a trustee or trustees in succession and commissioners on the said sequestrated estates, with the whole powers conferred by the said statutes, and to appoint said meeting to be advertised in the *Edinburgh Gazette*, and with power to remit to the Sheriff of the sheriffdom of Inverness, Elgin, and Nairn, at Elgin, to proceed further in said sequestration in manner mentioned in the statutes; and direct that the expense of this petition and of the proceedings to follow thereon shall form a first charge upon the funds of the estate."

Counsel for the Petitioner—M'Lennan. Agent—Thomas Liddle, S.S.C.

Thursday, November 15.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

MUNRO *v.* M'GEOGHS.

Lease—Defective Possession—Retention of Rent—Abatement—Liquid and Illiquid.

In an action for payment of rent it is a relevant answer to support a claim for abatement that the tenant has never got entire possession of the subjects let.

In an action by a landlord to recover arrears of rent from two of his tenants, the latter answered that they were entitled to an abatement, averring, *inter alia*, that certain farm buildings had not been handed over to them in a tenantable condition as required by the lease. *Held* (following the case of *Muir* v. *M'Intyres*, February 4, 1877, 14 R. 470) that the averments of the tenant were relevant to support a claim for abatement.

This action was raised by Hugh Munro, heir of entail in possession of the estate of Barnaline, Argyllshire, against two of his tenants, William and James M'Geogh, to recover £64, 11s. 8d. alleged to be due to him as arrears of rent of the farm they occupied.

The pursuer averred that the farm was let at a rent of £125, of which £64, 11s. 8d., the sum sued for, remained unpaid, and denied that the defenders' counter claim for abatement was well founded.

The defenders in answer admitted that the sum sued for had been retained by them from the rent of the farm, but averred that they were entitled to abatement of rent in respect of the pursuer's failure to implement his part of the agreement with the defenders to an extent exceeding the sums retained by them. In particular, they averred that under the lease the pursuer was, *inter alia*, bound to put the buildings on the farm in good tenantable order before handing them over to the defenders, and to furnish the defenders with wood for fences, but that he had failed to do either of these things, and had thereby caused them loss to an extent exceeding the amount of the rent retained by them.

The pursuer pleaded, *inter alia*—"(2) The defenders' claim being merely one of damage and illiquid, cannot be set off against the pursuer's claim for rent. (3) The defences being irrelevant and insufficient, and unfounded in fact, the pursuer is entitled to decree as craved."

The defenders pleaded, *inter alia*—"(3) The pursuer having failed to implement his agreement with the defenders to put the buildings of the farm in repair and supply wood for fencing, whereby the defenders were deprived of the beneficial use and enjoyment of the subjects let to an extent exceeding the sums retained by them from their rent and now sued for, the defenders are entitled to retain said sums, and are now entitled to be assoilzied from the conclusions of the summons."

The Lord Ordinary (KINNEAR) on 26th July 1888, before answer, allowed a proof of averments, to proceed on a day to be afterwards fixed.

"*Note.* — The pursuer maintains that he is entitled to decree without inquiry into the disputed matters of fact, on the ground that a tenant is not entitled to retain rent on account of an illiquid claim of damages. But the defender is in possession under missives of lease by which it is stipulated that the barn, byre, and stable shall be handed over to him in tenantable repair. These buildings are portions of the subject let, and are indispensable for the beneficial occupation of the farm. If the defenders' averments are true in fact, he has not received full possession, and it follows that the landlord's claim is not liquid because he has not delivered the subjects in the state agreed upon. The case appears to me to be distinguishable from those in which it has been held that a liquid claim for rent cannot be met by an illiquid claim of damages for breach of a collateral obligation, and to fall within the rule laid down in *Graham* v. *Gordon*, 5 D. 1211, which has been followed in subsequent cases. The facts might probably be ascertained more economically than by a proof, but the pursuer declines in the meantime to consent to a reference or remit."

The pursuer reclaimed, and argued—If the tenant had any counter claim to the claim for rent it was one of damages merely. Such an illiquid claim could not be set off against a claim for rent. The averments of the tenant were not such as to constitute defective possession.

Authorities—*Macrae* v. *Macpherson*, December 19, 1843, 6 D. 302; *Dods* v. *Fortune*, February 4, 1854, 16 D. 478; *Graham* v. *Gordon*, June 16, 1843, 5 D. 1207; *Muir* v. *M'Intyres*, February 4, 1887, 14 R. 470.

The defenders were not called on.

At advising—

LORD PRESIDENT—I do not think that there can be the smallest doubt that there is here a relevant defence stated to the landlord's demand for rent, on the ground that the tenant has never been put into possession of certain of the subjects let to him, and that therefore he is entitled to an abatement of the rent corresponding to the amount of possession, which has not been delivered to him.

