A. R. Clark and John Marshall, for pursuers.

Dean of Faculty (Moncreiff), N. C. Campbell, Young, and A. Moncrieff, for defenders.

Lord President—The Court are of opinion that *in hoc statu* no judgment should be given either as to the relevancy of the action, or upon the many points of law involved in this case. These will arise for discussion at the trial or after it; and the Court have framed issues which they think will keep all these matters open. But in the meantime the money part of the case should be withdrawn from the jury. It can be made matter of admission or adjustment hereafter.

The most important question is, whether the pursuers effectually exercised their right of stoppage *in transitu*. That is the foundation of this case. It must therefore be put in issue and made the first issue. That issue has been purposely framed in very general terms to keep open all question of law. Stoppage, however, may be found to consist of one act, or of several acts, and therefore no date is specified in the issue.

The following were the issues adjusted:—"It being admitted that a cargo of sugars, consisting of 1503 bags or thereby of channel brown sugar, and 1700 bags or thereby of American brown sugar, purchased and paid for by the pursuers, was shipped on board the British brig "Dante," lying at Pernambuco, on the order and account of Stirling Gordon and Company, merchants in Glasgow, to be delivered to them or their order at Greenock, and that the bill of lading of said sugars was forwarded by the pursuers to the said Stirling Gordon and Company, blank indorsed, and received by them on 5th December 1864:—

"It being further admitted that on the said 5th December 1864 the said Stirling Gordon and Company accepted bills of exchange drawn on them by the pursuers for the price of the said sugars, amounting in all to £4,114, 5s. 8d., and that these bills were dishonoured, and no part of the said price has been paid to the pursuers:—

"It being further admitted that the estates of Stirling Gordon and Company were sequestrated on 17th December 1864, and that the defender, James Wylie Guild, is trustee on said estates:—

"It being further admitted that the estates of John Reid junior and Company, merchants in Glasgow, were sequestrated on the 30th of December 1864, and that the defender, Peter White, is trustee on said estates:—

"1. Whether, before the said sugars were delivered to the said Stirling Gordon and Company, or any one in their right under the said bill of lading or indorsements thereof, the pursuers stopped the said cargo of sugars *in transitu?*

"2. Whether the said bill of lading was, on or about the 5th December 1864, fraudulently indorsed and transferred by the said Stirling Gordon and Company to, and fraudulently received by the said John Reid junior and Company, to the prejudice of the legal rights of the pursuers?

"3. Whether, on or about 5th December 1864, being within sixty days of the sequestration of their estates, the said Stirling Gordon and Company indorsed and transferred the said bill of lading to the said John Reid junior and Company, in security or satisfaction of a prior debt, contrary to the Act 1696, c. 5?

"4. Whether the said bill of lading was, on or about the 13th December 1864, fraudulently indorsed and transferred by the said John Reid junior and Company to, and fraudulently received by the defender, Walter Grieve, to the prejudice of the legal rights of the pursuers?

"5. Whether, on the 13th December 1864, being within sixty days of the sequestration of their estates, the said John Reid junior and Company, indorsed and transferred the said bill of lading to the defender, Walter Grieve, in security or satisfaction of a prior debt, contrary to the Act 1696, c. 5?

"6. Whether, on or about the 22d December 1864, the said Walter Grieve, defender, fraudulently sold or transferred the said sugars to the defenders, Paul, Sword, and Company, and the said Paul, Sword, and Company accepted the said sale or transference—in the knowledge that the said Walter Grieve and the said John Reid junior and Company had fraudulently obtained the said bill of lading and indorsations thereof, to the prejudice of the legal rights of the pursuers—and thereafter took possession of the said sugars and sold the same, in prejudice of the rights of the pursuers, as sellers who had stopped the said sugars *in transitu?*"

In the course of adjusting the terms of the issues, the counsel for the pursuers maintained that, in support of their reduction of the indorsations as fraudulent at common law, they were not bound to prove fraud on the part of such of the indorsees as had received the indorsations from bankrupt parties; and referred to the case of *M'Cowan* v. *Wight*, March 9, 1853 (15 D., 494), as an authority for that doctrine. The Court, however, held that the case of *M'Cowan*, being a reduction at the instance of a "*creditor*," was not applicable to the present case, which was a reduction at the instance of a "*seller of goods*," who had given to the purchaser a bill of lading, which is a negotiable document, passing the property of the goods which it represents to the indorsee, if onerous and *bona fide*, to the effect of defeating the seller's right of stoppage *in transitu*. Fraud, therefore, on the part of the indorsee, is an essential part of the pursuers' case, and must be put in issue, as was done in the case of *Stoppel* v. *Stoddart*, 14th November 1850 (13 D., 61).

Agents for Pursuers—Mackenzie, Innes, & Logan, W.S.

Agents for Defenders—James Webster, S.S.C., Wilson, Burn, & Gloag, W.S., and M'Ewan & Carment, W.S.

Saturday, July 29.

SECOND DIVISION.

FITZSIMMONS *v.* BELL.

Bankruptcy—Cessio *Act*—*Suspension*—*Liberation*—*Protection.* Question, whether under the 15th section of the *Cessio* Act, a liberation, without bearing at the same time to be a protection, and without specifying any particular period for which it is to be available, has the effect of suspending all diligence?

