be considered separately from the other facts, but it means that when one studies the import and effect of the documents, including the contract of purchase and sale and the joint circular which followed thereon, and when one gives due weight to the various facts admitted or proved, it is impossible to affirm that the Commissioners were not entitled, if they thought fit, to pronounce the finding now under appeal. My impression is that the finding was a right one, but it is enough that the Commissioners were entitled to come to that conclusion.

As regards the second question, it is impossible not to sympathise with the position in which the appellants find themselves, but that consideration of hardship has no bearing upon the question of succession.

The result is that we must answer both questions of law in the affirmative.

LORD CULLEN—As the appellants purchased not merely the tangible assets of Messrs Mickel & Company's business, but also the goodwill, with the intention to which they gave effect, as the documents show, of carrying on that business along with their own, it seems to be perfectly clear that they were successors of Messrs Mickel in the sense of the section of the statute here in question, and it appears to me to be nothing to the purpose if they have found that the business connection of Messrs Mickel & Company has not turned out so profitably as it might have done.

LORD SANDS—I concur.

The Court answered both questions of law in the affirmative.

Counsel for the Appellants—Macmillan, K.C.—Keith. Agents—J. Miller Thomson, & Company, W.S.

Counsel for the Respondent—The Lord Advocate (Hon. W. Watson, K.C.)—Skelton. Agent—Stair A. Gillon, Solicitor of Inland Revenue.

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*Wednesday, November* 14.

## FIRST DIVISION.

[Bill Chamber.

## FERGUSSON BUCHANAN *v.* DUMBARTON COUNTY COUNCIL.

*Interdict — Interim Interdict — Interim Interdict against Public Authority — Caution — Interim Interdict Refused on Caution — Unemployment (Relief Works) Act* 1920 (10 *and* 11 *Geo. V, cap.* 57), *sec.* 2.

A county council having served notices to enter upon lands in terms of the Unemployment (Relief Works) Act 1920, sec. 2, a note of suspension and interdict was brought by certain proprietors. The Lord Ordinary refused interim interdict, which was craved in the note, until the cause had been heard on answer. A reclaiming note was presented, and thereafter, but before the hearing in the Inner House, answers were lodged. The Court on consideration of the note and answers *refused* interim interdict *hoc statu*, but that only on condition of the respondents finding caution for any damage the complainers might instruct in consequence of the entry by the respondents on the complainers' lands.

Lieutenant-Colonel George James Fergusson Buchanan of Auchentorlie, Bowling, in the county of Dumbarton, the Littlemill Distillery Company, Bowling, and Admiral John E. Bearcroft, residing at Torwood, Bowling, presented a note of suspension and interdict against the County Council of the County of Dumbarton as the local authority for that area, in which they craved the Court to suspend the proceedings complained of, and to interdict, prohibit, and discharge the respondents as local authority foresaid, and all persons acting under them or by their authority, from in any way following up or proceeding under certain notices of intention to enter upon land served by the respondents on the complainers. The said notices were served in exercise of the powers given by the Unemployment (Relief Works) Act 1920, sec. 2, in virtue of which the respondents as local authority foresaid proposed to enter on and take possession of certain lands and buildings which they alleged were required for the construction of a new highway intended to connect the Glasgow and Dumbarton Road at a point west of Bowling with the western end of a new road from Anniesland, Glasgow, to Duntocher.

The complainers averred, *inter alia*—"4. The respondents as local authority foresaid proposed by the said notices to enter on and take possession of the following permanent buildings and structures owned by the complainer Lieutenant-Colonel George James Fergusson Buchanan or parts and portions thereof, all as shown on the plan annexed to the notice served upon him, viz.— . . . The respondents also propose by said notices to enter upon and take possession of the following permanent buildings or structures leased by the complainers the Littlemill Distillery Company, viz., . . . and the following permanent buildings or structures leased to the complainer Admiral John E Bearcroft, viz., . . . The complainers object to the proposed operations of the respondents as being contrary to and in breach of the provisions of section 2 of the foresaid Act of 1920. . . . 10. By the Development and Road Improvement Funds Act 1909, sec. 11 (3), it is provided that where a highway authority are authorised to construct a new road under Part II of that Act the authority may acquire land for the purpose of such construction or improvement, and by sub-section (4) it is provided that for the purpose of purchasing of land by agreement under Part II of said Act by the Road Board or a highway authority the Lands Clauses Acts shall be incorporated with Part II of said Act, except the provisions of those Acts with respect to the purchase and taking of land otherwise than

