Saturday, July 18.

FIRST DIVISION.

(BILL CHAMBER.)

[Lord Guthrie, Ordinary.

FENTON LIVINGSTONE *v.* CRICHTON'S TRUSTEES.

Succession—Right in Security—Diligence—Bond and Disposition in Security—Transmissibility of Personal Obligation—Heir having Personal Right to Land—"Taking Estate by Succession"—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *secs.* 9 *and* 47.

The personal obligation contained in a bond and disposition in security is not, by virtue of sections 9 and 47 of the Conveyancing (Scotland) Act 1874, transmitted to the heir-at-law of the debtor on his mere survivance of his ancestor so as to render him liable to direct personal diligence for the debt.

The Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), enacts—Section 9—"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, . . . and such personal right shall, subject to the provisions of this Act, be of the like nature, and be attended with the like consequences, and be transmissible in the same manner, as a personal right to land under an unfeudalised conveyance according to the existing law and practice."

Section 47—"Subject to the limitation hereinbefore provided as to the liability of an heir for the debts of his ancestor, an heritable security for money duly constituted upon an estate in land shall, together with any personal obligation to pay principal, interest, and penalty, contained in the deed or instrument whereby the security is constituted, transmit against any person taking such estate by succession, . . . and shall be a burden upon his title in the same manner as it was upon that of his ancestor or author, without the necessity of a bond of corroboration or other deed or procedure; and the personal obligation may be enforced against such person by summary diligence or otherwise, in the same manner as against the original debtor. . . . ."

On 22nd May 1908, T. F. Fenton Livingstone, midshipman, H.M.S. "Bedford," a minor, and J. J. M'Murdo, solicitor, Airdrie, his *curator bonis*, brought a note of suspension against William Gibson, W.S., Edinburgh, and others, as trustees of (1) the late Hew Crichton, W.S., Edinburgh, and (2) the late Miss Margaret Crichton, 13 Nelson Street, Edinburgh, craving suspension of a charge at the respondents' instance to pay to them as trustees foresaid two several sums of £1200 with interest. The complainer was the eldest son of the late G. F. Fenton Livingstone of Easter Moffat, near Airdrie, who died intestate on 16th August 1907, and at whose death there were three bonds over the said property, the third of which, to the extent of £2400, was held by the respondents. The complainer had not made up any title to the said estate, which was held in liferent by Mrs Fenton Livingstone, the mother of the said G. F. Fenton Livingstone, and was burdened with debt to the extent of £18,000, ranking prior to the respondents' bond. The respondents having charged the complainer to pay off the said sum of £2400, the complainer brought the present suspension.

The complainer pleaded, *inter alia*—"(3) The complainer, the said Thomas Frederick Fenton Livingstone, not having taken up said estate by succession, any personal obligation prestable against his father cannot be enforced against him by said charges, and they ought accordingly to be suspended."

The respondents pleaded, *inter alia*—"(2) The complainer, Thomas F. F. Livingstone, having succeeded to the security subjects, and the respondents' securities having transmitted against him, under and in terms of the Conveyancing (Scotland) Act 1874, the complainers are liable to the diligence complained of, and suspension of said charges should be refused."

On 12th June 1908 the Lord Ordinary (GUTHRIE) refused the note.

Opinion.—"The complainer's late father granted a bond for £3400 over his estate of Easter Moffat. To the extent of £2400 that bond is held by the respondents. The complainer is the eldest son and heir of his late father. He has not made up any title to his father's estate. He has been charged by the respondents to pay the £2400 in the bond granted by his late father.

"The question of the complainer's liability turns on the construction of section 47 of the Conveyancing Act of 1874. If he has taken his father's estate by succession in the sense of that section then he is liable; but if, before the section can apply, an heir must make up a title to the estate, then he is not liable, for he has made up no title.

"Contrary to my first impression, I think the section applies. The expression 'taking such estate by succession' is capable of being read either actively as equivalent to 'taking up the succession by making up a title thereto,' or passively as equivalent to 'becoming entitled to the succession.' I prefer the latter reading. It seems to me that the scheme of the Act is, under section 9, to confer on an heir the benefit of a transmissible personal title to his ancestor's estate without making up a title, and, under section 47, to impose on the heir the corresponding burden of liability for the debts of his ancestor even although he has not made up a title. The reference in Schedule K to a person in the position of the complainer as 'the present proprietor' does not imply that a title has been made up. He has become proprietor by virtue of section 9 of the Act. See *M'Adam*, 6 R. 1256."

