rule was made on the 17th May, two days from the end of the period during which it was competent. Had it not been made, the verdict might have been applied upon the 19th, and from that day I think interest should run. I think, moreover, that this petition ought not to have been presented. There was really very little ground for apprehension on the part of the defender; but I am willing to give them credit so far, that they were desirous of making very sure that no other sufferers from the collision were going to make claims upon them. But they were not entitled to secure their own safety at the expense of another party. I am not, therefore, for allowing the presentation of that petition to stop the currency of interest upon the sum found to be due.

The other Judges concurred.

The Court accordingly applied the verdict, and decerned in favour of Mr Seligmann for the full amount of damages found by the jury.

Agents for Mr Seligmann—Webster & Will, S.S.C.

Agents for the Flensburg Steam Shipping Company—Mann & Duncan, S.S.C.

Tuesday, July 18.

DUFFY *v.* RITCHIE, MENZIES & CO.

Cessio Bonorum—*Interim Liberation. Cessio* and liberation *refused*, in respect of the vagueness and unsatisfactoriness of the debtor's statements.

The pursuer was incarcerated on 3d May, in default of payment of a bill for £20, £19 of which was still due. Having made a claim for aliment, he deponed he was possessed of no assets: but in a summons of *cessio*, raised on 13th June, he stated he had assets to the amount of £68, 10s. His liabilities, he alleged, amounted to £336, 18s, one debt being for £150 to his father-in law, and one for £120 to his brother- in-law. No statement was made of how the debts were incurred, nor any proof given of their reality, and the only account he gave of his embarrassments was to the effect that he was a general dealer, and from his inexperience in business had got into difficulties. He also presented a petition for interim liberation, offering caution *de judicio sisti*. The incarcerating creditors objected to *cessio* or interim liberation being granted, and alleged their belief that he was in possession of further funds, and also of furniture.

When the petition was moved, the Court directed it to be heard along with the *cessio*.

MORRISON for the pursuer.

LEES in answer.

The Court *hoc statu* refused the *cessio*, and also to grant liberation. There was no information here on which *cessio* could be granted. Practically it amounted to this—the pursuer was in prison and wanted out. But before that could be granted there must be some information given of how he contracted debt, or what he lived on, and generally as to the circumstances. The only information given was very unsatisfactory.

Agent for Pursuer—J. Macqueen, S.S.C.

Agent for Defenders—W. K. Thwaites, S.S.C.

Tuesday, July 18.

SECOND DIVISION.

DUKE OF BUCCLEUCH *v.* TOD'S TRUSTEES.

Landlord and Tenant—Fences. Subdivision fences were put up by a tenant without the sanction of the landlord. *Held* that, as these fences were not necessary for the cultivation of the farm, and had been intended only for the tenant's use, they were the property of the tenant, who was entitled to remove them at the expiry of his lease.

This appeal arose out of a petition at the instance of the Duke of Buccleuch against the trustees of the late Mr Tod, who had been tenant of the farm of Cleuchfoots, presented to the Sheriff of Dumfries, and prayed to have the trustees ordained to restore certain fences which they had caused to be removed after Mr Tod's death. The facts are fully set out in the following interlocutor of the Sheriff-Substitute (HOPE):—

"Finds that the petitioner is heritable proprietor of the farm of Cleuchfoots, mentioned in the petition: That the respondents are the trustees of the deceased Walter Tod, sometime tenant of the said farm: That the said Walter Tod entered into a nine years' occupation of said farm at Whitsunday 1857, in virtue of a lease between him and the petitioner: That the said lease contained *inter alia* the following clause—'And the said tenant accepts the fences on the farm, whether dykes, ditches, or hedges (except the fences round the plantations) as in fencible condition, and binds himself to keep them in thorough repair, and to leave them in that condition at his removal;' and also the following clause—'And in case of the erection of new sub-division fences, the whole cost of constructing and repairing the same shall in every case be paid by the tenant, but no such subdivision fences shall be constructed until the lines of them are approved of by the proprietor or his chamberlain:' That at the time when said lease was entered into there was no wire fences on the farm: That, in the years 1861 and 1862 the said Walter Tod erected at his own expense the wire fences, wooden paling, and folds: That there is no evidence to show that said fences were erected with the approval of the proprietor or his chamberlain, but that no objection was made thereto by either of them: That, at the expiry of said lease, a new lease of said farm was entered into between the parties, to endure during the life of the said Walter Tod, but not exceeding fifteen years from Whitsunday 1866: That said lease contained clauses as to fences exactly similar to those contained in the previous lease: That it contains no reference by name to wire fences or palings: That the said Walter Tod died on or about the 25th of June 1869: That the respondents, as his trustees, caused to be taken down the wire fences, &c.: Finds in law—(1) That on a sound construction of the lease first mentioned, the deceased Walter Tod would not have been entitled as outgoing tenant at the expiry of the same to remove from the farm the wire fences and wooden paling and folds mentioned in the petition: (2) That the second lease confers no power on the said Walter Tod to remove said fences, which were on the farm when it was entered into: (3) That, therefore, the respondents are in no better position than their author would have been as outgoing tenant

