

of these cases the defender in his conscience must know that a decision in his favour would be a wrong decision. With that we have nothing to do. Our business is to do justice by applying the rules of evidence to the evidence before us. In this particular case I look in vain for any reasonable and substantial corroboration of the evidence of the pursuer. It is true that the defender admits that he had connection with the pursuer about two months after the date on which she founds. That is a kind of admission which cuts both ways. In this case I think that it is rather in favour of the defender that he makes such an admission, because it is plain that the pursuer never could have proved the acts of connection which the defender admits, and the admission also goes to explain what took place between the families when the matter of the defender's marriage to the pursuer was mooted. I quite agree that where a defender admits an act of connection before the date on which the pursuer founds she requires very little corroboration to bring home to him the act which she alleges. It is different when the admission refers to a date after the date on which the pursuer founds. In that case she requires to bring forward substantial corroboration of her evidence, and this, I think, the pursuer here has failed to do. There is no evidence of any previous familiarities between the parties, and I have difficulty in holding that the stovehouse in which the pursuer alleges the act of connection took place was a suspected place. Mr Brown founded on evidence to the effect that in September the pursuer told her sister about the connection which she alleges in the previous March. I think that that is not competent evidence, for it is evidence as to a statement made, as I gather it was made, outwith the presence of the defender, and later by several months than the date of the alleged occurrence. After what had happened between them, the defender, when he was told of the pursuer's condition, was at first not prepared to deny the paternity and was willing to marry her. It was only on ascertaining that she was so far advanced in pregnancy that he repudiated the idea of marrying her and denied the fact of paternity. On the whole matter I think that there is not any sufficient corroboration of the pursuer's story, and consequently that she has failed to prove her case.

LORDS LOW and ARDWALL concurred.

LORD STORMONTH DARLING was absent.

The Court recalled the Sheriff-Substitute's interlocutor and assoiized the defender.

Counsel for the Pursuer (Respondent)—
Scott Brown. Agent—S. F. Sutherland,
S.S.C.

Counsel for the Defender (Appellant)—
M'Lennan, K.C.—Ingram. Agent—J. Fer-
guson Reekie, Solicitor.

Thursday, January 16.

SECOND DIVISION.

COPLAND'S EXECUTORS v. MILNE
AND OTHERS.

*Succession—Testament—Destination—
“Cousins.”*

When the word “cousins” is used in a deed it must be construed as meaning first cousins, unless there is something in the context of the deed or in the circumstances of the case to show that it is used in a different and wider sense.

*Succession—Testament—Words Importing
Gift of Heritage.*

Terms of a testamentary writing which were held to carry heritage.

Thomas Milne Copland died on 16th October 1905 leaving a holograph will and codicils in the following terms:—

“26 Castlenau Mansions,

“Barnes, Surrey, 13th April 1904.

“I, Thomas Milne Copland, residing at above address, hereby appoint as my executors my brother-in-law Joseph Calder, farmer, Seaton of Usan, Montrose, along with the Town Chamberlain of Montrose acting in the capacity at the time of my death. After paying all debts due by me at the time of my death I hereby instruct my executors to divide the income of the balance half-yearly between my sister Margaret Copland or Calder, wife of the said Joseph Calder, and my brother John Copland, residing at Scotston of Usau, Montrose. On the death of either my sister or brother the whole income to be paid to the survivor, and on the death of the survivor the whole income to be paid to the said Joseph Calder during his life if he shall survive my sister and brother, and on his death or on the death of the survivor of my sister and brother, if my said brother-in-law be dead, I wish my whole estate realised and equally divided between my cousins on my mother's side who shall be alive at the time of my death. Signed by me this thirteenth day of April, Nineteen hundred and four, Written by myself. (Signed) Thos. M. Copland. J. J. Gibbs, witness, 74 Langham Road, West Green, London, D. G. Donaldson, witness, 132 Becklow Road, Shepherds Bush, London, W.

“Codicil No. 1—28th April 1904—I hereby instruct my executors to sell at the time of my death sufficient of my investments to pay at once the following legacies, to Edie Peach of 11 Bridge Avenue, Hammersmith, Two hundred pounds, and to Nellie Goodman, Mogsden, Wallington, Fifty pounds. (Signed) Thos. M. Copland. J. J. Gibbs, witness.

“Codicil No. 2—I hereby appoint as additional executors my brother John Copland and my sister Mrs. Margaret Copland or Calder. (Signed) Thos. M. Copland. J. J. Gibbs, witness.”

