injury suffered, and not merely remotely connected with it, for in that case it is not to be considered as contributing to the injury within the principle that fault or negligence on the part of the individual injured shall afford a good answer to a claim by him for damages against a defender who has also been guilty of fault or negligence. The fault by the injured party, when only remotely connected with the accident, is to be, as it were, discounted from the case. In a legal view it, in the question of the abstract right to damages, forms no part of the case—the negligence of the defenders alone being held to have caused the injury —whatever weight it may be entitled to in assessing the amount of the damages. But, on the other hand, if, while there was fault on the part of the defenders directly conducing to or causing the injury, there was at the same time fault on the part of the individual injured, by rashness or want of care which he was bound to exercise, or in any other way which also directly contributed to the injury, then damages cannot be recovered by him."

Taking the words "contributory negligence" in the sense thus expressed, the question is, what does the verdict mean? and if it means, as I think it plainly appears to import, that "in respect of contributory negligence on the part of the pursuer" the jury reduced the damages to £300, the verdict is bad in law, for the jury were not entitled after finding contributory negligence to bring in a verdict for the pursuer at all, and they were just as little entitled, after finding for the pursuer but that there was fault on both sides, to reduce the damages in respect of his contributory negligence. If the verdict, on the other hand, means anything else, I am quite unable to say what it does mean, and the conclusion therefore at which I arrive is, either that the verdict means something quite inconsistent with the law applicable to the case, or that it has no intelligible meaning at all —in other words, it is tainted by a fatal ambiguity, and the consequence is that it must be entered up for neither party.

There is no doubt that a very slight variance in the form of the verdict might have made a great difference in its effect, and enabled the defender to claim it as a verdict for him. Suppose, for example, the jury had found that the pursuer was injured by the fault of the defender, and that the injury was also caused by the contributory negligence of the pursuer, and assessed the damages at £300, that would have been quite an intelligible verdict. It would have been what is called a special verdict finding two matters of fact, and assessing the damages contingently upon the verdict being entered up for the pursuer, but it would have been left to the Court to decide whether it should be entered up as a verdict for the pursuer or for the defender. We would have had two substantive findings—first, that the defender was in fault, and second, that the pursuer was in fault, and that both faults contributed to the injury. The law applicable to such a verdict is not doubtful, and the pursuer could not recover damages under it, but the verdict in itself would be good. Observe, however, the difference between such a verdict and the present. The jury do not assess the damages contingently upon the verdict being entered up for the pursuer, but they assess at such a rate as they conceive to be proper in view of the fact that the pursuer's own fault contributed to the injury he suffered. But the legal consequence of the pursuer's contributing to the injury is that no damages are due to him at all. I think it is clear that the jury did not understand the nature and effect of contributory negligence, although they were well instructed by the presiding Judge upon the matter, and I therefore think we should set aside the verdict and direct a new trial.

LORD ADAM concurred.

LORD M'LAREN—It seems to me that the argument on the construction of this verdict resolves into a logical dilemma, which is the result of the jury having found the pursuer guilty of "contributory negligence." Either these words were used in their ordinary and legal signification, or they were used in some different sense, which the jury has failed to explain.

In the first alternative the verdict is void as being contrary to law; in the second alternative it is void for uncertainty or ambiguity. I need say no more, except to express my concurrence in the reasons given by your Lordship for setting aside this verdict.

LORD KINNEAR concurred.

The Court refused to enter up the verdict for either party, and remitted the cause to the Lord Ordinary for a new trial.

Counsel for the Pursuer—Comrie Thomson—Watt. Agent—Andrew Urquhart, S.S.C.

Counsel for the Defender—D. F. Balfour —Sym. Agents—Auld & Macdonald, W.S.

Thursday, December 18.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

DUKE OF SUTHERLAND *v.* REED AND OTHERS.

