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

further ordered that Baron Gudin should execute and deliver to Madame Gudin such transfers, deeds, or other documents as might be necessary for vesting in her, for her separate use, all property not capable of delivery referred to in the said affidavits, and should deliver up to her, for her separate use, such of the property referred to in the said affidavits as might be capable of delivery, and all documents in his custody or power relating to any property by said judgment directed to be conveyed or delivered. This order was repeated on 2d June 1885, and the Baron Gudin having failed to implement the order, the Court on 24th July 1885 nominated the Chief Clerk to execute on behalf of Baron Gudin the necessary transfers, authorities, and documents. The Chief Clerk accordingly executed upon 1st August 1885 an indenture, whereby, on the narrative of the agreement of 5th November 1884, and the decrees of 14th March and 2d June 1885, he conveyed the bonds and obligations and deposit-receipts for the money in bank partly to trustees to secure the allowance of £300 per annum to Baron Gudin, as provided in said agreement, and partly to Madame Gudin, her executors, administrators, and assigns absolutely. He also settled and signed on 1st August 1885, in pursuance of the directions of Mr Justice Pearson, a document of request and authority to the Bank of Scotland, Glasgow, to deliver to the trustees mentioned in said indenture, and to Madame Gudin, the bonds and obligations, and to pay to the Baroness the sums in the said deposit-receipts.

In addition to the demand on behalf of Madame Gudin for the delivery of the said bonds and deposit-receipts, an intimation was made to the bank by Baron Gudin, by which he notified to the bank that he would hold them responsible if they gave up to his wife any of the moneys or securities deposited by him with them. He also intimated that he had instituted proceedings in the French Courts to nullify the proceedings taken against him in England.

In these circumstances the present action of multiplepoinding was raised in name of the Bank of Scotland, as pursuers and nominal raisers, to have the question determined as to which of the claimants was entitled to the documents and cash deposited with them by Baron Gudin. Baroness Gudin was the real raiser. The fund *in medio* consisted of various bonds of American, Canadian, and French railways, together with a sum of £2000 in deposit-receipt, which sum the defender and real raiser, Madame Gudin, alleged belonged to her although deposited in the said bank by the defender Baron Gudin in his own name.

Madame Gudin claimed to be ranked and preferred to the whole fund *in medio* except to certain American and Canadian railway bonds, which were claimed by Messrs Isidore Bourke and Alfred Kirby (the trustees nominated by her in terms of the agreement of November 1884), and to which bonds Madame Gudin made no claim.

Baron Gudin also lodged a claim. He averred that the bonds and obligations were lodged by him in the bank for safe custody, that they and the £2000 already referred to were investments of funds belonging to him, and declared by the said contract of marriage to be his property. He also averred—"In consequence of proceedings taken by the real raiser in the English High Court of Justice to enforce a pretended agreement said to have been entered into between the claimant and real raiser in an action between the parties brought by the real raiser in the High Court of Justice in England—the said agreement purporting to deal with the right to the present fund *in medio*—the claimant has taken proceedings in the French Courts with a view to establish the nullity of the said pretended agreement, and all that has followed thereon in regard to the bonds, obligations, certificates, and sums of money forming the fund *in medio*, and to have his right to these bonds, &c., declared. The real raiser has appeared in the said action, and parties were heard upon the 14th January last. The ground of the said proceedings is that the English Courts had no jurisdiction to entertain the action between the parties, or pronounce the orders pronounced by them upon which the real raiser now founds, and that the parties by the law of France could not enter into any such agreement as the pretended agreement dated 5th November 1884, it being illegal for them to modify the provisions of the marriage-contract." He claimed the whole fund *in medio*. He stated that the agreement of 5th November 1884 was extorted by threats, and that in any view the Court of Chancery had no jurisdiction over him.

The pursuers and nominal raisers and Madame Gudin, the real raiser, pleaded, *inter alia*, that "(3) The Court of Session is the *forum conveniens* for the determination of the questions raised, in respect that the fund *in medio* is situated in Scotland, and in respect of the agreement of 5th November 1884, and of the decrees and orders of the High Court of Justice in England, and the procedure following thereon."

