person claiming this should have exhausted every means of getting justice in the court below before coming here. I see no reason to doubt that in this case the defender (the pursuer here) was entitled to appear at the hearing of the case by his wife, and it is an undoubted fact that the Sheriff proceeded on the footing that the wife was representing her husband the defender. He pronounced a judgment which bears to be a judgment *in foro*. It is said that it is a judgment which he ought not to have pronounced, that he ought to have pronounced a decree in absence, because the wife had no authority to represent and did not represent her husband. I think the Sheriff was entitled to assume that the defender was properly represented, and that the decree must stand unless the defender follows one or other of the two courses open to him—by appeal or by having the case sisted. These are the two things he might have elected, but from the date at which the judgment was pronounced the defender (the present pursuer) did nothing at all. He neither attempted to set up a contention in the Court below that it was a decree in absence, nor a contention that it was a decree *in foro*. Having taken no steps, he asks us to allow him to proceed in a reduction on the ground that he gave his wife no authority to represent him. That is not a ground on which we shall proceed to reduce a decree of the Sheriff. He is not in circumstances in which he can come forward to ask the remedy he seeks. I do not require to express an opinion whether reduction would have been competent if the defender had taken the proper steps to obtain redress and failed. I think we should recal the Lord Ordinary's judgment.

LORD YOUNG—I am substantially of the same opinion. I am not going to decide that in no case is a decree pronounced under the statute to be reduced. I think cases may arise in which reduction may be competent, not reviewing the Sheriff's judgment on the merits, but merely setting aside his decree. But it is not necessary to enter into that matter here. This is a clear case. The pursuer here had the debts recovery summons served upon him regularly, and his wife appeared and stated some case for him. He knew that, and knew that decree was pronounced, for the next day proceedings by arrestment took place on the decree. If there was anything he had to complain of it was open to him to have taken the proceedings which the statute allowed. I think the course he did take is not to be countenanced. I desire to decide that without deciding that cases may not arise in which reduction of the Sheriff's decree may be properly sought.

LORD TRAYNER—I take the case on the pursuer's own statement of it. Having in the Debts Recovery Court received the summons at the present defender's instance, he says that he instructed his wife to obtain the services of a law-agent to state the defence. He must therefore have told her what the defence was. It appears that she thought that she could state it herself, and that she did so. I think it is a mistake to suppose that section 4 of the Debts Recovery Act prevents or prohibits a defender being represented in that Court by his wife or other member of his family. The Sheriff, after hearing the wife, gave a decree which I think we must take to be a decree *in foro*. I take it as such because it is so entered in the Debts Recovery Book, in which the Sheriff Clerk is required by the Act to enter the fact as to whether the defender is represented or not. Now, the Act excludes reduction of a decree *in foro*. If the pursuer was not represented, and the decree pronounced against him was really one in absence, his course was to apply for a sist, which is the proper remedy in such a case. But he took no step at all except the incompetent one of raising this reduction I think the Lord Ordinary's judgment should be recalled.

LORD MONCREIFF—I concur. *Ex facie* the proceedings are regular. Now, there may be cases in which proceedings *ex facie* regular may be reduced notwithstanding the finality clause of the Debts Recovery Act. But the pursuer's averment that his wife appeared for him in Court without authority, she having only authority to employ a law-agent, is insufficient to infer reduction of the decree. It certainly is so in view of the finality clause.

The Court recalled the Lord Ordinary's interlocutor, sustained the preliminary defences, and dismissed the action in so far as regards the reductive conclusions of the summons.

Counsel for the Defender and Reclaimer—Campbell, Q.C.—W. Thomson. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for the Pursuer and Respondent—Thomson—Munro. Agents—St Clair Swanson & Manson, W.S.

Wednesday, November 22.

SECOND DIVISION.

TRAIN *v.* TRAIN'S TRUSTEES.

Succession — Foreign — Heritable Bond — Husband and Wife—Law Applicable to Succession to Heritable Bonds in Question between Husband and Wife.

A domiciled Irishman died intestate and without issue, survived by his widow. His estate consisted of, *inter alia*, sums contained in bonds and dispositions in security over heritable property in Scotland. By the law of Ireland the widow was one of his heirs *in mobilibus*, and entitled as such to a share of his moveable estate. *Held* that the widow was entitled to terce upon the bonds, and also to a share as one of her husband's heirs *in mobilibus* in the balance of the bonds after deduction of terce.

The parties to this special case were (1) and (2) Mrs Elizabeth Train, widow of the late Thomas Campbell Train, as administratrix of his estate and as an individual, and (3) the Rev. John Train, brother of and next-of-kin to the said T. C. Train, and (4) the trustees of the late Thomas Train, father of T. C. Train and the Rev. J. Train.