Property — Declarator — Res judicata — Effect of Judgment in Sheriff Court — Forum non conveniens—Crofters Holdings (Scotland) Act 1886 (49 *and* 50 *Vict. c.* 9), *sec.* 21—"*Questions Relating to Boundaries.*"

An action of interdict and removing was brought in the Sheriff Court by a proprietor against certain crofters upon his estate to have them prevented from pasturing their cattle and sheep upon a stretch of hill pasture belonging to the proprietor but let to another

tenant. The defenders averred an agreement between the proprietor, the former tenant of the hill pasture, and themselves, by which their boundary had been settled so as to include in their crofts the ground upon which complaint was made of their cattle pasturing, and of this averment a proof was allowed. A general proof of possession was, however, taken. The Sheriff-Substitute thereafter found the action incompetent, and an appeal from his judgment not being insisted in, his finding became final. An action in the Court of Session was afterwards raised by and against the same parties for declarator that the defenders were not entitled to graze their cattle upon the hill pasture (as formerly complained of), and interdict. The defenders, besides pleading to the merits, pleaded (1) *res judicata*, in respect of the Sheriff Court judgment; and (2) *forum non conveniens*, in respect that they had made application under the Crofters Act, and that sec. 21 thereof made the Commissioners the proper tribunal to decide questions of boundary for crofts. The preliminary pleas *repelled*.

Question argued, but not decided, whether a judgment in the Sheriff Court could found a plea of *res judicata* against an action in the Court of Session.

This was an action of declarator and interdict brought at the instance of the Duke of Sutherland, heir of entail in possession of the farm of Crakaig, in the parish of Loth in Sutherlandshire, against William Reed and others, crofters at Crakaig. The object of the action was to have it found and declared "that the defenders have no right or title to enter upon or pasture their cattle, horses, sheep, or other bestial upon the farm and lands of Crakaig . . . belonging to the pursuer, and let to George Bradfute Dudgeon, farmer, Crakaig, his tenant, or upon any part thereof;" and a conclusion for interdict was made against the trespass of the defenders and the pasturing of their cattle and sheep upon the said lands, "and in particular, from grazing their sheep and bestial to the west of the line marked A B on the plan produced herewith, being the eastern boundary of said farm of Crakaig."

The defenders, besides pleading to the merits, met the action with four preliminary pleas, viz.—"(1) *Res judicata.* (2) *Forum non conveniens.* (3) The pursuer having submitted the matter in controversy between the parties to the judgment of the Sheriff-Subststute, and having withdrawn his appeal against the said judgment, which determined the said controversy on its merits, and having acquiesced in its becoming final, is barred from insisting in the present action. (4) The matter in controversy being raised by the defenders' prior application to the Crofters Commission, which is still pending, and the said Commission being empowered to determine such questions finally, the present action should be dismissed." These pleas, however, were substantially stated by the first two.

The foundation in fact for the plea of *res judicata* was that on or about 10th July 1889 an action, with the same parties as pursuer and defenders, had been raised in the Sheriff Court of Ross, Cromarty, and Sutherland, in which it was asked that the Court should "interdict and ordain the defenders instantly to remove such cattle, horses, sheep, or other bestial as they have already put on the said farm and lands" (viz., of Crakaig), "and failing their removing as aforesaid within such period as the Court shall appoint," warrant was asked for their removal. In the proceedings which followed the controversy between the parties concerned the true boundary of the farm of Crakaig upon its eastern side, where it marched with the western boundary of a stretch of hill pasture enjoyed by the defenders in connection with their tenancy of certain crofts. The defenders averred that they and their authors had formerly held their crofts as sub-tenants from the former tenant of the farm of Crakaig, and that they possessed during the period of their sub-tenancy a large extent of hill pasture extending from Crakaig Burn on the south-west to Alteenie Burn upon the north-east. The averment (being statement 2 in the Sheriff Court process) continued thus—"About forty years ago it was intimated to the whole crofters in said township that they should hold direct from the landlord" (*i.e.*, the Duke of Sutherland). "At the time the landlord's factor (Mr Gunn), along with the then tenant of the farm of Crakaig (Mr Innes) settled the exact boundary between the crofters' hill pasture and the farm of Crakaig. That boundary was announced to be the said burn of Crakaig on the west;" . . . and the defenders further averred that since the date when the boundary was so fixed they had held their crofts with hill pasture to Crakaig Burn directly from the Duke. The contention of the latter was that the eastern boundary of Crakaig farm was beyond the Crakaig Burn, and was in fact a certain dyke with a line continued from its termination, all as set forth in a sketch produced. The boundary so marked out upon the sketch was the same as the line A B in the plan produced in the present action.

