Tuesday, March 13.

SECOND DIVISION.

ADAMSON'S M.-C. TRUSTEES, PETITIONERS.

Trust — Assumption of New Trustees — Trusts (Scotland) Act 1861 (24 *and* 25 *Vict. cap.* 84), *sec.* 1.

By an antenuptial marriage contract power was given to the trustees to assume new trustees with the consent of the spouses. The assumption of a new trustee having become expedient, the consent of the surviving spouse could not be obtained owing to her mental incapacity. On a petition the Court *dispensed* with the consent of the spouse.

The Trusts (Scotland) Act 1861 (24 and 25 Vict. cap. 84), sec. 1, enacts — "All trusts constituted by virtue of any deed or local Act of Parliament under which gratuitous trustees are nominated shall be held to include the following provisions, unless the contrary is expressed—that is to say . . . Power to such trustee, if there be only one, or to the trustees so nominated, or a quorum of them, to assume new trustees. . . ."

Thomas Nicol Johnston and John Millar, two of the trustees acting under the antenuptial marriage contract between Charles Henry Adamson and Margaret Fraser Johnston or Adamson, presented a petition craving the Court, *inter alia*, (1) to remove Mrs Adamson from the office of trustee under the marriage contract, and (2) to find the trustees entitled during Mrs Adamson's mental incapacity to assume a new trustee or trustees without her consent, and otherwise to dispense with the necessity of her consent to such assumption.

The marriage contract conferred on the trustees this power to assume new trustees:—"It is hereby declared that it shall be in the power of the trustees, with the consent of the said spouses during their joint lives, or the life of the survivor of them, to nominate and appoint a trustee or trustees to act in the trust hereby created in addition to the trustees before named, or in place of one or more of them, who may die or resign or become incapable to act, together with all other usual powers as are conferred on gratuitous trustees by the law of Scotland."

The petitioner Millar was desirous owing to advanced age of demitting office, and Mrs Adamson, who had been assumed as a trustee in 1903, had in 1914 become insane with, as the petitioners had been advised, no prospect of her recovery.

No answers to the petition were lodged.

Counsel for the petitioners cited the following authorities: — *Allan's Trustees* v. *Hairstins*, (1878) 5 R. 576, 15 S.L.R. 301; *Munro's Trustees* v. *Young*, (1887) 14 R. 574, 24 S.L.R. 392; Trusts (Scotland) Act 1861 (24 and 25 Vict. cap. 84), sec. 1.

The Court without delivering opinions pronounced this interlocutor—

"Remove Mrs Margaret Fraser Johnston or Adamson, designed in the petition, from the office of trustee under the antenuptial contract of marriage between Charles Henry Adamson, M.B., C.M., F.R.C.S.E., and the said Mrs Margaret Fraser Johnston or Adamson, dated 2nd October, and registered in the Books of Council and Session 4th December both 1899: Further, dispense with the consent of the said Mrs Margaret Fraser Johnston or Adamson during her mental incapacity to the assumption of a new trustee or trustees in the trust created by the said contract of marriage, and authorise and empower the petitioners and such other person or persons assumed as trustee or trustees, and the survivors and survivor of them, and such of them, one or more, as may be remaining and acting, to assume, during her mental incapacity, a new trustee or trustees in the said trust from time to time without her consent being obtained thereto."

Counsel for the Petitioners—Henderson. Agents—Fyfe, Ireland, & Company, W.S.

Wednesday, June 6.

FIRST DIVISION.

[Lord Anderson, Ordinary.

T. D. M'NEILL & SON *v.* INNES, CHAMBERS, & COMPANY.

Bill of Exchange — Summary Diligence — Presentment for Payment—Act 1681, *cap.* 20—*Bills of Exchange Act* 1882 (45 *and* 46 *Vict. cap.* 61), *secs.* 45 *and* 98—*Competency of Summary Diligence where no Presentment for Payment on Due Date but within Six Months thereafter.*

The Bills of Exchange Act 1882 enacts — Section 45 — "Subject to the provisions of this Act, a bill must be duly presented for payment. If it be not so presented the drawer and indorsers shall be discharged. A bill is duly presented for payment which is presented in accordance with the following rules:—(1) Where the bill is not payable on demand presentment must be made on the day it falls due. . . ." 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 of Scotland in regard to summary diligence."

