still he was also entitled to rely on the defenders and their servants refraining from negligently doing anything novel or unusual which was calculated to injure him, as the starting a train with an open door was. To that extent they were bound to take reasonable care of him. I think, therefore, that the bill of exceptions should be refused.

The LORD JUSTICE-CLERK concurred with Lord Salvesen.

LORD DUNDAS was sitting in the Extra Division.

The Court disallowed the exceptions.

Counsel for the Pursuer—George Watt, K.C.—Macquisten. Agent—J. D. Rutherford, W.S.

Counsel for the Defenders—Cooper, K.C. —E. O. Inglis. Agent—James Watson, S.S.C.

Tuesday, February 3.

FIRST DIVISION.

(SINGLE BILLS.)

FERRIS *v.* GLASGOW CORPORATION.

Process — Compromise — Joint Minute of Settlement — Minute Signed by Party — No Appearance for Party Signing Minute —Intimation.

When the Court is asked to interpone authority to a joint minute, and neither the opposite party nor his counsel appears, evidence must be produced of timeous intimation of the motion to the other party by registered letter.

Joseph Ferris, miner, 25 Garngad Avenue, Glasgow, *pursuer*, brought an action against the Corporation of the City of Glasgow, *defenders*, in which he claimed £750 damages for personal injury sustained, as he alleged, through the fault of the defenders' servants in suddenly starting a tram car while he (the pursuer) was boarding it. The cause having been remitted to the First Division for jury trial, the Court on 18th December 1913 ordered issues.

On 21st January 1914, the action having been extrajudicially settled, counsel for the defenders moved the Court to interpone authority to a joint minute in the following terms:—"The pursuer on his own behalf, and Russell for the defenders, concurred in stating to the Court that this action had been settled extrajudicially, and craved the Court to interpone authority to this minute, to assoilzie the defenders from the conclusions of the action, and to find no expenses due to or by either party. In respect whereof, &c. (Signed) JOSEPH FERRIS, ALBERT RUSSELL."

There was no appearance for the pursuer.

The attention of the Court having been called by the Principal Clerk of Session to the provisions of the Codifying Act of Sederunt of 1913, Book A, cap. iii, sec. 14, requiring such minutes to be signed by counsel, the LORD PRESIDENT stated that the Court would consult the Judges of the Second Division before disposing of the matter.

On 28th January 1914 the judgment of the Court (LORD PRESIDENT, LORD JOHNSTON, and LORD SKERRINGTON) was delivered by

LORD PRESIDENT—We have considered this matter with the Judges of the Second Division, and we are of opinion that when the Court is asked to interpone authority to a joint minute, and neither the opposite party nor his counsel appears, evidence must be produced of intimation of the motion to the other party by registered letter. That intimation will be accepted as sufficient notification to the absent party after such interval as the Court shall deem proper.

Thereafter on 3rd February 1914, evidence having been produced of intimation to the pursuer by registered letter, the Court interponed authority to the joint minute, and in respect thereof assoilzied the defenders.

Counsel for the Defenders — Russell. Agents — St Clair Swanson & Manson, W.S.

HOUSE OF LORDS.

Friday, February 6.

(Before Earl of Halsbury, Lord Kinnear, Lord Atkinson, and Lord Shaw.)

BANK OF SCOTLAND *v.* LIQUIDATORS OF HUTCHISON, MAIN, & COMPANY, LIMITED.

(In the Court of Session, November 29, 1912, 50 S.L.R. 151, and 1913 S.C. 255.)

Bankruptcy — Company — Winding-up — Vesting of Assets in Liquidators—Obligation to Grant a Security—Latent Trust.

The solicitors of a limited liability company wrote to a bank—"We further write to say that we are authorised by the directors, and our London correspondents have our instructions, forthwith to procure from Mr Johnson a debenture or floating charge over the whole of his assets in name of this company for the amount required to secure the debt due by Mr Johnson to our clients. So soon as that debenture reaches our hands we have instructions to make it available to the Bank of Scotland as further and additional security for the repayment by our clients of their indebtedness to the bank, and it is understood in respect of the arrangements made that the bank will give to those interested in the company the benefit of the arrangements referred to in past correspondence."

Correspondence followed as to whether an assignation or a mortgage should be given to the bank, but though the debenture in favour of the company was

granted, nothing more was done before the company went into liquidation.

Held that the bank had no preferential claim on the debenture.

This case is reported *ante ut supra.*

The pursuers the Bank of Scotland appealed to the House of Lords.

At delivering judgment—

LORD KINNEAR—The question in this case is raised by a claim made by the appellants in the liquidation of a limited company called Hutchison, Main, & Company. The claim is based on an alleged preferable right in a certain security which is said to have been constituted by a debenture created and issued in favour of Hutchison, Main, & Company, by another limited company styled F. A. Johnson, Limited. This debenture is now in the hands of the liquidators, and would seem, *prima facie*, to be held by them as an asset of the estate for distribution among the creditors *pari passu.* But the appellants claim right to a preference which will exclude the other creditors on two different and inconsistent but alternative grounds. They say, first, that at the date of the liquidation they had obtained a valid and effectual security over this debenture for payment of a debt of £14,000 due to them by the company; and secondly, that the debenture is not part of the distributable estate, but belongs to them, inasmuch as at the date of the liquidation it was held by the company as trustees for them and not as beneficial owners. Both grounds have been rejected as untenable by the Court below, and I think the judgment is right.

