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-

ceives a necessary condition of the argument on this branch of the case. On the opposite assumption the question of intention would not arise at all. That Gilbert Collow had no intention of comprehending the entailed estates in his trust-disposition, appears to the Lord Ordinary to be deducible from very obvious considerations. The general conveyance of lands and heritages is plainly inserted in the deed with no special reference, but as the ordinary stereotyped clause of every general settlement. At the time of executing the deed (which is the date at which intention is to be looked for) Gilbert Collow had unquestionably no power to convey the entailed estates, for admittedly James Grierson, one of the heirs-substitute, was then alive, himself a sufficient obstacle, and the probable germ of multitudes of other heirs-substitute. There was no immediate prospect of the estates devolving on the entailer's 'own nearest of kindred, and their heirs and disponees whomsoever.' But the settlement is further framed in a way altogether adverse to the idea of its being intended to comprehend the entailed estates. It evidently comprehends a limited estate, to be turned into money and distributed, and an estate as to which the testator doubted if it would not be exhausted by payment of about £5000 of legacies. It is admitted that at his death Gilbert Collow left enough of personality to answer all the legacies. But at the date of the trust-settlement he was not quite sure that there would be enough in the estate conveyed to pay a proposed legacy of £500, which he bequeathed, in addition to the others, on condition that there would be a surplus to pay it. If there was more than sufficient for this purpose, he provided that the surplus should be divided amongst the legatees (most of them apparently strangers in blood) proportionally, therein pretty evidently contemplating that any surplus would be inconsiderable. This is as unlikely a proceeding as can well be imagined, on the supposition of the conveyance intentionally comprehending the two entailed estates. These estates are said to have produced of yearly revenue upwards of £1200, and to be worth of capital £30,000 to £40,000, but independently altogether of the precise arithmetical value of the estates, the Lord Ordinary is satisfied that the arrangements of the trust-deed are such as would be made by no man possessed of the ordinary sentiments which actuate testators, if he was then dealing with two entailed family estates. Every reasonable conception as to the mode in which two such estates would be disposed of points to the contrary. The supposition is, in the view of the Lord Ordinary, incredible."

The pursuers reclaimed, and referred to the following authorities—viz., Ersk. 3, 8, 32; Bell's Prin., sect. 1694; Primrose *v.* Primrose, 9th Feb. 1854 (16 D. 498); Weir *v.* Steel, 7th Feb. 1745 (M. 11,359, Elchies *voce* "Pesumption," No. 17, and 2 Elchies' Notes, p. 348); Blair *v.* Blair, 16th Nov. 1849 (12 D. 97); Farquharson *v.* Farquharson *ut supra;* Eglinton *v.* Eglinton, 28th May 1861 (23 D. 1369); Leitch, 17th Feb. 1829 (3 W. & S. 366); Farquhar (1 D. 127, and 4 D. 600); Mure *v.* Mure, 16th Feb. 1837 (15 S. 581, and 3 S. & M'L. 237); Leny *v.* Leny (22 D. 1272); Brown *v.* Coventry (Bell's Oct. Cases, p. 310); Greig (6 W. & S. 406); Robson (M. 14,958); Dunn (1 W. & S. 96); Hamilton (M. 4360); Hislop (12 S. 413); and Gordon (14 D. 269).

The defenders cited Hepburn *v.* Hepburn and Fleming *v.* Fleming *ut supra;* Campbell *v.* Campbell (Craigie and Stewart, 343); Forlong, 3d April 1838 (3 S. & M'L. 177); Wigram on Wills, p. 65 and 81; Williams on Executors, p. 1006; Ersk. 3, 9, 2; Livingston *v.* Livingston, 3d Nov. 1864 (3 Macp. 20); Roxburghe Case (5 Paton 444); Hay *v.* Hay (M. 2315); Tenant *v.* Baillie M. 14,941); Campbell (M. 14,949); Stewart *v.* Richardson (2 Sh. Ap. 149); Tinnoch *v.* M'Lewnan, 26th Nov. 1817 (F. C.); Braid *v.* Ralston (22 D. 433); Milne 6th June 1826 (4 S. 685); Thomson (15 S. 432).

The Court to-day assoilzied the defenders on the ground that, whatever was Mr Collow's intention, he had no power to convey the entailed estates by his general settlement.

