but I can find nothing in the statute which warrants the particular pieces of land in question being withdrawn from its application. It is worthy of notice as a comment upon the anticipations of those who passed the Act that apparently these lotted lands have not continued to be appreciated, as lotted lands, by the people of this village, for two things have happened—in the first place a considerable portion of the original lotted lands have had to be resumed and handed over to the tenant of an adjoining farm, and, in the second place, this particular tenant has in 1894, 1896, and 1905, gradually amassed into his own hands three holdings or rather four, because one of them was at the time divided, and now cultivates them, not for the greater comfort of himself and his family, as an adjunct to his ordinary occupation, but as his regular business. This looks as if there was no demand for allotments properly so-called in this village, or else as if, having ceased to be regarded as ordinary allotments, this particular tenant has secured these lots by outbidding his neighbours, affording therefore the best criterion of their market value.

LORD MACKENZIE—I am of the same opinion. I had difficulty in following the argument presented for the appellants—certainly not because of any want of clearness of statement on the part of Mr Murray. I understood him to admit that the Commissioners' statement in their note is correct, viz.—"It is beyond doubt that these Fordyce 'lotted lands' do not come within any of the express exclusions in section 26 of the Act of 1911. Any 'small holding' under the Small Holdings Act 1892, or any allotment under the Allotments (Scotland) Act 1892, or the Local Government (Scotland) Act 1894, is no doubt excluded by sub-section 3 (*e*) of that section. This sub-section refers only to holdings and allotments formed on land which a public authority has acquired either by agreement or compulsorily, and subject to special regulations with regard to the tenure, rights, and obligations of the holders, under the statutes expressly cited in the sub-section. The formation or preservation of small holdings by public authority was regulated or extended in England by a series of statutes from 1601 to 1908—in Scotland much later, by the Crofters Act, the Acts above cited, and the Act of 1911."

Accordingly he addressed himself to what seemed to me the hopeless task of saying that by implication they were excluded by reason of the operation of certain sub-sections of section 26. It is impossible to come to that conclusion.

LORD SKERRINGTON concurred.

The Court answered the question of law in the affirmative.

Counsel for Appellants—Murray, K.C.—D. P. Fleming. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Respondent—Mitchell. Agents—Graham, Johnston, & Fleming, W.S.

Saturday, December 13.

SECOND DIVISION.

[Lord Skerrington, Ordinary.

GALBRAITH (MACDOUGALL'S TRUSTEE) *v.* IRONSIDE.

Bankruptcy — Fraudulent Preference at Common Law—Consciousness of Debtor of Own Insolvency—Reduction.

An action by a trustee in a sequestration for reduction, on the ground of fraud at common law, of a security voluntarily granted by an insolvent to a creditor, in which the pursuer averred that at the date when the insolvent granted the security the creditor was aware of the granter's insolvency, *held irrelevant* in the absence of an averment that the granter was himself conscious of his own insolvency.

On 6th May 1913 William Brodie Galbraith, C.A., Glasgow, trustee on the sequestrated estates of Hugh MacDougall, builder in Oban, *pursuer*, brought an action against William Ironside, solicitor and bank agent, Oban, and Peter Moir, bank agent there, *defenders*, for reduction of an assignation by the said Hugh MacDougall in their favour of a bond and disposition in security for £2000 in favour of the said Hugh MacDougall.

The pursuer averred — "(Cond. 1) The estates of Hugh MacDougall, builder in Oban, were sequestrated on 12th February 1913, and the pursuer was elected and duly confirmed trustee thereon. . . . (Cond. 2) Prior to the sequestration of his estates the said Hugh MacDougall carried on business in Oban for a period of twelve years or thereby. During that time his law agents were Messrs Hosack & Sutherland, solicitors in Oban, of which firm Mr John D. Sutherland and the defender William Ironside until the end of March 1912, and thereafter the said William Ironside, were the sole partners. Mr Sutherland was also the agent of the Royal Bank of Scotland's branch in Oban, at which bank the said Hugh MacDougall kept his bank account. The said firm of Hosack & Sutherland were thus intimately acquainted with MacDougall's entire business affairs and with his financial position from the time he commenced business onwards. (Cond. 3) About the month of October 1910 the said John D. Sutherland recommended the said Hugh MacDougall to erect a building of shops and dwelling-houses at Kinlochleven. At that time MacDougall's entire capital amounted only to £600, but on the representation of Mr Sutherland that he would procure a loan for him, MacDougall proceeded with the erection of the tenement. Mr Sutherland failed to procure a loan, but MacDougall succeeded in finishing the property with the assistance of an overdraft from his bankers. On its completion the property was sold for £3000, of which £1000 was paid in cash and the bond and disposition in security described in the conclusions of the summons was taken in payment of the balance. The £1000 received in cash

