as a will unless it is itself subscribed by the testator.

In the present case all that we have to decide is whether the holograph writing printed in the appendix ought to be read as forming two separate documents, and if so, whether the first seven words, viz. "Sunnybank Alford My last will Jessie Taylor" ought to be construed as meaning that the writer referred to and incorporated as part of her subscribed will the holograph but unsubscribed directions written below her signature. I think that there is at least a reasonable doubt as regards both questions, and I am not prepared to answer either of them in the affirmative. I am not satisfied that the words "Jessie Taylor" were intended to authenticate the words which preceded them or were other than descriptive of the person who was beginning to write out her will. Nor am I satisfied that the writer intended the words "my last will" to have the meaning and effect attributed to them by the appellants' counsel. The presumption that testamentary directions are incomplete and deliberative until they have been subscribed militates against the construction contended for. This presumption is founded, not upon any technical rule of law, but upon the ordinary understanding and practice even of rustics in this country. I am therefore of opinion that the judgment of the Sheriff-Substitute should be affirmed.

The Court pronounced this judgment—

"Dismiss the appeal: Affirm the interlocutor of the Sheriff-Substitute dated 12th July 1913: Repeat the findings therein, except the finding as to expenses: Of new refuse decree of declarator as concluded for, and decern, reserving the question of expenses."

On 25th November 1913 the First Division found both parties entitled to expenses out of Miss Taylor's estate.

Counsel for Pursuers (Appellants)—Lippe. Agents — Dalgleish, Dobbie, & Company, S.S.C.

Counsel for Defenders (Respondents) — Chree, K.C. — Mitchell. Agent — Henry Bower, S.S.C.

---

*Friday, November* 21.

## FIRST DIVISION.

(Before Seven Judges.)

[Lord Ormidale, Ordinary.

## ADAM (COLVILLE'S FACTOR) *v.* NICOLL AND OTHERS.

*Succession—Collation — Intestate Moveable Succession (Scotland) Act* 1855 (18 *and* 19 *Vict. c.* 23), *secs.* 1 *and* 2.

The proviso in section 1 of the Intestate Moveable Succession (Scotland) Act 1855, which provides that "no representation shall be admitted among collaterals after brothers' and sisters' descendants," applies also to section 2.

A died intestate, survived by, *inter alios*, a first cousin on his father's side, who was his sole next-of-kin, and by the children of a predeceasing cousin also on the father's side. B, one of the children of the predeceasing cousin and A.'s heir-at-law, claimed, on collating the heritage, to which he was admittedly entitled, to participate along with his sisters in A's moveable estate in virtue of section 2 of the Act. *Held* that B was not entitled to share in the moveable estate.

*Jamieson* v. *Walker*, March 4, 1896, 23 R. 547, 33 S.L.R. 397, *overruled.*

The Intestate Moveable Succession (Scotland) Act 1855 (18 and 19 Vict. c. 23) sec. 1, enacts—"In all cases of intestate moveable succession in Scotland accruing after the passing of this Act, where any person who, had he survived the intestate, would have been among his next-of-kin, shall have predeceased such intestate, the lawful child or children of such person so predeceasing shall come in the place of such person, and the issue of any such child or children . . . who may in like manner have predeceased the intestate, shall come in the place of his or their parents predeceasing, and shall respectively have right to the share of the moveable estate of the intestate to which the parent of such child or children or of such issue, if he had survived the intestate, would have been entitled; provided always that no representation shall be admitted among collaterals after brothers' and sisters' descendants. . . ."

Section 2 enacts—"Where the person predeceasing would have been the heir in heritage of an intestate leaving heritable as well as moveable estate had he survived such intestate, his child, being the heir in heritage of such intestate, shall be entitled to collate the heritage to the effect of claiming for himself alone, if there be no other issue of the predeceaser, or for himself and the other issue of the predeceaser if there be such other issue, the share of the moveable estate of the intestate which might have been claimed by the predeceaser upon collation if he had survived the intestate . . . and where in the case aforesaid the heir shall not collate, his brothers and sisters, and their descendants in their place, shall have right to a share of the moveable estate equal in amount to the excess in value over the value of the heritage of such share of the whole estate, heritable and moveable, as their predeceasing parent, had he survived the intestate, would have taken on collation."

