[1st *March* 1833.]

WILLIAM TAYLOR, late of Nethermains, Appellant.— *Lord Advocate* (*Jeffrey*). No. 21.

The Rev. RICHARD RAINSHAW ROTHWELL, and others, Trustees for the Creditors of Sir WILLIAM CUNINGHAM FAIRLIE of Robertland and Fairlie, Baronet, Respondents.—*Sir Charles Wetherell—Wilson.*

Bankruptcy — Process — Caution. — Circumstances under which (reversing the judgment of the Court of Session,) a bankrupt whose estate was under sequestration was held not bound to find caution for expenses of process as a condition of being allowed to defend himself against a declarator of irritancy of a lease.

2D DIVISION.

Lord M'Kenzie.

IN 1812 Sir William Cuningham Fairlie let to John and George and William Taylor, and their heirs, "but "secluding assignees and sub-tenants, under whatever "denomination, legal or voluntary, without the con- "currence of the proprietor in writing," the coal upon the lands of Fairlie in the county of Ayr, under certain reservations and conditions with regard to the working, for the space of twenty-four years, and the lifetime of George Taylor, if he should survive that period. The rent was 500*l.* yearly, payable quarterly, at Candlemas, Whitsunday, Lammas, and Martinmas, (excepting for the first year, during which the rent payable was to

No. 21.

1st *March* 1833.

TAYLOR *v.* FAIRLIE'S TRUSTEES.

be only one half of that sum,) or, in the option of the landlord, a lordship of one eighth part of the prices of the coal. The lease contained a clause to the following effect:—"And further, if it shall "happen that the said tacksmen or their foresaids "shall fail in the regular payment of the said respec- "tive shares or moieties of said rent at the terms at "which the same become due, so as that two quarters "payment thereof shall at any time be due when "a third becomes current, then and in that case "the said tack shall ipso facto become void and null, "without any process of declarator to be used for that "effect; and it shall thereupon be in the power of the "said Sir William Cuningham Fairlie and his fore- "saids to enter into the possession of the whole pre- "mises themselves, or otherwise to dispose thereof as "they may think proper, in the same manner as if "this tack had never been granted, or had finally "determined and been at an end."

In 1814 John and George Taylor assigned their interest in the lease to William Taylor, who continued in possession till 1816, when he assigned the lease to Messrs. Fulton and Neilson of Glasgow as trustees for the benefit of his creditors. These assignments were made without the consent of the landlord. In April 1818 the trustees abandoned the colliery, and William Taylor, as was alleged, resumed possession of it; but upon his deserting it shortly afterwards John and George Taylor presented a petition to the sheriff of Ayrshire, praying to be admitted to the management of the colliery, and they were accordingly, in May 1818, reinstated in possession by the sheriff's warrant, and the possession so continued till 1824. In 1819 sequestration under

the bankrupt act was awarded against William Taylor; and James Kerr, accountant in Glasgow, was appointed trustee on his sequestrated estate. John Taylor afterwards died, and his estates were sold under a ranking and sale before the Court of Session, and found inadequate to pay his debts. In 1823 George Taylor's affairs also became involved.

At Martinmas 1824 the tenants, as was alleged, stood indebted to Sir William C. Fairlie and his trustees in the rent of four quarters, besides previous arrears. The rent stipulated by the original lease (namely 500*l.*) had been subsequently restricted by the landlord to 400*l.*, though by no formal document, and for no fixed period; and it had been so restricted for the year in which the alleged arrears were incurred.

