ought to find that the horse was severely injured through the fault of the defender, and assess the damages at £27.

LORD GIFFORD—In such a case I am most unwilling to dissent, but I really am not able to concur in the judgment proposed. I doubt if *culpa* accounting for the injury or causing the damage has been shown. If there was any *culpa*, it was certainly *culpa levissima* or *levis culpa* at the most. The field appeared reasonably safe, and there was no apparent danger. We have nothing to do with trespass, and we are not in any question with the owner of the field or with the farmer complaining of trespass. Suppose the field had been a friend's field, and the defender had gone in to have a canter on the grass in a smooth and perfectly safe paddock, that surely, if *culpa* at all, would have been *culpa levissima*, and we have no evidence of the nature of the field, whether it was safe or not. Not a question is put on this subject, and no cross questions, and the reason is obvious. The only case stated against the defender is, not that he went to a dangerous place, but only that he rode in a violent and reckless manner. This is the only charge he had to meet, and so the evidence is confined to that point alone. The defender had frankly gone to the pursuer and told all that had happened. The pursuer knew where the field was or might have known. If it had been part of the pursuer's case that the field in which the defender took his canter was a dangerous field—a field into which by reason of its condition the defender had no right to go—I think he would have stated in his condescendence, and would have been bound to state, that fact, and that that was a fact which he relied on, and he has not done so. I am therefore inclined to hold that the defender went into a place quite suitable and safe for his purpose. It would be hard to say that a man may not ride or canter on grass when he hires a horse for a pleasure ride. Even Seton himself does not say that. It is "reckless galloping" he complains of.

But, again, assuming that there is *culpa*, I am not satisfied that the value of the horse is the measure of damages. No doubt the horse died, and so the pursuer claims its value. But was its death caused by anything that the pursuer did? I think not. I think it sufficiently appears that the injury to the pastern of the horse was the cause of the inflammation that led to its death. That might be a thing more or less likely, but there is certainly evidence that the death arose from a twist of the colon or intestine, occasioned by the animal rolling in its stall, but this was after its pastern was better. There is no necessary connection between the broken pastern and the twisted or knotted colon and the resulting inflammation; it is only proved that the inflammation is likely to be aggravated when the horse is kept tied up in its stall. But at all events a twist in the bowel seems from the *post-mortem* examination to have been the cause of death, and how we are to hold this gentleman liable for that I cannot see. I think he made a fair offer to pay for all the damage which happened to the animal when in his hands, and on the whole I incline to the judgment of the Sheriff.

LORD JUSTICE-CLERK—This is a narrow case, but I confess that my impression has all along been in favour of the view of the case which Lord Young has adopted, and that because the defender acted in breach of an implied condition of the contract in going into the field and there galloping the horse. There is unfortunately no evidence as to whether that is a custom of those who hire horses or not, but at all events the man who let out this horse says that he never would have let it out at the rate he did for such a purpose. I think it common sense to hold that if the defender used the horse for such a purpose, and harm followed it, he is responsible for his deviation from the implied conditions of his contract.

When that conclusion is reached, I have no difficulty in following Lord Young to the further conclusion, that while it is not absolutely certain that the inflammation of the bowels was the result of the injury, it was in all probability the result—a rather consequential one no doubt, but still the result.

On the whole matter I concur with Lord Young.

The Court sustained the appeal, found the appellant entitled to damages, and assessed the same at £27.

Counsel for Pursuer (Appellant) — Brand. Agent—D. Turner, S.L.

Counsel for Defender (Respondent)—Shaw. Agent—James M'Caul, S.S.C.

Friday, December 10.

FIRST DIVISION.

[Lord Lee, Ordinary.

BLACK AND ANOTHER (YOUNG'S TRUSTEES) *v.* JANES AND OTHERS.

Succession—Representation—Meaning of "Nearest-in-Kin" in a Trust-Settlement—Intestate Moveable Succession Act 1855 (18 *Vict. c.* 23).

