to and defended in the poinding of the ground, allowed the decree to pass in the form which it bears without taking any objection, which they might have done on the very intelligible ground that the rent in question had already been paid. In these circumstances I am afraid the only remedy competent to the pursuers is by suspension, or some such procedure, in the Supreme Court."

The pursuers appealed, and argued—A decree of poinding the ground was in a different position from other decrees, and was merely issued for what it was worth. In this case it was worth nothing as the tenants had paid their rents before decree was pronounced. The date of litiscontestation in the original action was 12th October 1882, when the record was closed, and at that date the facts on which the pursuers were founding in the process of interdict had not emerged. Therefore they did not constitute a defence which was competent and omitted.

The respondents argued—(1) This was merely an attempt to obtain review of one action in the Sheriff Court by means of another. This could not be done in the Sheriff Court unless there were *res noviter—Thom*, 10 D. 1254. (2) The defence was competent and omitted in the original action of poinding of the ground.

At advising—

Lord President—The Sheriff in this case on 15th August 1883 decerned as craved, "but only in so far as concerns the liability of the articles poinded to the extent of £40, being the rent due as foresaid by the said W. Crawford & Co." That interlocutor is founded on the assumption that that was the amount of rent due by William Crawford & Company to the landlord, and the poinding was restricted accordingly, but under that qualification the decree goes out as craved, and in the ordinary course would have been followed by instant execution—that would have been the immediate effect.

The matter in the present instance was hung up by appeals to the Sheriff, but in August 1884 the decree was extracted, and it is only on 31st December 1884 that the present pursuers bring this action. What they ask is that execution of the decree should be interdicted—that is to say, that the operative effect of the judgment of the Sheriff-Substitute and the Sheriff should be permanently and finally stopped, and I agree with the Sheriff-Substitute and the Sheriff in thinking that that would be equivalent to reviewing and setting aside by way of suspension or reduction the decree which they had pronounced, and I do not think that would be competent in the Sheriff Court.

It is further worthy of remark that the pursuers should have allowed extract decree to go out without taking an appeal, for if they had had any good ground for appealing they could have done so up to the time of extract. Surely they were in knowledge of the fact that the effect of the decree would be to make them pay the rent twice over. But instead of appealing, they come into Court by means of a process which, coinciding with the Sheriff-Substitute and the Sheriff, I consider quite incompetent. I am therefore for affirming the judgment appealed against.

Lord Shand—If this appeal had been taken in consequence of circumstances emerging after the date of the decree, on the footing that at that date the pursuers in the action of poinding had a right to obtain decree, but that because of payments which had been subsequently made the creditors were not entitled to go on and put the decree in force, I should have held that an action of interdict was competent either here or in the Sheriff Court.

But we have not got such a case here, because all the facts had emerged several weeks before decree was pronounced in the original action. In these circumstances I am of opinion that the action cannot be sustained. I hold that the action is excluded by the plea of competent and omitted. I think there was a plain duty on the party who paid the rent—if he meant to found upon that circumstance—to interpose before decree was pronounced.

On the ground therefore that at the date of the decree of poinding all the facts upon which the pursuers in the present action found had emerged, I agree with your Lordship, and am of opinion that the action is incompetent since it is an attempt to get the Sheriff to review his own judgment.

Lord Mure and Lord Adam concurred.

The Court affirmed the interlocutor appealed against.

Counsel for Pursuers (Appellants)—Lang—Crole. Agents—Smith & Mason, S.S.C.

Counsel for Defenders (Respondents)—Mackintosh—Graham Murray. Agent—J. Smith Clark, S.S.C.

Wednesday, June 3.

SECOND DIVISION.

[Sheriff of Forfar.

CLARKE & COMPANY *v.* MYLES (MILLER'S TRUSTEE).

Sale—Suspensive Condition—Delivery—Bankrupt—Fraud.