under the first lease, and were not entitled to remove or take down the fences and folds in question, but are bound to restore the same, in so far as they have been removed or taken down: Grants the prayer of the petition, and ordains the respondents to re-erect and restore the fences and folds specified in the petition within six weeks from the date hereof."

The Sheriff (NAPIER) recalled this interlocutor, and pronounced a judgment which contained the following finding:—

"Finds that the *wire fences, wooden-paling*, and *wooden-sheep folds* specified in the petition, and which form the subject of the present contention, were the exclusive property of the said late Walter Tod at the time of his death, over which his landlord, the petitioner, had no lien or right whatever, either at common law or constituted by express stipulation in either of the two contracts of lease between them produced in this process; and that the trustees of the said Walter Tod, who are the respondents in this action, have been duly vested in all his rights as late tenant of the farm of Cleuchfoots."

The Duke of Buccleuch appealed.

The Solicitor-General (CLARK) and REID for him.

MARSHALL and RANKINE, for the respondents.

At advising—

LORD JUSTICE-CLERK—A question of very considerable importance in the law of landlord and tenant has been raised by this case. There is no dispute that the fences were erected by Mr Tod, the tenant, at his own expense, and that he was under no obligation to erect them. The question is, whether these fences at the termination of the lease were the property of the Duke of Buccleuch or the tenant. The Sheriff-Substitute, mainly on the terms of the leases, has decided that the fences belong to the landlord. The Sheriff has come to the opposite conclusion, and held that they are the property of the tenant. I am of opinion that this conclusion is sound. Putting aside the argument derived from the contract of parties as contained in the leases, I shall first consider the ordinary principles of law, in order to see how they bear upon the question. But we must also have the state of the facts. Mr Tod took a lease for nine years of the farm from Whitsunday 1857. The farm was a sheep walk with no fences on it except some stone walls round plantations and round some patches of cultivated ground. The Sheriff-Substitute very accurately states the import of the proof. "He thinks it abundantly proved that with one or perhaps two exceptions the patches have not been cultivated or fenced within the memory of man." It seems that the tenant wished to make some experiments in breeding sheep, and he purchased a mile and a-half of wire fences. These were put up, and remained during the subsistence of the first lease, and during the second lease till its termination by the death of the tenant. The fences were fixed to the ground, but could be removed without injury to the soil. I think it proved that the fences were not intended by the tenant for the permanent improvement of the farm. There is a difference of opinion whether these fences were beneficial or not. The landlord pleads *ædificatum solo solo cedit;* and maintains that from the moment a building or fence is erected on the ground it belongs to the proprietor. But that maxim will not apply to fences such as the present. It has never been the law of Scotland that whatever is fixed to the ground belongs to the landlord. The law of England has been assimilated by 13 and 14 Vict., c. 17, to what I believe to have been the law of Scotland, viz., that agricultural erections are to be regarded in the same light as trade fixtures. The case of *Andrew*, Jan. 19, 1811, affirms this principle. Fences spontaneously erected by the tenant, which he was under no obligation to erect, may be removed by a tenant at the end of his lease. The whole of the law was reviewed in the recent case of *Seton* v. *Hay*. That was not an agricultural case, nor properly a trade case, but was about a market garden, where the tenant had erected frames and other fixtures for the purposes of his trade. The opinions of Lord Curriehill and Lord Deas are very instructive. Lord Curriehill laid it down that questions of this kind do not depend upon the fixity of the erections, but upon the intention of the tenant in putting them up. If it is clear that the tenant did not intend that the fences should be for the permanent improvement of the farm or for the benefit of the landlord, the tenant is entitled to remove them. If they were put up round land which had been reclaimed by the tenant, or if they had been substituted for other fences which were on the farm at the commencement of the lease, it might be different. I have considerable difficulty in getting over the provisions as to existing fences in the second lease. But I think it is clear that the landlord did not think that he had any right to these fences, but only to the fences which were on the farm at the commencement of the lease.

