money, he borrowed £250 from the objecting creditor to enable him to carry on what he must have seen to be a bad business. That is conduct which requires explanation,—whether he had any, and if any what, grounds for thinking that the £250 would not follow the money which he had already lost. Under the circumstances it was not unreasonable to ask him for some such justification, and none such was forthcoming. In these circumstances it is impossible to hold that the conditions of the statute have been fulfilled. That would be *pessimi exempli*, and would defeat the object for which the condition was enacted. If the bankrupt shall hereafter find money to pay a dividend of five shillings the question can be reconsidered, but as nothing has been paid after a course of reckless working and borrowing I can hardly conceive a stronger case for upholding the judgment of the Sheriff-Substitute.

LORD ADAM—I am of the same opinion. The bankrupt here has not in point of fact paid five shillings in the pound—he has not paid anything at all; but that is not an absolute bar to his getting a discharge, because if he is able to show that the failure to pay five shillings in the pound has arisen from circumstances for which he cannot be held responsible he may still get his discharge. I agree, however, that the onus is on the bankrupt of showing that he cannot justly be held responsible for the failure to pay five shillings. That was most distinctly stated by the Lord President (Inglis) in the case of *Clarke* v. *Crockatt & Company*, 11 R. 246, and I do not think it is possible to maintain the contrary. Now, it appears to me that this is a case of reckless—not perhaps trading—but of reckless speculation. The bankrupt became the lessee of a coal mine which several people had experimented in before him with the uniform result of failure. No doubt a man who has capital of his own is entitled to risk it if and as he likes; but here the bankrupt, starting with a small amount of capital of his own, and some borrowed money, goes on year after year losing it until the whole of his original funds are gone, and then he borrows a sum of £250 which goes in exactly the same way as the rest. Now, I think that this course of conduct discloses a perfectly different case from that of *Bremner*, 2 F. 1114. I can quite understand that there the failure arose from circumstances for which the bankrupt could not be justly held responsible; for it appears that there came about a great depression in the particular trade in which he was engaged which the bankrupt was not bound to anticipate, and besides, he had apparently stopped trading before all his assets were gone, for these when valued as at the date of the sequestration were sufficient to pay eight shillings in the pound to his creditors. Here, on the other hand, the bankrupt only stopped trading after he had lost everything—after the whole of his creditors' money had gone. Accordingly, in my opinion, not only has the failure to pay five shillings in the pound not been proved to have arisen from consequences for which the bankrupt is not responsible, but it has been distinctly proved to have been due to the bankrupt's own fault. I agree, therefore, that the Sheriff's judgment should be affirmed.

LORD M'LAREN — I concur with your Lordships. It is not necessary to support our judgment that we should be of opinion that the bankrupt was morally culpable, but I cannot hold that he was irresponsible for the form which his bankruptcy has taken—that it is one in which no dividend is available for his creditors.

LORD KINNEAR was absent.

The Court refused the appeal.

Counsel for the Appellant—A. M. Anderson. Agent—William Balfour, S.S.C.

Thursday, February 14.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

MARWICK *v.* GRAY.

Public-House — Certificate — Decision of Magistrates Reversed on Appeal—Proper Official to Grant Certificate — Home Drummond Act 1828 (9 *Geo. IV. cap.* 58).

Where a public-house certificate is refused by the magistrates of a burgh, and their decision is reversed on appeal by quarter sessions, the town clerk of the burgh as clerk to the magistrates, and not the clerk of the peace as clerk of the Appeal Court, is the official whose duty it is to make out and deliver a certificate to the successful appellant.

This was an action at the instance of Mrs Marion Mann or Kerr, spirit merchant, Anchor Tavern, Glasgow, with consent of her husband, and her husband for his interest, against (1) Sir James David Marwick, LL.D., Town-Clerk of Glasgow; and (2) George Gray, Clerk of the Peace for the county of the city of Glasgow.

