

fact that the deposit-receipt was in terms showing an antecedent probability of the deceased acting as he is alleged to have done, and therefore making the account given by the defender and his daughter more likely than it might otherwise have been.

The Court pronounced the following interlocutor:—

“Find in fact that the late John Macdonald delivered the deposit-receipt for £286, 19s. 2d., mentioned in the record, to the defender Alexander Macdonald, to be held by him for his the defender's own behoof: Find in law that the defender is in the lawful possession of the same as creditor therein, and that it does not form part of the estate of the said John Macdonald: Therefore recal the judgment of the Sheriff-Substitute appealed against,” &c.

Counsel for the Pursuers (Respondents)—
A. S. D. Thomson. Agent—Alex. Ross, S.S.C.

Counsel for the Defender (Appellant)—Sym.
Agent—David Milne, S.S.C.

Tuesday, June 11.

SECOND DIVISION.

[Sheriff of Stirling.]

SEMPLÉ V. WILSON.

Agreement—Condition—Payment.

A merchant who had bought goods from a farmer whose crop and stock had been sequestrated at the instance of his landlord, agreed to pay cash to the landlord's factor on the condition that he should guarantee delivery of the goods, and in sending a cheque for the price he stipulated that such guarantee should be granted. The factor retained and cashed the cheque, but refused to guarantee delivery of the potatoes.

In an action by the merchant against the factor for re-delivery of the cheque, or for the amount thereof, *held* that the defender was not entitled to retain the cheque except on the condition attached by the pursuer, and that he was bound to repay the amount.

On 2nd November 1887 Thomas Semple, grain merchant, Glasgow, bought 60 tons of potatoes from James MacAuslan, Kirkmichael Farm, Helensburgh, at 40s. per ton, for delivery up to 1st March 1888, payment to account to be made in eight days. MacAuslan's crop and stock having in August previously been sequestrated at the instance of his landlords, the trustees of the late Sir James Colquhoun, he applied to their factor James Wilson, Helensburgh, for permission to carry out the sale, who gave his consent on condition that the price was paid to him, to be applied in payment of rent then due. Shortly after the sale MacAuslan informed the pursuer of his position, and at a meeting with Wilson it was agreed that the price should be paid to him by Semple.

Semple received the account, and acting on his understanding of the agreement concluded at the meeting, he sent on 18th November his

cheque for the price, £120, and requested the defender to grant a receipt in the following form:—“£120. — Received from Mr Thomas Semple, grain merchant, 57 West Nile Street, Glasgow, the sum of £120 stg., in full payment of sixty tons potatoes—‘Champion’—to be delivered free on rail at Helensburgh, in good order and condition, at time specified, from Mr James MacAuslan, farmer, Kirkmichael, which I bind and oblige myself to deliver.”

Wilson next day forwarded to the pursuer a receipt for £120, the price of 60 tons of potatoes sold to him by MacAuslan, to be delivered as *per* agreement entered into between the parties. On the same day Semple wrote to Wilson that he would prefer something more definite, and again requested a guarantee of delivery, to which no written answer was made, although Semple was informed by Wilson's clerk, when he called shortly afterwards at the office, that no further guarantee would be granted.

In March and April following Semple would have taken delivery of the potatoes, but this was not given. Finally he repudiated the bargain, and raised this action in the Sheriff Court of Dumbarton against Wilson for re-delivery of the cheque for £120, or failing re-delivery for payment of the amount, with interest from 18th November 1887.

After a proof the Sheriff-Substitute (GEBBIE) assoltized the defender, and the Sheriff (MUIRHEAD) on appeal adhered.

The pursuer appealed to the Court of Session, and argued—The cheque was given only upon the condition that Wilson should guarantee the delivery. If he did not undertake to carry out that condition, then he ought to have returned the cheque. To keep the cheque after he had received information that there was a condition attached to the bargain was to intimate that he intended to observe the condition—*Dominion Bank of Toronto v. Anderson & Company*, February 10, 1888, 25 R. 324; *M'Griger v. Alley & M'ellan*, March 4, 1887, 14 R. 535; *Bell's Prin. 1244*; *Rankine on Leases, 355*, and cases cited there.

The defender argued—The pursuer and MacAuslan had entered into a bargain for the sale of a specified quantity of potatoes. After Semple learned that MacAuslan was under sequestration at the instance of his landlord he wished to have a guarantee that the latter would not interfere to prevent the execution of the bargain, but the original bargain between pursuer and MacAuslan still subsisted. There was no assignation by MacAuslan to Wilson, and if the pursuer had applied to MacAuslan at the proper time he would have got delivery of the potatoes without any interference from the landlord. Wilson was therefore entitled to keep the cheque, and apply it to the purpose of reducing MacAuslan's rent.

After the hearing the Court ordered the case to be argued before five Judges.