LORD COWAN—This application relates to an out-going tenant's right to take down or interfere with certain wire fences, wooden palings, and folds erected by him during his occupancy of this farm. The landlord asserts that these fences were erected by the tenant "partly in place of fences allowed to go down by him and partly as new sub-division fences." With the exception of this statement as to the substitutional character of certain of these fences, the ground of the application is not non-fulfilment by the out-going tenant of his obligation as to fences. On the contrary, their mere erection by the tenant, although ultroneous and at his own expense, with a view to the management of the farm, is alleged to have the effect of conferring on the proprietor an absolute right thereto, and to entitle him to have the representatives of the out-going tenant ordained to re-erect and restore these wire fences as his, the landlord's, property.

The Sheriff-Substitute decerned in favour of the landlord, on the ground that the lease under which the tenant possessed at the time of his death entitled the landlord to claim the fences as his property, and to have them restored, as having been wrongously removed from the farm. The Sheriff-Principal has recalled this judgment; and, on the grounds in fact and law specifically set forth in his interlocutor and note, has decerned in favour of the tenant. I am of opinion that the lease does not confer on the landlord the right which he asserts, and that the view adopted by the Sheriff-Principal is at once consistent with the obligations of parties, and with their relative rights to such fences as are here in question.

The determination of the case depends,—apart from special stipulations in the lease,—upon the circumstances in which the fences were erected, and especially on their nature and character, and

the purpose to serve which they were placed on the farm by the tenant. It appears to me established by the proof (1) that at the outset of the tenant's possession there were no other fences on the farm but dykes and ditches, or hedges of an inferior description, and in a delapidated state; (2) that the wire fences were erected by the tenant during the currency of the lease 1857, which was for nine years, with the view and for the purpose of carrying through what he considered the best mode of managing a sheep farm; (3) that these wire erections were made voluntarily by the tenant, and at his own expense; (4) that they were of a description which permitted of their being moved as occasion required, and were *de facto* to some extent so shifted from place to place; and (5) that the allegation of the fences having been to some extent erected in room of old fences allowed to fall into decay is not well founded. Holding these facts to be established, it appears to me that the tenant was legally entitled to remove the wire fences in question, unless the terms of the lease can be construed so as to confer upon the landlord the right, which he asserts, to prevent their removal.

This is not a case to which the legal rule applies *inædificatum solo cedit solo.* There were no buildings or houses erected to which the maxim properly applies, nor were these wire fences otherwise affixed to the ground than in a temporary way, to serve the tenant's purposes in the management of the sheep stock. I cannot read the authorities relied on in the argument for the landlord as having any just application to a case like the present. The case of *Thomson* v. *Oliphant,* in 1822, had regard to houses built on the farm by the tenant, and not to fences; and the valuable note attached to the case in the new edition shews that the distinction between houses and fences was in the view of the Court. The decision is stated in the Faculty Report to have been carried by a majority of the Judges altering the interlocutor of the Lord Ordinary. He had found the tenant entitled to remove at his option even houses built by him unless paid their value by the landlord, and therefore the note of the Lord Justice-Clerk's opinion, who was in the majority, is the more important. "*Andrew's* case," in 1811, he said, "could not apply to buildings," but "if a tenant choose to intersect the farm with fences, he must either remove them or put them into good condition." The case of *Andrews* had regard to fences voluntarily erected by the tenant, and cannot be held to have been overruled by this case of *Thomson.* But were this more doubtful than it seems to me, the principle which ruled the case of *Thomson* is not applicable to wire fences of the description with which we have alone to deal, and erected in the circumstances established by the proof.

