when sufficient cause has been shown to the contrary, then, if my reading of the statute is correct, we are entitled and bound to refuse to award the penalties,—which, I think, ought to be refused in this case.

Lord Kinloch—The facts of this case are fully ascertained. On 27th April 1869 an offer of composition was made in the sequestration of Messrs J. & G. Pendreigh, grain merchants, which, as the Court afterwards found, was an incompetent offer. The respondent, Mr David M'Laren, acting on behalf of his firm of David M'Laren & Co., objected to its incompetency at the first meeting of creditors called to consider it. Between that date and the date of the second meeting, on 21st May thereafter, being on or about 12th May, Mr M'Laren entered into an arrangement under which his firm was to receive a sum equivalent to 1s. 9d. per £ over and above the other creditors, as a consideration for waiving the objection. The arrangement was made, nominally with a Mr John Weir, but in reality with certain creditors interested in carrying through the composition, and with the bankrupts themselves, one of whom, Mr George Pendreigh junior, is proved to have advanced the money necessary to pay the preference, and which, amounting to £226, 9s. 3d., was paid to Messrs M'Laren & Co. on 13th May 1869.

In consequence of this arrangement, Messrs M'Laren & Co. withdrew their opposition to the offer of composition, which was unanimously accepted by the creditors at the second meeting, of 21st May 1869. Within a day or two thereafter Mr M'Laren was advised by his law agent that the arrangement he had made was illegal under the Bankrupt Statute, and on 25th May he returned to Mr Weir the money which he had received. Ultimately the Court held that the offer of composition was incompetent, and refused to approve it.

I entertain no doubt that the arrangement which was made by Messrs M'Laren, and under which the sum in question was received by them, formed the statutory offence struck at by the 150th section of the Bankrupt Statute, and inferred the statutory penalties enacted by that section. It seems to me clearly to come under more than one of the expressions used in the section. To go no further than one of these, it was a transaction of preference, engaged in for facilitating the bankrupts' discharge. It was the fruit of an agreement made apart from the general body of creditors, with one or more individuals of these, and with the bankrupts, and which in this way was, as I think, a "secret or collusive agreement" in the statutory sense. I give entire credence to the statement of Mr M'Laren that he was ignorant at the time that he was infringing the statute. But that the statute was infringed I cannot doubt. I cannot adopt the view of the Lord Ordinary, that because the offer of composition was incompetent, therefore there was no illegality in receiving a consideration to accede to it. To receive a consideration for waiving an objection to the competency of an incompetent offer, seems to me very clearly one form of the statutory offence, and by no means the least objectionable.

The question, therefore, and the only question in the case, is, whether the Court is bound to award the statutory penalties, or may acquit the respondents from these, in respect of the cancellation on the 25th May of the illegal transaction engaged in on the 12th of the same month? I would most willingly unite in following the last of these alternatives, if I thought that the statute left the Court any option in the matter. But I cannot so read the statute. I think the Court is bound to inflict the statutory penalties if it find the statutory offence to have been committed. Plainly there is no power conferred of mitigating the penalties if incurred; and the Court is shut up to the alternative of either imposing the penalties or finding them not incurred at all. With reference to the words, "if no cause be shown to the contrary," I cannot read them as bestowing on the Court a discretionary power of inflicting the penalties or not, according to the circumstances of the case. I think they simply mean that judgment shall go out for the penalties if the respondent do not make appearance to establish a valid defence.

