in security executed by the pursuer in favour of the trustees therein named on the 31st May 1858, and recorded in the Register of Sasines on the 2d of June thereafter.

DEAN OF FACULTY—The sum was payable at the first term of Whitsunday or Martinmas which should occur six months after the death, so that Martinmas 1856 is the right date.

LORD PRESIDENT—I thought it was the first term after the decease. Then it should be Martinmas 1856. And we find it unnecessary to dispose of any of the remaining conclusions.

The pursuer was found entitled to expenses to 5th February 1868, and the defender to expenses since that date.

Agent for Pursuer—J. Knox Crawford, S.S.C.
Agents for Defenders—H. & A. Inglis, W.S.

Friday, February 21.

PATERSON *v.* MONRO.

Sheriff—Sequestration Currente termino—*Landlord and Tenant—Cause—Action—Dismissal of Action*—16 & 17 *Vict., c.* 80, *sec.* 15—*A. S.* 10 *July* 1839. *Held* (Lord Curriehill, *dis.*) that a sequestration for rent is a cause within the meaning of the 15th section of the Sheriff-Court Act 1853.

The pursuer, James Paterson, was tenant of the defender, Alexander Binning Monro, Esq. of Auchenbowie, in the farm of Mains of Auchenbowie. On 5th September 1863 the defender presented a petition to the Sheriff of Stirlingshire, in which, on the narrative, *inter alia*, that the defender's right of hypothec over the pursuer's crop and stock was in danger of being defeated by the diligence of other creditors, he prayed his Lordship to sequestrate, and to grant warrant to officers of court to inventory and secure the whole stock, growing crop, hay, cattle, farm implements, household furniture, manure, and other effects in or upon the foresaid farm and lands belonging to the pursuer, or which might have been removed *de recenti* therefrom, in security, and for payment to the defender, 1st, of £78, 15s. sterling, being the half-year's rent of the said possession payable at the term of Martinmas 1863; and 2d, of the like sum of £78, 15s., being the half-year's rent of said possession, payable at the term of Whitsunday thereafter, with interest on the said respective sums from the said terms of payment till payment, and expenses; and on the said term of Martinmas being come and bygone, and the rent then payable being still unpaid, to grant warrant to the defender to sell the whole, or as much of the said sequestrated effects as would satisfy and pay the half-year's rent payable at that term, with the interest due thereon, and the expenses of sequestration and sale; and thereafter, on the said term of Whitsunday then next being come and bygone, and the rent then payable being still unpaid, to grant warrant to the defender to sell so much of the said sequestrated effects as would satisfy and pay the half-year's rent payable at the said term, with interest due thereon till payment, and expenses; and in the event of the proceeds of the sales, or either of them, not being sufficient to pay the said rent, interest, and expenses, to decern against the pursuer, at the instance of the defender, for such part thereof as might remain due.

On the same day the Sheriff-Substitute sequestrated and granted warrant to inventory and secure, as craved by the defender in the said petition, and appointed a copy of the said petition and deliverance, and of the inventory to be taken in virtue thereof, to be served on the pursuer.

On 19th July 1864, the defender applied for and obtained warrant of sale, which was carried out in the usual way. The tenant now brought an action of reduction and damages against his landlord, pleading *inter alia*, that neither party having taken any step in the foresaid petition of sequestration, of date 5th September 1863, for a period of ten months from and after 15th September 1863, the said process stood *eo ipso* dismissed under the 15th section of 16 and 17 Vic., cap. 80, and therefore the interlocutor of 5th September 1863, sequestrating the pursuer's crop, stocking, and effects, and the warrant of sale of date 19th July 1864, with all that followed thereon, ought to be reduced.

The landlord answered that the 15th section of the recited Act did not apply to sequestrations *currente termino*, these not being *causes* within the meaning of the section.

The LORD ORDINARY (MURE) found that "no proceeding having been taken in the process of sequestration raised by the defender against the pursuer in the Sheriff-court of Stirlingshire in September 1863, between the 15th day of September 1863 and the 19th day of July 1864, the said process stood dismissed at and prior to the said 19th day of July 1864, in respect of the provisions of section 15th of the Act 16th and 17th Vict., cap. 80; and that any proceedings taken, or interlocutors pronounced, as in the said process, on and subsequent to the said 19th day of July 1864, and in particular the interlocutors bearing to have been pronounced in the said process on the 19th of July, 23d September, 12th and 21st October 1864, were and are null and void: Therefore, and to that extent and effect, decerns, reduces, and declares, in terms of the conclusions of the summons, and appoints the case to be put to the roll to arrange as to further procedure in the cause, reserving all questions of expenses."

