Thursday, February 21.

SECOND DIVISION.

ELDERSLIE STEAMSHIP COMPANY, LIMITED, *v.* BURRELL & SON.

Contract—Ship—Salvage—Choice of Court—Delay in Exercising Choice.

In October 1894 the s.s. "Buteshire" was salved by the s.s. "Strathord" and towed to a port in Mauritius. Both ships belonged to Glasgow firms, and it was arranged between them that the owners of the "Buteshire" should give £25,000 bail for that ship and her cargo, and that she should be allowed to proceed upon her voyage; and further, that the salvors should have the right to have their claim for salvage tried either in England or Scotland. The bail bond was executed on 24th October.

On 18th January 1895 the owners of the "Buteshire" petitioned the Court of Session, in terms of section 547, subsection 3, of the Merchant Shipping Act 1894, to determine the amount of compensation to be paid by them for the salvage services rendered by the "Strathord." Before service of this petition the owners of the "Strathord" raised an action in the English Admiralty Court for the purpose of having the amount of salvage determined by that Court.

The petitioners maintained (1) that the respondents had lost their right to elect the Court by which their claim for salvage should be tried by undue delay in exercising it; and (2) that, the parties being both domiciled in Scotland, the English Court had no jurisdiction.

The Court *dismissed* the petition on the grounds (1) that there had been no undue delay on the part of the respondents in instituting proceedings, and that any delay which had occurred had been caused by the petitioners failing to give the respondents information as to the value of the ship and cargo which had been salved, although repeatedly requested to do so; and (2) that the petitioners could not be heard to deny the jurisdiction of a Court to which they had bound themselves to submit—*diss.* Lord Rutherfurd Clark, who was of opinion that the petition should be sisted until the Court of Admiralty had determined the question of jurisdiction.

On 22nd September 1894 the machinery of the s.s. "Buteshire" of Glasgow, bound from London to Australia with a cargo of merchandise, broke down in latitude 45° 36′ south, longitude 56° 57′ east.

On 2nd October the master of the "Buteshire," observing the "Strathord" of Glasgow steering to the eastward of her, signalled her to come to his assistance. In compliance with this request the "Strathord" towed the "Buteshire" to Port Louis, Mauritius, arriving at that port on 14th October.

On 15th October Messrs Burrell & Son of Glasgow, the managing owners of the "Strathord," having learned by cablegram of the services rendered by their ship, telegraphed to Messrs Turnbull, Martin, & Company, London, the managers of the Elderslie Steamship Company, Limited, Glasgow, who were the registered owners of the "Buteshire," asking a bail bond for £40,000 against the "Buteshire" and her cargo to save the vessel from being arrested at Mauritius. On 15th October Messrs Turnbull, Martin, & Company wrote in reply agreeing to give bail, and proposing two gentlemen, both of London, as cautioners, but objecting to the amount of the bail.

On 16th October Messrs Burrell & Son telegraphed—"We accept names offered. Send bond to-night for £40,000, which we consider moderate. As company Scotch and bail English, we require option inserted in bond to sue in Scotland or England as we decide, which we now confirm."

On the same date Messrs Turnbull, Martin, & Company replied—"We communicated with the underwriters, who agree to our giving the bail in the way desired by you, but object to the amount you demand, namely £40,000. The underwriters say that the outside amount of bail which you can reasonably claim is £10,000, and that they must object to giving more."

After some correspondence as to the amount of the bail, Messrs Burrell & Son telegraphed on 19th October—"We want bail for ship and cargo, either for principal, interest, and costs to be found due to us by English or Scottish Court or by arbiter, if arbitration agreed on, or in view of values of 'Buteshire' and cargo stated by you for £25,000."

On 22nd October Messrs Turnbull, Martin, & Company wrote, *inter alia*—"Can you decide how you would like the question of compensation settled? because, as you can understand, we would require to get the underwriters' formal sanction, and it would be well to settle the point. We do not think there will be any difficulty about your having the choice of having the arbitration settled in Glasgow, Court of Session or Admiralty Court here, but we should be glad if you could see your way to decide one or other."

