pursuer; the defenders, after consultation, having resolved to withdraw it as against him, The minute of withdrawal was not, however, adhibited to it till the 28th of December; and the pursuer now claims damages for the injury done to his character and feelings by the charge made against him in the publication of this warrant, by its having been served upon the parties named therein.

On behalf of the pursuer it was maintained that there was nothing in the letters and documents founded upon by the defenders to justify them in making the serious charge against Nelson which they did; that they had acted recklessly and without probable cause in the matter; and that the facts that Nelson was known to be an objector to the Rev. Mr Edgar's presentation, had used expressions on certain occasions similar to those found in the letters, and that his handwriting was supposed by the police authorities to correspond with that of the letter, did not afford reasonable grounds for the imputation preferred against him.

For the defenders it was argued that in trying to ascertain the author of the crimes averred in the petition, it was natural that they should look first among the most violent of the objectors to the Rev. Mr Edgar, of whom the pursuer was one; that there was much in the manner in which the explosion of the wheel-bush had been effected to lead to the suspicion that an old quarryman like the pursuer should have committed it; that Nelson had been known to use violent language towards Mr Edgar, and having been dismissed by that gentleman from the post of beadle to the parish, was unlikely to entertain very friendly feelings towards him.

Lord ORMIDALE said that although in one respect this case was of little importance, no great injury having been done to the pursuer, it involved considerations of the highest moment in connection with the protection accorded to public officers in the discharge of their duty, and the privileges they in consequence enjoyed. The issues in the cause had been framed in peculiar terms in order that the jury might take care that proper protection should be given to the defenders, and also so as not to preclude their responsibility for the consequences of their conduct, if the jury considered they had acted maliciously and without probable cause. The words complained of might be false and calumnious standing by themselves, or if spoken by any other persons than the defenders; but to hold them responsible for such statements the jury must be convinced that these words were uttered "maliciously and without probable cause." It was not necessary for him to define malice in the abstract, and he was not called upon to attempt that; but he did not think it was necessary in order to make out a case sufficient to entitle the jury to find that the defenders had acted maliciously that the pursuer should show by direct evidence that the defenders entertained personal ill-will towards him. Malice was not a thing that was tangible. It may be inferred from the acts and conduct of the party against whom it is alleged. To enable a jury to come to a conclusion of malice it was not necessary that some witness should be adduced to swear that he had heard the defender say he had ill-will against the pursuer. Malice could seldom be proved in that way. When a man wanted to do a malicious thing he would try to conceal his motives. Malice, therefore, might be inferred from the facts and circumstances; but then these facts and circumstances must be of such a character as to lead men of reasonable intelligence to the conclusion that the party against whom the charge of malice was made had been actuated by that motive. In the present action the official position of the defenders must be kept in view. It was both their right and their duty to discover the perpetrators of so atrocious an attempt at murder. It was for the jury to say whether they had acted in such a reckless manner as to infer malice on their part, and whether they had or had not probable cause for the course they had taken.

The jury, after being absent three hours, returned a verdict for the defenders, by a majority of nine to three. The Chancellor, in giving the verdict, accompanied it with the remark that the jury wished to express their opinion that the Procurator-Fiscals did not take proper precautions in issuing the warrant against Nelson.

Friday, Feb. 23.

(Before Lord Jerviswoode.)

WILSONS *v.* SNEDDONS.

Reparation—Culpa—Master and Servant—Foreman. (1) Direction to a Jury (per Lord Jerviswoode) that a master is responsible for injuries caused to his servant through the fault of his foreman or manager, acting in that capacity; (2) Verdict for pursuers in an action for personal injuries so caused.

Counsel for the Pursuers—Mr Guthrie Smith and Mr R. V. Campbell. Agent—Mr Alexander Wylie, W.S.

Counsel for the Defenders—Mr Shand and Mr MacLean. Agent—Mr John Leishman, W.S.

