person could be convicted who was not seen on land or coming from land, and decided that he must acquit because of want of evidence of this. He has thus stated the question of law—[*His Lordship quoted the question*]. I have no hesitation in answering that question in the negative.

LORD ADAM—This Act provides for two things, (1) searching, (2) conviction. It provides that it shall be lawful for a constable to search any person whom he may have good cause to suspect of coming from any land where he shall have been in unlawful pursuit of game. The constable under this first part of the section searched the respondents. To that there is no objection. The respondents were found to be carrying nets and other appliances for poaching, and to be in possession of rabbits recently killed. That showed without any doubt where they had been. That being so, the next thing the statute says is—"If such person shall have obtained such game by unlawfully going on any land in search or pursuit of game, or shall have used any such article or thing as aforesaid for unlawfully killing or taking game, or shall have been accessory thereto, such person shall, on being convicted," &c. There is nothing either about being seen upon land or coming from land. I cannot possibly answer the question otherwise than in the negative.

LORD RUTHERFURD CLARK—I am of the same opinion. The Sheriff thought he was not entitled to draw the inference that the implements found upon the respondents when they were searched had been used for unlawfully killing game. He thought that in order to justify conviction there must be proof that the persons were seen on some land taking game or in pursuit of game. It is plain that that is not so. The law entitles the magistrate to draw the inference that the implements found upon the accused were used for killing game, and that the game found was obtained unlawfully.

The Court answered the question of law in the negative.

Counsel for the Appellant—Guy. Agents—Gordon, Petrie, & Shand, S.S.C.

Counsel for the Respondents—M'Laren. Agents—J. R. Douglas & Mitchell, S.S.C.

COURT OF SESSION.

Thursday, October 30.

SECOND DIVISION.

[Sheriff of Lanarkshire.

SMITH'S TRUSTEES *v.* SMITH.

Trust — Construction of Trust-Deed — Change of Investments — Payment of Expenses from Capital.

A testator in his trust-disposition and settlement directed his trustees, *inter alia*, in the first place, to pay the expenses of every kind connected with the execution of the trust, and, in the seventh place, to pay his wife the free annual produce of the residue at and when the same was received by them, and gave them power to change his investments from time to time. *Held* that in terms of the trust-deed the residue was to be ascertained after payment of the whole expenses of the trust of every kind, including accounts incurred by the trustees in connection with the renewal of investments from time to time, and that therefore such accounts fell to be paid out of capital, and not out of the widow's liferent.

Opinion (*per* Lord Young) that irrespective of the terms of the trust-deed the rule of common law is that the expense of all proper changes of investments by trustees should be charged against capital.

Osbourne Smith died on 11th December 1883 survived by his wife Mrs Mary Robb Hatrick or Smith. He left a trust-disposition and settlement dated 18th September 1882, by which he conveyed his whole estate, heritable and moveable, to trustees. By the trust-deed it is provided, *inter alia*, "In the first place, I direct my trustees to pay all my just and lawful debts, sickbed and funeral expenses (all of which may be paid without constitution), and the expenses of every kind connected with the execution of the trust hereby created." And in the seventh place—"I direct my trustees, after fulfilling the foregoing purposes, to hold the residue of my estate, or the proceeds thereof if converted into money, for behoof of my said wife in liferent for her liferent alimentary use allenarly during her life after my death . . . and I direct my trustees to pay to my said wife the free annual produce of the said residue as and when the same is received by my trustees." Power was also conferred on the trustees to call up, realise, and change the truster's investments from time to time, and to continue any investments the truster might have made.

The trustees entered on the possession and management of the trust-estate, and all the law expenses incurred in executing the trust up to the time when the residue was fixed by them and invested were paid by the trustees out of capital.

Thereafter two accounts were incurred by the trustees principally in changing the investments under the powers conferred on them by the deed. One of these accounts, amounting to £25, 8s. 6d., was paid by the trustees out of half-yearly payment of liferent due to Mrs Smith on 18th May 1887. The other account, amounting to £11, 9s. 4d., was similarly paid out of the half-yearly payment of liferent due to Mrs Smith on 24th April 1888.

Mrs Smith brought an action against the trustees in the Sheriff Court of Lanarkshire for recovery of the sums thus paid, with interest from the date of payment.

The pursuer pleaded—"The defenders having wrongously and in violation of the provisions of the trust-disposition and settlement retained the foresaid sums from the revenue of the estate instead of the capital, decree should be pronounced and warrant granted as craved."