On 24th October Messrs Botterell & Roche, London, solicitors for Messrs Burrell & Son, wrote to Messrs Lowless & Company, London, solicitors for Messrs Turnbull, Martin, & Company—"Mr Burrell therefore wishes to be quite satisfied that no exception will be taken by your clients to the bond as altered, and that it will be handed to us completed, in the course of the day."

On the same date the bail-bond was executed in London by the owners of the "Buteshire" and the two London cautioners. It was for the sum of £25,000, and provided "that if the said Elderslie Steamship Company, Limited, shall pay to

the said Messieurs Burrell & Son such sum, if any, with interest as may be agreed upon, or as may be found to be due in any action or proceedings which may be brought or commenced on behalf of the owners, master, and crew of the steamship "Strathord" in any Court in England or Scotland, or in any arbitration proceedings which may be agreed on in respect of the alleged salvage services, and the cost of any such action or proceedings as may be payable by the said Elderslie Steamship Company, Limited, or the owners of said cargo and freight, then the above written bond shall be void and of no effect, otherwise to be and remain in full force and virtue."

Thereafter a correspondence ensued between the parties. Messrs Turnbull, Martin, & Company called on Messrs Burrell & Son to make a proposal for a settlement, or to choose their tribunal. On 29th November they wrote—"At the same time we are quite willing to put forward any proposal you might make; failing this, what tribunal will you select?" And again on 3rd December—"If you make any proposal for a settlement we shall be pleased to put it before the underwriters, but failing this we should like to know at once what Court you wish to decide the question of compensation." Messrs Burrell & Son, on the other hand, wrote repeatedly asking for information as to the value of the ship and cargo, but they received no information except that the hull and machinery of the vessel were insured for £70,000.

On 18th January 1895 the Elderslie Steamship Company, Limited, presented an application to the Second Division of the Court of Session, to fix and determine the amount of compensation to be paid by the petitioners in respect of the salvage services rendered by the "Strathord." They called Messrs Burrell & Son as respondents, and the petition was served on the latter on 21st January.

The petitioners averred, *inter alia*—"Subsequent to the granting of the bail-bond a long correspondence took place between the petitioners and Messrs Burrell & Son, in which the former pressed the latter to state the amount which they claimed in name of salvage, and whether they desired the question determined in the English or Scotch Courts. Messrs Burrell, however, declined to name a figure, or to indicate in what Court they preferred that the question should be settled. In these circumstances the petitioners have been obliged to bring the present application. It is important in their interests that the matter should be disposed of speedily, both because they have given bail on behalf of a large number of owners of cargo for their proportion of the salvage payable, the amount of which they may have difficulty in recovering from certain owners of cargo who are resident in Australia, and because the 'Buteshire' is now on her homeward passage to London, where her crew will fall to be discharged, with the result that their evidence may not be available to the petitioners. They accordingly present this application to have said question determined, under and in virtue of the Merchant Shipping Act 1894, section 547, sub-section 3, which is in these terms—'Disputes relating to salvage may be determined on the application either of the salvor or of the owner of the property saved, or of their respective agents.' For the purposes of the present application the petitioners represent the owners of the cargo, in respect that they have been obliged to give bail for the amount payable in respect of the salvage of the cargo as well as of the steamer and her freight. In the correspondence already referred to Messrs Burrell & Son profess to act on behalf of the owners of the 'Strathord' as well as the master and crew, and the bail-bond which they exacted is expressed in their favour as representing same."