Held (*rev.* Lord Lee, Ordinary) that a destination in the residuary clause of a mutual trust-settlement to the testator's "nearest-in-kin" who should be alive at a certain period, meant those nearest in blood to the testator who should be alive at that period, and did not include the class of persons called by the Act of 1855 as representatives in moveables.

Observations (*per* Lord President Inglis) on *Ferrier* v. *Angus*, Jan. 21, 1876, 3 R. 396, and previous decisions.

Observed (*per* Lord President and Lord Shand) that the question whether next-of-kin in a settlement would mean nearest in blood or nearest in line of moveable succession was left open by this case, as the person here preferred happened to stand in both relations to the testatrix.

By mutual disposition and settlement, dated 2d March 1852, the Rev. Peter Young and Mrs Maitland M'Culloch or Young, his wife, on the narrative of their having resolved to make a settlement of their affairs by which the longest

liver of them should have absolute right to the whole property, heritable and moveable, then belonging to them, or that should belong to them, or either of them, on the dissolution of their marriage by the death of one, and that after the death of the survivor, the same, and whatever other property the survivor might die possessed of, should be disposed of as the survivor should direct, conveyed in favour of themselves in conjunct fee and liferent, and to the longest liver of them two, and the heirs, successors, and assignees of the longest liver in fee, the whole heritable and moveable estate then belonging to them, or that should belong to them at the dissolution of their marriage by the death of one of them. The survivor of them was nominated to be the executor of the other, and trustees were appointed, to whom was conveyed in trust the whole estate then belonging or that should belong to the longest liver of the two, and who were nominated executors of the said longest liver. The trustees were directed to implement any instructions which the trusters or survivor of them might at any time give as to the management or disposal of the estate, and power was given them to realise the estates for the trust purposes. Of the same date the trusters executed a letter of instructions, which, after various directions as to legacies, &c., proceeded as follows:—"In the last place, as to whatever residue there may be of our said property after fulfilling the foresaid purposes, we wish and direct it to be divided and disposed of in such way as we or the survivor of us two shall direct by any future writing under our hands, or the hand of the survivor of us two, made at any time, which writing we hereby declare to be, like these presents, part of our said deed or deeds of settlement, and as binding on you our trustees as if it had been engrossed therein, and failing such writing disposing of said residue, then the said residue shall be equally divided among the nearest-in-kin of us both who shall be alive at the time of the death of the survivor of us two—that is to say, one-half to the nearest-in-kin equally amongst them of me the said Peter Young, and the other half to the nearest-in-kin equally amongst them of me the said Maitland M'Culloch or Young, who shall be alive at the time of the death of the survivor of us two."

Mrs Young died in March 1853. Her husband after her death executed at different dates various codicils altering and increasing legacies already left and adding new ones. He died on 28th September 1864. The trustees having paid the various legacies, &c., and difficulties having occurred as to the terms of the residuary clause, they raised an action of multiplepoinding and exoneration. There was no dispute as to the share of residue falling to the nearest-in-kin to Mr Young, but competing claims were lodged for parties claiming to be next-of-kin to Mrs Young.

Mr and Mrs Young had no issue. Mrs Young had three brothers and two sisters, who all predeceased her, the brothers dying unmarried. Of the sisters, Mary married Dr M'Adam, and died in 1841, leaving issue Robert John M'Adam, who died intestate at Montreal on 4th February 1869, his widow dying shortly after. They left issue (1) Elizabeth M'Adam or Wells, who and her husband died in 1872 leaving three children; (2) Margaret M'Adam or Delbridge; (3) Mary M'Adam or Wells. One set of claimants in this action were the children of Elizabeth Wells (represented by their tutor Mr W. D. B. Janes), Margaret Delbridge, and Mary Wells. They claimed one-half of the residue of the trust-estate as next-of-kin to Mrs Young, of which one-ninth was to go to each of the children of Elizabeth Wells, one-third to Mrs Delbridge, and one-third to Mrs Mary Wells. They pleaded—"(2) On the death of Peter Young the right to one-half of the residue of the trust-estate vested, in terms of the settlement, in Robert John M'Adam, as nearest-of-kin of Mrs Young."

