

the deed of 1829, which gave the fee of the estate of Newton to the children, subject merely to the father's power to regulate the shares and proportions thereof to be taken by them severally. There is, farther, a general clause of revocation of deeds of settlement previously executed by him, which was, no doubt, intended by the grantor to strike *inter alia* at the deed of 1851, but which he had no power to revoke. Again, it is manifest from the whole deed and its several provisions, that the grantor of it was under the conviction that, at the time of its execution, it was within his power to divide the whole estate of Newton among his children, or the proceeds of it when sold, on the footing that the deed of 1851 had been effectually recalled, or, at all events, of its not being entitled to any effect. This being so, the apportionment made by the deed of 1861 cannot be sustained. Apart from the other objections to its validity, how can it be predicated that if he had known that not the whole but only two-thirds of the estate of Newton remained to be divided he would have given so large a precipuum to his eldest son? The whole estate was stated to have been worth less than £9000, and the eldest son getting £3000, there remained only £6000 to be divided amongst the other seven sons. Had the father appreciated the fact that one-third of the estate was already effectually apportioned, leaving only £6000 to be divided, it cannot be assumed that he would have given £3000 to his eldest son. There was thus essential error in the exercise of the power of division, which is fatal to this deed. And, in addition, there is the other ground of objection to the deed—viz., that it purports to be a division of money to be realised from the sale, which he had no power to direct, instead of an appointment of the shares or proportions of the landed estate to which the sons were severally to be entitled. On the whole, therefore, it seems to me that this apportionment cannot stand.

Holding, then, the deed of 1851 to be a valid deed in favour of the second son, and the deed of 1861 to be invalid, there remain the two-thirds of the estate undivided, and the result is to bring into operation the direction of the deed—that, failing an appointment by the father, the estate, in so far as undivided, is to be taken by the children equally. And in this division I think the second son, although entitled to take under the deed of 1851, must be included. This result appears to me consistent with the principles recognised and acted on in the case to which I have referred, and in the other English decisions to which references were made in the course of the argument.

LORD BENHOLME—I have no doubt the deed of 1861 is invalid. It is not a deed of apportionment of the subject under the faculty, a landed estate, but an appointment of a sum of money—no share of an estate. It is quite clear to me that testator misunderstood his power, and what had previously been done. He had then no power to divide his whole landed estate, but only two-thirds of it. This being so, I cannot, in view of the English authorities, hold that the party who has already got a part apportioned to him is to be cut out of the benefit of an equal share of the remainder. There remains in his person a right to demand a share of the part unapportioned.

LORD NEAVES—I have no difficulty in holding that the deed of 1851 was a good exercise of the power of apportionment by the father. He handed over one-third of his estate to his second son, the deed was delivered, infestment followed, it was made the subject of traffic, and I look upon it as valid and irrevocable. As plainly the deed of 1861 is bad, proceeding on a wrong view of the father's position, and dealing with it in an inhale manner. This being so, is the second son also entitled to an equal share of the two-thirds of the estate unapportioned, or may not the deed of 1861, though invalid, be read so as to preclude this inequality? The law is, that any unapportioned part of any unapportionable estate is divisible equally among the beneficiaries, unless something is done in any deed of apportionment or by subsequent deeds which necessarily implies the reverse.

I do not see how we can look upon the deed of 1861 as a good deed to any effect.

The LORD JUSTICE-CLERK not having been present at the hearing of the case gave no opinion.

Agent for First and Second Parties—John Walls, S.S.C.

Agent for Third Parties—A. Kirk Mackie, S.S.C.

Agents for Fourth Parties—Renton & Grey, S.S.C.

Agent for Fifth Parties—Wm. Ross Skinner, S.S.C.

Tuesday, June 11.

## FIRST DIVISION.

GALLOWAY v. KING.

*Reparation—Injury to Person—Negligence.*

*Held*, in an action of damages for bodily injury caused by an explosion of nitro-glycerine, that the defender, to whom the nitro-glycerine belonged, had taken reasonable precautions for getting rid of the substance, and that there was no such fault or negligence on his part as to lay a foundation for the action.

*Question*, Whether the action was excluded by the pursuer having met with the accident in consequence of being in a place where he had no right to be, and by the explosion having been caused by an act of an associate of the pursuer?

This was an action of damages for bodily injury by Denniston Galloway, Greenock, against Walter King, contractor, Greenock.

