Council for Second Party—H. Johnston—Macfarlane.

Agents for First, Second, and Third Parties—Tods, Murray, & Jamieson, W.S.

Tuesday, December 8.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

STUART & STUART *v.* MACLEOD.

Sequestration — Contingent Debt — Bankruptcy Act 1856, *sec.* 14—*Crofter—Crofters Holdings Acts* 1886 *and* 1887.

A creditor applied for sequestration of his debtor, founding on a debt constituted by extract decree. The debtor lodged a minute stating that the decree had been granted for payment of the arrears of rent of a croft occupied by him, and that he had applied to the Crofters Commission to fix a fair rent therefor, and to determine the amount of arrears payable by him. He craved the Court to dismiss the petition for sequestration in respect that the debt founded on was contingent.

The Court *held* that the debt was not contingent, in respect that it had been decerned for as arrears of rent of an inn let to the debtor separately from his holding as a crofter.

Opinions by Lord Adam, Lord Kinnear, and Lord Kincairney, that arrears of rent for which decree has been granted against a crofter are a contingent debt where the crofter has applied to the Crofters Commission to fix a fair rent for his holding.

Opinion by Lord M'Laren, that where a dispute arises between a landlord and tenant as to whether the latter is or is not a crofter, that dispute is outside the jurisdiction of the Crofters Commission, and can only be determined by the ordinary courts of the country.

Sequestration—Discretion of Court—Bankruptcy Act 1856, *sec.* 30.

Opinion per curiam—following opinion of Court in *Joel* v. *Gill*, 21 D. 929—that in awarding sequestration the Court is not exercising any discretion, but must award it where the statutory requisites are complied with.

This was a petition for the sequestration of Donald Macleod, residing at Scuir Inn, Island of Eigg, presented by Messrs Stuart & Stuart, W.S., the amount of the debt sworn to being £77, 18s. 7d.

The circumstances in which the application was made were as follow:—On 30th June 1890 Norman Macpherson, LL.D., advocate, Edinburgh, and Miss Isabella Macpherson, Miss Margaret Macpherson, and Miss Anna Maria Macpherson, proprietors *pro indiviso* of the Island of Eigg, brought an action against the said Donald Macleod for payment of £52, 10s., with interest thereon from the date of citation until payment.

The pursuers averred—"(Cond. 1) The pursuers are proprietors *pro indiviso* of the Island of Eigg, . . . and the Scuir Inn, of which the defender is tenant, is situated in the Island of Eigg, and forms part of the pursuers' said property." "(Cond. 2) Upwards of fifty years ago the house now known as the Scuir Inn was the house of the tenant of the farm of Galmisdale. That farm having fallen out of lease some forty or fifty years ago, it was divided among crofters, and the farmhouse was let to defender's father, the late Allan Macleod, as an inn, in place of the small cottage near the seashore then occupied by him as such. There was also at same time let to Allan Macleod a croft in Galmisdale, which is now in possession of the defender. The two subjects were let distinctly, and separate rents paid therefor. Subsequently the pursuers prohibited the said Allan Macleod from selling spirituous liquors in the inn, and in respect thereof let him occupy the house rent free. When in 1878 it was found that the inn had fallen into disrepair, and become insufficient for the requirements of the island, the pursuers at a very considerable outlay improved the house and put it into thorough repair, and agreed to give the said Allan Macleod and defender a lease thereof for three years at £15 per annum. . . . No formal lease was prepared, but the arrangement come to under the letter and minute was acted on, the proprietors repairing and adding to the house, and Allan Macleod and the defender regularly paying the agreed-on rent of £15 per annum, and that over and above and distinct from the rent of the croft in Galmisdale, £14 per annum. The explanation in answer is denied." In Cond. 6 they averred that the defender had paid no rent for said inn since Martinmas 1886, while he had paid regularly the rent of his croft in Galmisdale, and that he was accordingly due the sum sued for, being the seven half-yearly rents due for the inn from Whitsunday 1887 to Whitsunday 1890.