Mrs Young's other sister, Joan, married Joseph Thackwray, and had five children, of whom three predeceased the said Peter Young unmarried, and two others, James and Thomas, predeceased him leaving issue. James died in 1860, leaving a widow and three children, for whom, however, no claim was lodged in this action. Thomas died in 1858 leaving seven children, and survived also by the issue of a deceased son William. A claim was lodged for the children and grandchildren of Thomas Thackwray. The children of Thomas Thackwray claimed to be ranked and preferred each to a share of the residue in question, equally with any other party or parties establishing as near a relationship as themselves or their father to the said Mrs Young; and the children of William Thackwray, as representing their father, claimed the share which was payable to him.

The Lord Ordinary (Lee) pronounced an interlocutor in which he found "that the one-half of the residue destined to the nearest-in-kin of the said Peter Young has been already disposed of in this process, and that according to the sound construction of the said mutual disposition and settlement, the other half, destined to the nearest-in-kin of the said Mrs Maitland M'Culloch or Young alive at the time of the death of the said Peter Young, is payable to the heirs *in mobilibus* as at that date entitled to succeed *ab intestato* to the said Mrs Maitland M'Culloch or Young, including not only the said Robert John M'Adam, who died at Montreal on 4th February 1869, but also the children of Mrs Young's deceased nephew Thomas Thackwray, as coming in place of their father, and also the children of any other nephew or nephews of Mrs Young who may have survived her but predeceased her said husband; and appoints the case to be enrolled for the purpose of hearing parties as to the effect of this interlocutor."

His Lordship added the following note—"Apart from the authorities on the subject, the Lord Ordinary might have had difficulty in admitting among the nearest in kindred of Mrs Young, along with her nephew John Robert M'Adam, the children of a nephew who predeceased the prescribed period of distribution. He should have been disposed to regard 'nearest-in-kin' (an expression frequently used as synonymous with next-of-kin, *e.g.*, Bell's Prin., section 1861) as pointing to propinquity in degree as well as to the order of succession provided by the common law of Scotland; and he should have thought it questionable whether a statutory provision applicable to cases of intestate succession could be applied to the interpretation of such a term in a mutual settlement which was made before the statute was passed which changed the law of moveable succession.

"But the Lord Ordinary is of opinion upon the authorities that the expression may be read as meaning those relations who are entitled to take the succession according to law; and that in deeds like that which is founded on in this case it ought to be so read, unless there are expressions to be found in it which indicate an intention to use it in a different sense. It was a part of the mutual settlement of Mr and Mrs Young that the survivor should have full power to direct the disposal of the residue. Indeed, it was the express purpose of the deed that the longest liver should have 'absolute right' to the whole property. The question, therefore, as to the meaning of the residuary bequest in favour of the nearest-in-kin of Mrs Young alive at the death of the survivor must be considered to have been made by Mr Young on the day of his death for the purpose of disposing of his own property. It is entirely disencumbered of any notion of personal predilection on the part of Mrs Young, and no difficulty arises from the deed having been made before 1855, or from one of the parties having died before that date.