Under these circumstances the trustees for the creditors of Sir W. C. Fairlie, and the latter for his interest, raised before the Court of Session an action of declarator of irritancy in March 1825 against George Taylor, John Taylor junior, the heir of the former tenant, and his curators (he being a minor), William Taylor, Messrs. Neilson and Fulton, and Mr. Kerr, narrating the failure to pay the rent at the stipulated terms; and that, "besides former rents, there was due to the "pursuers, at the term of Martinmas 1824, the sum of "400*l.* sterling on account of the said colliery, being a "full year's rent, or the rent for four quarters, as the "same was restricted, and payable for the said year "or for four quarters, and interest on each quarter's "payment from the respective terms of payment until "paid, whereby the irritancy declared in the foresaid "tack has been incurred, and the said tack has become "void and extinct in all time coming;" and thereon

No. 21.

1st *March* 1833.

TAYLOR v. FAIRLIE'S TRUSTEES.

it concluded that it should be found that the foresaid rents were due, "at least that they are resting and "owing to the pursuers, two quarterly payments of the "foresaid yearly rent as restricted, while a third has "become current; and that the said defenders have "thereby contravened the terms of the said tack, and "incurred the irritancy foresaid;" and that they should be decerned to remove from the occupation of the subject.

Defences were lodged for Messrs. Neilson, Fulton, and Kerr, objecting to any decree going out against them personally for rents due from the colliery, on the ground that they had nothing to do with the subject during the time for which the rents mentioned in the premises had fallen due. No defences were at first lodged for William Taylor; and the Lord Ordinary, while he assoilzied Messrs. Neilson, Fulton, and Kerr "from any claim for the rent of the year at and pre-"ceding Martinmas 1824," quoad ultra decerned and declared in terms of the libel.

William Taylor, having afterwards represented against this interlocutor, was allowed to lodge defences, and a record was made up. The Lord Ordinary thereafter, on the 18th December 1827, decerned and declared against William Taylor in terms of the libel, and found him liable in expenses.

He then presented a reclaiming note to the Second Division of the Court, who appointed him to lodge a condescendence before answer with reference specifically to the allegation that the arrears were not due. A condescendence was accordingly lodged, and the pursuers then maintained, that as William Taylor was a sequestrated bankrupt, they were not bound to

litigate farther without his finding caution for the expenses of process. The Court, on the 4th December 1829, pronounced the following interlocutor:—"The Lords "having advised the cause, and heard the counsel for "the parties, before further proceeding, et ante omnia, "ordain the defender to find sufficient caution for the "whole expenses of process on or before the third "sederunt day in January next, and appoint the cause "to be then put to the roll for further advising."

No. 21.

1st *March* 1833.

TAYLOR v. FAIRLIE'S TRUSTEES.

Taylor then applied for leave to appeal, but this was refused (3d March 1830), and no farther appearance being made by him, the Lord Ordinary's interlocutor was adhered to on 6th March.*

William Taylor appealed.

Appellant.—There are two questions raised by this appeal: 1st, whether the appellant, against whom an interlocutor of the Lord Ordinary has been pronounced, decerning against him in terms of the libel, is entitled to be heard against that interlocutor without finding caution for expenses of process; and, secondly, whether the Lord Ordinary's interlocutor, decerning against him in terms of the libel, be well founded on its merits. As to the first, there is no rule in law which renders it necessary for a party called as defender in a suit to find caution for the expenses of the pursuer, although he may have been rendered bankrupt previous to the institution of the action. A defender in a declarator is ex hypothesi in possession, and the action can be brought only either to alter the mode of possession, or

* 8 S. D. 666.

No. 21.

1st *March* 1833.

TAYLOR v. FAIRLIE'S TRUSTEES.

to strip the possessor of the right altogether. The defender must be entitled to defend effectually; and though one may have suffered the misfortune of bankruptcy, he is not to be held as ipso facto excluded from the right to defend himself. The principle is the same as to whether the defender is prohibited absolutely from stating his defence, or has such conditions attached to the exercise of his right as render it difficult or impossible. In the case of a bankrupt it is very nearly the same, whether he shall be prohibited absolutely, or whether he shall be prohibited indirectly, by being subjected to the necessity of finding security for expenses. A bankrupt cannot in almost any case be expected to obtain solvent securities.

