

[13th May 1834.]

JOHN HUNTER, W. S., Appellant.—*Dr. Lushington—* No. 16.  
*Anderson.*

Mrs. GEORGE and others, Trustees of the late JAMES  
GEORGE, Respondents.—*Lord Advocate (Jeffrey) —*  
*Murray.*

*Bill of Exchange.*—Circumstances under which it was held,  
without reference to oath (affirming the judgment of the  
Court of Session), that a party was not an onerous bonâ  
fide holder of a bill, and that the bill having been granted  
without value, he was not entitled to recover.

*Process.*—Question as to the competency of the Inner  
House in the Court of Session, in reviewing an interlocu-  
tor of a Lord Ordinary which does not exhaust the cause,  
pronouncing a new one which has that effect.

CHARLES M'Donald acted for some time as agent in 1ST DIVISION.  
Huntly for the Aberdeen Banking Company. On the Ld. Corehouse.  
2d of January 1830 he applied to Alexander Reid and  
James George for their joint acceptance for 160*l.*, which  
they granted; and at the same time he addressed a  
letter to Reid, in these terms:—

“ Sir, Huntly, January 1830.

“ Having this day received your and Mr. James  
“ George's acceptance to me for 160*l.* sterling, pay-

No. 16.  


---

13th May  
1834.  


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HUNTER  
v.  
GEORGE'S  
TRUSTEES.

“ able six months after date, I promise to pay the  
“ same when due, as it is for my behoof.

“ I am, &c.

“ CHARLES M'DONALD.”

“ Mr. Alexander Reid.”

Two days afterwards a bill for 200*l.* was accepted by Reid and George in favour of M'Donald, and the former bill was thereupon destroyed. On this occasion M'Donald addressed to Reid a letter in these terms:—

“ Sir, Huntly, 4th January 1830.

“ I have this day received your and Mr. James  
“ George's acceptance to me for 200*l.* payable  
“ twelve months after date, which bill I promise to pay  
“ when due. I am, &c.

“ CHARLES M'DONALD.”

“ Mr. Alexander Reid.”

'These letters were given by M'Donald to Reid. M'Donald was at this time deeply indebted to the bank, and they took possession, on the 6th, of the whole books and papers which could be found in his office; and on the following day he executed a trust disposition for behoof of his creditors in favour of the bank. The appellant, (who was the brother-in-law of M'Donald, and acted as his law agent,) admitted that some days after the seizure of the papers by the bank he went to Huntly, and then became aware that M'Donald had executed a trust deed, but he denied that he was at that time made acquainted with the terms of the deed. He also admitted that the bill for 200*l.* was indorsed to him by M'Donald posterior to the exe-

cution of the trust deed, and alleged that it was indorsed in satisfaction of a business account due by him to M'Donald.

James George died in July 1830, and the bill fell due on the 7th of January 1831, by which time Reid had become bankrupt, and it was not then protested. About three months after it fell due Hunter raised an action before the Court of Session against the respondents as the representatives of James George, concluding for payment of the contents of the bill for 200*l*. In defence the respondents pleaded that Hunter was not an onerous bonâ fide holder, and that as it was proved by the letter of 4th January 1830 that the bill was an accommodation one to M'Donald, he had no right to recover. The Lord Ordinary, on the 2d of February 1832, pronounced this interlocutor:—“ Finds, in the  
 “ circumstance of the case as admitted by the pursuer,  
 “ that he is not entitled to the privileges of a bonâ  
 “ fide and onerous indorsee; but in respect that the  
 “ defenders do not found upon the letter from  
 “ M'Donald, the drawer, to Reid, as conclusive evi-  
 “ dence that the bill was an accommodation to the  
 “ drawer, in so far as George was concerned, but  
 “ refer to books and other documents on this subject,  
 “ remits to Mr. Joseph M'Gregor, accountant in Edin-  
 “ burgh, to examine the said books and documents, to  
 “ call for such others as may be competent to produce,  
 “ to hear parties, and thereafter to report to the Lord  
 “ Ordinary; and in the meantime appoints intimation  
 “ of the dependence of the action to be made to the Aber-  
 “ deen Banking Company.”

Both parties reclaimed; the respondents praying to be assoilzied, and the appellant that the interlocutor should

. No. 16.

---

 13th May  
 1834.

---

 HUNTER  
 v.  
 GEORGE'S  
 TRUSTEES.

No. 16.

13th May  
1834.

HUNTER  
v.  
GEORGE'S  
TRUSTEES.

be recalled, and consideration reserved as to whether he was an onerous bonâ fide holder, till it should be ascertained whether the bill had been granted for value or not.

