of such a nature as to colour, so to speak, the ordinary transactions of his life. I do not think, therefore, that it could be held that anything which was not coloured by the delusions to which he was subject was insufficiently done by him, nor can any such action be described as having been done by him while he was in a state of unsound mind. For that reason I think it cannot be held that he was incapable of disposing of his property. The question which we have to consider here, as in every such case, is one of simple fact—whether or not, according to the evidence brought forward, the testator had or had not a sound disposing mind, or was or was not capable of conceiving and executing the will which he left behind? If, on the evidence brought forward, the Court or the jury are satisfied that he was so capable, then the ground of challenge is absolutely swept away, and it matters not that on something else the testator might have shown that he was of unsound mind. That he was of unsound mind in connection with something else is not the question. The question is, Was the will well made? Was it made by anyone who knew what he was doing? Was it made when he was uninfluenced by any peculiarity in regard to the particular matter he was doing? Is there anything to be found in the will which shows that in executing it he was influenced by the peculiarity or delusions to which he was subject? Now, I think that the answer to that question must be in the negative. I conceive that it would not only be very unfortunate, but a very strange result, if this will were to be set aside in the circumstances of this case. For some years—perhaps not for many, but for some years—Major Ballantyne was capable of doing everything that any sane man would be expected to do, or which it was necessary for any man to do. He performed all his duties as an officer. He performed all his social duties and his duties to his friends and others. So far as we can see, he transacted in a perfectly satisfactory way every duty which he was called upon to perform. The manner in which he performed his duties gave no indication of any mental peculiarity whatever. He did his part just as well as any man going out and in in the world would do. Now, if we come to the conclusion on these facts that this will was not made by a man capable of disposing of his property, I should think it would be a very unreasonable one. There seems to me to be no ground for any such conclusion. It would be strange as well as unreasonable to hold that when he was doing other things so reasonably and satisfactorily he could not make a will just as well. Of course these remarks are all on the assumption that the making of the will was not influenced by the delusion which led to the suicide, and which undoubtedly coloured his later actions.

I have said this much, but I do not know that there is any reason for going further—if, indeed, there is reason for going so far—for the Lord Ordinary has given an admirable exposition of his own views both as to the law and the facts of the case, and I entirely concur with him, and in truth adopt everything he has said.

LORD RUTHERFURD CLARK—I concur.

The Court adhered.

Counsel for Pursuers—D.-F. Mackintosh, Q.C.—Graham Murray. Agents—Russell & Dunlop, C.S.

Counsel for Defenders—J. P. B. Robertson, Q.C.—Dickson. Agents—J. & F. Anderson, W.S.

Wednesday, January 6.

FIRST DIVISION.

[Sheriff of Fife.

DENHAM *v.* BETHUNE AND OTHERS.

Process—Appeal—Judicature Act 1825 (6 *Geo. IV. cap.* 120), *sec.* 40—*Sheriff—Proof.*

An action to interdict the defender from golfing or "putting" on a piece of ground forming part of Pilmour Links at St Andrews was raised at the instance of Lieut.-Col. Bethune and others on behalf of the St Andrews Ladies' Golf Club, who claimed to be tenants of the ground in question, and to have enjoyed uninterrupted possession thereof for more than seven years prior to the action. The defender maintained right, as an inhabitant of St Andrews, to golf on the ground. The Sheriff allowed a proof, and the defender applied for a jury trial. The Court were of opinion that a proof ought to be taken, and *remitted* to one of the Sheriffs-Substitute of the district to take a proof in the cause.

Counsel for Appellant — M'Kechnie. Agents —Mitchell & Baxter, W.S.

Counsel for Respondents—Gillespie. Agents—Mackenzie & Kermack, W.S.

Wednesday, January 6.

FIRST DIVISION.

[Sheriff of Lanarkshire.

SELKIRK (COUPLAND'S TRUSTEE) *v.* COUPLAND.

Bankruptcy—Goodwill of Hotel Business—Delivery of Licence—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 29), *secs.* 91 *and* 93.

The tenant of an hotel became bankrupt, and after his sequestration obtained, with the concurrence of the trustee, a new certificate or licence. The trustee then sold the goodwill of the business. *Held* that the license was an accessory of the goodwill, and that the trustee was entitled to delivery of it for behoof of the creditors.

This was an appeal of the trustee against a deliverance of the Sheriff in the process of sequestration of the estates of H. C. Coupland, hotel-keeper, Langham Hotel, Buchanan Street, Glasgow, under the Bankruptcy (Scotland) Act 1856. The question "Will you hand me the certificate of license for the Langham Hotel?" was put to the bankrupt by the agent for the trustee, and objected to by the agent for the bankrupt "(1) on the ground that it was hypothecated

to him, and (2) that it had been acquired by the bankrupt subsequent to his sequestration, and therefore did not fall to be handed over except by order of the Lord Ordinary on the Bills." The Sheriff repelled the first objection, and sustained the second.

