

Tuesday, November 8.

FIRST DIVISION.

[Lord Ordinary officiating
on the Bills.

THE GAS POWER AND BY-PRODUCTS
COMPANY, LIMITED *v.* WILLIAM
BEARDMORE & COMPANY, LIMITED.

*Process—Contract—Interdict—Minute of
Compearance by Third Party—Title to
Appear and Defend—Interest—Conflicting
Contracts.*

B. & Co., Limited, who had their registered office in England, but also carried on business in Scotland, were bound by contract to allow the P. G. Corporation (an English corporation) to inspect their plant to see that they were duly paid certain patent royalties. Subsequently B. & Co., Limited, entered into a contract with the G. P. and B. P. Co., Limited, a Scottish company, for the use of certain of their patents, and bound themselves to secrecy as to the machinery and processes used. The P. G. Corporation, on the allegation that the royalties were not being paid, instituted a suit in England against B. & Co., Limited, and applied for inspection of their plant. B. & Co. gave an undertaking that inspection would be allowed to two persons named, and no order was pronounced. Thereafter the G. P. & B. P. Co., Limited, fearing that the obligation of secrecy would be breached, brought an action of suspension and interdict against B. & Co., Limited, allowing anybody to inspect their plant, and in particular against the two persons to whom B. & Co., Limited, had promised admission. B. & Co., Limited, did not put in answers, but the P. G. Corporation lodged a minute of compearance and asked to be heard.

The Court—*rev.* the decision of the Lord Ordinary officiating on the Bills (Ardwall) — *allowed*; the minuters to lodge answers.

The Gas Power and By-Products Company, Limited, having their registered office at 116 Hope Street, Glasgow, presented a note of suspension and interdict against William Beardmore & Company, Limited, having their registered office at 36 Victoria Street, London, and carrying on business at Parkhead Forge and elsewhere in Scotland.

The note asked the Court to interdict the respondents from permitting the Power Gas Corporation, Limited, 39 Victoria Street, London, or anyone acting on their behalf, and in particular their representatives H. A. Humphry and F. C. Fogg, to inspect the details and construction of certain gas producers and ammonia recovery plant erected by the respondents as licensees of the complainers.

On 8th July 1910 interim interdict was granted and intimation ordered, and on 19th July, in respect that the induciæ had expired

and no appearance had been entered for the respondents, the note was passed and the interim interdict continued. Thereafter a minute was lodged for the Power Gas Corporation, Limited, to whom intimation had not been made, asking the Court to sist them as parties to the process, and to recall the interim interdict pronounced, and in any event not to make it perpetual. To this minute answers were lodged by the Gas Power and By-Products Company, Limited.

The facts are narrated in the note (*infra*) of the Lord Ordinary officiating on the Bills (ARDWALL), who on 24th August 1910 pronounced this interlocutor—"Refuses to sist the said minuters in terms of their said minute, and appoints said minute to be withdrawn from the proceedings: Further, in respect of no answers having been lodged for William Beardmore & Company, Limited, the only respondents called, in absence suspends the proceedings complained of: Interdicts, prohibits, and discharges in terms of the prayer of the note: Declares the interdict already granted perpetual, and decerns," &c.

Note.—"This is a note of suspension and interdict presented by the Gas Power and By-Products Company, Limited, who for the sake of convenience I shall hereafter call 'the company,' against William Beardmore & Company, Limited, and the note asks the Court to interdict Beardmore & Company from permitting the Power Gas Corporation, Limited, 39 Victoria Street, London, which I shall hereafter refer to as 'the Corporation,' and their representatives or experts, Mr H. A. Humphry and Mr F. G. Fogg, to inspect the details and construction of certain gas producers and ammonia recovery plant erected by Beardmore & Company as licensees of the company.

"Messrs Beardmore & Company did not oppose this application either by appearing or lodging answers, and accordingly on 19th July 1910 the Lord Ordinary on the Bills passed the note and continued the interim interdict. In the usual course the interdict would have been declared perpetual and the process brought to an end but for the interposition of the corporation, who lodged a minute asking to be sisted as parties to the process for the purpose of opposing the prayer, and in the meantime asking that the interdict should not be declared perpetual. To this minute answers have been lodged by the company, who ask that the minute should be dismissed, and the interdict declared perpetual.

"I am of opinion that the corporation have no right to be made parties to the present action, which is founded entirely upon a contract between the company and Messrs Beardmore, with which contract or the performance thereof it appears to me that the corporation have no right to interfere, whatever supposed interest they may have to do so.

