sional privilege; but I have no doubt that malice ought to be inserted in the issue.

LORDS DEAS, ARDMILLAN, and KINLOCH concurred.

The issue was altered as follows:—The words "and maliciously" were added after the word "calumniously;" and for the words "was not speaking" were substituted the words "would not speak."

Agent for Pursuer—Alexander Morison, S.S.C.
Agent for Defender—David Milne, S.S.C.

Wednesday, June 29.

RANKING *v.* TOD AND OTHERS.

Bill of Lading—Freight—General Average—Bottomry Bond—Arrestment. Messrs T. & Co. bought from Messrs M. Brs. a cargo of wheat, and received through their agents Messrs H. & Co. a bill of lading endorsed "Deliver the within cargo to the order of Messrs H. & Co. with whom account for your freight as per charter-party without recourse to us, (Signed) M. Brs." It was proved by the bought-note that the price included freight and insurance, and that average and bottomry bond were "to be on account of and settled by sellers." The master and owner of the ship were not parties to the sale. In a question between Messrs T. and certain parties who had arrested in their hands the amount due as freight to the master and owner of the vessel, *held* that Messrs T. & Co. were not entitled to deduct from the sum due as freight (1) the amount of a bottomry bond; nor (2) the amount of general average due by them.

This was an action at the instance of the Messrs Ranking against Messrs A. & R. Tod, millmasters, Leith, the arrestees, and Francis Debono, the owner of the brig "Reggenti," lying at Leith, and also against Barbara, the master of the said vessel, for the purpose of making forthcoming the sum of £450, the property of the owner and master of the vessel, said to have been arrested in the hands of Messrs A. & R. Tod in payment of a sum of £350 due by Debono to the pursuers. Upon 5th March 1869 the pursuers raised an action against Debono, and Barbara, the master of the "Reggenti," in which, upon 5th May, they obtained decree ordaining the defenders to make payment to them "of the sum of £350 sterling, being the amount contained in a bill drawn by the said Francesco Debono upon, and accepted by, the said Salvatore Barbara, dated 3d October 1868, and payable eight days after the arrival of the said brig or vessel 'Reggenti,' at port of discharge in Great Britain or Ireland, or the Continent of Europe, between Havre and Hamburg, to the order of James Bell & Co., and endorsed by the said James Bell & Co. to the pursuers, with the legal interest on the said sum of £350 from the 6th day of March in the year 1869, being the date of citation to the action, until paid, together with the sum of £11, 10s. 2d. sterling, being the taxed amount of the expenses of process, and 14s. 6d. sterling as the dues of extract." In virtue of the warrant to arrest contained in the summons in said action, the pursuers, on the 6th of March 1869 caused Andrew Webster, messenger-at-arms, to arrest in the hands of the defenders, Messrs A. & R. Tod, arrestees, the sum of £450 sterling, more or less, due and addebted by the said Messrs A. & R. Tod to the said Francesco Debono and Salvatore Barbara.

The defenders' statement of facts was as follows:—"The defenders, who are millmasters and corn-merchants in Leith, purchased through Harris Brothers & Company of London, from Messrs Melas Brothers of London, on 12th February 1869, a cargo of wheat per the 'Reggenti,' supposed to consist of 2800 chetwerts (about 2016 quarters), at the price of 47s. 9d., less 2 per cent., per quarter, delivered; said price to include freight and insurance; that is, the seller to pay freight and insurance. The ship was under bottomry, and average was due; and it was expressly stipulated in the bought note, 'The average and bottomry bond to be for account of, and settled by, sellers.' By the terms of the bargain, therefore, the whole freight, insurance, average, and bottomry were due and to be paid by the sellers; but in practice in such cases, where the sellers are not at the port of discharge, it is not unusual for the purchasers to pay necessary charges as for the seller, the purchasers getting credit therefor as part of the price. The ship 'Reggenti' arrived in Leith on or about 22d February 1869, and endorsed bills for the cargo were duly sent to the defenders; the defenders, in exchange therefor, giving, as usual, their draft for the price; but as it was understood that the defenders would pay to the captain the balance of freight, they got credit in account with the sellers for the estimated balance of freight, which balance was estimated by the sellers to be £256, 14s. 6d. The substance of the transaction was, that the defenders paid the sellers the full price of the wheat, but retained in their hands £256, 14s. 6d. to meet the unpaid balance of freight. On the arrival of the vessel the captain applied to the defenders, as the consignees, for a payment to account of the balance of freight, to enable him to proceed with the discharge. The defenders complied with this request, and paid the captain, on 26th February 1869, £150, and on 2d March £50 farther, to account of the balance of freight, as per receipts produced. The discharge of the cargo proceeded between the 26th of February and the 8th of March. Between the 4th and 8th of March, however, various arrestments were used in the defenders' hands against the captain and owner of the ship. In particular—(1) On 4th March 1869 an arrestment, on a dependence, was used in the defenders' hands at the instance of Soltz, Zoff, & Company, shipbrokers, Leith, for £50. (2) On 5th March 1869 an arrestment to found jurisdiction was used in the defenders' hands at the instance of Messrs Heath & Company, merchants, London; and next day, 6th March 1869, an arrestment on the dependence was used in the defenders' hands at the instance of Heath & Company for £120. (3) On same 6th March 1869 there was used in the defenders' hands, first, an arrestment to found jurisdiction at the instance of the present pursuers; and then an arrestment on the dependence, at the pursuers' instance, for £450. A subsequent arrestment was used on 13th March 1869 at the instance of Messrs H. Clarkson & Company, shipbrokers in London, for £50. The arrestments used at the pursuers' instance, though used on the same day as Messrs Heaths', were some hours later. After the discharge of the cargo had been completed on 8th March 1869, the captain made out his freight account, in which, after giv-