The defenders pleaded, *inter alia*—"(2) The accounts in question being for ordinary trust management, formed proper charges against the revenue of the estate, and the defenders were justified in paying the same from revenue, and are therefore entitled to absolvitor with costs."

On 20th March 1890 the Sheriff-Substitute (GUTHRIE) pronounced the following interlocutor—"Finds that by the first purpose of the trust-disposition and settlement of the late Osbourne Smith the expenses of every kind connected with the execution of the trust are directed to be paid in the first instance by the trustees, and that the trustees are thereafter directed, in the seventh place, after fulfilling the foregoing purposes, to hold the residue of the estate or the proceeds thereof, if converted into money, for behoof of the truster's wife, the pursuer, in liferent, and to pay to her the free annual produce of the said residue at and when the same is received by them: Finds that these directions import that the residue is to be ascertained after payment of the whole expenses of the trust of every kind, including such outlays as those connected with the renewal of investments from time to time, and that the pursuer is therefore not bound to suffer deduction from her liferent of the accounts condescended on, but that the same fall to be paid from the capital held by the trustees: Therefore decerns as craved: Finds the defenders *qua* trustees liable to the pursuer in expenses, &c.

"*Note.*—It would perhaps be more convenient as a question of accounting if the opposite view to that embodied in the interlocutor were taken. But it is not I think authorised by the terms of the trust-deed, which gives the law of the case. The pursuer is made liferentrix of the residue, and is to receive at once the free annual proceeds of it. And the residue is by the clear intention of the deed what remains 'after fulfilling the foregoing purposes,' one of which is payment of 'the expenses of every kind connected with the execution of the trust hereby created.' I can put no other meaning on these words than that the pursuer's right to the free annual proceeds of the residue is not to be burdened with the expenses of management, which are expenses connected with the execution of the trust, except in so far as the residue of the capital sum is from time to time diminished by the payment of such expenses.

"The two cases cited by both parties as bearing on this question do not appear to be decisive. In the later case—*Baxter & Mitchell* v. *Wood*, 2 Macph. 915, there is no statement of the terms of the trust, and indeed the case rather turns upon general principles applying to circumstances different from those of the present case. In the other—*Pearson* v. *Casamajor*, 2 D. 1020—principles are laid down which are referred to by Professor Montgomerie Bell (Conveyancing, 943) as 'useful in general practice.' But it rather seems that Professor Bell regarded them as referring to the case where the trust-deed is silent on the subject. I am not sure that in the case of *Pearson* the trust-deed was silent, for its terms are more fully given in the House of Lords' Report in 2 Rob. 218, than in either of the Court of Session Reports (15 S. and 2 D.), and seem to have been not unlike the first purpose of the deed now before me. But the clauses disposing of residue were there entirely different from the present deed, and afforded no such distinct indication of intention as we find in the terms and collocation of its directions.

"No distinction was made in argument between the various charges in the accounts in process, and I have dealt with the accounts on the footing that they apply entirely to work connected with changes in investments. According to the usual and proper practice in the management of trust-estates where the trust-deed is silent or less distinct than it is here, such expenses, as I have always understood, are charged against capital, and if that course, as explained by Professor Montgomerie Bell and the Lord Ordinary (Moncreiff) in *Pearson* v. *Casamajor*, had been followed, the pursuer would very probably have raised no question as to minor and ordinary charges if there be any such. But the trustees' directions are here so special that it would be difficult to allow even expenses of ordinary management, such as factor's commission, to be deducted from the annual proceeds of the residue in the event of that smaller question being raised."

The defenders appealed to the Court of Session, and argued—Free annual produce meant that expenses incurred were to be taken out of gross annual produce. Clause 7 of the deed must be considered without reference to clause 1. If expense was not charged against liferent there would require to be an uninvested margin of capital. The keeping up of the trust was in the interest of the liferentrix. It was for her interest that changes were made in the investments; it was done to raise her income. The rubric in *Pearson* v. *Casamajor*, June 6, 1840, 2 D. 1020, was erroneous, and Bell in his Conveyancing, p. 943 (3rd ed. 950), followed it.

Argued for pursuer and respondent—The

expenses were not of the nature of ordinary annual expenses, and fell naturally on the fee. There was no need for change in the investments as far as the liferentrix was concerned. No expense was incurred in merely handing over the income to a liferenter. The usual way was to authorise the liferenter to draw the income. Any question in this case was solved by the language of the trust-deed—*Pearson* v. *Casamajor*, 2 D. (*per* Lord Moncreiff), p. 1021; Bell's Conveyancing (3rd ed.), p. 950; *Baxter & Mitchell* v. *Wood*, March 24, 1864, 2 Macph. 915.

