LORD MONCREIFF—I am of the same opinion. No doubt under section 23 of the Factory and Workshop Act a quay or part of a quay may be a "factory." But for practical purposes it is impossible to apply that term without finding some-one who in the sense of the Act is in occupation of the quay or a defined portion of it. A quay is a public place, and the mere presence on the quay of persons who with or without luggage or goods come on to a quay to await the arrival of vessels will not make them occupiers of the quay. Here it is not distinctly stated that the ship which was coming in was going to that particular part of the quay. If it was, then the shipowners were the occupiers. But if not, it does not follow that the Coal Company were the occupiers. In my opinion they were not. They were waiting to see to what part of the quay the coals should be taken to be loaded on board the vessel assigned to them, and that being so, they cannot be said to have been occupiers in the sense of the Act.

The LORD JUSTICE-CLERK was absent.

The Court answered the first and third questions of law in the negative and affirmed the dismissal of the claim.

Counsel for the Claimant and Appellant—Watt, K.C.—Guy. Agent—Wm Fraser, S.S.C.

Counsel for the Respondents—Campbell, K.C.—Hunter. Agents—W. & J. Burness, W.S.

Tuesday, January 14.

FIRST DIVISION.

[Lord Low, Ordinary.

SEMPLE *v.* KYLE.

Bill of Exchange—Cheque—Verbal Condition—Indorsee for Value—Holder in Due Course—Proof of Condition—Bills of Exchange Act 1882 (45 *and* 46 *Vict. c.* 61), *secs.* 29 (*a*), 73, *and* 100.

In an action upon a cheque by an indorsee and holder for value, who had taken it with notice of dishonour, the defender, the drawer, proved by parole that he had granted it subject to a condition that on the day of granting he should receive the cheque of a third party to cover his liability, and that he had stopped payment in consequence of this condition not having been fulfilled. *Held* that it was competent to prove by parole that the cheque had been granted subject to the condition; that the provisions of the Bills of Exchange Act as to holders in due course applied to cheques; that the pursuer was not a holder in due course; and that he was affected by the condition on which the cheque had been granted.

This was an action at the instance of Thomas Semple, coalmaster in Glasgow, against Thomas Kyle, house factor there.

The pursuer concluded for payment of £500 which he claimed as the indorsee and holder for value of a cheque for that sum drawn by the defender in favour of one Saunders, and ultimately indorsed to the pursuer.

The cheque upon which the pursuer sued was as follows:— No. 2.

"R. D. Glasgow, 11th Decr. 1899.

£500 Stg.

The Commercial Bank of Scotland, Limited.
Bridgeton Branch.

Pay to Charles W. Saunders, Esqr., or Order Five Hundred Pounds Stg.

Crossed & Co.

No. 88,436 (Sgd) THOMAS KYLE.

(Endorsed).

CHARLES W. SAUNDERS.
WILLIAM LIVINGSTON.
R. W. SAUNDERS.

Remitted by the
Union Bank of Scotland, Limited,
Kinning Park Branch, Glasgow.

U. B. of S., Ld.
Bridgeton."

This cheque was endorsed by Charles W. Saunders, the payee, in favour of William Livingston. Payment of the cheque having been refused by the Bank in accordance with instructions received from the drawer Kyle, and the cheque having been marked with the letters R. D. (refer to drawer), it was endorsed by Livingston to R. W. Saunders, the father of C. W. Saunders, and by R. W. Saunders it was endorsed and delivered to the pursuer.

The defence to the action was that the cheque had been drawn by the defender subject to the condition that he should receive on the same day a cheque by one Russell, who was the father-in-law of one Hurry, at whose request and to oblige whom Kyle, the defender, drew the cheque; that this condition was known to Charles W. Saunders at the time when he received the cheque from the defender, and that he took it subject thereto; that no cheque from Russell having been received by Kyle, the defender, he accordingly in terms of the condition stopped payment of the cheque at the bank; that payment was consequently refused; that the pursuer took the cheque with notice that it had been dishonoured; that he was consequently not a holder in due course, and was therefore affected by the condition subject to which the cheque had been granted.

The pursuer denied that Charles W. Saunders received the cheque subject to any such condition as the defender alleged, and maintained that in any view he was not affected by that condition.

Proof was allowed and led.

The facts established thereby sufficiently appear from the opinion of the Lord Ordinary (Low).

The Bills of Exchange Act 1882 (45 and 46 Vict. c. 61), sec. 29, enacts—"The holder of a bill in due course is a holder who has taken a bill complete and regular on the face of it under the following conditions:—(*a*) That he became the holder of it before

it was overdue, and without notice that it had been previously dishonoured if such was the fact." . . . The Act further enacts as follows:—"Part III., section 73—A cheque is a bill of exchange drawn on a banker payable on demand. Except as otherwise provided in this part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque."

