ask any more. With reference to the conclusion in the summons regarding the debentures, supposing that this matter was in the power of the shareholders, and looking forward to the possibility of future calls upon their shares, even that would not in my opinion give the pursuers the right they here demand; and on the whole case I concur with your Lordships in the opinions which have been expressed.

Their Lordships adhered, and on the motion of the respondents recalled the sist in the petition presented by the company for a confirmation order of the rules in question, and remitted to Mr Charles Logan, W.S., to inquire whether the interests of creditors would be prejudiced by the proposed proceeding.

Counsel for Pursuers — Robertson—Pearson. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for Defenders—Mackintosh—Jameson. Agents—Webster, Will, & Ritchie, S.S.C.

Thursday, July 20.

FIRST DIVISION.

[Lord Fraser, Ordinary.

MONCREIFF *v.* DRYLIE AND OTHERS.

Succession — Legacy — Description of Legatee— "Second Cousin."

The term "second cousins" in a settlement *held* to include first cousins once removed.

A truster having provided an annuity to two first cousins, directed an annuity to be paid "to each of my second cousins other than H. B." H. B. was not related to her at all. In a subsequent part of her will she bequeathed a legacy to "J. S., one of my second cousins, . . . in addition to the annuity falling to him under these presents." J. S. was not a second cousin, but a first cousin once removed of the truster. The truster had certain second cousins in the strict sense who were also her first cousins once removed. *Held* that in construing the bequest of an annuity to each of the second cousins, first cousins once removed were entitled to be included.

Miss Margaret Drylie died at Portobello on 21st November 1879. She left a trust-disposition and settlement, of which the portions material to the present question were these:—The fourth purpose was—"I further appoint the said trustees and their foresaids to pay the following annuities to the following persons, viz., to my second cousin and servant Helen Bennet, during her life, an annuity of £25 sterling; to each of my cousins Jane Bennet and David Philip, during her or his life, an annuity of £20 sterling; and to each of my second cousins, other than the first above-named Helen Bennet, an annuity of £10 sterling." By the sixth purpose she left to "John Stoddart, spirit-retailer, Danderhall, one of my second cousins, and his spouse, each a legacy of £100 sterling, this being, as regards the said John Stoddart, in addition to the annuity of £10 sterling falling to him under these presents." By the eighth purpose she directed the residue and remainder of her estate, heritable and moveable, to be divided into two equal portions, one of which was to be given to the Edinburgh Royal Infirmary, and the other to be distributed among such of the Schemes of the Church of Scotland, and among those selected, in such proportions as the trustees should think fit. Miss Drylie left moveable property amounting in value to over £15,000.

The trustees having resigned, the Hon. F. J. Moncreiff, C.A., was appointed judicial factor on the estate. The main question for decision in the present multiplepoinding, which was raised by the judicial factor in consequence of the claims made upon him by various relatives claiming as "second cousins" the annuity of £10 left by the fourth purpose to the truster's second cousins, was whether the term "second cousin" in the settlement was to be interpreted in the strict sense of the term as meaning only persons descended from a common great-grandparent, and who were thus the children of persons who were first cousins to each other, or whether it was to be interpreted as including also first cousins once removed of the truster—that is, persons who were children of her first cousins, and were thus in a degree nearer to her in relationship. Neither of the persons whom the truster in the clauses of the deed which are quoted above designated "second cousins," viz., Helen Bennet and John Stoddart, were "second cousins" in the strict sense of the word. Helen Bennet was not related to her at all, and John Stoddart was her first cousin once removed.

Of the truster's relatives, two, Mrs Archibald and Mrs Somerville, were her "second cousins" in the strict sense by one side of their descent, and were also by the other side her first cousins once removed. These two persons were her only second cousins in the strict sense, In addition to the claims of these persons, nearly sixty persons, who were related to the truster as first cousins once removed, claimed to be entitled to take benefit under the clause in favour of "second cousins," contending that the expression as ordinarily used, and especially as used by the truster in giving a legacy to John Stoddart, included first cousins once removed. A number of persons also claimed to take benefit under the same clause who were "either first cousins twice removed, or second cousins once removed."

The Lord Ordinary (Fraser) found that the truster intended to include under the term "second cousins" first cousins once removed, and therefore first cousins once removed are entitled to legacies granted to second cousins."

He added this opinion:—"The question in this case is one as to the construction of a clause in the trust-disposition and settlement of Margaret Drylie which was duly framed by a man of business. The fourth purpose of the trust is as follows:—'*Fourthly*, I further appoint the said trustees and their foresaids to pay the following annuities to the following persons, viz., to my second cousin and servant Helen Bennet, during her life, an annuity of £25 sterling; to each of my cousins Jane Bennet and David Philip, during her or his life, an annuity of £20 sterling; and to each of my second cousins, other than the first above-named Helen Bennet, an annuity of £10 sterling; and to Mrs Adamson, residing at

No. 17 Tantallon Place, Edinburgh, widow of the late Rev. John Adamson, sometime minister of the parish of Newton, an annuity of £40 sterling; the said several annuities conferred by this fourth head or purpose to be payable by equal moieties at the terms of Whitsunday and Martinmas.' A number of claimants in this multiplepoinding are not second cousins according to the ordinary and technical meaning of these words, but are first cousins once removed. The contention in support of their claim is, that the testator used the words 'second cousins' as including not merely persons standing to her in that relationship strictly speaking, but also first cousins once removed.

