of *bona fides* on her part unnecessary. His Lordship consequently decerned in terms of the conclusions of the summons, with expenses to the pursuer.

The defenders reclaimed.

MAIR for them.

ASHER, for pursuer, was not called on.

The Court adhered.

MAIR, for the unsuccessful parties, moved for expenses, or at least that there should be no expenses found due to either party, on the ground that this was an action in which the defenders were called upon to defend their *status* as lawful children, which had been given to them by the father of the pursuer.

The Court, however, saw no reason to depart from the ordinary practice, and allowed the pursuer additional expenses.

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

Agent for Defenders—John Galletly, S.S.C.

Wednesday, June 28.

SPECIAL CASE—JOHN ROBERTSON AND OTHERS (MACLEOD'S TRUSTEES).

Succession—Heir and Executor—Relief—Entail. A testator conveyed certain estates to trustees, for the purpose of being entailed; and by a subsequent deed of settlement he conveyed the residue of his property to other trustees. At the date of his death the estates to be entailed were burdened with certain heritable debts. *Held* that the disponee of these estates was not entitled to be relieved of the burdens attached to them, at the expense of the testator's general estate, although the deed of settlement contained a general direction to pay the testator's debts.

Legacy—Implied Revocation. Circumstances in which a legacy was held to be revoked by implication.

Kenneth Macleod, Esq. of Grishornish and others, in the Isle of Skye, died unmarried on the 15th day of March 1869. He left the following testamentary writings:—(1) Trust-disposition, dated 5th September 1865, whereby he conveyed to trustees his lands of Grishornish and others, with directions to execute an entail in favour of a series of parties, of whom Kenneth Macleod Robertson Macleod is the institute. (2) Holograph deed of settlement, dated 24th October 1865. (3) Trust-disposition and deed of settlement, dated 6th March 1867.

The parties to this Special Case were:—*First*, the trustees under the deed of 1865. *Second*, the trustees and executors acting under the deeds of 1868 and 1869. *Third*, John Robertson, for himself, and as administrator-in-law for his son, Kenneth Macleod Robertson Macleod. *Fourth*, the trustees nominated for erecting and maintaining the "Gesto Hospital" by the said Kenneth Macleod, conform to the deed of 1869.

At the date of Mr Macleod's death the estates directed to be entailed were burdened with two debts of £5000 each, the bond and disposition in security in the first being dated 25th June 1861, and in the second, 5th October 1866.

The parties of the *first* and *third* parts claimed that the sums due under these heritable securities should be paid out of the residue of the truster's estate. The claim was opposed by the parties of the *second* and *fourth* parts, who claimed that the whole of the residue should be applied for the purposes of the Gesto Hospital.

The holograph deed of 1868 contained the following clause:—"My landed property in the Isle of Skye being already entailed—namely, Greshornish, Orbost, Cushletter, and Edinbane—it is my wish and will that all the stock of every description and denomination on the grounds of Greshornish, Orbost and Cushletter, should be succeeded to by the person who succeeds to the entailed property. It is also my wish and will that all the household furniture and plate of all descriptions, and pictures—in fact, all moveable and immoveable property within the walls of the houses of Greshornish and Orbost—should be succeeded to by same person who succeeds to the entailed property from time to time." Every provision in the deed of 1868 was repeated in the deed of 1869, with two exceptions—the one a mocking bequest of one penny to a lady, and that of the stock to the heir of entail. The bequest of furniture and inside plenishing was repeated.

Mr Macleod died possessed of a valuable sheep stock on the farms mentioned in the above clause of the deed of 1868. This was claimed by the party of the *third* part as bequeathed to K. M. R. Macleod by the deed of 1868; and the claim opposed by the parties of the *second* and *fourth* parts, on the ground that the bequest was revoked by implication by the later deed of 1869.

Certain expenses were incurred by the parties of the *first* part in executing the deed of entail and completing the titles of K. M. R. Macleod, including his entry with the superior. The party of the *third* part claimed that these expenses should be paid out of the rents of the lands from the date of the truster's death and the term of Whitsunday thereafter, which had been uplifted by the parties of the *second* part, or out of the residue of the testator's moveable estate in this country. It should be mentioned, in reference to this part of the case, that while the trust-deed of 1865 conveyed the estates to the parties of the first part for the purpose of being entailed, reserving the truster's liferent, the entail was directed to be made at the first term of Whitsunday or Martinmas after his death.

