ever, I have had no opportunity of seeing the practice of the Court as to appeals. I have never thought the practice, if practice there was, a reasonable one. I think it a most proper rule to introduce that a party to a suit who holds a judgment should not lose it simply because he does not follow the appellant to this Court. An appellant must, before he can succeed, show cause why the interlocutors appealed from should be altered.

The LORD JUSTICE-CLERK and LORD YOUNG were absent.

The Court then heard the appellant on the merits, and in the result recalled *hoc statu* the interlocutors complained of.

Counsel for Appellant — Rhind. Agent—W. Officer, S.S.C.

Thursday, July 8.

SECOND DIVISION.

[Sheriff of Lanarkshire.

HERITABLE SECURITIES INVESTMENT ASSOCIATION (LIMITED) *v.* WINGATE & COMPANY.

Right in Security—Ex facie *Absolute Disposition*—*Lease to Disponers*—*Hypothec*—*Excessive Rent.*

W. & Co., shipbuilders, borrowed from a Heritable Securities Association (Limited) a sum of money, in security of which there were executed *unico contextu* (1) an *ex facie* absolute disposition of their shipbuilding yard and heritable machinery therein; (2) a personal bond for repayment of the sum by instalments running over ten years; (3) a lease by which the yard was again let to them by the Heritable Securities Association for a rent which was much larger than the rent stated in the county valuation roll; and (4) a deed of agreement, which after explaining that the lease had been granted with the view of more effectually securing the lenders in payment of the sum due under the deeds, provided "that it was agreed that the borrowers should receive credit for all sums paid in name of rent under the said lease as payments made to account of the sums due under" the above deeds. W. & Co. remained in possession of the yard. On their insolvency the Heritable Securities Association presented a petition for sequestration of the *invecta et illata* in the shipbuilding yard for the amount of the rent contained in the lease. The trustee on W. & Co.'s sequestrated estate resisted the action. *Held* (*diss.* Lord Young) that no true relation of landlord and tenant had been established, and that the various deeds embodied no more than an arrangement to give the pursuers a preferential security over the general creditors of the defenders, which was not maintainable at law.

Thomas Wingate & Company were engineers, shipbuilders, and founders at Whiteinch, near Glasgow. In December 1875, being in difficulties, they borrowed from the Heritable Securities Investment Association (Limited) the sum of £55,000, for which they granted their personal bond dated 14th December, and payable partly by instalments running over a period of ten years, and in security of which they also granted an *ex facie* absolute disposition of their shipbuilding yard and heritable machinery, &c., and furnishings as per inventory therein, dated the 14th and recorded 15th December 1875. On the same day, viz., 14th December 1875, a lease was drawn up by which the Heritable Securities Company let the subjects again to Wingate & Company at a rent of £4800 a-year, payment to be made at two terms in the year, for a period of ten years, viz., £2400 on the first Monday of December and June respectively. The rent of the subjects as it appeared on the valuation roll for the county of Lanark was only £1800. Further, on the 14th December 1875 the parties (lenders and borrowers) executed an agreement, which after alluding to the loan of £55,000, and the *ex facie* absolute disposition granted to the Heritable Securities Association, bore that the subjects therein conveyed should be held "by them in security of said advance, and interest and penalties thereon, as well as for premiums of insurance and other disbursement after mentioned; and the said first parties (the Association) shall be entitled to retain possession of said subjects till the whole sums due or to become due to them by the said second parties in respect of said advance of £55,000 are wholly paid, and the whole obligations undertaken by the said second parties to the said Association in connection therewith are fulfilled: (*Second*) The heritable subjects, machinery, and others before referred to are and shall be redeemable by the said second parties (except in the case of a sale or sales as after mentioned), on payment being made to the said Association, not only of all sums of money that shall be due to the said Association at the time of redemption under the foresaid loan of £55,000, but also of all other sums of money that shall be due to the said association at the time of redemption, in any manner of way, and the interest thereof, including all costs, charges, expenses, and disbursements of every kind incurred or to be incurred by the said Association in relation to the premises, with the interest thereof, which sums shall be sufficiently vouched and ascertained by a statement under the hand of the manager of the said Heritable Securities Investment Association (Limited). . . . . (*Eighth*) With regard to the said lease of the said several subjects and machinery and others, granted by the first parties to the second parties, in respect that the same has been granted with the view of more effectually securing the first parties in the payment of the sums due under the said personal bond and these presents, it is agreed and hereby declared that it is not the intention of the parties hereto that the first parties shall, in addition to the sums due under the said personal bond, be entitled to demand payment from the second parties also of the rents stipulated under the said lease to be paid to the first parties, and accordingly the second parties shall be entitled to receive credit for all sums paid in name of rent, under the said lease, as payments made to account or in satisfaction of the sums due under the said personal bond and these presents: (*Lastly*) The said second

parties hereby declare that they have accepted the said loan on the conditions set forth in the rules of the said Association so far as they relate to loans and are consistent with these presents and the foresaid personal bond, a copy of which rules they have subscribed of equal date with their signatures to these presents as relative hereto; and the said second parties hereby acknowledge and declare themselves to be subject to the whole of said rules so far as incumbent on borrowers, and to the extent foresaid; and to that effect they bind themselves to conform to and observe and implement the same." Rule 14 of the Heritable Securities Association in regard to loans was as follows:—"Borrowers shall have right to possess the property conveyed in security to the company, or to let the same and draw the rents, so long as their repayments continue to be regularly made and the rules of the Association complied with, but always without prejudice to the rights of the Association over the same. No alterations, either externally or internally, on property conveyed in security to the company shall be lawful without previously obtaining the consent of the directors thereto in writing." The subjects continued in possession of Wingate & Company.

