

by the prosecutor's failure to state the amounts, and whether the Crown was entitled to a verdict under that head of the indictment. In the meantime I am not prepared to sustain the objection.

As regards the general objection to all the charges, that it was not averred that the documents were not intrinsically of the value given for them, I have no difficulty in repelling it. The crime charged was the representing certain manuscripts as genuine, and receiving a price for them as such, the accused well knowing that they were spurious. If a person fabricates documents, and sells them for a price on the allegation and representation that they are genuine, that undoubtedly is a crime, because the price is obtained by fraud. It would not be a relevant defence for the accused to prove that the spurious manuscripts were such good imitations of genuine manuscripts as to be worth the money obtained by selling or pawning them on the false and fraudulent representation that they were genuine.

Then, it is said that in the case of the charges relating to the pawning, it is not averred that the prisoner did not intend to repay the sums obtained from the pawnbroker. It is not necessary to make any such statement, because the fraud consisted in obtaining possession of the money by false pretences—by passing off as genuine documents which were fabricated, and it was immaterial whether there was or was not any intention to pay back the money.

The last objection is that in the second and third charges it is not specified what was the value of the genuine as distinguished from the fabricated documents in the bundles pledged with the pawnbrokers. Here, again, if the prosecutor does not know the specific sums applicable to the good and the bad documents respectively, he is not bound to state them or the grounds of his want of knowledge; but if at the trial it turned out that he knew or might have known the particular sums, it is only fair to the prisoner that he should state them, and it will be matter of direction for the jury whether they can convict in the circumstances.

The Court repelled all the objections.

After the evidence had been led, the Judge refused to direct the jury that the evidence showed that the prosecutor had been in a position to specify the sums received in the case of the first charge, and to apportion the lump sums between the genuine and the fabricated documents in the case of the second and third charges.

The jury found the prisoner guilty as libelled on all four charges, but recommended him to mercy on account of the facilities afforded to him in the disposal of the spurious manuscripts.

The prisoner was sentenced to twelve months' imprisonment.

Counsel for the Crown—Strachan, A.-D.
—J. A. Reid, A.-D. Agent—Crown Agent.

Counsel for the Panel—Dewar—Grainger
Stewart. Agent—Daniel Turner, Solicitor.

COURT OF SESSION.

Tuesday, June 27.

FIRST DIVISION.

GOVERNORS OF ROBERT PHILP'S TRUST, PETITIONERS.

Trust—Education Endowment—Alteration of Scheme Issued by Educational Endowments Commissioners—Alienation of Trust Funds.

In a scheme issued by the Educational Endowments Commissioners for the administration of an educational trust it was provided that the trustees should spend a certain sum annually in maintaining or assisting to maintain evening classes for technical instruction and instruction in science and art. Power was given to the Court to alter the provisions of the scheme on application made by the trustees with consent of the Education Department. The scheme did not authorise the trustees to spend or alienate any part of the capital of the trust.

In a petition presented with consent of the Education Department the trustees craved authority to apply part of the capital of the trust in furnishing a school, which was under the control of the school board, with the necessary equipment for technical instruction and instruction in science and art. The Court *refused* the petition on the ground that the proposal would place part of the capital of the trust beyond the control of the trustees, and that this objection could not be obviated by any arrangement between the trustees and the existing school board.

Robert Philp, merchant, Kirkcaldy, died in 1823, leaving a trust-disposition and settlement by which he bequeathed certain funds and estate to trustees for educational purposes in Kirkcaldy and district. The trustees were subsequently incorporated by Act of Parliament 9 and 10 Vict. cap. 24, and for many years they kept and conducted schools of their own. With the progress of educational legislation the continuance of these schools became unnecessary, and the trust falling within the provisions of the Educational Endowments Act 1882, the Commissioners under that Act issued a scheme in June 1888 for the future administration of the trust, under which, in lieu of the discontinued schools, arrangements were made to assist selected scholars in their attendance at public or state-aided schools, and to make annual grants to these schools for the promotion of higher and technical instruction.