The trustee appealed to the Court of Session. He stated that the goodwill of the Langham Hotel, Glasgow, which was the only asset in the sequestrated estate known to him, had been sold by him publicly for £120, and that the certificate of license which was held by the bankrupt, and was of no value to him without possession of the hotel, was an accessory of the goodwill, and should be delivered to the appellant. The trustee therefore prayed the Court to recal the deliverance of the Sheriff-Substitute, and to ordain the bankrupt to deliver to him the certificate of license.

The trustee in argument founded on sections 91 and 93 of the Bankruptcy (Scotland) Act 1856, and also on the case of *Selkirk* v. *Service*, Oct. 22, 1880, 8 R. 29.

The bankrupt appeared in person and resisted the application.

The Court then pronounced this interlocutor:—"Ordain the bankrupt, on or before the first sederunt day in January next, to produce the certificate referred to in the appeal; and appoint the trustee to state in a minute the terms of the sale of the business of the Langham Hotel, and the use he proposes to make of the said certificate."

The trustee in obedience to this interlocutor lodged a minute stating the following facts:—(1) That he was confirmed as trustee on 31st August 1885. The hotel had been let furnished to the bankrupt in 1883, under a lease for a period of years expiring in 1895, at rents rising gradually from £550 per annum to £1000 per annum. The lease to the bankrupt contained a clause excluding his assignees and subtenants without the written consent of the landlords. (2) At the date of the sequestration the bankrupt was carrying on business without a formal certificate or licence, having omitted to apply in time before the April Court for a renewal of his certificate, which expired in May 1885. The bankrupt, however, obtained from the Excise authorities a permit to carry on the hotel temporarily, and the business was being carried on under this permit at the date of the sequestration. (3) With the view of obtaining the best price for the goodwill of the hotel, the trustee delayed exposing the same to sale till after the October Licensing Court. At that Court, with the sanction and approval of the trustee, an application for a certificate was made by the bankrupt, and as the application was, though technically for a new certificate, truly for a renewal of a certificate formerly granted, the magistrates gave the certificate referred to in the appeal without any difficulty. (4) The trustee, with consent of the commissioners on the estate, thereafter exposed the goodwill of the business for sale publicly after due advertisement, and conform to articles of roup. (5) The goodwill was sold to Mr Charles Macrae, hotel-keeper, Glasgow, on 1st December 1885, at the public exposure, for £120. By the articles of roup it was provided that the price was, within twenty-four hours after the sale, to be consigned on deposit-receipt in joint names of the trustee and the purchaser. It was also provided by said articles as follows:—"*Sixthly*, The exposer shall not earlier than the 11th day of December 1885 hand to the purchaser the certificate of licence relating to the said business, in exchange for which the purchaser shall endorse the deposit-receipt for the price, and deliver the same to the exposer, and the purchaser shall at the same date be entitled to entry to the said hotel (so far as the exposer is entitled to give him such entry). It is understood, however, that the purchaser shall take the risk of obtaining the consent of the landlords to his tenancy of said hotel, and shall also take the risk of obtaining a transfer of the said license. *Seventhly*, In the event of the exposer being unable to deliver the said certificate of licence within the period of two months from the date of the exposure, the sale shall be at an end, but the exposer shall not be liable in any damages to the purchaser." (6) In selling the goodwill and undertaking to deliver the certificate the trustee followed the course invariably followed by trustees in the sequestration of the estates of hotel-keepers and spirit merchants, with this difference, that in the ordinary case the sale is carried out at once after the sequestration, but in this case, through the bankrupt's failure to apply in time for a renewal of his certificate, the trustee had to wait till a certificate was got.

The trustee further stated:—"On obtaining the certificate the appellant proposes to hand it to the purchaser Mr Macrae in exchange for the indorsation of the said deposit-receipt for £120. The certificate will be endorsed by the appellant to the effect that Mr Macrae is purchaser. This is in accordance with the usual practice followed in the sales of the goodwill of hotel businesses, and the indorsation enables the purchaser to get a transfer more readily than it would be for him to get a new certificate altogether. On Mr Macrae getting the certificate he must, before carrying on business, make application to the magistrates for a transfer of it to himself as the present tenant of the hotel; and if the magistrates consider him a fit and proper person the transfer will be granted forthwith, but with the steps ulterior to the delivery of the certificate to the purchaser endorsed and the payment of the price the appellant has no concern. No other certificate will be granted during the currency of the one in question, which in ordinary course will endure till May next, and no transfer of said certificate to the purchaser will be granted unless the said certificate is produced to the magistrates endorsed by the appellant. But for the obligation to deliver the certificate the goodwill would not have sold so readily, or realised as much as it did. The bankrupt has not been in possession of the hotel premises since 21st December 1885. He has no interest to retain the certificate. The goodwill of the hotel was given up by him as an asset in his state of affairs. The Excise authorities will not grant a permit to the purchaser, as no permit is given where a certificate has been granted by the magistrates, and is current. In consequence of the want of said certificate, Mr Macrae and the appellant are prevented from carrying on the business of the hotel in question."

