Trustees, 1879, 7 R. 96, 17 S.L.R. 25; *Henderson* v. *Hendersons*, 1890, 17 R. 293, 27 S.L.R. 247; *Cumming's Trustees* v. *White*, 1893, 20 R. 454, 30 S.L.R. 459; *White's Trustees* v. *Chrystal's Trustees*, 1893, 20 R. 460, 30 S.L.R. 463; and *Bowman* v. *Richter*, 1900, 2 F. 624, 37 S.L.R. 424. I propose to refer in detail only to the case of *Cumming*, which appears to me most nearly to resemble the present case. A testator there had provided in certain events that the residue of his estate should fall and belong to a grandniece's sister and four brothers *nominatim* equally amongst them, and in the event of any of them dying without leaving lawful issue the share of the predeceaser should "go and be divided among the survivors;" but should the predeceaser leave issue, "then such issue shall be entitled to succeed to their parent's share equally among them, in the same manner and as fully as if such parent had survived." It was held that the issue of predeceasing brothers took no part of the share of a brother who had died leaving no issue. Lord Trayner said—"A child who is called, either expressly or under the implied condition *si sine liberis*, *&c.*, to take a parent's share is entitled only to the parent's original share, and not to any participation in a lapsed or accrued share. This is necessarily so in a case like the present, where there is a clause of survivorship. The survivors take the share of a predeceaser, and the children of a predeceaser cannot take what is specially destined to another beneficiary." The present case is distinguishable from *Cumming's* case, inasmuch as there is no clause expressly giving the survivors of the testator's brothers and sisters the shares of those who predecease without leaving issue.

The second question raised in the case was whether the share falling to one of the testator's sisters, Mrs Williamson, fell to be divided *per stirpes* or *per capita* among her descendants. Mrs Williamson predeceased him leaving two children. One of her children is the claimant Mrs Lewis. Her only other child, Mrs Bell, predeceased the testator leaving seven children surviving. For Mrs Lewis it is maintained that the one-sixth share of residue to which the issue of Mrs Williamson are entitled, if the opinion I have expressed above be sound, falls to be divided equally between her and the children of Mrs Bell. The latter, however, maintain that the one-sixth share should be divided into eight parts, of which they should receive seven parts and Mrs Lewis the other part. I confess that I have difficulty in following this argument. Under the destination the division would fall to be made *per capita* where all the claimants stand in the same degree of relationship to the legatee whose share they take. The Bell family, however, only take as representing their deceased mother. It would certainly appear to be an anomalous result that Mrs Lewis would have taken one-half if Mrs Bell had survived the period of vesting, but only takes one-eighth on account of Mrs Bell's having died leaving seven of a family. There is nothing in the language of the deed to indicate that that was the testator's intention, and I shall therefore repel the claim.

Counsel for the Pursuers and Real Raisers—Gentles. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Claimants Mrs Agnes M'Dowall or M'Meekan and Others—Garson. Agents—Oliphant & Murray, S.S.C.

Counsel for the Claimants Peter M'Meekan and Mrs Isabella M'Meekan or Laird—R. C. Henderson. Agents—Scott & Glover, W.S.

Counsel for the Claimants Andrew M'Meekan's Trustees and Others—Gentles. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Claimant Mrs Mary Jane or Jeanie Williamson or Lewis—Wilton. Agents—Gray, Muirhead, & Carmichael, S.S.C.

Counsel for the Claimant Mrs Margaret Elizabeth Bell or Skimming and Others—A. M. Mackay. Agent—Alexander Wylie, S.S.C.

Counsel for the Claimant Mrs Agnes M'Kinnell or Woods—A. M. Stuart. Agent—C. Strang Watson, Solicitor.

Counsel for the Claimants Andrew Black and Another—Pitman. Agent—W. Leslie Christie, W.S.

Counsel for the Claimants Mrs Janet M'Meekan or M'Meekan and Others—Greenhill. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for the Claimants William Paterson and Others—Maclaren. Agent—John N. Rae, S.S.C.

Friday, February 28, 1919.

SECOND DIVISION.

[Lord Sands, Ordinary.

