of the proceeding. In Lord Kinnoull's hands an act of contravention committed with regard to any portion of the estate, however small, would irritate the right to the whole. What effect would a contravention by Lord Dupplin have on the right of Lord Kinnoull? How are family provisions, or claims for meliorations, to be arranged in such a case? These, and many such questions, are more easy to be asked than answered. They are only avoided by assuming that two entailed estates are created, with all the incidents of two separate estates, as much as if they came to the different parties by two unconnected deeds of entail. But this overcomes lesser difficulties by the greatest difficulty of all. For nothing is, generally speaking, more clearly beyond the power of an heir of entail than to split down the entailed estate into two estates held by two co-existent fiars.

It is said that under the Entail Amendment Act it is competent to disentail an estate "in whole or in part." But this is under statutory authority. The question here is, What may be done without such authority? The Entail Statutes convey no right of propulsion, which rests entirely on the anterior law. They refer indeed to propulsion, but it is to that instance of it in which a propulsion is made manifestly of the whole estate, reserving the liferent of the granter, when they provide that the consents necessary to disentail shall be those required in the case of the liferenter—thereby affording a strong implication against disentail by the propellee, as in his own right, being contemplated. No authority for the present proceeding is to be found in the Entail Acts. We are called on to determine the point on the general principles of our entail law. I am of opinion that this partial propulsion derives no support from these.

On this ground I am of opinion that the present petition should be refused.

Agents for Petitioner—Mackenzie & Kermack, W.S.

Wednesday, November 15.

LAW & BRAND *v.* (POOR) EDGAR.

Reparation—Solatium—*Mines Regulation Act*, 18 *and* 19 *Vict. c.* 108. Where the special rules of a colliery, issued and published to the men under authority of the Mines Regulation Act, 18 and 19 Vict. c. 108, for the conduct and management of the colliery and the workmen employed therein, contained provisions intended to secure the safety of the workmen—*Held*, in an action of damages for loss of life through an accident occurring in the pit, that the men were entitled on their part to rely upon the observance of these regulations, and that the coal-masters had been guilty of a culpable neglect or breach of duty in not observing them. *Held* further (*contra* opinion by the Lord President), that all the pursuer required to do was to show that there was a reasonable probability that the accident would not have occurred but for this neglect or breach of duty on the part of the coal-masters; and that there was no *onus* on the pursuer to prove absolutely that the accident was caused by the defenders' neglect of duty, or would have been prevented by their observance of it.

This was an action of damages raised in the Sheriff Court of Lanarkshire at Airdrie by Mrs Mary Fleming or Edgar, widow of Joseph Edgar, a collier, against Messrs Law & Brand, coal-masters, at Drumshangie Colliery, near Airdrie, for damages or *solatium* in consequence of the death of the said Joseph Edgar, her husband, who had been killed while working in the defenders' pit.

The summons set forth that the said Joseph Edgar had been killed "by and through the culpable negligence and gross recklessness and carelessness of the defenders, or of those acting under them, or for whom they are responsible, in consequence of the engine at said pit having been wrongfully started while the deceased was placing his hutch on the cage, or adjusting the same, at the bottom of the shaft of said pit, for being taken up said shaft, and before the same was ready for being raised, or the safety of the deceased provided for, whereby said cage was lifted before the deceased could escape, and he was thereby raised and crushed betwixt the said cage on which he had placed his hutch and the roof or sides of the pit, and was thereby killed; and which death in any case was caused by the culpable carelessness, fault, and negligence of the defenders, or others for whom they are responsible, in not having taken proper measures for the safety of their workmen while engaged in working in said pit, and specially of the said deceased while working there as aforesaid; and from their not having provided proper means of communicating distinct and definite signals from the bottom of the shaft to the surface, and from the surface to the bottom of the shaft, and not having secured or used due caution for the securing of said signals being safely and properly made from the bottom of the shaft to the surface, and from the surface to the bottom of the shaft, especially for the starting of the engine at said pit for raising and lowering men and material; and also from their culpable recklessness and negligence in not having a bottomer or signalman employed in said pit to make the appointed signals necessary for regulating the ascent of men and materials, which they were bound to do for the safety of their workmen in said pit, and although a bottomer or signalman is provided for in the 'Special Rules' for the conduct and guidance of the persons charged with the management, and of the several workmen employed in and about the defenders' said colliery, the duties and requirements of such bottomer or signalman being, and they are defined in said rules," &c.

