

man himself. That does not prevent his obtaining compensation under the Act, to which he is entitled irrespective of fault, but it is sufficient to meet the point taken against the pursuer, that his claim is excluded by his own fault in causing the accident. I therefore concur with your Lordships.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Respondent and Pursuer—W. Campbell, K.C.—D. Anderson. Agent—James Ayton, S.S.C.

Counsel for the Reclaimer and Defender—Ure, K.C.—M'Clure. Agents—Macpherson & Mackay, S.S.C.

Friday, May 27.

## SECOND DIVISION.

[Lord Kyllachy, Ordinary.]

### M'CORMICK v. DALRYMPLE.

*Sale—Public-House—Sale of Public-House Business by Tenant of Premises—Price Payable on Confirmation of Purchaser's Licence—Termination of Seller's Tenancy after Transfer of Licence Followed by Ejection of Purchaser from Premises before Confirmation.*

By contract entered into by A and B the former agreed to sell and the latter to purchase the goodwill of a public-house business carried on by A in premises of which he was tenant, the price to be consigned in bank and only to be payable when the licence had been granted at the statutory court in the following April in favour of B. At the licensing court in April, as the magistrates resolved to deal only with renewals and not with transfers, the licence was renewed in favour of A, who had early in April been warned by his landlords that his tenancy was to terminate at Whitsunday. On 18th May parties agreed that the purchase price should remain on deposit until the licence, if transferred to B, was confirmed. On 20th May B obtained a transfer of the licence. On 22nd May the premises were exposed for sale by public roup, and B bid £250 over the upset price but failed to acquire the premises; and the purchaser declined to let them for use as a public-house. Thereafter B was ejected from the premises, and the licence accordingly was never confirmed. In an action of multiplepoinding, of which the bank were nominal raisers, A claimed the purchase price, and maintained that B, by failing to purchase the premises or obtain a lease, had prevented the carrying out of the contract. B claimed return of the price in respect of failure of the condition on which the contract was entered into. *Held*

(*affirming judgment of Lord Kyllachy*) that B was entitled to be ranked and preferred in terms of his claim in respect that the non-fulfilment of the contract was due to circumstances beyond the control of either party.

This was an action of multiplepoinding in which the Commercial Bank of Scotland were pursuers and nominal raisers. Competing claims were lodged by Thomas M'Cormick, spirit merchant, 52 Whitevale Street, Glasgow, who was the real raiser, and William Paterson Dalrymple, spirit merchant, 4 Trainard Terrace, Tollcross, Glasgow.

The question at issue was as to the rights of parties under a contract entered into between Dalrymple and M'Cormick, whereby the former agreed to sell and the latter to purchase the goodwill of a public-house business. The contract was embodied in the following offer and acceptance by parties' agents. M'Cormick's agent wrote—"On behalf of my client Mr Thomas M'Cormick, spirit merchant, Gallowgate, I offer to purchase the goodwill of the wine and spirit business carried on by your client Mr W. P. Dalrymple, . . . and that at the price of two thousand pounds (£2000). . . . The price to be consigned within a week in bank in joint names of myself and you, and only to be payable when the licence has been granted by the magistrates in favour of my client, the application for which will be made at the statutory court in April first." Dalrymple's agents accepted this offer on their client's behalf.

On 18th May 1903 the following letters passed between parties' representatives:—Dalrymple's agents wrote as follows to M'Cormick's agent—"On behalf of our client Mr Dalrymple, we hereby agree to allow the purchase price to remain on deposit until the licence, if granted to your client Mr M'Cormick, is confirmed." M'Cormick's agent replied—"I have received your letter of this date agreeing that the purchase price shall remain on deposit until the licence, if granted to my client Mr M'Cormick, is confirmed, and on that footing I have to-day lodged an application for a transfer."

M'Cormick claimed in the present action to have the purchase price returned to him, and Dalrymple claimed payment thereof in the following circumstances, which are disclosed in the averments of parties in the condendences annexed to their claims.

