forms The 6th section provides—"That every action in the ordinary Sheriff Court shall be commenced by a petition." In the interpretation clause the term "action" is defined to include "every civil proceeding competent in the ordinary Sheriff Court." Now, in the former procedure there were two classes of proceedings, the one beginning with a summons, called Actions, the other beginning with a petition, and called Summary Proceedings. The term "action" in this statute is made to include every case, and therefore this new form is applicable to this case as to every other.

With regard to the nature of the remedy adopted here, I see no reason why an application to apprehend a person *in meditatione fugæ* should be incompetent where the action proposed to be instituted against him is one *ad factum præstandum*. I see no reason, and I know of no authority, for holding that it is incompetent. The action to be brought here is for the fulfilment of the indenture entered into by the complainer. There will also, of course, be a conclusion for a penalty to the amount of the damage suffered by the master, but that does not alter the nature of the case, and therefore I see no reason for doubting that an application to imprison a person *in meditatione fugæ* to answer in an action of this kind is competent.

But one is unwilling to shut the door against the possibility of an arrangement, and after what Mr Alison has told us of the proposals made by the master, I venture to suggest to your Lordships that the case should be allowed to stand over for a week.

LORDS DEAS, MURE, and SHAND concurred.

Counsel for Complainer—M'Kechnie. Agents—Walls & Sutherland, S.S.C.

Counsel for Respondent—Alison. Agents—Adamson & Gulland, W.S.

Tuesday, December 12.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

DALZELL *v.* DENNISTON AND OTHERS.

Bankrupt — Sale — Compromise — Bankruptcy Act 1856, *secs.* 115 *and* 176.

Under the 115th section of the Bankruptcy Act the approval of the Accountant in Bankruptcy and of a majority of the creditors in number and value is requisite before the heritable estate of the bankrupt can be sold by private bargain. Under the 176th section the trustee and commissioners have power to compromise questions arising relating to the estate.

A dispute having arisen between the trustee in a sequestration and a creditor claiming certain heritable property of the bankrupt, the trustee and commissioners, on condition that the latter should abandon his right to rank upon the estate, agreed to give up to him the heritage in question.

Held that there being here a *bona fide* dispute, the action of the trustee and commissioners amounted to a compromise competent under the 176th section, and not to a private sale of the property.

By missive offer of purchase addressed by Robert Dempster, mason and builder in Glasgow, and the pursuer Robert Bruce Dalzell, to Robert Denniston, merchant in Glasgow, dated 2d October 1862, and acceptance by Denniston of the same date, Dempster and Dalzell agreed to purchase from Denniston a steading of ground fronting Argyle, Main, and Holm Streets, Glasgow, containing 1580 square yards or thereby, at the price of £6500, the price to be converted into a yearly ground-rent at twenty years' purchase, to be allocated over buildings to be erected. Dempster and Dalzell agreed, *inter alia*, to make certain erections upon the steading of ground on receiving the advances therein specified, and further bound and obliged themselves to have the two tenements fronting Argyle Street erected and finished by the 1st day of July 1863, and the remaining tenements by 15th May 1864, it being declared that should they fail to erect any of these buildings or tenements within the specified time the said Robert Denniston should have the right to draw the surplus rents of the tenements then erected, under deduction of ground-rent, interest on first bonds, and expenses of collection, which he should apply towards compensation for the loss which he should sustain by their non-fulfilling the said agreement; and it was further agreed that should they make a stoppage during the course of the erection of any building for more than one month, unless from the state of the weather precluding building operations, then the whole buildings should immediately revert to and become the said Robert Denniston's property in consideration of his advances, and that he should have power without any legal process of law whatever to enter into possession and either finish the said buildings or sell them, as he might deem most advisable.

