where there is no employment and no means of subsistence except upon the land, he has given his village tenants an expectation that they will be enabled to support themselves out of the land, and he is under an obligation to furnish them with sufficient arable and pasture land for the purpose of subsistence. That, I take it, is the principle embodied in the Act, and it is worked out by means of a Commission who are empowered to deal with questions of rent and also with questions of occupation, and if necessary to add to the holdings. Now, one sees that in the end that may be a better thing for the proprietor than to have to support his tenants under the poor law. But it never was intended that these tenants should choose for themselves any part of the lands most convenient for themselves and belonging to their landlord; and if they claimed a part of the estate as their possession, that is a question of law which must be decided by the ordinary Courts and not by a Commission, which does not deal with questions of right at all, but with questions of expediency or of the obligation resulting from circumstances of residence, and the obligation of the land to maintain the poor who are upon it. It appears to me that the right of the farm tenant is a right quite as deserving of consideration by a court of law as the right of the crofter, and where the two interests conflict, the proprietor is the proper person to have the claim settled. That I presume to be the reason why the Duke of Sutherland appears here to maintain the right of his farm tenant. After we have determined whether the subject in dispute belongs to the crofter community or belongs to the farm tenant, it will then be for the Commissioners, if necessary, to assign such holdings as they may think proper to the crofters.

I agree with your Lordship that there is no good objection to the present action.

LORD KINNEAR—I agree with your Lordship in the chair, and also with the additional observations that were made by Lord Adam.

The Court adhered.

Counsel for the Pursuer—Graham Murray — Dickson. Agents — Tods, Murray, & Jamieson, W.S.

Counsel for the Defenders—M'Kechnie—Kennedy. Agents—Rusk & Miller, W.S.

Thursday, December 18.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

M'EWAN (PARLANE'S TRUSTEE) *v.* MURRAY.

Succession — Bequest — Construction — Bequest under Burden of Heritable Securities and Ground-Annuals — Debt — Extinction of Debt confusione.

A testatrix directed her trustees to convey to a legatee certain heritable subjects "under burden of any heritable securities that may affect the same, and the feu-duty, ground-annual, and other burdens affecting it," with entry as at the term immediately preceding her death. Before the will was executed the testatrix paid up a cash-credit, and received an assignation of certain ground-annuals on the said heritable subjects disponed in security of the advance. After the will was executed the testatrix paid up a sum secured over these subjects by a heritable bond in which she was debtor, and took an assignation thereof in her favour. *Held*, on construction of the terms of the bequest, (1) that the heritable bond did not affect the property when the will came into operation, as the security was extinguished when the debt was paid; but (2) (*diss.* Lord Young) that the legatee must take the property subject to the burden of the ground-annuals.

Mrs Parlane, Elmbank Crescent, Glasgow, died upon 11th July 1889. By trust disposition and settlement dated 11th March 1873 she conveyed her whole estate to trustees, and provided, *inter alia*—"In the third place, my trustees shall, at the expense of my estate, assign, dispone, and convey to the said Thomas Murray, whom failing to his son Walter Murray, or procure a proper title with that destination to the property belonging to me in Cleveland Lane, Glasgow, presently vested in the said Thomas Murray, but qualified by a back-letter in my favour, but always under burden of any heritable securities that may affect the same, and the feu-duty, ground-annual, and other burdens affecting it, with entry as at the term of Whitsunday or Martinmas immediately preceding my death." She destined the residue to such charities as her trustees should approve of.

In March 1890 Murray brought this action against the trustees to have it declared that they were bound to convey to him the property left him under the trust-disposition, and that without the burden of a bond and disposition in security for £1800, and two ground-annuals of the value of £19, 4s. and £19, 8s. 1d. respectively.

It appeared that the property in Cleveland Lane, called Cleveland Buildings, had been erected in 1863 by Robert Johnston, Mrs Parlane's first husband, and that in 1861 on security of the site he had obtained a cash-credit for £4000 from the Bank of Scot-

land. In 1863, by contract of ground-annual, with consent of the Bank of Scotland, he disponed the property to Charles England, who in turn undertook to pay the above-mentioned ground-annuals to the bank, and in security disponed the buildings to the bank. The conveyance to England, although *ex facie* absolute, was in reality qualified by a back-letter, in which he admitted that he held the property only in trust for Johnston, and bound himself to re-convey it to him whenever called upon to do so. At the same time England, as proprietor of Cleveland Buildings, on the security thereof, borrowed £1800 from Peter Simons in March 1863. The money, however, was paid to Johnston. Johnston died on 6th May 1868 leaving a settlement, by which he left all his estate to his wife, but on 4th August 1868 England disponed the Cleveland property to the pursuer, who granted a back-letter to the testatrix in the same terms as that granted by England to Johnston. The testatrix paid off the balance of the £4000 cash-credit, and upon 12th April 1871 received a discharge thereof from the bank. This discharge also contained an assignation of the ground-annuals in favour of the testatrix, her heirs and assignees.

