tute's judgment upon what may be called the proper merits of the case, namely, whether the defender made the charge which she did to the police maliciously and without probable cause. Now, I must say that I think the Sheriff-Substitute's judgment upon this part of the case is very well reasoned and very conclusive. There was nothing that I can see in the circumstances in which this charge was made which indicated the existence of malice on the part of the defender. The pursuer seems to have got excited and alarmed at the charge which was made against him in the presence of his mother and sister. That, however, was not the defender's fault. If the pursuer had retained his presence of mind, and explained who he was, and the position which he held, and offered to verify his statements, it is possible that the defender might have been satisfied with his explanations, and might not have pushed matters further—at least it is not to be assumed against her that she would have done so in such circumstances. It was in the absence of these explanations which caused all that has subsequently taken place.

The defender was satisfied that the pursuer was the man who called upon her the day before, and she was supported in this belief by her servants, whose opinion as to the pursuer's identity with the party who had defrauded the defender coincided with her own.

In these circumstances the defender had undoubtedly probable cause for her charge, while all evidence of malice I consider to be wanting.

No doubt she persisted in her charge, but she was quite entitled to do so, if she truly believed the pursuer to be the man who had defrauded her the previous day, but when she appeared at the police office in support of her charge and the Superintendent told her that he could not detain the pursuer, she said that she did not desire to press the matter in any way, and that she thought she had only done her duty in bringing the matter under the notice of the authorities.

Such is the state of the facts, and on the main points of this case I am prepared to agree with the Sheriff-Substitute's interlocutor.

LORDS MURE, SHAND, and ADAM concurred.

The Court pronounced the following interlocutor:—

"Sustain the appeal and recal the interlocutor appealed against: Find that on 23d July 1884 the female defender in certain streets of Glasgow accused the pursuer of having obtained money from her by false pretences the day before, and gave the pursuer into custody on said charge, and that in consequence thereof he was taken to the Central Police Office, where he was detained for two hours or thereby and then liberated: Find that the pursuer has failed to prove that the charge made against him by the defender to the police was made maliciously and without probable cause: Therefore assoilzie the defender from the conclusions of the libel and decern: Find the pursuer liable in expenses in this Court and in the Inferior Court," &c.

Counsel for Pursuer—J. P. B. Robertson—Ure. Agents—Dove & Lockhart, S.S.C.

Counsel for Defenders—Mackintosh—Graham Murray. Agent—F. J. Martin, W.S.

Friday, June 26.

FIRST DIVISION.

[Lord Fraser, Ordinary.

HORSBRUGH (STEWART'S TRUSTEE) *v.* RAMSAY & COMPANY.

Bankruptcy — Sequestration — Act 1696, c. 5— Assignation within Sixty Days of Bankruptcy— Endorsement of Bill—Course of Trade.

A trader being unable in consequence of his unsatisfactory financial position to get his own bills discounted at his bankers, was in the practice of paying his creditors by endorsing to them accepted bills sent him by his customers in payment of their debts to him. These bills were then put to his credit in the creditors' accounts for goods furnished to him. He was sequestrated within 60 days after granting certain of such endorsements. *Held* that they constituted illegal assignations not protected as transactions in the course of trade, and were reducible under the Act 1696, cap. 5.

The estates of Charles Stewart & Company, who carried on business as wholesale boot manufacturers at Gorgie Road, Edinburgh, and of Charles Stewart, the sole partner, were sequestrated on the bankrupts' own petition on 10th September 1883.

H. M. Horsbrugh, C.A., was elected and confirmed trustee.

Stewart, the bankrupt, had been embarrassed in 1881, and had compounded with his principal creditors for a dividend of 6s. 8d. per £. This dividend was paid except to the Royal Bank, his bankers and also his creditors for a large sum, who did not receive their whole dividend.

