the defenders. He had been acquainted with Mr Clark, the proposed arbiter, for a number of years, and although it may have been imprudent, I think it was not unnatural that he should be asked to ascertain whether Mr Clark would accept or not. It is proved that Mr James R. M. Robertson had nothing to do with the appointment or suggestion of Mr Clark—indeed he was absent from the country at the time when Mr Clark was suggested, and he did not arrive in London till the 5th May, while the minute of reference was signed on 27th April and on 1st and 4th May. It seems also sufficiently proved that Mr James R. M. Robertson had occasion to see and to write Mr Clark on a totally different and independent matter, namely, a proposal that one of Mr Clark's sons should go out to Borneo, and it was this subject, and not the reference at all, which led to his being in communication with Mr Clark.

But the pursuers have entirely failed to show either that any improper communications were made to Mr Clark by Mr James R. M. Robertson or by anybody else, or that Mr Clark was guilty of any impropriety whatever in receiving or permitting *ex parte* communications. If the pursuers' case had been followed up in evidence on the lines indicated on record, the case might have been different, and the fact that Mr Clark accepted the reference on the request of Mr James R. M. Robertson would have been an important commencement of a chain of proof that the arbiter was corrupt, and tainted with partial counsel. But the pursuers' case commences and ends with the comparatively innocent inquiry in May 1875 whether the arbiter would accept of the office or not? And there the case ends, for there is not a particle of evidence either that the defenders directly or indirectly attempted to influence the arbiter, or that the arbiter received partial counsel, or was guilty of the slightest impropriety in his proceedings. I lay altogether out of view the other averments of unjust or inequitable proceedings on the part of the arbiter, such as the averment that he wrongfully refused to re-examine Thomas Adams, or that he awarded excessive or unreasonable expenses. These objections relate only to the merits of the questions submitted, and they were not and could not be relied upon as grounds for upsetting or reducing the award.

[His Lordship then dealt with the other ground of challenge, and concurred in holding that the matter of stowing the wastes was included in the reference.]

The LORD JUSTICE-CLERK concurred.

The Court adhered.

Counsel for Pursuer (Reclaimers)—Lord Advocate (Watson)—Moncreiff. Agents—Dewar & Deas, W.S.

Counsel for Defenders (Respondents)—Balfour—Low. Agent—D. Lister Shand, W.S.

Friday, December 7.

FIRST DIVISION.

[Sheriff of Lanarkshire.

WALKER *v.* LOUDON BROTHERS.

Bankrupt—Statute 1696, *cap.* 5—*Illegal Preference—Transaction in Ordinary Course of Business.*

An article which had been recently bought, but never used, was returned by the purchaser, who did not now require it, to the seller within sixty days of the bankruptcy of the former. Credit was given for it in the books of the latter. It was proved that the parties acted in perfect *bona fides*, and that there was an absence of all intention to create a preference. *Held* in the circumstances that such a transaction, as it had taken place in "the ordinary course of business," was excepted from the operation of the Statute 1696, cap. 5.

It is an open question whether perfect *bona fides* is of itself sufficient to take a transaction within sixty days of bankruptcy out of the operation of the Act 1696, cap. 5.

The pursuer in this action was trustee on the sequestrated estate of Messrs Reid & Lauder, engineers and rivet makers, Port-Glasgow. The date of the warrant of his confirmation was 19th October 1875. The defenders were Loudon Brothers, engineers, Glasgow, and the summons concluded for delivery of a lathe that had been sold and delivered to the bankrupts on 26th July 1875, "which lathe has been in the defenders' possession without any right or title since 6th September 1875." There was an alternative conclusion for payment of £180, the value of the lathe.

The pursuer pleaded—"The defenders being in possession of property of the bankrupts, the pursuer is entitled to decree therefor." And he afterwards added this additional plea—"The transaction averred by the defenders being a preference struck at by the Act 1696, cap. 5, and the Bankruptcy (Scotland) Act 1856, their defence is irrelevant, and the pursuer is entitled to decree."

The defenders answered that the lathe was their property.

