this train was neglected. The train was a train of six carriages waiting for passengers, and according to practice, the day being a Saturday, three carriages from a train arriving about eight o'clock were put on to the front of the train, because on Saturdays there would be more people to be carried than on an ordinary week day. When these three carriages were put on, that was simply making up the train to what it was to be when it came to start some twenty minutes afterwards. Apparently there was a rush made for the train when the three carriages were put on, and this lady seems to have been run up against a carriage and was to some extent injured. I am unable to say that I can find in this evidence proof that the Railway Company were at fault in not having prevented that. I think the Sheriff-Substitute has considered the case with great care, and has given a very moderate and ample statement of the case. Upon the whole matter I do not see that we would be justified in holding that he was wrong in the decision to which he came, and I think his judgment ought to be affirmed.

LORD LOW—I am of the same opinion. I do not think that fault is proved on the part of the defenders. It seems to me that this was no unusual occasion, and they had no reason to anticipate that there would be any great crowd or any unusual danger to passengers, and it is perfectly plain that there was the ordinary and usual number of officials to look after the safety of passengers connected with this particular train. The accident which the pursuer sustained seems to have been a pure accident for which the defenders are in no way responsible.

LORD ARDWALL—I agree. The question is whether fault has been proved against the Railway Company. It appears to me that it is plain upon the evidence that the cause of the accident was the heedlessness and selfishness of the crowd of people, or of individuals composing that crowd, who made a rush for the three empty carriages which were in course of being added to the Bathgate train on the night in question. There was no necessity for such a rush at the time, nor was it to be expected, for some twenty minutes had to elapse before the train was timed to start, and as no complaint was made at the time it is impossible for the Railway Company to prove by their inspectors where they were at the particular moment of the accident. I agree with the Sheriff that it is proved that there was a sufficient staff for all ordinary purposes. Further, it is I think proved that the Railway Company did not allow an unreasonable number of people to get on to this platform. They had taken the very proper precaution of allowing nobody to go on to it except through the gates where persons were stationed to check the tickets and to prevent too many people getting on to the platform.

I accordingly hold that the pursuer has failed to prove that the accident complained of was due to the fault of the defenders.

LORD STORMONTH DARLING was absent.

The Court adhered.

Counsel for the Pursuer (Appellant)—Trotter. Agents—Bryson & Grant, S.S.C.

Counsel for the Defenders (Respondents)—Scott Dickson, K.C.—Grierson. Agent—James Watson, S.S.C.

Tuesday, January 14.

SECOND DIVISION.

LOGAN'S EXECUTORS *v.* M'LENNAN AND OTHERS.

Succession — Intestate Succession — Collation—More than One Heir—Heirs Portioners.

In intestate succession, whether there is only a single heir in heritage or whether there are heirs portioners, the rule applies that the heir or heirs can only share in the moveable estate of a deceased intestate on the condition of collation in every case where there is another person, or persons, possessing the character of next-of-kin.

A died intestate, predeceased by his father and mother, and by two sisters, B and C. He was survived by a nephew D, the child of B, and a nephew and niece, the children of C. D claimed half of the heritable and a third of the moveable estate of A.

Held that the ordinary rule as to collation applied, and that accordingly D could not share in the moveable estate without collating his share of the heritage.

Expenses — Special Case — Unsuccessful Party Liable to Successful.

The successful party in a special case found entitled to his expenses from the unsuccessful party.

Mr John Logan died on 24th June 1906, unmarried and intestate. Mr Logan was, at his death, possessed of both heritable and moveable estate, the heritable estate being worth about £4000, and the moveable about £10,000. He was predeceased by both his father and his mother. He never had a brother, but he had two sisters both older than he was, who predeceased him leaving issue, viz.—Andrew M'Lennan, the only child of the elder sister, and John Logan Smith and Margaret Hutcheson Smith, the only children of the younger sister.

Questions having arisen as to the division of the deceased's heritable and moveable estate, a special case was presented to the Court, to which the deceased's executors-dative were the *first parties*, Andrew M'Lennan the *second party*, and Margaret Hutcheson Smith the *third party*.

The second party *contended* that he was

entitled (1), as representing his mother, to one-half of the deceased's heritable estate, and also (2), as one of the next-of-kin of John Logan, to one-third of his moveable estate, without collating his share of heritage. The third party contended that the second party had no claim to any share of the moveable estate unless he collated therewith his share of heritage.

