performed as housekeeper for her grandfather she was to receive no money (except to the extent of 2s. 6d. or 3s. weekly of pocket money) but money's worth, and that the total amount of the remuneration which she was to receive came to 20s. or 22s. 6d. weekly. It is not found in so many words that the services which she rendered were equivalent in value, but I think it is fair from the way in which the fifth finding is expressed to conclude that she was giving a *quid pro quo*.

In these circumstances I think there was evidence upon which the arbitrator was entitled to come to the conclusion which he did.

LORD SKERRINGTON—I agree with Lord Mackenzie. The appellant's senior counsel perilled his case upon his ability to demonstrate that the facts which the arbitrator has found proved did not entitle him to come to the conclusion that the appellant's services to her grandfather were rendered under a contract. In my judgment the arbitrator was amply justified in drawing that inference from the facts set forth in the fifth finding. If so, the appeal fails, and the cases of *Moyes* v. *Dixon* (1905, 7 F. 386, 42 S.L.R. 319) and *Simms* v. *Lilleshall Company* ([1917] 2 K.B. 368) have no application.

LORD CULLEN—I think that the findings in the Stated Case disclose a contract of service between the deceased and the appellant, with the result that the appellant, in so far as not dependent upon her father, was dependent upon her own earnings under that contract.

The Court answered the question of law in the affirmative.

Counsel for the Appellant—Morton, K.C. —James Stevenson. Agent — John Baird, Solicitor.

Counsel for the Respondents—D. Jamieson. Agents—Drummond & Reid, W.S.

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*Wednesday, December* 3.

## FIRST DIVISION.

[Lord Blackburn, Ordinary.

## MUNRO AND OTHERS *v.* ROTHFIELD.

*Contract — Bankruptcy—Illegal Preference — Pactum illicitum — Insolvent Debtor Arranging to Make Payments in Full to Certain Creditors.*

A consciously insolvent debtor made an agreement with certain of his creditors, who also knew him to be insolvent, whereby he undertook to set aside not less than £300 out of his income to pay their debts by instalments, and they undertook to the debtor and to each other to refrain from enforcing their claims so long as the £300 was paid. One of the creditors who signed the agreement, unknown to the other parties to the agreement, obtained from the debtor a letter to the effect that if the agreement referred to was concluded he would pay that creditor's debt which was scheduled to the agreement by larger instalments and at shorter intervals than the debts would be paid under the agreement. The debtor did not obtemper the letter, but he did obtemper the agreement and made payments under it to all the parties to it. The creditor to whom the letter was granted brought an action founding on the non-implement of the letter and obtained decree in absence in the Sheriff Court against the debtor, upon which the creditor charged. Thereafter the creditor received and kept further payments under the agreement. In a suspension of the Sheriff Court decree and charge brought by the debtor and the other parties to the agreement against the creditor to whom the letter was granted, *held* (*rev.* Lord Blackburn) (1) that the agreement, while it might constitute an illegal preference and be reducible at the instance of a qualified creditor or a trustee in bankruptcy, was not *ipso facto* null and void as being *pactum illicitum;* (2) that no other ground of illegality having been pleaded, the parties to the agreement were entitled to found upon it and were bound by it; (3) that the Sheriff Court proceedings and their consequents were in breach of the agreement, and the decree and charge *suspended.*

Charles John Munro, C.A., Edinburgh, as trustee for certain creditors of a debtor under a minute of agreement of May 1918, and James Bruce, S.S.C., as onerous assignee of certain creditors of the debtor who were parties to the minute of agreement, in and to their claims against the debtor and their rights present and future under the minute of agreement, and the debtor, were *complainers* in a note of suspension against Henry Rothfield, financial agent, 201 Buchanan Street, Glasgow, *respondent*, in which the complainers sought suspension of a decree obtained in the Sheriff Court at Edinburgh against the debtor at the instance of the respondent dated 18th October 1918 and of the charge thereon.

The *minute of agreement* of May 1918 provided, *inter alia* — "(*Second*) The first party [the debtor] hereby binds and obliges himself, his executors and representatives whomsoever, to pay the said scheduled debts by instalments, and for that purpose to provide and set aside out of his income a sum of not less than Three hundred pounds per annum, and to pay and authorise that amount to be paid over at intervals of not exceeding three months or thereby, to begin as at thirtieth June Nineteen hundred and eighteen, and that to the third party as his attorney, for proportionate equal division amongst the second parties [the money lending creditors] hereto until the whole scheduled debts are paid, as also the whole expenses of executing these presents, including adequate remuneration to the third party [Charles John Munro] for his trouble and outlays and other disbursements he may, in his discretion, have to make in

connection with the premises in any way whatever. (*Third*) To enable the third party to uplift the said sum of Three hundred pounds which he shall be entitled to do without reference to the first party, and to do whatever may be necessary in addition thereto to give effect to the provisions of the immediately preceding article hereof, the first party shall, of even date with his execution of these presents, grant a power of attorney by him in favour of the third party authorising him to uplift from His Majesty's Treasury, or from whoever pays or may have to pay same, the first party's whole salary . . . and that quarterly or otherwise as the said salary becomes due and payable, and to apply same primarily for the purposes of these presents, and to pay the balance to the first party, or otherwise to apply same on his the first party's instructions. The said power of attorney shall be irrevocable so long as any part of the obligations of the first party hereunder remain unfulfilled and undischarged to any extent. Further, in the event of the death of the third party, or of his ceasing for any cause or reason to act under the said power of attorney, it is agreed that the first party shall grant a power of attorney, in similar terms and to the same effect to the said power of attorney in favour of the third party, in favour of the nominee of a majority in value of the second parties. (*Fourth*) As a security *pro tanto* for implement of these presents by the first party, he hereby dispones and conveys to the third party his whole estates and effects, heritable and moveable, of every description, including his household furniture, plenishings, and effects, with power to the third party to enter into and take possession of the whole of the said estates if and when he in his the third party's own sole discretion may think proper to do so. . . . (*Seventh*) Nothing herein contained shall import a departure by the second parties or any of them, or a discharge by them or any of them, of their or any of their said scheduled debts until the same are fully paid, the whole claims for which, so far as outstanding from time to time remaining—subject to the provisions hereof — enforceable by all legal process and diligence: But declaring that so long as the said sum of Three hundred pounds per annum is paid by the first party in terms hereof, the second parties hereby bind and oblige themselves to refrain from enforcing their respective claims: And in the event of any failure on the part of the first party to implement his part under these presents, or it becoming impossible, through the death of the first party or from any other cause whatever, for him to carry out and implement the provisions otherwise of these presents to be carried out and have full effect given thereto, the second parties and each of them shall have full power to enforce their respective claims by all legal process and diligence against the first party, his representatives and estate. Upon completion of these presents and of the said power of attorney all actions at present pending at the instance of any of the second parties, including the application at the instance of Henry Rothfield, Two hundred and one Buchanan Street, Glasgow, for sequestration of the first party's estates, shall be withdrawn."

