in the course of the year by the persons who apply for these tickets. If the amount of traffic so sent or received does not yield as much as £250 per annum to the coffers of the company, then no traders' ticket can be issued at all, and the trader is left to the ordinary season-ticket rates. If the amount of traffic is between £250 and £1000 per annum then traders' tickets are issued, but at a somewhat dearer rate than those which are issued to traders forwarding or receiving traffic above the limit of £1000. In so far as the company distinguish between £250 and £1000 worth of traffic, it would appear from the evidence that their practice is exceptional, or at all events is only shared by, I think, one other company; but in so far as they refuse to issue traders' tickets below a certain limit it appears that they are acting in accordance with the practice of all railway companies in the kingdom. Now, the applicants admit that the Highland Railway Company are not bound by statute to issue traders' tickets at all, but they say that if they do issue such tickets they ought to make no difference among traders, but ought to issue the tickets to all of them without regard to the volume of traffic which they send or receive. Now, it seems to me that there being undoubtedly an irregularity of treatment among traders, and therefore to some extent a preference of one over another, the whole question comes to be, whether the preference is undue; and that is a question purely of fact. There is, in my opinion, a strong presumption that when a preference of this kind is offered and given to all and sundry upon purely business considerations, without any element of caprice or arbitrary choice about it, the preference is not undue. It stands precisely on the same footing as the undoubted preference which is given to the holder of a season ticket or a week-end ticket, or any other ticket issued on favourable terms over the ordinary passenger who takes his ticket at the daily rate, and the ground for all these preferences obviously is that the company find it for their interest to encourage travelling, and are willing to carry the passenger for a rate which would not be remunerative if it were a single journey, in the expectation either that he is going to make a number of journeys or that if he does not he will pay the company on the footing that he does. Similarly here the object of the undoubted difference which prevails among traders in the north is, that the company, judging from the past, look for those favoured persons contributing such an amount of goods traffic to their revenue as will make it worth their while to carry them as passengers at rates which would not be remunerative if they contributed less. That, therefore, is a purely business consideration, of which the company is, in the first instance, the best judge; and although I am far from saying that a case might not arise where it would be competent for and might be the duty of this Commission to examine and adjudicate upon the amount of difference so meted out to different persons or different classes, still I am equally clearly of opinion that here no such case has been made. Both on the admission in the pleadings and on such proof as has been led it appears to me that the preferences here given are not undue, and therefore that the application must fail.

A point was made on the published notice that the company reserve the right to refuse to issue a traders' ticket without assigning any reason. But it will be time enough to consider the effect of this notice when, if ever, the company attempt to act upon it.

VISCOUNT COBHAM—I concur.

SIR FREDERICK PEEL—I take the same view as the learned Judge.

The Commissioners refused the application.

Counsel for the Applicants—Guthrie, K.C. —Hunter. Agents—Kinmont & Maxwell, W.S.

Counsel for the Respondents—Macphail. Agents—Stewart, Rule, & Burns, Solicitors, Inverness.

COURT OF SESSION.

Thursday, July 18.

SECOND DIVISION.

[Sheriff-Substitute at Glasgow.

GLEN *v.* SEMPLE.

Bill of Exchange—Cheque—Negotiability—Holder in Due course—"Pay to A 'Against Cheque'"—Bills of Exchange Act 1882 (45 *and* 46 *Vict. cap.* 61), *sec.* 3, *sub-sec.* 3, *and sec.* 8, *sub-sec.* 1.

A, who had applied to B for financial assistance, received from him a cheque in these terms, "Pay to A against cheque £400." A indorsed the cheque to C, his creditor, who presented it for payment at the bank, where payment was refused in consequence of a letter from B stopping payment. Thereafter C brought an action against B for payment of the amount of the cheque. B pleaded in defence (1) that by an arrangement between A and B, intimated to C, it had been agreed that the cheque should not be honoured until certain other cheques granted by A to B had been honoured; and (2) that the words "against cheque" imported a condition that the cheque should not be negotiable. *Held* that the pursuer was entitled to decree, in respect (1) that on the evidence the alleged agreement had not been proved; and (2) that the words "against cheque" did not indicate an intention that the cheque should not be negotiable within the meaning of section 8 (1) of the Bills of Exchange Act 1882.

