Counsel for the defender was not called upon.

LORD JUSTICE-CLERK—I have seldom seen a more hopeless case than this. The pursuer, who had occasion to go to the lavatory of the defender's public house, walked through a door which was not the door leading to the lavatory. It opened on to a landing 5 feet 5 inches long by 3 feet 10 inches broad. Now either this landing was dark or it was not. If it was dark, the pursuer ought not to have gone forward in the darkness without exercising very great care. If he had exercised such care he would not have fallen down the stair. If, on the other hand, the landing was not dark, then if the pursuer had used his eyes he would have seen the stair, and would not have fallen down it. The stair might have led to the lavatory, for it might quite well have been downstairs. No fault could have been imputed to the landlord if it had been. There is no obligation upon the landlord of a public-house to provide a lavatory on the same floor as the bar. Now, in these circumstances is the defender liable? I am taking into account that inside the door there was a landing of such a size as to be quite a safe place for the pursuer to stand on. A person going through such a door as this, when there is nothing beyond the door except a well with a ladder in it, might possibly meet with an accident without it being possible to charge him with any negligence of his own safety. In such circumstances it might be fault on the part of the landlord to leave such a door unlocked and unguarded, but when the door opens on to a landing which is quite safe, the case is altogether different, whether such landing is dark or lighted, and I am therefore of opinion that on either of these assumptions the defenders in this case are not liable.

Hitherto I have been proceeding on assumption. But what are the facts? The pursuer must have seen the light which was burning at the foot of the stair, and that light must have shown him that there was a stair. How can it be suggested that if he fell down that stair it was not either his own fault or else a pure accident for which no one could be responsible to the pursuer. The presence of the light below would suggest to anyone exercising reasonable care that the door he had gone through led to a stair going to another floor.

I am of opinion that the Sheriff-Substitute was right in holding that the defender was not to blame, that the pursuer was himself negligent of his own safety, and that his negligence was the cause of his injuries.

LORD TRAYNER—I am of the same opinion. I would only say that I think no fault on the part of the defender has been proved.

LORD MONCREIFF—I am of the same opinion. I would only like to add that if this door had led to the lavatory, that would not have inferred any fault on the part of the defender. The landing was lighted. But, further, on the evidence I think it is proved that if the pursuer had used his eyes he would have seen where the lavatory really was. I think no fault has been proved against the defender.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

"Dismiss the appeal: Find in fact and in law in terms of the findings in fact and law set forth in the interlocutor appealed against: Further find in fact that the pursuer has failed to prove that the accident from which he suffered was due to fault on the part of the defender: Therefore of new assoilzie the defender from the conclusions of the action, and decern: Find her entitled to expenses in this Court."

Counsel for the Pursuer—A. M. Anderson. Agents — W. & J. L. Officer, W.S.

Counsel for the Defender—W. Brown. Agent—R. C. Gray, S.S.C.

Thursday, December 1.

FIRST DIVISION.

[Lord Low, Ordinary.

GALBRAITH (NEIL'S TRUSTEE) *v.* BRITISH LINEN COMPANY.

Bankruptcy — Notour Bankruptcy — Termination of Bankruptcy.

In an action raised under the Act 1696, cap. 5, at the instance of the trustee in a sequestration, to reduce a bond and disposition in security granted by the bankrupt, the creditor in the bond, while admitting that the debtor was insolvent at the date of the bond, in respect of an expired charge upon a debt due by the firm of which he was a member, maintained that notour bankruptcy had been extinguished prior to the date of the sequestration, by the firm's creditors accepting an arrangement by which the debtor undertook to pay off the firm's debts by instalments.

Held (*aff.* judgment of Lord Low) that the bankrupt had never ceased to be insolvent, as he had failed to carry out the contract with his creditors, the last instalment not having been paid.

Bankruptcy—Act 1696, *cap.* 5—*Cash Payment—Realisation of Security.*

A notour bankrupt who within the period of bankruptcy had granted a bond and disposition in security over certain heritable subjects, sold the subjects, and the creditor in the bond agreed to disburden them upon receipt of the purchase price. This transaction having been carried through, *held* (*aff.* judgment of Lord Low), in a question between the creditor and the trustee in the bankrupt's sequestration, that there had been no

cash payment, but merely a realisation of the security, and that under the Act 1696, cap. 5, the trustee was entitled to recover the price from the creditor.

Bankruptcy—Trustee in Sequestration—Title to Sue—Bankruptcy Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 11.

It is not necessary for a trustee in a sequestration under the Bankruptcy Act 1856 to aver that he represents prior creditors in order to have a title to sue an action for the reduction of an illegal preference.