From a proof, in which Mr George Loudon, one of the defenders, was examined for the pursuer, and the bankrupts for the defenders, it appeared that the lathe had been sold and delivered to the bankrupts on the date mentioned in the summons. It was found, however, that they had no use for it, and the place in which they had intended to put it was filled by a rivetting machine which they could not dispose of. They therefore, on 24th August, within sixty days of their bankruptcy, proposed to the defenders that they should take it back. To this the defenders, by letter of 26th August, agreed, on condition of getting 5 per cent. of the price, but the bankrupts objected to the condition, which was then departed from. The lathe was returned on 6 September, and the bankrupts were credited with its value in Loudon Brothers' books. Neither party had any idea at the time of the transaction of the insolvency of Reid & Lauder, and the transaction, it appeared, was carried through in perfect *bona fides*. The nature of the evidence is

more fully brought out in the opinions of the Court.

The Sheriff-Substitute (GUTHRIE) found that the transaction was void and null under the Act 1696, cap. 5, and gave decree accordingly against the defenders. He added this note:—

"*Note.*—I am unable to bring the transaction in question, as the defenders desire to do, within any of the recognised exceptions, from the operation of the Act of 1696. It is not a cash payment made in the ordinary course of business; and indeed it does not appear whether, according to the understanding of parties or usage of trade, the price of the lathe had become payable at the time of its redelivery. The Act does not require that there should be evidence of any fraudulent or unfair intention of giving a preference over other creditors—and there is no such substantive evidence here—but only, as is the case here, that the transaction should actually have that result. The return of the lathe, if valid, had the effect of wiping off the debt due to the defenders, as a cash payment would have done; but it does not at all follow that it is to be regarded as a transaction in the ordinary course of business; on the contrary, even if it were proved (as it is not) to have taken place at the usual time for settling the price of such purchases, it was not the usual way, but a very unusual way, of settling the price of a purchase. There is perhaps some delicacy in distinguishing this in regard to principle from a cash payment; but in interpreting this statute I conceive that this Court is not entitled to enlarge the exceptions to this equalising statute by proceeding upon any mere analogies drawn from previous cases."

On appeal the Sheriff (CLARK) adhered.

The defenders appealed to the Court of Session, and argued—This was a *bona fide* transaction, and in all the cases where a trustee had been successful there had been some element of *mala fides*—*Ferguson, Anderson, & Co.* v. *Welsh*, March 2, 1869, 7 Macph. 592 (observations of Lord Deas on the words of the Statute 1696, cap. 5). The fact that the creditor had got an advantage was not, as the Sheriff thought, enough to decide the question. To reduce the transaction there must be an intention to give him such a fraudulent preference—Bankton, i. 2, 72; Bell's Comm. ii. 199 (M'Laren's ed.), 5th ed. 214, and following pages, and case of *Hepburn* quoted in note. There must be an intention to create a preference in order to bring the transaction under the Act—*Bruce* v. *Hamilton*, Jan. 27, 1832, 10 Shaw 250; *Stewart* v. *Scott*, Dec. 4, 1832, 11 S. 171; *Scougal* v. *White*, Feb. 7, 1828, 6 S. 494; *Dawson* v. *Lauder*, Feb. 4, 1840, 2 D. 525. In all of these cases it was found that the transaction had been in security of a prior debt, and therefore they were reduced. Where there was no such object, reduction was not competent (Murdoch on Bankruptcy, 187). Now, here there was a new transaction, entered into after the sixty days had begun to run, which led to compensation, and accordingly reversed the position of debtor and creditor. It was, in short, a sale.

The pursuers answered—It was not relevant to go into the question of fraud; no proof of that was required, and if the creditor got a preference by the transaction that was sufficient. It had never been held that *bona fides* was a sufficient ground to render such a transaction valid—*Gibson* v. *Forbes*, July 9, 1833, 11 S. 916; *White* v. *Briggs*, June 8, 1843, 5 D. 1148; *Steven* v. *Scott & Simpson*, June 30, 1871, 9 Macph. 923; *Booker & Co.* v. *Milne*, Dec. 20, 1870, 9 Macph. 314. This was not a case of an ordinary transaction in the course of business; it was an illegal preference to this creditor—cf. *Hamilton* v. *Barrow & Reynolds*, reported in note 3 to Bell's Comm. i. 255 of M'Laren, 234 of 5th ed.