ing credit for payments to account and other deductions, he brought out a balance of freight due to him and to the ship of £29, 19s. 4d. This account was correct, and was certified as such. The defenders, as already mentioned, had retained in their hands part of the price of the wheat to meet the estimated balance of freight, and of the sum so retained they had £56, 14s. 6d. in hand. The actual balance of freight due, however, being only £29, 19s. 4d., the difference fell to be paid to the sellers of the wheat, as the balance of the price; and the only sum claimable by the captain and owners from the defenders was the above sum of £29, 19s. 4d. This sum the defenders would at once have paid to the captain but for the arrestments above mentioned. They explained this to the captain, and intimated that they would pay, provided the arresting creditors consented. On 16th March 1869 the captain brought to the defenders a written consent by the four arresting creditors consenting to the defenders paying the master £10 'out of the balance of freight arrested in your hands.' In virtue of this consent the defenders paid the captain the said sum of £10. On 2d April a farther written consent for a farther payment of £10 out of the arrested money was sent the defenders, and the said £10 was paid by them accordingly; and on 15th May 1869 a third written consent by the whole arresting creditors was sent the defenders, authorising them to pay the captain £9 farther; and this sum the defenders paid accordingly. These three payments, made of consent of the arresters, exhausted the whole balance of freight arrested excepting 19s. 4d., which the defenders have always been ready and willing to pay. No farther sum is due by the defenders either to the captain or to the owners of the vessel. The defenders have repeatedly explained to the pursuers, as well as to the other arresting creditors, that there is only 19s. 4d. or thereby in their hands arrested. They have offered to exhibit accounts, and give every explanation; but, notwithstanding this, the pursuers have chosen to raise the present groundless and unnecessary action. The defenders, of course, and notwithstanding the prior arrestments, would at once pay the 19s. 4d. rather than be further troubled. Even if a larger sum were due, it would be attached by the prior arrestments at the instance of Soltz, Zoff, & Company, and Heath & Company, both of which were prior to the pursuer's arrestments; and a multiplepoinding would be necessary, calling the whole arresting creditors. As there is really no fund *in medio*, the defenders abstain from bringing any such action; but they reserve all rights, and hold the pursuers liable in all expenses which may be occasioned."

Under a joint minute of admission the parties were agreed that prior to the purchase of the cargo by Messrs Tod general average had arisen on the vessel and cargo to the amount of £117, 9s. 10d.; and prior to the date of the arrestments the defenders did not pay any sum to the captain or owners on account of said average, but the same was paid after that date by Messrs Melas.

After a proof, the Lord Ordinary (ORMIDALE) pronounced the following interlocutor and note:—"The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, including the proof, Finds it established, as matter of fact, that on 6th March 1869 the pursuers were creditors of the defenders Francis Debono and Salvatore Barbara, to the extent of £350 of principal, with interest thereof from 6th March 1869, and £11, 10s. 2d. of expenses, conform to decree of this Court, of which No. 121 of process is an extract; and that on said 6th March 1869, when the pursuers' arrestment was laid in the hands of the defenders Messrs A. & R. Tod, they were indebted to the defenders Francis Debono and Salvatore Barbara in (*first*) the sum of £333, 13s. 9d. as the balance of the freight of a cargo of wheat, after certain deductions which fell to be made therefrom; and (*secondly*) in the sum of £117, 9s. 10d. as the amount of general average, making together the sum of £451, 3s. 7d.: Finds in these circumstances, as matter of law, that the defenders Messrs A. & R. Tod are bound and liable to account for said sum of £451, 3s. 7d.; but before pronouncing decree of furthcoming for that, or any other sum, appoints the case to be enrolled, that parties may be heard on the effect of the arrestments, said by the defenders to have been laid in their hands by parties other than the pursuers, and as to the proceedings, if any, which the defenders propose and maintain they are entitled to adopt in regard to said arrestments, as also on the question of expenses.

