quite satisfactory, but supposing that prescription had not run upon the title of heir-at-law which was made up by the defender here, then it appears to me the defender would have had no answer to the present action, because he would have been in the position of a person sued on the obligation which lies upon every heir to implement his ancestor's trust-deed, and on the other hand he would not have been in a position to reduce that deed *ex capite lecti* founding on his individual right, because it was quite settled in the law of Scotland that no one but the heir can bring an action of reduction *ex capite lecti*. It appears to me that the defender takes benefit by prescription in this way—that he has a good title by prescription against any adverse claim excepting one founded on breach of trust, and if it can be shown that he has committed a breach of trust his prescriptive title would be of no avail. But then on the question of breach of trust it appears to me, in accordance with a rule of wide application, that the strict rules of evidence and rules of law are to a certain extent broken down, so that anyone who is charged with breach of trust may show by all competent evidence that he has acted honestly. And therefore though the defender is not in the position of bringing a reduction *ex capite lecti*, yet he is obliged to defend his author against a charge of breach of trust, and to show in point of fact that the deed was executed on deathbed, and that therefore his author committed no fraud in making up his title and neglecting to convey to the trust. Having established that point, he then falls back on his prescriptive title, which is a perfectly good title against any other competing right except one founded on the trust-deed. The view I take has only a theoretical difference from that suggested by Lord Kinnear and as I understand concurred in by Lord Adam, but they both lead to the same result—that both in law and substantial justice the claim of the defender is well founded.

LORD PRESIDENT—I concur in the opinion of Lord Kinnear.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Dickson—Law. Agents—Reid & Guild, W.S.

Counsel for the Defender and Respondent—Ure—Craigie. Agents—Gordon, Petrie, & Shand, S.S.C.

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*Saturday, July* 18.

## FIRST DIVISION.

## SIMPSON, PETITIONER.

*Curator Bonis—Brieve for Cognition—Court of Session Act* 1868, *sec.* 101—*Interim Appointment of Nearest Agnate.*

The wife of an inmate of a lunatic asylum presented a petition for the appointment of a *curator bonis* to her husband and suggested the name of a chartered accountant. The husband's eldest brother being his nearest agnate of full age opposed the petition as unnecessary on the ground that he had obtained a brieve for cognition with the view of having himself appointed his brother's tutor-at-law. The Lord Ordinary reported the case. The Court, pending the result of the cognition, *appointed* the said nearest agnate *curator bonis*.

Mrs Barbara Macdougall or Simpson, wife of Donald Simpson, formerly wine and spirit merchant, Lochalsh Road, Inverness, now an inmate of Saughtonhall Asylum, Edinburgh, presented a petition to have a *curator bonis* appointed to her husband, and suggested the name of Mr Robert Falconer Cameron, C.A., Inverness. There was one child of the marriage alive, a son only a year old. After him the nearest male relations of Donald Simpson were his two brothers Thomas and John, who lodged answers in which they averred that it was for the interest of their brother and his family that the business should be kept up, that the elder of them had hitherto attended to it, and further, had obtained a brieve from Chancery ordering a cognition with a view to his being appointed tutor-at-law to their brother, that in these circumstances the appointment of a *curator bonis* was unnecessary, and that in any case a chartered accountant was not a suitable person to manage such a business.

The Lord Ordinary (LOW) reported the case to the First Division.

"*Note.*—This is a petition for the appointment of a *curator bonis* to Mr Donald Simpson, wine and spirit merchant, Inverness, presented by his wife on the ground of his insanity.

"Answers have been lodged for Thomas Simpson and J. A. Simpson, brothers of Donald Simpson. The respondents admit the insanity of their brother, but aver that his business is a 'counter' business, and could not be carried on successfully by a chartered accountant—which the curator suggested by the petitioner is—or by any person not practically acquainted with the trade. The respondents then say that they have come to the conclusion that 'Thomas Simpson should, in the interest of his brother and his family, exercise his right as legal guardian of the ward, and assume the management of the estate.'

"Thomas Simpson is the nearest agnate of Donald Simpson of full age, and he has obtained a brieve from Chancery under

the 101st section of the Court of Session Act of 1868.

