the piano wires which would account for this appearance on arrival. But no foundation was laid by the Railway Company for a case of this kind by leading the proper technical or expert evidence, and therefore I come to the conclusion that on the evidence the case for the pursuer is proved.

LORD KINNEAR—I quite agree with your Lordships, and I have nothing to add.

LORD ADAM was absent.

The Court pronounced this interlocutor:—

"Recal the interlocutor of the Sheriff-Substitute of 10th June 1899 appealed against: Find (1) that on or about 27th June 1898 the respondents delivered to the appellants at their Inverness Station a piano addressed to Mr James Grant, Kirkwall, Orkney, as consignee, to be carried at the appellants' risk from Inverness to Kirkwall in terms of the consignment-note; (2) that the mode of transit specified in the said consignment note was by goods train from Inverness to Aberdeen, and by steamer from Aberdeen to Kirkwall; (3) that it was agreed between the respondents and the said James Grant that the respondents should pay the carriage from Inverness to Aberdeen, and that the said James Grant should pay the steamer freight from Aberdeen to Kirkwall, as also that an entry to this effect was made in the consignment-note; (4) that when the said piano was delivered to the appellants for carriage as aforesaid it was in good order and condition, as also that it was carefully packed in a suitable case, and capable of being safely carried throughout the transit with ordinary care and skill; (5) that when the said piano arrived at Kirkwall it was not in the like good order and condition in which it was delivered to the appellants, but was, on the contrary, seriously damaged by wet from the outside, probably by steam, and that the damage was not due to any infirmity in the piano, or to any atmospheric or other natural cause; (6) that the said piano was damaged during the transit through the fault or negligence of the servants or agents of the appellants; (7) that the said James Grant, the consignee, refused to accept delivery of the said piano, which he was entitled to do, in respect of its damaged condition; (8) that the said piano was returned to the respondents, and that they supplied another piano to the said James Grant in its place: Find in law (9) that the appellants having received the said piano from the respondents for carriage from Inverness to Kirkwall in terms of the said consignment-note in good order and condition were bound to deliver it at Kirkwall in the like good order and condition, unless any change in its condition was due to infirmity in it or to some natural cause not avoidable by ordinary care and skill, and that the appellants are liable to the respondents in respect of the piano not having been delivered to the said James Grant in the like good order and condition in which they received it; and *separatim*, (10) that the appellants are liable to the respondents in respect that the said piano was damaged during its transit from Inverness to Kirkwall through the fault or negligence of the servants or agents of the appellants; (11) Find that in consequence of the appellants having failed to deliver the piano to the said James Grant in the like good order and condition in which they received it, and *separatim*, in respect of its having been damaged in transit by the fault or negligence of the servants or agents of the appellants, the respondents have suffered loss and damage to the amount of £40: Decern and ordain the appellants to make payment to the respondents of the said sum of £40," &c.

Counsel for the Pursuer—W. Campbell, Q.C.—M'Lennan. Agents—Skene, Edwards, & Garson, W.S.

Counsel for the Defender—Guthrie, Q.C.—Macphail. Agents—J. K. & W. P. Lindsay, W.S.

Friday, December 15.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

HAY *v.* RAFFERTY.

Bankruptcy—Composition Arrangement—Pactum illicitum.

A debtor who had entered into a composition arrangement with his creditors, assigned his share in a Crown lease, held by a copartnery of which he was a member, to one of the creditors who had acceded to the arrangement, in consideration of his advancing to the debtor money to pay the amount of the composition. *Held* that the assignation did not constitute a *pactum illicitum*.

Lease—Assignation—Reduction—Restitution in integrum.

One of the partners in a copartnery assigned his share in a Crown lease. It was provided by the lease that assignees and sub-tenants were excluded except by the explicit consent of the Crown, while under the copartnery agreement a retiring partner had no power to substitute a partner in his place. The assignation having been intimated to the Crown, the assignee was accepted by them as a tenant, and the remaining partners admitted him into the copartnery. Thereafter an action of reduction of the assignation was raised by the assignor on the grounds of misrepresentation and essential error. He made no offer to repay the sum in consideration of which the assignation had been granted, or otherwise to make

restitution *in integrum*. *Held* that he was not entitled to reduce the assignation.

