No. 39. WILLIAM BURRIDGE CABBELL, Cashier to the Glasgow Bank Company, and others, Appellants.—*Lord Advocate (Jeffrey)—D r.Lushington.*

JAMES BROCK, Archibald Newbigging and Co.'s Trustee, Respondent.—*Mr. Rutherford—Mr. Kaye.*

Lease—Right in Security.—A mercantile company in possession of a lease borrowed money from a private bank, and granted an assignation of the lease in security to the bank, which was intimated to the landlord; the bank thereupon granted a sub-lease to the company, who remained in possession and paid the rents; and no possession was taken by the bank:—Held, (affirming the judgment of the Court of Session,) in a question with the trustee on the sequestrated estate of the company, (without deciding the general question with respect to the sufficiency of intimation without possession,) that the assignation was not effectual against the creditors.

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2D DIVISION. INNER HOUSE.

This was the sequel of the case reported ante vol. iii. p. 75. The Second Division of the Court of Session (15th Nov. 1821) had found "that, under the whole circumstances of this case, "the assignation founded on cannot be effectual against the "petitioner (respondent), the trustee for the creditors of the "cedents; and therefore, in the suspension, find the letters "orderly proceeded, and decern; and in the declarator decern "and declare in terms of the libel, and find no expenses due, "so far as hitherto incurred." On appeal, the House of Lords (13th May 1828) "ordered and adjudged, that the cause be "remitted back to the Court of Session in Scotland, to review "generally the interlocutors complained of in the said appeal." And it was farther "ordered, that the Court to which this "remit is made do require the opinion of the Judges of the "other Division and of the Lords Ordinary on the matters "and questions of law in this case, stated in writing, which "Judges of the other Division and Lords Ordinary are so to "give and communicate the same; and, after so reviewing the "interlocutors complained of, the said Court are to do and decern "in this cause as may be just."

The cause having thus returned to the Court below, their Lordships ordained the parties to give in cases, and to subjoin thereto a draft of such questions as they deemed fit to be put to the consulted Judges in pursuance of the judgment of the House

of Lords. Cases were accordingly put in; and the appellants proposed the following questions: 1. "Is intimation of an assignation of a personal right, or of a real right not requiring seisin, the regular mode of completing the title of the assignee? and if so, is the assignation of a lease an exception from the general rule, and on what grounds is it excepted? 2. If it is not an exception, is intimation to the landlord sufficient, whether the original lessee be in the natural or the civil possession? 3. When the natural possession is held by a party deriving right, whether as sub-tenant or otherwise, from the original lessee, is intimation to such party as well as to the landlord sufficient to complete the right of the assignee; and is the consent of such party to the assignation an equipollent to intimation? 4. If intimation is not sufficient to complete the right of an assignee to a lease, what is necessary to complete it; and if possession be requisite, what kind or degree of possession is necessary? 5. More especially, is the granting of a sub-lease, whether to the original lessee or a third party, such an act of possession as will complete the right of an assignee; and is it necessary to the validity of such sub-lease that a sub-tack duty be specially made payable to the assignee; or is it sufficient that the sub-tenant be bound to pay the rent, and perform the prestations in favour of the landlord which are stipulated in the principal lease? 6. If the right of the assignees to the leases was duly completed, did they also acquire right to the machinery and utensils of the bleaching and printing works established on the lands, without a separate delivery of them to the assignees, it being kept in view that the parties in possession of such machinery and utensils at the date of the assignation agreed to hold them by virtue of a sub-lease from the assignees?" Sept. 23, 1831.

The respondent proposed the following questions:—"1. Whether, the original tenant continuing in possession, assignation of a lease may be completed by bare intimation to the landlord, without any possession, natural or civil, on the part of the assignee? On the contrary, whether, in a competition between two assignees, the assignee first obtaining bonâ fide possession, would not be preferred to the assignee who had merely intimated his title to the landlord? 2. Whether this would not hold à fortiori where the assignation attempted to be completed by

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" intimation merely stood qualified by an understanding between " the parties (the landlord included), that the assignee should not " enter into the possession, but that the possession of the original " tenant should remain undisturbed? 3. Whether the original " tenant, without ceding possession, natural or civil, of the subject, " can, by a mere deed of assignation, erect his lease into a security " for debt in favour of a creditor who does not enter into posses- " sion, nor at all take up the subject in the character of a real and " bonâ fide tenant; and whether, if it be competent thus to assign " the original lease in security to one creditor, there be any prin- " ciple for at all restricting the number of creditors who may hold " such securities over the same lease, if actual and bonâ fide pos- " session be not required as an essential in the constitution and " completion of the assignee's right; in a word, whether it be " consistent with the nature and purpose of the right of lease, and " with the relations thereby created between landlord and tenant, " that that right may, by several assignations, be conveyed in " security to different creditors of the tenant, not one of these " creditors ever entering into actual possession as assignee to the " right of lease in the only legal and proper sense of the term. " 4. Whether, in the whole circumstances of the present case, the " assignation executed in favour of the Glasgow Bank was a " validly completed assignation of the leases in dispute so as to " transfer the whole right of the tenants, Newbigging and Com- " pany, over to the Bank, qualified merely by their back-bond in " favour of Newbigging and Company? or whether, on the con- " trary, the right of lease did not at the date of the bankruptcy " still stand vested in Newbigging and Company? and whether " it was not preferably carried by force of the sequestration, and of " the right completed by the trustee under the same, followed, as " the trustee's right was, by the first real possession of the sub- " ject? 5. Whether, supposing the assignation in favour of the " Bank to have been duly completed, so far as regards the leases, " the right to the machinery and utensils was also carried as an " accessory to the leases? or whether, on the contrary, the ma- " chinery and utensils, so far at least as they are to be held " movable property did not remain with the bankrupts, the " assignation in regard to them being of no effect, as being an " assignation of movables retentâ possessione."

The consulted Judges, having considered the cases, returned

the following opinions:—" It is a general rule in the law of Scot- Sept. 23, 1831.
" land that possession, natural or civil, is necessary to complete
" the transference of a real right. A tack is a real right, by force
" of the statute 1449, in a question between assignees and ad-
" judgers from the tenant; and to that case, therefore, the general
" rule applies. This is vouched by the concurrent authority of
" every institutional writer, and by an uninterrupted series of
" decisions for more than two centuries. When the transference
" depends on natural possession, a difficulty can seldom occur;
" but it is otherwise with regard to civil possession, which is of a
" less palpable nature, and not so well defined in law. If a prin-
" cipal tenant, wishing to transfer his lease, should intimate an
" assignation of it to his landlord and to his sub-tenant, and if the
" sub-tenant, after this, should pay rent to the assignee, it is clear
" that the real right in the assignee would be complete. Further,
" it may be granted, that if, after due intimation in the manner
" which has been mentioned, the question should arise before
" a term's rent became payable, the assignee might still be held to
" have attained civil possession; for, by the intimation itself, he
" had assumed the control of the sub-tenant's management, put
" himself in titulo to sequestrate for current rents, and maintain
" other possessory actions, and, in short, asserted his possession
" in every way which the nature of the case admitted.