The defender in answer averred—"Admitted that upwards of fifty years ago the house called by the pursuers the Scuir Inn was the dwelling-house of the tenant of the farm of Galmisdale; that the said farm was then divided into crofts, and that the defender's father became a tenant of one of these. *Quoad ultra* denied. Explained that the defender's father having leased the largest croft, there was let along with it to him the said dwelling-house, which was thereafter occupied by him and subsequently by the defender. The pursuers made certain improvements on the dwelling-house about the year 1878, on the footing of a verbal agreement with the defender whereby he undertook to pay 5 per cent. on the cost after the repairs were executed. The pursuers represented that they had expended £300, and charged the defender £15 per annum of additional rent for said croft and dwelling-house. The defender and his father always complained against that increase as excessive. Admitted that the defender has continued in the occupancy of his croft and dwelling-

house, and that he refuses to pay the additional rent of £15. Explained that he has applied to the Crofter Commissioners, under the Crofters Holdings (Scotland) Act 1886, to fix the fair rent for said croft, including the dwelling-house, and arrears payable by him, and that the said application has not yet been disposed of. They have issued the following order, viz.—*Wick, 15th September* 1890.—The Commissioners having resumed consideration of this application, together with the objections for the respondents and answers thereto for the applicant, and other documents produced, prohibit *in hoc statu* all proceedings for the sale of the applicant's effects upon his holding by virtue of any decree for rent or arrears of rent, and without prejudice to and under reservation of the whole rights and pleas of parties: Ordain the applicant to make payment on or before the 1st day of November next of the sum of fifteen pounds sterling to account of the rent or arrears of rent sued for."

The defender pleaded, *inter alia*—"(1) The statements for the pursuers are irrelevant. (2) *Lis alibi pendens.* (3) In any view, the action ought to be sisted pending the disposal of the defender's application by the Crofters Commissioners."

The Lord Ordinary (WELLWOOD) having repelled these pleas and allowed a proof, a minute was lodged for the defender withdrawing the defence stated for him, and consenting to decree in favour of the pursuers conform to the conclusions of the summons "without prejudice to the defender's application to the Crofters Commission."

On 20th December the Lord Ordinary, in respect of this minute, decerned against the defender conform to the conclusions of the summons, with expenses, which were subsequently decerned for.

The pursuers thereafter extracted the decree pronounced in their favour, and on 29th May 1891 they charged the defender to make payment of £77, 18s. 7d., being the rent, interest, and expenses found due thereby, under deduction of £15 paid to account by the defender in accordance with the order of the Crofters Commissioners. The charge expired without payment being made, and in July the pursuers assigned the decree obtained by them to their law-agents Messrs Stuart & Stuart, W.S., who, as already stated, presented a petition for Macleod's sequestration.

In answer to the petition for sequestration, Macleod lodged a minute craving the Court to dismiss said petition. He founded on his application to the Crofters Commissioners, and to the order pronounced by them on 15th December 1890, and pleaded, *inter alia*—"(1) The petition is incompetent pending the respondent's application to the said Commissioners, and is barred by the terms of the order of said Commissioners. (2) The petition is incompetent in respect of its non-compliance with the statutory requirements, in so far as (*b*) the debt founded on is contingent. (3) The proceedings of the petitioners are unfair, oppressive, and unjust."

On 22nd August the Lord Ordinary on the Bills (KINCAIRNEY) refused the petition.

"*Opinion.*—I think the petition must be refused. The respondent has applied to the Crofter Commissioners to have his rent fixed on the assumption that his possession is a holding in the sense of the Act. It may turn out not to be so, but the Commissioners have provisionally treated it as a holding and have pronounced orders on that footing. I think I must take it in the meantime that it is or at least may be a holding. If so, it is within the reach of possibility that the arrears for which the petitioners hold a decree, or part of them, may be remitted, and therefore the petitioners' decree is not unconditional; it is in the position of a decree subject to review, and is therefore contingent and insufficient to found a sequestration. (Bankruptcy Act 1856, section 14—*Forbes* v. *Whyte*, November 29, 1890, 16 R. 182).

