principal trust moneys received by him, and applied to his own use, and to ascertain and state the balance due from the estate of the said James Anstruther to the settlement of 1828, and, if necessary, an account to be taken of all the estate of the said James Anstruther not comprised in or subject to the trusts of the settlement of 1828."

This may not be necessary. It is only to ascertain what free general personal estate of James Anstruther there now is, to answer what will be the demand against him under the provisions of the settlement of 1828, and with the receipts and payments of his trustees for or representatives in respect of such estate not subject as aforesaid, and to ascertain what estate of the said James Anstruther is applicable to the payment of the balance that may be found due from him to the settlement of 1828 as aforesaid.

There is, then, a point which I must submit to your Lordships' attention, and that is the question, How the enormous amount of the costs that have been incurred in this unfortunate litigation are to be met? Now, considering how the decisions in this case have varied, the wanderings of the parties themselves may in some degree be excused, and I should therefore humbly submit to your Lordships that the costs of all the parties should be paid out of the free estate of Mr Anstruther.

I am desirous that, if possible, we should dispose of this matter in such a way as not to leave any door ajar that may be pushed open in the Court below, so as to admit of further litigation in this matter; whether we can do that or not may be very problematical. I understand that your Lordships wish to reserve to yourselves the power of considering the exact form of your order. I am not at all sure that the words I have now read comprehend the whole of the matter, but in case any alteration therein should be desirable, perhaps your Lordships will approve of the form of account being given before the order is made to the counsel on either side, not to afford an opportunity at the bar, but that they may be at liberty to send in such amendments in the form of account as they may think desirable in this case.

With these declarations, findings, and directions, I would submit to your Lordships to remit the causes to the Court of Session.

LORD CHANCELLOR—My Lords, with reference to the last remark that my noble and learned friend has made regarding the expense of this litigation, I should go so far with him as to think that, ultimately, Mr Anstruther's property (he being really the cause of the mode in which these instruments were executed, and therefore the source of the vexation and intricacy that have subsequently occurred in solving the various questions which have arisen) might be charged with that expense, but one does not know how the course of events may turn out with reference to the proportion of property in the several estates, as between the three sisters. I apprehend that all costs should come equally, if they are obliged to have recourse to their own funds, out of that free fund which is left after the apportionment, but having recourse to the father's estate in the event of that estate being sufficient to answer them, in order to recoup the diminution of the fund. The father's estate, therefore, will pay the costs in the first instance, if sufficient to do so. If not, the costs will necessarily have to come out of the fund to be divided.

LORD WESTBURY—I have not the least objection to that.

LORD CHANCELLOR—Then the question will be that the interlocutors complained of, so far as they are inconsistent with the declaration afterwards to be contained in your Lordships' order, be reversed. We will postpone the exact form of the declaration, though I believe we agree in substance with the proposal of the noble and learned Lord; and as to the expenses, that they be borne in the manner prescribed in the form of order as it will be finally drawn up.

Agents for Mr and Mrs Smith Cuninghame, &c. —Hamilton, Kinnear, & Beatson, W.S.; Grahame & Wardlaw, Westminster.

Agents for Anstruther's Trustees—A. & A. Campbell, W.S.; Loch & Maclaurin, Westminster.

Thursday, May 2.

THE LORD ADVOCATE *v.* HAGART'S TRUSTEE.

(*Ante*, vol. viii., 280.)

Inventory-duty—Debt—Marriage Contract Provision,—5 and 6 *Vict., c.* 79, § 23.

Held (affirming the judgment of the Second Division), that a sum of £10,000, which the deceased was taken bound to pay under his antenuptial marriage-contract, and a relative deed, was a debt "due and owing from the deceased," in terms of section 23 of 5 and 6 Vict., c. 79,' and that his executors were entitled to repayment of inventory-duty in respect thereof.

Inventory-duty—Heritable Security—23 *Vict., c.* 15, § 6, *and* 23 *and* 24 *Vict., c.* 80.

Held (reversing the judgment of the Second Division and adhering to that of the Lord Ordinary) that sums heritably secured, though they may be included in the same inventory with personal estate, for the purpose of computing the gross inventory-duty payable by executors, must be excluded from any computation whereby the amount reclaimable in respect of debts of the deceased is to be ascertained.

