it is inconsistent with a sound construction of the deed of arrangement. And I may add that it was distinctly negatived by the other Division of the Court in the case of *Walker* v. *Reith* (1906, 8 F. 381) upon the construction of the same testamentary writings of Mr Dick, which their Lordships had to consider on a question of income-tax.

Then it is said that, assuming the fund in question to be fruits of the testator's estate, it cannot be regarded as a gift, seeing that it is part of the emoluments of the employees, who draw the 10 per cent. of profit only so long as they remain in the service of the firm and draw it year by year as salary. It is pointed out that these employees were in the service of the deceased during his life, and it is said that this new arrangement really amounts to an increased remuneration proportioned to their success in keeping the business going. Now, it must be kept in view that this participation in the profits is arranged not by the trustees but by the testator himself, and is operative by his will; and further, that any employee may leave when he pleases. They find that this very advantageous arrangement has been made for them by the testator to the effect that over and above their former salaries they shall be entitled to this proportion of the net profit so long as they continue at their posts. In other words, they are to share in the profits subject to the condition that they remain in the management of the departments. They draw their share not under any contract with the trustees but under and by virtue of the will, and it is none the less a legacy because it is coupled with a condition. This has been so held in England in a case very similar to the present—the case of *in re Thorley* (1891, 2 Ch. 613), referred to by the Lord Ordinary. In that case a manufacturer by his will directed his trustees to carry on his business in conjunction with his son, each receiving an annual sum of fixed amount out of the profits while they did so. It was held by the Court of Appeal, affirming the judgment of North, J., that the amounts so received were legacies and subject to legacy duty, and it was laid down that there was no difference in such a matter between an annual payment and a lump sum, such as a gift by will to executors for their trouble in performing the trusts of the will, which, it is well settled, is dutiable as a legacy.

For the reasons I have stated I am of opinion that the Lord Ordinary is right, and that we should adhere to his interlocutor.

LORD KINNEAR—I concur.

LORD M'LAREN—The LORD PRESIDENT authorised me to say that he concurred. I myself did not hear the case.

The Court adhered.

Counsel for the Defenders (Reclaimers)—Clyde, K.C.—Cullen, K.C.—Scott Brown. Agent—Henry Robertson, S.S.C.

Counsel for the Pursuer (Respondent)—The Solicitor-General (Ure, K.C.)—A. J. Young. Agent—The Solicitor of Inland Revenue.

Wednesday, March 20.

FIRST DIVISION.

[EXCHEQUER CAUSE.]

[Lord Johnston, Ordinary.

INLAND REVENUE *v.* THE EARL OF BUCHAN.

Revenue—Succession Duty—Entail—Propulsion of Estate—Disentail following on Propulsion—"Devolution by Law"—Extinction of Prior Interest—Succession Duty Act 1853 (16 *and* 17 *Vict. cap.* 51), *secs.* 2 *and* 15.

A, an heir of entail in possession under an old entail, in 1872, for certain considerations and in pursuance of an agreement, granted a deed of propulsion of the entailed estate in favour of B, his son, the heir apparent, born after 1848. In 1875, when B attained the age of twenty-five, on the application of A and B, and the narrative that A had propelled the estate, and that B consented, the Court authorised a disentail of the estate.

After the death of A in 1898, the Crown having claimed succession duty on B's succession to A in respect of the estate so propelled—*held* (*rev.* the Lord Ordinary, Johnston) that a succession had been established by devolution of law under the entail, and that succession duty was payable thereon in terms of the Succession Duty Act 1853, secs. 2 and 15.

Earl of Zetland v. *Lord Advocate*, February 12, 1878, 5 R. (H.L.) 51, 15 S.L.R. 373; and *Northumberland* (*Duke of*) v. *Attorney-General* [1905], A.C. 406, *commented on* and *applied*.

Entail—Succession—Propulsion of Estate—Deed of Propulsion.

Examination of the *history*, *nature*, and *legal effect* of a deed of propulsion.

The Succession Duty Act 1853, which by section 1 provides that the term "succession" shall denote any property chargeable with duty under the Act, enacts—Section 2—"Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person, . . . and every devolution by law of any beneficial interest in property or the income thereof upon the death of any person . . . to any other person in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution, a 'succession,' and the term 'successor' shall denote the person so entitled, and the term 'predecessor' shall denote the settler, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived." Section 15—"Where . . . any reversionary property expectant on death shall be vested, by alienation or other derivative title, in any person other than the person who shall have

been originally entitled thereto, under any such disposition or devolution as is mentioned in the second section of this Act, then the person in whom such property shall be so vested shall be chargeable with duty in respect thereof as a succession at the same time and at the same rate as the person so originally entitled would have been chargeable with if no such alienation had been made or derivative title created, and where . . . any succession shall, before the successor shall have became entitled thereto or to the income thereof in possession, have become vested by alienation or by any title not conferring a new succession in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created, and where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place."

On 30th April 1906 the Lord Advocate on behalf of the Commissioners of Inland Revenue raised an action against the Right Honourable Shipley Gordon Stuart Erskine, Earl of Buchan, in which he concluded for delivery of an account of the Earl's succession to the lands and estate of Strathbrock, Kirkhill and others in the county of Linlithgow, so that the amount of succession duty payable by him upon the death of his predecessor, the late David Stuart Erskine Earl of Buchan, in respect of said lands, might be ascertained, and for £4000 in name of such duty, with interest from the date of the death of the late Earl.

The pursuer pleaded—"(1) The succession to the said entailed estates having been accelerated by the surrender or extinction of the deceased's interest as heir of entail in possession, succession duty is payable as if no such acceleration had taken place. (2) The defender as successor in a statutory sense being liable for the duty claimed, decree as concluded for should be given."

The following narrative of the *facts* is taken from the opinion of the Lord President:—"The Lord Ordinary has so succinctly and correctly set forth the facts on which the present controversy arises that I borrow the first portion of his opinion. He says—'The late Earl of Buchan was in 1872 heir of entail in possession of the entailed estates of Strathbrock, &c., in the county of Linlithgow, under an entail dated in 1664 and registered in 1720. His eldest son and heir-apparent, then Lord Cardross, and now Earl of Buchan, was born on 27th February 1850. The late Earl of Buchan was in embarrassed circumstances and had been for a considerable time under trust, and shortly before 1872 his estates were sequestrated. By an agreement dated 23rd and 27th March 1872 he agreed to propel the estates to the present Earl as from 13th September 1871, and completed the propulsion by the disposition dated 24th May 1872. But this deed of propulsion did not contain the real or whole terms of the transaction. These are to be found in the agreement of March preceding, which dealt with many details, and imposed very onerous conditions upon the present Earl, which it will be necessary to refer to later. But two important parts of the arrangement embodied in this agreement were, that the Earl of Buchan should dispone to his son his fee-simple estate of Ammondell, and should, whenever his son reached twenty-five years of age, do whatever was necessary on his part at once to disentail Strathbrock, &c.' I here interpolate that at the date in question the power to disentail still rested on the second section of the Rutherfurd Act, or, in other words, that while an heir in possession under an old entail, but born after August 1848, could disentail when of full age, an heir-apparent could not give consent to the heir in possession born before 1848 until he, the heir-apparent, was twenty-five years of age. Accordingly, what happened in 1875 is described in condescendence 9, which is as follows:—'On 19th March 1875 the deceased and the defender presented a petition to the Court for authority to disentail the said lands and estates. The petition set forth that the deceased had succeeded to the said entailed lands and estates as nearest and lawful heir-male of tailzie and provision, that he had propelled the whole of the said entailed estates to the defender and the heirs-male of his body, whom failing the other substitute heirs of entail, and that the defender was heir of entail in possession, or otherwise the deceased himself was. In a deed of consent, dated 9th June and recorded 17th September 1875, the defender consented to the disentail; and by interlocutor dated 20th July 1875 the Court interponed authority, and authorised instruments of disentail to be recorded. Accordingly two instruments of disentail, dated 9th June 1875, the one by the deceased and the other by the defender, were recorded on 17th September 1875.' I resume the Lord Ordinary's narrative—'The late Earl died on 3rd December 1898, survived by his son Lord Cardross, who then succeeded to the title. The Crown now lay claim to succession duty on the entailed estates so propelled in 1872 to the present Earl, and the record leaves it somewhat in doubt whether the claim does not extend to succession duty on the fee-simple estates also.'

