June 24. 1829. circumstances of the transaction. Two only of the parties out of the three were trustees,—William Henry Anderson was not a trustee. It appears that the money was advanced by these parties, and the obligation taken by them as tutors. It further appears, that the discharge was given to them in their character of tutors; and throughout this transaction, in every part of it, they appear to have acted in their character of tutors. This view of the case taken at the bar, cannot I think be supported, and the correct course will be to affirm the judgment of the Court of Session.

With respect to the action of relief, it appears to me that the decision of that follows as a consequence from the other. The money was paid under an authority which turns out to be altogether invalid. It was paid on a consideration which has entirely failed. The parties represented themselves, when this money was advanced, as clothed with an authority which in point of fact they did not possess. It appears to me, consequently, that the parties who are the pursuers in this action are entitled to the relief which they seek. I should recommend to your Lordships, therefore, that the judgment of the Court below in this action of relief should also be affirmed.

LE BLANC, OLIVER, and COOK—SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL,—Solicitors.

No. 35. ALEXANDER RITCHIE, Appellant.—*Lushington—Hunter.*

JOHN MACKAY, Respondent.—*Spankie—Napier.*

Bill of Exchange—Oath.—The Court of Session having found, that a reference to the oath of the drawer of a bill was incompetent, in respect that he had been convicted of a crime inferring infamia juris;—the House of Lords found it unnecessary to pronounce any judgment on that question, but that under the circumstances the reference had been properly rejected.

June 24. 1829.

2D DIVISION. Lord Cringletie.

ON the 4th of March 1817 the appellant, Alexander Ritchie, accepted a bill drawn on him by his brother, James Ritchie, for L. 250, payable three months after date. The bill was discounted by the drawer with the Commercial Banking Company, and was dishonoured when it fell due on the 17th June. He held two shares in the Bank; and on the same day desired the manager of the Bank to pay the bill from the proceeds of the shares. This was declined. On the 18th of August he executed a conveyance of all his effects to a trustee for behoof of his creditors, and afterwards attempted, unsuccessfully, to get the benefit of the cessio. On the 18th or 25th November the respondent, Mackay, (who alleged that he was a creditor of the drawer to a

large amount), paid the bill, and obtained an assignation from the Bank. He then gave the appellant a charge of payment as accepter of the bill, against which the appellant immediately presented a bill of suspension, on the ground that Mackay was not an onerous bona fide holder, and offering to prove, by the oath of the drawer, that no value had been paid for the bill. The bill of suspension was passed; and a litigation then ensued, as to whether Mackay was entitled to the privileges of an onerous bona fide holder. The Court, on the 29th of May 1823, found that he was not so. Thereafter Mackay was authorized by the creditors to carry on the action for their and his own behoof. June 24. 1829.

In the meanwhile (21st of April 1818) the drawer was convicted before the Court of Justiciary of fraud, falsehood, and wilful imposition, and sentenced to be imprisoned for one year. The appellant having made a reference to his oath that he had paid no value for the bill, Mackay objected, 1. That, as the drawer was the brother of the appellant, was bankrupt, and in collusion with him, a reference to his oath was not competent so as to affect creditors; and, 2. That as he had been convicted of a crime inferring legal infamy, a Court of law could not receive nor give effect to his oath. The Lord Ordinary issued this note:—

'The Lord Ordinary has advised this minute of reference to the 'oath of James Ritchie, with answers thereto, which object to 'the competency of an oath on this occasion by James Ritchie. 'It is said, 1*st*, That he is the brother of the suspender in this 'case, and that he is in collusion with the suspender; and, 2*d*, 'That there can be no dependence on his oath, as he has been 'found guilty, by the verdict of a jury, of fraud, falsehood, and 'wilful imposition, and that he has been accordingly punished 'by a sentence of the Circuit Court of Justiciary: that if he had 'been adduced as a witness, in this or any other cause, he would 'have been inadmissible; and therefore, as this is a question at 'the instance of a trustee for his creditors, his oath cannot be 'admitted to defeat their right. The suspender (appellant) has 'not been heard in reply to these answers, owing to avizandum 'having been made with the cause; and the Lord Ordinary 'thinks that it is right to afford the suspender that opportu-'nity, the question being at the instance of a trustee for credi-'tors, and arising on a bill due by the suspender to his brother. 'The oath referred to is not exactly that of a witness, but 'it is very similar to it; for the trustee for his creditors being 'the pursuer or charger, the point at issue is to be deter-'mined by James Ritchie's oath, who really is evidence for his

June 24. 1829.

