Martinmas, and that the child born 305 days after was the fruit of that intercourse. Assuming that her oath was believed, then the *onus* lay with the defender of fixing a date which made it impossible that he could be the father of the child.

Authorities—*Boyd* v. *Kerr*, June 17, 1843, 5 D. 1213; *Gibson* v. *M'Fagan*, March 20, 1874, 1 R. 853; *Henderson* v. *Somers*, July 7, 1876, 3 R. 997.

At advising—

LORD JUSTICE-CLERK—The proof in this case has not been all that could be desired. The case is narrow on the facts, and I do not know what our judgment would have been had it come up to us from the first. But the Sheriff below has bestowed great pains on it, and on the fact whether the defender is right or not in saying that what took place was beyond the ten months preceding before the birth of the child. There is no question that if it was within that period he is the father of the child. Then there can be no doubt that the pursuer is entitled to give her oath on the matter, and if it appear sufficient she will be believed; but then her oath to be sufficient must be to the effect that the intercourse took place on a specified occasion which made it possible that he could be the father of her child, the fruit of that intercourse; and if the pursuer fails to give such evidence as will entitle her to be thus believed, she must fail in her case; so that the question is, Has she done so here? Now, no doubt, if the extreme case is taken, "six weeks and two days" before Martinmas, that brings the period to 313 days; "five weeks" brings it to 305 days; and "four weeks" brings it to a period on which there can be no question at all. On the whole matter, however, though it is a narrow case—and I cannot but think that the time of intercourse might have been cleared up more correctly—I see no reasons for disturbing the Sheriff's judgment.

LORD GIFFORD—I concur.

LORD YOUNG—I have come to be of the same opinion, but I confess not without some difficulty. Both parties have been examined here, and the opinions which your Lordships give, and in which I concur, involve this, that one of them, the defender, is not speaking the truth, and we therefore do not believe him. He says that he went with Edmund Kettles to the pursuer's house late one night, and induced the two girls to rise from their beds and admit him and his companion as visitors; and that while Kettles and Elizabeth Millar went to the kitchen, he went into the byre with the pursuer, but that although he remained with her about an hour nothing took place between them there. Now, this we do not believe, and this is the material feature in the case, because we do believe the pursuer when she swears that connection took place between them. Then the pursuer swears that from the intercourse which she then had with the defender she conceived the child which was born 19th August 1879. She knew if she did so, and swears to it; but then it is relevantly urged she is not to be believed, because it is impossible that a child born then could have been begotten at the meeting. Now, if this were so, either by absolute certainty or by such probability as to make it extremely unlikely, we would yield to it and give it weight against the evidence of the pursuer; her case would then break down, and her action be at an end. But I am of opinion that this Court cannot (as matter of judicial cognisance) say it is either impossible or extremely unlikely that a child born on the 19th of August could not have been begotten on the date referred to by the pursuer, looking to the evidence of the point. I know of no Act of Parliament nor of any text which says that an intercourse which took place "five weeks" before Martinmas may not produce a child born 19th August following. The question is more properly one for a jury, or a question of fact for the Court, but I do not think that there is that certainty or strong likelihood which should induce us to reject the pursuer's evidence. I therefore agree with your Lordships that the Sheriff's judgment should be affirmed.

The Court therefore affirmed the judgment of the Court below.

Counsel for Appellant — Millie. Agents — Macrae, Flett, & Rennie, W.S.

Counsel for Respondent—Nevay—J. Gibson. Agent—W. N. Masterton, L.A.

Tuesday, December 7.

SECOND DIVISION.

[Lord Adam, Ordinary.

M'LEOD & COMPANY *v.* HARRISON.

Sale—Bankrupt—Stoppage in transitu.

B. & Sons purchased from M. & Co. some goods to be shipped by P.'s first steamer from Leith to Riga, and to be delivered to them at Moscow. The bill of lading was made out in their name. On the insolvency of B. & Sons, M. & Co. stopped the goods *in transitu* at Riga, when in the hands of the Riga Dunaburg Railway Company, and raised an action against the manager of their sequestrated estate for the price of the goods. The Court *sustained* the action, holding that the goods were still *in transitu* when stopped by the pursuer.