Dalrymple averred—" (Cond. 1) [*After narrating the offer and acceptance already referred to*]—The said sum of £2000 was duly deposited in bank in the joint names of the agents for the said Thomas M'Cormick and the claimant on 20th January 1903. (Cond. 2) At the date of the said sale the claimant was tenant from year to year of the premises 743 Gallowgate, in which the said business was carried on. The owners of the said premises resolved to sell the same as at the term of Whitsunday 1903. The said Thomas M'Cormick was, prior to the statutory court in April, informed of the intention of the owners to sell the said

subjects, and he entered into negotiations with them with a view to purchasing or alternatively leasing the said premises. The claimant was, on or about 2nd April 1903, warned by the proprietors to flit from the premises on 28th May following, and he informed the said Thomas M'Cormick of the said warning. (Cond. 3) The said Thomas M'Cormick presented an application to the magistrates at the said statutory court in April for a transfer of the said licence. By arrangement with him the claimant at the same time presented an application for renewal of the said licence, it being understood that this latter application would be withdrawn if the magistrates granted the transfer in favour of the said Thomas M'Cormick. The magistrates, however, resolved to consider at said court only applications for renewal of licences, and to defer till a subsequent court consideration of applications for transfer of licences. Accordingly, it was agreed between the said Thomas M'Cormick and the claimant that the former's application should be withdrawn, and that the claimant should ask for a renewal of his licence, with a view to the said Thomas M'Cormick obtaining a transfer at a later date. The claimant's application was granted at said court. The claimant and the said Thomas M'Cormick arranged that the former should apply for a transfer at the special court to be held on 20th May 1903. Thereafter the said Thomas M'Cormick represented to the claimant that the property could not be purchased at the price he anticipated, and the claimant agreed to deduct the sum of £300 from the price of the business, in order to help the said Thomas M'Cormick to purchase the property. (Cond. 4) The said Thomas M'Cormick applied for and was granted a transfer of said licence at said special transfer court on 20th May 1903, and thereupon the licence granted to the claimant at the said April court lapsed and became void. The said Thomas M'Cormick entered into possession of the shop and business immediately thereafter. (Cond. 5) The said property was exposed for sale by public roup at the upset price of £2000 upon the 22nd May 1903. The said Thomas M'Cormick failed to purchase the property, which was bought by an outside party for the sum of £2255. The new proprietor ejected the said Thomas M'Cormick from the said premises as he had failed to obtain a lease or other right to occupy the same."

M'Cormick's averments were as follows:—  
"This claimant did all that was incumbent upon him to obtain a right to occupy the premises as tenant or proprietor, and throughout acted in good faith. The various steps he took to obtain the right to occupy were taken with the approval and assistance of the claimant Dalrymple and those acting on his behalf. When it was ascertained that the property was to be sold, the claimant Dalrymple and his agents fully recognised the risk of the licence not being renewed if this claimant did not get a right to occupy the premises. Accordingly, when the arrangement was made by

which the purchase price was to lie in the joint names of the parties till the licence was granted at the half-yearly October court, it was arranged between the parties that the claimant should bid the upset price, which the parties considered was more than the value of the premises, and at which price they anticipated there would be no other bids. As the price was considered so much above the true value, it was arranged by the claimant Dalrymple that he would grant an abatement of £300 off the purchase price of the business. In terms of this arrangement this claimant attended and bid the upset price as had been arranged. Of his own accord, when an unexpected competitor appeared and bade at the sale, this claimant bade another £250. The competitor, however, for private reasons, apart from the value of the premises, was determined to buy the place regardless of the cost, and he did so at the price of £2255. After the sale an attempt was made jointly by this claimant and the claimant Dalrymple, or those acting for him, to buy from the purchaser, who was offered a large profit, but he declined to sell. He also declined on any conditions to lease the premises to be used as a public-house. This claimant was ejected from the premises on 31st July 1903."

M'Cormick pleaded—" (1) No contract of sale having been completed, the sum consigned as price should be repaid to this claimant. (2) The said sum having been conditionally deposited to await this claimant getting his transfer confirmed at the statutory October court, and the same not having been done, this claimant is entitled to have the sum so deposited by him repaid."

Dalrymple pleaded—" The claimant having performed his part of the said contract of sale, and the said Thomas M'Cormick having failed to do what was necessary in order to obtain renewal of the transferred certificate in his favour, the claimant is entitled to be ranked and preferred in terms of his claim."

On 5th February 1904 the Lord Ordinary (KYLACHY) sustained the claim for Thomas M'Cormick, and ranked and preferred him to the fund *in medio* in terms thereof.

*Opinion.*—" There can be no doubt that under the original agreement for the purchase of this business the purchaser (the claimant M'Cormick) was entitled to be off with the transaction and to receive back his deposit on the refusal of the magistrates in April 1903 to transfer the licence or renew it in the claimant's name. That is I think common ground.

