behind the roll as to the question of liability, the defenders could not proceed against anyone until it was declared by competent authority that he was the proper party. Besides, the defenders were proprietors of minerals. *Bell* v. *Earl of Wemyss, supra*, did not apply, for it proceeded on the footing that minerals are not a permanent property, and therefore it was not fair to impose upon the proprietor of them the permanent burden of building a church. But here the question was with regard to repairs merely. (2) The manse and other ecclesiastical buildings stood on the same footing as the church—*Heritors of Olrig* v. *Phin*, July 10, 1851, 13 D. 1332; *Highland Railway Company* v. *Heritors of Kinclaven, supra.*

At advising—

Lord President—The Trades House of Glasgow have been for a long time proprietors of extensive lands which now constitute the Tradeston district of Glasgow, and which are now entirely covered with buildings. They were sole owners of the ground, but they feued it out in different proportions throughout a long series of years until 1856. In the meantime they continued to be on the cess roll of the county of Lanark, and to pay land tax for the whole of the ground so feued off, and in that way they were still the sole representatives of the valued rent of this portion of the county of Lanark.

Now, the object of the present action is to have it found that in consequence of their ceasing to be proprietors of the *dominium utile* of this ground or of any part of it, they are no longer liable to pay any assessment for any ecclesiastical buildings within the parish of Govan. It was argued that they had ceased to be heritors, and that it was heritors only who were liable for such assessment. Now, that undoubtedly is a very plausible way of presenting the case. But there are difficulties in the way of accepting that view. One of the assessments is for repairs to the parish church, not the existing parish church, which was completed in the year 1884, but for repairs which were all executed during an earlier period on the old parish church. There is no doubt as regards it, that it was built at the cost of the valued rent heritors, and that the division of the cost of the church was according to that valued rent, and that the Trades House had allotted to them a proportion of the area of the church. That being the state of the circumstances, it is clear that the provision contained in the 23d section of the Ecclesiastical Buildings Act (31 and 32 Vict. c. 96) applies: ". . . when the area of any parish church heretofore erected has been allocated among the heritors according to their respective valued rents, all assessments for the repair thereof shall be imposed on such heritors according to such valued rent." If the Trades House were still a heritor of the parish that would be conclusive. But they say that they have ceased to be heritors by feuing off the ground, and that now they are superiors only. But here a difficulty presents itself. The assessment is laid on according to the valued rent, and the collector is bound to lay it on and collect it in this way. There is nobody else who has a valued rent except the Trades House; they have never been divested, and accordingly they stand upon the cess roll as representing the whole valued rent of the ground thus feued off by them. If they are not heritors, they should have taken care that somebody else was put on the roll in their place.

Their remedy is a very simple one. They have only to apply to the Commissioners of Supply to divide the valued rent among the different parties to whom they have feued out the ground, and to allocate the proportion in which each is liable. If they have failed to do so, that is their own fault; it is quite obvious that neither the collector nor anybody else can do this for them. There is thus only the one way, and it affords a very simple remedy. But if any difficulty arises, if the Commissioners decline to act, there is an appeal from them to this Court. But so long as they continue to stand on the cess roll, and to pay land tax applicable to the valued rent, I do not see how they can ask to be relieved. Accordingly I agree with the Lord Ordinary's view as to the assessment for repairs on the church. And in regard to the other assessment, I adopt the reasoning of the Lord Ordinary. "If," he says, "the assessment was rightly imposed on the valued rent, then the decision of this question and that of the repairs to the church is one and the same. But if the assessment was wrongly imposed on the valued rent, then I am of opinion that the Trades House of Glasgow has not taken the proper and necessary proceedings for correcting the illegality. A ratepayer who intends to challenge an assessment upon objections which, if sustained, would nullify the whole assessment, must meet his antagonist fairly and promptly." It will not do for a party merely to lie by and allow arrears to accumulate, and then to come and say, "Oh, this assessment is imposed on a wrong principle." If this objection is to be taken at all it must be taken at the time, otherwise it would be necessary to go back and disturb all that has been done in the past, and rear up a readjustment of the whole accounts of years gone by.

Lord Mure and Lord Shand concurred.

Lord Adam was absent on circuit.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Gloag—Graham Murray. Agents—J. & A. Hastie, S.S.C.

Counsel for the Defenders and Respondents—D.-F. Mackintosh—J. M. Black. Agents—Ronald & Ritchie, S.S.C.

Friday, July 8.

FIRST DIVISION.

HOGG *v.* BRUCE AND OTHERS.

Succession—Mutual Settlement between Spouses—Substitution in favour of "the Nearest in Kin of Us."

A husband and wife disponed their whole estates, which consisted entirely of moveable property, "to and in favour of the survivor of us, and after the decease of the longest

liver of us, to the nearest in kin of us" the said spouses "equally." *Held*, in a question between the next-of-kin of the husband and the next-of-kin of the wife, that "the nearest in kin of us" meant one class, embracing the next-of-kin of both spouses, amongst whom the division fell to be made *per capita*.

