would as co-owner have been entitled to a share of net freight on the ground that when it was earned he was one of the co-owners of the vessel. But when on 5th December 1885 he purchased the shares of the vessel, she was fitted out and already in a condition to sail on the voyage by which freight was to be earned. And accordingly what he acquired was a right to 22/64th shares in a vessel equipped with a crew, fully provisioned and in repair, and ready to proceed on her voyage. What was sold to him was not a vessel which was going to be put into repair, but a vessel already in good repair. The defender therefore got the advantage of all that had been already done. I think the managing owner or ship's-husband has no action against him for the cost of repairs and fittings on the simple ground that he was not the employer of those who executed them. The co-owners as they stood before the bill of sale were the only employers.

Lord Mure—I am of the same opinion. The facts have been clearly explained by your Lordship. It appears to me that except as to that part of the expense which was incurred subsequently to the date of the bill of sale there is no claim against the defender. That view is, I think, clearly indicated in the passage from the opinion of Sir Robert Phillimore, quoted in the note of the Sheriff-Substitute. The ship was repaired and fitted out for the voyage before the bill of sale, and it must be taken that the defender gave full value for his shares in her when so fitted out and repaired.

Lord Shand—The advances which are here in question were not made on the defender's credit, nor were they made—or at least his obligation to pay them was not incurred—at any time during the period when he was part-owner. In that state of the facts it is plain that unless special grounds are shown to establish the supervening liability alleged, he cannot be made liable. Now, on the record and in the minute of admissions, one fact, and one only, is relied upon—the fact, namely, that the defender became owner of 22/64th shares in the vessel on 5th December 1885, at the very time when she was about to sail under the charter-party of 11th November 1884. The minute of admissions goes further in expression than a mere statement that the defender became owner on 5th December 1885, for it goes on to say that he "assumed the rights of ownership" on that date. Both sides were pressed as to whether that expression conveyed any additional meaning, and I was left in the state of mind to which your Lordship has given expression—that of thinking that the words have no substantial meaning beyond the statement that the defender became co-owner. Accordingly there is no general ground for holding that any liability for the expenditure had supervened on the defender. He did not authorise it, nor was he in any way responsible for it, unless the mere fact of his becoming a co-owner made him so. Now, so far as we can see, this bill of sale was kept entirely latent. It was a transaction between the defender and Hendry; it was not intimated or registered; and the parties to it might have put it into the fire a week afterwards if they had liked. It was never acted on, and no one else had any right under it. I can see no ground on which we can hold the defender responsible in consequence of his merely taking the bill of sale.

Further, I agree that even if intimation of the bill of sale had been made to the ship's-husband and the co-owner, the result of the facts and admissions would have been the same. When the defender purchased his shares there was no special stipulation that he should be liable for previous furnishings and repairs. He bought shares of a ship which was provided and ready for sea, and in that state of the facts, then, there is no ground for holding him responsible to the ship's-husband. It is quite true that had freight been earned, the ship's-husband would have been entitled to retain as against the defender the advances he had made to enable the freight to be earned. That follows from the relation of the ship's-husband to the ship, and the right arises from the doctrine of retention. He would retain as against the ship what he had paid out for the ship. But that is quite a different thing from the assertion of a right to sue the defender personally for advances made before he had anything to do with the ship. As the facts stand there is no freight. What, then, is the ship's-husband's remedy? His remedy is plainly against the former proprietor of the shares now belonging to the defender for the proportion due in respect of those shares, and that because it was in his employment that this work was done. But has he also a remedy against the co-owner? There is no averment as to a custom of trade to the effect that in such a case as this the liability of the person to whom the ship or part of it belonged when the repairs were made, attached also to the person who buys his shares after the work is done, and even if there were I should think it extremely questionable whether any effect could be given to such a custom.

I think the case fails at the outset, and that there is no legal ground for making the defender responsible.

Lord Adam concurred.

The Court refused the appeal and adhered to the interlocutors of the Sheriffs.

Counsel for the Pursuers (Appellants)—Gloag—M'Kechnie. Agent—W. B. Rainnie, S.S.C.

