mission to serve had been given. The warrant must also be signed by a proper officer of Court—Darling on Messengers-at-Arms, p. 16. Citation was an *actus legitimus*, and therefore if it were inept all the subsequent procedure would be ineffectual. In regard to clause 10 of the Heritable Securities Act, relied on by the defenders, "irregularity" implied proceedings, but here there were no proceedings at all. The Act applied to "irregularities" only and not to fundamental nullities—*Lindsay* v. *Magistrates of Leith*, May 22, 1897, 24 R. 867. 34 S.L.R. 648.

Counsel for the defenders were not called upon.

At advising—

LORD JUSTICE-CLERK—Whatever may have been the history of the proceedings in this case, it may, I think, be disposed of on a very simple ground. The pursuer's case is this—that in proceedings a good many years ago to have it declared that the present pursuer had forfeited his right of redemption of his estates of Aberarder and Skibo, the petition was served on him by a messenger-at-arms and not by a sheriff officer. Now it may be a question whether citation by a messenger-at-arms is a good citation in a sheriff-court process unless the messenger-at-arms is specially authorised by the sheriff. But I do not think that we need to determine that question in the present case. The question here is whether the defender's title can be attacked on the ground that it proceeds on a decree in an action in which the citation was by a messenger-at-arms. It seems to me that the 10th section of the Heritable Securities Act 1894 covers exactly such a case as the present. The section is quite clear in its terms, which are these.—[*His Lordship quoted the section.*] I think that these words plainly apply to the irregularity here, if it was an irregularity. I think it is plainly the object of the section to make purchasers from a creditor safe, and to relieve the purchaser from the necessity of inquiring in detail into the history of the proceedings on which his title is based. It is said that this was not a case of irregularity in any "proceedings," because, it was argued, you cannot have "proceedings" until you have a regular and valid citation. In a sense that is true, but the serving of a petition which requires the warrant of the sheriff seems to me clearly to be a proceeding to which section 10 of the statute is applicable. I have no doubt that the statute protects purchasers against irregularities such as we have here in citation. I am clearly of opinion that we should adhere to the Lord Ordinary's interlocutor.

LORD YOUNG—I think it clear that the clause of the statute applies. I also think it clear that there was a citation here in point of fact, given no doubt by a messenger-at-arms and not by a sheriff officer. Now I am not prepared to say that a messenger-at-arms may not effectually give a citation of a sheriff-court writ, even although he has not the special authority of the sheriff. I am not prepared to say that a citation so given is in law of no effect whatever, but assuming, without affirming, that there was an irregularity in such a citation, it nevertheless was a citation in point of fact, and that being so I have no doubt that the statute applies. The irregularity, assuming that there was any irregularity, seems to me a typical case of the sort of irregularity to which the statute applies.

LORD TRAYNER—I agree. I think that section 10 of the Heritable Securities Act 1894 exactly covers such a case as we have here. Assuming, but without admitting, that there was an irregularity in the proceedings in connection with the service of the petition against the present pursuer, I think section 10 covers such an irregularity and protects purchasers against the consequences thereof. I am therefore of opinion that the Lord Ordinary's interlocutor should be affirmed.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Hunter—W. Mitchell. Agent—Alexander Bowie, S.S.C.

Counsel for the Defenders and Respondents—Dundas, K.C.—Chree. Agents—Dundas & Wilson, C.S.

Wednesday, July 9.

SECOND DIVISION.

[Sheriff Court of Fife and Kinross at Dunfermline.

CRAIG'S TRUSTEE *v.* MACDONALD, FRASER, & COMPANY.

Bankruptcy — Illegal Preference — Statute 1696, c. 5—Right in Security—Retention —General Lien—Auctioneers.

The tenant of a farm arranged with a firm of auctioneers to conduct a displenishing sale of the stock and cropping of the farm on October 26th 1900. The tenant, who had been insolvent for some time prior to the date of the sale, was made notour bankrupt on November 29th 1900, and was sequestrated on January 11th 1901. At the date of the sale, as the result of a series of transactions between the auctioneers and the tenant, the tenant was due to the auctioneers a balance of £244—part of the balance being alleged to be an advance of £200 made by the auctioneers to the tenant on September 26th 1900. On October 19th 1900, a receipt, which was ante-dated September 26th 1900, had been granted by the tenant to the auctioneers in these terms—"Received from 'M., F., & Co.' the sum of £200 to account of my displenishing sale." In a question with the tenant's trustee in bankruptcy, the auctioneers claimed to retain the sum of £244, being part of the proceeds of the dis-

plenishing sale, in payment of the debt due to them by the tenant.