Against this action the defenders pleaded, *inter alia*—"(2) The pursuer not having averred acts or omissions on the part of the defenders, or those for whom they are responsible, causing the death in question, the defenders fall to be assoilzied with expenses. (3) The pursuer having failed to aver in the record any facts or circumstances sufficient, even if proved, to show that the death in question was caused by any wrongous act or omission of the defenders, or of those for whom they are responsible, or by any defects in the construction of the pit and machinery attached thereto, the defenders fall to be assoilzied with expenses;" and the said pleas were held as repeated *brevitatis causa* as pleas on the merits.

The accident through which Edgar met his death is thus described in the evidence of Bernard Bannan, who was the only eye-witness:—"I wrought in defenders' pit at the time Edgar was killed. There was no bottomer in the pit that I saw. . . . I was at the pit-bottom at the time,

and had been so about two minutes before the accident. When I came to it Edgar was on the cage, lifting his hutch on to it. He had no back to the hutch, and as the fore wheels had gone off the rails, he was lifting the hutch to get them on to the rails. He was in a stooping posture. If the hutch had not gone off the rails he would not have required to have gone on to the cage, as he could have pushed it on before him. The engineman lifted the cage while Edgar was on it, and the hutch came to the one side, and he fell to the other, and he was gripped at the door heads between the cage and the side of the shank. He was drawn up the shaft two or three fathoms in that position, and then fell back to the bottom. The cage went right up the shaft to the top without stopping. Edgar appeared to be dead when I went to him. . . . I never wrought in the pit after that. If there had been guide-plates there, properly put in, the hutch would not have gone off the cage, and the accident would not have occurred. I was about 2½ fathoms from the signal wire when the cage started. I think it would have been safer if there had been a lever to drop the bell.

"*For defenders*—I was between 2 and 3 fathoms from Edgar when I first saw him. I was then standing at the back side of my hutch in a stooping position. While I was there I did not see or hear a signal given either from top or bottom. Edgar remained in my sight all the time until the cage began to rise. That was for one or two minutes. Edgar was in the centre of the cage, and so would be about 4 feet from the signal. After I came in sight, Edgar neither could have signalled nor have come against the signal accidentally without my seeing it. No one else was in view of Edgar that I saw. When I was employed there I saw that there was no bottomer. My brother and I had a place between us, but I generally used to draw. When I saw there was no bottomer, I saw we must do the chapping ourselves, or the hutches would stand. I did the chapping the first day I wrought. I saw a few other drawers doing the same thing. In pits that I have worked in there was always a lever to the bell, with the exception of a small pit at Auchengray belonging to Mr Cowie. The advantage of the lever is that you do not require to reach so far in to get hold of the wire. I have wrought in plenty of pits where there was no bottomer. . . . The general rule is that there should be a bottomer in every pit; but some keep them, and others do not. If there had been a bottomer standing at the signal he could not have prevented the accident after the cage started, as one turn or two of the engine would have taken it to the door heads. I have always seen the signal given after the hutch was properly fastened on the cage. (On his evidence being read over, the witness adds)—that the colliers are made to sign the rules when engaged, and these rules always provide for there being a bottomer, so that they should keep the rules as well as make us keep them."

The import of the rest of the evidence will sufficiently appear from the interlocutor of the Sheriff-Substitute, and from their Lordships' opinions.

