Foundry, Bo'ness, N.B." Lists with the defenders' name and that of their foundry printed on their face would not suggest that the boilers offered for sale were manufactured by anyone except the defenders; but such lists might be deceptive as suggesting that the defenders were the manufacturers of the "Horse Shoe boiler" which had been upon the market for a number of years. The other lists which did not bear the defenders' name, but which were intended to bear the name of the tradesmen who bought from the defenders, were, in my opinion, well fitted to mislead the public.

I am therefore of opinion that by issuing the lists complained of the defenders subjected themselves to an interdict restraining them from describing their boilers as "Horse Shoe boilers" without clearly distinguishing them from the pursuers' boilers. But I do not agree with the Lord Ordinary in holding that actual deception has been proved in the case of any of the persons who bought the defenders' boilers either directly from the defenders or from their customers. It follows that the award of damages must be recalled.

LORD M'LAREN and LORD JOHNSTON were absent.

The Court recalled the interlocutor reclaimed against; interdicted the defenders from using the words "Horse Shoe" as descriptive of or in connection with boilers (not being boilers of the pursuers' manufacture) sold or offered for sale by the defenders without clearly distinguishing such boilers from the boilers of the pursuers; *quoad ultra* assoilzied the defenders from the conclusions of the summons, and decerned: Found the pursuers entitled to expenses in the Outer House, modified to two-thirds of the fixed amount thereof; *quoad ultra* found no expenses due to or by either party.

Counsel for the Pursuers (Respondents)—Hunter, K.C.—Chree. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Defenders (Reclaimers)—Murray, K.C.—Sandeman. Agents—Bruce & Black, W.S.

Tuesday, December 21.

FIRST DIVISION.

[Lord Guthrie, Ordinary.

M'INTYRE *v.* THE NATIONAL BANK OF SCOTLAND, LIMITED.

Proof—Onus probandi—Fraud—Bill of Exchange—Non-Probative Writ.

"The person who proposes to put in force a written instrument which is not in itself probative, must prove it to be genuine if its genuineness is disputed."

Duncan M'Intyre, farmer, Kelsay, Islay, was on 20th June 1908 charged at the instance of the National Bank of Scotland, Limited, in virtue of an extract registered protest and warrant of the Lords of Council and Session, dated 15th April 1908, to make payment to the said bank of the sum of £400 sterling, with interest thereon at 5 per cent., alleged to be due by a bill of exchange dated 16th April 1907 and payable six months after date. The alleged bill purported to be drawn by Duncan M'Intyre upon and accepted by Dugald Campbell, farmer, Grainel, Islay, and to be endorsed by M'Intyre to Campbell.

M'Intyre brought against the National Bank a note of suspension of the charge, and averred that the signature "Duncan Macintyre" appearing on the bill as drawn was not his signature but a forgery, and that so also was the alleged indorsement. The genuineness of the signature of the acceptor, Dugald Campbell, was not disputed.

Execution was sisted, the note passed, and a proof allowed.

On 25th March 1909 the Lord Ordinary (GUTHRIE) pronounced this interlocutor—"Suspends the charge complained of, and whole grounds and warrants thereof, and decerns."

Opinion.—"The bill in question is admittedly accepted by Dugald Campbell, farmer, Grainel, Islay; it purports to be dated 16th April 1907, and to be signed by the complainer as drawer and endorser, and it bears to be for £400 at six months' date. The complainer was charged to pay the amount in the bill, and he seeks suspension of the charge. He alleges that the signatures 'Duncan Macintyre' on the face, and on the back of the bill, were not adhibited by him or with his authority.

"The respondents led in the proof. The *onus* was upon them to prove affirmatively that the signatures on the bill, purporting to be those of the complainer, were adhibited by him—(*Anderson* v. *Gill*, 20 D. 1326, *aff.* 3 Macq. 180). The reverse is the rule in the case of a probative deed, where on the face of the document there appear two attestations to the genuineness of the signature as against a single denial—(*Ferrie*, 1 Macph. 291). In the former case the *onus* is on the proponer, in the latter case on the challenger. . . . [*After examining the evidence.*] . . . The respondents, in order to succeed, were bound to prove that the signatures were those of the complainer, and in my opinion they have failed to do so."

The respondents reclaimed, and argued—They did not dispute that the *onus* was on them to prove the genuineness of the signatures on the bill, following the law in *Anderson* v. *Gill*, July 20, 1858, 20 D. 1326, *aff.* April 16, 1858, 3 Macq. 180, yet they submitted that this *onus* was very slight—Lord Fullerton at p. 1330 in that case—and this was also shown by the fact that till *Anderson* v. *Gill* it had been thought the *onus* lay on the party disputing the authenticity of a signature—*Findlay* v. *Currie*, December 7, 1850, 13 D. 278; *Gellatly* v. *Jones*, March 11, 1851, 13 D. 961. In any case they had discharged the *onus*.

