or the workman, according as the *onus* is laid by the terms of the medical certificate.

The result is that the workman is entitled to go on and prove that, notwithstanding the medical opinion, his morbid condition of the eye was caused by his employment. And accordingly I agree with your Lordship in the course you propose.

LORD JOHNSTON.—I have experienced very much greater difficulty in this matter than apparently your Lordships have, for I cannot personally reconcile the provisions of section 8 (1) (i.) followed as it is by the words "and the disease is due to the nature" of the workman's employment, with the finality of the referee's determination under section 8, (1) (*f*) and with section 8, (2). But my own reading of the statute is not to my mind sufficiently satisfactory to justify me in differing from the judgment your Lordship proposes.

LORD MACKENZIE.—There is, I think, much to be said in support of the conclusion reached by the Sheriff-Substitute, but I do not feel it safe to take the same view.

If one was in a position to consider the certificate of the medical referee as being equivalent to this, that the workman was not suffering from industrial disease, then, of course, that would be equivalent to finding that there never had been any accident and there would be no need for any further procedure. It is just because I do not feel that, judicially, one has sufficient knowledge of where the medical referee passes from the region of science into the region of fact that I am unable to construe the certificate in that way.

I agree with your Lordship's observation that probably the whole difficulty in the case has arisen from the way in which the Order in Council was framed, and that, had it been framed so as to apply to miner's nystagmus only the difficulty in this case would not have arisen.

The Court answered the first question of law in the negative and the second in the affirmative; recalled the determination of the Sheriff-Substitute as arbitrator; and remitted the cause to him to allow parties a proof of whether the nystagmus from which the appellant was certified to be suffering was or was not due to his employment with the respondents, and to proceed as accords.

Counsel for the Appellant—Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Russell. Agents—W. & J. Burness, W.S.

Friday, March 8.

SECOND DIVISION.

[Sheriff Court at Aberdeen.

MACKENZIE *v.* THE NORTH OF SCOTLAND PROPERTY COMPANY, LIMITED, AND OTHERS.

Right in Security—Heritable Creditor in Possession—Right to Let Security Subjects—Heritable Securities (Scotland) Act 1894 (57 *and* 58 *Vict. cap.* 44), *sec.* 6.

A property company granted a five years' lease from Whitsunday 1909 of a shop to an auctioneer, and a few months later, in respect of a payment by the auctioneer, undertook, by an arrangement embodied in two improbative letters, not to let certain adjoining premises of which they were the owners for the purpose of selling goods by auction during the currency of the lease. In 1908 the company had obtained an overdraft from a bank, for which three of its directors undertook personal liability, and it had disponed to the bank in security thereof the whole of the property. In April 1910 the bank demanded payment of the overdraft and, the company being unable to pay, the three directors paid it up and got from the bank an assignation of their bond. As holders of the bond they then intimated to the company that they intended to enter into possession of the security subjects and collect the rents thereof, and that they had appointed a firm of law agents to act for them as factors. The directors of the company thereupon resolved that it be left to the bondholders' factors to collect the rents of the security subjects for behoof of their principals, and its agents notified the tenants that the rents would be collected by these factors. In 1911 the factors let the adjoining premises for a year to an auctioneer for the purposes of his business. The tenant under the five years' lease thereupon brought an action to interdict the bondholders from letting or giving possession of the adjoining premises to any person for the purpose of selling goods by auction in breach of his lease and the letters above mentioned between him and the company.

Held that the bondholders were heritable creditors in possession, and as such were entitled to grant the lease complained of.

The Heritable Securities (Scotland) Act 1894 (57 and 58 Vict. cap. 44), section 6, enacts—"Any creditor in possession of lands disponed in security may let such lands held in security, or part thereof, on lease for a period not exceeding seven years in duration."