Having concluded the proof the Sheriff-Substitute (LOGIE) pronounced the following interlocutor:—

"*Airdrie, 25th October* 1870.—Having heard parties' procurators on the concluded proof and whole cause, finds that the defenders carry on business as coalmasters at Drumshangie, in the parish of New Monkland; finds that the late Joseph Edgar wrought as a collier in defenders' pit at Drumshangie, and was killed while in their service on 23d October 1869; finds that the Special Rules for the conduct and guidance of the persons charged with the management, and of the several workmen employed in and about said colliery, provide (rule 9), that the bottomer shall attend during the working shifts in the colliery, *inter alia*, to see the drawers carefully place the loaded hutches on the cage, and secure them, and give them instructions on that matter, to examine and report to the underground manager on the state of the signal apparatus, and to attend to and answer the signals made by the pitheadman from the pithead; finds that the Special Rules 10, 11, 12, 13, 14, and 15, prescribe what further duties devolve upon the bottomer, &c.; finds that the special rules in question having been approved of by one of Her Majesty's Principal Secretaries of State, in terms of the 5th section of the Act 18 and 19 Vict. c. 108, were in terms of the 6th section of the Act, at the time of the said Joseph Edgar's death, hung up or affixed on a conspicuous part of the principal office or place of business of the colliery, 'for the purpose of making known the General Rules and Special Rules to all persons employed in or about' said colliery; finds that at the time when the said Joseph Edgar met with his death in said colliery no person had ever been employed by the defenders to act as a bottomer in said colliery; finds that there were no guide plates in said colliery at the pit bottom to guide the hutches on to the cage when approaching the bottom; finds that the apparatus for signalling to the engineman was faulty in various respects, there being no lever to the bell,—the lever giving additional power to the party using it, and enabling him to get more easily at it, and the bell on the pithead being so placed that the engineman could not see as well as hear the bell; and as the engineman could not see as well as hear the bell, another small bell was provided on the pithead for the pitheadman to signal to the engineman; finds that on 23d October 1869 the late Joseph Edgar drew a hutch of coals to the pit bottom; that there being no guide plates to assist in leading the hutch on to the cage the fore wheels got off the rails; that Edgar got upon the cage to lift the hutch and place it properly on the cage, and while in the act of doing so the cage was suddenly lifted from the pit bottom, with Edgar on it, who being caught at the door-heads between the cage and the side of the shaft, was thus deprived of life; finds that the only person who was present at the pit bottom at the time was the witness Bernard Bannan, who saw no signal given from the bottom to raise the cage while he was present, and as neither the pitheadman nor the engineman was adduced as a witness, there is no proof as to the cause that induced the engineman to set the machinery in motion. From these findings in fact, finds, in point of law, that the defenders having, in terms of law, established rules for the government of their work, and having had said rules approved of by the Secretary of State, and published these for the information of their workmen, the men accepting employment from them were entitled to rely upon these rules being fairly and fully carried out; finds that it being the duty of the employers to have had a bottomer to perform the duties prescribed in the special rules already referred to, and in particular to give the necessary signals to the engineman,

and the said Joseph Edgar having lost his life in consequence of there being no bottomer, and of the defective arrangements and appliances at the pit bottom, they are liable to the pursuer in damages; and as a solatium for the loss of her husband, finds that £80 sterling is a fair and reasonable sum in name of damages in the circumstances of this case."

The Sheriff (GLASSFORD BELL) adhered on appeal.

The defenders appealed to the Court of Session.

Solicitor-General (A. R. CLARK) and GLOAG, for them, relied mainly upon *Wilson* v. *Merry & Cunningham*, H. of L., May 29, 1868, 5 Scot. Law Rep. 568, and in particular upon Lord Chelmsford's opinion in that case. They referred also to *Skip* v. *Eastern Counties Railway Co.*, Nov. 24, 1853, 23 Law Jour. Ex. Cases, 23; and *Dynen* v. *Leach*, April 18, 1857, 26 Law Jour. Ex. Cases, 220.

MELVILLE for the respondent.

At advising—

LORD ARDMILLAN—This is an appeal from the Sheriff-court of Lanarkshire in an action at the instance of Mrs Edgar, widow of Joseph Edgar, collier, against Messrs Law & Brand, coalmasters. The judgment of the Sheriff-Substitute and of the Sheriff was in favour of the pursuer.

I think that the case has been fairly and properly presented to us, as to some extent a question of fact depending on the direct testimony of witnesses,—to some extent a question of fact depending partly on testimony and partly on reasonable inference or implication,—and to some extent a question of law as applicable to the facts thus ascertained.

