which the arbiters may have committed. But the terms of the award in this case are ambiguous. The award seems rather to negative the pursuer's claim for payment than to find that the subject for which he claimed compensation was of no value. As a matter of expediency, the Lord Ordinary has thought it right to allow a general proof before answer of the whole averments, excepting only those in the 20th Article. He has made the proof before answer so as to keep all questions open as to the competency or relevancy of any special evidence that may be tendered. Many of the averments will be proved by the recovery and production of the proceedings in the submission."

The defenders reclaimed.

SOLICITOR-GENERAL and MR BALFOUR for them.

SHAND and J. C. LORIMER, for pursuer, were not called upon.

The following cases were referred to in the discussion:—*Queen* v. *The London and North-Western Railway Company*, 15th Feb. 1854, 23 L. J. (Q.B.) 185; *Read* v. *Victoria Station, &c. Company*, 14th Feb. 1863, 32 L. J. (Exch.), 167; *Dare Valley Railway Company*, 9th July 1868, L. R., 6 Equity, 429; *Penny* v. *South-Eastern Railway Company*, 7th May 1857, 26 L. J. (Q.B.) 225; *Alexander* v. *Bridge of Allan Water Commissioners*, 5th Feb. 1869, 7 Macph., 492; *Duke of Buccleuch* v. *Metropolitan Board of Works*, 3 L. R., Exch., 306, and 5 Exch., 221; and in H. L., 30th April 1872.

At advising—

The LORD PRESIDENT observed that he had no doubt whatever as to the propriety of sending the case to proof. The averments were undoubtedly relevant, and he would have been disposed not to qualify the proof as one "before answer." His Lordship referred to the case of *Sir James Alexander* v. *The Bridge of Allan Water Commissioners*, in 1869, where a similar course of examining an arbiter, whose award was challenged as *ultra vires*, had been pursued.

The other Judges concurred—Lord DEAS observing that the present was a clearer case than Sir James Alexander's; and Lord KINLOCH reserving his opinion on the relevancy till the proof was taken.

Agent for the Pursuer—D. J. Macbrair, S.S.C.

Agents for the Defenders—J. &. R. D. Ross, W.S.

Tuesday, July 3.

MATTHEW STEEL *v.* SAMUEL BRIDGE JUNIOR.

Bill of Exchange—Proof—Parole.

Where it was alleged that A, a partner of a sequestrated firm (who had been himself sequestrated), had, after the sequestration, signed the firm name to a blank bill, and handed it to B as confidential associate, without value, for private purposes of their own, and that B, being himself a sequestrated bankrupt, had endorsed it without value to C, who was cognisant of all the circumstances regarding the bill, but who thereupon charged A as an individual partner of the firm whose name the bill bore.—*Held* that the averments on record were sufficiently suspicious to let in a proof *prout de jure* before answer in a suspension of the charge.

Held farther, on proof being led, that the complainer had failed to instruct either that the charger acquired the bill charged on in *male fide*, or that the charger did not give value therefor.

The complainer Matthew Steel, grocer, Buchanan Street, Glasgow, some time a partner of the firm of Steel & Henderson, grocers there, had been charged, at the instance of Samuel Bridge junior, fruit merchant, Sauchiehall Street, Glasgow, to make payment to him of the sum of £47, being the sum contained in a bill, dated 4th March 1871, purporting to be drawn by J. R. Swan, upon and accepted by the said Steel & Henderson, and payable four months after date, and to be endorsed to the said Samuel Bridge junior, charger and respondent. Steel suspended, and the Lord Ordinary (GIFFORD) passed the note on juratory caution. The following is the statement of facts for the suspender:—No such firm of Steel & Henderson existed at the date of said bill, viz., 4th March 1871, and the said bill was not and could not be accepted by said firm of Steel & Henderson. The complainer was a partner of the said firm of Steel & Henderson for a period of about twelve months prior to 3d September 1870, at which date, as a partner of said firm, and as an individual, he was sequestrated under the Bankrupt Acts. John M'Lean, accountant in Glasgow, was, on or about the 13th September 1870, elected, and on or about 11th October same year, confirmed, trustee in the sequestration. By said sequestration the said firm of Steel & Henderson was dissolved, and was never afterwards reconstituted. In order to wind up said dissolved firm of Steel & Henderson, the said firm was also sequestrated on or about the 10th December 1870, and the said John M'Lean was also, on or about the 20th, elected, and on 28th December 1870, confirmed, trustee on said estates. After various steps of procedure in said sequestrations, the complainer made offer of a composition on the company debts, and on his own individual debts, which offer was, at a general meeting of the creditors, held on the 20th February 1871, unanimously accepted, and the complainer was discharged on or about 12th August current (1871). The business of said dissolved firm of Steel & Henderson was thus finally wound up. Some months prior to the said sequestrations, Adam Henderson, the other partner of the said firm, had left Glasgow and gone forth of Scotland. In these circumstances the sequestration of the complainer was obtained on his own petition, and the sequestration of the firm on the petition of certain of the creditors, to enable them to get possession of the company estates. It was by advice of the said J. R. Swan that the complainer applied for sequestration, and the said J. R. Swan, in order if possible to command the trusteeship, induced the complainer, on or about October 1870, to sign the blank paper on which the bill charged on is now written. Neither the complainer nor the said dissolved firm were indebted to the said J. R. Swan in any sum whatever at the date of said alleged bill, and no value of any kind was given for it by the said J. R. Swan, or the charger, to said firm. The said J. R. Swan is an undischarged bankrupt, and endorsed said bill after his sequestration, as the charger well knew. The charger Samuel Bridge junior, was also bankrupt, and was only discharged in April 1870. The said J. R. Swan and the charger have been for a considerable time,

