Friday, January 10.

SECOND DIVISION.

[Lord Dundas, Ordinary.

WIGAN *v.* CRIPPS.

Sale—Sale of Heritage—Rents—Assignation of Rents—Legal and Conventional Terms—Pastoral Farms—Titles to Land Consolidation (Scotland) Act 1868 (31 *and* 32 *Vict. cap.* 101), *sec.* 8, *and Schedule B, No.* 1.

The Titles to Land Consolidation (Scotland) Act 1868, section 8, enacts that a clause of assignation of rents in the statutory form—viz., "And I assign the rents,"—"shall, unless specially qualified, be held to import an assignation to the rents to become due for the possession following the term of entry, according to the legal and not the conventional terms, unless in the case of forehand rents, in which case it shall be held to import an assignation to the rents payable at the conventional terms subsequent to the date of entry."

A disposition of an estate with entry at 2nd February 1905 contained a clause of assignation of rents in the statutory form. The estate included certain pastoral farms let under leases in which the term of entry was Whitsunday, and the term of payment of the rents conventionally postponed six months. *Held* that the rents legally payable at Whitsunday 1905 but conventionally payable at Martinmas 1905 were "for the possession" subsequent to Whitsunday 1905, and so were carried to the purchaser by the clause of assignation of rents.

Mackenzie's Trustees v. *Somerville*, July 17, 1900, 2 F. 1278, 37 S.L.R. 953, *commented on.*

Sale—Sale of Heritage—Rents—Assignation of Rents—Legal and Conventional Terms—Pastoral Farms—Minute of Sale Providing for Apportionment of Rents—Disposition Containing Clause of Assignation of Rents—Competency of Giving Effect to Minute of Sale.

The owner of an estate consisting of, *inter alia*, pastoral farms let under lease in which the term of entry was Whitsunday and the term of payment of rent conventionally postponed six months, agreed by minute of sale to sell the estate to a purchaser with entry at 2nd February 1905. The minute contained a provision that the purchaser should be entitled to the rents and liable for the feu-duties and public burdens for the possession following the term of entry, the seller being entitled to the rents and liable for the feu-duties and public burdens for the possession prior to the term of entry, notwithstanding that payment of the rent for the possession prior to the said term of entry might be conventionally postponed to a date subsequent to that term. The rents, rates, and taxes for the possession from Martinmas 1904 to Whitsunday 1905 were to be apportioned between seller and purchaser. A disposition in favour of the purchaser followed on the minute, and contained the usual clauses, and, *inter alia*, a clause of assignation of rents in the statutory form. *Held* that the minute of sale, not being contradictory of, was not superseded by the disposition, and that under the minute the half-year's rents legally payable at Martinmas 1904 and conventionally payable at Whitsunday 1905, being "for the possession" to Whitsunday 1905, fell to be apportioned between purchaser and seller.

The statutory form of assignation of rents provided by the Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. cap. 101), and the import thereof as provided by section 8 of that Act, are quoted *supra* in the rubric.

By minute of sale dated 30th July and 5th August 1904 Lewis James Wigan, proprietor of the estate of Glendaruel, in the county of Argyll, agreed to sell the said estate to William Harrison Cripps, with entry on 2nd February 1905.

By article 8 of the minute of sale it was provided—"The second party (Cripps) shall have right to the rents and duties of the said lands, and shall be liable in payment of the feu-duties and public burdens for the possession following the said term of entry, the first party (Wigan) having right to the rents and duties of the said lands, and being liable in payment of the feu-duties and public burdens for the possession prior to the said term of entry, and that notwithstanding that payment of the rent for the possession prior to the term of entry may be conventionally postponed to a date subsequent to that term. The rents, rates, and taxes for the possession of said lands for the half-year from Martinmas 1904 to Whitsunday 1905 shall be apportioned between the first and second parties."

The disposition following on the minute of sale contained the usual clauses, and, *inter alia*, a clause assigning the rents in the statutory form.

On 23rd March 1906 Wigan raised an action against Cripps to recover the sum of £638, 13s. 2d., including, *inter alia*, the rents of certain farms on the estate of Glendaruel.

