Friday, June 29.

FIRST DIVISION.

[Lord Trayner, Ordinary.

FORBES, PETITIONER.

Entail—Disentail—Resolutive Condition — Heir Apparent.

The heir of entail in possession of an entailed estate presented a petition for authority to disentail with the consent of his eldest son. The deed of entail provided that if the heir of entail in possession of the entailed estate should at any time succeed to a certain peerage, he should for himself and his heir apparent denude of the entailed estate. At the date of the application the petitioner was heir presumptive to the peerage.

Held that the condition in the deed of entail was resolutive only, that the state of facts must be taken as at the date of the petition to disentail, and that the petitioner was entitled to disentail with the consent of his eldest son, being his heir apparent in the sense of section 52 of the Rutherfurd Act.

This was an application by the Hon. Atholl Monson Forbes, heir of entail in possession of the entailed estate of Brux in Aberdeenshire, for authority to disentail the estate with the consent of his eldest son only, born in 1882, whom he averred was his heir apparent in the sense of section 52 of the Rutherfurd Act, or alternatively with the consent of the three next heirs of entail.

The petitioner held the estate of Brux under a deed of entail dated 15th July 1799, executed by the deceased Jonathan Forbes in favour of himself and the heirs whatsoever of his body. This deed contained the following provision—"And whereas it is my wish and intention that the succession to my said lands and estate of Brux and others before disponed should be for ever kept separate and distinct from the succession to the family honours and dignity of the peerage of Forbes while there shall be any of the issue male of the said James Lord Forbes existing besides the person possessing the said dignity for the time and his heir apparent, and failing the said James Lord Forbes and his issue male, while there shall be any issue male existing of the family or families entitled to succeed to the said dignity and peerage of Forbes besides the person actually enjoying the said dignity and peerage for the time and his heir apparent, it is hereby expressly provided that in case any of the heirs of taillie above mentioned descendent of the body of the said James Lord Forbes shall succeed to the honours and dignity of the peerage of Forbes while there is any other heir or heirs of taillie existing descendent of the body of the said James Lord Forbes besides the person succeeding to the peerage and his heir apparent, the person so succeeding to the said peerage shall for himself and his heir apparent in the said peerage forfeit, amit, and lose all right, title, and interest which he may have to my said lands and estate."

Lord Forbes, who succeeded in 1868, was at the date of the petition fifty-eight years of age, and unmarried, and the petitioner, a younger brother of Lord Forbes was his heir presumptive.

The Rutherfurd Act (11 and 12 Vict. cap. 36), section 2, provides that an heir of entail born before 1st August 1848, being of full age, and in possession of an entailed estate under an entail dated prior to 1st August 1848, may disentail with the consent (and not otherwise) of the heir next in succession, "being heir apparent under the entail of the heir in possession." By section 52 the words "heir apparent" are to be construed as meaning "the heir who is next in succession to the heir in possession, and whose right of succession, if he survive, must take effect."

By the Acts 38 and 39 Vict. cap. 61, sec. 5, and 45 and 46 Vict. cap. 53, secs. 12 and 13, it is provided that consents may be given in the course of the application by the heirs themselves or their curators *ad litem*, and when not given, may be valued by the Court and dispensed with.

The petitioner stated that he was born on the 15th day of February 1841, and was of full age and subject to no legal incapacity, and that the three nearest heirs who at the date of presenting this application were for the time entitled to succeed to the said entailed estate of Brux, in their order successively, immediately after the petitioner, were (1) Atholl Laurence Cunyngham Forbes, the petitioner's eldest son, and heir apparent under the entail, born on the 14th day of September 1882, and residing with him; (2) Ivan Courtenay Forbes, the petitioner's second son, born on the 11th day of December 1883, and also residing with him; and (3) the Hon. Walter Robert Drummond Forbes, the petitioner's half-brother, born on the 14th day of May 1865, and residing at Castle Forbes, Aberdeenshire. The said Atholl Laurence Cunyngham Forbes and Ivan Courtenay Forbes were in pupillarity, and curators *ad litem* were appointed to them.

