

June 28. 1825. in this case), whether the provisions of the statute of 1701 do apply to the Court of Session or not, I think it would be right, lest it should be conceived that the decision which may be made has rested upon that ground, that some words should be introduced to guard against that inference. I will therefore take care, in the form of the judgment I shall propose to your Lordships to pronounce upon this case, that your Lordships shall not, by affirming this interlocutor, be supposed to affirm that general proposition, which may be supposed to be included in the interlocutor as pronounced. They say, 'The Lords
' having resumed consideration of this petition, and advised the same
' with the answers thereto, and having heard Counsel for the parties
' in their own presence, they find that the provisions of the Act of Par-
' liament 1701, c. 6. do not apply to cases of fraudulent bankruptcy,
' which are cognizable only in the Court of Session;' from whence it might be supposed, that they meant to decide this solely on the ground that the provisions of the statute of 1701 do not apply to the Court of Session. My Lords, the other ground argued upon, but not expressly decided by the Judges in the Court below, appears to me to be quite sufficient to justify the interlocutor which has been pronounced; and therefore I would propose to affirm this judgment, at the same time taking care to introduce some words to shew that this case has not been decided upon that ground.

Appellant's Authorities.—Stat. 1555, cap. 47.; 1581, cap. 118.; 2. Hume, 32. 37, 38.; Kilk. 316.; 2. Mackenzie, p. 5.; Blackstone, b. 1. § 3.; 1. Hume, 502.; Burnet, p. 167. 380.

Respondent's Authorities.—2. Hume, 37.; 1696, cap. 5.; 1. Bank. 10. 122.; 4. Ersk. 4. 79.; 1. Hume, 503.; 2. Hume, 98.; Burnet, 355.; 4. Ersk. 4. 85.; 2. Hume, 107.; Burnet, 380.; Rodger, Feb. 4. 1737, (Elchies, Wrong. Imp. No. 3.); Kerr, Nov. 22. 1744, (No. 8. Ib. and 7419.); Stark, July 29. 1748, (3442.); Cameron, Aug. 9. 1754.

————— A. MUNDELL,—Solicitors.

No. 54.

EARL OF BREADALBANE AND HOLLAND, Appellant.

CLAUD RUSSELL, (CAMPBELL'S Trustee), Respondent.

Assignment in Security—Lease.—Two parties being joint tenants of certain quarries, and sole partners of a company for working them; and one of them having become the landlord, and advanced a sum of money for the other, who, in security, granted an assignation of his share in the concern; and there being no publication of this deed, or express intimation to the manager of the quarries, till within sixty days of the granter's bankruptcy; and the Court of Session having found, in a question with his creditors, that the assignee had acquired no preference;—The House of Lords remitted to take the opinions of all the Judges.

IN 1748 the late Earl of Breadalbane, proprietor of the lands and barony of Nether Lorn, and of the island of Easdale, in Argyllshire, granted two leases, one of the marble and slate rocks of the whole estate, and the other of Easdale, in favour of certain persons, who had formed themselves into a company under the name of the Easdale Slate Company, for a period which, by a subsequent prorogation, extended to 1841. Among other partners were Colin Campbell of Carwhin, the father of the appellant, and John Campbell, father of John Campbell, writer to the signet, the constituent of the respondent Mr Russell. Their fathers, in 1754, became the sole partners and tenants, and on their deaths were succeeded by their respective sons. In 1782 the appellant, on the death of his cousin the late Earl, succeeded to the honours and estate of Breadalbane, and thereby became proprietor of the quarries. His copartner, Mr Campbell, resided in Edinburgh, where he practised as a law-agent and conveyancer, acted as factor and cashier for his Lordship, received the bills and proceeds of the quarries, kept the books, and accounted to the Earl for his share; while the active operations were carried on at the quarries by means of a manager or overseer. In March 1813 Mr Campbell obtained for his accommodation two bills accepted by the appellant, one for L. 5000, and the other L. 1000, payable twelve months after date, for which Mr Campbell granted a letter of relief; and in June thereafter he executed an ex facie absolute assignation of his share of the Easdale quarries in favour of the appellant, under the exception of a previous assignation granted to his wife in security of her jointure in the event of her surviving him. On the other hand, the appellant granted to Mr Campbell a back-bond, declaring that he held the assignation for his own relief; and thereupon it was deposited in his charter-room at Taymouth. No intimation, however, was made of this assignation to the manager, nor did any change in possession at this time take place. On the contrary, it appeared from the books that the accounts were kept in the same form as they had been prior to the assignation,—the one-half of the profits being allotted to the appellant, and the other to Mr Campbell. The accounts so kept were docketed by the parties on the 21st February 1816. After several renewals the appellant was obliged to retire the bill for L. 5000 to the extent of L. 2000. In 1816 he went to the Continent, and did not return till April 1818, when, finding that there was a balance of rents of L. 10,000 in Mr Campbell's hands, he required him to apply it in a particular way, but was informed by

June 28. 1825.

 2D DIVISION.
 Lord Pitmilley.

