the Courts of all three parts of the United Kingdom are subject.

The complainers have been allowed to amend their prayer. They now ask the Court, as they have allowed judgment to go against them in absence, to allow them an opportunity of raising the question in Ireland. If there is such a remedy in Ireland, I think it is not incompetent for us to sist procedure till the complainers have had time to make application to the Irish Court. I propose that we sist process for this purpose, but the complainers must be found liable for the expenses incurred.

LORD DEAS—I concur. We cannot examine this judgment as a foreign decree, but we can examine it to the extent of satisfying ourselves whether we ought to give a sist to enable the complainers to make application to the Irish Court.

LORD ARDMILLAN—I had some difficulty whether, without putting an end to this process, we should even grant a sist, but I do not oppose.

LORD KINLOCH—I am of opinion that, at the time the Lord Ordinary's interlocutor was pronounced, he rightly refused this note of suspension.

It is true, speaking generally, that by our law the judgment of a foreign Court is examinable; and if found to have gone out against a person over whom the foreign Court had no jurisdiction, the judgment will not receive effect. But I think the object and effect of the Judgments Extension Act of 1868 (which was an Act of the Imperial Parliament) is to take away the character of a foreign judgment from the judgments of the Supreme Courts of England and Ireland in the matters to which the statute refers; and to give to these, without further inquiry, the full effect as to execution of a judgment of this Court. The statute intended no review of the judgments by this Court, whether on the point of jurisdiction or any other. On the contrary, the theory of the statute is, that each of the Courts is alike competent to pronounce on this as on the other points of the case; and the judgment, if *ex facie* regular, is to receive immediate execution in the three countries alike. It is as to execution, and this alone, that the judgment is put on a footing of identity with a judgment of this Court. By the sixth section of the statute the Courts are authorised to exercise "the same control and jurisdiction" over the judgments presented to them as over their own judgments; but it is added, "in so far only as relates to execution under this Act." I can put no meaning on these words, other than that the respective Courts are debarred from exercising any control or jurisdiction over the judgments presented to them, except to the effect of regulating or suspending execution.

But, under this reserved power, I think the Court is entitled to stay execution till an opportunity is afforded of applying for redress to the Court which pronounced judgment, or to any other Court holding appellate jurisdiction over that Court. This follows, partly from the express language, partly from the general tenor, and, I think, clear intendment of the statute. Under this power, I think we may and ought to comply with the proposition now made to us of sisting procedure to afford the complainers an opportunity to apply to the Irish Courts. But, up to this date, I think we must hold the complainers to have maintained an ill-founded case.

Process sisted for fourteen days, and complainers found liable in expenses.

Agents for Complainers—J. & R. D. Ross, W.S.
Agent for Respondent—A. Kirk Mackie, S.S.C.

Friday, February 10.

WRIGHT *v.* MONCRIEFF MITCHELL (M'GREGOR, BUCHAN & CO'S. TRUSTEE).

Sale — Condition — Rejection — Bankrupt — Statute 1696, *c.* 5. Where the seller undertook to ship goods at Liverpool for Montreal, and accordingly took the bill of lading in the purchasers' name, and consigned the goods to the purchasers' agent at Montreal, and afterwards sent the bill of lading to the purchasers themselves in Glasgow, along with a bill at four months for the price, which was not accepted by the purchasers, who shortly thereafter became insolvent—*Held* that delivery was complete on the goods being shipped, and the bill of lading handed to the purchasers; that the signing of the bill of exchange for the price was not a condition suspensive of the sale, but, in the circumstances, only an ordinary mercantile custom in sales on credit; and that a delivery order signed by the purchasers in favour of the seller, while the goods were on their passage out to Montreal, did not, and could not, operate as a rejection on the part of the purchasers—delivery having been given and accepted; but that, being within sixty days of bankruptcy, the transference thereby attempted was struck at by the Act 1696, c. 5.

This was an appeal from the judgment of the Sheriff of Lanarkshire, in an action raised before him at the instance of Moncrieff Mitchell, C.A., the trustee under a trust-disposition and assignation, for behoof of creditors, of Messrs M'Gregor, Buchan & Co., grain merchants, Glasgow, against John Wright, tea merchant there. The summons sought to have the defender ordained to return or deliver to the pursuer, as trustee foresaid, forty-six half-chests of tea, or alternatively to pay the value of the same, on the grounds, that by means of a delivery order, granted by P. C. M'Gregor in name of the firm, dated 28th March 1867, and addressed to James Smellie, Montreal, to whom the said teas had been consigned by M'Gregor, Buchan & Co. for sale on their account, the defender had obtained transference and delivery of the said teas at a time when he was a creditor of the firm of M'Gregor, Buchan & Co., which was rendered notour brankrupt upon 12th April 1867; that said transference and delivery had been made for the defender's farther satisfaction and security, in preference to the other creditors of the said firm, and had been fraudulently taken by the defender in the knowledge of the firm's insolvency; and were therefore null and void in terms of the Act 1696, c. 5.

