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.

The testator's sister Isabella having survived him, but died without issue—*held* that Richard's children were entitled to one-third of the share liferented by her, in respect that under the codicil they were entitled to everything to which Richard was entitled under the provisions of the will.

William M'Culloch died on 24th January 1880, leaving a trust-disposition and settlement dated 26th May 1873, and relative codicils. By his trust-disposition he conveyed his whole estate, heritable and moveable, to Alexander Fleming and others, as trustees, for the ends, uses, and purposes following, viz.—"In the first place, for payment of all my just and lawful debts, sickbed and funeral expenses, and the expenses of executing this trust: In the second place, for payment of such legacies as I already have or may hereafter bequeath by any writing, however informal, under my hand: And in the last place, my trustees shall hold, apply, pay, and convey the whole rest, residue, and remainder of my means and estate, and the interest and produce thereof, equally to and for behoof of my brothers and sisters who may survive me, jointly with the lawful issue of any of them who may have predeceased me leaving issue, the division being *per stirpes:* Declaring that the right and interest of my youngest sister Isabella M'Culloch, presently residing at Brodick, Island of Arran, in the share original or accrescing falling to her of my means and estate shall be, and is hereby restricted to an alimentary liferent of said share, not affectable by the debts or deeds of herself or of any husband she may marry, or attachable by the diligence of her or his creditors, and the fee of the said share shall be held and applied for behoof of the lawful child or children of the said Isabella M'Culloch, equally among them if more than one, whom failing for behoof of my brothers and sisters who may be surviving at the date of her decease, jointly with the lawful issue of such of them as may have deceased leaving issue, the division being *per stirpes;* but notwithstanding the foregoing declaration, my trustees shall have full power and liberty to apply the whole or such part of the capital or fee of said share as shall be necessary, or they may think proper, for the alimentary support and benefit of my said sister and her issue, or any of them." . . .

By holograph codicil dated 27th May 1876 he provided—"I hereby revoke and cancel all share that my brother Richard would have been entitled to from my last will (as prepared by Mr Cowan); and I also ordain that he is not to be made a trustee, or, in fact, have anything to do with my estate, heritable or moveable property, business, or anything I may have at my death, but that his family may not altogether suffer owing to the faults of their father, for which they are not (poor children) accountable for, I leave that share (that my brother Richard would have got had he conducted himself towards me with anything like a brotherly feeling, of which, I am sorry to have to say, he is totally wanting, both as to truth and gentlemanly demeanour) to his family (James, Agnes, and Gartshore) to be equally divided, under direction of my trustees (their father to have no say in the matter), James and Gartshore to get their share in full when they arrive at twenty-eight years of age, and Agnes to have her share vested in my business, property, or whatever security the trustees may think proper, so that she will only receive the interest on her share, and this interest is not to be given to her till she is eighteen years of age; should she die without lawful issue, her share to go back to my brothers and sisters (always exclusive of my brother Richard); should I die before James and Gartshore are twenty-eight years of age, the trustees to have full power to give their share to them in part or whole as they (the trustees) may deem proper. . . . Should James and Gartshore die without lawful issue, their share to revert to my brother and sisters, not brothers."

The testator was survived by his brothers Richard and Alexander M'Culloch, by his sister Isabella M'Culloch, by three children of Richard, and the children of a deceased sister Mrs Taylor.

Isabella M'Culloch married James Dunn, and died without issue on 27th January 1890. After her death questions arose as to who were entitled to participate in the share of residue liferented by her, and a special case was presented by (1) Alexander Fleming and others, the testamentary trustees of the deceased William M'Culloch; (2) the children of Richard M'Culloch; (3) Alexander M'Culloch and the children of the deceased Mrs Taylor; (4) the trustee on the sequestrated estate of Richard M'Culloch—in order to obtain the judgment of the Court on the following questions—"(1) Is the fourth party, as Richard M'Culloch's trustee, entitled to one-third, or, if not one-third, to what (if any) part of the share of residue liferented by Mrs Dunn? (2) Are the second parties entitled to one-third of said share? (3) Are the third parties entitled to payment of the whole share of residue liferented by the late Mrs Dunn?"

