Friday, November 12.

FIRST DIVISION.

[Exchequer Cause.

WISHART AND OTHERS (GALLETLY'S EXECUTORS) *v.* THE LORD ADVOCATE.

Revenue—Inventory-Duty—Claim for Return—Public Company—Calls.

Held that calls in a liquidation paid by executors in respect of bank stock held by a party deceased were debts due and owing by the deceased, and that his executors, who had paid inventory-duty, *inter alia*, on the value of said stock as at a period anterior to the failure of the bank, were entitled to a return of so much of the inventory-duty so paid by them as corresponded to the amount of the executry estate paid by them in respect of calls due by the deceased.

Revenue—Inventory-Duty—Valuation of Assets in Inventory.

Held that the market value of bank stock at the date of giving up the inventory of a deceased party's estate is the value upon which inventory-duty falls to be paid, and that no drawback can afterwards be claimed in respect that the stock eventually turns out to be worthless.

This was an action at the instance of the executors of the late David Galletly for return of £400 of inventory-duty paid by them on his executry estate in terms of sec. 23 of 5 and 6 Vict. c. 79. The following narrative of the circumstances of the case is taken from the note to the Lord Ordinary's interlocutor:—"In the present case David Galletly died on 17th January 1878, leaving a trust-disposition and settlement in favour of certain persons, of whom the pursuers are the acceptors and survivors, as trustees, and to whom he conveyed his whole estate, heritable and moveable, in trust for the purposes therein specified, and, *inter alia*, for payment of all his just and lawful debts, deathbed and funeral expenses. The pursuer gave up an inventory of the personal estate, which was recorded in the Books of the Commissariot of the county of Edinburgh on 6th March 1878, the amount being given up at £29,444, 16s. 4d., and the inventory-duty corresponding thereto being £400, which was duly paid by the pursuers. The said sum of £29,444, 16s. 4d. included £2400 consolidated stock of the City of Glasgow Bank, as of the value of £5738 at the date of the oath to the inventory. On 8th March 1878 the agent of the trustees and executors, Mr John Galletly, who was himself one of their number, sent the confirmation with the certificates of the stock to the bank's manager in Edinburgh, and requested him to send new certificates in name of the executors, which request was complied with, and the names of the executors were entered as holders of said stock in the stock-ledger which the bank kept as its register of members. The bank suspended payment on 2d October 1878, and went into liquidation on 22d October, and is now in course of being wound up. The pursuers had not sold the stock before the bank failed, and the liquidators on 7th November following placed their names on the first part of the list of contributories as liable personally for calls. Various calls were from time to time made, the total amount being £66,000. Some time thereafter the First Division of the Court, on 19th July 1879, transferred the names of the pursuers (except John Galletly) from the first part of the list of contributories to the second part thereof, and directed their names to be entered on the second part as executors of the deceased David Galletly, liable as such to make his executry estate forthcoming in a due course of administration. It is admitted that almost the whole of the estate has been realised and paid over to the liquidators of the bank to account of the calls, the amount so paid or accounted for being £19,650, and the remainder of the estate, including any sum which may be recovered in the present action, will as soon as possible be paid over to the liquidators. In any view, it is certain that a large part of the £66,000 of calls will remain unpaid, and that the estate is therefore insolvent. In this state of matters the pursuers have raised the present action for return of the sum of £400 paid by them as inventory-duty. Their demand is based upon the Act 5 and 6 Vict. cap. 79, sec. 23, which provides, that 'When it shall be proved by oath and proper vouchers, to the satisfaction of the Commissioners of Stamps and Taxes, that an executor hath paid debts due and owing from the deceased, and payable by law out of his or her personal or moveable estate, to such an amount as being deducted from the amount or value of the estate and effects of the deceased, which shall be included in an inventory duly exhibited and recorded after the 31st day of August 1815 in a Commissary Court in Scotland, shall reduce the same to a sum which, if it had been the whole gross amount or value of such estate and effects, would have occasioned a less stamp-duty to be paid on such inventory than shall have been actually paid thereon, it shall be lawful for the said Commissioners, and they are hereby required, to return the difference, provided the same shall be claimed within three years after the date of recording such inventory as aforesaid.'"

