# APPENDIX.

## PART I.

## FRAUD.

1776. *December* 4.

JAMES M'MASTER, WILLIAM MACKENZIE, THOMAS M'CULLOCH, and SAMUEL M'DOWALL, *against* JOHN and ALEXANDER M'MICHANS.

No. 1.
Indorsation of bills fraudulently given to disappoint the arrestments of creditors, found ineffectual.

IN the year 1774, John M'Michan, tenant in Portincallie, bought from Archibald Shaw a parcel of black cattle, at the price of £99. Sterling, for which he accepted a bill payable to Shaw at the Martinmas following. Shaw soon after being in labouring circumstances, left the kingdom, and upon his elopement several of his creditors raised diligence against him, and executed arrestments in the hands of John M'Michan, who upon this, in order to relieve himself, raised a process of multiplepoinding, in which the Lord Justice Clerk Ordinary pronounced the usual interlocutor.

Besides the interests produced by the several other creditors, interests were also produced by John and Alexander M'Michans. Alexander produced a bill for £99. Sterling, drawn by his nephew Shaw the common debtor, upon John M'Michan, and accepted by him, and which bill had been indorsed to Alexander by the common debtor sometime after his elopement. This indorsation, he contended, was onerous to the extent of £33. 19*s*. Sterling, and claimed a preference for that sum upon the common fund. John M'Michan produced, as his interest, a retired bill accepted by the common debtor, and which he (John) had paid to Hugh M'Michan the creditor therein, at desire of the common debtor, and craved to be preferred *secundo loco* upon the fund in competition. The Lord Ordinary having heard parties, and advised minutes of debate, pronounced (17th February 1776) the following interlocutor: 'The 'Lord Ordinary finds it admitted by John M'Michan, the raiser of the multi- 'plepoinding, that he has in his hands £99. Sterling, being the price of black

No. 1. 'cattle bought by him from Archibald Shaw, his nephew, the common debtor, with interest thereon from Martinmas 1774, when the price was payable, for which price M'Michan accepted a bill to Shaw, but which bill is not signed by Shaw as drawer; finds it proved that Shaw was bankrupt, and fled to Ireland in the end of November or beginning of December 1774; finds the indorsation of the above bill by Shaw, after he had fled to Ireland to Alexander M'Michan his uncle, without a date to the indorsation, and without any date to the letter which accompanied it, does not prove that the indorsation was made before the arrestments, and that the letter which accompanied it, instead of proving an onerous cause, proves a fraudulent contrivance betwixt the nephew and his uncle to disappoint the other creditors by this pretended indorsation, and at any rate being an indorsation to a bill void and null in law, can have no effect against the creditors arresters; and therefore repels the claim of preference for Alexander M'Michan founded on the above indorsation; and with respect to the claim of compensation or retention made for John M'Michan, the raiser of the multiplepoinding, another uncle of Shaw's, founded upon his having paid a bill of £20. Sterling, to Hugh M'Michan his own brother in law, finds no evidence of any order of such payment from Shaw, nor any sufficient evidence *inter personas tam conjunctas* that the payment was made, if ever made, before the 24th December 1774, when it is marked upon the back of the bill for £99. Sterling, and which being posterior to the arrestments used by the lawful creditors of Shaw, cannot operate against them; and therefore repels this claim for John M'Michan: Finds that the said John M'Michan, raiser of the multiplepoinding, and the said Alexander M'Michan, pretended indorsee to the bill, being found by this interlocutor to have no interest in the funds now in competition, can therefore have no title to object to the preference of the creditors arresters; therefore repels the objections made by them to these arrestments; and therefore prefers Samuel M'Dowal *primo loco* to the sums in the hands of the raiser of the multiplepoinding; Thomas M'Culloch *secundo loco*; James M'Master *tertio loco*; and William M'Kenzie *quarto loco*, for payment of the sums contained in their several grounds of debt, upon which these arrestments proceed; and decerns in the preference, and against the raiser of the multiplepoinding acordingly." And to this interlocutor his Lordship adhered, upon advising a representation, with answers.