Under this scheme the governors of the trust were directed to sell or let the school buildings (with the exception of "Philp's School," which they were empowered to retain if they saw fit), and to invest the proceeds in securities of certain kinds (sections 15, 16, and 22). No authority was

conferred upon the governors to spend or alienate the capital of the trust, but various provisions were made as to the application of the income. *Inter alia*, the governors were directed (section 36) to "apply the annual sum of not less than £250 in maintaining, or assisting to maintain, in Kirkcaldy and in Kinghorn, evening classes for science and art instruction, or for instruction in such branches of technical education as may not be provided for out of grants from Parliament, or rates authorised to be raised under any Act of Parliament now in operation or that may be hereafter passed. . . . The said annual sum may be applied as the governors may determine—(1) In providing proper accommodation for said classes. (2) In furnishing apparatus, models, and other means of instruction. . . . (4) in paying fees for pupils. . . . Section 42 provided—"It shall be in the power of the Court of Session to alter the provisions of this scheme upon application made to them, with consent of the Scotch Education Department, by the governing body or any party interested, provided that such alteration shall not be contrary to anything contained in the Educational Endowments (Scotland) Act 1882."

In carrying out the directions contained in section 36 of the scheme the governors of the trust did not think it expedient to establish classes of their own, as evening classes for technical education and instruction in science and art already existed in Kirkcaldy. They accordingly made arrangements with the persons in charge of these classes that they should receive pupils nominated by the governors, the fees of these pupils being paid out of the funds of the trust.

In November 1892 the governors, with consent of the Scotch Education Department, presented a petition to the Court, setting forth that, owing to the mode in which they were carrying out the provisions of section 36 of the scheme, the subjects known as Philp's School were practically useless to the trust; that the Kirkcaldy Burgh (Higher) School was about to be largely extended, and that provision was to be made for accommodation for science and art instruction under the superintendence of the Burgh School Board. They accordingly suggested "that the purpose of the 36th section would be best carried out by selling the subjects, and applying the proceeds, so far as they will go, in fitting up the accommodation so to be provided in said Kirkcaldy Burgh (Higher) School with the appliances and general equipment necessary for the carrying on of such instruction." They further stated—"In the subsequent arrangements to be made as to the admission to these classes of pupils nominated by the petitioners, the petitioners will stipulate with those in charge of them that classes will be taught in the evening, on such days and at such hours as may be arranged, and that the pupils presented by the petitioners shall be admitted on payment by the petitioners of such fee as the petitioners may from time to time fix, and that the

petitioners shall have a voice in the management of the classes by representation on the body in charge of them."

The petitioners therefore craved the Court to authorise them to apply the price to be received on the sale of said subjects in equipping the Kirkcaldy Burgh (Higher) School in the manner proposed, and to approve of the alteration thus made on the scheme.

The Court remitted to Mr Bremner P. Lee, advocate, to report.

In his report Mr Lee stated, *inter alia*, the following objections to the proposed scheme—"The application of the petitioners may be considered as an application for authority to spend a portion of their capital in the manner proposed. Such a proposal cannot, I think, be looked upon as a modification of the existing scheme, but is an entirely new departure. In the whole complicated machinery provided for the working of this trust and the disposal of its revenues, no provision is made for spending its capital, or any part of its capital. And the reason for this is obvious. The governors having ceased to conduct schools of their own, have made an arrangement by which, in consideration of an annual grant from the trust, a large number of their nominees are received as free scholars in the science and art evening classes, held in the burgh school of Kirkcaldy, and conducted by a committee sanctioned by the Science and Art Department of the Privy Council. So long as the arrangement remains on this footing, the governors are only paying for what they immediately receive. But whenever the capital of the trust is allowed to be spent on what must remain the undertaking of another body, the governors must depend for any due return on the possibility of ensuring the continued existence and success of that other body, and also their interest in the alienated capital. Your petitioners consider that they have provided against this difficulty by a proposed agreement to be entered into between themselves and the School Board, ensuring continuity of instruction and certain privileges to the governors. . . . Such an agreement I cannot think of much value. It would be incompetent for the School Board to hold the property of another merely on sufferance, and therefore any conveyance by the governors must be such as will absolutely divest them. Nor can the School Board give any such undertaking as would fetter it in the administration of its statutory rights and duties; the School Board, for example, must retain its statutory power to discontinue or change the site of its schools (Technical Schools (Scotland) Act 1887, sec. 7). If this be so, any such agreement as is proposed would, in so far as competent to the School Board, be quite in effectual as a protection to the interests of the petitioners."

At advising—

LORD PRESIDENT—I do not think that we can grant the prayer of this petition.