By a contract of copartnery entered into between William Hay, fish merchant, Tarbert, and others, dated 21st March 1887, the parties agreed to be copartners in establishing an oyster fishery in Loch Tarbert.

In July 1888 a lease of the fishery was obtained from the Crown in favour of the copartners, trading under the name of William Hay & Company, by which it was provided, *inter alia*, that assignees and sub-tenants were excluded except with the explicit consent of the Crown. The copartnery entered into possession of the fishery and carried on business for a number of years in terms of the contract of copartnery.

In December 1896 William Hay being in embarrassed circumstances called a meeting of his creditors, at which it was resolved that, "provided the pursuer could get the necessary money within a fortnight from this date to enable him to pay the creditors a composition of 2s. 6d. per £ in cash, said composition should be accepted in full settlement, and absent creditors were strongly recommended to concur in the proposed arrangement."

Among the creditors present was William Rafferty, fish salesman, Glasgow, who was entered as a creditor to the amount of £600. After the meeting Mr Hay granted the following assignation in favour of Mr Rafferty—"I, William Hay, fish merchant, Greenock, and residing in Brisbane Street, Greenock, in consideration of the sum of eight hundred pounds, formerly paid to me by William Rafferty, fish salesman, Glasgow, and residing at three Princes Square, Strathbungo, Glasgow, do hereby assign my whole right, title, and interest in all and whole a lease, dated the 30th July and 22nd day of August Eighteen hundred and eighty-eight, and recorded in the Register of Sasines for the county of Argyle the day of Eighteen hundred and , granted by the Crown in favour of myself, and also of Robert Hay, fish merchant, Tarbert, and John Black, fish merchant there, of all and whole the ground situated in West Loch Tarbert, parishes of Kilcalmonell and Kilbery and So. Knapdale, and county of Argyle, occupied by me and them as oyster fishings, under the name or firm of William Hay & Company, oyster and mussel fishers, West Loch Tarbert; with entry as at Martinmas last Eighteen hundred and ninety-six."

This assignation was intimated to the Crown, who accepted Mr Rafferty as a tenant under the lease. On 3rd May 1897 Mr Hay wrote the following letter to the firm of William Hay & Company—"Dear Sirs,—I have assigned to William Rafferty, Esq., of Messrs M'Kinney & Rafferty, Great Clyde Street, Glasgow, my whole interest in the lease of West Loch Tarbert Oyster Fishery, and in the copartnery of William Hay & Co,, which carries on the same, and I shall be obliged to you for accepting this intimation, and holding him entitled to my place and share in the firm. —Yours truly, WILLIAM HAY." Thereafter the remaining partners assumed Mr Rafferty as a partner in the firm.

An action was raised by Mr Hay against Mr Rafferty concluding for a reduction of the assignation, and also for accounting of his intromissions with "the assets of the foresaid copartnery.

The pursuer averred that the defender had offered to advance him the money to pay the composition to his creditors if he would transfer in security of the advance his interest in the fishery business, and that the statement in the assignation that the consideration was a payment of £800 formerly made was false and fraudulent.

He averred—"(Cond. 11) In point of fact, no sum other than defender's own share of the said composition was due by the pursuer to the defender, and no consideration was given by defender for said assignation. The pursuer signed said assignation under essential error, and in the belief, induced by the statements of the defender at the time, that it was made and executed merely for the purpose of giving security to the defender for the amount of the composition which he was to advance, viz, £191, 0s. 6d. This was the representation made by the defender at the time, and on the faith of which pursuer's signature was obtained. There was a very large number of blanks in the assignation which pursuer signed, and at the time he was in total ignorance of its true import and effect, but his signature was obtained thereto under the influence of the pressure of the defender as pursuer's creditor, and trusting to the false and fraudulent representations made to him by the defender at the time. The said assignation, further, is void from uncertainty. It is improperly stamped, and the agreement which it sets forth is, in any event, a *pactum illicitum*, which can be set aside. The pursuer wished that said document should be examined by his agents, the Messrs Shearer, but he was dissuaded from informing them on the matter by the defender, who represented to the pursuer that this might prevent the composition arrangement being carried through."