After this composition the bankrupt's bills were not discounted at the bank, and as he required the cash he drew in his business for payment of wages, &c., he frequently endorsed and handed to his creditors his customers' bills, *i.e.*, acceptances which he had received from the persons whom he supplied with goods, in payment of their debts to him.

The bankrupt had various dealings of this kind with, *inter alios*, James Ramsay & Company, leather merchants, with whom he had dealings for a considerable period, but of small extent. They knew nothing of the composition arrangement with the large creditors in 1881, and entertained no suspicion of the state of Stewart's affairs till his sequestration took place. When they received his customers' bills they placed them as cash against his account, and if they were duly retired by the customer the bankrupt heard no more of them. If they were not retired they required payment from him.

Within 60 days of 10th September, the date of the sequestration, Ramsay & Company received in this way from the bankrupt, and put to his credit in their account with him, three bills for £15, 4s. 7d., £8, 10s. 3d., and £24, 3s. 2d., drawn by the bankrupt and accepted respectively by J. M. Balfour, M. A. Aitken, and C. & J. Stewart, all customers of the bankrupt. These bills were payable in December 1883 and January 1884.

At the date of sequestration the bankrupt was indebted to Ramsay & Company to the extent of £37, 10s., on an acceptance by him to them, and

£83, 2s. 5d. on open account. In their claim to vote in the sequestration, Ramsay & Company valued and deducted, *inter alia*, the three customers' bills above mentioned, on the ground that other parties were liable on them as well as the bankrupt.

The trustee admitted Ramsay & Co. to a ranking for the amount of their debt as constituted by the bankrupt's acceptance and by the open account, and called upon them to return to him the three bills. He maintained that the endorsing and delivery of these bills to them was an assignation to a creditor of part of the bankrupt's funds within 60 days of sequestration, and was therefore reducible under the Act 1696, c. 5. He raised this action for reduction of the indorsement and transference of the three bills, and for delivery of the bills themselves. Alternatively, and failing delivery, he claimed payment of £47, 18s. as the amount due under the bills. The defenders averred that the transaction was one within the ordinary course of the bankrupt's trade, and pleaded that they were therefore entitled to absolvitor.

Two of the bills (Balfour's for £15, 4s. 7d. and Aitken's for £8, 10s. 3d.) had been paid by the acceptors, and the bills had therefore been delivered up to them. £3 had been paid to account of the other bill (C. & J. Stewart's), and the bill remained in possession of the defenders.

After a proof, in which these facts appeared, the Lord Ordinary (Fraser) pronounced this interlocutor—"In respect that the two bills for £15, 4s. 7d. and £8, 10s. 3d. referred to in the summons have been paid, and the bills themselves delivered up to the acceptors, decerns against the defenders for payment of the said two sums, amounting to £23, 14s. 10d.; and in respect that £3 have been paid to account of the bill for £24, 3s. 2d. referred to in the summons, decerns against the defenders for the said sum of £3: reduces, decerns, and declares as regards the endorsement and transference of the said last bill as concluded for: Finds the pursuer, as trustee upon the sequestrated estate of Charles Stewart & Co., entitled to the possession of the said last-mentioned bill, with a view to the recovery of the balance still due thereon, and decerns: Finds the defenders liable in expenses," &c.

"*Opinion.*—The estates of Charles Stewart, wholesale boot manufacturer at Gorgie, near Edinburgh, were sequestrated on 10th September 1883, and the trustee on his sequestrated estate now seeks to set aside, under the Act 1696, cap. 5, certain bill transactions which took place between the defenders and the bankrupt. It is not disputed that the defenders are creditors of the bankrupt.