It is common ground between the parties that the rights of competing creditors in the liquidation are to be governed by the same rules as regulate the rights of creditors in a sequestrated estate under the Bankruptcy Acts. These are well established and familiar. The general object of the statutes, as Lord President M'Neill states it in *Littlejohn* v. *Black* (18 D. 215), "was to preserve as far as possible all rights and interests in the position in which they stood the moment before bankruptcy." From that moment no preference could be acquired by any creditor or created by the bankrupt. But the Act "abstained from disturbing any securities or preferences honestly obtained and lawfully completed according to the nature of such securities or preferences." I do not understand it to be disputed that in this respect the company in liquidation is exactly in the same position as an individual debtor under the Bankruptcy Acts. Rights in security which have been effectually completed before the liquidation must still receive the effect which the law gives to them. But the company and its liquidators are just as completely disabled by the winding-up from granting new or completing imperfect rights in security as the individual bankrupt is by his bankruptcy. This, indeed, is the necessary effect of the express provision of the Companies Act that the estate is to be distributed among the creditors *pari passu.* Every creditor is to have an equal share unless anyone has already a part of the estate in his hands by virtue of an effectual legal right. The question therefore is, whether at the date of the liquidation the appellants had obtained a valid security legally completed over the debenture issued by F. A. Johnson.

In answering this question the Court did not require to consider whether a floating charge over the assets of a trading company would constitute a valid security according to the law of Scotland except in the cases where it may have been specially authorised by statute, because F. A. Johnson is an English company, and its rights and liabilities must be governed by English law. Nor did they need to inquire, as in other circumstances might have been necessary, how far it was valid and effectual, or by what method it could be effectually transferred in security according to the law of England, because, in fact, it has not been transferred to the appellants at all.

There can be no question that by the law of Scotland the *jus crediti* in debts may be made the subject of an effectual security, provided the debt be assigned and the assignation completed according to the method recognised as proper for the completion of such rights. But to make it effectual the assignee must have a right which he can enforce against the debtor in his own name, because it is indispensable for the efficacy of a security that the secured creditor should have *jus in re.* It is manifest on the face of their own statement, and of the document they produce in support of it, that the appellants have no such right. They say that the company had financial dealings both with the appellants themselves and with the British Linen Bank, and that at a time when the appellants were not satisfied with the state of the account it was arranged that they should transfer to the British Linen Bank certain goods which they held in security, and in lieu thereof should take bills on F. A. Johnson to be held in security, and "as collateral security the company would give the appellants a debenture or floating charge over the assets of F. A. Johnson for the sum of £12,000." This last part of the statement lacks precision. But the nature of the proposed debenture is more clearly brought out in the contractual obligation.

This is expressed in a letter from the company's agents to the appellants, dated 3rd February 1910, in the following terms—"We are authorised by the directors, and our London correspondents have instructions, forthwith to procure from Mr Johnson a debenture or floating charge over the whole of his assets in the name of the company for the amount required to secure the debt due by Mr Johnson to our clients. So soon as that debenture reaches our hands we have instructions to make it available to the Bank of Scotland as further and additional security for the repayment by our clients of their indebtedness to the bank." This is the only writing by way of security which the appellants ever obtained, and it seems to me quite idle to pretend that it is a valid and effectual security in itself. It is a pro-

mise to give the bank the benefit of a security which the company is to procure from its debtor in its own favour, and it is nothing more. It does not appear in what manner the bank was to obtain this benefit, and in particular it is not stated whether the debenture is to be transferred or whether the company is to account for the proceeds. But this is not material, because nothing was done to make the promise effectual. The appellant's counsel laid great stress on the undertaking to "make the debenture available to the bank" as soon as it reached the hands of the agents. But that only shows that something remained to be done which the appellants could not do for themselves. If they have a complete and real security they require no help from the company to make it good. If they have not, they have no preference of any kind. They are in no better position than that of unsecured creditors of the company, and the estate must be divided equally among all such creditors.

But then it is said that the question as to the validity of the security arises only on the assumption that the debenture is part of the distributable estate, and that although the appellants have stated a claim on that assumption their substantial case is said to be that it is held by the company and its liquidators, not as part of the company's estate but as trustees for them. In aid of this contention it was argued that the company procured the debenture as agents for the appellants. But agency is matter of fact, and no facts are proved or stated from which it could possibly be inferred. The case has been decided on the assumption that the appellants' averments on record are true, and in these averments no suggestion is to be found that they employed Hutchison, Main, & Company as their agents to procure the debenture. In the absence of averments relevant to be sent to proof the case must be decided on the documents. These consist of the letter already mentioned, the agreement between Hutchison, Main, & Company and F. A. Johnson, and the debenture itself, and there is no trace of the supposed agency in any of them. If they are to be taken as expressing the transaction, they make it apparent that Hutchison, Main, & Company procured the debenture in their own name and acting on their own behalf, and not as agents for anybody else. The agreement between them and F. A. Johnson was that the latter should execute and deliver to the Scotch Company a debenture for a total sum of £17,000 to be "held as security for all amounts which may from time to time be owing to the Scotch Company"; and the debenture actually issued is accordingly for £17,000, and is in favour of Hutchison, Main, & Company. I have no difficulty therefore in rejecting the argument founded on a supposed agency. But it is nevertheless true that Hutchison, Main, & Company were under an obligation to make the debenture available to the appellants, not to its full amount, but to the extent of £12,000, and it is said that this affects their right with a trust which excludes any beneficial interest in themselves or their creditors. The argument was founded on the decision of this House in the *Heritable Reversionary Company* v. *Millar*, and on the doctrine which was there considered that a trustee in bankruptcy takes the estate *tantum et tale* as it stood in the bankrupt.