The terms of a contract of sale of flax were contained in this sale-note of 11th July:—"We confirm sale to you of *circa* 30 tons Kashin Seretz flax at £30, 10s. per ton. Payment by draft at 3 months." The goods were delivered on 4th August. On the previous day, 3d August, the buyers had found their position critical, and on the 5th they decided to stop payment. No invoice or bill for acceptance had then been sent, and in consequence of the suspension none were sent. *Held* (1) that there was in the circumstances no fraud in accepting delivery, and (2) that the granting of their bill by the buyers was not a suspensive condition of the sale, and therefore that the property passed by delivery to the bankrupts, and fell under their sequestration which subsequently took place.

Case distinguished from *Brandt & Co.* v. *Dickson*, January 18, 1876, 3 R. 375, on the ground that in that case the proof showed that the granting of the bill was a suspensive condition of the sale.

This action was brought in the Sheriff Court of Forfarshire by Messrs A. F. Clarke & Co., merchants, London, against Messrs O. G. Miller & Son, flax-spinners, Dundee, and on their sequestration on 16th September 1884 was insisted in against David Myles, judicial factor and thereafter trustee on their sequestrated estates. The action was brought to obtain delivery of 194 bales of Kashin Seretz flax which had been sent by the pursuers to Messrs O. G. Miller & Son's warehouse on 4th August 1884 in the following circumstances:—On 11th July 1884, through George Armitstead & Co, who acted as the pursuers' agents, the pursuers sold 30 tons flax to O. G. Miller & Son, the sale-note being in the following terms:—

"Messrs O. G. Miller & Son,
Dundee. *Dundee, 11th July* 1884.

"Dear Sirs,—We have pleasure in confirming sale to you of ca. 30 tons Kashin Seretz flax @ £30, 10s. p. ton, *ex* w'house. Payment by draft @ 3 mos.: less 1½ p. c. disct.—We are, dear sirs, yours truly, GEO. ARMITSTEAD & Co."

In implement of the contract Messrs Armitstead advised that the flax was ready for delivery. O. G. Miller & Son did not require the flax immediately, and the Dundee holidays took place in last week of July, but on Monday 4th August, at the request of O. G. Miller & Son, Messrs Armitstead sent it off—delivery at the warehouse of Messrs O. G. Miller & Son beginning early in the morning, and being completed at 2 o'clock in the afternoon. About five tons of the flax was passed to the machines as it arrived. In the meantime, on Sunday the 3d, Mr Miller junior had had a conversation with his father, who told him he had lost heavily on the Stock Exchange, and that the financial condition of the firm was in consequence critical. They agreed that it was necessary that they should consult Mr Thornton, their agent, and accordingly on the Monday (4th) they did so, spending the morning till 2 o'clock in his office, with the result that he advised them to do nothing more in the way of paying out or receiving money. They then decided to stop taking delivery of the pursuers' flax, but finding that the whole parcel had been by that time delivered, they telephoned at once to the works to stop using it. On the next day (5th August) they issued a circular to their creditors announcing their suspension. The senior partner, Oliver Miller, deponed in this action that on the 4th he had become convinced that suspension was inevitable, though they did not finally resolve on it till the 5th. The junior partner, W. B. Miller, deponed that even on the Monday (4th) he did not think they would need to stop payment. The invoice and bill for acceptance were sent off by the pursuers to Armitstead & Co. on 5th March, but owing to the suspension of O. G. Miller & Son, were never handed to them. It was proved to be the custom of dealing that the invoice came a day or two after delivery of the goods, and the bill was sent a day or two after the invoice. On 16th September 1884 the estates of O. G. Miller & Son were sequestrated, and David Myles appointed judicial factor thereon. He was afterwards elected trustee.

