[Heard 24*th April*, 1845.]

## PATRICK CRUIKSHANK and another, Trustees of James Cruikshank, Deceased, *Appellants*.

## LADY ANNE L. CRUIKSHANK, *Respondent*.

*Obligation.—Provisions to Heirs, &c.*—An obligation by a father in the marriage contract of his son to pay the son's widow an annuity *held* not to be satisfied by an annuity provided by the son to his widow, out of the rents of lands to which he had succeeded as heir, under an entail executed by his father previous to the date of the contract of marriage, which contained a power of alteration or revocation.

*Ibid et Ibid.*—Held that an annuity provided by a son out of the rents of lands, purchased with the accumulations of the general estate of his father after payment of debts, and entailed pursuant to a direction by the father to that effect, could not be imputed in satisfaction *pro tanto* of a joint obligation by the father and son, in the son's contract of marriage, to provide the son's widow in an annuity.

*Trustee.—Executors.*—Trustees or executors purchasing and entailing lands with the residue of a testator's estate pursuant to a direction in that behalf *held* personally liable for payment of a bond of annuity granted by the truster.

ON the 2nd August, 1819, James Cruikshank executed an entail of his lands of Langley Park in favour of himself and his wife in life-rent, and their eldest son James in fee, and a series of substitutes. The deed contained an exception from the prohibitions of entail in favour of the institute and substitutes in these terms:

" But, with this exception, that it shall be lawful to and in " the power of the said James Cruikshank my son, and the " whole heirs of tailzie succeeding to the said lands, mills, teinds, " and others, and to each of them, to provide their wives and the " wives of the apparent and presumptive heirs in a life rent loca- " lity of any part of the said lands, teinds, and others above " written, not exceeding a fourth part of the free rent of the said " lands at the time such locality is granted, after deducting former

" life-rents and interests of provisions granted by former heirs to " children, if any be, so that subsequent life-rents shall not exceed " one-fourth part of the surplus rents, but may increase proportion- " ally as the former life rents and provisions shall cease and be paid " off."—The entail also reserved to the maker this power of alteration: " but reserving always full power and liberty to me, by any " deed to be executed by me at any time in my *liege poustie* to " alter, innovate, or revoke these presents, in whole or in part, to " change the order of succession of heirs, in whole or in part, to " discharge the several burdens, conditions, limitations, irritant " and resolutive clauses herein contained, or any part thereof, or " to add such other conditions and provisions to the same as I " shall think fit, to sell, alienate, or dispone, gratuitously or " otherwise, and to charge and affect with debts the whole lands " and others before disponed, or any part thereof, in such manner, " and as freely in all respects, as if these presents had never been " made or granted; but declaring that any alteration or revoca- " tion of these presents shall not be inferred by implication or " construction, but only from an express writing under my " hand."

On the 4th of August, 1819, the entailer executed a trust, disposition, and settlement of his whole lands and estate, real and personal, other than the lands entailed, upon the following among other trusts.

" *Secondly*, in trust for the payment and satisfaction of all my " just and lawful debts, death-bed and funeral expenses, and obli- " gations of every denomination or description, which may be " due and prestable by me at the time of my decease, in any " manner of way, together with the legacies and provisions here- " inafter mentioned, or which I shall make, leave, or bequeath " by any other deed, writing, or codicil. *Sixthly*, in farther " trust, that so soon as my said trustees shall have paid off or " extinguished my whole debts, funeral expenses, and legacies, " and such other bequests and legacies as I may afterwards think

CRUIKSHANK *v.* CRUIKSHANK.—24th April, 1845.