At advising—

LORD JUSTICE-CLERK—The late Osbourne Smith in his trust-disposition and settlement directed his trustees to pay the liferent of the residue of his estate to his wife, and the question has arisen whether certain expenses incurred by the trustees mostly in reference to change of investments fall to be deducted from the liferent of the widow or from the capital. Such expenses may fall into two categories, first those expressly relating to capital, and secondly those incurred in recovering the income and paying it over to the persons entitled to it. There is also another class of expenses, namely, expenses which relate to both these categories such as those incurred in connection with meetings of trustees.

The main question here is as to the expenses of the trustees while doing their duty under the clause in the deed empowering them to change the investments from time to time. For some time past the trustees in perfect good faith have been deducting these expenses from the liferent of the widow. This having come to the knowledge of the widow, she demands the sum thus paid, on the ground that it was improperly deducted from her liferent.

It is important to see what powers are given to the trustees in connection with the expenses of the trust. These powers are expressed in distinct and brief terms in the first purpose of the trust—"I direct my trustees to pay all my just and lawful debts, sick-bed and funeral expenses (all of which may be paid without constitution), and the expenses of every kind connected with the execution of the trust hereby created." Occurring in this place these words might be read as meaning "expenses incurred in setting the trust in motion." Looking, however, at its terms taken along with the clause conferring the liferent on the widow, I consider that the expression used covers all expenses incurred by the trustees in performing their duties as such. There is here not merely a winding up of the trust. The truster contemplated a trust continuing for a tract of time and the performance by the trustees during that time of duties additional to merely setting the trust in motion, and expenses to be incurred in carrying out these duties. In terms of the seventh purpose of the trust the widow is to receive "the free annual produce of the said residue as and when the same is received by my trustees." It was argued that the free annual produce means the whole annual produce. I am not quite clear that this is so. The free annual produce might be said to be the produce after paying the amount of collection. This, however, in the present case is a mere trifle. The principal expense is incurred in altering the investments. If this falls to be charged against capital it will reduce the capital and the liferent with it, and will thus affect the interest of both fiar and liferenter. On the whole matter, dealing with the case on the words of the trust-deed, I have come to the conclusion that the interlocutor of the Sheriff-Substitute is right.

LORD YOUNG—I concur with your Lordship, but I think I would have arrived at the same conclusion irrespective of the words of the deed. These, however, remove any hesitation that I might have had. But I wish to say a few words for the future guidance of the trustees.

This is a simple enough trust. After the trustees had paid debts and realised the estate they got something like £12,000. Their duty was to invest that for the benefit of the widow in liferent and certain parties in fee. Under the terms of the deed I hold it clear that the expense of realising the estate and investing it suitably was a proper charge on the capital. But some investments may not last. It frequently becomes the duty of trustees to change investments. In my opinion irrespective altogether of the terms of the deed, the rule of the common law is that where it becomes necessary for the trustees to change investments the expense must be charged against the capital. In short, the expense of all unavoidable and, as I think, all proper changes of investments should be paid by trustees out of capital But it was said by counsel for the trustees that the trustees had been assailed by the widow to get more profitable investments in order that her liferent might be increased, and that they had changed the investments on her behalf. I think that what ought to have been done in such circumstances was this—if the changes were made at the request of the widow, and on her behalf exclusively, the trustees before making them should have stipulated that she was to pay the expense. The expense of any such investment should be matter of arrangement. There was nothing to prevent the trustees from investing the estate in the funds and giving the widow the interest. If the expense incurred here was caused by the change of investments at the request of the widow, I cannot commend the good taste of this action. But nothing of that kind is averred on record, and I agree in the view that these investments must be taken to have been made in the interests of both liferenter and fiar, and must therefore be charged against capital.

LORD RUTHERFURD CLARK—I think the Sheriff-Substitute's interlocutor should be affirmed.

The Court affirmed the interlocutor of

the Sheriff-Substitute, and found the pursuer entitled to additional expenses, to be paid out of the trust estate.

Counsel for the Pursuer—Asher—Maclaren. Agents—Macpherson & Mackay, W.S.

Counsel for the Defenders—Pearson—Shaw. Agent—James Drummond, W.S.