Held (*diss.* Lord Young) (1) that the auctioneers having no right to retain for a general balance were not entitled to retain the proceeds of the sale in order to repay in full unsecured advances made by them to the tenant, and (2) that the receipt for £200 granted by the tenant having been in fact granted within sixty days of the tenant's bankruptcy and in the knowledge that he was insolvent, was invalid to entitle the auctioneers to a preference as secured creditors to that amount on the tenant's bankrupt estate.

John Watson Mackintosh, Chartered Accountant, 115 St Vincent Street, Glasgow, trustee on the sequestrated estate of James Craig, farmer, Lathalmond, Dunfermline, brought an action in the Sheriff Court of Fife and Kinross at Dunfermline, against Macdonald, Fraser, & Company, Limited, auctioneers and cattle salesmen, in which, as ultimately restricted, he craved decree against the defenders for a sum of £244, 19s. 1d., being a balance which the defenders had retained, over and above their commission and outlays, out of the amount realised at a displenishing sale of the stock and cropping of the said James Craig's farm carried out by the defenders.

Craig was tenant of the farm of Lathalmond on a lease for nineteen years from Martinmas 1895 with a break in his favour at Martinmas 1900. Craig elected to take advantage of the break, and made arrangements with the defenders for their conducting a displenishing sale on his behalf on October 26th 1900. The displenishing sale of Craig's effects was carried out by the defenders on said date. By the conditions of sale (No. 9 of process), which were signed by Craig, it was provided that accounts for purchases should be payable to the defenders, "who are hereby authorised to receive, discharge, and if necessary sue for the same in their own name, and the purchaser or purchasers shall not be entitled to withhold payment from the said Macdonald, Fraser, & Company, Limited, of the price or prices for purchases on account of any actual or alleged claim which he or they may have against the exposer."

The defenders, over and above their commission and outlay in connection with the sale, retained the sum sued for out of the proceeds of the sale. The sum in question was entered by them in their account rendered to Craig dated 26th October as an "advance on sale."

On November 28th 1900 Craig was rendered notour bankrupt in virtue of the expiry without payment of a charge served upon him. On January 11th 1901 Craig's estates were sequestrated and the pursuer was elected trustee in the sequestration, his election being duly confirmed by act and warrant in his favour of date January 31st 1901.

The trustee thereafter raised the present action.

The defenders claimed right to retain the sum sued for from the proceeds of the sale as being the balance due by Craig to the defenders in a "statement of account" (No. 12 of process) on a series of sales, purchases, and advances with interest.

From the statement of account (No. 12 of process), between Craig and the defenders, bringing out a balance of £244, 19s. 1d. due to the defenders, it appeared that prior to 26th September 1900 a sum of £437, 18s. 11d. had been due to the defenders by Craig. On 26th September 1900 the defenders sold for Craig stock to the amount of £402, 8s. The defenders credited Craig in the account (No. 12 of process) with that sum, of date 26th September 1900, and also debited him in the said account with a sum of £200, of date 26th September 1900, "to cash advanced on sale."

The defenders produced a receipt (No. 14 of process) in the following terms:—"*26th Sept.* 1900—Received from Messrs Macdonald, Fraser, & Co., Ld., the sum of two hundred pounds to account of my displenishing sale at Lathalmond. Paid, 26th Sept. 1900—(signed) JAMES CRAIG." This receipt was stamped with a 1d. stamp. It was in fact signed on 19th October, but was ante-dated of the date which it bore.

It was admitted that a sum of £200 was paid by the defenders to Craig on 26th September 1900. The pursuer denied that this payment was an advance to Craig by the defenders, and averred that it was a payment by them to Craig on account of the stock sold by them on 26th September 1900 for Craig.