June 28. 1825. him that he was unable to do so. On the 28th May Mr Campbell wrote to the manager of the quarries, that ‘ in making out
 ‘ the bills for the ensuing year, you will attend, in consequence
 ‘ of arrangements, they are now to be drawn payable to your
 ‘ order, at the Royal Bank, Edinburgh, and that they be blank
 ‘ indorsed by you.’ A copy of this letter was transmitted by Mr Campbell’s son to the appellant, in which he said; ‘ I have
 ‘ the honour of enclosing a letter from my father to the manager
 ‘ at Easdale, which went this night, and will of course put all
 ‘ matters right. The bills were formerly payable to my father,
 ‘ after being accepted by the purchasers. As they come up, they
 ‘ will be lodged in the Royal Bank, who will draw the proceeds,
 ‘ and retain them until further orders.’ The manager acknowledged the receipt of the letter on the 2d June, in which he stated, ‘ that the alteration in the form of drawing the bills will be
 ‘ attended to.’ The appellant was not satisfied, and caused Duncan Campbell, his land factor, to call upon the manager, and desire the bills to be in future taken payable to the factor. Accordingly the manager, on the 6th June, wrote to Mr Campbell, that ‘ Lord Breadalbane’s factor called here this morning,
 ‘ and intimated his Lordship’s wishes that the bills were to be
 ‘ drawn in future payable to his Lordship’s factor: to this I answered, that I would write you on the subject. You will please,
 ‘ therefore, send me the exact form you wish, and the kind of
 ‘ indorsation, to prevent any inaccuracy hereafter, as I find myself at a loss how to act till I hear particularly on the subject.’ In answer to this Mr Campbell’s son wrote to the manager on the 18th, that ‘ My father will himself write you about Easdale;
 ‘ in the mean time I beg to mention to you, that the bills are all
 ‘ to be payable, and drawn in favour of Mr Duncan Campbell,’—that is, Lord Breadalbane’s factor.

From the state of Mr Campbell’s affairs the appellant found it necessary to employ another agent, who, on the 26th of June, caused a notorial protest and intimation to be served on the manager, by which the procurator for the appellant intimated to him the assignation, ‘ and required him to enter the said intimation in the books of the Company, by a minute to the effect
 ‘ foresaid, and required that he, the said Alexander Campbell,
 ‘ should deliver to him a certified copy of said entry or minute,
 ‘ and give effect to the said deed by immediate possession, and
 ‘ by paying over to Duncan Campbell, Esq. factor for the said
 ‘ Earl in Argyllshire, all such sum or sums of money, bills, or
 ‘ securities, as were then in his the said Alexander Campbell’s

June 28. 1825.

‘ hands, arising from the share of profits or dividends of said Com-
 ‘ pany, formerly due to the said John Campbell, but then to the said
 ‘ Earl, in virtue of the said deed of conveyance,’ &c. A second
 notorial intimation was made on the 31st July, and a certificate
 was granted by the manager in these terms:—‘ I, Alexander
 ‘ Campbell, manager of the Marble and Slate Company of Nether
 ‘ Lorn, do hereby certify, that upon the 26th day of June last,
 ‘ the foregoing conveyance was intimated to me, in name of the
 ‘ Earl of Breadalbane, conform to a schedule delivered to me of
 ‘ that date, and engrossed in the books of the said Company;
 ‘ and further, I certify, that the said conveyance was again inti-
 ‘ mated to me this day by Duncan Campbell, Esq. his Lordship’s
 ‘ factor in Argyllshire; and in consequence of these several in-
 ‘ timations possession was respectively given to his Lordship, by
 ‘ delivery to his said factor of bills due to the Company, for pur-
 ‘ chases of slates sold by me on their account,’ &c. On the 11th
 August Mr Campbell executed a trust-deed in favour of Mr
 Claud Russell for behoof of his creditors, and on the 21st he was
 rendered legally bankrupt, being within sixty days from the first
 notorial intimation. An action of reduction and declarator,
 founding on the statutes 1621 and 1696, and 54. Geo. III. c. 137.
 of the assignation in favour of the appellant, was then brought by
 Mr Russell, upon these grounds:—First, ‘ That the creditors for
 whose behoof the action was raised, were, at the date of the deed
 of conveyance, lawful creditors of Mr Campbell,—that the con-
 veyance was granted to the appellant, without any just cause or
 adequate price,—that it remained latent in defraud of the credi-
 tors,—and that the conveyance, therefore, was null and void, in
 terms of the Act 1621, c. 8. Secondly, ‘ That the conveyance
 was intended as a security of a former debt, granted by a person
 insolvent, with the view of giving a preference to the appellant
 over the other creditors,—that the granter of the deed was ren-
 dered legally bankrupt upon the 21st of August 1818, within
 sixty days of the intimation or delivery,—and that the conveyance,
 therefore, was null and void, in terms of the Act 1696, and also
 by the provisions of the later bankrupt statutes. And, thirdly,
 ‘ That the conveyance was granted in trust, or in security of a
 limited sum, inadequate to the real value of the subject convey-
 ed, and, therefore, that it could in no respect be made available
 to any greater extent than the sum really paid.

