that question, and on the whole I concur in the judgment which your Lordship proposes.

Lord Mure and Lord Shand concurred.

The Court recalled the Lord Ordinary's interlocutor, and decerned in favour of the pursuer for £16, 17s. 2d., with expenses.

Counsel for pursuer then moved the Court for expenses in the petition for recal of inhibition, the prayer of which fell to be granted, as the Lord Ordinary's interlocutor in the action had been recalled. He urged that the use of diligence had not been warranted in the circumstances,—*Weir* v. *Buchanan*, Oct. 18, 1876, 4 R. 8.

The defender replied that it was the constant practice to use inhibition on the dependence of a reclaiming note, that the pursuer had been *vergens ad inopiam*, and that he was therefore not entitled to the expenses of the petition.

At advising—

Lord President—It is plain the inhibition must be recalled, and the only question is as to the expenses of the petition. It is said for the defender that this is the usual mode of procedure under the circumstances; I am not prepared to say it is incompetent, but if it is the correct practice, it is certainly not a commendable one. The defender in this action has been assoilzied from some very trifling claims by the Lord Ordinary, and found entitled to expenses, which cannot exceed (say) £40. The pursuer has reclaimed, and the defender used inhibition in security, not of any sum due, but of one which might become due in the event of the Lord Ordinary's judgment being affirmed. I think those circumstances did not justify such a proceeding, and that the pursuer is now entitled to the expenses of the petition.

Lord Deas—I am of the same opinion. I am not prepared to say that the inhibition was incompetent, but I hope no such practice exists as that which has been alleged. If such a practice were to receive countenance, the result might be that whenever a judgment was given in the Outer House with expenses, inhibition would be used for these expenses although the judgment was liable to be recalled in the Inner House, and if recalled, no expenses were really due at the time, nor ever would be due. It would be monstrous to suppose agents using inhibitions in this way, and I concur in thinking that any such practice would be disgraceful to the profession.

Lord Mure and Lord Shand concurred.

Counsel for Pursuer (Reclaimer)—Asher—Marshall. Agent—John Rutherfurd, W.S.

Counsel for Defender (Respondent)—Black. Agent—Lindsay Mackersy, W.S.

Thursday, January 22.

FIRST DIVISION.

[Sheriff of Midlothian.

PENNEY (JOLLY'S TRUSTEE) *v.* FERGUSON, DAVIDSON, & COMPANY.

Bill of Exchange—Proof—Whether prout de jure *or by Writ or Oath—Where Suspicious Circumstances Alleged.*

Wherever the averments of parties on record, as explained or admitted by the holder of a bill of exchange suing upon it, are such as to show that the bill came into the possession of the holder through some irregular dealing, and not in the ordinary course of business,—or are such as to lead to the inference that no actual value was given for the bill at the time,—or wherever the special circumstances in which the holder became possessed of the bill, as admitted or explained by him, are such as to render it desirable for the ends of justice that the inquiry into the facts should not be limited to the writ or oath of the holder,—the Court will allow a proof, before answer, of the averments; but (*diss.* Lord Shand) in all other cases the proof will be limited to the holder's writ or oath.

Circumstances and averments in consequence of which a proof before answer was allowed in regard to a debt said to be constituted by a bill of exchange.

Opinion (*per* Lord Shand) that where the *bona fides* of the holder of a bill is disputed, the Court should allow a proof *prout de jure* although no suspicious circumstances are stated or admitted by him.

The estates of Mr William Ramsay Jolly were sequestrated on 19th October 1878, and Mr J. C. Penney, C.A., was appointed trustee. Messrs Ferguson, Davidson, & Co., merchants, Leith, lodged a claim in the sequestration for £398, 7s. 2d., being the amount of a bill which Jolly had endorsed to them. The trustee rejected the claim "in respect that no value was given for this bill, and that the same ought to have been returned to the bankrupt or the trustee on his sequestrated estate." Ferguson, Davidson, & Co. appealed to the Sheriff, and in the record which was subsequently made up the trustee made the following averments as to the circumstances in which the bill was granted and came into Ferguson, Davidson, & Co.'s hands—"(2) The bankrupt, Jolly, about Whitsunday 1878 agreed to purchase certain house property at 11 Rosehall Terrace, Edinburgh, from Stevenson, at the price of £4500, of which £3600, with which the subjects were burdened, were to remain on the property, the difference only being paid by Jolly, and the transaction to be settled at Martinmas 1878. (3) On 12th August 1878 Stevenson wrote to Jolly in the following terms:—'Until such time as the papers for the above (11 Rosehall Terrace) be got ready, I would take it very kind of you by letting me have bill for £300 or £400 by Wednesday first.' Jolly replied on the 15th August as follows:—'If you will procure a bill and have it made out for £400, I will accept it at once for you for the period you mention. I wish you would push on with the papers, as I am waiting for them, and am

