Saturday, February 5.

SECOND DIVISION.

[Lord Sands, Ordinary.

ADAM'S EXECUTRIX *v.* ADAM.

Succession—Intestacy—Mixed Estate—Heir, Grandnephew of Intestate not Collating—Right of Heir's Aunts to Share in Estate—Share of Moveable Estate to which Heir's Sisters Entitled — Intestate Moveable Succession (Scotland) Act 1855 (18 *and* 19 *Vict. cap.* 23), *secs.* 1 *and* 2.

The Intestate Moveable Succession (Scotland) Act 1855, enacts—Section 1—"(1) 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 predeceassed 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, or of any descendant of such child or children who may in like manner have predeceased the intestate shall come in the place of his or their parent 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. . . ." Section 2—"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 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."

Where an intestate, leaving heritable and moveable estate, was survived by sisters and predeceased by a brother who was survived by daughters (nieces of the intestate) and by the children of a predeceasing son (a nephew of the intestate), the children consisting of a son (a grandnephew of the intestate) who was the latter's heir in heritage, and two daughters (grandnieces of the intestate), *held* that in terms of sections 1 and 2 of the Intestate Moveable Succession (Scotland) Act 1855—(1) the nieces of the intestate took no share in the intestate succession, and (2) the grandnieces had right to a share of the moveable estate equal in amount to the excess in value over the heritage of such share of the whole estate, heritable and moveable, as their predeceasing parent, the intestate's nephew, would have taken on collation.

Mrs Anne Hardie or Adam, residing at Hillhouse, Locharbriggs, Dumfries, widow and executrix-dative of Robert Adam, *pursuer* and *real raiser*, brought an action of multiplepoinding and exoneration against herself as an individual and others in order to determine certain questions arising out of the intestate succession of her husband.

The pursuer averred, *inter alia*—"(Cond. 1) Robert Adam of Hillhouse, Locharbriggs, near Dumfries, died on the 26th day of October 1918, survived by his widow and by various sisters and others, representatives of a deceased brother and sisters as after mentioned. He left no issue. (Cond. 2.) The said Robert Adam died intestate, and his widow, Mrs Anne Hardie or Adam, the pursuer and real raiser, was confirmed executrix-dative *qua* relict of the deceased . . . (Cond. 3.) The estate of the deceased Robert Adam consists of heritable property known as Hillhouse, Locharbriggs, aforesaid, of the value of about £500, and of moveable estate the gross value of which was given up in the inventory for confirmation at the sum of £14,585, 0s. 1d. sterling. (Cond. 4.) The pursuer has made such progress with the winding up of said estate that the time has come to deal with the matter of distribution. Questions have been raised as to the persons entitled to and as to the extent of their rights in the estate. These arise from the fact that the deceased left a widow but no issue surviving, and his nearest relatives are sisters and the representatives of a deceased brother and sisters. The heir-at-law is the grandson of a deceased brother of the said Robert Adam, which brother predeceased the said Robert Adam, and at the date of the death of the said Robert Adam was represented by daughters and a son, and a son and daughters of a predeceasing son. In particular, questions have been raised as to the effect of the provisions of the Intestate Moveable Succession Act. . . (Cond. 5.) The fund *in medio* consists of the whole moveable estate which belonged to the said Robert Adam at the time of his decease, under deductions of all the debts and liabilities of the said Robert Adam, and of the expenses of administration and of this action. . . "

Claims were lodged by (1) the widow of the deceased Robert Adam; (2) Miss Elizabeth Adam, one of the two surviving sisters of the intestate; (3) Mrs Jane Adam or Langmuir, the other surviving sister; (4) Miss Margaret M'Naught, Mrs Kate M'Naught or Spence, and Alexander M'Naught, the whole children of the late Mrs Margaret Adam or M'Naught, a predeceasing sister of the intestate; (5) John Taggart, only child of the late Mrs Agnes Adam or Taggart, one of the intestate's sisters; (6) Miss Grace Burns Simpson Adam, and Miss Margaret

Adam, the whole children, along with their brother James Easton Adam, the heir in heritage of the intestate of the late Robert Adam, who was the son of James the only brother of the intestate; (7) Mrs Agnes Adam or Maxwell and others, the five surviving children of the intestate's only brother the late James Adam.

The claimants Miss Grace B. S. Adam and her sister averred, *inter alia*—"(Cond. 6.) The said late James Adam had six children of whom his elder son, Robert Adam, predeceased the intestate. The claimants and their brother James Easton Adam (who is the heir in heritage of the deceased intestate) are the whole children of the said Robert Adam, who was a nephew of the deceased intestate. The said James Easton Adam has taken the heritage as heir, and he does not claim to exercise his right of collating under section 2 of the Intestate Moveable Succession (Scotland) Act 1855. Therefore the claimants claim to be ranked and preferred each to one-half of the excess in value over the value of the heritage of one-fifth share of the whole estate, heritable and moveable, subject to the deduction from said estate of the legal rights of the intestate's widow thereto (including her claim for £500 in terms of the Intestate Husband's Estate (Scotland) Act 1911)."