In defence the appellant pleaded, that the delivery of the deed
 to him was sufficient to complete his right; and that, at all events,
 that supposing intimation or possession were requisite, this had

June 28. 1825. been given and acquired by the communications to the manager, and by the bills being ordered to be taken payable to his factor. The Lord Ordinary pronounced this interlocutor:—‘ The Lord Ordinary having considered the mutual memorials for the parties, in the case, and whole process, in respect the granter of the conveyance or assignation of the 23d of June 1813 was allowed to continue in possession of the subject conveyed, and that no intimation of the assignation was made till within sixty days of his bankruptcy, finds, that the assignation was not completed, to the effect of giving a preference to the assignee in a question with the creditors of the cedent; sustains the reasons of reduction, and reduces, decerns, and declares in terms of the libel.’ To which interlocutor his Lordship afterwards adhered upon advising a representation, with answers. The appellant having reclaimed, the Court, on the 3d December 1822, by a majority, ‘ adhered to the interlocutor of the Lord Ordinary complained of, in so far as it finds, that, in respect the granter of the conveyance or assignation challenged was allowed to continue in possession of the subject conveyed, and that no intimation of the assignation was made till within sixty days of his bankruptcy, the assignation was not completed, to the effect of giving a preference to the assignee in a question with the creditors of the cedent; but, before answer, remitted to his Lordship to hear parties further on the conclusions of the libel, and do as he shall see cause.’ *

The Earl then appealed.

Appellant.—It is necessary to attend to the relative situation in which the parties stood. The appellant was the landlord, and the Company the tenant. He and Mr Campbell were also joint tenants, and they were likewise the sole members of the partnership. The assignation, therefore, when delivered to the appellant, was complete in every respect as a conveyance of Mr Campbell’s right as tenant; because it was a deed of transfer executed several years prior to his bankruptcy, and consequently effectual to divest him; and the delivery to the appellant as landlord was the only and the best intimation that could be made. Again, it was effectual as a transfer of Mr Campbell’s share as a partner in the Company; and as he and the appellant were the only partners, and it was executed by the one and delivered to the

June 28. 1825.

other, it was impossible that any more complete intimation could be given. In whatever light, therefore, the case is viewed, an effectual right was vested in the appellant. The manager was a mere servant, and consequently, intimation to him would have been productive of no effect. But the proceedings in June 1818 are important, as establishing a change of possession.

Respondent.—The assignation remained latent till the first notorial intimation was made, and in that document it was admitted, that no previous possession had taken place, or intimation been given. Accordingly it appears from the books, that no alteration was made on the right of parties, and that Mr Campbell drew his share of profits as if no conveyance had been executed by him. In a question with creditors, therefore, the assignation must be considered as latent, and consequently incapable of conferring a preference. It is declared by the Bankrupt Statute, that until intimation shall be made, or possession taken, no assignation shall be effectual against them. It is impossible to regard the correspondence with the manager as productive of a change of possession.

The House of Lords ordered, ‘ that the cause be remitted
‘ back to the Court of Session, to review generally the interlocu-
‘ tors complained of; and, in reviewing the same, the Court is
‘ especially to consider how and to whom intimation of the as-
‘ signation ought to have been given: And it is further ordered,
‘ that the Court to which this remit is made, do require the
‘ opinion of the Judges of the other Division in the matters and
‘ questions of law in this case, in writing, which Judges of the
‘ other Division are so to give and communicate the same; and
‘ after so reviewing the interlocutors complained of, the said
‘ Court do and decern in this cause as may be just.’*

LORD GIFFORD.—My Lords, There is a case which stands for your Lordships’ judgment, involving an extremely important question in the law of Scotland—the case of Lord Breadalbane v. Russell. That was an appeal from several interlocutors of the Lords of Session, in an action arising out of the following circumstances:—It appears that, in the year 1748, the then Earl of Breadalbane granted two leases of certain slate and marble quarries, situated at Easdale, in the county of Argyll, with two adjoining farms, to Mr Campbell of Carwhin, and Mr Campbell, cashier of the Royal Bank of Scotland, and certain other persons, who formed themselves into a Company, for the purpose of

* See 5. Shaw and Dunlop, No. 433. for the result of the remit.

June 28. 1825. working the quarries. The concerns, it appears, were afterwards left entirely to Mr Campbell of Carwhin and Mr Campbell of the Royal Bank. The tacks were at first granted for three nineteen years from Whitsunday 1746, and were afterwards prorogated for an additional term of two nineteen years, so that they do not expire until 1841.