by agreement. No agreement has been entered into between the complainers and the respondents with respect to the acquisition of any part of the lands of the complainers proposed to be entered on and taken possession of by the respondents in pursuance of the foresaid notices to enter. 11. By section 11 of the Development and Road Improvement Funds Act 1909, sub-sec. (5), it is provided that where any highway authority are unable to acquire by agreement on reasonable terms any land which they consider necessary they may apply to the Development Commissioners for an order empowering them to acquire the land compulsorily in accordance with the provisions of the schedule to the said Act of 1909, and that the Commissioners should have power to make such an order. In the said schedule it is, *inter alia*, provided by sub-section (1) that the highway authority may submit to the Development Commissioners a draft order putting in force as respects the land specified in the order the provisions of the Lands Clauses Acts with respect to the purchase and taking of land otherwise than by agreement. By section 90 of the Lands Clauses Consolidation (Scotland) Act 1845 it is enacted that no party shall at any time be required to sell or convey to the promoters of an undertaking a part only of any house or other building or manufactory if such party be willing and able to sell and convey the whole thereof. 12. By section 2 (3) of the said Act of 1920 it is, *inter alia*, provided that when a local authority enter upon any land in pursuance of that section they shall by virtue of said section have power to acquire the land compulsorily, and for the purposes of the acquisition of any such land the provisions of the Lands Clauses Acts shall, subject to the provisions of the said section, be deemed to be incorporated in the Act. There is accordingly deemed to be incorporated in the Act, *inter alia*, section 90 of the Lands Clauses (Scotland) Act 1845. 13. The whole of the lands referred to in the foresaid notices to enter are within the meaning of section 90 of the Lands Clauses Consolidation (Scotland) Act 1845 parts of the mansion-house of Auchentorlie, the house of Torwood aforesaid, the farm-house of Dunnerbuck, and the Littlemill Distillery, or one or other of them. The complainers are willing and able to sell the whole thereof, but the respondents are not willing to purchase and acquire the same."

They pleaded—"1. The respondents having no statutory power or authority to enter upon and take the lands referred to in the notices to enter, interdict should be granted as craved. 2. In respect that under the notices served on the complainers the respondents propose to enter on and take possession of permanent buildings or structures, the proposed operations are not warranted or authorised by the statute under which the notices bear to be given, and the note should be passed and interim interdict granted as craved. 3. The respondents not being entitled to acquire compulsorily the areas of land in question, which are parts only of a house or other building or manufactory of which the respondents are unwilling to acquire the whole, interdict should be granted as craved. 4. In any event the respondents, only having power to enter upon land actually required for the construction of the road, they should be interdicted from entering upon any other lands belonging to or leased to the complainers."

On 9th November 1923 the Lord Ordinary (MURRAY) appointed the respondents to lodge answers within four days, and refused interim interdict until the cause was heard on answer.

*Opinion.*—"I did not express an opinion at the close of the hearing last night for this reason, that I desired to consider whether upon the state of the information before me I could not be in a position to give a definite indication to parties of my view in regard to the question of interim interdict apart from mere questions of lodging answers.

"I have considered that matter, and I do not feel that I am in a position now to do more than to intimate that as things stand I shall, of course, allow answers to be received and refuse interim interdict *in hoc statu*.

"That view will enable parties, if they are so advised, either to take my temporary judgment to review or to proceed with the case, and if so advised, renew the application for interim interdict when the papers are fully before me.

"I shall accordingly refuse interim interdict *in hoc statu* and order answers; and unless I am mistaken, from what I heard yesterday the respondents will be in a position to obtemper that order within a very few days. I was thinking of Tuesday, but if I ordered them for Monday I understood from what I heard that that would not be unreasonable."

The complainers reclaimed. Before the hearing took place answers were lodged.