"It is right, however, that I should explain the circumstances of the case and the law which I hold applicable to it.

"The contract founded on by the company is No. 6 of process, and is dated 11th 12th, and 14th October 1904. It takes the form of a minute of licence. It narrates that the patentees are owners of certain letters-patent, and it provides for the licensing of Beardmore & Company to construct machinery and plant of the nature described in the patents at their works at Parkhead and Dalmuir, and for the supplying by the company free of charge of plans and details necessary to enable Beardmore & Company to construct and use the patented machinery. The last head in the licence contains this provision— 'The second party hereby undertakes not to supply the said plans and details to third parties, or to allow the knowledge or contents of them out of their immediate possession.'

"Counsel for the corporation maintained that this provision did not entitle the company to interdict Beardmore & Company from allowing any person they pleased to inspect the machinery and plant at their works. I cannot assent to this argument, as I think that to allow such inspection would be practically supplying plans and details to third parties of the machinery erected under the licence.

"Further, I am of opinion that the condition regarding the keeping secret of the plans and details of the machinery was a lawful and proper condition to be inserted in a licence, and that the company are entitled to enforce it. I may refer to the opinion of Justice Wills in the *Incandescent Gas Light Company v. Cantelo* (1895), 12 R.P.C. 262, in which he points out that as a patentee has a right to prevent people from using the patented articles, he has the right to do the lesser thing, that is to say, to impose conditions on the use of them; and he goes on to say that it does not matter how unreasonable or how absurd the conditions are, if a person takes the licence he must be bound by the conditions.

"I arrive accordingly at the conclusion that Beardmore & Company have no answer, even if they had desired to make one, which they did not, to the granting of the interdict as craved.

"But the corporation intervene and plead, first, that by an indenture dated 10th June 1901 between the United Alkali Company Limited (whose assignees the company are) and Beardmore & Company, and which granted a licence to the latter to use and exercise certain patented inventions, it was provided in article 7 as follows 'That the licensees will at all suitable times permit the grantor or any person nominated by him to visit and inspect the works and machinery of the licensees in use for the manufacture of all or any of the products named in the before-mentioned letters-patent.' There seems little doubt that this would cover the machinery put up by or under the directions of the company at Messrs Beardmore & Company's works. But I think there can be no doubt that so far as regards the questions between Messrs Beardmore & Company and the

company this clause could have no effect whatever. If Messrs Beardmore & Company have disabled themselves from carrying out the contract in the indenture, that may give rise to an action of damages against them at the instance of the corporation, but I do not see how, in a question with the company, it can invalidate a condition under which the company granted their licence to Messrs Beardmore & Company.

"The corporation further state that the company are not entitled to the interdict they crave, or that the Court should not grant it in respect of the undertaking given by Messrs Beardmore & Company in the English Courts, as appears from the copy order by Mr Justice Joyce, No. 12 of process, and dated 30th May 1910, that undertaking being to give the plaintiffs' witnesses, Mr Humphry and Mr Fogg, inspection of the ammonia recovery plant mentioned in paragraph 4 of Mr Ross's affidavit. I have not that affidavit before me, but it was admitted by both parties that the undertaking would embrace the plant erected by the company as well as that erected by the corporation. Now if this be so, it was an undertaking which, in a question with the company, Messrs Beardmore & Company were not entitled to give, and which in my opinion cannot be held to affect the company in enforcing their contract against Beardmore & Company. I confess I have had difficulty in dealing with this particular part of the case, lest it should appear that I was in any way wanting in respect towards the English Court, but as no order was granted by Mr Justice Joyce I hope that I shall not be thought guilty of any disrespect to the Chancery Division of the High Court of Justice in disposing of the present question notwithstanding the undertaking by Messrs Beardmore & Company. The company were not represented in the Chancery proceedings, and accordingly their rights under the contract were not brought under the notice of the Masters or Judge, and I wish to point out as emphatically as I can that the present action is really one between Messrs Beardmore & Company and the company, and decides nothing as to the rights of the corporation as against Messrs Beardmore & Company.

"As an authority for refusing to allow the corporation to appear in the present action, I may refer to the case of *Laing's Sewing Machine Company v. Norrie & Sons*, 5 R. 29.