The complainer reclaimed, and argued—The complainer had not "taken the estate by succession" in the sense of section 47 of the Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94). Taking the estate meant doing something active or overt, *e.g.*, intromitting with the rents or making up a title—in short, doing something which would show an intention to accept the succession. Mere survivance of the ancestor was not taking the succession, for otherwise an heir would lose the benefit of the six months allowed him for deliberation whether to enter or not. It would be contrary both to principle and to statute that liability to diligence should result from mere survivance. The creditor was not without his remedy, for he could go against the estate. The complainer was not a "proprietor" in the sense of Schedule K of the Act, for proprietor there meant feudal proprietor, and the complainer had not made up any title to the estate. That being so, he had not "taken the estate by succession," and the personal obligation in the bond had not transmitted against him —*Lamb* v. *Field*, October 30, 1889, 27 S.L.R. 242. The respondents' argument founded on section 47 of the Act of 1874 was inconsistent with the terms of section 9 and section 13, for section 9 conferred only a personal right to the estate, not the estate itself, and under section 13 the right of challenging the heir's succession ran from the date of "infeftment," not from that of "survivance." In any event, the complainer was not liable except in so far as *lucratus*—*Welch's Executors* v. *Edinburgh Life Assurance Co.*, May 29, 1896, 23 R. 772, 33 S.L.R. 585. The complainer was not bound, as the respondents contended, to renounce the succession. The question of renunciation was not *hujus loci*, for renunciation was an answer to a process of adjudication—an entirely different process from the present. The complainer's answer to this process was twofold, either he had not accepted the succession, or, if he had, he was not *lucratus* thereby, and suspension should therefore be granted.

Argued for respondents—The Lord Ordinary was right. The complainer was the proprietor of this estate, and was therefore liable for the debts secured upon it. The object of the Act of 1874 was to prevent an estate being *jacens* between the death of the last proprietor and the completion of title by his heir. It therefore gave the heir a right to the land immediately on the ancestor's death. He became owner of a personal right to land, and was in the same position as if he held a conveyance to the estate—*M'Adam* v. *M'Adam*, July 15, 1879, 6 R. 1256, *per* Lord President Inglis at p. 1258, 16 S.L.R. 761. If an heir did not wish to accept the succession he was bound to renounce it at once. The complainer had recorded no minute of renunciation, and must be assumed therefore to have taken the succession. The word proprietor as used in Schedule K included an heir who had only a personal right, for he was the owner of an "estate in land," and "estate in land" included "any interest in land" (sec. 3). The case of *Lamb* relied on by the reclaimers was an Outer House decision and not binding; and, moreover, the case of *M'Adam* (*cit. sup.*) did not appear to have been cited there. As to the practice under the old law, where an heir might enter with the benefit of inventory, reference was made to Ersk. Inst. iii, 8, 68; Bell's Com. i, 706; and Parker on Adjudication, pp. 72-74.

At advising—

LORD KINNEAR—This is a note of suspension by Mr Thomas Fenton Livingstone, midshipman, a minor, and his *curator bonis*, of a charge to make payment to the respondents of two several sums of £1200 with interest. The ground of charge is that the complainer is the eldest son and heir-at-law of the late George Frederick Fenton Livingstone, who was proprietor of the estate of Easter Moffat, that the respondents are in right of a bond and disposition in security for £2400 granted over the estate by the father, and that the son as heir-at-law is by force of the Conveyancing Act of 1874 liable in the personal obligation undertaken by the father so as to be subject to direct personal diligence for payment. The position of the estate is not perhaps material to the question, but I infer from statements on the record that the chargers whose bond is postponed to two prior bonds for larger sums do not expect to recover the full amount of their security from the estate, and therefore they desire to fix a personal liability on the complainer. The latter, however, has made up no title to the estate, has not entered into possession, or taken any advantage from it whatsoever; and the only ground on which he is said to be liable is that he stands in the relation of heir-at-law to the actual debtor. He is in fact the eldest son as well as the heir-at-law, but the ground on which his liability is alleged would obviously be equally applicable to any other heir of the investiture, however distant his blood relationship to the deceased might be and however ignorant he might be of the succession. It is enough, according to the respondents' argument, to make any person liable by mere survivance for the debts of a deceased landowner if they are secured over the land that the one should stand in the legal relation of heir-at-law to the other, or as the Lord Ordinary puts it in his opinion, that he "becomes entitled" to the succession whether he does anything to appropriate the succession or derive any benefit from it or not. I must confess I should have had no difficulty in rejecting that proposition without hesitation were it not for my respect for the judgment of the Lord Ordinary, which is entitled to all the more weight because his Lordship explains that his conclusion is contrary to his own original opinion, and has therefore not been reached without consideration. I must confess, however, that my own original opinion was exactly the same as that of the Lord Ordinary, and that it is not shaken, but, on the contrary, confirmed, by further consideration of the