" But, in the present case, we are of opinion that no possession,
" natural or civil, followed on the assignation by Newbigging and
" Company to the Glasgow Bank. The avowed object of the
" transaction was to interpose the Bank as a principal tenant be-
" tween the landlord and Newbigging and Company, solely to
" create a security for an advance of money made by the Bank to
" Newbigging and Company, who were to continue in the natural
" possession of the subject. Accordingly, it is admitted that the
" Bank never attained natural possession. With regard to civil
" possession, Newbigging and Company never paid rent, nor per-
" formed any prestation of the tack to the Glasgow Bank; nor
" did the Glasgow Bank pay any rent, or perform any prestation
" to the landlord. There was no opportunity of intimating an
" assignation to a sub-tenant, for there was no sub-tenant distinct
" from the cedents and the assignees. There was an attempt, in-
" deed, to constitute the cedents sub-tenants to the assignees; but
" that attempt proved entirely abortive. The intended missive of

Sept. 23, 1831. " subtack was informal and null; it was not written on stamped " paper, and it did not specify any rent, which is inter essentialia " of the contract of lease. No possession followed or could follow " upon it different from the possession which Newbigging and " Company had attained, and were holding, by virtue of the " principal tack. Therefore the case plainly resolves into a " collusive device to create a latent security over a real right, " without change of possession, either naturally, civilly, or sym- " bolically; an attempt at variance with the first principles of " the law of Scotland, and which, if it could be accomplished, " would give rise to mischievous consequences.

" The same reasoning applies to the utensils, holding them " to be heritable, and therefore part of the subject of the lease. " Holding them to be movable, a security over them, retentâ " possessione, is manifestly ineffectual."

Lord Medwyn.—" I concur in the above opinion, understand- " ing that it does not import that an assignation by a principal " tenant, where there is a power to assign, must be intimated " both to the landlord and sub-tenant; but that such an as- " signation, if intimated to the sub-tenant alone, and the assignee " levy or attempt to levy the sub-rent, will complete the right of " the assignee."

Lords Balgray and Gillies.—" We concur in the result of the " opinion of the majority of the consulted Judges; but we en- " tertain considerable doubts as to some of the general propo- " sitions in law. We consider a lease to be a right of an anomalous " nature. Its creation and its transmission are to be regulated as " if it were, what it truly is, a personal right. We therefore can- " not affirm that it is the law of Scotland that an assignation of " a lease duly intimated is per se an imperfect right, unless fol- " lowed by natural or civil possession. In the opinion, so far as " founded on the special circumstances of the case, we entirely " concur."

Lord Craigie.—" It seems to be agreed on all hands that the " contract of location or lease, whether relating to lands or other " subjects, is merely a personal contract. In the case of a lease " of lands, therefore, as soon as the lessor, being at the time pro- " prietor of the lands, has disposed of his property, he has no " power over the lessee, nor over the lands contained in the " lease; and a lessee having power to assign, after having executed

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" and delivered a formal assignment, cannot have a better or " broader right.

" To prove this, it only seems necessary to resort to the earliest " enactment on the subject, that of 1449, c. 17. It is in these " words :—' It is ordained, for the safety and favour of the poor " people that labours the ground, that they, and all others that " has taken or shall take lands in time to come from Lords, and " has terms and years thereof, that suppose the Lords sell or " annalzie that land or lands, the takers shall remain with their " tacks unto the issue of their terms, whose hands that ever the " lands come to, for sicklike mail as they took them for.'

" Thus it appears, 1. That by the common law the landlord or " proprietor of lands could not effectually grant a lease to en- " dure beyond the period of his right. 2. That the extension of " the right of the tenant by positive statute, and in express devia- " tion from the common law, is confined to the case of buyers, or " singular successors, in the property of the lands.

" And so in practice the statute has been understood. Where " lands fall into the hands of a superior in virtue of any of the " feudal casualties, or in the case of a lease granted by a wad- " setter when the right of reversion has been exercised, and in " every case where the right of the lessor is set aside, the current " leases flowing from him are of no effect for ensuring possession " to the lessee.

" It is the more necessary to attend to this, because in many of " the books of authority there are expressions from which it has " been inferred, that, by the statute, leases had become real rights, " and that they could not in any case be effectual to third parties, " unless followed with natural and actual possession. The very " opposite proposition, as it humbly appears to me, is the true " one.

" Properly speaking, a lessee of lands has no right to the lands. " He has a right of possession merely ; and so it must be governed " by the properly attested agreements between those who have an " interest in it. A lessee may renounce his lease, in whole or in " part, to take effect at a certain term not yet come ; or the lessor " may give up a part of the rent due to him ; and in both cases " the renunciation will be effectual against an after assignee, with- " out publication or intimation of any kind ; and why should not " an assignation be attended with the same effect, if made bonâ

Sept. 23, 1831. " fide, and no undue concealment practised? In short, a lease is " quodammodo, and, so far as the statute goes, equivalent to a " real right, in a question between a lessee in possession and a " purchaser of the lands. But here the resemblance ceases, " and beyond this it is merely by an unauthorized analogy that " the expression has been employed in a more extensive sense.

" To this general doctrine there is only one exception to be " considered in the sequel; namely, where by undue delay in " taking possession, according to the nature and purpose of the " right on the part of a lessee, or the assignee of a lease, a third " party has been induced bonâ fide to make a separate agreement, " and has thereafter been introduced into the full and peaceable " possession of the lands contained in the lease, before the prior " lessee or assignee, and without knowing that such prior right " existed. If he is aware of the prior lease or assignation, he is " accessory to the wrong of granting double rights, and can take " no benefit by it.

" In the case where a lease is assigned by the original tacksman " by virtue of power, either expressly given, or where, from the " endurance of the lease, such a power is presumed to have been " given, there are three individuals who alone are immediately " interested. 1. The cedent, who, after delivery of the assignment " has in the ordinary case no right whatever, and ought to have " none, whereby he may injure the assignee. 2. The assignee, " who, after acceptance, comes under all the obligations prestable " by his author to the landlord, and who, therefore, ought to have " all the benefits of the right; as to him, the case is the same as " if he had obtained a new lease from the owner of the lands; and, " 3. The owner of the lands, who, although entitled in every case " to object, if an unfit person is made assignee, is in all other " respects bound to the assignee as much as the assignee is bound " to him.

" It is no doubt necessary to create a direct obligation upon the " landlord, that he should be informed of the assignment; but for " this no particular form is necessary. If, de facto, he knows that " such a right has been granted, which he may do in many ways " as well as by direct communication, the transfer is as effectual, " both for and against him, as if it had been intimated to him by " a notary, or in the form of an executed summons. This, as it " humbly appears to me, is a case quite independent of the late

" statute 54 Geo. 3. c. 197, s. 13., which relates only to inti- Sept. 23, 1831.
" mations indispensably necessary in point of form to complete
" the intimated right. If, after such knowledge, the landlord
" voluntarily does any thing to injure the right of the assignee,
" and particularly if he concurs in any act by which the original
" tenant attempts to prefer a second assignee to a former one,
" he also must be held accessory to the granting of double rights,
" as well as the cedent, and the second assignee, if the latter
" is cognizant of the prior right.