But the decision has only a remote bearing, if any, on the case before your Lordships, and the doctrine of *tantum et tale* is inapposite, because on the liquidation of a limited company there is no transference of property to which it can be applied. The effect of the Bankruptcy Act is to divest the bankrupt, and to invest the trustee in the entire estate, and it is not surprising that questions should have arisen as to the extent to which this transference of the legal title might or might not involve a corresponding transference of all equitable qualifications which might have affected the estate in the hands of the bankrupt. But the liquidators of a limited company are not vested in the estate to the exclusion of the company. The estate remains vested in the company itself, and the liquidators are mere administrators of it for the purpose prescribed by the statute, and that is for equal distribution among creditors. It appears to me therefore that the argument on the doctrine of *tantum et tale* is beside the mark. But the question remains whether the debenture forms part of the distributable estate, and it is that which is said to be decided by the case of *Millar*. I cannot agree. The only arguable question in that case belonged to a totally different chapter of law: to wit, what is the legal effect of the registration of an absolute title to land in the Register of Sasines. A bankrupt who had been manager of a trading company had purchased a certain heritable property for behoof of the company and on the instructions of their directors, and the purchase money was provided by them. He took the title in his own name, and he executed a declaration of trust which was perfectly explicit, and effectual to qualify his right, but unfortunately he recorded the title, *ex facie* absolute, in the Register of Sasines, and he did not record the declaration of trust. It was therefore a latent trust, however effectual as between the agent himself and his employers. It was held in the Court of Session that the Register of Sasines was conclusive because the bankrupt was infeft on an absolute title, and everyone, whether creditor or purchaser, dealing with a proprietor infeft was entitled to rely on the public records, and was not affected by any qualification or burden on the real right which did not appear there. The main ground of judgment was that the bankrupt could have sold the subject and given an unimpeachable title to a purchaser, and that the trustee in bankruptcy is vested in all heritable estate held by the bankrupt under such an absolute title, to the same effect as if he had obtained a decree of adjudication in implement of a sale to himself.

That construction of the vesting power was corrected in this House and the judgment was reversed in this House on the

ground that as between the bankrupt and his employers the former was a bare trustee, and the latter were the true and beneficial owners of the property, which therefore did not belong to the bankrupt in the sense of the Act, and was not vested in the trustee. It was not disputed that third persons dealing with the bankrupt with specific reference to the property were entitled to rely on the title as it stood in the Register of Sasines, and thus that an onerous purchaser from him would have obtained an unimpeachable title. But it was held that this would not be because the property was his, but because the true owners had permitted him to appear on the Register of Sasines as the owner, and thus entitled anyone dealing with him for value to regard him as such. The noble and learned Lords held that the rule of personal bar which thus protects transactions of the trustee from challenge only applies to such as have specific reference to the trust estate, and is not pleadable by personal creditors who do not stipulate for or obtain any conveyance to that estate. This appears to me to be the full force of the decision, and I am unable to see that it has any bearing on the matter in hand. Of course it assumes, what, indeed, was never disputed, that property admittedly held under a bare trust without any beneficial interest in the trustee, would not pass to his creditors on his bankruptcy. But the bankrupt's title of property was qualified only by a latent trust. The question was whether this latent declaration of trust could be looked at, and when that was once settled by the decision of this House the rest followed as a matter of course.

It is further to be observed that the trust so established was declared in express terms, and directly affected the constitution of the real right. It is a very different thing to say that a personal obligation to give the benefit of a specific fund to a particular creditor creates a trust which attaches to the fund and excludes it from the estate for distribution. That the judgment in the case of *Millar* was not intended to cover such a case as this is obvious, because Lord Herschell states the distinction between the duty imposed by a trust and the liability created by a personal contract in perfectly clear terms. But the appellants rely upon a dictum of Lord Westbury in *Fleeming* v. *Howden* (6 M., H.L., 121), where he is reported to have said that "an obligation to do an act with respect to property creates a trust." This proposition is expressed in general terms, but in relation to property only, and not to personal obligations, and it must be interpreted with reference to the particular case which the noble and learned Lord was discussing. The effect intended to be given to it in that case does not seem to me to be doubtful. Mr Fleeming, afterwards Lord Elphinstone, held the estate of Duntiblae under a deed of entail which required him to denude on succeeding to a peerage. He was duly infeft in terms of an instrument of sasine which was recorded in the Register of Sasines, but the deed under which he held was not recorded in the Register of Tailzies. It followed that although the entail was distinctively set forth on the face of the deed in which he was infeft, the fetters of the entail were ineffectual to exclude the diligence of creditors. He succeeded to a peerage in 1860 and died in 1861 without having denuded, and leaving large debts. It was held that the estate did not pass to a trustee in bankruptcy, because from the moment the clause of devolution became operative it was not to be regarded as the property of the deceased bankrupt, but was held by him in trust for the benefit of the heir to whom it had devolved. But it was so held, as is shortly but very clearly explained in the judgment of Lord Colonsay, because the duty to devolve was a quality of the right on the face of the title under which Mr Fleeming possessed. It was thus a trust "which everyone becoming his creditor on the faith of his having a feudal investiture was bound to know, for there it stood open and patent." An obligation of this kind, which in express terms qualified the title to land, imposed a duty which might well be held to involve a trust.

