sorry at present to give any opinion to the contrary. I am rather disposed to agree with the Lord Ordinary, and with the view expressed by Lord Ardmillan in the case of *Gadois*. But it is not necessary to decide that at present, for at least it is certain that such an allegation must be made in very precise terms. It must be alleged, first, that there was no reasonable ground for fear, and secondly, that there was malice; in the present case it is impossible to look at the letters and the history of this woman without seeing that it is utterly impossible to prove want of probable cause of apprehension. I agree with the Lord Ordinary, and am for adhering to his interlocutor.

Lord Deas—There is no doubt that it remains a part of the law and practice of this country that a party who apprehends danger from his neighbour is entitled to the protection of law-burrows. As Lord Stair explains, lawburrows are "caution found to do nothing but by order of law; for a borrow or burgh in our ancient language is a cautioner, and lawborrows is caution to keep the law." If the party finding caution keep the law, no harm comes to him or anyone else. The Act 1449, cap. 13, remains as it did when passed. "And attour, gif ony person dreadis ane uther, that he passe to the Schireffe or to the officiaires that it effeiris to and make that knawin or sweare that he dreadis him, and they sall take borrowes of peace, after the actes maid thereupon of before." Though that Act was introduced a long time ago, and may perhaps have been more necessary in a barbarous society than it is at the present day, it has never been repealed, and it is by no means useless. Cases of this kind occur every year, and if we wanted an example of the necessity of such a provision we could not have a clearer one than the present case. The case is that this woman had a serious grievance against this man, and its effect on her seems to have been to throw her into a state very little short of insanity. Being in that state she writes all these letters which have been produced in process, and which I have read, and which are one more violent than another. That they were written with serious purpose is placed beyond all doubt by the fact that her father was quite willing to find caution for her if she would only have given an assurance that she would keep the peace. This, however, she entirely declined to do; she preferred remaining five years in prison. It is only quite recently that any arrangement has been made at all to the extent of finding caution for £5, and it is of that very small amount that she is now trying to get rid. I do not go into the question as to the form of the oath, except as to this—whether it is requisite in point of form to allow a proof. When we look at all the circumstances, the facts and the admissions on record, it is clear to me that to grant a proof would be merely putting parties to useless expense, in pursuit of a mere shadow.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for the complainer Marion Aitken Brock against Lord Gifford's interlocutor, dated 10th February 1874, Adhere to the said interlocutor, and refuse the reclaiming-note; find the complainer liable in additional expenses; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Complainer—W. A. Brown. Agent—T. Lawson, S.S.C.

Counsel for Respondent — Dean of Faculty (Clark), Q.C., and W. Orr Paterson. Agents—J. & A. Peddie, W. S.

Thursday, June 11.

SECOND DIVISION.

[Sheriff of Midlothian and Haddington.

APPEAL—R. & A. SCOTT.

Bill of Exchange.

Circumstances in which the rule of law that non-onerosity on the part of an endorsee to a bill of exchange can only be proved by his writ or oath—*held* to apply.

This suit arose on a petition to the Sheriff of Midlothian at the instance of Thomas Wilson, Edinburgh, with consent of William Wight, accountant, Edinburgh, for his interest, against Robert and Andrew Scott, provision merchants, Leith, and A. D. Murphy, solicitor, Leith, for delivery of a bill of exchange for forty-five pounds. The bill in question was dated 24th October 1873, and was drawn by the petitioner Thomas Wilson upon and accepted by J. Jenkinson, farmer near Haddington, and was payable three months after date, and it was endorsed by the petitioner and William Wight. The statement of the petitioners was that the bill was received "from the said William Wight by the said Andrew Scott on the 28th October 1873, for the special purpose of procuring the same discounted at the bank (chiefly for behoof of the petitioner, to enable him to carry on his business), five pounds meantime of the proceeds thereof being retained by the said Andrew Scott and placed to the credit of the petitioner in account with the said firm of Robert & Andrew Scott, and the balance of forty pounds, less discount, to be handed over to the said William Wight for behoof of the petitioner, and which bill, if not so discounted, was to be returned to the said William Wight the day following, namely, 29th October 1873: That, notwithstanding said arrangement, the said Andrew Scott, or his said firm, have parted with the said bill to the said A D Murphy, and they, and each and all of them, refuse to restore the said bill to the petitioner or the said William Wight."

On the other hand, the respondents stated that in September 1873 they employed Murphy to raise an action against Wilson for £52 due to them by him. This action was not prosecuted in consequence of the following agreement made by the petitioner with them:—

"*25th September* 1873.—Sirs,—I herely offer you £5 stg. cash down, £5 within a fortnight, and £5 per month after that date until your account be discharged. This without prejudice any way to me, and subject to deductions from the account. You at once withdraw the arrestments used on my funds.—Yours truly, *per* Thomas Wilson, W. Wight.

"*Leith, 26th September* 1873.—Dear Sir,—Messrs R. & A. Scott have handed me the offer made by you on behalf of Mr Wilson, as to the liquidation of their account. I understand my clients have

accepted that offer on the footing that the expenses incurred to me will be paid by Mr Wilson.

"In consequence of this arrangement, I shall delay calling the summons, provided you agree not to put up protestation to give Mr Wilson every facility in carrying out the terms of the arrangement; but in the event of Mr Wilson falling into arrear with his instalments, I shall at once proceed to obtain decree.—I am, &c.,

per A. D. MURPHY.
JAMES PHILP."

