that he can take his carts on the pier without paying anything, no separate charge being made for any cart except when it is embarked or is landed. Now, notwithstanding the disadvantage alluded to, the case expressly sets forth "That such carts and wheelbarrows, &c., were constantly taken down the pier without charge for the purpose of removing goods." Such being the statement in the case, the contention of the assessor cannot be reconciled with it. That contention is as follows:—"That by their (the owners') exclusion of other horses and carts from the pier, the owners had a monopoly of the carting business to and from it, which was an advantage they enjoyed from which all others were debarred; and that the revenue or value of that advantage was heritable, and moderately estimated at £156, 10s." Now, it is the law that where a trade is a monopoly attached to particular premises, the monopoly practically belongs to the landlord, and he would therefore expect his rent to be in proportion, not only to the value of the premises *per se*, but also to the value of the trade they enable a tenant to carry on. But it must be a monopoly pure and simple. If it is only some slight advantage for managing the business which a tenant would possess if the subject were leased, this would not be a ground for treating the return from that business as a heritable subject to be valued; and I cannot say that because the owners have the right to bring a horse and a cart down the pier while the general carter has only a right to bring a cart, and is obliged to draw it up to the end of the pier before he can yoke his horse, that the owners have a monopoly requiring the cartage business to be entered as an item in ascertaining the annual value. I am therefore of opinion that £156, 10s. ought to be deducted from the yearly rent or value of £1217, 16s., as fixed by the Commissioners.

Lord Kinnear concurred.

The Court was of opinion that the determination of the Valuation Committee was wrong, and that the sum of £156, 10s. should be deducted from the sum of £1217, 16s., leaving as annual value the sum of £1061, 6s.

Counsel for Appellants—W. Campbell. Agents—Skene, Edwards, & Bilton, W.S.

Counsel for Assessor—Pearson. Agent—R. Kinloch, W.S.

COURT OF SESSION.

Tuesday, February 27.

FIRST DIVISION.

[Sheriff of Forfarshire.

ADAM & SONS *v.* KINNES.

Process — Appeal — Competency—Cessio—*Debtors (Scotland) Act* 1880 (43 *and* 44 *Vict. cap.* 34), *secs.* 8 *and* 9—*Sheriff Court (Scotland) Act* 1876 (39 *and* 40 *Vict. cap.* 70), *sec.* 26, *sub-sec.* 4.

An interlocutor by a Sheriff pronounced in terms of sec. 9, sub-sec. (1), of the Debtors (Scotland) Act 1880, in a petition at the instance of a creditor, finding that there is *prima facie* evidence of notour bankruptcy, and appointing the petitioner to follow forth the further procedure required by the statute, and the defender to appear for examination, cannot competently be appealed to the Court of Session.

The Debtors (Scotland) Act 1880, sec. 8, provides that "Any creditor of a debtor who is notour bankrupt within the meaning of the Bankruptcy (Scotland) Act of 1856, or of this Act, may present a petition to the Sheriff of the county in which such debtor has his ordinary domicile, setting forth that he (the debtor) is unable to pay his debts, and praying that he may be decerned to execute a disposition *omnium bonorum* for behoof of his creditors, and that a trustee be appointed who shall take the management and disposal of his estate for such behoof, and such process shall be taken and deemed to be a process of *cessio*. In the petition there shall be inserted a list of all the creditors of the debtor, specifying their names, designations, and places of residence, so far as known to the petitioner, and with the petition shall be produced evidence that the debtor is notour bankrupt."

Sec. 9, sub-sec. 1, provides that "The Sheriff, if he is satisfied that there is *prima facie* evidence of notour bankruptcy, shall issue a warrant appointing the petitioner to publish a notice in the *Edinburgh Gazette* intimating that such a petition has been presented, and requiring all the creditors to appear in Court on a certain day, . . . and the Sheriff shall further ordain the debtor to appear on the day so appointed for the compearance of creditors in the presence of the Sheriff, for public examination; and the debtor shall, on or before the sixth lawful day prior to the day so appointed, lodge . . . . a state of his affairs, subscribed by himself, and all his books, papers, and documents relating to his affairs, in the hands of the Sheriff-Clerk."

