which he conveyed it to his wife Elizabeth Allan and her heirs. Elizabeth Allan died in 1884. Her husband survived her nearly five years, and that disposition of the house, of which he was proprietor, was found in his repositories, and there was no other disposition. The question, as I regard it, is, whether that disposition is or is not to have effect? I cannot find any sufficient grounds in law for denying it effect. The house remained his notwithstanding that disposition for thirty years, and when his first wife died he of course continued at liberty to deal with it as he pleased, but as a matter of fact he never dealt with it otherwise than by that disposition in favour of his first wife and her heirs. Her heir now claims it, and I see no reason for refusing to accede to his claim.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER—I have had some doubts as to whether this settlement is to be regarded as other than a provision for the wife if she survived, and as falling therefore by her predecease. The doubts in my mind, however, do not affect my concurring with your Lordships further than to induce me to express considerable hesitation.

The Court answered the first question in the affirmative and the second in the negative.

Counsel for the First Party—M'Kechnie—Cooper. Agents—A. P. Purves & Aitken, W.S.

Counsel for the Second Party—Goudy—G. W. Burnet. Agent—J. Murray Lawson, S.S.C.

Tuesday, January 13.

SECOND DIVISION.

[Lord Kyllachy Ordinary.

CUNNINGHAM AND OTHERS *v.* CUNNINGHAM AND OTHERS.

Succession — Division among Relatives— Division per stirpes or per capita.

A testator directed the residue of his estate "to be equally divided amongst all my relatives, my sister Maria to get a half more than the others." *Held* that the residue fell to be divided amongst the testator's heirs *in mobilibus* equally *per stirpes*, his sister getting one-half share more than that of each of the other *stirpes*

The late Arthur Cunningham, commission merchant, Girvan, died unmarried on 12th October 1889, leaving a last will and testament dated 18th February 1884, with codicil thereto dated 18th February 1887, both recorded on 9th December 1889. He nominated Dr John Cunningham and another his trustees and executors, and instructed them to pay certain legacies and by the codicil directed "the residue or remainder of my estate to be sold, and the proceeds to be equally divided amongst all my relatives, my sister Maria to get a half more than the others."

The testator was survived by one sister —Mrs Maria Cunningham or M'Lean, and by the issue of five deceased brothers or sisters.

A multiplepoinding was raised by the trustees to have the rights of claimants under the will determined. These claimants were, *inter alios*, the said Mrs Maria Cunningham or M'Lean, who maintained that the residue fell to be divided amongst the testator's heirs *in mobilibus per stirpes* according to the provisions of the Moveable Succession Act, *i.e.*, into six shares, but so that her share should be one-half more than each of the other shares, and the children of a deceased brother, who maintained that the residue fell to be divided amongst the testator's heirs *in mobilibus per capita*, his sister Maria receiving one-half share more than the other heirs.

The Lord Ordinary (KYLLACHY) pronounced as follows—"Finds . . . . that on a sound construction of the said settlement and codicil the said whole estate falls, after payment of the legacies . . . mentioned in the codicil, and under deduction of the expenses of realisation, management, and distribution, to be divided *per stirpes* among the testator's brothers and sisters and their descendants, in the same manner as if he had died intestate, but subject always to his sister Maria receiving one-half share more than the share falling to each of the other *stirpes*." . . .

The claimants who desired division *per capita* reclaimed, and argued — No doubt the term "relatives" meant heirs *in mobilibus* — *Williamson* v. *Gardiner*, November 17, 1865, 4 Macph. 66, but according to the codicil the residue was to be divided "equally" amongst them all, whereas the Lord Ordinary gave unequal shares even to persons in the same degree of kinship to the testator. The proper course was to find out who were the relatives, and then divide the residue equally amongst them as individuals forming one class, *i.e.*, *per capita*, giving Mrs M'Lean a half share more than the others. That was the method of division recognised in the analogous case of *Hogg* v. *Bruce*, July 8, 1887, 14 R. 887.

