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.

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

was defective, and the house overrun with rats; and accordingly, shortly after Mr Tennent's appointment as *curator bonis*, the minor's mother and uncle, the said Mr Baird, made arrangements for getting a new house erected, and obtained Mr Tennent's consent thereto. At this time there was in bank at the credit of the ward's estate a sum of £1630.

Plans were obtained from Mr Turnbull, architect, Glasgow, and the work was commenced, and the building operations went on, everyone interested being in full knowledge thereof, and no one contemplating any difficulty until Mr Tennent's first account of intromissions, made to close on 30th September 1884, fell to be reported on by the Accountant of Court in March 1885. The Accountant then drew attention, *inter alia*, to a sum of £782 entered in the account as paid in connection with building operations at Overton House, and intimated that these accounts could not be passed without the authority of the Court.

Immediately thereafter steps were taken to induce Mr Tennent to resign his office of *curator bonis*, which he consented to do on obtaining his discharge and expenses. In April 1885, on the nomination of the ward, Mr Baird was appointed curator.

The Lord Ordinary (TRAYNER) made a remit to the Accountant of Court, who reported in favour of Mr Tennent's exoneration and discharge. On 28th January 1887 objections to the Accountant's report were lodged by the ward and his curator Mr Baird, who, *inter alia*, objected to the *curator bonis* taking credit for sums expended on the mansion-house. On 16th March 1887 the Lord Ordinary, in respect of the report of the Accountant of Court, granted Mr Tennent his exoneration and discharge.

The ward and his curator reclaimed, and the Court, after hearing parties, remitted to Mr Molleson, C.A., to inquire into the circumstances of the case, and if necessary to examine witnesses and havers, and to report.

Mr Molleson in his report stated that the payments made by the *curator bonis* on account of the new mansion-house amounted to £1989, 4s. 5d.; that the ward and the curator chosen could hardly avoid completing the work; and that the expenditure of the curator was £1709, 3s. 1d., making a total cost for the new mansion-house, with stabling and offices, of £3698, 7s. 6d. The reporter then added—"I think that had the ward and his curator chosen been anxious to economise a good deal might have been saved by completing the house in a less costly manner than has been done, as the fittings and furnishings are all of a first-class description, yet the question of the building of the house as entered into during Mr Tennent's term of office must, from a capital point of view, be regarded as one amounting to say £3500." Mr Molleson stated that the estate was about 1000 acres, and yielded a gross rental of £800, and that deducting for public burdens, &c., £200, this left a net rental of £600. The annuity of £300 to the ward's mother, with the interest on the money borrowed to complete the house, left the ward little more than £200 per annum, and the reporter stated that the diminution in the ward's income had in his opinion not been brought about by good management. With reference to the house which had been erected, the reporter was satisfied, after hearing the evidence of skilled witnesses, and making a personal examination of the buildings, that the house was well constructed, and had been erected at a moderate cost. The view of the reporter was given in the following passage in his report—"The clear £600 per annum of revenue must, however, suffer diminution from the £300 of an annuity secured to Mrs Dougal during her lifetime. It does not seem good management for one in the possession of a surplus income of but £300 to reduce the same by the interest on money to be borrowed in order to erect a house manifestly in excess of the needs of one whose income so further reduced could not much exceed £200. It may also be noticed that the ward has entered upon his studies for the profession he has chosen."

In his evidence Mr Tennent gave the following account of the part he took in the erection of the new mansion-house—"I never approved of the house at any time. I objected to it from first to last. I objected to it on the ground that William James Semple had land that needed improvement, and houses that were not in good order, and I thought that when he became of age he would be a better judge of what was needed. That was my opinion. (Q) You did ultimately give your approval?—(A) I signed the contracts. (Q) How did you come to do that?—(A) Mr Turnbull brought them to my own house, and I did it. (Q) Why did you agree to them?—(A) I do not know; it was a very stupid thing. (Q) Was it on account of the pressure brought to bear on you?—(A) It was just that. . . . I knew I had to pay for the house out of the ward's money. (Q) Why did you allow it to go on?—(A) Well, that was an error I committed. (Q) You saw the house from time to time as it was being built?—(A) I only saw it twice, I think. (Q) Did you just tell Mr Turnbull to go on and carry out the plans?—(A) Mr Turnbull just showed me the plans, and asked me to sign two contracts, and I knew these were the plans. (Q) You asked Mr Turnbull to prepare plans, and the house was being built according to these?—(A) Yes, perfectly. (Q) And the plans were signed before you thought it was necessary to get the authority of the Court?—(A) I could not say at that period; but afterwards I did. I had doubts. My doubts were that I was exercising powers perhaps beyond my authority. (Q) And if you should have got authority, why did you not?—(A) Well, perhaps I should have got authority; that is the blunder now."

