are managed with great care they are likely to injure people with whom they come into contact. Therefore, although there may be no duty on the part of those to whom such things belong in relation to any particular person, there is a duty which attaches to everybody who uses or deals with dangerous things of that kind to take care that they do not harm his neighbours—that is to say, the public in general.

Now the defenders in this case laid down a line of rails across a road frequented by the public—whether it is a public road or right-of-way is, in my opinion, of no consequence whatever—and ran trains of trucks across it which, from the very nature of the machinery by which they are worked, are not placed under the conduct or control of anybody at the time they are crossing the road. They are worked by an endless rope, so that the person working them at one end has no means of seeing what dangers they are causing when they cross the road, and nobody has any control over them at that dangerous moment. Persons using machinery of that kind take upon themselves the risk of causing injury to their neighbours. They are bound to consider that the people using this public road as a public right or according to the ordinary usage of the neighbourhood may include persons of different degrees of capacity for avoiding danger. I should come to the conclusion myself upon the evidence that there was really no considerable danger to any active and intelligent man who might cross this road, and who was taking reasonable care of himself. But people who run waggons of the kind I have described across a frequented road are bound to take into account that the persons using it may include aged or infirm people, or very young people, who are not so well able to take care of themselves as ordinary active and intelligent men are.

Therefore I think that when they have the misfortune to run over a child, which from its tender years is quite incapable of taking care of itself, it lies with them to show that they had taken every reasonable precaution which ordinary foresight and skill would suggest to prevent such a calamity. The Lord Ordinary, on a consideration of the whole facts, has come to the conclusion that they have failed to show that they have taken such care, and that they must be responsible for their negligence; and I am not prepared to disturb his Lordship's judgment upon the question of fact, even although I agree with your Lordship that it is rather a narrow question.

LORD PEARSON — I am of the same opinion.

LORD M'LAREN was not present.

The Court adhered.

Counsel for the Pursuer and Respondent —George Watt, K.C. — A. M. Mackay. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defenders and Reclaimers —M'Lennan, K.C.—Mercer. Agents—Cumming & Duff, S.S.C.

Saturday, July 17.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

CLYDESDALE BANK LIMITED *v.* M'INTYRE.

Bankruptcy—Right in Security—Trust for Creditors—Provision that Trust to Proceed as if Sequestration under Bankruptcy Acts—Right of Secured Creditor to Reconvey Security Subjects when Unsaleable and Liable to Feu-duties.

In 1902 a firm granted a trust-deed for behoof of their creditors. A bank to whom a partner of the firm had conveyed certain subjects in security for advances was to value its security and to rank for dividend on the balance of the debt. A composition of 6s. 8d. in the £ was to be paid. The composition was duly paid. The bank, with the exception of certain engines and machinery, failed to realise the security subjects, and as feu-duties were due therefrom to the superior amounting to over £150 a year, it called upon the partner of the firm in 1908 to accept a reconveyance of the subjects. He refused on the ground that the bank had taken them over as their property. The bank brought an action for declarator that he was bound to accept a reconveyance.

Held that the pursuers' right was a right in security, and that the defender was bound to accept a reconveyance.

Kinmond, Luke, & Company v. *James Finlay & Company*, March 8, 1904, 6 F. 564, 41 S.L.R. 378, *followed.*

Craig v. *Somerville*, October 25, 1894, 2 S.L.T. 139 and 243, *commented on.*

The Clydesdale Bank Limited raised an action against William Anderson M'Intyre, sometime millspinner and manufacturer at Erichtside, Rattray, and against Douglas William M'Intyre and Angus David M'Intyre for any interest they might have, in which they sought to have it declared "that the defender William Anderson M'Intyre is bound to accept and record in the Division of the General Register of Sasines applicable to the County of Perth a disposition and reconveyance by the pursuers in his favour, with entry as at the term of Martinmas 1908, of the following subjects, *videlicet*:—All and whole the several subjects and others described in the title-deeds thereof, as follows, viz.—(*First*) All and whole the lands and others called the Blairgowrie Spinning Mill, and lands connected therewith, situated in the parish of Blairgowrie and County of Perth, . . . and (*Second*) All and whole that piece of ground upon which the Waulk Mill of Blairgowrie is built, with the said Waulk Mill and houses erected thereon and ground adjoining thereto, and the privilege and use of the water in the Corn Mill lade for driving the machinery of the said Waulk Mill, bounded as follows, *videlicet*:— . . . and the whole engines, shafting, gearing,

