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.

Arthur Connor, who was to advance capital and to have half the profits of the working of the mine. They traded under the style of Borrows and Co., and had continued to pay the rent regularly every half-year to the factor of Mr. Colquhoun. The receipts were in the following terms :—

"*Killermont*, 11*th Aug.* 1848.—Received from Mr. Arthur Connor, on account of J. Borrows, the sum of £50, as the half-year's fixed rent of Dryflat Colliery, due on the 15th July last, reserving prior arrears.

(Signed) ROBERT BROWN."

"*7th Feb.* 1849.—Received from A. Connor £50, being payment of the half-year's rent of Dryflat Colliery up to 15th Jan. last, as due by *J. Borrows & Co.* ROBERT BROWN."

The other receipts were in the same terms, being all for rent "as due by Jeremiah Borrows and Co."

Simultaneously with the agreement between the trustee and the landlord, viz. in Feb. 1850, these two parties joined in presenting a petition to the Sheriff, "to prohibit, interdict and discharge" Borrows and Connor, and all and sundry their servants, from intromitting with or using the machinery or minerals, and to turn them out of the premises.

The Sheriff-substitute appointed a copy of the petition to be served upon Borrows and Co., ordaining them to lodge answers in three days, "and in the meantime granted interdict as craved, till the future orders of the Court." Borrows and Co. were thus at once ejected. The Sheriff refused to recall the interim interdict. Borrows and Co. then advocated the cause to the Court of Session, and prayed for a recall of the interim interdict. A record was made up in the Court of Session on that question, but no record was made up on the merits.

The Lord Ordinary (Cowan) recalled the interlocutor of the Sheriff, and dismissed the petition for interdict, "as an illegal and incompetent interference with the actual possession of the premises at the time of its presentation." The Second Division, however, repelled the reasons of advocation, remitted the cause to the Sheriff, with instructions to grant the prayer of the petition, and to declare the interdict perpetual. Borrows and Co. now appealed against their interlocutor.

The appellants, in their *printed case*, contended for a reversal on these grounds :—"1. Because the tenant, though bankrupt, was entitled to continue in possession of the subjects under the lease, provided he paid the rent regularly, and performed the other stipulations in the contract. 2. There was, at least, a yearly tenancy established, and the landlord and trustee were not entitled to eject the appellants summarily during the currency of a term. 3. The summary application for interdict was an incompetent procedure, and the interim interdict was an illegal, unwarranted interference with the possession of the premises."

The respondents relied on these grounds :—"1. By the sequestration of Borrows, the lease of the Dryflat Colliery, and the whole machinery and utensils therein, belonging to him, were transferred to and vested in the trustee, and the trustee was entitled to dispose of them with the consent of Mr. Colquhoun, the proprietor, without any interference on the part of the appellants. 2. The appellants never having obtained any assignation or other legal title to the written lease of the colliery, or to the machinery, had no right to use or interfere with these subjects in any way, and after the arrangement entered into in Feb. 1850, whereby the lease was renounced, and the machinery made over to the proprietor, the respondents were entitled to an interdict against the appellants in the terms prayed for in the original petition."

Sol.-Gen. Sir R. Bethell, and *Rolt* Q.C., for appellants.

The Scotch Sequestration Act 2 and 3 Vict. c. 41 passes to the trustee only what the bankrupt could himself transfer, and this lease, therefore, did not pass to the trustee.—1 Bell's Com. 77, 81 ; 2 Hunter L. & T. 542, 6 ; *Duke of Buccleugh* v. *Elliot*, M. 10,329 ; *Cuninghame* v. *Hamilton*, M. 10,410 ; *Crauford* v. *Maxwell*, M. 15,307 ; *Roberts* v. *Wallace*, 5 D. 760. The bankruptcy did not destroy the bankrupt's right to the lease.—*Crauford* v. *Maxwell, supra ; Taylor* v. *Fairlie's Trustees*, 6 W.S. 301. But whatever may have been the effect of the sequestration, and whether it put an end to the lease or not, it was clear that the landlord here consented to allow the bankrupt to continue in possession. This appears from the terms of the receipts for rent during the two years following the sequestration. Those receipts bear that the rent received was "the rent due for the colliery by Borrows and Co." The landlord thus, in the most express manner, recognized the possession not only of Borrows, but of a third person, viz. Connor, his partner. That of itself amounts to homologation, and the landlord could not challenge the bankrupt's right of possession during the residue of the lease.—*Maule* v. *Robb*, Hume's Dec. 835 ; *Robb* v. *M'Tier*, *ibid.* But, at all events, it clearly amounted to tacit relocation for a year. It is well established that the receipt of rent created, or rather implied, a yearly tenancy.