Robert John Mackenzie, auctioneer, 120 Union Street, Aberdeen, *pursuer*, brought an action against (1) the North of Scotland

Property Company, Limited, Aberdeen; (2) (*a*) the testamentary trustees of Hugh Imlay, (*b*) John Brown, and (*c*) James Murray; and (3) Messrs Hunter & Gordon, advocates, Aberdeen, *defenders*, in which he concluded for interdict against the defenders or any of them letting or attempting to let, or giving possession or attempting to give possession of the shop 118 Union Street, Aberdeen, to any person for the purpose of selling goods by auction or otherwise in breach of the conditions of a lease granted to him by the said Property Company, and of an agreement following thereon between them.

The defenders the North of Scotland Property Company, Limited, did not lodge defences.

The defenders Hugh Imlay's trustees and others pleaded—"(1) The action is incompetent. (2) The pursuer's averments are irrelevant and insufficient to support the conclusions of his action."

The defenders Hunter & Gordon pleaded —"The defenders Hunter & Gordon being only factors for the property, and as such acting under instructions of the bondholders in possession, and having no other interest therein, should be assoilzied, with expenses."

The *facts* are given in the note of the Sheriff-Substitute (LOUTTIT LAING), who on 18th May 1911 pronounced this interlocutor—". . . Sustains the first and second pleas-in-law for the defenders, Imlay's trustees, Brown and Murray, and the plea-in-law for the defenders Hunter & Gordon, and assoilzies them from the conclusions of the action: *Quoad ultra*, in respect of no appearance, grants interdict as craved against the defenders the North of Scotland Property Company: Finds no expenses due to or by any of the parties."

Note.—"By lease dated the 26th May and 7th June 1909, the defenders the North of Scotland Property Company leased to the pursuer the premises at 120 Union Street, Aberdeen, where he has since carried on the business of an auctioneer and valuator. By letters dated 10th and 13th July 1909, the secretary of the company, in respect of a payment of £30 made to him by the pursuer, undertook on the company's behalf not to let the adjoining premises at 118 Union Street—also the property of the company—'for the purpose of selling goods of any description by auction during the currency of your lease of the "Queen's Rooms."' It appears that in August 1908, a year prior to the above lease being entered into, the company had in security of an overdraft of £24,000 from the Clydesdale bank, by bond of cash credit and disposition in security, disponed to them, *inter alia*, the properties Nos. 116-120 Union Street, known as the Queen's Rooms. For this overdraft the late Mr Imlay and the defenders Brown and Murray, three of the company's directors were personally responsible. In April 1910 the bank requested repayment, and as the company was unable to pay it, the compearing defenders, Imlay's trustees, Brown and Murray paid it off, obtaining in exchange from the bank an assignation of the said bond of cash credit and disposition in security, dated 26th October and recorded 3rd November 1910. Having obtained this assignation, these defenders notified the company that they proposed entering into possession of the properties Nos. 116 to 120 Union Street, and appointed as their factors the defenders Messrs Hunter & Gordon, who thereafter obtained from the company the leases affecting the properties and proceeded to factor them. On 6th May 1910 the company passed the resolution embodied in condescendence 6, and intimated to the tenants in the properties that the half-year's rent would be collected by the defenders Messrs Hunter & Gordon, who were acting on behalf of the bondholders. On 1st April 1911 the defenders Messrs Hunter & Gordon, as factors foresaid, leased to a Mr Frank, as from 28th May 1911, the shop 118 Union Street, where he intends to carry on business 'as an auctioneer of jewellery and miscellaneous goods.' The pursuer now seeks to interdict all the defenders from giving Mr Frank possession of the premises 118 Union Street, on the ground that to do so would be a violation of his agreement of July 1909 with the company. The company have not entered appearance, and accordingly, in ordinary course, interdict will fall to be granted against them, futile although it may be. As regards the other defenders, parties' agents, in view of the proximity of the 28th inst., agreed that on the main features as above narrated there was really no dispute, the only point upon which it was thought a proof might be necessary being whether the defender Brown, in his capacity as a director of the company, was in July 1909 aware of the restriction placed on the letting of No. 118 Union Street by the company's secretary. The defender Murray, through his agent, admitted that he was consulted at the time, but that in the interval, owing to the pressure of private and public business —he being Dean of Guild—he had completely forgotten the existence of the letters of 10th and 13th July 1909. It is not suggested that either the defenders Imlay's trustees or Messrs Hunter & Gordon were aware of the existence of the restriction, and indeed it may be taken that that firm only leased the premises 118 Union Street to Mr Frank after being satisfied that, *ex facie* of the leases over the properties, they were entitled to do so. I think it unnecessary to allow a proof as to whether the defender Brown *qua* director was also aware of the restriction on 118 Union Street. I shall assume that both he as well as Murray was aware of it. On consideration, I have felt compelled to refuse to grant interdict against the compearing defenders. The argument maintained for the pursuer was that, as the defenders the North of Scotland Property Company had not lodged defences, the defences of the compearing defenders must be held to be irrelevant, as they could have no higher rights than the company, and must be held to have taken the property *tantum et*