The Sheriff-Substitute (MACKENZIE) allowed the defenders a proof of their averments in statement 2, and to the pursuer a conjunct probation, and after the proof and a personal inspection of the ground, he issued the following interlocutor—"The Sheriff-Substitute having, as notified in last interlocutor, inspected the ground in question, and having advised the cause, Finds that the crofts of which the defenders are now in possession were formerly held by them or their authors as sub-tenants on the Crakaig farm, and that attached to said crofts there was a large extent of hill pasture common to the whole crofters of the township of Crakaig, and lying between the Alteenie Burn on the east and the Crakaig Burn on the west: Finds that

during the tenancy of Robert Innes, principal tenant of Crakaig farm, and about forty years ago, intimation was made to the whole crofters of the township that in future they should hold direct of the proprietor—the Duke of Sutherland—to whom the rents would be payable, and this arrangement was then carried out, and has been acted upon ever since: Finds that in carrying out said arrangement the proprietor's factor Mr Gunn, along with the said Robert Innes, settled and defined the boundaries between the crofters' hill pasture and the Crakaig farm pasture as follows—The Crakaig Burn on the west, and an old drain and feal dyke leading eastwards from the Crakaig Burn to the road giving access to the public road to the defenders' holdings on the south: Finds that the hill pasture between these boundaries has been possessed and used in common by the defenders and the other crofters of the township ever since said delimitation and up to July last, when the present interdict was served upon the defenders, and that until said last-mentioned date no legal intimation was ever made to them that in occupying the common pasture allocated as above mentioned they were thereby acting illegally and committing a trespass upon any part of the principal farm of Crakaig: Finds in law that as crofters in legal and actual possession of the common pasture extending up to the Crakaig Burn on the west at the date of the passing of the Crofters Holdings (Scotland) Act of 1886, the defenders are entitled to security of tenure as regards the holdings then possessed by them: Therefore finds that the present action, in so far as it seeks to interfere with their free use of the said common pasture extending up to the Crakaig Burn (and no other trespass on the Crakaig farm is alleged against the defenders), is incompetent: Recals the interim interdict and dismisses the action: Finds the defenders entitled to expenses of process," &c.

From this judgment the pursuer appealed, but as he did not insist in the appeal, it was dismissed upon 16th January 1890, and the judgment became final.

The facts relating to the plea of *forum non conveniens* were these—On or about 28th May 1887 the defenders lodged applications with the Crofters Commission to have fair rents fixed for their holdings, and although the Commission had not yet taken up the question, they were shortly expected to do so, and they could then settle the question of disputed boundary, which fell within their competency under section 21 of the Crofters Act.

The Lord Ordinary (STORMONTH DARLING) upon 13th November 1890 repelled the four preliminary pleas upon the grounds set forth in the following opinion:—"The pursuer asks for a proof of his averments. This is resisted by the defenders on two grounds—(1) that the matter in controversy is *res judicata* in respect of a judgment of the Sheriff-Substitute of Sutherland, and (2) that the subject-matter of the present action falls within the exclusive jurisdiction of the Crofters Commission.

"I do not think that either of these pleas is a bar to inquiry in the present action.