" it proper to leave and bequeath to any person or persons, by " any writing under my hand, and after my said trustees shall " also have paid, secured, or set apart the foresaid provision of " 6000*l.* sterling, to each of my daughters, or such part thereof " as shall not have been paid to them by myself during my life, " my said trustees are hereby directed and appointed, to pay, " apply, lay out, and secure such part of the yearly produce, " profits, and proceeds of my said whole estate, heritable and " moveable, real and personal, hereby conveyed to them, as shall " not be necessary or required for payment of the foresaid annuity " to my son James Cruikshank, with the principal and interest " of such monies as may have been borrowed by my said trustees, " and the whole charges, and expenses, and allowances before " mentioned, in manner following, viz.: to pay and apply one- " half of the said free produce and proceeds yearly to and for the " use of the said Patrick Cruikshank, my second son, or to his " heirs, executors, or successors, and that in lieu and place of the " annuity of 500*l.* before provided to him, which shall from " thenceforth cease and determine, and to lay out in trust, or the " public funds, or on such other securities as to them shall " appear good and sufficient, the other half of the said free surplus " and proceeds, and to accumulate the same from year to year, " until the said accumulated sum shall amount and increase to " the sum of 30,000*l.* sterling, which sum of 30,000*l.*" (*restricted by codicil to* 10,000*l. sterling*) " my said trustees are hereby " directed to lay out in the purchase of lands, tenements, or " hereditaments, in Scotland, and to settle and secure the same " to the same series of heirs, and under the same conditions, pro- " visions, clauses irritant and resolutive, declarations, restrictions, " limitations, and faculties, as are contained in and provided by " the foresaid disposition and deed of entail, executed by me, of " my lands and estate in Forfarshire."

In the month of January, 1821, James, the institute under the entail, made proposals of marriage to the respondent, the

daughter of the Earl of Northesk, and in contemplation of the intended marriage a contract was executed, to which the fathers of the two spouses were respectively parties. By that deed the entailer and his son bound themselves, "jointly and severally, "and their heirs, executors, successors, and representatives what-"soever, to pay to the said Lady Anne Letitia Carnegie, future "spouse of the said James Cruikshank, junior, during all the "days of her lifetime, from and after his decease, in case she "shall survive him only, an annuity of 500*l.* sterling, free of all "deductions and burdens whatever, at two terms in the year, "Whitsunday, &c. And farther, the said James Cruikshank of "Langley Park hereby binds and obliges himself, and his fore-"saids, to pay to the said James Cruikshank, his son, an annuity "of 500*l.* sterling, free of all burdens and deductions whatever, "and that at four terms in the year, &c., during the joint lives "of the said James Cruikshank of Langley Park, and James "Cruikshank, his son; and the said James Cruikshank, junior, "hereby obliges himself and his foresaids to educate and main-"tain the child or children of the marriage hereby contracted, "suitably to their rank and station, until they are properly "provided."

On the other hand, the Earl of Northesk gave the following obligation:

"For which causes, and upon the other part, the said Wil-"liam, Earl of Northesk, has, of the date of his subscription "hereto, executed a disposition and assignation of a bond by the "Right Honourable John, Earl of Hopetoun, to him the said "William, Earl of Northesk, and his heirs and assignees, for "2000*l.* sterling, dated the 3rd day of February, 1809, with "interest thereof from the 14th day of November, 1820, in fa-"vour," &c., "in trust, for the uses and purposes, with the powers, "and under the conditions and provisions therein mentioned, "and that in name of portion or provision agreed to be paid by "him, the said William, Earl of Northesk, with the said Lady

CRUIKSHANK *v.* CRUIKSHANK.—24th April, 1845.

" Anne Letitia Carnegie, his daughter; of which trust-disposi-
" tion, and assignation, and bond for 2000*l.* thereby conveyed
" and made over to the said trustees, the said Lady Anne Letitia
" Carnegie, with consent of the said James Cruikshank, her
" future husband, and he for himself, and as taking burden upon
" him for her, and they both, with one consent, accept in full
" satisfaction to them of all legitim, executry, former provision,
" or whatever else she the said Lady Anne Letitia Carnegie can
" ask, claim, or demand, by and through the decease of the said
" William, Earl of Northesk, her father, or by virtue of the con-
" tract of marriage between him and the Right Honourable
" Mary, Countess of Northesk, her mother, or by any bond of
" provision granted by him to his said daughter, or by his latter
" will and testament, or by any other manner of way whatsoever."

In January, 1830, James Cruikshank, the maker of the entail, died, having been predeceased by his wife; and upon his death, James, the institute under the entail, entered into possession of the entailed lands under the entail, and in the month of March, 1830, he put the entail upon record.