"As regards the last sentence no argument has been adduced to your Lordships as to the fee-simple estate. I do not see how it could possibly be contended that a disposition of fee-simple estates *inter vivos*, followed by complete possession on the part of the disponee, could give rise to a claim for succession duty at the death of the disponer twenty-six years afterwards, and that matter may be dismissed once for all."

On 30th November 1906 the Lord Ordinary (JOHNSTON) assoilzied the defender with expenses.

Opinion.—" . . . [*After passages quoted by the Lord President, supra*] . . . The questions at issue, stripped of a great deal

of detail, are, I think (*first*) whether, if the deed of propulsion be alone regarded, the defender, who holds under it, was liable for succession duty on the estates propelled when his father died; and (*second*) whether the propulsion is to be looked at as an isolated act independently of the agreement of which it was part, or whether it is competent to look at the whole composite transaction embodied in the agreement and carried out by several deeds, of which the deed of propulsion was only one, and by a variety of procedure; and if it be so competent, whether consideration of the whole transaction as an *unum quid* affects the liability.

"*First.*—The Succession Duty Act 1853 provides— . . . [*quotes sections* 1 *and* 2, *supra*] . . .

"Section 5 provides that any increase of benefit accruing to any person by the extinction of any charge on property determinable by the death of any person, should be deemed a succession accruing to the person beneficially entitled to the property.

"Section 7 provides that 'when any disposition of property, not being a *bona fide* sale, and not conferring an interest expectant on death on the person in whose favour the same shall be made, shall be accompanied by the reservation or assurance of or contract for any benefit to the grantor, or any other person for any term of life,' the cesser of the benefit so contracted for is to be deemed a succession.

"By section 10 'there shall be levied and paid to Her Majesty in respect of every such succession as aforesaid, according to the value thereof,' the following graduated duties, viz., &c.

"Now I think it necessary to consider at this point how the matter would have stood had the defender succeeded to his father under the entail in ordinary course.

"The entail of Strathbrock, executed in 1664 by Sir James Stewart in favour of William Stewart, his second son, called in succession under the destination Katherine Stewart, the entailer's youngest daughter, and the heirs-male of her body, &c. It would appear that by 1720 the lands had devolved on Katherine Stewart, then Lady Cardross, under the entail, and that thereafter they descended in the direct line to the late Earl of Buchan, and, had nothing occurred, would have so descended to the defender. The defender would therefore have taken up the estate by serving heir of provision to his father under the entail on his father's death in 1898. In these circumstances the defender would have taken by devolution of law from his father, and not by disposition from the entailer—*Earl of Zetland* v. *Lord Advocate*, 1878, 5 R. (H.L.) 51, where the series of decisions on the subject was reviewed. And it must be kept in mind that the position of the heir of entail in possession is that of fee-simple proprietor, except so far as fettered, and not in any sense of liferenter, with a fee in reversion to the next substitute heir. The estate which descends from him to the next substitute heir 'is the same estate in law which was in the preceding owner, which was none the less a beneficial fee, though the law placed fetters upon it so far as the power of alienation was concerned,' *per* Lord Selborne in the *Earl of Zetland's* case *supra*, at page 58. Accordingly, the late Earl would have been the predecessor and the defender successor in the sense of section 2 of the Succession Duty Act 1853, and the defender would have paid duty accordingly under section 10.

"Let me revert now to what was done in 1872. A disposition, which may be called a deed of propulsion, but is none the less a disposition, was granted by the late Earl to the defender. This deed would have been a contravention of the entail had the grantee been any other than the defender. But as he was apparent heir, as there was no change in the destination, and as the conveyance was under the fetters of the entail, it was a disposition which the late Earl could competently grant and the defender safely accept. Now, turning to section 2, this deed did not create a succession in the sense of the Act, for though it was a disposition whereby the defender became beneficially entitled to the Strathbrock estates he did not do so on the death of any person. Again, if it passed the property beneficially from the late Earl to the defender in 1872, was there any devolution by law of a beneficial interest on the late Earl's death to the defender in possession? I do not think that it is possible to maintain—at least, counsel for the Crown did not attempt to do so—that whatever the destination was on which the fee-simple estate of Ammondell stood prior to 1872, that after the disposition of that estate to the defender on 24th May 1872 there could be any devolution by law of that fee-simple estate or any interest in it upon the defender on his father's death. Having regard to the legal position of an heir of entail in possession and his apparent heir, and to the appropriate terms of the disposition or deed of propulsion of the entailed estate, I am unable to see any difference in this respect between the entailed and the fee-simple estate.

"Accordingly, in my opinion there was no dutiable succession, in the sense of the 2nd section of the Act at the death of the late Earl of Buchan on which the defender fell to be assessed, although it is possible that there was an extinction of a charge or a cessor of a benefit reserved, which, under section 5 or 7, might have been deemed a dutiable succession. I think that a consideration of these sections tends to support the view I have indicated on the bearing of section 2 on this matter.

"I pass now to section 15 of the Succession Duty Act 1853. It provides in its first two paragraphs for the case of the alienation of any reversionary property expectant on death, and declares that the alienee shall be chargeable with duty in respect thereof as a succession, at the same time and at the same rate as the person originally entitled would have been chargeable if no such alienation had been made. I do not think that these provisions have any bearing on the case before me. But the

section proceeds— . . . [*quotes supra*]. . . .

"Now, even if I had nothing to consider except the propulsion of the entailed estate in 1872 by the late Earl of Buchan to the defender, I should have doubted whether the devolution imported a surrender or extinction of a prior interest in the sense of the Act. If the estates of Strathbrock, &c. had been held by the late Earl on a destination, that is, a tailzie without fetters, under which his son, the defender, would have succeeded as heir of provision, I conceive, as I have already said, that it would have been open to the late Earl to propel the estate to his son, that is, to dispone it to his son, without leaving his son liable to the same claim for succession duty as he would have been had he taken under the destination on his father's death. If so, then as the heir of entail in possession is fee-simple proprietor except so far as fettered, and the fetters do not prevent propulsion or disposition to the next heir, being heir-apparent, I cannot see that liability for duty survives any more on propulsion in the case of a strict entail than of an unfettered destination. I think, in fact, that the term 'prior interests,' the surrender or extinction of which is contemplated, does not appropriately describe the right of an heir of entail in possession, but covers only such interests as are a charge on the fee. I assume that the propulsion is *bona fide* and absolute, and that there is no question of *donatio mortis causa*.

"*Second.*—But I do not rest my opinion entirely on this view, for I think that the latter part of the clause affords strong ground for the same conclusion.

"Assuming that the propulsion is an acceleration in the sense of the provision, still the duty is only to be payable 'at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place.' This involves, I think, not that duty might have been payable if nothing but the acceleration had taken place, but must have been payable whatever else took place.