"(1) What the pursuer here seeks is declarator that the defenders have no right or title to enter upon or pasture their stock on the farm of Crakaig or any part thereof, and interdict against them from disturbing the tenant of the farm in his peaceable possession thereof, and in particular from grazing their sheep or bestial to the west of a certain line on a plan produced with the summons. The action in the Sheriff Court was at the instance of the same pursuer against the same defenders, and it related to the same stretch of hill pasture. The petition prayed for interdict in similar though less precise terms, and it also concluded that the defenders should be ordained to remove their stock, or failing their doing so, that warrant should be granted to the pursuer to have it removed. The Sheriff-Substitute after granting interim interdict allowed a proof limited to certain averments, and personally inspected the ground. He then issued the interlocutor quoted on record, whereby he recalled the interim interdict and dismissed the action. I cannot regard a possessory judgment of that kind as forming a bar to this action of declarator and interdict. It may be that the Sheriff proceeded on a view of the evidence which, if well founded, would be fatal to the pursuer's success in the present proceedings. But in order to reach the conclusion that the defenders ought not to be interdicted, and that their stock ought not to be summarily removed, it was unnecessary for him to do more than satisfy himself that the defenders had a *prima facie* case for maintaining possession. The question of right was not necessarily involved, and the case may not have been, and probably was not, presented with the fulness appropriate to a declarator in the Supreme Court.

"(2) By section 21 of the Crofters Act it is made competent to the Commissioners to decide summarily any questions relating to the boundaries or marches between crofters' holdings and adjoining lands. This section is introduced, and I think the whole of it is controlled by the words 'when an application for an enlargement of crofters' holdings is made to the Crofters Commission;' but it is admitted by the pursuer that such an application has been made by the defenders, although it has not yet been considered by the Commissioners. The defenders' counsel rather repudiated the notion that it was by this application that the Commissioners' right of adjudication was let in, for he maintained that the application to fix a fair rent necessarily brought within their cognisance all questions affecting the extent of the holding. But whether the jurisdiction of the Commissioners is invoked by the one kind of application or the other, I am of opinion that it is not privative, and that in particular it does not oust the jurisdiction of the Supreme Court in determining whether a particular area of ground falls within one contract of lease or another. [See Erskine's Inst. i. 2, 7; and with reference to a sepa-

rate part of the jurisdiction of the Crofters Commission, *Fraser* v. *Macdonald*, 14 R. 1881.]"

Against this judgment the defenders reclaimed, and the case was considered and judgment given upon 18th December 1890.

Argued for the reclaimers—(1) The question was *res judicata*. The action in the Sheriff Court raised the same question of right as was raised in this action, and as it had been contested and decided upon the precise point now raised, the rule of the *Marquis of Huntly* v. *Nicol*, 20 D. 374, was applicable. The following also were cited—*Glasgow, &c., Railway Company* v. *Drew* 23 D. 835; *Murray* v. *M'Kenzie*, 1 Coup. 247; *Pattison* v. *Campbell*, 5 S. 208; *Earl of Leven* v. *Cartwright*, 23 D. 1038. Further, notwithstanding the view in Erskine's Institutes (iv. 3-7), it was evident from the note of cases in the last edition that a judgment in the Sheriff Court would now be *res judicata* in the Supreme Court unless appealed or reduced. (2) The Court of Session was *forum non conveniens*. Application had been duly made by defenders to the Crofters Commission for an enlargement of their holdings, and under the Crofters' Holdings (Scotland) Act 1886 (49 and 50 Vict. cap. 29), sec. 21, it was competent to the Commissioners under such an application "to decide summarily any questions relating to the boundaries or marches between crofters' holdings, including grazings, or between crofters' holdings, including grazings, and adjoining lands." This was really a question of boundary, and therefore competent to the Commission, while the whole policy of the Act was to provide for the indigent crofter a cheap and expeditious tribunal for the decision of matters affecting his holding. To bring him to the Court of Session was to enforce a surrender of rights he could not defend there because of his poverty.

