9 R. 453, is the only mode in which a testatrix can assume the parental character—has placed herself *in loco parentis* towards this particular claimant. She has done so undoubtedly as regards the bequest of residue, and the claimant will get the benefit of what was left by that provision to the late Mrs Allan. But what is there to show that the destination-over to her of a certain proportion of the sum of £2500 primarily intended for another family altogether (if they had come into existence) was intended as a family provision for the Black family? The unequal division of that sum among the three members of the Black family named has much more the appearance of a division inspired by personal favour than the assumption of the parental character. But, apart from that circumstance, I think that the case of *Greig* v. *Malcolm*, 13 S. 607, which rests on the high authority of Lord Corehouse, shows that the *conditio* proceeds entirely on the presumption that the testator has overlooked or forgotten the contingency of the institute having children, and that where this cannot be said of the settlement in question, the reason for the application of the *conditio* disappears. Now here the clause of residue, as judicially construed, does provide for the claimant taking the share destined to his mother, and I do not think that he can claim more.

LORD LOW concurred.

LORD ARDWALL was absent.

The Court adhered.

Counsel for Claimant, Stephen Strachan Allan (Reclaimer)—Cullen, K.C.—A. M. Mackay. Agents—Mackintosh & Boyd, W.S.

Counsel for Pursuer and Real Raiser, and for Claimants James Macaulay and Others (Respondents)—Chree—Duncan Miller. Agents—Jack & Bryson, S.S.C.

Wednesday, January 29.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

GILMOUR *v.* CRAIG.

Reparation—Landlord and Tenant—Diligence—Rent, when Due, and Payment—Arrestment for Rent Used on Afternoon of Term Day upon Tender of Rent by Cheque only—Relevancy.

A tenant brought against his landlord an action of damages for wrongous sequestration on averments that he, the tenant, had, at 2·30 p.m. of the term day, sent a cheque in payment of the rent to the landlord, who had declined to accept it; that his agent had again sent it at 3·15 p.m., but the landlord had thereupon taken out a summons for sequestration, and at 4·10 p.m. executed the warrant obtained thereon; that at 4·40 p.m. the landlord's agent called on his agent and said the cheque was of no use, refused to cash it and withdraw the summons, and also refused to receive the rent in cash save on payment of the expenses of the summons; that the cheque was returned next day. The defender maintained that the case was irrelevant, (1) in the Outer House, on the ground that after noon of the term day the rent was in arrear and the landlord entitled to do diligence; and (2) in the Inner House, on the ground that the tenant's conduct amounted to a refusal to pay the rent, which entitled the landlord to do diligence.

The Lord Ordinary *allowed* an issue and the Court *adhered.*

Per Lord Salvesen (Ordinary)—"I am prepared to hold that payment of rent is just like any other payment falling to be made on a specified day, and as to which the debtor is not in default if payment be made at any time during the day; although, on the other hand, the debt is due in the sense of being demandable by the creditor when the day arrives."

On 19th November 1907 Thomas Hyslop Gilmour, grocer and wine merchant, 24 Cadzow Street, Hamilton, raised an action against William Godfrey Craig, hotelkeeper, County Hotel, Hamilton, his landlord, to recover £500 as damages for wrongful use of diligence, he having sequestrated for rent.

The pursuer pleaded, *inter alia*—"(1) The defender having wrongfully and oppressively sequestrated the effects of the pursuer, is liable in reparation."

The defender pleaded, *inter alia*—"Payment of rent having been refused by the pursuer, and the same having been past due before sequestration was executed, the defender is not liable in reparation."

The *facts* as averred are given in the opinion, *infra*, of the Lord Ordinary (SALVESEN), who on 15th January 1908 approved an issue in the ordinary form.

Opinion—"This is an action of damages for alleged wrongful sequestration. The material facts as averred by the pursuer are, that on 11th November 1907, when a half year's rent of £20 was due by him to the defender, he sent his foreman to the defender about 2·30 with a cheque on the Clydesdale Bank, Hamilton, for £20, which the defender declined to accept; that at 3·15 p.m. his agent again sent the cheque to the defender along with the letter quoted in condescendence 4 (*v. infra*), and that the defender, while the cheque was still in his possession, caused to be prepared and presented a summons for sequestration for rent under the Debts Recovery Act 1867 on which he obtained the usual warrant to inventory and sequestrate the pursuer's goods in his premises, and that this warrant was executed at 4·10 p.m. About 4·40 p.m. the defender called on the pursuer's law agent with the letter before referred to and said the cheque was of no use to him, and on being asked to cash the cheque and with-

draw the summons he declined to do so or to receive the £20 due in cash except on the condition of the pursuer paying the expenses of the summons of sequestration. The cheque itself was only returned on the following day by the defender's law agents.

