debt. Infeftment followed upon this decree, and Elder, and subsequently the defenders, possessed the subjects and drew the rents, which were applied *pro tanto* to extinguish the debt and interest. A balance was still due to the defenders.

The pursuer, one of the co-obligants in the debt, now brought an action concluding, *inter alia*, that the defenders should be ordained to accept payment from him of the whole balance due to them, and on receipt thereof to assign to him, for the purpose of his operating his relief, the security constituted in their favour by the decree of adjudication. The defenders objected, but offered to take payment from the pursuer of the proportion of the debt due by him, and thereafter to convey to him the security so far as extending over the portion of the subjects belonging to him.

The Lord Ordinary (JERVISWOODE) sustained the plea of the defenders. He thought that the pursuer had no equitable or legal foundation for his demand. The defenders were accountable to other parties besides the pursuer. The pursuer's discharge could not, he thought, free the defenders of all question or liability to account to the other parties whose subjects were embraced within the adjudication; and, if so, the defenders were entitled to hold until called on to denude by the parties in whom the true and radical right was vested, and with whom they were in entire safety to deal.

The pursuer reclaimed.

MONRO and MACKINTOSH for him.

GIFFORD and J. HUNTER in reply.

LORD PRESIDENT—I am not surprised that there is no authority cited to us by the pursuer, for the proposal is perfectly unreasonable. One of several *correi debendi* proposes to the creditor to pay off the balance of debt, and thereupon to obtain as his right an assignation to an adjudication, not of his own estate but of the estate of all the *correi debendi*. Now, what is the position in which the creditor would be placed if he acceded? He would have taken payment of a sum of money, but he would not have got the balance of his debt ascertained in such a way as to be binding on the other debtors, and they might come home and say to this creditor, why you are paid long ago, and more than paid, by intromissions with our estate. That is conclusive of the whole matter. Every demand of this kind must be founded in equity, but there is nothing of that here. I think the Lord Ordinary was right.

The other Judges concurred.

Adhere.

Agents for Pursuer—Hill, Reid and Drummond, W.S.

Agent for Defenders—Wm. Mitchell, S.S.C.

Wednesday, November 6.

SECOND DIVISION.

OAKELEY *v.* CAMPBELL AND OTHERS.

Poor Rates—Collector—Warrant—Justice—52 *Geo. III., c.* 95, §§ 13 *and* 14—8 *and* 9 *Vict., c.* 83, § 88. A collector of poor-rates applied to one of the Justices of the Peace of the county for a warrant to poind and distrain the pursuer's goods, who had fallen into arrears. The warrant having been put into execution, the pursuer brought an action of reduction, and also concluded for damages. *Held* (1) that a warrant to recover rates under the Act 8 and 9 Vict., was a good warrant if signed by one Justice. (2) That an action of damages for a fact done under the Act was excluded by section 88 of the Act 8 and 9 Vict.

The pursuer's goods were pointed and sold for payment of £26 of poor-rates. He brought the present action against the defenders—Campbell, the collector for the parish of Ardchattan, who obtained the warrant; Murray Allan, the justice who signed it; and Carmichael, the sheriff-officer who executed it—concluding for reduction of the warrant and execution, and for damages, laid at £3000. The warrant to poind and sell bore to be granted by Mr Murray Allan, acting as a Justice of the Peace, "as directed by the Statute 8 and 9 Vict., cap. 83, § 88; and 52 Geo. III., cap. 93, §§ 13 and 14." The certificate upon which the warrant proceeded, and the warrant itself, were in the following terms:—

"I, Colin Campbell, collector of poor and registration rates in the parish of Ardchattan and Muckairn, hereby certify that R. B. Oakeley, Esquire, now or lately at Kilmaronaig, stands duly assessed in the amount of £26, 16s. for the relief of the poor, and 11s. 2d. for registration purposes, for the year from 26th May 1865 to 26th May 1866, payable on the 20th day of December 1865. That such assessments are resting and not duly paid by R. B. Oakeley, Esquire, foresaid, a warrant for the recovery thereof is hereby requested in terms of the statute. COLIN CAMPBELL, *Collector*."