The following narrative is taken from the opinion of Lord Low—"The pursuer sold the estate of Glendaruel to the defender, with entry at 2nd February 1905. The farms upon the estate were all pastoral, the term of entry under the leases being Whitsunday, and the first half-year's rent being payable at Martinmas thereafter and the second half at the succeeding Whitsunday. In this action the pursuer claims that he has right to the half-year's rents conventionally payable at Whitsunday 1905 but legally payable at Martinmas 1904, and he also claims the proportion corresponding to the period from Martinmas 1904 to 2nd February 1905 of the half-year's rent conventionally payable at Martinmas 1905 but legally payable at Whitsunday 1905.

"The defender, upon the other hand, maintains that he is entitled under the assignation of rents in the disposition in his favour, to the half-year's rent conventionally payable at Martinmas 1905 but legally payable at Whitsunday of that year, and that he is also entitled, under a special contract made between him and the pursuer, to the portion of the half-year's rents conventionally payable at Whitsunday 1905 but legally payable at Martinmas 1904, corresponding to the period from the date of his entry (2nd February 1905) to Whitsunday 1905."

The defender pleaded—"(2) The date of entry to the said subjects being 2nd February 1905 the defender is entitled to retain the whole of the rents of the pastoral farms legally due at Whitsunday 1905, but conventionally payable at Martinmas 1905. (3) In respect of the agreement between the parties for apportionment of the rents for the possession of said lands for the half-year from Martinmas 1904 to Whitsunday 1905, the defender is entitled to retain a proportion of the rents of the pastoral farms legally due at Martinmas 1904, but conventionally payable at Whitsunday 1905, corresponding to the period from 2nd February to Whitsunday 1905."

The Lord Ordinary (DUNDAS) on 17th January 1907 decerned against the defender for payment of substantially the sum sued for subject to adjustment of figures.

Opinion.—"This case is not in my opinion a difficult one, though it belongs to a category of law in which perplexities are apt to arise. The facts are few and simple. The pursuer sold the estate of Glendaruel to the defender, with entry at 2nd February 1905. A copy of the disposition dated 27th January 1905 is in process. It contains the clause in the statutory form — 'And I assign the rents.' The import of that clause is defined by 31 and 32 Vict. c. 101, sec. 8, repeating the words of 10 and 11 Vict. c. 48, sec. 3. The farms on the estate are all pastoral. The term of entry under the leases is Whitsunday. Payment of the rents legally due for each year at Whitsunday and Martinmas is conventionally postponed for six months, *i.e.*, to the following terms of Martinmas and Whitsunday respectively. There can I think be no doubt that the whole of the rents for crop and year 1904 belong to the seller, and that the rent for the first half of crop and year 1905 must be apportioned between him and the purchaser in the proportions corresponding to the period before and the period after 2nd February 1905 respectively. Nor is there in my judgment any difficulty in affirming that the rent for the first half of crop and year 1905, so to be apportioned, is that which was legally due at Whitsunday 1905, but conventionally payable at Martinmas thereafter. In my opinion, therefore, the pursuer's argument is entirely right, and must be given effect to. The defender maintains (ans. 5) that 'he is entitled to retain the whole of the rents conventionally payable at Martinmas 1905 (being for the first half of crop and year 1905), and that the rents conventionally payable at Whitsunday 1905 fall to be apportioned between the pursuer and the defender,' and in ans. 6 it is 'explained' that the rents payable at Whitsunday 1905 for the second half of crop and year 1904 'were payable for the possession from Martinmas 1904 to Whitsunday 1905.' In short, the defender's claim is that the rents for the second half of crop and year 1904 should be apportioned between the parties, and that all subsequent rents belong to himself. This contention is in my judgment in the teeth of the authorities, and appears to me to proceed upon a misconception of their import. The rents assigned to the defender are (in the words of the statute) those 'to become due for the possession following the term of entry,' viz., 2nd February 1905 'according to the legal and not the conventional terms.' It is, I think, palpably wrong to assert, as the defender does, that the rent for the second half of crop and year 1904 is to any extent due for possession after 2nd February 1905, or that the rent conventionally payable at Martinmas 1905 for the first half of crop and year 1905 is due wholly in respect of possession subsequent to that date. I was referred to some of the authorities upon this branch of the law, and have examined a number of others. Those which appear to me to be specially useful are *Sir Wm. Johnston*, 1727, M. 15,913; *Sir Francis Elliott's Trustees* (*Stobs*), 1792, M. 15,917; *Campbell's Creditors* (*Edderline*), 1800, M. App. 'Term legal and conventional' No. 1; the recent case of *Mackenzie's Trustees* (*Portmore*), 1900, 2 F. 1278, particularly Lord Adam's opinion; Ersk. Inst. ii, 9, 64; and M. Bell's Conveyancing (3rd ed.), p. 639. A question was raised and argued as to whether the terms of the minute of sale between the parties could competently be referred to. I was referred to some strong judicial opinions in the negative, *e.g.*, *Clark*, 1889, 16 R. 545, Lord Trayner, 547, Lord Adam 549; *Maxwell's Trustees*, 1873, 1 R. 122, Lord Benholme 131; *Lee*, 1883, 10 R. (H.L.) 91, Lord Watson 96. But it is unnecessary that I should form or express a definite opinion upon this point, because I think that the language of the minute of sale, which is quoted in condescendence 2, is quite in harmony with the view which I have expressed in regard to the rights of parties *inter se*. The defender founded upon the last sentence quoted in condescendence 2. But the words there used are, in my judgment, correct, and mean in effect (what I hold to be the case) that the rents for the first half of crop and year 1905, being those legally due at Whitsunday 1905, but conventionally postponed to the following Martinmas, shall be apportioned between the parties. For the above reasons decree must in my opinion pass in the pursuer's favour. There are admittedly certain deductions to be made from the sum actually sued for, but counsel for the parties stated that they would adjust the proper figure when the legal principle had been decided."

