ment that the iron had been placed to his credit in their books. Campbell Brothers shortly after became bankrupt; and Mr Hertz sold the iron to recover his advances.

Mr Vickers raised the present action in the Sheriff-court of Lanarkshire, whence it was brought by advocation to the First Division of the Court of Session. He claimed restitution of the iron, or at any rate of its value, on the ground that Campbells had fraudulently transferred the delivery warrants, and that their pledge of it was consequently invalid. It was held by the Judges of the Court of Session that Vickers, by his transmission of an unqualified order to Campbell Brothers, had put them in a position to go into the market as owners of the iron, and effectually to make over the right to it to a *bona fide* lender or purchaser.

The pursuer appealed to the House of Lords against this judgment.

The LORD ADVOCATE, with him Mr J. BROWN, Q.C., and Mr DICEY, for the appellant.

SIR ROUNDELL PALMER, Q.C., and Mr JESSEL, Q.C., for the respondent, were not called upon in reply.

At delivering judgment—

LORD CHANCELLOR—This is a case in which the appellant having certain pig-iron to sell, employed Messrs Campbell of Glasgow to sell it, and sent them delivery orders on the Carron Company to enable the sale to be effected. Messrs Campbell, instead of selling it, fraudulently pledged it with the respondent, who now keeps the iron in order to satisfy the advances he had thus made. The case has been argued at great length, but the point lies in a small compass. The Lord Advocate took no notice of the Factors Act, 5 and 6 Vict. c. 39, which has a material bearing on the case, and he relied on general principles as to the right of property as represented by the possession of the delivery orders, and argued that as Campbell Brothers, who were merely agents or mandatories, had no right of property, so Hertz was in no better situation. Mr Brown, however, argued the case on the Factors Act, and contended that the Act applied only to specific goods, whereas here, he said, the goods were not specific. It might have been difficult to say whether these delivery orders could have passed the property to Hertz if the question had turned on the construction and effect of those instruments, but it is unnecessary to decide that point, for the Factors Act seems to confer on agents, such as Campbell Brothers were, a right to deal as they have done with the documents of title. The Act applies to goods not specific as well as to specific goods if the goods are deliverable on demand. That being the case here, the decision of the Court below is right, and must be affirmed.

LORDS CHELMSFORD, WESTBURY, and COLONSAY concurred.

Appeal dismissed.

Agents for Appellant—A. Kelly Morison, S.S.C.

Agents for Respondent—Hamilton, Kinnear & Beatson, W.S.; and Grahames & Wardlaw.

Tuesday, May 9.

CARTER (PENDREIGH'S TRUSTEE) *v.* M'LAREN & CO.

(*Ante*, vol. vii, p. 27; also see *ante*, vol. vi, p. 606.)

Bankruptcy Act—Creditors—Discharge—Forfeiture—Penalty—Preferential Payment—Good Cause.

B. & Co., creditors of C. & Co., refused to agree to the offer of composition made by the latter when sequestrated; but being pressed by some of the other creditors to accept a preferential payment and give their consent, they eventually did so, on the understanding that the additional payment was to be made by the friends of C. & Co., and not by any of the creditors. On learning that the transaction was illegal, they at once refunded the money. *Held* (reversing a judgment of the First Division) that the forfeiture and penalty which sec. 150 of the Bankruptcy Act imposes had been incurred; and *observed* that the words of the clause "if no cause be shown to the contrary," do not give the Court any discretionary power in the infliction of the penalty, if the facts are proved.

This was an appeal from the First Division of the Court of Session.

J. & G. Pendreigh carried on business as grain merchants in Edinburgh and Leith, and as brewers at Abbeyhill, Edinburgh; but the firms were different—the partners being different—and the creditors of each firm were different. The estates of each firm were sequestrated, and Mr Carter, the petitioner, was elected trustee in each sequestration. At a meeting of the creditors on 27th April last, the bankrupts made offer of a composition of 3s. 7½d. per pound on the debts of each estate—it being understood that for this purpose the two estates should be massed in one.

The respondents, who were creditors of the grain firm only, refused to accede to this composition, believing that the estates, if properly worked, should yield a dividend of 10s. per pound, and that the massing of the two estates was illegal. As they were overruled, and the composition accepted, they brought an action of reduction of this agreement, and succeeded in getting it set aside.

Meanwhile, as the other creditors were anxious for an immediate settlement, the respondents were pressed to accept a composition on their debt of 10s. per pound. They however refused to receive any sum that came out of the pockets of the creditors, but expressed their readiness to agree to 9s. per pound if the 1s. 9d. per pound of difference was paid by the Pendreighs' friends. On receiving an offer of this sum, amounting, after deduction of 2½ per cent. discount, to £226, 9s. 3d., through a Mr Weir, they, on 12th May, acceded to the offer.

The respondents made no secret of this agreement, openly telling it to other creditors and merchants. Hearing, however, that it was objected to, they, on 22d May, printed and issued a circular, with a copy of their correspondence in the matter, in which they stated—"We are informed that an opinion had been expressed that our object in opposing a private settlement was to do injury to some of the younger houses who are creditors, and it was for the purpose of disproving such an unfounded charge that we agreed to take 9s. per pound, provided that composition came from the Pendreighs, or their friends, not being creditors,

although we declined to take the larger composition of 10s. per pound, which was offered to us by certain creditors. We entertained a decided opinion that the estate, if even then wound up by the trustee, would have yielded at least 9s. per pound, and we believe that a considerably larger dividend would have been realised if the estate had been at once sequestrated and properly wound up by the trustee."

On the 25th of May, having been informed that their acceptance of this sum was illegal under sec. 150 of the Bankruptcy Act, they returned the money to Mr Weir.

The trustee presented a petition praying for forfeiture by M'Laren & Co. of their whole debt, and payment of double the amount of the preference received by them.

The Lord Ordinary (MANOR) pronounced the following interlocutor:—"Refuses the prayer of the petition: Finds that the respondents, D. M'Laren & Co., have not forfeited the debt claimed by them on the sequestrated estate of J. & G. Pendreigh, and individual partners thereof, or otherwise incurred any of the penalties provided by the 150th section of the Bankruptcy (Scotland) Act 1856, but have shown good cause to the contrary: Finds the respondents entitled to expenses."

The trustee reclaimed.

