who gave the leading opinion, held that the question was one of intention, and that the granter did not intend that in the event which happened, namely, that she had a child who predeceased the liferenter, her money should go to the child's heirs because the child was her heir and executor at the time when she died, but that she intended it to go to her own heirs in the event of failure of children. It is plain that the testator here contemplated that the two children, to each of whom he gave a share of the residue of his estate in liferent, would survive him, and of course he must be taken to have known that at his death they would be his heirs *in mobilibus*. Suppose he had only one child and had given the whole residue in liferent to that one, and on the child's death without issue had directed that the funds should go to his own heirs *in mobilibus*, and at the same time excluded the child from taking any vested interest in the fund, is it possible to hold that his intention was that the child nevertheless should take such an interest (subject only to defeasance in the event of his having issue) and might divert it to strangers by a *mortis causa* deed? I confess that I cannot understand such a view. There is here no question of intestacy, in which case it sometimes happens that the fund goes to a testator's heirs through the operation of law, although he had plainly indicated that he did not desire it to do so. That result only happens where the testator has failed to dispose of the fund. Here he has not failed to do so, but has provided for the very circumstance which has occurred. If, then, as is shown by the cases of *Johnstone* and *Muirhead*, words descriptive of a class usually ascertained at the testator's death may in virtue of the presumed intention of the testator be held to refer to the later period when the gift actually takes effect, I do not think that apart from express declaration any case is likely to occur where the intention could be more clearly inferred than in the present. I am accordingly of opinion that the second question falls to be answered in the negative and the third in the affirmative.

LORD GUTHRIE—I concur in the result arrived at by Lord Dundas. On the second point involved in the second and third questions my opinion has varied. I still feel that there is great force in the views expressed by Lord Salvesen, founded on the clause "neither of my said children shall have any vested right in the capital of said balance," but on the whole, although with hesitation, I am not prepared to differ from the result arrived at by Lord Dundas, in which I understand your Lordship in the chair concurs.

The LORD JUSTICE-CLERK concurred.

The Court answered the second question in the affirmative and the third question in the negative.

Counsel for the First and Second Parties—R. S. Brown. Agents—Martin, Milligan, & Macdonald, W.S.

Counsel for the Third Party—C. H. Brown. Agents—Mackintosh & Boyd, W.S.

Thursday, January 16.

SECOND DIVISION.

[Sheriff Court at Perth.

SIEVWRIGHT (CROCKART'S TRUSTEE) *v.* HAY & COMPANY, LIMITED.

Bankruptcy—Illegal Preference—Retention—Act 1696, *cap.* 5—*Act in Ordinary Course of Business—Auctioneer Entrusted by his Debtor within Sixty Days of his Bankruptcy with Displenishing Sale.*

A firm of auctioneers made it a condition of the sales conducted by them that they should have a right of general lien over all goods and moneys coming into their possession for all debts due to them by the owner. They were employed by an insolvent farmer within sixty days of his bankruptcy to conduct a displenishing sale, but without knowledge on their part of his insolvency, and without intention on his part by so employing them to confer a preference on them over his other creditors. On the auctioneers claiming the right to retain out of the proceeds of the sale the amount of a debt due to them by the farmer, the trustee on his sequestrated estate pleaded that the handing over of the goods to the auctioneers for the purpose of the sale was struck at by the Act 1696, cap. 5, inasmuch as it had the effect of giving the auctioneers an illegal preference.

The Court *held* that the Act did not apply, as the transaction was in the ordinary course of business, and was not intended to create a preference.

William Barclay Sievwright, accountant, Perth, trustee on the sequestrated estates of John Crockart, formerly farmer, North Cassochie, near Methven, *pursuer*, brought an action in the Sheriff Court at Perth against Hay & Company, Limited, auctioneers, Perth, *defenders*, for £185, 12s. 9d., being the balance of the proceeds of the sale of the bankrupt's stock, crop, and implements carried out by them on 22nd October 1910. On 17th December 1910 the bankrupt's estates were sequestrated. The sale realised £321, 4s., after deduction of the defenders' commission and expenses, and out of this sum the defenders retained the sum sued for in payment of the balance of a debt due to them by the bankrupt.

The pursuer pleaded, *inter alia*—"(3) Said voluntary tradition of stock, crop, and implements within sixty days of Crockart's bankruptcy, in the circumstances averred, having disturbed the equality of division of Crockart's estate, is illegal (*a*) at common law, (*b*) under the Act 1696, chapter 5, and does not entitle defenders to retain the sum sued for. (4) In the circumstances, as the defenders cannot contract themselves out of the operation of the Act 1696, chapter 5, decree should be granted as craved, with expenses. (5) The defenders having obtained an undue and illegal preference over the

bankrupt's other creditors, to their loss and injury, are bound to surrender the same."