The pursuer pleaded—"(1) The pretended assignation libelled in the summons ought to be set aside in respect (*a*) It is void from uncertainty; (*b*) That in conjunction with the composition arrangement it sets forth a *pactum illicitum*; (*c*) That it was signed by the pursuer under essential error, or in consequence of the fraudulent misrepresentations of the defender, and decree of reduction ought to be pronounced in terms of the conclusions of the libel. (2) The defender having received the pursuer's share of the profits in the said fishery partnership, is bound to hold just count and reckoning with the pursuer thereanent and pay him the balance due."

The defender admitted that the terms of the consideration clause were not strictly accurate, but averred that the £800 represented the pecuniary liabilities which it

was roughly estimated he was undertaking for the pursuer.

He pleaded, *inter alia*—"(6) The defender having materially altered his position, and having incurred serious liabilities on the faith of the assignation sought to be reduced, and *restitutio in integrum* being neither offered nor possible, the defender should be assoilized."

The Lord Ordinary (KINCAIRNEY) on 26th May 1899 pronounced the following interlocutor:—"Finds that the averments of the pursuer are irrelevant to support the conclusions of the summons: Finds further that in respect the pursuer does not offer, and is not in a position to make, restitution *in integrum*, he is not entitled to decree of reduction: Therefore repels the first plea-in-law for the pursuer: Sustains the sixth plea-in-law for the defender: Assoilzies the defender from the conclusions of the summons, and decerns: Finds the defender entitled to expenses," &c.

Opinion—"This is an action of reduction of a deed of assignation by the pursuer, which bears that in consideration of £800 'formerly paid' to the pursuer by the defender, he, the pursuer, assigned his interest in a lease granted by the Crown in his favour, and in favour of Robert Hay and John Black, 'trading as William Hay & Co.,' of the rights and interests of the Crown in the West Loch Tarbert Oyster and Mussel Fishery. The action concludes also for an accounting by the defender for his intromissions with 'the assets of the foresaid copartnery,' meaning, I suppose, William Hay & Company, and with the profits received by him in virtue of the assignation. There is an apparent want of connection between these two conclusions, because the assignation is not of the pursuer's interest in the copartnery but of his interest in a lease. But the action proceeds on the footing that the lease was the only asset of the copartnery; that the copartnery existed merely in order to work the lease; and that an assignation of a share in the lease was equivalent to an assignation of a share in the copartnery. I am not prepared to negative that view.

"I have found the case exceedingly confused, and have followed the statements of both parties with much difficulty. A large part of the record appears to be totally irrelevant; but after the best consideration I have been able to give I have found myself unable to sustain the relevancy of the action.

"It is important to have in view that the primary conclusion is for nothing but reduction. There is no conclusion for damages; and, what is more important, there is no conclusion for declarator that the assignation was in security or in trust. It would be totally inconsistent with the action to hold that it was so. The action is for absolute reduction, and seeks to set aside the assignation altogether. It is an action concluding for restitution *in integrum*.

"There are three grounds for reduction—(1) uncertainty, (2) essential error or fraudulent misrepresentation, and (3) *pactum illicitum*; and it will be convenient to deal with the grounds of reduction in that order, although it is not the order in which the pursuer has stated them in his pleas.

