

persons and companies, and the meaning of the section is that the representative of the creditor is to be put into immediate possession of property to which the company has a substantial right, reserving if necessary all preferential claims which may affect it.

The Lord Ordinary has reserved to Mr Donald his claim, and to the liquidator his answers, and it does not appear to me that Mr Donald's right of retention, if he has such a right, is in any way prejudiced by the order which the Lord Ordinary has pronounced.

On the other hand, I am unable to accept the argument founded on the 11th section of the agreement to the effect that in the event that has occurred Mr Donald was entitled to be retrocessed. I do not read this section as contemplating the case of a creditor's liquidation at all, and if it had, I should have had the very gravest doubt whether an undertaking of this kind could stand, because I cannot conceive that it is in the power of the parties to an agreement to provide that in case of insolvency the property of one of them shall be passed to the other for the purpose of preventing its being distributed amongst creditors.

For these reasons I am also of opinion that the Lord Ordinary's interlocutor should be affirmed.

LORD KINNEAR was absent.

The Court adhered.

Counsel for the Petitioner—H. Johnston—Burnett. Agents—Carmichael & Miller, W.S.

Counsel for the Respondent—Vary Campbell—Macaulay Smith. Agents—Kirk, Mackie, & Elliot, S.S.C.

Thursday, November 16.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.]

THE MARQUESS OF BREADALBANE
v. J. WHITEHEAD & SONS AND
OTHERS.

Landlord and Tenant—Lease—Exclusion of Assignees except with Consent of Landlord—Right of Landlord.

A landlord let a granite quarry to a company. The lease expressly excluded assignees, legal or conventional. The company having gone into liquidation, the landlord wrote to the liquidators, whom he had permitted to continue the company's possession, intimating that he was willing to consent to the lease being sold, but on the condition, *inter alia*, that the assignee must be a person approved by him. The liquidators thereafter sold the lease and granted an assignation to the purchasers, but the landlord refused to accept them as tenants.

In an action by the landlord for reduction of the lease and removal of the assignees who had entered into possession, the latter averred that the sole reason of the landlord's refusal to accept them as tenants was that he had come under an obligation to grant a lease to another party.

Held that the defence was irrelevant, in respect that the landlord was entitled under the lease to withhold his consent without assigning any reason, and that he had not surrendered his right by his letter.

Duke of Portland v. Baird & Company, November 9, 1865, 5 Macph. 10, followed.

Opinion (by Lord M'Laren) that after consenting to a sale of the lease the landlord was bound to consider the qualifications of any tenant who might be presented, and that an averment that he had granted a lease to another party without awaiting the result of the sale would have been a relevant defence to the action.

By lease dated 11th and 25th May 1885 the Marquess of Breadalbane let a granite quarry, of which he was the proprietor, to the Ben Cruachan Granite Company, Limited, "but expressly excluding (except with the consent of the proprietor in writing) assignees, legal or conventional, and sub-tenants, also creditors or managers for creditors in any way or shape (including liquidators)." . . . The lease was to endure for twenty years.

On 7th January 1892 the company went into liquidation, and liquidators were appointed. With the consent of the Marquess the liquidators remained in possession of the subjects let until March 1893. On the 11th of that month Messrs Davidson & Syme, the agents of the Marquess of Breadalbane, wrote to the liquidators that "while his Lordship is willing to consent to the lease being sold, it must be on the conditions which we are now to state—1, The assignee must be a person approved by him or his factor, and the assignee must, of course, undertake the whole obligations and conditions of the lease. . . . On 15th March 1893 the liquidators exposed their whole right and interest under the lease for sale, and it was purchased by J. Whitehead & Sons, to whom the liquidators granted an assignation of the lease dated 30th April and 1st May. The Marquess of Breadalbane refused thereafter to approve of the assignees or consent to a transfer of the lease to them, but nevertheless they entered into possession of the quarry, and asserted a right to continue working it.

The Marquess of Breadalbane accordingly raised the present action against the Ben Cruachan Company and its liquidators, and also against J. Whitehead & Sons, for reduction of the assignation, and for decree of removing against Whitehead & Sons.

He averred that he had rejected Whitehead & Sons as tenants after inquiry and consideration.