[LORD CHANCELLOR.—There may be tacit location as well as tacit relocation.]

The landlord accordingly could not put an end to the tenancy except in the usual and legal way. It is therefore absurd to say that there was no colour of title under which Borrows and Co. held

possession. A proceeding by summary interdict was accordingly entirely incompetent. *Fife Ferry Trustees* v. *Magistrates of Dysart*, 6 S. 265 ; *Dunoon Presbytery* v. *Campbell*, 6 D. 1262 ; *Blackburn* v. *Finlay*, 10 D. 598. That extraordinary remedy is in its very nature confined to cases where the usual processes of the law would be too slow to prevent remediless injury during the judicial inquiry. But there was no pretence for saying that any such injury would be done by our continuing in possession. The landlord did not allege that we were dismantling the colliery. The landlord might have brought his action of removing, but he had no right, by the law either of Scotland or of any civilized country, to turn the tenants out at a moment's notice in such circumstances. Even if we had paid a week's rent, we could not be thus summarily ejected. The Lord Ordinary, therefore, took the right view of this case when he dismissed the petition of interdict ; and the interlocutor of the Second Division ought to be reversed.

R. Palmer Q.C., and *Anderson* Q C., for respondents.—The effect of the sequestration was to transfer to the trustee all the right and title which Borrows had to the lease and machinery. The authorities cited by the other side to the contrary refer to notour bankruptcy, which is quite distinct from sequestration under the statute. Borrows could thus derive no benefit from the lease, for all that he had or could acquire vested in the trustee. As against the trustee, therefore, Borrows had no title to the lease, and the trustee could, at a moment's notice, interdict him from intromitting with the materials. All that Borrows did was the result of mere sufferance on the part of the trustee, such as often happens during the interval that elapses before a trustee can advantageously sell the bankrupt's interest in the subjects. As Borrows, therefore, had no right in his own person, he could assign or communicate none to Connor or any other person. Nor did the landlord ever grant any new lease to Borrows. As Borrows, therefore, lost all right in the old lease, and obtained no new lease, he had no colourable title of possession. It was said the receipts recognized his title, but that is an extravagant inference, and it has never been held that such expressions in a receipt amount to a formal assignation of the lease. Such a title would obviously be too slender to ground upon.—*Maxwell* v. *Grierson*, Hume's Dec. 849 ; *Campbell* v. *Robertson*, *ibid.* Besides, the receipts were not granted by the landlord, and there is nothing to shew that he ever was aware of them.

Cur. adv. vult.

LORD CHANCELLOR CRANWORTH.—After considering this case with a good deal of attention, I have come to the conclusion, that the view taken of it by the Lord Ordinary was right, and that the decision of the Inner House was erroneous. The Lord Ordinary, in the very careful and useful note appended to his interlocutor, thus lays down the law :—" Where 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 recognizes 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 this enunciation of the law is expressly approved of by the Judges of the Inner House, but they say that it is not applicable to this case, because there was no colour of title in Borrows and Connor, who had merely possession as the servants of the trustee. That, however, I consider an entirely erroneous opinion. At the date of the sequestration Borrows was in the condition of a party who had assigned to his trustee. The landlord, by the express terms of the contract, was not bound to accept the trustee ; in fact, he refused to do so. Borrows was permitted both by the landlord and the trustee to remain in possession for two years. The sequestration took place in February 1848, and the next rent, which became due on the 15th July following, was paid to Mr. Brown, the agent for Mr. Colquhoun, and a receipt was given in these words—(reads receipt of 11th Aug. 1848).