" Where two assignations of the same lease are given to
" different persons, without possession following upon either, the
" prior assignation is preferred to the later one.

" Such being the state of the parties immediately interested in
" the transmission of a lease, and in most other rights purely of
" a personal nature, it would seem to require a positive enact-
" ment to overturn the whole transaction in favour of an individual
" who, at the time of the assignment, had no interest in the subject
" to which the lease relates. In this view, it would seem to be ne-
" cessary that some publication should be required by the public
" law, as in the case of real rights; and it has been sometimes pro-
" posed that there should be such a record as to leases; but the
" expense which would thus be created, and the trivial nature and
" value of leases, until a late period, have always been considered
" to counterbalance any advantage that could thereby be ob-
" tained; and when it is kept in view how easily any one desirous
" of acquiring right to a lease may obtain information from the
" owner or possessor of the lands, it would seem to be very unne-
" cessary. It must be justly held, therefore, in this as in other
" cases of personal rights or contracts, that unusquisque debet
" scire conditionem ejus cum quo contrahit. In such a case as
" the present the right of the assignee could not in the smallest
" degree interrupt the facility of transferring the use of the
" lands, or other real property, to one who had occasion for it;
" and as to those who looked to the lease merely as a subject of
" security, they could be at no loss, by proper inquiry, to ascer-
" tain how the right stood.

" And holding that no publication in the case of leases is ne-
" cessary or required by law, it seems rather extraordinary that,
" upon notions of expediency, some other intimation of a more
" limited and most imperfect kind should nevertheless be consi-

Sept. 23, 1831. " dered indispensable. The expedients suggested by those favour-
" ing the introduction of such a principle prove how ineffectual
" and unsatisfactory it would be. In the case of Russell against
" Earl of Breadalbane it was held by some that intimation of
" such an assignment might be made to the manager of a stone
" quarry held by joint lessees and partners, although such manager
" could have no concern in the matter, nor any right, without ex-
" press authority, to divulge what might pass between his em-
" ployers in reference to their mutual transactions; and the form
" of intimation to sub-tenants holding of the original lessor, so
" far as regards the transfer of the right, appears to be just as
" little to the purpose, and as little likely to afford the means of
" knowledge to the public at large. As proving the existence
" and reality of the transaction between the assignee and cedent,
" the knowledge of these parties may be of some use; but to
" prefer information from them to that which every one may
" obtain from the landlord or his factor or from the possessor at
" the time, (those individuals having no interest to conceal what
" they know,) appears to me, with submission, to be not a little
" unreasonable.

" It has also been said, that in the case of a sub-lease granted
" by assignees to the cedents, besides the rent payable to the
" landlord, some surplus tack-duty should be paid to the as-
" signees; but if the additional rent were of considerable
" amount, it would resolve into an usurious transaction; and,
" at all events, such payment could not be more easily known
" to third parties than the sub-tack itself. The only appro-
" priate obligation in such a case is the same as is binding on
" the original tenant; and one having right to a lease by a total
" sub-lease or assignment must hold it under the same condi-
" tions as his author, so that it is quite unnecessary to say any
" thing concerning it.

" It will be remembered that even in the case of personal rights
" to lands, it was long held that the first conveyance completely
" divested the disponer. This was only departed from in 1737
" in the noted case of Bell against Gartshore, and chiefly, as it
" appears, in consequence of the statutes requiring the publication
" of all land-rights in certain registers established for that pur-
" pose; which would have been in a great measure ineffectual
" if, after the granting of a personal right which did not enter

" those records, no effectual conveyance could be made by the same disponer or by those immediately deriving right from him. But this reasoning appears to be altogether inapplicable to leases and other agreements respecting lands, which do not require or admit of being registered for publication, and where, in the general case, the obligation arising from agreement is not pleadable against singular successors. Sept. 29, 1831.

" It is a mistake to say, generally, that an adjudication of a lease is preferred to an assignation, unless followed with actual possession. The decision referred to was rested upon specialties; the assignation, which had been granted by one brother to another, having remained dormant and latent, and entirely unknown either to the landlord or sub-tenants, and, as it would appear, intended merely as an assignment to the rents. There has also been a mistake in the quotation from Lord Kilkerran in the same case; the reasoning at the bar, in which a lease is held out as a real right, having been brought forward instead of the concluding part of the report, which truly contains the opinion of the Court, viz. that in such competitions it was civil possession in opposition to natural or actual possession which was chiefly regarded; and that the former might be sufficiently attained, either by payment of the rent to the proprietor, or by enrolment of the assignee as tenant; and in many other ways the reality and fairness of the transaction, as between the cedent and assignee, may be established with equal certainty.

" There is a case reported by Dirleton which may appear at first sight to favour the pursuer's argument. It was a question between a singular successor and the trustee for a wife who had obtained from her husband a lease, to commence at his death; the right of the former, which was preferred by the Court, having been followed with infeftment before the husband died. But even there, as stated by the reporter, the determination was partly rested upon the circumstance, that the lease had been granted for a period commencing in futuro. And Lord Stair (24th February 1676), who reports the case at greater length, says, 'that if the tack had been to the wife, or her trustee to take present effect, the husband's possession would have validated the same, and so have enjoyed the benefit of the same jure mariti.' In short, although latent, or exclusive, or fraud-

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" ulent transactions in the form of a lease, or of an assignation
" to a lease, might be disregarded, such agreement has been al-
" ways considered as a personal contract, and as such supported,
" if followed with that degree and extent of possession of which
" the right is susceptible.

" But, since the date of these cases, the law appears to me to
" have been completely fixed by a series of decisions commencing
" more than forty years ago, which have been followed in practice
" in innumerable instances, and are at present known to affect
" property and commerce to a great extent. I refer to the case of
" 8th July 1783, not reported, but referred to in the subsequent
" case of Hardy, Douglas, and others, 6th June 1794, which was
" decided upon the same principle; and it was followed by an
" unanimous decision in 1813, in the case of Yeoman v. Elliot
" and Foster, the rubric of which is as follows:—' A right to a
" lease by assignation is completed by entry of the assignee's
" name as tenant in the landlord's rental-book.' In this last
" case it will be remembered that no rents had been paid by the
" assignees nor by the sub-tenants after the date of the assignation,
" the first term of payment not having arrived before the cedent's
" public bankruptcy. But that circumstance should have rather
" operated against the validity and fairness of the assignation.
" In these cases the authorities of Stair and Kilkerran referred
" to were stated by the parties objecting to the assignation, but
" disregarded, and, as it humbly appears to me, with great
" propriety and justice.