"I may add, though it is not necessary for the decision of the matter, that it appears to me that an attempt is here being made by the corporation to take advantage of the clause in their indenture with Messrs Beardmore & Company to obtain information regarding certain secret processes not patented but of importance to the company, and which are worked along with the company's patents at Messrs Beardmore & Company's works; and it will be noticed from the amended statement of claim of the corporation against Beardmore & Company in the Chancery

Division that the action, while nominally an action for royalties under the indenture of licence of 21st June 1901, endeavours to bring in a statement implying that the company's apparatus and plant are infringements of the corporation's patents. If this is so, the proper course for the corporation to take is to bring an action against the company for infringement, but it seems that they had in 1908 raised an action in the High Court of Justice in England against Beardmore & Company, asking an injunction against them for infringing certain patents and for damages. This action was defended by the company in name of Messrs Beardmore & Company in terms of the minute of licence, and after the defence was lodged, it appears that the corporation abandoned the action and paid Messrs Beardmore & Company's costs. The action in which the undertaking by Messrs Beardmore & Company was given was raised in 1909, and, as has been pointed out, was an action for accounting for royalties to which the company have not been called and cannot appear as defendants, and they have now raised the present note of suspension to protect themselves against the inspection of their plant and machinery by the representatives of rivals in trade, and I am of opinion, for the reasons I have already stated, that under their contract with Messrs Beardmore & Company, they are entitled to the protection they ask.

"On the whole matter I am of opinion that the corporation have no right to intervene in the present action, and I accordingly refuse to sist the corporation, and appoint the minute to be withdrawn from the process.

"With regard to the question of expenses, it is open to doubt whether any decree for such can be competently pronounced against the corporation, seeing that they are not, and have not been sisted as, parties to the process. I observe that in the case of *Laing's Sewing Machine Company*, above quoted, expenses were not given against the minuters, and I think that is the only safe course to follow here."

The minuters reclaimed, and argued that they were entitled to be heard.

The respondents supported the judgment of the Lord Ordinary.

No cases were cited by either side.

LORD PRESIDENT—This case arises out of the following circumstances—The Power Gas Corporation, Limited, in their capacity of assignees of a company known as the United Alkali Company, are parties to a standing contract with Messrs Beardmore & Company, who are a limited company registered in England but carrying on business in Scotland at Parkhead and elsewhere. Under this contract certain patents which are the property of the Power Gas Corporation, Limited, are given to be used by Messrs Beardmore as licensees, and by one of the terms of the contract the Beardmores are bound to allow the Power Gas Corporation at all times liberty to inspect the plant in their works in order

that the Power Gas Corporation may see if they are being duly paid the royalties which are stipulated by the contract.

The Power Gas Corporation, upon the allegation that they have not been duly paid these royalties, have instituted a suit in England (as they were quite entitled to do) against the Beardmores, and in the course of that suit an application was made for inspection of the plant in the works at Parkhead. We have the terms of that application before us, but it appears that upon the Beardmores, Limited, giving an undertaking by their counsel that inspection would be permitted to two gentlemen named, the Judge in the case did not think it necessary to make any order. I think your Lordships can have little doubt that in that case—just as if it had happened here—the order although not actually an order of Court is really tantamount to one, because it is a solemn undertaking given by counsel before the Court, in respect of which the Court does not pronounce a formal order.

That being the state of affairs, it seems that the Beardmores had entered into a contract, subsequent in date to the contract which I have already stated, with a Scottish company, the Gas Power and By-Products Company, Limited. In respect of this contract they had accepted from the Gas Power and By-Products Company, Limited, right to use certain of their patents and to instal certain of their apparatus; and by another term of that contract they had bound themselves in a question with the Gas Power and By-Products Company, Limited, to secrecy, and had promised that they would not disclose to anyone else the machinery or the processes which they had received from the Gas Power and By-Products Company.

Accordingly the Gas Power and By-Products Company, Limited, having heard of this inspection to which Beardmores had in England consented, and fearing that the result of that inspection would be that the obligation of secrecy to which they had bound the Beardmores would be breached, bring an action of suspension and interdict in the Scottish Courts, and, founding upon their own contract, ask for an interdict against Beardmore & Company, Limited, allowing anybody to inspect their, the Gas Power and By-Product Company Limited's plant, and, in particular, an interdict against the very two gentlemen by name whom the Beardmores in England had promised to admit to see their works.