At advising—

LORD MURE—The question that is raised in this action is a question of difficulty and importance relative to the application of the Act of 1696, cap. 5, in so far as it deals with transactions entered into within sixty days of bankruptcy. It comes before us on a proof, and from that proof it appears that this is a very special case in its circumstances, and it is therefore necessary to look very carefully at the evidence.

Now, the broad facts are these—The lathe was ordered in the early part of the summer, and was delivered to Reid & Lauder in the end of July. In August a correspondence commenced between them and the defenders, in which a proposal was made by the former that the lathe should be taken back. It appears that a rivetting machine occupied the place in Reid & Lauder's premises where the lathe was to stand, and that they had some difficulty in getting rid of it, and accordingly could make no use of the lathe. The proposal was not at first accepted by Loudon Brothers; but in a letter of August 24, Reid & Lauder say—"We have not got any views of selling our rivet machine, and consequently cannot get the large lathe put down. If you had any parties requiring such machines, you might send them down. We would be willing to let you have the large lathe at present, if you had any other way of disposing it, and we could get one at some future time, as we have little or nothing for it to do at present; and for it to lie here, if it could otherwise be disposed of, would be a pity." In answer Loudon Brothers wrote—"As there is a possibility of us having a chance of disposing of the lathe, we will take it back on condition that you pay the carriage we have incurred in sending it to Port-Glasgow from England, and what it takes to bring it to Glasgow, also five per cent. on the price, as we may keep it on hand a year before getting a customer for it, being a specially made tool." At first Reid & Lauder declined that proposal, because they objected to that part of it that related to the 5 per cent., but finally on this being waived the lathe was returned in September. The bankruptcy occurred in October, and the trustee was confirmed on 19th October.

In the shape the action has now taken it is an application for restoration of the lathe, on the ground that it was sent back within sixty days of bankruptcy, and that thereby an illegal preference was created. Now, this point was not originally raised before the Sheriff. The original condescendence contained nothing in reference to this matter of illegal preference, and there was no plea-in-law to that effect. In the revised condescendence the main ground set forth by the pursuer is—"On or about the 6th September 1875 the defenders sent and removed said lathe from the premises of the said Reid & Lauder without

their consent, and without right or title ; and the same has been in the defenders' possession without any right or title ever since." And in answer to that we have an explanation of the circumstances under which the lathe was sent back. There is then an additional plea-in-law for the pursuers—[*reads plea*].

It appears from the evidence of Mr George Loudon that on the 7th September the lathe was returned to his firm, and Reid & Lauder were credited with its value in their books. He is questioned as to the transaction of the 24th August, and he says—"The letter of 24th August, of which I have a copy put in, is the first proposal of the lathe being returned to us. The place where the lathe was to be put down in the bankrupts' premises was pointed out to me before it arrived. That place was close beside the engine, where they had at that time a rivet-making machine. This machine occupied the site on which this lathe was to be placed." That distinctly shows the main ground on which the defence is founded, viz., that it was because Reid & Lauder had the rivetting machine that they were led to send back the lathe. Mr Loudon further explains—"When the letter of 26th August was written by our firm, I think there were some parties looking after the machine. In that letter there is a stipulation of 5 per cent. addition on the price on condition of its being returned. I saw the bankrupts after the letter was written in reference to that stipulation. They objected to the stipulation, saying it was rather hard that we should insist upon it. At the same time they urged us to take back the lathe. They said if they got busier at another time they might take another one then. The lathe was sent back to us by the bankrupts. We said we would not insist upon the stipulation as to the 5 per cent. on the price, as there was a chance of getting it sold. The two letters and the interview completed the contract for the return of the lathe. They were to return it at once. They did not do so. They said they were busy, and I believe they were, and we did not press them much for a while." And then he adds these important words—"At the time these letters were written I had no knowledge or suspicion of insolvency on the part of the bankrupts. (Q) In point of fact, the return of the lathe was a resale by them to you?—(A) Precisely. (Q) And the whole proceedings were in the ordinary course of trade?—(A) Yes. We were creditors of the bankrupts for a certain amount, apart from the lathe, and we still have a claim on the estate." Accordingly this evidence shows the honesty of Loudon Brothers in the matter, and indeed that they hesitated at first as to taking the lathe back at all.