" My opinion therefore is, that there may be an effectual as-
" signation of a lease of lands in security of a debt, although it
" may not be followed with actual and natural possession, such as
" is required by the statute in 1449, in a question with a singular
" successor in the lands; and it would be most inexpedient at this
" time if a different opinion were to prevail. Indeed, the abstract
" point seems now to be hardly disputed. If there had been a
" formal sub-lease by the assignees to a third party, or if the as-
" signees had been acknowledged by sub-tenants put in by the
" original lessee, or if, after assignation, the cedent had ob-
" tained a formal sub-lease by which some tack-duty, however
" small, had been directly payable to the assignees, it is not
" said that the assignment could have been liable to challenge.
" The objections now brought forward appear to be, 1. That the

" sub-lease in this case was not attested according to law; and, Sept. 29, 1831.
" 2. That as, notwithstanding the assignation, the cedents re-
" tained possession, a presumption arose that the assignation had
" been collusive and fraudulent. But this reasoning appears to
" be wholly groundless. When possession has followed upon
" a written lease, however informal, and still more when a large
" sum has been paid in consequence of it, it cannot be pretended
" that there is room for any challenge, either by the creditors of
" the cedent or of the assignee. Besides, the question here is
" not as to the formality of the writing or the endurance of the
" sub-lease, but as to the true and legal state of the possession
" held by the parties; and taking in view the acceptance of the
" assignees by the landlord as tenants, and the payments de facto
" made by the bankrupts, and which, in a question between them
" and the assignees, could only be imputable to their obligation
" as sub-tenants, the result appears to be noways doubtful; and
" the presumption arising from retaining possession being only
" presumptio hominis, and chiefly in respect to moveables, cannot
" apply to a case like this, where there is clear and unexcep-
" tionable evidence to the contrary, the assignation, which was
" most onerous, having been followed by every act of possession
" of which the right was susceptible. It was intimated to the
" landlord, so as to be binding on him, and to subject the as-
" signees to the whole obligations of the lease; it was acknow-
" ledged in the books kept by the landlord, or (which is the same
" thing) in the books kept by his factor, the payments being made
" distinctly by the cedents as sub-tenants to them; and as soon
" as the insolvency of the cedents was known, the landlord took
" care, in the most decided terms, to assert the claims thus com-
" petent to him against the assignees, who without hesitation
" admitted their liability.

" The circumstances do not appear to have been attended to
" with sufficient care. The assignation (dated the 12th of March
" 1816) was ex facie absolute, though qualified by a back bond of
" the same date. By it the assignees became directly and expressly
" liable to the landlord for the rent, and all the other prestations
" of the lease. On the 14th of March the assignation was formally
" intimated to the landlord, and as formally acknowledged and
" ratified by him, and the assignees entered in the rental of fac-
" tory accounts of the same year. On the 15th of March the sub-

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" lease was granted, whereby the cedents became bound to pay the " rents, and fulfil the other obligations of the lease. In the sub- " lease the rent is left blank, and properly, as the assignees were " only interested that it should be regularly paid. It would have " been an useless and absurd ceremony for the assignees, at the " end of each half year, to demand and receive the rent, for the " purpose merely of paying it over to the landlord, and in a " bonâ fide transaction, such as here took place, could never be " thought of; and the sub-tenants uniformly paid what was due " at each term until their bankruptcy in July 1819. The terms " of the receipts granted by the landlord or his factor do not " appear. But, considering the entries in the landlord's books, " and the communications which took place between him and " the assignees immediately after the bankruptcy, there seems " no room to doubt that the obligations and rights of the parties " in their respective characters and relations as ascertained and " explained by their former proceedings were strictly attended to.

" After this detail it may be thought almost unnecessary to ad- " vert at any length to the case where the assignee of a lease has " unduly delayed to make any use of his right, and where a second " assignee, having been thereby encouraged to acquire a second " conveyance, has obtained possession before any overt act of " possession on the part of the first assignee.

" The principle of such decisions as are to be found in the " books on this subject is perfectly sound. It is not confined to " the assignation of a lease, but applies to every case in which, " by the careless and dilatory exercise of a legal right, heavy loss " is occasioned to a third party. Before the acts requiring the " registration of real rights it was applied to base or subaltern " grants of land, though followed with infeftment, Ersk. 2, 7, 10; " and it is analagous to that which has lately been recognized, " although perhaps in some instances carried too far, where " the managers of a banking company, having allowed their " agent to act in opposition to his duty, without giving due " notice to the agent's cautioners, were held barred, personali " exceptione, from having recourse against the cautioners. But " in a case like the present, and under all the circumstances " which have been stated, the objection appears to be inad- " missible; for,

" 1. Holding that a lease may be assigned in security of debt,

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" it appears that in this case the assignees did every thing that " could be required from them for the completion of their right " according to its nature and purpose. If the question, therefore " had been between them and a second voluntary assignee, who " might upon the slightest inquiry have obtained information in " so many different ways as to the existence of such an assignment, " the loss, if any, would have been attributable to him, and not " to the prior assignees; but,

" 2. In the question which here occurs the competition is not " between two voluntary assignees, one of whom, though prior in " right, has not (as it is contended) entered into possession as he " ought to have done; and where the second assignee can plead " prior, actual, and exclusive possession. It is a question between " assignees to a lease and a statutory trustee under a sequestra- " tion, whose only title to the lease arises from the general " adjudication, which is for the benefit of all the creditors of the " bankrupt, and comes in the place of those adjudications which " would have otherwise followed in virtue of the separate debts " and obligations of the bankrupt; and which separate adjudica- " tions, it must be kept in view, have been prevented by the " statute.

" Before the general adjudication the trustee had no right to " the lease. The bankrupts had none, except as sub-tenants, until " the debt due to the assignee in security had been discharged. " But long before this, and while the estate was under the admi- " nistration of the statutory factor, the right of the assignees was " fully known and recognized, the sequestration having taken " place in the month of July 1819, and immediately followed " with a communication between the landlord and the assignees " and the statutory factor, and the payments made to the land- " lord by the factor, as coming in the place of the sub-tenants.

" Under the sequestration, the state of the parties at the date " of the sequestration must be the rule. The possession of the " judicial factor or of the trustee must be held as the possession " of all and each of the creditors according to their rights at the " time; and the general adjudication which follows can give no " right, or even a title of possession, which would alter or dimi- " nish the rights of any of the creditors; and holding, that in this " case the assignees were preferable, unless actual or exclusive " possession had been obtained by the trustee in favour of the

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" general body of creditors, there seems to be no pretext for " resorting to the doctrine upon which so much stress has been " laid, as to priority of possession.

" It often happens that a trustee enters into the management " of lands covered with heritable securities; but this makes no " difference on the preferences or privileges competent to the " heritable creditors. In this case it is hardly possible to imagine " that the judicial factor paying for the sub-tenants the rents, " which by their sub-lease they were bound to pay, and had been " in the use of paying, could in the smallest degree affect the " interests of the parties.

" In a late case it was justly decided (and the decision has been " affirmed in the House of Lords) that the adjudication in favour " of a trustee upon a sequestrated estate gave the same preference " to the creditors of the ancestor over those of the heir which " would have been competent if each individual creditor had led " a separate adjudication, and upon the same principle the case " of Holmes v. Reid was lately decided.

