No. 5. WILLIAM TAYLOR, Appellant.—*Brougham.*
JAMES KERR, Respondent.—*Jameson.*

Bankrupt—Sequestration.—An appeal dismissed against an order in a sequestration for choosing commissioners, after an appeal entered against a judgment awarding sequestration, which had in the meanwhile been affirmed.

March 9. 1824.
1ST DIVISION.

THE Court of Session having sequestrated the estate of the appellant, as falling under the Bankrupt Act, he entered an appeal to the House of Lords; and the respondent, Kerr, having thereafter been appointed trustee, the Court authorized him to take possession of the estates in the meanwhile, in terms of the Bankrupt Statute, and granted warrant for holding a meeting of creditors to elect commissioners.* Against this order the appellant entered another appeal, on the ground that, pending the other appeal, it ought not to be enforced. That appeal, however, was dismissed on the 26th of July 1822, (see ante, Vol. I. p. 254.); and in this appeal the House of Lords 'ordered and 'adjudged, that the appeal be dismissed, and the interlocutor 'complained of affirmed, with L.50 costs.'

DUTHIE—THOMAS,—Solicitors.

(Ap. Ca. No. 9.)

No. 6. WILLIAM TAYLOR, Appellant.—*Brougham.*
Colonel JOHN BOYLE, Respondent.—*Warren—Cameron.*

Landlord and Tenant—Irritancy.—Circumstances in which a judgment of the Court of Session, refusing a bill of suspension of a decree of irritancy of a lease by a Sheriff, was affirmed.

March 9. 1824.
2D DIVISION.
Bill-Chamber.
Lord Meadowbank.

IN the month of December 1814, Taylor obtained a lease for thirty years, from Whitsunday 1815, of the colliery of Shewalton, from the proprietor, Colonel Boyle, at the rent of L.150 for the first year, and L.300 for every subsequent year. By this lease it was stipulated, that 'in the event of bankruptcy, or of a 'sequestration being awarded against the said William Taylor, 'or any of his heirs succeeding to the lease, the said Colonel 'John Boyle, and his foresaids, shall be entitled to enter into possession of the premises at the first term of Whitsunday or Martinmas thereafter, as if the lease had come to an end.' There-

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* Not reported.

after Colonel Boyle let to him a lease of a steam-engine and rail- March 9. 1824.
way, for the same period, at the rent of L.190, payable at four terms in the year, and in which it was agreed, 'that in case the 'said William Taylor shall at any time allow three quarters' rent 'to remain in arrear unpaid, then this tack shall be irritated and 'forfeited; and it shall be in the power of the said Colonel John 'Boyle immediately to remove the said William Taylor from the 'possession. And in regard that it has been agreed that the 'foresaid engine and railway shall be possessed along with the 'coal, so it is likewise agreed upon, that the foresaid tack of the 'coal shall not subsist longer than these presents; and that if the 'one tack shall from any cause terminate before the expiry of 'the said thirty years, so shall the other, and a decreet of remov- 'ing from the one shall imply a decreet of removing from the 'other; so that if the said William Taylor, by allowing his rent 'to run in arrear, shall forfeit this tack, and be removed from the 'engine and railway, then he also obliges himself and his fore- 'saids at the same time to remove from the coal-work.'

Soon thereafter Taylor got involved in pecuniary difficulties, diligence was raised against him, and measures were adopted for having his estates sequestrated under the Bankrupt Act, when, on the 5th of August 1816, he executed a disposition omnium bonorum to trustees for his creditors. Under this title they took possession of the colliery, &c.; but, on the 16th of April 1818, they intimated to Colonel Boyle, under form of protest, that they intended to abandon it on the 14th of May thereafter. At this time there was an arrear of rent due to Colonel Boyle, which he alleged amounted to L.568. Having then applied to the Sheriff of Ayrshire, he obtained a warrant of sequestration of the stocking, and thereafter a warrant of sale, under which he realized L.200, leaving a balance due to him of L.368. After the abandonment of the trustees he resumed possession, and raised a summons before the Sheriff against Taylor and the trustees, libelling on the two leases, setting forth that there was a large arrear due, and that Taylor was bankrupt, and concluding for decree, 'finding and declaring that the fore- 'said leases are irritated, and that the same expired and came 'to an end on the said 14th day of May last, and that the pur- 'suer has been legally in possession thereof since that date, and 'that neither the said trustees, nor the said William Taylor, 'have now any right or title to the said leases, or to interfere 'with or to interrupt the pursuer in the possession thereof; and 'in the event of their so interfering, they ought to be summarily

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'ejected therefrom, and decerned and ordained, by decree fore-
'said, to flit and remove themselves, their families, goods, and gear,
'from the said subjects, and leave the same void and redd, and
'cease to molest and trouble the pursuer in the possession thereof.'
In this summons, however, he did not expressly libel the conventional irritancy, in the event of an arrear of rent, nor specify what that arrear was. On being served with this summons Taylor intimated his intention to resume possession, whereupon Colonel Boyle presented a petition for interdict till the issue of the cause, which was granted.