While so in possession, Cruikshank, on the 29th of May, 1830, executed a bond of provision, whereby on the recital that by the 5th Geo. IV., c. 87, " power is granted to every heir of entail in
" possession of an entailed estate, under any entail then made, or
" thereafter to be made in that part of Great Britain called Scot-
" land, to grant provisions to their wives and children in manner
" therein fully set forth; and now seeing that I am desirous to
" exercise the said powers in manner hereinafter written," he bound himself to infeft the respondent in a life-rent provision out of his entailed lands of 600*l.* a-year, free of all burdens or deductions whatever; " declaring, as I hereby expressly declare, that the an-
" nuity to be payable to the said Lady Anne Letitia Cruikshank,
" from and out of the said entailed lands and estate, in virtue of these
" presents, is not granted by me, nor to be received by the said
" Lady Anne Letitia Carnegie, now Cruikshank, nor to be in

" any way interpreted or held as coming in lieu of, or as provided " to her in satisfaction of the annuity of 500*l.* sterling per annum, " which, in the contract of marriage betwixt the said Lady Anne " Letitia Carnegie, now Cruikshank, and me, I and the said " deceased James Cruikshank of Langley Park, my father, " bound and obliged us, jointly and severally, and our heirs, " executors, successors, and representatives whatsoever, to pay to " her during all the days of her lifetime from and after my " decease, in case she shall survive me; but that the whole " rights and claims of the said Lady Anne Letitia Carnegie, now " Cruikshank, under her said marriage contract, are reserved " and shall remain entire to her, as if these presents had never " been granted, my intention being, that she shall draw and " enjoy the utmost provision I have it in my power to settle and " secure for her out of the said lands and estate, in addition to, " and above, and over the provisions settled on her by my father " and myself in the said marriage contract." The respondent was duly infeft upon this bond, and her infeftment duly recorded.

Thereafter the lands of Tayock, part of the entailed estate, were sold under the powers of the 3 & 4 Will. IV., cap. 30, and 11,000*l.* was borrowed on the security of the other lands. To disencumber the title, the respondent renounced her infeftment over the lands sold and those made subject to security for the loan.

Afterwards, the trustees under the entailer's trust disposition and settlement, out of the accumulations of his general estate, and in exercise of the power in that behalf contained in that deed, repurchased the lands of Tayock, and by deed in January, 1836, settled them under the fetters of the entail of 2nd August, 1819; and under the precept in this deed, Cruikshank was reinfeft in these lands, and his infeftment duly recorded in February, 1836.

In March, 1836, Cruikshank executed another bond of provision, on a recital of the powers given to heirs of entail by the 5th Geo. IV., cap. 87, and his desire to exercise them, whereby

he bound himself to infeft the respondent in an annuity of 133*l.* 6*s.* 8*d.* out of the lands of Tayock, with a similar declaration as in the bond of 29th May, 1830. The respondent was infeft under the precept in this bond.

On the 4th May, 1842, Cruikshank died in insolvent circumstances.

In July, 1842, the respondent brought an action against the appellants, the trustees of the entailer, to have them ordained to pay to her 250*l.*, the half year's annuity, payable to her under her marriage contract at Whitsunday, 1842, and to secure to her the future due and regular payment of the annuity.

The appellants stated in defence, that after satisfying the primary purposes of their trust, the only fund remaining was a West Indian estate, which had become so depreciated in value, that it was doubtful whether there would in fact be any trust estate out of which to satisfy the respondent's demands, and they pleaded:

"I. The pursuer not being entitled to two jointures, and "having that provided to her by the marriage contract, secured "or nearly so by the charge on the entailed estate, the provision "in the marriage contract has to that extent been satisfied, and "the debt discharged.

"II. No act or deed, and far less any mere declaration on "the part of Mr. Cruikshank, junior, whilst substantially satis-"fying the provision in the marriage contract, could avail to "keep up the debt against his father and his father's separate "estate.

"III. At all events, the separate estate of Mr. Cruikshank, "senior, is clearly liberated to the extent of one-half of the debt, "which was in any view the debt of James Cruikshank, junior, "himself.

"IV. The defenders, as trustees, are in any view only liable "to the extent of the trust estate under their charge."

