Thursday, March 19.

FIRST DIVISION.

M'CALLUM TRUSTEES *v.* M'NAB.

Expenses—Skilled Witnesses—Preliminary Investigation—Jury Trial—A. S. 10th July 1844. Successful party entitled to recover the expense of bringing down from London a civil engineer, who had special knowledge of the ground concerning which the dispute arose, and whose evidence was of great service in the cause. Expenses of preliminary investigation disallowed, the condition of A. S., 10th July 1844, not having been complied with.

This was a question arising on an objection to the auditor's report. There was a question in the case as to the sufficiency of water on a certain estate. The trial took place before the Lord Ordinary, without a jury, and among other witnesses Mr Bruce, C.E., was examined. It appeared that Mr Bruce was well acquainted with the ground in question, having been employed to survey it some time previously. Two days before the trial, Mr Bruce left for London, to attend a Parliamentary Commission, but finding that his engagements allowed it, he returned to Edinburgh and gave evidence at the trial. The party calling him as a witness was ultimately successful, and the question now arose whether the expense of bringing Mr Bruce from London was recoverable from the successful party.

The Lord Ordinary stated that he was much influenced in forming his judgment by Mr Bruce's evidence.

Another question arose as to the expense of £3, 3s., charged for preliminary investigations, it being objected to this charge that the requisite certificate by the presiding Judge was not produced in terms of the A. S., 10th July 1844.

Hall for Complainers.

W. M. Thomson for Respondents.

At advising—

Lord President—I am not disposed to deal with this witness as in the ordinary position of an expert, whose place can always be supplied, because although one expert may have been employed by the party, another may be found to supply his place. I think Mr Bruce was in a different position. He was in the position of having special knowledge of the subject from previous employment in surveying the ground, and in bringing that special knowledge to bear at the trial there cannot be much doubt that the citation of a witness of that kind, already possessed of the requisite knowledge, and his presence at the trial, is a source of much less expense than calling one or two indifferent experts so to visit the premises for the first time. I think it was of consequence to the ends of justice that Mr Bruce should be present at this trial. He was more of the nature of a witness in the cause than a mere expert. If he had been necessarily absent in London at the time of citation, the ordinary rule that the party bringing him from London, would, if successful, have been entitled to the necessary expense. The only speciality here is that he went to London to attend the Parliamentary Commission, and found that he could come back to attend the trial. It would be rather too strict to hold that to be a sufficient reason for disallowing a charge which in the ordinary case would be allowed. We may presume that it was reasonable and proper, if not absolutely necessary, that the witness should go to London, and, therefore, the charges on this head must be allowed.

But there is a charge of £3, 3s., for preliminary investigation. In the ordinary case, apart from the Act of Sederunt, 10th July 1844, that is not a charge that can be made against the opposite party, and, therefore, if the Act of Sederunt does not apply, there is no warrant for such a charge. If the Act of Sederunt does apply, then the condition under which it allows such a charge has not been purified, and therefore the £3, 3s., must be disallowed.

Lord Curriehill—I am of the same opinion, although on the second point I have a little hesitation.

Lord Deas—I concur. I am disposed to rest on the statement of the Lord Ordinary, that Mr Bruce was a necessary witness, and, moreover, I quite go along with the ground stated for his being a necessary witness. I think there is no doubt that he was so, for although a great number of ordinary persons from Oban might be called to speak as to the means of getting water, that was not to be compared with the evidence of a skilled witness. Would any proprietor act on the evidence of inexperienced persons, without having a survey by an engineer. I am clear that Mr Bruce having gone to London to attend a Parliamentary Commission, the expense of bringing him down lies on the unsuccessful party, and the expense is much less than if a skilled witness had been got on purpose to make this investigation. My only difficulty is as to the £3, 3s. On that matter I don't differ, but I would not be understood as laying down a general rule that in all cases a man of skill is bound to give parties the full benefit of the knowledge he has acquired without any consideration at all. Suppose a mining engineer has got valuable knowledge as to the strata in a certain district, it may be a matter for consideration whether he is not entitled to stipulate for renumeration, and whether that would not be a good charge against the other party. In this particular case I concur that the £3, 3s. ought not to be allowed.

