CASES

DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

COURTS OF SCOTLAND.

1835.

[12*th June* 1835.]

ROBERT BALFOUR, Appellant.—*Attorney General Campbell—A. Wood.*

ARCHIBALD LYLE and EBENEZER BOW, (Trustees on his sequestrated estate,) Respondents.—*Lord Advocate Murray—Kaye.*

Lease—Assignation—Right in Security.—An heir of entail granted a lease at a rent of 70*l.*; the tenant subset for a rent of 180*l.*, and sold and assigned 100*l.* of the surplus subrent; the assignation was intimated; but the assignee allowed the principal tenant to draw the subrent and took payment from him of the surplus rent; and the lands were afterwards disentailed and sold.—Held, in a question with the purchaser (affirming the judgment of the Court of Session), that he was not liable to pay the surplus rent.

Appeal—An appeal against interlocutors ordering issues and remitting them for trial to a jury held incompetent.

WILLIAM Cunninghame Cunninghame Graham, the heir in possession of the entailed estate of Gartmore, let in December 1814 the farm of Drum, forming part of

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that estate, to George Dunlop, W. S., his law agent, and to his heirs and assignees, for nineteen years, from Martinmas 1813 as to the arable, and Whitsunday 1814 as to the grass lands, at the rent of 70*l.* 14*s.* 10*d.*

On the 12th of January 1815 Mr. Dunlop granted to George Graham, the tenant who had been previously in possession of the lands, a sublease excluding assignees and subtenants, at the rent of 180*l.* for nineteen years from the date of his own entry. In this way a surplus rent of about 110*l.* belonged to Mr. Dunlop.

On the 29th of May of the same year Mr. Dunlop executed a deed in favour of Thomas Balfour, merchant in Stirling, proceeding on the narrative of the lease and sublease, and that Balfour had granted him his bill for 700*l.* sterling, payable at three months after date, —which bill he accepted as the agreed price and value of 100*l.* sterling of surplus rent, due to him by George Graham, in terms of the sublease. He therefore constituted Balfour his assignee to the said sublease, and that to the extent of 100*l.* sterling of yearly surplus rent, with power to him to uplift the said sum of 100*l.* yearly during the currency of the said sublease, and that at the two usual terms in the year Martinmas and Whitsunday, by equal portions. The deed contained a clause of absolute warrandice.

This right was, on the 19th of December 1816, transferred by Thomas Balfour, in consideration of the payment of 650*l.*, to the appellant, Robert Balfour, master in the royal navy.

No intimation of the asignation was at this time made to George Graham, and the full amount of the subrent was drawn by Mr. Dunlop. Mr. Balfour drew

bills half-yearly for payment of one half of the surplus rent, which were accepted and paid by Mr. Dunlop.

On the 3d of March 1820 Mr. Balfour, by notarial instrument, intimated to George Graham that he had now, in virtue of the assignation and transfer in his favour, the only title to the 100*l.* sterling of surplus rent, payable after the term of Martinmas then last, and during the currency of the said tack; and that Graham must accordingly in future make payment of the rent to him or to his factor, and that if he should do on the contrary, that he would be liable for the same to Balfour, and in all costs.

Notwithstanding this intimation the subrents were paid to Mr. Dunlop as formerly, and Mr. Balfour continued to receive payment of the surplus rent from him in precisely the same manner he had previously done.

