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

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

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

The Court pronounced this interlocutor:—

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

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

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

Wednesday, June 12.

SECOND DIVISION.

BANK OF SCOTLAND *v.* LAMONT & CO.

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

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

The drawers of a bill by agreement with the acceptors, to which the Bank of Scotland was also a party, were bound not to enforce a debt of which the sum contained in the bill formed a part. When the bill fell due the acceptors declined to renew it, and the bank, who were the discounters and the holders of the bill, without having presented it to the acceptors for payment sued the drawers for the sum contained therein. *Held* that the drawers were not entitled to plead want of presentment as a ground for not retiring the bill.

The Bank of Scotland were the discounters and holders of a bill of exchange in the following terms:— "*Glasgow, 3rd January* 1888.

"£720, 4s. 4d. stg.

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

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

Endorsed thus:—

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

"HENRY LAMONT & Co.

"For the Bank of Scotland,
"D. HENDERSON."

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

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

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

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

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

on the following Monday, but he afterwards declined to do so, on the ground that the bank had failed duly to protest the bill.

In consequence of this refusal the bank brought an action against Henry Lamont & Company in the Sheriff Court at Glasgow for payment of £720, 4s. 4d.

The Bills of Exchange Act 1882 (45 and 46 Vict. cap. 61), by section 46 provides—" . . . . (2) Presentment for payment is dispensed with . . . . (*c*) As regards the drawer where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented."

The pursuers pleaded—"(2) The agreements operate as an implied waiver of presentment."

The defenders pleaded—"(1) The pursuers having failed duly to present the bill for payment to the acceptors, and also to note the same for non-payment, the drawers have been discharged. (2) The pursuers by their actings and also by their failure duly to negotiate the bill and to protect the rights of the drawers in accordance with the statutes, have lost recourse against the defenders, and the action ought to be dismissed, with expenses."

The Sheriff-Substitute (SPENS) allowed a proof, which established the facts given above, and on 22nd November 1888 he found that the bill was not properly presented, and that no binding waiver of presentment had been proved. He accordingly sustained the defences.

The pursuers appealed to the Court of Session, and argued—This bill was scheduled as part of the debt due to Henry Lamont, and accordingly the bank could insist upon payment from him. If that were not so, and Henry Lamont was to be let out, the bill would have been scheduled as part of the debt due to the bank. In fact, the debt was due by Ferguson, Lamont, & Company to Henry Lamont, and the bank was the creditor of both. The respondents relied upon a false view of the agreement, viz., that the liquidation committee was bound to go on renewing the bill, and the bank to go on discounting it, and that they were not to be troubled about the debt. Ferguson, Lamont, & Company could not have paid this debt even if the bill had been presented to them without violating the agreement to which both Henry Lamont, the drawer, and the bank were parties. It would accordingly have been an idle proceeding on the bank's part to go through the form of presentment. The respondents were parties to the agreement, which rendered payment impossible, and must therefore be held to have waived their right of objecting to pay because there had been no presentment. The appellants had a right to succeed under sub-section (*c*) of section 46 of the statute, which apart from waiver made presentment unnecessary where "the drawer has no reason to believe that the bill would be paid if presented." The Act had codified previous cases, but these were collected in Thomson on Bills, p. 367, and in Byles on Bills, p. 202.

Argued for the respondents—The Bills of Exchange Act was virtually a code whose provisions must be rigorously complied with by section 46, sub-section 2 (*a*)—A holder must present a bill even where he did not expect payment. The first and second parts of (*c*) must be read together, and showed that presentment was only dispensed with in accommodation bills. The *onus* of proving that this was an accommodation fell on the appellants—sec. 30—and this had not been discharged. The agreement did not excuse non-presentment. Its object was to grant time to the debtors, but this could be done in two ways by the respondents—(1) By retiring the bill and waiting till the liquidation committee could pay the debt. This was the way in which the appellants argued time must be granted; or (2), the course adopted for three years, by taking renewals of the bill. The inference of the drawer from non-renewal was that there was money enough in the acceptor's hands to pay his debt. He could not therefore be said to have had no reason to believe the bill would be paid if presented. The liquidation committee were empowered to pay dividends to the creditors as the funds accumulated. By the bank's failure to present the respondents had lost their right to use summary diligence, which was competent to them if there were sufficient funds in the acceptor's hands, leaving any questions that might arise in consequence of their doing so to be tried in a suspension. The respondents did not know when they promised to pay that presentment had not been made, and therefore, as the appellants now admitted, could not be held to have waived their right to object on the ground of non-presentment.

