I have not overlooked the distinction which is taken in reference to cognate questions between common property and common interest. If it were clearly settled that the interest of the defenders in the roof was only common interest, that would be an important, though in my view not a decisive, argument in favour of the pursuer's contention. But as the nature of the right to the roof has not been itself the subject of an authoritative decision, this undetermined point cannot be used as a step to the solution of any other question. I have therefore considered the question in this action on its own merits, and will only add, that as I read the title-deeds, the pursuer is not able to establish such an exclusive right of property in the roof as would displace the inference resulting from theoretical considerations depending on the way and manner in which the different parts of the tenement have been given off. My opinion is that the interlocutor of the Dean of Guild ought to be recalled, and the prayer of the petition refused.

LORD ADAM—I agree in the opinion that has just been delivered.

LORD YOUNG—I concur generally in the opinion which has just been given by Lord M'Laren. I shall state shortly what is the import of my opinion upon the matter, which I think is sufficient for the decision of the case.

The house in question was built between 1799 and 1804 by Mr and Mrs Fell, who had acquired the property of the *solum*, *i.e.*, the feu, and who built the whole tenement, let me say, in 1804. They sold it to different parties, and eventually the parties to this case acquired different parts of it. Now, I regard this case in the same way as if the original proprietors had sold this garret to the present respondent, the petitioner in the Dean of Guild Court, retaining the rest of the property and the *solum* in their own hands.

In my opinion, when the proprietor of a tenement, containing it may be two or three storeys and an attic, sells the attic, he sells nothing else, and he sells no right to the buyer of the attic to load the *solum* with anything more. I do not think that this case is different from what it would have been if this tenement had consisted of three square storeys only, and the proprietor of the *solum* had sold—as he might have done—the right to some one to erect an attic. The right that was sold in that case would not give the purchaser a right to erect anything else. I think the position of the seller and of his disponee are exactly the same whether he builds an attic and sells it, or whether he sells the right to build an entirely new attic.

I wish only to guard myself from being thought to say anything that would prevent improvements from being carried out on any house. I think that if the proprietor of the *solum* were to object to any of the improvements being carried out on a house which the civilisation of the day thought were proper and expedient improvements, that his objections would be unreasonable and would probably not be carried into effect. But converting a garret into two square storeys is a perfectly different matter from making such improvements, and one that will not be sanctioned here any more at this time than if the Fells had sold the garret directly to the petitioner.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER—I am able to agree with Lord M'Laren's opinion so long as he puts his decision upon the question of real right. I am not so sure that I agree with the further deduction that warrant for this proposed operation could be refused as being a matter of contract.

The LORD JUSTICE-CLERK concurred.

LORD ADAM intimated that the LORD PRESIDENT, who was not present at the advising, concurred in Lord M'Laren's opinion.

The Court sustained the appeal and recalled the judgment of the Dean of Guild, and remitted to refuse the petition.

Counsel for the Petitioner and Respondent — C. S. Dickson — C. N. Johnston. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Objector and Appellant—Blair—Sym. Agents—Blair & Finlay, W.S.

Thursday, March 5.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

THE NATIONAL BANK OF AUSTRALASIA *v.* TURNBULL & COMPANY.

Bill of Exchange—Proof of Extrinsic Agreement—Bill of Exchange Act 1882 (45 *and* 46 *Vict. cap.* 61), *sec.* 100.

By sec. 100 of the Bills of Exchange Act 1882 it is provided that in any judicial proceeding in Scotland any fact relating to a bill "which is relevant to any question of liability thereon" may be proved by parole evidence.

The drawees having refused to accept a bill, the payees, who had given value for it, sued the drawers for payment. The defenders answered that the pursuers had entered into a parole agreement to the effect that the said drawees were alone to be liable upon any bills drawn by the defenders upon them, and discounted by the pursuers, on receipt by the pursuers of the endorsed bills of lading of the goods against which the bills were drawn.

The Court, *recalling* an interlocutor of Lord Wellwood's allowing a proof before answer, *found* that the drawers' defence was irrelevant, the Lord President and Lord M'Laren holding that it was incompetent for the defenders to

contradict by parole evidence their liability as it appeared on the face of the bill; Lord Adam and Lord Kinnear holding, that according to the defenders' averment, the agreement was only to come into operation in the event of the bill being accepted by the drawees.

Opinion by Lord Adam, that under the 100th section of the Bills of Exchange Act it is competent for the drawer of a bill to prove a parole agreement contradicting his liability to the payee on the written contract, such an agreement being a fact relevant to the question of liability on the bill.

This action was raised by the National Bank of Australasia, Limited, against George V. Turnbull & Company, merchants in Leith, for payment, *inter alia*, of the amount of two bills for £514, 15s. 10d. and £186, 17s. With regard to the first of these bills the pursuers averred—"(Cond. 2) Against a shipment of wood pulp to Messrs Phipps, Turnbull, & Company, merchants in Melbourne, the defenders, on 15th November 1889, drew a bill on them, in favour of the pursuers, for £524, 15s. 10d., payable ninety days after sight. The pursuers bought the bill, and obtained therewith the bills of lading of said shipment duly endorsed by the defenders. The bill of exchange was in due course presented for acceptance, but acceptance was refused by the drawees on 24th December 1889, and it was then noted by Mr Alfred Brooks Malleson, notary public, duly admitted and sworn, practising in the city of Melbourne. On 27th March 1890, being the last of the days of grace, the bill was presented for payment, which was refused, and it was then protested against the drawers by Mr Malleson for non-payment." In Cond. 3 the pursuers made similar averments with regard to the bill for £186, 17s., and further averred that "information of the dishonour of both bills was duly intimated at the time to the defenders."