This was an appeal from a judgment of the Second Division, at the instance of the Crown. In that action the pursuers, Hagart's executors, claimed repayment from the Commissioners of Stamps and Taxes of the sum of £300 of inventory-duty in respect of certain debts or alleged debts of the deceased, in virtue of 5 and 6 Vict., c. 79, § 23.

The facts connected with Mr Hagart's succession were as follows:—The total amount of personal estate in the United Kingdom and money secured on heritage in Scotland was returned in the inventory as £78,243. In this sum was included, by virtue of 23 and 24 Vict., c. 80, four heritable debts due to the deceased, amounting respectively to £9000, £7922, £3500, and £1500. The duty paid by the executors, as on a sum between £70,000 and £80,000, was £1050.

Of personal debts due by the deceased £4999 was admitted by the Inland Revenue Office. But besides this, Mr Hagart was bound, under his antenuptial marriage-contract and a subsequent deed, to pay a sum of £10,000 to his son—(for the terms of the marriage-contract see previous report). The executors contended (1) that they were entitled to treat this sum of £10,000, payable to Mr Hagart's son, as a debt due by the deceased, so as to make, with the debt admitted, £14,999, in respect of which

they were entitled to claim repayment of inventory-duty. And (2) that in computing the amount of deduction to be repayed, they were entitled to treat the two sums of £9000 and £7922, mentioned above as heritably secured, as if they were moveable debts. The ground which they finally took up on this point was, that by 23 Vict., c. 15, § 6, these debts were made moveable, and directed to be included in the inventory, and that 23 and 24 Vict., c. 80, entitled them to treat these debts as moveable, in computing the sum from which debts of the deceased were to be deducted. Both these contentions were disputed by the Crown.

Admitting, for the sake of explanation, that the £10,000 due under Mr Hagart's marriage-contract was a debt, and that, therefore, the total debts were £14,999, the result, if the pursuers' contention was sustained, would have been as follows:—The total contained in the inventory was £78,243; deduct the two sums of £3500 and £1500, and there remains £73,243—the duty upon which would be £1050. From £73,243 deduct £14,999, the amount of debt, and there remains £58,244—the duty on which is £750. The difference between the duties, which is the sum to be repayed, would be, therefore, £300.

But taking the view of the Crown; from £78,243 there would fall to be deducted £9000, £7922, £3500, and £1500, or in all £21,922, leaving £56,321—the duty on which is £750. From £56,321 take the amount of debt, £14,999, and there remains £41,322—the duty on which would be £600. The difference between these duties, being the amount recoverable, is only £150.

The Lord Ordinary gave effect to the pursuers' contention, that the sum of £10,000, payable under the marriage-contract, was a debt due by the deceased; but rejected the other contention of the executors—the result being to give the executors repayment of only £150. On reclaiming note, the Second Division altered the interlocutor of the Lord Ordinary, and gave effect to both contentions of the pursuers, giving decree for the full claim of £300.

The Lord Advocate appealed.

The LORD ADVOCATE and Mr SELLAR for the Crown.

Sir ROUNDEL PALMER, Q.C., and Mr J. T. ANDERSON, Q.C., for the Respondents.

At advising—

LORD WESTBURY—My Lords, this case has been argued on the part of the Crown with great ingenuity and great subtlety, but I think your Lordships will agree with me that there is no substance whatever in the case contended for. The first thing to be determined with a view to the solution of the case really is the question, What in the eye of the law constitutes a debt? I believe that we have invariably been in the habit of considering that a debt is an obligation arising from contract,—and if you like, though that may not be always needful, a contract for consideration.

Now, what is the obligation that we have here to consider, and upon which, in the first place, we must put the denomination and the legal quality of debt. In a marriage-settlement made antecedent to the marriage, the intended husband contracts and binds himself to make a certain provision for the wife, and then that a sum of money, equivalent to the capital for raising the annuity given to the wife, shall be destined to the children of the marriage. The considerations for the obligations in that marriage-settlement are first the marriage itself, and then the provisions which are made by the friends of the intended wife. There can be no doubt, therefore, that for that engagement made by the husband there was good and valuable consideration in law. Well, now, the engagement by the husband is to find, raise, and provide this sum of £10,000. The difficulty which has occurred to the Crown upon the matter is, that inasmuch as the £10,000, or the obligation itself, if you regard that as matter of property, is subject in law to the peculiar description of ownership, namely, that during the life of the husband he has the powers of spending or of selling, and pledging or alienating, the property which would be required to answer the obligation, in any mode that he may think proper, provided that he does it for onerous cause.

