[*25th March* 1833.]

No. 23. ARCHIBALD GIBSON (Wilson and Sons, Trustee), Appellant.—*Dr. Lushington—Murray.*

JOHN KIRKLAND and J. F. SHARPE, Respondents.—*Solicitor General (Campbell).*

Bankruptcy—Trust.—A party who held a lease and feus became bankrupt, and the trustee on his sequestrated estate entered into possession of the lease, and was infeft in the feus; and for several years took the benefit of the lease and feu-rights for the use of the sequestrated estate—Held (affirming the decision of the Court of Session) that he was bound to fulfil the prestations due under these contracts towards the landlord.

2D DIVISION.
Lord Medwyn

WILSON and Sons, carrying on business as iron masters at Wilsontown, held a lease, for forty years, of coal in the lands of Climpy, and two feus of the same property from the proprietor, Mr. Crawford. The rent payable under the lease was 150*l.* for the first five years, and 200*l.* for the remaining years; and the total amount of the feu-duties was 115*l.* a year. Owing to the embarrassment of their affairs in 1808, Wilson and Sons executed a trust, and in 1812 a sequestration was awarded against them. Under the latter Mr. James Bristow Fraser was appointed trustee, and entered into possession of the coal lease as well as of the two feus,

in which he was afterwards infeft, and he carried on the iron works for a short time after his appointment, during which period the coal was wrought for the use of the works.*

Repeated attempts were made to effect a sale of the works, coal lease, and feus by advertisement, but without success. In the meantime the estate of Mr. Crawford having been sequestrated, and a trustee appointed, his trustee instituted three actions against Fraser as trustee on the estate of Wilson and Sons; first, an action libelling on the lease, and setting forth that the coal works had been stopped and the machinery dismantled, and praying that the machinery should be restored; second, an action concluding for payment of the feu-duties bypast, and half-yearly for all time coming; third, an action of irritancy and removal ob non solutum canonem. Fraser in defence did not deny his liability, but stated counter claims against the conclusion for rents and feu-duties. In 1814 these processes and the mutual claims of the parties were submitted to the decision of Mr. Henry Cockburn, advocate, as arbitrator. The submission was, first, of all demands, claims, disputes, questions, and differences depending or subsisting between the parties as trustees; second, of a specific claim made by Crawford's trustee, and all other claims competent to him in virtue of the lease of the coal, and feu contracts; third, of the actions before mentioned; and, fourth, of a claim by Wilson and Sons on Crawford's estate. Pending the discussion of these claims sums were paid to and received on account

* See the facts more fully detailed in the Lord Ordinary's interlocutor, p. 342, et seq.

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of sales of coals, and as rents of the pasture grass on the feus, on behalf of the sequestrated estate. A decree arbitral was pronounced in July 1817 by Mr. Cockburn, by which he sustained inter alia the landlord's claim to the coal rents and feu-duties to Whitsunday 1817, assoilzied Fraser from the declarator of irritancy, and found, "that upon implement of the foresaid findings, "the said parties, submitters respectively, are hereby "severally and mutually discharged of all claims which "they may have against each other under this sub-"mission, or the processes referred to in it, together "with the said processes themselves, and all following "or competent to follow thereon."

In 1818 the respondents, Kirkland and Sharpe, purchased the lands of Climpy, and also the feu duties from the trustee on Mr. Crawford's estate; and in September of the same year the Wilsontown property, including the lease, but not the feu-rights, was exposed to public roup, and also in the following year till June 1820, when the lease was omitted from the articles of roup. The respondents, alleging that Fraser, as trustee, had continued in possession of the lease and feu-rights, raised an action before the Court of Session, concluding that it should be found that the trustee had become lessee and vassal; and for payment of the arrears of rent and feu-duty, and that he was liable in future for such payments. These claims were resisted by Fraser on the ground that the estate was not liable, and that at all events, the decree arbitral having been implemented, nothing more could be demanded. Fraser having become bankrupt, the appellant, Gibson, was appointed trustee in his stead. The record being closed, the Lord Ordinary pronounced the following interlocutor: — "Finds,