"The testator does use the term in this latter sense, for she calls John Stoddart, who is a first cousin once removed, and to whom she leaves a legacy of £100, 'one of my second cousins.' She further calls Helen Bennet 'my second cousin,' while it is admitted that Helen Bennet is no relative at all. In these circumstances those who are first cousins once removed averred and offered to prove 'that the testatrix was in the habit of calling them, and persons standing in their degree of relationship, her second cousins; and they further aver that the expression "second cousins" in the will was meant by her to designate, and is therein used to designate, those standing in the aforesaid degree of relationship to the testatrix.' This offer of proof was resisted as incompetent, but the Lord Ordinary would have allowed it if he had thought it to be necessary in order to enable him to arrive at the conclusion he has reached. The case comes within the rule laid down by Sir James Wigram (p. 8)—'Any evidence is admissible which in its nature and effect simply explains what the testator has written, but no evidence can be admissible which in its nature or effect is applicable to the purpose of showing merely what he intended to have written.' The evidence tendered here would have simply been to explain what the words used by the testator meant, not what the testator intended to write, and therefore according to this rule it would be admissible. But it is not necessary to resort to such extraneous evidence, because the deed itself shows what the testator meant much better than any parole evidence given by her friends and neighbours could do. When she calls John Stoddart a second cousin, she thereby intimated that she considered a cousin once removed to be a second cousin; nor is the effect of this taken off by the fact that she calls Helen Bennet, who is no relative at all, a second cousin. If the testator knew that Helen Bennet was not a relative, and still called her a second cousin, there might be some ground for holding that she attached no very definite meaning to the words. But there is nothing to suggest that she did not believe that her servant was not her second cousin. On the contrary, the presumption is that she did believe her to be so, rightly or wrongly. Now, a testator is allowed to use his own glossary, provided he himself furnishes the translation—to write in a cipher, provided he furnish the key to it. He may declare that by James he means John, and that by ten he means a hundred, and that by second cousins he means first cousins once removed. It is a notorious fact (and a Judge is bound to take notice of it) that amongst the humbler classes the term second cousin is used to indicate the relationship of cousin once removed, and that the latter term is one almost unknown in the phraseology of these classes in Scotland. It would appear to be so also in England, for in one of the English cases on the point the Vice-Chancellor of England said, 'It was very common for persons to call the children of their first cousins their second cousins'—*Slade* v. *Tooks*, 9 Sim, 386.

"Therefore, having obtained from the testator herself a key to her meaning, the technical import of the words must yield to the intention so expressed, and it is no answer to this evident intention to say that there are persons existing who are properly second cousins, and that consequently it is unnecessary, in order to find a legatee, to hold that a cousin once removed is, in the sense of this will, a second cousin.

"There seems to be no judgment in the Scottish Courts bearing on the questions here raised. The English decisions are collected in Roper on Legacies, vol. i. p. 145, together with the following recent cases—*In re Parker*, 15 Ch. Div. 528, *aff.* 17 Ch. Div. 262; *in re Bonar*, 19 Ch. Div. 201."

Leave having been granted, the residuary legatees, the Right Rev. James Smith and others, as representing the Church of Scotland and the Royal Infirmary, reclaimed, and argued—The principle is that if a term is used in describing a class of legatees which is not entirely satisfied by any persons who are claimants under the will, it may then be inferred that the word was not used in its ordinary sense, and the persons who come nearest the description given by the term may be preferred, but that where persons were to be found who were exactly described by the term used no such construction is needed. Here there were second cousins in the proper sense, and no other persons need be looked for. The testator could hardly be thought to have contemplated favouring a great multitude of people of whom she knew nothing. The deed was framed by a conveyancer, who presumably understood the terms he used. No inference could be drawn from the description of John Stoddart as to what the truster meant by a second cousin, for she applied the term to Helen Bennet, who was not a cousin of hers at all.

Argued for first cousins once removed—"Second cousin" is not a technical term of law, but a popular term, and must be construed in its well-known popular sense. Second cousins in a strict sense were not so nearly related to the truster as first cousins once removed, and it was fair to suppose that in calling relatives as a class she did not intend to leave out those nearest to her who were popularly described as being of that class. Niece had been held to include "grandniece" in an analogous case to the present—*James* v. *Smith*, 1844, 14 Simon's Rep. 214.

Authorities—Those cited in the opinion of the Lord Ordinary.

The Lords made avizandum.