"Now, in 1872 Lord Cardross was heir-apparent under an old entail. In 1875 he attained the age of twenty-five, necessary at that date to consent to disentail. He was then capable of giving his consent, even without consideration to his father's disentailing, and acquiring in fee-simple, or burdening or disposing of the estate. If no such acceleration had taken place and the estate had remained under the entail, there was nothing to prevent at any moment this course being taken, and the duty, in whole or in part, would have disappeared. There was, therefore, no must during the late Earl's life about the payability of the duty at the late Earl's death. The above course was not taken by reason of the fact that Lord Cardross, though of age, was not yet twenty-five in 1872. But the real and whole transaction was this—The late Earl agreed to execute in favour of the defender a deed of propulsion of Strathbrock, a conveyance of Ammondell, and an assignation of certain other rights and interests, including any reversion of his estates under trust and in sequestration. The late Earl and the defender bound themselves to take the earliest possible steps to disentail Strathbrock, and to that end the late Earl bound himself to execute and deliver, *unico contextu* with the deed of propulsion, an irrevocable mandate to the defender's nominee, empowering him to do all acts required of the late Earl to carry out the disentail and vest the estates in fee-simple in the defender. Simultaneously with the deed of propulsion and the granting of such irrevocable mandate by his father, the defender undertook to borrow on the estates or otherwise £46,000 for payment of the late Earl's debts, and he undertook to pay certain annuities, a comparatively small part only of which were determinable on the death of the late Earl. These considerations were not considerations merely for the propulsion, but in a greater degree, if not entirely, for the disentail and the vesting of the estates in the defender in fee-simple. At the earliest moment possible the estates, which had been propelled to the defender, were disentailed and acquired by him in fee-simple.

"I cannot separate up the transaction as the Crown would have me do, and say that the defender is caught in a net woven of the form of conveyancing rendered necessary by his being under twenty-five when this family arrangement was entered into, which he would have escaped if he had been twenty-five. Had the defender been twenty-five in 1872, the late Earl and he might have proceeded straight to disentail, and to transfer the estates reduced to fee-simple from the late Earl to the defender, after putting on them the burdens necessary to pay the late Earl's debts and the other charges agreed upon. There would have been in the terms of this necessarily complicated family agreement the *quid pro quo* on both sides involved in a disentail, and all succession by the defender to his late father would have been ended. What was done in a slightly different form, by reason of the defender being only twenty-two years of age and not twenty-five, in 1872, produced exactly the same result. There was the same potentiality in the situation after the deed of propulsion was executed as there was before it was thought of. That potentiality has resulted in accomplished fact; and it is, in my opinion, impossible now to say that any 'duty would have been payable' if no such propulsion had taken place.

"Accordingly, on both grounds, I do not think that the propulsion of an entailed fee in Scotland is the surrender or extinction of a prior interest in the sense of the statute. These words cover, and I think are intended alone to cover, not a fee, though it may be a fettered fee, but a charge upon the fee, as the interest of the tenant for life is a charge on the estate of a tenant in tail in England.

"I was much pressed by counsel for the Crown with the decision of the House of Lords in *Duke of Northumberland's* case, (1905), A.C. 406. Did I think the decision in that case in point I should be bound by it, but I do not think that it is in

point. All that it, or rather a subordinate part of it, does is, in conjunction with Lord Lilford's case, L.R. 2 E. & I. App. 63, to satisfy me that though the provision of the 15th section in question may apply to the interest of the tenant for life under an English entail, it does not apply to the right of an heir in possession under a Scottish entail.

"I shall therefore assoilzie the defender with expenses."

The pursuer reclaimed, and argued—The deed of propulsion only brought the beneficial possession of the estate to an heir already having under the entail a right defeasible only by his death. Its effect was just what the death of the granter would have—*Viscount Dupplin* v. *Hay*, November 15, 1871, 10 Macph. 89, Lord Kinloch at p. 93, 9 S.L.R. 74. It could not be said that the propulsion here was really a disentailing and re-entailing, for when it was granted the late Lord Buchan could not have disentailed, his son the defender not being of consenting age — *Viscount Fincastle* v. *Earl of Dunmore*, January 14, 1876, 3 R. 345, 13 S.L.R. 410. The Lord Ordinary, therefore, was mistaken in holding that the estate passed to the defender by the propulsion. It was merely an anticipation of his ordinary succession under the entail—*Halkett Craigie* v. *Halkett Craigie*, December 4, 1817, F.C. The right to succeed existing previously under the entail, and passing by devolution of law, a succession was established within the meaning of the Act which no manipulation of the parties could get rid of—*Duke of Northumberland* v. *Attorney-General*, [1905] A.C. 406, Lord Halsbury at p. 409. There had been an acceleration by extinction of a prior interest, and section 15 applied—*ex parte Sitwell*, L.R., 21 Q.B.D. 466, Manisty (J.) at p. 470. The Lord Ordinary was wrong in construing the expression "prior interests" in that section as synonymous with interests which were a charge on the fee. The words "charge, estate, or interest," were used together in section 20, showing them to be different, and the expression "prior interest" covered a propulsion. The defender had succeeded his father in the entailed estates by devolution of law, and was liable in duty under section 2, and the succession having been accelerated by the extinction of his father's prior interest, that duty was payable in terms of section 15, viz., as at the death of the late Lord Buchan. It was to be noted that section 15 was in fact a charging section — *Baron Wolverton* v. *Attorney-General*, [1898] A.C. 535, Lord Halsbury (L.C.) at p. 544. This case was distinguished from *Attorney-General* v. *Earl of Selborne*, [1902] 1 K.B. 388; since there a new line of succession was introduced; here the regular succession under the entail was preserved. The Lord Ordinary's interlocutor should be recalled.

Argued for the defender and respondent — The succession for which duty was claimed was said to have arisen by devolution of law under the Succession Duty Act 1853. Under that statute there was a succession in two cases only—(1) When the right under which beneficial interest arose upon the occurrence of a death was conferred by disposition, or (2) When a devolution by law took place upon death. In the former case the duty attached whenever the disposition took effect, under section 2, although by section 15, which was ancillary to section 2 and regulated the time of payment, duty could not be exacted until the death of the liferenter or other person to whose interest the succession was postponed. When on the other hand the succession was by devolution of law the duty did not attach until that devolution took place, *i.e.*, until the death of the person formerly entitled to the beneficial interest. Here the claim must be on the ground of succession by devolution of law, the defender being called under the destination in the entail to the heirs of the body of Katherine Stewart. Had he succeeded his father under that destination on his father's death there would have been a succession by devolution of law—*Earl of Zetland* v. *Lord Advocate*, February 12, 1878, 5 R. (H. of L.) 51, 15 S.L.R. 373. But there had been so such succession by devolution, because of the propulsion and because of the disentail. Devolution meant a passing from a person dead to a person living—Hanson on Death Duties, 5th ed. 492. The late Lord Buchan had, however, propelled his fee in 1872, more than 26 years before death, and he had thereby absolutely divested himself and vested the full fee in the defender, subject only to the fetters of the entail — *Halket Craigie* v. *Halket Craigie*, December 4, 1817, F.C. It was conceded that no duty would have been exigible had Lord Buchan been a fee-simple owner and conveyed to the defender *inter vivos*, and it made no difference that the estate was entailed—*Baron Wolverton* v. *Attorney-General*, *ut supra*, Lord Halsbury (L.C.) at 542. The expectancy in the case of entailed lands as well as unentailed was merely *a spes successionis*. In England it had been held competent for the parties to defeat the operation of the statute in cases similar to this—*Attorney-General* v. *Earl of Selborne*, *ut supra*, Collins (M.R.) at 396, Stirling (J.) at 398. This case was not within section 2 on a fair construction of it. Nor was the case within section 15, which was not a taxing section, but merely declaratory, and regulated the amount and time of payment of duty imposed by section 2—*Duke of Northumberland* v. *Attorney-General*, *ut supra*, Lord Macnaghten at p. 413. Here there was no duty payable in 1872, since the requisite relation of predecessor and successor was lacking, and in 1898 nothing passed by way of succession. Therefore the statute did not apply. *Duke of Northumberland* v. *Attorney-General* merely decided that if a liferenter and fiar in England combined to sell to a third party, the succession duty imposed inchoately by section 2 was a first charge on the property sold under sections 15 and 42. The case of *ex parte Sitwell* was not in point here, since

the succession which came into effect there had been established by disposition, and took effect on the marriage as a new right. The interlocutor of the Lord Ordinary should be sustained.

