of MacNicol, because he was not personally liable to the creditor in the bond, and his own creditor, the seller, had no real right in his own person for that part of the price. There the security had been granted by a party other than the deceased, and the Court held that the ordinary rule did not apply; but as we have not a case of that sort here I think the ordinary rule should apply.

Lord Deas was absent on Circuit.

The Court pronounced this interlocutor:—

"Find that the sum of £2000, being one half of the amount of the legacies due by the deceased Miss Georgina Duncan, falls to be paid out of her heritable estate."

Counsel for First, Third, and Fourth Parties—Mackintosh—Brown Douglas. Agent—J. & J. H. Balfour, W.S.

Counsel for Second Parties—Pearson—Low. Agent—John T. Mowbray, W.S.

Thursday, June 28.

FIRST DIVISION.

[Sheriff of Lanarkshire.

M'LEAN *v.* WARNOCK.

Reparation — Custody for Hire — Liabilities of Custodier.

Where a farmer had taken in a horse to graze for hire in one of his fields, which was over old mineral workings, and had failed, through not having examined the field, to discover that there was in it a subsidence of the ground, through the existence of which an accident happened to the horse, and caused its death — *held* that he was liable to the owner for the value of the horse.

Observed that in such circumstances the *onus* was on the custodier to account for the death of the horse.

This was an action raised in the Sheriff Court of Lanarkshire by Archibald M'Lean, carting contractor, Auchinbegg, against George Warnock, farmer, Lesmahagow, concluding for a payment of £50, being the value of a horse belonging to the pursuer which the defender agreed to graze during a part of the summer of 1882, and which was found dead on the 3d of September, owing, as the pursuer averred, to the defender's carelessness and neglect.

It appeared from the proof which was taken before the Sheriff that the defender had had upon several previous occasions, including the preceding year, both horses and cattle belonging to the pursuer for grazing, and that it was the custom between the parties to make a payment for the grazing at the end of the season. The same course was to have been followed upon the present occasion, and no precise sum was stipulated for in name of rent.

The soil underneath the field into which the pursuer's horse was put upon the 1st of July 1882 had been to some extent removed on account of mineral workings, and in consequence there was a sit or subsidence of the surface.

There appeared also to have been in a hollow part of the field a hole, the soil about the edge of which seemed to be quite hard, and the mouth of which could only be seen by one who was close to it. There was some difference of opinion among the witnesses as to the size of the mouth of the hole, but it could not have been less than from 18 inches to 2 feet in diameter. A wet ditch lay near to it, but the hole itself was dry. Both pursuer and defender deponed that they were ignorant of its existence, while the witnesses who spoke to its size alleged that it had been known to them for a considerable time. There was no fencing of any kind around the hole, and the defender had horses of his own going about in the same field. It was into this hole that the pursuer's horse had slipped. The horse's hind legs had apparently gone in first, and in struggling to free himself he had enlargened the hole, and caused the water from the wet ditch to flow into the hole. The result was that the horse was drowned.

As the defender denied all liability for the death of the horse, and refused to make any compensation, the pursuer raised the present action for its value, and pleaded—"(1) The defender in undertaking and agreeing to graze the gelding in question for pursuer, was bound to take all proper precautions for the protection and safety of said gelding; and having failed to do so, he is liable for the loss occasioned to the pursuer through such failure. (2) The defender having undertaken to graze the said gelding for pursuer, and having negligently permitted the same to fall into a hole or sit on his park or field, and thereby to be destroyed, is liable to the pursuer in reparation to the extent sued for, which is reasonable."

The defender pleaded that he had entered into no contract with the pursuer for the grazing of the horse, and had undertaken no responsibility in relation thereto, and further—"(3) In the event of the death of the said gelding being shewn to have resulted from a sit or sinking of the surface of the ground in consequence of the minerals thereunder having been wrought out, for which the proprietor of the said lands might be held responsible, the pursuer ought to have called the said proprietor for his interest."

After a proof the Sheriff-Substitute (Birnie) pronounced this interlocutor:—"Finds in fact (1) That the defender contracted with the pursuer to graze for hire a three-year-old gelding belonging to the pursuer for the portion of the season after the month of July last; (2) That said gelding was placed on the defender's farm of Auchinbegg, and grazed there until on or about the third day of September, when it was killed by falling into a hole on said farm: Finds in law that said gelding was killed through the fault of the defender: Assesses the damages at £50: Finds the defender liable to the pursuer in said sum, with interest at the rate craved from date of citation until payment: Finds the defender liable to the pursuer in expenses," &c.