The defenders averred that the sum of £200 paid by them to Craig on 26th September 1900 was an advance made to Craig by them on that date in contemplation of the sale of his effects, which he then entrusted to the defenders on the understanding and agreement that the advance should be repaid with interest out of the proceeds of the sale, that said advance and other advances were made by them in the ordinary course of their business, and that the arrangement as to repayment was an arrangement which is customary among auctioneers and live-stock salesmen.

The pursuer pleaded that the retention by the defenders of the sum sued for was contrary to common law, and to the Acts 1621, c. 18, and 1696, c. 5.

The defenders pleaded, *inter alia*, as follows:—"(3) The defenders' whole intromissions having been in *bona fide*, and in ordinary course of trade, they are entitled to be assoilzied with expenses. (4) The defenders are entitled to set off or compensate the sums advanced by them to and the obligations undertaken by them for Craig against the proceeds of the sale of his effects."

The Sheriff-Substitute allowed a proof. The purport of the proof sufficiently appears from the opinions.

On 21st October 1901 the Sheriff-Substitute (GILLESPIE) pronounced the following interlocutor:—"Finds in fact (1) that the pursuer is trustee on the sequestrated estates of James Craig, who was tenant on the farm of Lathalmond, near Dunfermline, for

five years ending with Martinmas 1900: Finds (2) that the debts due to the creditors represented by the pursuer were all incurred prior to 26th October 1900, the date of Craig's way-going sale: Finds (3) that between October 1899 and 26th October 1900 he had dealings with the defenders from time to time, which are shewn in the statement of account, which is a transcript from their books, the result being that Craig was due to them immediately before his way-going sale an unsecured balance of £234, 9s. 11d., with £10, 9s. 2d. of interest claimed by them, or £244, 19s. 1d. in all: Finds (4) that in the summer of 1900 it was arranged between Craig and the defenders that they should conduct Craig's way-going sale: Finds (5) that at the date of the sale, and for some months previous, Craig was hopelessly insolvent, and if he had looked into his affairs he must have known that he was insolvent: Finds (6) that for about a week before the sale Mr Nicol Ross, the defenders' managing director in Dunfermline, had good ground for suspecting Craig's solvency, and did suspect it: Finds (7) that on 26th October 1900, on the morning of the sale, Craig signed the document entitled conditions of sale, and delivered to the defenders the greater part of his crop, stock, and other effects for public sale, and the sale was accordingly held that day: Finds (8) that Craig was rendered notour bankrupt on 28th November 1900, in virtue of the expiry without payment of a charge served on him: Finds (9) that in settling with the pursuer as Craig's trustee, the defenders claim to deduct from the proceeds of the sale, *inter alia*, the balance of £244, 19s. 1d. above mentioned: Finds in law that the delivery by Craig to the defenders of crop, stock, and other effects in satisfaction or security for their debt is struck at by the Act of 1696, cap. 5, and that the defenders are bound to pay to the pursuer, as trustee foresaid, the said sum of £244, 19s. 1d., for which decerns against the defenders with interest thereon at 5 per cent. per annum as from 29th January 1901."

Note—"The salient points on which the decision turns are few and simple.

"For some months before the sale Craig was unquestionably insolvent. He had the materials in his possession for knowing his insolvency, and if he did not know it, it must have been because he resolutely kept his mind off the subject. It is not necessary for the pursuer to aver or prove that the defenders were aware of Craig's insolvency; but their managing director admits that he had grounds for suspecting Craig's solvency a week before the sale. The antedating of the receipt No. 14 of process, which is now admitted, is significant of Mr Ross' suspicions.

"On the morning of the sale the defenders were nothing more than unsecured creditors of Craig. It is true that it was arranged that they should conduct the sale, and it may be conceded that they advanced the sum of £200 on 26th September in the expectation that they would recoup themselves out of the proceeds of the sale. But they took no security at the time, and it may be doubted whether Craig would then have been willing to give them security. He would have preferred to favour his own relatives who were creditors. They cannot even say that there was an obligation to give security. The receipt No. 14 of process, 'Received from Messrs Macdonald, Fraser, & Co., the sum of two hundred pounds to account of my displenishing sale at Lathalmond,' though bearing date 26th September, was not granted by Craig till 19th October, and was within sixty days of notour bankruptcy. Even that was not a security.