The *schedule of debts* appended to the minute of agreement contained the following:—"6. Mr Henry Rothfield, registered moneylender, 201 Buchanan Street, Glasgow, £250."

On 28th March 1918 the debtor wrote the following *letter* to the respondent — "To Murray Oliver, Esq., Solicitor, Edinburgh. . . . Edinburgh, 28*th March* 1918. *H. Rothfield.* Dear Sir—I beg to confirm in writing the arrangement regarding this claim. 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."

The *procedure* prior to the stage of the case which is the subject of this report was —The respondent brought an action in the Sheriff Court at Edinburgh against the debtor and alleged that he had been induced to sign the minute of agreement by the granting of the letter above referred to; that he had received £12, 10s., but that the first instalment under the letter was £83, 6s. 8d. and had not been paid, and he concluded for £70, 16s. 8d., the difference between the instalment due and the sum paid. He obtained decree in absence on 18th October 1918 and charged thereon. The debtor brought a note of suspension, which was refused in the Bill Chamber. The debtor reclaimed, and in the Inner House the other complainers lodged minutes craving to be sisted as parties to the cause. The Court sisted the minuters, and allowed them to incorporate the averments in their minutes in the statement of facts attached to the debtor's note of suspension. Thereafter the Court recalled the interlocutor of the Lord Ordinary on the Bills (Blackburn) refusing the note, and remitted the cause to him to continue the sist and pass the note. The note having been passed a record was made up.

In the record the *averments* of parties were — "(Stat. 1) On 9th October 1917 the [debtor] granted to the respondent, who is a moneylender, a bill for £250 payable on demand, in consideration of advances made by the respondent to the [debtor]. (*Ans.* 1) Admitted. (Stat. 2) In February 1918 certain moneylending creditors of [the debtor], including the respondent (who afterwards all became parties to the agreement after mentioned), were pressing the [debtor] for payment of various sums due to them, amounting *in cumulo* to about £1200. The [debtor] was unable to pay their claims and was insolvent, and was aware of his insolvency. Said creditors were also aware of his insolvency. In point of fact the respondent on 20th February 1918 presented a petition in the Bill Chamber for sequestration of the [debtor's] estates, in which he averred that the [debtor] was notour bankrupt. Protracted

negotiations took place between said creditors and the [debtor] with a view to making an arrangement with him under which the claims of said creditor[s] would be satisfied and sequestration of the [debtor's] estates obviated, sequestration being greatly to the disadvantage of all concerned, and in the end the minute of agreement was entered into. Said negotiations took place throughout on the footing that under any arrangement that might be come to all said creditors would receive equal treatment, and that no one of them would obtain a preference over the others. The respondent was at first unwilling to enter into any arrangement, but ultimately agreed to the arrangement set forth in said agreement and was a signatory thereto. The agreement was drafted by his agents Messrs Clark & Macdonald. Although the minute of agreement was not completely signed until 29th May 1918, the terms of the draft were finally adjusted at a meeting of the agents for the various creditors who were parties to it held in the complainer Munro's office on 25th March 1918. By said agreement the [debtor] agreed to set aside in the hands of the complainer C. J. Munro from his income the sum of £300 per annum for payment of the claims of his said creditors, and said creditors, including the respondent, bound and obliged themselves so long as the said portion of the said complainer's income was paid by him in terms of the said minute to refrain from enforcing their respective claims. The debts for the payment of which provision was made in said minute of agreement, which were enumerated in the first schedule thereto, included the debt of £250 due by the [debtor] to the respondent, in consideration of which the before-mentioned bill for £250 had been granted by the said complainer. (*Ans.* 2) The said minute of agreement is referred to for its terms. Reference is expressly made to the admission of the complainers that at the time when the said minute was prepared and executed they were aware of the insolvency of the debtor. Admitted that certain negotiations took place which ultimately led to the signing of said agreement on 29th May 1918. Reference is made to answer 5. Admitted that the respondent at one time presented a petition for sequestration of the estates of the [debtor], which petition was subsequently withdrawn. The process in the said sequestration petition is referred to. Not known and not admitted that any of the moneylending creditors (other than the respondent) were pressing for payment at the date referred to. *Quoad ultra* denied. (Stat. 3) The said minute of agreement which is referred to contained, *inter alia*, the following clause, viz.—'*Seventh*. . . . *v. supra* . . .' (*Ans.* 3) Admitted under reference to the said minute of agreement for its terms. Explained that at the time when the said minute of agreement was executed there were numerous creditors of the [debtor] who were not parties to the agreement and whose claims are still outstanding. . . . (Stat. 5) Recently the complainers Bruce and Munro have ascertained, and it is averred, that while said negotiations were in progress the respondent and his said agents in breach of good faith pressed the [debtor] to grant additional bills to the respondent without consideration so as to give the respondent an unfair advantage over the said other creditors. The [debtor] refused to do this, and the respondent and his said agents then in breach of good faith, and while said negotiations were still in progress, pressed him to enter into a secret arrangement under which the respondent would obtain a fraudulent preference over said other creditors, and ultimately induced him, representing to him that the undertaking therein contained would not be put into force against him, to write a letter to the respondent's agent in the following terms:—'. . . [*The letter is given supra*] . . . .' At the instigation of respondent's said agents the said letter was addressed to Murray Oliver, Esquire, solicitor, Edinburgh. Mr Oliver was then a clerk in the office of respondent's said agents, and is acting as the agent for the respondent in these proceedings. The arrangement set forth in said letter has all along been concealed from the said other creditors of the [debtor], and constitues a fraud on their rights and the rights of the complainer James Bruce as assignee of Messrs Finklestone and is not enforceable. Further, under said agreement the respondent bound himself to withdraw the said petition for sequestration of the [debtor's] estates, but in breach of said agreement he failed to do so. It was only on 8th February 1919, after a minute had been lodged for the complainer James Bruce in the sequestration process, that the petition was dismissed. Further, while the said Clark & Macdonald were through their clerk the said Murray Oliver acting for the respondent in this action, they were at the same time acting as agents for the [debtor] in an action against him at the instance of his sister-in-law, which is at present depending before the Court of Session in the Outer House. The [debtor] on 25th January 1919 wrote a letter to the said Clark & Macdonald recalling his mandate to them to act for him. By the said letter of 28th March 1918 the respondent obtained an undertaking that the debt due to him would be paid at an earlier date than the debts due to the other creditors who were parties to said minute of agreement. The said undertaking constituted an illegal preference in favour of the respondent, and was obtained by him as a consideration for his accession to said minute of agreement. The averments of the respondent in answer in so far as not coinciding with the complainers' averments are denied. (*Ans.* 5) The relations between the [debtor] and the firm of Clark & Macdonald are not known to the respondent. The process in the depending action at the instance of the said complainer's sister-in-law is referred to. *Quoad ultra* denied. Explained that said letter of 28th March, which is produced herewith and referred to, was voluntarily offered by the [debtor] to the respondent as an inducement to him to become a party to the said minute of agreement. This at first he refused to do, as he was in need of the amount due to him by the [debtor] and