In the meanwhile Mr. Graham of Gartmore being desirous to disentail the lands of Drum, and to substitute in their place the lands of Garchell (which belonged to him in fee simple) in the entail, entered into an arrangement with Mr. Dunlop and two other friends, under which he conveyed to each of them a portion of the lands of Garchell not exceeding thirty acres; and these gentlemen agreed to execute contracts of excambion of these portions for corresponding portions of the lands of Drum in virtue of the statute 10 Geo. 3. cap. 51. To carry this into effect separate petitions were presented in September 1820 to the sheriff of the county, praying for authority to make an excambion of the lands. Warrant was granted accordingly, and contracts of excambion were executed in December of the

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same year. The validity of this transaction was sustained by the Court of Session on the 11th of July 1821.[1]

The lands of Drum which were thus disentailed were then sold to the respondent Archibald Lyle, and on the 23d of July 1822 he obtained a renunciation from George Graham by a document in these terms:—

" I, George Graham, tenant in Drum of Arnmanuel,
" considering that it has been agreed upon betwixt me
" and Archibald Lyle, now proprietor of the said lands
" of Drum, that he is to accept of a renunciation of my
" present tack of said lands on the terms underwritten,
" therefore I have renounced and upgiven, as I do
" hereby renounce and upgive, for myself and my heirs,
" &c., all right or title I have or can pretend to the said
" lands by tack, missive, or otherwise; and that from
" and after the term of Martinmas first as to the arable
" lands, and Whitsunday thereafter as to the houses,
" yards, and grass; and I oblige myself to remove from
" the premises at the above terms respectively without
" any warning or process of removing, under the pain of
" ejection, &c. It being expressly understood that I am
" to make payment to the said Archibald Lyle of the
" rent for the current crop and year, with all arrears of
" rent, and to pay and perform the whole other presta-
" tions incumbent on me by the tack of said lands; and
" reserving to me all claim competent against the landlord
" or granter of said tack, for whom it is hereby de-
" clared that the said Archibald Lyle shall be liable and

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[1] M'Kechnie v. Graham, 1 S. & D., p. 114 (new edition); p. 116 (old edition).

" bound to me, and particularly any claim I may have " for payment of the expense of making the summer fal- " low of said farm during the present year; and in the " event of the said Archibald Lyle and me differing in " opinion on these matters it is hereby agreed, that all " matters in dispute shall be referred to men mutually " chosen, whose joint opinion, or the opinion of any overs- " man to be chosen by them, shall be binding upon us."

Mr. Lyle thereupon entered into possession of the lands, which he held personally till 1824, when he let them to another tenant. He did not take infeftment till February 1827.

Mr. Balfour was no party to any of these transactions, nor did Mr. Dunlop make him aware of them. On the contrary, Mr. Dunlop continued to accept bills as formerly till Whitsunday 1826, drawn upon him by Mr. Balfour " for value received in surplus rents of " the lands of Drum." Mr. Dunlop soon after that became publicly bankrupt.

In the month of April 1827 Mr. Balfour raised an action of declarator before the Court of Session against Mr. Lyle, in which, after referring to the lease, sub-lease, and assignation of the surplus rent, and the payment of that rent by Mr. Dunlop in virtue of his obligation of warrandice, he set forth, " That some time " previous to the term of Martinmas last, the said " George Dunlop having stopped payment, and de- " clared himself insolvent, gave notice to the pursuer " that he was no longer to look to him, the said George " Dunlop, for payment of the said surplus rents: " That thereupon the pursuer, having made inquiry, " found, to his surprise, that Archibald Lyle, now of " Drum, had, by a contract of excambion or otherwise,

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" acquired the property of the farm and lands of Drum " from the said William Cunninghame Cunninghame " Graham, the former proprietor of the said farm; and " that by agreement between the said Archibald Lyle " and the said George Graham, the subtenant, of date " 23d July 1822, without the knowledge of the pursuer, " the said George Graham had renounced and upgiven " all right or title which he had or could pretend to " the foresaid farm, from and after the term of Mar- " tinmas 1822 as to the arable land, and from and " after Whitsunday thereafter as to the houses, yards, " and grass; and the said George Graham thereby " obliged himself to remove from the premises at the " said terms respectively, without any warning or pro- " cess of removing, under the pain of ejection, &c.; " and that the said George Graham, in fulfilment on " his part of this agreement, had removed from the " said farm, and the said Archibald Lyle had entered " into and taken possession of the same, and has ever " since, by himself or his tenants, continued in the pos- ", session thereof." He therefore concluded that it should be found and declared " that the said Archibald Lyle, " defender, in entering into the foresaid agreement " with the said George Graham, subtenant of the farm " of Drum, and taking from him a surrender of the " sublease, without the pursuer's knowledge, and by " entering into possession of the said farm, became " virtually the assignee of the said George Graham " in so far as the pursuer's interest is concerned, and " acquired the right and possession of the farm during " the currency of the said George Graham's sublease " as subtenant of the pursuer; and that in that cha- " racter the said Archibald Lyle, and along with him