The respondents lodged answers, in which they contended that the delay had been caused by the petitioners refusing to give them information as to the value of the vessel and cargo. They further averred—"The respondents delayed for a short time instituting proceedings as they still hoped to get the information necessary to enable them to state their claim, and as they knew that, both ships being in New Zealand, the compensation could not be fixed till their return. As, however, the petitioners still continued to withhold the information, the respondents, on 19th January 1895, instructed an action to be instituted in the English Admiralty Court, in ignorance of the petitioners' intention to present the present petition, which was not served on the respondents until 21st January 1895. A few days thereafter the petitioners' London solicitors were asked to accept service of an Admiralty writ, which was duly issued for the purpose of having the amount of the said salvage, and all questions relative thereto decided in the said Court. Notwithstanding the agreement before referred to, and the terms of the bail-bond they declined to accept service. The respondents respectfully submit that the petition ought to be dismissed, or otherwise refused, and with expenses, for the following, among other reasons, viz., that the respondents are entitled, by the terms of the said agreement and bail-bond, to have the questions raised in the present petition decided in the English Court of Admiralty, and that they have duly exercised their option to that effect by instituting proceedings in said Court; that the said Court is the most convenient tribunal for trying the said questions, as the 'Buteshire' is bound for London, her managers and underwriters are in London, her cargo was shipped there, the bail sureties are there, and the 'Strathord' is expected to discharge there; that the petition is incompetent, and that all parties interested are not convened thereto."

Argued for petitioners—Under the statute the Court could not refuse to grant the petition. The petition was competently presented and both parties were Scots, and were represented before the Court. Alternatively, the Court in the

exercise of their discretion should not refuse the application. For three months the petitioners had been calling on the respondents to table their claim, and, the latter having refused to do this, the petitioners were entitled to bring this petition in order to have the matter settled. Further, the English Courts had no jurisdiction to determine the claim, both parties in the proceedings being of Scots domicile.

Argued for the respondents—The petition should be dismissed. If any delay had been caused, it had been caused by the action of the petitioners in refusing to give the respondents any information as to the value of the ship and cargo. No loss had been caused by the delay, as no inquiry could be made till the ships arrived in this country. Both ships were due in London in April, so the Courts at London were the most convenient place to try this question. In terms of the letters and the bail bond the respondents had a right to choose the Court in which the proceedings should be taken. They had chosen the English Admiralty Court, which was therefore the proper Court to try the cause. The petition should be dismissed, not sisted, as if it was sisted the English Court might refuse to proceed because the process was before the Scots Court.

At advising—

LORD YOUNG—This is an application made to us by the owners, who are in business in Glasgow, of a ship called the "Buteshire," which came to grief in the month of October last in the Far East by her machinery giving way. Another ship came to her rescue—the "Strathord"—also the property of people in business in Glasgow, and she was salved by that ship, that is to say, taken in safety to a port in the Mauritius, all in the month of October last.

The application by the owners of the salved ship is stated to be under section 547 of the Act of 1894, which provides that disputes relating to salvage may be determined on the application either of the salvor or of the owner of the property saved, or of their respective agents, and the application is to have the amount of the salvage due for salving the vessel determined.

Now, I suppose there is no doubt of the competency of the application, and that this Court has jurisdiction to entertain it, for, as I have stated, the owners not only of the salving ship but also of the salved ship are carrying on business in Glasgow, their respective ships belong to Glasgow, and therefore, if there were no specialty in the case, we should have only one duty to perform, which would be to proceed immediately to take such evidence as was necessary to enable us to determine the amount of the salvage, for that salvage is due is not in dispute, and it was suggested by the learned counsel that we should take the course of remitting to a Lord Ordinary to proceed with the investigation. But the case does not rest there, or there would have been no question, for it appears, and indeed is not matter of dispute, that when the salved vessel was in the port of the Mauritius to which she was taken, an arrangement was effected by telegrams or cablegrams from this country, generally to the effect that, while the fact of salvage was admitted, the amount in dispute should be left for subsequent determination, the vessel salved being allowed, having been repaired, to go upon her voyage in the busy season, the salvors being secured by a bond of surety for £25,000 that what should be ascertained to be the amount of the salvage should be duly paid. The whole dates in the case are within so small a compass that even this bond, after the vessel was repaired and starting again on her voyage, was in the same month of October last.

