the entailed estate of which he had not acquired the property by purchase, but had succeeded to as heir-substitute of entail? On this branch of the argument the views I entertain are the same with those held by all your Lordships. It is clear to me that the object and purpose of the granter of the deed was to convey to his trustees all the property that it was in his power to convey, with a view to that new entailed settlement upon the family of the barony and estate of Lochbuy, for which his deed provides. The ground on which the Lord Ordinary proceeds in pronouncing the interlocutor under review is explained in the Note, is that Donald "had no intention whatever of effecting a conveyance of the entailed estate, or of the portions thereof," which are the subject of this action, *i.e.*, not Scallastle only, but all the rest of the lands vested in him under the old entail, and to which he had right as heir of entail, and not as purchaser. I cannot so view the intended effect of this deed. Throughout its provisions reference is made to parts of the entailed estate other than those which he had purchased. The entail was no longer in existence as a bar to his dealing with the lands, as a fee-simple estate in his person. He had power to execute a gratuitous deed, regulating the succession to those lands. Then why is he to be held to have left the old entail to regulate the succession to one portion of his lands, over which he had power—while he made provision for a new entail as to the rest of his estate? I cannot think this at all probable. But, at all events, to exclude the operation of the general conveyance in the trust-deed of his whole lands, some evidence must be shown that such was his intention. But no such evidence exists. For I cannot think that subsequent bonds of provision can be viewed as demonstrative that the lands of Scallastle were not intended by Donald to be disponed to his trustees. The object of their execution appears to be to provide for the contingency of his not having succeeded in vesting himself with such a title to the lands, as would support his conveyance of them with the rest of the entailed estate and his other estates; and this is corroborated by the reduction provided to be made from the provision settled on his wife and family by the trust-deed in the event of bonds such as those in question being subsequently executed in their favour. Assuming that his general conveyance of "all and sundry lands and heritable estate of whatever kind" belonging to him at his death, were effective to carry these entailed lands, the full annuity and provisions which he intended to give to his family were provided for. And it may be remarked that the designation he assumes in these bonds of "heir of entail in possession of the entailed lands" of Scallastle, demonstrates that he himself held, whatever difficulties there might be from the state of the title as regarded his power to convey, that a full and complete feudal title to these lands had been vested in his person.

On these grounds, I am of opinion that this action of adjudication cannot be sustained, and that the defenders are entitled to be assoilzied.

LORDS NEAVES and BENHOLME concurred.

Agents for Pursuers—Tods, Murray, & Jamieson, W.S.
Agent for Defenders—John Martin, W.S.

Thursday, January 25.

BAILLIE *v.* CAMPBELL.

Process—Decree in name of agent—Expenses.

A defender who had been found entitled to his expenses died before the account was audited. The agent then moved for expenses in his own name, and no appearance was made for the pursuer. The Court refused the motion, holding that the representatives of the defender must be sisted before the agent was entitled to decree.

Friday, January 26.

FIRST DIVISION.

BAIRD & BROWN *v.* SELKIRK (HUGH STIRRAT'S TRUSTEE).

Bankrupt—Inhibition—Ranking of Creditors.

Held (*dubit* Lord Deas) that the proper order of ranking a body of creditors on the proceeds of the heritable estate of a bankrupt, where one of the creditors had used inhibition on his debt three months before the sequestration,—the debts of some of the creditors having been contracted *before*, and of others *after* the inhibition,—was, first, to rank all the creditors *pari passu*, and then to give the inhibiting creditor the difference between the dividend arising thereby, and what he would have drawn had no debts been contracted subsequent to the use of the inhibition, by way of drawback from the dividends of the creditors whose debts were contracted after the inhibition.

Bankruptcy Act 1856, *sec.* 127.