The defenders pleaded, *inter alia*—"(2) The defenders having been in lawful possession, in the ordinary course of trade, of moneys (the proceeds of the said displenishing sale) for which they were liable to account to Crockart or those in his right, were entitled to compensate his admitted debt to them, in virtue of (*a*) the common law, (*b*) the usage of trade between auctioneers and live-stock salesmen and their customers, (*c*) the express conditions upon which the defenders dealt with him, and (*d*) the course of dealing between him and the defenders. (3) The transaction challenged having been *bona fide* and in the ordinary course of business, the defenders should be assoilzied."

On 12th January 1912 the Sheriff-Substitute (SYM) after a proof led, pronounced this interlocutor—"Finds (1) that the defenders Hay & Company, Limited, are auctioneers and live-stock salesmen at Perth, and that they conduct sales at their marts and many displenishing sales at farms; (2) that they have conditions of sales, which stipulate that 'the sales conducted by them, either at their mart or elsewhere, shall be subject to the following conditions, which shall be binding on all persons concerned,' and which include a condition that the auctioneers 'shall have the right of general retention or lien over all goods and money coming into their possession for any debt or liability, howsoever arising, of the owner or consigner to them'; (3) that frequently in the course of their business they make advances to farmers who deal with them, and that these advances are frequently, and indeed usually, repaid by the price of stock which such farmers put into their hands for sale; (4) that John Crockart was tenant of North Cassochie, Methven, prior to Martinmas 1910, at which date, by arrangement with the landlord, he terminated his tenancy of that farm; (5) that for some years prior to 1910 the defenders dealt with the said John Crockart in the way described, there being sometimes a balance against him, and such balance being from time to time extinguished or at other times much reduced; (6) that in particular the defenders advanced to Crockart on 21st June 1910 the sum of £100, he being to a small extent at the time indebted to them for balance of cash and of stock removed without payment, and that the £100 was used by him in paying rent claimed by his landlord (as to part of which claim there was at this time a dispute); (7) that at that time the defenders had no special knowledge of the state of his affairs, and that they made the advance in the ordinary course of their business and of their dealings with him, supposing him to be solvent; (8) that in June or July 1910 Crockart arranged with his landlord, with whom he had still a dispute, to go out of said farm at Martinmas 1911, but that he, towards the end of August 1910, changed his intention, and arranged with the landlord to renounce the lease as at Martinmas 1910 (a less advantageous year for outgoing), and that very shortly after that he met the witness Mr J. D. Hay at Perth Cross on a market day, and told him so, and told him that his firm (the defenders) would be entrusted with his displenishing sale; (9) that the conducting of displenishing sales is not only a common part of the defenders' business, but is in this district a common part of a farmer's business, not only if he retires, but also if he leaves one farm and takes another; (10) that the only difference in the defenders' usual conditions in the case of a displenishing sale is that the buyers have three months' credit or discount at 3d. per £ for cash, and that they are allowed time to remove the goods, and that it is announced at the beginning of such sales by the auctioneer that the terms will be as usual, but with three months' credit or cash, and with such opportunity of removal; (11) that the date fixed on for the sale was 22nd October 1910, and that a handbill, No. 10, was issued on 10th October by the defenders, who had the subjects of sale delivered over to them on the morning of the sale day for the purpose of their business; (12) that the sale of the crop and stock and turnips produced, after deduction of commission and expenses, £321, 4s.; (13) that the said net amount, £321, 4s., was brought into Crockart's current account with the defenders, and that they afterwards paid out wages to his servants till Martinmas 1910, amounting to £21, 4s., which sum was also brought into account; (14) that it now appears, though the defenders are not shown to have known it, that in the summer and autumn of 1910 Crockart's affairs were embarrassed; (15) that the sale not having been a good one, and litigation having arisen with Crockart's landlord as to the last year's rent on North Cassochie and arrestments having been used on the money in defenders' hands after the sale by the said landlord on the dependence of his action, and by another creditor on the amount of a decree for a small sum (the balance of a bill), and other claims having been made, Crockart applied for sequestration of his estates, the date of which sequestration is 17th December 1910; (16) that the pursuer was confirmed trustee on the estate, and represents creditors prior to said 22nd October 1910; (17) that in accounting with the pursuer the defenders have given him an accurate account of the sale, and have remitted to or for him £135, 11s. 3d., but are retaining £185, 12s. 9d. which is due to them on their current account with Crockart, and that the pursuer maintains that the sum must be paid over to him as the trustee, leaving them to make a claim for it, because Crockart was insolvent when he voluntarily handed over his whole stock (which practically was his whole estate) for sale, and the sale was for equal distribution among all creditors, or if that was not so, the handing over of the stock was in satisfaction of the prior debt due to the defenders, and within sixty days of said 17th December, and the equality of distribution is thus disturbed; (18) that

