whole of the residue. He says, "the residue is to be divided." It is necessary, therefore, for the first parties to maintain that the words "legacies and claims," include the half of the residue. I don't believe these words were ever so used. And it is also to be observed that there is a further destination; for the balance over, if any, is to be distributed amongst the families of the testator's four sisters. This is not inconsistent with a revocation of the destination of the residue to the five families; for four of the families are still here, that of his brother John alone being excluded.

There is certainly a considerable difference between the amount of the residue in reality and what there would have been if no balance had remained after paying the legacies, amounting in all to £1750. But the testator may have expected there would be little in amount, or possibly he might have added on more legacies. I think, therefore, the destination of the residue is only to be found in the codicil of 1864.

The other Judges concurred.

Agents for Parties of first part—Gillespie & Bell, W.S.

Agents for other Parties—Duncan, Dewar & Black, W.S., and J. & C. Steuart, W.S.

Wednesday, May 18.

SECOND DIVISION.

DUFF *v.* FLEMING.

Landlord and Tenant—Lease—Action for Rent—Destruction of Subject. Certain premises let to the defender upon lease were so much destroyed by fire as to render them unsuitable for the purposes of his trade. *Held*, in an action at the instance of the landlord for rent, that there had been a *rei interitus* entitling the defender to abandon the lease.

This was an appeal from the Sheriff-court of Forfarshire. Robert Duff, sometime merchant in Dundee, sued Mathew Fleming, bottler there, for £55, being the half-year's rent due at Whitsunday 1869 by the defender, on account of certain premises let to him by the pursuer. The action was founded on a lease between the parties, dated 31st August 1867. The defence to the action substantially was, that the premises had been destroyed by fire, therefore that the lease was at an end.

The defender made the following statement:—"A fire, without fault on the part of defender, occurred in the premises rented by the defender from the pursuer under the lease referred to in the condescendence, on the 17th or 18th days of January last, and the premises were totally destroyed and rendered entirely useless for the purposes for which they were let, or for any purpose whatever, and the defender's stock was destroyed, and the defender's large business transacted therein entirely stopped; and on 21st January last the defender in consequence wrote through his agent a letter, intimating to the pursuer that he abandoned the lease and the premises, and would not be liable for any more rent. The defender was carrying on a large and profitable business in the premises, and by the destruction of the subjects his business was therein interrupted, and he was deprived of possession, and was obliged to provide himself with premises otherwise with the view of carrying on his business, and he had expended considerable sums in fitting up and otherwise preparing these premises for that purpose; and he has, since said fire and destruction, been carrying on his business in those other premises rented by him since that date. The expenses of providing said other premises amounted to £68, besides the rent which he is paying therefor, amounting to £36, for the period that has elapsed. The defender, by the destruction of the subjects let to him by the pursuer, suffered severe loss in his business, and lost by reason of the burning upwards of £220 on loss of trade, mens' wages, and keep of horses. The subjects lay in ruins for a considerable time, but the pursuer proceeded to renew the same; but the old walls were allowed to stand, and the new erections made by the pursuer are unsuitable for the defender's heavy business, and he would not take such premises, the same not being of use to him, and not strong enough nor capable of accommodating his business requirements."

And the defender pleaded "(1) the destruction of the subject taken by the defender from the pursuer, and the deprivation of possession thereof, entitled the defender to liberation from the lease of the same; and the defender is not liable for rent, at least for more than the proportion of rent of the half-year from Martinmas up to the period of the destruction. (2) The defender having abandoned, and intimated the abandonment to the pursuer, is free of the lease thereof founded on, and no rent is due under the same after the period of destruction. (3) The defender is not bound to enter on the new and altered subject, the more especially it being unsuitable and insufficient for his business. (4) *Separatim*, without prejudice to the foregoing pleas, and on the supposition that the defender could be bound to continue the lease, which the defender holds he is not, he has suffered loss, and been obliged to pay expenses, rents, and other outlays more than sufficient to meet any rents which may arise under the lease. And he is entitled to set off the same against any claim under the lease."