In July 1876 Wingate & Co. suspended payment, and Mr Charles Maclean acquired the yard under its obligations, and taking in one of the Wingates as a partner, started a new firm in the old name, which in January 1877 borrowed £10,000 more from the pursuers, undertaking at the same time all the obligations of the old firm as to the loans, &c., and placing the new firm in the same position as the old as tenants under the lease.

On 13th January 1879 the new firm entered into a written contract with the Dundalk Harbour Commissioners whereby they agreed to build for the latter a new self-propelling dredging machine.

On 2d May 1879 Wingate & Co. suspended payment, and on 3d June 1879 they were sequestrated, Mr William Mackinnon being elected trustee on their sequestrated estate.

This was a petition for sequestration of all the property in the shipbuilding yard, at the instance of the Association, for £4800, the rent under the lease of 14th December 1875. The defenders were Mr Mackinnon, the trustee, and the Dundalk Harbour Commissioners as in right of certain fittings connected with the dredger, which itself had left the yard.

The pursuers pleaded, *inter alia*—"(3) The pursuers being heritable proprietors of said subjects, of which the said Thomas Wingate & Company were tenants under said lease, the former have a right of hypothec over the *invecta et illata* thereon, in security of payment of the foresaid rent. (4) The pursuers being heritable proprietors of said subjects, and the said Thomas Wingate & Company tenants thereof, and the rent not having been paid when it fell due. decree should be pronounced as craved."

The defender Mackinnon pleaded—"Said pretended lease, with all following thereon, is invalid and ineffectual, and ought to be set aside *ope exceptionis*, in respect of (1) It is not a *bona fide* lease, the 'rent' stipulated for in it is not *bona fide* rent, but really instalments of principal and interest of money lent, and the subjects embraced in it are of much less annual value; and (2) it was a simulate and illegal transaction entered into by the pursuers for the purpose of depriving the other creditors of the bankrupts of their just rights and securities; and (3) was an illegal preference to the pursuers both under the Bankruptcy Statute (1696, c. 5) and at common law."

The defenders the Dundalk Harbour Commissioners pleaded that the articles which they claimed did not fall under the sequestration.

The Sheriff-Substitute (Erskine Murray) found "(1) that the sequestration is good, but only to the extent of £1800, being the real rent of the premises due 2d June and 1st December 1879, in equal proportions of £900 at each of these dates; (2) that the articles specified in connection with the dredger contract are the property of the defenders the Dundalk Harbour Commissioners, and do not fall under the sequestration: Therefore recals the sequestration *quoad* the articles before mentioned found to be the property of the defenders the Dundalk Harbour Commissioners; but grants warrant to John Dixon, auctioneer in Glasgow, to sell by public roup as many of the remaining effects sequestrated as will pay the half-year's rent of the premises in question, due 2d June 1879, being £900, and the half-year's rent due 1st December 1879, being £900, with interest on these sums from said respective dates."

In the note which he appended to his interlocutor he said—"The Sheriff-Substitute has had considerable difficulty in this case, as some very nice points arise in it for decision.

"In the first place, it is clear that the first plea-in-law for the defenders, to the effect that 'the pursuers being *de facto*, and upon the deeds founded on, merely creditors, with no right to or security over the moveables embraced in the sequestration following upon the present action, were not entitled, in virtue of their pretended lease, which was invalid and insufficient to give them a conventional right of hypothec to sequestration as craved to the prejudice of the other creditors of T. Wingate & Company,' cannot be sustained as a whole. It is clear from the authorities, and is indeed admitted at the debate by defender, that an heritable creditor holding an absolute disposition can now (as it was held that a wadsetter was entitled to do in former times) grant a lease to the disponer of the subjects conveyed under the disposition; and if he can grant a lease he can sequestrate for the rent really due under the lease. The question as to whether the whole amount here sequestrated for can fall under this category will be considered hereafter.

"Again, it is pleaded for defenders that the lease altogether was a simulate and illegal transaction, entered into for the purpose of depriving the other creditors of the bankrupts of their first rights and securities. The Sheriff-Substitute cannot adopt this view. It was no more simulate and illegal than the disposition of the same date. Each was a preferential security given to certain creditors, not entirely a reality, but meant to secure the lenders of money, and recognised by law as a legal means of giving such a security. But then the defenders further plead, that not only was the lease a preference, but that it was an illegal preference, both at common law and under the Bankruptcy Act 1696, cap. 5, as read along with section 6 of the Bankruptcy (Scotland) Act 1856. That section says that the date of a deed under this Act, or under 1696, cap. 5,

shall be the date of recording the sasine where sasine is requisite, and in other cases of registration of the deed, or of delivery, or of intimation, or of such other proceeding as shall in the particular case be requisite for rendering such deed completely effectual. Upon this it is argued by defenders that the real date of the lease must be held to have been at the time when there was failure to pay, viz., the 2d June 1879. This argument is mainly based upon the fact that the agreement, dated the same day as the lease and disposition, stipulates that the lenders shall have power to enter into possession and grant leases if the sums stipulated under the agreement are not paid, and that the rules embodied in the contract stipulate (especially in article 14) that the borrowers shall have right to possess, as long as they pay the stipulated sums, without prejudice to the pursuers' rights under their deeds. Therefore, the defenders argue, the borrowers had no power to enter into possession or to make the lease effectual till the failure in payment on the 2d June: Therefore, under section 6 of the Bankruptcy Act, the lease must be held to date from that time: Therefore, being within 60 days of notour bankruptcy, it falls under 1696, c. 5. But, in the first place, apart from the agreement and rules, a lease is made effectual, properly speaking, by delivery. After execution by both parties its natural place is in the hands of the lessor. It is manifest that the clause in question does not mean the making effectual which is implied by the use of sequestration following upon a lease. All that is meant is that something must be done which makes it an effectual deed henceforward binding on both parties. Here nothing more required to be done to make the lease an effectual deed. As regards the special terms of the agreement and rules, there is undoubtedly a difficulty. The words of the three documents--the disposition, agreement, and lease--at first sight appear to contradict each other. There can be no doubt (apart from the agreement) that from the time of granting the disposition the Wingates' only title of possession was the lease, and the pursuers as the heritable proprietors possessed the subjects through their lessees the Wingates. The agreement (with the rules embodied in it), on the other hand, speak of the borrowers being entitled to possess as long as they paid the stipulated sums, on failure in payment of which the lenders were entitled to enter into possession and grant tacks and leases, &c. But where deeds granted at the same date have an apparent ambiguity, that interpretation which reconciles them best is to be preferred, as it must be presumed that the granters had a definite purpose and intended their deeds to have some definite effect. Now, the apparent discrepancy is reconcileable if the possession mentioned in the agreement is only taken as the possession to which the Wingates were entitled under the disposition and lease read together. If the borrowers failed to pay the sums, the lenders were entitled in spite of the lease to grant new leases to others. Anyway, the Sheriff-Substitute cannot think that the terms of the agreement are sufficiently clear to override the legal force of the other deeds and prevent the lease from becoming 'effectual' at the date of delivery. Therefore the Sheriff-Substitute cannot hold that the lease through a preference is bad under the Act 1696, c. 5.