Section 100 of the Act enacts as follows:—. . . "Any fact relating to a bill of exchange, bank cheque, or promissory-note, which is relevant to any question of liability thereon may be proved by parole evidence."

By interlocutor dated 19th June 1900 the Lord Ordinary (Low) assoilzied the defender.

Opinion.—"The first question in this case is, what were the circumstances under which the defender granted the cheque for £500 to Charles Saunders?

"It appears that R. W. Saunders, the father of Charles Saunders, was indebted to Livingston in a bill for £525, which fell due on Saturday the 9th December 1899. R. W. Saunders had not funds wherewith to meet the bill, but he alleges that Hurry, a partner of the firm of Kyle & Hurry, writers, Glasgow, was indebted to him in a larger sum than the amount of the bill. R. W. Saunders had to go to London on business on the 8th of December, and he instructed his son Charles Saunders to see Hurry and get from him £500 to account of his debt. With that sum and a cheque for £25, 5s. which R. W. Saunders gave to Charles Saunders the latter was to retire Livingston's bill.

"Charles Saunders accordingly went to Hurry's office on Monday the 11th December between half-past two and three o'clock in the afternoon. Why he did not see Hurry sooner was not explained.

"In regard to what passed in Hurry's office there is a serious conflict of evidence."

[*His Lordship then reviewed the evidence of Charles W. Saunders, Hurry, and the defender, observing that Charles W. Saunders' evidence was unsatisfactory, and then proceeded as follows.*]

"I am therefore of opinion that it is proved that the defender granted the cheque under the condition alleged, and that Charles Saunders was aware that it was granted under that condition. . . .

"The way in which the cheque came into the pursuer's hands was this. He held a bill of R. W. Saunders' for £575, and the latter tendered the defender's cheque to him in part payment of the bill. The pursuer says that he saw from the markings on the cheque that it had been dishonoured, but that when R. W. Saunders explained to him the circumstances under which it had been granted he thought that it was all right and discharged the bill to the extent of the amount of the cheque.

"The bill has indorsed upon it 'Received Thos. Kyle's cheque as a payment to a/c of the within-mentioned sum, leaving a balance due on this bill of £75.'

"The pursuer also took a receipt from R. W. Saunders acknowledging the receipt of 'the sum of five hundred pounds in payment of T. Kyle's cheque.'

"The receipt is said to have been granted on 26th December, when the pursuer says that he agreed to accept the defender's cheque in part payment of the bill. It is, however, dated 24th December, which was a Sunday. It is said that the date was either a clerical error or that the due date of the bill was used. The 24th would have been the due date of the bill if it had not fallen upon a Sunday, but as it did so the due date was the 23rd. In regard to the date being a clerical error, it is not likely that anyone would by mistake, on the day after Christmas day, date a document the 24th December. It seems to me to be extremely doubtful whether the receipt was granted at the time alleged by the pursuer and R. W. Saunders. Both of them say that at the time when the cheque was first tendered to the pursuer he said that a receipt was unnecessary as the indorsement upon the bill was sufficient.

"The pursuer further took from R. W. Saunders an assignation dated 7th September 1900 assigning to the pursuer, his heirs, executors, and assignees, 'the sum of five hundred pounds due by the said Thomas Kyle to me, and the whole interest due or to become due to me thereon.' I do not know why that assignation was taken, because apart from the cheque neither the sum of £500 nor any other sum was due by the defender to Saunders. It seems to me that the inference is that the pursuer took the assignation because he was doubtful of his claim upon the cheque.

"The pursuer did not get possession of the cheque on 26th December 1899, the day on which he says that he discharged Saunders' bill to the extent of £500. He says that he left it in Saunders' hands for collection, as on account of certain business transactions in which he was engaged at the time with the defender he did not want to enter into negotiations with him. The pursuer finally got the cheque from Saunders in June 1900. He was at that time engaged in litigation with the defender, who was suing him for an alleged debt. The pursuer seems for the first time to have demanded payment of the cheque from the defender in July 1900.

"The pursuer therefore knew that the cheque was dishonoured when he took it.

"Further, I do not think that the pursuer can be regarded as having acted in good faith. He knew enough at all events to put him upon his enquiry, but he made no enquiry. If he had done so he would have found that the defender had stopped payment of the cheque on the ground that the condition upon which it was granted had not been fulfilled.

"In these circumstances I am of opinion that the pursuer is not entitled to recover the amount of the cheque, and I shall therefore assoilzie the defender."