The following narrative of the facts in the case is taken from the opinion of the Lord Ordinary (KINCAIRNEY):—"The pursuer Mrs Kerr seeks by this action to obtain a public-house certificate for the Anchor Tavern, 21 Argyle Street, Glasgow. Her position is somewhat embarrassing, but the facts are as simple as possible. An application by her for renewal of her public-house certificate for these premises was refused at the general half-yearly meeting for granting publicans' certificates held by the Magistrates of Glasgow on 11th April 1900. Against this deliverance she, as empowered by section 14 of the Home Drummond Act, appealed to the Quarter Sessions of the Peace. Her appeal was sustained on 9th May 1900, and a remit was made by the Justices 'to the Town-Clerk of Glasgow to issue the necessary certificate under the Public-House Acts.'

"In order to enable the applicant to carry on her business she requires a double authority—(1) a certificate in the statutory form from the authority whose function it is to grant it, and (2) a licence from the Commissioners of Excise. Section 18 of the Home Drummond Act provides that no licence shall be granted to any person 'unless such person shall have previously obtained from the Justices a certificate under this Act . . . and every licence granted by the Commissioners of Excise, or by any officer of Excise, contrary to this provision shall be null and void to all intents and purposes.' Section 5 of the Public-Houses Acts Amendment Act 1862 (25 and 26 Vict. cap. 35) is to much the same effect, and also contains a clause of nullity. Hence it appears that she cannot get a licence unless she gets a certificate; and the statutory form of the certificate bears that it is conditional on the person in whose favour it is issued obtaining also a licence from the Excise. I understand that the Commissioners of Excise have declined to grant a licence except on production of the certificate required by the statutes. Meantime, if she carries on her business she may became liable to penalties under section 30 of the Home Drummond Act and section 17 of the Act of 1862. There is no doubt that the judgment of the Justices at Quarter Sessions, sustaining her appeal, authoritatively affirmed her right to carry on her business at the Anchor Tavern. But that judgment has as yet been wholly unavailing, because she has never been able to obtain her certificate or licence.

"She has applied to the Town-Clerk of Glasgow, and he has refused to issue a certificate, and a request to the Clerk of the Peace was met with a similar refusal. It is undoubtedly a startling defeat of justice. Of course both of these gentlemen desire only to obey the statutes under which they act. I understood from the bar that under similar circumstances the Town-Clerk of Glasgow was in use to grant a certificate, but that on closely examining the statutes he has come to the conclusion that they do not empower him to do so. His scruple is entitled to much respect, and I need not say that both gentlemen are acting in perfect *bona fides*. But none the less the position in which the pursuer finds herself involves a defeat of justice, and the result is so absurd, from a legal point of view, that it cannot be accepted if it be possible to avoid it.

"The pursuer has therefore raised this action, and has called as defenders (1) the Town-Clerk, (2) the Clerk of the Peace, and (3 and 4) the preses of the two meetings, and she concludes that the two first defenders, or one or other of them, should be ordained to deliver to her a certificate. Defences have been lodged for the Town-Clerk and the Clerk of the Peace. Preliminary defences are stated, but so far as I remember nothing was said about them, and the question was argued whether the statutes admit of either the Magistrates or the Justices in Quarter Sessions granting a certificate, and on which of them, if on either, the duty falls."

The pursuer pleaded, *inter alia*—"(1) The application of the pursuer Mrs Marion Mann or Kerr for a public-house certificate having been granted as condescended on, she is entitled to have said certificate made out and delivered to her."

The sections of the Home Drummond Act relating to the question at issue are cited in the opinion of the Lord Ordinary, *infra*.

On 30th November 1900 the Lord Ordinary pronounced the following interlocutor:—"Sustains the first plea-in-law for the pursuers: Assoilzies the defender George Gray from the conclusions of the summons, and decerns: Finds that the defender the Town-Clerk of Glasgow is the official whose duty it is as clerk to the Magistrates to deliver a certificate to the pursuer Mrs Marion Mann or Kerr: Find the pursuers and the defender George Gray respectively entitled to expenses against the defender Sir James Marwick as Town-Clerk of the city of Glasgow."