Dempster and Dalzell accordingly entered into possession, and having nearly completed the erection of certain tenements fronting Argyle Street, they obtained from Denniston and certain other gentlemen holding a title to it as trustees for him, a disposition of the part of the ground upon which these buildings stood amounting to 664 square yards. Subsequently the buildings were completed, and while they were being erected certain advances had been made by Denniston to Dempster and Dalzell, which were in part repaid out of the proceeds of a bond obtained by them over the property. In security of the balance remaining unpaid, they in 1863 recorveyed the ground and buildings to Denniston by an *ex facie* absolute disposition, Denniston at the same time granting a back-letter acknowledging the true nature of this transaction.

In the summer of 1863 Dempster and Dalzell began to erect additional tenements upon the remainder of the ground, their right to which stood upon the missive offer and acceptance already mentioned. They soon after became embarrassed in their circumstances, and the firm of which Dalzell was a partner, as well as the individual partners of it, was sequestrated in February 1864—Dempster's sequestration taking place in the following month. Denniston, who during the erection of this second set of buildings had made the temporary advances as stipulated for, after due notice to Dalzell's trustee, entered into pos-

session of the ground and proceeded to finish the buildings at his own expense. He did so on the ground that a stoppage in the building operations, continuing for more than a month, had taken place.

In 1867 Denniston came forward with a proposal to Dalzell's creditors, in which he offered to abandon all his claims against the sequestrated estate upon the trustee and commissioners abandoning all claim to the 1580 square yards of ground referred to in the missive and the buildings erected thereon.

After a resolution in favour of it had been passed by the trustee and commissioners, Dalzell's creditors on 10th April 1868 agreed to Denniston's proposal, and gave directions for co-operation with Dempster in executing all the necessary deeds in favour of Denniston. The agreement subsequently was carried out. Denniston relieved the sequestrated estate of the personal obligation and bond affecting this property, and the trustee and commissioners discharged the missive offer and the back-letter. By the 115th section of the Bankruptcy Act 1856, the private sale of heritable estate belonging to the bankrupt must be with the concurrence of the majority in number and value of the creditors and the approval of the Accountant in Bankruptcy; but under the 176th section this is not necessary where the transaction is merely a compromise of claims made upon the estate.

In 1875 Dalzell brought the present action, which was one of reduction, declarator, and adjudication against Denniston and the trustee and commissioners. The ground upon which he rested this action will be learned from the findings in the Lord Ordinary's note.

A proof was allowed to the parties; and thereafter, upon 28th March 1876, the Lord Ordinary (CURRIEHILL) issued an interlocutor of which the following are the concluding findings:—"Finds that the pursuer has not established that the said transaction was unfair, or that it was gratuitous on the part of the trustee and commissioners, or that it was not to the advantage of the creditors on the sequestrated estate of himself and his firm, or that the value of the subjects exceeded the amount of the advances of Mr Denniston and his trustees: Finds, on the other hand, that the defenders have not proved that the pursuer in the knowledge of the facts homologated or acquiesced in the said transaction: Finds that in so far as regards the just and equal half *pro indiviso* of the subjects in Main Street and Holm Street (being the whole of the original steading of ground contained in the missive offer of purchase and acceptance, excepting therefrom the said plot or area of ground containing 664 square yards, and the tenements thereon, in Argyle Street and Main Street), the full right of property therein having reverted to the said Robert Denniston in 1864 in the manner above mentioned, the said transaction was not a sale of the heritable estate belonging to the bankrupt, and was not *ultra vires* of the trustee and commissioners on the sequestrated estates of the pursuer and his said firm: Therefore assoilzies the defenders from the whole conclusions of the action in so far as the same may extend or relate to the said subjects in Main Street and Holm Street; and *quoad ultra* Finds, as regards the just and equal *pro indiviso* half of the said plot or area of ground, consisting of 664 square yards or thereby, that in respect the same formed at the date of the sequestration, and also in 1867–68, part of the heritable estate of the pursuer falling under the sequestration of the estates of himself and his said firm, the foresaid transaction was a sale of the said heritable estate, and that the same not having been a public sale, and the requirements of the Bankruptcy Acts in the case of a private sale not having been complied with, the said transaction was *ultra vires* of the creditors and of the trustee and commissioners on said sequestrated estates, and is reducible, and that the pursuer, on paying to the defender Robert Denniston or the foresaid trustees, for whom he acts, any balance which upon a just accounting shall appear to be due to him or them by the pursuer, or by the trustee on the sequestrated estates of the pursuer and his said firm, and upon the pursuer further making payment to the trustee in the said sequestration of whatever sum may be necessary to satisfy and pay in full the whole liabilities of the pursuer in so far as the same have not been already paid by dividends from the said sequestrated estates, and upon paying or providing for the charges for recovering and distributing the said estates, the pursuer will be entitled to decree of reduction and declarator in terms of the conclusions of the summons, in so far as the same are applicable to his *pro indiviso* half of the said plot or area of ground, consisting of 664 yards, with the houses thereon, and to obtain a valid and effectual disposition thereof from the defenders: And appoints the cause to be enrolled for further procedure, reserving in the meantime all questions of expenses, and grants leave to all parties to reclaim.