The defender reclaimed.

SHAND and CRAWFORD for Reclaimer.
MACKENZIE and MAIR for Respondent.

LORD PRESIDENT—My Lords, on resuming consideration of the argument in this case, I have been unable to find sufficient reason for differing from the Lord Ordinary.

The question depends on the construction of the words of an Act of Parliament, which, I think, are in themselves very clear and not susceptible of such a construction as would limit them to a class of cases exclusive of the present.

The petition in the present case was presented to the Sheriff on 5th September 1863, and it is important to attend to the terms of that petition as stated on record. [*Reads petition.*] Now, this petition having been presented on 5th September, sequestration was awarded on that date, and an inventory of the sequestrated effects made up. The term of Martinmas arrived within little more than two months, and the rent being then unpaid, it was open to the landlord to apply for warrant of sale, and to have the sequestrated effects sold, and the proceeds applied towards payment of the rent, but he did not do so. Whitsunday 1864 came, and still the landlord had done nothing. It was competent to him then to apply for warrant of sale, but that he did not do until 19th July. There was then a certificate put in by the sheriff-clerk that

no appearance had been made by the tenant, and, on that warrant of sale was granted, but the sale did not take place till 3d September, and it was reported on 17th September 1864. Then on 23d September, the petitioner's account of expenses was remitted to the auditor. On 11th October a report of the sale having been put in, and a state of payment of rent, these were allowed to be seen, and on 21st October the report of the sale was approved, and the proceeds applied in payment, and decree pronounced against the pursuer for the balance due by him. Then in the second sequestration, the defender's account of expenses having been remitted to the Auditor of Court, and his report having been lodged, and all concerned having been allowed to see, the Sheriff, also of this date, October 21, 1864, in respect that no objections had been lodged to the report of sale, found that the proceeds of sale, after deducting discount at 3d. per £, amounted to £320, 14s. 2d.; that, after payment of expenses and the rent of 1864, less the interest, till the terms of payment, there remained a balance in favour of the respondent, the present pursuer, of £147, 1s. 9d. "to be applied towards payment of the expenses incurred under warrant of date 25th May last, in the petition referred to *in causa*, when these shall have been ascertained."

There can be no doubt as to the fact that from 5th September 1863 till 19th July 1864, neither party took any proceedings under this petition, and the question comes to be, whether to such a petition the 15th section of the Act 16 & 17 Vict., c. 80, applies. If it does apply, it is clear that after the three months from 3d September 1863 the process stood dismissed, with liberty nevertheless to either party to revive it within the three next months; but failing that revival, that the case, at the end of six months after 5th September 1863, was absolutely at an end, and no further step could be taken in it.