It was pleaded for the M'Michans, in a reclaiming petition, that there was here no fraud, supposing them even to have been in the knowledge of the common debtor's intentions to elope, and to have taken advantage of that knowlege to secure their own payment; for every creditor is warranted by law to operate payment from his debtor's effects either by legal diligence or a voluntary deed, (the case of the act 1696 excepted,) though his fellow creditors should suffer by his doing so. But the truth is, that the petitioners knew of no such intention. And though it may have been wrong in the common

debtor to make any distinction among his creditors, yet there was nothing unlawful done by accepting the indorsation. The indorsee Alexander, has shown by restricting his claim to £33. 19s. the value which he gave for it, that he intended nothing unfair, and he would ask his competitors, which of them would have refused such a favour from their debtor? No. 1.

With regard to that part of the Ordinary's judgment which finds that this bill of £99. Sterling is void and null, not being signed by the common debtor as drawer, and consequently the indorsation inept,—it was contended, that the want of the common debtor's subscription is supplied by the bill being holograph, and containing his name at full length in the body of it. This it was said is equipollent to the subscription of the drawer, according to two cases reported by Lord Kilkerran, without names, *vide* BILL OF EXCHANGE, December 5, 1738, No. 36. p. 1436. and July 1750, No. 43. p. 1442. Besides, supposing the drawer's name not to have been in the body of the bill, yet as it is indorsed by him, and contains his name, of his own hand writing, upon the back of it, it is thus made a complete mutual contract, and actionable in a court of law.

As to that part of the interlocutor, which finds that the common debtor was bankrupt,—if by bankruptcy be meant simple insolvency, it is not to be disputed that the common debtor was bankrupt at the time mentioned in the interlocutor; but then he has never yet been rendered bankrupt in terms of the act 1696, so as to frustrate the effect of any deed granted by him to one creditor in preference to the rest.

As to its not being proved that the indorsation was made before the arrestments, it is immaterial whether it was before or after, provided the cause of it was onerous; for by the privileges of bills of exchange, an onerous indorsation is preferable to an arrestment of a prior date.

With regard to the allegation of fraud inferred from the letter which accompanied the bill; this is not supported by the evidence referred to. The letter gave the first intimation whether the common debtor had retired, and proves the indorsation to have been a voluntary act of his own, of which the indorsee Alexander had no foreknowledge. And the argument here recurs again, that though it might be wrong in the common debtor to grant, yet no blame could lie upon the petitioner for accepting the preference.

The arresting creditors have also objected that the indorsee Alexander stands in the character of a conjunct person to the indorser, and that the indorsation falls of consequence under the first branch of the act 1621. But supposing this to be the case, it is still competent to prove the onerous cause of the indorsation, and the indorsee is willing to prove it, in the manner required by the interpretation of that act.

So far with regard to Alexander the indorsee.

For John M'Michan it was pleaded, That though the Lord Ordinary has found that there is no evidence of any order of payment from Shaw the common debtor, yet it is not to be supposed that John, as a prudent man, whom

No. 1. his competitors stiled cautious and exact, would have paid the bill to Hugh M'Michan without the common debtor's command. Supposing him even to have paid the bill without any order, it is *negotium utiliter gestum* as to the common debtor, productive of a claim against him for reimbursement, and that claim being liquid, is a ground of compensation which must be good against his arresting creditors, who can be in no better situation than their debtor. Had John M'Michan, upon paying the money, taken an indorsation from Hugh to the bill, his right of action against the common debtor could not have been disputed, although he had had no order from him; and it can make no difference that he took only a receipt for the contents: For it is the payment of the money, not the form of the document or security, that constitutes his claim for reimbursement. From the moment he retired the bill, Shaw and he became debtor and creditor to each other, and compensation took place to the amount of the mutual debts; and by retiring it, nothing unfair was done to the arresting creditors, as the common debtor was in the country at the time, not suspected of leaving it, as no one creditor had arrested, nor any one step of diligence been taken.

