Thereafter the Lord Ordinary on 30th November 1897 pronounced the following interlocutor—"In respect that it is stated the arrester has brought an action of furthcoming of the sum alleged on record to have been arrested, continues the sist formerly granted, to await the result of said proceedings."

On 14th December 1897 Lord Kincairney, acting for Lord Low, who was absent owing to illness, pronounced the following interlocutor—"Recals the sist granted by interlocutor of 29th October last: Suspends *simpliciter* the charge complained of, and whole grounds and warrants thereof, and decerns: Finds the respondents liable in expenses," &c.

The respondents reclaimed.

It was stated at the bar that some delay had occurred owing to Mrs Creighton having changed her agent, and that the action of furthcoming had actually been raised the day before the date of Lord Kincairney's interlocutor, but that this was not then known to the respondent's counsel, and consequently was not stated to Lord Kincairney. In view of these circumstances counsel for the respondents asked that the interlocutor reclaimed against should be recalled and a sist granted to await the result of the furthcoming, this being the course adopted by Lord Low, the Lord Ordinary before whom the cause depended.

Counsel for the complainers were not called upon.

LORD TRAYNER—I think that this suspension was quite properly brought. A question arose whether a certain arrestment was habile to affect a fund. The complainer had no concern whether the arrestment was good or bad. I think he was clearly entitled to raise the suspension. It was the respondents' duty to clear out of the way the only question which prevented his paying the money.

LORD MONCREIFF—I concur in thinking that the complainer was justified in raising a suspension.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

The Court adhered with additional expenses.

Counsel for the Complainers—Sol.-Gen. Dickson, Q.C.—Aitken. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Respondents — R. K. Galloway. Agent—F. Campbell MacIvor, S.S.C.

---

*Friday, February 4.*

## SECOND DIVISION.

[Lord Kyllachy, Ordinary.

## SOMMERVILLE *v.* AARONSON.

*Bill of Exchange — Promissory-Note — Protest for Non-Payment — Protest not at Place of Payment—Protest by Householder — Summary Diligence — Bills of Exchange Act* 1882 (45 *and* 46 *Vict., cap.* 61), *secs.* 45 (5), 51 (6), 87 (1), 94, *and* 98.

A promissory-note was made payable at Bradford, and was duly presented and noted for non-payment by a notary there, but no protest was extended. Thereafter the note was again presented at a place where the debtor was for the time, and protested for non-payment by a householder under section 94 of the Bills of Exchange Act 1882, "there being," as the protest bore, "no notary-public available." Upon this protest, duly recorded, a charge was given, and ultimately cessio was applied for and obtained. *Held* that the proceedings taken upon the householder's protest were inept, in respect that such a protest was only competent where "the services of a notary cannot be obtained at the place where the bill is dishonoured," which was not the case here, as the bill was dishonoured at Bradford, where it was not alleged there was any want of notaries.

*Question*—Whether in any case a householder's protest under section 94 can be used for purposes of summary diligence in Scotland.

This was an action at the instance of William Sommerville, blacksmith, Glasgow, against G. Aaronson, money-lender, 15 Thornton Road, Bradford, in which the pursuer sought reduction of (1) a decree of cessio pronounced against him on the petition of the defender by the Sheriff-Substitute at Rothesay, and (2) a decree of the Sheriff of Renfrew and Bute dismissing an appeal brought by the pursuer to set aside the decree first sought to be reduced.

The trustee under the decree of cessio was subsequently, of consent, sisted as a defender.

The petition for cessio presented by the defender bore to proceed upon an extract registered protest of a promissory-note granted by the pursuer in the defender's favour and an expired charge made thereon.

