that the right to the fund had vested in Wilbraham on his attaining the age of twenty-four, or, at all events, on the death of his grandmother, Lady Catherine Camilla, and therefore is now payable to his representatives. Now, it is impracticable that both of these directions in the fifth article shall be read according to their strict meaning. They are inconsistent, and as an inconsistent intention cannot be imputed to a testator, one direction must be bent so as to be consistent with the other. We must fix which is to receive effect as the most probable intention of the truster. This requires us to examine the whole deed, the circumstances of granting it, and the general intention thereby indicated. After doing so, the conclusion I come to is that which the Lord Ordinary has arrived at, that the right must be held to have vested in Wilbraham Archibald Tollemache during his life. The grounds on which I come to this conclusion may be shortly stated. The claim of Lady Catherine Sinclair's representatives is that the funds should be returned to her estate, there being no other purpose to serve. Now, I find that, in the subsequent articles of this agreement, there are various express provisions, and I examine these in order to see if they express or fairly imply that, on the occurrence of a contingency such as has here happened, the £1000 was to be returned to Lady Catherine's estate. Now, I find no such intention expressed. I think the tendency of these provisions is rather the other way. I may refer to the tenth and eighth articles of the agreement. By the tenth article it is provided "that if the said Wilbraham Archibald Tollemache shall die before attaining twenty-four years of age, without leaving lawful issue, then the said Lady Catherine Camilla Sinclair, Sir George Sinclair, and Henry Bertie Tollemache, shall get back the sums they have paid or contracted for herein in regard to him." The only contingency in which the contracts for any thing provided to Wilbraham ever being brought back is that of his dying before attaining the age of twenty-four. And my inference is, that if he survived the age of twenty-four, the sum provided to him was not to be brought back. The eighth article is so plain as to afford an inference to the same effect. By that article it was provided "that if no children should be thereafter born of the body of the said Mrs Amelia Madeline Louisa Sinclair, or if such should die without issue, and without attaining twenty-four years of age, then the said £2000, the balance of the said £3000, part of the said Lady Catherine Camilla Sinclair's funds, should be at the absolute disposal of the said Lady Catherine Camilla Sinclair." This is a provision that, in the event of the failure of such children, the £2000 was to be returned, but this is the only other clause in the contract in which there is any provision of return to Lady Catherine Sinclair, and it does not include the £1000, but the other £2000. So that there seems only one contingency in which Lady Catherine contemplated the return of the £1000. Secondly, with regard to the words of the fifth article, that "after the death of Mrs Amelia Sinclair," the monies are to be held by the trustees. They, at first sight, appear to mean that the trust is only then to be constituted. And if that were the case, it would create great difficulty. But that is not the case, for on looking at the first article we find that the trust was constituted from the very outset, in 1841, and the funds provided by Lady Sinclair were put at that date out of her control, and into the hands of the trustees, so that the fifth article did not constitute the trust, but merely directed what the trustees were to do in certain contingencies with a trust constituted long before. And that takes off the meaning intruding itself at first sight, and creating a difficulty from the terms of the fifth article. I am therefore of opinion that the interlocutor of the Lord Ordinary ought to be adhered to.

The other Judges concurred.

Agents for Reclaimers—Hope & Mackay, W.S.

Agents for Respondent—J. A. Campbell & Lamond, C.S.

Saturday, December 21.

SECOND DIVISION.

FOWLIE *v.* BARNETT & CO.

Bill of Exchange—Blank Bill—Sequestration—Indorsation without Recourse—Fraud—Writ or Oath—Suspension. A party charged on a bill of exchange by parties who had acquired it by indorsation without recourse, alleged that if his subscription as acceptor of the bill was genuine it was originally adhibited to one of a number of blank bills which he had granted to the indorsers, and as, since his sequestration, he had had no dealings with the indorsers, that the filling up of the bill was fraudulent. *Held* that proof of these allegations of fraud was not restricted to writ or oath, the words on the bill "without recourse" presuming that the indorsees had made all proper inquiry as to the acceptor.

Observed by Lord Benholme, that the indorsation "without recourse" showed that the indorsees were conjunct and confident persons with the indorsers.

The suspender of this charge on a bill for a £100 is a spirit merchant in Edinburgh, and the chargers are watchmakers in Glasgow. The bill is dated 14th February 1867. It bears the signature of the suspender as acceptor, of Macnab & Co. as drawers, and the chargers, the present holders, are indorsees of Macnab & Co., the back of the bill bearing the words "Indorsed without recourse on Macnab & Co." It was averred by the suspender that if the signature to the bill was genuine it had been fraudulently obtained, or turned to a fraudulent use. He stated that he had been sequestrated and discharged in 1866; that, prior to his sequestration, he had given to his brother-in-law, Pater Macnab, of the firm of Macnab & Ritchie, ironmongers, Edinburgh, some blank bill stamps; that he had had no dealings with his said brother-in-law or his firm since his sequestration; and that, on the assumption that the signature was genuine, the document in question must have been written upon one of these blank bill stamps which were given before his sequestration. He further averred that John Barnett & Co., the indorsees, well knew that the bill had been turned to a fraudulent use when they accepted of the indorsation without recourse upon Macnab & Co.

Lord Jerviswoode allowed a proof of the allegations of fraud, remarking that the matter was one of some difficulty.

