Thursday, November 24.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

ANDERSON *v.* SOMERVILLE MURRAY & COMPANY.

Bills of Exchange—Inchoate Instrument—Filling up Blank Bill—Onus of Proof—Bills of Exchange Act 1882 (45 *and* 46 *Vict.* c. 61), *sec.* 20.

A person signed his name to a blank stamped paper, and delivered it to another to be converted into a bill. The latter completed the bill by filling in an amount which the stamp would cover, and dating it.

Held (*rev.* the judgment of the Lord Ordinary) that the *onus* of showing that the bill had not been filled up within a reasonable time, or in accordance with the authority given, and was therefore invalid under section 20 of the Bills of Exchange Act 1882, lay upon the signer.

Juratory Caution — Act of Sederunt, 28*th July* 1828, *sec.* 8.

Circumstances in which a note of suspension of charge on bill passed on juratory caution, and bond of juratory caution sustained as in conformity with the Act of Sederunt of 28th July 1828, sec. 3.

By section 20 of the Bills of Exchange Act 1882 (45 and 46 Vict. c. 61) it is enacted—"(1) Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a *prima facie* authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer or the acceptor or an indorser; and in like manner when a bill is wanting in any material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit. (2) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact. Provided that if any such instrument after completion is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time, and strictly in accordance with the authority given."

George Anderson, grocer and wine merchant, Peebles, presented a note of suspension against Somerville, Murray, & Company, Scotch whisky dealers, Leith, and Alexander Somerville Murray, the only known partner of that firm, in which he prayed the Court to suspend a charge threatened to be made against him at the instance of the respondents for payment of £100.

The complainer averred that in 1892, he being in want of funds, Mr Murray offered to try and raise the money for him, and for this purpose induced the complainer to write blank acceptances on two bill stamps, which Mr Murray took away with him; that Mr Murray afterwards informed the complainer that he had been unable to raise the money on them, and complainer thereupon desired him to return the blank acceptances, but this he failed to do. The complainer further averred that in the autumn of 1894 his affairs became embarrassed, and he came to a private composition with his creditors, and in August of that year received a full discharge from them, including the respondents. He further averred—"(Stat. 7) On the 2nd of October 1897 a bill for £100, bearing to be dated 30th July 1896, and to be payable fourteen months after date, and having complainer's acceptance on it, was presented by the British Linen Bank, Peebles, to complainer for payment. This was refused by complainer for the reasons hereinafter set forth. Said alleged bill, which was upon a Revenue stamp, dated 17th September 1890, was thereupon noted by the bank for non-payment. (Stat. 8) The complainer believes and avers that the bill so presented and noted was drawn by the respondent upon one of the bank acceptances handed to him as aforesaid in 1892 for the special and limited purpose above specified, which respondents had failed to return to complainer as required by him. The bill bears *ex facie* to be dated 30th July 1896, four years after the date when respondents received the forms from complainer, and two years subsequent to complainer's discharge. The complainer never authorised the use of said forms for any purpose other than originally intended."

The complainer pleaded—"(1) The bill upon which diligence is threatened not having been filled up in accordance with any authority given by complainer, and, *separatim*, not having been completed within a reasonable time of the date of the complainer's signature thereto, is invalid in terms of the 20th section of the Bills of Exchange Act 1882, and the complainer is entitled to have diligence thereon stayed as craved. (2) The authority to use said acceptances for any purpose having been terminated by the discharge produced, the subsequent conversion of one of them by respondents into a bill is illegal, and said bill is inept and invalid as a foundation for diligence."

The respondents averred that they were in 1894 the largest creditors of the complainer, and admitted that they had then accepted a composition from the complainer. They averred that the complainer thereafter voluntarily expressed a desire to recoup the respondents for their losses under said composition arrangement, and that when on 30th July 1896 Mr Murray called on the complainer at Peebles, "the complainer then, referring to previous promises, stated that he could not make a payment, but would give a bill, and he then and there gave him the bill of which com-

plaint is now made, and which is herewith produced and referred to, with instructions to make it out for £100 at fourteen months' date."

The respondents pleaded—"The bill complained upon being valid and due, and having been properly filled up by the respondents according to the complainer's instructions of the date it bears, suspension should be refused. (4) The said bill having been accepted two years subsequent to the defender's discharge, the prayer of the note should be refused."