Held (*dub.* Lord Johnston) that summary diligence was competent against the acceptor of a bill although the bill was not presented for payment on the due date but within six months thereof, as such presentment was due presentment according to the law and practice of Scotland prior to 1882.

The Bills of Exchange Act 1882 (45 and 46 Vict. cap. 61), secs. 45 and 98, is quoted *supra in rubric.*

T. D. M'Neill & Son, tailors and clothiers, and Thomas Day M'Neill, sole partner

thereof, *complainers*, brought a note of suspension against Innes, Chambers, & Company, *respondents*, craving suspension of a pretended charge by the respondents upon a bill, dated 1st April 1916, for £100 at four months, drawn by the respondents and accepted by the complainers.

The complainers *pleaded, inter alia*—"(1) The said bill not having been presented to the complainers at its due date cannot be made the foundation of summary diligence, and the charges and warrants thereof should be suspended."

On 23rd January 1917 the Lord Ordinary (ANDERSON) refused the note.

The *facts* of the case appear from the following opinion appended to the Lord Ordinary's interlocutor:—

Opinion.—"This note of suspension raises an interesting question under the law relating to bills of exchange. The suspension is at the instance of Messrs T. D. M'Neill & Son, who carry on business as tailors and clothiers at 9 South St Andrew Street, Edinburgh, and it is directed against Messrs Innes, Chambers, & Company, Hawick, who have charged the complainers to make payment of a bill of exchange for £100.

"The parties are not really at issue as to the main facts upon which the litigation is based, although they are in dispute as to some facts which I regard as non-essential and subordinate. The circumstances which have led to the present unfortunate state of matters are these:—The bill in question is dated 1st April 1916. It is a bill for £100, and is at four months. Accordingly, taking into account the three days of grace, the bill fell due and became payable on 4th August 1916. It is a bill which is drawn by the respondents Innes, Chambers, & Company, and it is accepted generally by the complainers T. D. M'Neill & Son. The bill has not been negotiated, and accordingly the question in the case is one which arises between the drawers and the acceptors, the drawers being the holders of the bill. The bill is made payable by its terms at the complainers' business premises, 9 South St Andrew Street, Edinburgh. The bill was not presented for payment on the date when it fell due, viz., 4th August 1916, but it was presented for payment on 4th January 1917 by a notary-public authorised to receive payment of the bill on behalf of the respondents, and was presented at the place of payment, the business premises of the complainers. The bill was presented, not to Mr M'Neill, the sole partner of the complainers' firm, who was not then in his business premises, but to a cutter in his employment, who was the only person there, and the parties are at issue at to what took place when the notary-public, with the bill, and the cutter were face to face in the shop. The bill was not paid on the day on which it was presented and has not since been paid, and on the day of presentment the notary-public noted it as evidence of dishonour by non-payment, and a protest of the same date has been executed and registered for execution in the Books of Council and Session, and a charge proceeding on the extract registered protest and warrant thereon was given by a messenger-at-arms on the usual induciæ of six days. These are the facts which give rise to the present proceedings, and, as I have said, the parties are not seriously at issue as to these main facts. Now I do not think it is necessary to examine in any detail the answers which have been lodged by the respondents, because their contention was that the averments in the note are irrelevant, and of course this point falls to be determined on a consideration of the complainers' averments alone. The figures, however, which are to be found in the answers of the respondents show, I think, quite plainly that the complainers' financial position is hopelessly embarrassed. The reasons of suspension are highly technical, and they have obviously been adopted in order to stave off the evil hour when the assets of this copartnery must be sequestrated and distributed among the creditors. I accordingly think it would have been better at the end of the day for the complainers if this note had not been presented at all, and it will undoubtedly be better for them if the proceedings fall to be disposed of at this stage, because even if the complainers are successful in the technical pleas which have been proponed it seems to me that it is merely postponing the evil day and in the meantime incurring serious legal expense.

"Although, however, the grounds of suspension are technical the complainers are entitled to have them carefully considered, and I accordingly proceed to examine their pleas-in-law. [*The Lord Ordinary dealt with matters which are not reported.*] . . .

