privilege, and that malice should be inserted in the issue. But I do not dissent, as the pursuer cannot suffer from its non-insertion. If the case turns out at the trial to be one of privilege, the judge will tell the jury that unless malice is proved their verdict must be in favour of the defender. It is perhaps better on the whole to leave it out.

The Court approved of the issues proposed by the pursuer for the trial of the cause.

Counsel for Pursuer—Shaw—M'Watt. Agents—Carmichael & Miller, W.S.

Counsel for Defender—Burnet. Agents—Cuthbert & Marchbank, S.S.C.

Friday, May 13.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

BRAND AND ANOTHER *v.* BRAND AND OTHERS (SCOTT'S TRUSTEES).

Succession—Heritable Security—Heir and Executor—Relief—Relevancy.

A testator by a settlement dated 1879 directed his trustees after payment of his debts, to pay one-half of the residue of his estate to his sisters, and the other half to his sister-in-law and her children in fee. By a codicil in 1889 he conveyed to his sister-in-law in liferent and her daughter in fee certain heritable subjects, which at the testator's death in 1890 were burdened with a bond and disposition in security for £4000 granted by him in 1880. The sister-in-law and her daughter sought declarator that they were entitled to the subjects disencumbered of the bond, and averred that the bond had been granted voluntarily to protect a friendly creditor against the testator's possible bankruptcy, that subsequently the testator's affairs became prosperous, and at his death the bond which he had retained in his possession had disappeared with the probability that it had been destroyed by him; that the security-subjects had never been of greater value than £3000, and thus the bequest was valueless unless relieved of the bond.

Held that the facts averred were not relevant to make the case an exception to the general rule that heritable debt is payable out of heritable estate, and the action *dismissed.*

John Scott, surgeon, Langshaw, Moffat, by trust-disposition and settlement dated 26th August 1879 disponed his whole heritable and moveable estate to and in favour of trustees for certain purposes, *inter alia*, as follows—"After payment of all my just and lawful debts, and deathbed and funeral expenses, and the expense of executing this trust, my said trustees shall pay and make over to Mistress Janet Carruthers or Brand, wife of the said William Brand, my sister-in-law, in liferent, for her liferent use allenarly, and to Jane Anne Scott Brand, their daughter, and their other children in fee, one-half of the residue of my estate, the said Jane Anne Scott Brand being entitled to one-third part of said half, and the other children equally among them, share and share alike, to the remaining two-third parts of said half of the residue, and shall pay and make over to Isabella Scott, Samuel Kennedy, David Kennedy, Margaret Kennedy, and Jane Kennedy or Lawrie, my brothers and sisters, equally among them, share and share alike, the other half of the residue of my said estate."

On 6th August 1889 he executed a codicil by which he disponed and made over to "Mrs Janet Carruthers or Brand, widow of William Brand, Esquire, merchant in London, my sister-in-law, in liferent for her liferent use allenarly, and to Jane Anne Scott Brand, their daughter, and her heirs and assignees whomsoever, heritably and irredeemably in fee all and whole my dwelling-houses, offices, and grounds of Langshawbank or Langshaw, in the parish of Kirkpatrick-Juxta and county of Dumfries, all as now occupied by me and as described in the title-deeds thereof; together with the whole household furniture, silver plate, and other moveables in the said dwelling-house: And I revoke the said settlement only in so far as the same conveys generally the said dwelling-house, offices, and grounds, and the said household furniture, silver plate, and moveables in the said dwelling-house, hereby confirming the same in all other particulars."

Dr Scott died upon 22nd July 1890. His whole property amounted to about £12,000. At his death Langshaw was burdened with a bond and disposition in security for £4000 granted by the testator to Mrs Brand's husband in 1880. Upon Dr Scott's death the firm of W. & H. Brand & Company intimated a claim for £9097, the amount due to them by Dr Scott. His trustees paid the sum upon receiving an assignation by the late Mr Brand's trustees as executors, to the said bond for £4000, which sum appeared *ex facie* of the record to be a charge upon Langshaw.

Mrs Brand and her daughter therefore raised this action against Dr Scott's trustees to have it found and declared that they had obtained a valid right to the estate of Langshaw under the aforesaid codicil, and that they were entitled to hold and possess the said lands free and disencumbered of the bond and of the debt therein contained, and that the defenders were bound to deduct the sum of £4000 from the moveable estate of the deceased Dr John Scott administered by them.

