had obtained advice from his law-agent, after he had become alarmed by certain rumours as to his debtor's solvency. But he knew that in the meantime the bankrupt was still the apparent owner of the shares transferred, and was drawing dividends in that capacity. It is argued, therefore, that the purpose as well as the effect of the transaction was to leave the debtor in the ostensible ownership of the shares, and at the same time to give the creditor the means of completing a security as soon as it should appear that the debtor was *vergens ad inopiam*. But there is nothing necessarily illegal in a transaction by which the lender may hold shares belonging to the borrower in security without becoming ostensibly the owner of such shares. If this were done with intent to defraud, it would be a different matter. But no such intent is imputed to the defender. It is not a perfect security; and if it were completed, or required to be completed, by an act of the bankrupt, it might be struck at by the statute. But in the present case the bankrupt did nothing, and could do nothing, to give a further security to the defender beyond what he had obtained when the transaction was settled. It is proved that the transfers were executed of the dates they respectively bear, none of these being within the period of constructive bankruptcy; that they were delivered to the defender of the same dates, along with the relative certificates, and in each case in return for an advance which on that day he made to the bankrupt. There remained nothing further for the bankrupt to do in order to complete the security. It is true that the transferee's right was not completed, for all purposes and against all the world, until he had obtained registration of the transfers. But as against the bankrupt and anyone in his right it was completed and made effectual by delivery of the transfers and certificates. They were registered without the aid or interposition of the bankrupt, and he had no right or title to oppose the registration at any time when the transferee might think fit to apply for it. It is the debtor, and not the creditor, whose hands are tied by the statute; and it is impossible to hold that the act of the creditor in presenting his transfer for registration is the voluntary deed of the debtor within the meaning of the statute.

"But it is said that under the 6th section of the Bankruptcy Act 1856 the date of the registration is to be taken as the date of the security, and therefore that the security must be held to have been given on the 21st of January, after the debtor had stopped payment, when of course it would be quite ineffectual. There can be no question that registration was a proceeding necessary to make the right created by the transfer completely effectual. But the question raised under this provision of the Bankruptcy Act is precisely the same as that which arose, and has long since been settled, under the corresponding provision of the Act 1696, c. 5, which declares that dispositions and other heritable rights on which infeftment may follow shall be reckoned to be of the date of the sasine which may follow upon them. This enactment was at one time the subject of conflicting decisions. But Mr Bell, after citing the earlier cases, states it to be now settled law that 'no objection can be taken to a heritable security granted at the date of the advance, though sasine should not be taken till within sixty days before bankruptcy;' and the law so laid down was approved in the case of *Inglis* v. *Mansfield*. Mr Bell goes on to observe that in the analogous case of moveable property the same sort of difficulty occurred, and he solves it in the same way. Thus he points out that 'if money be borrowed upon the transfer of a ship, the vendition is not complete without making entry in terms of the statute; but the delay of this act of completion will not alter the lender's condition nor endanger his security upon the statute as granted for a prior debt.' The lender who has advanced money upon a transfer of shares, and has delayed to have his transfer registered, appears to me to be in precisely the same position.

"There is no material distinction between the case I have just considered against Mr Young and the other action, *Guild* v. *Hannan*, which has been brought upon similar grounds against Messrs Monteith & Company. It appears that in that case the bankrupt had specially requested his creditors not to register the shares; and it does not seem doubtful that they purposely abstained from doing so. I do not think it material to inquire whether this was merely to oblige the bankrupt or whether it was the desire of both parties to prevent the transaction becoming known to the banks where the defenders' acceptances were discounted. The material point is, that from the moment the transfers were delivered it was in the power of the creditor, uncontrolled by the debtor, to present them for registration. They were asked not to do so, but they made no agreement on the subject. No aid, therefore, was required from the bankrupt, and nothing was, in fact, done by him to complete the security after he had stopped payment, or during the currency of the sixty days. The result is that in both cases the defenders must be assoilzied."