At advising—

LORD JUSTICE-CLERK—It appears that the main question which was argued in this Court was not argued to any extent before the Sheriff-Substitute, but we have heard full argument on it, and I think we are now ready to dispose of it. The firm of Ferguson, Lamont, & Company parted in 1885 with the entire control of their own business, and also with their power to uplift the debts due to them and to pay those due by them. They assigned their whole estates and assets to a committee of their creditors, to be managed under an agreement by which the committee of management were empowered to transact all the company's business, and collect the debts due to them, and make a rateable distribution of the funds among the creditors. At the date of the agreement there were interested in the firm's estate, among others, the Bank of Scotland and Mr Henry Lamont, both of whom were creditors, and both of whom were also parties to the agreement. The debt due to Henry Lamont was about £1500. In connection with part of it he had drawn a bill upon Ferguson, Lamont, & Company for £700 odds. They accepted that bill, and he then discounted it at the Bank of Scotland and got the proceeds. While that bill, or a renewal of it, was current this agreement was entered into, the bill having been renewed when it fell due, and thereafter from time to time new bills being given to replace it. Then there came a time when Mr John Lamont, the acceptor, declined to grant an acceptance of a renewed bill. The question then came to be, whether the drawer Henry Lamont should be obliged to pay the bill or not.

Henry Lamont's only defence to the demand of the bank for payment of the bill by him as the person who indorsed it for value is, that the bank failed in a duty to him as the drawer and

indorser. That failure is said to be the non-presentation of the bill for payment to Ferguson, Lamont, & Company as acceptors. The question therefore is, whether there was in the circumstances any obligation on the bank to present the bill for payment? The bank was a party to the agreement, and knew that no debt could be paid to individual creditors of the firm, but that, on the contrary, there must be rateable distribution of all sums payable by the firm among the creditors by the committee who were managing the firm's affairs. The bank therefore knew that to present the bill to the firm for payment would be an idle form. Now, we have been referred to section 48 of the Bills of Exchange Act. That section provides that "presentment for payment is dispensed with . . . (c) as regards the drawer where the drawee or acceptor is not bound, as between himself and the drawer to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented." Now, I am quite satisfied on the facts brought out in the proof that the acceptor was not bound to pay the bill and that the bank had no reason to expect that the bill would be paid if presented, and if so, the case is within the exception stated in the statute, and the bank must prevail in this action.

