might, in my apprehension, have misled the Jury. That a child even so young might in certain circumstances have by his or her own act led to the accident, and that this may have been therefore proper matter for the consideration of the Jury in considering the defence of contributory negligence, may be true; and if the actings of the child in this respect had been excluded from the consideration of the Jury by the presiding Judge, there might have been ground for excepting to his having so ruled. The bill of exceptions, however, excludes any such objection, setting forth, as it does, that, while the ruling asked by the defenders was refused, the presiding Judge informed the jury "that this was a matter of fact — not of law," and "that if, in their opinion, the boy was guilty of negligence which contributed to the accident, or if, in their opinion, the father had been guilty of negligence which contributed to the accident, they must find for the defenders." This, as it appears to me, was the only safe and proper mode, in such a case as the present, of leaving the question as to contributory negligence to the jury for their decision upon the facts in evidence before them.

"Reference was made to several decisions in the English Courts in the course of the argument, in particular (1) to the case of *Lynch*, in 1841, decided in conformity with the opinion of Chief-Justice Denman, who delivered the judgment of the Queen's Bench; (2) to the case of *Mangan* v. *Atterton*, in 1866, in Exchequer; and (3) to the prior case of *Hughes & Abbot* v. *M'Fee*, 1863, also in Exchequer. The views stated by the Judges in Exchequer in the two last cases are certainly to the effect that children of tender years may by their act contribute to the accident and be thereby, if proved, excluded from any legal remedy for the injury suffered. In this respect it would seem that the views so stated are scarcely consistent, if they are not at variance, with the carefully expressed judgment of Lord Denman in the case of *Lynch*. But whether this be so or not, I cannot find in the opinions delivered in these later cases any distinct statement to the effect that the jury should not be left to judge of the alleged contributory negligence upon the facts in evidence before them. This was the course followed in the present case by the presiding Judge, and it humbly appears to me a course in itself unobjectionable. Having regard to the facts in evidence bearing on the fault of the defenders, and on the acts of this child founded on as establishing contributory negligence, I consider that had the presiding Judge refused to leave the case on both its branches in the hands of the Jury, his ruling to that effect would have given room for exception by the pursuer. And I cannot think that the exception here taken can be supported, having regard to what was actually laid down and stated to the jury by the presiding Judge.

"The second exception is to the refusal of the Judge to direct the jury "that if the jury were satisfied that the boys Robert and Neil Campbell were playing together at the machine when the accident in question happened, and the fault of said Neil Campbell materially contributed to the accident, the pursuer was not entitled to recover."

"Any such direction by the Judge would, I think, have been improper in the state of the evidence. No doubt the two boys were playing together at the place where the machine was, and it may be that the act of Neil setting the machine agoing may so far have led to the accident. But it by no means follows that they had conspired together, or were capable of doing so, to set the machine in motion, whereby the accident to the younger boy was caused. The exception as expressed does not raise a case of joint and combined action even if a child of four years old is to be viewed as capable of being a party thereto to the effect of making the act of the elder boy the foundation of a charge of contributory negligence, to have the effect of excluding the younger from his claim for redress for the injury suffered. The case of *Abbot* in 1863 does not, as I read the judgment, establish any doctrine hostile to this view; but if it is to be viewed otherwise, I must fairly own that I could not concur in that judgment. I cannot hold, therefore, that in refusing to give the direction asked by the defenders, the presiding Judge was in error.

"For these reasons, I am of opinion that both exceptions should be disallowed, and the motion for a new trial refused."

The other Judges concurred.

The Court pronounced the following interlocutor:—

"Disallow the exceptions; discharge the rule; refuse to grant a new trial: Find the pursuer entitled to the expenses of discussing the Bill of Exceptions, as well as those connected with the application for a rule, and decern; and remit to the auditor to tax the expenses now found due, and to report."

Counsel for Pursuer—Millar, Q.C., and Smith. Agent—A. Shiell, S.S.C.

Counsel for Defender—Trayner and Robertson. Agents—Horne, Horne, & Lyell, W.S.

