tices of Ayrshire had no power to pronounce a decreet for expenses against the pursuer; and reduce, decern, and declare in terms of the second conclusion of the summons: Find no expenses due to or by either party.

Agents for Pursuer—Tods, Murray, & Jamieson, W.S.

Agents for Defender—J. & R. D. Ross, W.S.

LANDS VALUATION APPEAL COURT.

(Before Lords Ormidale and Mure.)

No. 88.—(LANARK.)

28*th May* 1872.

ROBERT BINNING.

Value—Dwelling-House (Glasgow)—Owner the Occupier—Comparison with other Houses—One House less in size in same Terrace let—Last year's value fixed at £140—*This year reduced to* £135.

The appellant is owner and occupier of a house in Princes Terrace, Glasgow, which is assessed at the value of £175. Last year it was assessed at £155, and was reduced on appeal to £140. The terrace consists of 12 houses, all of the same size, excepting Nos. 6 and 7, which are two-thirds the size of the appellant's, and all occupied by the owners, excepting No. 7, which is let at £125. The appellant referred to the value, as assessed, of other houses in the West End of Glasgow, and stated if his house were valued at the same rate of floorage the assessment would be £115. The assessor alleged the houses referred to were entered at too low a rate, and although houses of the same description were seldom let, yet, where let, the rent obtained bore out his valuation. The Commissioners reduced the valuation to £135.

Held that the Commissioners were wrong, and that the assessable value of appellant's house should be £140.

No. 89.—(LANARK.)

28*th May* 1872.

CALEDONIAN RAILWAY COMPANY.

Railway (Caledonian)—Dwelling-Houses outside the Railway Fence—Occupiers Employees of Railway Company—Whether they should be in Railway Assessment or County Assessment?

Dwelling-houses belonging to the Caledonian Railway Company, in the parishes of Dalziel and Bothwell, situated beyond the railway fence, occupied by employees of the Railway, are entered in the County Lands Valuation Roll—the Caledonian Railway Company as proprietors, and the employees as occupiers. The employees occupy the houses only while in the service, and on leaving service must vacate the houses without formal notice. They pay rent, which is deducted from their wages. They consist of five classes, who are entitled to different periods of warning: 1. Heads of departments, three months; 2. Chief clerks, &c., two months; 3. Other clerks, one month; 4. Guards, &c., two weeks; 5. Porters, &c., one week. They are all liable to immediate dismissal for disobedience, &c.

The appellants alleged the houses were included in the Valuation Roll made up by the Assessor of Railways, and fell within "stations, wharfs, docks, depots, counting-houses, and other houses and places of business," in § 21 of 17 and 18 Vict., cap. 91.

The Commissioners refused the appeal.

Held that the Commissioners were right.

COURT OF SESSION.

Friday, May 31.

FIRST DIVISION.

STOPFORD BLAIR'S TRUSTEES AND OTHERS, PETITIONERS.

(FOR OPINION OF THE COURT.)

An unfortunate error has crept into our report of this case, on pp. 490, 491, which we take the earliest opportunity of correcting.

The conclusion of the report should be, as is correctly set forth in the rubric, — The Court answered the first alternative in the negative, and the second in the affirmative.

Saturday, June 8.

SECOND DIVISION.

SPECIAL CASE—TENNENT (MURRAY'S TRUSTEE) AND OTHERS.

Apportionment.

A father (in implement of a reserved power of dividing his estate among his children in such share and proportion, or shares and proportions, as he might appoint by a writing under his hand, which failing, equally among them), disponed one third of his estate to his second son. This deed was delivered, and infeftment followed on it. Ten years afterwards, his second son being alive, he executed a settlement in which he directed his trustee at his death to sell his estate, and divide the proceeds among his children in certain proportions, viz., to his eldest son the sum of £3000, the balance to be equally divided among his other children. *Held* that the first deed was a valid exercise of the reserved power of apportionment, and irrevocable; that the second deed was inept; and that the second son was entitled to share the two thirds unapportioned, equally with the other children.