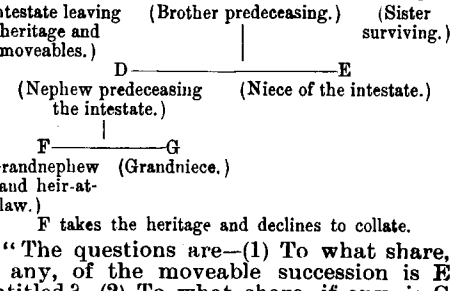
The claimants Mrs Agnes Adam or Maxwell and others averred—"(Cond 5.) The said James Adam, who predeceased the intestate as aforesaid, would, had he survived the intestate, have been among his next-of-kin, and would also have been his heir in heritage, and entitled to collate the heritage with the moveable estate. The said Robert Adam, his elder son, had he survived the intestate would also have been entitled to collate the heritage. Accordingly, the claimants, as the five surviving children of the said James Adam, are entitled, along with the representatives of their deceased brother Robert Adam other than James Easton Adam the heir in heritage, to come in place of the said James Adam, and have a right to the share of the moveable estate of the intestate to which the said James Adam, if he had survived the intestate, would have been entitled. The said James Easton Adam was not entitled to collate the heritage. The claimants accordingly each claim to be ranked and preferred on the fund *in medio* to the extent of one-sixth of a sum equal to one-fifth part of—(1) The value of the heritable estate of the intestate, under deduction of (*a*) the proportion effeiring to the heritable estate of the sum of £500, to which the widow of the intestate is entitled by virtue of the Intestate Husband's Estate (Scotland) Act 1911; and (*b*) all competent claims in name of terce; and (2) the value of the whole moveable estate, under deduction of (*a*) the proportion effeiring to the moveable estate of the said sum of £500; and (*b*) all competent claims in respect of legal rights to which the widow of the intestate may be found entitled, under deduction from the said one-fifth share of the value of the heritable estate falling to the heir in heritage."

The claimants Miss Grace B. S. Adam and her sister pleaded, *inter alia*—"1. The claimants being the sisters of the intestate's heir-in-heritage, who is a grandson of the intestate's brother, are entitled to be ranked and preferred in terms of their claim. 2. Alternatively, the claimants, being the sisters of the intestate's heir-in-heritage, who is a son of the late Robert Adam, who, if he had survived would have been the heir-in-heritage of the intestate, are entitled to be ranked and preferred in terms of their claim."

The claimants Mrs Agnes Adam or Maxwell and others pleaded—"The claimants being the whole children of the intestate's brother other than the heir-in-heritage are entitled to be ranked and preferred in terms of their claim."

On 1st December 1920 the Lord Ordinary (SANDS) found "(*first*) that the claimants, the surviving children of James Adam (1), take no share of the intestate succession; and (*second*) that the claimants the daughters of Robert Adam have right to a share of the moveable estate equal in amount to the excess in value over the heritage of such share of the whole estate, heritable and moveable, as their predeceasing parent Robert Adam had he survived the intestate would have taken on collation."

Opinion.—"This case raises novel and difficult questions under the Moveable Succession Act 1855. The nature of these questions can be made much clearer by an imaginary table than by explanations which would necessarily be involved:—



F takes the heritage and declines to collate.

"The questions are—(1) To what share, if any, of the moveable succession is E entitled? (2) To what share, if any, is G entitled?

"If one were free to give effect to what one may conjecture was the intention of the Legislature I do not think that the matter would present much difficulty. The probable intention was to put the *stirps* of the predeceasing heir-at-law in the same position as nearly as may be as the heir-at-law, *i.e.*, with a right to participate in the moveable succession on collating the heritage. There was this peculiarity in the matter, however, viz., that as the remoter heir would only get a fractional part of the moveable succession of his *stirps*, it might not be his interest to collate in circumstances where his ancestor, the predeceasing heir-at-law, would have collated. Accordingly the intention was to make provision that in that event the other members of the *stirps* should not be prejudiced, but should get what they would have taken if the heir had collated. That, I conjecture, was the intention of the Legislature. But

unfortunately the language of the section is, as has been pointed out by Lord M'Laren (p. 121) involved and obscure.

"The section begins with the words—'Where the person predeceasing would have been the heir-in-heritage.'

"It was held in the leading case of *Colville* v. *Nicoll* (1914 S.C. 62) that for the meaning of the words 'person predeceasing' reference must be made to section 1. But this does not solve the difficulty. Section 1 deals with more predeceasers than one. It deals (1) with the case where 'any person who, had he survived the intestate would have been among his next-of-kin, shall have predeceased such intestate.' It also deals (2) with 'the issue of any such child or children or of any descendant of such child or children who may *in like manner have predeceased* the intestate,' who is to come 'in the place of his or their parent *predeceasing*.'

"Section 2 begins with the words—'Where the person predeceasing.' In the case of *Colville* there are dicta by Lord Johnston and Lord Mackenzie which point to this 'person predeceasing' as being only the person first referred to in section 1, viz., the person who if he had survived would have been one of the next-of-kin. In *Colville's* case, however, the attention of the Court was not directed to the point here raised. All they had to consider was whether section 2 is limited to the class dealt with in section 1, and that class always starts with a person who if he survived would have been one of the next-of-kin.

"Under the first part of section 2 the right to collate is limited to 'his' (*i.e.*, the person predeceasing) 'child being the heir-in-heritage of such intestate.' It is suggested in argument that 'child' must be read as equivalent to 'descendant.' That is a difficult reading. But what renders it more difficult is clear recognition in the immediately preceding section that child does not mean descendant, for in that section there is express provision made for the case of 'the issue of any such child' and 'any descendant of such child.' If 'the person predeceasing' in section 2 is limited to the person coming first who would have been one of the next-of-kin if he had survived, then, if the ordinary interpretation be given as I think it must to the word 'child' the benefit of the section would be limited to one generation. This view was not supported or even suggested in argument, and I hardly think that it is maintainable. These considerations seem to lead to the conclusion that 'the person predeceasing in section 2 may be either the first heir or any succeeding heir descended from him, and that it is the child of this person who has the privilege of collating. But the substantive provision of this part of the section causes difficulty. The collation is to be for 'himself and the other issue of the predeceaser.' In view of this provision, either (1) the benefit is limited to the brothers and sisters of the heir collating to the exclusion of their uncles and aunts, or (2) the word predeceaser must here be held to designate a person who may in some cases be different from the person so designated in the earlier part of the sentence. (That 'predeceaser' here means the original predeceaser might seem to be suggested by the word 'issue,' but that is not conclusive, for a brother or sister of the heir collating might have left issue). Either alternative is difficult. I confess I should prefer the latter but for the way in which the former seems to square with the provision in the last part of the section with which I have yet to deal. In the view which I take, however, it is not necessary for me to determine the question. I note that the difficulties I have canvassed do not appear to have occurred to Lord M'Laren, but on the other hand he fully recognises the difficulty of the concluding provision with which I now proceed to deal.