Process—Amendment of Record.

Motion for leave to amend record *refused*, on the ground that the amendment proposed, even if relevant, involved a new issue.

On 27th March 1877 William Blews & Sons, who were bell and brass founders, with places of business at Birmingham, West Bromwich, and Moscow, purchased, by order of that date, a quantity of gas-piping from William M'Leod and Co., metal merchants in Oswald Street, Glasgow. The terms of the transaction were that the goods should be paid for by six months' bill from date of shipment and bill of lading, and that they were to be shipped by Messrs D. R. Macgregor and Co.'s (of Leith) "first steamer from Leith to Riga, to our orders." By a second order of the same date Wm. Blews & Sons purchased another quantity of gas-piping on exactly similar terms, and they themselves corresponded with Messrs Macgregor & Co., and arranged with them as to the freight. On the 20th April 1877 the goods, in two parcels, were duly despatched by M'Leod & Co. to Messrs Macgregor & Co., and invoices being sent to William Blews & Sons, they granted their

acceptance for the amount at six months from the 18th April. The goods duly arrived at Leith, and were shipped by Messrs Macgregor & Co. on board their first steamer to Riga, the "Waverley." Separate bills of lading were made out for each parcel of goods, and were handed to William Blews & Sons. They were dated Leith, 24th April 1877. The following specimen is taken from the Lord Ordinary's note appended to his interlocutor — "Transmarine goods traffic, Leith to Moscow *via* Riga, in transit." The goods "are to be delivered in the like good order and condition at the aforesaid port of Riga, unto the agent of Riga Dunaburg Railway Company or to their assigns, to be by them forwarded in transit to Messrs William Blews & Sons, Moscow —freight for the said goods Leith to Moscow, including Riga charges, being hereby agreed upon to be 30¾ cops per pood, to be paid in Moscow, with primage and average accustomed, and charges as stipulated." On the 12th May thereafter William Blews & Sons issued a circular instructing that they had been compelled to file a petition for liquidation, and Charles Augustus Harrison, public accountant, Birmingham, was appointed receiver and manager of their estate. On hearing this M'Leod & Co. wrote on 17th May 1877 to Messrs Macgregor & Co. requesting them to stop the pipes in transit, and on 30th May thereafter the latter wrote back saying that their agent had done so at Riga while the goods were in the hands of the Riga Dunaburg Railway Company. The present action was then raised by M'Leod & Co. against Harrison, the receiver and manager for Messrs Blews & Sons' estate, concluding for the sum of £269, 7s. 5d., with interest thereon at the rate of 5 per cent. per annum from 21st October 1877, being the price due for the gas-piping. The pursuers pleaded—(1) That having sold to Blews & Sons the gas-piping, and William Blews having become insolvent and bankrupt at and prior to the time when the goods were delivered to them, or to any agent on their estate, for custody, they were, the price being unpaid, entitled to stop the goods *in transitu*, and that the goods were validly so stopped. (2) In respect to the stoppage *in transitu*, they were entitled to decree against the defenders for the price of the goods sold by them to William Blews & Sons, with interest thereon from the date when the bill which was granted for the said price became payable.

The defender, on the other hand, pleaded—(1) that the pursuers' statements were not relevant or sufficient to support the conclusions of the summons; and (2) that the goods having been delivered to Messrs Blews & Sons, and shipped by them at Leith, the pursuers were not therefore entitled to stop *in transitu*.

The Lord Ordinary (Adam) decerned against the defender, ordaining him to make the payment concluded for, and in the note which he appended to his interlocutor he said—"The only question argued to the Lord Ordinary was, whether this was an effectual stoppage of the goods while *in transitu?*