much inconvenienced by the delay.' The bill was accordingly drawn by Stevenson and accepted by Jolly on the same day, and given to Stevenson. (4) Stevenson thereupon blank endorsed the bill, and tried to get it discounted at the Commercial Bank, who refused, and informed Stevenson that Jolly was not good for the money. On further inquiry Stevenson found that Jolly was greatly embarrassed and would be unable to carry through the transaction. The titles of the property were at this time in the hands of Mr Lee, S.S.C., Jolly's agent, for the purpose of having the necessary deeds prepared. Stevenson on learning Jolly's impecunious condition got back from Mr Lee the titles, and the transaction between him and Jolly came to an end. Jolly's circumstances became worse, his embarrassments well known, and he appeared in the Black List before 1st October 1878. On 19th October he was sequestrated, and on 14th November 1878 Stevenson was also sequestrated. The transaction between Jolly and Stevenson was never renewed, nor acted upon in any way by the parties or their trustees. (5) In September 1878 Stevenson was in difficulties, his principal creditors being Messrs Ferguson, Davidson, & Company, who had supplied him with wood, and to whom Stevenson, in part payment thereof, had endorsed an acceptance of Robert Hyman, glazier, Edinburgh, who had dishonoured it. Negotiations took place between Stevenson and the appellants, and they proposed, upon an assignation of his whole means being made to them, to make the necessary advances to carry him on. Stevenson refused to do so, but offered to convey to them as security the reversion of certain property belonging to him if they gave him an advance. Jolly's bill was spoken of, and the appellants desired to have it also. Stevenson explained the circumstances in which he got it, and that it was in part payment of the Rosehall Terrace property, the transaction as to which had fallen through, and informed them of his inability to discount it. The appellants proposed to give an advance of £1000. In the course of these negotiations the £400 bill was, on or about 1st October 1878, sent to the appellants for their consideration. A few days after the appellants asked further security, and Stevenson offered to give the said subjects at 11 Rosehall Terrace in addition, the appellants increasing the proposed advance to £1500 or £1700. But the appellants asked further for Stevenson's interest in a field at Rosehall Terrace, which he refused, and the negotiations fell through. The explanation in answer is denied, and it is explained that the appellants were under antecedent obligation to renew the £486, 5s. 9d. bill when it should fall due in October 1878, and it was renewed accordingly, without any reference to the said £400 bill."

In answer to this article Ferguson, Davidson, & Co. stated—"(5) Admitted that in September 1878 Stevenson was in difficulties, and that he was being pressed by his creditors, including the appellants, for payment of the debts due to them. Admitted that at this time various negotiations (which are not correctly set forth by the respondent) took place between the appellants and Stevenson in regard to the security which Stevenson should give to the appellants for the debt due to them. Admitted that in course of these negotiations, to which Jolly was not a party, Stevenson endorsed the bill now claimed on by the appellants, and sent it to them on or about 1st October 1878, in security of part of the debt due by Stevenson to the appellants, which debt still remains unpaid. *Quoad ultra* denied. Explained that an acceptance of Stevenson's to the appellants for £486, 5s. 9d. fell due on 4th October 1878, which he could not meet, and it was specially to induce the appellants to renew that bill that the said bill was sent to them. In consideration of receiving this security the appellants renewed the said bill for £486, 5s. 9d. for three months. The old bill was delivered up to Stevenson, but the renewed bill was dishonoured by him, and it forms part of the appellants' claim on Stevenson's estate. If Stevenson had not endorsed the said bill to the appellants in security as aforesaid, they would have declined to renew, and would have pressed him for payment of the said bill."

The trustee further averred—"(6) No advance was ever made by the appellants on the faith of the proposed securities. The bill was handed to the appellants as part of the said proposed transaction, and conditionally upon the same being carried out, which was never done. The bill ought to have been returned to Stevenson when the transaction fell through; and he wrote to the appellants for it, and was informed in reply that Mr Davidson (who had taken part in the negotiations) was from home. (7) The bill was not treated by the appellants as an obligation or security in their hands. It was never entered in their business books. It was never noted for non-payment. They did not claim upon the estate of Stevenson in respect thereof, although they claimed on his estate in respect of other bills. No deduction was made from their claims on Stevenson's estate in respect of the £400 bill. Stevenson was discharged on 1st July 1879, the appellants, his principal creditors, having consented thereto, nor did they claim upon the estate of Jolly (who was sequestrated on 19th October 1878) till 22d July 1879. In these circumstances, the respondent, after communication with the appellants on 4th October 1878, rejected the claim."