'brother. It is in consequence too of the equitable powers of 'the Court that they permit any oath of reference to be taken; 'for, in strict-law, a bill is evidence of a debt; but where the 'Court has just reason to apprehend that truth will not be ob- 'tained by such an oath, it has in many cases refused to permit 'the oath to be taken. The Lord Ordinary's idea is, that this 'case should go before the Court on short Cases; but he desires 'that the record shall first be closed, so far as that the parties 'shall declare that they have no other written evidence to pro- 'duce, and that they rely on what is in process.' Thereafter his Lordship reported the cause to the Court on Cases; and their Lordships, after being equally divided in opinion, and having resumed consideration, found, 'In respect that James Ritchie 'was convicted, and received sentence for a crime which ren- 'dered him infamous, that the proposed reference to his oath is 'incompetent; and remitted to the Lord Ordinary to proceed 'accordingly, and to determine all questions as to expenses.'* The Lord Ordinary thereupon repelled the reasons of suspension, and found expenses due.

Ritchie appealed.

Appellant.—1. As it has been decided that the respondent is not entitled to the privilege of an onerous bona fide holder, the appellant was entitled from the outset to refer to the oath of the drawer. He accordingly made an offer to that effect before the conviction of the drawer, and was only prevented from getting the benefit of the oath by the litigious conduct of the respondent. He ought not, therefore, to be placed in a worse position than he was at the time of making that offer.

But, 2d, There is no foundation for the objection rested on the plea of infamia juris. This may disqualify a person from acting as a witness or a juror, but not of deponing on a reference to oath. Such a reference is a contract, and a person who has been convicted even of an infamous offence can effectually contract. Besides, the sentence for the crime has received entire execution.

3. Neither is the plea rested on the bankruptcy available to the respondent. It has been found that he is not an onerous bona fide holder, and therefore he is identified with the drawer. But the drawer could not state either his own bankruptcy or infamy as an objection to a reference to his oath. Even in a question with

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* 4. Shaw and Dunlop, p. 534.

creditors such a reference is competent; whereas, in this case, the appellant is not claiming on the estate, but is resisting a claim made against him. June 24. 1829.

Respondent.—1. The respondent sues on behalf, not of the drawer, but of his creditors; and although he individually has been found not entitled to the privileges of an onerous bona fide holder, yet, on behalf of the creditors, he is entitled to state objections which may not be competent to the drawer himself. The plea rested on the offer to refer to oath prior to the conviction, is irrelevant. The question must be decided as at the time when the reference is actually made. Many supervenient circumstances may deprive one of the power of referring to oath,—*e. g.* the death of the party; and it would be no reason for giving effect to the defence proposed to be verified, that after reference, but before the oath was emitted, the party had died.

2. The drawer having been convicted of an offence inferring infamy, no Court can give credit to his testimony; which is just in other words saying, that his statement on oath cannot be listened to or received. Nothing can do away the infamy except the King's pardon; and it is of no importance that the sentence of imprisonment has received effect.

3. But under the peculiar circumstances of this case,—the parties being brothers,—confessedly raising money by accommodation bills,—and the drawer being bankrupt, and having been refused the benefit of the cessio, and convicted of an infamous offence,—and the two brothers being evidently colluding to defraud the creditors, the reference ought not to be permitted.

The House of Lords pronounced this judgment:—

'It is declared that this House does not think it necessary, for 'the decision of this case, to determine whether by the law of 'Scotland reference to the oath of a party is incompetent by 'reason of his having been convicted, and having received sen- 'tence for a crime, which renders him infamous, and would ren- 'der him incompetent as a witness; but the Lords find, that, un- 'der the particular circumstances of this case, such reference was 'properly refused; and it is therefore ordered and adjudged, 'that the interlocutors complained of be affirmed.'

Lord Chancellor.—My Lords, In the case of Ritchie against Mackay, which was argued some time since at your Lordships' Bar, the facts of the case were shortly these—at least as far as it is neces-

June 24. 1829.

sary for the purpose of raising the only question on which I think any doubt can reasonably be entertained:—A person of the name of James Ritchie, who was brother of Alexander Ritchie, the appellant, drew a bill upon his brother to the amount of L. 250; which bill was accepted by Alexander Ritchie. This bill was discounted by James Ritchie with the Commercial Bank of Scotland, James Ritchie at that time possessing shares in that Bank. When the bill became due it was dishonoured; and four or five months afterwards was taken up by Mackay, the respondent. The circumstances under which this bill found its way into the possession of Mackay, the respondent, were such as to render it a material point to ascertain whether or not there was value given by James Ritchie to Alexander Ritchie for the acceptance; and the only material point for consideration is this,—whether or not such value passed?