The pursuer's statements were shortly as follows:—On the afternoon of Sunday, 11th September 1870, the pursuer, who is sixteen years of age, left his house to take a walk. He met ten or eleven other lads, and proceeded with them to the public park of Whinhill, going along the hill till they came to a dyke surrounding an adjoining piece of ground occupied by the Water Trust of Greenock, on which the Water Trust has recently erected new water filters. The filters had been constructed by the defender under contract be-

tween him and the Water Trust. For the convenience of his workmen, the defender had erected two huts on the ground. One of these huts was now used as a receptacle for old tools and other rubbish. The door was unsecured and open, and the public had been in the habit of entering the hut at all times since the beginning of 1869, without objection by any one. The piece of ground on which the huts stood was open, and frequented by the public, and access could be had to it by two gates in the wall surrounding it, as well as by a set of steps. A heavy shower coming on, the pursuer and his companions crossed the wall and took shelter in the hut. When they entered, a number of old tools and apparently valueless materials were lying about, and among them a tin can, with nothing about its appearance to indicate that it contained a dangerous explosive substance. One of the lads, without the pursuer's knowledge, struck the can with a hammer. The can proved to contain nitro-glycerine, and a terrific explosion at once took place. Eight of the young men were killed, and the remainder, including the pursuer, were more or less seriously injured. The pursuer was carried to the infirmary, had a leg amputated, and is permanently disabled from earning a livelihood. He claimed £1000 of damages for the injuries sustained, as he alleged, in consequence of the culpable negligence of the defender, or those acting under him, in allowing a dangerous explosive substance to lie about the floor of the hut.

The defender pleaded:—

“*Preliminary*.—1. The action is irrelevant, and falls to be dismissed, in respect—(1) It is not averred that the defender, or any one for whom he is responsible, placed the alleged explosive substance in the alleged place of danger; (2) It is not averred that the premises in question were the property of the defender, or were in his charge or under his control, and that he knew of the said substance being allowed to remain in a dangerous place; and (3) It is not stated how the explosion took place,—whether spontaneously or through the act of any one; and no facts or circumstances are averred connecting, or tending to connect, the defender with the alleged injuries.

“*On the Merits*.—2. The pursuer is barred from insisting in the present action, in respect the injuries sustained by him have arisen through his own fault, in as much as—(1) The explosion was the result of his own wanton conduct and that of his associates; (2) His injuries were sustained when he was in a place where he had no right to be, and in consequence of his being there. 3. The injuries sustained by the pursuer not having been caused by the fault of the defender, or of any one for whom he is responsible, he is not liable in damages.”

The Sheriff-Substitute (TENNETT) found that the pursuer had not set forth a relevant case, inferring liability in damages on the part of the defender; sustained the third preliminary plea for the defender; and dismissed the action.

The pursuer appealed, and the Sheriff (FRASER) adhered.

“*Note*.—The pursuer was allowed to amend the record, the defender not objecting. As amended, it is somewhat more specific than it was when the Sheriff-Substitute pronounced his interlocutor; but still it is irrelevant. After studying this re-

cord in the light of the English and Scotch cases upon this subject, the Sheriff is unable to hold that there is anything stated which would render the defender responsible in damages for the injuries which the pursuer sustained; and enough is admitted on the record to enable the Court to dispose of the case upon the relevancy, and without a proof.

“The pursuer and a number of other lads went into a hut the door of which was open, and into which they had no business whatever to go. They were simply trespassers, and did wrong in entering into this hut, which was not in their way, and with the contents of which they had no right whatever to interfere. One of the band, however, proceeds to strike a can, the contents of which turned out to be nitro-glycerine, and in a moment there was an explosion, and all the lads except one suffered injuries or were killed.

“Now, what legal obligation was there upon the defender to the pursuer or his associates? What duty was it which he violated, and for the breach of which he must now pay damages? It is said that nitro-glycerine is very explosive, and therefore dangerous, and that in consequence of this all due precautions ought to be taken for the safety of the public. This is quite true; and if the defender had placed a can of nitro-glycerine at the way-side, where the public must pass and repass, and where a passer-by would naturally (seeing the deserted article) take it up with the view of discovering its contents or its owner, and an explosion had followed, it might be very fairly concluded that the defender, in that case, was guilty of such reckless or thoughtless conduct as to render him culpable and liable in damages. But the present case is exactly the reverse of that. In a field to which the public have no access by right (although it appears they often go into it), and in the midst of that field, there is a hut to which no one has a right of access but the defender, and in this hut he keeps his private goods, which are interfered with by a trespasser, who enters therein without leave or licence,—such is the case for the pursuer as against the defender, the only point being that the defender had not locked the door—which is no point at all. A man, may, if he please, leave the door of his private house open, but this will not entitle a passer-by to enter and meddle with his goods. If the defender had left his gun loaded in the hut, an action of damages would be maintainable against him (supposing the pursuer had been shot by one of his companions with the gun) if the present action were sustained as relevant.”

The pursuer appealed to the Court of Session.

SHAND and HALL for him.

WATSON and MACLEAN in reply.

There was a long debate, especially on the questions of law raised by the defender's first and second pleas on the merits.

On 31st January 1872 the Court recalled, *in hoc statu*, the interlocutor appealed against, and allowed a proof before answer.

A proof was accordingly taken before Lord Deas.