The answer to the seventh averment was as follows—"Admitted that the appellants did not enter the bill in question in their books, it not being their practice to do so in regard to bills held only in security. The renewed bills granted by Stevenson for £486, 5s. 9d. were duly passed through the appellants' books. The bill in question was not noted when it became due, in respect that both Jolly and Stevenson had become bankrupt. Admitted that the respondent rejected the appellants' claim to be ranked as creditors on Jolly's estate in respect of the said bill. *Quoad ultra* denied. Explained that the appellants had learned that Jolly's estate would pay very little, if anything at all, and accordingly when they prepared and lodged their claim in Stevenson's sequestration they did not put any value on the said bill. Sometime afterwards the appellants learned that there was some chance of assets falling into Jolly's estate of considerable amount, and on 21st May 1879 they by letter intimated to the trustee in Stevenson's sequestration that they might shortly be in a position to amend their claim in that sequestration, and reserving right to do so at any time previous to drawing a dividend. In giving this notice the appellants

had in view the probability of Jolly's said bill, endorsed to them by Stevenson, coming to be of value, and that in that event they would fall to give credit for its value in their account with Stevenson's estate. Accordingly in July 1879 they lodged their claim in Jolly's sequestration."

The trustee further averred—"(8) When taking the bill from Stevenson, the appellants knew that the transaction between him and Jolly, in respect of which it was granted, was at an end, and that Jolly was not truly debtor for the amount thereof. The appellants in taking the said bill, and in now claiming upon the same against the estate of Jolly, in the circumstances condescended on, have acted fraudulently." "(Answer 8) Denied. Explained that throughout the whole transaction with Stevenson the appellants acted in perfect good faith, and they reserve all claims of damage competent to them for the charge now made against them by the respondent that they acted fraudulently. The trustee on Stevenson's estate has never called in question the transaction between the appellants and Stevenson, and the appellants had no transactions or communication whatever with Jolly, on whose estate the respondent is trustee. The respondent in no way represents Stevenson, whose trustee has ranked the appellants as creditors on Stevenson's estate for £2838, 6s. 4d."

The trustee pleaded—"(1) The appellants having received the bill in the knowledge that it constituted no obligation against Jolly, they are not entitled to claim against his estate. (2) The bill having come into the appellants' hands during negotiations between the appellants and Stevenson for pecuniary advances, which negotiations were never completed, the bill ought to have been returned to Stevenson, and the appellants are not entitled to claim thereon against Jolly's estate. (3) The appellants having obtained the bill from Stevenson conditionally upon making advances to him, and never having done so, the bill ought to have been returned, and the appellants are not entitled to claim against Jolly's estate. (4) The taking and using of the bill by the appellants in the circumstances condescended on is a fraud against the bankrupt and his estate."

Ferguson, Davidson, & Co. pleaded, *inter alia*—"(2) The appellants being *bona fide* onerous indorsees and holders of the bill claimed on, they are entitled to be ranked on Jolly's estate therefor, and the respondent's deliverance rejecting their claim ought to be repelled. (3) In any view, the averments of the respondent can only be proved by the writ or oath of the appellants."

The following letter from Ferguson, Davidson, & Co. to Stevenson was founded on by the trustee:—"*Leith, 28th May* 1878.—Dear Sir,—As arranged, we now enclose for your acceptance our draft for £486, 5s. 9d., at 6 m/ from 1st April, and we agree to renew the same when it falls due for three months at *our* expense. We shall be obliged if you will kindly return it in course with your signature."

The Sheriff-Substitute (Hamilton) refused the motion of the trustee that he be allowed a proof *prout de jure*, and found "that his averments can only be proved *scripto vel juramento*." He added this note—

"*Note.*—In the opinion of the Sheriff-Substitute the circumstances of this case as disclosed in the statements of the parties are not such as to entitle the trustee to a proof *prout de jure*. The Sheriff-Substitute even doubts whether the trustee's averments are to any extent relevant in answer to the claim of the appellants as *bona fide* indorsees and holders of the bill in question." . . .

The trustee appealed to the Court of Session, and argued—Proof *prout de jure* would be allowed where there was an averment of fraud and suspicious circumstances on the part of the holder. Here there were such averments, and the letter of the holders, coupled with their answer to the seventh article of the condescendence, constituted circumstances sufficiently suspicious to bring the case within the exception to the general rule.

Argued for Ferguson, Davidson, & Co.—The circumstances were not of the suspicious character averred. The letter of 28th May did not constitute a binding obligation.