Baroness Gudin pleaded—"In respect of the agreement between the spouses above mentioned, and of the decrees of the High Court of Justice, conveyances and transfers in favour of the claimants following thereon, the claimants are entitled to be ranked and preferred in terms of their respective claims."

Baron Gudin pleaded, *inter alia*,—"(1) In the circumstances set forth, the Court of Session is not a convenient *forum* for the determination of the questions raised between the parties. (7) The pretended decrees and orders of the High Court of Justice in England having been pronounced in the absence of the claimant by a Court not having jurisdiction, and proceeding upon a pretended agreement which is null, the rights of the claimant are not affected thereby."

The Lord Ordinary, after having repelled the objections which were stated to the competency of the action, ranked and preferred the Baroness Gudin and the trustees under the deed of trust executed by her and them, and settled and approved by the Chancery Division of the High Court of Justice, in terms of her claim.

"*Opinion.*—In this action of multiplepoinding the claim at the instance of the wife, Baroness Gudin, to be preferred to the money and securities deposited with the Bank of Scotland appears to me to be well founded, while the claim of the husband is, in my opinion, on the merits entirely untenable, and on the technical grounds urged legally unsound.

"I have already given judgment on the question of jurisdiction, and that point being settled, so far as I have power, I am now in a position to give immediate decree.

"It appears from the contract of marriage into which the parties entered (in the French form) that the wife, Baroness Gudin, was possessed of considerable personal property, while the husband is not stated to have been possessed of any income-producing property, his whole estate (consisting of furniture, jewels, and plate) being set down at the estimated value of 35,000 francs, or about £1400.

"The parties having come to reside in England, disputes arose as to the ownership of the investments of the property, and an action was raised in the High Court of Justice in England to determine these disputes.

"Instead of litigating these questions to the bitter end, the parties, acting under the advice of counsel, entered into an agreement defining their rights, as the result of which the action in the High Court was withdrawn. Under this agreement the subjects and securities constituting the fund *in medio* are declared to be the property of Baroness Gudin, subject to an annuity of £300 a-year in favour of the Baron. This is not disputed by Baron Gudin, but he contends that the subjects are really his; that he was persuaded to enter into the agreement against his true interests, and that by the law of France he had no power thus to alienate his estate in favour of his wife.

"Baron Gudin having refused to perform his part of the agreement, an action was raised by Baroness Gudin in the High Court of Justice, Chancery Division, to enforce specific performance of the agreement. In this action a decree, dated 14th March 1885, was pronounced wherein it was declared that the agreement ought to be specifically performed and carried into execution. Baron Gudin having failed to execute the necessary transfer of the securities into his wife's name, the Chief Clerk, on the Judge's order, executed a judicial transfer thereof, which is recited in the condescendence. The Chief Clerk by the Judge's authority also executed a deed of request and authority to the Bank of Scotland to deliver to certain trustees, and to Baroness Gudin respectively, the documents of security there specified, and to pay to Baron Gudin the sums in the deposit-receipts which are part of the fund *in medio*. The judicial transfer and authority to pay here referred to constitute the title of the claimant Baroness Gudin and of the trustees who are joined with her in the claim, and if the title is good their claim must be sustained.

"I take for granted that deeds of judicial transfer, whether expressed in words of conveyance or in the form of a procuratory or authority to pay (the latter form being properly applicable to money in account), have the force of a decree of adjudication, although by English procedure they are signed by the Chief Clerk and not by the Judge. There is indeed little difference in this respect between an English and a Scottish adjudication of property—the actual decree in our practice being signed by the Extractor of Court although proceeding on an interlocutor or order signed by a Judge. The only question is whether we are to give effect to the decree, transfer, and authority.

"On this question I have very little to say, because it does not present any difficulty to my mind.

"It may be, and I think is, the law of Scotland that a decree or judgment of the Superior Courts of England is examinable when founded on for execution in this part of the United Kingdom. But it is to be executed, if after examination it is found to be regular.