Walter Galbraith, trustee on the sequestrated estates of John Neil, raised an action against the British Linen Company to reduce a bond and disposition in security granted by Neil to the defenders, and for payment of £2255, 7s. 10d., being the price realised by the property over which the security was granted.

The facts averred on record and disclosed by the proof were as follows:—On 4th March 1889 Neil, who was then indebted to the Bank to the extent of £2127, 1s. 3d., wrote to the agent of their Trongate branch in Glasgow—"I beg to hand you herewith the title-deeds of property at Greenock to be held in security of advances. I bind myself to convey said property to the Bank if deemed necessary." In consideration of this undertaking, and of Neil's granting mortgages in their favour over his steam-yacht and his interest in a steamship, the Bank allowed him an overdraft, which in September 1891 amounted to £8480.

On 10th September 1891 the Bank called upon him to grant a bond and disposition in security in their favour over the Greenock property referred to. As Neil raised difficulties about doing so, the Bank, on 7th October 1891, raised an action against him for the full amount of the overdraft, and on the dependence of the same laid on inhibitions affecting all Neil's heritable property. On 9th October 1891 Neil signed the bond, which was recorded on the 12th of the same month. It was this bond which Neil's trustee sought to reduce in the present action.

Meanwhile, the firm of Neil & Reid, biscuit makers, of which Neil was a partner, had got into difficulties. On 7th October 1891 a judicial factor was appointed upon its estates, and a charge was executed against the firm and against the individual partners thereof on 16th October, which charge expired without payment. After sundry negotiations between Neil and the firm's creditors a proposal was made on 14th November 1891 on behalf of Neil that he should at once pay the creditors a dividend of 8s. in the £, and grant his own acceptances for payment of the balance by five instalments at intervals of three months. This offer was accepted by the whole of the creditors. At the same time Neil arranged with the Bank to grant them a bond for £2500 over certain premises in Glasgow as additional security for their debt, and in consideration thereof the Bank withdrew the inhibition on 9th January 1892. Neil paid the first two instalments and half of the third under the above-mentioned composition with his creditors, but no more.

On 17th May 1892 Neil sold the Greenock property. The Bank being satisfied that the price was as much as the property could be expected to fetch, agreed to disburden the subjects of the bond on the footing that the proceeds of the sale, which turned out to be less than the sum for which the bond had been granted, should be handed over to them, and this was accordingly done.

On the 29th December 1892 a petition for Neil's sequestration was presented to the Sheriff, and sequestration was awarded on 27th February 1893. The pursuer was shortly afterwards appointed trustee in the sequestration. Neil was discharged on 19th April 1895.

The pursuer averred—"(Cond. 3) At and prior to the date of the said bond and disposition in security, or within sixty days of said date, the said John Neil was notour bankrupt, and continued to be so down to the date of his discharge in bankruptcy on 19th April 1895. . . . . (Cond. 4) The said bond and disposition in security was granted by the said John Neil voluntarily, and in satisfaction or further security of the said prior debt, contrary to the provisions of the Act 1696, cap. 5."

With reference to the composition between Neil and the creditors of the firm, the defenders averred—"As part of the same arrangement, under which the defenders were to get the full benefit of the securities they held, and in addition the postponed bond over the Albion Street subjects, the defenders discharged the inhibition on 9th January 1892, on receiving a bond for £2500 stipulated by them over the bakery subjects in Albion Street, which was executed on the 13th and recorded on 23rd January 1892. But for said arrangement the defenders would have done diligence against Mr Neil's private estate, which was at that time perfectly solvent, and would have refused to discharge the said inhibition, and in all probability they would have succeeded in operating full payment therefrom."

The defenders further averred—"The pursuer does not represent any creditors whose claims arise in respect of transactions prior to the date of the bond now sought to be reduced. At all events he does not represent any who were not parties to the arrangement already narrated, or who did not acquiesce in the defenders retaining the security created by said bond unchallenged."

The pursuer pleaded—"(1) The bond and disposition in security described in the summons having been granted in security or satisfaction of a prior debt within sixty days of bankruptcy, and contrary to the provisions of the Statute 1696, cap. 5, the pursuer is entitled to decree of reduction as concluded for with expenses."