Argued for the third parties—The codicil revoked and cancelled "all share" to which Richard was entitled under the will—that was, it deprived Richard of all right and interest in the testator's succession. But it did not transfer more than the share originally destined to Richard to his children. The will dealt separately with and distinguished from each other the original shares of residue and the share accrescing on the death of Mrs Dunn, and if the testator in his codicil had meant to deal with both, he would have dealt expressly with the accrescing share. The words "that share" in the codicil could not therefore be held to include Richard's proportion of the share which lapsed on Mrs Dunn's death, and the case belonged to the same category as *M'Nish, &c.* v. *Donald's Trustees*, October 25, 1879, 7 R. 96. An instructive contrast to that case was to be found in

Laing v. *Barclay*, July 20, 1865, 3 Macph. 1143, where a child was held entitled to all that her parent would have taken on survivance, it being there expressly declared that the issue should "represent and be entitled to the proportion which would have been payable to their parent." The suggested construction of the words "that share" was supported by the following clause of the codicil, which contemplated only one period of payment. The third parties were accordingly entitled to the whole of the share liferented by Mrs Dunn.

Argued for the second parties—By the codicil the testator first deprived Richard of "all share" that he "would have been entitled to," and then gave "that share" which Richard "would have got" to his children. The words of gift were thus almost the same as those used in *Laing* v. *Barclay*, *supra*, and differed materially from the words used in *M'Nish* v. *Donald's Trustees*, *supra*, where the direction was that the issue should take the share of their predeceasing parent. The case was also outwith the authority of such cases as *Young* v. *Robertson*, February 14, 1862, 4 Macq. 337, because this was a case not of conditional institution, but of direct gift. The second parties were therefore entitled to one-third of the share liferented by Mrs Dunn.

No argument was offered in support of the claim of the fourth party.

At advising—

LORD PRESIDENT—The question to be decided is, what meaning is to be given to the words "that share" occurring in the codicil dated 27th May 1876. Do these words include the share which accresced—that is, which lapsed on the death of Mrs Dunn—or are they confined to the original shares into which the residue was divided? I cannot think that the question is left in doubt, or that it requires that we should analyse the different classes of decisions cited to us. It appears to me that the catena of language between the settlement and the codicil is close and clear. We have to interpret the meaning of the words "that share that Richard would have got" following on the words "all share that Richard would have been entitled to." Now, even if the words "that share" stood alone, they would be almost the equivalent of the words which were the subject of decision in the case of *Laing* v. *Barclay*, 3 Macph. 1143—that is to say, their fair reading and import is that what they describe is just everything that Richard would have taken under the will. But we are not confined to the argument founded on the words of the codicil, because the words "all share" again relate to the words used in the settlement, or rather the words in the settlement afford a sort of gloss on the words in the codicil. Treating of Isabella's share in the settlement, the testator talks of "the said share," and considering that the codicil is drawn by the testator himself, and looking to the terms of the testament to which no doubt he would have regard, I think that in using the words "all share," that the testator meant both the original and accrescing share to which Richard would have been entitled, and by the words "that share" he intended to give to Richard's children not merely the share originally destined to Richard, but also the accrescing share—in fact, everything which Richard would have taken under the settlement.

LORD ADAM concurred.

LORD M'LAREN—In this case apparently there is no doubt as to the true meaning and construction of the residuary clause in the original will, but the question is as to the extent and effect of the direction given in the codicil. The codicil is evidently prepared by the testator himself, and while sufficiently clear is not quite accurate in its language. It begins, "I hereby revoke and cancel all share that my brother Richard would have been entitled to from my last will," and I take that to mean "I revoke and cancel all provisions under which my brother Richard takes any share of my estate." The words "all share" are sufficiently comprehensive in my view to include every right and interest arising to Richard under the will. Accordingly, when the testator goes on to say that he does not wish the children to suffer by the fault of their father, and proceeds to leave them "that share which my brother Richard would have got," it is obvious that he has given to them precisely what he has previously taken from their father by the words of revocation.

The argument addressed to us was founded upon a distinction to be taken between the language of the destination in the will and the language in the codicil. It was said that the testator when he meant to deal with interests in his estate arising by accretion took care to say that these interests were included, and it is quite true that in the will, which is drawn by a lawyer, when he is dealing with the event of one of his brothers dying and leaving issue, he does say that the issue shall take the share, "original or accrescing," which the parent would have taken. These words "original or accrescing" are properly introduced for the purpose of making clear what might otherwise have been in question, viz., whether accrescing shares were intended to be included. But it does not appear to me that there was any necessity for repeating these words in the codicil. Besides, it is announced at the outset of the codicil that what the testator is there proposing to deal with is all right and interest—so I interpret the words—that Richard would have taken under the will.

