presentment to the person bound to pay rather than presentment at a particular place. Presentment and protest made in the creditor's own office was not looked upon favourably by the law. See *Bartsch* v. *Poole & Company*, December 18, 1895, 23 R. 328.

Argued for the pursuer and respondent—(1) Section 94 of the Bills of Exchange Act of 1882 was intended to apply to cases in which a protest was required for other purposes than summary diligence. "Authorised or required" meant authorised or required by the Act, as in sections 51 and 67. This interpretation gave quite sufficient effect to section 94 without bringing it in to revolutionise, as it would, the law of summary diligence in Scotland, which in terms of section 98 was not to be altered or affected by the Act. If a protest by a householder under section 94 was to be sufficient for purposes of summary diligence, then where the statement that a notary could not be obtained was denied, as here, extraneous proof would be necessary, and it was a cardinal principle of the law of summary diligence on bills that it was not competent where any extraneous evidence was necessary to support it—*Smith* v. *Selby*, July 10, 1829, 7 S. 885; *Fraser* v. *Bannerman*, June 21, 1853, 15 D. 756. (2) Apart from this question, however, the protest was bad, because it was not made at the place where the note was dishonoured—Bills of Exchange Act 1882, section 51 (6). Section 94 only applied when a notary could not be obtained at the place where the bill was dishonoured, which in this case was Bradford, where it was not maintained there was any want of notaries.

LORD JUSTICE-CLERK—I think that there is no very substantial difficulty in this case. This bill was payable at Bradford. It was noted there, but no protest was extended. The place of payment is the place where the acceptor undertakes to pay. The case of *Poole*, 23 R. 328, does not seem to me to have any bearing. The ground of decision in that case was that it was not stated in the protest that the debtor could not be found. If the debtor fails to make provision for the payment of the bill at the place where he undertakes to pay, the creditor may note the bill and take a protest there. Here no such thing was done. The creditor says that he took a protest at Millport. It appears to me that the bill was dishonoured at Bradford, and should have been protested there. With respect to the protest taken at Millport by a householder, it is said that a notary was not available there, and that consequently under the Act the protest might be effected through a householder. That question, however, does not really arise here, for Millport was not the place where the bill was dishonoured. I am therefore of opinion that the Lord Ordinary's judgment is right.

LORD YOUNG concurred.

LORD TRAYNER—Whether summary diligence may proceed according to the law and practice of Scotland, upon a protest made by a householder under the 94th section of the Bills of Exchange Act 1882, is a question which it is not necessary here to decide. I agree with the Lord Ordinary in thinking that the cessio proceedings in question must be set aside, in respect that the diligence on which these proceedings followed was inept. The bill for £30 granted by the pursuer to the defender was made payable at Bradford. On maturity it was there presented for payment and dishonoured, and the presentation and dishonour were noted on the bill by a notary-public in the usual way. If that notary's protest, so noted on the bill, had been extended and diligence done upon it, no question could probably have arisen. But instead of that the defender proceeded to present and protest the bill *de novo* at Millport, where the pursuer was at the time, and this protest was made by a householder under section 94, already referred to. Now, protest by a householder instead of by a notary is only allowed "where the services of a notary cannot be obtained at the place where the bill is dishonoured." The bill in question was dishonoured at Bradford, where a notary's services could have been obtained, and therefore the permission given by the Act to substitute a householder for a notary was not one of which the defender could in the circumstances avail himself. I think, therefore, as I have said, that the defender's diligence was inept, and could not validly be used as a ground for cessio proceedings against the pursuer.

LORD MONCREIFF concurred.

The Court adhered with additional expenses.

Counsel for the Pursuer—Sym—Cochran-Patrick. Agent—Andrew White, W.S.

Counsel for the Defenders — Balfour, Q.C. — Craigie — Bartholomew. Agent—James Russell, S.S.C.

Friday, February 4.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

RENISON *v.* BRYCE.

Proof—Contract—Admissibility of Extrinsic Evidence in the Construction of Writings—Ambiguity—"Proposed Company."

A offered to assign his rights in a business carried on by him to B, or B's nominee, in consideration of B's paying to him £500, and allotting or having allotted to him shares in a "proposed company" to be promoted by B to the extent of £1750 in preference shares of £1 each, and bearing interest at 7½ per cent. This offer was accepted by B. There was nothing in either the offer or the acceptance to show what the capital

of the proposed company was to be. Thereafter a company was formed and registered by B, with a capital of £10,000. A refused to transfer his business to this company, and in an action by B to have him ordained to do so, averred that it was agreed between him and B that the capital of the "proposed company" should not exceed the sum of £5000. *Held* (*rev.* the Lord Ordinary) that A was entitled to a proof of this averment.