The defenders did not deny these averments, but made the following averments in a separate statement of facts:—"(Stat. 1) The defenders have for the last fifteen to twenty years acted as agents in this country for Messrs Phipps, Turnbull, & Company (prior to 1875 Messrs Smith, Turnbull, & Company) of Melbourne, for the purpose of procuring and forwarding consignments of such goods as the said Phipps, Turnbull, & Company desired for the Australian markets. For many years prior to 1881 all transactions were financed by bills drawn by the defenders upon Messrs Smith, Turnbull, & Company, under arrangement with the National Bank of Scotland, Limited, who agreed to discount all bills drawn by the defenders upon the said Smith, Turnbull, & Company, on receiving endorsed the bills of lading of the various consignments, and to look to Smith, Turnbull, & Company alone for payment. (Stat. 2) In 1881 Messrs Phipps, Turnbull, & Company found it desirable to carry out the transactions through a London Bank. They therefore, being old customers of and well known to the pursuers, instructed Mr R. Murray Smith, at that time Agent-General in London for the Colony of Victoria, to make similar arrangements with the pursuers to those which had existed with the said National Bank of Scotland, Limited. This the said R. Murray Smith did, and explained to the pursuers that Phipps, Turnbull, & Company were alone to be liable on any bills discounted by the pursuers drawn by the defenders on them, on receipt of the bills of lading endorsed, which the pursuers agreed to. The defenders, but for this arrangement, would not have relied on Messrs Phipps, Turnbull, & Company accepting the bills for such consignments on a fallen market, and this was well known to the pursuers. At the date of said arrangement the defenders were wholly unknown to the pursuers. (Stat. 3) Numerous transactions were thereafter carried out under this arrangement, amounting in the aggregate to a sum of at least £100,000. (Stat. 4) In 1888 the defenders, by order of Messrs Phipps, Turnbull, & Company, commenced to consign quantities of wood pulp to Australia. Payment of these was, according to the invariable custom, made by drafts on the pursuers, which were met by bills drawn by the defenders on their principals (Messrs Phipps, Turnbull, & Company), payable to the pursuers. As trade in Australia turned bad about the beginning of this year Messrs Phipps, Turnbull, & Company wrote to the defenders cancelling all further consignments, and this the defenders at once did. Two consignments, however, one for fifty tons of pulp and the other for ten tons thereof, could not be cancelled. Payment of these two consignments was made by the pursuers, which payment was met by bills drawn on Messrs Phipps, Turnbull, & Company, and payable to the pursuers in the ordinary way. The sums contained in these two bills (£524, 15s. 10d. and £186, 17s.) together form the principal part of the amount now being sued for."

The pursuers pleaded—"(1) The said bills have been dishonoured by the drawees, the defenders as drawers are personally liable therefor, and the pursuers as holders and payees are entitled to recover the amount contained in the bills, with charges, interest, and expenses as concluded for. (2) No relevant defence having been stated to the action, the pursuers are entitled to decree as concluded for."

The defenders pleaded, *inter alia*—"(2) The bills libelled being drawn by the defenders as agents for the drawees, and the pursuers having agreed to look to the drawees alone for payment, the defenders are entitled to absolvitor."

By section 100 of the Bills of Exchange Act 1882 it is enacted—"In any judicial proceeding in Scotland, 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: Provided that this enactment shall not in any way affect the existing law and practice whereby the party who is, according to the tenor of

any bill of exchange, bank cheque, or promissory-note, debtor to the holder in the amount thereof, may be required, as a condition of obtaining a sist of diligence, or suspension of a charge, or threatened charge, to make such consignation, or to find such caution as the court or judge before whom the cause is depending may require. This section shall not apply to any case where the bill of exchange, bank cheque, or promissory-note has undergone the sexennial prescription."

On 20th December 1890 the Lord Ordinary (WELLWOOD), before answer, allowed parties a proof of their respective averments, and to the pursuer a conjunct probation.

"*Opinion.*—The sum sued for, £718, 6s. 8d., is made up chiefly of the contents of a bill of exchange for £524, 15s. 10d., dated 15th November 1889, and another bill of exchange for £186, 17s., dated 20th January 1890. These bills were drawn by the defenders in favour of the pursuers upon Messrs Phipps, Turnbull, & Company, Melbourne, the defenders' foreign principals, but in both cases acceptance was refused by the drawees. The pursuers now claim payment of the contents of the bills and certain other charges from the defenders, the drawers of the bills.

"The defenders allege and offer to prove that although on the face of the bill they, as drawers, are liable to the payees, the bill was delivered to the pursuers in accordance with an agreement which was followed by a course of dealing extending over six years, by which the pursuers agreed that only the drawees, Phipps, Turnbull, & Company, should be looked to as liable on any bills discounted by the pursuers drawn by the defenders on Phipps, Turnbull, & Company.

"The pursuers contend that these averments are altogether irrelevant, or at least that they cannot be proved by parole. There is no doubt that prior to the passing of the Bills of Exchange Act 1882 such averments could only be proved by the writ or oath of the holders of the bills. But the 100th section of that statute made a material alteration in regard to the proof of such matters. It is provided that 'In any judicial proceedings in Scotland, 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: Provided that this enactment shall not in any way affect the existing law and practice whereby the party who is, according to the tenor of any bill of exchange, bank cheque, or promissory-note, debtor to the holder in the amount thereof, may be required, as a condition of obtaining a sist of diligence, or suspension of a charge, or threatened charge, to make such consignation, or to find such caution as the court or judge before whom the cause is depending may require.' I do not think that the scope of this section has been defined by decision. It is a hard saying that it is now competent to contradict by parole the terms of the contract on a bill of exchange, but the clause is expressed in terms so wide that it is still more difficult to hold that its application is excluded in a case like the present. For instance, the clause contemplates that parole evidence may be led in order to show that a party, who, according to the tenor of a bill is debtor to the holder, is not in reality bound to pay. By the latter part of the section quoted it is provided that a party in that position shall not be entitled to obtain a sist of diligence without making a consignation or finding caution if so required. That seems to imply that while the privileges of summary diligence and the necessity of finding caution or making consignation as the condition of obtaining a sist of diligence are saved, a party to a bill may be entitled in an ordinary action or suspension to prove by parole that he is not truly debtor on the bill in a question with the holder.