"The reason why the assignation is challenged on the ground of uncertainty is that no assignee is expressly mentioned. There is an assignation but it is not said to whom. I am of opinion, however, that there is nothing in this objection, because it is absolutely certain that the defender was the assignee intended, and that the omission of his name was a mere careless blunder which gives rise to no uncertainty. Had the deed been a disposition of heritage there might have been a difficulty of a formal kind in making up a title; but there is no difficulty of that kind in this case.

"The main ground of reduction is what I have stated as the second, which the pursuer thus expresses in the third branch of his first plea—'That it was signed by the pursuer under essential error, or in consequence of the fraudulent misrepresentations of the defender.' The averments on which that plea is based are all contained in condescendences 10 and 11, and the two objections which are there taken to the assignation seem to be that the statement that the consideration was a payment of £800 formerly made is false, and that the assignation is absolute and not in security. It is not said that there was any error in the assignation. It is not disputed that the purpose of the deed was, and was known to be, the assignation of the pursuer's interest in the lease. The pursuer alleges that 'he signed said assignation under essential error, and in the belief, induced by the statements of the defender at the time, that it was made and executed merely for the purpose of giving security to the defender for the amount of the composition which he was to advance, viz., £191, 0s. 6d. This was the representation made by the defender at the time, and on the faith of which pursuer's signature was obtained.' The composition here referred to was a composition on the pursuer's debts.

"The deed was the pursuer's deed, signed by himself, although prepared as he alleges by the defender's agent. He does not allege that he signed it without reading it, or that he did not know the contents of it. What he does say is that he was in total ignorance of its true import and effect. In the absence of these essential averments I must hold that he did read the deed and knew what was in it, whether he understood it or not. Now, if it be meant to be averred that the assignation, although *ex facie* absolute, was truly in security, that would be quite an intelligible averment which might receive some support from some of the other statements, and might have been of importance had there been a corresponding conclusion in the summons. But there is not; and such an averment would be wholly irrelevant in this action for total reduction of the deed. It is said that the statement of the consideration was false, and it may have been so—apparently it was—but it is the pursuer's own statement. He does not aver that the defender falsely stated to him that he had

advanced £800, and that he, the pursuer, believed that false statement, and was induced by it to grant the assignation. Nothing of that kind is said. On the contrary, the pursuer says that he understood the assignation was a deed in security of an advance of £191, 0s. 6d., or was intended for that purpose, so that it does not appear that he was at all misled by the erroneous statement of the consideration, or that he ever imagined that the defender had advanced £800. He may possibly mean to say that he was induced to sign one deed when he was informed and believed that he was signing a totally different deed. But I think that if he meant that, it is irrelevantly averred, and cannot be relevantly averred so long as there is no averment that he did not read the deed or hear it read, and that he did not know what it contained.

"He does not dispute that he knew it was an assignation of his interest in the lease; only he says that the consideration is overstated. But that is really of no consequence if he did not believe the statement, and was willing to make the assignation in respect of the consideration which he actually received. On the whole, I cannot find in the faulty and confused averments of the pursuer any statement of a case on which the conclusion for reduction can be supported on the ground of essential error or of misrepresentation.

"It is true that the defender was obliged to admit that the statement of the consideration for the deed was erroneous or inaccurate, and his explanations about the true consideration were, in my opinion, far from satisfactory. The pursuer argued that the admission of the inaccuracy of the consideration stated entitled him to disregard the deed, and to lead a proof at large as to the true nature of the transaction; and he referred to *Miller* v. *Faulds*, 7th February 1843, 5 D. 856, and *Grant's Trustees* v. *Morrison*, 26th January 1875, 2 R. 377, in support of that contention. I do not think these cases apply. They were not reductions. I think they amount to this, that when it was admitted that the consideration for a deed was incorrectly stated in the deed, the true consideration could be ascertained by proof. If the question here were as to the amount which the defender had advanced in consideration of the deed, these cases might be of importance. But that is not the nature of the present case.