Argued for respondent—(1) There was no authority for the statement that a Sheriff Court decree could found a plea of *res judicata* in the Court of Session. Erskine in the passage quoted (iv. 3-7) was against that view, and the cases in the note, if examined, gave no support to the view of the editor. The cases were—*Marquis of Stafford*, 5 S. 839; *Robertson*, 22 D. 893; *Crawford*, 22 D. 1064; and *Campbell*, 2 Macph. 399; see also Dove Wilson's Sheriff Court Practice (3rd ed.), p. 583. But in any event, the question raised in the Sheriff Court was not the same, being merely to decide the matter of possession, while this was a declarator of property, and the Sheriff holding interdict to be an improper mode of effecting a removing, found the action incompetent. But in reality the Sheriff went beyond his warrant, and in the possessory action professed to give judgment upon matters not raised in the record. (2) The jurisdiction of the Crofter Commissioners was not exclusive of that of the Court of Session in matters of proprietary right; the Act conferred upon them such jurisdiction only as ancillary to their ordinary functions. The defenders claimed to possess the ground here in dispute as part of their holdings, and at the same time applied to the Commissioners to have it added to their holdings. The extent of the holdings was in dispute, and it was a more orderly procedure that the proper Court for questions of property should determine the present extent of the defenders' pasture before the Crofters Commission proceeded to decide whether the defenders were entitled to more.

At advising—

LORD PRESIDENT—This is an action of declarator in which it is sought to be declared that the defenders, who are crofters in the parish of Loth and the county of Sutherland, have no right or title to enter upon or pasture their cattle, horses, sheep, or other bestial upon the farm and lands of Crakaig, in the parish of Loth and county of Sutherland, belonging to the pursuer, and let to John Bradfute Dudgeon, farmer, Crakaig, his tenant, or upon any part thereof; and there follows a conclusion for interdict against the defenders entering upon or disturbing the tenant in his possession of the farm.

Now, the defence upon the merits to that action is that the defenders have the right of pasturage over the lands in question, and there is thus raised a question of fact and law which seems to be quite competent to be raised by this summons and defences, and as certainly suited to the jurisdiction of this Court. But the action has been met by four pleas-in-law of what may be called a technical character, but in practical effect they resolve into two only. The one is *res judicata*, and the other is *forum non conveniens*. The Lord Ordinary has disposed of these adversely to the defenders.

As regards the plea of *res judicata*, it is founded upon a summons or petition in the Sheriff Court of the county of Sutherland, and a judgment pronounced by the Sheriff-Substitute thereon. The petition prays the Sheriff to interdict the defenders from unlawfully entering, trespassing, and pasturing their cattle, horses, sheep, or other bestial upon the farm and lands of Crakaig, in the parish of Loth and county of Sutherland, or upon any part thereof, and so forth; I need hardly read the rest of the prayer. Now, this petition was disposed of by the Sheriff-Substitute in a way which appears to me to be rather remarkable. The statements of the parties in that petition were to a large extent statements of possession by the one party and the other, but the way in which the Sheriff-Substitute dealt with the case was to allow a very limited proof, not a general proof of possession to both parties, but a proof of article 2 of the defenders' statement of facts (in so far as the same is denied or not admitted), and to the pursuer a conjunct probation. Now, statement 2 for the defenders in that Sheriff Court case was not a statement of possession at all, but it was to this effect—"That about forty years ago it was intimated to the whole crofters in said township that they should hold direct from the landlord. At that time the landlord's

factor (Mr Gunn), along with the then tenant of the farm of Crakaig (Mr Innes), settled the exact boundary between the crofters' hill pasture and the farm of Crakaig. That boundary was announced to be the said burn of Crakaig on the west, and an old ditch and turf dyke leading eastwards from the said Crakaig Burn to the road leading from the public road to the defenders' holdings on the south." Now, that is an averment of an agreement, but when the parties came to lead evidence the Sheriff-Substitute seems to have forgotten what was to be the character of the proof he allowed, and accordingly evidence of possession was adduced upon both sides. The proceedings therefore were so far very irregular. But what renders the whole case still more remarkable is this, that in the end the Sheriff-Substitute "finds that the hill pasture between the said southern boundary and the defenders' holdings has been possessed and used in common by the defenders and the other crofters of the township ever since said delimitation and up to July last, when the present interdict was served upon the defenders." Now, that is a finding in fact on which the Sheriff-Substitute had allowed no proof whatever. Then he finds still further, "that until said last-mentioned date no legal intimation was ever made to them that in occupying the common pasture allocated as above mentioned they were acting illegally and committing a trespass upon any part of the principal farm of Crakaig." And he "finds in law that as crofters in legal and actual possession of the common pasture up to the Crakaig Burn on the west at the date of the passing of the Crofters Holdings (Scotland) Act of 1886, the defenders are entitled to security of tenure as regards the holdings then possessed by them;" and therefore he "finds that the present action, in so far as it seeks to interfere with their free use of the said common pasture up to the Crakaig Burn (and no other trespass on the Crakaig farm is alleged against the defenders) is incompetent," and "recals the interdict, and dismisses the action."

