tion is bad, because it is impossible to say that it has not proceeded upon the mere fact of conveyance without the party convicted having been engaged in a removal at all.

The state of the question thus presented is admitted to have arisen under the following circumstances:—The station of the North British Railway is beyond the limits of the burgh of North Berwick, and to the westward of the town. The complainer is a servant on a farm to the eastward of the burgh, and was engaged in driving manure from the railway station to the farm. In the transit he passed along one of the streets of the burgh, using an uncovered cart. It is said that a conveyance of offensive matter along a street in such a conveyance is within the prohibition of the Act; it is said, on the other hand, that it is *removal* of the offensive matter from a part of the burgh along a street of the burgh which is made the subject of statutory provision—a description of conveyance, but one which is said, by the very use of the term, to be limited to a taking away from a particular locality, and the taking away in this case is said to mean, according to a right construction of the Act, a taking away from premises within the burgh.

The particular provision in question, which is § 145, is one of a series commencing with § 132, which forms a section relative to the cleaning of streets. These sections deal with the disposal of dirt, ashes, and manure. The first of the series, vesting what I may call the whole fuilzie, excepting stable and byre dung, in the commissioners, and providing for the collection and carrying away of all manner of manure. In that and following sections before the 145th, the word removal is used eight times, and, in all of them, undoubtedly in the sense of taking away from the places within the burgh where the fuilzie is generated or collected. The special clause in question following up provisions as to removal of offensive matter provides, in the first place, "that the commissioners may fix the hours at which only it shall be lawful to remove offensive matter from the premises;" the case of a removal at other hours than the hours so fixed is then provided for, and then follows the provision that, whether the hours be fixed or not, any one who "uses, *for any such purpose*" —that is plainly for "the removal of offensive matter from any premises,"—an uncovered cart, shall be liable to a fine of 40s.

Independently of what I consider the impossibility of reading the words "premises" as applicable to other premises than premises within the burgh, arising from the preceding sections, I think it very plain that it is impossible to read these words without that restrictive meaning, looking to this section alone, because an opposite construction would necessarily infer that the magistrates of any burgh could not only regulate the removal of offensive matter from places within their own burgh, but from places in counties entirely beyond their jurisdiction, nay, from places in other burghs. The words must be read as giving a universal jurisdiction of fixing the times of removal of manure all over Scotland; or as limited to the burgh over which their ordinary jurisdiction extends. If they could regulate the time of removal of manure from the station at North Berwick, they could equally regulate the time of removal at any other station within the county. If they can only regulate the time of removal from premises within the burgh, then the use of an uncovered cart for any such purpose must necessarily mean a purpose of removal from such premises—that is to say, the taking away of manure from places where the manure is collected or generated within the burgh.

I cannot extend penal provisions beyond the fair meaning of the expression used in imposing them, because the evils from the offence prohibited and the actual thing done are similar. But I take leave to say that I do not believe that the Legislature ever contemplated to impose on all farmers who might have occasion to drive a single cart of guano or other manure from a railway station or neighbouring seaport through a part of a street of a burgh the necessity of providing a set of conveyances with covers proper for preventing the escape of the contents of the cart or stench therefrom. It is quite right that the carts used in the ordinary process of removing fuilzie in towns, whether by contractors or neighbouring farmers accustomed thus to get supplies of manure from the town, should only perform the removal at stated times, and at all times in covered carts. I do not think that the Legislature meant to deal—and I do not think that they did deal—with any other case than the removal of offensive matter from places within the burgh.

As to the second point, it is unnecessary, in my view of the first objection, to say anything. I may only remark that the complainer would have to meet two difficulties had the offence under the statute been incurred by the conveyance of manure in an uncovered cart along the street—one, that the absence of the expression of the condition on which a farm-servant is liable in the complaint is matter of form, and the other, that the evidence, as a conviction followed, must be taken to have been sufficient to warrant conviction.

The other Judges substantially concurred.

Agents for Complainer—J. & J. Milligan, S.S.C.
Agents for Respondent—H. & H. Tod, W.S.

COURT OF SESSION.

Tuesday, February 23.

SECOND DIVISION.

THOMAS *v.* WADDELL.