The Court, on the 24th May 1832, pronounced this interlocutor: — “ Recall the interlocutor of the Lord  
“ Ordinary, in so far as it proceeds on the ground  
“ of the defenders having declined to found on the  
“ letter from M'Donald to Reid; also recall the remit  
“ to Mr. M'Gregor, accountant, as unnecessary;  
“ and in respect that by the foresaid letter the bill  
“ libelled on is proved to have been signed by James  
“ George only as an accommodation bill, and that  
“ the pursuer is not entitled to the privileges or cha-  
“ racter of an onerous indorsee, assoilzie the defenders  
“ from the conclusions of the libel, and decern:  
“ Find the pursuer liable to the defenders in ex-  
“ penses, &c.”\*

The appellant then presented a petition to the Court, maintaining that the interlocutor was ultra vires, in respect that it exhausted the whole merits of the cause, which it was alleged was incompetent, seeing that the cause was brought before the Court for review of an interlocutor of the Lord Ordinary, which did not exhaust the cause, and not by a report on cases. The Court, on the 1st June 1832, refused the petition with additional expenses.†

Hunter appealed, contending that the interlocutor of the 24th May 1832 was incompetent; that there were no circumstances sufficient to justify the finding that he was not an onerous bonâ fide holder, and that the letter

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\* 10 S. & D., p. 561.

† 10 S. & D., p. 604.

to Reid was not competent to establish that the bill was an accommodation one by George.

On the other hand, the respondents maintained that it was in the power of the Court, when reviewing the judgment of a Lord Ordinary, to alter it, and to decern or assoilzie as they saw fit; that the admitted facts that the appellant was the brother-in-law and the law agent of M'Donald, and that he had got the bill after he knew that M'Donald had a trust disposition, and that he gave no present value, were sufficient to show that he was not an onerous bonâ fide holder; and that although the letter was addressed to Reid, it established the fact that the joint acceptance was for the accommodation of M'Donald.

No. 16.

---

 13th May  
1834.

---

 HUNTER  
v.  
GEORGE'S  
TRUSTEES.

LORD WYNFORD.—My Lords, this is an action by Hunter, the indorsee of a bill of exchange, against the representatives of one George, who was, along with one Reid, an acceptor of that bill. The defenders alleged that the bill was drawn for the accommodation of the drawer M'Donald, in support of which they produced a letter from the pursuer Hunter to Reid, and they pleaded that the pursuer was not entitled to the privileges of a bonâ fide and onerous indorsee. The Lord Ordinary found, that in the circumstances of the case, as admitted by the pursuer, he was not entitled to these privileges; but he also found, that the defenders did not refer to the letter from the pursuer to Reid as conclusive evidence that the bill was an accommodation to M'Donald, the drawer, in so far as George was concerned, but referred to it along with books and other documents; and he therefore remitted the case to an accountant, to examine these books and documents, and call for such others as might be competently produced,

No. 16.  
 ———  
 13th May  
 1834.  
 ———  
 HUNTER  
 v.  
 GEORGE'S  
 TRUSTEES.

and to report. Both parties complained of this interlocutor, the pursuer (who is the present appellant) praying that the Court would, in hoc statu, recall the interlocutor, in so far as it found that he was not entitled to the privileges of a bonâ fide and onerous indorsee, and that they would reserve the consideration of that question till the prejudicial question,—whether the bill was granted without value, in so far as the acceptor George was concerned, was determined. The First Division of the Court recalled the interlocutor, in so far as it proceeded on the ground that the defenders had not founded on the letter from M'Donald to Reid as conclusive evidence of the bill being an accommodation one, and also the remit to the accountant as unnecessary; and they held, that the bill was proved to have been signed by George as an accommodation bill, that the pursuer was not entitled to the character or privileges of an onerous indorsee, and assoilzied the defenders. The pursuer has appealed to your Lordships against both these interlocutors. He did not ask the Court of Session to send this case to the Jury Court; and the prayer of his reclaiming note seems to import that he wished the Judges to decide the case without the intervention of a jury; but his counsel have insisted, that, as the case depended on disputed facts, and on the sufficiency of the proof of those facts, and on the conclusions to be deduced from the facts proved, neither the Court below nor your Lordships could decide it, and that a jury was the only competent tribunal. In support of this argument they referred your Lordships to an opinion, said to have been delivered in this House by the Lord Chancellor, in the case of Macdonald v. Mackie. The Lord Chancellor thought that that case