In their statement of facts the respondents averred—"3. The respondents have statutory authority for the construction of the said road, and for the compulsory acquisition of the land necessary for the purpose. By the Development and Road Improvement Fund Act 1909 the Road Board (now the Minister of Transport) is empowered, *inter alia*, to make advances to highway authorities for the construction of new roads, and in such cases to authorise highway authorities to construct the road. Provision is also made for the grant, where necessary, of an order authorising the highway authority in such circumstances to acquire land compulsorily for the purpose of construction of the road. In the present case the Minister of Transport is making an advance towards financing the respondents' scheme, and has approved of the respondents' plans. On 13th April 1923 the Minister of Labour granted a certificate in pursuance of section 2 of the Unemployment (Relief Works) Act 1920, relative to the respondents' proposed road, and on 17th April 1923 the Minister of Transport authorised the construction of the road, and the exercise by the respondents of the summary powers conferred by

the said section. The conditions of said section 2 have thus all been complied with, and in particular the road is one (*a*) which the respondents have power to construct, and (*b*) for the construction of which land could, under an enactment in force on 3rd December 1920, have been authorised to be acquired compulsorily for or in connection with the construction of a road. . . . 5. the respondents deny that any of the subjects enumerated by the complainers in Article IV of their statement of facts is a 'permanent building or structure' within the meaning of the Act. . . . The respondents' plans showing their proposals for dealing with the various roads, accesses, &c., intersected or crossed by the new road, have been approved as part of the scheme by the Ministry of Transport. In every case careful provision has been made to leave the complainers' access substantially unaffected, and the respondents have never questioned their liability, under section 2, sub-section 5 of the Unemployment (Relief Works) Act 1920 to pay compensation and interest to the complainers as the same may be ascertained in accordance with the Requisition of Land (Assessment of Compensation) Act 1919. 6. The notices of intention to enter were served by the respondents on the first and third named complainers on 12th June 1923, and on the second named complainers on 8th August 1923. They have thus had ample notice of the respondents' intentions, and have been well aware since the beginning of September 1923 that operations have actually been commenced on the new road at a point close to Auchentorlie estate. Nevertheless it was not until about a week after the contractors had actually entered upon Auchentorlie estate that the present note of suspension was brought. No other owner or occupier on the line of the proposed road has raised any objection to the construction thereof. 7. The main object of the respondents' scheme is to relieve distress during the current winter, and any interruption of the operations will to that extent frustrate this object, and may have serious consequences upon the wider schemes referred to above, which in the view of the respondents, and (they believe and aver) of the Minister of Transport are urgent, and of material public importance. Further, the unemployed men at present engaged in the relief work are disentitled from claiming unemployment benefit or parish relief, and if the work is suspended, delay will inevitably ensue before these men will again receive payment of relief, and hardship will accordingly result. In these circumstances the respondents respectfully submit that interim interdict should be refused."

They pleaded—"3. The respondents' operations being duly authorised by statute as condescended on, the note should be refused. 4. In respect that the complainers do not propose to enter on any permanent building or structure, the complainers' second plea-in-law should be repelled. 5. In any event, interim interdict should not be granted."

The case was heard on the note and answers on 14th November 1923.

Counsel for complainers cited the case of *Ellice* v. *Invergarry and Fort-Augustus Railway Company*, 1913 S.C. 849, 50 S.L.R. 550.

LORD PRESIDENT (CLYDE)—This reclaiming note comes before us in the Bill Chamber. The Lord Ordinary, when the case was before him, made an order for answers and postponed consideration of the question whether or not interim interdict ought to be granted until the answers were before him. The complainers, regarding the case as one of much urgency, reclaimed and asked for an immediate hearing which has been granted them. The answers which Lord Murray ordered have, however, been lodged since the reclaiming note was in the Single Bills; and we are therefore in the position in which the Lord Ordinary wished to be before disposing of the question of interim interdict. In strictness the case should be sent back to the Lord Ordinary in order that he might have an opportunity in the first place of deciding as to interim interdict on the note and answers; but that course would hardly be expedient in the circumstances of the present case, which call for immediate disposal.

In the Bill Chamber there are two, and only two, questions which it is proper to consider in an application of this sort. The first of these is whether the note discloses a question or questions to try; and the second is (on the assumption that the note does disclose such a question or questions) whether the balance of convenience is favourable, or adverse, to the granting of an interim interdict—if, that is to say, an interim interdict is asked.

We have heard a pretty full statement of the nature of the questions which, from the point of view of both sides of the bar, this note of suspension and interdict raises. The statement has been of some length because of the serious difficulties which attend the construction of the statutory enactments with regard to the operation of which the present dispute has arisen. I say nothing whatever about the merits of any of those questions. But I do say this that some questions, which are probably not less anxious and troublesome than they appear to be at first sight, are undoubtedly presented for trial by this note. The necessity of having those questions tried in the only way in which they can be tried, namely, by passing the note into the Court of Session, is obvious; and no doubt that will be done when the case is sent back from this Division.