Now, I really am unable to understand by what process of reasoning the Sheriff-Substitute comes to that conclusion. He begins the conduct of the process by substantially refusing any proof of possession, and then he allows evidence to be led of possession in the course of the proof, and then he finds certain facts in reference to possession, and therefore he finds the action incompetent, and recals the interim interdict, and dismisses the action. Now, perhaps it might be thought sufficient for the present purpose, without further criticising the mode of conducting the process by the Sheriff-Substitute, to say that his finding that that process was incompetent can never by any possibility be *res judicata* to bar an action which undoubtedly is competent for trying the question. An action dismissed as incompetent cannot prevent the pursuer of that action from raising a competent action to try the same question. It would be just as absurd to say that because an action had been dismissed as irrelevant, therefore the pursuer of that action could never bring a relevant action to try the same cause. That question was raised in the well-known case of *Russell* v. *Gillespie*, 21 D. (H. of L.) 13, and 3 Macq. 757, where the House of Lords held, reversing the judgment of this Court, that the fact of the second action being relevant when the first action was irrelevant was a complete answer to the plea of *res judicata*. It appears to me that this kind of incompetency is a case *a fortiori* altogether. If the former action was incompetent the case could not be tried, and was not tried, under it, and therefore that plea falls to the ground.

Then as regards the second defence, it appears that the party has mistaken his position altogether. The object of this action is to establish—independently of the operation of the Crofters Act altogether, and without prejudice to any application which may be made to the Crofters Commission for giving additional land to the defenders—what were the rights of parties at the time the Crofters Act was passed. That does not interfere with the operation of the Crofters Act. On the contrary, it rather seems to me to clear the way to let in the operation of the Crofters Act, for until it be determined what were the existing rights of parties at the time the Crofters Act was passed, or at the time the application under the Crofters Act was made—until that is determined, it is difficult to see what the Crofters Commission could do. Are they to grant additional pasture land to the crofters upon the footing that they already possess this pasture land on the farm of Crakaig, or on the supposition that they do not possess it. I think that would be a great obstacle to the Crofters Commission in determining this case. But a judgment in the present case would remove that, and would show the Crofters Commission what was the state of the rights of parties and of the possession of parties at the time when the Crofters Act was passed and the Commission brought into operation. Therefore the plea of *forum non conveniens* appears to be a dream in this case altogether. It seems to me this is the convenient form of all others for trying this question.

Upon these grounds I entirely agree with the Lord Ordinary in the conclusion at which he has arrived in repelling the first four pleas.

LORD ADAM—The pursuer of this action of declarator is the Duke of Sutherland, and the defenders are certain crofters who claim to have in connection with their crofts certain rights of pasture extending over adjoining ground. Now, the declarator in its leading conclusion seeks to have it found and declared that the defenders had no right to pasture cattle, and so on, on the farm and lands of Crakaig. But that does not disclose the real question at issue between the parties, because if you once establish a right to pasture, the question arises, what is the extent of the farm of Crakaig? and, as I understand the case, the

defenders do not maintain any right to pasture cattle upon that farm. Therefore the real question does not appear on the first conclusion of this action. But it appears upon the second conclusion, where interdict is sought against the defenders in particular grazing their sheep or bestial to the west of the line marked A B on the plan produced, being the eastern boundary of the said farm of Crakaig. The answer to that is in point of fact that that particular line A B, which is, I understand, represented by a wall on the ground, is not the eastern boundary of the farm of Crakaig, but that the eastern boundary is the burn of Crakaig, and it is said that the only place where the defenders have pastured their cattle is upon the piece of ground in dispute between these two places. That is the real question at issue—the question of fact whether or not the true boundary of the farm of Crakaig is this wall or whether it is the burn.

