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 certa in 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 prepared 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 Kelmonhead, 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-

action now sought to be enforced by the pursuers. Robert Marshall did not take an active part as a trustee under the deed, and he resigned his office on 14th March 1871."

The defenders now refused to implement the compromise on the following grounds:—(1) That Messrs Gifford & Simpson and Mr Sinclair had no authority from the defenders to compromise the action. (2) That, in any view, they had exceeded their powers by including in the compromise a lease of the lands of Kelmonhead for 350 years at an elusory rent, granted by Mr Carstairs in favour of Thomas Marshall, the lease not being involved in the action of reduction. (3) That they had no authority from Janet Marshall to compromise her rights, she not having subscribed the mandate of 13th March 1871. (4) That it was competent for the defenders to resile, the conditions of the compromise not having been embodied in a probative deed.

The Lord Ordinary (MACKENZIE), after a proof, pronounced the following interlocutor:—

"*Edinburgh, 4th January* 1872.— . . . . . Finds that an action of reduction and count, reckoning, and payment having been raised, on or about 11th July 1870, by the pursuer George Love, and others, against the defenders, Thomas Marshall, James Marshall, and Robert Marshall, as trustees and executors under a trust-disposition and settlement, bearing to be executed by the late James Carstairs of Kelmonhead on 11th February 1869, and also against the said Thomas Marshall, James Marshall, and their sister, Janet Marshall, as claiming to be beneficiaries under the said trust-deed, concluding for reduction of the said trust-deed, defences were lodged by the said Thomas Marshall, James Marshall, and Robert Marshall, as trustees and executors under the said trust-deed, a record was closed, issues were adjusted to try the validity of the said trust-deed, and the case was set down for trial by jury upon 20th March 1871: Finds, that by mandate dated 13th March 1871, the said Thomas Marshall and James Marshall, a majority and quorum of the trustees under the said trust-disposition and settlement, authorised Mr George Sinclair, solicitor, Bathgate, their law agent, and the law agent of their sister, Janet Marshall, in the said action, to compromise the said action on the terms proposed in the memoranda or heads of compromise annexed to the said mandate, or on such other terms and conditions as he, the said George Sinclair, might consider proper and judicious: Finds that the said Thomas Marshall, James Marshall, and Janet Marshall were the principal beneficiaries under the said trust-disposition and settlement, and that the employment of the said George Sinclair to compromise the said action, in virtue of the said mandate, was sanctioned and agreed to by the said Janet Marshall: Finds, that Robert Marshall resigned his office as trustee under the said trust-deed on 14th March 1871: Finds, that in virtue of the said mandate the said George Sinclair compromised the said action on the terms contained in a letter or offer dated 15th March 1871 (No. 9 of process), addressed to Messrs J. & R. Macandrew, W.S., the law agents for the said George Love and others, the pursuers in the said action, and subscribed by the said George Sinclair and by Messrs Gifford & Simpson, W.S., the law agents in Edinburgh in the said action for the said Thomas Marshall, James Marshall, and Janet Marshall, and relative letter of acceptance of said offer (No. 44 of process) by Messrs J. & R. Macandrew, as duly authorised and empowered by the said George Love and others, pursuers, dated 20th March 1871, and addressed to Messrs Gifford & Simpson: Finds that the said Thomas Marshall, James Marshall, and Janet Marshall are bound to implement the said compromise or transaction, and that the pursuers are entitled to enforce the same against them; and Finds, declares, and decerns against them, in terms of the first declaratory conclusions of the summons: Assoilzies the said Robert Marshall from the conclusions of the action, and decerns: Reserves all questions in regard to expenses, and appoints the cause to be put to the roll for further procedure.