The note as originally presented stated that "the complainer considers that in the whole circumstances of the case he is entitled to have the note passed without caution." At the discussion in the Bill Chamber on the passing of the note the complainer was allowed to amend by adding a statement that "he is willing to find juratory caution, complying with the requisites of the Act of Sederunt, which is all that the complainer in his present situation and circumstances is able to find." On 2nd December 1897 execution was sisted and the note passed "on juratory caution as now offered." A remit having been made to the Sheriff-Clerk at Peebles to take the suspender's oath anent juratory caution, the suspender deponed that he had, *inter alia*, the goods in his shop, his licence, and certain book debts resting-owing to him. The lease of the shop was in the hands of the parties who were giving him financial support. On a bond of juratory caution in common form being lodged, the respondents maintained that it did not satisfy the requirements of the Act of Sederunt of 28th July 1828, sec. 3, in respect there was no deposit of his vouchers of debt, nor any conveyance to respondent of the lease, the book debts, goodwill, licence, and fittings of his shop. They maintained that they were entitled to an assignation of these. The Act of Sederunt provides (sec. 3)—"Further, the complainer shall lodge in the hands of the clerk his vouchers of any debts due to him, . . . and shall grant a special disposition to his respondent (*if so required*) of any heritable subject of which he may be possessed, and an assignation of all debts or other rights due to him for the respondent's security."

Argued for the respondent—The words "if so required" mean if required by the respondent. The suspender argued that the granting of the assignation, &c., was only incumbent on him if required by the Court; and that in the circumstances of the present case he ought not to be required to grant it in respect—(1) The lease was not his, and the licence was an accessory of the lease of his licensed premises, while the goodwill, in so far as not a purely personal asset, was in the same position. (2) The book debts were not debts associated with any vouchers such as bills or bonds. (3) The fittings and stock were necessary for the conduct of his business. He undertook, however, not to make away with those except in the ordinary way of trade. The case of *Livingstone*, 1890, 17 R. 702, was referred to.

The Lord Ordinary on the Bills (PEARSON) having heard counsel on the objections, on 11th January 1898 repelled the objections and approved of the caution found by the complainer.

On the case being heard in the Outer House on the passed note, and a proof allowed, the parties supported by evidence their respective averments, but as the case was decided on the question of *onus*, it is not necessary to enter into the conflict of evidence.

The Lord Ordinary (KINCAIRNEY) on June 21st 1898 pronounced the following interlocutor:—"Finds that it has not been proved that the complainer signed the bill founded on of the date it bears, or that he authorised the respondent to fill it up for the sum of £100: Therefore suspends the proceedings complained of and whole ground and warrants thereof; and decerns."

Note.—"I have found this case to be very troublesome by reason of the strangeness and extreme improbability of the stories told by both the parties. The question seems to be whether the party who is *in petitorio* has proved his case. It is a suspension of a charge on a bill for £100 in favour of the respondent, and admittedly signed by the complainer as acceptor. It is dated 30th July 1896, and made payable at fourteen months. The question is raised on a record made upon the passed note. The respondent states on record that on 30th July the complainer gave him the bill, with instructions to make it out for £100 at fourteen months. That is to say, that the complainer signed the bill, and delivered it blank to the respondent with that instruction. It was therefore admittedly an inchoate bill when it was delivered to the respondent, and the question is whether the respondent can recover on this inchoate bill, filled up by himself. With regard to inchoate bills it is provided by the 20th section of the Bills of Exchange Act 1882, that when a signature on a blank stamped paper is delivered by the signer in order to be converted into a bill, it operates as a *prima facie* authority to fill it up as a complete bill for any amount the stamp will cover, but that, in order to be enforceable against any person who becomes a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. This bill has not been negotiated, but is in the hands of the person in whose favour it bears to be granted. It seems to me that in these circumstances the holder is *in petitorio*, and has to prove his case, with, no doubt, the statutory provision in his favour that the signature of the complainer *prima facie* implies his authority to fill it up for £100. But the Act creates no presumption as to the date of the bill, and the *prima facie* implication of the statute is not conclusive. No authorities were quoted except *Awde* v. *Dixon*, 1851, 6 Ex. 869, and *Hanbury* v. *Lovett*, 2nd May 1868, 18 L.T. 366. But I do not find these cases of material consequence.

"Regarding the respondent as *in petitorio*, I am of opinion that he has failed to

prove his case. [*His Lordship then reviewed the evidence*]. I must confess that I do not feel by any means certain which of the two unlikely stories is true, only I think that the respondent has to prove his case, and that he has not done it."