The only valid defence which in my view of the statute could be established is, that the statutory offence was not committed. And in this question it is to be remembered, that to constitute the statutory offence it is not necessary that the composition, for accession to which the illegal consideration is promised, should be carried through by the bankrupt. By the express terms of the statute, the offence will be constituted by an agreement to give the proposed composition effect or facilitation, "whether the offer be accepted or not, or the discharge granted or not." It may be sufficient to avoid the statutory result to show that the offence was not completed, as if, before the arrangement was concluded, it was broken off; or perhaps, by a very lenient construction, if it was withdrawn from instantly afterwards, and before anything had been done on it. But I cannot consider the present case as involving such a state of fact. The agreement was fully concluded,—the money was paid in terms of it,—and the equivalent was given, by Messrs M'Laren abstaining from appearing at the second meeting of creditors, and allowing the bankrupts to obtain a unanimous acceptance of the composition. I cannot, however earnestly desirous to do so, reach any other conclusion than that the statutory offence was fully committed; and in such a case I am of opinion that, however inoperative the arrangement may have become, and whether by the force of events or its abandonment by the parties, the Court has no alternative but to award the statutory penalty. I have thought it right to state my view to this effect, not that the view can now have any influence in the determination of the present case, but because in so important a matter as the construction of a public statute, and in the prospect of after possible discussion in other cases, I have considered it to be my duty not to withhold my opinion.

Agents for Reclaimer—Waddell & M'Intosh, W.S.

Agents for Respondents—Murdoch, Boyd, & Co., S.S.C.

Tuesday, October 26.

SECOND DIVISION.

GLEDDEN *v.* MONCRIEFF AND GOWANS.

Submission—Terms of Agreement—Joint Minute. A reference was made to an arbiter of the true meaning and intent of an agreement for the construction of a viaduct. In the course of constructing the viaduct an accident happened, in consequence of which an action was

raised against one of the contracting parties. Pending the action they enlarged the submission by referring to the arbiter the claim for relief of the damages sued for in the action in question. The result of the action was an absolvitor of the defender. *Held* (*per* LORD BARCAPLE, and adhered to) that the reference as enlarged did not include the claim for the parties own expenses in successfully defending the action for which he had got decree but had been unable to recover.

This was an action brought by Daniel Gledden, contractor in Dalkeith, against William Moncrieff, contractor, Edinburgh, and James Gowans, arbiter under a sub-contract between the pursuer and Moncrieff for the construction of a certain viaduct. The object of the action was to have Gowans interdicted from entertaining a certain claim made by Moncrieff in the reference. The claim was for relief of expenses incurred by Moncrieff in defending himself against an action brought by the representatives of a party who was killed through defects in the scaffolding supplied by Gledden for the execution of the viaduct mentioned. It was maintained, on the part of Gledden, that this was a matter which did not fall within the reference.

The minute of agreement was in the following terms:—"In the event of any difference between the said parties hereto, in regard to the said work or this agreement, or the true intent and meaning thereof, the same shall be referred and submitted to the final decision of James Gowans, contractor in Edinburgh, without appeal to any court of law." The defender had incurred a sum of £208, 17s. 3d. in defending himself against the action in question, and he lodged a minute in the reference to Mr Gowans in which he claimed these expenses and the dues of extract. This claim was entertained by the arbiter, who, after hearing parties, pronounced the following order:—"The arbiter has considered the minute for Mr Moncrieff, claimant, and answers for Daniel Gledden, respondent, dated respectively 8th and 12th December 1868; and proposes to find that the items of claim referred to in the minute for Moncrieff fall under the present reference, and ordains the parties to state within six days whether they are agreed as to the various amounts in the items of claim submitted."