"In such a case the meaning of the expression will depend on the nature of the subject which forms the subject of the destination. If it be an heritable estate, the heir-at-law, according to the rules of succession in heritage, would presumably be called although another relative might be nearer in degree. Of this the case of *Connel* v. *Grierson*, Feb. 14, 1867 (5 M. 379), affords an example. If, on the other hand, it be a moveable succession that is referred to (as in the present case), those entitled to succeed at law as heirs *in mobilibus* will be held to be favoured, unless there be something in the deed, as in the case of *Scott* v. *Scott* (H. L., May 10, 1855, 2 Mag. 281), which shows that the testator did not desire to adopt the legal order of succession. But the expression is not held to be a technical term signifying exclusively those who would succeed according to the common law as it stood prior to 1855. The cases of *Nimmo* v. *Murray's Trustees*, June 3, 1864 (2 M. 1144), and *Maxwell* v. *Maxwell*, December 24, 1864 (3 M. 318), seem to the Lord Ordinary, in this view, to have an important bearing on the present case. In *Nimmo's* case the expression was 'my own nearest heirs and successors.' This was held to include the descendant of a sister who had predeceased the testator, along with a brother who had survived him. In *Maxwell's* case the bequest was to John Maxwell, 'his heirs, executors, and assignees.' This was held to mean the heirs *in mobilibus*, according to the law of intestate moveable succession, as altered by the Act 18 Vict. cap. 23. Unless, therefore, it could have been shown that the term nearest-in-kin, as used in the settlement of Mr and Mrs Young, was intended to exclude the children of a nephew predeceasing the time of the survivor's death, in the event of any nephew or niece being then alive, there seems to be no reason to doubt that the children of Thomas Thackwray are entitled, as in place of their father, who predeceased, to a share of the succession along with John Robert M'Adam, who survived, or those who represent him.

"The case of *Cockburn's Trustees* v. *Dundas*, June 11, 1864 (2 M. 1185), is not inconsistent with the decision in *Nimmo's* case. In that case there seems to have been no claim for the children of the deceased grandchildren, and it was pointed out in *Maxwell* v. *Maxwell* that there were specialties, which are fully brought out in the opinion of the Lord Justice-Clerk. But for these specialties the Lord Ordinary sees no reason to doubt that the opinion of Lord Neaves would have been given effect to. He held that the testator meant to bequeath the succession to those who should be his heirs *in mobilibus* or in heritage at the time of distribution, and that the Intestate Succession Act should receive effect and be imported into every will in which the testator leaves his succession to heirs and executors alive at the time of distribution. This was just what had been held in *Nimmo's* case, and none of the other Judges indicate that their decision in that case was in any degree shaken.

"It was observed in argument that the expression 'next-of-kin,' or 'nearest-in-kin,' was not dealt with in these cases. The observation is a just one, and there is no doubt that the Statute of 1855 itself draws a distinction between 'next-of-kin' and the children of those who if they had survived would have been among the next-of-kin. The question, however, is, What is the meaning of the expression as used in a testamentary deed of this kind? And upon that question the Lord Ordinary thinks that a very sufficient answer is to be found in the opinion of the Lord President in the case of *Ferrier* v. *Angus*, Jan. 21, 1876 (3 R. 396). 'The ordinary sense of the words' (nearest-in-kin) 'would be the heirs *in mobilibus* of the spouses—that is, the next-of-kin of each at the time of his or her death.' There was no competition in that case between one of the next-of-kin and the children of another who had predeceased. But the Lord Ordinary considers that this description of the class shows that the expression 'next-of-kin' in a legacy is not presumed to exclude any of those who are heirs *in mobilibus* according to the law of moveable succession. The opinion of the Lord Justice-Clerk in the more recent case of *Webster* v. *Shiress* (6 Rettie, 102) is still more adverse to the suggestion that the term must always be read in its strict legal signification. Speaking of the Statute 4 Geo. IV., c. 98, he said—'I read the expression "next-of-kin" to mean nothing whatever but the heir *in mobilibus ab intestato.*'

"The Lord Ordinary did not understand that there was anything in the settlement indicative of an intention to use the term in a different sense, unless the words themselves have such different meaning."