The defenders pleaded—"(1) No title to sue. (3) The said bond and disposition in security having been granted in respect of a *novum debitum*, and in specific imple-

ment of a prior specific obligation, is not reducible on the grounds libelled. (5) The said John Neil not having been made notour bankrupt within sixty days of the bond sought to be reduced, or otherwise the said notour bankruptcy founded on having been discharged or extinguished, the defenders should be assoilzied. (6) The defenders having entered into said arrangement, and having discharged the inhibitions used by them, on the footing of the said bond and disposition in security not being challenged at the instance of creditors, the pursuer is not now entitled to reduce the same. (8) *Esto* that the said bond and disposition in security is reducible, the defenders are entitled to retain the sum sued for, in respect that it was a cash payment made to them by the said John Neil prior to the date of his sequestration."

The Act 1896, cap. 5, declares "all and whatsoever voluntar dispositions, assignations, or other deeds, which shall be found to be made and granted, directly or indirectly, by the foresaid dyvour or bankrupt, either at or after his becoming bankrupt, or in the space of sixty days of before, in favour of his creditor, either for his satisfaction or further security in preference to other creditors, to be void and null."

The Bankruptcy Act 1856 (19 and 20 Vict. cap. 79), section 11, enacts—"The trustee on a sequestrated estate under this Act shall be entitled to set aside any such deed or allienation for behoof of the whole body of creditors."

On 25th November 1897 the Lord Ordinary (Low) sustained the reasons of reduction, repelled the defences, and decerned in terms of the reductive and petitory conclusions of the summons.

Opinion—"It is not now disputed that the bankrupt was insolvent when he granted the bond and disposition in security under reduction; that it was granted in security of prior advances; and that it was a voluntary transaction, within the meaning of the Act 1696, c. 5.

"The defenders, however, contend upon various grounds that the pursuer is not now entitled to obtain reduction of the security, and demand payment of the sum for which it was realised.

"(1) The defenders contend that after the granting of the security, and prior to the sequestration, the bankrupt became solvent, and the condition of notour bankruptcy was extinguished.

"Neil, the bankrupt, was a partner of the firm of Neil & Reid, which got into financial difficulties, and in October 1891 a judicial factor was appointed on the firm's estate. The firm's estates, together with the sum of £866 supplied by Neil, were only sufficient to pay the firm's creditors 8s. in the pound. Neil then proposed to pay the balance of 12s. in the pound by five instalments, in three, six, nine, twelve, and fifteen months respectively. The creditors accepted the proposal, and Neil duly paid the first two instalments, and one-half of the third instalment, but he was unable to make further payments, and his estates were sequestrated under the Bankruptcy Acts. The defenders' argument, if I understood it aright, was that when the creditors of the firm accepted Neil as their debtor, instead of the firm, and payment by instalments instead of immediate payment, the old debts were extinguished, and that the moment the agreement was completed Neil became solvent, because it was impossible to say that he was not then able to meet all his existing liabilities.

"I do not think that there is any substance in the argument. It is admitted that prior to the agreement with the firm's creditors, Neil was insolvent, and I am unable to understand how he can be said to have recovered his solvency when he was unable to pay his debts, even with an allowance of fifteen months within which to do so. Further, the agreement was only with the firm's creditors. Neil had also private creditors, and so far from ever having recovered solvency as regarded them, he spent nearly all his available means in the ineffectual attempt to pay the firm's creditors.

"(2) In the next place, the defenders argued that when the agreement was come to between Neil and the firm's creditors, the defenders discharged certain inhibitions which they had used against Neil, upon the footing that the security under reduction was a valid security. They therefore argued that the pursuer as representing creditors is barred from challenging the security.

"The facts are these. In September 1891 the defenders called upon Neil to execute the bond and disposition under reduction, but he was unwilling to do so unless he received further advances. The defenders then brought an action against Neil for payment, and upon the dependence used inhibitions. As Neil's means consisted almost entirely of heritable properties, he could not make the arrangement to which I have referred with the firm's creditors if the inhibitions stood. The defenders, who were creditors of Neil as an individual, were therefore asked to withdraw the inhibitions, and this they consented to do on receiving an additional security over one of his properties to the amount of £2500.

"I do not think that in that transaction there was any such recognition of the security in question as a valid security as to form a bar to the present action. I suppose that the firm's creditors knew that the defenders held the security, but they were never put to consider whether it was a challengeable security or not. The only question appears to have been as to the conditions upon which the defenders were to withdraw the inhibitions. They intimated their willingness to withdraw the inhibition if they received the additional security.

"They did receive that security, and as they considered that their debt was thereby fully secured they withdrew the inhibitions. I do not see anything in that transaction to set up the security in question, or to prevent its being challenged upon its own merits.

"(3) The defenders further contend that

the payment to them of the price of the security-subjects was a cash payment which is not struck at by the Act of 1696.