Sub-sec. 2 of the same section provides for the examination of the debtor in public Court, in the Sheriff's presence. Sub-sec. 3 provides that the Sheriff shall, on such examination being taken, "allow a proof to the parties, if it shall appear necessary, and hear parties *viva voce*, and either grant decree decerning the debtor to execute a disposition *omnium bonorum* to a trustee for behoof of his creditors, or refuse the same *hoc statu*, or make such other order as the justice of the case requires."

Sub-sec. 4 provides that "Any judgment or interlocutor or decree pronounced in such petition may be reviewed on appeal in the same form, and subject to the like provisions, restrictions, and conditions as are by law provided in regard to appeals against any judgment or interlocutor or decree pronounced in any other process of *cessio bonorum*."

John Adam & Sons, plasterers, Dundee, presented a petition in the Sheriff Court of Forfarshire at Dundee against James Kinnes, ironmonger, Dundee, praying the Court to ordain the defender to execute a disposition *omnium bonorum* for behoof of his creditors, and to appoint a trustee who should take the management and disposal of his estate for such behoof.

The petitioners set forth that they were creditors of the defender in respect, *inter alia*, of

a bill for £100 and interest thereon, amounting to £16, 9s., and also for the taxed amount of expenses decerned for in their favour in the Court of Session in an action of damages at the instance of J. & W. Kinnes and the defender against them, amounting with extract dues to £46, 15s. 7d. (see *ante*, 8th March 1882, vol. xix. p. 478). They further set forth that the defender had been duly charged upon the said extract decree, and the days of charge had expired, and that he had also been charged on an interim decree of the Court of Session to pay to them the expenses in a petition which had depended before that Court, and that on 12th December 1882, in virtue of this interim decree and charge, arrestments of certain moneys of the defender had been used in the hands of David Myles, accountant, Dundee, as judicial factor on a trust-estate in which the defender was interested.

The petitioners averred that the defender was insolvent, notour bankrupt, and unable to pay his debts. They appended to the petition, as required by the statute, a list of all the known creditors of the defender. Lastly, they set forth that notice of their intention to present the petition was duly given as required by the Act of Sederunt anent Processes of *Cessio*, dated 22d December 1882.

They pleaded that "the defender, being notour bankrupt, insolvent, and unable to pay his debts, should be decerned to execute a disposition *omnium bonorum*, and a trustee should be appointed as craved."

A caveat had been lodged for the defender craving that intimation might be made to his agent before any deliverance should be issued on any petition for *cessio* which might be presented at the petitioners' instance.

On 29th January 1883 the Sheriff pronounced this interlocutor:—"Having heard parties' procurators on the caveat, and having seen the productions, and being satisfied that there is *prima facie* evidence of notour bankruptcy, appoints the pursuers to publish a notice in the *Edinburgh Gazette* intimating that such petition praying that James Kinnes be decerned to execute a disposition *omnium bonorum* for behoof of his creditors, and that a trustee be appointed who shall take the management and disposal of his estate, has been presented, and requiring all the creditors of the said James Kinnes to appear in Court within the Sheriff Court-house, Dundee, on Wednesday, the 14th day of February next, at eleven o'clock forenoon; at which time and place ordains the said James Kinnes to appear personally before the Sheriff or Sheriff-Substitute for public examination; such notice to be published at least eight days before said diet of compearance: And appoints the pursuers, within five days after the publication of such notice, to send letters, post paid, to all the creditors known to the pursuers, containing a copy of said notice to appear time and place foresaid: Ordains the debtor James Kinnes, on or before the sixth lawful day prior to said day of compearance, to lodge with the Sheriff-Clerk, Dundee, a state of his affairs subscribed by himself, and all his books, papers, and documents relating to his affairs in terms of the statute: Further, appoints a copy of the petition and this deliverance to be served on the debtor."