The pursuers pleaded—"(1) The pursuers are entitled to get decree as craved for redelivery of the flax, in respect it was fraudulently taken delivery of by the bankrupts—1st, when in the knowledge that they were utterly and hopelessly insolvent; or 2d, when they were aware that they could not pay for the goods; or 3d, when they did not intend to pay for them; or 4th, when they had resolved to stop payment; or 5th, when they knew that the state of their affairs was such as to make a suspension of payment unavoidable. (2) The defenders O. G. Miller & Son never having granted their acceptance as stipulated for, the delivery which took place did not pass the property in the flax libelled."

Mr Myles, as trustee for the creditors, pleaded that any claim by the pursuers must be made in the sequestration.

The Sheriff-Substitute (CHEYNE) pronounced this interlocutor—"Finds in fact—(1) that on 11th July 1884 Messrs George Armitstead & Company, of Dundee, sold to Messrs O. G. Miller & Son, flaxspinners, Dundee—the original defenders in this action—*circa* 30 tons Kashin Seretz flax, being part of a parcel belonging to the pursuers then lying in one of their (Messrs George Armitstead & Company) warehouses in Dundee, at the price of £30, 10s. per ton, the sale-note bearing that payment was to be by draft at three months, less 1½ per cent. discount; (2) that in making this sale Messrs George Armitstead & Company were, in the knowledge of Messrs O. G. Miller & Son, acting in behalf of the pursuers, who are merchants carrying on business in London; (3) that following upon the said contract, Messrs O. G. Miller & Son, in the early part of Monday 4th August received delivery *ex* warehouse of 194 bales of flax, weighing in the aggregate 31 tons 1 cwt. 2 qrs. and 27 lbs., which flax was taken to their works, and a portion of it at once passed to the machines; (4) that at the very time the delivery was being taken the Messrs Miller were consulting with their solicitor as to whether they should suspend payment, and on the following day (5th August) they issued a circular to their creditors announcing their suspension, and gave directions, which were complied with, for the unused portion of the foresaid flax to be set aside; (5) that the suspension was announced before the invoice of the flax and draft for acceptance could, in the ordinary course of mercantile dealing, reach them from London, and owing to the suspension no invoice or draft was ever handed to them; (6) that their estates have since been sequestrated, and the compearer David Myles is the trustee in the sequestration; and (7) that the unused portion of the said flax, set apart as above-mentioned, and amounting to 25 tons 19 cwts. 1 qr. 9 lbs. has, under an order of Court, been deposited in a public warehouse in the name and to the order of the said David Myles, to abide the issue of this action, and that the pursuers have, by minute, restricted their demand for delivery under the conclusions of the action to the quantity so deposited: Finds in law on these facts that the property of the said flax never passed to O. G. Miller & Son, and that the pursuers are entitled to restitution of the same so far as extant: Therefore ordains the compearer David Myles forthwith to deliver to pursuers, free of all warehouse charges, the quantity of flax above referred to as deposited in his name, &c.

"*Note.*—On the face of the sale-note the transaction is a sale under the suspensive con-

dition that the purchasers should grant their acceptance for the price. That condition, it is admitted, was never purified, and accordingly, under the authorities (Stair, i. 14, 4; Erskine iii. 3, 11; Bell's Com., i. 237, 239, 440) the pursuers must prevail in the action, unless the purchasers' creditors, whom Mr Myles represents, can shew from the actings of the parties that they did not intend the granting of a bill to be a suspensive condition, or, what practically amounts to the same thing, that the condition was waived. Now, has this been shewn? That, as it seems to me, is the real question in the case; and while I cannot say that it is altogether unattended with difficulty, I have, after consideration, come to think that it must receive a negative answer.

