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of his hands, then no properly completed indorsation took place; but this is perfectly immaterial, because it must be presumed to have been indorsed before going out of his hands, as a bill, without this, is ineffectually transferred. And even supposing no indorsation had taken place, it is clear that such a nexus was created upon the bills, tantamount to an indorsation, as put it out of the power of any person to attach or acquire them, until the appellant's debt was paid; and which also brings the transaction under the statute. Nor is it any answer to this to say, that the money which the appellant thus acquired in extinction of his debt was a ready money payment, because, according to the construction put upon this act, it is even a question how far actual payment in cash to one creditor in preference to the rest, on the eve of bankruptcy, is not within the operation of the statute. Undoubtedly the words of the statute strike against every such act and deed of the nature here resorted to, and if the statute were not made to apply to the circumstances of this case, then it might be eluded on every occasion.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors complained of be affirmed.

For the Appellant, *Al. Wedderburn, Alex. Wight.*
For the Respondent, *Ja. Montgomery, Ar. Macdonald.*

M. Append. P. I. "Bankruptcy," No. 7.

ANDREW WAUCHOPE, Esq. - - *Appellant:*

Sir ARCHIBALD HOPE, Capt. JOHN M'DOWALL, and JOHN WAUCHOPE, Esq., } *Respondents.*

House of Lords, 10*th April* 1774.

LEASE—ARBITRATION.—Construction of lease held entitling the landlord to shut up the level, communicated from his colliery to another, without his consent or remuneration. This dispute having been referred to arbitration, with power to issue orders as to the opening the level, until the question of right was determined, and this reference having fallen to the ground by expiry of the same; Held that any order of the arbiter to open the level acquiesced in by both parties during the subsistence of the submission, could not be the ground of a judgment, holding that the landlord could not shut up the level, as such a judgment was contrary to the judgment of the House of Lords in the same case finding the reverse; and also because the submission

founded on, had become an absolute nullity from the expiry of the same.

This is the sequel of the case reported ante p. 286, regarding the import of certain leases of coal and the communication of the Duddingstone level to the adjacent collieries higher up, without consent or remuneration. The judgment of the Court of Session, holding that the level was to be communicated without consent or remuneration, was reversed in the House of Lords; and a remit *quoad ultra*, to the Court of Session to do therein as might appear agreeable to law and justice.

The appellant then petitioned the Court of Session, praying them to alter their former interlocutor of the 7th Feb. 1771, and in lieu thereof, to find and declare in terms of the House of Lords' judgment. Also, in consequence thereof, to find, that the appellant was at liberty forthwith to proceed to shutting up the level where it communicated from the lands of Niddrie into the lands of Edmondstone. 3dly. To ascertain what consideration ought to be paid him by the respondents Hope and M'Dowall for the benefit and advantage they had received in raising coal in the lands of Edmondstone and Woolmet, by means of the level, since it was first communicated to the lands of Edmonstone, and what they should receive from farther quantity of coal raised in those grounds, until the communication was effectually shut up: And further, to find the respondents Hope and M'Dowall bound and obliged to obtain from Lord Abercorn a perpetual communication of the Duddingstone level to the Niddrie level. A submission had been at first entered into, in which both parties empowered the arbiter to issue orders regarding the opening the level, until the question of right was determined. The arbiter ordered the level to be opened. But the submission fell to the ground by expiry thereof.

The Lords applied the House of Lords' judgment, but on the other points remitted to the Lord Ordinary, who ordered a full argument by informations, and reported the questions to the Court.

The Court, of this date, pronounced this interlocutor:— Dec. 9, 1773.

"In respect that the level from the lands of Niddrie was "communicated into the lands of Edmonstone and Wool- "met, by order of the arbiter chosen by the parties to de- "termine the questions between them concerning said level, "and which order the arbiter had power to pronounce, "therefore, the Lords find that the pursuer, Andrew Wauchope

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" of Niddrie, during the subsistence of Sir Archibald Hope " and Captain John M'Dowall, their rights and interests in the " collieries of Edmonstone and Woolmet, in virtue of their " present leases, is not entitled to shut up the foresaid level. " But find that the said defenders, for any benefit which it " shall appear they have enjoyed, or shall hereafter enjoy, " by means of said communication, and for raising coals on " the lands of Edmonstone and Woolmet, are liable to the " pursuer in a recompense on that account: Further, the " Lords find the said defenders, in consequence of the lease " of Niddrie coal by the pursuer to John Biggar, liable to " warrant a communication of the Duddingston level to the " Niddrie coal, so long as their present right to the said Dud- " dingston level shall subsist, but no longer; and remit to the " Ordinary to proceed accordingly, and to hear parties on " any other points of the cause, and do as he shall see " just."

The appellant, conceiving that denying him the right of shutting up the level, during the continuance of the respondents' interest in the Edmonstone and Woolmet collieries, to be erroneous, and also that the latter part of the above interlocutor, which confines his right of even communicating the Duddingston level to the Niddrie coal, only so long as the continuance of the respondents' interest in the Duddingston level, but no longer, to be directly contrary to the import of John Biggar's contract of lease from the appellant, he thought it proper to bring the present appeal to the House of Lords against the above interlocutor.