My Lords,—The present appellant, and Mr John Campbell, writer to the signet, succeeded to these leases, as the heirs of the two original tacksmen, their fathers, and became the sole partners of the Company, which was called the Easdale Slate Company. In the year 1780, the appellant, Lord Breadalbane, succeeded to the title and estates of his cousin, the late Earl of Breadalbane, and thus became proprietor of the farms and quarries possessed by the Easdale Slate Company as tenants; so that he united in himself, at the same time, the character of proprietor of the lands and quarries, and he was joint tacksman with Mr John Campbell in this lease. The superintendence of this concern devolved upon Mr Campbell, writer to the signet, who was for many years employed in the general management of Lord Breadalbane's affairs. There was, indeed, an overseer resident at Easdale to take charge of the works, but he was a mere servant of the Company, the management of the concern being conducted solely by Mr Campbell. It appears, that the custom was for the overseer to draw bills on the purchasers of the slates, which were made payable to Mr Campbell, at his office in Edinburgh, to whom they were sent, in the first instance, for the purpose of getting them accepted, and when due to get them paid. Mr Campbell was also occasionally in the habit of visiting the quarries, of giving directions for their management, and of annually settling the overseer's accounts; and, in his general account with the appellant, he gave him credit for the one-half of the profits.

Matters continued upon this footing until the month of March 1813, when Mr Campbell, who, it appears, was engaged in a variety of other concerns, wanting money, applied to the Earl of Breadalbane to join him in security for a loan of money, which he represented as a matter of the utmost consequence to him at that period. The security he proposed to give him for his relief, was an assignment of his share in those tacks, and in the stock of the Easdale Company. The Earl of Breadalbane, to oblige Mr Campbell, acceded to this request, and accepted two bills, one for L. 5000, and the other for L. 1000, drawn by Mr Campbell, at twelve months' date. Mr Campbell granted a letter of relief in the mean time; and for completing the proposed security, the following deeds were executed:—Of the date of the 23d June 1813, Mr Campbell, on the narrative of certain good causes and considerations, granted an absolute and unqualified conveyance, in the appellant's favour, of his interest in the Easdale quarries, being one-half; but under the exception of a previous assignation which he had granted to his wife, in her contract of marriage, in security of her jointure of L. 400 a-year, in the event of her surviving him.

Upon obtaining that conveyance, Lord Breadalbane executed a

back-bond in favour of Mr Campbell, in which, upon the narrative of the conveyance, and of the bills which he had accepted, he declared that the said conveyance was granted in trust, and for his relief and indemnity of the said cautionary engagements come under by him on account of the said John Campbell; and whenever the said John Campbell, or his foresaids, should relieve him of payment of the bills above-mentioned, if the same should be put into circulation, and of the payment of all other bills which he might hereafter accept without value, or on his own account or for his accommodation merely, and of all damage, interest and expense, which he might have incurred in relation to the said bills or cautionary engagements, or whenever he should recover payment of the same from him, and of all charges and expenses incurred in relation to the premises in any manner of way;—then Breadalbane thereby bound and obliged himself, his heirs, executors, and successors whomsoever, on the expense of the said John Campbell, and his foresaids, in their own right and place of the premises; declaring that he is not to be liable any farther than for his own actual intrusions, by virtue of the conveyance aforesaid, and that he is not to be liable in diligence, nor for omissions of any kind; but declaring that he should be obliged, as he thereby bound and obliged himself, and his foresaids, to account to the said John Campbell, and his foresaids, for all sums of money which he should actually receive in virtue of his conveyance, beyond the foresaid principal sums of L. 5000 and L. 1000, and interest and expenses if incurred: So that your Lordships perceive, that the effect of this instrument was what we should call in this country a mortgage of Mr Campbell's share in this Easdale slate quarry concern to my Lord Breadalbane, to secure my Lord Breadalbane against the bills which he might be called upon to pay for Mr Campbell.

This conveyance by Mr Campbell was delivered to the appellant, Lord Breadalbane, immediately after it was executed, and was by him deposited among his other papers in the charter-room at Taymouth. Mr Campbell appears to have had the management of this concern for several years afterwards. The bill for L. 1000, which had been discounted at the Royal Bank, was taken up by Mr Campbell; but the other bill for L. 5000 was renewed by bills of subsequent dates, accepted by Lord Breadalbane; and the debt was at last paid by Lord Breadalbane to the Bank.

My Lord Breadalbane, it is stated, went to the Continent in 1816, and did not return till 1818. Upon that occasion, being aware of a considerable sum of his rents being in Mr Campbell's hands, he wrote to Mr Campbell to desire he would furnish him with a state of his accounts, and employ the balance, which amounted, as my Lord Breadalbane states, to upwards of L. 10,000, in paying the balance of the price of an estate which my Lord Breadalbane had recently purchased. On that occasion, as it turned out, Mr Campbell was obliged to explain the state of his affairs, and to acknowledge that it was altogether out of his power to make this payment. Upon that coming to Lord

June 28. 1825.

June 28. 1825. Breadalbane's knowledge, he thought it would be proper to take immediate legal steps to make effective the security which he had obtained over Mr Campbell's share of the Easdale Company; and, upon that occasion, his Lordship communicated with Mr John Archibald Campbell, the son of Mr Campbell, upon the subject of the state of his father's affairs; and in consequence of directions given by Lord Breadalbane, Mr John Campbell wrote to the overseer at Easdale, to make a change as to the mode of the remittances, by a letter, dated Edinburgh, 28th May 1818, in these terms:—'DEAR SIR, I notice, by your letter of the 12th instant, that all the bills for the sales at Easdale for the year ending Martinmas 1817 are transmitted. In making out the bills for the ensuing year, you will attend, in consequence of arrangements, they are now to be drawn payable to your order, at the Royal Bank, Edinburgh, and that they be blank indorsed by you.'

