

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'ULLOCH'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." . . .

The complainer reclaimed.

At advising—

LORD PRESIDENT—This case is too clear for argument. Section 119 of the Titles to Land Consolidation Act 1868, which has been appealed to, has really nothing to do with the question. Where the subject of the security is to be realised the provisions of that section are to be followed, and the sale may take place upon three months' premonition. But there is no proposal to sell in the present case. The only matter before us is the ordinary charge upon a personal bond, which, the suspender says, should not be allowed to proceed because the three months have not expired. But this bond gives two remedies—the first is that of charging upon the personal obligation; the second is that of calling up the bond, and failing payment within three months, of proceeding to a sale of the security subjects. It cannot be doubted that the respondents were entitled to both remedies.

LORD MURE, LORD SHAND, and LORD ADAM concurred.

The Court adhered.

Counsel for the Complainer and Reclaimer—M'Kechnie—Forsyth. Agent—Robert Emslie, S.S.C.

Counsel for the Respondents—Graham Murray—M'Clure. Agents—Smith & Mason, S.S.C.

HIGH COURT OF JUSTICIARY.

Wednesday, July 13.

(Before the Lord Justice-General, the Lord Justice-Clerk, Lords Young, Mure, Craighill, and M'Laren.)

NICOL v. M'NEILL.

Justiciary Cases—Sunday Trading—Summary Procedure—Act 1661, cap. 18—9 Geo. IV. cap. 29 (Sir William Rae's Act)—19 and 20 Vict. cap. 48—Summary Procedure Act 1864 (27 and 28 Vict. cap. 53), sec. 3—Summary Jurisdiction Act 1881 (44 and 45 Vict. cap. 33), sec. 3.

A shopkeeper was charged in a burgh court at the instance of the procurator-fiscal with an offence against the Act 1661, cap. 18, "for the due observation of the Sabbath-day." The complaint set forth, *inter alia*, that the accused was "liable, on conviction, to pay a penalty of £10 in Scots money, or 16s. 8d. in sterling money, and failing payment of said penalty, is liable to be exemplarily punished in his person, namely, to be imprisoned for any period not exceeding twenty days;" and further prayed, *inter alia*, that the accused be "punished according to law." At the trial on this complaint the depositions of the witnesses were recorded, the record being signed by the witnesses and the presiding

magistrate. The accused having been convicted, brought a suspension on the grounds (1) that the complaint was incompetent in form, in respect that *Bute v. More*, November 24, 1870, 1 Coup. 495, had settled that a contravention of the Act 1661, cap. 18, could not be tried summarily, and (2) that that Act was in desuetude.

Conviction *quashed*, *per* the Lord Justice-Clerk, Lords Mure, Craighill, and M'Laren, on the grounds that, whether or not the restriction of the punishment in the complaint and the recording of the evidence took the case out of *Bute v. More*, the 3d section of the Summary Jurisdiction Act 1881 had made all summary complaints not in the form provided by the Summary Jurisdiction Acts 1864 and 1881 incompetent; and *per* the Lord Justice-General and Lords Young and M'Laren, on the ground that the case was ruled by *Bute v. More*.

Observations on the question whether the Act 1661, cap. 18, was in desuetude.

Robert Nicol, baker, Arbroath, was charged before the Magistrates of the Burgh on a complaint dated 6th July, at the instance of the Procurator-Fiscal, setting forth a contravention of the Act 1661, cap. 18, "for the due observation of the Sabbath-day." The complaint was in the following terms:—"Unto the Honourable the Magistrates of the Burgh of Arbroath, officiating in the Police Court of Arbroath: The Complaint of Duncan M'Neill, Superintendent of Police of Arbroath, and Procurator-Fiscal of Court for the Burgh of Arbroath, for the public interest.—*Humbly sheweth*,—That Robert Nicol, baker or shopkeeper, in or near High Street, in the burgh of Arbroath, and county of Forfar, has contravened the Act passed by the Scottish Parliament in the year 1661, chapter 18, entitled 'an Act for the due observation of the Sabbath-day,' more particularly that part of said Act which relates to or prohibits the using of merchandise on Sabbath-days: In so far as on Sabbath, the 4th day of July 1886 years, the said Robert Nicol did open or cause or permit the shop or premises situated at 236 High Street, in the burgh of Arbroath and county of Forfar, then and now or lately occupied or rented by him, to be opened, and did keep or cause or permit the same to be kept open for the using of merchandise, namely the sale of goods, and did sell or cause or permit pies, pastry, and lemonade or other goods or merchandise to be sold within said shop or premises on said Sabbath-day, to both or one or other of William Cargill, a fisherman, and now or lately residing in or near High Street; James Keir, assistant shopkeeper or messenger, and now or lately residing in or near John Street, both in the burgh of Arbroath and county of Forfar; and to several or one or more of the lieges whose name or names and place or places of abode are to the complainer unknown, said selling of goods or using of merchandise on said Sabbath-day, not being a work of either necessity or mercy, whereby the said Robert Nicol is liable, on conviction, to pay a penalty of ten pounds in Scots money, or sixteen shillings and eightpence in sterling money, and failing payment of said penalty, is liable to be exemplarily punished in his person, namely, to be