expressly directs that if Mrs Millar should resort to legitim, and so forfeit her rights under the deed—her right of liferent—by her so doing her children, who have independent rights, as I have said, under the deed shall forfeit these rights also. It has not been suggested that any language in this deed could be represented as having that effect from its express terms. So the argument comes to be reduced to this, that a provision to that effect is implied somehow within the four corners of this deed. Now, with reference to the argument founded on implication, to which I think I have reduced the contention of the reclaimer, I do not think it necessary to say a single word more about the clause at the close of all these provisions declaring that the provisions in the deed shall be in full of all sums of money which the testator had undertaken to pay to any of his daughters or their issue, and in full satisfaction of legitim or other claims, because your Lordships who preceded me have so fully disposed of that point. I think it is plain that no implication of the kind desired can be derived from that source. That being so, there are only two elements left in the deed founding the argument. One of these is that the estate has been divided into three shares, and that obviously the truster intended that each of the three families should get an equal share of this money I concede that to be the case. I think Mr Snody did so intend. But Mr Snody I say intended to include the legitim as part of the general estate, and obviously did not contemplate the case that has occurred, that one of the daughters would repudiate the provision in her favour and resort to legitim; and therefore the argument that he meant the estate to go into three parts does not go very far. We are asked to take a step further, and to hold that because he intended the estate to go into three parts, and that intention has been defeated by one of his daughters, her children are to suffer. I am not prepared by implication to go that length from the mere circumstance that he intended the estate to be divided into three parts, and that each family should get one share. The only other argument founded upon implication from this deed is—that we find that in estimating what the share of Mrs Millar and her children of his estate should be, the trustees are directed to deduct a sum of £1500 which had been paid partly to the mother and partly to her son, and £300 advanced to Mrs Millar by her grandaunt, and in the event of her claiming payment of an annuity which had been bequeathed to her by that grandaunt, also to charge interest on that sum of £300. I am not prepared from that circumstance—because he has treated this provision as one in regard to the mother and children in this respect, that to that extent there shall be a deduction in estimating that share—to say that therefore it follows that if the mother takes the legitim the children are to lose the fee. I think, as I said in the argument, that the circumstance that these two sums were to be deducted may be turned the other way and put in this way—that as we find Mr Snody did carefully provide that these particular sums should be deducted from that share of the estate, if he meant that to be done in the event of Mrs Mrs Millar taking her legitim he would have made the same provision. It is not easy to say which of these arguments is sound, but on the whole matter it appears to me that there is not enough in this deed to bear the implications we were asked to find, or to take the case out of the general rule of *Fisher* v. *Dixon*. I do not say cases may not occur in which a special provision in the deed may be so clear as to show that if one of the children takes the legitim, the children of that child may lose the fee. But I think it would be difficult to get that from implication. I should think after the rule being so deeply rooted in our law and so clearly stated in *Fisher* v. *Dixon*, it can be set aside only by words to that effect, and it could be done by a few words in the deed. However that may be, I am of opinion with your Lordships—it being admitted that in this deed there is no express statement, I am unable to find anything like that by implication.

The Court pronounced this interlocutor:—

"The Lords having heard counsel on the reclaiming-note for Mrs Helen Snody and Gibson's trustees, against Lord M'Laren's interlocutor of 3d November 1882, Adhere to the interlocutor with this variation, that the second finding is qualified by adding thereto, after the words 'mother's election,' the words 'except in so far as their share of the free residue may be required to contribute along with the other shares of the free residue to satisfy their mother's claim of legitim.'"

Counsel for Gibson's Trustees—Gloag—Darling. Agents—Scott Moncrieff & Trail, W.S.

Counsel for Claimants W. S. Millar & H. L. Millar—Pearson—Shaw. Agent—William Asher, S.S.C.

Wednesday, February 21.

SECOND DIVISION.

[Sheriff of the Lothians.

SCORGIE *v.* LAWRIE

Reparation—Excessive Punishment of Pupil by Schoolmistress—Assault.

In an action of damages against the teacher of a class of girls by one of her pupils on the ground that she had inflicted an excessive punishment, resulting in permanent disablement of the hand, it was proved that the defender had inflicted one blow with a cane upon the hand of each of thirteen girls; that the pursuer was the only one who suffered injury; that she received just such a blow as the others; that the cane was the instrument of punishment recognised in the school; and that the blow was inflicted without any intention of injuring the pursuer. *Held (diss.* Lord Rutherfurd Clark) that in the circumstances the defender was not liable in damages for an assault upon the girl.

Observed per curiam that while the mere use of a cane in such circumstances did not amount to assault, it was extremely improper.

