of £16,000 being paid to the parties of the third part by the party of the first part, the party of the second part is entitled to have the said sum of £16.000 applied to the extent of £14,600, but no further, to disburden *pro tanto* the entailed estates of Kelburne, Kilbirnie, Crawfurd Lindsay, and Glengarnock, of the sums of £8000 and £12,000 charged on the said entailed estates by two bonds and dispositions in security, executed by the said James, Earl of Glasgow on the 18th July 1850; and Decern and Direct the expenses incurred by the parties to the case to be paid by the first party out of the funds in his hands, as the said expenses shall be taxed by the Auditor of Court."

Counsel for Mr Mackay—Watson and Mackintosh. Agent—Party.

Counsel for Earl of Glasgow—Shand. Agents—Hope & Mackay, W.S.

Counsel for Trustees of late Earl of Glasgow—Solicitor-General (Clark) and Marshall. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, December 14.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

MITCHELL'S TRS. *v.* BANKS OR MITCHELL.

Succession—Construction—"Nearest Heirs."

A destination of moveable and heritable property was made by *mortis causa* deed to "my own nearest heirs and assignees whomsoever, in and through my mother, hereby excluding the relations by my father and all others."

Held—(1) that the destination was not void by reason of uncertainty; (2) that the heirs of the mother were intended to be adopted as the testator's heirs, and that consequently (A), the heritable property, should go to the mother's heir of line, and (B), the moveables, to her next of kin.

This was a reclaiming note against the interlocutor of the Lord Ordinary (MACKENZIE), in a multiplepoinding raised by the trustees of the late Thomas Mitchell. The testator, Mitchell, a tobacconist in Haddington, died August 19, 1870, and was survived by his widow. His estate consisted both of heritable and moveable property, and he left a disposition and settlement, with a codicil annexed, dated respectively December 22, 1857 and June 22, 1859. The codicil, under which the questions in the action arose, contained a partial revocation of the previous settlement, and constituted a trust, in favour of certain persons named, of all his estate, moveable and heritable, and then continued—"And I nominate and appoint my trustees to be my sole executors; but declaring always that these presents are granted by me in trust only, for the ends, uses, and purposes after mentioned, viz.; *First*, that my trustees shall pay all my just and lawful debts, funeral expenses, and the expense of executing this trust. *Second*, that they shall, from the first and readiest of my moveable means and estate, make payment of the principal sum contained in the bond and disposition in security narrated in the preceding settlement, and any interest due thereon, so as to obtain a full and valid discharge thereof from Miss Wilkie, the holder, or her heirs and assignees. *Third*, my trustees shall pay, as I hereby direct them to pay, an annuity, at the rate of seven shillings per week, commencing in advance, as at my decease, to Margaret Waddell, my aunt . . . *Fourth*, my trustees shall hold the trust-estate and effects generally and particularly before mentioned, aye and until Thomas Mitchell, my son, and presently in my service, is twenty-one years of age, and they shall pay and apply the rents, interests, and profits thereof in manner following; that is to say, they shall give and apply the free rents (after paying repairs, insurance, and whole expenses of management) of the subjects in Crossgate or High Street of Haddington, and of the subjects at Gilmerton, before disponed, and the household furniture, plenishing, and effects in my dwelling-house, presently occupied personally by myself, to the said Wilhelmina Banks or Mitchell, my spouse, so long as she continues my widow; declaring that she shall *ipso facto* forfeit these provisions if she again marry, and that without any process of law to that effect; and they shall pay and apply the free rents of the subjects in Tolbooth Street or Market Street, after answering the burdens and payments leviable therefrom and herein also contained, to aliment, board, and clothe properly the said Thomas Mitchell, so long as he requires the same, and till he is twenty-one years of age; And with respect to my moveable means and estate, after answering the purposes foresaid, I direct and appoint my trustees to pay one-half of the free interest or annual proceeds thereof to my said spouse, and to retain in trust, for behoof of the said Thomas Mitchell exclusively, the remainder thereof, aye and till he is twenty-one years of age, when the same will fall to be applied and divided as after mentioned."