The respondents reclaimed, and argued—When a blank piece of paper with a signature upon it was delivered in order that it might be converted into a bill, the person to whom it was delivered had *prima facie* authority to fill it up with any amount the stamp would cover, and to put a date upon it. This was the law prior to the passing of the Bills of Exchange Act 1882, and that Act had not altered the law in any way. The *onus* of proving that the respondents had no authority to complete the bill as they had done was therefore upon the complainer. This *onus* the respondents had not discharged, and the reasons of suspension should be repelled. The Lord Ordinary was of opinion that the *onus* of proving authority to complete the bill lay upon the respondents. This view was erroneous, and his judgment was therefore wrong.

Argued for complainer—The Bills of Exchange Act 1882 drew a distinction between a bill and a blank piece of paper with a signature upon it. The latter was not a bill at all; it was a mandate to make a bill; and the agent, like any other agent, was bound to prove his authority to fill it up as he did. If it was not shown that the granter of the blank paper had authorised it to be filled in the manner the holder had filled it up, it was not a valid bill—*Baxendale* v. *Bennett*, 1878, L.R., 3 Q.B.D., opinion of Brett, L.J., 531. If the holder admitted that the paper was blank when he received it, the *onus* lay upon him to show that it was filled up within a reasonable time, and strictly in accordance with the authority given.—Bill of Exchange Act 1882, sec. 20, sub-section (2).

At advising—

LORD YOUNG—[*After referring to the complainer's averments on record*]—I think it is conceded by the respondents that if these averments are proved, the plea-in-law founded upon them is good and the suspension must be sustained. But if they are not proved, the plea fails and the suspension must be disallowed. I think it quite clear that the burden of proving a breach of faith constituting a ground of suspension of an *ex facie* complete bill is on the complainer. Suppose for a moment that no evidence had been led here, and that probation had been renounced by the parties. I put the question, Is it arguable that the suspenson could stand? But it is sufficient for me to say that, so far as my opinion goes, it is incumbent on the complainer to establish the only ground on which he founds his complaint. He has not done so. The Lord Ordinary granted the suspension, not on the ground that the averments in support of the suspension had been established, but on the ground that the respondents had not proved the negative of the complainer's statements. I must say that I am unable to concur in that view. I think that the holder of a bill of exchange, the signature on which is admitted to be genuine, is entitled to do diligence upon it, as equivalent to a decree, unless something is established to affect its validity. The Lord Ordinary holds that nothing has been established by the complainer against the present bill. I agree with him that the only ground for suspending the bill is not established by the complainer.

I confess that when I listened to the argument I was not unwilling to hear any good reason for stopping this bill, because the respondents admit that it was granted gratuitously in this sense, that the acceptor was under no obligation to grant it. But I cannot at the same time agree with the Lord Ordinary that the granting of such a bill was unlikely. [*His Lordship then went into the facts.*] On the whole matter I am of opinion—not I confess with any hesitation—that the only ground of suspension has not been established by the complainer, on whom it was incumbent to establish it, and that on the evidence the ground averred is not true in itself. I therefore propose that the judgment of the Lord Ordinary should be altered and the reasons of suspension disallowed, and the case dismissed.

LORD MONCREIFF—In this case the Lord Ordinary finds "that it has not been proved that the complainer signed the bill founded on on the date it bears, or that he authorised the respondent to fill it up for the sum of £100." He does so on the ground that the respondent is *in petitorio*, and has failed to prove his case on these points; but I gather from his Lordship's note that if he had been of opinion that the burden of proof was upon the complainer and not upon the respondent his decision would have been different.

I am of opinion that the burden is upon the complainer and that he has not discharged it.

The complainer seeks to suspend a threatened charge on a bill for £100, which bears to be dated 30th July 1896, drawn by the respondent and accepted by the complainer. *Ex facie* the bill is complete in all particulars, and the complainer's signature as acceptor is admittedly genuine.

Before the passing of the Bills of Exchange Act 1882 I apprehend that there is no doubt that, in the absence of admissions by the holder, it would have lain upon the complainer to establish all of his objections. The proof would probably have been limited to writ or oath of the respondent; but perhaps in respect of the peculiar circumstances of the case proof *prout de jure* might have been allowed. In either case, however, the burden of proof would have been upon the complainer.

