AUGUST 8, 1854.

WILLIAM CLARK, M.D., *Appellant*, *v.* CITY OF GLASGOW LIFE ASSURANCE and REVERSIONARY CO., *Respondents.*

Et è contra.

Superior and Vassal—Obligation to Uphold a Building—Real and Personal Obligation—*By a feu contract, A, the vassal, bound himself "to maintain and uphold in proper working condition a mill," built on the land disponed, and also to keep it insured for £900. A was duly infeft, and the above obligation was engrossed in the sasine A then disponed the subjects to B, who again disponed to C, "but always under the burden of the feu duties, and other conditions and burdens" contained in the feu contract. C was duly infeft. The mill was burnt down accidentally, whereupon the superior raised an action against C, concluding that C was bound to rebuild the mill, or at least expend the sum of £900 on repairs.*

HELD (reversing judgment), *That the obligation to maintain and uphold the mill imported the obligation to rebuild; and therefore that C was liable.*

Appeal to the House of Lords—Process—Cross Appeal—Time to Appeal—6 Geo. IV. c. 120, § 25—*In the above case the Court of Session held*—1. *That C was not bound to rebuild; but*, 2. *That C was bound to expend £900 in repairing the mill. The superior (pursuer) within two years duly presented an appeal against the first part of the interlocutor. C afterwards presented a cross appeal against the second part of the interlocutor, but this appeal was not presented within two years after the date of the interlocutor, or within the first 14 days of the session of parliament next following the lapse of the said two years, though it was presented within 14 days after the answers to the original appeal were put in.*

HELD, *That the cross appeal was not a cross appeal strictly so called, but even if it were, it was subject to the same rules as the original appeal, and that, as it was not presented in due time, it was incompetent.*[1]

On 3rd March 1838, Dr. Clark, the appellant, by way of feu contract, conveyed to David Smith five acres of land, with a valuable mill built upon it. By that deed Dr. Clark, in consideration of the feu duty and other considerations, afterwards stipulated, disponed, in favour of Smith, the said five acres of land, and obliged himself to infeft Smith in the ordinary way, to hold under him, Dr. Clark, *de se*, for which causes, and on the other part, Smith, the purchaser, bound and obliged himself, his heirs, executors and successors, to pay to Dr. Clark the sum of £125 per annum for five years, as feu duty, and £130 per annum for ever afterwards; and certain other things are mentioned. Then the deed goes on to say that the lands are thirled to Monkland Mill, and David Smith binds himself to fulfil the whole conditions of the thirlage. There are several other stipulations, and then comes this:—"And further, the said David Smith and his foresaids shall be bound and obliged, as by their acceptation hereof they bind and oblige themselves, to maintain and uphold the mill now built upon the said lands in a proper and sufficient working condition, and shall also keep the present dwelling houses in a proper and tenantable state of repair," and these and all other burthens, and so on, are to remain in all time coming. There was also an obligation on the part of Smith to keep the mill at all times insured in the sum of £900.

Smith was thereafter duly infeft, and then he, in the same way, disponed in favour of Steven and Co., and then Steven and Co. obtained infeftment, holding the property under Dr. Clark as their superior. Then Steven and Co., in the same way, disponed in favour of the City of Glasgow Life Assurance and Reversionary Co., "but always under the burden of the feu duties and other conditions and burdens contained in the feu contract" between Dr. Clark and David Smith, and they took sasine in the same way under Dr. Clark. The result therefore was, that Dr. Clark was the superior, and ultimately the Glasgow Assurance Co. were vassals holding this mill under him.

The mill having been accidentally burnt down, an action was raised by Dr. Clark, as the superior, against the Glasgow Assurance Co., to compel them to rebuild the mill, upon the ground that it was part of the terms of the feu holding, that they were to keep it in constant repair, and that if the mill was destroyed, and he was only to have five acres of land as a security for his £130 a year instead of the mill, his security was gone.