At the time of his death Mr Macleod was possessed of considerable moveable estate in this country, and also of large estates in India, subject however to outstanding claims. By the trust-deed of 1869 he conveyed his Indian estates to separate trustees, and directed that his property there should be administered separately from that in this country. For some time previous to his death Mr Macleod contemplated the erection and endowment of an hospital in the island of Skye, to be called the "Gesto Hospital." For this purpose various provisions were made in the deeds of 1868 and 1869. The Indian trustees were directed to transmit £10,000 from the produce of the estates there. A sum of £6000, secured over an estate in Skye, and the whole residue of his means and estate in this country, were also to be applied for the purposes of the hospital. It was stated that the value of the estates directed to be entailed was about £1100 a-year, including shootings. Parties were agreed that although, from the fact of all claims on the Indian estate not having been settled, it was not possible to state the figures with accuracy, in the event of the *third* parties' claim to the stock being sustained, there might not be sufficient residue in

the hands of the parties of the *second* part to clear off the two heritable securities; and that in the event of both the claims for relief of the burdens and that of the stock being sustained, there would be no free residue from the estate in this country available for the purposes of the Gesto Hospital.

The questions of law submitted to the Court were as follows:—

"1. Whether the parties of the first and third parts are entitled to have the said two sums of £5000 each, due under the two heritable securities mentioned in Article 5 *supra*, and interest thereon, paid out of the said residue of the estates conveyed to the parties of the second part, as the Scotch trustees and executors of the said Kenneth Macleod, under his settlements of 24th October 1868 and 6th March 1869.

Or,

"Whether the said heritable securities are proper burdens on the lands embraced in the said trust-deed of 5th September 1865, and the said deed of entail thereof in favour of the party of the third part, and the heirs-substitute of tailzie therein set forth?

"2. Whether the said Kenneth Macleod Robertson Macleod, as institute of entail foresaid, is entitled to the stock on the grounds of Grishernish, Orbost, and Coislater at the death of the said Kenneth Macleod?

"3. Whether the said sum of £99, 17s. 2d., and such further sum as has been or may be expended relative to the entries with the superiors obtained and to be obtained, being the expenses attending the execution of trust purposes of the deed first above mentioned, directing the lands therein specified to be entailed, or any, and if so what, part thereof falls to be paid by the second parties out of the said rents and produce in their hands as aforesaid, or out of the said residue of the estates conveyed to them?"

The SOLICITOR-GENERAL and ASHER for the First and Third Parties.

HORNE and LEE for the Second and Fourth Parties.

The following cases were referred to as bearing upon the first question:—*Fraser*, 13th Nov. 1804, F.C., and Mor. No. 3, App. "Heir and Executor;" 5 Paton's Appeals, 642; *Carrick's Trustees*, 11 June 1840, 2 D. 1068; *M'Nicol*, 31 January 1816, F.C.; *Douglas' Trustees*, 17 January 1868, 6 Macph. 223, 5 Scot. Law Rep. 154; *Campbell*, 11 March 1830, 8 S. 713.

