mineral owner in parting with the surface might reserve power to create subsidence of that kind, and no other, upon paying damages. But the reservation must either be expressed or very plainly implied. It is not expressed here, but it appears to me that it might be held as implied in the language of the reservation, if it were perfectly clear that the damage to be compensated was damage occasioned by the due and proper exercise of the reserved power of working. To my mind that is by no means clear; and keeping in view the fact that the superior is bound to work so as not to injure springs of water, I agree with the Lord President that the damage contemplated by the parties may be reasonably held to be damage arising from accident or negligence. I could not have agreed with his Lordship had the damage in question been described, as was the case in *Aspden* v. *Sedden* (L.R., 10 Ch. App. p. 394), as "done to the erections on the said plot by the exercise of any of the said excepted liberties,"—an expression which obviously refers to the proper use, and not to the abuse, of the liberties reserved.

I am therefore of opinion that the present appeal ought to be dismissed, with costs.

Lord Fitzgerald—My Lords, I concur in the judgments of the noble and learned Lords who have preceded me. The rights of the parties must be governed by the construction of the instruments on which their titles rest, and the application of a rule which harmonises with the law of all parts of the United Kingdom.

That rule has been already stated by the noble and learned Lord (Lord Blackburn). It rests on authority now beyond controversy, and is, in effect, that where the ownership of the surface and the ownership of the subjacent minerals have become separated and are vested in different proprietors, the owner of the surface has an apparent inherent right to necessary support from the minerals. If the owner of the minerals, on the other hand, alleges that he has not only the property in the whole minerals, but has also retained all proper means to make that property available, and amongst them a right to get at and remove the whole, though in doing so he may destroy the surface by removing its necessary supports, then he must show by his title that he has such a right.

It was asserted strongly in the argument that the burden lay on the defenders to establish that they had this right, and to show it in clear and express terms, but in a question of the construction of an instrument it does not seem to be a matter of much importance on whom the burden lies. It is our duty to put a fair and reasonable construction on the instrument, having regard to the subject-matter and to the surrounding circumstances so far as they are disclosed on the face of the instrument itself.

If anything turned on the *onus probandi*, it would be open to the defenders to insist that the *onus* was shifted in this particular case, inasmuch as the principal deed (the feu-charter of 18th September 1800, which is called the mineral deed) was a grant by the then owner in fee of both minerals and surface—of "All and whole the whole coal and ironstone, with full power to work and raise," &c.—to which the maxim "*concedere videtur et id sine quo res ipsa esse non potuit*" might be applicable. It seems to me, however, that whether the first deed was a grant of the surface reserving the minerals, or was a grant of the minerals retaining the surface, the question for your Lordships' decision remains the same.

The question, then, on the construction of the mineral deed of 1800 is, whether the ownership of the surface was thereby so subjected to the ownership of the minerals that the owner of the minerals might, if necessary, in order to get the minerals, destroy the surface of the land north of the boundary line by withdrawing all mineral support, and thus causing its subsidence? In dealing with this question I forbear to consider the provisions of the deed in detail. I could add nothing to the exhaustive criticism of the Lord President. I desire to express my general concurrence in his observations.

It seems to me that to give effect to the contention of the defenders would be to defeat the objects of Robert Houston Rae, the granter, in relation to that portion of his lands of Little Govan lying to the north of the boundary line, as expressed in that deed, and I am of opinion that there is no provision to be found in that deed which would give the defenders a right to remove the minerals without leaving a sufficient support.

My Lords, the view which the noble Lord (Lord Blackburn) has taken of the feu-charter of 1800 renders it unnecessary for me to take up further time by discussing the other feu grants; but I desire to say that I did not in the course of the argument entertain any doubt that Robert Houston Rae did not in the contract of 1799 except or reserve a right to remove the subjacent coal and minerals, so as to leave no sufficient support to the surface and cause its subsidence, nor did John Goudie agree that such a right should be retained.

Interlocutors appealed against affirmed, and appeal dismissed with costs.

Counsel for Appellant — Solicitor-General Herschell, Q.C.—Solicitor-General Asher, Q.C. —Mackay. Agents—Grahames, Currey, & Spens.

Counsel for Respondent — Lord Advocate Balfour, Q.C.—Benjamin, Q.C.—Davey, Q.C. —W. H. Bolton. Agents—Murray, Hutchins, & Stirling.

