one sense his heir apparent, but who it is urged is not his heir apparent in the sense of the Rutherfurd Act, because his right of succession is not indefeasible.

The statute defines heir apparent "as the heir who is next in succession to the heir in possession, and whose right of succession if he survive must take effect." His right of succession to what and to whom?

His right of succession is to the heir in possession. If he survives he must succeed to his father, the heir in possession.

It is an elliptical mode of expression to say that a person succeeds to a thing or to a place; what he succeeds to is to a person in the possession of the thing, and that being so, if you are the next person to the heir in possession you are the heir apparent.

The other view is that it is a right of succession to the entailed estate that is to take effect. If that be so, then the rules laid down in the case of *Preston Bruce* would undoubtedly apply.

Upon these grounds I am of opinion that the petitioner's eldest son is heir apparent in the sense of the Rutherfurd Act.

The Court adhered and remitted to the Lord Ordinary to grant the prayer of the petition.

Counsel for the Petitioner—Moncreiff—Low. Agents—Skene, Edwards, & Bilton, W.S.

Counsel for the Respondents—Mackay—Begg. Agents—W. & J. Burness, W.S.

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*Tuesday, June 26.*

## SECOND DIVISION.

### CRICHTON AND OTHERS, PETITIONERS.

*Process—Arbitration—Diligence to Recover Documents.*

A petition was presented by one of the parties to an arbitration in which the Court was asked to appoint a commissioner to receive productions from havers, and to grant a warrant for the citation of havers to appear before the commissioner, and produce on oath the documents called for in the specification annexed to the petition. The Court *refused* the petition on the ground that as they had no knowledge of the facts of the case, the petitioners should first have had the specification approved of by the arbiters, and then, if necessary, applied to the Court.

On 13th January 1888 a submission under the Land Clauses Consolidation (Scotland) Act, 1845, was entered into between Miss Catherine Crichton and others, proprietors of certain subjects in Burntisland, and the North British Railway Company, as to the value of these subjects, which had been taken by the railway company.

Arbiters were appointed, who allowed a proof, and issued an order, which contained the following:—"... The arbiters respectfully recommend the Lords of Council and Session, and the Sheriffs of the Lothians and Peebles and county of Fife, to grant warrant for citing witnesses and havers on the application of the parties."

A petition was accordingly presented to the Second Division of the Court of Session by Miss Crichton, to which was annexed a specification of the documents sought to be recovered.

The petitioners prayed the Court to "appoint a commissioner to receive all papers and productions from havers, and to grant warrant to messengers-at-arms and sheriff-officers for the citation of havers to appear and produce on oath the documents called for in the specification annexed hereto before the commissioner aforesaid, and that at such time and place as he may fix for that purpose; and also to grant warrant in ordinary form for the citation of havers and witnesses on behalf of the petitioners, to appear before the said arbiters within the board room of the directors of the said North British Railway Company on the 2nd day of July 1888, at half-past ten o'clock forenoon."

The petition was opposed by the respondents.

The Court, on the ground that they had no knowledge of the facts of the case, stated that the specification should first have been approved of by the arbiters, and that then, if necessary, the petitioners might have applied to the Court.

The following interlocutor was pronounced:—

"Grant warrant for the citation of witnesses at the instance of the petitioners before the arbiters named in the petition, within the board room of the directors of the North British Railway Company at Edinburgh, on the 2nd day of July 1888, at half-past ten o'clock forenoon, and at such other place or places, and at such other time or times, as the said arbiters shall appoint for the examination of witnesses: *Quoad ultra* refuse the prayer of the petition."

Counsel for the Petitioners—C. N. Johnston. Agent—Andrew Wallace, Solicitor.

Counsel for the Respondents—C. Thomson. Agents—Millar, Robson, & Innes, S.S.C.

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*Tuesday, June 26.*

## SECOND DIVISION.

[Lord Lee, Ordinary.

### THOM *v.* ANDREW.

*Process — Caution for Expenses — Bankrupt—Damages.*

Circumstances in which the tenant of a shop, an undischarged bankrupt, was *held* entitled, without finding caution, to bring an action of damages against his landlord for illegally entering the subjects let, and removing the pursuer's effects.

This was an action of damages at the instance of James Wallace Thom, a confectioner and medicated lozenge manufacturer in Aberdeen, against Francis Andrew, auctioneer and valuator there.