That doctrine has been recognised in a variety of cases, and it admits of no doubt at all as a doctrine of law. The principle was very well stated by Lord Fullerton in the case of *Graham* v. *Gordon*. His Lordship there says—"Rent is

not liquid in the sense that a sum due by bond is. It is a matter of contract in consideration of something to be done. It is paid for possession of the subject let. If the tenant says he has not got entire possession, that is a good answer to the claim for rent." That principle has been affirmed over and over again, and very emphatically in the case of *Muir* v. *M'Intyres* decided only last year, where a claim for abatement was rested upon the ground of the accidental destruction by fire of a part of the subjects let. The difficulty the Court had to deal with was that there was no fault on the part of either landlord or tenant, and the landlord very plausibly maintained that as the loss of possession was due to a mere accident, he was still entitled to the fulfilment of the entire contract of lease. It was held that the accidental destruction of a part of the subjects let put the case in the same position as if possession of part of the subjects had not been delivered. The case of *Muir* v. *M'Intyres* is in fact *a fortiori* of the present, and of every case where a landlord has not given full possession of the subjects let. The Lord Ordinary has stated his ground of judgment quite clearly and distinctly, and I have no doubt that it is sound.

LORD MURE and LORD ADAM concurred.

LORD SHAND was absent

The Court remitted to the Lord Ordinary to allow the defenders a proof of their averments in support of their claim for abatement of rent, and to allow to the pursuer a conjunct probation.

Counsel for the Pursuer (Reclaimer)—Graham Murray — Shennan. Agents — Gill & Pringle, W.S.

Counsel for the Defenders (Respondents)—H. Johnston. Agent—Peter Adair, S.S.C.

Saturday, November 17.

SECOND DIVISION.

WATSON *v.* CALLENDAR COAL COMPANY.

Poor's Roll—Appeal from Sheriff Court, and Reporters divided in Opinion.

A pursuer in a Sheriff Court action for damages for personal injury appealed to the Court of Session against a judgment of a Sheriff, affirming the judgment of his Substitute, and assoilzieing the defenders. The pursuer applied for the benefit of the poor's roll, and the reporters on the *probabilis causa* were equally divided in opinion. The Court (following the case of *Carr, &c.* v. *North British Railway Company*, November 1, 1885, 13 R. 113) *refused* the application.

Samuel Watson, surfaceman, Kerse Lane, Falkirk, raised an action in the Sheriff Court at Falkirk against the Callendar Coal Company, Falkirk, concluding for a sum in name of damages for personal injury alleged to have been sustained by him from the fault of the defenders.

The Sheriff-Substitute (SCOTT MONCRIEFF), after proof, assoilzied the defenders, and his judgment was affirmed by the Sheriff (MUIRHEAD).

The pursuer appealed, and applied for admission to the poor's roll. A remit was made to the reporters in the *probabilis causa*, who reported that they were equally divided in opinion. It was stated that of the reporters there were one counsel and one agent on each side.

The pursuer moved the Court to admit. He admitted that the circumstances of the case were identical with those of *Carr, &c.* v. *North British Railway Company*, November 1, 1885, 13 R. 113, in which the First Division refused to admit, but argued that the case of *Marshall* v. *North British Railwoy Company*, July 13, 1881, 8 R. 939, was in his favour and that it was in the discretion of the Court to grant the application.

The defenders argued that the question was no longer open, and that the Court were bound to follow the unanimous judgment of the First Division in the case of *Carr* v. *North British Railway Company, supra.*

LORD JUSTICE-CLERK—I think we must refuse this application.

LORD RUTHERFURD CLARK—I am of opinion that we are bound to plead the decision of the First Division in the case of *Carr*, in which the circumstances were precisely similar to those in the present case, unless we are to send this case to the whole Court to discuss, which I think unnecessary.

LORD LEE concurred

The Court refused the application.

Counsel for Applicant—Macnair. Agent—J. D. Turnbull, S.S.C.

Counsel for the Respondent—Dickson. Agents—Peddie & Ivory, W.S.

Saturday, November 17.

FIRST DIVISION.

[Sheriff of the Lothians.

NICOL *v.* JOHNSTON.

Process—Sheriff—Failure to Lodge Defences—Prorogation—Discretion of Sheriff—Sheriff Court Act 1853 (16 *and* 17 *Vict. c.* 80), *sec.* 6—*Sheriff Court Act* 1876 (39 *and* 40 *Vict. c.* 70), *sec.* 48.

The Statute of 1853, sec. 6, provides—"When any condescendence or defences . . . or other paper shall not be given in within the periods prescribed or allowed by this Act, the Sheriff shall dismiss the action, or decern in terms of the summons, as the case may be, by default, unless it shall be made to appear to his satisfaction that the failure to lodge such paper arose from unavoidable or reasonable causes, in which case the Sheriff may allow the same to be received on payment of such sum in name of expenses as he shall think just." . . .

In an action in the Sheriff Court the Sheriff-Substitute decerned against the defender in respect his defences were not timeously lodged. On appeal the Sheriff, after