and still are, confidential associates, and are in the practice of meeting and associating daily. The said J. R. Swan gave no value for said bill, and he knew that at its date no firm of Steel & Henderson existed. The pretended endorsation was made without any value given by the charger, and not for the purpose of transferring the bill, but in order to recover payment by using his friend Bridge's name. On said occasion, in presence of another associate of Swan's, of the name Bruce, a few pounds were handed over the table by Bridge to Swan, and immediately handed back again under it by Swan to Bridge. The charger has all along been aware of the bankruptcy of Swan and the complainer, and of the whole foresaid circumstances in reference to the bill, and has merely allowed his name to be used at the request and for behoof of the said J. R. Swan. The charger is not a *bona fide* onerous endorsee, and at the time of the endorsation in his favour was well aware that no such firm of Steel & Henderson was in existence."

The respondent, on the other hand, averred that he had discounted the bill and given value for it, and that on the bill being dishonoured he had protested it, and otherwise proceeded in the ordinary manner. He also stated that the complainer, either by himself or along with others, was carrying on business under the firm of Steel & Henderson at the date of the bill, and subsequently thereto.

The complainer pleaded *inter alia*—"(1) The said pretended bill having been endorsed by Swan after his sequestration, and when said bill, if a true document of debt, was vested in his trustee, the charger has no title to charge on said bill, and the said charges ought to be suspended. (2) No firm of Steel & Henderson being in existence at the date of said alleged bill, the bill and charges should be suspended. (6) The said bill not having been signed by the complainer, or, if signed, having been fraudulently obtained from him, the charges ought to be suspended."

The respondent pleaded *inter alia*—"(1) The respondent being an onerous and *bona fide* indorsee of the bill now charged on, the reasons of suspension ought to be refused. (3) The suspender's averments can be proved only by writ or oath of the respondent."

In regulating the order of proof, the Lord Ordinary (Gifford) pronounced the following interlocutor:—

"*2d December* 1871.—The Lord Ordinary having heard parties' procurators, before answer, and under reservation of all pleas, allows the parties a proof of their respective averments on record, the suspender to lead in the proof; assigns Friday, the 15th current, at twelve o'clock noon, for taking the proof, and grants diligence for citing witnesses and havers accordingly.

"*Note.*—The Lord Ordinary is of opinion that the circumstances disclosed on record, and admitted or not disputed by the respondent, coupled with the averments of fraud and *mala fides* made by the suspender, are sufficient to let in a proof *prout de jure*, and to prevent the instant application of the rule, that the suspender can only prove by the respondent's own writ or oath. The Lord Ordinary thinks that the case falls within the principle laid down by Lord Winford, in *Hunter* v. *George's Trustees*, May 13, 1834, 7 W. and S. 333, a principle which has been applied in a great variety of subsequent cases. See the leading cases cited in Thomson on Bills (Wilson's edition), p. 61.

"The Lord Ordinary has made the proof before answer."

Against this interlocutor the respondent reclaimed, but the Court adhered.

