Friday, February 4.

FIRST DIVISION.

MUIR *v.* M'INTYRE.

Lease—Landlord and Tenant—Damnum fatale—*Fire—Abatement of Rent—Compensation.*

Where a tenant is deprived of part of the beneficial enjoyment of the subject let, whether through fault of the landlord or not, the full rent is not due, and a claim for abatement arises, which may receive effect in defence to an action for the rent.

Therefore, where a farm-steading was damaged by fire, and the landlord sued for the full rent, the Court found the tenant entitled to set off against his claim a demand for deduction in respect of his being deprived of part of the subject contracted for, *holding* that such demand was not compensating a liquid debt by an illiquid one, but a plea that the rent was not due.

By lease dated 14th and 27th April 1883 William Campbell Muir of Inistrynich, Argyllshire, let the farm of Hayfield to John, Hugh, and Donald M'Intyre for a term of fourteen years at the yearly rent of £300, payable by equal portions at two terms in the year, Whitsunday and Martinmas, beginning the first payment thereof at Martinmas 1883. The farm was mainly a grass farm but contained also arable land, and the tenants entered into possession at the term of Whitsunday 1883. They stocked the farm with sheep and Highland cattle. It was disputed in this action whether it was sufficiently stocked or not.

The full rent was paid down to Martinmas 1885, except a sum of £25, 7s. 6d.

On the night of the 25th October 1885 a fire occurred at the farm-steading whereby the office-houses were entirely or in great part destroyed.

In January 1886 the landlord presented a petition in the Sheriff Court of Argyllshire at Inverary, in which he prayed the Court—(First) To remit to a man of skill to inspect the farm with a view to satisfying the Court whether properly stocked and plenished, and to report; and to ordain the defenders to stock and plenish the farm in a sufficient and proper manner, and that within a certain short space to be fixed by the Court, and to the satisfaction of the Court, or at the sight of such person as the Court should appoint; or, alternatively, and failing the defenders obtempering said order, to grant decree in favour of the pursuer against the defenders, jointly and severally, for the sum of £500 sterling as damages for said failure; (Second) "To decern and ordain the said defenders, all jointly and severally, to pay to the pursuer the sum of £25, 7s. 6d. sterling, being the balance of the half-year's rent for said farm of Hayfield due by the defenders at the term of Martinmas last;" and (third) to grant decree against the defenders, or one or more of them, for £25 as damages occasioned by their having destroyed a number of trees on the estate.

The defenders averred that their stock on the farm afforded the landlord an ample security for his rent. They averred further that their intention had been to breed a stock of Highland cattle; that the destruction of the out-buildings by fire had rendered this impossible, and they had been obliged to sell part of their stock; that the landlord had not offered to rebuild, and that the destruction of the buildings being a *damnum fatale* which would entail heavy loss upon them, they had intimated that they held the contract as at an end as at Whitsunday 1886; that the sum already paid by them as rent more than covered the rent to which the pursuer was entitled in the altered circumstances, and they reserved their claim for repayment of the excess. They denied the alleged damage to trees.

The defenders pleaded, *inter alia*—"(3) The defenders having been deprived to a material extent of the use of the subject contracted for, they are entitled to terminate the lease as at Whitsunday first [1886], and they are also entitled to a deduction from the current year's rent of a larger amount than the arrears now sued for."

On April 16th 1886 the Sheriff-Substitute (CAMPION) made a remit to a person of skill to inspect the farm, and to report whether it was properly stocked and plenished.

On July 5th 1886 the Sheriff-Substitute granted decree against the defender for £25, 7s. 6d., being the balance of the half-year's rent due at Martinmas 1885, and allowed a proof of Cond. 6, being pursuer's averment as to the alleged damage to the pursuers' trees.

The defenders appealed, and on 28th September 1886 the Sheriff affirmed the interlocutor appealed against, "reserving to the defenders any claim for abatement of rent which may be competent to them on the ground of their not having the full use of the premises."

"*Note.*— . . . The main question arises on the second conclusion of the action, which resolves into a plea of compensation or set-off for damage done by a fire by which a portion of the farm-buildings was destroyed. That claim, in the form in which it is presented, is disputed by the pursuer, and it appears to the Sheriff that it is so disputed on good grounds in law. Few legal principles are more clearly established than this, that a liquid demand for rent cannot be met by an illiquid claim for damages. It is only to 'debts *de liquido ad liquidum* instantly verified be writ or aith of the partie,' that the old Scots Act 1592 c. 141 (Act Parl. 1592, c. 61, vol. iii. p. 573), gives the benefit of being admitted by way of exception, nor can the maxim apply that 'things which can at once be rendered liquid are held as liquid,' for the existence as well as the amount of the claim is contested by the landlord—*Drybrough* v. *Drybrough*, May 21, 1874, 1 R. 909. This and the kindred subject of retention of rent are treated off by Mr Hunter on Landlord and Tenant, vol. i. p. 281, *et seq.*

"Of course it may be that the defenders have a claim for abatement for not having the full use of the premises. As remarked by Lord Redesdale in *Bayne* v. *Walker*, 1815, 3 Dow 233—'The justice of the matter amounts to no more than this, that the tenant should have an allowance equal to the diminution in the value of the subject by the loss of the house during the term.' But this loss must in the opinion of the Sheriff be constituted in the usual way."