In this case, Mrs Agnes Russell or Wilson, residing in Young Street, Wishaw, and her children, were pursuers, and Thomas D. & J. Sneddon, coalmasters. Cambusnethan Collieries, Wishaw, and John Sneddon, coalmaster there, the only known partner of said company, were defenders; and the issue which was sent to trial was as follows:—

"It being admitted that the defenders are proprietors or lessees of the pit known as No. 6 pit on the Cambusnethan estates, near Wishaw: Whether, on or about the 31st day of March 1865, the deceased Andrew Wilson, the husband of the pursuer, Mrs Agnes Russell or Wilson, and the father of the other pursuers, while employed by the defenders in the shaft of said pit, was precipitated to the bottom and killed, in consequence of the breaking of the rope used for raising the workmen to the surface, from defect or insufficiency thereof, through the fault of the defenders, to the loss, injury, and damage of the pursuers?"

Damages laid as under:—To Mrs Agnes Russell or Wilson, £250. To each of James Wilson, William Wilson, Jane Wilson, and Andrina Wilson, £150.

After evidence had been led on both sides tending to explain the circumstances under which the occurrence in question had taken place,

Mr GUTHRIE SMITH addressed the jury for the pursuers. He contended that because the deceased and his fellow-workman, who also met his death on the same occasion, had examined the rope before going down the shaft, that was not enough to do away with all responsibility for the consequences on the part of the defenders. Masters were bound to provide their servants with materials suitable for their work. A master was still responsible if he supplied insufficient or defective materials either personally or by his foreman or manager—(Somerville *v.* Gray, 1 M'Ph., 768). Even actual knowledge of the insufficiency of the material was not necessary to be brought home to the defenders. It was sufficient if they had the means of knowing and did not make use of them.

Mr SHAND, for the defenders, contended that it had not been shown from the evidence that they had been neglectful of the interests of their workmen; that this occurrence had either occurred through accident, and was thus attributable neither to the fault of the defenders or of the deceased; or if there was fault anywhere, it lay with the deceased, who had himself suggested the employment of the rope in question—a rope which did not belong to the defenders, and with regard to the sufficiency of which the deceased and his fellow-labourer, being experienced and practical workmen, were perfectly capable of forming an opinion.

Lord JERVISWOODE said the first thing to be

attended to by the jury was the question embraced in the terms of the issue. There was no doubt as to the deceased having met his death at the time and in the manner there stated. The only question was whether this had occurred through the fault of the defenders. If there was fault on the part of the defenders' foreman, then the defenders were themselves responsible, in so far as that fault was committed by the foreman acting in that capacity. In the circumstances of the present case it was proved that he was so. If the fault had been that of a fellow-workman of the deceased, then the defenders would not have been responsible. But the question here was one with reference to proceedings at the colliery, where the defenders' foreman was superintendent. His Lordship, after a review of the evidence, went on to observe that even if the workmen had some doubts as to the sufficiency of the rope, but did not object to it, he could not say that there would be no claim arising to the pursuers on account of his death.

Mr SHAND for the defenders, with reference to that portion of his Lordship's charge in which he laid down that if there was fault on the part of the foreman, though there was none on that of the defenders, still the defenders were responsible for that fault if committed by the foreman when acting as such for the defenders, asked his Lordship to direct the jury that if they were satisfied on the evidence that the defenders had used reasonable care in the appointment of a foreman, and provided for his use a sufficient rope for the operation in question, then the defenders were not in law answerable for the personal fault of the foreman in using a defective or insufficient rope not belonging to them. His Lordship declined so to direct the jury, and the defenders excepted.

Mr SHAND further requested his Lordship to direct the jury:—That if they were satisfied on the evidence that the deceased Andrew Wilson used the rope in question in the knowledge that it did not belong to the defenders, and had not been provided by them, but belonged to the engineers who were fitting up the machinery at the pit, and without reasonable grounds for believing that the defenders had sanctioned its use, the defenders were not responsible in law for the result. His Lordship declined to do so, and the defenders excepted.

The jury retired, and after an absence of twenty minutes returned a unanimous verdict in favour of the pursuers, awarding damages to the extent of £175 to Mrs Wilson and of £50 to each of the children.

FIRST DIVISION.

COLLOW'S TRUSTEES *v.* CONNELL AND GRIERSON.