Argued for the reclaimers—Looking to the facts of the case, a new house was clearly unnecessary, and the expenditure on its erection was made without the authority of the Court. In such a case the *onus* lay upon the *curator bonis*, being an officer of Court, to show that the ward had got benefit therefrom—*Maitland* v. *Kermack*, July 11, 1863, 1 Macph. 1104. A *curator bonis* superseded or ousted the minor, and therein differed from a curator chosen—*Mayne*, March 11, 1853, 15 D. 554.

Argued for the respondent—There had been great delay in taking objection to these outlays, and it was only after the Accountant of Court had reported favourably to the *curator bonis* obtaining his discharge that any objection was taken to this expenditure. [LORD PRESIDENT—The question before us is whether you have done your duty as *curator bonis* in consenting to this outlay, and that is a question between you

and the ward.] The estate of the ward was *lucratus* by this expenditure, for admittedly the house had been well and cheaply erected; besides, all parties interested had consented to the expenditure—Ersk. ii. 9, 60; *Haliday* v. *Gardyne*, M. 13,419, and *Scot* v. *Forbes*, M. 8278.

At advising—

Lord President—The ward in this case succeeded on the death of his father to an estate yielding a rental of £800, or, after deducting a sum sufficient to meet the burdens affecting the property, a net rental of about £600. He had also a sum of £1630 in the bank on deposit-receipt. If the ward had been proprietor of an estate unaffected by any burden of liferent, and had also been of full age, I am not prepared to say that the expenditure of £3500 on a mansion-house on his estate would have been expenditure of an extravagant or excessive amount. The position, however, is very different from that. His mother had by her marriage-contract an annuity settled on her of £300, and also the liferent of the mansion-house. The effect of that is well brought out by Mr Molleson in his report, when he says—"The clear £600 per annum of revenue must, however, suffer diminution from the £300 of an annuity secured to Mrs Dougal during her lifetime. It does not seem good management for one in the possession of a surplus income of but £300 to reduce the same by the interest on money to be borrowed in order to erect a house manifestly in excess of the needs of one whose income so further reduced could not much exceed £200. It may also be noticed that the ward has entered upon his studies for the profession he has chosen;" and therefore is not in need of any mansion-house at all, as the prosecution of his studies requires his presence elsewhere.

In such circumstances nothing could be more inopportune than to consent to such a proceeding. The effect of it has been that the £1630 in bank has all been expended with the addition of a further sum, which goes to make up the total of £3500, and on that further sum the ward has to pay interest. The effect has undoubtedly been to create great prejudice to the ward without any corresponding, even prospective, advantage to him. The money has been expended on a subject in possession of a liferentrix of the age of forty-two, and the income of the ward has thus been reduced to £200. There is no necessity to go into the circumstances further. Nothing can be more candid than Mr Tennent's own admissions. He thought it very imprudent to spend so much money on the house. He was just overpersuaded by the Dougals, and surrendered his own judgment in the matter to their orders, and so entered into a contract for the building, and expended the ward's money on it.

In these circumstances I do not see what effect can be produced by talking of his good faith in the matter. In fact I think we can hardly speak of good faith in face of his own admissions. He surrendered his independence of judgment to others. What was his position? He was *curator bonis* to a ward of fifteen. His duty was clearly to come to the Court for special powers, and, without obtaining such special powers, his action was illegal in embarking on such expenditure of his ward's money. It is perfectly plain that if he had come to the Court with a petition containing his candid opinion as to the expenditure which he asked the Court to authorise, the petition would have been refused. He could not have come here and asked the Court to give him these powers, asserting his belief that the expenditure would be for the benefit of the ward, and without such assertion on his part the powers would not have been granted. The expenditure therefore was plainly illegal, and to the injury of the ward. Is it to be allowed as an item of charge by the curator against the ward? That cannot be sustained or considered for a moment. The expenditure of the £3500 was illegal and injurious, and must be disallowed, I listened attentively to the argument in favour of the reduction of the amount to be disallowed on the ground that the ward's estate is benefited by the expenditure—that is, that when he succeeds he will have a better house. If the *curator bonis* can make out such a claim, I am very far from wishing to shut him out from making it. All I desire to say on that point is, that he cannot make it in the present proceedings. What we have to do is to audit the accounts of an officer of Court. We must decide on each item, and an unlawful item of charge cannot be sustained. We have, besides, no material to decide such a question as that. If we are asked what reduction by way of recompense the curator is entitled to, and to what extent the ward will be benefited when he succeeds, we have nothing to enable us to answer. I am disposed to acquiesce in the proposal to reserve any claim for recompense which the *curator bonis* may have. If he seeks redress from the liferentrix in the name of the ward, an offer has been made to assign to him any right the ward may have to bring an action against the widow. I am therefore for disallowing the item of charge in question.