Opinion.—[*After stating the facts*]—"I have been referred to the Irish law, in which the difficulty is met very simply, and the duty is thrown on the Clerk of the Peace (23 and 24 Vict. cap. 35). The provisions in the English Acts seem hardly so plain; but there are no provisions of that kind in the Scotch statutes.

"The Scotch statutes bearing on the question are the Home Drummond Act 1828 (9 Geo. IV., cap. 58), and the Public-Houses Acts Amendment Act 1862; but it depends chiefly on the Home Drummond Act, which is certainly expressed as regards the matter in hand in the most perplexing manner, the reason for which seems not far to seek.

"The most important provisions are as follows:—By section 1 of the Home Drummond Act two general meetings of the magistrates of every royal burgh are appointed, to be called 'the general half-yearly meetings for granting public-house certificates.' The section relates to justices of the peace also, but I require to refer only to the magistrates. By section 7 it is provided that the magistrates may at these meetings grant such certificates to keep common inns, &c., as they think most convenient, within which excise liquors may under excise licences be sold in retail, and that such justices shall deliver to every person so authorised a written certificate, and the section concludes with the somewhat formidable and apparently unambiguous declaration, 'and any certificate granted otherwise than at such meetings shall be void and of no effect.' I think this clause gives rise to the chief difficulty in the case, because if enforced literally it would plainly make it impossible for either magistrates or justices to issue a certificate after an appeal, and so the statute would be defeated.

"Section 12 provides for the keeping of a book or register by the clerk of the magistrates containing the names of applicants for certificates with various particulars, and among others the manner in which the application is disposed of, and it provides

that at the end of the meeting for each day a deliverance shall be written in the book, and then and there signed by the majority of the magistrates assembled, or the preses, and the section proceeds 'And it shall not be lawful for the justices or magistrates at any adjourned meeting to alter anything which was done at any previous meeting in granting or refusing such certificates, and the clerk of such justices or magistrates shall make out a certificate' in the form provided (which now is that given in the schedule to the Act of 1862). Although the Magistrates are required to sign these entries of their dates, yet it does not follow that the entries might not be modified afterwards. The magistrates, it is true, cannot recal their own deliverance, but it does not follow that the entry in the register cannot be altered. On the contrary, for example, section 28 provides that all convictions for breach of certificate shall be transmitted to the town-clerk, and that he shall enter them 'in the book or register required to be kept by him' . . . 'as aforesaid.'

"Section 16 provides that if any town-clerk shall deliver a certificate 'contrary to the deliverance in such book or register, or to any person not duly authorised to receive the same by the justices or magistrates assembled at such general or district meeting' . . . 'or shall insert any untrue date in such certificate,' he shall suffer a specified penalty.

"Section 17 relates to the proceedings with the Excise, and provides that the magistrates and justices respectively shall transmit to the collector or supervisor of excise in the district 'a list of all the persons who have obtained such certificates,' . . . 'which list shall be made up from the books and registers hereinbefore appointed to be kept by such clerks respectively, and shall contain the same heads and titles, and shall be duly certified by the subscription of such clerks respectively.'

"Then section 18, already noticed, prohibits the granting of a licence without the production of a certificate.

"Section 27 requires the clerk of the peace and clerk of the royal burgh, when lawfully required, 'to make out from the books kept by them as aforesaid a duplicate 'or counterpart of any certificate issued by them.'

"These are all of the provisions in the Home Drummond Act which seem of consequence, and I do not think there is anything of much consequence affecting the argument materially in the Act of 1862, in which several of the provisions in the Home Drummond Act are modified or repeated, but I think there is nothing which need be here noticed as throwing light on this question.

"It appears to me that all the sections to which I have referred relate to the magistrates where the magistrates are the persons who hold the meeting for disposing of applications for certificates, and where justices of the peace are referred to they are the justices who in the first instance deal with the applications and grant or refuse them. It is they who are to grant the certificates and authenticate the register, and the duty is thrown on them of transmitting to the proper officers of excise a list of the applicants who have received certificates.

"There is not the faintest allusion from beginning to end to the Justices sitting in Quarter Sessions. Quarter Sessions are not mentioned, except in two sections to be immediately referred to, nor, so far as I have gone, is there the slightest appearance of difficulty. There is no conflict between one clause and another.

