been ordered or delivered until 10th August 1875. when it seems the clerk came with the invoice for the spirits and applied for payment of the price. He received the promissory-note as security for the price, and granted a receipt.

There is no doubt that there was a sale of 120 gallons of spirits at the price of £91, 7s., and that the promissory-note was granted for payment of the price. It is also conceded that the spirits were delivered to the complainers without a permit, and that gives rise to the plea of the complainers, that if spirits be delivered without a permit there can be no recovery of the price from the buyer to the seller.

It is quite true that not only were the spirits delivered to the complainers, but that they were also used and consumed by them, and one can have no sympathy with them in the position they take up. But we have to deal with the construction of a statute, and we must be guided by its provisions.

The leading statute on the subject of permits is the Act 2 Will. IV. cap. 16, the 12th section of which enacts—"That in any action or suit at law or in equity, or on any bond, bill, note, or other security, contract, agreement, promise, or understanding, where the whole or any part of the consideration thereof shall be for the value or price of any commodities for the removal of which a permit is or shall be required, and for and with which a proper permit shall not have been given, the defendant in such action or suit may plead or give in evidence that such commodities were given without a permit accompanying them ; and if the jury shall find that such goods were delivered without a true and lawful permit having been obtained for the removal thereof, they shall find a verdict for the defendant ; and if such commodities shall have been sold for ready-money, or if the person selling the same shall otherwise have been paid or satisfied for the value or price thereof, it shall be lawful for the person who shall have been paid or satisfied such value or price, within twelve calendar months after payment or satisfaction made, to recover back from the seller of such commodities the amount of the value or price of such commodities, to be sued for and recovered by action of debt, or on the case, in any of His Majesty's Courts of Record." Nothing can be more clear and distinct than that clause. There can be no double construction of it, because if we consider it proved that the goods were delivered without a permit having been obtained, as required by law, then the defender may plead that as a defence to an action for the price; and if the price has been paid by the purchaser of the goods, then he is entitled to recover it back.

The application of that statute to the present case is very obvious. No doubt can be entertained under the section of the Act 2 Will. IV. cap. 16, which I have just read, that the consideration is the price of the goods. On the face of the record the facts are not disputed. But if it were necessary to go to the last excise statute, 23 and 24 Vict. cap. 114, we find a section, which has been chiefly dealt with in the argument, as clear as the one I have read. It is differently expressed, because it is applicable to spirits alone, whereas the section I have just read applies to all "commodities for the removal of which a permit is required." I think its meaning is that where spirits are delivered to a buyer without being accompanied by a permit, all the consequences spoken of shall follow. They may be stopped in transit; they may be forfeited in the hands of the buyer; the seller shall not recover the price and shall forfeit the spirits. It would be a strong thing, notwithstanding the statute of 2 Will. IV., to give effect to the reading which is here contended for, that the seller is only to be excluded from applying for the price in the event of forfeiture. That would be virtually a repeal of the statute 2 Will. IV. But it is difficult to suppose any such intention on the part of the Legislature, and any such construction is excluded as being inconsistent with the section itself.

I am of opinion that the interlocutor of the Lord Ordinary is right.

Lord Deas—I am of opinion with your Lordship that there is no justice in this claim. But the laws upon this and upon analogous subjects make injustice practicable in order to show parties the risk they run. Upon the law I have no doubt, and I need not repeat what your Lordship has already said.

Lord Mure—I see no difficulty in this matter. If I could deal with it upon equitable grounds I should give effect to the argument of the charger.

The Court adhered.

Counsel for Complainers—Scott. Agent—Robert Menzies, S.S.C.

Counsel for Respondents—Guthrie Smith—H. Johnston. Agents—Leburn & Henderson, S.S.C.

Wednesday, November 29.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

SAMUEL *v.* MACKENZIE & BELL.

Debts Recovery (Scotland) Act—Competency.

The 17th section of the Debts Recovery (Scotland) Act provides that "no interlocutor judgment, order, or decree pronounced under the authority of this Act shall be subject to reduction, advocation, suspension, or appeal or any other form of review or stay of diligence, except as herein provided, on any ground whatever."—*Held* that the suspension of a charge upon a decree obtained under the Act is not thereby excluded.

This was a suspension brought by Ernest Samuel, jeweller, Glasgow, of a charge upon a decree obtained against him in the Sheriff-Court of Glasgow by Mackenzie & Bell, Glasgow, the respondents in the suspension.

The circumstances were as follows:—On 30th December 1875 the complainer had presented a petition for sequestration of his estates, wherever situated in Great Britain, to the Bankruptcy Court in London, the majority in number and value of his creditors being resident in England. The petition had been filed, and his creditors, among whom were the respondents, had duly lodged their names and designations and the

amounts of their debts. On 21st January 1876, after notice, the creditors met and resolved to accept a composition of four shillings per pound, and the further proceedings in the sequestration were admittedly carried through in regular form, so that no exception could be taken to them by the respondent.