"It is obvious that in a transaction of the description of the one with which I am dealing, it is impossible for either the invoice or the bill to be made out until the exact weight of the goods has been ascertained, and it is also obvious, that as the invoice and bill naturally fall to be prepared in the office upon the warehouseman's report, a certain period of time must in every case of the kind intervene between the departure of the goods from the warehouse and the despatch of the documents to the purchaser. This very thing, indeed, happened in the case of *Brandt & Co.* v. *Dickson*, 1876, 3 R. 375 (where the terms of the sale were identical with those of the present case), and the Court distinctly rejected the argument that the fact of the goods being despatched and arriving a little in advance of the invoice and bill amounted to a waiver of the suspensive condition, holding that there has been no undue delay in forwarding the documents, and that, having regard to the ordinary course of mercantile dealing, the two things—the delivery of the goods and the despatch of the documents—might reasonably be looked upon as simultaneous, or as *partes ejusdem negotii*. In the present case, accordingly, if the documents had been delivered at the Messrs Miller's office on the afternoon of 4th August, or had been posted in time to reach them on the morning of the following day, I would not have hesitated for a moment in holding, upon the authority of *Brandt's* case, that the property of the goods had not passed by the delivery. On the other hand, if the pursuers' place of business had been in Dundee, I would have been inclined to say that the delay in forwarding the documents justified the inference that the pursuers were not treating the granting of the bill as a suspensive condition. But it so happens that the pursuers, who, as the Messrs Miller knew, were the principals in the transaction, and who were to be the drawers of the bill, carry on their business in London. It was therefore impossible—unless indeed their agents had advised them of the weights by telegraph, which I cannot hold they were under any obligation to do—for the invoice and bill to reach Dundee earlier than the morning of 6th August. But it appears from the copy letter that they were despatched from London by the post of 5th August, and seeing that they were thus sent off as soon as possible, and that they would in all probability, if the suspension had not been announced, have been delivered to the purchasers at the earliest time at which, according to ordinary mercantile dealing, they could expect to receive them, I think that I am only applying the principle of *Brandt's* case when I hold that the fact—which is all that the creditors have to found upon—that the invoice and bill had not been received at the date of the purchasers' suspension does not warrant the conclusion that the pursuers did not originally regard, or had ceased to regard, the granting of the stipulated bill as a condition-precedent to the passing of the property. The result of this view is that the pursuers are entitled to my judgment, and in deciding, as I have accordingly done, in their favour, it is satisfactory to me to think that the law goes along with the equity of the case, which is very clearly against the creditors."

Myles appealed, and argued—The Sheriff-Substitute was in error in holding that this case was ruled by the case of *Brandt & Co.* v. *Dickson*, January 18, 1876, 3 R. 375. In that case the Court gave effect to a suspensive condition in favour of the sellers owing to the combination of the sale-note with the special and peculiar circumstances connected with the delivery of the goods and the transmission of the invoice and the bill of sale. In *Brandt's* case the terms were "draft at 3 months;" here they were "payment by draft at 3 months." In that case the goods were weighed before despatch; here the sale was a sale of "*circa* 30 tons," so that the goods were not ascertained when sent off. In that case there was a document following on the sale-note which clearly indicated the nature of the sale as a conditional one; here there was nothing but the sale-note. The expression in the sale-note merely defined the terms of the sale.—1 Bell's Comm., M'Laren's ed., 257, 259; Ersk. Inst., iii., 3, 11; *Brodie* (*Trustee for Arnot's Creditors*) v. *Tod & Co.*, May 1814, 17 F.C. 609. The actings of parties showed that there was no suspensive condition here, since the bill for acceptance and the delivery were not proffered simultaneously. There was, then, no suspensive condition, and the goods having been delivered, the property passed to the buyers, and hence to their trustee in bankruptcy. (2) The buyers had no knowledge on the day of delivery of the suspension which was found necessary the day after. Directly they had determined to suspend, they ordered no more of the delivered goods to be used. There was therefore no fraud.

The pursuers replied—(1) The facts here were entirely within the case of *Brandt*. The terms of the sale were identical, as also was the subsequent history of the actings of parties. (2) If there was consent to take delivery of the goods, it was, looking to the buyers' private knowledge of the state of their affairs, a fraudulent one, and not available in a question with creditors.—1 Bell's Comm. (M'Laren's ed.) 253.