The trustee in a sequestration issued a deliverance, in which he explained the scheme of ranking, and addressed a copy to each creditor, stating the class in which he had placed his claim. *Held* that an appeal by a creditor against the deliverance on his own claim competently brought under review the whole scheme of ranking, and that it was not necessary for him to appeal against the deliverance on any other claim.

This was an appeal under section 170 of the Bankruptcy Act 1856, against an interlocutor of the Sheriff of Lanarkshire, affirming a deliverance of the trustee in the sequestration of the estates of Hugh Stirrat & Son, wrights and tun builders, Glasgow; and of Hugh Stirrat, the sole partner of the said firm, which were sequestrated on the 22d May 1871.

On the 22d February 1871 Robert Melville & Co. used inhibition on a debt due to them by the bankrupt. The debts due to the other creditors were not secured by inhibition. Some were contracted before, and others after the inhibition. Part of the bankrupt estate consisted of heritable properties, which were realised by the trustee.

On the 4th September 1871 the trustee issued and addressed to each creditor a deliverance, in which he explained the scheme of ranking which he adopted—"With reference to the rankings, I have to explain that an inhibition was used against the bankrupts on 22d February last, the effect of which is to separate the creditors into two classes: those whose claims existed at the date mentioned

being placed under class A in the state of interests, and being entitled, first, to rank on the heritable estate, and secondly, on the general estate, along with the other creditors, for any deficiency until they are paid in full; the whole creditors ranking on the general estate being placed under class B; and creditors not receiving dividend from heritable estate may receive a second ranking until also paid in full, if subsequent recoveries shall admit of this.

"To prevent misapprehension, I desire further to explain that the secondary ranking which the law gives to class A on the general estate, for the dividend of 11s. per £, is not equal to payment in full, as at first sight might appear—because their ranking is for the deficiency only, and not for the full debt;—the deduction of the primary ranking being equivalent to the valuation and deduction of their quasi-security under the inhibition.

"The proposed dividends on claims admitted are these:—ten shillings per pound to creditors in class A; and eleven shillings per pound to creditors in class B; but in the event of my deliverances on claims being appealed, the dividends will fall to be altered according to the results of such appeals."

To Messrs Baird & Brown the trustee intimated that their claim for £165, 17s. 4d. was sustained, and placed in class B, the debt having been contracted subsequent to the date of the inhibition. Similar notices were sent to the other creditors.

Baird & Brown appealed against this deliverance, "in so far as the trustee has divided the creditors into two classes—A and B—and in so far as he has ranked and preferred class A on the heritable estate, and has ranked the appellants under class B," and they prayed the Sheriff "to recal the deliverance, and ordain the trustee to rank the appellants equally with the whole creditors not preferably secured upon the funds of the sequestrated estates."

Minutes having been ordered by the Sheriff, the trustee, besides maintaining the soundness of the scheme of division, pleaded that, as the appellants had failed to appeal against the deliverance on the claims admitted under class A, they had now become final (Bankruptcy Act 1856, sec. 127), and that the attempt of the appellants to bring under review the whole scheme of division merely by an appeal against the deliverance on their own claim was incompetent.

The Sheriff pronounced the following interlocutor:—

"*Glasgow, 24th November* 1871.—Having again heard parties' procurators and reviewed the process, finds that it is settled—1st, That an inhibitor cannot be prejudiced by posterior debts; 2d, That anterior creditors, adjudgers within year and day of the inhibitor, cannot be prejudiced by the inhibition, and are entitled to be ranked *pari passu* with the inhibitor (Bell's Com., 7th ed., vol. ii, pp. 409 *et seq.*); finds that it is enacted, *inter alia*, by section 102 of the 'Bankruptcy (Scotland) Act, 1856,' that the act and warrant in favour of a trustee in a sequestration has the effect of vesting in him, as at the date of the sequestration, 'for behoof of the creditors,' the bankrupt's whole heritable estate, as if a decree of adjudication had been pronounced in his favour; finds that the vesting as above in the respondent's person occurred within year and day of the inhibition used by one of the creditors, and the effect of such vesting was to put all the anterior creditors on a par with the inhibitor; finds that it is the duty of the trustee to rank all the creditors according to their several rights and interests (*Id.* sec. 121); finds that the scheme of ranking adopted in the present instance is equitable, and in conformity with the above principles; finds farther, and *separatim*, that to sustain this appeal would be tantamount to recalling all the deliverances which have been pronounced by the respondent on the claims of the anterior creditors, and that as no appeal has been taken by the appellant, as he might have done, against all or any of these deliverances, they are consequently final, and cannot now be cut down either directly or indirectly; therefore adheres to the deliverance appealed against, and dismisses the appeal; finds the appellants liable in expenses; allows an account thereof to be given in; and remits the same to the Auditor of Court to tax and report, and decerns."