At advising—

LORD PRESIDENT — [*After narrative of facts quoted supra*]—The real and only question is as to the entailed estates. Now the Lord Ordinary has decided that a duty is not payable, and his judgment, abbreviated, consists of two propositions. Had the old entail subsisted, then, on Lord Buchan's death, the present Lord Buchan, whom for the sake of clearness I shall hereafter call Lord Cardross, would have made up his title to his father as heir of tailzie and provision, and would have paid succession-duty, his father being his predecessor, because, as held by the House of Lords in the cases of *Saltoun* (*Lord Saltoun* v. *The Advocate-General*, 1860, 3 Macq. 659) and *Zetland* (*Earl of Zetland* v. *Lord Advocate*, February 12, 1878, 5 R. (H.L.) 51) the estate would have passed by devolution of law. But in the actual circumstances when that event happened the old entail was gone, and Lord Cardross did not need to make up any title under it, because he was already holding under the deed of propulsion, which had operated as a disposition *inter vivos* twenty-six years before, followed by a disentailing deed three years afterwards. No succession-duty was therefore due under section 2 of the Succession Duty Act 1853 (16 and 17 Vict. cap. 51). That is the first proposition. The second is that so far as section 15 is concerned it does not alter the matter. The provision of section 15 in question is as follows:—"And where the title to any succession shall be accelerated . . . *quotes supra* . . . if no such acceleration had taken place." His Lordship holds that the propulsion was not a surrender or extinction of prior interests. It is obvious that the soundness of these views really depends on what is the true nature of a deed of propulsion, but before I discuss that I wish to make a few general observations.

It has been pointed out many times by the highest tribunal that the Succession Act is drawn in untechnical language, and that it must consequently be applied to the differing technical systems of the settlement of land by title in England and Scotland, so as to preserve harmony in the practical working of the Act in the two kingdoms. A masterly and authoritative exposition of the similarities and differences of the methods of settling land by title in the two kingdoms will be found in the judgments of Lord Selborne and Lord Blackburn in the case of the *Earl of Zetland*, 5 R. (H.L.) 51, which are worthy of the most careful perusal. (Here I think it not immaterial to point out a curious slip—I will advert to the materiality of it afterwards—into which the Lord Ordinary has fallen, where he quotes a passage of Lord Selborne's opinion in *Lord Zetland's* case, at page 58 of 5 R., as a description of the estate of a Scottish heir of entail taking from a previous holder, whereas what his Lordship is giving is really the description of the estate of an English tenant in tail, who takes from a previous tenant in tail, who either was unable to bar owing to some special peculiarity, or who being able did not do so.) It follows from the general proposition above stated that English authorities, though in one sense not directly in point, are at the same time of use and weight. And though I always feel that any lawyer in examining authorities who deal with a system of real rights unfamiliar to him is handling *periculosæ plenum opus aleæ*, yet I feel myself constrained to do so in a subject like this. I say so because I think the leading case undoubtedly on this branch of the law is the case of the *Duke of Northumberland*, [1905], A.C. 406. In that case the sixth Duke of Northumberland being tenant for life, and his eldest son, afterwards seventh Duke, tenant in tail, executed together a disentailing deed, and conveyed a piece of land to Lord James Murray. Lord James died, and was succeeded by his daughter Miss Caroline Murray, who paid succession-duty as succeeding to her father. Thereafter the sixth Duke died, and the Crown claimed and obtained a succession-duty from Miss Caroline Murray, becoming due on the death of the sixth Duke, and calculated as an annuity on Miss Murray's life from that time. The actual point in dispute, which was the matter of decision, namely, whether an alienee could be called on to pay a duty when such alienee had already paid one duty, is of course not relevant to the matters which we have to decide. But I have called this case the leading authority because of the lucid exposition of the Act given by Lord Macnaughten and concurred in by the Lord Chancellor, and the further opinion given by Lord Davey. Now, in the very short opinion which the Lord Chancellor himself pronounced there is one sentence which I think really settles the kind of question which we have to consider in this case. His Lordship says—"Two observations I wish to make: . . . one is that a succession within the Act once established no manipulation of the parties afterwards can get rid of it." Of course it must be kept in view that something more is needed before the Crown can claim the duty, namely, that the person from whom it is claimed has become beneficially entitled to the succession. Now, was there or was there not a succession established to which Lord Cardross became beneficially entitled by what was done in 1872; for if there was, then, in the words of the Lord Chancellor, no subsequent manipulation can get rid of it, and therefore the Lord Ordinary's argument, so far as based on the effect of the subsequent disentail, falls to the ground.

That brings me straight to the question of the nature and effect of the deed of propulsion. It has certainly surprised me to find how little authority there is upon the subject and how obscure seems to be the origin of such a deed. Stair, Bankton, Erskine, and Walter Ross (though it is fair to say it scarcely fell within the scope of

