ant to make meliorations on his farm, that reduction had not been given effect to in a question with a singular successor—*Turner* v. *Nicolson*, March 6, 1835, 13 S. 633; *Bruce* v. *M'Leod*, July 8, 1822, 1 Shaw's App. 213; Ersk. Inst. ii. 6, 29.

At advising—

LORD JUSTICE-CLERK—The case must be taken on the footing that the lease in question here was granted by Slater to Strains in September 1889. In May 1891 he granted this document—"This is to certify that Mr Strains gets five pounds reduction per annum after this date from his rent during expiry of lease." It is not disputed that if that document was part of the contract of lease at the time of the sale of the property to Page, that Page is bound by it, and he is not entitled to have the larger rent as originally stipulated for.

It was said that this latter part of the arrangement was not communicated to Page. That may be so, but that is a matter entirely between him and the seller of the property. The tenant has no responsibility for, and is not liable for, what the seller may have done or not done in his transaction with the buyer. In point of fact, under this arrangement the tenant had paid rent at the reduced rent.

Now, the question is whether the lease between Slater and Strains was or was not, at the date of the sale to Page, a lease for the subject at a rent of £45 per annum. I hold that it was. Originally the bargain was for a rent of £50, but it is contended that by a special bargain the rent was to be £45, and that Strains was holding the subject at a rent of £45. If that be so, then there is an end of the question. The pursuer cannot be in a better position than Slater was at the time he made the bargain and sold the property.

Certain cases were quoted to us, but I do not think they affect the question. They were cases in which the landlord allowed the tenant to retain part of the rent to make improvements upon the subject. These were held by the Court to be extrinsic bargains, outside the lease, and not binding upon the singular successors. But this case is one of stipulated rent only, and these cases have no bearing upon it.

LORD RUTHERFURD CLARK—I am of the same opinion, and I think the case to be quite clear. Beyond doubt, at the time when the pursuer bought the property, the tenant was possessing under the original lease as modified by the later writing. This is a sufficient title, and being clothed with possession it is good against a singular successor.

But we may dispose of the case on a simpler ground. The liquidation is used for the rent due under the original lease. It is plain that that rent is not due; for it was reduced by the subsequent writing. Whatever question may be raised as to his right to possess against a singular successor, the tenant cannot be liable for more rent than he has agreed to pay. There is no existing contract under which the rent claimed by the pursuer is due.

LORD TRAYNER—It is now conceded, and I think quite properly conceded, that the finding in fact by the Sheriff-Substitute is wrong. It must therefore be taken as the fact that at the time of the sale to the pursuer the defender held the subjects as tenant at the rent of £45. The lease, as originally expressed, set forth the rent at £50, but this was afterwards modified in a writing, under the hand of Slater, then the landlord, to the extent of £5 per annum. The lease accordingly on which the appellant held the property at the time of the sale was a lease the rent in which was £45. That is the limit of the tenant's liability, and the limit of the landlord's right.

The Court pronounced this interlocutor:—

"Recal the interlocutor appealed against: Find in fact that William Slater, the defender's former landlord, agreed to reduce the rent payable under the lease by £5 a-year from Whitsunday 1891: Find in law that said agreement is binding on the pursuer: Therefore dismiss the petition, and decern," &c.

Counsel for Appellant — M'Kechnie — Baxter. Agent—Donald Macpherson, L.A.

Counsel for Respondent — G. Stewart. Agents—Irons, Roberts, & Company, S.S.C.

Saturday, November 12.

FIRST DIVISION.

[Sheriff of Lanarkshire.

BRAND *v.* KENT.

Recal of Arrestments—Title to Sue.

A creditor, on the dependence of an action against his debtor, arrested the rents of certain houses in the hands of the debtor's tenants. A third party, alleging that he held an *ex facie* absolute disposition from the debtor to the subjects whose rents were arrested, presented a petition for recal of the arrestments used. Petition *dismissed*, on the ground that the petitioner had no title to sue.

James Kent, contractor, Coatbridge, on the dependence of an action raised by him in the Sheriff Court at Airdrie on 25th April 1892 against Alexander Gillon, house proprietor, Coatbridge, used arrestments in the hands of certain persons so as to attach the rents due by them to the said Alexander Gillon.

In May 1892 John Brand, coalmaster, Uddingston, presented a petition to the Sheriff Court at Airdrie, in which he called Kent as defender, to have these arrestments loosed, on the ground that the houses to which the rents applied belonged to him by virtue of an absolute disposition granted in his favour by Alexander Gillon dated 20th June and recorded 21st December 1891.