The pursuer reclaimed, but afterwards acquiesced in the Lord Ordinary's judgment, and the cases were taken out of Court.

Counsel for Pursuer — Ure. Agents — Maconochie & Hare, W.S.

Counsel for Defenders—Jameson. Agents—Millar, Robson, & Innes, S.S.C.

Saturday, March 7.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MURDOCH *v.* MACKINNON (GAUCHALLAND COAL COMPANY'S TRUSTEE).

Reparation — Master and Servant — Mine — Bottomer—System of Signals—Reasonable Precautions for Safety of Servant.

Two miners were employed in loading a hutch of coals from a seam of coal on to a cage which was raised and lowered up and down a "blind" shaft by means of a rope working over a pulley in charge of a brakesman, He mistaking as a signal what was merely an exclamation by one of the miners to the

other, removed the cage at the moment when one of them was pushing a hutch forward. The result was that the miner fell to the bottom of the shaft and was killed. In an action by his widow, *held*, on a consideration of the proof, that the presence of a bottomer at the opening leading to the shaft, and a proper system of signals, were ordinary and reasonable precautions for the safety of miners, which the employers were bound to have provided, and for omitting which they were liable in damages to the pursuer.

This was an action of damages raised by the widow of Alexander Murdoch, a miner, who was killed while in the employment of the Gauchall and Coal Company, in their pit near Galston. The action was raised against the trustee under a trust for behoof of the creditors of the company and James and Adam Wood, the partners of it. The circumstances of the case were as follows:—In No. 2 Gauchalland Pit, where the deceased was working, there was a "blind" shaft from the "major" down to the "main" coal, 20 fathoms deep [*i.e.*, one not passing up to the surface]. About four fathoms below the "major" coal there was another seam called the "stone" coal. At the top of the "blind" shaft there was a drum or pulley from which two cages were worked by means of a rope working over the drum, one ascending while the other was descending. The cages were used in order to receive coal from the different seams in the "blind" shaft, and to lower them to the main coal at the bottom of that shaft, to be transmitted by the main road in the main coal to the pit-head by the main shaft. The raising and lowering of the cages was regulated by a brakesman, whose duty it was to work a brake in connection with the drum. On 24th July 1883 the deceased was working with a man called Kirkland in the seam of stone coal. It was his duty to load hutches and push them on to the cage when it was lowered to him by the brakesman. He pushed his hutch towards the cage, but it stopped, and Kirkland went round to shove it back so that Murdoch might give it more impetus. He shoved the hutch back and said to Murdoch "there," and Murdoch thereupon took the hutch back a few feet and called to Kirkland to stand clear. The brakesman having heard the exclamation "there," understood this to be a signal to him to remove the cage, and he raised his brake and removed it. Murdoch meantime was pushing the hutch towards the cage, and coming on through the empty space fell down with his hutch to the bottom of the shaft and was killed instantaneously.

The grounds of action which bear on the decision in the case were stated as follows:—'(Cond. 5) The defender was bound by law and the general practice in mining, in order to secure the safe and proper working of the pit, to provide at every working opening leading into a shaft a bottomer for the purpose of putting the hutches off and on, whose duty is to receive the hutches, give the necessary signals to the brakesman, and generally to take charge of the communication between the miners in the workings at the part of the pit where he is stationed, the brakesman at the top of the shaft, and all necessary connections with the other seams. No such man was stationed at the working opening leading from the stone coal where the pursuer's said husband was working, to the said blind shaft." "(Cond. 6) The defender was bound by law, and the general practice in mining, to provide proper signals to show when the bucket or cage in said blind shaft was to be put into motion or stopped. There was no such signal, and consequently the brakesman was unable to judge with precision when to put the bucket or cage in motion, or stop the same. The only signals which the men could avail themselves of in communicating with the brakesman were 'ca' awa'' or 'doon.'"