Thomas Campbell Train died in 1897 intestate and without issue. He was survived by his widow. There was no marriage-contract. At the time of his death he was domiciled in Ireland. His estate consisted, *inter alia*, of sums contained in two bonds and dispositions in security in ordinary form over heritable property situated in Scotland. It was agreed that by the law of Ireland his widow was entitled to one-half of the residue of his moveable estate. "(Stat. 10) As regards the said two bonds and dispositions in security, the second party maintains that she is entitled to her terce of the deceased's share of the said bonds and dispositions in security, and in addition to one-half of the deceased's share of the said bonds under burden of her terce. She maintains that the law of Ireland, as the law of her husband's domicile, is the law which falls to be applied in determining the succession to said bonds and dispositions in security as moveable estate, subject to her terce as aforesaid. She further maintains that by the law of Scotland she is entitled to the rights claimed by her as aforesaid. The party of the third part, who is the only brother, and by the law of Scotland sole next-of-kin and heir of the deceased Thomas Campbell Train, maintains that the succession to the said heritable bonds is regulated and ought to be determined by the law of Scotland, and that by the law of Scotland the second party is entitled to terce out of said bonds, and to that only, and that the said bonds belong *quoad ultra* to the third party."

By the Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. c. 101) it is enacted, sec. 117, that after 31st December 1868 "No heritable security granted or obtained either before or after that date shall, in whatever terms the same may be conceived, except in the cases hereinafter provided, be heritable as regards the succession of the creditor in such security, and the same, except as hereinafter provided, shall be moveable as regards the succession of such creditor, and shall belong after the death of such creditor to his executors or representatives *in mobilibus* in the same manner and to the same effect as such security would, under the law and practice now in force, have belonged to the heirs of such creditor, . . . provided that all heritable securities shall continue and shall be heritable *quoad fiscum*, and as regards all rights of courtesy and terce competent to the husband or wife of any such creditor, and that no heritable security, whether granted before or after marriage, shall to any extent pertain to the husband *jure mariti*, where the same is or shall be conceived in favour of the wife, or to the wife *jure relictæ*, where the same is or shall be conceived in favour of the husband, unless the husband or relict has or shall have right and interest therein otherwise: Declaring nevertheless that this provision shall in no way prejudice the rights and interests of wife or husband, or of the creditors of either, in or to the byegone interest and annual rents due under any such heritable security, and *in bonis* of the husband and wife respectively prior to his or her death; and further, provided that where legitim is claimed on the death of the creditor, no heritable security shall to any extent be held to be part of the creditor's moveable estate in computing the amount of the legitim."

The opinion of the Court was asked upon, *inter alia*, the following question:—"Is the second party entitled to terce out of her husband's share of the said heritable securities, and in addition to one half of said share under burden of said terce?"

Argued for the second party—There is no doubt the widow is entitled to terce out of the sums in the bonds. They are Scots heritage, except so far as their nature is altered by the Act of 1868. Sec. 17 of the Titles to Land Consolidation Act provides for the widow's right to terce. The bonds remain heritable till the claim to terce is satisfied. After satisfying the terce they become moveable. This is confirmed by sec. 119 of the Act. Succession to moveable estate is regulated by the law of the deceased's domicile, *i.e.*, in this case Ireland. By the law of Ireland the widow is one of the heirs *in mobilibus*. She is therefore entitled to share in her husband's moveable estate, which includes the balance of the sums in the bonds. There is no authority on the point.

Argued for the third party—Heritable securities are heritable property, and as such regulated by the law of Scotland. The widow has a claim upon it as upon all heritage, but she is put to an election whether she will have it treated as heritable or moveable. If she claims her right of succession to heritage, she has no claim on the same subject as moveable property. This is shown by the Act excluding the widow's *jus relictæ* for the sums in the bonds. It could never be the intention of section 117 of the Act to give the widow two claims of succession—one as to heritage and another as to moveable property. The law is not altered further than to attain the object of the statute—*Frake* v. *Carbery*, 1873, L.R., 16 Eq. 461; *Duncan* v. *Lawson*, 1889, 41 Ch. D. 394. "Representatives *in mobilibus*" in the statute means representatives *in mobilibus* according to the law of Scotland, which does not include the widow.

LORD JUSTICE-CLERK—It is admitted that the widow is entitled to terce under the reservation in favour of widows in the statute, and the first question in the case is, whether she is entitled also to a part of the balance of the sums in the heritable bonds on the ground that they are moveable estate, that her husband, whose estate it was, died domiciled in Ireland, and that by the law of Ireland she, as his widow, is entitled to share in that moveable estate to the extent of one-half. I can see no ground

for saying that because she is entitled to terce out of securities on Scots heritage, she is not entitled to share in what is moveable, and in which she is entitled to share by the law of the domicile of her deceased husband.