It is stated, that, in order that the appellant might see that his instructions with regard to the appropriation of these remittances had been duly obeyed, Mr John Archibald Campbell transmitted a copy of the above letter to him in London, writing, at the same time, as follows:—'I have the honour of enclosing a letter from my father to the manager at Easdale, which went this night, and will of course put all matters right. The bills were formerly payable to my father, after being accepted by the purchasers. As they come up, they will be lodged in the Royal Bank, who will draw the proceeds, and retain them, until further orders.'

My Lords,—It appears that my Lord Breadalbane thought that the change which had been thus directed, with respect to the mode of drawing the bills, might not be sufficiently effectual, and that it was necessary to go a step farther; and he ordered that the bills should be made payable directly to himself. For this purpose, upon the 6th of June 1818, Mr Duncan Campbell, who was the appellant's factor in Argyllshire, called upon the overseer at Easdale, and required him for the future to make the bills payable to him.

This is noticed in a letter from the overseer to Mr John Campbell, dated the 6th of June, in which he says,—'Lord Breadalbane's factor called here this morning, and intimated his Lordship's wishes, that the bills were to be drawn in future payable to his Lordship's factor: to this I answered, that I would write you on this subject. You will please, therefore, send me the exact form you wish, and the kind of indorsation, to prevent any inaccuracy hereafter, as I find myself at a loss how to act, until I hear particularly on the subject.'

This letter was answered by Mr John Archibald Campbell, the son of Mr John Campbell, in a letter of the 18th of June, in which he says, 'My father will himself write you about Easdale; in the mean time I beg to mention to you, that the bills are all to be payable and drawn in favour of Mr Duncan Campbell.' The matter was thus settled, and the manager acted upon this order, from that time forward, in making his remittances.

June 28. 1825.

My Lords,—After the above intimation had been given to the overseer at Easdale, with regard to the mode in which the remittances were for the future to be regulated, Lord Breadalbane found it necessary, in consequence of the state of Mr Campbell's affairs, to employ another man of business; and having selected Mr Harry Davidson, writer to the signet in Edinburgh, for this purpose, that gentleman, immediately upon his appointment,—a stranger, it is stated, entirely to the Earl of Breadalbane's affairs—unacquainted with the precise nature of the conveyance, which remained in the depositaries at Taymouth, to which he had not at that time access—and ignorant of the previous intimation which had been made to the manager of Easdale,—directed his son to proceed to that place, and make such intimation as he could, to any clerk or manager of the Company whom he might find upon the spot, of the conveyance which had been executed in favour of the appellant in 1813.

My Lords,—Shortly after this Mr Campbell was made a bankrupt, namely, on the 21st August, within sixty days after this intimation which had been given by Mr Harry Davidson, so that no legal effect could be attached to that intimation. On the 11th of August 1818 Mr Campbell executed a trust-deed of his whole estate, real and personal, in favour of Mr Claud Russell, accountant in Edinburgh, the respondent in this cause. This deed was afterwards intimated to Lord Breadalbane, but he never acceded to the trust.

My Lords,—An action of reduction and declarator was afterwards brought before the Court of Session, at the instance of the trustee Mr Russell, and also certain creditors of Mr Campbell, against Lord Breadalbane, concluding for reduction of the conveyance of his share of the stock of the Easdale concern, and the instrument of the intimation and possession which had been taken on the 26th of June, upon three grounds:—First, That the creditors for whose behoof the action was raised were, at the date of the deed of conveyance, lawful creditors of Mr Campbell,—that the conveyance was granted to the appellant, without any just cause or adequate price,—that it remained latent, in defraud of the pursuers, and that the conveyance therefore was null and void, in terms of the Act of 1621, chap. 8. Secondly, That the conveyance was intended as a security of a former debt, granted by a person insolvent, with a view of giving a preference to the appellant over the other creditors,—that the granter of the deeds was rendered legally bankrupt upon the 21st of August 1818, within sixty days of the intimation or delivery,—and that the conveyance therefore was null and void, in terms of the Act of 1696, and also by the provisions of the later bankrupt statutes. Thirdly, That the conveyance was granted as a trust, or in security of a limited sum, inadequate to the real value of the subject conveyed, and, therefore, that it could in no respect be made available to any greater extent than the sum really paid.

This case was remitted to Lord Pitmilley, and his Lordship granted

June 28. 1825. a diligence to recover such written evidence as appeared to either party to be material to the cause, and afterwards ordered memorials; and his Lordship, on the 21st of March 1821, pronounced the following interlocutor:—‘ The Lord Ordinary having considered the mutual
 ‘ memorials for the parties in the case, and whole process, in respect
 ‘ the granter of the conveyance or assignation of the 23d of June 1813
 ‘ was allowed to continue in possession of the subject conveyed, and
 ‘ that no intimation of the assignation was made till within sixty days
 ‘ of his bankruptcy, finds, that the assignation was not completed to
 ‘ the effect of giving a preference to the assignee in a question with
 ‘ the creditors of the cedent; sustains the reasons of reduction, and
 ‘ reduces, decerns, and declares in terms of the libel.’