the defenders maintain their right to retain the sum of £185, 12s. 9d. in dispute, on the grounds set forth in their second and third pleas-in-law; (19) that Hay & Company got the conduct of the sale not to give them a preference, but in the ordinary way of business so far as they were concerned: Upon these findings in fact, *finds as matter of law* (1) that an auctioneer employed in the ordinary way of his business to sell for a customer has, in accounting with the customer for the prices received, a right to retain against him not only his expenses and commission, but also to retain the amount of other debts which have arisen in the ordinary course of dealing between them; but (2) that when on 22nd October Crockart handed over and gave possession of his estate to the defenders, already his creditors for a considerable sum, so as to put the defenders in a position to obtain full payment of said debt then unsecured, and that when he was insolvent and within sixty days of his sequestration on 17th December, Crockart was not acting in the ordinary course of business, and did what amounted to a satisfaction or security for their said unsecured debt, and which is exposed to the operation of the Act 1696, c. 5: Therefore repels the defences, and ordains the defenders to make forthcoming to the pursuer, as Crockart's trustee, the sum claimed in the initial writ, reserving always to the defenders their whole claims to rank as creditors on Crockart's estate. . . ."

Argued for the appellants—The appellants were entitled to retain the amount of their debt out of the sum realised by the sale, not only by reason of their right of retention—Bell's Com. (7th ed.), vol. ii., p. 111; *Miller* v. *Hutcheson & Dixon*, February 16, 1881, 8 R. 489, *per* Lord Justice-Clerk at p. 491 and Lord Young at p. 492, 18 S.L.R. 304, at pp. 305-6; *Glendinning* v. *Hope & Company*, 1911 S.C. (H.L.) 73, *per* Lord Kinnear at p. 78, 48 S.L.R. 775, at p. 779—but also by reason of their right of compensation—*Mitchell* v. *Mackersy*, December 6, 1905, 8 F. 198, 43 S.L.R. 107. The Act 1696, cap. 5, did not strike at the transaction, because the employment of the appellants by Crockart was an act in the ordinary course of his business, and there was no intention to give the appellants a preference over his other creditors—Bell's Com. (7th ed.), vol. ii., 202; *Pringle's Trustee* v. *Wright*, February 25, 1903, 5 F. 522, 40 S.L.R. 396; *Loudon Brothers* v. *Reid & Lauder's Trustee*, December 7, 1877, 5 R. 293, *per* Lord Mure at p. 298, 15 S.L.R. 187, at p. 189. Both parties acted in *bona fide*, and even if the transaction was not in the ordinary course of business it was an open question whether the good faith of the parties might not of itself take the transaction out of the operation of the Act—Lord President in *Loudon Brothers* v. *Reid & Lauder's Trustee*, *cit.*, 5 R. at p. 301, 15 S.L.R. at p. 190. The crux of the question in all such cases was simply whether or not there had been an intention to create a preference. This was shown by the form which the issue took in *Blincow's Trustee* v. *Allan & Company*, January 22, 1831, 9 S. 317, at p. 319; see also *Anderson's Trustee* v. *Fleming*, March 17, 1871, 9 Macph. 718, *per* Lord President at p. 722, Lord Deas at p. 723, and Lord Kinloch at p. 725, 8 S.L.R. 430; *Hepburn* v. *Bell*, July 11, 1816, rep. in Bell's Com., vol. ii., p. 199; *Bruce* v. *Hamilton*, January 27, 1832, 10 S. 250; *Price & Pierce, Limited*, v. *Bank of Scotland*, 1910 S.C. 1095, *per* Lord Kinnear at p. 1109, 47 S.L.R. 794, at p. 803. *Craig's Trustees* v. *Macdonald, Fraser, & Company, Limited*, July 9, 1902, 4 F. 1132, 39 S.L.R. 773, was not an authority for such a case as the present, where there was an averment and proof that the transaction was in the ordinary course of business. In *Craig's* case a receipt had been ante-dated, and the transaction was entered into in view of approaching bankruptcy. Insolvency was an elastic term—Bell's Com. (7th ed.), vol. ii., p. 180—and the question of Crockart's insolvency at the date of the transaction had nothing to do with the construction of the Act.

