Lords Mure and Shand concurred.

Lord Adam—The question here is, whether the defenders are entitled to an abatement of rent? Their claim for abatement has been reserved to them by the Sheriffs. But they are of opinion that that claim could not be constituted in the present action. The Sheriff says—"Few legal principles are more clearly established than this, that a liquid claim for rent cannot be met by an illiquid claim for damages." I quite agree with that proposition, but I think it has no application here, for the claim here is not a claim for damages; it is a claim for abatement of rent. Further, it is clear that if the landlord is not entitled to the whole rent, the whole rent is not due, but if that be so the claim of the landlord is no more liquid than is the claim of the tenant. In these circumstances it is impossible to do what the Sheriff has done, viz., to decern for the whole rent and leave the tenant to constitute his claim by a separate action. There are several additional authorities in support of that view. I refer to *The Annuitants of the York Buildings Company* v. *Adams*, June 5, 1741, M. 1027; and *Campbell* v. *Watt*, June 18, 1795, Hume 788. On the whole circumstances, and looking to the facts, I have no hesitation in concurring with your Lordship.

The Court pronounced this interlocutor:—

"Recal the interlocutors of the Sheriff-Substitute of 5th July 1886 and of the Sheriff of 28th September 1886: Find that in the circumstances admitted on the record, the defenders, as tenants, are entitled to some abatement of the rent payable by them at Martinmas 1885, and that they are entitled to plead this abatement as a defence against the pursuer's demand for payment of the full rent due in terms of the lease at that date: Remit to the Sheriff to ascertain and fix what the amount of the abatement ought to be, and to proceed further in the cause as shall be just: Find the defenders entitled to expenses in this Court," &c.

Counsel for Pursuer and Respondent—D.-F. Mackintosh, Q C. — Omond. Agents — Boyd, Jamieson, & Kelly, W.S.

Counsel for Defenders and Appellants — M'Kechnie — Salvesen. Agent — J. Young Guthrie, S.S.C.

Saturday, February 5.

FIRST DIVISION.

[Lord Lee, Ordinary.

ROBERTSON *v.* ROBERTSON AND OTHERS.

Jurisdiction—Sheriff—Debts Recovery (Scotland) Act 1867 (30 *and* 31 *Vict. c.* 96), *sec.* 17—*Review—Competency.*

A person against whom a decree had been obtained under the Debts Recovery Act, brought a reduction thereof, on the allegation that the Sheriff had, after making avizandum, allowed the opposite party to lead further evidence, and refused to allow him to lead evidence in answer to it. *Held* that reduction was incompetent in respect of sec. 17 of the Debts Recovery Act.

The Debts Recovery (Scotland) Act 1867, sec. 17, provides — "That no interlocutor, judgment, order, or decree pronounced under the authority of this Act shall be subject to reduction, advocation, suspension, or appeal, or any other form of review or stay of diligence, except as herein provided, on any ground whatever."

In April 1886 Robert Pringle, butter merchant, Castleblaney, Ireland, and his mandatories, raised an action in the Sheriff Court of Lanarkshire at Glasgow under the Debts Recovery (Scotland) Act 1867, against James Robertson junior, grocer, Glasgow, and his father James Robertson senior, sergeant of police there, jointly and severally or severally, concluding for payment of £12, 5s. 10d. as the price of goods sold and delivered by the pursuer to the defenders or one or other of them. James Robertson senior denied liability, alleging that he had no connection with the business in connection with which the alleged debt was incurred, it being solely his son's. James Robertson junior did not defend.

On 14th August the Sheriff-Substitute (Balfour) "having considered the evidence adduced," found that the goods were supplied on the credit of James Robertson senior; that James Robertson junior was simply his father's manager, and therefore —James Robertson junior not defending the action—found them jointly and severally liable in the sum sued for.

"*Note.*— . . . Proof was led in the case at two diets, viz., 1st June and 14th June. At the first diet the father was not represented by an agent, but at the second he was. The proof was closed at the second diet and avizandum made. The father's agent made no request to be allowed to lead more proof, but he asked for a continuation of the cause for the special purpose of considering whether he would raise an action of declarator in the Court of Session in order to have the question of the father's liability determined in that Court. I continued the case on two occasions for that special purpose, and at the last diet the agent appeared with six witnesses and proposed to examine them. I refused to allow the examination, because the proof had been closed on 14th June, avizandum had been made, and judgment would thereupon have been pronounced but for the special request of the agent to be allowed time to consider about raising an action of declarator. The witnesses examined were the two defenders, Thomas Holland, the pursuer's agent; John Wilson Bruce, trustee on the son's estate; and Mr John Andrew, a creditor."

James Robertson senior appealed to the Sheriff.

On 25th October the Sheriff (Berry) adhered.

"*Note.*—After giving full consideration to this case I can see no sufficient ground for interfering with the judgment appealed against. Without deciding the general question which was raised, whether a Sheriff can order additional evidence to be taken in a case where there has been no note of evidence taken by the Sheriff-Substitute, it is difficult to conceive a case where a Sheriff would make such an order without having had the means of judging of the sufficiency of the evidence which was before the Sheriff-Substitute. In the present case there is nothing to satisfy me

that to make such an order would conduce to the ends of justice."

