trial was much and unexpectedly prolonged, and in such cases it may have been found necessary to supplement the original fee. It is for the Court to determine whether in the present case any, and if so, what, deduction should be made from the fees which have been allowed.—EDMUND BAXTER."

In reference to the first matter reserved by the Auditor, the Court were of opinion that this was an exceptional case, and that the pursuer was entitled to charge as part of his expenses against the defenders the expense of three counsel at the trial; but that he was not entitled to the expense of a third counsel at any stage of the cause previous to the consultation before the trial. There was therefore deducted from the account as taxed the sum of £11, 13s. 6d., which was charged for a third counsel at previous stages of the cause.

In reference to the second matter reserved, they were of opinion that in the circumstances of this case the fees given to counsel at the trial, and allowed by the Auditor, were reasonable charges against the defenders. The trial was one which, considering the magnitude of the case and the time usually occupied in jury trials, was likely to last for two or three days. If the trial had gone on and not been brought to an unexpected conclusion on the first day, refreshers would have been, according to the present practice, sent to the counsel; and if this had been the case, the Court would then have considered the whole matter, as in the cases referred to by the Auditor. But this case was peculiar, and the fees sent were thought to be in the circumstances a fair charge against the defenders.

Counsel for Pursuer—The Dean of Faculty. Agents—Leburn, Henderson, & Wilson, S.S.C.

Counsel for Defenders—Clark and Lancaster. Agents—White-Millar & Robson, S.S.C.

SECOND DIVISION.

CRAWFORD'S TRUSTEES *v.* A. H. CRAWFORD AND OTHERS.

Heir and Executor—Reduction ex capite lecti—Action of Relief from Heritable Debt—Approbate and Reprobate. A trust-disposition and settlement made an annuity (which was a proper heritable debt) payable out of the trust-estate which was the whole heritable and moveable property of the truster. *Held* (affirming Lord Jerviswoode) that the heir-at-law reducing the disposition on the ground of deathbed took the heritable estate under burden of the annuity, and was primarily liable in payment of it. *Held* by Lord Jerviswoode (and acquiesced in) that the heir could not take a bequest to himself under the deed he had reprobated.

The deceased James Crawford jr., by ante-nuptial contract of marriage bound and obliged himself and his heirs, executors, and successors whomsoever, to make payment to his promised spouse, in case she should survive him, during all the days of her lifetime, of a free yearly annuity of £150 sterling, and that at two terms in the year, &c. And he further bound and obliged himself and his foresaids to make payment to her of £50 yearly in lieu of a house during her widowhood.

Crawford died in 1863. Before his death he executed a trust-disposition and settlement whereby he disponed and assigned to the pursuers, and A. H. Crawford, the defender, his whole heritable and moveable estate, as trustees for certain purposes. He also appointed the said trustees to be his executors. The trust purposes were, *inter alia*—(1) payment of his debts and the expense of executing the trust; (2) payment in the most liberal and ample manner of the yearly annuities and provisions in favour of his wife, contained in their contract of marriage, dated 24th November 1856, and of an additional provision in her favour of £2500, £500 whereof should be held by her for other parties, and £2000 should be retained by herself. (3) payment of various legacies, including one to the defender of £150, as a very small token of the truster's regard, it being his wish that the defender, Crawford, his wife, and four children, should each receive £20, and that the remaining £30 should, in addition to the £20, be given to his son Alexander, for the purpose of buying some memento which the truster had intended to present him with upon his entering upon the world.

After Crawford's death, the defender, A. H. Crawford, who was his brother and heir-at-law, brought a reduction of his brother's disposition and settlement *ex capite lecti*, in regard to the heritable estate, in which he obtained decree.

Thereafter the trustees and executors of James Crawford brought the present action against A. H. Crawford and his wife and their children, in which they sought to have it found and declared that the defender, A. H. Crawford, was bound to free and relieve them and the moveable estate of the late James Crawford of the annuities foresaid, to the extent of the value of the heritable estate to which he had succeeded or might succeed, and that he should be decerned to pay the same; and further, that in respect of the reduction the foresaid legacy (specified in the third purpose of the trust-disposition) should be declared to have been forfeited, and that it should be found that neither A. H. Crawford nor the other defenders were entitled to demand payment of it.