The Lord Ordinary (CURRIEHILL) found—"That according to the sound construction of the Joint Stock Companies Act of 1862, sec. 75, the calls on the City of Glasgow Bank stock held by the deceased David Galletly were a debt accruing due from the said David Galletly from the time when he became a partner of the bank, and were payable by law out of his personal estate; and that the calls already paid or accounted for to the liquidators of said bank by the pursuers, as executors of the said deceased David Galletly, greatly exceeded the amount or value of the estate and effects of the deceased as realised by his executors, and that his estate was insolvent, and that the pursuers, as executors foresaid, were entitled to a return of the inventory-duty paid thereon, in whole or in part."

The Lord Advocate reclaimed, and argued—The debt in respect of which a return of inventory-duty is claimed must be owing by the deceased himself, but this debt does not accrue till it is ascertained—Companies Act 1862, secs. 74 and 76. Till a call is actually made there is only a liability to contribute—see *per* Lord Chelmsford *ex parte Grissell in re Overend, Gurney, & Co.*, 1866, L.R. 1 Ch. App. 528; *Lord Advocate* v. *Pringle*, 5 R. 912.

The respondents maintained—The case of a call being made after the death of the holder of the stock falls under sec. 76 of the Act, which implies its previous existence; and the same point was so decided in the previous case of *Wishart*, March 16, 1879, 6 R. 823. The call is only a means of enforcing payment—*Harding*, 1 E. and I. App. 27; *ex parte Carswell*, 33 L.J., Bankruptcy, 26, and 4 De G., J. and S. 539; see also 55 Geo. III. c. 184, sec. 40.

At advising—

Lord President—This is an action by the executors of the late David Galletly against the Lord Advocate for repayment of inventory-duty, under the provisions of the 23d section of the Act 5 and 6 Vict. c. 79. The testator died on the 8th of January 1878, and the inventory of his personal estate was given up by the executors on the 6th of March of that year. The amount of the estate so given up was £29,444, 16s. 4d., and the inventory-duty corresponding to that amount was £400, which was paid by the executors to the Inland Revenue. That sum of £29,444, 16s. 4d. included, among other items, consolidated stock of the City of Glasgow Bank, which belonged to the deceased—£2400 of that stock—and which in the inventory was valued, at the then selling price in the market, at £5738. In October 1878—that is, seven months afterwards—the City of Glasgow Bank stopped payment and went into liquidation, and in consequence calls were made by the liquidators upon the executors as holders of this stock, the amount of the calls being in all £66,000. The liquidators had placed the executors upon the first part of the list of contributories as partners in their own right and interest, but upon a petition being presented to the Court we ordained the liquidators to transfer their names from the first to the second part of the list of contributories, and to enter them as liable as executors to make the executry estate furthcoming in a due course of administration. The account between the executors and the liquidators has not yet been settled, but it appears that the liquidators have received £19,650 on account of those calls, and we are told that the executry estate has now been almost all realised, and as soon as this action is decided, and certain shares held by the deceased, which are at present unrealisable, can be disposed of, the remainder of the estate will be paid to the liquidators, but there will be a large part of the £66,000 of calls unpaid, the executry estate being insufficient to pay them.

Now, in these circumstances the executors demand repayment of the whole £400 of inventory-duty which they paid in March 1878. The Crown resist this demand *in toto*, and contend that the debt which has been paid by the executors was not a debt of the deceased David Galletly, but only a debt of his executry estate, and therefore they say the case is not within the Act 5 and 6 Vict. c. 79.