The claimants Janes and others reclaimed, and argued—At the date of Mr Young's death, when the succession opened, Robert John M'Adam was the sole surviving next-of-kin to his aunt Mrs Young, and his descendants were therefore preferable to those of his other nephew Thomas Thackwray, who predeceased Mrs Young. "Nearest-in-kin" must mean nearest in blood, and would not include the class of persons brought in by the 1855 Act. Before that Act next-of-kin had been just those persons who would take the dead's part *ab intestato*, and the Act made no alteration in the status or character of next-of-kin, but simply refers to them as a known order. The case was one of testate succession. The question being one of intention, and Mrs Young having died before the Act was passed, her deed could not fairly be construed by reference to it. The

cases quoted were all distinguishable from the present.

Replied for the claimants Thackwray and others—This was virtually a case of intestate intestacy. The mutual settlement though dated in 1852, was to all intents and purposes a deed executed in 1864. It must be read by reference to the Act of 1855. "Nearest-in-kin" meant not nearest in blood but heirs *in mobilibus*. This view was favoured by the cases, and especially by the *dicta* of this Court in *Ferrier's* case.

Authorities (besides those cited in the Lord Ordinary's note)—*M'Call* v. *Dennistoun*, Dec. 22, 1871, 10 Macph. 281; *Turner and Others*, Nov. 27, 1869, 8 Macph. 222; *Ewart* v. *Cotton*, Dec. 6, 1870, 9 Macph. 232; *Stoddart's Trustees* v. *Stoddart*, March 5, 1870, 8 Macph. 667; *Webster* v. *Shiress*, Oct. 25, 1878, 6 R. 102; 2 Jarman on Wills, p. 94, and cases there quoted.

At advising—

Lord President—This is a question on the construction of a clause in the mutual settlement and relative documents of the late Mr and Mrs Young, which is dated 12th March 1852. After providing a number of legacies the trustees were directed as to the residue in the following terms:—"In the last place, as to whatever residue there may be of our said property after fulfilling the foresaid purposes, we wish and direct it to be divided and disposed of in such way as we or the survivor of us two shall direct by any future writing under our hands, or the hand of the survivor of us two, made at any time, which writing we hereby declare to be, like these presents, part of our said deed or deeds of settlement, and as binding on you, our trustees, as if it had been engrossed therein; and failing such writing disposing of said residue, then the said residue shall be equally divided among the nearest-in-kin of us both who shall be alive at the time of the death of the survivor of us two—that is to say, one-half to the nearest-in-kin, equally amongst them, of me the said Peter Young, and the other half to the nearest-in-kin, equally amongst them, of me the said Maitland M'Culloch or Young, who shall be alive at the time of the death of the survivor of us two."

