intention to murder his wife. If they believed that the prisoner intended to injure her, that the wounds were inflicted either with intention to injure, with an utter recklessness as to the life of the woman, or that they were given in the exercise of his fury or passion, the law held that such a man was a murderer."

The jury returned this verdict—We, by a majority, find the panel guilty of murder; but unanimously recommend him to mercy on the ground of want of premeditation.

LORD JUSTICE-CLERK—You say that the panel should be recommended to mercy on the ground of want of premeditation. Is it your view that the panel did not premeditate the offence at all, or is it your opinion that he was not guilty of malice aforethought in the sense of having settled and arranged before to commit the murder?

FOREMAN OF JURY—I think I speak the mind of the jury, when I say they think it was without premeditation.

CRAWFORD—I move that it be entered as a verdict of culpable homicide.

FOREMAN OF JURY—Some of the jury would like to discuss these two points.

LORD JUSTICE-CLERK said that if they held there was no premeditation whatever, he did not know but that their verdict would be a verdict of culpable homicide rather than a verdict of murder. In considering this question it was not necessary that the panel should have had a purpose of actual murder in view, but that he should have conducted himself with an utter recklessness of life in the infliction of the injuries, or in the repeating of injuries, and that he had in view the injuring of his wife. If the prisoner had had no premeditation in the matter, he thought that the expression in the verdict, murder without premeditation, was a very difficult one to reconcile. He thought the jury should re-consider the matter.

The jury then retired, and on their return,

FOREMAN OF JURY—We have now amended our verdict, in the hope that it will be satisfactory. Our verdict is as follows:—We, by a majority, find the prisoner guilty of murder; but recommend him to mercy on the ground of want of malice aforethought.

CRAWFORD, on behalf of the prisoner, quoted Hume's definition of the crime of murder (i. 254), "I shall now examine the third degree of homicide, the crimeof willful murder. . . . The peculiar characteristic of this sort of homicide is that it is done wilfully, and out of malice aforethought." It was plain, upon that authority, that a verdict such as that given in the present case could not be held as one of willful murder. The question did not arise, What amounted to malice aforethought in the legal sense? Whatever it was, the jury had negatived its presence. And it was essential to murder.

LORD ADVOCATE said that the statement by Baron Hume was qualified, and it was sufficient reason for a verdict of murder if there was an utter recklessness of life.

The verdict having been recorded,

LORD ADVOCATE moved for sentence in terms of the verdict.

CRAWFORD argued it would not be competent for the Court to pronounce sentence of death on such a verdict as that which had been given by the jury. He moved that their Lordships should continue the case to a future day, when he would be prepared with a greater number of authorities on the point that had been raised. The jury had used a technical expression which showed beyond all doubt that they held that the prisoner was not guilty of the legal crime of murder; and he therefore submitted that the motion of the Lord Advocate could not be adopted, nor sentence of death passed.

The Court having consulted for a few minutes,

LORD ARDMILLAN said he held that the verdict, as it now stood, was a verdict of murder, and that the recommendation fell to be considered in a different quarter.

LORD JERVISWOODE was of the same opinion, and said he could not hold that by their recommendation the jury had destroyed the leading portion of the verdict, which was one of murder.

LORD JUSTICE-CLERK concurred, and said he read the verdict as convicting the panel of the crime of murder.

Sentence of death was pronounced.

Agent—John Welsh, S.S.C.

COURT OF SESSION.

Tuesday, December 17.

FIRST DIVISION.

ACCOUNTANT IN BANKRUPTCY *v.* A. B.

Bankruptcy—Trustee on Sequestrated Estate—Contravention—Accountant in Bankruptcy—Bankruptcy Act 1856. On a report by Accountant in Bankruptcy, stating that a trustee on a sequestrated estate had contravened the 83d and other sections of the Bankruptcy Act 1856, and praying for censure of trustee, and finding against him of expenses, *held* (1) that by such contravention the trustee became bound to pay penal interest in terms of the Act; (2) that if such contravention did not arise from innocent causes, the Court were bound to remove the trustee, to find him not entitled to any remuneration, and to find him liable in expenses. In the circumstances of the case, expenses modified.

Bankruptcy—Report by Accountant in Bankruptcy. Held that a report by the Accountant in Bankruptcy under sec. 159 of Bankruptcy Act 1856, brings on the whole matter of the report to be dealt with by the Court, just as if a petition had been presented to the Court.

This was a report presented to the Court by the Accountant in Bankruptcy under sec. 159 of the Bankruptcy Act, 1856.

The report narrated sections 82, 83, 84, 125, 130, and 132 of the Act, and bore that the trustee had failed to lodge in bank a sum of money belonging to the bankrupt estate, and had falsely set forth in the accounts submitted by him from time to time to the Commissioners, that these sums were lying in bank to the credit of the estate. The report craved the Court to order intimation to the trustee, and thereafter to deal summarily with the matter, by censure or otherwise, and to find the trustee liable in expenses.

