Friday, November 21.

FIRST DIVISION.

TRONSON *v.* TRONSON.

Succession—Testament—Revocation—Meaning of "Next-of-Kin" in a Will.

A testatrix conveyed her whole estate to trustees and executors, directing them to pay any legacies she might leave by a separate writing, and to convey the residue to any person she might name by any writing under her hand, and failing such writing, "among my next-of-kin who would have been entitled to succeed to my moveable estate had I died intestate." Eight years afterwards she by a holograph writing addressed to the executors named in the settlement, directed certain legacies to be paid after payment of debts and funeral expenses, and bequeathed any residue of her property "to my next-of-kin." She was survived by two brothers, and also by the children of a brother and two sisters who predeceased her. Her surviving brothers claimed the whole residue as next-of-kin. *Held* (1) that the second writing had not by implication revoked the first; (2) that reading the two together, it appeared that the testatrix intended by "next-of-kin" her brothers and also the children of the deceased brother and sisters, the issue of each taking the parent's share.

Mrs Anne Tronson or Charters died in Edinburgh on 24th July 1883. At the time of her death two writings by her of a testamentary character were in the possession of her law-agent, Mr Scot Dickson, W.S. They were put up together in an envelope in his office.

The earlier in date of these writings was a trust-disposition and settlement, prepared by Mr Dickson in 1874, by which she conveyed to Miss Sibella Anderson and Mr Dickson, as trustees, her whole estate, heritable and moveable, for two purposes—"*First*, For payment of all my debts and of the expenses of this trust, and of any legacies which I may leave by a separate writing, whether formal or informal; and *Second*, That my trustees shall on my death pay or convey the residue of my said trust estate to any person or persons I may name by any writing under my hand, and failing such writing, among my next-of-kin who would have been entitled to succeed to my moveable estate had I died intestate; and I appoint my said trustees and their foresaids to be my sole executors; and I revoke all former settlements made by me; and I reserve power to alter or revoke these presents in whole or in part."

The later in date of the two writings was dated 18th February 1882. It was holograph of the testatrix and signed by her. It was as follows—

"To my executrix Miss Sibella Anderson, also David Scot Dickson, Esq., W.S.

"I wish the following legacies paid after the sale of my house and property therein. [Here followed a legacy to Miss Anderson, and sundry other legacies. The writing then continued—] "Having appointed Mr David Scot Dickson my executor, I wish it to be understood that he is entitled to act as agent in the trust, and make the usual professional charges.

"To Mr David Scot Dickson £50 (fifty pounds) for his kind attention to me at all times in regard to my business affairs.

"Should my servant Elizabeth M'Lauchlan be in my service at my death, the sum of £60 (sixty pounds). I shonld wish her to have sufficient furniture to settle down with in her room, whither she may go. I bequeath all my wearing-apparel to my brother Edward Thomas Tronson, for the use of his wife and children, to be sent to Swan Hill, Victoria, Australia. I wish effect to be given to no memorandum hitherto written by me. Of course the above cannot be settled till my debts, funeral expenses, including mourning for my servants, and every other expense attending my last illness is paid. ANNE CHARTERS.

"I bequeath the sum of £150 (one hundred and fifty pounds) to Edith Cumberlige, niece of Colonel Bruce Boswell. Any residue of my property I bequeath to my next-of-kin.

"ANNE CHARTERS."

Mrs Charters was survived by two brothers, Captain James Tronson and Edward Thomas Tronson. A brother, General Tronson, had predeceased her leaving eight children. Two sisters had also predeceased her, one of whom, Mrs Greville, had left four children, and the other, Mrs Egerton, had left one child.

Captain Tronson and Edward Thomas Tronson, the two surviving brothers, claimed as being the only next-of-kin of the testatrix to be entitled as such, in accordance with the intention of the testatrix, to the whole residue of the estate after payment of debts and legacies. The children of the deceased brother and sisters claimed to be entitled also to share the residue, the children of each family taking one share in place of their parent, and the estate being thus divided into five shares in all.

This Special Case was therefore presented for the judgment of the Court, Captain Tronson and Edward Thomas Tronson being the first parties, and their nephews and nieces being the second parties. The third party was Mr Scot Dickson, the sole surviving trustee.

The question of law was—"Are the parties of the first part entitled to the whole residue of Mrs Charters' trust-estate; or are they only entitled to one-fifth thereof each, the remaining three-fifths being divisible among the parties to the second part, all according to the rules of intestate moveable succession?"

