there, beginning with the Institutional writers and going down to the date of the case.

Applying then the rules there laid down, I cannot but agree with the Lord Ordinary, that it is not necessary in a case like this to call all the wrongdoers. Each of them is liable *ex delicto* or *ex quasi delicto*, and there is no necessity for calling all or any particular number or more than one if the pursuer chooses to select one.

I am therefore for adhering to the interlocutor of the Lord Ordinary of 23rd November and 12th December.

LORD SHAND—I am also of opinion that the Lord Ordinary has done rightly in repelling the plea of all parties not called. The pursuers are beneficiaries under a trust-deed, and the defenders are the assumed and acting trustees. The existence of the relation of beneficiary and trustee creates certain duties and obligations on the part of the trustees. Whether these rest upon contract or not is of little consequence for the present purpose. It is enough that the trustees come under an obligation to observe certain well-known rules in regard to the administration of trust-estates to fulfil obligations arising out of their acceptance of the offices they hold. In the present case, there has been violation of duties, in their lending a portion of the trust-estate to one of their own number and otherwise. I do not think it is necessary to distinguish this from many other breaches of trust administration which occur as the making any unauthorised investment. The same result follows as in the case of their lending to one of their own number. In each case there is a violation of the duty which they owe to the beneficiaries. For the consequences, the trustees so acting are all liable *in solidum* and conjunctly and severally, and in bringing his action against them the beneficiary is not bound to call more than one of them. As I think that the case of the *Western Bank* v. *Douglas* settles the point, I am for adhering to the Lord Ordinary's interlocutor.

If I thought that by so holding we were prejudicing the question whether, where one of the trustees has been found liable for a breach of trust duty, and there has been no fraud, he could claim a contribution from those who have not been called, but who were also parties to the acts of negligence or violation of duty which created the liability to the beneficiaries, it might have been different. But where a pursuer has reasons for selecting one defender rather than another having several persons jointly and severally liable, there can be no prejudice suffered as among the trustees themselves in the subsequent question whether those who have not been called but who were, it may be, equally to blame must bear a share of the loss to the estate.

LORD ADAM—I may just observe that the claim made here by the pursuers is not only for the replacing of money lent by the trustees to one of their own number, but also for the recovery of funds loaned to a beneficiary on insufficient security. I do not think there is any good ground for making any distinction between the different parties of the claim. I consider the case to be ruled by the *Western Bank* v. *Douglas*.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuers — Kennedy. Agents—Macpherson & Mackay, W.S.

Counsel for the Defenders — Salvesen. Agents—Bruce & Kerr, W.S.

Tuesday, March 11.

FIRST DIVISION.

[Sheriff of Lanarkshire.

CLYDESDALE BANK *v.* ANDERSON (MARTIN, TURNER, & COMPANY'S TRUSTEE).

Sequestration—Del Credere Agents—Preference—Agreement with Particular Creditor—Dividend from Concurrent Foreign Liquidation.

A copartnery of mercantile commission agents trading in Glasgow with foreign branches at Manila and other places failed. Shortly before the date at which they suspended payment certain Glasgow merchants had consigned to them for sale abroad a quantity of goods. Against these goods the copartnery had made advances in the shape of acceptances, which the consignors had discounted with a bank. An agreement was come to between the consignors, the bank, and an accountant representing the bankrupts and certain creditors, that the bank, on condition of the bankrupts transferring to the consignors the unsold goods and the proceeds of goods sold but not remitted for, would not claim on the bills except to the effect of recovering the remittances already in the bankrupts' hands or in transit. The copartnery having been sequestrated, the unsold goods and remittances in course of transit to the bankrupts at the date of suspension were transferred to the consignors, and handed by them to the bank, but the proceeds of goods sold which were mixed with the general funds of the bankrupts either at home or abroad were not handed over. The consignors, however, were ranked upon the estate of the bankrupts in Manila, where a separate liquidation was carried on, for the amount of goods sold there, the proceeds of which had not been remitted home before suspension, and obtained a dividend, which they handed to the bank. The bank having claimed in the sequestration, their

claim was rejected *in toto* by the trustee.

In an appeal from the trustee's deliverance—*held* (1) that the bank had no right to a preferential claim on the sequestrated estate, but (2) was entitled to an ordinary ranking thereon for the amount of the bills discounted by them, under deduction of the value of the unsold goods and remittances in transit which had been transferred to them; and (3) that the bank was not bound to give up to the trustee the amount of the dividends obtained by the consignors in Manila and handed to the bank, as a condition of ranking.

Messrs Martin, Turner, & Company were a firm of merchants and mercantile commission agents in Glasgow. The partners of this firm also carried on business under the separate name of Martin, Dyce, & Company in Batavia, Sourabaya, Singapore, Manila, and Ilo Ilo. The Glasgow house was the principal house, the other houses being branches. One contract of copartnery embraced all. The copartnery suspended payment on 29th February 1884, and placed their affairs in the hands of William Anderson, C.A., Glasgow. Shortly before that date Messrs William Gardner & Company and Messrs William Galloway & Company, both of Glasgow, had consigned to the bankrupts, as agents, a quantity of goods for sale abroad, and against these goods Martin, Turner, & Company had made advances in the shape of acceptances to the consignors, which had been discounted by the latter with the Clydesdale Bank (Limited). Upon certain of the goods shipped by William Galloway & Company Martin, Turner, & Company had made cash advances.

After the suspension William Galloway & Company and William Gardner & Company and the Clydesdale Bank applied to Mr Anderson, who represented the bankrupts and certain of their creditors, for the goods consigned, as already mentioned, and after some negotiations an agreement was arrived at, which was embodied in certain letters.

With reference to the consignment by William Gardner & Company, the agreement was contained in the following letter written by Mr Cunninghame, the manager of the bank, on March 5th, to Martin, Turner, & Company:—"Gentlemen,—By request of Messrs William Gardner & Company, wholesale umbrella manufacturers, Glasgow, we beg to state that, upon condition of your transferring to them or their order the goods consigned by them through you, so far as unsold, and the proceeds of goods sold but not remitted for, we shall not claim against you upon the bills drawn against these consignments as enumerated in the subjoined list, except to the effect of recovering the remittances already in your hands, or in transit." The list referred to contained 28 bills, together amounting to £7964.

With regard to William Galloway & Company, the agreement was expressed in the two following letters written by the manager of the bank on March 6th to Martin, Turner, & Company. The first was in these terms:—"Gentlemen,—By request of Messrs William Galloway & Company, manufacturers, Glasgow, to whom we discounted the under-mentioned bills accepted by you, we beg to state that, on condition of your handing over to the said William Galloway & Company, or their order, the goods, so far as unsold, consigned through you to Martin, Dyce, & Company, and against which these bills were drawn, and the proceeds, whether in cash or promissory-notes, of such consignments as have been sold but not remitted for, we shall not claim against you for the bills referred to, except to the effect of recovering the remittances already received by you, or which are in course of transit to you." The bills referred to were ten in number, and together amounted to £3740.

The second letter was in these terms:—"Gentlemen,—With reference to goods shipped through you by Messrs William Galloway & Company, and upon which you have yourselves given them cash advances, we hereby undertake to account to you for such proceeds of these goods as may reach us through the hands of Messrs Ker, Bolton, & Company, or whoever may transmit the same to us. You will understand, however, that this undertaking does not in any way apply to goods or proceeds thereof applicable to bills current between you and Messrs William Galloway & Company discounted by us. *P.S.*—The goods against which you have made cash advances are described by you as follows"—[Here followed a list of shipments, the total values set against which were £614].