The defender denied that it was either usual or necessary to have a bottomer, there being only about ten men working at the place at the time of the accident, or that it was the general practice in mining to provide means of signalling in the blind shaft in question, it not being fifty yards in depth (Coal Mines Regulation Act 1872 (35 and 36 Vict. c. 76), sec. 51, sub-sec. 19).

He also pleaded—"(3) The accident in question having been materially contributed to by the carelessness of the deceased Alexander Murdoch, the defender is entitled to be assoilzied with expenses. (4) The accident in question having been caused by the carelessness of a fellow-workman of the deceased who had no duty of superintendence or authority over the deceased, the defender is entitled to be assoilzied with expenses."

The Sheriff-Substitute (GUTHRIE) pronounced this interlocutor—"Finds that it is not proved that the death of the said Alexander Murdoch was caused by any fault or omission of the defender for which he is answerable either at common law or under the Employers Liability Act: Therefore assoilzies the defender and decerns.

"*Note.*—This unfortunate accident happened from a mistake made in signalling to a brakesman employed in working the cages conveying coal by a blind shaft in one of the defender's coal mines. The pursuer's chief contention is, that it would not have happened if a bottomer had been employed at the entrance of the coal seam where the deceased was loading his hutch into the cage. I am unable to see how this precaution, which is in some cases a proper one, would have guaranteed the men against accidents. It would not have made such an accident as happened impossible, although it might have had the result of making the bottomer, or some other, the victim instead of the pursuer's husband. The bottomer might have made a wrong signal, or the brakesman might have mistaken his signal, just as the mistake occurred on the occasion in question. But this view does not suffice to discharge the defender's liability; for if they be in fault in not employing a bottomer, it may reasonably be argued that that fault is to be deemed the cause of the accident. Upon the evidence, however, it is impossible, in my opinion, to say with any confidence that the employment of a bottomer would have been conducive to greater safety, or that it was the duty of the defender to have one. If the hutches had been brought to the bottom by boys employed as drawers, or if there had been a large number of men, it would undoubtedly have been proper and necessary to have a bottomer; but in the latter case it is not clear from the evidence that the employment of a

bottomer would have been resorted to for the sake of greater safety. I think that a bottomer is employed, where men draw their own hutches, rather for the sake of increasing the output than of increasing the safety of the miners.

"It is unnecessary to go into any of the numerous other faults alleged in the condescendence. There is no sufficient evidence that any usual precaution was neglected or that any part of the machinery or plant was out of order. The accident happened simply through an unhappy mistake made by the witness Kirkland, and it is in my opinion impossible to find any law or reason for holding the employers bound to pay for this."

On appeal the Sheriff (CLARK) adhered.

The pursuer appealed, and argued—There ought to have been a bottomer at the place. Had there been such the accident would not have happened. It was a proper and necessary precaution, as was shown by the proof, to have a bottomer at such a place, and for the absence of such a precaution the employer was responsible. Again, the want of a proper system of signalling by way of a bell also conduced to the accident. For such a defect in his system of work the employer was liable. It was proved that a bell would have been desirable, because such a signal could not have been mistaken, whereas the accident showed that a mere exclamation of one miner to another might be taken for a signal.

Authority—*Edgar* v. *Law & Brand*, 10 Macph. 236.

Argued for defender—No fault was proved. (1) The system of signalling by bell was adapted for the main shaft, and was provided for such by the Mines Regulations Acts. But this was a short blind shaft, and the men were so near the brakesman that he could hear them call, and that was a perfectly good signal. (2) There was no need of a bottomer. His duties were to keep order when a number of drawers were coming to the shaft, but he was not needed where only a few were at work. Even if there ought to have been one, his presence then would not have made any difference. The accident arose from a mistake which he could not have prevented. (3) In any view, the deceased had accepted employment where there was neither bell nor bottomer, and worked in full knowledge of that state of working. That barred this action.