Baird and Brown appealed to the Court of Session.

Solicitor-General and Orr Paterson for them, argued—That the ranking of the creditors must be regulated by the principles which have been long established, and explained by Bell in his Commentaries (vol. ii, p. 407, &c., 7th ed), viz. —(1) that no person is to suffer by the use of inhibition except the persons against whom it is used; (2) that no person is to be benefited by the inhibition except the person who has used it. The only way in which these principles can be carried out is by first ranking all the creditors *pari passu* on the proceeds of the heritable estate, and then giving the inhibiting creditor the difference between what he thus draws and what he would have drawn had no debts been contracted subsequent to his inhibition, by way of drawback on the dividends of the posterior creditors, *i.e.* those whose claims are affected by the inhibition.

It must be observed that the use of inhibition does not prevent adjudication by subsequent creditors, any more than it prevents a voluntary security being created. It prevents any subsequent debt from affecting the heritable estate to the prejudice of the inhibitor, but it will not prevent a subsequent creditor from obtaining a security preferable to those who have not adjudged. In short, the sole effect of the inhibition is to enable the inhibitor to rank on the heritable estate as if no debts had been contracted after the inhibition.

Lord Advocate and Asher in reply—The inhibition prevents the debtor from subsequently contracting debt, so as to affect his heritable estate in competition with the inhibitor, but the inhibition cannot prejudice the right of creditors whose debts were contracted before the inhibition. Suppose the inhibiting creditor had proceeded to adjudge, the anterior creditors would have been entitled to be conjoined in his adjudication, and to come in *pari passu* with him, but the posterior creditors would have had no right to be conjoined, the inhibition having put it out of the power of the debtor to affect his heritable estate in a question with the inhibitor.

Lord Kinloch—The present is an appeal against a deliverance by the trustee in the sequestration of Hugh Stirrat and Son, ranking the creditors for a dividend; and against the judgment of the Sheriff of Lanarkshire, affirming that deliverance.

I have no doubt that this appeal is competent. The deliverance of the trustee, whilst admitting generally the claims of the creditors, lays down a

scheme of ranking applicable to all, and in which some have a preferable, others a postponed place. This scheme the trustee intimated to all equally. I am clearly of opinion that an appeal against the deliverance on the appellants' claim brought up for review the general scheme of ranking; and that it was not necessary to this end that the appellants should also appeal against the deliverance on any other claim thereby preferred. The trustee is in Court as a proper party contradictor, to defend his scheme of ranking; and whatever judgment is pronounced on this scheme will affect all concerned in it equally.

On the merits, the question is raised by the circumstance of one of the creditors having used inhibition on his debt some months anterior to the sequestration; this inhibition being posterior to the contraction of some of the debts, and anterior to the contraction of others. The main question is, how this inhibition tells on the distribution of certain heritable estate belonging to the bankrupts, which has been sold, and the proceeds of which are included in the fund of division.