Counsel for the Defender (Respondent)—D.-F. Mackintosh—Dickson. Agent—J. Smith Clark, S.S.C.

Friday, July 8.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

THE TRADES HOUSE OF GLASGOW *v.* BLACKS.

Church—Manse—Assessment—Cess Roll—Valued Rent—Ecclesiastical Buildings and Glebes (Scotland) Act 1868 (31 *and* 32 *Vict. cap.* 96), *sec.* 23.

The Ecclesiastical Buildings and Glebes (Scotland) Act 1868 provides by section 23 that when the area of a church theretofore

erected has been allocated amongst the heritors according to their respective valued rents, all assessments for repairs shall be imposed according to the valued rents.

The superiors of lands which had been feued out under reservation of the minerals, raised an action against the heritors of the parish to have it declared that they were not liable for assessments in respect of repairs upon the parish church, manse, churchyard, and walls, imposed subsequent to 1857, when they ceased to be proprietors of the *dominium utile* of any portion of the lands. The pursuers had been allocated seats in the church; their names had never been removed from the cess roll; and they had continued to pay land tax on the valued rent. *Held* (1) that they were liable under the statute for the assessments for church repairs; and (2) that if the other assessments were rightly imposed on the valued rent, the decision of this question and that of the church repairs was one and the same, and that even if the other assessments were wrongly imposed upon the valued rent, the pursuers were yet liable, because they had not timeously taken the proper steps for correcting the illegality.

Per the Lord President—that the pursuers' remedy was to apply to the commissioners of supply to allocate the valued rent among the different feuars.

The Trades House of Glasgow were the proprietors of certain lands lying within the parish of Govan, commonly known as the Tradeston district of Glasgow. About the year 1791 they began to feu these subjects, under reservation of the coal, metals, and minerals, for building purposes, in small lots, to be held immediately of and under themselves; and they continued to dispose of the same gradually in this way until the year 1856, when the last remaining lot of ground was feued, and they were then entirely divested of the *dominium utile* of the subjects, and their rights limited to the *dominium directum*. Under the various feu-rights thus granted, which were all uniform in their terms, the pursuers' vassals were in every case taken bound, *inter alia*, to free and relieve the Trades House of a proportional part, according to the extent of surface feued to each, of all cess or land tax, teinds, minister's stipend, schoolmaster's salary, and all other public or parish burdens payable or which should be payable out of the said lands.

The heritors of the parish of Govan imposed, and sought to recover, the following assessments as on the *dominium directum*, viz.—(1) The sum of £25 sterling as on the 9th day of June 1873; (2) the like sum of £25 sterling as on the 11th day of February 1875; (3) the like sum of £25 sterling as on the 11th day of April 1876; (4) the sum of £12, 10s. sterling as on the 28th day of October 1880; and (5) the like sum of £12, 10s. sterling as on the 4th day of December 1885. The whole of these assessments were in respect of repairs effected on the parish church, manse, churchyard, and the like.

Thereafter the Trades House of Glasgow, and certain individuals described as proprietors of, and feudally vested in trust for behoof of the Trades' House and certain incorporations, in the *dominium directum* of the subjects in question, raised an action of declarator against the clerk and collector of assessments to the heritors of the parish of Govan, in which they sought to have it declared that they were not liable for payment of any assessments imposed in respect of the lands of which they held the *dominium directum* only, subsequent to 1st January 1857, and still remaining unpaid, and, in particular, were not liable for the assessments above specified or for any future assessments.

They pleaded—"(1) The pursuers' rights, as proprietors in trust foresaid in the subjects described in the summons, being limited to the *dominium directum* or superiority thereof, and having been so limited since the first day of January 1857, they are entitled to decree of declarator as concluded for. (2) The pursuers having been denuded of the *dominium utile* or right of property in said subjects prior to the imposition of the special assessments claimed by the defenders as representing the said heritors of the parish of Govan, detailed in the summons, and having in no way acquiesced in said assessments, they are not liable therefor, and are entitled to decree to that effect as concluded for. (3) In any view, the assessments in question were illegally imposed according to the valued rent, and ought to have been imposed according to the real rent as set forth in the valuation rolls, and the pursuers not being entered in said valuation rolls, are not liable for any assessment."