"To Mr Duncan Carmichael, jr. sheriff-officer and justice of peace officer for the county of Argyle.—Whereas it appears from the above-written certificate, that the above person named and designed has been duly assessed to the amount of £26, 16s. for the poor of the parish of Ardchattan and Muckairn, and 11s. 2d. for registration purposes, and which should have been paid on the 20th day of December 1865, and that the said poor and registration rates are resting and not duly paid; therefore I, Thomas William Murray Allan, one of Her Majesty's Justices of the Peace for the county of Argyle, do hereby grant warrant for poinding and distraining the goods and effects belonging to the said R. B. Oakeley, Esquire, and for keeping and detaining the said goods and effects for the space of four days in your custody, liable to the payment of the said whole poor and registration rates in arrear by R. B. Oakeley, Esquire, whose goods and effects shall be so poinded and distrained, and the costs to be paid to you as after directed, unless the owner shall redeem the same within the said space of four days by payment of said poor and registration rates due by him, and costs; and further, I hereby grant warrant, after the expiration of four days, to value and appraise the said goods and effects by two persons to be appointed by you, and to sell and dispose of the same by you, at a sum not less than the value, to be applied, in the first place, to the satisfaction and payment of said poor and registration rates owing by the said R. B. Oakeley, Esquire, whose goods are so poinded; and, in the second place, to the payment of your trouble at the rate of 2s. per pound of the said poor and registration rates, unless the owner shall redeem the same by payment to you of the appraised value within the further space of four days after valuation, and for returning the surplus that may remain to the owner of the said goods and effects; and in case no purchaser appear at the sale, for consigning and lodging the said goods and effects in

the hands of the Sheriff-depute of the county or his substitute, as directed by the Statute 8 and 9 Victoria, chap. 83, section 88, and 52 George III., chapter 93, sections 13 and 14, in that case made and provided. Given under my hand at Oban, this 20th March 1866 years.

"T. W. MURRAY ALLAN, *J.P.*"

The pursuer maintained that the warrant was illegal, because the Statute of Geo. III. cited had no bearing on the matter; and that even cap. 95, which was intended, conferred no jurisdiction on Justices of the Peace, still less on a single Justice, but only on Commissioners of Supply. It was also alleged that the warrant was illegally and oppressively carried out.

The defence set forth for all the defenders was the 86th section of the Poor Law Amendment Act, which provides "that all actions on account of anything done in the execution of this Act shall be brought before the Sheriff-Court, and every such action shall be commenced within three calendar months after the fact committed." The defenders pleaded—(1) No valid reason or ground of reduction is libelled or exists; (2) the warrant complained of having been completely executed, and being incapable of further execution, reduction is incompetent, or at least inappropriate, and the action, so far as reductive, ought to be dismissed; (3) the action, in so far as it concludes for damages, is excluded by 8 and 9 Vict., c. 83, § 86; (4) the pursuer's averments are insufficient in law to support a claim of damages against the defenders.

The Lord Ordinary (JERVISWOODE) repelled these four pleas, and, before answer on the remaining pleas, ordered issues. His Lordship explained the grounds of his judgment in the following note:—

"This case, as it strikes the Lord Ordinary, is one of considerable importance in its general aspect, as well as in its direct bearing on the interests of the respective parties.

"The pursuer here seeks reparation for that which he states has inflicted grievous wrong upon him, under colour but outwith the provisions of the law; while the defenders maintain that the claim of the pursuer cannot, in the circumstances which are here presented, be insisted in at all.

"As respects the case of the pursuer as presented on the record, and apart from the consideration of the special defences with which he is met, it certainly does strike the Lord Ordinary as a strong one.

"A warrant was granted, in respect of default on his part of payment of certain poor-rates, to poind and distrain his goods and effects for payment of these rates, in terms which are quoted in the first head of the condescendence. That warrant purports to have been granted by the defender Allan, acting as a justice of the peace, and under it warrant is granted, in case no purchaser appear at the sale, for consigning and lodging the said goods and effects in the hands of the sheriff-depute of the county, or his substitute, as directed by the statute 8 and 9 Vict., c. 83, § 88, and 52 Geo. III., c. 93, §§ 13 and 14, in that case 'made and provided.'

