Graham v. *M'Kay*—the objection that was taken was to jurisdiction—as strong an objection as could well be taken—yet the Court repelled it, and would not inquire into the matter because of the exclusive jurisdiction of the Inferior Court; and in the case of *Lennon* v. *Tully*, July 12, 1879, 6 R. 1253, where the allegation was that the execution of the citation of the summons had been illegal, yet even in such a case as that the Court held that their jurisdiction was excluded under the provisions of the Small Debt Act of 1837.

Looking then to the decisions in these cases, I think that the Lord Ordinary was wrong in refusing to sustain the plea of incompetency, and that what he has done is the most idle procedure, because even if the production was satisfied, it is quite impossible that we should find the action competent.

Upon that ground I am for recalling the Lord Ordinary's interlocutor and sustaining the second plea for the defenders.

Lords Mure, Shand, and Adam concurred.

The Court recalled the Lord Ordinary's interlocutor, sustained the second plea-in-law for the defenders, and dismissed the action *quoad* the reductive conclusions.

Counsel for Pursuer — Gardner. Agents—Sturrock & Graham, W.S.

Counsel for Defenders—Hay. Agents—Adamson & Gulland, W.S.

HOUSE OF LORDS.

Monday, February 14.

(Before Lord Blackburn, Lord Herschell, and Lord Watson.)

BURNS *v.* MARTIN (MARTIN'S TRUSTEE AND EXECUTRIX).

(*Ante*, vol. xxii. p. 898, and 12 R. 1343—July 17, 1885.)

Lease—Landlord and Tenant—Heirs and Executors—"Conjunctly and Severally."

A lease was granted to two tenants and the survivor of them, excluding assignees and sub-tenants, whether legal or conventional, the tenants binding "themselves and their respective heirs, executors, and successors, all conjunctly and severally, renouncing the benefit of discussion," to pay the rent. One tenant became bankrupt and the other died. *Held (rev.* judgment of the Second Division) that the liability of the deceased tenant did not cease with his death, but that his legal representative was liable for the future rents under the lease.

This action is reported *ante*, vol. xxii. p. 898, and 12 R. 1343—July 17, 1885.

The pursuer appealed.

At delivering judgment—

Lord Herschell—My Lords, during the argument of this case there were present my Lord Blackburn, my noble and learned friend on my left (Lord Watson), and myself. Lord Blackburn is unable to be present and to take part on this occasion, and accordingly an intimation was given to the parties that if they desired it the case might be re-argued, although all those who heard the argument agreed as to the judgment which ought to be delivered. The parties have expressed no such desire, but have prayed for the judgment of your Lordships' House, and under these circumstances there seems to be no difficulty in its being pronounced.

The respondent was sued, as executrix of her deceased husband Hugh Martin, for two half-years' fixed rent under a mineral lease granted by the appellant to William Logan and Hugh Martin for thirty-one years from Martinmas 1882.

The sole question, as it appears to me, is, whether upon the true construction of the covenant for payment of rent contained in the lease, the legal representative of a deceased lessee became liable for the rent accruing after his death?

The lease was granted to William Logan and Hugh Martin "and the survivor of them, but expressly excluding assignees and sub-tenants, whether legal or conventional." The covenant is in these terms—"The said William Logan and Hugh Martin bind and oblige themselves and their respective heirs, executors, and successors, all conjointly and severally, renouncing the benefit of discussion, to pay to the said John William Burns, his heirs and successors, and to his or their factor or agent, the sum of £200 sterling yearly for each of the first five years of this lease, and the sum of £250 sterling yearly thereafter during the currency of this lease in name of fixed rent or tack-duty . . . for the privilege of working and disposing of the fireclay in manner herein mentioned."

There can be no doubt, in view of the terms of the grant, that the interest of Hugh Martin under the lease ceased on his death, and that the entire interest then vested in William Logan as the survivor.

It has been contended by the respondents that on the true construction of the covenant all liability on the part of Hugh Martin or his representatives terminated at the date of his death.

The majority of the Judges of the Second Division of the Court of Session were of opinion that this contention was well-founded, though they rested their judgment on another ground to which I shall presently refer.

