state of possession indicative rather of absolute than common property. In a competition where the matter had not been determined judicially before, these facts would have been material; but when it is not proved, as I think it is not, that for any period of forty years together there was a cessation of actual pasturage of the Colzium sheep; when we find, on the contrary, by evidence which it is impossible to gainsay, that the shepherds of Colzium did constantly, except perhaps during Noble's time, view the Broadbents as a part of their farm, and follow a course of pasturing apparently in practice at the date of the decree, by collecting their flocks from below, so that they might range over that very ground. Can I hold that there was no right exercise in virtue of the decree by the proprietors of Colzium. The period during which exclusive possession is affirmed to have taken place commences about 1814. If the facts stated by the defender and by a number of the Colzium shepherds are true, there was not only no cessation of possession, but a constant assertion of it. Take the period about 1839, when Mr Hunter first became connected with the property, can we reconcile them with the assertion that the decree was given up? I do not find that any admission by any writing, by any act, brought clearly before the proprietors and inferring the non existence of their right. The acts of alleged removal of the Colzium sheep never seem to have been brought under the notice of any proprietor of the land, except Mr Laing, who is very far from admitting that the act was lawful. I doubt if it is proved that they were done even in the knowledge of the Colzium shepherds, and they may be to a certain extent explained by the necessary separation of the sheep. As to shooting over the ground, I think the evidence of the pursuer's sons, fortified by Mr Pott's, is nearly as good as the defender's. On the whole, I come to the conclusion that for no one period of forty years has it been shown that the possession has been exclusively with the defender, and that for no period of forty years has the pursuer failed to exercise a right of pasturing the common under his decree.

His Lordship then shortly noticed the defender's argument—that the pursuer's was a mere right of servitude, assuming him to have one; and said, he could not agree to the proposition that, pasturage being a right consistent with mere servitude, the proprietor's right would he lost and reduced to a mere servitude right if it were proved that no act inferring property was proved to have been done by the pursuer.

The other judges concurred.

Their Lordships therefore recalled the Lord Ordinary's interlocutor; found the defender liable in expenses since the date of his lodging defences; and remitted to the Lord Ordinary to proceed with the cause.

Agent for Pursuer—W. Traquair, W.S.

Agents for Defender—Jardine, Stodart, & Frasers, W.S.

Saturday, June 8.

FIRST DIVISION.

MORISON AND MILNE *v.* BARTOLOMEO AND MASSA.

(*Ante*, vol. iii, pp. 94, 366.).

Reparation—Verdict—Insurance—Ship—Assignation. Pursuers of action of damages for injury to ship by collision obtained verdict and moved that it be applied. They produced assignation in their favour, by insurers, of claim against injurers of ship; objection by defenders, that pursuers had already recovered compensation from insurers, repelled, and verdict applied.

The pursuers, owners of the schooner "Scotia" of Aberdeen, sued the defenders, the owner and master of the barque "Ghilino" of Genoa, for damages on account of injury done to the "Scotia" through the barque of the defenders having come into collision with it. The defenders brought a counter action against the owners of the "Scotia," on account of injury done to their barque "Ghilino" by the said collision. The actions went to trial in April last.

In the course of leading the evidence the defenders, owners of the "Ghilino," proposed to put in a policy of insurance on the "Scotia" for £350, and a receipt by the owners of the "Scotia" for the sum in the policy, in abatement of damages. The pursuers objected. It was agreed, after discussion, that the evidence should be received: that the jury, in assessing the damages, should leave out of view the sum already received by the owners of the "Scotia" from the underwriters, on account of the collision, and that there should be indorsed on the verdict a special finding by the jury that the sum in the policy had been received by the owners of the "Scotia."

In both cases the jury found for the owners of the "Scotia," finding them, in the action in which they were pursuers, entitled to £566 damages. The special finding was indorsed on the verdict.

J. M'Laren (with him Young) for the pursuers, now moved the Court to apply the verdict, and produced an assignation in their favour by the underwriters of their claim for damages against the wrongdoers.

Asher (with him Gifford), for the defenders, opposed. He contended that the owners of the "Scotia," having already, admittedly, received £350 from the underwriters on account of the collision, could not recover the full damage found by the jury, but only the difference between what they had already received and the sum in the verdict. In point of fact, all that the jury had found, as the loss and damage due to the pursuers, was the difference between the whole sum of damage and the sum received from the underwriters. The effect of payment by insurers to the parties insured, for injury suffered, was to put them in the place of the insured, with full right to recover any compensation that might be recoverable from the party doing the wrong—*Stewart* v. *Greenock Marine Insurance Company*, 13th Jan. 1846, 8 D., 323; Addison on Contracts, 845. Therefore, whenever the underwriters paid the owners of the "Scotia" the sum in the policy, they became vested with the right to receive compensation from the defenders; and, if they did not choose to press their claim, still that did not entitle the owners of the "Scotia" to insist. If the owners of the "Scotia" had gone in the first instance against the wrongdoers, they could not now have gone against the underwriters, and, in like manner, having gone first against the underwriters, they were barred from recovering damages a second time from the defenders.