Now, in defence four pleas, as your Lordship has said, are stated by the defenders, but in point of fact these really resolve into two. The first is that it is *res judicata*, a certain process in the Sheriff Court having already decided that this boundary claimed by the respondents is the true boundary; and in the next place, that whether that was so or not, the Court of Session is not the *forum conveniens* in which to try this case. These are the two pleas, or rather, that is the substance of the four pleas which the Lord Ordinary has repelled, and the question is, whether the Lord Ordinary is right or wrong in repelling those pleas?

Now, your Lordship has stated what the Sheriff Court action was. It merely asked interdict against the defenders pasturing their cattle "upon the farm and lands of Crakaig." It does not appear anywhere on the face of the petition in the Sheriff Court what the boundaries are of that farm. That question, which is the question raised in the present action, first appeared in the defences to the petition in the Sheriff Court, and it is a question that is vital, because if the respondents are right in saying that the only place where they pastured their cattle is beyond that boundary, then of course the Sheriff should have refused the interdict, and there would have been an end of the case. The Sheriff-Substitute, as your Lordship pointed out, took a very peculiar view. It was to my mind a possessory action, and neither more nor less, and it was therefore one in which the proof of possession for a period of seven years, or for any period short of forty years, would be sufficient and all that was necessary to entitle the tenants to have the interdict brought against them refused; and that was the real point in the case to which the proof should have been directed. But instead of that, as your Lordship has pointed out, the only thing of which the Sheriff-Substitute allowed proof was the averment in article 2 of the defenders' statement of facts, in which it was averred that some forty years before those representing the Duke of Sutherland at the time had laid out on the ground the true boundary of the farm of Crakaig, and that it was then announced to be this particular burn. That was the only thing of which a proof was allowed, but proof was notwithstanding led not only of that but of possession, for which there was no warrant, and thereafter, on considering this proof, the Sheriff-Substitute came to the conclusion that the action was incompetent, and he accordingly dismissed it. Now, how an action brought by a party against cattle being allowed to trespass on what he alleged was his ground is an incompetent action I cannot understand. He might have had no ground on the merits for saying that cattle were trespassing on his ground, but how an action which he brought against an alleged trespass is incompetent I entirely fail to see. That, however, was the result of that action, and I agree with your Lordship that no finding in fact in an action which the Sheriff has found incompetent can avail in barring a subsequent action which is competent. But besides that, I think this action being merely a possessory action, any finding come to in it cannot be *res judicata*.

Mr Murray raised a very large plea on this question. He said it was well-known law that no decree of the Sheriff Court, or judgment in the Sheriff Court, can in any case be *res judicata*. I do not consider it necessary to go into that question in this case, because, as I have said, the case which was in the Sheriff Court was a mere possessory action. The Sheriff, no doubt, is allowed in some cases to determine questions of heritable right, but he has not a universal jurisdiction in questions of that kind. By the 8th, 9th, and 10th sections, I think, of the Sheriff Court Act of 1877 the Sheriff has jurisdiction in a limited class of cases to determine questions of that kind, but that is his only jurisdiction. Now this case in the Sheriff Court was not brought under these clauses at all, but just as an ordinary possessory action brought before the Sheriff in the exercise of his ordinary jurisdiction. He had no jurisdiction to determine a question of heritable right, and if that be so, any findings of his which are said to determine the question of heritable right which is in litigation in the present action cannot exclude the present action. On these grounds I quite agree with your Lordship and the Lord Ordinary that this plea must be repelled.

I have nothing to add to what your Lordship has said about *forum non conveniens*. I think this is not only the *forum* convenient, but the only *forum* to determine this question.