The pursuers averred that in August 1879 Dr Scott was proprietor of a sugar estate in Demerara, called Zeelugt. Messrs W. & H. Brand & Company, merchants in London, managed this estate for him, and they had made large advances to him, which upon 4th January 1881 amounted to £11,764. Dr

Scott was anxious that Mr W. Brand, one of the partners of the firm, should suffer no loss through his inability to meet his engagements, and he instructed his agent Mr Tait, Moffat, to prepare a bond and disposition in security over his estate of Langshaw to the amount of £4000, and on 11th December 1880 he wrote William Brand, senior partner of the firm, as follows—"I have requested Mr Tait to make out a bond giving you a lien on Langshaw for Four thousand pounds (£4000). As the document will have to be registered in Edinburgh, I think you had better write Mr Tait authorising him to do so. This falls far short of your claim upon Zeelugt, but you may rely upon me doing everything in my power to protect your interests." Mr Brand sent the authority asked for, and the bond was recorded by Mr Tait on 5th January 1881. "(Cond. 5) At the time said bond was executed it was not intended by the parties that it should ever be acted upon except in the event of Dr Scott's bankruptcy. Accordingly the bond was never delivered to the creditors therein, but was retained by Dr Scott in his repositories. At his death a careful search was made, but the bond was not amongst the papers of the deceased, and the pursuers believe and aver that it was intentionally destroyed by the deceased after his affairs had become more prosperous, in the belief that by so destroying it the bond would cease to be operative. . . . (Cond. 6) At or about the time when the bond in question was written out, Dr Scott also placed certain other securities, intended by him to protect the said firm of W. & H. Brand & Company, in the event of his bankruptcy, in a canister which he kept in the Bank of Scotland at Moffat. At his death there was found a memorandum in the following terms—'(Private.) Your bond on Langshaw has been registered, and I have enclosed some railway scrip in an envelope addressed to you, saying you hold it as security for your advances on Zeelugt. Should anything happen to me, you will find these documents in a canister in the safe of the Bank of Scotland.—JOHN SCOTT.' This memorandum, which is holograph of the testator, was enclosed in an envelope and addressed in handwriting 'Wm. Brand, Esq.,' amongst whose papers it was found after his death. None of the documents mentioned in said memorandum were found in the canister kept by the testator at said bank, or in his repositories, and, as already stated, the probability is that he destroyed the bond after the purpose for which it had been made out at the testator's request had been in his view served. . . . (Cond. 10) The estate of Langshaw, as possessed by the testator, was never of the value of £4000, and as at the date of the codicil of 6th August 1889, as well as at the date of Dr Scott's death, it was not worth more than £3000." . . .

The pursuers pleaded—"(1) The said settlement and codicil fall to be construed under reference to the facts condescended on, and it being the intention of the testator, as appearing therefrom, that the estate of Langshaw should go to the pursuers free of the said bond for £4000, the pursuers are entitled to decree as concluded for. (2) *Separatim*—On a sound construction of the settlement and codicil in question, it is implied that the testator intended the estate of Langshaw to go to the pursuers free of debt, and the pursuers are therefore entitled to decree in terms of the conclusions."

The defenders pleaded—"(1) The action is irrelevant. (2) On a sound construction of the testamentary writings of the testator, the pursuers are not entitled to take the subjects except under burden of the bond and disposition in security affecting same. (3) The sum contained in said bond and disposition in security having been made by the testator a burden on said subjects, falls to be defrayed out of same *primo loco*."

Upon 18th March 1892 the Lord Ordinary (KINCAIRNEY) allowed a proof.

"*Opinion.*—[*After stating the facts*]—The pursuers ask a proof of their averments in support of their conclusion, and after a careful consideration of the record, I have come to the conclusion that a proof before answer cannot safely be refused. But I think it desirable to indicate my view of the law on the point, in order that the expense of a proof may be avoided, if the pursuers come to be satisfied that they will not be able to bring up their case to the requirement of the law on this point.

"The pursuers may be entitled to have the lands disencumbered, but only in virtue of the desire of Dr Scott to that effect sufficiently indicated. It was open to Dr Scott to direct the manner in which his debts should to be paid, and to point out the funds to be applied for that purpose. But unless he directed that the bond over Langshaw should be paid out of his personal estate, or clearly indicated his intention to that effect, the lands must continue to bear the burden of the bond. The lands can only be disburdened in virtue of the will of Dr Scott.

"The general rule as to the incidence of the debts and burdens on the estate of a deceased, whether testate or intestate, is not open to any doubt whatever. Heritable debts are payable out of heritable estate; each heritable estate bears its own burden; and the personal debts are payable out of the personal estate; and a general direction to a trustee or executor to pay debts will not affect this general rule.