But to extend Lord Westbury's phrase so as to make it cover personal obligations which do not affect the real right of the obligor seems to me altogether extravagant. It was maintained in argument that every obligation with reference to any property or fund which involves a liability to account fell within the principle. If that were so every imperfect security, however invalid as a real right, would be effectual as a trust. But then in the same sense a bankrupt holds his whole estate as trustee for all his creditors. The fallacy consists in using legal terms in a popular or metaphorical sense and yet affixing to them all the legal consequences which would attach to their use in a strictly technical sense. It is impossible to suppose that Lord Westbury employed the word "trust" in any such inaccurate sense, and, indeed, the danger of so using it is nowhere more clearly exposed than it is by that eminent person himself in *Knox* v. *Gye* (5 E. and I., Ap. Ca. 675). In discussing the liabilities of a surviving partner to the representatives of a deceased partner his Lordship says—"A source of error in this matter is the looseness with which the word 'trustee' is frequently used. The surviving partner is often called a trustee, but the term is used inaccurately. He is not a trustee, or if he is by an improper use of words to be called so, the trust is limited to the discharge of the obligation." He goes on to say—"It is most necessary to mark this again and again, for there is not a more fruitful source of error in law than the inaccurate use of language. The application to a man who is improperly and by metaphor only called a trustee, of the consequences which would follow if he were a trustee by express declaration—in other words, a complete trustee holding the property exclusively for the benefit of his *cestui que* trust—well illustrates the remark made by Lord Mansfield that nothing in law is so apt to mislead as a metaphor." That Mr Fleeming was a complete trustee

in the sense thus explained, holding the property as trustee by express declaration, and holding it exclusively for the benefit of the *cestui que* trust, is beyond question, because it was so decided by this House. I think it equally clear that Hutchison, Main, & Company, who held a debenture under no express declaration of trust, and who certainly did not hold it exclusively for the benefit of the appellants, cannot be styled trustees of that debenture except by such an inaccurate use of language as Lord Westbury condemns. They were under an obligation to give the benefit of it to the appellants, but only to a limited extent, and that obligation they are disabled from performing in terms because their hands are tied by the liquidation.

On the whole matter, therefore, I am of opinion that the appellants are in the position of mere personal creditors who hold no complete security for their debt, and that the debenture, which they might have obtained in security had their contract been carried out, is not held exclusively in trust for them, but forms a part of the estate for equal distribution among the creditors of the company.

LORD ATKINSON—This is an appeal against an interlocutor, dated the 29th of November 1912, of the Lords of the Second Division of the Court of Session in Scotland, whereby they adhered to an interlocutor of the Lord Ordinary dated the 20th of June 1912.

By this latter interlocutor the deliverance of the liquidators of a certain limited liability company named Hutchison, Main, & Company, on the claim of the Governor and Company of the Bank of Scotland that they were entitled, to the extent of £14,000, to a security constituted by a certain debenture of the total nominal amount of £17,000, on the entire assets of a certain English limited company styled Frank A. Johnson, Limited, in accordance with the proviso of an agreement dated the 4th of May 1910 made between Frank Alexander Johnson of the first part, Frank A. Johnson, Limited, of the second part, and Hutchison, Main, & Company of the third part.

The liquidators by their deliverance rejected this claim. The Bank of Scotland filed objections to this deliverance, and the Lord Ordinary found that the averments made by the bank in support of this objection were irrelevant. It is admitted that for the purpose of this appeal the averments in the answers of the bank must be taken to be true.

The facts have been fully and clearly stated in the judgment of the Lord Ordinary. It is unnecessary to re-state any but the very few upon which, in my view, the question for decision turns. Hutchison, Main, & Company were a Scotch company carrying on in Glasgow the business of manufacturers of golf balls and other gutta-percha and indiarubber goods. These goods they were in the habit of selling to Frank Alexander Johnson, and afterwards to Frank A. Johnson, Limited, the company into which Frank Alexander Johnson converted his business. As against these purchases the former company drew bills on Johnson, and subsequently on his firm, which the latter respectively accepted. Many of these bills were discounted by Hutchison, Main, & Company, Limited, in the Bank of Scotland, and many others in the British Linen Bank, all or nearly all of each lot being renewed from time to time. Some other bills remained in the hands of the drawers undiscounted. In February 1910 Hutchison, Main, & Company stood indebted to both banks in respect of these bills in considerable sums. The precise amounts are immaterial. Securities had been lodged with both banks by them to secure their indebtedness. The British Linen Bank, thinking the security inadequate, refused or threatened to refuse to discount any more of these bills or to renew any of them unless they were further secured.

