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 folowing 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

"should the shipper, for the sake of continuing his voyage, however, for the object of an expense not relating to the general average, have given a bottomry bond on the cargo, or have disposed of a part of the same by sale or otherwise, then the loss which a party interested in the cargo sustains in consequence of a ship and freight being insufficient to pay such loss, either in part or not at all, then such loss is to be paid by all the parties interested in the cargo, on the basis of the general average." Accordingly, a second general average statement was prepared and confirmed by the proper authority; and by this statement, which embraced or adopted the first, there was allocated on the pursuers' iron a sum in all of £720, 4s. This sum the pursuers were obliged to pay as general average, and they now sued the defenders, the underwriters, for indemnity. The iron, which was valued in the policy at £850, was valued for the purposes of the average statement at the higher sum of £1293; and this contributary valuation was the basis on which the pursuers' gross contribution of £720 was fixed. The defence was, that the underwriters were liable only on a contributory value of £850, being the value fixed in the policy, and on which they were willing to pay; and that the pursuers must themselves bear so much of the average loss as effeired to the difference between the policy value of £850 and the contributory value of £1293, of the iron as estimated by the average state.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 29th July* 1875.—Having considered the cause, repels the defences, and decerns against the defenders in terms of the conclusions of the summons: Finds the pursuers entitled to expenses, and remits the account thereof, when lodged, to the Auditor to tax and to report.

Note—"This case raises a question of considerable importance in the law of marine insurance, the question, viz., what effect is to be given between the insurers and underwriters to the clause now usual in marine policies—'General average payable according to foreign statement, if so made up. . . . .

"I think it may be assumed that in the absence of the special clause on the margin of the policy providing that general average should be payable 'according to foreign statement if so made up,' the defenders' contention must have received effect. The point does not appear to have been the subject of judicial decision in this country or in England. In Arnould on Insurance, 4th ed. by Mr M'Lachlan, p. 816), after referring to the rule that the value of the subject insured as between the assured and the underwriter is the value at the time and place of sailing in an open policy, and the fixed value in a valued policy, while the contributory value for general average is the net value as the subject reaches the port of destination or adjustment, the author adds—'Whatever is paid in contribution in respect of the excess of the contributory value over the value in the policy is paid by the assured, but for whatever is paid on a contributory value not exceeding the value in the policy, the insured is indemnified in the proportion insured.' Mr M'Lachlan explains that the chapter on general average from which this quotation is made has been re-written to a great extent by himself; but on referring to the second edition of 1857, edited by Mr Arnould himself, I find that the rules between the underwriter and the assured is stated substantially to the same effect. The authorities referred to are Magens on Insurance, p. 245, case 19. The average statement there given had reference to a loss which occurred in 1744, and in reference to which the assured and the underwriters settled on the principle stated by Mr Arnould, not because of any decision on the question, but because the principle was admitted by the assured to be sound. In Benecke on Insurance (London, 1824), pp. 328, 629, the rule for settlement in the case of an average loss made up by contribution is stated in the same way. In Philips on Insurance, sec. 1410, it is stated that the practice in Boston, and apparently generally throughout America, is in accordance with the rule as stated by Mr Arnould, who indeed refers to Mr Philips' work as an authority on the point. Mr Philips, however, states that the practice is different in New York, where under a valued policy 'the underwriters contribute the whole amount assessed upon the subject in general average, whether it contributes in a value greater or less than that at which it is fixed in the policy.' He adds, 'This is a very material difference in the practice of the two places as to the mode of adjustment. There is nothing in the policy that favours one of these modes of construction in preference to the other, each being equally consistent with the language of the instrument, and the preference of the one or the other being merely a matter of construction and the application of the general principles of Insurance.' The point does not appear to be referred to in the works either of Parsons or Marshall on Insurance. The result of the authorities, however, seems to be that, in the absence of a special clause, according to the usage between merchants and underwriters, where the contributory value in the case of an average loss is greater than the value at the time and place of shipment, the underwriter pays the proportion applicable to the latter value, and the merchant pays the surplus.