A record having been made up between the parties, Lord Jerviswoode, Ordinary, pronounced the following interlocutor:—

"*Edinburgh, 16th February* 1866.—The Lord Ordinary having heard counsel, and made avizandum, and considered the closed record, productions, and whole process—Finds, 1st, That the defender is bound to free and relieve the pursuers, as trustees and executors of the deceased James Crawford, junior, W.S., of and from the annuity of £150, and annual payment of £50, set forth in the leading conclusions of the present summons, under the deduction from the said annuity, and subject to the condition attached to the said annual payment, as stated in the summons, and that to the extent of the value of the heritable property to which the defender has succeeded, or may yet succeed, as heir in heritage of the said deceased James Crawford, junior, and to such extent and effect sustains the first plea in law for the pursuers; and 2d, That in respect the defender has challenged and set aside the deed of the said deceased, in so far as respects the conveyance of heritable estate therein contained, he is barred from taking any benefit under the same, and, in consequence, cannot claim the sum of £20, being the portion of the sum of £150 bequeathed to him for distribution to his wife and children, to which he has right as an individual; and, with reference to these findings, and to the several conclusions of the summons, appoints the cause to be enrolled, that parties may be heard as to the particular terms of such decree as may be compe-

tent and necessary under the same, and reserves meantime the question of expenses.

"CHARLES BAILLIE."

"*Note.*—The debate which here took place had relation mainly to the leading, and in a pecuniary sense, the truly important question, whether or not the defender, having, in his character of nearest lawful heir of his brother, the deceased James Crawford, successfully challenged the deed of settlement of the latter, in so far as the same disposed of heritable estate, is now bound to bear the burden of payment of the annuity of £150, provided by Mr Crawford in favour of his wife Mrs Crawford, in terms of the contract of marriage referred to in the conclusions of the present action, under the deduction therein stated, and also of the sum of £50 yearly in lieu of a house, as also therein set forth.

"The Lord Ordinary has adopted the views which were here urged on the part of the pursuer. It appears to him that the annuity provided by the deceased for his widow, in terms of the contract of marriage set forth in the conclusions of the summons and record, is, as bearing *tractum futuri temporis*, heritable in its character, and therefore, apart from special provision to a different effect, such as to form *ex lege* a debt against the heir in heritage of the granter.

"If this be so, it follows that, had the late Mr Crawford, as to whose succession this question has reference, failed to execute any *mortis causa* deed or settlement whatever, and left his estate, and the burdens affecting the same, to be settled and regulated by the operation of law alone, the annuity provided to his widow would have formed a proper burden on the heritable estate, to the relief (assuming its sufficiency in respect of value for that end) of the moveable succession.

"When, then, the defender came forward as he did, in the original action at his instance, to challenge *ex capite lecti* the disposition and settlement of the deceased, in so far as heritage was thereby conveyed, and by his success in that action carried to himself, in his character of heir of the deceased, the whole heritable estate, he took that estate out of the general succession of his brother, *free* of all the obligations or burdens which might have attached to it, merely as forming a portion of that succession as a whole, had it remained subject to the *mortis causa* deed of the brother, but *not free* of such of these burdens or obligations as properly attached to the subjects which were heritable in their own character while in the person of his brother, nor of such burdens as would attach to these subjects *ex lege* at his death.

"Of the latter class of burdens, it appears to the Lord Ordinary the annuity to the widow of the deceased, as bearing *tractum futuri temporis*, was one.

"It was the intention of the deceased to have massed his whole estate, heritable and moveable, and to make it available in the hands of his trustees for all the purposes contemplated by his deed. But when the pursuer now throws aside the deed, and denies effect to the will of the deceased, and in his character of heir-at-law claims and takes the heritage for his own advantage, he cannot stop at that point, but must go further, and take it subject to all its proper burdens. Now, as between heir and executor, in a case where the succession is left to the operation of law alone, the Lord Ordinary assumes it to be clear that an annuity to a widow, such as that here in question, falls primarily as a burden on the heir in heritage.

"But the defender cannot relevantly or competently say that he is in any position preferable to that of such an heir. He asserts and takes his right solely in that character, and must, in consequence, admit his liability for all burdens which by force of law attach to that estate which he thus takes. The fact that the deceased directed his trustees to pay the annuity from the general estate, cannot be alleged by him as a ground of exemption, for by his own act he has infringed on the integrity of that estate, and has created that separation of interests between heir and executor which it was the direct object of the deceased to exclude; and having so created the separation, he must admit it to be carried out to its legitimate results.

