23 R. 547), to a stirps which otherwise would have no right at common law as next-of-kin, and no right by statute as representing next-of-kin to any share in the moveable succession at all.

The Lord Ordinary had no alternative but to follow the precedent in *Jamieson's* case. But for the above reasons I think that that decision was unsound, and that the interlocutor reclaimed against must therefore be recalled.

LORD SALVESEN—The difficulty in this case—and I think it is a real difficulty—arises from the imperfect way in which the statute is expressed. If sections 1 and 2 are to be read as dealing with separate matters, then I think the reasoning of Lord Trayner in *Jamieson* v. *Walker* cannot be impugned. It would have been very easy for the draughtsman of the Act to have commenced the second section by such words as "Subject to the provisions of the preceding section," or in some other way to have correlated it to the preceding section; and probably it would have been a still better way of making the meaning of the Legislature clear if the second section had simply been made an additional proviso of the first.

According to the mode in which the statute is expressed, I think the *prima facie* view is that section 2 deals with a different set of circumstances from those dealt with in section 1; but to read it in that way is to make the two sections inconsistent with each other; and therefore I agree with your Lordship in the chair that we must read them together. So reading them, I am of opinion that the result at which the Second Division arrived cannot be sustained.

LORD MACKENZIE—In my opinion section 2 of the Intestate Moveable Succession Act 1855 is not independent of section 1, but must be read along with it. Section 1 introduced the doctrine of representation as regards all cases of intestate moveable succession. The proviso at the end of the section is expressed in very plain terms, and provides that no representation shall be admitted among collaterals after brothers' and sisters' descendants. Accordingly in the present case the families of John and William, deceased brothers of Mrs Adam, cannot make any claim to share in the moveable succession along with her. She is the first cousin of the intestate and his sole next-of-kin. The respondents are the family of David, another deceased brother of Mrs Adam. It is a fortuitous circumstance that the intestate left some heritable property. The effect, however, of this, according to the respondents' construction of section 2, is that as the heir in heritage, Robert, is a son of David, this gives him, or failing him the other members of David's family, a right to a share of the moveables. Robert is not one of the next-of-kin, nor one who has a statutory right of representation under section 1. It is said he has an independent right as heir to collate and claim for himself and his brothers and sisters a share of the moveable estate, and that if he does not collate, his brothers and sisters may come in and claim in their own right. The result of this is startling, for it makes the right of these descendants to claim a share of the moveables along with the next-of-kin depend entirely upon whether there is any heritage, however trifling in amount. If there is, then they, though of the same degree as their cousins, who are entirely cut out, are to be held entitled to a share of the moveables, otherwise not. This does not appear to me a reasonable construction to put upon section 2. It is, in my opinion, an enactment consequent upon section 1, for the purpose of obviating any questions as to the extent of the rights of an heir in heritage who also in virtue of the provisions of section 1 was made one of the heirs *in mobilibus* of the intestate. If and when the heir in heritage is clothed with the character of one of the next-of-kin as defined by section 1, then section 2 will operate, but not otherwise. The provisions of section 1, including the proviso, must, in my opinion, be read into section 2.

If sections 1 and 2 are read together, then I think the argument of the respondents' is untenable. I am accordingly unable to agree with the judgment in *Jamieson* v. *Walker*, upon which the Lord Ordinary has proceeded.

LORD GUTHRIE—I concur with your Lordship in the chair.

LORD SKERRINGTON—I concur with your Lordship.

The Court pronounced this interlocutor—

"Adhere to the said interlocutor except in so far as it finds the various claimants entitled to be ranked and preferred on the moveable estate of the deceased: Recal said findings, and in lieu thereof find that the said Mrs Annie Bruce Adam or Nicoll is entitled as sole next-of-kin of the deceased to be ranked and preferred in terms of her claim: Remit to the Lord Ordinary for further procedure, and decern."

Counsel for Mrs Nicoll (Claimant and Reclaimer)—Chree, K.C.—J. R. Christie. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for Robert Adam and Others (Claimants and Respondents)—Moncrieff, K.C.—A. R. Brown. Agents—Gordon, Falconer, & Fairweather, W.S.

Wednesday, November 26.

SECOND DIVISION.

[Lord Hunter, Ordinary.

FRAME *v.* CALEDONIAN RAILWAY COMPANY.

Process—Proof or Jury Trial—Appeal to House of Lords—Leave to Appeal.