his work) are all silent on the point. The earliest mention I have happened to find is in the argument in *Gordon of Carlton's* case, 1749, in the report in M. 15,384, and another in the case of *Suttie*, in 1758, Brown's Supp. 5, 866, and yet it is there spoken of as a recognised proceeding. Under these circumstances it is obvious I think that it crept in without actual authority, just as I had occasion to observe in the case of *Cadell* v. *Allan*, March 17, 1905, 7 F. 606, excambions of glebes crept in without any particular sanction. Perhaps like much else in Scottish conveyancing it had its origin in the desire to create votes. I need scarcely remind your Lordships that a vote in pre-reform Act days depended on the holding of so much land of valued rent direct from the Crown, and the deed of propulsion offered obvious facilities for the attainment of this end. But be that as it may, it is undoubted that it existed from an early period. Further, it is obvious that under the state of the law at that time it could but rarely happen that it was anyone's interest (assuming the deed to be in proper form—*i.e.*, a true repetition of the fetters of the existing entail) to challenge. At that time there was no possibility of disentailing depending on the date of the birth of the heir in possession in reference to the date of the entail, so that there could be no question of a remoter substitute being cut out by a disentailing deed before the natural time. There could be no question of succession duty, for the Succession Duty Act had not been passed. Accordingly, in the ordinary case the remoter substitute, who so far as title went could have raised the question, could have no interest. For either the propelling deed was no contravention, or if it was its only effect was to irritate the propellor's right under the entail and vest it in the propellee. The case which might have raised the matter acutely does not seem to have occurred in a pure form—I figure the case of an entail which forfeited on contravention the right not only of the contravener but also of the issue of his body. If that question had been mooted early in the eighteenth century I confess to a strong idea that it would have been decided adversely to the deed. The case indeed very nearly arose in the pure form, though it was complicated by a further proposed alienation by the propellee, in the case of *Dalrymple* v. *The Countess of Glencairn*, in 1783, M. 15,433. In that case an entail had been executed by Governor Macrae of estates in Ayrshire, but the prohibitive clauses were only directed against the *nominatim* substitutes; and not against the heirs of these substitutes' bodies. Mrs Dalrymple, who succeeded as a *nominatim* substitute, executed a disposition in favour of her son, being her heir-apparent. (It is noticeable that the term 'deed of propulsion' is not used and it may be doubted if it had been invented by this time.) He then, as unaffected by the fetters, entered into a minute of sale. The case was then tried by means of a declarator against a remoter heir, and the judgment is thus reported—"The Court were of opinion that this bargain, if carried into execution by Mrs Dalrymple, would infer a contravention of the entail." This case was appealed to the House of Lords, and was affirmed. It is reported in 6 Paton's Appeals, 807. There is no note of the judgment given, only that taken from the journals of the House that the judgment is affirmed. But it is rubricked thus—"An entail prohibited the sale of the estate and laid the fetters on the 'substitutes before mentioned and described by name.' Held that this was sufficient to include within the fetters the descendants of the body of those substitutes." I have the gravest doubts as to whether this rubric is anything more than a mistake of the reporter. The date of the case was 1784. Mr Paton's first volume of reports appeared only in 1825, and this is the sixth volume. He deplores in the preface to the first volume the absence of all material for the grounds of judgment in the earlier cases, and I take it that he would have before him only the cases and the entry in the journal. I have examined the appeal cases, and though it is true that one of the arguments in the respondent's case is that the fetters affected the heirs of the bodies of the *nominatim* substitutes, it is not, any more than it was in the Court of Session, the argument that she rested on. And if the House of Lords decided on that ground they decided against what was afterwards found to be undoubted law, namely, that each class of heirs must clearly be affected by the fetters, and that to express the prohibition so as to include only one class will not do—(See, *e.g.*, *Brown* v. *Macgregor*, 1837, *aff.* 3 S. & M. 84; and *Dalyell & Selkrig* v. *Dalzell*, May 30, 1809, F.C.). The Court of Session judgment seems to me clearly put on the ground that a deed of propulsion could be quarrelled the moment it in any way prejudiced the interest of a remoter substitute, and my view of the decision is I see borne out by a remark of Lord Alloway in the case of *M'Leod*, 6 S. 77, presently to be noticed. For the moment, however, let me revert to the history of the phrase "propel" or "deed of propulsion." George Joseph Bell first mentions it in the third edition of his Principles, date 1833 (it was not in the second edition), where in sec. 1749 *ad fin.*, treating of the prohibition against alienation, he says—"And it has been held not to prevent a conveyance to an heir-apparent so as to propel the estate." In subsequent editions "apparent" is changed to "presumptive," but I doubt if he is there using the term "presumptive" in its strict sense. When, however, I come to his authorities it is curious how little they support the proposition. He first quotes the case of *Gordon*, reported in M. 15,384, Elchies' Tailzie, 37, and 5 B. Supp. 774. I have examined all these reports and can find only the casual reference in argument to which I have alluded. The actual point decided in *Gordon* had nothing to do with it. Then comes *Suttie*, 5 B. Supp. 866. That was a question about a tack, and the report bears—"The Lords found that such a tack could be assigned to the eldest son

in the same manner as a ward-fee could formerly have been conveyed to the heir or as a tailyied estate can yet be disponed to the next heir of tailyie." This is obviously rather a reference to an acknowledged practice than a judgment, which on the facts of the case it could not be. Then comes *Dalrymple's* case, 6 Pat. 807, which I have already examined and which is obviously no authority for the proposition. Then there is the case of *M'Leod* v. *M'Kenzie*, 6 S. 77. Now that case decided that a deed of propulsion in favour of an heir-presumptive did not give a good electoral qualification, and Lord Alloway went on to say expressly that it had never yet been decided that even a deed of propulsion to an heir-apparent was good, and that in the only case where it had ever been tried, namely *Dalrymple's* case, it had been found to be bad, thereby taking the same view of the import of *Dalrymple's* case as I do. Thus far, therefore, of the authorities quoted none of them support, and some even contradict, the proposition, and there is only left one more, namely, the case of *Craigie* v. *Halkett Craigie*, December 4, 1817, F.C.

Notwithstanding all this, deeds of propulsion of the innocuous character I have indicated were doubtless fairly common, and the practice was eventually given statutory recognition by the 22nd section of the Entail Act of 1853, which enacts that "where any heir of entail in possession of an entailed estate created before the passing of the said Act" (*i.e.*, the Rutherfurd Act) "shall have lawfully propelled or shall hereafter lawfully propel such estate, under reservation of his own liferent, to the heir entitled to succeed him therein, any application which has been made or shall be made by him under the recited Act or under this Act . . . shall be equally effectual in all respects as if he had not propelled the succession, provided the consents of the persons whose consents would have been required to such application if he had not propelled the succession as aforesaid be obtained thereto." This section had reference chiefly owing to a decision in *Pet. L. Wharncliffe*, 24 Scot. Jur. 553. And the same thing is repeated in fuller form in section 13 of the Act of 1868.

The most modern authority is the case of *Dupplin* v. *Hay*, 10 Macph. 89, where it was decided that a propellee of part of an entailed estate was not an heir of entail in possession in the sense of the entail statutes, so as to be able to disentail; and Lord Kinloch gave it as his opinion that a propulsion of part of the estate was invalid *per se*. I mention, to show that I have not overlooked it, the case of *Skeete* v. *Buchanan*, 7 R. 15, but the case is of no authority—being decided only in the Registration Appeal Court—the grounds of judgment being different with the different Judges, and the result being contrary to what was decided by the Inner House in *M'Leod*, 6 S. 77, and in *Dupplin*, 10 Macph. 89. There is also the case of *Turnbull* v. *Hay Newton*, 14 S. 1031, but it ranks more appropriately with another class of cases which I shall presently mention.

This leaves only the case of *Craigie* v. *Halkett Craigie*, December 4, 1817, F.C., and this is really the only case which can be said, so far as decision goes, to sanction the practice of propulsion, as it is also the only case in which there is any real discussion of what propulsion is. Unfortunately the opinions are conflicting, and the result arrived at was, in my humble opinion, wrong. Yet the case is worthy of attention as being really the only discussion of this subject. In that case Mrs Halkett Craigie of Dunbarnie, heiress of entail in possession, conveyed the estate to her eldest son Major Halkett Craigie, under reservation of her liferent, and also with a reservation of full power to exercise every right whatsoever respecting the estates so far as not restricted by the entail. The entail contained a power to burden to a certain extent in favour of younger children. In virtue of this latter reservation Mrs Craigie granted provisions in favour of her younger children. Major Craigie did the same in his marriage contract. He had children, and predeceased his mother. On the mother dying the succession opened to the eldest grandchild, and then the question was raised as to whether the two sets of provisions were effectual. Memorials were ordered, and at advising Lords Balgray, Hermand, and Succoth thought both sets of provisions good—*dissentientibus* Lord Balmuto and Lord President Hope, who thought the mother's provisions good but the son's bad. I confess to very great difficulty in the result arrived at, but the importance of the case is that all the Judges look upon the possession of the propellee as a possession under the original entail. Thus Lord Balgray says—"It is understood in the practice of the law of Scotland that an heir in possession may propel the fee to the heir *alioqui successurus*, and the heir in so obtaining the fee has as good a right as if the ancestor were really dead. He is *civiliter mortuus*." Lord Succoth says—"When Mrs Halkett Craigie put forward the fee in the person of her son she voluntarily divested herself of the character of heir of entail in possession. From the moment she ceased to have this character all the right pertaining thereto passed into the person of her son." But if the propellee is really possessing under the original entail then he is possessing what in English law phrase is called "an estate of inheritance," and not, as the Lord Ordinary here thinks, an estate created by *inter vivos* disposition.