"It is also pleaded and argued for defenders that the transaction was a latent one, which could not be pled against creditors. But it must be remembered that the disposition in favour of pursuer was a registered, and therefore public deed, and therefore creditors ought to have been prepared for the fact that under the authorities pursuers were legally entitled to grant a lease of the property even to the disponers. The insertion in the valuation roll of the Wingates as owners was their act, and not that of pursuers. The Sheriff-Substitute cannot therefore sustain this defence.

"Again, it is argued by defenders that the lease is not a *bona fide* lease, the rent stipulated in it not being *bona fide* rent, but really instalments of principal and interest of money lent, and the subjects embraced in it are of much less annual value. The Sheriff-Substitute cannot sustain this plea to the extent of overthrowing the lease entirely, for it is just as much a *bona fide* lease as the disposition is a *bona fide* disposition. If the amount of the rent stipulated under it for the purpose of covering the sums payable had been anything like the real rent of the premises, the Sheriff-Substitute would not have meddled with the sequestration at all. But it does not necessarily follow that the sequestration is good to the whole extent of the rent stipulated in the lease. For it has been held over and over again that a conventional hypothec, by which parties attempt to give a security under the name of rent for what is not really rent is ineffectual. Therefore, though the pursuers could let the premises to the Wingates, and stipulate for rent, they could not legally make for themselves a security as for rent beyond the real rent of the premises. Here the real rent must be taken as only £1800 a-year, while the stipulated and nominal rent was £4800. The pursuers have sequestrated for £4800 as the year's rent, but the Sheriff-Substitute is, on the above principles, only able to sustain the sequestration to the extent of £1800." . . . . . .

The pursuers appealed, and argued—(1) The Heritable Securities Association, in virtue of their lease, were entitled to hypothec. They were proprietors in civil possession under that lease. The lease was quite as essential to the whole bargain as the absolute disposition, and there was no illegality in having two securities—*Scottish Heritable Securities Company* v. *Allan, Campbell & Company*, Jan. 14, 1876, 3 R. 333. (2) There was no evidence to show that £4800 was an unreal rent, and even if there was an excess, that would not void the lease *in toto*.

Argued for defenders Wingate & Company—(1) Looking to the terms of the writs in question, the lease was a mere excrescence not intended to affect the rights of the parties; it was never acted upon, and was only a collusive device to confer on the Heritable Securities Association a conventional hypothec to the prejudice of others in the event of Wingate & Co.'s insolvency, by establishing a fictitious relation of landlord and tenant. (2) Even supposing the relation of landlord and tenant did exist between the parties, the rent was largely excessive, and besides showing what the nature of the contract really was it voided the contract—*Ex parte Jackson*, June 25, 1880 (not yet reported); *Williams*, Nov. 29, 1877, 7 Chan. Div. 138; *Mackay*, May 9, 1873, 8 Chan. App. 643.

At advising—

Lord Ormidale—The material facts in this case are set out, I think, with precision and accuracy in the Sheriff-Substitute's interlocutor of 15th May 1880.

The pursuers (present appellants) say that they are proprietors of the shipbuilding yard of the defenders Thomas Wingate & Company, conform to *ex facie* absolute disposition which they have produced. They also say that Wingate & Co. are their tenants of the ground and erections thereon, in and connected with the shipbuilding yard, as also certain steam-engines, machinery, and fittings, under a lease for ten years at £4800 per annum granted to them by the pursuers as proprietors in virtue of their absolute disposition. The relation of landlord and tenant has thus, it is maintained by the pursuers, been established between them and the defenders Wingate & Co.; and they have therefore pleaded, that in respect of rent which had become due under the lease they were entitled to apply, as they did, for a landlords' sequestration of all the effects in the shipbuilding yard. They have endeavoured to support this sequestration in virtue of their assumed rights of hypothec as Wingate & Co.'s landlords. On the other hand, it is maintained by the trustee for Wingate & Co.'s general creditors in the sequestration in bankruptcy which had issued against them before the pursuers' petition was presented, that their assumed position as Wingate & Co.'s landlords, and their alleged consequent claim of hypothec, are without the requisite foundation, and that the relations of landlord and tenant has not in truth and reality existed between these parties; or, in other words, that the various deeds obtained by the pursuers from Wingate & Co. merely embody an arrangement which was no more or better than a device to give the pursuers a preferential security which they would not otherwise have had over Wingate & Co.'s general creditors in the event of their bankruptcy, and that such a device is not maintainable in law against the defenders to the effect contended for by the pursuers.