"The bankrupt sold boots manufactured by machinery, to country boot and shoe makers, he obtaining the leather which he needed from leather merchants, chiefly in Edinburgh. His business was very extensive, the turn-over being about £20,000 a-year, and the premises at Gorgie, where he conducted his manufacture, cost him £10,000 or £11,000. In the year 1881 his affairs became embarrassed, and his creditors agreed to accept a composition of 6s. 8d. in the pound. This composition was paid to all the creditors except the Royal Bank, whose claim amounted to £15,000, under deduction of the value of heritable property belonging to the bankrupt which they held in security. The fact that the bankrupt had in the year 1881 to compound with his creditors necessarily affected his credit, and thereafter he found it difficult, and latterly impossible, to obtain from the bank the same facilities in discounting his bills which he previously had. Nevertheless he continued to carry on business at Gorgie from 1881 down to the date of his sequestration. When he got leather from the merchants with whom he dealt, he paid for it in cash when he was in funds, and when he had none, his mode of operation was to endorse over to them the bills which he had got from his country customers. These bills were taken by his creditors, and credited to him in their account with him; but they were always taken upon the condition that if the acceptors failed to meet them, recourse would be had upon him. The defenders, James Ramsay & Co., got eight of these bills in the course of their dealing with the bankrupt. Five of these were anterior to the sixty days before the sequestration, and in regard to them no question is at present raised. The other three were granted within the sixty days, and were payable at dates after the sequestration. Two of them were discounted by the defenders after the sequestration, the third being held by them undiscounted. The trustee maintains that the defenders are not entitled to claim the amounts in these three bills, because Stewart was notour bankrupt at the time that they were given to the defenders, and they do not fall within any of the recognised exceptions to the annulling effect of the Act 1696. The amount of the three bills is only £47, 18s.; but the importance of the question for this bankrupt estate consists in this, that there are a number of other creditors who have obtained bills within the sixty days for very much larger amounts, and if the trustee is successful in the present action he necessarily will be successful also against these other creditors.

"The reason why the bankrupt, instead of paying cash to the people who furnished him with leather, handed over endorsed bills to them, is simply this, that the banks would not discount the bills with his name merely. It was the practice of the merchants who got these bills from the bankrupt sometimes to discount them themselves, and sometimes to keep them till they arrived at maturity. The two first bills obtained by the defenders, of which delivery is sought in the summons, have been paid by the acceptors and are now in their possession; but of the third bill for £24, 3s. 2d., only £3 has been paid to account, and the bill has been produced in this process.

"The first two bills were handed to the defenders upon the 8th of August 1883, at which time there was a debt for former furnishings, due by the bankrupt to them of £65, 6s. 6d. These two bills were put to the credit of the bankrupt's account. On the same day he got additional goods to the amount of £7, 5s. 8d.; and thereafter, till the sequestration, further goods were furnished to the amount of £26, 6s. 7d. The third bill for £24, 3s. 2d. was given to the defenders on the 6th September—four days before the sequestration—and was entered to the credit of the bankrupt as against preceding furnishings—like the two other bills.

"None of the bills was given as payment for goods received at the delivery of the bills—they were simply entered in the account to meet past