The provision of the Act is expressed thus—[*reads section.*] It was argued that this petition and the proceedings following on it did not constitute a *cause* within the meaning of the section; and we can understand that the term *cause* might be used in a Statute in a limited signification, if from the other provisions it could be gathered that the term was meant to represent one class of cases only. But, on full consideration of the other clauses, I think the word *cause*, and also the words *case* and *action*, are all used in a comprehensive sense, all meaning, in some parts at least, the same thing,—everything of the nature of a proceeding before the Sheriff to which he is judicially to apply his mind. It is very difficult to say that this petition is not a cause in that sense. It was represented that a petition for sequestration is more of the nature of diligence, and in one part of it it may be so, for in some steps of a petition for sequestration the procedure is more of the nature of diligence in security than anything else, especially if it is a petition for sequestration *currente termino*, and it may be said that nothing is done but the creation of a *nexus* over the subjects. And if there was nothing more, it would be very like a diligence and nothing else. It would correspond very much with a bill of arrestment. But then there is a great deal more here. There is a further proceeding by way of obtaining a warrant of sale, and actual sale, and judicial application of the proceeds to extinguish the rent due. That is not diligence in security. That is a proceeding for the purpose of operating payment of a debt. If it is to be likened to anything else, it must be likened to an arrestment and furthcoming combined, and no one can doubt that a furthcoming is a cause, and yet a furthcoming is to have the same effect as sale in a sequestration. And then, in accordance with the practice of the last thirty years, every petition for sequestration contains an express prayer for decerniture for the balance of rent remaining unsatisfied after the procedure of sale. That being the nature of the petition, I cannot doubt that the proceedings depending before the Sheriff on 5th September 1863, were a cause within the meaning of this Act. It is said that the construction of this Act will be attended with inconvenient consequences; that it will be difficult to manage these petitions for sequestration *currente termino*, because necessarily the proceedings in them stand still for a considerable time in the Sheriff-court, and there may elapse a period in which it is impossible to move. I should be sorry to deal with any case not actually before us, and if such a case occurs, that a petition for sequestration is presented considerably more than three months before the term of payment of the rent, I should be unwilling to deal with that case. It rather occurs to me that the petitioner in such a case will not have much difficulty in getting out of the Act, for he could come to the Sheriff within six months to revive the process. Whether there is any other case of such a nature I am not prepared to say. I don't well see how there can be, for it is not likely that a petition for sequestration *currente termino* will be presented at such a time as that the whole period of six months will elapse between the granting of the prayer of the petition for sequestration, and the occurrence of the term of payment. And, further, any party who is not able to move in such a petition to any practical effect, may yet move for the purpose of avoiding the operation of this Statute. Suppose that three months had elapsed in which it was impossible to do anything, still there is the second period of three months; and if, during that period, there is nothing to be done, still the party may in that three months show cause why no procedure has taken place, and on doing so, he is entitled to have the cause revived. Now there can be no better cause shown why there was no procedure than that there was nothing to be done. The present case, however, is a strong case, for there were many things which the petitioner could have done. He was dilatory, and did not take advantage of his rights under that petition. If he had done so, he could have kept the cause alive. I therefore think that the interlocutor of the Lord Ordinary is well founded.

Lord Curriehill—This is a question of great practical importance. It involves the question, whether a provision in an Act of Parliament intended to regulate judicial proceedings in Sheriff-courts, is to be extended to proceedings of an execution of diligence. On that question I differ from your Lordship.

To solve that question we must see distinctly what is the character of the proceeding before us. It is an application by a tenant to have sequestration carried into legal effect against the moveable property of his tenant. The pursuer was tenant of the defender in the farm of Mains of Auchenbowie, and in September 1863 the landlord, as he thought, had reason to fear that the current rent would be defeated by the diligence of other creditors, and therefore, on 5th September, he applied for sequestration in the usual way. That remedy con-