On 7th March the estates of Martin, Turner, & Company and Martin, Dyce, & Company were sequestrated by the Sheriff of Lanarkshire, and on 19th March Mr Anderson was appointed trustee on the sequestrated estates.

The trustee Mr Anderson obtained possession of the bankrupts' assets in this country, Singapore, Batavia, and Sourabaya, but was unable to obtain possession of the assets so far as situated in Manila and Ilo Ilo, as the creditors in these places appointed local liquidators and took possession of the assets, which they refused to give up.

After the sequestration the goods consigned, so far as unsold, in the possession of any of the foreign branches, were transferred by Martin, Dyce, & Company to Messrs Ker, Bolton, & Company, a firm which had been chosen to act as agents for the consignors abroad, and the proceeds of these goods, as they were realised, were transmitted by this latter firm to the bank. The amount of remittances in transit at the date of suspension, and dealers' bills received specially in payment of goods, were also transferred to the consignors, and received by the bank. On the other hand, the proceeds of the consigned goods which had been sold prior to the suspension of payment were not handed over to the bank, as these were found to be mixed with the general funds of the bankrupts either at home or abroad, viz., to the extent of £1562,

9s. 6d. with the funds of Martin, Turner, & Company at home, and £967, 19s. 2d. with the funds of Martin, Dyce, & Company at Singapore and Batavia.

Messrs Gardner & Company and Messrs Galloway & Company claimed in the liquidation carried on in Manila and Ilo Ilo, and were allowed to rank for the amount of the proceeds of goods consigned to Martin, Dyce, & Company at Manila and Ilo Ilo, and sold but not remitted for at the date of suspension of payment. Upon these rankings dividends of 40 per cent. were paid, which, after deduction of Messrs Ker & Company's commission, yielded to Messrs Gardner & Company £1015, 1s. 6d., and to Messrs Galloway & Company £738, 2s. 4d., and were handed by them to the Clydesdale Bank.

The Clydesdale Bank lodged claims in the sequestration carried on at home for £4792, 4s. 10d. and £1982, 3s. 11d., being the entire amount of the bills discounted by them, less the value of the unsold goods handed over, and any cash or bills received from the trustee or the consignors, with the exception of the dividends received by the latter in Manila and handed to the bank, but these claims were rejected by the trustee *in toto*, in respect of the agreement embodied in the letters above quoted.

The Clydesdale Bank then appealed to the Sheriff against the deliverance of the trustee. The bank referred to the letters of 5th and 6th March above quoted, and averred—"The proceeds of goods sold but not remitted for, and the remittances in the hands of the bankrupts or in transit at the date of the said letters, were never paid over to the appellants, and the present claim is made to the effect of recovering the amount of these preferably out of the sequestrated estates."

The trustee also founded on these letters as containing an agreement on the part of the bank not to seek a ranking on the bankrupts' estates, and he further founded on the fact that the bank had received the amount of the dividends obtained by Messrs Galloway & Company and Gardner & Company from the Manila liquidation.

The bank pleaded—"(2) The remittances in the hands of the bankrupts or in transit, and the proceeds of goods sold but not remitted for at the date of the letters founded upon, not having been recovered by the appellants, the respondents' deliverances are not well founded, and ought to be recalled. (3) The appellants being willing to account for proceeds of goods on which the bankrupts had made cash advances, the present appeal ought to be allowed with expenses."

The trustee pleaded—"(2) The appellants having received delivery of the unsold goods, and also payment of the proceeds of goods sold obtained by the respondent, all in terms of the agreement expressed in said letters, are not entitled to be ranked for the advance bills founded on. (3) *Separatim*—The appellants having illegally obtained payments or preferences abroad, after the date of the sequestration, out of the bankrupts' estate or effects, which were carried by the respondent's act and warrant, are bound to communicate and assign to the trustee such payments or preferences, obtained or to be obtained, before they can be ranked to any extent or draw any dividend out of the funds in the trustee's hands. (4) In any case, the appellants were not entitled to be ranked for more than the proceeds of sold goods not handed over to the consignors or the appellants; and as the amount already received by the appellants out of the Manila portion of the estate exceeds the dividends which they would have obtained if ranked in the sequestration, they are not entitled to be ranked thereon, at least until the other ordinary creditors draw an equal amount from the sequestration funds."

From the proof in the action, in addition to the facts already stated, the following facts appeared—For a number of years the firms of William Galloway & Company and William Gardner & Company had been in the custom of sending through Martin, Turner, & Company goods to Martin, Dyce, & Company for sale abroad, Martin, Turner, & Company and Martin, Dyce, & Company guaranteeing the solvency of purchasers. In some cases Martin, Turner, & Company made cash advances on the goods, but usually bills were drawn by the consigning firms on Martin, Turner, & Company for a considerable proportion of the value of the goods consigned, and discounted with the Clydesdale Bank. With regard to remittances, the practice was for Martin, Dyce, & Company to make telegraphic transfers to Martin, Turner, & Company of slump amounts and follow them up by letters giving details of the remittances for the purpose of division among the various parties on behalf of whom the remittances were made. But even when these arrived the funds in question were not at once distributed. Whenever the telegraphic transfers were made, the funds were paid into Martin, Turner, & Company's bank account and mixed with their general funds; and in many cases they were not paid over on the arrival of the letters, as they were retained to meet the bills drawn against them. Any surplus remaining after the bills had been paid was handed over to the consignors. In Manila the liquidators, while allowing Gardner & Company and Galloway & Company the ranking already mentioned, refused to sustain any claim in respect of remittances sent by Martin, Dyce, & Company to Martin, Turner, & Company. On certain of the goods, for the value of which Gardner & Company and Galloway & Company were ranked in Manila, Martin, Turner, & Company had made cash advances to the extent of £234.

The Manila liquidation having only paid a portion of their claims, Messrs Gardner & Company and Messrs Galloway & Company claimed in the sequestration carried on at home, but their claims were rejected by the trustee, because they refused to give up to him the dividends obtained by them in Manila.

On 11th May 1889 the Sheriff-Substitute

(ERSKINE MURRAY) pronounced the following interlocutor:—"For the reasons assigned in the note annexed hereto, recals the deliverance of the respondent Anderson, Martin, Turner, & Company's trustee, in so far as it absolutely rejects the claim of the appellants the Clydesdale Bank; but sustains the same in so far as it is to the effect that the proper basis of settlement between the parties was, and still is, the agreement embodied in the letters of 5th and 6th March 1884 (quoted in his minute), however it may have been affected by the disturbing action of third parties; and that the object should be, in dealing with such matters as have been so affected, to bring about a result as nearly as may be the same as would have existed had such action never taken place: Finds (1) the appellants entitled to a ranking under their bills to the extent of the remittances received by the bankrupts on behalf of Messrs Galloway & Company and Gardner & Company, and not accounted for by them or the respondent to Messrs Galloway and Messrs Gardner or the Clydesdale Bank, being £1562, 9s. 6d., *plus* a ranking for £967, 19s. 2d., being a sum held for Gardner & Company and Galloway & Company by Martin, Turner, and Company's Singapore and Batavia branches, all whose assets were subsequently received by respondent, and which must therefore be held to be in the same position as the previous remittances: Finds (2) that in settlement the respondent will be entitled to set against any dividend to be paid by him under the above ranking the dividends received by the bank in respect of claims made by Gardner & Company and Galloway & Company at Manila, for the prices received for goods on which Martin, Turner, & Company had themselves made the £234 of advances referred to in the second letter of 9th March 1884: Finds (3) that the respondent is not in the circumstances entitled to demand that the appellants shall give up to him as a condition of a ranking the other dividends received by Gardner & Company and Galloway & Company out of the Manila estate in respect of claims which only referred to the Manila estate: Finds no expenses due to or by either party, and decerns.