The pursuer averred—(Cond. 2) "By missive of lease dated 31st December 1887 the defender let to the pursuer the shop 47 Broad Street, Aberdeen, at a weekly rent of £2, for a period not to exceed three months, unless otherwise agreed upon between the parties; entry to be given on 31st December 1887." ... (Cond. 3)

"The pursuer duly entered into possession of said shop, and expended a considerable sum of money upon fitting it up for the purposes of his business. . . . The pursuer's business was conducted therein in a prosperous manner up till the evening of Tuesday, 31st January 1888." . . . (Cond. 4) "No agreement was come to between the pursuer and defender to terminate the lease sooner than the stipulated period of three months from 31st December 1887, and no intimation was given by the defender to the pursuer that he desired it to be terminated sooner." (Cond. 5) "On the evening of said 31st January 1888, the said shop was closed and secured in the customary way, and the key taken possession of by the pursuer. . . . The defender sometime between midnight of 31st January and six o'clock the following morning, 1st February 1888, went to the said shop with joiners and other men, and without giving the pursuer any intimation or warning, forcibly and illegally broke into and entered the said shop, breaking open a wooden partition at the back thereof, or otherwise." . . . (Cond. 6) "After the defender and those acting on his instructions had affected a forcible entrance into the said shop as aforesaid, he and they illegally, and without any warrant or authority whatever, lifted and carried out into the street the whole contents thereof, embracing shop-fittings, iron safe, manufacturing machinery and plant, drawings, &c. The shelving which had been fitted up by the pursuer in said shop was also torn down and removed. After the whole contents of the shop had been taken out into the street by the order and instructions of the defender, they were placed upon three lorries, which were brought there by him, and were carried away by the defender, who illegally and unwarrantably retains possession thereof, and refuses or delays to return the same to said shop, although he has been requested to do so by the pursuer." (Cond. 9) "By the said illegal and unwarrantable action of the defender in forcibly breaking open the pursuer's said shop and illegally carrying away and detaining the whole contents thereof as aforesaid, the pursuer has not only sustained loss and damage to the amount of the value of said contents, but he has suffered in his feelings and has been subjected to much anxiety and inconvenience; his trade has been suddenly put a stop to, and his credit and reputation have been seriously injured." . . .

The defender admitted that he had let the shop to the pursuer, but averred that the agreement between them was contained in a missive, which was in these terms—"Aberdeen, Dec. 31st, 1887.—I hereby let the front part of shop occupied by me at 47 Broad Street, Aberdeen, reserving to myself the back part measuring 20 feet or thereby, at the weekly rent of Two pounds sterling per week, paid in advance, and the occupancy to be monthly if so wanted by either party, and we the undersigned, agree to the above agreement. (Signed) F. ANDREW. JAMES W. THOM." He also admitted "that on 1st February 1888 the defender removed from the premises which had been let by him to the pursuer the pursuer's effects therein, and deposited them with Mr M'Adam, carting contractor, North Charlotte Street, Aberdeen, for safe custody." This he on the same day intimated to the pursuer. He further averred—"On 9th January 1888 the defender gave the pursuer warning to remove in the following terms:—'9th January 1888. 47 Broad Street, Aberdeen. Mr James W. Thom, 47 Broad Street, City. Sir,—I hereby intimate that I require you to remove from my shop No. 47 Broad Street, let to you for the present month, and that on or before 31st January current.—Yours truly (Signed) FRANCIS ANDREW."

The pursuer pleaded—"The defender having illegally, unwarrantably, and forcibly broken open the pursuer's said shop, taken possession of and carried away the whole contents thereof belonging to the pursuer, and paralyzed his business, is liable in damages therefor, and decree should be granted as concluded for, with expenses."

The defender pleaded—"(1) The pursuer being an undischarged bankrupt, should *ante omnia* be ordained to find caution."

Upon 6th March 1888 the Lord Ordinary (LEE) pronounced this interlocutor—"In respect it is stated that the pursuer is an undischarged bankrupt, appoints intimation of the dependence of this process to the trustee on his sequestrated estate, in order that he may, if so advised, sist himself as a party to the action within ten days."

The trustee refused to sist himself, and then the Lord Ordinary on 13th March 1888, in respect of this declinature, ordained the pursuer to find caution for expenses by the first box day in the ensuing vacation. The adjustment of the record was continued, and upon 18th May the pursuer, not having yet found caution, was allowed eight days to do so.

On 29th May the Lord Ordinary pronounced the following interlocutor—"In respect the pursuer has failed to find caution for expenses, assoilzies the defender from the conclusions of the summons, and decerns: Finds the defender entitled to expenses."

The pursuer reclaimed.

The defender cited *Clarke* v. *Muller*, Jan. 16, 1884, 11 R. 418.

At advising—

LORD YOUNG—This question of caution is always one for the discretion of the Court, and the Court may, in the exercise of that discretion, order either the pursuer or the defender of the action to find caution for expenses, but that discretion of the Court will not be exercised unless it appears that the interests of justice require caution to be so found.