In the course of the communications which passed relative to allowing the vessel to go upon her voyage, security being granted to the salvors that whatever should be ascertained to be due to them ultimately would be paid, we have considerable correspondence between Burrell & Son in Glasgow, who had been informed by telegram or cablegram I suppose of all that had occurred, and Turnbull, Martin, & Company in London, who were acting for the owners of the salved ship. One of these letters from Burrell & Son, dated 16th October 1894, is in these terms—"We have your favour of yesterday and wired you to-day as follows—We accept names offered"—that is, the names of the sureties—"Send bond to-night for £40,000, which we consider moderate." They came down to £25,000 from £40,000, which was represented to their satisfaction to be an extravagant amount. The letter proceeds—"As company Scotch and bail English"—the sureties were English—"we require option inserted in the bond to sue in Scotland or England as we decide." The answer to that is—"We have your letter of yesterday, also copy telegram, but before we had communicated with the underwriters and our solicitors it was rather late to wire. We communicated with the underwriters, who agree to our giving the bail in the way desired by you, but object to the amount you demand."

Now, I read that *prima facie* as an agreement that they should have an option inserted in the bond to sue in Scotland or England as they should decide, and I think that is repeated in subsequent letters, the owners of the salving ship, who were really the claimants, requiring that it should be left to their determination whether they should have the amount of salvage ascertained by arbitration or by an appeal to the Court in England or an appeal to the Court in Scotland. Besides, the bail bond dated 24th October bears this, that the amount ascertained to be due shall be paid, and that the sureties shall be surety for such sum "as may be agreed upon or as may be found to be due in any action or proceedings which may be brought or commenced on behalf of the owners, master, and crew, of the steamship "Strathord" in any Court in England or Scotland, or in any arbitra-

tion proceeding which may be agreed on in respect of the alleged salvage services."