By the 107th section of the Bankrupt statute, 19 and 20 Vict. c. 79, it is declared that "the sequestration shall, as at the date thereof, be equivalent to a decree of adjudication of the heritable estates of the bankrupt for payment of the whole debts of the bankrupt, principal and interest, accumulated at the said date." The effect of this enactment is to place all the creditors in the position of adjudging creditors, having a *pari passu* ranking at the date of sequestration; but subject to any preferences *inter se* by inhibition or otherwise. In the present case there are (1) the creditors anterior to the inhibition, being in law adjudging creditors on the heritable estate; (2) the inhibiting creditor, who is an adjudging creditor, but who has also an inhibition; (3) the posterior creditors, who are equally adjudging creditors with the others, but whose debts are struck at by the inhibition.

In such a case the grand principle of ranking is to give full effect to the preferential or exclusive right, but only to give it effect in favour of those to whom its benefit enures by law, and not in favour of others who have no right to found on it. In the present case the inhibition gives the inhibiting creditor a full right of preference against the posterior creditors, entitling him to be put in the same position in a question with these as if their debts did not exist at all. But the inhibition gives the inhibitor no preference over the anterior creditors, at whose debts it does not strike. Further, the inhibition gives no right of preference to the anterior creditors other than the inhibitor, for by them or for their behoof it was not used; and in any question with these the posterior creditors are entitled to a *pari passu* ranking, being all equally adjudging creditors. The proper mode of ranking is therefore that which gives the benefit of the inhibition only to the inhibiting creditor, and leaves matters as to the others as if no inhibition had been used.

How to accomplish such a ranking was for a while a difficulty in our law; a difficulty at least as old as the case of the *Creditors of Langton* in 1709, Mor. 2877. But a formula of ranking was at last laid down, which I consider quite settled. It is explained by Mr Erskine in Book II. tit. 12, sec. 32; and more fully and clearly by Mr Bell in his Commentaries, 2d volume, from p. 402 (last edition) onwards. At p. 413 he thus lays down the primary canons of ranking—"(1) That the first operation in the ranking and division is to set aside for each of the creditors who hold real securities the dividend to which his real right entitles him, without regard to the exclusive preference. (2) That the rights of exclusion are then to be applied in the way of drawback, from the dividends of those creditors whose real securities are affected by them, taking care that they do not encroach on the dividends of other creditors. (3) That the holder of such exclusive right is entitled thus to draw back the difference between what he draws upon the first division and what he would have drawn had the claims struck at by the inhibition not existed." These canons of ranking I consider so firmly established and so trite that I almost wonder at their having been overlooked in the present case.

Applying these canons in the present case, the proper mode of ranking involves the following process. The proceeds of the heritable estate are first tentatively divided among all the creditors *pari passu*, as all equally adjudging creditors, having a *pari passu* ranking. This would be the mode of ranking if no inhibition existed; and it fixes the rights of the anterior creditors and the inhibiting creditor *inter se*, because the interests of these are not affected by the inhibition. Under the second step in the process, the ranking is made as if the posterior creditors did not exist at all. This of course shows an increased ranking to both anterior creditors and inhibitor. But the anterior creditors cannot take advantage of it, because they have no right of preference over the posterior creditors. The benefit belongs alone to the inhibitor. The third step accordingly is, that the inhibitor draws back from the posterior creditors the difference between an equal dividend to all, and the enlarged dividend which he would have individually drawn had no posterior creditors existed. There is thus brought out the true order of ranking. The anterior creditors get their proper ranking, which is *pari passu* with all. The inhibitor gets the benefit of his inhibition, which he draws back from the posterior creditors, at whose debts the inhibition strikes. The posterior creditors suffer the defalcation brought upon them by the inhibition, but only in a question with the inhibitor, not with the anterior creditors, who have no preference over them.

