Much was made of the absence in the agreement of the term of entry. That does not offer any impediment in law. In the case of an agricultural lease, where no term of entry is specified, the law implies that the following term should be taken. This being a mineral lease, I see no reason why the new adjustment of conditions should not commence at once. I understand that the defenders are willing to take Martinmas 1897 if necessary, which if anything would be more favourable to the pursuer, but that is a matter of detail. On the whole matter I am of opinion that the Lord Ordinary's interlocutor should be recalled, and the action dismissed in respect of the settlement.

LORD YOUNG was absent.

The Court recalled the interlocutor reclaimed against, dismissed the action, and decerned.

Counsel for the Pursuer—H. Johnston, Q.C.—Graham Stewart. Agents—Mylne & Campbell, W.S.

Counsel for the Defenders — W. Campbell, Q.C.—John Wilson. Agents—Davidson & Syme, W.S.

Tuesday, November 28.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

LAMBERTON *v.* AIKEN.

Bill of Exchange — Essentials of Promissory-Note — Sum Certain—Interest—Bills of Exchange Act 1882 (45 *and* 46 *Vict. cap.* 61), *secs.* 9 (1) *a and* 83 (1).

By section 9 (1) *a* of the Bills of Exchange Act 1882 it is provided that the sum payable by a bill is a sum "certain within the meaning of the Act, although it is requested to be paid with interest." By section 83 (1) it is provided that the sum payable under a promissory-note is "a sum certain in money."

The following letter: — "James M'Cracken, Esq.—Dear Sir—We beg to acknowledge having received from you the sum of £250 sterling, and we jointly and severally bind ourselves, our heirs and successors to make payment of this sum together with any interest that may accrue thereon" [Signed through a penny stamp]—*held* not to be promissory-note, on the ground that neither the rate of interest nor the date of payment was specified on the face of the document, and that accordingly the sum payable thereunder was not "certain" in the sense of the Bills of Exchange Act.

This was an action at the instance of Mr William C. Lamberton, secretary and director of Donaldson Aiken & Scott, Limited, shipbuilders, against James Aiken and others, shareholders and directors in that company, concluding for payment by each of the defenders of the sum of £63, 3s. 6d. The pursuer averred that at the end of June 1898, the company being in financial difficulties, he and the four defenders arranged to procure an advance from the bank of the sum of £250 upon their joint and several personal guarantee, and that the following letter of obligation was granted by them to Mr M'Cracken, the agent of a branch of the Clydesdale Bank :—

PI 21/11 98.

Commissioners of Inland Revenue 22, 11 Adjudged Duly Stamped 98.

22 11 £1 Penalty Paid 98.

Adjudication 1709 14 Nov. 98.

(STAMP.) Six Shillings and Three Pence.

Scotland 22 11 98

JAMES M'CRACKEN, Esq., Clydesdale Bank, Moore Place.

"157 West George Street, Glasgow, 1st July 1898.

"Dear Sir,

"We beg to acknowledge having received from you the sum of £250 stg., and we jointly and severally bind ourselves, our heirs and successors, to make payment of this sum, together with any interest that may accrue thereon.—We are, Yours faithfully,

(*Signed through a Penny Stamp.*) J. W. DONALDSON AIKEN. WILLIAM C. LAMBERTON. JAMES AIKEN. ARCHD. SCOTT."

The pursuer further averred that the sum of £250 had thereafter been handed over to him as the secretary of the company, and had been applied by him to the purpose for which it was borrowed; that on the 15th September 1898 he had repaid to the bank the sum borrowed, and that he had not been relieved of payment thereof by any of his co-obligants, the defenders.

The defender James Aiken lodged answers in which he claimed to set off a sum of £80, which he averred he had contributed to the pursuer in order to avoid the liquidation of the company. He averred with respect to the letter of obligation:—"The said document is a promissory-note, and is not stamped as such, nor is it capable of being stamped as such. The document has been after stamped since the present proceedings were commenced, but it has not been properly stamped."

The defender pleaded, *inter alia*—"(4) The said document, dated 1st July 1898, being a promissory-note and not stamped, or capable of being stamped as such, cannot be founded on, and this defender ought to be assoilized.

The Lord Ordinary (STORMONTH DARLING) on 24th May 1899 pronounced an inter-

locutor by which he repelled this plea, and decerned against the compearing defender conform to the conclusions of the summons.