"Again, I do not think it is disputed that it is competent under this section to prove by parole *quo animo* a bill is delivered to the holder. The case of *Simpson* v. *Brown*, 15 R. 716, may be referred to. The averment in that case was that the acceptor of a bill of exchange had delivered a blank bill to the drawer to be used for a different purpose to that for which it was used. The only question raised at that stage of the case was whether the complainer, the acceptor, was entitled to have a note of suspension passed without caution. The Court held that the Bills of Exchange Act made no difference in regard to caution, but Lord Shand said (p. 718)—There is no doubt that section 100 of the Bills of Exchange Act has introduced a very important and valuable change in the law, for where formerly the mode of proof was restricted to the writ or oath of the parties where the parties, although truly acceptors, had granted bills for accommodation purposes, a proof at large is now competent. But the practice of the Court in regard to caution is saved.' According to that decision the case of *Wilson* v. *Scott*, 1 R. 1003, June 11, 1874, would be decided otherwise now.

"The question in this case is, whether the clause applies in a question with a holder for value, but still one of the 'immediate parties' to the bill. If it does apply, it would seem that matters can be proved now in Scotland by parole, which cannot be so proved in England. See the case of *Abrey* v. *Crux*, L.R., 5 C.P. 42, which is an authority to the effect that it is incompetent, even in a question with an immediate party, to contradict the terms of the contract on the bill by parole. On the other hand, it is hard to distinguish between that case and the case of *Castrique* v. *Buttigiez*, 10 Moore, P.C. 94, in which an agent-endorser, in a question with his immediate endorsees, was allowed to prove by parole that he had only endorsed the bill for the purpose of transferring the bills to the endorsees, who were his principals. The distinction drawn appears to be that the contract between the endorser and endorsee consists only partly of the endorsation, and is not completed without deli-

very, and that the purpose of delivery may be proved by parole. But it may be said that the contract between the drawee of the bill and the payee is also not completed without delivery if the law of England be as stated in *Abrey* v. *Crux*, and the 100th section bears the construction sought to be put upon it by the defender; it is unfortunate that such wide expressions should have been used in the 100th section as to admit parole evidence in Scotland in cases in which it would not be admitted in England.

"Looking to the importance of the questions raised, I think that the facts should be ascertained before deciding whether the 100th section applies or not. I therefore propose to allow a proof before answer, a course which was sometimes adopted under the former law where it was not quite clear on a suspender's statements whether the facts relied on were such as to entitle him to prove that a bill was an accommodation bill, or that he was not the true debtor on it otherwise than by writ or oath. As there are other matters which the pursuer must admittedly prove, I shall allow a proof in the usual terms, but of course as regards the question of liability on the bills, it lies on the defenders to establish the arrangement averred, and the pursuers will be allowed a conjunct probation to meet the defenders' evidence on the point."

The pursuers reclaimed, and argued—The defender had stated no relevant defence to the action, and were not entitled to a proof of their averments. If they had desired to limit their liability under the bills in question, they could have inserted in the bills a stipulation to that effect as provided for in sec. 16 of the Bills of Exchange Act, but it was incompetent, even in a question with an immediate party to the bill, to contradict the terms of the contract by parole—*Abrey* v. *Crux*, 1869, L.R., 5 C.P. 37. A statute was to be construed *secundum subjectam materiam*—*Regina* v. *Harold*, 1872, L.R., 7 Q.B. 361; *Commissioners of Weir* v. *Adamson*, 1876, L.R., 1 Q.B.D. 546. It was never intended by the 100th section of the Bills of Exchange Act to let in parole evidence to contradict the contract contained in a bill, and to destroy it as a document of debt. The object of the section was merely to remove certain special rules of evidence previously applicable to bills in Scotland—*Brown* v. *Sutherland*, March 17, 1875, 2 R. 615; *Dutton* v. *Marsh*, 1871, L.R., 6 Q.B. 361; Notes to *Thomson* v. *Davenport*, 2 Smith's Leading Cases (9th ed.) 416; *Simpson* v. *Brown*, June 9, 1888, 15 R. 716; *Wilson* v. *Scott*, June 11, 1874, 1 R. 1003.

The defenders argued—The defenders had averred a collateral agreement relevant to the question of liability on the bill, and were entitled to prove the agreement averred—*Thomson* v. *Clubley*, 1836, 1 M. & W. 212; *Brill* v. *Crick*, 1 M. & W. 226. At all events there was here an alleged agreement which might under the old law have been proved by writ or oath, and was now provable by parole under section 100 of the Act of 1882—Bell's Comm. (7th ed.) i. 421. As parole evidence was now admissible in the case of accommodation bills to prove that the acceptor was not liable to the drawer, such evidence was surely admissible to prove that the drawer was not liable to the payee. The alleged agreement operated as an assignation to the pursuers of any rights possessed by the defenders against the drawees.

At advising—

LORD PRESIDENT—On 15th November 1889 the defenders drew a bill on Phipps, Turnbull, & Company, of Melbourne, for £524, 15s. 10d., at ninety days' sight, payable to the pursuers. The bill was presented for acceptance, but acceptance was refused by the drawees, and it was then noted in due form. On 27th March 1890, being the last of the days of grace, it was presented for payment, but payment being refused, it was then protested against the drawers, the present defenders.