"The Lord Ordinary is clearly of opinion that it was. It appears to him that the goods were directed to be delivered to William Blews & Sons at Moscow, and nowhere else, and that the *transitus* lasted until the goods arrived at their destination in Moscow. The only ground on which the defender maintained that the stoppage was ineffectual is that set forth in their third plea-in-law, that the goods were delivered to William Blews & Sons and were shipped by them at Leith. By this it is not meant that the goods were actually delivered to William Blews & Sons, but that Macgregor & Co. were their agents, and that delivery to Macgregor & Co. was the same in law as delivery to them. In the case *ex parte Rosevear China Clay Co.*, April 24, 1879, L.R. 11 Chancery Division, 560, it was held that delivery of goods by a vendor to a carrier hired by the purchaser is only constructive, not actual delivery, inasmuch as the contract with a carrier to carry goods does not make him the agent or servant of the person with whom he contracts. The goods in the present case were shipped in a general ship, but the same has been decided in the case where the goods were shipped in a ship chartered by the purchaser for the purpose—*Brendston v. Strang*, April 21, 1860, L.R. 3 Chancery App. 588. It appears to the Lord Ordinary that the goods in this case were at the time of the stoppage in the custody of a third person intermediate between the seller, who had parted with, and the buyer who had not yet acquired, actual possession, and therefore were liable to be stopped by the unpaid sellers. See also *ex parte Watson*, February 15, 1877, L.R. 5 Chancery Division, 35; *ex parte Barron*, March 12, 1877, L.R. 9 Chancery Division, 783; *ex parte Cooper*, February 20, 1879, L.R. 11 Chancery Division, 68; *ex parte Goldey, Davis, & Co.*, February 12, 1880, L.R. 13 Chancery Division 628."

The defender reclaimed, and during the discussion craved leave to add to his record the following amended statement of facts—"At all events, the goods were delivered to Blews & Sons at Riga.

"The agents for Blews & Sons at Riga and Revel are Kniep & Werner, shipping agents at these ports, to whose care the goods were consigned by the bills of lading. Kniep & Werner act as the general and shipping agents of Blews & Sons, and have a running account with them, in which the usual agency commission is charged. The disbursements amount to £3000 or £4000 annually.

"On the arrival of the "Waverley" at Riga, and on or about 4th May 1877, the goods were discharged and delivered to Kniep & Werner as agents for Blews & Sons.

"On 6th May 1877 notice was received by Kniep & Werner from the Riga and Dunaburg Railway Company that the goods would, on being handed over to them, be detained until the arrival of instructions.

"On 13th May Kniep & Werner, having thus been warned of the risk of stoppage, lodged protest against the proposed detention, and asked whether the railway company had received orders which would admit of the goods being forwarded by them.

"On same day the railway company informed Kniep & Werner that they had left it open to Helmsing & Grimm, acting for Macgregor & Company, to lodge an attachment within twenty-four hours.

"On 17th May, and before resolving to hand over the goods to the railway company, Kniep & Werner communicated with Mr Grimm, and re-

ceived from him an assurance that no attachment would follow. In reliance on this assurance Kniep & Werner cleared the goods and paid the duty and charges thereon, amounting to Rs. 2300, with a view to forwarding them by the Dunaburg railway to Moscow, and handed them to a wharf warehouseman to be loaded in trucks and delivered to the railway company. They were accordingly loaded and delivered to them.

"On 18th May, and after the goods had been delivered to the railway company, Kniep & Werner were informed by the company that Helmsing & Grimm, in the name of Macgregor & Company, had handed in a notarial protest against forwarding the goods to Moscow."

And also to amend the record by adding the following plea-in-law—"(4) At all events, the goods having been delivered to Messrs Blews & Sons at Riga, and handed over by them to the railway company on the assurance above stated, the pursuers were not entitled thereafter to stop them *in transitu*."

On the merits of the case as it existed prior to his putting in the above amendment the defender argued—The stoppage was incompetent when in terms of the contract the pursuer shipped the goods to the defenders' agents Macgregor & Co. at Leith, taking the bill of lading in the defenders' name; there was then actual delivery, and the transit ended. It has been so held in the case of *Schotsmans* v. *Lancashire and Yorkshire Railway Co.*, Jan. 16, 1867, L.R. 2 Ch. App. 232, even where the goods had been shipped in a general ship known to belong to the purchaser. If the pursuer had desired to restrain the effect of such delivery, he should have, on the authority of *Turner* v. *Trustees of Liverpool Docks*, May 26, 1851, L.J. 20 Exch. 393, taken the bill of lading for goods deliverable to his own order.