In dealing with this question it is necessary to examine, besides the *ex facie* absolute disposition and lease on which the pursuers chiefly rely, the deed of agreement which was executed of the same date and by the same parties, and which explains what the nature of the whole transaction truly was. This deed of agreement bears that it had been arranged between the pursuers, therein called the first parties, and the defenders Wingate & Co., therein called the second parties, that the first parties should make an advance to the second parties of £55,000, afterwards increased by an additional advance of £10,000, although this need not be further noticed, on the security of the shipbuilding yard and relative property and effects belonging to the latter; and then, after referring to the *ex facie* absolute disposition granted to the pursuers, the agreement further bears that it was agreed that the subjects thereby conveyed should be "held in security of said advance and interest and penalties thereon, as well as for premiums of insurance and other disbursements after mentioned, and that the said first parties shall be entitled to retain possession of said subjects till the whole sums due or to become due to them in respect of said advance of £55,000 are wholly paid and the whole obligations undertaken by the said second parties to the said Association (the pursuers) in connection therewith are fulfilled." And besides the clauses showing that the disposition founded on by the pursuers, although *ex facie* absolute, was granted to and held by them in security only of the advances to Wingate & Co., the agreement in its eighth head has this reference to the lease, viz., "In respect that the same has been granted with the view of more effectually securing the first parties in the payment of the sums due under the personal bond"—a separate bond for the advances which had been granted by Wingate & Co. to the pursuers—"and these presents, it is agreed and hereby declared that it is not the intention of the parties hereto that the first parties shall, in addition to the sums due under the said personal bond, be entitled to demand payment from the second parties also of the rents stipulated under the said lease to be paid to the first parties, and accordingly the said parties shall be entitled to receive credit for all sums paid in name of rent under the said lease as payments made to account or in satisfaction of the sums due under the said personal bond and these presents." The agreement also contains a clause in these terms—"Lastly, the said second parties hereby declare that they have accepted the said loan on the conditions set forth in the rules of the said Association, so far as they relate to loans and are consistent with these presents and the foresaid personal bond, a copy of which rules they have subscribed of equal date with their signature to these presents as relative hereto; and the said second parties hereby acknowledge and declare themselves to be subject to the whole of said rules so far as incumbent upon borrowers and to the extent foresaid, and to that effect they bind themselves to conform to and observe and implement the same." Now, one of the rules referred to (the 14th) is to the effect that "Borrowers shall have right to possess the property conveyed in security to the company, or to let the same and draw the rents, so long as their repayments continue to be regularly made and the rules of the Association complied with, but always without prejudice to the rights of the Association over the same."

Besides all these features of the transaction, which show, I think, that it was truly of the nature of a loan with security, and not an ordinary lease at all, it is obvious that the sums stipulated for by the pursuers and agreed to be paid by Wingate & Co., although called rent, were in truth and reality instalments of principal and interest upon the advances which had been made to them by the pursuers. Accordingly no change of possession ever took place. The shipbuilding yard and others referred to continued in the possession of Wingate & Co. after the execution of the *ex facie* absolute disposition in favour of the pursuers, just as if no such deed had been granted. And the pursuers did not in any practical way whatever assume the character of Wingate & Co.'s landlords till they applied for the present so-called landlords' sequestration; but prior to that Wingate & Co. and their estates had, as already mentioned, been sequestrated in bankruptcy. And till the present application by the pursuers for landlords' sequestration, the existence of the lease by them to Wingate & Co. had been unknown to the public, and had not, indeed, been in any way whatever acted upon. In short, it remained alto-

gether latent till the bankruptcy of Wingate & Co., when the pursuers put it forward for the purpose of securing to themselves through the operation of the hypothec—which they say is available to them as Wingate & Co.'s landlords—exclusive right to the effects referred to in their petition.

In these circumstances I cannot help thinking that there was no such lease as entitled the pursuers to the right or privilege of hypothec as in the ordinary case of landlord and tenant—a right and privilege which is found frequently to operate with great hardship against ordinary creditors, and is therefore not to be extended beyond its legitimate range by what, as in the present case, I must characterise as a new device resorted to for the purpose of unduly obtaining certain preferential advantages over Wingate & Co.'s general creditors in the event of their bankruptcy, which the pursuers would not otherwise have had.

I feel myself very much strengthened in this view of the pursuers' case by the circumstance that the so-called rent of £4800 is, for anything that appears to the contrary, altogether disproportionate to the subjects let. The value of the heritable portion of these subjects is, according to the only evidence we have on the point, only £1800 a-year, and nowhere can I see any statement by the pursuers as to the worth of the moveables in the yard, which must necessarily have been of a shifting character. Besides, I do not see how the hypothec of a landlord can arise from or be maintained in reference to anything but heritable property.

If these views of the transaction in question are correct, the case of the pursuers against the defenders the Dundalk Harbour Commissioners must be equally untenable, as it is against the other defender Mr M'Kinnon, the trustee in bankruptcy for the general creditors of Wingate & Company. Nor can I understand how the contract between the pursuers and Wingate & Company can be reformed or altered so as to give the former a claim which they have not under the deeds on which they found as they now stand. The reforming of contracts is a proceeding unknown in the law and practice of Scotland, and, at anyrate, such a thing is out of the question in a case laid upon an illegal device.