The 5th purpose of the trust had reference to the majority of the testator's son, and the apportionment of the estate to be made in that event; and then followed the important clause—"*Sixth*, in case the said Thomas Mitchell should predecease me without leaving lawful issue, my trustees shall pay and apply the estate and effects, before directed to be conveyed to the said Thomas Mitchell, to David Mitchell my father, and in case of his being then dead, to my own nearest heirs and assignees whomsoever in and through the late Helen Waddle, my mother, hereby excluding the relations by my father and all others, except through my said mother, in the same way as if the said Thomas Mitchell had been alive: Declaring and hereby providing that the provisions herein contained in favour of my said spouse are in full to her of all terce, *jus relictæ*, or otherwise, which she could claim in any manner of way; and I recommend to my trustees to dispose of and terminate the trades or businesses carried on by me at my decease, if any, unless the said Thomas Mitchell is nearly major, and in their opinion enabled to carry one or either of them on. And I authorise my trustees to appoint any person to uplift and discharge the funds of the trust, and to invest, alter, and change them at pleasure, as also to sell any part of my estate by public roup or private sale, except the heritable subjects specially disponed; and I confer on them full powers of compromise and submission, and in general, I

authorise them to do or cause to be done everything necessary for the execution of the trust hereby created, and for these purposes to grant, subscribe, and deliver all writs and deeds requisite and necessary."

The testator's son, Thomas, predeceased him, and the estate was claimed, *firstly*, by Thomas Waddell and Janet Waddell or Robertson, brother and sister of the testator's mother; *secondly*, by Agnes Waddell or White, only child of David Waddell, a brother of the testator's mother, who predeceased him; and *thirdly*, by George Archibald (first cousin of the testator) claiming as heir-at-law.

The testator's mother had in all two sisters and three brothers; of these one sister and one brother died without issue, and at the time of the testator's death there survived — 1st, the two claimants Thomas and Janet Waddell, and 2d, the claimant Agnes White, representing the other brother David, also dead.

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

"*Edinburgh, 25th June* 1872.—The Lord Ordinary having heard the counsel for the parties in the competition, and considered the closed record, productions and process, finds that the sixth trust purpose of the additional settlement of the testator Thomas Mitchell, of 22d June 1859, is not void from uncertainty; that according to the true construction of the said sixth trust purpose, the claimant Mrs Agnes Waddell or White is entitled to the testator's heritable subjects situated in Tolbooth Street or Market Street of Haddington, and in the Crossgate or High Street of Haddington, and at Gilmerton, but subject, in so far as regards the said subjects situated in the Crossgate or High Street of Haddington, and the subjects in Gilmerton, to the liferent thereof conferred by the said additional settlement upon Mrs Wilhelmina Banks or Mitchell, widow of the said Thomas Mitchell, but under the conditions attached to the said liferent by the said additional settlement; and that the claimants, Thomas Waddell and Mrs Janet Waddell or Robertson, are entitled to one-half of the free moveable estate and effects of the said Thomas Mitchell, and to the household furniture, plenishing and effects in the dwelling-house of the testator, subject always to the liferent of the said furniture, plenishing and effects conferred upon the said Mrs Wilhelmina Banks or Mitchell, but with and under the conditions attached to the said liferent by the said additional settlement: Ranks and prefers the said several claimants upon the fund *in medio* accordingly, but under burden of the raisers' expenses, and of the expenses found due to Mrs Wilhelmina Banks or Mitchell by interlocutor dated 9th March 1872, as the same may be apportioned in the course of the process: Repels the claim for George Archibald: Finds no expenses due in the competition, and decerns, and continues the cause.

"*Note.*—The Lord Ordinary is of opinion that the sixth trust purpose of the additional settlement of the testator is not void from uncertainty, as maintained by the claimant George Archibald, and that there are no grounds on which the testator's heirs-at-law can succeed. By that additional settlement the trustees are to convey the testator's heritable subjects in Haddington and Gilmerton to his son Thomas Mitchell, on his attaining twenty-one years of age, but under burden of the liferent over part thereof conferred upon his widow. The household furniture and plenishing is to be liferented by the widow, and on her death is to fall and belong to the said Thomas Mitchell; and one-half of the moveables is to be paid and applied to the widow, and the other half to the said Thomas Mitchell on his attaining majority. It is by the trust purpose of that additional settlement provided, that if the testator's son Thomas Mitchell should predecease him without issue, an event which happened, the trustees should pay and apply the estate and effects therein directed to be conveyed to him, to the testator's father David Mitchell; and in case of his being then dead, which also happened, 'to my own nearest heirs and assignees whomsoever in and through the late Helen Waddell, my mother, hereby excluding the relations by my father, and all others except through my said mother, in the same way as if the said Thomas Mitchell had been alive.' There is here not only an express exclusion of his relations by his father, but there is a direction to the trustees to pay and apply his estate and effects to certain parties, in regard to whom there can, it is thought, be no doubt. The expression, 'my own nearest heirs and assignees whomsoever in and through the late Helen Waddell, my mother,' is not accurate. But the intention of the testator, in regard to the persons whom he intended by that sixth trust purpose to favour, appears to the Lord Ordinary to be clear. And he considers that these persons are the nearest heirs whomsoever of his mother.