The pursuer stated, "that on or about the 2d day of March 1867, the said M'Gregor, Buchan & Co. bought from defender forty-six half-chests Hyson tea, *ex* 'Onsuri,' containing 2352 lbs., at 1s. 5½d. per lb., or at a slump price of £171, 10s., as per invoice. The tea was at the date of sale in London, and the conditions of the sale were, that it should be delivered free on board at Liverpool for Montreal, and that the price should be payable in four months thereafter; that shortly after the

date of the said purchase, the said defender, as agreed on at the time of sale, forwarded the tea from London to Liverpool, and on or about the 13th March 1867 delivered the said tea, by order and on account of the said M'Gregor, Buchan & Co., on board of the ship or vessel 'Nestorian,' then about to sail from Liverpool to Portland, United States of America; and by the directions of the said M'Gregor, Buchan & Co. he took bills of lading from the master of the said ship or vessel in favour of James Smellie, commission-merchant in Montreal, to whom M'Gregor, Buchan & Co. meant to send the tea, to be disposed of on their account. The defender sent the bills of lading so made out to the said M'Gregor, Buchan & Co., and they forwarded them to Smellie for the purpose of enabling him to receive and dispose of the tea on their account upon its arrival. The tea went to Montreal in the said vessel, which sailed from Liverpool on the 14th March 1867. The 'Nestorian' arrived at Portland on 25th March 1867, and on or about that date the tea was forwarded by the shipmaster or ship's agents at Portland by railway to Montreal, where it was received by the said James Smellie, and entered in bond by him in his own name on 9th April 1867. That soon after the said sale the said M'Gregor, Buchan & Co. unexpectedly found themselves obliged to suspend payments; and the defender, on calling at their office to ask them for a bill he had drawn on them at four months for the price of the tea, was informed by them that they had been obliged to suspend payment. Upon learning this the defender, on or about the 22d March 1867, wrote to Allan Brothers & Co., Liverpool, the agents of the 'Nestorian,' desiring them to request their agents at Portland to detain the tea, or to prevent it getting into Smellie's hands. He added, that if necessary he would instruct them to telegraph on his account on Monday. On the 25th he wrote them again, stating that he did not think he need be at the expense of a telegram, adding, 'I am getting the senders here to give me an order on Smellie for them (the chests of tea);' and on 28th March he again wrote Messrs Allan Brothers & Co. that since writing them last he had succeeded in getting from Messrs M'Gregor, Buchan & Co. an order on Smellie, Montreal, for the forty-six half-chests tea; so 'as this puts all right,' he requests them to undo the order previously sent as to holding them at Portland. In point of fact, the defender, on or about the said 28th March 1867, induced the said M'Gregor, Buchan & Co., or rather the said Peter Comrie M'Gregor, to grant, and the said Peter Comrie M'Gregor did accordingly, on or about the said date, grant and deliver to the defender, an order signed by him in the firm's name, and addressed to the said James Smellie, Montreal, desiring Smellie to deliver the said forty-six half-chests of tea to the defender. This order was given and received with the intention that the tea should be received by the defender in acquittal and satisfaction or in security of his claim against the firm for the price of the tea."

That the tea having been received by Smellie before the delivery order had been given to the defender, or at any rate before any intimation of it had been made to Smellie, was upon presentation of the said delivery order, upon 6th May 1867, removed from bond, and delivered over to the defender or some one on his behalf, and disposed of on his account. That M'Gregor, Buchan & Co were rendered notour bankrupt upon 12th April 1867. That they were insolvent at the time the said delivery order was granted to the defender. That he was aware of this, and fraudulently obtained said order, and got back the tea in payment and satisfaction of the price thereof due by M'Gregor, Buchan & Co. to him, and in farther security of the same, to the prejudice of the other creditors.