Argued for the respondents — An auctioneer had no general right of lien. This was well settled at any rate in English law—Bateman's Auctions (8th ed.), p. 347—and the defenders here had no right of retention founded on special contract, because the stipulation in the conditions of sale had the same operation in law as had the receipt in *Craig's Trustees* v. *Macdonald, Fraser, & Company, Limited*, *cit.* In any event the transaction was struck at by the Act 1696, cap. 5. Although, in a sense, in the ordinary course of trade, the transaction was one which extinguished the bankrupt's trade altogether, it really amounted to a winding-up of his estate in order that the appellants should get payment out of the proceeds—Goudy's Bankruptcy (3rd ed.). p. 21; Bell's Com. (7th ed.), vol. ii. p. 204; *Craig's Trustee* v. *Macdonald, Fraser, & Company, Limited*, *cit.*, *per* Lord Moncreiff, 4 F., at p. 1143, 39 S.L.R. at p. 778; *Morton's Trustee* v. *Fifeshire Auction Company, Limited* (O.H.), 1911, 1 S.L.T. 405; *Torrance* v. *Traill's Trustees*, March 19, 1897, 24 R. 837, *per* Lord Ordinary (Kyllachy) at p. 841, 34 S.L.R. 573 at p. 575; *Carter* v. *Johnstone*, March 5, 1886, 13 R. 698, *per* Lord Shand at p. 708, 23 S.L.R. 458, at p. 464; *Nicol* v. *M'Intyre*, July 13, 1882, 9 R. 1097, *per* Lord Young at p. 1100, 19 S.L.R. 815, at p. 817; *Loudon Brothers* v. *Reid & Lauder's Trustees*, *cit.*, *per* Lord Muir, 5 R. at p. 298, 15 S.L.R. at p. 189; *Schurrmans & Sons* v. *Goldie*, July 7, 1828, 6 S. 1110. In *Anderson's Trustees* v. *Fleming*, *cit.*, the act was a necessary act—*per* Lord President at p. 722. It was not necessary to show fraud to bring the transaction within the operation of the Act, nor even was it necessary to prove intention. The question of intention only arose when the transaction would otherwise have fallen within the exception of transactions in the ordinary course of business, but this transaction was not in the

ordinary course of business. It was enough for the respondents to show that Crockart must have known that he was insolvent, and voluntarily handed over his estate to a creditor who could operate a preference —Bell's Com. (7th ed.), vol. ii., 170; *M'Cowan* v. *Wright*, July 6, 1852, 14 D. 968, *per* Lord Justice-Clerk at p. 970; *Matthew's Trustee* v. *Matthew*, June 28, 1867, 5 Macph. 957, *per* Lord President at p. 961. In *Blincow's Trustees* v. *Allan & Company* (*cit.*), "intention" was put into the issue only because in that case the transaction was in the ordinary course of trade, but where, as here, the transaction was not in the ordinary course of trade, it was not necessary to prove intention—*Wilson* v. *Drummond's Representatives*, December 20, 1853, 16 D. 275; *Ramsay* v. *Donald*, March 3, 1854, 16 D. 720.

At advising—

LORD DUNDAS—The pursuer (respondent) is trustee in the sequestration of John Crockart, who until Martinmas 1910 was a tenant farmer in Perthshire. Crockart's estates were sequestrated on 17th December 1910; he had been rendered notour bankrupt on or about 29th October. The defenders (appellants) are a firm of auctioneers in Perth. On 22nd October 1910 the defenders, in accordance with instructions received by them from Crockart in September, sold by auction his waygoing stock, crop, and implements. They claim to be entitled to retain a sum of £185 out of the price realised by the sale in payment of a balance due to them by Crockart on account-current. The pursuer says this money must be paid over to him as trustee in the sequestration, because otherwise—the sale having been within sixty days of Crockart's bankruptcy — the defenders would obtain an illegal preference over his other creditors in the matter of their debt, contrary to the Act 1696 cap. 5. The real question comes to be whether or not the handing over by Crockart of his stock, &c., to be sold by the defenders was a transaction in the ordinary course of trade or business between the parties, and, as such, outside the scope of the Act. The Sheriff-Substitute, who evidently gave much care and study to the matter, has, with great difficulty and hesitation, decided that question in the pursuer's favour. The case is a narrow one, but I have come to the conclusion that the defenders are entitled to succeed.

The material facts are summarised in the nineteen findings of fact contained in the interlocutor appealed against. The appellants' counsel accepted these as correct and sufficient. The respondent's counsel did so also, subject to two qualifications —(1) that finding 19 should be deleted in so far as it bears that the defenders got the conduct of the sale in the ordinary way of business so far as they were concerned, and (2) that an additional finding should be made to the effect that, at least in July 1910 and onwards, Crockart was in fact insolvent, and knew or ought to have known that he was so. I think finding 19 is quite right as it stands. Nor am I for making the additional finding suggested. The Sheriff-Substitute has found "(14) that it now appears, though the defenders are not shown to have known it, that in the summer and autumn of 1910 Crockart's affairs were embarrassed." It seems probable, but I do not think it is actually proved, that Crockart was in fact insolvent from July onwards. That he knew he was insolvent is not in my judgment proved, and in any case it is, I think, perfectly clear that Crockart had no intention at all, when he placed the sale in the defenders' hands in September and allowed them to conduct it in October, of creating any preference in their favour or any idea that such preference would or might result from his doing so. The transaction was, I believe, an honest one throughout on his part, as it seems clearly to have been on the part of the defenders.

