the first and only son of his said nephew Archibald," &c. The natural theory is, that not only are the trustees to be invested at once with these funds for Archibald, but there is no trust created in favour of anybody else except in one event, and that is, "if Archibald Frederick Campbell shall die in my lifetime." It seems to be clear, therefore, that Archibald, having survived the truster, becomes residuary legatee, entitled to the £5000 and fee of the furniture, &c., under the will. If that be so, it leaves only the question whether it is most reasonable, looking to the circumstances of the case, to suppose that the truster intended the £5000 and the furniture to go one way, and the lands of Kilchoan another. That Colonel Campbell intended the £5000 to go to Archibald Campbell is beyond doubt. Does that not throw light upon the question of vesting under the trust-deed? The lands of Kilchoan are not the most important part of the truster's succession; the residuary estate is so, and it is difficult to suppose that he meant Archibald Campbell to get the fee of the one and not of the other. This furniture of which he at once gets the fee, is the furniture in the cottage on the lands of Kilchoan, and if the testator's intention was that the parties under the will should be different from those in whom the rights under the trust-deed were to vest, it comes to this that he meant one party to get the furniture in the cottage, and another the cottage itself. But the will says they are to go to Archibald Frederick Campbell, "who will then be head of my family," if he survives. What made him head of the family? He was Colonel Campbell's heir-at-law, but it is difficult to suppose that that made him head of the family. The expression here used can mean nothing else but that Archibald is to have the beneficial fee of the lands. If that is the fair meaning of the word, it gives us the testator's own construction of what he meant in the trust-deed. So that although I don't say that two views may not be taken of these deeds (the other being that he meant the party under the will to be different from that under the trust-deed), I think, looking to all the circumstances, that he meant the parties to be the same. I think he has himself given us a kind of glossary to construe his trust-deed. Now, if I am right in this view, a decision to the effect that the fee of the furniture and lands vested in Archibald Frederick Campbell is according to the plain meaning of these deeds, and does not therefore trench in the least upon any principles of construction such as that laid down in the case of Donaldson's trustees. The detailed provisions here enable us to see that although the conveyance was to be postponed, vesting was not. The intention of the testator is the ruling principle in all those deeds.

The only other question is whether the general disposition and settlement has conveyed these subjects to Archibald Frederick Campbell's mother. Upon that I have no doubt. If I am right, Archibald Frederick Campbell by survivance of the truster became fee-simple proprietor. He held not under a deed with a destination, but under a deed which would have made these subjects descend to his own heir-at-law, if he had not executed this disposition. And I therefore think it clear that this general disposition conveyed them to his mother.

I think the better form of our interlocutor would be to recal that of the Lord Ordinary, to find that the fee of the lands and furniture vested in Archibald Frederick Campbell, and *quoad ultra* remit to the Lord Ordinary.

Agent for Anne Moore or Campbell—William Waddell, W.S.

Agents for Colonel Campbell's Trustees and Executors—A. & A. Campbell, W.S.

Agents for Melfort Campbell—Adam & Sang, S.S.C.

LEIGHTON *v.* LINDFIELD.

Promissory Note—Proof pro ut de jure—Allegation of Fraud. Circumstances in which held 1. That a sufficient case was averred to defeat the probativeness of a promissory note so as to entitle the defender to a proof of his averments *pro ut de jure*. 2. That the evidence had failed to establish the allegation of fraud.

This was an advocation from the Sheriff Court of Stirlingshire. The action was brought upon a promissory note for £44, alleged to have been granted by the advocator to a person of the name of Somerville, with whom he was in business, whose indorsee the respondent was. The defence was that the document had been impetrated at a time when the advocator was signing an acknowledgment to Somerville as to the state of the partnership affairs, he really signing, through the fraud of Somerville, a different document from what he believed himself to be signing. The answer to this was that the promissory note was granted in satisfaction of a private, not a company, debt; but it was proved in evidence that, under a reference which the parties made of their company affairs, no mention was made by Somerville of his possession of this document, although a balance was found by the referees against him, and that it was, after ascertainment of this balance, indorsed to the respondent.

