Wednesday, January 7.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

MOIR'S TRUSTEES *v.* LORD ADVOCATE.

Stamp Duties—Inventory Duty—"Debt"—Statute 5 and 6 Vict., c. 79, § 23—Marriage Contract Provisions.

By antenuptial contract of marriage a person settled his whole estate, heritable and moveable, upon the issue of the marriage, leaving to himself power during his life to deal with it, and by testament to divide it among his children in any way he might think proper. The power of testing was exercised. *Held*, in a question between the father's executors and the Crown, that in the sense of the statute the provisions to the children under this antenuptial contract were not a debt "due and owing from the deceased," and therefor were not to be deducted from the gross estate in ascertaining whether the executors were entitled to an abatement of the duty paid by them upon the gross amount of the recorded inventory.

This was a reclaiming note against an interlocutor of the Lord Ordinary (ORMIDALE) of date December 2, 1873. The circumstances under which the case arose are set forth in his Lordship's note.

The terms of the important clauses in the Deed are as follows:—

By the said contract the said George Moir, in contemplation of his marriage, and in consideration of the provisions in his favour thereinafter written, gave, granted, assigned, and disponed to and in favour of himself and the said Flora Tower, his promised spouse, in conjunct fee and liferent for her liferent use allenarly, but with and under to her the condition and declaration thereinafter written, and not otherwise; and to the child or children of the marriage, or its or their lawful issue, as in manner thereinafter provided, in fee; and further, declaring always, that if of the said intended marriage more than one child should be born and survive, or if any of them should die leaving lawful issue, it should be lawful to and in the power of the said George Moir, at any time of his life, even on deathbed, to divide among the said children or issue the fee of the whole of his property thereby conveyed, in such proportions, and with and under such conditions, in relation both to such children and issue, as he should by any writing under his hand appoint; and failing any such appointment, the said children, or the issue in right of the parent, should succeed to the same equally, share and share alike. Declaring that the share o any child dying without issue before the same should become payable should devolve to the survivors or survivor of said children, and to the issue of such as might have deceased; but that such issue should succeed only to the share to which their parent, if alive, would have had right, unless where an appointment as therein written, regulating the extent of the share of such issue, should be made; but in no case whatever should the said child or children or issue be entitled or permitted to receive or draw more than one-half of the said George Moir's property during the survivance of the said Flora Tower; nd whatever the said child or children or issue might have so received or drawn should be under the burden of her eventual life-interest therein, as in manner thereinbefore provided: And in order to render the foresaid conveyance and destination of his property, heritable and moveable, more complete and valid, the said George Moir thereby bound and obliged himself, and his heirs, executors. and successors, whenever so required, to settle and secure, and for that purpose to take the rights and securities of all the property whatever which he then possessed and might thereafter acquire, in terms thereof, and in precise conformity thereto: And further, the said George Moir thereby bound and obliged himself and his foresaids to make payment, within three months after the day of his death, to the said Flora Tower, if she should survive him, for and in name of mournings and interim aliment from the day of his death to the first term's commencement of the liferent either of the whole or of the half of his said property thereby conceived and created in her favour, as the case might be, of such sum as might, according to his rank and fortune at the period of his death, be for these purposes deemed just and proper: And the said George Moir bound and obliged himself and his foresaids to aliment and educate his said children suitably to their stations until the term of payment of their respective provisions.

George Moir died on the 19th October 1870, and by a trust disposition and settlement, dated 12th October 1865, with several codicils thereto, recorded in the Books of Council and Session on 29th October 1870, he, on the narrative of his contract of marriage, and that he was then desirous to execute his will and deed of appointment of his estates, heritable and moveable, in the exercise of the reserved powers in the contract of marriage, and in order to settle his worldly affairs in the event of his death, disponed and assigned the whole estates, heritable and moveable, real and personal, then belonging to him, or which should belong to him at the time of his death, to and in favour of the pursuers and the now deceased Alexander Tower, Esq., of Crookham, Torquay, in the county of Devon (who predeceased him), and John Millar, Esquire, advocate, Edinburgh, (who accepted and acted, but afterwards resigned the office), and the survivors and survivor of them who should accept, as trustees and trustee for executing the trusts of the said trust disposition and settlement, &c., and his heirs and successors whomsoever, to execute and deliver all deeds and writings in favour of his trustees which might be necessary or proper for implimenting and fulfilling the general disposition and conveyance of his estates. He also thereby nominated and appointed his trustees, and the survivors and survivor of them who should accept, to be his sole executors and administrators, and executor and administrator, with all the usual powers.