"*Note.*— . . . . . A number of questions are thus raised:—

"1. What was the position of parties, apart from bankruptcy and the agreements at all? As to this, it is clear that Martin, Turner, & Company, being simply *del credere* agents, were bound to pay over to Gardner & Galloway the prices received for their goods, and not to mix them up with their own funds at all. Any such mixing was an improper act on their part, though as long as they remained solvent it was a matter of no importance. But they were not purchasers from Gardner or Galloway at all. When they received the prices they received them at the hands of Gardner & Company and Galloway & Company.

"2. What was the effect of bankruptcy apart from the agreements? As to this, it is also clear that the bank, as holders of the bills, were entitled to claim for them both on the estates of Gardner & Company and Galloway & Company, and those of Martin, Turner, & Company, till they had got twenty shillings in the pound. But practically they might have had much difficulty in getting possession of the unsold goods, &c., unless their way had been made easy by means of the agreement. And further, the bankruptcy undoubtedly made those funds of Gardner & Company and Galloway & Company, which Martin, Turner, & Company and Martin, Dyce, & Company had so mixed with their own funds as to be no longer distinguishable assets of the general estate, and not preferentially claimable by Gardner & Company and Galloway & Company. Whatever faults Martin, Turner, & Company and Martin, Dyce, & Company may have committed in mixing them up, the fact remains that they are mixed, and therefore all creditors alike had an equal claim on them along with the other assets.

"3. What would have been the result under the agreement, had the Manila complication not taken place? What was the result, in fact, that was contemplated at the time of the agreement? The bank would have got, whether from the East or from the trustee, the proceeds of the goods against which the bills discounted by them had been granted, whether sold or unsold at the date of sequestration, except in so far as these proceeds had been already remitted and were mixed up with the funds of Martin, Turner, & Company; while a difficulty, hardly contemplated under the agreement, would have arisen as regards funds mixed up in the colonies with Martin, Dyce, & Company's other funds, The reason of this not being contemplated was possibly, in part, the fact that though the agreement contained in the letters was made on the very eve of sequestration, sequestration had not yet taken place, and therefore Martin, Turner, & Company's obligation as yet remained intact, not merely to pay over moneys which had been kept apart but to separate those that had been mixed. The Sheriff-Substitute considers that as the trustee would have been unable to give up funds which had been mixed up with Martin, Turner, & Company's and Martin, Dyce, and Company's funds, whether at home or abroad, these funds, when so mixed abroad, would have fallen to be dealt with, under the letters, in precisely the same way as they would have fallen to be dealt with had they been mixed up after remittance home; that is, the bank would be entitled to claim for them (under the bills) in the same way as it would be entitled to claim for the remittances mixed up at home.

"The point arises whether under the agreement the bank's claim upon the bills would have been (1) a preferential one for the whole amount of the remittances and mixed funds; or (2) a claim for a ranking to the extent of the remittances and mixed funds; or (3) a claim for the total amount of the bills, on which however, they could not recover more than the total amount of the remittances and mixed funds, The second view, on the whole, seems preferable. It must be remembered that at the date of the agreements, as above remarked, though

Martin, Turner, & Company were on the eve of sequestration, they were not sequestrated; and so the agreements must be read on that footing. A claim on a firm for a certain amount does not necessarily imply more than a claim to rank for that amount if the firm is thereafter sequestrated. If the firm had been already sequestrated, the word might be interpreted to mean a claim in bankruptcy; but that was not the case. The only exception to this would have been the case of remittances in transit. These, as not mixed with Martin, Turner, & Company's funds were separable, and might be the subject of a preferential claim. As a matter of fact the trustee has acknowledged this by paying them over in full to the bank under the agreement.

"As regards the effect of the second letter granted by the bank's manager on 6th March, by which the bank agreed to account to Martin, Turner, & Company for the proceeds of goods shipped by Galloway & Company on which Martin, Turner, & Company themselves had made advances, which proceeds might reach them through Ker, Bolton, & Company, one or other of two results might have occurred had the Manila complication not taken place. Either the said proceeds, if not mixed with Martin, Dyce, & Company's other assets, would have been sent by Ker, Bolton, & Company to the bank, which would then have been accountable for them to the trustee under this letter; or, if mixed already, they would not have been paid to the bank, nor would the bank have been accountable for them, as the trustee would have got them along with Martin, Dyce, & Company's other assets.

"4. What was the necessary difference owing to the Manila complication between the condition of things in consequence arising, and that which would have existed had it been possible to carry out entirely the original agreement?

"It will be observed that by what happened at Manila the trustee was rendered unable to fulfil his engagements that the proceeds of goods sold but not remitted should be handed over to Galloway & Company and Gardner & Company, so far as regarded Manila and Ilo Ilo. No doubt it is true that nearly the same result, irrespective of the Manila complication, would have been brought about by the discovery that the Manila and Ilo Ilo funds were, as a rule, mixed in the same way as they had been mixed at home, and were therefore not transferable *in toto*. On the other hand, the bank was rendered unable to hand over to the trustee the proceeds of any of the goods on which the £234 had been advanced by Martin, Turner, & Company.

"5. In what way has the now existing condition of things been varied by the subsequent actings of parties?

"When the trustee proved unable to get hold of the Manila assets he not only sanctioned but encouraged claims being made at Manila by Gardner & Company and Galloway & Company, very properly, because such claims would necessarily relieve the creditors at home. These claims were sustained by the Manila liquidators to the goods unsold (preferentially), and for the value of the goods sold in the Spanish Colonies, of which the price had not been remitted as an ordinary claim. But these claims so sustained did not include any goods, or the price of any goods, either at home or in any other place than in Manila and Ilo Ilo. So they were by no means coextensive with the bills held by the bank, but only affected goods over which a portion of the bills had been granted. On the other hand, Gardner & Company and Galloway & Company claimed at Manila and drew dividends (which were handed over through Ker & Company to the bank), in respect of goods over which Martin, Turner, & Company had made the advances referred to in the second letter of 6th March.

"In other respects the agreement under the letters has been carried out by both sides. The goods unsold were transferred to Ker & Company or another firm on behalf of Gardner & Company and Galloway & Company, sold on their behalf, and the proceeds transferred to the bank. Dealers' bills that had been sent home in payment of goods sold were also handed over to the bank. Even remittances in transit were handed over to the bank by the trustee.