and machinery of every kind and description, both heritable and moveable, within or upon or connected with the said Waulk Mill and others, so far as held by the pursuers under the disposition" dated 16th and recorded 30th December 1897, granted to the pursuers by William Panton, solicitor and banker, Blairgowrie, with consent of the defender William Anderson M'Intyre, "and still remaining"; and "that the defender William Anderson M'Intyre is bound to pay to the pursuers the whole costs and expenses of and connected with the preparation, execution, and recording of the said disposition and reconveyance: And thereafter, in the event of the defender William Anderson M'Intyre failing to accept and record the said disposition and reconveyance within two months after the date of the decree to be pronounced herein ordaining the said defender to accept and record the same, warrant should be granted in favour of the pursuers authorising them to put a warrant of registration on the said disposition and reconveyance, and to record the same on behalf of the said defender in the appropriate Register of Sasines, the whole costs and expenses of the said registration being payable by the said defender."

The pursuers pleaded, *inter alia*—"(2) The pursuers being only security holders over the said subjects, and being no longer desirous to hold same, are entitled to a decree ordaining the defender William Anderson M'Intyre to accept and record in the appropriate Register of Sasines a disposition and reconveyance thereof. (3) In the event of the defender William Anderson M'Intyre failing to accept and record a disposition and reconveyance of the said subjects within the period specified in the summons, the pursuers are entitled to decree authorising them to record the same on his behalf."

The defenders pleaded, *inter alia*—"(3) The pursuers having taken over the said subjects as their own property, this defender is not bound to accept a reconveyance thereof. (4) The pursuers having discharged the defenders of all obligations incumbent upon them under and in virtue of the said deed of declaration and of the whole debt due by them to the pursuers, the defender is entitled to absolvitor. (5) It being a condition-precedent of any right of reconveyance on the part of the pursuers that they should account to the defender for their intromissions with the said subjects, and not having done so, the action should be dismissed; *et separatim*, the action is premature. (6) In any event the pursuers are barred by their actings from seeking the remedy they now crave."

The *facts* appear sufficiently from the opinions of the Lord Ordinary (SKERRINGTON) and of LORD KINNEAR.

On 25th May 1909 the Lord Ordinary pronounced this interlocutor:—"Repels the pleas-in-law stated for the defender William Anderson M'Intyre so far as directed against the declaratory conclusions of the summons: Finds and declares that the said defender is bound to accept and record in the Division of the General Register of Sasines applicable to the County of Perth a disposition and reconveyance by the pursuers in his favour, with entry as at the term of Martinmas 1908 of the subjects and others specified and described in the summons, which specification and description are here referred to and held as repeated *brevitatis causa*, and the whole engines, shafting, gearing, and machinery of every kind and description, both heritable and moveable, within or upon or connected with the Waulk Mill and others mentioned in the summons, so far as held by the pursuers under the disposition specified in article 1 of the condescendence, and still remaining, and decerns; and finds and declares that the said defender is bound to pay to the pursuers the whole costs and expenses of and connected with the preparation, execution, and recording of the said disposition and reconveyance, and decerns: *Quoad ultra* continues the cause: On the motion of counsel for defender William Anderson M'Intyre, grants leave to reclaim."