The pursuers pleaded—"(1) The whole estate, heritable and moveable, of the said George Moir, having been settled by him in his contract of marriage upon his children as aforesaid, no inventory-duty was due or payable on his personal estate. (2) Or otherwise, by virtue of the said contract of marriage, the whole personal estate was, according to a sound construction of the foresaid statute, a debt due and owing from the deceased to his said children, and the amount of inventory-duty paid by the pursuers on the said personal estate ought to be returned to them. (3) In the

circumstances above set forth, the pursuers are entitled to decree as concluded for."

The defender pleaded—"(1) The provision in favour of his children contained in the marriage contract of the late George Moir was not a debt due and owing from the deceased in the sense of the Act 5 and 6 Vict cap. 79, sec 23, and the pursuers are not entitled to a return of inventory-duty in respect thereof. (2) The Commissioners of Inland Revenue having consented to an abatement of inventory-duty corresponding to the amount of debts proved to their satisfaction to have been due and owing from the deceased, and duty being claimed only on the residue of the estate, the pursuers' claim in the present action cannot be maintained, and the defender is entitled to be assoilzied with expenses."

The interlocutor and note of the Lord Ordinary was as follows:—"The Lord Ordinary in Exchequer Causes having heard counsel for the parties, and considered the argument and proceedings, assoilzies the defender from the conclusions of the summons, and decerns: Finds the defender entitled to expenses; allows an account thereof to be lodged, and remits it when lodged to the auditor to tax and report.

"*Note.*—In this action the testamentary trustees of the late Mr George Moir conclude against the Lord Advocate, as representing the Commissioners of Stamps and Taxes, for a return of £900, which has been paid by them as the inventory-duty on Mr Moir's personal estate.

"The ground upon which the pursuers maintain they have a right to a return of the inventory-duty referred to is, that as the whole of Mr Moir's estate, heritable and moveable, was settled by him in his antenuptial contract of marriage upon his children, the same must be held to be of the nature of a debt owing by him to his children, and therefore that no inventory-duty was due thereon. The Lord Ordinary, being of opinion that this ground of action is erroneous, has not given effect to it.

"By the Revenue Statute, 5 and 6 Vict. cap 79, sec. 3, quoted in article 14 of the pursuers' condescendence, it is enacted, that when it shall be proved that 'an executor hath paid debts due and owing from the deceased, and payable by law out of his personal estate,' so as to reduce the sum exigible as inventory-duty to less than that which has been paid, the difference must be returned. Having regard to this enactment, it is obvious that the pursuers can have had no good or valid claim to a return of the inventory-duty in question, unless it is to be held that the whole of his personal estate is, in the statutory sense, 'a debt due and owing from the deceased.' The Lord Ordinary has been unable to come to any such conclusion.

"It is no doubt quite true that Mr Moir's children had, under and by virtue of his antenuptial contract of marriage, the benefit secured to them of a certain measure of protection as regarded their interests in the succession to his personal estate. He had by his marriage settlement, the leading provisions of which are given in article 5 of the pursuers' condescendence, precluded himself from settling by testamentary disposition his personal estate to their prejudice; but he had it in his power to deal with this estate, both heritable and moveable, during his own life as he saw proper. He certainly had himself the full and uncontrolled possessiou and enjoyment of it. The result, therefore, might have been that at his death no personal estate existed to be left by him; or the result might have been that his personal estate turned out immensely larger than it actually was. But according to the pursuers' theory, the richer the deceased became, and the larger his personal estate was at the time of his death, the greater also would then be his debt. If, for example, his personal estate, free from ordinary debts, was £1,000, or £100,000, or any other sum, to the same extent there would be a debt due and resting owing by him to his children. In short, his debt would expand in an equal ratio with his estate, so that the one would be always precisely the same as the other. The Lord Ordinary must own that he has been unable to see how in this view the personal estate of the deceased could be very well characterized as a debt at all, and still less can he understand how it could be, with any accuracy or propriety, called a 'debt due and resting owing by the deceased.' He has failed to discover in the argument which was addressed to him for the pursuers any principle for such a conclusion, and he was referred to no precedent or authority in support of it.