Mrs Young died in 1853 without having made any bequest in terms of the power reserved to her in the residuary clause. Her husband died eleven years afterwards, and the chief alteration which he made was to bequeath a liferent of £150 per annum to Miss Jane M'Adam. The period of time at which the bequest of residue is to be determined is the death of Mr Young, which took place on 28th September 1864. The half of the succession which went to the next-of-kin of Mr Young has been disposed of without competition. But as regards the half belonging to the next-of-kin of Mrs Young, a competition has arisen between the representatives of a nephew who survived the period of the death of the survivor of the spouses, and the representatives of another nephew who predeceased that period. The reclaimers are representatives of the nephew who survived, and Mrs Margaret Thackwray or Harris and others are the representatives of the nephew who predeceased the period. At the death, therefore, of the survivor of the spouses there was only one person in the degree of nephew or niece to Mrs Young, but the representatives of the other nephew say that under the operation of the Intestate Moveable Succession Act, or taking it as helping to construe the terms of this succession, they are entitled to a share of the fund. The whole question is, What is meant in this settlement by the words nearest-in-kin? I think it is the first time since the passing of the Act that we have had to fix the meaning of "next-of-kin" in reference to moveable succession as used in a testamentary disposition, and it seems to me that the representatives of the nephew who predeceased the death of the survivor of the spouses were not at that date next-of-kin in any sense at all. They were not next-of-kin in blood, for they were a degree further than the nephew who was then alive. Nor were they next-of-kin according to common law, for there was no representation in moveables by the common law of Scotland, and nephews and nieces then alive would take in preference to the children of those who had predeceased. It is further clear that they were not next-of-kin in the meaning of the Intestate Succession Act. The only parties who are next-of-kin under that statute are those who were and are so by the common law. For the section (1) which admits representation runs thus:—"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 predeceased 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." Now, there we have the words next-of-kin used, but not as including representatives of next-of-kin, but as expressing the same meaning as the words had previously at common law. But the section goes on to say—"Provided always that no representative shall be admitted among collaterals after brothers' and sisters' descendants, and that the surviving next-of-kin of the intestate claiming the office of executor shall have exclusive right thereto in preference to the children or other descendants of any predeceasing next-of-kin, but that such children or descendants shall be entitled to confirmation when no next-of-kin shall compete for said office." There, again, there is a sharp distinction between those who are to come in as representatives and the next-of-kin. It rather appears to me that the words next-of-kin have never under any circumstances been used as including those who by force of the statute have been admitted as representatives of next-of-kin to a share in the succession. The Lord Ordinary seems to have inclined to that view, but to have thought himself precluded from it by the authorities to which he refers. I think his Lordship has misunderstood these authorities, for the principal cases—those of *Nimmo*, *Connell*, and *Maxwell*—are all different from the present case. The words there used were not next or nearest-of-kin. In *Nimmo* v. *Murray's Trustees*, June 3, 1864, 2 Macph. 1144, the expression was "nearest heirs and suc-