No answers were lodged for the respondents, but it was maintained for the heirs second and third in succession that the petitioner's eldest son was not in the position that if he survived his father his succession "must take effect."

On 14th March 1888 the Lord Ordinary (TRAYNER) found that the petitioner was entitled to disentail the lands in question on obtaining the consent of his eldest son.

"*Opinion.*—The petitioner, who was born in 1841, is the heir of entail in possession of the lands of Brux under an entail dated in 1799, and he asks under the present application authority to disentail the said lands with the consent of his eldest son, who was born in 1882. In these circumstances the petitioner is undoubtedly entitled, under the provisions of the 2nd section of the Rutherfurd Act, to disentail the lands in question, provided his son, whose consent is to be given, falls within the definition of 'heir apparent' as defined in that Act. That definition is, 'Heir apparent shall be construed to mean the heir who is next in succession to the heir in possession, and whose right of succession, if he survive, must take effect." It is not disputed that the petitioner's eldest son is the heir next in succession under the entail to the petitioner, but it is maintained by the heirs second and third in succession that the petitioner's eldest son is not in the position that if he survive his father his succession 'must take effect.'

"It appears that under the entail it is pro-

vided that if the heir in possession of the lands of Brux should at any time succeed to the family honours and dignity of the peerage of Forbes, he must, for himself and his heir apparent, denude of the lands of Brux, which then descend to the heir next in succession to such heir apparent. The present Lord Forbes, who succeeded in 1868, is now fifty-eight years of age and unmarried, and the petitioner (a younger brother of the present peer) is his heir presumptive. If, therefore, Lord Forbes predeceases the petitioner without issue, and the petitioner succeeds to the title, he will be bound to denude of the lands of Brux, which would then pass (other circumstances being the same as at present) to the respondent Ivan Courtenay Forbes, the petitioner's second son. It is upon the possibility or probability of this taking place that the respondents maintain that the petitioner's eldest son is not an heir whose succession if he survive the petitioner 'must take effect.' The respondents' opposition is based entirely on probabilities and speculations as to what may happen. If Lord Forbes should predecease the petitioner, if he should not marry, and if married he should have no issue, or, having issue, if that issue should also predecease the petitioner, then the petitioner would succeed to the peerage, and in that event the petitioner's eldest son would not be the heir entitled to succeed to Brux. On the other hand, if Lord Forbes survives the petitioner, if he marries and leaves issue, the petitioner and his eldest son may disentail the lands of Brux.

"If all possible contingencies were taken into account (and I have only noticed some of those which might arise in the present case) it would be almost impossible to give effect to the provisions of the Rutherfurd Act. In the present case, a quite possible contingency would (as I am told) carry away from the respondents their character of second and third heirs in succession to Brux. It appears to me that the only reasonable way of dealing with the Rutherfurd Act is to give effect to its provisions in the circumstances existing at the time when these are appealed to. That I take to be the principle on which the Court proceeded in deciding the case of *Preston Bruce*, 1 R. 740. In that case there was a clause of devolution somewhat similar to what we have here, and regarding it the Lord President observed that while it might operate as a resolutive condition, it was not suspensive.

"The case of *Gordon Duff* (Duncan's Manual, p. 227), to which I have been referred, does not bear upon the present question at all. In that case the lands of A were held under an entail, which provided that those lands and the lands of B should never be held by the same person. The heir in possession of A sought to disentail with consent of the three next heirs, and one of these three heirs was then heir in possession of B. Obviously, therefore (so long as he held B), he could not be an heir of entail of A, but as it was possible he might become so (by renouncing his right to B), it was thought proper, *ob majorem cautelam*, to call the fourth heir entitled to succeed to A. By doing so it was made certain that the three heirs next in succession to the estate of A were called and consented. But that case decided nothing bearing upon the present question."

