale of goods only, and

that having that legal meaning a sale of goods by auction shall be necessarily excluded. I am clearly of opinion, that there is nothing at all, either in the law of Scotland, or in the decisions, or in the good sense and reason of the thing, to warrant such an interpretation. The law of Scotland may well be, that if there be a lease of a dwelling house, as a dwelling house, it shall not be perverted to a perfectly different purpose. It may not be turned into a beer house—it may not be turned into a manufactory—it may not be converted into an open shop. That may well be allowed to be the law ; but to hold, that under the lease of a shop, a back shop and a cellar, there is necessarily inherent in the subject a prohibition against the use of it for the sale of goods occasionally by public auction, is a proposition which cannot I think find acceptance with any reasonable person. But that is the only proposition on which this interlocutor rests.

That the interlocutor, therefore, must be reversed, I cannot have one particle of doubt ; but the reversal of this interlocutor will not at all alter or affect any part of the settled law of Scotland confining the user of a thing to that state, in which the thing was at the time when the lease was made.

We cannot, however, let the matter rest there, because this interlocutor was pronounced upon a Reclaiming Note of the present respondent, and that Reclaiming Note was brought from an interlocutor of the Lord Ordinary disposing of another question, a question of fact, namely, whether assent to the transfer by Fraser to the appellant had been given by the respondent on the express terms that the premises during the residue of Fraser's term should not be used for the purpose of selling goods by public auction. Upon that question of fact, the Lord Ordinary came to a decided opinion, that the proof did not warrant any such conclusion, and he embodied these findings in his interlocutor.

Upon that there was no deliverance by the Inner House, for the reason already stated, that the learned Judges conceived, that there was a proposition of law which superseded and rendered unnecessary the inquiry into that question of fact. They rested their decision, therefore, upon the legal conclusion, and not upon the question of fact. But we must dispose of that, because we shall, I trust, come to the conclusion not only, that the interlocutor of the Inner House must be reversed, but that the prayer of the Reclaiming Petition is to be refused with expenses. And that throws upon us the obligation of dealing with the question of fact as decided by the Lord Ordinary's interlocutor.

Now upon that I have nothing whatever to add to the conclusive observations which have been made by my noble and learned friend on the woolsack, and by my noble and learned friend LORD CHELMSFORD. I have not a particle of doubt that there was no agreement whatever made between the appellant and the respondent, touching the user of the premises during what is called the balance of Fraser's term, and that the evidence of Mr. Edmond, although I have no doubt he gave it with perfect sincerity of belief, and perfect honesty of purpose, was in truth nothing but an impression upon his own mind, that the agreement which he made with respect to the future lease was intended to cover also the residue of the term that was contained in the demise to Fraser. I am certainly of opinion, that that was altogether overlooked, and was not made the subject of any kind of stipulation ; and that, therefore, the argument upon the point of fact, on which the case of the respondent has been rested, and rested with great ability and candour by the Lord Advocate, namely, the proposition, that there was such a conditional consent, is a proposition totally unconfirmed by the evidence, nay, I will say, disproved by the evidence, and by the *evidentia rerum* also, and that, therefore, there is no foundation for the complaint that was made by the present respondent in her original petition to the Sheriff.

Now, my Lords, that brings us to the petition. If you examine it, it is impossible to find any statement more loose, more inconsistent with itself, or more vague than that petition is. The first suggestion, therefore, which occurs to one's mind is, that those things ought not to be permitted to remain under rules which admit of that vagueness. Then the vagueness of the petition is attempted to be supplemented by a condescendence which is open to the same observation. But what occurred with regard to that second form of pleading? There is a revised statement of facts, and then they address themselves to the conclusions of law, and there are no less than five sets of vague half reasoning conclusions of law brought forward under the head of "Reasons of Law." And all this elaborate vagueness is applied to a question of fact, in itself of the most immaterial and trifling character, ending, however, with a judgment of the Sheriff, which might well have been conclusive, but admitting of an appeal, which appeal is heard before the Lord Ordinary. From his decision there is another appeal to the Inner House, and from the decision of the Inner House there is another appeal here.

