stage. I think all that the bond instructs is that there was to be a limit to the defender's advances, and I cannot say he was bound to go on, whatever might be his own circumstances or those of the pursuer. On the whole, looking to the time which had elapsed before the defender took steps under the bond—from 1859 to 1861—I think there is no ground for saying that there was a premature proceeding on his part. But, besides, it was a proceeding under the £350 bond, which had been regularly assigned to the defender. I think, therefore, that this action, which is not raised till 1866, cannot be maintained.

Lord CURRIEHILL—I am quite clearly of the same opinion. As to the £200 bond, it is an ordinary cash credit bond exactly such as is daily acted on by every bank in the country; and though a bank binds itself to make advances under such a bond within a certain limit, it is not thereby bound to go on advancing if it sees good reason to stop. Farther, the damages are claimed in respect of the pursuer's removal from the property; but be removed voluntarily.

Lord DEAS—I am of the same opinion. As regards the £350 bond, it is a bond and disposition in security in the usual form, with power of sale. The defender gets an assignation to that bond. There is nothing on the face of either the bond or the assignation to limit the legal rights of the creditor. The allegation is that there was a verbal agreement that the money was not to be called up until the defender had made certain advances to the pursuer. I am very clearly of opinion that an allegation of that kind is altogether inadmissible and irrelevant. Then as to the other bond, it mentions that at its date, in November 1859, advances had been made to the extent of £70. There is no breach alleged until May 1861. It is not said that there had been no transactions between 1859 and 1861; on the contrary, it is set forth that there were intermediate transactions. A series of transactions is stated by the pursuer himself to have taken place, and the ground of action put in issue is that, in breach of the agreement, the defender failed to make advances to the amount of £200. But goods had been furnished for a year and a half. This is not therefore the case of an agreement to make advances followed by nothing. I am not aware of any case where a bank has been held liable in damages for not making advances under a cash credit bond if it sees cause not to make them. Such a claim may be competent, and I say nothing as to such a case except that it does not arise here.

Lord ARDMILLAN concurred.

The Court therefore found that there were no relevant averments to support the claim of damages, and remitted to the Lord Ordinary to dispose of the conclusions for count and reckoning. The defender was found entitled to expenses since the closing of the record.

Agents for Pursuer—Hamilton & Kinnear, W.S.
Agents for Defender—Horne, Horne, & Lyell, W.S.

Friday, Jan. 11.

FIRST DIVISION.

ROUTLEDGE *v.* SOMERVILLE AND SON.

Expenses—Taxation—Counsel's Fees. Circumstances in which—(1) the expense of three counsel at a trial allowed, but at previous steps of the cause disallowed; and (2) fees of forty-five guineas to the senior and thirty guineas to each junior, allowed, for a trial which was compromised after the examination of the first witness for the pursuer.

The Auditor of Court in reporting his taxation of the pursuer's account of expenses, reserved for the consideration of the Court the two points referred to in the following special report by him:—

"The Auditor has reserved two points for the consideration of the Court—1st, The liability of the defenders for the expenses incurred in the employment of a third counsel on the part of the pursuer at various stages of the case, subsequent to the conclusion of the debate on the closed record; and 2d, The amount of fees paid to the pursuer's counsel for the trial chargeable against the defenders.

I. In regard to the first point, the Auditor has only to state that it was admitted by the defenders' agent at the audit that throughout the case his clients had taken the assistance of three counsel. It appears from the process and account that the case was one of importance, and involving considerable detail, the documents produced and recovered being numerous. If the Court shall decide against the liability of the defenders for the expenses of a third counsel, there will fall to be deducted from the amount above reported the sum of £68, 18s. 6d., being the amount of these expenses as taxed.

II. The Auditor has had some difficulty in forming an opinion on the second point, and he is desirous to have the directions of the Court in regard to it for his guidance in other cases. The fees paid by the pursuer for the trial are stated in the account at fifty guineas for the senior counsel, and thirty guineas for each of the juniors. In taxing the account, the Auditor has allowed forty-five guineas for the senior counsel, and thirty guineas for each of the juniors. In allowing the sums, he has had in view the cases of Cooper and Wood *v.* North British Railway Company, 19th Dec. 1863, Session Cases, 3d Series, vol. ii. p. 346, and Hubback *v.* North British Railway Company, 25th June 1864, Session Cases, 3d Series, vol. ii. p. 1291. Had the trial in this case lasted three days, the fees allowed would not have exceeded the amount indicated by the Court in the cases referred to as proper fees to be stated against the losing party. The peculiarity of the present case is, that the trial lasted only a few hours of one day, the defenders having consented, after the examination of the pursuer's first witness (the pursuer himself), to a settlement of the case, but without a verdict in his favour. The Auditor has no doubt that had the trial lasted for three days, fees for the second and third days would have been paid by the pursuer to his counsel in addition to those charged in the account. But the question remains, whether, when a trial is brought to a termination unexpectedly by the surrender of one of the parties, the other is not entitled to recover from him fees actually paid, at least to the extent of reasonable fees, for the whole trial. Although it be the present practice in jury causes, where a trial cannot be brought to a close at one sitting, to remunerate counsel by continuation fees day after day, it is to be presumed that before the commencement of the trial counsel have prepared themselves upon the whole case. The Auditor believes that the earlier practice in the Jury Court was to instruct counsel by a single fee for the whole trial, and not by continuation fees. Cases of course did occur where a

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-