"The pursuers maintain that it was a leading object of the special clause now usual in policies not only to avoid a class of questions which had frequently occurred and caused dispute, as to whether particular cases fell under the head of general average at all, by providing that the foreign statement should be conclusive, but also to avoid all questions of re-valuation of the subject insured, and new calculations, in order to allocate the average loss partly on the underwriter and partly on the assured, where the contributory value should happen to exceed the shipping value. I am of opinion that the pursuers' view is well founded, and that, according to a sound construction of the special clause, the underwriter, to the extent of his subscription, undertakes to pay the proportion of the amount imposed on the insured as the average loss payable for the subject of insurance, as that amount is ascertained and fixed by the foreign statement, and not merely the proportion of that amount which by calculation may be found to effeir to the shipping value as distinguished from the contributory value of the subject.

"The question now raised as to the effect of

the special clause does not appear to have been the subject of discussion in any previous case. The only writer by whom it has been noticed is Mr M'Lachlan, whose views on Insurance and Merchant Shipping Law I have always found worthy of consideration, and who at p. 818 of his edition of Arnould states an opinion favourable to the pursuer's contention, thus—'This rule' (that is the ordinary rule above stated) 'may in effect be set aside in virtue of a stipulation in the policy to pay general average according to foreign adjustment, and by the assumption at the port of adjustment, in accordance with the law there prevailing of higher values than those in the policy.' The parties in the course of the discussion referred to the case of *Harris* v. *Scaramanga*, June 3d, 1872, Law Reports, 7 Common Pleas 481, in which the effect of the special clause was considered with reference to the question whether, seeing the loss sustained would not have been held to fall within general average in England, the underwriter was nevertheless liable, because the loss had been treated as general average, in accordance with the foreign law in the foreign statement. I find that the effect of the clause has been the subject of decision in two cases since that of *Harris*, viz., *Hendrick* v. *The Australasian Insurance Company*, 27th April 1874, Law Reports, 9 Common Pleas, p. 460, and *Marro* v. *The Ocean Marine Insurance Company*, 8th July 1874, Law Reports, 9 Common Pleas, p. 595, affirmed in the Exchequer Chamber 11th May 1875, Law Reports, 10 Common Pleas, p. 414. In each of these three cases the underwriters sought to give the special clause, which is the subject of the present question, a more restricted meaning than the Court held that on a sound construction it ought to receive. The contention was substantially similar in all of them, although the circumstances were materially different, viz., that the foreign statement should be held conclusive merely as to the valuations and results brought out, subject, however, to the right of underwriters to resist liability where the loss sustained would not have been a general average loss according to the law of England. But the Court held that the underwriters were bound by the foreign statement, and that, even assuming the circumstances would not have raised a case of general average according to the law of England, the underwriters were neverthless liable, because they had undertaken to pay general average 'according to foreign statement, if so made up.' The defenders in the present case are in the same position as the underwriters in the case of *Harris*, as regards the question raised in that case; for the defence there stated arose in precisely the same state of circumstances as in the present case so far as regards the second average statement here founded on. It was maintained in the case of *Harris* that the contribution levied on the cargo in consequence of the owner's inability to pay the proportion applicable to the ship was not a loss within the perils insured against, and therefore that the average statement, though accepted as correct as regards the valuations and the results which these brought out, could not affect the underwriters so as to render them liable for what was really not an average loss. The Court were of opinion that the loss was not one which according to the English law could be treated as falling under general average for the purpose of contribution, so as to affect the underwriters; but because it had been so treated in the foreign statement, and in accordance with the law of the country where the statement had been prepared, the underwriters were liable under the special clause in the policy.

