why should we not formally convert this into an application to this Court? A pen and ink and half an hour would do it.

Counsel for the pursuer, in view of the opinions expressed from the Bench, did not press for a decision on the question of jurisdiction, but asked for a continuation to allow the pursuer an opportunity of presenting a new application to the Court of Session for the custody of her children.

Thereafter the agent for the pursuer having intimated that she did not propose to present any such new application, the defenders presented a note to the Lord Justice-Clerk asking his Lordship to move the Court to refuse the appeal and adhere to the interlocutor appealed against, with expenses.

The Court dismissed the appeal, and affirmed the interlocutor appealed against.

Counsel for the Pursuer — Younger — Peddie. Agent—James M'William, S.S.C.

Counsel for the Defenders—D.-F. Asher, Q.C.—W. Thomson. Agents—Mackenzie, Innes, & Logan, W.S.

Wednesday, November 30.

SECOND DIVISION.

[Sheriff-Substitute of Aberdeen.

MACKIE *v.* MACMILLAN.

Reparation—Negligence—Injury by Falling into Cellar in Public-House—Contributory Negligence.

A man who intended to go into the lavatory of a public-house, by mistake went through a door situated near the bar, and near the door of the lavatory, and sustained injuries by falling down a stair to which this door gave access. This door led first of all to a landing, 5 feet 5 inches by 3 feet 10 inches, from the right side of which the stair descended. There was no marking on this door, but the lavatory door had the word "lavatory" upon it, and opened from the stair side of the landing. In an action by the injured man against the keeper of the public-house for not having a door in such a position either locked or guarded in some way, *held* that the defender was not liable, on the ground that this door could not be a source of danger to anyone taking reasonable care of his own safety, and that consequently no fault was established on the part of the defender.

This was an action brought in the Sheriff Court at Aberdeen by John Mackie, mason, Aberdeen, against Mrs Elizabeth Macmillan, spirit dealer there, in which the pursuer craved decree for the sum of £100 as damages for injuries sustained by him through falling down a stair in the defender's public-house, his fall, as he alleged, having been caused by the fault of the defender.

A proof was allowed. The facts established sufficiently appear from the following interlocutor and note of the Sheriff-Substitute (ROBERTSON) dated 13th June 1898:—"Finds (1) that on the occasion libelled pursuer was in defender's bar, and desired to go to the lavatory; (2) that pursuer had not been in the bar before, and was not aware of the position of the lavatory; (3) that seeing a door open at the end of the bar, pursuer assumed it led to the lavatory, while in point of fact it opened on to a small landing, from which the stair down to the cellars led; (4) that pursuer, in going through said door, failed to observe the stair, and fell down and broke a bone in his leg; (5) that the door in question was not marked in any way, but that the lavatory door, which was through a glass swing door, and was 6 feet beyond the door into which the pursuer went, was plainly marked with the word "lavatory," which was visible from a considerable portion of the bar; (6) that the landing at the top of the cellar stair was well lighted from the bar, and that the stair, which was not a steep one, was in addition lighted by a gas-jet opposite the bottom of it; (7) that at the time when pursuer entered no one was stationed at the door in question to prevent the public entering; but finds (8) that the said landing and stair was not, on the occasion in question, a dangerous place to anyone using the most ordinary precaution, and that pursuer must be held to be himself to blame for the accident: Therefore assoilzies defender from the conclusions of the action, and decerns," &c.

Note.—"The facts of this case are as follows:—Defender is proprietor of a bar in Bridge Street of Aberdeen. This bar is at a corner, and is a large and well-lighted one. There are large windows on two sides, two on each side 8 feet wide, and extending to the roof; as pursuer's witness Winchester put it, 'There is no question but that it is a very well lighted bar.' The entrance to the bar is in Bridge Place, and on entering the serving bar faces you; at the right-hand end of the bar there is a passage at right angles leading through a double swing door into the smoking-room. This swing door is of clear glass, and has clear glass panels on each side of it. On the right hand side of this passage, just opposite the end of the bar, and just before you come to the swing door, there is another door of obscure, or rather rolled glass in its top and larger half. Through the swing door, and about 6 feet from the door just mentioned, is the lavatory door. The door first mentioned opens on to a landing 5 feet 5 inches by 3 feet 10 inches. On the right-hand side of this landing a stair goes down to the cellars. The near corner of the stair is about 2 feet from the door, a substantial stair-rail commences at the cheek of the door and continues down the stair. The stair is not a steep one. The ceiling of the passage opposite to the door is sloped corresponding to the stair, and the door opens away from the stair side. There is no marking on this door.

"The lavatory door is plainly marked with two-inch letters on the top, and the marking is plainly visible from probably half of the bar—that is to say, to anyone who was using his eyes and looking for such a place.