The first instalment of £5 was paid, but no other payment was made. On 27th October 1873 the respondent sent up a clerk to Mr Wight for a payment to account, but instead of getting any money he was desired to ask Mr Scott to call for Mr Wight as he had a bill for them. Mr Andrew Scott, the junior partner, accordingly called for Mr Wight, who handed him the bill referred to in the petition, toward payment of his firm's claim against Mr Wilson, and which bill the respondent is entitled to retain. The amount still due to Messrs Scott, exclusive of interest and expenses, is £48—£3 more than the amount of the bill. No such arrangement or understanding was come to at the meeting Mr Andrew Scott had with Mr Wight such as that mentioned in the petition. The said bill is in the hands of Mr Murphy simply as agent or the present respondents.

It appeared that subsequently the bill had been discounted by the Scotts, was dishonoured by Jenkinson, and was paid by the Scotts.

The Sheriff-Substitute pronounced the following interlocutor:—

"*Edinburgh, 27th January* 1874.—The Sheriff-Substitute having heard counsel for the petitioners and the solicitors for the respondents, considered the proof and whole cause, decerns and ordains the respondents Robert and Andrew Scott as a company, and Andrew Scott, a partner thereof, as an individual, to deliver up to the petitioner, or William Wight, accountant, Edinburgh, the bill of exchange mentioned in the petition, and failing their doing so within eight days, decerns and ordains the respondents to pay to the petitioner the sum of forty pounds sterling as the balance of the contents of the said bill, reserving to the petitioners any claim for loss or damage which they may have, and to the respondents their defences as accords: Finds the said respondents liable in expenses, allows an account thereof to be lodged for taxation, and remits to Mr Robert Barclay Selby, solicitor, to tax and report.

"*Note.*—There is no doubt in the general case the holder of a bill of exchange is entitled to the presumption of having given value, and that he holds it for a special purpose or under a limited title can in general be proved only by his writ or oath. There are cases, however, where the proof will not be so restricted, and the present, it is thought, may fairly be placed in that category. *Mathieson* v. *Anderson*, 12th June 1822, 1 S. 486; *Haigs & Buchanan*, 25th June 1823, 2 S. 412; *Borthwick*, 22d December 1833, 12 S. 121; and *Smith* v. *Stark*, 16th December 1831, 10 S. 150. It is not pretended that any present value was given when the bill was got; far less can it be alleged that the indorser, from whom it was obtained, had any transaction with, or was in any degree indebted to, Messrs Scott. In the light of the surrounding circumstances, it is very difficult to believe that Wight, who had no interest whatever in the transactions, would, after having endorsed it, and made himself liable as an acceptor, hand over the bill to Scott except for the limited purpose which he states. All the claim the respondents then had was for an instalment of £5 of the debt due them by Wilson. The proof is perhaps not so satisfactory as could have been desired, but on the whole the version of the transaction given by the petitioners is the one which the Sheriff-Substitute is inclined to believe. It is possible the respondents thought that having obtained the bill by fair or unfair means they were justified in appropriating it, but such a view of mercantile dealing ought not to be countenanced.

"It was unnecessary to call Mr Murphy as a party, and it was equally unnecessary for him to make a separate appearance."

On appeal, the Sheriff pronounced the following interlocutor:—

"*Edinburgh, 22d April* 1874.—The Sheriff having considered the appeal for the respondents, with the proof and whole process, and heard parties' procurators, dismisses the said appeal, adheres to the interlocutor appealed against, assoilzies the respondent A. D. Murphy, and finds him entitled to the expense of entering appearance: Finds the respondents Robert and Andrew Scott liable in additional expenses, and decerns.

"*Note.*—It is right to assoilzie Murphy; but as there was no necessity for a separate appearance by him, he is not entitled to greater expenses than have been awarded.

"The Sheriff is of opinion that the petitioners are entitled to prove otherwise than by the writ or oath of the respondent the distinct averment they have made; and on the evidence he has no hesitation in holding they have proved their case."

The respondent appealed.

Authorities cited—*Mathieson*, 12 S. 486; *Borthwick*, 12 S. 121; *Haigs*, 2 S. 412; *Smith*, 10 S. 150.

At advising—

LORD BENHOLME—I am clearly of opinion that the proof allowed here was not competent.

LORD NEAVES—I quite agree.

LORD ORMIDALE—I had doubts at first whether this was not a case of fraud, and it is maintained that it is, but I think it is impossible we can admit such proof as we have here. It is admitted that there was a debt due to Scott at the time the bill was endorsed. The instalments had not been regularly paid and the agreement came to an end and Scott was entitled to the whole amount There is here no case for a proof at large of non-onerosity.

LORD JUSTICE-CLERK — I concur. The cases cited I do not think in point. The allegations are most meagre. If the respondents were mere hands in the transaction, it would amount to fraud. But the kind of case attempted to be set up is that a debt was admittedly due of a larger sum than that in the bill, and the creditor was to interpose his own credit to get the bill discounted, which is clearly not an allegation to be proved by parole. I think the case of *Little and Smith* contains a resume of all the authorities to the effect that a mere allegation of fraud, with nothing to support it *aliunde*, is not sufficient to entitle a pursuer to a proof at large.

Counsel for Appellants—H. Moncreiff. Agent—A. D. Murphy, S.S.C.

Counsel for Respondents—Rhind and Mair. Agent—R. Scott, S.S.C.