of the granter's death. The date of the commencement of the privileges of the heir of entail may be looked at from one point of view, but the power of the testator is to be looked at from a totally different point of view, and I think the Act of Parliament distinctly states that in regard to that matter, the last moment at which he could exercise these powers is to be held to be the date at which the entail comes into operation.

LORD NEAVES—I concur in the opinion delivered by your Lordship, and adopt the grounds of it. Whatever may be said of the case of *Dickson*, I am satisfied with the thorough sifting which this Act of Parliament, as bearing on this matter, has now received.

LORD ARDMILLAN—I have nothing to add to what your Lordship has said, for I am entirely of the same opinion. I do not rely necessarily on the case of *Dickson*, because the grounds of judgment are to my mind clear, even if that decision had not been pronounced in Dickson's case; but from the explanation given by Lord Deas, who took a part in that decision, Dickson's case seems to be so far an authority for our present judgment.

LORD JERVISWOODE concurred.

Counsel for Reclaimers—Watson and M'Laren. Agents—Ronald, Ritchie & Ellis, W.S.

Counsel for Respondent (Petitioner)—Solicitor-General (Clark), and Marshall. Agents—Tods, Murray & Jamieson, W.S.

Wednesday, Nov. 5.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

CAMPBELL *v.* ORD & MADDISON.

Reparation—Culpa—*Contributory Negligence—Jury Trial—Bill of Exceptions—Motion for New Trial.*

An action for damages was raised by the father of a child, four years old, for injuries caused by a machine standing unprotected in a public thoroughfare, against the owners of the machine. At the trial the defenders asked the presiding Judge to direct the jury—(1) that the child was capable of contributing by negligence to the accident; (2) that the pursuer was not entitled to recover if the fault of the boy's brother, then with him, materially contributed to the accident. The Judge refused to give these directions, and a bill of exceptions was tendered, which, together with a motion for a new trial on the ground that the verdict was contrary to evidence, came before the Court,—*held* that the Judge was right (1) in leaving the first point to the jury as a question of fact, not of law; and (2) in refusing, on the evidence, to give the second direction.

This case arose out of an action of damages at the instance of John Campbell, as administrator-in-law for his son Robert, against Ord & Maddison, agricultural implement makers at Darlington. The cause was tried on 22d July 1873, before the Lord Justice-Clerk and a jury. The circumstances as set forth on record were as follows:—The pursuer is a baker in Hawick, and his dwelling-house and shop are in one tenement in No. 10 High Street, Hawick, about twenty yards from the Tower Knowe, upon which a weekly corn market is held every Thursday. The market is held on an open street or place, with shops and dwelling-houses on three of its sides, and men, women, and children passing to and fro. The defenders have for a considerable time past attended this market, selling agricultural implements and other machines. These for the last three years they have exposed on market days on the Tower Knowe or public street, in front of the Tower Hotel, for show and sale. Some of the machines are dangerous when set in motion, but nevertheless they were in use to be exposed on the public street without being properly fenced or watched, with their gear in full working order, and so that they could be set in motion by any one. When they were formerly exhibited there was generally in attendance upon them a man, who was, however, engaged only to take them to and from the market, and who did not watch them. On these occasions young lads, and particularly children who happened to be about the street, began to work the machines and set them in motion for amusement. This was frequently the case, and the present Provost of Hawick and others noticed the danger to children, and spoke to Messrs Ord & Maddison's traveller and the other man about it, warning them of the risk, and cautioning them against exposing the machines without their being more carefully watched, and the handles being removed and wheels locked or tied up. On Thursday the 27th of February 1873 the implements and machines were exposed as usual, and amongst them was an oil-cake crusher—a machine of a peculiarly dangerous construction. About 3 P.M. the pursuer's sons, Neil, aged seven, and Robert, aged four years, and other children, were on the street amusing themselves, and they began to look at and touch the oil-cake crusher, which was in full gear and working order. While the younger one was examining and touching the wheels on the outside of the machine—wheels which were not fenced in any way—his right hand was caught and severely crushed in the pinion or cog wheels, some one on the other side having set the machine in motion by pushing the handle. The fore and middle fingers were broken in several places, and the former lacerated to such an extent that amputation was necessary. The injuries sustained have disfigured and partially disabled the hand for life. The boy will never be able to employ his hand in any heavy work. The whole injury to him was, the pursuer alleged, caused by the fault of Ord & Maddison, or others for whom they were responsible. They were guilty of gross negligence in having taken no precaution whatever in regard to the machines.

