varies considerably according to the conditions of lease. For instance, during a period of trial, when the field is newly opened, the risk may be laid on the landlord; but when the field is once opened and proved, the risk may be transferred to the tenant; or there may be many other stipulations regulating the risk necessary to be incurred.

Now in the present case the parties have provided in a very suitable and commendable manner for the risk which was inseparable from the enterprise on which they were embarking. They agreed that for the first year no rent should be paid by the tenant, unless he should remove from the estate any freestone, minerals, &c.; but that if he should so remove any of the freestone, minerals, &c., he should then pay £100, being one-half the fixed rent payable annually during the currency of the lease. They farther agreed, that at the end of the first three years the tenant should be entitled to renounce the lease, merely upon giving six months' notice, and on condition of restoring the ground to a ploughable state. Again, at the end of seven years, and after that at the end of fourteen, it is provided by the lease that the tenant shall be entitled to renounce it under certain very moderate conditions as to restoring roads, &c., and this in all cases without the necessity of assigning any reason, or going into any proof on the subject. Now in the fair construction of the document before us, I am bound to say that I view these clauses as having being introduced into the contract for the purpose of disposing of all questions as to risk which might arise between the parties, without the trouble and the expense which an inquiry into the matter, either judicially or by arbitration, would necessarily involve. The manifest and true intention was that after the first year, which he might employ for experiments if he liked, provided he removed nothing from the lands, the tenant was to take his chance up to the end of the third year. That during this period the risk was to lie upon him however things might turn out. At the end of that time, it was to be expected that he would be able to judge of the prospects of the undertaking, and it was to be at his option to abandon if he chose. If, on the other hand he retained the lease, the risk for the next four years was to be entirely upon him. But again at the expiry of these four years, that is at the end of the seventh year of the lease, he was to be entitled to abandon. In like manner during the next period of seven years the risk was to be entirely the tenant's, but with a like option of abandoning at its termination, failing which he must continue in it until the completion of the whole twenty-one. years. In conjunction with all this, there is no option given to the landlord at any time of putting an end to the lease. Now looking at this arrangement, I cannot help saying that it is not only a convenient, but a fair way of obviating the difficulties which may occur in such a lease. It is in fact far more advantageous to the tenant than the stipulation in most mineral leases. He is given a fair opportunity during the first three years of seeing whether he can make anything of the lease. He has afterwards three several opportunities of backing out of it if he finds that his former judgment was erroneous. Now it is a very great advantage to a tenant to be entitled to abandon in this way, without being put to the expense of a proof. I look upon it as a very high privilege conferred upon him indeed; and I observe again that there is no counter-privilege or advantage conferred on the landlord. His tenant might during the currency of the lease be amassing a large fortune, and the landlord would be unable to interfere, but must content himself with his bare rent of £200 a-year, as he has stipulated no lordship. I think the tenant must be viewed as having bought that privilege by undertaking that during the first three years, and again during the subsequent periods of four, seven, and seven, he would continue to pay the stipulated rent whatever might occur, without seeking to back out of the lease in any way.

That being my view, I think that the tenant's averments are irrelevant to sustain an action of reduction of this lease. He has let slip the first period at which he might have freed himself from his obligation at his own option, and he must now wait for the arrival of the next. That is enough to decide the matter at present before us, and I do not feel called upon to enter on the many questions which might arise upon another lease of the same subjects differently expressed.

The other Judges concurred.

Action dismissed.

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

Agents for Mr Christie—Hamilton, Kinnear & Beatson, W.S.

Agent for Mrs Christie—D. F. Bridgeford, S.S.C.

Wednesday, February 8.

SPECIAL CASE—ANDREW HEATLIE'S TRUSTEE AND OTHERS.

Trust-Deed—Clause—Construction—Legacy a Burden on Heritage or Moveables? Circumstances in which it was *held* that the ordinary rule of law, viz., that where both heritage and moveables are left under a general trust-disposition and settlement the legacies are payable out of the moveable estate, should receive effect, as the truster had not clearly manifested his intention to invert that rule; but that, contrary to the general rule, the trustee had manifested his intention of making the heritage security for full payment of the legacies in case of the moveables proving insufficient.