We must decide, then, whether or not the transaction was one in the ordinary course of trade or business between the parties. For the pursuer it was argued that it was not, because a displenishing sale of practically the whole assets of a man giving up his farm, and perhaps farming altogether, could not, *ipsa natura*, be in the ordinary course of business from his point of view, even if it were so (which was not admitted) from that of the auctioneers. I do not agree with this argument. The sale was a necessary and proper step in the giving up of the farm, and that was a circumstance, though perhaps an exceptional one, in the ordinary business career of the farmer, and the latter quite naturally gave the conduct of the sale to the auctioneers through whom he had for years been in use to buy and sell stock, who in the ordinary course of their business had from time to time advanced money to him, and whose ordinary business included displenishing sales of all kinds. There was nothing, I think, so exceptional in the nature of the transaction itself as to take it out of the ordinary course of trade. It was no more exceptional than, *e.g.*, the transaction which was sustained in *Loudon Brothers* (*infra cit.*), and I observe that in *Craig's* case (*infra cit.*) Lord Moncreiff regarded a displenishing sale as being *prima facie* in the ordinary course of business. But the pursuer's counsel argued that, even so, that transaction could not stand, because, assuming that Crockart did not mean to create a preference, his acting none the less resulted in fact in the creation of a preference, and that was enough to bring the transaction within the scope of the Act 1696, cap. 5. I think the weight of the authorities is against this contention.

Professor Bell (Comm., ii., 202, 7th ed.) says—"The plain intendment of the Act of 1696 was to comprehend all conveyances made to a creditor if directly or indirectly intended to confer on him a preference over other creditors." In *Bruce* v. *Hamilton* (1832, 10 S. 250) the Lord Ordinary (Moncreiff), after quoting this passage, added—"Before, therefore, there can be any room even for reasoning on a case as within the statute, it must at the least

appear that the conveyance was made with the intention of giving to the particular creditor satisfaction or security of the prior debt; for if this intention did not exist there could be no intention to give it as a preference." The Court agreed with the Lord Ordinary, Lord Justice-Clerk Boyle observing—"This was a transaction in the ordinary way this bankrupt carried on his business, and is just one of the cases excepted from the statute, which does not cut down any incidental preference arising from such transaction." The case of *Anderson's Tr.* v. *Fleming* (1871, 9 Macph. 718) bears a very close resemblance to the present case, except that the persons claiming to retain were not auctioneers, but bleachers, and that the subjects concerned were a parcel of goods and not (as here) the bulk of the customer's belongings, neither of which distinctions appears to me to be material. There was a clause of lien, similar to the clause here present, which was held to be effectual. The Court held that the transaction was one in the ordinary course of trade, and not struck at by the Act 1696, c. 5, there being no collusion or improper intention, no device to defeat creditors, nor anything secret or suspicious in the way it was gone about. Lord Kinloch said—"There was no special purpose to constitute such security, which I consider indispensable to the operation of the statute. The goods were sent in the ordinary course of trade, and so the case falls under the well-known statutory exception, which holds good for the simple reason that no special transaction of security is thereby gone about. . . . There was no special security constituted. The preference has arisen by the operation of the law in the ordinary course of trade. Therefore the statute is inapplicable." The case of *Loudon Brothers* (1877, 5 R. 293) is the next important authority on this matter of intention. Lord Mure, who gave the leading opinion, expressed the view that "if it is proved that the transaction was entered into in the ordinary course of trade, it cannot be held to come within the provisions of the statute unless it is also distinctly shown that a preference was intended to be conferred." After referring to the authorities, his Lordship proceeded to sustain the transaction under consideration, though it was of an exceptional character, because "there was no collusion, and no intention to confer a preference over other creditors," but the transaction was "one of a description which may fairly be said to have taken place in the ordinary course of business and dealing between the parties, and to come within the ordinary transactions of life." Lord Shand agreed, but reserved his opinion as to whether the same result ought not to follow "in reference to any case in which it is shown that the transaction, even though not in the ordinary course of business, was yet in *bona fide*, and that no preference was intended to be given or taken." In the view I take of the present case no occasion here arises for determining the point reserved by Lord Shand. The earlier case of *Blincow's Trustee*, which passed through many stages (7 S. 124 and 753; 9 S. 317 and 599; 7 W. & S. 26), was commented on in *Loudon Brothers*, Lord Mure observing that its value as an authority was "that it shows that whenever the transaction challenged comes within the course of trade it will not be set aside unless it is also proved that it was entered into with a view of conferring an undue preference." One may be thankful that cases like *Blincow's Trustee* are not now tried by way of jury; but the form of issue there adjusted—its terms are given by Lord Mure—is instructive in connection with the words just quoted. The case of *Craig's Trustee* (1902, 4 F. 1132) does not, I think, help the pursuer here. The facts were peculiar, and the decision a narrow one. I am not sure that I appreciate some of the views expressed by the learned Judges who formed the majority. But assuming the case to be well decided, it is easily distinguishable from this case. The defenders there had no averment that the transaction was in the ordinary course of trade, and there were facts tending to show that they had grave suspicions of Craig's insolvency, and obtained an antedated receipt with the view of securing their own position in preference to his other creditors. The cases I have referred to—many others were cited at the discussion—are, I think, sufficient to establish that if a transaction is *primâ facie* in the ordinary course of business and the affairs of life, it is not enough to take it out of that category and bring it within the scope of the Act 1696, cap. 5, to show that it incidentally results in a preference, if it is clear that there was no intention to create one.