This was a note of suspension and liberation brought by Fitzsimmons, craving to be instantly liberated from prison, and protection from all other diligence. The complainer last year brought a process of *cessio*. During its dependence he was put in prison by Bell, upon a bill for £100. He thereupon made an application to the Court, in the

progress of which he asked for liberation in order to be able to attend to the depending process of *cessio*. The Court liberated, but the interlocutor did not bear that the liberation was to be available for any particular time, and did not give protection. Fitzsimmons afterwards applied to the Lord Ordinary on the Bills during vacation for protection, and having failed to find the consignation or caution required, it was refused. Nearly a year having elapsed without any steps being taken in the process, Bell again re-imprisoned him, upon a different diligence from what had been put in force in the *cessio*. The present note of suspension and liberation was accordingly brought to set aside the present warrant of imprisonment. The question turned on the construction of the 15th section of the *Cessio* Act, which is as follows:—

"And be it enacted, that if the debtor be in prison, it shall be competent for the Inner House during session, and for the Lord Ordinary on the Bills during the vacation or the Christmas recess, whether the case has been originally instituted in the Court of Session or before the Sheriff (provided that it be under review of the said court), and for the Sheriff, where the petition has been presented to and is depending before him, on production of a copy of the said Gazette containing the notice aforesaid, and of the certificate of transmission of the letters or execution of citation, to grant warrant to liberate the debtor, and if the debtor is not in prison to grant warrant for his personal protection against the execution of diligence for such space of time as shall be proper; provided that before any such warrant be issued the debtor shall lodge with the clerk of Court a bond with a sufficient cautioner, binding themselves that he shall attend all diets of Court whenever required under such penalty as may be reasonable, and which, if forfeited, shall be divided among the creditors; and it shall be competent for the Inner House, or the said Lord Ordinary, or the Sheriff respectively, in all cases to grant warrant to bring the debtor before them for examination, and also to carry him back to prison; and such warrant, as well as the warrant of liberation and the warrant of personal protection, shall be good and lawful warrants in all parts of Scotland to the effect therein specified; and it shall not be competent, where the warrant of liberation or protection is granted by the Lord Ordinary on the bills or the Sheriff, to suspend the effect thereof by lodging a reclaiming note or petition complaining of the same: provided nevertheless, that a reclaiming note or petition may be lodged as herein-before provided, and it shall be competent to the Inner-House or the Sheriff (as the case may be), on hearing parties, to recal the warrant of liberation and protection."

The Lord Ordinary (MURE) reported the case to the Inner-House.

MAIR, for the complainer, argued that the interlocutor of the Inner-House was intended to be a protection against all diligence, and that there was no meaning in it if the complainer was liable at any moment to be re-imprisoned.

W. A. BROWN in answer. The complainer did not ask the Court for protection in the prayer of his application; he only craved liberation for a limited purpose, and that was granted. It might be true that he was liable to be re-incarcerated, but his remedy in that event would have been to apply to the Court to get protection, and protection would be awarded or refused according as the Court thought proper; and if awarded, would be limited to a specified period. The effect of the complainer's contention was practically to give him the benefit of a decree of *cessio*.

The Court were of opinion that the point raised was one of great importance, and that it would not be expedient, without further argument and more mature consideration, to pronounce a judgment upon it. But there was enough doubt in the case to justify the note being passed, and also to warrant liberation.

The note was accordingly passed, and liberation granted.

Agent for Complainer—W. Officer, S.S.C.
Agent for Respondent—James Bell, S.S.C.

Tuesday, July 2.

FIRST DIVISION.

BUCHANAN & M'GAAN AND OTHERS *v.* BARR & SHEARER.

Issues—Salvage — Towage — Agreement. Form of issue adjusted by the parties to try a claim of salvage. Counter issue adjusted by the Court, to try the defence that the service was rendered under contract to tow entered into between the masters of the two vessels, and that the owner and crew of the salving vessel were bound by such contract.

This was an action originally raised at the instance of Norman Buchanan, distiller in Islay, registered owner of the steam vessel "Xantho," for himself, and as specially authorised by and on behalf of the master and crew of the said vessel, against the defenders, who are shipowners in Ardrossan, and the registered owners of the barque "Lorena." Buchanan having been sequestrated, the action was insisted in by John M'Gaan, merchant in Glasgow, as assignee under a letter and assignation executed by Buchanan and the trustee in his sequestration, and by Peter Thomson and others, designing themselves the master and crew of the "Xantho," who all sisted themselves as pursuers.

The summons concluded for £2000, in name of salvage, for services rendered by the "Xantho" and her master and crew to the "Lorena," in towing her from near the Mull of Cantyre to Whitefarlan Bay, in the Sound of Islay. It is stated on record that the "Lorena," of 475 tons register, left Ardrossan on 15th December 1865, with a cargo of coals bound for Kurachee, but was obliged to put back for repairs, having encountered severe weather and been disabled (the amount of injury being a matter of dispute between the parties); that, on 2d January 1866, the "Xantho," a small steamer of 44 tons register, trading between Glasgow and Islay, fell in with the "Lorena" near the Mull of Cantyre, on her way back to Ardrossan, and towed her to Islay, the time occupied being eight hours, and the distance, as stated by the defenders, about thirty miles.

The defence was, that the service rendered to the "Lorena" was towage, and not of the nature of salvage service, and was performed under an agreement for £50 entered into between the masters of the two vessels in the presence and hearing of the respective crews. It was further averred by the defenders that, on arriving at Islay, the master of the "Lorena," at the request of the person