The present case seems to me to depend upon the application which ought to be given to the words "all conjunctly and severally, renouncing the benefit of discussion," as these occur in the clause of obligation for rent. Do they unite in one common obligation all the parties enumerated, or must they be read distributively, and as applying separately to the heirs, executors, and successors of Logan and the heirs, executors, and successors of Martin? In the one view the representatives of Martin are liable for the rent as long as the lease endures, in the other they are not liable for rents becoming due after the death of Hugh Martin unless the tenant is his heir or assignee.

In my opinion the words "renouncing the benefit of discussion" may be treated as surplusage, because persons who are bound conjunctly and severally cannot plead the *beneficium ordinis.* It was argued that the words, though in that sense superfluous, are nevertheless officious as indicating that a common obligation was only to attach to such heirs, executors, and successors as were subject *inter se* to the rule of discussion; and that inasmuch as the rule had no application between the representatives of Logan, and the representatives of Martin, it must have been the intention of the parties to the lease to impose a separate conjunct obligation upon each class. That argument appeared to me to be completely met by the appellant's counsel, who pointed out that the rule as to discussion, if not excluded, obtains not only between heir and executor but between an actual tenant and those persons who, having no interest as tenants, are bound along with him for rent, all such persons being mere cautioners in any question with the tenant.

I have been unable to resist the conclusion that by the terms of the clause of obligation each and all of the parties therein mentioned are made conjunctly and severally liable for rent, irrespective of their interests, during the subsistence of the lease. I agree with Lord Rutherfurd Clark and the Lord Ordinary in thinking that the meaning of the clause is really not doubtful, and that there is no such ambiguity in its language as to entitle the respondent to the benefit of the presumption that only William Logan, the tenant, and his representatives are to be responsible for future rents.

The only term in the clause which appears to me to be capable of suggesting a construction favourable to the respondent is the word "respective" upon which much stress was laid in the argument in her behalf. If the expression used had been "their heirs, executors, and successors," it was hardly contended that the respondent could have escaped from liability. But it was argued that the word "respective" is used to mark a separation between the two classes of representatives; and consequently that the clause ought to be read in the same way as if William Logan had bound himself and his heirs, executors, and successors all conjunctly and severally, and Hugh Martin had in like manner, bound himself and his heirs, executors, and successors all conjunctly and severally. Logan and Martin begin however by binding "themselves" conjunctly and severally, and the word "respective" appears to me to be introduced, not for the purpose of separating the obligees into two classes, but for the purpose of indicating that the obligation common to both classes was imposed by each of them upon his own representatives, which was all that he had power to do. Then the introduction of the word "all" before "conjunctly and severally" makes it clear, in my opinion, that the two original tenants, and their heirs, executors, and successors, were each and every one of them to be equally liable for rent to the lessor so long as the lease endured.

Lord Young in giving judgment expressed an opinion that the appellant's abstaining from the exercise of his rights voided the lease, and his retention of an undischarged bankrupt who was not in possession as his tenant would constitute an inequitable and unconscionable device for exacting rent from the respondent, who has no beneficial interest in the lease, and can obtain no consideration for the rent which she pays. None of the other Judges have expressed any opinion upon that point, but I think it right to say that I cannot agree with Lord Young. Martin may have made an improvident contract, but he and his representatives are not the less bound to perform the obligations which he undertook. The respondent, as representing him both in heritage and moveables, is liable for rent till the end of the lease, but it does not necessarily follow that she must continue to pay rent until the term of Martinmas 1913. It appears from the appellant's averments on record that Logan is not possessing as tenant under the lease, and is making no claim for possession. As against Logan the respondent has all the right of a cautioner, and in that position of matters Logan is bound either to relieve the respondent at once of the rents which she may have to pay, or to exercise the power which the contract gives him of renouncing the lease at Martinmas 1887. If Logan when duly required refuses or delays to do one or other of these things, I do not think his wrongful failure to renounce would justify the appellant in exacting rent from the respondent after that term.

I therefore concur in the judgment which has been moved by my noble and learned friend.

The House reversed the decision of the Second Division, and restored that of the Lord Ordinary, with costs.

Counsel for Pursuer (Appellant)—Rigby, Q.C.—J. P. B. Robertson, Q.C. Agents—Grahames, Currey, & Spens, for J. & J. Ross, W.S.

Counsel for Defender (Respondent)—Lord Adv. Balfour, Q.C.—Rhind. Agents—Smith, Fawdon, & Low, for R. Pasley Stevenson, S.S.C.

COURT OF SESSION.

Tuesday, February 15.

SECOND DIVISION.

HASTIE *v.* STEEL.

Process — Expenses — Judicature Act 1825 (6 *Geo. IV. c.* 120), *sec.* 4.

