Counsel for Complainer — Lang. Agent—Thomas Lawson, S.S.C.

Counsel for Respondent—A. J. Young. Agent—D. Howard Smith, Solicitor.

Saturday, January 27.

SECOND DIVISION.

[Bill Chamber.

ALEXANDER *v.* STUART.

Proof—Bill of Exchange—Onerosity—Fraud.

Averments which *held* sufficient to entitle the suspender of a charge under a bill to a proof *pro ut de jure.*

This was a suspension by John Alexander, Arnhill, by Huntly, complaining that he had been charged at the instance of John Stuart, Mill of Crannabo, Marnoch, to pay £35 under an alleged bill, dated 20th June 1876, by the complainer and William Roger, residing in Huntly, payable four months after date, but under deduction of £18, 6s. 6d. paid to account on 20th Oct. 1876. Alexander averred that Roger was a mutual friend of himself and the charger. He had fallen into embarrassed circumstances, and in the month of June last, at the suggestion and solicitation of the charger, the complainer was induced to accept of the bill charged on, along with Roger, on the understanding and agreement that it was to be drawn by the charger and indorsed and cashed by him at the Aberdeen Town and County Bank, at its branch in Banff, and that the charger was to hand the contents of the bill to Roger for his own use, under deduction of a sum of £5 to be paid out of it to account of a debt due by Roger to the charger. This was done because the Bank would not discount the bill in the names of the charger and Roger alone. It was part of the said agreement that, although the charger was the drawer and indorser of the bill, he should have no right of relief against the complainer as one of the acceptors, except to the extent of one-half of any sum which Roger might be unable to pay. Upon this agreement alone the complainer accepted the bill charged on, and delivered it to the charger for the purpose of being discounted. He received no value for the bill. The charger discounted the bill, but failed to implement the agreement under which it was accepted by the complainer and Roger. The respondent fraudulently, and in breach of that agreement, applied the whole of the money to his own uses and for his own purposes, and fraudulently failed to give to the acceptor Roger any part of the sum. The bill became due on the 23d October 1876. On the 20th of that month Mr James Forbes, solicitor of the charger, wrote to the complainer a letter, in which he demanded immediate payment of £16, 13s. 6d., alleged to be due by the complainer and Roger to the charger on the bill in question. In that letter the charger's solicitor stated that the £16, 13s. 6d. was the amount of a bill for £14, 5s., with interest payable on the same since 20th May 1873, which was accepted by Roger to the charger, and in respect of which the charger's solicitor stated that the bill for £35, being the one charged on, was granted. On receipt of this letter the respondent's solicitor wrote to the charger's agent stating the agreement under which the complainer was a party to the bill as above set forth. To this letter the complainer's agent received no reply. Until receipt of the letter of 20th October the complainer did not know of the existence of the bill for £14, 5s. The complainer would not have accepted the bill charged on had he known that it was to be applied to the payment of a former bill.

The respondent, on the other hand, averred that on 23d January 1873 he drew a bill upon Roger for £14, 5s., payable four months after date. This bill was duly accepted by Roger, and was for value had and received by Roger from the respondent. After the said bill had become due, or about that time, the respondent learned that Roger had been putting away or had put away his effects in favour of his mother and brother, and that he was not able to pay the said bill, and in point of fact he did not pay it. The respondent frequently pressed Roger for payment of the said bill, and ultimately threatened him with personal diligence, and the result was that at a market held at Keith on 14th June 1876 Roger offered the respondent, on condition that he should not do diligence against him in the meantime, a bill at four months by the complainer in favour of an unnamed acceptor. The bill had £35 in the corner, and was signed by the complainer. The respondent, it was proposed by Roger, was to retain the bill for £14, 5s. This offer was considered by the respondent, and the result was that he agreed to take the £35 bill, with the complainer as acceptor, only on the conditions (1) that Roger should also be an acceptor; (2) that he should retain the £14, 5s. bill until the £35 bill was paid; (3) that he should discount the £35 bill and have the use of the money in the meantime; and (4) that on the £14, 5s. bill with interest being paid, he should hand over the £25 bill. In point of fact, the £35 bill was a collateral security for the £14, 5s. bill, and was granted by the complainer and received by the respondent only on that footing. The complainer was present, and agreed to all those conditions. The £35 bill was granted for that sum by Roger and the complainer, who was really Roger's cautioner, to induce the respondent to postpone diligence against Roger, and in consequence of its being granted he did postpone such diligence. The £35 bill was protested against the complainer for the sum in the bill for £35, under deduction, as the protest bears, of "£18, 6s. 6d. sterling," being the difference between the said bills for £14, 5s., with interest thereon, and the £35 bill. That difference has been paid by the respondent to the bankers who discounted the £35 bill, but neither Roger nor the complainer has made any payment to account of either of the bills. The charge sought to be suspended was given for payment of the said sum of £35, less the said sum of £18, 6s. 6d.

The Lord Ordinary refused the note, and the suspender reclaimed.