Thereupon an arrangement was entered into between the Bank of Scotland through their local manager Mr Bisset, whereby it was agreed that the securities to the value of £2000 held by the bank as against the overdraft of Hutchison, Main, & Company should be released and transferred to the British Linen Bank, who in consideration therefor would continue to renew the Johnson's bills. A further term was added, of which the written evidence is contained in a letter dated the 3rd of February 1910, written by W. Baird & Company, the solicitors of Hutchison, Main, & Company, to Mr Bisset. The passage of this letter dealing with the matter runs thus—"We further write to say that we are authorised by the directors, and our London correspondents have our instructions, forthwith to procure from Mr Johnson a debenture or floating charge over the whole of his assets in name of this company for the amount required to secure the debt due by Mr Johnson to our clients. So soon as that debenture reaches our hands we have instructions to make it available to the Bank of Scotland as further and additional security for the repayment by our clients of their indebtedness to the bank, and it is understood in respect of the arrangements made that the bank will give to those interested in the company the benefit of the arrangements referred to in past correspondence."

It would appear to me to be perfectly clear on the construction of this letter, if it embodies the agreement of the parties, that Hutchison, Main, & Company in procuring this debenture were acting on their own behalf and not as agents for the Bank of Scotland. I do not think there is any ground whatever for the contention that they were instructed to act as such agents, or did in fact so act; and it is, I think, equally clear that the only obligation they put themselves under was at the most a contractual obligation to make the debenture available to the Bank of Scotland "as a further and additional security" when they procured it. How that was to be done is not stated, but from the letter of Mr Bisset to W. Baird & Company of the following day it is plain that the mode in which he contemplated that Hutchison, Main, & Company should

discharge this obligation and make the debenture available as a security was by assignation of it, followed presumably by notice to the debtor Frank A. Johnson, Limited. He wrote—"With regard to the debenture or floating charge over Mr Johnson's assets, we shall rely on your having this completed as soon as possible and sent to us for assignation to the bank as a security for the company's indebtedness."

This was not done. Discussion arose as to the best mode of making the debenture available, but nothing was done to perfect the security. The debenture was delivered on the 4th of March 1910 by Frank A. Johnson & Company, Limited, to Hutchison, Main, & Company, Limited, in pursuance of an agreement of the same date entered into between them. By that agreement Johnson Limited contracted to forthwith execute and deliver to Hutchison, Main, & Company a debenture or series of debentures in the form to the agreement annexed, in the total sum of £17,000, to be held by the latter company as security for such sums as might from time to time be due to them by the former company, either on the bills in the schedule mentioned, or "in respect of advances, or generally on trade account." There is no mention whatever in this agreement of the arrangement made between Hutchison, Main, & Company and the Bank of Scotland touching the debenture or debentures to be delivered under it.

Hutchison, Main, & Company went into liquidation on the 1st of July 1913. At that time they were *ex facie* the absolute beneficial owners of this debenture, and according to the case of the *Heritable Reversionary Company* v. *Millar* (1892 A.C. 598) any beneficial property they had in it would, under the Bankruptcy (Scotland) Act 1856, on liquidation pass to and become vested in the liquidators.

The interest which would so pass would be absolute and entire beneficial interest (unless some lesser beneficial interest had been carved out of this whole and had before liquidation become vested in another). It would not, I think, on the authorities, be at all sufficient that Hutchison, Main, & Company should have merely entered into a contract to carve out of their property in the debenture this partial interest. Something in addition should be done which would, in contemplation of equity and good conscience at all events, separate the part from the whole, and prevent that part from being available to satisfy *pro tanto* the creditors of the insolvent owner. The ingenious arguments of Mr Clyde and the Solicitor-General for Scotland appear to me to amount to a contention that in the circumstances of this case this carving out took place in contemplation of equity the moment the debenture was delivered to Hutchison, Main, & Company. They did not contend that any specific charge on the debenture was thereby created, but they did contend that by reason of the contract obligation of Hutchison, Main, & Company to make the debenture available as a security to the Bank of Scotland, a trust in favour of that bank attached upon it immediately upon its delivery; that Hutchison, Main, & Company thenceforth held it as to £12,000, portion of the sum secured, as trustees for the bank, and not as beneficial owners, and that the liquidators are now bound, as it is contended this company would itself have been bound before liquidation, to transfer to the Bank of Scotland the benefit of the debenture up to that sum. That contention is, in my opinion, ingenious but unsound.