sists of two parts, the first being an application for immediate sequestration of the hypothecated effects to the extent of the rent, and the second for warrant of sale in payment of the rent due. The Sheriff granted sequestration, and granted warrant to his own officer to inventory the tenant's effects, and intimate the sequestration and inventory to the tenant. What is the character of this proceeding? In my opinion its character is that, not of a pursuing for a decree for a debt due, but of a petition that the Sheriff shall instantly, and without notice, proceed to exercise his function of sequestrating the tenant's effects. A landlord has by law a hypothec over his tenant's effects as a security for payment of the rent. That hypothec is by law itself a general hypothec, but the law has provided the means of converting it into a pledge, or a right equivalent to a pledge, by sequestration, and that is what was done here. By sequestrating the tenant's effects, the Sheriff converts the right of the landlord, which was formerly a general right of hypothec, into a real right, the same as that created by a title, except that the custody of the effects is left with the tenant. Therefore, on 5th September, the landlord had acquired this real right. It is proper to observe that the diligence thus so far executed was a diligence in security of a debt of which the terms of payment had not arrived. The terms of payment for crop 1863 were not to arrive, the first till Martinmas following, that is, in some two or three months; and the other at Whitsunday, some eight or nine months after, and this therefore was a diligence in security. That is a species of diligence that is almost peculiar to the law of Scotland; but it is well established in our law that diligence can be obtained before the term of payment or for a contingent debt. Even adjudication can be obtained in security, and there is the ordinary diligence of arrestment in the same way. And so also we have the diligence competent to a landlord, which may be granted in security before the term of payment, or *currente termino*, and it often happens that nothing more can be done under this diligence for many months. That depends on the conventional terms of payment of the rent. One effect of its being obtained is, that there is a prohibition on the party obtaining it from moving further until the term of payment has arrived, or the condition is qualified. That is explained by Mr Bell (2. 67). In this case, the first term of payment did not arrive for more than two months, and the second for more than eight. The first term did arrive at Martinmas 1863. And though, in my opinion, that is of no consequence, I think it appears from the record that the landlord had it not in his power, and indeed had no cause, to ask a warrant of sale for the Martinmas rent, for that rent was fully paid. In article 7 of the pursuer's condescendence we read that the "half-year's rent, due at Martinmas 1863, having fallen due, an arrangement was made between the pursuer and defender, whereby the pursuer sold, for a sum of £70, a portion of hay out of the sequestrated effects in order to meet payment of the said rent, and this sum the pursuer paid to the defender to account of the rent due at Martinmas 1863. On or about 22d December 1863 the pursuer sold, for the sum of £20, an ox which he had acquired, and this sum he applied in part-payment of the balance of the rent due at Martinmas 1863, and in part-payment of the rent due at Whitsunday 1864. The balance of the rent due at Whitsunday 1864, which remained owing by the pursuer, was thus reduced to £67, 10s." When the last instalment of rent became payable at Whitsunday 1864 it was not paid, and then the warrant of sale was carried into execution, and the question before us is, is that warrant, and the sale itself, to be reduced as null and void? It is said that that must be done, because by the Sheriff-court Act it is declared that where in any cause neither of the parties thereto shall, during the period of three consecutive months, have taken any proceeding therein, the action shall at the expiration of that period, *eo ipso*, stand dismissed. The word cause is a general word. The question is, whether the Legislature intended to apply it to cases where a Sheriff is acting, not in his proper judicial capacity, but ministerially, in executing diligence? I think it did not. I think the whole of that Statute, except the 27th and 28th sections, is applicable to the ordinary judicial proceedings of a Sheriff-court. The very circumstance that there can be execution for a future debt is to me conclusive, because it is a rule of law that during the intervening period, when the term of payment has not arrived, or the condition has not been purified, the law holds the creditor prohibited from taking any step. He is not entitled to do anything that will contradict the implied prohibition. It is impossible to hold that that can be avoided by reviving the action after it has become extinct, for what becomes of the creditor's real right established by sequestration? If all the proceedings are at an end, his real right is gone, and a mere movement in the petition will not revive his extinct right. It would be necessary to have a new sequestration to restore the creditor to his former state. I therefore —without enlarging further on the matter—am of opinion that the word *cause* in this Act, looking to the whole Act, cannot be held as including functions belonging to a Sheriff in an entirely different capacity, viz., the function of carrying through an execution for payment of debt, not for constituting, or decerning for, debt. Nor do I think that this matter can be affected by the circumstance that at the end of the petition there is a clause for decerniture for any balance that remained after applying the realised estate to payment of the rent due. That is a mere condition of the sequestration. If the sequestrated effects are sufficient to pay the rents due, then the condition does not apply. It is a claim in which no movement can take place until the term has arrived when the diligence itself can be executed. I am therefore inclined to alter the judgment of the Lord Ordinary.

Lord Deas—The question comes to be whether this petition is a *cause* in the sense of the Act 16 and 17 Vict., c. 80, sec. 15. That section is expressly applied to any cause, *i.e.*, every cause depending in a Sheriff-court. It appears to me that, before this Statute was passed, the procedure in a sequestration was understood to be a cause or action, and was so dealt with in the Act of Sederunt 10th July 1839, which was passed under sanction of an Act of Parliament, and had therefore the authority of an Act. An application for sequestration was always a petition in a summary form, for causes which required extraordinary despatch might be brought in that way. [His Lordship then read sections 150 and 151 of Act 1839, and continued] The reason why statutory authority was required for the introduction of a clause concluding for payment, was simply the rule that only matters requiring extraordinary despatch could be brought in

the form of a summary petition, and it was not thought to require extraordinary despatch to conclude for payment of a balance due; and accordingly there was introduced a provision that you might conclude for a sum of money. Under this Act of Sederunt, I think sequestration was a cause. But while that is so, the material question is, whether it is a cause in the sense of the Statute? It is only necessary to read the other provisions of the Statute to see whether the petition for sequestration is to be dealt with as a cause; and I cannot doubt that it is. The 7th section of the Act provides, that "in all applications before the Sheriff which are at present commenced by petition, and are not otherwise regulated by this Act, the petition shall be as nearly as possible in the form of schedule (E) annexed to this Act"—including undoubtedly all proceedings for sequestration—"and thereafter the procedure under such petition shall, as nearly as may be, be the same as hereinbefore provided in regard to ordinary action." [His Lordship then read sections 13, 16, 17, 18, 22, 26, and 27, and continued] All these provisions are made by Statute expressly applicable to sequestrations for rent. They are all dealing with causes or actions, and I think it is impossible to hold that a process of sequestration is not an action in the sense of the Statute. My only doubt is that expressed by your Lordship,—viz., assuming this to be a cause, whether there may not be a stage at which it is impossible to do anything, and to which it may be said this provision cannot be applied. That is a different case from the present; and I think it is safer to give no opinion on it. It is certainly quite competent to come to Court and apply for an interlocutor that has no meaning except to keep the cause alive. As to the case of a landlord applying for sequestration simply, without applying for any warrant of sale, that is a question on which I give no opinion.