COURT OF SESSION.

Tuesday, March 20.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

HALL (COLLECTOR OF POOR-RATES FOR THE CITY PARISH OF GLASGOW) *v.* THE NORTH BRITISH RAILWAY COMPANY.

Poor—Lands Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. c.* 19), *sec.* 127—*Deficiency of Poor-Rate, caused by Lands being Taken—Railway.*

The 127th section of the Lands Clauses Act 1845 enacts that the promoters of an undertaking shall make good the deficiency in the several assessments for poor-rate and others which may occur in respect of lands taken for the purposes of their undertaking under any Act until the works shall be completed and assessed.

Held, in regard to lands taken by a railway company under powers in a Special Act subsequent to that by which they were incorporated, (1) that the works were not completed until the lands by conversion had become part of the undertaking, and as such liable to assessment; and (2) that the deficiency in assessment for poor-rates and others was to be computed according to the rental at which such lands and buildings thereon were valued at the time of passing of the Special Act, under deduction of the value of those portions converted to the purposes of the undertaking, and also of those on which the buildings were still standing.

The North British Railway Company obtained in the year 1873 an Act of Parliament (36 and 37 Vict. cap. 209) authorising them to construct certain railways and other works, and, *inter alia*, to enlarge their College Street Station in Glasgow.

In the year 1877 the company obtained another Act of Parliament (40 Vict. cap. 21) for the enlargement and improvement of their Queen Street Station. Under the powers conferred upon them by these Acts the company became possessed of tenements of houses and others lying within the City Parish of Glasgow, which at the date they were so acquired were liable to assessment for the relief of the poor in the said City Parish. A number of these houses were then taken down.

This was an action at the instance of the Collector of Poor-rates for the City Parish for deficiency of poor-rates in respect of the subjects so lying vacant for the year 1880-81 and 1881-82, amounting *in cumulo* to £336, 1s. 9d. The claim of the pursuer was founded on the Lands Clauses Consolidation (Scotland) Act 1845, sec. 127, which clause was incorporated with and to be read as a part of the Acts of 1873 and 1877 before referred to, and enacts—"That if the promoters of the undertaking became possessed by virtue of this or the Special Act, or any Act incorporated therewith, of any lands charged with the land tax, or liable to be assessed with the poor-rates or prison assessment, they shall from time to time, until the works shall be completed and assessed to such land tax and poor-rate and prison assessment, be liable to make good the deficiency in the several assessments for land tax and poor-rate and prison assessment, by reason of such lands having been taken or used for the purposes of the work, and such deficiency shall be computed according to the rental at which such lands, with any building thereon, were valued or rated at the time of the passing of the Special Act; and on demand of such deficiency the promoters of the undertaking or their treasurer shall pay all such deficiencies to the collector of the said assessments respectively; nevertheless, if at any time the promoters of the undertaking think fit to redeem such land tax, they may do so in accordance with the powers in that behalf given by the Acts for the redemption of the land tax."

The pursuer averred that the ground had become vacant and yielded no assessable rental.

The defenders averred that the greater part of the ground once occupied by the houses now formed part of the station, and was as such liable to assessment, and that the rental at which the undertaking in the parish was valued or rated during the period in question was greater than the rental at which the undertaking together with the lands and houses acquired by the defenders under the Special Act were valued and rated at the time of the passing of the Act.

After a proof the Lord Ordinary (M'Laren) decerned in terms of the conclusions of the summons.

"*Opinion.*—In this case the Collector of Poor-Rates for the City Parish of Glasgow sues the North British Railway Company for a sum in lieu of assessments chargeable on buildings taken by the company for the purposes of their undertaking, and since demolished. Credit is given in the statement of claim for the value of certain sidings which were formed on a part of the lands in question, and which are included in the valuation of the assessor of railways and canals. Subject to this deduction, the whole unoccupied lands—the site of the demolished houses—are treated as the subject of a claim under section 127 of the Lands Clauses Consolidation Act, which provides—'That if the promoters of the undertaking become possessed by virtue of this or the Special Act, or any Act incorporated therewith, of any lands charged with the land tax, or liable to be assessed with the poor-rate or prison assessment, they shall from time to time, until the works shall be completed and assessed to such land tax and poor-rate and prison assessment, be liable to make good the deficiency in the several assessments for land tax and poor-rate and prison assessment by reason of such lands having been taken or used for the purposes of the work; and such deficiency shall be computed according to the rental at which such lands, with any building thereon, were valued or rated at the time of the passing of the Special Act.'