"*Note.*—No question has been raised in this case in regard to the pursuers' claim of debt as creditors of Debono and Barbara, the owner and master of the 'Reggente,' as referred to in the third article of the pursuers' condescendence. Nor has it been disputed that the pursuers validly attached by arrestment, used in the hands of the defenders Messrs A. & R. Tod on 6th March 1869, whatever sum was of that date owing by them to Debono and Barbara.

"The dispute relates entirely to the question, What was the sum which must be held to have been owing by the defenders Messrs A. & R. Tod to Debono and Barbara on 6th March 1869? The defenders Messrs A. & R. Tod contend that it was only 19s. 4d., as explained in their statement of facts; while, on the part of the pursuers, it is contended that it was a much larger sum, consisting of a balance of freight, and a sum of general average.

"The brig 'Reggente,' of which Debono was the owner and Barbara the master, arrived in Leith in February 1869 with a cargo of wheat, which had been previously purchased by the defenders the Messrs Tod from Messrs Melas Brothers of London. On that purchase being effected, Messrs Melas Brothers handed the bill of lading (No. 30 of process) to Harris Brothers of London, the defenders' agents, with an endorsement thereon in these terms—'Deliver the within cargo to the order of Messrs Harris Brothers & Company, with whom account for your freight, as per charter-party, without recourse to us.—*London, 13th February* 1869. (Signed) Melas Brothers.' And this bill of lading, which is in accordance with the charter-party (No. 123 of process), was handed to the defenders by their agents Messrs Harris Brothers & Company, having been first blank endorsed by them. The defenders, the Messrs Tod, in this way became entitled, on the one hand, to delivery of the cargo of wheat, and, on the other hand, became liable for its freight, at least so became liable on taking delivery of the cargo, as immediately to be mentioned.

"It appears from No. 104 of process, as well as other evidence, that the price at which the defenders purchased the wheat from Messrs Melas Brothers included freight and insurance, and that average and bottomry bond were 'to be on account

of and settled by sellers,' that is, Messrs Melas Brothers. But Debono and Barbara were no parties to this transaction between the defenders and Melas Brothers, and do not appear to have known anything of it till after the 6th of March 1869.

"It was in this state of matters that the cargo of the 'Reggente' was discharged from the vessel and received by the defenders. According to their own statement (article 3 of their statement of facts), the discharge of the cargo proceeded during the period between the 26th of February and the 6th of March, when it was completed. That the defenders, as the holders of the bill of lading and receivers of the cargo, were liable for the freight to the master of the 'Reggente' neither was nor could be disputed (1 Bell, p. 547), whatever may be their rights of relief against Messrs Melas Brothers and Company. But various questions were raised as to the amount of freight due to the ship on 6th March 1869, the date of the pursuers' arrestment. That the freight of the cargo, including gratuity to the master, amounted in all to £828, 0s. 4d.,—independently of the deductions to be immediately noticed, and in regard to which the present controversy in a great measure relates,—has been admitted (third article of joint minute of admissions, No. 133 of process); and as to some of the deductions to be made from the £828, 0s. 4d. the parties are also agreed. Thus they are agreed (article 5 of joint minute of admissions) that to account of the freight there were paid by the defenders, prior to the date of the pursuers' arrestment, the sums of £150 and £50, and afterwards, with consent of the pursuers and other arresters, £29, all of which being deducted from £828, 0s. 4d. leaves £599, 0s. 4d. Nor did the pursuers dispute that there falls to be further deducted the sums of £200, being an advance at Marianople, and £12, 0s. 9d. of insurance, which two sums being deducted from £599, 0s. 4d., leaves £386, 19s. 7d., being the balance of freight which, according to the pursuers' contention, was attached by his arrestment on 6th March 1869.