Leave to appeal to the House of Lords against an interlocutor appointing a

case to be disposed of by way of proof and refusing a jury trial *refused.*

The Evidence (Scotland) Act 1866 (29 and 30 Vict. cap. 112), sec. 4, enacts—"If both parties consent thereto, or if special cause be shown, it shall be competent to the Lord Ordinary to take proof in the manner above provided in section first hereof in any cause which may be in dependence before him. . . ."

On 14th February 1913 Gregor Macgregor Frame, produce merchant and commission agent, London, *pursuer*, brought an action of damages against the Caledonian Railway Company, *defenders*, for £3000 for personal injury caused him by the defenders not having supplied artificial heat to the carriage in which he travelled from Aberdeen to London on 30th September 1911.

On 28th May 1913 the Lord Ordinary (HUNTER) pronounced this interlocutor—"The Lord Ordinary having considered the cause, finds that the same is one more suitable to be disposed of by way of proof before his Lordship than by a jury: Therefore refuses the issue proposed: Allows to the parties a proof of their respective averments on record, and appoints the same to proceed on a day to be afterwards fixed."

The pursuer having reclaimed, the Second Division, on 12th July 1913, refused the reclaiming note.

The pursuer then presented a petition for leave to appeal to the House of Lords against the interlocutors of the Lord Ordinary and the Inner House. The petition stated, *inter alia*—"That the petitioner having been advised that the said interlocutors of 28th May and 12th July 1913 are erroneous and contrary to law, proposes now to appeal to the House of Lords against the same; but as your Lordships were unanimous, and as the conclusions of the said action are not exhausted by the said interlocutors, it becomes necessary to obtain leave to appeal in terms of the Act 48 Geo. III, cap. 151, sec. 15. That the petitioner is advised that the leave to appeal craved ought to be granted, for the following among other reasons:—Because the action being one of damages in respect of personal injury, the pursuer is entitled to trial by jury, there being no special cause shown to the contrary."

Argued for the petitioner—The Lord Ordinary and the Court were wrong in assuming that they had a discretionary power to refuse a jury trial. The action raised a pure question of fact. There was no legal question involved, and therefore, since the respondents had shown no "special cause," the petitioners were of right entitled to a jury trial.

Argued for the respondents—The question as to whether the action should go to proof or jury trial was a question of procedure to be determined by the discretion of the Court, and in such a case as the present the discretion of the Court ought not to be brought under review by the House of Lords. Admittedly, if the Lord Ordinary and the Court had exercised their discretion in an arbitrary fashion, and had refused a jury trial without giving their reasons for so doing, there might have been a case for interference, but the respondents here had satisfied them that there was a "special cause" why the case should not go to a jury—*Hope* v. *Hope's Trustees*, December 15, 1898, 36 S.L.R. 220; *Pringle* v. *Dunsmure*, June 1, 1877, 14 S.L.R. 498.

LORD JUSTICE-CLERK—This case in its present stage relates to procedure and to procedure only. We had an opportunity, when the case was heard before us at considerable length, of considering the question whether we would interfere with the discretion of the Lord Ordinary, who held that it was a case more suitable for a proof before himself than to be sent to a jury; and we were unanimous in deciding that we ought not to interfere with the discretion of the Lord Ordinary in the matter.

I think it is an established principle that except upon very strong grounds the Court will not interfere with the discretion of the Lord Ordinary in fixing the mode in which proof in the case is to be taken. It is quite certain that if the Lord Ordinary stated in his note some ground upon which he proceeded, which in no way gave reasons for exercising his discretion in substituting proof for jury trial, it would be the bounden duty of the Court to interfere in the matter. But we have been of opinion that that is not the case here. The Lord Ordinary has stated grounds which are sufficient to prevent us from interfering with the judgment which he has pronounced.

In those circumstances the question is whether the pursuer is to be allowed to appeal to the House of Lords on the question whether we have properly exercised our discretion. I do not think this is a petition which ought to be granted, and therefore I am for refusing it.

LORD DUNDAS—I quite agree. When this case was before us I thought it seemed to be a very peculiar one. It seemed to me that the facts were very special, and that they might, probably would, raise difficult questions of law at the inquiry. The Lord Ordinary, in the exercise of a discretion which he thought he had, and which I think he had, thought fit to send the case to proof and refused an issue. We adhered to that interlocutor, and, as your Lordship has said, it is not the custom of either Division of the Court lightly to interfere with the discretion exercised by a Lord Ordinary in such matters. But it is now said by the learned Solicitor-General that we and the Lord Ordinary exercised our discretion wrongly, or rather that we and the Lord Ordinary assumed a discretion which we had not, because no special cause had been shown why the case should not be tried by a jury. I think there was ample ground for holding that there was special cause why that procedure should not be resorted to. I am against granting leave to appeal to the House of Lords against our interlocutor. The precedents are against our doing so; similar motions have been not infrequently made and always refused. I do not think there is any general question

of law raised, or indeed any question of law at all. I regard the matter as one of procedure and discretion. In some of the cases a consideration has been adverted to about the possibility of two appeals; and, for what it is worth, that element is here against the Solicitor-General, because if we were to grant him leave now to appeal, and he were unsuccessful, for aught we know there might be a second appeal at the end of the matter after proof had been taken. On the whole matter I am of opinion that this is a petition which we ought not to grant.

