the case had best be tried before the Lord Ordinary, and looking at the case of *Blair* v. *Macfie*, and seeing that as in that case there has been public discussion, I am not disposed to differ from that view.

LORD YOUNG, LORD CRAIGHILL, and LORD RUTHERFURD CLARK concurred, and the case was sent back to the Lord Ordinary for proof.

Counsel for Pursuers — W. C. Smith — Graham Murray. Agent — Andrew Newlands, S.S.C.

Counsel for Defender—Asher, Q.C.—Cosens. Agents—Tait & Crichton, W.S.

Saturday, October 23.

SECOND DIVISION.

[Sheriff of the Lothians and Peebles.

HOGG *v.* J. WALDIE & SONS.

Reparation—Relevancy—Coal Mines Regulation Act 1872 (35 *and* 36 *Vict. c.* 76), *sec.* 51, *sub-sec.* 4.

The representatives of a miner who had been killed by a fall of stone in a coal-pit brought an action against the lessees of the pit, alleging that the accident occurred through his having, in accordance with a custom of miners, gone into a disused working to ascertain if the coal was better there, which working was not fenced off as required by the Coal Mines Regulation Act 1872 to prevent persons "inadvertently" entering such a place. *Held* that the action was relevant.

This was an action by the widow and children of William Hogg, a miner, who was killed on 30th December 1885 by being crushed by a fall of earth and stones in a pit at Tranent, of which the defenders J. Waldie & Sons were lessees.

The pursuers averred that the pit was being worked on the "long wall" system, with passages or main roads, intersected by side roads in the workings; that the deceased was working in one of these; that a face had been prepared for them by being "brushed" for a certain length; that the working, however, proved so arduous and unremunerative that William Hogg went further along the seam to see if the face improved in quality; that his acting as aforesaid was in conformity with a common and recognised practice in coal mines, and in particular in the defenders' mine, and further, was in consequence of what the oversman had told him and his squad; and that a few minutes afterwards he was heard to utter a cry, and when his companions found him he was lying crushed to death at an unused working face some little way further on, a portion of the face having fallen on him. The pursuers further averred that the coal at the place in question had for several years been abandoned as unworkable to profit, but the entrance to it was not fenced, nor had a fence been erected to bar the entrance to it from the deceased's working-place close by, and that the place had not been inspected for some time. They averred that the deceased lost his life through the fault of the defenders, as they had not the opening to the unused working face at which the accident happened properly fenced in terms of the Coal Mines Regulation Act.

The Coal Mines Regulation Act 1872, sec. 51, sub-sec. (4), enacts "that all entrances to any place not in actual course of working and extension, shall be properly fenced across the whole width of such entrance, so as to prevent persons inadvertently entering the same."

The defenders stated that the deceased ought not to have left the squad, and any purpose for which he did so was not in any way connected with their work. They explained that the portion of the mine where Hogg was killed was the air course thereof, which was a most important statutory requisite. They averred that the deceased had lost his life through his own recklessness and want of precaution.

The pursuers pleaded—"(1) The death of the said William Hogg having been caused by the fault of the defenders, or person or persons for whom they are responsible, they are liable in reparation and damages."

The defenders pleaded—"(2) The action is irrelevant. (4) The said William Hogg having met his death through no fault of the defenders, or those for whom they were responsible, they are entitled to absolvitor."

On the 23d of September 1886 the Sheriff-Substitute (SHIRREFF) found that the pursuers had not averred facts relevant to infer the claim of damages sued for, and assoilzied the defenders from the conclusions of the prayer of the petition.

"*Note.*—The averments of the pursuers on which this cause depends are in statements 3 and 4 of the pursuers' condescendence. They are to the effect that the pursuer's husband and father William Hogg, along with his squad, were working in the defenders' pit at a portion of the wall face where the seam, being only 2 feet 3 inches thick, the work was not remunerative. The oversman promised to have a working place 'brushed' for the squad farther along the wall face where the working had been disused for some time, and where the coal improved. Accordingly a working place was brushed for the deceased and his squad. On going to their work at this new working place on 30th December 1885 the deceased, on his own suggestion, and with the concurrence of his father and brother, went along the passage to see whether the seam improved, as the oversman said it did. That the deceased met his death when going about the mine in search of a place where the seam may be thick will certainly not found an action against the defenders. Going about the mine was no business of his. The addition made on revisal, to the effect that the deceased went to the place where he met his death for the further purpose of having the working-place of his squad transferred to it if the seam improved, and that was in conformity with a common and recognised practice in coal mines, and in particular in the defenders' mine, and further, was in consequence of what the oversman had told deceased and his squad—the Sheriff-Substitute does not think that the addition much improves the pursuer's case. If the practice is for miners to go about a pit looking for the best working-place, particularly in a pit where working has for some time been discontinued, the miners must make these investi-

gations at their own risk. It is not averred that the oversman desired the deceased to go further along the pit than the place averred to have been brushed for his squad. Then the averment that the deceased met his death by an accident in a disused working, which under the Mines Regulation Act the defenders should have fenced off, is contradictory of the other averments of the pursuers. It was only if that portion of the mine was likely to be wrought that the pursuers have any pretence that the deceased had any business to be there, and if so the pursuers were not bound to fence it off.