was paid to the said John D. Sutherland, and to the extent of £100 it was applied in paying his firm's business accounts, and the balance of £900 was placed to the credit of MacDougall's bank account. After placing this amount to the credit of the account it still stood at debit to the amount of £885, 3s. 5d. This was on 11th November 1911. (Cond. 4) In the month of February 1911 Messrs Hosack & Sutherland asked the said Hugh MacDougall to manage the Ardshiel Granite Quarries, which had formerly been worked by the Quarrier Company Limited, of which company Hosack & Sutherland were the law agents. Having implicit confidence in, and relying as they well knew on the advice of, his law agents, and believing the arrangement which they had proposed to him was for his benefit, the said Hugh MacDougall entered into a contract of copartnery with the said Quarrier Company, under which he was to manage the quarries, receiving an annual salary and a certain share of profits. He was also at this time induced by the said Messrs Hosack & Sutherland to contribute £250 to the capital of the Quarrier Company, but no information whatever was furnished to him by the said Hosack & Sutherland as to the financial position of that company, although they were fully conversant therewith. MacDougall was promised by them balance sheets relating to the quarries, but they were never furnished, and he was thus kept entirely in ignorance regarding the financial workings of the concern. He, however, trusted to his law agents, one of whom was also his banker. The said partnership agreement was invalid and void and null in respect that the Quarrier Company had no power under its memorandum and articles to enter into any such partnership, but Messrs Hosack & Sutherland, in breach of their duty to MacDougall as his agents, failed to inform him of this. (Cond. 5) Towards the end of March 1912 Mr Sutherland retired from the said firm of Messrs Hosack & Sutherland and also from the agency of the said bank. Mr Ironside was thus left sole partner of the said firm of Messrs Hosack & Sutherland, and he, along with the other defender Peter Moir, was then appointed joint-agent at Oban of the said Royal Bank of Scotland in succession to Mr Sutherland. (Cond. 6) A few days before Mr Sutherland's retiral from business the said Hugh MacDougall called for him to discuss his private affairs, when he was assured by Mr Sutherland that these would be put all right before he retired from the business. At this time the said Hugh MacDougall's account with the Royal Bank was overdrawn, but he had no information at the time as to the state of the Quarrier Company's account, nor did he consider that he had any responsibility therefor. About the beginning of April he had some communications from the defender William Ironside as to his personal overdraft, and Mr Ironside suggested an assignment to the bank of certain policies of insurance amounting to £400 on MacDougall's life. Later Mr Ironside suggested that MacDougall should assign to himself and the other defender the £2000 bond which MacDougall held over the property at Kinlochleven. Having implicit confidence in his law agents and bankers, MacDougall agreed to do so, and on 16th April 1912 called at the defenders' office and signed an assignation of the bond. Prior thereto he had received a letter from Mr Ironside dated 12th April, marked 'private,' in which it was stated—'You of course will get a back-letter from Mr Moir and myself stating the purpose for which the assignation is granted. The acceptance of this assignation must not prejudice the position taken up by the bank that your overdraft must be considerably reduced.' MacDougall understood, and was led by the defenders to understand, that the assignation referred to his individual overdraft, and that he would receive a back-letter from the defenders setting forth the purpose for which the deed had been granted. No such letter was, however, granted. At the same time the life policies before referred to were assigned to the Royal Bank, and thereupon MacDougall was stripped of his whole available assets. The amount of his overdraft at the bank on 12th April was £1131, 12s. 6d. Throughout these transactions Mr Ironside was agent for MacDougall, the Quarrier Company, and for the bank. *The said Hugh MacDougall was insolvent at the date of granting the said assignation, and he remained in a state of insolvency down to the date of his bankruptcy. The object in obtaining the assignation of the said bond was to enable the defenders to obtain security for the said Hugh MacDougall's overdrafts, and thus to protect the said bank and obviate any question as between the bank and themselves. It is believed and averred that the defenders had received instructions from the head office of the bank that the overdrafts must be paid off or secured, and they acted in concert in obtaining the security above mentioned. They were both aware that the said Hugh MacDougall was liable for the overdraft on the Quarrier Company's account, as in fact he was in a question with the bank, and that he was then hopelessly insolvent. But the defender Mr Ironside, who personally carried through the transaction, acting for himself and the other defender and also as law agent for the said Hugh MacDougall, fraudulently concealed these facts from the latter in order to induce him to grant the said assignation which he could not honestly have done. In further pursuance of their scheme the defenders represented to the said Hugh MacDougall that the assignation referred only to his individual overdraft, and in order to prevent the true state of the facts becoming known to him, they failed to execute and deliver to him the back-letter which had been promised in the letter above quoted, stating the purposes for which the assignation was granted. As his law agent, the defender Mr Ironside had a duty to the said Hugh MacDougall to make a full disclosure to him of the whole facts which were necessary to enable him to decide whether he was warranted in granting the said assignation. This the said defender failed*