"According to that provision if the heir-at-law does not collate his brothers and sisters may take the same proportion that their parent might have taken had he survived and collated. Agreeing I think with Lord M'Laren I am unable to regard this provision as ambiguous and open to construction. The difficulty is the anomalous and arbitrary result to which it seems to lead. I cannot read 'his brothers and sisters' in other than their primary sense. Nor can I read 'his' as referring to any other person than the heir who might have collated but has refrained from doing so.

"That, in the apparently confused mind of the framer of the section, 'brothers and sisters' meant 'brothers and sisters' literally is I think borne out by the consideration that no provision is made to solve the difficult question of a division between the literal brothers and sisters of the heir and their uncles and aunts. In the case I have figured, How would the moveable succession coming to B's stirps be divided? Would G get a full half notwithstanding that the whole of the heritage had come to the sub-stirps to which she belongs? Or on the other hand would G, as representing D, her father, take only such share of the moveable succession as would equalise E and D after allowing for the heritage as coming to D's sub-stirps? The latter would probably be the more equitable solution and the one that best accorded with the general scheme of the legislature, but it might in many cases have the anomalous result that under a provision in favour of 'brothers and sisters' literal brothers and sisters would take nothing.

"There remains the question, To what shares the heir's brothers and sisters—taking the words literally, as I think we must—are entitled? The measure of that share, after allowing for collation as if it had been made, is 'such share of the whole estate, heritable and moveable, as their predeceasing parent had he survived the intestate would have taken on collation.' I am unable to read 'parent' as equivalent to 'ancestor' who had he survived would have been 'one of the next-of-kin. I see no reason for doing so. It may be an anomaly that the Act excludes from benefit the uncles and aunts. But it does not appear to me that it would lessen the anomaly if what one would have expected to go to

them should be given to the brothers and sisters of the heir.

"In the table I have given above, according to the construction contended for A's niece E would take nothing, whilst his grandniece G would take half the moveable estate subject to an adjustment in respect of the value of the heritage, and that simply because she was the sister of the heir-at-law. Doubtless the alternative construction under this branch of the argument also leads to an anomalous result. E still gets nothing, though G gets only what her own parent might have taken, and this to the benefit of C the surviving next-of-kin. But to reach the former anomaly a strained and unusual meaning must be put upon the word 'parent.' The latter seems to be reached by simply giving the words of the statute their natural meaning.

"Accordingly the result at which I arrive is that upon a sound construction of the statute the nephews and nieces in the heir-stirps take nothing; the grandnieces being the sisters of the heir can take only such share of the moveable succession as, after making allowance for the heritage not being collated, their parent if alive would have taken if he had collated.

"I confess that I would much rather have seen my way to give effect to what, as I indicated at the outset, was the probable intention of the Legislature; and I should not regret if a Court of Review were able to give such a free construction to the statute. But I find myself unable to do so. The explanation, as I believe, of the difficulties under both parts of section 2 is that the framer of that section overlooked the contingency of a third generation. If only one generation is concerned both parts of the section are clear and simple.

"I shall accordingly find—(1) That the claimants the surviving children of James Adam (1) take no share of the intestate succession, and (2) That the claimants the daughters of Robert Adam have right to a share of the moveable estate equal in amount to the excess in value over the heritage of such share of the whole estate, heritable and moveable, as their predeceasing parent Robert Adam had he survived the intestate would have taken on collation.

"After writing the foregoing judgment a doubt occurred to my mind on again referring to section 2. The brothers and sisters are to take what their 'predeceasing parent had he survived the intestate would have taken on collation.' Under the earlier part of the section the heir may collate '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.' Now it has occurred to me that it is arguable that what the predeceasing parent 'would have taken on collation' in the latter part of the section means what he might have claimed for 'himself and the other issue of the predeceaser.' (As I have already pointed out, upon one reading 'predeceaser' here means the original predeceaser, *i.e.*, the next-of-kin at the head of the stirps.) I note, however, that what the section says is, not that the heir is to claim, but that he may collate 'to the effect of claiming.' It seems to me that the provision simply sets forth the effect of the claim, and does not infer that the heir is actually to claim and receive on their behalf the shares of those benefited by collation, or that if he collates for his own benefit their rights are in any way dependent upon his making a claim on their behalf. This consideration appears to me negative of the idea that 'would have taken' in the latter part of the section means anything else than 'would have taken beneficially.' I confess, however, that the other construction would have been tempting if it had led to a more equitable result. But for reasons I have already stated it does not do so. What the heir's parent might have claimed for the other issue of the predeceaser is to go not to the other issue of the predeceaser but to the heir's brothers and sisters. The statute in so far as it introduces representation in moveables impinges for equitable reasons upon the common law rights of the next-of-kin. I see no reason why its provisions should be strained as against the next-of-kin in order to give certain of the remoter heirs a larger share than equitably they are entitled to. I may note too that if under the first part of the section predeceaser means the original predeceaser, and if accordingly the heir collating lets in the whole stirps of the predeceaser who if he had survived would have been one of the next-of-kin, it would be an extraordinary anomaly that by simply arranging with his sisters not to collate, however trifling the value of the heritage, he could under the second part of the section cut out the rest of the stirps and secure what would have fallen to them exclusively for his own family."