After a proof the Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 27th February* 1872.—The Lord Ordinary having heard parties' procurators, and having considered the closed record as amended, proof adduced, and whole process: Finds that the suspender has failed to instruct either that the charger acquired the bill charged on in *mala fide*, or that the charger did not give value therefor; therefore repels the whole reasons of suspension, and refuses the Note of Suspension: Finds the letters and charge orderly proceeded, and decerns: Finds the suspender liable in expenses to the charger and respondent, and remits the account thereof, when lodged, to the auditor of Court, to tax the same, and to report.

"*Note.*—When the case was debated upon the passed note, the Lord Ordinary was of opinion that the suspender's averments, and the admitted circumstances connected with the position of the charger, were sufficient to entitle the suspender to a proof before answer of his averments, in accordance with the practice which has been usually followed in such cases, and with the principles laid down by the House of Lords in the case of *Hunter* v. *George's Trustees*, 13th May 1834, 7 W. and S., 333. See *Little* v. *Smith*, 9th December 1845, 8 D., 265; *Anderson* v. *Lorimer*, 21st November 1857, 20 D., 74; *York* v. *Gossman*, 5th July 1861, 23 D., 1245. The suspender's amendments on the record, allowed by interlocutor of the Inner House of date 20th January 1872, made the matter still more clear that a proof before answer was necessary, and the charger's reclaiming note was of consent refused.

"Now that the proof has been led, however, the Lord Ordinary is of opinion that it does not sufficiently instruct the suspender's averments, or deprive the charger of his right to recover under the bill.

"Mere suspicion attending the conduct or position of the charger is not enough. Circumstances of suspicion, when sufficiently strong and pregnant, may indeed let in proof, but then the proof when led must be sufficient to destroy the charger's right as indorsee of the bill. The onus of proof is wholly upon the suspender, and until the contrary be established, the charger is entitled to the presumption of law that he is the onerous and *bona fide* holder of the bill. This presumption, the Lord Ordinary thinks, has not been sufficiently or effectually overcome, and although the conduct of the charger was undoubtedly strange, and open to very serious observation and remark, there is not enough, in the Lord Ordinary's opinion, to negative his right to recover payment of the bill charged on.

"Without attempting any analysis of the proof, the Lord Ordinary may advert to one or two of the leading points raised.

"(1) No weight can be attached to the circumstance that Steel & Henderson was a sequestrated and a dissolved firm at the date of the bill charged on. The suspender is barred from insisting on any such plea, for he admits that he himself, after the sequestration, subscribed the firm's name,

'Steel & Henderson,' across the bill stamp, and sent it so subscribed to the drawer, J. R. Swan. The bill stamp was then not filled up, but the Lord Ordinary cannot take it off the suspender's hand that he did not know it was a bill stamp, and that it might be filled up as a bill for any sum which the stamp would cover. It is trite law that whoever signs a blank bill stamp will become liable to an onerous holder for whatever sum may be filled in (within the stamp), and the suspender, though by signing the firm of Steel & Henderson he might not bind that firm or the other partner thereof, still by his signature he undoubtedly bound himself.

"(2) It rather appears to the Lord Ordinary that Swan's account of the blank bill stamp is the correct one, and that it was given as for the amount of Swan's account for professional services, to be filled up when the account was closed. Undoubtedly this was loose and improper practice. It will never, as in a question with Swan, constitute Swan's debt or Swan's claim, but it is at least an intelligible explanation of the blank stamp, while the suspender's account is scarcely so. All questions between the suspender and Swan are entirely open, and if the suspender pays the bill, he may, if he chooses, call Swan to account, and claim credit for the sum so paid.

"(3) The Lord Ordinary does not think himself entitled in the present question to decide the point, whether any and what sum is due by the suspender to Swan. Swan is not a party to the present action, and would not be bound by any judgment therein. It is sufficient for the present case that Swan made a claim against the suspender, and that the suspender gave him the means, by entrusting him with a signed bill stamp, of putting the bill in question into the circle. If Swan has filled in too large a sum, or even if Swan's claim has been otherwise discharged, the suspender has himself to blame, and he must meet the consequences of having signed a blank bill stamp.