It was proved that the defender, or rather his son, Mr James King, who superintended the works at Greenock, had ordered a sample of nitro-glycerine, to be used for blasting. A small portion of it was so used, but the workmen did not find it answer, and accordingly the can containing the rest was for some time kept in a powder magazine at Whinhill. In August 1869, Mr King ordered

his foreman to get the nitro-glycerine destroyed. The latter, along with another man, took the can to a stream, where they turned the can upside down, till, as they believed, its whole contents were poured out into the water. The can, supposed to be empty, but really still containing some of the nitro-glycerine, was then put in the hut, where it remained till the accident. The explanation of the fact that some of the substance remained in the can after its contents were believed to be poured out, is to be found in the scientific evidence. Dr Stevenson Macadam deponed that nitro-glycerine, though liquid, as it is used for blasting, has a tendency to become solid at a temperature of 40 or 50 degrees Fahrenheit. When the temperature falls to this point, it does not necessarily follow that the whole will solidify, but a part would be likely to form a solid substance in a vessel, while another portion would remain liquid."

The view which the Court ultimately took of the case renders it unnecessary to state the import of the rest of the proof. It was proved that the public were not allowed on the ground in which the huts stood, though members of the public may not unfrequently have gone there; and that there was a notice board warning off trespassers.

The case was again heard on the proof.

At advising—

**LORD DEAS**—This is a case which requires and has received very great attention. If the question of liability were supposed to turn on the fault of the boys who were injured, from the fact of their being trespassers, and from their having committed certain slight acts of violence within the hut, it would raise very difficult and delicate questions of law.

But it appears to me that there is a question which takes precedence of this, viz., Whether, in the whole circumstances of the case, there can be held to have been such fault or negligence on the part of the defender, or his servants, as to lay a foundation for the present claim? For unless there was fault or negligence on the part of the defender, or those for whom he is responsible, there is no foundation for the claim; and no room for the question, What sort of conduct on the part of the injured would prevent that claim?

The substance which produced this lamentable accident has been proved to be a very dangerous substance. To some extent, its dangerous properties were not unknown to the defender, but it has been shown to possess other qualities, which we have no reason for supposing were known to the defender, or for imputing fault or negligence to him for being ignorant of them. It has now been shown that nitro-glycerine has a tendency to solidify at a certain temperature, but this the defender did not know. It appears that he had procured some of the substance for blasting, but the workmen found that it did not answer. It was accordingly kept in a place of safety for some time. The defender then directed his foreman to have it destroyed. I have no doubt that the men who said that they emptied it out into a stream, did it to the best of their belief. The explanation is found in the evidence of Dr Stevenson Macadam, that at that time there must have been a quantity of the substance in a solid state, which remained in the can after it was supposed to be all poured out. Now, there is no ground for attributing fault to the defender for not knowing or suspecting this quality. If that be so, if there is no sufficient fault to lay the foundation of the action, I am not pre-

pared to say that, even had the accident happened to his own servants who had gone into the hut in the discharge of their duty, there would have been liability on the part of the defender.

I am glad to avoid the difficult and delicate question of contributory negligence on the part of the pursuer; and I rest my judgment on the ground that there was no substantial fault or negligence on the part of the defender, or those in his employment, to lay the foundation of the action.

The other Judges arrived at the same result, and on the same grounds, viz., that the defender had taken reasonable precautions for getting rid of the substance.

The Court adhered.

Agents for Pursuer—Fyfe, Miller & Fyfe, S.S.C.

Agents for Defender—Murray, Beith & Murray, W.S.

Wednesday, June 12.

**LOVE AND OTHERS (CARSTAIRS' TRUSTEES)  
v. JAMES MARSHALL AND OTHERS.**

*Obligation—Compromise.*

Circumstances in which it was held that an agreement to compromise an action on certain terms was proved.

In this action the leading conclusion of the summons was to have it declared that the defenders were bound to implement an agreement to compromise an action; the pursuers being the trustees under a trust-settlement of the late James Carstairs, dated 3d July 1862; and the defenders being the trustees under a trust-settlement executed by Mr Carstairs on 11th April 1869, and along with their sister Janet, also a defender, the chief beneficiaries under it.

"The trust-disposition and settlement of James Carstairs of Keltonhead, dated 11th February 1869, under which the defenders, Thomas, James, and Janet Marshall were the chief beneficiaries, was challenged on the ground that he was not of sound and disposing mind when he subscribed it, and that it was impetrated from him when in a weak and facile state of mind by the defenders, Thomas and James Marshall, by fraud or circumvention and intimidation. These defenders, and their brother Robert Marshall, who was also a trustee, employed Messrs Sinclair and Dodds, Solicitors, Bathgate, and Messrs Gifford & Simpson, W.S., Edinburgh, to defend the action; and for that purpose defences were lodged in the name of Thomas, James, and Robert Marshall, as trustees under that deed. After issues were adjusted, and the case was set down for trial, the said defenders were strongly advised by their counsel to compromise the case. In consequence of that advice, and after various communings with their agents, the defenders Thomas and James Marshall, being two and a quorum of the trustees, granted the probative mandate of 13th March 1871, by which they authorised their agent, Mr Sinclair, to compromise the said action on the terms proposed in the two memoranda annexed thereto, which are duly executed as relative to the said mandate, "or on such other terms and conditions as he may consider proper and judicious." Acting on this mandate, Mr Sinclair, with the assistance of Mr Simpson, of Messrs Gifford & Simpson, the defenders' Edinburgh agents, effected the compromise or trans-