tale as possessed by them, and therefore subject to the lease with the pursuer and the agreement of July 1910. This argument is, I think, unsound in respect that it proceeds on the assumption that the compearing defenders, Imlay's trustees, Brown and Murray, represent the company, and must therefore be bound by the company's contracts, and ignores the fact that they are the bank's assignees, and therefore stand in place of the bank. As between the pursuer and the compearing defenders there is no privity of contract. The lease and letters upon which the pursuer founds constituted a contract solely between him and the company; and although two of the compearing defenders were directors of the company at the time the letters were written, it is not in that capacity that they are sued, but as holders of bonds over the company's property, to which they have acquired right under their assignation from the bank. Being assignees of the bank, what are the rights of the compearing defenders? On obtaining the overdraft of £24,000 from the Clydesdale bank, the company disponed to them in security thereof the property 116-120 Union Street. The bond of cash credit and disposition in security by the company in the bank's favour is dated August 1908, or nearly a year prior to the time when the company leased No. 120 Union Street to the pursuer and placed on No. 118 Union Street the restriction referred to. At the time when this was done the consent of the bank was not obtained; indeed, no notice of the transaction appears to have been sent to the bank. A debtor under a bond and disposition in security may, while he remains in possession, perform ordinary acts of administration, such as granting leases of ordinary duration for a fair rent; but it is plain that, without his creditor's consent, he is not entitled to prejudice his security by contracts outside the ordinary powers of management. Such contracts on the debtor's part would not be binding on the creditor—*Heron* v. *Martin* 1893, 20 R. 1001, 30 S.L.R. 733, and *Morier* v. *Brownlie and Watson*, 1895, 23 R. 67, 33 S.L.R. 47. After the bond and disposition in security had been granted to the bank by the company it seems clear that they were not entitled, without the bank's consent, to place on 118 Union Street any restriction which might affect its letting value, or, in other words, affect the value of the security disponed to the bank. That the restriction did affect the letting value is obvious from the fact that, if enforced, it will deprive the compearing defenders who paid the bank of an income of £200 a-year. Had the bank entered into possession of the properties in the same way as the compearing defenders have done, and had proceeded to lease 118 Union Street for an auctioneer's business, I think it plain that the pursuer would not have been entitled either to interdict them from doing so or have recovered damages from them in respect of the breach. The bank would, I think, have been entitled to ignore the restriction created by the letters of 10th and 13th July 1909—a date subsequent to the disposition of the security subjects to them. Accordingly it seems to me that the compearing defenders, Imlay's trustees, Brown and Murray, having paid the overdraft to the bank and obtained an assignation to the bank's rights, are now entitled to exercise all the rights and privileges which the bank could have exercised, one of these being the right to ignore any act of the debtor prejudicial to the security subjects. The rights of these defenders are those which pertained to the bank under the bond of cash credit and disposition in security—not these rights as restricted by the company without the bank's consent after the date of the disposition to the bank. Had the conveyance to the bank been subsequent to the lease and letters of 10th and 13th July 1909, and been accepted by the bank in knowledge of these letters, it would have been clear that the property conveyed was subject to the restriction placed on part thereof, which would in that event have been enforceable against the bank and their assignees. I refer to the cases of *Davie* v. *Stark*, 1876 3 R. 1114, 13 S.L.R. 666, and *Bruce* v. *Macleod*, 1822, 1 Shaw's Appeals 213. It was further argued for the pursuer that the defenders were in terms of the company's resolution of 6th May simply their mandatories or agents, and therefore bound to respect the restriction placed on No. 118 Union Street. I do not think that it affects the legal position of the compearing defenders that they did not in an action of maills and duties formally enter into possession of the security subjects. It was certainly open to them to have adopted this course, and doubtless it would have been followed had any difficulty been placed in the way of the collection of the rents. But so far from any difficulty being placed in their way, the company by their resolution of 6th May 1910 facilitated collection and saved the compearing defenders the expense of bringing the proceedings necessary to interpel the tenants from paying their rents to them—the company. The rights of these defenders to enter into possession of the security subjects was conferred on them by the assignation to rents in the bond assigned to them by the bank, and it seems to me that the resolution of the company, and their letter to their tenants, has effectively put them, the defenders, in the position of creditors in possession—at least for the purposes of administration—as a decree in an action of maills and duties would have done. In taking the course they did the company's law agents followed a common practice, under which creditors enter into possession of security subjects without a decree of maills and duties when their debtor does not object to their doing so (Craigie, Heritable Rights, p. 949), and it appears to me that the company's resolution and letters to their tenants were simply intimations that they consented to the compearing defenders entering into possession. It is not disputed that in point of fact the compearing defenders have for a year exercised the powers of creditors in possession, and I doubt whether it lies in the pursuer's

