

and if the directors had re-allotted the shares to the remaining shareholders, and this had been confirmed at general meetings, I think the transaction could not have been challenged on either side. The objection in this way becomes, *inter socios*, one as to procedure merely, not to substance, and is therefore one which acquiescence or ratification may cure.

The question whether it has been ratified is very narrow, but if it were capable of ratification I think it was ratified. The sellers were removed from the register in 1876, and this in so limited a partnership must be held to have been notorious. The sale was duly reported to the general meeting of 1877, and was again formally approved of in 1878, at a meeting where all the shareholders excepting three were represented. In the meantime the sellers, who are trustees under a *mortis causa* settlement, have made their arrangements on the faith of this unchallenged bargain, and the shareholders took the chance and the risk of the rise or fall of the value of the shares. I think they cannot now repudiate it, and as this company is solvent that is the only question we have to consider.

I think the substance of this article, although ambiguous both in expression and in its practical effect, has a most material bearing on this branch of the law as applied to this case. It gives the company a right to prohibit transfers outside the company, and gives the shareholders in substance a right of pre-emption. Now, the Companies Act of 1862 expressly provides in section 22 that the shares of such companies shall be transferable subject to the articles of association. But to my mind this power necessarily implies a power on the part of the company to purchase and hold its own shares, and although the words are misty enough, the inclination of my opinion is that the obligation to purchase is not laid on the individual shareholders who vote against the transferee, but on the company. Some one, a body of men, must become the transferee. It would be a strong provision to compel an unwilling shareholder to take more shares than he ever undertook to take, and therefore I conclude that the company itself were to hold them.

The Court refused the prayer of the petition, with expenses.

Counsel for Petitioner—Guthrie Smith—Pearson.
Agents—Boyd, Macdonald, & Co., S.S.C.

Counsel for Respondents—Balfour—Rankine.
Agents—Maclachlan & Rodger, W.S.

Saturday, October 26.

SECOND DIVISION.

[Sheriff of Perthshire.

WEBSTER *v.* SHIRESS (WEBSTER'S
EXECUTOR).

Process—Sheriff—Competition for Office of Executor.

Held that in a petition for decerniture of an executor any one may come forward with a competing petition before confirmation, and that neither reduction of nor reponing against a decree is necessary.

Executor—Nomination and Confirmation—Next-of-Kin—Moveable Succession Act 1855 (18 Vict. c. 23)—Act 4 Geo. IV. cap. 98.

W died intestate and unmarried; her father thereupon was decerned executor-dative *qua* next-of-kin, but was not confirmed. Subsequently he died leaving an executor, who in his turn was decerned executor-dative to W *qua* executor-nominate of her father. In a petition for recall of that decree-dative, at the instance of W's brother as one of her "next-of-kin," held that as both parties were equally entitled to the succession they must both be conjoined in the administration.

Observed (*per curiam*) that the term "next-of-kin" does not denote any special degree of propinquity, but merely that which is next in the order of succession.

This was an appeal from the Sheriff Court of Perthshire in a petition presented by Edward Webster, residing at Dollerie, near Crieff, against William Shiress, solicitor, Brechin, executor-nominate of the late Lieutenant-Colonel J. C. Webster, lately residing at Portobello. The pursuer prayed the Court to recall a decree-dative granted by it in favour of the defender as executor-dative of Sophia Webster, sometime residing at Dollerie, near Crieff, *qua* executor-nominate of the said James Carnegie Webster, dated the 31st day of August 1877; and to decern the pursuer executor-dative *qua* one of the next-of-kin to the said Sophia Webster. In his condescendence he set forth that his sister Sophia died at Dollerie on 17th September 1876, intestate, and that he was her eldest surviving brother and one of her "next-of-kin." She had been survived by her father Lieutenant-Colonel Murray, and by several brothers. Her father had been decerned executor-dative *qua* next-of-kin to her on 27th April 1877, but it appeared that by a clerical error Sophia had been named Euphemia in the petition for appointment. Colonel Webster died on 19th July 1877, and by will, dated June 1, 1877, had appointed Mr Shiress, the defender, his executor. He had died without obtaining confirmation as his daughter's executor, and on 31st August following Mr Shiress had been decerned her executor-nominate in the terms mentioned above.