On 8th January 1876 a summons under the Debts Recovery (Scotland) Act, concluding for payment of £14, 16s. 4d. for work done, was raised in the Sheriff Court of Lanarkshire by the respondents against the complainer, and decree was given in absence on 17th January. The complainer stated that his reason for not appearing was that he believed all diligence against his estate was superseded by the sequestration awarded in England. Upon the 11th July the respondents instructed that a charge should be given up on the decree, and on 13th July they raised and executed a summons of furthcoming upon arrestments of the sum due them, used in the hands of the Trongate Branch of the Commercial Bank in Glasgow.

The complainer now sought to have the charge suspended, and the furthcoming interdicted and prohibited.

The respondents answered that the suspension was incompetent under the 17th section of the Debts Recovery Act, which provides that "no interlocutor, judgment, order, or decree pronounced under the authority of this Act, shall be subject to reduction, advocation, suspension, or appeal, or any other form of review or stay of diligence, except as herein provided, on any ground whatever."

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 7th September* 1876.—The Lord Ordinary having considered the note of suspension and answers and amended answers, refuses the note as incompetent; recals the sist and interim interdict already granted, and decerns; finds the complainer liable in expenses to the respondents; appoints an account thereof to be lodged, and remits the same to the Auditor to tax and to report.

"*Note.*—In this application suspension is sought of a charge given to the complainer upon a decree given by the Sheriff of Lanarkshire at Glasgow, dated 17th January 1876, pronounced in an action at the instance of the respondents, raised under the 'Debts Recovery (Scotland) Act 1867.' The charge was given on 11th July 1876, and it has been followed by arrestment and by an action of furthcoming against further proceedings, in which interdict is also sought.

"The ground of suspension is, that in certain proceedings under the English Bankruptcy Act, which was commenced in December 1875, an offer of composition was accepted by the creditors of the complainer at meetings held on 21st January and 2d February 1876; that the respondents were bound thereby; and that the charge now sought to be suspended is incompetent. But no objection appears to be stated to the decree itself, upon which that charge proceeds, and which, although pronounced in absence of the complainer, might have been resisted by him had he chosen to appear and defend the action. Without expressing any opinion as to the effect, if any, which these English bankruptcy proceedings may have had upon the right of the respondents to sue the complainer in the Courts of Scotland, I am of opinion that the remedy of suspension which the complainer now seeks is excluded by the Debts Recovery Act, which enacts (sec. 17) that 'no interlocutor, judgment, order, or decree pronounced under the authority of this Act, shall be subject to reduction, advocation, suspension, or appeal, or any other form of review or stay of diligence, except as herein provided, on any ground whatever.' The statute refers to and incorporates in itself certain clauses of the Small Debt Act of 1837, and, *inter alia*, sec. 16, which enables a defender against whom decree in absence has been pronounced to obtain in the Sheriff Court a sist of diligence, and to be reponed under the circumstances and conditions therein expressed. Whether and to what extent that remedy may be now open to the complainer is a matter on which I express no opinion. But it appears to me to be not doubtful that the remedy which he now seeks is excluded by the Debts Recovery Act 1867, and that the note of suspension and interdict must therefore be refused, with expenses."

The complainer reclaimed.

Authorities quoted—*Learmont* v. *Darling*, Feb. 28, 1849, 1 D. 884; *Scott* v. *Lethan*, June 27, 1844, 6 D. 1221; *Murchie* v. *Fairbairn*, May 22, 1863, 1 Macph. 800.

At advising—

Lord President—I think the interlocutor of the Lord Ordinary proceeds on a misunderstanding of the nature and effect of the section of the "Debts Recovery (Scotland) Act" 1867, on which the respondents rely. I am sure none of your Lordships desire to refuse the fullest effect to this provision of the statute. It is a most salutary one, and the Court will never review any judgment of an inferior Court which is fenced by such a clause. But that is not the nature of this case, and the suspender here does not bring a suspension of the decree of the Sheriff.

It is necessary to attend to the state of the facts. Judgment was pronounced in absence of the complainer upon 17th January 1876. The reason why he was absent was that he had no defence, as the debt was due, and he had nothing to say against it. He therefore abstained from appearing. It is suggested that the way to get the better of this decree is to apply for a rehearing before the Sheriff under another section of the statute. But that would be of no use, because there could be no better defence then than before the decree; and the purpose for which a rehearing is allowed is to enable a party against whom a decree in absence has been pronounced to be heard again upon the merits. The charge was not given till the 11th July, six months after the decree, and in the meantime certain proceedings had taken place in the Bankruptcy Court in England, which are the foundation of the present suspension. It is needless to go through the details of these proceedings. The 21st January and the 2d February 1876 are important dates, for it was upon these days the arrangements for a composition were carried through. It is manifest that if they were regularly conducted, the effect was to discharge the complainer of all debts due by him on payment of the stipulated composition.