At advising—

Lord Justice-Clerk—This case raises a delicate question of law which from time to time arises for our consideration, viz., an alleged suspensive condition in a sale of goods where one of the parties to the sale (the purchaser) becomes bankrupt. The state of facts in the case is as follows:—Messrs O. G. Miller & Son, merchants in Dundee, purchased through Messrs Armitstead, of the same place, from A. F. Clarke & Co. of London, certain quantities of flax on

the 11th July 1884, and the sale-note by Messrs Armitstead & Co. bears that date and is as follows:—"We have pleasure in confirming sale to you of ca. 30 tons Kashin Seretz flax @ £30, 10s. p. ton, *ex* w'house. Payment by draft @ 3 mos.: less 1½ p. c. disct." In consequence of the sale Messrs Armitstead & Co. advised that the flax was ready for delivery, and on the morning of the 4th August delivery of the whole order was made to Messrs O. G. Miller & Son at their warehouse in Dundee, complete delivery being made apparently by two o'clock that afternoon. In the meantime, on Sunday the 3d, the previous day, Mr Miller found he was in a position of difficulty, and doubts occurred to him as to his solvency, and he and his son conferred together, with the result that they resolved to go to Mr Thornton, who acted as their agent, on Monday morning. They did so, and had a long conversation with the latter, and next day (Tuesday the 5th) they settled to stop payment, though after their conversation with him it was perfectly plain that this was the necessary result of their financial position, and that they could not properly undertake additional obligations with or receive additional goods from their customers, and they did not do so. But the flax having been received early—delivery began a little after six o'clock on Monday morning—and it all had been delivered by two o'clock on that day, and a portion of it had been used up in the manufactory in the course of the day. The question then comes to be, whether the flax was delivered and the property passed by these facts. Two questions are raised—(1) Whether there was a suspensive condition on the face of the sale-note by reason of a stipulation contained in the sale-note that a "payment by draft at three months" was to be the counterpart of the delivery of the goods; and (2) whether Miller & Co. acted in good faith in accepting delivery. As regards the first, reference has been made to the case of *Brandt*, which was decided in 1876, and which, as regards the facts, bears certainly a strong resemblance to this case. I was one of the Judges who decided that case, and I adhere now to the principles which we there gave effect to. The decision of the case was only carrying out Professor Bell's views in his Commentaries, and I think there can be no doubt cast on its soundness. In *Brandt's* case, though there was some interval between delivery of the goods and the receipt of the invoice (and in the present case I should have said there was no invoice received), we held that the acceptance of the bill was a condition-precedent to the proper delivery of the subject; and, I repeat, that was quite in conformity with Mr Bell's statement (5th ed., i. 238), where he says:—"So, if it be stipulated as the condition of a bargain, or if goods be sent accompanied by a draft to be accepted and returned, and the goods are received but the acceptance not sent, the property is not passed—the goods are still unsold." That principle was precisely applicable to the facts in *Brandt's* case, and we had little difficulty in applying the law to the facts. But the case is no rule here at all. Here the sale-note does not express a suspensive condition, but only the terms of the sale—three months' credit of the whole price of the goods. No invoice and no draft was sent for acceptance; on the contrary, there was some suspicion of the solvency of their correspondents, and nothing further was done except that the flax was delivered. I am of opinion that the principle of *Brandt's* case presents no ground in fact on which to rest our judgment here, and that the statement in the sale-note was a mere statement of the terms of the sale, and not a suspensive condition. Lord Rutherfurd Clark has referred us to the case of *Watt* v. *Findlay* (Feb. 20, 1846, 8 D. 529), which dealt with the more subtle question, whether a ready-money sale included a suspensive condition if the ready money was not forthcoming? Though the point was not actually decided, both Lord Fullerton and Lord Mackenzie were not disposed to hold that it did. Here, however, we are dealing with the totally different case of a draft sent for acceptance. Therefore, on the ground that the goods were delivered and the property passed, I am of opinion that the creditors of the buyer have a just claim here.