Lord Young.—I am of the same opinion, and upon the same grounds. The case hinges on the agreement of 12th November 1885, which was a subsisting agreement when this bill fell due upon 6th April 1888. The agreement was between Ferguson, Lamont, & Company, and their leading creditors, included the defender here, who in the schedule attached to the agreement appears as a creditor to the extent of £1500. The bill on the face of which the defenders' firm are the drawers, and Ferguson, Lamont, & Company the acceptors, was part of that debt of £1500. The bill was kept up for Henry Lamont's own convenience by renewals of the bill which enabled him to obtain money by discounting them. It was just so much of the £1500. Now, by that agreement the creditors obliged themselves to abstain from enforcing their debts against their debtor upon his putting the whole of his estate into certain hands for administration, and for the satisfaction of his creditors. Henry Lamont and others were bound by it from enforcing their debt, or any part of it, and to take payment only through the fair administration introduced by that agreement. It is therefore clear that had that bill, which was only the document of debt for part of that debt, been in his hands when it fell due Henry Lamont could have taken no steps to obtain payment of his debt except by intimating the fact to the liquidation committee for their consideration. He could not have presented the bill to the acceptors for payment. He could only have intimated the fact of its falling due if that was necessary. Indeed, they knew it was part of their debt of £1500, and to say that the respondent could have exacted payment is extravagant, and therefore an untenable position. But the bill in reality was in the hands of the bank, and they acquired all the right to that part of the debt of £1500, viz., £730, that the respondent could give them. Now, they happened to be cognisant of the agreement, because they were parties to it. They were cognisant of the fact that Henry Lamont was under agreement not to exact payment, and when the bill fell due and, there was no renewal of it, they applied to Henry Lamont for payment, and his liability to pay is undoubted unless the bill was rendered non-negotiable. There is no reason to doubt that the bank officials in Glasgow, well accustomed to such transactions, would have negotiated it in the usual way, would have presented it and noted it all in the usual way, but that they were cognisant of the agreement. Instead, they explained the position of matters to Henry Lamont. There seems to have been some unpleasantness with the bank managers, but the respondent agreed to pay, and went to the bank with money for that purpose in his pocket, which was acting only under his plain legal obligation. But before he made the payment someone suggested to him a plea to the effect that the bank was wrong in thinking that the agreement made any difference as to the duty of presentment, although it would have been presentment to the very persons from whom he was bound not to enforce payment. But this comes under the very case provided for by the Act of Parliament, which has been referred to by your Lordships. I am prepared to find that the drawer knew that the acceptors would not pay, and indeed could not, without violation of the agreement to which he was a party, which violation would have been reducible by any of the parties to the agreement,

I would therefore find in law that the acceptors were not liable to pay, and were bound under the agreement in justice to their creditors not to pay, and in fact I would find the drawer knew this, and I would use the very language of the Act of Parliament. He cannot therefore plead want of due presentment as a ground for his liberation from liability to pay. I think the Sheriff-Substitute has misapprehended the case.

Lord Rutherfurd Clark concurred.

Lord Lee—Apart from the agreement it has not been, I think, maintained to us that there was on the part of Henry Lamont any waiver of the right to have performed towards him the duty which the holder of a bill owes to the drawer. The reasoning of the Sheriff-Substitute is therefore inapplicable to the case as it is now presented.

But the question remains, whether, standing the agreement—and it is not disputed that the agreement remained in force—presentment of the bill for payment was not dispensed with in terms of section 46 of the Bills of Exchange Act, sub-section (c), which your Lordship has quoted? Upon that question my opinion concurs with those which have been expressed.

The Court pronounced this interlocutor:—

"Find in fact (1) that by the memorandum of agreement mentioned in the record the parties thereto, creditors of Ferguson, Lamont, & Company, undertook to allow the business of that company to be carried on under the management of a committee, which should collect all assets, and distribute the same rateably among the creditors; (2) that the defenders were parties to that agreement as creditors of the said company to the amount

of £1502, 14s. 10d., and previous to its date had drawn a bill on the company for part of the said sum, which bill was accepted by the company, and discounted by the pursuers; (3) that the said bill was renewed from time to time, and discounted by the pursuers, and is now represented by the bill sued for; (4) that when the bill last mentioned fell due, the defenders, being parties to the agreement, knew that the acceptors, being the managers thereby appointed, having no power to pay creditors otherwise than rateably, could not retire it: Find in law that the defenders are not entitled to plead that the bill was not presented to the acceptors for payment: Sustain the appeal: Recal the judgment of the Sheriff-Substitute appealed against: Repel the defences: Ordain the defenders to make payment to the pursuers of the sum of £740, 4s. 4d. sterling, with interest thereon at the rate of £5 per centum from the 6th day of April 1888 till payment: Find the pursuers entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for the Pursuers (Appellants)—Sol.-Gen. Darling, Q.C.—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defenders (Respondents)—Low—C. K. Mackenzie. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Thursday, June 13.