Bankrupt—Discharge—Payment to facilitate—Composition—Preferable Debt—Bankrupt Act, sec. 150—*Expenses.* (1) Circumstances in which *held* that a payment of money towards facilitating a bankrupt's discharge was an illegal preference in the sense of the 150th section of the Bankrupt Act; (2) Party succeeding in cause *held* entitled to expenses only since the date of the Lord Ordinary's interlocutor, although that interlocutor was affirmed in respect the transaction which grounded the action, and was now declared illegal, was the act of the defender, which the pursuer was entitled to hold by until there was a judgment against him.

This was an action brought by the pursuer to enforce implement of an obligation undertaken by the defender in the following circumstances:—The pursuer was a creditor to a large amount in the sequestration of R. S. Smith, Walkerton Mills, Leslie. For the amount of his debt he claimed to hold a security over the machinery in the bankrupt's mill. This security was disputed by the

trustee, who rejected the pursuer's claim for a preference. The bankrupt having offered a composition, and there being a difficulty in adjusting the same while the pursuer's claim to a preference remained undisposed of, the defender, who appears to have been a friend of the bankrupt, wrote to the pursuer, offering him £500 over and above the composition, provided he would not insist in his claim for a preference, and would give the defender a mandate to act for him at all meetings in reference to the composition. This offer was accepted by the pursuer. It did not appear that the bankrupt had any knowledge of the transaction, neither was it alleged that the body of creditors were aware of it.

The pursuer now brought the present action to enforce the payment by the defender of the £500 referred to. The defender pleaded that the obligation founded on was void, as constituting an illegal preference in the sense of the 150th section of the Bankrupt Act.

The Lord Ordinary (MANOR) sustained this defence, and assoilzied the defender with expenses, adding the following note: — "The pursuer, James Thomas, being a creditor of Robert Suttie Smith, a sequestrated bankrupt, for various sums, amounting to £2797, 17s. 6d. or thereby, lodged claims in Smith's sequestration for the sums so due to him, and, in particular, he lodged a claim for a sum of 1795, 1s. 4d., contained in a promissory-note granted to him by the bankrupt, stating, with reference to this debt, that he held no security for it except a certain policy of assurance, and certain machinery and effects belonging to him, situated in and at Walkerton Mills, occupied by the bankrupt as tenant, and which machinery and effects the bankrupt had right to purchase from him on certain conditions specified in a letter referred to in the claim. The trustee in the sequestration did not admit the pursuer's right of property in, or security over, said machinery and others, but claimed them as the property of the general creditors, which he was entitled to sell without regard to the pursuer.

"In the month of June 1867, which was after the pursuer received intimation of the trustee's rejection of his claim for a preference in respect of machinery, the bankrupt made overtures to his creditors, with the view to obtaining a discharge on payment of a composition. Meetings then took place, and a correspondence was opened between the defender, James Waddell, acting on behalf of the bankrupt, and the pursuer, with reference to the adjustment of the pursuer's rights to the machinery, and his preferable claims in respect thereof, without which, it is stated, the proposal of a composition was considered impracticable. There appear to have been frequent meetings on the subject, and numerous letters passed between the defender Waddell and the pursuer, the correspondence closing with the letter on which the present action is founded. It is in these terms—'175 Buchanan Street, Glasgow, 9th September 1867, — James Thomas, Esquire, Forthar—Sir,—In consideration of your taking the same dividend as the rest of the creditors will be offered and paid by the bankrupt on the sequestrated estate of Mr Robert S. Smith, spinner and manufacturer, Walkerton Mills, Leslie, Fifeshire, and giving me your mandate to act on your entire claim of £2797 or thereby, at all meetings in connection with offer, and acceptance of offer, on said bankrupt estate, I agree to see you paid, or to pay you, the sum of £500 sterling, payable as follows, viz., £300 within two months of the date of Mr Robt. S. Smith's discharge; £100 in eight months from date of R. S. Smith's discharge; and £100 in twelve months from the date of R. S. Smith's discharge; which £500 is over and above the composition upon your entire claim of £2797 or thereby, and all without prejudice or recourse.— I am yours respectfully, JAMES WADDELL.'