Lord President—I think that any difficulty there might seem to be in the case is removed by the assignation. With that before us, the owners of the "Ghilino" have no longer any interest to oppose. The damage inflicted by them has been

awarded by a jury in a trial between the proper parties, and fixed at £566; and the owners of the "Ghilino" are therefore liable to pay that amount of damages, and their only interest is to see that the party getting payment of that sum is not only the proper party in the first instance, but represents every claim against them for the damage done. The owners of the "Scotia," having that assignation, are in that position.

The other judges concurred.

The Court applied the verdict, and in respect thereof and of the assignation now produced, decerned against the defenders for the sum in the verdict.

Agents for Pursuers—Henry & Shiress, S.S.C.

Agents for Defenders—Murdoch, Boyd, & Co., S.S.C.

HIGH COURT OF JUSTICIARY.

Saturday, June 8.

(Before Lord Justice-Clerk and Lords Cowan and Neaves.)

SUS. AND LIB.—PATERSON *v.* MALCOLM.

(*Ante* Vol. I., p. 209.)

Interim Liberation—Appeal to Quarter Sessions—17 *Geo. III., c.* 56. The complainer was fined by the Justices, under 17 Geo. III., c. 56 (Embezzlement Act). He appealed to the Quarter Sessions, who refused to hear the appeal because the complainer had not complied with the requirements of the statute. Not paying the fine, he was sent to prison, and thereafter presented a suspension and liberation. Interim liberation granted, and case remitted back to Quarter Sessions.

In December 1865, a complaint was brought before the Forfarshire Justice of Peace Court by Mr Malcolm, superintendent of police, against James Paterson, weaver in Kirriemuir, charging him with a contravention of the Act 17 Geo. III., c. 56, § 10, in so far as, on 30th November 1865, certain purloined or embezzled materials of flax used in the linen manufacture were found concealed in his dwelling-house or weaving-shop. By the 10th section of 17 Geo. III., c. 56, it is enacted, that it shall be lawful for any two justices of the peace, upon complaint being made to them upon oath of one credible witness that there is cause to suspect that purloined or embezzled materials of flax, &c., are concealed in a dwelling-house or other place, to grant warrant to search, and if such purloined materials are found, and if the person in whose house these materials are found does not give an account to the satisfaction of the justices how he came by the same, he shall be guilty of a misdemeanour although no proof be given to whom such materials belong; and, by the 14th section, £20 is fixed as the penalty for the first offence. Malcolm had made a complaint upon oath, and obtained a warrant for searching, and had found the articles. Paterson was brought before the justices, who, at that time, sustained a preliminary objection to the complaint; but, on appeal by Malcolm to the High Court, the case was remitted back to the justices to be tried on the merits. After a trial, which lasted two days, Paterson was convicted, and sentenced to pay the penalty of £20. He appealed to the Quarter Sessions, who, *ex proprio motu*, and contrary to the wish of the prosecutor, refused the appeal, on the ground that, after conviction before the justices, the appellant had neither gone to prison nor entered into recognisances for his due appearance before the Quarter Sessions, one of which alternatives was alleged to be required by the statute. Paterson having failed to pay the £20, was, on 22d May last, sent to prison for a month, in terms of the statute. He now presented this bill of suspension and liberation to the Court, and asked the Court to quash the whole proceedings *simpliciter*, on the following grounds:—(1) The original complaint before the Justice of Peace Court was defective under the statute, having failed to specify the materials alleged to have been purloined. (2) The oath of the informer who obtained the search-warrant under the statute for searching the prisoner's house, stated the suspicion that the flax was purloined, without giving the grounds of the suspicion; and it was the duty of the justices to ascertain these. (3) The materials, after seizure by the police, had been so handled as to render it impossible for parties to identify them. And (4) the long period of twelve months had elapsed between the first appeal to the High Court (when the case was remitted back to the justices to be tried on the merits) and the ultimate disposal of it by the justices. Farther, the complainer asked for liberation unconditionally, since his appeal had been illegally dismissed, and he could not appeal to another Quarter Sessions, the statute requiring that the appeal should be heard at "the next Quarter Sessions following the conviction."

Black for the Suspender.

Scott for the Respondent.

Lord Cowan—The Quarter Sessions have taken an erroneous view of the statute in dismissing the appeal, but there is nothing to prevent the appeal being taken up at the next Quarter Sessions, and we can remit to them to do their duty.

Lord Neaves concurred.

The Lord Justice-Clerk—It was contended by the suspender that the petition was defective in not specifying the materials; but another section gives a list of materials, one of which is mentioned in the petition. It was also contended that the oath of the informer was not full, and that it does not state the grounds which he had to suspect that there were purloined articles in the suspender's house. But the statute does not require such grounds to be stated, and I think the requirements of the statute have been complied with in this case. Another objection was, that the articles had been so handled as to render it impossible to identify them; but this was a question of proof, and it was a matter for the justices to determine. With respect to the lapse of twelve months between the original apprehension and the date of the disposal of the case, it did not appear that the accused had suffered from it. We come, therefore, to consider the question upon the proceedings about appeal. The justices have rejected the appeal. The statute did not intend that the absence of recognisances should prevent appeal. The Quarter Sessions were bound to dispose of the appeal according to law. It did not matter whether the accused was present or not if he got notice to attend. The best thing we can do is to alter the finding of the justices, and remit to the next Quarter Sessions to proceed with the appeal.

The Court recalled the finding complained of; remitted to the justices to resume consideration of