It is clear, therefore, that so serious and severe a disability cannot be presumed. Its existence as an established principle of law must be shown before it can be permitted to operate to the disadvantage of the parties against whom it is pleaded. Now, this disability is not imposed by statute nor by common law, nor is it recommended by any principle of expediency; and if any such rule did exist in ordinary cases, it would be inapplicable to the present.

It is admitted that the practice of the Court has rendered it imperative on bankrupt pursuers to find security for the expenses of actions instituted for the purpose of making effectual claims, which, after having been transferred by the sequestration to their trustees, have been re-assigned by the trustees to them. This practice was introduced and has become established for two reasons, neither of which applies to the situation of the appellant. In the first place, it has been held inexpedient to favour a suit carried on by assignation from

the trustee, because, if suits were favoured, trustees would in all doubtful cases make fraudulent or at least deceptive assignations to the bankrupt on mutual understanding or expressed condition, and subject the parties against whom the claim lay to the oppressive necessity of contesting with an insolvent, not really in the right which he is attempting to make good, but acting for a party who remains in the back ground.

And, in the next place, since the trustee must make available for creditors all the rights vested in the bankrupt, and cannot, consistently with his duty to them, surrender or part with any right of value, there is a plain and strong presumption against the validity of the claim; and the pursuer may be very naturally looked upon as engaged in an attempt to enforce a claim which he got right to enforce only because it was weak and desperate.

In the present case the right which is attempted to be cut down was all along in the person of the appellant, and never vested in the trustee; and the appellant is not suing for the establishment of any claim, but maintaining possession against a claim preferred against himself.

The lease was granted to the appellant and his brothers on condition that assignees and sub-tenants, legal and voluntary, should be excluded. The trustee was never recognized by the landlord; the legal assignation under the bankrupt statute was inept in so far as it attempted to convey any right to the lease, and accordingly the trustee gave up possession only because he had no right to maintain it.

The appellant was never divested. There was no room for the presumption, therefore, which might have

No. 21.

1st March 1833.

TAYLOR v. FAIRLIE'S TRUSTEES.

been fairly raised had the right to the lease been in the person of the trustee, and he had denuded in favour of the bankrupt. There is no ground for holding the claim, ex facie, weak and untenable, and there is nothing to affect the ordinary and reasonable presumption by which the situation of one in possession is favoured by the law. Just as little reason is there for any imputation of fraud in relation to the trustee's abandonment, as his surrender does not arise from any inclination of his, but from his inability to get the right effectually vested in his own person.*

But further the plea, if a good one, fell to be stated in limine. Nothing has been more settled in the law than that a defender, by stating peremptory defences or defences upon the merits of the case, virtually abandons all the dilatory defences which might have been competently pleaded by him. The law has been thus fixed upon the principle, that no one can be allowed in equity to lead his adversary into the expenses of litigation, which would have been stopped at the outset by a statement of the proper defence. The principle applies equally in the case of a pursuer who joins issue with the party whom he calls as defender upon the merits. The respondents did not, at the first calling of the cause, insist for or demand security for costs. It was only after issue had been joined on the merits, and at a time when the success of their case upon the merits appeared doubtful, — after a great expense had been incurred, and incurred upon the faith of the contract of litis-contestation,—that the plea was resorted to. As

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* Barry v. Geddes, 5 S. & D., 727, (New Ed. 678); Clark v. Ewing and Brown, May 20, 1813, F. C.

the appellant had been notoriously bankrupt before the suit was instituted, and was known and stated to have been so from the beginning, there is neither any ground for error as to the fact, nor excuse for delaying the plea.

As to the second question;—the interlocutor of the Lord Ordinary is not well founded on the merits, inasmuch as it was pronounced without any inquiry into the validity of the defence pleaded by the appellant, which was clearly relevant, and ought to have been admitted to probation.