Barnett & Co. reclaimed, and craved that it it should be held that the proof of suspender's allegations should be limited to writ or oath.

Counsel were heard, and the bill was produced

and examined, and the bill stamp found to bear the figures 10, 5, 65.

Gifford and Asher for reclaimers.

Campbell Smith, and M'Lennan for respondent.

At advising—

Lord Cowan was of opinion that the interlocutor ought to be adhered to. It was averred that a blank bill stamp, granted by the suspender before his sequestration, and before the sequestration of Peter Macnab and his firm, had been filled up and indorsed to the charger. The mandate to fill up this document and convert it into a bill fell by the suspender's sequestration, and to use it, as it was said to have been done, was an act of gross fraud on the part of the drawers. As against the chargers, it was averred that they knew of the drawers' fraud, and that they received the bill in the full knowledge of how it had been fabricated. It appeared on the face of the bill that the stamp had been issued on the 10th May 1865, which was long anterior to the suspender's sequestration. That ought to have put the chargers upon their inquiry; but instead of inquiring they took an indorsation of the bill "without recourse" against the party from whom they received it. That was, to say the least of it, a very suspicious proceeding on their part, and he thought the circumstances disclosed, and the averments, were quite sufficient to warrant a proof by parole of the allegations of fraud and privity to it.

Lord Benholme concurred, being of opinion that the indorsation "without recourse" showed that the indorsees were conjunct and confident parties with the drawers and indorsers, and that, if the one party had committed a fraud, the other had a sufficient knowledge of it to bind them together in their interests.

Lord Neaves and the Lord Justice-Clerk also concurred, both laying great stress upon the date of the stamp; upon the suspender's sequestration, which was a public act of which the indorsees must be presumed to have known; and upon the indorsation "without recourse;" Lord Neaves remarking that Barnett & Co. must have been presumed, when they accepted of this indorsation "without recourse," to have made very thorough inquiry about the acceptor.

The Court adhered, with expenses.

Agents for Reclaimers—White-Millar & Robson, S.S.C.

Agent for Respondent—W. Milne, S.S.C.

Saturday, December 21.

HENDRY *v.* GRANT & JAMESON.

Process—Evidence Act—Expense of Printing Proof. After a proof was led before the Lord Ordinary, the defenders, who had led about one-half of the proof, intimated that they would bear no part of the expense of printing. The pursuer accordingly printed the whole, and called on the defenders to relieve him of one-half, which they refused to do. *Held*, on a report from the Lord Ordinary, that each party having led an equal amount of proof the defenders were liable in one-half.

In this case, which is an action of damages at the instance of a grieve against Messrs Grant & Jameson, writers, Elgin, on the ground partly of failure to obey instructions, and partly for want of professional skill in the management of a cause which he had employed the defenders to raise, issues were reported to the Court, and a long discussion followed. The defenders, before judgment was pronounced, offered to take a proof before the Lord Ordinary under the Evidence Act, to which the pursuer assented. The proof was accordingly led. Upon its conclusion the defenders' agents intimated to the pursuer that they would share no part of printing the proof. The pursuer accordingly printed the whole, and then called upon the defenders to relieve him of one-half, which they refused to do. Each party led an almost equal amount of proof. The Lord Ordinary was then moved for an order on the defenders to that effect. His Lordship reported the point.

W. A. Brown, for the pursuer, argued that the defenders should be ordained to pay one-half of the expense of printing the proof. It was necessary that the proof should be printed for the Inner-House, and the defenders having intimated that they would not print at all, the pursuer was entitled to print the whole, and he had an equitable claim to be relieved by the defenders of what he had expended for them.

Lancaster, for the defenders, answered:—It is not expedient that any such order should be pronounced as that which the pursuer seeks. The Lord Ordinary has reported the proof, and the case will be very soon disposed of by final judgment. It will then be seen who has to defray the whole expense of the proof, for that will fall on the unsuccessful party. The pursuer is a poor man, and in the event of the case being decided against him the defenders might fail to recover what they had disbursed for him, and that would be a hardship. Further, the nature of the action is one which justifies the defenders in resisting this motion. It is an action of damages against them, grounded on the allegation of want of professional skill. The case could not be brought to the Inner-House unless the proof was printed, but the defenders would provide no facilities for that being done.

The Court, without laying down any general rule for practice, and proceeding on the fact that there was an equal amount of proof on each side, ordained the defenders to divide the expense of the proof, and found them liable in the expenses of the discussion.

Agent for Pursuer—James Bell, S.S.C.

Agents for Defenders—H. & A. Inglis, W.S.

Tuesday, December 24.

FIRST DIVISION.

SMITH *v.* ANDERSONS.

Embezzlement Act, 17 *Geo. III., c.* 56—*Conviction—Penalty—Clerk of Court.* In a suspension of a conviction obtained under sec. 11 of the Embezzlement Act, the conviction bearing to proceed on the deposition of two witnesses, manufacturers, and on the failure of the party to give a satisfactory account of how he came by the stuff; *held* (1) that the deposition was unnecessary, and (2) that the judgment rightly ordained payment of the penalty to the clerk of court, he being the proper immediate recipient, although ultimately the penalty was to be divided between the informer and the poor of the parish.