"There are, however, two sections which refer to Quarter Sessions, section 25, which relates to convictions, and has no bearing on this question, and section 14, which confers a very general right of appeal to Quarter Sessions against any proceeding of any justices or magistrates assembled for granting certificates, and having conferred that right of appeal the section says no more. It leaves the Quarter Sessions to their own discretion. It gives no directions whatever, and imposes no limitations. This section makes all the difficulty.

"Without this right of appeal the Act is consistent and complete. But when the right of appeal is given there is no provision at all for what may happen under it. Appeal from the certificating justices to Quarter Sessions was a novelty in this branch of the law. There was no statutory appeal or statutory double procedure of this kind given in the immediately previous statutes—44 Geo. III. c. 55, and 48 Geo. III. c. 143. There may have been a right of appeal at common law from Petty Sessions to Quarter Sessions in some branches of law, but not, I think, any statutory appeal in regard to certificates. Section 14 has all the appearance of an afterthought introduced with very little consideration after the details of the Act were adjusted, and I find that in point of fact there was no such clause in the bill when introduced into Parliament. It must have been added in the course of debate. All the provisions of the Act relate solely to the procedure before the magistrates or licensing justices. They seem to have no reference to procedure on appeal.

"If that be so, I can find no *termini habiles* for deciding this case against the Clerk of the Peace. He might conveniently enough have been directed to issue certificates as in Ireland. But there is no direction of the kind in the Act. There is no duty of that kind thrown by the Act on the Clerk of the Peace, and I do not see how it can be implied. He could not make a certificate in accordance with the statutory schedule, and his certificate would not be such as the Commissioners of Excise would be bound to accept or would accept. It would not be a statutory certificate. I see no sufficient warrant for imposing on the Clerk of the Peace a duty which the statutes certainly do not impose, and I therefore think that he should be assoilzied.

"Does it follow that the pursuer has no legal remedy? That can hardly be, seeing

that the plain and certain intent of the Act would be thereby defeated. For there can be no doubt that it was the intention of the Act that a person in the position of the pursuer should receive a certificate and a licence, so that the statute must be construed so as to carry out that intention if it be at all possible. But I admit that the verbal difficulty which has pressed on the Town-Clerk is very great, but not, I think, wholly insuperable.

"The chief puzzle, although not the only puzzle, is caused by the last sentence of the 7th section of the Home Drummond Act. I repeat the words—'Any certificate granted otherwise than at such meeting shall be void and of no effect.' The words are absolute and unambiguous. They do not admit of construction properly so-called, but they may possibly admit of limitation. They can only be limited in effect by holding them limited in application. Read strictly, they would strike against all certificates granted after appeal, whether they were issued by Quarter Sessions or by the Magistrates. But it is impossible to hold that the statute conferred a right of appeal and at the same time declared positively that the appellant should take no benefit from it. I therefore think it legitimate to hold that these words do not apply at all to procedure before the Quarter Sessions on appeal, and that a certificate would not violate the statute although if issued in respect of a deliverance on appeal it bore the date of that deliverance.

"There are, no doubt, other difficulties. It is true that the Town-Clerk, as he argues, can only (section 16) deliver a certificate in terms of the book or register kept by him as provided by section 12, and it is said that that book or register can only contain the deliverances of the licensing magistrates at their dates; and I rather think it is true that the certificate to be delivered by the Clerk must be in terms of the entry in the register; and, therefore, before the certificate demanded by the pursuer can be issued by the Town-Clerk the register must be corrected if it does not already embody the deliverance of the Quarter Sessions, so that 'the deliverance' in the register spoken of in section 16 will correspond with the certificate. And I think that to modify the register or book in that manner, that is by making on it such alteration as will give effect to the rulings of Quarter Sessions on appeal, must be in accordance with the Act. The prohibition in section 12 to alter anything that has been done at a previous meeting means that a resolution finally adopted shall not be altered, but it does not necessarily mean that an entry shall not be altered, that a blunder shall not be corrected, or that the entry of a wrong judgment put right by adequate authority shall not be rectified. For what is the book? I apprehend that it is not meant to be a record of the transactions of the Court, but a list of persons who have applied for certificates, and of those who have received certificates. It, or a copy of it, is to be sent to the officers of the Excise to enable them to know in whose favour licences are to be granted, and not surely in order to mislead them—not, for example, to represent that an applicant had received a certificate whose application had been refused at Quarter Sessions. I think that what the Act contemplates is, that the magistrates shall send reliable information on which the Excise authorities may safely act. No doubt it may often be difficult and sometimes impossible to do this within the time fixed by the Act. For (section 17) the list is to be sent within eight days after the date of the magistrates' meetings, while under section 14 ten days are allowed for appeal, which only shows the curious disconnection which there is between this appeal clause and the other provisions of this bungled Act, and the necessity there is for working it with all the accommodation and freedom which its words will permit.