The following matters of fact come under the first head, and are proved by the direct testimony of witnesses.

The late Joseph Edgar, whose widow is pursuer of this action, was in the defenders' service as a collier, and he lost his life in the defenders' coal-pit on the 23d October 1869. He was at the time engaged in working in the pitbottom; he was placing or adjusting his hutch at the bottom of the shaft; the cage was lifted, and Edgar was crushed and killed. There are rules and regulations issued and published under authority of the statute 18 and 19 Vict. c. 108, and these rules are for the conduct and guidance of the management of the colliery, and of the workmen employed. One of the leading rules to be observed by the "owner and agent" of the colliery is rule 7th in the first class, or General Rules—"Every working pit or shaft shall be provided with some proper means of communicating distinct and definite signals from the bottom of the shaft to the surface, and from the surface to the bottom of the shaft."

The 8th rule of the Special Rules, which follow these General Rules, bears that "the drawers shall, with proper caution, place their loaded hutches on the cage and secure them there, under the supervision and orders of the bottomer, preparatory to being sent up the pit." Then follow the rules from 9 to 15 inclusive, under the head "Bottomer or Signalman."

These rules are so important, with reference to this case, that I shall read them all.

"9. The bottomer shall attend, during the working shifts in the colliery, to regulate the number of men who shall ascend on the cage at a time—to keep order among the drawers arriving with loaded hutches at the pitbottom—to see the drawers carefully place their loaded hutches on the cage and secure them, and give them instructions on that matter—to make the appointed signals necessary for regulating the ascent of men and materials—to examine and report to the underground manager on the state of the signal apparatus, and of the hutches used in the pit, and of the cage wrought in the shaft; and also on the state of the slides or guide rods in which the cage moves. He shall, along with the fireman, attend to and keep in proper order the cube or rarifying furnace in the pit. The bottomer shall attend to and answer the signals made by the pitheadman from the pithead.

"10. No collier, drawer, or other worker in the pit, shall on any pretext be allowed to make signals while the bottomer is on duty.

"11. The bottomer shall not suffer more than four men at a time to ascend the shaft in any cage; he shall not allow any person to ascend along with a hutch, whether empty or loaded; and he is forbidden to signal the ascent if more than the appointed number shall go on the cage, or if any worker shall attempt to ascend with a hutch.

"12. In the unavoidable temporary absence of the bottomer, the underground manager, roadsman, or some other qualified person, shall make the necessary signals from the pitbottom, and receive and attend to the signals sent from the pithead.

"13. The bottomer, or such person acting in his absence, shall make the following signals, being those appointed in this colliery for guiding the ascent of the cage:—

"He shall strike or ring the signal bell at the pithead *once* for the ascent of the cage, whether loaded with coals or empty.

"He shall strike or ring the signal bell *thrice*, in rapid succession, intimating that men are about to ascend; and after a pause, during which a signal shall be made from the pithead that all is ready, the bottomer shall make the usual ascent signal of *one* stroke of the bell, whereupon the cage shall be raised.

"He shall strike or ring the signal bell *twice* when he desires the engine to be reversed, and the ascending cage returned to the pitbottom, and to remain there.

"14. No deviation from these signals shall be permitted on any account; the signals shall not be made until the cage with its load, whether of men or materials, are securely placed, and everything ready for the ascent.

"15. The bottomer shall not leave his post at the pitbottom until the whole workers of his shift shall have first safely ascended the shaft."

I entertain no doubt that according to the true meaning of these rules it was the duty of the defenders to provide proper means of communicating distinct signals from the bottom of the shaft; that the bottomer or signalman has important functions to discharge both in the supervision of the drawers and colliers, and in the giving and directing of signals; and that his proper post is at the pitbottom and at the foot of the shaft, no collier or drawer or worker being allowed to make signals while the bottomer is on duty. I am also clearly of opinion that the presence of the bottomer at his post is a protection to the workmen, which they are entitled to expect, on which they are entitled to rely and which in this case, it was the defenders' duty to provide.