This was an action brought in the Sheriff Court at Glasgow by Hugh Glen, coal-master, Cambuslang, against Thomas Semple,

Glasgow, in which the pursuer concluded for payment of £400, being the sum contained in a cheque, dated 27th November 1899, drawn by the defender in favour of Messrs Kyle & Hurry, Writers, Glasgow, and endorsed and delivered by them for value to the pursuer, of which the pursuer averred that he was the holder in due course.

The cheque was in these terms:—

"£400. *Glasgow, 27th Nov.* 1899.

"The Commercial Bank of Scotland, Limited, St George's Cross Branch, 135 Great Western Road.

"Pay to Messrs Kyle & Hurry against Cheque or *Order* four hundred pounds sterling.

"No. 23787. THO. SEMPLE.

"Endorsed Kyle & Hurry—Hugh Glen."

[This cheque was crossed "& Co.," and the word "Order" was scored out. Stamp 1d.]

The pursuer averred that on presentation of the cheque at the bank payment was refused.

The defender admitted that he had granted the cheque, and explained,—"(Ans. 2) That on 27th November 1899 Mr Alfred Hurry, writer, Glasgow, called on the defender and requested a loan of £610. He explained that he would be in a position to repay the money the following day, and offered his firm's cheque for the amount of the loan, stating that his cheque would be honoured the following morning. The defender thereupon obtained from the said Alfred Hurry his firm's cheque for £610, dated 27th November 1899, and the defender handed him the document in question, and another for £210 of same date. It was arranged between the parties that the documents granted by defender were not to be honoured until Messrs Kyle & Hurry's cheque was also honoured, and the document produced bears this condition on the face of it. The said Afred Hurry further agreed, that in the event of his transferring the documents by endorsation he would make this condition known to the endorsee, and averred that he did so, his letter of 28th November 1899 being herewith produced and referred to. The said Alfred Hurry also granted a letter embodying the conditions upon which the document was granted, which is produced herewith."

The defender admitted that payment of the cheque was refused, as "the condition attached had not been purified."

The pursuer denied that the cheque bore any condition on its face, and explained that he had no concern with or knowledge of the circumstances under which the cheque was granted, and had no knowledge of the same when he became holder of the said cheque.

The pursuer pleaded, *inter alia*—"(1) The defender having drawn said cheque, and the payees therein having endorsed and delivered same to pursuer, the defender is liable to pay the sum contained in said cheque to the pursuer, as holder thereof in due course."

The defender pleaded, *inter alia*—"(3) The conditions in said document not having been purified the pursuer is not entitled to decree."

The Bills of Exchange Act 1882 enacts (sec. 3)—"(1) A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a certain sum in money, to or to the order of a specified person, or to bearer. . . . (3) An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with (*a*) an indication of a particular fund out of which the drawee is to reimburse himself, or a particular account to be debited with the amount, or (*b*) a statement of the transaction which gives rise to the bill, is unconditional."

Sec. 8—"(1) When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but it is not negotiable."

Proof before answer was allowed and led.

Upon the evidence the Court held that Kyle & Hurry duly endorsed and delivered the cheque to the pursuer, that the pursuer thereupon became the holder in due course thereof, and that he was not proved to have been aware of any such agreement with regard to it as was alleged by the defender. There was no evidence which proved any general custom of using the words "against cheque" with the meaning of "not negotiable."