Lord Ardmillan—I am of the same opinion. As to the first point I have no doubt. It was out of the question for the parties to rely on such evidence merely as was to be obtained at Oban. As to the second point I have some difficulty. Under the Act of Sederunt of 1844, if this were a jury trial, then the certificate not being obtained in due time, the claim for preliminary investigation by Mr Bruce could not be allowed. But this being a trial before the Lord Ordinary without a jury, it may be that the Act of Sederunt does not apply. As a general rule I am not prepared to say that a skilled witness is bound to unfold all the stores of his mind without charging for preliminary investigation. In the present case, however, I think the charge should be disallowed.

Agents for Complainers—Neilson & Cowan, W.S.
Agent for Respondent—Wm. Burness, S.S.C.

Thursday, March 19.

SECOND DIVISION.

RUSSELL (REEKIE'S TRUSTEE) *v.* DANIEL & GREEN.

Bankrupt—Section 62 — *Bankrupt Act — Oath—Security—Assignation.* Circumstances in which

the Court gave effect to the provisions of the 62d section of the Bankrupt Act.

This was a petition presented under the 62d section of the Bankrupt Act, which provides that where an oath specifying the value of a security held by a creditor has been made use of in voting at any meeting of creditors, or in assenting to or dissenting from the bankrupt's composition or discharge, it shall be competent to the trustee, with the consent of the Commissioners, or to the body of creditors "to require from the creditor making such oath a conveyance or assignation in favour of the trustee of such security, obligation, or claim, on payment of the specified value with 20 per centum in addition to such value, and the creditor shall be bound to grant such conveyance or assignation at the expense of the estate."

The petitioner in this case was the trustee on the estate of James Reekie, manufacturer, Falkland, and the respondents were Messrs Daniel & Green, merchants, Manchester.

The petition set forth the following statements,—

"The estates of the said James Reekie were sequestrated on the 19th day of December 1867 by the Sheriff of the county of Fife, in virtue of the 'Bankruptcy (Scotland) Act 1856,' on the 8th January 1868 the petitioner was declared trustee by said Sheriff, and duly confirmed by said Sheriff on 9th January 1868, conform to act and warrant in his favour, herewith produced.

"On 30th December 1867, at the meeting for the election of trustee on said sequestrated estate, Samuel Daniel, merchant in Manchester, produced an affidavit, dated 28th December 1867, to a debt of £1800 alleged to be due by the bankrupt to his firm of Messrs Daniel and Green, merchants in Manchester, and therein deponed that no part of this sum had been paid or compensated; that no security was held for the same, other than a bond and disposition in security by the said James Reekie, dated 11th December 1866, for the sum of £1800 over the power-loom factory and relative grounds belonging to him; and that Messrs Daniel and Green valued the security at the sum of £800, leaving a balance of £1000 unsecured.

"At said meeting, there having been a competition for the office of trustee, the said Samuel Daniel voted on said balance of £1000 for the election of Richard Wilson, chartered accountant, Edinburgh, as trustee upon the said sequestrated estate.

"By the 62d section of the 'Bankruptcy (Scotland) Act 1856,' it is enacted that 'it shall be competent to the trustee, with the consent of the commissioners, within two months after an oath specifying the value of a security or obligation or claim in the several cases (therein) before mentioned has been made use of in voting at any meeting, or in assenting to or dissenting from the bankrupt's composition or discharge, and it shall also be competent to the majority of the creditors (excluding the creditor making such oath), assembled at any meeting, and during such meeting, to require from the creditor making such oath a conveyance or assignation in favour of the trustee of such security, obligation, or claim, on payment of the specified value, with twenty per centum in addition to such value, and the creditor shall be bound to grant such conveyance or assignation at the expense of the estate.'

"At a meeting of the petitioner and commissioners on the said sequestrated estate, held at Falkland on the 25th day of January 1868, the petitioner brought under notice of the commissioners the said affidavit and claim.

