

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 accreting 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 bequeathed by Mrs Dunn; found it unnecessary to answer the other two questions, and decreed.

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

unexpired term or interest, under any lease, missive of lease, or grant of such lands, that you will produce to them such lease, missive of lease, or grant or other evidence thereof in your power along with your claims, at least within twenty-one days after this notice, and that failing your doing so, you will, in terms of section 115 of the said Lands Clauses Consolidation (Scotland) Act 1845, be considered as a tenant holding only from year to year, and be entitled to compensation accordingly."

Upon 31st August 1891 Alexander Bell served a statement of claim on the company. On 6th October 1891 he served a request to have his claim settled by arbitration in terms of the Lands Clauses Consolidation (Scotland) Act 1845. On 25th October 1891 he served upon the company an amended claim, in which he offered to forward the writings constituting his lease upon receiving a written request to that effect, and on 26th November 1891 he served upon the company a deed of nomination of an arbiter. Under protest the company nominated an arbiter to act for them, but in December 1891 they presented a note of suspension and interdict against Alexander Bell and the arbiters named to prevent the arbitration proceeding.

They averred (statement 9) that "the respondent Alexander Bell failed, after being called upon in writing, to produce his lease, missive of lease, or grant of said lands, or other legal evidence thereof, in terms of section 115 of said Lands Clauses Act, and is, in terms of said section and Act, a tenant holding only from year to year, and the complainers have ever since 20th August 1891—that is, ever since the expiry of the twenty-one days allowed in the said notice served upon him on 30th July 1891 for production of any lease, or missive of lease, or grant of said farm—considered and regarded him as a tenant holding only from year to year. The whole proceedings of the complainers were taken in accordance with the provisions of the said statute, and in accordance with the practice of other railway companies in Scotland."

The respondent denied that he had failed to comply with the terms of the Act, or that he must be held to be in the position in which the complainers alleged him to be.

The complainers further averred (statement 11) that in fact the only right or interest the respondent had in the lands to be acquired was that of a tenant holding only from year to year.

This statement the respondent denied, and set forth his titles to the lands.

The complainers pleaded, *inter alia*—"(1) The respondent Alexander Bell having failed to produce to the complainers the lease or other writings condescended on under which he makes the claims, requisitions, and nomination of arbiter condescended on, although called upon to do so by the complainers, in terms of the statute, they, the complainers, are entitled to suspension and interdict as craved."

The respondent pleaded, *inter alia*—"(1)

The respondent being entitled, under the provisions of the Lands Clauses Consolidation Act, to have his claim for compensation determined by arbitration, the complainers have no right to interdict him from doing so. (2) The respondent not having failed in any of the statutory requirements for having his claim for compensation determined by arbitration, the present application should be refused."

The following sections of the Lands Clauses Consolidation (Scotland) Act 1845 were referred to and founded upon:—Section 17. "When the promoters of the undertaking shall require to purchase any of the lands which, by this or the special Act or any Act incorporated therewith, they are authorised to purchase or take, they shall give notice thereof to all the parties interested in such lands, or to the parties enabled by this or the special Act to sell and convey the same or their rights and interests therein, or such of the said parties as shall, after diligent inquiry, be known to the promoters of the undertaking, and by such notice shall demand from such parties the particulars of their interest in such lands, and of the claims made by them in respect thereof; and every such notice shall state the particulars of the lands so required, and that the promoters of the undertaking are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works."

Section 19. "If for twenty-one days after the service of such notice any party shall fail to state the particulars of his claim in respect of any such land, or to treat with the promoters of the undertaking in respect thereof, or if such party and the promoters of the undertaking shall not agree as to the amount of the compensation to be paid by the promoters of the undertaking for the interest in such lands belonging to such party, or which he is by this or the special Act enabled to sell, or for any damage that may be sustained by him by reason of the execution of the works, the amount of such compensation shall be settled in the manner hereinafter provided for settling cases of disputed compensation." Section 115. "If any party having a greater interest than as tenant for a year, or from year to year, claim compensation in respect of any unexpired term or interest under any lease, missive of lease, or grant of any such lands, the promoters of the undertaking may require such party to produce the lease, missive of lease, or grant in respect of which such claim shall be made, or other legal evidence thereof in his power; and if, after demand made in writing by the promoters of the undertaking, such lease, missive of lease, or grant, or other legal evidence thereof, be not produced within twenty-one days, the party so claiming compensation shall be considered as a tenant holding only from year to year, and be entitled to compensation accordingly."