There is, however, another class of cases which I think may be usefully referred to as throwing light on the subject, and that is the set of cases in which it has been held that it is possible to work off the fetters of an entail by possession for forty years upon an unlimited title. Of these cases an example may be taken in the *Earl of Eglinton* v. *Montgomrie*, 4 D. 425, *aff.* 2 Bell's Appeals 149. The reason of the title being unlimited in that case was that the second entail was not recorded in the

register of tailzies, and it is to be inferred from the opinions that a mere deed of propulsion, which no one ever thought of registering in the register of tailzies was only exempt because it was truly no new title of possession. And in particular, the Lord Ordinary and the consulted Judges, Lords Moncreiff, Meadowbank, Medwyn, Jeffrey, Cockburn, Murray, and Ivory, refer to the case of *Turnbull* v. *Hay Newton*, which was a case of propulsion. The latter Judges say—"It was impossible to hold that such a deed could have the effect of superseding an entail which it in express words confirmed, or that it could be considered as an original entail when it merely put forward the fee expressly as it was held by the title of the only original entail." But the Lord Ordinary's view here would, I think, lead necessarily to the position that the deed of propulsion created a new entail—not inconsistent with the old but still a new entail—and if so it would, I think, have required registration, and that is inconsistent with the case of *Turnbull*, 14 S. 1031. *Eglinton*, 4 D. 425, was affirmed in the House of Lords, and Lord Brougham puts the question (p. 176) thus—"First, was the deed of 1774 a new and substantive and independent entail? or was it only one related and ancillary to the former entail of 1728 . . . and having the mere operation of propelling the fee from the heir of entail in possession to the heir next called." And then follows on page 179 a passage which I think shows that Lord Brougham had precisely the same difficulties as to the real authority for a deed of propulsion as I have ventured to express—"It is to be observed, respecting such deeds as an heir of entail in possession makes merely to propel the fee, that they must very closely follow the tenor of the original and radical entail, because, unless they be so conceived as to be wholly identical with it there is some difficulty in understanding how a forfeiture is to be avoided supposing the original deed to be sufficiently fenced; nay, more, there seems some anomaly even then; for example, if Mrs Lilias Montgomerie possessed under the deed of 1774, which she must have done if she had propelled the fee to the next heir *alioqui successurus*, and converted her own fee under the old entail into a mere liferent, giving her son before his time a power to jointure his wife, one does not very well see how she could escape a forfeiture under the careful prohibition contained in the deeds of 1725 and 1757 against brooking, that is, enjoying or possessing, under any title except that of those deeds themselves. However, this difficulty must long since have been got over in the Scotch law, because the validity of propelling deeds has long been fully recognised."

On the whole matter therefore I come to the conclusion that the possession of an heir in virtue of a deed of propulsion is a possession of an estate of inheritance under the old entail, and that consequently a succession is established and becomes due. Its payment, however, as regards time, is I think regulated by the 15th section, because I think there is proper acceleration by the surrender of a prior interest. The Lord Ordinary thinks that section 15 is inapplicable, his reason being, as explained by him, that "these words cover, and I think are intended alone to cover, not a fee, though it may be a fettered fee, but a charge upon the fee, as the interest of the tenant for life is a charge on the estate of a tenant in tail in England." Now, in the first place, I think the last sentence is inaccurate. As I understand it, the tenant for life holds a separate estate from the tenant in tail, and the one is not a burden on the other in the sense that a Scottish liferent is a burden on the fee. And further, I fail entirely to see that the principle of the *Duke of Northumberland's* case ([1905] A.C. 406) is at all limited to the case of tenants for life. On the contrary, looking to the observations of Lord Davey in that case, and the observations of Lord Selborne in the *Earl of Zetland's* case (5 R. (H.L.) 51), misapplied by the Lord Ordinary, I think that if in England a tenant in tail who either could not bar or had not *de facto* barred the entail surrendered his interest and allowed the next tenants in tail to come in, there would be a succession which would give rise to a claim for payment at the time fixed by the 15th section, *i.e.*, on the death of the surrendering tenant in tail.

I am therefore for recalling the interlocutor and giving judgment in favour of the Crown.

LORD M'LAREN—I agree generally in the opinion which has just been delivered by the Lord President. The only observation I wish to make is with regard to a subsidiary point in the case—the question as to the effect of deeds of propulsion. In my opinion the validity of a deed of propulsion depends entirely on the question whether the deed involves a contravention of any of the cardinal prohibitions of the deed of entail, because a disponee or heir under a deed of entail is an unqualified proprietor except in so far as he is restrained by the prohibitions and fetters of the deed under which he holds. Now, if an heir of entail under the guise of a deed of propulsion were to introduce any outside person into the destination, of course that would be an alienation, and no one would think for a moment of defending such a deed. If, again, he propelled the estate in favour of a person who was presumably the heir, but a nearer heir should afterwards be born, then that would be in fact, although it might not be in intention, an alteration of the course of succession, and it would be open to the subsequently born heir, by an action of declarator or other proper legal measure, to obtain himself reinstated in his right. But if an heir propels the fee to his own eldest son, I am unable to see how such a deed could ever be challenged under the law of entail, because it is not an alienation; it introduces no new person into the destination, and it is certainly not an alteration of the course of succession; the succession after the death of the dis-

ponee goes on exactly as before. It is on this ground, I can hardly doubt, that the conveyancers of former generations had come to recognise that in fitting circumstances propulsion was a perfectly legal proceeding on the part of a person holding under a tailzie; and although it is singular, as his Lordship has pointed out, that there is so little authority of early date, I cannot help thinking that this is mainly because the principle of propulsion was so well understood that it did not occur to conveyancers to raise any doubt as to its validity when confined within its proper limits. On the main question I think this case is governed by the 15th section of the Succession Duties Act, which I think was just intended to prevent the avoidance of succession duty by an anticipatory deed such as we have under consideration.