Argued for first parties—The only next-of-kin in the true legal sense of the words were the first parties, the second parties being only representatives of next-of-kin. No doubt they would succeed by the law as altered by the Intestate Succession Act of 1855 if there had been intestacy; but that Act (which adopts the common law definition of next-of-kin) did not make them next-of-kin—*Young's Trs.* v. *Janes*, December 10, 1880, 8 R. 242; *Haldane's Trs.* v. *Murphy*, December 15, 1881, 9 R. 269 (Lord President at p. 275). That being so, (1) the first parties being the only next-of-kin in point of law, must take under the writing of 1882, which could alone be looked at. It was a complete though informal will, providing for debts and legacies, and it conveyed residue. It operated an implied revocation of the formal writing of 1874, because it dealt with the whole estate and conveyed the residue to a certain class of persons narrower than would come in

under that of 1874. The test of implied revocation suggested in the case of *Sibbald*, 9 Macph. 399, was thus met. If the deed of 1874 had any effect it could only be as a mere nomination of executors, because the gift of the whole estate by the later writing was complete. (2) If the two writings were taken together, and the second read as a codicil only, then a meaning must be given to the omission in the second of the words which followed "next-of-kin" in the first. The omission must be taken to be intentional. The maxim *posteriora derogant prioribus* was in point—Jarman on Wills, p. 175. If the second deed had increased the class of residuary legatees instead of diminishing it, the claim of those it added to the class must have been admitted. (3) The condition on which "next-of-kin who would have been entitled to succeed to my moveable estate had I died intestate" were to take was "failing" a subsequent writing—and there had been such, by which a smaller class was favoured.

Argued for second parties—The question was one of intention, and the two papers could be read together. The presumption was against rejecting the first executed if it could stand along with the second. It furnished an explanation of the sense in which the testatrix used the term "next-of-kin," and it gave the residue to a clearly-defined class of persons. Equally clear words were required to take such a gift away, and the maxim *posteriora derogant prioribus* only applied if there was inconsistency—Jarman, p. 479. But here the first parties had only a highly technical interpretation of the term "next-of-kin" to rely on.

At advising—

Lord Mure—This case must, I think, be taken on the footing that these two writings which were left by the testatrix are to be construed together as forming her will. The first of these writings is a trust-disposition and settlement in which there is a conveyance to trustees named of the whole heritable and moveable estate of the testatrix, and then after a distinct provision for the payment of debts and legacies there follows a direction in the following terms:—"My trustees shall on my death pay or convey the residue of my said trust-estate to any person or persons I may name by any writing under my hand, and failing such writing, among my next-of-kin who would have been entitled to succeed to my moveable estate had I died intestate."

Now, a writing was found which it is admitted was prepared by the testatrix herself, and sent by her to her man of business, who put it up in an envelope along with the trust-disposition and settlement. That circumstance, I think, brings the present case within the principle laid down in the case of Lady Baird Preston's settlement (*Baird* v. *Jaap and Others*, July 15, 1856, 18 D. 1246), and the two writings must be read together. Reading them, then, as one will, I find that the leading declaration is that the residue is to go to "my next-of-kin who would have been entitled to succeed to my moveable estate had I died intestate." If she had died intestate, the whole of the first and second parties to this case would have shared the residue.

In the second writing there is, first, provision for various legacies, some of which are to be paid to those who are next-of-kin as that term was understood under the old law, and some to the next-of-kin who succeed under the provisions of the Intestate Succession Act of 1855. I do not think much can be made of that on either side. Then, though the first document contains a careful revocation of all former settlements—that is to say, all settlements made before 1874—this writing contains no such revocation—declaring only that effect is to be given to "no memorandum hitherto written by me"—but begins with a reference to the executors appointed by the first deed—viz., Miss Sibella Anderson and David Scot Dickson. Under the circumstances I cannot hold that the second document is a deliberate revocation of the first. The first was prepared by a man of business who was aware that the expression used in it included not only next-of-kin properly so called, but also the children of brothers and sisters deceased. And I think that in using the expression next-of-kin in the second document the testatrix must have had in view the same persons who are described in the trust-disposition and settlement.

Lord Shand—It seems quite clear that the two deeds here must be read together as forming one will, and that the second of the deeds must be regarded as one only of the testamentary writings.

In the original deed provision is made in two of its clauses that the testatrix may leave memoranda or separate writings containing directions for the payment of legacies or the disposal of the residue of her estate. And in the second deed, which no doubt is dated a number of years after, there is a plain reference to this reserved power. This second deed is addressed to the executors who were before appointed, and there is a clear reference to that appointment of the executors, because it is declared that "Having appointed Mr David Scot Dickson my executor, I wish it to be understood that he is to act as agent in the trust." This deed further provides that the testatrix wished "effect to be given to no memorandum hitherto written by me." That could not revoke the settlement of 1874, so that there appears to be no question but that the two deeds must be taken together.