"The petitioners suggested that the petition might be sisted until the condition was purified, but I know of no precedent for such a course, and see no advantage in it.

"Further, if I have power to refuse a petition for sequestration on the ground of expediency, I think this petition should be refused on that ground, for this reason, that if sequestration were awarded, and if this debt after a lapse of more than forty days were reduced below £50, the respondent might be unable to get the sequestration recalled. He would suffer a wrong without having any apparent remedy. Having in view the observations of the Lord President in *Campbell* v. *Macfarlane*, 1862, 24 D. 1097, I think that, sitting in the Bill Chamber, I cannot hold that I have not that power.

"I think the petition should be refused on these two grounds. I do not find it necessary to deal with the respondent's other objections."

The petitioners reclaimed, and argued—A decree of Court was not suspended by an application to the Commissioners, and they had no power to suspend sequestration which was a diligence—*Fraser* v. *Macdonald*, December 7, 1886, 14 R. 181. Section 3 of the Crofters Holdings (Scotland) Act 1887 referred to section 1 of the Crofters Holdings Act 1886, and its purpose was limited to preventing a crofter being removed in consequence of a charge upon a decree for rent due upon his holding having expired without payment being made. The debt founded on by the petitioners was not arrears of rent of a "holding." It was constituted by a decree granted in terms of the conclusions of the libel, which proceeded on the averment that the sum sued for was the arrears of rent of an inn let to the respondent separately from his holding as a crofter, and was granted in respect of the respondent having withdrawn his defence that the sum sued for was the arrears of rent of the dwelling-house of his holding. It had now been ascertained that the respondent's application had been refused by the

Sub-Commissioners. The Lord Ordinary had no discretion to refuse sequestration where the conditions required by the Bankruptcy Act had been complied with —Bankruptcy Act 1856, sec. 30.

The respondent argued—Until the respondent's application was disposed of finally, it could not be known whether the debt founded on was or was not due to the petitioners. In the meantime the Commissioners had misused the powers given them by sec. 2 of the Act of 1887 by prohibiting a sale of the crofter's effects. The debt was contingent, and the petition should be refused—*Forbes* v. *Whyte*, November 29, 1890, 16 R. 182. The Sub-Commissioners' decision did not affect the contingency of the debt, as it was subject to an appeal to the Commissioners. The proceedings taken to make the respondent notour bankrupt were contrary to sec. 3 of the Crofters Act 1887. It would destroy the benefit of a crofter's application to the Commissioners if his estates could be sequestrated for arrears of rent pending their decision. The minute put in by the respondent, in respect of which the decree constituting the debt founded on by the petitioner was pronounced, was lodged "without prejudice to the defender's application to the Crofters Commission," and because the defender had no power to prevent the pursuers getting a decree for the amount of the arrears in accordance with the case of *Fraser* v. *Macdonald*. In that case, however, the effect of such a decree was specially reserved, and the amount ultimately to be paid thereunder would depend on the result of the application to the Commissioners. The question of the contingency of the debt founded on by the petitioners was therefore not affected by the circumstances in which the decree constituting it was granted. Further, it was within the discretion of the Lord Ordinary to refuse an application for sequestration if reasonable cause were shown why it should not be granted—*Campbell* v. *Macfarlane*, June 11, 1862, 24 D. 1097; *Gardner* v. *Woodside*, June 24, 1862, 24 D. 1133. This was a case for the exercise of such discretion by the Court. There was no case of diligence, for the landlord was the respondent's sole creditor. There was no danger of dilapidation. The creditor could suffer no loss by the application being refused, while the bankrupt would be greatly prejudiced if it were granted.

At advising—

LORD ADAM—This is a petition at the instance of Messrs Stuart & Stuart, Writers to the Signet, for sequestration of the estates of Donald Macleod. The Lord Ordinary has refused the application, and the question is whether he has been right in so doing.