Pleaded for the Appellant.—That the interlocutor of 7th February 1771 being reversed *in toto*, it necessarily follows that every point which it embraced is reversed also. That interlocutor declared, that John Biggar had a right by the lease to carry his level through the pursuer's lands, and to communicate the same to the coal of Woolmet, &c., and that the pursuer cannot shut up the level. These two propositions were reversed by the House of Lords, and the converse of them must therefore be established. The respondents' pretence, therefore, that this judgment was a mere decision on the import of the lease, without regard to the point now raised, or any other right the respondents might have of communicating the level. The lease expressly prohibited the communication of the level to any neighbouring lands without the appellant's consent. And the submission entered into having afterwards expired, and all the proceedings thereon become abortive, was not evidence of his con-

sent, and ought not to be founded on, as is done in this interlocutor, because the mere order of the arbiters to open the communication of the level could not affect the true legal construction of the lease itself; and, in particular, could not "hurt the interest or claim of the said Andrew "Wauchope," the arbiters having power only to issue such interim orders, always under condition of not hurting his interest, and only during the subsistence of the submission. Of course, when the submission expired, these powers, and all rights derived from their exercise, would cease and determine. The import of the lease was also the matter submitted to arbitration, which, on its failure, was determined in the House of Lords. On this event the arbiters' interim order became a nullity, and any judgment founded thereon must be erroneous. He is, therefore, entitled to shut up the level, and the same principle which entitles the appellant to do so, entitles him to have it done at the respondents' expense, as he has a clear right, after the judgment of the House of Lords, to have matters placed *in statu quo* before that order was issued. In regard to the endurance of his right, the appellant's lease to Biggar expressly binds the latter to procure from the Earl of Abercorn a consent to the communication of the Duddingston level to the Niddrie coal. His right so to be procured was, by the general words of the contract, plainly intended to be perpetual. That such was the meaning, is evident from the after covenants in the lease, whereby they settle the terms upon which that level might be communicated to other coals at any future time, which could not take effect, unless the appellant had a previously vested and perpetual right to the Duddingston level.

Pleaded by the Respondents.—That the judgment of the House of Lords was only a judgment on the import of the lease, without regard to any other right the respondents might have of communicating the level to the lands of Edmonstone, independently of the lease. But as, subsequent to the lease, a submission was agreed to, with power to make such decrees and orders for carrying on the level, as he might think proper, and as the arbiter had ordered the communication of the level to the lands of Edmonstone, whereof the respondents had, independent of the lease, right to avail themselves, the respondents ought not to be deprived of the enjoyment of the level so communicated, nor can the appel-

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lant shut up the same, except by the consent of both parties. Besides, the new demand of the appellant for shutting up the level is inconsistent with the conclusions of his own libel or declaration in this very cause. As there he first concludes for a consideration for the benefit of the level in all time coming; and it is only in the event of his failing to obtain such consideration, that the other conclusion for shutting up the level is added. In such circumstances, the only question that remained was, the recompense to be received, on the assumption that the level is to be allowed to remain open. The interlocutor appealed from is quite conformable to the judgment of the House of Lords, which was a mere *general* reversal, without establishing any thing specifically, leaving to the Court below to proceed further therein. The only point fixed by that decision was, that John Biggar had no right *by the lease* to communicate the level without the consent of the appellant; but such consent was already given, by empowering the arbiter in the submission to consent for him, whose order to open the communication of the level must be held as tantamount to that consent. And in regard to the perpetual communication of the Duddingston level contended for by the appellant, Biggar came under no obligation by the lease to procure Lord Abercorn's consent to such perpetual communication, and there is no expression therein which even implies such a right. He came under no warranty to that effect; and the appellant could never expect to obtain a better right than Biggar himself possessed.

After hearing counsel, it was

Ordered and adjudged that the appellant is entitled to have the level in question shut up by the respondents, and kept so shut up at their expense, and also that the respondents are liable to make the appellant such satisfaction as shall be just and reasonable, under all the circumstances, for the benefit they have enjoyed, if any, by reason of the opening and communication of the said level. And it is therefore hereby ordered and adjudged, that so much of the interlocutor complained of, as is contrary to the declaration above mentioned, be, and the same is hereby reversed. And as to that part of the said interlocutor which relates to the respondents' procuring the consent of the Earl of Abercorn to a communication of the Duddingston level to the Niddrie

coal, it is hereby further declared, that as the question materially turns upon the construction of the covenant entered into by the Earl of Abercorn in the lease granted by him to John Biggar, therefore complete justice cannot be done, but in a suit to which the said Earl is a party; and it is therefore ordered and adjudged, that such part of the said interlocutor be, and the same is hereby reversed, without prejudice, and with liberty to the appellant to add proper parties to this; or to bring a new suit, as he shall be advised. And it is further ordered, that the Court of Session in Scotland do give all proper and necessary directions for carrying this judgment into execution.

For Appellant, *Al. Wedderburn, J. Dunning, John Maddocks.*

For Respondents, *Ja. Montgomery, Al. Forrester, A. John Ord, Ar. Macdonald.*

Note.—Unreported in Court of Session.

(M. 15,523.)

JOHN CARRE of Cavers, - - *Appellant;*
WILLIAM CAIRNS' WIDOW and CHILDREN, *Respondents.*

House of Lords, 6*th May* 1774.

LEASE UNDER ENTAIL.—Construction of clause in a lease, which, by the entail of the estate, was only to be granted for the lifetime of the granter, or for 15 years. Held good though granted for 19 years, and though the granter died before that term expired.

The appellant's grandfather, John Carre, granted a lease of the farm of Softlaw, for 15 years, to William Cairns, the husband of Mrs. Cairns, and father of her children, respondents.

The estate was held under strict entail, and contained the following prohibitory clause:—" That it shall not be lawful " to the heirs of entail to sell, analzie, wadset, or dispone, " redeemably or irredeemably, said lands, or any part there- " of, or to grant infeftments of annualrent or liferent furth " thereof, or to contract debts, or to do any other facts or