far as the case shows, which to any extent excludes or abridges the right to so use the court-house. The meetings which are founded on by the second parties appear to me to be matter of casual privilege and nothing more. In these circumstances I think the questions should be answered as your Lordships propose.

The LORD PRESIDENT (CLYDE), who had acted as counsel in the case, did not sit at the hearing, and was not present at advising.

The Court answered the first question of law in the negative.

Counsel for the First Parties—Moncrieff, K.C.—Scott. Agents — Wallace & Begg, W.S.

Counsel for the Second Parties—Fraser, K.C. — T. Graham Robertson. Agents — Gulland & Stuart, S.S.C.

HOUSE OF LORDS.

Monday, June 28.

(Before Viscount Haldane, Viscount Finlay, Viscount Cave, Lord Dunedin and Lord Shaw.)

MUNRO AND OTHERS *v.* ROTHFIELD.

(In the Court of Session, December 3, 1919, 57 S.L.R. 165.)

Bankruptcy—Contract—Illegal Preference —Pactum Illicitum—Void and Voidable.

A debtor arranged with a particular creditor for payment of his debt in certain instalments if a general scheme to which the particular creditor would be a party were carried through; that arrangement conferred a privilege on the particular creditor over the other creditors to the proposed general scheme; the general scheme was agreed to; the particular creditor obtained in absence a decree on his debt acting on his particular agreement; the creditors of the general scheme suspended. *Held* (*aff.* judgment of First Division) that the general scheme was only voidable not void, the arrangement with the particular creditor void as fraudulent, or superseded.

This case is reported *ante ut supra.*

The defender Rothfield appealed to the House of Lords.

At the conclusion of the arguments—

VISCOUNT HALDANE — The difficulty which confronts the appellant in this case is that he proves either too much or too little. Too much if the principle on which he is founding his argument is the wide and sweeping one lying at the very foundations of the jurisprudence of Scotland, as he asserts, because that principle forces this House as a court of justice to take notice not only of the illegality of what has been called the general agreement, but also the illegality of his special agreement and the decree *in absentia* he obtained upon it, and of the charge he obtained following on that decree *in absentia;* these all fall to the ground if that general principle is the one which applies. But I do not think that we are concerned with the general principle, for as soon as you look at the facts in the case the point turns out to be of a nature much narrower.

The debtor got into financial difficulties in the year 1918. A little earlier, on the 9th of October 1917, he had given a bill in favour of the appellant for £250. On the 20th of February of the next year, 1918, the debtor had presented a petition for sequestration. Then on the 18th of March 1918 he was already considering an arrangement with his most important creditors, and apparently was approached by the appellant, and he entered into the special agreement with the appellant which we have had read, and which refers to what had apparently been verbal negotiations; and the substance of his special agreement which, as I have said, was dated the 28th of March 1918, was this —that in the event of the proposed general arrangement with the important creditors, including Mr Rothfield the appellant, being concluded, he (the debtor) undertook "to arrange that Mr Rothfield's claim be taken over by instalments at three, four, and six months from the last date of signature in said agreement," and bound himself accordingly. The effect of that was to give Mr Rothfield not only the benefit of the prospective general agreement, but an advantage over the other creditors under that agreement.

Now the next material thing that happened was that on the 5th of May in the same year 1918 the general agreement of which I have spoken was come to. It was entered into between the debtor himself and a number of his important creditors, including Mr Rothfield and a Mr Munro, an accountant, who was a sort of trustee for the creditors; and the effect of it was this, that the debtor undertook to make over, not only his general assets but his income specially, and to pay out of his income a sum of not less than £300 a-year. That amount was to be paid at intervals, and the trustee, Munro, was to divide proportionately among the creditors specified until their debts, which were set out in a schedule, were paid. That was the general agreement.

Now the next thing that happened was that on the 14th of September in the same year Mr Rothfield took proceedings to enforce his special agreement, and under that he got a decree *in absentia* for the sum of £70 odd, suing upon this special agreement, and on the 18th of October the decree was complete.

The next thing that happened was that the present action out of which this appeal arises was commenced on the 26th December. That was an action for suspension of Mr Rothfield's decree, and the charge following on it, and it was begun by the debtor himself, and Mr Bruce as the assignee of certain of the creditors, and Munro the trustee under the general agreement, as representing the creditors gener-

ally under the agreement. That action asked for a suspension, as I have said, of Mr Rothfield's decree and of the process following upon it.

