titles in the event of a sale of the security subjects under the powers of his bond.'

"The reporter had great doubts whether he should have troubled your Lordship with any details beyond giving the form of receipt he would suggest, but as the parties expressed a desire that he should state the views on which he proceeded in adjusting the terms of the receipt, he has entered more fully into the question than was necessary, or than perhaps your Lordship may desire."

The Lord Ordinary approved of the report.

Counsel for the Pursuer—Martin. Agents—Henderson & Clark, W.S.

Counsel for the Defenders—Shaw. Agents—Rhind, Lindsay, & Wallace, W.S.

Friday, May 31.

FIRST DIVISION.

[Sheriff of Argyllshire.

ROBERTSON'S TRUSTEES *v.* GARDNER.

Right in Security—Decree of Maills and Duties—Sequestration for Rent—New Tenant.

A heritable creditor who under a decree of maills and duties had entered into possession of the lands disponed in his bond, presented a petition for the sequestration for rent of a tenant who by assignation had entered to the subject of his lease prior to the signeting of a summons of maills and duties, but who had not been called as a party to that action.

Held, in the absence of any objection by the proprietor, or of any competition for the rent in question, that the heritable creditor being duly in possession under his decree was entitled to make use of the landlord's hypothec, and sequestration *awarded.*

On 21st April 1888 an action of maills and duties was raised by Mrs Harriot Holmes or Robertson and others, trustees of the deceased R. J. Robertson, W.S., against John Gardner, quarrymaster, Ibrox, near Glasgow, Alexander Gardner, quarrymaster, Lagnaha, Argyllshire, and James Young Gardner, heritable proprietor *pro indiviso* of the lands of Auchindarroch, Argyllshire, and of Lagnaha aforesaid, as principal debtors, and also against various other persons mentioned in the summons, who were described as the tenants or occupants of the lands and subjects at Lagnaha.

The pursuers averred that they were heritable creditors upon the said lands and estate to the extent of £9550, contained in a bond and disposition in security, and that the said sum and interest from Martinmas preceding were unpaid, and they had reason to fear would not be paid.

After various procedure the Lord Ordinary (Lee), on 25th May 1888, decerned in absence against the principal debtors, the proprietors, and also against certain of the tenants, who did not appear; and thereafter, on 19th July 1888, his Lordship pronounced the following interlocutor:—"Finds it not instructed that the compearing defenders have paid the rents and lordships due at and prior to 1st May 1888, or had ceased at the date of raising this action to be liable therefor: Therefore repels the defences so far as applicable to the rents and lordships for the possession up to May 1888, and decerns against the defenders the said John Gardner, Alexander Gardner, and George Jamieson Alison junior, as trustees for the firm of J. & A. Gardner & Company, jointly and severally, and the said J. & A. Gardner & Company, to make payment of the rents, lordships, and others concluded for in terms of the conclusions of the summons, save and except the rents, lordships, and others subsequent to 1st May 1888, as to which dismisses the action as against said defenders, and decerns." And this interlocutor was on a reclaiming-note adhered to.

In January 1889 a petition was presented in the Sheriff Court of Argyllshire at Oban by Robertson's trustees, as heritable creditors in possession of the lands of Auchindarroch and Lagnaha, under the decrees in the action of maills and duties against Duncan Macgregor Gardner, quarrymaster, Lagnaha, praying for sequestration of the defenders' effects in security, and for payment of (1) £25 as rent for the half-year from 1st May 1888 to 1st November 1888; (2) £25 as half-year's rent to become due and payable at 1st May 1889, and to grant warrant to inventory and secure the whole effects subject to the pursuers' hypothec, and for warrant of sale, &c.

It was admitted that the defender was and had been since 6th April 1888 lessee of the quarry at Lagnaha, and houses connected therewith, conform to (1) minute of lease between John Gardner and others, the proprietors, and the said John Gardner and others, trustees for J. & A. Gardner & Company, and assignation thereof by the latter to him and acceptance thereof. The rents were £50 for the quarry, with an alternative lordship, £50 for the houses, and £50 for the stores. It was also admitted that the rents as at Martinmas 1889 were unpaid.