This was an action at the instance of John Renison, golf club manufacturer in Glasgow, against Andrew Stewart Bryce jun., golf ball manufacturer there, in which the pursuer concluded for decree ordaining the defender to implement and fulfil a contract for the sale of the defender's business, or alternatively for damages.

The pursuer founded upon two letters, which were as follows:—"Bellvale Chemical Works, Glenpark Road, Glasgow, 1st Dec. 1896.—Mr John Renison, 70 Dobbie's Loan.—Dear Sir,—Referring to our conversation regarding the business of the Bellvale Chemical Coy., I beg to make you the following offer, viz.—In consideration of your paying me the sum of Five hundred pounds sterling (say £500), and allotting or having allotted to me shares in your proposed limited company to the extent of Seventeen hundred and fifty pounds in preference shares of one pound each, fully paid up, and bearing interest at the rate of seven and one-half per cent. (say 7½ %), I hereby offer to assign to you or your nominees, my right, title, and interest in the afore-mentioned concern, including all plant, machinery, fixtures, patent rights, and stock-in-trade, together with the goodwill, conform to inventory sent herewith. I agree to transfer the above to you on payment of the afore-mentioned sum of Five hundred pounds, and Seventeen hundred and fifty pounds in shares; and I bind myself to transfer the assets as referred to here free of all liability. I am the sole proprietor, and this offer is binding upon me until the fifteenth day of January Eighteen hundred and ninety-seven (1897). As I am meantime working up the raw material in stock, it must be distinctly understood that you pay all charges for rent, wages, etc., incurred from this date until date of transfer, you getting all goods manufactured from the said raw material.—I am yours truly, The Bellvale Chemical Coy., A. S. Bryce jr."

"A. S. Bryce junior, Esq., Bellvale Chemical Works, Glenpark Road, Glasgow. —*Registered.*—145 St Vincent Street, Glasgow, 14th January 1897.—Dear Sir,—I am instructed by Mr John Renison, of No. 70 Dobbie's Loan, to accept on his behalf, as I now do, your offer to him of 1st December 1896, to sell, assign and transfer the business of the Bellvale Chemical Company, of which you are the sole proprietor, and that upon the terms and conditions therein set forth. The company which Mr Renison is forming will be registered to-morrow, and I am desired to ask you to send to me a statement with respect to the raw material which you stated in your offer you were working up, so that the charges incidental thereto may be adjusted, and the settlement with you may be carried through without delay. You might kindly send me the papers relating to the patents that I may prepare the assignations.—Yours truly, Jas. Cunningham." Mr Cunningham was a writer in Glasgow."

The pursuer set forth these letters, and averred as follows:—"(Cond. 5) The company contemplated by the parties and referred to in the missives was registered under the name of the 'Golfers' Supply Company, Limited,' on 20th January 1897. The pursuer thereafter called upon the defender to implement his bargain. He was ready and willing, as he informed the defender, to fulfil his counterpart. He is still willing and ready to do so. He offered the defender payment of the price stipulated, viz., £500 in cash and £1750 in preference shares of £1 each fully paid up, bearing interest at the rate of 7½ per cent. in the limited liability company formed by him, which was registered on 20th January 1897, and is now carrying on business. The defender has, however, intimated to the pursuer that he does not intend to carry out his bargain. The pursuer has since frequently pressed the defender to do so, but he refuses or delays to carry it out, and the present action has therefore been rendered necessary."

The pursuer also averred that the capital of the proposed company was from the beginning of the negotiations stated at £10,000.

The defender in his statement of facts averred, *inter alia*—"(Stat. 3) It was expressly agreed between the pursuer and the defender that in the event of the proposed transaction being carried out, the capital of the company proposed to be formed should not exceed £5000, that the working capital of the company should be £1500 or thereby, and that the pursuer should not receive in cash more than £100, and that to be for the formation expenses. It was also agreed between the parties that the company should be registered, and the capital provided for by the 15th January 1897, and that the defender's offer should fall in the event of the company not being registered, and the cash stipulated for by him not being paid, and the shares stipulated for him not being allotted or handed to him on or before said date. (Stat. 5) The pursuer failed to hand over to the defender the cash and shares stipulated for by said 15th January 1897. (Stat. 6) The defender believes and avers that a limited company has been formed on an entirely different basis from that agreed upon by the pursuer and defender. The memorandum and articles of association of the company which has been formed are dated 18th January 1897, and the company was registered on 20th January 1897. The capital of the company formed is £10,000, divided into 9500 preference shares and 500 ordinary shares of £1 each, and the shares in the said company referred to by the pursuer

are consequently not the shares, nor are they of the value, stipulated for by the defender. The pursuer was not, on or before 15th January 1897, and is not yet, in a position to tender to the defender shares in the company referred to in the defender's offer of 1st December 1896, or to fulfil his part of the alleged contract."