In like manner on 28th January 1890 another bill for £186, 17s. was drawn by the defenders on Phipps, Turnbull, & Company, of Melbourne, payable to the pursuers ninety days after sight. The history of this bill was the same as the former bill for £524, 15s. 10d., acceptance and payment having been refused by the drawees, and protest being made in due form.

It is not alleged or suggested by the defenders that the pursuers did not give full value for the bills, and therefore, on the face of each of the bills, the obligation—and the only expressed obligation—is by the drawers to the payees to pay the sums therein specified on the maturity of the drafts.

But the defenders aver that they made an arrangement with the pursuers that the Melbourne house of Phipps, Turnbull, & Company were alone to be liable on any bills discounted by the pursuers drawn by the defenders on them, *i.e.*, the Melbourne house. This is the substance of the second article of the defenders' statement of facts. The third article avers that "numerous transactions were thereafter carried out under this arrangement, amounting in the aggregate to the sum of at least £100,000." If this means that in these numerous transactions the drawees accepted and paid the bills at maturity, that was only in the natural course of business, and nothing more seems to be covered by this averment.

The Lord Ordinary has allowed the parties a proof before answer, notwithstanding that the pursuers contend that the defenders' averments are altogether irrelevant. His Lordship entertains no doubt that prior to the passing of the Bills of Exchange Act such averments could be proved only by the writ or oath of the holder of the bills, but he is of opinion that the 100th section of the statute makes parole proof admissible. I am unable to concur with his Lordship in this construction of the section.

The provision of the 100th section, so far as applicable to the present question, is

that "in any judicial proceeding in Scotland, any fact relating to a bill of exchange," &c., "which is relevant to any question of liability thereon may be proved by parole evidence." But the obligations of the immediate parties to a bill must be in writing, and the allegation of a verbal understanding or arrangement that these obligations shall be subject to conditions not appearing on the face of the bill is an attempt to substitute a different contract from that which is expressed in the written instrument. If it is desired that the usual legal meaning of the words used in the bill should be subjected to some condition, the statute suggests the proper means of effecting that object in section 16, which provides that "the drawer of a bill and any indorser may insert therein an express stipulation negativing or limiting his own liability to the holder." This section is no doubt only a declaration of the common law, but it is none the less valuable on that account, because it shows that the contracts expressed in a bill must receive effect unless they are limited on the face of the bill.

If we were to entertain the contention of the defenders, and their averments were proved, we should then be asked not to limit the liability of some person *ex facie* liable on the bill, but to deny all effect to the written contract contained in the bill, and to substitute therefor a parole agreement directly contradictory of the written contract. By the bill as it stands the pursuers are the sole creditors, and the drawers are the sole debtors. By the verbal contract proposed to be substituted for it, the pursuers are still the sole creditors, but the only debtors are the Melbourne house of Phipps, Turnbull, & Company, with whom under the unaccepted bill the pursuers have no connection, and against whom they have no right of action.

This would involve a delegation, by which the creditor in the unaccepted draft consented to accept a new debtor in place of the drawer, his original debtor. But the original obligation being in writing, no delegation can be effectual which is not also in writing. Delegation is a discharge of the original debtor, but to such discharge the rule must apply, *Eodem modo dissolvitur quo colligatur.*

By the 55th section of the Act "The drawer of a bill by drawing it engages that on due presentment it shall be accepted and paid according to its tenure, and that if it be dishonoured he will compensate the holder or any endorsee who is compelled to pay it, provided that the requisite proceedings on dishonour are duly taken."

This again is a declaration of the common law, and no novelty, and correctly defines the obligation of the drawer at the time of drawing. It shows that the obligation is unilateral, and that the payee has then no debtor under the written instrument but the drawer. But according to the contention of the defenders the written contract may be entirely abrogated and superseded by a verbal agreement which becomes the substitute, and the only substitute, for the written contract.

It seems almost unnecessary to advert to the question how far parole evidence may be admitted to clear the question, *quo animo* the delivery of a bill has been made. But as the Lord Ordinary has apparently attached some importance to the supposed analogy between such a case and the present, it may be as well to point out the essential distinction between the two. No written instrument containing contracts or obligations is complete until it has been delivered, *i.e.*, until the party who is bound by the contract or obligation has transferred the actual possession to another. But delivery, whether of goods or writing, is a matter of fact, and as proof *prout de jure* is admissible to instruct that fact, it seems to follow, of necessity, that the purpose for which the delivery is made may be proved in the same way. But no such proof will vary or affect the contracts or obligations expressed in a written instrument so conditionally or unconditionally delivered.

It has also been suggested that in accommodation bills it was competent to prove before the statute by writ or oath of the party, that the person who stood, *ex facie* of the bill, true debtor was not so in fact, and that under section 100 parole evidence may now be received in place of writ or oath of party. To this I assent. But the case of accommodation bills has no true analogy to the present. If the drawer of such a bill be truly the debtor, and not, as appears on the face of the bill, the creditor, that fact can be proved, and will be given effect to in a question between the true debtor and the true creditor. But this does not alter the contract expressed in the bill. Drawer and acceptor, whatever their true relation in accounting between one another, do not cease to be drawer and acceptor respectively, and liable as such to any *bona fide* holder for value. But if effect were given to the contention of the defenders in the present case, the bill would cease to exist as a document of debt altogether.

I am of opinion that the Lord Ordinary's interlocutor ought to be recalled, and that the pursuers should have decree for the contents of the two bills with interest.

There are other charges comprehended within the conclusions of the summons which may require further inquiry.

LORD ADAM—The amount sued for in this action is £718, 6s. 8d., which is made up of the two bills your Lordship has referred to, and certain other charges on the defenders, the drawers of the bills. These other charges, I understand, are either withdrawn or are to be arranged, and the only question which we have now to dispose of is the liability of the defenders upon the two bills, one for £524, 15s. 10d. dated 15th November 1889, and the other for £186, 17s. dated 20th January 1890.