BALFOUR-KINNEAR *v.* BALFOUR-KINNEAR.

Process — Res Noviter — Divorce — Proof Closed—Recal of Witnesses.

In an action of divorce on the ground of adultery counsel for the defender after proof had been closed tendered a minute averring *res noviter veniens ad notitiam*, viz., that the evidence of two of the pursuer's principal witnesses was deliberately false, and known by them to be false, and that the defender did not know and could not have discovered this when the evidence was led. The defender craved that he should be allowed to add this minute to his defences, to open up the proof in order that the two witnesses might be recalled and examined thereon, and to lead additional evidence in proof of these averments if necessary. The Lord Ordinary (Sands) refused the crave contained in the minute and subsequently assoilzied the defender. The pursuer having reclaimed, counsel for the defender moved in terms of the foregoing minute. The Court, without delivering any opinions, pronounced an interlo-

cutor allowing the minute to be received as a condescendence of *res noviter*, under reservation of all objections.

Mrs Ethel Anna Purvis-Russell Montgomery or Balfour-Kinnear, *pursuer*, brought an action of divorce against her husband George Purvis-Russell Balfour-Kinnear, Writer to the Signet, Edinburgh, *defender*, on the ground of his adultery with one, Agnes Robertson. The defender brought a similar action against the pursuer.

Proof was led and was closed on 24th July 1918, the cases being continued until 17th October 1918 for the hearing of counsel.

On 2nd August 1918 the defender tendered a minute in the following terms:—"That the name of Agnes Robertson referred to on record first appeared in the newspapers in connection with the case on Thursday, 25th July 1918, and this publication brought information to the defender which for the reasons after mentioned it was not possible to obtain prior thereto. In her evidence as a witness for the pursuer the said Agnes Robertson deponed:—'I was not a prostitute at the time I went with the defender. (Q) Did you subsequently become a prostitute?—(A) No. (Q) Were you never a prostitute?—(A) I say I was; I led a silly life, which I am sorry for now, but as for knowing that life at the time I went with the defender I did not. (Q) If you were not a prostitute at the time you went with the defender, did you afterwards become a prostitute?—(A) Yes. . . . (Q) Are you now leading a respectable life?—(A) Yes. (Q) And are you anxious now to do well?—(A) I am.' Another witness for the pursuer, viz., Emily Johnston Dear, also deponed—'I took her (that is Agnes Robertson) to Haddington Place to Mrs Bryden's in December 1913. She lived there for a period of about six weeks with the exception of a week. (Q) At that time, the end of 1913 and January 1914, was Agnes Robertson a prostitute?—(A) Oh, no. . . . I know Agnes Robertson very well. (Q) Is she a truthful girl apart from her unfaithfulness?—(A) As they go I consider Agnes very truthful. . . . She was a girl who never should, I say, "lived off" money on the streets. . . . (Q) Have you ever known Agnes Robertson tell you a lie?—(A) I won't say I have not, silly little things, you know, things of no consequence. (Q) In saying that the subject was trifling, aren't you inclined to be very indulgent to these girls?—(A) No, I say I am not; I am considered very hard to the girls.' The defender has now ascertained that the evidence before quoted, given by the said two witnesses, was deliberately false, and was known to them to be false, and he avers as follows:—1. On or about Saturday, 18th May 1918, the said Agnes Robertson, who prior to that date resided at 22 Lochrin Buildings, Edinburgh, lodged a complaint with the Edinburgh police against Mrs A. B., a certificated midwife residing at Edinburgh, charging her with having in a bedroom in the house of the said Mrs A. B., on 15th May 1918, performed an illegal operation on the said Agnes Robertson, she being then pregnant, with the intention to procure abortion, and did cause her to abort. 2. On or about the same day—18th May—the said Agnes Robertson informed the witness Emily Johnston Dear of the crime committed by the said Mrs A.B., and the said Emily Johnston Dear instantly visited the police in support of the said Agnes Robertson. Medical experts were called in by the criminal authorities, who after an examination of the said Agnes Robertson certified that her condition was consistent with the said illegal operation having been performed, and the said Agnes Robertson repeated the charge against the said Mrs A. B. to the police and others in the presence of the said Emily Johnston Dear. At the same time the said Emily Johnston Dear stated to the criminal authorities that she had known Agnes Robertson for five or six years, and that for that time she had known her to be acting as a prostitute on the streets, and had also known her to work at different times. The said Agnes Robertson on said 18th May went to reside in the home of the said Emily Johnston Dear, and it is believed she was kept there by arrangement with the pursuer's agents till the proof in this case was led. It was at this time that the said Emily Johnston Dear was giving information to the pursuer's agents which led to the raising of the present action, the summons in which was signeted on 24th May 1918. 3. In consequence of the charge thus made by the said Agnes Robertson, supported as aforesaid, the said Mrs A. B. was apprehended on a sheriff's warrant, and her house was searched. She declared that she had never seen the said Agnes Robertson, and did not even know her by name, and that no such crime as that with which she was charged was committed by her. In consequence of these protestations by the accused, who was represented by a law agent, the criminal authorities again visited the said Agnes Robertson, and on being confronted with the accused's statements she admitted that the charge was a lie in so far as the accused was concerned, but that the operation had been performed in the accused's house but not by the accused. This in turn was denied by the accused, and on again being confronted the said Agnes Robertson confessed that the charge against the said Mrs A. B. was wholly untrue, that the operation had neither been performed by the accused nor in her house, but that she had herself performed the operation in her own lodgings in Lochrin Buildings. During all this time the said Agnes Robertson was living with the said Emily Johnston Dear, and the latter was fully aware of the history of the investigations and of the successive falsehoods told by the said Agnes Robertson to the criminal authorities. 4. After the confession of the said Agnes Robertson, the agent of the said Mrs A. B. was written to by the Crown authorities that the charge against his client was dropped."