The pursuer further states:—"The said claim does not fall within the reference or submission to Mr Gowans contained in the foresaid minute of agreement, and he has no power to deal with or determine the same, as he proposes to do. The reference to him in the said minute of agreement, under which he is now acting, embraces only differences between the parties in regard to the work mentioned in the agreement and relative specifications, or the said agreement itself, or the true intent and meaning thereof. The said claim does not fall within any of the matters agreed to be submitted to Mr Gowans, and it was neither submitted nor was it meant to be the subject of reference to him under the said submission. Notwithstanding this, Mr Gowans has held, or intends to hold, that the claim is within the reference, has appointed parties to proceed on that footing, and intends to adjudicate upon the merits of the claim. The pursuer finds it therefore necessary to institute the present action, in order that it may be judicially determined that the said claim is not within the reference, and that the arbiter may be interdicted and prohibited from further dealing with or taking cognizance of the same." This is denied by the defender, who founds on the following joint-minute lodged in the submission by the parties pending the action in question:—"Both parties agreed that all questions in relation to the accident which happened at the Victoria Viaduct on the 31st May 1867, embraced in the 9th and 11th items of the claim, shall be reserved until the decision of the question of loss or *solatium* to the representatives of the man killed by the accident, either in Court in the action at the instance of Robert Scott against the claimant, William Moncrieff, or by an arrangement of the parties to this reference, after which the arbiter shall proceed to investigate and dispose of their claims." Explained further, that the 9th article of the claim so reserved is in the following terms:—"In respect of the service roadway on the top of the staging breaking down, the delay to building operations, and throwing the claimant's workmen out of work for nearly six days, and, further, the accident having caused a panic among the claimant's men, and prevented him from geting men as easily as before the accident occurred, caused a loss to him of £10, exclusive of inspection and survey of staging by Mr Bruce, C.E. It is assumed the arbiter will allow expenses of Mr Bruce, C.E., for inspecting and surveying staging after the accident for the safety of workmen;" and that the 11th claim so reserved is as follows:—"The claimant claims to be relieved by the respondent from all claims of damages and expenses, at the instance of the relatives of the workman killed, on or about the 31st of May 1867, or at the instance of the other workmen injured at the same time, by the breaking of the cross-beam on the staging or service roadway on said bridge. It is explained that the accident happened from a latent defect in the beam, and that the superincumbent weight on it at the time was not sufficient to cause the accident, except for such defect."

The Lord Ordinary (BARCAPLE) pronounced the following interlocutor:—

"*Edinburgh, 29th March* 1869.—The Lord Ordinary having heard counsel for the parties, and considered the Closed Record and whole Process, Repels the defences; and Finds and Declares, and Interdicts, Prohibits and Decerns, in terms of the conclusions of the libel: Finds both the defenders liable in expenses; Allows an account thereof to be given in, and, when lodged, remits the same to the Auditor to tax and report.

"*Note.*—The Lord Ordinary would have had no hesitation in holding that the clause of reference in the contract did not, by itself, give power to the arbiter to deal with the claim for relief of the damages and expenses claimed from the defender by the relatives of the workmen killed by the falling of the staging; but he thinks that claim was clearly imported into the reference by the proceedings in regard to it before the arbiter, and especially by the joint minute, by which they reserved all questions in relation to the accident, embraced in the 9th and 11th items of the defender's claim (the 9th item being the claim for relief), until the decision of the question of *solatium* to the workman's representatives, 'after which' the minute bears that 'the arbiter should proceed to investigate and dispose of 'their claim.' The question is, whether this addition to the original scope of the reference includes the claim now made for the defender, for his own expenses in successfully defending the action of damages brought against him by the man's father, which he got decree for, but has been unable to recover?

"The 11th item of the claim, which was reserved, is for relief from all claims of damages and expenses at the instance of the relatives of the workman killed. If the action of damages had resulted in a judgment against the defender, the arbiter would have been entitled to deal with his claim to be relieved from the consequences of the decree, both as to damages and expenses. It would have been a different question whether, in that state of the case, the expenses incurred by the defender to his own agent in defending the action, might not have been held to be imported into the reference, as a necessary incident of the action raised against him? On that point the Lord Ordinary expresses no opinion, except that it appears to him to be in principle very different from the question on which the parties are now at issue,—as to the defender's claim to be relieved of his expenses in successfully resisting the claim for damages made against him, for which he has got decree against the pursuer of the unsuccessful action.