The testator was survived by his brother and sister and by eight full first cousins on his mother's side. The testator was also

survived by thirteen first cousins once removed on his mother's side, being children of two other full first cousins, viz. George Johnston and William Falconer, who predeceased the testator. He was also survived by six first cousins twice removed, the issue of two other children (Alexander Johnston and James Falconer) of George Johnston and William Falconer.

Questions having arisen as to the disposition of the testator's estate after his death, a special case was presented to the Court in which the executors were the *first parties*, the eight full cousins the *second parties*, the thirteen first cousins once removed the *third parties*, the six first cousins twice removed the *fourth parties*, and the testator's heir-at-law the *fifth party*.

The following statement is taken from the case—"The question has now arisen whether the expression 'cousins' occurring in the residuary clause of the will is to be interpreted as applying only to the eight first cousins who survived the testator, or as including also the surviving children and descendants of the two other first cousins who predeceased him. . . . In addition to moveable estate, amounting to about £3300, the deceased had a personal right to a one-third share (valued at under £100) of a small heritable property, a cottage in the parish of St Cyrus, Kincardineshire, the title to which is still in the name of his deceased father and unrecorded. With regard to this a further question has arisen as to whether the terms of the will are habile to convey heritage. The second parties contend that the expression 'my cousins on my mother's side' taken along with the words 'who shall be alive at the time of my death' excludes all except full first cousins on the mother's side who survived the testator, and that the second parties alone are entitled to share in the estate. . . . The second parties further contend that the will is habile to carry heritage, and that accordingly the testator's share of the heritable property referred to forms part of the executry estate. The third and fourth parties contend that they are cousins of the testator on his mother's side within the meaning of the expression used in the will, and that they are accordingly entitled to share in the estate. . . . The party of the fifth part maintains that the will of the testator does not provide for the succession to his heritable estate, that so far as the heritage is concerned the said Thomas Milne Copland died intestate, and that the party of the fifth part being the heir *ab intestato* of the deceased, is entitled to the heritable estate."

The following questions were, *inter alia*, submitted to the Court—" (1) Are the second parties alone entitled to the fee of the testator's moveable estate? . . . (5) Are the terms of the testator's will habile to convey his heritage? Or (6) Is the fifth party, as the testator's heir *ab intestato*, entitled to the heritable estate?"

Argued for the second parties—(1) Cousins meant first cousins only—*Stoddart v. Nel-*

son, 1855, 6 De Gex, M'N. and G. 68; *Stevenson v. Abingdon*, 1862, 31 Beavan 305; *Burbey v. Burbey*, 1862, 9 Jur. (N.S.) 96, 6 L.T. 573; *cf.* also *Thompson v. Robinson*, 1859, 27 Beavan, 486 (nephews and grand-nephews); *in re Blower's Trusts*, 1871, 6 Ch. Ap. 351 (nephews and grandnephews); *Drylie's Factor v. Robertson*, July 20, 1882, 9 R. 1178, 19 S.L.R. 834. *Caldecot v. Harrison*, 9 Sim. 457, had not been followed; *see* Jarman on Wills, vol. ii. 1008. (2) The will carried the heritage. In form it was capable of doing so, and the expression "whole estate" evidently meant whole estate heritable and moveable. If it did not, the result was intestacy, against which there was here an overwhelmingly strong presumption—*cf.* *M'Leod's Trustee v. M'Luckie*, June 28, 1883, 10 R. 1056, 20 S.L.R. 714; *Aim's Trustee v. Aim*, December 15, 1880, 8 R. 294, 18 S.L.R. 204; Titles to Land Act 1868 (31 and 32 Vict. cap. 101), sec. 20. Further, the Executors (Scotland) Act 1900 (33 and 64 Vic. cap. 55), sec. 2, had assimilated the position of trustee and executor, and to a large extent discounted the value of the cases cited by the fifth party.

Argued for the third and fourth parties—They were included under the term cousin, which included cousins of every description—*Caldecott v. Harrison*, 9 Sim. 457. Williams on Executors, vol. i. 864, was referred to. (2) The will carried heritage.

Argued for the fifth party—The will did not carry heritage. It was clear from the expressions used that the testator only meant to deal with moveables, *e.g.*, "executors," "balance," "realise"—*cf.* *Urquhart v. Dewar*, June 13, 1879, 6 R. 1026, 16 S.L.R. 602; *Grant v. Morren*, February 22, 1893, 20 R. 404, 30 S.L.R. 442; *Bell and Others v. Bell and Others*, July 19, 1906, 14 S.L.T. 244.

