

whether an arbiter under this Act has power to investigate and determine questions of status involving possibly nice questions not only of fact but of law.

LORD LOW concurred.

LORD DUNDAS was sitting in the Extra Division.

The Court pronounced this interlocutor—

“Find it unnecessary to answer the first question of law . . . Find in answer to question 2 that the facts stated do not warrant the finding that Annie Herd Shepherd or Wallace was the widow of David Wallace: Find that the third question cannot be at present answered: Recal the award of the arbitrator, and remit to him to proceed as accords,” &c.

Counsel for the Appellants—Horne—Carmont. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—Wilson, K.C.—Wilton. Agent—D. R. Tullo, S.S.C.

Friday, May 28.

EXTRA DIVISION.

(Lord McLaren, Lord Pearson, and Lord Dundas).

[Lord Salvesen, Ordinary.]

INGLIS v. THE NATIONAL BANK OF SCOTLAND, LIMITED.

Repetition — Payment — Fraud — Misrepresentation — Evidence — Payment Induced by Fraudulent Misrepresentation — Averments as to Defrauding Other Persons on Similar Occasions to Support Averments as to Defrauding Pursuer — Relevancy.

In an action of repetition for the amount of a bill accepted by pursuer, which pursuer renewed and subsequently paid on the false representations (as he averred) of defenders' agent that said bill had not been paid, pursuer made averments that defenders' agent was in the custom of obtaining bills in this way from the bank's customers and specified an instance of this practice.

Held that these averments were irrelevant.

A v. B, February 23, 1895, 22 R. 402, 32 S.L.R. 297, followed.

On 9th December 1908 William Inglis, Engine Street, Bathgate, brought an action against the National Bank of Scotland, Limited, to recover £189, 8s. 8d., being the amount of the payments made by him to meet a bill, originally for £200 and subsequently renewed for various sums, drawn by his father-in-law A. L. Muir and accepted by the pursuer, and subsequently discounted with the defenders' bank at Bathgate by their agent there, Alexander Sloan.

Pursuer averred that at maturity said

bill was retired and debited to Muir's account in his bank pass book as made up by the defenders, and that after debiting the amount necessary to retire the bill there was a credit balance in favour of Muir; that he, the pursuer, was led by Sloan to believe that the bill had not been paid at maturity and had been induced from time to time to grant renewals thereof; that after Sloan had absconded, he, the pursuer, was given to understand by the defenders through their agent at Bathgate that the bill was still due and was induced to sign on 11th April 1906 another bill along with Muir for £150, having already paid part of the previous bills; that Muir's estates having been sequestrated on 9th February 1907, he, the pursuer, lodged a claim for the bill in the sequestration, receiving a dividend thereon, and at the same time paid the amount of the bill outstanding, with interest, to the defenders.

The pursuer further averred—“(Cond. 10) The pursuer has further ascertained that the defenders' said agent Mr Sloan, for whom they are responsible, was in the habit of manipulating the accounts of customers of the bank in order to cover his own defalcations, and that he so manipulated the account of Mr Muir. On a proper statement of Mr Muir's bank transactions with the defenders, it is averred, and it is the case, that the said bill for £150 had been extinguished long prior to the claims for payment made by the defenders upon the pursuer in respect thereof. Further, the defenders' said agent Mr Sloan, in the course of his manipulating as aforesaid of the bank books at said branch, with a view to deceiving the defenders and their inspectors when the latter came to examine his books, was in the habit of getting customers, on his representation to them that by so doing they would obtain easier terms from the defenders' bank, to sign bills blank in drawer's name, and, although appearing to be for a specific sum, without any value having been given therefor. In particular, he induced Mr Muir to sign such a bill for £785 dated 11th November 1905. No value was given by Mr Sloan or by the defenders for this bill. After Mr Sloan's departure this bill was found, unsigned by the drawer, in Mr Sloan's private house. The defenders obtained possession thereof after Mr Sloan's departure, and, against all banking practice, had said bill signed by their secretary Mr George B. Hart for and on behalf of the bank. At the time when it was so signed said bill was overdue. No entry of said bill was contained in the bank's books at the time, and the defenders had no right or title to intromit with said bill, nor had they given any value therefor. It is believed and averred that the bill, the renewal of which is contained in the said bill of 11th April 1906, was found in Mr Sloan's private house, and had been obtained by Mr Sloan from Mr Muir in the same way as the said bill for £785, and was dealt with in a similar way, and that the pursuer was induced by the defenders to sign the said bill for £150, and was kept