The pursuer pleaded, *inter alia*,—"The said delivery-order having been granted by M'Gregor, Buchan, & Company, or by the said Peter Comrie M'Gregor, to the defender, then a creditor of the firm, and the tea having been transferred and delivered by them or the said Peter Comrie M'Gregor to defender, directly or indirectly, for his satisfaction or further security, in preference to the other creditors of the said firm, at or after their becoming bankrupt, or in the space of sixty days before the date of their bankruptcy, the said delivery-order and the said transference and delivery of the tea were illegal and null and void, in terms of the Act 1696, c. 5; and the pursuer is entitled to re-delivery of the tea, or to payment of the value thereof, as concluded for. Farther (1) The defender hasstated no relevant case of stoppage *in transitu*. (2) The defender's attempt to stop was too late. (8) The competency of stoppage by the vendor, and rejection by the vendee, depend on the same principles, and are exerciseable only within the same limits; and as the defender was too late to stop, the insolvents were too late to reject. (9) The sale was so far completed by delivery, and the property so vested in the vendees, that the seller had no longer right to stop, and the insolvents had no more power to give the seller security or satisfaction or other benefit from these goods than from any other in their possession."

The defender pleaded—"(2) It having been a condition of the sale of the tea by the defender to M'Gregor, Buchan, & Company that the defender should receive an accepted bill of exchange by the vendees in return for the bill of lading for the tea, and the vendees having failed to perform this condition, the contract of sale was never completed. (3) The vendees being in insolvent circumstances at the date of the intended sale, or at all events at the date of the transmission to them of the bill of lading, and being aware of their inability to pay the price of the tea, they were justified in granting, before actual bankruptcy, the order in the defender's favour referred to in the proceedings."

In support of these pleas, while admitting most of the facts stated above, the defender alleged that the condition of the sale of tea on March 2d, with respect to payment, was that the price was to be paid by bill at four months' date, in exchange for the bill of lading; that the defender sent the bill of lading to M'Gregor, Buchan, & Co., accompanied by a bill of exchange, payable at four months' date, for the price, and a letter, in which he requested that the bill of exchange should be returned to him accepted "in course," meaning thereby in course of that day; that, not having received back the bill of exchange accepted in due course, he called next day, and repeatedly for several days afterwards at the office of Messrs M'Gregor, Buchan, & Co., but did not succeed in finding either of the partners there; that, becoming doubtful of M'Gregor, Buchan, & Co.'s circumstances, he wrote on 22d March to the agents of the ship 'Nestorian,' stopping delivery of the tea *in transitu;* that, on or about 24th March, he met Mr M'Gregor, the senior partner of the firm of

M'Gregor, Buchan, & Co., for the first time after the tea was shipped, and Mr M'Gregor then stated that he had sent the bill of lading to Smellie, but that, as his firm had suspended payments, he did not consider himself justified in accepting the bill of exchange or in claiming the tea. He gave to the defender an order upon the consignee for the delivery of the tea, and he returned the bill of exchange unaccepted, stating at the same time that he had not considered the transaction concluded. When the defender received the order on Smellie as above-mentioned, the tea was still *in transitu*. The order was transmitted to Montreal on or about the 28th day of March, and was intimated to Smellie early in April; and the tea, which had in the interval been landed by Smellie, was thereupon delivered to the defender.

The Sheriff-Substitute (GALBRAITH) found for the pursuer, and the Sheriff (GLASSFORD BELL), upon appeal, adhered to his Substitute's interlocutor, and found in point of law—"(1) That the Sheriff-Substitute has correctly held that there are no sufficient grounds for believing that, as regards the purchase of teas on 2d March, *fraus dedit causam contractus*, or that the vendees knew themselves to be in such circumstances that they would be unable to pay the price, it being, on the contrary, shown that they were at said date carrying on their business as usual, that they believed themselves to be solvent, and that they met their liabilities on that and one or two subsequent days; (2) That it is not proved that the acceptance of a bill of exchange for the price was a condition suspensive of the sale, it being not even satisfactorily established that anything was said about a bill at all, or that the terms were other than four months' credit; but even if it was understood that an acceptance was to be given, there is no evidence that this was to be done *unico contextu* with delivery of the bills of lading, and as a condition of receiving them, for all the defender himself depones on the subject is, that 'the tea was sold at four months' bill from date,' and it is proved that in a previous transaction he had with the same vendees they did not grant their acceptance till 'a few days after the bill of lading was got;' (3) That the power of rejecting the goods, or of giving an order for their re-delivery to the vendor, could not exist after the goods ceased to be *in transitu;* and (4) That the transitus was at an end as soon as the teas were shipped at Liverpool in the vendees' name, and bills of lading taken for them as shipped, which bills of lading were handed over to and accepted by them, the teas being then entirely under the control of the vendees, to whom they had been constructively delivered, and by whom they were forwarded to the Canadian market, with a view to their disposal there for their behoof."