So that these unfortunate litigants are placed at the mercy of their legal advisers, and the legal advisers have power, under this wretched system, to drag their clients through these several stages that I have described, to consume six or seven years in this course of litigation, and to involve their clients in an expense that has already apparently proved the ruin of one, and for aught I know may prove the ruin of the other. It is lamentable, that there should be a state of procedure in a country which admits of these things being done. All, however, that we can do in this case, besides expressing our regret, is to reverse the interlocutor complained of, and to

adjudge, that the Reclaiming Note of the respondent from the Lord Ordinary be refused with expenses.

LORD COLONSAY.—My Lords, I regret as much as any of your Lordships the course which this case has run. It appears, that as early as in November 1862 an application was made to the Sheriff for an interdict, and it appears, that in March 1863 the appellant in this case became bankrupt; and I gather from the correspondence and the statements on the Record, and from the absence of statements to the contrary, that the occupation of the premises under a minute of lease which was to commence at Whitsunday 1863, has not taken place. Now, in that state of matters, the appellant having been sequestrated, a delay took place in the proceedings. His trustee declined to resume them, but security was found for carrying on the litigation, and a judgment was pronounced by the Sheriff substitute, and confirmed by the Sheriff, to the effect, that the application for an interdict was not well founded. I am at a loss to see what great or adequate interest the respondent in this appeal had in removing the case from the Sheriff Court to the Court of Session. The judgment of the Sheriff Court was against her upon the question of interdict, and her tenant or intended tenant had become bankrupt.

Then the case having come to the Court of Session, many years were spent there. But there, again, I think the delay which occurred was occasioned very much by the proceedings adopted against this tenant. He was again sequestrated; and then, when proof was considered necessary, that proof was taken, not before a Judge or before a jury, but by a commission, which is always a tedious course of proceeding. I am glad to think, that the course of procedure in the Court has been materially altered and improved by an Act of Parliament which was passed subsequent to these proceedings; and I am in hopes, that before long, under the guidance probably of my noble and learned friends, we shall have still further improvements in the procedure both in the Court of Session and especially in the Sheriff Courts.

Now, as to the merits of the case itself, I am of opinion, that although it was rather clumsily put, the question of fact which has been argued to-day was raised upon the Record before the Sheriff, and I think, that is made very evident by the very alteration which the Sheriff suggested in the petition, because he required the petitioner to make a positive averment in reference to the matter of the condition. Then I think, when it came into the Court of Session, that same contention in point of fact was maintained, and that appears on the pleas in law which are stated in the Court of Session. So that I think the question of fact was raised.

Then there was also raised the question of law mixed with the question of fact, or partly intended to supersede it. I do not see how it could well supersede it, because if there was any express condition in point of fact there would be no room for an inquiry into the legal result of it, but the Lord Ordinary after proof led, (which had been at one time I think apparently intended to be taken before a jury, because an issue was adjusted in order to that,) found, as the Sheriff had found, that the condition was not established. Then the case went to the Inner House, and there their Lordships were of opinion, that in point of law the party had no right to use the premises in this way. From the line of reasoning which the learned Judges took, and from the grounds on which they placed their decision, I am inclined to think, that the majority of them were of opinion, that the condition alleged by the original petitioner had not been established as a fact, for if established as a fact I do not see, how they could have placed their judgment on the simple ground of legal inference.

First, then, as to the ground on which the judgment of the Inner House is based: it is no doubt a principle of the law of Scotland, that a house or tenement for a particular purpose, or as to which it may fairly be inferred to have been the intention of both parties, that it should be applied to a special use, such as in the case which my noble and learned friend put, of a dwelling house or an inn, is not to be converted to a totally different use. But there are shades or degrees of change, and the question may arise, whether any particular change which has been made is such a change as to amount to an inversion of the purpose for which the property was let, looking at the whole of the circumstances of the case, and looking at the *bona fides* of the transaction.

Now it does appear to me, that the principle which restrains a tenant was pressed too severely in this case. Mr. Keith had come into possession of a very short remainder of a lease which belonged to another person. He desires to get rid of his old stock of books and to possess himself of his new stock of china, and it is said, that the act he committed was of that sort, that it violated the understanding on which he entered. Now, looking at the short period which this lease had to run, and the condition in which this party was placed in removing from one shop to another, and having a stock of that kind to dispose of, I think it is pressing the matter too far to say, that having to get rid of the balance of his stock in that short period to make room for his stock of china he was not to be entitled to sell by auction.