Friday, October 24.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

HORSBRUGH (ROBERTSON'S TRUSTEE) *v.* ROYAL BANK OF SCOTLAND.

Retention—Bonds Lodged with Bank—Presumption—Terms of Receipt.

The customer of a bank, whose account was overdrawn, lodged with the bank certain annuity bonds transmissible by delivery and payable to bearer, receiving from the bank agent receipts bearing that the bonds were held "for safe keeping on your account and subject to your order." The customer died leaving his account largely overdrawn and a large amount of bonds in the bank's hands. His estates were sequestrated after his death. In an action by the trustee against the bank for delivery of the bonds, the Court *assoilzied* the defenders, holding (1) that as the defenders had the custody of the bonds there was a presumption in favour of their having a right of retention over them; (2) that this presumption was not rebutted by the terms of the receipts, which did not fully express the terms of the deposit, and were consistent with the bank having a right of retention; and (3) that the rest of the evidence in the case supported the presumption in the bank's favour.

On 25th November 1887 Mr David Souter Robertson deposited with the Royal Bank of Scotland at Brechin an Edinburgh City Annuity bond for £3500 with interest coupons attached, receiving from the bank a receipt in the following terms—"We hold for safe keeping on your account and subject to your order, City of Edinburgh Annuity bond, No. 3937, for the payment annually of £105 with coupons attached, £52, 10s. each, payable half-yearly on 1st February and 1st August." On 12th April 1888 Mr Robertson deposited with the bank two Edinburgh City Debt bonds for £500 each with coupons attached, receiving a receipt in substantially similar terms, and on 27th April 1888 he deposited further Edinburgh City Debt bonds and coupons attached with the bank, and again received a similar receipt. All these bonds were payable to bearer, and in terms of 1 and 2 Vict. cap. 55, sec. 45, were transmissible by simple delivery and without intimation of any kind. Mr Robertson died on 10th November 1888, at which date the bonds above mentioned still remained in the bank's hands, and his account with the bank was overdrawn to the extent of £5651. Mr Robertson's estates were sequestrated after his death, and Henry Moncreiff Horsbrugh, C.A., was appointed trustee thereon.

The present action was raised by Mr Horsbrugh against the bank for delivery of the said bonds.

The pursuers founded on the receipts above quoted, and pleaded—"(1) The bonds and coupons referred to being part of the sequestrated estates of Mr David Souter Robertson, the pursuer is entitled to delivery thereof. (2) In respect of the acknowledgments quoted, the pursuer is entitled to decree as concluded for. (3) The defenders' statements are irrelevant; *et separatim*, they can only be proved *scripto*."

The defenders claimed a right of retention over the bonds in respect of Mr Robertson's debt to the bank, and averred that there had been all along an understanding and agreement between him and them that they were to hold the bonds as a security against any advances by them to Mr Robertson; the advances to Mr Robertson had been made on the faith of this agreement. The bank collected the coupons and annuity warrants as they fell due, and the parties otherwise acted inconsistently with the bond being held by the bank merely for safe keeping.

The defenders pleaded—"(1) The pursuers' statements are irrelevant and insufficient to support the conclusions of his summons. (2) The defenders being entitled to retain the bonds sued for until payment of the debt due to them, should be assoilzied, with expenses. (3) In respect of the understanding and agreement libelled, and of the course of dealing following thereon, the defenders are entitled to the retention claimed."

On 5th November 1889 the Lord Ordinary (KYLLACHY) before answer allowed the defenders a proof *habili modo* of their averments, and to the pursuer a conjunct probation, and the pursuer having reclaimed, the Court on 7th December adhered.

Proof was led on 6th February 1890.

The evidence for the defenders consisted of the parole evidence of Mr Guthrie, the bank agent at Brechin, and of Mr T. R. Chaplin, a son of Mr Robertson, of the correspondence passing between the bank and members of Mr Robertson's family, and of the bank account.

Mr Guthrie, the bank agent at Brechin, gave evidence to the following effect:—Mr Robertson began to bank with the Royal Bank at Brechin in 1880. In November 1882 his account was overdrawn, and the witness asked him to lodge securities against the overdraft, which he did; the bank gave a receipt bearing that they were lodged for safe keeping and held to your order. In November 1887 Mr Robertson's account was overdrawn to the extent of £3210, and the bank held bonds belonging to him for £3000. Mr Guthrie then intimated to Mr Robertson, both by letter (dated November 4th) and verbally, that he