"The chief interest of the case centres on the interpretation of the words of the statute defining the deficiency which the company is bound to make good, but the defenders also disputed the fact that there was unoccupied land, and contended that the whole or part of the subjects in question were part of or pertinent of the company's railway stations. On this subject I will only say that the evidence of Mr Thomas Smellie, confirming that of the pursuer, proves to my satisfaction that the lands in question are unoccupied ground—taken no doubt for the purposes of the company's undertaking, but not forming part of a completed work, and consequently not liable to assessment as part of the company's undertaking. The evidence of the assessor of railways and canals, Mr Munro, is to the effect that the lands in question (other than the sidings) have not in fact been valued as part of the company's undertaking, and while that circumstance is not conclusive, it is proof that Mr Munro's opinion, formed without reference to the present action, coincides with the opinion of Mr Smellie as to the character of the subjects. There is a question whether the sum allowed under the first head of deduction, £212, 10s., is

a sufficient allowance; but as the defenders adduced no evidence in favour of a higher figure, I am prepared to accept this entry, as well as the figures in the pursuer's statement, as correct.

"Both parties referred to a decision of the Court—*Hall* v. *The Glasgow Union Railway Company*, 8 R. 688—which, for a reason to be explained, I have difficulty in applying to this case; and the different views prescribed in arguments involve the consideration how far, in estimating the 'deficiency,' which is the measure of the claim under section 127, it is competent to take an account of the increase in the assessable value of other parts of the company's undertaking within the parish. I shall first state my own opinion, irrespective of authority, as to the true meaning of the section when applied to the present case. The hypothesis of the section is that 'lands' are to be acquired. It is clear that the lands here referred to are not the undertaking as a whole, but the proceeds of land which may be acquired under the authority of the Special Act, and which are separately charged with land tax, or liable to assessment for the relief of the poor. It is, I say, the hypothesis of the section that lands are to be acquired from time to time, to be used for the purposes of the undertaking, and that in the progress of the work such lands are neither assessable in the ordinary way nor under the special mode of assessment applicable to the completed undertaking of a railway or canal company. There is, then, *prima facie*, a deficiency in the assessment by reason of these lands being temporarily withdrawn from the category of assessable subjects, and the question is, whether this is not the deficiency which the enacting part of the section professes to supply? I think the lands referred to in the enacting words of the section—the lands upon which the deficiency of assessment is said to arise—are the same lands which are characterised in the introductory or hypothetical part of the section. Lands are to be acquired from time to time, and upon these lands, respectively and successively, a deficiency may arise by reason of their being in use for the purposes of an uncompleted undertaking, and being withdrawn from liability to assessment. I should therefore be disposed to answer this question in the affirmative.

"1. I think the statute supposes a necessary deficiency, and not merely a possible deficiency, depending on an examination of the assessable value of the aggregate of the undertaking within the parish. 2. I think the cause of the deficiency is indicated in these words, 'by reason of such lands having been taken or used for the purposes of the work,' not, as contended for by the company, by reason of the whole undertaking within the parish being of less assessable value than it formerly was. 3. I think the measure of the deficiency which the undertakers are to make good is distinctly specified in the statute—'such deficiency shall be computed according to the rental at which such lands, with any building thereon, were valued or rated.' That is, the rental which was the measure of the assessment before the lands were taken is to be the measure of the deficit caused by the withdrawal of the lands from assessment. If it was intended that the deficiency should be otherwise ascertained, and that the rental should be used only as a limit of the possible liability of the undertakers, I think some indication of such a principle might be found in the language of the enacting clause. Looking to the words of the enactment alone, I should say that the company—the undertakers—are taken bound to continue to pay on each separate subject in course of conversion to their uses and purposes the same assessment as would have been payable at the time of the passing of the Special Act. That the parish may be benefited by an increase in the assessable value of the completed portions of that undertaking is immaterial in my view of the meaning of the clause. Whether such increase is a real gain to the parish depends on the further inquiry, whether the increment or ratio of increase in the value of the company's property is greater than the increment of the value of other heritable property in the parish. This, in the case of the City Parish of Glasgow, would obviously open a very extended field of inquiry.