Then, as to the fact whether there was such a condition, I think there has been some misapprehension in the mind of Mr. Edmond upon this matter. He seems to have dealt with this tenant entirely on the footing, that he was going to be a china merchant, and to have had nothing else in his mind. And he seems to have thought, that having in the new lease for five years prohibited sales by auction, he had done everything necessary to prevent any sale by auction on

the premises, not having in his mind any expectation, that there would be a sale by auction during the short period which the old tenancy had yet to run. He was under a misapprehension; he applied that condition which was present to his own mind, as if it had been also present to the mind of the tenant, that there should be no sale by auction. But a condition of that kind, under the circumstances, must be recognized as such by both parties; and if the party who wishes to make that condition has not made it plain enough to the other party, then I do not think the condition is established. It is in fact the consent of both parties that is required. It would have been very easy to make it clear. And Mr. Edmond being a *solicitor*, and an *Aberdeen solicitor*, I am surprised he did not make it very clear on the face of the writing, that auctions should not take place on the premises. But he has not done so; and I think he has therefore erred in that respect. On the whole I entirely concur in the conclusion of my noble and learned friends.

Interlocutors complained of reversed, and the Reclaiming Note of the respondent against the interlocutor of the Lord Ordinary refused with expenses.

Appellant's Agents, W. Officer, S.S.C.; J. Dodds, Westminster.—*Respondent's Agents*, Hill, Reid, and Drummond, W.S.; W. Robertson, Westminster.

JUNE 30, 1870.

THE CITY OF GLASGOW UNION RAILWAY COMPANY, *Appellants*, *v.* ROBERT HUNTER, *Respondent*.

Lands Clauses Consolidation Act—Injuriously Affecting Property—Noise and Smoke—Execution of Works—*A railway company took for their railway the back part of a plot of ground consisting of outhouses, but did not take the front part on which a dwelling house was built, and there was no necessary connexion between the front and back part of the property except the contiguity, and the fact of the whole belonging to one person.*

HELD (reversing judgment), *That according to* Brand's case, *L. R.* 4 *H. L. C.* 171, *the owner cannot claim compensation for injury from noise or smoke, whether part of his land be taken or not.*

Lands Clauses Act—Damage to Lands—Feu Duty—Compulsory Sale—*In assessing the price to be paid for taking land belonging to H., subject to feu duty payable to A., the jury added to the price ten per cent. for compulsory purchase, and this ten per cent. was calculated on the whole value of land, inclusive of feu duty.*

HELD (affirming judgment), *The verdict of the jury could not be disturbed.*[1]

This was an appeal from a judgment of the First Division of the Court of Session. The action was raised by the City of Glasgow Railway Company to reduce and set aside a verdict of the jury assessing the sum payable to Mr. Robert Hunter, spirit merchant, the proprietor of houses and shops in Eglinton Street, Glasgow. The railway company required to take part of Hunter's property, consisting of back ground, together with some temporary erections thereon standing, behind his houses and shops in Eglinton Street. The railway did not come nearer than twenty eight yards to the back of Eglinton Street, and did not go towards the front of the street. Mr. Hunter claimed a sum for damage done to the value of the houses in Eglinton Street, owing to the noise and other inconveniences of having the railway so close to the houses. A claim having been made before a Sheriff, the jury assessed the damages as follows:—

"For the property to be taken,	£1205	4	0
For old materials thereon,	65	0	0
	£1270	4	0
For the compulsory purchase thereof at ten per cent.,	127	0	0
	£1397	4	0
Less value of the feu duty at twenty years' purchase,	639	0	0
	£758	4	0
For damage to the pursuer's (the present defender's) remaining property, caused by noise of trains, railway bridge across the street, smoke, and general nuisance, and deterioration of the tenement next the railway,	392	0	0
Total,	£1150	4	0"

[1] See previous report 7 Macph. 408: 41 Sc. Jur. 229. S. C. L. R. 2 Sc. Ap. 160: 8 Macph. H. L. 156: 42 Sc. Jur. 430.