On advising the proceedings in this action, the Sheriff-substitute pronounced this interlocutor:—'Finds, that by the tack of
'the coalwork produced, it is declared, that in the event of bank-
'ruptcy, or of a sequestration being awarded against the defender,
'William Taylor, or any of his heirs succeeding to the lease, then
'the pursuer and his foresaids should be entitled to the posses-
'sion of the premises at the first term of Whitsunday or Martin-
'mas, or at any term of Whitsunday or Martinmas thereafter,
'as if the lease had come to an end; and by the subsequent tack
'of the engine or railway it is declared, that, in order to secure
'the punctual payment of the rent, it is hereby stipulated and
'agreed upon, that in case the said defender should at any time
'allow three quarters' rent to remain in arrear unpaid, then the
'said tack should be irritated and forfeited, and it should be in
'the power of the pursuer to remove the defender from the pos-
'session; and it was also agreed, that the foresaid engine and
'railway should be possessed along with the coal as therein men-
'tioned, and that this last tack should not subsist longer than the
'first tack, and that if the one tack should from any cause ter-
'minate, so should the other, and a decree of removing from the
'one should imply a decree of removing from the other; and if
'the defender, by allowing his rent to run in arrear, should for-
'feit this last tack, and be removed from the engine and railway,
'then he also obliged himself and his foresaids at the same time
'to remove from the coalwork: Finds it admitted, that the affairs
'of the defender, William Taylor, were in confusion and dis-
'order: Finds, that a sequestration of his estate was applied for
'on 12th July 1816, and which was afterwards abandoned, and
'the defender granted a trust-deed of his whole estate to the
'other defenders, his trustees, for the special purposes therein
'mentioned: Finds, that these trustees managed and wrought
'the coalworks, &c. until the 14th of May last, when they found
'the same unprofitable and disadvantageous, and by the direc-

'tions of a general meeting of the creditors, they abandoned the same, agreeable to notarial intimation of date the 16th of April last: Finds, from the stated account, No. 8. of process, betwixt the pursuer's factor and the doer for the trustees, a balance of rent, &c. is due the pursuer, amounting to L.568. 19s. 9½d. Sterling: Finds, that the defender, William Taylor, does not allege that he has got his affairs extricated from the confusion they were originally involved in: Finds, under the whole circumstances of this case, that he had no right to reassume the possession of the premises, without at least paying up the arrears of rent confessedly due, and thereby purging the irritancy. Before advising, ordains him immediately to do so, and assigns this day ten days for that purpose, with certification.' March 9. 1824.

This judgment was adhered to by the Sheriff-depute, who gave this opinion in reference to an objection stated to the competency of the action:—'In the case, 2d of June 1812, Forbes *v.* Duncan, it was found, that an irritancy on a tenant's bankruptcy might be declared in the ordinary form of a removing before the Sheriff, without any previous action of declarator. In that of 7th of December 1805, Gordon *v.* Copland, there referred to, it was further found, that such an irritancy was not purgeable by the supervening solvency of the tenant before decree of removing was pronounced; and the same principle was recognized in the case of 16th of June 1812, Kinloch *v.* Macomie. Here, besides the general ground of bankruptcy, there is a farther irritancy declared on the incurring three quarters of a year's arrear; and it seems pretty clearly established that more than this is incurred. All the length which the present interlocutor goes, is to ordain the arrear to be paid up, on failure whereof the irritancy must be declared, and decree of removing pronounced. Even were this arrear paid up, it may be a farther question, whether an irritancy has been incurred on the ground of bankruptcy or otherwise; though it may be doubted whether the conveyance to trustees, and renunciation by them, would be sufficient per se to vacate the lease, supposing the tenant could now prove his solvency. As to the question of possession, that falls more properly under the process of interdict remitted hereto. But it appears that the trustees renounced possession on the 14th of May. The whole stock and machinery were sold under the authority of the Court, and bought by the landlord. Nobody appears to have taken possession for the tenant, (his letter threatening to resume possession not being dated till 11th of

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'July, near two months thereafter). In all these circumstances, 'the landlord might fairly presume desertion by the tenant, and 'take possession himself; and this possession, it is thought, cannot 'be interrupted till the tenant shews his title to resume the lease. 'As to the tenant's argument on the Act of Sederunt 1756, it 'seems to make against himself; for the case of 15th of December '1767, Wauchope *v.* Hope, only shews, that in collieries the land-'lord is dispensed from the regular forms of removing under the 'Act, and may obtain decreet against the tenant on any reason-'able grounds; and to the same púrpose, Erskine, b. ii. t. 6. § 49.'