mouth to object to the defenders as such, as for the past year he has recognised them by paying his rent to their factors, the defenders Messrs Hunter & Gordon. As suggesting the soundness of the argument that the compearing defenders represented the company, it was maintained that they could not grant a lease of No. 118 Union Street without the consent of the company. In point of fact these defenders have done so through their factors Messrs Hunter & Gordon. For these reasons I think that the compearing defenders cannot be regarded as simply the agents or mandatories of the company.

"In this view of the legal rights of the respective parties it seems to me immaterial whether the compearing defenders Brown and Murray were aware that the company had placed a restriction on No. 118 Union Street. If the restriction was ineffective as regards the bank, who were the bondholders, it was, I think, equally ineffective as in a question with their assignees, whoever they were. If as bondholders the compearing defenders Brown and Murray knew of the existence of the restriction, it must be taken that they also knew that it was ineffective. Knowledge of an ineffectual restriction could not make the restriction binding on an assignee of the bondholder whose right was not affected thereby (*see* opinion of the Lord-Justice Clerk in *Morier* v. *Brownlie & Watson*, *supra*). On these grounds it appears to me that the party against whom alone the pursuer has his remedy by way of an action of damages is the North of Scotland Property Company. I have not allowed the compearing defenders their expenses as I think that the defenders Messrs Brown and Murray, as directors of the company, ought to have seen that the arrangement with the pursuer embodied in the letters of 10th and 13th July 1909 was carried out in such a way as to be binding on the company's bondholders and their assignees, and I may add that I still think that on equitable grounds they ought to adhere to their offer to reimpose the restrictions on No. 118 Union Street after the expiry of Mr Frank's lease, which is only for one year."

Cond. 6 was—"The following resolutions were passed by the directors of the said Property Company on or about 6th May 1910, viz. — 'In respect that Mr Hugh Imlay's trustees, Mr John Brown and Dean of Guild Murray (the defender James Murray) have equally between them paid to the Clydesdale Bank, Limited, the sum of £20,223, 4s. 3d., due by the company to the bank, and that these persons are now in right of the securities formerly held by the Clydesdale Bank over the company's properties, and have intimated to the directors their intention of entering into possession and collecting the rents of the heritable subjects known as the Queen's Rooms, and of properties 393 and 399 Union Street, and that they have appointed Messrs Hunter & Gordon, advocates, to act for them as factors, the directors of this company resolve that it be left to Messrs Hunter & Gordon to collect the rents thereof and to pay over the same for behoof of Mr Imlay's trustees, John Brown and Dean of Guild Murray; and further, that it be remitted to the secretary of the company to collect the rents of the property known as Union Chambers, to pay the interest, feu-duties, and repairs, and annual charges against same, and to apply the surplus, if any, towards payment of any sum due to himself as secretary.' . . ."