to do, but in breach of his duty took from him an assignation which he had no right to grant. The transaction was an attempt on the part of the defenders to secure the said bank from loss by getting from the said Hugh MacDougall a conveyance of his whole estate, and thus obtaining an illegal preference to the detriment of MacDougall's other creditors. . . . [The italicised words were added by way of amendment, *q. v. infra.*] . . . (Cond. 7) After this MacDougall went to Copinsay, where he was erecting a lighthouse, and did not return to Oban till the end of September or beginning of October 1912. He had then a meeting with the defender Moir, who informed him that it was the purpose of the bank to hold him liable for the whole of the Quarrier Company's overdraft. This overdraft amounted to £1412, 11s. 4d. or thereby, while MacDougall's own overdraft only amounted to £401, 11s. 9d. MacDougall at once protested against the attempt which was being made to make an improper use of the assignments which he had made, but the defender Ironside persisted in the position which he had taken up. [*Apart from the Quarrier Company overdraft, MacDougall, it is believed and averred, was solvent on 12th April* 1912, *and also at the date of the trust deed after mentioned, but*] liability for the overdraft of the Quarrier Company at both dates rendered his estates hopelessly insolvent. This was well known to the defenders, who were fully acquainted with MacDougall's entire position. . . . [The italicised words in brackets were deleted by way of amendment, *q. v. infra.*] . . . (Cond. 8) Thereafter MacDougall's creditors began to press him, and on the recommendation of the defender Ironside he, on 23rd November 1912, signed a trust deed in favour of the pursuer. This deed was superseded by the sequestration which was awarded on 12th February following. (Cond. 9) At the time when the said assignation was granted in favour of the defenders the said Hugh MacDougall, having regard to his liabilities as a partner of the said Quarrier Company, was hopelessly insolvent, and this was well known to the defenders. No consideration was given for the said assignation, and the granting and procuring of the said deed was a fraudulent attempt to secure the overdrafts of MacDougall and of the said Quarrier Company to the said bank, and to the prejudice of the just rights of MacDougall's other creditors. The pursuer has called upon the defenders to reassign the said bond to him, but they refuse or delay to do so, and the present action has accordingly become necessary."

The pursuer pleaded — "(1) The assignation libelled falls to be reduced in respect (*a*) that it was granted without consideration; (*b*) that at the date thereof the granter was insolvent; (*c*) that the said deed was procured by the defenders fraudulently in the knowledge of MacDougall's insolvency, and with the intention to defeat and to the prejudice of the just rights of his others creditors; (*d*) that the said deed was procured by the defenders while acting as agents for MacDougall and in breach of their duty to him. (2) That, in the circumstances condescended on, the pursuer is entitled to decree as concluded for."