Opinion.—"The pursuers, the Clydesdale Bank Limited, ask for declarator that the defender William Anderson M'Intyre is bound to accept and record in the Division of the General Register of Sasines applicable to the County of Perth a disposition and reconveyance by the pursuers in his favour, with entry as at the term of Martinmas 1908, of the heritable subjects described in the summons. These subjects were acquired by the pursuers conform to disposition dated 16th and recorded in the appropriate Register of Sasines 30th, both days of December 1897, granted in their favour by John Panton, solicitor and banker in Blairgowrie, with consent of the defender William Anderson M'Intyre. This disposition was *ex facie* absolute, but by deed of declaration, dated 17th and 22nd December 1897, and recorded in the Register of Sasines on 28th May 1908, the pursuers, with the special consent and concurrence of the defender, acknowledged, confessed, and declared that the said subjects were vested in the pursuers for the purposes and objects therein particularly mentioned, which were to secure the payment of certain advances made and to be made by the pursuers. The defender was never feudally vested in the subjects, and accordingly it would not be correct to say that he had the radical right thereto—(*Ritchie* v. *Scott*, 1899, 1 F. 728)—but he himself alleges that Mr Panton simply held the subjects for his behoof for a few weeks until certain documents should be prepared. It follows that the defender was the beneficial owner of the subjects although the feudal title was in name of Mr Panton, and in my opinion he continued to be such beneficial owner notwithstanding the disposition granted by Mr Panton in favour of the pursuers.

"The pursuers having a proprietary title to the subjects have had to pay feu-duties to the superiors amounting *in cumulo* to the annual sum of £151, 17s. 8d. As they have been unable to sell the subjects, and

no longer desire to hold them, they have called upon the defender to accept and record a disposition and reconveyance thereof, but he has declined to do so.

"It was not seriously disputed by the defender's counsel that, as matters stood under the disposition and deed of declaration of 1897, his client was under an implied obligation to accept a conveyance of the subjects from the pursuers when called upon to do so. I need hardly say that no such obligation is expressed in either of the deeds, but I think that it is clearly implied. In support of this view the pursuers' counsel referred to the opinion of Lord Justice-Clerk Hope in *Gardyne* v. *Royal Bank of Scotland*, 1851, 13 D. 912 (p. 922), the soundness of which does not seem to be affected by the fact that the decision of the Court of Session was reversed by the House of Lords—1 M'Q. p. 350. The pursuers' counsel also referred to the case of *Marshall's Trustee* v. *Macneill & Company*, 1888, 15 R. 762. The real defence upon which the defender's counsel relied was that stated in his third plea-in-law, to the effect that by a certain transaction which took place in 1902–1903 the pursuers took over the subjects as their own property. What happened was this—On 6th June 1902 the defender and his firm granted a trust deed for behoof of their creditors. The pursuers do not seem to have executed any formal deed of accession, but their representatives attended meetings of creditors and took part in the proceedings. It appears from the minute of meeting of the creditors held on 7th October 1902 that the debtors offered a 'composition of 6s. 8d. per £, payable one half in cash on the trustee receiving acceptances of the offer from all the creditors, and the other half in three months thereafter, the bank to hold the value of their security as £10,000 and to rank for dividend on the balance, and the estate to remain under the charge of the trustee for realisation in order to provide the second instalment of the dividend.' The meeting, at which the pursuers were represented, unanimously accepted this offer. The pursuers subsequently received payment of the composition of 6s. 8d. per £ in full of their claim of £3640, 1s. 5d., and by the terms of the receipt they discharged the debtors and the trustee of said claim.