intended to press for payment. It was only on the repeated and urgent requests of the [debtor], and on the express understanding that the undertakings contained in said letter would be implemented, that the respondent ultimately did agree to sign said agreement. The said agreement, to which only a selected class of the [debtor's] creditors were parties, was an unlawful agreement in so far as it purported to confer rights upon creditors who became parties thereto in the knowledge of the insolvency of the debtor. The respondent is not and was not at the date when he signed the said agreement aware that the [debtor] is or had at any time been insolvent. Had the [debtor] been insolvent at the date of the execution of said agreement that fact ought to have been narrated therein and made known to the respondent in this or some other manner. It is expressly denied that it was ever represented to the [debtor] that the undertaking contained in said letter of 28th March 1918 would not be put in force, and he is called upon to aver specifically when and by whom such representation was made. Explained further that from the outset Messrs Clark & Macdonald have consistently declined to have anything to do with the arrangement come to between the [debtor] and respondent or to take any part in the proceedings on behalf of the respondent, and the respondent believes that they were not at the time aware that any additional bills had been asked for. In point of fact the actual terms of said letter of 28th March 1918 were unknown to the said Clark & Macdonald until quite recently. It is believed that the said Clark & Macdonald, on being informed by the [debtor] of the exact terms of the said letter, advised him to place the position of matters before Mr Munro, and it is believed that he did so. The said Murray Oliver, who has all along conducted these proceedings on behalf of the respondent, carried on business as a solicitor for himself for several years at his office, No. 53 Frederick Street, Edinburgh, until Whitsunday 1918, when he transferred his said business to the office of Clark & Macdonald, and conducted it, still on his own behalf, from there. Since March 1916 he rendered certain professional assistance to the said Clark & Macdonald in terms of an arrangement come to for the duration of the war only, whereby he was also entitled to carry on and did carry on his own business. Although the said Clark & Macdonald were naturally aware that he was conducting said case on behalf of respondent as he was entitled to do, they have never, either directly or indirectly, acted for the respondent in the matter, nor were they entitled to interfere with Mr Oliver for so doing. [Stat. 6 *set forth the proceedings in the Sheriff Court above referred to.*] (Stat. 7) The complainer C. J. Munro has, in virtue of the said minute of agreement and power of attorney therein referred to, regularly uplifted at the end of each quarter, commencing 30th June 1918, the sum of £75, and to each of the second parties to the agreement, including the respondent in these proceedings, he has paid four separate dividends of 1s. per £1 on the amount of their respective debts. The respondent has thus received £50 to account of his debt, the first instalment of £12, 10s. being the sum referred to in the initial writ in the Sheriff Court action as having been received by the pursuer to account of the first instalment of £83, 6s. 8d. said to be due in terms of the letter of 28th March. The respondent has received payment of three further instalments of £12, 10s. each since the date of raising the Sheriff Court proceedings. (*Ans.* 7) Admitted. (Stat. 8) The agents for the complainer James Bruce have communicated with Messrs J. King, Joseph Jackson, Herbert Manford Limited, and Hyman Kerman, all parties to the said minute of agreement of the second part, and they have intimated that they approve of the action taken by him in appearing in these proceedings. Their claims and his amount together to £759, 7s. 3d., while the whole claims referred to in the said minute of agreement amount to £1285, 6s. The complainer C. J. Munro is concerned to protect and enforce the terms of the said minute of agreement under which he acts and holds office, and which the proceedings complained of, if not suspended, will defeat. (*Ans.* 8) The respondent has no knowledge of the alleged communications between the agents for the complainer James Bruce and the other said parties to the minute of agreement, nor of their approval of the complainer Bruce's action. The amount of the claims and the total in the said minute of agreement is admitted. *Quoad ultra* denied. (Stat. 9) The complainers James Bruce and C. J. Munro were not called as defenders in said Sheriff Court action at the instance of the respondent against the [debtor]. They had no knowledge of it until after the present proceedings were raised. They were not originally complainers in the present note of suspension, but were sisted as complainers in terms of the interlocutor of their Lordships of the First Division dated 22nd February 1919. (*Ans.* 9) Admitted that the complainers Bruce and Munro were not called as defenders in the Sheriff Court action, and that they became sisted as complainers in the present proceedings in terms of said interlocutor of the First Division. *Quoad ultra* not known and not admitted."