Argued for him—The suspender is entitled to a proof *pro ut de jure* of his averments. A relevant case of fraud is alleged. In *Anderson* v. *Lorimer*, 21st November 1857, 20 D. 74, a proof was allowed of the averment that a bill had been signed blank on the understanding that it was to

be filled up for a sum much less than the amount it bore. The fraud was not in the inception of the bill, but in the misappropriation of the money. In *Steele* v. *Bridge*, 13th July 1872, 9 Scot. Law Rep. 573, a proof at large was allowed of an averment of a simulated transfer of a bill.

Argued for respondent—In *Brock* v. *Newlands*, 11th Nov. 1863, 2 Macph. 71, it was held that the admission that a bill had been to a certain extent granted without value did not deprive the charger of the usual privileges and presumption to the extent to which he maintained the onerosity of the bill. This was followed in *Mercer* v. *Livingstone*, 21st December 1864, 3 Macph. 300.

At advising—

Lord Justice-Clerk—In this case the respondent has put himself outside the rule which presumes onerosity except in so far as the want of it is instructed by writ or oath. He admits that there was value only to the extent of £14, and he has not satisfactorily explained how he came to take a bill for £35, retaining in his own possession the previous bill. I don't dispute the law laid down in *Broch* v. *Newlands*, but this transaction is one entirely out of the usual course of business, and I think it is not protected by the legal presumption to which I have referred. We must therefore remit to the Lord Ordinary to pass the note and to allow a proof *pro ut de jure*.

The other Judges concurred.

Counsel for Suspender (Reclaimer)—Brand. Agent—W. Officer, S.S.C.

Counsel for Respondent—M'Kechnie. Agent—Thomas Carmichael, S.S.C.

HIGH COURT OF JUSTICIARY.

Monday, January 29.

WILLIAM MANN.

Crime—Forgery—Vitiation—Indictment—Relevancy.

Held that the fraudulent alteration of the figures and words denoting value in a bank-cheque is relevantly libelled as forgery, the cheque being afterwards cashed at the bank.

This was an indictment charging William Mann, lately inspector of the poor of the parish of Rerwick, in the stewartry of Kirkcudbright, with the crime of forgery, as also the wickedly and feloniously using and uttering as genuine a forged bank-cheque or order for the payment of money, knowing the same to be forged, in so far as it being his practice as inspector foresaid to receive from time to time from John Boyes, collector of poor-rates levied in said parish, bank-cheques or orders for the payment of money drawn by Boyes in his favour on the account-current of the Parochial Board, in order that he might uplift the proceeds and make the necessary payments to the paupers on the roll of the parish, he nevertheless on two several occasions wickedly and feloniously altered and falsified such a cheque or order for the sum of £6 by adding the figure 0 to the figure 6 at the left-hand corner of the cheque, and by adding the letters "ty" to the word six in the body thereof, and afterwards wickedly and feloniously used and uttered the said cheque as genuine by presenting them at the bank for payment, and receiving in each case £60, of which he applied £54 to his own uses.

W. S. Cooper, for the panel, objected to the relevancy of the indictment. It was at one time doubted whether the case of a bill or other obligation, drawn over a genuine subscription, amounted to forgery, but it was never doubted that the *species facti* here amounted only to vitiation or falsification which Hume distinguishes from forgery (Comm. i. pp. 159-60). The practice is shown by the cases cited by Hume, of *Alexander Falconer*, 7th October 1812, where the panel, who had altered the date on a property-tax receipt, was found guilty of alterations and vitiations and using; and by the cases of *John Hutchison*, 28th October 1872 (2 Couper 351); and *Robert Pollock*, 1857 (cited by Couper, *loc. cit.* p. 356). This is also the opinion of Macdonald (Crim. Law, pp. 97-107), where he distinguishes between writing on blank space over genuine subscription, which is a kind of forgery and vitiation of an existing and genuine deed to the prejudice of others, and is described as a kind of fraud, and as less serious than the falsification of the *corpus* of a deed, one consequence being that in the latter case lettering does not require to be proved.

Solicitor-General (Macdonald), in reply, cited the case of *Simon Fraser*, 21st November 1859 (3 Irv. 467), where, in deciding that the writing and subscribing of a document known to be untrue does not constitute forgery, the Judges agree that the uttering of a document which is not genuine is sufficient.

At advising—

Lord Justice-Clerk—I see no sufficient reason why in the present case Crown counsel should have departed from what appears to be the usual and proper mode of libelling the offence disclosed in the indictment. But if I am compelled to decide the point, I must say I have no doubt that the objection ought to be repelled. That category of the *crimen falsi*, which consists in forgery or the falsification of writs, may be constituted in either of two ways—1st, by the fabrication of a signature; 2d, by the fabrication of a document or obligation above a genuine signature different from what the party subscribing intended. In the case of *Fraser*, Lord Ivory said—"It is sufficient to constitute the crime of forgery if to the prejudice of a person an instrument is written above his genuine signature different from that which the person intended should be written." I think that is sound law; and I can see no difference in principle between the case where an entire document is so fabricated and a case like the present, where only a part of the document is fabricated but the value of the obligation is made something entirely different.

Objection repelled.

The panel thereafter pleaded guilty as libelled, and was sentenced to five years' penal servitude.