Thursday, Nov. 16.

BANKS *v.* M'LENNAN.

Crime—Suspension—Breach of the Peace—Conviction.

Conviction in a summary complaint before the Sheriff on a charge of "disorderly conduct in a public street of a town," by "using insulting or abusive language" to a passer-by, *set aside.*

This was a suspension at the instance of John Banks, shoemaker, Pulteneytown, Caithness, of a conviction obtained against him in a complaint under the Summary Procedure Act, brought in the Sheriff Court by Malcolm M'Lennan, Procurator-Fiscal in Wick. The complaint charged the suspender with having "been guilty of the crime or offence of disorderly conduct in a public street of a town, actor or art and part, in so far as on the 8th day of April last 1876, or about that time, and in or near Saltoun Street of Pulteneytown aforesaid, the said John Banks did wickedly and feloniously conduct himself in a disorderly manner by using insulting or abusive language to and of and concerning George Swanson, sheriff-officer, residing in Thurso, who was then peaceably passing along said street, calling aloud that the said George Swanson was a thief, and using other grossly offensive words of the like nature, all in a manner calculated and intended to provoke a breach of the peace."

The Sheriff (THOMS) found the suspender guilty as libelled, and decerned him to pay a fine of £1, 15s. or to be imprisoned for ten days. At the trial an objection to the relevancy was taken and repelled.

Argued for the suspender—There is no such crime at common law, nor is there any statutory enactment creating one—*Galbraith* v. *Muirhead*, 7th Nov. 1856, 2 Irv. 520.

Argued for the respondent—Charges of this kind are competent at common law, and in the interests of public order and peace. Such cases are known in practice—*Durrin and Stewart* v. *Mackay*, March 14, 1859, 3 Irv. 341.

At advising—

LORD YOUNG—I am clearly of opinion that this conviction cannot be sustained. In the Dundee case quoted to the Court on behalf of the respondent, the conviction was under the Police Act for that burgh; but this was not a police prosecution at all. It was a prosecution before the Sheriff of the county, and although under a summary form, it proceeded upon a regular complaint served upon the accused person. That complaint in the major calls "disorderly conduct" a crime by the law of Scotland, and then in the minor explains that this conduct consisted in calling a sheriff-officer a thief in such a way as to provoke a breach of the peace, adding that it was not so much what the accused said that was bad as his manner of saying it. The sheriff-officer had his remedy against his traducer, but not by way of a criminal charge. I am therefore for sustaining the grounds of suspension and quashing the conviction.

The Lord Justice-Clerk and Lord Craighill concurred.

The Court sustained the grounds of suspension and set aside the conviction.

Counsel for Suspender — Mair. Agent — W. Officer, S.S.C.

Counsel for Respondent — Burnet. Agent—Crown Agent.

Thursday, November 16.

FIRST DIVISION.

[Lord Rutherfurd Clark.

FLEMING *v.* WALKER'S TRUSTEES AND OTHERS.

Bankrupt—Title to Sue—Discharge of Trustee—Abandonment of Claim.

Circumstances in which *held* that a bankrupt who was discharged, but who had not been reinvested in his estates, was entitled to sue a claim which had been abandoned by the creditors.

This was an action of reduction on the ground of fraud and essential error of an assignation, and other deeds following upon it, relating to certain subjects in Larkhall, Lanark.

The pursuer John Fleming, residing in Larkhall, in 1851 became lessee for ninety-nine years of a piece of ground in Larkhall, on which he erected premises of the value, he averred, of £3000. He borrowed money for that purpose, and gave an assignation of the subjects in security to Alexander Walker, merchant, Larkhall, and others for behoof of his creditors. That assignation turned out to be an absolute conveyance, as no back letter was granted to Fleming. It was alleged that no adequate consideration was given, and that the deed was signed in essential error as to its nature and effect, induced by the representations of Walker. The deed was dated 21st January 1863, and on 17th July following the pursuer was obliged to take out sequestration. A trustee was appointed upon his estate, and a minute of meeting of creditors on 11th September 1863 stated—"The principal item in the bankrupt's assets is the reversion which may accrue to the estate from the heritable property after payment of the bonds preferably secured thereon. . . . . It appears that the property was assigned to Mr Alexander Walker, merchant, Larkhall, and others, *ex facie* absolutely, but actually in trust for certain purposes enumerated in the deed ef assignment. A back-letter should have been granted in favour of the bankrupt, but somehow it was never done. The trustee has applied to Mr Walker, the only trustee who acted, for an account of his intromissions under the trust, but this has been refused. There is no doubt Mr Walker will be bound to denude himself of the trust, and to reconvey the property to the reporter on payment of his just claims against the same." A valuation of the property was obtained, and a minute of meeting of creditors, dated 17th March 1864, bore as follows:—"The (heritable) property, some months before the sequestration, was assigned to certain trustees for behoof of the bankrupt's creditors. The assignation was *ex facie* absolute,

but actually in trust for payment of the bankrupt's debts. A back-letter should have been granted to the bankrupt, but this was not done. The only acting trustee under this deed has been repeatedly called upon to denude in favour of the trustee under the sequestration, but this he refuses to do. Law proceedings were instructed to be raised against the assignee; but there being no funds on hand belonging to the estate to meet the expenses, and the creditors declining to become security for them, the trustee does not feel himself in a position to proceed with the action."