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[1] See previous report 12 D. 1047; 22 Sc. Jur. 459. S. C. 1 Macq. Ap. 668: 26 Sc. Jur. 638.

There were two questions which arose in the case. The *first* question was—Whether the respondents, who were purchasers from Steven, who was the purchaser from Smith, were bound by the obligation of Smith to maintain and uphold the mill? *Secondly*, If they were, did the terms of the contract impose upon the respondents the duty of rebuilding the mill, it having been burnt down? The Lord Ordinary (Ivory) held that the respondents were bound by the conditions of the original feu contract: that this contract did not impose upon them the obligation to rebuild, but that it obliged them to keep the mill insured in the sum of £900. He held that the contract, as it is called in England, ran with the land, consequently that the present holders were bound by the contract of Smith: that according to the true construction of that contract it did not compel them to rebuild, but it obliged them to keep the property insured in the sum of £900, and that they were bound to expend that sum in repairing it. The Court of Session adhered to the interlocutor of the Lord Ordinary.

Dr. Clark, the pursuer, then appealed to the House of Lords against the interlocutors of the Lord Ordinary, and also that of the Inner House, the latter dated 20th June 1850, so far as these were unfavourable to him. His petition of appeal was presented on 21st June 1852. The respondents did not lodge answers thereto till 14th Dec. 1852, on which day they also presented a cross appeal against that part of the interlocutors unfavourable to them. The cross appeal was thus not presented within two years after the date of the interlocutor, nor within the first fourteen days of the session of parliament next after the expiration of such two years, for such session commenced on 4th Nov. 1852. Dr. Clark, the respondent in the second or cross appeal, accordingly presented a petition to the House, praying that the cross appeal may be dismissed as incompetent on the above ground, but the Appeal Committee reserved the objection to competency to be argued along with the merits of the original appeal at the bar.

The appellant Dr. Clark, in his *printed case* in the original appeal, submitted that the interlocutors ought to be reversed or varied for the following reasons:—"1. Because the obligations come under by David Smith, for himself and his successors, in the original feu contract, of which implement is sought to be enforced against the Glasgow Life Assurance Co., are binding upon the company as Smith's successors in the subjects, and infeft therein, in respect that said obligations are conditions of the grant, and real burdens; and further, in respect that the company acquired right to the subjects under the conditions and burdens contained in the said feu contract, the obligations resulting from which were adopted by them. 2. The special terms of the clause in the said feu contract in reference to David Smith and his successors maintaining and upholding the mill, and insuring it against fire, render it incumbent on the respondents, not merely to lay out the sum of £900, as found by the Court below, but to rebuild the mill and other buildings which were destroyed by fire, and restore the subjects, so far as practicable, to the state in which they were before the fire." As to the *cross* appeal, the appellant Dr. Clark submitted it ought to be dismissed as incompetent, because it had been presented after the lapse of the statutory period of two years from the date of the signing of the last interlocutor appealed from, and of fourteen days from and after the first day of the meeting of Parliament for the despatch of business next ensuing the said two years, contrary to the provisions of 6 Geo. IV. c. 120, § 25. The *respondents*, the City of Glasgow Co., submitted as to both appeals, that the interlocutors ought to be affirmed or varied for the following reasons:—"1. Because even assuming that the obligations in question, contained in the original feu contract, have been adopted by, or are otherwise effectual against, the respondents, there are no grounds for holding that, upon a sound legal construction of these obligations, they can be required, in the circumstances of the case, to do more than lay out and apply the sum of £900 in terms of the judgment under appeal. 2. Because, more particularly, the mill in question having perished by a *damnum fatale*, the respondents are not bound to rebuild and restore the same by force of the clause in the feu contract, which takes the vassal bound to uphold and maintain the mill and houses in sufficient working condition, and in a proper and tenantable state of repair."