"It is contended by the company that the Legislature must have contemplated a general deficiency upon the whole account of the year between the company and the parochial board, otherwise the enactment would be a violation of the principle of equality of assessment. I have already suggested a reason for doubting whether the principle of equality is really infringed, but I would further observe that assessing statutes only aim at approximate equality, and that it has not been the practice of the Court to allow much weight to equitable considerations where the meaning of the enactment is otherwise ascertainable. I see no hardship to the company in requiring them to pay the amount of the old assessment on each separate subject until such subject becomes liable to assessment as part of the railway undertaking.

"But it was further contended by the railway company that the case of *The Union Railway Company* had decided that some effect must be given by way of set-off to the increment of assessment upon the company's other lands, and that the only question is, whether two accounts are to be struck—one for the College Station, and one for the Queen Street Station—or whether there is to be one account for the whole lands of the company within the parish, including the two stations and a part of the line. If it had appeared that this question was settled by the case of *The Union Railway Company*, I should have followed that decision, and applied it to the facts of the case. But I am asked to determine whether the deficiency contemplated by the statute is a deficiency arising on each station or on the whole lands of the company within the parish; and I have no materials to guide me in determining between two constructions which appear to me to be equally at variance with the statute. I must therefore, with the greatest respect for the opinions of the Judges who decided the case of *The Union Railway*, give judgment in conformity with my own opinion of the meaning of the statute, which I give with the reserve due to the high authority which is opposed to my construction.

"I therefore decern in favour of the pursuer for the sum brought out in the amended statement of claim."

The defenders reclaimed.

It was admitted that there was a deficiency in regard to the land taken for the purposes of the

Queen Street Station. With regard to College Street Station they argued—(1) That there was no deficiency in the poor-rate, because the works were in point of fact completed, and therefore the ground taken was liable to assessment. (2) That supposing the work was to be held as not completed, the principle upon which the deficiency was to be computed was to take the value of the whole undertaking of the company in the City Parish at the date of the Special Act *plus* the value of the land and houses taken under the Act, and contrast this with the value of the whole undertaking in the parish in the year in which the deficiency arises. On this construction of section 127 there would be no deficiency, as the value of the lands and houses taken under the Act of 1873 was only £1667, 11s., while since this date there had been an increase in the value of the whole undertaking of the company within the parish of about £14,000—*Hall* v. *The Glasgow Union Railway Company*, March 18, 1881, 8 R. 687; *Stratton* v. *Metropolitan Board of Works*, November 25, 1874, L.R., 10 C.P. 76; *Wheeler* v. *Metropolitan Board of Works*, June 22, 1869, L.R., 4 Ex. 303; *Reg.* v. *Metropolitan District Railway Company*, February 1, 1871, L.R., 6 Q.B. 698; *East London Railway Company* v. *Whitechurch*, May 19, 1874, L.R. 7 Eng. & Ir. App. 81.

The pursuer replied—The railway company was not entitled to impute the increment on the whole undertaking in the City Parish under whatever statutes, but in computing the deficiency to be replaced regard must be had to the undertaking as under the Act of 1873, and to the land taken under that Act. The principle of the cases of *The Union Railway Company* and *Stratton* had been given effect to here by deducting from the value, as at the date of the Act, of the lands and houses taken, the valuation, as appearing in the railway assessor's roll, of that portion on which the station had been constructed, and also by deducting the rateable value of that portion on which houses were still standing.

At advising—

Lord President—The North British Railway Company obtained an Act in 1873 to enable them, among other purposes, to enlarge their College Street Station, and for that end to acquire lands and other property situated in the City Parish, Glasgow. They did accordingly take a number of parcels of land lying to the north of the then existing College Street Station for that purpose. These lands were to a great extent covered by buildings, and before they could be made available for the purpose for which they were taken the buildings had to be pulled down. Some portions of the lands so taken have been already incorporated with, and form part of, the station, and therefore form part of the undertaking of the company. On other portions the buildings which existed when the land was taken are still undemolished. On the third portion the buildings have been demolished, but the site formerly occupied by them has not yet been used for any purpose connected with the College Street Station, and the ground is lying vacant and unoccupied.

The contention of the pursuer Mr Hall, who is the collector of poor-rates in the City Parish, is, that so far as regards the last-mentioned portion, the railway company are liable for poor-rates on the rental of the ground as it stood at the date of the passing of the Special Act in 1873, and that they are bound to pay such rates in terms of the 127th section of the Lands Clauses Act 1845.