Against these judgments Taylor presented a bill of advocation, which Lord Cringletie refused, for the reasons explained in the following note:—'The Lord Ordinary having advised 'this bill with the process,—and although he thinks that the 'bankruptcy alluded to in both the leases granted to the com-'plainer by Colonel Boyle, was a real bona fide insolvency 'of the tenant, although he might not be a notour bankrupt in 'terms of the statutory law; as for instance, that the tenant should 'be forced to grant a disposition omnium bonorum to trustees, 'for behoof of the creditors, whereby he would become quite 'unable to perform his part of the lease, as happened to the com-'plainer; yet the Lord Ordinary does not think it necessary to 'take bankruptcy into view, as a substantive ground of removing 'in this case. There were two leases granted to the complainer, 'the latest of which in date is that of the engine and railway, and 'in it the rent is L.190; and in the tack there is a clause declar-'ing, that if the said William Taylor shall at any time allow 'three quarters' rent to remain in arrear unpaid, then this tack 'shall be irritated and forfeited, and it shall be in the power of 'the said Colonel John Boyle to remove the said William Tay-'lor from the possession.

'It is then declared, "that a removing from the subject let by 'the one tack shall imply a decree of removing from the other, 'so that if the said William Taylor, by allowing his rent to run 'in arrear, shall forfeit this tack, and be removed from the engine 'and railway, then he also obliges himself and his foresaids at the 'same time to remove from the coalwork."

'From these clauses it is as clear as any proposition can be, 'that it does not require Mr Taylor to be three quarters of a 'year in arrear of rent for both the coal and engine before Co-'lonel Boyle is entitled to remove him. But, on the contrary, 'that if Mr Taylor were in arrear for rent of three terms for the 'engine alone, he might be removed from both the subjects.

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'Mr Taylor became insolvent, and conveyed his leases to trus-
'tees, whose management the Colonel permitted, and they gave
'him notice that they were to abandon, and did actually abandon
'the subjects at Whitsunday last 1818; and it is not disputed
'that Colonel Boyle did then assume possession, in which he
'continued quietly till 7th of July following. At that term the
'rents had been unpaid, and an arrear was due, as Colonel Boyle
'says, of L.568. 16s. 9d., which is more than a year's rent of
'both the subjects, and even according to Mr Taylor's own
'statement, there was an arrear of L.344, which is nearly two
'years' rent of the engine and railway. Had then Mr Taylor
'been in possession at Whitsunday 1818, Colonel Boyle could
'have brought a removing against him before the Sheriff from
'both the subjects, because he owed much more than three terms'
'rent of the engine, and a removing from that inferred also a
'removing from the coal. But Mr Taylor was not in possession,
'for it had been ceded by the trustees, who were in the lawful
'possession, and it was assumed by the Colonel, who therefore
'was not obliged to raise the removing in order to obtain posses-
'sion, which otherwise would have been necessary. When, how-
'ever, Mr Taylor began to be serious in attempting to reassume
'possession, the Colonel raised his action before the Sheriff,
'which, proceeding on the authority of 2d of June 1812, Forbes
'*v.* Duncan, by which it was found in this Court that a con-
'ventional irritancy in a lease might be enforced without a de-
'clarator of irritancy; the summons concludes, that the pursuer,
'Colonel Boyle, being in possession, and the leases irritated, so,
'in the event of their (viz. Mr Taylor or his trustees) interfer-
'ing, they ought to be summarily ejected therefrom, and decern-
'ed and ordained by decree foresaid instantly to flit and remove
'themselves, their families, &c. The declaratory part of the
'summons is only with the view of introducing the conclusion
'for the removing, which could not well have been libelled with-
'out it, and in terms of the case of Forbes is competent before
'the Sheriff.