R., Clerk.

Wednesday, November 5.

SECOND DIVISION.

[Lord Gifford, Ordinary.

MAXWELL AND OTHERS *v.* SCOTT.

Sale—Land—Forehand Rents—Apportionment Act, 1870, 33 *and* 34 *Vict. c.* 35.

An estate having been sold, a question arose as to the apportionment of the rents between the seller and purchaser;—*held* that these were forehand, and that, accordingly, the purchaser was entitled to the rents paid at the term prior to the purchase, less only the proportion due from that term to the day of entry.

This case came up by reclaiming note against the interlocutors of the Lord Ordinary (GIFFORD), of dates March 11 and June 6, 1873. The circumstances were briefly as follows. The defender, Mr Scott, purchased from the pursuers the estate of Auchenfranco, in the stewartry of Kirkcudbright. The offer was as follows:—

"*Dumfries*, 23*d June* 1871.

"Gentlemen,—I offer to purchase the estate of Auchenfranco at the price of £18,750, cash down and rents and taxes to be apportioned to the day of payment, and without regard to the legal question of crops—the trustees to obtain their £200 from the Water Commissioners; the purchaser to recog-

nise the recent feu-rights in Lochfoot village; the trustees not to be bound to enter with the Crown. An answer to this to be given me within ten days. Reference to Manchester and Liverpool District Bank, Manchester Spring Gardens. A good and legal title to be given to the purchaser.—Yours, &c."

The pursuer maintained that it was, *inter alia*, one of the conditions of sale, and expressly stipulated for by the pursuers and agreed to by the defender, that, in respect that the defender's entry to the lands was to be from the date of the payment of the price thereof, and that the price was to be a cash down or ready money payment, the rents derived from and taxes due by said lands, on and after the term of Whitsunday 1871 (viz., the rents and taxes due at Martinmas 1871, and payable by the tenants at Candlemas 1872), should be apportioned between the pursuers and the defender to the day of the payment of the price thereof, and that without regard being had to the legal question of crops. The half-year's rents of the lands for Whitsunday 1871 were due at Whitsunday 1871 and paid to the pursuers in August following, prior to the defender's entry to the lands.

This Mr Scott denied, and explained that the clause as to apportionment of rents was inserted expressly for the benefit of the defender, who would otherwise have been entitled only to the half-year's rents conventionally payable at Martinmas 1871, and that the half-year's rents to be apportioned were those conventionally payable at Whitsunday 1871 (but not then paid), for the last half of crop and year 1871.

In fulfilment of the missives of sale, the pursuers, by disposition dated the 29th and 30th days of September, and 9th day of October 1871, in consideration of the payment of £18,750, disponed the estate to the defender Samuel Scott.

The disposition fixed the defender's term of entry as at 14th October 1871, the clause being as follows:—"And we, with consent foresaid, assign the rents from the date of delivery hereof, being the 14th day of October 1871, and without regard to the legal question of crops." The defender retained the price of the estate in his own hands from the date of the missives of sale, in June 1871, until the date of the disposition, being nearly four months, and paid no interest thereon to the pursuers. The amount of interest on the price retained by the defender, calculated at four per cent., amounts to about £300, and the pursuer averred that the defender had not only retained this interest, but had also drawn the rents falling due during the period in which he withheld payment of the purchase-money and interest. Under the leases granted by the pursuers to the tenants, their term of entry was fixed to be at Whitsunday 1871, but the first half of that year's rent was to be payable at Martinmas 1871. The half-year's rents amounted to £376, 0s. 5d., of which it was maintained that £294, 12s. 5d. belonged to the pursuers, as sellers of the lands, and £81, 8s. to the defender as purchaser. On 28th October 1871 James M'Kie, writer, Dumfries, one of the pursuers, intimated by letter to the tenants of Auchenfranco that the pursuers, as sellers of the estate, had right to the rents thereof from Whitsunday 1871 to the 14th day of October 1871, and he informed each tenant of the apportioned sums of rents due by him to each party. The defender admitted that the tenants' term of entry to the arable farms was at Whitsunday 1871 in so far as regards the houses, grass, and pasture, and to the "arable land" at the separation of the crop of that year, but he explained that the half-year's rents due by the tenants at Martinmas 1871 were payable for the first half of crop and year 1872, and that the rents to be apportioned and referred to in the disposition were the rents for the last half of crop and year 1871, and made payable under the leases at Whitsunday 1871, although not collected till Lammas 1871. At the date of the sale of the lands to the defender these rents had not been collected.