"This being the case, and the succession being partly moveable and partly heritable, the moveable estate falls to the next of kin of the testator's mother, and the heritable estate to the heir of line of his mother as her heir whomsoever, although one of the heritable subjects was conquest in the person of the deceased, the heir of conquest of the mother is not, it is thought, entitled to take under such a destination. The mother had no right to the subjects, and her heirs of conquest could not therefore have any right. The heritable estate must be given according to the direction of the testator, and that direction being to the testator's nearest heirs whomsoever in and through the mother, must be held, the Lord Ordinary conceives, as designating her heir of line as the party entitled to the heritage.—(*Boyd*, 58 June 1774—Dict., 3070; *Miller*, 9 Shaw, 295, and 7. W. & S., 1; *Robison*, 21 D. 905). The claimant Mrs Agnes Waddell or White has therefore been preferred to the fund *in medio*, in so far as it consists of heritage, as the heir of line of the testator's mother.

"The only other claimants being relations on the mother's side are her sole surviving brother and sister, and they have been preferred to the fund *in medio*, in so far as it consists of moveables.

"The sole claimant, being a relation on the father's side, who has appeared in the process is George Archibald, and his claim has been repelled, for the reasons above indicated."

Mrs Janet Waddell having reclaimed, it was argued for the reclaimer and Thomas Waddell, that by "nearest relations" was meant the nearest in blood. "Nearest heirs and successors" is held to mean those who would by law take to the exclusion of the more remote, and consequently it could not here be supposed that the words were applied in their technical sense. The meaning came to be—mass my estate in one and give it to my nearest

blood relations (through my mother) whoever they may be. Were there any room for the application of the Intestacy Act, Mrs White would interpose. There are three properties in question—two are heritage, but one is conquest, and to it Mrs White is not entitled in any view.

Authorities—*Nimmo*, 2 Macph. 1144; *Smith*, 14 D. 1057; *Cockburn's Trs.* 2 Macph. 1185; *M'Cormack*, 23 D. 398; Bell's Lectures, ii, 992.

For Mrs White it was argued, that as heir of line of her grandmother she was entitled to the heritable estate. That by the settlement it was intended to place the testator's mother and her heirs in the position in which, had he died intestate, the law would have placed his father and his heirs, and that, although the deed was, technically speaking, unintelligible, yet this construction was a sound one, and indeed was that which manifestly fulfilled the testator's intention.

Authorities — *Buchanan*, 4 Macq. 381; *Patrick*, 1 D. 207; *Pearson*, 20 D. 106.

For George Archibald it was argued, that the deed was void by reason of uncertainty, and that to his intestate succession the relations by the father's side were entitled.

At advising—

Lord Benholme—This question has come before your Lordships in a multiplepoinding in which the trustees of the late Thomas Mitchell have called various competitors into the field. The whole questions lie on the construction of the sixth purpose of the trust created by him, which runs thus:—"In case the said Thomas Mitchell shall predecease me without leaving lawful issue, my trustees shall pay and apply the estate and effects, before directed to be conveyed to the said Thomas Mitchell, to David Mitchell my father, and in case of his being then dead, to my own nearest heirs and assignees whomsoever in and through the late Helen Waddell, my mother, hereby excluding the relations by my father, and all others except through my said mother, in the same way as if the said Thomas Mitchell and David Mitchell had been alive."