I am therefore, on the grounds now stated, of opinion that the appeal ought to be sustained, the Sheriff's judgment recalled, and all the defenders assoilzied from the pursuers' action. And although I cannot refer in support of this result to any Scotch decision—and I do not suppose that any such case as the present has ever before occurred in the Scotch Courts—I may refer to the English case of *ex parte Jackson in re Bowes* as reported in the *Times* of Saturday the 26th ulto., and which I have no doubt will shortly appear in the ordinary reports. The question in that case arose between the holder of a mortgage for £7000 over the factory and business premises of a manufacturing chemist, the mortgage containing a clause of attornment making the debtor or mortgager a tenant paying a rent of £8000. It was maintained by the holder of the mortgage that the relation of landlord and tenant was thus created, whereby he by means of a distress which was used by him pleaded that he had secured a preference over the mortgager's ordinary creditors on the latter's bankruptcy. The mortgager's claim was, in a question with the trusteee for the general creditors, decided by the registrar of the County Court favourably for the trustee, but the chief-judge reversed that decision, which reversal came by appeal to be reviewed by Lord Justices Baggally, Cotton, and Thesiger, who were unanimous in reverting to the decision of the registrar of the County Court. The circumstances of the case are very similar to those of the present, and the remarks of the Lords Justices are, as it appears to me, applicable to the one case as much as to the other. They held, as I have held in the present case, that looking at all the circumstances, and especially the excessive amount of the so-called rent, there was in reality no proper lease, but a mere device resorted to for the purpose of obtaining an advantage over the general creditors of the mortgager, and in support of this view the case of *ex parte Williams* (7 Chan. Div. 138) was cited. Lord Justice Baggally appears to have proceeded chiefly, if not entirely, on the excessive amount of the so-called rent, but the other two judges proceeded upon the other circumstances of the case as much as the rent. Lord Justice Cotton, after going over the circumstances, said—"In such circumstances what was called a rent was not a rent, but merely a sum stipulated for under the name of rent, and that no legal incident of distress could arise out of it, and consequently the bank had acquired no legal right under the distress which they had levied. A distress must be for a real rent to which the law had annexed the power of distress. When it was not a real rent, but only something called by that name, an attempt to give a mortgagee as mortgagee a right which he could only have as a landlord was a fraud on the bankruptcy law." And Lord Justice Thesiger said—"If from the terms of the deed, or from the amount of rent fixed, it could be collected that it was not a real rent, that the tenancy was not a real tenancy but a mere sham, and that the clause was a mere device to give to the mortgagee, in the event of the bankruptcy of the mortgager, a security over chattels which would otherwise have been distributed amongst the creditors of the mortgager, then the claim was void as a fraud on the bankruptcy law." These remarks appear to me to be applicable to the present case, and to support the conclusion at which I have arrived.

Lord Gifford—I entirely concur in the opinion which your Lordship has read, and upon the same grounds.

The case is a new one in Scotch law, and is one of some interest, for it raises a question as to the mode in which companies like the present Heritable Securities Investment Association lend money, and in particular as to the mode of enlarging the security upon which they make the loan. The Heritable Securities Investment Association lent £55,000 to Wingate & Co., shipbuilders and proprietors of a shipbuilding yard at Govan, near Glasgow. They executed four separate deeds, all relating to the same loan and the arrangements made for its security and repayment. The first deed was an *ex facie* absolute disposition, not only of the shipbuilding yard—the heritable subjects—but of the moveable estate as well. Then there was a personal bond by Wingate & Co., the borrowers, to

repay the sum borrowed by instalments in a period of ten years. Then there was a lease by the Heritable Securities Company to Wingate & Company of the shipbuilding yard and appurtenances which had been conveyed, for the rent of £4800 a-year; and then there was a fourth deed—the deed of agreement—which alone disclosed the true relationship between the parties.

Now, of course, all these deeds must be read together, but the most important is the deed of agreement, which I may shortly describe as a back-letter qualifying the whole of the other three. The absolute disposition was not an absolute disposition in reality. I mean it did not in any real sense transfer the property to the Heritable Security Company, but was merely a security for the loan they had got. The personal bond was intended to give a ready execution for repayment of the loan by instalments and at the periods stipulated. The lease, to which I shall more particularly advert, was, I think, only intended to broaden the Heritable Company's security by the device of making them landlords on the face of the deed and giving them a hypothec for £4800 per annum —the hypothec not only of property belonging to themselves but over whatever Wingate & Co. might bring into their yard. Now, it is a very important question whether a lender can broaden his security in this way by assuming the position of a landlord, and obtain a right of hypothec over everything the borrower may bring in to the premises. I suppose this case has arisen owing to the recent decision that Heritable Security Companies, taking the security by way of absolute disposition, cannot poind the ground. If the company had had that remedy I do not think that we should have been entertaining this case, and I am of opinion that the case here is simply intended to give them a similar remedy.

Now, I do not dispute—on the contrary, I at once agree—that a heritable creditor holding a security by way of an absolute conveyance may validly take possession and let either to strangers or to the debtors themselves. But he must let under a *bona fide* contract of lease. There must be constituted between the heritable creditor and the debtor the true relations of landlord and tenant. If that could be shown in the present case, I would sustain the sequestration, not only for £1800, but for the whole amount in the lease, £4800. But it must be shown that there is a *bona fide* lease between the parties. The ground on which I agree with your Lordship in recalling the judgment of the Sheriff-Substitute is, that the owners here were truly Wingate & Co., and that a lease between the parties, with the relations of proper landlord and proper tenant therein, never had any real existence. The lease was executed merely to give a broader security than the true relations would have given in law. There was merely the form of a lease. Of course it is a question of fact—Was there a true lease between the parties, or was this a sham one? and I think it is proved conclusively that there was no relation between the parties of landlord and tenant, from which alone the right of hypothec and security over the property could arise.

