W. TAYLOR, Appellant.—*Brougham—Shaw.* SIR W. C. FAIRLIE, and G. TAYLOR, Respondents.—*Keay—Abercromby.*

No. 13.

1. *Landlord and Tenant.*—A lease having been granted to three tenants, excluding assignees, and two of the tenants having, without consent of the landlord, assigned their interests to the other tenant, who obtained possession, and was thereafter deprived of it: Held (affirming the judgment of the Court of Session), that he was not entitled to maintain an action against the landlord demanding re-possession, as being the only person entitled to possession.
2. *Appeal.*—Respondents, in an appeal, having failed to lodge answers to the petition of appeal, and also their Cases, in due time; and the cause being appointed for hearing ex parte, not entitled to be heard at the bar; but the case delayed on their paying the costs of the day.

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1ST DIVISION.
Lord Medwyn.

IN 1812, Sir W. Cunningham Fairlie, proprietor of the estate of Fairlie, let to 'John Taylor, Esq. of Blackhouse, William 'Taylor, Esq. Member of Parliament, and George Taylor, Esq. 'residing at Ayr, and their heirs; but secluding assignees and 'subtenants, under whatever denomination, legal or voluntary, 'without the concurrence of the proprietor in writing,' the coal in the lands of Fairlie, 'for the whole time and space of twenty-'four years, and during the lifetime of the said George Taylor, 'should he survive the said period of twenty-four years, and 'commencing from and after the term of Martinmas next 1812.' By another lease granted in the same year, Sir William let to the same parties the farm of Peatland for the same period, and under the same conditions. In 1814, an arrangement was entered into between the three tenants, who were brothers, by which, after narrating the terms of a submission which was then in dependance, and that they had 'agreed to sell and make over to 'the said William Taylor, and his heirs and assignees, our in-'terest in the tacks before-mentioned, and as more particularly 'herein after assigned; and seeing the said William Taylor 'has granted bills to us, for the value of the stock and machi-'nery after-mentioned, in terms of the foresaid agreement, 'therefore, in part implement of the said agreement, we have 'made and constituted, as we do hereby make and constitute, 'the said William Taylor, his heirs, and donators, our lawful 'cessioners and assignees, in and to our two third parts or shares 'in the two tacks in part before narrated, during the whole 'years and terms thereof, to run from and after the term of 'Martinmas 1813, as to the said farm of Peatland, and the first 'day of June 1814, as to the coal; and to all the clauses and 'obligements contained in the foresaid two tacks, profits, and

May 5, 1826. ‘ emoluments which may arise therefrom, and to all action and ‘ execution competent to us thereupon, with power to the said ‘ William Taylor and his foresaids, to occupy the said lands and ‘ others as after-mentioned.’ On the other hand, William Taylor bound himself to free and relieve them of the rents payable to the landlord, and to pay the sums specified in the bills. By virtue of the assignation, he obtained the exclusive possession of the coal and farm; but it was not intimated nor consented to by the landlord. In 1818, William Taylor became insolvent, and conveyed his estates, including the above leases, to trustees for behoof of his creditors. The trustees took possession; but in April 1818, they gave notice that they were to abandon the subjects on the 15th May thereafter. Immediately thereafter, William Taylor went to Ireland, and he alleged that he had caused his overseer to enter to the possession of the premises on his behalf. During his absence, John and George Taylor presented a petition to the Sheriff of Ayrshire, stating the threatened abandonment by the trustees, the absence of William Taylor, and the interest which they had in the subjects, in consequence of their liability for the rents, and praying the Sheriff to authorise them ‘ to carry on said collieries, and set the lands, repair ‘ the houses and fences, and to do everything for the interest of ‘ all parties, and to keep proper accounts.’ The Sheriff at first granted the prayer, ‘ quoad the care of the subjects in dispute,’ and thereafter, on the motion of the petitioners, granted warrant for the inspection of the premises by persons of skill. No farther step was taken in this process; and William Taylor, on his return from Ireland in the month of August, presented a petition to the Sheriff, praying him to ‘ ordain the said John and ‘ George Taylors immediately to cede and give up the possession of the said colliery and pertinents to the petitioner, the only person entitled to the possession thereof. Answers were lodged to this petition; but in the meanwhile the estates of William Taylor were sequestrated under the bankrupt act; and no farther proceedings occurred in this action. Thereafter yearly, in 1825, and while the legality of the sequestration was depending on appeal, the landlord advertised that the coal and farm were to be let to a new tenant; William Taylor then presented a new petition to the Sheriff, founded on the leases and the assignation granted by his brothers, (one of whom, John, had in the meanwhile died,) and he prayed the Sheriff ‘ to ordain the said George ‘ Taylor, and the said John Taylor, heir of the said deceased ‘ John Taylor, if still in possession of the said colliery, or the ‘ said Sir William Cunninghame Fairlie, if he be in possession