LORD JUSTICE-CLERK—The first question raised in this case is as to the sense in which the testator used the word "cousins" in his will. Did he by "cousins on my mother's side" mean first cousins only, *i.e.*, children of brothers or sisters of his mother, or did he also mean to include under the term everyone in any of the degrees of relationship to which the term is sometimes applied, *e.g.*, first cousins once or twice removed, or second cousins? I have no doubt whatever that by "cousins" he meant only first cousins. That is the primary and normal use of the word, and the one in which it must be presumed a testator used it, if in fact he had first cousins, and if there is nothing else in his settlement to indicate that he meant to use it in a wider and looser sense. Such a wider use will generally be improbable, for in many cases, as here, the effect would be to multiply the number of recipients of the testator's bounty to a more or less indefinite extent.

The second question is whether the one-third share (valued at £100) of a small cottage in the parish of St Cyrus, Kincardineshire, is carried by the will. I have no

doubt whatever that it is. One has only to read the will as a whole to see that the testator intended to deal with his whole estate. When he comes to the provision which deals with the ultimate division of the capital he uses the term "my whole estate," which I think is equivalent to my whole estate, heritable and moveable, and he further directs the estate to be "realised," which seems to me a suitable enough word to describe the turning into money of his share of the cottage. If that was the testator's intention, it ends the matter, for there is no doubt that the will is habile to carry heritage.

LORD LOW—I am of the same opinion. In the English cases which were quoted to us by Mr Munro it was held that when the word "cousins" is used in a will or deed it must be construed as meaning first cousins, unless there is something in the context to show that it is used in a different sense. These authorities seem to me to be practically conclusive of the present question, because there is no difference between the law of England and the law of Scotland in this matter, and the cases are of high authority, the leading case having been decided by so eminent a Judge as Lord Cranworth.

Without authority I should have come to the same conclusion, not only because I think that the primary meaning of the word cousins is limited to first cousins, but because I think there are circumstances here which make it most improbable that the testator used the word to denote more remote relations than cousins-german.

The settlement was executed in April 1904. The testator died in October 1905. At his death he had eight first cousins alive. If first cousins alone are included each beneficiary will receive a very substantial benefit. He had also no fewer than thirteen first cousins once removed and six first cousins twice removed—that is, nineteen cousins more remote than first cousins, so that if all these cousins were included this small estate would be divided among twenty-seven persons, making the benefit to each almost inappreciable. Again, the estate was to be realised and divided equally among the cousins. That is very intelligible if they are all in the same degree of relationship, but it is not so apposite where relations of different degrees are included. Therefore I have no doubt that the construction which I think to be sound in principle is also the construction which carries out the intention of the testator.

In the special case a question is stated as to whether the division is to be *per capita* or *per stirpes*. There can be no doubt that the division must be *per capita*, and indeed the contrary was not maintained.

On the question as to whether the heritable estate is included, there is more room for difference of opinion. The question is one of intention, because the words of the will are quite sufficient to carry heritage if it was intended that heritage should be carried. The will is very simple. The income of the whole estate is to be divided

between the brother and the sister of the testator, and failing them is to be paid to his brother-in-law, and on the termination of the liferents the whole estate is to be realised and divided. There can be no question that the testator intended to dispose of the whole estate which belonged to him at his death. There was no reason why this small heritable estate should be left out. The only circumstance which militates against that view is that the testator appointed the first parties executors but not trustees. There is some force in that consideration, but not I think enough to overcome the plain indications of intention to which I have alluded.

LORD ARDWALL—This case raises a question of some interest, because it is the first case in which the term "cousins" has come up for construction in the Courts of Scotland. But there have been quoted to us decisions in the Courts of England which I regard as founded on a correct view of the construction of the term. In conformity with these decisions I am of opinion that the word "cousins" when occurring in a testamentary writing ought to be held to signify "first cousins," unless there is something in the context of the deed or in the circumstances of the case to show that it was intended to designate more remote relatives. The principle of construing the term cousins by reference to the context of the deed is obvious enough. The principle of construction by reference to the circumstances of the case may be illustrated by the case of a testator who has no first cousins but only more remote cousins, making bequests to his "cousins," when it would properly be held that he meant to designate cousins of such a degree as were actually in existence at the date of the deed. In the present case, as pointed out by my brother Lord Low, it would be out of the question to hold that the testator, who had eight first cousins, intended to divide his small estate among the whole body of his cousins of all degrees of relationship to the number of twenty-seven, with the result that the more remote relatives, by reason of their numbers, would carry off the bulk of the estate.

I accordingly am of opinion that *prima facie* the word "cousins" must be held to mean "first cousins," and that in the deed presently under consideration there is nothing to displace that meaning.