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" that after trying the effect of a voluntary trust, the
" estates of Messrs. Wilson and Sons, late iron masters
" at Wilsontown, were sequestrated in June 1812, and
" Mr. James Bristow Fraser, the trustee, entered into pos-
" session of a coal lease of part of the lands of Climpy,
" as well as of two feu-rights of parts of the said pro-
" perty, and was infeft therein 25th of July 1814:
" Finds it admitted that the said trustee carried on the
" Wilsontown iron works from the term of his appoint-
" ment at least till December 1812, and that during
" this period the coals in the lands of Climpy were, in
" virtue of the said lease, worked for the use of the
" works: Finds it further admitted, that in February
" 1813 sums were paid to and received from Thomson
" the overseer on account of sales of coals at Climpy
" on behalf of the trust estate: Finds it further ad-
" mitted, that for several years subsequent to the se-
" questration the pasture grass on the Climpy feus
" was let on behalf of said estate, and in particular
" that payments from this source were received down
" to Whitsunday 1819: Finds that Mr. Crawford, the
" proprietor of Climpy, having also been sequestrated,
" his trustee in 1812 instituted three actions against
" the trustee on Messrs. Wilson's estates, one in the
" Sheriff Court relative to the lease, and the other two
" in this Court relative to the feus, one of them for
" payment of the feu-duties, and the other a declarator
" of irritancy ob non solutum canonem; and that the
" Wilsontown trustee did not state in defence that he
" had not entered into possession, or that he meant to
" surrender the possession to the landlord, nor did he
" allege that he had intimated to the landlord, and
" obtained his approbation or acquiescence, that he

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" was trying the experiment of a sale, and did not
" mean to take possession of them for behoof of the
" estate; on the contrary, it appears that at this time
" these subjects were reckoned valuable appendages of
" the iron works, and that he only stated counter claims
" against the rents and feu-duties claimed from him as
" assignee to the lease and feus in the lands: Finds,
" that in August 1814 these processes and the mutual
" claims of the parties were submitted to the decision
" of Mr. Henry Cockburn, advocate, and that a decree
" arbitral was pronounced in July 1817, which sus-
" tained various claims of the parties hinc inde, and
" among others the claim on the part of the landlord
" to the coal rents under the lease, and the land rents
" under the feu-rights down to Whitsunday 1817:
" Finds, that as the trustee did not argue in this sub-
" mission that he had abandoned the lease and sur-
" rendered the feu rights, and that he was no longer
" liable for them, but, on the contrary, if not expressly,
" he at least tacitly admitted himself to be liable to
" implement the conditions of the lease and the feu-
" rights, the clause in the decree arbitral founded on,
" which mutually discharges all claims the one party
" has against the other, cannot be interpreted as cut-
" ting off the landlord's claim to these rents and feu-
" duties subsequent to Whitsunday 1817: Finds it
" averred by the pursuers that, subsequent to the date
" of the decree arbitral, it was held by both parties
" that the lease and feu-rights continued in force as
" before, and possessed by the Wilsontown trustee—a
" statement which is simply denied by the defender;
" but this denial is contradicted by his continuing to
" draw rent for the pasture grass; moreover, he does

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" not allege that after the date of the decree arbitral
" there was any notice of the surrender or these to the
" landlord, and invitation to him to take possession,
" and that the defender was no longer to be liable for
" the rent and feu-duty; on the contrary, the Wilson-
" town trustee was assoilzied by the decree arbitral
" from the declarator of irritancy. He is craved for the
" rent due at Whitsunday 1818, to which he returns
" no answer; and though the feu-rights were not, the
" lease was expressly exposed to public roup along
" with the other Wilsontown property of the following
" dates, 16th of September 1818, 20th of January,
" 10th of February, and 10th of March 1819, forming
" lot second of the subjects exposed, as alleged by the
" pursuers, at the upset price of 2,000*l.*, which is
" denied by the defender, who, however, does not state
" what was the upset price of this lot; and no offerer
" having appeared, the property was again exposed to
" sale on the 14th of June 1820, when, for the first
" time, the said lease was left out of the articles of
" roup: Finds that the pursuers, who had purchased
" the lands of Climpy in 1818, having renewed the
" demand for the coal rents due under the lease, and
" the feu-duties under the feu-rights, the Wilsontown
" trustee was instructed by the creditors to resist this
" claim by the resolution of the 27th of December 1820,
" on the ground that the decree arbitral having been
" implemented, nothing more was due: Finds, under
" these circumstances, that the Wilsontown trustee
" having entered into possession of the lease, and been
" infeft in the feu-rights, and having for so many years
" taken benefit of the lease and feu-rights for the use
" of the sequestrated estate, has become the assignee

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" to the lease, and the vassal in the feu-rights, and must " be bound to fulfil the prestations due under these " contracts towards the landlord, and is not now en- " titled to abandon them: Finds that Mr. Fraser, the " trustee, has been succeeded in his office by the " present defender, and no decree is now craved, either " as an individual or as trustee, against Mr. Fraser: " Therefore, and in respect that the pursuers have ac- " quired right to the coal rents and feu-duties which " fell due subsequent to Whitsunday 1817, decerns " against the defender, the trustee on the Wilsontown " estate, for the rents and feu-duties subsequent to " Whitsunday 1817, payable half-yearly at the terms " of Martinmas and Whitsunday, with interest from " the term at which each fell due and till payment, and " to continue the payment of the said rent and feu- " duties, with interest as above, during the subsistence " of the said contracts respectively: And, further, " finds the defender liable in expenses, of which " allows an account to be given in, and remits to " the auditor to tax the same when given in, and to " report."