"The only difficulty connected with the case is in relation to plea No. 1. That plea is—'The said bill not having been presented to the complainers at its due date, cannot be made the foundation of summary diligence, and the charges and warrants thereof should be suspended.' The short but important question thereby raised is this—Is it essential in a question of this sort, where the holder of a bill wishes to do diligence against the acceptor, that as a necessary step of doing summary diligence he should have presented the bill on the day on which it was payable, or was it enough that within six months of the day when the bill fell due it was presented for payment and was dishonoured and protested and a charge given before that period of six months had expired? This is the question I have to determine.

"Now the foundation of the complainers' contention that presentation on the day of payment was necessary is the case of *Neill*, 1902, 4 F. 625, 39 S.L.R. 412, and it is necessary to examine this case with some care. The circumstances in the case of *Neill* were exactly those which we have here, to wit, a bill which had not been negotiated but which was held by the drawer, who proposed to do summary diligence against the acceptor Neill. The bill was not presented on the day on which it fell due, but, as here, at a subsequent date, and it was not presented at the place of payment, which was the residence of the acceptor, but at his place of business—a different place alto-

gether. Now the opinion of the Lord Ordinary (Stormonth Darling) supports to the full the contention which was advanced on behalf of the complainers here, but before examining that opinion I think it is important to notice that there was an obvious and a sufficient ground of judgment in that case apart from the question of time, and the Judges of the Inner House made that obvious ground of judgment the sole basis of their decision. That ground of judgment was that the bill in effect was never presented at all because it was not presented at the prescribed place of payment.

"The Judges of the Inner House said nothing about the question of time, but based their decision specifically on the fact that the bill was presented for payment at the wrong place. Therefore in my humble judgment the case is wrongly rubricked. The rubric is—'Held . . . that the protest was invalid, the bill not having been presented for payment at the time and place of payment.' How the case should have been rubricked is — Held that the protest was invalid, the bill not having been presented at the place of payment; and then the reporter should have added — Opinion by Lord Stormonth Darling that the diligence was also bad because the bill had not also been presented at the time of payment.

"The opinion of Lord Stormonth Darling was that there were two vices in the diligence—the one because the bill had not been presented for payment on the day when the bill fell due, and the other that it had not been presented at the place of payment. The opinion as to time of payment, on the view I take of the case and the real ground of decision, was merely an *obiter dictum* of Lord Stormonth Darling, which, of course, is entitled to great respect and weight, but which I am not bound to follow. In my opinion it is a wrong view of the law, as I hold that in a case like the present it is unnecessary that there should be presentment on the day of payment as the first step of doing summary diligence.

"I think the fallacy which underlies the views expressed by Lord Stormonth Darling is just this, that he regards the rules as to presentation set out in section 45 as having to do with diligence. They are merely rules that are laid down for a specific purpose to which I shall allude in the sequel, and they do not necessarily apply where diligence is being done against an acceptor by the holder of the bill. The question is—What is due presentment of a bill in these circumstances?

"Now I make these three observations upon section 45, which sets forth the rules of presentment of a bill for payment:—The first observation I have already referred to, to wit, that this section says not a word about diligence, and in my opinion is not concerned with the question of summary diligence. The next observation I make is that the provisions of the whole section are subject to this initial proviso, that these rules are subject to the provisions of this Act. *Inter alia*, they are subject to the provisions of section 52 (1), which provide that 'when a bill is accepted generally, presentment for payment is not necessary in order to render the acceptor liable,' and they are also subject to the provisions of section 98 of the statute, which preserves the law and practice in Scotland in regard to summary diligence. The third observation I make upon this section of the Act is that its purpose or object is disclosed in the second sentence of the section. If a bill be not so presented—that is, presented according to the rules that follow — the drawer and endorser shall be discharged. Thus the object of the formulation of those elaborate rules was to preserve the recourse which in a negotiated bill the holder might wish to have preserved against the drawer and the indorsers.