These bills were drawn by the defenders in favour of the pursuers upon Messrs Phipps, Turnbull, & Company, of Melbourne, the defenders' foreign principals, but in both cases acceptance was refused

by the drawees. We have in the second article of the pursuers' statement, which is not disputed, the history of these bills and how they came to be granted. They say —"Against a shipment of wood pulp to Messrs Phipps, Turnbull, & Company, merchants in Melbourne, the defenders on 15th November 1889 drew a bill on them in favour of the pursuers for £524, 15s. 10d., payable ninety days after sight. The pursuers bought the bill and obtained therewith the bills of lading of said shipment duly endorsed by the defenders." It appears that the price of the goods ordered by the defenders for shipment to Phipps, Turnbull, & Company was paid by the pursuers' cheque, in return for which they got the bill and the shipping orders. That is the mode in which the bills were bought. In other words, it appears that the goods ordered were in fact paid for by the pursuers. Article 2 goes on to say that the bill of exchange was in due course presented for acceptance, but acceptance was refused by the drawees on 24th December 1889, and it was duly noted and protested. The history of the other bill is precisely the same. Now, if the bill for £524, 15s. 10d. had been duly accepted, of course on the face of the bill the pursuers would have had two debtors. They would have had the parties to whom the goods were consigned, and they would have had the defenders, the parties who ordered the goods. But the bill not having been accepted, the only debtors upon the face of the bill that the pursuers have are the present defenders, and of course that is upon the ground that, in the ordinary case, the drawer represents that the drawees will accept the bill, and becomes liable for the amount if they do not accept it. Now, if it be true that the pursuers have entered into an agreement whereby they discharge the defenders entirely from any liability in any event upon this bill, the result is very curious, because it leaves parties in this position, that the pursuers, who are mere bankers—persons who finance bills—and not merchants, and who have nothing to do with the sale of goods, have no claim whatever against Phipps, Turnbull, & Company because there is no contract between them, and are simply left to do the best they can to realise the amount of the goods, while the merchants retire scot free from the transaction and are liable for nothing to anybody. That is the result of the agreement which the defenders maintain they have averred on record. But that is not a probable agreement for bankers to enter into, and if an agreement of so very unusual a nature was averred, I think the defenders were bound to have made it perfectly clear upon record. In statement 1 the defenders refer to a previous similar agreement with the National Bank of Scotland, Limited, but the agreement with which we have to deal is set forth in the second statement and there only. It says—"In 1881 Messrs Phipps, Turnbull, & Company found it desirable to carry out the transactions through a London bank. They therefore, being old customers of and well known to the pursuers, instructed Mr R. Murray Smith, at that time Agent-General in London for the Colony of Victoria, to make similar arrangements with the pursuers to those which had existed with the said National Bank of Scotland, Limited." Then follows the only averment that I can find as to what the agreement was—"This the said R. Murray Smith did, and explained to the pursuers that Phipps, Turnbull, & Company were alone to be liable on any bills discounted by the pursuers drawn by the defenders on them on receipt of the bills of lading endorsed, which the pursuers agreed to." That is the agreement which is averred on this record, and the question is, what is the meaning of it? To my mind it distinctly implies that Phipps, Turnbull, & Company shall have accepted the bills before the agreement comes into operation, because I cannot understand how the pursuers could look to Phipps, Turnbull, & Company as their debtors unless they had first accepted the bills. Until Phipps, Turnbull, & Company accepted the bills there was no liability on their part and no contract between them and the present pursuers. I think, therefore, that it is clearly implied in this alleged agreement that it is to come into operation in the event of the acceptance of the bills by Phipps, Turnbull, & Company. In that event, the pursuers having then got a debtor, were to look to these debtors alone for payment of the bills. Such is my construction of the averment on record, and if it be correct, it is obvious that the agreement alleged does not meet, and was not intended in my view to meet, the case of a bill not accepted by Phipps Turnbull, & Company, which is the case we have to deal with. The averment does not state that in the event of non-acceptance the defenders were not to implement the obligation which they had undertaken by drawing the bill. I am therefore quite prepared to concur in the result at which your Lordship has arrived, on the ground that the averments put by the defenders on record as to this agreement are not relevant, and ought not to be admitted to proof, because even if proved they would not meet the present case, or displace the ordinary liability of the drawer to the payee appearing on the face of the bill. Upon that ground I am prepared to assent to your Lordship's view that decree should be pronounced in favour of the pursuers for the amount of these bills, there being in my view nothing to control the ordinary rules of the liability of a drawer.

But while concurring with your Lordship on that ground, I am not able to persuade myself that your Lordship's construction of the 100th clause of the Bills of Exchange Act is a correct one, and I shall state very shortly where my difficulty lies. Assuming the agreement averred to be that the defenders in no event were to be liable for a bill drawn by them, and supposing that before the passing of the Bills of Exchange Act such an agreement in writing had been produced—in answer say to a charge upon

