Lord Neaves—I concur on all points. The most difficult question is as to the nomination of residuary legatees. By the original will Mr Cox made as little deviation from the natural order of succession as he could; he left his moveable property equally amongst his next of kin, and by express nomination he allowed a system of representation amongst the children of next of kin. Until, therefore, the writing of 10th August 1872 the next of kin were nominatim residuary legatees.

It is possible that at that time he may have altered his views, as was suggested, in favour of the younger generation, but the question is, did he by the writing of 10th August 1872 change the appointment of the residuary legatees, or merely modify it. I am of opinion that he only modified it. There is at any rate the substantive nomination of Robert Cox as one of his residuary legatees, and if we are to look at these words as to appointing Robert Cox as one of several legatees, we are not entitled to do more than apply them in the same way to all the rest there mentioned.

Thus, there is no exclusive appointment. If the testator had wished he might have made such an appointment by saying these persons are to be my sole legatees, but he has done nothing of the kind.

On these grounds, I cannot hold that there is any revoking clause substituting these persons for the residuary legatees formerly appointed, but appointing them in addition.

Lord Ormidale—This case has raised three questions. Of these the first is the most important. I keep in view that in 1850 the next of kin were appointed to succeed to the residuary estate.

Then arises the question, does the holograph writing of 1872 show any intention to change the disposal of the estate? I cannot say what may have been in the mind of the testator, for I cannot go beyond the case to ascertain if there was any alteration of his intentions. I am not able to see any indication of such change. I know, on the contrary, that when he wrote that holograph writing he had in view the original settlement—there is in fact express reference to the original settlement. And my view is, that not only is there no express recall of the settlement in the original will, but that there is no necessary implication of such intention in this holograph writing.

As to the second question, I have had some little difficulty, but still not enough to lead me to differ from your Lordships.

On the third question, I have had no difficulty, and therefore I concur without any hesitation.

Lord Justice-Clerk—The Court then answers the first question in the affirmative; the second in the negative; and as to the third, finds that the persons therein named are to take an equal share of the residue.

Counsel for the First Parties—Dean of Faculty (Clark) and Mackay. Agents—Leburn, Henderson, & Wilson, S.S.C.

Counsel for Second Parties—Solicitor-General (Watson) and M'Laren. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Third Parties—Adam and Kinnear. Agents—Adam Kirk, & Robertson, W.S.

Tuesday, October 27.

SECOND DIVISION.

[Sheriff of Lanarkshire.

KING *v.* POLLOCK.

Injury to the Person—Reparation—Culpa.

A received back his gun, which he had left at a neighbour's house. He examined the nipple, and finding no cap on it, he supposed it unloaded, and put the gun away in a closet. In his absence B took out the gun, which exploded and injured C. *Held* that A had taken sufficient precaution against risk, and was not liable in damages to C.

This was an appeal from the Sheriff of Lanarkshire in an action at the instance of Archibald King, blacksmith, Hamilton, against James Pollock, blacksmith, Hamilton, John Dun, farmer, Kennedies, as curator for his son James Dun; and James Frew, ironfounder, Hamilton, as curator for his son James Frew,—in the following circumstances:—

It appeared that the defender Pollock was in the habit of occasionally shooting rabbits over the farm of the other defender Dun, and for this purpose he was in the habit of using a single-barrelled gun belonging to himself. It further appeared that Pollock did not always bring his gun home after shooting at Dun's farm; and on the particular occasion in question he had left it within a bothy at Mr Dun's house. Some considerable time after this—on or about the 3d of October 1872—the defender Dun sent his son James Dun to return the gun to Pollock, the gun being, as subsequently appeared, loaded, but this being unknown to the defender. Pollock took the gun from the boy Dun and asked him if it were loaded; Dun replied that he did not know. Pollock then raised the hammer of the gun and saw that there was no cap on the nipple, he then tried to draw the ramrod to ascertain by the application of it if the gun were loaded. This, however, he could not do from the ramrod having stuck fast in its place. He then put the gun away in a press or closet in his smithy to which no one but himself or his men had access.

At this time the pursuer King was a journeyman blacksmith in the employment of Pollock, earning wages of twenty-three shillings a-week, and on the occasion in question was in the smithy in discharge of his daily avocation.

On the afternoon of the day on which Pollock had put the gun into the press in the smithy, a boy named James Frew came into the smithy. Frew was known to the defender, who asked him to blow the bellows for him, which Frew did for a few minutes, when Pollock was called out of the smithy by a gentleman. While Pollock was absent Frew took the gun from the press where Pollock had placed it, and while the gun was in his hands it exploded and injured the pursuer King so seriously in the right arm that he was permanently disabled from following his trade as a blacksmith.

The pursuer thereupon raised an action in the Sheriff Court against all the defenders, concluding for £500 as damages for the injury sustained by the pursuer through the carelessness of the defenders.

The Sheriff-Substitute at Hamilton, to whose interlocutor the Sheriff adhered, dismissed the action as regarded the defender Dun, but found there had been culpa on the part of the defenders

Frew and Pollock, and found them liable in damages to King to the amount of £70.