"*Note.*—The defender is tenant of several adjoining farms, including High Stockbriggs and Auchinbegg, and says the pursuer was told by him to put the horse on High Stockbriggs, and is therefore not entitled to damages for the injury which happened to the horse on Auchinbegg; but to my mind that is not so, as whether

the pursuer was told to put the horse on High Stockbriggs or not, the horse was on Auchinbegg for two months, in the knowledge and under the care of the defender's shepherd, who on one occasion removed it from High Stockbriggs, to which it had strayed, and took it back to Auchinbegg. The defender's son, who assisted him in the management of his farms, was also aware that the horse was on Auchinbegg. As to the liability of the defender, the case is narrow. Certain portions of Auchinbegg lie above old mineral workings, and there have been subsidences or sits, but none had taken place for five and probably nine years before last September. The pursuer also was aware that the grazing was above mineral workings. But the hole into which the horse fell was seen some time before the accident. The witness Mr Muir senior saw it three years ago, his wife saw it years ago, and their son and Shaw last spring, another son and a cousin having told them of it. There was also some evidence that moss was growing in it. No doubt the defender's witnesses did not see it; but that will not detract from the fact that others saw it, although it proves that it was not very observable. Keeping in view that it was seen, that the farm was known to be above shallow mineral workings and that subsidences had taken place, it seems to me the defender was bound to be peculiarly on his guard when he undertook to graze horses belonging to others, and to have fenced off dangerous parts. It is also an item of evidence against him that this hole was near a sit, and also near a water-run, to which horses would naturally be attracted, and that it was in a hollow, and therefore so much nearer the workings. The defender thinks the value of the horse was £45, but the other witnesses say £50, or above it."

The defender appealed to the Sheriff (Clark), who on 8th February 1883 adhered to the interlocutor of the Sheriff-Substitute.

"*Note.*—It may be taken as proved that neither party knew of the dangerous hole, though it had been in existence for some years. Yet such ignorance will not relieve the defender of liability. If he did not know of the hole, he ought to have done so; and if he did not intend to incur the risk of what might happen to the pursuer's horse when grazing in his field for payment, he ought to have communicated the fact to the pursuer, so as to put the latter in a position to make such modifications in his contract, or to abandon it altogether, as he might deem fit."

The defender appealed to the Court of Session, and argued—That as the pursuer had failed to make out a case of fault against the defender, the loss must fall upon the owner. The evidence showed that the defender had acted with reasonable care and prudence; besides, it showed the pursuer was never authorised to put his horse into this field; he did it of his own accord, and at his own risk. He desired to look after the horse himself, and knew well about the mineral workings underneath the ground.—Bell's Prin., sec. 234.

Argued for the respondent—This was just an ordinary case of grazing for hire. The defender was bound periodically to have inspected his fields, especially as he was aware of the mineral workings and the liability of the ground to subside on that account. He failed to examine it with that care which a prudent man would show in taking care of his own property, and must be liable for the consequences.—Bell's Comm., vol. i., 488; *Rooth* v. *Wilson*, 1 B. & Ald. 59; *Broadwater* v. *Blot*, Holt 547.

At advising—

Lord President—It is satisfactorily established, I think, that upon the first of July last, a horse belonging to the pursuer was put out to graze on a field of the defender's at a farm called Auchinbegg. This was done in pursuance of an agreement that the horse should be sent to graze for a certain time, and although no rent was fixed there was an understanding that at the end of the season a reasonable price would be paid for the grazing. Both parties appear to have been acting throughout in good faith. On the night of the third September the horse was found dead by the pursuer, it having fallen into a hole which appears to have been in the park in which it was feeding, and the question now arises whether the defender is to be answerable for this unfortunate occurrence? It no doubt raises a presumption against the defender that the horse died in his field, and that it does not appear to have strayed beyond it. The obligations of the custodier in a case such as this clearly were, that he was bound to use all reasonable precautions to keep the animal free from risk. The law upon the subject is, I think, admirably stated in the passage in Bell's Commentaries to which we were referred in the course of the discussion, where he says—"The care required of a custodier is such as a diligent and prudent man takes of his own property . . . The place of custody must be secure against the ordinary accidents incident to the property to be preserved . . . The grazing field must be properly secured against the escape of the cattle, and free from pitfalls and dangers which may lame or injure them . . . A failure in these respects will expose the owner of . . . the field, . . . or other place of custody, to a claim for the damage thus occasioned by his fault." Such were the duties imposed upon the defender in his capacity of custodier, and the question comes to be, did he discharge this duty, or did he not fail properly to inspect this field and thereby become responsible for the unfortunate occurrence which has taken place. His defence is that if there was any risk arising from the subsidence of the ground owing to the workings of the minerals beneath it, that risk was unknown to him. Both the Sheriff-Substitute and the Sheriff have come to be of opinion that if the defender did not know of the existence of this hole which caused the accident, he ought to have been aware of it. No doubt it was in a part of the field little frequented, and might upon that account pass unobserved. But its existence was known and spoken to by several of the witnesses at the proof. The Muir family saw it, and also the witness Shaw, and they speak clearly both as to its nature and size. It does not appear to have been one of those treacherous spots which are often found upon a moor, which look to be quite firm, and yet which will not support any weight, but rather a hole at which people could safely stand and look in. It was not, as far as the evidence shows, a wet place, although no doubt the horse in its struggles increased the size of the hole and tapped an adjoining ditch, thereby letting water in. At first it seems to have been a dry hole, as one of the witnesses speaks

to seeing a rabbit go into it, and it is well known that rabbits will not frequent a wet place. The question therefore comes to be, was it not the defender's duty to examine his field from time to time and see that it was safe before taking in animals to graze. I am clearly of opinion that it was his duty to do so, and that his failure in this respect has resulted in this unfortunate occurrence. I am therefore for affirming the Sheriff's judgment.