The defenders say that this ground, though not used for station purposes, is nevertheless within the station, and forms part of their undertaking, and therefore falls to be assessed for poor-rates and the like purposes.

Before proceeding further with the consideration of this question it is desirable to see how the matter stands in point of fact. Mr Hall in his evidence gives this account in speaking of the properties which had been taken and demolished —"For the most part they were demolished prior to the assessing year 1880–1, and the remainder were demolished prior to the assessing year 1881–2—all as set forth in the first and third branches of the claim. Since the demolition, the ground, with certain exceptions mentioned in the amended claim, has been lying waste, covered with the débris of the old buildings." He then mentions certain exceptions, to which I shall afterwards refer, but what he is there speaking of is the ground coloured green on the plan, and enclosed by a red border, and it is so spoken of in the evidence.

Mr Munro, the assessor of railways and canals, says that he succeeded to that office in December 1879, on the death of Mr Dods, and that the ground described as green, surrounded by a red border, is wholly unoccupied, and was not comprehended in the railway undertaking. He has therefore, he says, excluded it in the valuation of the railway's undertaking.

Therefore the state of the matter in point of fact is this, that the ground in question, although enclosed by a fence so as to bring it within the area occupied by the College Street Station, is not yet used for station purposes, but is lying waste, and therefore not subject to assessment as part of the undertaking within the City Parish.

In these circumstances the collector made a claim against the railway company for deficiency of poor-rates arising in respect of the demolition of these buildings, as shown in his amended statement of claim. But before going to the special terms of that claim it is necessary to consider the terms of section 127 of the Lands Clauses Act, which undoubtedly requires some care in the construction. I must observe, in the first place, that the kind of idea on which this section of the statute is framed was to make it apply to the case of a company acquiring land immediately after its incorporation for the purpose of making the railway; that is the leading idea in the mind of the framer of the Act. Still it is clearly applicable to the case of lands taken by subsequent Acts for the purposes of enlarging the railway undertaking, and it enacts—"That if the promoters of the undertaking become possessed by virtue of this or the Special Act, or any Act incorporated therewith, of any lands charged with the land tax, or liable to be assessed with the poor-rate or prison assessment, they shall from time to time, until the works shall be completed and assessed to such land tax and poor-rate and prison assessment, be liable to make good the deficiency in the several assessments for land tax and poor-rate and prison assessment by reason of such lands having been taken or used for the

purposes of the work." And then it goes on to provide how the deficiency is to be computed.

The meaning of this first part is, I think, plainly this, that if lands are taken by a railway company under the Act by which it is incorporated, and which authorises the undertaking, then they are to go on paying the amount of the deficiency in the poor-rate caused by the land being taken until their works shall have been completed and assessed—that is to say, until the undertaking can be assessed as a whole.

But I think also that the language of the statute makes it plainly applicable to lands taken as additions under the powers conferred by subsequent Acts, for although the words are not precisely applicable yet they must be construed in such a reasonable way as to make them applicable. What is meant, then, in the case of lands taken under a subsequent Act by the words "until the works shall be completed and assessed?" They must mean "until the additional land shall have been made part of the undertaking, and so liable to be assessed." The way in which I would take leave to construe the Act as applicable to additional land taken subsequently would be this—If a railway company, having completed their original undertaking, gets a new Act, and under the powers conferred thereby takes land which pays poor-rates, then they shall make good the deficiency, and pay poor-rates according to the rental of the land at the date of the Special Act until the land by complete conversion has become part of the undertaking, and as such liable to assessment. This, I think, is the only reasonable construction of the words of this statute as applicable to the taking of additional land.

Then follows the mode of computing, which is very clearly expressed—"And such deficiency shall be computed according to the rental at which such lands, with any building thereon, were valued or rated at the time of the passing of the Special Act." If what I have above given be the true construction of section 127, then its application to the present case is pretty clear. The demand by the pursuer is for two years' assessment, viz., 1880-1 and 1881-2, and I may remark in passing that though in his interlocutor the Lord Ordinary has decerned against the defenders for the total amount of £307, 16s. 4d., I understand that the reclaimers do not complain of the judgment in so far as the property in connection with the Queen Street Station is concerned. The only question, then, is in regard to the property acquired for the purposes of the College Street Station.