On 16th November 1912 A. Y. Adam, solicitor, Dundee, judicial factor on the estate of the late John Colville, bank agent, Dundee, *pursuer and real raiser*, brought an action of multiplepoinding and exoneration against Mrs Annie Bruce Adam or Nicoll, widow of Charles Nicoll, High Street, Lochee, and others, *defenders*, for the determination of certain questions relating to the distribution of Mr Colville's estate. Mr Colville, who died intestate and without issue on 13th October 1911, was an only child, and his nearest relations were de-

scendants of brothers and sisters of his father. He left heritable estate of about £800, and moveable estate of between £8000 and £9000 in value.

Claims were lodged by, *inter alios*, (1) the said Mrs Nicoll, the intestate's only surviving cousin on the father's side and his (the intestate's) sole next-of-kin; (2) by Robert Adam, shoemaker, Edinburgh, the intestate's heir in heritage, he (Robert Adam) being a son of the late David Adam, a predeceasing cousin on the father's side; and (3) by Mrs Annie Adam or Lister, Liff Road, Lochee, and others, the children (other than the said Robert Adam) and grandchildren of the said David Adam.

The claimant Mrs Nicoll claimed as sole surviving next-of-kin of the intestate to be ranked and preferred to his whole free moveable estate.

The claimant Robert Adam maintained that he was entitled as the heir in heritage of the intestate to claim along with his sisters and his nephew and niece the share of the moveable estate of the intestate which might have been claimed by his father the said David Adam upon collation if he had survived the intestate. He therefore claimed to be ranked and preferred (1) to the intestate's whole heritable estate, and (2) to one-sixth of the share of the moveable estate which might have been claimed by the said David Adam upon collation if he had survived the intestate.

The claimants Mrs Lister and others claimed to be ranked and preferred to the following proportions of the share of the moveable estate of the intestate which might have been claimed by their father and grandfather the said David Adam on collation if he had survived the intestate, namely, each of the daughters one-sixth thereof, and each of the grandchildren (the children of a predeceasing son) one twelfth thereof.

On 26th June 1913 the Lord Ordinary (ORMIDALE) pronounced the following interlocutor:—"Finds that the claimant Mrs Annie Bruce Adam or Nicoll is the daughter of a sister of the father of the deceased John Colville, who died intestate on 13th October 1911, and that she was at the date of his death the sole surviving next-of-kin of the said John Colville: Finds that the claimant Robert Adam is the eldest son, and that the claimants Mrs Annie Adam or Lister, Mrs Elizabeth Adam or Butchart, Mrs Mary Adam or Stark, and Mrs Jessie Adam or M'Leish, are children, and the claimants William Robertson Adam and Agnes Milne Adam are grandchildren, all of the late David Adam, who was the son of a sister of the father of the said John Colville, and predeceased the said John Colville, and who would, had he survived the said John Colville, have been his heir-at-law and one of his next-of-kin along with the claimant Mrs Annie Bruce Adam or Nicoll: Finds that the claimant Robert Adam is the heir in heritage of the deceased John Colville, the intestate, and is entitled as such to be ranked and preferred in terms of the first branch of his claim: Finds also that the said Robert Adam is entitled to participate in the moveable estate of the intestate, and to be ranked and preferred in terms of the second branch of his said claim: Finds that the claimants Mrs Annie Adam or Lister, Mrs Elizabeth Adam or Butchart, Mrs Mary Adam or Stark, and Mrs Jessie Adam or M'Leish, and William Robertson Adam and Agnes Milne Adam, are also entitled to participate in the moveable estate of the said intestate, and to be ranked and preferred in terms of their claim: Finds that the claimant Mrs Annie Bruce Adam or Nicoll is entitled, as next-of-kin foresaid, to receive and to be ranked and preferred upon the balance of the fund *in medio*; and with those findings appoints the cause to be enrolled for further procedure: Grants leave to reclaim."

Mrs Nicoll reclaimed.

On 4th November 1913 the First Division appointed the case to be heard before Seven Judges.