By deed of assignation dated on 11th August 1874 Mrs Parlane paid to Peter Simons the debt of £1800, and took from him an assignation to her executors and assignees whomsoever to the bond and disposition in security granted by England in March 1863. In this way all the burdens which up to this time had affected the Cleveland property were now assigned to the testatrix, and she did not replace them with any other burdens.

The pursuer maintained that on the bond and disposition in security and ground-annuals being assigned to the testatrix, the same became extinguished; that the words "affect" and "affecting" in the third purpose of the settlement were employed by the testatrix in the sense of heritable securities which at the time of her death might constitute a claim against her as true owner of the subjects, and not in the sense of heritable securities which though paid by her might stand *ex facie* of the record undischarged; and in any event, that the testatrix, by speaking of the heritable securities as burdens which "may affect" the property, contemplated the contingency which happened, of her being able before her death, out of her surplus income, to pay up the bond and disposition in security for £1800, and intended, should that event occur, that the pursuer should not be burdened with it. On the other hand, the defenders maintained that the bond and disposition in security for £1800, and the ground-annuals for £19, 4s. 1d. and £19, 8s. 1d. still existed as burdens on the subjects to be disponed to the pursuer, and that he must accept the property under these burdens.

The defenders pleaded—"(4) On a sound construction of the said trust-disposition and settlement, and of Mrs Parlane's title to the said subjects, the defenders are not bound to convey the same to the pursuer except under burden of the said bond and disposition in security. (5) On a sound construction of the said trust-disposition and settlement, and of Mrs Parlane's title as aforesaid, the defenders are not bound to convey the same to the pursuer except under burden of the said ground-annual."

Upon 6th August 1890 the Lord Ordinary (KINNEAR) found and declared that the defenders were bound to convey the Cleveland property to the pursuer unburdened by the bond and disposition in security for £1800, but that the property was still burdened with the right to exact the ground-annuals.

"*Opinion.*—The question depends upon the intention of the testatrix as expressed in her will. She gives the pursuer certain property in Glasgow 'under burden of any heritable securities that may affect the same, and the feu-duty, ground-annual, and other burdens affecting it, with entry as at the term immediately preceding' her death. The pursuer is therefore entitled to the property free from the burden of all securities except such as validly affect the land when the will comes into operation. But the bond for £1800 in favour of Peter Simons did not so affect the land. At the date when the will was executed the testatrix, as representing her late husband, was debtor in the bond. But she paid up the money in July 1874, and obtained an assignation in her own favour from the creditor, and the debt being thus extinguished, the land was necessarily disburdened of the security. It is not material that by the form of the title the land was held by the pursuer and not by the testatrix herself, for the pursuer was a mere trustee for the testatrix, and held the lands for her behoof alone. It is said that by taking an assignation instead of a discharge the testatrix indicated an intention that the debt should be kept up as against the estate, but assuming it to be a reasonable inference, the debtor's intention would be unavailing to create or maintain a security upon land. If the land were still affected by the bond after the testatrix had paid the debt, it follows that she must have held a security over her own estate preferable to any later bond which she might have granted to other creditors, either before or after the date of the assignation. This appears to me an untenable position. The sole debtor in the bond being also proprietor of the subjects disponed in security, the security was necessarily extinguished as soon as the debt was paid.