That leaves the question of interim interdict to be decided. The considerations on which the Court should proceed in a case such as this are, in my opinion, these. In the first place it is pointed out that the proceedings which it is sought to interdict are proceedings of a public body instituted to meet a pressing public necessity, with at any rate the approval of one or more Ministers of the Crown, and with the financial assistance of the Treasury. They are proceedings which form part of a public

undertaking devised and executed for a public purpose and under the general authority of an Act of Parliament. That is, of course, not conclusive but it is a strong consideration against granting interim interdict. I must not be understood to suggest that any public authority will be held entitled by any Court to ride roughshod over the rights of private individuals; but in considering how far in a case of disputed right the existing state of possession should be preserved *ad interim* it is not irrelevant to have in one's mind that the proceedings with which it is sought to interfere by interim interdict before the question of right is determined, are the proceedings of a public authority conducted for no self-regarding object but in the public interest. In the second place there is the point which Mr Macmillan very properly though moderately urged, that the propriety of interference in anticipation of a judgment on the merits depends a good deal on the question whether the proceeding which it sought to stop is one which, if allowed to go on, involves some possibly irreparable injury to the complainers. I think this can be said to be the case with regard to some of the points mentioned in the note. The interest of the complainers to resist the proceedings complained of is all the stronger in respect that the statutory powers relied on by the respondents are exceptional in character, and if the interpretation put upon them by both parties at the bar is correct, may turn out to provide no very adequate protection (either in compensation or otherwise) for the complainers' rights of property. It is certainly at this stage impossible to affirm (having regard to the provisions of section 2 of the Unemployment (Relief Works) Act 1920, under which the respondents profess to be acting) that if the respondents should turn out to be justified in their present proceedings, the complainers' loss and damage would be met by adequate statutory accommodation and compensation.

Weighing these considerations the one against the other, the course which I suggest to your Lordships is that we should not, at least immediately, interfere by way of interim interdict against the prosecution of this public undertaking, but that our refusal of interim interdict should be conditional on the respondents finding caution for whatever damages the complainers may at the end of the day be able to instruct by or in consequence of the respondents' entry upon and possession of their lands and property under the notices condescended on, or the consequent execution of works upon them—see *Johnston* v. *Dumfriesshire Road Trustees*, (1867) 5 Macph. 1127. It is perhaps not usual to put a public authority under a condition of that kind, but in this case there must be no mistake about the matter. I am not sure whether the money which the County Council (as the financially responsible road authority) is receiving from the Treasury could be made available for a claim of damages, and as the damages might possibly be extensive, I am not prepared to propose to your Lordships that we should treat the County Council differently from anybody else. What the damages would be, or how they might be minimised, I do not know, and I say nothing about that. But if the parties wish an opportunity to adjust terms with regard to the caution necessary to satisfy the requirement I have indicated before any interlocutor is pronounced they ought to have it, and if they ask for it they will get it.

Lastly, I think I may add that it seems regrettable in connection with a scheme which after all is intended for the remedy of grave conditions of public distress, that it should not have been possible — nay, it would be regrettable if it were not even now possible—for parties to find a *modus vivendi* rather than to seek to push their rights on both sides to extremes and demand a judgment in law. This, however, they are perfectly entitled to do, and if no other course turns out to be practicable it is the proper course to take. There are, I think, great difficulties on both sides springing from the uncertainty which attends the construction and operation of a statutory enactment at once novel and obscure. Those seem to me to be circumstances in which if it is at all possible accommodation ought to be sought.

LORD SKERRINGTON, LORD CULLEN, and LORD SANDS concurred.

The Court pronounced this interlocutor—

"Adhere to the said interlocutor [dated 9th November 1923]: Refuse interim interdict *in hoc statu*, but that only on condition of the respondents finding caution on or before Friday, the 23rd inst. (which they are hereby allowed to do if so advised) for any damage the complainers may instruct by or in consequence of the entry by the respondents on the complainers' lands or property through the possession thereof or the execution of works thereon: Continue the cause."

Counsel for Complainers — Macmillan, K.C. — Gentles, K.C. — Patrick. Agents— J. Miller Thomson & Company, W.S.

Counsel for Respondents—Moncrieff, K.C. —Cooper. Agents—Macpherson & Mackay, W.S.