Street, was assumed and agreed on, in as much as the further extention of Reid Street eastward was provided for by mutual arrangement. Accordingly, I read the agreement of 1860 as aiding my construction of the title of 1854.

Then we have the disposition by the Western Bank and Reid's Trustees to Mr John Thomson in December 1860. By this disposition an additional piece of ground was conveyed to Mr Thomson, and the minute of agreement of April 1860 is specially referred to. Mr Kyle's plan is mentioned as delineating the line of the proposed streets, and the agreement is stated to be "for the formation of Reid Street, as delineated on said plan, eastward from the central line of Sword Street." After narrating this agreement, a large piece of ground—as I think No. 7 on the plan—is conveyed to Mr Thomson under reference to a plan by Mr Kyle, and the boundaries are given, one of which is, "on the west by the central line of Sword Street, measuring 50 feet in breadth;" on the east "by the central line of a proposed street, to measure 50 feet in breadth," that is the street known as the unnamed street; and "on the south by the central line of a proposed street, to be called Reid Street, to measure 60 feet in breadth. Now, that portion of street bounding No. 7 on the south, and described as a proposed street to be called Reid Street, is undoubtedly the portion falling within the agreement of 1860, which was just a proposed extension eastward of the street known as Reid Street, which had been delineated in the plans, and recognised in the previous deeds.

Reading these three deeds together, viz., the disposition of 1854, the agreement of April 1860, and the disposition of December 1860, and construing them fairly, and with reference to the plans, and to the undoubted fact that the formation of streets, and the giving of access by streets, was the original purpose and intention of the whole arrangements, I come to the conclusion that this case is distinguishable from the case of *Free St Mark's Church;* and that, in regard to the central line of Reid Street, as well as in regard to the central line of Sword Street, and of the unnamed street, the defender is under obligation so to deal with his own property as to secure the access by street, which has been all along intended, in which access by street the owners of the said streets on both sides, deriving their rights from a common author, have a common interest which they are entitled to protect.

If the obligation exists, as I think it does, then there can be no doubt that the pursuer has right and interest to enforce it; and it is equally clear that the defender, not a singular successor, but representing the disponee, who is in the position of a contracting party, is the person who must be liable in that obligation to open up and keep open all the streets in question.

In so far as regards the space at the east end of Reid Street, and forming the south boundary of No. 7, the words of the agreement are clear, and the defender has been rightly ordained by the Lord Ordinary not only to open up, but to form and causeway, that part of the street.

In regard to the other streets to which the agreement does not apply, the Lord Ordinary has only found the defender bound to open them up and keep them open. In thus limiting his judgment, I understand that he has not pronounced any opinion in regard to the formation and causewaying of streets, apart from the specific obligation in the titles; and, taking that view of the question, I concur in holding that there are no sufficient grounds for ordaining the defender at once and immediately to form and causeway these streets. There are no definite words of obligation to that effect anywhere, except in the agreement, which relates to one part of one of the streets only. There is no time specified or pointed at for the formation and causewaying of the streets, and I am not surprised that the Lord Ordinary has refrained from giving a decerniture at present to that effect. For my own part, I think that it is sufficient at present to say that Mr Thomson is not taken bound by his titles to form and causeway the streets at present.

Counsel for Mr Dennistoun — Lord Advocate (Young), Watson, and R. V. Campbell. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for Mr Thomson — Solicitor-General (Clark) and Asher. Agents—J. & A. Peddie, W.S.

Friday, November 22.

FIRST DIVISION.

[Lord Gifford, Ordinary.

PEAT & CO. *v.* THOMAS.

Bankrupt—Bankruptcy (Scotland) Act 1856, § 150—*Payment to Facilitate Discharge—Composition—* Bona fides—*Penalty—Illegal Preference—Consent of Creditors.*

A creditor in a sequestration, claiming to hold a preferable security for part of his debt, agreed to accept a sum of money from a friend of the bankrupt with a view to a composition by the latter, and alleged his belief that the friend was acting on behalf of the trustee and creditors. *Held* that this was an illegal preference under section 150 of the Bankrupt Act of 1856, and that the *bona fides* of the creditor did not exempt him from the statutory penalty.

This was an action of multiplepoinding arising out of the sequestration of Robert Suttie Smith, Walkerton Mills, Leslie, Fife, and was brought by Messrs Peat & Co., Glasgow, the real raisers, against Mr James Thomas of Transy, Forthar, nominal raiser, and the other creditors on Smith's estate. The facts of the case will be found reported on February 23, 1869, *ante*, vol. vi., p. 360.

