School Board while he acted as a member of it would be invalidated by reason of any judgment subsequently pronounced. (See section 44 of 53 & 54 Vict. cap. 55.) Further, if Mr Beattie's vote were left out of view, there remained more than a quorum of the Board who voted for the dismissal of the defender.

"On the whole matter, I am of opinion that the pursuers are entitled to decree of declarator, removing, and interdict, and I shall accordingly pronounce decree to that effect with expenses. It will be unnecessary to dispose of the reductive conclusions of the summons."

The defender reclaimed.

LORD JUSTICE-CLERK — The defender in this case maintains that at the date of his first dismissal Mr MacMillan was a member of the School Board, and that notice of the motion for defender's dismissal ought to have been sent to him. Mr MacMillan had been nominated by the School Board but he had refused to accept office. I see no ground for holding that a person who has been thus nominated is a member if he declines to accept office. The analogy which was attempted to be drawn between this case and the case of an elected member of Parliament is inadmissible, because the position of a member of Parliament is entirely different. He has no right to resign. Although it is common to speak of a member of Parliament resigning, that is not really what takes place. The member cannot resign. He must accept an office under the Crown, the acceptance of which by statute vacates his seat in Parliament. Here we have an entirely different state of circumstances. I have no doubt that Mr MacMillan could quite competently refuse to accept office. In that view the Board was bound to proceed to get someone else instead of him, and on 16th August 1894 William Beattie was nominated to fill the vacancy. Thereafter when the proper period of notice had elapsed which was necessary to enable such a motion to be dealt with, the defender was dismissed. I think this was all perfectly regular.

But it is not necessary to rely solely on this dismissal, as I think there can be no doubt that the defender's second dismissal was entirely free from exception. The defender maintains that Mr M'Millan's letter of refusal to act must be read as a resignation, and that as such it did not take effect till 9th September 1894; that consequently Mr Beattie's nomination on 16th August was inept, there being then no vacancy, and that no nomination by the Board to fill the vacancy was made till 16th May 1895. Accordingly he says that more than eight weeks elapsed before the Board proceeded to supply the vacancy, and that consequently the Board must be held to have lost their right of nomination, which, he submits, after the elapse of eight weeks, passed to the Scotch Education Department. It does not appear to me that the power given to the Scotch Education Department to fill vacancies after the elapse of eight weeks in any way puts an end to the right of school boards to make nominations after the expiry of that period. If the Education Department does not exercise the power given to it, I think the school board can at any time competently exercise the power conferred upon them. But in any view I am clear that it is not within the right of a third party to come forward and vindicate the rights of the Education Department, when the Education Department is not claiming any rights for itself.

I am therefore of opinion that Beattie was legally nominated in May 1895, and if that be so, then there is no doubt that whatever may have been the case with regard to the first dismissal, the defender was duly dismissed on 29th June 1895. I think the reclaiming-note should be refused, and the Lord Ordinary's interlocutor affirmed.

LORD YOUNG and LORD TRAYNER concurred.

LORD RUTHERFURD CLARK was absent.

The Court adhered.

Counsel for Pursuers—M'Lennan. Agents—Dalgleish & Dobbie, S.S.C.

Counsel for Defender — Abel. Agent — Charles George, S.S.C.

Wednesday, March 4.

SECOND DIVISION.

JAMIESON *v.* WALKER.

Succession—Intestacy—Intestate Moveable Succession Act (18 *and* 19 *Vict. c.* 23), *secs.* 1 *and* 2—*Right of Heir who is not among the Next-of-Kin to Collate.*

The Intestate Moveable Succession Act, which introduces representation of predeceasing next-of-kin into moveable succession, enacts, section 1, "that no representation shall be admitted among collaterals after brothers and sisters' descendants, and section 2, that "where the person predeceasing would have been heir in heritage of an intestate, having 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 . . . . . 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."

Held that an heir in heritage of an intestate, the only child of a predeceasing uncle, was entitled to collate the heritage, and to share the combined heritable and moveable estate equally with the intestate's aunt, who was the sole surviving next-of-kin.

