Wednesday, December 8.

SECOND DIVISION.

[Sheriff of Inverness.

MACDONALD *v.* FRASER.

Lease—Landlord and Tenant—Crofter—Arrears of Rent—Crofters Act 1886 (49 *and* 50 *Vict. c.* 29), *sec.* 6.

A crofter in a crofting parish was sued by his landlord for rents which had fallen into arrear at and prior to Whitsunday 1886. He maintained in defence that the action was incompetent, because he had applied to the Commissioners under the Crofters Act 1886 to fix a fair rent for his holding and to determine the matter of arrears. *Held* that the action was competent, because the Act did not, either expressly or by implication, take away the common law right of the landlord to obtain decree for and to recover these arrears.

Observations per curiam on the meaning of the expression "arrears of rent" in section 6, sub-section 5, of the Act.

On 9th October 1886 Lieutenant-Colonel William Fraser of Kilmuir raised an action under the Debts Recovery Act in the Sheriff Court at Portree against Alexander Macdonald, 3 Shiadder, Snizort, Isle of Skye, for £30, 17s. 6d., being the amount of arrears of rent due to Colonel Fraser from Whitsunday 1884 to Whitsunday 1886. On 21st October decree in absence was given against Macdonald for the sum sued for. He desired a re-hearing before the Sheriff, and consigned a sum to meet the expenses of the re-hearing. He stated this defence—"That the defender has made an application to the Commissioners appointed by the Crofters Holdings Act to fix a fair rent and to deal with the matter of arrears, and that until these Commissioners have pronounced an order on that application, and the same has been presented to the Sheriff, it is incompetent for him to give the decree asked in the case;" and on 15th November he lodged in process a certificate by the clerk to the Crofters Commission, to the effect that on 11th November 1886 he had applied to the Commission to fix a fair rent and to deal with the matter of arrears. He offered to find security that the arrears as fixed by the Commission under the application would be duly paid at the date the Commission might fix.

The pursuer, on the other hand, offered, on consignation or payment of two-thirds of the arrears sued for, to take no further proceedings for the balance till the Commissioners should have considered the question of arrears, but the defender did not avail himself of this offer.

The pursuer pleaded—"(1) The present action not coming within the provisions of the Crofters Act, the rehearing should be dismissed with expenses.'

The Sheriff dismissed the re-hearing and affirmed the original decree, finding the pursuer entitled to additional expenses.

The Crofters Holdings (Scotland) Act 1886 provides—"Sec. 6 (1) The landlord or the crofter may apply to the Crofters Commission to fix the fair rent to be paid by such crofter to the landlord for the holding, and thereupon the Crofters Commission, after hearing the parties, and considering all the circumstances of the case, holding, and district, and particularly after taking into consideration any permanent and unexhausted improvements on the holding and suitable thereto which have been executed and paid for by the crofter or his predecessors in the same family, may determine what is such fair rent, and pronounce an order accordingly. (5) In the proceedings on such application" [*i. e.*, to fix a fair rent] "the Crofters Commission shall take an account of the amount of arrears of rent due or to become due before the application is finally determined, and may take evidence of all the circumstances which have led to such arrears, and shall decide whether in view of such circumstances the whole or what part of such arrears ought to be paid, and whether in one payment or by instalments, and at what dates the same should be paid; and the amount and dates so fixed shall be deemed to be the total amount of such arrears due by the crofter, and the terms at which the same become payable."

The defender appealed, and argued — The crofter, the appellant in this case, had made an application to the Crofter Commission to fix a fair rent and to deal with the questions of arrears, and until the Commissioners had dealt with the subject the landlord was not entitled to take any steps to recover arrears, and the case ought to be remitted to the Sheriff to sist proceedings until the Commission had dealt with the matter. Upon a just construction of section 6, sub-section 5, what was the proper amount of the debt could not be determined until the Commissioners had dealt with the question, as they might reduce or abolish the arrears altogether, so that arrears could not be held to be a debt, and were not recoverable until the proper amount had been ascertained.