"The Lord Ordinary assumes that what was probably here intended to be done was, as in exercise of the powers conferred by the 88th section of the Poor Law Act, to bring into operation for recovery of the poor-rates alleged to be due by the pursuer, the statutory machinery provided for the recovery of the land and assessed taxes. The Poor Law Act itself does not specify the *special* mode of procedure. The selection of that is, within certain limits, left in the first instance to the party desiring to enforce the assessment, and in the second to the sheriffs, magistrates, and other judges, to whom application for a warrant may competently be made.

"It seems obvious, therefore, that where a collector of poor-rates, such as the leading defender here, has in contemplation the enforcement of an assessment from any defaulting ratepayer, he is invested with a certain discretionary power as respects the particular class of warrant for which he may apply, in so far as these may vary in relation to the particular public taxes for the collection of which they may be granted.

"Accordingly, the defender, the collector here, naturally, and, as the Lord Ordinary thinks, so far properly, applied to the defender Mr Allan for a warrant, and obtained one, which, so far as it is rested upon the provisions of the Poor Law Act, appears correct. But as these, taken alone, do not suffice to specify the special class or character of the warrant desired, reference is made, apparently to supply that requisite, to '52 Geo. III., c. 93, §§ 13 and 14, in that case made 'and provided,' which is thus, so far as respects intended to be imported into the Poor Law Act.

"But if this be the intention, it must be carried out with precision, and in its true sense and tenor; and, if used as the warrant and authority for the execution of the diligence of the law, must be fulfilled with due precision. Here, however, a marked failure occurs on the part of the defender. In the first place, while the statute 52 Geo. III., c. 95, is probably intended, reference is in fact made to 'chapter 93;' and, in the second place, assuming the reference to be truly to chapter 95, the provisions of the sections 13 and 14 of *that* Act infer no power whatever on a single justice of the peace, or indeed to any justice of the peace, to grant a warrant such as was here obtained.

"Thus, then, as it appears to the Lord Ordinary, the warrant in question is not one which could be legally obtained by the one defender, or granted by the other. And if this be so, the only question which remains for present determination is, Whether the pursuer has set forth a title and interest to insist that he shall be heard on the merits of the claims in which he insists? The opinion of the Lord Ordinary on this matter is, that the action must proceed for investigation on its merits; and, in coming to this conclusion, he has had under his consideration the cases which were on either side quoted and commented on in the course of the discussion.

"The case of *Ferguson* v. *Malcolm*, 14th February 1850, quoted for the pursuer, tends, as the Lord Ordinary thinks, to support the argument for the pursuer; while that of *M'Laren* v. *Steele*, 13th November 1857, which, with others, was referred to for the defenders, can support their case only in the event it shall be held that the defenders here were truly acting under statutory powers conferred by, or by reference imported into, the provisions of the Poor Law Act."

The defenders reclaimed.

SOLICITOR-GENERAL and WATSON for them.

PATTISON and THOMS in answer.

At advising—

LORD JUSTICE-CLERK thought the Lord Ordinary's interlocutor ought to be recalled. By section 88 of the Poor Law Amendment Act, a jurisdiction to grant such warrants was clearly conferred upon Justices of the Peace. That being so, he was of

opinion that it was perfectly competent for a single justice to sign such a warrant. Such an act was simply ministerial, and differed essentially from giving judgment in a disputed case. The misrecital of the Act of Geo. III. was unimportant. The provisions of the Poor Law Amendment Act were sufficient, and were not impaired by this unnecessary misquotation. The warrant was therefore legal, and there was no ground for reduction or for damages, so far as the claim arose out of the alleged illegality of the warrant. The claim for damages was, however, also founded upon the manner in which the warrant had been carried out. But such a claim was excluded by the limiting clause, § 86, of the Poor Law Amendment Act.

Lord Cowan concurred with the Lord Justice-Clerk in holding the grounds of reduction bad, and that the action was excluded by the 86th section of the Poor Law Act. His Lordship indicated an opinion that he would hold the same view as to the excluding effect of the Poor Law Act, even if the warrant had been bad.

Lord Benholme thought it was unnecessary to pronounce an opinion upon a point that was not necessary for the decision of the case. He agreed in holding the warrant a good one.

Lord Neaves concurred with Lord Benholme. The objections taken to the warrant were not latent, they were *ex facie*. He would not say that he would not reduce the warrant if he thought it bad, but he agreed in holding it quite a good one. The objection that it was not signed by two commissioners really came to this, that a warrant could not be issued without the intervention of a Justice of the Peace Court.