" his tenants, and other possessors of the said farm, as " having come in place of the said George Graham, " are liable to the pursuer in payment of the foresaid " surplus rent of 100*l.* sterling per annum, payable by " two equal instalments at Martinmas and Whitsun- " day as before mentioned, with interest and penalty " as aforesaid; and that during the whole period which " the foresaid sublease in favour of the said George " Graham had to run,—beginning the first term's pay- " ment of the said surplus rent as at the term of Mar- " tinmas last, and the next term's payment thereof as " at Whitsunday next, and continuing, as subtenant, " to be liable for the said rents during the currency " of the foresaid sublease in favour of the said George " Graham: And it ought farther to be found and " declared, by decree foresaid, that for compelling pay- " ment of the said rents the pursuer is entitled to all " the rights and remedies competent to a landlord, and " which, under the tack and conveyances thereof already " recited, would have been competent to him against " the said George Graham, and all deriving right " from him; and that the pursuer has a direct right to " demand payment of the rents payable for the lands " of Drum, in satisfaction of the rents due to the pur- " suer therefor; and that the said Archibald Lyle is " bound to convey and make over to him preferably, " in implement of his implied obligation to make effec- " tual his foresaid lease and surplus rent, the rents of " the said farm of Drum, to the extent of the foresaid " surplus rents due to the pursuer, as before mentioned: " And it being so found and declared, the said Archi- " bald Lyle, defender, ought to be decerned and or- " dained, by decree foresaid, to make payment to the

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" pursuer of the foresaid surplus rent of 100*l.* sterling " per annum, beginning with 50*l.* sterling thereof as " at the term of Martinmas last,—all prior subrents " having been formerly paid and discharged by the " said George Dunlop,—and half-yearly and termly " thereafter, during the whole period the foresaid sub- " lease in favour of the said George Graham had to " run, together with the legal interest of the said half- " yearly payments from the time the same falls due, " during their not-payment, and a fifth part more of " penalty in case of failure: And it being found and " declared as aforesaid, the said Archibald Lyle ought " and should farther be decerned and ordained, by " decree foresaid, to convey and make over to the pur- " suer as much of the rents payable out of the said " farm and lands of Drum as will satisfy and pay the " said surplus rents, interest, and penalty."

In defence Mr. Lyle alleged, that the deed in favour of Mr. Balfour was altogether latent; that although he had made intimation of it to George Graham in March 1820, yet he had never acted on that intimation; that he had allowed the full amount of the rent to be paid by George Graham to Mr. Dunlop, who was known to be the law agent and factor of Mr. Graham of Gartmore; and that Mr. Lyle, a singular successor, was entirely ignorant of the existence of any sublease, being under the belief that George Graham was the principal tenant. He therefore pleaded that the holder of an assignation of a surplus rent, even although formally intimated to the subtenant, could not compete with an onerous purchaser of the lands; and at all events he could not do so where he had not acted on the assignation and intimation, but had drawn

the surplus rents from a party who was collaterally bound for them.

