Aberdeen with funds belonging to the mortification mentioned in the 1st and 2d articles of the condescendence, and to four other mortifications: Find that the said lands were held by the said corporation till the year 1797 on titles expressing *in gremio* the several trusts subject to which the lands were so held: Find that in the year 1797 the said lands were sold by the corporation, as trustee for the mortifications, to the said corporation for its own behoof, in consideration of a feu-duty of £50: Find that the said sale was illegal and void, and that the said lands, notwithstanding the said sale, are held and possessed by the defenders on the subsisting title thereto in name of the treasurer of the burgh of Aberdeen, subject to the trusts of the said mortifications: Find that the corporation in entering into the illegal transaction aforesaid acquired or attempted to acquire the said lands as the estate of the corporation itself, for the purpose of being thereby enabled to apply to the Commissioners of His Majesty's Treasury for a grant in favour of the corporation of the salmon fishings in the sea *ex adverso* of the said lands, according to a practice then prevalent of the Crown granting rights of salmon fishing in the sea to proprietors whose lands were bounded by the shore merely on the consideration of their being proprietors of such lands: Find that in pursuance of such purpose the corporation, in the year 1801, presented a petition to the Lords of the Treasury, setting forth that they were absolute proprietors of the said lands in their own right, and on that ground praying for a grant of salmon fishings in the sea *ex adverso* of the said lands, for the benefit of the corporation: Find that the prayer of the said petition was granted, and a Crown charter in favour of the corporation, conveying the said salmon fishings, was expede, which is written to the seal and registered the 27th February 1804: Find that the corporation have ever since possessed and do now possess the said salmon fishings in virtue of the said charter: Find that the corporation, being the trustee for the said mortification, having thus used the trust-estate and the title thereof vested in them for the purpose of obtaining a benefit to themselves, are bound to communicate that benefit to the trust-estate and the parties interested therein, and are bound to hold and administer the said salmon fishings as part of the said trust-estate, and to apply the revenues and profits thereof to the benefit of the parties interested as beneficiaries in the said mortifications: Therefore find, declare, and decern in terms of the declaratory conclusions of the summons: Find, under the petitory conclusions, that the concurring pursuer Dr W. R. Pirie is entitled to a share of the revenues and profits of the trust-estate corresponding to his tenure of the Professorship of Divinity and Church History from December 1843, the date of his appointment, till the date of citation: Find also, under the petitory conclusions, that the late John Cruickshank, as concurring pursuer, was, and his representatives who have been sisted in his place are, entitled to a share of the profits and revenues of the trust-estate corresponding to his tenure of the Professorship of Mathematics from or about the year 1833 till the year 1858: Find that the said shares of the profits and revenues of the trust-estate for the said periods may competently be ascertained and decerned for in the present action: Find the pursuers entitled to the expenses hitherto incurred by them; and remit to the Auditor to tax the account of the said expenses and report to the Lord Ordinary: Remit to his Lordship to proceed with the accounting in accordance with the above findings, and to proceed further as shall be just, with power to decern for the expenses now found due; and appoint this interlocutor and decree to be recorded in the Register of Sasines."

Counsel for the Pursuers—Asher—Jameson. Agents—M'Ewen & Carment, W.S.

Counsel for the Defenders—Dean of Faculty (Watson)—Keir. Agent—T. J. Gordon, W.S.

Thursday, July 20.

FIRST DIVISION.

[Lord Rutherfurd Clark, Bill Chamber.

FORGIE *v.* STEWART & M'DONALD.

Debtor—Creditor—Diligence—Liberation—Act of Grace.

When a debtor has been liberated under the Act of Grace he may be re-imprisoned by the incarcerating creditor upon the same diligence, but it depends upon the circumstances whether the Court will allow it.

A change of circumstances is not necessary before a debtor who has been liberated under the Act of Grace can be re-incarcerated, and he must show neglect or misconduct on the part of the creditor to entitle him to liberation.

This was a note of suspension and liberation presented in the Bill Chamber for John Forgie, sometime draper, Newcastle-upon Tyne, and then prisoner in the prison of Edinburgh, complainer, against Stewart & M'Donald, warehousemen, Glasgow.

The complainer stated that on 29th October 1875 he had been charged upon a decree obtained against him by the respondents in the Court of Session for £225, 16s. 4d. besides interest and expenses; and on 18th November following he had been incarcerated in the prison of Edinburgh upon a fiat granted for that purpose. He then applied for aliment, which was granted, and fixed at 1s. per day. It was duly paid till 20th June 1876, when, the complainer having been left without aliment, the usual certificate was sent by the governor of the prison to the bailies of the city, who thereupon granted warrant for his liberation. Upon 23d June, without any new charge or warrant of imprisonment he was re-incarcerated at the respondents' instance. He stated that there had been no change in his circumstances, and that he could make no exertion to earn money to pay the debt while in prison,

and averred that it was *ultra vires* of the respondents to re-imprison him upon the original warrant. He therefore prayed the Court to grant a warrant for his liberation, and was willing to find juratory caution.

