1770.

PATTEN, &c. *v.* CARRUTHERS, &c.

THOMAS PATTEN, Esq. and the Representatives of RICHARD RICHARDSON, Esq., *Appellants.*

WM. CARRUTHERS, GEORGE CLERK, WM. DUNBAR, CHARLES WARNER DUNBAR, *Respondents.*

House of Lords, 24*th March* 1770.

POWER TO GRANT LEASES OF MINES—IMPLIED RECALL OF FACTORY.—Two persons acted in this country as trustees for a person abroad, owner of an entailed estate in Scotland. Their previous letters advised them to enter into agreements in regard to the lead mines on the estate, and that any such, entered into by them, would be affirmed and ratified by him. They entered into an agreement with the appellants for a lease of the mines of the estate, binding themselves, so soon as powers to that effect arrived from Antigua, to grant them a regular lease. On this agreement possession followed. These powers arrived; but, before the regular lease was granted, the owner's affairs became embarrassed, and he sent home to Scotland his son with powers to raise money on his estate, either by lease, assignation, or conveyance of the same, and conferring on him power to grant deeds to that effect. The son granted letter agreeing to give a lease of the same mines to other parties; Held, reversing the judgment of the Court of Session, that the second factory was not meant as an implied revocation of the first, but was to be viewed only as a power to raise money on the estate, and that the trustees' obligations remained good to grant a lease to the appellants in terms of the *first* agreement with them.

The trustees and attornies of Patrick Dunbar of Machermore entered into a treaty with Mr. Stevens, agent for the appellants, for a lease of the lead mines on his entailed estate. Mr. Dunbar resided at Antigua, and the trustees acted in Scotland as doers for him. It was not very certain whether lead would be found; but Carruthers and Company had taken a lease of the immediately adjacent lands, belonging to Mr. Heron, and from this Company's operations, strong presumption existed of lead being found. Agnew, one of the trustees, wrote Maxwell, a co-trustee, as follows; "and "in regard we have not as yet proper powers to give them "a tack, they (the appellants) in the meantime would be "satisfied with a letter from us, authorizing them to open "the ground, and promising to give them a tack upon these "terms, as soon as we receive proper powers for that pur-"pose; and if we give such letter, he will order the work "to be begun immediately."

Accordingly the following agreement was signed: "We, "John Agnew, Esq. of Sheuchan, and David Maxwell, Esq. "of Cairnsmuir, trustees of William Dunbar, Esq. of Maher- "more, do hereby authorize James Stevens, agent for Tho- "mas Patten, Esq. of Bank in Lancashire, and Richard "Richardson, Esq., banker in Chester, immediately to open "the grounds, and make what trials he judges necessary in "searching for mines on the estate of Mahermore, and ob- "lige ourselves to give said Messrs. Patten and Richardson "a lease of the mines on said estate, on the same terms as "Patrick Heron, Esq. of Heron, has set those on his estate, "to a mining company he has lately contracted with, as "soon as we have proper powers for that purpose. In case "the said William Dunbar should not authorize us to give "a lease of said mines on the above terms, we are not to be "liable in any damages to said company, or any ways bound "or answerable to them.

(Signed) David Maxwell, John Agnew."

This treaty was duly intimated to Dunbar at Antigua, who wrote: "I have some curiosity to know the terms on which the lead mine is let out, and whether it proves encouraging to the miners, and what value the landlord's share may be." And along with this letter he sends a regular power and factory, authorizing them to grant a lease of the lead mines on the estate.

The above agreement for a lease was immediately followed by possession. This possession was notified to every one, and to the respondents in particular. The respondents had farther notice when one of their number applied to Maxwell for a lease of the same lead mines, he was informed by letter, that the appellants had agreed with them for a lease.

In terms of this agreement Stevens, as acting for Patten and Richardson, put miners on the ground, sunk a shaft, and discovered ore under such favourable circumstances, that the miners, from the certainty of a vein, offered to work it for nothing; but this was delayed until the agreement was confirmed by a regular lease from Dunbar himself.