"*Note.*—(*After the narrative given above*)—The defenders plead that Mr Sinclair had no power or authority to compromise or settle the said action; and further, that he had no power or authority to include, as a condition of the compromise, the surrender by Thomas Marshall of certain leases of the lands of Kelmonhead at an elusory rent of 6d. an acre, which he had obtained from James Carstairs. The Lord Ordinary considers that full power was conferred upon Mr Sinclair by the foresaid mandate to compromise the action, and to agree to the surrender of these leases as a condition of the compromise. The import and meaning of the mandate were fully explained to Thomas and James Marshall by Mr Sinclair before it was executed by them, and the Lord Ordinary is satisfied from the evidence, and from what he saw of Thomas and James Marshall in the witness-box, that they fully understood it. In regard to the long leases of the small possession of Kelmonhead, it is true that they are not specially mentioned in the memoranda annexed to the mandate; but Thomas Marshall, who was alone interested in these leases, had been previously made fully aware by Mr Sinclair that they were challengeable on the same grounds as the trust-disposition and settlement, and that the pursuers made it a condition of any compromise that these leases should be given up. Mr Sinclair depones that the question about these leases was so well known to Thomas Marshall, that 'it was not taken notice of in the mandate. There was a general power in the mandate, which comprehended all these minor matters.' That this was the case is proved by Thomas Marshall's conduct when the terms of the compromise came to his knowledge. He depones that he never heard, until his meeting with Mr Simpson in Edinburgh, which took place on 10th April 1871, of the long leases being included in the compromise. But this is, in the opinion of the Lord Ordinary, an untrue statement, because it is established by the evidence of Mr Dodds, that, on 21st March 1871, immediately after the conclusion of the compromise, he went over and fully explained to him, from a copy of the two letters containing the same, the whole terms thereof, and that he then made no objections to the condition therein contained in regard to the leases. It also appears, from statements which he made to his former agent, Mr Gardner, about a fortnight after granting the mandate, that he was then aware that the renunciation of the long leases had been made a condition of the compromise. And it is proved by his agent Mr Simpson that when he called upon Mr Simpson, upon 10th April 1871, he was fully aware of this condition, and that he then made no objection to it. These leases were then in the possession of Mr Simpson, having been delivered to him by Thomas Marshall when he was employed to defend the action. Their subsistence

was, it is thought, incompatible with a compromise on the footing of Thomas Marshall getting the liferent of Kelmonhead.

"It was further contended that Janet Marshall had given no authority to Mr Sinclair to compromise her rights. After careful consideration of the proof, the Lord Ordinary is of opinion that she was aware of the granting of the mandate by her brothers, and sanctioned and agreed to the compromise. Under the trust-settlement she was entitled to James Carstairs' moveable estate, after deduction of his moveable debts, and the trust-expenses applicable to the moveable estate. And, under the compromise it was provided that she should receive the whole moveable estate after payment of James Carstairs' debts, excepting the heritable debts, and the expense to be incurred in realizing that estate. But even although it were to be held that Janet Marshall was not bound by the compromise, that would not affect the liability of Thomas and James Marshall, who are, in the Lord Ordinary's opinion, bound to implement the compromise, in so far as it applies to or affects Janet Marshall, in respect that they took burden on them for, and authorised the action of reduction to be compromised on behalf of, the whole defenders to the action, one of whom was Janet Marshall.

"In concluding his remarks on the proof, the Lord Ordinary thinks it right to state that he considers the evidence given by Mr Sinclair, Mr Dodds, and Mr Simpson, entitled to full credit, and that he regrets he cannot say the same of the evidence which was given by the defenders.

"The defenders further pleaded that it was competent to them to resile from the compromise, in respect that the letter or offer of 15th March 1871, subscribed by Mr Sinclair and Messrs Gifford & Simpson, was not holograph or tested, and that a transaction or compromise can only be proved by writ or oath. In support of this proposition, they cited the old cases of *Cranstoun*, Feb. 11, and March 6, 1533; and *Somervell*, Jan. 21, 1540, Dict. 12,297; and of *Fotheringham*, Nov. 27, 1708, Dict. 12,414; The case of *Fotheringham* is not in point, and the other two cases cannot now be considered of authority, after the decision in the case of *Thomson* v. *Fraser*, Oct. 30, 1868, 7 Macph. 39, in which it was decided that a compromise or transaction may be proved *prout de jure*. See also *Jaffray* v. *Simpson*, July 1, 1835, 13 S. 1122. The defenders also cited the case of *Taylor* v. *Carron Paper Company*, July 14, 1869, shortly reported in the Journal of Jurisprudence, vol. xiii. 463, but that report is incorrect. In that case the defender moved for a discharge of the notice of trial, on the ground that the action was compromised on the terms embodied in a letter by the pursuer. The defenders having tendered a condescendence of *res noviter*, setting forth the compromise alleged by them, the Court, by interlocutor dated 20th July 1869, discharged the notice of trial for the ensuing sittings, on condition of the defenders paying the expenses incurred by the pursuer in preparing for trial, in so far as not available for the future trial of the cause; held that condescendence as a minute for the defenders; and appointed the same to be answered by the pursuer on or before the first sederunt day in October. The case was thereafter compromised, and no decision was pronounced on the alleged compromise."

