question of a class which often arises under wills as to whether words of description occurring in a bequest are to be held as merely descriptive or as conditioning the bequest. It is not exactly a case of *falsa demonstratio*, but bears a strong analogy to cases of that class. A case of *falsa demonstratio* generally occurs with reference to a specific legacy or subject of bequest, and if the testator has described the subject of bequest erroneously, but nevertheless in such a way that it can be identified, the rule is that the legacy must receive effect. I refer to such a case as a testator leaving all the money he possesses "in Consols" when he has no money in Consols, but has money in reduced annuities or something of the sort. On the other hand, if a testator leaves a legacy in a particular stock which he possesses at the time, and subsequently sells that stock, the legacy is held to be adeemed, and the legatee has no claim to what has been substituted for it. What we are dealing with here is not a bequest of a particular subject, but of an annuity with the description added that it is the annuity "provided under our marriage-contract." The question of intention is whether these words imply a restriction on the amount of the annuity or are merely descriptive. If a testator leaves a relative having a claim upon him a bequest in such terms as these—"In respect my wife is already amply provided for, I leave her nothing more than what she is to get under our marriage-contract," and it turns out that he has left her more, there would be difficulty in saying that he meant to give her more than the amount of her marriage-contract provision. But here there is nothing in the will to show that the testator meant to restrict his wife's provision to the precise sum which he was under obligation to provide. On the contrary, the provisions of the will show that he intended to give her more. Having that key to the interpretation of the will, I think we are brought a long way towards accepting the principle which I have referred to as familiar in the case of specific legacies, and I think the intention appearing from the whole will is that the testator meant to give his wife an annuity of £150, and that the mention of the marriage-contract annuity will not invalidate the bequest.

LORD KINNEAR—I am of the same opinion. I am disposed to think that the rule of construction laid down in the case of *Wilson* is perfectly sound, because what I understand Justice Fry there to lay down is, that where a testator directs his executors to pay a debt without evincing any intention to confer a bounty, either expressed in terms or to be inferred from the terms of the deed as a whole, a mere misdirection with regard to the amount of the debt will not be held to infer an intention on the part of the testator to bestow any bounty on the creditor, but will rather be referred to an erroneous belief in the mind of the testator as to the amount of his obligation, and that therefore if the testator describes the debt as larger than it really is the creditor will not be entitled to claim the excess. But holding that rule of construction to be perfectly sound, I find here, both from the series of provisions in the deed and from a consideration of the relative position of the testator and the annuitant, perfectly sufficient and relevant reasons to found the inference that it was the intention of the testator to confer a bounty upon the fourth party.

The Court answered the first question in the negative and the second in the affirmative.

Counsel for the First and Second Parties—Ross Stewart. Counsel for the Third and Fourth Parties—Sym. Agents for the Parties—W. & J. Burness, W.S.

Tuesday, January 17.

OUTER HOUSE.

[Lord Kincairney.

CAMPBELL *v.* COUNTY COUNCIL OF PEEBLESSHIRE.

Expenses—Jury Trial—Fees of Counsel—Auditor's Report.

In an action of damages in respect of the death of a child, *held* (following *Campbell* v. *Maddison*, November 5, 1875, 1 R. 149) that the successful pursuer was entitled to charge as fees for the trial £21 for senior and £15, 15s. for junior counsel for the first day, and £15, 15s. to senior counsel and £10, 10s. to junior counsel for the second day, on the ground that the trial, besides assessment of damages, involved questions of contributory negligence, and points of law as to liability between the defenders and certain other parties in a question with the pursuer, who was a tenant of these parties.

William Campbell, warper, Walkerburn, raised an action against the County Council of the county of Peebles for payment of the sum of £250 as compensation in respect of the death on 4th December 1891 of his son John Campbell, a boy six years of age, through the fault of the defenders in failing to sufficiently fence part of the turnpike road leading through the village of Walkerburn. The defence was a denial of liability, and contributory negligence on the part of the pursuer and the boy, and the defenders further maintained that certain feuars were liable for the maintenance of the wall at the part of the road in question, and over which the boy had fallen into vacant area ground in front of an adjoining tenement of dwelling-houses.

The case was tried by Lord Kincairney, Ordinary, with a jury, and lasted two days; thirteen witnesses were examined for the pursuer, and five for the defenders. The jury returned a verdict for the pursuer with £50 damages.

The verdict was applied, and the pursuer found entitled to expenses.