The defenders appear to have been conscious that this duty rested upon them. In their defences they state that on the day in question a man of the name of "Abercromby had been acting

as bottomer." This man Abercromby was examined as a witness. He says—"I never did the duty of bottomer in that pit. I did not do so on the day that Edgar was killed." He again says—"There was no bottomer employed in said pit." Bernard Bannan, a collier, who was present and saw the accident, also states distinctly that there was no bottomer. Edward Cairnie, John Newall, and Arthur M'Gennes, all concur in stating that there was no bottomer at the time of the accident.

It therefore does not admit of doubt, on the direct testimony of the witnesses, that according to the rules as published and understood in the work there should have been a bottomer, and that in point of fact there was no bottomer at the time of the accident. It is clear to me on this proof that even apart from the Special Rules it was at common law the duty of the employers to provide a bottomer if that was necessary for protection of the workmen. It appears that, as too often happens, the unfortunate accident immediately led, but too late for the sufferer, to an improvement in the management. A bottomer was appointed within two days after the accident, and I have no doubt that the appointment tends to promote the safety of the work.

I do not allude to the question raised about "guide-plates." There is some difference of opinion as to the benefit arising from them, and there is no special duty in regard to them. Therefore I do not rest my opinion on the absence of guide-plates, although the evidence in favour of their use appears to me to preponderate, and that, I observe, is the opinion of the Sheriff.

Assuming, as I now do, that it was the duty of the defenders to provide a bottomer; that the presence and the functions of the bottomer were intended and calculated to protect the safety of the workmen; and that there was no bottomer present at the time of the accident, and no bottomer appointed for that pit by the defenders—I find it impossible to arrive at any other conclusion than that the defenders have been guilty of neglect of duty or breach of duty in that matter.

But it is said that the presence of a bottomer in discharge of his duty at the time of this accident would not, or might not, have prevented the accident. In entering on the consideration of this question I must say that, in my opinion, there is no presumption in favour of the defenders. Those who have failed to fulfil their obligation, and to discharge their duty, and to furnish requisite and reasonable protection to their workmen, can scarcely be allowed to suggest that if they had done their duty, and if the protection had been furnished, still the protection would have proved or might have proved insufficient. We have some direct testimony of opinion on this point from practical workmen, several of whom say that if there had been a bottomer the accident would in all human probability have been prevented. This, I think, is the opinion of Abercromby, and of Bannan, and of Cairnie, and of Newall, and of Patrick Gillooly the elder, and I think the opinion which these practical men give is to some extent supported by the testimony of Mr Benson, a colliery manager for fifteen years, and a witness for the defenders, who admits that the appointment of a bottomer is a safe and proper course. There is, in my opinion, as matter of fair inference from the evidence, a natural, reasonable, and very high probability that the accident would not have occurred if the defenders had done their duty in appointing a properly qualified bottomer. That is quite sufficient. It cannot be necessary for the pursuer to prove as matter of certainty that the accident could not have occurred if a bottomer had been present. The pursuer of such an action as this cannot be bound to exclude the possibility of accident on the supposition that the defenders had done their duty. No human arrangements can certainly ensure safety or exclude the possibility of accident. It is easy to speculate on such possibilities. But if the defenders have failed to perform a plain duty, on the performance of which the workmen were entitled to rely, they cannot escape from liability on the strength of such ingenious speculations.

It has still further been suggested by the defenders, though this also is matter of mere suggestion, that there may perhaps have been fault in some other quarter; it may be in the pitheadman or the engineman. I do not know whether it is possible that that may have been the case or not. It is not proved. It does not appear. It cannot be presumed in favour of the defenders without evidence. If it had been the case the proof thereof was within the power of the defenders. The engineman and the pitheadman were the defenders' servants. They have not been examined. The defenders, who make suggestions in regard to their conduct, have not adduced them as witnesses; they have not explained their absence; and in their absence we cannot presume that they would have given testimony tending to relieve the defenders from the consequences of a proved and undoubted fault.