"Now the respondents maintain that their diligence proceeds under section 98 and is unchallengeable, being according to the law and practice in Scotland which regulated summary diligence prior to 1882. The necessary steps of summary diligence on a bill, as established by our practice, seem to me to be these — (1) that there should be an unsuccessful presentment for payment at the place of payment; (2) that in the case where diligence is being done by the holder against the acceptor this presentment may be made on the day on which the bill falls due, or on any lawful day during six months thereafter (Act 1681, cap. 20); (3) that on the day of presentment the bill should be noted for non-payment; (4) that a protest of the same date should be executed; (5) that the protest should be registered for execution; (6) that an extract and warrant thereon should be obtained; and (7) that a charge upon an induciæ of six days should be given.

"The respondents have duly taken all these steps, and they maintain that their diligence is therefore unimpeachable. I am of opinion that this contention is well founded. It is supported by authority and also by certain general considerations to which I shall allude.

"First, then, as to authority, I refer to the case of *Bon*, 1846, 12 D. 1310, and to a short statement as to the practice on this point contained in the opinion of the Lord Ordinary, Lord Wood. The circumstances of the case are not exactly in point, because what was decided by the Court in that case was that summary diligence on a bill payable on demand is competent for six months after a demand for payment has been made, although a longer period may have elapsed since the date of the bill. But then on this matter of practice I think the observations of Lord Wood are quite in point. They are to be found in the third paragraph of his note, on page 1311. The Lord Ordinary says—'By practice (for the Lord Ordinary sees no authority for it in the statutes) a latitude in time is allowed for protesting bills or notes against the acceptor or granter. It may be done at any time within the six months after falling due. As against drawers and indorsers, bills and notes, to have summary diligence, or preserve recourse at all, must be protested on the last day of grace, where days of grace are allowed.' And then he goes on to deal

with the case before him, to wit, a bill payable on demand. It seems to me, as I have said, that that is exactly in point. It may be suggested that he is merely referring to the matter of a protest, but a protest must necessarily be of the date on which presentment for payment and a note of dishonour have been made, and accordingly these observations seem to be entirely in point.

"The next case is that of *Mackenzie*, 1854, 17 D. 164, opinion of the Lord Ordinary Lord Curriehill, and also of the Lord President. There the bill had been negotiated, but the question arose between the holder of the bill, who was attempting to do diligence against the acceptor, and the latter. The suspender's first plea-in-law was this—'The bill not having been duly and timeously protested cannot be made the ground of summary diligence,' and there, as here, the protest was not executed on the day of payment of the bill. The Lord Ordinary, Lord Curriehill, disposed of that plea in this way. He says—'In the suspender's first plea-in-law the summary diligence on the bill charged on is objected to on the ground of this bill not having been protested, inasmuch as the last day of grace was on 5th October 1853 and the protest is dated 17th November thereafter. This objection would have been well founded if the suspender had been the drawer or indorser of the bill, because by the Statute 1772, cap. 72, it is enacted that "unless inland bills be protested within the three days of grace there shall be no recourse against the drawers or indorsers of such inland bills." But in none of the statutes is there any such enactment in regard to a protest against the acceptor or to summary diligence thereon, and in practice summary diligence proceeds against the acceptors on protests taken and recorded in terms of the Statute 1681, cap. 20, and 1696, cap. 36.' And the Lord President says on this point —'The first plea in defence is not now insisted in, and is clearly not maintainable.'

"There again I think we have a decision exactly in point and which is regulative of the present matter. To the same effect, it seems to me, are certain observations which fell from Lord M'Laren in the case of *Gordon*, 1898, 25 R. 570, 35 S.L.R. 469, where these general observations are made—'I should have been surprised to find in a code Act of Parliament any deviation from such a well-established and very convenient rule as that the acceptor of a bill is liable in terms of his obligation without the necessity of charging him by presentment. What are called the requisites of negotiation—presentment, protest, and notice of dishonour—are only necessary to preserve the holder's recourse against the drawer and indorsers in order that each may be in a position without delay to enforce his recourse against those who are liable to him, but the acceptor or maker of a note is always liable in terms of his obligation for his signature without notice.'

"Finally, in the recent case of *Carmont*, decided by Lord Hunter and reported in 1916, 2 S.L.T. 350, it was held that in the circumstances of that case the summary diligence was good. These circumstances were that the bill was presented for payment on the day when it fell due but nothing else was done. Accordingly as a step in diligence that is just the same as if nothing had been done at all, because it is essential that presentment for non-payment, if summary diligence is to follow, should on the same day be followed by noting and protest. It seems to me, therefore, that the circumstance that presentment was made on the last day of grace may thus be disregarded, nothing more having followed upon it.