"By examination I do not understand to be meant a re-trial of the cause on issues of fact or of law. It is not necessary, nor in my view would it be altogether convenient, to attempt to define the kinds of irregularities in decrees which would make it the duty of this Court to deny effect to them.

"Instances of such irregularities may occur, whether as to jurisdiction, form, or substance, and no doubt a Superior Court may be imposed upon, so as to be induced to issue a decree which, when the truth came to be known, neither it nor any Court whose aid was sought would be willing to enforce. But nothing of the kind is suggested here. The case for the competing claimant is, that he was entitled to plead his own disability in the English High Court; and that not having done so, he should be allowed to do so here. Why did he not maintain the plea of disability in England? or if decree was given against him in absence, why did he not move to have the case opened up? No explanation is given on these points. The pursuer's case resolves into this, that he is to be allowed to re-try the case on its merits. On principle and authority I conclude that he is not entitled to this indulgence. I accordingly prefer Baroness Gudin and others in terms of their claim."

Baron Gudin reclaimed, and argued—While not maintaining that the Court of Session had no jurisdiction, it was submitted that it was a *forum non conveniens*, and that the question between the parties could be more satisfactorily determined by the French Courts—*Stavert*, February 3, 1882, 9 R. 519. The service here was defective, in so far as it was executed under an English Act of Parliament; it was not effectual against a French subject. In applying a foreign judgment the Courts of this country would consider whether it was pronounced according to the rules of international law. Baron Gudin was a foreigner, and not subject to the rules of the Court of Chancery. If any doubt was entertained as to his nationality this could be determined by a proof.

Authorities—*Corbet* v. *Waddell*, November 13, 1879, 7 R. 200; Storey's Conflict of Laws, sec. 546; Wharton's Conflict of Laws, sec. 199.

Replied for Madame Gudin—The claimant had already a decree of the Court of Chancery, and it fell on Baron Gudin to show that his wife had not an indefeasible title to this property. The objections taken by Baron Gudin might or might not be good, but he had delayed too long to plead them. Any objections to jurisdiction were completely removed by the Baron having prorogated it in both actions by defending, and by his being a consenter to the agreement of November 1884. As to whether the Court in this country would look into the merits of a decree pronounced by a competent Court in England or Ireland, the result of the authorities was that a case of extreme hardship must be made

out to induce the Court to look behind the decree.

Authorities—*Wilkie* v. *Cathcart*, November 19, 1870, 9 Macph. 168; *Gladstone* v. *Lindsay*, November 5, 1868, 6 Scot. Law Rep. 71; *Waygood* v. *Bennie*, February 17, 1885, 12 R. 651; *Whitehead* v. *Thomson*, March 20, 1861, 23 D. 772; *Murray*, M. App. 5, *forum competens*.

At advising—

Lord President—The fund *in medio* consists of certain bonds and deposit-receipts, specified in the record, which were lodged in the Bank of Scotland by Theodore Gudin between the months of April and August 1883.

What was the object of making these various deposits we are not informed; it may have been for safe custody or for some other good reason, but for the purposes of the present judgment it is of very little matter. It may just be noticed in passing that the lodging of these bonds in the bank was the first step in the proceedings which have subsequently followed.

In 1884 Madame Gudin raised an action in the Court of Chancery in England under the Married Women's Property Act 1882 in order to have her title to these investments and property declared. In answer to this action Baron Gudin now alleges, that although he was lessee under a lease for twenty-one years of a house in London, he was a domiciled Frenchman, and subject only to the jurisdiction of the French Courts. That plea, however, cannot be of any avail to him now, because he appeared in the action and pleaded on the merits. Whether there was any other jurisdiction I need not now pause to consider; there was at anyrate *jurisdictio inter consentientes*, and that being so, the Baron cannot take any objection now to the jurisdiction of the Court of Chancery. That case, however, did not go on to judgment, because it was compromised by an agreement dated 5th November 1884, by which it was arranged that the property lodged in the Bank of Scotland should become the property of Madame Gudin, while an allowacne of £300 per annum was to be provided to Baron Gudin, in security for which a sum of £8000 was to be placed in the hands of trustees.