It is also to be observed that the defenders Messrs Law & Brand adduced as a witness for themselves one of the partners only, Mr Law. That gentleman most candidly and properly states that he took no part in the management of the pit operations—that he sold the coals—that Mr Brand took charge of the pit—that he, Mr Law, took no charge of the pit. It thus appears that the defenders adduced as their witness the partner who knew nothing about the matter. Mr Brand, the partner who knew all about the matter, was not examined. This is the more important when we refer to the evidence of Abercromby in regard to a conversation with the inspector of mines. Abercromby had said to the inspector that they had no bottomer. The inspector turned round to Mr Brand and said—"What, Mr Brand, have you got no bottomer?" Mr Brand said—"This man" (meaning Abercromby) "acted as bottomer and every other thing." The inspector then said—"That will not do; one man could not act both as roadsman and bottomer." It is proved by Abercromby that he did not act as bottomer. Now, it is remarkable that Mr Law only was examined, and that Mr Brand, who had this conversation with the inspector of mines, and who was the partner taking charge of the pit operations, was not examined. If he had any explanations to offer he should have appeared as a witness. The explanation given by the defenders on record was negatived on evidence. We have no other explanation from the defenders. It will not do for the defenders to offer conjectures instead of proof, and to substitute ingenious suggestions of possibilities for the testimony of witnesses whom they might have examined, but whom they did not adduce.

"Taking the view which I have now expressed of the facts of this case, it only remains for me to say in a word that as the duty of appointing a bottomer rested with the defenders themselves,

and as they failed in that duty, and as their failure in duty must be held to have caused this accident, I have no difficulty in concurring with the Sheriffs in finding them liable to the pursuer in damages. The Sheriffs have awarded the sum of £80, and I do not see any sufficient reason for disturbing their judgment on that point.

Lord Deas—I have been made aware of the terms of Lord Ardmillan's opinion, in which I entirely concur, and I think it quite unnecessary to go over again the grounds of judgment so distinctly stated by his Lordship.

Lord Kinloch—I am of opinion that the Sheriff has rightly found the defenders liable in damages.

I conceive that under the special rules applicable in terms of statute to the defenders' colliery the defenders were bound to have a bottomer employed continuously in the pit. I do not think that the necessity of this was dispensed with by any specialty in the circumstances of the colliery. The scanty extent of the business might require fewer workmen, but the safety of these it was as necessary to protect and preserve.

The duty of the bottomer according to the regulations consisted in seeing the hutches properly put in the cage at the bottom of the shaft, and the cage with its hutches, or with the workmen who were to ascend in it to the pitmouth, safely carried up. For this purpose he was to attend to the signals forming the communication with the pitheadman and engineman, and giving them notice when the cage was to be drawn up the shaft, and when it was to be left at the bottom. He was specially in regard to these matters to instruct all the workmen, themselves presumably ignorant or thoughtless. The presence and services of the bottomer were thus indispensable to the safe working of the pit. His absence was proportionally attended with danger to the workmen.

On the occasion in question I think the fair inference is, that had a bottomer been employed (as he was not) the accident would not have occurred by which the husband of the pursuer lost his life. It appears that when his hutch was brought near the cage he had found some difficulty in placing it on the cage, and that he had got on the cage in order to draw it on, itself an act attended with some peril as the event showed. It appears that when so on the cage it began to be drawn upwards by the engineman, and that Edgar having fallen over to the side of the cage, was caught between the cage and the door-head or top of the aperture forming one of the openings to the workings, and crushed to death. Such a result was just that which was intended to be prevented by the instructions and intervention of a bottomer, and I am under a strong conviction that if a bottomer had been there the result would not have occurred. Either the workman would not have been on the cage at all, or the bottomer would have so timed the signals as to make sure that the cage should not have began to move upwards till the workman was off the cage and in safety.

The only difficulty I have found in the case arises from an impression derived from the evidence of Bannan, the only man present with the deceased, that the cage began to move upwards without any signal at all, inferring *prima facie* some neglect or carelessness on the part of the pitheadman or engineman. There thence arises the question, Whether the accident truly occurred for want of a bottomer, and would not have occurred equally even had a bottomer been there? Another form of the question is, Whether the result did not arise by the fault of one or other of those who were collaborateurs with the deceased, and so all claim is excluded against the masters? The point is not unattended with difficulty, and I have given it careful consideration. I have come to the conclusion that nothing has been made out in connection with this point sufficient to affect the masters' liability.