"The pursuer further pleads that the deed should be set aside as *pactum illicitum*. I think the condescendence does not contain any relevant averment of *pactum illicitum*. It is pleaded on record in the barest possible manner without any explanation; and I hardly know what kind of *pactum illicitum* is intended. I gather that it is meant that the defender obtained an illegal preference; but I do not think that that is intelligibly averred. The pursuer does not allege that he was a party to a *pactum illicitum*. There was no *pactum illicitum* in the agreement which he alleges, and apparently there could not be a *pactum illicitum* unless he was a party to it. There may be much that is unsatisfactory in the defender's explanations about the consideration, but I am unable to see how that difficulty can be said to be one of the grounds of reduction.

"For these reasons I am of opinion that the pursuer's averments in support of the conclusions of reduction are insufficient and irrelevant.

"But the defender maintains further, that even if the pursuer's grounds for reduction were valid, the remedy of reduction is not open to him, because he does not tender and cannot make restitution *in integrum*. I am of opinion that this defence is well founded, and may be sustained on the pursuer's admissions and without inquiry. I think the case is one to which the rule applies, that there cannot be reduction where a change of circumstances has made restitution impossible. *Addie* v. *Western Bank*, 20th May 1867, 5 Macph. (H.L.) 80.

"In this case no restitution is offered. The pursuer does not tender repayment of the sum advanced by the defender for payment of the composition to his creditors. Further, it is clear that while this assignation stood unchallenged, the condition of matters was totally changed, and that by the act of the pursuer. For it appears that on 3rd May 1897, half a year after the date of the assignation, the pursuer intimated to the other partners of the firm of William Hay & Company that he had assigned to the defender his interest in the lease and in the copartnery, and requested them to hold him 'entitled to my place and share in the firm'; and it also appears that these partners had agreed to assume the defender as their partner. It is said, besides, that the defender made certain payments to the other partners in consideration of his assumption as a partner; but these payments are not admitted, and of course cannot be considered at this stage. But it sufficiently appears that if this assignation were reduced the pursuer would not be replaced in the position in which he stood before it was granted; for he would be subject to contractual obligations towards the other partners of William Hay & Company, and also to obligations to the Crown under the lease. It may be also that the interests of those partners and of the Crown (none of whom are called as defenders) might be affected.

"The pursuer seems to explain that his letter to the partners of William Hay & Company was written to make his security title, as he expresses it, effectual. But by this action he seeks to get rid of the title altogether, whether absolute or in security. I think that his own act has put this out of his power. Therefore, even if the pursuer's grounds of action or any of them could be otherwise supported, I apprehend that the remedy of reduction must be refused.

"I have indicated that the defender's explanations about this transaction do not appear by any means satisfactory; and it may be that the pursuer may have some other remedy if he has been over-reached

or has suffered wrong. All that I decide is that he cannot obtain reduction on the averments in this record."

The pursuer reclaimed, and argued—(1) There was contained in Cond. 10 a relevant averment of misrepresentation inducing essential error, there having been a false and fraudulent statement as to the consideration. (2) The assignation constituted a *pactum illicitum*, the result of it being that a creditor who had accepted a composition obtained the benefit of property belonging to the bankrupt, in which the other creditors did not share. It accordingly fell to be set aside—*Bank of Scotland* v. *Faulds*, July 8, 1870, 42 J. 557. The pursuer was entitled to found on this fraud, the Court regarding the creditor as the defrauding party who should get no benefit therefrom — *Arrol & Cook* v. *Montgomery*, Feb. 24, 1826, 4 S. 499. (3) It was true that the pursuer did not offer to make restitution *in integrum*, but he had nothing to do with the actings of the defender after the assignation. There was nothing for him to restore, for he averred that the defender was largely indebted to him. (4) In any view, he was entitled to an accounting, since the defender admitted that the consideration stated in the assignation did not represent the true consideration, or what actually took place—*Miller* v. *Faulds*, Feb. 7, 1843, 5 D. 856; *Grant* v. *Mackenzie*, June 7, 1899, 1 F. 889.

