

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 CURRIEHL—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 Curriehill, 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 advocacy was accordingly refused, with additional expenses.

Agents for Advocate—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 grantor; and, *separatim*, as being made by a party insolvent, or who had thereby rendered himself insolvent, in fraud 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 grantor 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

an averment, on payment of expenses only from the date of the Lord Ordinary's interlocutor.

"In the present case, where the averment of insolvency, though not in the summons, has been made by the pursuer on revisal, the Lord Ordinary would have been disposed to look upon the case of *Bolden* as a sufficient authority for holding that in modern practice, the averment is of such a kind as may be introduced into the Record without an amendment of the libel, when the general character of the averments in the original summons is such as to make it fair that the pursuer should be allowed to make them distinct and specific on this point, by the introduction of a positive averment of insolvency. But the present case does not seem to warrant such a mitigation of the more strict rule of correct pleading in favour of the pursuer. In the original summons there is no statement implying the existence of any creditor of the grantor of the deed under reduction, except the pursuer was a true creditor of Cameron on the account libelled, or a large portion of it, amounting to between £14 and £15, was due at 16th September 1847, the date of granting the deed under reduction. This is the only debt which is said in the original summons to have been owing at that time by Cameron.

"The Lord Ordinary cannot read the summons as even by implication setting forth a case of which the insolvency of Cameron at the date of granting the deed in question was any part. On the contrary, he thinks that the pursuer must be held to have brought his action apparently advisedly, upon the view that he was entitled to set aside the deed without respect to whether Cameron was insolvent at that date or not, and that he purposely abstained from making the averment. If this is the correct view of the summons, the pursuer was not entitled on revisal to introduce a ground of action which he had previously excluded. The matter might have been different as to insolvency at the date of the challenge. That is not explicitly averred in the summons, but perhaps it might be held to be implied in the statement that the pursuer has held a decree for his debt against Cameron since 1851.

"As the Lord Ordinary thinks the action must be dismissed on the second plea, it is unnecessary for him to dispose of the other pleas which have now been argued."

Against this interlocutor the pursuer reclaimed.

SCOTT, for him, argued—1. It is not necessary to aver insolvency in the summons. The Act 19 and 20 Vict., cap. 79, sec. 10, does not require such an averment, as the Act 1621 may be pleaded in answer to the defences. Insolvency may be taken up by way of defence—2 *Bell's Com.*, 183, 184, 186. 2. Even if such an averment were necessary, it is stated *tempestive* in the revised condescence. In *Bolden v. Ferguson*, 3d March 1863, 1 M'Ph. 522, the Court allowed the record to be opened up and insolvency averred in the revised condescence. 3. There were conclusions of count and reckoning applicable both to the capital and to the revenue, and in any view, these conclusions as to the revenue were not dependant on the conclusions of the reduction.

The SOLICITOR-GENERAL and A. MONCRIEFF, for the defender, were not called on.

The LORD-PRESIDENT—According to our opinion, the averment of insolvency should have been made in the summons and original condescence. The objection has been taken all along, the record has been made up on this matter of reduction.

Insolvency is an essential element in the action. I see no advantage in allowing the pursuer to amend the proceedings by paying expenses from the beginning. I think it is better that he should bring a new action. I think the real meaning of the summons was that these minutes should be reduced; and this done, then there was an opening for the conclusions for count and reckoning. That is the substance of the action. I think we should adhere to the Lord Ordinary's interlocutor.

The other Judges concurred.

Agent for Pursuer—A. Kelly Morison, S.S.C.

Agent for Defender—John Ross, S.S.C.

FARQUHARSON AND OTHERS v.

FARQUHARSON.

Trust—Remuneration of Trustees—Commission—Outlay—Accounting. (1.) Held that voluntary trustees were not entitled to remuneration for acting as factor and cashier to the trust, but that they were entitled to reimbursement of outlay. (2.) Circumstances under which trustees were held not liable for sums which it was alleged ought to have been deducted by them from the liferent of the trustor's widow.

These are conjoined processes of advocacy, declarator, and multiplepounding. The first is an advocacy at the instance of Peter Farquharson of Whitehouse and Others, trustees of the late Andrew Farquharson of Breda, against Robert Farquharson of Allargue; the second, a declarator at the instance of Mr Farquharson of Allargue against the said trustees; and the third, a multiplepounding at the instance of Mr Duncan, now the only surviving trustee, against Mr Farquharson of Allargue and others.

On 21st December 1860, the Lord Ordinary (Jerviswoode), on the motion of Allargue, and before answer, remitted to Mr W. Moncreiff, accountant, "to consider the objections stated on record to the accounts of the trustees of the late Andrew Farquharson of Breda, in so far as they involve questions of accounting, and to examine the trust-accounts and vouchers and other productions, and report upon the accounting, and, if necessary, to make up a new state of the trust accounts, bringing the same to a balance as at the respective dates when new trustees were assumed."

Mr Moncreiff thereafter made a long report, on which parties were heard. Various objections were stated by all the parties. The Lord Ordinary, on 6th January 1863, disposed of a great many of these objections, and made a new remit to Mr Moncreiff.

Mr Duncan reclaimed.

PATTISON and MACDONALD appeared for him.

CLARK and HUNTER for Allargue.

LORD ADVOCATE and GLOAG for Whitehouse.

In the course of the debate a number of concessions were made by the parties, leaving only three questions to be determined by the Court. The nature of these sufficiently appear from the judgment of the Court, which was delivered by

Lord ARDMILLAN—The questions which we are now called on to consider have been raised, by objections to an accountant's report in the conjoined processes of multiplepounding and exoneration and advocacy and declarator, at the instance of Mr Duncan, surviving trustee of the late Andrew Farquharson of Breda. Under a remit by the Lord Ordinary of 21st Dec. 1860, the accountant, Mr Moncreiff, considered and disposed of a number of objections by the