The evidence led by the defenders substantially corroborates this. Mr Reid, who is examined for them, says — "At the time the agreement was made for the return of the lathe, we had no idea of stopping payment. We did not agree to send back the lathe in order to give Messrs Loudon any advantage over the other creditors ; it was done as a matter of ordinary business. Messrs Loudon were averse to take the machine back ; they would not take it back unless with the addition of 5 per cent. to the price. It was taken back as a matter of favour to us." Mr Lauder's evidence is to the same effect—"We had tried unsuccessfully to dispose of the rivet machine, and we had therefore no place where we could erect the lathe. We had then no work for which we needed the lathe, but had had a prospect of contracts when we ordered it, in which we were disappointed. At date of letters we arranged, as an ordinary matter of business, to send back the lathe, and not with any view of giving the defenders a preference. We had bought the lathe for our own business. At date of the letters we had no idea that our estates were to be sequestrated." The import of this evidence is that the taking back the lathe was a perfectly honest transaction on the part of Messrs Loudon. In these circumstances the Sheriff-Substitute finds—"The said transaction is null and void under the Act 1696, cap. 5, as having been voluntarily made by the said Reid & Lauder within sixty days of their bankruptcy, for the satisfaction of the defenders in preference to other creditors."

Now, no doubt the words of the Statute of 1696 seem at first sight to favour the contention of the trustee, but there are several well-recognised exceptions from the application of that Act. The course of decisions has not been very uniform, but it is well established that there are three broad classes of exceptions, viz., cash payments, transactions in the ordinary course of business, and *nova debita*, or transactions in which parties become debtor and creditor to each other of new. This, it was contended, falls under the third head of these exceptions. It was a peculiar transaction, and the defender says it was really a resale, the lathe being sent back and paid for in this way, that the bankrupts were credited with its value in Loudon's books. If the question stood there, I should have great difficulty in bringing it under the class of exceptions sanctioned by any of the cases in the books. But it is proved that this was a transaction in the ordinary course of trade, and I think that where a transaction can be brought up to that, it is settled that the Act does not apply unless fraud is distinctly shown to have been intended. Mr Bell thus explains the law in his Commentaries, ii. 217, 5th ed. (202 M'Laren's ed.), and that passage is quoted as the leading authority by Lord Moncreiff in the case of *Bruce* v. *Hamilton*, 10 S. 250, and as the foundation of his judgment, which was affirmed by the Court. The case of *Scougal* v. *White*, 6 Shaw 494, is a case where the transaction very nearly comes up to being one in the ordinary course of business. The Lord Ordinary, however, found that it was struck at by the Act, and the note of judgment shows that it was given on the ground that it had been shown that there was an intention to defraud on the part of the bankrupts. In *Blincow's Trustee*, Dec. 3, 1828, 7 Shaw 124, 7 W. & S. 35, the Court held, without sending the case to a jury, that some of the transactions in question were struck at by the Act, but on other parts of the case, where it was pleaded that the transactions were entered into in the ordinary course of business, they sent an issue to try that question to a jury in the following terms, viz., "Whether the funds were paid to the defenders in the fair and ordinary course of trade?" and on that issue the case was disposed of. The import of that case is, that where *ex facie* the transaction appears to come within the ordinary course of trade, it is a matter for

investigation by a jury; and if it is so, then, unless fraud can be shown, there is no ground for reducing the transaction.

Now, that is the question that has to be decided here. I apprehend that we must take it as proved that there was no fraudulent intention. The nature of the transaction shows that there could not have been any such intention, for if Mr Loudon had stood to his condition as to the 5 per cent. the transaction could never have taken place. There is not a vestige of any intention to give Messrs Loudon a preference over the other creditors of the bankrupts. But I also think that it was quite within the ordinary dealings of life for Reid & Lauder, when they found they had no room for this article, to send it back again. This, I think, was fairly one of a series of transactions between these two parties, and shows no intention of fraud. Therefore I come to a different conclusion from the Sheriff, and I think we must hold that it was not one of these illegal preferences struck at by the Act.

Lord Deas—I do not think that it is necessary in this case to consider whether an intention to give a creditor a preference is a necessary element in a reduction under the Act 1696, for there is a well-known class of exceptions, viz., transactions in the ordinary course of business. It would be very strange if there was not. The question accordingly here simply is, Whether the return of the lathe can be held in the circumstances to have been a transaction in the ordinary course of business? This is a kind of transaction that often takes place. Take the case where a party furnishes a house, and gets articles for that purpose from time to time from a tradesman; he finds that one of these articles is not the sort of thing he expected, and he returns it; I think it would be an extravagant proposition to say that that did not come under this ground of exception.