Now, with regard to the first, it provides that failing any writing under the hand of the testatrix, the residue should be divided among "my next-of-kin who would have been entitled to succeed to my moveable estate had I died intestate." There can be no dispute as to the meaning of that expression. The term "next-of-kin" is no doubt there used inaccurately; but it is plain from the description who are meant, viz., those who would have been entitled to succeed in the case of intestacy, *i.e.*, the heirs *in mobilibus*, or, written fully, the two brothers of the testatrix, and the children of her deceased brothers and sisters. It is, therefore, clear that though these persons are not, strictly speaking, the next-of-kin of the testatrix, yet she calls them so, the words which follow indicating her meaning. Turning, then, to the codicil we find that the words used are —"Any residue of my property I bequeath to my next-of-kin." The argument for the brothers which is founded upon that, is that this operates a revocation of the previous deed and the institution of a new class. We are asked

to hold that the testatrix desired by that deed to benefit her brothers alone, and to cut out her nephews and nieces.

I think that cannot be gathered from the deed. Where you have a distinct provision in the first deed making it clear who the residuary legatees are to be, I think it would require an equally distinct declaration in the second to operate a revocation. The words in the second deed are "next-of-kin." But in the previous deed you have what the testatrix means by that; and I therefore think you can only read the clause commencing with the words "any residue" as referring back to what is in the previous settlement. Probably, if the second deed had been prepared by her law-agent there would have been some explanatory words added; but though owing to the fact that the deed was prepared by the lady herself, there are no such words, yet there can be no doubt as to her meaning. There is no suggestion in the case that there was any change of circumstances which might have caused her to have a different feeling with regard to her nephews and nieces, and in the absence of any such suggestion I think it fair to assume and take into consideration that there was no such change. In the case of *Young's Trustees*, the words "next-of-kin" occurred without description of any kind; and I do not think that the construction put upon those words in that case is to be imported into any other where those words are loosely used, and where there is something to indicate that persons other than the next-of-kin in a strict sense are meant.

Lord Adam—I am clearly of opinion with your Lordships that these two writings must be read together.

I am also of opinion, though not so clearly, that it was not the intention of the testatrix to make any alteration on the destination of residue contained in the first deed, and that when she makes reference in the second deed to her next-of-kin her real intention was to refer to those persons who are called in the first deed as next-of-kin.

The Court pronounced this interlocutor—

"Find that the parties of the first part are only entitled to one-fifth of the residue of the trust estate each, the remaining three-fifths being divisible among the parties of the second part, all according to the rules of intestate moveable succession, and decern."

Counsel for First Parties—Sym. Agent—A. Y. Pitcairn, W.S.

Counsel for Second and Third Parties—Gillespie. Agent—Thomson, Dickson, & Shaw, W.S.

Friday, November 21.

SECOND DIVISION.

[Sheriff-Substitute of Argyll.

PHILLIPS *v.* MUNRO (CLERK TO POLICE COMMISSIONERS OF DUNOON).

Burgh—Street—General Police and Improvement (Scotland) Act 1862 (25 *and* 26 *Vict. c.* 101), *secs.* 146, 394, 395, 396, *and* 397 — *Notice — Appeal.*

In the course of operations on a street within a burgh the police commissioners altered the levels of the street without giving notice to the proprietors of property therein. One of these proprietors sought interdict against them on the ground that the street had never been previously levelled, and that he was therefore entitled, under section 394 of the General Police and Improvement Act 1862, to twenty-eight days' notice of the operations. The commissioners alleged that the street had been previously levelled, and that the section did not apply. The Sheriff granted interdict without a proof of the pursuer's averments. *Held* that the interdict must be recalled, since section 394 did not apply unless the street had never previously been levelled.

Opinion (*per* Lord Rutherfurd Clark) that the commissioners were bound to give notice of their operations whenever those affected existing levels, whether the street had been previously levelled or not.

Observed—that assuming the operations to have required notice, it did not follow from the fact that it had not been given that the works executed must be undone.

Section 146 of the General Police and Improvement Act 1862 provides—"The commissioners may from time to time cause all or any of the streets within the burgh not under the management of any turnpike road or other trustees, or any part of such streets respectively, to be raised, lowered, altered, and formed in such manner and with such materials as they think fit, and they shall also repair such streets from time to time . . . and any person considering himself aggrieved may appeal to the Sheriff in manner after provided."

"The 394th section provides—"Twenty-eight days at the least before fixing the level of any street which has not been theretofore levelled or paved . . . the commissioners shall give notice of their intention by posting a printed or written notice in a conspicuous place at each end of every such street through or in which such work is to be undertaken, which notice shall set forth the name or situation of the street intended to be levelled or paved . . . and shall refer to the plans of such intended work, and shall specify a place where such plans may be seen and a time and place where all persons interested in such intended work may be heard thereupon."

Section 395 provides how the objection is to be heard by the commissioners; and that no work to which objection has been taken shall proceed unless the surveyor of the commissioners shall after the hearing certify that it ought in his judgment to be executed, and that it shall not be begun until