Authorities (on last point) — *Crichton* v. *Keir*, February 14, 1863, 1 Macph. 407; *M'Gee* v. *Eglinton Iron Company*, June 9, 1883, 10 R. 955; *Wilson* v. *Wishaw Coal Company*, June 21, 1883, 10 R. 1021; *Woodley* v. *Metropolitan District Railway Company*, February 14, 1877, L.R., 2 Ex. Div. 384.

At advising—

LORD YOUNG—This is an action of damages for an accident which occurred in a coal-pit, whereby a miner met his death, the pursuer being his widow, and the only grounds of action requiring our attention are those set forth in the 5th and 6th articles of the condescendence. One is that there was no bottomer at the place, it being usual and necessary that there should be one in order to provide for the reasonable safety of the workmen; the other is that there was not a proper system of signals, the engineman being left to act on orders given to him by word of mouth by the men working the hutches, they being near enough to him to make him hear them. The accident occurred in consequence of the engineman mistaking for a signal what was not intended as one, but as a mere exclamation by one miner to the other, the exclamation being "there," and meaning that the cage was in position to run the hutch on to it. The signal being mistaken, the hutch was pushed towards the cage, but before the shaft was reached the cage was removed by the engineman, and the hutch fell down the shaft, with the result that the man pushing it was killed instantaneously. It is unnecessary to examine the other grounds of action. The Sheriff-Substitute has explained his views on the case satisfactorily and briefly in the note to his interlocutor, and I think his grounds of judgment are contained in the following passages:— "The pursuer's chief contention is that it would not have happened if a bottomer had been employed at the entrance of the coal seam where the deceased was loading his hutch into the cage. I am unable to see how this precaution, which is in some cases a proper one, would have guaranteed the men against accidents. It would not have made such an accident as happened impossible, although it might have had the result of making the bottomer or some other the victim instead of the pursuer's husband. The bottomer might have made a wrong signal, or the brakesman might have mistaken his signal just as the mistake occurred on the occasion in question."

I have considered the evidence very carefully, and have attended particularly to the opinion of the Government Inspector of Mines, who says—(and I still confine myself to the only ground of action which I have noticed)—"It is usual to have a bottomer where a seam opens on to a shaft like this. I recommended a bottomer to be placed there. It was because there were so few men there that there had not been one before. I was told that there were seven men working. If I were told that there were ten men working I would say that I believe a bottomer is required in such a case. If there was only one man there would not be much need of a bottomer to look after the hutches, and if he was as competent as a bottomer there could not be any difference." On the question of signals he says—(Q) Do you think signalling by bell preferable to the voice?—(A) I like the bell signals. "I think whenever you have a number of men there ought to be a bottomer. I do not think I could name a number. A bottomer is necessary to maintain order about a pit where drawers are coming in. (Q) Supposing, as in the case in question, you had two miners of full age and experience helping each other in putting a hutch on a cage, do you think that the presence of a bottomer would add to the safety? —(A) A bottomer may be of use in that way, but generally speaking he is there to maintain order, and he comes to be quite familiar with the place. I think he is necessary." And Robert Strathern, a mining engineer in Glasgow, whose opinion appears entitled to weight, says—"I consider it necessary for the safe and proper working of that seam of stone coal to have a bottomer placed there. I consider it necessary to have a bottomer at all mid-seams, no matter where situated, where

a cage is liable to pass and re-pass it. The duties of a bottomer are to push off and on the hutches, and keep order at the bottom and make signals to the brakesman. I consider that there ought to have been, as well, a bell signal for the bottomer or miner to communicate with the brakesman in the major coal." And the Government Inspector explains—"We have frequently accidents from the engineman mistaking the signals. A bottomer would generally go upon the same signal."