Before the next rent became due, which would be on 15th January 1849, a contract of copartnership was entered into between Borrows and Connor, who was his brother in law. The terms of that partnership are not material, but it was a partnership by which Connor agreed to furnish capital for the purpose of working the mines, and those two parties were to work them in partnership together. It is not necessary to go into the question, how far it was competent to the bankrupt to do this, so as to gain any benefit to himself at the expense of the trustee under the sequestration. Probably it was not competent for him to do so ; but, in point of fact, he did enter into the contract with Connor, who being a wealthy man, was to supply the capital, and the mine was to be worked by them for their joint interest, according to the terms of their stipulation. Accordingly, when the next half year's rent became due on the 15th January 1849, Connor paid that rent on account of himself and his partner, and he took a receipt from Mr.

Brown, the agent of Mr. Colquhoun, in these terms—(reads receipt, dated 7th Feb. 1849). So in the very same way the rent which accrued on 15th July 1849 was paid—not all in one payment, as they seem to have been in difficulty at the time, but in two payments, making altogether £46, the balance being allowed for deductions. In that, as in the former instance, they obtained a receipt from the agent of Mr. Colquhoun, the money being paid by Connor "as due by Jeremiah Borrows and Co." These receipts were given on five different occasions. Now it may be that the partnership was void as against the trustee under the sequestration, or it may be that all profits made would be for the benefit of the trustee, but the fact undoubtedly was, 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, therefore, that this gave a title of possession against the landlord, which could not be questioned by interdict.

It was objected by the counsel for the respondents, that there was no proof of this partnership, or of their tenancy or occupation having ever been recognized by Mr. Colquhoun, inasmuch as the payment had been made only to his factor or agent. But, in my opinion, it would be a very dangerous doctrine to hold that gentlemen absenting themselves from their property, and leaving an agent to manage in their stead, are not to be bound by their acts in a transaction of so ordinary a nature as this. Such a remark is all the more applicable in the present case, especially when it is found that Mr. Colquhoun has in the strongest way recognized the same party as his agent in this matter; for the very petition to the Sheriff in February 1850 was signed, not by Mr. Colquhoun himself, but by his factor, who was authorized to bind him—the same factor who signed the receipts.

It is obvious from the passage read from the Lord Ordinary's note, that an interdict in Scotland is very analogous to an English injunction. If the landlord could not remove the tenant by that kind of process, as I think he clearly could not, it appears to me that the union of the trustee with him could make no difference. Supposing Borrows, instead of working the mine, which he had held since the bankruptcy, had got possession by contracting with the 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 instance of the trustee. In this case I think the Judges below have not given sufficient weight to the recognized possession of Borrows and Co. It may be that they have no title to resist an action of removing, and that they are accountable to the trustee for all the profits; but that is not the question. The question is, whether, in such a case as this, the tenant can properly be removed by interdict? I entirely agree with the view taken by the Lord Ordinary, that the tenant could not be so removed; and I accordingly move your Lordships to reverse the interlocutor of the Court of Session, and affirm that of the Lord Ordinary.

I may mention that LORD BROUGHAM, who was present during the argument in this case, and has read the notes I drew up for my own guidance, requested me to intimate his full concurrence in these observations.

Interlocutor of Inner House reversed; and that of the Lord Ordinary affirmed.

Robertson and Simson, *Appellants' Solicitors.*—Richardson, Loch and Maclaurin, *Respondents' Solicitors.*

AUGUST 11, 1854.

KING'S COLLEGE OF ABERDEEN, *Appellants*, v. LADY JAMES HAY and HUSBAND, *Respondents.*

Feu Charter—Bond of the Vassal for Feu Duty—Perpetual Obligation—Feudal Relation—Construction—*A bought lands for a certain feu duty from B at a public roup, and, in terms of the articles, gave a bond, binding himself, "A his heirs, executors and successors," to pay the said feu duty for ever. C joined as cautioner for A, but binding himself only for ten years. The bond bore to be in pursuance of the articles of roup. B afterwards granted a feu charter to A, which narrated the granting of the bond, and bore to be in implement of the articles of roup, and A was duly infeft under this charter.*

HELD (reversing judgment), *That A and his general representatives continued liable for ever for the payment of the feu duty, notwithstanding their alienation of the feu.*[1]

The appellants, the King's College of Aberdeen, on 28th May 1818, being heritable pro-

[1] See previous report 14 D. 675; 24 Sc. Jur. 342. S. C. 1 Macq. Ap. 526: 26 Sc. Jur. 643.