"Until 26th October Craig might have disposed of his crop and stocking by private sale or through another auctioneer, and all that the defenders could have claimed would have been to be ranked for their debt and for any loss from their services as auctioneers being dispensed with.

"The document No. 9 of process, signed by Craig on 26th October, and the delivery of his effects to the defenders, for the first time gave them security for their advances. Unfortunately for them it was within sixty days of notour bankruptcy.

"The defenders have a plea on record: 'The defenders' whole intromissions having been in *bona fide* and in ordinary course of trade, they are entitled to be assoilzied.' *Bona fides* is not sufficient to exclude a challenge under the Act 1696. The defenders have no averment that the transaction was in fact in the ordinary course of trade, and they have led no proof as to custom of trade. There is no evidence of a recognised right of retention on the part of auctioneers and live-stock salesmen for a general balance in a question with creditors. A farmer and an auctioneer cannot contract themselves out of the operation of the Act of 1696, c. 5.

"The defenders appeal to the principle of balancing accounts in bankruptcy, and maintain that they cannot be compelled to pay their debt to Craig in full while receiving only a dividend on Craig's debt to them. But the principle of balancing accounts in bankruptcy cannot be pleaded to set up a transaction struck at by the Act 1696, c. 5. The statute where it applies overcomes the common law. The defenders may perhaps seem to be in a more favourable position from the goods delivered to them for sale being largely in excess of their own claim; but if their defence is good it would be good if their claim had swallowed up the whole proceeds of the sale."

The defenders appealed to the Court of Session, and argued—The transactions in question were *bona fide* dealings in the ordinary course of business, and as such were not struck at by the Act 1696, cap. 5—*Loudon Brothers* v. *Reid* (*Lauder's Trustee*), December 7, 1877, 5 R. 293, 15 S.L.R. 187; *Carter* v. *Johnstone*, May 5, 1886, 13 R. 698; 23 S.L.R. 458; Bell's Comm. (7th ed.), pp. 206 and 211. The sale was duly advertised, and the goods were delivered not as security for debt but merely to be sold as advertised. The receipt dated 26th September 1900 was simply the acknowledgment of a loan made on September 26, and the Act

1696, cap. 5, could not apply to that receipt There was nothing to show that a preference was intended, and the payment to the defenders on the day of the sale, when their account was made up, was made in the regular course of the defenders' business. The auctioneers, the defenders, were entitled to a lien over the goods sold by them at the sale for the general balance due to them on their transactions with Craig—*Anderson's Trustees* v. *Fleming*, March 17, 1871, 9 Macph. 718, 8 S.L.R. 430; *Miller* v. *Hutcheson & Dixon*, February 16, 1881, 8 R. 489, 18 S.L.R. 304; *Webb* v. *Smith* (1885), 30 Ch. Div. 192. It was contrary to the rule of balancing accounts in bankruptcy that the defenders should be compelled to pay this debt in full to Craig and receive only a dividend on the debt due to them by Craig.

Argued for the respondents—The defenders were in the position of unsecured creditors until the granting of the receipt on 19th October 1900, which for their own purpose was antedated 26th September 1900. The receipt in fact was granted within sixty days of bankruptcy, and if it was a security it was invalid as an illegal preference under the Act 1696, cap. 5—*Nicol* v. *M'Intyre*, July 13, 1882, 9 R. 1097, 19 S.L.R. 815; *Stiven* v. *Scott and Simpson*, June 30, 1871, 9 Macph. 923, 8 S.L.R. 605. The effect of the receipt, and the intention of the defenders in taking it, was to constitute an assignation to that amount of the proceeds of the sale—*Carter* v. *M'Intosh*, March 20, 1862, 24 D. 925, at p. 933. The receipt was taken in the knowledge of Craig's insolvency, and even if it were not proved that the defenders were in *mala fide*, *bona fides* was not sufficient to render such a transaction valid. The mere mandate to the defenders as auctioneers to uplift the proceeds of the sale could not give them any right to retain the proceeds of the sale for a general balance due to them by Craig. Their right of retention was limited to the amount necessary to meet their business charges for carrying out the sale. To that extent it was not disputed.