"This was decided in the case of *Frazer* v. *Frazer's Executors*, 1804, M., 'Heir and Executor,' App. 3, and 1812, 5 Pat. App. 642, and other cases; and was very distinctly explained and enforced in *Douglas' Trustees* v. *Douglas*, January 17, 1868, 6 Macph. 223.

"The case of *M'Leod's Trustees*, June 28, 1871, 9 Macph. 903, while confirming the general rule, sanctions the proposition that something short of a testator's direct and express testamentary direction might be sufficient to charge the personal estate with an heritable debt; but it was laid down that the indications of the testator's

intention to that effect must be of an unmistakeable kind. On that point the Lord President says—'I am not disposed to extract from these authorities so strict a rule as this, that nothing but an express statement or declaration by a testator that one heir or executor shall relieve another heir of the burden affecting the subject bequeathed to him, is necessary; but I do think we gather from them this conclusion, that nothing but an indication so strong as to be equivalent in effect to an express declaration will be sufficient to justify such a result.'

"Taking the rule to be as thus expressed, the question is whether there are sufficient grounds for departing from it in the present case.

"It is not said that there is any testamentary or written expression of Dr Scott's desire to that effect. The pursuers seek to infer Dr Scott's intention from the facts and circumstances which they aver. They are certainly extremely peculiar and special. It is averred that Dr Scott became indebted to his relatives, the Messrs Brand, and was anxious to give them some security for their debt. Accordingly in 1880 he ultroneously granted them a bond and disposition in security for £4000 over his property, consisting of the house in which he lived and the grounds around it. His debt to Messrs Brand considerably exceeded £4000, but that was apparently the full value of Langshaw. The bond was registered in the Register of Sasines, but it was never, except by this registration, delivered to the creditors. It was retained by Dr Scott, and has now disappeared altogether. Dr Scott's circumstances improved after he granted the bond, and his estate became amply sufficient to pay the advances of his relatives without taking Langshaw into account.

"The pursuers further aver that at the date of the codicil the lands of Langshaw were of less value than £4000, so that the bequest of it by the codicil was of no value at all unless it was relieved of the heritable bond.

"These averments do not seem very seriously disputed by the defenders; but if these had been all the averments I could not have considered them relevant. I should not have felt warranted in inferring from these facts only, either that Dr Scott did in fact destroy the bond, or that he did so with the intention and in the belief that it would thereby be rendered inoperative as a burden on Langshaw.

"But then the pursuers have averred that the bond 'was intentionally destroyed by the deceased after his affairs had become more prosperous, in the belief that by so destroying it the bond would cease to be operative.'

"If the pursuers should prove that averment in all its particulars so as to place it beyond the region of conjecture, and should also prove the other averments, I am not at present prepared to say what the result might be.

"I am, therefore, not prepared to throw out the action as irrelevant; but I have thought it desirable to indicate what appears to be the clear requirements of the law on the question, because it would be regrettable if the pursuers should incur the cost of a proof, and should in the end have no more than conjecture to offer in support of the averment to which I have specially adverted."

The defenders reclaimed, and argued—The pursuers were not entitled to parole evidence of the testator's intention when there was no indication in the testamentary writings that the testator intended the deeds to mean anything different from what, *prima facie*, was their import. The rule of law plainly was that a heritable debt had to be paid out of the heritable estate, not out of the moveable estate. Even if what the pursuers averred to be true was proved, the facts were not sufficient to permit the Court to draw the inference that the testator intended the heritable debt to be paid from his moveable estate—*Frazer* v. *Frazer*, 1804, M., *voce* "Heir and Executor," App. No. 3; *Macleod's Trustees et al.*, June 28, 1871, 9 Macph. 903.

The respondents argued—The Court was entitled to construe testamentary deeds to discover the testator's true intention, having regard to the extraneous circumstances, although there was not anything in the writings which necessarily implied that the testator had intended anything different than what appeared *ex facie* of the deeds. All the averments of the pursuer for which proof was sought were of a kind to indicate a different intention in the mind of the testator from what might be observed from the terms of his bequest. In the first place, it was averred that the bond and disposition was granted solely on the motion of the debtor, and for the creditor's greater security. The creditor never asked for it. Secondly, the bond was kept in the debtor's own repositories, and disappeared just when he made the codicil, at least as far as could be ascertained. In the third place, the estate of Langshaw was never worth more than £3000, while the bond over it was for £4000. It plainly appeared from the codicil that the testator intended to convey a benefit to the widow and daughter of Mr Brand, but to leave them an estate which they could only take under burden of losing £1000 could not be described as conferring a benefit upon them. These facts, which the pursuers were ready to prove, indicated such an intention on the part of the testator, that the Court must draw the inference that he had not intended the ordinary rule of law to apply, but that he had intended the heritable bond to be paid out of the moveable estate—*Glendonwyn* v. *Gordon*, May 19, 1873, 11 Macph. (H. of L.) 33; *Duncan, &c.*, June 22, 1883, 10 R. 1042 (Lord President's opinion, 1044).