"*Note.*—The ground on which I have arrived at the results embodied in the foregoing interlocutor are so fully explained by the findings themselves that not much additional explanation is required.

"It appears to me that the missive offer and acceptance for the purchase of the 1580 square yards was a conditional contract of sale, implement of which could not be enforced by either party against the other without fulfilling the conditions imposed or undertaken by himself. I also think that the contract admitted of being implemented in parts, so that the sale of one part of the ground might be completed while the right of the purchaser to the other part remained conditional upon his fulfilling the conditions applicable thereto. And accordingly the parties did so interpret the contract.

"I. As regards that part of the ground, extending to 664 square yards, situated in Argyle Street and at the corner of that street and Main Street, the missive was substantially implemented by 15th May 1863—the few minor details then unexecuted having been all fully completed by the 1st of July 1863, in terms of the missive. So far as regards that part of the ground, therefore, the missive was entirely superseded, and the sale thereof was absolutely completed by the disposition granted by Mr Denniston to Dempster and the pursuer, on which they were infeft on 15th May 1863. They on same day exercised their right of ownership by borrowing from Mr Mitchell £8000 on the security of the property. Thereafter, but under burden of that security, they, also of same date, reconveyed the 664 square yards to Mr Denniston by a disposition *ex facie* absolute, but qualified by

Mr Denniston's back-letter of even date therewith (15th May 1863), by which he declared that he held the property in security of the balance of his advances, amounting to £1063, 18s. 7d., and for implement of the obligation in the missive, *i.e.*, as I read the deed, for implement of the obligation to complete the buildings on the said 664 yards by 1st July 1863. That obligation was duly implemented, so that Mr Denniston after that date held the property merely in security of his said balance of £1063, 18s. 7d., and of any advances which he might have made prior to the registration of the back-letter in October 1863. The 664 square yards, and the buildings thereon, were thus, in my opinion, from the 15th May—or at all events from 1st July 1863—the absolute property of Dempster and the pursuer, freed from all the conditions of the missive, but burdened with the securities which they had constituted over the property in favour of the lender of the £8000 and of Mr Denniston. If so, it follows that the said plot of ground did not and could not revert to Mr Denniston under the original missive, but was part of the bankrupt's heritable estate not only at the date of the sequestration but at the date of the transaction with Mr Denniston now sought to be reduced. But as that transaction was in substance, and I also think in form, a sale of that heritable estate, I am of opinion that it was illegal, in respect that it was not a public sale, and that it had not the concurrence of the majority in number and value of the creditors or the sanction of the Accountant in Bankruptcy, both of which are essential to the validity of a private sale of a bankrupt's heritable estate.