"Then there was a second presentment some time thereafter, and summary diligence followed on that. Lord Hunter decided that the summary diligence was valid, and it seems to me that case is an authority for my taking the same view in this case. It is quite true that in *Neill* there was no presentment at all upon the last day of grace, but, as I have stated, that does not seem to make any difference. I think if Lord Stormonth Darling on the views he expressed in *Neill* had been deciding *Carmont* he must have decided it differently from Lord Hunter, because Lord Stormonth Darling's opinion seems to be that in order to do summary diligence you must commence the diligence on the last day of grace. Accordingly the judgment in the case of *Carmont* cannot stand if the judgment in the case of *Neill* is right. I content myself by saying that I prefer the judgment of Lord Hunter to that of Lord Stormonth Darling.

"The contention of the respondents appears thus to be supported by authority. It seems also to be supported by certain general considerations with which I shall now conclude. I have already pointed out that the reason for the elaborate rules regulating presentment for payment which are set forth in section 45 is to be found in the language of the section itself. They are enacted in order that a holder of a bill which has been negotiated may preserve his recourse against a drawer and against the other indorsers. The reason, again, which underlies the enactment of these rules seems to be a well-settled principle in the law of cautionary obligations, that, to wit, which penalises the giving of time to the principal debtor. In the law relating to bills of exchange the legal position of indorsers is really that of cautioners for the due performance of his obligations by the acceptor. The acceptor is the principal debtor and the indorsers are in the position of cautioners in a question with the holder of the bill, who is the creditor for the due performance by the acceptor of his primary obligation of paying the bill.

"Now it is well settled in the law of cautionary obligations that if time is given to the principal debtor the cautioners are liberated, and it seems to me that the only reason for these rules as to presentment is just this, to prevent the giving of time and the liberation of indorsers and the drawer. On the other hand, consider the relationship which subsists between the drawer of a bill and the acceptor. There is privity of

contract between these two, and they are directly related as creditor and debtor. Why should not the drawer, having no other interest to serve but his own, give time to the acceptor without being penalised for so doing?

"The contention of the complainers is that if he does so he loses his remedy of summary diligence. His leniency in the case supposed is to be penalised by the serious loss of legal remedy. It seems to me that that suggestion is outrageous, and this against all considerations of equity and good sense. Accordingly on the whole matter, although this first plea is one which is attended with some difficulty, I reach the conclusion that it also falls to be repelled.

"The result is that I shall refuse the Note, for the reasons I have stated, with expenses."

The complainers reclaimed, and argued—The respondents had not taken the steps requisite to entitle them to do summary diligence. The Bills of Exchange Act 1882 (45 and 46 Vict. cap. 61), section 45, provided that a bill must be duly presented for payment, and in the case of a bill not payable on demand presentment must be on the day the bill fell due. If payment could not then be obtained the bill was dishonoured (section 47). It had to be noted on the day of dishonour, but where it was duly noted the protest could be subsequently extended (section 51 (4)). Here there was no due presentment, noting, or protest, for the bill was not presented on the day on which it fell due. The provisions of the Bills of Exchange Act were no doubt not to be read so as in any way to affect the law and practice of Scotland with regard to summary diligence (section 98). There was no law or practice with regard to summary diligence in Scotland which in any way differed from the rules laid down in the sections above referred to. Summary diligence was first introduced with regard to foreign bills; due protest was a prerequisite, and the diligence in the case of non-payment was only available against the acceptor—Act 1681, c. 20. The same provisions were extended to inland bills—Act 1696, c. 36. Summary diligence was thereafter made available against all the parties to the bill, but the bill had to be protested before the expiration of the three days of grace—Bills of Exchange (Scotland) Act 1772 (12 Geo. III, c. 72), secs. 41-43. Under all those enactments due protest was an essential prerequisite of summary diligence, and that applied to all the parties to the bill—Thomson on Bills (1st ed.), p. 591 *et seq.*; Bell's Comm. (7th ed.), i, 413, 434, and 437; Juridical Styles (1883 ed.), vol. ii, pp. 17 and 18. There was no trace of any distinction between the acceptor and the other parties on that matter. Due protest meant presentment and noting within the days of grace, before the Act of 1882—Thomson on Bills (2nd ed.), pp. 296 and 315. The rules of the Act of 1882 applied—*Neill* v. *Dobson & Company*, 1902, 4 F. 625; 39 S.L.R. 412. *Mackenzie* v. *Hall*, 1854, 17 D. 164, and *Carmont* v. *Cinema Trust Company, Limited*, 1916, 2 S.L.T. 350, were not in point, for the bills in those cases were presented within the days of grace. In *Bow* v. *Rollo*, 1846, 12 D. 1310, the bill was payable on demand, and dicta on the present point were *obiter*. The *ratio* of the rule requiring presentment within the days of grace was that the acceptor's contract was to pay at that time—*Bartsch* v. *Poole & Company*, 1895, 23 R. 328, 33 S.L.R. 233. *Gordon* v. *Kerr*, 1898, 25 R. 570, 35 S.L.R. 469, was an ordinary action upon a bill and had nothing to do with summary diligence.