The facts set forth in the foregoing four articles were not known to the defender when the evidence in the case was led, and could not have been discovered by him. The criminal charge against the said Mrs A. B. never became public, and there was no

public record which could have disclosed its existence, and when the defender's agent called for the said Emily Johnston Dear on 21st June 1918, after a number of ineffectual attempts to see her, she declined to be precognosced. The defender accordingly craves in respect that the matters now averred are *res noviter veniens ad notitiam* and are clearly relevant to affect the issue of the cause, and that the proposed enquiry is essential to allow of the administration of justice between the parties—(1) to be allowed to add this minute to his defences; (2) to be allowed to open up the proof in order that the said Agnes Robertson and Emily Johnston Dear may be recalled and examined thereon; and (3) to lead additional evidence, and to prove the said averments by competent evidence in the event of their not being fully admitted by the said Agnes Robertson and Emily Johnston Dear."

On 13th September 1918 the Lord Ordinary (SANDS) pronounced this interlocutor—"... Allows the minute for the defender to be received, and having of consent heard counsel for the parties thereon and considered the same, refuses the crave contained in said minute."

Opinion—"This is a very unusual application. After proof has been closed upon both sides, the defender desires that two of the witnesses for the pursuer should be recalled for the purpose of cross-examination upon matters affecting their credibility, which matters are not pertinent to the issue which is here being tried. No precedent has been cited to me for granting such an application. Two cases were cited which have some resemblance to the present—*Robertson* v. *Steuart*, 1 R. 532, 11 S.L.R. 427, and *Hoey* v. *Hoey*, 11 R. 578, 21 S.L.R. 407. Both these cases, however, differ from the present. In both the application was made before the whole proof on both sides was concluded. What in my view, however, is more material is that in both these cases the proposal was to recal a witness for further cross-examination upon a matter which was pertinent to the issue, and a matter upon which it was by statute competent to lead evidence to contradict the witness. In the above absence of precedent I do not see my way to accede to this motion. There is no doubt a specialty in this case. The object of the proposed further cross-examination is not simply to attack the general credibility of a witness, but to show that the witness was guilty of a peculiar kind of untruth similar to the untruth suggested in the present, viz., the fabrication of and obstinate adherence to a circumstantial story embodying a serious and baseless charge. The logic, however, of allowing further evidence upon the peculiar ground would appear to me to be that if the witness denied the imputation evidence to prove it ought to be allowed. This would be the trial of a collateral issue. The rule of practice against the admission of such evidence is stated and explained by Lord President Robertson in the case of *A* v. *B*, 22 R. 402, 32 S.L.R. 297 (followed in *Inglis* v. *National Bank*, 1909 S.C. 1038, 46 S.L.R. 730, and in other cases). In that case the Lord President refers to the case of *Whyte*, 11 R. 710, 21 S.L.R. 470, where, following a judgment of Lord Stowell in *Forster*, 1 Haggard 144, evidence upon a collateral issue was admitted. I think that it is clear that Lord Robertson doubted these decisions, but he seeks to avoid them by suggesting that they appear to rest upon considerations peculiar to matrimonial causes. This might appear to favour the contention that these considerations are applicable here, because this is a matrimonial cause. I confess on examining these cases it appears to me that Lord Robertson's statement was just a polite way of getting rid of them, and that there is nothing really peculiar to a matrimonial cause in either case that has any bearing upon the admissions of the evidence. In any view, though this is a matrimonial cause, any considerations peculiar to a matrimonial cause which may have influenced these decisions are not present as regards this application. It is certainly not the general rule that a collateral issue may be entered into if the cause happens to be matrimonial.