Lord Medwyn, on the 16th of December 1828, pronounced this interlocutor:—" Finds that Mr. George " Dunlop, being Gartmore's tenant in the lands of " Drum, granted a subtack of these lands, and assigned " the surplus tack duty to the extent of 100*l.* yearly, " during the currency of the subtack, to the cedent of " the pursuer, which assignation was duly intimated to " the subtenant: Finds that the defender acquired the " lands of Drum, and was allowed to draw the full " subtack duty directly from the subtenant, the annuity " being regularly paid to the pursuer by Mr. Dunlop, " who was also bound in personal warrandice: Finds " that the subtenant having professed his inability to " continue to pay the subrent, renounced his sublease, " which was accepted by the defender, without any " communication with Mr. Dunlop, the principal " tenant: Finds, under these circumstances, that the " right of the pursuer, being validly constituted, cannot " be defeated by this transaction between the defender " and the subtenant. Therefore finds that the defender is liable, as coming in place of his subtenant, to " pay to the pursuer the sum of 100*l.* half-yearly " during the years which would have been the currency of the sublease if not renounced, commencing " with the half-yearly annuity due at Whitsunday 1827, " the first payment subsequent to citation in this process; and that he is bound to grant an assignation " to that extent out of the rent payable by the tenant: " Finds no expenses due, and decerns."—" Note: The " defender ought to have inquired as to the leases on " this property at the time of his purchase, and he

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" would have ascertained that Graham was only a " subtenant. The matter, indeed, ought to have " been distinctly explained to him at the time. Again, " when he accepted the renunciation of the subtack " from George Graham, on seeing that he was not " principal tenant, he should have been led to com- " municate with Mr. Dunlop, the principal tenant, " which must have produced an explanation, which " would probably have put matters on their proper foot- " ing, although it seems impossible to defeat the assigna- " tion, which was validly completed, because the defender " through neglect of his own interest, was deceived into " the belief that he was safe to transact with the sub- " tenant. Expenses have not been given, because the " pursuer, by not levying the annuity directly from " the subtenant, but consenting to receive it from " Graham's agent (which he could not refuse, perhaps, " as he was guarantee for it), contributed to continue " the defender in his ignorance of the true state of his " rights. The citation in the process is due intima- " tion that henceforward the assignee is to claim the " annuity from the subject charged with it in terms of " the intimated assignation."

Against this interlocutor Mr. Lyle reclaimed, and when the case was advised on the 7th November 1830 the Court allowed Mr. Lyle " to put in an additional " plea in law on the right of the principal tenant, " Mr. Dunlop, to grant a subtack of the lands of Drum " to George Graham," and both parties to put in such farther additional pleas in law as might be competent under the closed record, and to lodge cases on the whole cause.

Mr. Lyle did not put in a plea to the above effect,

but pleaded that Mr. Balfour could stand in no better situation, so far as Mr. Lyle was concerned, than Mr. Dunlop or Mr. Graham of Gartmore. On the other hand Mr. Balfour pleaded, that as it was alleged in the record that Mr. Lyle was in the full knowledge of the existence of the subtack at the time when he entered into the transaction for the acquisition of Drum, and it appeared from his own titles that he had acquired the property for a price which necessarily imported that it was sold to him under the burden of the assignment of the surplus rent, this was relevant to bar him from resisting payment of it to Mr. Balfour.

When the case again came to be advised on the 5th of July 1831 the judges were equally divided in opinion, but ultimately concurred in granting warrant for diligence to recover writings with a view to ascertain whether Mr. Lyle was in the knowledge as alleged by Mr. Balfour, and they appointed additional cases to be lodged.

At the next advising, on the 26th January 1832, a division of opinion still prevailed on the bench, both as to the legal effect of the assignation and intimation, and as to the result of the evidence which had been recovered. To have the matter of fact settled their lordships appointed Mr. Balfour "to give in the "draft of an issue or issues with a view to a trial by jury." He accordingly lodged an issue in these terms:— "Whether, at or prior to the date of the said agreement "or dispositions, the defender knew, or had cause of "knowledge, of the existence of the said subtack, and "of the assignation or translation of the surplus rent, "to the extent foresaid, in favour of the pursuer?" The Court however, on 28th February 1832, appointed

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an issue in the following terms to be tried by a jury:—
"Whether or not Archibald Lyle, defender, when he
"accepted a renunciation by George Graham of the
"lease of the lands of Drum, knew the fact of the
"transference and assignation of 100*l.*, due under the
"subtack of these lands to Robert Balfour, pursuer?"