the bill—I could not have said that it would not have been (to use the words of the Act) a "fact relating to a bill of exchange relevant to a question of liability thereon." I think it would have been a fact most relevant to liability on the bill. If that would have been so before the passing of this Act, then the circumstance that the agreement is not in writing, but is alleged to be verbal, does not make it to my mind a fact less relevant to the question of liability upon the bill. It is only a question of the mode of proof. Such an allegation was perfectly useless before, because it could not be proved, but it was not the less relevant. But it is just here that I think the Act comes in and says, that where such a fact relating to a bill of exchange is relevant, then it may be proved by parole evidence. Such a proof would not have been competent before the Act of 1882, but I think the operation of that Act is to make it possible to prove by parole what formerly could not be so proved I think, therefore, that if the defenders' averment had been what I have assumed, it would under the Act have been proper to send it to proof. It is certainly very anomalous, and against all principle, so far as I can see, that the effect of the written contract on the face of a bill, or of any other written contract, should be taken away by parole evidence, but I cannot get over the fact that the Act of Parliament seems to me to say so. Your Lordship has assented to the proposition that in the case of an accommodation bill, though upon the face of such a bill no doubt the acceptor is liable to the drawer, it would now be competent by parole evidence to show that that was not the true contract between these parties under the bill, but that the true relation between them was exactly the opposite, as formerly might have been shown by writ or oath. I do not think, therefore, that there is anything so very unusual in a party to a bill being permitted to show that the contract on the face of the bill is not the true contract between the parties. The novelty lies in the fact—and I think this is the effect of the Act—that what you could formerly prove only by writ, you can now prove by parole. It is, as I have said, very anomalous that the effect of a written contract should be taken away by parole evidence, but that, I think, is exactly what the Act has done. Why it should have done so I do not understand. I do not know if it was to assimilate our law to the law of England or not, because I do not know what the law of England is on this point. I have the same difficulty as the Lord Ordinary, and I feel how much we are going against principle in this matter, but I cannot get over the express words of the Act of Parliament. And therefore, while I concur with your Lordship on the first ground stated, I cannot concur as to the construction of the Act.

LORD M'LAREN — The 100th section of the Bills of Exchange Act provides that facts relevant to a question of liabilty on a bill or note may be proved by parole evidence. The operation of the section is confined to Scotland, and the section as I think contains internal evidence that it was intended to apply to cases in which the law of evidence as administered in Scotland was different from that of other parts of the United Kingdom. I should not think it consistent with sound construction to interpret such an enactment in a manner which would amount to a subversion of any of the fundamental principles of law which are everywhere recognised and acted upon. Now, the contention of the defender when expressed in plain terms is, that he ought to be allowed to prove a parole agreement that he was not to be bound by his subscription to the bill to any effect. This amounts to a subversion of a fundamental rule of jurisprudence, that a written agreement may not be contradicted by parole evidence; and the proposed interpretation of the section in my judgment involves a large and wholly inadmissible extension of the 100th section, which as I think does not relate to any questions of liability except questions depending on extrinsic and relevant facts.

Under the common law of Scotland facts relevant to a question of liability on a bill or note were in general only capable of being proved by the writ or oath of the holder of the instrument. There can be no doubt that one of the objects of the 100th section was to alter this rule of evidence, and to allow questions as to value, and questions as to the purposes for which bills were endorsed or delivered, to be investigated by parole evidence. The language of the enactment does not suggest to any mind that anything more than this was intended.

In the argument addressed to us it was maintained that as parole evidence would be admissible under the statute to prove that the acceptor of a bill of exchange is not liable to the drawer, such evidence ought also to be admitted to prove that the drawer is not liable to the payee. But, as your Lordship has observed in your opinion which I have had the opportunity of considering, there is no true analogy between the cases; because in admitting evidence of the state of the account between the drawer and the acceptor we do not admit the evidence for the purpose of setting up a contract different from the written contract. This is easily seen. In the case of an unaccepted bill of exchange (which is the present case), the draft amounts to an undertaking on the part of the drawer that the bill will be accepted and paid. In the case of an accepted bill there is also an undertaking on the part of the acceptor that he will pay the sum contained in the bill. By these undertakings the parties are bound absolutely. But it does not appear on the face of the bill what is the nature of the antecedent arrangement between the drawer and the acceptor. The arrangement may be that the acceptor shall give credit to the drawer to a certain extent, and that to the agreed extent the credit may be drawn upon. Or the arrangement may be, that the drawer shall only draw against cash in the acceptor's hands. Either

arrangement is consistent with the purposes for which bills of exchange are granted, and with the form of the instrument; because the bill does not affirm that the acceptor is the drawer's debtor.

Accordingly, where a drawer has paid his bill and is seeking to charge the acceptor, the question of liability generally resolves into an inquiry as to the state of the account between the drawer and the acceptor. Opinions may differ as to the best way of conducting such an inquiry. Under our customary law, evidence was confined to writ or oath. By statute parole evidence is now admissible. But in any case the proof could have no effect in restricting the obligations of the subscribing parties to a holder of the bill for value, and it is therefore distinguishable in principle from the proof which the Lord Ordinary proposes to allow. I concur in the opinion of your Lordship in the chair as to the true principle of construction of the 100th section of the Bills of Exchange Act, and as to the application of that principle to the facts of this case, and it follows that the pursuers are entitled to recover in terms of the bill under deduction of any sum which they may have received out of the proceeds of the sale of the goods.

