the estate which this trustee has received is something over 3 per cent., about 3½, which is certainly far beyond anything that has ever been allowed on estates of this kind, taking the company's estate and that of the individual partner, Lewis Potter's, together. And therefore if we had not been precluded from investigating this matter I should have been prepared to go into it, but I am certainly not prepared to sanction what has been done without at least considerably more inquiry than we have had. But it is needless to pursue this consideration further, for we are all of opinion that the petition must be refused.

Petition refused.

Counsel for Petitioners—D.-F. Balfour, Q.C. —R. Johnstone. Agent—J. Smith Clark, S.S.C.

Counsel for Respondents—Gloag—Lorimer. Agents—Davidson & Syme, W.S.

Friday, November 27.

SECOND DIVISION.

[Sheriff of Renfrewshire.

PATERSON *v.* LINDSAY.

Reparation—Operations by Proprietor on his Own Ground causing Danger to a Neighbour—Blasting—Reasonable Precautions for Safety of those in the Neighbourhood.

A proprietor *held* liable for the result of blasting operations performed in his own grounds without sufficient care to prevent injury to persons in adjoining grounds.

James Paterson, who was employed as gardener in the Kilmalcolm Hydropathic Establishment, raised this action of damages for £100 against Robert Lindsay, in respect of injuries sustained by him, caused by some blasting operations which were being carried on by the defender on ground belonging to him and adjoining the Hydropathic establishment. The defender was engaged in making a new road to the farm belonging to him, and in order to do this blasting was necessary. His servants—Holmes and M'Killop—were in the habit of taking certain precautions in the blasting operations, partly by covering the blasts with planks and brushwood, and partly by making an "outlook" whereby they could see into the Hydropathic grounds, and they also made warning cries of "fire." On the 18th December 1884 the pursuer, when about 88 yards from the ground where blasting was going on, heard the cries of "fire," and being nervous from having previously repeatedly observed a fall of stones following the explosions, and uncertain as to the time which would elapse till the shot went off, he did not run to the tool-house, where he usually took refuge, but threw himself down behind a small dung-heap. He was struck by a piece of falling rock, and very seriously injured.

He averred that the accident happened owing to the negligence, carelessness, and fault of the defender, or of those for whom he was responsible.

The defender answered that the pursuer, although timeously warned, had unnecessarily and carelessly exposed himself, or at least failed to take ordinary precautions to get out of danger or protect himself, and that his carelessness and negligence materially contributed to the accident.

Proof was led, in which, in addition to the facts contained in the foregoing narrative, it was established that the blasts were not sufficiently covered, that the "outlook" did not command the whole of the Hydropathic grounds, that the pursuer's position in the grounds was not seen on this occasion before the shot was fired, that no special warning was given to the pursuer that the shot was going to be fired, although M'Killop knew the pursuer was usually working in the garden.

The Sheriff-Substitute (SMITH) found, *inter alia*, as follows—"... (2) That the defender's servants, who were conducting the operations, did not take the precautions necessary to prevent danger therefrom; that they failed to ascertain the pursuer's proximity, although they knew that the charge could not be exploded without danger to anyone in the place where he was unless it was more efficiently covered. . . . (4) That the defender has failed to prove any fault on the part of the pursuer himself causing or materially contributing to the accident: . . . Finds in law that the defender is responsible for the conduct of his servants in exploding the charge without adopting the precautions necessary to obviate danger." He awarded £100 as damages.

On appeal the Sheriff (MONCREIFF) affirmed the judgment.

"*Note.*—The Sheriff-Substitute has decided this case on the footing that negligence has been proved on the part of the defender's servants, who were conducting the blasting operations which resulted in the injuries to the pursuer which are complained of. The fault which he finds proved is twofold—first, that they failed to cover the charge effectually; and secondly, that although they knew that the charge could not be fired without danger, they did not take care to ascertain whereabouts the pursuer was before they fired it. After a careful consideration of the evidence the Sheriff is satisfied that these views are well founded. The mere fact of the occurrence of the accident affords in the circumstances *prima facie* evidence of negligence, the stone which hit the pursuer having struck him at a distance of about 100 yards, and descended upon him nearly vertically. It may be added that this was not a solitary occurrence, as it is abundantly proved that stones from the defender's property had frequently fallen before in the grounds in which the pursuer was working. Now, when the evidence is carefully examined, it will be found that practically the only witness brought to speak from his own knowledge to the sufficiency of the covering on the occasion is the witness M'Killop. Holmes, the defender's foreman, says—'I gave no instructions in regard to the preparation or covering of the blasts. M'Killop took all that in his own hands. He was a practical borer and blaster and quarrier.' Now, M'Killop himself says that he would not have fired the shot if he had seen anyone at all in the Hydropathic grounds, as he would have been afraid of their getting hurt. Now, no special warning was given to the pursuer, although it was well known to M'Killop that he was usually working in the garden.