Now, my Lords, it appeared upon the face of the bill that the bill was accepted for value; and there was no written document in the possession of the party, Alexander Ritchie, for the purpose of opposing what appeared upon the face of the bill. It was contended, however, on the part of Alexander Ritchie, that he was entitled in this case to have the benefit of the drawer's oath, and a reference was made in the usual way to the oath of the drawer; and the question turns entirely upon that reference, under the particular circumstances to which I am about to advert. This transaction took place as far back as the year 1817. Shortly afterwards a proceeding was instituted against James Ritchie, the drawer of the bill, in consequence of certain fraudulent transactions in which he had been concerned. James Ritchie had negociated in Scotland two several bills, with fictitious names upon those bills, which, according to the law of England, would be forgeries. He was concerned in uttering those bills in Scotland, knowing that the names were the names of fictitious persons, and thereby committing a gross fraud;—he was prosecuted for the fraud which he had so committed, found guilty, and sentenced to one year's imprisonment; and it was contended, under these circumstances, on behalf of Mackay, the respondent, that it was incompetent to make a reference to the oath of James Ritchie,—that he was, in consequence of these circumstances, and of his conviction of this fraud, rendered incompetent as a witness in a Court of justice, and incompetent also to have an oath tendered to him for the purposes to which I have adverted. It was contended, on the other side, that the offence was not to be considered as a crimen falsi; and that even if he would, in the first instance, have been rendered incompetent, still, by having undergone the sentence of the law, his competency was restored. These were the two primary objections which were made.

Now, with respect to the first question, no reasonable doubt can be entertained, that the offence of which he was guilty ranged itself under the denomination of the crimen falsi,—it was in the true sense of the word a forgery. He knew the names to be fictitious,—he issued

the bills knowing that the names were fictitious,—he issued them for the purpose of fraud, and he consummated that fraud;—it is impossible that an instance more strong, as ranging itself under the denomination or description of the crimen falsi, could be mentioned;—upon that point, therefore, it appears to be impossible any doubt can be entertained. June 24. 1829.

The next question for consideration is, whether, as he has undergone the sentence of the law, his competency is restored according to the law of Scotland. I understand the disqualification to be perpetual, unless it is removed by a pardon from the Crown. It was so decided in the year 1815, in a case reported in the Faculty Collection of Cases, the case of Black *v.* Brown; which case afterwards came under the consideration of Lord Pitmilly in the year 1825, and he recognized and adopted that decision. No contrary decision is to be found; and I think we are entitled to assume, that, according to the law of Scotland, the mere circumstance of the party having gone through the punishment imposed upon the crime, does not remove his disqualification, and that it can be removed only by a pardon from the Crown. Under these circumstances, therefore, if James Ritchie had been tendered as a witness, I apprehend it is perfectly clear that he would have been incompetent,—that his testimony as a witness would not have been received.

But, my Lords, in this case he was not tendered as a witness; and I beg now, therefore, in the first place, to suggest, that I entertain very great doubt, as to whether or not an objection of this kind can be made as a general objection, where a reference is made to the oath of the party. I shall take this in its most simple form,—I shall suppose this to have been a proceeding, in which Ritchie the drawer was the plaintiff, in a suit against Alexander Ritchie the accepter: it does not appear to me that there is any sufficient reason, under such circumstances, and in that state of facts, to say that Alexander Ritchie, the defendant, in such a suit, would have been deprived of a right to make his appeal to the oath of the plaintiff, merely because the plaintiff had become incompetent as a witness as between third persons, in consequence of his having been convicted of the crimen falsi. There is no authority that has been cited for the purpose of establishing such a position; and I see no sufficient ground on which it can be rested, as between two parties in a Court of justice who are contending against each other. It does not appear to me, that there is any reason why, because one person has committed a crime which would render him incompetent to give evidence, the other should be deprived of the benefit the law gives him, if he chooses to avail himself of the benefit of resting his case on an appeal to the oath of his adversary. It is true that the appeal, under such circumstances, is not likely to be advantageous; but that is for the consideration of the party making the appeal; and in the absence therefore of all authority I should say, in that state of facts to which I have adverted, namely, where one of the litigating parties in the suit was a person who had committed a

June 24. 1829. crime, and whose incompetency as a witness was declared, his adversary would not be deprived of the right of appealing to his oath. The only ground which has suggested itself to me for sustaining the objection is, that a Court of justice under such circumstances might think they ought not to tender an oath to a party who had become infamous in consequence of the conviction of a crime.