The pursuers alleged that they had a right of hypothec over the subjects, that the action of maills and duties was effectual against the defender as the successor of the tenants therein named and whose assignee he was.

The defender denied that the pursuers, as heritable creditors, were in possession of that portion of the said estates which was occupied by him as tenant, and averred that none of the decrees of maills and duties founded on by the pursuers was directed against the defender as tenant, although the pursuers were informed that he was in possession at the date when the said action was raised. The defender further alleged that the rents claimed were neither due nor resting-owing to the pursuers, who were not in a position to give him a valid discharge thereof; that the decree in the action of maills and duties was not directed against the pursuers, but against the former tenants, who had ceased to be tenants before the action of maills and duties was raised, or to have any interest in the said quarries.

The pursuers pleaded (1) that as the defender was in arrear in payment of his rent they were entitled to sequestrate his effects in security, and for payment of rent, and (2) that as their right of hypothec was in danger of being defeated, they were entitled to the decree craved.

The defender pleaded, *inter alia*—(1) That as the pursuers had not entered into possession of the subjects occupied by him either under the decree of maills and duties or otherwise, they were not entitled to pursue the action; (2) that the pursuers had not the right of hypothec they claimed.

On 26th March 1889 the Sheriff-Substitute (MACLACHLAN) pronounced the following interlocutor:—"Finds that the pursuers are heritable creditors in possession of certain lands and others, including the subjects mentioned in the petition, in virtue of decrees of maills and duties dated 25th May 1888, and 19th July 1888, and 15th January 1889: Finds that the defender is, and has been since 6th April 1888, tenant of the said subjects, conform to a minute of lease and assignation thereof in his favour dated 11th and 12th April 1888, and relative minute of acceptance dated 12th and 14th April 1888: Finds that the said decrees gave the pursuers, as heritable creditors foresaid, a right to pursue for and recover the rents of said subjects from all parties in possession of the same: Therefore decerns against the defender in terms of the conclusions of the petition, &c.

"*Note.*—This is an action of sequestration for rent raised by heritable creditors holding decrees of maills and duties which were pronounced in an action raised by them on 21st April 1888, in which they called the proprietors of the subjects as principal debtors, and the several tenants or occupants for the respective rents due by them. The action was undefended by the proprietors and certain of the tenants, and decree was pronounced against them, conform to the conclusions of the summons, but the parties who were called in respect of their occupancy of other portions of the subjects, being those referred to in the present action, defended, on the ground that before the action of maills and duties was raised they had assigned their lease to the present defender by assignation duly intimated to and approved of by the proprietors, and they pleaded that having ceased to be tenants before the action was raised, the same, so far as directed against them, was incompetent. But as they failed to shew that they had paid the rents and lordships due at and prior to 1st May 1888, or had ceased at the date of the action to be liable therefor, decree of maills and duties was pronounced against them for these rents, and as to the rents, lordships, and others subsequent to 1st May 1888, the action was dismissed as against said defenders. The present defender pleads that as there was no conclusion against him these decrees of maills and duties do not affect him though he was in possession when the action was raised, and the same cannot apply to those portions of the estate which he occupied as tenant. This appears to be a plea against the competency of the proceedings in the action of maills and duties, and cannot now be considered. In that action decree was pronounced against the proprietors, and that decree gives a right to recover and intromit with the whole rents due, so far as the security extends and is operative, as a constant title of possession against the natural possessors of the ground, and also against the proprietors or liferenters who are in the civil possession, and from whom the natural possessors derive their right—(E. iv., 1, 49). By his assignation, which was duly intimated and ratified, the defender is the tenant of and derives his right from the proprietors, against whom there is a continuing decree, and not from the previous tenants, the decree against whom was limited to the rents applicable to the period of their possession. The rents, therefore, that are due by the defender are payable directly to the pursuers, and they must be allowed the ordinary means for recovering the same. This principle was recognised in the case of *Railton* v. *Muirhead*, June 20, 1834, 12 S. 757, where a creditor holding a decree of maills and duties had allowed the debtor, who was also proprietor, to enter into possession of the subjects, but was found not entitled to bring a sequestration for rent, because he failed to make out any agreement for lease with the debtor, or that the latter had entered on the subject otherwise than as a proprietor, and a poinding of the ground is the proper remedy when the proprietor is in possession."