I do not think that the averments contained in the appellants' answers carry their case any further than the documents. The contract they rely upon was, no doubt, a contract for good consideration. Whether after a delay of so many months it was enforceable, and if so, what was the nature of the relief which would be obtained, are matters beside the real question for decision, which is this—Were Hutchison, Main, & Company at the time of their sequestration owners of the entire beneficial interest on this debenture or not? In my opinion they were. Whether they had bound themselves by contract to denude themselves of a portion of their interest or not does not alter their position as owners while and as long as that contract remained to be carried out. The Lord Justice-Clerk has, I think, put the case in a nutshell in the following passage of his judgment—"To me it appears to be clear that at the date of the liquidation the debenture in question was still held by the company, and that the bank had no right to it, but had only a right to enforce a contract by which it was bound to assign the debenture to the bank." In my opinion nothing has been shown, either in the documents given in evidence or in the averments contained in the respondents' answers, to establish that on any principle of equity at the time of the liquidation this insolvent company had, either in the form of a charge or trust, denuded itself of any portion of the entire beneficial interest in this debenture. If so, the entire of that interest must go to satisfy *pro tanto* the debts of all their creditors, not the debt of one alone.

The decision appealed from was therefore, in my opinion, perfectly right, and this appeal should be dismissed with costs.

Lord Halsbury has requested me to say that he concurs in the judgment which has just been delivered by my noble and learned friend Lord Kinnear.

LORD SHAW—I concur. The facts are important, but they are not complex. They are as follows:—In the beginning of the year 1910 a limited firm named Hutchison, Main, & Company, carrying on business in Scotland, were indebted to two Scottish banks—one the appellants, the Bank of Scotland, and the other the British Linen Bank. For some time the English agent of Hutchison, Main, & Company had been a Mr F. A. Johnson. By an arrangement amongst all these parties the Bank of Scotland transferred to the British Linen Bank certain goods and merchandise of the value of about £2000 which they held in

security. On the other hand, they received bills by Johnson for £3000.

Johnson, who was, as stated, Hutchison, Main, & Company's agent in England, was also indebted to that company. He was anxious to form his own business into a limited liability concern, and to obtain for this concern the agency of Hutchison, Main, & Company which he himself held. It was necessary in these circumstances that some arrangement should be made by which Johnson Limited should come under obligation to pay the bills due by Johnson himself. This was accordingly done, and the terms of that arrangement are contained in an agreement of the 4th March 1910.

By the 5th article of that agreement Johnson Limited undertook to execute and deliver to Hutchison, Main. & Company debentures for £17,000. The terms under which the debenture was to be held were these—"Such debentures shall be held by the Scotch Company (that is, Hutchison, Main, & Company) as security for all amounts which may from time to time be owing to the Scotch Company either in respect of such bills set forth in the schedule hereto or of any other sum that may from time to time be due to the Scotch company by the English company either in respect of advances or generally on trade account." It thus appears that if there was any trust with regard to the debenture or debentures granted by Johnson Limited in favour of Hutchison, Main, & Company, the trust was as now stated. And there can be no doubt that if Johnson Limited had paid the sums due by them to Hutchison, Main, & Company, that firm would have been bound to hand back the debenture which had come into their hands under that simple arrangement. This transaction took place, as mentioned, on the 4th March.

The debenture was granted on the same day. It is by Johnson Limited, and it covenants with Hutchison, Main, & Company, "its successors and assigns, to pay to the said Hutchison, Main, & Company, Limited, its successors and assigns, on the 4th day of March 1915, or on such earlier date as the principal moneys hereby secured shall become payable under the conditions of this debenture, at the registered office of the company, the sum of £17,000 on presentation of this debenture."

In these circumstances it would require competent and very cogent and clear evidence to convince the mind that this debenture, once granted, was not the property of Messrs Hutchison, Main, & Company until that firm should have parted with it by voluntary assignation, or until its liquidator or its trustee in bankruptcy should have succeeded to it as a consequence of the statutory assignment which vested in him everything which was *in bonis* of the firm.

The whole question in this case appears therefore to be—Has there been any deed produced, formal or informal, or is there indeed any relevant averment that the property in this debenture thus duly vested in Hutchison, Main, & Company was not in reality the property of that firm, but was so only in appearance—that the debenture was only their apparent title, but that the real title to its contents was in somebody else, namely, the appellants? In short, I will venture to put the proposition which, as it appears to me, is at the bottom of this case in these words—What proof is tendered that the contents of this debenture were not at the date of liquidation *in bonis* of its holder Hutchison, Main, & Company, but were *in bonis* of the Bank of Scotland? For unless the latter proposition be relevantly averred and legally proved the claim of the bank to that debenture must fail.

This being the statement of the proposition, it is now important to see how the bank addresses itself to it on the record. In particular, does the bank really claim that this property throughout belonged to it and not to Hutchison, Main, & Company?

It founds upon the correspondence. From that it appears that in the preceding month of February Messrs Hutchison, Main, & Company, whose own affairs were manifestly embarrassed, did make an important promise to the bank. It is in these terms—"We are authorised by the directors, and our London correspondents have instructions forthwith, to procure from Mr Johnson a debenture or floating charge over the whole of his assets in the name of this company for the amount required to secure the debt due by Mr Johnson to our clients." The letter is written by Messrs Hutchison, Main, & Company's solicitors, and it proceeds as follows:—"So soon as that debenture reaches our hands we have instructions to make it available to the Bank of Scotland as further and additional security for the repayment by our clients of their indebtedness to the bank, and it is understood in respect of the arrangements made that the bank will give to those interested in the company the benefit of the arrangements referred to in the past correspondence." The bank is therefore undoubtedly right in so far as it maintains that a just expectation was held out to it that the debenture was to be made available to it by Hutchison, Main, & Company.