The following *questions* were submitted to the Court:—(1) Is the second party entitled to one-half of the heritable estate, and one-third of the moveable estate? (2) Must he collate his share of heritage as a condition of receiving a share of the moveable estate?

The special case contained no agreement as to expenses.

Argued for the second party—The second party was entitled to take one-third of the moveable estate without collating his one-half share of heritage. The rule that the heir must collate applied only to an heir who took the whole heritage to the exclusion of all others. This was the natural inference from the fact that all the institutional writers always spoke of "the heir"—Erskine, iii, 9, 3; Bankton, iii, 8, 28. Here the second and third parties each represented or derived their rights from an heir portioner—*cf.* Stair, iii, 5, 11. These heirs portioners had already shared the estate, so that there was no room for collation within the circle of their representatives. In fact the *ratio* for collation was absent in the case of heirs portioners, collation being the price which the heir had to pay for the privilege of succeeding to moveables, whereas heirs portioners succeeded to moveables as part of their *portio legitima*—see *Gilmour* v. *Gilmour*, December 13, 1809, F.C. The circumstances in *Balfour* v. *Scott*, 1787, M. 2379, were quite different (heir succeeding under destination, etc.), and the expressions of opinion in Bell's Prin. 1911, and in *Anstruther* v. *Anstruther*, January 20, 1836, 14 S. 272, in so far as of any value, were only applicable to a case like *Balfour*. The case of *Turner and Others* v. *Couper and Others*, November 27, 1869, 8 Macph. 222, 7 S.L.R. 130, was adverse but should be reconsidered on this point, the case having really turned on a different question.

Counsel for the third party was not called upon.

LORD ARDWALL—We had a very able and ingenious argument from Mr Hamilton in this case on behalf of the second party; but having considered all that he has submitted to us, I do not think that the questions here put are difficult of solution. On the contrary, I think, both on principle and authority, it is clear that we must answer the first question in the negative and the second question in the affirmative.

Mr John Logan, who was a solicitor and town clerk of Wishaw, died intestate on 24th June 1906, and at the date of his death his heirs in heritage were his nephews Andrew M'Lennan, the second party to this case, and John Logan Smith, and his next-of-kin were these two nephews and his niece, who is the third party in this case, daughter of Mrs Smith.

Now, in that position of matters, I think it is clear that the ordinary rule of collation must apply, namely, that although the heritage of a person who has died intestate goes to his heir and the moveables to his next-of-kin, the heir, if he is one of the next-of-kin, may throw the heritage to which he succeeds as heir into the common stock and insist upon receiving an equal share of the composite estate, comprising both heritage and moveables; but if he does not choose to collate he has no right to take any part of the moveable estate. That is the undoubted rule where there is only one heir, and I am unable to see how in principle it matters in the very least that instead of there being only one heir in heritage there are two or more persons who are entitled to that character, and as such entitled to take shares of the heritage of a deceased person.

Mr Hamilton's argument was founded on the position of the mothers of the second and third parties, his contention being that as they—had they survived their brother the intestate—would have been entitled to share equally both the heritage and the moveables, then their descendants *per stirpes* were in a similar position as regarded heritage, and that consequently the rule above referred to did not apply. I cannot accept this argument. The reason why the rule does not apply and never can apply to the case of heirs portioners who are also next-of-kin is because they are all heirs in heritage and are also the only heirs in movables, and there is no person with whom they can collate. They possess the characters of heirs-at-law and next-of-kin in their own persons. Therefore there is no room for the application of the law of collation at all. But a different state of matters exists in the present case, for while two of the next-of-kin are the intestate's heirs in heritage they are not his only next-of-kin, because the third party also possesses that character. Accordingly if the second party desires to share the moveable estate of the deceased with the next-of-kin, he must, in conformity with the said rule, collate his share of the heritage.

The question raised in this case is I think decided by authority. In the first place there is the case of *Anstruther*, 14 Shaw, p. 282, where in the course of a long opinion of high authority, delivered as it was by the Lord President and Lords Balgray, Gillies, Mackenzie, Corehouse, and Fullerton, certain propositions were laid down with regard to the persons who were entitled or bound to collate; and the third and fourth propositions were these—"3. In the case of heirs portioners being themselves exclusively next-of-kin there cannot be collation, for they are all heirs and all executors. 4. Heirs portioners being in the same degree of kindred with others not heirs portioners, the former claiming a share of the moveables are bound to col-

late with the latter." Now it seems to me that this fourth proposition applies directly to the present case.