In regard to the second question, I am of opinion that there is no ground to impute want of good faith to Messrs Miller & Co. They had not decided to stop when the goods were delivered. Doubtless they knew they were in danger of insolvency, but a trader need not necessarily advertise his insolvency unless he has actually concluded to stop payment. That has been laid down more than once, and, moreover, young Miller says that even on the Monday he was of opinion that the firm did not require to suspend payment. Therefore, as the goods were delivered on the Monday, I am not inclined to say that on the ground of fraud they can be set aside. I therefore think that the Sheriff-Substitute's judgment ought to be altered.

Lord Young—That is my opinion also. The expression "suspensive condition" is one which we scarcely know in our law, but which we have adopted from the law of England and given a meaning to. It is a useful expression with reference to the law of England, where a contract of sale as a rule passes the property, so that when the contract is made the property of the goods sold has passed from the seller to the buyer, and a suspensive condition is that which suspends the passing of the property. But with us the contract of sale does not pass the property. Delivery is required to do so, and I must say that I cannot understand the idea of a contract of sale followed by *bona fide* delivery, it may be, as here, of a very large part of the goods, and at least the consumption of some of them, where the property does not pass. There is no case in Scotland which I know of a contract of sale followed by delivery, not obtained by trick or fraud, where the property does not pass. In England the contract of sale alone passes the property, unless there is a suspensive condition, but even there the delivery would destroy the suspensive condition, and the property would pass as in Scotland unless the delivery had been obtained by fraud. Now here the notion of fraud is not insisted on. Whether with the knowledge of the circumstances the buyers would have been justified in refusing delivery, or returning the articles if placed on their premises suddenly, we need not inquire; but I think it not amiss to observe that there may be cases where the buyer would be warranted in doing it, and would be acting otherwise than honestly towards the seller if he allowed the property to pass to his own creditors.

I agree with the principle which ruled *Brandt's* case. Whether the facts were such as the principle ought or ought not to have been applied to them we need not consider, for they are different in this case. I endeavoured to illustrate the principle by what is known as a ready-money sale. In that case if the goods are tendered by the seller, the buyer having the money for them in his hand—if the latter holds his hand the former will refuse the goods, and no bargain would be completed, because the condition of it was that the money should be laid down by the buyer when the seller gave the goods. The acceptance is in just the same position. If the goods are sent to the buyer's premises either for ready-money payment or for payment by acceptance, the goods cannot be kept against the seller when his demand for ready-money payment or for an acceptance in payment for them has been refused. The two things ought to be substantially simultaneous, and the Court rightly or wrongly held that that simultaneous element existed in *Brandt's* case. Here that was not so. The goods here were sent, and the bill for acceptance need not have come for a week, and to say that the property did not pass all that time is what I cannot assent to. I therefore entirely concur in thinking that the judgment of the Sheriff-Substitute ought to be reversed.