"The evidence as to what actually occurred is not so clear as it might have been, but apparently the course of events was this. In 1892 Neil, without consulting the defenders, agreed to sell the security subjects. The defenders, after considering the matter, resolved not to interfere with the sale, but to enable it to be carried through by disburdening the subjects of their security. They did so, however, upon the condition that they should receive the price, which was less than the amount in their bond. The price, less expenses, was accordingly paid into the defenders' branch at Greenock, and was credited to Neil. This does not appear to me to be a case of cash payment, but simply a method which the defenders adopted in the circumstances of making their security available.

"(4) The defenders also plead that the pursuer is barred from suing the present action in respect that he admitted the defenders' claim upon the bankrupt estate in the full knowledge of the circumstances under which the security was granted.

"I am of opinion that the alleged fact upon which that plea is based has not been established. I saw no reason to doubt the evidence of the pursuer that it was not until shortly before this action was brought that he became aware of the circumstances which rendered the security open to challenge.

"(5) It was also argued that the action fails because the pursuer has not proved that he represents prior creditors. As, however, the pursuer is trustee in bankruptcy, it is, under the 11th section of the Bankruptcy Act 1856, unnecessary for him to aver or prove that he represents prior creditors, as he is entitled to set aside any preference for behoof of the whole body of creditors.

"I am therefore of opinion that the defenders have not established a good defence to the action, and that the pursuer is entitled to decree."

The defenders reclaimed, and argued—1. The status of notour bankruptcy which was Neil's at the date of the granting of the bond had been put an end to by the arrangement with the firm's creditors. Something less than a total discharge of debts would suffice to extinguish that status. The acceptance by creditors of a composition, if it did not imply a complete recovery of solvency, at all events meant the termination of notour bankruptcy—*Teenan's Trustees* v. *Teenan*, March 19, 1886, 13 R. 833. (2) The removal of the inhibition was a matter of contract between the Bank on the one hand and Neil and his creditors on the other. The consideration which the Bank received was the being allowed to retain the security it had already, and the receiving of additional security. That was the price paid for Neil being made a free man as regards his heritage. Had the creditors then challenged the Bank's security, the Bank would not have given up the inhibition. Therefore the creditors or their representatives were not entitled to come forward now and challenge a deed whose validity they had implicitly admitted. (3) It was not the Bank which sold the security-subjects but the debtor. He handed the price to the Bank. That was a cash transaction, and therefore not struck at by the Act 1696, cap. 5—*Coutts's Trustee and Doe* v. *Webster*, July 8, 1886, 13 R. 1112. (4) The pursuer had not averred that he represented prior creditors. [The defenders also submitted an argument to the effect that the granting of the bond here was not a "voluntary" act in the sense of the statute, being truly in implement of a prior obligation. They impugned the soundness of the decision in *Gourlay* v. *Mackie*, January 27, 1887, 14 R. 403, and relied on *Taylor* v. *Farrie*, March 8, 1855, 17 D. 639, and *Lindsay* v. *Shield*, March 19, 1862, 24 D. 821.]

Argued for the pursuer—The Lord Ordinary was right on every point. (1) The condition of notour bankruptcy had never been terminated. The arrangement with creditors meant nothing more than a giving of time. No change was made in the amount of assets and liabilities. Besides, the arrangement was made with creditors of the firm, not with private creditors.—Bell's Comm., ii. 168, 169; Bankruptcy Act 1856, sec. 9; *Mackellar's Creditors* v. *Macmath*, 1791, M. 1114, referred to. (2) There was absolutely nothing to show that the trustee had agreed to waive all objections to the validity of the security. Besides, the creditors who were said to have assented to this arrangement were again the firm's creditors, and not private creditors. (3) There had been no cash payment here, but merely the realisation of a security—*Barbour* v. *Johnstone*, May 30, 1823, 2 S. 309. (4) With regard to the pursuer's title to sue, the pursuer founded on sec. 11 of the Bankruptcy Act of 1856; and referred to *Cook* v. *Sinclair & Co.*, July 2, 1896, 23 R. 925; *Brown & Co.* v. *M'Callum*, December 19, 1890, 18 R. 313 (*per* Lord Kinnear, 317); *Barclay* v. *Lennox*, 1783, M. 1151; Bell's Comm., ii. 194-5. [On the point whether the granting of the bond was voluntary, the pursuer drew attention to the fact that the alleged undertaking to grant a bond was not stamped, and submitted an argument on the Stamp Acts which need not be repeated.]