He pleaded—"1. The complainer having been incarcerated at the instance of the respondents, and detained for a period of seven months in prison upon the warrant of imprisonment dated 18th Nov. 1875, and liberated on 20th June 1876, it was illegal and *ultra vires* to re-incarcerate him without a new charge being given to the complainer, and a new warrant of imprisonment being obtained against him. 2. The complainer having been detained in prison at the instance of the respondents till 20th June 1876 for a period of seven months, it was illegal and oppressive to re-incarcerate the complainer on the 23d June 1876, three days after his liberation, there being no change in the meantime in the complainer's circumstances, and the complainer ought therefore to have liberation granted as prayed for."

In answer the respondents stated that the complainer had sold off his stock-in-trade, and after promising to pay their account out of the proceeds, had fraudulently concealed these, amounting to £600. Thereafter he had absconded, and on being apprehended on a *fugæ* warrant at their instance he was committed to prison on 12th May 1875. In his declaration at that time he had said—"I paid none of my creditors in Newcastle before leaving. I am sorry to say that all the money I got for the business I lost, having got on the spree." Thereafter he had found caution, and in an action at the respondents' instance, after proof, the decree upon which he was afterwards charged had been given against him. The note to the Lord Ordinary's interlocutor in that case bore—"The facts upon the proof come out so clearly against the defender that the Lord Ordinary thinks it superfluous to turn attention to particular parts of the evidence. The general results are set forth in the findings of the foregoing interlocutor. It is right to add, though the Lord Ordinary adds with regret, that the defender, who was the only witness examined for the defence, produced a very unfavourable impression upon the Lord Ordinary, who considers his testimony, except in one or two particulars as to which the truth was extorted by the defender being confronted with his own signature, is not entitled to credit, and indeed is nothing but a tissue of falsehoods." When the aliment was awarded the complainer the respondents had lodged £10 to meet it, and their agents were at that time informed, in reply to a special inquiry, that notice would be sent when that sum was exhausted. An application by the complainer for cessio had been refused by the Second Division of the Court on 30th May 1876, in respect that he had given no satisfactory explanation of what had become of the proceeds of his business. Further, when the aliment was exhausted no notice was sent from the prison as promised, and no intimation of a renewed application for liberation under the Act of Grace had been made to the chargers. The magistrates had made no inquiry into the provision of the chargers for continuing aliment, and they had neither refused or delayed to do so within the meaning of the Act of Grace. A further sum would have been lodged had they known the first was exhausted. Further, no disposition *omnium bonorum* had been lodged.

The respondents, *inter alia*, pleaded—"2. The liberation of the complainer under the Act of Grace has no effect on the chargers' diligence, and they were entitled to put the same in force without a new charge and new warrant of imprisonment. 3. The chargers not having made any oppressive use of their diligence, the imprisonment of the complainer is legal, and there are no grounds for the equitable interference of the Court therewith. 5. The alleged exhaustion of the aliment lodged by the chargers having arisen from no wilful refusal or delay on their part to provide aliment, but solely from their agent's reliance upon receiving notice as promised, the complainer's imprisonment is valid."

The Lord Ordinary refused the note, and found the complainer liable in expenses.

The complainer reclaimed, and argued—He now only insisted on the second plea. The incarcerating creditor was bound to maintain the debtor in prison, and he was not entitled to, and it had never been the practice to give, notice of failure of aliment. Upon the authority of the cases of *Crawford* v. *Dawson* and *Mackenzie* v. *Maclaine* he should be liberated, as there had been no change of circumstances.

The respondents argued—A creditor could always re-incarcerate, and oppression on his part was the only ground for interference by the Court. There was no oppression here, and the circumstances were all adverse to the complainer.

Authorities—*Crawford* v. *Dawson*, March 11, 1836, 14 S. 688; *Mackenzie* v. *Maclaine*, Jan. 14, 1830, 8 S. 306; *Pender* v. *M'Arthur*, Jan. 28, 1846, 8 D. 408; *White* v. *Robertson*, Nov. 24, 1858, 21 D. 28; *Denovan* v. *Cairns*, Feb. 1, 1845, 7 D. 378; *Boyd* v. *Ponton*, Dec. 21, 1811, 16 F. C. 457; *Abercromby*, 1759, M. 11,811; *Pollock*, M. 11,815; Erskine's Inst. iv. 3, 28.

At advising—

Lord President—The decree against the complainer and in favour of the chargers was pronounced upon 2d July 1875, for £225, 16s. 4d. besides interest. Upon that decree the complainer was charged, and then a fiat of imprisonment was granted, and he was incarcerated. He then applied for aliment, which was granted, and fixed at one shilling per day. That continued to be paid until the 20th June 1876, for a period of somewhere about seven months. The aliment was then exhausted, and on the 20th June a certificate was granted by the governor of the prison that the aliment was exhausted, and the bailies granted a warrant for liberation. It is not said that any intimation was made to the chargers or their agents, or that the fact of the exhaustion of the aliment was communicated. They allege, and in the absence of any statement to the contrary we may take it, that a sum was lodged with the clerk of the prison to meet aliment, and that it was arranged that notice should be given by him when the aliment was exhausted. In these circumstances the complainer was re-incarcerated by the chargers three days after he was liberated, viz., on the 23d June, and he complains of that proceeding as illegal.