The terms of the leases, then, under which the farm was possessed, must be the ground on which the claim of the landlord is to be supported if it is tenable. Fairly construed, however, the leases do not support the claim. The tenant had been in possession of this farm for upwards of thirty years. Whether he had a written title prior to 1857 does not clearly appear. In that year a lease was entered into between him and his landlord to continue for nine years from and after Whitsunday 1857, and by its terms the tenant "accepts the fences on the farm, whether dykes, ditches or hedges (except the fences round the plantations) as in fencible condition, and binds himself to keep them in thorough repair, and to leave them in that condition at his removal." These fences did not consist of anything else than dykes, ditches or hedges. But in 1861 or 1862, when there was still four or five years of the lease to run, wire fences were erected at the tenant's cost, and without communication with the landlord. On the termination of this first lease another was entered into in 1866, to take effect on the termination of the nine years, and to continue during the tenant's lifetime, but not longer than fifteen years; and in this new lease a clause in precisely the same terms in reference to the fences is inserted without any notice being taken of the wire fences which had meanwhile been erected by the tenant. It appears to me that this clause can be held to apply exclusively to those original fences which were on the farm in 1857, and that the obligation of the tenant solely applied to them. I cannot think that the tenant's obligation in the new lease, expressed in the very same words, can be extended to embrace fences of a different description and character altogether. The just inference from the silence of the lease as to these wire fences is, that the property of them was left with the tenant. Otherwise the clause in the lease and the relative obligation ought to have been differently expressed, so as to embrace wire fences, and to place them on the same footing with the old fences on the farm.

There is, however, another clause on which much stress was laid in the argument for the landlord. It occurs in both leases. It relates to new sub-division fences, the burden of construction of which is laid upon the tenant; but then it is provided—and this is the key to the true meaning of the clause—that "no such sub-division fences shall be constructed until the lines of them are approved of by the proprietor or his chamberlain." This plainly had reference to sub-division fences of a permanent character, and having in view the permanent sub-division of the farm in a similar way to that effected by the old fences already existing. It has no application to wire fences of the description here in question, and erected for the purpose of the kind of management of sheep stock which the tenant had in view. These wire fences were put up by the tenant in the lines and on the places which he thought most suitable, and it was entirely under his own control and in his option whether to leave them where originally placed or from time to time to shift them to some other locality. The proprietor or his chamberlain did not require to give their consent to their erection; they were never asked to do so; and could not moreover have interfered with what the tenant thought it for his interest to do in his lawful occupancy and right to possess this sheep farm under his lease.

On the whole, I am of opinion that the appeal should be dismissed, and the interlocutor of the Sheriff affirmed.

LORD BENHOLME—My Lords, I arrive at the same result. This wire fence did not come in place of any previous fence; it did not supersede any fence already on the farm. Had that been the case, my opinion would have been influenced by it, because I do not think that a tenant is entitled to allow the fences on a farm to fall into disrepair, and then by erecting a wire fence, which he can remove, so denude the farm of all its fences. But that is not the case here: it is clear that this wire fence did not come in place of any existing fence. What the

motive of the tenant was in erecting the fence is perhaps of little consequence, but it appears to me that the tenant intended the wire fence to be of permanent advantage in the management of the farm. The separation of the sheep stock which might be affected by it was a substantial convenience, and I do not think that it was erected for merely the purpose of a temporary experiment. It is said by some of the witnesses that the existence of this fence was rather injurious than otherwise. I cannot understand how that can be. I mention this merely in reference to a suggestion that has been made, that after all the only object of the tenant in erecting this fence was to enable him to make a temporary experiment. I have no doubt his intention was materially to facilitate the advantageous occupation of the farm, and in the first instance to accomodate himself. This, however, is not sufficient to ascertain the rights of the tenant, because what has been spontaneously put up by him the general principle of law entitles him to remove. I think it would have been the wisdom of the landlord or his factor to have offered a price for the fence to the representatives of thedeceasing tenant, for the expense of erecting it must have been considerable, and greater than the value of the fence when removed.