The pursuers pleaded—"(1) In terms of the disposition and other writs condescended on, the pursuers were entitled to draw the rents of said lands from Whitsunday 1871 until 14th October 1871. (2) The defender having illegally and unwarrantably got payment from the tenants of the said sum of £224, 18s. 3d. belonging to the pursuers, is bound, under deduction of whatever sum he may instruct to be due by the pursuers to him for taxes, to pay the same to the pursuers, with interest as concluded for. (3) In any view, the defender is not entitled to retain the rents, and also the interest upon the price or purchase-money of said lands."

The defender pleaded—"(2) According to the true construction and meaning of the disposition founded on, the defender is entitled to the whole rents payable by the tenants at Martinmas 1871, and to absolvitor from the conclusions of the present summons. (4) The rents in question being payable by the tenants for the possession of their farms subsequent to Martinmas 1871, the defender is entitled to absolvitor, with expenses."

The Lord Ordinary's interlocutor was as follows:—

"*Edinburgh*, 11*th March* 1873.—The Lord Ordinary having heard parties' procurators, and having considered the closed record, writs produced, and whole process—Finds that the rents payable by the tenants of all and whole the five-pound lands of Auchenfranco, with the mill and pertinents of the same, sold by the pursuers to the defender, and which rents were payable by the said tenants at the term of Martinmas 1871, are apportionable between the pursuers and the defender so and in such manner that a proportion of the said rents effeiring to the period from Whitsunday till 14th October 1871 shall belong to the pursuers, and a proportion of the said rents effeiring to the period from said 14th October till Martinmas 1871 shall belong to the defender: Finds that the taxes and public burdens payable in respect of the said lands and others, and the ownership thereof, fall to be apportioned between the pursuers and defender in the same manner, and appoints the cause to be put to the roll that the exact amount of rent and taxes apportioned as aforesaid may be determined, and that decree may be pronounced in favour of the pursuers for the proportion or balance due to them by the defender, and decerns: Finds the pursuer entitled to expenses, and remits the account thereof, when lodged, to the auditor of Court to tax the same and to report.

"*Note.*—This case involves a question of very general interest and importance relative to the meaning and effect of the 'Apportionment Act, 1870,' 33 and 34 Vict., cap. 35, entituled 'An Act for the better Apportionment of Rents and other Periodical Payments.' A very broad question indeed is raised upon this Act, namely, whether its

provisions apply to all cases whatever—cases of contract, for example, and cases of sale—unless its operation is expressly excluded; or whether the statute is confined to cases of the termination of limited interests by death or otherwise, and to questions of succession, and between heir and executor, as seems to have been the case with the old Apportionment Act, 4 and 5 Will. IV., cap. 22 (1834).

"The difficulties, however, are greatly enhanced in the present case by the peculiar terms in which the parties have chosen to express their contract, whether the contract be considered as contained in the original missives of sale, or as contained in the disposition which was executed and delivered by the pursuers to tho defender. The missives expressly say that rents and taxes are to be apportioned to the day of payment, without regard to the legal question of crops, while the disposition, without saying anything about apportionment, merely assigns the rents from 14th October 1871, without regard to the legal question of crops.'

"A very strenuous argument was maintained before the Lord Ordinary, to the effect that it was incompetent to look to the missives of sale, or to the correspondence between the agents, to any effect whatever; but that the question must be considered upon the terms of the delivered disposition, and on the terms of that deed alone, all prior missives being held as cancelled and superseded.

