

exceed the funds and capital which he admittedly possessed." Now that is a very serious report; I think about the most unfavourable report I ever saw, and the great weight which must always be given to the trustee's report is in this case increased by the Sheriff-Substitute, for he says that he "is well acquainted with the circumstances of the sequestration, the lengthened public examination of the bankrupt having taken place before him, and he is satisfied that the trustee could not have reported otherwise than he has done." Besides this, we have had a full enquiry by the Accountant in Bankruptcy, and it is enough that in the main features of his report he concurs with the trustee. This, therefore, is a very unfavourable case for the bankrupt. The trustee seems to be of opinion that there never was any reason for a sequestration at all, and he has shown, I think clearly, that even if no more funds had been recovered, there were still assets enough to have paid the creditors in full. The effect of these proceedings in bankruptcy must have been to create a great deal of expense, and of this expense the bankrupt has complained. He has only himself to thank for it, but the effect of it has been to render the estate insolvent to a small extent. The trustee is still of opinion that more funds may be recovered, and I am not inclined to differ from him, nor to allow the bankrupt's interest to prevail as against his creditors. The case which was referred to, *Cooper v. Fraser*, decided in the Second Division, November 5, 1872, 11 Macph. 38, is at first sight rather startling, for in that case the bankrupt had been convicted on a criminal charge, but the circumstances in that case were very different, for the trustee's report was entirely in his favour. The bankrupt was convicted of breach of trust and embezzlement, and after he came out of prison applied for discharge, which was granted by the Second Division on appeal. If it were possible to conceive a case which is opposite to the present, that is the case—the sole objectors to his discharge being the beneficiaries under a trust in which he was trustee.

The Sheriff-Substitute has refused the petition "*in hoc statu*." I do not think it necessary to say that that is an incompetent form of interlocutor under sec. 146, but I am of opinion that it is not precisely in terms of the statute, nor expedient; the words, "*in hoc statu*," would not prevent the bankrupt from coming back with a fresh application a month hence. I think it is better to follow the Act strictly, and so we should not refuse the appeal absolutely, but defer it for a somewhat long period, say twelve months. I hope by that time, if the bankrupt renew his application, we shall have further materials for judgment.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"*Edinburgh, 26th November 1873.*—The Lords having heard counsel on the appeal and proceedings, Recall the deliverance complained of, and remit to the Sheriff with instructions to defer the consideration of the bankrupt's petition for discharge for a period of twelve months from this date."

Counsel for Appellant—Mair. Agent—Wm. Officer, S.S.C.

Counsel for Respondent—Asher. Agents—Millar, Allardice, & Robson, W.S.

M., Clerk.

Wednesday, November 28.

SECOND DIVISION.

CAMPBELL v. ORD AND MADDISON.

(See *ante*, p. 54.)

Expenses—Fees of Counsel—Auditor's Report.

Where a jury trial lasted one day only, a fee of twenty guineas to senior counsel, and fifteen guineas to junior counsel, *allowed* to be charged against the losing party.

This case, (reported *ante*, p. 54), in which the pursuer had been found entitled to expenses, came up upon two objections to the auditor's report. The account of expenses submitted by the pursuer's agent had amounted to £188, 9s. 8d., but the taxed amount came to £164, 5s. 5d. Objection was taken by the pursuer's agent to two items disallowed by the auditor—(1) A fee of one guinea and relative fees for the agent and clerk for moving the Lord Ordinary to fix a diet for trial; and (2) a sum of £11, 6s. in respect of deduction of five guineas each from the fees given to senior and junior counsel for the trial. The fee, as stated, given to senior counsel was twenty guineas, and to junior counsel fifteen guineas. As taxed, the fees allowed were fifteen guineas and ten guineas respectively. The trial lasted one day, during which eighteen witnesses were examined.

Cases cited—*Cooper*, 2 Macph. 346; *Hubbuck*, 2 Macph. 1291; *Duke of Buccleuch*, 5 Macph. 1054.

At advising,

LORD COWAN said—I am clear, on the first objection, that we ought not to interfere with the discretion of the auditor. The second objection involves delicate consideration. As a general rule the auditor ought not to interfere with the agent's discretion unless a clear and specific objection is stated, and if there is excessive exuberance of fees he should report the matter to the Court. In this case it does not appear he ought to have interfered. This was a case requiring great consideration, where important questions of law were involved, and I do not think that because it was finished in one day the fees should be cut down. The case of *Cowper* required great investigation, and the Court took into account the time the trial lasted, and the refreshers given to counsel. I cannot acquiesce in any general rule that no less a fee than twenty guineas to senior counsel and fifteen to junior should be given for a trial lasting one day only. The auditor must exercise his discretion in each case.

LORD BENHOLME—I agree very much. Where a case lasts only one day we cannot argue from a case lasting more than one day.

LORD NEAVES—I concur. This was not a simple assessment of damages, but various intricate facts had to be cleared up in order to bring out the point of law.

LORD JUSTICE-CLERK—I am prepared to acquiesce, although my first impression had been not to interfere with the auditor; but I think it of great importance to keep in mind that the trial lasted only one day, and cannot acquiesce in the principle that each day after the first is to count as a separate

day. I think a great reason of the unpopularity of jury trials has been the practice of continuing the trial over the one day, and thus increasing the expense against the losing party.