"The main ground of action is that the pursuer was not in arrear of his rent until the expiry of the 11th of November, and that accordingly the warrant for sequestration, obtained on the representation that he had refused or delayed to pay the rent due on that day, was wrongful. The defender on the other hand maintained that the rent ought at all events to have been paid by 12 noon on the 11th November, and that on the pursuer's failure to pay by that hour the defender was within his rights in causing the diligence in question to be executed.

"The defender's counsel did not quote any direct authority to the effect that a tenant who delays to pay his rent after 12 noon on the term day is in arrear. He supported his proposition, however, by two arguments which at all events reflect credit on his ingenuity. In the first place he founded on the Removal Terms (Scotland) Act of 1886, section 4, which enacts that 'where the term for a tenant's entry to or removal from a house shall be one or other of the terms of Whitsunday or Martinmas the tenant shall in the absence of express stipulation to the contrary enter to or remove from the said house at noon on the 28th day of May if the term be Whitsunday or at noon on the 28th day of November if the term be Martinmas.' The bearing of this enactment on the question here raised is not obvious; but the defender's counsel maintained that as the legal and conventional terms are theoretically the same, it must now be held that payment of the rent must be made by 12 noon on the 11th of November just as the tenant is bound to remove by 12 noon on the 28th when his lease expires at Martinmas. I confess that I do not see why any such consequence should follow. The Removal Terms Act 1886 proceeded on the assumption that the legal and conventional terms were not the same and left the term for payment of rent entirely unaffected. If therefore before the enactment was passed the tenant had the whole of the legal term day on which to make payment I see no reason to infer that this enactment, which was entirely for the convenience of tenants *inter se*, should alter the relation of the tenant to his landlord.

"The second argument was based on a series of decisions dealing with a chapter of the common law which in consequence of the Apportionment Act has now become of only antiquarian interest. In the case of *Lady Brunton*, M. 15,885, it was held that the executors of a liferentrix who had survived to the afternoon of the term of Martinmas were entitled to the rents of heritage due on that date in preference to the heir; and in the later case of *Paterson* v. *Smith*, M. 15,902, a similar decision was pronounced in the case of a liferentrix who had died on the forenoon of Martinmas day. Both of these decisions proceeded on the maxim *dies inceptus habetur pro completo;* and they were used by the defender to show that rent payable at Martinmas becomes due immediately after midnight of the 10th of November, or at all events by custom at noon on the 11th. These decisions are, however, in no way inconsistent with the notion that a tenant has the whole of the term day in which to make payment, as seems to have been expressly held in England in the case of *Dibble*, 2 El. & Bl. 564. They are also consistent with the old case of *Wright*, M. 15,919, to which I was referred by the pursuer's counsel, in which it was held that the days Whitsunday and Martinmas respectively conclude and are comprehended in the proceding terms and are not the first days of a new period.

"I am accordingly prepared to hold that payment of rent is just like any other payment falling to be made on a specified day, and as to which the debtor is not in default if payment be made at any time during the day; although on the other hand the debt is due in the sense of being demandable by the creditor when the day arrives. This view involves that the defender was premature in obtaining, or at all events in executing, a warrant to sequestrate the pursuer's effects, and that the execution of that warrant was wrongful. It follows that as such a warrant is obtained *periculo petentis* the defender is liable in any damages thereby caused, and that the pursuer is entitled to the issue which he proposes."

The letter referred to by his Lordship was— "Hamilton, 11th November 1907.

"Mr W. G. Craig, County Hotel.

"Dear Sir,—Our client, Mr Thomas H. Gilmour, has instructed us to send you the enclosed cheque for £20 in settlement of the half-year's rent due at this term. Please send us receipt.

"We are to explain that the same is made under reservation of Mr Gilmour's claims against you for (1) fee as witness on your behalf at the Lands Valuation Court. He claims £1, 1s., and application for payment was made to your agents, but they have taken no notice; and (2) price of goods damaged by water from the roof of the saloon, of which you had due notice, and have failed to attend to the repair. We will send detailed claim within the next few days.—Yours truly,

"KEITH & PATRICK."

The defender reclaimed, and argued—Rent became overdue either by non-payment on the term day or by refusal to pay on that day. The offer of a cheque, which was not legal tender, and the repetition of that offer when the defender had once refused the cheque, was equivalent to a refusal, and justified the defender in using diligence. (The point as to time taken in the Outer House was not argued in the Inner House.)