Argued for the respondents—Prior to 1882 the law and practice as to presentment for payment was different in the case of acceptors from what was the rule in the case of indorsers. As indorsers were cautioners, if time was given to the principal debtor they were released, and consequently to preserve the remedies against them presentment must be within the days of grace. The case of acceptors was different, and in practice it was sufficient to present at any time within six months from the date for payment to enable summary diligence to be done. That distinction was found in the Acts 1681, c. 20, and 1696, c. 36, which only applied to acceptors, and the looser practice had been judicially recognised—*Bar's* case (*cit.*), *per* Lord Wood, Ordinary, at p. 1311; *Mackenzie's* case (*cit.*), *per* Lord Curriehill, Ordinary, at p. 166, and Lord President M'Neill at p. 167. It was also accepted by text writers—Thomson on Bills (2nd ed.), p. 316. That looser practice was expressly saved by the Bills of Exchange Act 1882 (*cit.*), section 98, and the sections referred to by the complainers, which were subject to there being no contrary practice prior to that Act, and that had been so decided—*Carmont's* case (*cit.*). *Neill's* case (*cit.*) did not decide that the looser practice had now ceased to be effectual, for the decision proceeded on the footing that presentment had been at the wrong place. Bell's Comm. i, 413, was referred to.

At advising—

LORD PRESIDENT—I am of opinion that, according to the law and practice of Scotland, due presentment of a bill of exchange, so as to afford ground for summary diligence against an acceptor, may be made on any day within six months of the bill falling due.

That appears to be the result of the authorities. The Lord Ordinary's examination of all the decisions seems to me to be careful and exhaustive, and his criticisms and observations upon them just. With his reasoning, and the conclusion to which it leads us, I entirely agree, and therefore I am for affirming his interlocutor.

LORD JOHNSTON—While I acquiesce in the judgment which your Lordship has announced, I do so with great hesitation and regret, because I cannot help feeling doubtful whether, although it may be supported by precedent, it does not lead to a result contrary to the intention of the statutes.

The question is not one of liability upon a bill. It is whether summary diligence was competently executed upon a protest taken

at a date some months after the due date of the bill. Summary diligence is not part of the general law-merchant of bills. It is a peculiarity, in the matter of remedy, of Scots law, and depends entirely upon the statutes of 1681, 1696, and 1772. I am not going to delay your Lordship by going back upon the terms of these Acts, but shall content myself with reading what Lord Wood, in his opinion in *Bon* v. *Lord Rollo*, 1846, 12 D. 1310—an opinion which was founded on as supporting the view your Lordship has taken—says (at p. 1311)—"The protest to be registered is one duly taken. The provision in the case of non-payment imports a failing to pay on the bill or note falling due, which in consequence has been duly protested." In these words I think his Lordship indicates precisely what is the result of the statutes. Admittedly, however, there has been before and since the case of *Bon* v. *Lord Rollo* (*cit.*) a failure to give effect to the term "due presentation" or "duly presented," which word "due" is emphasised in the statutes above mentioned, and is equally emphasised by the Bills of Exchange Act 1882, sections 45 and 46, as regards presentation for payment. For, having stated briefly and with exactitude the law of the situation as determined by the statutes, his Lordship at a subsequent point goes on to say—"By practice (for the Lord Ordinary sees no authority for it in the statutes) a latitude in time is allowed for protesting bills or notes against the acceptor or grantor. It may be done at any time within six months after falling due." I doubt whether that practice can override the statute; but, as your Lordship has pointed out, it has been accepted in several cases that it has been allowed to do so—unfortunately, I think, not on consideration of the Court but by admission of counsel in one case, a better ground of judgment arising in a second case, and so on. The question has never been properly considered and determined by the Court on a review of the statutes, of the considerations *hinc inde*, and of the decisions.