Argued for respondent—(1) There was no relevant averment of error or misrepresentation, the pursuer not having stated that he was ignorant of the terms of the assignation. (2) The pursuer was not entitled to recover his property by pleading that he had been a party to a *pactum illicitum*—*Macfarlane* v. *Nicoll*, Dec. 14, 1864, 3 Macph. 237. But in point of fact there had been no *pactum illicitum*; the transaction had been quite a legitimate one; and, moreover, it had been homologated by the pursuer after the composition had been paid. (3) In any event, the pursuer had not offered, nor would he have been able to effect, restitution *in integrum*, and the effect of granting the reduction would be to leave the defender under obligation to the other parties, and to remove from him this asset in the partnership.

At advising—

LORD PRESIDENT—The pursuer by his summons concludes for reduction of an assignation granted by him to the defender on 14th December 1896 of his (the pursuer's) whole right and interest under a Crown lease dated 30th July and 22nd August 1888, in favour of the pursuer and two other persons trading under the name of William Hay & Company, of certain oyster and mussel fishings in West Loch Tarbert, as also for an accounting in respect of the defender's intromissions with the assets of that company, and for payment of the amount which might be found due under such an accounting. The summons does not contain any conclusion asking to have it affirmed that the assignation was granted in security or in trust. The pursuer only asks for total reduction of it.

1. The pursuer's first ground of reduction is that he granted the assignation in error induced by misrepresentations made by the defender. It appears from the condescendence that in the month of December 1896 the pursuer found himself in embarrassed circumstances, and called a meeting of his creditors, which was held on 14th December 1896. The defender was one of these creditors, the amount of the debt due to him being entered in the state of affairs submitted by the pursuer to the meeting as £600. The meeting resolved that, provided the pursuer could within a fortnight get the money necessary to enable him to pay a composition of 2s. 6d. per £ to his creditors, the composition should be accepted in full settlement of his debts. The pursuer alleges that on leaving the meeting the defender offered to advance to him the money required to pay the composition within the time stipulated, provided the pursuer would transfer to him in security of the advance his (the pursuer's) interest in the oyster and mussel fishings above mentioned, and that he agreed to do so. On the same day the pursuer signed the assignation sought to be reduced, and he alleges that he did so under essential error, and in the belief, induced by the defender, that it was merely for the purpose of giving security to the defender for the amount of the composition which he was to advance, viz., £191, 0s. 6d. He further alleges that he was in total ignorance of the import and effect of the assignation when he signed it, but he does not allege that he signed it under any error except that he believed it to be in security while it is truly absolute. Nor does he allege that he did not read over the assignation, or that it was not read over to him before he signed it, although he meets with a general denial the pointed statement of the defender that the assignation was read over to him (the pursuer) by Mr Brown, the solicitor by whom it was prepared.

The pursuer does not allege that he was misled as to the terms of the assignation, but only that he was in error as to its meaning or effect, and the meaning or effect which he states he believed it had is at variance with its plain terms. In the absence of any averment that he did not read the assignation or hear it read, or that he was not aware of its terms, I think it must be taken as against him, for the purposes of the present question, that he was cognisant of its terms, and if this be so, he saw that it was *ex facie* absolute. Under these circumstances it does not appear to me to be relevant to allege that he was led by the defender to believe that it was in security only. If the pursuer had granted the assignation in the belief induced by the defender that it was merely in security, his natural course would have been to sue for declarator to this effect, but this he has not done.

The pursuer further alleges that the statement in the assignation that the consideration for it was a payment of £800 formerly made was not in accordance with fact,

but the statement appeared *ex facie* of the assignation, and I think that the pursuer must be taken to have seen it or heard it read. It was his own statement; it related to a matter within his own knowledge, and he does not allege that the defender misled him, or said anything to him in regard to the consideration. It is true that the reason for inserting £800 as the consideration for the assignation is not satisfactorily explained, though it may probably have been inserted because the pursuer was already indebted to the defender in £600, and the amount of the composition which he had undertaken to provide was £191, 0s. 6d., making together very nearly £800. But assuming that the consideration was incorrectly stated, it is not alleged that this was done by the defender, and it would not influence the effect of the deed as an assignation.

