Wednesday, June 28.

SECOND DIVISION.

[Sheriff of Lanarkshire at Glasgow.

MANCHESTER AND LIVERPOOL DISTRICT BANKING COMPANY, LIMITED *v.* ALEXANDER FERGUSON & COMPANY.

Bill of Exchange—Agreement Qualifying Obligation on the Bill—Proof—Parole—Competency—Bills of Exchange Act 1882 (45 *and* 46 *Vict. cap.* 61), *sec.* 100.

In defence to an action brought by the endorsees of a bill of exchange against the drawer and acceptors for payment, the defenders averred that the pursuers had obtained the bill under a verbal agreement that payment should not be demandable until "sufficient" working capital had been raised by a certain limited company to repay an advance in security of which the bill was granted, and that the working capital had not yet been raised. *Held* that the defenders' averments were not of such a nature as to entitle them under section 100 of the Bills of Exchange Act 1882 to be remitted to proof.

The Bills of Exchange Act 1882 (45 and 46 Vict. cap. 61) enacts, section 100—"In any judicial proceeding in Scotland, any fact relating to a bill of exchange . . . which is relevant to any question of liability thereon, may be proved by parole evidence." . . .

An action was raised in the Sheriff Court at Glasgow by the Manchester and Liverpool District Banking Company, Limited, against Alexander Ferguson & Company, 106 and 108 West Regent Street, Glasgow, and Alexander Ferguson and W. Bruce Mount, the partners thereof, as such partners and as individuals, in which the pursuers sought to recover a balance due, after deducting certain payments to account, under a bill of exchange for £500, dated 15th February 1904, drawn by Alexander Ferguson and accepted by Alexander Ferguson & Company, payable three months after date. The bill had been endorsed by the drawer to the Industries Development Company, by whom it was endorsed to the pursuers.

The defenders in their statement of facts, as amended in the Court of Session, averred —"(Stat. 1) The bill for £500 condescended upon is part of an original bill, dated 28th January 1902, amounting to £2500, drawn by The Industries Development Company, Limited, London, on and accepted by the defender Alexander Ferguson in connection with an advance believed to have been made by the pursuers to" (a certain limited company owning a gold mining property) "to enable it to pay off a debt. The arrangement made at the time the advance was given was that the advance was to be repaid from the working capital which said company were to raise so soon as the state of the mining market would allow of their doing so successfully. This company, however, was not successful in raising said working capital, and its assets and debts were subsequently taken over by The Industries Development Company, Limited, aforesaid. This latter company having failed also to raise sufficient working capital to repay said advance, an agreement was come to between the pursuers, the Industries Development Company Limited, and the defender Alexander Ferguson, that the last-mentioned defender should give his guarantee to the pursuers in connection with said advance, which it was arranged should not be enforced until said working capital had been raised. . . . (Stat. 2) The said original bill for £2500 was in terms of said agreement renewed from time to time until the beginning of 1903, when the pursuers asked for an additional name to said bill by way of further security, and the said defenders Alexander Ferguson & Company agreed to give two bills dated 3rd February 1903 for £2000 and £500 respectively, which were to be renewed from time to time on the condition, agreed to by the pursuers, that payment of said advance was not to be demandable until said working capital had been raised to pay off same. The bill of which the sum now sued for is part was the last renewal so granted on 15th February 1904 for £500. The bills so far as cancelled, and a statement showing the whole bill transactions, are produced. Said agreement above condescended on was made on or about 3rd February 1903 at the pursuer's London office between Thomas Ferguson, their London manager, and Mr David Philip, S.S.C., on behalf of the defenders."

The pursuers denied the alleged agreement, and pleaded—"(1) The defenders' statements in answer are irrelevant."

The defenders pleaded—"(4) The bill founded on having been accepted by the pursuers on condition that they were not to ask payment until working capital had been raised by the Industries Development Company Limited, and that capital not having been raised, the defenders should be assoilzied."

On 2nd February 1905 the Sheriff-Substitute (BALFOUR) repelled the defences as irrelevant, and granted decree in terms of the prayer of the petition.

Note.—. . . "The defenders founded upon the 100th section of the Bills of Exchange Act, providing that any fact relating to a bill of exchange which is relevant to any question of liability thereon may be proved by parole evidence. The cases which have been decided with reference to the construction of that section are *The National Bank of Australasia* v. *Turnbull & Company* (18 R. 629), *Gibson's Trustees* v. *Galloway* (23 R. 414), and *Drybrough & Company* v. *Roy* (5 F. 665). It is unnecessary to go into the details of these three cases, but the outcome of them is this, that where the defender makes an averment that the bill was to be renewed when due, and from time to time thereafter until he should be in a posi-

tion to repay it, the defender was not entitled to a proof of the averment, for if the agreement meant that the defender was not bound to pay the principal sum but an annuity, it contradicted the written obligation; but, on the other hand, it was held in *Drybrough's* case that if the defender averred that the bill was to be renewable for a definite time, it was a relevant defence under the 100th section of the Bills of Exchange Act. In the present case it is not averred that the bill was to be renewed for any definite time." . . .