"(4) The Lord Ordinary is of opinion that the suspender has failed to prove that the charger did not give value for the bill charged on. The Lord Ordinary puts the proposition in this negative form, because he cannot help viewing with some suspicion the manner in which value is said to have passed, and he proceeds rather upon the presumption of law, which the suspender was bound to redargue, than on the weight to be attached to the parole evidence itself. The Lord Ordinary is also of opinion that on the mere question of value, and supposing there were no suspicious, fraudulent, or exceptional circumstances in the case, the suspender could only prove want of value by the writ or oath of the charger himself. This is the general rule, which can only be displaced by proof of *mala fides* in the charger. Even upon the evidence, however, the Lord Ordinary is inclined to think that value did pass, and the suggestion or averment that the money paid over the table was immediately handed back under the table has not been instructed. The evidence of what Swan said to Dunbar, while it may discredit Swan, will not set up the truth of Swan's hearsay.

"On the whole, the Lord Ordinary thinks that this is a case where, while suspicion attaches more or less to all parties, no sufficient reason has been shown why the general rule of law should not be enforced—that the acceptors of a bill must pay the amount, and the holder thereof is entitled to receive payment."

The suspender reclaimed.

SCOTT and BRAND for him.

SOLICITOR-GENERAL and M'LAREN, for the respondent, were not called upon.

At advising—

LORD PRESIDENT—I am of opinion that the Lord Ordinary's interlocutor is right. It does not turn upon the evidence of Swan, or upon the relations between Swan and Steele, or how they stand on account, or whether this bill was given for convenience, but the Lord Ordinary "finds that the suspender has failed to instruct either that the charger acquired the bill charged on in *mala fide*, or that the charger did not give value therefor."

Now, the question whether or not the holder of a bill is an onerous holder, must generally be proved by writ or oath only, and it is only in exceptional circumstances that other evidence can be admitted. The Lord Ordinary thought that this was an exceptional case, and that evidence at large should be allowed, and we were of the same opinion. What we proceeded upon was the averments in Stat. XI, as amended. The averment there is this—"The said J. R. Swan and the charger have been for a considerable time, and still are, confidential associates, and are in the practice of meeting and associating daily. The said J. R. Swan gave no value for said bill, and he knew that at its date no firm of Steel & Henderson existed. The pretended endorsation was made without any value given by the charger, and not for the purpose of transferring the bill, but in order to recover payment by using his friend Bridge's name. On said occasion, in presence of another associate of Swan's, of the name Bruce, a few pounds were handed over the table by Bridge to Swan, and immediately handed back again under it by Swan to Bridge. The charger has all along been aware of the bankruptcy of Swan and the complainer, and of the whole foresaid circumstances in reference to the bill, and has merely allowed his name to be used at the request and for behoof of the said J. R. Swan. The charger is not a *bona fide* onerous endorsee, and at the time of the endorsation in his favour was well aware that no such firm of Steel & Henderson was in existence." Now, there is here a strong case of fraud alleged against the charger, and if it had been proved, we should have suspended diligence. But the fraud has not been proved. The averment of fraud is most distinct, and the mode in which it is said to have been perpetrated is specifically stated. Yet the parties who were present on the occasion when the fraud is said to have been committed, negative the averment; and the only evidence in support of the allegation is, when the witness John Dunbar says that Swan told him that Bridge handed the money over the table, and then he (Swan) handed it back to Bridge under the table. Now that evidence is utterly inadmissible as against the charger, although it might have been admitted as discrediting Swan. The circumstances of the case are undoubtedly suspicious, but the suspender cannot benefit from these suspicious circumstances as he is involved in them. I am of opinion that we should adhere to the interlocutor of the Lord Ordinary.

LORD DEAS—I concur with your Lordship. I am not quite sure that we were right in allowing a proof at large in regard to this matter, for it is a very exceptional thing to allow a proof at large on

a bill. But be that as it may, the suspender has not proved his averments.

LORDS ARDMILLAN and KINLOCH concurred.

Agents for Suspender—M'Caul & Armstrong, S.S.C.

Agents for Defender—Millar, Allardice, & Robson, W.S.

Thursday, July 4.

SECOND DIVISION.

JACKSON'S TRUSTEES *v.* MARSHALL.

River — Property. The proprietor of ground bounded by a private river is not entitled to build on the alveus.

