minister may from time to time, with the consent of the presbytery and of the heritors as hereinafter provided, make application to the Court by summary petition for authority to feu his glebe, or any part thereof . . . ." Section 6—"Previous to making any such application the minister shall intimate his intention so to do to the presbytery . . . . and if the presbytery are of opinion that it would be for the interests of the benefice that the glebe should be feued . . . . they shall signify their consent to such application, subject to such conditions, if any, as they think necessary or advisable, by a certificate to that effect . . . ." Section 7—"Upon such certificate being granted the minister shall call a meeting of heritors . . . ." Section 8—"At that meeting a copy of the proposed application to the Court shall be submitted to such meeting; and if approved of by two-thirds in value of the heritors of such parish, the clerk to the heritors shall grant a certificate to that effect under his hand to the minister."

The Rev. William Dundas, B.D., minister of the parish of Carriden, presented a petition in which he craved authority to feu his glebe. The application was subsequently restricted to a certain part of the glebe lands, and a remit was made by the Court to the Clerk of Teinds. The Clerk having reported that he had revised and adjusted the form of feu-charter, so far as applicable to the portion of the glebe to which the petition was now restricted, and that neither the presbytery nor the heritors imposed any conditions in their consents to the application, the petitioner applied to the Court to grant the authority craved, and to approve of the draft feu-charter as revised and adjusted.

Appearance was made for James Hope Lloyd Verney of Carriden, one of the heritors of the parish, whose mansion-house adjoined the glebe, who moved the Court to insert in the feu-charter a prohibition against the sale of exciseable liquors and ice-cream on the portion of the glebe proposed to be feued, and cited *Boyd* July 17, 1882, 19 S.L.R. 828. It was stated for the minister that he had no objection to the insertion of the suggested prohibition in the feu-charter.

The opinion of the Court was delivered by

LORD PRESIDENT—We consider that the case quoted—*Boyd*, 19 S.L.R. 828—shows that it is within the power of the Court to allow restrictive conditions to be inserted in a feu-charter, and we need not distinguish between restrictive conditions of one kind or another. Such conditions would not be inserted *ex proprio motu* of the Court, nor on the suggestion of a single heritor, but if they are suggested by the heritors as a whole the Court would not refuse. Mr Chree has quite frankly admitted that his client's suggestion has not at present the support of two-thirds of the heritors. It would be going beyond what we ought to do to insert *de plano* at his suggestion a restrictive condition. So we shall continue the case to give the other heritors and also the presbytery an opportunity of lodging minutes of *non renitentia*.

The Court continued the application.

Counsel for the Petitioner—J. B. Young. Agents—Purves & Simpson, S.S.C.

Counsel for the Respondent — Chree. Agents—J. C. Brodie & Sons, W.S.

COURT OF SESSION.

Friday, July 1.

FIRST DIVISION.

MURRAY'S JUDICIAL FACTOR *v.* MELROSE AND OTHERS.

Succession — Testament — Construction — "Nearest of Kin according to Law"— Intestate Moveable Succession (Scotland) Act 1855 (18 *and* 19 *Vict. cap.* 29).

Held that "nearest of kin according to law" does not signify those who on intestacy would succeed as heirs *in mobilibus* under the Intestate Moveable Succession (Scotland) Act 1855, but those who would have succeeded as heirs *in mobilibus* at common law, *i.e.*, before the passing of that Act.

A Special Case for the opinion and judgment of the Court was presented by David Todd, judicial factor on the trust estate of the deceased Thomas Murray, farmer, Braidwood, Penicuik, *first party;* Mrs Helen Murray or Melrose, a sister of the testator, *second party;* David Murray, Glenfalloch, Pukeran, New Zealand, and others, being four nephews and a niece of the testator, and the husband of the niece as her administrator-in-law, *third parties;* Agnes Robb and others, being (*a*) two nephews and four nieces of the wife of the testator, (*b*) the husband of one of the said nieces, and (*c*) the representatives of two other nephews of the wife, who had survived the testator but had since died, *fourth parties;* Thomas Brown and another, being a grand-nephew and a grandniece of the wife of the testator, *fifth parties;* Mrs Minnie Brown or Sharp, another grandniece of the wife of the testator, and her husband as her administrator-in-law, *sixth parties.*

Thomas Murray, farmer, Braidwood, Penicuik, the testator, died on 16th January 1909, predeceased by his wife Mrs Joanna Forsyth or Murray, who died on 26th May 1906 leaving no property. They left a mutual disposition and settlement dated 10th December 1862, and codicil thereto dated 6th February 1878, which were both recorded in the Books of Council and Session 9th February 1909. There was no nomination of executors in the said mutual disposition and settlement and codicil, and David Todd, the party of the first part, was appointed judicial factor on the trust estate, conform to interim act and decree in his favour

dated 17th February and extracted 11th March 1909.