Argued for the respondent—The Act dealt only with arrears of rent due at the time the application was finally determined, and not at the time the application was made to the Commission, so that—this sum of £30, 17s. 6d., being arrears of rent before that time—the landlord could use his common law rights to recover them. Admitting that the Commissioners had power to remit all the arrears at the time of their determination of the fixed rent, they had no power to interfere with the ordinary powers of the courts of law. The tenant was protected by section 6, sub-section 5, so that he could not be turned out of his holding although the landlord might poind his goods. But if the landlord were deprived of his common law rights while the crofter's other creditors had the power of suing for their debts, there might be nothing left to satisfy the landlord when the Commission should have dealt with the holding.

At advising—

LORD JUSTICE-CLERK—This question is of course important and interesting, and I have found it very difficult. I will shortly explain the grounds on which I think your Lordships ought to sustain the judgment of the Sheriff, and therefore decide against the argument urged on the appellant's behalf. The state of the matter seems to be this, that in the month of October the landlord obtained a decree in absence for outstanding arrears of rent. In November the tenant invoked the aid of the

Crofters Act, which was passed recently, and presented an application to the Crofters Commissioners for the purpose of having a fair rent fixed, and, as he said, in order to obtain also the benefit of the fifth sub-section of the sixth section, which gives power to the Commissioners to judge of the arrears, to reduce them or leave them untouched, or to find that no part should be paid—a consequence of an application for fixing a fair rent. The decree in absence was opened up, and after a re-hearing was confirmed by the Sheriff, and that judgment is now appealed against. It is maintained that we have no power to do anything here except to recal the judgment of the Sheriff, because the true interpretation of the fifth sub-section of section 6 of the Crofters Act necessarily suspended—sisted for the present—all the proceedings for the recovery of arrears on the part of a landlord within a crofter district until the Commissioners should have come to adjudicate on any application which the tenant might have made. I could quite understand such a provision being introduced into the statute. The statute, while it is for an object of public policy approved of by the Legislature, is at the same time in derogation of the ordinary common law rights of the proprietor. Such is the nature of the statute, it supersedes the common law according to some of its clauses. In short, to a large extent its effect is to derogate from and to soften the complexion, it may be, of certain provisions between landlord and tenant which the common law enforces in regard to a certain class of tenants in a way which had been thought too strict. Now, my first observation is, that in a statute proceeding on such lines where it was not right and not desirable that anything should be left to inference, if the common law relations between landlord and tenant are to be interfered with, that should be done directly and expressly, and therefore I am not inclined to apply the principle of inference to provisions which might have been made clear. I have fully in view the consideration that an application having been made under the statute which alters the relations to the ordinary courts of law which usually subsist between the landlord and tenant, everything of the nature of ordinary diligence should stop from that time onward. I am very much impressed with that, but on full consideration I have come to the conclusion that there is no ground at all for assuming that the omission of any provision about sisting procedure pending the consideration of an application was an inadvertence. I am quite satisfied it is not so. It might be that it was thought that the necessary implication was so strong that the precise words were not necessary, but, on the other hand, the interfering with a landlord who had, as in this application, not only his writs containing the precise obligations of the tenant, but a decree for the amount before the application was made, would be rather a strong proceeding. There are three results that may happen from the Commissioners dealing with the arrears. First, they might fix that none of them should be paid; secondly, they might find that a certain proportion of them only should be paid; and lastly, they might see no reason at all for interfering with the payment. In the two last cases the landlord would be left wholly without remedy. Assuming that the Commissioners are of opinion that the rent should be paid in full, before that opinion is given effect to by the Commissioners' judgment all chance of recovering on the part of the landlord may have come to an end, and the same thing may be said of the proportion which possibly the Commissioners may find ought to be paid. That would be a hardship. I am not going to assume that the Legislature meant to do that. I am not going to say they would have done injustice if they had done so; that is no matter for us to express an opinion on. This Act is founded on views of public policy, and it is not for us to express an opinion on that matter. But I think I may refer to an analogous case. There have been two Acts of this nature—one of them the Irish Arrears Act of 1882—and I find that in that statute the two views which are in question were dealt with by the Legislature—I mean the power to remove and the power to take proceedings. This Crofters Statute deals with the question of removing, and gives the Commissioners an express power to intervene and prevent the tenant being removed for non-payment of arrears of rent for two years. What does the Irish Act say? The provision is this [Section 13]—"Where any proceedings for the recovery of the rent of a holding to which this Act applies, or for the recovery of such holding for non-payment of rent on account of the rent in respect of the year expiring as aforesaid, and antecedent arrears, have been taken before or after an application under this Act in respect of such holding, and are pending before such an application is disposed of, the court before which such proceedings are pending shall, if the provisions of section 1, sub-section (*a*), have been complied with, and on such terms and conditions as the court may direct, postpone or suspend such proceedings until the application under this Act has been disposed of." This refers to the courts and not to the commissioners, and there are express powers given to stop the proceedings. Now, I think that if that had been intended in this Act it would have been expressed. My impression, on the argument we have heard, is that under this statute presenting an application to the Commissioners did not necessarily suspend or sist procedure on the part of the landlord for the recovery of his rent, and I to a large extent agree with the view which has been suggested by Lord Young during the argument that the word "arrears" means arrears due, and that in the provisions of the Act it means arrears due when the Commissioners come to consider the application. That would necessarily imply that the landlords may take the remedy for recovery of the rent in the meantime. But it was suggested on the part of the tenant that the landlord is not without a remedy, because he might propose to remove tenants for non-payment of two years' arrears, and that would bring in the discretionary power of the Commissioners. That is a roundabout way of arriving at a result which was not expressed in words, and I do not think I could give that effect to the provisions of the statute. I think that the provisions are intended to apply to removing, and if they had been intended to apply to recovery of arrears, why was that not set forth? I think it was not intended, and that the statute said all that it was intended to say. For myself I must say that I would have been perfectly satisfied to sist the procedure had