I confess that I approach the construction of the covenant with every inclination to take the same view. I am fully alive to the force of the argument that it is not to be expected that the representatives of the deceased lessee should be made equally liable with the survivor to the payment of the rent seeing that the entire benefit passes to him.

But, after all, the case must be determined by a careful scrutiny of the language used, and by giving to that language its natural grammatical meaning. It is not an impossible or inconceivable bargain that each of the lessees should agree that his estate should remain liable for the rent notwithstanding that the lease enured to the benefit of the survivor. If the covenant had been fairly open to either construction I should certainly have yielded to the argument of the respondents, but upon the best consideration I can give to the matter I cannot avoid the conclusion that the plain natural meaning of the

words of the covenant is, that the representatives of Hugh Martin became liable for payment of the rent after his decease. It is unnecessary for me to state in detail the considerations which have led me to this conclusion, as I have had the advantage of perusing the opinion of my noble and learned friend (Lord Watson), and I concur entirely with the reasons he has expressed. I think that, ignorant as we necessarily must be of the surrounding circumstances which might have explained the bargain and shown that it was reasonable, we should be quite as likely to do injustice as justice if we were to depart from the natural construction of the language employed by the parties because we thought the result unreasonable and such as was probably not intended. The only safe rule in cases like the present is a strict adherence to the view that the parties intended that which is the natural meaning of the language they have used. As the case involves a question of Scotch conveyancing it is a great satisfaction to me to find that my noble and learned friend (Lord Watson), who is so well versed in such matters, and also two out of the four learned Judges who have had to consider the case, have arrived at the same conclusion to which I have felt myself compelled.

Observing the construction which I have expressed upon the covenant, the whole case is, in my judgment, disposed of in favour of the appellant.

The Lord Justice-Clerk and Lord Young held that the appellant had put himself out of Court by the allegations contained in his third condescendence. That condescendence states that "the estates of William Logan were, on or about the 19th October 1883, sequestrated under the Bankruptcy Statutes, and thereupon the tenants' rights and liabilities in and under the said lease devolved wholly on the said Hugh Martin, who accordingly made payment to the pursuers of the fixed half-year's rent due in terms thereof at the term of Martinmas 1883, and worked and manufactured the said fire-clay, and carried on the said business as alone interested therein, and in the subjects let by the said lease."

To this condescendence the answer was as follows:—"Admitted that W. Logan's estate was sequestrated on 19th October 1883. Admitted that the Martinmas 1883 rent was paid by Mr Martin. *Quoad ultra* denied. The clause of the lease regarding bankruptcy is in these terms—'It is hereby specially provided and declared that if the second parties [Martin and Logan] or either of them or their foresaids shall become bankrupt, or if sequestration shall be awarded against them or either of them, . . . this lease shall, in the option of the first party or his aforesaids, become *ipso facto* void and null.'"

Upon the statement of the pursuer in this third condescendence, that on Logan's bankruptcy and sequestration the tenants' rights and liabilities under the lease devolved wholly on Hugh Martin, Lord Young observes that this necessarily implies that the pursuer as landlord deprived Logan and the trustee in his bankruptcy of all rights, and freed them from all liabilities under the lease, which he was entitled to do by reason of the bankruptcy and sequestration. He then proceeds—"But if Logan and his trustees were thus deprived of all rights, and freed of all liabilities as from 19th October 1883, Logan could not by his survivance become tenant on Martin's death three months after, in January 1884. It follows clearly, and indeed necessarily, that the defender cannot be liable or bound for rents due by Logan since Martin's death."