The pursuer reclaimed, and argued—The defenders were there in right of and represented the debtor company, and were bound by its contracts. As bondholders they had to find out what the pursuer's title was. It consisted not only of the lease but of the subsequent letters. A bond and disposition in security left the powers of administration unimpaired in the debtor—Duff's Feudal Conveyancing, 274; Rankine on Leases (2nd ed.), 49; Hunter on Landlord and Tenant (4th ed.), ii, 571. Even inhibition did not strike at acts of ordinary administration—Graham Stewart on Diligence, p. 562; Ross's Lectures, i, 497; Bell's Comm. (7th ed.) ii, 142. The restriction put on the letting of the adjacent shop was an ordinary act of administration by the debtor, and was therefore binding on the bondholder. (2) At any rate, the pursuer was entitled to succeed in a question with the defender Murray, because he was aware of the arrangement embodied in the letters between the pursuer and the company, and had taken rent from the pursuer in the knowledge of the restriction in his favour. (3) The defenders were not in possession under a decree of maills and duties; without such decree they could not enter into possession and draw the rents. The defenders had no right whatever except what they had gained by the company's resolution. It merely entitled them as mandatories of the company to collect such rents as might be due and payable by the tenants, and was no sort of equivalent to a decree of maills and duties—Duff's Feudal Conveyancing (*sup. cit.*); Rankine on Leases (*sup. cit.*); Hunter on Landlord and Tenant (*sup. cit.*); *Blair* v. *Galloway*, December 21, 1853, 16 D. 291 (Lord Rutherfurd, Ordinary at p. 293); *Wylie* v. *Heritable Securities Investment Association*, December 22, 1871, 10 Macph. 253, 9 S.L.R. 184; *Neils* v. *Lyle*, December 1, 1863, 2 Macph. 168; Graham Stewart on Diligence, 515. (4) In any event, and assuming that the resolution by the company and the intimation to the tenants was equivalent to a decree of maills and duties, the defenders were not entitled to let the property. Maills and duties was merely a process for the recovery of rents—*Henderson* v. *Wallace*, January 7, 1875, 2 R. 272 (*per* Lord President Inglis at p. 276), 12 S.L.R. 174. Whatever were the defenders' rights as regards the collection of rents, they were not entitled to let the subjects.

Argued for the defenders (respondents)—(1) It was incompetent to interdict the defenders from "giving possession." They

could not be interdicted from doing what was already a completed act. If interdict were granted, it would be an order on them to break their contract of let. The pursuer would have to proceed by way of reduction of the lease, or else he might have a remedy in damages. (2) The defenders were entitled to grant the lease complained of. They were assignees of the bank, and, in a question with the pursuer, had other rights than the debtor company. The restriction on letting the adjacent shop was not binding on them, as it was granted after the date of the bank's bond —*Heron* v. *Martin*, June 15, 1893, 20 R. 1001, 30 S.L.R. 733. As bondholders they had right to enter into possession—Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. c. 101), sec. 119. They had also power to grant leases — Heritable Securities (Scotland) Act 1894 (57 and 58 Vict. c. 44), sec. 6; Bell's Prin. 914 (3). The debtor company had in no way disputed their right. On the contrary, they had made intimation thereof to their tenants. There was accordingly no need for an action of maills and duties, as the sole object of it was to interpel tenants from paying rent—*Henderson* v. *Wallace* (*sup. cit.*). *Budge* v. *Brown's Trustees and Others*, July 12, 1872, 10 Macph. 958, 9 S.L.R. 612, was also referred to.