LORD M'LAREN—I agree with your Lordship that nothing that we decide in this case can interfere in any way with the operation of that most useful and convenient Act of the Legislature, the Crofters Act. That sufficiently appears when we consider what is the principle of the Crofters Act. Whether one agrees with the principle or not, it is this—I think that where a proprietor has allowed a village community to be formed on his estate in those remote districts of the Highlands

where there is no employment and no means of subsistence except upon the land, he has given his village tenants an expectation that they will be enabled to support themselves out of the land, and he is under an obligation to furnish them with sufficient arable and pasture land for the purpose of subsistence. That, I take it, is the principle embodied in the Act, and it is worked out by means of a Commission who are empowered to deal with questions of rent and also with questions of occupation, and if necessary to add to the holdings. Now, one sees that in the end that may be a better thing for the proprietor than to have to support his tenants under the poor law. But it never was intended that these tenants should choose for themselves any part of the lands most convenient for themselves and belonging to their landlord; and if they claimed a part of the estate as their possession, that is a question of law which must be decided by the ordinary Courts and not by a Commission, which does not deal with questions of right at all, but with questions of expediency or of the obligation resulting from circumstances of residence, and the obligation of the land to maintain the poor who are upon it. It appears to me that the right of the farm tenant is a right quite as deserving of consideration by a court of law as the right of the crofter, and where the two interests conflict, the proprietor is the proper person to have the claim settled. That I presume to be the reason why the Duke of Sutherland appears here to maintain the right of his farm tenant. After we have determined whether the subject in dispute belongs to the crofter community or belongs to the farm tenant, it will then be for the Commissioners, if necessary, to assign such holdings as they may think proper to the crofters.

I agree with your Lordship that there is no good objection to the present action.

LORD KINNEAR—I agree with your Lordship in the chair, and also with the additional observations that were made by Lord Adam.

The Court adhered.

Counsel for the Pursuer—Graham Murray — Dickson. Agents — Tods, Murray, & Jamieson, W.S.

Counsel for the Defenders—M'Kechnie—Kennedy. Agents—Rusk & Miller, W.S.

Thursday, December 18.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

M'EWAN (PARLANE'S TRUSTEE) *v.* MURRAY.

Succession — Bequest — Construction — Bequest under Burden of Heritable Securities and Ground-Annuals — Debt — Extinction of Debt confusione.

A testatrix directed her trustees to convey to a legatee certain heritable subjects "under burden of any heritable securities that may affect the same, and the feu-duty, ground-annual, and other burdens affecting it," with entry as at the term immediately preceding her death. Before the will was executed the testatrix paid up a cash-credit, and received an assignation of certain ground-annuals on the said heritable subjects disponed in security of the advance. After the will was executed the testatrix paid up a sum secured over these subjects by a heritable bond in which she was debtor, and took an assignation thereof in her favour. *Held*, on construction of the terms of the bequest, (1) that the heritable bond did not affect the property when the will came into operation, as the security was extinguished when the debt was paid; but (2) (*diss.* Lord Young) that the legatee must take the property subject to the burden of the ground-annuals.

Mrs Parlane, Elmbank Crescent, Glasgow, died upon 11th July 1889. By trust disposition and settlement dated 11th March 1873 she conveyed her whole estate to trustees, and provided, *inter alia*—"In the third place, my trustees shall, at the expense of my estate, assign, dispone, and convey to the said Thomas Murray, whom failing to his son Walter Murray, or procure a proper title with that destination to the property belonging to me in Cleveland Lane, Glasgow, presently vested in the said Thomas Murray, but qualified by a back-letter in my favour, but always under burden of any heritable securities that may affect the same, and the feu-duty, ground-annual, and other burdens affecting it, with entry as at the term of Whitsunday or Martinmas immediately preceding my death." She destined the residue to such charities as her trustees should approve of.

In March 1890 Murray brought this action against the trustees to have it declared that they were bound to convey to him the property left him under the trust-disposition, and that without the burden of a bond and disposition in security for £1800, and two ground-annuals of the value of £19, 4s. and £19, 8s. 1d. respectively.

It appeared that the property in Cleveland Lane, called Cleveland Buildings, had been erected in 1863 by Robert Johnston, Mrs Parlane's first husband, and that in 1861 on security of the site he had obtained a cash-credit for £4000 from the Bank of Scot-