" Before leaving this subject it may be proper to advert to the " situation of the prior assignees, in reference to the landlord, if " the statutory trustee were to be preferred to him. Can it be " said that the prior assignees, after being deprived of their secu- " rity, are liable for the rents and other prestations of the lease, as " they certainly were, after having been accepted by the landlord? " Could the sub-tenants admitted to possession by the assignees, " supposing them different from the cedent, be removed by the " trustee? An authority has been quoted for showing that the " creditors of a bankrupt may, under a sequestration, reject a " lease, or the assignation of a lease, if they judge it expedient. " But are they empowered, at the same time, to oust a prior " assignee in security, who must still remain subject to the obli- " gations arising from the lease?

" On these separate grounds, and in the particular circum- " stances of this case, I am humbly of opinion that the trustee was " not authorized or entitled, by the general adjudication, to ex- " clude the assignees in security from the full enjoyment of a prior " and bonâ fide right, known to him, as well as to all the parties " immediately interested, long before the general adjudication " was obtained. In such a case the trustee cannot put the ge- " neral body of the creditors in a better situation than the as-

" signees of the lease. The creditors may claim generally the Sept. 23, 1831.
" benefit of possession through the trustee pari passu with the as-
" signees, if standing in the same circumstances; but, unless they
" prove a prior possession, the prior assignee ought to prevail.

" I have yet some observations to make upon two cases
" lately decided, where the same question occurred. In the case
" of Russell v. the Earl of Breadalbane I concurred with the
" other Judges in thinking that, on the specialty more distinctly
" brought into view in the last stage of the proceedings, the
" preferable right of the Earl could not be justly disputed. But I
" also thought he ought to be preferred, 1. Upon the general
" grounds already stated; 2. Because the action was brought in
" virtue of a voluntary and general trust-deed, by which the inte-
" rests of the non-acceding creditors could not be affected; and,
" 3. Because the Earl's prior assignment was specified in the
" trust-deed itself; so that the creditors, knowing of it, could
" not avail themselves of the trust-conveyance, to disappoint a
" prior right.

" Again: the other case, that of Paul v. Inglis, I had no op-
" portunity of considering until a majority of the Court had
" formed and given their opinions. Perhaps it may have been
" rightly decided upon the footing that the assignees of the lease
" had been improperly dilatory in communicating their right to
" the parties interested; but I must say that the circumstances
" of the case were not ascertained as they ought to have been.
" On the one side it was stated that Macfarlane, to whom in-
" timation of the assignment had been made, was proprietor
" of the subjects, and also entitled to a quit-rent payable by
" the assignee; while, on the other side, it was averred that
" this person, to whom only before the sequestration, intima-
" tion had been made, was no proprietor, but had been a
" prior assignee, and had made a general assignment to the
" bankrupt. In the one case it humbly appears to me that inti-
" mation to Macfarlane ought to have been held as sufficient,
" and especially in a question with the statutory trustee; in the
" other case it could hardly be said that the assignation had been
" either intimated or followed with possession, as it might have
" been in justice to third parties.

" As to the question raised respecting the machinery and
" utensils found at the date of the sequestration upon the subjects

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" under lease, it does not seem to have been in the view of the " Judges of the Second Division when the opinions of the Court " were required."

Lord Fullerton.—" Although a lease of lands be, like any other " contract of location, in itself personal, yet it has become, in " virtue of the statute 1449, a real right—a character uniformly " assigned to it by our institutional writers, and confirmed by " a series of decisions which it is impossible now to disturb. As " a consequence of this, and upon the same authority, it may " be assumed that possession is necessary for the effectual con- " stitution and transference of the right. In this respect, there " may be some ground for the supposed analogy between pos- " session in relation to a lease, and sasine in the case of a right " of property. But the analogy is imperfect. In the latter case, " the sasine, being attested by a written instrument, is neces " sarily connected with the special grant on which it proceeds. " Possession, in the case of a lease, does not admit of any such " distinctive connexion with a particular title; and as the title " consists of a personal contract, on the terms of which the " existence, duration, and value of the right depend, the pos- " session may remain ostensibly the same, although the right " receive every possible modification. By a transaction with the " landlord, a tenant holding a lease highly beneficial both as " to rent and endurance, may, without any change or suspen- " sion of possession, reduce its value in both particulars to any " given extent; and there seems no reason to doubt that, by " assigning the lease, intimating the assignation to the landlord, " and taking a sub-lease from the assignee, he may descend " from the situation of tenant under a beneficial lease to that " of a sub-tenant at a rack-rent, without affording, by the dis- " continuance of his former possession, any means of detecting " the change. Although, therefore, a lease may, in consequence " of its character as a real right, require possession to complete " its transference, it does not seem that an apparent change of " possession is indispensable to effect either its transference, " alteration, or extinction. Neither is this attended with any " dangerous practical consequences; for, as possession under a " lease implies merely a right, of which the value depends on " the terms of the personal contract forming the title, it never " can raise a credit in behalf of the possessor, while the nature

" and terms of the title remain uninvestigated; so that it is a " case to which the principle ' unusquisque debet scire condi- " tionem ejus cum quo contrahit,' seems most clearly to apply.

" To complete the transference of a lease, then, it appears to " me that there must be, in the first place, a conveyance of the " title or personal contract, in regard to which, I think intima- " tion to the landlord not merely competent, but indispensable, " as, by the law of Scotland, intimation is the appropriate and " requisite act by which the substitution of the assignee for the " cedent in every personal contract is effected; and, secondly, " that there must be such possession as can be legally ascribed to " the title so transferred.

" The measures necessary to effect these objects may vary ac- " cording to the circumstances of each particular case. When " the principal tenant assigns, and places the assignee in posses- " sion, the transference is perhaps complete without a formal in- " timation to the landlord, because intimation admits of equipol- " lents, and the public assumption of possession by the assignee " may be viewed in that light. If the cedent has already granted " a sub-tack in addition to intimation to the landlord, intimation " or some equivalent to intimation to the sub-tenant may be re- " quired; because actual possession being unattainable by the " assignee, that measure, or some equivalent having the effect of " completing the substitution of the assignee for the cedent in the " contract with the sub-tenant, may be requisite to render the " possession of the sub-tenant constructively the possession of the " assignee; and, in this view, actual payment of rent by the " sub-tenant to the assignee does not seem to be indispensable, " although it may supply the absence of a formal intimation to the " sub-tenant. In the case of a sub-lease previously granted by the " cedent, I consider the true test of the transference of possession " to be the existence of some act by which the possession of the " sub-tenant becomes referable to the right of the assignee to the " principal lease. In a third supposable case, where the assignee " grants a sub-tack to the cedent, the original tenant, the trans- " ference may become effectual without any ostensible change of " possession. But there ought to be, in that case, some separate " intimation to the landlord, because there is no public change of " possession which admits of being construed as an intimation to " the landlord of the assignation by the original tenant.

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" These views seem to be supported by the two decisions chiefly " founded on by the parties, and indeed seem to afford the only " means of reconciling them.