The Lord Ordinary (GIFFORD) issued the following interlocutors:—

"*Edinburgh, 25th January* 1872. — The Lord Ordinary having heard parties' procurators, and considered the closed record, Repels the first plea in law stated for the nominal pursuer and objector Mr James Thomas, and before farther answer, allows to both parties a proof of their respective averments, the proof to proceed before the Lord Ordinary under the Evidence (Scotland) Act, 1866, on Saturday the 24th February 1872, at half-past 10 o'clock, the real raiser to lead in the proof; and grants diligence to both parties against witnesses and havers.

"*Note.*—The counsel for the nominal raiser supported his first plea in law by a very ingenious argument, founded on a critical construction of the 150th section of the Bankrupt Statute. He contended that, where the sequestration has been wound up, as in the present case, no penalty can be made good even where an illegal preference has

been stipulated for or promised—where, in point of fact, nothing has been recovered or realised under the stipulation or promise. He urged that what was to be ascertained was only the value illegally obtained, that is, realised, not merely promised, the word promise being carefully omitted in the ascertainment clause, that is, the clause under which the fund *in medio* in an action like the present is fixed.

"The Lord Ordinary, admitting the ingenuity of the argument, cannot give effect to it. He thinks that the clause must receive a fair and equitable, and not a judicial or malignant, interpretation. Although of a penal nature, it is intended to repress mischievous, if not fraudulent practices, and its true meaning must be sought from the words used. See the opinions of the Judges, particularly in the House of Lords, in *Carter* v. *M'Laren*, October 26, 1869, 8 Macph. 64; H. of L., May 9, 1871, 9 Macph. 49. See also *Murdoch* v. *Clydesdale Bank*, January 29, 1864, 2 Macph. 515.

"As this was the only objection on relevancy, the Lord Ordinary repels the first plea.

"But the objector pleads that in point of fact there was no contravention of the Bankrupt Statute; that no preference was given, stipulated, or promised; but that the real transaction was a compromise between the objector, on the one hand, and the whole body of creditors on the other, by which, for the sum stipulated, the objector gave up a security which he claimed over part of the bankrupt estate.

"This was not pleaded in the direct action at the objector's instance to make good the alleged illegal preference; see *Thomas* v. *Waddell*, 23d February 1869, 7 Mcph. 558. Probably in that action it was competent and omitted, and such plea is now excluded in any question as to making good the obligation against Waddell. But *Thomas* v. *Waddell* does not constitute *res judicata* in the present action, and Mr Thomas' counsel explained that additional inquiry and information has shown that the transaction was not of the nature at first supposed. The Lord Ordinary thinks it is not too late for the defender and objector to show, if he can, in the present process, that the transaction was not a contravention of the statute. He has therefore allowed a proof before answer. It seems expedient to get in the correspondence and documents, which, though used in *Thomas* v. *Waddell*, were not formally proved in that process. All ulterior questions as to the amount of the penalty or debt forfeited, or the value of the security, will also arise better upon a completed proof."

"*Edinburgh*, 28*th March* 1872.—The Lord Ordinary having heard parties' procurators, and having considered the closed record, proof adduced, productions, and whole process, Repels the objections stated by James Thomas, the nominal raiser, to the competency of the action: Finds that the action has been competently and properly brought: Finds the nominal raiser liable in only once and single payment of the fund *in medio*, and, with a view to the ascertainment of the amount of the fund *in medio*, appoints the nominal raiser to lodge a condescendence of the fund *in medio* by the second box-day in the present vacation, and appoints all concerned to lodge claims by the first sederunt day in May next: Finds the nominal raiser liable in expenses to the real raisers from the date of lodging defences or objections down to this date, and remits the account thereof, when lodged, to the Auditor of Court, to tax the same, and to report; and decerns.

"*Note*.—The Lord Ordinary is well assured that when the nominal raiser Mr Thomas, in September 1867, made the arrangement which he did with Mr Waddell, on behalf of the bankrupt, he was not aware that he was doing anything wrong, or that he was committing a violation of the Bankrupt Act. The Lord Ordinary thinks it certain that at that date the nominal raiser Mr Thomas had never read, and probably had never heard of, the 150th section of the Bankrupt Statute; and even Mr Waddell, who is an accountant in Glasgow, seems to have been quite unaware of the effect and scope of that section.