At advising—

LORD JUSTICE-CLERK—The Court having had the benefit of a re-hearing of this case and the assistance of Lord Wellwood in considering it, we are all of opinion that although the contract between MacAuslan and the pursuer may have continued to subsist, and might, with the consent of the defender, have warranted an

assignment by MacAuslan of the right to demand payment of the price of the potatoes, it is proved that the pursuer in sending his cheque to the defender, understood the arrangement between MacAuslan and the defender to be such as entitled him to attach the condition that the defender was to undertake responsibility for the delivery of the potatoes.

This being so, the Court is further of opinion that the defender, being informed that such was the pursuer's understanding, was not entitled both to reject the condition and to retain the cheque, but was only entitled on discovering the misunderstanding, to withdraw his consent to the sale of the potatoes, and to fall back on his rights under the landlord's sequestration.

The judgment of the Court therefore will be to recall the interlocutors appealed from, and to decern in favour of the pursuer, with expenses.

The Court pronounced this interlocutor :—

"Find in fact (1) that the pursuer purchased the potatoes in question from James MacAuslan, and agreed to pay cash to account, subject to the condition that the defender, as representing the landlord at whose instance MacAuslan had been sequestrated, should guarantee delivery of the same, and in sending the defender a cheque for the price, stipulated that such guarantee should be granted; (2) that the defender retained and cashed the cheque, but refused to guarantee delivery of the potatoes: Find in law that the defender was not entitled to retain the cheque except upon the condition attached by the pursuer, and find accordingly that he is bound to repay to the pursuer the amount of the cheque with interest as concluded for: Therefore sustain the appeal, Recall the judgments of the Sheriff and Sheriff-Substitute appealed against," &c.

Counsel for the Appellant—Murray—Dickson.
Agent—Thomas Carmichael, S.S.C.

Counsel for the Respondent—Gloag—Lorimer.
Agents—Tawse & Bonar, W.S.

Wednesday, June 12.

SECOND DIVISION.

BANK OF SCOTLAND v. LAMONT & CO.

Bill of Exchange—Presentment—Agreement by Drawer not to Enforce Payment against Acceptor.
—Bills of Exchange Act 1882 (45 and 46 Vict. cap. 61), sec. 46, sub-sec. 2 (c).

The Bills of Exchange Act 1882, by sec. 46, sub-sec. 2, provides—"Presentment for payment is dispensed with . . . (c) As regards the drawer where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented."

The drawers of a bill by agreement with the acceptors, to which the Bank of Scotland was also a party, were bound not to enforce a debt of which the sum contained in the bill formed

a part. When the bill fell due the acceptors declined to renew it, and the bank, who were the discounters and the holders of the bill, without having presented it to the acceptors for payment sued the drawers for the sum contained therein. Held that the drawers were not entitled to plead want of presentment as a ground for not retiring the bill.

The Bank of Scotland were the discounters and holders of a bill of exchange in the following terms:— "Glasgow, 3rd January 1888. £720, 4s. 4d. stg.

"Three months after date pay to our order the sum of seven hundred and twenty pounds four shillings and four pence sterling value received. "HENRY LAMONT & Co.

"Messrs Ferguson, Lamont & Co.,
Royal Exchange, Glasgow."

Endorsed thus:—

"Pay to the Governor and Compy. of the Bank of Scotland or Order.

"HENRY LAMONT & Co.

"For the Bank of Scotland,

"D. HENDERSON."

This bill was crossed—"Accepted—Payable at our office, P. pro Ferguson, Lamont, & Co., J. M. Lamont., Archd. Nisbet;" and stamped "8s."

This bill was the last renewal (with interest added) of a bill for £665, 9s. 2d., accepted by Ferguson, Lamont, & Company, which formed part of a debt of £1502 due by them to Henry Lamont & Company as at 12th November 1885. Upon that date an agreement was entered into between (1) Charles Lamont, sole partner of Ferguson, Lamont, & Company; (2) certain clerks of the firm as managers and attorneys; and (3) the principal creditors of the firm, including the Bank of Scotland, and Henry Lamont, the sole partner of Henry Lamont & Company. They agreed that the business and the whole assets of Ferguson, Lamont, & Company should be transferred to a committee of creditors to be liquidated and applied towards gradual payment of the creditors. "Eighth. As the object of these presents is to ingather the assets of the foresaid businesses and gradually apply the same towards the reimbursement of the third parties, it is provided and agreed that after paying preferable charges, salaries, allowance to the first party, and other claims as aforesaid, and so soon as the funds received by the second parties as commissions and actual profits shall admit, a rateable division will be made with the concurrence of the said committee of advice to and among the third parties, and from time to time thereafter until their claims are duly paid, the amount of said claims as at the date of these presents being stated in the schedule annexed, and signed as relative hereto."

In the schedule of claims Henry Lamont appeared as a creditor to the extent of £1502.

When the bill fell due on 6th April 1888 the attorneys representing the acceptors intimated to the Bank of Scotland that they did not intend to renew it, and the bank, without presenting it to the acceptors for payment or noting it for non-payment, called upon Henry Lamont & Company to make payment of the sum contained therein.

On Saturday the 7th of April 1888 Henry Lamont called at the bank and promised to pay