The defender, *inter alia*, pleaded—"The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed."

On 16th July 1913 the Lord Ordinary (SKERRINGTON) allowed a proof before answer.

Opinion.—"This is an action to reduce a security voluntarily granted by an insolvent to a creditor, the ground of reduction being fraud at common law. The relevancy is objected to for the reason that the pursuer refrains from averring that the granter of the security was conscious of his insolvency, The judgment and opinions in the well-known case of *M'Cowan* v. *Wright*, March 10, 1853, 15 D. 494, show that such an averment is of the very essence of an action of reduction based upon the ground that a security was granted fraudulently and in order to disappoint the legal rights of the other creditors. In the present case the pursuer alleges that the defenders were aware of the insolvency, but a creditor cannot be guilty of collusion in a case where his debtor acted honestly in giving the security.

"For the foregoing reasons I should have dismissed the action as irrelevant but for certain specialties which make it necessary, in my opinion, to have an inquiry into the facts. The pursuer alleges that the defenders, in whose favour the security was granted, were the law agent and the banker of the insolvent; that they knew of his insolvency, but for their own purposes industriously concealed the fact from him; and that they thus obtained from him a security which he could not honestly have granted if he had known his true position. I am not prepared to decide as an abstract proposition in law that a creditor owes no duty whatsoever to his fellow creditors in the matter of obtaining securities from an insolvent, and that accordingly it is impossible to aver or prove a case of the breach of such duty. I shall allow a proof before answer."

The defenders reclaimed, and after a hearing on 15th November 1913, in the Summar Roll, the Court allowed the reclaimers to amend the condescendence *ut supra*. The case again appeared in the Summar Roll on 13th December 1913.

Argued for the reclaimers—The pursuer's averments were irrelevant, because (1) they set forth that, apart from the liability for the Quarrier Company's overdraft, for which the pursuer denied MacDougall's responsibility, MacDougall was solvent at the time he granted the assignation; and (2) they did not state that MacDougall was conscious of his own insolvency. The assignation of the £2000 bond did not amount to a disposition *omnium bonorum*. An averment to the effect that MacDougall was conscious of his own insolvency was a *sine qua non*—Bell's Comm., vol. ii (7th ed.), pp. 170 and 226; Goudy's Bankruptcy (3rd ed.), p. 40; *M'Cowan* v. *Wright*, March 10, 1853, 15 D. 494, *per* Lord Justice-Clerk (Hope) at 498-9, and Lord Cockburn at 510; *Thomas* v. *Thomson*, December 19, 1866, 5 Macph. 198,

per Lord Neaves at 201, 3 S.L.R. 121, at 122; *Price & Pierce, Limited* v. *Bank of Scotland*, 1910 S.C. 1095, 47 S.L.R. 794, *per* Lord Kinnear, 1910 S.C. at 1110, 47 S.L.R. at 804. It was true that in the case of a gratuitous alienation the insolvent's consciousness of his own insolvency was assumed—Goudy's Bankruptcy (3rd ed.), at p. 24—but the present case was not that of a gratuitous alienation, but of an alleged fraudulent preference. The word "transaction" occurring in Bell's Comm. (7th ed.), vol. ii, pp. 226 and 229, note 1, meant "fraudulent transaction." *Crawford* v. *Black*, December 2, 1829, 8 S. 158, and *Jones' Trustees* v. *Jones*, January 25, 1888, 15 R. 328, 25 S.L.R. 245, were different. They were not cases of a fraudulent preference given by a debtor, but cases of creditors themselves taking a preference. *Dick* v. *Alston*, 1913 S.C. (H.L.) 57, 50 S.L.R. 726, was also referred to with regard to the knowledge of the insolvent's law agent of his insolvency.

