

view and the Sheriff the second view. I am bound to say that without any hesitation I think the view taken by the Sheriff is right. I think that that is so not only because the effect of the other construction of the words would be fantastic and capricious—admitting those who had no connection with Scotland at all but who happened to be there by chance when the testatrix died, and excluding those who had spent all their life in Scotland but who happened on the day of the testatrix's death to be out of Scotland on a visit of, it might be, only twenty-four hours—but also because if you take the words in their ordinary sense only one conclusion is possible.

The testatrix knew that Mr Argo was a second cousin, and she knew that he lived in Scotland somewhat permanently, for she says, "Gavin Argo of Scotland." She singles out others in the same degree of relationship and in the same circumstances as Mr Argo himself, and that I think is equivalent to saying "my Scotch cousins."

I am therefore of opinion that the interlocutor of the learned Sheriff is right, and that it ought to be affirmed.

LORD ADAM—I am of the same opinion. I think the lady meant this bequest to go to her relatives living in Scotland at the time of her death.

I think that is the right view to take of the meaning of this bequest. Mr Anderson says the words must be taken as meaning my relatives actually in Scotland at the time of my death, but he does not admit that a relative whose ordinary residence was in Scotland but who happened to be out of Scotland for a few hours would be excluded. I think the view taken by the Sheriff is right.

LORD M'LAREN—There are two points which I think may be noticed. The first is, What is the time at which the class to be benefited falls to be ascertained? Parties here are agreed that it must be the time of the testatrix's death, and that would seem to be sound, as the bequest is to be shared by persons who were living at the time of her death. It would be a very arbitrary construction to hold that residence in Scotland was to be determined at one point of time and the fact of survivance at another. It is in accordance with the general practice that the opening of the succession is the time at which a bequest to a class must be ascertained.

The second point is as to the meaning and effect of the words "in Scotland," regarded as descriptive words in a legacy. The expression is elliptical, for there is no verb or participle governing the words "in Scotland," and we may supply the word "living," or "resident," or as Mr Anderson suggested, the word "present." In the absence of anything to show that mere casual presence in Scotland was intended, I think we must accept the more reasonable construction and hold that the words mean being resident in Scotland.

I do not say that a domicile in Scotland would be necessary, and if this lady had come over and taken a house in Scotland

for an indefinite period she might fairly be held entitled to the benefit of the legacy. But as she came to Scotland on a visit to friends, and with the intention of returning to Australia, she cannot, as I think, be held to fall within the description of "my relatives of like degree in Scotland at the time of my death."

LORD KINNEAR—I concur.

The Court refused the appeal and affirmed the judgment of the Sheriff.

Counsel for the appellant moved for the expenses of the appeal out of the fund *in medio*.

Argued for the appellant—The codicil was ambiguous. There was a difference of opinion between the Sheriffs, and the appellant was reasonably justified in bringing this appeal. This was not a case of making one claimant pay for determining the meaning of the codicil, as the two shares would fall to be divided among all the other claimants equally. Further, this was an action of multiplepounding, and the appellant had been called *nominatim*.

Argued for the respondents—This was not a case for expenses out of the fund. The meaning of the codicil was clear. This was just the ordinary case of a dispute between two claimants, one of whom had been unsuccessful.

The Court found the parties entitled to their expenses out of the fund *in medio*, and pronounced this interlocutor:—

"Refuse the appeal; affirm the interlocutor of the Sheriff, dated 3rd February 1905; and decern, and remit to the Sheriff to proceed as accords: Find the appellant Annie Elmslie and the respondents entitled to their expenses in the appeal out of the fund *in medio*," &c.

Counsel for the Appellant—Orr, K.C.—A. M. Anderson. Agents—Clark & Macdonald, S.S.C.

Counsel for the Respondents—Cullen, K.C.—A. R. Brown. Agents—Ronald & Ritchie, S.S.C.

Friday, November 17.

FIRST DIVISION.

[Sheriff Court of Lanarkshire
at Glasgow.]

M'LAUGHLAN v. THE CLYDE VALLEY ELECTRICAL POWER COMPANY.

Process—Appeal for Jury Trial—Proof or Jury Trial—Trifling Nature of Case—No Definite Injuries Specified.

In an action of damages for personal injuries alleged to have been sustained through falling into an excavation on the side of a street made by the defenders while engaged in laying an electric cable, the pursuer, a miner, averred

that he "sustained very severe injuries: Amongst other injuries he is suffering from very severe bruises on the chest and right down the right leg. He has also sustained a severe nervous shock. He has been confined to bed as a result of his injuries, and has been incapacitated from carrying on his work."