"The evidence as to contributory negligence really does not require serious notice. It is said that the pursuer might have reached a safer place than that which he selected. Perhaps he might, but the answer is twofold—first, that the pursuer was rendered so nervous by the frequent blasts which took place that on the spur of the moment he made for the nearest refuge, the dung-heap; and in the next place, that the place he selected would in ordinary circumstances have been sufficiently safe. A man who drives round a corner at a furious pace is not entitled to maintain that a foot-passenger whom he runs over could have reached the pavement in time to escape if it be the fact that he was so unnerved as to be unable to decide at once what to do, and in the present case the Sheriff thinks it is equally out of the question to entertain the plea of contributory negligence.

"It is not necessary to decide the point, but even although negligence were not proved it does not follow that the defender would be entitled to absolvitor. A man must use his property in such a way as not to injure his neighbour, and if the use he makes of it, although lawful in itself, causes injury to his neighbour, he will be liable in damages although it be proved that he used the best means to prevent it. There are many examples of this rule, which imposes limitations on the use of property. If a man impounds water artificially he will be liable if it escape and cause damage—*Rylands* v. *Fletcher*, 1 L.R., Ex. 265. If the rule applies to the case of water, it is difficult to see why it should not apply *a fortiori* to such destructive and uncertain agents as gunpowder and dynamite, and if to injuries to property, why not to injuries to the person? Again, if a man keep a ferocious animal, and it bites any person, it will be no defence that he used the best precautions to restrain it—*Burton* v. *Moorhead*, July 1, 1881, 8 R. 892; see also in regard to blasting operations the case of *The City of Tiffin* v. *M'Cormack*, 32 Amer. Rep. 408, and especially the instructive opinion of M'Ilvanie, J." . . . .

The defender appealed.

The respondent was not called on.

Lord Young—We do not think that it is necessary to call on counsel for the respondent. There are two judgments of the Sheriffs against the defender and appellant, and they are both on the same ground, viz., that dangerous operations of rock blasting, with insufficient precautions for the safety of those who might be on the neighbouring Hydropathic grounds, were carried on by the appellant. I am clearly of opinion that the operations were not carried on with reasonable precautions for those who might be on the neighbouring grounds. It is clearly proved that blasting operations may be conducted with safety. If not, then they ought not to be conducted at all, and I have no hesitation in saying that any blasting in the vicinity of private grounds such as this is in that case illegal and ought to be stopped. Of course a neighbour might give consent, or his consent might be implied by his conduct. But save with his consent his grounds are not to be assailed by stones thrown into them. There is no consent here. It is sufficient for judgment in this case—for it is not necessary to inquire if the Hydropathic Company knew their rights—that on the facts there is, and in the absence of clear evidence I should assume there was, negligence. And in the circumstances I think £100 not excessive damages.

Lord Craighill—I agree that we should affirm the judgments of the Sheriffs. There is no doubt that there was fault in the defenders. The operations were dangerous. The weight of evidence goes to prove that neither on this nor on other occasions was there sufficient care taken in covering the blasts. So on this occasion, as on others, the course followed meant that outlook was necessary. Yet there was a part of the garden which was not visible from the standpoint taken for this outlook. I think there was reasonable cause for complaint. Contributory negligence has not been proved.

Lord Rutherfurd Clark—I concur. The view most favourable to the defender is that his operations were carried on with consent of the Hydropathic Company. This might imply that he was not liable for any unavoidable accident. But he would still be bound to take all reasonable precautions. The Sheriffs decided that he did not do so, and on that ground I decide against the defender.

The Lord Justice-Clerk was absent.

The Court pronounced this interlocutor:—

"Find in fact, firstly, that the pursuer was injured in manner stated by him on the record, and that the injury so sustained by him is attributable to the fault of the defender in failing, in the blasting operations, to take due precautions for the safety of persons in the adjoining grounds in which the pursuer was engaged when injured as aforesaid; and secondly, that the pursuer did not, by fault or negligence on his part, contribute to said injury: Find in law that the defender is liable in damages to the pursuer: Therefore dismiss the appeal; affirm the judgments appealed against; assess the damages at one hundred pounds."

Counsel for Pursuer (Appellant)—Ure. Agents—Gill & Pringle, W.S.

Counsel for Defender (Respondent)—James Reid. Agent—John Macpherson, W.S.

Friday, November 27.

FIRST DIVISION.

[Lord Lee, Ordinary.

M'MASTER *v.* THE CALEDONIAN RAILWAY COMPANY.

Reparation—Railway—Personal Injury—Death of Injured Person after Raising of Action—Executor—Excessive Damage.

The pursuer of an action of damages for personal injury died shortly after the action was raised, but his father and executor was sisted, and recovered from a jury an award of damages. In an application by the defenders to have the verdict set aside,