Thomas Anderson, picture dealer, Glasgow, died on 29th July 1895, unmarried and in-

testate, leaving estate amounting to £18,750, of which about £17,000 was moveable and £1750 heritable. He was survived by the following relatives—(1) Mrs Jane Anderson or Jamieson, a paternal aunt; (2) Mrs Annie Anderson or Walker, the only child of William Blair Anderson—a paternal uncle predeceased; and (3) by one child and three families of grandchildren of a paternal aunt. Mrs Jamieson was consequently his sole next-of-kin, and as such was decerned executrix-dative to the intestate on 22nd August 1895. Mrs Walker was heir-at-law of the deceased.

The Intestate Moveable Succession Act (18 and 19 Vict. c. 23), section 1, after enacting that descendants of next-of-kin who have predeceased the intestate are to take the share which would have fallen to their parent if he had survived the intestate, enacts—"Provided always that no representation shall be admitted among collaterals after brothers and sisters' descendants;" and section 2 provides as follows—"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."

In these circumstances questions arose between Mrs Jamieson and Mrs Walker as to whether Mrs Walker was entitled to collate the heritage and obtain a share of the combined fund, and this special case was presented to the Court. The parties to the case were (1) Mrs Jamieson as executrix-dative of the intestate; (2) Mrs Jamieson as an individual; and her husband William Jamieson for his interest; and (3) Mrs Walker.

The second parties maintained that Mrs Jamieson, as sole surviving next-of-kin of the deceased Thomas Anderson, was entitled to the whole of the moveable estate left by him, and that the third party had no right or title to any share in the same.

The third party, on the other hand, contended that she, the heir in heritage of the said deceased Thomas Anderson, being the only child of the said William Blair Anderson, who had he survived would have been not only heir in heritage but also one of the next-of-kin of the said deceased Thomas Anderson, was entitled to collate the heritage to the effect of claiming one-half of the combined heritable and moveable fund, as her father could have done if he had survived the deceased Thomas Anderson.

The opinion of the Court was requested upon the following questions:—"(1) Is Mrs Jamieson, as the sole surviving next-of-kin of the said Thomas Anderson, entitled to the whole of his moveable estate, to the exclusion of any right of collation by the heir-at-law Mrs Walker?; or (2) Is Mrs Walker entitled to collate the heritage, and to receive one-half of the combined moveable and heritable estate, the other half thereof falling to Mrs Jamieson?"

Argued for the second parties—At common law the heir-at-law had no right to collate if he was not at the same time one of the next-of-kin.—*M'Caw* v. *M'Caw*, December 28, 1787, M. 2383; *Anstruther* v. *Anstruther*, January 20, 1836, 14 S. 272, at p. 282. Under the Intestate Moveable Succession Act the child of a predeceasing uncle had no right to any part of the moveable estate if any of his father's brothers or sisters were surviving, as representation was confined to the descendants of the intestate's brothers and sisters—see *Ormiston* v. *Broad*, November 11, 1862, 1 Macph. 10. Section 2 of the Act was unintelligible unless read in connection with section 1, and if so read the intention of the statute appeared to be that when the heir-at-law was the representative of a person who would have been heir-at-law and also one of the next-of-kin if he had survived, and was himself within the class of persons entitled under the Act to share in the moveable estate, he should be entitled to collate, but not otherwise—M'Laren's Wills and Succession, vol. i., sec. 299.

Argued for the third party—The sections were independent, and section 2 should receive construction according to its terms without reference to section 1. In *Ormiston, cit.*, the effect of section 2 was not under consideration. The intention of the statute was that the heir-at-law should have a right to collate if the person whom he represented would have had that right had he survived the intestate.

At advising—

LORD TRAYNER—The question presented to us for decision under this special case does not appear to me to be attended with any difficulty. Indeed, if the view which I take is correct, the question is already decided by the express and unambiguous language of an Act of Parliament. Prior to the passing of the Act 18 and 19 Vict. cap. 23, an heir in heritage had no right of collation unless he was also among the next-of-kin of the deceased. By the second section of that Act, however, the right to collate was extended. It provided that when the person who would have been heir in heritage of an intestate predeceased the intestate, his child (being the heir in heritage of the intestate) should have the same right to collate which his parent would have had had he survived. That is exactly the case here. It was admitted in the argument addressed to us by Mr Dundas that this must be the result if the second section of the Act I have cited is read as a substantive provision independent of the first section. I think it is the result whether the sections are read separately or together. But I have no difficulty in coming to the conclusion that the sections are independent of each other. They deal with separate matters, and are intended to effect changes in our law quite distinct from

each other. The first clause introduced representation in intestate moveable succession, thus admitting persons who were not of the next-of-kin to share in the intestate succession with persons who were. The second introduced the right of an heir in heritage who was not of the next-of-kin to the benefit of collation. I am therefore for answering the first question in the negative, and the second question in the affirmative.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD RUTHERFURD CLARK was absent.