To decide how the question stands, we must look at the proof; there we find that when the lathe was purchased the purchasers had no place to put it except on the site of a rivetting machine; they intended to sell that machine, but found they could not; and moreover they found they had not the same prospect of being able to make use of their new lathe. On 26th August, thirty days after its delivery, an agreement was made by the sellers that they would take it back; that was within sixty days before the sequestration. There were certain obstacles which prevented the sellers, who had thus agreed to take it back, from actually getting delivery of it till forty days after it had been originally sent; but the date of the agreement, which is the proper date to look at in this matter, was the 26th August. If there had been any ground whatever for supposing that this transaction was tainted by an intention to create a preference, it must have been reduced. This was, however, a most reasonable transaction between man and man, and the exception of transactions in the ordinary course of business includes such reasonable transactions. As this, therefore, is fully proved to have been a transaction in perfect *bona fides* and in the ordinary course of business, the result is that it is not challengeable.

Lord Shand—I concur, and I should content myself with saying so, if it were not that this is a question of importance in the law of bankruptcy, and that by our judgment we are reversing that of the Sheriff. It is clear that within a month of the delivery of this lathe to the bankrupts they found that they had no use for it; that the rivetting machine which stood in the place where they had meant to put it could not be disposed of; and that there was no pressing want for the lathe in their business. The return of the lathe, therefore, was in the ordinary course of business, and as there was no contemplation of bankruptcy by either party, there was not, I think, any intention to create or to receive an illegal preference. The transaction therefore falls under a class of cases against which the Act of 1696 does not strike, viz., transactions entered into in the ordinary course of business, and not intended to create a preference.

It is true that the bankrupts were not makers of lathes, and therefore it cannot be said to be a sale of goods in which the seller ordinarily dealt, but the expression "ordinary course of business" must be taken in a wider sense. In the "ordinary course of business" a tradesman or manufacturer often takes return of goods which have been partly used or not used at all. Lord Deas has instanced the case of one furnishing a house. There are many instances of a similar kind, and nothing is of more ordinary occurrence than that in such cases the purchaser goes back to the seller and resells the article. Accordingly I take it that a transaction of that kind is of ordinary occurrence. Is there any distinction between such a case and the sale by a man of an article in which he deals? I think not.

I observe that the Sheriff says—"The Act does not require that there should be evidence of any fraudulent or unfair intention of giving a preference over other creditors—and there is no such substantive evidence here—but only, as is the case here, that the transaction should actually have that result." Further on I observe he speaks of the Act as "an equalising statute." If it be meant that it is enough to show that the transaction operates to the extinction of a debt due by the bankrupt, I am not prepared to concur with the Sheriff. We have had a full argument to the effect that if such a transaction were in *bona fides*, the statute would not strike at it. But the decision of that point is not necessary, and if it were it would involve a consideration of the principle on which the exceptions to the operation of the statute have been allowed. Whether that principle is that the Act will not cut down any transaction where there is no intention to defraud is an important question, but it is not raised by this case, which falls under one of the long-recognised exceptions.

Lord President—The facts of this case are very clearly ascertained. It is highly satisfactory that that should be so, for your Lordships' judgment proceeds on those facts and the peculiar case that is disclosed by them. There is no doubt that both parties acted in perfect good faith—the bankrupts had no suspicion that they would have to stop payment; the defenders had no suspicion that the bankrupts were insolvent or were verging on insolvency. Whether that is sufficient to take the case out of the operation of the Act, I am not prepared to say; and in the judgment of all your Lordships that is still an

open question, which will certainly not be determined by this case, for the fair inference from the facts here is, that this was a transaction in the ordinary course of business.

There is nothing very remarkable in the circumstance of an article of this kind being returned when the purchasers found they had no use for it. It is not indeed a transaction in the ordinary course of business in the sense of being a sale of an article in which the bankrupts dealt, or which the other parties were to use for the purposes of their trade, but it is an ordinary enough circumstance in the course of business. It is a transaction, or, to speak more correctly, it is incident to transactions in which the parties were ordinarily engaged.

