

Wednesday, May 17.

FIRST DIVISION.

ROBERTSON v. MITCHELL.

Bankruptcy—Trustee—Removal—Petition. A petition for the removal of the trustee in a sequestration having been presented by the bankrupt, the Court, before answer, ordered the proceedings to be laid before the creditors. The creditors resolved that the trustee should continue in his office. The resolution having been reported to the Court, the petition was dismissed.

This was a petition and complaint at the instance of Mr Robertson of Dundonnachie against Mr R. Mitchell, the trustee on his sequestrated estate, praying for his removal from the office of trustee on the ground of certain alleged fraudulent proceedings. The Court, by interlocutor dated 17th March 1871, before answer, and reserving all objections to the competency of the petition, appointed the respondent, as trustee, to call a meeting of the creditors, to lay the proceedings before them, and to report to the Court any resolution that the creditors might adopt thereon. A meeting of the creditors was accordingly called by notice and special circulars. The meeting was held on the 8th of April. A large number of creditors were present or represented by mandatories. The whole proceedings having been laid before the meeting, a resolution was proposed and carried, with one dissident, that "the meeting is of opinion that they should not interfere, and that the trustee should continue in his office."

The minutes of the meeting were now reported to the Court and parties heard thereon.

The SOLICITOR-GENERAL and TAYLOR INNES for the respondent.

MORRISON, for the petitioner, was proceeding to address the Court, when Mr Robertson stated that he wished to plead his own case. He accordingly addressed the Court at considerable length.

At advising—

LORD PRESIDENT—When the case was before us on a former occasion, looking to the nature of the allegations made in the complaint, it did not seem to be for the interest of parties that the complaint should be *de plano* dismissed. But the case now stands very differently. The creditors have almost unanimously expressed a very decided opinion on the matter. We must keep in mind that the whole policy of the bankruptcy laws is to make the creditors masters of the bankrupt estate, to the exclusion of the bankrupt. Among other points the election and dismissal of the trustee is left entirely in the hands of the creditors under the statute, whatever may happen at common law under very exceptional circumstances. In the present case it would not be prudent for us to interfere with the resolution to which the creditors have come. We cannot take any step of the kind asked without interfering in the most direct manner with their resolution. It is our duty to refuse this complaint.

The other Judges concurred.

The Court refused the petition and complaint, but found no expenses due.

Agent for Petitioner—R. H. Arthur, S.S.C.

Agents for Respondent—Lindsay & Paterson, W.S.

Wednesday, May 17.

SECOND DIVISION.

MACQUEEN v. MACDONALD.

Process—Reponing—Appeal—A. S. 10th March 1870, § 3. An appellant living in the Island of Uist having neglected to print and box the Record, or to instruct an Edinburgh agent to do so within fourteen days after the process had been received by the clerk, *reponed*, on payment of £2, 2s. of expenses, on the ground that the omission had been made *per incuriam*.

In this action, which is one of filiation from the Sheriff-Court of Inverness, the Sheriff-Substitute and the Sheriff gave decree against the defender. Against these judgments the defender minuted an appeal to the Second Division on 13th April, and the process was received by the clerk on 26th April. The time fixed by § 3 of A. S. of 10th March 1870 for the appellant printing and boxing the Record, &c. (fourteen days), having been allowed to expire *per incuriam*, the appellant moved the Court to be reponed in terms of the subdivision 3 of § 3 of the A. S., and to be allowed eight days further to print and box the Record, &c.

FRASER and SCOTT for the appellant.

REHND for respondent.

The Court granted the motion of the appellant. The fact that the case came from the Island of Uist, from which the communication was long and uncertain, and that this was the first case which had occurred under that section of the A. S., had much influence in the judgment, and the Judges indicated opinions that they proceeded on the peculiar circumstances of the case.

The section of the A. S. was not intended to allow an appellant to change his mind after allowing the fourteen days to expire.

The Court reponed, on condition of paying £2, 2s. of expenses.

Agent for the Appellant—John Gelletly, S.S.C.
Agent for Respondent—Crawford & J. Y. Guthrie, S.S.C.

Thursday, May 18.

FIRST DIVISION.

M'ALISTER v. BROWN AND OTHERS.

Proof—Payment—Writ or Oath—Diligence—Receipts. Where a party sought to instruct payment by writ or oath of the payees, the Court refused to grant a diligence for the recovery of receipts said to be in the hands of the payees, as the mere fact of such receipts being in their hands, unless supplemented by parole evidence, would not prove payment, but the reverse.

This was an appeal, under the 169th section of the Bankrupt Act, against a resolution of the creditors in the sequestration of James M'Alister, glass merchant in Glasgow. The appeal was taken by M'Alister himself, not *qua* bankrupt, but as trustee of certain parties deceased, alleged to be creditors on his estate. The resolution appealed against was a resolution that the estate shall not be wound up under deed of arrangement; and the object of the appeal was to have it declared that a counter resolution, that the estate ought to be wound up under a deed of arrangement, was carried by a due majority,—that is, by a majority in

number and four-fifths in value of the creditors present. Mr M'Alister objected to the whole votes of his opponents, on the ground that the whole of the creditors voting had discharged the bankrupt under a private trust in 1862, and therefore could not act as creditors in the present sequestration. The appellant's averments on this head were shortly as follows:—That in 1862 he granted a trust-deed for behoof of his creditors; that an arrangement was then made by which he should be discharged on payment of a composition of £700; that the composition had been paid, and a deed of discharge prepared and duly delivered to him; that the discharge had shortly after been fraudulently obtained from him, and the signatures scored out. Various objections in detail were stated by the appellant to the votes of his opponents. The latter denied the statements of the appellant, and objected to the debts in virtue of which he claimed to vote.