The general rule is that when a bankrupt has been divested of his whole estate, either by the operation of the Bankruptcy Act, or where he has granted a voluntary trust-deed, he will not, apart from his trustee, be permitted to sue any action of which the subject-matter relates to that estate without finding caution for expenses. This is not on the ground that the bankrupt is a poor man, and would not be able to pay the expenses if the action was decided against him, because that is the case with many litigants besides bankrupts or persons who have granted a trust-deed. The most common case is that of persons on the poor's roll, who by reason of their poverty are even provided with counsel and agents without payment by the liberality of the professions, and who would not be able to pay the expenses if the action were decided against

them. But a man who has been divested of his whole estate is in a very different position. He is, as a general rule, not entitled to sue an action without finding caution for expenses. The Court, however, has made exceptions in the case of certain personal actions, although it is not an absolute rule that they will not call upon the bankrupt to find caution even in these cases, because the discretion of the Court still remains. A bankrupt, however, is not to be grossly slandered nor to be assaulted, and not allowed to have any remedy unless he can get the trustee on his bankrupt estate to sist himself as a party to the action, which I should think no trustee desirous of doing his duty honestly would do. But even in the case of personal slander the discretion of the Court remains, as appears from a case cited to us in which the other Division refused to allow the pursuer to continue his action unless he found caution for expenses.

Considering this particular case, the conduct of the defender appears to me to have been outrageous. On a very short notice of removing—only a few days—which notice the pursuer denies he ever received, he proceeded in the course of the night with a number of men to the shop where the pursuer was engaged in carrying on his business, he broke down the door, and, entering the shop, carried off the contents. That seems a most lawless proceeding on the statement of it, and I think it is an outrage that the pursuer is not bound to submit to merely because he cannot get his trustee to think that it would be a proper act of administration for him to try and recover some funds for the creditors by sisting himself in an action of damages against the defender. I do not think that the trustee would be warranted in appearing in such an action. But then I cannot say that I think the bankrupt is obliged to submit to such treatment. I think that in the exercise of our discretion we may, in the circumstances of the case, recal the Lord Ordinary's interlocutor ordering the pursuer to find caution for expenses, and allow the case to proceed. It is of course only *hoc statu*, as the application for caution may be renewed at any stage of the proceedings, and I do not think that we should send the case for jury trial, but remit to the Lord Ordinary to allow a proof.

Lord Rutherfurd Clark—This is so very peculiar a case that I am disposed to agree in Lord Young's conclusion.

Lord Justice-Clerk—I have come to the same conclusion as Lord Young. The Court usually adheres with stringency to the general rule of ordering the bankrupt to find caution before allowing him to sue an action, and it is not in many cases that the rule is relaxed. But in cases which are personal to the bankrupt the Court has from time to time relaxed that general rule, and this seems a very strong instance of such a case. I am therefore disposed to recal the Lord Ordinary's interlocutor and remit to him to proceed with the case.

Lord Craighill was absent through illness.

The Court recalled the interlocutor reclaimed against, and remitted to the Lord Ordinary to proceed with the case.

Counsel for the Pursuer and Reclaimer—Party. Agents—Sturrock & Graham, W.S.

Counsel for the Defender and Respondent—Rhind. Agent—Wm. Officer, S.S.C.

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*Tuesday, July 3.*

## FIRST DIVISION.

[Lord Trayner, Ordinary.

## SEMPLE AND ANOTHER, PETITIONERS.

*Judicial Factor—Curator bonis—Unauthorised Expenditure of Ward's Money.*

In a petition for the discharge of a *curator bonis*, objection was taken by the ward to a sum expended by the curator, without the authority of the Court, on the erection of a new mansion-house. The sum so expended was £3500. The net rental of the estate was £600, out of which the ward's mother, forty-two years of age, had an annuity of £300. At the death of the ward's father there was in bank a sum of £1630 on deposit-receipt. After deducting the interest upon the money borrowed to build the house the ward's income was little more than £200.

*Held* that as the *curator bonis* had given his consent to the expenditure of £3500 on the mansion-house, without having obtained the authority of the Court, and as this expenditure was not for the benefit of the ward, this item in the audit of his accounts as an officer of Court should be *disallowed, reserving* to the curator any claim of recompense which he might be able to establish in respect of any benefit accruing to the ward's estate.

On 9th July 1885 William James Semple of East Overton, Lanarkshire, with the consent of his uncle and curator John Baird, manufacturer, Glasgow, presented an application for recal of the appointment of Thomas Tennent, bank agent, Strathaven, as his *curator bonis*, and for his exoneration and discharge.

The circumstances under which the application was made were as follows:—The deceased Mr James Semple of East Overton died in July 1873, intestate, leaving a widow and two children, a son and daughter. The petitioner was his son, and was at the date of the petition fifteen years of age.

By his antenuptial contract of marriage and relative supplementary deed Mr James Semple provided to his wife the liferent of his mansion-house, and an annuity of £300 out of the rents of the estate. Mrs Semple, who at the date of the petition was forty-two years of age, had married again, and was then the wife of Dr Dougal, Strathaven.

Mr Tennent had been appointed factor *loco tutoris* in February 1874 to the petitioner, and he continued to act in this capacity until May 1883, when his ward attained minority, whereupon his appointment was recalled, and he was re-appointed *curator bonis*.

At the date of Mr James Semple's death the existing mansion-house of Overton was a small one, contiguous to the Overton steading; the drainage