The defender appealed to the Court of Session.

The respondents objected to the competency of the appeal. Argued for them—Appeal was incompetent. The Sheriff was vested with a discretion by the statute in determining whether there was *prima facie* evidence of notour bankruptcy, and on his deciding that question he had no option but to grant the warrant. This was merely a deliverance or warrant, not a decision on the merits or final judgment, and therefore not appealable.

Argued for appellant—(1) On the competency: This interlocutor was appealable; the right to appeal existed in every case in which it was not expressly prohibited by statute. (2) On the merits: This was a judgment damaging the credit of the appellants. It was the most serious deliverance in the whole process, as it compelled him to submit his whole affairs to scrutiny.

Authorities—43 and 44 Vict. cap. 34, secs. 7 and 8; 39 and 40 Vict. cap. 70, sec. 26, sub.-sec. 4; 6 and 7 Will. IV. cap. 56, sec. 4; 44 and 45 Vict. cap. 22.

At advising—

Lord President—The remedy which is provided by the statute of 1880, called the Debtors (Scotland) Act, and which allows a creditor to present a petition to the Sheriff requiring the debtor to execute a disposition *omnium bonorum* for behoof of his creditors, is somewhat of a novelty in the law, and indeed the Act is on the whole rather an anomalous piece of legislation. It seems to have been thought just and reasonable in taking away from creditors the right to imprison their debtors to supply them with an equivalent, and accordingly there was substituted a petition by creditors against their debtor in the shape of what is called a process of *cessio*, which differs from a warrant to imprison, in place of which it came, in this respect, that the latter could be suspended; but no equivalent is to be found for that remedy in this statute, for we could not possibly entertain a bill of suspension. There should accordingly have been some other mode of staying execution substituted by this statute, provided the debtor could show that the petition was groundless, in order to prevent any damage arising to him from the preliminary procedure, for it appears that the Sheriff has no alternative but to issue the warrant if he thinks that there is *prima facie* evidence of notour bankruptcy, while all that we can do in the matter is to give effect to the provisions of the statute. The remedy which is sought here is to bring under review, by way of appeal, the warrant which the Sheriff has pronounced in terms of sec. 9, sub.-sec. 1, of this Act. Now, I can find no countenance in the statute for any such procedure as the present appeal. This is not a decree; it is only a preliminary order in the process which is to follow. All that it does is to appoint the petitioner to publish in the *Gazette* a notice that a petition praying that the bankrupt be decerned to execute a disposition *omnium bonorum* for behoof of his creditors has been presented, and that the creditors are required to meet the bankrupt at the time specified in the warrant. When that time comes then a judicial process may be commenced, ending in a decree, for the Sheriff may allow a proof, or he may grant *cessio*. After the Sheriff has decided whether or not there is to be a disposition *omnium bonorum*, then that interlocutor

is one which may be appealed, because by such an interlocutor the merits of the case are disposed of. If such a judgment is not final, then there is no such thing as a final judgment at all. But the interlocutor now before us is not of that character, nor is it of such a kind as would be appealable in an ordinary Sheriff Court case. By sec. 9, sub-sec. 4, of this Act, it is provided that "Any judgment, or interlocutor, or decree pronounced in such petition may be reviewed on appeal in the same form, and subject to the like provisions, restrictions, and conditions as are by law provided in regard to appeals against any judgment, or interlocutor, or decree pronounced in any other process of *cessio bonorum*." Now, this necessarily carries us back to sub-sec. 4 of sec. 26 of the Sheriff Court Act of 1876, which provides that "Judgments or interlocutors pronounced in such actions shall be reviewed on appeal in the same form, and subject to the like provisions, restrictions, and conditions as are by law provided in regard to appeals against any judgment or interlocutor pronounced in any other action in the Sheriff's Ordinary Court, but warrants of interim protection or interim liberation shall become effectual when granted, and remain good till recalled." And that carries us back to the Sheriff Court Act of 1853, which provides (sec. 19) that it "shall not be competent to take to review of the Court of Session any interlocutor, judgment, or decree of a Sheriff not being an interlocutor sisting process or giving *interim* decree for payment of money or disposing of the whole merits of the cause." From all this it appears impossible to say that such an interlocutor as we have here could be brought under review by any process of appeal. I think, therefore, that we must sustain the objections to the competency of this appeal. The debtor by the Act of 1880 gets six days' notice of the procedure which is to be followed, and we are not in a position, in carrying out the provisions of the Act, to afford him any further relief, and can in fact do nothing until an interlocutor allowing or refusing *cessio* shall have been pronounced.