The form, however, of making it available was certainly not that they should take the debenture as trustee or agent for the bank and hold the debenture for it. On the contrary, the firm took the debenture exactly in terms of the agreement made with Johnson Limited, viz., as its own; and the arrangement with the bank was that after this had been done then the next step would be taken, viz., to grant a title to it to the bank by way of assignation. This is clear from the bank manager's letter of the 4th February, which says—"With regard to the debenture or floating charge over Mr Johnson's assets, we shall rely on your having this completed as soon as possible and sent to us for assignation to the bank as a security for the company's indebtedness."

The debenture was thereafter granted on the 4th March, but no assignation was made. Correspondence is produced which shows that in April a solicitor in London

had been consulted on the point of assignment and that counsel had been instructed to prepare a mortgage. On the 6th April the bank manager stated that he would "be glad to receive the mortgage referred to when it is ready for delivery." Nothing further was done; the months slipped away; and neither assignment nor mortgage had been received by the bank when, on the 1st July 1910, Hutchison, Main, & Company went into liquidation.

The learned Judges in the Courts below, not unnaturally treat the case as one of an "uncompleted security." And so treated their judgment upon it would humbly appear to me to be correct. But, in truth, this puts the facts too favourably for the appellants, unless indeed the words "uncompleted security" are meant to include the case of a security not merely inchoate but never to any extent having any existence. A promise had been made to bring it into existence, by way first of assignation and then of mortgage, but beyond the giving of that promise nothing had been done. The learned Lord Justice-Clerk expresses most clearly and concisely, if I may say so, the essential facts of this case in one sentence when he says—"To me it appears to be clear that at the date of the liquidation the debenture in question was still held by the company and that the bank had no right to it, but had only a right to enforce a contract by which it was bound to assign the debenture to the bank."

It is from this point of view that the citation of much of the authority quoted seemed to me to be inapplicable. For the right of the bank in the circumstances which I have mentioned was a right resting upon nothing more than this, namely, an unfulfilled promise. And when one analyses the idea that is the simple category under which we may presume that 99 per cent. of every bankrupt's obligations could be ranged. All his creditors, down to the humblest tradesman, relied on his promise, expressed or implied, that he would pay for accommodation given, services rendered, or goods received. Upon what principle is one of these creditors to be preferred to another? The whole law of equitable distribution would be destroyed and the whole security for mercantile dealings would be much impaired if it were open to an individual creditor to say—"I got no assignment of my debtor's goods either by delivery or by deed, but he promised to me that he would not part with certain of them except in my favour." After bankruptcy or liquidation, things still standing on that footing, all these *nuda pacta* disappear, and the one question which remains is—Was the property—whatever promises were made with regard to it before—was the property at the time of bankruptcy or liquidation *in bonis* of the debtor or not?

It is only fair to the appellants to say that the shape of their pleadings in this case is in accord with the correspondence, their 11th answer containing the gist of their claim at law in these terms—"As part of the arrangements aforesaid concluded between the company and the respondents (the bank), the company were under obligation to transfer the benefit of such debenture to the extent aforesaid, and that such obligation is therefore binding on the liquidators." This is a plain admission that at the date of liquidation the debenture was not the property of the bank but still remained the property of the company. At the conclusion of a strenuous argument for the appellants I ventured to put the bank's contention in the following propositions, to the accuracy of which their learned counsel assented—"When the debtor acquires and holds property in his own name, but under a personal obligation to account to a particular creditor therefor, then in the event of bankruptcy the existence of the personal obligation prevents the property being treated as *in bonis* of the debtor. On the contrary, the debtor must denude in favour of the particular creditor for whom he is truly a trustee." I am of opinion, for the reasons stated, that these propositions are not in accordance with the law of Scotland. A preference created in this manner is repugnant to the sound and familiar principles of equitable distribution, and the doctrine of converting a promise to assign or transfer into something which effects a transmutation of real ownership by the debtor into merely apparent ownership by him is legally indefensible.

The only support to be obtained for this operation is by misapplying the well-known doctrine of apparent and real ownership. When an agent obtains money for the specific purpose of purchasing a property for his client and takes the title in his own name and becomes bankrupt, it is clear that in such a case the law will get behind the apparent title to the beneficial and the real title, and that—always granted the interests of third parties who have bought upon the faith of the records have not arisen—the property will, in the event of bankruptcy, be correctly treated as never having been *in bonis* of the debtor, but always of the client. Lord M'Laren explains this with clearness in *Forbes* v. *M'Leod* (25 R. 1015). Or when a property is acquired by a company with the company's money and put for convenience sake in the name of the company's manager, then upon the occasion of the manager's bankruptcy the same result happens. The apparent title and the beneficial and real title are in conflict, not on account of the existence of any promise on the part of the manager to transfer it to the company, but on account of the fact that the property all along never was the manager's but was the company's. It would be therefore contrary to the truth of the case to permit that property to enter the assets of the manager, to whom it never in truth belonged. The company stands accordingly preferred to the property in the distribution of his assets.