Argued for reclaimer—*Esto* that prior to the Intestate Moveable Succession Act 1855 (18 and 19 Vict. cap. 23) there was no representation in moveables—though there was representation in heritage, however remote the heir might be—the Act had altered the rule by introducing representation in moveables subject to this limitation, that among collaterals representation should not be admitted after brothers' and sisters' descendants. That being so, where, as here, the intestate was survived by a cousin and the children of a predeceasing cousin, the latter were not entitled to any share of the moveable estate. The fact that one of these children was the heir in heritage did not entitle him to collate the heritage in order to claim a share of the moveables, for it was only when the heir was himself one of the next-of-kin that he was entitled to this privilege—*M'Caw* v. *M'Caw*, 1787, M. 2383; *Anstruther* v. *Anstruther*, January 20, 1836, 14 S. 272, at p. 282; *Ormidale* v. *Broad*, November 11, 1862, 1 Macph. 10; *Turner* v. *Couper*, November 27, 1869, 8 Macph. 222, 7 S.L.R. 130. Sec. 2 of the Act of 1855 did not, as the respondents maintained, extend the limits prescribed by sec. 1, for the proviso contained in sec. 1 applied equally to sec. 2—M'Laren on Wills, vol. i, pp. 120 and 152. The opening words of sec. 2, viz., "Where the person predeceasing" clearly referred to the person designed by sec. 1, *i.e.*, to one of the limited class therein defined. The Act did not say "where the heir in heritage has predeceased," but "where the person predeceasing . . ." *Esto* that it would have been otherwise had sec. 1 contained the words "Except as after mentioned in sec. 2," no such words were used. The respondents founded on the proviso in order to exclude the families of John and William, and at the same time appealed to sec. 2 to bring in the family of David, who were in the same degree of relationship. That could not have been the intention of the Act. The case of *Jamieson* v. *Walker*, March 4, 1896, 23 R. 547, 33 S.L.R. 397, in which the Court held that sec. 2 was to be read apart from and as extending the scope of sec. 1, was wrongly decided, and the case of *Innes*

v. *Coghill*, October 22, 1897, 25 R. 23, 35 S.L.R. 20, did not do more than lay down the rule for applying that principle. In the later case of *Robertson* v. *Robertson*, (1907) 15 S.L.T. 249, Lord Mackenzie (Ordinary) thought he was bound to follow the case of *Jamieson* (*cit*).

Argued for respondents—Sec. 2 of the Act of 1855 was to be read independently of sec. 1, for the Act was clear in its terms; that being so, the respondents' claim was unanswerable. The right conferred by sec. 2 was an independent right conferred upon the heir in virtue of his position as heir, and was not limited by the proviso in sec. 1—*Jamieson* (*cit.*). The law of Scotland had always favoured the heir in heritage, whereas the case of *Turner* (*cit.*) showed that the representation in moveables introduced by the Act of 1855 was a novel remedy in favour of the issue of a predeceasing next-of-kin who would otherwise have been excluded. The words "where the person predeceasing" were not, as the reclaimers contended, inappropriate, for they limited the right to the case of a person having the dual character of heir in heritage and the representative of one who, had he survived, would have been among the next-of-kin. An heir's right to collate was not limited to cases where he was one of the next-of-kin, for a grandson by the eldest son of the deceased was entitled to collate with the deceased's immediate children—Ersk Inst. iii, 9, 3.

At advising—

LORD PRESIDENT—We have had the advantage of a singularly able argument from both sides of the Bar in this case, but I do not suppose that any of your Lordships at any time entertained any doubt as to what our ultimate judgment should be. But inasmuch as we were asked and are about to overrule a decision pronounced by the other Division of the Court some eighteen years ago, it was deemed necessary to summon Seven Judges to the consideration of the case. The question relates to the scope and meaning of the Intestate Moveable Succession Act of 1855. The rival views presented of that statute are these—One side maintains that in the case of all estates where you are dealing with collaterals the scheme of representation in moveables introduced by the statute is confined exclusively to brothers and sisters of the intestate and their descendants. The other side maintains that whilst that may be so when you are dealing with an estate consisting exclusively of moveables, it is otherwise where there is a mixed succession, and that in the latter case the heir-at-law, howsoever remote, is entitled, on condition of collating the heritage, to participate along with his brothers and sisters, if he has any, in the moveable succession.