At his death the testator was possessed of both moveable and heritable property. Now I am of opinion that the succession turns on the meaning to be attached to the words "my own nearest heirs and assignees whomsoever in and through the late Helen Waddell, my mother." It is obvious, my Lords, that this clause scientifically construed means nothing; but I cannot take the view that there is so great uncertainty that the testator must be held to have died intestate. There is an ambiguity as to the individual to be preferred, but there is not uncertainty leading to intestacy. I will therefore say no more as to the claim of the relation through the father, as he is expressly cut out by the destination. We have then to consider what may be intended by "nearest heirs through the mother;" this of course has no scientific meaning whatever, but at the testator's death there survived Thomas Waddell, an older brother of his mother, and also a niece, Mrs White, the daughter of his mother's younger brother. It is a singular succession, it is a disposition and conveyance, or an assignation, or both. We have had it contended that the word "relations" in the latter part of the clause must have great weight in deciding on the parties whom he did institute, but unfortunately for this view he uses a different term in the two sentences, for while he excludes the "relations" of his father, in the case of his mother the expression used is "nearest heirs and assignees." By the use of the word "relations" he cut out from *both* heritage and moveables all those claiming through the father, but here the position of those claiming through the mother is different. "Relations" is a term indicating no preference for any distinction between heritage and moveables, but I cannot approve of the substitution of that word derived from the excluding clause, and of its interpolation in the instituting clause as an equivalent to the expression there used.

Mitchell the testator had not, nor could he have, any heirs through his mother, but it occurs to me that the true meaning is that the heirs of his mother (thus incorrectly adopted as his heirs) were to take. The niece, Mrs White, would be in this view the heir in heritage, as the daughter of the younger brother, taking up by representation her father's right. This question suggests itself, my Lords, whether we are to take a distinction between heir of heritage and heir of conquest? But there was not here any real succession whatever, the right never vested in the mother, and for that reason I am induced to prefer the heir of line, and consequently this lady would take all the heritage. The moveables alone then remain, and these I would assign as the Lord Ordinary has done in his interlocutor, namely, to the next of kin of the testator's mother.

Lord Cowan—This is a case of great difficulty, and two inquiries occur to my mind, firstly, what were the subjects conveyed by the sixth purpose of the trust-disposition and settlement? and next, what was the effect of the authority to sell contained in another part of the deed? I do not think that the testator ever extended to his trustees the power to alter in any way his succession by a capricious sale of portions of heritable property here and there, but power to sell was given to enable them more readily to fulfil his intentions. I am inclined to think that under the settlement the whole estate was left as a *universitas;* but to whom? This seems almost unintelligible, but yet it is not entirely so, and we must endeavour to find whom the testator intended. It is not a case in which the heir-at-law can on ground of uncertainty have any well founded claim. I think that we have a glossary to explain the words "nearest heirs" and that perhaps the whole nearest relations by mother's side should be preferred. At the same time, however, I entirely acquiesce in the view as to the heir who, under Lord Benholme's interpretation of the clause, ought to take.

Lord Neaves—The difficulty here arises from frequent use of technical words in a popular sense by persons who do not fully appreciate their meaning. The conflicting views seems to me to be mainly on the question as to whether this succession was to be dealt with as a *universitas* for those entitled, without distinction of heritage and moveables. I agree with the opinion that heritage and moveables are determined as at the testator's death. But here there is a special clause, and it must be looked at as a whole. If your Lordships dispose of the heritable and moveable property together as a *universitas*, and if "heirs" were to be taken as equivalent to "relations," there would be great difficulty in doing justice to the testator's meaning, as "nearest relations" would exclude Mrs White. This seems to me to be repugnant to

the testator's probable intention. I regard the meaning rather to establish a sort of legal relation, taking the mother as a "stirps" in place of the father.

On the whole, I concur in Lord Benholme's view; and although I am by no means clear that we have discovered the testator's meaning, yet this appears the most probable interpretation of the clause.

LORD JUSTICE CLERK—On the whole I am inclined to agree with the result at which Lord Benholme has arrived. I feel quite clear that the testator did not by reason of uncertainty die intestate; and then the question alone remains, whether the succession is to go as a *universitas*, or whether the heritable and moveable parts thereof divide? All throughout the settlement the distinction is maintained between heritage and moveables very clearly, and therefore, but without expressing a confident opinion, I concur with Lord Benholme.

The Court pronounced the following interlocutor:—

"Refuse said note, and adhere to the interlocutor complained of: Find no expenses due to either party, and decern."

