general creditors of a company dealing in the ordinary course of business would have no security at all either against the shareholders or the property of the company in cases where the shares had been fully paid up and the assets of the company fully charged with debentures; and for my part I do not think that would be desirable.

Some argument was offered as to whether a case of fraud had been made out against the holders of certain of the debentures, but upon that I think it is unnecessary to say anything, because it is plain that the heritable property, which is of small value, has been admittedly secured by the registration of the conveyance in the register of sasines in the usual way, and the value of that property will be fully exhausted by debentures open to no such objection. The general trade creditors have thus no interest now to raise any question of that kind.

On the whole, I am of opinion that the general creditors are entitled to the securities claimed by the debenture-holders, other than the small heritable property which was conveyed to them and secured to them by the registration of the conveyance in the public register of sasines.

The following interlocutor was pronounced:—

"The Lords having considered the cause and heard counsel for the parties on the reclaiming-note for the reclaimers, the claimants George Wilson Clark and others (debenture-holders of the West Calder Oil Company), against the interlocutor of Lord M'Laren of 3d February last, Recal the said interlocutor: Find that the disposition dated 8th December 1875 and 21st January 1876 having been duly recorded in the register of sasines before the commencement of the liquidation, constitutes a valid security in favour of the debenture-holders over the heritable subjects thereby conveyed: Find that the assignation dated 8th December 1875 not having been followed by possession, either of the subjects contained in the leases thereby assigned, or the moveables thereby assigned, created no valid or effectual preferential security in favour of the debenture-holders in competition with the other creditors of the company in liquidation: Find that there are no relevant averments to support the 2d and 3d pleas-in-law for George Bennie & Co. and others, and the 3d plea-in-law for David Fraser Wishart: Repel the said pleas: Remit to the Lord Ordinary to proceed further in the cause as shall be just."

Counsel for Reclaimers — Solicitor-General Asher, Q.C.—Jameson. Agents—J. & J. Ross, W.S.

Counsel for Liquidators of City of Glasgow Bank — D.-F. Macdonald, Q.C. — Lorimer. Agents—Davidson & Syme, W.S.

Counsel for George Bennie & Co. (Trade Creditors)—Gloag — Mitchell. Agents — Hagart & Burn Murdoch, W.S.

Counsel for Liquidators of West Calder Oil Co. —Mackintosh—Rankine. Agent—W. S. Harris, L.A.

Friday, June 30.

SECOND DIVISION.

(Before Lord Justice-Clerk Moncreiff, Lords Craighill and Rutherfurd-Clark.)

SPECIAL CASE—FLEMING'S TRUSTEES AND FLEMING'S TUTORS.

Apparent Heir—Statute 1695, *c.* 24—*Delivered Deed—Onerosity.*

An *inter vivos* deed granted by an heir possessing on apparency, delivered and acted upon for twenty years, is a "debt or deed" in the meaning of the Statute 1695, c. 24, and will bind a succeeding heir who passes over the apparent heir and serves to a remoter ancestor.

Opinions that a deed granted by the eldest son of a family, who was his father's heir, but had made up no title, on the narrative of a desire to carry out his father's known intentions, conveying certain heritable subjects to trustees for his mother in liferent and himself and the rest of the family equally in fee, was an onerous deed, and therefore fell under the scope of the statute.