SECOND DIVISION.

PARR *v.* MACLEAN.

Crofter—Right to Cut Peats—Landlord's Discretion as to Place.

A crofter's right to cut peats does not attach to any particular place. The place is in the landlord's discretion, provided he does not put the crofter to unreasonable inconvenience.

A crofter with a right to peats cut them at first from moss A, but at his own request he was allowed upon sufferance to take them from moss B. He and his son continued to do so for more than twenty years. The landlord then told the son, who had succeeded to the croft, to give up cutting at B, and to go for peats to A. *Held* that the crofter had no right to continue cutting at B, but must comply with the landlord's instructions.

Thomas Philip Parr of Killichronan, Mull, brought an action of interdict in the Sheriff Court of Argyllshire at Oban against Hugh Maclean, crofter, Kellon, one of his tenants, to have him interdicted from taking peat from the moss of Killichronan.

The pursuer pleaded that the defender had no right to enter or be on the farm of Killichronan for any purpose whatever. That a moss at Killiemore had been thirled by usage to the croft, was much nearer and as convenient for the defender, and being now, and having all along been, open to him without let or hindrance, any claim to peats which he had under the Crofters Act or otherways was satisfied.

The defender averred—"The pursuer himself about the year 1865 pointed out to defender's father the place where to cut peats on the farm of Killichronan, and the peats have each year been cut there ever since then by the tenants of Kellon Croft, and occasionally by pursuer himself and the tenants of Killichronan when it was let by pursuer. No objection or complaint was ever made to the exercise of the right of peat cutting until the pursuer's agents wrote the defender on 8th December 1887. . . . Explained that the moss at Killiemore is inaccessible to a cart, although geographically slightly nearer to defender's holding, and that the good peat in that moss has been exhausted. . . . The said right of peat cutting is a pertinent of the holding of the defender from which he is not legally to be debarred, in respect of the provisions of the said Crofters Holdings (Scotland) Act 1886. The defender's said right of peat cutting on Killichronan farm has been continuously exercised for a prescriptive period of time."

The defender pleaded—"(1) The right to cut peats being a pertinent of the defender's holding for time immemorial, he, as a crofter in the sense of the Act, cannot be deprived of the same by the present proceedings."

A proof was allowed, from which it appeared that the defender succeeded to the croft about 1877 on the death of his father Donald Maclean, who had possessed it with right to get peats from 1865. At that date the peats were cut at Killiemore, about one and a half miles off. There was then a mill on the croft, and in 1867 Donald Maclean asked the present pursuer if he might take peats from Killichronan, three miles off, as he was working in that neighbourhood and could fetch them in his cart, and also because the peats from Killiemore were spoiling the meal. Leave was given to take peats from Killichronan during the landlord's pleasure, and no rent was charged for this accommodation. The mill ceased to be worked during the year after Donald Maclean died, and on 8th December 1887 permission to cut peats at Killichronan was withdrawn by letter to the defender. There was a cart road to the moss at Killichronan, but only a horse with creels could be taken to the peats at Killiemore.

The Sheriff-Substitute (MACLACHLAN) on 7th November 1888 found as follows—"(First) that the defender's father Donald Maclean became tenant of a croft at Kellon, on the estate of Killichronan, at that time the property of the pursuer's father, on or about the year 1865; (second) that the holding of which the said Donald Maclean became tenant included the right of cutting peats on a moss on Killiemore Hill, part of said estate; (third) that the said Donald Maclean exercised the said right of cutting peats on said moss for two years or thereby, and thereafter applied to the pursuer, who had then succeeded to said estate, and obtained permission from him to cut peats on a moss at Killichronan, on another part of said estate, but that said permission was granted by the pursuer during his pleasure only, and no rent was exacted therefor, and that said permission has now been withdrawn: Finds that the pursuer was entitled to withdraw said permission, and therefore decerns in terms of the prayer of the petition."

On appeal to the Sheriff (IRVINE) this interlocutor was affirmed.