"The claim of £3640, 1s. 5d. which the pursuers thus expressly discharged was of course only the balance of what was due to them by the debtors after deducting the £10,000 which the pursuers agreed to hold as the value of their security. It is unnecessary to consider whether this transaction further operated as an implied discharge by the pursuers of the whole debt, including the £10,000. If it did not so operate, then it could not be maintained that the pursuers' position as mere security holders was in any way affected or altered. On the other hand, if the whole debt, including the £10,000, must be held to have been discharged, the present case would in that respect be similar to that of *Kinmond, Luke & Company* v. *James Finlay & Company*, 1904, 6 F. 564, decided by the Second Division, affirming the judgment of Lord Low. It was there decided, in circumstances not unlike the present, that a security which had been valued and deducted, and which afterwards proved to be of much greater value than had been anticipated, had not become the property of the creditor, but remained a mere security, although the debt which it secured had been discharged. The defender's counsel cited an earlier decision, viz., *Craig* v. *Somerville*, 1894, 2 S.L.T. 139, to the opposite effect. The opinion of Lord Kyllachy (Ordinary) indicates that this case must have been argued upon the assumption that if a creditor in a sequestration values and deducts his security, and the debtor be afterwards discharged on payment of a composition, the creditor must be held to have made the security subjects his own—an assumption which, if sound, would go far to justify the decision. I was told that it appeared from the minute book that Lord Kyllachy's judgment was affirmed by the Second Division, but it does not appear upon what grounds their Lordships proceeded, or whether the judgment was pronounced of consent. The case of *Kinmond, Luke & Company* is, in my opinion, precisely in point, and is a conclusive authority so far as I am concerned for the proposition that the pursuers by the transaction in question did not take over the security subjects as their own property. If, then, the defender is still beneficial owner, I think it follows that he is bound to accept a conveyance from the pursuers. In the meanwhile I shall repel defender's pleas so far as directed against the pursuers' declaratory conclusions, and shall pronounce a decree in terms of that conclusion, and *quoad ultra* continue the cause. It is unnecessary for me to say more about the defender's fourth and fifth pleas-in-law than that they seem to me to be untenable."

The defender reclaimed, and argued—The trust deed provided that the rights and preferences of creditors should be determined as if in a process of sequestration, and that the discharge granted to the debtors should be valid and effectual as if it had been obtained under a sequestration under the Bankruptcy Acts. Accordingly, while they did not dispute that as matters stood under the disposition of 1897 the defender (in accordance with *Gardyne* v. *Royal Bank of Scotland*, March 8, 1851, 13 D. 912, Lord Justice-Clerk Hope at p. 922) was under an implied obligation to accept a reconveyance of the subjects, there was no such obligation after the trust-deed and the acceptance of the composition offer. The debtor transacted with his creditors on the footing that he was to get the benefit of the Bankruptcy Act, namely, a complete discharge from all liabilities in return for stripping himself of his property, but the argument on the other side would have the effect of re-creating bankruptcy. Everything, including rights in security, went to the trustee to be administered by him—*The Cleland Trustees* v. *Dalrymple's Trustees*, December 18, 1903,

6 F. 262, 41 S.L.R. 159; Goudy on Bankruptcy, 449—but by agreeing to value their security, and to rank for dividend on the remainder, the bank transformed their right of security into a right of property—*Craig* v. *Somerville*, July 6, 1894, 2 S.L.T. 134, *affirmed* in Inner House, October 25, 1894, 2 S.L.T. 243. *Kinmond, Luke & Company* v. *James Finlay & Company*, March 8, 1904, 6 F. 564, 41 S.L.R. 378, was admittedly to the contrary effect, the distinction being that there the bankrupt was seeking to recover a surplus after full satisfaction, while here the attempt was to impose a continuing obligation on the debtor. *Craig* v. *Somerville* should be followed, and the defender assoilzied. *Speedy's Trustees* v. *Commercial Bank* (*cit. inf.*) had no direct application to the present case. (2) In any case, if, as they averred, the bank had acted as full owners and had stripped the property of its machinery and other valuable adjuncts, it was barred now from saying that it was a mere security holder. A proof of these averments should be allowed.

Argued for the pursuers and respondents —The case was ruled by *Kinmond, Luke, & Company* (*cit. sup.*). The report in *Craig* v. *Somerville* (*cit. sup.*) was unsatisfactory in that it did not show on what grounds Lord Kyllachy's decision had been affirmed. In any case, so far as appeared, the 65th section of the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79) had not been cited to Lord Kyllachy, who seemed to have assumed that the secured creditor became under the 65th section the proprietor, whereas, on the contrary, the words "reserve to such creditor the full benefit of such security" implied the contrary. There was no question of re-creating bankruptcy; the debts now due were not due before the date of the trust deed. A secured creditor, even after valuing and deducting the value of his security and ranking for the balance, could revalue the security subjects—*Commercial Bank of Scotland Limited* v. *Speedie's Trustee*, November 27, 1885, 13 R. 257, 23 S.L.R. 167; it followed that valuing and ranking did not convert the security right into a right of property. (2) A secured creditor was entitled to sell as much as he could of the security subjects.