The first deed I should refer to is the deed of agreement, which really gives the true position between the parties and supersedes all the other deeds. Your Lordship has already read the main passage of that deed regarding the relations of the parties. After alluding to the security it goes on to deal with the lease—"With regard to the lease of the said several subjects and machinery and others granted by the first parties to the second parties, in respect that the same has been granted with the view of more effectually securing the first parties in the payment of the sums due under the said personal bond"—that is the object; it has been granted for more effectually securing the payment of the instalments, that is, the sums by which the loan is to be repaid under the personal bond, and in the lease—"it is agreed and hereby declared that it is not the intention of the parties hereto that the first parties shall, in addition to the sums due under the said personal bond, be entitled to demand payment from the second parties also of the rents stipulated under the said lease to be paid to the first parties, and accordingly the second parties"—that is, the debtors—"shall be entitled to receive credit for all sums paid in name of rent under the said lease as payments made to account or in satisfaction of the sums due under the said personal bond." They wanted to have more security for these instalments, and to have more security for these instalments they desire that the sums due under the lease shall be called "rent," and paid in name of rent, but they are not to be held as an addition to the sums in the personal bond.

Accordingly, when we come to inquire into this, I cannot but concur with your Lordship that it is quite sufficiently and distinctly proved that £4800 is far too large a rent, and that nobody would give £4800 a-year for these premises. Their true value is spoken to by several witnesses, and that is put at £1800 a-year. That was the view of the Sheriff-Substitute, who restricted the amount to £1800. The demand on the part of the Heritable Company was to obtain hypothec for £4800 a-year, the rent of the moveable subjects brought into the yard, as well as of the yard itself; but if that be the true nature of their case, the Heritable Company are not entitled to such a security, there being no hypothec for the hire of moveables. It just comes to this, that the Heritable Securities Company say, after lending the money—"In order to secure our repayment, in addition to the other obligations, you shall call us landlords for an amount which we shall state at £4800 a-year, that being a way of repayment under the personal bond, and these sums paid to us in name of rent will be so accounted for." This was done only to heighten their security; but the rule in Scotland is, that it is the real relation of the parties you have to look to, and not what they say the relationship is. The law looks not at the form of the transaction, but to its reality, and whenever it is found that there is no real relationship of landlord and tenant, as we find here, I am bound to come to the conclusion that this was just a stipulation to get a security from the semblance of a lease which ought only to arise from a real contract. As lenders they are entitled to make a new form of security if they can, but not to make an apparent relationship which did not really exist.

The view of the Sheriff was to restrict the

£4800 claimed to a fair rent, and give the Heritable Securities Company hypothec for that, and I had some doubts whether the Sheriff did not take the sound view, but ultimately I have come to the same conclusion as your Lordship. I cannot make a lease for the parties if they have not made a real one for themselves. I cannot make a rent which the parties do not admit. And therefore I put them in the former position, which is that of heritable creditors who have not granted a lease at all. Wingate & Co. continued to possess the property as long as the payments were made, and it would not do, when that was the character of their position, to say that they possessed as tenants under this lease at an assumed rent of £4800. I have therefore come to the same conclusion as your Lordship. I think that this is an attempt to get a new form of security which would be very largely and generally adopted if the present demand was successful. But it sprinciple is not a sound one. In Scotland in order to give a legal right of security arising out of a contract, you must have that contract in reality, and not in mere form. I therefore think that this application for sequestration should be dismissed altogether, and that both defenders—that is, Wingate & Co. and the Dundalk Harbour Commissioners, the owners of the dredges—should be assoilzied.

Lord Young—Laying aside in the first instance the question with the Dundalk Harbour Commissioners, and taking the case as between the pursuers and the trustee in Wingate & Company's bankruptcy, I must assume that the goods which the pursuers caused to be sequestrated on 5th June were not their own property, but that of Wingate & Co., or of some other, and were so on the premises alleged to be leased as to be subject (on that assumption) to hypothec for rent. Further, as the pursuers claim the property of the machinery and appurtenances of the building-yard specified in the inventory appended to the disposition of December 1875, and conveyed to them along with the yard itself, I assume that the sequestrated goods are not included in the inventory and conveyance.

With respect to the disposition to the pursuers, I see no reason to doubt the validity of it in all its parts, and none was suggested. A disposition of a house, with its furnishings as per inventory appended, is a valid and familiar conveyance, good against the disponer from its execution, and against all the world (assuming the disponer's title) from the date of tradition or delivery under it as to the heritage (the house). This tradition is effected by recording the disposition in the register of sasines. As to the moveables (the furnishings) it is not effected without actual delivery, or what the law esteems an equivalent. The equivalents for actual delivery of moveables are not numerous, and we are not now concerned with any of them except that which consists in putting or continuing them in the possession of the transferror on a contract for that purpose between him and the transferee. It is immaterial what the contract is, provided it is *bona fide*, and in fact the title of the subsequent possession. It is frequently a contract for safe custody merely without use, or in the case of cattle, to graze them for a grass mail. In the case of furniture, the seller may, instantly upon or *unico contextu* with the contract of sale, hire it from the buyer, and so continue his possession and use without any ostensible change. The subsequent possession, although in continuation of the prior possession, being on a new title standing on a *bona fide* contract, is ascribed thereto, and so implies tradition to the author of the new title which has been accepted and acted on. It was so decided in a case which occurred some time ago, where the landlord of a house bought his tenant's furniture therein, and immediately re-let to him the house and furniture together—*Orr's Trustees* v. *Tullis*, July 2, 1870, 8 Macph. 936. The result must, I should think, clearly be the same when the house and furniture together are purchased from the owner of both and immediately leased to him so as to make him tenant of a furnished house under the buyer. In the one case, as in the other, it would be absurd to require the landlord to put the furniture to the street or road to be immediately put back again, or to ascribe any legal virtue to such a foolish proceeding. Nor would it signify, in my opinion, that the buyer of the furniture was not proprietor of the house, provided always the circumstances were not such as to present a case of fraud or collusion. Thus, a furniture dealer who let furniture for hire might purchase the furniture of a house and allow it to remain on a contract of hire with him, and if the transaction was in good faith and without infringement of the bankrupt laws against illegal preferences, I think it not doubtful that it would have effect. Such a transaction on the eve of bankruptcy with a furniture dealer who was a prior creditor would no doubt be impeachable, but that on grounds foreign to the doctrine that delivery is necessary to pass property, and which would accordingly operate although delivery had been given ever so formally.