By a clause in the lease the defender was taken bound to keep the premises in good order and repair, and to leave the same in that condition at the end of the lease, ordinary wear and tear being excepted.

The Sheriff-Substitute (GUTHRIE SMITH) pronounced the following interlocutor:—"The Sheriff-Substitute having heard parties' procurators, finds, as matter of fact, that this is an action for the rent from Martinmas 1868 to Whitsunday 1869, of certain premises which are situated in the Seagate, Dundee, and which were let to the defender by lease, No. 4 of process, for the space of seven years from Martinmas 1867, for the purpose of carrying on a bottling business, at a rent of £110 per annum: Finds that the subjects of the lease were, on the 17th January last, so destroyed by fire, not attributable to any fault of the defender, as to be rendered unfit for the purposes for which they were let, and were not restored to a tenantable condition till the 13th of April: Finds that, on 21st January the defender intimated to the pursuer that in consequence of the destruction of the premises he abandoned the lease, and would pay no rent for the same from and after the date of the fire: Finds, in point of law, that the defender was entitled so to abandon the said lease, and is only liable for the rent down to said date, amounting to £20, 3s. 10d., and a further sum of £5, as the value of his occupation of the premises when he was realising his damaged stock, amounting to-

gether to £25, 3s. 10d.: decerns against the defender for said sum, with interest from the 25th day of February last till payment. *Quoad ultra*, sustains the defences: assoilzies the defender from the conclusions of the summons, and decerns: Finds the pursuer liable in expenses: allows an account thereof to be given in; and remits the same, when lodged, to the auditor of Court, to tax and report.

"*Note.*—The preceding interlocutor is almost identical in its terms with that which was pronounced by the Supreme Court in the recent case of *Drummond* v. *Hunter*, 12th January 1869, 7 Macph., p. 347. But in that case the fire occurred a few days before the term, and the ground of judgment was, that the tenant did not, and could not, get possession at the term, no opinion being given on the question whether, when a fire occurs during the currency of a lease and causes a temporary cessation of the tenant's beneficial enjoyment of the premises, he is entitled to abandon. Lord Barcaple says that on that question no precise rule could be laid down, but were such a case presented, he would attach great importance to the length of the interruption. It is quite clear that where there is a total extinction of the subject let, the lease must be at an end, because the relation of landlord and tenant cannot exist when there is nothing for them to be landlord and tenant of. The doctrine of the civil law is express on that point. In the Digest, *loc. cond.* (19, 2), lex 9, ℔ 1, the death of a liferenter is likened to the occurrence of a fire: "Si fructurarino locaverit fundum in quinquennium et decesserit heredum ejus non teneri ut frui præstet *non magis quam insula, exusta teneretur locator conductori.*" And as regards the obligation of the tenant, he is only to be liable to pay the rent for the period of his occupation: "In exustis quoque ædibus ejus temporis quo ædificium stetit mercedem prestandum rescripserunt." The same principle was applied by the House of Lords in *Bayne* v. *Walker*, 1815, 3 Dow, App. 233, where it was observed that the maxim *res perit suo domino* does not mean that the dominus is to make good the consequences of an accident, but that as to any one interested in the subject destroyed, no matter by what title, it perishes according to the nature and extent of his interest. Their Lordships therefore decided that the tenant could not force his landlord to rebuild a farmhouse which had been accidentally burnt down; but as to whether the fire would entitle him to abandon the lease, or claim an abatement of the rent, they would give no opinion, because neither question was raised in the action. The case, however, is of rare occurrence in which the destruction of the subject is total. In this country, where houses are not built of wood, but are substantial stone erections, they are, on the occasion of a fire, usually only damaged; and it is the degree of the damage entitling the tenant to abandon the lease as to which no precise rule can be laid down. In the present case the building in question appears to have been worth from £800 to £900, and the damage done by the fire was estimated at £479. It is obvious, that repairs of this extensive character could not have been executed without putting the defender to serious inconvenience, and exposing him to the risk of losing all his customers who looked to him for a continuous supply of liquors, and while the repairs were in progress, would have been obliged to go elsewhere for them. In point of fact, the repairs were not completed for nearly three months. In these circumstances, the Sheriff-Substitute thinks that the defender was entitled to abandon the lease, and is not liable in rent after the date of the fire; but, as he had afterwards the use of the premises for about a month to enable him to realise the salvage, the pursuer has been found entitled to a small additional sum, or the value of that occupation, which has been fixed at the rate of about one-half the rent."