The mutual disposition and settlement provided—"We, Thomas Murray, farmer, Eastside, parish of Penicuik, and Mrs Joanna Forsyth or Murray, spouses, for the love, favour, and affection which we have and bear to each other, and for other good causes and considerations, have mutually agreed to execute these presents in manner under written—Therefore I, the said Thomas Murray, do hereby give, grant, assign, dispone, and convey from me, my heirs and successors, to and in favour of the said Mrs Joanna Forsyth or Murray, my spouse, in case she survive me, in liferent, for her liferent use only, and to and in favour of the children to be born of the marriage between us, equally among them, share and share alike, in fee, but subject to the power of division among them hereinafter written, and failing our children, then to the extent of one-half to and in favour of my own nearest of kin according to law, and to the extent of the other half to and in favour of the nearest in kin of the said Joanna Forsyth or Murray according to law, heritably and irredeemably, All and whole my whole means and estate and effects, heritable and moveable, real and personal, wherever situated or addebted, which shall belong or be addebted to me at the time of my death."

By the codicil it was provided with regard to Robert Murray, a brother of the testator—"Therefore we jointly and severally, and with mutual consent and assent, do hereby revoke and recall the general dispositions and conveyances of our said respective estates, heritable and moveable, and destinations thereof, as contained in the foregoing deed, in so far as the same are conceived in favour of or would give any right or claim of succession to the said Robert Murray or his issue, or other heirs or successors whomsoever; and we hereby expressly exclude him and them from all share of or participation in our said means and estate, heritable and moveable, and direct and declare that the nearest of kin of me the said Thomas Murray, referred to in the said deed, shall be held and construed as meaning my nearest of kin exclusive of the said Robert Murray and his foresaids."

Another brother of the testator, viz., James Murray, had not been heard of for fifty years, and a petition to presume his death was pending.

The testator's whole estate. after payment of debts, Government duties, and expenses was estimated to amount to just over £2000.

The second party *maintained* that she and her brother Robert G. Murray were the sole surviving "nearest of kin according to law" of the deceased Thomas Murray, and that as her said brother had been excluded by the codicil of 1878 from any participation in deceased's estate, she was entitled to one-half of the whole estate, or alternatively, if her brother James Murray should be found to have survived Mr Murray, then to one-quarter thereof.

The fourth parties maintained that they were or represented the sole nearest in kin of the said Mrs Murray according to law who survived Mr Murray, and that as such they were entitled among them to one-half of the whole estate.

The third parties maintained that on a sound construction of the said mutual disposition, settlement, and relative codicil, the words "nearest of kin according to law" included the whole parties who would have been entitled to succeed to the moveable estate of the deceased Thomas Murray had he died intestate, and that they were entitled to receive the share of the deceased's estate which would have fallen to their father as one of the nearest of kin had he survived. They therefore maintained that they were entitled to one-quarter of the whole estate, or alternatively, if the said James Murray survived Mr Murray, or having predeceased him had left issue, to one-sixth thereof.

The fifth and sixth parties maintained that on a sound construction of the said mutual disposition, settlement, and relative codicil, the words "nearest in kin" of Mrs Murray "according to law" meant her heirs *in mobilibus*, and that they, as among those, were entitled to receive the shares of the estate which would have fallen to their respective fathers had they survived Mr Murray.

The *questions of law* stated for the opinion and judgment of the Court were—"(1) Upon a sound construction of the said mutual disposition and settlement and relative codicil, do the expressions 'nearest of kin according to law' and 'nearest in kin . . . according to law' confer a right of succession only upon those who as at the death of Mr Murray were the surviving next-of-kin of Mr and Mrs Murray respectively? Or (2) Upon such construction, do the said expressions confer a right to participate in the succession by representation upon the issue of those next-of-kin of Mr and Mrs Murray respectively who predeceased Mr Murray."