I should like to add, as the case of *M'Nish* has been referred to, that I should not be disposed to assent to the proposition that there is any artificial rule of construction which obliges us to hold where a residue is disposed of among different members of a family, that the children of one of the residuary legatees who may die leaving issue are cut out from what their parent would have taken by accretion.

In some cases that might come to be a very large interest, because it might be that in a family of five or six all had died except one—one only, those who had died leaving issue—and to apply the doctrine that issue take only their parents' original share in such a case would reduce their interest to a fraction of what the testator really intended them to receive. When the case of *M'Nish*—which was cited as the strongest authority in support of that artificial rule—comes to be examined, it is seen that in that case the testator had begun by expressly giving over the interest of such of the legatees as might die without issue to the survivors, and so he dealt completely and exhaustively with accrescing shares. Consequently, when the testator goes on to say what is to be the benefit taken by the children of a predeceasing child, one must look to what he has already done in dealing with interests arising by accretion, and put such a construction upon the word "share" as will be consistent with what the testator has already announced. But I do not think that a decision on the terms of a will so expressed would be a decision to the effect that irrespective of the language there used the Court is to be hampered by a general rule that all gifts in favour of issue are to be strictly construed, and, if possible, cut down. I do not think the Court ever intended to lay down any rule adverse to the rights of the children of a predeceasing member of a family to whom a residuary bequest has been made, whose claims on the testator are precisely of the same nature as are those of other members of the family.

These observations are perhaps not necessary to the decision of the present case, but as the case of *M'Nish* was commented upon, I think it right to say that the question, although supposed to be concluded by authority, is one which I think must remain for subsequent consideration when a case, properly raising it, shall arise.

LORD KINNEAR was absent.

The Court found that the second parties were entitled to one-third of the share of the residue liferented by Mrs Dunn; found it unnecessary to answer the other two questions, and decerned.

Counsel for Second Parties—C. S. Dickson. Counsel for Third Parties—Ure. Counsel for Fourth Party—Deas. Agents—Millar, Robson, & Company, S.S.C.

Tuesday, May 17.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

FORFAR AND BRECHIN RAILWAY COMPANY *v.* BELL.

Railway—Lands about to be Taken Compulsorily—Compensation—Notice—Production of Tenant's Lease—Lands Clauses Consolidation (Scotland) Act 1845, *secs.* 17 *and* 115.

Section 17 of the Lands Clauses Consolidation (Scotland) Act 1845 enacts that when the promoters of an undertaking are about to take lands compulsorily they shall give notice to all parties interested in such lands, and by such notice shall demand from such parties the particulars of their interest therein; and section 115 provides that if any party having a greater interest than as a tenant for a year or from year to year claim compensation, the promoters of the undertaking may require such party to produce his lease, and if, after demand made in writing, the lease be not produced within twenty-one days, the party so claiming compensation shall be considered as a tenant holding only from year to year.

A railway company in their first notice required any tenant claiming compensation in respect of any unexpired term or interest under any lease to produce his lease along with his claim within twenty-one days, under penalty, if he failed to do so, of being regarded, in terms of the 115th section of the Act, as a tenant from year to year only.

Held that the railway company were not entitled thus to combine the provisions of the two sections, and shorten the time for tenants producing their leases, so as to involve them, if they failed to comply with such notice, in the penalties contemplated by the 115th section.

The Forfar and Brechin Railway Company, incorporated by "The Forfar and Brechin Railway Act 1890," were authorised by said Act to construct certain railways, and to enter upon and use certain lands for that purpose. Upon 30th July 1891 they served upon Alexander Bell, farmer, Broomfield, Forfarshire, a notice of their intention to purchase and take a portion of the lands of the said farm of Broomfield, and by said notice they demanded and required from him the particulars of his interest in the lands so to be taken, and of the claims made by him in respect thereof, and intimated that they were willing to treat for the purchase of said lands, and as to the compensation to be paid for damage to be sustained by him by reason of the exercise of the powers conferred on them by their said Act, and also intimated to him that if "you claim compensation in respect of any