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

will use every endeavour to engage freight-room and expedite shipments, but are not liable for delay caused by want of tonnage. Payment by cash on London on delivery of bills of lading, less two months' interest at 5 per cent. per annum."

On 16th November 1874, owing to the non-arrival of the sugar, which in fact did not leave Dunkirk till the 21st, the defender wrote to Mr James Dunn, sugar broker, Glasgow, the pursuers' agent, rescinding the contract, and he afterwards refused delivery of the sugar alleged to have been shipped, "on the ground," as he averred, "that the contract had been broken by the pursuers' failure timeously to deliver or ship the first 500 bags, being one-fourth of the total contract quantity." Dunn on 17th November wrote to the pursuers as follows:—"I regret exceedingly that in consequence of the delay in shipping Mr Forrester's beetroot sugar that gentleman now considers himself altogether free from the contract. . . . . Please instruct me in this unfortunate affair, and, in the meantime, if the sugars are not yet shipped to Greenock, I would advise you to divert them to another market, ours being exceedingly dull. Perhaps you will kindly telegraph me early to-morrow if I am to re-sell the sugars if shipped." On 25th November Dunn again wrote to the pursuers "the market is exceedingly dull."

The defender was called on to receive the November, December, and January deliveries, reserving all questions as to the October delivery, but he refused, and declined implement of his part of the contract.

The sugars, which arrived in two vessels about the 26th November, were not re-sold by the pursuers till the 20th January 1875, and this action was raised for damages against the defender, on the ground of loss sustained by the difference between the contract price of the goods and the price they brought when sold. Other items, for storage, &c., were claimed, which need not be noticed.

The defender answered that by the contract the pursuers were bound to have shipped in October 1874 the sugar contracted for; and that, assuming shipment was not obligatory, the pursuers had failed or neglected to "use every endeavour to engage freight-room and expedite shipments."

A joint minute was put in for the parties, by which it was, *inter alia*, agreed—"(3) That, for the purpose of assessing the damages (if any) to be found due by the defender, but for that purpose only, the fair average prices for sugars of the quality in question was 23s. 6d. per cwt. in November 1874, and 22s. 6d. per cwt. in December 1874 and January 1875."

The Lord Ordinary pronounced an interlocutor with certain findings of fact, and the following as matter of law:—"(1) That according to the sound construction of the said contract between the pursuers and the defender, No. 6 of process, the pursuers were not bound to ship, but were only bound to deliver at the port of shipment within the month of October 1874, the 500 bags of sugar intended for the October delivery, and consequently that the failure to ship the said quantity in October was not a breach of said contract; (2) That the agent or representative of th pursuers at Dunkirk having, immediately on th arrival of the said 500 bags at that port, applied for and been promised freight-room for that quantity on the first steamer that could take them, and the sugars having in implement of this engagement been taken, there was on the part of the pursuers no breach of their undertaking to use every endeavour to engage freight-room and expedite shipments; and (3) That, in the circumstances above set forth, the defender is liable to the pursuers in the consequences of their repudiation of the said contract with the pursuers: Therefore repels the defences, and decerns," &c.

The defender reclaimed.

Authorities quoted—*Turnbull* v. *M'Lean & Company*, March 5, 1874, 1 Ret. 730; *Jonessohn* v. *Young*, June 24, 1863, 32 L.J., Q.B. 385; *Simpson* v. *Crippin*, Nov. 26, 1872, Law Rep., 8 Q.B. 14; *Hoare* v. *Rennie*, Nov. 14, 1859, 29 L.J., Excheq. 73; *Coddington* v. *Paleologo*, Law Rep., 2 Excheq. 193; *Brown* v. *Müller*, June 8, 1872, Law Rep., 7 Excheq. 319.

At advising—

Lord President—This is an action of damages for breach of a contract contained in a sale-note between the parties, dated 17th September 1874. The subject is "about 2000 bags French or Belgian beetroot sugar . . . free on board at Dunkirk or Antwerp." There is a provision that the sugar is "to be delivered at the port of shipment," according as it was French or Belgian, "in about equal quantities per month, during October, November, December 1874, and January 1875." As regards this clause, I do not think its meaning is very doubtful. The obligation of the sellers was to have the goods at the port of delivery at the time mentioned, that is, to have 500 tons at one of the ports of delivery in each of the four months. It has been contended on the part of the defender that this imported an obligation to have the sugars on board a vessel within the month. I do not so read the contract, and to read it so, it seems to me, would be unreasonable. If the sellers had undertaken to provide vessels for the carriage of the sugar to a port in the United Kingdom, there might have been an obligation to have the cargo on board in each of the months. That would have been a different contract. The delivery would have been at the port of discharge, for the sellers would have undertaken the carriage. If the sellers had the sugars ready to ship at the port within each of the four months in equal quantities, then I think they discharged their obligation.