The defender appealed to the Court of Session, and argued—That the decree of maills and duties was not operative against him, because, in the knowledge of the pursuers, though he was a tenant at the date of the signeting of the summons, he was not called as a party to that action. Besides, the decree did not warrant sequestration with reference to the portion of the estate occupied by the defender. The decree in the action of maills and duties would not found the present proceedings, and without the decree the clause of assignation of rents contained in the bond would not warrant sequestration—*Webster*, July 13, 1780, M. 2902; *Neils* v. *Lyle*, December 1, 1863, 2 Macph. 168; *Scottish Heritable Security Company* v. *Allan, Campbell, & Company*, January 14, 1876, 3 R. 333; Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. cap. 101); Rankine on Leases, p. 324. The defender was willing to consign but not to pay, as he dreaded repetition as not being included in the decree. The respondents' title was bad as they should have set forth their assignation to rents in the bond—Bell's Prins. sec. 1243; *Railton* v. *Muirhead*, June 20, 1834, 12 Sh. 757; Rankine's Land Ownership, p. 44, instead of which they merely founded on the decree of maills and duties, which the appellant contended was bad.

Argued for the respondents—The only question of importance was, whether the pursuers had effectually ousted the landlord by entering as heritable creditors into possession of the lands in virtue of their decree of maills and duties. Their right of hypothec and to sequestrate for rent depended undoubtedly upon that. The action of maills and duties had a twofold effect, first against the landlord, and second against the tenants. By not defending the landlord did what was equivalent to assenting to the pursuers coming into his place, and it was an intimation to that effect to the tenants—Duff's Feudal Conveyancing, p. 274; Lothian, July 11, 1634, M. 14,087; *Forsyth* v. *Aird*, December 13, 1853, 16 D. 197. The defender, though not actually a party to the cause, was well aware of what was going on. Where the heritable creditor has by a decree of maills and duties displaced the landlord, he can uplift the rents of tenants not called in the process and can grant a valid discharge — Wedderburn, July 23, 1709, M. 10,399;

M'Glashan's Sheriff Court Practice, p. 405; *Budge* v. *Brown's Trustees*, July 12, 1872, 10 Macph. 958.

At advising—

LORD SHAND—In this appeal the pursuers are the trustees of the late Robert James Robertson, W.S., Edinburgh, and they libel as their title in the present action against the defender that they are heritable creditors in possession of certain lands in Argyllshire under a decree of maills and duties dated 25th May and 19th July 1888, obtained by them against the heritable proprietors and the tenants or occupants, and they produce the decree which they then obtained.

The present action is one of sequestration for rent, and it is raised by the heritable creditors in possession under their decree of maills and duties against the defender who became a tenant of the subjects by minute of lease and assignation in his favour of dates 11th and 12th April 1888.

The Sheriff has found that the procedure in the previous action (which was undefended by the proprietors and certain of the tenants) was quite regular, and he has accordingly granted the prayer of the present petition. Against this the defender has appealed upon the ground that he was not called as a party to the former action.

It is to be observed here, in the first place, that the proprietors of the lands do not in any way oppose the present proceedings, and it is obvious that they could not very well do so; and second, it may be remarked that there is no competition as to who the parties are who are entitled to these rents. In such circumstances it appears to me that no legitimate ground exists for resisting the present claim provided that the pursuers have succeeded in establishing that they are heritable creditors in possession of these lands under their decree, and this, I think, they have satisfactorily done.