Lord Mure—I should have been glad to come to any other conclusion than that at which your Lordship has arrived. One cannot, however, read the evidence without seeing that the curator has in point of fact done what he had no right to do. He seems to have been induced by the relations of the ward to put up a better house than the testator lived in. He accordingly expended £3500 in putting up a big house. That was an imprudent act, and illegal without the authority of the Court. In these circumstances the only question is how to put the matter right. I listened with attention to the course suggested by counsel to see whether any other course was possible than that your Lordship has proposed. It at first occurred to me that we might debit the curator with the interest of the money expended by the ward, and so leave it till the death of the widow, but, as your Lordship has said, we have no material to calculate that satisfactorily. All we have to do is to follow the principle laid down in the case of *Graham* v. *Lord Hopetoun*, M. 5599, and to disallow the item under reservation to the curator to take such steps as may seem proper to him to recover from the ward to the extent to which the estate has been *lucratus*.

Lord Adam—This is an application by a *curator bonis* for discharge. The question is what

items of the curator's account are to be allowed to stand. On the merits of the case I have no doubt at all. No one disputes that the *curator bonis* had no power without the authority of the Court to enter upon the expenditure in question. The result lies upon himself. The expenditure was illegal *prima facie*. No doubt expenditure may be made without the authority of the Court, and it may not always be disallowed, but that is when it has clearly been for the benefit of the ward. It is perfectly clear that if the *curator bonis* had come to the Court with a petition for special powers that petition would not have been granted. The act was a most imprudent one. I can therefore see no alternative but to conclude that the item must be disallowed. I am equally clear that that is the only proper matter before us. As to the claim for recompense by the curator against the ward, we have not that question before us, and we have no materials for disposing of it. It is very doubtful, I think, whether there will be such a claim against the ward when he succeeds.

The Court pronounced the following interlocutor:—

"Find that the respondent Thomas Tennent, as *curator bonis*, acted illegally in entering into contracts which involved the expenditure of the ward's funds to the amount of £3500 in rebuilding the mansion-house of the estate of East Overton: To that effect and extent sustain the second and third of the objections for the reclaimers to the accounts lodged by the said Thomas Tennant: Repel the other objections, and remit to Mr Molleson to re-consider the curator's accounts in accordance with the above finding, reserving to the curator any claim of recompense which he may be able to establish in respect of any benefit accruing to the ward's estate in consequence of the said expenditure, and to all other parties their answers as accords."

Counsel for the Petitioners—Balfour, Q.C.—W. Campbell. Agents—Gill & Pringle, W.S.

Counsel for the Respondent—Comrie Thomson—Strachan. Agent—W. Officer, S.S.C.

Tuesday, July 3.

SECOND DIVISION.

CRAIG *v.* NORTH BRITISH RAILWAY COMPANY.

Process—Action of Damages for Personal Injuries—Diligence to Recover Pursuer's Business Books and Income-tax Receipts.

A merchant who had been injured in a railway collision, raised an action of damages against the railway company, stating that he had been obliged, owing to the shock to his system, to abstain from business for several weeks, whereby he had suffered loss. The defenders moved for a diligence to recover the pursuer's "business books, cash books, ledgers, balance-sheets, statements of profit, accounts, receipts for payment of income-tax, and all other books kept by or for him during the last four years, in order that excerpts may be taken therefrom of all entries showing his income from his business during these years." The Court (*diss.* Lord Rutherfurd Clark) *refused* the motion.

This was an action of damages for £2000 at the instance of Robert Hunter Craig, a produce merchant in Glasgow, against the North British Railway Company, on account of personal injuries alleged to have been sustained by him in a collision between a passenger train on their line running between Kilsyth and Glasgow and a mineral train which was standing at Bishopbriggs Station.

He averred that owing to the shock he had sustained he had been "obliged to abstain entirely from business for several weeks, and for several weeks thereafter was able to attend only partially to business." He further averred that "in consequence of the injury he sustained he had been put to considerable expense, and owing to his inability to attend to business he had further sustained serious loss and damage therein."

The Lord Ordinary (LEE) closed the record, and adjusted an issue. Notice of trial was given for the Summer Sittings.

The defenders then moved the Second Division of the Court for a diligence and commission for the examination of havers and recovery of the writings contained in the following specification—"All the business books, cash books, ledgers, balance-sheets, statements of profit, accounts, receipts for payment of income-tax, and all other books and documents kept by or for the pursuer, or by or for any firm of which he has been or is a partner during the last four years, in order that excerpts may be taken therefrom of all entries showing or tending to show the pursuer's income from his business during these years."

The pursuer's counsel opposed the motion, submitting that as the pursuer only averred that he had been incapacitated from business for several weeks after the accident, it was unreasonable to force him to disclose the state of his business for so long a period as four years. The defenders, however, were quite entitled to see his books with reference to all his transactions during the period named in his record.

The defender's counsel replied that the diligence now craved was the usual one given in such cases. The matter was of vital importance to railway companies. The pursuer here sued for a slump sum of £2000. How was it possible to ascertain the true profits of the business for which he said he had been incapacitated through the defender's fault, in order to assess his damages, unless the defenders were allowed access to his books? The state of his books for the last four years would enable an average to be struck for these damages in the event of his being awarded them. In order to have a basis of fact on which to found cross-examination at the trial it was necessary that the diligence craved should be granted.

At advising—

LORD YOUNG—I think the diligence craved is altogether unreasonable. I think the pur-