consignation been made. I think that would have removed the just apprehension of the landlord, and been sufficient to satisfy the tenant. But as that had been refused, we must decide the case.

Lord Young—I am of the same opinion. I understand this is a case of interest to a number of people, and has been selected as a specimen in order to determine a variety of others depending upon the same considerations. I make the observations I do only to show to those interested, as clearly and distinctly as I could, the grounds upon which my opinion rests. The action originated in the Sheriff Court of Portree by a landlord against his tenant for payment of two and a-half years' rent on his farm. That is the nature of the action. There was no defence—indeed, no defence was given in to the action—and decree in absence for the amount, £30, 17s. 6d., was pronounced on 21st October. An application was then made to the Sheriff to set aside the decree in absence and to re-hear the case, and determine it otherwise, upon this the defender's plea, which was the only plea disposed of by the Sheriff, and is the only plea now before the Court—"That the defender has made an application to the Commissioners appointed by the Crofters Holdings Act to fix a fair rent and to deal with the matter of arrears, and that until these Commissioners have pronounced an order on that application, and the same has been presented to the Sheriff, it is incompetent for him to give the decree asked in the case, and he offers, by minute lodged in process, to find security for sum which may be fixed by Commissioners." The offers of security and making consignation were really extra-judicial communings, and if they came to nothing the Court has no concern with them. And they did come to nothing. There was no defence to the action, but only the plea that the action was incompetent. The Sheriff repelled this plea, and the only question was whether the Sheriff was right or not, and I am convinced that the Sheriff was right. The first and most material point is, that the defender is a crofter within the meaning of the Act, and the Act applies to him. The reasons for the conclusion are clear enough, as he is a crofter with a holding in a crofting parish. Further, the rent sued for terminated at Whitsunday 1886, the term immediately preceding the passing of the Act, and therefore it is a rent due before the Act passed. The question then is, Is the landlord by the statute precluded from suing a crofter to whom the statute applies for rent due prior to the passing of the Act? I think the principle of the common law and the rule of the common law are sufficient for the decision of this case. It is the legal right of a landlord to whom his tenant is owing money, as it was of any creditor, to sue for payment. If this Act of Parliament deprived a landlord of the legal right at common law of suing a crofter tenant to whom the Act applied for rent due before the passing of the Act, then the defender's plea was well founded. In the construction of the Act we have a rule of the law which is quite familiar, and is sufficient for the determination of the matter. That is, that the legal right of the party at common law should remain to him, unless it was expressly taken away. It is the duty of the Court to give expression to the provisions of the Crofters Act according to their import, and I add, the Court will have regard to the intention of the Legislature as that was to be gathered from the whole language of the Act. But it is the practice of the Legislature, when a distinct familiar legal right at common law was taken away from an individual or a class of individuals, to do so expressly. I do not say it is impossible to do it by implication—that is, by some provision manifestly inconsistent with the continued subsistence of that legal right. All would agree that in this Act there is no express provision saying that a crofter's landlord should be deprived of his common law right of proceeding by action against the crofter owing money as rent. Then, is there any provision which is inconsistent with the continued existence of that most familiar legal right? There is none, unless it is in sub-division 5 of clause 6. It is provided, apparently somewhat superfluously, by section 5 that the rent may be altered by agreement between the landlord and the crofter. But I should not say superfluously, because the statute makes somewhat free with agreements—I do not doubt through considerations satisfactory to the Legislature, upon which I express, and indeed have, no opinion. But the parties interested are nevertheless left to make