On the second question I have felt some difficulty, not because the will is not habile to convey heritage, but because I have difficulty in holding that heritable estate was in the contemplation of the testator when he made his will. The difficulty arises because executors only and not trustees are appointed, and because there are no words of conveyance of heritage. But I think it is settled that if a testator's intention is plain it must receive effect notwithstanding technical difficulties. As to intention, when the testator says "I wish my whole estate to be realised and equally divided," I think that the Court are entitled to hold that by the words "my

whole estate" the testator meant his whole estate heritable and moveable. That being so, when he directs that his whole estate shall be realised and divided, I think that may be viewed as a direct injunction to realise the whole estate without exception. The fact that the will contains a direction to realise differentiates the present case from the case of *Bell* (1906, 14 S.L.T. p. 224), where there was no direction to realise and the trustees had no powers of sale. Here there is a direction to realise, which applies to the testator's "whole" estate. I think therefore, though with some hesitation, that the will may be held to dispose of the share of the insignificant heritable subject to which the testator had a personal right.

LORD STORMONTH DARLING was absent.

The Court answered the first and fifth questions in the affirmative and the sixth in the negative.

Counsel for the First and Second Parties—Munro. Agents—Mackintosh & Boyd, W.S.

Counsel for the Third and Fourth Parties—Chree. Agent—Harry H. Macbean, W.S.

Counsel for the Fifth Party—Taylor Cameron. Agents—Roxburgh & Henderson, W.S.

Friday, January 17.

SECOND DIVISION.

[Lord Dundas, Ordinary.]

FIFE COAL COMPANY, LIMITED v.
LINDSAY.

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 1 (3), First Schedule (1) (b), (2) and (12), and Second Schedule (8) and (14) (b)—Suspension of Charge upon Registered Agreement as for Total Incapacity where Reduced Compensation has been Given and Accepted, on Ground that Total Incapacity has again Supervened—Competency.

To justify a suspension of a charge upon a registered agreement it ought to be shown that without such suspension the complainer would suffer some manifest injustice, and further that the end to be attained by such suspension could not be attained by proceedings under the Act.

In February 1904 a workman was injured, and the compensation payable to him by his employers was fixed by agreement at 15s. 11d. per week, being the statutory maximum for total incapacity. A memorandum of the agreement was duly recorded in July 1905. The workman sufficiently recovered to be able to do light work between 26th September and 9th December 1905, and during that period the employers made payments, which he accepted in name

of compensation, of sums at the rate of 7s. 9d. per week from 26th September to 21st October 1905, and at the rate of 5s. a week thereafter till 9th December 1905; the compensation paid representing one half of the difference between the amount which he was then earning and the amount which he was earning at the date of the accident. The workman subsequently refused to accept further payments of 5s. per week, at the end of December, on the ground that he was not able to work continuously even at the light employment, and from January 10, 1906, on the ground that total incapacity had on that date again supervened. In March 1907 he charged his employers upon the registered agreement to make payment to him of 15s. 11d. per week from 10th January. The employers brought a suspension, and argued that the original agreement had been superseded by agreements to pay and accept the lesser rates, that by their acceptance between 29th September and 9th December the respondent was barred from charging at the original higher rate, and that in any case the suspension could not be disposed of without inquiry, as they denied total incapacity.

The Court *refused* to suspend the charge, on the ground that the complainers had a remedy under the statute which they had failed to take, viz., to apply, when the dispute arose in December 1905, for review of the weekly payments.

James Lindsay, miner, George Place, Cowdenbeath, by virtue of an extract registered memorandum of agreement under the Workmen's Compensation Act 1897, dated 6th July 1905, and recorded in the register kept under the Act in the Sheriff Court at Dunfermline on 17th July 1905, and in the Sheriff Court books of the county of Fife at Cupar, for preservation and execution, on 23rd February 1906, charged the Fife Coal Company, Limited, having their registered office at Leven, to make payment of the sum of 15s. 11d. per week as from and after January 10th 1906.

The Fife Coal Company, Limited, brought a suspension.

Execution having been sisted on consignment, and the note passed, a record was made up.

The following narrative of *facts*, as set forth in the averments of parties, is taken from the opinion of the Lord Ordinary (DUNDAS)—“The complainers, the Fife Coal Company, Limited, seek to suspend a charge at the instance of James Lindsay, miner, Cowdenbeath. It appears that, on February 1904, the respondent, while in the course of his employment with the complainers, met with an accident, and claimed compensation under the Workmen's Compensation Act 1897 in respect of his consequent incapacity for work. The parties agreed that the amount should be 15s. 11d. per week, which was the statu-