The Lord Ordinary's interlocutor had found that there was sufficient evidence *inter personas tam conjunctas*, that the payment was made, if ever made, before the 24th December 1774. By a statement of facts, it was endeavoured to be proved, that the money was paid on 22d November, and John and Hugh M'Michans declared themselves willing to undergo a judicial examination upon the truth of what they had set furth concerning it. As to that part of the interlocutor which finds, that the petitioners, having no interest in the funds in competition, have no title to object to the preference of the arresting creditors,—it was contended with regard to Alexander, that his indorsation being a liquid ground of debt, must at any rate give him an interest in the fund *in medio;* and with regard to John, he must have the same: For if he can set aside the diligence of his competitors by good objections, his plea of compensation will be valid.

Pleaded for the arresting creditors: The distinction made by the petitioners, that though it might be wrong in the common debtor to grant, yet it was not so in them to accept a preference, is totally erroneous. If the indorsation was unjust on the part of the indorser, the acceptance of it was equally so on the part of the indorsee. The belief of the grantee that the granter was solvent at the time of executing any conveyance in his favour, is essential to its validity. Erskine (lesser edition) B. 4. Tit. 4. § 13. And in the present case it is not denied that the insolvency of the common debtor was publicly known; the acceptance of the indorsation is therefore fraudulent.

As to the nullity in the bill, from its not being signed by Shaw as drawer, the decisions referred to by the petitioners are clearly against themselves. And in another case, Bonnar against Grant, 14th February 1749, No. 44. p. 1441. it was found that the want of the drawer's subscription was a nullity

in a bill, notwithstanding the bill was blank indorsed by him. The same doctrine is clearly laid down by Mr. Erskine, B. 3. Tit. 2. § 28. At any rate this is not a bill of exchange, but an inland bill, which has not the same privileges. No. 1.

As to the argument, that the common debtor was not bankrupt in terms of the act 1696;—there are three requisites, to constitute a notour bankrupt, viz. diligence by horning and caption, and insolvency, joined with one or other of the alternatives of imprisonment, or retiring, or flying, or absconding, or forcibly defending himself. That Shaw was not under diligence by horning and caption was owing to the precipitancy of his flight, but he clearly possessed the two other characteristics of a bankrupt, *flying and absconding*. His case therefore falls clearly under the act 1696.

It was argued by the petitioners, that it is immaterial whether the indorsation was before or after the arrestments. But the two reasons given for this are nugatory; for, in the first place, this is not a proper bill of exchange, and it is denied in the second place, that the indorsation is onerous. The only manner directed by the act 1621, for proving a deed to be gratuitous, or without a just and competent price, is by the writing or oath of the grantee; but Mr. Erskine observes, B. 4. Tit. 3. § 35. that "This has been so altered by practice, "that the grantee, if he be a conjunct or confident person, must support the "onerous cause, or valuable consideration of the right, not barely by his own "oath, but by some collateral evidence, July 15, 1670, Hamilton, No. 445. "p. 12555; December 14, 1671, Duff, No. 260. p. 12428. And the petitioner has not condescended upon any evidence of the onerossity of his indorsation equivalent to what is thus required. With regard to John M'Michan, the order he pretends to have received from Shaw, was merely verbal, and can afford no evidence of the payment. Hugh and John M'Michan are also married to two sisters, which throws a greater air of fraud over the transaction. The Court (4th December 1776,) pronounced the following interlocutor: "Find the indorsation of the bill in favour of Alexander M'Michan, and the "receipt for £20. Sterling upon the back of it, founded on by John M'Michan, "both fraudulent, intended to disappoint the respondents, and that in virtue "thereof the petitioners cannot compete with the respondents; adhere there-"fore to the Lord Ordinary's interlocutor reclaimed against preferring the "respondents, and refuse the petition."

Lord Ordinary, *Justice Clerk.* Act. *A. Ogilvie.* Alt. *M'Cormick.*

*J. W.*