Held, farther, that an annuity, being a recognised burden on heritage, and not inconsistent with its nature, the presumption of law was, that the truster intended to lay it upon the heritable estate, as in the former case, and lay the legacies on the moveable.

The parties to this Special Case were John Henderson, the only surviving and accepting trustee, and the beneficiaries under the trust-disposition and settlement of the late Andrew Heatlie, weaver in Selkirk. The questions submitted to the Court arose upon the construction of this trust-deed.

By it Heatlie disponed to his trustees (1) a small heritable subject in the Kirk Wynd of Selkirk, worth about £14, 10s. per annum gross rental; (2) another small heritable subject in the Town Head of Selkirk, worth about £18, 17s. per annum of gross rent; and (3) his moveable property, which was stated as amounting to about £135, after payment of debts, funeral expenses, and expenses of the trust. The main purposes of the trust were thus expressed:—"*Secondly*, I appoint my said trustees, from the rents, profits, and interests of my said estate, to pay to Isabella

Fairgrieve or Heatlie, my wife, in case she shall survive me, an annuity of £20 sterling during all the days of her life or widowhood, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first payment thereof at the first of these terms which shall happen after my death, and so forth yearly and termly during the life or widowhood of the said Isabella Fairgrieve or Heatlie, with a fifth part more of each termly portion of liquidate penalty in case of failure in the punctual payment thereof, and the legal interest of the same from and after the respective terms of payment until payment thereof. *Thirdly*, I appoint my said trustees, after my decease, to dispone and convey to William Henderson, son of the foresaid John Henderson, the subjects in the Kirk Wynd of Selkirk first above disponed, and to dispone and convey the subjects in the Town Head of Selkirk, second above disponed, to James Heatlie or Thorburn, son of Jessie Thorburn, residing in Selkirk; declaring always that the houses, yards, and others above specified are hereby disponed under the express burden of the foresaid annuity in favour of my wife, and of the sum of £50 which I hereby bequeath, and which I appoint my said trustees to pay to Andrew Henderson, son of the said John Henderson, and of the sum of £60 which I hereby bequeath, and which I appoint my said trustees to pay to Jane Henderson, daughter of the said John Henderson, and which annuity of £20, and the foresaid sums of £50 and £60, are hereby declared real and preferable burdens affecting the said houses, yards, and others above disponed, and are appointed to be engrossed in the infeftments to follow hereupon, and in all the future transmissions and investitures of the said houses, yards, and others, aye and until complete payment be made thereof; Declaring always that my said trustees shall dispone and convey the said subjects to the said William Henderson and James Heatlie or Thorburn respectively, and pay the said sums to the said Andrew Henderson and Jane Henderson at such time after my decease as they may think proper and expedient, and the state of the trust funds will allow. *Lastly*, I appoint my said trustees to pay the residue of my means and estate to Basil Henderson, James Henderson, and Helen Henderson, children of the foresaid John Henderson, and the children of my brother, Robert Heatlie, equally amongst them, share and share alike."

Among the powers conferred upon the trustees there occurred the following clause:—"With power also to the said trustees to sue for, uplift, and receive the principal sums of the debts, heritable and moveable, hereby conveyed, to discharge and assign the same, and to renounce or dispone the securities held therefor; as also to sell and dispose of all or any part of the said trust-estate and effects, and that either by public roup or private bargain, upon such advertisements and after such prorogations and adjournments as to them shall seem proper; and for that purpose to enter into articles of roup or minutes of sale, to grant dispositions containing all usual and necessary clauses, and to execute all and whatever deeds may be necessary for rendering the said sale or sales effectual, in the same manner and as amply as I could have done myself."