The LORD PRESIDENT said—These estates, which were held by Mr Gilbert Collow, had descended to him as heir under two entails executed by William Collow. When the settlement was executed, the estates were unquestionably held under the fetters of the entails, because James Grierson, a substitute-heir, was then in life. But before the death of Gilbert Collow, James Grierson had died, and it is said that the estates became then vested as fee-simple estates in Mr Collow. The question is raised in these circumstances, whether the general deed is sufficient to carry the estates. At the time he executed his settlement he certainly had no power to convey the two estates held by him as heir of entail; but it is said that the deed must be read with reference to the state of matters as they existed at his death. The Lord Ordinary has held that on a sound construction of the settlement Mr Collow did not intend to convey, and did not convey, the entailed estates. I think it would be very difficult to hold that at the time he executed the deed Mr Collow had any intention of conveying the estates, because he had not then the power, but that does not solve the question. The question which remains—namely, whether, assuming that at the time of his death he had the power to convey them, he has sufficiently done so by his general deed, is a very nice and important question. But there is another question which it is proper to deal with first. It is said that at the time of Mr Collow's death the entails had not come to an end, and that he therefore had not even then the power to convey the estates. That question depends on the construction of the deeds of entail. One of the defenders, Miss Grierson, maintains that under these deeds she is heir of entail, and Mr Connell maintains that he is. There is a question which is the true heir, but that question arises in another case. There is, besides, a separate question arising out of the Over Kirkcudbright entail, under which Mr Connell maintains that he is called as an heir-female of John Collow. The clause in both entails which we have to construe is as follows:—"Whom all failing, to such person or persons as shall be called and nominated to the succession of the lands and others after mentioned by writing signed by me at any time hereafter, and in case of no such nomination, to my own nearest of kindred and their heirs and disponees whomsoever." The contention on the one side is that that clause has the same effect as if it were a destination to the entailer's own nearest heirs and assignees, in which case the entail necessarily came to an end in the person of Gilbert Collow. But the words are not "to my own nearest heirs and assignees," but "to my nearest of kindred and *their* heirs and assignees." I hold, therefore, that it was the purpose of these deeds of entail to call some person, whoever it was, who was nearest in blood to the entailer himself, and after whom were to come the heirs of that person. I think we have here parties who can claim the character of being related by blood to the entailer. Miss Grierson is a granddaughter of the entailer's sister, and Mr Connell also traces his blood connection. I think that one or other of them is called by these entails; which of them is a different question. But does the expression "nearest of kindred" mean to call one or several persons. If several, it is said that this is practically a destruction of the entail. I don't think the deeds can be so read. The analogy relied on is the case of a destination to heiresses—portioners—and it is a very fair analogy; but it must be remembered that in that case the entail is not destroyed until the succession opens, because it is not till then that it can be known whether there is one or more to take. The cases of Farquhar and Mure lead necessarily to this conclusion. I therefore hold that Mr Gilbert Collow did not at the time of his death hold these estates in fee-simple, and therefore that he had no power to convey them

by his trust-deed. In this view it is unnecessary to consider what was his intention. But I am also very strongly of opinion that this was not his intention, and I would be disposed to come to this conclusion irrespective altogether of the other grounds on which I desire to rest my judgment.

LORD CURRIEHILL concurred. The question depended upon whether there existed at Mr Collow's death any person falling under the description of "nearest of kindred" to the entailer. Now there was a grandniece through his sister Jean, and a great-great-grandnephew through his brother John. That being so, he was of opinion that one or other of these individuals—he would not say which—falls under the description, and is the heir of entail. Both were of kindred to the entailer. The fetters of the entails therefore remained, and Gilbert Collow had no power to convey the estates. In regard to the other question, his Lordship regarded it as one of very great difficulty, and stated that he had changed his mind upon it since the discussion. The question as put was, Did the truster intend to convey? He thought that was not the proper question. The words were sufficient to convey everything, even an estate which the trnster had not, at the time he made the deed, any intention of acquiring, and which, of course, he could not, therefore intend to convey. The proper question was, Did he intend to exclude the entailed estates? It was necessary to get the better of the words which *prima facie* conveyed everything. Now, these general words in a *mortis causa* settlement have been held in a variety of cases to be subject to construction. If they occur in an onerous deed, as, for instance, in a trust-deed for behoof of creditors, his Lordship had no doubt that they would convey all which the party had the power to convey. But it is different in the case of a deed meant to regulate succession. Again, expressions may be used in a deed which indicate that the granter means to exclude an entailed estate, as in the case of Hepburn (10th Feb. 1860, 22 D. 730). It is also a well-known principle that when there are special destinations or provisions granted by a testator in one deed, and he afterwards grants a general conveyance, the general words of it do not of themselves revoke the special conveyance. If accordingly these entails had been granted by Gilbert Collow himself, I am clear that a subsequent general conveyance would not have included the entailed estates. But here the entails were granted by an ancestor. Even in that case the property is subject to a special investiture, and the question is, Was it intended to alter the existing investiture? That question has been in various cases anxiously considered both here and in the House of Lords, and it was held that such an alteration was not implied in the cases of Strachan, 7th July 1752 (M. 11356), and Campbell *v.* Campbell (*ut supra*). These were followed by the case of Farqhuarson to the same effect. Looking at the circumstances of the present case, his Lordship thought (and it was on this point that he had changed his opinion) that the truster did not intend to make any alteration when he executed the deed. He must have known that he would die proprietor of the estates, and there was no ground for presuming that after he executed the deed and before his death he had altered his intention. If such had been his wish. he could not, feudally, have expressed it by means of a general disposition. He must have renewed the investiture with the superior. It is therefore necessary to suppose that he imposed an obligation on the heir of entail to make up a title and then convey to the trustees, for without holding that he imposed this obligation it cannot be held that he intended to alter the destination and send the estates away from the heirs of investiture.