due furnishings. Further, this is not the case of a cheque drawn upon a bank, endorsed by an insolvent, which can immediately be turned into money, and which may therefore be held equivalent to cash. Nor is it the case of a bill the term of payment of which has come, and which (because payment may be immediately demanded) might also be considered as cash. We have here only bills, the term of payment of which has not come, in regard to which this is the definition given by the Lord Justice-Clerk (Hope) in *White* v. *Briggs*, 8th June 1843, 5 D. 1174,—'A bill payable six months afterwards is a security for, and a right to get, money at a distant period. It is not a remittance of cash in any sense of the term. Hence it is a transference or assignation granted in favour of a creditor, in satisfaction or further security, in preference to other creditors. That point appears to me quite clear.' That an indorsation of a bill within the sixty days is reducible as under the Act of Parliament has been decided in many cases (see 2 Bell Com. 211; *Campbell* v. *Graham*, M. 1120; *Campbell* v. *Macgibbon*, M. 1139; *Robertson* v. *Ogilvie*, M. App. v. Bill, No. 6; *White* v. *Briggs*, 5 D. 1148; *Manson* v. *Angus*, M. App. v. Bankrupt, No. 7; *affd.* 2 Pat. 336; *Nicol* v. *M'Intyre*, July 13, 1882, 9 Ret. 197). This law cannot be disputed; but it is said that the present case comes within one of the recognised exceptions, viz., that the bills were delivered and taken in the ordinary course of trade; and if the Lord Ordinary could see his way to sustain this plea, he would very willingly do so, because the whole affair was fairly and honestly gone about. The bankrupt went on after his composition arrangement in 1881, struggling with scanty means and impaired credit, hoping to 'carry through,' as he expressed it in evidence, and not wishing to give a preference to any one creditor over another. As the bank would not discount his paper, he did the next best thing that his necessities impelled him to, by giving the bills to his creditors, allowing them to discount them if they pleased. It is unnecessary to determine whether Stewart was all along insolvent from 1881 onwards, seeing that the deeds here challenged were granted within the sixty days prior to the sequestration. Actions were very frequently brought during that period against him for small sums, and decrees were pronounced against him, but he contrived to keep off any ultimate diligence till September 1883. The defenders must have known of his labouring circumstances, although it may be quite true that they had no anticipation that sequestration of his estates was imminent. Granting all this, the Lord Ordinary does not see how to bring this within the exception of a dealing in the usual course of trade, of which the last and perhaps the most striking illustration is found in the case of *Loudon Brothers* v. *Read & Lauder's Trustee*, 7th December 1877, 5 Ret. 293. It is not in accordance with the usual course of trade for a debtor to hand over bills payable to him to his creditor, leaving the latter to recover payment from the acceptor directly or through a bank; and not being so, it is simply an assignation struck at by the Act 1696. The bills were not given and taken as cash in return for goods then bought. It was simply a security (of which something might be made) for a past due-debt."

The defenders reclaimed, and argued — The indorsations of these bills ought not to be reduced, because they fell within the recognised exceptions to reduction under the Act 1696, cap. 5. The endorsing and delivering of these bills by the bankrupt, and their acceptance by the defenders, was an ordinary act of trade or business; no undue preference was intended to be given thereby, and the case was free from fraud. The mode in which the bankrupts had long carried on their business was by endorsing their customers' bills and using them as a substitute for cash.

Authorities—In addition to these cited by the Lord Ordinary—*Watson* v. *Young*, March 1, 1826, 4 Sh. 507; *Stewart* (*Stein's Trustee*) v. *Forbes*, March 1, 1791, M. 1142; *Pattison* (*Blincow's Trustee*) v. *Allan*, December 3, 1828, 7 Sh. 124, and in H. of L. 7 Wil. and Sh. p. 26; *Mackintosh* v. *Brierly*, February 19, 1846, 5 D. 1100, and 5 Bell's App. 1; *Anderson's Trustees* v. *Fleming*, March 17, 1871, 9 Macph. 718, Bell's Com. (5th ed.), ii., 218.

Replied for the trustee—The bankrupts had long been in difficulties, as shewn by their mode of carrying on business—in fact, from 1881 they had been practically insolvent. The position of the defenders was practically that they were holders of bills; in order to reduce the indorsation of these bills it was not necessary for the trustee to allege fraud, all that he was required to shew was that such a mode of carrying on business was not a custom of trade. It was not sufficient for the holders of these bills, in order to get the benefit of the exceptions to the Act, to shew that the bankrupts had been in the habit of so carrying on their business; they must shew that such a way of doing business was an ordinary custom of trade.

Authorities—Cases in Lord Ordinary's note and *Robertson* v. *Ogilvie*, M. *voce* Bill, App. No. 6; *Ramsay* v. *Kirkwood*, June 11, 1829, 7 Sh. 749; *Nicol* v. *M'Intyre*, July 13, 1882, 9 R. 1097; *Mitchell* v. *Rodger & Others*, June 26, 1834, 12 Sh. 802.