The pursuer pleaded—"The pursuer's pupil son having sustained loss, injury, and damage from the fault or gross negligence of the defenders, they are liable in damages and *solatium* as concluded for, with expenses."

The defenders pleaded—"(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons, and the defenders should be assoilzied. (2) The injury alleged not having been caused by the defenders they should be assoilzied, with expenses."

The following issue was approved by the Lord Ordinary (ORMIDALE), and by interlocutor of 24th June 1873 appointed to be the issue of the trial: —"Whether on or about the 27th February 1873, on or near the public street of Hawick, called the Tower Knowe, the pursuer's son, Robert, had his right hand crushed or lacerated by an oil-cake crusher belonging to the defenders, through the fault of the defenders, to the loss, injury, and damage of the pursuer, and of his said son.'

Counsel for the defenders required the Lord Justice-Clerk to direct the jury as follows:—"(1) That the child Robert Campbell was to be held in law as capable of contributing to the accident which resulted in the damage libelled." But the Lord Justice-Clerk refused to direct the jury as so called upon, and informed them that this was a matter of fact, not of law, and left the fact to the jury. He told the jury 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. Whereupon the counsel for the defenders did, then and there, except to the said refusal and ruling, and did tender his exception accordingly. Counsel for the defenders further required the Lord Justice-Clerk to direct the jury as follows:—"(2) 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." But the Lord Justice-Clerk refused to direct the jury as so called upon: whereupon the counsel for the defenders did then and there except to the said refusal, and did tender his exception accordingly.

The verdict of the jury was as follows:—"At Edinburgh, on the twenty-second day of July eighteen hundred and seventy-three, in presence of the Right Honourable the Lord Justice-Clerk, appeared the pursuer and the defenders by their respective counsel and agents, and a jury being empannelled and sworn to try the issue between the parties, say upon their oath that they find for the pursuer, and assess the damages at one hundred pounds."

At the hearing on the Bill of Exceptions, it was argued for the defenders—This was an accident caused by no fault of the defenders, active or passive. It was caused by what the children themselves did. The defenders are here entitled to a verdict on the ground of contributory negligence, without which no accident could have happened. The only difficulty which arises is from the age of the child, and the consequent capacity to have contributed to the accident. (*Mangon* v. *Atherton.*) It has been held to have the same effect on the part of an infant as in the case of an adult. (*Abbott* v. *M'Fie; Hughes.*) The views of English law as to contributory negligence find a precise equivalent in the law of Scotland. (*Grant* v. *Caledonian Railway Co.*) [Lord Justice-Clerk—The negligence of the parents entered materially into that judgment.]

Authorities (English)—*Mangon* v. *Atherton*, April 30, 1866, 35 L. J. Exch. 161; *Abbott* v. *M'Fie*, Dec. 7, 1863, 33 L. J. Exch. 177; *Hughes*, Dec. 7, 1863, 2 H. and C. 744; *Lynch* v. *Nurdin*, 1841, 1 Ad. and Ellis, 29. (Scotch)—*Grant* v. *Caledonian Railway Co.*, Dec. 10, 1870, 9 Macph. 258; 8 Scot. Law Rep. 192.

The Court desired pursuer's counsel to confine his argument to the motion for a new trial.