It is in that action that the question has arisen which is now before your Lordships. The view contended for in its extreme form I have already referred to, with the difficulties which attend it; but although the Lord Ordinary conceived himself able to act upon the principle embodied in that view, the Inner House, the First Division, looked at the transaction in a different light. They said—"This is not an agreement the purpose of which is to commit a common law fraud; it is merely an agreement under which certain creditors bound themselves to take payment of their just debts in a particular manner from the debtor on terms of equality as to each and all of those concerned," and it was said that that is an agreement which may be impeachable by other creditors, but *prima facie* it is a proper agreement for a debtor to make, subject to the chances of its being successfully impeached under the Bankruptcy Act; in other words, it is a voidable as distinguished from a void agreement, such as is void on the face of it. In that view the law is that there is no authority for the proposition that every agreement for a preference is null and void. It may be voidable in the way I put it, but *prima facie* it is good unless it is struck at by the wider principle of the kind I have spoken of, and which is a principle so wide that it does not apply to the limited kind of agreement to which I have referred.

We were pressed with the decision in the case of *Farmers' Mart, Limited* v. *Milne*, (1915) A.C. 106, 1914 S.C. (H.L.) 84, 51 S.L.R. 729. But when you look at the *Farmers' Mart* case, that is a case in which the wider principle applied. That was a case in which somebody who was to be in the position of trustee in a sequestration had undertaken the obligation to give a preference, which was, very naturally and properly (if I may use the expression about a decision of your Lordships' House) looked at as contrary to the very foundations not only of the law of bankruptcy but of common law principles. That is very far from the very limited question with which we are concerned here, which is whether the agreement of which I have been speaking is an agreement which is possibly voidable under the provisions of the Scottish Bankruptcy Acts. Under the circumstances I agree with the view taken in the Inner House that there was nothing to prevent the debtor and the creditors concerned from saying what they did in answer to Mr Rothfield's action, and that accordingly the decision of the First Division was right, and this appeal ought to be dismissed, with costs, and I move your Lordships accordingly.

VISCOUNT FINLAY — I am of the same opinion.

In this case there had been negotiations going on for an arrangement between the debtor, the first of the respondents, and a certain number of his creditors, some eight, to whom he was indebted for moneys lent. Before these negotiations had resulted in any agreement an arrangement was entered into between the debtor and one of those creditors, to whom the debtor was indebted for moneys lent in the terms contained in the second sentence of the letter of the 28th March 1918, which is signed by the debtor, and that sentence is this — "In the event of the proposed arrangement being carried through as to all the claims specified in the schedule to the agreement, I undertake forthwith to arrange that Mr Rothfield's claim be taken over by instalments at three, four, and six months from the last date of signature in said agreement, and I hereby bind and oblige myself to pay the said instalments accordingly." That arrangement with his eight creditors was carried out, and it is in effect an arrangement between the debtor and those persons who had lent him money that he should set aside a sum of £300 a-year for the purpose of discharging all the debts of that class, and should assign all his property to a trustee as security for the carrying out of that agreement. Mr Rothfield was a party to that agreement. He had entered into the secret arrangement which I have already read as to his getting payment by instalments more beneficially than any other creditors with whom he was entering into that arrangement, which eventuated in the document in the appendix dated 29th May 1918. Now under these circumstances Mr Rothfield brought his action. There was no defence, and he obtained judgment for one of the instalments, some £70 odd. Proceedings have now been taken by the other creditors of the class who entered into the agreement of May for suspension of the judgment which he had so obtained with a view, no doubt, to its reduction. There is no doubt whatever that the private arrangement, on the terms of which Mr Rothfield entered into the general arrangement of May, was of about the most objectionable character it is possible to imagine, and the only defence raised is that those who now seek to impeach it, namely, the creditors, parties to the agreement of 29th May, were concerned in a transaction illegal in its nature, namely, providing for payment to them, a portion of the creditors, of funds in preference to the general body of creditors. It was said that that transaction was in itself void, and that the Court ought not to assist creditors who were parties to that deed in giving effect to it by setting aside the judgment which Mr Rothfield had obtained.

I entirely agree with the judgment of the First Division upon the point of law as to the nature of such agreements, and I concur with them in thinking that they are only voidable and not void.