"But from No. 46 of process, being the state in reference to which the defenders ultimately settled with the master of the 'Reggente' on 9th March 1869, it will be seen that from the freight he then deducted, or in other words gave credit for—(1) a cash advance at Malta of £20; (2) a sum of £33, 5s. 10d., being the produce of a sale of a portion of the wheat at Malta; and (3) three sums of £288, 6s. 11d., £25, 19s., and £18, 8s. 6d., being the amount of a bottomry bond, with relative interest and insurance. It appears to the Lord Ordinary that the £20 and £33, 5s. 10d. fall to be deducted from the freight which would otherwise have been due. The master and owner of the 'Reggente' were bound to credit the amount of any advance they had received, and also the amount received for that portion of the wheat they had disposed of, when they came to settle for the freight with the Messrs Tod, the consignees or owners of the cargo, and this was what was done. But then it was argued by the pursuers that there is no sufficient evidence of the £20 advance, or of the sale of any portion of the cargo at Malta, or of the alleged price which was obtained, supposing that there had been a sale. In thus arguing the pursuers seem to forget that it is for them to prove the amount of the sum attached by their arrestments. Keeping this in view, and that no allegation has been made of collusion or fraud in the matter, and that the settlement which actually took place with the master of the 'Reggente' (No. 46 of process), proceeded on the footing of there having been an advance of £20 at Malta and a sale of a portion of the cargo there to the extent of £33, 5s. 10d., the Lord Ordinary thinks that these sums must be deducted from the amount of freight in bringing out the balance due when the pursuers' arrestment was used on 6th March 1869; and this being done, there is left a balance of the freight of £333, 13s. 9d.

"The amount of the bottomry bond and relative charges stand in a different position. The bond has not been produced; and at anyrate such a bond had no necessary connection with the freight; and the charges regarding it, according to the only documents in process bearing reference to the matter, relate to a proper bottomry bond, and not to anything else. The defenders Messrs Tod were on the 6th of March—the date of the pursuers' arrestment—liable for the freight, or what was then due of it, and in the present discussion with the pursuers the Messrs Tod are not, in the Lord Ordinary's opinion, entitled to claim deduction for any sum, not only not necessarily connected with the freight, but which came to form a deduction only by an arrangement with the master of the 'Reggente,' entered into subsequently to the sixth of March, the date of the pursuers' arrestment. The question as between the pursuers and the Messrs Tod is, What was the latter bound to pay to the owner and master of the 'Reggente' as freight on the 6th of March, the date of the pursuers' arrestment?

"Now, the Lord Ordinary can have no doubt that of that date the owner and master of the 'Reggente' could have insisted on payment of the freight from the Messrs Tod, as the parties to whom the cargo was delivered, irrespective of the bottomry bond, the amount of which and relative charges had not at that date been agreed to be deducted or credited. It was for the owner and master of the 'Reggente' themselves to pay off the bottomry bond to the party to whom it was due; but after the nexus created by the pursuers' arrestment, the defenders, the Messrs Tod, were not entitled to defeat and destroy the legitimate effect of that nexus by any arrangement under which they or the Messrs Melas Brothers may have paid the amount of the bottomry bond and relatives charges.

"So much for the questions raised in relation to the freight. But besides the balance of freight which the pursuers claim as having been attached by their arrestment, they have also maintained that the sum of £117, 9s. 10d., as the amount of general average, was resting-owing on 6th March 1869 by the defenders the Messrs Tod to the 'Reggente,' and was consequently attached by their arrestment. The 8th, 9th, and 11th articles of the joint minute of admissions are of importance in reference to this matter. It is by these articles mutually admitted that general average had arisen, that the Messrs Tod had granted the obligation No. 32 of process for the proportion that might be found to be payable in respect of the cargo, and that this proportion has been found to be £117, 9s. 10d. Now there can be no doubt that, in terms of their express obligation, the defenders, the Messrs Tod, were owing that sum to the owner and master of the 'Reggente' on 6th March 1869, and if so, it must have been attached by the pursuers' arrestment. And, independently of their special obligation, the Lord Ordinary holds that the defenders, as the consignees and receivers of the

cargo, were liable for general average, which formed a lien over the cargo; 1 Bell, pp. 542–3, and 2 Bell, pp. 99–100, and 103. It may indeed be assumed that the defenders would not have come under the special obligation they did if they could have insisted for delivery of the cargo without it. And the Lord Ordinary cannot consider it of any importance that the master of the 'Reggente' subsequently to the 6th of March got a settlement of the general average from Messrs Melas Brothers, and that the defenders' obligation therefor was then given up and cancelled. No such subsequent transaction can be allowed to affect or prejudice the rights and interests previously secured to the pursuers by their arrestment.

"It was understood at the debate that the Lord Ordinary should not at once, or till parties were heard on the subject of the claims, if any, of the other arresting creditors of the 'Reggente,' pronounce decree of furthcoming. The parties will now, of course, be heard on that subject, and also on the question of expenses of process."