The defender reclaimed, and argued—Under the clause of assignation of rents the defender was entitled to all rents to become due for the possession following

his entry on 2nd February 1905—Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. c. 101), sec. 8; *Campbell* v. *Campbell*, July 18, 1849, 11 D. 1426. In pastoral farms where Whitsunday was the term of entry, the first half-year's rent was legally due at entry, and payment of it only entitled the tenant to possession till Martinmas, when he would be required to pay another half-year's rent to entitle him to remain till the following Whitsunday. The period of possession in respect of which rent was paid was from Whitsunday to Whitsunday, and not from the Martinmas preceding the tenant's entry to the following Martinmas. In pastoral farms the rent was thus really due in advance—*Kerr* v. *Turnbull*, July 2, 1760, 5 Brown's Sup. 876; *Hunter* v. *Stewart*, November 18, 1857, 20 D. 60; Kames' Elucidations, p. 67; *Mackenzie's Trustees* v. *Somerville*, July 18, 1900, 2 F. 1278, 37 S.L.R. 953. The rent here legally payable at Whitsunday 1905, and conventionally payable at Martinmas 1905, was the rent for the possession had between Whitsunday and Martinmas 1905, and belonged therefore to the defender. (2) The defender admitted that he was not entitled under the clause of assignation of rents in the disposition to any part of the rents legally payable at Martinmas 1904 and conventionally payable at Whitsunday 1905, but he maintained that under the minute of sale these rents fell to be apportioned between the parties. The minute of sale was not superseded by the disposition. It was referred to in the disposition and was not inconsistent with it. By the minute the pursuer came under an obligation to share with the defender rents legally payable before the defender's entry, and that obligation was in the same position as an obligation to deliver moveables—*Jamieson* v. *Welsh*, November 30, 1900, 3 F. 176, 38 S.L.R. 96.

The pursuer argued—Though in pastoral farms the first half-year's rent was legally due at entry, it did not follow that rent was payable in advance. Rent was paid for crop and year, and the whole crop was gathered in the summer months, possession from Martinmas to the following Whitsunday being thrown in as an unimportant accessory. The payment of rent at Martinmas in any year was for the second half of the crop and year, and the payment at Whitsunday for the first. A tenant entering at Whitsunday and entitled to the crop on the lands at his entry must therefore be regarded as having had constructive possession from the preceding Martinmas, and the payment of rent due on his entry at Whitsunday must be ascribed to that constructive possession from the preceding Martinmas—*Campbell* v. *Campbell*, *cit.*, *per* Lord Wood; *Mackenzie's Trustees* v. *Somerville*, *cit.*, *per* Lords Adam, Kinnear, and Kyllachy. Pastoral rents were thus not payable in advance, but each term's rent was to be ascribed to the possession during the preceding half-year. In this case, therefore, the rents legally payable at Martinmas 1904 and conventionally payable at Whitsunday 1905 were for the possession between Whitsunday and Martinmas 1904 and belonged wholly to the pursuer, while the rents legally payable at Whitsunday 1905 and conventionally payable at Martinmas 1905 were for the possession between Martinmas 1904 and Whitsunday 1905, and fell to be apportioned between the pursuer and the defender. The defender was not entitled to more than this under the minute of sale, but in any event the minute was superseded by the disposition. In *Jamieson* v. *Welsh*, *cit.*, the missives contained a separate contract for the delivery of moveables, with which the disposition did not deal. Here the disposition dealt with assignation of rents.