The Lord Ordinary (GIFFORD) dismissed the appeal, with expenses.

M'Alister reclaimed.

M'KECHNIE, for him, argued that if he could show that the whole votes of the respondents were null in consequence of their having granted a discharge in 1862, the appellant would be entitled to succeed if he had any good votes at all. For this purpose he asked a proof by writ or oath, and particularly a diligence for the recovery of documents to instruct payment by the bankrupt of the £700 mentioned above.

J. M. DUNCAN, for the respondents, was not called on.

At advising—

LORD PRESIDENT—I am quite satisfied with the Lord Ordinary's interlocutor. The appellant seeks to open up the question by a demand for a recovery of documents. His object is to show that he was discharged in 1862 by the creditors who voted against him. Now it is in evidence that a deed of discharge was prepared at that time. If it had been delivered it would have had the effect of discharging the bankrupt. But the deed is cancelled, and in the hands of the granters. What the appellant proposes to do is to show that this deed was to be granted on payment of £700. He proposes to prove that the £700 has been paid by him, and, therefore, that the deed of discharge ought to have been delivered. The payment he proposes to instruct by writ or oath. But what kind of writ? Not by receipts in his own hands, which constitute the proper evidence of payment, but by writings in the hands of other parties, which he seeks to recover. But unless this recovery is itself to operate as delivery, it would be no verification of his allegation, but the reverse. The fact that the receipts, if there are such, are still in the hands of the creditors, would rather show that the payment had not been made.

LORDS DEAS and ARDMILLAN concurred.

LORD KINLOCH—This is simply an attempt to falsify affidavits of creditors, ostensibly by means of a diligence to recover writs. But no diligence would be of any avail without parole evidence. The recovery of the writs would prove nothing in the appellant's favour.

The Court adhered, with additional expenses.

Agent for Appellant—John A. Gillespie, S.S.C.

Agents for Respondents—Goldie & Dove, W.S.C.

Friday, May 19.

THE LORD ADVOCATE v. SIR JOHN ANDREW CATHCART AND OTHERS.

Salmon-fishing—Barony—Prescription—River—Sea.

A barony, the titles of which contained no express grant of salmon-fishings, consisted of certain lands on the banks of two rivers, and of certain other lands on the sea at a distance of several miles from the former. Held that the proprietor, having proved prescriptive possession of the salmon-fishings in the rivers, but not of those in the sea, had right to the salmon-fishings in the rivers, but not to those in the sea, the maxim *Tantum præscriptum quantum possessum* ruling the case.

The barony of Carleton, in Ayrshire, belonging to Sir John Andrew Cathcart and his trustees, consists of various parcels of land, some of which are situated on the banks of the river Girvan, others on the river Stinchar, and others adjoining the sea. The lands last mentioned are detached, and at a distance of several miles from any of the other lands in the barony. The charter of erection contains no express grant of salmon-fishing, but certain of the lands are granted *cum piscationibus*.

The Lord Advocate, acting on behalf of the Commissioners of Woods and Forests, raised the present action against Sir John Cathcart and his trustees, to have it declared that the salmon-fishings both in the river and in the sea *ex adverso* of the lands and barony of Carleton, belong exclusively to the Crown. The defenders pleaded prescriptive possession on the barony titles. A proof having been taken, the Lord Ordinary (ORMIDALE) found it proved that for upwards of forty years the defenders and their predecessors had fished for salmon by net and coble and other lawful means in the rivers Girvan and Stinchar, and that without interruption from the Crown or any other party; but that the defenders had failed to prove prescriptive possession of salmon-fishings in the sea *ex adverso* of their lands. His Lordship accordingly found for the pursuer as regards the sea fishings, and for the defenders as regards the river fishings, and found the defenders entitled to one-half of their expenses.

The defenders reclaimed.

ADAM and MARSHALL, for them, argued—(1) That in point of fact Sir J. Cathcart and his predecessors had for upwards of forty years fished for salmon in the sea by the best means possible in the locality and known at the time; (2) Even if this were not so, prescriptive possession of the salmon-fishings in the rivers was sufficient to give the defenders right to the whole salmon-fishings of the barony. Prescriptive possession of salmon-fishings entitles the proprietor of a barony to read an express grant of salmon-fishings in his titles. It is not necessary to prove that every part of the waters have been fished. Possession is the badge but not the measure of the right, and the fact that the different parcels of land are discontinuous does not alter the case, for a charter of barony confers the same rights on the detached parcels of which it consists, as if they had been physically united. Erskine, ii, 6, 18; Stair, ii, 3, 45; *Milne's Trustees*, July 1, 1868, 6 Macph. 772, 5 Sc. L. Rep. 620.

The SOLICITOR-GENERAL and IVORY, for the respondent—To test the argument of the defenders,