After another interlocutor, in which the Lord Ordinary disposed of the whole case, the defenders reclaimed.

MILLAR, Q.C., and CRICHTON, for them.

WATSON and STRACHAN in reply.

At advising—

LORD KINLOCH—I concur in the Lord Ordinary's judgment, and substantially for the reasons assigned by his Lordship.

The compromise now sought to be enforced was a compromise of an action of reduction of a deed of disposition and settlement under which the present defenders, the Marshalls, obtained right to the estate of the deceased James Carstairs. The reduction was laid on very serious allegations of fraud; and it is plain that the legal advisers of the Marshalls had great fear of the result. I consider it clearly established that the Marshalls gave authority to their agent to settle the case on certain specified terms, or, as the letter of authority bears, "on such other terms and conditions as he may consider proper and judicious." I am further satisfied that the compromise effected was strictly in terms of this authority. The objection taken is, that for a certain specified consideration the Marshalls were made to give up not only their right under the settlement, but also a right which arose under a previous lease by Carstairs for 350 years at 6d. per acre, the aspect of which was, to say the least, nearly as suspicious as that of the settlement. I think it clearly appears that the abandonment of this lease was a necessary part of the compromise, which imported a cession of all their rights in return for the consideration stipulated. There would have been little or no use in obtaining an abandonment of the right of property given by the settlement, if a right of tenancy for 350 years at 6d. per acre was still retained. It is true that a reduction of the lease was not included in the action of reduction of the settlement. But the compromise of an action is not necessarily confined to a mere arrangement of its conclusions by decree on the one hand, or absolvitor on the other. It frequently introduces other considerations,—as the payment of a sum of money, the cession of some other right, and the like. The abandonment of the lease was, I think, a proper, and indeed necessary, element of the transaction.

A separate case was attempted to be made for Janet Marshall, whose name is not subscribed to the mandate to settle. But Janet Marshall was a party to the action compromised, which the trustees under the disposition challenged defended for her behalf. And I am satisfied on the evidence that she knew of the negotiations for a settlement, and committed her interests to the two and a quorum of the trustees by whom the settlement was effected. Her interests were well attended to; for she obtained by the compromise as nearly as possible what she had under the settlement. Her only real interest is as to the agreement about expenses, and I think her conduct precludes her from challenging this as unauthorised.

I conceive that no difficulty arises from the fact of the letter of Messrs Gifford & Simpson, by which the terms which were accepted were offered, not being holograph of either of the agents signing it. There is strong ground for holding that Mr Simpson's holograph note, enclosing this letter, entitles us to read the enclosure as thus having transferred to it the probativeness of the holo-

graph note itself. But, independently of this consideration, the authorities referred to by the Lord Ordinary determine, as I conceive, that probative instruments are not necessary to instruct the compromise of a suit; but that this may be proved by the combination of informal writings with parole evidence. We are therefore, I conceive, fully put in possession of the terms of the compromise; and the compromise, as I think, is liable to no legal exception, and has been rightly enforced by the Lord Ordinary.

The other Judges concurred.

The Court adhered, with additional expenses.

Agents for Pursuers—J. & R. Macandrew, W.S.
Agents for Defenders—Waddell & Mackintosh, W.S.

Wednesday, June 12.

LEES *v.* WHIFFIN.

Executor—Foreign—Title.

Held (dissent Lord Deas) that a person who was appointed by the Court of Probate in England to be administrator, pending a suit, of the personal estate and effects of a deceased foreigner, had not, in virtue of that appointment, any title to be appointed executor-dative to the deceased in Scotland.