Counsel for Reclaimer and for Thomas Waddell—Millar, Q.C. and Guthrie Smith. Agents—W.P. Anderson, S.S.C.

Counsel for Pursuers and Real Raisers and for Mrs Agnes Waddell or White and Husband—Solicitor-General (Clark), Q.C. and W. A. O. Paterson. Agents—Keegan & Welsh, S.S.C.

Counsel for George Archibald—Watson & Millie. Agents—Watt & Anderson, S.S.C.

Saturday, December 14.

SECOND DIVISION.

[Sheriff of Edinburgh.

CLARK *v.* STEWART.

Lease—Breach of Contract—Sale.

A let to B certain premises by written lease, and further, by it undertook to supply a certain amount of steam-power.—*Held*, in a question between the parties as to the steam-power, that the action must be deemed one for breach of contract. *Observed* that the bargain was rather one of sale than of lease.

This case came up on appeal from the Sheriff. Certain premises at Silvermills were let on a five years' lease by the pursuer Clark to the defender Stewart; the pursuer further, in another clause of the lease, "lets to the said John Stewart junior a portion to the extent of eleven horse-power of the steam-power of the engine to be erected by the said Martin Clark upon the said subjects; and, until the said new engine is erected, he binds himself to furnish the said John Stewart junior with power to the extent of five horse from the present engine for the use of the works to be carried on by the said John Stewart junior, and obliges himself to supply the said steam-power to the said John Stewart junior and his foresaids during the currency of this tack, each week-day for the usual working time of ten hours, except Saturdays, when the same shall be supplied for six ordinary working hours, and except at such times as it may be necessary to repair the said engine, and the said Martin Clark shall supply and put up the main shaft and driving pulley in connection with the said engine, and shall keep the said engine and shaft and pulley in good working order during the currency of this lease at his own expense." The defender got access to the premises in March 1870, and commenced business on April 20, but he asserted that Clark was unable to supply him with steam-power, as he was bound under the contract to do, and, in consequence, before Whitsunday he took down his machinery. The pursuer averred that he had fulfilled his contract, and had the larger engine ready, and sent notice of the fact to the defender on July 26th 1870. The claim made was in all for £26, 4s. as the rent due for the steam till November 11th 1870, with a reservation of any claims for future payments under the lease. The Sheriff-Substitute (CAMPBELL) allowed joint probation, and thereafter, on consideration of the closed record, proof, and productions, and whole process, and having heard counsel for the parties, appointed the case to be put to the roll, adding in his note—"The Sheriff-Substitute would desire to hear the parties as to whether the pursuer is entitled to sue on the contract just as if he had been allowed by the defender to fulfil it by supplying the power. Or whether he is only entitled to sue the defender for the damage he has sustained by the defender's refusal to take the power. It might also be well to consider whether, if the pursuer is entitled to sue for the contract price of the power which the defender refused to receive, and which was consequently not manufactured by the pursuer, the defender is not entitled to insist that the cost of producing or manufacturing such steam ought to be deducted from the price or rent charged for it. A remit to a man of skill might settle the question as to the cost of production of the steam power. Would not such cost, if deducted from the price or rent charged, furnish something like an approximation to the sum to which the pursuer is entitled?"

On 28th July 1871 the Sheriff-Substitute pronounced an interlocutor finding for the pursuer, and remitting to Mr Slight, an engineer, to inspect and report on the minimum cost of the production of the steam-power which by the contract was to be furnished. The finding on the point was as follows:—"Finds that the pursuer is further entitled to payment for 5-horse steam-power at the said rate, from 20th May to 26th July, both inclusive, and for 11-horse steam-power at the said rate, from 27th July down to 11th November 1870, but subject to deduction of the minimum cost which he would have been compelled to incur had he produced or manufactured the steam power charged for, and which he would have required to supply had the defender received the same as he bound himself to do under his agreement in the lease aforesaid." And in the note appended it is added—

"*Note.*—After a careful consideration of the authorities, the Sheriff-Substitute has come to be of opinion that the present case falls under the principle upon which the case of *Calterns* v. *Tennent* was decided in the House of Lords. Where there are contained in the same instrument a lease of premises at one rent, and an undertaking to supply steam power at another and separate rent or price, these are to be regarded as distinct obligations, the first a proper lease, the second a mere