"This view of the question appears to the Lord Ordinary to be that which has been taken by the Court in disposing of questions of relief between different classes of heirs or beneficiaries, in cases similar in their general features to the present—such as of Bain *v.* Reeves, January 29, 1861, 23 D. 416, and of Sinclair *v.* Fraser, 14th February 1798, Hume 176, which is referred to in the above case of Bain by the Lord Ordinary; and also in those of Edmonstone *v.* Edmonstone, July 20, 1706, M. 3219, and of Campbell *v.* Campbell, House of Lords, 1st June 1749, 1 Paton's Appeals, p. 436. Important principles bearing on the same matter are discussed and dealt with by the Court in the elaborate opinions delivered in the case of Wallace *v.* Ritchie's Trustees, July 7, 1846, 8 D. 1039.

"The Lord Ordinary must, in conclusion, refer shortly to the second branch of the interlocutor, which deals with the question as to the bequest of £150 to the defender in the peculiar terms quoted in the summons. The view of the Lord Ordinary, on which he has proceeded in dealing with that matter, is that Mr Crawford was to receive the sum in question truly as trustee for his wife and children, excepting as respects the sum of £20, which seems to the Lord Ordinary to be a direct bequest to the defender himself, and therefore one which he cannot take while he reprobates the deed by which it is given.

"C. B."

Against this interlocutor the defender, A. H. Crawford, reclaimed, in so far as it dealt with the annuity of £150, and annual payment. The other portions of the interlocutor were acquiesced in.

The SOLICITOR-GENERAL and NEVAY, for the defender, argued that the heritable estate having been, by the heir's reduction, withdrawn from the trust-settlement, the moveable estate alone remained subject to the trust purposes. In an intestate succession the heir would undoubtedly have been liable for this annuity, as a debt properly falling on the heir. A testator may however, as here, alter, or rather reverse, the rule of law. If the truster's settlement had contained a conveyance of the moveable estate only, the direction to pay the annuity out of that estate would have imposed the burden primarily upon the trustees. In the present case, however, the intention was to make both heritable and moveable estates in the hands of the trustees liable for the annuity. The heir's reduction, however, has defeated that intention, and left the moveable estate alone subject to the trust powers and purposes. By the reduction the truster became intestate as to his heritable estate, and the result in law is just the same as if that estate had never been included in the settlement. It is of no consequence, therefore, what his intention was, as events have brought about a contingency not provided for. In the case of a deathbed settlement to the prejudice of the heir, containing a revocation of prior settle-

ments, which also excluded the heir, the rule of law is well settled that the heir may reduce the settlement, *quoad* the heritage, and yet take advantage of the revocation of the former settlements, although that defeats the intention of the testator. The doctrine of approbate and reprobate was not applicable to this case where the heir was not, in the proper sense, seeking benefit from the settlement. He was defending himself from a claim at the instance of the trustees, whose sole title to make the claim *ex facie* discloses that they alone are liable in the claim. But even if the heir's defence involved approbate and reprobate, that is not necessarily fatal to it. In the case of an heir taking benefit from a revocation of previous settlements to his prejudice, he necessarily approbates and reprobates. But if the settlement in the present case had directed the trustees to convey the heritable estate to a third person and to hold the moveable estate for the payment of the annuity, the trustees could have had no relief against the heir challenging the settlement. Trustees in such a case could only be held as suing in the interest of the special and residuary legatees, whose interest was, by the conception of the trust, limited to the moveable estate. Lastly, if the heir was to be held to his legal obligations, he ought, on the other hand, to have his legal privileges. Collation here would give greater benefit to the heir than taking the heritage even unburdened. But as the heir cannot have collation here, the trustees cannot press against him his legal obligations.

A. R. CLARK and TRAYNER, for pursuers :—The annuity of the widow is an obligation in which the heir is primarily liable by the rule of the common law. The defender has failed to show any reason for the application of a different rule here. He has voluntarily taken up the heritable succession, against the will of the deceased ; and, having taken the advantages of that character, he must bear its burdens. The special clause in the deceased's will on which the defender founds cannot avail him—(1) because, as he has reprobated the testators will, he cannot take benefit under it in any way ; and (2) because that clause does not lay the burden proper to the heir upon the executor, but leaves each to meet the burdens proper to their respective characters.

The following authorities, in addition to those mentioned in the note to the Lord Ordinary's interlocutor, were referred to in the discussion of the case :—Erskine, 2. 2. 6 ; 3. 9. 48 ; Stair, 3. 8. 65 ; Bankton, 3. 8. 97.98 ; Hill *v.* Maxwell and Robertson *v.* Baillie, M. 5473 ; Russells *v.* Russell, M. 5211 ; Campbell, Hume's Decisions, 180 ; Moncrieff *v.* Skene, 1 W. and S., 672 ; Denham *v.* Denham, M. 5224 ; Waddell *v.* Waddell, 6 Dow, 279 ; Drummond, 4 Paton, 66 ; Fraser, 5 Paton, 642.

