1871, must have been procreated. I think that the time of both the husband and the wife during that period is as well accounted for as could be expected. I can see no reason why they should have desired to meet during that period, or at all. They had parted long before that. There had been no reconciliation. There was no love. There was no interest. There was no motive—not even the stimulant of animal passion, for he was living with another woman, and she was abandoning herself to a loose life without scruple. That they did not wish to meet is very obvious. That they should have met is most improbable. That they did not meet is proved to my satisfaction by the evidence before us, and by the oath of the woman herself.

On the whole matter, I am of opinion that, without requiring the additional evidence which the testimony of the husband would furnish, we have enough in the proof before us to lead to the conclusion, on sound and safe grounds, that at and about the period when the pursuer's child must have been procreated, her husband James Brodie had no access to her, and no intercourse with her; and that the case of filiation must be disposed of without reference to James Brodie, and just as if the pursuer had been an unmarried woman.

So viewing the case, I concur in the opinion of the Sheriff-Substitute, that the pursuer has instructed sufficiently that the defender is the father of her child.

Lord Deas—The only doubt which I have in regard to this case is, whether it would not have been better to have examined the husband, and re-examined the wife, for, in my opinion, there would have been no incompetency in examining one or both of them. Looking, however, to the whole circumstances of the case as established by the evidence, such a course, although it would have been satisfactory, is not necessary, and I entirely concur in the opinion delivered by Lord Ardmillan.

The Lord President concurred.

The Court pronounced the following interlocutor:—

> "Recall all the interlocutors in the Sheriff-court subsequent to the interlocutor of 2d November 1871; find that the defender (respondent) is the father of the pursuer's (appellant's) child, born on the 9th May 1871; therefore decern against him in terms of the conclusions of the summons; find the defender liable in expenses, both in this Court and the Inferior Court; allows accounts thereof to be given in, and remit the same, when lodged, to the Auditor to tax and report."

Counsel for the Pursuer—Jamieson. Agents—Macrae & Flett, W.S.

Counsel for the Defender—Fraser. Agent—John Gallatly, S.S.C.

Friday, November 29.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

GARDINER AND OTHERS (SILLARS' TRUSTEES) *v.* W. J STEUART AND OTHERS.

Settlement—Construction.

A directs her trustees to pay over the residue of her estate "to my heir-at-law, whom failing, to my next kin."—*Held* that heir-at-law meant heir in heritage.

By trust-disposition and settlement, dated 15th May 1852, Mrs Grant, afterwards Mrs Sillars, "gave, granted, assigned, and disponed to the Reverend Peter Gardiner, chaplain in the prison, Ayr, John C Haldane, surgeon, Ayr, and William Pollock, writer, Ayr, and to the survivors or survivor of them, all and whole her *pro indiviso* half of certain subjects in St Enoch's Wynd, and others, in the burgh of Glasgow; as also, her *pro indiviso* half of the lands of Davidston, in the county of Ayr, all therein specially described; as also, her whole estate and effects, heritable and moveable, pertaining to her at her death. She also thereby appointed her said trustees to be her executors, but in trust always for the ends, uses, and purposes therein mentioned; and she directed them, immediately after her decease, to sell and dispose of her whole means and estate, and after paying her debts, deathbed and funeral expenses, and the legacies and annuities therein named (all of which have been paid and settled), to pay over the residue of her estate to her heir-at-law, whom failing, to her next kin, and that at the first term of Whitsunday or Martinmas that should occur six months after her death, as the said trust-disposition and settlement in itself more fully bears." On 5th June 1852, Mrs Grant executed an antenuptial contract of marriage with Thomas Sillars, whereby, under certain burden and sreservations she disponed to herself, whom failing, the children of her intended marriage, whom failing, to herself and her heirs and assignees whomsoever, the subjects therein described, (being the same as those specially described in and conveyed by her said trust-disposition and settlement), but excluding her said husband's *jus mariti*, right of courtesy, and right of administration in relation to the said subjects, and the rents and proceeds thereof, which the said Thomas Sillars thereby renounced. It was, however, thereby provided and declared that, in the event of Mrs Jean Oswald Calder Glen or Grant's predeceasing the said Thomas Sillars, he should have the liferent enjoyment of the whole rents and profits of her means and estate thereby conveyed, and the foregoing conveyance was burdened with the said liferent accordingly." The testatrix died in June 1853 without issue, and in 1859 the lands left by her were sold, the debts, legacies, and annuities paid, and her husband received a sum equivalent for his liferent until 25th March 1872, when he died. The residue of the said trust-estate, amounting to £2300, constitutes the fund *in medio* in this action. The claimant, William Steuart, as heir-at-law served to the testatrix, claimed the whole fund, which was also claimed by the Rev. John Glen, Miss Margaret Glen, and Mr Wilson, as next kin of the testatrix at the time of her death.

