payment of that composition they (to use the Lord Ordinary's felicitous expression) enfranchised the trust for fifteen years, which expired on 13th October 1900. Whether they retained the subjects or alienated them, a second composition became then due and payable. Before the expiry of that period Henry Hoile Gordon, as sole remaining trustee for behoof of the firm, conveyed the subjects in 1897 to the defenders, who were duly infeft and entered with the superior. In October 1900, while the defenders were still in possession and undivested another composition fell due in terms of the statute, fifteen years having expired from the date of the last payment of composition. Three years later the defenders conveyed the subjects to the pursuers, with the clause of relief which I have mentioned.

On that narrative I do not see any escape from the conclusion that under the clause of relief the defenders were bound to relieve the pursuers of the second composition.

If the second composition had been paid on 13th October 1900, when it should have been paid, the pursuers would not have been called upon to pay a casualty until 1915. But owing to the defenders' refusal to pay the casualty the pursuers had to pay it to the superior, in a question with whom they had no answer.

I confess that I share the difficulty which the Lord Ordinary has felt in seeing how the cases of *Dick Lauder* v. *Thornton*, 17 R. 320, and *Hamilton* v. *Chassels*, 4 F. 494, can assist the defenders; and I still less appreciate the grounds of the defenders' contention that the twenty-five years' limit and not the fifteen years' limit applies to the case.

In what I have said I do not think I have gone back in any way on what was decided in the cases of *Motherwell*, 5 F. 619, and *Heriot's Hospital Trustees* v. *Caledonian Insurance Company*, 6 F. 646, which were cases between superior and vassal, and which raised no question on a clause of relief. In the latter case, although it did not raise the same question, I had occasion very carefully to consider the terms and meaning of the 5th section of the statute.

On the other hand, I think the cases of *Straiton*, 8 R. 299, and *Farquharson* v. *Caledonian Railway Company*, 2 F. 141, assist the pursuers. I am accordingly prepared to dispose of the case as the Lord Ordinary has done and on the same grounds. As this is sufficient for the decision of the case I have not found it necessary to examine more particularly the conditions of the original feu-charter in favour of John Gordon, upon the terms of which I think a separate and independent argument could be successfully rested by the pursuers.

The Court adhered.

Counsel for the Defenders and Reclaimers—C. K. Mackenzie, K.C.—Macphail. Agents—Lindsay, Howe, & Co., W.S.

Counsel for the Pursuers and Respondents—Craigie—MacLennan. Agents—Miller & Murray, S.S.C.

Thursday, January 26.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

REID & LAIDLAW, LIMITED *v.* REID.

Company—Liquidation under Supervision of the Court—Powers of Liquidator—Agreement by Liquidator to Compromise Claim subject to Sanction of Court—Subsequent Objection by Creditors—Locus pœnitentiæ till Sanction Obtained.

In an action at the instance of the liquidator of a company, which was being wound up under the supervision of the Court, for payment of a debt alleged to be due by the company, the defender pleaded that the liquidator was barred from insisting on the action in respect that he had concluded a compromise with the defender and had failed to apply to the Court for sanction of the compromise. The defender founded on (1) an offer by the liquidator to accept a certain sum in full of the claim, subject to the approval of the Court being obtained and to an accurate statement of his affairs being made by the defender, and (2) an acceptance of that offer by the defender, followed by the delivery by the defender of a statement of his affairs to which the liquidator took no objection for a period of seven weeks. It appeared that subsequently an objection to the compromise was intimated on behalf of certain creditors to the liquidator, who thereupon refused to proceed with the compromise and to apply to the Court to sanction it.

Held that, pending the sanction of the Court being obtained to the compromise, there was *locus pœnitentiæ*, and accordingly that the liquidator, in view of the objection taken by the creditors, was entitled (1) to refuse to present a note to the Court for the approval of the compromise, and (2) to prosecute the action.

On 1st July 1904 Reid & Laidlaw, Limited, wholesale ironmongers, Edinburgh, and William Robertson, liquidator of the said company, raised the present action against John Reid, formerly one of the directors and secretary of the said company, concluding for payment to the pursuer William Robertson, as liquidator of the said company, of the sum of £1106, 17s. 2d.

Reid & Laidlaw, Limited, resolved on voluntary liquidation on 19th February 1903, and thereafter on 6th March 1903 the First Division appointed the winding-up to be continued under the supervision of the Court.

The pursuers averred that the liquidator had frequently called upon the defender to make payment of the sum sued for, but that he refused to do so.

