"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,

held (*diss.* Lord Shand) that the award though large was not so excessive as to entitle the Court to interfere with the discretion of the jury.

Question—Whether the amount of damages recoverable by an executor in such circumstances was limited to the pecuniary loss actually sustained by the deceased and a sum by way of *solatium* for the suffering which he endured during his survivance?

A lad named Robert M'Master, sixteen years of age, an ironworker, was, while a passenger in a train on the Caledonian Railway Company's system at Mossend in September 1884, injured by fault for which the company were responsible. The injuries consisted in a dislocation of both ankles, and caused considerable suffering. An operation had eventually to be performed on one of his feet, and there was a probability that he would be somewhat lame for life. He died in May 1885 in consequence of the results of the chloroform necessarily administered to him while being treated for his injury, and therefore indirectly in consequence of the accident. On 19th March prior thereto he had raised an action against the company for £1500 as damages, which was defended by the company on the ground that the damages claimed were excessive.

On 26th May the Lord Ordinary deleted the case from the roll in consequence of the pursuer's death.

On 23d June the Lord Ordinary sisted William M'Master, who was the deceased Robert M'Master's father and his executor, and reinstated the case in the roll.

The record was thereafter closed, and the case went to trial before a jury on the following issue:—"Whether, on or about 20th September 1884, in consequence of a collision on the defenders' line of railway near their Mossend Station, the now deceased Robert M'Master was injured in his person through the fault of the defenders, to the loss, injury, and damage of the said Robert M'Master, and of the pursuer as in his right and as representing him. Damages laid at £1500."

The jury returned a verdict of £400 damages.

The defenders obtained a rule to show cause why this verdict should not be set aside on the ground of excessive damages.

At advising—

Lord President—The original pursuer of this action, Robert M'Master, suffered severe injury in the month of September last year in consequence of a collision on the defenders' line of railway. The injury was to both ankles, and it appears from the statement made to us that he suffered a great deal of pain and distress in consequence of that injury, and ultimately died after this action had been raised. The action was raised on the 19th of March 1885, and he seems to have died in the month of May, because on 26th May the Lord Ordinary, in respect of pursuer's death, appointed the case to be deleted from his roll. His father, who was his executor, was afterwards upon 23d June sisted in place of the deceased, and then the record was closed and the case went to trial. The jury returned a verdict of £400 of damages, and a rule has been obtained by the defenders to show cause why this verdict should not be set aside upon the ground of the damages being excessive.

The question is very peculiar in every aspect of it. It is a case where the injury has resulted in the death of the injured person after he had raised his action of damages, and it was contended upon the part of the defenders that the whole damage which the pursuer could possibly demand or receive in such an action as executor of the injured person was the loss actually sustained—the pecuniary loss actually sustained by the deceased—and a sum by way of *solatium* for the suffering which he endured during his survivance. Now, I am not satisfied that that is necessarily the limit of the damage. I do not mean to give any very decided opinion as to what is the particular scale or measure of damages in such a case. But the occurrence of the death after an action so raised suggests various considerations. If it had been foreseen that the man was to die very shortly after the occurrence of the injury, or very shortly after the time when the trial was to take place, there may be a question whether he would not have been entitled to damages for the shortening of his life. And so it may be a question whether his executor, as now representing him, is not entitled to damages for that very same thing, it being now ascertained beyond all dispute that his life was shortened in consequence of this injury. But I am rather disposed to think upon the whole that the jury were entitled in a great measure to take this matter into their own hands, and so long as they did not do anything very extravagant that their verdict should stand, and I have come to the conclusion that although perhaps it may be a large sum, in the circumstances I cannot pronounce it to be so excessive as to entitle the Court to interfere, and therefore I am for discharging the rule.

Lord Mure—I have come to the same conclusion as your Lordship. The case is certainly very peculiar, arising from the fact that this man died before the case was sent to the jury. But the case was sent to the jury, and they have given their verdict. Now, I think the damages were large myself, but it was a matter of a peculiar nature. I am very clear up to this point, that if the original pursuer had been alive to-day, and the jury had given him that sum—if it be the case that he was so damaged and wounded in his one leg as to be practically deprived of the use of it for a certain time and made a cripple for life—I do not think the damages are too high, at least I would not have seen my way to altering the verdict of the jury on the ground of excessive damage. And I cannot see myself that there is anything in the circumstances to give sufficient ground for saying that upon that ground the verdict should be altered. I agree with your Lordship that the jury took the whole matter into their consideration, and that they thought that was the damage which in the circumstances was due.

Lord Shand—I am of opinion that the sum of £400 for which the jury gave a verdict in name of damages in this case is extravagant and excessive, and that consequently the verdict ought to be set aside.

The deceased pursuer was a lad of sixteen years of age, living with a married sister, with no one dependent on him, and earning 12s. 6d. a-week as an ironworker.