It is not disputed that the respondent Macleod is subject to the jurisdiction of the Scotch Courts, nor is there any question that he is notour bankrupt under the Debtors Act 1880, nor, again, is it disputed that the petitioners have produced oath and vouchers of debt to an amount sufficient to warrant the granting of sequestration. Thus all the requisites for obtaining sequestration are present, but it is maintained by the respondent that the petitioning creditor is not qualified, because the debt on which he founds is a contingent debt. If that is so, no doubt under section 14 of the Bankruptcy Act sequestration cannot be awarded.

The first question then is, whether the debt on which the petitioning creditor founds is a contingent debt? That debt is constituted by a decree pronounced by Lord Wellwood for the sum of £77, 18s. 7d., and of that amount the sum of £52, 10s. is said to be contingent as being the arrears of rent of subjects which are a holding in the sense of the Crofters Act 1886, and because the respondent having applied to the Crofter Commissioners to have a fair rent fixed, it cannot be known until the result of that application how much of these arrears are really payable to the petitioners. That contention is supported by reference to section 6 of the Crofters Act, which provides sub-section (1) that "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 sub-section (5) that "in the proceedings on such application the Crofters Commission shall take 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."

Now, assuming that the respondent is a crofter, and that the rent of which he is in arrear is the rent of a holding in the sense of the Crofters Act, it is difficult not to concur in the Lord Ordinary's finding that the debt in question is a contingent debt, because it cannot be known until the respondent's application to the Crofters Commissioners has been disposed of what amount he will have to pay to the petitioners. That of course is, as I have said, on the assumption that the subjects, the rent of which is in arrear, are a holding in the sense of the Act, and that the respondent is a crofter. This leads us to the definition clause of the Act—section 4—to find out what a crofter and a holding are. A "crofter" is defined to mean "any person who at the passing of this Act is tenant of a holding from year to year, who resides on his holding, the annual rent of which does not exceed £30 in money, and which is situated in a crofting parish, and the successors of such persons in the holding, being his heirs or legatees." A "holding" is defined as "any piece of land held by a crofter, consisting of arable or pasture land, or of land partly arable and partly pasture, and which has been occupied and used as arable or pasture land (whether such pasture land is held by the crofter alone or in common with others) immediately preceding the passing of this Act,

including the site of his dwelling-house, and any offices or other conveniences connected therewith, but does not include garden ground, only apartments to a house."

Now, it is clear from these definitions that "holding" does not mean a house let by itself, but a piece of arable and pasture land, and that the term "crofter" is not applicable to the tenant of a house by itself.

That being so, we must go to the decree constituting the debt to see whether or not it is a decree for arrears of rent due on a holding in the sense of the Act. The decree was given in terms of the conclusions of the libel, but we must examine the record to see what the sum sued for consisted of. [*His Lordship then read Cond.* 1 *and* 2 *and Ans.* 2 *as above quoted.*] Now, these averments show quite distinctly what the issue between the parties was. The pursuers (whose assignees the present petitioners are) maintained that the Scuir Inn was let to the defender at a rent of £15 per annum, and the defender that the inn was the house of the croft, and that this £15 a-year was the additional rent charged for the house of the croft. In condescendence 2 we find distinctly stated what the sum sued for was, for the pursuers there aver that the defender, in accordance with his arrangement with them, regularly paid £15 a-year as the rent of the inn, "and that over and above and distinct from the rent of the croft in Galmisdale." It is perfectly clear from that that the sum of £52, 10s. sued for is the amount of seven half-years' rent of the inn and nothing else. After some proceedings the defender by minute withdrew his defences, and the Lord Ordinary in respect of that minute pronounced decree in terms of the conclusions of the libel—that is to say, for the amount of the arrears of the rent for the inn. Now, there is no averment that there is any arable or pasture land let in connection with the inn, and so it is quite clear that it is not a holding in the sense of the Crofters Act. It appears to me, therefore, that the Commissioners have no jurisdiction to deal with the arrears of rent for the inn, and on that ground I am of opinion that these arrears are not a contingent debt, and that the decision of the Lord Ordinary is wrong.