The petitioner and commissioners at said meeting having inspected the factory, were unanimously of opinion that it was for the benefit of the estate that the petitioner should acquire for the estate the bond and disposition in security referred to at £800 *plus* twenty per centum, as by so doing all questions as to what is covered by the said bond and disposition in security would be removed, and they therefore consented to the petitioner's acquiring the said bond and disposition in security at the said price. A copy of the minute of said meeting is herewith produced.

"Upon the same day the petitioner addressed and posted to the said firm of Daniel & Green a letter of requisition in the following terms:—

"*Falkland, 25th January* 1868.

"To Messrs Daniel & Green,
Merchants and Manufacturers,
Manchester.

"Gentlemen,—I, Arthur Russell, banker, Cupar-Fife, as trustee on the sequestrated estates of James Reekie, manufacturer at Falkland in the county of Fife, with consent of the commissioners on said estates, intimate to you that, under the 62d section of the Bankruptcy (Scotland) Act 1856, I require you to assign to me, as trustee foresaid, a bond and disposition in security, dated the 11th, and recorded in the particular register of sasines, &c., for the burgh of Falkland the 12th days of December 1866, granted by the bankrupt in favour of Samuel Daniel and George Green, therein designed as the individual partners of the firm of Daniel & Green, manufacturers and merchants in Manchester, and the survivor of the two, and the heirs of such survivor, and their respective assignees whomsoever, for the principal sum of £1800, payable at the term of Whitsunday 1867, with interest from its date at five per cent., and penalties, all as contained in said bond and disposition in security; and that (1) on payment by me of the sum of £800, being the value put on said bond and disposition in security in a claim and oath bearing date the 28th day of December 1867, emitted by the said Samuel Daniel to a debt of £1800 alleged to be due to you by the bankrupt, which claim and oath were used by the said Samuel Daniel in your name for voting at the meeting for election of trustee, held at Markinch 30th December 1867; and (2) upon payment by me of 20 per centum in addition to such value of £800, all in terms of said section.—I am, gentlemen, your mo. obedt. servt.

(Signed) ARTHUR RUSSELL.'

"Letters of requisition, in the same terms, were, of the same date, addressed and posted by the petitioner to the said Samuel Daniel and George Green.

"Following up the said letters of requisition, the petitioner directed his law-agents, Messrs Gibson & Spears, writers, Kirkcaldy, to prepare a draft assignation by the said Samuel Daniel and George Green in his favour of the said bond and disposition in security, in consideration of the said sum of £800, at which it had been valued in the said affidavit, with twenty per centum added in terms of the Act, and to forward the same to Charles Gulland junior, writer, Falkland, the known agent in Scotland of the said Messrs Daniel & Green, and Samuel Daniel, and George Green, for his revisal, on their behalf.

"The said Messrs Gibson & Spears accordingly prepared said assignation, and, of this date, sent it to the said Charles Gulland for his revisal,

accompanied by a letter intimating that, on the execution of the document, they were ready to pay the said sum, as well as all expenses connected with the assignation.

"The said Charles Gulland returned to the said Gibson & Spears the said draft assignation unrevised, stating, in the letter returning same (which, with the said draft assignation, is herewith produced), that it appeared 'to have been framed under a delusion.'

"Thereafter the said Messrs Gibson & Spears having threatened legal proceedings for enforcing the petitioner's rights, the said Charles Gulland requested delay until the date of the second general meeting of creditors, which fell to be held on 10th February current. To this delay the petitioner agreed, with a view to having an amicable arrangement with Messrs Daniel & Green, carried through.

"Notwithstanding the said delay, the said Messrs Daniel & Green, and Samuel Daniel and George Green, still refuse to grant the said assignation in favour of the petitioner; and with the view of attempting to defeat his rights under the said 62d section of the Act, have served upon him a notarial intimation, requisition, and protest, intimating their intention of bringing the heritable subjects over which the said bond and disposition in security extends to sale, under the powers contained in the said bond. The schedule served upon the petitioner is herewith produced.