"The result of the three cases referred to, as stated in the opinions of the learned Judges in the Exchequer Chamber, appears to be that the effect of the special clause is that general average in the cases for which it provides means average 'according to foreign, not English, rules' (p. B. Pollock). These cases do not decide the present question; but the whole scope of the opinions there delivered supports the general view, that the intention of the special clause, to be gathered from the general terms in which it is expressed, is to make the foreign statement of general average conclusive (assuming, of course, that it had been made up with regularity and in accordance with the law of the foreign country), as defining and specifying the sum which the underwriters have to pay in proportion to the amounts subscribed by them, viz., the sum which the assured has himself lost. It is obvious that this result is desirable in the interests of commerce, for it avoids opening up the foreign average statement, (1) by inquiries as to shipping value; and (2) by calculations in the preparation of a new statement for an adjustment of the loss between the owner and the assured where the contributory value has exceeded the shipping value. The insurer will naturally and reasonably desire that the average statement which fixes his liability should at the same time thereby fix the measure of liability of the underwriter, and if in practice somewhat larger payments for average loss should thus occur at times where foreign average statements are made up, this must be kept in view as an element in fixing the premium, just as the circumstance that under such statements cases of liability for general average which would not come under that head by the law of this country, will arise and must be kept in view in fixing the premium. And it is not to be thrown out of view that the contributory value may often be less than the shipping value, in which case the underwriter gets the benefit. The scope of the whole opinions in the English cases is in favour of the construction of the clause which gives effect to the view now expressed, and the opinion of Chief-Justice Bovill, concurred in by Justice Keating, expressly states the view of these learned judges to that report. They say (p. 489), 'Under the terms of this policy, the underwriters and assured have both agreed to accept the judgment and statement of the average stater in the foreign port, if and when made as conclusive as between them both in the principle and in details, as to the loss which the underwriters are to undertake in respect of general average.'

"The special clause is framed in most general terms, 'General average payable according to foreign statement.' It may be possible to read it in accordance with the view maintained by the underwriters, viz., that the foreign statement (regularly made up) is to be accepted without question as the basis only for a settlement in the same way as an English average statement

would be accepted, leaving open for adjustment the amount for which the underwriters shall be liable should the contributory value exceed the shipping value of the subject assured. But it appears to me to be the more natural interpretation of the general terms used, and to be more in accordance with the presumed intention of the parties, that the foreign shall be conclusive between the parties as furnishing the precise sum for which the underwriters, according to their several subscriptions, are liable. The question, which is the best arrangement, viz.—whether the average statement should be conclusive in the sense now stated, or should, in the particular case in which the contributory values exceed the shipping values, merely form the basis for the preparation of another statement,—is one on which mercantile opinion and usage are divided, as appears from the conflicting practice in Boston and New York. In the present case the parties by the policy have fixed the shipping value of the goods, but the question would be the same in the frequent case of open policies, and the contention of the defenders involves in that case the obtaining of a valuation of the ship or cargo as at the port of shipment after the loss occurs, not for the purpose of the average statement, but for the settlement with the underwriter. It appears to me, that according to the fair reading of the clause it was not contemplated or intended that such re-valuations and new adjustments should take place. 'General average' is to be 'payable according to foreign statement, if so made up;' that is, I think, the general average paid by the assured, according to the foreign statement, is to be payable to him by the underwriter. The term 'general average' thus directly refers to what the insured has paid as such. If the more limited meaning for which the defenders contend had been the true agreement of parties, words of limitation would, I think, have been introduced, shewing that the foreign statement was to be taken, not as fixing the general average, but as forming the basis only for preparing another statement, according to which the general average should be payable. In this view the clause would have been expressed in terms not unlimited, but such as these, viz.—'General average on a sum not exceeding the shipping value,' payable 'according to foreign statement, if so made up.' The defenders' argument substantially involves the introduction of restraining or limiting words by implication into the clause, with the result that the general average is not payable according to the foreign statement, as it has been actually paid by the assured, which is the natural meaning of the language, but may vary according to a separate valuation to be obtained in many cases, and to be used with the foreign statement as a basis for ascertaining the general average payable. I am of opinion that this is not the true meaning of the language used, but that, having regard to the fact that the valuations of ship and cargo in foreign ports throughout the world proceed on rules and principles extremely various, and to the extreme desirability of having a simple and ready means of fixing the precise amount of the underwriter's liability, the clause in question has in effect provided that the general average payable by the underwriter shall be the sum which the assured has paid in the foreign port—that is, shall be 'according to foreign statement, if so made up.'"