Against this interlocutor the defender appealed to the Court of Session.

HALL for him.

J. M'LAREN for the (respondent) pursuer.

At advising—

LORD PRESIDENT—There were only two pleas in this case maintained by the defender. The first founded upon an alleged condition said to have been attached to the contract. The second, upon an alleged rejection of the goods by the purchasers at a time when they were in a position to reject. These defences are stated in an action in which the trustee for the purchasers' creditors is the pursuer, with the concurrence of the said creditors. Now, with regard to the first of these defences, I think that there is no foundation for it whatever in point of fact. In one sense of the word every sale is conditional—conditional, namely, on the payment of the price. The seller undertakes to deliver on condition of receiving payment. The buyer undertakes to pay on condition of receiving delivery. Delivery and payment are the two counter obligations, and it does not matter that a stipulation is introduced to the effect that the price is to be paid, or delivery given in any particular way. But the fact that these are the conditions of the contract of sale in no way suspends its operation. If it is intended to render the contract conditional, to the effect of introducing a suspensive condition, it is perfectly easy to do it in writing, though very difficult to effect in a verbal agreement. But no such condition was ever intended to be introduced here. The transaction was simply the sale of a certain quantity of tea by Wright to M'Gregor, Buchan, & Co., upon four months' credit, (which we may take as the usual credit in such cases), and according to the practice of merchants, a bill was expected to be granted by the one party, and would have been granted by the other, as is always done in all cases of sales on credit, had not circumstances intervened. But this was no condition suspensive of the sale, and it clearly appears from the evidence that it never was intended to be so.

The defender's second plea is also bad for another reason, namely, that the goods at the time of redelivery to the defender not only were in the possession and under the control of the vendees, but had been so since they were shipped at Liverpool, and therefore they were not in a position to reject either at the time of signing the delivery order or at the time of actual delivery. In order to enable a vendee to reject in such circumstances as the present, it is necessary that he have not taken possession. We had lately an excellent illustration of that principle in the case of *Milne* v. *Booker & Co.* (December 20, 1870, *vide supra*, p. 239), where rejection was held to have taken place. Now, how does the matter stand here. The goods were sold upon March 2d. At that time the vendees were in a position to enter into a valid contract such as this. They were not at that time at all aware of their approaching insolvency. Even the first meeting of their creditors was not decisive of their bankruptcy. They thought, and apparently reasonably thought, that they had resources which would carry them over their difficulties. The object of the sale was that the teas purchased should be sent to Montreal, and disposed of there by the purchasers' agents for their behoof; and the teas lying at the time in London, Wright the defender undertook to ship them in such a way that they should go straight to the purchasers' agent in Montreal without coming actually into the purchasers' own hands at all. The teas were accordingly shipped at Liverpool—the bill of lading was taken in the name of the purchasers, and sent to them at Glasgow by the defender. Now, the bill of lading might have been taken in such a way as to have shown that the defender was the shipper, and in that case it would have been necessary for him to indorse it to the purchasers in order to their getting possession of the goods. If this had been done there is no doubt that stoppage *in transitu* might have been effected. But it was not done, and we may presume that it was not intended by the parties that it should be done. The goods, then, being shipped

for M'Gregor, Buchan, & Co., and consigned to their agents, and the bill of lading being taken in their name, Mr Wright has no standing upon the bill of lading at all. He had no right to it or under it, unless he acquired it subsequently for value. Then Wright having taken the bill of lading in the purchasers' names, sent it to them, and they received it in fulfilment of the contract of sale. From that point delivery was complete. The goods were at sea passing from the vendees to their agents at Montreal, and not awaiting delivery. The bill of lading was the title to the property of the goods in the hands of M'Gregor, Buchan, & Co. until they transferred it to the defender. When, then, did the redelivery alleged take place? The goods arrived in port, and ultimately arrived and were taken possession of by the purchasers' agent at Montreal. It was not till after that that the delivery order came out, and delivery was made to the defender or some one on his behalf. That proceeding is justified on the ground that there was in the granting of the delivery order rejection on the part of the purchaser. But rejection must take place before delivery in order to its having any effect here. Now, not only has delivery been given in this case, but it was so in this country before the goods sailed. I think, therefore, that both the defender's pleas are bad, and that the Sheriff has disposed very satisfactorily of the case.