It is on that ground, combined with the entire absence on the part of both parties of any intention to create a preference, that I think our judgment must be based.

The Court pronounced an interlocutor, which, after certain previous findings in fact, proceeded :—

> Find that on said 6th September 1875 the price of the lathe due under the sale by the defenders to the said bankrupts was unpaid, and that they were on the return of the lathe credited in the defenders' books with its value : Find that on the said 6th September the defenders had no expectation or suspicion that the bankrupts were insolvent or likely to stop payment : Find that the bankrupts had no apprehension or expectation that they would require to stop payment : Find that neither the defenders nor the bankrupts had any intention to create any preference in favour of the defenders, or to satisfy or pay the debt of £180 due by the bankrupts to the defenders for the price of the said lathe, to the prejudice of other creditors of the bankrupts : Find that in these circumstances, and in law, that the return of the lathe was made in the ordinary course of business, and is not reducible under the Act 1696, c. 5 : Therefore assoilzie the defenders, and decern, &c.

Counsel for the Pursuer (Respondent)—Asher —Jameson. Agent—John Martin, W.S.

Counsel for the Defenders (Appellants) — M'Laren—Begg. Agents—Morton, Neilson, & Smart, W.S.

Wednesday, December 12.

SECOND DIVISION.

KENNEDY *v.* POLICE COMMISSIONERS OF FORT-WILLIAM.

Reparation—Wrongous Interdict—Relevancy—Liability of Police Commissioners under Statute 25 *and* 26 *Vict. cap.* 101—*Malice and Want of Probable Cause.*

> The Police Commissioners of a burgh, appointed under the General Police Act, 25 and 26 Vict. cap. 101, interdicted the owner and occupier of certain premises in said burgh from executing certain alterations upon his premises which he had commenced. Upon appeal which the interdict was recalled.—*Held*, in an action of damages against the Commissioners for wrongous use of interdict, that the defenders' position as Commissioners gave them no more protection than would be afforded to other members of the public, none being afforded them under the statute ; that the action was relevant ; and that it was not necessary for the pursuer to aver malice and want of probable cause.
>
> *Distinction* (*per* Lord Ormidale) between actions of damages for use of legal forms of process, *e.g.*, arrestment, and for the use of special diligence, *e.g.*, interdict or *meditatione fugæ* warrant.

The pursuer in this action, Colin Kennedy, was proprietor and occupier of a tenement which formed the north-west corner of Church Square in Fort-William. It was separated from Church Square by a piece of ground about 11 feet wide, enclosed by a dwarf wall and railing. On 1st July 1876 the pursuer entered into a contract to have certain works executed, whereby the front of his premises should be carried considerably nearer Church Square, and a considerable portion of the ground should be built upon. A petition was presented on 1st August 1876, and interim interdict was on 2d August granted against the operations by the Sheriff-Substitute of Inverness-shire, at the instance of the Police Commissioners of Fort-William, which was a police burgh under the General Police Act of 1862. That was on the allegation that the line of building was not being adhered to. The Sheriff thereafter recalled the interdict, and on appeal the Court of Session affirmed his decision.

The Commissioners had proceeded upon an order made upon Kennedy by which they had assumed power to prevent the building, and which it was now found by the above-mentioned judgment they had had no power to make. Pending the process of interdict, the pursuer submitted the order to review, when the Sheriff-Substitute pronounced an interlocutor quashing it. Thereafter a note of suspension and interdict was presented by the Commissioners to the Court of Session, praying the Court "to interdict, prohibit, and discharge the pursuer from building beyond the line of the outer column or pillar of the house adjoining that now in course of erection by him in Church Square, within the burgh of Fort-William ; and further, to ordain the said respondent to set backward the said building now in course of erection by him in Church Square, Fort-William, to the line of the outer pillar or column of the adjoining houses or buildings in said Square;" and craving interim interdict. The note was passed without granting interdict, and the case was reported to the Second Division, in respect of contingency with the appeal in the interdict case originating in the Sheriff Court at Fort-William. Upon January 9, 1877, the note of suspension was refused, with expenses.

The pursuer averred that the whole proceedings, and, in particular, the application for interim interdict on 1st August 1876, were wrongful and ruinous, and without just or probable cause,