"Practically the result has been that what would naturally have formed one estate has been dealt with as two—the estate of Martin, Dyce, & Company in the Spanish Colonies, on the one hand, and the estate of Martin, Turner, & Company at home, and that of Martin, Dyce, & Company other than in the Spanish Colonies, on the other hand. On the former estate, Gardner & Company and Galloway & Company have claimed in respect of goods sold but not remitted, and the dividends got on their claims have been handed over to the bank. On the latter estate under the agreement, if it is still binding, the bank are only entitled to claim in respect of the remittances made to the home firm and funds mixed abroad which are exactly in the same position. Thus it will be seen that if the bank are allowed to claim to the above extent, they will not be as the creditors would have been in the cases of *Stewart* v. *Auld*, or the *Banco de Portugal*, ranked twice in respect of the same debt, or getting any funds whatever from two sources connected with the estate in respect of the same debt. They will have got Gardner & Company and Galloway & Company's dividend drawn out of the Manila portion of the estate in respect of part of the debt, the unremitted moneys, and will have ranked at Glasgow in respect of remitted moneys and funds mixed elsewhere than at Manila, besides getting all unsold goods and identifiable payments, such as dealers' bills or in transit.

"6. Thus it seems that the effect of the Manila complication has been that while in all other matters the agreement contained in the letters has been carried out, it has been found impossible to carry it out in its entirety as regards the Spanish Colonies, owing to circumstances over which neither

party had control. Does this, then, break down the agreement altogether, and nullify it? On the whole, the Sheriff-Substitute is unable to come to this conclusion. The parties acted on it as far as they could, and seem to have recognised it as binding, in spite of what was done at Manila. If, then, it is still binding, all that can be done is, as near as may be, to bring out the same results. It seems to the Sheriff-Substitute that the bank by accepting through Gardner and Galloway the dividends received by these firms from the Manila estate, are precluded from claiming on the home estate in respect of the same debt for which Gardners and Galloways claimed at Manila. They try to make out that these are entirely different funds belonging to Gardners and Galloways. But if the agreement is still binding, it seems to the Sheriff-Substitute that their acceptance of these funds seems to be equal to a renunciation in favour of the estate of any further claim in respect of the goods and moneys on which these dividends were given. On the other hand, it is contended by the trustee in debate (though the contention is inconsistent with his own deliverance), that the acceptance by the bank of these sums received by Gardner and Galloway bars the bank from their claim *in toto*, or at least renders it necessary that as a condition of ranking at home they should give up or credit Gardner and Galloway's Manila dividends. The point is one of considerable difficulty. In the case of *Stewart* v. *Auld*, July 10, 1851, 13 D. 1337, where concurrent bankruptcy proceedings relative to the same estate took place in Australia and Scotland, creditors who had ranked in Australia for their whole debt, and drawn dividends thereon, were not allowed to rank again and get another dividend for the same debt in the Scottish proceedings. In the English case of the *Banco de Portugal* v. *Waddell*, 16th March 1880, L.R., 5 App. Cases, 161, creditors who had claimed and drawn dividends on a foreign bankruptcy of traders who had carried on business at home and abroad, were held bound, before receiving any dividend when they claimed at home in respect of the same debt, to deduct the dividends received abroad. Manifestly such a rule is the only right and fair one for the interest of the creditors as a whole. But between these cases and the present there is, in the first place, the distinction that whereas in them the creditors had already been ranked for the whole debt abroad, in the present case the bank has only come into possession of dividends which were paid on part of the debt, which does not in equity exclude the idea of a ranking here for the rest of the debt. In the second place, it must be remembered that the bank cannot be considered to have ranked directly on any part of the bankrupt estate. No doubt the bank got from Gardner & Company and Galloway & Company the dividends which these firms had got out of the Manila part of the estate; but there is only an indirect and rather equitable than legal claim against the bank (as distinguished from Gardner and Galloway), for the refunding of these sums. If it be held that the bank got these dividends under the agreement, then it follows that they got them just in place of the full prices of goods which they were to have got under the agreement. On the other hand, it must be remembered than in equity Gardner & Galloway, and the bank through them, had a right not merely to demand all these dividends, but the whole proceeds of the goods in full, as Martin, Turner, & Company, who were only their agents, had no right to a single penny of them; and the other creditors, in getting dividends out of any of these proceeds, are really getting payment of debts due them by Martin, Turner, & Company out of funds which ought to have been, and really were (had they been distinguishable), funds of Gardner & Company's and Galloway & Company's, and not Martin, Turner, & Company's at all. The equity, therefore, against the bank's having to give up the sums which the two firms received as dividends seems, therefore, to balance entirely the equity in favour of the bank's having to give them up before getting a ranking for the remainder of the debt, the portion contemplated by the agreement as still claimable under the bills. But in the third place, it must be remembered that the trustee's deliverance is on the footing that the agreement is still good and binding. He cannot take up the opposite ground that it is null and ineffectual, and that parties must be held to their strict rights under the bankruptcy law, and that therefore, as in the case of *Stewart*, the bank's claim falls to be repelled in consequence of the previous ranking. This would be practically not to sustain but to upset his own judgment. On the other hand, to admit the claim to the extent contemplated in the agreement, subject, however, to the condition that the bank should first deduct all dividends received by Gardner & Company and Galloway & Company at Manila, would, it seems to the Sheriff-Substitute, be also contrary to the spirit of the agreement on which the trustee founds. For were those dividends to be deducted the bank would not under the agreement be getting anything in respect of what may be called the Spanish part of the debt at all. On the whole, therefore, for the above three reasons, the Sheriff-Substitute considers that he cannot compel the bank to throw into the general fund the sums received by them from Gardner & Company and Galloway & Company which these firms drew as dividends at Manila.

"An exception of course falls to be made in respect of the sums received by the bank out of the dividends drawn by Gardner & Company and Galloway & Company at Manila in respect of goods on which Martin, Turner, & Company themselves had made the £234 of advances. Under the spirit of the agreement they were bound to hand over these sums to the trustee, and there is no counterbalancing equity to justify them in retaining them.

"It seems therefore to the Sheriff-Substitute that on the above footing the agreement is still standing. The trustee is bound

to rank the bank as on an ordinary claim under their bills for the amount of the remittances, being £1562, 9s. 6d., *plus* the proceeds of goods falling under the bank's bills mixed up with Martin, Dyce, & Company's funds, other than those at Manila and Ilo Ilo, amounting to £967, 19s. 2d., as stated in the joint minute.

"On the other hand, the trustee will be entitled to credit, as against any dividend due under the above ranking, for the dividends received by Gardner & Company and Galloway & Company, and transferred by them to the bank, on the goods for which Martin, Turner, & Company's advances of £234 were made.

"In the divided result which has been arrived at neither party seems to be entitled to expenses."

Both parties appealed to the Court of Session.

Thereafter the bank amended their record and claim as follows—(1) They claimed not an ordinary but a preferable ranking for the amount of the claim as lodged. (2) They lodged a new affidavit and claim for the whole amount of the bills without deducting the proceeds of the goods sold which were received by them.

The trustee in answer denied the right of the bank to the preferable ranking claimed, but in the event of it being held that he had failed to implement the conditions specified in the letters quoted above, he offered to give the bank an ordinary ranking for the balance still due under the bills, only, however, on condition that they paid over to him the dividends they received from Manila.