The case came on for trial on the 23d of July 1832 before Lords Mackenzie and Medwyn and a jury, when the jury returned a verdict by which they found it "not "proven that Archibald Lyle, the defender, when "he accepted a renunciation by George Graham of the "lease of the lands of Drum, knew the fact of the "transference and assignation of 100*l.*, due under the "subtack of these lands to Robert Balfour, pursuer." [1]

Mr. Balfour presented a bill of exceptions; but the Court, on the 21st of June 1833, disallowed the bill[2], and thereafter on the 5th of July they in respect of the verdict assoilzied Lyle and also Mr. Bow, who in the meantime had as trustee on his sequestrated estate been sisted as a party.

Mr. Balfour appealed.[3]

Appellant.—By the verdict of the jury the appellant is precluded from stating any plea founded on the

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[1] 10 S., D., & B., p. 853. [2] 11 S., D., & B., p. 906.

[3] Mr. Lyle and Mr. Bow also cross-appealed, in so far as they were not found entitled to full expenses.

Mr. Balfour in his petition of appeal included the interlocutor of the 26th of January 1832, by which the Court appointed him to lodge an issue with a view to a trial by jury; and the one of 28th of February 1832, by which they sent the issue to trial; the appeal was objected to as incompetent, in so far as related to these interlocutors; and the committee on appeals sustained the objection, and ordered these interlocutors to be struck out.

knowledge of Mr. Lyle as to the existence of the assignation in favour of the appellant at the time when he purchased the property; but, independent altogether of the verdict, the appellant maintains that the assignation of the surplus rent, combined with intimation to the subtenant, formed a good and effectual title in favour of the appellant, and preferable to the subsequent disposition and sasine in favour of the respondent.

This is not the case of a competition between two parties deriving right from one and the same author to one and the same subject. If the appellant had been founding on an assignation by Mr. Graham of Gartmore of the principal rent, and maintaining that the intimation of that assignation to Mr. Dunlop, the principal tenant, was preferable to the disposition granted by Gartmore, with the relative infeftment, in favour of Mr. Lyle, there would be a proper question of competition. The appellant would be founding on one species of right derived from Gartmore, and Mr. Lyle would be founding on another to one and the same subject—the rent. In that case the authority of Mr. Erskine[1] and of Mr. Bell[2], referred to by the respondents, might be applicable. So, if the appellant were founding on an assignation from Mr. Dunlop of his lease and intimation to the landlord, and the respondent had been trustee on Mr. Dunlop's estate, and thus his judicial assignee, a proper competition would arise, and the case of Cabbell v. Brock, founded on by the respondents, might have some bearing, as it was there held that actual possession was necessary. But in the present case the

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[1] 3 Erskine, 5. 5. [2] 1 Bell, p. 757.

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appellant's title is derived from the principal tenant Mr. Dunlop, while that of the respondent's is a disposition from another party Mr. Graham of Gartmore. The subjects to which they have respectively acquired right are also different. The appellant does not found on any right derived from Gartmore, or to any estate which belonged to him; he founds on a right from Mr. Dunlop, the principal tenant, to the surplus subrent, which belonged exclusively to him, and which is a species of property which he could lawfully sell in the market. The respondents, on the other hand, found on the conveyance by Gartmore, which undoubtedly gives them a right to the rent payable by Mr. Dunlop, the principal tenant, but not to the subrent. There is therefore no proper competition of rights here to which the authorities relied on by the respondents alone apply. The question is, whether the assignation and intimation did not complete the right to the surplus rent. The respondents say that actual possession is requisite. But this is untenable, because from the very nature of the subject and of the contract a change in the possession is impracticable. It is a contract, not for the purchase or assignment either of a lease or a sublease, but "for a surplus rent," or part of a surplus rent, payable by a subtenant to a principal tenant. If the subtenant were to be dispossessed, it is plain that no subrent, and consequently no surplus rent, could be payable; and it would be absurd to require the assignee to enter to possession, and cultivate the lands at his own expense. Indeed this is out of his power, because, although he has a right to the obligations undertaken by the subtenant to the principal tenant, he has no power to dispossess him. Again, from the nature of the transaction, he does not obtain any

