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