Thursday, May 19.

FIRST DIVISION.

BUNTEN & COMPANY *v.* AITKENHEAD.

Process—Mandatary—Defender Abroad—Discretion of Court.

When a litigant leaves the country it is a matter for the discretion of the Court whether or not he shall be ordained to sist a mandatary.

Motion to have the defender in an action under appeal to the Court of Session, who held decree of absolvitor in the Sheriff Court, and had gone abroad, ordained to sist a mandatary *refused.*

George Aitkenhead, grain and general storekeeper, Glasgow, brought an action in the Sheriff Court at Glasgow against William Bunten & Company, drysalters, Glasgow, for £292, 7s. 3d., for storage, and William Bunten & Company brought an action in the same Court against George Aitkenhead for £470, 9s. 6d., being the value of valonia stored with him, which, as they alleged, he had failed to redeliver. These actions were conjoined. The Sheriff-Substitute (LEES) on 23rd March 1891 gave decree in Aitkenhead's favour for £87, 16s. 3d. in the action in which he was pursuer, and assoilzied him from the conclusions of the other action. That interlocutor was affirmed by the Sheriff (BERRY) on 23rd March 1892, and William Bunten & Company appealed to the First Division of the Court of Session.

Upon May 19 the appellants moved that Aitkenhead should be ordained to sist a mandatary, as he had gone to America some months ago, and was, as they had now discovered, an undischarged bankrupt. They argued that the rule was that a mandatary should be sisted. The cases relied on by the respondent were all decided on special grounds. They were cases in which the person whom it was sought to require to sist as mandatary was defender. Here Aitkenhead was pursuer in the first action which might be brought up for review under the appeal.

Argued for Aitkenhead—There was no inflexible rule. It was in the discretion of the Court to grant or refuse the motion, but here it was an oppressive motion. He was defender in the action under appeal, and a defender who had obtained decree of absolvitor from both Sheriffs. There was nothing in the conduct of the case requiring a mandatary to be sisted. All the recent cases were against requiring a defender to sist a mandatary—*Simla Bank* v. *Home*, May 21, 1870, 8 Macph. 781; *D'Ernesti* v. *D'Ernesti*, February 11, 1882, 9 R. 655; *M'Donald's Trustees* v. *Stewart*, February 6, 1891, 18 R. 491.

At advising—

LORD PRESIDENT—All these cases are cases of circumstances. It has not been asserted that there is any inflexible general rule compelling the Court to order a party who has gone abroad, even although *animo remanendi*, to sist a mandatary. I can understand that at any stage of such a case the person at home may move to have a mandatary sisted, and the Court will order a mandatary to be sisted if they think the case is not in responsible hands, and if the motion for such an order is refused it will necessarily be refused only *in hoc statu*, as circumstances might alter and call for such an order being made.

Let us see how this application is made to us. It is not made on the ground that the conduct of the case requires that a mandatary be sisted, but rather because of the financial position of Mr Aitkenhead, who has gone abroad, and of the rights of him and his creditors to certain money. Now, I think Mr Aitken is right in the way he puts this case. His client has been found entitled to the sum of £87, which is in the hands of his adversary, and Mr Ure admits that that sum of £87 must be paid unless he can establish a claim, which he is suing this action to assert, but which has been negatived in the Court below. Accordingly the absent Mr Aitkenhead is the defender, and holds a decree in his favour. He is therefore in the doubly advantageous position of being not only defender in the action but defender holding a decree. In these circumstances I do not think we need to order Mr Aitkenhead to sist a mandatary, and I am therefore for refusing the motion.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR was absent.

The motion was refused.

Counsel for William Bunten & Company—Ure. Agents—J. & J. Ross, W.S.

Counsel for Aitkenhead—Aitken. Agents—Webster, Will, & Ritchie, S.S.C.

HIGH COURT OF JUSTICIARY.

Tuesday, May 24.

(Before the Lord Justice-Clerk, Lord Young, and Lord Trayner.)

DONALD *v.* HART.

Justiciary Cases — Suspension — Accused Convicted of Aggravation not Charged.

On a complaint charging that the accused did drive a horse and van against a woman, "and knock her down and fracture her skull, to the danger of her life," a conviction followed finding the accused "guilty of the crime charged, aggravated as charged." *Held* that no aggravation having been charged in the complaint, the conviction must be set aside.