Now, there was no bottomer here, and I think the weight of the evidence is that it would at all events have greatly conduced to the safety of the miners if there had been one. The signal was mistaken, or rather that was mistaken, for a signal which was not intended as a signal at all. I think the probability is it would not have occurred had there been a bottomer who would always give the same signal, and thus a mistake would almost be impossible. A bell signal would not be so liable to be mistaken as the human voice. I am of opinion, therefore, that a proper and altogether reasonable precaution for the safety of the men was awanting and that the master is responsible, and I cannot accede to the view of the Sheriff-Substitute when he says he is unable to see how the precaution of having a bottomer would guarantee the men against the accident. It would not have made the accident impossible. The question is not one of guaranteeing the men against accident or rendering such impossible. I did not know that any precautions could be specified which would have that effect, but we always proceed on the view that if ordinary and reasonable precautions, which would greatly conduce to the safety of the miners and would have rendered an accident much less likely, have been omitted, then the master who is responsible for the omission shall be held liable for the accident occurring in consequence of such omission, or shall be liable where the observance of that precaution might reasonably have been expected, and would probably have prevented the accident. I am therefore of opinion that the Sheriff-Substitute is in error here. I ought to notice that I desire to be understood as expressing no opinion that this was a place where, under the Mines Regulation Act, there must imperatively be a bottomer. I proceed on the view which I understand is the view of the Government Inspector and the mining engineer, that the presence of a bottomer and a safer working of signals was reasonably necessary for the safety of the men engaged. I think, then, that the Sheriff's judgment should be altered, and that we must find that the pursuer's husband met his death in consequence of the fault of the defenders, who are in consequence liable in damages to her.

Lords Craighill and Rutherfurd Clark concurred.

The Lord Justice-Clerk was absent.

The Court pronounced this interlocutor:—

"Find in fact that the deceased Alexander Murdoch was killed at the time and place and in the circumstances averred by the pursuer on record, through the fault of the defenders, and that the pursuer is the widow of the deceased: Find in law that the defender is liable in damages to the pursuer: Therefore recal the interlocutors of the Sheriff and of the Sheriff-Substitute appealed against: Assess the damages at One hundred and fifty pounds sterling; ordain the defenders to make payment of that sum to the pursuer, with interest thereon at the rate of five pounds per centum per annum from the date of this decree till paid: Find the pursuer entitled to expenses," &c.

Counsel for Appellant—J. A. Reid—Orr. Agent—W. &. F. C. MacIvor, S.S.C.

Counsel for Respondent—Sol.-Gen. Asher, Q.C.—M'Kechnie. Agent—Thomas Carmichael, S.S.C.

Saturday, March 7.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

BERTRAM *v.* PACE.

Reparation—Process—Issue—Innuendo—Counter Issue.

A gamekeeper brought an action of damages for slander on the ground that the defender had said that he (defender) had repeatedly sold game for pursuer, and had paid him the proceeds, meaning thereby that the pursuer had taken game off his master's land and sold it and appropriated the proceeds, and thus been guilty of dishonesty. The defender proposed to take a counter issue whether the pursuer had left game with him for sale, and he had sold it and transmitted the money to pursuer. The Court *disallowed* this issue on the ground that it omitted all suggestion of dishonesty.

James Bertram, gamekeeper and forester to Sir Thomas Dick Lauder at Fountainhall, Haddington, raised the present action, concluding for £500 in name of damages for slander against Robert Pace, farmer at Ormiston Mains in the county of Haddington. The alleged slander was said to have been uttered in the course of a proof which was being led in another action between the same parties in the Sheriff Court-room, County Buildings, Haddington on 30th June 1884. The pursuer alleged that during the temporary absence of the Sheriff from the Court-room the defender had stated to him personally, "and in the presence and hearing of a large audience then assembled in Court, that he the defender had repeatedly sold or disposed of game for and on behalf of pursuer, and paid him the proceeds thereof. On the same day, and within the said County Buildings, the defender also repeated the said accusation to Mr Andrew Wood, solicitor, Haddington, and at same time, and in the lobby of the said County Buildings, while certain of the parties were temporarily absent from Court, the defender stated to the pursuer's agent Mr Andrew Gemmell, solicitor, Haddington, in presence of the said Andrew Wood, that he (Mr Gemmell) did not surely know what kind of man he was acting for,