Mr Park, agent of the Commercial Bank of Scotland St George's Cross Branch, deponed as follows— . . . "The pursuer and defender have accounts with me. On the morning of 27th November I received from pursuer the cheque for £400. I received that cheque by itself from pursuer to be lodged to his credit. That same morning I received a letter from defender. [The letter referred to stopped payment of the cheque.] On the 27th of November, in consequence of that letter of defender's, I wrote to pursuer notifying him that I could not make payment. . . *Cross-examined.* —(Q) You will observe that that cheque bears a condition on the face of it?—(A) Yes. Before paying a cheque such as that I would not ascertain what the condition was. It is intelligible so far as it goes. I could not ascertain what the condition was from the cheque. . . . *Re-examined.* . . . (Q) Did defender's letter come before pursuer's?—(A) If it had not come before pursuer's cheque the cheque would have been paid, because payment would not have been stopped." . . .

On 22nd February 1901 the Sheriff-Substitute (GUTHRIE) pronounced an interlocutor in which he found, *inter alia*, that the words "against cheque" meant "as was understood by the parties thereto, that it was not to be paid unless a cheque of the same date, by the firm of Kyle & Hurry to the defender upon their banker, should be honoured;" found "that this condition and understanding was known to pursuer when he received the cheque;" sustained the defender's third plea-in-law, and assoilzied him from the conclusions of the action.

The pursuer appealed to the Court of Session, and argued—The drawer of a bill,

if he intended to impose a condition and to make it non-negotiable, was bound to use unequivocal language. The words "against cheque" had no definite or recognised meaning, and could not be interpreted as meaning "not negotiable"—Thomson on Bills, p. 15; Chalmers on the Bills of Exchange Act, sec. 3; *Inman* v. *Clare* (1858), Johnson's Chancery Rep. 769; *Banner* v. *Johnston* (1871), L.R., 5 E. and I. App. 157; *Griffin* v. *Weatherby* (1868), L.R., 3 Q.B. 753; *Jury* v. *Barker* (1858), 27 L.J., Q.B. 255; *In re Boyse* (1886), 33 Ch. D. 612. That view was supported by the evidence of Mr Park, the bank agent, who deponed that he would have cashed the cheque but for the defender's letter stopping payment. (2) The special agreement alleged by the defender that the cheque was not to be honoured until Hurry's cheques were honoured had not been proved—at all events, it had not been proved that the pursuer had knowledge of any such agreement.

Argued for the defender and respondent—It was clear upon the face of the cheque, from the deletion of the words "and order," with the addition of the words "against cheque," that the intention was that it should not be negotiable. "Against cheque" was not merely a jotting for the information of the drawer, but was addressed to the banker, and imported the intention that the cheque should not be negotiable. Mr Park, the bank agent, admitted that the words imported a condition—Byles on Bills, 16th ed., 109–10; *Carlos* v. *Fancourt* (1794), 5 Durnf. and East. 482; *Jenny* v. *Herle*, 2 Raymond, 1361. (2) The evidence showed that the pursuer knew of the condition, and he was therefore barred from negotiating the cheque contrary to the faith of this agreement—Bills of Exchange Act, sec. 29 (2).

At advising—

LORD JUSTICE-CLERK—The defender in this case drew a cheque for £400 in favour of Messrs Kyle & Hurry, who endorsed and delivered the cheque to the pursuer. The defender refuses to pay, on the plea that the cheque bears a condition on its face, and that the condition not having been fulfilled the pursuer is not entitled to succeed. In other words, he maintains that it was not a cheque negotiable in the ordinary way. Certain communications between the defender and Messrs Kyle & Hurry are referred to in the proceedings, but these have not, in my opinion, any bearing upon the case. The sole and the simple question is, whether there is anything on the face of the cheque which places an indorsee in any worse position as regards his rights under it than in the case of an ordinary cheque, which is a negotiable document.