The fatal objection to what is proposed is, that it is an alienation of part of the

capital of this trust in favour of a statutory board which is necessarily external to and independent of the trust; and the proposed arrangement between the two bodies does not and could not give to the trustees any such control and management of the alienated property as to obviate this radical objection. I have heard no adequate answer to the trenchant remarks of the reporter upon this head.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court refused the petition.

Counsel for the Petitioners—J. B. Young.
Agents—Mitchell & Baxter, W.S.

Tuesday, June 27.

FIRST DIVISION.

[Lord Kincairney, Ordinary.]

MURRAY v. MAGISTRATES OF FORFAR.

Burgh—Qualified Right of Property—Market Muir—Immemorial Usage for Purposes of Recreation—Powers of Magistrates.

A Crown charter of confirmation and novodamus dated 1665 conveyed to the magistrates and community of a royal burgh, said burgh “with all muirs,” &c. After the muirs adjoining the town had from time immemorial been used, primarily for markets, but also for purposes of recreation, the magistrates were held not to be entitled under their powers of administration to lease a small portion of it to be covered with an auction mart, although they maintained that that method of holding markets had superseded in public favour the former one of open markets, and would increase the funds of the burgh which had suffered by the falling off of market dues.

Held, however, that the powers of the magistrates were not thus limited with regard to ground now forming part of the muir, but which had been acquired within the prescriptive period, in exchange for land held under no restriction, and which was not proved to have been dedicated to the public for purposes of recreation.

Question reserved as to the rights of the public to unenclosed land belonging to the burgh which they had used for the purposes of recreation for the prescriptive period, but of which the magistrates had on all suitable occasions asserted they were the proprietors.

Dr William Fettes Murray, Forfar, brought an action of suspension and interdict against the Magistrates and Town Council of Forfar to have the proceedings complained of suspended, and the defenders interdicted from “selling, feuing, letting, or

in any other form alienating any part he portion of the muir situated within tor burgh of Forfar known as the Market Muir, and from encroaching or building upon or enclosing the same, or otherwise interfering with the same, so as to impede or obstruct the complainer, or any other inhabitant of the said burgh, in freely using, possessing, and enjoying the same for the purpose of playing such games thereon as golf,shinty, cricket, football, and quoiting, and for exercise and recreation in general, or in approaching or entering upon or traversing the same from all points and in all directions, and from letting, feuing, selling, or otherwise alienating or exposing to let by public roup, or negotiating for letting, feuing, selling, or otherwise alienating that piece of ground, part of the said muir situated on the north side of the prison and Sheriff Court Buildings, and extending from the march stone of the prison ground northward 132 feet or thereby, and from the east in a line with the prison east wall westward along the boundary wall of the Sheriff Court Buildings 230 feet or thereby, and consisting of one acre imperial or thereby; and specially, without prejudice to the above written generality, from exposing the said piece of ground for let by public roup on a lease of ten years, and upon the conditions already prepared and adjusted with reference to a roup to be held upon the 19th day of March 1892.”

The complainer stated—(Stat. 2) “Forfar is one of the ancient royal burghs of Scotland, but the infeftments, confirmations, documents, and erection of the burgh having been lost and destroyed during the usurpation, His late Majesty King Charles II., by charter of confirmation, passing under the Great Seal on 9th May 1665, ratified and confirmed the ancient erection and all the lands, tenements, houses, muirs, and marshes, multures, fishings, liberties, privileges, immunities, commodities, and others pertaining and belonging to the same, whereof the provost, bailies, councillors, burgesses and inhabitants of the said burgh, and their predecessors were in any former time possessed, and of new gave, granted, and disposed to the provost, bailies, councillors, and community of the said burgh and their successors in perpetuity, the said burgh, with all infield and outfield lands, houses, tenements, yards, acres, tofts, crofts, milns, multures, muirs, towards the south and the north, and all other muirs, marshes, meadows, lochs, woods, fishings, temple lands and other lands howsoever designed, lying within the burgh and pendicles of the said burgh and territories thereof, the fee-farm, cess, and feu-farm duties thereof, and annual rents due from the same in any past time to the priory of Restenneth, abbacy of Cupar, or lordship of Torphichen, with the teinds, privileges, immunities, casualties, pasturages, parts, pendicles, and pertinents thereof whatsoever, as well near as at a distance lying, pertaining, and belonging to the said burgh, or which are known to pertain and belong to the same,