The ground of the action was an alleged arrear of rent at the term of Martinmas 1824, amounting to 400*l.*, more than three quarters' payments of the rent stipulated. The existence of any such amount of arrears was from the first denied, and partial payments were alleged to have been made, by which the amount of debt was reduced to a sum greatly less than that which was necessary to justify the application of the clause of irritancy. There was farther alleged, in compensation, an unpaid account for coals furnished to the constituent of the respondents during five years, and a very large debt due by that individual to two of the parties holding the lease. It is impossible to maintain that these averments were not relevant, if proved, to elide the conclusions of the libel.

Respondents.—The appointment on the appellant to find caution for expenses before being allowed to be heard against the judgment obtained against him before the Lord Ordinary is consistent with the established practice of the Court and the equity of the case. When a sequestrated bankrupt attempts to pursue an action

No. 21.

1st March 1833.

TAYLOR v. FAIRLIE'S TRUSTEES.

in which his trustee refuses to concur, it may be said that his residuary interest in the trust funds gives him a sufficient title; but as it would be manifestly unjust to compel a party to litigate with him who had no means of recovering his expenses from him, in the event of success, in consequence of his being already divested in favour of his creditors, the invariable rule has been in such cases to compel the bankrupt pursuer to find caution for expenses.*

The same rule applies to the case of a bankrupt defender under sequestration. The sequestration vests the trustee directly with the effects of the bankrupt, and gives him the most immediate and strongest interest to defend the estate from a claim made against it, if it appears to him that a defence is tenable. If the trustee had litigated, the respondents would have had the security of the funds in the sequestration; but if he declines, and a party sists himself who is divested of all his funds by the sequestration, security for expenses must be found by him as a necessary preliminary to his being allowed to plead. On this principle the Court have always acted.†

But it is said that the present case is not within the general rule, because the right to the lease was declared not to be assignable, either voluntarily or judicially; that it could not, therefore, pass to the trustee under the sequestration, but still remains a subject vested in the person of William Taylor; that the trustee's declining to appear, or his allowing decree to pass against him, is of no consequence, as he had no interest to appear; and therefore it is inferred that the appellant ought to

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* 2 Bell's Comm. 412.

† Lyell v. Mudie, Dec. 1, 1829; 8 Sh. & D. 122.

be allowed to defend exactly as if his estate had not been sequestrated at all.

This distinction is however without foundation; for, first, though assignations are declared by the lease to be prohibited, except with the landlord's consent, this is a clause conceived in favour of the landlord only. If he object, the assignation is bad; if he consent, the assignation is effectual, whether the cedent attempt subsequently to recall his assignation or not. The bankrupt who has granted the assignation in favour of his trustee cannot challenge that assignation if the landlord does not; and the landlord, instead of challenging it in this case, gives his consent to it by calling the trustee under the sequestration as a defender in the action.*

But, secondly, even supposing that the right of the lease was never taken out of William Taylor by the sequestration, the objection to his being allowed to defend, without finding caution, would equally remain. The objection rests upon the ground, that a person who has been divested by bankruptcy and sequestration of his funds (no discharge having been obtained by him) has no right to litigate, without affording his adversary security for payment of his expenses. The sequestrated funds are devoted to the payment of debt contracted prior to the sequestration. An account for the expenses of a process, begun after the sequestration, could not even afford a ground for ranking on the sequestrated funds with other creditors. Hence a party in the situation of the respondents would not even have the remedy of ranking upon an inadequate fund for the expenses that might be found due to him.

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* Hay v. Hood, Dec. 8, 1801, Mor. 15,297.

No. 21.

1st *March* 1833.

TAYLOR v. FAIRLIE'S TRUSTEES.

As to the second question in this appeal, the interlocutor of the Lord Ordinary is correct upon the merits.