Now, the fact is that there are only two things in the cheque by which it can be distinguished from an ordinary cheque. First, there is on the face of it no reference to "bearer" or "order." I say on the face of it, for although this arises from a pen having been put through the word "order," that is equivalent to that word not being there at all, and nothing can be founded on this being the result of a deletion, as the fact of deletion excludes the reading in of the word for any purpose whatever. It only results in this being a cheque drawn in favour of Kyle & Hurry. There is nothing to show how the cheque came to be in that form, but I am unable to see how the pursuer's rights and interests as an endorsee can be affected by the fact. It cannot be maintained, and it was not in fact maintained, that a cheque drawn in favour of A B, without any other words, cannot be endorsed on to another so as to transfer the right to the proceeds.

The second ground of refusal to pay maintained by the defender is, that there are written on the cheque these two words, "against cheque." It is argued by the defender, and the Sheriff-Substitute has given effect to the contention, that these words constitute a condition which deprived the holder of the cheque of the rights of an indorsee, and that the condition remaining unfulfilled the pursuer cannot insist on payment. Now, if an onerous endorsee of a cheque is to be precluded from his ordinary rights as holder of a cheque because of something written on the cheque by the drawer which imports only conditional rights under it, it appears to me that two things are essential—first, it shall be manifest that a condition is imposed; and second, that the condition should be self-explanatory. I am unable to hold that the words written on this cheque have the effect of a condition, and I am unable to see from the words what the condition could be. Cases occur where words are written on cheques which are of the nature of a memorandum or note by the drawer, and which would more appropriately find their place on the counterfoil. Therefore the mere presence of words cannot be held to import any restriction of an endorsee's rights. The words in this case do not appear to me to be nearly so strong to imply a condition as were the words in numerous cases quoted at the bar, in which the argument in favour of a superimposed condition was rejected. And certainly the words are not self-explanatory. As Mr Park, the bank agent, says, he would not, before paying such a cheque, take steps to ascertain what condition, if any, such words were intended to import, it not being possible to ascertain the condition from the cheque itself. I am further unable to hold that the evidence establishes that the pursuer knew what the meaning of the words was, and that it constituted a non-negotiability in ordinary course. Any expressions used by the pursuer did not necessarily infer that he knew of or attached any such meaning to them. It would, I think, require something much more pregnant to make such a conclusion right than what is found in the evidence in this case.

My opinion is that the decision of the Sheriff is not well founded, and that he erred in sustaining the third plea-in-law for the defender to the effect that "the conditions in said document not having been purified the pursuer is not entitled to decree."

I would move your Lordships to recal the interlocutor and grant decree in terms of the conclusions of the petition.

LORD YOUNG—I arrive at the same conclusion. The case is peculiar to the extent of being unprecedented. The pursuer is the indorsee and holder of the cheque on which he sues, and it may be presumed, in the absence of sufficient evidence to the contrary, that he is the *bona fide* onerous holder of the cheque, and that his action is good, and without any defence to it unless the defence is to be found in the words "against cheque," to which your Lordship has referred, and the evidence that has been led regarding these words. I am of opinion that these words are no answer to the action.

I think that it was admitted before us—at all events it is to my mind quite clear—that the words of themselves are no defence to the action. But the defender avers, as usual quite irregularly in answer to the pursuer's statement, that this cheque was given under certain circumstances of which he gives this account—[*His Lordship read the defender's averment* (*Ans.* 2) *above quoted*]. On that averment the Sheriff-Substitute allowed a proof before answer, and we have the proof before us. Now, I think we do not need to decide the question whether a case for proof is averred. There is no averment of any agreement between the defender and the pursuer, the endorsee. It is averred that Hurry agreed to make the condition known to the endorsee and that he did so. Taking that to mean an averment of an agreement between Hurry and the pursuer that the cheque would not be honoured except on condition that Hurry's cheque was paid, and that the proof was allowed properly, I think it is not established that there was any such agreement, and that is sufficient for the decision of the case.