At advising—

Lord President—In this case I concur in the judgment of the Lord Ordinary, and I think his Lordship in the note appended to his interlocutor has given a very satisfactory exposition both of the facts and the law of the case. The bankrupt Stewart, although a person carrying on apparently a very large business, and at one time a good business, had been in considerable difficulties so far back as 1881, and at that time he made a composition arrangement with his creditors, the details of which are not important here, but he had not absolutely fulfilled all his obligations under that arrangement down to the time at which his sequestration was awarded—10th September 1883—and in the interval between 1881 and 1883 he was certainly in labouring circumstances, to say the least of it, and all his creditors and customers were quite aware of it. In particular, he had no credit with his bank, being in the condition of owing them a large balance, and therefore he was not in the way of proceeding in the ordinary course that a trader does; he was not in the way of lodging his trade bills with the bank and having them placed to his account with the bank, but he dealt with them in a very different way, which has given rise to the present litigation. In purchas-

ing the materials wherewith to carry on his trade, he, of course, became indebted to those who furnished the materials, and the way in which he managed to pay his creditors was sometimes by cash if he had it, but oftener by endorsing to them customers' bills—that is to say, he took the bills which he had received from a customer for the goods manufactured for and furnished to them, and endorsed these bills over to the creditors who furnished him with the materials of his trade, and so discharged the debt of that creditor. The defenders, in particular, obtained an endorsation of certain of these customers' bills in payment of goods furnished by them, and there are three bills in particular—namely, those in question before us—which were endorsed to them within sixty days of the sequestration. Now, these bills were given for the debt then due by the bankrupt. They were not bills the term of payment of which had come, but, on the contrary, they were payable at a date which occurred subsequent to the date of the sequestration, and the endorsing of these bills was for the purpose of satisfying or securing a debt due by the bankrupt; and it is also quite clear that if the endorsees of these bills get the proceeds and so have their claim paid in full, they will thereby obtain a preference over the other creditors of the bankrupt. To sustain the endorsation of bills in these circumstances would be plainly against the rule of the statute, and would defeat the object of the statute of 1696, because it would put it in the power of the bankrupt to make his endorsations in favour of the creditors whom he may prefer, and leave others to find their rankings on the bankrupt estate after the sequestration comes. Therefore on the face of these proceedings there is plainly an assignation made in favour of a certain creditor in satisfaction or security of his debt to the prejudice of the other creditors, which brings the case directly within the words as well as the principle of the statute. But then it is said that this was done in the ordinary course of business, and that if it be done in the ordinary course of business it does not matter whether the statute directly applies to the case or not, because a thing done in the ordinary course of business is excepted from the operation of the statute. Now, it does not appear to me that this can be said to be done in the ordinary course of business at all. The ordinary course of business for a trader like this Mr Stewart, in a state of solvency, and carrying on his trade under advantageous circumstances, would have been this—that every one of these customers' bills which he so endorsed would have been lodged by him with his banker, and placed to his credit in his current account with his banker, and when he paid his creditors' accounts for goods furnished to him in his trade, he would have paid them by cheques on that account. That is the ordinary course of business, and this is an extraordinary course of business, only resorted to because the bankrupt was in such labouring circumstances and could not make these bills available except in the way in which he did it. If he had lodged these customers' bills with his banker, they would have gone to wipe off the balance with his banker. But that was not what he wanted. He wanted to make them available as cash, and so, instead of lodging them in the ordinary course of business in his banker's hands, he endorsed them over to his own creditors. Now, that is not the ordinary course of business, nor the course anyone would resort to except in difficult circumstances, in which this bankrupt was at the time. Reference has been made to some authority for the purpose of supporting this argument of the defender as to the ordinary course of business, and the authority of Mr Bell is alluded to in this passage of the second volume (5th ed., vol. ii. p. 218)—"Payments and other operations in the course of a running account between two merchants, or between a banker and his customer, whether made in cash or by the endorsation of bills, are effectual notwithstanding the statute." Now, in regard to this statement, I think perhaps there is a little misunderstanding in the first reading of it, from his speaking of a running account as if the word account is not of the nature of a cash account. Certainly the authorities to which Mr Bell appeals are cases of running accounts for cash, and nothing else; they are accounts into which money enters on both sides, and nothing else. And I think really that is what Mr Bell means here, that payments made into a running cash-account, whether made in the shape of money, or in the shape of endorsation of bills, are not struck at by the statute. The first case that he refers to is the case of a banker—*Stein's Creditors* v. *Sir William Forbes & Company* (M. 1142)—where there was an ordinary current cash-account which Stein, the trader, had with Sir William Forbes and Company's bank, and the bills in the ordinary course of business were lodged by the bankrupt with, and endorsed by him to his banker. Nothing could be more clearly in the ordinary course of business than that. The second case was *Richmond and Freebairn's Trustee* v. *Pelican Insurance Company*, June 26, 1805, F.C. Now, there again the relation of parties was apparently a current cash-account, and could be nothing else. The bankrupt was the agent of The Pelican Insurance Company in this country, and the account was caused thus—he remitted, in the shape either of cash or bills, the premiums which he received, and they formed the one side of the account; and the other side was composed of sums remitted by The Pelican Insurance Company for the purpose of settling claims. Nothing would enter that account except cash, and whether it came in the shape of bank-notes, or in the shape of drafts or cheques or endorsed bills, was of no consequence to the rule laid down, because of responsibility in that respect caused on account of the bankruptcy. In that case Mr Bell reports certain observations which were made by Lord President Campbell, and which are very important. He said "that the principle held by the Court in the case of *Sir William Forbes & Company* with *Stein's Trustees* settled the case; that this was not a security for a prior debt, but was a case of mutual debt and credit under a running account which must be taken altogether as one transaction; the articles, *hinc inde*, being counterparts not to be disjoined." Now that is the second case. And the third case is that of *Dundas* v. *Smith*, June 2, 1808, F.C. That was a case of an insurance broker and an underwriter. And there again the account was, from the nature of the relation of the parties, an account consisting of money on both sides, and nothing else. It was a