The pursuer pleaded—"(1) The pursuer being heritably vested and seised in the said subjects by disposition containing assignation to rents duly recorded, is legally entitled to the said arrested rents—*Scottish Heritable Security Company* v. *Allan Campbell & Company*, January 14, 1876. (2) As the arrestments complained of prevent the said tenants from paying their rents to the pursuer, who is in right thereof, the same should be recalled, and the defender found liable in expenses."

The defender pleaded—"(1) This present application is incompetent, and should be dismissed. (2) No title to sue."

Upon 16th July 1892 the Sheriff-Substitute (MAIR) pronounced the following interlocutor:— . . . "Finds in law that the pursuer, being heritably vested and seised in the said subjects by the disposition before referred to, containing assignation to rents, is entitled to the said arrested rents, and that he has a title to sue for the recal of the said arrestments: . . . Therefore recals the arrestments in terms of the prayer of the petition: Finds that the rents due and payable by the parties respectively named in the petition are due and payable by them to the pursuer, &c.

"*Note.*—It was pleaded for the defender that the petition for the recal of the arrestments was incompetent, being at the instance not of the party against whom the arrestments were used, but of a third party, and that the proper *forum* to deal with such a petition was the Court of Session. I cannot give effect to this plea, (1st) because the arrestments were used on the dependence of an action in the Sheriff Court; and (2nd) because, being so used, the Sheriff has, in my opinion, jurisdiction to deal with the arrested funds in an application at the instance of any party claiming right to them.

"On the merits of the petition for the recal of the arrestments I entertain no doubt. The pursuer's title to the rents arrested speaks for itself. The disposition in favour of the pursuer is absolute, and contains an assignation to the rents. That disposition was duly recorded in the register of sasines, and the registration of the disposition operated as a public intimation, and completed the pursuer's title to the properties and rents. It is said, however, that the disposition was granted in security merely, and that the radical right to the properties remained in Mr Gillon, the disponer. Assuming that it was, the right to uplift the rents was nevertheless in the pursuer, the disponee. These rents belong to the pursuer in virtue of the disposition, and it is, in my opinion, *jus tertii* of the defender to attempt to set it aside *ope exceptionis* in the present action." . . .

The defender appealed to the Court of Session, and argued—1. The petitioner had no title to sue. If the subjects were his, their rents did not fall under the arrestments used in the hands of Gillon's tenants. 2. The Sheriff had no power to entertain a petition for the recal of arrestments unless presented by the common debtor—Personal Diligence (Scotland) Act 1838 (1 and 2 Vict. c. 114), sec. 21. 3. This was really an attempt under a petition for recal to try the validity of the arrestments, which was incompetent—*Vincent* v. *Chalmers & Company's Trustee*, November 2, 1877, 5 R. 43.

Argued for the respondent—1. He had a real interest, as the tenants might not feel safe to pay to him standing the arrestments. 2. The 21st section of the Personal Diligence Act did not limit the right of applying for recal of arrestments to the common debtor. It was only right that anyone aggrieved should present such a petition. 3. The case of *Vincent* applied where a proof was necessary, but here the petitioner's title was too clear to admit of question. His absolute disposition gave him a right to the subjects, whose rents were arrested, against the whole world—*cf. Scottish Heritable Security Company* v. *Allan Campbell & Company*, January 14, 1876, 3 R. 333.

At advising—

LORD PRESIDENT—The arrestments here sought to be recalled were arrestments used upon the dependence of an action brought by Kent against Gillon, and it is important to note the effect of these arrestments, which is clear upon the face of the execution. They arrest in the hands of his tenants all sums due to Gillon.

Now, the petitioner in this case—Brand—comes forward to have these arrestments recalled on this curious ground, that the rents belong to him and not to Gillon. If that is so, then upon his own averments the arrestments can do him no harm. They do not arrest sums due to him.

It appears to me that a petition for recal of arrestments is misplaced when laid on such a ground as is here stated. If the arrestee in whose hands the arrestment has been used regards himself in danger in paying his rent to the petitioner here, he has his remedy; but the petitioner, a third party, who asserts that the funds arrested are not the funds of the defender in the action, on whose dependence the arrestments were used, but his funds, has no title to present a petition for their recal. I am of opinion this petition should be dismissed.

LORD ADAM—As I understand the case, an action was raised at the instance of Kent against a man named Gillon, and on the dependence of that action arrestments were used in the hands of certain persons interpelling them from paying their rents to Gillon, to whom their houses belonged. Now, we have a petition for the recal of these arrestments at the instance of a third party—Brand—to loose these arrestments affecting sums due by the arrestees to Gillon, on the ground that these sums belong not to Gillon but to him.