"What was the nature of the defender Waddell's relation to the bankrupt, or his interest in his affairs, or from what source the money thus stipulated to be paid by him was to come, are facts nowhere disclosed on the record. It is merely stated that he was a friend of the bankrupt's. But it is sufficiently evident that the whole transaction, however it originated, and whatever its effect might be, was managed without the privity or knowledge of the other creditors. The bankrupt having made offer of a composition which, after consideration, was accepted, the defender Waddell became one of the cautioners for its payment, and at all the meetings of creditors held for the purpose of deciding on the offer of composition, Waddell was present, and voted and acted on a mandate which had been granted by the pursuer in his favour on his whole claims in the sequestration. The result was that the pursuer was reckoned as an ordinary concurring creditor for his whole debt of £2795, 17s. 6d.; and since the bankrupt's discharge, which was obtained on 21st November 1867, the pursuer has accepted payment of the instalment or instalments of the composition which have become due and payable. He has now brought this action against the defender for payment of £400, with interest, as concluded for, being the balance alleged to be due to him under the letter or obligation libelled, of 9th September 1867.

"It was pleaded, in defence, that the said obligation is in violation of the 150th section of the Bankruptcy (Scotland) Act 1856, whereby it is declared that 'all preferences, gratuities, securities, payments, or other considerations, not sanctioned by this Act, granted, made, or promised, and all secret or collusive agreements and transactions for concurring in, facilitating, or obtaining the bankrupt's discharge, either on or without an offer of composition, and whether the offer be accepted or not, or the discharge granted or not, shall be null and void.' The defender further maintained that the obligation is void at common law, and cited various cases in support of his pleas.

"For the pursuer it was contended that the said letter or obligation does not fall within the meaning or intention of the statute, inasmuch as the bankrupt was no party to the transaction, and that the effect of it, so far from being to diminish the estate divisible among the creditors, is, on the contrary, to increase and enlarge it, by inducing the pursuer to accept the composition payable to an ordinary unsecured creditor, instead of leaving him to take steps for establishing his preference over the machinery, whereby the estate might have been materially lessened. The Lord Ordinary was struck with the force of this argument, but after carefully considering it, he has felt himself constrained to give effect to the defender's pleas, being of opinion that it would be dangerous to sanction a private transaction of this kind, which was plainly one for facilitating or obtaining the bankrupt's discharge. The pursuer not only bargained for and received from the defender a consideration for foregoing his claim to a preference, but, as part of the agreement, entrusted his whole rights and in-

terests in the sequestration to the absolute discretion of the defender as his mandatory. There may have been no fraud or unfairness intended in the matter, but the words of the statute, which are very broad, seem to exclude everything like such secret interposition on the part of friends of the bankrupt, even though he himself have no knowledge of what is done on his behalf. The case is in many respects a special one, and none of the authorities cited by the defender have any direct bearings upon it, but they show the extreme jealousy which the law entertains of the slightest interference in the procuring of concurrence to the discharge of a bankrupt.

"It is scarcely necessary to observe that the position and conduct of the defender, in repudiating his own obligation are anything but creditable to him. With that, however, the Lord Ordinary considers he has nothing to do, and he has accordingly, with some reluctance and hesitation, decided the case in the defender's favour, though, in its circumstances, it appears to him to be an extremely narrow one."

The pursuer reclaimed.

CLARK and BALFOUR for him.

PATTISON and CRICHTON in answer.

At advising—

LORD JUSTICE-CLERK—This action concludes for payment of certain sums said to be due under an agreement come to between the pursuer and defender under the following circumstances. A person of the name of Smith became bankrupt, and was sequestrated, and offered to pay to his creditors a composition upon their debts in consideration of obtaining a discharge. Mr Thomas, the pursuer, was a claimant on the sequestrated estate for a total debt of £2797, 17s. 7d. He lodged a claim for that debt, in which he stated that he held no security for its payment except a policy of insurance for £1000 on the bankrupt's life, and certain machinery and effects in a mill which the bankrupt had used in connection with his business as a manufacturer.

The claim lodged in the sequestration by the pursuer did not contain any estimate of the value of the alleged securities. It was not lodged with a view to voting, and therefore did not require to contain any such value; but it is said by the pursuer on record that the security was of very considerable value—in fact, equal or nearly equal to the debt. The right to the moveables in the mill was disputed by the trustee; but as the pursuer's estimate of their value was high, and his claim to a preference asserted, it is clear that if matters had proceeded in their ordinary course, the pursuer, Mr Thomas, must have deducted a very considerable sum from the amount of his total debt before he proceeded to *vote* on the question of the composition; for before he could have given such a vote he must have stated his securities, and put a value upon them, and deducted the value from the total amount of his debt. The vote would have been upon the difference alone between the debt and the estimate of the security, which would have reduced it to a vote for a small debt, if it afforded a vote at all.