"The Lord Ordinary is not disposed to give effect to this plea in the broad terms contended for by the defender. There is no doubt of the general principle that when a formal deed, whether of agreement or of conveyance, is adjusted, executed, and delivered, it supersedes previous missives or communings between the parties, and cannot be controlled or overruled by the terms of previous missives. But this rule must be taken in a reasonable sense, for it often happens that in the sale and transference of an estate questions relating to searches, encumbrances, repairs, or even as to completing titles, are left to stand upon the agreement in the missives even after the formal disposition is delivered, and the mere delivery of the disposition will not in all circumstances, and *per se*, discharge the seller of separable and separate obligations which he had come under in the missives.

"In the present case, however, this question, which may often be one of some nicety, is not very material; for the Lord Ordinary has come to think that the apportionment of rents, which by the preceding interlocutor he has found must be made, is an apportionment which results from the terms of the disposition, as well as from the terms of the missives. At the same time, the Lord Ordinary is confirmed in his view by what he thinks is the fair reading and intention of the missives, as expressing the real meaning of the parties.

"Taking the terms of the disposition, and considering that deed along with the leases current at its date, and with the express provision of the Apportionment Act of 1870, the Lord Ordinary is of opinion that the rents payable under the leases at Martinmas 1871 fall to be apportioned between the pursuers and defender in the proportion of 152 to 28—the 152 being the number of days from Whitsunday 1871 to 14th October, the term of entry, and 28 being the number of days from 14th October to Martinmas 1871, when the half-year's rents were payable. He has reached this conclusion, although not without difficulty, upon the following grounds:—(1) The Apportionment Act of 1870 is expressed in the broadest and most general terms. Section 2 enacts that 'from and after the passing of this Act all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise), shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.'

"There is no limitation of the cases to which this enactment shall apply. It is not confined to the determination of limited interests. It is not confined to questions of succession; it applies to every case where the right to a subject commences at a given date; the right to rents shall be apportioned to that date 'in respect of time.' Hence, if a man agrees to sell a house, or farm, or fishings, or anything else as at a given date, the rents of the subject are apportionable in time up to that date, just as the interest of money assigned would be, for this is the analogy to which the statute itself reduces everything. It enacts that all rents, &c. shall, 'like interest on money lent,' accrue from day to day. The narrative of the statute points to the same broad result. It narrates the mischiefs and inconveniences arising from rents, &c., not being apportionable at common law. That some of these mischiefs and inconveniences have been remedied by various statutes, including that of 1834, and it subsumes the expediency of remedying all such mischiefs and inconveniences.' This plainly extends to cases of contract as well as to cases of succession. So universal is the Act, that it seems to have required two special clauses to exempt from its operation premiums on policies of assurance, and cases where the parties stipulate that there shall be no apportionment.

"The result seems to be that, whenever a subject yielding rent is sold, the rent shall be apportioned to the day of sale or entry, without regard to the nature of the fruits, or to the special enjoyment for which rent is paid, and this unless the contrary is stipulated. This may lead to some anomalies in reference to grazing, shooting, fishing, or mineral rents, but it is not inequitable, and seems as fair as a rule of universal application can be made to be. Parties are always at liberty to make any special bargain they please for themselves.

"(2.) By the terms of the disposition there is to be 'no regard to the legal question of crops.' This is really very much what the statute says. The statute enacts that time is to be the measure of apportionment: *De die in diem* all through, without regard to what is the special term or period of productiveness. But the provision goes somewhat beyond the statute, for it seems to preclude the question for what crop and year the rent is payable. We must look to the leases to get the rent, but we are not to have any regard to the particular crop for which rent is exigible. This seems to fix that the time of the tenant's possession is the true and only criterion, for apportionment is to be made '*in respect of time.*'

"(3.) Now, the leases current at the date of the disposition are four in number, besides a missive under which a small mill is held. All of them bear that the tenant's entry is to be Whitsunday 1871 in so far as regards the houses, grass, and pasture, and at the separation of the crop of that year as to the arable land, and the yearly rent is

declared to be payable in two equal portions at Martinmas and Whitsunday, the first half-yearly payment being at Martinmas 1871, and so forth half-yearly. The mill has a Whitsunday entry, with rent payable at Martinmas and Whitsunday thereafter. In reference to the arable parts of the estate, the old leases had all expired as at Whitsunday 1871, and the new leases had been granted under an express reservation contained in the missive of sale.