If we examine the terms of the decree we find that the parties called in that action were, first, John Gardner, Alexander Gardner, and James Gardner, *pro indiviso* proprietors of the lands of Auchindarroch and Lagnaha, as principal debtors; and then the tenants on the estate, first certain farmers, and then certain quarrymasters. In that action decree was granted in absence against the proprietors, so no question arises as to them, and with regard to the tenants, it was only those who defended against whom decree was taken. They maintained that they had paid their rents, and the Lord Ordinary dealt with that defence by repelling it so far as applicable to the rents and lordships for the possession up to May 1888.

Now, the result of this decree is, that the bondholders have vindicated their rights as in the landlord's place, and the leases were ceded to them. No doubt the decree only applied up to May 1888, while the parties against whom it had been taken had before that date ceased to be tenants, but the effect of that decree was to render the tenants liable to the pursuers for the rents. It appears that the present defender became a tenant in April 1888, so that as the decree in question affected all the rents of these lands his rent was also affected thereby. Nor was it necessary that any new proceedings should be instituted in order that he might be included in and affected by what had been done.

The decree is applicable to this whole estate, and all parties interested in the rents are liable and are properly called. Seeing, then, that there is no opposition on the part of the landlord, and no competition, I think that we should adhere to the Sheriff-Substitute's interlocutor.

LORD ADAM—[*After stating the facts above narrated*]—When the action of maills and duties was raised it was, I think, very properly directed against the proprietors as principal debtors, and also against the various tenants upon the estate. The result of that action as seen by the decree was a decerniture against the defenders to make payment of the rents due up to May 1888. If the tenants at the time when the action of maills and duties is raised are properly called, then I do not think that in the event of a new tenant entering on the lands any additional proceedings are necessary with a view to making him a party to the action; besides, it is to be kept in mind that this present defender entered on his lease in April 1888, while the decree affected rents due as at May of that year. I therefore concur with the opinion expressed by Lord Shand.

LORD PRESIDENT—The summons in the action of maills and duties calls as defenders the proprietors of the lands, but it does not conclude for any decree or judgment against them, so it was a mistake to take decree against these parties in the undefended roll. The object of calling the proprietor in such a case as defender is in order to see if he has any reason to state why the heritable creditor should not enter into possession of the lands and levy the rents.

If the proprietor does not offer any objection to this being done, then it may be taken as an assent on his part to this course being followed. If the heritable creditor then calls all the tenants as defenders, and obtains a decree against them, he is entitled thereafter to enter on the lands and uplift the rents.

By the interlocutor of 19th July 1888 the pursuers obtained decree against the compearing defenders for the rents due up to May 1888. The decree was complete except in this, that as the defenders in that action had parted with their lease to the defender in the present action they could not be called upon to pay the rent due after the date of his entry.

But no arrangement entered into between these different defenders can prejudice the heritable creditor's right to levy the rents. The tenants who renounce their leases cannot of course be made responsible for the rents to become due, but the tenants who take their places become liable for their rents, and as the one set of tenants takes the place of the other no new action is necessary unless the new tenant has some special objection to urge which could not have been taken by his predecessors.

If the new tenant without any sufficient reason withholds payment of the rents, the heritable creditor can undoubtedly make use of the landlord's hypothec, for the new tenant although he may not perhaps have been personally decerned against, is yet personally responsible to the heritable creditor for the rents. Upon these grounds, therefore, I think with your Lordships that we ought, with some slight modifications, to adhere to the Sheriff-Substitute's interlocutor.

LORD MURE was absent.

The Court pronounced the following interlocutor:—

"... Vary said interlocutor [of 26th March 1889] to the effect of disallowing in the meantime the prayer of the petition, other than that portion of it which craves for warrant to sequestrate and inventory: *Quoad ultra* adhere to said interlocutor and remit the cause to the Sheriff to proceed further therewith," &c.

Counsel for the Appellant—Dundas. Agent—David Turnbull, W.S.

Counsel for the Respondents—M'Watt. Agents—Macrae, Flett, & Rennie, W.S.

Friday, May 31.

SECOND DIVISION.

EDWARDS *v.* HUTCHEON.