The claimants Mrs Agnes Adam or Maxwell and her brother and sisters reclaimed, and argued—The Lord Ordinary was wrong in his construction of the words "the person predeceasing" in section 2 of the Intestate Moveable Succession (Scotland) Act 1855 (18 and 19 Vict. cap. 23), and that not only on a proper construction of the statute, but also on the authority of *Colville's Judicial Factor* v. *Nicoll*, 1914 S.C. 62, 51 S.L.R. 62. Section 2 should be read along with section 1, and the word "the" at the beginning of the section should be read as equivalent to "such." So read, the words "the person predeceasing" meant the head of the stirps, who was also one of the next-of-kin, in the present case, James. The word "child" in the same section was to be taken in its natural meaning and did not include grandchild or remoter descendant. In the present case "child" meant Robert. So read, there was no power of collation in James E. Adam, the grandchild who was the actual heir, and there was no room for collation in the case. Section 2 like section 1 was intended to relax the strictness of the common law and to allow persons to participate in the succession who otherwise would not have been entitled to do so. It was intended to effect with regard to a mixed estate what section 1 did with regard to moveables only. As a matter of fact, however, the language of the

section was such that the benefit was confined to one generation and the right to collate passed only to the child of the predeceasing next-of-kin who was also the heir when that child was also the heir. This, however, did not mean that the section in the present case was inoperative, because to obtain the benefits of the section actual collation was not necessary. It was sufficient if there was present someone who could have collated. The person in this case who if he had lived could have collated was Robert, and it was his brother and sister, the present claimants, who were benefited by the section. This being so, it was impossible to maintain that the present claimants, being of the class of persons intended to be benefited by the section, were excluded. Assuming, however, that section 2 did not apply to the case, these claimants were alternatively entitled to succeed under section 1. The true view of the heir's right prior to the Act was that he was not an alien to the moveable estate. He was entitled to participate therein subject to certain conditions—More's Notes to Stair, vol. ii, p. 363, section 11; Erskine's Inst., bk. iii, tit. 9, section 3; *Anstruther* v. *Anstruther*, 1836, 14 S. 272, at p. 282 mid. In other words the heir did not take by mere survivance, but was put to his election and had to exercise an option. When, therefore, section 1 spoke of the share to which a parent "would have been entitled" these words were sufficient to include a parent who would also have been heir, so as to give a share of the moveable succession to his issue in the event of his predecease. Applying the section to the present case, James, as one of the next-of-kin was a person to whom the words "would have been entitled" applied and the present claimants as his issue came in under the section. The case of *Newbigging's Trustees* v. *Steel's Trustees*, 1873, 11 Macph. 411, did not apply, because it dealt with collation by the representatives of an heir who had actually possessed the heritable estate for twenty years.

Argued for the claimants Miss Grace B. S. Adam and another—If section 2 of the Act was read in its natural meaning, then "the predeceasing person" meant the head of the stirps, who was also one of the next-of-kin. The word "child," however, should be construed liberally, and so construed included grandchildren—in the present case the heir James E. Adam. In that section "issue" was used as convertible with "child," and the word "issue" was not confined to children—*Macdonald* v. *Hall*, 20 R. (H.L.) 88, at p. 104, 30 S.L.R. 279, at p. 289; *Turner's Trustees* v. *Turner*, 1897, 24 R. 619, 34 S.L.R. 468; M'Laren on Wills and Succession, vol. ii, p. 770. In reparation cases "parent and child" might include "grandparent and grandchild"—*Eisten* v. *North British Railway Company*, 1870, 8 Macph. 980, *per* Lord President (Inglis) at p. 984; *Cooper* v. *Fife Coal Company, Limited*, 1907 S.C. 564, *per* Lord Stormonth Darling at p. 567, 44 S.L.R. 402. [The Lord Justice-Clerk referred to Stroud's Dictionary, *s.v.* "Child."] The whole intention of section 2 was to give effect to the equitable principle introduced by section 1 in the same scope as section 1, and in the same way as the common law gave effect to equitable principles by the introduction of collation. This being so, it was quite permissible to construe the language of the section in the wider sense contended for, and if this were not done the word "child" in the section could not be applied to the circumstances of the present case, because Robert having predeceased James, the head of one stirps, could never answer the description, "child, being the heir-in-heritage." The only person who satisfied the definition was the actual heir, James E. Adam. In terms of the section he was entitled to collate, and failing his doing so his brothers and sisters, the present claimants, were brought in to share in the succession under the concluding words of the section. The share which they were entitled to take was a share of the moveable estate equal in value to the excess in value over the heritage of such share of the mixed estate as their predeceasing "parent" would have taken on collation. The word "parent," however, must be read *secundum subjectam materiem*, and like the word "child" in the earlier part of the section must receive a liberal interpretation. In other words, it must be read in the sense of ancestor of the stirps—in the present case the grandparent James Adam. In other words, "parent" and "child" in the section were used as equivalent to "ascendant" and "descendant." The share of the mixed estate, however, which the "parent"—that is, the grandparent—would have taken was in the present case one-fifth, and the present claimants were therefore entitled to the increased amount as so determined. This interpretation of the section was in conformity with the decision in *Colville's Judicial Factor* v. *Nicoll*, 1914 S.C. 62, 51 S.L.R. 62, which decided (1) that the two sections of the Act must be read together; (2) that the second section was intended to introduce in the case of mixed successions the same rule of representation as was introduced in the case of moveables by section 1; and (3) that the principle of division was equal division *inter stirpes*, "the predeceasing person" being the person mentioned in section 1, viz., in this case James. Under the Act collation was introduced for the benefit of the heir's stirps, and to make its share equal in value to the shares of the other stirpes—M'Laren on Wills and Succession, p. 120, sec. 234. The effect of these contentions might, no doubt, be to exclude the claimants Mrs Maxwell and her brothers and sisters, but the Legislature might quite well have contemplated equal division *inter stirpes*, and inequality of division within the particular stirps of the heir-at-law. It might, however, be possible on this method of construction to read brothers and sisters as including uncles and aunts, and alternatively these claimants put this forward as a possible view—M'Laren on Wills and Succession, p. 152. If these claimants were held to be wrong in these contentions they supported the Lord Ordinary's view, giving its primary and natural meaning to the word

"child" and the wider meaning to "the person predeceasing." Alternatively, if it should be held that section 2 did not apply to the present case, these claimants adopted the argument for the reclaimers Mrs Maxwell and others that they came in under section 1, and that an absolute right was conferred on them by that section, which was not defeated by the fact that the heir was to be found in their stirps. In any event Robert never could be the heir in heritage, and his brothers and sisters could not take advantage of section 2 as brothers and sisters of a "child being the heir in heritage."