Lord Kinnear—I agree with all your Lordships that the defenders' statement contains no relevant averments which can be remitted to proof. Their statement as to the way in which the bills in question came to be granted and discounted by the pursuers is clear enough. They say that there had been for fifteen or twenty years a course of business between them and their correspondents in Australia, by which the defenders were in the habit of consigning goods to the Australian firm of Phipps, Turnbull, & Company, and drawing bills upon the consignees which they discounted with a London bank. Then they say that in 1888, in accordance with the ordinary course of transactions, they consigned certain quantities of wood pulp to Phipps, Turnbull, & Company, upon their order. Payment of these they say was made by drafts on the pursuers which were met by bills drawn by the defenders on their principals Phipps, Turnbull, & Company, payable to the pursuers. They go on to say that trade in Australia having turned bad their correspondents there wrote cancelling further consignments, but that before that letter had been received they had despatched two consignments for which they had drawn bills in the ordinary way. They say—"Two consignments, however, one for fifty tons of pulp, and the other for ten tons thereof, could not be cancelled. Payment of these two consignments was made by the pursuers, which payment was made by bills drawn on Messrs Phipps, Turnbull, & Company, and payable to the pursuers in the ordinary way." Then they state the sums contained in these two bills which are the subject of this action. Now, that is an averment that the pursuers gave value to the defenders for these bills. The defenders indeed say in the next article of their statement that they personally received no value; but that is quite inconsistent with the facts as they have themselves stated them, because the import of their statement is that they paid for the goods which they consigned to Australia, and for which it must be supposed upon their statement they were liable to pay by drafts upon the pursuers' bank. That is to say, they paid for the goods with pursuers' money, and granted bills for the amount. The statement is that they drew the bills in question on Phipps, Turnbull, & Company, in favour of the pursuers as payees, and delivered the bills to the pursuers for value. Now, the legal import and effect of bills delivered in these circumstances is beyond all question. The defenders thereby undertook to the pursuers that the drawees Phipps, Turnbull, & Company would accept the bills upon presentment, and pay the amount at maturity; and they further undertook that if the drawees should refuse to accept, or if, having accepted, they should fail to pay, they would themselves pay the pursuers on due notice being given to them. That is undoubtedly their liability upon the face of the bills, and that is the liability which this action has been brought to enforce.

Now, the Lord Ordinary considers the question in his opinion as if the question were, whether it being admitted that there is a relevant averment upon record of an agreement which would displace that liability, the only point he had to consider was whether that relevant averment could be proved by parole, or whether it was necessary that it should be proved by writing, and that is the way in which the case was argued to us. It appears to me that no question of that kind arises upon record, because I am quite unable to find any statement of any fact or any agreement relevant to affect the defenders' liability upon the bills drawn in the circumstances which they have stated. Their statement of the supposed agreement is, I must say, a very unsatisfactory statement as an averment of an agreement to any effect, but I certainly cannot read it as an averment of an agreement which has any bearing upon the question which we are considering. What they say is, that Phipps, Turnbull, & Company thought it desirable to carry out their transactions with this country through a London bank. They therefore, being old customers of and well known to the pursuers, instructed Mr Murray Smith to act as their agent in this matter, and to make with the National Bank of Australasia arrangements similar to a certain arrangement which had previously existed with the National Bank of Scotland. Now, here comes the averment—and the only averment—of any agreement connected with the defenders—"This the said R. Murray Smith did, and explained to the pursuers that Phipps, Turnbull, & Company were alone to be liable on any bills discounted by the pursuers drawn by the defenders on them on receipt of the bills of lading indorsed, which the pursuers agreed to."

Now, as I have observed, I think that is a

very unsatisfactory way of stating an agreement. But there are two things to be observed about it which are extremely material. In the first place, it is not a specific agreement having reference to this particular bill, but it is said to be a general arrangement made verbally to apply indiscriminately to all bills which might be granted in the course of business to extend over several years, and consequently it is an arrangement to which the defenders were no parties. It is not an arrangement made with them, and certainly it does not contain any stipulation to be communicated to them. Now, it would appear to me that if Phipps, Turnbull, & Company had accepted the bills in question, and refused payment of them at maturity, it would be extremely doubtful whether the defenders could found to any extent upon an agreement so alleged to displace their liability upon these bills. The agreement is said to have been made antecedently to any transactions being entered into at all, and it would appear to me to come to this, that the bank are said to have agreed with Phipps, Turnbull, & Company that they would discount bills drawn upon them upon which they alone should be liable. I cannot extract any other meaning from the statement than that. And accordingly it would appear to me that if that agreement had been carried out, and the defenders had drawn upon Phipps, Turnbull, & Company, as they might easily have done in terms which should exclude recourse against them, the agreement would have been carried out if the London bank had discounted these bills. But the agreement was not carried out, because what was done was not to present to the bank for discount any bill which would give effect to that antecedent parole agreement. The Act of Parliament enables that to be done by the provisions of the 16th section, in which it is provided that the drawer of a bill may insert an express stipulation negativing or limiting his own liability to the holder. And therefore there would have been no difficulty in carrying out the supposed agreement if the bank and the defenders had acted upon it. But they did not present such a bill, but, on the contrary, asked the bank to discount for value a bill drawn in ordinary terms containing no restriction or limitation whatever. It would rather appear to me that if that bill had been accepted, and the action had been brought against the defenders as drawers in respect of the drawees' failure to pay, the answer the bank would have made to the defence, which would have been set up in the same terms as now, would have been conclusive, because it would have been obvious, that the whole arrangements had been displaced by written contracts passing between the parties, in the course of carrying out the transactions to which the antecedent arrangement had referred. The defence in that case would have been an attempt to displace the plain legal effect and import of a written contract by antecedent communings, not between the parties to the contract, but between one of them and somebody else. And apart altogether from any difficulty arising on the construction of the Bills of Exchange Act, I should as at present advised have great difficulty in holding that such an averment would have been relevant in an action of the kind I am supposing.