"In point of fact, however, M'Cormick agreed, by letters which passed in the month of May, to keep the transaction open until it was seen whether the licence would be transferred at the ensuing Transfer Court on the 20th of May and the transfer confirmed by the magistrates at the statutory Court in October. If the licence was then granted the purchase was to take effect. If it was refused the whole matter was to be at an end and the defender was to be repaid his deposit. That I think is

the plain meaning of the letters of 18th May, read in connection with the previous letters. And it does not, so far as I see, make any difference that it seems to have been understood, although not expressed, that if the transfer was granted by the Transfer Court on 20th May possession should be at once given, and the condition as to confirmation in October be thus rendered a resolute instead of a suspensive condition.

"In these circumstances it might seem *prima facie* that the question to be decided was only this—whether as matter of fact the licence was refused by the October Court. And upon that matter of fact the parties are, it appears, not at issue. It is admitted that the licence was refused by the October Court; and accordingly the claimant M'Cormick contends—and I think rightly—that that *prima facie* proves his case. *Prima facie* he does not require to aver and prove anything more.

"But then it is, of course, true that a person founding upon a condition may be barred from doing so if it be shown that the failure of the condition was due to his own act or default; and therefore the question seems really to be whether the competing claimant Dalrymple has relevantly averred a counter case of that kind.

"Now, it is certainly not suggested that M'Cormick did anything—anything right or wrong—which even influenced the result. Neither is it suggested that he omitted to do anything which by the terms of his contract he had become bound to do. But what seems to be suggested is something of this sort—that the sole or main reason for the refusal of the licence must be held to have been that the applicant M'Cormick had, at or a few days after Whitsunday, been turned out of the premises by the landlord, who had early in April duly executed a warning against the seller Dalrymple, and who, having resolved to sell the property, refused to continue Dalrymple's tenancy. This, it is suggested imposed on M'Cormick the duty of purchasing the premises, which it appears were to be put up in June to public sale, and to do so at all costs, this duty being deduced, as I understand, in this way, that M'Cormick having been put in possession was impliedly bound to maintain the continuity of his possession to the date of the October Court, or, at all events, to maintain it so far as by expenditure of money it was possible to do so.

"Now, as to all this I must say that I quite fail to see what there is in the contract between the parties, or in anything which followed upon it, to justify an implication of that kind. I am quite unable to see why M'Cormick should be held bound either to lease the premises, or to buy them, or to take any active steps in the matter. As far as I see he might at once, on being turned out of possession, have declared the transaction off—that is to say, he might have done so if (as seems common ground) the loss of the premises involved the loss of the licence, and the seller Dalrymple did not choose to purchase. But supposing, for

some reason not obvious, he (M'Cormick) was bound to make or join in making some effort to save the licence, it is surely vain to suggest that he was bound to do more than he in fact did—viz., to appear at the sale and offer a price considerably exceeding the upset price, and also considerably exceeding what both Dalrymple and he agreed was the full value of the property. The truth was, as I think sufficiently appears upon the statements of both parties, that the tenancy, and probably therefore the licence, was lost for a cause practically as much beyond the control of either party as if the premises had been burned down.

"It was argued, however (I suppose alternatively), that M'Cormick having been informed in April of the landlord's intentions, and having nevertheless taken possession upon 20th May, he must be held to have taken his risk of the licence being lost by the loss of the premises; by which, I suppose, is meant that by having taken possession and not at once declared the transaction off, he impliedly agreed to modify the contract so as to discharge the condition as to the continuance of the licence. But here again, all I can say is that I fail to follow the reasoning. Possibly, as I have already said, M'Cormick might, on being informed of the landlord's warning, have declined to take possession and claimed to be off with the transaction. But he was quite entitled, perhaps bound, to take his chance, such as it was, of such eventualities as might occur. And so long as the contract stood he was quite safe in doing so. He was protected by the condition expressed in the contract. And why, by taking a course entirely in terms of the contract he should be held to have waived performance of an essential condition of the contract, I do not, I must say, comprehend.

"I therefore think the claim of M'Cormick must be sustained, and that of the other claimant repelled, and of course expenses follow the result."

The claimant Dalrymple reclaimed, and argued—The non-fulfilment of the contract was due to M'Cormick's failure to acquire a title to the premises, whether as proprietor or tenant, to enable him to present an unobjectionable application to the Licensing Court in October. The value of the subject sold, viz., the goodwill of the business, which involved the continued occupation of the premises, depended entirely on the personal efforts of the purchaser, who took the risk of losing the premises. The reclaimer had fulfilled his part of the contract and was entitled to payment of the price.

Argued for the respondent—It was a condition of the contract that the price should only be payable when this claimant had obtained a licence and had it confirmed; as that condition could never be fulfilled the price could never be payable, and therefore fell to be returned to the respondent.