The right to the lease of the colliery, which originally belonged to the appellant, is entirely extinguished by the decree obtained against the trustee, to whom the appellant's right had been judicially assigned, the landlord alone being entitled to object to the validity of such assignation, and he having recognised its effect by calling the trustee as a party to the present process.

The appellant, therefore, had no title to resist the judgment of the Lord Ordinary; neither can the appellant found any defence upon his alleged exclusion from .possession of the colliery, that being an act in which the landlord had no share, and for which, if illegal, the appellant's remedy lies against the parties on whose application he was excluded.

Lastly, none of the averments made by the appellant are relevant to show that the rents alleged in the summons to be due were paid.

LORD CHANCELLOR.—My Lords, I will not at present trouble your Lordships with the view I take of the main question in dispute between these parties, but although the judgment I am about to propose for consideration will not finally decide the question, yet I hope it will not lead to further litigation between the parties. I shall now proceed to state the grounds on which I shall call upon your Lordships to come to a different conclusion from that which has been arrived at by the Court below.

There were these parties in the original suit,—Neilson and Fulton as trustees for the creditors of William Taylor, and James Kerr as trustee on his

sequestrated estate. Neilson and Fulton were the trustees to whom he had assigned his lease, for the benefit of his creditors. They took possession, but afterwards abandoned it; on which Taylor re-entered. The pursuers themselves made the bankrupt a defendant in the suit. When it was first brought into the Court below all the trustees disclaimed any interest in the disputed property, and Taylor did not appear, in consequence of which the Lord Ordinary pronounced this interlocutor: —" Assoilzies the defenders, John Neilson, John Fulton, " and James Kerr, from any claim for the rent of the " year at and preceding Martinmas 1824; and quoad " ultra decerns and declares in terms of the libel: Finds " the above defenders entitled to their expenses." What is this but a calling on the parties to give up their title to the property in every respect; for it decerns and declares in terms of the libel? Now, let us consider for a moment in what a situation this left Taylor, who was made a defendant by the pursuers. There was a judgment giving to the other defendants their expenses; but as to Taylor, there was a judgment against him in terms of the libel. I find, that if it is a decree in absence, it imports a finding of expenses, and that a decree in terms of the libel is held in practice tantamount to a finding of expenses in general terms. It is clear that this finding burdens Mr. Taylor with the expenses of the suit. Again, by the interlocutor of the 18th December 1827, after Mr. Taylor had met the parties in Court, he, Mr. Taylor, was found " liable to the pursuers in ex- " penses," of which an account was appointed to be given in, and, when lodged, remitted to the auditor to tax the same, and to report; so that, at all events, here is Mr. Taylor made a defender, and put to expenses.

No. 21.

1st *March* 1833.

TAYLOR *v.* FAIRLIE'S TRUSTEES.

Now, can it be said, on any view whatever of justice, that a party has a right to bring another into Court and get a judgment against him in his absence, which may saddle him with the expenses of the suit, if that party is debarred from coming in? It is said that Taylor appeared by his own trustees, and that he had no right himself to appear at all. On this point I have very great doubt, for I do think that Mr. Taylor had an interest; but it is quite unnecessary to stop at that, for undoubtedly he had at least an interest in not having judgment passed against him, or, at any rate, one which saddled him with expenses. I will now shortly state the judgments of the Court below, after the hearing of the arguments on the merits of the case.

The first is on the 18th of December 1827, and which was pronounced as follows:—"The Lord Ordi-" nary having heard, &c. decerns and declares against " the defender, William Taylor, in terms of the libel: " Finds him liable to the pursuers in expenses, of " which appoints an account to be given in, and " when lodged, remits to the auditor to tax the same, " and report." He then reclaimed to the Second Division of the Court, when their Lordships pronounced the following judgment, on the 6th of February 1829: —"The Lords having resumed consideration of this " case, and heard the counsel for the parties, appoint " the defender, William Taylor, within three weeks " from this date, to lodge a condescendence before " answer, and therein to state, specially and articulately, " the grounds and evidence on which he alleges that the " arrears, stated in the summons as due at Martinmas " 1824, were not due, as averred, and also the means " of proof by which he proposes to establish his allega-