clauses of the statute upon which the respondents' case is founded. The respondents' argument is rested on two sections of the Conveyancing Act, the 9th and the 47th. The 9th provides 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 . . . . . and such personal right shall, subject to the provisions of this Act, be of the like nature and be attended with the like consequences, and be transmissible in the same manner as the personal right to land under an unfeudalised conveyance according to the existing law and practice." The legal effect of that enactment is, to my mind, perfectly clear and simple. The heir-at-law, without making up a title, and, as the Lord President puts it in the case of *M'Adam*, 6 R. 1256, without even beginning to make up a title by serving heir to his predecessor, has by force of the statute a complete personal right to the lands. He is in the same position as if he had obtained a deed in which he might have been infeft but had not taken infeftment. He may therefore deal with the estate if he pleases as freely as any owner not infeft but standing on a good personal right. He may sell it or grant bonds over it to creditors. But all that will not make him liable for the debts of his predecessor, provided he does nothing to subject himself to such liability either by taking up the estate formally by completing title or by taking possession of it and so incurring a passive representation. It is said that a person in this position is referred to in Schedule K as proprietor of the lands. That may or may not be a very apt expression for defining his position. It is unnecessary to consider whether it is so or not, because the statute itself has told us, in the enacting part of the clause, what is meant by the proprietor. It is a person having a personal right, who may have done nothing to make his personal right effectual. That entitles him to take the estate if he pleases, but it does not oblige him to do so. A disponee under a deed of conveyance does not become liable for the debts of the disponer on the mere delivery of the conveyance, and the legal position of the heir in whom a personal right is vested by mere survivance is exactly the same as that of such a disponee. So far, therefore, as the ninth section goes, I am unable to see that it advances the respondent's claim in any way. But then they found upon the 47th section, and I think the true question between the parties arises out of that section. That provides that subject to a certain limitation as to liability of an heir for the debts of his ancestor, "an heritable security for money duly constituted upon an estate in land shall, together with any personal obligation to pay principal, interest, and penalty contained in the deed or instrument whereby the security is constituted, transmit against any person taking such estate by succession, gift, or bequest or by conveyance when an agreement to that effect appears in *gremio* of the conveyance," and so on. Now that is the clause upon which it is said that mere survivance of a person who has effected a security over his estate will subject his heir-at-law to direct personal diligence without any steps being taken to constitute a debt against him, and without his having done anything to indicate that he has taken over the debt or the estate of his ancestor who originally undertook the liability. The whole question seems to me to depend on what is meant by words that are perfectly plain words according to our legal language. What is meant by "taking the succession?" The Lord Ordinary says it means to become entitled to a succession. I cannot give that meaning to the words, even taking them as words of ordinary language, because it is one thing to become entitled to a right and another to take it, and if a person who becomes entitled does not desire to take it he may let it alone with all the encumbrances with which it is affected. But it is in truth a term of legal language, and if we come to the first book which naturally suggests itself to one as an authority for ascertaining how successions are to be taken up and how a successor is subjected in liability for his predecessor's debt—I mean Mr Bell's Principles—we find that in starting his exposition of the law of passive representation he uses exactly the phrase of the statute, and says a person may become liable for his ancestor's debts by taking the *hæreditas*, which is only substituting the Latin word for the English one—by taking the succession he will be liable for his ancestor's debts—and he goes on to explain how he may take the succession so as to have that effect. The methods by which he undertakes that liability are, of course, perfectly well known and elementary. He may make up a title or he may take benefit from the estate so as to subject him to passive representation; but if he holds aloof from it and does nothing, there is no ground in law, so far as I can see, for saying that he has become subject to personal diligence for the debts of a man whose property he has not taken up and may not intend to take up. I am therefore very clearly of opinion that the interlocutor which the Lord Ordinary has pronounced is not well founded, and that the charge is baseless and must be suspended. I say nothing at all as to the other remedies which may be open to the respondents. What the proper proceedings may be for realising the subject of their security, or attaching the other estate of their debtor, are questions for them to consider. They are not before the Court; but so far as this charge is concerned I am of opinion that the statute gives them no right to use personal diligence against the complainer.

LORD MACKENZIE—In my opinion the complainer has not taken the estate by succession within the meaning of section 47 of the Conveyancing Act of 1874, and therefore cannot be charged to pay the sums contained in the bond granted by his late father. He has not made up a title to the estate, nor has he subjected himself to the responsibilities of an heir by any passive

title. He has done nothing. In these circumstances I am unable to take the view that he has subjected himself to personal diligence.