The complainers *pleaded, inter alia*—"1. The respondent having bound himself by said minute of agreement to refrain from enforcing his claim in respect of the debt for which he obtained decree, the said decree and the charge proceeding thereon should be suspended *simpliciter*. 3. The answers for the respondent being irrelevant should be repelled."

The respondent pleaded, *inter alia*—"1. The said minute of agreement in respect of the complainers' averment of their knowledge of the insolvency of the debtor, being an agreement which these parties are not entitled to enforce as having been affected with illegality—(*a*) the complainers have no title or interest to present the note; (*b*) decree of suspension should be refused. 2. The averments of the complainers are irre-

levant and insufficient to support the prayer of the note. 3. The proceedings complained of not being in breach of the contract embodied in said minute of agreement, suspension should be refused. 4. *Separatim*, the complainer [the debtor] having, by said letter of obligation dated 28th March 1918, induced respondent to become a party to said minute of agreement, and having failed to implement said letter, the respondent is not bound to implement his part of said agreement to the complainer, and suspension should be refused. 5. The complainer [the debtor] having been solvent at the date of granting said letter of 28th March 1918 and at the date of execution of said agreement, and being still solvent, the obligations undertaken by him in said letter are binding and do not constitute an illegal preference in favour of respondent, and the proceedings following thereon are therefore effectual, and the suspension should be refused."

On 16th July 1919 the Lord Ordinary (BLACKBURN) repelled the reasons of suspension and refused the prayer of the note.

*Opinion*—"I refused the note of suspension in the Bill Chamber on the ground that the debtor, who was then the only complainer, had not averred facts relevant to infer that the letter granted by him to the respondent was in defraud of his creditors within his own knowledge. Thereafter the assignee of one of the creditors, who was a party to the minute of agreement which it is said justifies the suspension, and the trustee under the agreement, were sisted as complainers and the note was passed. A record has now been made up in which no distinction is taken between the right of the debtor and that of the other complainers to have the decree and charge suspended, and as it was admitted at the Bar that in the event of bankruptcy proceedings there was no hope of any reversion for the debtor, it follows that his interest in the matter is the same as that of the other complainers, namely, to have the terms of the minute of agreement enforced against the respondent.

"It is now averred by the complainers that at the date of the minute of agreement the debtor was insolvent, and that both he and the creditors, who were parties to the agreement, were aware of this state of matters. The respondent does not deny this averment, but states that so far as he is concerned he is not and was not at the date when he signed the agreement aware that the debtor is or was at any time insolvent. It is difficult to believe the truth or sincerity of this statement, for prior to the agreement the respondent had himself on 20th February 1918 presented a petition for the sequestration of the debtor. This petition narrates 'that the debtor has been rendered notour bankrupt within the last four months and still remains in a state of notour bankruptcy,' and this petition was the immediate cause of the agreement being entered into.

"The respondent, however, founds on the complainers' averment that they entered into the agreement in the knowledge of the debtor's insolvency as an admission that it was a transaction on their part to defraud the other creditors and is thus affected with illegality. He accordingly pleads that the complainers are not entitled to found upon the agreement in any sort of action and that the present action should be dismissed.

"The complainers deny that the agreement which they are endeavouring in this action to enforce against the respondent is in defraud of the rights of other creditors and therefore tainted with illegality. They do not now maintain, as was done in the Bill Chamber, that the agreement is of the nature of a composition contract. They found on it as giving them a security for full payment of their debts and as binding the respondent to refrain from enforcing his claim against the debtor. The subject of this security is a salary payable to the debtor by Exchequer, and therefore they say unattachable by his creditors. Accordingly they maintain that in obtaining this security they have not defrauded the other creditors of any right available to them. Although under article 4 of the agreement the debtor dispones and conveys his whole means and estates to the trustee with power to him to take possession at his sole discretion, the complainers maintain that this is only in security of the fulfilment of the obligation undertaken by the debtor in articles 2 and 3 of the agreement which constitute the creditors' security for the payment of their debts. The power conferred on the trustee under article 4 has not been exercised, and the complainers state that it will not be exercised, and consequently that the other creditors are not affected thereby.

"I think the complainers are right in their contention that an official salary payable by Exchequer is not attachable—Bell's Comm., i, p. 124; *Latta* v. *Bremner*, 1857, 19 D. 1107; but I think it is quite clear that as and when the salary is received by the debtor it becomes available to his creditors. The right of challenge of a voluntary transference of property by a debtor is not necessarily excluded by the fact that at the time of the transaction challenged the subject of it was not attachable by diligence—*Obers* v. *Paton's Trustees*, 1897, 24 R. 719, 34 S.L.R. 538. I do not think there can be any doubt that the transaction embodied in the minute of agreement by which certain favoured creditors are enabled to intercept the debtor's salary before it reaches him from Exchequer is a gratuitous alienation of property which at the moment of interception ought to be available to his creditors, and since this agreement was admittedly entered into by the complainers in the full knowledge of the debtor's insolvency it is one which in my opinion the other creditors could set aside as constituting an illegal preference. No attempt has been made by the other creditors to set aside the agreement, and it may well be, for reasons into which I need not enter, that they would gain little if they did so. But that does not appear to me to alter the character of an agreement entered into without the consent of all the creditors, and in my opinion it remains an agreement in de-

fraud of the other creditors' rights and to this extent illegal.