Then it is said on the part of the Crown that, according to the view of Scotch law, the money is raised, and that the contract for the purpose of raising it is regarded as a subject of property, with respect to the ownership of which the husband, that is the contracting party in the eye of the law, is fiar, and the parties who are to have the benefit of the contract after his death have during his life no more than a *spes successionis*, and then, fastening upon the children a denomination of *hæredes* or heirs, the counsel for the Crown desire to carry out the idea of heirship throughout the whole of the existence of the contract, and even up to the time of its fulfilment, and to bind the rights of the children by the notions involved in that word *hæredes*, so as to give to their title the quality of succession or descent, and not the quality of a claim by contract.

This is an ingenious subtlety, because it is perfectly clear that, even if you regard the father as having a right of alienation,—that is, a right of discharging his own contract by alienation for value, or a right of disposing of the property when raised in his lifetime by virtue of that contract by alienation for value—if you regard him as a person having these rights, you are in the present case required to consider what is the character of the ownership at the time when the contract came to be fulfilled at the death of the father, and then the right to the fulfilment is not an heritable right by virtue of a succession (that is a title given by law), but it is right by the act and pact of the parties. It is a title given by virtue of the contract contained in the marriage settlement, which then has to be fulfiled. The *hæres* represents a right or title given by law, the creditor represents a right or title given by contract, and here are persons who at the death of the father claim, not by virtue of inheritance—for a title by inheritance would be quite inapplicable,—but they claim by virtue of the distinct contract of the father contained in the marriage settlements. There can be no doubt, therefore, that they claim by a title which gives them a right wholly independent of any law of inheritance or law of distribution, and that right can be none but the right which is founded upon the engagement contained in the marriage settlement. They are therefore entitled by a contract for value to receive a certain sum of money. These facts contain within them all the elements that are necessary to constitute that which in law we denominate debt.

That being so, we come to the fact that this sum of money being, by the process I have gone through, that which in law is to be regarded as and entitled a debt, has been paid out of the estate. Then the executor comes and says, in the language of the

statute, I have paid a debt out of the estate, let me have a return of the duty. When we come to look at the language of the statute, we find that that language gives the right to a return, in the event of debts paid by the executor out of the moveable estate that were due and owing by the deceased. I think the proper interpretation of that language is, that the return is given in respect of a debt of the deceased paid by the executor, which was due and owing at the time of the payment.

Then I fall back upon the analysis of the case, and of the rules of law applicable to it, and we have only to ask, Was this £10,000, in respect of which the children were entitled at the death of the father to have it raised and paid out of the estate—Was that a debt due and owing at the time when the executors paid it? The answer to that is clear. Without fatiguing your Lordships by going through the whole of the authorities—whether you look to the passage from Erskine, whether you look to the judgment pronounced by Lord Fullerton, or whether you look to the other decisions, particularly the case of *Wilson's Trustees*, which have been gone through again and again—there can be no possibility of doubt that all the Judges have concurred in the expression, that the children at the death of the father are not to be regarded as heirs, and entitled by legal rules of succession, but are to be regarded as persons claiming by contract, —therefore creditors of the deceased.

For these reasons, my Lords, without repeating what has been said, and very well said, on both sides, or fatiguing your Lordships by reading again the decisions which have been referred to, I think there can be no possibility of doubt that this £10,000 constituted a debt in the proper sense of the word, and was attended with all the qualities and characteristics which, in the eye of the law, are required to constitute a debt, and therefore, having been paid out of the personal estate, was a proper subject of a deduction from the duty under the statute.