The heritors lodged defences, and pleaded—"(1) The pursuers' averments are irrelevant, and insufficient to support the conclusions of the summons. (2) The pursuers being heritors in the parish of Govan, and appearing as such in the old valuation or cess roll of the county of Lanark, are liable for all assessments leviable upon the heritors according to the valued rent. (3) The assessments in question having been legally imposed upon the pursuers according to the valued rent, as appearing in the old valuation or cess roll, the defenders ought to be assoilzied. (4) In any event, the said assessments having been imposed and levied after due notice, and the pursuers having taken no steps to bring the said assessments under review, they are now barred from challenging the said assessments."

The Lord Ordinary (M'Laren) allowed a proof, in which there was a conflict of evidence as to whether proper notice of the assessment had been sent to the Trades House or not. In other respects it was superseded by a joint-minute of admissions, in which "Graham Murray for the pursuers admitted—(1) That the ecclesiastical buildings of Govan were built by the valued rent heritors of the parish, and that the seats in the parish church (demolished in 1884) were in 1826 allocated according to the valued rent, and that the pursuers, as such heritors, had certain seats in the church allotted to them, for which they received rent down to the year 1857, and one single payment in the year 1869, as found by the Sheriff in the action in the Sheriff Court of Lanarkshire referred to in the condescendence, but that with the exception of the single payment above referred to they have not received any rent for said seats since the year 1857. (2) That in the year 1878 a petition was presented to the House of Commons against the Govan Burgh Bill, of which a true copy forms No. 11 of process. (3) That the pursuers have

long been, and still are, entered on the cess roll of the county of Lanark, that they have regularly paid, and still continue to pay, cess or land tax, and that they on two occasions applied by petition to the Commissioners of Supply of said county in order to have their name removed from said roll, and that in each case their application was refused. (4) That the method of assessment for repairs on church, manse, &c., in the parish of Govan has from time immemorial been according to the valued rent, and that at no time was an assessment ever levied according to the real rent. (5) That the various meetings of heritors held between 1872 and 1886 were duly convened by notice read in the parish church and advertisements in a public newspaper. That in the year 1870 pursuers, in a letter to the defenders, denied their liability for assessments for repairs on church, manse, &c., but that in an action raised in 1871—being the action referred to in admission 1—by the present defenders, decree was granted by the Sheriff against the present pursuers in respect of such assessments, which were thereupon paid. That since the date of said decree the pursuers have taken no steps to have their immunity from assessment established, further than asserting that they were not liable, and presenting the petitions above referred to, and also refusing payment of their share of the assessments, referred to in the summons, when the same was demanded. (6) That the assessments mentioned in the summons were none of them applicable to the new parish church, which was erected subsequent to the year 1884 by subscription, under arrangement with the heritors."

"Black for the defenders admitted, as had been done by them in the proceedings which pended in the Sheriff Court at Glasgow in the year 1871, that the Trades' House and Incorporations of Glasgow, presently represented by the pursuers, had, previous to the year 1857, feued the whole of their land in Tradeston, Glasgow, as described in the summons, but under reservation to them of the whole coal and other metals and minerals in the foresaid lands, and that they had not in any manner re-acquired any of the land so feued out. He further admitted that the vassals were in every case taken bound to free and relieve the said Trades' House and Incorporations of a proportional part, according to the extent of surface feued to each, of all cess or land tax, teinds, minister's stipend, schoolmaster's salary, and all other public or parish burdens, and that the feu-rights had been duly recorded in the appropriate Register of Sasines.

"He also admitted that since 1869 the pursuers had not attended any meeting of heritors of the parish of Govan, and had taken no part in their proceedings.

"He further admitted that the parish of Govan is now a landward burghal parish."

On 16th February 1887 the Lord Ordinary (M'Laren) assoilzied the defenders from the conclusions of the summons.