At advising—

LORD KINNEAR—In this case the pursuers, who are the holders of a security *ex facie* absolute, allege that they have got all the benefit out of the security for payment of their debt which they can have, and that they are left with the property on their hands; that this involves them in liabilities to the superior, and therefore that their debtor whose property was impledged with them must now take his own property back again so as to relieve them of these liabilities. Upon the two general questions of law which are raised by this demand I entirely agree with the Lord Ordinary. The first question is whether the defender is in the same position in relation to the pursuers, the Clydesdale Bank, as if he had himself been infeft in the property at the date when the security was effected, and had conveyed it in his own name to the pursuers. I think he is exactly in the same position. There is no question as to his proprietary right, and although, in consequence of the state of the title at the time, he gave it to the pursuers in the form of a conveyance by a third person with his consent, that, I think, leaves the position exactly the same as if he had himself been infeft and had conveyed it by his own deed.

The other general question is, whether, when a creditor has accepted a conveyance of property in security of a debt due to him, he has the right to require the debtor, whose property the subjects still remain under burden of the security, to take it back again, and as to that I agree with the Lord Ordinary that there is no doubt about his right. The question then arises, whether in the particular circumstances of this case the pursuers, the Clydesdale Bank, can enforce the ordinary right of a creditor holding a security, who, when the purpose for which he took it has been served, requires the debtor to take it back again. That arises out of certain proceedings for the distribution of the defender's insolvent estate by virtue of a private trust, which it was agreed between all the parties should have the same effect and be conducted in the same way as if the estate were being distributed under the Bankruptcy Act, and the question raised is whether the effect of these proceedings was not, as between the creditor claiming a dividend on the one hand and the insolvent estate on the other, such as to put an end to the original right of property in the insolvent debtor and leave the subject of the security as the property of the creditor himself. If that question were open I should think it one of some difficulty, but the Lord Ordinary has decided it in accordance with the judgment of the Court in the case of *Kinmond, Luke & Company* v. *James Finlay & Company*, which he holds to be binding on him. I do not think there can be any question that that decision is directly in point, or that it was binding upon the Lord Ordinary. Therefore I think it is also binding upon us, and in consequence of that decision I propose to your Lordships that we should adhere to the Lord Ordinary's interlocutor. Since we are bound to follow that decision as a conclusive authority, I do not think it desirable to enter into a discussion of the arguments *hinc inde*, which would have required consideration if the question had been an open one. I think the question has been decided, and that in obedience to that judgment we must adhere to the Lord Ordinary's interlocutor.

Lord Dundas reminds me that it is said that a different decision was given by Lord Kyllachy. If it were clear to my mind that there was a conflict of decision between the Second Division and Lord Kyllachy—whose judgment is said to have been confirmed by the same Division—it might probably have been desirable that the case should be considered by a larger Court. But in the only report of Lord Kyllachy's judgment which appears to

exist I do not find that his decision in itself is inconsistent with the decision in *Kinmond, Luke & Company* at all. The two cases are perfectly reconcilable. All that is suggested as inconsistent is his Lordship's ground of judgment, and it is said that the *ratio decidendi* was in conflict with the decision in *Kinmond, Luke, & Company*, although it was accepted by the Second Division upon a reclaiming note against Lord Kyllachy's judgment. But unfortunately the report is so meagre as to make it quite impossible to say what Lord Kyllachy's ground of judgment truly was. I am not satisfied from the report before us that Lord Kyllachy intended to express any opinion which would conflict with the previous decision of the Second Division, and therefore I cannot hold that the Second Division can be held to have pronounced a judgment in conflict with its former decision.