The record was made up on the summons and defences, and

thereafter on 24th January, 1843, the Lord Ordinary (*Wood*) pronounced the following interlocutor, adding the subjoined note:

"The Lord Ordinary having considered the closed record "and whole process, and heard parties procurators, and made "avizandum, repels the defences and decerns in terms of the "libel, finds the pursuer entitled to expences, and remits the "account thereof when lodged to the auditor to tax and report."

"NOTE. The obligation undertaken by James Cruikshank, "senior, and the late James Cruikshank, junior, in the marriage "contract executed in 1821, upon the marriage of the latter "with the pursuer to pay an annuity of 500*l.* to the pursuer "for life, in case of her surviving her then intended husband, "is expressed in absolute terms. There is no provision for "its terminating in any event, except that of her decease, nor "is there any other event, even pointed at or indicated, by "the occurrence of which it was to be extinguished. Farther, "it does not appear that the entail and trust deed, and settle-"ment, which James Cruikshank, senior, had previously exe-"cuted in 1819, if referred to, warrant any different construc-"tion being put on the obligation in the marriage contract, "than that which it must independently have received. Whe-"ther the contract be taken by itself or in connection with these "deeds, it is thought that nothing will be found which admits "of the obligation in question being construed so far as regards "James Cruikshank, senior, and his estate, other than the "entailed estate, to be an obligation which was to be extin-"guished wholly or partially upon James Cruikshank, junior, "either to its full amount or a part of its amount, making pro-"vision for the pursuer out of the entailed estate, if he should "succeed to it; or that if it was thereafter to continue to subsist "to any extent, it was only to the effect of enabling the pursuer "to draw one annuity of 500*l.*, and no more. But if so, then "there seems to be no ground for holding that by James Cruik-"shank, junior, as subsequently heir of entail, granting in the

CRUIKSHANK *v.* CRUIKSHANK.—24th April, 1845.

" pursuer's favour the bonds of provision which he did execute
" in virtue of the power given by Lord Aberdeen's Act, any
" claim for the annuity in the contract of marriage as a separate
" and independent provision ceased, and she has now only a
" claim for one provision of 500*l.* a-year. The declaration in
" the bonds quoted at page 6 of the summons excludes all ques-
" tion as to the intention of James Cruikshank, junior, in exe-
" cuting these bonds. No room is left for any presumption that
" might arise from his being then a debtor in the obligation in
" the contract of marriage. It is in express terms set forth that
" the bonds were granted in addition to the marriage contract
" provision, and not in lieu of or as a substitute for it either in
" whole or in part. It has been said that James Cruikshank,
" junior, had no power to grant the bond as additional provisions
" to the pursuer, and that the declaration referred to must there-
" fore go for nothing. But unless the obligation in the marriage
" contract could receive the construction which the Lord Ordi-
" nary has held to be inadmissible, he can discover no ground
" on which the above plea can be maintained. Again, it has
" been said that the trustees of James Cruikshank, senior, might
" upon the footing of his being truly only a cautioner for his son
" in the obligation in the marriage contract have taken steps to
" compel the latter to substitute the provision which he had
" power to make out of the entailed estate in favour of the pursuer
" for that contained in the contract of marriage, and thereby to
" extinguish it. But granting that the trustees could have done
" so, it is a sufficient answer that no steps of the kind were
" taken by them. On the contrary, James Cruikshank, junior,
" was allowed to execute the bonds in the terms in which they
" are conceived, by which the pursuer is made creditor in the
" provision out of the entailed estate, in addition to and not as a
" substitute, either in whole or in part, for her original provision
" in her contract of marriage, which therefore remained in full
" force, according to its terms. Such being the state of matters,

"the Lord Ordinary is of opinion that none of the defences "insisted in are well founded."

On the 24th February, 1843, the Court adhered to this interlocutor.

*Mr. Russell* and *Mr. Rolt* for the appellants.—The obligation of the father and son to pay the annuity sued for was joint and several. When the father became a party to the contract of marriage, he was aware of the power he had given his son to provide his wife out of the entailed land. It cannot be presumed he contemplated a double provision for her, and therefore, when he entered into the contract, without exercising the power of alteration reserved by him in the entail, he must have contemplated that a provision by the son in exercise of the powers in the entail, would satisfy the obligation in the contract. In another view, the entailed lands were the estate of the father at the date of the contract over which he had an absolute right, as he could at any time have exercised the power of revocation, and therefore the bond of provision satisfied his obligation out of his estate, *pro tanto*, and set him free. The father, by allowing the land to go to the son, satisfied every obligation upon him, and it was then the duty of the son to provide the 500*l*.