Parties were heard on this minute. Coupland appeared personally to oppose the appeal.

LORD PRESIDENT—I have no doubt with regard to this case.

The lease and goodwill of this hotel form part of the sequestrated estate, and the business cannot be carried on without the licence. At the date of the sequestration the hotel had been carried on under a series of certificates for the persons who held the lease of the hotel. It happened accidentally that at the time of the sequestration there was no certificate of the right kind, for the bankrupt had *per incuriam* not applied for one in time. He therefore applied for and obtained a permit which enabled him to carry on the business just as if he had got a certificate. The next Licensing Court occurred after the sequestration, and the bankrupt with the sanction of the trustee applied for a new certificate, which was granted. It appears to me that the existing certificate and licence are documents belonging to the bankrupt's estate, and that they go as accessories of it to the creditors. Therefore I think that the trustee is entitled to the certificate and licence in order to get a transfer. If the bankrupt attaches any importance to getting back the certificate after the transfer has been obtained, there is no reason why he should not get it back after the trustee has made use of it—that is to say, after the next Licensing Court, when the purchaser will be bound to get a fresh certificate in his own name.

I think we should recal the deliverance in so far as appealed against, and ordain the bankrupt's agent to deliver the certificate and licence to the trustee.

LORD MURE concurred.

LORD SHAND—There can be no doubt that if the sequestration had occurred during the currency of the certificate, and the business was to be sold, the bankrupt would have been bound to give the certificate up. There is here this peculiarity that the certificate was not so granted. The trustee might have said to the bankrupt that he was to leave the premises, and he would then not have been bound to get a new certificate. But it was arranged that he should remain, and that he should get a new certificate.

It was said by the bankrupt that the trustee had not used him well. That may or may not be so. We cannot enter into it in regard to the present question, though it may be that the bankrupt has a right of action to enforce any arrangement he has made with the trustee.

LORD ADAM concurred.

The Court recalled the deliverance of the Sheriff-Substitute in so far as appealed against, and ordained the bankrupt's agent to deliver the certificate and licence to the trustee.

Counsel for Appellant—Dickson. Agent—David Turnbull, W.S.

Counsel for Mr Coupland—Party.

Counsel for Mr Fyfe, the Agent for the Bankrupt—Younger. Agents—Ronald & Ritchie, S.S.C.

Friday, March 5.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

CARTER (M'GREGOR & PRINGLE'S TRUSTEE) *v.* JOHNSTONE.

Bankruptcy — Indorsed Cheque — Assignation in Satisfaction—Payment in Cash—Trade Transaction—Act 1696, *c.* 5.

The indorsation by a bankrupt to a creditor within sixty days of bankruptcy of a cheque in which the bankrupt is payee, in payment of a debt already due, is an assignation in satisfaction within the meaning of the Act 1696, c. 5.

A firm of wool brokers in Leith had consigned to them in July 1883 certain wool for sale, which was sold in the months of August, September, and October following. According to the ordinary course of the wool trade, the price should have been remitted to the consigner within twenty-one days from the date of the sales. This was not done, but on 5th January 1884 the brokers sent to the consigner, who resided near Moffat, an advice-note stating—"We have this day sold on your account the under-noted wool. . . Remittances are due in twenty-one days." On 21st January they remitted the amount due. The remittance was made partly by means of two cheques drawn by third parties in favour of the brokers, and payable to them or their order, one crossed generally upon an Edinburgh bank, the other uncrossed upon a bank in Jedburgh. At the time this remittance was made the brokers were, and had for some time past been, insolvent; their bank account was overdrawn, and they had never previously made a remittance in this form. The indorsee cashed the cheques at his bank in Moffat; he had not been pressing for payment, and had no knowledge of his debtors' impending insolvency. On 22d January the brokers took advice with regard to the state of their affairs, and on 24th January issued a circular to their creditors. Their estates were sequestrated on 5th February 1884. *Held*, in an action of reduction at the instance of the trustee in the sequestration, that the indorsations of these two cheques were neither payments in cash nor transactions in the ordinary course of trade, and were reducible under the Act 1696, c. 5.

This was an action of reduction under the Act 1696, c. 5, at the instance of F. W. Carter, C.A., trustee upon the sequestrated estates of M'Gregor & Pringle, wool brokers in Leith, against John Anderson Johnstone, Archbank, Moffat, in which the pursuer sought to reduce certain payments which had been made within sixty days of bankruptcy by the bankrupts to the defender by means of two indorsed cheques.

The defender had transacted business with the bankrupts from the year 1875 down to the date of their sequestration in 1884. In July 1883 Johnstone consigned to M'Gregor & Pringle certain clips of wool for sale. These wools were