The questions which arose upon these clauses in carrying the trust purposes into execution were as follows:—"1. Is the annuity of £20 per annum directed to be paid to the said Mrs Isabella Fairgrieve or Heatlie, the testator's widow, payable (1) primarily out of the rents of the heritable property which belonged to the testator, or (2) primarily out of the income of the balance of his moveable estate *pro tanto*, and out of the rents of the heritable estate *secundo loco*, or (3) rateably out of the income of the whole estate, heritable and moveable? 2. Are the legacies of £50 to Andrew Henderson and of £60 to Jane Henderson payable out of (1) the heritable property of the testator, or (2) out of his personal estate, or (3) rateably out of his whole estate, heritable and moveable? 3. Are the said legacies of £50 and £60 payable immediately or only on the termination of the annuity to the testator's widow, and until payment are the legatees entitled to interest?"

The parties chiefly interested in the decisions of these questions were the two beneficiaries who were to receive the heritable property—viz., William Henderson and James Heatlie or Thorburn, on the one side, and the residuary legatees, Basil Henderson, &c., on the other. The truster's widow and the two special legatees had no particular interest to appear, as there was no allegation that the estate was insufficient to meet their claims, whatever view was taken of the questions in dispute.

SHAND, for the trustee and the residuary legatees, referred to *Carter* v. *Macarthur*, 4th Feb. 1870; 7 Law Reporter, 282, and argued that the burden of the special legacies had been validly thrown by the truster upon the heritable estate by the terms of the clause above quoted.

J. M'LAREN, for the heritable legatees, contended that the ordinary rule of law must be applied, and the legacies paid out of the moveable estate, *primo loco*, so far as it went, and that the effect of the above-mentioned clause was only to place the heritable legatees in the position of cautioners for the sufficiency of the moveable funds. From the fact that the legacies would almost exhaust the moveables, he had no interest to argue the question as to the annuity. He referred to Erskine, 3, 9, 48; *Douglass' Trustees* v. *Douglas*, Jan. 17, 1868; 5 Law Reporter, 154.

At advising—

LORD PRESIDENT—The solution of the questions which are put to the Court depends entirely upon the meaning and effect of Andrew Heatlie's trust-disposition and settlement. But, at the same time, the effect which that deed must receive depends in some degree upon an established rule of law. Accordingly, the question comes to be whether, in the disputed clauses there is an intention to provide anything inconsistent with the general rule of law? Now when a man leaves a general trust-disposition, conveying both heritage and moveables, there is no doubt that in the general case the legacies which he may bequeath are payable out of the moveable estate, and that the heritable estate is not liable, even though the moveable estate should be insufficient to pay the legacies left. But the question here arises, What is the effect of the peculiar conditions introduced into the third purpose of this settlement? Its apparent object was to effect one of the two following things:—Either, first, to relieve the moveable estate from the operation of the ordinary rule of law above stated at the expense of the heritable; or, secondly, to afford a security to the legatees and annuitant for payment of their legacies and annuity in full in the event of the moveable estate proving insufficient.

Which, then, of these two things was meant here? With regard to the annuity left to his widow, I think there can be little doubt. When a man directs an annuity to be paid out of heritage, or secured on heritage, he is not doing anything which is unusual; he is not doing anything which is inconsistent with the nature of heritable property; he is only laying upon heritage one of its recognised legal burdens. Therefore, on this part of the question I do not feel any doubt. I think that it was the testator's intention to burden the heritage with this annuity, and to relieve the moveable estate, and that he has validly succeeded in doing so, because he was just following one of the ordinary rules or presumptions of our law. But when we come to deal with the two legacies, I think our conclusion with regard to them must be different. The laying of a legacy as a burden upon heritage would be the inversion of the ordinary rule, which, as I have stated, is, that legacies are paid out of moveable estate, and are burdens upon it only, notwithstanding any deficiency. Now, it seems to me that, when it is a testator's purpose to invert a recognised rule, it is his duty to express himself so clearly and decidedly as to satisfy the minds of all concerned. All I can say is that the testator in the present case has failed to do so. On the contrary, there are a number of circumstances indicative of a different purpose altogether, and there are several clauses in the deed which I find it very difficult to reconcile with the view that he intended to make these legacies simply burdens upon the heritage. If the burden of the legacies were to be laid upon the heritage in addition to that of the annuity, the result would be most calamitous to the beneficiaries who are to receive the heritable properties. Both of them are but of small value, and the free annual rental is almost swallowed up by the widow's annuity. Now, were the burden of the legacies thrown on them as well, the question would immediately arise, are the legacies intended to be paid at once, or at least is interest to run upon them from the truster's death? If so, there would in all probability be nothing left, even eventually, to the heirs in heritage. This, I think, would be quite inconsistent with the apparent intention of the testator. There is good evidence of the persons for whom it is designed having been *personæ delictæ*, and it is not to be supposed that he would so have dealt with them in favour of persons in whom his interest was not apparently so warm. Then, again, if we consider when the legacies are to be payable, which indeed is one of the questions put to us, I think we shall find nothing to contradict the view that they were intended to be paid at once, or at any rate that interest was to run on them from some date, say six months after the testator's death; and yet I do not see how this could be arranged without a sale of the properties, which would be practically to annul the security given to the annuitant. I cannot think that this was the intention of the truster. No doubt a power of sale is given, but I am clear it was not to be exercised in this way. In short, upon the consideration of all the clauses of the deed, I cannot come to the conclusion that the testator had any purpose of relieving the moveables at the expense of the heritage. On the contrary, I think he had another, and much more reasonable purpose—namely, to provide for any insufficiency there might be in the moveables, by making the heritage, so to speak, caution or security for full payment.