The First Division (dissenting Lord Kinloch) adhered, with additional expenses.

The present appeal was then brought.

SIR ROBERT ROUNDELL PALMER, Q.C.; HORACE LLOYD, Q.C.; and JOHN TRAYNER, for appellant.

The LORD ADVOCATE, Q.C.; GEORGE JESSEL, Q.C.; EDWARD ROLLAND, and ALEXANDER ASHER, for respondent.

At advising—

LORD CHANCELLOR—My Lords, In this case the appellant is trustee under a sequestration issued against two firms of the name of Pendreigh & Co.; and the trustee complains of an interlocutor of the Lord Ordinary upon a certain petition presented by him under the Act of the 19th and 20th of the Queen with reference to matters of this character, and of the order of the Court of Session affirming that interlocutor, by which the application made by the trustee has been refused, and he has been directed to pay the costs of the petition so presented. The petition was presented under a special enactment in the Act of the 19th and 20th of the Queen, cap. 79—the 150th section of that Act. That is a section of the Act which, with very considerable severity, strikes at the offence of receiving any preference or payment or satisfaction whatsoever by any creditor as a consideration for his concurring in or facilitating the discharge of a bankrupt, the payment so received being a sum over and above the rateable payment made to all the other creditors of the bankrupt.

I will shortly read the provisions of the section. It directs that "all preferences, gratuities, securities, payments, or other consideration 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; and if, during the sequestration, any creditor shall have obtained any such preference, gratuity, security, payment, or other consideration, or promise thereof, or entered into such secret or collusive consideration, or agreement or transaction, the trustee shall be entitled to retain his dividend; and he, or any creditor ranked on the estate, may present a petition to the Lord Ordinary, or to the Sheriff, praying that such creditor shall be found to have forfeited his debt, and be ordained to pay to the trustee double the amount of the preference, gratuity, security, payment, or other consideration, given, made, or promised, and if no cause be shown to the contrary, decree shall be pronounced accordingly." The part of the section which follows directs how the sums shall be applied which are payable upon any order or decree so made upon such petition. It directs their distribution among the other creditors, and if there be any surplus, then it is to be paid to the Unclaimed Dividend Fund. There is a further provision that "if the sequestration shall have been closed, it shall be competent to any creditor who shall not have received full payment of his debt to raise a multiplepoinding in the name of the person who has obtained such preference, gratuity, security, payment, or other consideration or promise as aforesaid, and on the value of the preference, gratuity, or security, or amount of the sum paid or consideration obtained, being ascertained, double such value or amount, together with the amount of the debt of the colluding creditor, shall be ordered to be consigned by him, and shall be divided among the creditors."

Now it is very important to consider the exact meaning of this provision of the statute before considering the facts of the case. Of course for that purpose I shall assume the fact, that the payment has been made, to be proved, and that that payment having been so made, the offence which is struck at by the statute has been completed, and the question for consideration then will be, in the turn which this case has taken in the Court below, Whether or not, that being so, the Court is competent to do otherwise than make an order or decree upon the petition on account of the view which the Court may take of the character of the offence not being of such a description in point of moral obliquity as to lead the Court to inflict the penalty which is required by the statute? It is admitted that in the face of statute the Court had no power of mitigating the penalty. The sole question we have to determine in this case (with perhaps the exception of one or two collateral matters which I will notice, but which are, after all, points upon which the case has not been rested), is, Whether or not those words "if no cause be shown" will justify the Court before whom the matter is brought on petition in saying that in their judgment no cause is shown if circumstances of an extenuating character are produced before them in evidence showing that although the offence itself has been committed it was not attended with that moral amount of delinquency which would justify them, in their opinion, in acting upon the facts proved as establishing the actual offence under the statute, and that they had therefore a right to deal with that species of defence as one which in their judgment amounts to "cause shown," enabling them to assoilzie the person accused?

Now it appears to me, my Lords, I confess, very plain that this clause was intended to act with full and complete effect upon the offence when committed under whatsoever circumstances—provided, of course, the offence has been committed. In the first place, the section says that every

security, payment, or other consideration which shall have been paid shall be null and void if it has been paid with the object of facilitating or obtaining the bankrupt's discharge; and if no actual payment has been made, then every secret or collusive consideration or agreement which has been entered into for the same purpose is also to be null and void; and this whether the bankrupt's discharge be obtained or not, or whether there be a composition or not—showing the extreme anxiety of the Legislature under every state of circumstances, and whether the effect of the payment made has been successful or not, to prevent any person from engaging in a transaction of this character by holding over the person disposed so to act an extreme and severe penalty.

The next observation to be made upon the section is, that there is undoubtedly no power in the Court to remit or mitigate any portion of the penalty. Those two circumstances are in themselves of considerable weight to show that the Legislature intended finally and decisively to strike at the offence. My Lords, the offence is one of no slight character, because if a creditor can be at liberty to obtain for himself an advantage by receiving a payment over and above that equal distribution of the assets which is made amongst the rest of the creditors, he is at once by so doing enabled to frustrate the whole policy and object of the bankruptcy law, which is to secure to all the creditors an equal distribution of a bankrupt estate, giving to none a preference, seizing upon the whole of the property and giving to the bankrupt considerable advantages in point of his discharge, and when the property is thus fairly made over, proceeding to divide it equally and rateably among all the creditors.

Then, my Lords, if that be so, and if it is important to take care that this offence—of endeavouring to obtain an undue advantage over the rest of the creditors—should be wholly put a stop to, is it *à priori* likely that we shall find in this clause a power given to the tribunal before whom it is brought, not of saying—The offence has been committed under such extenuating circumstances that the penalty should be reduced or mitigated;—but of saying—According to our judgment the offence has been committed, but it has been committed under circumstances which present features which in our opinion considerably modify the guilty character of the offence or contravention of the law, and on that ground we will treat these modifying circumstances as "cause shown" for our refusing to act upon the petition of the trustee.