Now, the whole correspondence which is printed here—we have a great deal of it—proceeds on the assumption that that right of choice was given to the owners of the salving ship by agreement between the parties. In the letter of 22nd October, two days before the bond was executed, Turnbull, Martin, & Company write—"We do not think there will be any difficulty about your having the choice of having the arbitration settled in Glasgow, Court of Session or Admiralty Court here," and on 24th October, the very day the bond was signed, Mr Burrell wishes to be "quite satisfied that no objection will be taken by your clients to the bond as altered, and that it will be handed to us completed in the course of the day." In the correspondence subsequent to the execution of the bond, it is assumed by the owners of the salved vessel that the choice thus given was well given and existed, and might be acted upon by the owners of the salving ship. For instance, in the letter of 29th November from Turnbull, Martin, & Company the concluding words are—"Failing this, what tribunal will you select?" Then in the letter of 3rd December Turnbull, Martin, & Company write to Burrell & Son—"If you make any proposal for settlement we shall be pleased to put it before the underwriters, but failing this we should like to know at once what Court you wish to decide the question of compensation." There are other letters very much to the same effect. No doubt the owners of the salving ship do not bring their action or make their application immediately; they do not bring it in November; they could not well have brought it sooner than November or December, but they brought it in January; I think, if I am not mistaken, they instituted their proceedings in the Court of Admiralty on the 21st January. Complaints in rather strong language were made of their not answering this appeal as to which Court they selected, in pursuance of the choice given to them, earlier. Well, I do not think there was much delay. In the first place, so far as I can judge *prima facie* — and it is only a *prima facie* judgment that I can form on such a matter—they asked repeatedly, quite reasonably as it appears to me, for information as to the value of the ship and particulars as to the value of the cargo, for the owners of the ship undertook to answer for the owners of the cargo also, and the sureties in this bond are for salvage payable in respect of the cargo, as well as in respect of the ship, and I think before bringing their action they asked very reasonably for information from the owners of the salved vessel as to the value of the ship, and for information as to the cargo, and I think they got none. Therefore, so far as delay is concerned, I see no grounds whatever to affect the validity of the choice which was given to them, in their not bringing their proceedings in the Court of Admiralty in England prior to the 21st January. Then I think it was on the 18th January that this application was presented by the owners of the salved ship, that is to say, the proper defendants, those who are resisting the claim or whose interest it is to have it reduced as much as possible—to have the amount of salvage due in respect of this vessel which was salved in the beginning of October 1894 fixed. Well, this had not been communicated—I think that was stated with the assent of both parties—to the owners of the salving ship before they had instituted their action in the Court of Admiralty. I do not dwell upon that because it does not appear to me to affect the case. I think the application—whether the previous application here had been communicated to them or not—was well made in pursuance of the choice which was given to them and well instituted; their choice was well exercised and well acted upon by instituting this proceeding in the Court of Admiralty in England on the 21st January. There was *prima facie* at least very good reason for their making that choice—although they were in trade in Glasgow themselves—to have the amount of salvage determined in the English Court, for, although the owners of both ships were Glasgow merchants, yet their trade was very much carried on from London, and both ships sailed from London with cargoes from London—I mean the ship that was salved sailed from London upon the voyage in the course of which she came to grief with a cargo taken on board in London, and was proceeding from that port to some port abroad—I do not remember where at this moment—and the salving ship had also sailed from the port of London, and both ships are returning to the port of London from which they sailed, and therefore it is plain enough that the convenient place—the only convenient place in the interests of both parties—for having this investigated, is London. But it is said the Court of Admiralty in England has no jurisdiction, or it is not certain that the Court of Admiralty has jurisdiction. Well, that assertion is rather strange I must say, coming from a party who has agreed, and agreed in a proper business transaction—leading to a bond with sureties for £25,000—that the claimant against him shall be at liberty to go to the Court of Admiralty if he pleases. I cannot receive that suggestion with any favour, at least from a party who entered into that contract—a very onerous contract under which the salved vessel was allowed to go at liberty. We have presented to us a contract, a business contract, of which this is a term—that the choice of the Court to determine the amount of salvage shall be with one of the parties, and he makes his choice, and the answer by the other party to the contract is—"The Court has no jurisdiction or may have no jurisdiction." We must act upon the contract unless that is a good answer to the party who is insisting upon his right to act upon it, and that would have to be investigated. Under the old law—the old statute—we should have had to allow a proof on it as a matter of fact, and English lawyers would