"Considering the whole averments of the pursuers the Sheriff-Substitute has come to the opinion that there are no facts averred relevant to infer a claim of damages against the defenders."

The pursuers appealed to Court of Session, and argued—There was a relevant averment of fault against the defenders in not having the opening to this unused working face fenced in terms of the Act of Parliament. Hogg was entitled to see if there was a place more fitted for his work than where he had been, and finding this opening unfenced he was entitled to assume that it was safe for him to enter to see if it was good for his work. He had gone into this dangerous place "inadvertently." The word "inadvertently" meant innocently.

Argued for the defenders—The pursuer's husband and the squad with which he worked had been given a particular place to work at, and he had no right to leave that place and wander about the mine looking for another face to work at. He ought to have inquired as to the safety of the place before he entered it. As he must have gone knowingly into this opening, he could not be said to have gone in "inadvertently," and therefore the Coal Mines Regulation Act did not apply to this case.

At advising—

Lord Justice-Clerk—I do not think that the Sheriff-Substitute has taken the right view of this case in dismissing it on the ground of want of relevancy. It may turn out that the Coal Mines Regulation Act does not apply to the circumstances of this case, but the pursuer makes a relevant averment in support of his contention that it does apply. I think that on the face of the summons there is a relevant statement of fault on the part of the defenders. It is said that the Act only applies to cases of "inadvertence," but the statement in this record is of an accident happening through inadvertence—that is, if this place had been fenced as provided for in the statute, then this man Hogg would not have gone into it, because he would have seen it to be dangerous. I do not see how the owners of the mine can protect themselves better than by complying with the regulations of the statute. I think the action is relevant.

Lord Young concurred.

Lord Craighill—I am of the same opinion. The interpretation of the statute which the defenders seek to put upon it here would exclude miners from the protection which it was intended to give them. The place where the accident happened was a disused working—that is, it was not in "actual course of working,"—and it was not fenced as provided for in the Act. I concur in thinking with your Lordship that the action is relevant.

Lord Rutherfurd Clark—I concur.

The Court sustained the appeal, recalled the interlocutor of the Sheriff-Substitute appealed against, and on the pursuers' motion ordered issues to be lodged for the trial of the cause.

The following issue was afterwards adjusted, and the case remitted to Lord Fraser for trial:—"Whether, on or about the 30th day of December 1885, and within the Kingslaw Mine, No. 1, near Tranent, leased by the defenders, the deceased William Hogg, while in their employment, lost his life through the fault of the defenders, to the loss, injury, and damage of the pursuers? Damages claimed—1. Mrs Margaret Porteous or Hogg, the widow, £500; 2. Margaret Hogg, a child, £250; William John Hogg, a child, £250."

Counsel for Pursuers—Rhind—Gunn. Agent—Charles B. Hogg, L.A.

Counsel for Defenders—Strachan. Agent—T. F. Weir, S.S.C.

Wednesday, October 27.

SECOND DIVISION.

[Sheriff of Lanarkshire.

M'INALLY *v.* KING AND OTHERS.

Reparation—Master and Servant—Fault—Contributory Negligence.

Labourers were engaged in undermining a bank of clay in a quarry when the clay slipped down and killed one of them. The Court *held* on a proof that it was the duty of the employer, according to the practice of the work, to have a watchman to warn the workmen of signs of a fall; that none had been set, and in consequence the accident had happened; that the deceased was not guilty of negligence contributing to it in having trusted that a watch would be set, and worked on without examining for himself as to the risk of a fall, and *therefore* that the employers were responsible for his death.

On the 26th November 1885 certain labourers employed at a freestone quarry, Langloan, Coatbridge, were employed in stripping the soil off the face of a portion of the said quarry, which was of a soft clayey nature, to enable them to work the freestone. The operation was not finished that day, and on the next day, the 27th, the men began to the work again by the order of the gaffer or foreman. The "fall" which they were "holing" or undermining was about ten feet high, and while they were so engaged the earth above gave way and fell upon one of them called John M'Inally, and killed him.

His father John M'Inally raised an action in the Sheriff Court of Lanarkshire, against the owners and lessees of the quarry, Archibald King, John Scott, and Thomas Gilchrist, trustees of the late James King, Coatbridge. He averred that the accident was caused by the fault of the