The curator *ad litem* to the heir second in succession reclaimed, with the leave of the Lord Ordinary, and argued—The interpretation clause of the Rutherfurd Act (sec. 52) made it clear that the eldest son of the petitioner did not fall under the description there given of "heir apparent," because if his father succeeded to the peerage then his "right of succession," even though he survived, would not "take effect"—Ersk. Inst. iii. 8, 54. As to the meaning of the term "heir apparent," see Bell's Prin. sec. 1677; Statutes 16 and 17 Vict. cap. 94, secs. 20 and 21, 31 and 32 Vict. cap. 84, sec. 6, and 45 and 46 Vict. cap. 53, secs. 12 and 13; Duff on Entails, p. 17.

Argued for the petitioner—The case was ruled by the principles laid down in *Preston Bruce*, 1 R. 749. A condition such as that contained in this deed of entail was resolutive, not suspensive. The important words in section 52 upon which the present question turned were "must take effect," and they were equivalent to the term "indefeasible" in the law of England. In this case the rights of the father and son went together. [Lord President—There can be no succession except to an "heir in possession."] At the time of application the petitioner was undoubtedly "heir in possession," and the son, with whose sole consent he proposed to disentail, was his heir apparent—*Kinnoull* v. *Drummond*, February 26, 1869, 7 Macph. 576.

At advising—

Lord President—The petitioner is the heir of entail in possession of the estate of Brux in Aberdeenshire, held under an entail dated in 1799, and he proposes to disentail his estate with the consent of his eldest son, being his heir apparent. The son was born in 1882, and so is still in pupillarity; but although under sec. 2 of the Rutherfurd Act it was necessary that the heir apparent, in order to give a valid consent, should have attained the age of twenty-five years, subsequently altered to twenty-one, yet that has now been changed by the Act of 1882, which provides that the necessary consents may be given either by the heirs themselves or by their curators *ad litem*.

But the question which is raised by the present case is, whether under the provisions of this entail the eldest son of the heir of entail in possession is heir apparent within the meaning of the Rutherfurd Act? He is undoubtedly heir apparent in this sense, that he is the eldest son of his father, and if he survives his father must succeed him, I do not say necessarily to this estate, but according to the common law of succession.

The term "heir apparent" is one which is not known to the common law of Scotland. It was introduced into the law by the statute. At the same time it cannot be said to be a term about which we know nothing, for the term is made use of in peerage law, and the meaning which is there given to it is the same as that which is now given to it in the interpretation clause of this Act of Parliament. We have no corresponding term in the law of Scotland, because the expression apparent heir has a very different meaning from the term heir apparent. The one means the person to whom the succession has actually opened, but who has not completed his title to his predecessor's estate, while the other means the heir who is next in succession to the heir in

possession, and whose right of succession if he survive must take effect. The statute attaches to the term heir apparent the same meaning which belongs to it in the peerage law, which again is the same meaning as is attached to it in the law of England. Now, by the law of England the heir apparent is defined to be—"He whose right of inheritance is indefeasible provided he outlive the ancestor, as the eldest son who must by the course of the common law be heir to his father on his death." I take the definition of the term from Wharton's Law Lexicon.

Now, this being the meaning of the term heir apparent in the peerage law and in the law of England, it is clear that the words in the Rutherfurd Act "must take effect" are the same as the word "indefeasible" in the law of England, and they both apply to the person who must succeed as his father's heir.

Now, the difficulty which it is suggested arises in the present case is, that in a certain event the father will not be able to hold the estate of Brux, but will lose it not only for himself but also for his heir apparent, for the deed of entail contains this provision—[*His Lordship here read the passage from the deed quoted above*]. The present Lord Forbes has no family, and he is somewhat advanced in life, and there is therefore a possibility—perhaps even a probability—that the petitioner may on the death of Lord Forbes without issue succeed to the peerage. By so doing he will not only lose the estate of Brux for himself, but also for his heir apparent, and it is urged that in consequence of this contingency the so-called heir apparent is not heir apparent within the meaning of the statute, because it is not by any means certain that he must succeed in the event of his surviving his father.