Argued for the complainer (respondent)—The *onus* was on the reclaimers to prove the authenticity of the bill—*Anderson* v. *Gill* (*cit. sup.*) Even assuming that prior to that case it had been thought the *onus* lay the other way, that did not show that the *onus* was slight. The reclaimers had not discharged the *onus* on them.

At advising—

LORD KINNEAR—This is a suspension at the instance of Duncan M'Intyre, a farmer in Islay, of a charge by the National Bank to make payment of a sum contained in a bill purporting to be drawn by the complainer upon and accepted by Dugald Campbell, farmer in Islay. The question so raised is a question of fact; but there is one preliminary question of law, namely, whether the burden of proof lies upon the one party or the other, which is important in a case of this kind, where the evidence is so evenly balanced.

The Lord Ordinary has expressed his opinion upon that point, saying that the *onus* lies upon the chargers to prove affirmatively that the signatures upon the bill purporting to be those of the complainer were in fact adhibited by him. I do not understand that the law so laid down by the Lord Ordinary—in which I entirely concur—was very seriously disputed. But at the same time, since we are referred to a decision which was said to be to the contrary effect, in the case of *Gellatly* v. *Jones*, I observe upon the dictum of Lord President Boyle, which was cited as inconsistent with the Lord Ordinary's law, that that supposed dictum does not appear to me to be of weight as an authority for the decision of any other case or for any purpose except that for which it may have been used in the case in question. It is to be found in a very imperfectly reported charge to a jury, and it follows that the learned Judge did not intend to enunciate a general principle for the determination of other cases, but simply to instruct the jury in the law by which they must be guided in the decision of a particular question of fact. Every observation of that kind is to be understood with exact reference to the specific facts which have been proved in the particular case, and we know nothing about the facts in the case cited.

The observation of the Lord President, if we are to assume that he made it in the terms quoted in the report, we must also assume to have been perfectly right for the particular purpose for which it was made. But then the *onus* of proving or disproving the genuineness of a document must depend upon the conduct of the parties with reference to it, and it may be perfectly right at a certain stage of a particular case that the person who impugns a document should be required to disprove it, although in general one cannot be required to prove a negative. Therefore I cannot take the dictum imputed to Lord President Boyle as in any way conflicting the principle of our law, which I think to be settled, and which is in accordance with justice and good sense, that the person who proposes to put in force a written instrument which is not in itself probative must prove it to be genuine if its genuineness is disputed; and I think the burden of that obligation is the more imperative in this case, because the chargers by their conduct in discounting the bill without an inquiry which they might reasonably have made, or by the conduct of their agent for them, have taken the risk of a controversy which need never have arisen.

The bank agent says in his evidence that when the bill had become due, the complainer being called upon to pay denied his signature, and that he went to see the acceptor of the bill, Dugald Campbell, who resided in the district, taking with him the bill in dispute and one of the former bills; and he is asked why he took the former bill and he says, "Because I noticed the bill was not in his usual signature when I compared the two after Macintyre left. I compared the disputed bill with the previous bill, and noticed that the signature was not the usual signature. It was apparent to anyone familiar with his usual signature." Now I do not refer to that as evidence that the signature in question is not the signature of the complainer. I refer to it only for the purpose of observing that it appeared to the bank agent to be different from the complainer's usual signature, and that it appeared to him that the difference was such as to be obvious to anybody that was familiar with the complainer's writing. Therefore this litigation need not have arisen if the bank agent had paid the same kind of attention when the bill was presented for discount as he did afterwards when its genuineness was disputed, and had inquired of Macintyre whether he admitted the signature or not, and had acted upon his admission or denial by discounting or refusing to discount the bill.

The result is that the chargers have to prove after the lapse of many months that the signature was really adhibited by the complainer.

[*His Lordship then examined the evidence, and came to the conclusion that the reclaimers had not discharged the onus upon them.*]

The LORD PRESIDENT concurred with Lord Kinnear as to the *onus* of proof, and after examining the evidence came to the same conclusion.

LORD JOHNSTON also concurred as to the *onus* of proof, but came to the conclusion that the *onus* had been discharged.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Complainer (Respondent)—Blackburn, K.C.—Macmillan. Agents—Maclachlan & Mackenzie, S.S.C.

Counsel for the Respondents (Reclaimers)—Constable, K.C.—Spens. Agents—Mackenzie, Innes, & Logan, W.S.