By disposition in trust, dated 3d April 1829, granted by Robert Rollo, writer in Edinburgh, he sold and disponed to Dorothy Elizabeth Boehm, Mark Kennoway, and Henry Charles Gibbs, and to the survivors or survivor of them, and to the heirs of the longest liver, as trustees and fiduciaries, and in trust for the use and behoof of Margaret Maxwell Hamilton, otherwise Murray, wife of John Murray, Esquire, in liferent, for her liferent alimentary use allenarly, and exclusive always of the *jus mariti* and right of administration of the said John Murray, her husband, and not affectable or attachable by the debts or deeds of her, or of her said husband, or by any diligence or execution

thereon; and after the death of the said Margaret Maxwell Hamilton, in trust for the use and behoof of the said John Murray, in liferent for his liferent alimentary use allenarly, and not affectable or attachable for his debts or deeds, or by any diligence or execution thereon; and in trust for the use and behoof of any child or children lawfully procreated, or to be procreated of the body of the said John Murray, in such share and proportion, or shares and proportions, as he, the said John Murray, might appoint by a writing under his hand.

The said trustees accepted of the office, were infeft upon the said disposition, and acted together for some time.

The said Margaret Maxwell Hamilton or Murray died on 12th July 1833, leaving three children procreated of her marriage with the said John Murray. The said John Murray was married a second time, on 19th May 1854, and by his second marriage had five children. On 27th September 1851 the said John Murray granted a disposition in favour of his second son by his first marriage. This disposition proceeded on the narrative of the said trust disposition of the said Robert Rollo, as also that the said Margaret Maxwell Hamilton, otherwise Murray, had deceased, leaving several children, and that the said disposition was executed by the said John Edmund Murray in implement of the power and faculty reserved in his favour to divide and apportion the foresaid lands among his children. Accordingly, in implement of the said reserved power and faculty, the said John Edmund Murray, with consent of the then surviving trustees and fiduciaries under the disposition by Robert Rollo in 1829, alienated, assigned, disponed, conveyed, and made over from him, his heirs and successors, to and in favour of Charles James Boehm Murray, his second son, his heirs and assignees whomsoever, heritably and irredeemably, all and whole, one third part or share *pro indiviso* of all and whole the lands of Easter Newton and West Newton, and of the other subjects contained in the disposition of trust by Robert Rollo, with entry at the term of Whitsunday after the death of the said John Edmund Murray. The said Charles James Boehm Murray was infeft on said disposition.

The said John Edmund Murray died on 6th September 1868. He left a deed of settlement dated 18th May 1861, and codicils thereto dated 14th March 1865 and 15th August 1868. By said deed of settlement, after narrating the deed of 1829, he directed and appointed the sole surviving trustee under that deed, immediately after his death to sell his estate of West Newton and to pay over and divide the proceeds among his children in the shares under written, viz.:—To his eldest son, Edmund John Murray, £3000; and he directed the balance of the proceeds of the sale of his said estate to be equally divided between his other remaining children, viz., Charles James Boehm Murray, Augustus Berney Murray, Elizabeth Murray, Joseph Hutchison Murray, William Strang Murray, Frederick Murray, and Henry Murray, share and share alike, declaring that the share or proportion falling to any of his children above named who should predecease him should be divided in equal proportions among his surviving children. Further, by said deed of settlement, the said John Edmund Murray directed his trustees to burden his said children with an annuity of £50 to his second wife, declaring that if any of his said children should refuse to accept of the sums thereby provided for them, or to act up to his said last will and settlement, he thereby cancelled and annulled his or her right to any share of the proceeds arising from the sale of said property; and he directed his said trustee to divide the same equally among his other children who should accept thereof, and he thereby revoked and cancelled any former deeds, and reserved power to alter or revoke the said deed.

The estate was ultimately sold, with consent of all parties, for the sum of £8210, and this case brought to settle the rights of parties to the same.

The questions of law submitted to the Court were:—

"1. Whether the disposition of 27th September and 2d and 3d October 1851, was a valid exercise by the deceased John Edmund Murray of the power of apportionment conferred upon him by the trust-deed of Mr Rollo; and whether, in virtue of the said disposition, the parties of the third part had or have a valid claim to one-third share of the lands of Easter Newton, and West Newton, or the price thereof?