" tions; and sist James Miller, writer in Edinburgh, " in room of the late Robert Burnett, as trustee for the " creditors of Sir William Cuningham Fairlie, Bart." This is a judgment of the Court itself, which lets in Taylor without stating any terms or conditions. It is an interlocutor which leads Taylor on to further expenses. Thus the Court is itself a party to the drawing Taylor on in the suit, but afterwards it stops him short in the prosecution of it. Then comes the interlocutor of the 4th of December 1829, which is in these terms: —" The Lords having advised the cause, and heard " the counsel for the parties, before further proceeding, " et ante omnia, ordain the defender to find sufficient " caution for the whole expenses of process on or before " the third sederunt day in February next, and appoint " the case to be put in the roll for further advising." On this Taylor presented a petition for leave to appeal against the interlocutor, but the petition was refused, and on the 6th of March 1830, the Court pronounced the following judgment:—" The Lords having heard " the counsel for the respondents, in respect of no ap- " pearance for the defender, William Taylor, and of " the former procedure, refuse the desire of the reclaiming " note; adhere to the interlocutor submitted to review, " and decern."

No. 21.

1st *March* 1833.

TAYLOR *v.* FAIRLIE'S TRUSTEES.

Now by these judgments your Lordships perceive Taylor is precluded from proceeding in his cause. If, in the opinion of the Court, it was found necessary to stop this cause, even then I think they should have gone on other grounds. They should have gone on the ground that Taylor was not liable to these proceedings. Mr. Taylor petitioned the Court against the interlocutor of the 4th December, the prayer of which

No. 21.

1st *March* 1833.

TAYLOR *v.* FAIRLIE'S TRUSTEES.

petition was refused. Therefore, he was perfectly regular in appealing to your Lordships against that finding, which was clearly a decerniture fixing him with the expenses due. If, indeed, there was any practice in the Scotch Courts which would allow a plaintiff to call on a defender for a security for expenses in a case in which the defender was brought into Court, I should have my doubts as to the justice of that practice; for I own I am unable to apprehend how such a practice should prevail, one so inconsistent with the ordinary principles which govern the proceedings of courts of law, nay, so repugnant to natural justice;—still, if it had become the practice of the Courts, I should have been exceedingly slow in giving a judgment which would go against an established course of procedure. But I find there is no such practice; I find it even varies very considerably in cases where pursuers are called on to find caution; but in all cases where a defender is called on, there is no such practice, and therefore it appears that this is the first case on record where such security has been required from a defender, if I except the case of Lyell v. Mudie, on which I shall presently remark. I do not see any case in which a defender is to be prevented from proceeding in his defence, whether such prevention should be offered at an earlier or a more advanced period of the cause, but more particularly so, when the party has been drawn into that cause by the judgment of the Court itself, which, at the latest period, precludes him from proceeding in his defence, by imposing upon him a condition with which he is unable to comply. I can see no reason why, in any one of these three stages of the proceedings, the Court ought to put a defender upon terms, who comes compulsorily into Court.

Another case has been mentioned where a decision was given something like the present; but that case, in point of authority, is upon the same level with this. It was one decided by the same Court only a few days before, this judgment having been given on the 4th December, and that having been pronounced on the 1st December. It is to be found in the 8th volume of Shaw and Dunlop's Reports, page 153; and it gives to the decision under appeal a support which is very slender indeed. It only shows that their Lordships held the same doctrine on the 4th that they had held on the 1st; and that those learned persons did deliberately and advisedly intend to adopt the principle, and assert their right to make a defender find security for the costs of the suit. Further than this that authority does not go; it leaves the present judgment cloathed with no additional claims whatever to our respect. But when your Lordships look to the case of Lyell v. Mudie, it differs in a very material respect. It is not the case of a defender being found subject to costs, but it is that of a person under different circumstances; for Mr. Lyell could scarcely be said to stand in the situation of a defender at all. Mudie was called the suspender; he therefore was substantially the pursuer (for Lyell was the charger), and as such came voluntarily into the proceedings. There are other points in that case which vary it from this: for instance, even if it had been standing in the books for a great length of time, yet it would, on its own merits, have wanted that which could have given it authority for ruling the present decision. It is a case in which one party puts another party to a great expense by a vexatious proceeding (he being a tool in the hands of a professional man), without