But the matter does not rest there; for in the case of *Turner* v. *Cooper and Others*, reported in 8 Macph. p. 222, Lord President Inglis says this—it was a case under the Moveable Succession Act 1855—"If the statute does not apply to the case, it seems to me that all the difficulty raised by this special case is removed. In that event the common law says quite unmistakably that the heirs in heritage, whether the heir be a single heir or whether they be heirs portioners, cannot take a share of the moveable estate along with the other next-of-kin without collating the heritage. I do not think it is suggested that that rule does not apply equally to heirs portioners as to a single heir, and here we have Mrs Turner, Mr Robert Couper, and Mr Thomas Macdonald taking as the three heirs portioners of the intestate and not offering to collate. The consequence is, I think, we must answer the first question in the negative." The first question put in that case was whether Mrs Turner, although one of the three heirs portioners and taking a third of the heritable estate, was also entitled as one of the next-of-kin to a share of the residue of the moveable estate?

It appears to me that the above opinion precisely covers the case we have here. But Mr Hamilton, with some ingenuity, tried to get round it by saying that, while it was not suggested in that case that the rule does not apply equally to heirs portioners as to a single heir, it is suggested by him now for the decision of the Court. But I think the phraseology of the Lord President's opinion goes to show that not only was the suggestion not made, but that he would have been very much surprised if it had been made. At all events I think that the decision is a distinct authority for the proposition that whether there is only a single heir in heritage or whether there are heirs portioners, the rule applies that they can only share in the moveable estate of a deceased intestate on the condition of collation in every case where there are other persons possessing the character of next-of-kin.

The LORD JUSTICE-CLERK and LORD LOW concurred.

LORD STORMONTH DARLING was absent.

The Court pronounced this interlocutor—

"Answer the first question of law therein stated in the negative, and the second question of law therein stated in the affirmative: Find and declare accordingly and decern: Find the third parties to the special case entitled to their expenses against the second party."

Counsel for the First Parties—Fenton. Agent—D. Hill Murray, S.S.C.

Counsel for the Second Party—Hamilton. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Third Party—Kennedy, K.C.—M. P. Fraser. Agent—D. Hill Murray, S.S.C.

Wednesday, January 15.

SECOND DIVISION.

CONOLLY *v.* NORTH BRITISH RAILWAY COMPANY.

Expenses—Jury Trial—New Trial — Expense of First Trial— What Included.

The expenses of discussing a rule for a new jury trial form part of the expenses of the trial sought to be set aside.

Earl of Fife v. *Duff and Others*, March 3, 1827, 5 S. 524 (n. ed. 492), *followed.*

Thomas Conolly brought an action of damages for personal injury against the North British Railway Company. A jury awarded him £160 of damages. On the motion of the defenders the Second Division allowed a new trial, which resulted again in a verdict for the pursuer and an award of £75 of damages. The defenders again moved for a rule, which was granted, but the Second Division, after the hearing, refused to allow a third trial, and pronounced this interlocutor—"The Lords having heard counsel for the parties on the rule granted by the previous interlocutor, Refuse the said rule, of consent apply the verdict of the jury, and in terms thereof decern against the defenders for payment to the pursuer of the sum of £75 sterling: Find him entitled to expenses, except the expenses of the first trial, and remit the same to the Auditor to tax and report."

The Auditor allowed the pursuer the expenses incurred by him in connection with discussing the rule which resulted in the first trial being set aside.

The defenders, in a note of objections to the Auditor's report, objected to the allowance of these expenses, and contended that they formed part of the expenses of the first trial—*Earl of Fife* v. *Duff and Others*, March 3, 1827, 5 S. 524.

LORD JUSTICE-CLERK — I think these expenses (except, of course, the expenses which Mr Dickson has given up in connection with precognitions) should not be allowed. These are expenses connected with the first trial, and although the word trial expresses generally the idea of going to a verdict, and getting the verdict of a jury, we all know that a verdict has no weight whatever except in so far as it is applied by the Court, the Court having power if they see fit not to apply it on certain grounds, they having a discretion to judge whether the jury have gone so far wrong in their verdict, either in fact or law, that a new trial ought to be granted on the ground that the verdict was either contrary to evidence or contrary to law. I take that to be part of the proceedings of the first trial, and until that has been done nothing effective has been done in the original trial at all. To say that these expenses, which resulted in the pursuer being compelled to enter upon a new trial, are expenses connected with the new trial, seems to me to be