" In the first case, that of Wallace against Campbell, the " tenant assigned a lease from the Duke of Argyll in security of " a debt, and took a sub-tack from the assignee. A competition " arose between the assignee and an adjudger, which was deter- " mined in favour of the latter. But it does not appear from the " reports of that case, that the circumstance of there being no " ostensible change of possession was held to be conclusive; for " the Court remitted to the Lord Ordinary to inquire, inter alia, " ' what evidence Inverasragan (the assignee) could give, that any " part of the yearly rent payable to the Duke of Argyll had " been paid on his account as assignee to the tack, or that he " was enrolled as tacksman in the Duke's rental;' and Lord Kil- " kerran, in remarking upon the decision, and obviating the " assignee's plea, that the case did not admit of or require any " further intimation, observes, ' for still, as has been said, the " civil possession was what completed the right; for, as the remit " to the Lord Ordinary supposes payment might have been " made of the Duke's rent by the disponee, or he might have " been enrolled as tenant, which ought to have served for inti- " mation.' I rather consider the fair inference from that deci- " sion to be, that if there had been an intimation, or any thing " equivalent to an intimation to the landlord, the assignation " would have been supported.

" And this inference seems to be warranted by the later deci- " sion in the case of Yeoman v. Elliot and Foster, 2d February " 1813. There the tenants had assigned certain leases from the " Duke of Buccleuch in security of advances to the extent of " 1,000*l.*, and received sub-tacks from the assignee. But, in addi- " tion to these circumstances, the assignee had enrolled his name " in the Duke of Buccleuch's rental books—a step which was " equivalent to intimation. In that case the assignations were " sustained, though unquestionably they were granted merely in " security, and although no rent was paid, or indeed could have " been paid, either by the assignee to the landlord, or by the " cedent or sub-tacksman to the assignee, as the competition arose " before the first term of payment had arrived. I must confess " my inability to discover how this decision could have been pro-

" nounced, unless on the principle already referred to, that the " title or personal contract being effectually transferred by as- " signation and intimation to the landlord, the sub-tack had the " necessary effect of rendering the subsequent possession by the " cedent and sub-tacksman constructively the possession of the " assignee.

" On applying these principles to the decision of the present " question, I am of opinion that the assignation in favour of " Messrs. Cabbell and Brown is effectual. There can be no doubt " that the title was effectually transferred. There was an assig- " nation to the lease ex facie absolute, and that assignation was " formally intimated to the landlord. There was, in addition, a " missive of sub-tack granted by the assignees to Archibald New- " bigging and Co., and an acceptance by Archibald Newbigging " and Co. written, and, as I presume, signed by Archibald New- " bigging, in whose name I understand the original lease stood in " trust, as it is said, for the company. Now, although these last- " mentioned documents are in many particulars informal, I am " inclined to think that they are sufficient to constitute an exer- " cise of the assignees' right, to which the subsequent possession " of Newbigging and Co. may and must be legally ascribed. In a " question between the assignees and Archibald Newbigging and " Co., it appears to me that these missives would have been suffi- " cient to support the possession of the latter from year to year, on " payment of the ' whole rent exigible by the landlord,' with all " ' taxes, burdens, and duties affecting the property and posses- " sion,' being the terms specified in the missive. As Newbig- " ging and Co. had been divested of the original title, the principal " lease, by the assignation and intimation to the landlord, and as " the missives of sub-tack, though informal, were capable of form- " ing a title of possession, I think the subsequent possession of " Newbigging and Co. may be legitimately ascribed to these " missives of sub-tack, and consequently must be held as the " constructive possession of the assignees.

" In arriving at this conclusion, it is hardly necessary to men- " tion that I have thrown out of view entirely the charges of col- " lusion and undue concealment made against the assignees. I " see no ground for any such charges; and in regard to the sup- " posed danger of giving effect to a security over a lease, without " any public change of possession, I think, in the first place, that

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" the danger, if it existed at all, is inseparable from the very nature " of a lease; and, secondly, that it is entirely imaginary, in as " much as a lease, considered as a subject capable of raising credit, " never can be relied on, and has no value independent of the " terms of the title of possession, into which terms the party " giving the credit must be presumed to inquire.

" Upon the other point, the machinery and utensils, I hardly " think that the information afforded by these papers is satisfac- " tory or conclusive. It appears to me at present that, in so far " as concerns the utensils, the claim of the assignees is ill founded. " The assignation, no doubt, conveys the utensils; but no posses- " sion seems to have been taken of them by the assignee; and it " is quite impossible, even in the most favourable point of view " for these assignees, to hold the subsequent possession of Archi- " bald Newbigging and Co. as their possession, as the missives " of sub-tack do not mention the utensils.

" The circumstances regarding the machinery are somewhat " different. The machinery is expressly mentioned in the missive " of sub-tack; and I am rather inclined to think, that if it truly " consists of articles which, according to the usage of the manu- " facture, are held to be accessory to, and generally go along " with the buildings, the proper subject of a lease, the assignation " and disposition, followed by the missive of sub-tack, might be " sufficient to support the claim of the assignees."

The cause was now put out for advising by the Second Division.

Lord Justice-Clerk.—" I have read the cases with every atten- " tion in my power; but I remain of the opinion which I de- " livered when the cause was formerly before us, that the assig- " nation is not effectual against the creditors."

Lord Glenlee.—" I am also of the same mind."

Lord Pitmilly.—" I likewise think the former interlocutor " well founded, and entirely concur in the opinion of the Lords " President, &c. I have always thought assignation of a lease " without possession ineffectual; and but for the specialty in the " case of Russell, on which the decision actually proceeded, I " would have been for adhering to my original interlocutor."

Lord Cringletie.—" I have not altered my opinion."

Thereafter (5th March 1830), " the Lords, having resumed

" consideration of the cause, with the opinions of the consulted " Judges, adhered to the interlocutor of this Court, prior to " the appeal therefrom to the House of Lords,—but in re- " spect that the present judgment proceeds under a remit from " the House of Lords, finds, that nothing should now be pro- " nounced as to additional expenses, since the date of the in- " terlocutors appealed from." * Sept. 23, 1831.

Cabbell appealed.

Appellant. — 1. A lease is a mere personal right. The only real rights known in the common law of Scotland are property, servitude, pledge, and perhaps exclusive privilege; but a lease does not belong to any of these classes. It is a personal contract, effectual against the parties contracting and their heirs, but not ex suâ naturâ effectual against third parties. Hence it followed, that if the landlord sold the property, or if it was adjudged by his creditors, the purchasers or adjudgers were not affected by the leases which he had granted, but could remove the tenants at pleasure; and the latter had no redress, except a claim for damages against the granter of the lease. This was felt to be a great grievance; and attempts were sometimes made to convert the personal into a real right, by granting seisin of the land to the tenant. But the form of a seisin was unavailing; for the right being radically personal, mere seisin or delivery did not change its nature, and the tenants were still removable at the will of the landlord's singular successors. As, therefore, the common law furnished no remedy, the legislature found it necessary to interpose; and accordingly, by the act 1449, chap. 17, leases were made effectual against purchasers. The only alteration of the common law by the statute was to secure tenants from removal by the landlord's singular successors; but in all other respects, the legislature left the lease still a personal right. The protection afforded by the statute was of the nature of a personal privilege bestowed on " the poor people that labour the ground;" but it left their title unchanged in its nature and character. In order, however, to entitle them to this privilege, it was necessary that they should

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* 8 Shaw and Dunlop, p. 647.