One of the considerations which I may point out is this—a distinction has been taken between the case of protest against the acceptor and protest against the drawer and endorsers. It is perfectly true that the question of time is at the bottom of the reason why protest in the case of the drawer and indorsers must be made within the days of grace. They are, as the Lord Ordinary has pointed out, really in the position of cautioners, and failure to present the bill for payment on its due date or before the expiry of the days of grace comes under the rule that you must not give time to the debtor in a question with a cautioner. But there is also a question of time, although arising in a different manner, in the case of protest for non-payment against the acceptors. I think that if, when the due date arrives, the holder of a bill chooses to hold it up and not present it for payment on its due date, he in giving time does not *duly* present, and though he may enforce the contract on the bill forfeits the benefit of summary diligence. One must recollect that the acceptor of a bill does not know who the holder is; he knows who the drawer is but he never can know who the holder is, and therefore he cannot go and seek him, even if it is competent for him to do so where the bill is domiciled at a particular place. The result is that if the bill is not duly, that is at its due date, presented for payment, the holder of the bill would be giving time to the acceptor, leading him into difficulties as to when it is to be presented, obliging him to keep money on hand wherewith to meet it at any time when it may be presented within six months. I think therefore that, though for a different reason, time is just as much of the essence of due presentation for payment in the case of the acceptor as of the drawer and endorser, and that where the Statute 1681, cap. 20, speaks in one breath of "duly protested for not acceptance or for not payment," it was not its intention to draw any distinction between *due* presentation in the one case and in the other as a statutory preliminary to the exceptional privilege of summary diligence.

I venture to think that this matter is one which should receive further consideration, because I do not think that it has ever been properly brought before the Court.

LORD MACKENZIE — [*Read by the Lord President*]—The complainers' plea that the bill in question not having been presented to them at its due date cannot be made the foundation of summary diligence, is in my opinion, not well founded. They were the acceptors of the bill, which was in these terms—"£100 stg. Hawick, 1st April 1916. Four months after date pay to us or our order the sum of £100 sterling, value received. INNES, CHAMBERS & CO. T. D. M'Neill & Son, 9 South Saint Andrew Street, Edinburgh."

The respondents, who were the drawers, presented the bill for payment on 4th January 1917 at the complainers' shop and place of business. It was dishonoured. On the same date it was noted for non-payment and a protest executed, upon which the charge which it is sought to suspend followed. The point taken by the complainers is that the presentment had to be made on the date the bill fell due, and they found on section 45 of the Bills of Exchange Act 1882. It appears to me that that section provides what must be done to preserve recourse against the drawer and indorsers, but does not affect the position of the acceptor, who is the principal debtor. His position as regards summary diligence is not altered or affected by the 1882 Act. This is expressly provided by section 98. The practice prior to 1882 is shown by the authorities to which the Lord Ordinary refers, especially the case of *Bon*, 1846, 12 D. 1310, where Lord Wood says that by practice bills or notes may be protested against the acceptor or granter at any time within six months after they fall due. To the same effect is the case of *Mackenzie*, 1854, 17 D. 164; the practice is stated to be the same by Lord Curriehill, and the Lord President's opinion is decisive to the same effect.

As the Lord Ordinary points out, the decision in *Neill*, 1902, 4 F. 625, 39 S.L.R. 412, does not conflict with the earlier cases, because the only ground of judgment of the Inner House was that the bill was presented for payment at the wrong place. This, as is pointed out by Lord Moncreiff, would have been fatal to summary diligence according to the practice before 1882.

I accordingly agree with the conclusion the Lord Ordinary has reached.