Argued for the pursuers—(*Paterson* v. *Wallace.*) [Lord Neaves—If the party who is injured in any way contributes to that injury, the question is, whether an action of reparation is barred.] It has been held both in English and Scotch cases that where the contributory negligence is very slight, and the negligence on the other side is very gross, the former must be overruled. (*Traill* v. *Small and Boase.*) [Lord Neaves—This is a case where there is a breach of the statutory duty to fence machinery, and therefore it places the injured person in a far better position.] [Lord Benholme—Is there any case to maintain this view which would bring the English and Scotch law into accord?] (*Holmes* v. *Clark.*) The American law recognises the same distinctions. (*M'Lellan* v. *Pennsylvania Railway*). The other Scotch cases bear also this construction. (*Davidson* v. *Monkland Railway; Balfour* v. *Baird and Brown.*) [Lord Justice-Clerk—The case of *Balfour* seems to me to find that there was no negligence on the part of the defender, and does not affect the question of contributory negligence at all.]

Authorities (English) — *Holmes* v. *Clark*, 31 L. J. Exch. 356. Addison on Torts., pp. 170 and 400. (Scotch)—*Traill* v. *Small and Boase*, July 10, 1873; 10 Scot. Law Rep. 547; *Paterson* v. *Wallace*, 1 Macq. 748; *Galloway* v. *King*, June 11, 1872, 10 Macph. 788, 9 Scot. Law Rep. 500; *Davidson* v. *Monkland Railway Co.*, July 5, 1855, 17 D. 1038; *Balfour* v. *Baird and Brown*, Dec. 5, 1857, 20 D. 238; and cases cited there. (American)—*M'Lellan* v. *Pennsylvania Railway*, 3 Amer. Rep. 628; Shearman and Redfield on Negligence, p. 58.

At advising—

The LORD JUSTICE-CLERK read the following opinion—

"On the Bill of Exceptions I am of opinion that neither of the propositions I was asked to lay down is sound in law. The first is a proposition not of law, but of fact. It would be as unsound to say as a proposition in law that this child was not capable of negligence as to say that he was. Negligence implies a capacity to apprehend intelligently the duty, obligation, or precaution neglected, and that depends to a large degree on the nature of that which is neglected, as well as on the intelligence and maturity of the person said to have neglected it. The capacity to neglect is a question of fact on the individual case; as much so as negligence itself, which is always a question of fact. I told the jury that this was a matter for themselves to decide—that a child of four years old might be guilty of negligence—and that it was for them to say whether such was the case here. The question whether the evidence ought to have led to a different conclusion arises in the motion for a new trial.

"In regard to the second exception, it was impossible for me to lay down the law in the terms requested. The mere fact of the boys playing together at the machine did not, in my opinion, make one of them responsible for the act or the negligence of the other. Even if the proposition had been so worded as to combine the two boys in the act of setting the machine in motion, looking

to the circumstances, I could not have affirmed it; for if the boy injured was not guilty of negligence in his own act, neither could he be so in respect of the act of the other.

"The question, however, on the evidence is one deserving of grave consideration. I left three questions to the jury. Now, as to the first—(1) It is proved that this Tower Knowe was a known and lawful resort of children. (2) That the machine, if meddled with, was known to be dangerous. (3) That the defenders, or those acting for them, were warned of the danger, and promised to take steps to guard against it, and failed to do so. I think the jury rightly found that the defenders were negligent in leaving their machine unguarded, and that this caused, or contributed to cause, the injury —Caused it if the pursuers' negligence did not contribute to it, and contributed to it if it did.

"2. Did the boy contribute? It is contended on one side that a child of this age could not be guilty of contributory negligence; on the other, that his acts must be judged of without regard to his tender years. I do not agree with either proposition. This is a question of fact, to be decided on the evidence. There is no doubt that if the child had been a man, the act would have amounted to contributory negligence. But he was not a man. It is said he must be dealt with as if he had been a man. He must, in my opinion, be held to be nothing but what he was. There is no need or room for legal fictions or classifications to exclude the fact in such case. He is no more to be held to have capacity which he had not, than to have inches or strength which he had not. If the child was in point of fact unable from his tender years to appreciate the danger, to find the reverse would be contrary to the fact.