The Lord Ordinary (ORMIDALE) pronounced the following interlocutor:—

"*Edinburgh, 27th June* 1872.—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings—Finds that, on a sound construction of the trust-disposition of the late Mrs Sillars, her next of kin—the claimants the Rev. John Glen, Miss Margaret Glen, and Mrs Janet Watson Glen or Napier and her husband, for his interest—are entitled to the fund *in medio:* Therefore ranks and prefers said claimants in terms of their claim, and decerns: Repels the claim for William John Steuart, and decerns: Finds no expenses due to or by either party.

"*Note.*—The question which the Lord Ordinary has had to determine in this case is, whether the claimants, who stand in the position of Mrs Sillars' next of kin, are entitled to be preferred to the fund *in medio*, being the residue of that lady's means and estate, preferably to the competing claimant Mr Steuart, who has the character of heir-at-law.

"This question the Lord Ordinary has felt to be attended with considerable difficulty, owing to the peculiar terms in which the bequest of her residue has been expressed by the testatrix. By her settlement, which was executed in 1852, she directed her trustees, 'immediately' after her decease, to sell and dispose of her whole estate, heritable and moveable, and this was accordingly done. She then directed that from the proceeds of her estate her debts and various legacies should be paid, as well as an aliment of 6s. weekly out of the residue of her estate to Mrs Jessie Campbell or Norman; and in the event of any part of the residue remaining 'unappropriated for the said weekly alimony at the death of the said Mrs Jessie Campbell or Norman,' she directed her trustees 'to pay over the same to my heir-at-law, whom failing, to my next kin, and that at the first term of Whitsunday or Martinmas that shall occur six months after my death.'

"Whom did she mean by her 'heir-at-law' and 'next kin'? At the time of her death the claimant Mr Steuart was technically and in the strict legal sense her heir-at-law, and the other claimants were then her next of kin. But Mr Steuart is not so near in propinquity to her as the other claimants; and it is very obvious from the terms of her settlement that the testatrix neither intended nor contemplated that any lands or other heritable property should be preserved for or should descend as such among her successors. On the contrary, it is clear from the instructions she gave, to the effect that immediately on her death her trustees were to sell and dispose of her heritable subjects, that she intended and contemplated that her succession was to be treated as entirely moveable. In this view it does not appear to the Lord Ordinary to be an unnatural or strained interpretation to hold that by the expression 'heir-at-law,' she in reality meant her heir or heirs *in mobilibus*. In any other view her settlement would be irrational. It is impossible that her next of kin, in the ordinary sense of that expression, could succeed, failing her heir-at-law, for she could never fail to have an heir-at-law, so long as she had next of kin. It rather appears, then, to the Lord Ordinary that the testatrix must have intended by the expression 'heir-at-law' her heir or heirs entitled by law to succeed to the residue of her estate, converted, as she had directed it to be immediately on her death, into money; and that by the expression 'next kin,' she must have referred to persons who might not by law be entitled to succeed to her *ab intestato*, —such as her maternal relations, or her relations by the half blood—rather than those technically and in the strict sense, and having the legal character of her 'next of kin.'

"The Lord Ordinary is not aware of any precedent exactly in point to the present case, but he may refer to M'Laren on Wills, pp. 726–7–8, for various cases which he thinks support and are illustrative of the principles of construction upon which he has proceeded in deciding the present.

"The Lord Ordinary has considered it proper in this case to allow each party to bear their own expenses, in respect a judicial determination of the matter in dispute was rendered indispensable in consequence of a difficulty created by the testatrix herself."

The heir-at-law reclaimed against this interlocutor.

Cases cited—*Norris*, 2 D. 220; *Scott*, 14 D. 1057; M'Laren on Wills, p. 207; *Cathcart*, 1 W. aud S. 239.

At advising—

LORD JUSTICE-CLERK—The question is, Whether, looking to the words used, we can read them in the sense of the Lord Ordinary? The term heir is flexible, and may denote either heir *in mobilibus* or in heritage, according to the complexion of the succession; and if the word heir alone had been used here, it would probably have been held to mean heir *in mobilibus*. But that is not the case, and, from the collocation of the words in the settlement, I think it is clear the testatrix meant her heir in heritage as distinguished from her next of kin.

LORD COWAN—I am quite clear that it was the intention of the testatrix to prefer her heir-at-law. It is all important that the succession here is heritage. I do not think the destination is irrational or unintelligible.

LORD BENHOLME—Is there an heir-at-law in the proper sense of the word—the individual entitled by law to take. There is such a person, and therefore I think the destination to the next kin is avoided, and he ought to prevail.

LORD NEAVES—The natural reading of the words is as plain as possible. There is nothing unreasonable in the testatrix preferring her heir-at-law. She does not deal with her succession as moveable, but desires her trustees to invest in heritable bonds. The plain meaning is that heir-at-law means heir-at-law.

Counsel for Reclaimers—Muirhead and Solicitor-General (Clark). Agents—J. C. & A. Stewart, W.S.

Counsel for Next of Kin—Paterson and Horn. Agents—J. & A. Peddie, W.S.