Per the Lord President—that the substitution in favour of the nearest of kin was effectual, and could not be defeated by either of the two spouses after the death of the other, because it was matter of contract, and the reservation of the power to alter was given to both spouses jointly.

By contract and mutual disposition, dated 22d July 1835, executed by David Wilson and Isabel Wood or Wilson, his wife, it was provided that the said David Wilson and Isabel Wood or Wilson "do hereby, with and under the burdens and reservations after mentioned, give, grant, assign, and dispone to and in favour of the survivor of us, and after the decease of the longest liver of us, to the nearest in kin of us, the said David Wilson and Isabel Wood, equally . . . the whole estate and effects, heritable and moveable, real and personal, of whatever kind or wherever situated, at present belonging to us, or either of us, or that shall pertain and belong to the party predeceasing at the time of their death . . . and declaring these presents to be equally valid and effectual to all intents and purposes as if each particular of our respective means and estate were herein expressly described: And we do hereby nominate and appoint the survivor of us, whom failing the nearest in kin of us, the said David Wilson and Isabel Wood, to be the sole executor or executors of the party predeceasing . . . And we do hereby reserve our liferent of the whole estate and effects hereby conveyed, with full power to us, with consent of each other, to alter and revoke these presents in whole or in part . . . And we consent to the registration hereof in the Books of Council and Session, or others competent, for preservation, that all necessary execution may pass on a decree to be interponed hereto in common form."

This contract and mutual disposition was not altered during the joint lives of the spouses, and there were no children of the marriage. There was no marriage-contract between the spouses. David Wilson died on 4th September 1855. His wife survived him, and accepted of the office of executor, to which the survivor was nominated in the contract and mutual disposition. There was no real estate.

Mrs Wilson died on 27th March 1883. Mrs Agnes Wood or Hogg, as the only surviving sister and next-of-kin of Mrs Wilson, was decerned her executor-dative. Mrs Wilson had three brothers and four sisters, of whom only Mrs Hogg survived. Mr Wilson had no brothers and only one sister, Isabella Wilson or Dickson, who died in 1867, leaving four daughters, Grace, Helen, Catherine, and Isabella, of whom the last named predeceased Mrs Wilson unmarried.

A question arose regarding the construction of the mutual disposition, and this Special Case was adjusted, to which Mrs Hogg was the first party, and Mrs Grace Dickson or Bruce, Mrs Helen Dickson or Thomson, and Miss Catherine Dickson were the second parties.

The first party maintained that she was entitled to one-half of the whole estate as the only surviving sister and nearest in kin of Mrs Wilson. The second parties contended that the nearest in kin of both spouses were called as a class, that the estate should be divided among the nearest in kin of both spouses *per capita*, and that the division should accordingly be into four equal parts.

The question presented for the judgment of the Court was—"Whether the destination in the above-mentioned contract and mutual disposition 'to the nearest in kin of us, the said David Wilson and Isabel Wood, equally,' confers a right to one-half of the succession on the nearest in kin of the husband, and to the other half on the nearest in kin of the wife; or whether the nearest in kin of both spouses are to be treated as a single class, and the succession divided equally among the individuals of that class?"

It was argued for the first party that the words "nearest in kin" were to be taken in the proper sense as unaffected by the Statute 18 Vict. cap. 23—*Young's Trustees* v. *Janes*, December 10, 1880, 8 R. 242. In other cases the same words were found, with, however, an explanatory clause—*Young's Trustees* v. *Janes*, *supra*; *Murray* v. *Gregory's Trustees*, January 21, 1887, 14 R. 368. No doubt in a certain class of cases the presumption was for division *per capita*—*Macdougall* v. *Macdougall and Others*, February 6, 1866, 4 Macph. 372. But that was always limited to the case of a destination to children or issue. In general, too, the case was simple, because the document to be construed was the will of one person. Here the presumption was the other way. It was a mutual will, equivalent to two wills. Besides, the language of the deed was important. The words are "to . . . equally," not "between" or "among." Moreover, there was here no relationship between the two sets of next-of-kin—*Allen* v. *Flint*, June 15, 1886, 13 R. 975.

It was argued for the second parties that the division should be *per capita*. The testators were dealing with an estate, of which the *corpus* was composed of the funds of both, and they had in view the next-of-kin, considered as forming one class. Had they intended otherwise, they would have inserted a special provision, as in the case of *Young's Trustees* v. *Janes*, *supra cit.*

At advising—

Lord President—The probability is that the estate left by the spouses was originally entirely estate of the husband. At all events, as there was admittedly no marriage-contract or settlement of any kind, I think it must be taken that the estate was his *jure mariti*. What the spouses did was to deal with the entire estate in this way:—It is to go, in the first place, to the survivor in fee; there is no limitation, and failing the survivor there is a substitution in favour of the "nearest in kin of us"—the two spouses—equally. That substitution is effectual, and could not be defeated by either of the two spouses after the death of the other, because it is matter of contract, and the reservation of the power to alter is to both spouses jointly.