We find from the statement that the properties which were taken in connection with College Street Station under the Act of 1873 yielded at the date of the Special Act in 1873 £4143, 3s., but the claim is only for assessment upon a rental of £2620, 8s. The difference represents the value of houses acquired under the Act of 1873, but which are still standing, and are therefore paying assessment, and it also includes those parts which are already incorporated with and made part of the station works, and assessed as such. That explains the difference between the two sets of figures. As regards the £2620, 8s., the pursuer deducts the valuation by the assessor of railways and canals of the portion on which a station has been constructed, say £212, 10s., thus reducing the rental to £2407, 18s., which, with the allowances authorised by section 37 of the Poor Law Act, reduces the rental to £1926, 10s. 5d., yielding, at 12¼d. per pound, £98, 6s. of poor-rates, and this amount the pursuer desires to receive for the year 1880-1.

In regard to the other year, 1881-2, the pursuer makes a further deduction of £80 in respect of the increase in valuation of the station consequent on the construction of two new sidings, which represents a piece of ground which in the interval between the two years had thus been converted to station purposes, and was therefore completed and liable to assessment as part of the whole undertaking.

This is explained very clearly by the evidence of Hall and Munro. Hall says—"The first exception is an area of ground occupied by sidings. It was so occupied prior to the assessing year 1880-1. For that ground I have made a deduction of £212, 10s. in the claim. The railway assessor added £425 to the valuation of the College Station in 1876-7. There were operations in progress on the College Station, as authorised by the Company's Act of 1865, and there were also sidings laid down on the ground acquired under the Act of 1873, and as I had not the means of apportioning, I took one-half on each. They are both within the City Parish. There is another exception of certain additional ground which was occupied for additional sidings in 1881. I made a deduction of £80 under the third head of the amended claim in respect of these additional sidings. I got that £80 from the railway and canal valuation roll." It thus seems that Hall acted quite rightly in making these deductions. The whole difficulty arises from the unfortunate death of Mr Dods, the previous assessor of railways and canals, because he having slumped the valuation of the ground under the Acts of 1865 and 1873, Hall and Dods' successor, Munro, had no means of knowing how the amount is to be apportioned under the two Acts. The only way in which Hall could arrange it was by holding one-half as the portion effeiring to the ground taken under each Act.

Munro says—"The gross valuation for 1881-2 was £5580—an increase of £80 over the preceding year. That increase was made by me. (Q) Will you explain the principle on which you made that increase? *By the Court*—Wholly unoccupied ground was not included—ground not occupied for station accommodation. I produce the plan which I used in making my valuation. The ground coloured green on No. 8 was not included. *Examination continued*—There is a portion of the ground coloured green on the west side of the red line which is partly covered with sidings, and the £80 was added on account of the additional sidings. *By the Court*—In saying that the ground coloured green on No. 8 was not included, I was referring to the green within the red boundary lines." It is thus clear how the deductions were made, and I think it is precisely in accordance with the provisions of section 127, and its leading principle. The portion of ground taken which was not liable to assessment prior to the year 1880-1 had by that time become occupied, and part of the station and part of the undertaking, and was therefore in that year included as part of the entire undertaking. So in the year 1881-2 the additional piece of ground

for which the deduction of £80 was allowed was included in the valuation of the entire undertaking by the railway assessor. Therefore when the conversion of these portions was complete, and the valuation of the undertaking comprehended them, there ceased to be any deficiency in the poor-rate or other assessment, and thus as the rest of the ground comes to be used for station purposes and incorporated, it will all cease to be under the category of vacant and unoccupied ground under the 127th section for which the railway company are bound to make good the deficiency in the poor-rate and other assessments.

It only remains to consider the defences which have been urged in answer to the pursuer's demand. First of all, it was maintained that the action failed on the facts. But this is a hopeless contention on the construction of the statute which I have expounded, for although this ground may be enclosed within a fence it certainly has not been converted to station or railway purposes so as to be assessed by the assessor of railways and canals.