have had to be examined as to whether the Court of Admiralty would have jurisdiction or not, but now under the recent statute we could refer the case to the English Court to ascertain whether by the law of England—for that is law of England and nothing else, and we are not acquainted with it—the Court of Admiralty had jurisdiction or whether they could entertain an action in the circumstances which I have stated. Now, just consider how ridiculous it would be to take such a course as that? We are told that both ships are coming back to London from which they started; it is said that the salved vessel is to be back in the beginning of April, and I do not know when the other is to be back, but I suppose about the same time. But then it is suggested that they may never come back. Well, it has been suggested sometimes that "the lift may fa and smoor a' the laverocks;" there may be a great earthquake or anything which may prevent what both parties are looking forward to, and the ships may never return at all, and so the question of fact upon which the jurisdiction of the Court of Admiralty depends may be affected by some calamity which will prevent the return of the ships. But we will know in the month of April whether the lift has fallen, or whether there has been a great earthquake or any other calamity which has prevented the return of these ships as expected in early spring. We could take no proceedings in this application before then; the Lord Ordinary could take no proceedings in the application, I suppose, before May or June next, and I suppose what must occur to everybody, as not only a likelihood, but approaching to a certainty, is that the proceedings will proceed before the Court of Admiralty upon the return of the ship—and they cannot proceed anywhere before that, because the witnesses are not back in this country—in the month of April next. But it is said —"The Court of Admiralty then may find they have no jurisdiction, let us keep this application here to await the result of that." Well, I should have had no objection to that course had I seen any expediency in it whatever in the interest of either party, but I can see none, and I confess I have considered as carefully as I could—whether either party had any legitimate interest whatever in that course being taken. The owner of the salving ship, who has instituted the proceedings, suggested this reason against keeping the application here, and it struck me as forcible, that it would or might be represented in the Court of Admiralty by the other party, "There is a pending proceeding in the Scots Court," and then the judge in the Court of Admiralty might say, what the Master of the Rolls said on a similar suggestion being made, "Oh! I wo'nt go on with an application pending in the Scots Court; I am not going to put my hand into a hornet's nest; there would be a tremendous row about interfering with the jurisdiction of the Scots Court." I thought that really a forcible suggestion that the petition had better not be kept here; it is brought quite in the teeth of the agreement of the parties, in violation of it, and the only suggestion advanced in support of it is that the Court which has been chosen in pursuance of that agreement may decline its jurisdiction. Well I think it is a very fanciful suggestion that it is in the least likely ever to come to that, but if it should, what is the harm in this application being out of the way so as to avoid that statement in the Court of Admiralty, that there are pending Scotch proceedings in the Court of Session. The measure of the harm is that another application will have to be presented, which will cost 10s. or perhaps 15s. or 20s., for if such an unlikely thing should occur as that, then the application would have to be made here as the only Court of jurisdiction. This Court would then have jurisdiction, and an application at the expense of a few shillings could be presented. There is a great aversion on the part of the Court to throw out proceedings which have gone some length, and upon which expenses to an appreciable amount have been incurred, which would have to be taken over again, but that is not the case here. There have been no proceedings here at all except this application. I suppose it is one of these applications to which the common law applies, and we will entertain it or not, and allow any number of them to be presented, according to the reason and expediency of the case and the legitimate interests of the parties.

I have no doubt that by refusing the application—it is not refusing it upon its merits, but dismissing the application—and leaving the contract between the parties to be carried out in the action before the Court of Admiralty, we shall act according to the bargain of the parties, and according to the truth, justice, and law of the case, and if such a monstrously unlikely thing—for I cannot characterise it by a weaker word than that—should occur, as that it should be found that the Court of Admiralty has no jurisdiction in the matter, another application can be presented here at the cost of a few shillings.

My opinion therefore is, and I confess without any doubt or hesitation, that our proper course is to dismiss this application, and I should say with costs, for I am of opinion that it has been presented in violation of the legitimate contract between the parties as they both understood it and intended it.

LORD RUTHERFURD CLARK—There can be no doubt that this Court has jurisdiction to determine the question which has been raised, and, as it is the first Court to which application has been made, it would have exclusive jurisdiction, unless there is a good reason why we should not proceed with the petition.

I am satisfied from the correspondence that the petitioners agreed that the choice of Courts was to rest with the respondents, who have, in pursuance of that agreement, and while it was still in force, presented an application to the Court of Admiralty in England, but two days after the petition

before us was lodged. It is for the Court of Admiralty to say whether they will proceed with it. We cannot judge on that matter. Until they sustain their jurisdiction it must remain uncertain whether or not they will proceed with the application of the respondent. They may differ from us in the construction of the correspondence, and if they do they may hold that their jurisdiction is excluded, because the first application was made to this Court. While the uncertainty exists we ought not in my opinion to dismiss a petition which it may be our duty to dispose of on its merits. It is unlikely that we shall ever be placed in that situation. But we cannot, I think, proceed on a probability however strong.

I am of opinion therefore that we should sist the petitioner until we know what the Court of Admiralty will do.