Argued for respondent—"Equally" was not used in *Williamson's* case, and was not conclusive of the matter. There might be equality either *per stirpes* or *per capita* —*Home's Trustees* v. *Ramsays, &c.*, December 11, 1884, 12 R. 314; *Allan* v. *Flint*, June 15, 1886, 13 R. 975. The Moveable Succession Act of 1855, under which the reclaimers succeeded here, provided for division *per stirpes*. The Lord Ordinary's interlocutor was right.

At advising—

LORD JUSTICE-CLERK—The late Arthur Cunningham, who was a merchant in Girvan, left a testament and relative codicil,

both holograph, and the question raised in this case relates to the disposal of the residue of his estate by the codicil, by which that residue is directed to be "equally divided amongst all my relatives, my sister Maria to get a-half more than the others." It is contended, on the one hand, that by this direction the testator favoured equally all those who were legally his next-of-kin, that the estate must be divided into twice as many shares as there are next-of-kin, and one share more, and that they must receive each two shares, Maria, the sister, receiving three. On the other hand, it is contended that the true construction is, that the testator intended by the expression "my relatives" his brothers and sisters, or the direct descendants of those who should predecease him, the latter taking their parent's share.

There is considerable difficulty in finding grounds in the words of the codicil for either construction, but I have come to the conclusion that the construction by the Lord Ordinary is the right one. I think that is the conclusion I should have arrived at had there been no other words than these—"amongst all my relatives." The deceased was making a family settlement, in which he was acting as *in loco parentis* to the rest of his family, and it would, I think, be an unnatural construction to put upon the words he used a meaning which would cause the shares of his brothers and sisters who might survive him to have a proportion carried out of them whenever a brother or sister should die leaving a number of children. Such a reading would, I think, be strained and unnatural. But the special favour shown to "my sister Maria" that she was to get "a half more than the others," seems to me to indicate very plainly that in speaking of his relatives he intended a division among the family in equal proportions to each family, and not in proportions to each individual, whether brother, sister, nephew, or niece, who might survive. I move your Lordships therefore to adhere to the interlocutor reclaimed against, and to remit the case back to the Lord Ordinary.

LORD YOUNG and LORD RUTHERFURD CLARK concurred.

LORD TRAYNER did not hear the case.

The Court adhered.

Counsel for the Reclaimers—Asher, Q.C. —Fleming. Agent—W. B. Rainnie, S.S.C.

Counsel for the Respondent—Vary Campbell—W. Campbell. Agent—Thomas Hart, L.A.

Thursday, January 15.

SECOND DIVISION.

LINDSAY *v.* KERR.

(*Ante*, p. 233, December 19th, 1890.)

Expenses—Decree against Husband and Wife.

A wife with the concurrence of her husband unsuccessfully brought an action of affiliation and aliment against a man whom she alleged to be the father of a child born shortly after her marriage. *Held* that decree for expenses in favour of the defender fell to be pronounced against both the wife and her husband.

A married woman with the consent and concurrence of her husband brought an action of affiliation and aliment against a man whom she alleged was the father of a child born shortly after her marriage. The Sheriff-Substitute pronounced decree in her favour, but the Court of Session recalled this interlocutor, assoilzied the defender, and found him entitled to expenses. The defender's counsel when moving the adoption of the Auditor's report, contended, upon the authority of Lord Fraser's work upon Husband and Wife, p. 584, that the decree for expenses should be pronounced against the husband as well as against the wife.

It was argued for the husband—That on the authority of the case of *Baillie* v. *Chalmers*, April 6, 1791, 3 Paton's App. Cas. 213, decree for expenses here should go out against the wife alone. It was her action.

At advising—

LORD YOUNG—It is quite clear that decree must go out against the husband here as well as against the wife. He could have pursued this action quite well without his wife. The child was his, and could not have been given to anyone else by any action at the wife's instance.

LORD JUSTICE-CLERK, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

The Court pronounced decree for expenses against both the husband and the wife.

Counsel for the Defender—Sym. Agent—Alex. Wyllie, Solicitor.

Counsel for the Husband—Burnet. Agents—Emslie & Guthrie, S.S.C.