The pursuer argued—The stoppage was competent. The transit could never end till the goods reached Moscow, for it was there that the goods were to be finally delivered to Blews & Co. as consignees. The mere fact that the goods came into the hands of Macgregor & Co. at Leith did not affect the *transitus* in the smallest degree. They held the goods merely as carriers.

Authorities—*Morton* v. *Abercromby*, Jan. 7, 1858, 20 D. 362; *Mitchell* v. *Wright*, Feb. 10, 1871, 9 Macph. 516, Bell's Com. (M'Laren's ed.) 232; *Gibbes in re Whitworth*, Nov. 8, 1875, L.R. 1 Ch. Div. 101; *ex parte Golding, Davis, & Co. (Limited) in re Knight*, Feb. 12, 1880, L.R. 13 Ch. Div. 628; *ex parte Rosevear China Clay Co.*, April 24, 1879, L.R. 11 Ch. Div. 560; *ex parte Falk in re Kiell*, May 6, 1880, L.R. 24 Ch. Div. 446; *ex parte Cooper*, Feb. 20, 1879, L.R. 11 Ch. Div. 68; *ex parte Barron*, March 12, 1877, L.R. 6 Ch. Div. 783.

At advising—

Lord Justice-Clerk.—When the case was first argued we thought the goods when stopped were still *in transitu* under the original sale, and not delivered in the sense of completing the *transitus*; but then it is stated on the other side by the purchasers that the *transitus* did end at Riga by the goods being specially delivered to their agents, and that therefore they must be considered to have been completely delivered. If that were so, I think it would have modified the matter, because though the question might run into shadowy subtilties, yet the question would be a simple one of fact as to whether the goods were in the hands of the pursuer to be forwarded, or in the hands of the purchaser's agent, or otherwise, when they had reached their destination.

We have here an amended statement of facts, which I think I am not inclined to allow to be added to the record. It is a singular statement that information was given to the railway company that the goods on arrival might be stopped by the creditors of the purchaser (and it is clear that Macgregor & Co. knew that there were circumstances which would make such stoppage competent); that it came to the early knowledge of Kniep & Werner, the purchaser's agents, that the goods might be stopped, and they therefore refrained from clearing the goods and paying the duty and charges thereon, but in the end they did clear the goods with a view to forwarding them by the Dunaburg Railway to Moscow, and handed them to a wharf warehouseman to be loaded in trucks and delivered to the railway company, and they were then stopped *in transitu*. But then it is averred that this was only done on the understanding that there should be no attachment of the goods while on the railway. This is an unsatisfactory statement even if relevant, and I do not think that parole proof of a conversation of this kind is sufficient to justify us in allowing an amendment or for giving further proof in the case. On the merits of the whole case I think as I thought before we heard argument on the proposed amendment, that the goods were *in transitu* when on their way to the purchaser, and that therefore the Lord Ordinary is right in the views which he has taken on the case.

Lord Gifford—I am of the same opinion. And first as to the proposed amendment. It appears to me to be simply an appeal at a late stage in the case to the discretion of the Court. There is no reason why we should not have had the information at first, and I therefore agree with your Lordship that the amendment ought not to be allowed. I do not think, in any view, that it would much alter the case. It would simply involve inquiry as to what took place at a different place, and looking to the position of parties I think it would be hardly fair to commit them to a new amendment of this kind. I do not think it is relevant, and it looks just like a change of case from the beginning. Secondly, as to the merits. I do not think the transit ever terminated. Moscow was the place of business of the purchasers, and not Riga. The goods were just as much *in transitu* when on their way to Moscow as at Leith, though necessarily they went into the hands of successive carriers, and someone must carry them; the seller was in good time in stopping them before they had reached their destination, and he thus was enabled to secure that the goods should not go to the bankrupt purchaser's creditors, and was saved from being left to take his chance in a mere ranking against the debtors' estate.