I therefore answer the first question put to us by saying that the widow's annuity is to be paid out of the rents of the heritable property only; the second, by saying that the legacies are to be paid out of the moveables so far as they go, and that the balance, though there seems no likelihood of their being any, is to become a burden on the heritable estate; and the last question, by saying that the legatees are entitled to immediate payment.

The other Judges concurred.

Agent for the Trustee and the Residuary Legatees—James Milne, W.S.

Agent for James Heatlie or Thorburn and William Henderson—D. Curror, S.S.C.

Wednesday, February 8.

SECOND DIVISION.

MANSON *v.* SMITH.

Small Debt Act, 1 *Vict. c.* 41—*Nullity—Circuit Court of Justiciary—Suspension.* A Sheriff-clerk-depute having brought an action under the Small Debt Act in his own name in his own Court, the summons being signed by himself, the Sheriff-Substitute gave decree in terms of the conclusions thereof. Decree and charge thereon *suspended*, in respect that the summons was intrinsically null.

This was a suspension at the instance of John Manson, clerk to and as representing the Police Commissioners of the burgh of Lerwick, against George Smith, Depute Sheriff-clerk at Shetland, of a decree of the Sheriff-court of Shetland, and a charge threatened thereon. It appeared that in September 1866 the General Police and Improvement Act 1862 (25 and 26 Vict. c. 101) was adopted by the burgh of Lerwick, and Smith, the respondent, was appointed one of the Commissioners under said Act. By the said Act of Parliament 3 and 4 Will. IV. c. 46, § 36, it is enacted "that none of the Commissioners for the purposes of this Act shall directly or indirectly derive any emolument or profit for any business or work of any description performed or to be performed by him under this Act." This provision is repeated in the Act 25 and 26 Vict. c. 101, § 57, above mentioned.

Smith, in December 1869, rendered an account to the Commissioners of Police for agency and expenses incurred to him for carrying through the petition to the Sheriff in connection with the adoption of the Police Act. The Commissioners, in respect that Smith had been himself one of the Commissioners under the Act, refused to pay him anything for agency, but paid the rest of his account. Accordingly, Smith brought an action for the sum due to him in respect of agency in the Sheriff-court. This summons was signed by himself as Sheriff-clerk.

The complainer appeared before the Sheriff-Substitute, and pleaded as a defence against the summons—"(1) That the charger having done the business charged for solely as a Commissioner of Police, and under his appointment as one of a committee, and not as an agent employed by the Commissioners, he was not entitled to remuneration for his trouble, or for fees of agency. (2) That being a Commissioner of Police at the time, he was precluded by the 36th section of the statute 3 and 4 Will. IV. c. 46, as well as by 25 and 26 Vict. c. 101, § 57, from deriving, directly or indirectly, any