Lord DEAS and Lord ARDMILLAN concurred, but the former gave no opinion as to the question of intention, which the Lord Ordinary had decided, and which, from the way the case was now dealt with, it was not necessary to decide.

## JAMIESON *v.* ANDREW.

*Law Agent—Lien—Companies Clauses Act.* Question as to whether an English Solicitor who had a claim for a business account against a company which was being wound up, had a lien therefor over the company's books and papers in his possession, in a question with the official liquidator.

Counsel for Liquidator—Mr Gifford. Agents—Messrs Auld & Chalmers, W.S.

Counsel for Mr Andrew—Mr W. M. Thomson. Agents—Messrs C. & A. S. Douglas, W.S.

The question involved in this case is whether Mr George Auldjo Jamieson, C.A., the official liquidator of the Garpel Hœmatite Company (Limited), is entitled to demand delivery from Mr John Andrew, a solicitor in London, of certain books, deeds, and papers of which the liquidator requires possession to enable him to wind up the company under the Companies Clauses Act 1862. Mr Andrew admitted that he had possession of the books and papers required, but he declined to deliver them to the liquidator, on the ground that he had a lien over them for a sum of £768, 19s. 3d. due to him as the solicitor of the company. In July last, the Court, in virtue of their powers under the Winding-up Acts, appointed Mr Andrew to lodge the documents with the Clerk of Court, in order that inspection thereof in his hands might be obtained, and appointed the question of lien to be argued in writing. This having been done, the case was in the roll to-day.

The LORD PRESIDENT said—The liquidator, in order to facilitate matters, says he is willing to pay Mr Andrew's claim, as it may be ascertained, out of the first and readiest of the recoveries of the estate. But he disputes the accuracy of the account, and he also disputes the right of lien. In this state of matters we have not materials for determining either whether the claim is good or whether there is a right of lien. On the other hand, it is very important that the liquidation of this company should proceed, if it can proceed, without injustice to Mr Andrew. I am not satisfied that, if he has a right of lien, justice will be done to Mr Andrew by giving up the documents on the offer which the liquidator has made. The use of a lien is this — it is a sort of screw, and is often used for purposes of pressure. The documents may be worth little or nothing, but the withholding of them may often produce payment of a considerable sum. The Court therefore think that if the documents are to be placed at the liquidator's disposal, he must bind himself to pay the amount of Mr Andrew's account as it may be ascertained, in the event of the right of lien being afterwards found to exist.

The case was continued that the liquidator should consider whether or not he would undertake this obligation.

## PETITION—M'VEAN OR BAIN.

*Citation.* Warrant granted to a Sheriff-officer in Stornoway to serve a petition, there being no messenger-at-arms there.

Counsel for Petitioner—Mr G. H. Thoms. Agent—Mr P. S. Malloch, S.S.C.

This was a petition for the discharge of a judicial factor, and for the appointment of another. Certain of the parties mentioned in the prayer of the petition, and on whom service was ordered, being resident at Stornoway, where there is no messenger-at-arms, the Court to-day, on the report of the Junior Lord Ordinary, granted warrant to any Sheriff-officer there to make service of the said petition.