'thereof, immediately to cede and give up the possession of the 'said colliery of Fairlie and pertinents thereof, and farm of Peat-'land and pertinents thereof, to the petitioner, the only person 'entitled to the possession of the same.' In defence, it was stated by Sir William Cunninghame Fairlie, that he had conveyed his estates to trustees, and had gone to reside in England more than forty days prior to the execution of the petition against him, and therefore he was not subject to the jurisdiction of the Sheriff, and besides that, he had not consented to the assignation. On the part of George Taylor it was maintained, that as the estates of William Taylor were under sequestration, he had no title to pursue; that the warrant granted by the Sheriff in 1818, was a lawful title of possession; and that, at all events, William Taylor could not obtain possession, without first paying the arrears of rent, and finding security for the rents to fall due in future. The Sheriff found it 'admitted, that the pursuer's estate 'was sequestrated by the Court, and that the competence there-'of is at present depending on an appeal to the House of Lords; 'that by the tack granted by Sir William Cunninghame Fairlie 'to the pursuer, and John and George Taylor, of the coal-'work and lands, the proprietor secluded assignees and sub-'tenants, under whatever denomination, legal or voluntary, 'without the concurrence of the proprietor in writing; that from 'the nature of the assignation granted by the defender, George 'Taylor, and his deceased brother, John Taylor, of their two-'thirds of said tack, he, the pursuer, bound and obliged himself 'to make payment to the proprietor of the whole rents or tack-'duties stipulated by the several tacks therein mentioned, and 'also to perform, implement, and fulfil the whole other obliga-'tions and prestations incumbent upon the tacksman, and that 'yearly, during the tack; and therefore, under the present cir-'cumstances of the whole case, sustained the defences, and as-'soilzied the defenders from this process.' William Taylor then presented a bill of advocation, which the Lord Ordinary refused, 'in respect that the bill is offered without caution and separa-'tim; in respect that the complainer can have no right to claim 'possession exclusive of the other lessees, except in virtue of an 'assignation, which their title expressly debars, and which the 'proprietor objects to; and farther, that the coal lessees are not 'bound to yield the possession to a bankrupt whose estate is se-'questrated, and whose trustee does not concur in the applica-'tion, unless he find caution for the obligations incumbent by 'them to the landlord, which he does not offer to find.' A second bill having been presented, offering caution for the ex-

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penses of process, and for payment of the arrears of rent which should be ascertained to be due, and which should thereafter become due, the Lord Ordinary ordered Cases to the Court, who adhered to the interlocutor, and thereafter, on the 11th February 1826, refused a reclaiming note.*

Lord President.—We cannot compel the landlord to take any one as an assignee. The advocator claims possession from him in that character. It is impossible to grant his prayer.

Lord Balgray.—There is some difficulty from the advocator being a joint tenant, and holding an assignation from the other tenants. I rather think, however, that he cannot found on it as a title of possession against the landlord. The case may be different as to the other tenants; but I apprehend, that all the advocator can claim from them is damages for non-implement of the assignation.

Lord Craigie.—From my acquaintance with some of the actions between these parties, I know that the landlord never recognised this person as an assignee.

Lord Gillies.—There are peculiar circumstances attending this case, which present some difficulties; but I rather think the interlocutor right.

William Taylor appealed.

Appellant.—As the trustee on the appellant's sequestrated estate has abandoned all claim to the leases, and as the appellant has found caution for the expenses of process, he is entitled to prosecute this action, notwithstanding that his estates are under sequestration.† By virtue of the leases, he has, in a question with the landlord, a right to exclude him from possession; and by virtue of the assignation granted by the co-tenants, he has a similar right as to them, and is entitled at all events to draw the profits and emoluments corresponding to their shares. He obtained possession under each of these titles respectively, and he remains undivested,—the conveyance to the trustees being merely to them as managers, and the nature of the leases preventing the

* See 4 Shaw and Dunlop, No. 299.