Reparation—Culpa—*Defective and Dangerous Machine—Threshing Mill without a Guard over the Drum.*

Held that a threshing mill without a guard over the drum is a defective and dangerous machine, and that a contractor who supplied such a machine was liable in damages for personal injuries caused thereby, especially as the occurrence took place in a neighbourhood where there had been previous similar accidents.

Jessie Helen Edwards, Rothriehill, Aberdeenshire, aged nineteen, with the consent and concurrence of her father David Edwards, farmer, Rothriehill, brought an action in the Sheriff Court at Aberdeen against William Hutcheon, traction engine proprietor, Parkhill, Newhills, for £500 as damages for injury sustained by her while going to her place as a "looser" upon a threshing machine or mill supplied by him to thresh upon her father's farm.

She averred that "the mill was defective in not having a cover over the drum to prevent accidents when the feeder is not engaged at his work. William Taylor, who was in charge of the feeding of the mill, was not in his proper place. . . . Had the drum been covered, or the said William Taylor been in the feeding-box, the accident might not have happened."

The pursuer pleaded—"(1) The pursuer having been injured in manner above libelled through the insufficient and defective machinery in use belonging to the defender, and under his charge, is entitled to compensation from the defender for said injuries."

The defender pleaded—"(1) No relevant case against defender. (2) There being no fault or negligence on the part of the defender, or of those for whom he is responsible, he should be assoilzied. (3) The risk of the plant used and of the employment being with the injured girl's employer, the action should have been directed against him, the pursuer David Edwards. (4) The plant was not defective."

A proof was allowed, from which it appeared that on 5th October 1887, the defender, who had on several previous occasions threshed for David Edwards, contracted to do the threshing on his farm. As the defender's two threshing machines, which both had guards over the drum, were engaged, he procured a "Robey" (English) threshing machine belonging to three brothers named Taylor, and sent it along with its three owners. In practice the men who come with such machines feed and work them, the farmer only supplying hands to "loose" the sheaves. When a machine has a guard it remains closed until the machine is at full speed and the "feeder" and "looser" are in their places, and it is then opened sufficiently to allow the sheaves to get down to the drum. When the operations began, William Taylor, one of the owners of the machine, was chosen to "feed," and the pursuer to act (for the first time) as a "looser." When the "loosers" were called to take their places the pursuer ascended by the ladder. William Taylor was beside the feeding-box, but not in it, and the machine was getting up speed. The pursuer slipped as she alighted on the platform, and falling across the funnel or "hopper," her foot went down through the feeding-hole into the drum, and her leg was wrenched off below the knee. Her father was present at the time. It was proved that there was a practice of guarding the drums of such machines. The defender admitted that his mills were provided with drums, and that he considered this necessary for safety.

The Sheriff-Substitute (DOVE WILSON) on 12th July 1888 pronounced the following interlocutor:—"Finds that the female pursuer was injured through the fault of the defender, or those for whom he was responsible, in placing her at work upon a dangerous and defective machine supplied by him for the purpose: Finds that the defender is liable in damages: Assesses the same at the sum of £150: Finds the defender liable in expenses, &c.

"*Note.*—The female pursuer was severely injured while working at a portable threshing machine. Four possible causes for the accident require consideration. It may have been due to the female pursuer's own inexperience, to a defect in the machine, to carelessness on the part of those in charge of it, or to carelessness on the female pursuer's own part. I do not think that there is any evidence of carelessness on the part of the female pursuer. Some of the witnesses speak to the girl having gone hastily upon the machine, but if there was any haste upon her part it was more likely due to her being young, and possibly nervous, rather than to her having been careless. I have considerable doubt whether the female pursuer would be entitled to found upon the negligence of those in charge of the machine. They were fellow-servants, engaged in the same employment, and it does not appear sufficiently that the female pursuer was at the time under their orders. She seems then to have been under the orders of her father As against the defender, the inexperience of the female pursuer forms no ground of action. She was not employed by the defender, but by her own father, and although he was much to blame in putting a young and untried girl to such work, no ground of complaint upon this score can be made against the owner of the machine or the person answerable for it. Neither, however, does the girl's inexperience absolve the defender. If the accident was due partly to the girl's in-