The case before us relates to a mixed succession, heritable estate of the value of some £800 and moveable estate of the value of between £8000 and £9000. The intestate, an only child, died unmarried survived by one cousin, his next-of-kin, a Mrs Nicoll, who claims the whole moveable succession. The heir-at-law is to be found in the family of a deceased cousin, and he has four sisters. He claims, on collating the heritage, to participate along with his four sisters in the moveable succession. His claim rests exclusively upon the statute, because it is conceded, that not being one of the next-of-kin he would not be entitled by the common law of Scotland, on collating the heritage, to participate in the moveable succession. There are two families of deceased cousins who make no claim. It is conceded that the statute does not admit the latter families to a right to participate in the moveable succession, and that it is only the family which has the good fortune to number among its members the heir-at-law which enjoys this privilege. That would be a fantastic result to which we should be led. If we were shut up by the plain words of the statute to that conclusion, I presume we would give effect to it. But I am of opinion that we are not.

The whole controversy turns upon the meaning to be attached to the expression in the opening words of the second section of the Act, "the person predeceasing." In my judgment "the person predeceasing" means exactly what it says, and does not mean "any person predeceasing." When the statute means "any person predeceasing" it says so, and these very words will be found at the opening of the third section. If, then, we are to interpret these words "the person predeceasing" as meaning what they say, we must look for that person in the first section of the Act. We there find "the person predeceasing" either amongst the ascendants or the descendants or the brothers and sisters of the intestate, or the descendants of brothers and sisters of the intestate. But the father of the family in which the heir-at-law in the present case is a member is not to be found in any one of these categories, and therefore the claim of that family fails.

I have only now stated shortly what might in other language be expressed in three propositions—(First) that the first and second sections of this statute are not to be regarded as separate and independent enactments, but to be read together as comprehending the whole scheme of representation in moveables introduced by the Act of Parliament; (Second) that the proviso in the first section is applicable to the whole scheme of representation in moveables introduced by the statute; and (Third) that the object of the second section of the statute is to apply in the case of mixed successions the rule of representation which is applied by the first section to estates consisting of moveables alone.

These propositions I regard as sound in law. All of them were disregarded in the judgment of the Second Division in the case of *Jamieson* v. *Walker*, (1896) 23 R. 547. That decision must now be regarded as overruled, and I move your Lordships, therefore, to recall the interlocutor of the Lord Ordinary—which I may say in passing he could not do otherwise than pronounce—to rank and prefer Mrs Nicoll to the whole of the moveable estate, to rank and prefer the heir-

at-law to the heritable estate, and deny his claim and the claims of his sisters to participate in any part of the moveable succession.

LORD DUNDAS—I am of the same opinion. This action of multiplepoinding raises a question of law under the Intestate Moveable Succession (Scotland) Act 1855 (18 Vict. cap. 23). Mr John Colville, the intestate, died on 13th October 1911, leaving heritable estate to the value of about £800, and free moveable estate amounting to between £8000 and £9000. At the date of his death, he left no brothers or sisters, or descendants of brothers or sisters, and his sole next-of-kin was the claimant Mrs Nicoll, his cousin, who was the only then surviving child of Mrs Barbara Adam, a sister of his father. Mrs Nicoll's brother David Adam predeceased the intestate, leaving issue who survived the intestate, viz., the claimants Mrs Lister, Mrs Butchart, Mrs Stark, Mrs M'Leish, and Robert Adam; and Charles Adam, a son of David, predeceased the intestate, but left issue, a son and a daughter, who are also claimants. Mrs Nicoll claims to be ranked and preferred to the whole moveable estate of the intestate, as being his sole next-of-kin. Robert Adam is the intestate's heir-at-law, and is entitled as such to the heritage. But he claims, in respect that his father would, if he had survived the intestate, have been his heir-at-law, to be entitled, upon collating the heritage, to participate, along with his sisters and his nephew and niece, in the share of the moveable estate of the intestate which might have been claimed by his father David (upon collation), if he had survived the intestate. The other claimants, upon a similar basis, claim to participate in the share of the moveable estate referred to. The parties are agreed that the case is ruled by that of *Jamieson* v. *Walker*, 23 R. 547. The Lord Ordinary, in deference to the authority of that decision, and without expressing any opinion of his own, gave effect to the claims of Robert Adam and of his sisters and his nephew and niece. The present Court of seven judges has been convened to reconsider the judgment of the Second Division in *Jamieson* v. *Walker*. I am of opinion that that case was wrongly decided. I am unable to see that Robert Adam, who is the intestate's heir-at-law but not one of the next-of-kin, nor a descendant of a brother or sister of the intestate, has any right to collate, to the effect of taking for himself or for his sisters or his nephew and niece the share of the moveable estate which his father would have taken if he had survived the intestate.

