Saturday, February 27.

OUTER HOUSE.

[Lord M'Laren.

FERGUSON *v.* JOHNSTON.

Process—Expenses—Skilled Witnesses—Act of Sederunt 15th July 1876.

Held that the Act of Sederunt 15th July 1876, by which additional charges are allowed in the case of skilled witnesses, upon certificate by the Judge that the case is a fit case for such additional allowance, did not apply where a skilled witness had simply been precognosced upon a hypothetical case, and certificate *refused* accordingly.

This was an action raised by James Ferguson, butcher in Grahamston, Falkirk, against Frederick Johnston, printer and publisher of the *Falkirk Herald and Linlithgow Journal*, for £1000 damages for slander. The alleged slander was contained in an article which was alleged to contain an imputation upon the quality of meat which was in the pursuer's possession, and on his conduct in business. At the trial several skilled witnesses were examined by the pursuer, and were asked as to the inferences which they would draw as to the cause of a cow's death supposing that the meat presented certain characteristics. They had been consulted with a view to giving evidence, but had not conducted any experiments or in any similar way specially prepared for the trial.

The Act of Sederunt 15th July 1876 provides, that "in cases where it is found necessary to employ professional or scientific persons, such as physicians, surgeons, chemists, engineers, land surveyors, or accountants to make investigations previous to a trial or proof, in order to qualify them to give evidence thereat, such additional charges for the trouble and expenses of such persons shall be allowed as may be considered fair and reasonable, provided that the Judge who tries the cause shall, on a motion made to him either at the trial or proof, or within eight days thereafter if in session, or if in vacation, within the first eight days of the ensuing session, certify that it was a fit case for such additional allowance."

The pursuer moved the Lord Ordinary to allow special fees to the skilled witnesses examined.

The Lord Ordinary (M'Laren), after consultation with the Lord President, refused the motion, on the ground that where a skilled witness has neither gone to the locality to make a personal examination nor conducted scientific experiments with a view to the ascertainment of the matter in question, the additional allowance specified in the Act of Sederunt cannot be allowed against the unsuccessful party.

Counsel for Pursuer — D.-F. Mackintosh—Dickson. Agents—J. & A. Peddie & Ivory, W.S.

Counsel for Defender — Darling — Guthrie. Agents — Macandrew, Wright, Ellis, & Blyth, W.S.

Tuesday, March 9.

FIRST DIVISION.

[Lord Trayner, Ordinary.

Bill Chamber.

AIR *v.* THE ROYAL BANK OF SCOTLAND.

Bankrupt—Sequestration—Unclaimed Dividend, Application for by Representative of Bankrupt—Abandonment of Claim—Statute 54 *Geo. III. cap.* 117, *secs.* 29 and 57.

In a sequestration under the Bankruptcy Act of 1814, the trustee obtained his discharge on consigning in bank the amount of certain dividends unclaimed by creditors. Fifty-seven years thereafter a representative of the bankrupt made application for these unclaimed dividends. *Held* that as the entire estate had been embraced in the sequestration, neither the bankrupt nor any of his representatives had any title to the money in question.

The estates of the deceased William Air, merchant in Coldstream, were about 1820 sequestrated in terms of the Bankruptcy Statute (the Act of 1814) then in force, and a trustee appointed thereon.

In 1828 the trustee applied to the Court for his discharge, which he obtained after consigning in the Royal Bank of Scotland sums amounting in all to £15, 0s. 1d., being the whole amount of dividends belonging to certain creditors, and had not been claimed by them.

This was an application by Alexander Cumming Air, residing in London, the representative of the bankrupt, who claimed these sums of unclaimed dividend, with interest from the date of consignation, on the ground that up to the date of the present petition no application for payment of the sums respectively due to them had been made by any of the creditors, and that the creditors had abandoned their rights to the said sums, and that in respect of this abandonment the bankrupt or his heirs or representatives were entitled to claim it. He averred that it was upwards of fifty-seven years since the money was consigned, and that as the bankrupt had by the lapse of time been discharged of all his liabilities, his representative was entitled to make the present claim; and that after inquiry he had found it impossible to trace the creditors or their heirs or successors in business.

Answers were lodged for the bank, in which they admitted that a sum of £17, 18d. 7d., being the dividends of certain creditors who were named, was placed to the credit of an account in the name of William Air's trustee; that of these unclaimed dividends three sums amounting in all to about £7 had been paid, one of which was paid in 1830, and two in 1885; that they were prepared to pay the balance of the sum standing in their books to anyone who was found by the Court entitled to the same. They averred that they were not aware of any precedent, either at common law or under the Bankruptcy Statutes, for an application such as the present by the representatives of a bankrupt for authority to uplift the unclaimed dividends on his estate.