The pursuer pleaded, *inter alia*—" (1) The said James Carnegie Webster not being one of the next-of-kin of the said Sophia Webster, the defender was not entitled to be appointed executor-dative *qua* next-of-kin of the said deceased Sophia Webster. (3) The pursuer, as one of the next-of-kin of the said Sophia Webster, ought to be decerned *qua* such. (6) The said Colonel Webster being father of Sophia, was not among her next-of-kin while collaterals were alive. (13) A petition for recall of an improper decerniture having been always competent in the Commissary Court in similar circumstances to the present, and the Sheriff Court (Scotland) Act 1876 having transferred the powers of commissaries to the Sheriffs, your Lordship is now entitled to exercise said power of recall."

The defender pleaded, *inter alia*—" (1) The action is incompetent in so far as it prays for the recall of the decree-dative pronounced in favour of the defender on 31st August 1877, and subsequently extracted. This Court cannot recall its own extracted decree or any of its decrees after seven days from their date, except under the provisions

and in the manner provided by section 14 (subsec. 2) of the Sheriff Courts (Scotland) Act 1876, and these provisions not having been followed, the present action should be dismissed, with expenses. (2) Sophia Webster having died intestate and without leaving issue, her surviving father had right to one-half of her moveable estate, and was her nearest in kin, and entitled to obtain confirmation of her estate as such (Statute 18 Vict. cap. 23, sec. 3). (3) The defender, as executor of Lieutenant-Colonel Webster, the father of Sophia Webster, has by the Statute 4 Geo. IV. cap. 98, the same right to obtain confirmation of the estate of Sophia Webster that belonged to Colonel Webster himself."

The Sheriff-Substitute (BARCLAY) repelled the defender's first plea-in-law, and on appeal the Sheriff (LEE) adhered, adding this note:—

"*Note.*—An able argument was submitted on behalf of the defender, to the effect that under the 14th clause of the Sheriff Court Act 1876 the only competent form of obtaining the recall of the decree-dative referred to in the petition is by presenting to the Sheriff a written note, as provided in subsection (2). But the Sheriff is of opinion that the provisions of that clause are not strictly applicable to a decerniture of the kind in question. They apply to decrees in absence pronounced in actions where appearance may be entered and defences lodged; and although it seems to have been held competent in the case of *Macpherson* to repon a party against such a decerniture, the Sheriff is satisfied that the form most consistent with Commissary Court practice, under the Act 21 and 22 Vict., cap. 56, is to present a counter-petition, and to accompany or conjoin with the same a petition for recall of the previous decerniture. This seems to be contemplated in the 44th clause of the Sheriff Court Act of 1876, and it is the form of which Mr Alexander gives a style in his work on Commissary Court Practice, p. 189.

"It was also urged that an Inferior Court cannot recall its own decrees, and that on this ground also the present petition is incompetent. But in commissary matters the Sheriff Court is not properly an Inferior Court, but a Court of privative jurisdiction. There may be cases in which it is necessary to proceed by reduction. The case of *Dowie v Barclay* (9 M. 726) affords an illustration of such a case. The allegation in that case was that the commissary of Kinross-shire had decerned an executor to a defunct person not domiciled within his jurisdiction, and that the party so decerned executor was not entitled to the office. It was said that the defunct was domiciled in the county of Edinburgh, As the commissary of Edinburgh could not recall the decree erroneously given by the commissary of Kinross, reduction was necessary to enable the petitioner to proceed. But there is no difficulty of that kind in the present case." &c.

The Sheriff-Substitute (BARCLAY) thereafter pronounced an interlocutor recalling the decerniture in favour of the defender, and decerning Edward Webster executor-dative *qua* one of the next-of-kin to his sister. He added the following note:—