assignment to the principal lease, and therefore he has no power to turn the principal tenant out of possession. In truth, the principal tenant may find it convenient or necessary to dispose only of a part of the surplus rent, (as in the present case); and if it were requisite that he should go out of possession, and the assignee enter and draw the full rents, it is plain that this would be just an interdiction against the principal tenant converting a valuable estate into money; because, if he went out of possession, and the assignee entered, he would have to trust to the personal credit of the assignee alone, and be exposed to the risk of his bankruptcy.

Accordingly, it appears from all the authorities that a sale of a surplus rent, or a loan raised on the security of it, is completed by an assignation from the principal tenant, and an intimation to the subtenant.

The rule is thus laid down by Mr. Bell[1]:—" Where " the original tenant has granted a sublease, and after- " wards assigns his right as principal tenant, the assign- " ment is truly of a surplus rent only, and uplifting " the rents, or intimation to the subtenant, completes " the real right."

Again he says, " The assignation of a lease, where " there is a sublease, is well completed by intimation " to the subtenant, because it is truly only an assignation " of rents, and the subtenant is the debtor. But there " seem to be no termini habiles for intimation to the " landlord to the effect of transferring a lease; and the " argument, that otherways there are no means of " borrowing money on the security of a lease, is fit " only for the legislature."

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[1] 1 Bell, p. 67.

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Lord Stair[1], in treating of the extent and effect of assignations, says, that "the same extends to all per-"sonal rights, whether heritable or moveable, as to "bonds, liferents, tacks, reversions, maills, and duties, "annual rents," &c.; and in a preceding passage he says,—"The assignation itself is not a complete valid "right till it be formally intimated to the debtor, "which, though at first (it is like) hath been only used "to put the debtor in malâ fide to pay to the cedent or "any other assignee, yet now it is a solemnity requisite "to assignations." He then proceeds to inquire what is a proper intimation, and what circumstances are equivalent to and will supersede the necessity of a formal assignation:—"Assignations (says his Lordship), to "annual prestations, as to maills and duties, teinds or "annual rents, or assignations to rights requiring "possession to complete them, as tacks, are perfected "by use of payment or possession, and need no other "intimation." He does not here say that any intimation does not complete the right, but that where no intimation has been given this solemnity will be dispensed with where there are equivalents, such as payment or possession.

Lord Kilkerran[2], in reporting the case of Wallace v. Campbell, 16th November 1750, lays down the doctrine in these terms:—"In a case where the assignee "cannot obtain the actual possession, the civil possession, "by uplifting the rents, comes in its place; or if such "assignee should be considered only as an assignee to "the maills and duties during the currency of the tack,

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[1] 3 Stair, 6, 8. [2] Kilkerran, p. 143.

"it must, as other assignations, be completed by intimation to the tenant." This is confirmed by Mr. Robert Bell on Leases[1], who says, that "it is settled that "when the assignation is made by a principal tenant "who has previously subset his farm, the assignation "must be completed by intimation to the subtenants."

These writers are supported by various decided cases; in particular by that of Halkerston v. Falconer[2], Webster v. Donaldson[3], Syme's Trustee v. Fiddler.[4]

In the present case due intimation was made of the assignment; and although the surplus rent came to the appellant through the hands of Mr. Dunlop, that rent was received by him as the appellant's agent, and as directly liable to him in respect of his obligation of warrandice.