At advising—

LORD LOW—[*After the narrative above quoted*]—I am of opinion that the defender's claim to the half-year's rent legally payable at Whitsunday 1905 is well founded, and that the pursuer is entitled to no part of that half-year's rent.

It is settled that when a proprietor dies between Whitsunday and Martinmas his executor is entitled to the half-year's rent legally payable at the term of Whitsunday before his death, and that if he dies between Martinmas and Whitsunday the executor is entitled to the half-year's rent legally payable at Martinmas. The same rule applies in the case of seller and purchaser, and accordingly, apart from the special contract which I shall consider presently, the pursuer is entitled to the half-year's rents conventionally payable at Whitsunday 1905. The defender does not dispute that that is the case.

The pursuer, however, also claims a proportion of the half-year's rent legally due at Whitsunday 1905, which is conventionally postponed until Martinmas 1905. That claim is founded upon the clause in the disposition assigning the rents. The clause is in the form "And I assign the rents," founded by the Titles to Land Consolidation (Scotland) Act 1868, which declares that the clause shall "be held to import an assignation to the rents to become due for the possession following the term of entry, according to the legal and not the conventional terms."

In order to test the pursuer's claim I shall assume that the question arises in regard to the rent of a farm which had been let to a tenant under a lease with entry at Whitsunday 1904. The first half-year's rent would be legally payable at Whitsunday 1904, and the second half-year's rent at Martinmas 1904. The pursuer is admittedly (apart from special contract) entitled to these two half-years' rent, but his claim is that he is in addition entitled to a proportion of a third half-year's rent, which he says is payable in respect of the possession of the farm from Martinmas 1904 to Whitsunday 1905. That looks very like a claim for three half-years' rent in respect of one year's possession of the farm.

The pursuer's counsel, however, explained that the claim is based upon the ground that the first half-year's rent legally pay-

able at Whitsunday 1904 (the term of entry) is truly for possession for the half-year from Martinmas 1903 to Whitsunday 1904. I confess that that is to me an entirely novel idea. Plainly a tenant in a farm does not in fact pay rent in respect of possession of the farm prior to his term of entry, because not only has he no possession and no right to possess until the term of entry, but up to that date the farm is in the possession of the outgoing tenant. Further, rent is properly payable for possession. I take it that rent from a legal point of view is the consideration which the tenant pays, in money or money's worth, for the possession and use of the subject of the lease, and that definition is as applicable to a farm as to any other subject. Again, whether rents are payable backhand or forehand, or at the legal terms, a farm is always let at a yearly rent, and the tenant, at one time or another, pays rent for every year and half-year during which he possesses the farm.

It seems to me that the idea that, by what must be a legal fiction, a tenant entering a grass farm at Whitsunday is to be regarded as paying the half year's rent, which is legally due at that term, in respect of possession of the farm for the preceding half-year, arises out of the fact that, for the sole purpose of regulating the division of rents between the heir and the executor of a deceased proprietor, or between the fiar and the executor of a deceased life-renter, a somewhat artificial rule has been adopted in which regard is had not to possession but to crop.