Thomas Fleming, Alexander Fleming, and James Fleming were infeft in certain shares of heritable property in Edinburgh. By a deed dated 1st October 1829 Thomas renounced all right to his share in favour of his brothers, equally between them. James predeceased Alexander, who was his heir, and took his shares of the subjects in question. In 1862 Alexander died, and his son Thomas Cleghorn Fleming was served heir in general to him. Upon his father's death, in the course of the same year, Thomas Cleghorn Fleming conveyed to trustees the whole heritable property belonging to his father, to be held by them for his mother in liferent and himself and his brothers and sisters in fee. This deed proceeded on the following narrative:—"Considering that the said Alexander Fleming died possessed of certain heritable properties which he intended to dispone to his widow in liferent, and to his children equally amongst them in fee, but having died without carrying his said intention into effect by executing any deed for that purpose, I, as his eldest son and heir-at-law, am entitled to take up said estates; and being desirous to carry out the intentions of my deceased father, I have resolved to execute these presents in manner underwritten: Therefore," &c. It also contained this clause:—"I bind and oblige myself to procure myself infeft or invest in said subjects, in terms of the Titles to Land (Scotland) Act, and thereupon to infeft or invest my said trustees and their foresaids therein; but in trust always, and for the ends, uses, and purposes after specified, viz.—First, That my trustees shall pay the expense of procuring me served and decerned heir as aforesaid to my deceased father and uncle, and vesting me in the estates above conveyed."

At the date of the deed the truster had three brothers and two sisters, who were with the exception of the youngest brother all grown up. The father left no moveable estate, but in addition to the heritable properties in question in the pre-

sent action he left two other parcels, to which the truster had completed his title, and conveyed by the same trust-deed for the same purposes.

The deed was delivered, and the trustees immediately after the execution of the deed entered into possession of the whole subjects therein conveyed, and in terms of the second purpose of the trust gave the truster's mother, Mrs Joan Gourlay or Fleming, the free rents and income of the said several subjects, or allowed her to uplift the same and apply them for her own benefit till her death, which occurred on 24th June 1878. She was survived by the five brothers and sisters of the truster.

Thomas Cleghorn Fleming, the truster, died in 1872, leaving a son, Thomas Fleming, who was at the date of this action in pupillarity, and was represented by his tutors, appointed by his father.

The trustees under Thomas Cleghorn Fleming's deed, and the tutors of Thomas Fleming, submitted this Special Case to the Court to have it determined which party had right to the subjects in dispute. The trustees (the first parties) maintained that the said Thomas Cleghorn Fleming, heir-apparent of Alexander and James Fleming, was, within the meaning of the Act 1695, cap. 24, by himself or others, in possession of the subjects referred to for the space of three years and upwards, and that his trust-disposition was, within the meaning of the said Act, a deed for which the heir-at-law of the said Alexander and James Fleming, passing over the said Thomas Cleghorn Fleming, was liable.

On the other hand, the parties of the second part, as tutors to the said Thomas Fleming, maintained that the trust-disposition of the said Thomas Cleghorn Fleming was an entirely gratuitous deed, which there was no obligation on him to grant, and was therefore not a deed within the meaning of the Act 1695, cap. 24, for which the heir-at-law is liable.

The parties submitted the following questions:—"(1) Are the parties hereto of the first part entitled to the following *pro indiviso* shares of the subjects '*Quarto*' and '*Lastly*' described in the trust-disposition of the said Thomas Cleghorn Fleming, viz., the share which pertained to the said Alexander Fleming, the share which pertained to the said James Fleming, and the part of the share which pertained to the said James Fleming as in right of his brother the said Thomas Fleming? or (2) Is the pupil the said Thomas Fleming entitled to the said shares of said subjects?"

The first parties relied upon the fact of delivery, and quoted in support of their contention that the deed was included in the Act 1695, c. 24, the cases of *Taylor* v. *Hutton*, 16 D. 885; and *Glen* v. *Lyon*, Dec. 15, 1881, 19 Scot. Law 201, 9 R. 317.

The second parties quoted *Adamson*, Nov. 16, 1832, 11 S. 40; *Corbett* v. *Porterfield*, June 20, 1839, 1 D. 1038; *Russell*, Dec. 7, 1852, 15 D. 192; *Orr*, Feb. 10, 1871, 9 Macph. 500; and maintained that neither the cause of granting nor the relationship of the parties were such that the Court could hold the deed to be onerous. To do so would be to go further than any of the authorities warranted. The fact of delivery could not be sufficient to make onerous a deed otherwise gratuitous.