Lord Young—I am of the same opinion. It is certain that the destination of the goods was Messrs Blews & Sons, Moscow. We heard argument formerly as to whether the goods, in a question with the seller at least, were delivered when they were given into Macgregor & Co.'s hands at Leith. We thought not, and that

Macgregor & Co. were only the sellers' agents to forward the goods to their destination. Now, the question is, had these goods reached their destination, or had the buyer ended their destination and substituted another before they were stopped? I am clearly of opinion on the evidence that the goods were stopped before they reached their destination and while on their way, and that they were therefore stopped *in transitu*. The idea is very well expressed in the bill of lading granted for the goods, and which the Lord Ordinary gives as a specimen in his note—"To be delivered in the like good order and condition at the aforesaid port of Riga, unto the agent of the Riga Dunaburg Railway Company, or to their assigns, to be by them forwarded in transit to Messrs William Blews & Sons, Moscow, freight for the said goods, Leith to Moscow, including Riga charges, being hereby agreed upon to be 30¾ cops per pood, to be paid in Moscow with primage and average accustomed, and charges as stipulated." And it was while the goods were being thus forwarded in transit to Blews & Son, Moscow, that they were stopped. It would have been a different case if Blews & Son had changed their order and instructed their agent at Riga to keep them there as their destination, and we allowed the defenders time to enable them to make a statement to this effect and put it on record. But we have got no such statement, but only an account of what must necessarily happen in one way or other to all goods on their way from Leith to Moscow by Riga. With respect to the allegation that the goods were sent to the Dunaburg Railway Station on the assurance of Helmsing & Grimm that they would not be stopped, the averment is not made properly. An averment which goes to bar a party of a legal remedy otherwise competent, ought to be precise and substantial; and further, it is an averment which raises a new issue, and is only important on the assumption that the defender has failed on his original issue that the law of transit did not apply. I do not think the defenders would be entitled to lead evidence on the new issue without paying all previous expenses, and as the estate is originally a small one it is scarcely likely they would deem it worth while to go further into the matter, even if the averment were precise enough to induce us to admit it.

I therefore concur that the additional amendment ought not to be allowed, and that the Lord Ordinary's interlocutor should be affirmed.

The Court therefore affirmed the Lord Ordinary's interlocutor.

Counsel for Appellant—Asher—Keir. Agent—John H. Lindsay, S.S.C.

Counsel for Respondent — Kinnear—Rhind. Agent—W. Pasley Stevenson, S.S.C.

Tuesday, December 7.

SECOND DIVISION.

[Sheriff of Forfar.

FLEMING *v.* BURNS.

Heritable and Moveable as between Landlord and Tenant.

A person who had been yearly tenant for a period of ten years of a house and garden, removed at the expiry of his period of occupancy a number of small trees which he planted in the garden, a quantity of turf which he had laid down on the terraces in the garden, and a quantity of gravel, which he had also laid down, from the walks. *Held* that he was not entitled to remove the bushes or turf.

Question, Whether he was entitled to remove the gravel?

Tuesday, December 7.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

BUCHANAN *v.* STEVENSON AND OTHERS.

Process—Expenses—Caution for Expenses in a Reclaiming-Note where Fraud Alleged—Reduction—Bankrupt.

In an action of reduction on the ground of fraud the Lord Ordinary gave decree against a defender. Both parties reclaimed. On the reclaiming-notes appearing in Single Bills counsel for the pursuer moved that the defender should be ordained to find caution for expenses, in respect that his estates were in sequestration, and that the trustee thereon had not appeared. The Court *refused* the motion, with three guineas of expenses, observing that the general rule, as laid down by the House of Lords in *Taylor* v. *Fairlie's Trustees*, March 1, 1833, 6 W. & S. 301, was against a defender in such a position as this being obliged to find caution for expenses of process, and that in this case, where the bankrupt's character was challenged, fraud being alleged, he should be allowed to proceed in the action without doing so.

Counsel for Pursuer—Mackintosh. Agent—Alex. Morison, S.S.C.

Counsel for Defender—Robertson. Agent—James Coutts, Solicitor.

Thursday, December 9.

SECOND DIVISION.

[Sheriff-Substitute of Midlothian.

SETON *v.* PATERSON.

Hiring—Liability of Hirer—Breach of Implied Condition of Contract of Hire.

If the subject of hire suffer injury while the hirer is dealing with it in a way not contemplated by the contract, it lies upon him