For that purpose all farms are regarded as being either wholly corn farms, as they used to be called, or grass farms. In the case of corn farms entry was always at Martinmas (or as it was sometimes expressed 'the separation of the crop'), because the outgoing tenant was then presumed to have ingathered his crop, and the incoming tenant required to get possession of the lands for the purpose of preparing them for the next crop. It was considered that a tenant could not be required to pay any rent until he had sown a crop, and accordingly the legal term of payment of the first half-year's rent was held to be the term of Whitsunday following the term of entry, when the incoming tenant was presumed to have completed the sowing of his crop, and the legal term of payment of the second half-year's rent was held to be the succeeding term of Martinmas, when the tenant was presumed to have reaped the crop. The rule applied even although entry to the houses and grass lands was (in conformity with the almost universal custom) at the term of Whitsunday preceding the entry to the corn lands, because, as I have said, the corn lands alone were regarded. No doubt the result in such a case was that at the beginning of the lease the tenant had partial possession for six months, for which he paid no rent at the time, but that was put right at the end of the lease, and in a succession of leases the landlord received a half-year's rent for every half-year of possession.

In the case of grass farms, the entry to which is by custom at Whitsunday, Mr Bell, in his treatise upon leases, points out that if the principle is that the full year's rent should not be payable until the crop has been reaped, then in grass farms the second half year's rent should not be payable until the term of Whitsunday, twelve months after entry, "because" (I quote the learned author's words) "the tenant is constantly, during the whole period, enjoying the benefit of the crop." The more logical course therefore would have been to hold that the first half-year's rent in a grass farm was legally payable at Martinmas six months, and the second half-year's rent at Whitsunday, twelve months after entry. But, says Mr Bell, the Court have held otherwise, because "the practice of the country has so fixed the point."

I may add that my impression from a study of the old cases is that the legal terms in grass farms were originally fixed at the Whitsunday of entry and the following Martinmas, because the position of the tenant at his entry and at the following term of Martinmas respectively was supposed to be analogous to the position of a tenant in a corn farm at the term of Whitsunday after his entry and at the following term of Martinmas respectively. The tenant of a grass farm at his entry finds upon the land a growing crop of grass, which was regarded as being analogous to a completely sown corn crop, and by the term of Martinmas he has obtained the benefit of the summer pasturage, from which his profit is chiefly derived, and therefore his position at that term was regarded as being analogous to the position of the tenant of a corn farm, who at the term of Martinmas had reaped his corn crop.

But however that may be, there was this advantage in the legal terms of payment adopted in the case of grass farms, that one rule was fixed for all cases, the rule being that if the landlord survived Whitsunday one-half of the rent applicable to the crop of the year in which he died belonged to his executor, and if he survived Martinmas the whole rent applicable to that crop belonged to his executor.

The rule is nowhere more clearly stated than in the report in Brown's supplement (vol. v. p. 876) of the case of *Kerr* v. *Turnbull*. In that case a tenant entered to a grass farm at Whitsunday, and by the lease the rent was payable one-half at the following Martinmas and the remaining half at the succeeding Whitsunday. The landlord died after Martinmas, and it was held that his executor was entitled to the half-year's rent payable under the lease at the following Whitsunday.

In a note to the report the reporter (Monboddo) states the ground of judgment thus—"The simple rule in this case, and which will apply equally to corn and grass farms, is the crop, without attending to the division of the year, which is arbitrary as to its commencement. According to this rule, the crop, whether of grass or corn, belongs to that year in which it grows and

is reaped; and the rent of that crop is divided betwixt the heir and executor, by the legal terms, of the Whitsunday when the crop was sown, and of Martinmas when it is reaped; so that, without inquiring about years at all, it is sufficient to consider whether the rent for that crop be still in the tenant's hands, or if it be uplifted by the defunct. . . ."

Now that statement of the law shows, in the first place, that, for the purpose of apportioning rents between heir and executor, every crop is assumed to be grown and reaped within the calendar year, or, to put it more definitely, the crop, whether corn or grass, is assumed to have been reaped by Martinmas in each calendar year. Therefore, for the purpose foresaid, it is unnecessary to consider what may be called the farm year—that is to say, the twelve months from and after the term of entry, for possession during which the first year's rent is in fact paid. Let me give a practical illustration. The tenant of a corn farm enters upon full possession of the farm at Martinmas 1904, but his first corn crop is grown and reaped entirely in 1905. Therefore in a question between heir and executor the possession which he has had during 1904 is disregarded, and the whole rent is dealt with as being payable for the crop of 1905. Again, the tenant of a grass farm enters at Whitsunday 1904, and his first crop, which is growing when he enters the farm, is assumed to have been wholly reaped at Martinmas in that year; therefore in a question between heir and executor the rent is dealt with as being wholly payable for the crop of 1904, and the possession which the tenant has in 1905 is disregarded. It therefore seems to me that the rule for apportioning rents between heir and executor and the like is an arbitrary rule, fixed for that purpose alone, and has no application when the question is for what possession of the farm is a particular payment of a half-year's rent made?