2. The pursuer's second ground of reduction is *pactum illicitum*. He alleges (condescendence 11) that "the agreement which it" (the assignation) "sets forth is in any event a *pactum illicitum*, which can be set aside." The assignation does not set forth any agreement, but the pursuer's contention is that an assignation of an asset belonging to him to the defender was under the circumstances an illegal preference, and therefore challengeable. There is authority for holding that when all the creditors of a bankrupt agree to a composition arrangement and subscribe his discharge it is not lawful for one or more of them without the knowledge of the others to take advantage of the bankrupt's position to extort from him money or bills over and above the composition, so as to put them in a better position than the other creditors, but it does not appear to me that the transaction in the present case was of that nature. The pursuer was not bankrupt although he had declared his insolvency, and the assignation was granted to the defender in consideration of his agreeing to provide the amount of the composition. If the pursuer had sold his interest in the Crown lease to a person who was not a creditor for a price equivalent to the amount of the composition, it does not seem to me that the transaction would have been liable to challenge, and I do not think that it makes any difference that in the present case the person to whom the assignation was granted was a creditor. The interest in the lease assigned was not like a sum of money or a bill for a definite amount—it seems to have been uncertain whether it had any value, and if it had a value, that value was unascertained, and probably altogether speculative. By the Crown lease assignees and sub-tenants were excluded unless with the explicit consent of the Board of Trade previously obtained in writing, and the pursuer had no right to substitute another person in his place in the copartnery which held the lease without the assent of the other partners. Unless, therefore, the Board of Trade and the other partners had accepted the defender as lessee and partner the assignation would have been valueless. Further, in the state of affairs given up by the pursuer on 14th December 1896 the following entry appears in the list of assets—"3. One-fourth share in Oyster Fishery West Loch Tarbert valued at *nil*. *Note.*—Oysters are still being sold from West Loch Tarbert, but the cost of working the fishery is no more than balanced by the profits, and nothing has been got from the fishery for the last two years." The defender thus took his chance as to whether he would or would not realise the amount of the composition out of the share of the lease, and I do not think that his taking an assignation of it was under the circumstances a *pactum illicitum*.

3. The pursuer's next conclusion is for accounting, but if the views above expressed be correct his claim to an accounting cannot be maintained.

4. The Lord Ordinary has, *separatim*, sustained the defender's sixth plea-in-law to the effect that he having materially altered his position, and having incurred serious liabilities on the faith of the assignation sought to be reduced, and *restitutio in integrum* being neither offered nor possible, he should be assoilzied. The pursuer does not offer restitution, and it further appears that he is not in a position to grant it. In order to enable the pursuer to give restitution he would require to get the Board of Trade to relieve the defender from his position as one of the lessees under the Crown lease, and also to get the other members of the copartnery to relieve him from his position as one of the partners in the firm of William Hay & Company, and it does not appear that the pursuer can do either of these things. I therefore think that the view expressed by the Lord Ordinary on this point also is correct.

For these reasons I consider that the Lord Ordinary's interlocutor should be adhered to.

LORD M'LAREN—I agree in all your Lordship's conclusions. The only observation which I wish to add is that under the Bankruptcy Act a creditor is allowed to become a purchaser of the trust-estate. This is a case of a private trust, but on a question of the validity of the sale we cannot be far wrong in accepting the analogy of the sequestration law, which is the most stringent law applicable to proceedings in bankruptcy. The sale in this case was not a public sale, but being for the purpose of carrying out the composition contract the creditors had no interest in insisting on a public sale.

LORD ADAM and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuer—C. D. Murray—T. B. Morison. Agents—W. & J. L. Officer, W.S.

Counsel for the Defender — M'Lennan. Agents—Miller & Murray, S.S.C.