Edward Woodford Donald, van-driver, 63

Sandyfauld Street, Glasgow, was charged before the Sheriff-Substitute (COWAN) of Renfrewshire at Paisley on a complaint at the instance of George Hart, Procurator-Fiscal of the Court, that the accused "did, on 4th February 1892, in Paisley Road, Glasgow, Renfrewshire, drive a horse and van against Elizabeth Young, wife of William Young, 62 Pollock Street, Glasgow, and knock her down and fracture her skull, to the danger of her life."

On 14th April 1892 the Sherff-Substitute, in respect of the evidence adduced, found the accused "guilty of the crime charged, aggravated as charged," and adjudged him to be imprisoned for the space of thirty days from the trial date.

Donald presented a bill of suspension and liberation, praying for the suspension of the conviction and sentence, and for liberation.

The complainer submitted various arguments relating to the relevancy of the complaint, which need not here be detailed, and further argued—The conviction went beyond the charge. There was no aggravation of the crime set forth in the complaint. There must be a resulting injury in order to constitute a good criminal charge, so the injury could not be held to be an aggravation, but was a part of the charge—Macdonald's Criminal Law (2nd ed.), p. 192. The complainer had therefore been convicted of more than he was charged with, and such a conviction was bad.

Argued for the respondent—The words in the conviction were "aggravated as charged." The Sheriff therefore found the accused guilty of nothing beyond what was charged in the complaint. "To the danger of her life" had been treated by the Sheriff as an aggravation of the offence of knocking down the woman and fracturing her skull.

At advising—

LORD JUSTICE-CLERK—In this case the prosecutor in his charge has stated certain things all together. "Did drive a horse and van against Elizabeth Young, and knock her down and fracture her skull, to the danger of her life." All these are charged as one thing. There is no suggestion of any aggravation, indeed the word aggravation is not used. The crime is stated as one crime. This is further brought out by the prayer of the complaint, which is the most important part of the complaint in an Inferior Court. The prosecutor calls on the Sheriff to convict the accused Donald "of the said crime." The Sheriff, however, in giving judgment in the conviction, finds the accused "guilty of the crime charged, aggravated as charged, and therefore decerns and adjudges him to be imprisoned for the space of thirty days." But I do not find either in the complaint or its prayer anything to justify these words "aggravated as charged." As a matter of speculation, it may be very plain what the Sheriff means by these words. I think it is possible that the Sheriff may have thought that "did drive a horse and van against Elizabeth Young and knock her down" was the crime charged, and that "did fracture her skull to the danger of her life" was an aggravation of the crime. But we do not know that this was what the Sheriff meant by these words, and it is not for us to speculate. I do not think the Sheriff could convict the accused of an aggravation under this complaint and prayer, and I therefore cannot sustain a conviction finding the accused guilty of an aggravation which is not charged.

LORD YOUNG—I asked to see the original proceedings in this case in order to observe whether the words "aggravated as charged" were part of the printed form of the conviction. I find this is not so; the words have been added in writing. I agree in thinking it would be unsafe to sustain a conviction from which it appears that the Judge was thinking of an aggravation which is not in the complaint. It is not only the crime which is taken account of, but also the aggravation which may go to increase the punishment. The Sheriff may have been under some misapprehension, and I think it would be unsafe to allow this conviction to stand.

LORD TRAYNER—I agree in the result at which your Lordships have arrived. I think the complaint asks for the conviction of the accused of a specified crime. The Sheriff in finding the accused "guilty of the crime charged" exhausted all that was asked of him, and when he went on to find the accused guilty of an aggravation he proceeded *ultra petita*.

The Court quashed the conviction.

Counsel for Complainer—W. Thomson. Agents—J. Douglas Gardiner & Mill, S.S.C.

Counsel for Respondent—C. N. Johnston. Agent—J. Auldjo Jamieson, W.S., Crown Agent.

Tuesday, May 24.

(Before the Lord Justice-Clerk, Lord Young, and Lord Trayner.)

DUFFIE *v.* M'CORMICK.

Justiciary Cases — Highway Passing through Burgh—Driving on Loanings—Powers of Police Commissioners to Prosecute under Roads and Bridges (Scotland) Act 1878 (41 *and* 42 *Vict. cap.* 51).

By section 123 of the Roads and Bridges (Scotland) Act 1878, which incorporates section 96 of the General Turnpike Act 1831, it is enacted that if any person shall drive any horse or carriage of any description upon any footpath or causeway on or by the side of any turnpike road made or set apart for the use or accommodation of foot-passengers, he shall be liable in a penalty.

A turnpike road as it ran through a police burgh formed the main street of