Authorities—*Smith* v. *Stark*, Dec. 16, 1831, 10 S. 150; *Glen* v. *National Bank of Scotland*, Dec. 14, 1849, 12 D. 353; *Gordon* v. *Pratt*, Feb. 24, 1860, 22 D. 903; *Brock* v. *Newlands*, Nov. 11, 1863, 2 Macph. 71; *Wilson* v. *Scott*, June 11, 1874, 1 R. 1003; *Alexander* v. *Stewart*, Jan. 27, 1877, 4 R. 366; *Martini* v. *Steel & Craig*, Dec. 18, 1878, 6 R. 342, 16 Scot. Law Rep. 216.

At advising—

Lord Mure—This case relates to a claim of Ferguson, Davidson, & Co. to be ranked on the sequestrated estate of William Ramsay Jolly in respect of a bill drawn by Thomas Stevenson, builder in Edinburgh, on Jolly, and accepted by him on the 15th of August 1878, and which bears to have been indorsed by Stevenson to Ferguson, Davidson, & Co. The claim was rejected by the trustee on Jolly's estate on the ground that no value was given for the bill, and that it ought to have been returned to the bankrupt or to the trustee on his sequestrated estate.

On this an appeal was taken by Ferguson, Davidson, & Co. to the Sheriff, who, after hearing parties, appointed the trustee to lodge a minute or condescendence of the facts and a record to be made up. This was accordingly done, and the record having been closed and parties again heard, the Sheriff-Substitute refused a motion by the trustee that he should "be allowed a proof *prout de jure*, and found that his averments can only be proved *scripto vel juramento*." It is this interlocutor which has now been brought under review, and the question for consideration is, whether the Sheriff-Substitute is right in so limiting the proof?

There is no doubt of the general rule of law that in the ordinary case the onerosity of a bill in a question with the holder can only be redargued by writ or oath. But the rule is not one of universal application. There are a variety of decisions in which it has been relaxed; and what we have now to decide is, whether, in the circumstances of this case as disclosed on the record, that course should be followed? The authority mainly relied on in support of the argument here maintained on the part of the holders of the bill is a passage in a note by Lord Ivory in his edition of Erskine (iii. 2, 31), where he says the rule applies in all cases of "non-onerosity, *mala fides*,

collusive indorsation, &c.;" and cases are referred to in the note in which it was so decided. But that edition of Erskine was published in 1827, sometime before the commencement of the series of decisions in which in special circumstances the rule has been relaxed, and even when Lord Ivory wrote, it appears from the case of *Campbell*, 25th November 1824, 3 S. 320, mentioned in the note, that the rule was not always acted on. In the subsequent case of *Smith* v. *Stark*, 16th December 1831, 10 S. 150, referred to at the discussion, which took the shape of an application for delivery of a bill, the rule was held not to apply; and had Lord Ivory been writing on the subject at a later date, it is, I think, more than probable that he would have to some extent qualified the above passage—because he was Lord Ordinary in *Little* v. *Smith*, 9th December 1845, 8 S. 265, in which he gave a clear opinion, founded mainly on the authority of the case of *Hunter*, decided in the House of Lords in 1834 (7 W. & S. 333), in favour of inquiry being made otherwise than by writ or oath in a question relative to the onerosity of a bill. That decision was pronounced after full discussion and examination of the previous decisions, and has been followed in a series of cases, the more important of which appear to me to be those of *Anderson*, v. *Lorimer*, 21st November 1857, 20 D. 74; *York* v. *Gossman*, 5th July 1861, 23 D. 1245; and *Alexander* v. *Stewart*, 27th January 1877, 4 R. 366—in all of which proof *prout de jure* was allowed.

Now, the result of a careful examination of these cases appears to me to be this, that wherever the averments of parties on the record, as explained or admitted by the holder of a bill, are such as to show that a bill came into the possession of the holder through some irregular dealing, and not in the ordinary course of business, or are such as to lead to the inference that no actual value had been given for the bill at the time, or wherever the special facts of the case relative to the circumstances in which the holder of a bill became possessed of it, as admitted or explained by him, are such as render it desirable for the ends of justice that the inquiry into the facts should not be limited to the writ or oath of the holder, the Court have been in use—and that apart from any question or allegation of fraud—to allow a proof, before answer, of the averments. The question therefore here raised is, whether the averments and explanations of the parties, and more particularly of the appellants in this case, are such as bring it within any of these rules?

The circumstances under which this bill was granted, but which are not alleged to have been known to the appellants at the time, are stated in the 2d, 3d, and 4th articles of the condescendence. From them it appears that it was granted by Jolly in answer to a written request by Stevenson, as part of a transaction between these parties for the purchase of some property belonging to Stevenson which Jolly was unable to carry through, but that the bill was not returned to Jolly. Now, as between Jolly and Stevenson, had any dispute arisen as to the right to the bill, I have little or no doubt that the circumstances disclosed in the record would have been sufficient to entitle Jolly to an inquiry otherwise than by the writ or oath of Stevenson.