There is another ground on which the Lord Ordinary decides in favour of the respondent, though he gives forth rather an uncertain sound with regard to it. He says—"Further, if I have power to refuse a petition for sequestration on the ground of expediency, I think this petition should be refused on this ground, for this reason, that if sequestration were awarded, and if this debt after a lapse of more than forty days were reduced below £50, the respondent might be unable to get the sequestration recalled. He would suffer a wrong without any apparent remedy. Having in view the observations of the Lord President in *Campbell* v. *Macfarlane*, 1862, 24 D. 1097, I think that, sitting in the Bill Chamber, I cannot hold and have not that power." With all deference to the opinion of the Lord Ordinary I cannot agree that a Lord Ordinary has any discretion to refuse sequestration if all the conditions required by the statute have been complied with by the petition. I think that rule is laid down by the late Lord President in very distinct terms in the case of *Joel* v. *Gill*, 21 D. 929. He said (p. 937)—"In considering the reclaiming-note against this interlocutor, it is not necessary to dispose of all the pleas of the petitioner Joel; but it may be right at once to say that the Court entirely agree with the concluding remark of the Lord Ordinary in his note, 'that if the case falls within the statute, the Court is bound to award sequestration, and to maintain it where awarded.' In awarding and recalling sequestration we are not exercising any discretion; we have the statute, and the statute only, for our guide in the administration of this branch of the law, and are bound to disregard all considerations of mere equity or expediency. Sequestration being a diligence, and the most comprehensive and stringent of all diligences, it would be most unfortunate if its application and effect depended on anything less unbending than a statutory rule." His Lordship evidently thought it of great importance that this view should be impressed upon the profession, because in a subsequent stage of the same case (22 D. 6) he repeats the sentence which I have quoted from his previous judgment. I must say for myself, speaking from a somewhat long experience, I have always understood that the Act was so administered. I know of no case in which, dealing with an application for sequestration, the Court has used its discretion, and I do not think section 30 of the Bankruptcy Act is capable of any other construction than that put upon it by the late Lord President. The only construction, I think, which can be put upon that section is, that if the necessary evidence is laid before the Lord Ordinary, the Court must award sequestration unless the debtor instantly pays the debt or produces written evidence of payment. The Court has no discretion, but is bound, the conditions required by the statute being satisfied, to fulfil the merely ministerial duty of awarding sequestration. I therefore dissent from the view hesitatingly expressed by the Lord Ordinary, and am of opinion that the case should be remitted to him to award sequestration.

LORD M'LAREN—This is an interesting case, because it for the first time brings an order of the Crofter Commissioners, exercising the powers of dealing with private property vested in them by Act of Parliament, into collision with the ordinary jurisdiction of the courts of law. The effect of the Crofter Acts is that in certain congested districts of the Highlands the landed proprietors through their representatives in Parliament have as a temporary measure consented to devolve the administration of part of their property on a Parliamentary Commission, who are to arrange the terms of the holdings of a defined class of tenants on an equitable footing.

It is very important to the fair working of the Crofter Acts that their provisions should not be extended to persons for whom they were not intended, and who may be altogether outside the class who are recognised by the statutes as proper subjects of legislative protection. Without professing to give a legal definition of that class (because the statute gives the definition), I may say that they are tenants who are in the condition of earning a bare subsistence from their holdings, and who are not regarded as independent persons able to treat with their landlords on perfectly equal terms, and to contract for themselves. The tenant of an inn who is carrying on a mercantile business cannot be considered as in any proper sense a subject of legislation whose motive is such as I have described, and there is nothing in the Crofter Acts which could justify the inclusion of an innkeeper within their scope.