Argued for the Clydesdale Bank—The bank were clearly entitled on the letters to the preferential ranking claimed. At the date of the letters neither Mr Anderson nor the bank could tell how the realisation of the goods sold abroad would turn out, and this introduced an element of transaction or compromise, and thus the preference conferred could not be termed an illegal preference. The agreement, looking to the time at which it was written, was neither *ultra vires* of a solvent firm to enter into nor *ultra vires* of the trustee to implement. The trustee recognised the letters, his deliverance being on the footing that they were binding. It was no good answer, if the agreement stood, to say that the proceeds of goods sold prior to the date of the letters had been mixed with the bankrupts' general bank account, for that general account showed a balance. Further, the moneys could be distinguished—*Macadam* v. *Martin's Trustee*, November 5, 1872, 11 Macph. 32. With regard to the Manila liquidation, what was recovered there was only the goods unsold, and a ranking on the proceeds of the goods sold, which distinguished the present from the case of *Stewart* v. *Auld*, July 10, 1851, 13 D. 1337. Besides, the bank recovered no dividend directly in Manila. What was there recovered was recovered by Gardner & Company and Galloway & Company. The bank was therefore under no obligation to hand over these dividends to the trustee. If the letters were set aside, the bank were entitled at common law to a ranking for the full amount of the bills, without any deduction in respect of securities or part payments elsewhere, provided they got no more than 20s. in the pound. The bank was not bound to hand over the Manila dividends—*Gibbs* v. *British Linen Company*, June 23, 1875, 4 R. 630.

Argued for the trustee—The bank's construction of the letters was erroneous. "Proceeds of goods" meant extant prices, not prices of goods sold, whether mixed with the general funds of Martin, Turner, & Company and Martin, Dyce, & Company or not. When an agent mixed up the prices of his principal's goods with his own assets, the principal could only rank after bankruptcy if the money was earmarked, and the Court could not unmix the funds unless (1) it was shown to have been the agent's duty to keep the funds separate, as in *Macadam's* case, (2) it was *de facto* possible. Neither of these conditions was present here—Bell's Comm. i. 284, 285 (7th ed.). The letters did not supersede the ordinary methods of bankruptcy law; all that they did was to facilitate those methods, and the trustee's construction has the advantage of agreeing with the common law rules for ranking creditors. If, however, the bank's construction were sound, the effect was to give the bank an illegal preference. Such an agreement could not bind the trustee, and the bank must fall back on its common law rights. But for the events which had occurred in Manila the bank would have been entitled to rank for the full amount of the bills. These events, however, made all the difference. The real claimants in Manila were the bank, who made use of the names of the consignors of the goods as the only way of obtaining the proceeds of goods in Manila, for the trustee's lien precluded independent action by the holders of the bills. For the dividends so obtained the bank must account before claiming in the sequestration. The fact that the bank's claim in Manila was only for a part of their debt did not take the case out of the rule of international law, that if a creditor got into his hands funds of the bankrupt in a foreign country he could not take advantage of a home sequestration unless he brought in the funds so obtained—Bell's Comm. ii. 376 (7th ed.); Westlake's Priv. Inter. Law, pp. 147-151; *Banco de Portugal* v. *Waddell*, March 16, 1880, L.R., 5 App. Cas. 161; *Wilson*, April 18, 1872, L.R., 7 Chan. App. 490. As the bank had obtained in Manila more than if they had been ranked for their whole debt at home, they were entitled to nothing more.

At advising—

LORD SHAND—The points to be determined in this case are (1st) for what amount are the appellants, The Clydesdale Bank, Limited, entitled to be ranked on the sequestrated estates of the firm of Martin, Turner, & Company, in respect of a number of bills which were accepted by that firm and afterwards discounted by the bank, who now claim as the holders of these

acceptances; and (2nd) whether it ought to be made a condition of any ranking by the bank that they should, in the first instance, pay over to the sequestrated estate certain sums obtained under a ranking in the liquidation of part of the bankrupts' estate situated in Manila, and which were remitted to the bank in the circumstances to be afterwards mentioned.

On the 29th of February 1884 Messrs Martin, Turner, & Company suspended payment. On 7th March thereafter the estates of the copartnership and of the individual partners were sequestrated under the Bankrupt Statute. Two days before the sequestration, viz., on 5th March 1884, the bank made an arrangement with Mr Anderson, who was then acting for the bankrupts and for certain of their creditors, with reference to such of the bills in the bank's hands as they had acquired from the drawers Messrs William Gardner & Company, Glasgow. That arrangement is embodied in a letter by Mr Cuningham, the general manager of the bank, addressed to Martin, Turner, & Company, dated 5th March, and quoted on the record (Cond. 5). On the following day a similar arrangement, embodied in two letters by Mr Cuningham to the bankrupts, dated 6th March 1884, was made with reference to the remaining bills, which form the subject of the bank's claim, and which the bank had acquired from Messrs William Galloway & Company, Glasgow, the drawers.

The arrangements embodied in these letters were entered into in the following circumstances—Messrs Martin, Turner, & Company, besides carrying on business in Glasgow, had also carried on business under the firm of Martin, Dyce, & Company in Batavia, Sourabaya, Singapore, Manila, and Ilo Ilo—the partners of both firms being the same—and for sometime before the bankruptcy of Martin, Turner, & Company Messrs Gardner & Company and Galloway & Company had been in use to consign goods to them for shipment to their foreign houses at each of the places now mentioned for realisation and return. The proceeds of the goods when sold and remitted to Martin, Turner, & Company were payable to the shippers, but under deduction of expenses, commissions, and advances. On the shipment of each parcel of goods it was the custom of Martin, Turner, & Company to grant their acceptances for a considerable proportion of the invoiced value of the goods, and in some cases to give advances in cash, and when the stoppage of the firm occurred a considerable number of transactions of this kind were unsettled. The acceptances which Gardner & Company and Galloway & Company had received had been, as already stated, discounted by them with the Clydesdale Bank. Certain quantities of the goods had been sold, and remittances on account of the prices of a part of these had been received by Martin, Turner, & Company from their foreign houses. Part of the prices, small in amount, was in the course of transit to this country, and part of the prices realised was still in the hands of the foreign houses unremitted. A large quantity of goods were still unsold in the hands of the firms abroad, and the value of these was considerable.

The bank and their customers Gardner & Company and Galloway & Company, on the occurrence of the bankruptcy of Martin, Turner, & Company, became anxious to make some arrangement by which these firms should acquire or resume the control of the goods which they had sent abroad for sale in so far as these were still unsold. This object they could not attain without the consent of Martin, Turner, & Company. That firm having made large advances on the security of the goods, were of course entitled to retain them and have them sold to recoup the advances, unless their acceptances were either cancelled or it was at least arranged that they should receive credit towards payment of the acceptances for the sums which might be realised from the goods, which practically they held in pledge, in the hands of their foreign houses. If Messrs Gardner & Company and Galloway & Company had still held the bills, the bankrupts would have been entitled, as a condition of parting with the control of the goods, to require that the bills should be cancelled and given up. The bills represented advances on security, and if the parties desired to get back the security they could only do so by giving up the acceptances. The shippers, though drawers of the bills, were themselves bound to pay any deficiency between the amounts realised for the goods and the relative acceptances.

The bills, however, had got into the hands of the bank as onerous purchasers, and the bank were in this different position, that they were entitled to demand payment of the bills from the acceptors even if the goods when realised fell short of the amounts in the acceptances. In a question between the bankrupt firm and the bank, the firm could only maintain their right to retain the goods for realisation in order that the proceeds should come into their own hands to be applied, so far as these proceeds would go, in meeting the bank's claims on the acceptances.

In this state of matters the arrangement made between the parties in regard to Gardner & Company's goods was expressed in the following letter (Cond. 5)—"By request of Messrs William Gardner & Company, wholesale umbrella manufacturers, Glasgow, we beg to state that upon condition of your transferring to them or their order the goods consigned by them through you, so far as unsold, and the proceeds of goods sold but not remitted for, we shall not claim against you upon the bills drawn against these consignments as enumerated in the subjoined list, except to the effect of recovering the remittances already in your hands or in transit." The list above referred to contained twenty-eight bills, amounting *in cumulo* to £7964.