But that does not solve the question as between the appellants and the trustee on Jolly's estate, which depends mainly on the circumstances set out and explained in the 5th, 6th, and 7th articles of the condescendence. The more material parts of these averments and explanations are those relative to the delivery of the bill. On the part of the trustee on Jolly's estate it is alleged that in the course of negotiations between Stevenson, who was in difficulties, and Ferguson, Davidson, & Co., who were his principal creditors, with a view to the security to be given to them for any further advances they might make, the bill in question was sent to them by Stevenson for their consideration as a security after he had explained to them the circumstances under which he had received it, that these negotiations fell through; and that the bill was never returned to Stevenson as it ought to have been. In their answers to this the appellants, while denying the allegations as stated, do not dispute that negotiations took place relative to the security to be given to them for the debt then due. They further state that in the course of these negotiations Stevenson endorsed the bill to them in security of part of that debt which was and is still unpaid, and they then make this further and special explanation—"Explained that an acceptance of Stevenson's to the appellants for £486, 5s. 9d. fell due on 4th October 1878, which he could not meet, and it was specially to induce the appellants to renew that bill that the said bill was sent to them. In consideration of receiving this security the appellants renewed the said bill for £486, 5s. 9d. for three months. The old bill was delivered up to Stevenson, but the renewed bill was dishonoured by him, and it forms part of the appellants' claim on Stevenson's estate. If Stevenson had not endorsed the said bill to the appellants in security as aforesaid, they would have declined to renew, and would have pressed him for payment of the said bill."

Now, it is upon the terms and accuracy of this explanation, in the view I take of the case, that the question as to the mode of proof mainly depends. For although it is not alleged that any actual value was given for the bill at the time, it was plainly delivered, according to the statement of the holders, for onerous consideration, viz., in payment or security of a debt, and if the explanation had been clear and consistent with itself, and with the written communications passing between the parties, I do not, as at present advised, think that I should have been prepared to hold that the case was one in which proof otherwise than by writ or oath should have been allowed. But that explanation, and more particularly the latter part of it, is inconsistent with the terms of the letter of the 28th May 1878, in which the appellants agreed to renew the bill for £486 when it fell due, and although their attention must have been called to that matter by the special addition made at adjustment to the 5th article to the condescendence, the explanation was in no respect qualified. It is plain therefore that when these pleadings were prepared in October and November 1879 the appellants' recollection of this material part of the transaction which took place in October 1878 was quite inaccurate, and that being so, I do not think that it would be right or desirable for the ends of justice that the mode of inquiry in this case relative to the circumstances in which the bill was delivered to the

appellants should be confined to the writ or oath of parties whose recollection of such a material point was evidently defective.

Such is the conclusion I have come to after anxious consideration of the case, and I may add that it appears to me that the facts brought out in the 7th article of the condescendence and relative answer, as to no claim having been made upon the bill on Jolly's estate until nine months after the sequestration, and as to the bill not having been valued in the claim lodged on Stevenson's estate, which ought to have been done, point to the same result. Omission and delay so to enforce a claim have in several of the cases been held very material circumstances for consideration in dealing with such questions as to the mode of proof. Here we have that omission and delay, and in the whole circumstances I have come to the conclusion that this is not a case in which the mode of inquiry should be restricted.

Lord Shand—In concurring as I do in the judgment proposed by my brother Lord Mure, allowing the appellant Mr Penney, trustee on the sequestrated estate of William Ramsay Jolly, a proof by parole evidence of his averments, I cannot refrain from saying that I know nothing more unsatisfactory in the law of this country than the rules of evidence—for I cannot call them principles—which are applied in cases of this class relative to bills of exchange.