The pursuer reclaimed, and argued—Though a cheque was dishonoured the payee was still the creditor of the drawer for the amount of the cheque, and might

assign his right to a creditor of his own. The pursuer was an onerous transferee from the payee of the cheque. Section 29 of the Bills of Exchange Act as to holders in due course did not apply to cheques, which were dealt with only in Part iii. of the Act. A condition could not be adjected to a cheque so as to limit the rights of an onerous indorsee—*Glen* v. *Semple*, July 18, 1901, 38 S.L.R. 844; *Clydesdale Bank* v. *M'Lean*, March 2, 1883, 10 R. 719, 20 S.L.R. 459, November 27, 1883, 11 R. (H.L.) 1, 21 S.L.R. 140. Even if the alleged condition was proved it did not affect the pursuer. Section 100 of the Act did not make it competent for the granter of a cheque to contradict by parole evidence his liability as it appeared on the face of the cheque—*National Bank of Australasia* v. *Turnbull & Company*, March 5. 1891, 18 R. 629, 28 S.L.R. 500; *Gibson's Trustees* v. *Galloway*, January 22, 1896, 23 R. 414, 33 S.L.R. 322.

Counsel for the defender and respondent were not called upon.

LORD ADAM—I do not think it necessary to call on the respondent. I think the judgment of the Lord Ordinary is sound, on the grounds stated in his Lordship's note.

The action is raised by Thomas Semple for payment of £500 under a cheque dated 11th December 1899 granted by Thomas Kyle to C. W. Saunders. The pursuer's right to recover depends upon whether he is a holder in due course. If he is not, then he is not entitled to recover.

The facts appear to be these—R. W. Saunders was indebted to a Mr Livingstone under a bill for £525 becoming due on 9th December 1889, and he had not the money to meet it. Having occasion to be in London, he employed his son C. W. Saunders to go to Messrs Kyle & Hurry to get money from them in order to retire the bill, and his instructions were to get a bill for £500 from Kyle & Hurry, who were said by J. W. Saunders to be his debtors.

C. W. Saunders went to Kyle & Hurry's office to carry out his mandate and procure the money to retire Livingstone's bill. Kyle & Hurry would not give a cheque, but Mr Hurry, whom Saunders saw, undertook to get a cheque from the defender here. Kyle the defender seems to be some relation of Hurry, but he had nothing to do with Saunders. He was sent for by Hurry, and went to Hurry's office on 11th December, and the transaction was carried through which is the subject of this action.

Kyle agreed to grant a cheque for £500 in favour of C. W. Saunders, and the first question is whether that cheque was granted by him with or without a condition. The defender says he agreed to grant that cheque on condition that on the same afternoon a bill or cheqne should be handed to him by Hurry's father-in-law Russell, and that if it was not handed to him, then he would be entitled to and would withdraw his cheque, or in other words that he would order his bankers not to pay. That is his account of what was done. On the other hand, it is said that there was no condition. Upon that question of fact the Lord Ordinary, treating it as a matter of credibility, says he is satisfied that the evidence of Kyle, corroborated by Hurry, is a true account of what took place, and that the cheque was granted on the alleged condition, and his Lordship says he does not believe C. W. Saunders. I must say that, looking to probabilities, they are all in favour of the Lord Ordinary's view. According to the evidence read by Mr Watt, C. W. Saunders says that when he went to get that money he was not present when his business was discussed, but that he remained outside the room in which Mr Kyle and Mr Hurry were arranging his business, and that he heard nothing of any condition as to the granting of the cheque.

The account given by Kyle, corroborated by Hurry, is the most natural—that this man whose business they were conversing about was in the room while they were discussing the condition, and that he could not but have heard what was said.

I therefore agree with the Lord Ordinary that it is proved that Kyle agreed to grant this cheque only on condition that he should receive a cheque by Russell that same afternoon, and if he did not then he would countermand payment of the cheque. Accordingly we find that what he did was exactly what he said he would do if the condition was not fulfilled.

What followed was this, C. W. Saunders presented his cheque to his bankers, and next morning it was sent by them to Mr Kyle's bank, and that bank refused payment and the cheque was dishonoured.

Now the cheque was returned marked "R. D.," refer to drawer. Whether "R. D." was intelligible to Saunders or not, the cheque bore on the face of it that it was dishonoured. Seeing that, the pursuer took the cheque, and the question is whether, having taken it in these circumstances, he can recover under it.

By section 73 of the Bills of Exchange Act it is declared that a cheque is a bill, except where the Act itself makes a distinction. Section 29 of the Act declares that a holder of a bill in due course is, *inter alia*, one who "became the holder of it before it was overdue, and without notice that it had been previously dishonoured if such was the fact." In this case there is no doubt the pursuer knew the cheque had been dishonoured, for he tells us so in his evidence, but he chose to think that would not affect his rights under it. I think he was quite wrong, and that under section 29 it is very clear that that fact does affect his rights, and I think that is enough for the decision of this case.

