former bill. But there is no proof of this by the drawer's writ or oath, and no other evidence is competent. And even supposing that other evidence was competent, there is nothing in the parole proof to show that the bill libelled on was not discounted by the pursuer, and the proceeds applied to his own use, or, if discounted by John Fraser, that the money was not at once handed to the pursuer. The bill bears to have been accepted by the pursuer 'for value received,' and the legal presumption is that the acceptor received the money as the value in respect of which he accepted. On the whole, therefore, the Sheriff is of opinion that the pursuer has failed to prove that the bill in question was granted for the accommodation of John Fraser."

The pursuer appealed.

REID for him.

MACKINTOSH in answer.

The Court unanimously sustained the appeal, recalled the interlocutor of the Sheriff-Depute, and returned to that of the Sheriff-Substitute.

Agents for Pursuer—Philip & Lang, S.S.C.

Agent for Defender—Æneas Macbean, W.S.

HIGH COURT OF JUSTICIARY.

Friday, February 3.

MITCHELL *v.* MACWATT.

(Before the Lord Justice-General, Lord Deas, and Lord Ardmillan.)

Suspension—Relevancy—Assault with Intent—Indecency. A charge libelling assault, especially when committed on a female in an indecent manner, and with the intent to obtain carnal knowledge of her person, but not alleging that this was against her will, *held* irrelevant, and conviction thereon *set aside.*

This was a suspension of a conviction obtained before the Sheriff and a jury at Alloa. The charge was assault with intent to ravish, or alternatively, assault, especially when committed on a female in an indecent manner, with the intent of obtaining carnal knowledge of her person. The jury found Mitchell guilty of the second charge only. He was sentenced to four months' imprisonment, with hard labour for half the period. The points on the relevancy were decided by the Sheriff-Substitute.

CAMPBELL SMITH and M'KECHNIE, for the suspender, argued that the second charge, on which alone Mitchell was convicted, was irrelevant. If it charged any crime at all, it was identical with the first charge, and an acquittal on the first charge was necessarily an acquittal on the second. But in reality there was no crime charged but assault, the aggravations not being known to the law of Scotland. Indecency is not the recognised name of any crime; it is not a crime independent of circumstances; *Mackenzie*, November 14, 1864, 4 Irvine, 570. Intent to have carnal knowledge of a woman is not a legal crime at all; it must be alleged to have been against her will. It might have been competent to convict for assault, but as it is impossible to say what part of the sentence was appropriated to the simple assault, and what to the aggravation, the whole must fall.

SOLICITOR-GENERAL and BALFOUR, in answer, contended that assault, committed in an indecent manner on a female, was a relevant point of dittay, and that the remaining words, even if they did not amount to an aggravation, could not weaken the charge, and must be read as explanatory. There must be some middle charge between simple assault and assault with intent to ravish.

The Court were of opinion that the second charge could only be viewed as an inadmissible form of charging assault with intent. A simple assault might be charged, or possibly an assault aggravated by being committed on a female in an indecent manner, though that circumstance might be proved without charging it as a special aggravation. But where the charge of assault is coupled with intent to have carnal knowledge, it must be specially libelled that it was against the woman's will.

Conviction suspended.

Agent for Suspender—Thomas Carmichael, S.S.C.

Agents for Respondent—Morton, Whitehead & Greig, W.S.

COURT OF SESSION.

Friday, February 10.

FIRST DIVISION.

WOTHERSPOON & BIRRELL *v.* CONOLLY.

Suspension—Judgments Extension Act 1868—*Jurisdiction—Citation—Process—Sist.* Suspension of a charge on an extract certificate of a judgment of the Court of Queen's Bench in Ireland, registered for execution in Scotland under the provisions of the Judgments Extension Act (31 and 32 Vict., c. 54), on the ground that the complainers were not subject to the jurisdiction of the Irish Court, and had not been validly cited,—*refused simpliciter*, but process *sisted* till the complainers should have had an opportunity of applying to the Court of Queen's Bench in Ireland to be heard on their objections.

The circumstances of this case were as follows:—The complainers, who are shipowners in Glasgow, contracted by bill of lading, dated Almeria, 19th October 1868, to deliver 60 barrels of grapes to the respondent in Dublin by the ship "Fitzwilliam." The ship arrived in Glasgow on the 3d November, and, there being a large number of packages to be delivered there, the complainers proposed to send on the grapes to Dublin by another vessel. The respondent declined to receive them except from on board the "Fitzwilliam," and, consequently, the grapes, being of a perishable nature, were sold by public auction in Glasgow for £72, 6s. 1d. The respondent thereupon commenced proceedings against the complainers in the Court of Queen's Bench in Ireland. An affidavit was made by him, setting forth the non-delivery of the grapes, and proceeding:—"Saith that the said defendants reside in Glasgow, out of the jurisdiction of this Court; that Mr William Scott, of Eden Quay, Dublin, is their agent in Ireland, and is in constant communication with the defendants; and deponent says that if a copy of the summons and plaint in this cause shall be served upon the said William Scott, for the defendants, it will be sure to reach them in due course: saith that the cause of action herein arose

within the jurisdiction of this honourable Court." Service was accordingly made on Mr Scott, and the complainers were cited by registered letters. It was now denied that Mr Scott was the agent of the complainers. No appearance was made for the latter, and after some further procedure the respondent obtained judgment for £202, 16s. of damages, with £34, 15s. 6d. of costs. It appears that the damages were assessed by a jury. A certificate of the judgment was registered under the provisions of the Judgments Extension Act, 31 and 32 Vict., c. 54, for execution in Scotland. The complainers prayed the Court to suspend the certificate *simpliciter*. The grounds on which they pleaded that they were entitled to suspension were stated in their pleas, as follows:—"(1) In respect the judgment on which the said certificate proceeds was obtained by the respondent in a foreign Court having no jurisdiction over the complainers; (2) In respect the said judgment proceeded in absence, and without any proper or valid citation of the complainers; and (3) In respect the said judgment is unfounded on its merits, and that the complainers are not liable to the respondent for the amount decerned for."