The defender reclaimed, and argued—This document fulfilled all the statutory requirements of a promissory-note, contained in section 9 of the Bills of Exchange Act. It was a unilateral obligation, and no acceptance by the other party to it was necessary. The fact that interest was provided for did not prevent the sum being certain in the sense of the Bills of Exchange Act—see section 9 (1). It was quite possible from an arithmetical calculation to ascertain the specific amount, and accordingly this document was in the same position as those which were held to be promissory-notes in the cases of *Blyth* v. *Forbes*, June 27, 1879, 6 R. 1102; *Vallance* v. *Forbes*, June 27, 1879, 6 R. 1099; *Macfarlane* v. *Johnston*, June 11, 1864, 2 Macph. 1210. The case of *Tennent* v. *Crawford*, January 12, 1878, 5 R. 433, was in a different position, because of the indefiniteness of the rate of interest stipulated for. See definition of promissory-note contained in section 33 of Stamp Act 1891 (54 and 55 Vict. cap.).

Argued for respondent—The Bills of Exchange Act in no way innovated upon the common law. Under the definition clause a document could only be a promissory-note if the sum payable thereunder was "certain;" that was ascertainable on the face of the document. The provision in section 9 with regard to interest was not intended to apply to a case where the amount of interest was not specified, for the amount of both the principal sum and of the interest must be "certain." Here the defender had failed to show what was intended to be the rate of interest under this obligation. It might either be "legal," or "bank" interest. If "bank," it was necessarily fluctuating, and the rate could only be determined by extraneous evidence—*Pirie's Reps.* v. *Smith's Executrix*, February 28, 1833, 11 S. 473; *Morgan* v. *Morgan*, January 20, 1866, 4 Macph. 321; *Tennent* v. *Crawford*, *supra*. In the cases cited by the defender the sums due were easily ascertainable upon the face of the documents. (2) This document fulfilled all the salient requirements of a bond. Moreover, it had been adjudicated on by the Inland Revenue, and treated as a bond, and stamped as such.

LORD ADAM—The only question raised in this reclaiming-note is whether the Lord Ordinary was right in repelling the fourth plea for the defenders. Accordingly, if we agree with the Lord Ordinary on that point we will adhere to his interlocutor *in toto*. The question raised by that plea is whether the document referred to in article 3 of the condescendence is or is not a promissory-note. If it is, it cannot be stamped, and although it has been stamped by the Commissioners of Inland Revenue, that does not bar the defenders from maintaining that it should not be stamped. The document is in these terms — [*His Lordship quoted the document given above*]. The Lord Ordinary has not furnished us with any note of his opinion, but it is stated that his view was that it was impossible on the face of the document to ascertain any certain sum to be payable. I think that view is right. Whether a document be a bill or a promissory-note the law is that it must be for a sum certain, and that sum must appear on the face of the document, but Mr Smith maintained that you could not ascertain on the face of the document what sum was payable, because it did not specify what rate of interest was to be charged—whether, for example, it was to be bank interest or what is called legal interest, and it did not appear when payment would be demanded or what the amount due would then be. It is quite true that it does not appear on the face of the bill what rate of interest is to be paid—whether legal or bank interest. One can form conjectures as to what the parties intended, looking to the nature of the transaction, but one cannot be certain. Mr Guy says that a change was made by the Act of 1882 upon the previous law, and that it is sufficient if the principal sum due is certain whether the amount of interest is ascertained or not. In support of that contention he quotes section 9 of the Act, but as I read that section it means no more than that a "certain" sum may be made up partly of principal and partly of interest.

LORD M'LAREN—I am of the same opinion. The leading provision in the Bills of Exchange Act as to the sum payable under a promissory-note is that it is to be "a sum certain in money," and we are referred back to the sections dealing with bills of exchange, from which it appears that a bill does not cease to be such merely because it contains a stipulation for the payment of interest. Reading these enactments together, it is plain that the interest must either be ascertained in gross on the face of the document, or it must be capable of being ascertained by numerical calculation from materials contained in the document. This would be the case where the document in question specifies the rate of interest and the date of payment, for then it would only be necessary to multiply the rate of interest by the number of days in order to ascertain the amount of the interest due. In the case of a document payable on demand and containing a specified rate of interest, the question is a more difficult one, because the date of payment is not specified, and in order to make the sum certain it would be necessary to go outside the document and supply the date.

In this case there is no rate of interest specified, and the obligation is to make payment on demand of a certain sum "together with any interest which may accrue thereon." It is customary for bankers in their contracts with their customers to regulate the rate of interest payable from time to time by notice, and I think that the obligation here is to pay the overdraft rate of interest as varied from time to time. In my view it is uncertain on the face of the document what the rate of interest is to be during the period for

which the debt is current, and the fact that the creditor can supply materials for ascertaining the sum by making a demand and specifying the rate of interest cannot alter the character of the instrument.