If, then, as I hold, the transaction here in question was not within the scope of the statute, the defenders were, I think, clearly entitled to retain the £185, looking to the clause of lien which was usual in their contracts, and employed on this occasion. *Anderson's Trustee* v. *Fleming* (*sup. cit.*) is a direct authority in their favour. We were referred to other cases, *inter alia*, *Miller* (1881, 8 R. 489), where this Court held that an auctioneer has at common law a factor's lien for a general balance, and *Glendinning* v. *Hope & Co.* (1911 S.C. (H.L.) 73), where the law of lien was discussed with special reference to stockbrokers; but I see no occasion to deal with these, or to aim at a definition of the nature, quality, and limitations of the right of lien possessed by auctioneers in general, or by the defenders in the circumstances of this case, apart from special contract.

For the reasons stated, I think we ought to sustain the appeal, alter the interlocutor appealed against to the extent and effect (1) of adding to the findings in fact contained in it a finding "(20) that neither the defenders nor Crockart had any intention to create a preference in favour of the defenders, or to satisfy or pay the

defenders the debt of £185, 12s. 9d., due by him to them, to the prejudice of his other creditors;" (2) of deleting the second finding in law contained in said interlocutor, and substituting therefor: "and (2) that the transaction complained of was entered into and carried through by the parties in the ordinary course of business, and is not struck at by the Act 1696, cap. 5;" and (3) of deleting the concluding portion of said interlocutor from the word "therefore" to the end thereof; *quoad ultra*, affirm the interlocutor appealed against, sustain the second and third pleas-in-law for the defenders, assoilzie them from the conclusions of the initial writ, and find the pursuer liable in expenses in this Court and in the Courts below.

LORD SALVESEN—In this case the Sheriff-Substitute has set forth the material facts in a series of careful and exhaustive findings the accuracy of which was not challenged. It is only necessary, therefore, to refer to those which in my opinion directly bear upon the points in controversy, viz.—"(9) that the conducting of displenishing sales is not only a common part of the defenders' business, but is in this district a common part of a farmer's business, not only if he retires but also if he leaves one farm and takes another;" . . . "(19) that Hay & Co. got the conduct of the sale not to give them a preference, but in the ordinary way of business, so far as they were concerned;" and "(14) that it now appears, though the defenders are not shown to have known it, that in the summer and autumn of 1910 Crockart's affairs were embarrassed." So far as the bankrupt is concerned the material finding in fact is that he was insolvent at the time he instructed the defenders to conduct his displenishing sale; and there is also a finding in law that when he gave them possession of his stock, plant, and crop for the purpose of sale he was not acting in the ordinary course of business, and did what amounted to a satisfaction or security for the defenders' debt, contrary to the Act 1696, cap. 5. The Sheriff-Substitute has accordingly decerned against the defenders to pay to the bankrupt's trustee the sum of £185, 12s. 9d., the amount of their debt against Crockart which was unsecured prior to the date when they were put in possession of the bankrupt's effects for the purpose of sale.

The Sheriff-Substitute reached his conclusion with difficulty, and after a full argument I have come to an opposite result. It has always been recognised that a transaction in the ordinary course of business is not struck at by the statute even when it has the effect of conferring a preference on a creditor and takes place within sixty days of notour bankruptcy. Professor Bell, in dealing with this class of exceptions to the operation of the Act of 1696, cap. 5, says—"The only general doctrine that can be hazarded is, that wherever the transaction is in the ordinary course of dealing and requisite or suitable to the fair purpose of the debtor proceeding with his trade, and unaccompanied by indications of collusion or notice of insolvency, it is not challengeable, although the effect may be to give a preference to one creditor over the rest." The decided cases both before and after the date when the Commentaries were published entirely support this proposition. The question is whether the transaction now challenged falls within it.

Now it is quite plain here that as Crockart was giving up his farm it was necessary that some firm of auctioneers should be employed to carry through the displenishing sale. It is part of the defenders' ordinary business to conduct such sales, and they were employed on the ordinary terms. According to the Sheriff-Substitute's note it did not occur to Crockart that he was doing them any favour in so employing them, and they were the auctioneers with whom he had previously conducted most if not all his business in disposing of stock. It was natural, therefore, that he should employ them, and it is expressly held that he did not do so for the purpose of giving them a preference. It is true that Crockart was giving up his farm without any intention of taking another; but I do not think that circumstance by itself makes this transaction one not in the ordinary course of trade. If he had been solvent he would have acted in precisely the same way. The displenishing sale was a necessary part of his business as a farmer, for he had renounced the lease of his farm and required to cede possession of it at the Martinmas term. He was thus administering his affairs on the same footing as if he had taken another farm and was intending to continue his business as a farmer; and it appears to me to make no difference that he had definitely resolved to give up farming and to embark on some other mode of earning his livelihood. In short, the transaction on which he entered with the defenders was, to use the language of Mr Bell, "requisite or suitable to the fair purpose of his proceeding with his trade;" and it was not suggested that there were here any indications of collusion or notice of insolvency to the defenders, while the mere fact that the effect of the transaction was to give the defenders a preference over other creditors does not make it challengeable under the statute.