ought to be tried by a jury, because it did not appear from the evidence on which the Court had decided what the contract was on which the action was founded, or what was the extent of the obligation imposed on the defender. In the course of his address to the House in that case his Lordship complained of the prolixity and confusion of the Scotch pleadings, of the pleader jumbling together law and fact; and expressed a wish that questions of law and fact might be kept distinct, and that the former should be referred to the Judges and the latter to juries, as they are in England. But the Lord Chancellor did not say that the Court of Session is bound to send all cases of disputed facts to a jury, and that they cannot decide them; and when I told him that it had been stated at your Lordships bar that he had so decided he expressed his surprise. The Court of Session is a court of equity as well as of law; and although in complicated cases the Courts of Equity send questions of fact to be tried by jurors, they often decide on matters of fact without the assistance of a jury. Besides, the act of 6th George 4. cap. 120, settles this question. There are certain actions which must be sent to the Jury Court; but an action on a bill of exchange is not one of those actions. In all but the enumerated cases it is left to the discretion of the Court of Session either to decide on the facts or send the case to a jury. But it has been separately insisted, that it is to be presumed in all cases that an indorsee holds the character and is entitled to the privileges of a bonâ fide onerous indorsee, until that presumption is removed by the confession of the party or by writings. But an indorsee who has obtained a bill by fraud from the indorser, or to whom it has been indorsed by col-

No. 16.

---

 13th May  
 1834.
 

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 HUNTER  
 v.  
 GEORGE'S  
 TRUSTEES.

No. 16.  
 13th May  
 1834.  
 HUNTER  
 v.  
 GEORGE'S  
 TRUSTEES.

lusion with the indorser for the purpose of cheating creditors, would not be likely to confess that he was not a bonâ fide holder, or to furnish any written evidence that would destroy his right to sue on the bill indorsed to him. Such a rule, if generally acted on, would be a cover for every species of iniquity. The modern cases show, that evidence raising a suspicion of fraud prevents the application of this rule, and lets in circumstantial evidence to prove the want of bonâ fide consideration for the indorsement. There is in this case, from the admission of the pursuer himself, most urgent evidence of fraud. He admits, by his answers to the condescence, that the bill was indorsed after the execution of the trust-deed by M'Donald the indorser, although he says he was not informed of the contents of that deed, and he denies that it conveyed the right to that bill. If he was not informed of the contents of the deed, how could he deny that it conveyed that bill? If he was informed of the contents of the deed, he must have known that it did convey away from the indorser all his property, and of course that bill. He was the brother-in-law and the law-agent of the indorser, and he admits that the indorsement was made after the bank (to which the indorser was agent) had, in consequence of his having acted unfaithfully to his employers, seized on all his property. He does not pretend that any money was advanced at the time of the indorsement; the consideration, he says, was business done as law-agent; but there is no proof of any business being done, and the bill was never protested, and no action was brought on it until seven months after it was due. Now, if he was a creditor of the indorser, could any court or jury doubt that that indorsement was made to give an undue pre-



ference to the pursuer ; or, if he was not, to accomplish a fraud on the indorser's honest creditors? There are several cases the judgments in which break in on the old rule said to prevail in ancient times in Scotland ; a rule which could only have been endured when bills of exchange were never drawn or indorsed except in the course of trade, and as the means of paying commercial debts that were justly due. It is a rule not suitable to the present times when so many bills are manufactured and circulated for the purpose of enabling insolvent persons to get deeper in debt. There are several cases in the books, in which the Court of Session has not required a reference to be made to the oaths of the holders of bills as to the true bona fides of the indorsements of such bills. In the case of *Campbell v. Dryden\**, the defender accepted a bill for the accommodation of the persons who indorsed it to Campbell, who was their law-agent. Campbell was in advance to the indorsers, who became bankrupts, and he brought an action on the bill. Dryden pleaded that he was not an onerous holder ; and the Court of Session, on the report of an accountant as to the state of the transactions between Campbell and the indorser, held that the nature of the case took it out of the general rule,—that onerosity can only be proved by writ. The report does not show what the state of the transactions between the indorsers and Campbell was ; but I may venture to say, that it could not present more pregnant evidence of suspicion than the facts admitted by the pursuer. In that case your Lordships have a precedent which authorizes you to say, that you are not prevented from look-

No. 16:  
 ———  
 13th May  
 1834.  
 ———  
 HUNTER  
 v.  
 GEORGE'S  
 TRUSTEES.

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\* Nov. 25, 1824 (3 S. & D., new ed. 230.)

No. 16.  
 13th May  
 1834.  
 HUNTER  
 v.  
 GEORGE'S  
 TRUSTEES.

ing into all the circumstances of this transaction ; and your Lordships will, I think, confer a great benefit on Scotland by giving your sanction to this precedent to which I have referred you, and to the judgment of the Court below. On these grounds I humbly recommend your Lordships to dismiss this appeal, with costs, to be paid by the appellant when the amount shall have been ascertained by one of the officers of this House.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the sum of 200*l.* for their costs in respect of the said appeal.

SPOTTISWOODE and ROBERTSON — D. M. JOHNSTON,  
 Solicitors.