Though, as against the respondent, the father and son were jointly and severally bound, as between themselves, they had undoubtedly rights,—there was no antecedent obligation upon the father to provide for the wife,—the marriage was no consideration to him, but it was to the son,—the father therefore was in the nature of a surety for the son. Assuming him to be so, and that the lands were not his but the son's, he was discharged by what had taken place with the son, the principal debtor, who had satisfied the obligation out of his own assets, and in this view it was not in the power of the son by his declaration, to alter the effect of his own act—a pure donation by a principal debtor will discharge his surety.

CRUIKSHANK *v.* CRUIKSHANK.—24th April, 1845.

But whatever view may be taken of the bond for 600*l.* it is impossible that the respondent can be entitled to the annuity of 133*l.* 6*s.* 8*d.*, as the lands out of which it is payable, were purchased out of the general assets of the father—that purchase was made by the appellants on the assumption that all the liabilities of the father had been satisfied—she cannot therefore claim her marriage provision as an unsatisfied liability by him, and at the same time claim this annuity out of lands which it would not have been in the power of her husband to charge with it, but for the supposition that the liability had been satisfied. As regards this annuity, it must be viewed as satisfaction, *pro tanto*, whether the father were a co-obligor or a surety. The respondent is an appointee under a power in the father's gift by virtue of the statute. She takes, in fact, therefore, under the father's will.

The argument is strengthened by a consideration of the purposes of the several deeds. In Garshore *v.* Chalie, 10 Ves. 1, the Court looked at the intention of the provision, and the party taking by provision of law something similar to the provision by covenant, the one was held to be satisfaction, *pro tanto*, of the other. Here the intention was to provide for the wife of the son, and the son, accomplished it, out of what fund matters not to the respondent. In Wilson *v.* Piggott, 2 Ves. 351, it was said, "The Covenantor having suffered property to go so as to produce "the same effect, that is held a satisfaction of the covenant as in "Lechmere *v.* Carlisle, 3 P. Wms. 211, when lands suffered to "descend, were held a satisfaction of a covenant to purchase." Here the father suffered property to go, so as to produce the effect of satisfaction.

The two bonds were identical in intention with what the father had covenanted.

The summons concludes against the respondent, as personally liable to pay without regard to whether they may have assets of their truster or not; but they cannot in any view be liable beyond the fund in their hands, and no account has yet been

taken so as to ascertain whether they are in funds to answer these annuities.

*Mr. Stuart* and *Mr. Monteath* appeared for the respondent, but were not called upon.

LORD COTTENHAM.—My Lords, this case appears to me to be very free from doubt, as the Court of Session seem to have thought it. The object of the suit is to obtain payment of an annuity of 500*l.* a year, which, by the marriage contract, the father and son jointly bound themselves to pay to the intended wife of the son. The husband being dead, and the father being dead, she is now suing those who represent the father, for the payment of this annual sum of 500*l.*

The defence is, that the son, after the father's death, being in possession of the entailed estates, executed two bonds, by the first of which he charged the entailed estate under the power he had under Lord Aberdeen's Act, with the payment of 600*l.* a-year to his wife, in terms stating that that was to be without prejudice to the 500*l.* a-year. Therefore, as far as intention was concerned, excluding any argument on that ground. The other was a bond for the payment of 133*l.*, charged upon estates which had been purchased with the accumulation of interest from a portion of the residue of the father's estate, and in a similar way he charged the annuity on that portion of the estate. Therefore, as far as intention goes, there is no question on which an argument can be raised. The son intended this provision for his wife, in addition to the 500*l.* a-year provided for her by his marriage settlement. He has in terms so expressed himself by these several grants.

Then it is said, first of all, this cannot be in satisfaction. That is matter of intention. There is no evidence that it is in satisfaction; on the contrary, the evidence is all the other way. It is not intended in satisfaction by the granter, the husband, or the wife who accepted it.