Argued for the claimants John Taggart, Elizabeth Adam, and others—The alterations which the Act effected on the common law were confined within narrow and well-defined limits, and outside these limits the common law still prevailed. The alterations introduced by section 1 of the Act were confined to the moveable estate and to the shares of the next-of-kin therein in the event of any of them predeceasing the intestate. There was no mention in that section of the heir in heritage, or of collation of heritage. At common law the heir in heritage could buy a share in the moveable estate by collation provided he were one of the next-of-kin—*M'Caw* v. *M'Caws*, 1787, M. 2383; but collation was not a right that vested *ipso jure*. It was an arbitrary voluntary unilateral act—*Newbigging's Trustees* v. *Steel's Trustees*, 1873, 11 Macph. 411; *Kennedy* v. *Kennedy*, 1843, 6 D. 40, *per* Lord Jeffrey, p. 50. The claimants Mrs Maxwell and Miss Adam were claiming unconditionally what at common law the heir could only have taken conditionally. If, however, that had been the intention of the Legislature it should have been expressly stated. If that was the real meaning of the statute, there would have been no necessity for section 2, which would have been superfluous, and indeed would have been inconsistent with section 1 as so construed. So far as these claimants based their claims on section 1 to the exclusion of section 2, they were really asking the Court not to interpret the section but to legislate. Whatever rights these claimants had therefore must be sought in section 2. What the draftsman had tried to do in this section was to correlate the various stages of a mixed succession to the same stages in section 1, but as a matter of fact in working it out he had confined the operation of the section to a narrower case, not having foreseen the contingency which had occurred in the present case of one of the links dropping out. But as the section effected an alteration in the common law it could only be given the limited operation it expressly bore to have. *Prima facie* "the person predeceasing" in section 2 was the same as the person predeceasing in section 1. What the statute meant by "the person predeceasing" was the person who was the head of the stirps. The Lord Ordinary had taken it as open to construction that "the person predeceasing" could be Robert as well as James, and had thus read the words as if they meant *any* person predeceasing. In the present case Robert could not be the heir in heritage, because he predeceased not only the intestate but his father James. Having predeceased he transmitted no right to his representatives. Section 2 limited its operation to the child of the predeceasor who was at the same time the heir of the intestate. There was no warrant for extending the natural and primary meaning of the word child so as to include grandchild. Moreover, in section 1 the word "issue" was used when it was intended to include grandchildren. For the same reason it was impossible to construe "parent" as equivalent to "grandparent." In any event the contention of the claimant Mrs Maxwell was wrong, because even if the Lord Ordinary was right in construing Robert as "the person predeceasing"—and for the purposes of this case it did not really matter—the only persons benefited under the section would be his children, *i.e.*, the brothers and sisters of the heir. It was not open to construction that brothers and sisters included uncles and aunts—M'Laren on Wills and Succession, p. 121. The share which brothers and sisters of the heir could take under the section was a share of the moveable estate equal in value to the share of the mixed estate which their predeceasing parent their father would have taken on collation, less the value of the heritage.

Counsel for the claimant Miss Elizabeth Adam concurred in the foregoing argument, with the exception that he maintained that "the person predeceasing" in section 2 might be the head of the stirps, who if he had survived would have been among the next-of-kin or any descendant of the head of the stirps, and in the circumstances of the present case was Robert—*Colville's Trustees* v. *Nicoll*, *cit. sup.*, per the Lord President (Strathclyde), p. 67, and Lord Dundas, p. 69. Consequently the claimants Miss Grace Adam and her sister were only entitled to the share that the Lord Ordinary had given them.

At advising—

LORD JUSTICE-CLERK—I would have preferred to decide the questions raised by this reclaiming note after a decree of ranking and preference had been pronounced. The Lord Ordinary, however, granted leave to reclaim when he had merely pronounced certain findings, and we can only deal with these findings. By the first of these findings the Lord Ordinary has held that the surviving children of James Adam take no share of the intestate succession. James Adam was a brother of the intestate, and his surviving children maintain that that finding of the Lord Ordinary is wrong, and that they are entitled to a share of the intestate moveable estate in respect of the provisions of section 1 of the Intestate Moveable Succession (Scotland) Act 1855. In my opinion the conclusion reached by the Lord Ordinary in this first finding is right.

If James Adam had survived he would have been one of the intestate's next-of-kin, and he would also have been his heir-in-law. Had he survived, therefore, he would at

common law have been entitled to share in the intestate's moveable estate if he had elected to collate the heritage. But such election was a preliminary requisite to James taking any share of the intestate's moveable estate (*Newbigging's Trustees* v. *Steel's Trustees*, 1873, 11 Macph. 411; M'Laren, Wills and Succession, vol. i, p. 150). James, however, having predeceased the intestate was never in a position to collate, and of course did not collate. But James having predeceased his brother the intestate, his children came in the place of their predeceasing parent in terms of section 1 of the statute, and had right to the share of the moveable estate of the intestate to which James Adam, their predeceasing parent, if he had survived the intestate, would have been entitled. It was argued before us that the phrase "would have been entitled" had not the same signification in the circumstances with which we are now dealing as "would have taken." I am unable to recognise any difference between the two phrases so far as the requirements of this case are concerned. In my opinion, however, James as predeceasing parent would not have been entitled merely on survivance of the intestate to any share of the moveable estate of the intestate. To entitle him to such a share he would require in addition to surviving the intestate to have collated the heritage to which as heir-at-law he would have had right. It was argued that having regard to the respective values of the moveable and heritable estate it must be assumed that James would have collated as it would obviously have been to his pecuniary interest to do so. I do not think such an argument is legitimate. Mere pecuniary interest need not be the only or even a controlling factor in determining an heir-at-law to collate. But however that may be, an heir-at-law who does not in fact collate is not in my opinion entitled to any share of the intestate moveable estate by the mere fact of survivance, *i.e.*, survivance without collation. There was not and could not be any collation so far as James was concerned. In my opinion, therefore, the children of James were never brought within the scope of the Act at all by section 1, and the Lord Ordinary's finding as to them is therefore right.