The Sheriff (HERIOT) adhered, adding the following note to his judgment:—"The Sheriff has considered this case carefully, and is of opinion that the judgment of the Sheriff-Substitute is right. It is in accordance with the decision of the recent case of *Drummond* in the Court of Session. There is a certain distinction between the two cases, in respect that in Drummond's case the fire occurred a few days before the term of entry, and in the present case the fire occurred some time after entry. In both cases the premises had been taken for business premises, and in both cases, after the fire, the premises were no longer suitable for business premises until restored. The Court of Session held in the former case that the tenant was entitled to abandon. On the same principle, the Sheriff holds that the tenant here was entitled to abandon. A man in business must have a place in which to conduct his business. A bottling business requiring many men and horses to carry it on cannot be carried on in the street. The pursuer's house became unfit for the business for which the defender took it. They were so much destroyed that it was impossible the defender could have occupied any portion of them until renewed.

"The Sheriff has delayed his decision for some time, that he might have an opportunity of looking into the English cases referred to, which are of old date. They had as much bearing on the recent case in the Court of Session as on the present one. The Court of Session decided that case without referring to the English cases, and without their attention having been directed to the English cases. In such circumstances, the Sheriff feels himself shut up to follow the recent Court of Session, and to disregard the somewhat antiquated decisions of the English courts."

The pursuer appealed.

SOLICITOR-GENERAL and BALFOUR, for him, argued that the injury to the premises was not of such a character as to amount to *rei interritus*, and that, such as it was, the tenant's argument was fully met by the circumstance that the landlord had offered to repair the premises, and had in fact done so in the course of seven weeks from the tenant leaving them. They further founded on the clause in the lease obliging the tenant to keep the premises in repair, which, they maintained, threw the burden upon the tenant of himself repairing or restoring the premises to the extent they had been injured.

MILLER, Q.C., and DARLING in answer.

The Court held it to be settled law that in the contract of lease destruction of the subject let puts an end to the contract. What constituted destruction of the subject was a question of circumstances and a question of degree, and must be judged of with reference, amongst other things, to the purpose for which the subject was let. In the present case it was sufficiently established that the fire had so injured the premises in question as to render them useless for the purposes of the respondent's business, and that was enough. With regard to the clause in the lease, the Court was of

opinion that clauses of this description did not extend to cases of destruction by fire or storm.

Agent for Appellant—L. M. Macara, W.S.

Agents for Respondent—Lindsay & Paterson, W.S.

Thursday, May 19.

FIRST DIVISION.

SPECIAL CASE—MOODIE *v.* YOUNG.

Succession—Intestacy—Lapsed Share—Intention. A testator having provided certain annuities for his wife and son, directed his trustees to realise his property, and hold the residue for the behoof of his younger children, equally among them, for the daughters in liferent, and their children in fee, and for the younger son in fee; the widow in both cases getting the interests of the provisions during her viduity. He further provided—"and failing such issue attaining the said age of 21 years, I direct and appoint that the share and interest of such of my younger children deceasing shall form part of my estate, and shall belong to my other younger children or their issue attaining said age, equally among them *per stirpes.*" *Held* that the shares of two of the younger children, who had died without issue, went under said second recited clause into the deceased's general estate, and were to be disposed of in the same manner as the residue of his property had been disposed of in the former recited clause, in respect that by the words "failing such issue attaining said age" the testator had meant to provide also for the case of the failure of any issue.