Agent for Pursuer—W. Officer, S.S.C.

Agents for Defender—Adam, Kirk & Robertson, W.S.

Wednesday, November 6.

MORONEY & CO. AND OTHERS *v.* MUIR & SONS.

Sheriff—Action of Reduction—Petitory Conclusions—Advocation. An action was raised in the Sheriff Court which contained both reductive and petitory conclusions. The Sheriff-substitute disposed of the case on the merits; shortly thereafter the Court of Session decided the case of *Murray* v. *Dickson*. An appeal was then taken to the Sheriff, who dismissed the action as incompetent. Advocation of this judgment sustained, and case remitted to the Sheriff, on the ground that it was possible to separate the petitory conclusions from the reductive conclusions, and thereby entertain the former.

This is an advocation from the Sheriff-Court of Lanarkshire of an action raised by the creditors of Andrew Jackson & Son, concluding for reduction, under the Act 1696, of certain transfers of delivery-orders by which Jackson & Son, on the eve of bankruptcy, had conveyed 2000 bags of thirds to the defender. There were also petitory conclusions for the restoration of the goods or their value. There was a question of joint adventure between the parties, but that was not raised in the advocation. After a variety of procedure, the Sheriff-substitute (Glassford Bell), on 11th June 1866, pronounced decree on the merits in favour of the pursuers. On 7th June 1866 the case of *Murray* v. *Dickson*, below more fully referred to, had been decided by the Supreme Court, and was brought under notice of the Sheriff-Substitute, but was not given effect to in his judgment. But his Lordship made the following observations on that point:—"It may be right to state, before closing, that the Sheriff-Substitute has seen to-day a newspaper report of a case decided in the Second Division of the Court of Session on 7th inst.—*Murray v. Dickson*—from the judgment in which, in as far as the report can be understood, it would appear that the Division did not consider an action of reduction competent in the Sheriff-Court. No such defence has been pleaded in the present action, and ever since the provisions of section 10 of the Bankruptcy Act of 1856, and of section 9 of the Act of 1857, it has been held competent in this, and, it is believed, in most other Sheriff-Courts, to entertain actions of reduction. If this be erroneous, the consequence may be important; but it would be premature to hold that it has as yet been so authoritatively settled that actions of reduction are incompetent before the Sheriff, as to make it *pars judicis* to decline to adjudicate therein."

The defenders appealed, and specially pleaded that the action, being one of reduction, was incompetent in the Sheriff-Court. The Sheriff (Alison) pronounced the following interlocutor:—

"*Glasgow, 20th November* 1866.—Having heard counsel for both parties under the appeal for the defenders upon the interlocutor appealed against, and upon an objection or defence, pleaded at the bar for the first time, that the action being one of reduction is incompetent in this Court,—Finds that the present action is in substance and form one of reduction, under the Act 1696, of certain transfers or delivery-orders of 2000 bags of thirds belonging to the bankrupts Andrew Jackson and Son, with petitory conclusions for delivery or payment of the said 2000 bags of thirds following on the reductive conclusions contained in the summons: Finds, under the authority of the decision pronounced by the Second Division of the Court in the recent case of *Murray* v. *Dickson*, 7th June 1866 (M'Pherson's Cases, iv., 757), that such an action is incompetent in the Sheriff-Court: Therefore sustains the objection now pleaded against the competency of the action, recals the interlocutor appealed against, and dismisses the action as incompetent, reserving all competent action at the pursuers' instance against the defenders, and to them their defences thereagainst, as accords: And on the question of expenses, in respect the objection to the competency of the action was not stated by the defenders on record, and the parties joined issue on the merits, and led proof thereanent, and in respect the case of *Murray* v. *Dickson* was only decided in the Court of Session in June last, a few days before the date of the judgment of the Sheriff-substitute, and it was not till after the report of that case appeared, and the decision of the Sheriff-substitute was pronounced, that the objection to the competency of the action was stated for the defenders, Finds no expenses due to or by either party, and decerns.

"A. Alison.

"*Note.*—This is a most important case, and was most ably and concisely debated under the appeal upon the question of competency, both by Mr Lancaster and Mr Scott. It need hardly be said that by the law and practice of Scotland actions of reduction are among the class of actions which are only