LORD TRAYNER—This is a petition for the determination of a salvage dispute. The respondents have admittedly a claim for salvage, and the only matter in dispute is the amount to which they are entitled. In October last the respondents insisted on a bail bond being granted them to secure payment of the amount to which they should be found entitled, otherwise they threatened to proceed against the salved ship . . . and to detain her where she lay until settlement of their claim. Two Englishmen were offered as cautioners and accepted, but the respondents stipulated that, as the petitioners were a Scots company and the "bail English," they should have the option to sue in England or Scotland, as they should decide. This was agreed to by the petitioners, and accordingly in the bail bond the cautioners became bound for a certain sum from which they were to be free if they should pay to the respondents whatever might be found due to them in respect of the salvage service "in any Court in England or Scotland." I take it therefore to be perfectly clear that the petitioners agreed to abide by the decision of any Court in England or Scotland before which the respondents might bring their claim for determination. The petitioners now desire to have this claim determined by the Court of Session on the ground (1) of undue delay on the part of the respondents to make their election of the Court before which the claim is to be made, and (2) on the ground that the English Courts have no jurisdiction to determine that claim.

I think there is no foundation in fact for the first of these grounds. There has been no undue delay on the part of the respondents, and any delay which has taken place may, in my opinion, be fully accounted for by the refusal on the part of the petitioners to answer certain questions put to them by the respondents, which the latter had a right to put, and which I am surprised were not frankly and fully answered by the former. The delay, such as it has been, has caused the petitioners no prejudice. No material advance can be made towards settling this dispute until the vessels—the salved and the salvor—return to Great Britain. This cannot happen yet for several weeks to come. The petitioners' first ground therefore entirely fails.

The second ground is one that I think the petitioners are not entitled to plead. They cannot be heard to say that a Court to whose judgment they bound themselves to submit has no jurisdiction to decide the question which they agreed to submit to it. The English Court may say this, and if, when the question is brought before it, that Court decide that it has no jurisdiction, or declines to adjudicate upon the respondents' claim, then either party may apply to this Court. But as the petitioners agreed that the question should be decided by the English Court if the respondents, in the exercise of their option, advanced their claim in England, I am for keeping the petitioners strictly to the bargain which they made and giving the respondents the opportunity of bringing their claim before the English Courts. I see no reason at present to suppose that the English Courts will decline to adjudicate upon the claim in question, especially when regard is had to the terms of the 565th section of the Merchant Shipping Act of last year. I am therefore for refusing this petition.

LORD JUSTICE-CLERK—I agree with all your Lordships as to what is disclosed in this petition and the answers, namely, that upon the face of them it appears pretty plain that there is an existing agreement between the parties to this petition by which the salvors of the vessel have the option, if they choose, of raising their case for salvage either in Scotland or England, as they may elect, and I entirely concur also that nothing has occurred as yet, looking to everything disclosed on the face of the petition and answers, to exclude them from having the benefit of that agreement.

I do not think there was any undue delay. I think that the information which they asked for, and which they could not get, they were well entitled to get, because it was necessarily a part of the means by which their claim could be stated and ascertained; and further, that as no inquiry could possibly take place practically into the case until the arrival of the respective vessels, the salvors and the salved, they were not under any undue delay in taking advantage of what was their right under the agreement. Therefore the only question is as between sisting this petition—keeping it open—or dismissing it. Now, I must frankly say that my strong impression was, that sisting the petition would have been the proper course, the only reason which has been suggested why the sist might create any difficulty being that the salvors here were afraid that, if the petition stood sisted in this Court, it might prejudice them in the question before the Court of Admiralty in London. I think that could have been very easily avoided; it would have been very easy so to state our opinion, or so to frame the interlocutor as to prevent anything of that kind taking place. The matter is really, however, in its

essence as regards interest involved in it extremely small, because, as Lord Young has pointed out, this is a very simple and inexpensive petition, and can be renewed, because any judgment pronounced here dismissing the petition is practically dismissing it *in hoc statu*, for it is perfectly open to raise it again at any time the present petitioners may think fit, if the Court in England holds that it has no jurisdiction. I have therefore come to the conclusion that, as the majority of your Lordships are in favour of dismissing the petition, I shall not dissent from but concur in that being done.