Lord Ardmillan—The right of a landlord to sequestrate *currente termino* is well recognised in our law, but it is a right the exercise of which the law views with jealousy, for in the exercise of that right a wrong may be done. In the present case there is no ground for supposing that any wrong was done, and our duty is simply to try the question of the application of the 15th section of the Sheriff-court Act to a case like the present. I make this observation, because, in cases of sequestration *currente termino*, there is frequently a question of the kind I have indicated; but there is no such question here.

This is a question of construction, and I agree with your Lordship in the chair as to the impossibility of considering these proceedings as anything but a *cause*. In judging whether the proceedings constitute a cause, I think we must consider not merely the state of the proceedings when the question arises, but the original nature of the prayer of the petition. In many different classes of cases the Court have recognised the principle that the character of an action must be judged of by the summons and conclusions, and therefore the petition and its conclusions are what we must look at to see if it is a cause. There is here a prayer for sequestration [*reads*], and there is a prayer for sale [*reads to end of prayer*]. Taking the whole petition together, I have little doubt that it is a cause in the meaning of the Act. It is a demand for sequestration and sale and ultimate payment. It is a proceeding for constituting a *nexus* on the tenant's effects in security, and enforcing payment of the rent due or becoming due; and, looking at the petition in that aspect, can it be said that the Act does not apply?

The next question is, supposing this is a cause, and that the section applies, what is the effect of awarding sequestration? Does it so tie up the hands of the landlord as to relieve him from the necessity of taking any steps to prevent the operation of the Statute? On this point I think the argument of Mr Crawford was not only ingenious, but, to a certain extent, sound. I agree that the true theory is, that the hand of the law holds the sequestrated effects from the date of the sequestration. But then I think that the hand of the law opened at the term of Martinmas, which was within three months from the date of the sequestration, and that then the landlord had the right and power of taking proceedings under this cause by applying for warrant of sale or otherwise, and if he did not do that, he did not avail himself of his opportunity of keeping the cause alive. Suppose a case was sisted by the Sheriff for more than six months to await the arrival of some one from abroad, or the birth of an expected heir, or to wait the issue of an appeal, what will be the result of his so tying up the case? I give no opinion on that. Perhaps it might have the effect of preventing the parties from so taking any step as to save the case from the operation of the section, but that could only be so long as there was no step which the parties could take, and when the hand of the law opened so as to let the parties take a step in the cause, that step must be taken, else the Statute will apply. I agree with your Lordship that this is not like an arrestment, but an arrestment and forthcoming; and, on the whole matter, I am also of opinion that the proceedings before us fall under the operation of the 15th section of the Act.

Lord Deas—I may say that I concur with Lord Ardmillan in thinking that there was no wrong done in this case—I mean no wrong so as to ground an action of damages.

Agents for Reclaimer—Dundas & Wilson, C.S.
Agent for Respondent—Wm. Officer, S.S.C.

Thursday, February 20.

SECOND DIVISION.

DALGLISH (FERGUS' EXECUTOR) *v.* DENNISTOUN, *et e contra.*

Contract of Copartnery—Relative Deed of Agreement—Right of deceased Partner—Count and Reckoning. Circumstances in which *held* that the rights of the representatives of a deceased partner under a contract of copartnery were ruled by the terms of the contract itself, and a relative deed of agreement, and were not affected by an agreement subsequently entered into by the partners with the manager of the firm.

These were conjoined actions, the one at the instance of Mr Dalglish, Fergus' executor, calling on the defender to count and reckon with him as to the profits and proceeds of a copartnery between him and Mr Fergus, or to hold £20,000 as the sum due by the defender in respect of said copartnery; the other at the instance of Mr Dennistoun, claiming a sum of £1974, 19s. 10d. as the issue of the same contract of copartnery.