shipment; on the contrary, it appears to me that according to their evidence the captain might fairly and honestly have taken the casks as sufficient for the voyage. Blackhall in particular, speaking of the casks as they came out, says—"I saw that the hoops got very slack. I do not think they were ever tight. I mean that the hoops when put on had not been drawn tight. (Q) Was the original construction of the casks bad in your opinion?—(A) I would not say it for the construction; it was, I think, the way the casks had been coopered when the oil was put into them. (Q) If from any cause the casks had been expanding and contracting, would that have produced the result in regard to the hoops? (A) Yes." And again he is asked—"Must not the casks have been in a different condition then?"—that is, at shipment—"(A) They would be full, and the casks would be tight. (Q) And had they got slack on the voyage? (A) Yes." At the close of his evidence he says that if the casks had been properly coopered they would have been sufficient. The same evidence is given by the succeeding witness. He is asked, Were the casks of too thin material, and answers—"They were casks that had not got a proper overhauling before they were put on board." The result seems to me to be this, that with their special knowledge these witnesses cannot say that to an ordinary unskilled observer the casks were not sufficient at shipment; that they believe heat during the voyage would cause expansion, and if expansion occurred leakage would be the necessary result. And it rather appears to me that the true reading of the evidence as a whole is, that the casks, no doubt thin (as a number of the witnesses say), were yet in a fair condition as regards cooperage when they were shipped, but that the thinness of them, along with the heat during the voyage, aggravated by a quantity of locust beans having been loaded by the shipper on the top, all combined to cause them to leak on the voyage. Now, was the captain to know all that? Was he in accepting these casks as in good order and condition to be held as acting negligently or as making a wilful mis-statement in his bill of lading for which he shall be responsible as a misrepresentation? A captain carrying a cargo of this kind does not profess to have such knowledge as men of skill must possess in dealing with such cargoes, and to be aware of the importance of not putting the oil in thin casks or to know the risk of expansion during the voyage? Taking it that he had, or must be held to have had, all the knowledge that a captain of ordinary judgment and experience would have, it appears to me, looking at the evidence as a whole, and having regard to the statements made to him by the shipper, that he was fairly entitled to give the receipt he did for this cargo, and to represent it as in good order and condition, and that there is no such misrepresentation on the face of the bill of lading as can make either him or his constituents responsible for a claim of this kind. The person naturally responsible for such a claim, founded on the shipment of unsuitable and defective casks, and to whom the buyer of such a cargo should look, is the person who sold and shipped it. I quite admit that the shipowner may incur responsibility. Although he is merely earning a freight, he may incur responsibility to the full value of a cargo, but in a question like the present I think such responsibility should not be imposed upon him unless the case comes up to distinct negligence on his part in the statement which he has made in his bill of lading, or to a wilful mis-statement as to the condition of the cargo. And so upon the two separate grounds I have stated I am of opinion that the defenders should be assoilzied.

The Court pronounced the following interlocutor:—

"The Lords having considered the reclaiming note for Craig & Rose against Lord Craighill's interlocutor . . . in the conjoined actions—the first at the instance of Alexander M'Gonnell against them, and the second at their instance against James Delargy and others, owners of the ship 'Ann' of Liverpool, and also against the said Alexander M'Gonnell, master of said ship—Recal said interlocutor, and in said first action decern against the defenders Craig & Rose conform to the conclusions of the libel; in the second action, at the instance of Craig & Rose, sustain the third and fourth pleas-in-law stated for the defenders: Assoilzie them from the conclusions of the action, and decern: Find Craig & Rose liable in expenses in the conjoined actions, subject to modification," &c.

Counsel for Pursuers (Reclaimers)—Trayner—Balfour—Jameson. Agents—Boyd, Macdonald, & Co., S.S.C.

Counsel for Defenders (Respondents)—Asher—Thorburn. Agents—Foster & Clark, S.S.C.

Tuesday, July 15.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

M'ADAM *v.* M'ADAM AND HIS CURATOR AD LITEM.

Entail—Bond of Annuity—Apparent Heir—Conveyancing Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 9—*Validity of Bond of Annuity by Heir of Entail who had not made up Titles.*

The Conveyancing Act of 1874, sec. 9, provided that "A personal right to every estate in land descendible to heirs shall, without service or other procedure, vest or be held to have vested in the heir entitled to succeed thereto by his survivance of the person to whom he is entitled to succeed, whether such person shall have died before or after the commencement of this Act, provided the heir shall be alive at the date of the commencement of this Act, if such person shall have died before that date; and such personal right shall, subject to the provisions of this Act, be of the like nature and be attended with the like consequence, and be transmissible in the same manner, as a personal right to land under an unfeudalised conveyance, according to the existing law and practice." *Held* that under this enact-

ment an heir of entail in possession who had made up no titles was *in titulo* to grant bonds of annuity and of provision in terms of the Aberdeen Act, binding on the succeeding heir, who had completed his title by serving as heir of possession to the last heir of entail infeft.