such new agreement as they pleased. The rent, whether too high or too low, must continue until altered by agreement, which no party could force the other to make, or by the Commissioners. But either party may by section 6 be the applicant to the Commissioners to fix a fair rent. Sub-division 5 of clause 6 provides that in the proceedings on such application the Commission shall take into account the amount of arrears due, or to become due, before the application is determined, and that they may take evidence of all the circumstances which have led to such arrears, and shall decide whether in view of such circumstances the whole, or what part if not the whole, of such arrears ought to be paid. This undoubtedly gives the Commission power to deal with arrears when the application is finally dealt with. What is the meaning of "arrears of rent?" We have an argument on the one side to the effect that they include, to begin with, all rent due at the passing of the Act which was not to be exacted by the landlord, and not to be payable by the tenant, until the Commissioners disposed of the application, which I suppose the tenant will delay making as long as ever he could. It is a perpetual Commission. It is only one of its powers that is limited to five years, and while the Commission continued to exist either the landlord or tenant could make an application, and that would be an application to which this sub-section refers, and in every application the Commissioners might deal with the arrears of rent due. When an application is once disposed of it lasts for seven years, but then there may be a renewed one by either party, and there may be applications to deal with arrears. Now, "arrears of rent" is a familiar term. But we are not in the least familiar with the notion of restraining landlords from suing for the rent due to them, or using diligence to recover payment out of the tenant's property. The argument on the one side was that this provision that the Commissioners might deal with arrears signifies that the landlord was to be deprived of all his remedies for their recovery, and that during

a period of years. I should have thought the argument on the other side would be that the arrears were those which the tenant's circumstances had not enabled him to pay voluntarily, or enabled the landlord to recover although all his legal remedies were put in force. That is the familiar idea of arrears, and the Commissioners were authorised to remit or reduce these if they were satisfied that it was merely the tenant's poverty and want of property, whether in money or goods, that had left the rent in arrears, so that they should not be a burden, or should be a reduced burden, on his future prosperity. That is the argument which I prefer. I cannot read this provision of the Act as inconsistent with the landlord having the right to bring his action to ascertain what arrears were due to him, if any, and to get an order by the Court upon a party indebted to pay them, and if I am to express an opinion, although I do not think the point arises here for judgment, to use all the remedies which the law allowed for their recovery. But the plea before the Court went upon this, that the action was incompetent, and that the Sheriff even could not inquire what was the amount of the rent due under the contract between the landlord and the tenant—that he could not inquire whether any of the arrears had been paid, and ascertain whether there was a balance unpaid of the true amount of the rent or not. That approached to the extravagant, and indeed entered upon it. Therefore I think the action competent, and the decree competent, for it just ascertains that a sum is due and owing by the tenant, and orders him to pay that sum. I see no reason at present why that decree should not be enforced as the common law of the land allows against the tenant's property. It could not be enforced if he had none, but if he had cattle or money, why it should not be enforced does not occur to me. It was stated that it might be enforced cruelly so as to ruin the tenant. But all decrees against tenants might be enforced cruelly so as to ruin the tenant, and indeed all decrees against debtors might be enforced cruelly and in an ill-hearted manner. I think the common law sufficient for the determination of this matter. What the landlord asked, and had got from the Sheriff, was in accordance with his legal right, which the statute did not, in my opinion, by expression or necessary implication take away. I think this or any similar decrees which might be pronounced was enforceable against tenants' goods and money.

