by law or be made by the act of the parties, passes only what the husband is lawfully entitled to part with. And if the husband is not, as I grant he would not be, lawfully entitled to alien the contingent alimentary trust that might possibly arise under the fourth provision in the marriage contract on the death of the wife in the lifetime of the husband, then, certainly, it does not pass under the words in the disposition, which are limited entirely to this, "my whole claims, rights, and interests." That would not be a personal, private, and individual right of the husband. It is not, therefore, a right within the terms of the deed. In that respect, therefore, there is nothing whatever to reduce. The deed is a good deed, and rightly construed, according to the law, it would not touch that which it is said the maker of the deed had no right to dispose of.

There are two other interests given to the husband by the settlement, one of which is a life interest on the death of his spouse leaving him surviving. The counsel for the appellant, Mr. Anderson, who of course knew, as he always does, both the strength of the case and its weakness, felt that his only course, in order to rescue this life interest, was to make out that it was somehow charged with an alimentary character in favour of the children, and accordingly he attempted to establish that. But that is a mere imagination. It is not charged with any such thing. It is very true that the husband might possibly be personally liable to maintain the children even when adult, in case of their falling into a state of indigence and necessity. But there is no charge of that kind fastened upon the life estate, and the life estate cannot be brought within the declaration against alienation, for it is a principle of Scotch law as well as of English law, that you cannot retain an interest to yourself in your own estate and make it inalienable. The same observation must apply also to the contingent fee which is given to the husband in the event of the children failing and of his surviving his wife. That also cannot be made inalienable. And therefore the liferent, if he survives his wife, and the fee, if the children fail and he survives his wife, are two things that fall within the legitimate scope and operation of the *dispositio omnium bonorum*, and do not therefore subject that deed to any impeachment, so as to justify its being reduced or set aside.

This appeal is an instance of great pertinacity in litigation which we must regret very much. Under all the circumstances we must dismiss the appeal, and I am happy to be relieved from the obligation of dismissing it with costs.

Interlocutors affirmed, and appeal dismissed.

Appellant's Agents, John Shand, W.S.; Simson and Wakeford, Westminster.

MAY 2, 1872.

LORD ADVOCATE, *Appellant*, *v.* MAJOR GENERAL CHARLES HAGART, C.B., and Others, *Respondents.*

Succession—Inventory duty—Return of duty in respect of debts—Provision to children by marriage contract—*H. by antenuptial marriage contract bound himself to secure a sum for his children, but not having implemented his obligation, he by his trust disposition directed his trustees to pay one of his sons £10,000 in full of his share, and this was paid accordingly.*

HELD (affirming judgment), *That the £10,000 was a debt due by H., and ought to be deducted from inventory duty, pursuant to 5 and 6 Vict. c. 79, § 23.*

HELD FURTHER, *That the whole of the debts due to deceased, and heritably secured, should be added to the gross amount of the personal estate in order to ascertain the duty payable.*[1]

The executors of the late Thomas Campbell Hagart sought to recover from the Inland Revenue repayment of stamp duty in respect of payment of debts of the deceased.

By antenuptial marriage contract the late T. C. Hagart had bound himself to pay certain provisions to his children, and by his trust disposition he directed his trustees to pay to his second son, James M'Caul Hagart, a sum of £10,000. The trustees paid this sum.

The trustees, in making up the total amount of personal estate and money secured on heritable estate of the late T. C. Hagart, included two sums of £9000 and £7922, which were heritably secured.

The trustees contended, that they were entitled to deduct £150 in respect of the first sum of

---

[1] See previous reports 9 Macph. 358 : 43 Sc. Jur. 195. S. C. L. R. 2 Sc. Ap. 217; 10 Macph. H. L. 62; 44 Sc. Jur. 381.

£10,000, being a debt of deceased, and to deduct another £150 in respect of the two items secondly mentioned being counted as part of the personal estate.

The Lord Ordinary was in favour of the pursuers on the first point only, but the Second Division was in favour of the pursuers on both points.

The Lord Advocate appealed.