Lord Craighill—The facts of this case are as set forth by the Sheriff-Substitute in his interlocutor, and by your Lordship in your opinion, and consequently there is no need for further statement or for recapitulation. Upon these facts two questions, in point of law, are in controversy. The first—Whether by the contract between the parties the delivery of a bill for the price was a condition suspensive of the passing of the property on delivery of the goods? And the second—If such was not the contract, was the taking of delivery of the flax, which was the subject of the contract, a fraud upon the sellers, entitling them to claim restoration of the goods? The second of these questions has not been touched by the Sheriff-Substitute, the view he took of the first question rendering a decision of the second unnecessary. The first he answered in the affirmative, his opinion being that "on the face of the sale-note the transaction is a sale under the suspensive condition that the purchasers should grant their acceptance for the price," which they had not done when the flax was delivered, and which they were prevented from doing afterwards by supervening stoppage announced on the following day. I am unable to adopt this ground of judgment. There is, so far as I can see, nothing in the sale-note which shews that the transaction was a sale under a suspensive condition. The words "payment by draft at three months," being those on which this construction has been put, taken by themselves, do not suggest, much less do they prove, that such were the terms of the contract between the parties. They, read in their natural acceptation, on the contrary, shew that the sale was on credit, the mode of payment being by bill at three months. The words imply, or may be read as implying, that these three months are to run from the date of the sale, and that the seller may withhold delivery of the goods till the accepted draft shall be delivered; but that the goods might be delivered, and yet that when delivered they were to be held under a suspensive condition, is as little matter of implication as it is of expression. The course followed in the fulfilment of the contract is in this case inconsistent with the Sheriff-Substitute's interpretation of the contract. The goods were delivered before the draft or even the invoice was forwarded for acceptance. On the present, as on previous occasions, there was in the view of both parties to be an interval of days running between the delivery of the goods and the transmission of the draft which was to be accepted, and for that period the goods were in the hand and at the disposal of the buyer. There was in what occurred, or in what the parties expected to occur, nothing that indicated in the remotest way that the goods had been delivered, or that delivery had been taken *custodiæ causa* merely, and that the property, as is the case in ordinary circumstances, should not pass from the buyer to the seller upon delivery. The result, therefore, so far, appears to me to be clear.

But it is said the point in controversy has been otherwise decided in the case of *Brandt*, 3 R. 375. There, no doubt, the sale-note was substantially in the same terms as the present, and there it was held that the acceptance of the bill was a suspensive condition of the sale; but the Court reached this conclusion, not by force of the sale-note alone, but by that in combination with the circumstances connected with the delivery of the goods and the transmission of the invoice and bill. This is made plain in the opinion of the Lord Justice-Clerk. "I think," he says, "the despatch of the goods by rail, and the sending of the invoice and bill by post, were in law contemporaneous acts. One might arrive before the other, but they were manifestly intended to arrive simultaneously. If the latter had arrived first, the acceptance of the bill would have been postponed till the arrival of the goods, and in like manner if the goods had come first the purchaser could not conclusively take delivery until he had received advice as to the terms on which they had been sent. In the present case the facts exclude the completion of delivery."

This is the view of facts on which the Court proceeded in *Brandt's* case, and consequently the decision which was there come to is not a rule for judgment in the present case.

On the second question, I think that judgment ought also to be given in favour of the appellant. When delivery of the goods was given and taken the buyers were considering their position, but their business was still a going business They might stop and declare their insolvency, or they might go on trusting that their difficulties might be overcome. That on the ground of apprehended (if it was not at the moment actual) insolvency they might have refused to take delivery I have no doubt; but it appears to me to be clear that in taking delivery there was no fraud on their part. They had not schemed to get delivery, as the bankrupt in the case of *Watt* (8 D. 529) had done. Delivery had been arranged for when neither insolvency nor stoppage was thought of, and as when the time for delivery came they were only in doubt as to the course which in the interests of all concerned

ought to be pursued, they were free to allow things to proceed as usual till the doubt that existed should the one way or the other be resolved.

The result is that, as I think, the appellant, the trustee for the bankrupt's creditors, is entitled to the judgment of the Court.

Lord Rutherfurd Clark—I am of the same opinion. It is clear that the sale was one of honest faith. Then the sale was followed by delivery, and I see no other question in the case.

The Court pronounced this interlocutor:—

"Find that the flax in question was purchased by Messrs O. G. Miller & Son on the 11th day of July 1884 on the terms expressed in the sale-note: Find that the goods were delivered on the morning of the 4th day of August, and were partly used for the purpose of manufacture on that day: Find that on Sunday the 3rd of August 1884 Messrs Miller became doubtful of their own solvency, and on Monday the 4th had an interview with their agent Mr Thornton, and resolved to stop payment on the 5th: Find that there was no suspensive condition attached to the contract of sale in question, and that there was no fraud in the acceptance of delivery on the part of the buyers: Find in law that in these circumstances the property of the goods passed to Messrs O. G. Miller & Son, and that the pursuers are not entitled to restitution of the same: Therefore sustain the appeal, recal the interlocutor of the Sheriff-Substitute of 13th January last: Assoilzie the defenders from the conclusions of the action: Find them entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for Pursuers (Respondents)—Pearson—Dickson. Agents—Henderson & Clark, W.S.