Now, here the pursuers acquired a valid title to the property of the shipbuilding-yard together with its furnishings as per inventory, not by contract of sale, but by a contract equally lawful. I say "a valid title to the property" not to prejudice the question of passing the property, and meaning only a title on which the property might lawfully pass on the proper steps being taken on it to that end. As regards the heritage, the proper step to that end was taken by recording the disposition. The pursuers were thereafter proprietors of the yard with a good title. But as the infeftment which the recording implied while it made them proprietors did not itself imply possession, either natural or civil, of the subject, and precisely because it did not they made a further bargain with the disponers whereby they should be instantly put in the civil possession by becoming the landlords of the premises, and as such entitled to draw the rents from the tenants thereof. Had the disponers not desired themselves to occupy the property, this purpose would have been effected by an agreement that notwithstanding the terms of article 14 of the rules of the Association, which is in accordance with the usual practice of bankers lending on similar security, the pursuers might let the subjects to a tenant on a lease whereby the rent should be paid to them as landlords. Such an agreement being acted on by the pursuers granting a lease to a stranger, would undoubtedly have put them in civil possession with all the rights of landlords. Now, this is precisely the 'position

which it was intended and contracted they should occupy in so far as they possibly might consistently with continuing the disponers in the occupation. It was thought that this might be accomplished by the lease founded on, according to the terms of which the disponers became the tenants of the pursuers for ten years at an agreed-on rent, which they undertook to pay termly. Whether or not it is effectual for the purpose is the question for consideration.

The ground on which it is said to be ineffectual is that it was a sham and a fraud on the bankrupt laws, and we were referred to English cases and the *dicta* of English judges according to which a contract between debtor and creditor whereby it is provided that in the event of the debtor's bankruptcy the contract shall change its character so as to afford remedies to the creditor which he was not otherwise entitled to, is bad in a question with creditors in bankruptcy.

Now, in estimating the character of the lease as a reality or a sham, I must observe that the pursuers had an obvious, and I think legitimate, interest to be put in possession of the premises in a quite different sense from that in which infeftment implies possession. The possession implied by infeftment is a mere legal fiction or myth to satisfy the rule that property passes only by tradition. Possession of the subject may follow the infeftment or not, or having followed may be discontinued without any change in the infeftment, *i.e.*, without any act by the party infeft. The law of prescription, and the cases illustrative of it, show how vain a thing an infeftment on which possession has not followed may be. Here, while the infeftment passed the property of the heritage, I think it clear that it did not operate as tradition of the moveables upon it, which were, for aught I know, equally or more valuable. It was therefore material to the pursuers that they should have actual possession—natural or civil—and quite legitimate that they should bargain for it exceptionally to their general practice with borrowers as specified in their 14th rule, which, I may remark, refers pointedly to the familiar distinction between the possession implied by infeftment in order to pass the property and actual possession of the subject. The borrowers might of course have refused to accede, and declined the transaction except on the ordinary footing, videlicet, that the lenders should not have right to enter on possession so long as the interest and instalments of principal were regularly paid. They in fact acceded, and that their occupancy might not be disturbed took a lease to themselves of the premises, together with the machinery and appurtenances as per inventory, and if such a lease would have been good to a stranger, and made the pursuers his landlord, as I think it clearly would, I do not see in the mere circumstance that it was granted to the borrowers any reason for pronouncing it a sham and denying it effect.

But assuming that this circumstance alone would be no ground for impeaching the lease, it was contended that the facts disclosed two notes of fraud or collusion. The *first* of them was that the rent was not fixed with any reference to the value of the subject, but solely with reference to the annual interest of the debt *plus* the annual instalments of the principal payable under the agreement, which amounted, as it happened, to nearly three times the annual value of the subject. The *second* was, that it being matter of agreement that the rent paid should be imputed to the interest and instalments of principal, and that the borrowers' possession or occupation should not be disturbed while these were duly paid, the lease was purposeless, and could have no operation otherwise than as a device to secure a preference by the hypothec in case of bankruptcy to the prejudice of other creditors.

With respect to the first, I have to remark that the only evidence of the value of the subject is the valuation-roll, in which the shipbuilding-yard is entered at £1800, and that it is only a part, and for aught that appears the least valuable part, of the subject let. The machinery and equipments included in the lease are numerous, and some of them apparently of a costly description and likely to deteriorate rapidly. Of the fair annual value of the yard as let, *i.e.*, with its appurtenances, we have no evidence whatever. Further, the rent agreed on does not represent the annual sum necessary to pay £55,000 (the debt), together with interest, in ten years (the endurance of the lease), for it would take £5500 a-year for that term to pay the principal without interest. I am therefore of opinion that this supposed note of fraud or collusion so fails in fact that it is unnecessary further to pursue the consideration of it.

The second really comes to this, that a lender in the civil possession of the subject of his security, *i.e.*, who has granted leases of it to tenants, shall be esteemed a sham landlord if he has agreed with the borrower that the rents shall be imputed in extinction of the interest and principal of the debt. But as such agreement would be implied without expression, and probably relief afforded in equity against an agreement to the contrary, the contention is in truth that a lease by a creditor in possession on his security can never be other than a sham lease, which is absurd. I may observe that the agreement between the parties was consistent from the first and throughout, without any stipulation for a change in the event of bankruptcy.