Before answer, the Sheriff-Substitute (Robertson) allowed a proof of the defender's averments, and pronounced the following interlocutor:—

"Having considered the closed record, productions, and whole process, and heard parties' procurators thereon—before farther answer, allows the defender a proof *pro ut de jure*, of his averments on record, and to the pursuer a conjunct probation, grants diligence at the instance of both parties for citing witnesses and havers, and assigns Tuesday, the 16th April, at eleven o'clock, within the Sheriff Court-house, Stirling, for the defender proceeding with his proof.

"ROBT. ROBERTSON.

"*Note.*—Nothing could be more correct in legal argument than the pleading for the pursuer on the general law in reference to bills and promissory-notes, as regards the limitation of proof to the writ or oath of the drawer or indorser, and the Sheriff-Substitute entirely concurs in it. But the present is quite an exceptional case, and aware as the Sheriff-Substitute is of the previous litigation between the indorser (Somerville) and the defender, and the circumstances connected therewith, and keeping in view the pursuer's admission that every plea available to the defender as against Somerville, is equally good as against him (the pursuer), he has had no hesitation in allowing the defender a proof *pro ut de jure* of his whole averments."

The Sheriff (Moir) adhered on advising an appeal against this interlocutor, and appended the following note to his judgment:—

"The Sheriff fully adopts the rule of law that in the general case where a bill or promissory-note is alleged to have been granted without value, the proof of that averment must be limited to writ or

oath. But it is equally settled that there are exceptions to this rule. When the averments of the defender resolve into this, that the document was obtained from him fraudulently, or by some unfair misrepresentation as to its character, a proof *pro ut de jure* has been allowed. The case of the defender may be said to be of that kind, for he alleges that the bill, as read over to him, contained an acknowledgment *in gremio* that his partner Somerville had put into the partnership concern £40 more than the defender, the promissory note being intended to balance that super advance. He also avers that it was represented to be a bill for £40 only. Further, it has been held that where the averments of the defender are supported by suspicious circumstances in the conduct of the pursuer, a proof *pro ut de jure* may be allowed. Now, here the conduct of the pursuer is really inexplicable on the supposition that he considered this as a genuine document of which he was the onerous holder. For when an action is brought against him by the defender for a partnership accounting, and concluding against him for a sum of £40, although he litigates this action pertinaciously enough, it is ultimately decided against him, and a balance of £32, 12s. 6d. found due by him. And in all this litigation he never puts forward or mentions the defender's promissory note for £44, which would have more than extinguished the whole claim. In these circumstances the Sheriff thinks that, without interfering with the general rule of law, the proof *pro ut de jure* has been rightly allowed."

On the merits, the Sheriff-Substitute pronounced the following interlocutor finding for the pursuer :—

"Having considered the closed record, proof led for the parties, productions, and whole process, and having heard parties' procurators on the cause, and made avizandum, finds that the defender has failed to establish his defence that he is not due the sum of £44 contained in his promissory-note, No. 2 of process: Therefore decerns against the defender in terms of the conclusions of the summons: Finds the defender liable in expenses; allows an account thereof to be given in, and remits the same, when lodged, to the Auditor of Court to tax and report, and decerns.

"ROBT. ROBERTSON.

"After a careful consideration of the evidence on both sides, the Sheriff-Substitute is unable to see that the defender has succeeded in identifying to any extent the alleged acknowledgment for over-advances in the nail making business, with the promissory note pursued for. The evidence of the pursuer and defender is irreconcilable, but as regards the note for £44, each of them stands alone, and that document is not touched, it is thought, by anything in the other part of the proof for the defender. Then the note itself is liable to no objection, and as to it nothing can be clearer than Somerville's evidence, and, as already said, both the note and Somerville's statement in regard to it are unaffected by the pursuer's proof. There is nothing in the circumstance that the note for £44 was not produced in the submission. That submission had reference alone to the transactions between Somerville and Leighton as regarded the nail business, while, unless Somerville has grossly perjured himself, of which there is nothing to lead to a suspicion, the bill for £44 was for previous and wholly unconnected transactions. It would be very dangerous indeed, on such proof as the defender has brought forward, to set aside a privileged document in all respects formal and regular. Indeed, the defender's whole case, as respects *the note*, rests on his own unsupported evidence, expressly contradicted as it is by Somerville's evidence, and by the note itself."