The second finding of the Lord Ordinary depends on different considerations. It relates to the share claimed by the daughters of Robert Adam, a nephew of the intestate and a son of James. All parties were willing that to the extent set out in the Lord Ordinary's finding these daughters of Robert should be ranked and preferred on the fund *in medio*. But their counsel argued that they were entitled to more than that finding would give them, and that their shares depended not on the survival of Robert but on the survival of James Easton Adam. In support of this contention it was contended that the words "his child" occurring in section 2 must be interpreted as including "grandchild" and "grandchildren," and were not confined to "the child" of James. In my opinion this contention is unsound and cannot be accepted. The true interpretation of section 2 appears to me to be as follows—The word "person" only occurs three times in section 1, and on the last two of these occasions it has prefixed to it the word "such," so that it clearly refers on all three occasions to only one individual. The phrase in the second section which we have to interpret is "the person predeceasing," and in my opinion that refers and refers only to the individual who is identified by the word "person" in section 1. This may not have been made matter of decision in *Colville's* case (1914 S.C. 62), but there are opinions to that effect by some of the judges in that case, and I think these opinions are sound so far at least as they touch the present point. In *Colville's* case, however, it was decided that sections 1 and 2 must be read together and cannot be regarded as separate and independent enactments, as indeed seems quite clear from, *inter alia*, the opening words of section 2. As to the phrase "his child," as already indicated I cannot accept the suggestion that we are entitled to read "child" as equivalent to descendant. I think there is no doubt about the meaning of the word "child" in ordinary parlance. Even when the word is found in a legal document its primary sense is issue of the first generation, and that primary sense ought to be adhered to unless there is some satisfactory reason for displacing it—*Bowen* v. *Lewis*, 1884, 9 App. Cas. 890. That rule of interpretation seems to me to apply with special force when we are dealing with the construction of a statute, but so far from finding anything sufficient to displace this primary sense of the word there are to my mind reasons in the phrasing of the statute which go distinctly to indicate this primary sense as what the statute really intended, and no reasons to the contrary can in my opinion be found in the statute. The argument in support of the suggested signification of the word "child" therefore fails. The second case dealt with in section 2 does not concern us in this case, because there are no heirs-portioners here. The provisions at the end of section 2 have no application to James Easton Adam, because he was not one of the next-of-kin of the intestate and therefore could not collate.

I am therefore of opinion that no sufficient reason has been shown for differing from the findings of the Lord Ordinary, and I am for refusing the reclaiming note and remitting to the Lord Ordinary for further procedure.

LORD DUNDAS—I am of the same opinion. Upon first impression, looking at the family tree with which we were furnished, it may seem anomalous and unfair that Mr Brown's clients who are the surviving children of James Adam, who predeceased his brother the intestate, should have no right to share in the latter's moveable estate, especially as the Lord Ordinary has found that Mr Christie's clients, the daughters of the late Robert Adam, son of James, have right to a share of that estate however negligible in amount that share may ultimately prove to be. One must remember,

however, that at common law, apart from the Act of 1855, the whole moveable estate of the intestate would go to his two surviving sisters, neither of the sets of claimants I have mentioned being entitled to any share at all in it. The question therefore is not whether these persons or any of them have been excluded from some right which at common law they possessed, but whether by force of statute they have acquired some right to be admitted to participation in the estate which is the fund *in medio.*

No exception was taken by the respondents to the Lord Ordinary's second finding; they acquiesced in it (wholly or mainly as I gathered because they are convinced that the right therein declared will not ultimately come to sound in money), and we must therefore, so far as they are concerned, assume it to be correct. Mr Christie's clients, however, reclaimed against the finding in the hope of bettering their position under it. In my judgment their arguments fail, for it is necessary to their success to establish, *inter alia*, that the word "child" in section 2 of the Act is so used as to be equivalent to, or at least include, "descendants." This, as the Lord Ordinary justly observes, "is a difficult reading." I cannot accept it upon a construction of the context coupled with the use of the word "child," in the immediately preceding section, in its ordinary and natural sense and not in any extended signification. The Lord Ordinary's second finding must therefore, I think, be adhered to.

His Lordship's first finding excludes Mr Brown's clients from sharing in the fund. I think it is right. It appears from their pleadings and from their arguments that these claimants maintain that they are entitled, from whatever cause their right may be derived, to come in place of James Adam "and have a right to the share of the moveable estate of the intestate to which the said James Adam if he had survived the intestate would have been entitled." Now I do not think that James Adam would by mere survivance of the intestate have been entitled to any share of the latter's moveable estate. He was the intestate's heir in heritage but he predeceased him, and therefore never did or could collate the heritage. James Adam while in life had plainly no right to any share in his brother's moveable estate. He would, I think, have had none even if he had survived his brother, unless and until he collated the heritage. "The right of an heir, being one of the next-of-kin, is not that of a person primarily entitled to both moveable and heritable estate, but it is a primary right to heritage which he may extend by collation so as to obtain a share of the moveables"—*Newbigging's Trustees* v. *Steel's Trustees*, 1873, 11 Macph. 411, *per* Lord Ardmillan at p. 412. I consider the words quoted to be sound law and to be in accordance with much previous authority, *e.g.*, Stair, iii, 8, 47; Ersk. iii, 9, 3; Bell's Com. (7th ed.), vol. i, p. 95; *Anstruther's* case, 1836, 14 S. 272, *per* Lord Chancellor Brougham at p. 273; see also Green's Encyclopædia, *s.vv. Collatio inter hæredes*, by Lord Johnston. An argument, alternative to that which I have now rejected, was put forward perhaps rather faintly by Mr Brown, but I do not think it deserves to meet with any other or better fate. It was suggested, as I understood, that Robert Adam, son of the said James, would, if he had survived his father and the intestate, have been heir in heritage of the latter; he predeceased both and did not (could not, of course) collate; *ergo*, applying the language of the concluding clause of section 2 of the Act, as Robert did not collate, his brother and sisters (Mr Brown's clients) have right to a share of the moveable estate of the intestate equal in amount to the value of such share of the whole estate, heritable and moveable, as their predeceasing parent (James Adam) had he survived the intestate would have taken on collation. In order to destroy this argument I think it is sufficient to say that it is, in my judgment, clear that the heir who "shall not collate" within the meaning of that part of section 2 must be an heir who has survived so as to have a right to collate, and has not collated — a situation never in fact occupied by Robert Adam. I see no ground therefore for interfering with the Lord Ordinary's first finding.