'It is admitted, that the Sheriff has not rested his judgment
'on the circumstance alone of the complainer's insolvency, but,
'on the whole case, he has placed it on the ground of the com-
'plainer's being in arrear of more than three terms' rent; and it
'is quite enough to support that judgment if the complainer be
'in arrear only for the engine, which cannot be disputed. But
'the Lord Ordinary believes that the arrear extends to greatly
'more; because, by a docqueted account, the trustees have con-

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'fessed an arrear at Whitsanday 1818, of no less than L. 568. '16s. 9d. Viewing the case then as an irritancy, the Sheriff has 'considered it to be purgeable, and allowed it to be purged, so 'that his interlocutor appears to be perfectly well founded; and 'in these circumstances it is impossible for the Lord Ordinary 'to listen for a moment to the prayer of this bill, which prays 'him to pass it without caution. As to the Act of Sederunt '1756, the Sheriff has not proceeded on it at all; for if he had, 'he would have ordained the complainer to find caution for the 'arrears, and five subsequent crops, which he has not done. 'He has proceeded on the conventional irritancy, and consi-'dered the insolvency and dereliction of possession merely as 'circumstances.'

To this judgment the Second Division adhered on the 11th of February 1819.*

The case then returned to the Sheriff Court; and the estates of Taylor having been in the meanwhile sequestrated under the Bankrupt Act, and Kerr appointed trustee, Colonel Boyle called him as a party by a supplementary summons. The arrears not having been paid up, the Sheriff decerned in terms of the libel; and the decree having been extracted, Taylor presented a bill of suspension, which Lord Meadowbank refused, and the Court adhered on the 13th November 1819.* Against these judgments in the suspension (but not those in the advocation) Taylor entered an appeal, on the ground chiefly,—

1. That it was not competent for the Sheriff to declare the lease forfeited, but that this could be done by the Court of Session only. And,

2. That the summons did not libel on the conventional irritancy which formed the ground of judgment, and therefore that the judgment was inept.

To this it was answered,—

1. That the competency of the Sheriff to enforce a conventional irritancy in a lease, had been repeatedly decided in the affirmative, and that it had been so in this case by the judgments in the advocation, which were not appealed against. And,

2. That the leases had been libelled on, and an arrear averred and condescended on; and as an ample opportunity had been given to pay it up, and this had not been done, the Sheriff was bound to enforce the irritancy.

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* Not reported.

The House of Lords 'ordered and adjudged, that the appeal 'be dismissed, and the interlocutor complained of affirmed, with 'L. 50 costs.' March 9. 1824.

J. DUTHIE—SPOTTISWOODE and ROBERTSON,—Solicitors.

(Ap. Ca. No. 10.)

CHARLES FRASER, Esq. Appellant.—*Moncreiff—Skene.* No. 7.
FRANCIS MAITLAND, Respondent.—*Gordon—Buchanan.*

Landlord and Tenant—Singular Successor—Judicial Remit.—Held, (affirming the judgment of the Court of Session), 1. That a singular successor is bound by a stipulation in a lease to pay for the value of houses which were erected prior to his purchase of the property. 2. That a tenant is not liable in damages for retaining the keys of the houses, after tendering them on condition that the landlord should concur in getting the value of the houses ascertained. 3. That a landlord is not entitled, at the termination of a lease, to claim damages from the tenant for mislabouring, where during the currency of the lease he has made no objection, and where there have been no rules laid down in the lease as to cultivation. And, 4. That a party who has consented to a remit to a professional person to report on disputed facts, is not thereafter entitled to insist on a proof.

March 9. 1824.

1ST DIVISION.
Lord Alloway.

IN the year 1777, Alexander Leith, proprietor of the estate of Williamston, in Aberdeenshire, by a missive of lease let to Francis Thomson two adjoining farms, the one called North Williamston, consisting of 25 acres, and the other called Polquhite or Gateside, of 105 acres, for the period of two nineteen years. By the missive of lease it was stipulated, that the said 'Alexander 'Leith is to build at his own expense a sufficient fire-house and 'barn of stone and mortar, pinned with lime, which Francis Thom-'son is to get at an appreciation; and he is also to hold all the 'inventory on North Williamston, which belongs to the heritor, 'and what other sufficient houses he builds shall be held from 'him at an appreciation at the expiry of his lease.' In virtue of this missive, Thomson entered to possession, and Leith thereafter erected on the farm of Gateside a small house and barn, the former having only one chimney and fire-place, and both being only one storey in height, and covered with thatched roofs.

In 1791, Thomson was succeeded as tenant by his son-in-law, Francis Maitland, with consent of Leith; and Maitland thereafter erected additional buildings, consisting of wings attached to the dwelling-house and offices, for the use of the farm.

In 1797, and subsequent to these erections, the appellant,