The Sheriff adhered, but expressed difficulty in doing so.

The defender advocated.

LANCASTER (with him A. R. CLARK), for him, contended that the evidence instructed the complete unreliableness of the statement made by Somerville in explanation of the *causa debiti*, and the granting of the promissory note in satisfaction of said debt, and set up the account given by the advocator that it was impetrated from him.

W. A. BROWN (with him WATSON), in answer, relied on the presumption of onerosity, which was not taken away by the evidence, which only amounted to suspicion, not to proof of fraud. The obligation was granted for a private debt unconnected with the company affairs, and the evidence therefore went no length to detract from the probativeness of the document.

At advising,

LORD PRESIDENT—This is an action at the instance of James Lindfield, clearing-house clerk at Stirling, against Robert Leighton, nail manufacturer, St Ninians, for payment of a promissory note indorsed to Lindfield. The defence against the action is substantially this, that although the defender signed that document it was surreptitiously obtained from him while called upon to sign a different document relative to business accounts between the parties. That matter the Sheriff-Substitute considered a fit subject for investigation, and I think rightly so considered. I think that fraud is alleged, and accordingly that a proof before answer *pro ut de jure* was advisable. Proof was taken, and the question comes to be whether the evidence instructs that it was true that the promissory note was impetrated by fraud. The proof necessarily contained a good deal of evidence as to the nail trade carried on by the parties, and it appears that there being differences among them, they had agreed to a reference to two individuals, who thought that there was a balance in favour of Leighton. It is said by Leighton that while the investigation was going on he was asked by Somerville to grant a written document acknowledging that he (Somerville) had advanced £40 more than Leighton to the business. Leighton says that this demand was made and that he complied with it. Now, it requires very clear proof of party that he signed a promissory note without knowing its contents. It is alleged that he signed the document, which was not upon a clean stamp; this implies that if he had read the document, he would not have signed it. But the document is there, and he says he signed a document of a different kind. That is a kind of allegation difficult to receive from a person who considers himself qualified to grant a promissory note. But have we any proof of such allegation? The defender says that the document is fraudulent, and was not the document which was read to him; the party who obtained the promissory note and who indorsed it denies that story altogether. He says it was granted as to other business quite unconnected with their partnership affairs. So far the parties are directly at variance. The question, in one view, is which of them is to be believed. But I think that that is not enough. We must have something very conclusive in support of these varying statements to determine whether the amount of corroboration and contradiction lies with Leighton or with Somerville.

Both referees state that Somerville had come to them as to getting an acknowledgment from Leighton. I don't think that is a contradiction of Somerville. But Stevenson says that he obtained such a document, which must have been obtained at that time. Somerville contradicts Stevenson. Then I cannot say that I am much impressed with the other circumstances noticed, that no mention was made by Somerville of the possession of the document, although it was not then indorsed; and, moreover, when he was asked by the referees if he had anything more to say, that he had nothing more. I am not so impressed with that circumstance as Mr Lancaster seemed to be. I think that the reference had only to do with partnership affairs, and that this document did not fall within their scope. But still there was a balance found against them by the referees, and it might have been expected that he would then have produced the document. He did not do so, but indorsed it to the pursuer. That is a circumstance deserving of observation, but it does not amount to a contradiction. It is also a circumstance as to the partnership accounts that the books have a suspicious aspect, but that was not investigated, having no reference to this question. That may affect Mr Somerville, but it is not germane to the question whether Leighton signed in error. The question then comes to be, are these circumstances enough to take away the onerosity of the promissory note? I shrink from holding, however suspicious these may be, that there is here enough to do that.