The respondents Messrs Ferguson, Davidson, & Co. are the indorsees and holders of the bill for £398, 7s. 2d., which is the subject of their claim on the sequestrated estate of Mr Jolly. The bill was accepted by Mr Jolly on 15th August 1878, and sent or given to Stevenson, the drawer, in whose hands it remained until 1st October thereafter, when, as appears by the statement of the respondents Ferguson, Davidson, & Co., it was sent to them indorsed by Stevenson in security of part of a large debt due by him to them. The appellant alleges that the acceptance was granted by Jolly to Stevenson as part of a transaction for the purchase of house property in Rosehall Terrace, Edinburgh, which Mr Jolly proposed to purchase from Stevenson, and about which the parties were then in treaty; and there is evidence in support of this statement in a letter from Stevenson to Jolly requesting as a favour that he would grant the acceptance on this footing. The appellant (Jolly's trustee) alleges that the proposed transaction was given up and came to an end sometime before 1st October; and as the bill had been given in part payment of the price of the property, it follows that the drawer Stevenson was bound to cancel it or return it to Jolly, the acceptor. In place of doing so, he gave the indorsed bill to the respondents. The appellant alleges that "Stevenson explained" [to the respondents] "the circumstances in which he got it, and that it was in part payment of the Rosehall Terrace property, the transaction as to which had fallen through." This statement is denied by the respondents, and may turn out to be entirely without foundation; but the question now for decision relates only to the mode of proof, the respondents having successfully contended before the Sheriff-Substitute that the appellant can only be allowed to prove his averments by their writ on oath. It is clear that if the bill was granted in connection with a proposed purchase of property which had been finally abandoned, the drawer could not be in good faith to indorse and deliver the bill to the respondents; and in that case, if the respondents were aware of all the circumstances, they could not be in good faith in taking the bill as a security for part of their unpaid debt. It is of importance to observe that the question between the parties is not as to the onerous nature of the transaction on the respondents' part, but as to their *bona fides* in hastening delivery of the bill. The respondents may have given indulgence to their debtor in consequence of receiving the bill, and yet, as the complainer alleges, may not have been in good faith in taking the security.

It is maintained, however, that an averment even of collusion or fraud on the part of an indorsee—an averment that he has taken a bill in the knowledge that the indorser was not entitled to part with the bill to any third party—can only be proved by the writ or oath of the indorsee and holder, and I understand some of your Lordships to be of that opinion, subject only to the qualification that if it appear from the admissions on record or the real evidence of facts that the circumstances are sufficiently suspicious, a proof by parole evidence will be admitted. I am not prepared to concur in this as the sound view of the law to be gathered from the decisions where, as in this case, the question relates, not to the question of onerosity or value given by the indorsee, but to the alleged *mala fides* of the indorsee in taking delivery of the bill. The recent authorities cited by Mr Nicolson in his note (*b*) to section 31 of book ii., tit. ii., of his edition of Erskine (and which are all subsequent in date to the note by Lord Ivory in his edition of Erskine) seem to me to conflict with this view, and in the case of *Bannatyne* v. *Wilson*, 18 D. 230, the distinction is expressly drawn in the opening passage of the Lord Justice-Clerk's opinion, which is as follows:—"We ought not without very strong grounds to trench on the well-known rule of the law of Scotland—and a very valuable rule it is—not to destroy the right of the holder of a bill except by the writ or oath of the party holding; but that implies *bona fide* holding—not necessarily onerous holding—though often and most generally this condition will concur with the other. A party, however, may be an onerous and yet not a *bona fide* holder, and if so, then the rule does not apply."

If, however, the law be taken to be in accordance with what is here maintained, it appears to me to be open to the serious objection that, in the first place, it provides, not by statute but by common law, a cover for fraud in an important class of mercantile transactions, while one of the first objects of every system of enlightened jurisprudence ought to be by the rules of evidence to give all facilities for the discovery of fraud, and every means of redress for iniquitous wrongs thereby caused. The rule as to questions of onerosity which it is proposed to extend to the case of an indorsee acquiring a bill in *mala fide*, has been supported on the alleged benefit to commerce by favouring the negotiability of bills of exchange and the summary remedies allowed by the law for recovery of their contents. It seems to me that such benefits as negotiability and summary remedies at law are purchased at a very high price if the counter-

part is to give the holder of a bill the ready means of securing an advantage obtained by fraud by shutting out all evidence of the truth of the transaction beyond his own writ or oath. Moreover, I think it very clear that no reasoning can justify or support the rule where the fraud alleged is that of the holder of the bill himself, and fraud or *mala fides* must in the ordinary case be made out against the holder as a condition of any remedy being given. In no other obligations of any class known to the law is an alleged fraudulent party by the common law rules of evidence entitled to maintain what seems to me the unreasonable position of saying his fraud can be proved only by his own writ or oath on reference, and the advantages of bills would, I doubt not, be completely maintained by giving full effect to the legal presumptions both of onerosity and *bona fides*, as we know is done in England, while at the same time allowing parole evidence for the discovery and redress of fraud.

Another objection to the existing rule—and this case forms an instructive illustration of it—is that as regards the exception of "circumstances of sufficient suspicion," introduced no doubt to obviate the injustice which it was felt the application of the rule is so often fitted to produce, there is no criterion or standard to which a judge can appeal as the test in any particular case. If a fraud has been committed, the man who has taken care skilfully to cover his acts or conceal his knowledge is by the rule of evidence protected from the right which parole proof would afford, while a somewhat less designing person, who has by his acts or admissions left a *prima facie* case of suspicious circumstances sufficiently strong in the opinion of the Court, has opened the way to a proof at large.