Francisco Solano Lopez, President of Paraguay, died at Cerra Cora, in Paraguay, on or about 1st March 1870, and had at the time of his death his domicile in that country. He left personal estate and effects, which were situated partly in England, and partly in Scotland. Three competitors for that estate appeared in the English Court of Probate—the President's mother, as entitled under the law of the deceased's domicile; Eliza Alicia Lynch, claiming under a deed of universal donation *mortis causa;* and the State of Paraguay itself, founding upon the decree of outlawry which was issued against the President some months before his death, and confirmed by the Legislative Congress on 13th July 1871. In these proceedings, Lord Penzance, Judge of the Court of Probate, on application of Council for the plaintiff (Lynch), with the consent of the defendant (Madam Lopez), made an order appointing Mr George Whiffin to be administrator, pending the said suit, of the personal estate and effects of the said Francisco Solano Lopez; and on 6th September 1871 letters of administration of the personal estate and effects of the said deceased, pending the said suit, were granted by the Court of Probate to the said Mr George Whiffin.

As narrated above, a portion of the estate and effects of the deceased President Lopez were situated in Scotland, and in order to its recovery it was necessary that there should be a party having an active title from the Court to sue therefor, and accordingly Mr Whiffin presented a petition to the Commissary Depute in Edinburgh, craving to be decerned "executor dative to the said deceased Francisco Solano Lopez, *qua* administrator of the personal estate and effects of the said deceased."

This petition was opposed by Mr Richard Lees, as attorney in Great Britain and Ireland of the Government of Paraguay, and as delegate administrator on their behalf of the estate of the deceased Lopez. The said Mr Lees was a writer in Galashiels, and a partner of Mr Robert Stewart, writer and banker there, in whose hands was a deposit of £4136, the only part of Lopez's estate alleged to be in Scotland.

The Commissary Depute (HALLARD) pronounced the following interlocutor:—

"*Edinburgh, 8th March* 1872.—The Commissary-Depute having considered the whole process, and heard counsel for the parties, for the reasons stated in the following note, repels the pleas of the respondent, and decerns the petitioner, George Whiffin, executor-dative to the defunct, *qua* administrator of the estate and effects of the said defunct, conform to letters of administration from the Principal Registry of Her Majesty's Court of Probate in England produced: Finds the respondent liable in expenses; allows an account thereof to be lodged for taxation; and remits the same, when lodged, to Mr Robert Barclay Selby, S.L., to tax and to report."

The learned Commissary-Depute, in a note, stated that in his opinion every consideration of convenience and propriety was in favour of the application, and that it seemed right that the funds of the deceased in Great Britain should be in the hands of one administrator; that the circumstance that the only opposition to the application proceeded from a partner of the holder of the fund sought to be recovered, gave additional strength to the considerations of convenience and propriety; and that although the records of the Court afforded no direct precedent for this application, yet the case of the *Marchioness of Hastings* (14 D. 489) showed clearly that, instead of an absolute and inflexible line between those persons who are and those who are not entitled to the office of executor, there is no limitation, if the applicant has any interest in law to obtain a decree; and in his opinion the requisite legal interest had in this case been created or declared by what *ex comitate* must be held a competent tribunal.

Mr Richard Lees appealed.

The Commissary (DAVIDSON) pronounced the following interlocutor:—

"*Edinburgh, 19th April* 1872.—The Commissary having considered the appeal for the respondent with the process, and heard counsel for the parties, dismisses the said appeal, adheres to the interlocutor appealed against: finds the respondent liable in additional expenses, and decerns."

The appellant appealed.

SOLICITOR-GENERAL and BALFOUR, for him, argued that the appointment of Whiffin in the English Courts was only pending the decision whether Madame Lynch, or the mother of Lopez was the executor of Lopez; that he was therefore a mere collector of assets in England, and his being so was no reason why he should be appointed, not an officer of Court, but an executor in Scotland. That the sentence of outlawry during the life of Lopez constituted an escheat of all his moveables to the Government of Paraguay, and in that case the appellant, as agent of that Government, and as delegate administrator of the estate of Lopez, on their behalf, was the only person entitled to administer the estate in Scotland.

MILLER and BURNET, for the petitioner and respondent, argued that the petitioner had a sufficient legal interest to entitle him to apply for the office of executor, and that it was expedient that the application should be granted. That the sentence of outlawry was of no effect, as it was pronounced by an unauthorised and unconstitutional Government; and that, even if it were a good sentence of