Upon 17th March 1892 the Lord Ordinary (WELLWOOD) pronounced the following interlocutor:—"Finds that the respondent

Alexander Bell has not been called upon, in terms of section 115 of the Lands Clauses Consolidation (Scotland) Act 1845, to produce the lease under which he claims compensation: Therefore repels the first plea-in-law for the complainers, and before further answer allows parties a proof of their respective averments in statement eleven and the answer thereto: Appoints the proof to proceed on a day to be afterwards fixed: Meantime reserves all question of expenses.

Opinion.—The question which I have to decide at present is one of general interest, as it affects the existing practice of railway companies in Scotland in giving notices to treat for the taking of lands. It is, whether in consequence of the respondent not having produced the lease under which he holds his farm within twenty-one days of the notice to treat served upon him by the company on 30th July 1891, he is foreclosed from proceeding to arbitration, and must, without further inquiry, and whatever the extent of his interest may be, be considered as a tenant holding only from year to year, and entitled to compensation accordingly. This, on its face, is a strong proposition. The consequences which the complainers maintain flow from the respondent's alleged neglect are highly penal, and therefore the statutory provisions on which the company found must, I think, be construed strictly against them.

"The complainers, reading the 115th section of the Lands Clauses Consolidation (Scotland) Act 1845 into the 17th section, added to the particulars required by the latter section to be inserted into the notice to treat, a requirement under the 115th section, upon the parties on whom the notice was served to produce the leases under which they held, or other legal evidence of their right within their power. They thus sought to utilise one and the same period of twenty-one days for the purposes of both sections.

"The sections are as follows—[as quoted above].

"If these two sections are read together it will be seen, I think, that the later section refers to something not concurrent with the notice to treat, but which is to follow and depend upon the nature of the response that is made to the notice to treat. The notice to treat should, according to section 17, demand from the parties interested merely 'the particulars of their interests in such lands, and of the claims made by them in respect thereof.'

"When the particulars so demanded are given, and claims made in respect thereof are formulated, the promoting company will be in a position to decide whether or not, with a view to determining the proper mode of fixing compensation, they should demand from the parties who have stated their interest and lodged a claim in respect thereof, production of the lease, missive of lease, or grant, on which they found, or other legal evidence thereof in their power.

"Giving the words used in the two clauses their natural construction, I cannot see what other interpretation can fairly be

put upon them. The 115th section says—'If any party having a greater interest than as tenant for a year, or from year to year, claim compensation.' Does not this imply that the party must have previously stated the nature of his interest and the nature of his claim, or at least had an opportunity of stating his interest and lodging a claim?

"The complainer's counsel maintained that the word 'claim' in section 115 must be read as equivalent to 'entitled to claim.' But I do not find in the statute any warrant for such a construction. It is true that according to the decisions notice to treat operates as an acceptance of the offer to sell which is held to be made by the statute, and thus an inchoate contract of purchase and sale is completed to certain effects. But a claim for compensation is a separate and distinct matter, and the language used in other sections of the statute, and in particular in sections 17 and 19, show that the word 'claim' is used in its natural sense of making a claim.

"Again, it is suggested that the company would be placed at a disadvantage if a tenant by not claiming prevented them from setting the provisions of section 115 in force. I do not think there is much in this objection. It would be a much less strained construction of the Act than that now contended for by the complainers to hold a party who has failed to claim within twenty-one days from the date of the notice to treat as having claimed, so as to entitle the company to proceed as in a case of disputed compensation. This is just what is provided by section 19 in regard to the matters dealt with in that section, and the same rule might reasonably be applied so as to let in the operation of section 115.

"What I mean is this—Section 17 provides for the particulars that are to be stated, and the claims that are to be lodged, and section 19 says that if 'within twenty-one days after the notice to treat the party fails to state particulars of his claim in respect of any such land, or to treat with the promoters of the undertaking in respect thereof, . . . then the amount of compensation to be paid shall be settled in the manner hereinafter provided.' Thus, though the company do not actually know the interest of the party or particulars of the claim to be made, they are to proceed just as if the claim was in. I think the same principle should be applied to section 115. If, after notice to treat, the party on whom the notice is served does not lodge his claim, then he should be dealt with just as if he had made a claim, and the company should, under section 115, treat him as having made a claim, and give him notice that they wish to see the deed or writing, if any, on which he founds. Or else the company might proceed to summon a jury under sections 36 and 37 of the statute, and that would lead to a fresh notice. The party would then have to lodge his claim under certification of being taken before a jury; and if it turned out that he was merely a tenant from year to year, in all probability he would have to pay the ex-

penses of the abortive trial. Or, in any case, the company might, under section 81, enter upon the lands.