"But the ignorance or the *bona fides* of the nominal raiser will not save him from the statutory consequences if he has really contravened the statute. In the recent case of *Carter* v. *M'Laren & Co.* it was ultimately held by the House of Lords, 9th May 1871 (9 Macpherson, 49), that the entire *bona fides* of Messrs M'Laren, even when coupled with the instant repayment of the illegal preference, did not save them from the statutory penalty, and that the Court had no discretion in the matter, but were bound to decern for the full amount thereof.

"The only question in the present case, therefore, is, Was there or was there not on the part of Mr Thomas a violation of the 150th section of the Bankrupt Statute? If there was, then the present action of multiplepoinding has been well brought, in virtue of the express provision of the enactment in question. What the amount of the penalty or forfeiture—that is, of the fund *in medio*—may be, is another question, which has not been yet discussed. In particular, there is a very important question, whether the 'amount of the debt' means the gross sum ranked for, or only the dividend thereon; but this question only arises after the action is found competent.

"In the previous action at Mr Thomas' instance against Mr Waddell, in which Mr Thomas sued Mr Waddell for the £500 stipulated in the letter of 9th September 1867, the illegality of the transaction seems to have been held by the Court (see *Thomas* v. *Waddell*, 23d February 1869, 7 Macpherson, 558); but as it appeared that in that case Mr Thomas' pleas were of a limited nature, and as the judgment was not *res judicata* in the present action, the Lord Ordinary thought it right to allow the nominal raiser to show, if he could, that the transaction was not a preference or an illegal agreement in the sense of the 150th section, but a proper compromise between Mr Thomas on the one hand, and the creditors on the other, whereby Mr Thomas, in consideration of the £500, renounced a security which he claimed over the estate of the bankrupt. It is certainly a little awkward for Mr Thomas that the judgment in *Thomas* v. *Waddell* stands, for the result would be, if he succeeded now, that the same agreement which in 1869 was held null and illegal under the 150th section, and enforcement of which was refused, should now, in 1872, be held legal, and not inferring statutory penalties.

"On considering the proof and correspondence, the Lord Ordinary has come to be of opinion that the transaction in question, of September 1867, constituted in the sense of the statute a 'preference,

gratuity, security, payment, or other consideration granted, made, or promised for concurring in facilitating, or obtaining, the bankrupt's discharge.' He thinks the transaction was struck at by the statute. It is not necessary to determine whether the transaction was secret or collusive or not, although, after the observations made in the House of Lords in *Carter* v. *M'Laren*, it would probably be held to be secret and collusive in the sense of the statute. It is enough for the purposes of the present action if there was a gratuity, payment, or consideration made or promised for concurring in, facilitating, or obtaining the bankrupt's discharge.

"The Lord Ordinary feels obliged to hold that there was this in the present case:—

"(1) The transaction is really embodied in Mr Waddell's letter to Mr Thomas of 9th September 1867, for although there is no written acceptance of this letter addressed to Mr Waddell, it is proved—indeed it is expressly admitted—that the letter was accepted by Mr Thomas, and that its conditions were implemented by him by taking the composition the same as the other creditors, and by granting the mandate to act and vote on his entire claim. Now, it is impossible to read the letter without seeing that it is an agreement for facilitating or concurring in the bankrupt's discharge on composition. This is the only consideration expressed in respect of which the £500 is promised. Without Mr Thomas' concurrence the composition-contract could not be carried through, and, so far as the letter of 9th September 1867 goes, it is simply a purchase of that concurrence for £500. As such the transaction is obviously illegal.

"(2) But Mr Thomas contended that the letter of 9th September 1867 does not disclose the real transaction, which was a compromise of a security which he claimed over a part of the bankrupt's machinery: and he referred to his letter to the trustee of the same date, 9th September 1867, whereby he renounced his preferable claim. Now, it is quite true that Mr Thomas had stated a preferable claim or security over part of the bankrupt's machinery. His claim was reserved in the affidavit lodged by him in the sequestration, and it is proved by the correspondence that the preferential claim was stoutly insisted in in the sequestration. But neither the nominal raiser's letter of 9th September 1867, nor any of the other letters, prove that this preferable claim or security was the only consideration for the £500 for which the nominal raiser stipulated. The renunciation of the security was rather a consequence of the bargain by which Mr Thomas consented to the composition-contract than the bargain itself.