To that interlocutor his Lordship afterwards adhered, upon advising a representation, with answers.

My Lords,—Upon this the appellant presented a petition to the Second Division against the Lord Ordinary’s judgment; and the Second Division pronounced this interlocutor:—‘ The Lords having
 ‘ advised this petition, with answers thereto, adhere to the interlocutor
 ‘ of the Lord Ordinary complained of, in so far as it finds, that, in re-
 ‘ spect the granter of the conveyance or assignation challenged was
 ‘ allowed to continue in possession of the subject conveyed, and that
 ‘ no intimation of the assignation was made till within sixty days of his
 ‘ bankruptcy, the assignation was not completed to the effect of giving
 ‘ a preference to the assignee in a question with the creditors of the
 ‘ cedent; but, before answer, remit to his Lordship to hear parties
 ‘ further on the conclusions of the libel, and do as he shall see
 ‘ cause.’

My Lords,—Against this interlocutor an appeal has been brought to your Lordships’ House; and a question, which, as it seems to me, is of as great importance as any question which has been discussed at your Lordships’ Bar during this session, has arisen, namely, to what extent, and in what manner, an intimation was necessary, in this case, of this deed of assignation executed by Mr Campbell. My Lords, I say it is a most important question, because it undoubtedly affects the rights of persons in possession under tacks, seeking to raise money on the security of that interest which they may have in these tacks, and particularly as to the mode in which they can be permitted so to obtain money; it being stated, and stated from books of high authority in the law of Scotland upon this subject, that the general law was, that intimation was necessary in an assignation.

My Lords,—The general doctrine upon this subject is thus laid down by Mr Erskine. He says,—‘ A tack must also be accompanied
 ‘ by possession, in order to secure the tenant against the singular suc-
 ‘ cessors of the granter; for though leases, in the form in which they
 ‘ have been executed for several centuries past, admit not of symboli-
 ‘ cal possession by sasine, yet natural possession is required for giving
 ‘ the effect of a real right; and hence a posterior lease, followed by

June 28. 1825.

‘ possession, is preferable to a prior upon which there has been no
 ‘ possession. Though, therefore, the granter was proprietor at the
 ‘ date of the tack, yet, if he shall be divested of his right before the
 ‘ term of the tenant’s entry, the tack cannot affect singular successors,
 ‘ because a tenant can have no possession on his tack till the term of
 ‘ his entry.’ Then he goes on:—‘ Possession is as necessary for se-
 ‘ curing the transmission of a tack or sub-tack to an assignee or sub-
 ‘ tacksman, as for securing the tack itself to the original tacksman ; or,
 ‘ at least, there must be some publication by which the conveyance
 ‘ must be made known, that so third parties may not be ensnared by
 ‘ latent or private conveyances, and because the adjudication of a lease
 ‘ is a public and judicial act of the Supreme Court transferring the
 ‘ right to the adjudger. A creditor adjudging that right from the
 ‘ tacksman, before the tacksman’s voluntary assignee has obtained pos-
 ‘ session upon his conveyance, is preferable to the assignee.’ Then
 my Lord Stair also says,—‘ Possession is requisite not only to the
 ‘ conveyance of the property of moveable goods, but also of liferent
 ‘ rights, tacks, and rentals, servitudes, pledges, &c. ; which tacks,
 ‘ though they be truly personal rights of location, and constitute only
 ‘ as real rights by the statute, yet intimation will not transmit them ;
 ‘ but there is a necessity of possession.’

My Lord Kilkerran was also cited, who lays it down, that ‘ the
 ‘ transmission of the property of moveables is ‘completed by delivery ;
 ‘ of lands, by infestment ; of nomina, by intimation ; of tacks and
 ‘ other rights which require no infestment, by possession ; and, there-
 ‘ fore, between two tacks, or between two sub-tacks, it is the first pos-
 ‘ session that determines the preference.’

My Lords,—It is admitted in this case, that, by the law of Scot-
 land, there is no public intimation required in any particular form, or
 in any particular manner, to give validity to an assignation like that
 which has been made in this case ; and it was stated that a case had
 been decided by the First Division of the Court, *Yeoman v. Elliot*
 and *Foster*, 2d February 1813, on this subject ; and the short-note
 of that case at the head of the report is,—‘ A right to a lease by
 ‘ assignation is completed by entry of the assignee’s name as tenant in
 ‘ the landlord’s rental-book.’ My Lords, in that case, two persons of
 the name of Wilson and Main were manufacturers in Langholm ; each
 of them held long leases of houses and building areas in that village,
 from the Duke of Buccleugh. Those leases they assigned in May
 1810 to Mr Elliot in trust, for Messrs Elliot and Foster, bankers in
 Carlisle, in security of advances in money to be made to them, for the
 purpose of carrying on their trade. Upon receiving this assignation,
 Mr Elliot had his name enrolled in the Duke of Buccleugh’s rental-
 books, and granted sub-tacks to Main and Wilson, who thereby re-
 mained in possession of their respective subjects ; so that your Lord-
 ships perceive the intimation in this case was by Mr Elliot’s procuring
 his name to be enrolled in the Duke of Buccleugh’s rental-books, the