"The complainers founded strongly upon the practice of railway companies to insert in the notice to treat a demand for production of the lease, grant, or other evidence. They also referred to the form given in the appendix to Mr Deas' work, p. 245, which is in accordance with the practice relied on. I do not know whether the form in Mr Deas' book is taken from the previous practice of Scottish railway companies, or whether the practice has been adopted from the book. The form given in the latest edition of Hodges on Railways (vol. ii., p. 410) does not contain any such requisition, although the English Act contains a clause which corresponds to section 115 of the Scotch Act. It is not, however, maintained that the practice can rule if it is not warranted by the statute, and in my opinion it is not.

"Those are my views on the general question raised. But I may add that this is not a case in which I should be inclined at all to stretch the law against the respondent. The respondent has not actually pleaded that the company were barred from taking the objection, but I think what is disclosed in the record and the correspondence comes very near an absolute bar. Notice was served on the respondent on 30th July 1891. The respondent did not lodge a claim during the twenty-one days, but he did lodge on 31st August an articulate claim giving full particulars of his interest as under the lease expiring, I think in 1899, and full particulars of damages claimed. No objection was made; on the contrary, the parties proceed to negotiate, and it was only, I think, in the month of October or November that the company for the first time said they could not consent to any further negotiation because they were going to have the claims of the parties settled in terms of the statute. When further inquiry is made it is found that what they mean by that is that they are going to hold the respondent as foreclosed by his failure to produce his lease within twenty-one days from 30th July 1891, and to hold him confessed in respect of that failure of being only a tenant holding from year to year. Therefore what I propose to do is to find that the respondent Alexander Bell has not been duly called on in terms of section 115 of the Lands Clauses Consolidation (Scotland) Act 1845 to produce the lease under which he now claims compensation, and therefore repel the first plea-in-law for the defender, and before answer allow parties a proof of their respective averments in statement 11 and answer thereto. All I decide at present is that the respondent cannot be held foreclosed by failure to lodge his lease from now maintaining that he is a tenant for a longer period than a year, but as it is disputed whether he is so or not, that matter, I am afraid, must be cleared up by proof. I reserve the question of expenses."

The complainers reclaimed, and argued—
 (1) The tenant was not a tenant for years,

but (2) even if he was so, they were entitled to treat him as a tenant from year to year only, as he had not furnished the information asked after notice had been sent to him. The terms of that notice were plain and reasonable, and were such as had hitherto been regarded as complying with the provisions of the Lands Clauses Consolidation (Scotland) Act 1845.

Counsel for the respondent were not called upon.

At advising—

LORD PRESIDENT—I think the Lord Ordinary is right. The 115th section of the Lands Clauses Consolidation Act, which is here invoked by the railway company, involves serious consequences to the tenant if he does not comply with the notice therein referred to, because under that section even if he has right to compensation under an unexpired lease, yet if he does not within 21 days table his lease he loses his right, and is to be treated as a year to year tenant. It is therefore necessary to see whether the event has occurred in this case which alone entitles the railway company to act on the footing that the tenant has lost his right. I find in the 115th section of the statute "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 the lease, and if after demand made in writing such lease be not produced within 21 days the party so claiming compensation shall be considered as a tenant holding only from year to year."

Now, applying common sense to that section, it plainly refers to a tenant who has asserted a right, and it is quite natural that a company should be allowed to demand from such a tenant the production of his lease under pain of forfeiture of his right to claim. *De non apparentibus et non existentibus eadem est ratio*. But this company and others apparently have proceeded to amend the section by introducing a much more shorthanded method, because they have proceeded to issue notices saying that land would be required and taken, and asking those interested to state any claims, and lodge their leases within 21 days under pain of forfeiture as provided by the 115th section. They propose—that is—to engraft the provisions of that section upon the original notice, whereas it clearly contemplates procedure several stages in advance, and after claims shall have been stated. In fact the railway company propose to allow tenants only 21 days from the first moment when they are apprised that their interests are to be affected to produce their leases, and to make the penalties under the 115th section, which apply to a man making a claim, apply to one who is only considering whether he will make a claim. To engraft the penalties applying to the former case upon the latter might involve the tenant in serious loss.