The pursuer having appealed for jury trial, held, in accordance with the rule laid down in *Sharples v. Yuill*, 42 S.L.R. 538, that the case fell to be remitted to the Sheriff.

This was an appeal from the Sheriff Court of Lanarkshire at Glasgow in an action of damages for personal injuries at the instance of William M'Laughlan, a miner residing at 31 Drumpark, Old Monkland, against the Clyde Valley Electrical Power Company, 52 Bothwell Street, Glasgow.

The sum sued for was £250.

The pursuer averred—" (Cond. 2) On or about Thursday 10th August 1905 the defenders were engaged laying an electric cable in Shettleston. In connection therewith they had made an excavation in the north side of Main Street there, a few yards to the east of Station Road. Said excavation, which was about four feet in depth and two and a half feet wide, was situated two feet or thereby from the footpath on the north side of said street. (Cond. 3) On said date, about eleven o'clock at night, the pursuer was on his way home from Shettleston to Drumpark, and was in the act of crossing from the footpath on the north side of said street, in order to catch a tramcar for Barrachnie, when he fell into said excavation. The night was dark at the time and the pursuer did not see the excavation, which was uncovered and without any guard rope or protection of any kind. There was no light at the excavation, nor was there any warning given to the pursuer of its existence. . . . (Cond. 4) In consequence of falling into said excavation the pursuer sustained very severe injuries. Amongst other injuries he is suffering from very severe bruises on the chest and right down the right leg. He has also sustained a severe nervous shock. He has been confined to bed as a result of his injuries, and has been incapacitated from carrying on his work. The pursuer has suffered much on account of his injuries, and it will be a considerable time before he recovers from their effects."

He further averred that the injuries sustained by him were entirely due to the fault and negligence of the defenders or their servants, in respect that the excavation was neither covered nor fenced nor lighted; that it was the duty of the defenders and the usual course to have had the excavation securely fenced and properly lit; that the defenders, though aware of the dangerous condition of the excavation in question failed to take such precaution, and that they were therefore liable.

The defenders denied that the place was not properly fenced, and averred that "the pursuer's fall and consequent injuries (if any) were entirely due to his own fault and recklessness while under the influence of

drink. The excavation was well lighted and properly and sufficiently fenced and guarded, a watchman also being in attendance, and with the exercise of ordinary care and precaution the accident could easily have been avoided."

The Sheriff-Substitute (FYFE) having allowed a proof the pursuer appealed for jury trial.

When the case appeared in the Single Bills counsel for the defenders moved the Court to send the case back to the Sheriff in accordance with the rule laid down in *Sharples v. Yuill*, May 23, 1905, 42 S.L.R. 538.

Argued for the defenders—The injuries alleged to have been sustained were trifling. The pursuer averred no definite injuries with the exception of an injury to his leg, which was not a serious injury. He did not aver how long he had been laid up or confined to bed, or prevented from going to his work. The case ought to be sent back to the Sheriff.

Argued for the appellant—The mere matter of amount was not conclusive—*Sharples v. Yuill, cit. sup.* The injuries sustained by the pursuer were similar to those alleged in the case of *Sharples*, and in that case an issue was allowed. The pursuer had sustained "very severe bruises" and a "severe nervous shock."

LORD PRESIDENT—I think on the face of it this is so trumpery a case that it ought to be remitted.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court sent the case back to the Sheriff.

Counsel for Pursuer and Appellant—A. M. Hamilton. Agents—Clark & Macdonald, S.S.C.

Counsel for Defenders and Respondents—Horne. Agents—Webster, Will, & Company, S.S.C.

HIGH COURT OF JUSTICIARY.

Tuesday, June 27.

(Before the Lord Justice-General, the Lord Justice-Clerk, Lord Kinneir, Lord Kyllachy, and Lord Kincairney.)

TODD v. MAGOWAN.

Justiciary Cases—Jurisdiction—Civil or Criminal—Suspension—Competency—Sentence of Imprisonment not Authorised by Act Founded on—Summary Procedure (Scotland) Act 1864 (27 and 28 Vict. cap. 53), sec 28.

Where the Court in a suspension of a conviction in a summary prosecution for a statutory penalty under which the accused had been sentenced to imprisonment for a specified period, were of opinion that under the Act imposing the penalty it was not com-