"At the said second general meeting of creditors, the said Charles Gulland, as mandatory for the said Messrs Daniel & Green, produced a new affidavit by said Samuel Daniel, dated 7th February 1868, to a debt of £1785, 6s. 11d., in which the said firm of Daniel & Green value the said security at £1300, instead of £800, as in their original affidavit, and claimed right to vote for the balance of £485, 6s. 11d.; and a further affidavit and claim, also dated 7th February 1868, against the bankrupt for £2784, 18s. 4d. That upon these affidavits, and again with the view of frustrating the petitioner's rights under the said 62d section of the Statute, the said Charles Gulland, as mandatory foresaid, voted for, and succeeded by means of the said vote in carrying a motion made by Mr John Morton, writer, Cupar, as mandatory for the said Richard Wilson, a creditor claiming to be ranked for the sum of £6, 13s. 11½d., to the following effect:—'In respect the bondholders, Samuel Daniel & George Green, have taken proceedings by notarial requisition, intimation, and protest, for selling the heritable property contained in the bond, the trustees be directed to concur with the bondholders in the sale, in terms of the 112th section of the Bankruptcy Act, in order to fortify the title.

"Against this resolution certain creditors have, with concurrence of the petitioner, presented an appeal to the Lord Ordinary, as the same, so far as the said Messrs Daniel & Green are concerned, is an illegal attempt on their part to escape from granting the said assignation."

The petitioner demanded an assignation of this security at the value thus specified, with the statutory addition of 20 per cent., and the question was whether the circumstances were such as to exclude this statutory right. The respondent lodged answers to the petition, in which they pleaded that in the circumstances the right could not be exercised, and they maintained this upon the ground—(1.) That the trustee was bound by his own actings and conduct from taking advantage of the statutory provision; (2) That his requisition was technically defective; (3) That the affidavit and claim founded on had been withdrawn by a letter written of the same date as the requisition; (4) That the creditors, at a meeting on 10th February 1868, had resolved not to enforce the requisition.

GIFFORD and GIBSON for petitioner.

SHAND and DEAS for respondent.

At advising—

LORD JUSTICE-CLERK was of opinion that the trustee's actings, even if they were of the character alleged, could not deprive the body of creditors of their statutory right; and, on the other hand, that the letter by the respondents' agent founded on did not, even if timeous, amount to an intimation that the valuation was to be altered. The respondents' technical pleas as to the terms of the requisition were met by previous decisions, and altogether the respondents had stated no relevant answer to the petition.

LORD COWAN—I concur in your Lordship's view that this is a statutory right enacted for the purpose of preventing creditors from undervaluing their securities, with the view of enlarging their votes. The statute accordingly gives to the trustee and the creditors the privilege of claiming a security any time within two months after the lodging of the affidavit, and claimed on condition of paying 20 per cent. additional. There is no question here, that this creditor lodged his claim, and voted on it at the election of the trustee, and within 2 months thereafter the trustee, with consent of the Commissioners, intimated that they claimed the security in the statutory form. Now is there anything here to prevent the exercise of their statutory right. I humbly think not. Nothing relevant to obviate this privilege has been averred; but then there have been some technical objections taken to the requisition of the trustee, but on that part of the respondent's case the authority of Simpson & Greig throws great light. There the Lord President said that it was not necessary to put in the minute of requisition the precise words of the statute.

There can be no doubt that the trustee was in communication with Mr Gulland about the time of the requisition which was not intimated to him. And there is a peculiarity in the fact that the letter of Mr Gulland and the requisition are of the same date, but the letter was not received until the 27th January, two days later. Had Mr Gulland's letter, which was written in ignorance of the requisition, contained a direct or even an indirect statement that a new valuation of the security would be made and lodged, and the old one withdrawn, I should have been inclined to have given more effect to it. But I can find no retractation anywhere of the original valuation, and on the whole matter I find no difficulty in agreeing with your Lordship.

LORD BENHOLME and LORD NEAVES concurred.

The Court accordingly held the petitioner entitled to the statutory assignation sought by him, and appointed a draft of the same to be given in.

Agent for Petitioner—James Bruce, W.S.

Agents for Respondents—Adamson & Gulland, W.S.

Friday, March 20.

FIRST DIVISION.

BARR *v.* NEILSONS.

Husband and Wife—Slander—Reparation. Held that a husband is not liable in damages for his wife's slander.