There is this further clause in the contract:—"The sellers will use every endeavour to engage freight-room and expedite shipments, but are not liable for delay caused by want of tonnage." I rather agree with the observation made by Mr Darling in opening the case for the pursuers, that in endeavouring to engage freight the sellers were acting as agents for the buyer. But at the same time, I am not sure that this has any great bearing on the case. I do not see that a failure of that obligation would constitute a breach of contract.

The answer to the action made is, that if the defender has broken the contract, there was a previous breach on the part of the pursuers in two respects—(1) That they did not deliver at the port of shipment the requisite quantity of goods in

the month of October; and (2) Even supposing the goods were there, they failed to discharge the obligation to engage freight-room. The burden of proving a breach by the pursuers lies in the first instance on the defender. It lies on him to prove that the goods were not at Dunkirk timeously. It is not an easy thing for the defender to prove that, and therefore he will easily discharge the onus. If he can show reasonable cause to think they were not there, the pursuers will have to show that they were. In regard to the other matter, the burden is more seriously on the defender.

I think, on the evidence, there can be no doubt the pursuers have proved that the goods were at the port of shipment in October, and I do not think the defender has proved his other point either.

The consequence of the non-arrival of the sugar was that on 16th November 1874 the defender wrote to Mr Dunn, the broker, in terms amounting to a positive repudiation of contract, and this repudiation of the contract was intimated to the pursuers by Dunn. They were not left in doubt, and got good advice from Dunn, who pointed out their remedy as having suffered a breach of contract. Re-sale is the only proper remedy for parties in the position of the pursuers to adopt, and there was nothing to prevent the sale of the sugar before it arrived in this country. It could have been sold when in transition. But the pursuers did nothing even after the two vessels arrived. Dunn wrote to them again on the 25th that the market was dull. In fact the pursuers were fully certiorated, even if they were not themselves bound to know, that the contract having been broken their proper remedy was to re-sell the goods and claim the difference as damages against the defender. If they had sold immediately, it is admitted the sugars would have brought 23s. 6d. No doubt the market fell in December, and if they had sold then I cannot help thinking they would have had more to say, as the case ultimately turned out. But they did not sell until the 20th January.

A seller's right to recharge against a buyer a loss upon a re-sale of goods cannot be properly exercised by a re-sale occurring three months after the breach of contract. That would be a very loose and inexpedient proceeding to sanction, and I am not aware that any such privilege of delay has been admitted. A seller is certainly not entitled to speculate either for himself or for any other party. He is not entitled to consider his own interest. He must re-sell whatever the state of the market, and it is only if he immediately does that that he can charge the difference between the contract and the market price against the buyer. What was done here in January should have been done in November, and I therefore cannot agree with the Lord Ordinary on this point. The true estimate must therefore be the difference between the contract price and what the goods would have brought if sold in November. Whatever loss has arisen by the postponement of the sale till January must be deducted from the sum of damages found due to the pursuers.

Lord Deas—The only question about which I have any difficulty in this case is that of the amount of damages. I entirely agree in the law as stated by your Lordship. But my hesitation has arisen from the fact of the very short period to which we are confining the seller in order to effect a re-sale. That is a very narrow part of the case. But on the whole I agree with your Lordship that it is somewhat safer and sounder to be strict than loose upon that point.

Lord Mure concurred.

The following interlocutor was pronounced:—

"The Lords having heard counsel on the reclaiming note for the defender David Forrester against Lord Craighill's interlocutor, dated 5th June 1876, Adhere to the said interlocutor except in so far as it decerns the defender to make payment to the pursuers of the sum of £436, 7s. 4d., with interest thereon at the rate of five per centum per annum from 26th February 1875, the date of the summons in the present action, until payment, in terms of the conclusions of the summons: Recal the decerniture, and in place thereof decern the defender to make payment, to the pursuers of the sum of Two hundred and ninety pounds and eightpence sterling, with interest thereon at the rate of five pounds per centum per annum from the date of citation until payment: Find the pursuers entitled to additional expenses, modified to two-thirds of the taxed amount thereof: Allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Pursuers — Balfour — Darling. Agents—J. & R. D. Ross, W.S.

Counsel for Defender — Trayner — Alison. Agents—Webster & Will, S.S.C.

Saturday, December 2.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

LUCAS AND OTHERS (BERESFORD'S TRUSTEES) *v.* GARDNER.

Suspension—Caution.

A creditor was in right of an *ex facie* absolute disposition of certain lands, which, it was declared by a relative minute of agreement, were to be held in security and for repayment of a certain sum, "and of all other sums for which the respondent might become liable." In the event of failure to pay, there was a power to sell either by public roup or private bargain upon one month's notice.—*Held* that a note of suspension and interdict against the exercise of the power should be passed without caution, on the ground that the sum in respect of the non-payment of which it was proposed to enforce the power was not liquid, nor one *quod statim liquidari poterat.*

This was a note of suspension and interdict for Edward Averil Lucas, Charles David Lucas, and Lady Elizabeth Lucas or Beresford, trustees of the late Sir George de la Poer Beresford, against