Now, my Lords, I apprehend that there is nothing in the wording of this clause which will entitle us to come to that conclusion. I agree with the remark made by Sir Roundell Palmer in his argument, and I think your Lordships will also concur with me, in saying that so far as your memories extend, and certainly as far as mine can go back, and I have been able to make search into the matter, I have never found a single instance of those words "if no cause be shown to the contrary," being employed where the intent was that there should be a discretionary power in the tribunal before whom the matter was brought. The expression "unless cause be shown to the contrary," in its ordinary meaning, as applied to the vast variety of proceedings in courts of law, is not an expression which indicates a discretionary power in the Judge, but it directs him to consider all the matters in the cause, and having so considered the whole, to see whether—the offence being defined, and the punishment being defined—there be any cause shown why sentence should not be pronounced.

Now here the learned Judges of the Court of Session being all of opinion that the offence has been committed (subject to some little question raised on the part of one of the learned Judges as to the words "secret and collusive,")—and assuming for the purposes of the argument that the offence had been committed (I think the Lord President was clearly of the same opinion)—came to the conclusion that the words "if no cause be shown" might mean, if no cause be shown after the facts have been proved, because their reading of the section was this: The facts which are to constitute the offence are pointed out in the section; it is supposed, therefore, that the Legislature had in their view a case in which a petition being presented, and the facts established, there still remained ground and room for the words "and if no cause be shown to the contrary," and that if cause were shown to the contrary, then sentence was not to be pronounced. My Lords, I confess I cannot follow the learned Judges of the Court of Session in that argument. I apprehend that we cannot do so unless some authority could have been produced showing that such words as these have been held to have any such meaning, there being nothing whatever in the terms of the Act which is not in form imperative. The power of the trustee to present a petition is optional, but everything that is required to be done by the Court is imperative, with the single exception of cause being shown to the contrary. I apprehend that unless some authority is cited for those words having the effect of conferring a discretion, we are bound to hold that that in truth means no more than this, unless due cause be shown by the person who, when cited by means of the petition, comes before the Court and states his case, showing due cause in answer to the petition of his adversary. Although the matter has taken place, and the offence has been committed, nevertheless it is quite possible that he might show that at the time when the petition was presented, or under the circumstances in which the petition was presented, there was no ground for proceeding to sentence,—not on the ground of the offence being a slight one, or of the circumstances being extenuating,—but on one or other of several grounds which might be suggested, and some of which were suggested, by your Lordships during the argument. It might be shown that there is a personal objection to the person presenting the petition, and that he is not competent to do so. Supposing him to be a creditor or a trustee, it is possible that some cause might be shown to the effect that he is in such a position as not to be competent to present the petition. It might be shown that since the bankruptcy took place the bankruptcy has been superseded, and the debts have been paid and satisfied. Of course, in some such cases as these cause might be shown to the contrary. There is another case which would be going so much nearer to the verge that I should prefer the illustrations I have already given; but I am not at all prepared to say that it might not be good cause shown to show that every single creditor (the trustee who has presented the petition not being a creditor) is desirous that the petition shall be withdrawn. That might be a cause which might possibly justify the Judges in

saying that it is right and proper that the petition should be withdrawn; because I may remark that this is not a case in which the penalty is to be sued for as a matter concerning the administration of justice as regards the public in general, as distinguished from the parties injured by the act done. It is not imperative on the trustee to present the petition. The Act says that he may so do. I suppose that when creditors set him in motion he might probably be bound so to do. Further than that, when the penalty is inflicted, the whole of the money recovered is to be divided among the creditors, who are in that sense the parties interested, and it is only in the case of there being a surplus that the money is to go to the Unclaimed Dividend Fund. But that circumstance does not induce the Legislature to say that the trustee *shall* or *must* present a petition, but it only says that he *may* do so. There may, therefore, possibly be circumstances which may amount to cause shown why the Court should not pass sentence although the offence has been committed.

But, further than that, the words "if no cause be shown to the contrary," may simply mean that upon the petition being presented there is to be a formal hearing, and that the Court is not to proceed without due proof being produced on the part of the petitioner, which may be rebutted by the person who is the respondent to the petition. Certainly that view is to a considerable degree justified in my mind by the proceeding which is to take place after the sequestration is closed, in which case, there being no trustee, the matter is thrown on the creditors generally. If they choose to pursue their remedy, in that case they can raise an action of multiplepoinding, and there is nothing said about cause being shown, or the like. The case proceeds to a regular hearing. I think the difference in the phraseology may be well accounted for in the manner that was suggested by the learned counsel at the bar, namely, that when you get into a regular action with all the usual pleadings, cause will be shown in the regular manner; but when you present a petition, inasmuch as that is a proceeding of a summary character sanctioned by the Act, there may be cause shown against that proceeding. So understood, it would mean no more than that the case shall be as fully argued and determined as if there were regular pleadings; and the case having been so fully heard, the Court is to ascertain whether cause has been shown or not.

My Lords, the only thing that we have to look to is to see whether or not the offence has been committed—as to the effect of which I may say that all the Judges in the Court below, including the Lord Ordinary, came to one conclusion; because the Lord Ordinary only thought that the offence had not been committed under the very peculiar circumstances of the case with reference to the composition deed, which in itself was an irregular deed, and a deed which afterwards was not sustained by the Court, but was reduced by the Court as being contrary to the provisions of the Bankruptcy Act.

Now the offer of composition was this. It was an offer of composition by the bankrupt of so much in the £ in respect of two estates. There were two bankruptcies of two separate trading firms intimately connected with each other, the partners in one being partners in the other. The two firms, having of course separate creditors, offered a composition of 7s. 3d. in the £, which was to be paid to all the creditors alike of the two firms out of the joint assets of the two firms—that is to say, they swept in the assets of the two firms, and divided them *pro ratâ* among all the creditors of the two. Of course that was a very irregular and informal proceeding. You could not properly bring in the creditors of firm A to claim on firm B, who never had anything whatever to do with them. The transaction, when it came to be fully considered, was not a composition which could stand. The Lord Ordinary, therefore, came to the conclusion that, inasmuch as it could not operate to a discharge of the bankrupts, and would not be a proper composition, the offence, having relation to a composition of that character, ceased to be an offence within the Act so soon as the composition itself was got rid of. But I think that in coming to that conclusion he did not advert to the strong expressions in the Act to which I have alluded, whether there be a composition or not, and whether the bankrupt be discharged or not.

If the object is to facilitate that discharge, the offence is committed. The Court of Session appears to have thought that in that respect they could not concur in the view of the Lord Ordinary, and they considered that in truth the offence was made out, but they assoilzied the respondents on the grounds to which I have already adverted.