My Lords, I am quite unable to concur in this reasoning. Even if the allegations of the condescendence had been admitted by the defender, I do not think the conclusion arrived at by Lord Young would have followed. The allegation that on Logan's bankruptcy the tenant's right and liabilities under the lease devolved on Martin, I construe as stating the legal effect of the sequestration, and not as alleging any matter of fact, and when the terms of the lease are looked at it is clear that the allegation was not well-founded. The only effect of the sequestration was to give an option to the lessee to make the lease void and null. It is clear that he did not avail himself of this option, and it is not alleged that he did. And I cannot see how an erroneous allegation of this description can alter the rights either of Logan or the pursuer. But the defender denied the allegation, and no doubt rightly denied it. Under these circumstances I am, with deference to the learned Judges who have taken a different view, at a loss to understand how the pursuer, if otherwise entitled to recover, could be deprived of that right by reason of an erroneous allegation denied by the defenders, the issue on which would therefore have to be found in favour of the defender, but if so found would establish no bar to the pursuer's claim.

I think that the judgment of the Court below should be reversed, and the interlocutor of the Lord Ordinary of the 12th March 1885 should be restored, and that the respondent should pay the costs in the Court below, and costs of this appeal, and I move your Lordships accordingly.

Lord Watson—My Lords, by a lease executed in February 1883 the appellant let the seams of fire-clay in part of his estate of Cumbernauld for thirty-one years from Martinmas 1882 to "William Logan and Hugh Martin, and the survivor of them," assignees and sub-tenants, whether legal or conventional, and also managers, being expressly excluded, except with the written consent of the lessor. The tenants are empowered to renounce the lease upon giving intimation by registered letter to the lessor six months previous to the term of Martinmas 1887, or previous to any term of Martinmas thereafter at which any subsequent consecutive period of five years shall expire. In the event of the tenants or either of them becoming bankrupt, or of their estates being sequestrated, it is provided that the lease shall, in the option of the lessor, become void and null.

William Logan's estates were sequestrated on the 19th October 1883, and Hugh Martin died on the 5th January 1884. The half-year's fixed rent of £100 falling due at Martinmas 1883, was paid by Martin. The respondent is the sole accepting trustee and executrix under Hugh Martin's deed of settlement, and the present action was brought against her in that character by the appellant for payment of two half-years' rents which became due at the terms of Whitsunday and Martinmas 1884.

It was assumed in the arguments addressed to your Lordships, and it does not appear to me to

admit of doubt, that by the conception of the lease Logan and Martin are made joint-tenants during their joint lives; that on the predecease of one of them the survivor becomes the sole tenant; and that on the survivor's decease the right of tenancy devolves upon his heir of line. Accordingly William Logan on the death of Martin became, and now is, sole tenant under the lease unless his right has been in some way determined. The appellant's case is, that Martin's heirs and executors, although they have no interest as tenants, remain liable for rent during the currency of the lease; whereas the respondent maintains that by the terms of the lease the liability of the predeceaser's representatives is limited to rents which accrued during his lifetime.

The Lord Ordinary (Trayner) gave the appellant decree in terms of the conclusions of his summons, but the Second Division of the Court recalled his interlocutor, ordained the respondent to pay £30, 2s. 8d. sterling, being the proportion of fixed rent for the period between Martinmas 1883 and the date of Hugh Martin's death, and *quoad ultra* assoilzied. Lord Rutherfurd Clark dissented from the judgment. The Lord Justice-Clerk and Lord Young, who constituted the majority of the Court, indicated their opinion that the heirs and executors of Hugh Martin were not liable for rents becoming due after his death, but they rested their decision upon the ground that the appellant had judicially admitted that the lease came to an end by the sequestration of Logan, and consequently that after the death of Martin there was no longer any tenant liable for rent.

The averments which the learned Judges treated as a judicial admission to the foregoing effect I have mentioned are in these terms—"Thereupon" (*i.e.*, upon the sequestration of William Logan's estates) "the tenant's rights and liabilities devolved wholly on the said Hugh Martin, who accordingly made payment to the pursuer of the fixed half-year's rent due in terms thereof at the term of Martinmas 1883, and worked and manufactured the said fire-clay and carried on the said business as alone interested therein, and in the said subjects let by said lease." That is plainly an erroneous statement of the law, because Logan's sequestration could not affect his position as tenant unless the appellant exercised his option of putting an end to the whole lease, which he admittedly never did. Even if the statement were accepted as correct, I do not think it could bear the construction which was put upon it by the majority of the Court. Its import appears to be, that on his sequestration Logan's interest in the lease came to an end, and that the whole rights and liabilities of tenant passed to Martin. If the interest of Logan had been thus extinguished, and the exclusive right to the lease had thereupon vested in Martin, his heir would have become the tenant on his death, and in that event the respondent did not dispute that his estate would have continued liable for the rent. But the respondent meets the statement with an explicit denial, and had it been as favourable to her case as the learned Judges thought it was, I venture to doubt whether the respondent would have been entitled, without an amendment to the record, to found upon a statement which she denies, as a judicial admission in her favour.