The defender admitted that the liquidator had called upon defender to pay the sum sued for, but explained that the liquidator negotiated with the defender for a settlement of the claim, and that in full knowledge of the circumstances the liquidator agreed to accept £100 in full from the defen-

der. "It was accordingly arranged that the liquidator should apply to the Court to sanction said arrangement, but this he now refuses to do. A copy of the correspondence containing said arrangement is herewith produced. The defender is still willing to carry out the arrangement referred to."

The defender pleaded—"(3) The liquidator having agreed with the defender on a compromise of his claim for the sum sued for, and having failed to apply to the Court for sanction of said compromise, is barred *personali exceptione* from insisting in the present action."

The correspondence on which the defender founded as establishing the alleged compromise contained, *inter alia*, the following letters:—

On 27th February 1904 the defender's agents wrote the pursuers' agents as follows:—"We have instructions to offer, under reservation of all our client's rights and pleas, the sum of £50 in full settlement of the alleged claim against Mr Reid. This offer is made entirely without prejudice and without admitting any liability, and is not to be founded on by you."

In reply the pursuers' agents wrote declining the offer as insufficient in amount, and on 8th March the defender's agents wrote increasing the offer to the sum of £75.

On 14th March the pursuers' agents wrote the defender's agents as follows:—"We have now seen our client regarding the increased offer contained in your letter of the 8th inst., but he cannot see his way to accept it. He is, however, prepared without prejudice to agree to the following arrangement subject to the approval of the Court, viz.—(1) to accept a payment of £100, one hundred pounds, in full of the company's claim against your client, and (2) that your client will make up an accurate state of affairs duly deponed to. We shall be glad to hear from you at your convenience. We may state that various creditors are pressing the liquidator for information as to the position he proposes to take up in dealing with the private estates of Mr Reid and Mr Laidlaw."

On 22nd March the defender's agents wrote the pursuers' agents as follows:—"We have your letter of yesterday and have just received our client's instructions to agree to the proposal contained in your letter to us of 14th inst. Mr Reid is having a statement of his affairs prepared, and we hope to let you have same duly deponed in the course of a few days. This letter is without prejudice, and in the event of the Court not sanctioning the proposed compromise is not to be founded on to any effect."

The "statement" referred to in this letter was forwarded to the pursuers' agents on 31st March.

On 23rd May the pursuers' agents wrote the defender's agents as follows:—"We propose to lodge the necessary note to the Court regarding the claims at the instance of the Coy. against your client Mr Reid, and also against Mr Laidlaw, but meantime we have received some communications from Mr Peter MacNaughton, who has apparently received instructions to take objections to the statements lodged on behalf of your client and also Mr Laidlaw. We annex copy letter which we have received, from Mr MacNaughton on the 19th inst., from which you will see the grounds of the objections he proposes to raise. We hope to lodge the note shortly, but meantime we shall be glad to hear from you on the subject."

In the letter referred to Mr MacNaughton stated that the sum offered by way of compromise was quite out of the question, and that he would call the attention of the Court to the transaction.

Thereafter on 6th June 1904 the pursuers' agents wrote the defender's agents as follows:—"We forwarded the papers in connection with this matter to counsel with the view of his preparing a note to the Court for approval of the proposals made in connection with this matter. We have to-day seen counsel, and he is perfectly satisfied that the Court would not accept the statements made by Mr Reid, nor agree to the proposals made by you on his behalf, and indeed he states that the objections of creditors would in all probability be sustained with expenses. In these circumstances we must call upon you to satisfy us that the transferences of the greater portion of Mr Reid's estate to his wife and daughter were for onerous considerations, as otherwise they would fall to be reduced. We hope you will be able to supply us with the fullest information possible on the various items in the statement by writings or other documentary evidence, in order that we may submit these to counsel for his consideration."

In reply, on 7th June, the defender's agents wrote the pursuers' agents as follows:—"By your letters of 14th and 31st March, you, on behalf of the liquidator, definitely accepted our client's offer—being then apparently satisfied with his statements—subject to the approval of the Court being obtained for the proposed compromise. We further understood that the liquidator would recommend the Court to sanction the compromise. We not do see how you can go back on that undertaking. It seems to us that the liquidator is bound to move the Court for approval of the proposed compromise, and to recommend the Court to approve same."