"If the defender had been found liable in damages, he would have been in a position to contend that the successful claims at the instance of the representatives of the workman, for the consequences of an accident, caused, as he alleges, by the fault of the pursuer, had involved him in liability for the damages found due, and the expenses of the action on both sides; and that, on a fair construction of the 11th item of his claim in the submission, these must all be held to be included within it, and therefore imported into the reference. It is unnecessary to consider whether such a contention could have been successfully maintained. The claim for relief now insisted in is necessarily of quite a different description. It does not proceed on the footing of any claim at the instance of the relatives of the workman having been sustained, or having legally existed against the defender. They are very different questions,—whether, on the one hand, the pursuer is bound to relieve the defender of any claim of damages which might be sustained against him, with all its incidents? and, on the other hand, whether he is bound to relieve him from the consequences of an unfounded claim, viz., the expenses incurred in defending the action, and his inability to recover them from the opposite party? It is quite conceivable that the pursuer might have been willing to leave the former question to be decided by the arbiter, while he would have declined to make him judge in the latter, which involves legal considerations of a very different kind, quite independent of the construction or due execution of the contract. The Lord Ordinary sees no reason to think that any such question was in the contemplation of the parties, and he cannot hold it to have been imported by implication into the reference, to the proper subject matter of which it is entirely foreign."

The defender reclaimed.

A. MONCRIEFF and LANCASTER for them.

MACKENZIE and STRACHAN, in answer.

The Court adhered.

Agents for Pursuer—J. S. Mack, S.S.C.

Agents for Defenders—Wilson, Burn & Gloag, W.S.

Wednesday, October 27.

FIRST DIVISION.

STEWART *v.* CALEDONIAN RAILWAY CO.

Verdict — Damages — Inconsistency—Injury—Railway. A party getting out of a railway carriage at Broughty-Ferry Station, in an evening in January, sprained his ancle badly. He suffered much pain, and considerably in his business, and alleged the accident was due to the height of the carriage above the platform, the darkness of the station, and an inequality in the platform. The jury found for him unanimously with one shilling damages. Verdict *set aside* on ground of inconsistency.

This case arose from an action tried before Lord Mure and a jury last July, in which the pursuer sought to recover damages from the defenders on account of an accident he met with, owing, as he alleged, to their fault. He is senior partner of the firm of John Stewart & Sons, carrying on a lucrative trade as nurserymen and seedsmen in Dundee and in Dorsetshire. Much of their business is due to his activity in obtaining orders on the journeys which he makes for the firm during two or three months of the year. On 13th January last he returned, as was his custom, from Dundee to Broughty-Ferry, where he lived, by the 8·35 P.M. train. There were three gentlemen in the carriage with him. All of them got out before him. He had a small parcel in his hand, and on getting out, though with the aid of the handle of the carriage, doubled his right foot under him. He fell, and became unconscious from pain for a moment or two. On recovering, and being assisted up, he pointed out to the guard and porter an inequality in the pavement, which had, he said, caused the accident. He suffered severely from the injury, was confined to bed for four days, and for about ten days longer to the house. He gradually became able to resume business, but far from as actively as before; and, in consequence of this inability for active exertion, he had been deprived, since the 13th of April, of the salary of £32 a month allowed to him in addition to his share of the profits. His outlay for medical attendance, &c, exclusive of fees to Edinburgh doctors, amounted to about £50. The testimony of various eminent medical gentlemen who had attended him, was to the effect that the sprain was of a very severe character, so severe as to be worse ultimately than a broken leg.

The height of the carriage above the platform was about 3 feet 1 inch; and the depression in the platform was about 3 feet long, 14 inches wide, and variously represented as from 1¼ to 1¾ inches deep. There were three or four lamps on the platform, the nearest of which was 35 feet distant; and the evidence on the subject of the amount of light was exceedingly discrepant. The officials at the station alleged it was sufficient, and that no complaints of want of it had been made; and one or two witnesses for the company spoke to the station being well lighted. While, on the other hand, several witnesses had complained of its darkness; and one of the gentlemen who assisted the pursuer to rise said it was so dark at the time that they could not see the hole till the guard's lamp was brought. There was a like difference of opinion as to the excellence of the light on the opposite side of the platform. Several railway officials and engineers from various