in ignorance of the previous discharge thereof in order to make up to the defenders' part of the defalcations of their said agent Mr Sloan. The pursuer further believes and avers that the defenders ranked in Muir's sequestration for said bill of £875, and drew a dividend in respect thereof, as if their books disclosed they had given value therefor, whereas in fact said books contained no entry relative thereto, in the same way as there are no entries relative to said bill of £150. The pursuer believes and avers that the bank pass-book of Mr Muir as written and made up by the defenders only shows a debit balance of £53, 10s., whereas the defenders claimed in said sequestration for the sum of £558, 10s. 8d. as due on Mr Muir's current account over and above said bill for £785. In January 1907 the defenders raised an action in the Court of Session against Mr Muir, in which they sued Mr Muir for payment of said sum of £558, 10s. 8d., and also for payment of the amount contained in said bill for £785, but no mention was made in said action of the bill for £150 before referred to, although Mr Muir's name appears thereon as an obligant. A copy of the summons in said action is produced. It is further averred that in accordance with the statutory privilege conferred upon bankers by the Bankers' Books Evidence Act 1879 (42 and 43 Vict. cap. 11), the defenders, along with their affidavit and claim in said sequestration, lodged an alleged true copy from their ledger of the current account of the said A. L. Muir, and by sworn affidavit appended to said account, and referred to in the affidavit of Mr George B. Hart, their secretary, it was deponed on behalf of the defenders that the said account had been compared with the 'original entries in the ledgers of the National Bank of Scotland, Limited, at their Bathgate branch, and that the said copy is a true and correct copy of the said account.' A copy of said account is herewith produced and referred to. The pursuer believes and avers that said account is not a correct transcript from the ledgers of the said bank, and does not contain the said 'original entries' as existing prior to the date of the departure of Mr Sloan, but is an adjusted account prepared by the defenders at their own hands after the departure of Mr Sloan. It is averred that on a true examination of the books of the defenders' bank it will be found that the bill in question which the pursuer was called upon by the defenders to pay, and did pay as aforesaid, had previously been paid to the defenders long prior to its last renewal. In the examination in bankruptcy of Mr Muir, 22nd March 1907, the trustee asked the bankrupt if the sum of £200 entered in the copy of the bank account lodged and sworn to in the sequestration of Mr Muir at the date of the bankrupt's examination, along with the bank claim, as having been drawn out by him under date 7th May 1904, although not entered in his bank pass-book, was so drawn out. In the copy account now lodged by the defenders with their claim the said entry of the sum of £200 originally

debited under date 7th May 1904 has disappeared, although the backing of said account is the same as was lodged with the original account, and is signed as sworn to by Mr George B. Hart on 18th February 1907. The defenders are called upon to produce an inventory of the bills and other documents found outwith the bank's office at Bathgate, and delivered to them after the departure of Mr Sloan by Mr William Bannerman, solicitor, Edinburgh, or by the said William Bannerman on behalf of Messrs Hamilton, Kinnear, & Beatson, W.S., Edinburgh."

The defenders pleaded, *inter alia*—“(1) The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. (2) The pursuer's material averments being unfounded in fact the defenders should be assoltized.”

On 18th March 1909 the Lord Ordinary (SALVESEN), before answer, allowed to the parties a proof of their respective averments and to the pursuer a conjunct probation.

The defenders reclaimed, and argued—Condescendence 10 should be excluded from the proof. The other transactions which were there narrated would involve a far larger proof than the proof in this case. It was not relevant to support an averment of fraud to state that a party had been guilty of similar frauds against other persons on other occasions—*A v. B*, February 23, 1895, 22 R. 402, 32 S.L.R. 297.

The pursuer argued—Condescendence 10 was a relevant averment of custom on the part of Sloan of doing the same thing.

LORD M'LAREN—We have been informed that the Lord Ordinary, while allowing a proof of the pursuer's averments unlimited in point of form, has intimated to the parties that there are matters in article 10 and elsewhere in the condescendence which he might be obliged to exclude from proof; and by making it a proof before answer he reserved his discretion to exclude anything which he considered to be not germane to the inquiry. It was pointed out to us by Mr Watson that though the Lord Ordinary's observations safeguarded the interests of the defenders to some extent, it did not give them all the protection they needed against the admission of extraneous matter, because they would have to come to the proof prepared to meet averments as to the other transactions about which they knew nothing while the pursuer might know a great deal; and in any view they ought to be relieved of the expense of preparing to meet averments which *ex facie* have no bearing on the matter in dispute.

Having heard all that was said in support of article 10, I am not satisfied that it contains anything that ought to be admitted to proof. It is entirely ruled by the case that was quoted to us of *A v. B* (22 R. 402). Although that case in its merits and substance belongs to a very different region of law, yet in the only matter there considered, namely, the relevancy, it seems to me to be a good authority for the proposi-

tion that it is not evidence against a party of having committed a delict to show that he has committed delicts of the like description against other persons on other occasions.