LORD ADAM—Under the 17th section of

the Lands Clauses Act the company is entitled to demand particulars of the interest of those whose land is to be taken. That is all they are entitled to ask when their notice saying they were about to take certain lands is issued. If these particulars are not furnished within 21 days, then by the 19th section "the amount of compensation to be paid shall be settled in the manner hereinafter provided." This 19th section applies to all parties interested whether proprietors or tenants. The Forfar and Brechin Railway Company issued such a notice in terms of the Act, but then they added "if you claim compensation in respect of any unexpired term or interest under any lease, you will produce such lease at least within 21 days after this notice, and failing you do so, you will in terms of the 115th section be considered as a tenant holding only from year to year."

The question before us is, whether under the Lands Clauses Act they were entitled to give any such notice coupled with such a sanction. Section 115 contemplates that a claim has been made in terms of section 17. Can the railway company prejudice the right of the respondent here? The 115th section only applies if a claim has been made, and if a tenant claims to be more than a tenant from year to year. In that case the railway company is authorised to see the evidence of his claim. It is obvious that they are entitled to know his position, and if they are not satisfied as to his tenancy to ask for production of his lease, and upon failure to produce it, to regard him as a yearly tenant. But it is clear the railway company have no right to add the penalty upon failure to lodge the lease within 21 days of the first notice as they have sought to do. I agree with your Lordship in thinking the Lord Ordinary's interlocutor should be affirmed.

LORD M'LAREN—I concur, and only wish to add that where the number of persons with whom a railway company has to settle is large, it is natural that the two notices should be combined, at least to this extent, that the company should ask evidence of the right to claim along with the claim. People are generally willing to abridge forms. But the railway company here claim that by combining the two notices they have abridged the time the tenant has for lodging his evidence. That is clearly inadmissible, for the tenant must have the same right as if he had claimed and had then been asked to produce his lease. He may therefore now produce evidence of the lease upon which he bases his claim.

LORD KINNEAR was absent.

The Court adhered.

Counsel for Complainers and Reclaimers—Guthrie. Agents—Reid & Guild, W.S.

Counsel for Respondents—H. Johnston—Gillespie. Agents—Mackenzie & Kermack, W.S.

Tuesday, May 17.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.]

SINCLAIR v. BROWN.

Agricultural Holdings (Scotland) Act 1883 (46 and 47 Vict. c. 62), sec. 7, and Heads (16) and (17) of Schedule—Compensation for Unexhausted Improvements—Notice of Claim—Particulars to be Stated therein "as far as reasonably may be"—Bar.

A landlord in his pleadings in the Sheriff Court expressed his readiness to proceed to arbitration with regard to the first two of three heads of a claim made by a tenant for compensation for unexhausted improvements, but took exception to the last head on the ground of insufficiency of specification in the notice. The last head of the claim having been withdrawn, he afterwards brought an action of suspension and interdict in the Court of Session to prevent arbitration proceedings going on with regard to the first two heads of the claim, on the ground that the particulars furnished in the notice as to them were also insufficient.

Held that although the notice might probably have been regarded as insufficient the landlord was barred by his former pleadings from now challenging its insufficiency.

Opinions expressed that the particulars of a claim by a tenant for compensation for unexhausted improvements should be given in the notice with such detail as might reasonably be expected to enable the landlord to settle without resorting to arbitration, that being the course contemplated by the statute.

Agricultural Holdings (Scotland) Act 1889 (52 and 53 Vict. c. 20), sec. 2, sub-sec. (3)—Appointment of Referee by Sheriff within Fourteen Days of Application—Competency of Appointment upon Second Application where First Refused.

Held that a Sheriff who had refused to appoint a referee on the ground that more than fourteen days had been allowed to elapse since the application, was not barred from making such an appointment upon a new application duly proceeded with.

The Agricultural Holdings (Scotland) Act 1883 (46 and 47 Vict. c. 62) provides for a tenant obtaining from his landlord at the determination of his tenancy compensation for unexhausted improvements under certain conditions. Part 1 of the schedule appended to the Act sets forth ten improvements to which the consent of the landlord is required. Part 2 gives the improvement in respect of which notice to the landlord is required. Part 3 enumerates six improvements to which consent of the landlord is not required. Item (16) of the schedule is as follows—"Application to land of purchased, artificial, or other purchased