The bankrupt was discharged on 8th November 1866 without composition, and no further proceedings took place in the sequestration till 9th December 1875, when a meeting of creditors was held. The following is an excerpt from the minute of that meeting:—"The meeting expressed itself satisfied with the conduct of the trustee and the statement of accounts submitted, and empowered the trustee to apply for his discharge. The meeting also approved of the trustee giving a letter to the bankrupt John Fleming abandoning his right on behalf of the estate to the property in Larkhall, consisting of shops and dwelling-houses."

The pursuer thereafter received this letter from the trustee, dated 3d February 1876:—"Sir, In terms of instructions received from your creditors at a meeting held at Glasgow on 9th December 1875, it is my duty as trustee in the sequestration to intimate that, on behalf of the sequestrated estate, I abandon all claim to the property in Larkhall, consisting of shops and dwelling-houses; and that, so far as the creditors are concerned, you are now at liberty to prosecute your right thereto in any action which you may see fit to raise." The trustee's discharge followed on 21st March 1876.

This action was directed against (1) Alexander Walker's trustees for reduction of the assignation above named; (2) the Commercial Bank, who had advanced money to Walker on the security of the property; and (3) William Sibbald, Royal Hotel, Lanark, who on 23d July 1875 purchased at a sale by public roup one lot of the subjects in question. Other parties were called as defenders, but those named were all who lodged defences. The pursuer alleged that he had given each of the defenders sufficient notice of his claims, and that a letter intimating the action had been read at the sale above mentioned.

The defenders (Walker's Trustees) pleaded, *inter alia*—"(1) The pursuer having been discharged without composition, and not having been reinvested in his estate, he has no title to sue the present action." And there was, *inter alia*, the following plea by the Commercial Bank:—"The defenders are not bound to satisfy the production, and they ought to be assoilzied, or the action should be dismissed, in respect (1) the pursuer having been sequestrated, and not having been reinvested in his estates, has no title to sue."

The Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having considered the summons and preliminary defences, and heard counsel thereon, dismisses the action, and decerns: Finds the defenders entitled to expenses, allows accounts thereof to be given in, and remits the same to the Auditor to tax and report.

"*Note.*—The pursuer maintained that he was in effect retrocessed in the estate to which this action relates by virtue of the resolution of creditors at the meeting on 9th December 1875, and the letter written by the trustee by their authority. But in calling the meeting no notice was given that any such business was to be taken up, and the Lord Ordinary thinks that the resolution was beyond the power of the creditors. The cases cited were *Marshall*, 22 D. 926; *Galbraith*, 1 Macph. 644; *Graham*, 9 Macph. 798; and *Gavin*, 5 D. 1191."

The pursuer reclaimed.

At advising—

Lord President—I am quite unable to concur in the interlocutor of the Lord Ordinary in this case. It is quite settled that although a bankrupt may not be retrocessed, yet if a claim has been abandoned by the creditor, the radical right and interest thereby revives in the bankrupt to the effect of entitling him to prosecute it. The sole question here is, Whether there is sufficient evidence of the claim in question having been abandoned by the creditors? If there was, the bankrupt certainly had a title to sue. The evidence is very complete. The sequestration came to an end in 1866, when the bankrupt was discharged, for I see from the Sederunt Book that nothing took place between that year and 1875. That fact indicates that neither the trustee nor the creditors were looking to this matter at all. The subject of this action has been brought more than once under the notice of the creditors. The first occasion was in 1863, in which year it appears from the Sederunt Book the particular relation of the bankrupt to this property was brought under notice of the creditors, who were so much impressed with the account of it that they had a valuation of the property made. After they got a valuation they did not see their way to prosecute their claim, and therefore it was stated, at a meeting upon 17th March 1869, that from want of means the trustee did not feel himself in a position to take legal proceedings. I think that is good evidence of the fact that in 1864 the trustee presented the alternative to the creditors,—"Here is a claim; Do you wish me to prosecute it? If so, put me in funds for the purpose,"—and that the creditors declined to do so. That appears to me as like an abandonment as anything well can be, when it is followed by the discharge of the trustee, even if no notice had afterwards been taken of the claim. But at the very next meeting when anything was done after 1866 (when the bankrupt was discharged), viz. in 1875, the question of the trustee's discharge was submitted to the creditors. For nine years they decline to move because they have no funds, and then they discharge the trustee without taking further notice of the claim. But I do not think the matter stops there, because when creditors meet to entertain the question of a trustee's discharge they have to consider whether there is anything more for the trustee to do, and if there is he must not be discharged. It must be assumed in this case that the creditors were satisfied that the trustee had recovered everything that was to be had and that they wished. That is conclusive that there is no right to this claim either in the trustee or in the creditors. If any creditor came forward to say he had been taken advantage of behind his back, it might be a different matter, but there is nothing of that sort here, and therefore I take the letter which was directed, at the

meeting of 9th December 1875, to be sent to the bankrupt, as expressive of the purpose of the creditors. In it the trustee's right to the property in dispute is abandoned.