At advising—

LORD JUSTICE-CLERK—I have given repeated consideration to this case, and have been unable to see any sufficient ground for interfering with the judgment pronounced in the Court below. The circumstances are briefly these—James Craig, who was tenant of a farm, took advantage of a break in his lease to give up his tenancy, and arranged with the defenders to conduct a displenishing sale on 26th October 1900. He was at that time insolvent, and was made notour bankrupt on 28th November by the expiry of a charge without payment, and the pursuer was appointed judicial factor on his estate. Afterwards he was duly sequestrated on 11th January, and the pursuer was elected and confirmed trustee.

Craig had had former dealings with the defenders, and at the time he arranged for an auction of his stock, &c., he was due them a sum of £244, 19s. 1d., for which they had no security. It appears that the defender's manager in Dunfermline having had his suspicions aroused as to Craig's solvency, got him, on the 19th of October, to sign a receipt in these terms:—"Received from Messrs Macdonald, Fraser, & Co. the sum of £200 to account of my displenishing sale at Lathalmond;" and this receipt though not granted till 19th October was made to bear the date of 26th September. Thus it was in fact granted within sixty days of bankruptcy, and even if it could be held to constitute a security was invalid to entitle the defenders to a preference as secured creditors. If they advanced money to the bankrupt they might do so in the belief that they would get payment out of the proceeds of the sale they were to conduct, but they took their risk. I have been unable to see that there was any security before the sixty days preceding bankruptcy on which they could found. The obtaining of the letter on 19th October, which was antedated to 26th September, could only have been because they were under the belief that their position was insecure, and under a desire if possible to prop it up should their fears as to their client's pending financial breakdown turn out to be justified.

But it is maintained that what was done was in the ordinary course of business, and if this were so it might form a good answer to the contention of the trustee in bankruptcy. The conduct of the sale was certainly ordinary business, and the proper auctioneers' charges for carrying out the auction in the ordinary way would necessarily be deducted from their debit for the proceeds of the sale coming into their hands. But what the auctioneers maintain that they are entitled to do is, after conducting a sale of goods on employment as such, to retain part of the price realised in payment of prior advances made by them to a person who has become insolvent, founding on an acknowledgment of debt granted within sixty days of bankruptcy. I cannot hold that this is of the nature of ordinary trade procedure, and would expect that if that view was to be maintained it would be supported by very clear evidence. But the auctioneers have failed to prove any such case. It was suggested that the circumstances were such as to constitute a case of general accounting as upon running accounts. I am unable to find anything to justify that contention. I concur in the reasoning of the Sheriff-Substitute in his note, and am of opinion that his judgment should be affirmed.

LORD YOUNG—The pursuer, who holds the Sheriff's judgment, and is therefore respondent in the appeal, is the trustee in bankruptcy of a farmer, James Craig, who was rendered notour bankrupt on 20th November 1900. The appellants, the defenders, are auctioneers and cattle salesmen, who were in the summer of 1900 employed by Craig to conduct the waygoing sale of the stock on his farm, the lease of which terminated at Martinmas

1900. The pursuer avers that the defenders accepted the employment, and under it "duly carried out a displenishing sale of Craig's effects" on 26th October 1900, and that the net proceeds of the sale, "after deducting defenders' outlays in connection therewith and commission, amounted to £801, 11s. 8d.," the sum sued for. It is averred by the pursuer and specially found by the Sheriff that the stock sold by the defenders on 26th October was delivered to them at their auction mart that morning. It was, of course, all of it delivered by them to the purchasers at the sale. There is no suggestion that they retained any of it. It is superfluous but perhaps just to the defenders to notice the fact that there was no secrecy in the matter of this displenishing sale, which was advertised by the defenders in ten newspapers as shown by the account No. 23 of process.