That, however, is the question raised under the assignation of rents in the disposition. I have already quoted the statutory declaration of the meaning of the clause assigning the rents, and it will be observed, in the first place, that the rents assigned are only rents "to become due," and therefore the assignation does not include the rents legally due at Martinmas 1904, because these rents had become due prior to the term of the entry of the defender. In the second place, the rents assigned are rents to become due "for the possession following the term of entry," namely, 2nd February 1905. The first rent answering to that description appears to me to be the half-year's rent legally payable at Whitsunday 1905, because in the case which I have been supposing, of the tenant entering under a new lease at Whitsunday 1904, he would have already paid one year's rent, and he would have been in actual possession of the farm for one year and no more.

Certain dicta in the recent case of *Mackenzie's Trustees* v. *Somerville*, 2 F. 1278, were quoted as supporting the view that the half-year's rent legally payable at Whitsunday 1905 was truly for possession of the farm from the preceding Martinmas. The main question in *Mackenzie's* case was whether certain farms upon the estate of Portmore, which had been sold with entry at Martinmas 1897, were arable or pastoral? It was held that they were pastoral, and that accordingly rents legally due at Martinmas 1897, but conventionally payable at Whitsunday 1898, were not carried to the purchaser by the assignation of rents in the disposition.

The judgment, therefore—it being held that the farms were pastoral—was merely an application of the well-established rule upon which I have already commented, and it is to be observed that the purchasers' entry being at the term of Martinmas, there was no question in regard to the rents of a divided term.

The pursuer founds upon certain dicta of Lord Kyllachy, who was Lord Ordinary, and of Lords Adam and Kinnear. Lord Kyllachy said—"The rents in question, which were conventionally payable at Whitsunday 1898, were legally due at Martinmas 1897, and were so due as being the second half of the rent payable for the grass crop of 1897. To put it otherwise, they were legally due for the possession from Whitsunday to Martinmas 1897—the possession during the winter and spring 1897-98 being thrown in as an unimportant accessory."

Now the first of these sentences is an accurate statement of the rule that in questions between heir and executor or seller and purchaser the rent is to be regarded as payable for the year in which the crop is assumed to be reaped. In the second sentence I think that Lord Kyllachy evidently had in view the theory or hypothesis upon which the rule is founded in the case of grass farms, namely, that the whole of the grass crop has been reaped, in the sense that the tenant has received the whole benefit of it, by Martinmas. But however that may be, Lord Kyllachy does not say that the rent which is legally payable, one half at Whitsunday and one half at Martinmas, is not paid for possession from Martinmas to the following Whitsunday. What he says is, that the possession from Martinmas to Whitsunday is "thrown in." That is to say, possession for the latter period is thrown into and therefore is included in and forms part of the possession for which the rent is paid. If that be so, then it is obviously immaterial that the possession between Martinmas and Whitsunday is of little value to the tenant, because the rent stipulated is always the rent for the year, and it is only payable in two equal portions because it is the inveterate custom to do so.

Certain expressions used by the learned Judges in the Inner House were also founded on. Thus Lord Adam, referring to the half-year's rents conventionally due at Whitsunday 1898, but legally due at Martinmas 1897, said — "These rents were the rents due for the possession of the crop of 1897." The phrase "for the *possession* of the crop" is unusual, but I think that his Lordship's meaning would have

been the same, only more accurately expressed, if he had said "for the crop of 1897," leaving out the word "possession." That, I think, is clear from the next sentence, in which his Lordship says—"The rent is due for the year in which the crop, whether agricultural or sheep, is raised." That is, in my opinion, a correct statement of the rule of law applicable to the kind of question which was under consideration.