After taxation the pursuer lodged a note of objections to the report of the Auditor upon his account of expenses, which had been taxed at £193, 12s. 5d. The main items of the objections were the 4th and 5th of his note, dealing with fees of counsel and charges incident thereto for their attendance at the trial, involving a sum of £16, 18s. 2d. taxed off by the Auditor.

Salvesen, for the pursuer, submitted that the Auditor was wrong in allowing fees to counsel for the trial only at the rate to senior of 15 guineas for the first day instead of 20 guineas, and 12 guineas for the second day instead of 15 guineas, and to junior at the rate of 10 guineas instead of 15 guineas for the first day, and 8 guineas instead of 10 guineas for the second day. The scale he contended for was usual in jury trials. Here points of law as to liability between the defenders and certain feuars in a question with the pursuer, a tenant of the property of the latter, had been raised at the trial, as well as points in regard to contributory negligence. In regard to this latter point the defenders excepted to the charge of the Court to the jury, but did not proceed with their bill of exceptions.

The defenders supported the Auditor's taxation. The fixing of the scale of fees was one entirely within his discretion. The trial was of a simple description. No injustice could be done to the pursuer by the adherence of the Court to the report, in respect that in the present case the fees of his counsel were not sent at the time.

Pursuer's Authorities—*Campbell* v. *Ord & Maddison*, November 5, 1873, 1 R. 149; *Black* v. *Mason*, March 1881, 8 R. 666; *Young* v. *Johnston & Wright*, May 19, 1880, 7 R. 760.

Defenders' Authority—*Wilson* v. *North British Railway Company*, December 13, 1873, 1 R. 305.

Lord Kincairney—In this case I have consulted with the Auditor. In regard to the main items objected to I have had some difficulty. These relate to the fees of counsel for the first and second day of the trial. The case was an ordinary one of its class, but it was keenly contested, and lasted two full days. I do not think it was unduly prolonged in any way. The Auditor has explained to me that in taxing these fees he had in view an allowance by him to the pursuer of consultation fees of 5 guineas, and 3 guineas to senior and junior counsel respectively prior to the trial. But I think that upon the principle of *Campbell* v. *Ord & Maddison* the objection of the pursuer in this matter is well founded. Pleas of contributory negligence as in that case were pressed at the trial of this case, as well as other points of law. I observe from the report of *Campbell's* case that the same consultation fees were also sent in that case as the Auditor has allowed here. Accordingly, following that case, I sustain the objection in regard to these fees, increasing the fees to senior by 8 guineas, and to junior by 7 guineas, and as incident thereto, the agent's and counsels' clerks' charges of £1, 3s. 2d. must also be allowed. These items in all amount to £16, 18s. 2d. But as the pursuer did not press certain objections, and as I do not intend to interfere with the Auditor upon the remaining objections, I find no expenses due in regard to the discussion upon the objections.

Counsel for Pursuers—Comrie Thomson—Wilton. Agent—W. M. Morris, S.S.C.

Counsel for Defenders—Guthrie—Cook. Agents—Traquair, Dickson, & M'Laren, W.S.

Thursday, January 19.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

BROWN *v.* VERTUE.

Compensation — Action of Maills and Duties—Right of Tenant to Set-off Debt Due Him by Landlord Against Claim of Heritable Creditor of Landlord for Rent —Bankruptcy—Retention.

In an action of maills and duties brought by a heritable creditor infeft under a bond and disposition in security, a tenant maintained in defence that he was entitled to set-off an account for goods supplied by him to his landlord, the principal debtor, against the creditor's claim for rent.

The Court *repelled* the defence, *holding* (1) that as the tenant was bound after the raising of the action of maills and duties to pay his rent to the heritable creditor, there was no *concursus debiti et crediti* entitling him to set-off the debt due him by his landlord against the rent; and (2) that the fact that the landlord had been sequestrated before the action of maills and duties was raised did not give the tenant a right of retention for the debt due by his landlord, in respect the heritable creditor did not require to claim in the sequestration in order to obtain payment of the rent.

By bond and disposition in security dated 10th and recorded 13th September 1883, James Heddle bound and obliged himself to repay to Robert Chambers and others, as trustees of the deceased Robert Chambers, LL.D., the sum of £2300, which he had borrowed from them, and in security of repayment he disponed to the said trustees certain tenements in Water Street, Leith.

The estates of James Heddle were sequestrated on 1st March 1892.

On 5th March Richard Brown, C.A., who had been appointed judicial factor on the trust-estate of the said deceased Robert Chambers, and was in right of the foresaid bond and disposition in security, conform to assignation dated 21st January and re-