"Some difficulty has been felt in regard to the form adopted by Quarter Sessions. It is said that there was no power to remit. I do not see the difficulty. It was proper and convenient (possibly not essential) that the Magistrates should be authentically informed that their deliverance had been overruled, and I do not see how that could be done more fitly than by a remit, which may generally be made by a court of review. Probably, however, it does not signify in this case, because I think the result would have been the same had there been no remit.

"I feel, however, considerable difficulty in directing the Town-Clerk of Glasgow to deliver a certificate disconform, if it be so, to the register; while it is not clear that this process affords means for ordering the register to be rectified.

"Perhaps the defender Sir James Marwick may be able to remove that difficulty. But if not, and if he proposes to submit this judgment to the Inner House, probably the best course will be to sustain the pursuer's first plea, assoilzie the defender George Gray, and find that the defender the Town-Clerk of Glasgow is the official whose duty it is as Clerk to the Magistrates to deliver a certificate to the pursuer, and allow the defender leave to appeal before pronouncing a decree in terms of the conclusions ordering delivery of the certificate."

The defender Sir James Marwick reclaimed, and argued—There was no dispute here that the pursuer must obtain a certificate, and it was equally clear that the Home Drummond Act failed to specify who was to grant it. Practice had varied in the different burghs and counties of Scotland, in some cases the certificate being granted by the town-clerk, in others by the clerk to the peace. On a reasonable construction of the Act the clerk to the peace was the proper official. The magistrates, as a licensing body, formed a new court created by the Home Drummond Act, and therefore their officials had no powers except those expressly conferred. The Quarter Sessions, on the other hand, was an existing court with an established practice.—*Mackenzie* v. *M'Dougall*, December 11, 1874, 2 R., J.C., 12; *Wilson* v. *M'Intosh Brothers*,

July 19, 1878, 5 R. 1097. It was unnecessary, in providing an appeal to an established court, to make it a matter of express provision that its officials should carry out the procedure necessitated by its decision. It was part of their ordinary duty to do so, and therefore it ought to fall to the clerk of the peace to grant the certificate in circumstances like the present.

Argued for the respondent Gray—The question was a new one, as in the only case in which it had been involved—*Mackintosh* v. *Macpherson*, December 3, 1834, 13 S. 124—no decision had been given. The Lord Ordinary had decided rightly. It was obvious that the pursuer must get a certificate; and as the Act had omitted to state who was to grant it, it fell to the Court to decide that point by considering who was the official to whom that duty naturally belonged. Such considerations pointed to the town-clerk, as the official of the licensing body.

The pursuer was represented at the hearing by counsel, but did not submit an independent argument.

LORD PRESIDENT—We have a very full and carefully considered opinion appended to the Lord Ordinary's interlocutor, and I entirely agree in the conclusion at which his Lordship has arrived. There seems to be no doubt that section 14 of the Home Drummond Act was introduced into the bill, which ultimately became an Act, during its progress through Parliament, and no machinery was provided for carrying the section into effect. But the Legislature enacted it, and intending that it should have effect it is our duty to see that the intention of the Legislature is not defeated, if this result can reasonably be avoided. Seventy-two years have elapsed since the Act came into operation, and it does not appear that until now any difficulty has been experienced in carrying it into effect. It is true that at least two modes of doing so have been adopted, but there has been a large and long-continued practice in Edinburgh, Glasgow, and other important cities of giving effect to section 14, which the Town-Clerk of Glasgow now proposes to alter.