The defenders J. Whitehead & Sons made averments to the following effect:—

The letter of 11th March had been obtained by the liquidators and granted by the pursuer's agent in view of the intended sale of the lease, and for the special purpose of securing that the pursuer would not reject as a tenant any suitable party who might purchase the lease. The lease had been exposed for sale and bought on that footing. The assignees were most eligible tenants. The pursuer's refusal to accept them (Stat. 7) "was most unjust, and was a gross abuse of any right of removal reserved to him under the said letter to the liquidators of 11th March. In refusing to recognise these defenders as assignees the pursuer is acting in fraud of his arrangement with the liquidators embodied in the said letter, and in bad faith towards these defenders. The true reason of the pursuer's refusal is that he has come under some obligation to give a lease of the quarry to Mr Anderson or his nominees. It is solely for the purpose of implementing this obligation that the pursuer is unfairly and unreasonably withholding his approval of the assignees tendered by the liquidators."

The pursuer pleaded, *inter alia*—"(1) The assignation set forth in the summons ought to be reduced, in respect that it was granted without the approval of the pursuer having been obtained to the assignee named therein. (2) The pursuer having signified his disapproval of the assignee named in the said deed, and the defenders J. Whitehead & Sons having intimated their intention to maintain their rights thereunder, decree ought to be granted in terms of the conclusions of the summons. (4) The defenders' statements are irrelevant and insufficient to support their pleas."

Both defenders pleaded that the pursuer's averments were irrelevant, and that the defender by his actings was barred from insisting in the action.

The defenders J. Whitehead & Son further pleaded—"(2) These defenders are entitled to absolvitor, in respect . . . (b) that under the said letter of 11th March the pursuer is not entitled to reject capriciously, as assignees of the said lease, the defenders, who purchased the lease on the faith of the said letter. (c) That in refusing to give his approval to the said assignation in favour of these defenders the pursuer is acting in bad faith and in fraud of his arrangement with the liquidators."

On 11th September 1893 the Lord Ordinary (KYLACHY), before answer, allowed parties a proof of their respective averments, and to the pursuer a conjunct probation.

"*Note.*—The Lord Ordinary has had difficulty in this case, and has hesitated a good deal about allowing a proof. He is not prepared to hold that the pursuer was bound, under the terms of his agents' letter, to assign reasons for his disapproval of the assignees, or to enter into the question whether those reasons were good or bad. But the Lord Ordinary thinks that he was bound to consider the assignees on their merits, and to accept or reject them according to his honest opinion as to their suitability; and the question really is, whether

the defenders' averments do not (whether well or ill founded) come to this; that the pursuer did not so proceed, but rejected the defenders simply because he had come under engagements to another applicant. The Lord Ordinary thinks that the defenders' averments may be so read; and being so, that they at least raise a question which it is not desirable to decide without knowing the facts. He has therefore allowed a proof before answer."

The pursuer reclaimed, and argued—There was no necessity of proof. Under the lease the landlord was entitled to reject the assignees capriciously if he liked, and without assigning a reason—*Duke of Portland v. Baird & Company*, November 9, 1865, 4 Macph. 10; *Muir v. Wilson*, January 20, 1820, F.C., Bell on Leases i. 181. He had the same right under the letter of 11th March. The case of *Wight v. Earl of Hopetown* was not a case of proper tenancy, and did not conflict with the *Duke of Portland's* case—*per* Lord Justice-Clerk in *Duke of Portland v. Baird & Company*, 4 Macph. 19.

The defenders argued—The letter of 11th March barred the pursuer from taking up the position he now did. He thereby undertook to accept the purchaser of the lease as tenant unless there was some good reason to the contrary, and the assignees were most eligible as tenants. The position he now took up was practically to refuse to consent to any assignation of the lease. It was not clear that even under the lease he had any such right in law. The decision in the *Duke of Portland's* case was at variance with the judgment in *Wight v. Earl of Hopetown*, February 9, 1855, 17 D. 364. In averring that the landlord's refusal to accept the assignees was not due to any *bona fide* disapproval of them as tenants the defenders had stated a relevant case for proof—*Howldsworth v. Brand's Trustees*, May 18, 1875, 2 R. 683, esp. *per* Lord Ormidale, p. 694.

At advising—

LORD PRESIDENT—I do not think that the Lord Ordinary's judgment can stand.

The action is one to remove from the occupancy of the quarry the Messrs Whitehead, the principal defenders in the action, and they in defence claim right to retain the tenancy under a lease which expressly excludes assignees except with the consent of the proprietor in writing.