At common law, before the passing of the Act of 1855, representation in heritage was fully recognised without limit, but there was no representation in moveables. The heir, if he was himself one of the next-of-kin, was entitled to claim his share of the moveable estate with the other next-of-kin, on condition of collating the heritage, but if he was not one of the next-of-kin he had no right of collation. This last proposition seems to have been doubted by Mr Erskine—Inst. iii, 9, 3—but the law was laid down in the sense I have indicated in *M'Caw*, (1787) M. 2383, which has always been followed, *e.g.*, *Anstruther*, (1836) 14 S. 272, 282. But Mr Moncrieff for the respondents contended, in the course of an able argument, that the Act of 1855, section 2, had in effect made law by statute that which Mr Erskine thought might be or ought to be common law in regard to collation. I observe that Mr Erskine's doctrine is carefully restricted to a case where the heir as well as the next-of-kin is a descendant of the intestate. So far I agree with Mr Moncrieff that section 2 has restored Mr Erskine's doctrine; and indeed it goes somewhat further, for it provides that an heir descended from a brother or sister of the intestate may collate with those whom the statute designates as the intestate's heirs *in mobilibus*. But if Mr Moncrieff's clients are to succeed, a much greater change in the common law must have been effected than the restoration of Mr Erskine's doctrine, even with the extension I have indicated. In order to succeed they must, I apprehend, show that under the statute an heir, not related to the intestate within the degree specified in the first section, may nevertheless, under the second section, claim to share in the moveable estate on condition of collation. I am unable so to read the Act. As matter of construction I think the plain meaning of its words negatives the respondents' argument.

The first section of the statute introduced representation in moveables, but only within narrow and well-defined limits. It expressly provides that "in all cases of intestate moveable succession in Scotland accruing after the passing of this Act, where any person who, had he survived the intestate, would have been among his next-of-kin, shall have predeceased the intestate, the lawful child or children of such person so predeceasing shall come in place of such person," and so forth; but the section ends with the important and quite unqualified words, "provided always that no representation shall be admitted among collaterals after brothers' and sisters' descendants." The second section by its initial phrase makes it to my mind clear that it is intended to follow as a direct sequence of section 1, and cannot be read as a substantive provision independent of it. The opening words are, "Where the person predeceasing," &c. I think the word "the" is precisely equivalent to "such," and so one is taken back to section 1, and to its proviso as regards the extent and degree to which representation in moveables is intended to be introduced by the Act. I need not quote the words of the second section. It is to my mind clear that they must all be read subject to the scope of section 1 and its proviso. If this be so, it seems to follow that Robert Adam, the heir-at-law, not being within the class of persons entitled to share in the moveable estate, has no right of collation either for himself or for the benefit of his sisters or his nephew and niece (see M'Laren on Wills and Succession (3rd ed.), vol. i, p. 152, sec. 299).

For these reasons I think that the Lord

Ordinary's interlocutor, pronounced by him solely upon the authority of *Jamieson* v. *Walker*, ought to be recalled, and that Mrs Nicoll should be ranked and preferred to the whole moveable estate of the intestate, Robert Adam being found entitled to the heritage.

LORD JOHNSTON—We are called upon in this case to consider the judgment of the other Division, pronounced in 1896, in the case of *Jamieson* v. *Walker*, 23 R. 547, regarding the application of the second section of the Moveable Succession Act 1855. I think that that case was wrongly decided, and mainly by reason of the fallacy which is expressed in the leading judgment thus—Sections 1 and 2 of the Act "are independent of each other. They deal with separate matters, and are intended to effect changes in our law quite distinct from one another." I think that the opposite is the sound view and leads to an opposite conclusion. These sections are dependent on one another. They deal, indeed, in one sense with different matters, but so that the latter section is the complement of the former, and is intended to complete and perfect the change in our law effected by it.