Now, the facts of this case are so short that I shall not detain your Lordships very long in stating them. On the 27th of April there was a composition offered by the bankrupts to the creditors, of 7s. 3d. in the pound. One of the respondents, Mr David M'Laren, seems to have been present when this arrangement on the 27th of April was discussed. He was dissatisfied with the arrangement —he said he was of opinion that the estate could produce something more than that which was proposed to be divided among the creditors, and that the estate, if properly managed, would produce 10s. in the pound. He therefore refused to have anything to do with that composition; but that composition, although it ultimately failed, was undoubtedly a composition proposed with a view to obtain the discharge of the bankrupts; but this gentleman, Mr M'Laren, and another firm which took the same view, declined to accept it, on the ground of its not being sufficient. Then it was that the course of proceeding took place with reference to procuring the "concurrence" (which is one of the words used in the Act) of Mr M'Laren to this arrangement for the discharge of the bankrupts. The negotiation was begun by a Mr Weir, who appears to have approached Mr M'Laren in order to obtain his assent to the arrangement with the creditors in which Weir appears to have stated to him that the bulk of the creditors (whether all or not does not distinctly appear) were very desirous that this offer should be accepted—they were very anxious, especially some firms who were not engaged in such a large way of business as Mr M'Laren himself, and could ill afford to be kept out of their debts, that the whole affair should be settled at once. They were therefore desirous that he should concur in making the arrangement, and it was proposed through Mr Weir that instead of 7s. 3d. in the pound, 9s. in the pound should be paid to him on the amount of his debts, he thereupon withdrawing his dissent from the composition which was thus attempted to be made. Mr M'Laren seems to have stated that he would have nothing to do with such an arrangement if the money was to come out of the creditors' pockets

—if they were to pay the money. He said that he had already refused 10s. in the pound, an extra shilling beyond the 9s., because the proposal had come through a medium which induced him to think that it was to come out of the creditors' pocket. But if the bankrupts or their friends would produce this money, then he was disposed to listen to the application. The application was listened to, and the money was paid to Mr M'Laren by a cheque. He was assured that it came through the medium of the bankrupts and their friends—and thereupon his assent was given—and thereupon, it seems to me, the offence was committed. Because, as I said before, the actual payment and receipt of the money is sufficient for the commission of the offence, whether the composition takes place or not, or whether the bankrupt is discharged or not, if there only be an agreement or promise.

But the Act seems to require also, that it shall be "secret and collusive." A good deal was said upon this question of secrecy or collusion. It, however, is scarcely necessary to be entered into in any detail. It was argued very strongly that the case did not turn upon it, because the expressions in the petition were said to lead to that conclusion. If it did turn on it, whether or not there was a secret and collusive agreement, I confess I should be prepared to hold it was a secret agreement.

The letter which made the offer was headed "private." In the body of the letter it was stated that it was written in "strict confidence." Mr M'Laren, of course, was not bound to adhere to that confidence. Nobody is bound to adhere to a confidence that he has not invited; and he might have taken the course of saying at once to all the creditors, this proposal has been made to me, I am disposed to accept it. Mr M'Laren says that, in truth, he would not have accepted it if he had not been informed that unpleasant rumours were circulated about him with reference to his being disposed to interfere with the views of younger men—men not so stable and so advanced in business as himself—to whom money was an object—and that, therefore, he was disposed to hold out from the unworthy motive of prejudicing them in their business.

He says, "that was the turning point which influenced me; I cared nothing for secrecy. It was the pressure put upon me by the suggestion that I was unfairly dealing with other creditors, which was the principal consideration that influenced me." He says, "I told a friend, Mr Robinow, that this proposition had been made to me." The next meeting was to take place on the 21st of May, and he said to him—"If you attend the meeting you may tell them every thing you like about it; I do not wish to have any secrecy about the matter."

Now, as I observed during the hearing, it would, no doubt, have been more satisfactory upon this part of the case, dealing with the question of secrecy, if he had said to Mr Robinow, or anybody else, "attend the meeting on my behalf, and inform the creditors of all that has been done, and ascertain from them whether it is their wish or desire that the matter should proceed in the way that is proposed."

How far that might or might not have operated even then to the disadvantage of absent creditors, with reference to the earlier part of the Act, which does not deal with secrecy, it is not necessary to say; but by taking that course he would have got rid of the whole objection to this being a secret agreement or promise. But I hold, that if it were necessary to prove the secrecy of the agreement, when you have the fact that it commenced by being entered into in secrecy on the part of those who engaged in it, and that the person who accepted the money was sure that the fact would not be communicated by those who made the payment, it is incumbent upon him, if he wishes to prove that it was not secret, to show that it was duly communicated to those who were interested in the matter, otherwise I apprehend that it would open a dangerous door to transactions of this description. Therefore, as far as that point is concerned, I do not feel at all embarrassed, whatever view we may take of the exact construction of the phraseology used in the petition.

My Lords, there is only one other matter to consider with reference to the objections which suggested themselves to the minds of some of the learned Judges. One objection suggested was that by the Lord Ordinary, which I have referred to, namely, that the composition having failed the offence had failed. Another of the learned Judges, I think it was the Lord President, threw out a suggestion, but very faintly, whether the sequestration was not at an end. Clearly at the time that this transaction took place the sequestration was going on. A meeting was held with the view of settling with the creditors. They made a mistake in the mode of dealing with it; but as clearly as possible to my mind the intention and object was to effectuate the discharge of the bankrupts, which discharge could not have been effectuated without the concurrence of the majority of the creditors, and that was greatly facilitated by the concurrence of Mr M'Laren in the step that was taken.

My Lords, it is not for us to express any opinion upon the extenuating circumstances if we have no power to allow weight to that opinion by discharging the respondent or by mitigating the penalty which has been inflicted. I have no objection to say, for my own part, that from his statement I am quite willing to conceive that he was acting with the motive not only of facilitating the discharge of the bankrupts (which certainly was one object in view), but also of facilitating the wishes and desires of many of the creditors, as to all I cannot say upon the evidence brought me. I apprehend that before he can entitle himself to a discharge upon that ground, he must satisfy us by the stopping of these proceedings altogether on the part of the trustee (which it would not be difficult to do if he were so minded), that he had the concurrence of all the creditors in the transaction before we can say that there has been anything approximating to "cause shewn" why, the offence having been committed, the sentence should not be carried into effect.