Lord Craighill—I am of the same opinion. I have had some difficulty in this case, but that has been displaced by what has been said. It is admitted that there is no express provision in the Act by which the powers which the landlord may exercise at common law are restrained or taken away. If such a provision exists in the Act at all, it exists only by implication. But such an implication would require to be very clear. According to the appellant's reading of the statute, the landlord is not entitled to get a decree or to follow it out for the purpose of recovering arrears of rent due to him; and again, even if he has got a decree for those arrears, is not entitled to use diligence against the tenant for what may be finally found to be his due. That would be quite an exceptional hardship placed upon the landlord by this Act. The other creditors of the tenant can recover their debts from any property which is just now in the possession of the tenant, but not so the landlord. If such was indeed the rule laid down in the statute, then we would give effect to it, but such a rule must be clearly stated. It does not seem to me that the contention that such an implication is a fair inference from the words of the Act has been made good. I think the contrary is the true reading of the Act. I think that the landlord, in the case before us, may competently sue for these arrears of rent, though the tenant has made an application to the Commissioners. No doubt the tenant is protected—and very properly protected—according to the views of those by whom the Act was framed, from suffering hardship in consequence of the landlord's proceedings. It is at least a question whether the old contract rent will be found to be more than the fair rent, and after the application has been made while there is nothing to prevent the landlord's suing for his contract rent between the date of the application and the time of determination, still the tenant would be entitled to deduct what he had overpaid when the next rent became due to the landlord. Even an action of removing is competent, but on application to the Commissioners they would consider whether the remedy should be followed up, and if they thought it ought not to be followed up then they can fix the terms on which the sist asked for by the tenant is to be granted, and it is important to observe that the sist will not be granted unconditionally. Then we come to this case provided for in section 6, sub-section 5, of the Act, and it is important to observe the words—"The Crofter Commission shall take an account of the amount of arrears of rent due at, or to become due before, the application is finally determined." Now, there is an alternative there, but the true meaning of the section is this, that there are not to be two inquiries—an inquiry at the date of the application being presented, and another inquiry when the Commissioners come to determine the application. The thing—and the one thing—upon which judgment is to be given by the Commissioners, is the arrears of rent due at the time of the disposal of the application, although the alternative is not without importance. Once the application is taken up by the Commissioners as a matter of determination there is a duty upon the Commissioners, they have to decide whether, in view of all the circumstances of the case, "the whole or what part of the arrears ought to be paid." That is the protection given to the tenant—a protection against any evil consequences from the course followed by the landlord. They look back and see what amount has been paid between the time that the application was made and the time of the final determination, which was paid on the scale of the old rent, and taking that into account they may determine what he ought to pay. The debt here is due, and the tenant ought to pay it, and if he has means and does not pay his debt, then diligence may be done against him.

Lord Rutherfurd Clark—I have had some difficulty in the case, and I confess my difficulty has not been removed by what has been said. At the same time, I think I see my way clearly enough to agree with your Lordships. It was a

matter of concession on both sides that the right to take action and use diligence for the recovery of rent was not taken away from the landlord in express terms, but it was said that it was taken away by necessary implication, because the existence of the right or use of the right would frustrate and render inoperative the fifth sub-division of section 6 of the Act. Now, it was pleaded that in consequence of the statute the rent ceased to exist as a debt, because the landlord was only entitled to recover so much of the debt as the Commissioners thought proper that the tenant should pay. Up to this point I cannot agree with the argument for the appellant. I do not think that the statute had any effect on the legal quality of the landlord's right, and therefore the debt remained, and necessarily remained, a debt due under the lease by the tenant to the landlord. At common law, therefore, it is plain enough that he could bring an action for the purpose of obtaining a decree for the debt, and I do not think that in pronouncing a decree for the debt the Court is doing anything to render inoperative the 5th sub-division of section 6. So far, therefore, I am clear your Lordships are right in affirming the interlocutor of the Sheriff which was now under review. But a further question remains behind, namely, to what use that decree could be put without frustrating or rendering inoperative the section to which I have referred, and on that question I would rather avoid saying anything at all, because it was just possible that it might, though I hope that it may not, come again before us. I am only concerned with this question whether the decision should stand, and for the reasons I have stated I think the decree ought to stand.

