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

was still alive, the petitioners had no interest in the estate.

Answers were lodged for Messrs Robert Young and William French, in whose favour the deceased's son had, before leaving this country, executed a formal deed of factory and commission. They, and also the widow, opposed the appointment of a judicial factor, on the ground that there was a legal presumption that the deceased's son was still alive, and that, as he had made provision for the management of his property in his absence, there was no ground for the intervention of the Court.

After discussion, the Lord Ordinary pronounced the following interlocutor, which was acquiesced in by the petitioners:—

"*Edinburgh, 12th December* 1873.—The Lord Ordinary having considered the cause, refuses the prayer of the petition, and decerns: Finds the respondents entitled to expenses: Allows an account thereof to be given in, and remits the same when lodged to the auditor to tax and to report.

"*Note.*—The late James Steel died intestate on 30th January last. His only child, James Steel junior, went to sea in 1850, about the age of 17 or 18, and before leaving this country executed a factory and commission in favour of the respondents, Mr Young and Mr French, giving them ample powers to manage his affairs in his absence, and power in particular to make up titles to any property, heritable or moveable, to which he might succeed during his absence. The last communication received from him was a letter dated in July 1857, addressed to his mother, in which he spoke of deserting the whaling ship in which he was engaged, having a great distaste for the employment, and from the letter, No. 15 of process, it appears that he did desert the ship in March of that year. Mr Young and Mr French, as factors and commissioners for James Steel junior, propose to enter on the administration of the estate of his father, but the petitioners—a brother and three nephews, and a niece of the deceased—have applied, by the present petition, to have the estate put under judicial management.

"Although upwards of 16 years have elapsed since any communication was received from James Steel junior, the legal presumption is that he is still in life. This being so, the respondents are entitled, by virtue of the factory and commission which they hold, to make up titles in his person to the estate, heritable and moveable, which belonged to his father, and it appears to the Lord Ordinary that more distant relations of the deceased, who can succeed to him only if it shall be shown that his son is dead, are not entitled in the existing circumstances, and in the face of the legal presumption that he is in life, to have the management taken out of the hands of those whom he has appointed his commissioners. These parties will take up the estate for 'preservation and administration only, and it is not said that there is anything in their peculiar circumstances or position which renders it advisable or expedient that the management of the deceased's estates should not be in their hands. It appears to the Lord Ordinary that, if there had not been any factory and commission in existence, a factor *loco absentis* to James Steel junior would have been the appointment which should be made in the circumstances, and that the estate of the deceased should, in that view, have been administered by such an officer until at least the legal presumption of James Steel junior being still in life was in some way removed.

"At the close of the discussion the Lord Ordinary was disposed to think he might sist proceedings in this application for a time, in order that it might be seen whether the respondents, Mr Young and Mr French, would succeed in making up a title to the estate and enter on its administration, but having formed the opinion that they are entitled to do so, he has come to the conclusion that they are also entitled to have this application refused."

Counsel for Petitioners—Mr Jameson. Agent—D. J. Macbrair, S.S.C.

Counsel for Respondents—Mr Burnet. Agents—Campbell & Smith, S.S.C.

Tuesday, January 6.

SECOND DIVISION.

STEWART'S TRUSTEES, &c., *v.* ROBERTSON AND HEPBURN.

Property—Pertinents—Loch—Riparian Proprietor.

Circumstances in which *held* that the pursuers had failed to establish an exclusive right of property in a loch by reference to their titles, or by exclusive possession for upwards of forty years.

This was an action at the instance of Mrs Williamina Wilson Robertson or Stewart, widow of the late Stewart Robertson Stewart, Esquire of Derculich, and William Shaw Soutar, writer in Blairgowrie, sole accepting and surviving trustees of Stewart Robertson Stewart, and Alexander Robertson Stewart of Derculich, son of Stewart Robertson Stewart, against James Stewart Robertson, Esquire of Edradynate, and Mrs Helen Stewart Hepburn of Clunie and Blackhill, all in the parish of Logierait and county of Perth.

The pursuers sought to have it found that they "have under their titles the sole and exclusive right to the loch of Derculich, including the *solum*, and to the fishings thereof, together with the sole and exclusive right and privilege of using boats, nets, rods, and fishing in the said loch, and generally of exercising all rights of property in connection therewith, and that the defenders have no right of property or servitude, or other right whatever, in the said loch or fishings, and no privilege of using boats, or fishing in the said loch in any manner of way: and further, that they and their predecessors and authors have for time immemorial, or for forty years, been in the exclusive enjoyment and possession, under their titles, of the said loch of Derculich and the fishings thereof, including all the privileges connected therewith." The summons further sought interdict against the defenders placing or using boats upon the loch, and entering or trespassing upon the same, or passing on to or over the *solum* thereof, and fishing in the loch either from the banks or from boats. Finally, the pursuers sought to have the defenders ordained forthwith to remove from the loch a boat placed thereon by them, or by their authority or permission.