The action is in itself perfectly competent, and I apprehend that, even if there had been disclosed on the face of this record a difference as to the meaning or effect of the agreement and the mode of carrying it into operation, it would not have been the proper course to dismiss the action. In the well known case of *Merry* v. *Cunninghame*, 15 July 1859 and 7 June 1860, about a mining lease, almost the entire dispute between the parties was one which required to be settled by arbitration. The Court sisted process till the award of the arbiter should be presented. This is a far stronger case for keeping the action in Court. As I have said, it does not appear to me that any question has arisen, or will arise, which the arbiter would have jurisdiction to decide.

Lord Deas differed. His Lordship considered that the question between the parties, being one of figures, was one eminently suited for arbitration, and fairly came under the category of differences as to the "effect of the agreement, or the mode of carrying the same into operation," and that the powers of the arbiter would enable him to give decree for the balance due.

Lord Ardmillan concurred with the Lord President.

Lord Kinloch—I think that the Lord Ordinary has failed to remember that there may be a limited submission as well as a submission of all differences and disputes. This is a case of the former character. The action upon its face does not raise a question of the kind which is to be submitted to arbitration. It might have been otherwise. Though the conclusions are for a money payment, the grounds might have involved the reading of the contract. But for aught that appears, no one question, such as those referred, may occur. In this respect matters may change in the progress of the case. Questions may still arise fit for the decision of the arbiter, and yet they may not exhaust the cause. I agree with your Lordship that the proper course is not to dismiss the action, but to sustain it, reserving the effect of the arbitration clause if any question should arise under it.

The Court recalled the interlocutor of the Lord Ordinary, reserving the effect of the arbitration clause founded on by the defenders if any question should arise fit for the decision of the arbiter.

It was arranged that the action should be kept in the Inner-House, and that the defenders should lodge the accounts relied on by them, showing the gross revenue and expenditure during the years referred to in the record.

Agents for Pursuers—Hope & Mackay, W.S.
Agents for Defenders—M'Ewan & Carment, W.S.

Wednesday, December 13.

SECOND DIVISION.

CUMMING *v.* ORCHARD.

Process—Sheriff-Court Act 1853, § 15—*Dismissal of Action.* The enrolment of a cause in the roll book of the Sheriff-Court is a sufficient procedure to prevent the action standing dismissed under the above section.

This was an action of forthcoming in the Sheriff-Court of Inverness. A proof was ordered by interlocutor on 28th June. On 13th July the case was enrolled in the roll book by the pursuer's agent, and was dropped. The next procedure was the following interlocutor by the Sheriff-Substitute (Blair):—

"*Inverness*, 19*th October* 1871.—The Sheriff-Substitute having heard the defender's agent on his motion for revival of the action, finds that no sufficient reason has been stated for reviving it, and that no offer is made to pay expenses.

"*Note.*—The only motion by the defender's agent was a motion for revival, and this memorandum is placed on the minutes at his urgent request, with the view of recording his application and the grounds on which the Court refused it."

The defender appealed.

Strachan for him.

Rhind for respondent.

At advising—

Lord Justice-Clerk—I am of opinion that this appeal is competent, and that we ought to refer the case back to the Sheriff-Substitute. I think there has been a mistake throughout respecting the 15th section. The action never did expire. There was sufficient procedure to save it. The whole question is, whether an enrolment is such procedure in the cause as will satisfy the requirements of this statute. I presume the enrolment is *bona fide*. I say nothing as to its effect if it were a mere pretence.

The words of the section are these—"Where in any cause neither of the parties thereto shall during the period of three consecutive months have taken any procedure therein." An ordinary enrolment is unquestionably procedure, for thereby the case is brought before the Court. The matter is brought under the consideration and cognisance of the Judge. The party who enrols is bound to follow out his motion; and, if the case be dropped, will be held liable in expenses. This case never did get into the dormant or purgatorial state to which the provisions of the statute refer. In the present state of matters, therefore, I think that the interlocutor of the Sheriff-Substitute is wrong.

Lord Cowan—I concur. The case depends upon the competency of the Sheriff in exercising the statutory power conferred on him by the 15th section of the Sheriff-Court Act of 1853. He has held that three months had elapsed since any procedure had taken place, and that the cause could only be revived by an interlocutor pronounced, or cause shown. If it appear that there had been sufficient procedure to keep the cause alive, the interlocutor must be beyond the statutory discretion of the Sheriff-Substitute. Therefore the appeal is quite competent. The question then is, Whether there was a *bona fide* procedure? There is evidence before us that there was procedure. The case appeared in the roll of causes before the Sheriff. We must presume that the parties appeared, as there is no evidence that they were absent. The case comes near to the case of *Stewart* v. *Grant*, in which the Lord Justice-Clerk said—"I cannot doubt that the appearance of a cause in the roll book of the Court on a day within the three months till the expiry of which the process is a going process, and a marking upon the margin that avizandum has been made on that day, is a step in the cause." Though there is no marking by the Sheriff, we have one by the Sheriff-clerk. We are only acting on the principle established in *Stewart* v. *Grant* if we sustain this appeal.

LORD BENHOLME—I am of the same opinion. It is not necessary that there should be an interlocutor of the Sheriff in order to procedure. Nor is it necessary that the cause should be advanced. If there had been an adjournment of the cause that would have been enough.