The defenders appealed, and argued — The cases cited by the Sheriff, *i.e.*, *Bayne* v. *Walker*, 1815, 3 Dow 233; *Drybrough* v. *Drybrough*, May

21, 1874, 1 R. 909, were really not in point. Here the tenants' claim was not for damages in respect of the landlord's failure to keep the premises in repair. It was for abatement of rent in respect of a destruction of a material part of the subject leased. Whenever the tenant was deprived of a material part of the subject leased he was entitled to an abatement—*Guthrie* v. *Shearer*, Nov. 13, 1873, 1 R. 181; *The Kilmarnock Gas-Light Company* v. *Smith*, Nov. 9, 1872, 11 Macph. 58; *Lindsay* v. *Home*, June 13, 1612, M. 10,120; *Hamilton*, Jan. 2, 1667, M. 10,121; Hunter on Landlord and Tenant, ii. 453. The most convenient way of constituting the claim was in the present action—*Critchley* v. *Campbell*, Feb. 1, 1884, 11 R. 475. Further, the tenants were entitled to abandon at a reasonable time; what would entitle a tenant to betake himself to that course was always a question of degree—*Allan* v. *Markland*, Dec. 21, 1882, 10 R. 383; *Davie* v. *Stark*, July 18, 1876; *Duff* v. *Fleming*, 1870, 8 Macph. 769. Abandonment in a Highland farm was quite a different matter from the abandonment of a shop. It must be done with as little loss as possible in either case. In the present case abandonment in midwinter would entail almost absolute loss.

The pursuer argued—This was just a case like *Drybrough* v. *Drybrough*, *supra*, in which the liquid rent must be paid—Hunter on Landlord and Tenant, ii. 280, *et seq.*; *Dun* v. *Craig*, 1824, 3 S. 274. But even were the tenants here entitled to abandon he would be liable in rent up to the date of abandonment, and as he postponed his abandonment till Whitsunday he must be liable up to that date. There was no case in which a tenant remained in possession of his farm and was also allowed to abandon.

At advising—

Lord President—The prayer of this petition consists of three parts—1st, to have the farm inspected in order to satisfy the Court whether it is sufficiently stocked, and, on a report being given in, for decree that it be sufficiently stocked; 2d, that decree should be granted for £25, 7s. 6d., as the balance of the half-year's rent due at Martinmas last; and 3d, that certain damages should be awarded in respect of the destruction of trees.

The first conclusion has been dealt with, a remit having been made to a man of skill, which is still current. Regarding the two other parts of the prayer, the Sheriff-Substitute's judgment is that the pursuer is entitled to the balance of the half-year's rent, and he allowed the pursuer "a proof of the averments in article 6 of the condescendence, and to the defenders a conjunct probation," the 6th article referring to the third part of the prayer of the petition—the question about the damage for destruction of trees. This judgment the Sheriff affirmed, and the appeal has been brought against that part of the interlocutor of the Sheriff-Substitute and the Sheriff which decerns for the balance of rent. The tenant resists this demand, on the ground that on 26th October 1885 a fire took place which had the effect of destroying nearly all the accommodation that the farm had for cattle and horses. As the tenant explains, the stock on the farm consists of cattle of a particular breed, and he avers that he has suffered very great loss by reason of the fire, which has made the farm absolutely destitute of accommodation for these animals. The landlord did not offer to rebuild, and the tenant claimed an abatement. The tenant has paid the whole rent with the exception of a small sum. The Sheriff says that this demand of the tenant is in effect a plea in compensation, and that as the amount of damages is illiquid, it cannot be pleaded against the rent, which is a liquid claim. If I agreed with the Sheriff that this was a plea of compensation, I should hold with him. But I do not agree with him. I think it is a plea that the rent is not due, and if so, that is a direct answer to the demand, for if the rent is not due the landlord cannot recover it. And it is not due if the tenant is entitled to abatement. The Sheriff has treated the case upon the technical ground of compensation, and the landlord contended that no abatement is due, because that is not the proper remedy, the law only giving to the tenant a claim for damages. If the landlord's view is well-founded the claim would require to be constituted, and until then could not be pleaded. But I think it is quite settled that when the tenant, without any fault of his own, loses part of the beneficial enjoyment of the subject let either by the fault of his landlord or through unforeseen calamity, a claim for abatement may arise. Thus in the case of *Francis Hamilton*, 1667, M. 10,121, the landlord of an urban tenement neglected to repair the roof, and the rent was abated in so far as the tenant was damnified. In *Deans* v. *Abercromby*, 1681, M. 10,122, a tenement of houses consisting of flats let to different tenants had been unroofed by the proprietor of the uppermost flat. The tenant of a lower storey claimed abatement from his landlord on the ground of damage done to his plenishing and stock-in-trade, and he was found entitled to abatement from his landlord although the latter was not the party in fault. Various other cases are collected in the Dictionary, and we now come down to the case of *Factor on Sharp's Subjects* v. *Lord Monboddo*, July 3, 1778, where there is this very instructive record—"Although the tenant is allowed an abatement of rent where any part of the subject perishes by unforeseen accident, the Lords found that a tenant who had merely the use of a well was not on account of its failure entitled to any deductions." There the judgment was against the tenant. But at the same time the doctrine was distinctly recognised that the tenant is entitled to abatement when any part of the subject is withheld from him.

In more recent times, in the case of *Yeaman* v. *Gilruth*, June 27, 1792, Hume, 783, an abatement was obtained in consequence of short measure in the land leased, and again in *Brown* v. *Brown*, 1826, 4 S. 489, where the landlord had taken a small part of the farm and given it to road trustees for the purpose of making a road, he was held bound to allow a deduction. The principle is this, that where the beneficial enjoyment is lost to the tenant by reason of something which occurred not through his own fault, he is entitled to an abatement, *i.e.*, to a certain extent or amount he ceases to be debtor to his landlord. In the present case I hold, first, that the tenant has shown good ground for abatement, and secondly, that the plea can competently be stated as a defence against the pursuers' demand. As regards the amount, that is perhaps a matter more for the parties to adjust.

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