June 28. 1825. Duke of Buccleugh being proprietor of the land. Main and Wilson becoming bankrupts, the estate of Wilson was sequestrated upon the 15th of October 1810; the estate of Main, upon the 22d of the same month. At the date of their bankruptcy, both those persons were indebted to Elliot and Foster in sums greatly exceeding that of L.1000, in security of which their leases had been assigned. Intimation was given by these gentlemen to the bankrupts, and to Yeoman, the trustee upon their estates, that they meant to bring the lease of their subjects to sale, by virtue of a clause in the assignation empowering them to do so, in the event of sums advanced by them not being paid up in a certain time. A sale of the leases was then advertised, against which a bill of suspension and interdict was offered by the trustee, and passed. Upon the cause coming into the Outer-House, the Lord Ordinary pronounced an interlocutor, in which there are various findings of the facts; and the conclusion was, that, under the circumstances, the securities given by Main and Wilson to Elliot were sufficiently completed, and rendered preferable; and being of opinion that these securities were not liable to any challenge on the Act 1696, repelled the reasons of suspension, and decerned.

My Lords,—Against that interlocutor there was a representation, upon which occasion the Lord Ordinary adhered to his interlocutor: it was finally brought under the review of the Court of Session. On advising the case, I would just state to your Lordships, the argument against this interlocutor was, that the assignation to Elliot was never made effectual, as no possession or publication had followed upon it; and it could not, therefore, be preferred to the rights of the other creditors under the sequestration. Your Lordships perceive, that in that case there was no change of possession; the tenants continued in the possession, the assignee granted them sub-tacks; so that there was no alteration whatever of possession; and the only intimation was their intimating to the Duke of Buccleugh the fact, that they had become tenants by virtue of this. It was argued, that the want of possession could not be supplied by intimation to the landlord, nor by enrolment of the assignees in his rental-books, as the transfer of the property was not thereby made public; and the other creditors had been induced to transact with the bankrupts, from seeing them still in possession of the subjects in question.

My Lords,—That reasoning was answered by the other side; and the Court, in pronouncing judgment, said that which I am about to read to your Lordships. ‘To adopt the argument on this petition, ‘would be to overthrow the credit of the whole tenantry in the ‘country. A lease is merely a personal right, the parties to which are ‘the landlord and the tenant: this right is transferable, like all other ‘personal rights, by assignation, and the transference is completed by ‘intimation to the only other person concerned, the landlord. How ‘that intimation is made, is of no consequence, if it be acknowledged ‘that it was made: the assignation may be secret, known only to the

June 28. 1825.

‘ parties to the transaction ; but this cannot be helped, it arises’ from
 ‘ the nature of the right. Even where there is a subtenant, he may
 ‘ pay his rent without any one knowing to whom, or who is in right of
 ‘ the lease. The case of Hardie Douglas is negligently reported.’ The
 Court concurred in his Lordship’s opinion, and adhered to the interlo-
 cutor of the Lord Ordinary.

My Lords,—Under the authority of that case, it was argued by the
 appellant in this, that, as far as it was a decision, it decided, that all
 the intimation necessary of the assignation of a tack, was an intimation
 by the assignee to the proprietor of the land, that he had become pos-
 sessed of an interest in the tack ; that, in this case, the party, who was a
 tenant and tacksman, having assigned it to the landlord himself, the pro-
 prietor, the very assignation amounted to that intimation which was held
 sufficient in the case to which I have referred your Lordships. With
 respect to the notification, it was contended that it was not sufficient,
 but that a notification should have been given to the overseer of the
 work that there had been this change : but it was said, that giving
 notice to him was only giving notice to themselves ; that he was their
 mere agent to conduct the business there ; that he was removable at
 pleasure ; that any other overseer might be appointed ; and it was
 therefore too much to say, that intimation was to be given to that over-
 seer. But it was argued, that some public notification was necessary :
 I do not find that advertisement in the Gazette, or in any public paper,
 has been required.

It is then said there was no change in possession. My Lords, there
 was no change of possession in the case to which I have referred ; but
 all that had taken place, namely, that letter of the 18th of June, more
 than sixty days prior to the bankruptcy, and by which a very material
 change took place as to the mode in which the business was to be
 conducted. The bills were to be drawn in favour of Lord Breadal-
 bane, and not of Mr Campbell. It was argued, that this notice should
 have appeared in the books. My Lords, the books are not accessible
 to the public ; the books were not accessible to the creditors of Mr
 Campbell ; and, therefore, it does not appear to me how that could
 have any effect.

My Lords,—The principles applying to this decision appear to me
 to be in direct opposition to the case to which I have referred your
 Lordships. In that case, all which was done was intimation or notifi-
 cation to the factor, he being a party to the transaction : and, with
 respect to change of possession, it was not part of the transaction that
 there should be a change of possession, for it was merely to be a
 security.

