Ordinary had remitted) finding their deliverance wrong, but no longer.

Reservation of opinion by Lord Cowan and Lord Neaves on the general question of the right of commissioners in a sequestration to litigate in defence of their judgment.

In this case the appellant complained of a deliverance of the respondents as commissioners in a sequestration in which he (the appellant) was trustee, fixing his commission at a certain sum. That deliverance was as follows "The commissioners fixed the trustee's commission at three per centum on the sum of £2633, 18s. 3d., being the proceeds of the bankrupt's stock in trade, and five per cent upon £321, 6s. 5d., being the balance of the sum recovered by him, and authorised him to take credit for such commission in his accounts with the estate."

The Lord Ordinary (ORMIDALE), on the report of the accountant in bankruptcy, sustained the appeal, and fixed the commission at a sum considerably beyond that allowed by the respondents. He also found the respondents personally liable in modified expenses to the appellant. His Lordship added the following note:—"The Lord Ordinary does not see that he is entitled under this appeal to deal with the charges in the law-agent's account of expenses referred to in the accountant's report; but as the law-agent expresses his willingness to deduct the items referred to, there can be no difficulty in arranging this extrajudicially.

"In regard to the amount of the trustee's commission, the Lord Ordinary has had some difficulty. On the one hand, he has felt that this, being a matter peculiarly for the consideration of the commissioners, their determination ought not to be interfered with on light grounds. But, on the other hand, a remit having been made by a former Lord Ordinary to the accountant in bankruptcy, and the whole matter having been very carefully and minutely investigated by him, the Lord Ordinary has found it impossible to resist the conclusions at which he has arrived.

"Looking at all the circumstances, and as the appellant has not been wholly successful, the Lord Ordinary has only found him entitled to expenses subject to modification, which, however, he does not think ought to be much."

The respondents reclaimed against this finding of expenses.

D.-F. GORDON and DUNCAN for reclaimers.

GIFFORD and CAMPBELL SMITH in answer.

The Court ordered the accounts of both parties to be put in, and to-day they found that up to the date of the accountant's report the expenses of both parties should come out of the estate; but, *quoad ultra*, they adhered to the Lord Ordinary's interlocutor, and, with regard to the Inner House expenses, they found that each party must bear his own.

The LORD JUSTICE-CLERK held that it was the duty of the commissioners to appear and defend their judgment; that they were the proper contradictors of the trustee in that matter; and that, therefore, they were entitled to be relieved of all necessary expenses. They ought, however, to have acquiesced in the accountant's report, and not to have litigated further.

LORD COWAN and LORD NEAVES concurred in the result, in respect that the commissioners were called into the field by the Lord Ordinary, who had ordered the appeal to be served upon them. Their Lordships, however, reserved their opinions on the general question as to the right of the commissioners to litigate in defence of their judgments.

LORD BENHOLME dissented, holding that the commissioners had no right to appear at all, they not representing the creditors, and having no duties other than those specified in the statute.

Agent for Trustee—Adam Morrison, S.S.C.

Agents for Commissioners—Jardine, Stodart & Frasers, W.S.

Saturday, November 27.

FIRST DIVISION.

TURNER AND OTHERS *v.* COUPER & OTHERS.

Succession—Intestate Succession Act—Next of Kin—Representation. The Intestate Succession Act is a remedial statute, only intended to allow representation in a certain situation where the common law denied it. It does not apply where none of the class forming the next of kin at the intestate's death have predeceased him; but only where one or more have predeceased him leaving issue, and one or more survived him.

Agnes Hamilton died leaving certain heritable and moveable estate. She never was married, and left no brother or descendant of a brother; but she had three sisters, who were her nearest relatives, all of whom predeceased her, leaving issue. Mrs Turner was the only child of one; Robert Couper and three sisters the children of another; and Thomas M'Donald and seven brothers and sisters the children of the third. Mrs Turner, Robert Couper, and Thomas M'Donald, were served as heirs-portioners, and took the heritage equally amongst them. All the parties were agreed that the whole residue, both heritable and moveable, fell to be divided as in the case of intestate succession. It is enacted by § 1 of the Intestate Succession Act—"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: provided always that no representation 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." And by § 2 it is further enacted—"Where the person predeceasing would have been the heir in heritage of an intestate leaving heritable as well as moveable estate had he survived such intestate, his child, being the heir in heritage of such intestate, shall be entitled to collate the heritage to the effect of claiming for himself alone, if there be no other issue of the predeceaser, or for himself and the

other issue of the predeceaser, if there be such other issue, the share of the moveable estate of the intestate which might have been claimed by the predeceaser upon collation if he had survived the intestate."

Mrs Turner and her marriage-contract trustees, in addition to her share of the heritage as one of the three heirs-portioners, claimed one-third part of the moveables as being one of the next of kin (through her deceased mother) of Agnes Hamilton.