"II. The remainder of the ground, however, was in a different position. The rights of parties at the date of the sequestration still stood upon the original missive offer and acceptance, and the right of the bankrupt passed to the trustee in the sequestration subject to all the conditions of the missive. But under the missive the right of the purchaser was not absolute or complete. It was, as already mentioned, conditional upon their implementing all the stipulations of the missive. The contract was a peculiar one. No price was paid, but the agreed-on price was to be converted into a ground-annual when buildings were erected on the ground, and one of the conditions of the contract was that three tenements of buildings should be erected by the pursuer and Dempster on the part of the ground now in question, and completed by 25th May 1864. And another condition was that if a stoppage in the building took place, except from stress of weather, the buildings should immediately revert to and become the property of Mr Denniston in consideration of his advances, and he should have the power, without any legal process of law whatever, to enter into possession and either finish said buildings or sell them, as he might deem most advisable. This was a reasonable condition, as Mr Denniston undertook in the missive to make advances as the work advanced, to be repaid out of the money to be borrowed on the buildings when completed.

"The pursuer maintains that this was a proper *pactum legis commisserio*, and that the irritancy or clause of reversion could not take effect without decree of declarator. But I think the pursuer misapprehends the true nature of the contract, which was a conditional sale—the feudal title still remaining in Mr Denniston, while Dempster and the pursuer, who had not paid any price, could not have made themselves proprietors of the ground without implementing all the conditions of the contract. These conditions, it is obvious, were all made for the purpose of securing the completion of the buildings by 25th May 1864, so that Mr Denniston should then receive payment of his advances and obtain complete security for the ground-annual into which the price was to be converted. Unless, therefore, Dempster and the pursuer fulfilled all the above conditions, they had no right to call upon Mr Denniston to implement his part of the contract of sale by granting them a disposition of the property. And, on the other hand, as Mr Denniston did make the advances which he had undertaken to make—and by means of which alone it is plain the buildings were partially erected by Dempster and the pursuer—I think he was entitled, in the event of a stoppage of the work, to avail himself of the stipulation in the contract to reclaim the ground as his own, and to enter into possession and finish the buildings for his own behoof. Now, it is proved that a stoppage took place, beginning in February, even before the pursuer's sequestration; that it was caused, not by stress of weather, but by the pecuniary embarrassments of Dempster and of the pursuer, and that it continued throughout the whole of March. The creditors on the sequestrated estates appear to have had neither the funds nor the inclination to complete the buildings; and as a continuance of the stoppage at that season would have rendered the completion of the buildings by the 25th of May an impossibility, Mr Denniston, in order to secure his own rights and interests, entered into possession and completed the buildings at his own expense, in terms of the missive. I think it is an absurdity to maintain that to entitle him to do this he must have brought an action of declarator in the Court of Session, and I think that in consequence of the stoppage the conditional sale of the ground in Main Street and Holm Street came to an end, and that the property immediately reverted to Mr Denniston. If so, neither the bankrupt nor the trustee in the sequestration had any further right to the subjects, and nothing was required to be done by them to complete Mr Denniston's right. It appears, however, that some doubt came to be entertained as to Mr Denniston's legal right in the matter; and in 1867 he went to the trustee and said, 'You must either take these properties and pay me all my debts, or renounce them in my favour.' Now, so far as the Main Street and Holm Street subjects were concerned, if I am right in the views already expressed, this was a gratuitous offer on the part of Mr Denniston, because the property was absolutely his own, and I do not think that he can now be barred from maintaining that position when the transaction which he entered into with the creditors in the sequestration is sought to be challenged. By that transaction the missive offer of sale and acceptance was renounced and discharged in so far as regards the Main Street and Holm Street property—Mr Denniston, on the other hand, abandoning all claims in respect of his advances, arrears of ground-annual, interest, and the like, in respect of these premises. This was, I think, a superfluous and unnecessary pro-

ceeding. It was not a sale of heritable estate then belonging to the bankrupt; it was in effect but a confirmation of Mr Denniston's right, which was already, in my opinion, complete, and needed no confirmation.