"(4.) It appears plain enough that if there is to be an apportionment in respect of time, apart from crops, it must be the current rents which fall to be apportioned — that is, the rents becoming due under the current leases granted in August 1871, and not the rents which were paid and settled at Whitsunday 1871, the negotiations for sale only commencing in June thereafter. True, the outgoing tenants may not have fully reaped their waygoing crop at 14th October 1871, though it is more than probable they had done so before that date. But at all events they had ceased to be tenants, and had paid up their rents at Whitsunday 1871, long before the defender had even offered to purchase the estate. It would require a very strong case of express contract to give the defender a right to any part of the rents payable at Whitsunday 1871. There is no such contract here.

"(5.) It seems quite fixed that an agricultural lease, with a term of entry like those in process, at Whitsunday as to houses and grass, and at separation of crop as to arable land, has really a Whitsunday entry and a Whitsunday ish. It is one lease, and not two, and the term of years runs in law from Whitsunday. This was expressly decided in the case of *Wright* v. *The Earl of Hopetoun*, 10th July 1863, 1 Macph. 1074; Appd. (H. L.) 27th May 1864, 4 Macqueen, 729; 2 Macph. (H. L.) 35. Here, in a highly penal question, it was held that a right to renewal was forfeited, because notice was not given due time before the Whitsunday, although it was in plenty of time if the separation of crop was the ish.

"Lastly, The Lord Ordinary thinks it competent and fair to look to the missives, and to the letter which passed between the sellers and purchaser of even date with the missives, 23d June 1871. In that letter Mr M'Kie explains what he means by apportionment in Mr Scott's offer. He says that it would simplify matters if the purchaser would take the whole rents payable at Martinmas 1871, and pay interest on the price as from Whitsunday 1871, and that this would be much the same in money. This is nowhere repudiated in the correspondence, and if it expresses the intention of parties, it would really be conclusive; for the purchaser has paid no interest on the price, and he is now seeking the whole rents, which began to run long before his purchase. The rents, it seems, are just about equal to 4 per cent. on the price.

"The Lord Ordinary regrets that he must order the case to the roll to fix the exact amount of rents and taxes. But there should be no difficulty in doing this, if the principle of the Lord Ordinary's judgment is either acquiesced in or affirmed. The present interlocutor virtually exhausts the questions at issue; and as the pursuers are successful, the Lord Ordinary thinks them entitled to expenses."

At advising—

Lord Cowan—The pursuers of this action are the trustees of the deceased Thomas Maxwell, sometime of Auchenfranco, and the defender is proprietor of these lands under a disposition thereto by the pursuers in his favour, the term of entry thereby stipulated being 14th October 1871. The clause of assignation of rents is in these terms:—"We assign the rents from the date of delivery hereof, being the 14th day of October 1871, and without regard to the legal question of crops." Under this disposition immediate possession was obtained by the defender, and the half-year's rent payable by the tenants under their leases at Martinmas 1871 was drawn by the purchaser. The claim in this action is by the sellers of the lands, who maintain that they are entitled to the proportion of that half-year's rent effeiring to the period between Whitsunday and the 14th of October. This claim is resisted by the purchaser, who maintains that he is entitled to retain, as belonging to himself, the whole half-year's rents in question.

