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

the question were open, I should consider it difficult, but I think it settled by the case of *Russell.* Is there any good reason for challenging that judgment? I think not. Undoubtedly the decision was considerably in advance of any previous decision in the way of sustaining family provisions by an apparent heir. But very good reasons may be given in support of it. It has remained unquestioned for nearly twenty years, and must have been extensively acted on. It would be of evil example to challenge the judgment unless upon very strong grounds.

Lord Dras—I concur. Many family provisions must have been made since the case of *Russell*, on reliance on the decision. It was a reasonable and expedient conclusion if the law allows it, and we must hold that it does.

Lord Ardmillan concurred.

Lord Kinloch—I consider it settled that in order to the application of the Act 1695, c. 24, in that part of it which gives efficacy to the debts and deeds of an apparent heir more than three years in possession, these must be onerous, not gratuitous. The question therefore is, Whether the trust-disposition of the late William Orr is onerous or gratuitous.

By that disposition he conveyed his whole estate, including his lands of Kaim and Balmocloch to trustees, first for payment of expenses, debts, and legacies; and next for conveyance of the lands of Kaim and Balmocloch to his son William Orr Orr, burdened with payment of an annuity of £50 to his wife, now his widow, and of an annuity of £40 to his daughter Margaret Orr—payable this last till his son should attain majority, when it should be superseded by payment of a capital sum of £1000.

This deed has at first sight the aspect of a gratuitous family settlement. But attending more closely to its terms, and having regard to the authorities on this subject, and more particularly to the case of *Russel* v. *Russel*, 7th December 1852, D. 15, 192, I am of opinion that these provisions form claims of debt against the son William Orr Orr, under the Act 1695, c. 24.

The provisions are admitted in the Special Case to be reasonable provisions to be made by the granter for his wife and daughter. Being so, I am of opinion that they constituted onerous debts of the granter. It would be no answer to say that these provisions, or either of them, could not come into competition with the granter's general creditors. This happens in various cases, and yet the provisions form valid debts against the granter and his representatives. Such is the general character of post-nuptial provisions, so far at least as children are concerned.

In this view, I cannot have any doubt that if the deceased had granted personal bonds to his wife and daughter respectively for the provisions in question, these bonds would be now valid grounds of claim against his son under the Act 1695. Again, if in place of personal bonds he had granted in their favour heritable securities over his landed estate, the same result would have arisen. If the bonds had been granted, not to the parties directly, but to trustees in their favour, this, I very clearly think, would have created no difference in this case.

The question, then, is, whether the case is different because the deed is a trust-deed, couched in words of present conveyance, though only, as in any event would happen, operative after his death, conveying his estate to trustees with instructions to dispone the estate to his son under the real burden of these provisions. I am of opinion that the statute still applies. If the deed had been in favour of the trustees, with instructions to them to sell the estate for payment of the provisions, or to create them burdens on the estate, I think the statute would make the deed operative against the entering heir. This would just be a trust-deed for payment of creditors, which I see no room for doubting would be good under the statute. I think the case is not varied in substance because the creditors are to be paid or secured by the deed being granted in the heir's favour, with the provisions made a real burden on the conveyance.

To this effect I think the case of *Russel* supplies a conclusive authority. In that case James Russel, who possessed the estate of Garbethill on apparency for more than three years, granted a trust-disposition, *mortis causa*, of his whole estates in favour of trustees, first for payment of debts and expenses; and secondly, for payment of £500 to each of two daughters. The question was raised after his death whether this provision formed a valid claim against his successor in the estate, who had passed him over and served to a remoter predecessor. The case was argued very fully and elaborately. The objection, in particular, was anxiously discussed, that according to the form of the deed the provision was not onerous in the meaning of the Act, but a gratuitous family arrangement. By an interlocutor of Lord Wood, affirmed by the Court, this objection was repelled, and the claim against the successor given effect to. The Lord President observed—"We must look to the substance of the thing rather than its form. If there had been no previous provisions, but only that in the trust-deed, it would, I think, without doubt have been held to be onerous. There is no prescribed form for such obligations. The trust-deed was the mere machinery by which effect was given to the provisions; and to the extent of their provisions the daughters are creditors under that deed."

I cannot distinguish, in point of principle, between that case of *Russel* and the present. The terms of the deed are somewhat different. But the cases are the same in this, that the granter was settling fair and reasonable family provisions, such as the law considers onerous; and that in the words of the Lord President, "the trust-deed was the mere machinery by which effect was given to the provisions." Had the title of the deceased been made up, there cannot be any doubt that the provisions would have constituted a good claim against his son; and I think that the effect of the statute, in the circumstances in which things are placed, is to give to the claim precisely equivalent force.

I am of opinion that the first and second questions should be answered in the affirmative. The third question becomes in that case unnecessary; and the fourth has been withdrawn.

The Court answered the first and second questions in the affirmative; found it unnecessary to answer the third; and found the first parties liable *as tutors* in expenses to Mrs Orr and Mrs Dickie.

Agent for First Parties—John Martin, W.S.

Agents for Second, Third, and Fourth Parties—T. & R. D. Ross, W.S.