"The result, therefore, at which I have arrived is, that as regards Main Street and Holm Street tenements the transaction is unchallengeable, but as regards the 664 square yards and buildings thereon in Argyle Street and Main Street, the transaction is reducible as an illegal sale of the bankrupt's heritable estate, and that the pursuer will be entitled to vindicate that part of the property on paying or providing for all the debts owing by him in the sequestration, and the balance which on a just accounting shall be found due to Mr Denniston. Such restitution admits of being made without injustice to Mr Denniston, who will of course be entitled to recompense for all his proper outlays and advances which are legally chargeable against the pursuer.

"The defenders, however, maintain that the pursuer has homologated and acquiesced in the transaction. But I do not think that circumstances have been averred or proved sufficient to make out a case of homologation; all that is alleged is that the pursuer executed some work upon the premises for Mr Denniston a few years ago without objecting to Mr Denniston's character of proprietorship. But I don't think it is made out that the pursuer was then aware of the circumstances under which Mr Denniston obtained the disposition to the 664 square yards from the trustee and commissioners. The defence of homologation therefore is, in my opinion, not tenable.

"In conclusion, I have only to add that there seems to be no ground whatever to support the pursuer's allegations that the transaction between the creditors and Mr Denniston was gratuitous or unfair to the bankrupt and the sequestrated estate. I think it is proved that the claims of Mr Denniston equalled, if they did not exceed, the value of the whole property in 1867, and that the present action would never have been thought of but for the recent and unprecedented rise of house and shop property in Glasgow. Still, as the statutory requirements for the sale of the bankrupt's heritable estate were not complied with, I have, though with some reluctance, felt myself constrained to hold that the sale of the 664 square yards to Mr Denniston cannot be sustained."

Against this interlocutor Denniston reclaimed.

At advising—

Lord Neaves—The question raised in this case is an important one. It is right that trustees in sequestrations should have the power to enter into compromises, and the real question here comes to be, Whether as regards this heritable property there was really such a *bona fide* maintenance of counter proposition as to make it a proper subject under the statute for a compromise? Now, there were here claims upon both sides, and with the merits of these claims we have nothing to do. There was certainly a dispute, and hence a compromise was in the circumstances proper. There was no sale at all; and I cannot therefor agree with the Lord Ordinary in so far as he finds that here was a sale.

Lord Ormidale—I am of the same opinion. I fail to see any difference between the two portions of this property. As regards each, what was done was to compromise. Trustees have always full power to compromise claims which may be made against the estate under their management, whether they are claims in regard to heritage or moveable estate. There must, however, be a claim to compromise, and I am satisfied that there was here a claim which it was desirable and proper to compromise. There was nothing in my opinion fictitious in this claim, for I can come to no other conclusion but that there was here a serious dispute regarding this property. It is not necessary to raise an action in order to establish the existence of a dispute; it is sufficient that the dispute exists as a matter of fact, and in this case there can be no doubt of its existence.

Lord Gifford—I concur. There can be no question as to the fact of this dispute existing, and it is to be kept in view that the compromise had reference solely to the subjects in regard to which the dispute arose; no other part of the estate was involved in it, or we might have had a different and more difficult question to consider.

The trustee and commissioners were supported in what they did by the deliberate approval of the creditors.

The Lord Justice-Clerk concurred.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel on the reclaiming note for Robert Denniston and others against Lord Curriehill's interlocutor of 28th March 1876, Adhere to said interlocutor in so far as it assoilzies the defenders from the conclusions of the summons relating to the subjects in Main Street and Holm Street: *Quoad ultra* alter the interlocutor, and assoilzie the defenders from the remaining conclusions of the summons, and recal the findings of the interlocutor so far as inconsistent with this judgment: Find the pursuer liable in expenses to both defenders, and remit to the Auditor to tax the same and to report, and decern."

Counsel for Denniston—Lord Advocate (Watson) — Mackintosh. Agents — Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for Trustee — M'Laren. Agent — T. J. Gordon, W.S.

Counsel for Dalzell—Balfour—Lorimer. Agents —Ronald & Ritchie, S.S.C.