The Court dismissed the appeal and sustained the judgment of the Sheriff.

Counsel for Appellant—Balfour, Q.C.—Low. Agents—Duncan, Smith, & M'Laren, S.S.C.

Counsel for Respondent—D.-F. Mackintosh, Q.C.—Murray. Agents—Skene, Edwards, & Bilton, W.S.

Wednesday, December 8.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

THE BANK OF SCOTLAND *v.* GUDIN.

Foreign—Husband and Wife—English Decree—Prorogated Jurisdiction—Forum non conveniens.

A married woman raised an action against her husband, a foreigner, in the High Court of Justice in England, Chancery Division, to have her title to certain moveable property declared. The action was compromised by an agreement which was signed by the parties, and to which, by consent, the authority of the Court was interponed. The husband having failed to implement the agreement, the wife obtained decree in a second action which she raised to enforce specific performance. In an action of multiplepoinding raised by a banker in Scotland, in which the funds in dispute had been deposited, the husband maintained that the Court of Chancery had no jurisdiction over him in the previous action, and that the Court in Scotland was not *forum conveniens* for determining the dispute, he being in course of reducing the alleged agreement in the Courts of his own country. *Held* that the husband having appeared and pleaded in the Chancery suit could not now be heard to say there was no jurisdiction, and that the Court ought to prefer the wife to the fund *in medio*, repelling the plea of *forum non conveniens*.

Baron Theodore Gudin and Marie Isabelle Gudin were married at Boulogne-sur-Seine on 4th September 1882. It was provided by the contract of marriage, in conformity with the Code Civil of France, that each party should retain the distinct ownership of his or her real and personal property. Baron Gudin had a considerable amount of jewellery, furniture, and moveable effects, while the Baroness had considerable sums of money. Baron Gudin after his marriage became lessee under a lease for twenty-one years of a house in South Kensington, London. In consequence of disputes between the spouses as to the ownership of certain investments, Madame Gudin in September 1884 raised an action in the High Court of Justice, Chancery Division, under the Married Women's Property Act 1882, to have her title to certain investments and property, which she alleged to be investments of her money made in her husband's name for her behoof, declared.

The action was compromised in terms of an agreement dated 5th November 1884, by which it was, *inter alia*, provided that all the property which was the subject-matter of the action was to be the property of Madame Gudin. It was also provided by the agreement that an allowance of £300 per annum, secured by a trust-deed of a capital sum of £8000 in the hands of trustees, was to be secured to Baron Gudin. The Baron failed to appoint trustees, and two were accordingly nominated by Madame Gudin, and her nomination was confirmed by the Court of Chancery. Isidore Bourke and Alfred Kirby were the trustees thus appointed. The 12th head of this agreement was as follows—"By consent, an order of the said Court to be taken to the above effect, and a stay of proceedings *in re* Gudin to be taken on these terms."

Part of the property assigned to Madame Gudin by this agreement consisted of certain bonds, obligations, and certificates, along with a sum of £2000. These documents, and that sum of money were deposited in the Bank of Scotland at their office in Glasgow by Baron Gudin between the months of April and August 1883. After executing the agreement Baron Gudin left England, and on 16th December 1884 Madame Gudin raised an action against him in the Court of Chancery to enforce specific performance of the agreement above mentioned. Judgment was pronounced in that action in the High Court of Justice on 14th March 1885, whereby the Court declared that the said agreement of 15th November 1884 ought to be specifically performed and carried into execution, and did order and adjudge the same accordingly. It was