"(3) Even if the security over the machinery entered to some extent into the bargain, this would not make the bargain legal, for it is beyond all doubt that at least part of the bargain was that Thomas should concur in the bankrupt's composition If he had not agreed to do this, it is as clear as day that the £500 would never have been either promised or paid. In the most favourable view, therefore, the £500 was promised partly for a legal and partly for an illegal consideration, and this would be enough to infer contravention of the statute.

"(4) The evidence of Mr Waddell and that of Mr Thomas is in direct conflict, and the Lord Ordinary therefore is disposed to lay both out of view, and to proceed upon the evidence of the correspondence and writings passing at the time, and which seem to him to leave no doubt as to what was truly wanted by Mr Waddell and the bankrupt. The oral evidence of Mr Waddell is not very satisfactory, but he could scarcely be mistaken in supposing that he was stipulating for a concurrence in the discharge, and was not merely buying a security. It seems plain enough that, whatever Mr Thomas thought, Mr Waddell came simply and solely to purchase Mr Thomas' concurrence to the discharge.

"(5) If Mr Thomas' view was correct, that he was to get the £500 as the price of the security, and nothing else, then this sum should have been deducted from his claim. He was not entitled to rank and vote on his full claim and realise the security besides. But it was expressly stipulated that the ranking should be for the full claim, and this itself constitutes an illegality. In many a contested vote a majority might be carried by means of the full claim, when a deduction of securities would throw the party into a minority.

"(6) It is clear, contrary to the averment on record, that the trustee and general creditors were no parties whatever to the agreement with Mr Thomas. In this sense the agreement was collusive. Mr Thomas spoke of assigning his security to Mr Waddell, but if he was to rank for his full claim this was impossible, for ranking is equivalent to payment, and the security cannot be separated from the debt.

"(7) It is scarcely an element in the present case, but so far as the Lord Ordinary can judge, the security claimed by Mr Thomas was bad in law, and it is hardly conceivable that the creditors, and much less Mr Waddell, viewed as an independent third party, should give £500, or anything approaching that sum, for an assignation or renunciation of the security. In the Lord Ordinary's view, however, this was not at all the nature of the transaction.

"It follows that the multiplepoinding has been competently brought under the statute, and the Lord Ordinary has pronounced the usual order of once and single payment, and ordered claims."

Thomas reclaimed.

At advising—

Lord President—This multiplepoinding has been brought under section 150 of the Bankrupt Act. It appears to me indispensable, in the first place, to make it clear what is the charge against Mr Thomas. Now, section 150 provides "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." In section 140, which is one of a series of sections relating to discharge on composition, it is provided that the bankrupt shall make a declaration or oath, as the case may be, that he has made a full and fair surrender of his estate, and has not granted or promised any preference or security, or made or promised any payment, or entered into any secret or collusive agreement or transaction to obtain the concurrence of any creditor to such offer and security;" and in section 147, which applies to discharge without composition, there is a similar provision. It is needless to pause on the portion of section 150 next following, which applies only to a sequestration in dependence, but I pass on to the next part of the section, which applies to a closed sequestration.

It is plain that every illegal payment is to be followed by penal consequences. We must consider therefore what is the charge actually made against Mr Thomas, in order to see if he has really subjected himself to these consequences. "In the month of June 1867, the said Robert Suttie Smith made overtures to his creditors, with the view of obtaining his discharge under said sequestration, on payment of a composition; and as the nominal pursuer's claim was a large one, and his consent was necessary, James Waddell, accountant, No. 175 Buchanan Street, Glasgow, on behalf of the bankrupt, had meetings, and entered into a correspondence with the nominal pursuer, for the purpose of obtaining his consent and concurrence thereto. A secret and collusive arrangement was at length concluded between the said James Waddell, on behalf of the bankrupt, and the nominal pursuer, which was embodied in a letter or obligation, granted to the nominal pursuer by the said James Waddell, of the date and in the terms following, viz.,—'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, namely,—£300 within two months of the date of Mr Rob. 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,—(Signed) JAMES WADDELL.'"

Thomas' answer to this is—"Admitted that the bankrupt made proposals with a view to a composition arrangement. Believed to be true that the objector's consent was necessary thereto. The letter is referred to." The letter is not disputed, so we must see what it means. The bankrupt's discharge could not be obtained without Mr Thomas' consent, and he is to obtain by this arrangement a composition like all the other creditors, and over and above £500. Not a shilling of this is to be paid if the bankrupt is not discharged, so that it is impossible to dispute that this was an arrangement on behalf of the bankrupt; and in article 5 we find that the nominal pursuer accepted of this offer and acted upon it. "In implement of his part of said arrangement, and in pursuance thereof, he granted a mandate to the said James Waddell to act and vote for him at all meetings of the said Robert Suttie Smith's creditors, connected with the offer and acceptance of the offer of said composition, and to agree thereto for him as a creditor of the said bankrupt in said sum of £2797, 17s. 6d., and fulfilled the other conditions incumbent on him by said arrangement."