Argued for the first, third, fifth, and sixth parties — They admitted that had the words "nearest of kin" or "nearest in kin" stood alone they could not have been interpreted as meaning heirs *in mobilibus* — *Young's Trustees* v. *Janes*, December 10, 1880, 8 R. 242, 18 S.L.R. 135; *Gregory's Trustees* v. *Alison*, April 8, 1889, 16 R. (H.L.) 10, 26 S.L.R. 787; M'Laren on Wills, p. 765, section 1394—but they did not stand alone, but were followed by the interpretation "according to law"; that was a short way of expressing "according to the law of moveable succession in Scotland," which was the interpreting expression in *Rutherford's Trustees* v. *Dickie*, 1907 S.C. 1280, 44 S.L.R. 960, and also was similar to the interpreting expression "who would have been entitled to succeed to my moveable estate had I died intestate" in *Tronsons* v. *Tronsons*, November 21, 1884, 12 R. 155,

22 S.L.R. 125; and consequently nearest of kin so qualified fell to be interpreted as heirs *in mobilibus*. The contention on the other side made the words "according to law" superfluous and meaningless.

Argued for the second and fourth parties—There was no difference between "nearest of kin," and "nearest of kin according to law." It was not necessary in a testamentary deed to show that no words were superfluous, but it might be that they were added because of the distinction, referred to by Lord President Inglis in *Murray and Others* v. *Gregory's Trustees*, January 12, 1887, 14 R. 368, at 374, 24 S.L.R. 266, between nearest in the line of legal succession and nearest in blood.

LORD KINNEAR—This is a very short point, and has been put before us with very great clearness. The testator leaves his whole means, estate, and effects to his wife in liferent in a certain event which did not happen, and to the children of the marriage in fee. No children ever came into existence—or at anyrate none were left at the death of the testator—and failing them the testator left his estate to the extent of one-half to his own nearest of kin according to law, and to the extent of the other half to his wife's nearest in kin according to law.

Now it is conceded that there is no question as to the meaning of the words nearest of kin or next-of-kin, for the two phrases are identical in meaning, and that if they had not been qualified by the addition of the words "according to law," the gift must have taken effect in favour of the persons who would have succeeded as heirs *in mobilibus* at common law before the passing of the Intestate Moveable Succession (Scotland) Act 1855.

The practical effect of that would be that the second party and the fourth parties would succeed — that is to say, that the will would take effect to the extent of one-half in favour of a sister of the testator to the exclusion of nephews and a niece, the children of a deceased brother, and to the extent of the other half in favour of nephews and nieces of his wife to the exclusion of a grandnephew and grandnieces, the children of deceased nephews.

There is no question that if the words nearest or next of kin had stood alone they must have been interpreted in that sense. But it is said that the introduction of the words "according to law" gives a different significance to nearest of kin. It has already been explained in the case of *Young's Trustees* v. *Janes* (10th December 1880, 8 R. 242), by Lord President Ingls, that the Intestate Moveable Succession Act, which introduced changes into the law of moveable succession, made no change in the technical signification of the words next of kin. His Lordship points out, first, that "the representatives of a nephew who predeceased the survivor of the spouses were not at that date nearest of kin in any sense of the term. They were not nearest in blood, because they were a degree further off than the nephew who survived. Nor were they nearest of kin at common law, because by the common law of Scotland there was no representation in moveables. . . ." Then he says that the Act makes no difference, because the only persons who are there called next-of-kin are the next-of-kin by the common law, and not only so, but that by the proviso annexed to the first section there is a sharp distinction taken between those who come in as representatives and the next-of-kin. Therefore, as the Act uses the words in exactly the same sense as they bear at common law it makes no difference whether the reference in the words "according to law" be taken to be to common law or to the Intestate Moveable Succession Act. In each case the words next of kin refer to persons in the same degree of relationship—to wit, the nearest degree—and do not include also other persons in a more remote degree.

If I had had any doubt, it would have been removed by the observation of Lord Watson in *Gregory's Trs.* v. *Alison* (8th April 1889, 16 R. (H.L.) 10, at p. 13), where his Lordship, after referring to *Young's Trs.* v. *Janes*, goes on—"One thing is clear, that the expression is no longer equivalent to legal heirs *in mobilibus*, inasmuch as it does not include all the members of that class. It appears to me, however, that in its legal sense the expression is still applicable to those members of the class who would have been the sole heirs before the passing of the Act, and are now preferably entitled to administer the succession of the intestate." I cannot see any difference between saying that an expression "in its legal sense" has a certain meaning, and saying that it has that meaning "according to law."

I think we must answer the first question in the affirmative, and it follows that the answer to the second question is in the negative.

LORD SALVESEN—I entirely agree. I am quite unable to accept the argument that we must construe "nearest of kin according to law" as meaning heirs *in mobilibus* according to the rules of intestate succession, because such heirs may include persons who are not in the legal sense next-of-kin. I think the sense of the words is satisfied by holding that "according to law" means "in the legal sense of that term."

LORD DEWAR concurred.