Then there is a second plea to this effect—"(2) There being no deficiency in the rental at which the subjects were valued during the period in question to be made good, the defenders are entitled to absolvitor with expenses." That is vague and general, but is explained in the answer to the third article of the condescendence—"Explained that the greater part of the ground formerly occupied by the houses now forms part of the defenders' College Street Station, and as such is liable to be and is assessed for the relief of the poor." So far the pursuer has given effect to this in the deductions he has allowed. But then the defenders say—"The rental at which the defenders' undertaking in said parish was valued or rated during the period in question was greater than the rental at which the said undertaking, together with the whole lands and houses acquired by the defenders under said Act were valued or rated at the time of the passing of the Act." I think that is a bad defence. The undertaking of the North British Railway within the City Parish may have doubled in value since the passing of the Act of 1873 from extraneous circumstances; so much the better for the parish; other properties also increase or decrease in value from various circumstances. But the mere fact that the general undertaking within the parish has increased in value since the time when the land was taken cannot exclude the application of the statute, and the railway company is bound to supply the rental which has been diminished by their operations under the Special Act. I do not think that is a good answer to this demand.

I accordingly arrive at the same conclusion as the Lord Ordinary, but I am not sure that I agree with all the views he states in his opinion, for he supposes that his judgment runs counter to the decision in the case of *Hall* v. *The Glasgow Union Railway Company*. I have studied that case, and so far as I am able to understand it, the principle upon which our present decision rests is not adverse to that judgment, and I think that in principle the judgments are the same.

I think we should adhere to the interlocutor of the Lord Ordinary.

Lord Deas concurred.

Lord Mure—The question here, considered generally, is as to the effect of section 127 of the Lands Clauses Act on the liability of railway companies for assessment on lands taken by them for the purposes of their works. What the section provides in regard to that matter is this—[*quotes section as above*]. That is a very distinct provision, and the only question is, whether on the evidence in the case it has been proved that on this ground, which was taken with houses standing upon it, the works of the railway have been completed so as to render it liable to assessment as part of the company's undertaking.

I cannot come to the conclusion that the ground has been converted to station purposes. It appears from the passages in the evidence of Hall and Munro, which your Lordship has read, and also from the evidence of Smellie, that the ground within the red lines is lying waste, and has not been converted to station purposes, the works not having been completed in terms of section 127.

I think that the conclusion the Lord Ordinary has come to is well founded, and I also concur in the answer which your Lordship has made to the special defences of the railway company.

Lord Shand—I concur; and as your Lordship has dealt so exhaustively with the matter, I have only a very few observations to make.

The pursuer is able almost to demonstrate that Dods did not include the subjects taken under the Act of 1873 in his valuation as part of the completed undertaking, for the demolition of the buildings began in 1874-5, and if they had been valued by the railway assessor it must have been by way of percentage, which would have added from £2000 to £3000; whereas on referring to the table which shows the rental of the properties taken, we see there was no such sum added, but something very much smaller. This fact is made plain from the evidence relating to that portion of the ground which was from time to time appropriated to station purposes, and on which rails were laid down. Therefore, if the complainers were to get rid of the rates as calculated on the rental, they would be escaping from taxation altogether.

Munro says he did not include this ground in his valuation, and I think it is equally clear that Dods did not, and this, although it may not be quite conclusive, goes a long way.

I think that the proper way in which to construe the statutory provisions is to regard them as temporary; they are intended to save the assessment for poor-rates from deficiency only until the ground is incorporated in the undertaking as completed, to save the rates from loss during this temporary period. It might be the case that the company, within two or three years after taking the land, had erected buildings of a value equal to those demolished, and then they would be freed from the necessity of supplying a deficiency. In the case which has occurred there is a clear deficiency, and I concur in thinking that ground which is merely fenced in, but not incorporated with the station, cannot be regarded as part of the completed work. I do not say, in regard to the ground taken under this Special Act, that each field or subject is to be taken separately, and that

you are to ascertain whether new buildings have been put up on each separate part. You must regard the land taken under the Act of 1873 as a whole, debit the company with the rent of the houses as a whole as they stood at the date of the Act, then credit them with the value of the buildings put up since on the land, and deduct the sum so credited from that debited. This is precisely what the pursuer here has done.

It would be out of the question to credit the company not only with the value of buildings put up on the ground taken under this statute, but also with the increase in value during the years in question of the general undertaking; on no reasonable construction of the statute could it be possible to do that.

I think that our decision in this case is precisely on the lines of the case of *Hall* v. *The Glasgow Union Railway Company.*

The Court adhered.