In the first place, I do not think it proved that the cage rose without a previous signal. All that Bannan says is that he did not hear or see a signal. Now, the point is one on which I think the defenders, whose admitted want of a bottomer laid on them the *onus* of establishing freedom from responsibility, were bound to lead clear evidence, at least all the evidence in their power. They were bound to examine the pitheadman and engineman, who best could know whether or not a signal was given before the cage was raised. They not having done so, or given any good reason why they did not do so, I think it must be held not proved that the cage rose without a signal, and so the foundation of the defenders' case on this point is awanting.

But secondly, assuming that the cage did rise without a previous signal, I think it still is fairly to be held that had a bottomer been there the accident would not have occurred. For according to the evidence it was not merely the part of the bottomer to give the signal for raising the cage, but it might in certain circumstances become his duty to give a signal that the cage was not to be stirred till after another signal was given. The mode of doing this was to give two strokes, or, as the witnesses called them, "chaps," of the bell, which indicated that the cage was not to be stirred till another single stroke was given. For aught I can see to the contrary, the bottomer if there would have seen it to be his duty to give the two strokes of the bell, which would have operated as a prohibition to the engineman to raise the cage. If he had done so there is no reason to believe that the cage would have been raised till another signal, which was the signal of safety, had been given. The fact therefore of the cage rising without a signal (if such was indeed the fact) by no means interferes with the conclusion that if the bottomer had been there the accident would not have happened.

On these two grounds—1*st*, that the defender ought to have had a bottomer in the pit; and 2*dly*, that it is matter of fair inference that if a bottomer had been there the pursuer's husband would not have met his death, I think the defenders were properly found liable in damages. The Sheriff also proceeds on some other grounds, such as the absence of guide-plates, and the imperfect state of the signal wires. I do not think these made out. I proceed entirely on the want of a bottomer. But I consider this ground to be by itself sufficient.

Lord President—I concur with all your Lordships in holding that there was a clear breach of duty on the part of the defenders in not having a bottomer in their pit. But this is not all that the pursuer requires to make out in order to establish her case. She must prove not only that there was no bottomer, but that the absence of one was the cause of her husband's death. With regard to this second question I have felt very considerable difficulty, and I still entertain some doubt whether

the pursuer has established her case—in other words, whether it is proved that the accident was caused by the absence or want of a bottomer, or rather whether his presence could have prevented the accident. The immediate cause of Edgar's death was the sudden raising of the cage while he was up on it, engaged in lifting on to it his hutch. But what the cause of the sudden raising of the cage was is certainly not established in any satisfactory way. And in the absence of all explanation on this point, it is very difficult to say that the raising of the cage was caused in such a way that it would not have happened, and the accident not have occurred, if there had been a bottomer.

But while I have given expression to these doubts which occurred to my mind, they are not so strong as to lead me to differ from the unanimous opinion of your Lordships. On the whole matter, therefore, I am disposed to concur.

Appeal refused with expenses.

Agents for the Appellants—Burn & Gloag, W.S.
Agent for the Respondent—J. C. Junner, W.S.

Wednesday, November 15.

SECOND DIVISION.

DEMPSTER *v.* M'DONALD.

Possessory Judgment—Tenant—Common Landlord—Servitude—Possession. Two tenants, under leases of 999 years' duration, flowing from the same proprietor, occupied houses adjoining each other. The only access to the house of the second was through the property and past the door of the first, and this access had been enjoyed by the second for more than seven years. The first erected a barricade across this road. *Held*, in a petition for removal and interdict, that the enjoyment of this right of access for seven years entitled the petitioner to a possessory judgment, as craved.