"*Note.*—The solicitor for Mr Shiress took no plea on the decerniture obtained by the father in April 1877, but took his stand solely on the Statute 4 Geo. IV. c. 98 (1823). According to the general law of succession at the time of the

passing of that statute, as it still is descendants *first* succeed to intestate succession, *next* collaterals, and *lastly* ascendants, and *finally* the Sovereign. There was at one time a distinction between heritage and moveable succession. In the former there was representation, and in the latter, unless the next-of-kin confirmed to the succession, it did not vest. To remedy this, and to introduce representation in moveable succession, the Statute 1823 was passed. Before the Statute 18 Vict. c. 22, 1855, a father could not have interest in the moveable succession of his children, and so could not have competed with the brothers and sisters. He could not have obtained decerniture unless descendants and collaterals had all failed. The Act 1855 gives a father one-half of the moveable succession of a child dying intestate and without issue. But this is merely a claim of debt. There are no words implying he is entitled to the office of executor as next-of-kin in exclusion of collaterals. The solicitor for Mr Shiress pled his case much on the greater interest of his client over the collaterals. But it is not interest that confers the office. Had there been only one brother or one sister the interest would then have been equal, and it will not make a general rule subject to mere accidental circumstance. By the first clause of the Statute 1855 the next in kin is declared to have exclusive right to the office, in preference to the children or other descendants of any predeceasing next-of-kin, though it might be that this person so favoured might have a very small interest in comparison to the others entitled to share in the succession. The word 'kin' is not perhaps easy of being defined. It obviously has its root in 'kindred.' In general parlance it is confined to descendants and collaterals. A wife, however close the tie, takes office not as next of kin but *qua* *relict*. Those on the same platform take office as 'nearest in kin;' but if there be only one in the *stirps*, as 'next of kin.' But if the father is preferable to collaterals, he must take office either as one of the nearest or the next-of-kin, and he can only have the last denomination. If he is entitled to the office, then the mother, with less interest, is also entitled to the office as nearest or next-of-kin to a deceased son or daughter. It may be that the parents, failing collaterals, as creditors for their interest, may be entitled to the office, but just as a creditor is decerned *qua* creditor, the parents should be designated as *qua* father or *qua* mother, certainly not next or one of the nearest in kin."

On appeal the Sheriff (LEE) adhered.

The defender appealed to the Court of Session.

Authorities—Act 4 Geo. IV. c. 98; Erskine, iii. 8, 7; *Muir*, Nov. 3, 1876, 4 R. 74; *Dowie v Barclay*, March 18, 1871, 9 M. 726; Act 18 Vict. c. 23 (Intestate Moveable Succession Act, 1855); Sheriff Court Act 1876, sec. 44; *M'Pherson*, Feb. 2, 1855, 27 Jur. 149; *Bone v Morrison*, Dec. 21, 1866, 5 Macph. 240; *Dove Wilson* on Sheriff Court Practice, 474-5.

At advising—

LORD JUSTICE-CLERK—I cannot concur with the views of the learned Sheriffs in this case.

I am of opinion that if the father of the intestate in this case were still alive he would have been entitled to be conjoined in the confirmation along with the respondent under the pro-

visions of the 3d section of the Act 18 Vict. cap. 23, and that the petitioner, as his general representative, is now entitled to be so conjoined in his place in terms of the Act 4 Geo. IV. c. 98.

As to the first, I have heard no reasoning against it. As the father succeeded to half the moveable estate, he has half the interest in the succession, and according to the universal rule in intestate moveable succession is entitled to a share of the administration. This rule is not now a matter of controversy. It was expressly recognised both by the Lord President and Lord Deas in the case of *Muir*, which has been referred to; and so clear is this element in the practice of the Court that even where the interest arises under a foreign law inconsistent with our own it will prevail, although the party claiming confirmation could not have obtained it according to our own law—See the case of the *Marchioness of Hastings*, Feb. 12, 1852, 14 D. 489, in which a mother was confirmed in the character of next-of-kin to her daughter, who died domiciled in England, she having obtained letters of administration in England.

In entire conformity with this rule, in the first clause of the Intestate Moveable Succession Act 1855, the Act, while giving the interest in the succession to the children of next-of-kin who had predeceased the intestate, thought it necessary to exclude the operation of this rule by an express provision. No such qualification is attached to the father's right, and therefore I conclude that no such result was intended.