The Act in its entire purview was remedial—its object to alter certain anomalies and defects in the Scots law of intestate succession. As pointed out by Lord President Inglis in *Turner's* case, (1869) 8 Macph. 222, the particular purpose of the first section of the Act was "to take away the hardship which arose when, of several persons who would have been all equally next-of-kin of an intestate, one or more had predeceased the intestate leaving children." By the common law the children of the particular intestate would have been excluded from all share in the moveable succession of the intestate, though their parent had he survived would have taken an equal share with the other next-of-kin, and though they being left orphans are more likely to be the most necessitous. To remedy this hardship the statute introduced representation in moveable succession. But it introduced it with the limitations, first, that of the predecessor it must be possible to predicate that had he lived he would have been among the actual next-of-kin—*Turner's* case; and second, that representation among collaterals shall be confined to the descendants of brothers and sisters of the intestate. Thus in the present case, the next-of-kin of the intestate, being one cousin out of a family of seven, the other six having predeceased the intestate, the statute did not go the length of bringing in the children of those of the six who left issue, and, in particular, the children of the predeceaser with whom we are concerned, to share by reason of the statutory introduction of representation in moveables, because they are outside the category of those to whom the benefit of representation is accorded by the statute—*Ormiston* v. *Broad*, (1862) 1 Macph. 10.

But, then, how was the common law of collation to be reconciled with this limited statutory recognition of representation? Was section 2 of the Act added as a complement of section 1 to avoid a new or further anomaly which might, I think would, have been created by that section had it stood alone or as an entirely separate and detached provision, not remedial of any hardship which can be suggested, or of any existing defect in the law of succession, but occasioning what indeed would have called for remedy. Adapting the expression of Lord Justice-Clerk Inglis in *Ormiston's* case, if in answering this question "we incline to that which shall give the statute consistency and effect, we are at once led to the conclusion" that section 2 was added for the former purpose.

The second section commences with the words, "Where the person predeceasing would have been the heir in heritage of an intestate." If this is treated as an independent provision, then it must apply to every case without limitation of the predecease of a person who would have been heir in heritage of an intestate. I do not think that I should detain the Court by exposing the anomalies which would be created, and the confusion which would result, from the combination of the limited introduction of representation of predeceasing next-of-kin by section 1, with the assumed universal introduction of representative collation by section 2. But the statute does not say "where a person predeceasing," but "where the person predeceasing," and the definite article is, I think, used with meaning and intent. It indicates that to find the person referred to, the reader is sent back to something preceding, viz., to section 1. When he turns to that section he finds that "the predeceaser" is not any predeceaser, but a predeceaser of a class limited by two conditions. If the person predeceasing, and who would, had he survived, have been heir in heritage of an intestate, would have been (1) among his next-of-kin, and (2) within the limited class of collaterals specified in the proviso of section 1, then it at once becomes clear that to complete the remeid of the common law, not only must his issue be given the benefit of representation in moveables, but that provision must be made for reconciling the law of collation with this introduction of limited representation in the law of moveable succession. And this, and this only, is provided for by section 2, and it is provided for in a manner which exactly meets the case. It must be kept in mind that no heir-at-law who is not one of the next-of-kin can collate at common law (*M'Caw*, (1787) M. 2383). If then by representation he acquires right to share in the moveables, and as a condition of taking that share is not required to collate, injustice to others would be done. To remedy that possible result of section 1, section 2 was required. But to that purpose section 2 is, I think, limited. If the predeceaser does not come within the above category, there is no suggestion of any reason for the provision of section 2, regarded as an independent provision. And I am satisfied that it was not intended to give a right to collate, and to share in the benefit of collation, as would be the result of the judgment in *Jamieson's* case (1896,

23 R. 547), to a stirps which otherwise would have no right at common law as next-of-kin, and no right by statute as representing next-of-kin to any share in the moveable succession at all.

The Lord Ordinary had no alternative but to follow the precedent in *Jamieson's* case. But for the above reasons I think that that decision was unsound, and that the interlocutor reclaimed against must therefore be recalled.