In the same case Lord Kinnear said—"The rent in question, although collected by this defender, was rent derived from possession prior to his entry as purchaser, although it was payable at a term after that entry." It humbly appears to me that that was not a correct statement of the legal situation. His Lordship was dealing with the effect of the clause assigning the rents as interpreted by the statute, and it seems to me that the true ground for holding that the rent in question was not assigned to the purchaser by the statutory clause was, in the words of the statute, that it was not rent "*to become* due for the possession following the time of entry." I think that that was what Lord Kinnear was referring to, but there being no question between the parties as to rent due for a divided term, his Lordship did not pay so much attention to the form of the expression which he used as he would otherwise have done.

I have commented on the dicta—which are no more than dicta—in *Mackenzie's* case at so great length, because they constitute the only thing in the way of authority which the pursuer's counsel was able to cite for the proposition which is the foundation of his claim, namely, that a tenant who enters to a grass farm at Whitsunday and then becomes legally liable for a half-year's rent, is to be regarded as being so liable in respect of constructive possession for the half-year preceding his entry. I do not think that the dicta in *Mackenzie's* case support that view, and I have already given my reasons for holding that it is a proposition which is contrary both to fact and principle.

I am therefore of opinion that the half-year's rents legally payable at Whitsunday 1905 were assigned to the defender and that the pursuer is entitled to no part thereof.

I now come to the defender's claim for a portion of the rents legally due at Martinmas 1904. The defender admits that he has no right to any part of those rents at common law or under the assignation of rents in the disposition, but he says that he is entitled to a share of the rents proportionate to the period from 2nd February to Whitsunday 1905 in respect of an agreement entered into between him and the pursuer. That agreement is contained in the 8th article of a formal minute of sale executed by the parties in July and August 1904.

The article is in the following terms:—[. . . . *Quotes, supra.* . . . .]

It was maintained for the pursuer that that article was superseded by the disposition and cannot be founded upon or enforced. The only part of the disposition which could be regarded as superseding the article in the agreement is the clause assigning the rents, and if it could be shown that the agreement is inconsistent with the effect attributed by the statute to the clause assigning the rents, I should without hesitation hold that the agreement was superseded by the disposition in so far at all events as it is inconsistent with, or modifies the effect of, the clause assigning the rents.

Now I would observe in the first place that the agreement does not deal only with rents, which alone are the subject of the assignation in the disposition, but with public burdens. The agreement is that the pursuer shall be liable for the public burdens for the possession prior to the term of entry, and that the defender shall be liable for the public burdens for the possession following the term of entry. It was not contended that that part of the agreement was affected by the disposition, and I understand that as regards public burdens the agreement has actually been carried out. If that be the case it puts the pursuer in a somewhat awkward position, because plainly the defender undertook to pay the public burdens applicable to the period subsequent to his entry only upon the condition that he should have right to the rents applicable to the same period. The two things appear to me to be inseparable, and therefore I do not see how the pursuer can insist upon the defender paying a share of the public burdens and deny him an equivalent share of the rents.

That consideration, however, appears to me not to arise, because I am of opinion that the agreement is quite consistent with the disposition; that is to say, implement of the agreement would not prevent full effect being given to the assignation of rents in the disposition.

The only question which arises under the clause assigning the rents is what rents are thereby carried to the purchaser? I have already expressed the opinion that the half-year's rents legally payable at Whitsunday 1905 were carried to the defender, and that the pursuer had no right to any portion of these half-year's rents. Of course the inference is that the rents legally payable at Martinmas 1904 belonged wholly to the pursuer. And there is no doubt that that was the case, because if the pursuer had died at the date of the defender's entry and the competition had been between his heir and executor, plainly the rents legally payable at Martinmas 1904 would have gone to the executor because they would have been *in bonis* of the pursuer at his death. If, therefore, the rents referred to in the agreement were the rents legally payable at Martinmas 1904, the parties were bargaining about money, which at the date contemplated, namely, the defender's entry to the lands, would have vested in the pursuer, and would if he had then died have been *in bonis* of him. If, therefore, the agreement was in regard to the Martinmas rents, it is not superseded

or affected by the disposition, because it deals with moveable estate, with which the disposition had nothing to do.

The question therefore is, are the rents referred to in the agreement those legally payable at Martinmas 1904? The answer seems to me to depend upon the question which I have already so fully discussed, namely, whether the rents legally due at Martinmas 1904, and conventionally payable at Whitsunday 1905, were or were not for possession of the farms between these two terms? As I have already answered the latter question in the affirmative, it follows that the rents referred to in the agreement are those legally payable at Martinmas 1904, and accordingly the defender is, in my judgment, entitled to have these rents divided between him and the pursuer in terms of the agreement.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be recalled and that the second and third pleas-in-law for the defender should be sustained.