Under section 100 of the Act of 1882 parole evidence is competent, but the burden of proof remains the same unless the law has been altered by section 20 of the statute. That section deals with the case of a simple signature on a blank stamped paper "delivered by the signer in order that it may

be converted into a bill." The section proceeds to enact what was previously the law, that a paper so signed "operates as *prima facie* authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer or the acceptor or the endorser." Therefore in the present case if the respondent had delivered to him the blank stamped paper with the complainer's signature upon it in order that it might be converted into a bill, he *prima facie* had the complainer's authority to complete it, date it, fill it up for £100, and use the complainer's signature for that of the acceptor, as indeed it bears to be. If the respondent *prima facie* had authority to do these things, it necessarily follows that the burden of showing that he had not authority lies upon the complainer. Before the passing of the Act it was competent for a person who had delivered a blank bill stamp bearing his signature to prove by competent evidence that he did not give authority to fill up the bill in the way in which it was completed by the person to whom it was delivered. Accordingly, the second subsection of section 20 saves his right in that respect by providing that such an instrument in order to be enforceable must be completed within a reasonable time, and strictly in accordance with the authority given, unless indeed the instrument has found its way into the hands of a holder in due course. But the statute does not throw upon the holder the burden of proving this. If it did, what would be the value of the *prima facie* presumption of authority?

The only question which admits of discussion on the terms of section 20 (1) is whether it does not lie on the person who alleges that the blank stamped paper was delivered to him to prove that it was delivered for the purpose of being converted into a bill. That question, however, does not properly arise here, because even according to the complainer's averment (statement 8) the blank stamped paper with his signature upon it was delivered by him to the respondent in order that it might be converted into a bill that money might be raised upon it. He maintains, no doubt, that this was done in 1892 and not in 1896, and that the paper was delivered for a totally different purpose than that for which it is now sought to be used. He therefore differs from the respondent, not as to the fact of delivery but as to the date of delivery and the purpose for which the bill was to be completed and used.

But further, it would be to deny all effect to the presumption arising from possession of the instrument to put upon the holder the burden of proving the footing on which it was delivered to him. To do so would place him at the mercy of his debtor unless he had a witness with him when the instrument was delivered. In my opinion delivery is to be inferred from the bill, however completed, being found in the possession of the transferee.

Lastly, if I had to choose between the evidence for the complainer and that of the respondent, I am disposed to think that, although the respondent behaved somewhat harshly to the complainer in taking a document of debt from him in such circumstances, the balance of evidence is in favour of his story being true. [*His Lordship stated the considerations which led him to this conclusion.*]

It is not, however, necessary to proceed upon that ground, because I think the burden did not lie upon the respondent.

LORD JUSTICE-CLERK—I concur in the opinions which your Lordships have delivered.

LORD TRAYNER was absent.

The Court pronounced the following interlocutor:—

> "Sustain the reclaiming-note: Recal the interlocutor reclaimed against: Repel the reasons of suspension: Find the letters and charges orderly proceeded, and decern."

Counsel for the Complainer—Jameson, Q.C.—Christie. Agent—Lawrence M'Laren, W.S.

Counsel for the Respondents—W. Campbell, Q.C.—Ingram. Agent—Jose Ormiston, Solicitor.

Thursday, November 24.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

BANK OF SCOTLAND *v.* W. & G. FERGUSON AND OTHERS.

Process—Summons—Court of Session Act 1850 (13 and 14 Vict. c. 36), sec. 1, Sched. (A)—Competency—Court of Session Act 1868 (31 and 32 Vict. c. 100), sec. 29.

The pursuer of an action laid on a bill of exchange omitted to set forth the bill in his summons in terms of the Court of Session Act 1850, sec. 1, Sched. (A) of that Act, and the A.S., 31st October 1850. Upon his motion for leave to amend the summons so as to bring it into conformity with those enactments, the defenders objected on the ground that the action was *ab initio* incompetent, in respect of its disconformity to the statutory directions.

Held that the action though incompetent in form was susceptible of amendment, and therefore that the proposed amendment must be allowed.

Bill of Exchange—Sexennial Prescription—Interruption.

An action laid on a bill of exchange, and commenced within the sexennium, was incompetent in form, in respect that the bill was not set forth in the summons as directed by the Court of Session Act 1850, Sched. (A).

Held (*aff.* judgment of Lord Stormonth Darling) that having been truly