At advising—

LORD PRESIDENT—There are many decided cases on this point which require to be carefully studied. But we are pretty familar with them, having had them under our consideration in the recent case of *Douglas' Trustees*. There is no doubt as to the law applicable to such cases. I do not think we are entitled, in applying the general rule as to the allocation of burdens, to say that in a case of testate succession you are to gather from the general tenor of the deed some conclusions adverse to the general rule. In order to exclude the general rule something more is required. There is a good deal of authority for saying that express words are necessary to have the effect of relieving one heir at the expense of another, contrary to the rule of law. In the case of *Fraser* (November 13, 1804, M., Heir and Executor, App. 3), it seems to be laid down that a special clause is necessary. I am not sure whether we can rely absolutely on the part of the report which professes to give the *ratio* of the judgment. I prefer to take the interlocutor of the Lord Ordinary, which was adopted by the House of Lords (5 Paton's Appeals, 632, 643)—"That the settlement by which the lands of Knockie are disponed to Simon Fraser could only import a right to those lands subject to the heritable debt with which they were burdened; and that the clause taking the executors bound to pay the debts cannot have the effect of altering the right of relief between him and the executors." Now, reading that as the expressed opinion of the Court, there are two propositions in law laid down of extreme importance. *First*, When a particular estate is conveyed to a disponee by a settlement, and is in point of fact burdened with a debt, that debt is the debt of the disponee, and he is not entitled to be relieved of it by the executors or other successors. *Secondly*, A general direction to or obligation laid upon executors, whether in the same deed or in another, to pay the whole debts of the testator, will not be construed into an obligation to relieve the disponee of the debt attaching to the estate which he takes. These principles were carried out in the cases of *M'Nicol*, *Carrick's Trustees*, and *Douglas' Trustees*. The case of *Fraser* was particularly strong in the circumstances. There the testator had no other debt at all except that of £2000 on the estate disponed to Simon Fraser. There was an express direction to the executors to pay all the truster's debts. Still that was not held sufficient to overturn the ordinary rule of law, although the result was that the only person who paid any debt of the testator was the disponee. I am not disposed to extract from these decisions so stringent a rule as that an express statement by the testator that one heir is to be relieved at the expense of another, is necessary. But it must be an indication so strong as to be equivalent to an express declaration. The question in this case is whether we have any such indication. The first deed which we have to look at is the conveyance of the lands of Grishernish and others to trustees for the purpose of being entailed. The testator was then possessed of several parcels of land which he had acquired for the purpose of making an entail. He says so in the deed. But before he executed the trust he had already burdened one of the estates with a debt of £5000. The bond was granted in 1861, and the trust executed in 1865. It appears also that prior to the execution of the trust-deed, but while the purpose of the entail was present to his mind, he acquires a sum of £6000, but he does not use that money to pay off the debt on the lands. He keeps it invested on security on another estate. It would rather appear that this was from a desire to oblige the owner of the estate. Still, if he had been strongly set upon clearing the estate to be entailed, one would have expected him to prefer that to almost any other object. After the trust-deed is executed, he has occasion to borrow more money. He does not call up the £6000, but imposes another burden of £5000 on the subjects which by this time he had directed to be entailed. It is important to observe that the burdens on the lands were of the testator's own creation. We next come to the trust-deed of 1869. Now occurs a favourable and natural opportunity for the testator to express his intention of disburdening the lands. If he really had such intention in his mind, it is not very easy to see why, in making the trust, he should have said no-

thing about it. Many instances have occurred in trusts for the purpose of entailing lands where the intention of the truster has been expressed that the lands should be disburdened before being entailed. In the case of *Minto* v. *Elliot*, 14th Feb. 1823, 2 S. 180, a clause of that kind was given effect to, even against the executors under an English will. In short, the way of accomplishing this is perfectly well known to conveyancers, and would probably suggest itself to the testator. In the next place, let us consider in what condition his affairs would have been left if he had died after executing the holograph will of 1868. Under it he gives the institute of entail the whole furniture and plenishing within the houses of Gresshernish and Orbost. In addition to this he gives him a very valuable sheep stock. It is made an article of statement in the Special Case that if the institute of entail got the whole of that plenishing and sheep stock, and also got the land relieved of the debt of £10,000, there would be no free residue of the testator's estate in this country. But at that time he had resolved to found the hospital. So that the presumption is against his intending at that time to clear the burdens from the estates to be entailed. How is this affected by the deed of 1869? There is a peculiarity in this deed, but not available for the institute of entail. He conveys his Indian estates to separate trustees, and he provides that the Indian estate shall bear its own burdens; in short, that its administration shall be kept distinct from that of his estates in this country. But when he proceeds to convey to other trustees his estate in this country, other than those lands which he has already directed to be entailed, all that he says about debts is a general direction to pay all his just and lawful debts—a clause which has been authoritatively decided has not the effect of relieving the disponee of a particular estate from the burden attached to that estate. I can see nothing in this third deed which induces me to think that the testator had any such intention. It gives more satisfaction to my own mind that I am not defeating any latent intention of the testator. But I put my judgment on the position, that there is no clear and unambiguous implication by which we gather the testator's intention to relieve the heirs of entail at the expense of his general estate.