The late Lord President Robertson had, I may be allowed to say, an instinctive discernment of relevancy in cases coming before us, and I think an opinion by him on such matters is of very great weight.

Apart from authority, and on the general principles of the law of evidence, I am unable to see how the fact of Mr Sloan having defrauded others by similar transactions could be evidence that we should be entitled to consider in this case.

I therefore propose that we should affirm the Lord Ordinary's interlocutor, but exclude proof of the averments contained in article 10.

LORD PEARSON and LORD DUNDAS concurred.

The Court adhered, with the variation that they excepted from the proof the whole of the averments in Condescendence 10.

Counsel for Pursuer (Respondent)—M. P. Fraser. Agent—Allan M'Neil, Solicitor.

Counsel for Defenders (Reclaimers)—Hon. Wm. Watson. Agents—Mackenzie, Innes, & Logan, W.S.

Saturday, May 29.

SECOND DIVISION.

[Bill Chamber.

DRUMMOND v. CLUNAS TILES AND MOSAICS, LIMITED.

Bankruptcy—Sequestration—Notour Bankruptcy—Evidence—Expired Charge Destroyed by Bankrupt—Copy Produced.

A petition having been presented for the sequestration of the estates of B, the Lord Ordinary on the Bills on 11th March 1909 pronounced a deliverance granting warrant to cite B, and diligence to recover evidence of his notour bankruptcy. B having been cited to appear before the Lord Ordinary to produce (1) extract registered protest of a bill granted by him, which protest had been recorded in the Books of Council and Session on 15th December 1908, (2) execution of charge endorsed upon said extract registered protest, made on the 24th December 1908, and (3) the bill itself, deponed that he had destroyed these documents on 20th March 1909. A messenger-at-arms deponed that he had charged B upon the said extract registered protest and had returned an execution of that charge, and he produced a copy of the charge. Sequestration having been awarded, B presented a petition for recal on the ground that the necessary productions were not before the Lord

Ordinary, and no evidence of notour bankruptcy produced. *Held* that in the circumstances notour bankruptcy had been proved, and that sequestration had been competently awarded.

On 14th April 1909 Alan Drummond, accountant, Edinburgh, presented in the Bill Chamber a petition for the recal of the sequestration of his estates awarded on 1st April on the petition of the Clunas Tiles and Mosaics, Limited, and James Shiels Alexander, C.A., the official liquidators thereof.

The sequestration had been awarded under the following circumstances:—On 11th March 1909 the Lord Ordinary on the Bills (SKERRINGTON) pronounced a deliverance granting warrant to cite Drummond, and diligence to recover evidence of notour bankruptcy. On 26th March 1909 Drummond, having failed to produce the documents to the Commissioner, was cited to appear before the Lord Ordinary on the Bills to produce “(1) extract registered protest of a bill for £40, dated 30th June 1908, granted by him in favour of Herbert Lawton Warden, S.S.C., Edinburgh, which protest was recorded in the Books of Council and Session on 15th December 1908; (2) execution of charge endorsed upon the said extract registered protest made on the twenty-fourth day of December 1908; and (3) the said bill itself.” On 31st March 1909 he deponed that he had destroyed the said documents on 20th March 1909. On the same occasion Robert Gardiner, messenger-at-arms deponed—“On 24th December 1908 I charged Alan Drummond, accountant, 15 Queen Street, Edinburgh, upon an extract registered protest of a bill for £40, dated 30th June 1908, granted by him in favour of Herbert Lawton Warden, S.S.C., Edinburgh, which protest was recorded in the Books of Council and Session on 15th December 1908. I returned an execution of that charge. I have not got a duplicate. I have a copy of the charge given, but not of the execution. I produce the copy. I have an entry in my books relative to giving this charge. It is merely ‘executing protest, Herbert Lawton Warden, 3s. 6d.’ I will produce an excerpt from my books. I have nothing more in writing which can instruct that I had given the charge to Alan Drummond. It is the fact that I did give Alan Drummond a charge on that extract registered protest.” On 1st April 1909 the Lord Ordinary on the Bills (MACKENZIE), finding that the notour bankruptcy of Drummond and the other facts necessary to be established had been proved, granted sequestration of Drummond's estates.

Drummond in his petition for recal averred, *inter alia*—“In point of fact the necessary productions were not in process or before the Lord Ordinary at the time. No evidence of notour bankruptcy was produced, and the said Alan Drummond was not notour bankrupt as at the date of the presentation of the petition.”

Answers were lodged for the Clunas Tiles and Mosaics, Limited, in which the said