A variety of topics, other than those I have dealt with, and the decision of which seems to me to dispose of the matter, are mooted in the Lord Ordinary's judgment and were repeated, perhaps elaborated, in the arguments at our bar. I do not find it necessary to deal with these, nor do I desire to do so, unless it may be to observe (1) that I think we have to proceed upon a construction of what the Act says and are not concerned with speculations as to its supposed scope, policy, or intention; and (2) that *Colville's* case (1914 S.C. 62) seems to me to have little, if any, direct bearing upon the points which we have here to decide.

The Lord Ordinary has not as yet ranked and preferred anybody to the fund *in medio;* he has merely made the two findings referred to, and for reasons possibly (but not, I confess, to me apparently) good and sufficient has granted leave to reclaim at this stage. All we can do therefore is to adhere to his interlocutor and send the case back to the Outer House for further procedure.

LORD ORMIDALE — The difficulties and anomalies which were referred to in the course of the debate are largely due to the fact that while the intestate was possessed of heritage it was of small value, viz., £500, compared with the value of the moveable estate, viz., £14,585. The latter, and only the latter, is the fund *in medio* in this action. In my opinion the objections taken to the Lord Ordinary's interlocutor are not well founded.

The first finding of the interlocutor reclaimed against is challenged by the surviving children of James Adam on two grounds. They maintain, in the *first* place, that they are entitled to a share of the intestate's moveable succession under section 1 of the Intestate Moveable Succession Act 1855. Section 1 enacts that "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 place of such person . . . and shall . . . have right to the share of the moveable estate of the intestate to which the parent of such child or children if he had survived the intestate would have been entitled." James Adam, if he had survived the intestate would have been his heir in heritage. He would also have been among his next-of-kin, and the argument, as I understood it, was that being among the intestate's next-of-kin there was inherent in him a natural right to a share of the moveable estate, although before he could exercise this right he would require to collate the heritage, and that his children are now entitled to that share. It seems to me clear that until the heir at law operated his right to collate he was "entitled" to nothing but the heritage, just as the other next-of-kin were "entitled" to nothing but the moveable estate. This is demonstrated conclusively by the cases of *Anstruther* (1836, 14 S. 272) and *Newbigging's Trustees* (1873, 11 Macph. 411). In *Anstruther* the Lord Chancellor (Brougham) in remitting the cause back to the Court of Session, said—"The present question . . . arises out of that provision of the Scotch law which enables the heir who but for his inheriting the real estate of his ancestor would have taken a share in the personal property among his next-of-kin, to take that share as one of the children . . . at his election, but only upon paying the price by bringing in his inheritance as part of the whole fund or succession, and letting it be divided with the heirs *in mobilibus*." James Adam could not, and did not, "pay the price," and accordingly he was at no time entitled to any share of the moveables of the intestate. This conclusion appears to me to be confirmed by the provision made in section 2 for collation by the child of a person predeceasing who would have been the heir of an intestate leaving heritable as well as moveable estate.

If they are wrong in the first ground of their claim, as I hold them to be, the children of James maintain in the *second* place that under section 2 they are nevertheless entitled as sisters of Robert Adam to a share of the moveable estate equal to the excess in value over the value of the heritage of such share of the whole as their predeceasing parent James, if he had survived the intestate, would have taken on collation by him. They say that "the person predeceasing" in the beginning of that section is in this instance James; that the word "child" is used in its primary sense, and means Robert—their brother—who, being "the heir in heritage of the intestate," was entitled to collate but did not do so, and that in this way the later provisions of the section come into operation. Obviously, however, Robert, although he was the child of James, was never "the heir in heritage of the intestate," words which must refer to a child in life, whereas Robert had predeceased not only the intestate but also his own father, and was never entitled to collate. Both the contentions of the children of James, therefore fall to be rejected.

The daughters of Robert Adam, being the sisters of James E. Adam, the heir in heritage of the intestate, challenge the second finding of the Lord Ordinary. Their interest to do so is that under the interlocutor as it stands they will, we were informed, receive nothing out of the fund *in medio*. They would receive something if in the interlocutor for the words "parent Robert Adam" the words "grandparent James Adam" were substituted, and such substitution would fall to be made if their challenge be well founded. They supported the argument presented on section 1 by James Adam's children, which I have already dealt with and rejected. They further maintained that as brothers and sisters of James E. Adam, who being in life was in fact the heir in heritage of the intestate, they and not the children of James Adam were entitled under section 2 to the share of the moveable estate referred to in the concluding lines of the section. They say that great latitude is permissible in construing the words of the section in order that the remedial intention of the statute may not be defeated. Accordingly, while they maintain that James Adam is "the person predeceasing" mentioned in the beginning of the section, they further maintain that their brother J. E. Adam is the "child" of James Adam, treating that word as if it included "grandchild," and was in effect equivalent to "descendant," and again that the word "parent" falls to be read as the equivalent of "ancestor," and habile therefore to include their "grandparent" James Adam. In my judgment there is no warrant whatever for such construction, or rather misconstruction, of the plain language of the Act. It seems to me, on the contrary, that the words are clearly used in their primary sense. Both words occur in section 1 and are there used beyond doubt in their primary sense, and as the two sections fall to be read together—*Colville's Judicial Factor* (1914 S.C. 62)—it would require some very cogent reason indeed to justify varying meanings being given to the same words, and there is no such reason. I am unable, therefore, to sustain this ground of objection to the second finding of the Lord Ordinary's interlocutor.