running cash-account, and the entries were, of course, of this nature, that when the underwriters had incurred a loss they remitted to the broker in order to settle that loss, and when the brokers received premiums of insurance from the shipowners they entered in the account the money received on that head, so that in that case the only entries in the account, *hinc inde*, were cash entries. All these cases therefore proceeded on the same principle as is applicable to the case of a banker, and which is expressed in the words I have just quoted from Lord President Campbell's opinion. Now, it is very plain that these cases, and the rule deduced from them by Professor Bell, so far from supporting the contention that this is a proceeding in the ordinary course of business, present a very marked contrast, and show what the ordinary course of business would be in dealing with customers' bills—it is to lodge them in an account with a banker or with somebody with whom you are in constant dealing, and where you require to keep up a certain amount of credit on the one side in order to balance the debts on the other. Therefore, so far, I think, there is no help derived by the reclaimers from any of the authorities appealed to. There is only one case I think that gives an apparent support to what they have maintained, and the reason it gives that apparent support to their case is because it is an isolated and single act of the endorsation of a bill — I mean the case of *Watson* v. *Young* (4 Sh. 507). This was a case of indorsation within the period of constructive bankruptcy. But the difficulty in applying that case to the present state of the facts so as to be available to the reclaimers is this, that the relation of debtor and creditor did not exist between the endorser and the endorsee. It arose out of a contract of sale of oats, and without going into the particulars I may state generally, that the substance of the matter is this—it was a cash transaction, and the seller of the oats was not to part with his goods until he received the payment of the price in cash, and therefore the relation of parties was that of seller and purchaser only, and not that of debtor and creditor, and the relation of debtor and creditor did not exist between them at all at any time except in regard to a balance which I shall mention immediately. The buyer did not pay cash on delivery except a small sum, but handed to the seller at the very time of the delivery of the last parcel of oats an endorsed bill for £56, 10s., and which was taken as payment of the price of the oats *pro tanto*, leaving a certain small balance of about £26, which was still due to the seller when the action was raised Now, it was not possible to hold that the statute applied to that case, because the endorsation was not there given either in satisfaction or security of a prior debt, and there was no creation of any preference in favour of one creditor over another. It was merely the endorsation of a bill to satisfy the obligation of the purchaser in taking delivery of the oats. And so neither the words nor the principle of the statute applied to the case. It is perhaps a little unfortunate that the case is so shortly reported, and particularly that the opinions of the Judges have not been reported at greater length than a mere statement by the Lord President that "this is apparently a cash transaction," because it does require a somewhat minute examination into the precise facts of the case to show what the *ratio* of the decision in the case was. But when that is once arrived at it plainly has no application here. Now, I do not pursue the examination that has been made on both sides of subsequent decisions, for none of them are at all applicable to the present case. I think this case depends for its decision entirely on the question whether the indorsation of the bill was not an alienation or assignation of the contents of that bill to a prior creditor in satisfaction or security of a debt, and not done in the ordinary course of business, and about that I entertain no doubt.