LORD SALVESEN—The difficulty in this case—and I think it is a real difficulty—arises from the imperfect way in which the statute is expressed. If sections 1 and 2 are to be read as dealing with separate matters, then I think the reasoning of Lord Trayner in *Jamieson* v. *Walker* cannot be impugned. It would have been very easy for the draughtsman of the Act to have commenced the second section by such words as "Subject to the provisions of the preceding section," or in some other way to have correlated it to the preceding section; and probably it would have been a still better way of making the meaning of the Legislature clear if the second section had simply been made an additional proviso of the first.

According to the mode in which the statute is expressed, I think the *prima facie* view is that section 2 deals with a different set of circumstances from those dealt with in section 1; but to read it in that way is to make the two sections inconsistent with each other; and therefore I agree with your Lordship in the chair that we must read them together. So reading them, I am of opinion that the result at which the Second Division arrived cannot be sustained.

LORD MACKENZIE—In my opinion section 2 of the Intestate Moveable Succession Act 1855 is not independent of section 1, but must be read along with it. Section 1 introduced the doctrine of representation as regards all cases of intestate moveable succession. The proviso at the end of the section is expressed in very plain terms, and provides that no representation shall be admitted among collaterals after brothers' and sisters' descendants. Accordingly in the present case the families of John and William, deceased brothers of Mrs Adam, cannot make any claim to share in the moveable succession along with her. She is the first cousin of the intestate and his sole next-of-kin. The respondents are the family of David, another deceased brother of Mrs Adam. It is a fortuitous circumstance that the intestate left some heritable property. The effect, however, of this, according to the respondents' construction of section 2, is that as the heir in heritage, Robert, is a son of David, this gives him, or failing him the other members of David's family, a right to a share of the moveables. Robert is not one of the next-of-kin, nor one who has a statutory right of representation under section 1. It is said he has an independent right as heir to collate and claim for himself and his brothers and sisters a share of the moveable estate, and that if he does not collate, his brothers and sisters may come in and claim in their own right. The result of this is startling, for it makes the right of these descendants to claim a share of the moveables along with the next-of-kin depend entirely upon whether there is any heritage, however trifling in amount. If there is, then they, though of the same degree as their cousins, who are entirely cut out, are to be held entitled to a share of the moveables, otherwise not. This does not appear to me a reasonable construction to put upon section 2. It is, in my opinion, an enactment consequent upon section 1, for the purpose of obviating any questions as to the extent of the rights of an heir in heritage who also in virtue of the provisions of section 1 was made one of the heirs *in mobilibus* of the intestate. If and when the heir in heritage is clothed with the character of one of the next-of-kin as defined by section 1, then section 2 will operate, but not otherwise. The provisions of section 1, including the proviso, must, in my opinion, be read into section 2.

If sections 1 and 2 are read together, then I think the argument of the respondents' is untenable. I am accordingly unable to agree with the judgment in *Jamieson* v. *Walker*, upon which the Lord Ordinary has proceeded.

LORD GUTHRIE—I concur with your Lordship in the chair.

LORD SKERRINGTON—I concur with your Lordship.

The Court pronounced this interlocutor—

"Adhere to the said interlocutor except in so far as it finds the various claimants entitled to be ranked and preferred on the moveable estate of the deceased: Recal said findings, and in lieu thereof find that the said Mrs Annie Bruce Adam or Nicoll is entitled as sole next-of-kin of the deceased to be ranked and preferred in terms of her claim: Remit to the Lord Ordinary for further procedure, and decern."

Counsel for Mrs Nicoll (Claimant and Reclaimer)—Chree, K.C.—J. R. Christie. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for Robert Adam and Others (Claimants and Respondents)—Moncrieff, K.C.—A. R. Brown. Agents—Gordon, Falconer, & Fairweather, W.S.

---

*Wednesday, November* 26.

## SECOND DIVISION.

[Lord Hunter, Ordinary.

## FRAME *v.* CALEDONIAN RAILWAY COMPANY.

*Process—Proof or Jury Trial—Appeal to House of Lords—Leave to Appeal.*

Leave to appeal to the House of Lords against an interlocutor appointing a