Thereafter, on 26th February 1870, the Lord Ordinary pronounced this interlocutor:—"The Lord Ordinary having heard parties' procurators, in respect it is admitted that there are other arresting creditors of the brig or vessel 'Reggente,' and that a multiplepoinding is now in dependence before his Lordship at the instance of the arrestees, Messrs Alexander and Robert Tod, against the pursuers and others, for the purpose of determining the claims of all parties upon the amount of funds in the hands of the said arrestees, and in which the arrestees have been found liable in once and single payment: On the motion of the pursuers, decerns and ordains the said arrestees, and the principal debtors for their interest, to consign within eight days the sum of £451, 3s. 7d. sterling, for which the arrestees have been found liable to account by interlocutor of 14th December last, with the interest thereon since the date of citation, in the Royal Bank of Scotland, upon a deposit-receipt payable to the party or parties who shall be ultimately found entitled thereto in the said process of multiplepoinding; and ordains the defenders, arrestees, and the principal debtors, for their interest, to lodge said deposit-receipt in the said process of multiplepoinding within the said eight days: And holds said consignation of the said sum of £451, 3s. 7d. to be equivalent to payment of the same in this action, and decerns: Finds the principal debtors liable in expenses up to the lodging of the defences by the arrestees; and the arrestees liable in the whole expenses incurred subsequent to the lodging of their defences; and remits the accounts thereof, when lodged, to the auditor, to tax and report."

The defenders reclaimed against both interlocutors.

DUNCAN for them.

ASHER in answer.

The Court unanimously adhered.

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

Agent for Defenders—Henry Buchan, S.S.C.

Wednesday, June 29.

SECOND DIVISION.

WIGHT *v.* THE PRESBYTERY OF DUNKELD.

Church—General Assembly—Civil Court—Jurisdiction—Review—Procedure. A minister was proceeded against by a Presbytery by libel, charging him with fornication and with indecent and scandalous familiarity with a woman unbecoming a minister of the Gospel. The relevancy of the libel was objected to, but it was sustained. Ultimately, the minister pleaded guilty to the charge of scandalous familiarity alone, and that being accepted by the Presbytery, he was suspended for six months. In this sentence the minister acquiesced, but the case was taken by petition by certain elders of the congregation before the General Assembly. After a variety of procedure, the Assembly quashed the proceedings of the Presbytery, and remitted to them to proceed of new against the minister, and to exhaust the libel. The minister then brought a suspension in the Court of Session, in which he prayed the Court to suspend the deliverance of the Assembly, and to interdict the Presbytery from again putting him on his trial. *Held* that the question raised in the note of suspension being a mere matter of procedure in an ecclesiastical proceeding, the Court of Session had no jurisdiction to review the deliverance of the Assembly.

Observed that the constitution of the General Assembly stands upon statute like the Court of Session and the Court of Justiciary, and has like them an independent jurisdiction.

Opinions, per Lords Benholme and Neaves, that the proceedings complained of were liable to no objection on the ground of irregularity.

This is a question between the Rev. Mr Wight, minister of Auchtergaven, and the Presbytery of Dunkeld. Mr Wight had been served by the Presbytery with a libel, charging him with fornication, and also indecent and scandalous familiarity with a woman unbecoming a minister of the Gospel. When the case came before the Presbytery Mr Wight pleaded not guilty to the charges in the libel, but, in a subsequent conference with a committee, he acknowledged that he had been guilty of scandalous familiarity, expressly denying, however, fornication or indecent familiarity. The Presbytery accepted that plea, and pronounced sentence suspending Mr Wight for six months. The decision was acquiesced in by Mr Wight, but was afterwards petitioned against by elders of his congregation, and it was on that petition that the matter came before the Assembly. After receiving the report of a committee, and hearing parties in the case, the Assembly pronounced the Presbytery's proceedings irregular, and altogether null and void, and ordained the inferior court now to discharge the duties undertaken by them in commencing the process against Mr Wight, in conformity with the laws of the Church.

Mr Wight then raised an action of suspension and interdict in the Court of Session against the Presbytery of Dunkeld, as also against the General Assembly. He craved the Court to suspend the judgments of the Assembly, and to interdict the Presbytery from carrying into effect those judgments, and from proceeding in any manner of way, in respect of said judgments to revive or re-open the process of libel which had been served by the said Presbytery upon him.

The suspender maintained the following pleas:—

"1. The complainer having tendered a proper plea to part of the charge preferred against him in the libel, and such plea having been accepted by the Presbytery, and judgment having been pro