A similar letter passed between the parties on the following day in regard to the goods of Galloway & Company, and as in that case the insolvent firm had made certain cash advances on goods shipped by Gallo-

way & Company, a further letter was granted. The first of these letters is substantially in the terms already quoted. The bills referred to in that letter were ten in number, and amounted *in cumulo* to £3740. The second of the two letters is as follows—"With reference to goods shipped through you by Messrs William Galloway & Company, and upon which you have yourselves given them cash advances, we hereby undertake to account to you for such proceeds of these goods as may reach us through the hands of Messrs Ker, Bolton, & Company, or whoever may transmit the same to us. . . . The goods against which you have made cash advances are described by you as follows,"—and there follows a list of shipments, the total values set against which are £614.

In regard to all of these letters it must be observed that if and in so far as the arrangements which the letters embodied could be regarded as of the nature of preferences in any way given to the bank or to Gardner & Company and Galloway & Company—that is, could be regarded as giving to them without due consideration any rights of value which they would not have acquired otherwise under the sequestration issued on the following day—these arrangements would be ineffectual, for although Mr Anderson, who was then acting for the bankrupts and certain of the creditors, was himself appointed trustee in the sequestration, he of course then came to represent the whole body of the bankrupts' creditors, with the right and duty of challenging any arrangement which gave a preference or undue advantage to any creditor on the eve of sequestration, even though he had been himself a party to the arrangement.

The effect of the letters by the bank's manager has formed the subject of much discussion both in the Sheriff Court and in the argument of the parties on their respective appeals to this Court. Both parties have maintained that the arrangements recorded in the letters support their respective contentions in regard to the bank's claims. It appears to me that in the circumstances which have occurred since these letters were granted the agreement or obligation which they embody has no material bearing on the judgment of the questions in dispute. The true importance of the letters, I think, now lies in this, that they account clearly for the actings of the parties in regard to the transfer and obligation of the goods abroad, and the remittances of so much of the prices as were in transit, and were afterwards received in this country, and explain the footing on which these actings took place. The legal rights of the parties, as these must now be determined, having in view the actings which took place, must, I think, depend not upon the special terms of the agreement or obligation which the letters contain, but upon the rules or principles to be applied in the bankruptcy in consequence of Martin, Turner, & Company having consented, at the intervention and request of the bank, as holders of the bills, to allow Gardner & Company and Galloway & Company to realise the goods which the bankrupts held as security to cover their acceptances.

The letters themselves bear to be written at the request of Gardner & Company and Galloway & Company respectively, and there is no doubt that the bank had the authority of both firms for intervening as they did. The only undertaking which the letters contain is one by the bank, and that undertaking or obligation is made subject to a condition. The stipulation is that upon condition of the bankrupts' transferring to Gardner & Company or their order, and Galloway & Company or their order, (1) the goods so far as unsold in the hands of the foreign houses, and (2) the proceeds of goods sold but for which the remittances had not been sent home, the bank undertook that they should not claim against the bankrupts upon the bills drawn against the consignments "except to the effect of recovering the remittances already in your" (the bankrupts) "hands or in transit." The obligation is one the effect of which was to limit the bank's claim in the sequestration; but the limitation of the claim was only to be made if the two conditions were fulfilled, viz., that Gardner & Company and Galloway & Company should at once acquire the control of their goods abroad so far as unsold, and that they should also have transferred to them the prices or proceeds of the goods which had been sold but not remitted.

It appears to me to be pretty clear that both parties to this arrangement proceeded upon the view that as the whole of Martin, Turner, & Company's transactions were those of agents only, who had themselves no property in the goods consigned, not only would the unsold goods admit at once of identification and of being handed over, but that the prices of goods sold but not remitted would be still extant, entered in a separate agency account in the books of the foreign houses, and laid aside and ear-marked so as to be at once separable from the general funds of those houses, in which case the legal right of the shippers of the goods would have entitled them to have the prices of their goods so specially laid aside and kept separate from the general funds of the houses paid over to them. Had this turned out to be the fact, there would have been no difficulty in carrying out the arrangement intended to be embodied in the bank's letters, and it could not have been said that any preference would have been thereby given to the bank, or to Gardner & Company and Galloway & Company. But the fact turned out to be otherwise. Messrs Gardner & Company and Galloway & Company no doubt obtained possession of the whole of the goods so far as unsold through their new agents, who acted also so far in the interest of the bank in making remittances directly to them. The proceeds have been realised, and under the arrangement which they made with the bank were remitted directly to the bank. But they were unable to obtain the prices of the goods sold but not remitted in the hands of the foreign houses, because these funds had not been kept on

any separate account but had gone into the general funds of the different houses. After the bankruptcy, therefore, the only claim that could be maintained was for a ranking on the general estate, and not for payment preferentially of a fund set aside by the bankrupts' foreign firms as belonging specially to the consigners of the goods.

The result of this was, that while on the one hand the bankrupts fulfilled one of the conditions expressed in the bank's letters, viz., the transfer of the goods still extant, neither they nor the trustee in the sequestration were able to fulfil the other condition, viz., to pay over the proceeds of goods which had been sold but not remitted for. In this state of matters it follows that the obligation upon the bank to restrict their claim cannot be held to arise expressly under the terms of these letters; and therefore it is that, as I have already said in my opinion, the letters have not in this question the force of obligation, although the terms in which they are expressed, and the actings of the parties following on them, have an important bearing on the legal rights of the parties on the question as to the extent to which the bank is entitled now to be ranked on the bills which they hold. I think it right to observe in passing, although it is not necessary in the circumstances to decide the question, that if the words at the close of the bank's letters, "We shall not claim against you upon the bills drawn against these consignments . . . . except to the effect of recovering remittances already in your hands or in transit," could be held to mean that the bank—notwithstanding of their having induced the bankrupts to part with the goods which they held in the hands of their foreign firms as a cover for the bills, and of the bank having in this way obtained the proceeds of sale—should still be entitled to rank upon the full amount of these bills "to the effect of recovering remittances already in your hands or in transit." I should hold that this would have been giving the bank a preference which could not be maintained. It appears to me to be clear that in so far as the bank acquired from the bankrupts a right to take possession of goods which they held as a security for the bills, the bank could only obtain that right on the condition of crediting the prices of goods received in reduction of the amounts of the bills, and ranking only for the balance. It may be that this was really the intention of parties, but if so, the expression used was certainly not well chosen.

The bank in the Court below maintained that they were entitled to an ordinary ranking in terms of their affidavit and claim, and their claim was framed on the footing that on the one hand they debit the bankrupt estate with the amount of the different acceptances held by them, and on the other credit the whole of the sums received on account of goods of Gardner & Co. and Galloway & Co. sold after the arrangement of 5th March 1884, as well as certain small sums received from the trustee in the sequestration as the proceeds of goods sold which were in transit when that arrangement was made. These sums having, it appears, been earmarked as the proceeds of particular goods, were kept separate from the general bankrupt estate and handed to the bank. It is explained by Mr Harvie, the bank's secretary, in his evidence, that "in some cases the money that came home was sufficient to pay the bill, and in those cases the bill does not appear in our claim at all."