But, independent of the preceding plea, the sale to Mr. Lyle cannot affect the rights of the appellant. The farm of Drum was strictly entailed, and this entail operated in favour of the appellant to the same effect as an inhibition against selling. But by the sale an adverse party has been brought into collision with the appellant, and the security arising from the entail taken away from him. He ought therefore to have this question decided as if matters stood in the position in which they were prior to the sale.

Respondents.—The lease by Mr. Graham of Gartmore to Mr. Dunlop was a mere colourable transaction, with a view to raise money. Mr. Dunlop was his confidential

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[1] 1 Bell on Leases, pp. 451. 455.
[2] 18 January 1628, Mor. 765.
[3] 13 July 1780, Mor. 2902.
[4] 23 May 1806, Mor., No. 13, Appendix, Tack.

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law agent and factor, and George Graham had previously been in possession at a rent of 130*l.*, whereas the rent for the lease granted to Mr. Dunlop was only 70*l.* The sublease which Mr. Dunlop granted to George Graham (which had the same term of entry as the principal lease) was plainly intended, not as an actual sublease, but as a form to enable Mr. Dunlop, as Gartmore's agent, to sell the surplus rent, and thereby raise money for Gartmore, who was then in difficulties. Mr. Dunlop never entered into possession, and George Graham appeared to all the world as the principal and the only tenant. Mere intimation of an assignment of the surplus rent can never constitute such a right to these rents, as to exclude a bonâ fide onerous purchaser. Before the statute 1449, tacks of lands, even although followed by possession, were not available against singular successors, and it would be strange if at common law an assignation of the rents payable by a tenant or subtenant could create such a right as to defeat that of a purchaser duly infeft. Mr. Erskine[1] states, "That an assignation of the rents "creates merely a personal right to the assignee against "the possessor, or against personal creditors, but con-"fers no real right in these lands; for the cedent con-"tinues proprietor of the lands, notwithstanding the "assignation granted by him of the rents; and as he "transfers his property to a purchaser by a sale of the "lands, the purchaser from him must, in the character "of proprietor, be preferable in a competition with "assignations of rent, or other personal rights of that "sort, which fall upon the cedent's being divested of "the property."

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[1] 3 Erskine, 5. 5.

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In like manner Mr. Bell[1] lays down the same doctrine:—"Rents payable by tenants or by subtenants "are frequently assigned in security, either by a simple "assignation, or by disposition or heritable bond con- "taining assignation to rents. 1. Where the assignation "is by personal deed possession must be taken either "by intimation or by decree of maills and duties, which "proceeds on an action against the tenant founding on "the assignation, and concluding for decree adjudging "the rents to be paid to the assignee. Erskine denies "that such assignations have effect against singular "successors, and his doctrine seems to be law. 2. Where "the conveyance is by disposition or heritable bond, "the sasine is a sufficient completion of the creditor's "right to the rents, upon this principle, that the rents "are an accessory of the real right in the lands. The "same principle leads to this consequence, that personal "assignations of rents, although effectual while the "feudal right continues in the cedent or common debtor, "lose their force when the real right is transferred to "another. The purchaser of lands, therefore, or an "heritable creditor completing a real right to the lands, "carries the rents in competition with assignations, "however completed. The only security over rent "effectual against sasine in the lands is one which is "not confined to the rents themselves, but takes them "as an accessory to the feudal right." Agreeably to these principles it was decided, in the case of M'Tavish v. M'Lachlan[2], that in a question with heritable creditors attaching the lands, a tenant could not retain a part of the rents in payment of a debt due to him by his

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[1] 1 Bell, p. 757. [2] 11 Feb. 1748; Mor. 1736.