My Lords, I apprehend that the proper course to pursue will be to reverse the interlocutors complained of, namely, that of the Lord Ordinary and of the Court of Session, and to declare that the Court of Session ought to have found that the respondents had forfeited the debt claimed by them in the sequestrated estates, and to have ordered them to pay to the appellant double the amount of the payment made to them, the respondents, in the petition mentioned; and with this declaration to remit the case to the Court of Session to act in conformity therewith.

Lord Chelmsford—My Lords, the petition in this case was presented to the Lord Ordinary under the 19th and 20th Vict. c. 79, § 150, claiming to have it found that David M'Laren & Co. had forfeited the sum of £452, 18s. 6d. sterling, being double the amount of a preference gratuity or payment alleged to have been paid to and received by them for facilitating or obtaining the discharge of certain bankrupts named J. & G. Pendreigh, of whom they were creditors.

J. & G. Pendreigh carried on business as grain merchants and also as brewers at Edinburgh. The two firms were separate and distinct, and separate sequestrations were issued against them. David M'Laren & Co. were creditors of the grain merchants only. At a meeting of the creditors of both the firms, held on the 27th April, each firm made an offer of a composition of 3s. 7½d. in the pound in full of all claims against them, and both offers were made upon the footing that all the creditors should be entitled to rank upon the estates of both the firms for the debts due from each. M'Laren & Co. objected to the composition on the ground of the insufficiency of the amount, and also for incompetency on account of its mixing up the estates of the two firms so as to admit the separate creditors of each to receive the benefit of both estates.

Mr Daniel Smith, who was a creditor for a large amount on the estate of the bankrupts, was in favour of the composition arrangement. He was examined as a witness upon the petition, and said, —"Messrs M'Laren & Co. were against the composition, and I used means to bring them round. I bought them off by paying them 1s. 9d. per pound on their respective debts. That was 1s. 9d. per pound more than the other creditors were to receive. I arranged with Mr Weir to aid me by conveying this money to them, and that was done. Their opposition was discontinued." The negociation was opened by a letter from Mr Weir to Messrs M'Laren & Co., dated 30th April 1869, and marked "private," in these terms:—"Referring to our conversation yesterday I am now authorised to pay you 1s. 9d. per pound on the amount of your claims on Messrs Pendreigh's estate, on condition that you withdraw all opposition, and that a settlement is effected at 7s. 3d. per pound with the other creditors." At the close of the letter is this passage—"I further agree to write you a satisfactory letter stating the circumstances under which you have been induced to entertain this offer, but in the mean time the contents of this letter must he held strictly private and confidential."

Messrs M'Laren & Co. stated in answer that they would not accept of a single penny from the creditors, but that they would withdraw their opposition "provided Pendreighs would make up their dividend to 9s. per pound; and being informed in a letter from Mr Daniel Smith, dated 1st May 1869, that the difference between 7s. 3d. and 9s. came from a near friend of the Pendreighs and not from any creditor on their estate, M'Laren & Co. on the 13th May 1869 received the sum of £226, 9s. 3d., being the amount of 1s. 9d. on their claim of £2654, 10s. 11d., minus 2½ per cent. discount, which they acknowledged in a letter of that date, adding, "it being understood that we shall return said sum to you in the event of J. & G. Pendreigh failing to obtain a settlement as proposed."

Mr David M'Laren in his examination swore that he did not imagine there was the least illegality in receiving this money. But a meeting of the creditors having been held on Friday the 21st of May for the purpose of deciding on the offer of the composition of 7s. 3d. in the pound, and the creditors present having unanimously agreed to accept it, Mr M'Laren stated in his evidence that on the Saturday he heard it said that a great many of the creditors were objecting to the conduct of his firm in having received more than the 7s. 3d. and considered that they had behaved unfairly. That on the 24th of May he was sent for by Mr Murdoch, of the firm of Murdoch, Boyd & Co., his law-agents, who showed him the 150th section of the Bankruptcy Act, and said that the arrangement he entered into was a very awkward thing, and that he was very much astonished indeed when he read it.

On the 26th of May 1869 M'Laren & Co. returned to Mr Weir the amount received from him with 5 per cent. interest, stating in the letter inclosing the cheque for the amount that they had "ascertained that the transaction which Mr Weir induced them to enter into was illegal under the Bankrupt statute." And on the 26th of May M'Laren & Co. issued a circular to the creditors informing them what they had done. M'Laren & Co. having thus cancelled the transaction, renewed their opposition to the composition, which was finally determined by the Court of Session not to be a competent offer of composition under the Bankruptcy (Scotland) Act, and that it was not binding on the whole creditors in the sequestration.

It does not appear when the trustee under the sequestration became acquainted with the transaction; but on the 1st of June, a week after the return of the money by M'Laren & Co., he filed this petition, praying to have it found that under the Bankruptcy (Scotland) Act they had forfeifed double the amount of the sum they had so received. The Lord Ordinary was of opinion that, had the sequestration been regular, and in all respects legal and competent, M'Laren & Co. would have rendered themselves liable to all the statutory penalties, notwithstanding the apparent good faith with which they acted. But he held that as it had been determined by the Court of Session "that the entire proceeding with respect to the offer of the composition in the form in which it was made was irregular and incompetent, there never was any statutory offer of composition for discharge, and consequently there could be no infliction of penalties for interference with an arrangement which was not sanctioned or protected by the statute."