At the close of the argument on the appeal the bank amended their record and claim. In the first instance they there claimed not an ordinary ranking but a preferable ranking for the amount of their claim as lodged with the trustee. Thereafter they lodged a new affidavit and claim in which they claim to have a ranking for the whole amount of their bills without crediting the proceeds of the goods sold and received by them.

The trustee, on the other hand, maintained in the first place that there is no legal ground on which this last amended claim can possibly be sustained; secondly, that there is equally no ground for any preferable ranking, and that to whatever extent, if any, the appellants' claim can be maintained it should be to an ordinary ranking only; but thirdly, that the claim is altogether excluded—(first) because of the arrangement embodied in the letters of 5th and 6th March 1884, and (second), because the bank refuses to hand over to the trustee in the sequestration a considerable sum which was received in Manila under the liquidation there of the foreign firms on account of the prices of goods of Gardner & Company and Galloway & Company, which had been received by the foreign firms but not remitted to this country—the trustee maintaining that it is a condition of the bank's right to rank that they should communicate to the bankrupt estate the benefit which they received by the remittance to them of the Manila dividends.

The Sheriff-Substitute in disposing of the bank's original claim has sustained it in part only. His Lordship has held that the bank is entitled to rank on the bills (1) in respect of the sums which had been received by the bankrupts in this country as the proceeds of goods remitted but not paid over to Gardner & Company and Galloway & Company, and (2) in respect of the proceeds of goods belonging to those firms which had been sold by the bankrupt's houses at Singapore and Batavia, but which had not been remitted to this country. He has disallowed the claim *quoad ultra*, and so has not held the bank bound to give credit for the sums received on account of the goods sold since the bankruptcy, excepting the sums received for goods on which the bankrupts had made cash advances to the extent of £234, as to which the bank's obligation in the letter specially referring to these goods is most comprehensive.

I am of opinion that the bank's claim as originally presented was framed in accordance with sound principle, and that

that claim ought in substance to be sustained. It may be that the figures are quite accurate, and in accordance with the view I am now about to state, and if so, then I think the trustee's deliverance and the Sheriff-Substitute's judgment should be recalled and a remit made to the trustee to sustain the claim made. But the parties may desire to be heard in regard to the precise details of the figures if they should not agree as to the amount. It appears to me that the bank as the holders of the bankrupts' acceptances are entitled to rank for the amount of these, but only under deduction of all sums which they have received as the proceeds of the goods of Gardner & Company and Galloway & Company, which the bankrupts and Mr Anderson as representing them agreed to transfer to Gardner & Company and Galloway & Company on the 5th and 6th of March 1884. I am of opinion that there is no ground either for giving the bank a preferable claim over the bankrupts' estate to any extent, or for sustaining their new claim, which does not credit the proceeds of the goods sold after the bankruptcy; and finally, I am of opinion, for the reasons to be immediately stated, that the bank is not bound to communicate to the sequestrated estates the dividends which were received from Manila in respect of the goods which had been sold before the bankruptcy, but for which remittances had not been made to this country.

One thing appears to me to be abundantly clear, and that is, that the bank cannot take benefit from the prices of goods which they, as holders of the bankrupts' acceptances, induced the bankrupts to part with or transfer to Gardner & Company and Galloway & Company on the eve of bankruptcy in order that these prices should be remitted to them, without giving credit for these prices to the bankrupt estate in reduction of the bills on which they now seek to rank. The bankrupts had a good title to these goods as a security against their liability on the bills, and had possession of the goods in pledge at the time of their declared insolvency, and when their estates were about to be sequestrated. They had the right to hold these goods until they received their value, so as to recoup themselves for their liability under the advance bills which they had accepted. If they had given up these goods without consideration this would have been a clear preference in favour of the party to whom they were so given up, and the bank's last claim is simply an attempt to get such a preference. In the arrangements of 5th and 6th March it was plainly contemplated that the bankrupt estate should get credit for the value of these goods as they should be realised, and although the arrangement was not carried out so as to create in terms the obligation which the bank undertook, it is clear that they cannot retain an important advantage obtained without valuable consideration in the circumstances. The bank came forward obviously for the protection of their own interests to secure in reduction of the bills they held the value of the goods when sold. They must credit that value to the bankrupt estate, which could only legally part with the goods on condition of obtaining credit for their value, and indeed it was only because the bankrupts understood that such credit was to be given that they agreed to the arrangement, as appears sufficiently on the face of the letters. As already mentioned, in some cases the value of the goods realised was equal to the amount of the particular bills for which the goods were held in security. In such cases the bank have excluded the bills altogether from their claim. If in any case the prices realised exceeded the amount of the bills, the surplus ought, I think, to be credited and deducted from the claim. The transactions are not to be treated as if each were a separate and isolated dealing, but as all forming part of one general arrangement and system.

I have never been able to see any ground on which the bank could maintain the claim made in this Court for the first time, to a preferable ranking, and no intelligible argument was stated in support of that claim. If indeed it could have been shown that the bankrupts not only kept a separate agency account for the transactions of Gardner & Company and Galloway & Company, but that the funds realised for the goods of the firms had been kept separate and distinguished from the general funds of the bankrupts, and were still extant, there would have been room for that claim. In the joint minute of admissions for the parties, however, it is expressly stated in articles 1 and 3 that the proceeds of the goods sold from time to time were mixed with the general funds of the bankrupts. It is clear that when their insolvency occurred they had no separate funds extant, and the evidence of various witnesses makes it further clear that there never was any separation of accounts and funds such as would warrant a claim, for payment preferentially of a particular fund outstanding and earmarked, which the bankrupts held as agents only. The appellants were right therefore in the view which they originally took in claiming not for a preference but for an ordinary ranking.

For the reasons already fully stated the new claim in which the appellants ignore altogether the proceeds of the goods, with the control of which the bankrupts parted on the eve of bankruptcy, is equally untenable. To sustain the claim to this extent would be simply giving them an unwarrantable preference—a preference which the bank would in that case obtain by having induced the bankrupts to enter into the arrangements of 5th and 6th March 1884.

With regard again to the contention of the trustee, I can see nothing in the arrangements of 5th and 6th March which can bar the bank from making the claim to an ordinary ranking on the bankrupt estate. The trustee was unable to fulfil in all respects that particular condition whereby the bank's obligation as expressed in the letters would have been enforceable, and he can therefore only plead that the ordinary

rules in bankruptcy shall be applied in dealing with the claim.

Finally, I am of opinion that no difficulty arises in the case from what has been called in the argument "the Manila complication." What occurred in Manila was this. The creditors there, acting on their view of Spanish law, maintained their right to retain the bankrupt estate in as far as found in Spanish territory for payment of the obligations of creditors who could qualify claims properly affecting that estate. Messrs Gardner & Company and Galloway & Company claimed in the Manila liquidation for the amounts of the prices of the goods which had been sold but not remitted by the Manila houses to this country, and the liquidators there sustained these claims, which yielded dividends of 40 per cent. A farther claim for the moneys which had been remitted to this country, but which had not been paid to Gardner & Company and Galloway & Company was disallowed, as not being within the class of claims for which the funds of the bankrupts in Manila were deemed liable. The dividends received from Manila were remitted to the bank, and I think it appears to be clear that this was done under an understanding and arrangement made by them with the bank as their creditors. This was not however in any sense a ranking by the bank on the funds in the Manila liquidation. The bank had no title to make the claim, for their claim arose merely from the possession of the bills, and their only right was to enforce payment of the bills. They had no right in themselves to demand in the liquidation the proceeds of the goods which belonged to Gardner & Company and Galloway & Company. The case was simply that of Gardner & Company and Galloway & Company obtaining from their debtor the liquidators in the Manila liquidation the debt or dividends due to them, and when the money was obtained paying the bank sums to account of its claim against them. The bank on the other hand merely received payments from its debtors Gardner & Company and Galloway & Company to account of their debts.