As the record stands, the proceedings are quite regular, except in so far as it is not admitted by the respondents that they received notices of the

resolutions of the creditors to accept the composition. But it is now conceded by the counsel for the respondents that they are now prepared to admit that the notices were given and received. The proceedings were carried on in the Bankruptcy Court, and they had the effect of discharging the complainer of all debts due at the time they were instituted on payment of the composition.

The charge here under suspension is a charge upon a decree for payment of the whole debt, and the ground of suspension is that the debt is not due, although at the date of the decree of the Sheriff it was due. But that may have been extinguished by payment of a part of the debt, and if a charge is given for the whole debt under the Debts Recovery Act, it surely would not be incompetent to suspend the charge. The composition arrangement is only another mode of discharging the debt upon payment of a restricted amount. Further diligence upon the decree is thereby suspended.

It cannot be too distinctly stated that this is not a review of the interlocutor granting decree. The decree is here assumed to be valid and final. We are now affirming that under the circumstances in which the respondents are placed they are not entitled to enforce their decree in the face of the composition contract which has been carried through.

On these grounds, I think the Lord Ordinary's interlocutor must be recalled, and the case must be remitted to the Lord Ordinary to pass the note.

LORD DEAS concurred.

LORD MURE—Now that the matter has been fully explained, I have come to the same conclusion, because the ground of suspension amounts substantially to this, that the debt has been paid since the date of the decree charged on by the composition offered and accepted in the English bankruptcy proceedings. This would, I think, have been a good ground of suspension of a charge following upon a decree, by whatever Court that decree might have been pronounced. If, therefore, the decree had been given in the Small Debt Court, and the debt had been paid after decree, the clause in the Small Debt Act founded on by the charger would, as your Lordship has pointed out, have had no application, as it points at the cause being reconsidered on its merits. But that is not what is wanted, and the remedy in such a case would, as here, have been suspension of the charge illegally brought to enforce the decree for a debt no longer due.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for the complainer against Lord Curriehill's interlocutor, dated 7th September 1876, Recal the said interlocutor, and remit to the Lord Ordinary in the Bill Chamber to pass the note, and grant interim interdict as craved."

Counsel for Complainer—Millie. Agents—J. & A. Hastie, S.S.C.

Counsel for Respondents — J. C. Lorimer. Agents—Davidson & Syme, W.S.

Thursday, November 30.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

MILLER *v.* MILLER AND TUTORS.

Entail—Stat. 5 *Geo. IV. cap.* 87, § 10—*Process.*

The Act 5 Geo. IV. c. 87 (Lord Aberdeen's Act), provides that in case of an heir of entail in possession being sued for payment of provisions granted under the Act to the children of a former heir, he shall be discharged from such suit upon conveying to a trustee, "to be named by the Court of Session," one-third part of the rents of the estate. In such an action the Court (on a report by the Lord Ordinary), and following the precedent of the case of *Maxwells* v. *Maxwell*, June 26 1840, 2 D. 1225, instructed his Lordship to appoint a trustee.

Counsel for Pursuer—George Watson. Agent—H. R. Macrae, W.S.

Counsel for Defender—Pearson. Agents—Mackenzie, Innes, & Logan, W.S.

Thursday, November 30.

FIRST DIVISION.

[Lord Craighill, Ordinary.

WARIN & CRAVEN *v.* FORRESTER.

Sale—Sale-Note—Free on Board.

A sale-note stipulated that sugar sold was to be "free on board," and further, "to be delivered at the port of shipment in about equal quantities per month." There was also this clause—"the sellers will use every endeavour to engage freight-room and expedite shipments, but are not liable for delay caused by want of tonnage."—*Held* that the obligation upon the sellers was not to have the goods shipped, but to have them ready for shipment at the time specified, and to use all reasonable efforts to have them despatched without delay.

Date—Rescission of Contract—Remedy.

Where a buyer rejects goods, and distinctly intimates a repudiation of the contract, the seller must re-sell immediately to entitle him to claim against the buyer the difference between the contract price and the price obtained for the goods when re-sold.

This was an action of damages for breach of contract, at the instance of Warin & Craven, sugar merchants, London, against David Forrester, sugar merchant, Glasgow. The contract of sale-note was dated 17th September 1874; the subject sold was "about 2000 bags French or Belgian beetroot sugar, of the crop 1874/75, at 24s. 6d. per cwt., free on board at Dunkirk or Antwerp. The sugar to be taken at the official customs shipping weights, less usual tares, and to be delivered at the port of shipment in about equal quantities per month during October, November, December 1874, and January 1875. The sellers