The Court dismissed the first objection, and sustained the second.

Counsel for Objector—C. Smith. Agent—A. Shiell, S.S.C.

Counsel for Respondent—Trayner. Agents—Horne, Horne, & Lyell, W.S.

Tuesday, December 2.

FIRST DIVISION.

HANNAY AND OTHERS, PETITIONERS.

Titles to Land Consolidation Act, 1868—Females as Instrumentary Witnesses.

A judicial factor produced on his appointment a bond of caution in which the signature of the cautioner was attested by two female witnesses. The Principal Clerk of Session declined to certify the sufficiency, on the ground that it was doubtful whether under the Act of 1868 it was lawful for females to act as instrumentary witnesses in deeds other than those relating to heritage. The preamble of the Act sets forth that—"Whereas it is expedient . . . to make certain changes upon the law of Scotland in regard to heritable rights, and to the succession to heritable securities in Scotland: Be it enacted," &c. The 149th section provides that—"All deeds and conveyances, and all documents whatever, mentioned or not mentioned in this Act, and whether relating or not relating to land, having a testing clause, may be partly written and partly printed," &c. The 139th section, on the other hand, enacting the competency of females to act as instrumentary witnesses, is in these terms—"It shall be competent for any female person of the age of fourteen years or upwards, and not subject to any legal incapacity, to act as an instrumentary witness in the same manner as any male person of that age, who is subject to no legal incapacity, can act according to the present law and practice, and it shall not be competent to challenge any deed or conveyance or writing or document of whatever nature, whether exercised before or after the passing of this Act, on the ground that any instrumentary witness thereto was a female."

The matter having been brought under the notice of the Lord Ordinary (SHAND), he reported the matter to the First Division of the Court. *Held* that under the statute females were empowered to act as instrumentary witnesses to any document whatever, whether relating to land or not.

Authorities referred to by the Lord Ordinary—Dickson, 689, 1775; Ersk. (Nicolson), i. i., 49; Broom's Com., pp. 4 to 6; *Simsour and Ors. v. The Vestry of St Leonards*, 28 L. J. Com. Pl., 290; *Lees v. Summersgill*, 17 Vesey, 508.

Counsel for Petitioners—M'Laren. Agents—Ronald, Ritchie, & Ellis, W.S.

Wednesday, December 3.

SECOND DIVISION.

[Sheriff of Fifeshire.

MILLER v. M'ARTHUR.

Trespass.

The penalties of the Act 1686, c. 11, *held* to apply to the case of trespass by sheep in a garden partially unenclosed.

This was an appeal from a deliverance of the Sheriff of Fifeshire on a petition at the instance of John M'Arthur, butcher, Cowdenbeath, against William Millar, miner, Cowdenbeath, for delivery of two sheep belonging to the petitioner, which had been seized upon by the respondent; or alternatively for a sum in name of damages.

The facts were briefly these—that on the 6th June 1873 the respondent found several sheep in his garden, two of which he pointed in virtue of the Act 1686, c. 11. They belonged to the petitioner, who was sub-tenant of a park adjoining the respondent's garden, and they had made their way through a gap in the dyke, as there was no herd with them.

The Sheriff-Substitute (LAMOND) pronounced the following interlocutor:—

"*Dunfermline, 11th July 1873.*—The Sheriff-Substitute having considered the closed record, proof, and productions, and heard parties' procurators, finds that the respondent is proprietor of a feu at Foulford, Cowdenbeath; that his feu adjoins on the west a field in grass tenanted by Dr Mungall; that along the west boundary of his feu the respondent erected on his own ground a stone wall; that a gap in this wall was made some time ago by a spate, and that the respondent holds the Lochgelly Iron Company, his superiors, liable for the damage: Finds that some weeks prior to 6th June 1873, Dr Mungall (who also holds under the Lochgelly Company) informed the respondent that he had sublet the field to the petitioner for sheep pasture, and requested the respondent to get the gap in his wall repaired: Finds that about a week prior to said 6th June the petitioner put sheep into the field; that the gap was not repaired; that on Sunday, 1st June, some of the sheep got into the respondent's garden through said gap, but were driven out by the petitioner; that on Monday, 2d June, the petitioner went to respondent and apologised, and offered to help him to repair the wall; that the respondent refused, alleging as his reason that until he got settled with the Lochgelly Company he was not disposed to mend the dyke: Finds that on 6th June some of the petitioner's sheep again strayed into the respondent's garden; that the respondent seized two of them, and has ever since detained them; Finds that the respondent knew to whom the sheep belonged, but took no step to inform the petitioner, who lives across the road almost opposite to him: Finds that on Saturday, 7th June, the petitioner's agent wrote to the respondent the letter No. 7 of process, which letter would in course of post be delivered on Monday morning; that notwithstanding of said letter the respondent, well knowing to whom the sheep belonged, went to Dunfermline on Monday afternoon and got handbills printed, of which No. 6 of process is a copy, and had the same posted up: Finds in law that the respondent's detention of said sheep is illegal, and that in the circumstances he is not entitled to found on the Act