I am for recalling the Lord Ordinary's interlocutor.

Lord Deas—It must be kept in view that what it is proposed should be done in this is peculiar. There is no retrocession. There has been, it is said, a refusal or declinature to take up a certain claim, and the question is, What evidence have we of it? It is very far from clear to my mind that it would not amount to a refusal if a long period had elapsed, followed by the discharge of the bankrupt and the trustee. It would be difficult in that event to say that the creditors had not refused to take up the claim. At all events, these are material circumstances.

In addition to these, there is here an express resolution by the creditors approving of the trustee writing to the bankrupt to say on behalf of the estate that he abandoned his right to take it up. The only objection is that there was no notice that that matter was to be entertained at the meeting. But I am not sure that the claim was not abandoned before that time. But the resolution must stand till reduced, and then it would surely require a creditor to come forward and aver that he had not sufficient notice. There is nobody in that position here, and it was admitted at the Bar that there was no party to the action who could object in that character. It does not follow that because the creditors who were not present could not reduce that resolution, others in the position of the defenders could take up the the plea. Looking to that, and the other circumstances of the case, I think your Lordship is right, and Icome to the same conclusion.

Lord Mure concurred.

The following interlocutor was pronounced:—

"The Lords having heard counsel on the reclaiming note for John Fleming against Lord Rutherfurd Clark's interlocutor of 6th June 1876, Recal the interlocutor: Repel the defences stated as objections to the pursuer's title to sue: Find the defenders liable in expenses since the date of the Lord Ordinary's interlocutor, and remit to the Auditor to tax the account of said expenses, and report: and remit to the Lord Ordinary to proceed, with power to decern for the expenses now found due."

Counsel for Pursuer (Reclaimer)—Guthrie Smith—Gebbie. Agents—Adamson & Gulland, W.S.

Counsel for Walker's Trs. (Defenders) Mackintosh. Agent—Alexander Morison, S.S.C.

Counsel for Commercial Bank (Defender)—Alison. Agents—Melville & Lindesay, W.S.

Counsel for William Sibbald (Defender)—M'Kechnie. Agent—Thomas Carmichael, S.S.C.

HIGH COURT OF JUSTICIARY.

Thursday, November 16.

NEILSON *v.* FENTON.

Solway Fisheries Act, 44 *Geo. III. cap.* 45, § 9—*Licence to Fish.*

A fisherman held a licence to fish for white fish in the river Nith, and to erect therefor stake nets. In these nets salmon were caught, and the fisherman was tried and convicted before the Justices of contravention of the Solway Fisheries Act.—*Held*, on a case stated by the Justices, that the appellant was an "occupier" of a fishery in the sense of the Act (sec. 9), that therefore he had not contravened the same.

This was an appeal against a judgment of the Justice of Peace Court, Dumfries, whereby Neilson, a fisherman, was convicted of a contravention of the Solway Fisheries Act. The complaint was laid under the Summary Procedure Act 1864, and by it Neilson was charged with having illegally fished at Blackshaw Bank, in the river Nith, with a stake net for salmon, in contravention of the Solway Fisheries Act, not being, as required by that Act, "the owner, occupier, or farmer of a fishery, or the agent, servant, or fisherman of some owner, occupier, or farmer of a fishery." It appeared upon the evidence that Neilson had a licence to fish for white fish from the proprietor of the fishings, Lord Herries, and to erect stake nets for that purpose, paying a certain rent per net, and being bound, if called on, to remove the net or nets from any given place. On the day in question a salmon and some grilse were caught in the stake net, and when pursued Neilson threw them away.

At advising—

Lord Justice-Clerk—It seems to me that the only question which we require to answer in the case stated to us by the Justices is the fourth, and that question is expressed as follows:—"Was the licence of Lord Herries, a fishery proprietor under the Solway Act, to erect a net for the capture of white fish, available to protect the accused from the consequences of his having taken fish of the salmon kind in the net?" My own opinion is, that if that be a true description of the state of matters, and of the right conferred by the licence of Lord Herries, the appellant does not come within the 9th section of the Act. That section renders the taking of salmon by others than proprietors, occupiers, or farmers of fisheries an offence; but the appellant is an occupier of a fishery in the sense of that section, and therefore does not fall under its provisions.

Lord Young—I concur entirely.

Lord Craighill—I am of the same opinion.

Appeal sustained and conviction set aside.

Counsel for Appellant—Nevay. Agent—A. Rodan Hogg, S.S.C.

Counsel for Respondent—Johnstone. Agents—J. C. & A. Steuart, W.S.