The dispute between the parties appears to me to resolve entirely into the true effect and meaning of the assignation to rents in the disposition, upon the terms of which, as the contract of parties in that respect, the determination of the respective rights of sellers and purchaser in and to this half-year's rent exclusively depends. Towards the solution of this question, however, it is necessary to have in view the terms of the leases under which the rent became due. From the excerpts in the print of documents it appears that the lease held by the tenant was for fifteen years from and after Whitsunday 1871 as regards the houses and grass, and at the separation of the crop as to the arable land—the farm being admittedly arable and not pasture. The rent clause, again, stipulates that the tenant shall make payment of the rent at two terms in the year—Martinmas and Whitsunday—beginning the first term's payment at Martinmas 1871, and the next term's payment at Whitsunday 1872. The rent was thus payable forehand, being for the first year's possession of crop to be reaped in 1872. And, consistently with the same view, the rent paid to the proprietors at the preceding Whitsunday 1871 was for the last term's rent of crop and year 1871. It is necessary to have the terms of the leases now referred to in view in order that the true effect and meaning of the contract of parties may be seen.

The date of delivery of the disposition and payment of the price was fixed as at 14th October 1871, from which date the rents were assigned, subject to the declaration "without regard to the legal question of crops." What is the sound construction of this agreement as to the rents? On the one hand, it is alleged that the bargain, having taken place during the currency of the half-year between Whitsunday and Martinmas 1871, and the price being payable as on 14th October 1871, the half-year's rent should be apportioned so that as much of it should appertain to the purchaser as corresponds with the period from 14th October until Martinmas, the sellers being entitled to the remainder after deduction of that proportion of the rent. On the other hand, it is contended that, having regard to the stipulations in the lease of the tenants, and the fact of the rent being forehand, the purchaser is entitled to the whole half-year's rent due at Martinmas 1871, and that any apportionment that can be held applicable to the case, as between the parties, can apply only to the half-year's rent which was due at Whitsunday 1871 and was drawn by the sellers. The pre-

sent action has no relation to any claim for apportionment of this latter description. It has exclusive regard to the half-year's rent payable by the tenant at March 1871. There is considerable difficulty attending the question, which of the two constructions contended for is the right one; but, although not without difficulty, I have arrived at the conclusion that the assignation of rents was intended to carry to the purchaser the whole rent payable by the tenants at Martinmas 1871. There is no stipulation for apportionment of rents. On the contrary, all the rents falling due under the leases after the term of entry are, by the agreement of parties, to belong to the purchaser.

To this view it is objected that, as the price was paid on 14th October 1871, and the interest accruing on it fell to be drawn by the sellers only from that date, they should have the proportion of the rent payable at March for that part of term preceding 14th October, up to which date the purchaser drew the interest on the price. This argument appears to me fallacious. In the first place, the rent of this arable farm being payable forehand, the Martinmas rent became the purchaser's, as the true possessor of the farm during the year and crop of which it was the rent. And, in the second place, having regard to the circumstances in which the parties were relatively placed at the date of the contract, it is impossible to say that the price of £18,750 was not stipulated for and fixed between them with due regard to the fact that the purchaser would, in terms of the assignation, have right to the Martinmas rent—just as occurs in the sale of bank stock or railway stock in a transference of stock between the periods of dividends—the price paid by the purchaser corresponding to the period of the term that has run at the date of the purchase, and the seller getting in the price his due share of the dividend afterwards paid to the purchaser. It seems to me that, by the terms of the agreement as to rent, the same principle may well be held to have been acted on. But, whether this be so or not unless apportionment of this term's rent can be shown to have been specially stipulated for by the seller—the whole rent becoming due after the term of entry must be held to pertain to the purchaser *vi contractus*.

The missives exchanged between the defender personally (before he was aware of the terms of the leases or had consulted with his agent) and the pursuers and their agent, are appealed to by the latter, and have been founded on to some extent by the Lord Ordinary as supporting the claim of the pursuers. I cannot take that view of the import of the missives; for, in the *first* place, the expressions employed by the defenders are of doubtful import in themselves; and while the defender, writing from Manchester, says he saw nothing to object to the proposal of the pursuer, he would instruct his legal representative to communicate with the agent of the pursuers. And, in the *second* place, throughout the correspondence which followed the view adopted by the defenders' agent, so far as the Martinmas rent was concerned, was clearly stated, and the further claim for apportionment of the Whitsunday rent advanced. Further, a proposal to refer the matter to counsel having failed, the final agreement of parties as to this matter was embodied in the disposition. That deed makes no reference to the missives, and assigns the rents in the terms which were proposed by the defender's agent and agreed to by the pursuers. On the sound construction of that assignation, therefore, the legal rights of parties must be decided.