Mr Waddel, the defender, was a friend of the bankrupt, and in order to secure the pursuer's vote in favour of the composition, he agreed to pay the sum sued for. Five hundred pounds in all was to be paid at certain periods from the date of the discharge *being obtained*, in certain specified instalments, for two of which the action is brought, over and above the amount of the composition, the counter-consideration being that the whole debt should be voted on in the question as to the composition, and no deduction being made on the ground of the securities, and that the defender should hold the pursuer's mandate, and so be enabled to vote at all meetings touching the acceptance of the composition on the total debt; an arrangement by which the vote was effectually secured.

The question is, can such an obligation be enforced?

It is impossible to doubt as to this being a promise of a payment of money for facilitating the bankrupt's discharge on a composition, and it is not said to have been made known to the trustee or to any creditor in the sequestration. The pursuer refrained from deducting any estimated value on account of his holding a preference, voted on his whole debt through the defender as his mandatory, and the composition-contract was agreed to, and the bankrupt discharged on a composition.

Can we give decree in terms of such an agreement? Apart from the element of secrecy, on which there may be difference of opinion, as "*collusion*" has not been proved, there is present the statutory condition inferring nullity, viz., the payment promised for a facilitating of the bankbrupt's discharge.

The statute excludes from its operation all payments "sanctioned by the Act." It applies to every description of transaction containing the element just adverted to, where the transaction is *not sanctioned by the Act.* There is unquestionably no provision in the Act which sanctions such a payment by a friend of the bankrupt for such a purpose. This seems to be the single exception to the application of the sanction of nullity, and the present case is not without it, because it is not a case where the act done is sanctioned.

The pursuer pleaded that the defender, though acting in the interest of the bankrupt in the facilitating of the bankrupt's discharge, was truly a third party generously devoting a portion of his property to the laudable endeavour to restore to the bankrupt the capacity of resuming trade, and that, as the fund did not in any way diminish the available assets, and, on the contrary, went to augment them by the withdrawal of a claim to a preference, this transaction was not contrary to the spirit of the Act.

I think that the statute, in so far as the nullity is concerned,—and that is all with which we have to do,—does not discriminate between the case of a stranger and the bankrupt. The provision does not introduce, as an essential element of nullity, the interference or knowledge of the bankrupt, and the 151st section proves this to demonstration, for it contemplates the case of the bankrupt being personally concerned or cognizant of the arrangement, and the case where there has been such an agreement without the personal interference or knowledge of the bankrupt. In the latter case the discharge is annulled, and the bankrupt is deprived of all the benefit which accrued from it; in the other the consequence is the nullity of the obligation and the incurring of certain penalties.

I do not think that there is anything in the Act which can lead us to the conclusion that the provision is to apply only where the estate is diminished or the interests of the creditors affected in the amount of estate to be distributed. It must be admitted that although every farthing of available assets is divided, an engagement by the bank-

rupt to pay the debt in full at a time, however remote, would be fatal. It is not, therefore, because a portion of the estate is diverted from distribution, or the interest of the creditors affected by the withdrawal of a divisible fund, but rather on other grounds, that such transactions are rendered null and void. Such an application of the funds of the estate would be plainly illegal; but the statute dealing with such arrangements had also in view considerations which are quite irrespective either of the withdrawal of funds or of personal interference or knowledge of the bankrupt. The vote of a certain majority of creditors in such questions is made by the statute to prevail over the opposite votes of a minority who desire to operate payment of their just debts by the legal machinery provided under the Bankruptcy Act for their liquidation. To force a composition-contract upon an unwilling creditor is a strong act of legislative authority, which can only be justified on an assumption that the vote of the majority is freely and purely given. Where a majority of votes is obtained by bribes of money or other consideration, by whomsoever given, there has been an unfairness in the vote against which the only effectual protection is such a statutory declaration of nullity as the bankruptcy statute contains.