Lord Shand—I am of the same opinion. In argument on behalf of the reclaimers it was not disputed that this transaction was one which is struck at by the statute of 1696, unless the reclaimer were able to make out that the transaction was one in the ordinary course of business, and covered by the principle of the decision of the three earlier cases to which your Lordship has referred. The bankruptcy takes place within sixty days of the indorsation of the bills. The bills were not matured. They had a currency, and the creditor got them in security of furnishings which had been made before, and had retained these bills until they had matured before he got payment of them, as the Lord Ordinary has stated. Therefore, *prima facie*, this is a case in which one creditor is getting a preference over other creditors of the class which is struck at by the statute of 1696. In order to elide the effect of this it has been maintained that the transaction was one occurring in the ordinary course of business; that the particular trader was in the habit of making payment in this way, by indorsing bills that had a currency. But it is necessary to notice precisely what was the position of the bankrupt, and in what way it came about that these bills were given to these creditors. Now, as to the bankrupt's position I think it is quite clear on the evidence that from the year 1881, when he called his creditors together, and made an arrangement to go through a composition settlement, that the business they carried on thereafter was carried on under labouring circumstances. The trustee explains in his evidence that during that period he found the creditors—various creditors of the bankrupt—had raised actions against him at intervals prior to sequestration. He mentioned the names of several of the creditors, and adds that several of these had not only become creditors and raised actions, but had executed poindings with the view of recovering their debts or part of them, and that all or most of them were still creditors seeking to rank in the sequestration. Now, that is the position of the bankrupts in carrying on their business. I have taken the account of Ramsay & Company, the persons who were said to have got this preference, and I find this state of facts. It embraces the period between January 1881 and October 1883, and at the beginning of the transaction, and for some time, for goods ordered money was paid—I do not say paid at the time the goods were ordered, but paid from time to time after certain credits were allowed. But that soon ceased. The bankrupts were unable to give cash payments, and then the next thing is, they granted their acceptances for goods, and