"It therefore appears that there is no dispute as to the insanity of Donald Simpson, but that the only question is, who is to have the management of his estate? It was stated by the counsel for the petitioner that there are serious objections to the management being entrusted to the respondent Thomas Simpson.

"I am informed that a precept has been issued under the brieve, in terms of section 1 of the Act of Sederunt of 3rd December 1868, fixing the 18th inst. as the first diet of compearance. At that diet the claim of Thomas Simpson to the office of curator will, I apprehend, be brought up under section 2 of this Act of Sederunt.

"In these circumstances I doubt if it would be proper for me to appoint a curator; but as there is no question that Donald Simpson is insane, and as the cognition is only brought for the purpose of enabling Thomas Simpson to obtain the management of the estate, it appears to me that the best course is to report the case."

The petitioner lodged a note objecting to the appointment of her brother-in-law as tutor-at-law, on the ground that the business had not thriven in his hands, and that there were questions in dispute between him and her husband. Upon the competency of appointing a *curator bonis* in the circumstances, the cases of *Bryce* v. *Grahame*, January 25, 1828, 6 S. 425 (*espec.* p. 431), and *Irving* v. *Swan*, November 7, 1868, 7 Macph. 86, were referred to.

At advising—

LORD PRESIDENT—What I suggest is that we should appoint the nearest agnate, who is at present prosecuting a brieve of cognition, to be *curator bonis* in the meantime. I do not think any party interested can object, because all interests will be safeguarded, as caution will require to be found by the person we appoint.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

Counsel for the Petitioner—Blair. Agents—Forrester & Davidson, W.S.

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*Saturday, July* 18.

## FIRST DIVISION.

## YATES, PETITIONER.

*Sheriff Court—Proof—Accidental Destruction of Shorthand Writer's Notes—Remit to Take Evidence Anew—Nobile Officium.*

The notes of evidence taken by a shorthand writer in the Sheriff Court having been accidentally destroyed, a petition was presented to the Court of Session craving for a remit to the Sheriff-Substitute to take the evidence of new. Petition *granted.*

*Opinion* indicated that the Sheriff-Substitute might have taken the evidence again without a remit.

After the evidence of the witnesses for the pursuer in an action in the Sheriff Court at Aberdeen, at the instance of John Yates, labourer there, had been taken down in shorthand in the usual way, the Sheriff-Substitute (HAMILTON GRIERSON) declared the proof closed and appointed the parties to debate. The notes of the shorthand writer who had taken down part of the evidence were destroyed by the children in the house where he resided before he had extended them, and the pursuer applied to the Sheriff-Substitute to allow the witnesses whose evidence had been lost to be re-examined. The Sheriff-Substitute refused the application, on the ground that there were no provisions in the statute—the Evidence Further Amendment (Scotland) Act 1874 (37 and 38 Vict. c. 64)—authorising him to take the evidence a second time, and that he had no power to act without a remit from the Court of Session. The pursuer thereupon presented a petition to the Court of Session to grant, in the exercise of its *nobile officium*, a remit to the Sheriff-Substitute to take the evidence of new. The defender in the action opposed the granting of the petition, on the ground that in the circumstances of the case it was unfair to him to have the witnesses re-examined, and unnecessary, as he was willing that the shorthand notes of a newspaper reporter who was present should be regarded as giving the evidence correctly.

At advising—

LORD PRESIDENT—I am inclined to think that this matter might have been settled in the Sheriff Court. A scruple, however, arose in the mind of the Sheriff-Substitute as to his power to order the evidence to be taken over again. Whether he consulted the Sheriff or not I do not know. I am not surprised at his scruple, because it was a rather extraordinary occurrence, but I cannot see any good objection to granting the prayer of the petition, and so removing the difficulty that has arisen in the Sheriff Court. Indeed, I know no better ground for this Court granting the remit asked than the fact that a practical difficulty has occurred in the Sheriff Court.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court granted the prayer of the petition.

Counsel for the Petitioner — Lorimer. Agents—Auld & Macdonald, W.S.

Counsel for the Respondent—Crabb Watt. Agents—Wishart & M'Naughton, W.S.

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