"If, indeed, I could accept the unreserved expressions reported in the recent cases decided in England as laying down a general rule—a formula to exclude the actual fact—and I had felt bound by them, I should have so directed the jury, and told them that a verdict for the pursuer could not stand. But I should have thought such a course entirely inadmissible. That a child may contribute by negligence to an injury to itself the case of *Grant* v. *Caledonian Railway* is an instance. But that case was specially decided as a question on the circumstances, and in the circumstances I think it was rightly decided. But let me put another case. I suppose a mother standing on a railway platform with a child of eighteen months in her hand; a truck comes, by negligence, down an incline, and the mother, through sudden sickness or accident, from no fault of hers, loses hold of her child, which totters to the rails, and is killed. Is that a case of contributory negligence? I do not express myself too strongly when I say that reason revolts against such a conclusion. If it would not be so, then it is manifest that this question of capacity is one of degree and circumstances, and as such a simple question of fact for a jury, In that light I cannot say that the jury were wrong in the conclusion they came to.

"In one of the English cases quoted it was thrown out that the exposing of the machine was too remote a cause of the injury to be the subject of action. If this were so, there could have been no negligence on the part of the defender in so exposing it. I cannot affirm such a proposition. I think it unsound in itself, and quite inconsistent with a series of judgments both in this country and in England. I would particularly refer to Chief Justice Tindall's observations in *Daniels* v. *Potter;* as well as those of Lord Denman in the case of *Lynch*, to which Lord Cowan has referred.

"In the present case I cannot say that the jury came to an unreasonable conclusion when they held on the evidence that this little fellow did not and could not know there was danger in what he did. If they were right in that, he was not guilty of negligence, and their verdict was right.

"3. As regards the alleged negligence of the father, the jury have found that he was not negligent. The place where the children were was a usual playground. They had always gone there. The father knew of no danger; and I cannot disturb the verdict on that ground.

LORD COWAN read the following opinion:—

"The discussion of the legal questions stated in the bill of exceptions, and of the motion for a new trial on the ground of the verdict being contrary to evidence, proceeded on the footing that the disposal of the one or the other would substantially decide the whole cause.

"In considering the case it will be the better course to determine upon the evidence, whether—viewed separately from the defence of contributory negligence—there is room for holding the defenders guilty of negligence or fault, as found by the verdict.

"On this part of the case I cannot think that any doubt can be entertained. The machine, by the movement of which the accident was caused, was placed for exhibition in a part of the town where a considerable number of people usually congregated, and young children were in the habit of being for amusement. The machine was left there without any one to watch over it, and without any proper care, by removing the handle or locking the wheels, to prevent its being set in motion by children or accidentally by passers-by. And this want of watchfulness was persevered in, although the defenders and their agent were repeatedly warned to take steps to prevent the occurrence of accidents to children and others. The fact crops up throughout the proof that it was dangerous to leave such machines unwatched and without taking precautionary measures to render the machine innocuous, by having it locked or so watched as to prevent its being touched by young persons to their imminent peril. All this appears from the proof, and it does seem a very clear case on the evidence, to have been left to the Jury on the issue whether the accident to the pursuer's son occurred through the fault of the defenders. And the Jury having found in the affirmative, I see no good ground on which their verdict, apart from the legal questions raised by the bill of exceptions, can be disturbed as contrary to evidence.

"The first exception stated by the defenders is to the refusal by the presiding Judge to direct the jury "that the child Robert Campbell was to be held in law as capable of contributing to the accident which resulted in the damage libelled."

"At the time of the accident the child was under four years of age, and, viewed apart from the facts and circumstances in evidence, it does not appear to me how so young an infant could well be held *in law* to be capable of contributory negligence. An abstract legal proposition to that effect it was useless to affirm, even assuming it to be well founded, and any such statement in the abstract

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-