Lord Adv. Moncreiff, and *Rolt* Q.C., for appellant.—1. *First Appeal.*—The respondents are bound by the obligations undertaken by Smith, the original vassal, whatever those obligations may be construed to be. The feu duty was fixed as the price not only of the ground but of the mill built thereon, and the object of the superior was to obtain adequate security for the regular payment of the feu duty. The obligation to maintain and uphold the mill was accordingly made not only a condition of the feu right, but was made part of the *reddendo*, and this *reddendo* was engrossed in the sasine. The conditions on which the land was to be held were thus made patent, so as to bind singular successors infeft in the land, being not only made part of the *reddendo*, but being constituted a real burden. There are many authorities to shew that, in these circumstances, the obligation transmits to singular successors.—*Magistrates of Perth* v. *Stewart*, 13 S. 1100; *Kirkland* v. *Gibson*, 9 S. 596 and 1 D. Sup. 66; *Marquis of Abercorn* v. *Grieve*, 14 S. 168; *Tailors of Aberdeen* v. *Coutts*, 13 S. 226, and 1 Rob. Ap. Ca. 296. The above cases shew that it is not necessary to declare the obligation in express words a real burden, but that it is enough if it is in its nature a real burden. The same law exists in England, for where a purchaser takes with notice of a covenant to use

the land in a particular way, even though that covenant is not one which runs with the land, yet it will be enforced against him.—*Tulk* v. *Moxhay*, 2 Phillips, 774; *Patching* v. *Dubbins*, 1 Kay, 1; *Coles* v. *Sim*, 1 Kay, 56. The obligations of the vassal under a feu contract and a feu charter are entirely the same, except only that in the former case the superior has a more direct remedy against the vassal.—*Hunter* v. *Boog*, 13 S. 205. The rule recently laid down by the House in *Millar* v. *Small*, *ante*, p. 222; 1 Macq. Ap. 345; 25 Sc. Jur. 334; and in *Royal Bank* v. *Gardyne*, *ante*, p. 245; 1 Macq. Ap. 358; 25 Sc. Jur. 399, does not apply to the present case, for a ground annual is not a real right of feudal property, but only a real security for payment, and a transaction between debtor and creditor; and the distinction between a ground annual and a feu contract was recognized in those cases. All that those cases shew is this, that a personal covenant entered into by the vassal still remains in him after he sells the subjects, and that the purchaser is not himself personally liable; but it seems to follow, that the *land* continues still liable. It being clear, therefore, that the respondents are bound by the obligations of Smith, the question comes to be—What was that obligation, viz. the obligation to maintain and uphold the mill? It is well settled in England that a covenant to maintain and uphold a building obliges the covenantor to rebuild in case of accidental fire.—*Bulloch* v. *Dommitt*, 6 T.R. 650; *Digby* v. *Atkinson*, 4 Campb. 275; and that even though there is nothing said about insurance. But when there is also a covenant to insure, the parties clearly must have meant that the premises were to be rebuilt by the vassal, otherwise there would be no meaning in the stipulation. What is so well settled in England seems to be equally applicable to Scotland, for it is a simple matter of construction, and turns on no peculiarity of legal doctrine.

II. *Second or Cross Appeal.*—This appeal brought against us by the respondents was not presented within the statutory period, and is therefore incompetent. It is not in the nature of what is strictly called a cross appeal at all, but is an original appeal, directed against a substantive and independent finding of the Court below, viz. as to expending the £900. The Statute 6 Geo. IV. c. 120, § 25, therefore, is applicable, and peremptorily excludes the appeal.