On 8th June the pursuers' agents wrote the defenders' agents as follows—"We are not aware that the liquidator agreed to recommend the Court to sanction the compromise, although he was prepared to submit it to the Court subject to the advice of counsel, which we could only obtain after the statement was submitted to us. In view, however, of the attitude taken up by the creditors, and the strongly expressed opinion of counsel that the Court would not sanction the proposal, it seems futile at this stage to present the note to the Court on the subject."

On 10th December 1904 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor—"Finds that parties are agreed that the question raised by the third plea-in-law for the defender may be disposed of upon the correspondence and relative docu-

ments: Finds that, upon a just construction of the same, no concluded agreement for a compromise has been come to between the liquidator and the defender; therefore repels said plea-in-law: *Quoad ultra* allows the parties a proof of their respective averments, and to the pursuer a conjunct probation."

The defender reclaimed, and argued—The correspondence showed that an agreement to compromise the claim in question had been concluded. The agreement was contained in the letters of 14th and 22nd March, and no question was raised as to the fact until seven weeks afterwards. The compromise was binding on the parties, and the action should therefore be dismissed.

Counsel for the respondents were not called upon.

LORD ADAM—This is an action at the instance of a liquidator for payment of £1196. The defender says that the pursuer is not entitled to insist in the action, because he agreed to a compromise of the claim, and has failed to apply to the Court for sanction of that compromise. The alleged agreement for compromise is to be found in an offer contained in a letter by the agents of the liquidator to the agents of the defender dated 14th March 1904, and an acceptance of that offer contained in the defender's agents' letter of 22nd March 1904[—*his Lordship read these letters*]. These letters contain a clear offer and a clear acceptance of that offer. But the offer was made under the condition that it was subject to the approval of the Court. The statement referred to in the letter of the liquidator's agents was lodged with the liquidator, and after it had been in his hands for seven weeks he received a letter dated 19th May 1904 from Mr Peter MacNaughton on behalf of creditors objecting to the proposed compromise. This letter was forwarded to the defender's agents on 23rd May. Then on 6th June the liquidator's agents write as follows—[*his Lordship read the letter.*] Then finally on 8th June the liquidator's agents write that "in view of the attitude taken up by the creditors, and the strongly expressed opinion of counsel that the Court would not sanction the proposal, it seems futile at this stage to present the note to the Court on the subject." The liquidator consequently refused to proceed further with the compromise, and the question now is whether he is entitled to proceed with this action or whether he can be compelled to present a note to the Lord Ordinary for approval of a settlement to which he is now opposed, and we are asked to dismiss this action and to compel the liquidator to take steps for the completion of the compromise. I have always understood that in all these questions which occur in the course of liquidations, where the consent of the Court is required, there is *locus pœnitentiæ* until the consent of the Court is obtained. Here no consent had been obtained, and I think in the circumstances the liquidator was justified in refusing to present a note for approval of the compromise, which he thought would be useless, and that the Lord Ordinary was quite right in repelling the defender's third plea and allowing a proof.

LORD M'LAREN—I agree with your Lordship. I think the letters that passed were probably sufficient to constitute a compromise if the liquidator had power to make one. But a liquidator has no power to make a compromise without the sanction of the Court, and he must act on his own judgment as to applying for the sanction of the Court to the suggested compromise, especially when, as here, he was advised by counsel, on full consideration of the question, and in view of objections by creditors, that it would not be advisable to make such an application.

The Court was not, in fact, asked to give its sanction to this proposed compromise, which the liquidator now declines to conclude, and I agree that there must be *locus pœnitentiæ* up to the time when the parties whose consent is necessary—viz., the liquidator, the debtor, and the Court—have agreed to give it.

In this case the Court has not given its consent, and consequently there is no concluded agreement.

I therefore think that the interlocutor of the Lord Ordinary should be adhered to.

LORD KINNEAR—I agree. I think the defender's third plea might have been repelled upon its own demerits apart from the correspondence. The plea is that the liquidator is barred from insisting on this action by reason of an exception personal to himself, or in other words by a personal bar which does not affect the company or its creditors, on whose behalf the action is brought. I think that is not a tenable contention and that this would have been a sufficient ground for repelling the plea.

But I entirely agree that there was here no concluded compromise binding on the liquidator in his capacity as liquidator, because until the agreement for compromise had been finally approved and sanctioned by the Lord Ordinary there was *locus pœnitentiæ*.