What, then, are the questions in the case? That the defenders were lawfully and in the ordinary course of their business employed to sell and did sell the stocking of Craig's farm, and received the price thereof from the purchasers is admitted. Nor is there any dispute as to the amount received by them, or their liability to account therefor to their employer—that is, Craig, for they had no other—and that to him they did account at the conclusion of the sale on 26th October by laying before him what the Sheriff is satisfied with as being a full and truthful statement of the accounts as they then stood between them, and getting from him the discharge No. 15 of process. This, according to the Sheriff's judgment, and indeed admittedly, ratifies the payment by the defenders of £284, 18s. 6d. to Craig's landlord, and of £342, 12s. 7d. to the Royal Bank to be put to his credit, but does not, as the pursuer contends and the Sheriff decides, warrant the retention by them of £244, 19s. 1d. in payment of the debt to that amount which was then, as the Sheriff finds, and the pursuer admits, due by Craig to themselves.

It appears from the letters on the subject that in October 1900 the Royal Bank was Craig's creditor for £740, and that he directed the defenders to pay it in full, or so far as the proceeds of the displenishing sale were available for that purpose. This they did to the amount of £342, 12s. 7d., being the full amount in their hands available as they thought for the purpose. Had they disregarded the debt to themselves, which neither Craig nor the bank, nor indeed any man of sense, could have expected them to do, the amount so available would have been increased by £244, 19s. 1d., and made the sum payable to the bank on Craig's order and their own undertaking £587, 11s. 8d., leaving nothing in their hands to be claimed in this action.

The Sheriff's judgment is based entirely on the following finding in the interlocutor under appeal:—"Finds in law that the delivery by Craig to the defenders of crop, stock, and other effects in satisfaction or security for their debt is struck at by the Act of 1696, cap. 5, and that the defenders are bound to pay to the pursuer, as trustee foresaid, the said sum of £244, 19s. 1d."

This bears to be a finding "in law," but is not so beyond this, that if it be assumed as a fact that on 26th October the defenders' debtor Craig delivered to them his farm stock "in satisfaction or security for their debt," such delivery would be struck at by the Act 1696, cap. 5. But the interlocutor contains no finding in fact to that effect, and indeed there is no averment by the pursuer to that effect. The pursuer's averment of delivery, which follows that of the contract with the defenders to conduct the displenishing sale, is in condescendence 3—"The defenders on 26th October 1900 received delivery and carried out a displenishing sale of Craig's effects on said date." The idea that these effects (which realised £901) were delivered to and received by the defenders in satisfaction of their debt of £244 is absurd. That they were delivered as security for debt, or otherwise than in pursuance of employment to sell them by auction, is not in my opinion reasonably maintainable.

I have said enough to indicate my opinion, and the grounds of it, that this case is not within the scope or purview of the Act 1696, and that the Sheriff's finding which I have cited is erroneous. I am indeed clearly of opinion that no relevant case is presented by the record except for an account by the defenders of their conduct in executing the contract of employment which they accepted to carry out Craig's displenishing, sale. I agree with the Sheriff in thinking as, irrespective of the Act 1696, I understand him to do, that they have satisfactorily accounted for their whole receipts. I have specially referred to their employer Craig's express approval of their account, and his authority given to them to pay their own debt out of their receipts, but I may add, though superfluously, the law is so clear and trite that an auctioneer is entitled to retain the amount of any lawful debt due to himself by a customer out of the prices paid to him by the buyers of goods sold by him for such customer. This is indeed only an example of the common law doctrine that, speaking generally, any creditor in lawful possession of money belonging to his debtor may retain out of it the amount of his debt. The case before us is in my opinion a very clear one.

The only findings in fact in the Sheriff's interlocutor which the appellants object to are the fifth and sixth. I agree with their contention that these findings are irrelevant, and I have, I think, sufficiently indicated my reasons for thinking so. The subject of these findings can have no bearing except as suggesting an imputation on the integrity of the defenders' conduct in accepting employment to sell Craig's waygoing stock, and selling it as they did. Although thinking that such an imputation is irrelevant, I feel it my duty to say that it is in my opinion groundless in fact. The evidence, parole and documentary, satisfies me that they acted throughout not only legally and

regularly, but in all respects irreproachably. The idea that they, believing or suspecting that their customer was on the eve of bankruptcy, arranged with him to obtain a preference over his other creditors by means of an extensively advertised sale of his waygoing crop, I have no hesitation in rejecting as extravagant. I should therefore recal these two findings.

