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

emolument or profit from business or work of any description performed by him under the Act. (3) That, being Sheriff-clerk of Shetland, he was not entitled to act as an agent before the said Sheriff-court, or to charge agency fees for judicial proceedings in that Court."

The Sheriff-Substitute (MURE) remitted to the Auditor to fix the sum due to the pursuer of the action as remuneration for his services, and thereafter gave decree for the amount reported.

The complainers accordingly brought the present note of suspension to have the said decree and charge threatened thereon suspended.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 17th January* 1871.—The Lord Ordinary having heard the counsel for the parties, and considered the note of suspension, answers thereto, productions, and process—Refuses the note: Finds the complainer liable in expenses, of which allows an account to be given in, and remits the same, when lodged, to the auditor to tax and to report.

"*Note.*—The complainer, as clerk to and as representing the Police Commissioners of the burgh of Lerwick, in his note of suspension prays for suspension of a small debt decree for £6, 12s. 6d., and to £1, 4s. 1d. of expenses, pronounced by the Sheriff-Substitute at Lerwick against him, and of a threatened charge thereon, on the following grounds—viz., (1*st*) That the summons at the instance of the respondent, on which the decree was pronounced, is null, in respect that it was signed by the respondent as Sheriff-clerk; (2*d*) That the summons was brought before the Court when the respondent officiated as clerk; (3*d*) That the respondent was not employed as an agent, and that he did the work sued for as one of a committee of the Commissioners of Police of the burgh of Lerwick, without any stipulation for remuneration, and with a view to the adoption of the General Police and Improvement (Scotland) Act, 1862, and that he is precluded by the Burgh Police Act of 1833, and the said General Police Act of 1862, from deriving any emolument for business performed under these Acts; and (4*th*), That being Sheriff-clerk of Shetland, he could not act as agent, and make professional charges for agency in the petition to and proceedings before the Sheriff under the General Police Act of 1862, with a view to the adoption of that statute.

"All these grounds were, with the exception of the first, stated as defences to the summons in the Small-Debt Court, on which the decree complained of was pronounced.

"The complainer has presented an appeal to the next Circuit Court of Justiciary to be held at Inverness, on the same grounds as those now insisted in by him, with the exception of that second above set forth.

"The Lord Ordinary is of opinion that the note of suspension is excluded by sections 30 and 31 of the Small-Debt Act, 1 Vict., c. 41. The summons was, he considers, raised, and the decree complained of was pronounced, under the authority of that Act. Now, it is provided by section 30 that no such decree 'shall be subject to reduction, advocation, suspension, or appeal, or any other form of review or stay of execution,' on 'any ground or reason whatever,' other than is provided by section 31; and that section enacts that an appeal against such a decree may be taken to the next Circuit Court of Justiciary, provided always that such appeal shall be competent only when founded on the grounds therein set forth, and, among others, on 'incompetency,' which has been held as covering any incompetency in the procedure. (See opinions of the judges in *Murchie*, 1 Macph. 800.)

"The complainer maintained that the signature of the respondent as Sheriff-clerk to the summons in which he was pursuer, constituted an intrinsic nullity, and took the case out of the Small Debt Act altogether. The Lord Ordinary cannot adopt this view. The summons, the whole proceedings, and the decree, were, he considers, under the Small Debt Act. If it was incompetent in the respondent to sign as Sheriff-clerk his own summons, that incompetency could be made, and has been made, the subject of appeal to the Circuit Court. If that and the other objections stated by the complainer to the summons, procedure, and merits of the respondent's claim are competent grounds of appeal to the Circuit Court, he had his remedy by appeal. If they are incompetent, then all remedy on these grounds is, it is thought, excluded by the Act. The Lord Ordinary considers that the purpose and effect of sections 30 and 31 of the Small Debt Act were to exclude all review in the petty cases which the Sheriff is by that Act authorised to hear, try, and determine in a summary way, except on the grounds and by the appeal to the Circuit Court mentioned in the last of these sections; *Rankine* v. *Lang & Co.*, 7th Dec. 1843, 6 D. 183; *Graham* v. *Mackay*, 25th Feb. 1845, 7 D. 515, and 6 Bell's App. 214; *Louden's Trustees* v. *Pattullo*, 17th Dec. 1846, 9 D. 281; *Miller* v. *Henderson*, 2d Feb. 1850, 12 D. 656.

"It was said that there was some doubt whether the appeal taken by the respondent is competent, seeing that he failed to find caution within the period prescribed by the Act of Sederunt of 10th July 1839, § 133. But if, through the complainer's neglect of the provisions of that Act of Sederunt, he has lost his remedy by appeal, he must suffer the consequences."

Manson reclaimed.

PATTISON and BURNET for him.

SHAND and BROWN in answer.

At debate the reclaimer lodged a minute withdrawing from his appeal to the Justiciary Court.

The Court (LORD BENHOLME *diss.*) recalled the interlocutor of the Lord Ordinary, and passed the note. The majority of their Lordships were of opinion that there had been here a nullity *ab origine*. The summons having been signed by an officer of Court, there was in reality no process before the Court, and all that followed was null and void.

LORD BENHOLME thought that, a proper remedy having been provided by statute, viz., appeal to the next Circuit Court of Justiciary, the Court had no power to interfere.

Agent for Pursuer—Wm. Mason, S.S.C.

Agents for Defender—J. & R. D. Ross, W.S.

Thursday, February 9.

FRASER *v.* FRASER.

Bill—Proof—Writ or Oath—Accommodation Bill. Circumstances in which *held*, on construction of a holograph document, and after parole proof, that a certain bill drawn by a deceased party on, and accepted by, the pursuer, was an accommodation bill.

This was an appeal from the Sheriff-court of