In the present case the respondent made an application to the Crofter Commissioners to fix a fair rent for the subjects let to him, which included an inn in the Island of Eigg. An application was also made for an order in terms of the Crofters Holdings Act 1887 restraining all proceedings against him pending the issue of the application. I think that the Commissioners who considered the matter had not perhaps fully realised their duties under the supplementary Act of 1877 when they issued an order restraining the use of diligence, because before issuing that order I think it was incumbent on them to consider whether the petitioner was a crofter in the sense of the Crofters Act. In the absence of such an order by the Commissioners I do not suppose that any opposition would have been offered to the petition for sequestration, because it had already been determined by a decision of the Second Division of the Court that the dependence of a proceeding before the Crofter Commission was not a ground for suspending the effect of a decree or the use of execution by a creditor. It was apparently the existence of this order which led the Lord Ordinary to take the view that the debt was a contingent one—a debt which might or might not continue to have existence according to the action which might ultimately be taken by the Commissioners.

I agree with Lord Adam that while the Commissioners must necessarily consider the question whether an applicant is a crofter for the purposes of the special jurisdiction or authority conferred on them by the constituting Act, yet if a dispute arises between landlord and tenant on this point, the Commissioners have no jurisdiction as between landlord and tenant to construe the statute and to determine whether the tenant is or is not a crofter in the sense of the Act. Their duty is, having found a crofter, to consider the question of fair rent as between him and his landlord, and unless the proprietor and the tenant are agreed that the tenant is a crofter in the sense of the statute, and is entitled to its benefits, it is only through the ordinary courts of the country that the dispute can be finally determined.

I am clearly of opinion in this case that the respondent's house is not a crofter holding, and that the Crofter Commissioners have no authority to regulate the conditions of its tenure. If this is the opinion of your Lordships, it follows that the Lord Ordinary is in error in treating the sum sued for as a contingent debt upon which sequestration cannot be awarded.

In regard to the concluding paragraph of the Lord Ordinary's note, I may perhaps be allowed to say that I am not sure that Lord Adam has quite appreciated the position taken by the Lord Ordinary. As I read his Lordship's observations, I am not sure that he says anything more than that if he had a discretion he would not have allowed sequestration to issue. But I do not understand that the Lord Ordinary claims such a discretion, and it is plain that the Court of Bankruptcy does not possess it. If the Court had a discretion in the present case I should perhaps have considered that it would be best for all parties that sequestration should be awarded, and that the respondent should get his discharge. In view of the difficulty of coming to an agreement on such a question it is probably fortunate that such a discretion does not exist, but that the diligence must issue so soon as the statutory conditions have been fulfilled.

In all the circumstances I agree that sequestration must be awarded.

LORD KINNEAR — I agree with Lord Adam. If the debt upon which a petition for sequestration is based is a decree for rent payable by a crofter, and if it appears to the Lord Ordinary or the Sheriff who is asked to award sequestration that the crofter has made an application to the Commissioners which may result in the discharge of a part of the rent, that application would, in my opinion, render the debt contingent. A debt may be contingent in respect not only of a suspensive, but also of a resolutive condition, and if at the time the petition for sequestration is presented it appears that the efficacy of the debt may depend upon the result of the statutory application that would make it contingent. I think the contingency would arise upon the application being made to the Commissioners, and not upon the issue of an interim order for the purpose of restraining a sale of the crofter's effects, because the issue of an order to that effect by the Crofters Commission involves no decision of any question as to the applicant's right to appeal to them. We must assume that in issuing an order restraining the sale of the crofter's effects the Commissioners were acting properly in the exercise of the discretion which the Act of Parliament confers upon them. But the question whether the debt is contingent or absolute does not depend upon their power to grant an interim stay of diligence, but upon their power to discharge arrears of rent. If the latter power has been legally invoked by a person entitled to appeal to the Commissioners

under the Act, the debt is contingent; because it cannot be known whether the result of the application may not be to extinguish it in whole or in part. But I do not think that the issue of the order makes any difference to the question.