On the grounds now stated, I think there is no room in this case, so far as the rent in question is concerned, for considering the effect of the Apportionment Act; and, as regards the application of that Act as supporting the defender's right, put forward in the correspondence, to a share of the rents which were drawn by the seller at Whitsunday 1871. No question of that kind arises for consideration under this record, and to such claim, when duly raised, the clause excluding the legal question of crops would probably afford a good defence.

On the whole, it appears to me that the interlocutor of the Lord Ordinary should be recalled, and the defender assoilzied from the conclusions of the action.

Lord Benholme—I am sorry to say that I take a different view of this case from that of your Lordship, and in all points I agree with the interlocutor of the Lord Ordinary, and the distinct and satisfactory note thereto subjoined.

This estate of Auchenfranco was purchased in the summer of 1871, and, as Lord Cowan has mentioned, the question of apportionment of the rents is distinctly alluded to in the missives which passed between the parties in June of that year. No doubt we have in the course of the correspondence a suggestion that apportionment should be avoided altogether, by making the price of the property payable at the preceding term; that suggestion, however, was not carried out in the final arrangement, as we see from the missives before us.

The question then comes to be, whether or not it is consistent with the arrangement ultimately come to between seller and purchaser that there should be apportionment of the rents. I am free to admit that the contracting parties did not seem to understand each other, not I think as to an apportionment (*that* both sides admitted), but as to what terms' rents were to be apportioned. It is quite clear that entry took place at Whitsunday; then the first half-year's possession was from Whitsunday until Martinmas, and the first half-year's rent was due at Martinmas. Under a former lease of the subjects the first half-year's rent was due at Whitsunday, but under the subsisting lease the first half-year's rent was payable at Martinmas. The tenant who had entered at Whitsunday had by Martinmas enjoyed possession for half a year, and certainly it seems a fair way to look at the matter if we regard the Martinmas payment at the end of this first half-year as rent for the past half-year.

But, under another view, your Lordship has considered the half-year's payment at Martinmas as *forehand*, as a payment for the coming half-year of 1872 from Martinmas to Whitsunday. This I venture to think is an artificial way of putting the matter, it is contrary to what would *prima facie* arise out of the circumstances, and, yet further, it was from the very beginning repudiated by the expression contained in the first missive which passed between the parties, an expression to the effect that the apportionment therein proposed would have no reference to crops. It is not, as I have observed, the existence of apportionment that is there in question, but merely which half-year's rent was to be apportioned. It is vain to say when the missives are looked at that they did not

conceive that apportionment was to take place. [*His Lordship here read the Letter of 23d June* 1871 *offering for the estate.*] How is it possible, my Lords, (I cannot think it possible) in the face of this to introduce those considerations on which Lord Cowan founds his judgment? The question of crops is expressly excluded by the parties in making the contract, and yet the whole argument of the other side is based upon this very question of crops. Another great objection to Lord Cowan's view is that it brings out a result in the highest degree to my mind inequitable; a purchaser who has not paid for what he has bought, by this means becomes entitled to half a year's rent and to interest as from a certain date. Are we not to dwell upon and be governed by the missives which constituted the agreement between parties? I venture to say that in these there will not be found any exclusion of apportionment. Well then, if there is apportionment, and the only question is as to which term it applies, we must interpret the clause as we find it. The words are "from the date of delivery hereof,"—not "*after*" but "*from*," clearly having in my mind reference to the apportionment. That corresponds with the view of the parties in the missives, and that is the true view of the assignation.