† The case was appointed to be heard ex parte, as the respondents had not lodged their answers to the petition of appeal, nor put in their Cases in terms of the standing order of the 12th July 1811. Appearance was, however, made by the respondents at the bar, when the appellant objected, that they had no right to be heard. The respondents having, however, stated that they had presented a petition to the committee on appeals, to be allowed to give in their Cases, Lord Gifford moved, and the House ordered, that the hearing be adjourned, but that the respondents should pay the costs of the day.

judicial trustee acquiring any right to them. The warrant of the Sheriff in favour of John and George Taylor was illegal, because the application to him was truly to appoint judicial factors, which he had no jurisdiction to do; and besides, it was limited to the period of the appellant's absence, and the warrant never became final, as it was kept open by subsequent proceedings. Seeing, therefore, that the appellant had a written title, and was in actual possession, he thereby acquired a real right, of which he could not be deprived, except by the decree of a competent Court. If the assignation were objectionable, it could only be declared so judicially, and the circumstance of its being liable to objection, could not entitle the landlord to take possession at his own hand, in opposition to the real right vested in the respondent. The defence of the landlord, that he was not liable to the jurisdiction of the Sheriff, was unfounded, and at all events, judgment had been pronounced on the merits, which implied that the objection had been repelled, and no appeal had been brought by the landlord. The appellant was therefore entitled to call him into Court, and to demand possession from him as well as from the co-tenants. May 5, 1826.

Lord Gifford.—But look at the nature of your petition to the Sheriff, in which you found upon the assignation, notwithstanding the exclusion of assignees in the leases; and you there pray to have it found, that you are the 'only person entitled to the 'possession of the same.'

Appellant.—In the petition, the leases granted by the landlord are also founded upon, and the assignation merely relates to the question with the co-tenants. By virtue of these leases, the appellant has, in reference to the landlord, an exclusive right of possession, and as the landlord insists for payment of the whole rents from the appellant, he is entitled to the entire possession. No objection was taken in the Court below to the form of the prayer, and the judgments are placed on different grounds.

Respondents.—It may be admitted that the appellant has a title to pursue this action, as he has found caution for expenses, and the trustee does not claim. But the landlord was not subject to the jurisdiction of the Sheriff, and therefore cannot be affected by any judgment pronounced by him. Besides, the title which he granted to the appellant and his brothers was qualified with the express condition that assignees should be ex-

May 5, 1826. cluded; but the present action is founded on an assignation which is not consented to by the landlord, and the conclusion is to have it declared that the appellant is the 'only person entitled to the possession of the same,' a conclusion to which it is impossible to give effect consistently with the rights of the landlord. Again, as to the co-tenants, they are not liberated by this assignation from their obligations to the landlord, and it was only granted to the appellant on the condition that he should regularly pay these rents. But he has not done so; and the offer which he has made is insufficient, because he does not offer to pay the arrears of rent, but only to pay those which shall be ascertained to be due.

The House of Lords ordered and adjudged that the interlocutors be affirmed, with £50 costs.

DUTHIE—J. CAMPBELL, Solicitors.

No. 14. GEORGE ROBINSON, W. S. Appellant.—*Shadwell—Robertson.* EDGARS and LYON, Respondents.—*Adam—Keay.*

Bill of Exchange—Novation.—Circumstances under which, in a question with the payees of a promissory note, it was held (affirming the judgment of the Court of Session) that one of the two granters, who alleged he was merely a cautioner, was not released.

May 11, 1826. 2d DIVISION. Lord Pitmilly.

ROBERT AINSLEY, W. S. along with the appellant, accepted a bill for £235, in favour of a person named Mason, dated 10th November 1815, payable three months after date. When the bill was about to fall due, Ainslie, foreseeing his inability to take it up, wrote, on 9th January 1816, to Mr Edgar, who was his cousin, and a partner of the respondents, Edgars and Lyon, merchants in Glasgow, saying, 'The purpose of my writing you, is 'to mention, that, like other lairds, having a little debt, a sum 'of between two and three hundred pounds, for which my friend 'and late partner, Mr George Robinson of Clermiston, is bound 'along with me, is called up, and payable about the 8th or 10th 'of next month. The quarter from whence I expected to have 'got cash to have paid this sum, I have been disappointed in here, 'and it has just occurred to me, that probably you or Mr James 'might, from your floating capital, oblige me, by letting us have