**LORD JUSTICE-CLERK**—It appears that M'Cormick offered to purchase the goodwill of Dalrymple's business for £2000 on the footing that the price was to be placed in bank on deposit-receipt, and was only to be payable when a licence was granted by the magistrates in favour of the purchaser. Neither party contemplated any difficulty when the bargain was entered into, but it afterwards became known that the owners of the premises occupied by Dalrymple did not desire him to continue in occupation. They gave him notice to quit. Plainly one of the purposes of the removal was that the premises were about to be sold, and that, if the new proprietor so desired they should no longer be licensed.

As appears from the letters of 18th May, to which we were referred, it was agreed that the purchase price should remain on deposit until the licence, if granted to M'Cormick, was confirmed. Therefore there can be nothing more clear than that the arrangement was that the money should not be paid to Dalrymple until a licence should be secured by M'Cormick, to place him in a position to carry on the public-house business; the purpose plainly was to keep matters open for M'Cormick until that event should happen. It did not happen. The premises were put up for sale and went to a price beyond which parties were not prepared to go.

I think M'Cormick was bound to use reasonable means to obtain a renewal of the licence, and if it could be shown that he obstructed the renewal in any way then the case might be different. But it is said that because he did not take means to secure the premises for himself he was in fault. I cannot affirm that. I think the idea that he should have paid an unreasonable price for the premises cannot be entertained. I agree with the view of the Lord Ordinary that the claim of M'Cormick must be sustained.

**LORD YOUNG**—I am of the same opinion. I have heard nothing to raise a doubt in my mind as to the soundness of the Lord Ordinary's view. I think that the contract between the parties is quite clear to the effect that the price of the business is "only to be payable when the licence has been granted by the magistrates in favour of my client, the application for which will be made at the statutory court in April first." If the licence had been granted in April, although M'Cormick could not afterwards acquire possession of the premises, then according to the letter of the contract M'Cormick would be liable to pay the price of the goodwill of the business to Dalrymple. Whether in accordance with considerations of equity and good sense M'Cormick would be liable may be a legitimate subject for inquiry. It may be that considerations of equity would lead the Court to regard it as a condition of the contract that M'Cormick, either as proprietor or as tenant, should obtain possession of the premises to be used as a public-house. But we do not need to determine that here, because the letter of the contract was not fulfilled. I may,

however, indicate my impression that the maxim *qui hæret in litera hæret in cortice* applies here. I think it was according to the expectation of both parties that M'Cormick should obtain possession of the premises for the purpose of using them as a public-house, and I think that he would not have been bound to proceed with the transaction even had the licence been obtained in April if he did not get possession of the premises for use as a public-house. But, I repeat, it is not necessary to determine that, because the letter of the contract was not fulfilled—the licence was not obtained in April. I think with the Lord Ordinary that M'Cormick did all that he could reasonably be expected to do, and that the licence was lost for a cause practically as much beyond the control of either party as if the premises had been burnt down.

**LORD TRAYNER**—I agree with the Lord Ordinary. I do not offer any opinion as to what would or ought to have been the judgment if the licence had been obtained in the month of April. The contract of January is quite distinct. M'Cormick is to pay £2000 for the business, but he is not to pay it until the licence is granted. That condition of the contract seems to me to cover every contingency connected with obtaining the licence except such as might be due to the fault of M'Cormick. If I am right, it covers the contingency of getting the premises. In January the parties contracting had not before them the contingency that Dalrymple would be warned out in April. The expectation doubtless was that his tenancy would be continued, but it became known in the month of April that that could no longer be relied on, because Dalrymple had been warned to leave on 28th of May. In view of that the parties entered into a prorogation of the contract on the 18th of May, and this effectually secured M'Cormick in his former position, for it was then agreed that the money should remain on deposit-receipt until the licence was granted to M'Cormick and that licence confirmed. That condition was never fulfilled, and the question is whether it is open to Dalrymple to maintain on the facts as admitted, that the nonfulfilment of the contract was due to any neglect on M'Cormick's side. I think it is not. It appears to me that M'Cormick did all that could reasonably be expected of him to fulfil the condition of the contract. He did nothing to hinder its fulfilment certainly. I am unable to concur in the view presented to us on behalf of the claimant Dalrymple, that M'Cormick was bound to purchase the premises at any cost. He was not bound to pay an extravagant price for the premises.