Sol.-Gen. *Bethell*, and *Anderson* Q.C., for respondents.—1. *First Appeal.*—The defenders do not in any way represent Smith the original feuar, and are in no way connected with him, except that the title, which they took for the purpose of constituting a security over the land, flowed by progress from him. The only ground of liability against us must therefore arise out of the fact of our holding a disposition *ex facie* absolute, and our infeftment thereupon. The obligations in the deed, however, when rightly construed, are conceived in the proper form of personal obligations, and are not constituted real burdens or conditions, and therefore do not affect us as onerous singular successors. The case of the *Tailors of Aberdeen* v. *Coutts* laid down the rule, that to constitute a real burden it must be clearly and unambiguously expressed. It cannot be said that that is so here. Even if the vague expression, "under the declarations, conditions, and others," were held to apply to the obligation to maintain the mill, still it does not clearly set forth that the subject itself and singular successors were to be affected, and not merely the grantee and his heirs. The burden, therefore, lies merely on the party on whom, by its own constitution, it is imposed—that is, on Smith, the original vassal, who is still alive.—*Martin* v. *Patterson*, Mor. Pers. and Real App., No. 5; *Macintyre* v. *Masterton*, 2 S. 664; *Baird's Trustees* v. *Mitchell*, 8 D. 464; 13 D. 982; 22 Sc. Jur. 257. The judgment in the *Tailors of Aberdeen* v. *Coutts* assumes throughout, that if an obligation is not real it does not bind singular successors, and Lord Corehouse says that mere words will not make it a real burden. It is a mistake to say, that the obligation is made part of the *reddendo;* the rent is reserved in the usual way, and the obligation is merely personal. Besides, in this case the Court below proceeded on the old theory of *Millar* v. *Small*, and *Soot's Trustees* v. *Peddie*, a doctrine now exploded by the recent reversal of those cases. The obligation to maintain the mill is in its nature a restriction in the use of the land, and, as such, ought to have been expressed in the clearest language, if intended to overcome the natural presumption operating against it. Neither the obligation to maintain nor to insure, therefore, can be said to be real burdens, and we cannot be bound either to rebuild or to apply the £900 to that purpose. The obligation in a lease to uphold a building has been already decided not to mean that the tenant was to rebuild in the event of a *damnum fatale.*—Hunter on Leases; *Bayne* v. *Walker*, 3 Dow, 233; *York Buildings* v. *Adam*, Mor. 10,127, 1 Elchies, "Reparation, No. 3;" *Swinton* v. *M'Dougall*, 16th Jan. 1810, F.C.; Bell's Dict., "Fire," and references. It is said the case of *Bayne* v. *Walker* was the case of a lease, but a feu is only a perpetual lease, and does not differ except in name.

II. *Second or Cross Appeal.*—Our appeal against that part of the interlocutor unfavourable to us is a cross appeal, and incidental to the original appeal. A cross appeal is necessary where the original appeal addresses itself only to part of the interlocutor, and it is absolutely necessary here, in order to bring the entire question before the House. It is therefore subject to the rule applying to cross appeals, viz. Standing Order, No. 104, which is, that the cross appeal may be presented within a fortnight after the answer to the original appeal has been put in.

Cur. adv. vult.

LORD CHANCELLOR CRANWORTH.—As to the first point in the original appeal, namely, whether the contract entered into with Smith ran with the land, and became binding therefore upon the successive purchasers, all the Judges were clearly of opinion in favour of the pursuer. They all thought it clear that the obligations which were originally entered into by Smith were binding on all who came in through or under him. Upon that point of the case there was no room for any doubt. The law was fully considered in the case of the *Tailors of Aberdeen* v. *Coutts*, 3 Ross L. C. 273. The question there was—whether the parties were bound to maintain a railing round a square which was formed? The purchasers bound themselves to contribute towards the pavement, and to keep the railing in repair, and the question was—whether the purchasers under the original takers were bound by that contract? That case came before this House. It was remitted back to the Court of Session, in order that all the Judges might be consulted upon it, and that the law of Scotland upon that subject might be well considered, and a more able opinion never was framed than that which came up. It was understood to have been written by Lord Corehouse. The opinion was returned by Lords Gillies, Mackenzie, Corehouse and Jeffrey, and the House concurred in their view. The Judges below went into the subject in very great detail. What they say is this :—"To constitute a real burden or condition either in feudal or burgage rights, which is effectual against singular successors, words must be used in the conveyance which clearly express or plainly imply that the subject itself is to be affected, and not the grantee and his heirs alone, and these words must be inserted in the sasine which follows on the conveyance, and of consequence appear upon the record. In the next place, the burden or condition must not be contrary to law, or inconsistent with the nature of the species of property—it must not be useless or vexatious." "If these requisites concur, it is not essential that any *voces signatæ* or technical form of words should be employed. There is no need of a declaration that the obligation is real, that it is *debitum fundi*, that it shall be inserted in all the future infeftments, or that it shall attach to singular successors. It is sufficient if the intention of the parties be clear, reference being had to the nature of the grant, which is often of great importance in ascertaining its import. Neither is it necessary that the obligation should be fenced with an irritant clause," &c. "If the condition is one usually attaching to the land in a feudal or burgage holding—in particular, if it has a *tractus futuri temporis*, or is one of a continuous nature, which cannot be performed, and so extinguished by one act of the disponer or his heirs, words less clear and specific will suffice to create it than when the burden appears to be of a personal nature; for example, the payment of a sum of money once for all, in terms of a family settlement." So they go on to give various *indicia*, which are to shew whether this is meant to be a continuing burden attaching upon the land, or whether it is something which is meant to be done once for all. They mention different instances, and they give them all as *indicia* of the condition coming within the description of having connected with it a *tractus futuri temporis*.