The rule which, I think, was established in the case of *Preston Bruce*, and which is applicable here is, that a condition of this kind is not a suspensive but a resolutive condition, and when there is really a resolutive condition it does not affect such a question as we are here dealing with, because we must take the facts as they stand at the time when the application to disentail is made. What we find at present is, that the petitioner is the heir of entail in possession, and that his eldest son and heir apparent must succeed if he survives the petitioner. That seems to me to demonstrate that the so-called heir apparent is really heir apparent, because that is his present position with reference to his father. I think we are doing no violence to the definition of heir apparent in the statute in agreeing with the Lord Ordinary that we must take the facts as they at present stand. The resolution of this right may never occur. The present Lord Forbes may marry and have issue, the petitioner may predecease Lord Forbes, and many events may occur which may prevent the resolutive condition from taking effect. As therefore it may never apply to the case before us, it is not necessarily suspensive of any right. Upon these grounds I am for adhering to the Lord Ordinary's interlocutor.

Lord Mure—The question before us is a somewhat delicate and difficult one, but after consideration I am inclined to adopt the rule laid down in the case of *Preston Bruce*, though the facts in that case differed in some respects from those which we have at present to deal with. I think also that the earlier case of *Kinnoull* has a considerable bearing on the present question as deciding that we must look only at the state of the facts at the time the application for disentail is presented. In that case we held that an heir of entail in possession of an estate under an entail which contained a clause of devolution might grant bonds of provision under the Aberdeen Act which would be valid, though before his death he might be obliged to denude in favour of another heir. Here no doubt the eldest son of Mr Forbes is the one who will necessarily succeed his father if he survives him, and he is therefore in the ordinary sense of the words heir apparent of his father. It is possible, no doubt, to put another construction on these words, as has been suggested to us, but to do so would be, as the Lord Ordinary has pointed out, to take into account a variety of possible contingencies which may never occur, and which therefore ought not to be allowed to bar the present application. If we were to give effect to every possible set of circumstances which might possibly occur, and to refuse applications like the present in respect of these possible circumstances, it is clear that no petition for disentail could ever be successful. Now such a result is quite opposed to the spirit of the Act of Parliament.

I therefore agree with your Lordships in holding that we must deal with the state of facts as they exist at the date of the application to disentail, and so looking at them, I think that the petitioner's eldest son is his heir apparent in the sense of the statute, and I agree with your Lordship that we should adhere to the Lord Ordinary's interlocutor.

Lord Shand—An heir of entail in possession, as in the present case, is entitled to disentail his estates with the consent of his heir apparent, and in the statute the heir apparent is defined to be "the heir who is next in succession to the heir in possession, and whose right of succession if he survive must take effect."

Now, the language of this clause is somewhat ambiguous, because if the words have any meaning they must mean that the heir apparent's right of succession is one which is not to be defeated by contingencies. But the reclaimer urges that in certain contingencies the right of the heir apparent will be defeated, and that therefore his right of succession is not one which under all circumstances "must take effect."

But there is another possible meaning for these words, and that is, they may be descriptive of a class of heirs; and it is of importance to determine which of the two constructions of these words is the reasonable one.

I have come to the conclusion that the interpretation put upon these words by the petitioner is the true one, though at the same time I cannot agree with your Lordships in holding that the case of *Preston Bruce* has any application to the present case. The result at which I arrive on the question before us is the same as your Lordships, but I reach that result in a somewhat different way.

Lord Adam—This is a petition for authority to disentail, and the heir in possession has obtained the consent of his eldest son, who is in

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.

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.

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)