At advising—

The Lord Justice-Clerk, *after stating the facts, read the following opinion*:—The general principles of law which regulate the operation of the Statute 1695, c. 24, were the subject of a very recent case in this Division, that of *Glen* v. *Lyon*, and were very fully commented on and explained by the Court. The facts disclosed by the present Special Case are so far less favourable for the application of that statute that the long lapse of time which was held in *Glen's* case to aid the presumption of onerosity does not occur here. But the case presents another and more important specialty, which in my opinion removes from it all difficulty.

There can be no doubt that in the present case the truster was three years in possession, seeing that he survived the execution of the disposition for ten years, and that it is conclusively settled that the possession of anyone deriving right from the apparent heir is possession by the apparent heir in the sense of the statute. The question of possession in *Glen's* case was one of some nicety; but here it seems to be free from doubt.

In so far as the onerosity of this deed depends on the cause of granting, the question depends on the same principles by which I thought the former case of *Glen* might be decided. In *Glen's* case the inducing cause was the desire to give effect to a brother's testamentary intentions in favour of his widow. Here it was the desire to carry out the intentions of the father in favour of the granter's mother and his brothers and sisters. In that respect the present case is the more favourable of the two; and if, as I thought in the former advising, the ratification of the brother's unexecuted settlement was a rational, a reasonable deed, and protected by the statute, I think the tie of natural affection, and of moral solicitude for a mother, and for brothers and sisters, is stronger. What the law requires on this head, in order to infer the rational character of the conveyance, is the inducement, not of legal obligation, but of a reasonable sense of moral duty. From statements made from the bar we have learned that the moveable estate left by the father was inconsiderable, and that if the deed in question had not been executed, the widow and the younger children would substantially have had no share of the succession. The case of *Adamson*, in which the deed was granted in favour of a niece, for love, favour, and affection, and also for services, was scarcely so strong, as in addition to the reservation of a power to revoke it is impossible not to agree with the remark of Lord Cockburn in the case of *Porterfield*, that the services were little more than a pretence.

I do not, however, think it necessary to dwell longer on these analogies, because I think the present case is out of the category of the class in which these principles were applied. The authorities in question—not only those I have referred to, but the train of decisions on which they proceeded—related chiefly to cases in which there was no present debt prestable during the lifetime of the granter. In some of them there was delivery, but I do not find that in any of them, except in the case of *Glen*, a debt was constituted immediately enforceable by ordinary legal remedies by the creditor. They were for the most part cases of *mortis causa* provisions, in which as no debt existed which could be recovered from the heir-apparent during his possession, it

was necessary to raise them up to the character of debts by some element of onerosity in the cause of granting.

In the case of *Glen*, however, we were, I think, of opinion that the ratification granted by the apparent heir was an obligation under which he could have been compelled at any time to communicate to the widow all the powers which he had to give effect to the substance of the right ratified, and so became at once a debtor to that effect. This is a much clearer instance of the same kind. The conveyance here was not only delivered, but became immediately operative. It contains an obligation on the part of the granter to make up his titles when required, and against such a demand he would have had no defence. It would have been no answer on his part to allege that he was not legally bound to undertake such an obligation; it was enough that for reasons he thought sufficient he had undertaken it. He was a debtor for implement, and the grantees were his creditors, and in case of his refusal the latter could have done ultimate diligence against him. It was a debt as well as a deed of the heir-apparent, and very clearly, as I think, within the statute.