Where, as in the present case, we find a statutory enactment providing for an appeal but not supplying machinery, the Court must necessarily imply or infer such things as are requisite to make the enactment effectual. Section 12 of the Act provides for a book or register being kept by the clerk of the magistrates containing the names of applicants for certificates, with various particulars, including the manner in which the application is disposed of. The difficulty here—if there be a difficulty—arises from the fact that there is no provision as to what is to be done in a case like the present, where the Quarter Sessions decide that a licence certificate which has been refused by the magistrates is to be granted. It is said that the Justices sitting in Quarter Sessions must do all that is necessary to give effect to their finding, and that, although not appointed to do so, they must keep a register or record just as the magistrates are required to do, and that their clerk should issue the certificate. It appears to me that that is not so reasonable a view, or so consistent with the effective administration of the Act, as that at which the Lord Ordinary has arrived, to take of an administrative statute. Although it is not the case of an appeal from one court to another in the ordinary sense, but rather from one administrative body to another, it seems much more reasonable that where the inferior or primary body is required to keep a book or register, the Justices in Quarter Sessions shall, when they have decided that a licence should be granted, convey information of that to the magistrates in whatever form may be most expedient—it really does not matter how—and that the magistrates should note this decision in their book or register and give effect to it. Apparently no difficulty has arisen in practice in following this course. I understand that the practice has been to add to the statutory book or register kept by the magistrates a column stating that the application which had been refused by the magistrates had been granted by the Quarter Sessions. This does not infer any alteration of anything that had been already entered in the register. The original record stands untouched, only an addition is made to it, requisite to give effect to the Act. Then when the information has been sent from the Quarter Sessions, and the appropriate entry made in the book or register, the town-clerk can issue the certificate, which is the warrant for a licence. This is a short and simple view of the case, and under it the statute can be carried out very simply without the necessity for additional legislation.

LORD ADAM — Apparently the Home Drummond Act set up two primary courts for licensing purposes, the justices of the peace in counties, and the magistrates in burghs, and provided that they should hold meetings at fixed times. Among other provisions for these courts it is provided that the clerk shall keep a book in which shall be entered various particulars regarding applications for licences. It is clear that these particular bodies—the justices of the peace in counties and the magistrates in burghs—are the bodies charged with the duty of keeping this book in which all essential particulars in granting licences are to be entered. That being so, the Act proceeded by section 14 to give a right of appeal, whether the licence was refused or granted, and in both counties and burghs the appeal is to quarter sessions. It is said by Mr Ure that this is an appeal to a well-known court, and that that fact has a material effect on this case. But I do not think that is so, because this appeal is an entirely new procedure, and not part of the common-law jurisdiction of quarter-sessions. I demur entirely to the proposition advanced by Mr Ure, that because the Court of Quarter-Sessions is a court with ordinary jurisdiction it can therefore also exercise powers not conferred by statute in

carrying out a special statutory jurisdiction. I question if that Court has any power to keep a book containing a record of licensing appeals, but we do not require to consider that point. Both parties here are agreed that the pursuer must have a certificate, and the only question is whose official is to grant it. My view on that point corresponds with that of the Lord Ordinary. I think this is a *casus improvisus* in the sense that there is no provision for it made in the statute. I think originally the decision of the court of first instance was to have been final, and assuming that to be so, the whole procedure is to be found in the Act. Then section 14, giving a right of appeal was added, and there is no provision in the Act as to what is to be done in the event of the appeal being successful. There are as many difficulties in the way of the one view as of the other. The condition of my mind on the question is, that I admit the difficulties on each side, but then it is agreed that the difficulties on one side or the other must be got over. If the case is put so, the question naturally arises, which of these officials is the most appropriate person to grant this certificate. On this account I pointed out that the licensing body was really the magistrates, because it is obvious, as your Lordship has pointed out, that if we were legislating on this point now we would send all cases originally before the magistrates back to that court, and all cases originally before the justices of the peace back to them. Otherwise the county authorities would be compelled to keep a register in a matter outside their own jurisdiction. I therefore think that the Lord Ordinary has exercised a wise discretion in deciding that of these two officials it is the duty of the town clerk to grant the certificate in cases like the present.