The late James Kennedy M'Adam succeeded to the entailed estate of Craigengillan on the 25th April 1878, but died on the 9th May following without having completed a title. In the interval between his succession and his death upon 27th April he executed two deeds—one a bond of annuity in favour of his wife, and the other a bond of provision in favour of his only daughter—both in terms of the Aberdeen Act. The question was, whether these deeds were effectual to bind the succeeding heir of entail. There were two actions—one at the instance of the granter's widow, and the other at the instance of his daughter, and the defender in both was the succeeding heir of entail, the granter's only son, who had not made up a title to his father, but had served as heir of possession to the last heir of entail infeft. A curator *ad litem* was appointed to him, and was called as defender with him.

The 9th section of the Conveyancing (Scotland) Act 1874 was as follows:—"A personal right to every estate in land descendible to heirs shall, without service or other procedure, vest or be held to have vested in the heir entitled to succeed thereto by his survivance of the person to whom he is entitled to succeed, whether such person shall have died before or after the commencement of this Act, provided the heir shall be alive at the date of the commencement of this Act, if such person shall have died before that date; and such personal right shall, subject to the provisions of this Act, be of the like nature and be attended with the like consequence, and be transmissible in the same manner, as a personal right to land under an unfeudalised conveyance, according to the existing law and practice."

Pleaded for Mrs M'Adam—"(1) Under the Conveyancing (Scotland) Act 1874 (sec. 9) the said deceased James Kennedy M'Adam, by his survivance of the said Honourable Mrs Jean M'Adam Cathcart, had a personal right in the said entailed lands and estates vested in him as heir of entail, and had a good and undoubted right and title to exercise the powers conferred on heirs of entail by the Statute 5 Geo. IV. cap. 87, and to grant the bond of annuity libelled. (2) As heir of entail in possession of the entailed estate in virtue of the deeds above mentioned, the said James Kennedy M'Adam was entitled to grant the bond in question though not infeft. (3) In respect of the bond of annuity libelled, and of the said Act 5 Geo. IV. cap. 87, the pursuer is entitled to decree against the defender as heir of entail succeeding to the said entailed estates, in terms of the conclusions of the summons."

Pleaded for the defender—"(1) The said James Kennedy M'Adam not having made up any title to the said entailed estate of Craigengillan and others, was not *in titulo* to grant the bond of annuity founded on by the pursuer. (2) The bond of annuity libelled on not having been granted by an heir of entail in possession of the said entailed estate, in terms of the Act 5 George IV. chapter 87, is ineffectual to constitute any obligation against the defender, the heir of entail in possession of the said entailed estate. (3) In any view, the amount of the annuity claimed by the pursuer will fall to be restricted in terms of the Act 5 George IV. cap. 87.

The pleas in the other action were similar.

The Lord Ordinary (RUTHERFURD CLARK) found for the pursuers in both actions, and added this note to his interlocutor in the action at the instance of Mrs M'Adam—

"*Note.*—. . . . The question turns on the effect of the 9th section of the Conveyancing Act of 1874. The defender maintained that that section does not apply to entailed estates. But in the opinion of the Lord Ordinary the argument is without foundation. The section is expressed in the most absolute terms, and does not admit of any exception.

"Again, the defender maintained that in order to the validity of the bonds the granter must be infeft. But the bonds are mere personal obligations undertaken by the granter for himself and his successors in the entailed estate, though in the case of the widow it is intended that she should have a security by infeftment. Of course the granter, not being infeft, could not grant any warrant for infeftment. But the true question is, whether he had power to bind his successors in the entail? It may be that the fact that he made up no title deprived him of the power to do so; but the want of infeftment is not necessarily fatal to the bonds.

"This has been well illustrated in the cases of *Glencairn* and *Kennedy*. There the heir in possession, without having made up any title, gave in the one case a liferent locality to his wife, and in the other granted provisions in favour of his younger children—(M. Heir-Apparent, App. 1, and 7 Sh. 397). Both heirs had possessed on apparency for more than three years, and it was held that the provisions were effectual against their successors in the entail by virtue of the Act 1695. The ground of the judgment is to be gathered from the principle laid down in each of them, viz., that 'an heir of entail in so far as he is not restricted by the prohibitions is an unlimited fiar,' and 'that in the case of every heir of entail who has a power to burden, the estate is unentailed to that extent.' It is true that in both of these cases the provisions were granted in virtue of powers contained in the entail. But in the opinion of the Lord Ordinary the decision must have been the same if they had been granted under the Aberdeen Act; for that Act relaxes the fetters of entail, or introduces into it a power to make provisions, and in so far as the heir is acting within his powers, in whatever way they have been created, he is acting as proprietor of the estate, and as an unlimited proprietor.

"Of course the Act of 1695 has no application to the present case, and but for the change introduced by the Statute of 1874 the Lord Ordinary would have been of opinion that the bonds in question would not have been binding on the defender. The reason is that he would not have taken any estate which belonged to his father. But under the Act of 1874 a personal fee of the entailed estate was vested in his father, and he has taken up the estate in which that personal fee existed. It is true that he has expede no service to his father so as to take up that personal fee in that way. But that personal fee which was in

his father was an interest in land within the meaning of the Act, and passed to him by virtue of the Act. To avoid representation he must renounce the succession. But by making up titles to the estate, and taking possession of it, he has also taken up his father's succession, and has, it is thought, made himself liable for all deeds which his father could competently grant in relation to the entailed estate. He could not take that estate and at the same time renounce the succession."