"2. If question 1 be answered in the affirmative. (1) Whether the trust-settlement of the said John Edmund Murray contains any valid apportionment of the remaining two-thirds of the said lands or the price thereof? (2) Whether said trust-settlement contains a valid apportionment of the remaining two-thirds in favour of the whole children of the truster? (3) Whether Charles Boehm Murray is entitled to claim any share of the said two-thirds, in addition to the one-third share previously apportioned to him?

"3. If question 1 be answered in the negative—(1) Whether the said lands or price thereof are validly apportioned amongst the children of the truster, the late John Edmund Murray, by his deed of settlement? Or, (2) Whether the said lands or the price thereof are unapportioned, and belong to said children in equal shares?"

SCOTT and STRACHAN for first and second parties, Mr Murray's trustee and his eldest son.

Solicitor-General (CLARK, Q.C.), and MACLAREN for third party, Mr Charles J. B. Murray.

WATSON for fourth parties, Mr Murray's other children.

M'LEAN for fifth parties, assignees of one of the children.

It was argued for the parties of the first and second part—(1) That the deed of 1851 was not a good exercise of the power of apportionment by Mr Murray; (2) That it was revocable and was revoked by the deed of 1861; (3) That the deed of 1861 was bad.

It was argued for the parties of the third part—(1) That they were entitled to one-third of the estate under the deed of 1851; and (2) to an equal share of the estate remaining unappointed.

It was argued for parties of fourth part, that both the deeds of 1851 and 1861 were bad, and estate fell to be equally divided.

Authorities cited—*Anstruther*, 9 Scot. Law Rep. 431; *Watson* v. *Marjoribanks*, 15 S. p. 586; *Dallas*, 2 S. 543; *Foster*, 6 D. Gex., M'Naughton and Gordon, p. 63; *Simpson* v. *Paul;* Sugden on Powers, p. 36.

The Court answered the first question in the affirmative, the first two branches of the second in the negative, and the last branch in the affirmative.

At advising—

thereon; and after the death of the said Margaret Maxwell Hamilton, in trust for the use and behoof of the said John Murray, in liferent for his liferent alimentary use allenarly, and not affectable or attachable for his debts or deeds, or by any diligence or execution thereon; and in trust for the use and behoof of any child or children lawfully procreated, or to be procreated of the body of the said John Murray, in such share and proportion, or shares and proportions, as he, the said John Murray, might appoint by a writing under his hand.

The said trustees accepted of the office, were infeft upon the said disposition, and acted together for some time.

The said Margaret Maxwell Hamilton or Murray died on 12th July 1833, leaving three children procreated of her marriage with the said John Murray. The said John Murray was married a second time, on 19th May 1854, and by his second marriage had five children. On 27th September 1851 the said John Murray granted a disposition in favour of his second son by his first marriage. This disposition proceeded on the narrative of the said trust disposition of the said Robert Rollo, as also that the said Margaret Maxwell Hamilton, otherwise Murray, had deceased, leaving several children, and that the said disposition was executed by the said John Edmund Murray in implement of the power and faculty reserved in his favour to divide and apportion the foresaid lands among his children. Accordingly, in implement of the said reserved power and faculty, the said John Edmund Murray, with consent of the then surviving trustees and fiduciaries under the disposition by Robert Rollo in 1829, alienated, assigned, disponed, conveyed, and made over from him, his heirs and successors, to and in favour of Charles James Boehm Murray, his second son, his heirs and assignees whomsoever, heritably and irredeemably, all and whole, one third part or share *pro indiviso* of all and whole the lands of Easter Newton and West Newton, and of the other subjects contained in the disposition of trust by Robert Rollo, with entry at the term of Whitsunday after the death of the said John Edmund Murray. The said Charles James Boehm Murray was infeft on said disposition.