There appears to me to be no sound principle for holding that where a clear case of fraud is alleged, the competency of proof should depend on what must be rightly called the accidental circumstances of the party being able to present a colourable or *prima facie* case on the facts in support of his averments. It seems to come to this, that the Court, looking at antecedent probabilities to be gathered from the circumstances of particular cases, say to the complainer, if the case be one in which it seems likely that fraud will be established, a proof will be allowed—if unlikely, a proof will be refused. It is obvious that antecedent probabilities may be most misleading, and in my opinion there is no principle which can make the right to proof of an alleged fraud depend on such a consideration.

I confess I have the utmost difficulty in knowing what in each particular case should be regarded as a case of suspicion, and I think it a great anomaly in judicial procedure that such an inquiry—of the nature indeed of a jury question on an issue most vague and undefined—should be a preliminary to a proof in each particular case, and should be the subject of a verdict or judgment on which a decision as to the admissibility or incompetency of parole evidence must depend.

As I have said, I do not think the rule is settled in a question of *mala fides* in the acquisition of a bill by an indorsee, and I am not satisfied that the Court might not yet—particularly looking to the effect of more recent decisions, and the unsatisfactory nature of the inquiry now admitted as to the existence of suspicious circumstances in each case—relax the rigour of the rule even on questions of onerosity. If, however, this cannot be done, then, speaking of course entirely for myself, I can only express the wish that the unanimous recommendation of the Mercantile Law Commission on this subject made in their report in 1854 should yet receive effect. The passage in the report to which I refer is in the following terms:—"In all parts of the United Kingdom bills and notes import consideration; and the presumption that there was consideration cannot be rebutted otherwise than by writing or the oath of the holder, which the party sued is entitled to call for, provided he consents to be conclusively bound by the answer—a proceeding technically called 'oath on reference.' In England and Ireland the absence of considerations may be proved by any legal evidence in the same manner as other disputed facts, and this rule we think should be adopted in Scotland." The result would be, while maintaining the important legal presumption of onerosity, yet to render fraud or collusion discoverable by that kind of evidence by which alone it is reasonable to expect that it can be proved, and by which alone in many cases it can be proved, and at the same time to relieve the Court from the difficult and singular duty of determining in each particular case what are circumstances sufficiently suspicious to give the complainer a right to have parole proof.

I have been impelled to made these observations not only because I am impressed with the unsatisfactory state of the law, but because I am satisfied from an observation and experience of many years that the existing rule of evidence is a constant cause of injustice being done. With this conviction, and the knowledge that in many branches of the law, and particularly of mercantile law, amendments of much value are to be directly traced to the observations of Judges on existing evils or defects, I have thought it within my province and duty to direct attention to a rule of evidence which is, in my opinion, unreasonable in itself and mischievous in its operation.

I have only to add that in the circumstances of this case, as appearing on the record and writings produced, I concur in thinking a proof should be allowed.

Lord Deas—In the special circumstances of this case I concur in the result at which Lord Mure has arrived, but I do so entirely in respect of these special circumstances.

That the general rule of the law of Scotland is that the *mala fides* of the holder of a bill of exchange can be proved only by his writ or oath, I have no doubt at all. In all my experience I have never heard it questioned till now that the debtor must present an exceptional case in order to get out of the general rule; and but for the fact that I think such a case has been presented here, I should have agreed in the result at which the Sheriff-Substitute has arrived. Whether this ought to be the law it is not for us to consider. Whether the law ought to be altered is a matter for the Legislature and not for us. I know no authority for what has been said by my brother Lord Shand, and as regards the expediency of the present law, there are many considerations which tend in the opposite direction to that at which his Lordship has pointed.

I do not think that the law as to the nature of these exceptional circumstances is doubtful. I have always been of opinion that to that end two things must concur. First, there must of course be averments by the defender, which if proved show bad faith on the part of the holder; and second, there must be in the statements of the holder, or in the real evidence of facts and circumstances, or in some relative writing, something which tends to throw suspicion on him. Here I think there is a combination of these elements. There is, in the first place, no reasonable doubt that Stevenson, for whose accommodation the bill was accepted by Jolly, had no right to retain it after negotiation, for the purchase of the house by Jolly fell through. The question is, whether the endorsees knew that this was so? The trustee distinctly avers that they did. And along with this averment we have the endorsees' letter of 28th May, which plainly shows that the reason they assign in the record for taking the endorsation is an untrue reason. That may possibly be explained on the proof, but so it stands at present. That this case therefore comes up to an exception entitling the appellants to proof *prout de jure* I do not doubt; but if either of these two things had been absent—*i.e.*, an averment of bad faith and something suspicious on the part of the holders—I could not have arrived at this conclusion.