On the Solicitor-General's contention that the infeftment implied in recording the disposition inferred not merely a fictitious, momentary, and evanescent possession in order to pass the property as by tradition, but actual continuing possession of the subject, I should have been somewhat perplexed on this head. But rejecting it, as I do unhesitatingly, I see a substantial, immediate, and quite legitimate purpose to be served by the agreement that the lease should be granted and accepted quite irrespective of the hypothec, which on the Solicitor-General's argument must have been the only purpose. Without the lease the pursuers, though holding a good property title to the heritage, and with the property formally passed, would not have been in possession thereof, and so the property of the moveables therein, though assigned to them, would not have passed, inasmuch as the infeftment, which inferred a fictitious tradition of the heritage, did not apply to them. I must say, however, that I am not impressed by the argument that a security covenanted for is objectionable because it will probably be enforced or become of practical value only in the event of insolvency. Security in any case is needed only against insolvency or

such rare obstinacy as is not worth taking account of.

No point was made in the elaborate argument before us that the rent was separable, with a hypothec for only so much as effeired to the heritage, and I give no opinion on that point.

On the whole matter, I am of opinion—1st, That the pursuers are proprietors of the shipbuilding yard, together with the moveables therein as inventoried with reference to their disposition, and that the property is only redeemable according to the agreement which qualifies their title; and 2d, that their lease of it to the bankrupts is valid, and entitled to effect according to its terms, including the incident of hypothec for rent, in so far as applicable to leases of similar subjects and in similar terms, but unprejudiced by the relation of the parties as borrowers and lenders.

With respect to the question with the Dundalk Harbour Commissioners, I am of opinion that it has been rightly decided by the Sheriff. I think the dredge was delivered before the sequestration, and that the property of the fittings left behind to be subsequently put into the dredge had passed, and were not subject to the diligence of the builders' creditors or landlord.

The LORD JUSTICE-CLERK was absent.

The Court sustained the appeal and recalled the interlocutor of the Sheriff-Substitute in so far as it sequestrated Wingate & Company's estate.

Counsel for Appellants—Solicitor-General (Balfour, Q.C.)—Keir. Agents—Murray, Beith, & Murray, W.S.

Counsel for Respondents—Wingate & Co.—Asher—Mackintosh.

Counsel for Respondents—The Dundalk Harbour Commissioners—J. P. B. Robertson. Agents—Hamilton, Kinnear, & Beatson, W.S.

Thursday, July 8.

SECOND DIVISION.

[Lord Craighill, Ordinary.

CROPPER & COMPANY *v.* DONALDSON.

Sale or Hire—Agreement—Property to Pass when Price Paid—Bankruptcy.

C. & Co. agreed to let to W. a printing machine for nine months; the price (which was that usually given for the sale of such a machine) was to be paid in three instalments in a manner specially agreed on, and the machine was to be insured during the term of hire; if at the end of nine months the price stipulated were paid, the machine was to become the property of W. The machine was accordingly delivered to W., but before the full price had been paid it was poinded for a debt due by W., who had become insolvent. In an action raised by C. & Co. against the poinder to recover as damages the unpaid balance of W.'s debt due by them under the agreement—*held (diss.* Lord Young) that the form of the agreement, in so far as it had the colour of a contract of hiring, was a mere device resorted to for the purpose of evading the operation of the bankruptcy laws; that the contract was really one of sale; that the property had passed; and that therefore the poinding had been competently executed.

On the 21st November 1878 H. S. Cropper & Company, engineers and ironfounders in Nottingham, entered into the following agreement with Alexander Wood, a printer in Lanark—"1st, The owners shall let, and the hirer shall take on hire, for a period of nine calendar months from the date of this agreement, the crown folio 'Minerva' printing machine, No. 2634, belonging to the owners: 2d, The hirer shall pay for the use of the said machine during the said term, and by way of rent, the sum of fifty-eight pounds; and such payment shall be made as hereinafter mentioned—that is to say, the hirer shall, in the first instance, accept a bill at three months' date, to be drawn by and made payable to the order of the owners, and to bear even date with this agreement, for the sum of fifty-eight pounds, and when the bill falls due the hirer shall pay the same; but the owners shall, three days beforehand, advance to the hirer by way of loan the sum of thirty-eight pounds thirteen shillings and fourpence, to be applied towards payment of that bill, and thereupon the hirer shall accept a second bill at three months' date, to be drawn and made payable as aforesaid, and to be dated on the day when the first bill falls due for the amount of the said sum of thirty-eight pounds thirteen shillings and fourpence, plus interest thereon for three months at the local current rate per annum, and the value of the stamp and banker's commission on the second bill; and when the second bill falls due the hirer shall pay the same, but the owners shall, three days beforehand, advance to the hirer by way of loan the sum of nineteen pounds six shillings and eightpence, to be used towards payment of that bill, and thereupon the hirer shall accept a third bill at three months, to be drawn and made payable as aforesaid, and to be dated on the day when the second bill falls due for the sum advanced by the owners towards payment of the second bill, plus interest thereon for three months at the rate aforesaid, and the value of the stamp, &c. on the third bill; and when the bill falls due the hirer shall pay the same: 3d, During the said term of hiring, the hirer shall keep the owners truly informed of the place where the said machine may for the time being be set up, and shall not remove the same from one building to another without first informing the owners of such intended removal: 4th, During the said term of hiring, the hirer shall keep the said machine in proper order and working condition, and shall not cause or permit the brass plate fixed upon the tiebar, and bearing the inscription 'H. S. Cropper & Co.'s Patent, 2403, Nottingham, No. 2634,' to be removed, defaced, or concealed from view: 5th, During the said term of hiring, the hirer shall keep the said machine insured against damage by fire in the sum of fifty-eight pounds at least, with some office for fire insurance to be approved of by the owners; and if the said machine shall be injured or destroyed by fire during the said term, all moneys received on such insurance shall be paid to the owners, who shall, as the case may require, either make good the damage done or replace the said machine by another of the same description, to be hired for