These points are well illustrated by the case of *Anderson's Trustee* (9 Macph. 718), where goods were sent by a manufacturer to certain bleachers with whom they were in the habit of doing business within sixty days of notour bankruptcy. The bleachers claimed to retain the goods in their hands at the date of the manufacturers' sequestration in security of an open account and acceptances for work done upon other goods. It was held that the sending of the goods for the purpose of being bleached was a transaction in the ordinary course of trade and was not struck at by the Act, although it resulted in the bleachers obtaining a preference over the other creditors. It was suggested in the present case that it was the bankrupt's duty to

have entrusted his displenishing sale to an auctioneer who was not his creditor; and it was said that whenever he had reason to know he was insolvent he became a trustee for the general body of creditors, and so was precluded from giving a preference to one creditor over the others. I do not think that is the law. So long as he remains in the administration of his estate an insolvent is entitled to conduct his affairs in ordinary course. Thus, if he chooses to pay a creditor in cash it does not matter although he does so with the intention of conferring a preference on that creditor even where the creditor knows of his insolvency (*Pringle's Trustees*, 5 F. 522). From a moral point of view the debtor's duty, when he knows himself to be insolvent, is to hold his estate for equal distribution amongst his creditors; but he is under no legal disability to deal with it as he thinks fit, and even to exhaust it in paying one creditor to the prejudice of the rest, provided he makes his payment in cash. The same principle appears to me to apply to transactions in the ordinary course of trade. It may be a material element in considering whether a particular transaction was or was not in the ordinary course of trade to ascertain the debtor's intention in entering into it; but here the Sheriff-Substitute holds that the bankrupt had no intention of conferring a preference, and indeed it appears that he hoped (probably without much justification) that the sale would realise sufficient to meet all his liabilities. The only thing that can be said against the transaction is that the effect of it was to confer a preference. The same contention was maintained unsuccessfully both in the bleachers' case, to which I have referred above, and in *Loudon Brothers* (5 R. 293). The latter case is interesting, as showing that the circumstance that a transaction is unique in the debtor's business does not necessarily take it out of the exception of being in the ordinary course of trade. The transaction there challenged was the return of an article which had been purchased in the ordinary course of trade, but had been found useless for the buyer's purpose, and this was held to be within the ordinary course of business, having in view the absence of all intention to confer or obtain a preference.

An apparent difficulty is created by the decision in the case of *Craig's Trustees* v. *Macdonald, Fraser, & Company, Limited* (4 F. 1132). The facts there were in some respects not dissimilar from those of the present case, but there are two points of distinction which I think explain the decision. In the first place, the defenders neither averred nor proved that the transaction had taken place in the ordinary course of trade; and, in the second place, it was obvious that both they and the bankrupt suspected his insolvency. The receipt which was the foundation of the claim by the defenders was admittedly ante-dated with the object of evading the effect of the 1696 Act. The argument seems accordingly to have turned on the effect of the receipt, which, coupled with the subsequent delivery of the stock, was treated as a voluntary assignation and so reducible as having been granted within sixty days of notour bankruptcy.

There is another important distinction which appears from a passage in Lord Moncreiff's opinion. He says—"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." In the present case it appears that one of the conditions on which the defenders conducted their sales was that they should have the right of general retention or lien over all goods and moneys coming into their possession for any debt or liability, howsoever arising, of the owners or consigners to them. They had regularly done business on these terms with the bankrupt, and had recouped themselves for advances made to him from time to time out of the proceeds of stock which they sold on his account. The displenishing sale was conducted by them on the same condition. I do not think their lien would be excluded even if there had been no such general course of dealing, because in the case of *Miller* (8 R. 489) it was expressly decided that auctioneers who received horses to sell on commission and keep in their stables until sold, were entitled to a lien over the horses for a general balance due to them on all their transactions with the owner; and in the recent case of *Hope* (1911 S.C. (H.L.) 73) the general law was thus stated by Lord Kinnear (at p. 78)—"Every agent who is required to undertake liabilities or make payments for his principal, and who in the course of his employment comes into possession of property belonging to his principal over which he has power of control and disposal, is entitled, in the first place, to be indemnified for the moneys he has expended or the loss he has incurred; and, in the second place, to retain such properties as come into his hands in his character of agent until his claim for indemnity has been satisfied." This proposition applies to the case of the defenders, and indirectly supports the judgment in *Miller*, which, although cited in *Craig's* case, appears to have been overlooked in the opinions given by the majority. I cannot, therefore, regard that decision as ruling the present, for here not merely was the general lien claimed by the auctioneers established by the course of dealing between the parties, but there was no indication that the bankrupt by employing them to conduct his displenishing sale intended to confer any preference upon them, nor any ground on their part to suppose that he was insolvent at the time. In short, the transaction is free from the taint which so largely influenced the majority of the judges in *Craig's* case, and is, moreover, established to have been one in the ordinary course of trade as to which the evidence in *Craig's* case was held to be insufficient. In my opinion we