By the accident which occurred on the defenders' railway he had both his ankles dislocated, and was for a time in the Infirmary, where he underwent an operation on one of his feet, and though it was anticipated that he would recover he died not directly from the effects of the accident, but according to the best medical opinion in consequence of having had chloroform administered to him to enable him to undergo the operation. It appears that the injuries he sustained and which made the operation necessary were directly the cause of considerable suffering, and were indirectly the cause of the pursuer's death. He died seven months after the accident, and his father as his executor thereupon became pursuer of the action which had been raised by the deceased a month before he died.

The case, then, is that of a lad in humble circumstances, earning small wages, and the jury had before them the fact that his injuries caused considerable suffering and a certain amount of outlay for maintenance and medical attendance, and that he died seven months after the accident. These were the circumstances before them which afforded the whole elements for enabling them to assess the damages.

The case is singular in respect of the action having been raised by the deceased, of his death during its dependence, and of its being taken up by an executor, and a full argument was submitted from the bar as to the principles to which a jury should give effect in such a case. I do not think that any general rule or principle can be safely laid down. All that I think can be said is that a jury in trying such questions—in assessing damages, which was the only duty they had here to perform—must have regard in each case to the special circumstances as these are proved in the evidence. In this case one of the special circumstances, and a material one, was the death of the young man, for it is obvious that this occurrence made it quite improper that they should resort to the means of measuring or estimating damages usual in such cases by considering how far the injuries complained of would be permanent, and so would diminish the power of the injured person to earn wages for it might be a period of years. To adopt such a mode of assessing damages in the case of a young man who had died shortly after raising the action would be absurd.

In cases of injuries from an accident the jury ought unquestionably in the ordinary case to take into consideration everything that can be ascertained as to the state of the injured person down to the day of the trial, so as to enable them to the best of their ability to estimate the prospects of recovery, whether a complete recovery may be expected, and at what time more or less remote. The light so obtained may seriously affect the amount to be assessed as damages either favourably or unfavourably to the defenders in such actions. If the facts proved as to the history of the case down to the last show that the recovery must be very tedious, and that even graver consequences may develop themselves than any that have yet appeared, so that the injured person may be for many years unable or be only partially able to earn the income which he might otherwise expect, the amount to be allowed will be all the larger. If the evidence be to an opposite effect the amount to be allowed will be so much the less.

In the present case the idea of years of future life and the necessity of providing for this is inapplicable to the circumstances. What was left for the jury to deal with? The expenses of medical attendance and maintenance of the lad for seven months, some compensation for suffering to the moment of death, and for *solatium*—a ground of damage for which it is very difficult, if indeed possible, to provide any measure or means of assessment. £50 or £70 would fully cover the item of expenses, and having regard to the age and position in life of the deceased, if £130 were added in respect of the suffering and *solatium* I should say a full measure of damages—being in all £200—would be allowed. The jury gave double that sum to the deceased's executor, and that I think extravagant and excessive in the circumstances of the case. I should therefore, had the decision rested with me, have given a new trial unless the pursuer agreed to restrict the verdict to £200.

It may be said that the deceased would never have accepted £130 for the suffering he had and for *solatium*, and that is true, but the same observation may be made with truth of ten times that sum, and therefore all that can be given by way of direction to a jury is that they must judge fairly and reasonably between the parties, knowing that money can never afford compensation for serious injuries and much suffering, and that they must show moderation and good sense in giving some compensation for what cannot be otherwise repaired.

It was maintained for the pursuer that if the deceased had not died, but had a prospect of the average length of life, the jury would have properly taken into view that for many years he would be lame to a certain extent, and in that case might fairly have allowed £400 to compensate him, amongst other matters, for the loss of income which might thereby be caused, and, if so, that a less sum ought not to be allowed because of his death within a short time of the accident. Even in that view I should have thought the damages excessive, and that £250 or £300 should have been the maximum. But I cannot assent to the argument that in the actual circumstances, and having regard to the death of the original pursuer, the sum may not properly be estimated at a smaller amount than it would have been in different circumstances, *i.e.*, in the case of the deceased having survived, but lame to some extent for life. I think the only sound rule must be that the jury should look at the circumstances which are actually before them, and give effect to these, even if that effect be to reduce the amount for which a verdict is to be given below what it would have been had the deceased survived. It is to be noted that in this case the young man injured had no one dependent on him. Had the case been that of a husband and father with a wife and children wholly dependent on his exertions in business for the means of support, and assuming that the claim made originally by the husband would be exclusive of separate claims by his wife and children on account of his death, I should think that the fact of the resulting death being proved might greatly increase the amount of damage beyond what that would have been had the deceased husband and father survived and been able to earn an income.

On the whole I am of opinion that a new trial ought to be granted.