The defender reclaimed, and argued—The 9th section of the Act of 1874 did not apply to an heir of entail. There could be no such thing as an unfeudalised conveyance of an entailed estate. Then in order to grant these provisions the granter must be infeft—at all events in the case of the widow's bonds of annuity, as she was to have a security by infeftment.

Authority—*Bell* v. *Gartshore*, July 15, 1737, Ross Lead. Ca. ii. 410.

Argued for the respondent—The 9th section did apply. The effect of the clause was to put the heir into the position of an heir under a deed of propulsion uninfeft. There was nothing in the Aberdeen Act requiring that the granter of the bonds should be infeft. Substituting for the Act of 1695 the Act of 1874, and for the provisions of the deed of entail the provisions of the Aberdeen Act, the present cases were precisely similar to those of *Glencairn* and *Kennedy*.

Authorities—*Glencairn* v. *Graham*, May 23, 1800, M. "Heir-Apparent," App. I.; *Kennedy* v. *Kennedy*, February 11, 1829, 7 S. 397.

At advising—

Lord President—In this case Mr Kennedy M'Adam succeeded to the entailed estate of Craigengillan on the 25th April 1878, and died on the 9th May thereafter, so that he survived his succession barely a fortnight, but in the interval he executed the two deeds which are the subject of discussion in this action. One is a bond of provision in favour of his widow, giving her a liferent interest in terms of the Aberdeen Act, and the other is a provision in favour of his daughter under the same statute. His successor in the entail is his eldest son Alexander Frederick M'Adam, who is defender in this action, and maintains his defence on the ground that those deeds are not effectual to bind succeeding heirs of entail. Now, Mr Kennedy M'Adam undoubtedly made up no title to the estate, and did not even begin to make up a title by serving heir to his predecessor, and therefore these bonds would clearly not have been effectual but for the enactment upon which the whole of this discussion depends—I mean the 9th section of the Conveyancing Act of 1874. That section provides—[*His Lordship here read the section quoted supra*].

It is needless to trace the progress of legislation on this subject, because this last enactment has really the effect of making it impossible for any heir to possess an estate on apparency. There is now no such thing known in the law of real property in this country. On the 25th April 1878, the moment the breath went out of the body of the preceding heir of entail, James Kennedy M'Adam became owner of the estate, and had as complete a right in it as any right to land can be without feudal investiture. He was in the same position as if he had obtained a disposition upon which he might have been infeft, but was not. Now, what is the position of the owner of an estate who possesses upon a personal title? He can sell the estate; his creditors can attach it, and that either during his lifetime or after his death. Of course that does not apply to an entailed estate, but section 10 of the Conveyancing Act of 1874 is a perfectly general enactment, and I cannot read it as restricted to estates held in fee-simple. Its words are, "every estate in land descendible to heirs," and there are no estates which are descendible to heirs in a more emphatic manner than entailed estates. The heir of entail therefore is in the same position as if he held a disposition to the estate. That is a perfectly intelligible position in the law of entail—if in no other form, at all events in the case of a deed of propulsion. He is then in the position of a disponee to an entailed estate, of course subject to the fetters, and in so far as the fetters bind him, he cannot contract obligations which will be effectual either against the estate or the heirs. But so far as he is not fettered he is free, and free to the extent to which the fetters are relaxed either by the powers contained in the deed or by statute. In the present case the heir was free to the extent of the provisions of the Aberdeen Act. He was free therefore to execute bonds in terms of that statute, and these must be effectual to bind the succeeding heirs if not in violation of the entail, which in the present case *ex concessu* they are not. It appears to me, therefore, that these obligations are perfectly good. They were undertaken by one who was at the time owner of the estate, not infeft indeed, but under a perfectly good personal title.

The cases which were cited, of *Glencairn* and *Kennedy*, seem to me to have a very important bearing upon this question, because in them the provisions were held to be effectual because of the Act 1695. Without that statute they would not have been effectual, because the heir possessed on apparency only, and had none of the rights of an owner. But the statute said that his obligations should be effectual if he possessed for three years, in this sense that no heir could pass them by without fulfilling them. That Act is, as I said before, superseded by the stronger Act of 1874, which says, not that the heir apparent shall have his deeds given effect to, but that he shall no longer be heir-apparent but absolute proprietor on a personal right. In the case of *Glencairn* the deeds of the heir were made good by the Act of 1695—no doubt a different process, but still *via statuti*. In this view the whole difficulty of the case seems to me to vanish.

Lord Deas, Lord Mure, and Lord Shand concurred.

The Court adhered.

Counsel for Reclaimers (Defenders)—Kinnear—Blair. Agents—Hunter, Blair, & Cowan, W.S.

Counsel for Respondents (Pursuers)—Lee—Muirhead. Agent—John Latta, S.S.C.