should substantially reaffirm the Sheriff-Substitute's findings in fact, but recal the findings in law with the exception of the first, and should find instead that when on 22nd October Crockart employed the defenders to conduct the displenishing sale on his farm both parties were acting in the ordinary course of business, and although this employment incidentally gave the defenders security for their previous advances, the delivery to them of the stock and cropping for the purposes of such sale is not struck at by the Act 1696, cap. 5.

LORD GUTHRIE — I am of the same opinion. I think Mr Morison was right in saying that the real question in the case, and the only question, is whether the transaction complained of was or was not in the ordinary course of trade. If so, it appears to me that the ninth and nineteenth findings in the Sheriff-Substitute's judgment are conclusive of the question, and ought to have led to the finding in law to the effect that the transaction is not challengeable under the Act because it was in the ordinary course of business, which Lord Dundas has proposed. As I understand Mr Morison's argument, he did not in the end maintain, and in my opinion on the authorities referred to by your Lordships he could not maintain, that the mere fact of the transaction happening to result in a preference in favour of the appellants, no such preference being intended, would by itself take it out of the ordinary course of business. His argument turned on the specialty that the bankrupt was going out of business and was realising his whole trade assets. That undoubtedly made the transaction one of extraordinary rather than of ordinary administration. But none the less was it, in the particular circumstances in which Crockart was placed, the natural and ordinary course for him to pursue. Indeed, had he employed another firm of auctioneers, say Macdonald, Fraser, & Company, as it is said he should have done, he would have been departing from the ordinary course of business so far as his past course of dealing showed. And suppose he had taken this course the transaction would have been equally an act of extraordinary and not of ordinary administration.

In this view, the case of *Craig's Trustee* v. *Macdonald, Fraser, & Company* (4 F. 1132), which the respondent maintained was final in his favour, has no application, because it was expressly found both by the Lord Justice-Clerk and Lord Moncreiff, who formed the majority, that it was not in the ordinary course of trade. It was not averred that the transaction was in the ordinary course of trade, and to sustain the transaction in question in the present case in the ordinary course of business seems to me in accordance both with the letter and the spirit of the statute.

The LORD JUSTICE-CLERK was absent.

The Court sustained the appeal; recalled the interlocutor of 12th January 1912; found in fact in terms of the nineteen findings in fact of the said interlocutor, with the following additional finding in fact, viz.—(20) That neither the defenders nor Crockart had any intention of creating a preference in favour of the defenders, or to satisfy or pay to the defenders the debt of £185, 12s. 9d. due by him to them to the prejudice of his other creditors; found in law in terms of the first finding in law in the said interlocutor; and in lieu of the second finding in law, found (2) that the transaction complained of was entered into and carried through by the parties in the ordinary course of business, and was not struck at by the Act 1696, cap. 5; sustained the second and third pleas-in-law for the defenders, and assoilzied them from the conclusions of the action.

Counsel for the Appellants—Dean of Faculty (Scott Dickson, K.C.)—Jameson. Agents—Carmichael & Miller, W.S.

Counsel for the Respondents—Morison, K.C. — D. Anderson. Agents—J. Miller Thomson & Company, W.S.

Wednesday, January 15.

SECOND DIVISION.

[Lord Dewar, Ordinary.

COUPER *v.* LORD BALFOUR OF BURLEIGH.

Reparation—Slander—Privilege—Malice—Reiteration—Refusal to Withdraw Charge or Apologise.

In an action of damages for slander, A, the matron of a county hospital, averred that B, a member of the public, had transmitted to the county clerk certain charges of professional misconduct against her by letter, in which he further expressed the opinion that if the charges were true A was guilty of criminal conduct. She further averred that these charges having been held groundless after two inquiries instituted by the hospital committee and the Local Government Board at B's request, B transmitted further charges against her to the Local Government Board and obtained a third inquiry, which also exonerated her, and that B subsequently refused to withdraw the charge or apologise. It being admitted that the occasion was privileged, *held* (*rev.* judgment of Lord Dewar, Ordinary) that these averments were not relevant to infer malice on the part of B, and action *dismissed*.

Elizabeth Birnie Couper, matron, Clackmannan Combination Infectious Diseases Hospital, Alloa, *pursuer*, brought an action against the Right Honourable Alexander Hugh Bruce, Baron Balfour of Burleigh, residing at Kennet, Alloa, *defender*, in which she claimed £2000 damages for slander contained in two letters written by the defender on 1st September 1911 and 11th January 1912 respectively.