LORD YOUNG—I am substantially of the same opinion. I think it is too clear to be reasonably disputed that the succession to the moveable estate must be governed by the law of Ireland, where the deceased was domiciled at the time of his death. We are told that by the law of that country the deceased's widow is heir in moveables to the extent of one-half. I think that is so with reference to the bonds—that with respect to such of these sums contained in the bonds as are moveable estate she is entitled to one-half. But then part is not moveable, to this extent, that now, as before 1868, the widow is entitled to her terce. The law of Scotland governs Scots heritage, and the law of Scotland gives the widow terce out of bonds secured on the land in Scotland. She is entitled to that according to the law of Scotland, and she is entitled to her moveable estate according to the law of Ireland.

LORD TRAYNER—I agree. The heritable bonds in which Thomas Train was creditor are moveable as to his succession, but remain heritable in a question as to terce. The second party, his widow, is entitled to terce out of heritable bonds according to the law of Scotland, and that law must regulate the rights of parties in heritage in Scotland. But the balance of the creditor's right in the bonds is moveable property. The law of domicile must determine who is entitled to that. By that law (as it appears here, the law of Ireland) the widow is an heir in moveables, and is entitled to half the moveable property, which includes the balance on these bonds after deducting terce.

LORD MONCREIFF—I am of the same opinion. I think the leading purpose of the enactments in secs. 117 and 119 of the Act is to provide that after the date of the Act sums contained in heritable bonds are to be treated as moveable for the purpose of succession. It is declared that the sum in the bond shall belong to the heirs *in mobilibus* in the same manner and to the same effect as such security would, under the law and practice now in force, have belonged to the heirs of the creditor. If the clause stopped there the whole sums would have been divided according to the law of Ireland, but then the clause goes on to provide that such enactment shall not affect terce. That is a provision in favour of the surviving widow, and there is nothing else to exclude any right she may have as one of the heirs *in mobilibus* of her husband. Therefore I think that, though it seems as if she was gaining an undue advantage, she is only getting what is actually given to her by the enactment.

The Court answered the first question in the affirmative.

Counsel for the First Parties—Campbell, Q.C.—Cullen. Agent—F. J. Martin, W.S.

Counsel for Third and Fourth Parties—Sol.-Gen. Dickson, Q.C.—Younger. Agents—J. W. & J. Mackenzie, W.S.

Thursday, November 23.

FIRST DIVISION

(Without the Lord President).

[Sheriff of Renfrew.

ARMOUR *v.* M'KIMMIE'S TRUSTEES.

Landlord and Tenant — House Becoming Uninhabitable—Right of Tenant to Leave —Duty of Tenant if Defect Remediable— Lease.

If a house becomes uninhabitable the tenant is entitled to treat the contract of lease as rescinded, and to remove. If, however, the defect is one which could be remedied easily, and in a short time, the tenant is bound to give the landlord an opportunity of applying the remedy, and to await the event if the landlord proceeds to do so. Evidence on which *held* that a house had become uninhabitable, and that the landlord had failed to undertake such remedial measures as would lay on the tenant the obligation to continue the lease.

Thomas W. Armour, ship-chandler, became, in 1895, tenant of a house at No. 21 Queen's Crescent, Cathcart, belonging to the trustees of the late Mrs William M'Kimmie. He renewed his tenancy from year to year, and finally took the house from Whitsunday 1898 to Whitsunday 1899 at a rent of £28.

On 17th October 1898 Armour removed from the house. Prior to this the following letters had passed between him and the factor for the landlords:—

"21 *Queen's Crescent, Cathcart,*
"Mr Hitchcock, 16*th Sept.* 1898.
"c/ Mr D. Munro, Hope St.

"Sir—Re-letting house at above address—Not having heard from you if you have succeeded or not, and as the insanitary state of the house is getting worse, and you don't seem to be taking any steps to make it better, kindly grant me a letter that I can leave the house as soon before November term as possible, and if your intentions are to try and make the house right to live in, this will give you an opportunity and time for so doing—before an incoming tenant. I am quite willing to pay the rent and taxes up to November term, but after that I decline to do so.—Yours truly

"THOS. W. ARMOUR."

"39 *Hope Street, Glasgow,* 19*th Sept.* 1898.
"Thos. W. Armour, Esq.,
"21 Queen's Crescent, Cathcart.

"Dear Sir—Yours of the 16th inst., addressed to Mr Hitchcock, duly received. I have not yet succeeded in sub-letting your house, but am doing the best I can. I would suggest the house should be adver-