The 23d section of that statute provides—"When it shall be proved by oath and proper vouchers, to the satisfaction of the Commissioners of Stamps and Taxes, that an executor hath paid debts due and owing from the deceased, and payable by law out of his or her personal or moveable estate, to such an amount as being deducted from the amount or value of the estate and effects of the deceased, which shall be included in an inventory duly exhibited and recorded after the 31st day of August 1815 in a Commissary Court in Scotland, shall reduce the same to a sum which, if it had been the whole gross amount or value of such estate and effects, would have occasioned a less stamp-duty to be paid on such inventory than shall have been actually paid thereon, it shall be lawful for the said Commissioners, and they are hereby required, to return the difference, provided the same shall be claimed within three years after the date of recording such inventory as aforesaid." Now, it is contended that this is not a debt which was due and owing from the deceased within the meaning of this clause. It is said that the debt arose only when the bank went into liquidation and calls were made, and therefore it is a debt due only by the executry estate. I think this contention is hopeless after the case of *Wishart*, because it was there decided that a lady who possessed City of Glasgow Bank stock before her marriage, and was married before the liquidation of the bank, was indebted in the whole liabilities which came upon her in liquidation before her marriage; that that was, in the sense of a certain statute then in question, an antenuptial debt—that is to say, a debt contracted before marriage, although not enforced or enforcible till after the marriage. And so here I am of opinion, upon the same ground, that this was a debt which was due and owing from the deceased, although it was not enforced, and did not require to be enforced, till after his death.

But although that part of the case is, I think, abundantly clear, there is another question which raises greater doubt. The amount in the inventory is £29,444. The amount which has been actually paid is £19,650, and although there is still something more to be had from the executry estate, as we are given to understand, there appears to be no doubt that it will not amount to £29,444. Therefore, *prima facie* at least, the executors have not paid away the whole amount in the inventory in discharge of debts due and owing by the deceased, but have only paid away a certain portion of that. They have not been able to realise any more, and they have paid away certainly all that was realised. But there was one very important item in the inventory which has turned out entirely unproductive, and that was the £2400 of City of Glasgow Bank stock. But they contend that that has turned out to be of no value, and therefore it is not to be taken into account in this question—that it must in this question be just struck out of the inventory as an item that should not be there. The stock, they say, although apparently of the value of £5000 odds, was in reality of no value at all, and therefore the amount of the executry estate, instead of being taken at the sum contained in the inventory, must be taken at that sum *minus* this item of the inventory which has turned out to be valueless.

Now, I cannot say I am prepared to adopt that view of the case. It is a mistake to say that that City of Glasgow Bank stock was in March 1878 of no value at all. It was of the value set down in the inventory, for that was its selling price at the time, and if the executors had sold that stock in the month of March 1878 they would have got that money for it. And the question therefore comes to be, whether, under the clause of the

statute with which we are dealing, we must not take the actual amount of the valuation in the inventory as fixing distinctly what the amount of the executry estate was for the purposes of this question? I think we must do so, unless it could be shown that there was some mistaken valuation or estimate. There would be a remedy for that. If it could be shown, for example, that there was an item in the inventory which had no ascertained value, and the value or estimate of which was therefore conjectural—that it turned out to be stated at a high value, when in reality as at that date it was of a less value than as embraced in the inventory—then I think there might be a great deal to be said for the contention of the pursuers, and that case would probably fall within the operation of the statute which the Dean of Faculty referred to—I mean the 40th section of the 55 Geo. III. c. 184. But that is a very different case from the present. One can quite understand that many things must enter an inventory the value of which is quite unascertained and very uncertain. We had a remarkable example of that in the case of the *Lord Advocate* v. *Pringle*, in which an expectancy was set down in the inventory as of the value of £20, and it turned out to be many thousands. That was a case the other way. But of course there must fall to be cases of that kind in making up inventories. There are many assets of an estate the value of which at a particular date it is quite impossible to take with anything like accuracy or in any way but conjecturally, and these conjectural estimates are to be set right when the facts are ascertained. But this was not a conjectural estimate. This was an asset of the estate which had a present market value, and it would never do to say that because the executors had not realised that asset and got the present market value for it, but had chosen to hold it until, it might be, years afterwards, when it comes to be depreciated in value, that is to affect the amount of the executry estate as at the date of the inventory. I think that would be against the meaning and spirit of this Act of Parliament.