But it is not enough that a bankrupt shall merely allege that he is a crofter. It must appear that he is in fact a crofter, and entitled as such to the benefits of the Act. I can quite imagine that a question of some difficulty might arise if the Lord Ordinary or the Sheriff were required to sustain or reject a plea that the debt upon which the sequestration proceeded was contingent—if it were necessary to inquire for that purpose into a disputed statement of facts, and determine whether in fact the bankrupt was a crofter or not. The Lord Ordinary in the Bill Chamber must proceed upon facts which can be instantly verified. But there is no difficulty of that kind here. I think the question for the consideration of the Lord Ordinary was not whether in point of fact the subject was a crofter holding or not, but whether the decree upon which he was asked to proceed was or was not a decree for the rent of a crofters' holding. I agree with Lord Adam that when the decree is read with reference to the record, it is evident that it is a decree for payment of the rent of an inn, and not of a crofter holding. The defence was that the tenant was a crofter, and that defence was withdrawn. If the question had been brought before the Commissioners in the first instance they must have considered and decided it in the explication of their statutory jurisdiction. But it was certainly a question which this Court had jurisdiction to decide; it was distinctly raised upon the record; and the defender could not withdraw it from the jurisdiction of the Court by withdrawing his defences for the purpose of appealing to a discretion which he had no title to invoke unless his defence was well founded. The decree which proceeded upon that withdrawal was final and conclusive between the parties, and there was thus sufficient evidence before the Lord Ordinary that the rent for which decree had been given was not the rent of a crofter holding.

It is satisfactory to be informed that the Sub-Commissioners have rejected the respondent's application, because it is thus apparent that the defence which was withdrawn in this Court was not well founded upon its merits. But we must proceed upon the decree, and not upon the subsequent deliverance of the Commissioners.

If the statutory requisites were satisfied, I agree with Lord Adam that the Lord Ordinary had no discretion as to granting or refusing the application for sequestration. His Lordship appears to have had some doubt upon that point, and therefore I think it is important that it should be known that the question was justly determined by the judgment of the Lord President in *Joel* v. *Gill*.

LORD PRESIDENT—I concur in the judgment proposed by Lord Adam, and on the grounds stated by his Lordship. I consider that the interlocutor of Lord Wellwood, pronounced on the record before him, concluded adversely to Mr Macleod the question whether the arrears of rent were due for such a holding as to make those arrears liable to be cancelled under the Crofters Act. Holding that decree, the petitioners were entitled to sequestration as creditors in a debt due and not contingent, and I think they ought to have obtained it.

The Court recalled the interlocutor of the Lord Ordinary, and remitted to him to grant sequestration as craved.

Counsel for the Petitioners — Baxter. Agents—Stuart & Stuart, W.S.

Counsel for the Respondent—M'Kechnie —Wilton. Agents — Emslie & Guthrie, S.S.C.

Tuesday, December 8.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

SMITH *v.* SCHOOL BOARD OF INVERARAY AND GLENARAY.

School—Teacher Appointed Prior to Education Act 1872 — *Contract between School Board and Teacher as to Emoluments—Power of School Board to Surrender Government Grants to Teacher.*

In 1873 the School Board of Inveraray entered into an agreement with the teacher of a parochial school within their district, who had been appointed before the passing of the Education Act, that the latter should be entitled, in addition to a salary of a certain amount, to "all the Government grants without any deductions except for the salary or salaries of a pupil teacher or pupil teachers." In 1885 an additional grant for attendance was made to the School Boards of Argyllshire and other Highland counties in consideration of the exceptionally heavy expenditure required to provide efficient education in these counties, and under the Code of 1887 a special grant for needlework was introduced.

Held—diss. Lord Young — (1) that these grants fell under the agreement concluded in 1873; (2) *following Somers* v. *School Board of Teviothead*, that it was *ultra vires* of a school board to enter into such an agreement.

By minute dated 23rd October 1873 the School Board of Inveraray and Glenaray "resolved to adhere to the arrangement contained in their minute of meeting of 3rd inst., viz., 'that Mr Smith' (who had been appointed teacher of the Burgh Parochial School in Inveraray in 1854) 'should have £5 in addition to his statutory salary of £35 on condition that he gives the use of two-thirds of the new class-room to be converted