The other findings of fact in the interlocutor, importing, as I understand them, an affirmance of the facts which I have stated, as those on which my opinion is founded, and being assented to by the appellants may I think be affirmed. The finding in law, the only other finding in the interlocutor, ought in my opinion to be recalled.

LORD MONCREIFF (whose opinion was read by the LORD JUSTICE-CLERK)—This case is certainly very near the line. In deciding what transactions are struck at by the Act 1696, c. 5, distinctions are fine. A debtor pays his creditor by handing him an endorsed cheque; the transaction is set aside as an illegal preference. He cashes an endorsed cheque himself and hands the proceeds to the creditor; the transaction stands.

In this case it is necessary to distinguish. The sale by the defenders of James Craig's stock and cropping on 26th October 1900, and the receipt by them of the purchase price, was a transaction in the ordinary course of trade; and if the defenders had retained part of the price to satisfy their charges that also would have been in the ordinary course of trade. But that is not really the question. The first question is whether it was in the ordinary course of trade for the defenders to retain the purchase price to the extent of £244 in order to pay in full unsecured advances made to the bankrupt by the defenders. Now, although it may not be unusual for auctioneers to make advances against sales, I do not think there is evidence before us to establish that according to the settled usage of trade, or according to the course of dealing, the defenders were entitled to retain for a general balance. But, further, I think it sufficiently appears that on the 19th October, when the defenders took from Craig the antedated receipt No. 14 of process, both parties were well aware that the stock and cropping which constituted Craig's whole estate would be insufficient to pay even the favoured creditors in full. Before that date it is not clear that Craig intended to give the defenders a preference—at least they had secured none. He was chiefly anxious that his landlord and his own relatives should be paid in full, and if this had been done it would have exhausted the price realised. But on the 19th October, by the terms of the antedated receipt which he signed, he authorised the defenders, who were becoming alarmed, to pay themselves the £200 in question out of the proceeds of his displenishing sale. This was just as if he had delivered to them so much stock in payment of his debt to them. Now, at that date I think he must be held to have known that he was insolvent—he owed £1000 to other creditors. And the assignation was voluntary in this sense, that he was under no obligation to grant it, and even at that late date might, and I think should, looking to his ascertained insolvency, have had his stock and cropping sold by an auctioneer who was not his creditor.

Therefore, although the case is extremely narrow, I am not prepared to alter the judgment of the Sheriff.

LORD TRAYNER having been absent at the hearing gave no opinion.

The Court pronounced the following interlocutor:—

"Dismiss the appeal: Find in fact and in law in terms of the findings in fact and in law in the said interlocutor appealed against: Of new decern against the defenders to make payment to the pursuer as trustee on the sequestrated estates of James Craig, farmer, sometime at Lathalmond, Dunfermline, of the sum of £244, 19s, 1d., with interest thereon at 5 per cent. from 24th January 1901 until payment: Find the defenders liable in expenses in this Court, and remit," &c.

Counsel for the Pursuer and Respondent—Salvesen, K.C.—Wilton. Agent—P. R. M'Laren, Solicitor.

Counsel for the Defenders and Appellants—Wilson, K.C.—Hunter. Agents—Guild & Guild, W.S.

HIGH COURT OF JUSTICIARY.

Thursday, July 17.

(Before the Lord Justice-Clerk, Lord Young, and Lord Trayner.)

ZAINO *v.* MALLOCH.

Justiciary Cases—Statutory Offence—Illegal Trafficking in Exciseable Liquors—Public-House—Relevancy—Competency of Giving Effect in High Court to an Objection to Relevancy of the Essence of the Charge, though not Stated in Inferior Court—Public-Houses Acts Amendment (Scotland) Act 1862 (25 *and* 26 *Vict. cap.* 35), *sec.* 20.

A summary complaint in a Police Court set forth that the accused had been guilty of an offence against section 20 of the Public-Houses Acts Amendment (Scotland) Act 1862 in so far as a magistrate, on the evidence of a credible witness that there was ground for believing that exciseable liquors were trafficked in within premises occupied by the accused and not licensed for the sale of exciseable liquors, having granted a warrant to search these premises, on a search of the premises being made under the warrant certain exciseable liquors were found and seized in the premises; and "the said liquors so