Accordingly there is no room for the application of the principle in bankruptcy to which the trustee in the sequestration appealed in the argument—the principle, viz., that where a claimant in a sequestration seeks to have his claim ranked he must communicate to the sequestrated estate the benefit of any ranking which he has obtained elsewhere on the bankrupt's estate, in another country where part of that estate is administered. That principle no doubt does apply in the case of Gardner & Company and Galloway & Company, and accordingly the trustee rejected certain claims by them because they declined to communicate the dividends which they had received abroad. The bank did not receive these dividends as dividends on any claim which they had made in Manila, but only as payments to account by Gardner & Company and Galloway & Company's debts to them.

If it had appeared or could be shown that the bank had derived its right to the money which was obtained in Manila and paid to them by virtue of any right belonging to the sequestrated estate surrendered by the bankrupts on the eve of liquidation, there would have been room for holding that the bank must give credit for the sums so received in reduction of its claim. It might then be said that the bankrupts were not entitled to surrender a valuable right except for value, and that such value should be given by a deduction from the bank's claim. But there is nothing in the arrangement which can support the view that the bank, or even Gardner & Company and Galloway & Company, in any way obtained right from the bankrupts or the trustee to rank in Manila for the proceeds of goods which had not been remitted from abroad. On the contrary, from the evidence and documents in process it seems to be clear that if the trustee in the sequestration had in any way or on any ground maintained right to a share of the funds in Manila, his claim would have been at once repelled, and anyone claiming through him would have been in the same position.

On these grounds I am of opinion that the judgment of the Sheriff-Substitute and the deliverance of the trustee should be recalled, and that a remit should be made to the trustee in the sequestration to sustain the claim of the appellants the Clydesdale Bank, Limited, to the extent and effect which I have already indicated.

LORD ADAM and the LORD PRESIDENT concurred.

LORD M'LAREN was absent.

The Court pronounced this interlocutor, which was signed on January 14th and issued on March 11th:—

> "The Lords having heard counsel for the parties in support of their respective appeals against the interlocutor of the Sheriff-Substitute of 11th May 1889, recal said interlocutor, and recal also the deliverance of the late William Anderson, trustee on the sequestrated estate of Martin, Turner, & Company, merchants in Glasgow and elsewhere, dated 22nd February 1888: Find that on 29th February 1884 the said company of Martin, Turner, & Company suspended payment, and a few days thereafter, viz., on 7th March 1884, their estates were sequestrated by the Sheriff of Lanarkshire: Find that at the date of their stoppage and bankruptcy, Martin, Turner, & Company were in possession, by the hands of their Manila and Singapore branches or firms, of certain quantities of goods which had been consigned to them for sale by Messrs William Gardner & Company and William Galloway & Company, both of Glasgow, and which goods Martin, Turner, & Company held in pledge as a security for the repayment of certain advances, and the payment of certain acceptances granted by them to Gardner & Company and Galloway & Company,

and which acceptances had been discounted by these firms as the drawers thereof with the claimants and appellants the Clydesdale Bank, Limited: Find that after the declared insolvency of Martin, Turner, & Company, the claimants and the said Gardner & Company and Galloway & Company became desirous of obtaining the control of the said goods with a view to the sale thereof to the best advantage, and that the claimants, the said bank, on the eve of the sequestration of the estates of Martin, Turner, & Company, as the holders as aforesaid of the said bills accepted by Martin, Turner, & Company, induced them to agree to allow the said goods to be transferred to Messrs Gardner & Company and Galloway & Company in order that the prices thereof should be received by the said bank and placed to the credit of the said bills, so as to reduce the liability of Martin, Turner, & Company to that extent as acceptors thereof, and on the understanding that the prices thereof should be applied accordingly: Find that the goods were transferred accordingly and were thereafter sold, and the prices thereof were remitted from abroad to this country and received by the claimants the said bank: Find, in respect of said understanding, and in respect also of the ordinary rules of bankruptcy, that the claimants, the said bank, in making their claim on the sequestrated estate of Martin, Turner, & Company in respect of the said bills, are bound to give credit as a deduction from their claim for the prices realised for said goods transferred by the bankrupts on the eve of bankruptcy as aforesaid, as well as the payments made by the trustee on the sequestrated estate to the bank on account of remittances in transit to the country when the bankruptcy occurred: Find that the claimants have failed to show any ground in support of a claim to a preference on the sequestrated estate: Remit to the trustee to give effect to the judgment now pronounced by ranking the claimants and appellants, the Clydesdale Bank, Limited, as creditors on the sequestrated estates of the said Martin, Turner, & Company and individual partners in terms of the affidavits and claims, Nos. 51 and 52 of process," &c.

Counsel for the Clydesdale Bank—Sir C. Pearson—Ure. Agents—Ronald & Ritchie, S.S.C.

Counsel for Martin, Turner, & Company's Trustee—Lord Adv. Robertson, Q.C.—W. Campbell. Agents — Webster, Will, & Ritchie, S.S.C.

Wednesday, March 12.

FIRST DIVISION.

(Before Seven Judges).

[Sheriff of Argyllshire.

NEILSON *v.* WILSONS.

Process—Joint and Several Obligation—Illiquid Claim—Constitution.

Where a plurality of persons are alleged to be bound jointly and severally in a debt or obligation which has not been constituted by writing or decree, the whole *correi debendi* subject to the jurisdiction of the courts of the country must be called in any action to enforce payment or performance.

In an action brought by an agent in a Debts Recovery Court concluding against three defenders jointly and severally for payment of the amount of an open account, one of the defenders was resident outwith the jurisdiction of the court, and the summons was not executed against him.

Held, by a majority of Seven Judges (Lord President, Lord Justice-Clerk, Lords Rutherfurd Clark and Adam—*diss.* Lords Shand, Young, and M'Laren), that it was necessary for the pursuer to constitute the debt against all the alleged joint and several obligants before proceeding to enforce payment against any one of them, and action *dismissed.*

Opinion (*per* Lord Rutherfurd Clark) that the rule should not be enforced in cases brought in a Sheriff Court for sums under £25 when one of the co-obligants was resident outside the jurisdiction of the Court.

This action was raised in the Debts Recovery Court of Argyllshire by Thomas Neilson, writer in Glasgow, against John Wilson, resident in Glasgow, and Thomas and Isabella Wilson, resident in Dunoon. The summons set out that the defenders "all jointly and severally, or severally defenders," were owing to the pursuer the sum of £25, 2s. 7d. on open account annexed thereto, and that they should be decerned and ordained, jointly and severally, to make payment to the pursuer.

John Wilson being resident beyond the jurisdiction of the Court, the summons was not executed against him, nor was he competently made in any way a party to the action.

Thomas Wilson pleaded—"(1) Incompetency in respect of no jurisdiction. The defender John Wilson resides in Lanarkshire, and has no place of business in the shire of Argyll. (2) No process, in respect the summons does not bear to have been served against the whole defenders. (3) Admitted that the defender employed the pursuer in the dispute between him and his son Aird Wilson, but the account is overcharged, and this defender is entitled to get credit for the proceeds of the sale of