"Now the minute of agreement is the foundation of the complainers' whole case. They do not ask suspension of the respondent's decree and charge on any other ground than that he is bound to them by the terms of the agreement. It is accordingly necessary to consider whether the illegality which affects the agreement is such as to require the application of the maxim *ex turpi causa non oritur actio.* There are not many reported cases in Scotland in which this maxim has been applied, and none of them are very apposite to the present case. The most recent is, I think, *The Bile Bean Manufacturing Company*, 1906, 8 F. 1181, 53 S.L.R. 827. But in England the cases have been numerous, and whether the maxim is pleaded by the defender or not the moment the Court reaches the conclusion that the pursuer's case proceeds on a transaction in any way affected by illegality the action is dismissed without any consideration of the merits between the two parties. Another maxim *In pari delicto potior est conditio defendentis* is at once applied. The only case to which I was referred during the discussion was *Scott* v. *Brown Dering & Company*, [1892], 2 Q.B. 724, where the Court of Appeal refused to entertain an action founded on a contract for buying shares on the stock exchange, in itself an apparently innocent and ordinary transaction. But it transpired from correspondence produced in the case that the joint purpose of the parties in entering into the contract had been to create a fictitious market for the shares of a new company which had no intrinsic value, and thereby to induce the public to come in and purchase the shares at a premium. The Court at once refused to entertain the action. In his judgment A. L. Smith, L.J., held that the parties had been guilty of a conspiracy to defraud which was indictable, and this appeared to me to distinguish the case to some extent from the present one. I do not think that the fraud with which I hold this agreement to be permeated could be made the foundation of an indictment. But the case of *Taylor* v. *Bowers*, [1876], 1 Q.B.D. 291, shows that a fraud need not be indictable to warrant the application of the maxim. In that case an embarrassed debtor made over all his stock-in-trade to A in exchange for fictitious bills for the purpose of defrauding his creditors. One of the creditors being cognisant of the transaction got a bill of sale of the goods from A to secure his own debt, and did this without the knowledge of the debtor. Thereafter the debtor raised an action against A and this creditor to recover the goods. It was held that the fraudulent purpose not having been carried out, the debtor was not relying on the illegal transaction, and accordingly the maxim did not apply, and he was held entitled to recover the goods. But the opinions of the very learned judges who took part in the case make it quite clear that had the debtor been founding on the agreement entered into in defraud of his creditors, instead of endeavouring to set it aside, or had the result of the agreement been that the creditors had been defrauded, which was not the case, the debtor's action would not have been entertained. The quality of the fraud in that case was exactly the same as that of the fraud which affects the agreement in the present case. But the position of the complainers here is very different to that of the debtor and pursuer in the case referred to. Not only are the complainers founding on the agreement and endeavouring to enforce it, but the agreement has already resulted in the creditors who are parties to it having obtained payment of sums of money which otherwise would have been available to the whole body of creditors. Under these circumstances I do not think they are entitled to have their action entertained by the Court. For similar reasons I think that the respondent's action in the Sheriff Court might have been dismissed had it been defended, as the averments in this case show that the letter on which the Sheriff Court action proceeded is affected with illegality to as great an extent as is the agreement. Had the suspension been at the instance of any of the creditors who were not parties to the agreement, and who would have been entitled to have their action entertained, I do not doubt that the application would have been successful. It is the respondent's good fortune that as events have shaped themselves the objection has been taken in the action in which he is defender instead of in that in which he was pursuer. I see no alternative to allowing his decree and charge to stand. Whether if he proceeds to further extremes he will better the position which he has meantime secured for himself under the agreement is not a question which I can take into consideration.

"The action will be dismissed."

The complainers reclaimed, and argued—The agreement between the debtor and his moneylending creditors might create an illegal, undue, or fraudulent preference in the sense that it was voidable at the instance of certain creditors, but it was not a *pactum illicitum*. *Pacta illicita* were null and void *ab initio*. A voidable agreement was binding, and until reduced could be founded upon—*Smyth* v. *Muir*, 1892, 19 R. 81, *per* Lord Kinnear at p. 89, 29 S.L.R. 94. But illegal or fraudulent preferences were not null and void; they were binding till reduced—*Drummond* v. *Watson*, 1850, 12 D. 604, *per* Lord Moncreiff at p. 611, interpreting the Act 1696, cap. 5; Bankruptcy (Scotland) Act 1913 (3 and 4 Geo. V, cap. 20), section 8. The right to repudiate a *pactum illicitum* was universal, whereas the right to cut down an illegal preference was limited to certain creditors only—Ersk. Inst. iv, 1, 44; Bell's Prin. sec. 2327; Goudy, Bankruptcy (4th ed.), p. 33 and p. 42. Thus a trustee in a cessio could not reduce an illegal preference—*Forbes' Trustee* v. *Forbes*, 1903, 5 F. 465, *per* Lord Kinnear at p. 470, 40 S.L.R. 369. Such preferences were, no doubt, called fraudulent, but fraud was a word of ambiguous meaning—*Nocton* v. *Ashburton*, [1914] A.C. 932, *per* Viscount Haldane at p. 953. In its common law sense fraud always

connoted moral fraud, but it was used in other senses which did not involve any idea of moral fraud, *e.g.*, in fraud of legitim. In a question of preferences in bankruptcy moral fraud was not necessarily involved in a fraudulent preference. Actual fraud need not be proved—Bell's Comm. (7th ed.), vol. ii, p. 184; Goudy, Bankruptcy (4th ed.), p. 23; *Main* v. *Fleming's Trustees*, 1881, 8 R. 880, *per* Lord President Inglis at p. 886, 18 S.L.R. 632. A bargain was *pactum illicitum* either because it was contrary to public policy or involved actual moral fraud. Thus there was moral fraud in *Bile Bean Manufacturing Company, Limited* v. *Davidson*, 1906, 8 F. 1181, 43 S.L.R. 827, and in *Scott* v. *Brown, Doering, M'Nab, & Company*, [1892] 2 Q.B. 724. Fraud was also present in *Taylor* v. *Bowers*, (1876) L.R. 1 Q.B.D. 291. If the object of the promise or consideration was to promote the committal of an illegal act the result was *pactum illicitum—Herman* v. *Jeuchner*, (1885) L.R. 15 Q.B.D. 561, *per* Brett, M.R., at p. 563. Here the agreement was not only legal but binding till reduced. *Herman's* case (*cit.*) was approved in *Wild* v. *Simpson*, 1919, 35 T.L.R. 576. *Ex parte Milner*, (1885) L.R. 15 Q.B.D. 605, was an example of a case in bankruptcy where there was actual fraud. None of the examples of *pacta illicita* given in the text writers approximated to the present case, *e.g.*, Bell's Prin., sec. 35, *et seq.* If so, the respondent was in breach of contract in raising the proceedings in the Sheriff Court, and accordingly the decree should be suspended.