Objection was taken to an Auditor's report on the ground that the interlocutor remitting the accounts to him was incompetent, in

respect that when it was pronounced an amendment had been put upon record without any interlocutor allowing the same to be received, and closing the record of new. The Court *repelled* the objection.

The case of *Hastie* v. *Steel* was decided in March 19, 1886 [*ante*, vol. xxiii. p. 559], and the pursuer found liable in expenses to the defender, and a remit made to the Auditor to tax the defender's account and report. The pursuer lodged objections to the report of the Auditor. The principal objection taken was that when the case was in the Inner House, and during the argument there, an amendment by the defender relating to the matter in dispute was put upon record, but no interlocutor appeared upon the interlocutor-sheet, allowing the amendment to be received, and closing the record of new. The pursuer referred to the Judicature Act 1825, which by section 4 provides—"And be it further enacted that in ordinary causes where the defender shall make appearance and neither party shall abandon the cause, neither the Lord Ordinary officiating in the Outer House, nor the Court, shall proceed to give judgment upon the merits in the cause until the respective averments of the parties in fact, and their pleas in matter of law, shall, as hereinafter directed, be set forth on the record, and the record made up and authenticated in manner hereinafter appointed." The pursuer maintained that in these circumstances the interlocutor remitting the defender's account of expenses to the Auditor to tax and report was incompetent, as the record was not closed upon the amended statement.

Authority quoted—*Harvey* v. *Lindsay*, July 20, 1875, 2 R. 980.

At advising—

Lord Justice-Clerk—I do not think that we can sustain this objection to the Auditor's report. The defenders account of expenses is now objected to in a case which was allowed to go to judgment before this Court, and a decision was given by the Court in favour of the defender, with expenses, without any such objection being taken as the pursuer now makes, though he was represented by counsel as I understand—for I was not present. Now, the Auditor has made his report, and this objection is taken. The pursuer says the interlocutor remitting the account to the Auditor was an invalid interlocutor, an amendment having been put upon the record without any interlocutor authorising that to be done, and finally closing the record of new. I do not think that that is a relevant objection. The judgment was delivered by the Court and has become final, and it cannot be set aside now by any procedure such as this, which is an objection to the Auditor's report on a remit validly made. I do not think that Mr Hastie has shown any case of essential error in point of fact. It is only a statement, at most of an error in process. What effect it may have if the question is raised by another form of procedure I do not say, but it cannot have the effect of preventing us from considering this Auditor's report. I do not think we can sustain this objection.

Lord Young—I am of the same opinion. The question between the parties was originally one of jurisdiction. An action for damages for slander was brought against a gentleman who resided in Calcutta, all the matters referred to having taken place in Calcutta. It was sought to sue him here on the ground that this Court had jurisdiction over the defender, as he was the proprietor of heritable property in Scotland—a house in St Vincent St., Glasgow. The defender denied that he was proprietor of any such heritable property, and in order to make his denial specific he desired to have it written upon the record that the house belonged not to him but to his brother John Steel. Now, I doubt whether even the possession of a house in St Vincent St., Glasgow, would necessarily make a defender liable to our jurisdiction in an action of damages for slander uttered in Calcutta. But assuming that to be important, perhaps the clerk ought to have written an interlocutor allowing the amendment to be received; it would have been more regular. But these words were written upon the record without any interlocutor in regard to them. The question was argued and decided, and that decision cannot be altered now. We can do nothing now except pass to the consideration of the Auditor's report. I should only wish to say now, as I did during the course of Mr Hastie's statement, that I do not and never did entertain any doubt of the power of a Judge in the Outer House or of this Court to correct any error in fact in any interlocutor. If the name of the defender is inserted instead of that of the pursuer, or if decree is given for £1000 instead of £100, for example, all that can be remedied at once. It would be ridiculous to require an appeal to the House of Lords or an action of reduction. But this is not a matter of that kind at all. The utmost irregularity that it can be brought up to is that no interlocutor was written allowing the amendment to be received and closing the record again. It is always a question of degree, but we cannot listen to this objection at this stage.

Lord Craighill and Lord Rutherfurd Clark concurred.

The Court repelled the objections, approved of the Auditor's report, and decerned against the pursuer for the amount thereof, found the defenders entitled to the expense of this appearance, and modified the same at the sum of two guineas.

Counsel for Pursuer—Party.

Counsel for Defender — Pearson. Agent—J. B. M'Intosh, S.S.C.

Thursday, February 17.

SECOND DIVISION.

[Lord Fraser, Ordinary.

NORTH BRITISH RAILWAY COMPANY *v.* PATERSON (INSPECTOR OF CARDROSS).

Poor—Poor-Rate—Railway—Poor-Law Amendment Act 1845 (8 *and* 9 *Vict. c.* 83), *sec.* 36—*Assessment—Classification.*

A classification of lands and heritages under the 36th section of the Poor-Law Amendment Act 1845 must, in order to be valid, comprehend all the lands and heritages in the parish.