The judgment of the Lord Ordinary having been carried by reclaiming note to the First Division of the Court of Session, that Court adhered to his interlocutor, but on totally different grounds from those on which his Lordship proceeded. All the Judges expressed their dissent from the view of the case taken by the Lord Ordinary, and thought that the statutory offence was committed by M'Laren & Co. so far as to make the transaction illegal and null and void in terms of the first part of the 150th section of the Bankruptcy (Scotland) Act; but on the question of the liability of M'Laren & Co. to the penalty imposed by the second part of that section, three of the Judges were of opinion that M'Laren & Co. had, in the words of the Act, "shown cause to the contrary" against the decree for the penalty. Lord Deas was

of opinion that the Court had a certain discretion to consider whether, although the thing prohibited by statute had been done, the punishment should follow. The Lord President held that it was "in the power" (by which I understand him to mean in the discretion) of the Court to consider whether the party against whom the complaint is brought has any reasonable cause to show why the statutory penalty should not be enforced against him. Lord Ardmillan said—"To convince us that the penalties have not been deserved by the parties against whom we are asked to award them is in my opinion to show cause to the contrary." And the three learned Lords decided that as M'Laren & Co., when they entered into the arrangement for facilitating the discharge of the bankrupts, were ignorant that they were committing any offence, and as soon as they became aware that the transaction was illegal, they sent back the amount which they had illegally received—the words of the second portion of the clause (to use the language of the Lord President) "enabled them to give effect to the moral innocence of the party, and to the fact that the statutory offence had not been completed so as to produce the evils contemplated by the statute as a good reason—a good cause shown—against the pronouncing a decree for the penalty."

On the hearing of the appeal before your Lordships, the learned counsel for the respondents, besides enforcing the ground on which the majority of the Court of Session proceeded in their judgment, objected that the petitioner was bound by the terms of his petition to prove that the agreement entered into by the respondents was secret and collusive, and that the petitioner had failed to give such proofs.

The second part of the 150th section inflicts the penalty on any creditor who shall have obtained any such preference, gratuity, or payment, or entered into such secret or collusive consideration or agreement (*i.e.*, for concurring in facilitating or obtaining the bankrupt's discharge). Now, if a creditor actually receives a sum of money as a consideration for concurring in facilitating or obtaining a bankrupt's discharge, it is immaterial whether the money is received in pursuance of a secret or collusive agreement or not: the receipt of the money constitutes the offence. So, if the creditor enters into a secret or collusive agreement within the meaning of the Act, the offence is complete upon the agreement itself, without anything following upon it. The petition of the appellant is not founded upon an agreement having been entered into by the respondents to receive a preference, gratuity, or payment, but upon the actual receipt by them of a sum of money for facilitating, &c., the bankrupt's discharge. Now, as that is a complete offence in itself, all the allegations about the secret and collusive agreement may be treated as merely a narrative introductory to the charge, and not as any part of the charge to be sustained by proof. If, however, the petitioner had been called upon for such proof, I should have thought, with my noble and learned friend on the Woolsack, that he had satisfied the obligation by the evidence produced. The negotiation for the withdrawal of M'Laren & Co.'s opposition to the composition was commenced on behalf of Daniel Smith, one of the creditors, apparently without the knowledge of any of the others; and the first communication by his agent, Mr Weir, to M'Laren & Co., impressed upon them that the contents of his letter were "to be held to be strictly private and confidential." Whether any of the other creditors were made acquainted with the transaction before the payment of the money to M'Laren & Co. does not appear. The respondents in their case say that it is believed the negotiation was entered into "with the concurrence and approval of various other creditors." But of this there is no proof. It is proved that after the payment of the money the correspondence between Mr Weir and the respondents was shown to certain creditors by name, which rather leads my mind to the conclusion that the matter was down to that time kept secret. But, at all events, it was unknown to the trustee under the sequestration, whose duty it is to take care that no creditor obtains an advantage over the others, and who may require from the bankrupt, before he obtains his discharge on oath, that he has not granted or promised any preference, or made or promised any payment, to obtain the concurrence of any creditor to his offer of composition. So far, therefore, as the trustee is concerned, and as to some of the creditors, the transaction was secret; and as it was in violation of the statute, it may properly be said to have been collusive.

I was quite unable to follow that part of the argument of the learned counsel in which they contended that the respondents were not within the penal provision of the Act, because they had received the money paid to them to withdraw their opposition to the composition offered by the bankrupts, and not to facilitate or obtain their discharge. Under a sequestration there are two modes in which the final discharge of a bankrupt from his debts may be obtained, viz., with or without composition. Where a composition is offered by the bankrupt in order that it may be available to his discharge, it must be approved by the Lord Ordinary or the Sheriff, and accepted by a majority in number and four-fifths in value of the creditors. If the composition is accepted, a bond of caution is to be lodged and a report made and a deliverance pronounced approving of the composition; and upon a declaration by the bankrupt before the Lord Ordinary or the Sheriff, that he has made a full and fair surrender of his estate and of certain other particulars, the Lord Ordinary or the Sheriff shall pronounce a deliverance discharging the bankrupt of all debts, &c.; and such deliverance shall operate as a complete discharge and acquittance of the bankrupt. Now, as the discharge of a bankrupt offering a composition can only be obtained by the acceptance of the composition after approval by the Lord Ordinary or the Sheriff, who may hear any objection to the offer by opposing creditors; and upon approval and acceptance, the discharge of the bankrupt follows of course—to argue that a sum of money paid to a creditor to induce him to withdraw his opposition to a composition offered by the bankrupt is not a payment for facilitating or obtaining the bankrupt's discharge, is beyond my comprehension.

Having disposed of the objections raised by the learned counsel for the respondents upon the hearing before your Lordships, I now proceed to consider the grounds upon which a majority of the Judges of the First Division determined the case. They all of them seem to have been of opinion that the statutory offence had been committed, although the Lord President, by a subtle distinction between "offence" and "guilt," says—"It is a very curious question in law, whether in such circumstances" (that is, the respondents having