To this interlocutor the Court adhered on the 17th May 1831.*

Gibson appealed.

Appellant.—The trustee upon a sequestrated estate does not become a lessee, although, while acting within tne statute, he enters into possession for the purposes of management and consequent sale and realization; nei-

* 9 S. D. 596.

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ther can a trustee under such circumstances become a feudal vassal, because his assumption of such a character would be directly at variance with the nature of his trust, and subversive of the provisions and spirit of the sequestration statute. Where a trustee acts within the statute, he is not only entitled but bound to take possession for the purposes of sale and realization; and it is incumbent on the respondents to prove that he travelled out of the statute, and became lessee and vassal; but this has not been proved by the respondents. As long as a trustee possesses and otherwise manages for the purposes of sale and realization, conformably to the directions of the creditors, and assisted by the commissioners, he is within the statute, and his acts will bind the estate and the body of the creditors; but if he enter into speculations, or act against or without the directions of the creditors, he binds only himself personally and those creditors by whom his proceedings shall have been authorized and sanctioned; and the estate and the body of creditors are free.* Besides, by the terms of the submission and decree arbitral all claims against the trustee under the lease and feu contracts were discharged; or, at least, those deeds, when taken into consideration with the subsequent conduct of the trustee, are equipollent to a declaration of non-adoption.

Respondents.—The grounds on which the judgments

* Campbell v. Common Agent on estate of Edderline, Jan. 14, 1801, Mor. voce Adjudication, Appendix, Part I, No. 11; Bell's Election Law, p. 121–8; Murray v. Neilson, March 5, 1735, Mor. 8804; Donaldson and others v. Grant, March 11, 1786, Mor. Dic. 8689; Campbell v. Spiers, Dec. 14, 1790; Bell's Election Law, note, p. 123–26; Lockhart v. Wingate, Feb. 19, 1819, Fac. Col. 652.

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in this case must be affirmed are clearly recapitulated in the interlocutor of the Lord Ordinary. The uncontroverted facts show that the trustee on the estate of the Wilsontown company did become liable as assignee of the coal lease and feu-contracts, and deliberately acted for years with a view to what he considered the interest of the creditors whom he represented, as the assignee and successor of the Wilsontown company, the original tenants and feuars. It is a proposition incontestable on general principles, that when an assignee takes up a right vested in the assigner, he becomes liable to all his responsibilities; if he take an estate he takes it with its burdens, on the maxim "cujus commodum est ejus debet esse incommodum."*

LORD WYNFORD.—My Lords, the only difficulty that has occurred to me in this case has arisen from the difficulty of finding out what the facts are in the midst of this mass of papers; when once the point is got at, it appears to me that there is nothing to discuss. If I felt there was the least difficulty, I should not propose to your Lordships to give judgment in the absence of my noble and learned friend, who has been obliged, on account of public business, to withdraw himself. I knew what my noble and learned friend's opinion was before he left the woolsack, and nothing has since occurred to alter that opinion. This is a proceeding called an

* Nisbet's Trustees, Fac. Coll. Dec. 10, 1802, Morr. 15,258; Cuttall v. Jeffrey, Nov. 21, 1818, Fac. Coll.; Broome v. Robinson, 7 East, p. 339; Turner v. Richardson, 7 East, p. 334; Wheeler v. Bramah, 3 Campbell's Reports, p. 340; Hanson v. Stevenson, 1 Barn. & Ald. p. 303; Welsh v. Myers, 4 Campbell, p. 368; Hastings v. Wilson, 1 Holt, N.P., 290; and Thomas v. Pemberton, 7 Taunton, p. 206.