CRUIKSHANK *v.* CRUIKSHANK.—24th April, 1845.

Then the argument is put in this way—that the father and the son having joined in this marriage contract to pay the 500*l.* a-year, the father is to be considered as a surety only for the son, and that the principal debtor, namely, the son, has in fact done all that by the joint obligation the parties contracted to do. So that the contract and stipulation is performed.

Now, that rests entirely upon the supposition of the father and son being principal and surety, that is to say, that the father who joins in the contract or obligation upon his son's marriage, can say to his son, or to the wife, or to the wife's friends, who have entered into a corresponding contract, that he is not to bear any part of the burthen himself, but that if he is compelled by law to make any payment under such contract, he can recover it against his son, which is a general consequence of these parties standing in the relative situation of principal and surety. That to be sure would be a great surprise upon the wife and the friends of the wife, who, considering that they have got a beneficial pecuniary contract from the father, find that it turns out, that the family for whom they meant to provide are to receive it, but are in fact to repay it when they have received it, so that, in fact, the provision for the married couple would turn out to be of no benefit to them.

That clearly being so, and it being clear that the consideration runs through the whole, and that the parties are not principal and surety, all the rest of the argument entirely fails. Because, if they are not principal and surety, but both are liable as principals, then, unless it is to be contended that parties under a joint obligation cannot, by any possibility, confer a benefit on the obligee, the son has in terms said, "I mean to confer an "additional benefit on the obligee." He has availed himself of his right; it is clear that he had that right, and intended to exercise it.

Therefore, as far as the 600*l.* annuity is concerned, there is no argument whatever on which an objection can be founded.

Then with regard to the 133*l.*, how does that stand? It is said, the wife has received so much of the 500*l.* a-year out of the father's estate. It was impossible to maintain that argument without supposing that she received that benefit from the father's estate. But she has not received it out of that at all. The 10,000*l.* was a legacy to another party totally distinct from her. She had no connexion with that 10,000*l.* It was a benefit to the son and those who might take under the entail. But those who took under the entail having received that bounty from the testator, the husband's father, beyond all doubt, had a right to do with it as they pleased. Had they no right, deriving their title under the father's will, to charge that property so derived with an additional annual payment to the son's wife? It originally constituted part of the father's estate; but her title to it is not under the father's will, nor is her title to it under his estate, but it is given, and flows entirely from the bounty of her husband.

Then it is said that the decree is defective because it makes a personal charge against these trustees, and makes them pay. They are only undoubtedly in law liable to pay so far as they have assets. But parties may so conduct themselves that they cannot dispute the possession of assets. If an executor thinks proper to pay legacies, and to pay over a part of the property as the residue of the estate after payment of the legacies, is he to tell a creditor that he will not pay the debt, or that he cannot, because he has not got in hand assets of the testator? Whether he has kept those assets in his hands, or thought proper to pay them away from these persons, who could only claim them after payment of the debts, is precisely the same thing to the creditor. What are the provisions of this will? The provisions of this will are, "In trust after satisfaction and "payment of all my just and lawful debts, death-bed and funeral "expenses, and obligations of every denomination or descrip-"tion." Then they are to pay certain legacies,—6000*l.* a piece

CRUIKSHANK *v.* CRUIKSHANK.—24th April, 1845.

to each of the daughters, and a provision for the younger sons. Then they are to accumulate a portion of the income of the residue until it comes, as he first stated, to 30,000*l.*, but by a codicil he altered it to 10,000*l.*, which 10,000*l.* is to be laid out in the purchase of estates, to be settled as the other estates which were entailed. That has been done.

Then are we to be told, (not that it is put forward as a fact,) that they had no assets. It is quite obvious that could not be presumed. They have, therefore, dealt with this property, assuming that they had ample to pay all obligations of whatever denomination, and this is one, and the executors, from the mode in which they have conducted themselves, have excluded themselves from the power of contesting the fact of having received assets. Whether they have them now is immaterial. Having had means with which this obligation could be performed, it was their duty to have paid it over before they applied any portion of the estate in payment of the legacies. Independently of the legal result of the course they have pursued, the amount is such as to satisfy every one who looks into the mode in which they have applied the property, that in point of fact it was amply sufficient for this purpose.