On 5th January 1887 James Robertson senior raised in the Court of Session the action of declarator and reduction now reported, calling as defenders James Robertson junior and the trustee under a trust for his creditors, Pringle and his mandatories, and a number of persons claiming to be creditors of the business carried on in name of James Robertson junior. He sought declarator that he was not a proprietor of or partner in, or in any way interested in, the business conducted by James Robertson junior, but that it belonged wholly to James Robertson junior, who, and not the pursuer, was liable for the debts, and further, he sought reduction of the decree of the Sheriff-Substitute and Sheriff in Pringle's action.

He averred that he had no interest in the business, and further—"(Cond. 8) The procedure in said debts recovery action was grossly irregular, unjust, and illegal in consequence of the Sheriff-Substitute, after having made avizandum, allowing the pursuer (the present defender Robert Pringle) to lead further evidence, and thereafter refusing to allow the defender (the present pursuer) to lead evidence in defence. The pursuer was thus denied the justice he was entitled to, and was deprived of the opportunity of leading evidence to rebut that which had been led for the said Robert Pringle, and to prove (which he was quite prepared to do) that the business in question did not belong to him, and that he was not a partner therein with his said son. In these circumstances the pursuer is entitled to have said judgment or decree of the Sheriff-Substitute and said interlocutor or decree of the Sheriff reduced as craved. The defender Pringle, on or about 1st and 15th November 1886, caused arrestments to be lodged with J. D. Borthwick, treasurer of the police force, Glasgow, attaching the pursuer's wages."

Preliminary defences were lodged.

The defenders pleaded, *inter alia*, that the action was incompetent.

On 11th January 1887 the Lord Ordinary pronounced the following interlocutor:—"Repels the defences as defences against satisfying the production, reserving them *quoad ultra:* Assigns this day eight days as a term for satisfying the production, and grants warrant to and ordains the Sheriff-Clerk of Lanarkshire at Glasgow to transmit the decrees and interlocutors pronounced in the debts recovery action libelled, with the summons, notes of pleas, and numbers of procedure, or certified copies thereof: Finds the defender Robert Pringle liable to the pursuer in expenses of process incurred by him since 23d December 1886, being the date of lodging preliminary defences," &c.

"*Note.*—As the grounds of reduction alleged appear to be (at least in part) that the interlocutors and decrees challenged were pronounced by the Sheriff in disregard of the provisions of the statute, and not under the authority thereof, I think it necessary that the proceedings should be produced, and that the proper course is to pronounce an interlocutor such as was pronounced in the first branch of the case of *M'Millan* v. *The Free Church of Scotland*, 22 D. 290. It was suggested by me at the time the record was closed on these preliminary defences that the production might be satisfied under reservation, but the suggestion was not adopted. As the expense of printing and of this discussion will not be available, I think the defender must be found liable in expenses."

The defenders reclaimed (by leave), and argued —The action was incompetent, as no review of the Sheriff's decision was competent by way of reduction, or in any other way than that which the statute provided. The parties not having asked the Sheriff-Substitute to take a note of the evidence, therefore there could be no appeal on the facts, which was what was really desired by pursuer.

Authorities—Act 30 and 31 Vict. cap. 96, secs. 8, 9, 10, and 17; *Cumming* v. *Spencer*, November 21, 1868, 7 Macph. 156.

Replied for the respondent—This was a case in which an action of reduction should be allowed. There had been a miscarriage of justice, as the Sheriff had refused to allow the defender of the action in the Inferior Court to lead any evidence at all. The remedy sought was the appropriate one.

Authorities—*Graham* v. *M'Kay*, February 25, 1845, 7 D. 515; *Murchie* v. *Fairbairn*, May 22, 1863, 1 Macph. 800; *Tully* v. *Lennon*, July 12, 1879, 6 R. 1253.

At advising—

Lord President—The Lord Ordinary has repelled the defences as defences against satisfying the production, reserving them *quoad ultra*, and one of these defences is that "this action is incompetent." Now, I think this is a defence which ought to be disposed of before satisfying the production, because if the action is incompetent, then the defenders need not do anything in the way of satisfying the production. The question therefore comes to be, Is this action incompetent because included under section 17 of the Debts Recovery Act. That section provides —"That no interlocutor, judgment, order, or decree pronounced under the authority of this Act shall be subject to reduction, advocation, suspension, or appeal, or any other form of review or stay of diligence except as herein provided, on any ground whatever." Now, the exceptions referred to in this section of course refer to the modes of appeal sanctioned by the Debts Recovery Act, and set forth in previous sections of this statute. But the pursuer here has not availed himself of the right of appeal sanctioned by the statute, and the question comes to be, whether we can now entertain the reduction when by the provisions of this 17th section all actions of reduction are so strictly forbidden, and it may be observed that the words of this statute are just as prohibitory on this matter as are the provisions of the Small Debt Act.