This was an action by the trustees of the late Robert Jackson of Bardykes, against John Marshall of Caldergrove. The following were the conclusions of the summons:—"Therefore it ought and should be found and declared, by decree of the Lords of our Council and Session, that the retaining walls and embankments erected by the defender in the course of the Summer or Autumn of 1809, or about that time, in or upon the alveus of the stream or river called the Calder, opposite to the pursuers' said lands of Bardykes, and which retaining walls and embankments are shown on the plan or sketch herewith produced and referred to, have been so erected or constructed wrongfully and illegally, and to the injury of the pursuers' said lands; and it ought and should be found and declared by decree foresaid, that during the Summer or Autumn of 1869, or about that time, the defender wrongfully and illegally, and to the injury of the pursuers' said lands, quarried or excavated a quantity of rock at three points in the alveus of the said stream *ex adverso* of the pursuers' said lands, and situated on that part of the alveus belonging to them lying between their said lands and the centre of the said stream, and which points are shown on the said plan or sketch; and further, it ought and should be found and declared, that during the said Summer or Autumn of 1869, or about that time, the defender wrongfully and illegally, and to the injury of the pursuers' said lands, removed a number of large masses of rock, lying on the pursuers' property, on the north-east bank of the said stream, nearly opposite the said embankment, and which pieces of rock belonged to the pursuers, and formed, in the situation where they were, a useful protection against the encroachment of the said river upon the pursuers' property; and the defender ought and should be decerned and ordained by decree foresaid, forthwith to remove the said retaining walls, embankments, and works connected therewith, and also forthwith to replace the rock quarried or excavated from the alveus of the stream, as above mentioned, or otherwise to excavate the rock on the half of the alveus adjoining the defender's lands at or near the said points, in such a way and to such an extent as to neutralise the effect upon the said stream of the said excavations upon the pursuer's half of the said alveus, and also forthwith to replace, in the same position as they formerly occupied, the masses of rock removed by the defender from the bank of the pursuers' lands adjoining the said stream, as above mentioned, or otherwise to erect such an embankment along the pursuers' lands at the portion thereof from which the said masses of rock were removed, as will protect the pursuers' lands from the encroachment of the said stream to the same extent as the said masses of rock, if not removed, would have done; as also forthwith to restore the said stream," &c.

The defender pleaded, *inter alia*—"The action cannot be maintained, in respect that the only operations executed by the defender, with the exception of the removal of the three small pieces of rock above referred to, were not in the alveus of the stream, but upon the defender's own lands, for the protection of which they were necessary.

After a proof the Lord Ordinary (MURE) pronounced this interlocutor, from which the whole facts of the case appear:—

"10*th April* 1872.—The Lord Ordinary having heard parties' procurators, and considered the closed record, proof adduced, and whole process, finds, 1*st*, that upon the defender entering into possession of the estate of Caldergrove in the year 1869, the water of the river Calder passed in time of flood in a considerable body across the lower part of the road leading down to the river, between the point H and J upon the plan No. 100 of process, and from thence through an opening on the Caldergrove side of the point marked I upon the plan into a rut or channel which ran along the Caldergrove side of the alder tree marked K upon the plan, and through which the water flowed into the main stream below the alder tree, after passing over the ledge of rock shown upon the plan: finds, 2*d*, that this ledge of rock extended at that time across the river to the Bardykes side, and consisted of solid rock, with the exception of a place about 4 feet wide, near the point marked O in the centre of the stream, at which the water passed over one or more large blocks of stone, which were detached from the rest of the rock: finds, 3*d*, that there was at this time a considerable quantity of detached rock and boulder stones lying along the main bed of the river, from the letter C to the letter R upon the plan, which had the effect of breaking the force of the stream; and that there were also large stones lying along the greater part of the Bardykes Bank, which had the effect of protecting that bank from the action of the river: finds, 4*th*, that on the right-hand side of the road leading down to the river there were the remains of a rough wall or dyke which had extended into the river; and that there were also on the left hand side of that road some loose rough stones laid along the ground on which the retaining wall is now built, but that neither this old wall nor the rough stones had the effect of preventing the river in time of flood from finding its way across the road into the rut or channel on the Caldergrove side of the alder tree, and thereafter discharging itself into the stream below: finds, 5*th*, that shortly after the defender acquired the property he rebuilt the wall on the right side of the road, and raised it at the part where it entered the bed of the river higher than it had originally stood; and that he also built upon the left side of that road what is marked 'retaining wall' upon the plan, and raised that wall from 1 to 2 feet higher than any of the loose stones that lay along the road; and that he thereafter, in the course of the year 1869–70, filled up the above mentioned rut or channel, which had previously formed a portion of the ordinary water way of the river in time of flood: finds, 6*th*, that during the same period the defender removed, in considerable quantities, the loose rock and boulder stones from the bed of the