"There is this further consideration against granting an application of this kind for which there is no precedent, that such a decision would be practically irrevocable. For reasons I shall state immediately I do not think that an interlocutory appeal ought to be allowed in the present position of this case.

"I shall accordingly refuse the crave of the minute. I am not prepared to grant leave to reclaim. The nature of the case and the evidence which the defender desires to adduce are such that the question could not be determined without the whole of the evidence being explained and canvassed in the Inner House. It appears to me to be inexpedient that this should be done, in anticipation of the review of the evidence by the judge who tried the case. If the case is subsequently carried to the Inner House the defender will have an opportunity of renewing his motion, and in view of the grounds of my refusal he may do so without the embarrassment of having against him a discretionary refusal of the judge who heard the case to entertain it."

On 8th November 1918 the Lord Ordinary *assoilzied* the defender.

The pursuer reclaimed, whereon counsel for the defender moved for additional proof in terms of the foregoing minute, and argued—The minute contained a relevant averment of *res noviter veniens ad notitiam*. The defender was accordingly entitled to recall these two witnesses for the purpose of cross-examination upon the new averments, and also to lead additional evidence in the event of these averments not being fully admitted by these witnesses. In a case of this nature credibility was of the highest importance, and anything which might tend to discredit a principal witness was relevant, whether the averment was strictly pertinent to the issue or not. Counsel referred to the following authorities—Dickson on Evidence, secs. 1616-1621; *A* v. *B*, 1895, 22 R. 402, 32 S.L.R. 297; *Inglis*

v. *National Bank of Scotland, Limited*, 1909 S.C. 1038, *per* Lord M'Laren, 46 S.L.R. 730; Evidence Act 1852 (15 and 16 Vict. cap. 27), secs. 3 and 4; *Robertson* v. *Steuart*, 1874, 1 R. 532, 12 S.L.R. 514; *Hoey* v. *Hoey*, 1884, 11 R. 578, 21 S.L.R. 407; *Begg* v. *Begg*, 1887, 14 R. 497, 24 S.L.R. 367; *Gracie* v. *Stuart*, 1884, 11 R. (J.) 22 at p. 23, 21 S.L.R. 526.

Argued for the pursuer—The motion should not be allowed. The new averments in the minute did not constitute a condescendence of *res noviter veniens ad notitiam*. They were not pertinent to the issue, and if they had appeared on the original record they would have been struck out as irrelevant. The defenders had failed to state in the minute how the new facts they now averred had come within their knowledge, or that the defender could not have had earlier knowledge of them. Merely new evidence was not allowable—*Longworth* v. *Yelverton*, 1865, 3 Macph. 645, *per* Lord President M'Neill at pp. 648-649, and Lord Curriehill at p. 651. Proofs were closed for the purpose of imposing a limitation on the conduct of trials, which otherwise might be protracted indefinitely. Counsel also referred to *Allan* v. *Stott*, 1893, 20 R. 804, 30 S.L.R. 728.