Well, but then comes that peculiar circumstance about which the parties, I think, puzzled themselves, and puzzled their advocates, and, I must confess, for a long period of time, I think I may even say, puzzled your Lordships, and I am even now puzzled to find out how such a point could ever have entered into the imagination, and how it ever came to pass that this curious and obscure thing was dealt with in the manner in which it has been dealt with. If we were successful in at all diving into the depths of the thought of the learned counsel at the Bar, and pulling up from those depths what they intended to say, it appears to be this—it was said that the statute giving the right of deduction out of moveable and personal estate having been passed before the statute which made heritable securities moveable estate for purposes of duty, was attended with this result, that if you deducted the £10,000 out of the pure personal estate, refusing to include therein the money due on the heritable security, you would thereby reduce the sum that was liable to duty to a sum of money that would bear only in respect of the £10,000 a duty of £150. And then it was contended (though why I have not the least notion), that having by that operation reduced the pure personalty down to a sum of money amounting, I think, to £56,000 or thereabouts, the £56,000 alone become the subject to be assessed with duty, and the money due on the real securities (the heritable securities) was to be laid aside altogether, and never brought into computation for the assessment of duty. My Lords, that could not for a moment be sustained. It is perfectly clear that after you have reduced the pure personalty to the sum mentioned, then, for the purpose of duty, you must add to that amount the money due upon the heritable securities. It appears, however, that by reason of some mistake in the pleadings, or some misapprehension of the figures, the Court below gave the party entitled as pursuers a reduction of £300, whereas they ought not to have given them a reduction of more than £150, and the Crown therefore, by the accident of that blunder, succeeds in recovering a sum of £150.

The result therefore is, that the Crown, though failing altogether upon that which was the principal object of the appeal, does go away £150 richer than before. Under these circumstances, your Lordships have some difficulty how to deal with the costs of the appeal. If the Crown thinks it worth while to say that there must be some moderation of the costs, I submit to your Lordships that it will be right to give to the respondents a moiety only of the costs of the appeal. If the Crown assents to that, we will limit the costs, on the dismissal of the appeal of the Crown, to one-half only of the costs of the respondents. The order, then, that I shall suggest to your Lordships, will be to dismiss the appeal on the part of the Crown, and to direct the Crown to pay one-half the costs of the respondents.

Lord Cairns—Does the Crown desire that?

Lord Advocate—I should desire to place the matter entirely in the hands of the House with respect to the costs. I should not like to ask any costs which the House thought ought not to be asked. Substantially the judgment of the Lord Ordinary, except with respect to the costs, is the right judgment.

Lord Colonsay—My Lords, with respect to the merits of the case itself, I have not the least doubt that this must, under the statute, be regarded as a debt. I think that is very clear; and as there does not arise before us any question between this class of debt and other classes of onerous debts competing, as might happen in the case of a bankrupt's estate, we are relieved from the difficulty of deciding what might be a large question. With reference to the claim of the Crown arising under these statutes, I have no doubt at all that this is a debt, and that the Crown is not to be regarded in the position of a creditor, such as other creditors might be who have obtained documents of debt from the parties, or other onerous creditors, but that it has a right under the statutes, and only under the statutes, and that under those statutes this is a debt which ought to be deducted.

Lord Cairns—My Lords, I quite concur in the opinions which have been expressed by my noble and learned friends, and I do not propose to add anything on the merits of the case. On the subject of costs, I think your Lordships understand from the Lord Advocate that the Crown brought this matter before your Lordships for the purpose of having the question of principle decided. It is a question which obviously would arise in many cases; and if that were not so, the Crown would hardly have brought a case involving only £150 for consideration before your Lordships. Under these circumstances,—the Lord Advocate saying very properly that he puts the question of costs

into your Lordships' hands,—I venture to think that it would be more satisfactory that the appeal should be dismissed in the usual way, with costs, without making any distinction in consequence of the minor—I might almost say accidental—part of the case, which seems to have arisen more from an error in calculation than anything else.

LORD ADVOCATE—I merely wish to say, with reference to the carrying out of your Lordships' judgment, that the interlocutor of the Lord Ordinary, except only upon the matter of costs, is the correct judgment; and I apprehend that the judgment of the House would be to affirm the interlocutor of the Lord Ordinary.

LORD CAIRNS—I think your Lordships probably would not alter the interlocutor of the Lord Ordinary as to costs. It was very proper, in the case before him, to divide the costs as he has done.

LORD ADVOCATE—An affirmance of the interlocutor of the Lord Ordinary would be the form the judgment of this House would take, disposing of the costs otherwise as your Lordships may think fit.