The defenders reclaimed; and when the case was in course of hearing, an additional statement for the pursuers was put in. It was stated, *inter alia,* that "after paying the contribution according to the first average statement, and before the date of the second average statement, the balance of the freight was exhausted in paying wages of crew, harbour dues, ship's expenses, and other charges which according to German law, the value of ship being exhausted, form a charge against freight preferable to general average. Both ship and freight being exhausted, and having proved insufficient to pay the loss, the same fell, according to German law, to be paid by the cargo, and the amount ultimately allocated upon and paid by the cargo was unaffected by the contributory value put upon it."

They pleaded—"The loss sued for having been paid in respect of the iron insured as general average, according to the foreign average statements produced, and the amount of the said loss not having been affected by the value put upon the iron in the said average statements, the pursuers are entitled to decree as concluded for."

The defenders *inter alia* answered—"Admitted that, according to German law, the wages of ship's crew, harbour dues, and various other ship's expenses, form a charge against freight preferable to general average after the value of the ship has been exhausted; and that the balance of the freight has been exhausted in paying the said ship's expenses. Admitted that, where the value of ship and freight prove insufficient to pay the amount of a bottomry bond in the circumstances set forth in Article 734 of the German Commercial Code, the deficiency falls to be made up, according to German law, by contributions from all the parties interested in the cargo, on the principles of general average. Admitted that this deficiency must be so made up, whatever the amount of the contributory value of the cargo may be. *Quoad ultra* denied."

At advising—

Lord President—The pursuers of this action are owners of a cargo of iron which was shipped on board a vessel called the "Warrior" to be carried from Grangemouth to Königsberg. Unfortunately in the course of the voyage the vessel sustained injury, and was obliged to run for repairs to Gottenberg, and at that port the master was obliged to grant a bond of bottomry by which both the ship and cargo were pledged. When the vessel arrived at her destination the cargo was delivered to the consignees, and then the question arose, how the bottomry bond was to be met. The German law, it seems, provides, that if the ship and freight are unable to meet the bottomry bond, the parties interested in the cargo must provide for payment on the basis of general average. But it seems to me that that means no more than that if ship and freight fail, the other must pay. The policy of insurance which was effected on the cargo by the pursuers was valued at £850, and it contained a clause providing that general average should be payable "according to foreign statement, if so made up." Now, a general average statement was made up as soon as the vessel arrived at the port of destination and had discharged. As regards that

first average statement, there is no difficulty in understanding the principle upon which it was made up. There is, 1st, an ascertainment of the amount of loss to be provided for; and 2d, a calculation of the contribution as allocated upon the ship, cargo, and freight. The cargo was charged upon a contributory valuation of £1,293.

Now, if we were dealing with this average statement alone, and if the pursuers were claiming what they had to pay under it, no doubt the question decided by the Lord Ordinary would have arisen, viz., Whether the underwriters are bound to pay the loss upon a contributory value of £1,293, or so much only of the amount of the loss sustained by the owners of the cargo as effeired to a contributory value of £850 as stated in the policy?