I think also on the letters, apart from the absence of sanction by the Court, there was no concluded agreement, because it was only made conditionally (1) on the approval of the Court being obtained, and (2) upon an accurate statement of his affairs being made by the defender. In virtue of this second condition it was open to the liquidator, and indeed it was his duty, to consider whether the statement made by the defender was accurate and to accept or reject it accordingly. No doubt it is an observation against him that he retained the statement for six weeks without stating any objection, and indeed that he indicated that he saw no objection to it, because he intimated that he was going to present the note. But there was no definite acceptance, and while the matter was still open he received notice of an objection which apparently had not been previously known to him, because the agent of a creditor informed him by letter that he opposed the compromise on the ground that the sum offered

was out of the question, and that the defender had put a sum of £1000 beyond the reach of his creditors by transferring it to his wife and daughter and that these transferences would not bear inquiry. It is clear enough that the liquidator was not called upon to accept the mere statement of an opposing creditor as conclusive of the fact. But on the other hand the statement made it impossible for him to move for sanction without informing the Lord Ordinary that it had been made; and it is certain that on that information the sanction of the Court must have been withheld until the creditor's allegation was disproved or withdrawn.

The defender says that the liquidator had bound himself to "recommend" the compromise for sanction. No such obligation could have been lawfully undertaken, and there is nothing in the correspondence from which it can be inferred. The duty of the liquidator when he presents a compromise for sanction is to bring all the facts before the Lord Ordinary and to keep back nothing that is material to the propriety and expediency of the transaction. The pursuer would have been acting in breach of his duty if he had done what the defender says he ought to have done, and moved the Lord Ordinary to sanction the compromise in ignorance of the creditor's allegation that funds had been put away.

I am therefore for adhering to the interlocutor.

The Court adhered.

Counsel for Pursuers and Respondents—Graham Stewart—Mercer. Agents—J. & A. Hastie, Solicitors.

Counsel for Defender and Reclaimer—R. L. Orr—Burt. Agents—Gardiner & Macfie, S.S.C.

Saturday, January 28.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

BAIRD & COMPANY, LIMITED *v.* KANE.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *First Schedule, sec.* 11 — *Workman in Receipt of Compensation Going to Ireland—Refusal to Submit to Medical Examination in Glasgow without Tender of Travelling Expenses — Obstructing Examination.*

An injured workman who was in receipt of compensation in terms of a registered memorandum of agreement, and who, while resident in Scotland, had on two occasions submitted himself for examination by a medical practitioner provided by his employers, went to Ireland to live with his father, who was resident there.

Two months after he had left Scotland his employers called upon him to submit himself again for medical examination in Glasgow, but did not offer to pay his travelling expenses from Ireland to Glasgow and back. The workman intimated that he was willing either to submit himself for examination in Glasgow, provided the expenses of the journey from Ireland to Glasgow and back were paid him, or to proceed at the employers' expense to the nearest large town in Ireland and be examined there. The employers meantime stopped payment of the weekly compensation on the ground that the workman had refused to submit himself to, or had obstructed, medical examination.

In a suspension at the employers' instance of a charge by the workman on the registered memorandum of agreement, *held* (*aff.* the judgment of Lord Kincairney) that the workman had not refused to submit himself to, or obstructed, medical examination in the sense of section 11 of the First Schedule of the Act, and that the employers therefore were not entitled to stop the weekly payments of compensation due to him, and suspension *refused.*

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), First Schedule, sec. 11, enacts—"Any workman receiving weekly payments under this Act shall, if so required by the employer, or by any person by whom the employer is entitled under this Act to be indemnified, from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, or such other person; but if the workman objects to an examination by that medical practitioner, or is dissatisfied by the certificate of such practitioner upon his condition when communicated to him, he may submit himself for examination to one of the medical practitioners appointed for the purpose of this Act, as mentioned in the Second Schedule to this Act, and the certificate of that medical practitioner as to the condition of the workman at the time of the examination shall be given to the employer and workman, and shall be conclusive evidence of that condition. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place."

This was a note of suspension at the instance of William Baird & Company, Limited, iron and coal masters, Twechar, Dumbartonshire, complainers, against Henry Kane, locomotive man, sometime residing at 19 Old Row, Twechar, but who at the time when the note was presented was residing at Burnquarter, Ballymoney, County Antrim, Ireland, respondent.

The complainers sought suspension of a charge, proceeding on a registered memorandum of agreement under the Workmen's Compensation Act 1897, at the instance of the respondent for payment of the sum of £4, 5s. 4d. alleged to be due to him under the agreement referred to.

On 17th October 1903 the respondent while in the employment of the complainers met with an accident which necessitated the