An attempt was made in the debate—and the view finds support in the opinion of the learned Sheriff-Substitute—to represent the right of the father under the 3d clause of the statute of 1855, as one not of succession but of debt. But there seems to be no room for this view. There can be no relation of debtor and creditor between the father and the collaterals in this matter. The father succeeds to one-half of the moveable estate; to that half the collaterals do not succeed, for the statute says the father shall be preferred to—in other words, shall exclude—them. This share vests absolutely in the father *a morte testatoris* by a title of succession, and the collaterals have no more right or interest in it than the father has in the other half. By the old law the collaterals were preferred to the ascendants; by this law the immediate ascendant, as regards half the succession, is preferred to the collaterals. I presume that if the father had been preferred to the whole, and the collaterals had been entirely excluded in competition with him, no such theory could have been attempted. If the father does not succeed to this share, then the collateral succeeds—that is, he is preferred to the father—while the statute says that he shall be postponed to him. I cannot hold that the father's rights under this section are those of a creditor, and not those of an heir *in mobilibus*, and can find no ground for the plea.

If, then, the father would have been entitled to be confirmed during his life, does the right transmit to his representatives? In other words, does the case fall under the provisions of 4 Geo. IV. c. 98?

Now, this statute, in words, as I read it, deals with the right to confirmation, and says nothing directly about the vesting of the beneficial interest. It was not without some demur and

difficulty that in the case of *Mann v. Thomas*, Feb. 9, 1830, 8 S. 468, and of *Frith v. Buchanan*, March 3, 1837, 15 S. 729, the Court arrived at the conclusion that the intention of the statute, although not expressed in its words, was to vest the beneficial interest by survivance of the intestate, and they sustained the right of an assignee and an arresting creditor during the lifetime of the unconfirmed next-of-kin. Thus, the whole question in this branch of the inquiry is, Whether the beneficial interest in the succession vested in the father? for if it does that result only arises as a corollary deduced from the provisions of the statute relative to confirmation.

Now, I did not understand it to be disputed at the debate that the father's right of succession under this statute vested in him by the survivance of the intestate. It might have been assigned or arrested by a creditor. It never could have been intended that the right thus conferred should altogether finish by the father's death unconfirmed, and that the collateral, who is excluded, should in that event take all; and a little consideration of the true meaning of the enactment will show that it has no such result.

The intent and object of the Act Geo. IV. cap. 98, was to enable both the interest and the title of the heir *in mobilibus ab intestato* to vest *a morte testatoris*, and descend to representatives; and I read the expression "next-of-kin" to mean nothing whatever but the heir *in mobilibus ab intestato*. "The heirs entitled to moveable succession," says Mr M'Laren in his excellent Text Book, "are called next-of-kin" (i. 3.). The term has no other meaning in moveable succession. The law no doubt had at the date of the Act fixed a certain order in which propinquity should furnish the right of succession. The law might alter that order; it might provide that the half-blood should take along with the full blood. It might provide that in conformity with the law of England the mother should be of kin to her children, or it might provide, as in this case, that the father should share with collaterals. But in these cases, while the legal definition of heirs *in mobilibus* was altered, the operation of the statute would remain unaffected. When the heir *in mobilibus ab intestato* is once ascertained, the statute applies to him.

But in the case of the father even this view, sound as I think it, is unnecessary. The term "next-of-kin" does not denote any special degree of propinquity. When the statute passed it might denote descendants or collaterals or ascendants on the father's side, as the case might be, if the intestate had left none nearer. The descendants excluded the collaterals, and the collaterals excluded the father; but the father was not the less of kin to his children, and failing descendants or collaterals he was next-of-kin. The recent Act has made him next in succession along with collaterals; and therefore he is not only of kin, as he always was, but in a degree of propinquity which is now nearest or next in the order of succession. I can find no ground on which the operation of the statute can be refused effect.

It has been argued that if this view be sound as regards the father it must also be sound as regards the mother; and it is thought that the

expressions which fell from the Lord President in the case of *Muir* are opposed to these views. I think the principle on which these observations proceeded has been entirely misconceived. They are founded on the radical distinction between the case of the mother and the case of those who are by law of kin to her children, as she undoubtedly is not. She is not, like the father, legally of kin to her children in the matter of intestate succession. She has no place at all in the scale of propinquity. She has none even under the Act of 1855; for if the father survives she has no claim. This was the sole ground of the opinions delivered in that case. In the case of *Muir* the mother had no interest in the designation under which she might be confirmed, provided she was confirmed; and Lord Deas did not entirely coincide in the view of the Lord President. But it is quite clear that the judgment proceeded on considerations which have no possible bearing on the case now before us. What judgment the Court might pronounce if the same question as is presented in this case were to arise in the case of a mother we need not determine; but it was not determined in the case of *Muir*, which fixed nothing but a point of designation or nomenclature, and fixed it, as I think, correctly.