I think that a statute which should limit the remedy to cases where actual cognisance in the transactions on the part of the bankrupt can be proved—a matter of great difficulty even in cases where he truly was a party to the transaction—would altogether fail in meeting the exigency of the case, and that any limitation of the source of the consideration to a part of the bankrupt's estate would be equally deficient. The remedy, according to the spirit of the statute, can only be adequately carried out where transactions by which votes are unduly influenced are rendered null by whomsoever these transactions may be carried through, or whether the amount of the fund to be divided be affected or not.

The statute in the 150th section has made no distinction between the obligations of a friend of the bankrupt and those of the bankrupt himself, and the object of the statute would obviously be defeated if any such restriction were introduced. I do not find it necessary to go further, but it is certain that no body of creditors can be said to proceed to the consideration of a composition-contract where they are going on the footing of a large unsecured creditor taking his dividend on his apparent debt with others, while he has an engagement in his pocket giving him an additional sum. I do not believe that Mr Thomas intended any deception or fraud on the body of the creditors, but the effect of his vote was certainly to mislead them. They must have held that the composition was to be taken by Mr Thomas as it was proposed to be by themselves. The act operated unfairly in so far as the body of creditors is concerned.

On the whole I agree with the Lord Ordinary, who seems to me to have taken a sound view of the law of the case.

The other Judges concurred.

After hearing parties on the question of expenses, the defender was only held entitled to expenses since the date of the Lord Ordinary's interlocutor.

Their Lordships held (LORD BENHOLME dissenting) that the circumstances of the case were such as to put the defender in a very unfavourable position; and, although the transaction on which the pursuer founded was now ascertained to be illegal, yet it was a transaction into which the pursuer had been led by the defender, and which he was fairly entitled to hold by till its illegality was established by the judgment of a Court. The pursuer, therefore, should not be found liable in expenses prior to the date of the Lord Ordinary's judgment. Since, however, he should have been satisfied with that judgment, he must pay the expenses of the Inner-House procedure.

Agents for Pursuer—Hill, Reid, & Drummond, W.S.

Agent for Defender—J. Y. Pullar, S.S.C.

Wednesday, February 24.

FIRST DIVISION.

EDDIE *v.* FORSYTH.

Servitude—Titles—Access to Back Tenement. Circumstances in which *held* that a proprietor of an urban tenement had failed to prove a servitude of access to his back premises through the house of an adjoining proprietor.

In this action, at the instance of Mrs Margaret Carlaw or Eddie and her son, proprietors in liferent and fee of a dwelling-house, back house, and yard, in Whitburn, against John and Alexander Forsyth, the pursuers sought declarator that they "have good and undoubted right to the use and privilege of a passage or entry from the public road or street of the village of Whitburn through the property of the said John Forsyth and Alexander Forsyth, or one or other of them, fronting the said road or street, and on a line with and lying immediately to the east of the pursuers' said dwelling-house and yard, for access to their said back house, lying immediately behind their said dwelling-house; or at least that their pursuers, their predecessors and authors, had and have good and undoubted right of servitude of using and travelling on the said passage or entry, and that for forty years and upwards, or at least for seven years and upwards, as an entry for access to their said back house, and that the defenders have no right to shut out or exclude the pursuers or their tenants from said passage or entry."

After a proof, the Sheriff-substitute (HOME) decerned in terms of the conclusions of the summons against Alexander Forsyth and John Forsyth as his curator *ad litem*, assoilzieing John Forsyth individually, as having been denuded of the property for sometime previous to the action. The Sheriff (MONRO) recalled that interlocutor, "except in so far as it assoilzies the defender John Forsyth, which part of it is not appealed against by the pursuers: Finds no sufficient evidence of the constitution of a real right or servitude of a passage through the house now belonging to the defender Alexander Forsyth, in favour of the subjects now belonging to the pursuers: Finds it established by evidence that the shutting up in the year 1828 of the passage which previously existed through the premises now belonging to the defender Alexander Forsyth was acquiesced in by the pursuers' predecessors in his said subjects from that time to the year 1859, when the pursuers acquired the subjects, and that the pursuers are thereby barred from insisting that the said passage shall now be reopened: Therefore assoilzies the defender Alexander Forsyth from the conclusions of the summons, and decerns: Finds the defender Alexander