At advising—

LORD YOUNG—The facts of the case are in a nutshell. The testator, a doctor in Moffat, died in 1890 leaving property we are informed of the value of some £10,000 or

£12,000. Part of his property consisted of a villa where he himself resided, called Langshaw. It appears, although I do not think it is material, from the statement that he had been engaged in some West India sugar speculation along with Mr Brand, and that he got into debt to Mr Brand, or the firm of which Mr Brand was a partner, to an extent which he was not able, at least in 1880 or 1881, to meet; and being desirous that Mr Brand should be perfectly secure of his money, he apparently, with the advice of his man of business, Mr Tait—acting of his own accord—executed a bond over his villa of Langshaw in favour of Mr Brand for £4000, and informed Mr Brand that he had done so in order that he might be perfectly secure, although Mr Brand apparently was not anxious about any security, and did not seek any. But he informed him that for his safety he thought it proper to do this, and desired him to send a written authority to Mr Tait, his man of business, to put the bond on record. That was in the year 1880, and it is not disputed that thereby a document of debt in all respects good and valid for £4000 in favour of Mr Brand was created, and that the villa of Langshaw was burdened with that amount. There is no doubt about that, and no doubt is suggested. He made his first will in 1879, conveying his property to testamentary trustees, with directions to them—the usual formal directions—to pay his debts and then divide his whole property into two, giving one-half to his own sisters, and the other half to his wife's sister—his sister-in-law. In 1889 he executed a codicil whereby he conveyed this property of Langshaw, the villa and grounds, to his sister-in-law in life-rent and her children in fee. At that date it is not disputed—could not be disputed—that the debt for £4000 standing upon the bond for that amount, which I have already referred to, subsisted and that Langshaw was burdened therewith. Now, he died in 1890, and the question raised in the present process is, whether Langshaw was at the date of his death burdened with this bond for £4000.

The first conclusion—the leading conclusion of the summons, and it is the only one to be attended to—is for declarator that the pursuers, the sister-in-law and her children, are entitled to Langshaw disburdened of this debt of £4000, and that on the ground that, as they allege, it was the testator's intention that they should have it free of the burden, and that to that end the debt should be paid off, and the property released by the testamentary trustees out of the estate. Now, it is admitted and clear that this conclusion is contrary to the ordinary rule of law. The bond confessedly subsisting, the subject of the codicil, conveyed to the pursuer was burdened with the amount, and the conclusion which I have referred to, I repeat, is admittedly contrary to the general rule of law that a direction to testamentary trustees to pay debts in the very words which occur here do not extend so as to require them or authorise them to pay off a debt heritably secured upon a particular property specially conveyed to some beneficiary. That general rule I say is admitted; but the pursuers' case is that facts and circumstances are here averred, which if established will make an exception of this case and avoid the application of the general rule. The end desired to be reached of course is, that the testator had impliedly directed his testamentary trustees to pay this particular debt, so disburdening Langshaw and allowing the pursuers to have it without that burden.

Now, what are the special facts? The first, I think, is that the granting of the bond in 1880 was ultroneous—the testator's voluntary act to make quite safe a creditor who was not feeling unsafe and was not demanding security. The second is, that the value of Langshaw was only about £3000, whereas the bond was for £4000; and the third and only other, so far as I know, is, that the bond has disappeared, and disappeared so that it is reasonable to conclude that the testator himself destroyed it. Now, these are the three statements of fact of the specialties of which proof is desired in order to avoid the application of the general rule in this case. I am of opinion that these facts being established could not avoid the application of the general rule or make any exception of the present case. I think it is immaterial to the matter in hand that the bond was granted ultroneously from the debtor's own nervous anxiety to keep this man who had allowed him credit perfectly safe without his friend asking him to do so. His friend was aware of it—it was delivered to him and put upon record by his mandate. I say that amounts to delivery, and it is needless going into details here, for they are in the result all summed up in what I have said so often—that the debt admittedly subsisted and the property remained burdened with it in favour of Mr Brand. The first special fact, that the bond was granted ultroneously to a creditor who did not ask it, did not affect the subsistence of the debt or the burden over the property. The second, that the property was of less value than the amount of the bond, is I think immaterial—I mean legally immaterial. We are of course all alive to the good sense of the remark that the probability—the reasonable certainty, I think—is that the testator intended the pursuer, his sister-in-law and her children, to take benefit by the codicil of 1889, whereas they will take none unless this debt is paid off out of the rest of the estate by the testamentary trustees. But I know of no authority or known principle for giving to that, or such a fact as that, the effect of a direction that the testamentary trustees shall do what without directions they are not bound or entitled to do, namely, pay off the heritable debt secured upon a special property.

