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

signatures of the granters thereof was invalid, such deletion being without the authority or consent of the pursuer.

The pursuer was afterwards sequestrated, and the defenders, who were also creditors under the private trust prior to the granting of the said discharge, in debts due prior to the date of the trust, claimed to rank and vote in the sequestration. The pursuer insisted in this action, not only as an individual, but also as trustee of the late John M'Alister, and sole executor of the late Peter M'Alister, both of whom were creditors in the sequestration. In support of his title as trustee the pursuer produced an extract trust-deed in his favour by the said James M'Alister. In this action he sought to have it declared that in respect of the said discharge, and of the payment by the pursuer of the consideration therefor, the debts of the defenders were extinguished, and that they had therefore no right to claim or rank in the sequestration.

On 1st July 1873 the Lord Ordinary (GIFFORD) pronounced the following interlocutor:—"The Lord Ordinary having heard parties' procurators, and having considered the closed record, writs produced, and whole process—Finds that the pursuer has no title to sue the present action, either as sole surviving trustee of the late John M'Alister, Dumbarton, or as sole accepting and acting executor of the late Peter M'Alister, ironmonger in Dumbarton; and to this extent sustains the first plea in law stated for the defenders: Finds that the pursuer as an individual, and for his own right and interest, has a sufficient title to sue the present action, and to this extent repels the said first plea stated for the defenders; but finds that the pursuer, being a sequestrated and divested bankrupt, and the sequestration of his estates still subsisting, is not entitled to insist in the present action to the effect of excluding the defenders from ranking upon or voting in the sequestration of the pursuer's estates, without finding caution for the whole expenses of the present process: Therefore ordains the pursuer to find caution for the whole expenses of the present process in common form, and that by the first box-day in the ensuing vacation, and to this extent sustains the fourth plea stated for the defenders, reserving meantime all questions of expenses."

"*Note.*— . . . The present action is a formal action of declarator to have it found and declared that the pursuer stands exonered, acquitted, and discharged of the whole debts claimed and ranked upon by the six defenders, either in virtue of an alleged discharge already delivered, or alternately in virtue of an obligation to grant such discharge, which is concluded for accordingly; and the last conclusion of the action is, that the whole defenders shall be prohibited and interdicted from voting or ranking in the pursuer's sequestration, or from interfering therewith in any way.

"The pursuer is at present a sequestrated and divested bankrupt. The sequestration of his estates still subsists, and the trustee is no party to the present action. Nor are the other creditors parties thereto, unless in so far as the bankrupt himself, in a trust capacity, claims to be creditor in his own sequestration.

"There has been a good deal of discussion on the preliminary pleas stated for the defenders. The pursuer mainly relied as his title to sue on his right as creditor, as sole surviving trustee of John M'Alister, and as sole accepting and acting executor of Peter M'Alister. The defenders disputed his title to sue in any capacity, and the pursuer asked for an extensive diligence in order to prove the title. This the Lord Ordinary granted, and it was thought expedient at the same time, and in order to save expense (the havers being the same), to embrace in the diligence any writs which the pursuer required bearing on the merits of the case. A large recovery has been made, and the Lord Ordinary has heard parties on the preliminary pleas and whole cause.

"The Lord Ordinary is of opinion that the pursuer has failed to show that in any representative capacity he is a creditor on his own sequestrated estate. Indeed, in regard to this matter the case is substantially just where it was when the pursuer's appeal was disposed of by the Lord Ordinary and the Court in April and May 1871. The Lord Ordinary refers to the interlocutor and note, and to the opinions of the Inner House as reported in the Scottish Law Reporter, vol. viii. 502. No vouchers whatever have been recovered by the pursuer instructing any debt either in the late John M'Alister or in the late Peter M'Alister. As representating John and Peter M'Alister, the pursuer claims to be a creditor in his own sequestration for no less than £4295, 2s. 3d. The bulk o this sum is for cash said to have been advanced to or on account of, the bankrupt. Debts of this kind can only be proved *scripto*, and it was hardly contended by the pursuer's own counsel that any of the documents recovered and in process instruct such debt against the bankrupt, or any part thereof. The Lord Ordinary's note of 14th April 1871 notices the leading objections, and it is needless to go more into detail.

"The only point which the pursuer made, apart from vouching, is that the trustee in the sequestration has sustained the pursuer's claim as sole trustee of John M'Alister to the extent of £250, and that this deliverance not being appealed against is final. There is some force in this, if this had been a simple question in the sequestration; but then, unfortunately for the pursuer, the whole of the defenders' claims have also been ranked by the trustee, and these deliverances are also final in the sequestration. It seems plain that one creditor cannot found upon the finality of the trustee's deliverance in his own favour, and at the same time repudiate the finality of precisely similar deliverances in favour of other creditors. If the trustee's deliverance conclusively settles in the present process that John M'Alister's estate is a creditor, then it equally conclusively settles that all the defenders are creditors, and there is an end of the present process.

"On the whole, the Lord Ordinary repels the title of the pursuer, as John M'Alister's trustee and as Peter M'Alister's executor, to insist in the present action.

"There only remains the pursuer's own title as a bankrupt to insist that certain alleged creditors shall not rank upon his estate. The Lord Ordinary sustains this title, because he thinks that the radical right which is always left in the bankrupt, notwithstanding sequestration, gives the bankrupt a sufficient interest to challenge a pretended creditor.