Now, it was conceded by counsel who opened the case for the defenders that if the question stood upon the lease alone, it would be impossible to maintain their contention looking to the decision in the case of the *Duke of Portland v. Baird*. But then it was said that the defenders, the Messrs Whitehead, are entitled to defend their possession on the ground that Lord Breadalbane, the landlord under the lease, has taken up a less strong position by the letter of 11th March 1893. In that letter—his original tenants having gone into liquidation—his Lordship's agent said that while he "is willing to consent to the lease being sold, it must be on the conditions which we

are now to state—(1) The assignee must be a person approved by him or his factor, and the assignee must of course undertake to implement the whole obligations and conditions of the lease.”

Now, I cannot say that that materially alters the position of matters from what it would be under the lease itself—that is to say, I think that the right of the landlord in a question of approving or disapproving of an assignee stands under this letter just as it would have done under the original lease. It is to be noted that the occasion of the letter and the rest of its contents make it sufficiently plain that Lord Breadalbane is here referring to the lease as it stood; but even suppose this condition to be read as, in terms, something separate from the lease, I do not think that in quality it differs from the various clauses as to approval of assignees which are discussed by the Lord President in the case of the *Duke of Portland*.

Now, the law laid down in that case is certainly very distinct, and my objection to the Lord Ordinary's interlocutor is this—that I do not think his Lordship's interlocutor and note can be reconciled with the law as settled in the case. It is true that the condition in the *Duke of Portland's* case was a condition where assignees generally required to be approved of or consented to by the landlord, but the whole tenor of the judicial observations there, taken in connection with the passage in Mr Bell's Commentaries, to which reference is made by the Lord President, seems to show plainly enough that a variance in phrase will not affect the substance of the matter, and that in whatever form the thing is referred to the decision of the landlord, his approval is to be given or withheld according to his arbitrary wish.

That is laid down in such extremely distinct terms in several passages in the Lord President's judgment which have been read from the bar, that I do not think it necessary further to emphasise it. But in a matter of this kind it is certainly of great importance that we should adhere to a decision which puts in peremptory and intelligible terms the rule of law which is applicable to cases of the kind, and which will not be altered by some unimportant variation of expression.

Now, in the present case there can be no doubt of this fact that the present defenders are not approved by the landlord, and the question I put again is, what is their title to hold under this lease? Neither under the lease nor under the letter do they meet the condition under which alone an assignee can maintain right to hold the subjects, and that is that he is approved by the landlord.

Now, what is said in the record by the defenders as to the position of the landlord? They say it is very bad of him not to approve of the tenant; that the liquidator proceeded to sell the subjects on the footing that he would present an eligible tenant, and that he has presented such an one. I am perfectly willing to accept unreservedly all that can be said in praise of

the defenders. I take the view that Lord Breadalbane, for reasons good or bad, unconnected with the status or responsibility of these gentlemen, does not want them, but prefers somebody else; and I ask, how does the fact that they have been the highest bidders at the sale, but are not approved by him, put them in the position of being in the sense of this lease tenants approved by the landlord? It may be that the liquidators who entered into this bargain may have some cause of complaint against the landlord. Of that I say nothing. We have nothing to do with it, but with the question merely whether the defenders, who claim possession of this quarry, are entitled to it under the lease and this letter, and I say they do not possess the essential qualification, viz., of being assignees approved by Lord Breadalbane. Therefore it seems to me that the Lord Ordinary's judgment cannot stand. His Lordship thinks that Lord Breadalbane “was bound to consider the assignees on their merits, and to accept or reject them according to his honest opinion as to their suitability.”

Now, can that be said after the decision in the *Duke of Portland's* case to represent the law? It seems to me to be a revival of the doctrine which the Lord President in that case pronounced to be finally exploded, viz., the doctrine that the landlord was not entitled arbitrarily and out of mere caprice to withhold his consent. If I am right in thinking that that *dictum* of the Lord President's applies to a case where the landlord has reserved right to approve or disapprove as regards the individual presented to him, as well as on the general question of assignment, then it is plain that the Lord Ordinary's judgment is not reconcileable with the settled law upon the subject.

The subject-matter of proof, the Lord Ordinary says, would be whether Lord Breadalbane “rejected the defenders simply because he had come under engagements to another applicant.” I cannot see how the result of that proof, one way or other, would put the Messrs Whitehead into the position of being approved by Lord Breadalbane.

Accordingly I think the action against them for reduction and removing must prevail.

LORD ADAM—I am of the same opinion. The question is, whether the Messrs Whitehead have a good title to retain possession of these quarries? They plead their possession under the assignation, but no assignation in their favour can be a valid or good title of possession unless they can show that it has the approval of the landlord.