The LORD PRESIDENT and LORD JOHNSTON were absent.

The Court answered the first question of law in the case in the affirmative and the second question in the negative.

Counsel for the First, Third, and Fifth Parties—Howden. Agents—Hill & Dalziel, S.S.C., and Robert Miller, S.S.C.

Counsel for the Sixth Parties—Howden. Agent—Mal. Graham Yool, S.S.C.

Counsel for the Second Party—J. R. Christie. Agent—D. C. Oliver, Solicitor.

Counsel for the Fourth Parties—J. R. Christie. Agents—Russell & Dunlop, W.S., and G. M. Wood & Robertson, W.S.

Thursday, July 7.

SECOND DIVISION.

[Sheriff Court at Glasgow.

CUNNINGHAM *v.* M'NAUGHTON & SINCLAIR.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Sched. II,* 9—*Recording of Verbal Agreement—Bar—Finding by Medical Referee mutually agreed upon that Workman has Recovered—Stoppage of Payment thereafter.*

An injured workman received compensation under the Workmen's Compensation Act 1906 in virtue of an unrecorded agreement. The employers discontinued the weekly payments on the ground that the workman had recovered. A medical referee to whom the parties referred the question reported on 31st March 1909 that he was quite fit for his former duties or any ordinary work. On 12th August 1909 the workman lodged a memorandum of the agreement with the sheriff-clerk to be recorded, and the employers objected to the recording in respect of the medical report.

Held that the application for recording of the agreement was barred by the reference to the medical man and his award thereon, and that the memorandum ought not to be recorded.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58)—*Review—Proof of Recovery—Question of Fact or Law—Appeal.*

An injured workman received compensation under the Workmen's Compensation Act 1906 in virtue of an unrecorded agreement down to 25th March 1909, when his employers stopped payment on the ground that he had recovered. On 31st March 1909 a medical man to whom the parties had referred the question of the workman's recovery reported that he was quite fit for his former duties or any ordinary work. In an application by the employers for review, the arbitrator found in fact that the workman was fit to resume his former work, or to undertake any other form of labour conducted on the level of the ground; that in the meantime it would not be safe for him to climb ladders or steps (as his duties occasionally involved his doing), since from want of use, combined with the effect of the accident, his left leg was weaker than the right; that the best treatment for the left leg was the immediate resumption of such work as the workman was capable of. On these findings the arbiter ended the compensation.

Held (following *Anderson* v. *Darngavil Coal Company Limited,* 1910 S.C. 456, 47 S.L.R 342) that the question whether the workman had or had not recovered was a question of fact, and that the arbiter's finding could therefore not be interfered with.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), as applied to Scotland by section 13 and Schedule II., 17, enacts, Schedule II, 9—"Where the amount of compensation under this Act has been ascertained . . . by agreement, a memorandum thereof shall be sent in manner prescribed by [Act of Sederunt] . . . . by any party interested to the [sheriff-clerk], who shall, subject to such [Act of Sederunt], on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the memorandum shall for all purposes be enforceable as a [recorded decree-arbitral].'

In an arbitration under the Workmen's Compensation Act 1906 in the Sheriff Court at Glasgow, between R. C. Cunningham and M'Naughton & Sinclair, printers, 29 Cadogan Street, Glasgow, the Sheriff-Substitute (BOYD) granted warrant to record a memorandum of agreement between the parties, lodged by Cunningham, and at the request of M'Naughton & Sinclair stated a case for appeal.

In another arbitration between the same parties, and heard on the same date, the Sheriff-Substitute ended the compensation payable under the agreement, and at the request of Cunningham stated a case for appeal.

The first Case set forth—"On 12th August 1909 the respondent Cunningham lodged with the Sheriff-Clerk of Lanarkshire at Glasgow a memorandum of agreement purporting to set forth an agreement between the respondent and the appellants, said memorandum being in the following terms:—'The claimant claimed compensation from the respondents in respect of personal injuries to his left leg, some of the muscles of which were lacerated and destroyed, caused by accident in the employment of the respondents at their business premises at 27 Cadogan Street, Glasgow, on the 26th day of May 1908.

"'The question in dispute, which was the amount of the compensation to be paid by the respondents to the claimant, was determined by agreement.

"'The agreement was made on or about the 2nd June 1908, and was as follows:—The claimant agreed to accept the sum of 14s. per week as compensation due to him by the respondents under the Workmen's Compensation Act 1906 during the period of his disablement by said accident, and the respondents agreed to pay the said sum of 14s. per week to the claimant during said period. The respondents have paid said sum of 14s. per week to the claimant down to the 26th day of March 1909.