No. 21.

1st *March* 1833.

TAYLOR *v.* FAIRLIE'S TRUSTEES.

property, without any security for costs to the defender (a man of wealth), who, whilst he would in case of a defeat be called upon for costs, in case of success would have no chance of obtaining them from his opponent. This matter has been a subject of much discussion before the Common Law Commissioners, who have considered it a matter of so great difficulty that at present they have come to no decision upon it; for although a case such as I have put is one of great hardship, yet the danger would arise of a man being prevented under different circumstances, and not having the means of finding security for costs, from coming into Court. Such a case as the one I have named may have occurred; but I have never seen one in which a defender has been made liable in security of costs in case of defeat, and who has been thereby precluded from coming into Court to make his defence. In these circumstances, my Lords, I do not think there is a doubt that there has been a miscarriage in the Court below. I shall therefore recommend to your Lordships to reverse the interlocutors of the 4th December 1829, and the 3d and 6th March 1830, and to remit the case, with directions to proceed on that reversal. By this judgment your Lordships will enable the defender, Mr. Taylor, to proceed without finding security for the costs.

My Lords, I by no means would be understood as saying, that there are no cases in which a security for the payment of costs may not be requisite;—for instance, in case of bankruptcy, if a bankrupt should take a case out of the hands of his trustee at a time when he was well and properly represented, and should persist in going on with a vexatious litigation, contending with a party sufficiently competent to pay the costs, I by no

means think that this may not be a case where the Court might call on a poor party so vexatiously acting to find security for the costs. But on the grounds which I have already stated, I am clearly of opinion, that in this case Mr. Taylor ought not to be bound to find security for the costs; and I must add further the expression of my opinion, that if ever there was a case where it was beneficial for all parties that the matter in dispute should be settled out of Court, this is that case.

LORD WYNFORD.—My Lords, when I heard this case argued I could not but think there was some practice in Scotland which prevented this party from proceeding in the cause. I have, with the noble and learned Lord, inquired into that point, and I find this is not the case. There are in this case two questions,—first, whether this defendant could have been called upon to pay costs at any time? and, secondly, whether he could, in this cause, be stopped in his defence by not finding security for those costs? This is a question as to whether the defender is entitled to an estate. The defender comes in and says he has a right to claim, and he pleads that right. A judgment is given against him in his absence, but he is afterwards permitted again to come into Court, on paying two guineas as costs to the pursuer. But, after a defence of three or four years, the pursuer insists on the defender giving security for the costs, before he proceeds any further in the defence. The Court agree to that, and then two judgments are given. If that is the law, I would ask, what would be the situation of many persons? If you could bring a man into a court of law, and turn round upon him after such a lapse of time, and ask for security for costs, before you allow him to proceed in his defence, what would be the effect? If

No. 21.

1st March 1833.