At advising—

Lord President—The testatrix Miss Margaret Drylie was possessed of a considerable amount of moveable property. She had no very near relatives—none indeed nearer than cousins-german, but she had two cousins-german, Jane Bennet

and David Philip, and she had also, it appears, a whole troop of first cousins once removed—that is to say, if all the people who claim that character here really possess it. I was about to say that she had no second cousins. In one sense that is true, in another it is not true. Two persons who were her first cousins once removed by one side of the house were also in another way her second cousins, and thus if they had not been first cousins once removed, and so more nearly related to her than second cousins are, they would have still been related to her as second cousins in the strict sense. Thus in one sense the testatrix had no relatives more remote than first cousins once removed, but in another sense she had. In that state of the relationship we have to consider what the testatrix meant by this bequest of an annuity to each of her "second cousins." The contention of the reclaimers is that where she said by the will "I appoint my trustees to pay to each of my cousins Jane Bennet and David Philip, during her or his life, an annuity of £20 sterling, and to each of my second cousins other than the first above-named Helen Bennet an annuity of £10 sterling," she was exhausting her liberality as regarded two classes of persons by giving an annuity to these two cousins and an annuity to her second cousins. According to that reading she gives no annuity or legacy to her first cousins once removed except John Stoddart, of whom more hereafter.

The other contention is that she did not mean to restrict her liberality in that way or overlook her first cousins once removed, but that she used language which in ordinary conversational use means and includes first cousins once removed. Now, we are bound to take into account the fact that it is very common to indicate by the expression second cousin a first cousin once removed, and that not only in conversation but also on much more formal occasions. Thus the question is fairly raised whether the testatrix did not commit that common inaccuracy. On the whole, I must say that I think she did, and that it is not a fair construction of the will to hold that she selected these two persons Mrs Somerville and Mrs Archibald to enjoy her liberality because being first cousins once removed they were also second cousins. She does not profess any partiality for them; she does not name them; she calls her second cousins as a class. And then in this same will she leaves a legacy to John Stoddart, who was a first cousin once removed, designing him as one of her "second cousins." I think that we have here such a combination of circumstances as plainly to entitle the Court to conclude that by second cousins the testatrix meant first cousins once removed.

Lord Deas—I concur in the opinion of your Lordship. I must say that I have found it more difficult to adopt the construction of the Lord Ordinary so as to bring in the whole class of first cousins once removed than it would have been to say that a particular person is included by a testatrix in the one expression used by her. Helen Bennet, for instance, was no relative at all, and I have felt some doubt whether the testatrix really meant the whole class. But I am satisfied that the interlocutor is sound, and I am therefore not disposed to differ.

As I happen never to have had any cousins or second cousins of my own, and have therefore not been interested in such matters, I have no knowledge of the popular use of the expression "second cousin" to which the Lord Ordinary refers as popularly including first cousin once removed.

Lord Mure—I think that the interlocutor of the Lord Ordinary is quite sound. There is no presumption that the testatrix meant to leave out her first cousins once removed. She begins with first cousins, and I do not see any reason for thinking that she meant to leave out her first cousins once removed, who are more nearly related to her than "second cousins" in the strict sense. Again, it is a well-known fact that people often call a first cousin once removed a second cousin. It was said that there is no Scotch authority on the point, but I am confident that I once argued this question in the other Division of the Court, and if I recollect rightly the decision of Lord Justice-Clerk (Hope) and the other Judges was to the same effect as our present decision.

Lord Shand—If it had not been the case that the testator called Helen Bennet a second cousin I should think this a clear case, for we have in the first place the fact that second cousin is often used for first cousin once removed, and I think that is not a use of the expression confined to the humbler classes but that it extends to all classes of society. In the second place, we have John Stoddart called a second cousin when he is a first cousin once removed; and lastly, the result of sustaining the reclaimers' argument would be to pass over a class of persons called as such according to the popular meaning of the words without any predilection. The only question is whether because of the mistake about Helen Bennet there may be a mistake also about Stoddart, and that therefore nothing can be inferred about the meaning she attached to "second cousin." But I do not think that from the mistake about Helen Bennet we can make such an inference about Stoddart.

The Court adhered, and remitted to the Lord Ordinary for further procedure.

Counsel for Reclaimers—Mackintosh—Pearson. Agents—Hope, Mann, & Kirk, W.S.

Counsel for Judicial Factor—Moncreiff. Agent—Hon. James W. Moncreiff, W.S.

Counsel for Claimants—Strachan—J. C. Smith—Millie—Mure—Murray—Gillespie—Donaldson—James Reid—Baxter—C. N. Johnston. Agents—James Coutts, Solicitor—M'Caskie & Brown, S.S.C.—R. H. Miller, L.A.—John Goldie, L.A.—George Wood, S.S.C.—John Macpherson, W.S.—Cuthbert & Marchbank, S.S.C.—Hope, Mann, & Kirk, W.S.