I would only add that it is not necessary to decide whether the words "the person predeceasing" in the commencement of section 2 mean only the person first referred to in section 1. I do not think that question was determined in the case of *Colville's Judicial Factor*, and I reserve my opinion on it.

LORD SALVESEN did not hear the case.

The Court adhered.

Counsel for the Pursuer and Real Raiser and for the Claimant Mrs Anne Hardie or Adam—Fleming. Agents—Martin, Milligan, & Macdonald, W.S.

Counsel for the Claimants and Reclaimers Mrs Agnes Adam or Maxwell and Others—

Brown, K.C.—Black. Agents—Smith & Watt, W.S.

Counsel for the Claimants John Taggart, Mrs Langmuir, and Miss Margaret M'Naught and Others—M. P. Fraser, K.C.—J. G. Jameson. Agents—T. S. Paterson & Davidson, W.S.

Counsel for the Claimant Miss Elizabeth Adam—J. M. Hunter. Agents—Forbes, Dallas, & Company, W.S.

Counsel for the Claimants Miss Grace B. S. Adam and Another—Christie, K.C.—Gibson. Agents—Balfour & Manson, S.S.C.

Tuesday, November 30.

FIRST DIVISION.

[Exchequer Cause.

TRANENT CO-OPERATIVE SOCIETY, LIMITED *v.* INLAND REVENUE.

Revenue—Income Tax—Occupation of Land for the Purpose of Husbandry only—Election to be Assessed under Schedule D—Co-operative Society—Customs and Inland Revenue Act 1887 (50 *and* 51 *Vict. cap.* 15), *sec.* 18—*Industrial and Provident Societies Act* 1893 (56 *and* 57 *Vict. cap.* 39), *sec.* 24—*Income Tax Act* 1918 (8 *and* 9 *Geo. V, cap.* 40), *sec.* 39 (4), *and Schedule B, Rule* 5 (1).

A co-operative society registered under the Industrial and Provident Societies Act 1893 occupied land for the purposes of husbandry only. They elected by statutory notice to be assessed, in respect of profits from the land, for the periods 1918-19 and 1919-20, under Schedule D of the Income Tax Acts applicable to the periods. They were assessed under Schedule B. *Held* that the election was competent and that the assessments were bad.

Revenue—Income Tax—Exemption from Tax under Schedule D—Co-operative Society—Occupation of Land for Purposes of Husbandry only—Customs and Inland Revenue Act 1887 (50 *and* 51 *Vict. cap.* 15), *sec.* 18—*Industrial and Provident Societies Act* 1893 (56 *and* 57 *Vict. cap.* 39), *sec.* 24—*Income Tax Act* 1918 (8 *and* 9 *Geo. V, cap.* 40), *sec.* 39 (4), *and Schedule B, Rule* 5 (1) (2).

A co-operative society registered under the Industrial and Provident Societies Act 1893, which provides that such societies shall not be chargeable under Schedule D of the Income Tax Acts unless in certain specified circumstances, elected to be assessed under Schedule D for the profits from land occupied for the purposes of husbandry only. *Held* that the effect of their election was not to procure their exemption from income tax, but to make them assessable as under Schedule D in respect of their profits and gains as occupants of the lands in the same way as other occupants electing to be assessed under that schedule.

The Customs and Inland Revenue Act 1887 (50 and 51 Vict. cap. 15), sec. 18, enacts—"It shall be lawful for any person occupying lands for the purposes of husbandry only to elect to be assessed to the duties of income tax chargeable under Schedule D and in accordance with the rules of that schedule in lieu of assessment to the duties under Schedule B. The election of such person shall be signified by notice," . . . "and from and after the receipt of such notice the charge upon him to the duties of income tax for such year shall be under Schedule D, and the profits or gains arising to him from the occupation of the lands shall for all purposes be deemed to be profits or gains of a trade chargeable under that schedule."

The Industrial and Provident Societies Act 1893 (56 and 57 Vict. cap. 39), sec. 24, enacts—"A registered society shall not be chargeable under Schedules C and D of the Income Tax Acts unless it sells to persons not members thereof, and the number of shares of the society is limited either by its rules or by its practice. But no member of or person employed by the society shall be exempt from any assessment to the said duties to which he would be otherwise liable."

The Income Tax Act 1918 (8 and 9 Geo. V, cap. 40), sec. 39 (4), enacts—"(4) A society registered under the Industrial and Provident Societies Act 1893 shall be entitled to exemption from tax under Schedules C and D unless it sells to persons not members thereof, and the number of its shares is limited by its rules or practice, but no member of or person employed by the society shall be exempt from charge to the tax to which he would be otherwise liable."

Schedule B, Rule 5 (1) (2), of the Income Tax Act 1918 contains provisions similar to those of the Customs and Inland Revenue Act 1887, section 18, with the difference that the person may elect "to be assessed and charged under Schedule D."

The Tranent Co-operative Society, Limited, *appellants*, being dissatisfied with the determination of the Commissioners for the General Purposes of the Income Tax Acts confirming assessments for the years ending 5th April 1919 and 5th April 1920 made on double the annual value of lands occupied by the appellants for the purposes of husbandry only, obtained a case in which H. G. C. Brown, Inspector of Taxes, was respondent.

The assessments were made as regards (1) the year ending 5th April 1919, under the Acts 5 and 6 Vict. cap. 35, sec. 63, Schedule B; 16 and 17 Vict. cap. 34, sec. 2; 59 and 60 Vict. cap. 28, secs. 26 and 27; and 8 and 9 Geo. V, cap. 15, secs. 17 and 21; and as regards (2) the year ending 5th April 1920, under the Act 8 and 9 Geo. V, cap. 40, and the rules applicable to Schedule B, and 9 and 10 Geo. V, cap. 32, sec. 14.

The Case stated—"The following *facts* were proved or admitted—1. The appellants are a society registered under the Industrial and Provident Societies Act 1893 (56 and 57 Vict. cap. 39). To a very small and immaterial extent they sell to persons not members of the Society, but the number of shares of the Society is not limited either