LORD WESTBURY—In reality we shall be altering the interlocutor of the Court below to the extent of £150. I propose therefore to put the question to your Lordships in this form—to declare that the respondents are entitled to a return of £150 of surplus duty paid by them; reverse as much of the interlocutor of the Court below as is inconsistent with that finding; and direct that the costs of the respondents in the present appeal be paid to them by the appellant.

Agent for Appellant—Solicitor of Inland Revenue.

Agents for Respondents—H. G. & S. Dickson, W.S., and Loch & Maclaurin, Westminster.

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* LANDS VALUATION APPEAL COURT.

1870, 1871.

(Before Lords Ormidale and Mure.)

No. 71.—(BANFF.)

2d July 1870.

BANFF LUNACY BOARD.

Lunatic Asylum (Statutory)—Proprietor—Tenant Occupier (Board)—Public National Purpose —Beneficial Interest—Liability to Taxation.

The Banffshire District Lunatic Asylum having been erected under the compulsory statutory provisions, and being supported by the parishes from assessments or rates, and not being liable in any tax, it was contended that the asylum ought not to be inserted in the roll, on the principle that property not liable for any tax ought not to be so inserted. The assessor maintained that all lands and heritages should be in the roll, and it was not his province to determine whether such were liable to public taxes or not.

"Banffshire Lunacy Board, p. W. Coutts, solicitor, Banff," was entered in the columns of proprietor, tenant, occupier.

The Commissioners ordered entries to be expunged from roll.

Held that the Commissioners were wrong.

No. 72.—(LANARK.)

24th December 1870.

UNIVERSITY AND COLLEGE OF GLASGOW.

University and College of Glasgow—Exemption from Public and Local Taxation—Object of Act Basis for Public Assessments.

The University and College of Glasgow buildings, principal's and professors' houses, are entered on the roll. By royal charters, grants, and Acts of Parliament, the University, as a corporation, is exempted from all public and local taxation. The appellants maintained that the object of the Lands Valuation Act was to form a basis for taxation, and therefore subjects not liable to taxation should not be entered.

The Assessor maintained that the statute required the valuation roll to contain all lands and heritages, and § 41 specially provided that nothing in the Act should exempt from or render liable to assessment. That the question of exemption from rates should be raised before the different assessing bodies.

The Commissioners sustained the entry.

Held that the Commissioners were right; *vide* 8 Scot. Law Rep. 284.

No. 73.—(PERTH.)

28th January 1871.

MESSRS GRAHAM BROTHERS.

Shipbuilding Yard—Saw-Mill and Wood-yard—(Lease 21 years of ground, but not of Erections thereon)—Rent of Ground—Value of Erections —If Rent fair annual value?

The city of Perth let ground for a shipbuilding yard, and saw-mill and wood-yard, many years ago, to the appellants' predecessors. These predecessors erected saw-mills, sheds, and engines on the premises. In 1860 the current lease was resigned, and city of Perth granted a new lease of ground to the appellants for 21 years, at a rent of £63. The appellants acquired right to the erections from their predecessors, who had right by their lease to dispose of them to successors or remove them. The erections did not belong to the city, and the rent did not include them. The appellants were entered in the roll as proprietors and occupiers of erections, of the value of £70; against which they appealed, on the ground that they should not be included in the roll. They did not appeal against the entry of the rent of £63 payable to the city of Perth.

It was maintained by the Assessor that this rent did not include the erections which were on the ground when the renewed lease was granted, and that the rent was not the fair annual value of whole subjects.

The Commissioners sustained the entry.

Held that the Commissioners were right; *vide* 8 Scot. Law Rep. 332.

No. 74.—(PERTH.)

28th January 1871.

WALLACE & FENTON.

Shipbuilding Yard—(Lease ten years of Ground, but not of Erections thereon)—Rent of Ground—Value of Erections—If Rent fair annual Value?

* NOTE.—In consequence of representations made to us from various quarters of the extreme difficulty that exists in laying hands upon the Reports of Valuation Appeal Cases, we have printed the Index to the Cases decided since the beginning of the year 1870, prepared by Mr Croal, Solicitor of Inland Revenue, for the use of his office, and kindly furnished to us by him.