**LORD MONCREIFF**—While I do not differ from your Lordships, I think the case is not free from doubt. At the time of the contract being entered into in January it was known that Dalrymple only had a lease till May. The condition of the payment of the price was that a licence should be granted in favour of M'Cormick at the

court to be held in April, and if he had got a licence at that date it would have lain with him to secure the premises. There is also this difficulty, that at the date of the licensing court in April it was known to both parties that Dalrymple had been warned out, and that, notwithstanding that, M'Cormick proceeded to make his application on 17th April. If therefore the letters of 14th January had stood alone, they might have been read as meaning that M'Cormick was to take the whole risk of securing the premises. But the subsequent actings of parties and the letters of 18th May make it plain that a further effort was made to carry out the contract. In pursuance of the arrangement come to on that date M'Cormick applied on 20th May for a licence, though knowing that the premises were to be sold in a few days. Before the application was made it was agreed that the purchase price should remain on deposit until October, till it was seen if the licence, if granted in May, would be confirmed. This necessarily depended on whether or not M'Cormick succeeded in leasing or buying the premises. But this he failed to do. He attended the sale, made a bid of the upset price and £250 more, and did all that could reasonably be expected of him to carry out the arrangement which was come to after seeing that Dalrymple had been warned out. I think he might have repudiated the contract in April, but in any event, after his failure to obtain the premises I think he was entitled to repayment of the sum deposited. On the whole matter I think the Lord Ordinary has arrived at a right conclusion.

The Court adhered.

Counsel for the Claimant and Real Raiser and Respondent Thomas M'Cormick—Mackenzie, K.C.—W. Thomson. Agents—Sang & Moffat, S.S.C.

Counsel for the Claimant and Reclaimer William Paterson Dalrymple—Campbell, K.C.—Munro. Agents—St Clair, Swanson, & Manson, W.S.

Agents for the Pursuers and Nominal Raisers—Melville & Lindesay, W.S.

*Friday, May 27.*

## SECOND DIVISION.

[Lord Kyllachy, Ordinary.]

### JOHNSTON *v.* JOHNSTON.

*Donation—Whether Grant of "Use of" Dwelling-House during Grantee's Life Constituted Liferent Right.*

A by holograph letter granted to his brother B "the use of" a dwelling-house "during the natural period of his life . . . in consideration of him loosing his eyesight." *Held (aff. judgment of Lord Kyllachy) that the letter referred to did not constitute any life-*

rent right in favour of B, but only a right of personal occupation during his life.

This was an action at the instance of Thomas Johnston, contractor, East Main Street, Armadale, against William Johnston, sometime colliery manager, Boyd's Buildings, Darvel, Ayrshire, and Alexander Johnston, carting contractor, East Main Street, Armadale. The pursuer sought to establish a right to a liferent of a certain house in East Main Street, Armadale; the summons concluded for declarator of that right and for an accounting in respect of intromissions by the defenders with the rents of the house.

The pursuer founded on the following holograph letter of 25th February 1898 received by him from the defender William Johnston, the then proprietor of the house in question, viz.—"This is to certify that I do hereby, of my own free will and accord, grant the use of the room and kitchen now occupied by John M'Kinnon—who must remove at first term—to my brother Thomas Johnston, free of any rent during the natural period of his life, or period of his natural life, with liberty to add a back place such as a small room or kitchen to it. He to have the piece of ground as a garden, which is right behind the house. This I do in consideration of him loosing his eyesight. And he is to act jointly with my brother Alexander in looking after and keeping them in order as a factor would do. (Signed) WILLIAM JOHNSTON."

The pursuer entered into possession of the subjects referred to and occupied them himself from Whitsunday 1898 to Whitsunday 1900. He then let them. In the present action he averred—" (Cond. 4) On 10th April 1902 the defender William Johnston, by letter addressed to the pursuer and duly received by him, sought to cancel the said holograph letter dated 25th February 1898. About the same time the said defender prohibited the tenant from paying the rent due by him to the pursuer, and both defenders have since intromitted therewith. Thereafter the defender William Johnston disposed the said subjects to the defender Alexander Johnston, by disposition dated 31st July and recorded 12th August, both in the year 1903. This disposition was granted by the defender William Johnston and accepted by the said defender Alexander Johnston in the full knowledge by both of the pursuer's liferent right and interests constituted by the holograph letter above referred to, and subsequent possession."

The defenders maintained that no liferent had been conferred upon the pursuer, but only a right to use the house in question.

On 6th February 1904 the Lord Ordinary (KYLACHY) pronounced the following interlocutor:—"Finds that on a just construction of the letter referred to on record, the same did not constitute any liferent or other proprietary right in favour of the pursuer, but only a right of personal occupation during his life; therefore assolisies