Lord President—My brother Lord Mure has stated, I think with great precision and accuracy, the rule of law applicable to this class of cases, and he has also stated the exception to that rule. I entirely concur in that exposition of the law.

As I understand Lord Shand, he does not differ in his opinion as to what the law is, and therefore his views are to be taken as an exposition as to what his Lordship thinks the law ought to be rather than expression of doubt as to what it is. If there had been any doubt as to the law, I think it would have been found in the report of the Mercantile Law Commission, referred to in argument, before whom the points of difference in the laws of England and Scotland were brought by the examination of the most distinguished lawyers of both countries, and the perfect accuracy of the report is not disputed. Now, this report came under the notice of Parliament in 1856, and received very deliberate and anxious consideration, and the outcome was the Mercantile Law Amendment Act for Scotland and the Mercantile Law Amendment Act for England. Now, in the Act applicable to Scotland there are various important alterations made in the law, but the rule which we are at present considering is left unaltered. While, therefore, as a Judge I decline to enter into any question as to the expediency of the law, I have only to observe that Parliament did not think it right to alter it.

I have only to add that in the special circumstances of the case I concur in the judgment which is to be pronounced.

The Court therefore recalled the interlocutor of the Sheriff-Substitute and allowed a proof before answer.

Counsel for the Trustee (Appellant)—Balfour—Lorimer. Agents—Cowan & Dalmahoy, W.S.

Counsel for the Respondents—Lord Advocate (Watson)—Graham Murray. Agent—James Somerville, S.S.C.

Friday, January 30.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

EARL OF MANSFIELD AND OTHERS *v.* SIR A. D. STEWART—LOCALITY OF AUCHTERGAVEN.

Teinds—Sub-valuation by the Sub-commissioners of 1629—*Construction of Report.*

A report by the sub-commissioners of teinds dated 1629–35 contained these words—"Findis be the declaratioun and vpgiving of Sir Williame Stewart of Grantullie, Knight, that his landis of Obneyes, lyand within the barronie of Murthlie and parochin of Auchtergavine foirsaid, with the viccarage teindis of the saidis landis, hes payit, presentlie payes, and may pay, in constant rent, stok and viccarage teindis, comunibus annis in tyme cuming, and no moir, of siluer dewtie zeirlie, iiiᶜ-xxxiiiˡⁱᵇ vis. viiiᵈ. And hes been in vse of pay of rentallit bollis for the personage teind, to the titular and takisman, of wictuall zerlie . xl bollis burdenit with the few-dewteis and teind-dewteis. And siclyk, findis the landis of Nether Obney, Over Obney, and Wester Burnebane, perteining to the said Sir Williame Stewart, to be fewit of auld by vmqahil Alexander Erskine, Sub-dean of Dunkeld, wᵗ consent of Mr James Hepburne, Dean of Dunkeld, and viccar-generall *sede vacante* and channonis of the chapter thairof, to vmquhil Alexander Abercrombie of Murthlie and Elizabeth Dischintoun, his spous, and the said vmqˡˡ Alexʳˢ airis, &c., wᵗ the teindis of the saidis landis, als weill personage as wiccarage, quhilk wer never in vse to be separat fra the stok, conforme to ane chairtour producit yʳanent, of the dait the tent day of Junii Jajvᶜ. and fyftie zeiris, but na cofirmaᵒn. of the same is as zit producit."

Held, on a construction of the report and of the title-deeds to the lands, in a question between Sir W. Stewart's successor and certain other heritors in the parish (*diss.* Lord Shand), that notwithstanding a long usage in which the contrary had been assumed, the lands of Over and Nether Obney had not been valued, and fell to be localled on accordingly.

Teinds—Res judicata—*Admission by Lord Advocate*—Res inter alios acta.

Held that a judgment proceeding on an admission by the Lord Advocate in a question between him and a heritor in a process of locality was not *res judicata* as against the minister and two other heritors in the locality.

Observations per Lord Deas on *Officers of State* v. *Stewart*, July 20, 1858, 20 D. 1331.

In a locality of the united parishes of Auchtergaven and Logiebride objections were raised for the Earl of Mansfield and General R. R. Robertson, heritable proprietors of certain teinds in the parish of Auchtergaven, and for the Rev. D. Winter, minister of the united parishes, against Sir A. D. Stewart of Grandtully, as heritable proprietor of the teinds of the lands of Nether Obney and Over Obney in the parish of Auchtergaven. The common agent in his rectified state had