The LORD JUSTICE-CLERK concurred, and intimated that LORD ARDWALL—who was then sitting in the First Division — also concurred.

LORD STORMONTH DARLING was absent.

Counsel for the Pursuer—Scott Dickson, K.C.—Pitman. Agents—J. & F. Anderson, W.S.

Counsel for the Defender — Dean of Faculty (Campbell, K.C.)—Brodie - Innes. Agents—Mitchell & Baxter, W.S.

Friday, January 10.

FIRST DIVISION.

[Sheriff Court at Oban.

CAMPBELL *v.* MUIR.

Fishing—Salmon-Fishing—Rod-Fishing—River—Right of Fishing beyond Medium Filum.

A proprietor of salmon fishings *ex adverso* of one bank of a river, 60 yards broad, anchored a boat about the *medium filum* of the river and fishing with rod and line cast his lure towards the opposite bank, where at the time an angler, in right of the fishing *ex adverso* of that bank, was fishing, and disturbed him. In an action by the opposite proprietrix for interdict, *held*, in the absence of immemorial practice, that while casting from the bank beyond the *medium filum* might be within a reasonable exercise of the right, the method of exercise adopted was *in æmulationem vicini* and warranted interdict.

Opinion that the rules laid down for the regulation of the right of salmon-fishing in *Earl of Zetland* v. *Tennent's Trustees*, February 26, 1873, 11 Macph. 469, Lord Cowan at p. 474, and Lord Neaves at p. 475, 10 S.L.R. 286, apply to fishing by rod and line as well as by net and coble.

Process—Interdict—Landlord and Tenant — Alternative Conclusion — Interdict against Encroachment on Landlord's Right or against Molestation of his Tenant in those Rights—Competency.

The proprietrix of salmon fishings *ex adverso* of one bank of a river applied for interdict against the proprietor of the right *ex adverso* of the opposite bank "from trespassing or encroaching upon the fishing rights of the pursuer *ex adverso* . . . . or otherwise from interfering with or annoying or molesting . . . . the present tenant of said fishings under the pursuer in the exercise of his rights as such tenant; and to grant interim interdict. . . . ." *Held*, on appeal, that interim interdict which had been granted, and made perpetual, was incompetent and must be recalled.

On August 8, 1906, Mrs Jane Campbell of Inverawe and Dunstaffnage, with consent of her husband Alexander James Henry Campbell, as her curator and administrator-in-law, raised an action in the Sheriff Court at Oban against Esdaile Campbell Muir, Larach Bhain, Kilchrenan, Argyllshire, "to interdict the defender, and all others acting for him or under his instructions, from trespassing or encroaching upon the fishing rights of the pursuer *ex adverso* of her lands and estate of Inverawe, and particularly that portion thereof situated in the Pass of Brander on the south-east of property there belonging to the Most Honourable Gavin, Marquess of Breadalbane, K.G., or otherwise from interfering with or annoying or molesting Sir Robert Usher, Baronet, of 37 Drumsheugh Gardens, Edinburgh, the present tenant of said fishings under the pursuer, in the exercise of his rights as such tenant; and to grant interim interdict, and to find the defender liable in expenses, and to decern therefor."

The defender pleaded, *inter alia*—"(2) The defender not having trespassed or encroached on the pursuer's fishing rights in the Water of Awe, the action should be dismissed with expenses. (3) The defender being the owner of fishings in the Water of Awe (up to the *medium filum* thereof) *ex adverso* of his lands, has a legal right to fish up to the *medium filum* at the place libelled, and is entitled to absolvitor with expenses."

The incident out of which the action arose was thus described by the witness Sir Robert Usher, Bart.—"I remember on the forenoon of 6th August last, between 11 and 12 o'clock, while I was fishing at the Brander Pool, seeing Mr Muir coming down the loch in his launch. Mr Muir landed first from his launch with two friends, and the friends and he separated. Then Mr Muir got a boat, and with the assistance of his servant launched her. The boat had been lying on the bank I think. Having launched the boat, he pushed it out to midstream, or about midstream, above where I was fishing.