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be in possession at the time of the alienation by the landlord; and, indeed, this was indispensably requisite for the security of purchasers, because if a latent lease, known to no other persons than the landlord and tenant, and the existence of which is not indicated by any intimation or publication, were to be effectual against singular successors, a door would be opened to innumerable frauds. The appellant, therefore, denies the soundness of the opinion expressed by several of the Judges in the Court below, that a tack is a real "right by force of the statute 1449, "in a question between assignees and adjudgers from the tenant, "and to that case, therefore, the general rule applies." Other of the Judges express an opinion much more correct, when they say of a lease, that its "creation and its transmission are to be "regulated, as if it were, what it truly is, a personal right."

2. Personal rights are transferable by assignation, and the right of the assignee is completed, either by intimation, or by some act which in law is held to be equivalent to intimation. But assignation alone is not sufficient to complete the title of the assignee to the right or subject-matter of the assignation, and the mode of completion depends on the nature of the right or thing assigned. When moveables are the subject of the assignation, there is no party but the cedent and the assignee, and therefore the right must be perfected by possession or delivery. But, if a right or obligation constituted by a third party in favour of the cedent is assigned, the proper mode of completing the assignation is by intimation to such third party. But, though intimation is the most unexceptionable mode of completing an assignation, yet equipollents are admitted to supply its place. Of these, natural possession is one. But if the natural possession by an assignee completes his right as an equipollent of intimation, it follows, that the assignation of a lease is perfected, without the necessity of intimation, as soon as such possession is attained by the assignee. Other equipollents to intimation are admitted. Thus an enrolment of the assignee in the landlord's rental will supply the place of intimation. Without intimation, therefore, or some one of its equipollents, such as the natural possession or enrolment, an assignation of a lease is ineffectual; while, on the other hand, such intimation, or possession, or enrolment in the landlord's rental, completely vests the assignee in the right, and of course divests the cedent, so that no right

remains in him to be either voluntarily conveyed or attached by the diligence of his creditors. Sept. 23, 1831.

3. Even if intimation to the landlord were not sufficient per se to complete the security, still if a tenant, who has sub-set or given the natural possession to another, grant a security by assignation, the right of the assignee will be completed by intimation, both to the landlord and to the sub-tenant, or other person holding possession under the principal tenant; and there was such a sub-set and intimation in the present case.

4. The granting of a sub-lease by the appellants to Archibald Newbigging and Company, was an act of civil possession, which, according to the view of the Court below, was sufficient to perfect the assignment, even though there had been no intimation.

5. The right of the appellants to the machinery and utensils is not distinguishable from their right to the leases.

Respondent.—1. The assignation to the tacks, never having been clothed with possession in the appellants' persons, is a merely personal right, and so affords but an imperfect and uncompleted title, which cannot stand against the real right vested in the respondent. But an assignation of a tack, without possession of any kind, is altogether insufficient in competition with a singular successor, whose right has been duly clothed and completed by possession, to operate any effectual transfer of the real right under the lease. Possession is just as necessary to establish a real right of tack, whether in the original constitution of it, or in any transfer by assignment, as seisin is in the case of a feudal subject. The appellants' pleas rest entirely on the assumption that a lease is merely a personal right, overlooking altogether the important distinction, founded on the statute 1449, c. 18, between the lease before it is perfected by possession, in which case it is a mere personal and uncompleted right, and the lease after it is so perfected, in which case it becomes what the law recognizes as a real right. It is now indisputable, that in the case of competing leases, the lease first clad with possession is the only effectual one; and that, in the same way, in competitions between assignations to leases, or between sub-tacks, or between an assignation and a sub-tack, that right upon which possession has first taken place, to all intents and purposes, cuts out the rest; or, to put the matter in a general shape, the

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respondent maintains, that wherever a real right of lease comes in competition with a personal one, the former must of necessity be allowed the preference. Nor is there any equivalent which can be substituted in the place of possession, so as to have the same effect of thus perfecting a lease into a real right. Possession is essential as a solemnity. It is just as indispensable to the completing of the real right of lease, as the taking of sasine is to complete a feudal right; and since, where any proper solemnity is established for perfecting a right, equipollents are not to be admitted, as in the case of feudal rights, in which no equivalent can supply the want of a sasine, possession is no less essential, and no less incapable of being supplied by equivalents in perfecting a right of lease. It is by the authority of statute alone that leases were raised into the class of real rights. But the same statute which produced this change has ever been held to declare, that possession is an indispensable requisite.

2. The intimation of their assignation to the landlord will not avail the appellants; for though intimation may be all very good when there is something belonging to the cedent in the hands of the person to whom intimation is made, and the right to which something is meant to be transferred over to the assignee, as the party who thereafter shall be entitled to demand it, it is obvious that where the subject assigned is matter not of personal claim but of real right, and in itself directly capable of delivery from the cedent to the assignee, intimation is altogether out of the question. Indeed it is laid down by every authority that the legal transmission of a lease, as a real right, is by possession, and not by intimation.

The respondent denies that there is either authority or principle for the appellants' doctrine, that bare intimation to the landlord, unaccompanied by any possession, natural or civil, on the part of the assignee, and unsupported by any sub-tack or other change of title, so as to fix on the tenant's possession the restricted character of a possession as sub-tenant to the assignee, is sufficient, in any legal sense, to complete the assignee's real right, or to vest him in the full right of the lease.

But in addition to the argument founded on intimation, the defenders affect to lay great weight on the circumstance of their assignation being noticed in what they are pleased to term the landlord's rental book.

But this circumstance, even had it occurred in the most regular and unimpeachable shape, cannot possibly be regarded. Sept. 23, 1831.

3. The alleged sub-tack cannot avail the appellants. It is informal and improbative, but even had it been liable to no such objections, ex facie, it could not, from the latency and collusion of the whole transaction, avail the appellants in the least. There was never any real or bonâ fide purpose, on either side, that the subjects should be sub-set; and accordingly, neither did the appellants in any one particular act as tenants in chief, nor did any change of possession ever take place, to fix on the bankrupts the character of sub-tenants.

4. The assignation in the defenders favour was altogether a collusive transaction, having a totally different object from what it bore on the face of it, and being in truth a mere cover for an arrangement, which, if openly entered into, the parties were aware the law would not have recognised.

5. The conveyance to the appellants of the machinery and utensils, as considered apart from the real subject, is unavailing, as being a conveyance of moveables, retentâ possessione.