Surely, then, nothing can more clearly indicate perpetual endurance than a contract to maintain and uphold a building. This part of the case does not admit of any doubt. Indeed the Judges below had no doubt about it. It is impossible to suppose that the superior meant to look to any one else than the owner of the lands for the time being as the person who should keep the buildings in repair, or at all events, he certainly intended that the owner should be always liable, whether the original feuar, Smith, and his heirs, should or should not continue liable. On this first point the Judges were unanimous, but on the second point they were divided. Lord Fullerton thought that the condition did impose upon the respondents the duty of rebuilding, but the other Judges concurred with the Lord Ordinary, and held that a loss by fire was a *damnum fatale* to which the condition of keeping in repair did not extend.

Upon the second point, I confess that I am unable to concur upon this point with the majority of the Judges. Construe the words according to their obvious meaning, and there is no doubt about it. That is the interpretation put upon the words in England. Upon this subject it is perhaps almost pedantry to cite authority, where the doctrine is so well known, but I will just refer to two cases, one of which is a very old one, in which the principle is illustrated. The first is a case which occurred during the civil wars. It is *Paradise* v. *Jane*, Alleyn, 26. There the plaintiff declared upon a lease for years, rendering rent at the four usual feasts; and for rent behind for three years ending at the Feast of the Annunciation, 21 Car., he brought his action. The defendant pleaded, that a certain German Prince, by name Prince Rupert, an alien born enemy to the king and kingdom, had invaded the realm with a hostile army of men, and with the same force did enter upon the defendant's possession, and him expelled, and held out of possession from the 19th July, 18 Car., till the Feast of the Annunciation, 21 Car., whereby he could not take the profits: and that was set up as a defence against paying the rent. The plea was resolved to be insufficient, and amongst other reasons this was given :—"It was resolved that the matter of the plea was insufficient, for, though the whole army had been alien enemies, yet he ought to pay his rent. And this difference was taken, that where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. As in the case of waste, if a house be destroyed by tempest

or by enemies, the lessee is excused. So of an escape. So in 9 Ed. III., 16, a *supersedeas* was awarded to the justices, that they should not proceed in a cessavit upon a cesser during the war. But when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident, by inevitable necessity, because he might have provided against it by his contract. And therefore, if the lessee covenant to repair a house, though it be burnt by lightning or thrown down by enemies, yet he ought to repair it."