The defender pleaded, *inter alia*—"(5) No binding contract having been made between the pursuer and defender, the defender ought to be assoilzied. (6) The pursuer not being able to fulfil his part of the alleged contract, the defender ought to be assoilzied. (7) The pursuer being in breach *in essentialibus* of the said alleged contract, the defender is not bound thereby, and ought to be assoilzied with expenses."

On 8th December 1897 the Lord Ordinary (STORMONTH DARLING), after hearing counsel in the procedure roll, issued the following interlocutor:—"Finds that the contract founded upon in the summons was concluded by the missives set out on record, and in respect thereof decerns against the defender conform to the conclusions of the summons for implement, continues the cause, and grants leave to reclaim."

Opinion.—"The pursuer here sues for implement of a contract for the transfer to him of the defender's business as a manufacturer of golf balls in Glasgow, and failing implement for damages. At first the summons and condescendence were defective in asking performance of the defender's part of the contract without tendering performance of the pursuer's part. This, however, has been rectified by amendment, and the question now is, whether the offer and acceptance set out on record disclose a completed contract, or whether there is any room for inquiry.

"The missives are precise in their terms, and the acceptance exactly meets the offer without introducing any new term. The subject of the sale is defined, and the price, so far as payable in money, is fixed at £500. But in addition to that sum the defender was to receive preference shares of £1 each, fully paid up, and bearing interest at the rate of 7½ per cent, in a limited company to be formed by the pursuer. The defender pleads that this was an insufficient ascertainment of the price, because the capital of the company and the proportion between ordinary and preference shares were not stated. He further says that it was agreed between him and the pursuer, although not stated in the missive, that the capital of the company should not exceed £5000, whereas the capital of the company which has actually been formed is £10,000.

"The answer to that I think is, that if the defender attached importance to the capital of the company being limited to £5000,' he ought to have stipulated to that effect in his offer, and that by not doing so he left a certain latitude to the pursuer in the formation of what the offer called 'your proposed limited company.' I do not say that if the company as formed had been widely different from that which was proposed at the time the missives were exchanged, the defender could have been held to his offer. But the defender's case is very far from alleging anything like wide divergence between the one and the other. So far as the rule of law is concerned requiring the price in a contract of sale to be ascertained or ascertainable, I think it is amply satisfied by the number of the shares, their denomination, and the rate of interest on them being specified.

"The only other point which the defender attempted to make was that the company, which was registered on 20th January 1897, ought to have been registered five days sooner. But there is no stipulation to that effect in the missives; there is only the expression of a hope.

"I therefore see no room for a proof, and I think the pursuer is entitled to decree of implement *de plano*."

The defender reclaimed.

The argument sufficiently appears from the opinions of the Lord Ordinary and the Court.

LORD JUSTICE-CLERK — The defender's case is that he never agreed to take shares in the company actually formed by the pursuer, and that his offer to take shares in "your proposed limited company," did not refer to the company formed. I think no one would admit that it did not matter whether or not the capital were twice as large as the capital of the company which he understood was the "proposed company," yet that was the pursuer's argument to us.

I think the defender must be allowed an opportunity of proving that after the letter which he wrote referring to the "proposed company," the capital of that actually formed was doubled.

LORD YOUNG—The Lord Ordinary has given his opinion on the assumption that the defender's statement is true. He thinks it is immaterial. I cannot assent to that, and I think that there must be a proof.

LORD TRAYNER—I think that the Lord Ordinary scarcely gives due weight to the fact that while the offer and acceptance meet and square with one another, they relate to a matter which is itself left in doubt. They do not say what company the proposed company is, nor what is the amount of the capital, nor what is the distribution of the capital into shares. The respective writers of the offer and acceptance had previosuly conferred about these matters and understood them, as I suppose, at the time. But since they now differ as to these matters, there must be proof to ascertain what is the true state of the facts. The pursuer does not seek a proof, and takes his stand on the offer and acceptance. I think that we ought to allow a proof to the defender, and to the pursuer a conjunct probation.

LORD MONCREIFF—I agree. The burden will be on the defender. Unless he can show that the capital of the proposed company was not to be more than £5000, as he avers, he will not succeed.

