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

because no party had been called in the process of valuation who was entitled to represent the cure. It appeared that the parties called were—"Charles Earle of Southesk, and David Falconer of Newtoun, as patrons of the kirks of Strickathrow and Dunlappie, now annexed together, Master John Davie, late incumbent at the said kirk, and all other present incumbents there, and the tutors and curators of such of the said defenders as are minors, if they any have, for their interest." It was mentioned that the parishes had been vacant from 1695, when the last Episcopal incumbent died, until 1701, and that in 1698 they had been declared vacant, and that during this interval Mr Davie, who was Lord Southesk's factor, had intruded himself as minister for a few months. It was admitted that unless the decree of valuation was bad, there was no free teind.

The Court held, following the recent case of Kilbirnie (*ante*, p. 123), that the minister must first raise a declarator of the invalidity of the decree, and procedure was sisted that he might do so.

The following interlocutor was pronounced:—

"*Edinburgh, 16th January* 1867.—The Lords, having heard counsel for the minister and heritors, sist proceedings that the minister may bring an action of declarator, or such action as he may be advised, to try the validity or invalidity of the decree of valuation founded upon by the heritors.

"DUN. M'NEILL, *I.P.D.*"

Counsel for Minister—Mr Clark and Mr Asher. Agents—W. H. & W. J. Sands, W.S.

Counsel for Opposing Heritors—Mr Gifford. Agent—Alexander Morison, S.S.C.

COURT OF SESSION.

Wednesday, Jan. 16.

FIRST DIVISION.

WARNE AND CO. *v.* LILLIE.

Issue—Cautionary Obligation. Form of issues adjusted to try a question of liability under a cautionary obligation, the defence being that the pursuers had "given time" to the principal obligant.

This was an action upon a cautionary obligation at the instance of Willam Warne & Co., indiarubber manufacturers, No. 9 Gresham Street, London, against James Lillie, clothier, 45 Queen Street, Glasgow, sole partner of the firm of Lillie & Ferguson, clothiers there. The defence was that the cautioner was liberated from his obligation in respect the pursuers had "given time" to the principal debtor without his knowledge or consent.

The Court to-day adjusted the following issues for trial:—

"Whether, in reliance on the letters of caution, Nos. 6 and 7 of process, or either of them, the pursuers, the said William Warne & Co., on the usual business terms, furnished goods to Edward Hardmeat, indiarubber merchant in Glasgow, therein-mentioned, sole partner of the firm of Charles Hardmeat & Co., indiarubber merchants there, conform to account, No. 8 of process? And whether, under the said letters of caution, or either of them, and in respect of the goods so furnished, the defender, as cautioner for the said Edward Hardmeat, is resting owing to the said pursuers the sum of £393, 10s. 1d., or any and what part thereof, with interest at the rate of 5 per cent. per annum, from 1st March 1866 on the sum of £379, 7s., or such other portion of the first-mentioned sum as consists of principal?"

Or,

"Whether the pursuers gave time to the said Edward Hardmeat for payment of the sums sued for, or any part thereof, beyond the usual period of credit allowed in the trade, so as to liberate the defender from liability for the sums sued for, or any and what part thereof?"

Counsel for Pursuers—Mr Millar. Agents—Adam & Sang, S.S.C.

Counsel for Defender—Mr Clark and Mr Shand. Agents—J. W. & J. Mackenzie, W.S.

Friday, Jan. 18.

FIRST DIVISION.

ADAM AND OTHERS *v.* GRIEVE AND OTHERS.

Statutory Trust—Election of Members. An Act of Parliament having declared that a certain number of persons should be elected trustees on a certain day, and two of the persons elected having declined to act, held that the election was valid, and that the places of those who declined fell to be filled up as if they had resigned.

This is a suspension and interdict at the instance of George Adam, merchant and shipowner in Greenock, treasurer of the burgh of Greenock; James Tennent Caird, engineer, founder, and iron shipbuilder there; John Orr, jun., baker there; Robert Neill, writer there—all members of the Town Council of the burgh of Greenock; and Duncan Cook, chain manufacturer, Greenock; James Beith, butcher there; Benjamin Noble, merchant there; Thomas Ballantine, distiller there; and John Neilson, hatter there—being all elective members of the Board of Police of Greenock—against James Johnston Grieve, merchant in Greenock, Provost of the burgh of Greenock; Charles Grey, feuar there; James Morton, iron merchant there; John Fleming, worsted manufacturer there; John Hunter, fish merchant there—all bailies of said burgh; Thomas Muir Macfarlane, tanner and skinner; Robert Blair, sugar refiner; and John Crawford Hunter, ropemaker—all in Greenock, and all members of the Town Council of the burgh of Greenock; and Robert M'Vicar, smith; James M'Cunn, bookseller; and Charles Carbery, clothier—all in Greenock, pretending to be water trustees, and to constitute, along with the complainers Thomas Ballantine and John Neilson, "The Water Trust of Greenock," under "The Greenock and Shaws Water Transfer Act, 1866," and along with the said two complainers, to be and act as the water trustees, duly appointed under and in terms of said Act, and also against "The Board of Police of Greenock," constituted and incorporated by "The Greenock Police and Improvement Act, 1865," and the said James Johnston Grieve.

The object of the suspension is (1) To prohibit the individual respondents from acting as "water trustees" for the town of Greenock, or attempting to carry into effect any of the powers or duties conferred or imposed on the water trustees, or the water trust of Greenock, by "The Greenock and Shaws Water Transfer Act, 1866;" (2) To prohibit "the Board of Police of Greenock" from adopting or approving of any minute of a meeting