I propose that we should remit to the Sheriff to conjoin the parties to this suit in the confirmation.

LORD ORMDALE—Two points requiring consideration have been raised, and formed the subject of discussion at the debate in this case, the first being one of procedure or form of process, and the other involving the more general and important question, Whether a father, although he has no available interest in or claim on the intestate succession of his daughter except that conferred on him by the Statute 18 Vict. cap. 23, has right to the office of executor of that daughter as one of her next-of-kin, notwithstanding the existence of brothers of the daughter, who are undoubtedly entitled to participate in her moveable succession as her next-of-kin.

(1) From the nature and object of a process of executry it is obvious that neither reduction nor reponing is necessary to make room for a preferable claimant. The process commences by an application to the Sheriff as commissary, and public intimation of it is made, so as to give notice to all concerned that they may appear for their interests, and so long as it has not been finally settled who is entitled to the office of executor it is open to any one to come forward and claim to be preferred to the office either exclusively or jointly with another claimant or other claimants. So much for the question of procedure.

(2) And that a father is not in such a process entitled to be dealt with as next-of-kin, or one of the next-of-kin, to his daughter, there being surviving brothers, is clear, I think, from the recent case of *Muir* (4 *Rettie* 74), and the other authorities referred to in the report of that case. It is true that in the case of *Muir* it was a mother who claimed the office of executrix, and not a father, as in the present instance. But a mother is in blood equally related to her child with the father, and in *Muir*'s case the mother had under the Act of 1855 an interest in the moveable succession of her child, just as the father has in

in the present case. It may no doubt be said that prior to that Act, and independent altogether of it, a father, differing in this respect from a mother, might on the failure of descendants and collaterals have right to the office of executor of his child as his or her next-of-kin. But the father in the present case was not in that position, for here there were collaterals of the defunct who prior to the Act would have had right at common law to the office of executors *qua* next-of-kin. It is the Act of 1855 alone therefore which created the father's interest in the present case, just as it creates the mother's interest in the case of *Muir*. But really it is of very little moment how this point may be ruled in the present instance, as I concur with your Lordship in the same practical result, viz., that the proper course in the circumstances is to remit to the Sheriff as commissary to conjoin the appellant and respondent as executors of Sophia Webster, and to recall the interlocutors complained of so far as necessary to enable that to be done. This I observe was the course followed in the case of *Muir*.

LORD GIFFORD—I am quite of the same opinion. I think that since both parties here are equally entitled to the succession, both of them should be conjoined in the office of executor. That seems to me to be the true principle. I cannot come to the conclusion that anyone on whom the Act of 1855 conferred a new right is nevertheless to be excluded from the administrative office, even though the Act does not expressly include him. There is no reason for excluding a father who gets one-half the succession from one-half of the administration. I quite concur in the view adopted by your Lordships that, "next-of-kin" in a case of succession means those who take next.

The Court recalled the interlocutor appealed against, and remitted to the Sheriff to decern the pursuer and defender jointly executors-dative *qua* next-of-kin of the deceased Sophia Webster, and found neither party entitled to expenses.

Counsel for Pursuer (Respondent)—Trayner—Rhind. Agents—Begg & Murray, S.S.C.

Counsel for Defender (Appellant)—Kinnear—Moncreiff. Agent—W. J. Shirens, S.S.C.

Thursday, October 31.

SECOND DIVISION.

[Sheriff of Aberdeenshire.]

HARDIE v. LEITH.

Parent and Child—Illegitimate Child—Aliment—Right of Mother of an Illegitimate minor pubes to Sue for Aliment.

The mother of an illegitimate female child, born in May 1865, obtained decree for aliment against the reputed father till the child should be ten years old or able to maintain itself. In 1878 the mother raised a second action for aliment, claiming £5 yearly from May 1875 till May 1880, when the child would be fifteen, or till it should be able to support itself. *Held* (1) that the mother, *qua*