LORD NEAVES—I am of the same opinion. I look with satisfaction on this section of the statute, but it is not to be judicially construed. I do not say that going through the form of enrolment, if the parties did not appear, would be enough to save a cause. But here the party who enrolled the case, and was entitled to ask for circumduction and his expenses, waived his right. When the parties again appear the Sheriff refuses to do anything. The appellant is entitled to maintain that the action is alive, and to obtain redress. The interlocutor of the Sheriff-Substitute is a plain denial of justice, and we should take it out of the way.

Agents for Pursuer—D. Crawford & J. Y. Guthrie, S.S.C.

Agent for Defender—David Cook. S.S.C.

Thursday, December 14.

HERITORS OF ABERDOUR *v.* RODDICK.

Minister—Manse—Heritors. A minister is entitled to let his manse for two months in the summer, and the heritors have no right to interfere with his letting the manse, unless there be danger of some injury to the building.

The facts of the case sufficiently appear from the following Note, which the Lord Ordinary (MACKENZIE) appended to his interlocutor assoilzing the defender:—

"*Note.*—The present action has been raised by the heritors of the parish of Aberdour, and by the Earl of Morton, the Earl of Moray, and Mr Wotherspoon of Hillside, three of the heritors, against the Reverend George Roddick, the minister of that parish, to have it found and declared that the defender 'has no right to let or hire out the manse of the said parish of Aberdour, or any part thereof, to tenants, strangers, sea-bathers, or others, or to occupy, or to allow or permit the same to be occupied by such tenants, strangers, sea-bathers, or others, not being his own family, servants, or other members of his household,' and to obtain interdict against the defender prohibiting him from so letting or hiring out the manse. The pursuers aver that the defender has for some years been in the practice of letting his manse during the months of August and September, and, in particular, that he did so in 1868 to Mr Drybrough, brewer, Edinburgh, at £25, and in 1870 and 1871 to Mr James Shand, a fire-engine manufacturer in London, at £30, for each of these two months. The defender admits these statements of the pursuers, and he explains that he so let his manse while absent, with the knowledge of the presbytery, from his parish for the benefit of his health, and that, besides visiting his parishioners, he has, during these two months, discharged his Sunday duties personally for at least half the time, and that during the remainder of the time his duty is performed either by other clergymen with whom he exchanges pulpits, or by means of a paid assistant, for whom he takes lodgings in the village of Aberdour.

"It is not easy accurately to define the nature of a minister's right to his manse. Lord Stair, in treating of infeftments of property, states that 'the gleibs of ministers seem to come nearest to allodials, having no infeftment, holding, rent, or acknowledgement, though they be more properly mortified fees, whereof the lifrent escheat befals to the King only' (2, 3, 4). In the same book, after defining infeftments of mortified lands, he says (2, 3, 40), 'of all these mortifications there remains nothing now except the manses and gleibs of ministers, which manses and gleibs are rather allodial than feudal, having no express holding, reddendo, or renovation, yet are esteemed as holding of the king in mortification, and therefore the liferent of the incumbent, by being year and day at the horn, falls to the King.' In the *Heritors of Cargill* v. *Tasker*, February 29, 1816, F.C., where the question was, Whether a minister is liable to be assessed for poor-rates? the Court, in deciding that he was not, observed, as the report bears, that 'he is *qua* minister, neither an heritor, a tenant, nor a possessor.' But this was explained by Lord Fullerton in the case of *Forbes* v. *Gibson*, December 18, 1850, 13 D. 341, 'as importing that, though *de facto* possessing, still the possession of ministers was, from their peculiar character, not such as to bring them within the assessing clauses' of the Poor Law Acts. The question in that case was, Whether a parish minister was, by reason of the provisions of the Poor Law Amendment Act, liable to assessment for support of the poor in respect of his manse and glebe? In the same case, in the House of Lords, the Lord Chancellor (Lord St Leonards) stated that 'ministers are in a sense owners.'

"The right of a parish minister to his manse is statutory. By the Act 1563, c. 72, it is provided that the 'minister have the principal manse of the parson or vicar, or sa-meikle thereof as shall be fundin sufficient for staiking of them, to the effect that they may the better await upon the charge appointed and to be appointed unto them, quhidder the saidis glebis be set in few or tack of before or not: Or that ane reasonable and sufficient house be bigged to them beside the kirk be the parson or vicar, or others, havand the said manses in few or long tackes.' By the Act 1572, c. 48, it is declared 'that the manses outher perteining to the parson or vicar maist ewest to the kirk, and maist commodious for dwelling, perteins and sall perteine to the minister or reader serving at the samin kirk: Together with four acres of land of the glebe at least lyand *contiguè*, or maist ewest to the said manse, gif there be sa-meikle,' and these are appointed to be designed 'to the use of the minister or reader that sall serve and minister at the said kirk in time cumming.' And by the Act 1663, c. 21, the heritors of the parish are ordained, where competent manses are not already built, to 'build competent manses to their ministers,' and, where competent manses are already built, to repair them, the ministers being bound to uphold them during their possession after being repaired and declared free. According to these statutes, manses pertain to ministers during their incumbency, and they are designed for their use, 'to the effect that they may the better await upon the charge appointed.'

"Such being the statutory right of ministers, the Lord Ordinary has been unable to see any sufficient grounds on which the pursuers, as heritors of the parish of Aberdour, can, in the circumstances, and on the grounds averred by them, obtain the decree of declarator and interdict for which they conclude in their summons. It is not said that the defender, by letting the manse for two