What the defender did was to send intimation to the bank stopping payment of the cheque. Now, the granter of a cheque may stop payment of it on good cause. The defender might have good cause as against Hurry until a certain cheque of his was paid, but that is not good cause for stopping the cheque as in a question with a *bona fide* onerous endorsee, which the present pursuer was and is.

With reference to the argument that the words "against cheque" are equivalent to "not negotiable," it is important to observe that Mr Park, the bank agent, does not say that that is their meaning; but says that on presentation of the cheque with these words upon it payment would have been made to the endorsee unless the bank had received the letter stopping payment. It was not in consequence of the words on the cheque but in consequence of the letter that payment was stopped. I am of opinion that this is not a case for making any exception to the ordinary rule in business that a cheque should be paid on presentation except upon a very distinct statement of an agreement to the contrary. If it is not so paid the granter is liable. I think the Sheriff-Substitute's interlocutor should be recalled. I think it is better not to find that the proof is irrelevant, although my opinion is that it is, but I think that we should make findings in fact negativing the averments of special contract with the indorsee.

LORD TRAYNER—There is no doubt that the cheque in question constitutes a good obligation on the defender to pay £400 to the pursuer as endorsee and holder thereof, unless the words "against cheque," which appear on the face of it, have the effect of making the cheque not negotiable or indicate in the words of the statute—"an intention that it should not be transferable." I cannot attribute any such effect or meaning to the words. It is obvious to remark that had the defender intended to make his cheque "not negotiable," the easiest and most direct way of doing so would have been to write these words upon the cheque. The words are well known and in constant use among merchants—their purpose and effect equally well known and recognised. The words "against cheque" are not, so far as I can ascertain from the proof, either of common use or well defined and recognised meaning. That they did not indicate any intention to make the cheque non-transferable may be gathered from the evidence of the banker Mr Park, who says that he would have paid that cheque in ordinary course across the counter if the defender had not by letter stopped payment. It was nothing on the face of the cheque itself which stopped payment to an indorsee. What the words in question do mean it is hard to discover, and although the pursuer says he knew what they meant, and Mr Park says they are "intelligible," neither of them says exactly what they do mean. For my own part, unaided by any evidence on the subject, I should have been disposed to regard the words as indicating to the banker to whom the cheque was addressed the particular fund or account "against" which that cheque was to be debited. However that may be, I think we cannot hold on the evidence before us that the words "against cheque" are equivalent to "not negotiable," or indicate any intention that the cheque was not to be transferable. But if the pursuer took the cheque in the knowledge that the words "against cheque" meant that the cheque in question was not to be payable until some other valid cheque had been presented of equal or greater amount out of which such payment alone was to be operated, and that this was the condition on which the cheque was granted, he may be personally barred from claiming payment, the condition not having been fulfilled. This, I understand, is the ground on which the Sheriff-Substitute has decided the case against the pursuer. He thinks it is proved not only that the defender granted the cheque on that condition, but that the pursuer took the cheque in the knowledge of that condition. I do not think there is evidence to support that view. [*His Lordship referred to the evidence*].

Further, I am unable to accept the view that the pursuer, pressing his debtor for payment, accepted the cheque on such a condition as made it of no value to any endorsee. To avoid the liability which in ordinary course attached to him as the granter of a dishonoured cheque it lay upon the defender to show that his obligation to meet the cheque was conditional, and if the condition did not appear *ex facie* of the cheque, to bring home knowledge of the condition to the onerous indorsee and holder of it. This onus I think the defender has not discharged, and therefore the pursuer is entitled to our judgment.

LORD MONCREIFF—I concur.

(1) The meaning which the defender now seeks to put on the words "against cheque" is "not negotiable." But there is no proof whatever of practice or custom warranting such an interpretation—it is unknown.

Besides, such a meaning would not be consistent with the purpose for which the cheque was granted, which was, that it might be at once transferred to a creditor. If it was only to be paid out of funds provided by Hurry, Hurry's own cheque would have been equally good.