At advising,

The LORD JUSTICE-CLERK—The facts of the present case are very simple. The deceased James Crawford, in his marriage-contract, became bound in the ordinary way to make payment to his promised spouse, in case she should survive him, and during all the years of her life, of a free yearly annuity of £150, "and that at two terms," &c.—[Reads]. There can be no doubt as to the legal character of such an obligation. It constituted a proper debt against Crawford, his estate and "his heirs, executors, and successors whomsoever," as the marriage contract bears ; but being a debt bearing a tract of future time, it, of course, in the event of intestacy, would have become a burden upon the heir. Before Crawford's death, however, he executed a trust-disposition and settlement, whereby the trustees were by the second purpose ordered to make payment to his widow of the annuities and provisions conceived in her favour in the contract of marriage. Thereby undoubtedly Crawford made the annuity in question a special burden upon his trust-estate, which consisted of the *universitas* of his succession. It would appear that this deed had been executed on deathbed, and accordingly the defender of this action, as heir, raised a reduction of it so far as it conveyed heritage. He obtained decree of reduction, which set the deed aside *quoad* heritage, which he was enabled to take up as if there had been no deed. This left the trustees in possession of the moveable estate alone ; and they bring the present action for the purpose of obtaining relief from the payment of the annuity on the ground that it forms a proper debt against the heir. It is not disputed that it would have been so if there had been intestacy here. The only question is, What is the effect, as regards the moveables, of the deed having been executed on deathbed, and of the provisions directing the trustees to make payment of the annuity ? The view that I take of the case is a very simple one. I don't think it necessary to consider any question of approbate and reprobate, or of equitable compensation. According to my view, the heir can take no benefit from any supposed intention of the truster. The effect of what has taken place must be judged of entirely with reference to the legal rights and obligations of parties as brought into operation or left unaltered. Now this annuity in the case of intestacy would have transmitted against the heir. The executors would also have been liable with relief against him. By the trust-deed and the decree of reduction the liability of the heir is not affected so far as creditors are concerned ; nor are the executors made liable further than they would have been at common law. The moveable estate stands impledged as an additional security for the performance of the heir's obligations. The reduction can't create any right to the heir to be relieved of his obligations out of the moveable estate. That moveable estate is, so to speak, cautioner for the heir. I can find no principle for extending the rights or reducing the liabilities of he heir in that he has forced himself against the will of the deceased into the heritable estate as *ab intestato*.

Lord COWAN—The question involved in this case is not free from difficulty, although there are certain things not disputed. It is clear, in the first place, that this debt is from its nature heritable—one that by law affects the heir and the estate he takes. In the second place, where there is a settlement with a general direction to pay debts (as in the first purpose of the present trust) the respective liabilities of heir and executor are not affected, but are left to be determined by the character of the debt. The early case of Fraser, M. Dict., *voce* Heir and Executor, App. No. 3, brings out the principles of the law on this matter very clearly. The question is how far those can serve to guide us on the present occasion. I shall not say that if this deed had contained a special direction to pay this annuity out of a special fund, the heir would not have been entitled to take that benefit from the deed. [In reference to this matter, his Lordship analysed and commented on Cochrane *v.* Cochrane and Others, 9 D. 173, which he pronounced to be an exceedingly instructive case, and thereafter proceeded.]—The provision in this

case is not for payment of the annuity out of the moveable estate alone, but from the whole estate —out of the mass of heritable and moveable subjects. When the heir breaks through the deed, and comes forward to claim his legal rights, I am of opinion that he must take them subject to their legal burdens. On these grounds I concur with the Lord Ordinary.