My Lords, a similar rule of law applies in this country as to the evidence of persons convicted of certain crimes, who are thereby rendered incompetent witnesses in a Court of justice; but there are many cases in which an oath may be tendered to a party so situated—not an oath to him as a witness, but an oath under other circumstances. It does not appear to me, therefore, in this situation of things, that if James Ritchie had himself been the plaintiff in the suit, it would have been incompetent to Alexander Ritchie to put him to his oath. But, my Lords, that is not the state of things in this case; and it is observed by the Lord Ordinary in giving his judgment, that it is in a considerable degree in the discretion of the Court whether or not they will allow the oath to be tendered; and I find, in referring to Mr Bell's book upon the same subject, he also lays down as the law of Scotland, (and which I believe cannot be questioned), that it is not imperative upon the Court, under all circumstances, to allow the oath to be put, but that the Court, this being an appeal to the equitable consideration of the Court, has a right to exercise a discretion upon the subject; and if they see reason to believe that justice is likely to be perverted by the administration of an oath of that description, they will not give authority for the oath to be administered.

My Lords, in order that I may not be mistaken with respect to this doctrine, I will refer to the language of the Lord Ordinary, to which I beg leave to say, that on consideration I entirely subscribe. He says, 'It is in consequence of the equitable powers of the Court 'that they permit any oath of reference to be taken; for in strict law 'a bill is evidence of a debt; but where the Court has just reason 'to apprehend that truth will not be obtained by such an oath, it has 'in many cases refused to permit the oath to be taken.' Now, my Lords, let us consider what is the situation of the parties in this case. James Ritchie is a bankrupt,—a bankrupt under such circumstances that he has only a mere nominal interest in the success of the pursuer in this action;—it is obvious, therefore, that if the oath is tendered to him, he stands substantially in the situation of a witness,—he stands substantially, and gives his evidence almost in the character of a witness;—not in the situation of a witness in strict law, but in that situation in point of effect. Now, what is his situation? He stands in the relation of a brother to the party who claims the benefit of his oath, in addition to which he is wholly unworthy of credit, in consequence of the conviction of the crime of which he has been accused, and of which he has been found guilty. I should say, under these circumstances, my Lords, referring to the doctrine to

which I have adverted, that the Court would exercise a sound discretion, in a case of this description, in saying, that Alexander Ritchie ought not to be permitted to rest the case on an appeal to the oath of his brother. June 24. 1829.

My Lords, the result of what I have stated will be in substance to affirm the judgment of the Court below;—the only doubt that has occurred to me has been with respect to the terms in which that judgment has been pronounced. The judgment of the Court below is in these terms: 'In respect that James Ritchie was convicted 'and received sentence for a crime which rendered him infamous, 'find, That the proposed reference to his oath is incompetent; and 'remit to the Lord Ordinary to proceed accordingly, and to deter-'mine all questions as to expenses.' Substantially, I should recommend to your Lordships to affirm the judgment; but I am apprehensive, if it is affirmed precisely in the form in which that judgment is pronounced, it may be considered that the Court below meant to lay down as a general rule, and that this House has concurred in the opinion, that where a party had been convicted of a crime which rendered him infamous, under no circumstances, and between no parties, could reference be made to his oath; and I apprehend your Lordships would not be disposed, at least unnecessarily, for it is unnecessary to the decision of this case, to lay down such a doctrine. For the purpose, therefore, of avoiding such a conclusion being drawn from the terms in which this judgment is pronounced, although I should recommend to your Lordships to affirm the judgment in substance, I should suggest at the same time that some alteration should be made in the terms in which the interlocutor is conceived;—that particular alteration I shall take the liberty, on a future day, of submitting to your Lordships.—Ordered accordingly.

Appellant's Authorities.—(2.) Elchies, No. 7. voce Member of Parliament.—(3.) 2. Bell, 512.; 4. Ersk. 2. 21.; Halkerston, Feb. 26. 1783, (12,476).

Respondent's Authorities.—(2.) Burnet, 396.; 4. Ersk. 2. 23.; Black, Dec. 22. 1815, (F. C.); Smith *v.* Knowles, (Jury Court, 1824).—(3.) 1. Bell, 253.; Tait's Law of Evidence, p. 279.

ANDREW M'CRAE—JAMES DUTHIE,—Solicitors.

CHARLES CUNNINGHAM and CARLYLE BELL, Town-Clerks of Edinburgh, Appellants.—*Sol.-Gen.* (*Tindal*)—*Adam.* No. 36.

HUGH VEITCH, Town-Clerk of Leith, Respondent.

Public Officer—Town-Clerk—Exclusive Privilege.—Held, (ex parte, reversing the judgment of the Court of Session), That the right to receive the fees and emoluments of preparing charters, precepts of clare constat, and other feudal writs granted to