Lord Mure—I quite agree with the Sheriff-Substitute that this case is a very narrow one, for it appears that the pursuer and defender both had previous knowledge of the field in which the occurrence took place. The pursuer knew that it was situated over mineral workings, and he seems the year before to have grazed his horse upon the defender's fields without injury.

In these circumstances it does seem rather hard that the defender should be called upon to pay for this unfortunate accident, which took place in a field which was almost selected by the defender himself. But the law as laid down by Mr Bell in his Commentaries is quite clear, and must rule all such cases. Having regard to the facts as they appear from the proof that was taken before the Sheriff-Substitute, and especially to the circumstance that the ground in question was situated above an old and worked-out mineral field, it was clearly the duty of anyone letting out such land for the purposes of grazing carefully to notice beforehand that no cavities were caused by the subsidence of the ground. This matter does not appear to have been sufficiently attended to, and hence no doubt the occurrence in question took place. In these circumstances I concur with your Lordship.

Lord Shand—I am also of opinion that the defender has failed to show any satisfactory reason why we should alter the decision arrived at both by the Sheriff-Substitute and the Sheriff. The question is one of fact whether the defender has exercised that reasonable care with reference to this horse which a prudent man would take of his own property.

The case is a very narrow one, and it appears to me that the parties might have come to an amicable settlement of it by each agreeing to pay a half of the loss, but that course does not appear to have commended itself to either party. As we have now therefore to decide the legal rights of parties, I confess I do not think the defender realised the responsibility which he was undertaking when he consented to receive this horse for grazing, nor can I see that he realises it even now. He never seems to have taken any care of the animal, as it appears to have been permitted to wander at large over the whole farm. The defender further maintains that he was ignorant of the existence of this hole; possibly he may not have been familiar with this portion of his farm; but if he did not know about it, others did, and he cannot now avoid the consequences of his ignorance. The hole should undoubtedly have been fenced as a dangerous spot, situated as it was in a field with mineral workings underneath, and subsidence of the ground all round.

The *onus* is in the first place upon the defender to account for the death of the horse, and I do not think that he has satisfactorily discharged that *onus*.

It may no doubt be said that the defender treated his own horses in a similar manner, but in so doing he was clearly incurring a great risk, and one to which he was not entitled to expose his neighbour's horses when he was to receive hire for their grazing.

Lord Deas was absent on Circuit.

The Court affirmed the judgment of the Sheriff.

Counsel for Pursuer — Darling — Kennedy. Agent—D. Lister Shand, W.S.

Counsel for Defender — Trayner — Strachan. Agents—Morton, Neilson, & Smart, W.S.

Thursday, June 28.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

NICOLSON (M'LEOD'S TRUSTEE) *v.* M'LEOD AND OTHERS.

Succession—Testamentary Writing—Words importing a Bequest of Heritage—Titles to Lands Consolidation Act 1868 (31 *and* 32 *Vict. c.* 101), *sec.* 20.

A testatrix by her settlement appointed A "to be my sole executor and trustee." After specifying certain legacies she directed "my trustee to sell the remainder of my property wherever situated." The moveable estate proved insufficient to meet the legacies, and A proceeded to sell the heritable estate to enable him to make payment of them. In an action of declarator and implement brought by him against certain purchasers of it who refused to implement the contracts of sale on the ground that he had no title under the settlement to the heritage—*held*, having regard to the nature of the property of the testatrix, and to the fact that the words "property wherever situated" imported that the testatrix intended to refer to heritage, that the heritage was validly conveyed by the settlement.

This case arose upon the construction of certain words in the settlement of the late Miss Anna M'Leod, residing at 50 Grange Loan, Edinburgh, who died upon the 1st April 1882. By her settlement she appointed David Nicolson to be her "sole executor and trustee." The purposes of the settlement were for payment, first, of the expense of putting up a handsome railing round the grave of Miss M'Leod's father; second, a payment of two annuities—one of £10 and one of £20; and thirdly, she gave a legacy of £20 and divided certain corporeal moveables among her relatives. The last provision of the deed was in these words—"I also direct my trustee to sell the remainder of my property wherever situated, and to divide it equally among all my grandnieces."

Mr Nicolson as trustee made up a title by notarial instrument.

The question between the parties was, Whether by this deed there was a valid conveyance of heritable property to Mr Nicolson, the "sole executor and trustee?"