LORD KINNEAR—I agree entirely in the opinion of the Lord President, which indeed so completely anticipates all the reasons which I had intended to state to your Lordships that I should hardly have thought it necessary to add anything at all were it not for the importance of the general question. I rather think that what I do add will be merely a repetition of what has been said by the Lord President; but in consideration of the novelty and importance of the question I will state my own reasons. I observe, in the first place, that I do not understand that any question is now raised by the Crown with reference to the fee simple estate of Amondell. I understood Mr Young to say that he made no claim in respect of the succession to that estate, and the question which would have been raised, and which the Lord President dealt with in a manner in which I entirely concur, therefore does not really arise for judgment. The question for decision therefore relates only to the entailed estate of Strathbrock. As I understand the Act, any beneficial interest in property which may open to a person on the death of another person, either by disposition or by devolution of law, creates a succession in the sense of the second section of the statute. And, therefore, two things must combine in order to make the duty exigible, the right must have been created expectant upon death, and that right must have come into the beneficial possession of the person entitled. I think both of these conditions are satisfied in the present case. Nobody questions that the right of succession in favour of the present Earl of Buchan was created by the entail under which the late Earl held, and that that was a right indefeasible except by the operation of the Entail Amendments Act, which might extinguish the entail. It was a right of succession of which the father could not otherwise deprive his son, and it is common ground between the parties that the defender is now in the beneficial possession of the estate contained in the deed of entail. And therefore I should have held that the two statutory conditions were satisfied. But then it is said, and the Lord Ordinary has given effect to this view, that the right of succession created by the deed of entail has been defeated or superseded by subsequent proceedings which he details—by the deed of propulsion executed by the late Earl in favour of the present Earl, and by a disentail to which both the late Earl and the present Earl were parties. I think these two proceedings must be considered separately in order to see whether either of them had any effect in superseding or defeating the right of succession originally conceived. I do not think it is at all material to consider the question to which the Lord Ordinary adverts, whether if the entail had been undisturbed and the present Earl had succeeded as heir of the investiture on the death of his father without having been put in possession before that event he would have taken by devolution of law or by disposition. I have no doubt that the Lord Ordinary's view upon that point is right, because the present Earl was not the head of a new stirps, but succeeded his father. But that is of no consequence to the point in dispute, and the only question we have to consider now is whether the succession created by the entail has been disturbed or superseded, because if the defender in the event supposed must have been held to take by devolution of law, he still would have taken by virtue of the entailer's deed; and that is quite clearly brought out in the case of *Lord Zetland*, to which the Lord Ordinary refers. The principle of that decision is stated very clearly in the opinion of the late Lord President, in a passage cited by Lord Hatherley in the House of Lords—"The will of the entailer when he calls a class of heirs is that the law shall determine within that class who is the person to take on every occasion on which a death occurs among the class causing a devolution of the estate, and from this it seems to me to follow that on every such occasion the transmission of the estate from the dead to the living is a devolution by law." But then it is not devolution by the general rule regulating succession of heritable estate in Scotland *ab intestato*. It is a devolution by a rule of law called in by the entailer himself, and it is in virtue of the entail that each successive heir takes up the estate. The question therefore really is whether the succession which has admittedly been created in favour of Lord Buchan has been superseded by *inter vivos* deeds, and in the first place by the *inter vivos* deed of propulsion executed by his father. Now I do not suppose it can be disputed that if a proprietor transfers his own property *inter vivos* either by gift or by sale to a donee or a purchaser, that is not a succession, and therefore the question really is whether the deed of propulsion effected such a transference. I am very clearly of opinion that it did not. The Lord Ordinary says that although it is called a deed of propulsion it is in fact a disposition, and that it must be remembered that the heir of entail in possession is the fiar of the estate, and can dispone except in so far as it is restricted by fetters. He appears to place the validity of the deed of propulsion on

these two grounds—first, that the heir of entail is fiar and can dispose of the estate, and secondly, that the actual disposition made no change in the destination of the estate. Now, it is perfectly true that every tailzied disposition confers upon the institute a right of fee which descends to the successive heirs in their order as they take up the fee in succession. But then, although it is an entire fee which is vested in the heir in possession for the time, it is vested in him subject to the restrictions of the entail; and the effect of these restrictions is that it is a fee which is intransmissible by the heir in possession for the time either *inter vivos* or *mortis causa*. He is absolutely powerless to convey the fee to anybody. It is true, and it is a very important consideration, that the deed of propulsion in this case did not purport to alter the order of succession, but the deed did purport to dispone the estate, and one of the cardinal prohibitions of this entail, as of every strict entail, is that the heir in possession shall not dispone or sell; and therefore, whether he grants a disposition in favour of a donee or in favour of a purchaser, he is formally at all events in contravention of the entail. Now, of course, it is a great deal too late at this time of day to say that it necessarily follows from that principle that the deed of propulsion is invalid, because the validity of such a title has been recognised through a long course of practice and it is recognised in the Entail Amendment Acts. But then it is very important to consider why it has been recognised and to what extent it is effectual. For this purpose we must keep in view what is the origin and constitution of the propeller's right. He is a fiar, but he is a fiar with no power to dispone and no power to alter the order of succession. The examination which the Lord President has made of the whole series of cases on the subject dispenses me from the necessity of saying anything more about them than that I entirely agree with his exposition of these decisions. I think with him that it is very material to observe that throughout the whole course of the decisions there is really no clear judicial exposition of the principle upon which a deed of propulsion can be sustained. There are only three in which the question of the validity of such a deed was directly raised and decided. The first case was *Dalrymple* v. *Lady Glencairn*, in which it was held that the deed of propulsion was invalid because it would operate to the effect of defeating the interests of the heirs of entail, or, as it was said, of extinguishing the entail itself, whereas the validity of a deed of propulsion depends, according to the argument, in its leaving the entail undisturbed. The second case in which the question was directly raised was *M'Leod* v. *Mackenzie*. There again it was held that the deed of propulsion was bad, but that was upon a ground which does not arise in the present case, because it was a propulsion in favour not of the heir apparent but of the heir presumptive, whose title might possibly have been defeated by the subsequent birth of a son to the propeller. In the last case, of *Craigie* v. *Halkett*, the question was again raised directly, and there the deed of propulsion was sustained. I must confess that I share the doubt stated by the Lord President as to the soundness of that decision, because it resulted in what is really a legal impossibility—the co-existence in two persons at the same time of a power which the entail conferred only upon the successive heirs in their order, to burden the entailed estate with provisions for younger children. But whether it was in that respect a sound decision or not, it has been treated since as a decision that a deed of propulsion in general is a valid instrument; and to that extent I am not prepared to dispute it. But both in that case, and in the other cases which I have mentioned, the ground upon which a deed of propulsion may be sustained is explained, although only incidentally and in passing, by the judges in two of the cases, and in the course of the argument in the other. In the case of *Dalrymple* it is said that the deed of propulsion is valid because it does not injure the entail. In *M'Leod* v. *Mackenzie* Lord Alloway said that the propulsion has been sustained only because it does nobody any harm. In the case of *Craigie* v. *Halkett* Lord Succoth points out that the deed is sustained because nobody could have any title to challenge it. His argument is that if the next heir had challenged the deed of propulsion as a contravention the only effect would be to irritate the right created by the deed—to forfeit the right of the propeller and to carry the estate to the very person to whom the deed of propulsion had given it. Therefore according to his Lordship's view there was no interest in anyone to raise the question. I think that these expressions are enough to suggest the true explanation of the gradual establishment in practice of so anomalous an instrument, and I am therefore disposed to think that the deed of propulsion came into use in consequence of a principle which receives effect in other branches of the law of entail, and which is clearly explained by Lord Corehouse in the case of *Graham* v. *Bontine*. His Lordship says that wherever a conveyance, although prohibited by the entail, does not encroach upon the rights of the heirs-substitute they have no interest and therefore no title to challenge it, and that it is upon that ground that deeds of trust and heritable bonds have been sustained, provided their duration is commensurate with the interest of the heir of entail in possession who grants them. Now if that be the ground on which the deed of propulsion has been allowed, it appears to me to follow that it may be regarded as a good title of possession to an heir apparent during the granter's life, provided it be kept in view that while it may be kept up as a formal title it has no real efficacy after the granter's death. This condition is a necessary consequence of the admitted principle that the heir propelling cannot alter the succession. He cannot give his son a right of succession, because that is a right which is already secured to the next heir by the deed of entail, and which it is

