BORROWS AND CONNOR, . . APPELLANTS.
COLQUHOUN AND McLEAN, . . RESPONDENTS.

1854.
14th and 17th July, 11th August.

Interdict or Injunction.—An Interdict or Injunction may be summarily granted for the preservation of interests left unprotected, and subject to, or threatened with, irreparable damage.

But where the rights of parties are not affected or endangered, summary proceedings in the nature of Interdict or Injunction are inappropriate.

The acceptance of Rent, particularly if repeated, gives such a title of possession, as cannot be questioned by Interdict. A suit or action will be necessary.

Lease—Assignment.—Where a Tenant, in the face of a stipulation to the contrary, assigns a Lease, and the Landlord does not accept the Assignee, but permits the original Tenant to continue in possession, he cannot afterwards stop his operations summarily by Interdict.

So where a Tenant becomes Bankrupt, there being a clause in his Lease interdicting assignment, the Trustee or Assignee under the Sequestration cannot disturb the Tenant's possession, although he may be entitled to claim the profits for the creditors.

THE *Solicitor-General* (Sir *Richard Bethell*) and Mr. *Rolt*, for the Appellants.

Mr. *Roundell Palmer* and Mr. *Anderson*, for the Respondents.

The nature of the question, and the course of argument, appear fully from the following opinion delivered in moving for judgment, by

The LORD CHANCELLOR (*a*):

Lord Chancellor's opinion.

My Lords, in this case the question arises upon a

(*a*) Lord Cranworth.

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lease for 14 years from the 15th of July 1843, granted by Mr. Colquhoun to Jeremiah Borrows, of certain property called the Mines of Dryflat, in Lanarkshire.

The lease is in the form of an offer or proposal, in the pleadings termed a missive, by Borrows, which Mr. Colquhoun accepted.

The annual rent was to be 100*l.*, with certain provisions as to Royalty; and there was, moreover, the following stipulation:

> It is hereby provided that sub-tenants, assignees, and creditors, shall not be allowed to possess this lease, but are strictly prohibited under the penalty of paying double the rent or lordship in the option of the Proprietor, without the consent of the Proprietor being first asked and obtained in writing.

On the 24th of February 1848, Borrows having become bankrupt, his property was sequestrated, including all those things which could be properly sequestrated in bankruptcy. It will be observed that, according to the terms of the lease, it was not obligatory upon the landlord to permit the trustee for the creditors under the bankrupt statutes to take possession of the land, because there could not be any assignment to him without the landlord's consent. In point of fact, Borrows retained possession, and entered into a contract with Connor to carry on the works on their joint account. The landlord did not consent that the trustee should have the possession, and the trustee took no step to remove Borrows and Connor until February 1850, when a petition was presented to the Sheriff by the landlord and the trustee (who had concerted to enforce their respective rights against the bankrupt), praying an interdict against Borrows and Connor, which was immediately granted.

Borrows and Connor, however, contending that there was, under the circumstances, no authority to grant such an interdict, advocated the cause to the Court of

Session; and on the 13th of January 1852, the *Lord Ordinary* (*a*) recalled the interlocutor of the Sheriff, and dismissed the petition. The interlocutor of the *Lord Ordinary* found it established that the landlord had declined to relinquish his right to exclude the trustee and creditors of the bankrupt from taking possession of the property; that the bankrupt had consequently been permitted to continue in possession; that, while thus in possession, the bankrupt and Connor entered into a contract of copartnership to carry on the works, subject to the provisions of the lease; that the Respondent accepted payment from them, through his factor, of the rent stipulated by the lease; and that, at the date of the sequestration, there were arrears of rent due by the bankrupt. The *Lord Ordinary* further found, that the summary application for interdict presented by the Respondents, in the circumstances of the case, was an unwarranted and incompetent procedure, inasmuch as the landlord, to whatever other remedy he might be entitled, had no right thus summarily to interfere with the possession of his recognised tenants. Such was the finding of the *Lord Ordinary*.

The landlord and the trustee, being dissatisfied with the *Lord Ordinary's* interlocutor, appealed to the Lords of the Inner House, who, disagreeing with the *Lord Ordinary*, repelled the reasons of advocation, and remitted the cause to the Sheriff, with an instruction to make the interdict perpetual.

The question for determination is between the decision of the *Lord Ordinary* and that of the Inner House. Now, my Lords, I have considered the case with a good deal of attention; and I have come to the conclusion that the *Lord Ordinary* was right. In his very careful and useful note, appended to the interlocutor, he states that on which there is no

(*a*) Lord Cowan.

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difference of opinion between him and the Inner House. He says—

Lord Chancellor's opinion.