James Young of Scarlet Hall died on 8th September 1864, leaving a trust-disposition and settlement, by which he conveyed all his heritable and moveable estate to trustees in trust for certain purposes. In the first place, he provided annuities for his wife and eldest son. The 5th direction was as follows:—"That my trustees shall from time to time realise and convert into money my whole estates and effects, heritable and moveable, not hereby specially disposed of, and after providing for the annuities before written, shall hold and apply the prices and produce thereof, and whole residue and remainder of my estate, for the use and behoof of my younger children, the said Janet Edmonstone Young, Margaret Primrose Young, and John Primrose Young, and such other child or children as may be procreated of my body, equally among said children, share and share alike, under the burdens and conditions following, *videlicit*:—The share falling to the said Janet Edmonstone Young, my eldest daughter, shall be held by my trustees, or invested by them in their names for behoof of the said Janet Edmonstone Young in liferent during all the days and years of her life, and shall belong to her issue in fee, equally among such issue *per stripes* to the extent and on the condition after provided in the case of the shares of my whole younger children, it being hereby provided that the free interest or annual proceeds of the share of the said Janet Edmonstone Young shall be payable to her at each of the terms of Whitsunday and Martinmas occurring after my decease during all the days and years of her life: The share falling to the said Margaret Primrose Young, and to any other daughter or daughters to be procreated of my body, shall be held by my trustees, or invested by them in their names, for the use of such daughter or daughters in liferent, and shall belong absolutely and be paid or conveyed to the issue of such daughter or daughters equally among such issue *per stirpes* in fee, but that only as after provided in the case of the shares of my whole younger children. . . . And the share or shares falling to the said John Primrose Young, and to any other son or sons to be procreated of my body, shall be held or invested by my trustees in their names, for the liferent use of the said Margaret Marshall Primrose or Young, so long as she shall survive me and remain unmarried; and on her decease or second marriage, the said share or shares shall become vested interests in my said son or sons, and shall be payable to him or them on his or their respectively attaining the age of twenty-five years, till which time or times the free interest or annual proceeds thereof shall be administered for his or their behoof by my trustees. And I direct my trustees, in the event of the death of any of my younger children leaving lawful issue, and having at the time of such decease a share or interest in my estate, to pay or assign and convey such share or interest to and in favour of all the lawful children of such deceasing child who shall attain the age of twenty-one years, equally between or amongst them, share and share alike, if there shall be more than one; but if there shall be but one such child who shall attain the age of twenty-one years, then the whole share or interest of the deceasing parent to such one child, the same to be so paid or conveyed upon his, her, or their respectively attaining the said age; and until such child or children respectively shall attain the age of twenty-one years, I appoint my trustees to pay and apply the annual profits of the share or interest provided or intended for him, her, or them respectively, for his, her, or their maintenance and education respectively; it being hereby expressly declared that the share of any of my younger children so dying leaving lawful issue shall be divided equally among his or her issue attaining said age of twenty-one years, and failing such issue attaining the said age of twenty-one years, I direct and appoint that the share and interest of such of my younger children deceasing shall form part of my estate, and shall belong to my other younger children, or their issue, attaining said age, equally among them *per stirpes.*"

Mr Young was survived by Mrs Margaret Primrose or Young, his second wife; by his eldest son James Young, and his three younger children, viz., Janet Edmonstone Young, now Mrs Moodie, Margaret Primrose Young, and John Primrose Young.

John Primrose Young died in pupilarity on 29th October 1866. Mrs Young died on 29th August 1869, and Miss Margaret Young died on 22d January 1870, in minority and unmarried.

This Special Case was presented to the Court for their opinion and judgment as to the disposal of the two shares of the residue of Mr Young's estate which belonged to John Young and his sister Margaret.

The principal question was, whether or not the clause "failing such issue attaining the said age of twenty-one years complete, I direct that and appoint that the share and interest of such of my younger children deceasing shall form part of my estate,