Agnes Ross or Scorgie, residing at No. 8 Ferrier Street, Leith, with the consent and concurrence

of Charles Scorgie, also residing there, her step-father, who was sisted as her *curator ad litem*, raised this action in the Sheriff Court of the Lothians at Edinburgh against Margaret Lawrie, teacher in Dr Bell's School, Leith, under the following circumstances:—Upon the 29th of March 1881 the defender called up the class, of which the pursuer was a member, to repeat a spelling lesson. A number of the pupils were unprepared, their excuse being that the defender had omitted to set a lesson; this the defender denied, and one of the pupils who was called as a witness deponed that the lesson had been given out and that she had learned it. The defender thereupon punished fourteen or fifteen of the girls by inflicting upon the hand of each one blow with a cane, the instrument of punishment ordinarily used and authorised in the school. No one of the girls thus punished suffered any bad consequences except the pursuer, whose hand was so much hurt that her mother at once sent her to the doctor. For some months thereafter she was under medical treatment, and at the date of this action, according to the medical evidence, it was almost certain that her thumb was permanently paralysed. Her general health had also suffered. From the medical evidence it appeared that the injury was due either to the blow itself or to the blow taken together with some latent constitutional cause. The defender had occupied the same position in the school for twenty years; her conduct had never been the subject of complaint.

The Sheriff-Substitute (HAMILTON) pronounced this interlocutor:—"Finds that on the day libelled the pursuer, who was then a pupil in the defender's class, had neglected to learn, or at least failed in, her spelling lesson, and the defender in consequence punished her and about a dozen other girls who were in the same position by giving each of them one stroke with a cane on the palm of the hand: Finds that it is not alleged that the defender had any ill-will against the pursuer, or that on said occasion she struck the pursuer more severely than any of the other girls, none of whom were hurt: And finds that, even supposing that the present state of the pursuer's hand, as described by the witness Dr Murray, is attributable to injury to her thumb caused by said stroke, still such injury can only be regarded as an accident: Finds, in point of law, that, in the circumstances stated the defender is not liable to the pursuer in damages or *solatium*: Therefore assoilzies the defender from the conclusions of the libel, and decerns: Finds neither party entitled to expenses.

"*Note.*—The Sheriff-Substitute cannot say that the punishment here was excessive—that it was such as the defender in her position as school-mistress was not entitled to inflict. At the same time, the use of a cane in schools for every trifling offence is not to be commended—in the present instance the consequences to this poor girl had been most disastrous—and upon that ground the Sheriff-Substitute cannot give the defender expenses."

On appeal the Sheriff (DAVIDSON) pronounced his interlocutor:—"Recals the interlocutor appealed against: Finds that in March 1881 the defender was a teacher in Dr Bell's School, Great Junction Street, Leith, and the pursuer was a pupil in the said school; that on or about the 29th March 1881 the defender unwarrantably and unlawfully struck the pursuer a severe blow with a cane on her right hand, whereby the pursuer's hand was seriously hurt, from which she has suffered ever since, and by which she may be permanently injured: Finds the defender liable in damages; fixes the amount of the same at £20; and decerns against the defender for payment of the said sum: Finds the pursuer entitled to expenses, &c.

"*Note.*—That the injury to the pursuer's thumb was caused by the blow given by the defender cannot be doubted. From the moment of its infliction the pain and suffering of the pursuer has never ceased, and it has led on to effects on the child's health, the end of which cannot apparently even yet be seen. The pursuer was well before this happened—the evidence of Dr Murray as to her natural healthiness is not contradicted; and the attempt to shew that the injury was previously caused by a fall over a rope or otherwise has entirely failed.

"The defence is that the defender, in her place as teacher, did no more than she was entitled to do. Now, in the first place, it does not clearly appear that there was just reason for any punishment whatever. Several of the pupils stated that no spelling lesson had been given out, and though the teacher maintained the lesson had been prescribed, there was room for a possible mistake, and no person of ordinary discretion would have treated the matter as the defender did. But putting that aside, and assuming that the pursuer had committed a fault, the defender was not justified in inflicting a blow such as this. It is useless to dispute as to its being or not being a violent stroke. The pain, the appearance of the thumb, and what has followed, put that matter beyond question. The use of such an instrument for the punishment of young girls is most reprehensible, and when the result of its use is such as we see in this case, the teacher who inflicts such an injury must bear the consequences. In this school, unfortunately, corporal punishment seems a very common practice, instead of being rare and exceptional as it should be in well-conducted establishments. On this occasion Mr Coutts, the head-master, was standing, according to his own account, within five yards when fourteen or fifteen young girls (this is the number given by the defender) were being punished with a cane, and he did not even turn round to see what was being done, or the cause of it.

"It is in most cases difficult to fix the amount of damages. This case is not an exception.

"The Sheriff is unable to perceive any alleviating circumstance—not even a symptom of regret or sympathy."

The defender appealed to the Court of Session, and argued—The blow was not of a nature to cause injury in ordinary circumstances. The defender was not responsible, because she was within her right in administering the punishment she had inflicted. In any view, serious injury to the pursuer was not a probable consequence of anything she had done. There is no proof that the punishment was excessive.