It is not necessary for me to enter any further into the details of this agreement, which was most carefully drawn up, and was held to be a settlement of the action then in Court. Such a settlement is called in law a transaction, and it is of all agreements the most difficult to set aside, and indeed this can only be done on clear proof of force, fear, or fraud. The Court of Chancery gave effect to this agreement, and confirmed it by an order of Court. This, according to the form of that Court, required to be done in a separate action in which the Baron might have appeared if he had chosen and pleaded had he been so advised. He did not appear, and I do not think it is of much consequence that he did not, because he had already consented to the confirmation of the agreement by an order of the Court of Chancery.

In the present action of multiplepoinding Madame Gudin is the real raiser, and it is urged by the defender, Baron Gudin, that this Court is not a convenient *forum* for the determination of the questions raised between the parties. But what are the questions between the parties? There are not, as far as I can see, any questions to be determined between the parties, for everything was settled by the proceedings in Chancery, to which proceedings the Baron was a consenter. The Baron now says that by the French law he was not entitled to do what by the terms of the agreement he consented to do, and that he acted in ignorance of his rights. Upon that matter I give no opinion. What we have here to deal with is the decree of the Court of Chancery, which I am prepared to give effect to, and to rank and prefer Madame Gudin, as the Lord Ordinary has done, in terms of her claim.

Lord Mure concurred.

Lord Shand—I am of the opinion expressed by your Lordship. What we are asked to do in this action is virtually to give effect to the decree pronounced in the Court of Chancery, and I have not heard any good reason stated for Baron Gudin why this should not be done. He asks us to sist proceedings in this Court until the French Courts decide whether or not the decree of the Court of Chancery is to have effect in Scotland—a somewhat extravagant proposition. Had he proposed to open up the whole question on the merits in the French Courts, that might or might not have been a reasonable suggestion, but what I cannot see is, how the Courts of France could in any sense be called the *forum conveniens* for the determination of this question.

It was urged that the Court of Chancery had no jurisdiction over Baron Gudin, and that we ought to refuse to give effect to its decree upon that account. It is to be observed, however, that this objection is taken for the first time now, but apart from that I think that upon various grounds the Court of Chancery had jurisdiction. In the first place the Baron was lessee under a twenty-one years' lease of his house in London, then he appeared to defend the action raised by his wife, and further he was a party to the agreement which that Court was asked to enforce. Upon these various grounds I think it is hopeless for him to say that the Court of Chancery had no jurisdiction, and upon the whole matter I am prepared to concur with your Lordship.

Lord Adam—Baron Gudin prorogated the jurisdiction of the Court of Chancery by appearing as a defender in the action raised against him by his wife. Whether that Court would have had jurisdiction otherwise I am not prepared to say. He did, however, appear as a defender, and accordingly he is bound by what was then done.

The result of the proceedings was the agreement of 5th November 1884, by the 12th head of which the parties agreed that its terms were to be enforced by an order of Court. The whole procedure which followed appears to have been perfectly regular, and the Baron if dissatisfied with anything that took place ought to have appeared and objected, which it appears he did not do.

In these circumstances it is impossible that we can listen to his proposal to sist proceedings here until a judgment is obtained in the French Courts, and I concur with your Lordship that we should give effect to the proceedings in the English

Court, and that we should sustain the claim of the Baroness and the trustees to the fund *in medio*.

The Court adhered.

Counsel for Baron Gudin—Comrie Thomson—Gillespie. Agents—Mitchell & Baxter, W.S.

Counsel for Baroness Gudin and Others—Low—Moody Stuart. Agent—Donald Mackenzie, W.S.

Wednesday, December 8.

FIRST DIVISION.

AINSLIE'S EXECUTORS *v.* AINSLIE.

Succession—Executor—Trust—Trust (Scotland) Act 1861 (24 *and* 25 *Vict. c.* 84), *sec.* 1.

A testator by holograph will nominated certain persons to be his "executors," and directed them to pay various annuities, to hold his estate during the continuance of a liferent, to sell certain heritage, and generally to manage the estate as a continuing trust. *Held* (1) that the directions of the will showed that these persons were truly appointed as trustees, and that being so, they were gratuitous trustees to whom the Trusts (Scotland) Act 1861 applied; and (2) that a majority of trustees could exercise the power of assumption conferred by that Act.