cessors." In *Connell* v. *Grierson*, Feb. 14, 1867, 5 Macph. 379, the words were "nearest of kindred and their heirs and disponees whomsoever." And in *Maxwell* v. *Maxwell*, Dec. 24, 1864, 3 Macph. 318, the words used were "heirs, executors, and assignees." Now, all these expressions have special reference to intestate succession. They describe the parties who in the event of the testator dying intestate would take his succession, heritable or moveable, and so they are open to an entirely different construction from an expression which has reference rather to blood connection. In *Nimmo's* case I think the distinction is pointed out in a passage in my own opinion, which contains the following sentences. Speaking of the destination there I said—(p. 1149) "It is given to my own nearest heirs and successors. Now, I very much agree with Lord Benholme in thinking that in the construction of a clause of this kind an important distinction exists between words which express mere propinquity or nearness in blood, and words which express the relation between the testator and those whom he calls in regard to his succession. Parties may be nearest in blood, and yet not be the heirs or the only heirs who will take the succession; and therefore there may be great difficulties and ambiguities in the construction of words which import merely propinquity or nearness in blood, which will not arise in a case where the words used simply refer to the relation between the testator and the parties called as taking his succession. Now, keeping that in view, I cannot think that in a deed of this kind 'my own nearest heirs and successors,' unless there be something very peculiar in the context, or in the general scope and purpose of the deed, can bear any other construction than 'my nearest heirs,' or 'my nearest heirs *in mobilibus*,' according to the nature of the subject." Now, keeping that in view, it appears to me that none of the three cases quoted by the Lord Ordinary are of any authority here, except by way of distinction. But it was contended that in some other cases opinions have been expressed which are at variance with that construction of the words "nearest-of-kin;" and, in particular, reference was made to the case of *Ferrier* v. *Angus*, Jan. 21, 1876, 3 R. 396, in which I am reported to have said that "next-of-kin" and heirs *in mobilibus* were equivalent terms in relation to the deed then under consideration. But it must be observed that there was in that case no competition between next-of-kin and the representatives of next-of-kin. The question in that case related to the point of time at which the next-of-kin were to be ascertained, and nothing else; it was conceded on both sides that the next-of-kin in the sense of common law were entitled to succeed. That case occurred in 1876, and in the very same year another case came before this Division in which we had an opportunity of expressing our views as to the construction of the Act of 1855, and the meaning in it of "next-of-kin;" and what was then said is quite inconsistent with the view which is now imputed to me and the other Judges who decided the case of *Ferrier*. The question in the case of *Muir* (Nov. 3, 1876, 4 R. 74) was whether a mother was entitled to be confirmed executrix-dative *qua* next-of-kin to a deceased son. The Commissary-Depute found that "a mother is not one of the next-of-kin of her children, and that the petitioner is therefore not entitled to be confirmed executrix-dative *qua* one of the next-of-kin," and he dismissed the petition. We agreed with that finding; and I said—"I am not disposed to differ from the Commissaries in holding that a mother is not one of the next-of-kin of her children in a certain sense of the term. In the law of moveable succession 'next-of-kin' is a technical term expressing a certain degree of relationship, and in that sense certainly a mother is not one of the next-of-kin of her children." But I proceeded to say that I thought the Commissaries might have dealt less strictly, and have allowed the petition to be amended, and then confirmed her as executrix *qua* mother; and a remit was accordingly made to allow the petition to be amended with that view. That shows plainly enough that the persons called for the first time to a share in succession under the Act of 1855 are not "next-of-kin;" and the conclusion is that when you find the terms "next-of-kin" or "nearest-of-kin" in a settlement like this you must read these words as expressing propinquity in blood. Whether "nearest" according to the precise relation of each individual to the testator, or according to the lines of succession in moveables by the common law of Scotland, is of no consequence in this case; for the nephew who survived the period in question in this case answers both descriptions; he is both nearest in blood to Mrs Young and by the common law would have succeeded to her moveable estate. When that question arises, however, it will require consideration; and all the more so that in England the term next-of-kin has been interpreted as meaning nearest in blood, and not according to the lines of succession. That law was very properly referred to as having determined in England this question, or one very like it, viz., the meaning of "next-of-kin" in a will, in reference to the Statutes of Distribution, from which our Act was in great measure copied. The same distinction was recognised there between those specially called to the succession by the statute and the next-of-kin at common law; and it was decided after due consideration of the subject that "next-of-kin" in a will meant those nearest in blood to the testator, and not the heirs *in mobilibus*. That was laid down in the case of *Elsmley* v. *Young* (2 My. & K. 82), and afterwards in *Withy* v. *Maughs* (10 C. & F. 215), where Lord Cottenham delivered a very full and important judgment on the subject.

On the whole matter, I have no hesitation in holding that the parties who are here to take the succession are the representatives of the nephew who was nearest in blood at death of the survivor of the spouses, and not those who would have been called to the succession by the Moveable Succession Act of 1855.

LORD DEAS—The parties who are favoured by this residuary clause are the next-of-kin of the husband and wife respectively who should be alive at the death of the survivor of the spouses, and the question is what the testators meant by these words. It is always a question of intention who is meant in cases like that; but there are other considerations here which must be taken into account in deciding who are to be the favoured parties. In this case I have no doubt that the parties meant to be favoured were the

nearest blood relations of the parties as at the date then mentioned. I think that was the intention, and that construction is strengthened by the considerations which your Lordship has stated as to what has been held in the general case; and I have only to say, that taking all these considerations into view I have no doubt that the parties who are to share in this succession are the nearest in blood to the testators who should be alive at the date of the death of the survivor of them. I therefore concur with your Lordship.