It was said that this liability attaches to the complainer because of the operation of section 9, by which a personal right to the estate vested in him by mere survivance. This personal right, however, is by the section declared to be of the like nature and to be attended by the like consequences, and be transmissible in the same manner as a personal right to land under an unfeudalised conveyance according to the existing law and practice. If this be so, it cannot involve the consequences for which the respondents contend.

I am accordingly of opinion that the charge should be suspended.

LORD M'LAREN—I concur in Lord Kinnear's opinion. We recal the Lord Ordinary's interlocutor, sustain the third plea-in-law, which is the ground on which we proceeded, and remit to the Lord Ordinary to pass the note and to give decree for expenses.

The LORD PRESIDENT and LORD PEARSON were absent.

The Court recalled the Lord Ordinary's interlocutor, and remitted to him to sustain the third plea-in-law for the complainers, to pass the note of suspension, and to proceed as accords.

Counsel for Complainers (Reclaimers)—Aitken, K.C.—R. S. Horne. Agents—Drummond & Reid, W.S.

Counsel for Respondents—Cullen, K.C.—Hon. W. Watson. Agents—Tait & Crichton, W.S.

Saturday, July 4.

FIRST DIVISION.

PAUL (GUARDIAN OF THOMSON'S MORTIFICATION), PETITIONER.

Charity — Trust — Mortification — Nobile Officium—Failure of Purpose—Extension of Powers.

In 1774 and 1786 a testator mortified the residue of his estate, the interest to be applied in purchasing oatmeal, or oats to be made into meal, to be sold to poor householders in the City of Edinburgh at the price of 10d. per peck whenever the market price should exceed 1s. per peck, no family however to receive more than two pecks in one week. In 1908 the trustee under the mortification presented a petition to the Court of Session, averring that it was no longer possible to expend the whole income of the trust, which had largely increased, in pursuance of the above direction, and craving power to supply out of the interest of the mortified fund to those obtaining meal, also coal or milk at half the market price.

The Court *granted* power to supply to poor householders within the City of Edinburgh, and that whether they were receiving meal or not, coal, milk, oatcakes, bread, or flour at half the market price, in such quantities, at such times, and under such regulations as the trustee might think fit.

On 18th February 1908 George Morison Paul, Deputy Keeper of the Signet, and as such Deputy Keeper the guardian of Joseph Thomson's Mortification, presented a petition for powers for the future administration of the funds and estate of the mortification.

Joseph Thomson, saddletreemaker in Edinburgh, by his deed of settlement, dated 11th July 1774 and registered 13th February 1786, conveyed his estate to trustees, and with regard to the residue of the estate provided—"And the whole residue of my estate, heritable and movable, after payment of my debts, funeral charges, and the above-mentioned legacies, or such other legacies as I may afterwards give, and the expenses of carrying this settlement into execution, I mortify as a perpetual fund, the interest whereof is to be applied in manner after directed for purchasing oatmeal, or oats to be made into meal, to be distributed only among poor householders within the City of Edinburgh when the price of oatmeal exceeds 10d. per peck; and which meal is to be sold out to these householders at 10d. per peck be the current price ever so high; but I appoint that one family shall not get above two pecks of it in one week."

By a subsequent deed in 1786 the testator altered the above purpose to the effect that no purchase or sale should be made thereunder unless the price of oatmeal exceeded 1s. per peck. In 1846 an Act of Parliament (9 and 10 Vict. cap. xvi) was obtained authorising the sale of the lands and heritages falling under the trust, and the purchase of other lands, and confirming the administration of the fund in terms of the deeds of settlement.

The petitioner averred—". . . . . Every effort has been made to bring the existence of the charity under the notice of persons entitled to its benefits, and since he became guardian of the mortification the petitioner has made every endeavour to increase the number of recipients of the charity. In 1906 he sent a circular explaining the benefits of the charity to every clergyman, missionary, parish sister, and bible woman specially appointed by any church in Edinburgh, and he had the mortification brought under the notice of the Charity Organisation Society, and also of many of the ladies who work among the poor in the city. He has also kept the charity working during practically the whole year, but notwithstanding these efforts it has been found impossible to expend the annual income of the trust in the manner desired by the testator . . . . . The capital of the trust in 1846, when the Act of Parliament above mentioned was obtained, was about £9550. The capital of the trust at 31st December 1907 amounted to £26,938, 10s. 9d., consisting