LORD SKERRINGTON—If I had regarded this question as an open one I should have been disposed to say that the procedure sanctioned by the Lord Ordinary was not warranted by the statutes relative to summary diligence; that it was contrary to principle; and that it was calculated to lead to injustice in certain cases. Unfortunately the question cannot be regarded as open. Our duty under section 98 of the Bills of Exchange Act of 1882 is to ascertain what was the law and practice in Scotland prior to that date in regard to summary diligence.

Upon that question there are five witnesses whose testimony seems to me to be conclusive. In the first place, there is Lord Wood in the case of *Bon*, 1846, 12 D. 1310, and his statement of the practice is none the less valuable because it was an *obiter dictum*. Then in the case of *Mackenzie*, 1854, 17 D. 164, we have a judgment by Lord Curriehill (the Lord Ordinary) upon this very point. Further, the two eminent counsel for the complainer did not think it worth their while attempting to challenge Lord Curriehill's judgment. These counsel were Mr Penney, afterwards Lord Kinloch, and Mr Gordon, afterwards Lord Gordon. In the Inner House, Lord President M'Neill said—"The first plea in defence is not now insisted in and is clearly not maintainable."

Accordingly it appears to me to be too late to innovate upon a practice so well established. In the latest Scottish book upon Bills of Exchange — Mr Hamilton's commentary upon the statute of 1882—the learned author says (p. 211)—"It has, however long been the opinion of the legal profession in Scotland that for this purpose"—that of summary diligence against an acceptor—"it is not necessary to present bills not payable on demand on the day on which they fall due. Accordingly it has till very recently been the practice to present bills for this purpose at any convenient time after they have fallen due, and to do diligence on protests framed in accordance with this presentment." That statement is in accordance with what I have always understood to be the law and practice in Scotland.

Accordingly I agree with the decision which your Lordships propose to pronounce.

The Court adhered.

Counsel for the Complainers (Reclaimers) —Christie, K.C.—Ingram. Agent—W. R. Mackersy, W.S.

Counsel for the Respondents—Anderson, K.C.—C. H. Brown. Agent—E. I. Findlay, S.S.C.

Friday, June 29.

FIRST DIVISION.

[Lord Dewar, Ordinary.

OAKBANK OIL COMPANY, LIMITED v. LOVE & STEWART, LIMITED.

Contract — Sale of Goods — Conditions — Red Ink Note at Head of Seller's Note-paper Importing Condition into Contract of Sale.

Shale oil manufacturers sent to timber merchants (1) a schedule of conditions, (2) attached thereto a list showing their requirements in timber for about a year, and (3) a form of tender. Condition IX stipulated that the conditions must be accepted by tenderers, and if not no tender should be made; and the form of tender provided that the offerers agreed to adhere to the conditions. The timber merchants filled in prices against some of the items in the list of requirements, signed the list and the form of tender, and returned these documents to the oil manufacturers together with a covering letter. The letter bore at the top of the paper a note, printed in red ink, that all offers over a period were subject to stoppages through strikes, lockouts, &c., and that the right to cancel was reserved in the event of any of the countries from which supplies were drawn becoming engaged in war. A correspondence followed as to certain items on the list the prices of which had not been filled in, and as to the prices charged by the timber merchants. All the timber merchants' letters contained the red ink note. Finally, after adjustment of the prices the oil manufacturers accepted the timber merchants' offer. Thereafter one of the countries from which the timber merchants drew their supplies became involved in war, and they cancelled their contract. In an action of damages for breach of contract raised by the oil manufacturers, *held* (*rev.* Lord Dewar, *dis.* Lord Johnston) that the head-note in red ink formed part of the correspondence, and was embodied in the contract of sale as a condition thereof, and that the timber merchants were entitled to cancel the contract, and defenders *assoilzied.*

Oakbank Oil Company, Limited, *pursuers*, brought an action against Love & Stewart, *defenders*, concluding for £1800 damages for breach of contract.

The *facts*, as given in the opinion of Lord Johnston, were—"The Oakbank Oil Company are large importers, *inter alia*, of pit props. From 1888 to 1914, a period of twenty-six years, with the single exception of one year, they had adopted a system of invitation for tenders for the various stores required by them, including pit props, which was the uniform basis of their subsequent contracts. This system was as follows—Their financial year closes