The respondent and appellant in this appeal were tenants under long leases of 999 years, flowing from the same author, of two pieces of ground which joined each other. Upon these plots of ground two houses had been built, some distance from the turnpike road, and the only access to the house of the respondent was by a path which passed in front of the house of the appellant. The action originated in a petition to the Sheriff of Lanark to have the appellant ordained to take down and remove a barricade which had been erected by him across this road. The Sheriff-Substitute (DYCE) found that the respondent had possessed the subjects in question with access thereto by means of the path for more than seven years, and consequently that she was entitled to a possessory judgment of the nature craved.

He remarked in his Note:—"The respondent's contention is, that the petitioner is not entitled to a possessory judgment, in respect that her title is a bounding one, and that as the present action involves a question of heritable right, it is incompetent, and should be dismissed; and in support of his pleas he refers to the case of *Cruikshank* v. *Irving*, Dec. 23, 1854, 27 Jurist, 119, in which, however, it was held that possession could not be proved, because the title was so obscure as to require a declarator.

"He, moreover, relies upon the case of *Saunders* (*Mill's Trs.*) v. *Reid*, Feb. 26, 1830, 8 Sh. 605; and that of *York* v. *Ewing*, Dec. 19, 1857, 30 Jurist, 190.

"It is, however, scarcely necessary to remark, that although in the former case the action was dismissed in respect of the bounding nature of the charter, yet in the more recent and well-known case of *Liston* v. *Galloway*, Dec. 3, 1835, 14 Sh. 97, Lord President Hope especially refers to that of *Saunders* as requiring reconsideration, while, in the latter case, the action, which was not a possessory one, was dismissed, in respect that the summons was based upon a right of property in the subject claimed, although the title produced was strictly a bounding title. The petitioner, on the other hand, pleads that having by herself and her predecessors been in the possession of the subjects libelled, with the access thereto by the entrance in question, for more than seven years, she is entitled to be maintained in that possession until legally dispossessed, and refers to the fore-mentioned case of *Liston* v. *Galloway*, as well as to *Richmond* v. *Inglis*, Feb, 23, 1842, 4 B. M. D. 769, and *Wilson* v. *Henderson*, Feb. 28, 1855, 27 Jurist, 228."

On appeal the Sheriff confirmed this interlocutor, observing in his Note:—"It was authoritatively settled by the case of *Liston*, Dec. 3, 1835, that a party may be entitled to the benefit of a possessory judgment regarding a right of ish and entry to a plot of ground, though he held such ground under a bounding charter, making no reference to such right, and containing no clause of parts and pertinents. In his note the Lord Ordinary remarked 'that a bounding charter, though it may be conclusive against a claim of property beyond its limits, is not necessarily exclusive of any of the known rights of servitude over adjacent properties, such as that of ish and entry, and therefore does, if supported by the requisite proof of possession, afford sufficient title for a possessory judgment.' Lord Balgray, who, with the other Judges, approved of the view taken by the Lord Ordinary, said—'There is no rule of our law more salutary in itself, or better established, than that which declares that a party who has enjoyed peaceable possession of a right for seven years is entitled to be protected in it against summary inversion of the state of possession.' This decision overruled and set aside what had been held in the earlier case of *Saunders*, Feb. 26, 1830. In the recent case of *Calder*, March 2, 1870, 42 Jurist, p. 319, which was the converse of the present, the Lord Justice-Clerk said—'When a party attempts to obtain possession by a summary process, it is a sufficient answer to him that the respondent has possessed the subject for seven years.' No doubt, as Lord Benholme remarked in the same case, 'it is true that seven years' possession will not always give a possessory title, for the possession may have been precarious or violent, or there may have been some other vice in it.' But here no such element occurs. The defender's statement, that the pursuer's late husband paid 5s. per annum for the privilege of passage, is not corroborated, and the proof instructs a free use of the road for more than seven years before any interruption was attempted, so that the subsequent interruptions, which were not acquiesced in, were unavailing. See *Harvie*, July 10, 1827. The defender's proper remedy, if he chooses to insist in it, is by declarator, but he cannot, at his own hand, take away from the pursuer, *via facti*, the right of ish and entry which she has exercised for the above period, the more especially as it seems to be the only available access to her property."