"*Opinion.*—The question in this case is whether the Trades' House of Glasgow are liable in the capacity of heritors or otherwise for a proportion of the assessments levied since the year 1872 for repairing the parish church, manse, churchyard, and walls. The pursuers were formerly proprietors of the estate described in the summons, but before the period embraced by this action they had feued out everything they possessed in the parish excepting their seat in the parish church. This also they have eventually got out of, but only through the demolition of the building of which it formed a part. It is stated in a joint-minute for the parties that the old ecclesiastical buildings of Govan were built at the cost of the valued rent heritors, and it is further stated that the seats in the parish church (demolished in 1884) were in 1826 allocated according to the valued rent, and that the pursuers, as heritors of lands having a valued rental, had certain seats allotted to them which they had a right to occupy.

"It is admitted, or is in any case a necessary inference from the admitted facts, that the Trades Corporation, before they feued their lands, were rightly placed on the roll of valued rental by the Commissioners of Supply for the County of Lanark. It may be taken for granted that the pursuers are entitled to have their names taken off the roll of valued rent, by going through certain forms involving the consent of the feuars, amongst whom the land-tax is to be divided, or an adjudication against them. In the meantime the pursuers as a corporation are on the roll, and they have regularly paid their land-tax, for which they have a claim of rateable relief against their tenants in the various feu-holdings.

"With respect to so much of the assessments in dispute as applies to repairs on the fabric of the church, I have to consider the effect of the 33d section of 17 and 18 Vict. cap. 91, and of the 23d section of 31 and 32 Vict. cap. 96 (The Ecclesiastical Buildings Act), which provide that where the area of a church theretofore erected has been allocated amongst the heritors according to their respective valued rents, all assessments for repairs shall be imposed according to the valued rents.

"These enactments would, on a first impression, appear to be decisive of the question, so far at least as relates to the repair of the church. But they are not necessarily so; because the pursuers, while admitting the applicability of the statutes, contend that they themselves are not, in a legal sense, the true valued rent heritors; and that it is the business of the body of heritors to find out who the feuars are, and to make a division of the valued rent affecting their properties, for the purposes of the several assessments which they have laid on.

"This appears to me to be one of those propositions which contains in itself the elements of its own dissolution. How, or by what authority, are the heritors of Govan to divide the valued rent amongst the feuars? Where an assessment is laid on real rental, or on any fixed proportion of real rental, the extent of the liability is a mere question of fact, and can be ascertained like any other fact. Accordingly in the cases of disputed liability to assessment for the poor, which occurred before the passing of the General Lands Valuation Act, the Court had no difficulty in inquiring into the question of value for the purposes of the particular assessment.

"But, as it appears to me, valued rental is not a thing which can be ascertained or divided except by the Commissioners of Supply, or in an action to which they and the feuars are parties.

It is not a valuation at all (except in a historical sense), but is a fixed and constant scale according to which the land-tax is to be levied from the persons whose names are on the roll as representing certain ancient estates. Where superior and feuar are agreed, the Commissioners have authority to substitute the feuar for the superior. Where they are not agreed resort must be had to a court of law, by whose order the necessary substitution may be made. Until the proper correction is applied to the roll of valued rent, or county cess roll, as it is termed, it appears to me that the heritors have no other person liable to them for such ecclesiastical expenses as are burdens on the valued rent than the person or corporation whose name appears in the roll. Valued rent being a thing wholly factitious as a criterion of liability, it can neither be made nor unmade except in the regular legal manner. The pursuers have been unable (as appears from the papers) to obtain the consent of their feuars to the substitution of their names in the county cess roll; and as they have not brought an action to have the roll amended I am of opinion that they are liable to be assessed just as if they were the true heritors. If they have relief under their feu-contracts, this of course can be enforced in another way.