If by illegality it is meant that re-incarceration cannot take place on the same diligence where the debtor has been liberated under the Act of Grace, I know of no authority by which the illegality of such a proceeding can be maintained. It is quite legal, but on the other hand it depends upon circumstances whether it is allowed or not, and the debtor can come to the Court and state the grounds he has to show against it.

In the present case there are no circumstances which can justify the Court in interfering. All the circumstances are adverse. In the first place, it is clear that this man absconded to avoid the diligence of his creditors, or avoid paying his debts. He was found in the county of Ayr, when an application was presented to the Sheriff, and he was committed to prison as in *meditatione fugæ*. He found caution, and the action was then raised to which I have already adverted. He resisted it, but on grounds that were plainly anything but creditable, as appears from the note of the Lord Ordinary which is before us. Accordingly the complainer's condition, and that in defence to his creditors generally, is about as unfavourable as anything could very well be.

But the complainer maintains that it must always be shown that some change of circumstances has taken place before a second incarceration. I am not able to agree with that doctrine, although there is certainly some authority to be found for it in the opinions of some eminent Judges in the cases which have been referred to. These, however, have been repudiated by other Judges equally eminent. I think it lies with the party who is incarcerated to show something improper in the conduct of the creditor, and in the present case there is no appearance of that. I may also observe that where re-incarceration has not been allowed, it has always been on the ground of neglect on the part of the incarcerating creditor. There is nothing of that sort here; it was not known that the aliment was exhausted. No doubt if the creditor had been very vigilant he might have found it out, and have known that it must have been nearly exhausted. Still that does not amount to such neglect as took place in the other cases, where intimation was made to the agents or the creditor himself. I have no hesitation in agreeing with the interlocutor of the Lord Ordinary.

Lord Deas—There is no doubt of the legal right of a creditor to re-incarcerate upon a former diligence, though such a proceeding may be disallowed in circumstances which show oppression. The question is always one of circumstances, and here they are such that it is hardly possible to conceive any more inconsistent with the contention of the complainer, that he should be liberated.

Lord Mure—I am of the same opinion. Those cases which at first sight create a difficulty show that some notice was sent that the aliment was exhausted. Here that was not done, owing to some mistake on the part of the clerk of the prison. I cannot see any ground whatever for the application, unless it be that because a debtor once gets out of prison he is not to be re-incarcerated.

Lord Ardmillan was absent.

The Court adhered.

Counsel for the Suspender (Reclaimer)—Mair. Agent—Abraham Nivison, S.S.C.

Counsel for the Respondents—R. V. Campbell. Agents—Macnaughton & Finlay, W.S.

Thursday, July 20.

FIRST DIVISION.

[Lord Shand, Ordinary.

ROBINOWS & MARJORIBANKS, ETC., *v.* EWING'S TRS. AND OTHERS.

Marine Insurance—Policy—General Average—Contribution.

A policy of insurance effected on cargo, valued therein at £850, contained the following clause—"General average payable according to foreign statement, if so made up." On the voyage the ship sustained injury, and the master granted a bottomry bond for the repairs. When she reached the port of destination a general average statement was made up, in which £1293 was made the contributory value of the cargo. Ship and freight thereupon being unable to pay, the deficiency fell, according to German commercial law, "to be paid by all the parties interested in the cargo, on the basis of the general average." *Held*, that as the cargo was liable for the amount of the whole loss, which was not affected by the contributory value, a claim against the underwriters was good to the amount of the sum in the policy.

Held by Lord Shand (Ordinary) that under the clause in the policy the underwriters were liable in the amount of the loss effeiring to the contributory value of the subjects insured, as fixed by foreign statement.

This was an action at the instance of Robinows & Marjoribanks, merchants, Glasgow, with consent of two parties in Prussia, consignees of two lots of pig-iron shipped by them, against the Trustees and Executors of William Ewing, insurance broker, Glasgow, and others, in the following circumstances.

The pursuers insured a quantity of iron for the voyage from Grangemouth to Königsberg by a policy in which the iron was valued at £850. The vessel ("Warrior") sustained such injuries on the voyage as made it necessary, for the sake of ship and cargo, that she should run to Gottenburg in Sweden for repairs; and the captain, having no other means of payment, executed a bond of bottomry over ship and cargo at Königsberg. A general average statement was made up and confirmed by the proper authority, by which £629, 8s. was allocated on the ship, and £238, 19s. on the iron shipped by the pursuers. The captain and owner of the vessel having been unable to pay the amount of the contribution for the ship, the vessel was sold by order of the Court, and the price realised fell considerably short of the sum the ship ought to have contributed, consequently the liabilities of parties fell to be regulated by Article 734 of the code of the General German Commercial Law, which declares that