The deceased James Ainslie, of 11 Melville Crescent, Edinburgh, died on 25th October 1880. He left a holograph testament dated 7th March 1878, by which he nominated certain parties mentioned therein to be his "executors." He directed them to pay annually to his niece till death or marriage, payable half-yearly, £120, and to make payment of another annuity, which lapsed by the annuitant predeceasing him; further, "to divide whatever sum my estate may yield annually between my dear wife Narcissa Ainslie, and my dear niece Jane Suffield Ainslie, thus—to the former, say seven-tenths (say 7/10th), and to the latter three-tenths (say 3/10th), payable half-yearly, the survivor to have the liferent of the whole estate, and at her death my accounts to be closed at as early a date as practicable, and the proceeds divided into five equal shares, to be apportioned" among five persons named. The will further provided that his house, stable, and fixtures should be sold soon after his death, but not before it suited his wife's convenience. He further directed his executors to pay out of his estate legacy and other duties on the bequests to his wife and niece, "and also the whole expenses attending the executory and the annual expenses of management. I direct my executors either to retain and hold the various securities and investments on which my means and estate may be invested at my death, it being my wish, without, however, being imperative on my executors, that the investments and securities chosen by me should remain undisturbed as far as possible, or to realise the same or such part thereof as they may deem necessary or expedient, or to reinvest the same in such way and manner, and on such securities, heritable or personal, as they may deem best, including stock, funds, or securities of the Government of India, debentures or debenture stock, preferential or guaranteed stock, declaring that my executors shall not be liable for any loss that may arise from their retaining and holding any securities or investments on which my means and estate may be invested at the time of my death." He left to each of his executors a legacy of £100.

All the four executors survived the testator and accepted office. One of them died in 1885, and of the survivors two were in delicate health. The remaining executrix was the niece above named. The residue under their charge amounted to £32,000.

In these circumstances the two executors, being a majority, desired to assume certain persons to act along with them in the administration of the testator's estate. A question was raised whether such assumption was competent, and the present Special Case was accordingly presented to have the opinion and judgment of the Court upon this question. The first parties were the majority of the executors. The second party was Miss Jane Suffield Ainslie, the niece.

The first parties maintained (1) that although called executors by the testator, yet the effect of the provisions of the will was to put them in the position, and invest them with the powers of trustees, including the power of assumption conferred by the Trusts Act 1861, and (2) that the majority had that power.

The second party maintained (1) that as the testator had only nominated "executors" by his will, they were not trustees within the meaning of the statute, and (2) in any view, that they could not assume unless there was unanimity.

The Act 24 and 25 Vict. c. 84, sec. 1, provides that "all trusts constituted by virtue of any deed or local Act of Parliament under which gratuitous trustees are nominated, shall be held to include the following provisions, unless the contrary be expressed—that is to say, power to such trustee, if there be only one, or to the trustees so nominated, or a quorum of them, to assume new trustees;" and sec. 3 provides that "a gratuitous trustee shall, for the purposes of this Act, be held to be any trustee who receives no pecuniary or valuable consideration for performing the duties of a trustee, and is under no obligation without special acceptance of such office to discharge the duties of trustee."

The questions upon which the opinion and judgment of the Court were asked, were—"(1) "Whether, on a sound construction of the said last will and testament, the first and second parties are entitled to exercise the powers of assumption conferred on trustees under the terms of the Act 24 and 25 Vict. c. 84, sec. 1? (2) Whether, if the first question be answered in the affirmative, such assumption can be made by a majority of the first and second parties?"

Argued for the first parties—The will being a holograph will the word "executors" must not be taken in too technical a sense; the whole scope of the deed showed that the parties were to act more as trustees than as executors. They were to hold the estate during two lives. They were to deal with heritage, and they were to manage a continuing trust. There was nothing in the statute opposed to the present application.

Authorities—Ersk. ii. 2, 3; *Jameson* v. *Clark*, January 24, 1872, 10 Macph. 399; *Tochetti* v.