As matters stood under the original lease assignees were expressly excluded, but in the letter on which the defenders found the expression is that the assignees must be approved by the landlord. It was put to us by Mr Johnston that if we were called upon to construe the meaning of this expression for the first time, we would probably come to the conclusion that the

landlord is bound to consider and reject the assignees on their merits under a lease expressed in such terms, and that the landlord would not have a right capriciously to reject such an assignee, but would be bound to give his reasons for so doing. That may be so—I do not say that it is—but the answer is that the parties to that lease did not come to consider it for the first time. No doubt Lord Breadalbane was advised as to the meaning of the expression as determined by previous decisions.

Now, I agree with your Lordship that it is not to be questioned in our law that where you have an exclusion of assignees except with the consent of the landlord, that gives him an absolute right to reject without reason assigned the person tendered to him.

I agree with your Lordship that Lord Breadalbane did not mean to make any difference in his powers in the matter by using a different expression in the letter from what was used in the lease, because to my mind they mean the same thing.

It seems to me that where an assignee must be a person approved by the landlord that is tantamount to an express exclusion of assignees. What is the difference, where a landlord is bound to give no reason for non-approval, between saying that assignees are excluded and saying that it shall be with the consent of the landlord? The one means exactly the same as the other.

Even assuming that by refusing or by not considering these proposed assignees, the landlord may have been guilty of breach of contract with the liquidators of the company, and may be responsible to them in damages, I cannot see how that can entitle these assignees to say that they have his consent and approval.

LORD M'LAREN—I am unwilling to disturb an interlocutor of the Lord Ordinary allowing proof where he has felt that further inquiry is necessary, but in this case it appears to me that a relevant case for reduction has been stated by Lord Breadalbane which entitles him to decree unless met by a proper counter-case, and that no relevant counter-case has been stated. In other words, if all the defender's averments were admitted or proved, they would not avail to obviate the conclusions of the action. The case for the proprietor is that under the lease of the Ben Cruachan Granite Quarries he accepted the tenants as personally bound in terms which are very distinctly expressed, viz., assignees are expressly excluded except with the proprietor's consent and approval. The company having gone into liquidation, the proprietor gave a qualified assent to a sale subject to his approval of the purchaser. The purchaser not having obtained his approval, the proprietor desires that the lease should be reduced and the possession terminated. Now, the right of a tenant under this lease was a right to assign entirely dependent on the pleasure of the landlord. When the liquidator appointed Lord Breadalbane and applied for permission to sell, his Lordship could have said—"I object to you

selling on any conditions; I do not intend that the property should go to your assignee, as I mean to look out for a tenant for myself." That was his legal position, because I think the result of the *Duke of Portland's* case is that where an exclusion of assignees is qualified by the expression "except with the approval of the landlord," the reference to the approval of the landlord has no legal effect at all. Of course even where assignees are in terms excluded, it is always open to the landlord on the tenant's application to accept an assignee, and this is all the right which a tenant has under a reference to the landlord's consent or approval, because the landlord is not bound to give his reasons for withholding his approval, nor does it appear to me that he need have any reasons.

But then I am not quite prepared to apply that strict rule of construction to an undertaking given by the landlord or those representing him when the matter passes into the sphere of negotiation. In this case the landlord has not taken up the extreme position that he would give no consent to an assignee. On the contrary, the letter of Lord Breadalbane's agent, which is founded on in the pursuer's fourth condescendence, and which is printed elsewhere, states that Lord Breadalbane is willing that the creditors should take some benefit by the sale of the lease, but that the sale must be subject to certain conditions, one of which is that the selection of a purchaser is to be subject to his approval.

Now, I do not think that it was open to the pursuer, after having authorised that letter, to stop the sale by saying, "I have changed my mind, and give you notice that I shall not consent to any sale." I think the right of the liquidator under that letter was a right to sell on the chance that the purchaser would be approved, and that the landlord came under a corresponding obligation to consider any name that might be submitted to him. I do not say that he was bound to give his reason any more than he would be in the ordinary case, but to my mind there is a distinction between the two cases, because, having agreed to a sale for the benefit of the creditors, I think that Lord Breadalbane could not refuse at least to consider the qualification as tenant of any nominee who might be proposed by the liquidator.