The Lord Advocate (Young), and *Sellar*, for the appellant.—1. The £10,000 was not a debt due by the deceased; it was merely a legacy, and nothing more, or rather it comes to the son by way of succession. Children have no claim against a father which will entitle them to rank along with creditors either at his death or in the event of his bankruptcy. The father has still the absolute right to spend all his means and get rid of the obligation, the only restriction upon him being, that he cannot by a gratuitous deed defeat the claim of the children—Ersk. iii. 8, 39; Stair, iii. 5, 19; 1 Bell's Com. 640; Bell's Pr. § 1985; *Goddard* v. *Stewart*, 6 D. 1018; *Wilson's Trustees* v. *Pagan*, 18 D. 1096. It has long been settled, that children are creditors among heirs but only heirs among creditors—*Per* Lord Corehouse in *Browning* v. *Hamilton*, 15 S. 999. Hence the practice has been for the Inland Revenue not to allow deductions in respect of payment of children's provisions, because these are not debts of the parent, but legacies. There is nothing contrary to this view in *Lord Advocate* v. *Trotter*, 10 D. 56; or *Cuninghame* v. *Cuninghame*, 20th December 1810, F.C.; *E. Wemyss* v. *Wemyss' Trustees*, 28th February 1815, F.C.; 6 Paton, 390. 2. As to the second point, the respondents were not entitled to treat part of the funds heritably secured as personal estate and leave out other parts of such funds, and if so, the result would be, that the second £150 will not be properly deducted.

Sir R. Palmer Q.C., and *J. T. Anderson*, for the respondents.—1. The Court was right in treating a provision paid to a child by virtue of an antenuptial marriage contract to be a debt and not a succession. Such a deed partakes of the character of a contract as between child and parent—*Torry Anderson* v. *Buchan*, 15 S. 1073; *Pringle* v. *Anderson*, 6 Macph. 982; *Hope* v. *Hope*, 8 Macph. 699. The child has always been treated as a creditor in questions with the parent—Ersk. iii. 8, 38; M. 12,929; M. 12,967; *Wemyss* v. *Wemyss*, 28th February 1815, F.C.; *Dundas* v. *Dundas*, 1 D. 731; *Lord Advocate* v. *Trotter*, 10 D. 56; *Maxwell* v. *Inland Revenue*, 4 Macph. 1121; *M'Leod* v. *Leslie*, 6 Macph. 445. 2. The two debts of £9000 and £7922 ought so to be treated, that the result arrived at was right, viz. a duty due of £750 only. 23 Vict. 15, S. 6; 23 and 24 Vict. 80, §§ 1, 15.

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 a 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 the 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 consideration 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 this peculiar description of ownership, viz. that during the life of the husband he has the power of spending or of selling, 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 having 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 notion 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 a heritable right by virtue of a succession, that is, a title given by law, but it is a 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 fulfilled. The *hæres* represents a right or title given by law; the creditors represent 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 settlement. 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 entituled 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 Erksine, whether you look to the judgment pronounced by Lord Fullarton, 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 a contract, and if claiming by a contract, therefore creditors of the deceased.

For these reasons, 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 supposed, 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 whole, a duty of £750. And thus 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 became 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. 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 the richer than before. Under these circumstances, your Lordships have had 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 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 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 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, 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 principal questions 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 the 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 interlocutors 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.

Reversal in part, and in part affirmance, with declaration and direction as to payment of respondents' costs of appeal by appellant.

Appellant's Agent, W. H. Melvill.—*Respondents' Agents*, H. G. and S. Dickson, W.S.; Loch and Maclaurin, Westminster.

JULY 19, 1872.

COUSTON, THOMSON, and CO., *Appellants*, *v.* THOMAS CHAPMAN, *Respondent.*

Sale—Auction—Rejection of some lots as disconform to sample—*At an auction of wines, C. bought from B. several lots, one of the conditions being payment on or before delivery. C. did not pay on delivery, but removed his lots some days after the sale, and made no objection at that time, but five weeks later objected that some of the wines were disconform to lot. C. made no offer to return the lots till after action for the price, and the wines still remained in C.'s custody.*