With regard to the 2d question, I am of opinion that the bequest of sheep stock, left to the heir of entail by the holograph will of 1868, is impliedly revoked by the trust-deed of 1869. The implication is a very plain one. While in the latter deed he repeats every other bequest contained in the former, he omits two, one a mocking bequest, and the other this important bequest of sheep stock to the heir of entail. He repeats carefully the bequest of inside plenishing and omits outside plenishing. The sheep stock bequest is so conspicuous by its absence from the deed of 1869 as to make it very plain that it was intended to be revoked.

With regard to the 3d question—the claim by the parties of the first part to be reimbursed certain expenses by the parties of the second part. I cannot see any ground for such a claim. The expenses are just those of the first trust, and the demand amounts to this, that the second trust shall pay the expenses of the first. That may in certain circumstances be a very expedient arrangement, but surely it is necessary that the truster should order it. There is nothing of the kind here.

LORD DEAS—I rather envy the satisfaction with which your Lordship has come to the result. To my mind it is an unsatisfactory result. It is exceedingly difficult to believe, morally speaking, that the testator intended that the entailed estate should be under these large burdens. He introduces his trust-deed of 1865—"Considering that my ancestors have for many generations possessed or occupied lands on the west of the island of Skye, and that I am very desirous to continue the connection of my family with the said country after my death, and for this purpose have purchased the lands and others after described, and that in order to secure the object of my desire so far as in my power and as the law will permit, it is expedient that I should provide for the future destination of the estates to the descendants of my family by the fetters of an entail." We are told that the rental of the lands to be entailed is £800 or £900 a-year, or £1100 if the game be included, under burden of these two sums of £5,000 each. He gives the trustees no power whatever to pay any heritable burdens. The consequence of that is, that either of the creditors might bring the estates to sale. There is no way of preventing them doing so. It is the natural and almost necessary result that this should, sooner or later, be done. Thus, while the testator declares that he bought those estates for the purpose of their remaining in his family, he has left them in a position in which that purpose must almost necessarily be defeated. The result is to defeat his own act. Now, I cannot say that this view is much weakened by any of the circumstances of the case. That he imposed those burdens, instead of buying the estate with the burdens upon it, does not seem to me to go far to show that he intended the burdens to remain on it,—rather the reverse. That he had an opportunity of saying in the deeds that he wished the estates to be disburdened, is not conclusive if he took for granted that such was their effect. The deed which directs the entail, deals with the entailed estates only, and says nothing about debts. When we come to the last deed, that of 1869, it is obvious that the testator speaks of the entailed estate as something taken out of his general estate. In that view he conveys his whole other estate to trustees. The Indian estate is to be administered separately, but all the other debts are to be paid by his general disponees. I cannot help coming to the conclusion that he thought that he had so framed his deeds as to relieve the entailed estate. Unfortunately these deeds were not executed by the same man of business. That may account for the miscarriage. I am not prepared to differ from your Lordship in point of law. While I certainly hold that we are entitled to look at a man's intentions, there are some things in which intention must be more clearly manifested than in others. It is not necessary that the testator shall in so many words declare that one estate shall be relieved by another, but we are tied down by decisions to the rule that the implication must be clear and irresistible. I do not think the circumstances are sufficiently strong in this case to warrant us in infringing upon a rule so long laid down.

LORD ARDMILLAN—The general rule is that a person taking an estate by a *mortis causa* deed takes it *cum suo onere*. The successions, heritable and moveable, must bear respectively the debts attached to each, unless there is something to take the case out of the general rule. If we were left to mere

conjecture of intention, it might be difficult to reach a satisfactory result. Mr Macleod was a Skye man and wished to found a family, but he also wished to found an hospital. But I agree that we have no right to consider the question as matter of conjecture. Unless there is what has been called implication, so clear as to amount to declaration, we cannot transpose the burdens. The other questions are very clear.

LORD KINLOCH concurred.

The Court answered the 1st alternative of the *first* question in the negative, and the 2d in the affirmative; the *second* question in the negative; and in regard to the *third* question, they found that the expenses of executing the entail, and the other expenses claimed, form no charge against the general estate of the testator, conveyed to the parties of the *second* part, and that the said parties have no authority to pay or provide for such expenses; reserving all right and claim of the parties of the *first* part to the rents of the lands conveyed to them between the date of the testator's death and the execution of the entail, and to the other parties their answers; and found the parties of the *first* and *third* parts liable to the parties of the *second* and *fourth* parts in expenses.