My Lords,—Another case has been argued at your Lordships’ Bar
 this session, but which stood over on an objection which arose in the
 course of the discussion of that case, in which a similar question has
 been raised—the case of the Glasgow Bank v. Brock,* in which the

* See Vol. III. p. 75.

June 28. 1825.

Lords of the Second Division had come to the same decision to which they have come in this case of Lord Breadalbane, that in that case there had not been a sufficient intimation of the assignation. My Lords, this decision, however, of the Second Division has not been a unanimous decision; for my Lord Craigie was of opinion, that the assignation in that case required no intimation, and he was therefore for altering the interlocutor.

My Lords,—Considering the very great importance of this case, for I do conceive it is of very great importance, as it affects the rights of parties in Scotland; and seeing the different decisions, which I think are not to be reconciled, that of the First Division, and that in this case; and, as I stated to your Lordships, the question so materially affecting the rights of parties,—I must confess, that in this case I should be extremely sorry to call upon your Lordships now for a decision. My humble recommendation to your Lordships would be, to remit this case for the further consideration of the Second Division of the Court of Session, intimating, perhaps, in that remit, a wish on your Lordships' part, that, in reconsidering this case, they should consider particularly how and in what manner intimation ought to have been given in this case; because they have not pointed out in what manner intimation ought to have been given; and I think it is highly desirable, that upon that, and upon the other points of this case, we should have the benefit also of the opinion of the First Division of the Court of Session.

My Lords,—If the other case had been fully heard before your Lordships, I probably should have recommended your Lordships rather to make a remit in that case than in this, because I think the point is more nearly brought out in that case than in this; but, at the same time, I think the particular point is sufficiently raised in this case. The Court of Session have not proceeded in this case on any ground of fraud,—I do not mean in the common acceptation of the word,—but legal fraud between Lord Breadalbane and Mr Campbell. They do not reduce on any such ground, but their general finding is, 'that
' in respect the granter of the conveyance or assignation challenged
' was allowed to continue in possession of the subject conveyed, and
' that no intimation of the assignation was made till within sixty days
' of his bankruptcy, the assignation was not completed to the effect of
' giving a preference to the assignee in a question with the creditors of
' the cedent.' Their decision, therefore, is founded on these distinct propositions,—propositions which, as I have said, are most important to the rights of parties holding as these parties do; affecting, in the first place, I admit, that which the law of Scotland is very jealous of, secret assignations without any public or formal notification of them, so that the world may be apprized how they stand; but affecting also rights of tenants under tacks; because, if this decision be, as it may ultimately turn out to be, a right decision, it will follow, I think, to be extremely difficult for a tenant in possession of a large farm, whose only means of raising money to carry on that farm may be by assigning his interest to another, to obtain that assistance which he requires,

if that cannot be effected without change of possession, which will defeat all the man's views by putting him out of possession, and suffering the assignee to come in, and then rendering another change of possession back again necessary. I am not apprized in what way that could be done, or what steps a man, who, though in possession as a tacksman, still has assigned his interest to some body else for the benefit of the other person, or for advances he may have made, ought to take. These are questions of a most important nature, as affecting the rights of the public and the rights of the creditors on the one hand, and on the other hand the rights of the party, that being the only means, probably, by which he may be enabled to go on. June 28. 1825.

My Lords,—However much I regret that there should be farther delay in settling the rights of these parties, yet, after a great deal of anxiety on this subject, really the result of my impression has been, that the proper course will be to remit the case in the way I have stated, that we may have the benefit, if it comes here again, of the opinion of all the learned Judges in Scotland on this most important subject. For these reasons, therefore, I should humbly propose to your Lordships, neither to affirm nor reverse at the present moment, but to remit this case for the farther consideration of the Court of Session, requesting their decision upon the point which I have stated to your Lordships, how and in what manner intimation, in their judgment, ought to have been given in this case, in order to secure the right of Lord Breadalbane under this assignation; and I should propose to your Lordships, that the Second Division be requested to take the opinion of the First Division of the Court of Session, so that we may have the advantage of the opinion of all those very learned persons on this question. It will be to me personally, and I have no doubt will be also to every one of your Lordships, a great satisfaction to have the advantage of their opinion, before your Lordships are called upon to settle finally what shall be the law in these cases in future. In order that I may present to your Lordships a minute in the proper form, I would move your Lordships that this case shall stand for further consideration on Tuesday next.

Appellant's Authorities.—3. Stair, 1. 9.; 3. Ersk. 5. 4.; 2. Bank. 193.; Montgomerie, July 27. 1673, (841.); Argyll, Dec. 14. 1676, (842.)

Respondent's Authorities.—2. Ersk. 6. 25.; 3. Stair, 2. 6.; Kilk. 145.; Brock against Cappel, Nov. 29. 1822, (2. Shaw and Dunlop, No. 54.); Watson, Nov. 19. 1755, (850.); 3. Ersk. 3. 5.

J. CHALMER—SPOTTISWOODE and ROBERTSON,—Solicitors.