LORD MURE—The simple question which we have here to decide is, Who under a mutual settlement executed in 1852 are to be considered as falling under the words by which the residue is made over to "the nearest-in-kin of us both who shall be alive at the time of the death of the survivor of us two?" Do these words mean the nearest in the ordinary sense, or the heirs and successors under the Act of 1855? I agree with your Lordship in thinking that they cannot be held to include the parties who are brought into the succession under the operation of the Act, for by the words of that Act there is a plain distinction between next-of-kin in the ordinary sense and the parties who are to succeed by the operation of the Act; for one main object of the Act was to introduce representation in moveables, which did not exist previously. The words next-of-kin are very distinctly defined by Erskine when he says (Inst. iii. 9, 2)—"It is a universal rule in the legal succession of moveables that the next in degree of blood to the deceased, or the next-of-kin, succeeds to the whole, and if there be two or more equally near, all of them succeed by equal parts;" and he goes on to say—"The right of representation in heritage by which remoter heirs represent their ascendants has no place in the succession of moveables." Therefore next-of-kin by the law of Scotland meant nearest in degree of blood, and there was no representation in moveables. But since the Act of 1855 representation is introduced, and a different class of persons called in. There is therefore a plain distinction between next-of-kin in the common-law sense and under the statute.

With regard to the case of *Ferrier*, the expressions used both by your Lordship and myself, to the effect that next-of-kin was equivalent to heirs *in mobilibus*, might perhaps be misleading, but they must be looked at in reference to the circumstances of that case, where the question really was in regard to the point of time which was to be taken into account in determining who were the nearest-of-kin.

LORD SHAND—I entirely concur with your Lordships. It appears to me to be clear that the primary sense and natural meaning of the words next or nearest-of-kin is nearest in blood, and therefore, assuming that we were now deciding it for the first time, I should have no doubt that the meaning of the words in this settlement was to favour the nearest relatives of the testators. The Lord Ordinary appears to have held the same view, but to have considered that from the authorities which have been referred to, and certain expressions of the Judges in previous cases, he was tied up to interpret the words as meaning those entitled to take in the order of succession, including those who are called in under the 1855 Act. But I agree with the view which your Lordships have taken of these cases. I think the expression here used—nearest-in-kin—implies relationship in blood; while the words which occur in the other cases seem to refer not so much to relationship as to right of succession. The only case in which the Court have had the expression nearest-of-kin before them is, I think, that of *Connell*, in which there is a very instructive note by the Lord Ordinary, Lord Kinloch. His interlocutor, it is true, was reversed, but on the ground that the case dealt with was heritable estate, and that the rules of succession in heritage must come in, but still giving the succession to the nearest in blood.

In deciding this case I desire to keep open the question to which your Lordship referred in the concluding part of your opinion—Whether if the nearest relative in blood was not also the nearest in line, the one or the other would be held to be the next-of-kin? The question does not here arise, as the nephew who was alive at the opening of the succession was both nearest in blood and nearest in line of succession to the moveable estate.

The Court pronounced judgment, in which after recalling the operative finding of the Lord Ordinary's interlocutor, quoted above, they, in place thereof, "Find that said half of the residue, according to the sound construction of the deed of settlement of the spouses, vested at the death of the said Peter Young on 28th September 1864 in the now deceased Robert John M'Adam, being a nephew, and as such the sole nearest-in-kin of the said Mrs Young then alive, and belongs to the claimants W. D. B. Janes and others as his representatives, to the exclusion of the other claimants Mrs Margaret Harris and others as representatives of William Thackwray, another nephew of the said Mrs Young, who predeceased the said Peter Young."

Counsel for Reclaimers — Lord Advocate (M'Laren, Q.C.)—Martin. Agents—J. & F. J. Martin, W.S.

Counsel for Respondents—Trayner—Campbell. Agents—Murray, Beith, & Murray, W.S.

Friday, December 10.

FIRST DIVISION.

[Sheriff of Forfarshire.

RITCHIE (GIBSON'S TRUSTEE) *v.* STEWART.

Process—Poinding of the Ground—Diligence for Interest Current but not yet Due—Competency.

A poinding of the ground may competently be used in security of interest current but not yet due, provided payment be not demanded till it has become due.

The creditor in a real burden of £2000, the principal sum of which was payable to him only contingently, brought a petition in the Sheriff Court for poinding of the ground against the debtor and his trustee in bankruptcy, the