The Court (Lord Justice-Clerk, Lords Dundas, Salvesen, and Guthrie) *eo die*, without delivering any opinions, pronounced the following interlocutor:—

> "The Lords, under reservation of all objections, allow the minute to be received as a condescendence of *res noviter;* and appoint the pursuer, if so advised, to answer the same within fourteen days from this date."

Counsel for the Pursuer — Solicitor-General (Morison, K.C.)—Fraser, K.C.—Maconochie. Agents — Tods, Murray, & Jamieson, W.S.

Counsel for the Defender — Moncreiff, K.C. — Gentles. Agents — Macpherson & Mackay, S.S.C.

Thursday, March 6.

FIRST DIVISION.

[Lord Anderson, Ordinary.

M'KIERNAN *v.* CORPORATION OF GLASGOW.

Reparation—Jury Trial—Excessive Damages—Solatium for Death of Infant Son.

A child of working class parents, both of whom were under thirty years of age, was killed by being thrown from a tramway car owing to the negligence of those in charge of the car. The child in question was a son aged six months. The parents had one other child, a daughter about two years old. In an action for *solatium* for the death of the child in question the parents deponed that they missed their son very much. A jury having awarded £250 in name of damages, *held* that in the circumstances the damages were excessive.

John M'Keirnan, boiler and steam-pipe coverer, 12 Newton Street, Partick, *pursuer*, brought an action against the Corporation of Glasgow, *defenders*, concluding for decree for £250 damages for the death of his infant son, alleged to have been caused by the fault of the defenders' servants.

The case was tried before Lord Anderson and a jury.

The *evidence* led for the pursuer was to the following effect:—The pursuer was twenty-nine years of age and his wife was twenty-five. At the date of the accident (1st April 1918) they had one other child, a daughter about two years old. The pursuer's wife, who was carrying the child in question, aged six months, was thrown off a tramway car, and the child was so seriously injured that it died the following day. The only evidence as regards *solatium* was to the effect that the pursuer and his wife felt the death of their son very much.

The jury having found for the pursuer, assessed the damages at £250.

The defenders obtained a rule upon the pursuer to show cause why a new trial should not be granted. At the hearing on the rule the following authorities were referred to:—*Landell* v. *Landell*, 1841, 3 D. 819, *per* Lord Justice-Clerk (Boyle) at p. 822; Lords Fullerton, Mackenzie, Jeffrey, and Murray at p. 825, and Lord Cockburn at p. 826; *Adamson* v. *Whitson*, 1849, 11 D. 680; *Horn* v. *North British Railway Company*, 1878, 5 R. 1055, *per* Lord Ormidale at p. 1075, 15 S.L.R. 707; *Young* v. *Glasgow Tramway and Omnibus Company, Limited*, 1882, 10 R. 242, *per* Lord President Inglis at p. 245, 20 S.L.R. 169; *Middlemas* v. *North British Railway Company*, 1893, 1 S.L.T. 12; *Casey* v. *United Collieries, Limited*, 1907 S.C. 690, 44 S.L.R. 522; *Thoms* v. *Caledonian Railway Company*, 1913 S.C. 804, 50 S.L.R. 498; Glegg on Reparation, p. 115.

Counsel for the defenders offered £100 to the pursuer, which offer counsel for pursuer stated that he was willing to accept in the event of the Court being of opinion that the damages were excessive.

Lord President—We are asked to set aside this verdict on the sole ground that the amount awarded by the jury is excessive. The sum claimed was £250, and the jury have awarded the whole sum claimed. They were confronted, as your Lordships are confronted, by what appears to be an almost impossible task—to measure a parent's grief for the loss of an infant, in pounds, shillings, and pence. But our law allows such an action, and however difficult it may be to estimate the amount of damage we must face the task.

Now the pursuer was a boiler and steam-pipe coverer in Glasgow. His child was five or six months old. It was not killed at the time when the accident actually took place, but died afterwards from injuries then received; and the sole evidence in the case is that he and his wife were much attached to their child. There are, therefore, no peculiarities of any kind or specialties of