I therefore think that we must take the inventory as it stands, and the question comes to be, what amount of that £29,444 the executors have paid away in extinction *pro tanto* of the debts of the deceased? And the answer to that comes to be, not £29,444, but £19,650, *plus* so much more as may hereafter be realised and paid over to the liquidators.

It was said, no doubt, that this stock is to be handed over to the liquidators as an asset of the executry estate, or rather that there is to be an assignation by the executors to the liquidators of any value that may attach to this stock hereafter in respect of the surplus assets of the bank—any claim which the executry estate may have to surplus assets after the whole creditors have been paid—and that therefore this stock has really been paid away or handed over in payment to a certain extent of the deceased's debt. The question is, not what has been done with this presently worthless stock, but the question is, how much of the £5738, which was its value in March 1878, has been paid away in extinction of debt? and the answer must be—not one farthing. No part of that asset of the executry estate has been paid away in extinction of the deceased's debt.

The conclusion, therefore, to which I come is substantially that which has been arrived at by the Lord Ordinary—that while the pursuers are entitled to succeed in obtaining repayment of inventory-duty corresponding to the amount that they have actually paid away in extinction of the deceased's debt, they are not entitled to any more, and particularly they are not entitled *per aversionem* to claim the return of the whole inventory-duty paid upon a total of £29,444, because that is much in excess of what they have actually paid in extinction of debt. And yet the inventory-duty was quite accurately and correctly charged as at March 1878. The value of the estate was then £29,000, and consequently £400 was properly paid upon it, but the drawback must be, not the total amount of the lost executry estate, but the total amount of that portion of the estate which has been paid in extinction of the deceased's debts.

Lord Deas—I am very clearly of opinion that those calls were a debt due by the late Mr Galletly. That is clear, I think, both upon principle and in fact. That leads to this, that the executors are entitled to a return of the inventory-duty to the extent which has been stated by your Lordship. I am also of opinion, however, that they are not entitled to a return of the inventory-duty upon the amount which is stated in the inventory given up by them as the market value for the time being of that particular stock. We have no way of estimating it—no right to estimate it—except in the way in which it was estimated at the time, when it was quite rightly taken at the market value. I therefore entirely agree with your Lordship both as to this being a debt of the late Mr Galletly, and likewise as to the result to which that leads, upon the amount of the return to the executors.

Lord Shand—I am of the same opinion on both points. With regard to the large sum of £19,000 odds paid in respect of calls, it is to be observed that the payment made was in the ordinary course of executry administration by the executors. If the case had been one in which the executors had retained the stock over a period of years, and the result of their trading during those years had been that large liabilities had been incurred which were not liabilities existing when the testator died, I think a very different question would have been raised. It would then, I think, have been fairly represented that the calls were not in any true sense debts due and owing by the testator, but debts due and owing by the executors, which had been the result of their trading, and were properly their debts only. The bank failed within nine months after the testator's death. The calls were made in respect of trading that had occurred during his life. They were made upon shares which the executors were, we must presume, in the course of realising, and they were therefore not debts due and owing by the executors from any actings of their own, but due and owing by the deceased in respect of the stock left by him. I have therefore no doubt that the Lord Ordinary is right on that point.

On the second question, Whether the pursuers are entitled to receive back the inventory-duty paid upon the sum of £5738? there were two arguments urged. The first was