The note was passed on caution, and a proof allowed. On resuming consideration thereof, the Lord Ordinary (JERVISWOODE) refused the note of suspension.

The complainers reclaimed.

SHAND and LANCASTER, for them, argued—The complainers are domiciled Scotchmen, and the mere fact that the contract was to be fulfilled in Ireland could not give the Courts there jurisdiction. Moreover, there was no valid citation, the affidavit stating that the complainers had an agent in Ireland being false. The object of the Judgments Extension Act was to facilitate execution, and not to give jurisdiction where it did not exist before.

The SOLICITOR-GENERAL and BRAND, in answer—By the law of Ireland the Courts there had jurisdiction, in respect that Dublin was the *locus solutionis*. The procedure and citation were in accordance with the Act 15 and 16 Vict., c. 113, which regulates common law procedure in Ireland. The judgment complained of was one pronounced *causa cognita*. In any view, the questions which the complainers seek to raise are for the Irish Court to decide. The Judgments Extension Act excludes review by the Court of Session.

After the debate the complainers obtained leave, under reservation of expenses, to amend their record. They now inserted an alternative prayer, to sist execution till they should have had an opportunity of applying to the Court of Queen's Bench in Ireland to be heard on their objections to the competency of the proceedings.

At advising—

LORD PRESIDENT—The respondent obtained a judgment against the complainers in the Court of Queen's Bench, Ireland, dated 8th March 1869, by which they were adjudged to pay a sum of damages for breach of contract. This judgment being issued, a certificate was sent to this Court and registered according to the statute. We have the extract, on which the respondent was preparing to do diligence when this note of suspension was presented. The extract bears that the proper officer in the Irish Court of Queen's Bench certifies that the respondent obtained judgment in that Court against the complainers in respect of the non-delivery of a cargo of grapes. The grounds on which the complainers seek to suspend are stated in their pleas in law.—(*Reads pleas as above.*) In short, the complainers proposed that the judgment should be examined by us as a foreign decree. This appears to me irreconcileable with the object and provisions of the Judgments Extension Act. Its object is to exempt decrees of the Courts of one part of the United Kingdom from such examination by the Courts of another part, and to give them the same force and efficacy in that other part as they would have received in the territory in which they were pronounced. The provisions of the statute are not exactly commensurate with its object, but they are intended to effect that object as nearly as possible consistent with justice. On one point I am quite clear, that the provisions of the statute have the effect of preventing an English or Irish decree being examined like a foreign decree. To enforce a foreign decree an action is necessary, and the defences proper to an action are competent. But the statute provides that the judgments to which it applies, when registered, shall be put to execution. It is important to attend to the exact words —(*reads sect.* 2). The only judgments dealt with are debts, damages, or costs, in short, money decrees; they are to be enforced as if on the date of legislation this Court had pronounced a decree for the money. It is contended that it must always be competent to a party, against whom decree has passed in absence, to open it up. That is not the intention of the statute, as is clear from the exception in sect. 8, which provides that the Act shall not apply to any decree pronounced in absence in an action proceeding on an arrestment used to found jurisdiction in Scotland; implying that it does apply to other decrees in absence. Moreover, section 3 extends the provisions to decrees of registration. Even if this could truly be said to be a decree in absence, it would be no reason that we should examine it as the complainers propose. Their remedy, if there is one, must be sought in the Irish Courts. I regard, then, the third branch of their plea as quite untenable. There remains the allegation that the Court in Dublin had no jurisdiction over the complainers because they were resident Scotchmen. I am not prepared to say that it is impossible to raise a question of jurisdiction which we might entertain. But it must appear clearly on the face of the certificate that the Court had gone manifestly beyond its jurisdiction. Such a case is not likely to occur; and certainly we are not dealing with such a case here. The complainers are seeking to raise a question of jurisdiction by no means of a clear nature. What they contend for comes to this, that where a question of a Court's jurisdiction has arisen and been disposed of, then when the judgment comes to be executed in another part of the United Kingdom, the question is to be opened up in the Courts of that other part. The question here is, whether the fact that Dublin was the place where the contract was to be fulfilled was sufficient to give the Irish Court jurisdiction. That, in the first instance, is a question for the Court whose jurisdiction is impeached. It may be that their judgment is subject to review. But it is not intended that it should be reviewed by the Court of Session merely because the judgment is sought to be put in execution in Scotland. There is an Imperial Court of last resort to which the party may appeal. I cannot doubt that the Legislature in framing this statute had in view the existence of this one Imperial Court to which

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