LORD SALVESEN—I agree. One matter that certainly was in my mind when we adhered to the judgment of the Lord Ordinary was, that assuming that the contract had been broken, a difficult question of law might arise as to what damages reasonably and naturally flowed from that breach of contract. A jury, of course, is quite unable to appreciate matters of that kind, and is in the way of assessing damages in a very rough and ready way indeed. Apart from that specialty, which led me to concur in affirming the Lord Ordinary's interlocutor, there are other grounds upon which this may be treated as more or less a special case—indeed, we were not referred to any case that was at all like it. The question we have to decide now is merely, not whether we were right in affirming the Lord Ordinary's interlocutor, but whether we should give facilities to have the matter taken further.

If this be, as I think it is, a matter of procedure only, not touching any legitimate rights that the pursuer has, but merely the mode in which these rights are to be ascertained, and, if ascertained, to be converted into money, then I think we should be stultifying ourselves and acting against the long-established practice of this Court if we granted leave to appeal. That practice has existed since 1866, and has been consistently followed since then. I think this Court is presumably as well able to judge of the procedure that is proper for dealing with cases before it as even the House of Lords. Accordingly I agree with your Lordship that we should refuse this application.

LORD GUTHRIE—I agree. I think the way in which the petitioner has stated his application is sufficient for its disposal. He says, "there being no special cause shown to the contrary." He does not deny that special cause is alleged. The Lord Ordinary has dealt with two matters which he thought amounted to "special cause," and we agree with him. If this motion were granted, the application would be a very frequent one. The reports show that similar applications have come into Court raising exactly the same question—that is to say, whether the special cause that is alleged is or is not sufficient. These applications have all been refused, and refused by both Divisions, and I think we should follow the practice of the Court in this matter.

The Court refused the petition.

Counsel for the Petitioners—Morison, K.C. —Lippe. Agents — Dalgleish, Dobbie, & Company, S.S.C.

Counsel for the Respondents—Clyde, K.C. —Wark. Agents — Hope, Todd, & Kirk, W.S.

Wednesday, November 26.

FIRST DIVISION.

[Lord Hunter, Ordinary.

BRENES & COMPANY *v.* DOWNIE AND ANOTHER.

Company — Contract — Trust — Breach of Trust—Liability of Directors.

In an action against two individuals, the sole directors and shareholders of a company then in liquidation, for repayment of a sum of £1000 transmitted to the company before liquidation for the purpose of retiring certain bills of which the pursuers were the drawers and the company acceptors, it was admitted that the money was received by the company, that it was not employed to retire the bills, that the bills were dishonoured, and that part of it (£700) was applied by one of the defenders to his own purposes, viz., in defraying certain expenses which he alleged he had incurred in connection with the business of the company.

Held that as the money had been remitted to the company for a specific purpose, the defenders were in breach of trust in applying it to any other, and that the pursuers were entitled to decree *de plano* against both defenders, jointly and severally, for £600, and *quoad* the balance, as to which the defenders alleged a counter claim, to a proof.

On 26th May 1913 Brenes & Company, merchants, Costa Rica, and C. S. S. Guthrie, merchant, London, their mandatory, *pursuers*, brought an action against George Downie, coffee planter, Edinburgh, and Andrew M'Dougall, solicitor there, sole directors and shareholders of the Central and South American Land and Produce Company, Limited, *defenders*, for payment of £1550 odd, being (1) the sum of £700, the balance of a sum of £1000 alleged to be due by the defenders after deducting a sum of £300 paid to account; (2) the sum of £750 as damages for injury to the pursuers' credit through the dishonour of certain bills; and (3) a sum of £100 odd, being interest and expenses occasioned by the dishonour of the bills.

The *facts* admitted on record, as summarised by the Lord President in his opinion, were as follows:—"On the 17th July 1912, the pursuers, who are apparently merchants in Central America, transmitted to this country a draft for £1000 sterling, which they specifically set forth in the letter in which it was enclosed was to be