The Court dismissed the petition.

Counsel for the Petitioners—C. S. Dickson—Salvesen. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Respondents—Ure—Campbell. Agents—Hamilton, Kinnear, & Beatson, W.S.

Friday, March 8.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

ARTHUR *v.* LINDSAY AND OTHERS.

Process — Amendment of Record — Jury Trial.

In an action of damages for slander brought against several defenders, the Lord Ordinary, on 27th February 1895, approved of issues for trial of the cause. The pursuer thereafter gave notice for trial at the Spring Sittings of the First Division, and on 8th March he applied to the Division for diligence to recover documents. At the hearing of this application two of the defenders moved the Court to grant them leave to amend their record by adding a plea of incompetency. The Court *refused* this motion as incompetent, in respect that the interlocutor of the Lord Ordinary appointing issues for trial of the cause had become final, no reclaiming-note having been presented against it.

Diligence — Diligence for Recovery of Criminal Precognitions—Opposition by Lord Advocate—Public Interest.

The pursuer in an action of damages for slander against a procurator-fiscal averred that he had maliciously inserted false and calumnious statements in the precognitions in a criminal case, and had shown them to other persons, and applied for a diligence to recover these precognitions, and other documents connected with the case. The Lord Advocate having opposed the application on the general ground that the production of such documents was contrary to the public interest, the Court (*dub.* Lord Kinnear) *refused* to grant the diligence.

This was an action of damages for slander at the instance of Dr Hugh Arthur, Fruitfield, Airdrie, against Alexander Deuchar Lindsay, Procurator-Fiscal, Airdrie, William Glasgow Jameson, writer, Airdrie, and Robert Shanks, wood merchant, Airdrie.

The pursuer averred against Lindsay, *inter alia*, that he had inserted in the pursuer's precognition in a criminal case which had been instituted against Mrs Bell, the matron of Airdrie Fever Hospital, certain statements which had not been made upon any information supplied by him, and which were entirely devoid of truth. These statements were introduced for the purpose of reflecting blame upon the pursuer's professional conduct. The pursuer further averred that the Procurator-Fiscal had maliciously and without probable cause inserted false statements in the precognitions of other witnesses; that he had in breach of his duty shown them to the defender Jameson and others, and that he had maliciously and without probable cause transmitted them to the Crown office with a view to a criminal charge being made against the pursuer. He averred that the other defenders had slandered him upon various occasions condescended on.

The defender Lindsay averred that the precognitions contained an accurate record of the statements made by the witnesses; and further, that the defender Jameson was his depute, so that anything said to him with reference to the criminal case was confidential and privileged.

Issues were proposed by the pursuer, and counter-issues by the defenders, and on 27th February 1895 the Lord Ordinary (STORMONTH-DARLING) pronounced an interlocutor holding the issues and counter-issues as adjusted and settled, and appointing them to be the issues and counter-issues for the trial of the cause.

Notice for trial at the Spring Sittings of the First Division was subsequently given by the pursuer.

On March 8th 1895, the case having appeared in the Single Bills on a motion for diligence by the pursuer, the defenders Jameson and Shanks craved leave to amend the record by adding a plea of incompetency. This was opposed by the pursuer, who argued—This plea could not be taken now, only fourteen days before the trial, but must be held to have been waived. The plea of incompetency was one that might be waived, and they were therefore barred from putting it forward now.

Argued for the defenders—By sec. 29 of the Court of Session Act 1868 the Court might at any time allow an amendment, and owing to the very complicated nature of the case and number of issues this plea ought to be admitted now.

At advising—

LORD PRESIDENT—The motion before us is for leave to amend the record by stating on behalf of the second and third defenders a plea to the competency of the action. I