The arithmetical result was very clearly and accurately stated in the course of the argument. Suppose that the debts of the three classes were each class of equal amount, and that on a *pari passu* ranking of all the dividend is 10s. per pound. This represents the dividend which will belong to the anterior creditors, who have no right except to a *pari passu* ranking with all. But if the posterior creditors had not existed the inhibitor would have drawn 15s. per pound, because the 30s. which is divided, in the *pari passu* ranking of all, to the extent of 10s. to each class, would have been in that case shared in the proportion of 15s. each, between the anterior creditors and the inhibitor. In other words, the inhibiting creditor would have had one-half, in place of one-third. The difference, or 5s. per pound, is drawn back by the inhibitor from the postponed creditors. The ranking then stands—anterior creditors, 10s. per pound; inhibiting creditor, 15s. per pound; posterior creditors, 5s. per pound.

The trustee and Sheriff have not followed this method of ranking, but one wholly different. It is unnecessary to go into details. The admitted sub

stance of the ranking is that the anterior creditors are ranked along with the inhibitor, in preference to the posterior creditors; in other words, the anterior creditors have given to them the benefit of the inhibition. The result, as appears, is that the anterior creditors and inhibitor exhaust the heritable estate, and leave no part of that estate for the posterior creditors, though adjudging creditors quite as much and to the same full effect with the anterior. This is plainly erroneous. The posterior creditors must suffer the effect of the inhibition, and be postponed, in consequence, to the inhibitor. But there is no ground on which the anterior creditors are, in consequence of the inhibition, to be made better than the posterior creditors, against whom, as *inter se*, they have no right of preference.

The deliverance and interlocutor must therefore be altered, to the effect of remitting to the trustee to rank the creditors on the heritable estate according to the formula above referred to.

With regard to the ranking on the general or moveable estate, which is also involved in the trustee's scheme, there is no difficulty. The creditors are, in regard to the moveables, all in the same predicament. They are therefore to be ranked *pari passu*, subject to the qualification that all holding a preferable security over the heritable estate must value and deduct the value of the security, in terms of the Bankrupt statute. The amount will of course be easy to state, after the ranking on the heritable estate is fixed, for the amount of that ranking will denote the deduction.

Lord Deas—I cannot say that I participate in the surprise expressed by my brother Lord Kinloch at the judgment of the Sheriff. I do not say that he has arrived at a right result, but I quite understand the grounds on which he has arrived at his decision. I think it was conceded, and at all events I am of opinion, that the adjudication of the trustee in the sequestration was an adjudication for all the creditors according to their rights and preferences, and put the matter much in the same position as if separate adjudications had been led by each of the creditors. If separate adjudications had been led, the inhibiting creditor was entitled to obtain an adjudication preferable to the adjudications of the subsequent creditors. But the prior creditors, *i.e.*, those whose debts were contracted prior to the inhibition, were entitled to adjudge within year and day of the inhibiting creditor, and to come in *pari passu* with him. If the inhibiting creditor had adjudged, and the prior creditors had adjudged within year and day of his adjudication, they would have come in along with him, and been preferable to all adjudications led by subsequent creditors. Therefore, if there had been no sequestration, the result would have been that arrived at by the Sheriff. The prior creditors would have come in *pari passu* with the inhibiting creditor, and the subsequent creditors would have been postponed. The principle applied by the Sheriff is that where something occurs,—in this case the sequestration—which makes it impossible for any of the creditors to adjudge, you are to hold that the same rule of preference among the creditors which would have obtained but for the obstacle, is still to be applied. This derives great countenance from the cases where the debtor, before adjudication had been led, has sold his estate to an onerous purchaser, so that none of the creditors could adjudge. It was held that you were to deal with the prior and subsequent creditors as if there had been no sale, and as if the adjudications had been carried out. I refer particularly to the case of *M'Lure*, 19th November 1807, F.C. That principle, according to the Sheriff, applies here, for the effect of the sequestration is to prevent adjudication by the inhibiting creditor, and the prior creditors from being conjoined with him. Whether the Sheriff has arrived at a right or wrong conclusion, I think he has arrived at his conclusion on judicial grounds. On the other hand, the cases mentioned by Mr Bell in his Commentaries are not the same as this; for one thing, they were before the present Bankruptcy Act. None of them have the precise circumstances of the present case—an inhibiting creditor, a body of prior creditors, and a body of subsequent creditors. The question is one which admits of a good deal of discussion. Different views have been entertained by the Court at different times. But the Lord Advocate for the trustee did not state any such argument. He conceded that the result arrived at by the Sheriff was wrong. In that state of matters, I am not prepared to dissent from the result at which Lord Kinloch has arrived. It appears to be a more equitable result than that brought out by the Sheriff.

