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

West Calder Oil Company, and worked by them; and whether, on or about said date, the said John Shaw senior and John Shaw junior were employed by the said defenders as miners, and were, while acting in said employment, precipitated to the bottom of said pit, and killed, in consequence of breaking of the rope used for raising and lowering the workers in said pit, through the fault of the said defenders, to the loss, injury, and damage of the pursuers?"

In charging the jury, the presiding Judge (LORD ORMIDALE) gave the following direction:—"If the jury were satisfied on the evidence that, at the time the accident in question happened, the pit referred to in the issue, and fittings connected therewith, including ropes, were in the occupation and charge of Robert Boyd, and worked by him as a contractor under and in terms of the agreement No. 19 of process, and that the deceased John Shaw senior and John Shaw junior were, when they were killed, acting in the employment of Robert Boyd, then in law it cannot be held that it was through the fault of the defenders that the Shaws were killed."

Against this direction the counsel for the pursuers excepted, and asked his Lordship to give the following directions instead:—"(1) That the West Calder Oil Company having power under their lease to work the minerals in the lands of Gavieside, and to carry on manufactures of such minerals on said lands, and employed Boyd to assist them in a subordinate part of said trading operations, by putting out the shale for payment at a certain specified rate per quantity, Boyd is not to be considered an independent contractor, but a servant of said company. (2) That if the jury are satisfied upon the evidence that the machinery in use at the time of the accident was the property of the West Calder Oil Company, and that the miners employed in the pit in which the accident occurred were not made aware of the terms of the contract between the Company and Boyd, and were not made aware that the contract placed any obligation on Boyd as to the providing or maintaining of the machinery for raising and lowering the miners working in the pit, but were only made aware that he had contracted to work the shale, Boyd is to be held to be the servant of the company, engaged to work by the piece, and the miners working under him to be in the service of the company, and entitled to rely upon the company providing safe and sufficient machinery for raising and lowering them while workers at that pit."

On his Lordship refusing to give the said directions, the pursuers' counsel again excepted.

The jury thereafter brought in a verdict for the defenders on the said issue, and stated the following as their reasons for arriving at the said verdict:—"That the jury are of opinion that the deceased Shaws met their deaths in consequence of the defective and faulty state of the rope, which had long been subjected to atmospheric and other influences—all tending to make it utterly unfitted for the risk of human life at the time of the accident; and had it not been for the legal interpretation put upon the contract by the Judge, they should, by a majority, have given their verdict in favour of the pursuers. But as the law recognises the binding nature of the contract between the company and Boyd, they are necessarily obliged to give their verdict for the defenders, in accordance with the Judge's direction on the points of law relating to the said contract."

A bill of exceptions was presented by the pursuers to the First Division, founded on the two exceptions above mentioned.

MACDONALD and HUNTER were heard in support of the bill of exceptions.

Authorities—*Rankine* v. *Dixon*, Mar. 19, 1847, 9 D. 1048; *Maclean* v. *Russell, Macnee & Co.*, Mar. 13, 1849, 11 D. 1035, and Mar. 9, 1850, 12 D. 887; *Nisbett* v. *Dixon*, July 8, 1852, 14 D. 973; *Marshall* v. *Stewart*, Mar. 3, 1852, 24 Jur. 298, see also 14 D. 596; *Stone* v. *Cartwright*, 1795, 6 Durn and East, 411; *Rendlestone* v. *Murray*, 5 Ad. and Ellis, 109.

WATSON and MACLEAN, for the defender, were not called upon.

At advising—

LORD PRESIDENT—The issue sent to the jury in this case was whether—(*reads issue as given above*). Now in every case of this kind the first matter to be ascertained is the relation subsisting between the deceased and the defender. It was in reference to this essential matter of fact that the Lord Ordinary gave the direction complained of—(*reads the direction first excepted to*). Now, the agreement referred to between the defenders and Mr Boyd, and on which the question of the deceased's employment depends, has been laid before us, and I find it is not of a very extraordinary kind. Still it is necessary to attend to its details in order to understand the position which Boyd occupied in relation to the defenders on the one hand, and the deceased on the other. Under this agreement Mr Boyd undertook to work a certain seam of shale as opened up in No. 2 pit, leased by the defenders the West Calder Oil Co., and that at a contract price of 5s. per ton of 22½ cwt., delivered at the pit head. He was bound to provide coal, wood, nails, oil, tallow, and furnishings of every description, with the exceptions after mentioned, and he was to uphold the hutches, and keep in order the engine, boiler, pumps, ropes, &c., and pay the wages of the engineman, pitheadman, and others necessary for delivering the shale at the pit mouth. The West Calder Oil Co. reserved to themselves power to appoint the pitheadman—a reservation which is very easily explained in a contract like this—as the pitheadman was the most convenient and suitable person to employ in checking the output in the interest of the Oil Co. The company were to provide rails, plates, and trap-doors necessary for the fulfilment of the contract, and the contractor was to pay for such as should be awanting at any time. The contractor was taken bound to open out the workings in a certain way, and was to receive £60 for so doing, over and above the contract price for the shale. The contract was to continue for three months certain, and to be terminable at the end of every three months on four weeks' notice being given by either party. Farther, the contractor was to be liable for accidents of every description about the pit, above as well as below ground, with power to stop working until anything wrong or defective was remedied; and before commencing to work he was to satisfy himself that the shaft and fittings were safe. Finally, it was provided that none of the company's men were to be taken by the contractor, nor the contractor's men by them, without mutual arrangement.