But it appears that what took place afterwards altered matters, because after the allocation by the first average statement the ship and freight were found unable to meet all claims, and the consequence was, that the ship and freight became bankrupt and had to be sold, or at least the ship did, for the freight had all been swallowed up previously. In that state of matters, the German law made the owner of the cargo liable to meet the whole loss, while it gave him the advantage of the proceeds of the sale of the ship, and upon that footing the second average statement was made up. In this country we should not consider it an average statement, because it contains what we should not find in such a document here, but it is so treated in Germany. The clause in the policy is therefore obligatory against the underwriters, to the effect of making them liable for the loss sustained by the owners of the cargo under the second average statement.

What is the second average statement? Simply an account bringing out the amount of the loss which the owners of cargo must meet. That is done by taking the amount of the bottomry bond and all the expenses incurred, and setting against these the proceeds of the sale of the ship. The owner of the cargo is called on to pay the balance. That the value of the cargo is a matter of utter indifference is very apparent. The result is precisely the same whatever value is put upon it, and accordingly the sum which the pursuers claim is just the balance brought out against them which they were made to pay at the port of discharge. No doubt the second statement adopts and incorporates the first for the purpose of showing the actual amount of money laid upon the owners of cargo, because the loss is what they must pay one way or another, whether the first statement is taken into account or not. The result is the same as if there had been no first statement and the bankruptcy had taken place, and the holders of the bottomry bond had gone against cargo at once.

Therefore it appears to me that the question decided by the Lord Ordinary does not occur, and that the pursuers are entitled to recover the amount of the loss sustained "according to foreign statement," as the policy bears. I agree with the Lord Ordinary's judgment although without entering upon the ground upon which he has gone.

LORDS DEAS and MURE concurred.

LORD ARDMILLAN was absent.

The Court pronounced the following interlocutor:—

"The Lords having resumed consideration of the reclaiming note for Archibald Smith and others against Lord Shand's interlocutor of 29th July 1875, with the addition now made to the record, Recal the said interlocutor in so far as it finds the pursuers entitled to expenses: *Quoad ultra* adhere: Find the pursuers entitled to one-half of the taxed amount of the expenses incurred by them in the Outer House, and find them entitled to full expenses in the Inner House; and remit to the Auditor to tax the account or accounts of said expenses, and to report."

Counsel for the Pursuers (Respondents)—Dean of Faculty (Watson) — Balfour — Johnstone. Agents—Macara & Clark, W.S.

Counsel for the Defenders—Trayner—Hunter. Agents—Dewar & Deas, W.S.

Thursday, July 20.

FIRST DIVISION.

[Lord Young, Ordinary.

ALISON AND OTHERS (RENTON'S TRUSTEES) *v.* ALISON AND OTHERS.

Succession—Mutual Deed—Investment, Terms of—Revocation—Accretion.

Two sisters executed a mutual disposition and settlement, whereby each conveyed her whole estate to the other in liferent and to certain beneficiaries in fee, and each appointed the other sole executor. Thereafter the whole funds of the two sisters, which had previously been invested in their respective names, were invested in their names jointly and the survivor. It was averred that this change of investment was made by two gentlemen who had the entire management of the sisters' affairs, on their own motive, as being in conformity with the terms of the joint deed, and without any instructions from the sisters.—*Held* (1) that parole proof that the change of investment was made without the sisters' authority was competent, and (2) the evidence having established that there was no authority, that the joint investments had not the effect of putting the funds so invested beyond the operation of the joint will.

This was an action of multiplepoinding at the instance of Robert Alison, David Renton, and George Murray, trustees under the trust-disposition and settlement of Mrs Margaret Alison or Renton of Oakmount, Lasswade, dated 9th December 1868, against themselves and William Alison and Mary Catherine Alison, in the following circumstances:—

Mr and Mrs Renton were married in 1830, and Miss Alison, a sister of Mrs Renton, lived with them. Mrs Renton and Miss Alison had each about £7000. Mr Renton got possession of the whole of his wife's money and borrowed £5000 from Miss Alison. Thereafter his affairs became embarrassed and he executed a trust deed for