Counsel for the pursuer were not called upon.

LORD PRESIDENT—I do not think there is the slightest doubt this is a question for a jury. I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD M'LAREN—I am of the same opinion. It is not made clear by the statements in the record that payment might not have been made in the evening of the day in question, assuming that the defender had made a definite intimation that he would not accept payment by a cheque. In that case we do not know that the requisite sum in cash might not have been forthcoming. If the pursuer did not have the money in hand, he might have been able to borrow from his agents or friends.

LORD KINNEAR—I agree. The question whether the sequestration was wrongful is very much the same as whether the defender had reasonable grounds for saying in the circumstances that payment had not been duly made.

LORD PEARSON was not present.

The Court adhered.

Counsel for the Pursuer (Respondent)—Morison, K.C.—C. H. Brown. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Defender (Reclaimer)—Wilson, K.C.—Moncrieff. Agents—Simpson & Marwick, W.S.

Friday, January 31.

SECOND DIVISION.

[Sheriff Court at Glasgow.

MULVEIN *v.* MURRAY.

Contract—Restraint of Trade—Agreement—Validity—Severability of Agreement.

By an agreement entered into between A, "boot and shoe factor," and B, A engaged B "as a retail traveller, salesman, and collector in his said business of boot and shoe factor," and B bound himself "not to sell to, or to canvass, any of the said A's customers, or to sell or travel in any of the towns or districts traded in by the said A, for a period of twelve months from the date of the termination of the agreement." B having left A's employment, *held* in an action of interdict by the latter against the former, (1) (by all their Lordships) that the restriction not to sell to or canvass A's customers was reasonable and valid, and that the pursuer was entitled to an interdict giving it effect; (2) That the restriction *quoad ultra* was unreasonable and invalid and incapable of forming the basis for any interdict whatsoever, being too wide and indefinite in the matter of (*a*) the district or area, (*b*) the nature of the trade prohibited—*dissenting* Lord Low, who held (1) that the agreement being *ex facie* between a "boot and shoe factor" and his traveller, it followed that the clause of restraint related only to the boot and shoe trade, (2) that although too wide as it stood as regarded area, it included and made competent the form of interdict ultimately sought by the pursuer, viz., an interdict against the defender selling or travelling in districts in which he had actually been employed as the pursuer's traveller.

In February 1905 George Mulvein, boot and shoe factor, Maybole, engaged John Murray as a retail traveller, salesman, and collector on the terms and conditions set forth in the following agreement:—"This minute of agreement entered into between George Mulvein, boot and shoe factor, Maybole, and John Murray, presently residing in 1 Coral Hill, Maybole, witnesseth that the said George Mulvein hereby engages the said John Murray from the sixth day of February Nineteen hundred and five, as a retail traveller, salesman, and collector in his said business of boot and shoe factor, and that at a wage of twenty-four shillings per week, payable weekly, to be increased at such time or times and at such rate or rates as the said George Mulvein shall deem proper; and the said John Murray hereby binds himself, so long as he remains in the said George Mulvein's employment, to keep proper books, with the name, designation, and address of each customer entered therein, and shall make daily returns to the said George Mulvein of his sales and money transactions on sheets to be supplied to him by the said George Mulvein, and shall generally do everything in his power to further the interests of the said George Mulvein's business and to improve the same, and shall serve the said George Mulvein honestly, faithfully, and diligently; and this engagement shall be terminable by either party by giving a fortnight's written notice to the other party of his intention to terminate it; and the said John Murray binds himself not to sell to or to canvass any of the said George Mulvein's customers, or to sell or travel in any of the towns or districts traded in by the said George Mulvein for a period of twelve months from the date of the termination of this engagement."

Murray terminated his engagement on 27th October 1906. Within twelve months Mulvein brought an action against him in the Sheriff Court at Glasgow craving the Court "to interdict the defender from selling boots and shoes to, or canvassing, any parties who were customers of the pursuer prior to 27th October 1906, and from selling, travelling for, or trading in boots and shoes in the following districts, namely—Cambuslang, Tollcross, Parkhead, Kinning Park, Govan, Gorbals, Rutherglen Road, Tradeston, Auchenairn, and Springburn, being districts traded in by the pursuer, and in particular from soliciting the following persons or their representatives for orders for boots and shoes, namely—Archibald Duncan, 459 Rutherglen Road, Glasgow; Mrs Beauland, 456 Rutherglen Road,