But I agree with Lord Adam that it is unnecessary to consider how an agreement of that kind would have been proved, because that is not an agreement that would go to affect the defenders' liability in this case. The meaning of the bill is that the defender undertakes that the drawer shall accept. Now, it is not alleged that there was any obligation on the part of the bank to discharge the drawers' liability if the defenders refused to accept. It is quite impossible to read the statement of the arrangements that took place between Mr Smith, on the part of the drawers and the London bank as containing any agreement which did not assume that the drawers had undertaken liability upon the bills to which the agreement referred. It cannot possibly import an agreement that Phipps, Turnbull, & Company were to be liable, and were to be exclusively liable upon bills to which they had refused to become parties. But that is the import which we are asked to put upon that agreement. If it did not mean that, it would be quite irrelevant to any question arising in this case. And therefore the defenders' reading of this statement comes to this, that it means that there was a contract between the payees upon these bills and the persons upon whom the bills were drawn, that if those persons should refuse to accept them, the payees should have no action against the drawers to whom they had given value for them. That would be certainly a very singular arrangement, and I agree with what your Lordship has said, that an averment to that effect would not be an averment of any fact or agreement going to vary or modify the apparent liability on the face of the bill, but it would be an averment going to defeat or extinguish the bill altogether, and to set up a totally different verbal contract in its place. And it would be a very strange contract, because, as Lord Adam pointed out, it would come to this, that this bank, which had no concern so far as is alleged on record with any of these transactions, except that it discounted bills in the ordinary course of banking business, would have taken the entire risk of mercantile transactions, the entire profit of which was to go to the merchants, for the meaning of the arrangement, according to the defenders' representation of it, would be this, that the bank was to pay for goods which the defenders were to consign to their Australian agents, and neither the consigners nor the consignees were to be under any liability to the bank in respect of such transactions. Now, it does appear to me hardly necessary to consider how an agreement of that kind could have been proved, because at all events the party founding upon it is, as Lord Adam said, bound to allege it in

perfectly clear and distinct terms; and I find no averment on record to which it is possible in my judgment to give any such effect. And therefore the ground upon which I should be disposed to place my judgment in this case is, that there are no facts averred upon record which are in the least degree relevant to displace the defenders' liability upon these bills, and therefore that there is nothing which should go to proof.

In the view that I take of the case, I confess I do not feel called upon to consider some of the questions which are discussed in the Lord Ordinary's opinion. It appears to me that there may be questions of difficulty on the construction of the Bills of Exchange Act, but I do not feel called upon to consider whether facts or agreements, differing from anything which is averred upon the record, and which, unlike the averments on record, might be relevant if proved—I do not feel called upon to consider whether such facts or agreements could be proved by parole or not, because it is enough for my judgment to say that there is absolutely nothing upon the record that has any relevancy whatever. I therefore concur in the conclusion which all of your Lordships have arrived at.

The Court pronounced this judgment:—

"Recal interlocutor" of the Lord Ordinary: "Find that in the accounting between the parties, the pursuers are entitled to be credited with the amount of the two bills of exchange libelled, with interest: Find the pursuers entitled to expenses since the date of the interlocutor reclaimed against, and remit the account thereof to the Auditor to tax and report to the Lord Ordinary; and remit to his Lordship to proceed in the cause as may be just, with power to decern for the taxed amount of said expenses."

Counsel for the Pursuers—Guthrie Smith—A. S. D. Thomson. Agents—Mitchell & Baxter, W.S.

Counsel for the Defenders—Asher, Q.C. Deas. Agent—George Andrew, S.S.C.

Wednesday, March 18.

FIRST DIVISION.

ROY *v.* TURNER.

Process — Arrestments — Recal of Arrestments—Expenses.

A pursuer who had used arrestments on the dependence of an action for a debt, obtained decree, the defender paid the amount decerned for and expenses, and the pursuer granted a discharge for the amount. The defender then desired the pursuer to withdraw the arrestments by delivery of the execution of arrestment with a discharge thereon, or by sending sufficient intimation to the arrestee. The pursuer demanded as a condition the expenses of using the arrestments. The defender brought a petition for recal of the arrestments and for expenses against the pursuer, who opposed the petition only *quoad* the expenses sought.

Held (*diss.* Lord Kinnear) that as the pursuer was not entitled to the expenses of using the arrestments, so the defender was not entitled to expenses in having the arrestments removed.

On 30th September 1890 an action was raised by Daniel Turner, Solicitor-at-Law, against Henry Roy, Doctor of Medicine, Gladstone Terrace, Edinburgh, for payment of (1) £83, 19s. 3d., (2) £4, 1s. 6d., with interest, and expenses of process. Arrestments were used on the dependence of the action in the hands of the Caledonian Railway to the extent of £200. No defences were lodged, and after sundry procedure the accounts sued for, which were a law-agent's accounts, were remitted to the Auditor for taxation. The Auditor taxed the accounts at £61, 6s. 5d. and £2, 19s. 2d., and judgment was given against Dr Roy for these sums, with expenses of process amounting to £10, 11s. as taxed. Dr Roy paid these various sums to Turner on 9th December 1890, and obtained from him a discharge thereof written on the extract-decree. Roy asked Turner to deliver to him the execution of arrestment with a discharge thereon, or else to write such a letter to the railway company as would render it safe for them to pay to him the arrested funds. Turner demanded as a condition the expenses of using the arrestments.

On 18th March 1891 Roy presented the present petition for recal of arrestments, and prayed, *inter alia*, that Turner should be found liable in the expenses of the petition and of the procedure necessary to get the arrestments removed. Turner lodged answers, but opposed only in so far as expenses were sought against him.

Argued for the petitioner—The respondent was not entitled, as he had been paid in full, to keep this *nexus* upon the petitioner's funds. The petitioner was obliged to apply to the Court to have the arrestments recalled, and he was entitled to recover the cost of this application from the respondent.

Argued for the respondent—The expenses of an arrestment properly and lawfully used, whether on the dependence of an action or on an extract-decree which was successful in attaching funds, was a proper debt against the common debtor, recoverable in an action of forthcoming out of the arrested funds—*Wight* v. *Wight*, May 23, 1822, F.C.; *May* v. *Malcolm*, June 7, 1825, 4 Sh. 79; Mackay's Practice, vol. ii., p. 105. The arresting creditor was not liable in the costs of the proceedings which the debtor might take for getting the arrestments removed.

At advising—

LORD ADAM—This is a petition for the ecal of arrestments used on the de-