At advising—

LORD DUNDAS—The pursuer, an auctioneer and valuator, obtained a formal written lease of a shop, No. 120 Union Street, Aberdeen, for five years from Whitsunday 1909, from the defenders the North of Scotland Property Company, Limited, the proprietors of Nos. 116, 118, and 120 Union Street. In July 1909 the company, in respect of a payment by the pursuer of £30, undertook not to let No. 118 "for the purpose of selling goods of any description by auction" during the currency of the said lease. This arrangement was embodied in a couple of improbative letters, which are produced. In 1908 the company had obtained from a bank a cash credit for a large sum, in security for the repayment of which they had disponed the whole property. Three of the directors, Mr Imlay, Mr Brown, and Mr Murray, were made personally liable for the overdraft. In April 1910 the bank demanded payment, the company were unable to pay, and the defenders, Imlay's trustees, Brown and Murray, paid the overdraft, and got from the bank an assignation of the bond. They then notified the company that they intended to enter into possession of the security subjects, as of course they were entitled to do under the assignation to rents contained in the bond. The directors of the company on or about 6th May passed a resolution. It narrated that in respect that these defenders had paid the bank £20,323, due by the company to the bank, and were now in right of the securities formerly held by the bank over the property, and had "intimated to the directors their intention of entering into possession and collecting the rents of the heritable subjects known as the Queen's Rooms" (*i.e.* Nos. 116, 118, and 120 Union Street), and had appointed Messrs Hunter & Gordon to act for them as factors, the directors resolved "that it be left to Messrs Hunter & Gordon to collect the rents thereof and to pay over the same for behoof of" the said defenders; and on the same day the company's agents notified the tenants that the rents would be collected by the said factors of the bondholders. In the spring of 1911 Messrs Hunter & Gordon, by missives which are produced let the shop No. 118 to Mr Frank for a year from Whitsunday 1911 to Whitsunday 1912, at a rent of £200, for carrying on his business as an auctioneer of jewellery and miscellaneous goods. The pursuer, on becoming aware of this let, immediately brought the present action against the company, the bondholders, and Hunter & Gordon, their factors, to have them interdicted "from letting or attempting to let, or giving possession or attempting to give possession, of the shop" No. 118 to any person for the purpose of selling goods by auction, or otherwise in breach of the lease and letters above mentioned between him and the company. The company did not appear to defend, and interdict passed against them, but the Sheriff-Substitute assoilzied the other defenders. I have come to the conclusion that his interlocutor is right.

If the Sheriff-Substitute's view upon the merits of the matter is correct, as I think it is, it is hardly worth while to discuss whether or not he was right in sustaining the defenders plea that "the action is incompetent." I confess I was not much impressed by the arguments against the competency of granting interdict so far as giving possession of the shop is concerned. But the topic is, in the view I take, quite unimportant, and I pass from it.

It seems to me that a fallacy underlies the pursuer's argument on the merits. His principal plea-in-law assumes that the bondholders have "no rights, in a question with pursuer, higher or other than those of the company"; but the bondholders stand, as I think, in right and place not of the debtor company but of their former creditor, the bank. This is important, because I agree with the Sheriff-Substitute in thinking that the condition affecting the letting of No. 118, which was embodied in the letters of July 1909 between the pursuer and the company, is not one which the former can plead as against the bank or its assignees. It did not in fact form part of the pursuer's lease, and the rent payable under that lease was not to any extent the counterpart of the condition. But the pursuer argued that, whether this be so or not, the bondholders had no right to let No. 118, as they proceeded to do. This seems to me to depend, primarily at least, on whether or not the bondholders are to be regarded as heritable creditors in possession. If the proper answer to that question is in the affirmative, it would seem that the lease to Mr Frank was quite legal. The law was not always clear as to the powers in this regard of a creditor in