Altogether, I think the general rule must be applied, that the parties who take it shall take it as it exists—burdened largely or lightly or not burdened at all—at the testator's death. The suggestion that it is

a general rule of law that where a special property is given to a special beneficiary, to a special legatee, burdened beyond its value, that that implies a direction to the trustees to pay off the debt, I cannot sustain for a single moment. The testator may pay it off, he may reduce it, or he may increase it, but it would be really a singular proposition this, that if the debt were one-half the value of the property the beneficiary to whom it is conveyed must pay it, that if it is three-fourths of the value of the property the beneficiary to whom it is conveyed must pay it, that if it is anything short of the whole value the beneficiary must pay it, but that if the debt comes to be over the value of the property as at the testator's death then it must come out of the estate. I can find no authority, no rule in law to lead to any such conclusion as that.

Then I think the only other fact is, that the bond having disappeared the probability is that Dr Scott destroyed it, and that although the destruction has no effect on the creditor, —for the debtor is not entitled to destroy it —although it has no effect on the creditor, although, notwithstanding, the debt subsists just as good as if he had not destroyed it, and although the property remains burdened just as it would have done had he not destroyed it, yet nevertheless that act is equivalent to a direction to his testamentary trustees to pay the amount of the debt as if the testator had said—"I have destroyed the bond as a mode of directing my testamentary trustees to pay it." Now, I think it is extremely likely that he thought this bond would be paid. It is a money debt. Most people who do not know familiarly the rules of law regard a bond as a money debt, although there is heritable security for it; and that is the law of most countries—it is the law of England; and most people so regard it as a money debt, and to be paid by the testator's money. That is the law of England. It is not ours. Here the heritable security has such dignity with it that it carries the rights and liabilities of any money obligation secured through it according to the law of primogeniture, or it runs with the land if there is a destination to anybody. But I think it probable, almost amounting to a certainty, that Dr Scott was of opinion that this money obligation to Mr Brand would be paid off by the trustees—that those beneficiaries among whom his estate was directed to be divided should receive each one-half of the residue, and that it was not in his contemplation that his sister-in-law and her children to whom he directed the property to be given should have to pay the whole of the bond, or to take the property subject to that burden. But we cannot give effect to that contention, assuming this to be so, without violating what in my opinion are firmly established rules of law, and really the only safe rules of law in my judgment in such a matter.

I am of opinion, therefore, that there are no facts averred here relevant to make an exception of this case to the general rule of law, and that the interlocutor of the Lord Ordinary allowing a proof ought therefore to be recalled, and I do not think that in anything I have said I am going against the opinion of the Lord Ordinary, for he does not express any opinion to the contrary of what I have said, but only says he is not prepared to say what would be the effect on his mind of coming to the conclusion that this paper had been destroyed—he had not made up his mind on it. I have made up my mind on it. I think that even proof that he had destroyed the bond would not aid the pursuers in the present case, and that therefore it would be idle and incurring unnecessary expense to allow a proof of the matter. I think, therefore, that the Lord Ordinary's judgment ought to be recalled, and that the defenders ought to be assoilzied from the conclusions of the action, which I think are not maintainable from the statement on record.

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

The Court recalled the Lord Ordinary's interlocutor and dismissed the case as irrelevant.

Counsel for the Reclaimers—C. S. Dickson —Younger. Agents—Bruce & Kerr, W.S.

Counsel for the Respondents—Asher—Salvesen. Agents—Boyd, Jameson, & Kelly, W.S.

Saturday, May 14.

FIRST DIVISION.

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

Succession—Residue—Accretion—Issue of Predeceasing Legatee.

A testator directed his trustees to convey the residue of his estate equally to and for behoof of his brothers and sisters who might survive him, jointly, with the lawful issue of any who might have predeceased him leaving issue, the division to be *per stirpes;* declaring that the share of his sister Isabella should be restricted to an alimentary liferent, and that the fee of said share should be applied for behoof of her lawful children, whom failing for behoof of the testator's brothers and sisters who might be surviving at the date of her decease, jointly with the lawful issue of such of them as might have deceased leaving issue, the division being *per stirpes.*

By codicil the testator revoked "all share that my brother Richard would have been entitled to from my last will," and left "that share that my brother Richard would have got" to his children.