Entail—Clause—Construction—"Nearest of Kindred." Held that under two entails in which the ultimate destination was to the entailer's "own nearest of kindred and their heirs and assignees whomsoever," the estates were not fee simple in the person of the immediately preceding heir of entail, and that he had therefore no power to convey them by his trust settlement.

Trust Settlement—General Conveyance—Intention. Opinions that a truster who had executed a trust settlement conveying in general terms all his property, did not intend to comprehend therein two entailed estates of which he was in possession.

Counsel for Pursuers—Mr Gordon and Mr Fraser. Agents—Messrs Maclachlan, Ivory, & Rodger, W.S.

Counsel for Miss Grierson—Mr Patton, Mr Clark, and Mr Lee. Agents—Messrs Mackenzie & Kermack, W.S.

Counsel for Mr Connell—Mr Millar and Mr Marshall. Agents—Messrs A. & A. Campbell, W.S.

The pursuers of this declarator are the trustees of the late Gilbert Collow, who died on 7th March 1863, leaving a trust-disposition and settlement *mortis causa*, which was executed by him on 31st March 1859. They seek to have it declared that under the general conveyance of all lands and heritages in this deed are comprehended the two entailed estates or Auchenchain and Over Kirkcudbright, in which Mr Collow was vested as heir of entail at the date of the settlement and at his death. It is alleged that these estates came before his death to belong to Mr Collow in fee-simple, in consequence of all the substitute heirs deceasing prior to the devolution on "the entailer's own nearest of kindred and their heirs and assignees whomsoever." It is admitted that in 1859, when the trust-deed was executed, at least one of these substitute heirs was in existence. It is not said that there is any defect in the fencing clauses, irritant or resolutive; but what is contended is that by the failure of the heirs-substitute, prior to this ultimate devolution, the fetters of the entail had gone off, and the estates thus became fee-simple in Gilbert Collow's person, and fell under the general conveyance in the trust-deed. The action is defended by Mr J. W. F. Connell and Miss Mary Grierson, both of whom claim right to the estates under the deeds of entail.

The Lord Ordinary (Kinloch) found that, according to the sound construction of the trust-disposition, it was intended not to comprehend, and did not either in fact or law comprehend, the said entailed estates. He therefore assoilzied the defenders, and in a note thus explained the grounds of his judgment:—

"The contention of the pursuer is maintained on the ground that a general conveyance of all the lands and heritages which shall belong to the granter at the time of his death, necessarily sweeps into the conveyance all heritable property which shall be found in point of law to be fee-simple property of the granter at his decease. The Lord Ordinary cannot accede to a proposition maintained thus absolutely, and he thinks it would be much to be regretted if such a proposition were held established, as this would lead in many cases to results widely at variance with the granter's intentions. The Lord Ordinary considers it to be the fixed doctrine of the law that such a general conveyance is susceptible of construction according to the true intention of the granter, as fairly gathered from the deed, viewed in connection with the circumstances in which it was executed. If it is plain that the granter did not intend to convey a specific heritable estate under the general terms employed, the mere generality of these terms will not be sufficient to comprehend that estate, and it will be held excluded from the disposition. The general words, it must be remembered, are not words having *per se* the effect of conveying any particular property. They must be made effectual by proceedings of adjudication, raised on the ground of their expressing an intention to convey. Intention is therefore the proper subject of inquiry when this general conveyance is sought to be made effectual against a particular estate. If that estate was not intended to be conveyed, the law rightly and wisely holds it excepted from the ostensible conveyance. There are several authorities to this effect of which the Lord Ordinary thinks it necessary only to refer to the following—Farquharson *v.* Farquharson, 2d March 1756 (M. 2290), affirmed House of Lords 20th February 1759 (6 Paton 724); Fleming *v.* Fleming, 3d December 1800 (Dict. Implied Will., App. No. 1); Hepburn *v.* Hepburn, 10th February 1860 (22 D. 730). Applying this principle, the Lord Ordinary has formed a very clear opinion that Gilbert Collow had no intention of comprehending in his trust-disposition the entailed estates now in question. And in reaching this opinion, the Lord Ordinary assumes in point of law that the estates were in such a condition anterior to his death that he might, if he had so pleased, disposed of them as fee-simple properties; for this the Lord Ordinary con-