By interlocutor of 27th January 1886 the Lord Ordinary, after advertisement notifying the pre-

sentation of the petition and a report by the Clerk of the Bills, on the facts stated in the petition, granted warrant on the Bank for payment to the petitioner of £25, 10s., being the sum of the unclaimed dividends with the interest which had accrued upon them.

The bank reclaimed, and argued—(1) There was no abandonment by the creditors. (2) If there had been, it would not have given the bankrupt or his representatives any title to this money.

Authorities—Act 54 Geo. III. cap. 137, secs. 29 and 57; *Douglas* v. *Maclachlan*, February 4, 1881, 8 R. 470; *Mitchell* v. *Burness*, June 19, 1878, 5 R. 954; *Bain* v. *Blad*, 6 Syd. Bell's App. Cas. 317; *Muir* v. *Rodger*, November 18, 1881, 9 R. 149.

Replied for petitioner—All parties who had any interest in these funds must from the lapse of time be held to have abandoned their claims, and the radical right to these unclaimed dividends was in the bankrupt. Such evidence of abandonment had been accepted by the Court when the period of time was shorter.

Authority—*Fleming* v. *Walker's Trustees*, November 16, 1876, 4 R. 112.

At advising.—

Lord President—The amount at stake on this question is not very great, but we are told that it is of some importance for the decision of other cases of a similar nature. If I had had any doubt on the question I should have moved your Lordships to make avizandum, but I entertain no doubt. I am of opinion that neither the bankrupt nor his representatives have any title at all here.

The sequestration occurred under the Act of 1814. There is no provision under it for unclaimed dividends lodged in bank. Under the existing Act all this is provided for, and therefore the question in this case cannot occur in sequestrations awarded after 1856 or even after 1839. In 1828 the trustee presented an application for the purpose of obtaining his discharge, and he was discharged, previous to which, and seemingly as a condition of getting his discharge, he had lodged in bank the dividends which are now the subject of discussion. Now, the sequestrated estate had been completely disposed of. The entire estate of the bankrupt was embraced in the sequestration and divided among the creditors by the trustee. The consequence of that division was that the creditors who are there named received their share of the divided estate. The contention of the bankrupt's representative is, that as they did not come forward to claim their dividends, these necessarily belong to him. This rule is established within certain limits. If the creditors and the trustee resolve not to take up any portion of the bankrupt's estate, it reverts to the bankrupt, nobody else having any right to it. It falls under his radical right. There is a good example of this cited by the Dean of Faculty in the case of *Fleming* [*sup. cit.*], where a right to recover a heritable subject appeared to the trustee and creditors to be attended with so much trouble and expense that they did not consider it worth their while to spend money in recovering that part. It reverted to the bankrupt, but it must be observed that that part of the estate was never brought into the sequestration, and therefore could not form the subject of division among the creditors. But I should be prepared to go a step further, and say that before any division of the estate has begun, the creditors might have abandoned a part of the estate, which the bankrupt might take up. But when the whole estate of the bankrupt has been the subject of division, and the individual shares of the creditors have been assigned to and vested in them, there is an end of the radical right of the bankrupt. It has been adjudged to some one-else.

Nor do I think that we are in any way called upon in this case to determine what is to become of this money. I desire to give no opinion upon that question; this only I think it necessary to decide, that the bankrupt and his representatives have no title whatever to the funds which in this process they are claiming.

Lord Shand—The argument of the petitioner was rested chiefly on what was called the radical right of the bankrupt to this money, in respect of the creditors' presumed abandonment of their claims through lapse of time; but it appears to me that there is a marked distinction between this case and the others to which we were referred in the course of the discussion. Cases might quite well occur in which the title to the bankrupt's estate not having been taken up by the creditors, the radical right to the funds would remain in the bankrupt. But if the creditors take up the estate and convert it into money and proceed to distribute it, then the radical right of the bankrupt in any part of the estate which from any cause remains undistributed is at an end. That was exactly what occurred in the present case; the estate was taken up by the creditors and converted into cash, and therefore any right of the bankrupt to this remaining part of his estate is at an end.

It resembles to my mind much more the case of a man who deposits money in a bank, and from some cause or other fails or omits to uplift it. I think therefore that this application must be refused.

Lord Adam—I am of the same opinion. There can be no doubt that this sum was set aside as dividend, and that the parties in right of it are the creditors of the bankrupt.

Lord Mure was absent.

The Court remitted to the Lord Ordinary to refuse the application.

Counsel for Petitioner—D.-F. Mackintosh, Q.C. —Strachan. Agent—David Hunter, S.S.C.

Counsel for (Royal Bank)—Pearson—Fleming. Agents—Dundas & Wilson, C.S.