I agree with the Lord Ordinary as to the competency of proof. I think the condition in question was one which it was competent to prove by parole both under section 100 of the Bills of Exchange Act and at common law.

LORD M'LAREN—I am of the same opinion and have very little to add. I concur with the Lord Ordinary in his view of the evidence. It has been proved to the

satisfaction of the Lord Ordinary that this cheque was granted as a favour to enable the granter to meet a pressing claim, and on this condition, that a valuable asset, viz., the cheque of a solvent person, should be indorsed over to him in exchange. Failing this, the drawer was to be entitled to stop payment of his cheque. That he intended the payee to be affected by this condition is placed beyond doubt by his enforcing the condition when he did not receive Russell's cheque, by going to his banker next morning and stopping payment.

Nothing has been pointed out in regard to the evidence that shakes the conclusion of the Lord Ordinary that the bill in the hands of the payee was affected by this condition and that the condition was not fulfilled. It is a remarkable circumstance that no attempt was made on the part of the payee to remonstrate against the dishonour of the cheque or to insist on payment. Instead of that the payee did what an honest man would not have done; he tried to pass on the cheque to a third party, doing all he could to make it appear to be a document of value. It is an old principle of the law of bills of exchange that when a bill is taken by an indorsee out of due course, not for value, and especially with notice of an equity existing between the original parties to the bill, the indorsee takes no higher right than the indorser and is subject to all equities affecting him. This is obviously a very necessary restriction upon the general doctrine that a bill is a negotiable instrument, and it is a restriction as well established as any point in the law of bills of exchange. In this case the pursuer does not stand in the position of a holder in due course; he received the cheque long after its true date and he was made aware of the circumstances under which it had been dishonoured. He was then affected by the condition under which the cheque was issued to the payee; and his claim accordingly fails.

LORD KINNEAR—I agree. I have no doubt that the condition which the defender alleges was attached to the issue of this cheque is proveable by parole evidence as between himself and the original payee, because the alleged condition is not one which qualifies the meaning or effect of the writing. It is a collateral agreement by which the party who delivers the document to the payee stipulates that he shall be entitled to stop payment of it at the bank unless another cheque shall be obtained and put into his hands. This was a perfectly intelligible condition in my opinion provable as between drawer and payee by parole evidence. It is a condition which could not be expressed on the face of the cheque, and I know of no rule of law which requires it to be expressed in writing at all. How far it should affect an onerous indorsee receiving the cheque in due course is a different matter. But that is a question which does not arise in this case, because the pursuer is not a holder in due course. The statute is perfectly precise upon this matter. Section 29 defines a holder in due course as a holder who has taken a bill under certain conditions and, *inter alia*, under the condition that he took it without knowledge that it had been dishonoured. Now, upon this point the pursuer's own evidence is conclusive against his case. It is quite intelligible that he did not understand the meaning of the letters "R. D." on the cheque, but apart from these letters it appeared plainly on the face of the cheque that it had been presented and that payment had been refused, and the pursuer's evidence shows that he knew this perfectly well.

We have heard an argument for the purpose of showing that although it is declared by section 73 that except as otherwise provided the provisions of the Act applicable to a bill of exchange payable on demand shall apply to a cheque, this provision does not extend to the negotiation of cheques. I am unable to see any ground for this distinction, and the rule of common law as it is explained by Lord Blackburn in the case of *M'Lean* v. *Clydesdale Bank*, 11 R. (H.L.) 5, is the same as that of the statute. His Lordship says that the decisions are uniform to the effect that a cheque is a negotiable instrument by the law of Scotland to the same effect as a bill.

The pursuer therefore having taken the cheque with notice of a condition on which the drawer claimed right to stop it, took it subject to any defect which that condition attached to it; and since it turns out to be a good condition against the original payee, it is also good against the pursuer as indorsee.

On the question whether the payee was aware of this condition and took the cheque subject to it, we must accept the Lord Ordinary's opinion as to the credibility of the witnesses, and I agree with him as to the result of their evidence.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Salvesen, K.C.—J. C. Watt. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defender and Respondent—Shaw, K.C.—W. Thomson. Agents—Carmichael & Miller, W.S.

Friday, January 17.

FIRST DIVISION.

[Sheriff Court at Glasgow.

TODD *v.* BOWIE.

Lease—Agricultural Holdings (Scotland) Act 1883 (46 *and* 47 *Vict. cap.* 62), *sec.* 42—"*Determination of Tenancy*"—*Contract—Breach of Contract—Right to Rescind.*

Section 42 of the Agricultural Holdings (Scotland) Act 1883 enacts:—"Determination of tenancy means the termination of a lease by reason of