Lord Chancellor.—My Lords, this is a case which involves matters of considerable importance to the law of Scotland, and upon which there has been a difference of opinion among the learned Judges in the Court below. It is strange that there should be any doubt whether or not there has been a decision upon a transaction similar to the one in question, of the assignment of a lease, which occurs of leasehold premises in towns as well as of farming lands in the country almost daily in England, and which must have occurred very often in Scotland. One cannot help being surprised at not finding a decision distinctly referred to, disposing of the question, an intimation of an assignment, and actual possession also, or something equivalent to actual possession, is necessary to constitute a valid transfer? The learned Judges, a very considerable number on both sides, appear to have considered the question, and to have taken different views of it. The opinion of Lord Balgray and Lord Gillies is given very shortly, and very generally; but they so far plainly differ from their learned brothers, that they do not seem to hold possession so necessary as the others do to the transfer of a lease, at the same time that they entirely express their concurrence in the opinion of the Court; but this I can only treat as an indication that they consider the assignment not to have been a real but a collusive and colourable transaction, as the party assuming

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to assign continued in possession, to all outward appearance, as before. It appears he accounted for the rent to the landlord, and there is no evidence of the other party to whom the assignment is made having done so. It seems like raising up a man of straw between the party assigning and the party entitled to claim. This difference of opinion among the learned Judges below makes me wish to look more particularly into this case. I shall therefore very reluctantly propose to your Lordships to postpone for a short time stating what occurs to me upon the subject.

On a future day.

Lord Chancellor.—My Lords, this case is one not unattended with difficulty. When it was formerly before you, your Lordships were pleased to remit it to the Court below, for the learned Judges of the First Division to consult with the learned Judges of the Second Division; and we have now the benefit of the judgment of the Court below upon that consultation. They adhere to the original view of the question; but we have light let in upon the case by the expressed opinions of all the consulted Judges, who it seems differed as to the grounds, and some of them also as to the result of the decision.

Your Lordships recollect that it appeared to be a case of some importance, though it can be stated in a very few words. There was a lease for the term of one hundred years of premises employed as a valuable bleach-field, held by Hopkirk and Company, which was assigned by them to Archibald Newbigging; and the Company of which Newbigging was a partner having borrowed 7,000*l.* from the Glasgow Bank, and being to receive 5,000*l.* more if wanted, they assigned, when in manifest difficulties, this lease to the Bank. An intimation of the assignment to the lessor followed; but there was no possession taken by the Bank in any way. The Bank then granted a sub-tack to Newbigging and Company, and under this sub-tack it is said, that they, the original lessors and assignors, held under the Bank, their assignees. The Bank also granted a back-bond, setting forth what had taken place, and clearly showing that the assignment to them, the Bank, had only been in security. Now, to say nothing more about the informality of this sub-tack, it is enough for me to observe, that the most important part of the whole, the rent—the render—is blank in the instrument. Newbigging and Company became bankrupt, and the question arises as between the Bank, the assignees of the lease, and the trustee of the sequestrated estate of the assignors of the lease, which shall have the term in question; it being, on the one hand, contended for the Bank, that they have a valid assignment; and it being, on the

other hand, contended that there was no valid assignment, nor any instrument that could pass an interest. In support of the argument for the validity of the assignment, it was mainly urged that the requisite intimation had been made to the landlord. On the other hand, it was contended against the validity of the assignment, that intimation was not sufficient, until the right was clothed with possession in the assignee. In order to supply that defect, admitting for argument's sake that intimation without possession is not sufficient, the Bank contend that they had possession, that Newbigging and Company having assigned, they took the subjects back again as sub-tenants, and that their possession was no longer to be ascribed to their own original assignation as principal lessees, but to the sub-tack as derivative lessees, that their possession was the Bank's possession, and that there was not therefore only intimation but possession also to clothe the assignment. These are shortly the facts, and the bulk of the arguments on each side of the case, with which the Court below has dealt; and the conclusion which I have drawn coincides with that of the Lords President, Meadowbank, Mackenzie, Corehouse, Newton, and Moncreiff, who thus express themselves: "Therefore "the case plainly resolves itself into a collusive device to create "a latent security over a real right, without change of possession, "either naturally, civilly, or symbolically; an attempt at variance "with the first principles of the law of Scotland, and which, if it "could be accomplished, would give rise to mischievous conse- "quences." Lords Balgray and Gillies do not go the full length of the earlier part of this opinion, which I have not troubled your Lordships with, namely, that a tack in Scotland, which is a real right by force of the statute of 1449, can only be validly carried to an assignee, if there is, beside intimation, possession by the assignee: which point was the principal ground of the remit to the Court of Session; when it seemed an extraordinary thing, as it occurred to me, that such a matter never had been settled before. Their Lordships state, "We therefore cannot affirm that it is the law of Scotland, "that an assignation of a lease duly intimated is per se an imper- "fect right, unless followed by natural or civil possession." That is the opinion of those learned Judges; they do not go so far as their learned brethren in saying that intimation is not sufficient without possession; but in the opinion of those other Judges, so far as it is founded on the special circumstances of the case, they entirely concur. Now, my Lords, I take the same view with those learned Judges (without deciding a question which it does not appear to me necessary for the Court below, in the circumstances of the case, to have decided, and which I do not think it is necessary for your Lordships to deal with)—that there is nothing here, which, by

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the law of Scotland, can be said to vest a bonâ fide right in the assignee of the Bank, to the exclusion of the rights of the creditors, as represented by the trustee on the sequestrated estate; that it was the setting up of a fictitious person between the one party and the other, by a collusive transaction, and by means of such latent right as is always reprobated in the Scotch law of real property; that the right was not validly passed in such way as to exclude the trustee from entering into competition for it; that there was no parting with the possession, though the transaction purported to part with it; and as to the sub-tack, it appears to me, instead of mending the case on the part of the Bank, greatly to impair it; for I cannot conceive any more flimsy expedient as a right of possession, than to make the possession become, by virtue of a sub-tack, no longer the possession, such as Newbigging had before under his landlord at first, as main lessee, but a possession under his own assignee of the term, taking back from the Bank a sub-leasecollusivelyand latently, to defeat the proper right of the parties. Upon these grounds, and in the circumstances of this case, and without advising your Lordships to decide the general question with respect to the sufficiency of intimation, without possession, I am of opinion your Lordships ought to affirm the judgment now complained of.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

RICHARDSON and CONNELL,—MONCRIEFF, WEBSTER, and THOMSON,—Solicitors.

MURDO MACKENZIE, Appellant. — *Mr. John Campbell* — *Dr. Lushington.*

No. 40.

ALEXANDER MACARTNEY, for the Commercial Bank of Scotland, Respondent. — *Mr. Murray* — *Mr. Miller.*

Cautioner.—A principal debtor in a bond for a cash account with a bank failed, and executed a trust the deed of accession to which allowed a supersedere of diligence for three years; the bank lodged a claim and affidavit, without signing the deed of accession, and a delay of seven years took place: Held (reversing the judgment of the Court of Session), that the cautioner was liberated.

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2d DIVISION.
Ld. Cringletie.

IN 1811 Mackenzie, along with Ross and Geddes, became bound to the Commercial Banking Company in a bond for a cash credit