The other Judges concurred.

Appeal dismissed.

Agents for the Appellant—Maconochie & Hare, W.S.

Agent for the Respondent—A. R. Morison, S.S.C.

Friday, February 10.

SPECIAL CASE—TUTORS OF WILLIAM ORR ORR AND OTHERS.

Heir—Ancestor—Apparency—Passive Title—Statute 1695, *c.* 24—*Provisions to Wives and Children.* Reasonable provisions to a widow and daughter by a person who had possessed an estate for more than three years on apparency *sustained* as good debts, under the statute 1695, c. 24, against his son and successor, who had made up titles to a remoter ancestor, passing by his father,

The parties to this case were—*First*, the tutors of William Orr Orr, only son of the late William Orr. *Second*, the trustees of the late William Orr. *Third*, Mrs Christina M'Bride or Orr, widow of the late William Orr. *Fourth*, Mrs Margaret Orr or Dickie, daughter of the late William Orr, and her husband.

The late William Orr died in 1868, survived by his second wife, the third party in this case; a pupil son, represented by the first parties; and a daughter by a previous marriage, the fourth party. Mr Orr had been in possession of the estate of Kaim since the death of his father in 1844, but he never made up a title, and possessed only on apparency. After his death his son's title was made up as heir to his grandfather, as last infeft in the lands. William Orr left a trust-settlement, in which he conveyed to trustees, the second parties to this case, his whole estate, directing them to convey the lands of Kaim to his son William Orr Orr, under burden of an annuity of £50 to his widow during her life; and an annuity of £40 to his daughter Margaret; and (on the narrative that he had received a sum of £800 with his first wife) under burden of the further sum of £1000, to be paid to his daughter on the majority of his son, when the annuity in her favour was to cease. Power of revocation was reserved. The deed was signed by Mrs Orr in token of her acquiescence in the provisions thereof.

William Orr left no personal estate. The free annual value of the lands of Kaim is about £186. It was admitted by the parties that the provisions were reasonable. Mrs Orr and Mrs Dickie maintained that as William Orr had been in possession of the estate of Kaim for more than three years, the provisions in their favour were debts and deeds of his, for which his son was liable under the Act 1695, c. 24.

The following were the questions submitted to the Court:—"(1) Is the said William Orr Orr, in consequence of his succession to the said property of Kaim, liable under the statute 1695, c. 24, or otherwise, to pay to Mrs Christina Sophia M'Bride or Orr the annuity of £50 per annum, provided to her by the said deed of settlement? (2) Is the said William Orr Orr, in consequence of his succession to the said property of Kaim, liable under the said statute or otherwise to pay to Mrs Margaret Orr or Dickie the annuity of £40 per annum, and the deferred legacy or provision of £1000 provided to her by the said deed of settlement? (3) In the event of the Court being of opinion that the annuity of £50 to the said Christina Sophia M'Bride or Orr cannot be made effectual against the estate of the said William Orr Orr, is Mrs Orr entitled to aliment from her son of a similar amount, or to what aliment is she so entitled?"

A question was also submitted as to whether Mrs Orr was entitled to a further sum for board and education of her son, but was withdrawn, the Court intimating an opinion that this was a point on which trustees and tutors must exercise their own discretion.

The DEAN OF FACULTY and CRAWFORD, for the tutors of William Orr Orr, argued that the Act 1695, c. 24, does not apply to gratuitous deeds; and that provisions like the present in a revocable *mortis causa* deed must be held as gratuitous; *Marquis of Clydesdale*, January 26, 1726, M. 1274; *Lindsay*, February 26, 1794; Hume, p. 429.

M'LAREN, for Mrs Orr and Mrs Dickie, argued that the point had been settled by the case of *Russell*, 7th December 1852, 15 D. 192; that rational family provisions by an apparent heir were debts and deeds for which his heir was liable. Besides, Mrs Orr having signed the trust-settlement, it may be considered, as regards her, in the light of a postnuptial contract. And in the case of the daughter, to the extent of £800 the provision was in return for the tocher which the truster received at his marriage with her mother.

At advising—

LORD PRESIDENT—The facts of this case are simple. William Orr of Kaim died, having been a considerable period in possession, but without having made up a title. After his death, his son made up a title, connecting himself with his grandfather, and passing over his father. William Orr left no personal estate, but he left a trust-settlement with provisions to his widow and daughter. The question is, whether these are debts and deeds of William Orr, for which his pupil son is liable under the Act 1695, c. 24. If