not only expressed their penitence, but made restitution) "the statutory *guilt* is complete?" But it can hardly be questioned that the moment the respondents received the money as the inducement to withdraw their opposition to the composition the offence was complete, and the legal delinquency or guilt which was involved in the act was complete too: no repentance and restitution could purge the offence, unless a *locus penitentiæ* is provided by the Act by which the offence is constituted. This, the Judges say, is intended to be given by committing to them a discretion in the part of the 150th section imposing the forfeiture and the penalty by these words, "if no cause be shown to the contrary, decree shall be pronounced." According to Lord Ardmillan, "to convince the Court that the penalties have not been deserved is to show cause to the contrary." But, with great submission, "cause to the contrary," according to the ordinary meaning of the words, must be intended to be cause why the penalties have not been legally incurred, not proof of extenuating circumstances to show that they ought, upon a lenient consideration, to be remitted. Certainly, if such an extraordinary discretion was intended to be given to the Judges, to enable them to absolve an offending party because he had erred through ignorance, or had shown himself in any other way morally innocent, though legally guilty, one would have expected that such an unusual power would have been expressed in the clearest and most distinct language. The Lord President gathers the power from the words, not because they expressly give it, but because he can find no other meaning for them. His words are—"The petition cannot be presented except in a case where the transaction is null and void. Then how can cause be shown to the contrary of the prayer of the petition being granted if the transaction is null and void." It certainly would not alter my opinion upon the subject if it appeared that the words "cause to the contrary" were without application. The petitioning trustee or creditor, before he can be entitled to have a decree for the penalties, must establish that the transaction was null and void under the first part of the 150th section. If he does so, of course no cause can be shown to the contrary; if he fail, no decree can be pronounced for the penalties. The Lord President is a little inaccurate where he says —"The petition cannot be presented except in a case where the transaction is null and void." The petition can only be successful in such a case, but it may be presented where the trustee believes that the transaction is within the Act, although it may turn out not to be so. A case was supposed, in argument, where a transaction might be null and void, and yet a party petitioned against might not be liable to the penalties, as if an agent entered into an agreement prohibited by the first part of the 150th section, in the name, but without the authority of his principal, and I suggested the case of a creditor receiving a preference, but not as an inducement to facilitate the discharge of the bankrupt, though *prima facie* appearing to be so. In both these cases, upon a petition to enforce the penalties, the creditor would have a defence; and therefore the words "if no cause be shown to the contrary," are not necessarily without application, as the Lord President supposes.

I cannot help observing that the Judges, in exercising their supposed discretion in this case, have disregarded one of the fundamental maxims of the law, *ignorantia juris non excusat*. Every man is presumed to know the law (and perhaps more emphatically the statute law) of the realm, and to allow asserted ignorance to plead, not in extenuation (for the Lord President held that "there could be no modification of the penalty in any sense"), but an entire discharge from all penal consequences, seems to me to be contrary to principle, and to establish a bad precedent. The fact of ignorance can only be proved by the evidence of the party alleging his ignorance, and can never be satisfactorily ascertained; and one cannot help being surprised that commercial men like the respondents should be ignorant (which, upon Mr David M'Laren's evidence, I assume they were) of the provisions of the Scotch Bankrupt Act with respect to composition and creditors; at all events, they knew that the principle of these compositions is that all the creditors should fare alike. They were of opinion that the bankrupt's estate ought to pay more than seven shillings and threepence in the pound; and with this belief they stipulate for an increased payment to themselves: and having received it, they remove the obstruction they had interposed to the creditors consenting to take a composition which they believe was less than they ought to have insisted upon, and than the bankrupt's estate would yield. I confess I am not much struck with the hardship of the case under these circumstances.

But it is unnecessary further to consider the grounds upon which the Judges relieved the respondents from the penalties, because I am satisfied that it was not within their competency to do so. The offence against the Act charged upon the respondents was committed the moment the money was paid to them in pursuance of the previous arrangement; and neither ignorance that they were breaking the law, nor restitution of money illegally received, could prevent the penalties being recoverable under the petition presented against them.

I am of opinion that the interlocutors appealed from ought to be reversed.

Lord Westbury—My Lords, it is with great regret that I find myself obliged to concur in the decision about to be arrived at. It is a trite maxim that hard cases make bad law; and if we were to adopt the grounds on which this case was put by the Court of Session, certainly there would be a realisation of that maxim. It is quite out of the question to hold that this statute conferred upon a court of justice a discretionary power to apply the statute or not; yet that is the conclusion at which the Court of Session has arrived. The words relied on are in reality a mere formula, expressive only of this, that the respondent shall be cited and shall be heard to show cause why sentence should not be pronounced. That cause might be either the insufficiency of the evidence brought forward against him, or it might be that the transaction was one that had not received his authority, although *prima facie* it appear to be so. Or it might be that the transaction had been concurred in and condoned by all the persons interested, and therefore was no longer a subject of complaint in a court of justice. But to hold that this mere formula of expression amounts to a discretionary power to apply the statute or not, is, I think, a decision quite unprecedented, and quite unjustified by any kind of authority.

I have endeavoured very much to find, if I

could, some legal grounds on which we might absolve the respondents. First of all, I have endeavoured to find out that the act done must be done with the intent of facilitating the discharge of the bankrupt. It was represented that these gentlemen did not consider the question of the bankrupt's discharge, but that in reality their difficulty arose from the complaints of the other creditors who were injured by not receiving the composition, and that they accepted the money as a tribute paid by those creditors in order that they might obtain the dividend offered by the composition. My Lords, we cannot for one single moment enter into the intention with which the thing was done. There are two maxims which must never be weakened in courts of justice—one is that you must ascribe to every subject a knowledge of the law, more especially in cases where the law prescribes a rule of civil conduct. That is the case here, because the law deals with what ought to be regarded as a well-known rule of commercial obligation, namely, that where you come to have an estate distributed among all equally, one creditor shall not in any mode obtain a peculiar or predominant advantage for himself. The other rule of law that must not be weakened is this, that you must ascribe to every man a knowledge of that which is a necessary and inevitable result of an act deliberately done by him. These gentlemen deliberately accepted this composition; and the necessary consequence of that, if the offer of the composition had been a statutory one, would have been the facilitating the discharge of the bankrupt. They cannot, therefore, be heard to say, as they attempt to do, they were either ignorant of the law, or that they did not intend that this particular thing, namely the facilitating the discharge of the bankrupt, should be the consequence of that which they did. Undoubtedly if we endeavour to excuse the parties, and much more if we adopt the reasoning of the Court of Session, it could not be done without weakening very much the application and force of those two salutary maxims.

It was contended very strongly that there was here no secret or collusive agreement. The criminality of what has been done does not lie in the fact of a secret or collusive agreement, but it lies in the fact of the receipt of an undue amount of money in the distribution of the bankrupt's estate. The language of the statute strikes at two things. First it strikes at the act done; and then it strikes at an agreement to do the prohibited act. The agreement may constitute criminality although the act agreed to be done is not done. The clause is to be read thus, that "all preferences, gratuities, payments," and so forth, "not sanctioned by this Act, granted, made or promised."—That is one branch of the sentence. Then the other branch of the sentence is, "All secret or collusive agreements and transactions;" and then follow words which are applicable to both the antecedent clauses, namely, "for concurring in facilitating or obtaining the bankrupt's discharge." Now this was not merely an agreement to receive a sum of money, for the agreement had been matured with an act; the sum of money had actually been received; and it is impossible to hold that these gentlemen dealt only, or considered that they were dealing only with the creditors, because they declined to receive the money if it came from any creditor, or any number of the creditors, and they only consented to receive the money (in their own language) "provided that composition came from the Pendreighs or their friends," that is the bankrupts. I cannot, therefore, but admit that all the conditions of a completed act stamped by this statute with criminality are found in the case before us.