On appeal the Sheriff (GUTHRIE) adhered on 28th March 1905.

The defenders appealed to the Court of Session, and argued—The intention of parties to the agreement condescended on was that liability should emerge only if no working capital was ever raised. The defenders were entitled to an opportunity of proving their averments—Bills of Exchange Act 1882, section 100; *Drybrough & Company, Limited* v. *Roy*, March 17, 1903, 5 F. 665, 40 S.L.R. 594; *Viani & Company* v. *Gunn & Company*, July 14, 1904, 6 F. 989, 41 S.L.R. 822. The case of *Gibson's Trustees* v. *Galloway*, January 22, 1896, 23 R. 414, 33 S.L.R. 322, did not affect the present question. Even an averment that there was to be no liability might be proved —*National Bank of Australasia* v. *Turnbull & Company*, March 5, 1891, 18 R. 629, 28 S.L.R. 500.

Argued for the respondents—The defenders' averments were irrelevant; they could not have been proved by writ or oath prior to the passing of the Act of 1882, and they could not be proved by parole evidence under section 100 of that Act—*Gibson's Trustees* v. *Galloway, cit. sup.*

LORD KYLLACHY—Some of the cases on this subject have gone very far, but in this case we are asked to go further than has ever yet been proposed. We are asked to send to proof an averment of a mere verbal agreement to the effect that the sum in a certain bill should not be demandable and that no liability of any kind should arise on the bill until "sufficient" working capital should have been raised by certain limited companies; it is not said what was the amount of the working capital which was to be raised or to be held sufficient. Nor, as regards the time within which it was to be raised, is there any mention of any time. For all that appears it might be the Greek Kalends. Now, these are not in my opinion averments which could have been remitted to probation by writ or oath under the old law, or which in any view of the meaning of the 100th section of the Bill of Exchange Act can, in my opinion, be remitted to proof now.

LORD JUSTICE-CLERK, LORD KINCAIRNEY, and LORD STORMONTH DARLING concurred.

The Court dismissed the appeal and affirmed the interlocutor appealed against.

Counsel for the Pursuers and Respondents — Cullen — MacRobert. Agents — F. J. Martin W.S.

Counsel for the Defenders and Appellants — A. J. L. Laing. Agent — R. Ainslie Brown, S.S.C.

Wednesday, June 28.

FIRST DIVISION.

HEDDLE *v.* MELROSE-DROVER, LIMITED.

Bankruptcy — Process — Appeal — Petition for Discharge—Printing—Caution.

A bankrupt, whose petition for discharge had been refused by the Sheriff, which refusal was affirmed on appeal, presented, not quite a year later, a new application which the Sheriff refused as incompetent. The bankrupt appealed, and presented his appeal in April 1905, but took no steps to prosecute it, although requested by the respondents in the appeal on two different occasions to do so. On 28th June 1905 the respondents lodged a note to have the appellant ordained (1) to print and box the appeal and other documents, and (2) to find caution for expenses.

The Court *ordained* the appellant to print and box the appeal, but *refused* the prayer of the note *quoad* finding caution for expenses.

This was a note to the Lord President for Melrose-Drover, Limited, incorporated under the Companies Acts 1862 to 1898, and having their registered office at 17 Mitchell Street, Leith; James Heddle & Company, wholesale wine and spirit merchants, Mitchell Street, Leith; and George Bird, C.A., Edinburgh, trustee on the sequestrated estate of James Heddle, residing at 1 James Place, Leith, the respondents in the appeal at the instance of Mr Heddle referred to below.

On 12th April 1905 the Sheriff-Substitute of the Lothians (GUY) pronounced the following interlocutor in a petition by Mr Heddle for his discharge in his sequestration — "The Sheriff-Substitute . . . Finds that it is admitted by the petitioner (1) that he presented a petition for his discharge to this Court on 24th March 1904, averring that no dividend had been paid to his creditors, but that his failure to pay five shillings in the pound had arisen from circumstances for which he could not justly be held responsible; (2) that in that petition the Sheriff-Substitute by interlocutor dated 4th May 1904, and after having heard the petitioner and the agent for the said Melrose Drover, Limited, James Heddle & Company, and the trustee . . . found that the petitioner had failed to prove that the failure to pay a dividend of five shillings per pound out of his estate had arisen from circumstances for which he could not be justly held responsible, and therefore refused the petition and dismissed the