The younger children of Mrs Couper, and the younger children of Mrs M'Donald, as next of kin of Agnes Hamilton, claimed the whole residue of the moveable estate, to the exclusion of Mrs Turner, maintaining that, Mrs Turner being entitled as one of the three heirs-portioners of the deceased to a third part of the heritage, was excluded from claiming any part of the moveable estate, unless she collated, which she had refused to do. They further argued, that if Mrs Turner was entitled to any part of the moveable estate, the share to which she had right was no more than 1-13th, or at most, not more than 1-11th. A Special Case was therefore presented to the Court by Mrs Turner, and her marriage-contract trustees on the one part, and the younger children of Mrs Couper and Mrs M'Donald on the other.

FRASER and SCOTT for the first parties.

SOLICITOR-GENERAL for the second parties.

At advising—

LORD PRESIDENT—Agnes Hamilton died in 1860, and at that time the persons entitled to her succession, as her next of kin, were her thirteen nephews and nieces. The Intestate Succession Act provides—(*reads*). It does not apply universally. It only applies in certain cases. The question we have to put to ourselves is,—Does it apply here? Had Mrs Turner survived Miss Hamilton, by common law the moveable estate would have gone to her alone. But she predeceased her sister. Does, then, this case come under the statute? It is a remedial statute, and a remedial statute is always to be construed by the remedy intended. Its object was that where one of the next of kin predeceased the defunct, his issue might take along with the surviving next of kin. In short the statute applies only in such a case. But that is not the case here. None of the next of kin predeceased the defunct here. The statute therefore does not apply. If so, the whole difficulty of this special case disappears. The common law says if an heir in heritage refuses to collate he gets none of the moveables. Here Mrs Turner, Robert Couper, and Thomas M'Donald, take each a third of the heritage, and none of them therefore can take any of the moveables.

LORD DEAS—The object of the statute was to remedy the evil alone that your Lordship has stated. The words of the statute are not very clearly expressed; but looking to the common law of Scotland before it was passed, and what was the evil to be remedied, I am inclined to concur with your Lordship's interpretation of the clause.

LORD ARDMILLAN—The statute gives to the children of a predeceasing next of kin the right of their parent, along with a surviving sister or brother. Mrs Turner herself, however, is, under the circumstances of the case, one of the next of kin. She is not claiming to be admitted to that body; but, being one, she wants to have more than the rest.

LORD KINLOCH—I am of the same opinion with your Lordship in the chair; and very clearly so.

The difficulty found in this case has perhaps arisen from its being popularly said that the Intestate Succession Act introduced the representation proper to heritage into moveable succession. But the statute did no such thing. It only introduced a provision to remedy one particular grievance; and what the statute says and does the present case very well illustrates. Miss Agnes Hamilton died and left her next-of-kin in thirteen nephews and nieces. One of these was Mrs Turner, who, if nothing had intervened to bar her claim, would have been entitled to one-thirteenth of the moveable succession. The statute says 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 the place of such person." If another nephew or niece had predeceased Miss Hamilton, leaving a child or children, this enactment of the statute would have given that child or children the same share the parent would have had. This is what the statute provides, and all that it provides, in the clause just quoted. But nothing of the kind occurred. All the nephews and nieces survived Miss Hamilton. They all alike share her succession. The contingency of the statute, therefore, never emerged. The statutory purpose was to bring in a person or persons who under the common law had no right, and whose exclusion was felt to be unjust. There is no such case here. Mrs Turner is not excluded; on the contrary, shares with the others. The object now sought to be obtained is not to introduce her into the succession, but to increase her thirteenth to a third, which is quite away from the statutory intent.

There is thus, as I think, no ground whatever for giving Mrs Turner more than the one-thirteenth of the succession, which she inherits in her own right. But as she also has right as heir to a portion of the heritage, she cannot take this one-thirteenth without collating the heritage; and as she refuses to collate, she is thereby shut out from all share of the moveable succession.

Agent for First Parties—John Walls, S.S.C.

Agent for Second Parties—James Webster, S.S.C.

Saturday, November 27.

COWIES *v.* AIRDRIE MINERAL OIL CO.

Defences—Judicature Act—No Process—Preliminary Plea. "No process" is a preliminary plea, and can only be discussed *initio litis*. The enactments of the Judicature Act, and relative Act of Sederunt, as to the discussion of dilatory defences, are not repealed by the Court of Session Act of 1868.

In April 1866 the Airdrie Mineral Oil Company entered into an agreement with George Cowie, coal master, Airdrie, by which he contracted to supply them with certain quantities of coal of certain kinds. As they considered the kind he supplied much worse than what had been stipulated for, they refused payment of part of it. After much disputing, he raised an action in which he sued them for large damages for breach of contract, especially in refusing to accept delivery of the coal he sent. On his death the action was continued by Archibald Cowie and Richard Cowie, his trustees. The first plea in law for the defenders was—"No process, the summons never having been served on