"The pursuers no doubt cited and seemed to rely on the case of *Hagart* v. *The Lord Advocate*, (Court of Session, 24th December 1870, 9 M'P. 358; and House of Lords, 2d May 1872, 10 M'P. p. 62) as a precedent in their favour, but the Lord Ordinary cannot think that it is so. It appears to him, on the contrary, that the case of *Hagart* is plainly and essentially distinguishable from the present. In that case Mr Hagart obliged himself in his antenuptial contract of marriage not to settle the *universitas* of the estate that might be left by him at his death, as in the present case, but to pay an annuity of £800 to his widow in the event of her survivance, and at once to invest a capital sum sufficient for that purpose, taking the rights and titles thereof to himself and spouse in conjunct fee and liferent for her liferent use allenarly in case she should survive him, and to the children of the marriage, whom failing, to himself, his heirs and assignees whomsoever, in fee, with power of appointment among the children. There was thus settled, as there appears to have been in all previous analogous cases, a definite and specific sum, in payment of which at his death Mr Hagart was from the date of his marriage contract bound; whereas, in the present case, the estate to which the children of Mr Moir had a right of succession could not possibly be ascertained or known till after his death and the whole of his ordinary debts paid and discharged. And the result, even then, would be, not that a certain specific portion of the personal estate should go to satisfy a specific debt of the deceased, but that the whole of that personal estate, however large it might be, should be handed over *per aversionem* to his children. There could therefore be no payment by the executor of a specific debt out of, and deduction of it from the personal estate generally, so as to leave a free balance liable in inventory-duty as contemplated by the statute. No such process could, even on the pursuers' theory, possibly be applicable to a case such as the present, where the *universitas* of the personal estate has been settled upon the children, for, as has been already remarked, the larger the personal estate the larger would be the debt—if it can be so called—owing to the children. In short, the one must always be commensurate with the other, and so the process of making payment out of, or de-

ducting from, the personal estate of a party deceased of a debt or sum of a definite and specific amount could never be made. It therefore appears to the Lord Ordinary that in such a case—and the present is such a case—the right of the children cannot with propriety be called the right of creditors in a debt, but only a *jus crediti* to the effect and extent of having their interests in the succession or estate left by their father secured and protected against his testamentary disposition thereof contrary to the settlement of the same in his marriage contract. In this view, the children cannot be, with any accuracy or propriety, called creditors in a debt due and resting owing to them by their father—which they would require to be to entitle the pursuers to have their claim in the present action sustained on the principle which was given effect to in Hagart's case.

"The Lord Ordinary, in place of holding the children's rights in the present case to be of the nature of a debt due and resting owing by their father, is rather disposed to think their right is one merely of succession—to some extent, no doubt, protected; and that the observations of Lord Cowan in the recent case of *Grant* v. *Robertson and Others* (15th June 1872, 10 M'P. p. 808), although materially different from the present case in its object and circumstances, are applicable. In that case Lord Cowan remarked, with reference to the rights of a wife and children there in question—'It may be that because of the onerosity of the deed in which this settlement of his estate *mortis causa* occurs, the husband could not at his own will and pleasure disappoint his wife and children by executing a new settlement of his affairs, to take effect at his death, in favour of another. But whether it is revocable or not, the exclusive character of this provision is that of succession—a kind of provision which has no effect on the husband's right during his lifetime, and powerless to exclude his property from the diligence of his creditors.'

"On the grounds to which he has now adverted, the Lord Ordinary considered that the defender was entitled to absolvitor, and decree to that effect has accordingly been pronounced."