The clause of obligation for payment of rent is in these terms—"The said William Logan and Hugh Martin bind and oblige themselves, and their respective heirs, executors, and successors, all conjunctly and severally, renouncing the benefit of discussion, to pay to the said John William Burns, his heirs and successors, and to his or their factor or agent, in his or their names, the sum of £200 sterling for each of the first five years of this lease, and the sum of £250 sterling thereafter during the currency of this lease, in name of fixed rent or tack-duty," or in the option of the lessor, of a royalty on the output of fire-clay instead of the fixed rent.

I think it was rightly argued for the respondent that according to the law of Scotland it must be presumed that an obligation to pay rent is only meant to attach to those persons who are for the time being in right of the lease as tenants. In *Skene* v. *Greenhill*, May 20, 1825, 4 S. 25, a tenant who had expressly bound himself, "his heirs, executors, and successors," for payment of the rent, assigned the lease with the assent of the landlord, and it was held that the cedent and his representatives were under no obligation to pay rents becoming due after the assignee entered into possession. A tenant may, however, engage that he and his representatives shall remain bound along with his successors in the lease, and if he contracts in terms which, according to their just construction, imply that he has undertaken that responsibility to the lessor the stipulation must receive effect. Had the obligation in *Skene* v. *Greenhill* been laid upon the tenant, and his heirs, executors, and successors, "all conjunctly and severally," I think the decision would have been different, because in that connection the words which I have added, "all conjunctly and severally," appear to me plainly to import that the tenant and his representatives are to remain liable for rent along with persons succeeding to the lease as assignees. In the case of *The Police Commissioners of Dundee* v. *Straton*, February 24, 1884, 11 R. 586, an original feuar had bound and obliged "himself, and his heirs, executors, and successors, conjunctly and severally," for the prestations of the feu, and the First Division of the Court decided that after the feu had been transmitted to a singular successor the original vassal and his estate continued to be liable to the superior for these prestations. In my opinion the same words which in a feu-right are sufficient to imply that the original vassal and his representatives are to remain liable in perpetuity, notwithstanding their having ceased to possess any interest in the feu, must, when they occur in a lease, be equally effective to bind the original tenant and his representatives for the terms of its endurance although they have ceased to be tenants. It was suggested by the respondent's counsel that *The Police Commissioners of Dundee* v. *Straton* was not well decided, and ought to be re-considered, but I am unable to see that the Court could have arrived at any other decision in that case unless they had refused to attribute their ordinary meaning to the words "conjunctly and severally." The presumption that liability for rent is confined to those having the tenants' interest is, however, so strong that if it be doubtful to what persons "conjunctly and severally" apply, those words must be read as exclusively applicable to the tenant for the time being and his representatives.

The present case seems to me to depend upon the application which ought to be given to the words "all conjunctly and severally, renouncing the benefit of discussion," as these occur in the clause of obligation for rent. Do they unite in one common obligation all the parties enumerated, or must they be read distributively, and as applying separately to the heirs, executors, and successors of Logan and the heirs, executors, and successors of Martin? In the one view the representatives of Martin are liable for the rent as long as the lease endures, in the other they are not liable for rents becoming due after the death of Hugh Martin unless the tenant is his heir or assignee.