The promissory-note was in the following terms:—"£30. Bradford, November 19, 1895. On demand I promise to pay to G. Aaronson or order at 15 Thornton Road, Bradford, the sum of thirty pounds for value received.—WILLIAM SOMMERVILLE." This promissory-note bore upon it the following note of protest:—"Henry Fison Killick, notary, Commercial Bank Buildings, Bradford, Yorks., noting 2/6, no funds." This note was never extended into a protest, but upon 23rd October 1896 the bill was presented

for payment at Millport, where the pursuer was at the time, and payment not having been made of the balance of the sum in the promissory-note, amounting as the defender alleged to £15, 10s., a protest was made out in the following terms:—"Know all men that I, William Hunter, householder, of Stewart Street, Millport, in the county of Bute, in the United Kingdom, at the request of G. Aaronson, 15 Thornton Road, Bradford, the payee and holder of the promissory-note after mentioned—there being no notary-public available—did on the 23rd day of October 1896 at Millport demand payment of the promissory-note here underwritten from William Sommerville, blacksmith, Millport, the maker thereof, under deduction of £14, 10s. paid to account, leaving a balance of £15, 10s. due, to which demand he made answer, 'My affairs are in the hands of a law-agent', and payment was refused accordingly, wherefore I now, in presence of James Wallace, house factor, Bute Terrace, Millport, and James M'Connachie, gardener, Glasgow Street, Millport, do protest the said promissory-note." On 29th October 1896 this protest was registered in the Sheriff Court books of Bute for preservation and execution, and thereafter Sommerville received a charge to pay the note. The charge expired without payment being made, and thereafter the defender presented a petition for cessio against the pursuer, founding upon the extract registered protest and the expired charge, and thereupon the decree now sought to be reduced was granted in absence of the pursuer on 8th January 1897.

With regard to the protest at Millport, the pursuer averred—("Cond. 4). The said bill for £30, on which the said petition for cessio followed, was not duly protested by a notary-public in terms of the Bills of Exchange Act 1882, and the summary diligence which followed on the protest of the said bill was illegal under the said Act." The defender in answer averred—"(Answer 4). . . . The said bill was protested in the presence of two witnesses by a householder of Millport, because the services of a notary could not be obtained at the place of protest. There is no notary-public resident in Millport."

The Bills of Exchange Act 1882 (45 and 46 Vict., cap. 61) enacts as follows:—Section 45, sub-section 5—"Where a bill is presented at the proper place, and after the exercise of reasonable diligence no person authorised to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required."

Section 51, sub-section 6—"A bill must be protested at the place where it is dishonoured: Provided that . . . (*b*) when a bill drawn payable at the place of business or residence of some person other than the drawer has been dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to or demand on the drawee is necessary."

Section 87, sub-section 1—"Where a promissory-note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable."

Section 94—"Where a dishonoured bill or note is authorised or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonoured, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate signed by them, attesting the dishonour of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill. The form given in Schedule I to this Act may be used with necessary modifications, and if used shall be sufficient." The protest above quoted was in the form given in Schedule I.

Section 98—"Nothing in this Act or in any repeal effected thereby shall extend or restrict or in any way alter or affect the law and practice in Scotland in regard to summary diligence."

On 20th October 1897 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor:—"Reduces, decerns, and declares in terms of the conclusions of the summons: Finds the pursuer entitled to expenses as against the original defender, subject to modification; modifies the same at one-half of the taxed amount thereof."

The defenders reclaimed.

There was no note of any opinion of the Lord Ordinary before the Court, but it was stated at the bar that the ground of his decision was that summary diligence could not proceed upon a protest of a promissory-note made by a householder in terms of the 94th section of the Bills of Exchange Act 1882.

Argued for the defenders and reclaimers—(1) Section 94 of the Bills of Exchange Act 1882 was quite general, and was not limited as regards summary diligence by section 98. The protest was no part of the law and practice in regard to summary diligence. But even if it were it was not essential that it should be a notarial protest. The Acts 1681, c. 20, and 1696, c. 36, made no mention of a notarial protest, but merely required that the bills should be "duly protested," which meant duly protested according to the law in force at the time, and since 1882 the law sanctioned protest by a householder if no notary were available. If a householder's protest could not be used as the foundation of summary diligence, then practically section 94 was of no effect in Scotland. If the Legislature had intended this the Act would have contained an express provision to that effect. (2) The bill was first presented for payment at the place of payment, but though this was necessary, and though no subsequent presentment was necessary, yet it did not follow that such second presentment was illegal—Bills of Exchange Act 1882, section 45 (5). There was nothing to prevent a second presentment and a second dishonour of a bill or note. The debtor had certainly no right to complain of such second presentment. From the point of view of justice the important thing was

presentment to the person bound to pay rather than presentment at a particular place. Presentment and protest made in the creditor's own office was not looked upon favourably by the law. See *Bartsch* v. *Poole & Company*, December 18, 1895, 23 R. 328.