Argued for the respondent — On the assumption that the agreement with the moneylending creditors was not *pactum illicitum*, the respondent was not in breach of his contract in suing in the Sheriff Court, for his action was not upon the bill scheduled to the agreement, but upon a new agreement constituted by the letter. An express stipulation was required to exclude action if that was the intention of parties—*Thin & Sinclair* v. *Arrol & Sons*, 1896, 24 R. 198, 34 S.L.R. 187. But the agreement with the moneylending creditors was *pactum illicitum*. The agreement was made by a person consciously insolvent to confer a preference on certain creditors which they would not have had otherwise, to the prejudice of other creditors from whom the agreement was concealed. Such a transaction was fraudulent in the full sense of the common law—Goudy, Bankruptcy (4th ed.), p. 492; Bell's Comm. (M'Laren's ed.) ii, pp. 226-229, 399; *Arrol & Cook* v. *Montgomery*, 1826, 4 S. 499, (N.E.) 504, *per* Lord Justice-Clerk Boyle at p. 501, and Lord Alloway at p. 502; *Crawford* v. *Black*, 1829, 8 S. 158; *Cockshott* v. *Bennett*, 1788, 2 Term Rep. 763, *per* Lord Kenyon, C.J., at p. 765; *Obers* v. *Paton's Trustees*, 1897, 24 R. 719, *per* Lord President Robertson at pp. 731-732, and Lord M'Laren at p. 733, 34 S.L.R. 538; *Thomas* v. *Thomson*, 1866, 5 Macph. 198, 3 S.L.R. 121. It was not necessary to go so far, for if a transference of property were made by the debtor voluntarily, during insolvency, and while conscious of insolvency, to a third party, fraud was presumed, and it was unnecessary that actual intent to deceive should be present—Goudy, Bankruptcy (4th ed.), p. 37. But whatever the exact nature of the taint in such a contract as the present, it was certain that such a contract was not one upon which either of the parties to it could found—Bell's Comm. (7th ed.) i, p. 317, and note 8 referring to *Holman* v. *Johnston*, 1775, Cowp. 341, *per* Lord Mansfield at p. 343, and *Blachford* v. *Preston*, 1799, 8 Term Rep. 89, per Lord Kenyon, C.J., at p. 92, and Ashurst, J., at p. 93; *Scott's* case (*cit.*) per A. L. Smith, L.J., at p. 734; *Ex parte Cowen*, [1867] 2 Ch. App. 563; *The Bile Bean* case (*cit.*), per Lord Stormonth Darling at p. 1200. And it was always competent for either party to repudiate such a bargain for the benefit of the general body of creditors — *Taylor's* case (*cit.*), per Cockburn, L.J., at p. 295; *Arrol's* case (*cit.*). The present case could not be distinguished from *M'Ewen* v. *Doig*, 1828, 6 S. 889.

At advising—

Lord President—I am unable to take the view adopted by the Lord Ordinary of the minute of agreement on which this action rests. It is not, in my opinion, illegal or immoral and such as a court of law will not enforce. The fact that it could be set aside only by a creditor of the insolvent who was able to show that he was prejudiced thereby makes it manifest that it is not null and void and consequently unenforceable in a court of justice. Neither precedent nor principle was cited in support of the proposition that it is illegal for a creditor to make an engagement with an insolvent debtor not to take proceedings for recovery of his just debt provided the debtor agrees to pay it off by instalments. To make my ground of judgment clear it is unnecessary to explore at any length the law of *pacta illicita*. A simple description of the deed will suffice to show that even if open to challenge at the instance of others the agreement before us cannot be repudiated as being null and void by the parties who signed it. In May 1918 an insolvent debtor joined in an agreement with ten of his creditors, who knew him to be insolvent, to pay their debts by instalments. And in order to do so he undertook to set aside out of his income a sum of not less than £300 per annum. That sum was to be paid over each year to the ten creditors at intervals not exceeding three months. At this rate their debts would be paid off in about four years. On the other hand, the ten creditors came under obligation to their debtor and to each other that they would refrain from enforcing their claims so long as the £300 was paid. I can discover nothing illegal in such an arrangement. It may have been, for aught I know, a most beneficial plan for all concerned. By such an arrangement no cheat or deception was practised upon anyone. It carried out no fraudulent scheme. It is true that if a creditor who was not a party to the deed sought to impugn it on the ground that his interests were prejudiced he might have it reduced. For reasons which seem fairly obvious no creditor has come forward to challenge the agreement. That being

so, I am at a loss to understand on what ground a creditor who entered into the agreement can now be permitted to resile from it, or rather to demand that it should be disregarded by the Court. No authority was quoted to us which could support his repudiation of a bargain which he had thus deliberately made. And no principle of law seems to me to be involved save that which is stated by Jessell, M.R., in the case of *Printing and Numerical Registering Company* v. *Sampson*, L.R. 1875, 19 Eq. 462, at p. 465, in the following words:—"If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice." It is not disputed that the £300 per annum was duly paid, nor that the respondent has, despite that fact, raised action and taken decree against the debtor for a substantial part of his debt. The suspenders are consequently entitled to have suspension as craved. I move, therefore, that the Lord Ordinary's interlocutor be recalled and suspension granted in terms of the note.

LORD MACKENZIE—The agreement to which the respondent Rothfield became a party along with the complainers is quite explicit in its terms. He thereby became bound, along with certain other creditors, to refrain from enforcing against the debtor the specific claims which were scheduled to the agreement. The onerous consideration upon which this undertaking proceeded is clearly set out, and the stipulated payments, it is admitted, have been duly made to the respondent Rothfield and to the other scheduled creditors. Rothfield does not seek to reduce the agreement; he does not propose to repay any of the money he has received under it; all he says is that it is not to be enforced against him. The means he has taken to attempt to secure his end is to sue the debtor in the Sheriff Court, founding on the scheduled debt and a letter he obtained from the debtor giving him better terms in regard to his debt than he was entitled to under the agreement, and more favourable terms than his fellow-creditors under the agreement are entitled to. He obtained decree in the Sheriff Court, and the present suspension of a charge on that decree was brought originally by the debtor alone. It is not necessary to say what the result would have been had he now been the only party opposing the respondent. As a result of the procedure in the suspension the respondent is now faced not only by the debtor but by creditors who along with him became parties to the agreement to refrain from enforcing their respective claims provided the agreement was carried out.