The sole question, therefore, being whether any legal defence has been stated and proved against this obligation to pay out of the father's estate, I am of opinion that no such defence has been established, and that the decision of the Court of Session is right.

LORD BROUGHAM.—My Lords, I agree with my noble and learned friend, that there is nothing in this case. I could have wished that it had not come here. I freely state that I do not think it ought to have been brought here. I do not understand why we, in this House, should have such cases brought here as we have had this morning twice over. This is the second time to-day that a case has been brought up, in which it does not

appear to me that there is a shadow of argument, not even, as Lord Thurlow once said, "a probable argument."

The argument very ably and clearly urged by Mr. Rolt, would have very much to say for it if the parties, (the situation of the parties here is that of father and son,) had stood in the relation of principal and surety. It is quite clear on every ground, that they do not stand in that relation. There is a consideration moving to both in the marriage contract; and whether there is a provision made for the son or not in that marriage contract, it is equally a consideration moving to both. And the best answer to the argument which is set up, is, Can anybody say that if the father had paid, he could have had recourse over against the son in respect of his payment? It is not to be endured. It is impossible it could be so.

Then, my Lords, with respect to the decree being against the trustees personally, there is an end of that. At first I was disposed to think that perhaps there had been a slip in the decree, and that we might have corrected it by the insertion of a few words. But it is no such thing. There is no occasion for that, for it does not lie in the mouth of the executors to say that they have no assets, when as volunteers they have chosen to pay legacies, and not only legacies, but legacies out of the residue, which assumes that all the other legacies have been paid in priority of the administration of the estate. My noble and learned friend has justly observed that that of itself deprives them of the possibility of denying assets. It is an admission of assets —whether they have assets or not, whether they have used them in any way or not,—it is an admission on their part which they cannot gainsay or get rid of here.

My noble and learned friend read the statement in which it is said that they are to pay the legacies out of the residue, after having paid so and so, and "after having paid all my obliga-" tions." I do not care whether that is in the will or not, be-cause the law would have inserted that.

CRUIKSHANK *v.* CRUIKSHANK.—24th April, 1845.

Suppose a testator says, I give to A. B. a legacy of 10,000*l.*, without saying, "to be paid out of my residue," it is clear that his debts must be paid in the first instance; whether he says, "I give it to be paid after my lawful debts, and all obligations "which I owe," or not, the executor is bound not to pay the legacy until he has paid the honest creditor. Here it is in evidence, that there was money in hand.

Therefore, there is not really, as I said before, a probable ground, not even a *prima facie* argument, to call upon your Lordships to hear the respondent. Therefore, you cannot hesitate what judgment you are to give.

I conclude as I began, with making my complaint, that I think it is not right, that this House is not well used, in having its time occupied by cases such as we have had the whole of this day.

LORD CAMPBELL.—My Lords, the only foundation for the ingenious argument that we have heard at your Lordships' bar is, that the father was surety for the son. Now, my Lords, if they stood at all to each other in the relation of principal and surety, I should much rather say that the son was the surety for the father than the father for the son; I think it is quite clear that it was from the bounty of the father this payment was to issue, not from any provision that was to be made, so far as that was concerned, by the son.

But, my Lords, the foundation of that argument seems to me utterly fallacious, and there is no use in saying another word about it.

With regard to the objection as to the form of the decree, there is no doubt when one looks at the summons it does seem to charge the trustees personally, and the decree would make them personally liable. But, my Lords, they are personally liable, if they have assets in their hands out of which these payments might be made. And I think it is quite clear that

they must be taken to have assets in their hands for that purpose, and therefore, that they are personally liable, and that the decree is good in form as well as in substance.

I therefore regret that the parties should not have been satisfied with the opinion of the Court below. It was thought below, there was an argument in the case that might be successful. But I should think if the learned gentlemen who have argued this case as well as it could be argued, had been consulted, they would hardly have certified to this House, that there was reasonable ground for appeal.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed with costs.

PURRIER & WRIGHT—G. & T. W. WEBSTER,—Agents.