Argued for pursuer—The defender was bound to use discretion in punishing, and was therefore responsible if the punishment was excessive, as was here the case. The punishment was exces-

sive. The greatest caution must be observed in using such an instrument.

Authority—*Ewart* v. *Brown*, Nov. 10, 1882. *supra*, p. 105.

At advising—

Lord Justice-Clerk— In this case of *Lawrie* the Sheriff-Substitute and the Sheriff have differed, and at this I am not surprised, as it is a case which admits of various views. I have, however, come to be of the opinion of the Sheriff-Substitute.

This action is brought by the parents of the child for an injury said to have been inflicted by the schoolmistress—an injury caused by a blow from a cane on the hand.

I have no doubt that the injury resulted from the blow, but I am also of opinion, firstly, that the blow was not inflicted with the intention of causing the injury; and secondly, that in ordinary circumstances the injury would not have resulted from the blow. Indeed on both matters there is no question. The injury was inflicted on this girl of fourteen as a punishment for not having learned her lesson, at the same time and in the same way as twelve other girls of the same age suffered punishment. I confess that it took me by surprise that at a school, intended for and attended by girls of such an age, such a mode of punishment should have been in use. I consider such a mode very reprehensible, and I think that although the schoolmistress did not intend to do the child any bodily harm, it is very unfortunate that a method of punishment more refined and more effective than corporal punishment was not in use. Independently of that, however, the cane is not a proper instrument, although it may often be used without the bad effects which ensued upon this occasion, and I do think that such a consideration should in the slightest degree modify the expression of my opinion.

Unfortunately it happened that this punishment which consisted of one blow only, left enduring bad effects, either because a nerve was injured or because of the state of the child's health. When, however, the proposition is maintained that the schoolmistress must be responsible I am unable to agree.

This blow was not calculated in ordinary circumstances to have these injurious results, and it cannot be said that the schoolmistress was guilty of assault every time she inflicted punishment.

The medical evidence is all one way. The blow produced the injury, or rendered active some latent constitutional tendency. This would, of course, be quite enough were the blow an illegal or improper act. It is, however, not so at law, although in every way undesirable. Upon the whole question I agree with the Sheriff-Substitute that it was a misadventure that could not be calculated.

Lord Young—I am of the same opinion, and have very little to add, although the case presents many conflicting considerations. This use of chastising young girls I join with your Lordship in reprobating, and I use as strong language in reprobating it as can be used with propriety. I am surprised it should have continued so long; and I trust the managers of such schools will have their attention directed to it, and to this view of it in which all the members of the Court concur.

Another consideration is that the defender is a teacher of twenty years' standing in this school, and it is not suggested that she has been guilty of any impropriety of conduct, nor has any complaint been made. I am very averse to say anything against one who had conducted herself so well in her situation for so long.

Again, we cannot help sympathising with the poor child and her parents.

There is another consideration which we cannot lose sight of in a case of this kind, viz., that it is injurious to find a teacher guilty of an assault. It is to be avoided if possible. It is injurious to the cause of education, and injurious to schools.

Of course these consequences cannot be considered if the facts are proved.

Moreover, we must look to the nature of the action. Every action of this kind is for assault. Chastisement may degenerate into assault, but chastisement itself is not assault. If there is gross excess, that which is chastisement will degenerate into assault.

I must say that I have such an abhorrence of the use of the cane that I have considered whether the use of the cane in such circumstances as these is not in itself assault. If the cane is properly applied to a boy it is another thing; but to apply it to a girl of thirteen is so dreadful that I considered seriously whether the mere doing so did not constitute assault. I trust, however, that this use will be discontinued without convicting this teacher of assault for following the custom which she found in existence. Looking to that, I cannot consider as assault the mere use of the cane. I assume chastisement to have been inflicted in the legitimate desire to uphold discipline. Thirteen children were punished, and it follows, if we reflect that nothing came of the punishment in the case of the other children, that there was no assault save in the case of one child. But I am unable to distinguish between that girl and the others, although there was a difference in the result; and I am disposed to agree with your Lordship and the Sheriff-Substitute that this result was attributable to accident.

Lord Rutherfurd Clark—I am disposed to take an opposite view, and to think that the defendant is liable in the damages concluded for, on the ground that the punishment was excessive, but I do not think it is necessary for me to enter further into the details of the case.

Lord Craighill was absent on Circuit.

The Court recalled the interlocutor of the Sheriff, and of new assoilzied the defender, but found no expenses due.

Counsel for Pursuer (Respondent)—Strachan—Salvesen. Agents—Miller & Murray, S.S.C.

Counsel for Defender (Appellant)—Mackintosh—Low. Agent—William Gunn, S.S.C.