The respondent tables the plea that the agreement founded on is illegal, and that the complainers have no title or interest to present the note. There is also a plea that the proceedings complained of are not in breach of the agreement, which, for the reasons already indicated, I think plainly bad.

It would, in my opinion, be unfortunate if it were the law of Scotland that the respondent who set his hand to the agreement could not be held bound by it. It is obvious that in certain circumstances it may be beneficial for all concerned that a debtor should come to terms, even after insolvency, with his more clamant creditors. If he is successful in arranging with them his other creditors may be content to wait. It is, no doubt, open to any creditor who is not a party to such an agreement to challenge it as being to his prejudice. Such a one is entitled to his share in his debtor's assets, and is entitled to set aside any agreement which interferes with this right. The trustee would, of course, have a title to reduce the agreement if sequestration were granted. There is, however, no authority to support the view that a creditor who along with others becomes bound that they shall respectively take payment of their lawful debts only in the manner and subject to the conditions provided by such agreement can refuse to be bound by its terms.

This means that the agreement in question is not void but voidable, and that the respondent has no title to set it aside. Consequently his first plea-in-law is bad.

The cases founded on by the respondent are all illustrations of agreements in marked contrast to the present. There is no fraud about such an agreement as the present under which certain creditors on terms of equality as to each and all become bound to take payment of their just debts in a particular manner. The chapters in the institutional and text writers on *pactum illicitum* show the kind of case to which the maxim *ex turpi causa non oritur actio* applies. An examination of the cases cited has failed to show one which supports the respondent's contention.

I am of opinion that the charge should be suspended.

LORD SKERRINGTON—The respondent's counsel asked us to affirm the Lord Ordinary's judgment, which, as I understand it, declares that every agreement between an insolvent and a section of his creditors creating a preference illegal at common law is not merely voidable at the instance of any creditor with a title and interest to challenge it, but is also a *pactum illicitum* which is null and void to all intents and purposes, so that it is *pars judicis* to take notice of the illegality and to refuse to enforce the agreement even in a question solely between the parties who signed it. This proposition is in my opinion as unsound in law as it is novel, and I see no objection to saying so. At the same time I doubt whether on the pleadings as they stand the question is properly raised for decision. Though the complainers' counsel admitted in the course of his argument that the agreement which his clients seek to enforce creates a preference which is illegal at common law, that admission does not seem to me to follow necessarily from what is

averred by the complainers in their statement of facts. I am prepared to repel the respondent's first plea-in-law on the simple ground that the complainers nowhere aver that the preference conferred by the agreement on which they found was granted by the insolvent voluntarily and fraudulently and in order to disappoint the rights of his general creditors. The respondent's second plea (irrelevancy) seems to be intended to raise the question whether the separate diligence used by the respondent constituted a breach of his contract with the complainers. The argument on this point does not require to be stated or refuted. It follows in my opinion that the Lord Ordinary's interlocutor should be recalled, and that decree of suspension should be granted *de plano*.

In endeavouring to ascertain whether an agreement for a preference illegal at common law is necessarily a *pactum illicitum* it is requisite in the first place to exclude from consideration (as being misleading) all instances of composite agreements which attempt not only to create a preference but also to accomplish something else which is plainly dishonest, for example, (*a*) to conceal the true character of the transaction by means of false and concocted documents, or (*b*), as in the case of *Arrol* (4 S. 499, N.E. 504), to purchase the consent of a creditor to a composition contract the implied basis of which is that every creditor shall sacrifice the same proportion of his claim. In the second place, it should be kept in view that the answer to the question must depend solely upon authority and in no way upon *a priori* considerations and arguments. A preference which is correctly described as "illegal and fraudulent at common law" may not imply moral delinquency on the part of the granter, but it necessarily does imply that something has been done or attempted which our forefathers regarded as contrary to the policy of the bankruptcy laws. They might quite reasonably, for all that I know, have ordered that every such agreement should be absolutely prohibited —in other words, should be a *pactum illicitum*; or again, they might equally reasonably have subjected such an agreement only to a qualified prohibition which would suffice to protect creditors from injury without rendering it wholly invalid. The argument of the respondent's counsel overlooked the ambiguity of such expressions as "fraudulent," "illegal," and "contrary to public policy," and assumed that every agreement which is so described by our legal authorities is necessarily subjected to an absolute prohibition. No authority was cited in support of the proposition that every agreement for a preference illegal at common law is null and void, whereas there is ample authority to the contrary. It is unnecessary to do more than refer to the cases of *Fleming's Trustees* v. *M'Hardy*, 19 R. 542, 29 S.L.R. 483; *Forbes' Trustee* v. *Forbes*, 5 F. 465, 40 S.L.R. 369. The bankruptcy legislation of 1856-7 assumed, correctly in my opinion, that according to the law as it then stood a preference illegal at common law could be challenged by no one except a creditor of the insolvent suing an action of reduction in the Court of Session —19 and 20 Vict. cap. 79, sections 10 and 11; 20 and 21 Vict. cap. 19, section 9. It may be noticed that the Roman law, which presumably was the basis both of our common law and of our early legislation on this subject, appears to give a remedy to creditors only —Inst., iv, 6, 6.

LORD CULLEN—I concur in the conclusion reached by your Lordships.

Assuming as counsel in argument did that the agreement here in question represents what is known as a fraudulent preference at common law, such a transaction has two different aspects. On the one hand the favoured creditor receives no more than what his lawful claim entitles him to in a question between him and his debtor. On the other hand the transaction diverts part of the debtor's inadequate estate from other creditors desirous of obtaining a proper *pro rata* distribution of it or of doing legal diligence. It has, of course, long been settled that the rights of the excluded creditors are entitled to prevail, and that the favoured creditor accordingly takes what the debtor gives him for his satisfaction or security subject to their right of challenge. It is in their option to exercise the right to disturb the transaction. Circumstances may be figured where excluded creditors might think and find it to be most for their ultimate advantage to suffer a particular creditor to be satisfied rather than to take action likely to precipitate public bankruptcy and the break up of the estate of a debtor who has otherwise a good prospect of retrieving his fortunes. I do not think our law has gone further in the direction of repudiating such transactions than by treating them as voidable at the instance of creditors, or a trustee for creditors, having a title and interest to complain of them. No case has been cited to us where the Court has proceeded on the view that such transactions are so radically illegal as to be void and null as between the parties to them, no question with excluded creditors being raised. And apart from decision no authority for that view has been adduced. On the contrary, it is settled that the insolvent granter is not entitled in his own right to challenge or repudiate his own voluntary act, and, *pari ratione*, that his trustee in cessio, holding a disposition *omnium bonorum* from him, is not entitled to do so. The policy of the law is, I think, seen reflected in cases under the Act 1696, cap. 5, for while that Act in terms declares the preferences at which it strikes to be void and null, it has been interpreted and applied by the Court as only making them voidable in the sense already referred to.