Then it is said that the leases here control the principle of common law. These two leases were drawn up after a general and, as it were, a stereotyped form. These leases are just like the other leases of the farms in this district, and have no application to such a peculiar fence as this. When the first lease was entered into there was no such wire fence as this, and I do not think that the repetition in the second lease of the same words can be said to have any effect upon the property of this fence.

Upon the whole matter I think that the Sheriff has come to a just and proper conclusion.

LORD NEAVES concurred.

The Court affirmed the Sheriff's judgment.

Agent for Appellant—John Gibson Junior, W.S.

Agents for Respondent—Paterson & Romanes, W.S.

Wednesday, July 19.

FIRST DIVISION.

DISHINGTON & CO. *v.* GIFFORD & CO.

Ship—Charter-Party—Bar-Harbour. Where a ship was chartered "to load a full and complete cargo of barley, in bulk not exceeding what she can reasonably stow and carry; and being so loaded, therewith to proceed, &c." And it being in the view of both parties to the charter-party that the port of shipment was a bar-harbour: And farther, it being understood, on the one hand, that the charterers' object was to bring home a cargo of 1800 quarters of barley, which they had lying at the port; and, on the other, that the vessel was capable of loading that amount, and more. *Held* that the true obligation of the owner was to take as much cargo as the ship could carry with safety over the bar at the highest tide, but no more. And that, having started four days before the highest tide with a short cargo, they had committed a breach of contract.

This was an appeal in two conjoined actions, before the Sheriff of Edinburgh, sitting at Leith, the first, at the instance of the owners, for balance of freight of the steamer 'Andalusia,' from Caen to Leith; the second, at the instance of the charterers, for damages for breach of charter-party, and consequent loss of market. The second action was brought by the defenders in the first as a counter claim or set off.

The pursuers in the first action, William Gifford & Co., and William Gifford, the sole partner of that company, were ship brokers in Leith, and the defenders corn merchants there. The said William Gifford was the registered owner of the screw steamer 'Andalusia' of Leith. The pursuers entered into a charter-party with the defenders, who had a cargo of barley lying ready for shipment, under which the defenders chartered the said steamer for a voyage from Caen to Leith, with a full and complete cargo of barley, not over what she could reasonably stow and carry, and the defenders agreed to pay the pursuers the sum of £160 as a slump sum of freight for said steamer for said voyage, with £2, 2s. as the captain's gratuity. The terms of the charter-party, dated 12th October 1869, were as follows:—"That the said ship, being tight, staunch, strong, and every way fitted for the voyage, shall with all convenient speed sail and proceed to Caen, after discharging her present cargo and loading outwards for Caen, and there load a full and complete cargo of barley, in bulk not exceeding what she can reasonably stow and carry; and being so loaded shall therewith proceed to Leith. Four working days are to be allowed merchants for loading and discharging said cargo, to be reckoned from the date of the ship being ready to load and discharge. Mats, if necessary, to be furnished by merchants, and (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever during the said voyage, always excepted) deliver the same to the affreighters or to their assigns, on being paid freight at the rate of £160 (say one hundred and sixty pounds sterling in slump sum, with two guineas gratuity to the captain)."

The amount of the defenders' barley lying at Caen was 1800 quarters, and this was known to the pursuers, and it was understood by them that it was the defenders' object to bring this cargo over to Leith. On the other hand, the defenders were given to understand by the pursuers that their vessel was capable of carrying that amount of cargo, and rather more. It was also in the view of both parties that Caen was a bar-harbour.

The 'Andalusia' accordingly proceeded to Caen, taking out a cargo of coals for behoof of the owners, and arrived there on 8th November 1869. On the 10th she was ready to take in her cargo of barley. On the 10th and 11th she took on board barley to the amount of 1175 quarters, whereupon the master refused to take on board the remainder of the defenders' cargo, or any part thereof, but dropped down the river, and crossed the bar upon 16th November.

When the vessel arrived on the 8th there was nearly 14 feet of water on the bar; on the 12th, when she dropped down the river, there was only 9½; on the 16th, when she set sail, there was 12·3; and upon the 20th there was over 14. The vessel drew 13½ feet with a full cargo.

The defenders, on the ground that there had been a breach of contract on the part of the pursuers in sailing without a full cargo, paid £80 to