Lord BENHOLME—This is a delicate case, not as to the decision, but as to the grounds on which it should rest. The difficulty in my mind has been whether there is room for the doctrine of approbate and reprobate, or whether the case stands clear of it. I have come to be of opinion that the doctrine has no application. I look on the terms of this deed as of no effect to change the rights of heir and executor. If that be so, there is no need to apply the doctrine. This case has been argued on the footing of the intention of the truster having been to invert the legal order, and make this annuity a burden on the moveable estate. Had that been the case, I should have held that the heir could not found on the deed which he had overthrown as against the executors. The principle, on that supposition, is quite applicable on the footing that the deed benefited the heir. It is clearly broad enough to cover the case where the trustees are ordered to pay the legacy to the heir, and I cannot distinguish that case from the one I have put. But it is perhaps unnecessary to go into such matters, as I agree with your Lordship in the chair and the Lord Ordinary that they are not in the present case. Although the heir takes here by upsetting the will, our decision, as I understand, is not to rest so much upon that as on our construction of the trust-deed—that it does not change the legal relations of heir and executor. But an heir taking in the way the present defender has done, can't found a plea by way of action or defence upon the fact as against persons whom he has deprived of the estate.

Lord NEAVES—I concur in the opinion of all your Lordships, and also as to approbate and reprobate not being within the case. The case has been very well and ably argued, and ingeniously put on both sides. The authority of many of the cases referred to is displaced as only bearing on the question of intention. How can it be said that the truster here had any intention? He meant his whole property to go to trustees. The only event provided for was a case which has not arisen. The question of intention, then, if gone into, would come to be, what would he have intended in altered circumstances? This would lead to wild and remote conjecture as to what he would have wished in a case he endeavoured to prevent. The question is, what is the legal effect of this deed? The defender assimilates it to one originally confined to dealing with moveables. The construction of such a deed might have been very different as disclosing what we might have taken to be the *eniva voluntas* of the testator to put the burden of this annuity on his moveable succession. But that is not the character of this deed. The trustees were to get his *whole* estate, and pay therefrom. In this matter, I take the special enumeration in the second purpose to be just the same as if he had left this to be worked out under the first purpose of the trust. There is nothing in this deed to show that the truster meant the annuity to be paid out of the moveable estate alone. I wish to reserve my opinion on the question of approbate and reprobate. Very nice questions may arise under this doctrine. Something may be ordered to be done, not as a bequest to the heir, but for other parties, that may result in his benefit, and under a general deed there may be the creation of a special machinery of operation which may result in benefit to the heir, on which he may perhaps found as a fact without making it matter of express claim of his own. Here, however, there has been no distribution of liability—nothing to affect the rights of heir and executor, and in this case things fall to be adjudged according to rights at common law, which must be taken with their corresponding burdens.

The Court therefore adhered, and found the defender liable in expenses.

Agent for Pursuers—H. & H. Tod, W.S.

Agents for Defender—Scott, Moncrieff, & Dalgety, W.S.

Tuesday, Jan. 15.

SECOND DIVISION.

PETITION—RUSSELL AND CHRISTIE.

Bankruptcy—Funds Discovered after Discharge of Trustee—Process. A trustee on a sequestrated estate having been discharged, and certain funds belonging to the bankrupt having been discovered before the bankrupt's discharge, a remit made to appoint a meeting of creditors for the election of a new trustee and commissioners.

This was an application to the Court for a remit to the Lord Ordinary on the bills, or to the Sheriff of Fife, to appoint a new meeting of creditors in a sequestration for the election of a trustee and commissioners, and to proceed further in the sequestration. It was presented in circumstances for which the Bankruptcy Statutes made no provision. After the discharge of the former trustee (the bankrupt being still undischarged), it was discovered that funds might be made available for behoof of the creditors. The sequestration had been awarded by the Sheriff. This petition was presented by the former trustee and one of the commissioners (who was also a creditor), with the object of making these funds available and for the purposes above mentioned. After intimation on the walls and minute-book, and service on the bankrupt, the Court remitted to the Sheriff as craved, and granted warrant to the Lord Clerk Register to deliver the sederunt book to the petitioners, or to transmit it to the meeting of creditors.

Counsel for Petitioner—Mr MacLean. Agents—Leburn, Henderson, & Wilson, S.S.C.

COURT OF TEINDS.

Wednesday, Jan. 16.

MINISTER OF STRACATHRO AND DUNLAPPIE *v.* THE HERITORS.

Augmentation of Stipend—Decree of Valuation. Procedure in an augmentation sisted until the minister brought a declarator of the invalidity of an old decree of valuation which he alleged to be null, there being admittedly no free teind if the decree was valid.

The Rev. R. Grant, minister of the United Parishes of Stracathro and Dunlappie, whose stipend was fixed at 11 chalders in 1815, applied for an augmentation of 7 chalders. Sir James Campbell and other heritors opposed, on the ground that there was no free teind, and that their teinds had been valued by a decree in 1699. The minister replied that this decree was not binding upon him