In November 1764, about seven months after the agreement, Charles Warner Dunbar, son of Patrick Dunbar, returned to Scotland, whereupon he was applied to by the appellants' agent, for a formal lease, in terms of the agreement. This lease was delayed without sufficient explanation.

On the 30th March 1765, the appellants themselves wrote

1770.

PATTEN, &c. *v.* CARRUTHERS, &c.

the trustees, stating that as they had now been informed by their agent Mr. Stevens, that a regular power and factory had arrived from Mr. Dunbar in Antigua, they now called on them to grant a lease in terms of the memorandum of agreement.

The work was resumed for the season in April 1765, by the appellants' miners, who continued to work for four months. In the meantime, Charles Warner Dunbar had granted a letter agreeing to give a lease to the respondents Carruthers and Co., and during these four months operations they got notice to desist, in consequence of the lease so granted. They did not desist, but went on with their operations until the end of the season, when they withdrew. Upon this the respondents' miners took possession of the works and timber with which the shaft was laid down.

It appeared that the father's affairs in Antigua had gone wrong in the meantime, and Charles, the son, was sent to Scotland with a power, dated 1st September 1764, to raise money on Machermore estate, by leases, mortgage, assignment, sale, or other disposition, of all or any part of the same, authorizing him to grant and sign such leases, assignments, and conveyances. And it was in virtue of this power that the son acted in obliging himself to give leases to Carruthers and Co.

Two actions were then brought, one for a lease to Patten and Richardson, in terms of Dunbar's trustees' agreement to that effect; and the other for a lease to Carruthers and Co., in terms of a letter granted by Charles Dunbar

Feb. 28, 1765.

the son, of this date. These proved their own contents, and proof of possession being allowed to both parties, possession was proved under the first agreement with Patten and Richardson, and a disrupt possession on the part of the respondent. Upon the effect of the proof and the whole case, it was argued for the respondent, that the granters of the first memorandum agreement to Patten and Richardson had no power to grant leases: that they did not accept the subsequent power and factory sent them to grant such, and therefore that the same was put an end to, and superseded by the new power granted to the son: that the appellants were never properly in possession; and that the imperfect possession had was thereafter abandoned. By the appellants it was maintained that although the trustees had no power to grant leases, yet from the letters of Dunbar previous thereto, he had given them instructions to that effect,

and assured them, that he would confirm any agreement or promise they should make: That an agreement was effected, and the factory confirming that agreement came subsequently thereto; that this factory was immediately recorded, which is sufficient acceptance. The letter of attorney, therefore, to Charles Dunbar was not intended, and could not revoke the factory of 30th May, sent to the trustees,—the real object of that letter being to raise money on the estate: That the possession of the appellants took place immediately under the agreement, which continued uninterruped for two seasons. But that the possession taken by the respondents was violent, and while they were in the knowledge that another had got the right that they pretended to claim.

The entail having prohibited leases, the son raised against his father a declarator of irritancy of the entail, and obtained judgment thereon, whereupon the respondents alleged that the son, being now owner of the estate, his engagement with them must now take effect. To which it was answered by the appellants, that this proceeding between the father and son could not affect the question. It looked like a collusion, but whether it was so or not, the powers of the parties, at the time of the agreement, must determine the question.

The Lords pronounced this interlocutor:—"The Lords "having advised the state of the process, writs produced, "and testimonies of the witnesses adduced, with the memorials given in for the parties, they find that William "Carruthers and Company have the preferable right to the "lease of the mines in question, and decern and declare, in "terms of the libel at their instance, against William Dunbar of Machermore, and Charles Warner Dunbar, his son, "and assoilzie the defenders, John Agnew, Leonard Urquhart, and William Maxwell, from the conclusions of the "libel at the instance of Thomas Patten and Richardson, against them, and decern." Feb. 2, 1769.

On reclaiming petition the Court adhered. Mar. 3, ——

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—The memorandum of agreement entered into by the trustees contains an explicit agreement to give the appellants a lease; and the reservation at the end of it was simply to indemnify the trustees in case the principal refused to grant it. The principal sent full powers to grant the lease. It was followed by possession, and this possession continued for two seasons. The

1770.