LORD ADAM—If this lad M'Master had been alive at the time of the trial, although I should have thought the damages were large, I agree with Lord Mure that I would not have disturbed them. Undoubtedly the lad was severely injured, and he would have been a cripple for life. There is no doubt that he would have been, as I understand, very much affected by these injuries, and although the damages are large I would not have disturbed them. Now, that being so, the Caledonian Railway Company have not satisfied me that the damages should be less in respect that the injuries instead of causing prolonged suffering led to early death. No doubt that fact introduces different elements for the consideration of the jury on which to base their verdict. On the one side it removed the element of continued suffering; but, on the other hand, there is introduced the fresh element of early death to the other injuries. Now, in these circumstances I am not satisfied that the jury have not done quite right if they thought that if the lad had been alive the sum would not have been too large. I am not satisfied that the sum given should be less than in that case, and therefore I concur with your Lordship.

LORD LEE—The issue in this case put it to the jury to ascertain only, as was pointed out by the counsel for defenders, the loss, injury, and damage sustained by Robert M'Master, the injured lad himself, and by his executor as his executor; and I think it must be assumed that the jury in arriving at the sum of £400 have done their best to get at the proper amount of damage upon that view, and I must say that at the time the verdict was returned I thought, and I still think, the sum was larger than I myself would have given. But I do not think it would be at all safe to proceed in every case on an estimate of what the Judge who tried the case would give—it is primarily the province of the jury to decide as to the amount of damages. Now, I am not at all prepared to admit that Lord Shand's statement of the elements before the jury exhausted the whole that the jury were entitled to consider. There was a considerable amount of evidence upon that subject. The notes of evidence have not been printed, but they certainly would have shown if they had that the lad suffered from severe injuries to both feet, that these injuries continued for seven months, that they made it necessary ultimately for the lad to go back to the Infirmary, after suffering seven months of continual pain, and undergo this operation under which he sunk and died. I think the action being raised in the lifetime of Robert M'Master included every claim which he could have established to the satisfaction of the jury if he had continued to live down to the trial, and I see no reason therefore to think that it was not within the competency of the jury, dealing with the matter upon the footing of giving nothing to the pursuer except for the injury suffered by M'Master himself, to estimate the amount at £400, and although it is a large sum I do not think it is so large as to justify any interference with the verdict of the jury. I therefore entirely agree with your Lordships.

Rule discharged.

Counsel for Pursuer—Rhind. Agent—Robert Menzies, S.S.C.

Counsel for Defenders—R. Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Friday, November 27.

OUTER HOUSE.

[Lord Trayner.

LUCOVICH *v.* MACDOWELL AND OTHERS

Ship—Sale of Ship by Order of Court—Auctioneer.

Fee *allowed* to auctioneer for sale of ship under warrant of Court.

This was an action by the holder of a bottomry-bond over the ship "Cavendish" against the master, owner, and mortgagees of the vessel for (1) payment of £5000, the amount in the bond; (2) declarator that the pursuer had a real lien over the vessel; (3) declarator that he was entitled to have her sold, and the proceeds applied *pro tanto* for payment of the sum sued for; (4) to have the vessel sold, and adjudged from the defenders, the owners, and declared to belong to the purchaser, free of bonds and mortgages, reserving the pursuer's right to payment of his debt so far as not paid out of the proceeds of the vessel.

Decree in absence having passed under the petitory conclusion, the Lord Ordinary, after a report on the value of the vessel, ordered her to be exposed for sale by auction, which was done, and a title given by the Clerk of Court, who revised and executed the articles of roup and executed the bill of sale.

The question now reported (which arose on the taxation of the pursuer's account of expenses) related to the fee to be allowed to the auctioneer, and to that to be allowed to the Clerk of Court. The Auditor reserved these items (being, as charged in the account, respectively £63, 2s., one-half per cent. on the price obtained, and £21) for the determination of the Lord Ordinary, expressing his own view in the following note:—"1. In so far as the charge of £63, 2s. is concerned, I have a very decided opinion that it ought to be restricted to a much smaller sum. The auctioneer in such a case as this has little trouble and no responsibility. For sales of heritable property Mr Alexander Dowell, of Edinburgh (who is very largely employed as an auctioneer), has a graduated scale, closing with a maximum charge of £3, 3s. for property of the value of £5000 and upwards. The auctioneers in Glasgow have also a graduated scale, closing, I believe, with a maximum charge of £26, 5s. This I regard as altogether excessive. In the present case the auctioneer had a fee of 21s. for attending the unsuccessful exposure of the ship on 28th July, and I hold that Mr Dowell's maximum fee of £3, 3s. will fully remunerate him for his services on 13th August, when the ship was sold. The charge of £63, 2s. made by the auctioneer contrasts in a very remarkable manner with the fee of £15, 15s. (10th July 1885) paid