Lord M'Laren—I am not sure that I should be disposed to go quite so far as the Lord Ordinary has done in treating this as an appeal under an Act of Parliament which is very defective in its provisions. The appeal is not to a special court constituted for the purpose, but is an appeal to the next quarter-sessions—that is, to an established and known jurisdiction. The statute itself prescribes all the conditions for granting and renewing certificates, and of course those clauses in the beginning which relate to the constitution of the licensing court of first instance have no application to the quarter-sessions. The clause which is important as applicable both to the original hearing and the appeal is the 7th section, which, dealing with this kind of business partly in the spirit of judicial procedure and partly of administration, provides that the magistrates may grant a certificate according to their discretion, provided that "all meetings shall be held with open doors, and that it shall not be competent to refuse the renewal of any certificate without hearing the party in support of the application for renewal in open court, if such party shall think fit to attend." This provision, which is really the only provision relating to procedure before the justices, is of course equally applicable to an appeal to the Quarter-Sessions. There is no provision for the examination of witnesses. It was not contemplated that anything of the kind would be necessary. If it were necessary, we know that according to the constitution of the Court of Quarter-Sessions, as explained by the Lord President in the case of *Mackenzie*, 5 R. 1097, every appeal to the Quarter-Sessions is a re-hearing of the case from the beginning, and if evidence has already been taken they are not entitled to proceed upon the evidence taken before the Petty Sessions, but must re-hear the witnesses for themselves. Now, there are two things for which the statute fails to make express provision, and these are the registration of the decision of the Quarter-Sessions, and the person who is to grant the certificate. But we are not left without some light on the subject, because, first, in regard to the register I see that the Act of Parliament specifies very distinctly what this register may contain. It is to have columns for the designations of the applicants, for the names of the persons who recommend them, for the house or place for which such certificate is applied, and for the manner in which the application is disposed of; and then, what is perhaps not altogether to be overlooked, the Act goes on, "for noting a memorandum of convictions under this Act against such parties respectively and the dates thereof." Now, such a provision shews that the register is not a mere register of decrees, but is a working register which is to guide the magistrates at future sittings, and in order to their guidance there is to be noted by the proper officer any conviction for offences against the licensing laws which might affect the renewal of the certificate. Therefore, keeping in view that there is to be a column for the manner in which the application is disposed of, I cannot doubt that where an appeal is taken that column must be filled by the proper officer with a statement of what was done in the appeal, whether the certificate was granted or refused. That being so, who is the person who is to issue the certificate? On that subject what the statute in section 7 says is this—"Such justices or magistrates shall deliver or cause to be delivered to every person so authorised or empowered a certificate, written or printed on paper in such form as hereinafter directed." So that the delivery of the written certificate is to be the act of the justices or magistrates—an act which they are to do or cause to be done. That seems to point very plainly to the certificate being issued by the officer who is under the control of the justices or the magistrates to whom the original application was addressed, and certainly militates against the theory that it is to be the act of an officer of the Court of Appeal. I should have thought, if no other arrangement could be made, the statute might be worked out by the clerk of Petty Sessions, or the town-clerk in a case like the present, attending the

Quarter Sessions with his register-book and making the proper entry. He is responsible for the accuracy of the entry, and if he can arrange with the Clerk of the Peace, who sits generally as assessor to the Quarter Sessions, to send a note of what was done, and if he corrects his register accordingly, I do not doubt that that would satisfy the requirements of the statute. But there being no provision for a separate register to be kept under the authority of the Quarter Sessions, I think that in some way the register must be completed by a statement of the disposal of the case, and this, together with the general duty imposed upon the licensing Court to cause a certificate to be delivered, points to the officer of the primary court being the proper person to issue the certificate under all circumstances. While I in common with your Lordships think that is probably the best way of working out what the statute has left incomplete, yet as this is rather a matter of inference than of express enactment, I should not have been disposed to differ from any decision which the Lord Ordinary might have given as to which of the two clerks of court is the proper person to issue the certificate. But on a balance of considerations I think there is more to be said in favour of the solution which the Lord Ordinary has proposed. Accordingly I am of opinion that his Lordship's interlocutor should be adhered to.