Lord Ardmillan—I have no doubt on the competency of the appeal.

On the merits, the interlocutor of the Sheriff requires most attentive consideration. Few men are better acquainted with the subject than he. But after much consideration I have come to be entirely of the opinion of Lord Kinloch. I think that the law, clearly expressed by Mr Bell, must be held as established, and even if the question could be considered open, I should have come to the same conclusion. There is no adjudication prior to or apart from the sequestration. The sequestration operates on an adjudication, but for behoof of all the creditors, and does not disturb the rights of creditors *inter se*. The inhibition affects no rights except those which it strikes at, and gives no right except to the inhibitor.

Lord President—I should be sorry if the decision of the Court in a question of such importance should be thought to rest in any degree on the admission of counsel in argument. My opinion is not influenced by any such considerations. I concur entirely in the opinion of Lord Kinloch, as expressing a perfectly well settled rule of ranking, clearly applicable to this case. The rule was established without reference to a sequestration, and very naturally, because it was established before the introduction of the process of sequestration. The rule contemplates an inhibiting creditor, creditors whose debts were contracted prior to the inhibition, and creditors whose debts were contracted subsequent to the inhibition. All those creditors adjudge within year and day of one another, so that it does not matter which is the leading adjudication. In respect of their adjudications they all rank *pari passu*. But the inhibiting creditor has a preference over those whose debts were contracted subsequent to the inhibition. The prior creditors are to be neither hurt nor benefited by the inhibition. In these circumstances the clear and equitable rule of ranking was established, that the inhibitor's preference must be secured to him at the expense of the subsequent creditors, while creditors whose debts were contracted prior to the inhibition draw just what they would have done had the whole creditors been ranked *pari passu*. Lord Deas has

a difficulty in applying the rule to a sequestration. The adjudication in favour of the trustee is an adjudication for the benefit of all the creditors according to their rights and preferences as they stand at the date of sequestration, and it must have the same legal effect as if each one of the creditors had separately adjudged for his own debt at the same date. Here the creditors are in the position of adjudging creditors, with this peculiarity, that one of them has used inhibition. The case of *M'Lure* illustrates very satisfactorily the principle. In that case, after the debts had been contracted, and inhibition used upon one of the debts, the debtor sold his estate. The prior creditors, who had not used inhibition, could not of course adjudge, but the inhibiting creditor brought a reduction *ex capite inhibitionis*, but he reduced only in so far as his own right was concerned, and his reduction gave no benefit to any one else. This was giving precisely the same effect to the diligence of inhibition in a different set of circumstances. The rule when once understood is perfectly simple.

The Court pronounced the following interlocutor:—"Recal the deliverance of the trustee and interlocutor of the Sheriff complained of; Find that the order of ranking of the creditors on the proceeds of the heritable estate is to be ascertained as follows: First, the whole creditors are to be ranked *pari passu* as adjudging creditors on the said proceeds; and the dividend thereby arising is to be held the dividend payable to these creditors whose debts were contracted anterior to the use of the inhibition; Secondly, for the purpose of ascertaining the dividend payable to the inhibiting creditors, the said anterior creditors and the inhibiting creditors shall be ranked *pari passu* on the said proceeds, as if no debts had been contracted subsequently to the use of the inhibition, and the inhibiting creditor shall draw back from the posterior creditors the difference between the dividend arising on the first *pari passu* ranking and that arising on the second ranking, and the said difference, added to the dividend arising on the said *pari passu* ranking, shall be held the dividend payable to the said inhibiting creditors. Third, the dividend on the said *pari passu* ranking, less the amount so drawn back by the inhibiting creditors, shall be held the dividend payable to the posterior creditors: Find that all the creditors are entitled to be ranked *pari passu* on the proceeds of the moveable estate, each of the said creditors valuing and deducting the value of any security held over any part of the bankrupt estate in terms of law: Remit to the trustee to frame a scheme of ranking in accordance with these findings, and decern: Find the appellants entitled to expenses both in this Court and in the Sheriff-court: Allow accounts," &c.