Counsel for Pursuer — Mackintosh — Lang. Agents—W. & J. Burness, W.S.

Counsel for Defenders--Trayner--R. Johnstone. Agents—Millar, Robson, & Innes, S.S.C.

Tuesday, March 20.

FIRST DIVISION.

SPECIAL CASE—M'ALPINE'S TRUSTEES.

Trust-Deed—Residue—Clause of Survivorship—Vesting — Specific Bequest — Conditio si sine liberis

A testatrix directed her trustees and executors to make payment of certain legacies, and "after the death of the longest liver" of herself and her sisters "to pay, assign, and dispone" the residue in favour of three nephews, equally between them, "and that on their respectively reaching the age of twenty-one years complete." In the event of any of the nephews dying before reaching twenty-one his share was to accresce to the survivors. Two of the nephews having died after reaching twenty-one, but before the longest liver of the sisters of the testatrix —*held* (*diss.* Lord Deas) that their shares of residue had vested in them on attaining the age of twenty-one.

The *conditio si sine liberis* is not applicable to a bequest of corporeal moveables, such a legacy not being of the nature of a provision.

A testatrix by her settlement directed her trustees to pay and deliver certain legacies and bequests without deduction for legacy-duty. By a codicil she recalled a particular legacy and bequeathed the subject of it to other legatees without mentioning legacy-duty. The codicil, however, declared that it was in no way to infer a revocation of the settlement, which was to stand in full force with the alteration made thereon by it. *Held* that the legatees named in the codicil were not liable to pay the legacy-duty.

This was a Special Case relating to the construction of the settlements of Mary M'Alpine, Helen M'Alpine, and Margaret M'Alpine, daughters of the deceased Reverend Walter M'Alpine, minister of the gospel at Culross. Mary M'Alpine died upon 9th January 1860, Helen M'Alpine upon 18th June 1871, and Margaret M'Alpine upon 6th April 1881.

By her deed of settlement, registered in the Books of Council and Session in 1860, Mary M'Alpine disponed the whole of her estate, in the event of her dying unmarried, to and in favour of her sisters Margaret and Helen, for their life-rent use allenarly. She also directed her executors to "make payment of the following legacies which I hereby leave and bequeath to the persons after named." With regard to the residue she provided—"I hereby, after the death of the longest liver of me and my said sisters, appoint my said executors, or trustees to be named and appointed by me as before mentioned, to pay, assign, and dispone the same to and in favour of my nephews Walter, Charles Hunt, and John William M'Alpine, equally between them, share and share alike, and that on their respectively attaining the age of twenty-one years complete; and I hereby declare that if any one or more of my said nephews shall depart this life before he or they shall attain the age of twenty-one years, then the share or shares of him or them so dying shall go and accresce to the survivors or survivor equally amongst them: Providing, nevertheless, that if any of my said nephews so dying shall have left lawful issue, then such issue shall have right to the share or respective shares which their deceased parent or parents would have been entitled to."

By joint deed of trust and nomination dated 1846, and registered 21st July 1881, Mary M'Alpine, Helen M'Alpine, and Margaret M'Alpine disponed their whole means and effects to the parties mentioned therein, as trustees for the uses and purposes referred to in the said deed and in their respective deeds of settlement.

Helen M'Alpine, who died in 1871, left a settlement dated in 1864, by which she revoked a deed of settlement which she had executed in 1846, and conveyed her whole estate to trustees for the purposes mentioned in the deed. The residue of her estate was directed to be conveyed to her nephews Charles Hunt M'Alpine and John William M'Alpine, equally between them, share and share alike; but it was declared that "if either of them shall predecease the longest liver of us [that is, herself and her sister Margaret] without leaving lawful issue, then the share of such one so predeceasing shall go and accresce to the survivor, but if either of them so predeceasing shall have left lawful issue, then such issue shall be entitled equally, if more than one, to the share which their deceased parent would have been entitled to if alive."

The first codicil to this settlement, as to which one of the questions in the present case arose, was in the following terms:--"I, Miss Helen M'Alpine, within designed, do hereby revoke and recall the legacy of my silver plate bequeathed by the foregoing deed of settlement to my niece Susan Alexander M'Alpine or Goodwyn, now wife of George Stuart, Esq., residing at No. Melville Street, Edinburgh, and also of my third part or share of the whole furniture, linen, books, and other effects in the house No. 12 Melville Street,