Now, the reason why I have gone over the points of the case, following very much the line of illustration which your Lordships have taken, is that if, as was suggested at the bar, Lord Breadalbane, after authorising the letter of 11th March, had gone and let the property to another tenant without awaiting the result of the sale, I should have thought there was here a relevant case for inquiry, because I think the pursuer would not have been within his legal rights if by assigning to another he had disabled himself from giving fair consideration to the claim of the purchaser from the liquidator. But then I do not find any statement raising a defence of this kind within the defenders'

case. In answer to an inquiry as to the ground of defence in this relation, we were referred to statement 7 of the defences—"The true reason of the pursuer's refusal is this, that he has come under some obligation to give a lease of the quarry to Mr Anderson or his nominees." Now, I think that averment quite consistent with this meaning, that, having considered the sale to the Messrs Whitehead and rejected it, Lord Breadalbane came under an obligation to Mr Anderson, and of course, if that is the meaning of the statement, it is no defence to this action. If it had been intended to make such a case, as according to my suggestion would be a good answer, viz., that the landlord had disabled himself from giving his consent, I think it was incumbent upon the defenders to make this quite clear, and to put the facts before us so far as they had come to their knowledge.

For these reasons, which are in all essential respects identical with those of your Lordships, I think the interlocutor should be recalled, and decree given in terms of the conclusions of the summons. I give no opinion as to what right the liquidator may have with reference to any possible future sale, because that case is not before us.

LORD KINNEAR was absent.

The Court recalled the Lord Ordinary's judgment and granted decree of reduction and removing as craved.

Counsel for the Pursuer—W. Campbell—Ure. Agents—Davidson & Syme, W.S.

Counsel for the Defenders The Ben Cruachan Granite Company, Limited—Guthrie. Agent—Alexander Morison, S.S.C.

Counsel for the Defenders J. Whitehead & Sons—H. Johnston—Wilson. Agent—R. C. Gray, S.S.C.

Tuesday, November 21.

SECOND DIVISION.

[Lord Kincairney, Ordinary.]

MACDOUGALL v. M'NAB.

Bank—Bank Cheque—Acceptance of Cheque as Equivalent to Cash—Reparation—Wrongous Use of Diligence.

A, residing in Glasgow, held a decree against B, residing at Innellan, and employed C, a solicitor in Glasgow, to recover its amount. C caused a charge to be given to B, which expired on 29th December 1892, and on that day C intimated to B that a poiding would be executed unless payment was made on the 30th.

On 31st December C instructed a sheriff-officer to poid the furniture in B's house.

On 3rd January 1893 C received from B, in a letter dated 31st December, a crossed cheque for the amount of the

debt, but on inquiry he found that there were no funds in the bank to meet it. He telegraphed to that effect to B, and returned the cheque to B by letter on the same day, intimating that there were no funds. His letter was crossed by a letter from B, received by C on the afternoon of 3rd January, explaining why no funds had been provided for the cheque, and requesting that the cheque should be held over until the next day, the 4th, when funds would be provided. This letter C acknowledged.

On 4th January B by letter returned the cheque to C, and requested that he should again present it at the bank. Before 2 p.m. this letter was delivered at C's office, and about that hour his clerk ascertained that there were funds in the bank to meet the cheque. C was absent from the office from one to five o'clock, but on his return at five o'clock he was informed by his clerk of what had happened.

On 5th January, between 10 and 11 a.m., C sent the cheque to his bank with a request that it should be presented specially at B's bank. In compliance with that request it was presented about eleven o'clock and paid. The officials of C's bank did not inform C of the payment till two o'clock, and C then wrote the sheriff-officer intimating the settlement, and desiring that the decree should be returned, but the poiding had been executed at B's house at one o'clock of that day.

In an action of damages by B against C and A for wrongous poiding, the Court *assolzie*d the defenders, in respect that C was entitled to wait until he got money for the debt before staying proceedings, and that he had not on 4th January accepted the cheque as equivalent to cash.

Richard M'Nab, residing in Glasgow, obtained in the Sheriff Court at Glasgow a decree against Robert Macdougall, residing at Innellan, for £40, and employed T. C. Young, writer, Glasgow, to recover the amount. The latter caused a charge to be given to Mr Macdougall. The charge expired on 29th December 1892, and on that date Mr Young intimated to Mr Macdougall that a poiding would be executed unless payment was made on the following day.

On 31st December Mr Young instructed W. Warner, sheriff-officer, to poid the furniture in Mr Macdougall's house, situated about a mile and three-quarters from Dunoon.

On 3rd January 1893 Mr Young received from Mr Macdougall a letter dated 31st December 1892, enclosing a crossed cheque on the British Linen Company's Bank for the amount of the debt, but he was informed on inquiry that there were no funds in that bank to meet the cheque. He telegraphed to that effect to Mr Macdougall, and on the same day he returned the cheque by letter to Mr Macdougall, intimating that there were no funds. On the same date Mr Young wrote to W. Warner as