"There remains the question of liability for the repair of the manse and the churchyard walls. There can be no separate question of general importance with reference to repayment of expenditure for keeping this property in order. If 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 antagonists fairly and promptly. If the objections had been taken immediately on the imposition of any of the rates in dispute, and had been confined to that particular rate, we should have considered it. But it appears to me that I should be taking a departure in a direction opposed to the equitable considerations which have guided the practice of this Court were I to give any countenance to an objection which would invalidate all the payments that have been made within the last fourteen years, and would impose upon trustees and other representative persons the obligation of suing for repayment of local taxation, contributed and expended in good faith during all that time by a body of persons who believed that they were liable to contribute to these public objects. It is right to say that the officers of the Trades' House deny the receipt of the notices of assessment, and they may therefore conceive that they were not called on to take proceedings for the suspension of the assessment. But they do not deny that they were in the knowledge that the assessments were being laid on; and it is quite competent to suspend upon the apprehension of a threatened charge. The posting of the notices of assessment was proved in the usual way, and I must hold that notice was duly given.

"In all the circumstances I am not able to give effect to any of the conclusions of the summons, and I shall find that the condescendence is not proved, and assoilzie the defenders from the conclusions of the summons, finding them also entitled to their expenses."

The pursuers reclaimed, and argued that the Lord Ordinary's interlocutor rested on the view that liability for parochial assessments on the valued rent depended upon presence in the cess-roll. [Lord President—Is there an example of assessments on valued rent being recovered from anyone not on the cess roll? Murray—I think so.—*Robertson* v. *Murdoch*, February 23, 1830, 8 S. 587]. The cess roll had nothing to do with the question of liability—*Toshack* v. *Smart*, July 18, 1771, M. 13,134. I. (1) In no case was a superior liable for parochial assessments—Bell's Prin., pp. 1164, 1171; *Dundas* v. *Nicholson and Others*, July 2, 1778, M. 8511; *Traquair's Trustees* v. *Heritors of Innerleithen*, December 9, 1870, 9 Macph. 234; Ersk. Inst. ii, 10, 63 note; Duncan on Parochial Law, 167, 573, 575, 577. In so far as they still owned the minerals, they were not liable for church buildings—*Bell* v. *Earl of Wemyss*, February 16, 1805, 13 F.C. 444; M. App. *voce* Kirk, No. 3; Connell's Supplement to Treatise on Parishes, pp. 28, 29; Duncan on Parochial Law, p. 168. (2) The Ecclesiastical Buildings and Glebes (Scotland) Act 1868 (31 and 32 Vict. cap. 96) did not impose any obligation on the heritors not incumbent on them already—secs. 1, 23, 24. Another argument might be drawn from the general provisions of the statute. Heritors had been held to act as a quasi-corporation—*Boswell* v. *Duke of Portland*, December 9, 1834, 15 S. 148; *Boswell* v. *Hamilton*, June 15, 1837, 15 S. 1148. This view was recognised by the Act, and that being so, and the superior being no member of that quasi-corporation, how could he be assessed? II. But assuming the Lord Ordinary to be right as regarded the church, he was wrong as regarded the manse. An assessment for manse repairs must be on real rent—*Highland Railway Company* v. *Heritors of Kinclaven*, June 15, 1870, 8 Macph 858.

Argued for the defenders—(1) That the feuars were represented by the superiors being on the cess roll. The fact that persons not on the roll could be treated as upon it, as in the cases cited, did not go far to show that persons on it could get out of their liability. It was quite indifferent what was the extent of the *dominium utile*. The liability was in respect of property parted with or retained in respect of the representation of the old valued rent—*Harlaw* v. *Heritors of Peterhead*, June 24, 1802, 4 Pat. App. 356; *Boswell* v. *Hamilton*, *supra*; *Duke of Abercorn* v. *Presbytery of Edinburgh*, March 17, 1870, 8 Macph. 733. In short, the principle of assessment was to look at what appeared on the roll, not at the extent of property retained by the party assessed. There was no case where the assessment depended on property. There was no injustice in holding the cess roll as the basis. It was the pursuers' own fault for not going to the Commissioners of Supply and getting themselves taken off the roll. Had the Commissioners refused, an appeal lay to this Court. The procedure was quite simple—*Lord Advocate* v. *Commissioners of Supply for the County of Edinburgh*, June 5, 1861, 23 D. 933, 949; *Duke of Abercorn* v. *Presbytery of Edinburgh*, *supra*. If the pursuers could get

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