I am therefore of opinion that we should adhere to the interlocutor of the Lord Ordinary.

LORD PEARSON—In 1902 the defender and his firm granted a trust-deed for behoof of their creditors, and offered a composition of 6s. 8d. per pound. It was part of the arrangement that the pursuers, who held security for their advances, should hold the value of their security as £10,000 and rank for dividend on the balance of their debt, which amounted to £3640, 1s. 5d., and of which they discharged the debtors and the trustee on payment of the composition. They have tried to realise their security, but they have not been able to effect a sale, with the exception of certain engines and machinery; and in the result they are left with the security subjects and a liability to the superior for feu-duties amounting to over £150 a-year. They now call upon the defender to accept and record a reconveyance of the security subjects. The defender refuses to do so, on the ground that the security subjects have become the property of the pursuers. This raises the question, —What is the legal result when a secured creditor values his security and ranks for a dividend on the balance of his debt? Does his right of security become a proprietary right in his person, or does it remain a security right the value of which must be accounted for to the debtor if there should turn out to be a surplus value left after the creditor's debt is paid in full? The latter view was adopted in the case of *Kinmond, Luke & Company*, 1904, 6 F. 564, by the Second Division, affirming a judgment of Lord Low, and I think we should follow that decision. The ground of it was that a creditor after operating payment of the full balance of his debt was not entitled to hold to the security so as to make a profit —that the radical and proprietary right remained in the debtor, and that nothing had happened which would convert the creditor's right in security into a right of property.

Our attention was called to the case of *Craig & Somerville*, 1894, 2 S.L.T. 139 and 243, referred to in the Lord Ordinary's note as being a decision to the opposite effect. I am not sure that it is so when the facts are carefully examined. In *Kinmond, Luke, & Company* the rise in value of the security was sufficient to pay the creditors' debt in full and to leave a surplus; and it was that surplus which was the subject of contention. In *Craig & Somerville* there was no surplus value at all. The security subject—a policy of assurance—had been valued by the creditor at £30; and after deducting this the debt for which he ranked was £750, on which he received a dividend of 10s. in the pound, or £375. What the debtor demanded was retrocession of the policy on payment only of the £30 at which it had been valued. But if—as was laid down in *Kinmond, Luke, & Company*—it was a condition of giving back the security that the debt should be paid in full, that condition was not fulfilled in *Craig & Somerville*, for £375 of the debt remained unpaid and only £30 was offered for the security.

LORD DUNDAS concurred.

The LORD PRESIDENT and LORD M'LAREN were absent.

The Court adhered.

Counsel for Pursuers (Respondents)—Cullen, K.C.—W. J. King. Agents—Ronald & Ritchie, S.S.C.

Counsel for Defender (Reclaimer)—Hunter, K.C.—D. Anderson. Agent—Charles Waldie, S.S.C.

Saturday, July 17.

FIRST DIVISION.

[Lord Johnston, Ordinary.

SINCLAIR (TURNERS' TRUSTEE) *v.* EDINBURGH PARISH COUNCIL AND ANOTHER.

Bankruptcy — Assessments — Preference — Right in Security—Poinding—Poor and School Rates—Revenue Act 1884 (47 *and* 48 *Vict. c.* 62), *sec.* 7 (2)—"*Sequestration.*"

The Revenue Act 1884 enacts, sec. 7 (2)—"No moveable goods and effects belonging to any person in Scotland at the time any of the duties" (*i.e.* assessed taxes) "or land tax became in arrear, or were payable, shall be liable to be taken by virtue of any poinding, sequestration, or diligence whatever, or by any assignation, unless the person proceeding to take the said goods and effects shall pay the duties or land tax so in arrear or payable, provided such duties or land tax shall not be claimed for more than one year. . . . ." The remedies and provision for the recovery of land and assessed taxes are, under the Poor Law Act 1845, section 88, applicable to the recovery of poor rates.