The Court recalled the Lord Ordinary's interlocutor, and allowed the defender a proof of his averments, and to the pursuer a conjunct probation.

Counsel for the Pursuer—M'Clure. Agent—Andrew Gordon, Solicitor.

Counsel for the Defender—Guy. Agents—Graham, Johnston, & Fleming, W.S.

Saturday, February 5.

FIRST DIVISION.

THE WESTERN RANCHES, LIMITED *v.* NELSON'S TRUSTEES.

Process — Proof — Evidence (Scotland) Act 1866 (29 *and* 30 *Vict. cap.* 112)—*Act of Sederunt, February* 16, 1841, *sec.* 17—*Commission.*

Instance of application of the rule laid down in *M'Lean & Hope* v. *Fleming*, March 9, 1867, 5 Macph. 579, that the names of all witnesses whom a party proposes to examine on commission must be specified, and that, unless dispensed with of consent, interrogatories must be adjusted.

Process — Proof — Act of Sederunt, February 16, 1841, *sec.* 17 — *Commission to Examine Witness Resident Abroad.*

Commission *refused* to examine a witness resident in the United States, who, although not a party to the cause, "occupied a position of unique importance" in the question at issue.

The Western Ranches, Limited, presented a petition under the Companies (Memorandum of Association) Act 1890 (53 and 54 Vict. cap. 62) for confirmation of alteration of their memoradum of association.

Mrs Kemp or Nelson and others, trustees of the late Thomas Nelson, lodged answers to the petition, and after a report by Mr. Charles Logan, W.S., to whom the petition and answers had been remitted, the Court on 20th October 1897 allowed the petitioners a proof of their averments and the respondents a proof of their answers.

On 23rd November the petitioners presented a note craving the Lord President to move the Court to grant commission to Henry J. Sheldon, Chicago, to examine certain named witnesses in the United States and "such additional witness or witnesses as the petitioners may find it necessary to examine."

The petitioners averred that the witnesses to be called by them, so far as resident in the United States, would not be in this country at the date of the proof, and that consequently the petitioners would be deprived of their testimony if a commission were not granted.

Among the named witnesses was Mr John Clay junior, Chicago, senior partner of the firm which acted as agents for the company in America. The respondents averred in their answers that the proposal to alter the memorandum of association emanated from the said firm, and this was not denied by the petitioners.

The petitioners further suggested that interrogatories should be dispensed with.

The respondents objected to the note, and relying on the case of *M'Lean & Hope* v. *Fleming*, March 9, 1867, 5 Macph. 579, submitted (1) that all the witnesses proposed to be examined must be named; (2) that interrogatories must be adjusted; and (3) that Mr Clay's examination should take place before the Court of Scotland, he being, if not the true *dominus litis*, at least the most important individual concerned in the case.

The respondents referred to the Evidence Act 1866 (29 and 30 Vict. cap 112), and to the Act of Sederunt, February 16, 1841.

Section 17 of the said Act of Sederunt provides that "when it shall be made out upon oath to the satisfaction of the Court that a witness resides beyond the reach of the process of the Court and is not likely to come within its authority before the day of trial, or cannot attend on account of age or permanent infirmity, or is labouring under severe illness which renders it doubtful whether his evidence may not be lost, or is a seafaring man, or is obliged to go into foreign parts, or shall be abroad and is not likely to return before the day of trial, it shall be competent to examine such witnesses by commission on interrogatories to be settled by the parties, and approved of by one of the principal Clerks of Session."

LORD PRESIDENT—The question of the names of witnesses and also the question of dispensing with interrogatories are decided by the case of *Hope*, and accordingly it seems to me to be quite clear that we cannot in the face of opposition dispense either with names or interrogatories.

The papers in the case, as well as the statement made at the bar, show that Mr Clay occupies a position of unique importance in this question, and it seems to me that sufficient cause is not shown for his being examined on commission.

LORD ADAM—I concur.

LORD M'LAREN—I am of the same opinion. As regards the point of dispensing with interrogatories, I think it has been a matter of settled practice ever since I was a member of the bar that the Court never dispense with interrogatories except of consent.

LORD KINNEAR—I concur with your Lordship.

On 5th February 1898 the Court granted commission at the instance of the petitioners to the Hon. E. A. Otis, Chicago, "to take the oath and examination and receive the exhibits and productions of the following material witnesses for the petitioners in regard to the matter at issue between the parties" [here followed the names of five witnesses, Mr Clay's not being among them], "and appoint the examination to proceed upon interrogatories adjusted at the sight of the Clerk of Court."