Assuming that the agreement under consideration is not void and null, it is clear that the proceedings of the respondent complained of are in breach of his obligations thereunder, and the other creditors, parties to the agreement, who have compeared in this process, are entitled to have them suspended.

No argument has been addressed to us on the question whether under the particular

circumstances the debtor himself is entitled to suspend, and I express no opinion on that question.

The Court recalled the decree of the Lord Ordinary and suspended the decree and charge complained of.

Counsel for the Complainers—Macmillan, K.C.—Fleming. Agents—Bruce & Stoddart, S.S.C.

Counsel for the Debtor—Dykes. Agent—John N. Rae, S.S.C.

Counsel for the Respondent—Fraser, K.C.—Garrett. Agent—Murray Oliver, S.S.C.

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*Wednesday, January 7.*

## FIRST DIVISION.

[Sheriff Court at Cupar.

## SMITH *v.* REEKIE AND OTHERS.

*Contract—Proof—Innominate Contract—Unusual and Anomalous—Engagement to Shipowners to Serve on Ship Chartered to Admiralty.*

The owners of a steam drifter were said, in anticipation of its being chartered by the Admiralty for war service, in which event the owners had to supply a crew, to have offered to a fisherman a bonus of 1s. a-day to join the crew. The fisherman agreed to join the crew, and later when the Admiralty chartered the drifter did join the crew and served in the Royal Naval Reserve upon the drifter for 1363 days till he was discharged. He brought an action against the owners of the drifter for £59, 1s., being the amount at 1s. per day corresponding to his length of service, less a payment which he treated as to account. *Held* (1) that the alleged contract between the parties was an innominate contract; (2) that it was not of an unusual or anomalous character; and (3) that proof *prout de jure* of the contract was competent.

*M'Fadzean's Executors* v. *Robert M'Alpine & Sons*, 1907 S.C. 1269, *per* Lord Dunedin at p. 1273, 44 S.L.R. 936, at 938, *distinguished*, *per* the Lord President and Lord Mackenzie, and *doubted per* the Lord President and Lord Skerrington.

David Smith (Mackay), fisherman, St Monance, *pursuer*, brought an action in the Sheriff Court at Cupar against William Reekie (Smith) and others, the owners of the steam drifter "Janet Reekie," *defenders*, concluding for payment of £59, 1s. alleged to be due under a contract between the pursuer and the defenders. [The various parties involved are distinguished by their wives' surnames in brackets.]

The parties *averred*—"(Cond. 1) The pursuer is a fisherman residing in St Monance. The defenders are also fishermen residing in St Monance, and are the registered owners of the drifter 'Janet Reekie' of St Monance, M.L. 126. The first-named defender, as principal owner of the said drifter, takes chief part in its management on behalf of himself and the co-owners, his sons, with their authority. Defenders' statements in answer, so far as inconsistent with pursuer's averments, are denied. (*Ans.* 1) Admitted that the pursuer is a fisherman residing in St Monance, and that the defenders are the registered owners of the drifter 'Janet Reekie' referred to. Admitted also that the defenders, other than the said William Reekie (Smith), are fishermen residing in St Monance. *Quoad ultra* denied. Explained that the defender the said William Reekie (Smith) takes no part in the actual work of fishing. The said drifter is managed on behalf of the owners by Messrs John Bonthron & Sons, fishcurers, Anstruther. (Cond. 2) In the spring of 1915 the Admiralty made a request for drifters to be used on patrol and mine sweeping, a monthly rent to be paid the owners for the hire of the drifters, this rent ranging from £39 to £50 per month. It was a condition of such hire that the owners should supply a crew. Defenders' drifter the 'Janet Reekie' was available, but as the defenders themselves did not desire to go on patrol an arrangement was come to between the defender William Reekie (Smith), on behalf of himself, his co-owners, and William Tarvit, fisherman, St Monance, that the latter should take the 'Janet Reekie' on patrol. Subsequently Tarvit, considering he was too old to go as skipper, asked David Smith (Innes) to go as skipper, he, Tarvit, to go as mate. This arrangement was agreed to by the defender William Reekie (Smith). At this time the drifter owners were very anxious that their vessels should go on Admiralty service, as the fishing grounds had been closed owing to the war and the vessels were earning nothing. If they went on patrol the drifter owners stood to earn about £500 per annum net profit, as the vessels were kept up by the Admiralty. The deck hands' and trimmers' pay from the Admiralty was 3s. 6d. per day, and to induce crews to go the drifter owners were at that time offering these men, out of their own pockets, a bonus of 1s. per day. Believed to be true that the original rate of pay was subsequently slightly increased, but denied that a bonus was also granted by the Admiralty. A crew was got together, of whom pursuer was one, the last named agreeing to go provided the terms were satisfactory. Defenders' statements in answer so far as inconsistent with pursuer's averments are denied. Pursuer believes and avers that the person 'John Bonthron,' with whom the charter-party produced by defenders, dated 28th May 1915, purports to have been entered into, was non-existent at that date. The said charter-party is not admitted. In any event the crew, including pursuer, were engaged prior to the alleged date of the signing thereof. (*Ans.* 2.) The intimation, if any, issued by the Admiralty with reference to drifters required for patrol and mine sweeping is referred to. Explained that in the spring of 1915 the defenders had made arrangements to lay up their boat for a time at Queensferry as the