Argued for the pursuer and respondent—(1) Section 94 of the Bills of Exchange Act of 1882 was intended to apply to cases in which a protest was required for other purposes than summary diligence. "Authorised or required" meant authorised or required by the Act, as in sections 51 and 67. This interpretation gave quite sufficient effect to section 94 without bringing it in to revolutionise, as it would, the law of summary diligence in Scotland, which in terms of section 98 was not to be altered or affected by the Act. If a protest by a householder under section 94 was to be sufficient for purposes of summary diligence, then where the statement that a notary could not be obtained was denied, as here, extraneous proof would be necessary, and it was a cardinal principle of the law of summary diligence on bills that it was not competent where any extraneous evidence was necessary to support it—*Smith* v. *Selby*, July 10, 1829, 7 S. 885; *Fraser* v. *Bannerman*, June 21, 1853, 15 D. 756. (2) Apart from this question, however, the protest was bad, because it was not made at the place where the note was dishonoured—Bills of Exchange Act 1882, section 51 (6). Section 94 only applied when a notary could not be obtained at the place where the bill was dishonoured, which in this case was Bradford, where it was not maintained there was any want of notaries.

LORD JUSTICE-CLERK—I think that there is no very substantial difficulty in this case. This bill was payable at Bradford. It was noted there, but no protest was extended. The place of payment is the place where the acceptor undertakes to pay. The case of *Poole*, 23 R. 328, does not seem to me to have any bearing. The ground of decision in that case was that it was not stated in the protest that the debtor could not be found. If the debtor fails to make provision for the payment of the bill at the place where he undertakes to pay, the creditor may note the bill and take a protest there. Here no such thing was done. The creditor says that he took a protest at Millport. It appears to me that the bill was dishonoured at Bradford, and should have been protested there. With respect to the protest taken at Millport by a householder, it is said that a notary was not available there, and that consequently under the Act the protest might be effected through a householder. That question, however, does not really arise here, for Millport was not the place where the bill was dishonoured. I am therefore of opinion that the Lord Ordinary's judgment is right.

LORD YOUNG concurred.

LORD TRAYNER—Whether summary diligence may proceed according to the law and practice of Scotland, upon a protest made by a householder under the 94th section of the Bills of Exchange Act 1882, is a question which it is not necessary here to decide. I agree with the Lord Ordinary in thinking that the cessio proceedings in question must be set aside, in respect that the diligence on which these proceedings followed was inept. The bill for £30 granted by the pursuer to the defender was made payable at Bradford. On maturity it was there presented for payment and dishonoured, and the presentation and dishonour were noted on the bill by a notary-public in the usual way. If that notary's protest, so noted on the bill, had been extended and diligence done upon it, no question could probably have arisen. But instead of that the defender proceeded to present and protest the bill *de novo* at Millport, where the pursuer was at the time, and this protest was made by a householder under section 94, already referred to. Now, protest by a householder instead of by a notary is only allowed "where the services of a notary cannot be obtained at the place where the bill is dishonoured." The bill in question was dishonoured at Bradford, where a notary's services could have been obtained, and therefore the permission given by the Act to substitute a householder for a notary was not one of which the defender could in the circumstances avail himself. I think, therefore, as I have said, that the defender's diligence was inept, and could not validly be used as a ground for cessio proceedings against the pursuer.

LORD MONCREIFF concurred.

The Court adhered with additional expenses.

Counsel for the Pursuer—Sym—Cochran-Patrick. Agent—Andrew White, W.S.

Counsel for the Defenders — Balfour, Q.C. — Craigie — Bartholomew. Agent—James Russell, S.S.C.

---

*Friday, February 4.*

## SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

## RENISON *v.* BRYCE.

*Proof—Contract—Admissibility of Extrinsic Evidence in the Construction of Writings—Ambiguity—"Proposed Company."*

A offered to assign his rights in a business carried on by him to B, or B's nominee, in consideration of B's paying to him £500, and allotting or having allotted to him shares in a "proposed company" to be promoted by B to the extent of £1750 in preference shares of £1 each, and bearing interest at 7½ per cent. This offer was accepted by B. There was nothing in either the offer or the acceptance to show what the capital