Counsel for Defender (Appellant)—Mackintosh—J. P. B. Robertson. Agent—J. Smith Clark, S.S.C.

Wednesday, June 3.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

J. & A. PRICE *v.* THOMSON & GRAY, *et e contra.*

Shipping Law—Demurrage—Obligation to Take Delivery and Supply Ballast.

The charterers of a vessel engaged to take delivery of cargo (which was to be unloaded under an agreement with the owners) "as fast as ship could put it out," and to supply and put on board ballast. The vessel was detained beyond the lay-days by delay on the part of the charterers to take delivery as fast as the ship could put it out, and by their not supplying ballast to keep the ship in trim during the discharging. *Held* that although no protest had been taken they were liable to the owners in demurrage for the number of days which the ship was detained over the lay-days, and that in this question Sundays, holidays, and days when the weather prevented unloading ought not to be computed.

In December 1881 Messrs J. & A. Price, merchants in Melbourne, Victoria, chartered the ship "Blair Drummond" of Glasgow from her owners, Messrs Thomson & Gray, shipowners there, to proceed to Melbourne, and load there, or at Corio Bay, a full and complete cargo of wheat or flour in bags, and being loaded to proceed to a port in the United Kingdom, at a freight stipulated at so much per ton.

In April 1882, when the vessel was lying at Geelong partly loaded with the stipulated cargo, it was found by the charterers that, in consequence of a great rise in the price of grain there, a cargo could only be sent home at a loss. They therefore entered into negotiations with the owners to have the charter-party cancelled, which after some delay were brought to an end on certain terms, on fulfilment of which the owners were to instruct the master to give delivery to holders of the bill of lading or charterers of the cargo then on board at Geelong. Among the stipulations were:—"(1) Payment to the owners of the sum of £3500." "(3) That delivery of cargo shall be taken from ship as fast as ship can put it out." "(4) If delivery required in Melbourne, then the charterers to supply and put on board ballast, free of cost to ship, in consideration of such delivery."

In fulfilment of this arrangement the "Blair Drummond" proceeded from Geelong to Melbourne, and there discharged the cargo she had on board, and received ballast instead, with which she sailed from Melbourne for Calcutta.

On 21st May 1883 J. & A. Price, and Wincott, Cooper, & Co., merchants in London, as their mandatories, raised an action in the Court of Session against Thomson & Gray for payment of certain sums amounting together to £607, 16s. 11d., which they alleged to be due to them under the arrangement above narrated.

In defence Thomson & Gray, *inter alia*, advanced a counter claim for a sum of £507, 10s. which they alleged to be due to them for demurrage by undue detention of the ship by J. & A. Price & Co. at Melbourne, and also for another sum of £330, 15s. for certain other claims under the arrangement. Thomson & Gray also on 29th June 1883 raised a counter action in the Court of Session for £160, 15s. 7d., being the balance of their claim for £738, 5s. after deducting £577, 9s. 5d., being the amount of disbursements made by J. & A. Price as their agents at Melbourne on behalf of the vessel.

The averments of Thomson & Gray relative to the claim for demurrage were the same in both actions, and were to the following effect:—It was a condition of cancelling the charter-party that re-delivery of the cargo was to be taken as fast as the ship could put it out. They were prepared to re-deliver on 28th April, and the cargo could then have been discharged by the 8th of May, whereas it was not fully discharged till 7th June. The delay was due to J. & A. Price, in consequence of their having caused the ship to be taken from Geelong to Melbourne, where after some delay they began to take delivery. Even allowing for the removal from Geelong to Melbourne, the delivery ought at furthest to have been completed