TAYLOR v. FAIRLIE'S TRUSTEES.

a man brings an action against a person of even considerable estate, and that estate is the subject of the action (that person having no other property), and the title of that estate being necessarily involved in the suit, how could he give that security? and if he did not give it, what must be the consequence? Why, the plaintiff or pursuer might take that estate from him without his having an opportunity of giving an answer. I must admit that in some cases parties may be required to give security, whether they appear in the character of plaintiff or defendant, but at the same time I am aware that the Common Law Commissioners did not feel themselves justified in recommending that parties should be called upon to give such security. I brought in a bill in order to enable parties, in the case of a litigious plaintiff, to call for security, in order to prevent him from going on with a vexatious suit, or in the case of a litigious defendant, who, by keeping a plaintiff at arm's length, may put him to considerable and unnecessary expense; but I have not thought it safe to give that power to any Court, except in the case of a litigious and vexatious plaintiff or dishonest defendant. Nothing of that sort appears in the present case. Here is a party claiming a very important interest. This suit was instituted to get possession of a property which Taylor holds by lease, but which lease his trustees have repudiated. He contends that the lease is not void, although the other party contends that it is put an end to by nonpayment of rent, according to the terms of the agreement. This he disputed, as well as that it is void by his assignment to the trustees. If they did not think proper to take the necessary steps for the recovery of the same, or for the keeping possession while they had

it, still that did not bar the defender, who considered it as a very beneficial lease, in which he had a right and interest to defend. It has been said, that this has been decided by the old appeal of Taylor v. Fairlie*, but that does not decide this case; for in that case there were three parties concerned, and it was decided upon a mere technicality, that one only could not maintain the action. Therefore, the case of Taylor v. Fairlie does not decide this case. So it appears to me, that it cannot be said that this man has no beneficial interest in the suit. But how does the case stand? He is allowed to come into Court on a certain condition, which is performed; they allow him to go on for two or three years, and then they stop him, by calling upon him to find security for the costs. They allow him to come into Court on paying two guineas. He goes on, incurs considerable expenses, and then after three years, although he has conformed to the only condition imposed on him on coming into Court, they turn round upon him and say, that he shall not go on, without furnishing them with security for the costs. Now, I do think this is contrary to every principle of justice. I am aware that the laws of Scotland are not regulated by those of this country; but I do hope they are founded on common sense and common justice. Now, in this case, the man was out of the country at the time the cause was brought on; notwithstanding that, on his petition, he was allowed to come into Court, and to defend his interest over a period of three years; and yet after this, in this last stage of the proceedings, he is turned round upon and told that he shall not proceed, unless he will find security for the costs. My Lords, in such a case, I should be more

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Ante vol. ii., p. 101.

No. 21.

1st *March* 1833.

TAYLOR *v.* FAIRLIE'S TRUSTEES.

willing to stand by what is the practice of this country, than that which is said to be followed in Scotland. I do not think the case of Lyell v. Mudie can have any weight in the consideration of the present case. I am always extremely sorry when I am obliged to advise your Lordships to reverse a judgment of the Courts of Scotland; but I do feel myself compelled to say, that it is impossible that this judgment can be supported on any principles of law or of justice; and I shall be very glad, with my noble and learned friend, to see this cause put an end to extrajudicially; for whatever may be the value of the estate, a continuation of this litigation must seriously affect the interest of the parties, and the property in dispute.

LORD CHANCELLOR.—My Lords, the judgment which I shall propose to your Lordships is, that the two interlocutors of the 4th of December 1829, and the 3d and 6th of March 1830, be reversed, and the cause remitted to the Court below with instructions that they allow the defender, William Taylor, to proceed with his defence, without finding such caution as was required by the judgment of the Court.

The House of Lords ordered and adjudged, That the several interlocutors of the Court of Session, of the Second Division, dated the 4th December 1829 and the 3d and 6th of March 1830, complained of in the said appeal, be and the same are hereby reversed: And it is declared, That this House does not give any opinion upon the interlocutor of the Lord Ordinary, dated the 18th December 1827, and also complained of in the said appeal; but remits to the said Second Division of the Court of Session to proceed in the said cause as from the date of 6th February 1829, and to allow the said appellant to proceed in his defence in that Court, without calling upon him to find caution for expenses of process.

A. DOBIE—ANDREW M. M'RAE, Solicitors.