we have three such acceptances in the account-current, one on 4th July, another on 3d July 1882, for £25 and £23 respectively, and the third on 3d April of the following year for £37, 10s. Now, the system between the parties so far as these last transactions were concerned, was intended to be this, that the bankrupts having given their acceptances when these matured, it was certainly contemplated that they should be met by cash payments. But instead of that we find that in the account these bills are entered on either side, not as having been met, but by being under the entry "bill withdrawn." We have three entries at three different periods "bill withdrawn," showing that the bankrupts were not able to meet their bills, and immediately after the withdrawal of the bills instead of paying money they endorsed bills having a currency, and gave these over towards security in the first place, and towards payment of the bills due on the account. Now, that is the system which this account discloses, and the nature of the transaction, and I must say anything more out of the ordinary course of business I can scarcely well conceive. It was ingeniously put in argument that the case might be that of a large wholesale manufacturer or merchant dealing with another, who had purchased from him considerable quantities of goods for the purpose of re-sale, and that an arrangement was made that on his re-selling the goods the wholesale manufacturer should be willing to take all the bills of the purchaser from the middleman (if I may so call him), and place them to the credit of the current account, and keep that account going year after year upon a regular system by which he agreed to give goods constantly, and on the other hand to take the bills in that shape, and put them to the credit of the account. If the case had been one of that kind, in which business was so managed as to make the wholesale dealer as it were the banker in all his transactions, I can quite well see they might have been represented as a series of banking transactions of the parties, so arranged, and that the case might be brought within the exception of transactions of the nature commented on by Bell in the passage to which your Lordship has alluded. It would be an unusual arrangement that a wholesale merchant should become a banker—that he was to apply the bills recovered when discounted, or to apply them when current without discounting them—and it is not a case likely to be met with in mercantile transactions. But all I can say is, that this case totally differs from a case of that kind. This is just a case in which a trader having failed to pay cash or meet his acceptances, was driven to the third resource of giving over bills at a period of currency such as were endorsed here, and that such securities are especially securities struck at by the statute. It appears to me, therefore, that this is a case in which the endorsation must be set aside on the trustee's action, and that the transaction cannot be defended as having taken place in the ordinary course of business.

Lord Adam—I am clearly of opinion that the endorsations in question here were not granted in the ordinary course of business. I have no doubt it is common enough that where a trader, as in this case, has neither money nor credit with his banker, bills due to him by his customers are assigned direct to his creditors. That is the case here, but I do not consider that in any sense the ordinary course of business, and I concur with your Lordships.

Lord Mure, who was absent at the argument, delivered no opinion.

The Court adhered.

Counsel for Pursuer—Moncreiff—G. Wardlaw Burnet. Agents—Murray, Beith, & Murray, W.S.

Counsel for Defenders — Gloag — Baxter. Agent—William Gunn, S.S.C.

Friday, June 26.

SECOND DIVISION.

SPECIAL CASE—GILCHRIST AND OTHERS.

Succession—Settlement—Conveyance of Heritage—Words Importing a Bequest of Heritage—General Word followed by Enumeration—"Property."

A holograph will in these terms—"I hereby dispone, leave, and allocate all the property, goods, money, gear, stock, shares, boats, scrip, &c., which I may be possessed of at the time of my death,"—*held* habile to carry heritage.

Observations (*per* Lord Young) on *Brown and Others* v. *Bower and Others*, January 26, 1770, M. 5440.

William Oag, a fishcurer at Wick, died possessed of moveable property and heritable estate, consisting of certain houses at Wick. He left the following holograph last will, dated 22d March 1856:—"I, William Oag, fishcurer in Wick, being of sound mind and in full possession of my reason, do hereby dispone, leave, and allocate all the property, goods, money, gear, stock, shares, boats, scrip, &c., which I may be possessed of at the time of my death, whenever that may happen, to be divided into three equal shares at any time after my death as shall seem most convenient, to my trustees hereafter to be named, one of which three equal shares shall be given to my sister Alexandrina Oag, and one share of the same to be given to my sister Margaret Oag, and the remaining third share to be used by my said trustees as they shall consider would be most in accordance with my wishes in life; and to execute these premises I appoint as my trustees my said sisters Alexandrina Oag and Margaret Oag."

The two sisters made up a title to and divided the personal estate. A question arose whether the will was good to carry heritage. The present Special Case was adjusted to have this question decided, a decision upon it having been found necessary in consequence of the condition of the family, which it is unnecessary here to detail. Margaret Oag having become insane, her interest was represented by her *curator bonis*, James Gilchrist, agent for the Commercial Bank at Wick, the first party to this case. The second and third parties were those members of the family who contended that the will was ineffectual to carry heritage. The Court were asked to