The said John Edmund Murray died on 6th September 1868. He left a deed of settlement dated 18th May 1861, and codicils thereto dated 14th March 1865 and 15th August 1868. By said deed of settlement, after narrating the deed of 1829, he directed and appointed the sole surviving trustee under that deed, immediately after his death to sell his estate of West Newton and to pay over and divide the proceeds among his children in the shares under written, viz.:—To his eldest son, Edmund John Murray, £3000; and he directed the balance of the proceeds of the sale of his said estate to be equally divided between his other remaining children, viz., Charles James Boehm Murray, Augustus Berney Murray, Elizabeth Murray, Joseph Hutchison Murray, William Strang Murray, Frederick Murray, and Henry Murray, share and share alike, declaring that the share or proportion falling to any of his children above named who should predecease him should be divided in equal proportions among his surviving children. Further, by said deed of settlement, the said John Edmund Murray directed his trustees to burden his said children with an annuity of £50 to his second wife, declaring that if any of his said children should refuse to accept of the sums thereby provided for them, or to act up to his said last will and settlement, he thereby cancelled and annulled his or her right to any share of the proceeds arising from the sale of said property; and he directed his said trustee to divide the same equally among his other children who should accept thereof, and he thereby revoked and cancelled any former deeds, and reserved power to alter or revoke the said deed.

The estate was ultimately sold, with consent of all parties, for the sum of £8210, and this case brought to settle the rights of parties to the same.

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"2. If question 1 be answered in the affirmative. (1) Whether the trust-settlement of the said John Edmund Murray contains any valid apportionment of the remaining two-thirds of the said lands or the price thereof? (2) Whether said trust-settlement contains a valid apportionment of the remaining two-thirds in favour of the whole children of the truster? (3) Whether Charles Boehm Murray is entitled to claim any share of the said two-thirds, in addition to the one-third share previously apportioned to him?

"3. If question 1 be answered in the negative—(1) Whether the said lands or price thereof are validly apportioned amongst the children of the truster, the late John Edmund Murray, by his deed of settlement? Or, (2) Whether the said lands or the price thereof are unapportioned, and belong to said children in equal shares?"

SCOTT and STRACHAN for first and second parties, Mr Murray's trustee and his eldest son.

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WATSON for fourth parties, Mr Murray's other children.

M'LEAN for fifth parties, assignees of one of the children.

It was argued for the parties of the first and second part—(1) That the deed of 1851 was not a good exercise of the power of apportionment by Mr Murray; (2) That it was revocable and was revoked by the deed of 1861; (3) That the deed of 1861 was bad.

It was argued for the parties of the third part—(1) That they were entitled to one-third of the estate under the deed of 1851; and (2) to an equal share of the estate remaining unappointed.

It was argued for parties of fourth part, that both the deeds of 1851 and 1861 were bad, and estate fell to be equally divided.

Authorities cited—*Anstruther*, 9 Scot. Law Rep. 431; *Watson* v. *Marjoribanks*, 15 S. p. 586; *Dallas*, 2 S. 543; *Foster*, 6 D. Gex., M'Naughton and Gordon, p. 63; *Simpson* v. *Paul;* Sugden on Powers, p. 36.

The Court answered the first question in the affirmative, the first two branches of the second in the negative, and the last branch in the affirmative.

At advising—

LORD COWAN—The circumstances in which the Court are asked for their opinion and judgment on the questions of law in this Special Case are fully set forth, and need not be resumed, except in so far as necessary to explain the grounds of the opinion which I have formed.

The deed disposing the property, and conferring the power of apportionment, was executed by Robert Rollo in 1829. It conveyed the estate of Newton to trustees, in consideration of the sum of money therein mentioned, in trust for the use and behoof of Margaret Murray, wife of John Murray, "in liferent for her liferent alimentary use allenarly," excluding the *jus mariti*, and right of administration of her husband; and after her death in trust for the use and behoof of her husband John Murray, "in liferent for his liferent alimentary use allenarly," declaring the same not affectable for his debts or deeds, "and in trust for the use and behoof of any child or children lawfully procreated or to be procreated of the body of the said John Murray, in *such share and proportion, or shares and proportions, as he, the said John Murray, may appoint* by a writing under his hand; *which failing, equally amongst them.*" The trustees appointed by this deed were duly infeft in the lands; and it is not disputed that the only right conferred on John Murray was a right of liferent allenarly, that the fee vested in his children as a class, and that the estate was held by the trustees for their behoof, subject merely to the father's power of division.