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landlord, even although he had an authority to that effect; and a similar decision was pronounced in the case of Lord Cranstoun's Creditors v. Scott.[1]

But in the present case the intimation was not followed by any thing like possession. On the contrary, the right was kept altogether latent, and so far from the intimation having been acted upon, the appellant never drew any rent directly from George Graham, but allowed him to pay his whole rent to Mr. Dunlop, from whom the appellant received payment. In the case of Cabbell v. Brock[2] it was held that some public act of possession was so essential to warn third parties of the transference of a lease, that although there had been intimation, yet as this was altogether latent, a security attempted to be created in this form was found to be unavailing. But an intimation, when not followed by possession, is equally as latent as any other deed, and may be altogether departed from by contrary acts, as was decided in the case of Garden v. Lindsay.[3]

LORD BROUGHAM.—This case of Lyle v. Balfour appeared at first to be one of considerable complication, and in its result to an English lawyer the decision which had been come to by the Court below did seem to be repugnant to our principles; nevertheless, on very full discussion of the case, I have come to the opinion that it is in conformity to the principles of Scotch law in respect of property in Scotland, and that the decision therefore must stand. At the same time, when I state

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[1] 4 Jan. 1757; Mor. p. 15218.

[2] 3 W. & S., p. 75; 8 S., D., & B., p. 647; 23 Sep. 1831, 5 W. & S., p. 476.

[3] 28 Jan. 1757; 5 Brown's Sup., p. 855.

this, I ought to state that my difficulties appeared not so much upon the fundamental principles upon which this decision had mainly been rested in the Court below, and has been exclusively rested by the respondent in support of that decision at your Lordships' bar, but my difficulty arose rather upon a point on which I entertained some doubt, in respect of my not clearly perceiving that it had been taken into consideration by the Court below; neither the argument here at the bar, nor the printed cases, in which the argument is in some respects differently stated, nor the opinions delivered by the learned Judges in the Court below in advising the judgment, leading me to believe that that particular view had been taken of the case, though the argument there bore some reference to the character of the case, and might have influenced the decision, and have governed the result which had presented itself to the mind of the learned Judges who disposed of the case. I rather deemed it expedient upon that ground, as well as on other considerations affecting the argument which had been made the ground of decision in the Court below, that I should have a communication with some of the learned Judges in the Court of Session; and it is in consequence of that communication, and some little correspondence which arose out of it, that I have delayed so long requesting your Lordships to dispose of this case. My Lords, it has been very satisfactory to me to find that all my difficulty is removed at once on the first head, and with a very little consideration on the other, by the result of this correspondence. I am perfectly satisfied now that there was no ground for the hesitation which I at first entertained; the result of the whole, therefore,

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will be, that the judgment must be affirmed. I stated, as the argument went on in the course of the reply, how far I considered that the material grounds of the decision were solid; and without entering further into the discussion of the point at present, I shall, on the removal of the only difficulty I have felt, being perfectly satisfied that the point on which I at first doubted whether it had been well considered in the Court below was well considered, I conceive that it will be necessary only to move your Lordships that this judgment be affirmed. It must be admitted it is a case of very considerable hardship, and that it is only by the application of a very strict rule of law the Court has come to the decision. I stated my opinion of the conduct of some of the parties;—that there has been gross misconduct there is no doubt, that there has been fraud committed there is no doubt, that by fraud a conspiracy has been entered into by one of the parties, who appears to be in an insolvent condition, and by a person in his confidence and employment, who appears not to have been of greater solvency,—the object of the conspiracy being to defraud parties—to sell the same thing twice over, in such a way as excited the indignation of the learned Judges; but strict law must prevail, I will not say over the rights of parties, for they must be regulated by law, and this is ruled by the provisions of the Scotch law; but, under the circumstances of this case, it appears to me it is by no means so clear as to make it at all unjustifiable in the party against whom the decision was made in the Court below to appeal to your Lordships for a farther consideration of the case. I therefore would recommend your Lordships to affirm this decree, on the ground that

the Scotch law must decide the case, but not to give costs.

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The House of Lords ordered and adjudged, That the said original and cross appeals be and are hereby dismissed this House; and that the interlocutors, so far as therein complained of, be and the same are hereby affirmed.

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JOHN M'QUEEN — CALDWELL and SON,—Solicitors.