Lord Deas—No doubt the publication in the *Gazette* of a notice such as the Sheriff has appointed may be attended with serious consequences to the credit of the party petitioned against, but the Legislature seems to have looked rather at incongruity of allowing appeals in such cases than to the position or interests of the parties. As the Legislature has so acted we cannot alter the state of matters, but our later decisions on this and similar points may make parties a little cautious in making applications similar to the present. If the application was made in *mala fide* the consequence might be most serious to the applicant.

Lord Mure—I think that the objections which have been taken on the question of competency are well founded, and that this appeal is incompetent. Some qualification ought no doubt to have been inserted, or some method of appeal provided by this Act of 1880, as it is clear that most serious injury may be done to persons in trade if they are liable to have their private and business affairs disclosed without perhaps there being any very good reason for the procedure. But the provisions of the Acts of Parliament leave us no alternative but to refuse the appeal.

Lord Shand—There can be no doubt, I think, that this statute introduced great novelties into the law of Scotland, one of which was that a creditor should be able to compel his debtor to grant a disposition *omnium bonorum*. It seems to me a pity that the procedure under this Act should be of so summary a character, for not only is the debtor to be obliged to grant the deed referred to, but there is also a provision for the appointing of a trustee, and for the examination of the debtor with all his books and vouchers, the whole to take place within a very short time of the notice in the *Gazette*. I say that it is a pity that all this should be done so summarily; but what we have here to do with is the effect of the statute, and the question comes to be, whether such a deliverance as that now before us can be appealed? Now I agree with your Lordships in thinking that the statutory provisions regulating appeals clearly prevent this, and that there can be no appeal until by interlocutor *cessio* is either refused or granted.

The Court dismissed the appeal as incompetent.

Counsel for Appellant — Rhind. Agents — Sutherland & Clapperton, W.S.

Counsel for Respondent — Moody Stuart. Agents—Rhind, Lindsay, & Wallace, W.S.

Tuesday, February 27.

FIRST DIVISION.

LIQUIDATORS OF CITY OF GLASGOW BANK *v.* ASSETS COMPANY.

Public Company—Winding up—Disposal of Books and Documents—City of Glasgow Bank Liquidation Act 1882 (45 *and* 46 *Vict. cap.* 152), *secs.* 5, 21.

The liquidators of a public company made compromises with insolvent contributories and granted discharges on specified conditions. The remaining assets and liabilities of the original company were subsequently taken over by an Assets Company in terms of a private Act of Parliament, by which all documents containing contracts or agreements were vested in the Company. In a question between the company and the liquidators as to the disposal of books and documents relating to these compromises, *held*, on a construction of the private Act, that the Assets Company was entitled to all documents disclosing the terms of compromise, that it might be seen if the conditions stipulated had been fairly carried out.

Observed that nothing but a case of fraud would induce the Court to go back upon a discharge granted by the liquidators.

On 1st February 1883 a note was presented to the First Division of the Court of Session by George Auldjo Jamieson and others, liquidators of the City of Glasgow Bank, for authority and direction as to the disposal of books and docu-