The case that has been mentioned by the noble and learned Lord on the Woolsack—the *Farmers' Mart* case—contains some passages which were read to us with reference to this subject for the purpose of leading us to conclude that the transaction was not merely voidable but void, but when the *Farmers' Mart* case is looked at it is quite

clear that it must be understood as referring only to a case in which a person who expected to occupy the position of trustee in a sequestration had entered into an arrangement with those who would be certain of the parties to vote his selection as trustee that his fees as trustee should be applied for the purpose of paying to these persons their debt in full in preference to the other creditors. That, of course, was an arrangement of a very objectionable nature, and it was inevitably held that the agreement was one which was not enforceable. I think therefore that rightly understood the *Farmers' Mart* case throws no difficulty whatever in the way of the application of the well-established general law that such arrangements for a preference to creditors are not void but only voidable.

I agree with the First Division in thinking that the interlocutor of the Lord Ordinary cannot be sustained, and I agree that this appeal should be dismissed.

VISCOUNT CAVE—I agree, and I think the point may be put quite shortly in this way. The appellant had obtained a decree against the debtor for payment of a sum of money on the footing of an agreement of March 1918—an agreement which was not only secret but was dishonest and fraudulent in every sense of the term. The respondents, who are other creditors of the debtor, sought to suspend that decree on the ground, first, that the agreement under which it was obtained was fraudulent and void, and secondly, that the conduct of the appellant in obtaining the decree was contrary to an agreement of May 1918, to which both the respondents and the appellant were parties. The appellant's answer to that claim was this, that the agreement of May 1918 was itself fraudulent and void, and therefore as *ex turpi causa non oritur actio* the claim to suspend founded on that agreement could not be entertained. To that plea it was replied that the agreement of May although giving an undue preference, and therefore capable of being impeached by other creditors, was not an illegal agreement, or in other words, that it was voidable but not void from the beginning. That reply seems to me to be fully sustained by the case of *Drummond* v. *Watson*, 12 D. 604, which has been cited, and by other authorities referred to in the judgments of the learned Judges in the Court of Session. There was also a second reply, namely, that even if the agreement of May was void, still the respondents were creditors, and in that capacity were entitled to object to the decree which had been obtained. It seems to me that either reply is sufficient as an answer to the appellant's plea, and accordingly that the decision of the Court of Session is right and should be affirmed.

LORD DUNEDIN—I concur. I confess I think the appellant's attitude in this case is one of unparalleled impudence. He enters into an agreement with other creditors by which a certain amount of funds of the debtor is to be set aside for payment to them of their debts, and then behind their backs he gets an agreement for himself and on that agreement he proceeds to get a decree, and then when the other creditors not unnaturally object he says—"Oh, your agreement is void upon grounds of public policy, and therefore you cannot be heard to object to my getting the benefit of the trickery which I have successfully carried out."

As regards those agreements, the appellant's agreement probably is contrary to public policy, because it seems to me to fall almost exactly under the words of Professor Bell in the passage in his Principles which I cited in the *Farmers' Mart* case, where he says—"*E.g.*, agreements in which a creditor in fraud of an agreement to accept a composition stipulates for a preference to himself." Now it is not, of course, literally the same, because under the agreement of the 18th May it was not a composition, but it was what is equivalent to composition—it was an agreement that they would defer distressing the debtor if each of them got their equal share of the funds the debtor had given over to the trustee—and in fraud of that he, Rothfield, gets a preference to himself. That is a very good illustration perhaps of an agreement against public policy. The agreement of May, as has already been explained by your Lordships who have preceded me, is not of that character at all. There is nothing illegal in a debtor proposing to pay his creditors. There is nothing illegal in a debtor saying, "I will set apart a portion of my funds to pay A, B, and C." But the common law and the Bankruptcy Law of Scotland come in and say, "If it was the fact that you were insolvent when you made those arrangements, then we will give the privilege to other creditors who have already got debts and were not parties to this arrangement to cut it down." That, as has already been pointed out, is a case of a voidable, not a void, agreement.

I entirely concur with the observations in the Inner House, and I agree that this appeal ought to be dismissed with costs.

LORD SHAW—I agree. I desire especially to say that I wish to express my respectful adherence with the mode of putting this case adopted by the learned Lord Mackenzie in the Court below.

From my own point of view the case stands thus—By an agreement of May 1918 eight creditors of a certain debtor agreed to appoint a third person as recipient of certain funds which the debtor was willing to allot out of an official salary receivable by him. Of those eight persons Mr Rothfield, the appellant, was one. The debts were scheduled. Mr Rothfield's debt is scheduled as £250. By this deed of May 1918 Mr Rothfield, the appellant, bound and obliged himself to refrain from separate action for the purpose of enforcing his individual claim. This same gentleman, two months before, had, however, entered into a private agreement by which he had concluded a secret arrangement with the debtor to pay his individual debt at certain intervals of three, four, and six months.