Now, my Lords, I certainly think that the possession of this pit was fully given over to Mr Boyd if he got possession of it in terms of this contract; and that in employing men to work the shale in that pit, he was employing them on his own re-

sponsibility. They were in contract with him for the work they did and the wages they received, and with no one else. This is made even more plain by the special arrangement at the close of the contract, providing that neither party should interfere with the other's workmen. Now, the question really comes to be, under this contract, whether the persons deceased were the servants of Mr Boyd or of the company. Upon that question the jury could have no doubt. It was left to them by the presiding Judge to say whether they were satisfied that the deceased were, when they were killed, acting in the employment of Mr Boyd. It was left to them to be satisfied of this before they gave effect to the Judge's direction in point of law, that if the deceased were so acting, it could not be held that they met their death through the fault of the defenders the Oil Co. I can only say that if the contractor began to work the pit in terms of this contract, and engaged men to work the shale, they were his servants and nobody else's. He was their master, and the law admits of no doubt that an action for damages under circumstances such as these must be raised against the person who is master. The Shaws' master was Mr Boyd, and he is the only person who can be liable for the accident that happened to them. None of the cases quoted have any bearing upon the present question. Some of them indeed have at first sight rather a misleading effect. The cases of *Maclean*, and those like it, are cases which turn upon a rule of law which has nothing to do with the relations of masters and servants, but depend upon the duty of a proprietor to conterminous proprietors. The only difficulty that can there exist is, really, whether the proprietor is carrying on the operation himself, or whether it has been handed over to an independent party who is liable to conterminous proprietors for his own negligence. Another case referred to was that of *Nisbet*, where a landlord sought to recover against his tenant the expense of extinguishing a fire caused by carelessly calcining ironstone in the neighbourhood of a coal pit. It was clearly no answer for the tenant to make to his landlord that the operation of calcining was carried on by a contractor for whom he was not liable. Besides, in the contract which the tenant had made, he had a direct control of the calcining, and was entitled to fix where it was to go on. It was only through its being carried on in an improper way and at an improper place that the fire broke out. Similarly, the other cases do not bear at all upon the subject. I think, then, this is a very clear case, and that the difficulties raised have no weight in them when properly examined. I am therefore for disallowing this bill of exceptions.

The rest of the Judges concurred.

Agents for the Pursuers—Menzies & Cameron, S.S.C.

Agents for the Defenders—J. & R. D. Ross, W.S.

Tuesday, January 30.

SECOND DIVISION.

TOD'S TRS. *v.* FINLAY.

Marriage-contract—Clause.

Terms of a clause in a marriage-contract which *held* not to convey certain green-houses, iron fences, and an observatory containing a large telescope.

Heritable and Moveable.

Opinion that the greenhouse and fences were heritable, and the telescope moveable.

The questions raised by this note of suspension and interdict are fully stated by the Lord Ordinary (MACKENZIE) in a Note to his interlocutor granting the interdict:—"By the marriage-contract between the deceased Mr William Tod of Ayton, in Perthshire, and his wife Mrs Isabella Benny, Mr Tod conveyed to her 'absolutely the whole household furniture, bed and table linen, silver plate, books, pictures, prints, and other plenishing and effects, including heirship moveables, carriage and carriage-horses, and other effects, now belonging to, or that may hereafter be acquired by him, in so far as the same may form part of, or be situated or used at, in, or in any way connected with his ordinary or principal residence or establishment.'

"Mr Tod acquired the estate of Ayton in 1860, and he afterwards erected thereon, 1st, a large conservatory or greenhouse, two forcing-houses, and a vinery, with the necessary hot-water heating apparatus and other fittings; 2d, extensive iron fences in the policy grounds attached to Ayton House; and, 3d, an observatory containing a large and expensive telescope. Mr Tod died in 1867, survived by his said wife, and she married the respondent, Mr Finlay, in 1870. In virtue of the before-recited clause in the marriage-contract, Mr Finlay, as in right of his wife, maintains that he is entitled to the property of the foresaid subjects. Having advertised these subjects for sale, Mr Tod's testamentary trustees raised the present note of suspension and interdict, to prevent him from selling or in any way interfering with them.

"The question raised is, as regards one of the subjects, attended with difficulty. But having regard to the fact that the whole subjects were erected upon and annexed to his estate by Mr Tod, a fee-simple proprietor, for the more beneficial use, occupation, and enjoyment of that estate, the Lord Ordinary is of opinion that they are pertinents or accessories of the estate, and as such heritable, and therefore that they do not fall under the conveyance of moveable effects in favour of his wife, contained in her marriage-contract.

"1. As regards the large conservatory or greenhouse erected within the garden and against the garden wall, and the two forcing-houses and vinery erected outside the garden, and forming one separate and independent structure;—the Lord Ordinary has no doubt that, as in a question between the present parties, they fall under the legal maxim, *Solo inædificatum solo cedit.*

"These erections are of the most substantial description. The conservatory or greenhouse has a polished freestone wall, about two feet high; and the other houses have brick walls varying from one foot to five feet in height, resting on stone foundations. On these walls, sides and sloping roofs of the usual construction, with the requisite glass sashes, rest. One furnace, with a close boiler, in a building situated at a short distance from the houses, heats the whole of them by means of hot-water iron pipes conducted under ground to each of them. Such houses are the ordinary pertinents of a mansion-house; and a fee-simple proprietor, erecting them in or adjacent to his garden for the cultivation of flowers, plants, and fruit requiring care and heat, makes and intends these houses to become, the Lord Ordinary thinks, as completely