Agents for Appellants—J. & A. Peddie, W.S.
Agents for Respondent—J. & R. Macandrew, W.S.

Saturday, January 27.

MRS CATHERINE GRANT OR SHAW AND OTHERS *v.* THE WEST CALDER OIL CO.

Reparation—Assythment—Master and Servant—Contractor, Liability of.

The lessees of a shale-pit had contracted with a separate party to work the shale for them on being paid a contract price per ton on the output delivered at the pit-head. This separate party was to supply necessary furnishings, maintain the machinery and fittings, &c., and pay the wages of the men employed. Farther, he was to be liable for all accidents, and was to satisfy himself before commencing to work that the shaft and all the fittings were safe, and it was specially contracted that he and the lessees were not to interfere with one another's workmen.

Held that the party so agreeing to work the shale was a separate contractor, and that the lessees were not liable for injury sustained in his service by workmen employed by him—that they were his servants, and could look to him alone for reparation.

This action was raised by Mrs Shaw, widow of the deceased John Shaw, miner, Gavieside Oil Works, West Calder, and Elizabeth, Catherine, and Thomas Shaw, their three surviving children, against the West Calder Oil Co., and also against Robert Boyd, contractor, West Calder, concluding that the defenders, or one or other of them, should be decerned and ordained to pay to the pursuers certain sums in name of compensation, damages, and *solatium* for the death of their husband and father John Shaw senior, and also for that of their son and brother John Shaw junior, who had been killed at the pit at Gavieside through the fault and negligence, as alleged, of the defenders, or one or other of them.

The West Calder Oil Co. were the lessees of the pit at Gavieside aforesaid, and Robert Boyd had contracted with them to work the seam of shale therein, under an agreement, the terms of which will appear from the opinion of the Lord President. The deceased John Shaw senior and John Shaw junior, who were engaged as miners working in said pit, were killed through the breaking of the wire rope which was used in raising and lowering the cage to and from the pit mouth. The defender Robert Boyd had since the accident left the country, and his affairs were believed to be in a state of insolvency. The action was therefore insisted in against the defenders the West Calder Oil Co. only, who contended that the deceased having been in the service of their contractor Mr Boyd, and not in their own, they were not liable for their deaths, or for the negligence of their said contractor.

It was pleaded by the pursuers—"(1) The death of the said John Shaw senior and John Shaw junior having been caused by the fault and culpable negligence of the defenders, the said West Calder Oil Company, and the said individual partners thereof, as partners or as individuals, or by the fault and culpable negligence of the said Robert Boyd, or by the fault and culpable negligence of those for whom in law they are responsible, the said defenders, or one or other of them, are liable to make reparation to the pursuers for the loss, injury, and damage thereby sustained. (2) The defenders being bound to exercise due care, in order to have their tackle and machinery in a safe and proper condition, so as to protect their servants against unnecessary risks, and having by their failure to do so occasioned the deaths of the said John Shaw senior and John Shaw junior, are liable in reparation and *solatium*, as concluded for."

The case went to trial upon the following issue:—

"Whether, on or about the 16th day of January 1871, the shale-pit No. 2, at Gavieside, West Calder, was held on lease by the defenders, the