The case of *Paradise* v. *Jane* is a leading case, and proceeds upon very intelligible grounds. It was followed by a case, also a leading case, viz. *The Earl of Chesterfield* v. *Duke of Bolton*, Comyn R. 627, in which, just in the same way, there was a covenant to keep in repair, and the property was burnt down. *Secondly*, "It was argued the covenant is, he shall keep in repair, not that he shall rebuild, and therefore it could not be the intent of the parties to bind the defendant beyond the common and ordinary repair; and not to make a new house, if by accident, without the defendant's default, it should be burnt or demolished." That was the argument. "*Sed non allocatur*, for when the defendant covenants he will repair and keep in good and sufficient reparation without any exception, this imports that he should in all events repair it, and in case it be burnt or fall down, he must rebuild it, otherwise he doth not keep it in good and sufficient reparation ; and this is warranted by the cases cited, which shew the covenantor must rebuild if necessity require, as where the house is burnt by fire," &c. That was followed by a much more recent case, viz. *Bulloch* v. *Dommitt*, 6 T.R. 650, in the time of Lord Kenyon, and in that case the doctrine was supposed to be so clear that Mr. Baron Wood, then at the bar, declined to argue it.

In this country there can be no doubt upon the question, and it seems very strange that the same words, not being words of art, should have one meaning south of the Tweed and another meaning north of the Tweed. There is no authority in favour of such a proposition. Reliance was placed upon *Bayne* v. *Walker*, 3 Dow, 235, but it was not a case as to the meaning of words by which parties had bound themselves, but a decision as to the law where there had been no express contract. There the question was—Whether a landlord was bound to rebuild a house which had been burnt down ? It was held that he was not, because the obligation was not one which he had entered into by contract, but one which it was endeavoured to cast upon him by law.

It is extremely important to leave parties to use their own language, and then to interpret it according to its natural sense. This induces care and accuracy in its selection. Lord Eldon remarks in that very case of *Bayne* v. *Walker*, that it will be the fault of the individuals themselves if they do not so stipulate in their contracts as to make the judgment of law attach upon their cases, in such manner as they by their covenants may choose that it should attach. I must observe further, that I think there is great force in Lord Fullerton's observations as to the covenant to insure. He says—"This is a contract between superior and vassal, a perpetual feu, and the contingency of the destruction of the subject was contemplated and provided against. The obligation to uphold the building was also perpetual. Its object was to give the superior an effectual security for his feu duty, and for the purpose of preserving that security, there is a clause providing that an insurance of £900 was to be effected. Now I really do not see what is the use of this last obligation unless the mill is rebuilt. There seems to be no obligation to pay over to the superior the sum recovered under the insurance. I think the obligation imports that the vassal is bound to rebuild the mill, and to keep it insured, as an additional security for his ability to perform the leading obligation to rebuild. There is nothing to shew that the superior has any right to the sum in the policy. The leading obligation is the obligation to rebuild. Without it the obligation to insure goes for nothing." That covenant to insure, as Lord Fullerton remarks, would have no meaning or object if the feuar were not liable to rebuild. The covenant to insure in these cases does not impose an obligation to rebuild, it is merely an additional security to the superior, by securing to the feuar the means, to a certain extent, of performing his obligation. Upon that point I may refer to the pithy observation of Lord Ellenborough in *Digby* v. *Atkinson*, 4 Camp. 275—"The covenant to insure was introduced for the security of the landlord, leaving the tenant still absolutely liable on the covenant to repair."

No authority was cited shewing that these words ought not to receive their natural construction, and therefore I think we ought to interpret them according to their *primâ facie* obvious import, and to hold that the respondents are liable to rebuild.

With regard to the cross appeal against Dr. Clark, in so far as the interlocutor related to the sum of £900 insurance, I am clearly of opinion that it is out of time. The Statute of 6 Geo. IV. c. 120, § 25, is decisive. The time allowed is two years, and up to the first fortnight after the commencement of the ensuing session of parliament. I need not go into the details of the dates exactly, but it is quite clear that the cross appeal by the respondents was presented after that time, and there is no exception in the statute as to cross appeals. I must remark, further, that I think this appeal is not in any fair sense a cross appeal—it is an original appeal, which the appellants would probably not have thought it politic to bring but for the other appeal of Dr. Clark; but that does not make it a cross appeal. The standing order to which we have

been referred, No. 104, and which says that every cross appeal shall be lodged within a fortnight after the cases are delivered in answer to the original appeal, cannot enlarge the time positively fixed by act of parliament. The object of the order was to limit, not to enlarge, the time for cross appeals.