"The door first mentioned leading to the cellars was as a rule kept locked, at the time in question in this action it happened to be open, as ærated waters were being carried down.

"On the day in question, the 17th July, pursuer went into the bar with a friend between 5 and 6 p.m. It was a very fine bright day. The bar was crowded, and pursuer went to look for a lavatory; he assumed that the door open at the end of the bar was the lavatory and went into it, and, as he says, he turned 'a sort of round,' and fell down stairs and broke one of the bones in his leg. This action is raised to recover damages for the injury.

"In my opinion pursuer's case fails, and for the following reasons:—It is not proved that the stair was a steep or narrow one as alleged; on the contrary, it was eventually admitted that the stair was quite a good one. Next, and most important, it is in my opinion clearly proved that the landing inside the door and at the head of the stair was not dark; on the contrary, it was, on the occasion in question, quite well lighted, at least quite sufficiently well for pursuer to have seen the stair if he had taken any care whatever. It was between five and six on a bright summer evening; the door leading to the stair was open, though even if shut the evidence is to the effect that the landing was quite light, the wall opposite the door was whitewashed and sloped parallel to the stair, a stair-rail began just at the cheek of the door, and must have been plainly visible from outside the door, as the door opened away from it, and lastly the gas at the foot of the stair was lighted, which must have shown up the stair. For all these reasons it seems to me quite clear that if pursuer had, as I have said, taken any kind of reasonable care at all, or have looked where he was going, he must have seen the stair. In other words, the stair was not a dangerous place on the occasion in question to anyone with the use of his eyes. It must further, I think, be kept in view that, even assuming that the stair landing was not quite so light as I hold it was, pursuer must have been careless. He was entering a place which he could not know was the lavatory, because the door was not marked; that being so, he was bound, I should think, to be looking about for indications whether he was right in assuming it to be so or not; the very smallest glance round would have shown the hand-rail and the stair.

"In the view I take it is hardly necessary to refer to the other facts in the case—if the place was well lighted, and therefore not dangerous, there is an end of the case. But it is obvious that if pursuer, instead of assuming that the door in question was the lavatory, which, I think, he a stranger in the place was hardly entitled to do as a matter of certainty, had used his eyes for the purpose of looking for the lavatory at all, he must have seen the door with 'lavatory' marked on it, which was in his view for at least a good part of his way from the door, and was only about 6 feet from the door he entered. This also seems to me to indicate negligence or carelessness on pursuer's part.

"The only point in the case which might cause some difficulty is the evidence of the barman Strathdee, as to what his practice had been in connection with the cellar door when open. It can be argued that if he was ordered to watch the door for the safety both of the public and the premises, there was negligence on his part (for which his employer would be responsible) in neglecting this duty on this occasion. I was somewhat impressed by this argument at first, but it seems to me that that view of it presumes the fact that the place was a dangerous one at the time in question. If the place was not dangerous to anyone using it with ordinary precautions, defender cannot be held responsible if some-one falls down and hurts himself, presumably from his own carelessness, even if the precaution of a servant to keep people out was usual and was omitted. Assuming that the barman is telling the truth (though he is contradicted by the manager, and apparently is no longer in defender's employment), it seems obvious that he was watching the door just as much to keep people out of the private part of the premises as for any other reason, though no doubt the place might be dangerous at certain times and to certain customers, and his presence might also be necessary at these times and for the safety of these customers. Here I hold that his presence should not have been necessary for pursuer's safety, the place not being dangerous to pursuer if he used ordinary care. I was referred to various cases, but it seems to me each case must be decided on its own circumstances. The case of *Cairns* v. *Boyd*, June 5, 1879, 6 R. 1004, is probably in its facts the likest to the present, and though a different result was come to there, it is obvious in my view that it was the elements in which this case differs from and is contrasted with the present that enabled the Court to come to the conclusion it did."

The pursuer appealed to the Court of Session, and argued—This was a dangerous place—*Cairns* v. *Boyd*, June 5. 1879, 6 R. 1004. No doubt here there had been no previous accident, but it was proved that the dangerous character of the place had been brought home to the mind of the defenders, for this door was as a rule kept locked, and when it was open a man was appointed to watch it, who neglected his duty upon this occasion. *Walker* v. *Midland Railway Company* (1886), 2 Times L.R. 450, was an exceptional case, but Lord Selborne's definition of the duty of an innkeeper would cover this case. Counsel also cited—*Toomey* v. *London, Brighton, & South Coast Railway Company* (1857), 3 C.B., N.S. 146, 27 L.J. C.P. 39, and *Somerville* v. *Hardie*, October 29, 1896, 24 R. 58.

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