When an attempt is made, or threatened, to interfere with the existing state of possession, or to exercise some supposed power, or to do some act, which might prejudice or affect the due consideration and ascertainment of the legal rights of parties, an application for Interdict is the proper remedy which the law recognises for the protection of interests that might suffer if left unprotected. This summary remedial procedure, however, cannot be competently resorted to when the state of possession cannot truly be alleged to have been inverted or innovated upon, or to be endangered, and when the actual rights of the contending parties permit of being made the subject of judicial determination, in the ordinary and accustomed form of action for the trial of competing rights and claims. Judged by this test, the *Lord Ordinary* is of opinion that the application for Interdict in this case was not justified by the circumstances in which it was made, and was incompetently resorted to by the Respondents.

Now the learned Judges of the Inner House expressly approve of the *Lord Ordinary's* enunciation of the law, but they say that it is not applicable to the present case, because here there was no colour of title in Borrows and Connor, and the ground of that opinion is that the possession by Borrows and Connor was merely that of servants of the trustee. But with all deference, I conceive that opinion to be erroneous. Upon the sequestration Borrows was in the condition of a party who had assigned to his trustee; but the landlord was not bound to accept the assignee. In fact, he refused to give up his right to exclude. Borrows was permitted, both by the landlord and by the trustee, to remain in possession for two years. The sequestration having been in February 1848, the next rent becoming due on the 15th of July following, he on the 11th of August, having remained in possession, paid the half-year's rent to the agent of Mr. Colquhoun, and took a receipt in these words: "Killermont, 11th August 1848. Received from

Mr. Arthur Connor, on account of Jeremiah Borrows, the sum of fifty pounds sterling, fixed rent of Dryflat Colliery, due on the 15th July last, reserving prior arrears."

Between that rent-day and the following, which would be the 15th of January 1849, a contract of co-partnership was entered into between Borrows and Connor, who was his brother-in-law. It is not necessary to state in detail the terms of that contract; but it was one whereby Connor, who was a wealthy man, agreed to furnish capital for the business of the mines, to be worked by them in partnership together. Now I do not enter into the question whether it was competent to the bankrupt to do this so as to gain any benefit to himself at the expense of his trustee under the sequestration—probably it was not. But the next half-year's rent becoming due on the 15th of January 1849, Connor paid it on account of himself and his partner, and took a receipt from the agent in these terms: "Killermont, 7th February 1849. Received from Arthur Connor, the sum of fifty pounds sterling, being payment of the half-year's rent for Dryflat Colliery, up to the 15th of January last, as due by Mr J. Borrows and Co." Just in the same way, the rent which accrued due in July 1849 was paid, and it was received as due from "Jeremiah Borrows and Co." That happened on no less than five different occasions. It may be that this partnership was void as against the trustee; or it may be that all profit made would be for the benefit of the creditors. The fact is, however, that such a partnership was created, and that the rent was paid by Connor for the company, and so accepted by the landlord on several occasions. I am clearly of opinion, that this gave a title to possession against the landlord which could not be questioned by interdict.

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It has been said there is no proof that this partnership, or this tenancy, or this occupation, was ever recognised by Mr. Colquhoun, the payment having been only to his agent or factor. My Lords, it would be a very dangerous doctrine to hold that gentlemen absenting themselves and leaving an agent to manage their estates, are not bound by his acts in a transaction like this. In the present case, Mr. Colquhoun has recognised Mr. Kirkwood as being his agent in respect of this matter in the strongest way; inasmuch as the very petition to the Sheriff in February 1850 was signed, not by Mr. Colquhoun himself, but by Mr. Kirkwood, as his factor, authorised to bind him, and it must be assumed that the rent received by the agent came to the hands of his employer.

Now an interdict, as is obvious from the passage I have read from the note of the learned *Lord Ordinary*, is analogous to an English injunction. If the landlord could not remove by that process, which I think clearly he could not, it appears to me that the union of the trustee with him could make no difference. Supposing Borrows, instead of working this mine, which he had held from the bankruptcy, had got possession, by contract with some other landlord, of some other mine, he could only work, it may be, for the benefit of the creditors—but still he could not be removed by interdict at the suit of the trustee. I think in this case, the Judges below have not given sufficient weight to the recognised possession of Borrows & Company. It may be that they have no title to resist a proper suit or action for removing. It may be they are accountable to the trustee for all profit. That is not the question. The question is, whether this is a case in which a party can be properly ousted by interdict—a summary proceeding. In my opinion it is not. Therefore I think the interlocutor of the *Lord Ordinary* was right,

Lord Chancellor's opinion.

and that the interlocutor of the Court of Session ought to be reversed. I accordingly so move your Lordships.

I ought to state, that although my noble and learned friend (*a*), who heard this case with me, is not here present to express his concurrence, yet we have gone over the subject together; he has seen the short notes which I made in order to guide myself in the observations which I should address to your Lordships; and he has requested me to say that he fully agrees.

Interlocutor of the Inner House reversed.

(*a*) Lord Brougham.

ROBERTSON & SIMSON.—LANG.