LORD KINNEAR was absent.

The Court adhered.

Counsel for the Reclaimer — Ure, K.C. —Deas. Agents — Simpson & Marwick, W.S.

Counsel for the Respondent — Dundas, K.C.—A. S. D. Thomson. Agents—J. & A. Hastie, Solicitors.

Counsel for the Pursuer—A. O. M. Mackenzie. Agent—James Purves, S.S.C.

Friday, February 22.

SECOND DIVISION.

[Sheriff of Perth.

KINNEAR *v.* J. & D. BRODIE.

Sale—Sale of Moveables—Sale of Horse—Warranty—Breach of Warranty—Rejection—Buyer's Obligation to Return—Death of Horse during Trial through Vice Covered by Warranty—Passing of Property—Passing of Risk—Res perit domino—Sale of Goods Act 1893 (56 *and* 57 *Vict. c.* 71), *secs.* 20 *and* 53 (1).

A contractor purchased and received delivery of a horse, warranted by the seller to be "correct in wind and work." On being tried on the day of delivery it was very unruly and plunged violently, and on the following day, while being further tried, it behaved in a similar manner, and ultimately ran into a mill dam, where it was drowned. In an action brought by the seller for the price, it was held proved that the horse was not conform to the warranty, and that its death was due to a fault against which it was warranted.

Held that as the purchaser would have been entitled to reject the horse as disconform to warranty, and as his inability to return it was due to the seller's breach of warranty, he was not liable for the price.

David Kinnear, Todhills, Tealing, brought an action under the Debts Recovery Act in the Sheriff Court at Perth against John and Daniel Brodie, contractors, Coupar-Angus, for £30, 15s., being the price of a horse sold by the pursuer to the defenders.

On 17th November 1900 the Sheriff-Substitute (SYM) after a proof, pronounced the following interlocutor, in which the facts of the case are sufficiently set forth:—"Finds in fact (1) that the defenders, who are contractors, having heard that the pursuer, a farmer at Tealing, had a chestnut horse which would be suitable for their business, went to Tealing about 31st July 1900, with a view to buy said horse; (2) that said horse, which had been foaled at Tealing, and had spent all its life there, was then seven years old, and though a somewhat fractious horse when being broken in, had for some time been quiet and tractable in pursuer's hands; (3) that the pursuer on said date sold him to the defenders for £31, with 5s. of a luck penny, or £30, 15s., and gave a warranty that he was 'correct in wind and work'; (4) that on the following day the pursuer sent him to Auchterhouse Station, where he was met by Charles Ogilvy, the defenders' servant, and whence he was led by Ogilvy to the defenders' premises at Coupar-Angus; (5) that on the same day he was put into a waggon laden with a little over a ton of coal, and though carefully managed was very unruly and plunged violently; (6) that on 2nd August he was put into a stone-cart to fetch stone from Keithick Quarry to Cupar Grange, and though carefully managed by Ogilvy, was again unruly and plunged violently; (7) that on his second journey from the quarry, with about 18 cwts. of load, he stood fast, and then plunged violently and ran into a mill-dam some yards to the left of the road, where, being held down by the loaded cart, he was drowned, and that without any fault on the part of the defenders' said servant; finds in law that, until he was so drowned it was still within the power of the defenders to return him as not 'correct in work,' and that the conduct of the horse while in their possession justified his being so returned, and constituted a breach of said warranty, in respect that the defenders were entitled to expect that the horse was fit for immediate use: Therefore sustains the defences, assoilzies the defenders, and finds them entitled to of expenses, for which decerns."

The pursuer appealed to the Sheriff