"But then, as neither the trustee in the sequestration nor any of the other creditors are objecting to the defenders ranking and voting, the Lord

Ordinary thinks that the bankrupt cannot be allowed to litigate, to the effect of excluding the defenders, without finding caution for expenses. The question relates solely to the defenders ranking and voting in the sequestration, and the distribution of the estate therein. The very object of this action is to exclude the defenders from the sequestration, and this would only enlarge the rights of other creditors, and would not, so far as appears, affect the bankrupt himself. The Bankrupt Act places the distribution of the estate in the hands of the creditors, and they are all satisfied that the present defenders are entitled to rank. The bankrupt cannot attempt to invert this without finding caution for the expenses of the litigation.

"If, indeed, there had been any question as to the bankrupt's personal protection or liberation from jail, the Lord Ordinary would have allowed such question to be raised without caution—at least this is the general rule, although the matter is always one of discretion. But there is no such question here. The bankrupt's person is not threatened or said to be in danger, and the only averments on record are made in the interests of the other creditors. The Lord Ordinary has therefore ordered the bankrupt to find caution, and he has given him very ample time for doing so.

". . . The only averment which appears relevant for probation is, that the deed No. 167 of process was finally delivered to the pursuer as a discharge, and that it was thereafter wrongfully cancelled without the pursuer's consent or authority. The Lord Ordinary rather thinks that a proof of these averments might be allowed, without the necessity of a separate process of proving the tenor. The deed itself is extant, although the signatures have been deleted, and the Lord Ordinary inclines to think that it would be pressing a point of form beyond its legitimate effect to insist on a separate process of proving the tenor."

The pursuer reclaimed.

Argued for the defender—(1) The pursuer has no title to insist in the action, either as trustee or executor, or as an individual. (2) The pursuer being an undischarged bankrupt, is not entitled to sue the present action without finding caution for expenses incurred and to be incurred in this process.

At advising—

LORD PRESIDENT—The pursuer sues in this action in three different characters. First, as sole surviving trustee of the late John M'Alister; second, as executor of the late Peter M'Alister; and, third, as an individual, and for his own right and interest. The object of the action is to have it declared that he was exonered and discharged of certain debts in respect of a deed of discharge.

The Lord Ordinary found that the pursuer has no title to sue either as trustee or as executor. He has not found him disqualified as a pursuer in his individual capacity, but finds that he cannot proceed with the action without finding caution for expenses, in respect that he is an undischarged bankrupt. I am not able to agree with the Lord Ordinary on all these points. As to the first point, the Lord Ordinary has made some mistake in confusing the question of title with the merits. He holds that the pursuer has failed to instruct any debt due to the late M'Alister's trustee. But that is merits. If he has no claim for debt, of course he cannot succeed; but he produces, in support of his claim as trustee an extract trust-deed, which is surely sufficient in the question of title As to his title as executor, that stands in a totally different position, for he produces no evidence of any kind to instruct this character. So on that point I agree with the Lord Ordinary. There remains the question whether, suing, as he is entitled to do, in his individual capacity, he ought to be allowed to do so without finding caution? This is always a delicate question. No doubt the general rule is that an undischarged bankrupt cannot sue without finding caution. But there are exceptions to this rule, some of them well-established exceptions. I cannot say that this falls within the latter class. Everything depends upon the circumstances of the case. Now here the action is founded upon a formal deed, which has been signed, and bears to be a discharge by the trustee on the pursuer's sequestrated estate, and certain creditors, among whom are the defenders. But this deed is in a peculiar position, for in it the signatures of the granters are cancelled, as well as of the witnesses to their signatures. There is no explanation of how this came about. The deed was recovered from the agent of the former trustee, but the trustee himself is dead. The pursuer not only alleges that the deed in question was executed, but also that it was delivered. And his explanation of how it is not in his own possession is simply that the trustee got it on some pretext or other, and never returned it. I think the pursuer should have the opportunity of proving the delivery of the deed in an unmutilated condition, and therefore am willing to accede to his demand to be allowed to proceed without finding caution—qualifying the judgment, however, by the words *in hoc statu.*

LORDS DEAS, ARDMILLAN, and JERVISWOODE, concurred.

Counsel for Pursuer—C. Smith and M'Kechnie. Agents—Drummond & Mackersy, S.S.C.

Counsel for Defenders—J. M. Duncan. Agent—David Dove, S.S.C.

Wednesday, November 12.

SECOND DIVISION.

SPECIAL CASE—THE INSPECTORS OF POOR OF THE PARISHES OF ST CUTHBERT'S AND CRAMOND.

Poor—Settlement.

A pauper born in B parish, removed with his parents when two years old to A parish, in which his father acquired a residential settlement. The father died, and the mother after having been for some years chargeable on A parish, married again. The pauper having become insane, without previously acquiring any other residential settlement,—*held* that A parish was chargeable for his support.

This Special Case was submitted for the opinion and judgment of the Court by the Inspectors of the parishes of St Cuthbert's and Cramond. William Gardiner, the pauper whose settlement was the subject of dispute, was born on 18th July 1853 at Granton Mains, in the parish of Cramond, where his father was then residing. The pauper's father removed at Whitsunday 1855 into St Cuthbert's