Lord CURRIEHILL—The stake in this case is not large, but it brings large and important principles under discussion. The action is founded on a promissory note, a document falling under the category of bills of exchange. Such a document has great privileges. One is that its onerosity is presumed, and that presumption does not admit of being obviated but by writ or oath. Another privilege which it has is that it is regarded as probative, although it is not accompanied by statutory solemnities. By law such a document is probative, so that execution may follow upon it. The commercial law of this country requires that these documents shall receive effect. There may often be great suspicion that by giving effect to them injustice may be done to individuals. But we are sternly bound to take care that we don't give way to mere suspicion, so as to detract from the probative nature of such documents. His Lordship proceeded to consider the evidence to see whether there was more than suspicion in the case, and arrived at the same result with the Lord President that there was not.

Lord DEAS differed. He said the question in the case was not, as stated by Lord Curriehlll, whether they were to refuse to give effect to the probativeness of a promissory note, but whether the document in question was a true one. He was of opinion that it was not. The import of the proof was entirely to discredit the statement of Somerville that Leighton signed the promissory note in satisfaction of an obligation unconnected with the partnership affairs, and to corroborate the statement of Leighton that it was fraudulently impetrated from him.

Lord ARDMILLAN concurred with the majority.

The note of advocation was accordingly refused, with additional expenses.

Agents for Advocator—H. & A. Inglis, W.S.

Agent for Respondent — Alexander Cassels, W.S.

CAMERON *v.* DOW.

Fraud—Stat. 1621, *c.* 18—*Relevancy*—A reduction founded on the Statute 1621, c. 18, dismissed in respect there was no averment of insolvency.

This is an action of reduction at the instance of Donald Cameron, warehouse porter in Glasgow, against Angus Dow, wine and spirit merchant there, sole surviving trustee of the late Allan Cameron, of a minute of appointment of trustees or trust-deed, said to have been executed by the said Allan Cameron, and dated 16th September 1847, and minute annexed thereto, and also of a minute of acceptance by the defender and two other persons of the office of trustees under the above deed. The summons further contained conclusions of count and reckoning for the intromissions of the defender and his co-trustees with the estate of the said Allan Cameron. The pursuer sued as a true creditor of the said Allan Cameron, and also, as executor-creditor, decerned to him. No allegation of Cameron's insolvency was made in the summons and original condescendence, but in the revised condescendence a statement was introduced to the effect that at the date of the said minutes Allan Cameron was insolvent, or at least he was divested of his whole means and rendered insolvent thereby. In his pleas in law the pursuer stated that under the Act 1621, c. 18, "the minutes in question should be reduced, as being gratuitous alienations to conjunct and confident parties, to the prejudice of the pursuer, as a true creditor of the granter; and, *separatim*, as being made by a party insolvent, or who had thereby rendered himself insolvent, in defraud of the pursuer's rights as his creditor."

There was also a plea applicable to the conclusions for count and reckoning. The defender pleaded, "the averments are not relevant or sufficient in law to support the conclusions, in respect there is no averment that the deceased Allan Cameron was at any time insolvent, or that the trust was executed to defraud or to the hurt of prior creditors; and there having been no averment or plea in reference to insolvency in the summons and condescendence, the pursuer is not now entitled to found on alleged insolvency as a ground of action."

The Lord Ordinary (Barcaple) on the 22d November 1866 sustained the above plea for the defender, and dismissed the action. His Lordship observed in his note:—

"The proper mode of libelling a reduction on the Act 1621, c. 18, is undoubtedly to set forth, as a substantive part of the ground of reduction, that the granter was insolvent at the date of the deed challenged. The fact of insolvency may be established by statutory presumption in the absence of positive proof; but it is a fact essential to the pursuer's case. Accordingly, in Wood *v.* Dalrymple, 4th December 1823, 2 S. 480, a summons of reduction of the indorsations of bills libelling on the Acts 1696 and 1621, "which did not distinctly set forth that the indorser was bankrupt or insolvent, or any facts referring to this at the date of making the indorsations," was dismissed as irrelevant. In the recent case of Bolden *v.* Ferguson, 3d March 1863, 1 M'P., 522, a more lenient course was adopted. It was then objected, when the record had been closed and issues were being adjusted, that there was no averment of insolvency either at the date of the deed or of the challenge. An opinion was indicated from the bench that it was necessary to aver insolvency, but the Court allowed the record to be opened up to admit such