Now, so far the main facts are pretty well ascertained by admission; also, I think it is proved that Waddell was acting on behalf of the bankrupt. Thomas says he did not know this, but thought he was acting on behalf of the creditors and trustee. "In the summer of 1867 James Waddell, accountant in Glasgow, acting on behalf of the creditors of the said Robert Suttie Smith other than the objector, and with the full knowledge and sanction of them, and of the trustee and commissioners on the sequestrated estate, had meetings, and entered into a correspondence with the objector, with a view to a compromise or adjustment of his rights to the said machinery and others, and his preferable claims in respect thereof." This certainly was not the case, but Mr Thomas says that he thought so. Now, this seems to me not to found a relevant defence, because if Waddell was not representing the creditors, they cannot be barred from their right under section 150.

There were three grounds of defence stated on behalf of Mr Thomas—

1. That the transaction between him and Waddel was not an offence under section 150. I have already indicated my opinion on that point, and need say no more about it. There could have been nothing illegal in Mr Thomas compromising his claim, but as long as the sequestration lasted, the only party with whom he could deal was the trustee acting under the authority of the creditors, but until the bankrupt was discharged he had nothing to do with the matter, and to deal with anyone but the trustee was to run a great risk, if not to commit an illegality.

2. But secondly, it has been urged that Mr Thomas got nothing from Waddell. If so, it is very hard, but it is no answer. He certainly intended to do so.

3. Lastly, the defence most strongly maintained is that in point of fact this arrangement was assented to by the trustee and creditors. The first element of this defence is a clause in the offer of composition, dated September 6—"And will also take the entire responsibility of the claims made by Mr James Thomas against the estate; and offer for my securities Mr Murray Cowbrough, manufacturer, South Frederick Street, Glasgow, and Mr James Waddell, accountant, Buchanan Street, Glasgow, for payment of the same." The meaning of this, so far as the cautioners are concerned, is that they were to join in the responsibility for Thomas' claim. It is said that this clause ought to have roused the attention of the trustee, but it does not seem to me that he need necessarily have been aware that any arrangement was going on. If Mr Thomas was satisfied that the estate when reinvested in the bankrupt gave him as good security, the trustee had nothing to do with it. There is a good deal of written evidence which we need not go through in detail. All that can be said is, that the trustee was made aware that an arrangement was being made, but that is no defence against Mr Peat's claim, unless the knowledge can be brought home to him; but, further, I do not think that the trustee had any reason to believe that any illegal arrangement was going on. On the whole matter, I come to the conclusion that the Lord Ordinary's interlocutor is well founded, so far as it supports the multiplepoinding and ordains the nominal raiser to lodge a condescendence of the fund *in medio*.

LORD DEAS—Whatever conclusion may be come to in this case, it is necessary, for the sake of the law, to distinguish it from that of *Carter* v. *M'Laren*. Mr Thomas had obtained a security over the machinery of the mill, which he believed to be a good one. That security, so long as it was actively asserted, prevented the creditors from

winding up the estate. They might have got the machinery sold by Mr Thomas' consent, but they could not have divided the money as long as his claim existed unsatisfied. I have no doubt therefore that the creditors had a substantial interest in coming to an arrangement. Now, in this state of matters it is hard to say how far the trustee might have gone in that direction, but there would have been no illegality if the creditors agreed to it. Any advantage which Thomas got would have been the only thing which diminished their funds. But we have no sufficient evidence that the creditors did agree to it. I have no doubt Mr Thomas is quite correct in saying that he believed all the creditors were agreed; on the other hand, it is clear that Waddell in his evidence hedges; in short, Mr Thomas was his and the bankrupt's victim. If the agreement itself had been embodied in the offer of composition I should have doubted if Mr Thomas was liable to any penalty, but unfortunately it was not so, and I am compelled to reject his defence.