Now in May 1918 honesty and law would

have said that the position of Mr Rothfield was that he had obliterated his private arrangement of March. But he ignored the agreement of May under which he so obliged himself, and in September he proceeded to bring a litigation founded on his separate engagement of the preceding March. It is perfectly manifest to my mind that these two agreements cannot stand together. I do not wish to attach the term fraud or swindle to it in the audacious manner suggested by one of the learned counsel for the appellant, but I will say this, that whatever may have been the relation of the agreement of March to the agreement of May, nothing more audacious could be conceived than Mr Rothfield in the following September proposing to ignore his agreement of May and his obligations made under it in fairness to other creditors, and to go back to the sopited secret arrangement of March.

What is the attitude which this appellant assumes at your Lordships' bar? The other creditors affected by the agreement of May, on this secret agreement being divulged, say, "But this is in plain breach of your obligation of May." To that he replies, "Oh, it may be in plain breach of your obligations and mine, but" (to use the language of his learned counsel) "we were all engaged in manipulating a swindle."

Audacity has its limits, and I think they have been reached in the present case. The idea that any person should approach this House and ask us to condemn as a swindle the document of May 1918, signed by the appellant himself, is an idea which fortunately we are not able to comply with, because in the opinion of all your Lordships the agreement of May was not a swindle. The agreement of May was a transaction which at the instance of the general body of creditors was challengeable, but which there might be many motives for their failing to challenge. An agreement covering an assignment of a certain portion of unassignable salary and getting that benefit divided amongst certain participants does not necessarily fall. It is almost in the region of comedy to think that the appellant has not reduced that agreement and does not propose to reduce it, but, on the contrary, is taking funds out of it. The situation accordingly is that he sought and obtained a decree in absence on one footing, the separate March footing, and he has the arrangement of eight creditors still remaining operative, under which he is drawing funds from this unfortunate debtor on another.

As your Lordships have observed, it is necessary always to see what is the exact effect of the words "fraudulent," "illegal," even "void," and to see whether in the particular transaction which is aimed at the agreement made was null and void or merely voidable. By its own nature this transaction was not void. By its nature I do not wish to cast any doubt on the proposition that at the instance of creditors aggrieved, and at their instance alone, it was a voidable transaction. That distinction being observed the case is simplicity itself.

Their Lordships dismissed the appeal with expenses.

Counsel for the Appellant—Wilton, K.C. —Zeffert—Garrett. Agents—Murray Oliver, S.S.C., Edinburgh—Lazarus & Son, London.

Counsel for the Respondents Bruce and Munro—Macmillan, K.C.—D. P. Fleming. Agents—Bruce & Stoddart, S.S.C., Leith—E. B. Gee & Company, London.

COURT OF SESSION.

Tuesday, May 25.

SECOND DIVISION.

[Lord Hunter, Ordinary.

D. M'MASTER & COMPANY *v.* COX, M'EUEN & COMPANY.

Contract—Sale—Condition—Impossibility of Performance—Supervenient Legislation—Jute (Export) Order 1917, *dated 27th November* 1917.

The Jute (Export) Order 1917, dated 27th November 1917, provides, *inter alia* —"1. On any sale of any article or material manufactured or to be manufactured wholly or partly from jute, it shall be the duty of the vendor either to obtain from the purchaser a guarantee in writing that such article or material will not be exported from the United Kingdom, or if it is the intention of the purchaser that such article or material shall be exported from the United Kingdom, to obtain a permit issued by or on behalf of the Director of Raw Materials authorising the sale or manufacture as the case may be of such article or material as aforesaid. 2. No person shall sell or deliver any article or material of the description aforesaid for exportation from the United Kingdom without a permit issued by or on behalf of the Director of Raw Materials. . . ."

By verbal contracts confirmed by order-notes written and accepted by the parties, a firm of jute manufacturers contracted to sell to a firm of merchants certain quantities of jute goods, one-half to be delivered in January and the remainder in February 1918. Delivery was to be f.o.b. Dundee, the goods to be packed in twilled sheet and hoops, this being the packing usually required in the case of goods intended for export. The buyers, some days after the orders, verbally arranged with the sellers that in the event of their electing to take the goods loose, which would imply sale in the home market, they should get the reduction usually made in respect of the packing. On the passing of the Jute (Export) Order 1917 the sellers wrote the buyers asking for a guarantee, or permit to manufacture and deliver in terms of the Order. The buyers thereupon replied that the goods were for exportation to America. The buyers subsequently applied for a