In my opinion the words "renouncing the benefit of discussion" may be treated as surplusage, because persons who are bound conjunctly and severally cannot plead the *beneficium ordinis*. It was argued that the words, though in that sense superfluous, are nevertheless officious as indicating that a common obligation was only to attach to such heirs, executors, and successors as were subject *inter se* to the rule of discussion; and that inasmuch as the rule had no application between the representatives of Logan, and the representatives of Martin, it must have been the intention of the parties to the lease to impose a separate conjunct obligation upon each class. That argument appeared to me to be completely met by the appellant's counsel, who pointed out that the rule as to discussion, if not excluded, obtains not only between heir and executor but between an actual tenant and those persons who, having no interest as tenants, are bound along with him for rent, all such persons being mere cautioners in any question with the tenant.

I have been unable to resist the conclusion that by the terms of the clause of obligation each and all of the parties therein mentioned are made conjunctly and severally liable for rent, irrespective of their interests, during the subsistence of the lease. I agree with Lord Rutherfurd Clark and the Lord Ordinary in thinking that the meaning of the clause is really not doubtful, and that there is no such ambiguity in its language as to entitle the respondent to the benefit of the presumption that only William Logan, the tenant, and his representatives are to be responsible for future rents.

The only term in the clause which appears to me to be capable of suggesting a construction favourable to the respondent is the word "respective" upon which much stress was laid in the argument in her behalf. If the expression used had been "their heirs, executors, and successors," it was hardly contended that the respondent could have escaped from liability. But it was argued that the word "respective" is used to mark a separation between the two classes of representatives; and consequently that the clause ought to be read in the same way as if William Logan had bound himself and his heirs, executors, and successors all conjunctly and severally, and Hugh Martin had in like manner, bound himself and his heirs, executors, and successors all conjunctly and severally. Logan and Martin begin however by binding "themselves" conjunctly and severally, and the word "respective" appears to me to be introduced, not for the purpose of separating the obligees into two classes, but for the purpose of indicating that the obligation common to both classes was imposed by each of them upon his own representatives, which was all that he had power to do. Then the introduction of the word "all" before "conjunctly and severally" makes it clear, in my opinion, that the two original tenants, and their heirs, executors, and successors, were each and every one of them to be equally liable for rent to the lessor so long as the lease endured.

Lord Young in giving judgment expressed an opinion that the appellant's abstaining from the exercise of his rights voided the lease, and his retention of an undischarged bankrupt who was not in possession as his tenant would constitute an inequitable and unconscionable device for exacting rent from the respondent, who has no beneficial interest in the lease, and can obtain no consideration for the rent which she pays. None of the other Judges have expressed any opinion upon that point, but I think it right to say that I cannot agree with Lord Young. Martin may have made an improvident contract, but he and his representatives are not the less bound to perform the obligations which he undertook. The respondent, as representing him both in heritage and moveables, is liable for rent till the end of the lease, but it does not necessarily follow that she must continue to pay rent until the term of Martinmas 1913. It appears from the appellant's averments on record that Logan is not possessing as tenant under the lease, and is making no claim for possession. As against Logan the respondent has all the right of a cautioner, and in that position of matters Logan is bound either to relieve the respondent at once of the rents which she may have to pay, or to exercise the power which the contract gives him of renouncing the lease at Martinmas 1887. If Logan when duly required refuses or delays to do one or other of these things, I do not think his wrongful failure to renounce would justify the appellant in exacting rent from the respondent after that term.

I therefore concur in the judgment which has been moved by my noble and learned friend.

The House reversed the decision of the Second Division, and restored that of the Lord Ordinary, with costs.

Counsel for Pursuer (Appellant)—Rigby, Q.C. —J. P. B. Robertson, Q.C. Agents—Grahames, Currey, & Spens, for J. & J. Ross, W.S.

Counsel for Defender (Respondent)—Lord Adv. Balfour, Q.C.—Rhind. Agents—Smith, Fawdon, & Low, for R. Pasley Stevenson, S.S.C.

COURT OF SESSION.

Tuesday, February 15.

SECOND DIVISION.

HASTIE *v.* STEEL.

Process — Expenses — Judicature Act 1825 (6 *Geo. IV. c.* 120), *sec.* 4.

Objection was taken to an Auditor's report on the ground that the interlocutor remitting the accounts to him was incompetent, in