Against this judgment the defender Pollock appealed to the Court of Session, when three Judges of the Second Division recalled the interlocutors of the Sheriffs as against the defender Pollock, and assoilzied him from the conclusions of the summons.

Authorities—*Dixon* v. *Bell*, 13 June 1816, 5 Maule and Selvin, 198; *Abbot* v. *M'Fie*, 2 Hurlstone and Coltman, 744; *Lynch* v. *Nurden*, 1 Ad. and Ell., Q.B. 29; *Mackintosh* v. *Mackintosh*, 1864, 2 Macph. 1357.

At advising—

Lord Neaves—My Lord Justice-Clerk, this appeal relates to an important subject, involving considerable delicacy in applying the general principles involved in the case.

Accidents from fire arms are both numerous and formidable, and it is therefore most desirable that the Court should be careful and strict in determining whether each case is suitable for the application of the general rule—that the owner in possession of a dangerous weapon is responsible for any injury that another person might receive from such weapon when under the owner's control, and in applying the rule where it is found to govern such a case.

There have been several cases in which parties who from negligence have left out firearms and injury has resulted to others, have been subjected to the consequences of their neglect, and the learned Sheriffs have thought that the present case discloses such an amount of culpable negligence as to bring it within the rule of these cases. We have to decide as to the case against the defender Pollock.

It is often very difficult and delicate to determine what, in the circumstances of the particular case, is culpable negligence, and in the present case there are some circumstances in favour of Pollock and some against him. We must then consider what this negligence consists in, but we certainly cannot hold that the owner of firearms is to be an insurer of the public against the risk of any accident that may happen from them—there must in every case of culpable negligence be fault of a tangible and intelligible kind. Any sort of neglect will not be enough; there must be that sort of neglect which a man of anxious and conscientious mind would not be guilty of in his own family.

In the present case the gun had not been in Pollock's own possession for some considerable time, he had discharged it himself on the occasion of his last using it, and did not know that it was loaded when it came back.

Did he then take due precaution in the circumstances? He did not know the gun was loaded—if he had I should not go against the judgment of the Sheriff—but we must begin with the fact that in his belief the gun was not loaded. Still he showed anxiety to obtain certain information on this point: he enquired of the person who bought the gun, he examined it, and he found no cap upon it. And here there is a distinction between the present case and that when the person knows the gun to be loaded, but runs the risk of any accident, feeling safe because of the absence of the cap. Whether or not culpa could be imputed in such a case is a different question from the present, but there can be no culpable negligence where the person, not knowing the gun to be loaded, held the want of a cap to be proof that it was not loaded, he having moreover himself left it unloaded.

It is true that Pollock further attempted to satisfy himself by trying the gun with the ramrod, and was only prevented by finding the ramrod immoveably stuck in its place. But the fact that he did attempt to try the gun with the ramrod is not a proof that he thought that it was loaded.

But what does he next do? He does not leave the gun in an exposed place where it might attract notice, but he puts it for greater safety into a press in the smithy, but no sooner is his back turned than this lad Frew takes it out, and while he is playing with it it goes off and causes the injury to the pursuer. Now, I cannot hold that neglect of this kind amounts to culpa.

On this point I think I cannot do better than contrast this case with the case quoted by the Sheriff, in which Lord Denman has the following observations:—"If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume the sufferer might have redress by action against both or either of the two, but unquestionably against the first."

Now, here the first point is, that the thing left in an exposed position should be dangerous in itself. But that condition can hardly be said to have occurred in the present case.

Firearms are not dangerous unless loaded, and here we must hold that so far as the defender Pollock is concerned, the gun was unloaded.

The second point contained in the case put by Lord Denman is, that the place where the dangerous instrument was left must be exposed or open to access. And in order more fully to illustrate his meaning his Lordship puts the following case:—"If a gamekeeper returning from his daily exercise should rear his loaded gun against a wall in the playground of school boys whom he knew to be in the habit of pointing toys in the shape of guns at one another, and one of these should playfully fire it off at a school fellow and maim him, I think it will not be doubted that the gamekeeper must answer in damages to the wounded party."

Now, observe what is required here—the person must know that the gun was loaded, that is the first point.

Secondly, the place where it is left must be exposed as a playground. Here there is required the plainest element of indifference to consequences, the gun is supposed to be left where some one will be most likely to use it.

But in the present case there are none of these elements of carelessness. Pollock was not in recent possession of the gun so that he might know whether it was loaded or not; then he does all that he thinks necessary in the way of examination to find out whether or not it was loaded. He does not leave it in a dangerous position, nor does he leave boys about it, but grown men, who might have prevented any danger they saw likely to arise from the handling of the gun by the boy Frew.

I am therefore, considering all the circumstances of the case, not able to see any omission on the part of the defender Pollock amounting to neglect or culpa.