that this stock, having been valued at £5738, had really been handed over to the liquidators of the bank in payment of debts due and owing by the testator to the bank—I mean towards the extinction of the calls that had accrued upon the shares. Now, in regard to that question, if it had appeared that at the time when the liquidators stipulated that this stock should be handed over to them the stock had acquired a value in the market, and had been valued accordingly as between the executors and the liquidators at a certain sum, and given over as at that value in extinction of calls, I should have found it difficult to distinguish between that sum and the large sums in dispute between the parties; for I think it might then have been very properly represented that this stock, taken as of the value of whatever the sum fixed might be, had been given to the liquidators as a payment towards debt due and owing by the deceased at the time of his death, that debt being the calls which had accrued upon the shares. But the fact is not so. These shares were not, at the time when the liquidators demanded the surrender of this estate, treated as an asset of known value. The liquidators simply asked—Take them at what they may be worth; they must be thrown in with the rest of the estate;—and in that state of matters it must be kept in view that the possessors of those shares might have been liable for future calls for aught that anybody knew at the time this surrender was demanded. I do not think the facts of this case as presented to the Court raise what is necessary to entitle the party to a return of the duty, viz., that the assets were of value, and were valued accordingly, and to the extent of that value the claim should be allowed. Accordingly that argument fails. Another point maintained by the pursuers was, that at all events they are entitled to correct what was an erroneous value put upon those shares. They were valued at £5000 odds, whereas it appears by the result that they were worthless. I agree with your Lordships in thinking that in questions of this kind, between executors and the Revenue, what must be looked at is the market value of shares of this description. The case is not like one in which a body of private trustees have to wind up a testator's business which he has been carrying on alone—where they put a high value upon it, and in the course of realisation it is found there is no such value, because it is swept away. That, I think, would present a very different question, because there you would have a valuation of a speculative character tested by the result, and the result would show that it had no such value. But here, and in reference to a joint-stock company, you have another criterion—the market value. The executors could have parted with this stock at the value they put upon it in the inventory, and it appears to me that we cannot go back upon that market value to correct it by the result, in the same way as you could do in the case of such a private estate and private business as I have referred to. Accordingly, I agree with your Lordship in thinking that the Lord Ordinary is right in reference to this branch of the case also.

Lord President—Lord Mure concurs in this judgment.

The Court pronounced the following interlocutor:—

"Adhere to the first finding in the Lord Ordinary's interlocutor: *Quoad ultra* recal the said interlocutor: Find that the pursuers (respondents) are entitled to a return of so much of the inventory-duty paid by them in March 1878 as corresponds to the amount of executry funds which they have applied to payment of debt due by the deceased David Galletly, and decern: Find no expenses due to or by either of the parties since the date of the Lord Ordinary's interlocutor," &c.

Counsel for Pursuers—Dean of Faculty (Fraser, Q.C.)—Lorimer. Agents—J. & J. Galletly, S.S.C.

Counsel for Defender—Lord Advocate (M'Laren, Q.C.)—Solicitor-General (Balfour, Q.C.)—Rutherfurd. Agent—David Crole, Solicitor of Inland Revenue.

REGISTRATION APPEAL COURT.

(Before Lords Mure, Gifford, and Craighill.)

Monday, November 8.

[Sheriff of Midlothian.

ANDERSON *v.* NIVEN.

County Franchise — Heritable and Moveable — Trust Estate.

One of three surviving beneficiaries under a trust-disposition had right to seven fifteenth shares of an estate which consisted of heritable property to the annual value of £76, with a feu-duty of £5, and moveables to the value of about £1300—the trust-deed containing a power to the trustees to sell. He was in receipt of seven-fifteenths of the free annual income of the whole estate, heritable and moveable. *Held* that he was entitled to a vote in the county as "joint-proprietor" of the heritable subjects.

J. R. Anderson objected to Dr John Niven, who stood on the assessor's list for the county of Midlothian as "joint-proprietor, houses and shop, Currie," being entered on the roll of voters for said county, on the ground that he was not joint-proprietor of the heritable property in the sense required by the statute.

The facts were—That under the trust-disposition and settlement of James Abernethy, who died many years ago, Dr John Niven and his two sisters were the only surviving beneficiaries; that Dr Niven was also a trustee under the said deed; that the trust-estate consisted of both moveable and heritable estate; that the annual value of the heritable property in the county of Midlothian was £76; that the feu-duty was £5 a-year; that it was entered in the valuation-roll as belonging to the trustees of the late James Abernethy; that said trustees were infeft in the property; that the value of the moveable estate was about £1300; that under the trust-deed one-fifth of the whole estate was to be paid over to Dr John Niven, and that he was likewise to receive the income of other shares as they fell in; that he was now entitled to seven-fifteenths of the whole estate; that said one-fifth had never