The pursuers reclaimed, and argued—This was a debt. The question does not depend upon how the father defines what he is to settle. He may settle so many pounds, or an *aliquot* part, or the whole. The point is that it is a contract, and not a testament. The children are in the situation of creditors, not of beneficiaries, and this depends upon the construction of the contract, and upon the decisions. [Lord Benholme—The peculiarity here is that Mr Moir can, during his life, make this debt what he likes.] We admit that the provisions under this deed could not compete with onerous creditors, but neither could they have done so had they been specific. They are, as Lord Corehouse said, "heirs among creditors, but creditors among heirs." As to the contract itself, it is a contract in form; and it is onerous even *quoad* the children, for under its provisions they renounce legal rights. It is not revocable like a testament. The exclusion of legal rights of children is valid and effectual, but they can't be excluded by a testamentary deed. The decision in *Moir's Trs.*, where the same deed was being construed, favours this contention. That decision proceeded on the footing that Mr Moir was bound to do what he did *under the power*, and could not have done it otherwise. [Lord Neaves—That decision only went this length, that supposing he had to fall back upon the power, that power was sufficient.] Even if this is a succession, a succession may be protected by contract so effectually as to stand *in obligatione* as a debt. [Lord Justice-Clerk—The case of *Grant* v. *Robertson* was essentially different from this, for there the wife claimed a right of immediate administration, to the exclusion of onerous creditors.] Erskine shows that in such provisions the children are creditors, although not necessarily of the highest kind. In *Christie* v. *Dunn* it was decided that a contract containing a universal settlement, just as here, gave a right of credit and not a right of succession. So also compare *Dundas* v. *Dundas*. Although possessed of a power of disposal during his life, Mr Moir could not have done anything *in fraudem* of the contract. [Lord Neaves—Is the obligation here not different in kind from one of a specific amount?] That cannot alter the fact that it stands *in obligatione*. We stand in the same position as if a specific sum had been provided and the free executry had amounted to precisely that sum. *Hagart's* case supplies the true test, and Lord Westbury's remarks there may be referred to. [Lord Neaves—Then part of your case is that it is not succession at all?] That is so. Protected succession is only a phrase; he is not regulating succession when he divides the debt.

Argued for defender (respondent)—The question is whether this marriage-contract provision is or is not a "debt due and owing from the deceased;" the children here have no proper *jus crediti* and no *jus exigendi* against their father. This is not even a provision of conquest, but merely of residue, that is of what he chooses to leave. In all the cases quoted the obligation was specific in amount. A settlement of the *universitas* is an obligation different in kind from that. [Lord Justice-Clerk—Is there a less right in a beneficiary of the *universitas?* can he have a larger right than to take the whole estate?] In that event the amount depends entirely upon what the father choses to leave; but in the case of a specific sum he cannot vary the amount. This is not a debt, but succession or destination [Erskine]. As to the father's powers in a destination of the *universitas*, see *Champion* v. *Duncan and Dick*. The claim of the children most nearly resembles a claim for *legitim*, and it is not the practice to make a return of duty in respect of *legitim*. [Lord Justice-Clerk.—The claim by the children here is against their own money, and it is just there that the nicety arises.] *Christie's* case involved in reality the question whether the marriage-contract was a testamentary deed to the effect of dispensing with confirmation, which would have been necessary in a case of intestacy, and the Court held the confirmation unnecessary. It is, therefore, an authority in our favour.

Replied for pursuers—The distinction between this case and that of *Hagart* is not material; in neither case could the father alter the *amount* of the obligation. The statute being one which imposes a tax must be strictly construed.

Replied for defender—Clause 23 allows a deduction only of debts; money is involved in the notion of debt, and there is no obligation here to pay money at all; it is a destination of property. The language of the deed is appropriate to the idea of

succession. The statute allows a deduction of debts, but there is no case for deduction here, the alleged debt being the *universitas*.

Pursuers' Authorities—Ersk. iii. 9, 22; *Moir's Trs.*, 9 Macph. 848; *Christie* v. *Dunn*, 21st Jan. 1806, M. voce "Provisions and Heirs," Appx. 5 *Dundas* v. *Dundas*, 1 D. 731; *Advocate-General* v. *Trotter*, Exch. Rep., and 10 D. 56; *Grant* v. *Robertson*, 10 Macph. 804; *Hagart's Trs.* v. *Lord Advocate*, 9 Macph. 358, and 10 Macph. H. L. 62.

Defender's Authorities—Ersk. iii. 8, §§ 38, 39; *Champion* v. *Duncan*, 6 Macph. 17.

At advising—

Lord Justice-Clerk—We have had a full debate in this case, and as I was at first impressed by some of the distinctions drawn by Mr Balfour, and the apparent analogy between this case and the case of *Hagart*, I will shortly state my reasons for thinking that we should affirm the interlocutor of the Lord Ordinary.