I am therefore for reversing the interlocutors of the Sheriffs; it is a matter of delicacy to do so, but unless we suppose a person in the position of the

defender to be liable in any circumstance—in fact to insure the safety of the public—we should be, I think, transgressing the principles applicable to such cases as the present by allowing this judgment to stand.

LORD ORMIDALE—I concur. It would be extravagant to hold that a person in possession or charge of firearms is to be responsible for the safety of third parties in all possible circumstances. All that can be expected is that reasonable precaution which a prudent man with a dangerous instrument will take against risk of injury to those about him.

Both the Sheriffs say well that the question is, did Pollock take this precaution?

In the first place, we must keep in view, as a fact, what Pollock tells us, that he had left the gun unloaded after the occasion of his last using it. Again, when the gun was brought to Pollock, he did not rely upon its being unloaded, but he took precautions to ascertain the fact so far as he could. He asked the boy Dun who brought it to him if it was loaded. Dun was not able to say, but Pollock took further precautions to ascertain about the loading—he examined the nipple of the gun and found no cap on. Taking this fact in conjunction with the other fact that he left the gun unloaded, he felt himself justified in believing that it was still in the same condition. Not content, however, with this evidence as to the loading, Pollock tried to get the ramrod out of its place to try the gun by means of it, and was only prevented by finding the ramrod immoveably fixed in its place.

Now, in my opinion, instead of the fact that Pollock tried to get the ramrod out and did not succeed, telling against him, it tells in his favour, and why? because we know as a fact that he had left the gun unloaded, and therefore when he found the ramrod immovable it was most natural to conclude that it had not been interfered with.

On a consideration of the whole circumstances of the case, I am not able to find any culpable neglect on the part of Pollock. It is with great reluctance that I disturb the judgment of the Sheriffs, but I think that we have here no other alternative.

LORD JUSTICE-CLERK—I concur, and I hold that the gun was not loaded; it was charged, but properly speaking a gun cannot be said to be loaded until it has a cap on, Here Pollock did not know that the gun was loaded, and not seeing any cap he reasonably concluded that it was not loaded.

Whether a person would not be guilty of culpa who leaves about a gun which he knows to be loaded, but which he believes to be safe because it has no cap on, is a different question from the present.

Counsel for Pursuer (King)—Kirkpatrick and Millie. Agent—Thomas Lawson, S.S.C.

Counsel for the Defender (Pollock)—Moncrieff. Agent—Alexander Morrison, S.S.C.

Thursday, October 29.

SECOND DIVISION.

SPECIAL CASE—MILLER AND ANOTHER (SUTHERLAND'S TRUSTEES) AND OTHERS.

Succession—Vesting.

Terms of settlement *held* to confer a discretion on the trustees to fix the period of payment and vesting of the shares of the truster's moveable estate; and facts *held* sufficient to show that the shares had vested.

This was a Special Case submitted for the opinion and judgment of the Court by (1) the trustees of the late John Sutherland, fishcurer, Greenigoe, near Wick; (2) by Mrs Sutherland or Clarkson, Robertson Place, Leith Walk, Edinburgh, his daughter; (3) by the widow and eldest son of the deceased (John); (4) by the youngest son George.

The truster died in May 1856, leaving heritable estate worth £850, and free moveable estate to the amount of £2000. He was twice married, and was survived by his second wife, one daughter of his first marriage (now Mrs Clarkson), and by three sons of his second marriage, John, Alexander, and George. By his trust-disposition and settlement he directed his trustees *inter alia*, "when the same can be conveniently done, to divide, pay, assign, and dispone the same accordingly, it being distinctly understood that my wife shall have the same share as one of my children; declaring that, in the event of any one of my children predeceasing me, or dying without lawful issue, before receiving his share under this trust, the share of such child shall be divided between my wife and my other children, equally amongst them, share and share alike; and declaring further, that in the event of my eldest surviving son, or his heirs, quarrelling this disposition and claiming right as heir to my heritage, he or they shall not have any right whatever to any share or portion of my moveable estate, and he is hereby in that case expressly excluded therefrom, and my trustees shall divide the same amongst my wife and other children." His will was, in so far as regarded the heritage, reducible *ex capite lecti*. The heritage was managed by trustees until the eldest son came of age, and the free rents were lodged in bank by them, and his board and education defrayed therefrom. When he came of age, in May 1874, John repudiated the settlement, and elected to take the heritage as heir-at-law; and the trustees thereupon allowed him to take possession of the heritage and paid him the balance of the rents in their hands, without requiring him to reduce the will. In June 1857, the widow and daughter of the deceased, under an agreement between them, each got payment from the trustees of a fourth share of the moveable estate, the other two fourths being retained and managed by the trustees for behoof of the other two sons, not yet of age. Alexander died in May 1872, aged nineteen years, without issue, unmarried and intestate, no portion having been handed over to himself, and the balance of his one-fourth share amounted to about £500. In these circumstances, the Court was asked to say—(1t Did this share vest in Alexander before his death? and (2) to whom and in what proportions did it fall to be paid?

Cases cited—*Howatt*, 8 Macph. 327; *Thorburn*, 14 S. 485.

At advising—