At advising—

LORD M'LAREN—In this action the pursuer, who is trustee on the sequestrated estate of John Neil, sues for reduction of a bond and disposition in security granted by Neil to the defenders, the British Linen Company, and dated 9th October 1891. The ground of reduction is that the bond was executed within sixty days of bankruptcy. It is not disputed that the bond was granted in security of prior advances. The heritable subjects were sold in 1892, and there is a consequential conclusion for the payment to the trustee of the proceeds of the sale.

The action is defended on variou grounds, which are considered by the Lord Ordinary in his opinion, and I shall deal with them shortly in the same order. First, it is contended that Neil became solvent before sequestration was awarded, so that the condition of notour bankruptcy was extinguished. If this were according to the fact, the conditions necessary to give the trustee a title to sue would not exist when he came into possession of Neil's estate. But I agree with the Lord Ordinary that on the facts as stated by the defenders and confirmed by documentary evidence, the pursuer was never in a condition to meet his engagements during the period that intervened between his notour bankruptcy and the award of sequestration in 1893. In 1891, when a judicial factor was appointed on the estate of Neil & Reid in which Neil was a partner, the proceeds of the estate was only sufficient to pay the firm's creditors eight shillings in the pound. Neil offered to pay the balance of twelve shillings in the pound in five instalments at intervals of three months, but was only able to pay the first and second and one-half of the third instalment. In such a case I am of opinion that the acceptance of a composition arrangement is no proof of the recovery of solvency but the reverse. The debtor stands confessed that he is unable to pay his debts which are due. If he performs his contract he will recover his state of solvency, but until the last instalment is paid he continues in the condition of a man who is unable to meet his current obligations, and who only retains the possession of his estates through the indulgence of his creditors. It may be that, if creditors were offered such security for the instalments as should induce them to give an immediate discharge, the debtor would be rehabilitated. But in the present case this was not done, and on the failure to meet the third instalment sequestration was taken out in respect of the unpaid debts.

The second point is that when the composition agreement was made the Bank discharged certain inhibitions to enable Neil to sell his heritable property for the benefit of his creditors. It is said that this amounts to a transaction between the unsecured creditors and the Bank, in which the creditors should be taken to have recognised the validity of the bond as a condition of taking benefit through the withdrawal of the inhibitions.

The answer is, that that was in fact no transaction between the Bank and the unsecured creditors, but only between the Bank and their debtor. The Bank only withdrew the inhibitions on receiving further security from Neil for his overdraft, and there is no evidence that the assent of other creditors was either asked or given.

Thirdly, the defenders contend that the payment to them of the price of the security-subjects was a cash payment, and therefore not affected by the Act of 1696. Now, if the Bank had never held a security over the heritable subjects, and if Neil had merely sold an unburdened subject and paid the price to the Bank in reduction of his debt balance, I should agree that the payment was unexceptionable. But the facts are very different. In 1892 Neil entered into a contract of sale of the security subjects. This he was quite entitled to do without consulting the Bank; but then he could only sell under burden of the heritable security. To enable the sale to be carried through, the Bank agreed to discharge the security in exchange for the price. I agree with the Lord Ordinary that this was simply a mode of realising the security. There is no substantial distinction between the case of a sale by the Bank under the power of the bond and a sale by the debtor in the bond for the benefit of the Bank. In either case the discharge of the heritable security is the equivalent or consideration for the price of the subjects, and I cannot for a moment suppose that the Bank would have discharged its security without this equivalent, leaving it to the debtor to pay or not to pay as might suit his convenience.

The fourth point was not argued, and as to the fifth point it is sufficient to say that under the 11th section of the Bankruptcy Act 1856 the pursuer is entitled to set aside preferences for the benefit of the whole body of creditors, and it is not necessary to his title to sue that he should represent prior creditors.

I agree with the conclusions of the Lord Ordinary on all the points of the case, and am for adhering to the interlocutor under review.

LORD ADAM, LORD KINNEAR, and the LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Pursuer—Sol.-Gen. Dickson, Q.C.—Younger. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Defenders—Balfour, Q.C. —Salvesen—Macphail. Agents—Mackenzie & Kermack, W.S.

Thursday, December 1.

FIRST DIVISION

(With LORD KYLLACHY).

[Lord Pearson, Ordinary.

COUNTY COUNCIL OF RENFREW *v.* BINNIE AND OTHERS (TRUSTEES OF ORPHAN HOMES OF SCOTLAND).

Assessment — Exemption — Sunday and Ragged Schools (Exemption from Rating) Act 1869 (32 *and* 33 *Vict. cap.* 40).

Under the Sunday and Ragged Schools (Exemption from Rating) Act 1869, the rating authority, while it has power to exempt ragged schools from assessment, is not bound to grant such exemption.