"The ground-annuals are in a different position. These are *ex facie* irredeemable rights, and no authority has been cited for holding that an irredeemable right in land completed by infeftment can be extinguished *confusione*. The case of *Robertson* (Morr. 3044) is distinguishable, because a wadset is a redeemable right. It would appear to me to have been competent for the testatrix to keep up the ground-annuals as separable rights in her own person if she desired to do so; and the only question therefore is, whether she intended them to

pass to the pursuer along with the property? The terms of the settlement are in my opinion conclusive to the contrary. There is a noticeable distinction between the terms of the direction applicable to the ground-annuals and that which applies to heritable securities. The latter are referred to generally as securities which may affect the property, which can only mean such as may be found to affect it when the will comes into operation. But the ground-annuals are mentioned along with feu-duties as existing burdens, by which the property is actually affected when the will is executed. It does not appear that the subjects were ever burdened with any other ground-annual than that now in question, to which the testatrix had already acquired right at the date of the will. I think it follows that the pursuer must take the property subject to the burden of the ground-annual. The language appears to me susceptible of no other construction.

"The pursuer's claim under the fifth conclusion is in accordance with the express words of the will. It is said that if he takes the rents from Whitsunday 1889 he must be liable for the burdens from the same term. This appears to be just in so far as regards payments exigible from the representatives of the testatrix. But there can be no liability for ground-annuals accruing due during her lifetime."

The defenders reclaimed, and argued—The estate should be conveyed under burden of this bond and disposition in security for £1800. The intention of the will was that all burdens affecting it should still continue; if the testatrix had wished to remove the burden created by the bond, she would have taken a discharge of it and not an assignation. The burden was not extinguished *confusione*, as the Lord Ordinary thought. It was not enough that the debtor and the creditor should be the same person in an obligation in order to extinguish it *confusione* if there was any interest in that person to keep it as a subsisting burden—Stair, i. 18, 9; Bell's Prin. 580; *Fleming* v. *Imrie*, February 11, 1868, 6 Macph. 363; *Mackenzie* v. *Gordon*, January 16, 1838, 16 S. 311—*aff.* March 26, 1839, M'L. & Rob. 117. Here the interest was that of the various charitable institutions who might receive the residue, which the testatrix would have wished to make as large as possible. The ground-annuals were in a stronger position, as the testatrix acquired these ground-annuals before she had made her will.

The respondent argued—The testatrix intended that Murray should take the Cleveland property without any burdens upon it, and that that was so she showed by buying up and extinguishing any burdens that were upon it. The reason why she took an assignation of the bond and not a discharge was that the bond had been *ex facie* granted by England and not by herself. There was no intention to benefit the charities among whom the residue was to be divided in preference to a particular legatee. The bond and disposition had been extinguished *confusione*, because after the assignation by Simons to her the real creditor and debtor in the bond were in the same person, and she had no interest to keep up the debt—*Dun* v. *Blantyre*, July 1, 1858, 20 D. 1188; *Love* v. *Storie*, November 6, 1863, 2 Macph. 22; Bell's Prin. 584. The ground-annuals were in the same position; they were merely an incumbrance on the land. The testatrix when she succeeded to her husband's estate was the real obligant in them. She had paid them off and taken an assignation of them in her own favour; they were therefore extinguished.

At advising—

LORD JUSTICE-CLERK—The late Mrs Parlane by her settlement directed her trustee to convey to Thomas Murray, whom failing to his son Walter Murray, certain heritable property situated in Glasgow, and which at the date of the settlement was vested in Thomas Murray, but was qualified by a back-letter stating that the property was really Mrs Parlane's. The disposition in the settlement was accompanied with the declaration that Murray was to take the property "under burden of any heritable securities that may affect the same, and the feu-duty, ground-annual, and other burdens affecting it." The entry was to be as at the term immediately preceding her death. At the time this settlement was made the estate was burdened with a bond and disposition in security for £1800 in favour of a person named Simons, and under this bond Mrs Parlane was the debtor. It appears, however, that in 1874 Mrs Parlane paid this debt of £1800, and obtained an assignation of the bond and disposition to herself. She thus extinguished the debt, and the estate was freed and relieved of the burden upon it.

In reference to this part of the case it was contended on the part of the trustee that the beneficiary must take the property under burden of this sum of £1800 as being a debt due to Mrs Parlane. The Lord Ordinary has held that that is not so, but that the debt was extinguished *confusione* when the debt was paid in 1874. I think it is quite clear that he is right. I think that no burden could be kept up against the land by a bond to which the debtor under it had got an assignation, and that the security consequently ceased.

There is, however, another question in the case, and that is, whether two ground-annuals which were upon the property, but the right to which she had acquired in 1871, still subsisted, or whether the disponee takes the property under that burden? The facts in this case are somewhat different, because it is plain that before the testatrix executed the will by which she disponed this property to the pursuer, she had acquired a right to these ground-annuals, and the Lord Ordinary has held that he must take the property under the burden of them. It is argued against the Lord Ordinary's interlocutor that these ground-annuals do not now affect the land, and that the disponee is not bound to submit to the burden.