This case has been considered by the Lord Ordinary very deliberately, and it appears to me that his Lordship has pronounced a very sound interlocutor. I am unable to resist the opinion at which I originally arrived on reading the interlocutor and note, that there is no argument for the other party save one which is based upon the repudiation of the agreement in the missives. [*His Lordship then read defenders' answers 5 and* 6.] Now, my Lords, I think it very strange that, when both parties agree that there was apportionment, and actually argue that an apportionment is referred to in the disposition, we should come to a decision contrary to the arguments of *both* parties, and take a view adopted by *neither* side, throwing over apportionment altogether.

Such a view is, I think, contrary to the missives, —contrary to the words of the disposition,—contrary to the equity of the case,—and contrary to that repudiation of the question of crops on which the argument of the other side is based.

LORD NEAVES—I concur with Lord Cowan in this case, but I must say that I do not wonder that there should be a difference of opinion among your Lordships, as I think parties have been by no means happy in expressing themselves in their letters, and there was a great deal too much flitting to and fro, on the pursuer's part especially.

One point to which Lord Benholme alluded does not trouble me at all, namely, that we are following the views of neither party as maintained in their argument before us. I do not feel uneasiness at this, as the Court may often have to take a view of a case different from the parties, who have each perhaps been partly in the right and partly in the wrong, and who are each maintaining views as divergent as possible. The ultimate result of all the letters in this case was that the 14th of October was to be a *terminus a quo* in all questions as to the rents, and I go upon the missives as they were ultimately embodied in the disposition.

LORD JUSTICE-CLERK—I concur in the opinion of the majority of your Lordships. This is not a question of law but of the construction of a clause in a disposition. [*His Lordship read the clause.*]—Now the point is, what does that mean? I think it means an assignation to the rents payable after the date thereof, without there being any question raised with the seller as to the rents already drawn. The offer was made without the purchaser knowing how the question of rents stood, and the intention was that the rents of the half-year then current were to be apportioned. But it turned out that these rents were forehand, and then, further, the correspondence went on until another half-year was entered upon, and it was in that way that a difficulty has arisen as to the apportionment. The seller had in the meantime at term-day uplifted these rents, which, being forehand, were of course for the first six months *after* Martinmas 1871, and not for the half-year ending then. [*His Lordship read the letter of July* 14, 1871, *commenting on the terms thereof.*] In conclusion, I can only add that I entirely agree with Lord Cowan's views of this case.

The Court recalled the interlocutor of the Lord Ordinary reclaimed against, and assoilzied the defender with expenses.

Counsel for Pursuers (Respondents)—Marshall and M'Kie. Agents—Ronald, Richie & Ellis, W.S.

Counsel for Defender (Reclaimer)—Watson and Johnstone. Agents—J. C. & A. Steuart, W.S.

I., Clerk.

Friday, November 7.

FIRST DIVISION.

M'ALISTER *v.* SWINBURNE AND OTHERS.

Bankrupt—Expenses of Process—Caution.

Where an undischarged bankrupt brought an action to exclude certain creditors from ranking in the sequestration on the ground of an alleged discharge by them of the debts claimed granted under a private arrangement previous to the sequestration—*held* that the bankrupt was entitled to insist in the action without finding caution.

The pursuer in this action granted, on 11th August 1862, a trust in favour of Mr M'Clelland, accountant in Glasgow, as trustee for behoof of his creditors. All the creditors acceded to this trust, and a committee of their number was appointed to act along with the trustee. This committee had full power to advise and control the trustee in his administration of the trust. It was one of the conditions in the trust-deed that the truster should be discharged of all debts due by him at the date thereof upon making a full, fair, and complete surrender of his estate. The pursuer averred that an arrangement had been entered into on 9th September 1862 whereby he should be discharged on condition of making payment of £700 to the trustee, that he had made that payment, and that accordingly, on 14th December 1864, a discharge was executed by the trustee and the said committee, and duly delivered to him. This discharge was, however, afterwards got back from him, and never again returned; but notwithstanding, it was averred that the deed had been finally delivered, and that an attempt to cancel it by deletion of the