(2) Assuming the competency of the proof allowed, it is not satisfactorily proved that the pursuer took the cheque in the knowledge of the meaning and effect of the words contended for by the defender and accepted it on that footing.

The Court pronounced this interlocutor:—

"Sustain the appeal, and recal the interlocutor appealed against: Find in fact (1) that the defender drew a cheque for £400 in favour of Messrs Kyle & Hurry, writers, Glasgow, on the Commercial Bank of Scotland, Limited (St George's Cross Branch, Glasgow), on 27th November 1899; (2) that the said payees endorsed and delivered said cheque to the pursuer, who became the holder in due course; (3) that the pursuer duly presented the said cheque for payment at the said branch of the said Commercial Bank of Scotland and that payment was refused; and (4) that the defender has been applied to for payment of the sum contained in said cheque, but that he delays or refuses to pay said sum: Find in law that the defender is liable to pay the said sum of £400 to the pursuer as holder in due course of said cheque: Therefore repel the defences, and ordain the defender to make payment to the pursuer of the said sum of £400, with interest thereon at 5 per cent. per annum from 27th November 1899 till payment, and decern: Find the pursuer entitled to expenses," &c.

Counsel for the Pursuer and Appellant—M'Lennan — Craigie. Agents — Miller & Murray, S.S.C.

Counsel for the Defender and Respondent—Johnston, K.C.—Deas. Agents—J. & D. Smith Clark, W.S.

Friday, July 19.

FIRST DIVISION.

[Sheriff-Substitute at Falkirk.

COCHRANE *v.* DAVID TRAILL & SONS.

(*Ante*, March 16, 1900, 37 S.L.R. 662, and 2 F. 794, and November 1, 1900, 38 S.L.R. 18, and 3 F. 27.)

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap*, 37), *Second Schedule* (8), (14) (*a*) (*b*)—*Act of Sederunt, June* 3, 1898, *sec.* 7 (*a*)—*Memorandum of Agreement — Verbal Agreement — Process — Application for Warrant to Record Memorandum—Proof of Verbal Agreement—Proof.*

Under the provisions of the Workmen's Compensation Act 1897, Second Schedule (8) and (14), and the relative Act of Sederunt June 3, 1898, sec. 7 (*a*), it is competent to record a memorandum of a verbal agreement.

The genuineness of a memorandum of a verbal agreement to pay compensation under the Workmen's Compensation Act having been disputed, the workman presented an application for a special warrant to record the memoandum. The employers in answer denied the existance of any such agreement. The Sheriff-Substitute allowed parties a proof of their averments *habili modo*. On appeal the Court *affirmed* this interlocutor and remitted the case to the Sheriff Court.

This case is reported *ante ut supra*.

David Cochrane, a lumper in the employment of David Traill & Sons, stevedores, Grangemouth, met with an accident on 9th September 1898, whereby he was disabled from work.

After various proceedings, Cochrane on January 4, 1900, lodged in the hands of the Sheriff-Clerk at Falkirk a memorandum setting forth an agreement which he alleged had been come to between himself and Messrs Traill to pay him compensation under the Workmen's Compensation Act 1897 at a certain rate, in order that the memorandum might be recorded in terms of the Workmen's Compensation Act 1897.

On 17th January 1900 the Sheriff-Clerk intimated to Cochrane's agent that he had received a letter from Messrs Traill disputing the genuineness of the memorandum of agreement, and that consequently the memorandum could not be recorded without a special warrant from the Sheriff.

Cochrane accordingly presented a petition in the Sheriff Court at Falkirk against Traill & Sons, in which he prayed the Court "to grant warrant to record in the special register of Court kept for the purpose, the memorandum of agreement between the pursuer and the defenders, proposed for registration by the pursuer in terms of the Workmen's Compensation Act 1897, and relative Act of Sederunt."

Cochrane averred that the defenders in October 1898 had informed his law-agent