

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 consignment 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 recall 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

who seemed to act throughout as master of the "Xantho," gave him an order on the defenders for £50, in payment of the towage in question, which order the defenders have always been willing to honour. The defenders further maintained that, even though the service be held to have been of the nature of salvage service, the pursuers were bound by the above mentioned agreement, and that the sum of £50 was ample remuneration for the service actually rendered, apart from contract.

The pursuers, while admitting that an order for £50 was sent to Mr Buchanan in recognition of the services, alleged that it was grossly inadequate remuneration, and denied that the person above referred to was the master of the "Xantho," or had any authority to enter into any contract, or receive any payment that would be binding on the pursuers.

An issue was lodged by the pursuers, and after some discussion before the Lord Ordinary, the following was agreed to by the parties:—

"It being admitted that the defenders were, on 2d January 1866, and still are, the registered owners of the barque 'Lorena' of Ardrrossan, and that Norman Buchanan, distiller in Islay, was, on said 2d January 1866, the registered owner of the steam-vessel 'Xantho';

"And it being further admitted that the estates of the said Norman Buchanan were sequestrated under the 'Bankruptcy (Scotland) Act' on 21st August 1866, and that Mr George Wink, accountant in Glasgow, was appointed trustee on the said sequestrated estates, conform to act and warrant in his favour dated 5th September 1866; as also, that the pursuer, John M'Gaan, is now in right of the said Norman Buchanan and George Wink;

"Whether, on the said 2d January 1866, the 'Xantho' and her master and crew saved the 'Lorena' and her cargo from the perils of the sea? And Whether the defenders are indebted and resting-owing to the pursuers, or any of them, in the sum of £2000, or any part thereof, in name of salvage?"

The parties differed as to the counter issue proposed by the defenders, which was latterly stated in the following terms:—

"Whether the services rendered on 2d January 1866 by the 'Xantho' and her master and crew, were so rendered under contract entered into between the master of the 'Lorena' and the master, or those in charge, of the 'Xantho'? And whether the said contract, when so entered into, was just and reasonable?"

The Lord Ordinary reported the case to the Court, accompanying his interlocutor with the following note:—

"The pursuers' issue, with the admissions prefixed to it, No 27 of process, was not objected to by the defenders.

"But the pursuers objected to the defenders' counter issue, No. 26 of process, in respect that it did not embrace the question, whether the alleged contract, on which it is founded, was made with the authority of the owner and crew of the 'Xantho.' In regard to this objection, the Lord Ordinary has to remark that it is not very obvious what substantial interest the pursuers have to insist in it, supposing it to be made out (and the defenders undertake to make it out); that the alleged contract which they found on was in itself just and reasonable. It may be also remarked, that to hold that the special authority of the owner is necessary for

the validity of such a contract as that referred to would be almost equivalent to holding that no such contract can be entered into at all, as the owner is seldom or ever likely to be present to interpose his authority in the suddenly emerging circumstances which usually gave rise to questions of salvage."

BALFOUR (D.-F. MONCREIFF with him) maintained that the defenders were bound to put in issue and prove special authority granted by the owner and by the crew to the master of the 'Xantho' to enter into the alleged contract.

J. C. LORIMER (GIFFORD with him) maintained that the master had full power to bind the owner in salvage contracts entered into at sea in his absence; and that, in regard to the crew, it was a question of circumstances; and in the present case, in which the pursuers alleged salvage service, rendered by towing, and did not allege special personal exertions, and where the defenders undertook to prove that the contract was just and reasonable, the latter were not bound to prove any special authority,

The following were the authorities referred to by the parties:—M'Lachlan on Shipping, page 531. The *Britain* (1839), 1 Wm. Robinson's Admy. Rep., 40. The *Africa* (1854), 1 Spinks' Admy. Rep., 299., The *Sarah Jane* (1843) 2 W. Rob., 110. The *True Blue* (1848), 2 W. Rob., 176. The *Elise*, Swabey's Admy. Rep., 436.

The Court altered the counter issue to the following:—

"Whether the services rendered on 2d January 1866 by the 'Xantho' and her master and crew, were so rendered under contract entered into between the master of the 'Lorena' and the master, or person for the time in command, of the 'Xantho,' acting on behalf of the owners and the crew of the said vessel? And whether the said contract, when so entered into, was just and reasonable?"

Agents for Pursuers—Murray, Beath, & Murray, W.S.

Agents for Defenders—Duncan & Dewar, W.S.

Tuesday, July 2.

HOEY v. M'EWAN & AULD.

(Ante, p. 71.)

Obligation—Contract of Service—Partnership—Expenses.

In obedience to the order of the Court a minute was lodged for the pursuer, stating what he had earned during the period specified, but showing that the expenses of an office, &c., had more than swallowed up those earnings.

A minute was lodged for the defenders, agreeing to pay to the pursuer the full proportion of his salary for the period from 11th June to 1st October 1866, with interest from 1st October.

Decree of consent for that sum.

Both parties moved for expenses.

The Court gave expenses, subject to modification, to the defenders.

LORD DEAS thought that neither party should get expenses.