not in the power of the heir in possession either to take away or to confirm. The assumption upon which alone the propulsion can be sustained is that the deed does nothing more than to put the estate during the lifetime of the granter into the hands of the heir already entitled to succeed, and it follows that it is upon the deed of entail itself and not upon the deed of propulsion that the propellee must found his right to hold after his father's death. I think that is very clearly illustrated by the class of cases to which the Lord President referred in some detail where a question has arisen as to whether a new deed of entail was effectual although not recorded in the register of tailzies. The case of *Montgomerie* v. *Lord Eglinton* is probably the most important of these, and the opinion of Lord Moncreiff in that case is most instructive. The ground of distinction which Lord Moncreiff takes between a deed which merely puts forward the fee to the immediate heir of entail—a thing which he says has often been done without its being held that the deed executed for the purpose constituted a new entail—and the new deed in favour of the succeeding heir, which was under consideration in that case, is simply this, that the deed of propulsion does not affect or defeat the deed of entail but merely carries it on and gives effect to it except only in so far as it removes the propeller's interest during his life and allows that of the next heir to come into effect before the time, and accordingly, for the purpose of the distinction he is enforcing, he refers to the case of *Turnbull* v. *Hay Newton* as a clear illustration of the law. He says that in the case of *Hay Newton* "the disposition was in terms made under the conditions and irritancies specified in the entail, and it is impossible to hold that such a deed could have the effect of superseding the entail which it in express words confirmed, so that it could not be considered as an original and independent deed, but had simply the effect of putting forward the fee expressly as it was held under the deed of tailzie." On the other hand, the deed in question in *Lord Eglinton's* case was an independent and substantive title, which if it had not been validated by prescription would have involved a contravention and an irritancy. The validity of a deed of propulsion therefore must always depend upon whether it leaves the original entail to stand as the ruling title, or whether it purports to constitute an independent title which will supersede the entail. Now, when we turn to the deed of propulsion here it seems to me as clear as possible that the granter of the deed did not intend anything like an independent or original title which could stand upon its own merits, but simply intended to put forward the fee under the deed of entail with all the limitations of that entail, because it begins by reciting that his eldest son, "commonly called Lord Cardross, is the heir immediately entitled to succeed to me on my death in the said entailed lands and others," and on that narrative he conveys to his son, whom failing the other heirs specified in the original entail, but always with and under the conditions, provisions, prohibitions, limitations, clauses irritant and resolutive, and others contained in the said deed of entail. Now I think it is perfectly impossible to suggest that that created any title in the disponee independent of the deed of entail or that could stand without its support. The deed of entail remained the regulating and paramount title, and accordingly when the Earl of Buchan, the propeller, died it appears to me to be clear that his successor the present Earl was still in a position to take up the estate as heir of tailzie and provision under the original entail. There was no other title that could support his right, for the deed of propulsion, if it had been challenged, could only have been sustained on the ground that it did not in any way disturb the entail. But if that be so, apart in the meantime from any consideration of the disentail proceedings, the question is whether the duty is exigible on the assumption that the deed of entail is still the regulating title. I am of opinion with the Lord President that under the 2nd section the duty clearly attaches. But then the conditions upon which it is payable are set out in the 15th section, and any difficulty that might otherwise have remained as to liability for the duty under the 2nd section alone is removed by the terms of the 15th section. The 15th section provides that "where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty shall be payable at the same time and in the same manner as if no such acceleration had taken place." The Lord Ordinary has held that that provision of the 15th section does not apply to the right of an heir in possession under a Scottish entail. I must confess I am unable to follow that view, because if anything is settled by a series of decisions in the House of Lords upon the construction of this statute, it is that the taxation was intended to apply equally to the analogous rights of entailed proprietors in Scotland and England notwithstanding the difference between the technical systems of the two countries. In the application of that rule we are told to read the language of the Succession Duty Act not as technical language but as ordinary language and therefore capable of being applied to two different technical systems. But I cannot find in the provision which I have just cited that there is anything in the language to create a technical difficulty. All the terms used are terms of ordinary English. The question therefore is whether Lord Buchan's title has been accelerated, and it would not be easy to find words more clearly synonymous with those of the statute than the words which are generally used to describe a deed of propulsion. The heir in possession is said to put forward the fee to the heir entitled to succeed, and that appears to me to be just an acceleration of the succession. The deed of propulsion does nothing more or less than to put the heir immediately entitled to succeed into beneficial possession of the estate before

his time. The question then comes to be whether it was accelerated by the extinction of a prior interest. Now Lord Buchan's interest as long as he lived was prior to that of Lord Cardross, and I do not know how an heir of entail in possession could more effectually extinguish his own interest than by divesting himself and investing the next heir. What Lord Buchan did was to divest himself of the interest which would have belonged to him during his life by conveying the estate during his life to his eldest son. It appears to me therefore that there can be no question of the application of the 15th section. Then the only question that remains is whether any alteration upon the defender's right has been effected by the disentail which could have the effect of defeating the succession so as to substitute some other title for it. I am of opinion, with your Lordships, that that question is decided in the cases of the *Duke of Northumberland* and *Lord Lilford*. It is quite clear on these authorities that nothing that was done by Lord Buchan, either separately or by the aid of his father, to convert the right of an heir under a strict entail into the right of a proprietor in fee-simple conld have the effect of defeating or superseding the succession to which the duty attaches; and indeed the instruments of disentail are entirely in accordance with that view, because the defender proceeds to execute and record an instrument of disentail in no other character than that of heir of entail in possession, and nobody but the heir of entail in possession could apply for a disentail or effectually disentail. But then, apart altogether from the authority, which I think is conclusive, of the cases cited, I am unable to see how the effect of the disentail can be said to disturb the succession in the slightest degree. The only effect of the disentail is to relieve the title of the fetters. It does not alter the destination. Nothing that was done by the disentail had the effect of excluding the right of Lord Cardross to take up the estate as the heir of the existing investiture on the death of his father Lord Buchan. It was converted from a tailzied destination into a simple destination, and that was the whole effect of the disentail. I am therefore of opinion with the Lord President, and for his reasons, that we should recal the Lord Ordinary's interlocutor.

LORD PEARSON—I could not usefully add anything to the opinions which have been delivered and in which I concur.

The Court recalled the interlocutor of the Lord Ordinary and ordained the defender to deliver an account of his succession as concluded for.

Counsel for the Pursuer (Reclaimer)—The Solicitor-General (Ure, K.C.)—Lorimer, K.C.—A. J. Young. Agent—Solicitor of Inland Revenue (P. J. Hamilton-Grierson).

Counsel for the Defender (Respondent)—The Dean of Faculty (Campbell, K.C.)—Chree. Agents—John C. Brodie & Sons W.S.

Tuesday, March 19.

SECOND DIVISION.

[Sheriff Court at Glasgow.

HENDRY *v.* CALEDONIAN RAILWAY COMPANY.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1 (1)—"*Arising out of and in the Course of the Employment*"—*Fish Porter at Railway Station Killed when Unnecessarily Walking on Line.*

A fish porter, employed by a fish stevedore who had a contract with a railway company for the porterage of fish delivered at one of their stations, left the siding where the trucks were customarily discharged and went along the main line of railway, where he had no right to be, with the object of reaching a shunter's bothy, where he could learn the number of boxes expected by the incoming train. The information was not sought at the instance of his employer, and would in fact have been of no particular use to him or any of the porters. He was run down and killed by an engine. *Held* that he was not killed by an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act 1897, sec. 1 (1).

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), section 1 (1), provides—"If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act."

Mrs Ann Boyle or Hendry brought an arbitration before the Sheriff-Substitute of Lanarkshire at Glasgow (DAVIDSON), under the Workmen's Compensation Act 1897, against the Caledonian Railway Company for compensation in respect of the death of her husband Samuel Hendry.

The Sheriff-Substitute refused to grant compensation, and Mrs Hendry appealed by stated case.

The case set forth the following facts:—"1. That on 17th August 1906, the Caledonian Railway had a contract with John Maclean, fish stevedore, Glasgow, for the porterage of fish delivered at their station at Gushetfaulds.

"2. That up to the said date, and for several years prior thereto, the deceased Samuel Hendry was employed by the said John Maclean as a fish porter.

"3. That his average earnings amounted to 19s. per week.

"4. That he was paid by the day, and not under contract, to attend at the railway station at any particular time, but that he had for a long period done so regularly, and was looked on by the said John Maclean as a regular workman.

"5. That he and other porters who attended at the station were paid by the