Margaret Murray died in July 1833, leaving three sons of her marriage with John Murray. He married a second time, in May 1834, and by his second wife he had five children, and died in September 1868; two deeds relative to the estate of Newton having been executed by him, the one in 1851, being a disposition in favour of his second son, Charles James, and the other a deed of settlement executed in 1861, and relative codicils dated in 1865 and 1868.

The deed of 1851 in favour of the second son proceeds on the narrative of the disposition in trust in 1829, conveying the lands of Newton in the terms aforesaid, and of the decease of his first wife, Margaret Murray, leaving several children, and then "in implement of the reserved power and faculty" contained in the deed, and with consent of the trustees, he disponed to his second son the one third share *pro indiviso* of the said estate, "heritably and irredeemably;" the term of entry is declared to be the term of Whitsunday after his death, the granter's liferent being thus preserved to him; and the deed farther contains all the usual clauses of an absolute disposition. Upon this deed infeftment followed in favour of the second son; and thereafter the said disponee borrowed the sum of £460 upon the security of the subjects disponed to him, the bond in favour of the heritable creditor being duly recorded.

The deed of settlement of John Murray, bearing date 1861, with relative codicils, came into operation on the testator's death in 1868. And in relation to the estate of Newton he appointed that after his death the trustees in whom the estate was vested in trust for his children, should sell the lands, and divide the proceeds thereof amongst them in the shares and proportions therein stated, viz., "to his eldest son £3000," and the balance of the proceeds to be "equally divided among his other remaining children," consisting of seven sons, "share and share alike." The deed recalls and revokes any deed of settlement made by him at any time previously, and reserves power and liberty to alter the deed during his lifetime. There are other provisions in the settlement and relative codicils, to which it is not necessary at present to advert.

The primary question is, whether these deeds, or either of them, are valid, as in due exercise of the power of division.

As regards the deed of 1851, I see no good ground on which its validity can be successfully impugned. The estate of Newton was in 1851 held by the trustees under the deed of 1829, for the use and behoof of the children who were the sole fiars and beneficiaries, subject only to the liferent of their father, the survivor of the spouses, and his power of division. The deed of 1851 narrates that power, and gives over to his second son, his heirs and assignees, one third of the estate in absolute terms, subject to no power of revocation. The deed was delivered and took full effect; and the subjects were thereafter burdened with a security by the second son on the footing of his being absolute proprietor. Now, that a power of division or apportionment may be partially exercised cannot be doubted, after the recent decision and the opinions delivered in the House of Lords in the case of *Anstruther*; and this being so, the deed took effect as a delivered deed, and became irrevocable. The father had reserved no power to recall it, and it is not of a character to make it revocable *sua natura*. It fixed the proportion of the common estate which was to be taken by the second son, the remainder of the property being left to be taken by or apportioned among the other children. Farther, having regard to the principle recognised and acted on in the authoritative decision to which I have referred, this deed of 1851 must be held to remain valid, although no attempt had been made by the father to execute any other deed of apportionment among the rest of the children. There remained enough for them all, so that no objection could be taken to the deed of 1851 on the ground of any one of them being left to take a mere elusory share. Failing any other deed, the result merely was that effect would be given to the direction in the deed of 1829, that on such failure the unappropriated fund fell to be divided equally.

Then, as regards the validity of the deed of 1861, I am of opinion that it cannot be held a valid and effectual deed. The narrative states that the estate of Newton was held by the trustees under a deed of disposition *granted by him* in their favour for his liferent use, and in trust for his children, in such proportions as he might appoint. This was an error as to the origin of the rights in him and his children, inasmuch as no such deed existed, the deed bestowing the estate in fee to the children, and conferring the power of division on the father, having been the deed of Robert Rollo in 1829. The deed proceeds to direct the trustees to sell the estate of Newton, and to pay over and divide the proceeds among his children, whereas he had no power to direct the sale of the estate, and had no right in it beyond a mere liferent. Then his direction to the trustees is to divide the proceeds of the estate in shares or proportions, "viz., my eldest son the sum of £3000 sterling, and the balance or remainder of the sum arising from the sale of the estate to be equally divided" among his other children, including the second son, "share and share alike," so that this was not an exercise of the power conferred by

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 granter 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 granter 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, infeftment 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 inhabile 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-