This is a different question from the other point in the case. These ground-annuals are *ex facie* irredeemable rights, and in my opinion the fact that she had acquired these rights in her own person does not militate against the view that she could leave this property to anyone under burden of them. She could have given this property to the disponee unburdened if she had chosen to do so, and the question is, whether she did so or not? In that state of affairs we are therefore driven to see what are the terms of the settlement itself. In the settlement, then, not only do I find that the grant is to be taken subject to any heritable burdens that may affect the same, but the testatrix expresses most distinctly that it is to be subject to the ground-annuals upon it. I think that that is quite a clear expression of her will upon that matter, and I therefore think the Lord Ordinary's interlocutor should be affirmed.

LORD YOUNG—With respect to the question of the heritable security I think there is no difficulty, and I agree with the opinion of the Lord Ordinary.

With respect to the question of the ground-annuals, I think that there is a great deal of difficulty, but on the whole I am disposed to read the will somewhat differently. I think that the meaning of the will is that the pursuer is to take this property exactly as he would have taken it if he had been the heir of the testatrix. He is to take this property "under burden of any heritable securities that may affect the same had the feu-duty, ground-annual, and other burdens affecting it, with entry as at the term immediately preceding" her death. Whatever burden was on it then—heritable bond or ground-annual—the pursuer took it with all its obligations. Any obligation which was on the property at the time of the making of the will she might remove before her death, and it would be removed for the pursuer. The heritable bond was removed. She purchased the ground-annuals. There was no longer a ground-annual affecting the ground unless she put on another, and that she did not do.

I think that the same reasoning exactly which applies to the case of the heritable bond applies to the case of the ground-annual. It was on the land, and was removed when she purchased it herself.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred with the Lord Justice-Clerk.

The Court adhered.

Counsel for the Reclaimer — Dickson—Guy. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Respondent—Murray—Craigie. Agents—Miller & Murray, S.S.C.

Thursday, December 18.

SECOND DIVISION.

[Sheriff Court of Aberdeen.

AVON STEAMSHIP COMPANY, LIMITED *v.* LEASK & COMPANY.

Ship—Charter-Party—Construction—Carriage of Goods—Delivery of Cargo—Ship's Obligation in Delivering — Defective Appliances—Demurrage.

A charter-party provided—"The said cargo (salt) to be brought to and taken from alongside, free of expense and risk to the ship, . . . cargo to be loaded and discharged as fast as steamer can receive and deliver during usual working hours. If longer detained, demurrage to be paid at the rate of £12 per day." Demurrage of one day and a-half was incurred at the port of loading. The shipowner wrote to the charterers—"If you give us really good despatch and moderate charges at 'the port of delivery,' I will try and get my folks to meet you in this matter." The charterers by unusual efforts unloaded the ship one day sooner than in usual course, but on account of the inefficient character of the ship's appliances for discharging cargo quantities of the salt were lost between the ship's side and the wharf. The charterers retained part of the freight to meet the short delivery. In an action against them by the shipowner for the sum retained, and for demurrage—*held* (1) that under the charter-party the shipowner was bound to place the cargo outside and alongside the ship; that the loss of cargo occurred while under control of the ship, and that the ship was liable therefor; (2) (*diss.* Lord Young) 1st, that under the charter-party the obligations to load and discharge were separate; that the defenders were not entitled to lump the time of loading and discharging, and so escape a claim for demurrage, even although they could show that the time occupied in loading and discharging did not exceed the time in which the ship could have received and delivered the cargo "during usual working hours;" 2nd, that the pursuers' letter did not amount to abandonment of the claim for demurrage.

Upon 6th July 1889 Leask & Company, shipbrokers, Peterhead, chartered from the Avon Steamship Company the s.s. "Avon" to carry a cargo of salt in bulk from Liverpool or Birkenhead to Peterhead. A cargo was thereafter loaded at Liverpool and conveyed to Peterhead, and duly delivered there. The charterers paid the freight due upon the cargo, deducting £6, 10s. 9d. on the ground of short delivery.

The Avon Steamship Company then raised an action in the Sheriff Court at Aberdeen for this sum of £6, 10s. 9d., and also for a sum of £18 which they claimed