I would refer in conclusion to two authorities which seem to have some bearing on the last view which I have mentioned. I do not find that the case of a deed purely gratuitous, but becoming operative during the lifetime of the heir-apparent, has ever occurred for decision. In the case of *Graham* v. *The Countess of Glencairn*, M. Heir-Apparent, App. 1, which related to a liferent locality granted to a widow by an heir of entail possessing on apparency, it was pleaded that the Statute 1695, c. 24, made no provision in regard to the onerosity of the deeds to which it applied. The Court applied the statute, and the report bears that it was observed on the Bench—"The Act 1695, c. 24, transmits the obligation of the interjected heir against his successor, in the same manner as if his titles had been completed. It protects his onerous and rational debts and deeds; and there is no occasion at present to consider its effect as to those which are gratuitous, because a widow's provision is clearly onerous." The case was affirmed on appeal, and in Paton's Appeals, vol. v., will be found Lord President Campbell's note in the case, which is worth consulting. Thirty years afterwards, in the case of *Kennedy*, 7 S. 400, Lord Glenlee said—"As to the other matter, I own, from what I recollect of the case of *Graham*, I considered that the effect of an heir passing by his ancestor who had possessed on apparency was to subject the heir passing by in the same sort of debts which, if the heir-apparent had been entered, would have been effectual against the succeeding heir."

If this definition be sound, it is conclusive of such a case as the present.

The Lords answered the first question in the affirmative, and the second in the negative.

Counsel for First Parties—Begg. Agent—W. & J. Burness, W.S.

Counsel for Second Parties—Gillespie. Agent—G. M. Thomson, W.S.

Saturday, July 1.

FIRST DIVISION.

[Lord Lee, Ordinary.

MACKIRDYS *v.* KEITH AND ANOTHER.

Foreign—Jurisdiction—Executor—Confirmation—Domiciled Foreigner—Executor on Scots Estate.

A Scotswoman was decerned executrix-nominate on a Scots estate; thereafter she married an Englishman, and went to reside with her husband in England. Being sued to account as executrix in the Court of Session, she alleged that the estate had been divided, and pleaded that the Scots Courts had no jurisdiction. *Held* that if she was still administering the estate the Court of Session had jurisdiction.

Opinions that even if the administration had been completed, an action of accounting was properly brought in the Courts of Scotland.

This was an action raised by Granville de Montmorency Mackirdy and Henry Whitehead Mackirdy against Mrs Mary Wright Vale or Keith, "wife of the Rev. Charles M'Gee Keith, Puscombe Vicarage, Twyford, Berkshire, as executrix-nominate of the deceased Mrs Agnes Wright or Howie, sometime residing at Seamill, in the parish of West Kilbride, widow," and also against Miss Margaret Vale, residing in Brighton. The conclusions of the summons as laid against the former defender were to have her as executrix decerned to account and reckon with the pursuers for her intromissions with Mrs Howie's estate, and for payment to them of a balance said to be due them on such accounting, or failing an accounting, for payment of £1900. In the event of its being found that payment of part of the estate had been made to the other defender Miss Vale, the pursuers sought to have her decerned to repay such part of the estate either to them or to Mrs Keith as executrix, that it might be accounted for in this action.

From the averments of the pursuers and the admissions of the defenders it appeared that Mrs Howie died on 17th January 1878 at Largs Castle, Ayrshire. She left a settlement dated in July 1877, by which she nominated as her executrix the defender Mrs Keith, and directed that the residue of her estate should be divided between her and the other defender Miss Maggie Vale. At that time Mrs Keith was still unmarried, and domiciled and resident in Scotland. She was duly confirmed executrix-nominate to Mrs Howie. The pursuers' averment on this head was as follows:—"(Cond. 6) On Mrs Howie's death the defender Mrs Keith entered into possession of her whole estate, and gave up an inventory of her personal estate, which is recorded in the Commissary Court Books of Ayrshire on 16th March 1878. She also expede confirmation as executrix-nominate of Mrs Howie, conform to testament-testamentar by the Sheriff of Ayr in her favour, dated 30th March 1878, and she is now in course of administering the estate."

The defenders denied that Mrs Keith was administering the estate at the time the action was brought, and averred in their statement of facts "that the whole estate has, with the con-