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action of declarator. We have no such proceeding in the law of England. It is one by which a party desires to have a right affirmed to him, and the complainant in this case desires to have this right affirmed to him. After stating several circumstances he says, " Affirm my " right to recover against this defendant the rents of this " estate." The question is, is he entitled to them? The lease was granted, not to the present defender, but to a person whom the present defender represents as his assignee. The original lessee having become bankrupt, his property was sequestrated, and the party who appears before your Lordships is the person who stood in the situation of assignee under that sequestration. The original lessor had also become bankrupt, and his property was assigned to another person. It seems there were considerable debts existing, and there was a debt due from the original landlord to the original tenant to the amount of about 1,900*l.* In consequence of disputes that had occurred the question between these parties was referred to a gentleman, who was appointed the arbitrator to decide between them, and he decided that the amount which should be found due should be set off against the feu-dues and rents of the estate which would become due up to the year 1814. The arbitrator decided, that from the year 1814, this person, who was a bankrupt,—the defender,—is no longer entitled to the use of the debt to be set off against the said dues, but that he is to come in as an ordinary creditor. The person remains still in possession of the property; and it seems to me to be admitted in the course of the argument, that if there had not been an assignment of the counterpart of the lease, it could not be contended that he had not remained long enough to

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have made what is called an election to the property,—to have held it for the remainder of the term; because your Lordships will perceive that in 1814 he might have got out, or as soon after as he found it would not be beneficial to the persons whom he represented for him longer to retain the property,—instead of which, he remains in possession till 1820. Then he states that he shall not remain in possession, as a tenant must remain in possession, in consequence of the assignment of the counterpart of the lease. It is admitted, however, by those who insist that he remained in possession under the assignment, that the assignment, as far as it gives the assignee a right to recover the rents, is good against a singular successor—that is, against a person standing in the situation of those who claim the establishment of this right, calling on the person to pay his rents over to him. It struck me as extraordinary that the assignment should be said to extend to preventing the assignee recovering the rents, yet that it was to be considered that the man was in possession under the assignment, and not under his own lease. I think he must be considered as being in possession under his original lease; but the argument was very ingeniously put by Mr. Murray, at your Lordships bar, as to this assignment never having been assigned. This lease has never been assigned. They admit the property and the estate have been assigned, but the lease has never been assigned. But the terms of the lease, which was read to your Lordships, are, that the lessee binds himself, his executors, administrators, and assigns. The moment the estate is assigned the property and the lease are assigned, and all other things are assigned,—therefore it seems to me there is no pretence for that argument. This

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point does not seem to have been argued in the Court below. It was reserved to be argued here before your Lordships, who are not so familiar (and I include myself) with Scotch proceedings as they are in the Court below. In the Court below, as far as I can collect from the interlocutor, the question was, whether this person remained in possession a sufficient length of time to render him liable on the lease? There was nothing said as to the effect of the argument. Now, for the first time, it is argued that it was the assignment under which he was in possession, and not the lease. I cannot but consider that he was in possession under the original lease, and I think that he was in possession too long if he remained in possession after 1814, for though, undoubtedly, this was not decided until 1817, yet it was decided in 1817 that he was not to set off the rents after 1814; but perhaps it is not necessary to trouble your Lordships with observations on this part of the case, for he did not quit until 1817, and he continued in after 1817, and received a part of the profits of the estate in 1818, in 1819, and in 1820. I have always understood the law to be this, and it must be the law—for common sense constitutes the foundation of the law on both sides of the Tweed,—that if a man chooses to take part of the benefit of an estate, he must take it subject to all incumbrances. A man cannot say, I will receive the rents of part of an estate, and not be considered in possession of the whole. In this part of the United Kingdom, if a man remains in possession longer than is necessary to ascertain what is the value of the property, that is, as the assignee of a bankrupt, he renders himself liable to the covenants of the lease. In this case it is impossible to contend that he remained in possession to ascertain its value. It has

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been said by Dr. Lushington, that he remained in possession of the coal works to enable him to carry on a manufactory. No bankrupt's assignee has a right to remain in possession of an estate, for the purpose, not of ascertaining what is the value of the estate, but of carrying on some other manufactory. That is a plan by which he may be very much benefited, and by which the owner of the estate certainly may be very much prejudiced. My Lords, the learned Judges in the Court below had no difficulty in deciding that which was submitted to them. It appears from the report that the only question raised there was, whether this was decided on by the arbitrator in the Court below, so as to prevent them from getting at the question. The learned Judge who gave judgment below (for there was only one of the Judges who seems to have said any thing in giving the judgment) said, "After paying every possible attention "to the case, I can find nothing in the decreet arbitral "which can possibly be said to extinguish these con- "tracts of lease and feu in all time coming." It therefore seems to me, that unless there was something in the award which prevents the judgment from being given, that is the judgment which ought to be given. The Court below found nothing in the award which prevented the Court coming to the conclusion to which I humbly recommend your Lordships to come. I confess I do not see the least ground, from any thing which appears in any part of this award, to interfere with the judgment which has been pronounced in this case, and I shall humbly advise your Lordships to affirm the judgment of the Court below, and I am disposed to think it ought to be with costs.

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The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the sum of 100*l.* for their costs in respect of the said appeal.

A. DOBIE—MONCRIEFF, WEBSTER, and THOMSON, Solicitors.