Argued for the respondent—The pursuer's averments were relevant, because (1) they definitely stated that MacDougall was insolvent at the time he granted the assignation, and (2) it was unnecessary to aver that MacDougall was conscious of his own insolvency, for the injury done to the creditors was the same whether he knew of it or not—Bell's Comm., vol. ii (7th ed.), at pp. 226 and 229, note 1; Goudy's Bankruptcy (3rd ed.), p. 40; *Kinloch* v. *Blair*, January 18, 1678, M. 889; *Cramond* v. *Bruce & Henry*, February 25, 1737, M. 893; *Marshall's Trustees* v. *James Provan & Company and Others*, January 21, 1794, M. 1144; *Crawford* v. *Black* (*cit.*); *Jones' Trustees* v. *Jones* (*cit.*), *per* Lord Justice-Clerk (Moncreiff), 15 R. at 332, 25 S.L.R. at 248. Moreover, even if it were necessary to aver that MacDougall was conscious of his own insolvency, the pursuers had averred this, inasmuch as they averred an assignation by him which amounted to a disposition *omnium bonorum*, and which therefore in itself made MacDougall insolvent to his own knowledge.

LORD JUSTICE-CLERK—The Lord Ordinary in this case observes that he had a difficulty in allowing a proof, and that he did so solely because he considered there were certain specialties in the case. The question we have to decide is whether there are any such specialties as will justify that decision, and I have come to be satisfied, after hearing the very able discussion we have had, that here the pursuer has not stated such a case as entitles him to a proof.

The facts are that Mr MacDougall was in difficulties, to this extent at least, that his bankers were not willing to allow him to remain in the position of having unsecured overdrafts with the bank. They intimated that to him, with the result that they obtained the assignation of a bond. Now that was all done in the ordinary course of banking business by the joint agents of the branch bank at which the debtor did his business; it is a transaction such as happens every day, and it generally happens because the bank is beginning to be doubtful whether their debtor is in such circumstances as make it safe for them to go on with the overdrafts without security, and when a bank considers an overdraft too large it is, of course, within its rights in insisting that it should be reduced or in demanding security. It was in such circumstances that the bond was granted. Now to begin with, was it granted by a man in the knowledge that he was insolvent? There is no case of that kind at all. MacDougall did not believe himself to be insolvent, and therefore the idea of collusion between him and the two bank agents for the purpose of defeating the interests of the other creditors is entirely out of the question. As was pointed out in the course of the debate, it cannot be said that a man is acting in collusion with another unless they both know that what is being done is illegal or fraudulent. If MacDougall did not consider himself to be insolvent, he could not commit a fraud in giving security.

Therefore upon the first blush of the case I see no ground for holding that where it is not alleged and cannot be alleged that the debtor knew himself to be insolvent at the time of the transaction, that transaction can be attacked and cut down upon ordinary grounds. But the Lord Ordinary thinks there are special grounds for reduction averred, and these special grounds are two—in the first place, that it is alleged that the bank agents knew that the debtor was insolvent, and in the second place that one of these two bank agents happened to be the debtor's personal law agent. I do not see how these two facts can affect the matter at all. As to the first, Mr Macmillan's argument on that matter was unanswerable. It is not a question of what the creditors knew, but of what the debtor himself knew, and what he in conjunction with them did because he knew and because they knew of his insolvency. As to the other matter, viz., that one of the defenders was the law agent of the debtor, I do not see how that can affect the case. What was done by the bankers was done by them as agents of and for behoof of the bank, and to hold that an ordinary transaction of banking could not be carried out on the usual footing and with the usual result in a case where one of the bank agents, or even the bank agent himself, was a solicitor and was the agent of the person with whom he was dealing, would lead to very grave disturbance in a great deal of business—business which is perfectly usual and regular and occurs every day. Of course there might be an argument that the agent was more likely to be aware of the state of the debtor's affairs. But then, again, whatever the agent here knew, he knew as a bank agent, and it does not at all follow that he knew that the debtor was insolvent, or that the debtor himself was dealing with the matter on the footing that he was insolvent.

Another point very ingeniously raised by Mr Anderson was that this deed was of the nature of a disposition *omnium bonorum*. Mr Anderson says "that the bond which he transferred to the bank carried the whole of his goods." That is certainly not a thing to

be assumed, and it certainly does not appear to be so on the face of the bond. It is quite certain that if this had been a disposition *omnium bonorum* it would not have benefited the bank, because it would have been a distinct declaration of insolvency—a distinct declaration by the debtor that he knew that he was insolvent.

On the whole matter I have come to the conclusion that we should recall the interlocutor of the Lord Ordinary and dismiss the action.