My Lords, I was not at all inattentive to the argument which was raised upon the language of the petition. It was said that the petition must be taken to be an indictment, and that an alleged collusive agreement forms the *gravamen* of the act done; and that that being so, the allegation in the petition must be supported by proof of a collusive agreement. But in reality that is not the language of the petition, because in p. 6 the allegation is that M'Laren & Co. entered into a secret and collusive agreement whereby a preference, gratuity, or payment was granted, made, or promised, so that the offence laid in this indictment is the offence in the words of the statute, that a payment was granted, made, or promised to them, and then it goes on to allege that the money actually was received.

My Lords, I felt some difficulty, and still feel some difficulty, but as the point has not been deemed of importance by any one else, I suppose my impression about it is a wrong one; but certainly I felt some anxiety to relieve the gentlemen from this stringent order, upon the ground that the offer of composition was not a valid or effectual offer, and that therefore, that which was done under a transaction not warranted by statute fell to the ground when the transaction was voided by the statute. That view was supported in my mind by a number of instances which have occurred in our own bankruptcy law, where criminal acts have been laid, or at least penalties have been sought to be recovered from a party under a commission of bankruptcy. But the whole proceeding and the alleged offence were held to have fallen to the ground if before sentence the bankruptcy was annulled or the commission superseded. That was the state of the old law. It was held that if there was no bankruptcy there was no law that pronounced the offence, and if there was no law that pronounced the offence in consequence of the bankruptcy being superseded previously, there was no power of suing for penalties, no power of prosecuting the party, a party alleged to have offended against the law. The reason was plain enough, because the facts did not warrant the application of the law. There was in reality no law, because the transaction was not one that came without the cognizance of the law, the law itself being held not to have arisen under the circumstances. There was a difficulty in applying that rule in the present case, because, although the offer of composition was not warranted by the statute, and it was therefore void, yet it was a proceeding on the sequestration, and the sequestration remained, though the offer of composition was invalid. I must confess, however, that it would have been more satisfactory to my mind if that view of the case had been examined by the Judges in the Court below; and also if it had received the attention of the learned council at the bar. It, however, has not been deemed of sufficient weight to have received the attention of the judicial minds of the Court below, I abstain, therefore, from any attempt to rest upon it a judgment at variance with the conclusion at which your Lordships would otherwise unanimously arrive.

My Lords, upon the whole case it is impossible not to feel that this was a very unadvised act on

the part of M'Laren & Co. I give them full credit for not desiring to secure an undue advantage to themselves at the expense of others who were their rivals in this distribution of the bankrupts' estate. I believe that they acted simply from the reason that they themselves put forward, that they believed that the bankrupts' estate, if worked out, would give a greater dividend than the composition that was offered, and that they accepted this sum of money, therefore, in the conviction that they received only that which was their due, or somewhat less than their due, and that they did it merely because the long delay which might otherwise occur in the final distribution of this estate might be injurious to the smaller creditors who were less able to wait for the ultimate dividend than they themselves might have been. But it is important that these enactments, which are passed to secure commercial morality and fair dealing between creditors, should not be in any respect impaired or modified or reduced in their wholesome application by arriving at subtle distinctions or by indulging in views for the purpose of avoiding the operation of the statute. It is our duty to apply these enactments, and although in this case we exonerate the parties from having acted with any *malus animus* in the matter, still they have brought themselves within reach of a wholesome law; and it is our duty to apply that law without any compassion or any attempt to mitigate its application. Upon these grounds, my Lords, I concur in the motion of my noble and learned friend on the Woolsack.

Lord Colonsay—My Lords, I participate in the regret which has been expressed by my noble and learned friend who last spoke, but I am compelled to arrive at the same conclusion at which your Lordships have come. I have a strong opinion that the motive of these gentlemen was such as my able and learned friend who last spoke has ascribed to them, and not any intentional violation of the law, but I cannot accept that as any excuse in this case. The only point of any real difficulty that has been made here has been with reference to the introduction of the words "unless cause be shown to the contrary." As to that I think it enough to say that I concur in the views which have been already expressed as to the import of that clause, and I see various grounds on which cause might be shown, although I cannot put the construction upon those words which the judges in the Court below have put on them. The case is assumed to have been completely and fully made out in the first instance. The trustee must prove his case; he must prove the agreement which is *prima facie* an offence against the statute. But there may be rebutting evidence produced. The other party may show cause that that is not necessarily the case, and therefore I cannot accept the construction put on this phrase by the judges; I therefore concur in the judgment proposed by your Lordships.

Sir Roundell Palmer—Perhaps your Lordships will allow me to remind you, before judgment is pronounced, that the costs have been actually paid. In the order which your Lordships will pronounce on the present occasion you will doubtless provide for that in the usual manner.

Lord Chelmsford—Yes, I think that will be right.

Lord Chancellor—My Lords, the question which I have to put to your Lordships is,—to reverse the interlocutors complained of, of the Lord Ordinary and of the Court of Session, and to declare that the Court of Session ought to have found that the respondents had forfeited the debt claimed by them on the sequestrated estates, and to have ordered them to pay to the appellant double the amount of the payment made to them, the respondents, in the petition mentioned. And that the costs which have been paid by the appellant ought to be repaid to him, and with this declaration to remit the cause to the Court of Session.

Lord Westbury—You do not ask for the expenses of the petition, do you?

Sir Roundell Palmer—As the matter will be remitted to the Court below, I presume that that would follow as a matter of course, according to the course of the Court. No doubt I should have asked for them if it were necessary.

Mr Asher—There is no power under the statute to award costs.

Agents for Appellant—Waddell & M'Intosh, W.S.; and Simson & Wakeford, Westminster.
Agents for Respondent—Murdoch, Boyd & Co., S.S.C.; and William Robertson, Westminster.