The Heritable Reversionary Company v. *Millar* is the outstanding instance of this. In the language of Lord Watson, "An apparent title to land or personal estate, carrying no real right to property with it, does not in the ordinary, or in any true legal sense make such land or personal

estate the property of the person who holds the title. That which in legal as well as in conventional language is described as a man's property is estate, whether heritable or moveable, in which he has a beneficial interest which the law allows him to dispose of; it does not include estate in which he has no beneficial interest, and which he cannot dispose of without committing a fraud." And the distinction between a case of real and beneficial interest as against apparent title on the one hand, and a case of real and beneficial interest or dominion with a contractual obligation to convey or transfer, is well brought out in the judgment of Lord Herschell, where he distinguishes the case of *Wylie* v. *Duncan* in this way—"It appears to me that there has been some confusion between the case of heritable property held upon a latent trust of which the owner appearing on the register is a bare trustee and that of heritable property as to which the owner has come under some contractual obligation, The latter was the case of *Wylie* v. *Duncan*. Archibald was there the owner of the property, not a mere trustee; he had bound himself on certain conditions to redispone to Wylie, from whom he took the subject, but this was a mere personal contract. If he had sold the property and disposed of the proceeds he might have rendered himself liable to legal proceedings on the ground that he had put it out of his power to fulfil his obligation, but he would not have been guilty of a breach of trust or brought himself within the reach of the criminal law."

The familiar case sanctioned in all the law books and acknowledged in many decisions for the application of this law is that which was commented on in this House in the *National Bank* v. *The Union Bank of Scotland*. It is the case of a disposition of heritable property entering the record, but granted concurrently with a back bond which acknowledges that the transaction, although giving the title to the disponee was truly a security transaction. Nor do I question that the same result could be achieved in a less formal manner. But what is necessary in all such cases is that the question of property itself in what I have ventured to call a real and beneficial sense is settled adversely to the debtor—settled, that is to say, in this way, that the property does not belong to him, but belongs to someone else.

The decisions and dicta in many cases were cited at the discussion, and it would be impossible to deal with these in detail.

There are two further considerations which I bear in mind. In the first place, I think that nothing can shake the authority of the case of *The Heritable Reversionary Company* v. *Millar* (19 R. (H.L.) 43, 1892 A.C. 598), in which substantially the entire case law relevant to this subject was analysed and focussed in the judgments of Lord Herschell and Lord Watson.

But, in the second place, I feel constrained to add that the only judicial dictum of weight which seems to me to give any favour to the argument presented for the bank is that of Lord Westbury in *Fleeming* v. *Howden* (6 Macph. (H.L.) 121)—"An obligation," said the distinguished Judge, "to do an act with respect to property creates a trust, and if a feeor bound to fulfil an obligation acquires or retains by means of his neglect of that duty a greater asset than he would otherwise have had, he is a trustee of such excess of interest for the benefit of the persons who would be entitled to it if the obligation had been duly fulfilled." It seems somewhat late in the day to cite the dictum of this eminent judge as creating an invasion into the well-settled principle that a contractual obligation with regard to property which has not effectually and actually brought about either a security upon it or a conveyance of it is not *per se* the foundation of a trust or of a declarator of trust. As Lord Watson said in *Millar's* case—"I agree with the late Lord President in thinking that the opinions expressed by Lord Westbury in *Fleeming* v. *Howden* with reference to the nature of the interest which a trustee in sequestration takes in the heritable asset of the bankrupt require considerable modification." Perhaps one ought now to venture distinctly further and to say that it is difficult to reconcile the dictum of Lord Westbury with the decision in *Millar's* case, or to see how the former can now be stated to represent with accuracy the principle of the law of Scotland.

These circumstances make it clear to me that nothing urged by the bank in the present case comes up to what the law requires. For, as I have said, it requires nothing less than this, that the property in the debenture referred to was in the Bank of Scotland. The averments, squaring with the correspondence, are, however, that there was a personal contract with Hutchison, Main, & Company to transfer it to the bank, and that matters stood upon that contract at the time of liquidation. At that time, accordingly, the debenture was part of the property of the bankrupt. It required, in the view of parties, an assignment to divest him of it, and this assignment was not obtained. The case accordingly is the familiar one of an unfulfilled promise to give property or security for goods or benefit which have been received. It is no part of Scotch law to admit a claim of that character to preference in the distribution of bankrupt or liquidation assets.

I am humbly of opinion that the judgment of the Court below is upon that ground correct and should be affirmed.

Their Lordships dismissed the appeal with expenses.

Counsel for the Appellants—The Solicitor-General for Scotland (T. B. Morison, K.C.)—Clyde, K.C. Agents—Tods, Murray, & Jamieson, W.S. (Edinburgh)—Ashurst, Morris, Crisp, & Company (London).

Counsel for the Respondents—R. S. Horne, K.C.—A. C. Black—Morton. Agents—Davidson & Syme, W.S. (Edinburgh)—Faithfull & Owen (London).