The words which we have to construe are "the nearest in kin of us." Following upon these words are the words "the said David Wilson and Isabel Wood" equally, but I do not see that the

mention of these names makes any difference. Now, I cannot help thinking that the spouses were dealing with the nearest of kin of the spouses as constituting one class. It is said to be strange that persons wholly unconnected should make a class in a settlement of this kind. But I see nothing startling in that. A husband and wife, with no children of their own, very often look on the nearest relations of the spouses on both sides as having claims upon them, and as being in fact members of their family. It rather appears to me that that is the spirit which we find expressed in this deed—"We will just leave our whole estate to all our next-of-kin, yours as well as mine." I cannot construe the deed in any other way. And this view—that one class was intended, and an equal division among the members of that class—is supported by the clause nominating an executor. It is quite plain that there was a confusion of ideas. The survivor was to be executor of the predeceasing spouse, and when he died the nearest of kin were to be his or her executor. The cause of this blunder was an attempt to put two sentences into one. What was meant was this—"We nominate and appoint the survivor to be executor of the party predeceasing, and on the death of the survivor we appoint the next-of-kin to be executors." That is to say, when the last deceasing spouse dies, the executors are to be the next-of-kin of the spouses. That cannot be the next-of-kin of one of the spouses, nor one individual of each class of the next-of-kin. Neither of those constructions will do. So no construction of the expression next-of-kin in that clause will do which excludes the next-of-kin of husband and wife from being executors. But if all the next-of-kin are to come in as executors, that raises a strong presumption in favour of the same construction in the dispositive clause. I think the result is that it is impossible to extract anything in support of the contention that there is to be a division between two sets of next-of-kin who are in no way divided in the deed.

Lords Mure, Shand, and Adam concurred.

The Court answered the question by finding that the nearest in kin of both spouses were to be treated as one class, and that the succession was to be divided equally among the individuals of that class.

Counsel for the First Party—Pearson—Guthrie. Agents—H. & H. Tod, W.S.

Counsel for the Second Parties—Comrie Thomson—A. J. Young. Agents—Welsh & Forbes, S.S.C.

Saturday, July 9.

FIRST DIVISION.

[Lord Trayner, Bill Chamber.

M'WHIRTER *v.* RANKIN AND OTHERS (M'CULLOCH'S TRUSTEES).

Right in Security—Bond and Disposition in Security—Personal Obligation—Titles to Land Consolidation (Scotland) Act 1868 (31 *and* 32 *Vict. c.* 101), *sec.* 119, *Sched. F F* (*No.* 1).

The creditor in a bond and disposition in security in the form prescribed by the Titles to Land Consolidation (Scotland) Act 1868, Sched. F F, No. 1, containing the usual clause consenting to registration for execution, gave notice requiring payment of the sum contained in the bond, with the usual three months' premonition that failing payment he might proceed to sell. Shortly thereafter the creditor charged the debtor on the personal obligation in the bond to make payment within six days. The debtor having brought a suspension of the charge—*held* that the creditor was entitled to both remedies, and note *refused*.

By bond and disposition in security, dated 16th and recorded 17th February 1881, Robert M'Whirter borrowed £1000 from the Rev. J. M. M'Culloch over certain subjects in Greenock. The bond was in the form prescribed by the Titles to Land Consolidation Act 1868, Schedule F F, No. 1, and contained a clause consenting to registration for execution.

On 27th May 1887, Dr M'Culloch having in the interval died, his trustees gave notice requiring payment of the £1000 within the three months provided by the 119th section of the Titles to Land Consolidation (Scotland) Act 1868. On 16th June 1887, and prior to the expiry of the three months, the trustees charged M'Whirter, upon the personal obligation contained in the bond, to pay within six days thereafter the said principal sum of £1000, penalty and interest. M'Whirter brought a suspension of the charge, and pleaded, *inter alia*—"(3) The said charge is at variance with the terms of the schedule previously served on the complainer by the respondent, in virtue of the statute, and also at variance with the provisions of the statute itself."

The respondents stated that there had been delay in paying the interest on the bond, and that they had discovered that the value of the security had greatly depreciated.

The Lord Ordinary (Trayner) on 25th June 1887 refused the note.

"*Opinion.*— . . . . The clauses of the Act referred to make provision for the proceedings which must be taken before the creditor in a heritable security takes steps to realise the subject of the security. But these clauses have no application in the present case, because the creditor is not proposing to sell the security subjects, but is proceeding only to recover his debt by diligence on the personal obligation of the suspender. This appears to me to be within the right of the respondent, and is a right, in my opinion, distinctly recognised by the effect given by statute to the clause in the bond consenting to registration for execution." . . .