The Beardmores Limited do not put in any answer to that application. In other words, they are content enough to be debarred by an order of this Court here from doing what they promised the Court in England they would do. Hearing of this interdict, the Power Gas Corporation, Limited, put in a minute of compearance, and ask to be heard before the interdict is granted, their position, naturally enough, being that, although the interdict is in terms directed against the Beardmores Limited, it really in its operation will

strike against their rights and not against the Beardmores' rights.

The Lord Ordinary on the Bills, who took up the matter, refused permission to the minuters to be sisted, and then there being no defence to the interdict at all, he interdicted, prohibited, and discharged in terms of the prayer of the note, and declared perpetual the interim interdict which had been granted. Against that interlocutor the present reclaiming note is brought by the minuters, and the only question before your Lordships to-day is whether the minuters upon this matter are to be allowed to be heard.

I have been absolutely unable to see any argument upon which it can be contended that they should not be heard, and the whole reason which is given seems to me a reason which is based upon a forgetfulness of this very obvious fact that two different contracts may overlap and deal with the same subject-matter. The Lord Ordinary on the Bills, holding that "the corporation have no right to be made parties to the present action, which is founded entirely upon contract between the company and Messrs Beardmore," really brings his decision to a point in this sentence—"If Messrs Beardmore & Company have disabled themselves from carrying out the contract in the indenture (that is, the original contract between the Alkali Company—now the Power Gas Corporation—and Beardmore), that may give rise to an action of damages against them at the instance of the corporation, but I do not see how, in a question with the company, it can invalidate a condition under which the company granted their licence to Messrs Beardmore & Company."

That sentence might be turned round with equal justice and put exactly the opposite way. I think his Lordship has forgotten that in pronouncing a decree of the Court as he has done he has practically given specific performance of one contract to the one party, and denied specific performance of the other contract to the other, and that without the other party being heard.

As to what is to be the particular extrication out of this troubled position I do not wish at present to say anything, because it would be very improper that I should do so until parties have been fully heard upon the matter. They cannot be heard until we have them before us, and it seems to me out of the question that we should pronounce an order which practically decides the question against one of the parties interested without that party being heard.

I am therefore very clearly of opinion that the judgment before us is wrong, and that the case must go back in order that the Power Gas Corporation may at least be heard upon the matter before an interdict is pronounced.

LORD KINNEAR—I am entirely of the same opinion, and for the same reasons. This is an interdict which strikes directly and by name against the Power Gas

Corporation, because it prohibits the respondents, the Messrs Beardmore, from permitting the corporation to do certain things which they allege they have a direct right to do. It appears to me to be out of the question, for the reasons your Lordship has already given, that the Power Gas Corporation, who are to be struck at by this order, are not to be allowed to appear and to be heard upon the merits of the question, whether the order is good or bad. Without going into the merits, which are not before us, I have no doubt whatever that the reclaimers are at least entitled to be heard.

LORD JOHNSTON—I am of the same opinion, and do not desire to add anything.

LORD SALVESEN was sitting in the Second Division.

The Court recalled the interlocutor reclaimed against, of new allowed the minute for the minuters the Gas Power Corporation, Limited, to be received, remitted the cause to the Lord Ordinary to allow the minuters to lodge answers and to proceed as accords, and meantime continued the interim interdict granted on 8th July 1910 and found the minuters entitled to expenses both in the Inner House and in so far as caused by opposition to the receiving of said minute in the Bill Chamber.

Counsel for the Minuters and Reclaimers—Macmillan. Agents—J. & J. Ross, W.S.

Counsel for the Complainers and Respondents—Wilson, K.C.—Moncrieff. Agents—Smith & Watt, W.S.

Counsel for William Beardmore & Co., Limited, Respondents—W. T. Watson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Wednesday, November 9.

FIRST DIVISION.

[Sheriff Court at Stirling.
[Lord Ordinary officiating
on the Bills.

LOCHRIE v. M'GREGOR.

LOCHRIE, PETITIONER.

Bankruptcy—Sequestration—Petition for Sequestration—Citation—Clerical Error in Citation—Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79), secs. 14 and 26.

The Bankruptcy (Scotland) Act 1856 enacts—Section 14—"Petitions for sequestration may be at the instance or with the concurrence of any one creditor whose debt amounts to not less than fifty pounds. . . ." Section 26—"When a petition . . . is presented . . . for the sequestration of the estate of a debtor who is dead without the consent of the successor, the Lord Ordinary or Sheriff to whom it is presented shall grant warrant to cite