I agree with your Lordship that this is not a promissory-note, and that the objection founded on the want of a bill-stamp is not well founded. Whether it is a bond or not is a matter we cannot determine at the present stage; that would be a question for the Lord Ordinary to determine, but that (as I understand) it is not intended that the case should be further proceeded in.

LORD KINNEAR—I quite agree with your Lordships. The question seems to be merely whether an obligation to pay "any interest"—that is, any amount of interest—which may be found to be due, without any specification of the rate or character of the interest or of the date to which it is to run, is or is not an obligation to pay a definite sum, and I am quite clearly of opinion that it is not an obligation to pay a definite sum at all, because no one can tell what the sum due will be until it is decided what the rate of interest is and between what dates it is to be calculated. It is not disputed that under the authority of the decided cases an obligation in the same terms as the document we are considering would not be a promissory-note or bill, but it is said that the Bills of Exchange Act of 1882 changes all that and makes it a good bill for a certain sum. I cannot so read the statute. All that it says is, that a bill is an unconditional order for a sum certain in money, and that if it includes interest that fact alone does not prevent it being considered a bill for a certain sum. But before the date of the Act it was quite possible that a bill should be expressed to be payable with interest, and yet that the whole amount due might be clearly ascertainable on the face of the bill, and the statute seems to me to provide nothing more than that if a bill is expressed to be payable with interest, that alone will not prevent it from being a bill for a sum certain in the sense of the statute if it is for a sum certain in fact.

That is a perfectly simple case, because, for example, a promise to pay £100 twelve months after date with interest at the rate of five per cent. per annum is just as clearly a promise for a definite sum as if it had been to pay £105 twelve months after date. A sum is not the less certain because it includes interest if the amount of the interest as well as of the principal is clearly ascertainable on the face of the instrument. And therefore I see nothing in the clause founded on to alter the primary condition that a bill must be for a sum certain.

I quite agree that if we had been of a different opinion, and thought the document required to be stamped as a promissory-note, we should not have been entitled to look at it, notwithstanding that it has been passed by the Commissioners. The question is one for the Court to decide.

The Court adhered.

Counsel for the Pursuer—Clyde—A. D. Smith. Agent—William Cowan, W.S.

Counsel for the Defender—Baxter—Guy. Agent—A. C. D. Vert, S.S.C.

Tuesday, November 28.

SECOND DIVISION.

MOON'S TRUSTEES *v.* MOON.

Succession — Trust — Thellusson Act — 39 *and* 40 *Geo. III. c.* 98 — *Accumulations—Children's Portions—Testate or Intestate Succession — Heritable or Moveable —Conversion.*

A testator conveyed his whole estate, heritable and moveable, to trustees, whom he directed to pay certain annuities, and after meeting these annual payments "to accumulate the balance of revenue of my estate until the death of my said wife," when they were to realise the whole estate and dispose of the proceeds as follows:—(1) to hold certain provisions for his daughters in liferent and their children in fee; (2) to pay certain provisions to his sons; and (3) "to hold and invest the residue and remainder of my means and estate, and accumulations of revenue (if any) for behoof of my sons . . . and of my daughters . . . equally in liferent, for their respective liferent uses allenarly, and their respective children in fee. . . . The testator was survived by his widow and all his children, but his eldest son died a few years afterwards. The trustees administered the estate, and exercised some of the powers conferred upon them—*inter alia*, power to sell heritage—and they paid the various annual sums directed by the testator to be paid, and accumulated the surplus revenue. Twenty-one years after the testator's death his widow was still alive, and questions having arisen with regard to the trustees' power to accumulate further surplus revenue, and with reference to its disposal, a special case was presented to the Court, in which *held* (*diss.* Lord Young) (1) that the purpose for which the trustees were directed to accumulate surplus revenue was not "for raising portions for any child or children of" the granter in the sense of the Thellusson Act; (2) that accordingly the accumulation of surplus revenue beyond twenty-one years after the testator's death was struck at by that Act; (3) that there being no present gift of the capital from which the surplus revenue arose, the same fell into intestacy; (4) that the exercise of the power of sale by the trustees had not operated conversion of the said capital; (5) following *Hamilton's Trustees* v. *Boyes*, 36 S.L.R. 973, that the widow was entitled to terce out of the surplus revenue so far as derived from heritage or the proceeds of herit-