possession. One finds the following passage in Professor Montgomerie Bell's Lectures (3rd ed. p. 1170)—"Mr Duff says that heritable creditors in possession can grant leases, and no doubt they can do so as long as they continue in possession. But if it be meant that a heritable creditor can grant a lease which will subsist after his debt is paid up and discharged, I see no authority for the doctrine, unless it be in the view of the Court in the *Kildonan* case" (1785 M., 14,135) "that the heritable creditors in possession are to be looked on as the landlords, which I think the Court would hold to a very limited effect only. The creditors' remedy, when the proprietor is not aiding them, is to sell." But the point seems to be set at rest by section 6 of the Heritable Securities (Scotland) Act 1894, which provides that "any creditor in possession of lands disponed in security may let such lands held in security, or part thereof, on lease for a period not exceeding seven years in duration." The pursuer argued that the resolution of 6th May 1910 was in effect at best a mere mandate by the debtor company to the bondholders to collect such rents as might be due and payable by the tenants in the property, and formed no sort of equivalent to a decree of mailles and duties. I do not agree with this view. The creditors had intimated their intention of entering into possession, as they had undoubted right to do, and the company resolved, no doubt very sensibly, that there was no need to force them to take judicial steps, and accordingly stood aside. I consider, agreeing with the Sheriff-Substitute, that after the resolution and the company's intimation to the tenants, the bondholders were in as good a position as if they had taken out a decree of mailles and duties. It was said for the pursuer that, assuming all this, an action of mailles and duties is after all "nothing more than a process for recovery of the rents, and carries nothing more" (*per* Lord President Inglis in *Henderson*, 1875, 2 R. at p. 276 ft.); and accordingly, even a decree in such a process would not place the bondholders "in possession" of the unlet subject No. 118 so as to entitle them to let it. But the bondholders' right to enter into possession depended not on any such decree but on their bond and infeftment, and the statutory effect of these—a right independent of, and counter to, the debtors' title of property. So far as I can see, the debtors never attempted to prevent the creditors from taking possession of the security subjects, but, on the contrary, by their actings virtually put them in possession. In any case they could not have defeated the creditors' right to enter into possession except by paying the debt; the latter were in a position to enforce entry by any competent process, and I do not know that they could in fact have taken possession of No. 118 in any more effective manner than by letting it. I think, therefore, that these defenders must in a question with the pursuer be regarded as heritable creditors in possession of the security subjects, and entitled as such to let part of these as they did. I do not see upon what ground the pursuer can successfully maintain that such was not their position and character, or question the validity of the lease of No. 118. In other words, he has, in my judgment, stated no relevant case for the intervention of the Court. I have dealt with the case upon the lines of the arguments which were presented to us. But the matter does seem to me to be capable of being resolved by an even simpler view of it If the bondholders are, as I think they are, entitled to enter into possession by the statutory virtue of their bond and infeftment, I do not see how the pursuer can effectively oppose them, or anyone (*e.g.*, Mr Frank) who bears their authority, from doing so, apart altogether from any question as to the validity of this particular lease. I should add, in conclusion, that the question of knowledge on the part of one or more of the bondholders of the informal agreement between the pursuer and the company, embodied in the letters of July 1909, seems to me to be immaterial and irrelevant. Assuming such knowledge, it would not, in my judgment, bar these defenders from pleading their rights as assignees of the bank.

For the reasons now stated I agree with the conclusion arrived at by the learned Sheriff-Substitute, and substantially also in his carefully-reasoned opinion.

LORD SALVESEN, LORD GUTHRIE, and the LORD JUSTICE-CLERK concurred.

The Court dismissed the appeal and affirmed the interlocutor appealed against.

Counsel for Pursuer (Appellant)—Morison, K.C.—MacRobert. Agents—Mackay & Young, W.S.

Counsel for Defenders (Respondents)—Sandeman, K.C.—Lippe. Agents—Alexander Morison & Company, W.S.

Friday, March 8.

FIRST DIVISION.

CHRISTIE AND OTHERS *v.* BURGH OF LEVEN.

Burgh — Process — Appeal — Competency — Notices as to Formation of Road and Footway in Front of Property—Averment that Road and Property outwith the Burgh —Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 339.

A burgh served notices on an owner of property intimating their intention to have the carriageway of the road in front of his property properly completed, and calling upon him to have the footway formed. The owner appealed to the Court of Session on the ground that the road and his property fronting it were outwith the burgh boundary. *Held* that the appeal was incompetent, the assumption upon