Lord Ardmillan—I must say that I do in this case regret being compelled to come to the conclusion that Mr Thomas has incurred the statutory penalties; but the decision here is unavoidable, for the decision of the House of Lords in the case of *Carter* v. *M'Laren* has taught us that, if the facts are proved we have no discretion, but that the statute must be construed and applied with inflexible severity. So applying it, the result is here inevitable. I could have wished it otherwise. I cannot help saying that I think Mr Thomas was "more sinned against than sinning." I have great sympathy with him; but I have no alternative. The meaning of the letters of this Mr Waddell, of 9th September, written to Thomas by Waddell in concert with the bankrupt and Craig, as Waddell depones, is clear beyond all doubt, and it is an offer of a premium or bonus to secure accession to the bankrupt's discharge on composition. The offer was so understood, and was accepted and acted on according to its terms. Mr Thomas' position as a creditor was such that his accession was necessary to obtaining the discharge on composition, and that accession was obtained. The legal consequence under the statute of such an offer and such an acceptance is beyond question—it is almost impossible to suggest a reasonable doubt—and, as was explained in the case of *Carter* v. *M'Laren* in the House of Lords, a Court of Justice must assume knowledge of the law, and knowledge of the consequence of such a transaction.

I do not see sufficient ground, or indeed any ground, for imputing to Mr Thomas fraud or corrupt intention, or even a desire to take an unfair advantage. But if the act complained of, and proved, is a violation of the statutory law, so as to incur the statutory penalty, we cannot avoid coming to that conclusion; and, having reached it, we cannot escape, and must not shrink, from imposing the penalty.

Mr Thomas held a security, and he honestly thought he had a preference. In this the case differs from the case of *M'Laren.* He stoutly maintained his preference, and seems to have been so advised. He agreed to surrender it for a consideration, and to accede to the composition. I give him credit for believing that he was doing no wrong. Had the transaction been made with the creditors, or sanctioned by the creditors, it would not have been illegal. Had the trustee been made aware of it, it would have been his duty to communicate it to the creditors, and I have no doubt he would have done so, for I see no reason for questioning the fairness of the conduct of the trustee. But the serious point, which I cannot get over, is, that the creditors were not informed that this purchase was to be made, this bonus to be given; and that, in the letter of Mr Thomas to the trustee, of 9th September—just after the transaction, and on the same day—he does not communicate to the trustee the terms or the particular nature of Waddell's letter and his own agreement, nor does he mention the promise of a sum of money, payable on the discharge, and as contingent on the discharge, of the bankrupt—a sum promised and agreed to in order to facilitate the bankrupt's discharge.

I agree with your Lordship in holding that the reference to Thomas' claim in the offer of composition was not sufficient intimation to the creditors of this transaction. Nor is any such intimation to be gathered from the subsequent correspondence. The fact that Mr Thomas did not send the letter to the trustee, or communicate to the trustee the promise, and the fact that, through Mr Waddell as mandatory, and according to the agreement with Waddell, he voted on his whole claim without deducting the security, makes it too clear to need further remark, that, in regard to the trustee and creditors, the agreement was "secret," and that between the bankrupt and Waddell and Mr Thomas, it was, in relation to the creditors, collusive. That the bankrupt and Waddell meant by the payment of £500 to secure the accession of Mr Thomas to the composition, I have no doubt, and the transaction has been already found by the Court to be, as regards both parties, illegal; *Thomas* v. *Waddell*, Feb. 23, 1869.

I agree with the Lord Ordinary in thinking the testimony of Mr Waddell in this cause, and the conduct of Mr Waddell in the transaction, very unsatisfactory. But Mr Thomas was, to say the least, incautious and indiscreet, and the statutory penalty has been incurred.

A separate argument was ingeniously urged by Mr Asher, to the effect that since Waddell's promise to pay has been escaped from by him, on the ground, pleaded by himself, that it was illegal and void, and therefore that it is not to be valued—and, indeed, has no appreciable value—as it was not fulfilled. This plea cannot possibly be sustained. The meaning of it is, that the more manifest the illegality of the proceeding, the safer is the wrong-doer—that the transaction is so clearly illegal that the promise to pay is null and void, and therefore the penalty is escaped from. Not even the ability of my friend Mr Asher can make such an argument successful.

I am—though not without some regret—of the opinion expressed by your Lordship, that we must apply the statute and the penalty.

Counsel for Mr Thomas — Solicitor-General (Clark) and Asher. Agents—Hill, Reid, & Drummond, W.S.

Counsel for Messrs Peat & Co.—Pattison and Watson. Agent—J. Y. Pullar, S.S.C.