LORD DUNDAS concurred.

LORD GUTHRIE—I am of the same opinion. It is admitted that one of the defects in the previous record, namely, the absence of a clear averment that at the date of the assignation MacDougall was insolvent, has now been removed. But what the Lord Ordinary, in the opening paragraph of his opinion, desiderated, namely, an averment that he knew of his insolvency, has not been made and could not be made, because the case of the pursuer is that he thought he was not liable for the overdraft of the Quarrier Company, and without that overdraft he was perfectly solvent.

I think that the Lord Ordinary in allowing proof of what he thought a specialty has a little forgotten the position of the parties; because he says in his second paragraph—"The pursuer alleges that the defenders, in whose favour the security was granted, were the law agent and the banker of the insolvent; that they knew of his insolvency, but for their own purposes industriously concealed the fact from him." The fact is that one of them, Ironside, was law agent to MacDougall, that he was also a banker, and that the other, Moir, had no connection with MacDougall in the way of law agency, and was only a banker. Mr Anderson put it, however, that Ironside knew the facts which came to his knowledge as law agent, and that in some way, rather difficult to follow, Moir was responsible for Ironside. I do not know what might have been the result if that had been properly averred, but I find no such averment. The averment is that they were both —that is, the two bank agents—"aware that the said Hugh MacDougall was liable for the overdraft on the Quarrier Company's account, as in fact he was in a question with the bank, and that he was then hopelessly insolvent." Therefore, even if there might be a special case—I do not know of any on the books—which would entitle the pursuer to proof without an averment that the debtor knew that he was insolvent, I do not find any such specialties here.

In regard to what your Lordship has said about a disposition *omnium bonorum*, that again might raise a question if we had a case requiring us to consider it. But there is here no averment of a disposition *omnium bonorum*. If there were such an averment relevantly made, the conclusion would be obvious, so far as relevancy went, that the debtor must have known that when he granted such a disposition he left himself insolvent, because he had no estate remaining. It would also follow, if that were necessary, that the creditors must have known that their debtor had at their instance rendered himself insolvent; but we have no such case made.

LORD SALVESEN was absent.

The Court sustained the first plea-in-law for the defenders and dismissed the action.

Counsel for the Respondent (Pursuer)—Anderson, K.C.—Marshall. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Reclaimers (Defenders)—Macmillan, K.C. — Maitland. Agents—Dundas & Wilson, C.S.

VALUATION APPEAL COURT.

Friday, December 5.

(Before Lord Johnston, Lord Salvesen, and Lord Cullen.)

GLASGOW PARISH COUNCIL *v.* GLASGOW ASSESSOR.

Valuation Cases—"Yearly Rent or Value"—Parish Council Offices — Method of Valuation—Comparison with Neighbouring Premises—Contractor's Principle.

Held that in valuing large offices, owned and occupied by the Parish Council of Glasgow, the assessor should proceed on the principle of comparison with the rentals of other premises in the neighbourhood, and not on the contractor's principle.

Observed that the contractor's principle was only admissible where comparison was impossible or merely as a check.

At an adjourned meeting of the Valuation Committee of the City and Royal Burgh of Glasgow, on the 30th day of September 1913, the Parish Council of the Parish of Glasgow appealed against the valuation of the following subjects:—

Subject. Description.	No. of Street.	Proprietor.	Occupier.	Yearly Rent or Value.
Offices	266 George Street	The Glasgow Parish Council, Glasgow	Proprietor	£3300

The Parish Council craved that the entry in name of yearly rent or value should be £1950 instead of £3300, and submitted that there had been no change of circumstances justifying the assessor in increasing the figure of £1950, at which the subjects had stood in the roll for ten years.

The Valuation Committee fixed the valuation of the subjects at £2600, whereupon the Parish Council took a case for the opinion of His Majesty's Judges.

The Case was, *inter alia*, stated thus—"2. The subjects are situated east of George Square on the north side of George Street, and the ground occupied by the buildings extends to 1875 square yards. The subjects have a frontage to George Street of 82 feet. . . .

"5. The Parish Council Offices consist of a front stone building facing George Street,