Accordingly this petition, which professes to be for the recal of arrestments, really asks the Sheriff to find that the rents of certain houses belong to the petitioner. That is, in the absence of Gillon we are to recal arrestments used in the hands of his debtors, not because they were improperly used, but because there

is a dispute as to whom the rents of the houses belong.

It may be that Brand is the true proprietor. If so, he can raise an action against his tenants for the payment of his rents, and if they think they are not in safety to pay him, they can raise a multiplepoinding. But however it is tried, the question of right to the rents cannot be tried in such a petition as the one here.

LORD KINNEAR—On the face of the proceedings it is clear that the respondent here—the petitioner in the Sheriff Court—has no title or interest to complain of the arrestments used. Nothing was thereby done but to prohibit certain persons owing money to Gillon from paying it to him during the dependence of an action against him.

Here a third party comes and complains who has no interest in the matter at all. It is said the arrestments were intended to affect the rents of subjects belonging to him. But the arresting creditor did not arrest money due to him but only to Gillon. So, under the form of determining whether the arrestments were good or not, the Sheriff has gone on to determine the question of right, with the common debtor not before him.

It is manifestly not possible to decide the question of right in a process to which Gillon is not a party; it would not be *res judicata* against him, and would decide nothing. If it is impossible to try the question of right in this process, is there any ground on which the petitioner can ask to have these arrestments recalled?

If the moneys arrested belong to the defender in the original action, the arrestments are good, and ought not to be recalled. If they do not, they in no way affect the petitioner, and there is no need to recal them. The question of the recal of arrestments always proceeds upon the assumption that they have been well laid on.

The notion of using a process of recal of arrestments to determine a question of right between the common debtor and some third party seems to me entirely out of the question. I agree in thinking this petition should be dismissed, leaving it to the petitioner to have his rights determined in some competent process.

LORD M'LAREN was absent.

The Court sustained the appeal and dismissed the petition.

Counsel for the Pursuer and Respondent—Young—Gunn. Agent—Robert Stewart, S.S.C.

Counsel for the Defender and Appellant—Dickson—James Reid. Agents—Macpherson & Mackay, W.S.

Wednesday, November 16.

SECOND DIVISION.

[Lord Wellwood, Ordinary.

CRELLIN *v.* LATTA.

Succession — Legitim — Election — Claim to Legitim not Renounced by Provisions of Marriage-Contract.

One of the parties to an antenuptial contract of marriage conveyed to trustees certain funds to which "she will succeed in and through the settlements of her father, particularly a sum of £4000, or such other sum as she may be entitled to" under the said settlement. She never expressly discharged her claim to legitim, and the claim was not satisfied, as neither she nor her representatives ever received any payment or took any benefit under her father's settlement. Nothing had happened to prejudice the rights of other beneficiaries, and the fund out of which legitim was payable was still extant.

In an action by her trustee and executor under a will executed subsequent to her settlement—*held* that the provisions of the antenuptial contract did not amount to election to take her conventional provisions, and that the pursuer as her representative was entitled to the share of legitim which vested in her on her surviving her father, with interest to date.

Charles Muirhead died at Edinburgh on 23rd May 1865, leaving a trust-disposition and deed of settlement dated 18th July 1861. He was survived by his widow and by two sons and two daughters, viz., Charles, James, Mrs Agnes Muirhead or Christie, and Mrs Jessie Muirhead or Carter. The trustees and executors appointed by the said trust-disposition and settlement either predeceased the truster or declined to act, and in 1865 Thomas Steven Lindsay was appointed by the Court of Session judicial factor on the trust-estate. Mr Lindsay continued in possession and management until June 1876, when he resigned and was discharged, and thereafter John Latta, S.S.C., was appointed judicial factor.

By his trust-settlement Mr Muirhead made certain liferent provisions in favour of his widow, and directions were given for the disposal of the fee of the estate, with accumulated surplus revenue after her death. The trustees were directed, *inter alia*, "as soon after the death of my said wife as convenient," to dispone and convey to Mrs Carter certain heritable subjects in Edinburgh. In disposing of the residue of his estate his trustees were directed to pay to Mrs Carter one "just and equal fourth part or share thereof." Mrs Muirhead repudiated the settlement, and claimed her legal rights of terce and *jus relictæ*, which were duly paid to her. The remainder of the trust-estate was held, and the annual income thereof accumulated by the judicial factors down to 23rd May 1886. When further accumulation became