The complaint in this case is that the Sheriff-Substitute refused to allow the pursuer of the present action of reduction, who was one of the defenders in the Inferior Court, to examine witnesses, and that he decided the case without hearing any evidence for the defence, and we find that the Sheriff-Principal, after hearing parties, adhered to the interlocutor which had been pronounced upon the ground that he saw no sufficient reason for interfering with the judgment.

In the first case which occurred under the Small Debt Act 1837 (1 Vict. c. 41)—the case of

Graham v. *M'Kay*—the objection that was taken was to jurisdiction—as strong an objection as could well be taken—yet the Court repelled it, and would not inquire into the matter because of the exclusive jurisdiction of the Inferior Court; and in the case of *Lennon* v. *Tully*, July 12, 1879, 6 R. 1253, where the allegation was that the execution of the citation of the summons had been illegal, yet even in such a case as that the Court held that their jurisdiction was excluded under the provisions of the Small Debt Act of 1837.

Looking then to the decisions in these cases, I think that the Lord Ordinary was wrong in refusing to sustain the plea of incompetency, and that what he has done is the most idle procedure, because even if the production was satisfied, it is quite impossible that we should find the action competent.

Upon that ground I am for recalling the Lord Ordinary's interlocutor and sustaining the second plea for the defenders.

Lords Mure, Shand, and Adam concurred.

The Court recalled the Lord Ordinary's interlocutor, sustained the second plea-in-law for the defenders, and dismissed the action *quoad* the reductive conclusions.

Counsel for Pursuer — Gardner. Agents—Sturrock & Graham, W.S.

Counsel for Defenders—Hay. Agents—Adamson & Gulland, W.S.

HOUSE OF LORDS.

Monday, February 14.

(Before Lord Blackburn, Lord Herschell, and Lord Watson.)

BURNS *v.* MARTIN (MARTIN'S TRUSTEE AND EXECUTRIX).

(*Ante*, vol. xxii. p. 898, and 12 R. 1343—July 17, 1885.)

Lease—Landlord and Tenant—Heirs and Executors—"Conjunctly and Severally."

A lease was granted to two tenants and the survivor of them, excluding assignees and sub-tenants, whether legal or conventional, the tenants binding "themselves and their respective heirs, executors, and successors, all conjunctly and severally, renouncing the benefit of discussion," to pay the rent. One tenant became bankrupt and the other died. *Held* (*rev.* judgment of the Second Division) that the liability of the deceased tenant did not cease with his death, but that his legal representative was liable for the future rents under the lease.

This action is reported *ante*, vol. xxii. p. 898, and 12 R. 1343—July 17, 1885.

The pursuer appealed.

At delivering judgment—

Lord Herschell—My Lords, during the argument of this case there were present my Lord Blackburn, my noble and learned friend on my left (Lord Watson), and myself. Lord Blackburn is unable to be present and to take part on this occasion, and accordingly an intimation was given to the parties that if they desired it the case might be re-argued, although all those who heard the argument agreed as to the judgment which ought to be delivered. The parties have expressed no such desire, but have prayed for the judgment of your Lordships' House, and under these circumstances there seems to be no difficulty in its being pronounced.

The respondent was sued, as executrix of her deceased husband Hugh Martin, for two half-years' fixed rent under a mineral lease granted by the appellant to William Logan and Hugh Martin for thirty-one years from Martinmas 1882.

The sole question, as it appears to me, is, whether upon the true construction of the covenant for payment of rent contained in the lease, the legal representative of a deceased lessee became liable for the rent accruing after his death?

The lease was granted to William Logan and Hugh Martin "and the survivor of them, but expressly excluding assignees and sub-tenants, whether legal or conventional." The covenant is in these terms—"The said William Logan and Hugh Martin bind and oblige themselves and their respective heirs, executors, and successors, all conjointly and severally, renouncing the benefit of discussion, to pay to the said John William Burns, his heirs and successors, and to his or their factor or agent, the sum of £200 sterling yearly for each of the first five years of this lease, and the sum of £250 sterling yearly thereafter during the currency of this lease in name of fixed rent or tack-duty . . . for the privilege of working and disposing of the fireclay in manner herein mentioned."

There can be no doubt, in view of the terms of the grant, that the interest of Hugh Martin under the lease ceased on his death, and that the entire interest then vested in William Logan as the survivor.

It has been contended by the respondents that on the true construction of the covenant all liability on the part of Hugh Martin or his representatives terminated at the date of his death.

The majority of the Judges of the Second Division of the Court of Session were of opinion that this contention was well-founded, though they rested their judgment on another ground to which I shall presently refer.

I confess that I approach the construction of the covenant with every inclination to take the same view. I am fully alive to the force of the argument that it is not to be expected that the representatives of the deceased lessee should be made equally liable with the survivor to the payment of the rent seeing that the entire benefit passes to him.

But, after all, the case must be determined by a careful scrutiny of the language used, and by giving to that language its natural grammatical meaning. It is not an impossible or inconceivable bargain that each of the lessees should agree that his estate should remain liable for the rent notwithstanding that the lease enured to the benefit of the survivor. If the covenant had been fairly open to either construction I should certainly have yielded to the argument of the respondents, but upon the best consideration I can give to the matter I cannot avoid the conclusion that the plain natural meaning of the