Answers were lodged for the trustee, admitting the general correctness of the report, and expressing his deep regret that the irregularities complained of had occurred. He explained that the balance due by him to the estate, together with

the whole bank interest which would have been due thereupon, had now, with the exception of a sum of £17, 14s. 4d., been accounted for. It was also explained that the trustee was now himself bankrupt, and quite unable to pay penal interest.

Lord Advocate (Gordon) and Skelton for Accountant in Bankruptcy.

Brand for trustee.

After hearing counsel on the case, the Court desired information as to (1) whether penal interest had been paid; (2) whether the creditors wished the trustee to be retained or dismissed; (3), what had been done in previous cases; and continued the case.

The case was again called.

Lord Advocate (Gordon) and Skelton explained that penal interest had not been paid. They cited *M'Cubbin*, 29th June 1861, 2 Macph.. 1293, and *Accountant in Bankruptcy* v. *A.B.*, 9th Dec., 1865, 1 Scottish Law Reporter, 67. They craved the Court to censure the trustee, and find him liable in expenses.

Trayner, for a creditor, who was also a commissioner on the estate, craved the Court to find that the trustee had contravened the 83d section of the Act; to remove him from office; to find him liable in expenses; and to order a meeting of creditors for appointing a new trustee.

Brand for trustee.

Lord President—My Lords, this case comes before us on a report by the Accountant in Bankruptcy under the 159th section of the statute, and it is necessary for us to consider, in the first instance, what we can do under that section. The report is to be made by the Accountant when he sees cause to make it, or finds that a trustee or Commissioners are not faithfully performing their duties, and duly observing all rules and regulations imposed on them by statute, Act of Sederunt, or otherwise, relative to the performance of those duties; or, in the event of any complaint being made to him by any creditor in regard thereto, he is to inquire into the same, and, if not satisfied with the explanation given, he is to report thereon to the Lord Ordinary in time of vacation, or, during time of session, to either Division of the Court of Session, who, after hearing such trustees or commissioners thereon, and investigating the whole matter, shall decide, and shall have power to censure such trustees or commissioners, or remove them from their office, or otherwise to deal with them as the justice of the case may require. (Sec. 159.) It appears to me that when anything of this kind is brought before us by report by the Accountant in Bankruptcy, we may do anything in the matter which we have power to do under the statute, even though under other circumstances we could only act on a petition or some other process; in short, that the report brings the whole matter up, and leaves us to deal with the matter. That being so, we come back to the charge made against this trustee under the 83d section of the Act—and it is a very serious charge—because the Accountant reports it to be, and I cannot help dealing with it as, a flagrant violation of a trustee's duty, very gross and long-continued, by means of which monies belonging to the bankrupt estate have been kept in the trustee's own hand instead of in bank, and it is not disputed by the trustee that this charge is in the main well founded. The first consequence of such a charge against a trustee is, that he becomes bound to pay interest to the creditors at the rate of 20 per cent. per annum on the excess of such sum above fifty pounds as he shall keep in his own hands more than ten days for such time as the same shall be in his hands beyond ten days. But then there is a farther provision which devolves a particular duty on the Court. It enacts that unless the money has been so kept out of bank from innocent causes, the trustee shall be dismissed from his office upon petition to the Lord Ordinary or Sheriff by any creditor, and have no claim to remuneration, and shall be liable in expenses. Now, the first thing to be determined is, whether the money has been kept out of bank from innocent causes, and I must say I don't see the slightest ground for thinking that it has. Then, is not the clause imperative? I think it is, and that it is binding on us under this clause to dismiss the trustee from his office; to find that he has no claim for remuneration; and to find him liable in expenses. It is almost an inevitable consequence of a trustee being in such circumstances liable to pay penal interest, and not having paid it, that he should be dismissed from office, because otherwise there would be no one to recover that penal interest for the creditors. But it is not necessary to go into that, because the provision of the statute is imperative. Our course is the same as if a petition for dismissal of the trustee had been presented. I would only suggest that perhaps in the circumstances of this case, as we have had more than one discussion on this report, there may be room for some modification of expenses.

Lord Curriehill—I take precisely the same view of the case as your Lordship.

Lord Deas—I am of the same opinion. I think we have power to do every thing in the matter as if a petition had been presented to us; and I think that the things to be found against the trustee are imperative. It is the policy of the statute to make them so, for otherwise a trustee could reckon on appealing to the Court *ad misericordiam.*

Lord Ardmillan—I concur, and have nothing to add.

Trayner moved for expenses of a single appearance.

The Court granted modified expenses.

The Court appointed a meeting of creditors for electing a new trustee.

Agent for Accountant in Bankruptcy—T. G. Murray, W.S., Crown-Agent.

Agent for Trustee—J. Y. Pullar, S.S.C.

Agents for Creditors—Campbell & Smith, S.S.C.

Wednesday, December 18.

COX BROTHERS AND MANDATORIES *v.* BINNING AND SON.

Arbitration—Conditional Allowance of Proof—Consignation—Excess of Power—Award. Circumstances in which *held* (1) that although an arbiter committed an excess of power in ordering consignation by one of the parties of the sum in dispute at the same time as he allowed him to lead farther proof, that party was not justified in refusing to go on with his proof, the arbiter having explained that the allowance of proof and order for consignation were