The whole case turns not so much upon the fact that the amount settled upon the children by this contract of marriage is uncertain, as upon the nature of the obligation which is alleged to constitute the debt. It is clearly a bequest or conveyance of residue, and nothing else; and that conveyance is taken to the spouses in conjunct-fee and liferent, for the liferent use allenarly of the wife, and then to the children of the marriage in fee, whom failing, to the husband, his nearest heirs and assignees whomsoever. It is quite clear that this is a destination, and nothing else. It is not even a conveyance to the children—the immediate conveyance is to the husband himself.

It is true that by reason of the onerous nature of the contract in which this settlement occurs, Mr Moir prevented himself from altering that destination. But he undertook no more. And the mere fact that by the onerosity of the deed he was prevented from altering it does not prevent the children's right from being a proper right of succession. If the obligation upon the father was fulfilled by there being no alteration of the destination in favour of the children, their right at the father's death was just a right of succession.

Moreover, I do not see how, under the 23d section of the Act, children who are practically universal legatories (for that is their situation here) can say that their claim upon their father's estate is a debt which falls to be deducted in estimating the net sum upon which inventory-duty is to be paid. That is the kind of case which the section contemplated; but here there is really no question of deduction, for the claim is a universal claim.

It is quite clear that the whole property in the kingdom might be settled as it was settled in this case. And this goes to show that the Act cannot have the meaning contended for by the pursuers.

Therefore, not merely because there was really no money obligation at all, but because the only obligation was an obligation not to alter the destination, I am clear for adhering to the Lord Ordinary's interlocutor.

Lord Benholme—I very much coincide in the views expressed by your Lordship. Various grounds may be stated for adhering to the Lord Ordinary's interlocutor, but I think the real ground is this—The distinction between this case and that of *Hagart* is, that in *Hagart's* case there was a positive obligation to pay and to pay a definite amount; it really came to that, for in so far as that amount was uncertain, a simple calculation could render it certain. But all we have before us here is an obligation not to alter a certain course of succession. In that consists the whole onerous character of Mr Moir's deed. It is not less a succession because the party was without power of altering it, although in that case the succession may be more beneficial in this respect, that it is not so defeasible. Nor would the question of its being a succession be in any way affected by the fact that had Mr Moir interfered with the obligation, the other parties might have had a right of challenge.

In my view, the case turns upon the difference between a positive, definite, money obligation, such as will satisfy the words "debts" in the 23d section of the statute, and a protected succession, the protection consisting in this, that the father had no power to alter the destination. I am for adhering.

Lord Neaves—I concur, and have little to add. It is quite evident that however much this case may resemble the case of *Hagart*, they are not absolutely identical.

I do not say it is fatal to a claim of this kind that it is not known to how much the obligation will amount. We have not here an uncertain claim ascertainable by calculation or reference to a fixed standard, but one of a purely prospective kind, not liquidated till Mr Moir's death, and fluctuating indefinitely in amount as long as he survived. Suppose the deeds which the contract of marriage contemplated had been executed, the father would have been the fiar, and the children would have taken as heirs of provision. It is plainly not a debt "due from the deceased" to these parties, it is just a distribution of his estate in this way: and though there is onerosity, I do not think it is a debt in the plain and common sense of the term.

The Court adhered, with additional expenses.

Counsel for the Crown—Lord Advocate (Young), Q.C., Solicitor-General (Clark), Q.C., and Rutherfurd. Agent—The Solicitor of Inland Revenue.

Counsel for Moir's Trustees—Horn and Balfour. Agents—T. & R. B. Ranken, W.S.

OUTER HOUSE.

[Lord Shand.

THOMAS STEEL AND OTHERS, PETITIONERS.

Judicial factor—Absence of heir—Presumption of life.

Application for a judicial factor on the estate of a man whose son and heir left the country twenty-three years ago, and had not been heard of for sixteen years, but who had, before leaving, appointed factors and commissioners to act for him, *refused*.

The petitioners applied for the appointment of a judicial factor on the estate of the deceased James Steel, who died in January 1873. The deceased was survived by his widow. He had had only one child, a son, who left this country in 1850, and had not been heard of for 16 years. The petitioners believed that he was now dead; and if he was, they were entitled to succeed to the whole of the deceased's estate except that portion of it to which his widow was entitled. If, on the other hand, he