What I move, therefore, on the first appeal, is to reverse the interlocutor of the Lord Ordinary and of the Court of Session, and to declare that the respondents are liable to rebuild the mill and other buildings destroyed by fire, and with that declaration remitting the case to the Court of Session, and to dismiss the second appeal with costs.

LORD BROUGHAM said he entirely agreed.

Mr. Rolt asked that the respondents might have the security of the £900 insurance money.

LORD CHANCELLOR.—I have nothing to say to that. All I can say is, that upon the first appeal the interlocutors will be reversed, with a declaration that the respondents are bound to rebuild; and that the second appeal will be dismissed with costs. I had better say nothing about the £900. The stipulation about the £900, as Lord Ellenborough remarked, was only that the tenant might have the means of performing his other covenant.

First appeal—*Interlocutor reversed with a declaration, and cause remitted.*

Second Appeal—*Dismissed with costs.*

Deans and Rogers, *Appellant's Solicitors.*—Richardson, Loch and Maclaurin, *Respondents' Solicitors.*

AUGUST 11, 1854.

JEREMIAH BORROWS and Co., *Appellants*, *v.* J. C. COLQUHOUN and ANOTHER, *Respondents.*

Landlord and Tenant—Lease excluding Assignees—Bankruptcy of Tenant—Colourable Title of Possession—Interdict—Process—*B, a tenant of a coal mine under a lease which excluded "subtenants, assignees and creditors," except with consent of the landlord, was sequestrated during its currency. A the landlord refused to admit the trustee, and B continued in possession, paying rent in his own name. B afterwards assumed a partner who advanced capital, and they worked the mine under the style of B and Co. They paid the rent half-yearly to A's factor, who gave them receipts bearing to be for rent of the colliery, "as due by B and Co." B and Co. so continued in possession about two years, when A and the trustee on B's estate presented a joint petition to the Sheriff for summary interdict to remove B and Co. between terms.*

HELD (reversing judgment), *That A had so recognized the possession of B and Co., that he could not question their title by interdict, whatever other remedy he might have, and that it made no difference that B's trustee joined in the petition.*[1]

Jeremiah Borrows, one of the appellants, became tenant of a coal pit in the lands of Dryflat, belonging to J. C. Colquhoun, under missives of lease, dated Oct. 1843, the endurance of the lease to be 14 years. There was an express stipulation excluding subtenants, assignees and creditors, unless with the consent of the landlord.

On 24th Feb. 1848 the estates of Borrows were sequestrated. The landlord at first declined to relinquish his right of excluding the trustee from taking possession of the subjects, and Borrows remained in possession from the date of his sequestration in 1848 until February 1850. On 19th Feb. 1850 the trustee on the sequestrated estate entered into a written agreement with the landlord, whereby the former renounced the lease to the landlord as from that date. That agreement contained this narrative :—"And whereas the said lease contained a clause excluding assignees, subtenants and creditors, which exclusion the landlord declined to relinquish, wherefore the bankrupt continued the using of the engine, machinery, and colliery utensils, and the working of the coal after the sequestration, by sufferance of the trustee and the creditors : And whereas a considerable amount of arrear of rent was owing at the date of the sequestration, and the rent of the first half of the current year has also fallen into arrear, although some payments were made to the landlord by or on behalf of the bankrupt, for or to account of rents falling due on and after 15th July 1848, being the first term after the sequestration, under reservation of the claim for prior arrears," &c.

Previous to the date of this agreement, viz. in Dec. 1848, Borrows had taken into partnership

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[1] See previous report 14 D. 791; 24 Sc. Jur. 443. S.C. 1 Macq. Ap. 691 : 26 Sc. Jur. 641.