The Court answered the first question in the negative, and the second question in the affirmative.

Counsel for the Second Parties—Dundas. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for the Third Party — W. C. Smith. Agents — Forrester & Davidson, W.S.

Wednesday, March 4.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

DOLAN *v.* BURNET.

Reparation — Culpa—Defective Condition of Premises — Liability of Tenant of Shop for Accident to Customer—Implied Fault.

A person who had entered a shop to make purchases, was injured through the collapse of the shop floor, which owing to old age and defective repairing, gave way under her weight. It did not appear that the shopkeeper, who was tenant of the premises, was aware of the defect, or had reason to suspect its existence.

Held (*diss.* Lord Trayner) that the shopkeeper was bound to have his premises in a safe condition for the public using them, and was liable in damages to his customer for the injuries she had sustained.

On 27th June 1895, the pursuer, who was the wife of a bricklayer in Glasgow, called at the shop of which the defender, a grocer in Glasgow, was tenant, and made certain purchases. When she was leaving the counter of the shop, and when she was distant about two or three feet from it, the floor of the shop gave way and she was precipitated into the cellar underneath, and sustained certain injuries.

The shop was in an old building, and the woodwork of the floor was old and worn. There was nothing, however, in the appearance of the floor as viewed from above to show that it was in any way insecure. Boxes and barrels had been left standing on the place which gave way, but no accident had ever occurred before. No complaints as to the condition of the floor had ever been made to the defender by his employees or customers. The accident was due to the collapse of a patch in the floor which was defective and unsafe. The defect in the patch was that the boards composing it were supported not by the joists but by fillets nailed to them. The immediate cause of the accident was that the fillets and the nails attaching them to the joists gave way under the pursuer's weight, and left the boards without support. This defect in the flooring was visible to anyone inspecting it from the cellar below the shop. This cellar was in the occupation of the defender but he did not use it, and had not entered it during his tenancy, so that he never saw or had an opportunity of seeing the nature of the patch. By the terms of the lease the landlord was bound to keep the premises in repair.

The pursuer brought an action of damages for the injuries sustained through her fall, in the Sheriff Court at Glasgow.

She averred—"(Cond. 4) The said fall and pursuer's injuries were due to the fault of the defender. The said shop is in an old building, and the woodwork of the floor is old and worn. It is defective in respect that the floor, where the accident occurred, is patched in an imperfect manner—the flooring was not nailed on to the joists, but on to a strip of wood which was nailed on to the joist at the place of the accident. The pursuer received no warning of the dangerous state of the floor, which, as above stated, was defective, and not maintained in good and serviceable order and repair."

She pleaded—"(1) The pursuer having sustained loss, injury, and damage through the fault of the defender, is entitled to compensation with expenses; (2) the defender being tenant and occupant of said shop, warrants to the public that the same is safe."

The defender averred (Stat. 5)—"The floor of the shop in question was an old floor, but quite sufficient for the purpose required, and never showed any signs of giving way, or the floor would have been put right."

He pleaded, *inter alia*—"(3) The floor in question having shown no previous sign of weakness, the defender is not responsible for an unexplained accident."

The Sheriff-Substitute (BALFOUR), by interlocutor dated 18th December, assoilzied the defender. He added the following note—"If the defender had known of the patched condition of the floor, and how long it had been in that condition, I expect he would have been liable to the pursuer, because it was a dangerous thing to have boards about two feet square laid upon fillets nailed to the joists, and not laid upon the joists themselves, but the defender knew nothing about the patch, and neither did anyone connected with the premises. The floor must have been patched more than thirteen years ago, and the defender has only been in the premises three years. He was bound, as in a question with his