Agents for the First and Third Parties—Gibson-Craig, Dalziel, & Brodies, W.S.

Agents for the Second and Fourth Parties—Macrae & Flett, W.S.

COURT OF JUSTICIARY.

Wednesday, June 28.

DE BELMONT *v.* LANG

(Before the Lord Justice-Clerk, Lord Cowan, and Lord Neaves.)

Suspension—Jurisdiction—Glasgow Police Act, 1866 *—High Court—Circuit Court of Justiciary.* A suspension of a conviction obtained before the Glasgow Police Court, under the Glasgow Police Act, on the ground that the magistrates had acted entirely outwith the statute, was brought before the High Court. *Held* that the excess of jurisdiction alleged was not so clear as to render the suspension competent, the statute having provided an appeal to the Circuit Court as the only form of review.

This was a suspension of a conviction in the Glasgow Police Court, following on a complaint bearing to be brought under the Glasgow Police Act 1866 (29 and 30 Vict. c. 273), in which the suspender, Jacques Francois de Belmont, was accused of having "been guilty of the crime or offence of wilfully and indecently exposing his person, actor or art and part, in so far as on or about the 17th day of April last, within or near a building or part of a building known as the Corporation Galleries, situated in or near Sauchiehall Street, Glasgow, the said Jacques Francois de Belmont did wilfully and indecently expose his naked person in view of two or more females, whereby," &c.

In the complaint there was no specific reference to any particular section of the statute, but it was stated by counsel for the respondent that it was laid under section 135, which empowers the magistrate to inflict certain penalties on persons convicted of what is a crime or offence at common law, and one not specially described in the statute. Section 135 is as follows:—"Every person who is guilty of any of the following acts or omissions within the city, shall, in respect thereof, be liable to a penalty not exceeding the respective amounts, or to imprisonment for a period not exceeding the respective periods hereinafter mentioned, viz., to a penalty of ten pounds, or alternatively without penalty to imprisonment for sixty days; (4) Every person who does or omits to do any act the doing or omission of which is an offence which may be legally tried by the magistrate, and is punishable by public general statute or by common law, and to which, by such public general statute or common law, or by the provisions of this Act, a less punishment is not attached."

The magistrate having found the charge proven, inflicted a sentence of sixty days' imprisonment without the alternative of a fine. Against this decision De Belmont intimated an appeal to the next Circuit Court, in terms of section 132 of the statute; and having been imprisoned under the sentence, brought the present bill of suspension and liberation.

SCOTT and LANG, for the suspender, argued that the charge contained in the complaint amounting to no crime or offence known to the common law of Scotland (*M'Kenzie* v. *Whyte*, 14th November 1864, 4 Irv. 570), the magistrate, in inflicting the sentence complained of, had acted entirely outwith the statute, and that in these circumstances suspension was a competent remedy.

WATSON, for the respondent, contended that the complaint having been laid under the Glasgow Police Act, the suspender was bound by the terms of section 132, which, while it provided for appeal to the next Circuit Court, excluded all other forms of review (*Walker* v. *Lang*, 25th November 1867, 5 Irv. 506).

At advising—

The LORD JUSTICE-CLERK said—Two questions have been argued, one of competency, how far this suspension is competent; and the other, whether there are any good grounds for the suspension, if it be competent. These questions run into each other. It was said that the suspension was incompetent, because of the clause of the Glasgow Police Act which has been referred to, and which was unquestionably a very stringent and very explicit clause, and received very strong effect in a previous case of *Walker*. On the other hand, it was said in the face of this complaint that it was manifest that the magistrates were acting under their common law jurisdiction; and, in the second place, that they exceeded it by having convicted the complainer of that which was not a crime and not punishable by statute or at common law. If the suspender had made out the affirmative of the proposition, I do not say they had no jurisdiction in such a case, but I do not think he has made out the proposition to the extent or footing which alone would avail him and give him a remedy by coming here. I do not say, and guard myself from saying, that on the face of this charge there is sufficient to maintain this conviction before the regular and proper Court of Appeal; but I think there is enough on the face of it to show that there may be sufficient disclosed there to dispose of the magistrate's jurisdiction. In the case of *M'Kenzie* and *White* the Court took the nature of the charge and the substance of it under consideration. There they saw that the kind of act which was the subject of the charge was one that re-