PATTEN, &c. *v.* CARRUTHERS, &c.

only question thus remaining was, Whether on 3d April 1764, Agnew and Maxwell had power to make the lease they contracted for? and whether, subsequently thereto, Dunbar ratified and confirmed this engagement? Whatever doubts the trustees might entertain as to their letters of power in 1761 and 1762, those doubts vanished, and were removed by the power of 30th May 1764, which arrived in August, and was recorded by them in October, a considerable time before Charles Dunbar's arrival in Scotland. The subsequent power to Charles Dunbar, of 1st September, was not meant, and so did not revoke that power; because, by a letter of 21st September from William Dunbar himself, which reached Scotland in December, a month after Charles Dunbar arrived, he reappointed them his attornies, and restored all former powers. But, besides, there was strong presumptive proof of Dunbar's approving of the agreements. It was fully communicated to him, there was no dissent, and he only writes wishing to know what it was let at. There was also full knowledge of this agreement on the part of the respondents, and the possession had by them after the agreement was in *mala fide.*

Pleaded for the Respondents.—The agreement entered into by Messrs. Agnew and Maxwell with the appellants was null and void, being defective in all the necessary forms and solemnities required by the law of Scotland. But, supposing it was unexceptionable in point of form, and otherwise binding, it fell to the ground by the miners abandoning their possession under it. The respondents then entered into possession, in terms of an agreement with Charles Warner Dunbar, who was invested with full powers to enter into the same. They began their works, and have been in constant possession ever since, driving levels, sinking shafts, and taking out ore. It is for the advantage of all, that the mines should be worked, and the metals brought above ground, for the service and use of the community; and possession, to be complete and effectual, must be of this nature, and not that possession had by the appellants, which was imperfect and fruitless. Besides, the appellants' agreement imported no more than a right to make trials, not an obligation to grant a lease, and if they abandon the pursuit, as in this case was done, their agreement will thus be put an end to. It appears that they withdrew their mining implements in May 1764—that they destroyed their works, and carried off their tools in August 1765.

1770.

CHATTO, &c. *v.* BAILLIE.

After hearing counsel, it was
Ordered and adjudged that the interlocutors complained of be reversed.

For Appellants, *Ja. Montgomery, Al. Forrester.*
For Respondents, *Al. Wedderburn, Andrew Crosbie.*

Note.—Unreported in Court of Session.

(M. 14,941.)

JOHN CHATTO, Esq., an Infant, and his Administrator-at-law, - - - } *Appellants;*
WILLIAM BAILLIE, Esq., - - *Respondent.*

House of Lords, 26*th March* 1770.

SUCCESSION—HEIRS.—IMPORT OF TERM "HEIRS," as used in a destination.

For a full report of this case, *vide* Morison, 14,941.

In a competition of brieves between Agnes Tennent and William Baillie, claiming to succeed to the estate of Stoneypath, under a destination "to A. and his heirs or assignees "in fee; whom failing, to B. and his heirs and assignees," with which were conjoined mutual declarators, the Court of Session held that B. (the respondent William Baillie), being *nominatim* substituted, on failure of heirs of the body of A., was entitled to be preferred to Agnes Tennent, on the principle that the term "heirs," as here used, was to be limited to the *heirs* of the *body* of *A.* Reversed in the House of Lords; it being "declared that John Chatto (son "of Agnes Tennent), is preferable, and entitled to be served "heir of provision to the deceased Mr. William Walker, "under the settlement made by him of his estate of Stoney-"path in 1752; and it is further ordered and adjudged "that the objection to the service of the said John Chatto "be repelled, and that the mutual declarators be conjoined, "and that the said John Chatto be assoilzied from the pro-"cess of declarator at the instance of the said William Bail-"lie, and that the Court of Session do find, in terms of the "declarator at the instance of Agnes Tennent, mother of "the said John Chatto, against the said William Baillie; "and it is further ordered that the said Court of Session do