LORD ADAM—The Lord Ordinary has allowed a proof. We are asked by the defender to take the case on the footing that it is the case that at the pursuer's entry the fences round the plantations were sufficient to keep out sheep, that they are not so now, and that in consequence sheep get into the plantations and have to be driven out by men and dogs. On these admissions we are asked to deal with the case without a proof. I think the case does raise a question of law which can be decided without proof. That question is whether the defender is under an obligation to the pursuer to keep up the fences round the plantations. It is not alleged that the landlord has done anything, but only that he has let the fences fall into disrepair. The question is, whether in a case like this, where a mansion-house is let along with the right to shoot over the estate, there is an obligation upon the landlord to keep up the fences all round the plantations. It is maintained by the pursuer that the tenant is entitled to look to the condition of the fences at his entry and to have them kept up in the same state throughout his tenancy. If he wants to have that done I think he must have a special obligation to that effect inserted in the lease. I cannot hold that an obligation of that kind is implied in a let of shootings along with a mansion-house. It is just like cutting wood. No doubt if the landlord cuts down wood in the plantations and drags it away that may injure the shooting. But he will be entitled to do that apart from special stipulation to the contrary. All these things should be made matter of arrangement. I decline to hold that there was any implied obligation on the landlord to keep up the fences in the condition they were in at the date of entry.

LORD M'LAREN—I agree that we cannot infer an obligation on the landlord to maintain the fences enclosing the plantations for the benefit of the sporting tenant. The tenant no doubt considers the state of the ground when he enters into the lease, and therefore if it is the case that the plantations are an important part of the shooting, that would probably imply an obligation on the landlord not to cut them down—in fact, not to do anything which would derogate from his grant by destroying or injuring the subject let. But I am unable to take the further step that the landlord warranted the tenant against failure of the fences through decay. The pursuer has the benefit of a clause giving him the right to preserve the game. That might include the right to repair the fences at his own expense; but we do not need to consider that question.

LORD KINNEAR—I am unable to see that there is any implied obligation on the landlord to maintain the fences round the plantations. If the lessee thought it was of importance that these fences should be maintained, it lay upon him to get an express stipulation to that effect introduced into the lease. We cannot be certain that if he had demanded such a clause it would have been conceded. The landlord would have had to consider whether it was worth while, looking to the value of the subjects leased, to let the shooting subject to such an obligation. But at all events it was a matter for agreement. No authority and no principle has been adduced for adding to the written lease an obligation of this kind by implication of law.

The Court recalled the interlocutor of the Lord Ordinary in so far as it allowed parties a proof of their averments relative to this conclusion of the summons, found that the pursuer had not set forth averments relevant or sufficient to support such conclusion, and assoilzied the defenders from it.

Counsel for the Defenders and Reclaimers—The Solicitor-General (Dundas K.C.)—Sandeman. Agent—F. J. Martin, W.S.

Counsel for the Pursuer and Respondent—Mackenzie, K.C.—Boswell. Agent—George P. Normand, W.S.

Thursday, July 14.

SECOND DIVISION.

[Lord Pearson, Ordinary.

VIANI & COMPANY *v.* GUNN & COMPANY.

Bill of Exchange—Proof—Parole—Competency of Parole Proof not to Exact Payment on Bill Maturing—Bills of Exchange Act 1882 (45 *and* 46 *Vict. cap.* 61), *sec.* 100.

In defence to an action brought by the indorsee of a bill of exchange against the acceptor for payment, the defender averred that the bill was an accommodation bill, and that the indorsee had agreed at the time it was granted that in the event of the bill being in his hands till maturity the defender would not be called upon to retire it.

Held (*diss.* Lord Young) that under section 100 of the Bills of Exchange Act 1882 the defender was entitled to a proof by parole of the alleged agreement.

Section 100 of the Bills of Exchange Act 1882 enacts—"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." . . .

In February 1904 Messrs Viani & Company, bankers, Pallanza, Italy, raised an action against Messrs Gunn & Company, marble merchants, 130 George Street, Edinburgh, for payment of £45, being the amount contained in a bill of exchange dated 20th December 1902 and due on 20th May 1903, drawn by the Della Casa Granite Quarries of Italy, Limited, and accepted by the defenders, with the interest thereof at

the rate of £5 per centum per annum from 23rd May 1903 until payment. The bill of which the pursuers were indorsees was accepted by the defenders "payable at 130 George Street, Edinburgh."

The pursuers averred that they were holders of the bill for value, and that when it was presented at the place of payment to the defenders' manager on 23rd May 1903 with a demand for payment, payment was refused.

The defenders, while admitting that the bill had not been paid by them, denied that it had been presented to their manager, and explained that the pursuers were not the holders in due course. They gave the following account of the transaction:—"(Stat. 1) The questions arising in the present action have arisen out of the connection of the pursuers and defenders with the Della Casa Granite Quarries of Italy, Limited. That company was incorporated ten years ago, and was registered in Scotland. The company was formed for the purpose of purchasing and working certain granite quarries on Lake Maggiore, in Italy. After the formation of the company the purchase of these quarries was duly carried out, and the company commenced to work the said quarries, and according to the law of Italy the company had also to be registered in that country. Although the company has done a large amount of work, it has not been financially a success, and from time to time during the last ten years Mr Walter William Gunn, the senior partner of the defenders' firm, acting on the instructions of the directors of the company, visited the quarries with the view of improving the management and business of the company. The defenders also acted as agents for the company, and at the present time large sums are due by the Della Casa Granite Quarries of Italy, Limited, to Messrs Gunn & Company for the expenses of Mr Gunn's visits to Italy, and in respect of commissions due. (Stat. 2) The company incurred large liabilities in Italy to banks and others, and among the company's creditors are the pursuers, of whose firm Mr Agostino Viani is the sole partner. During Mr Gunn's various visits to Italy he met the said Agostino Viani, who for some time undertook a general supervision over the company's affairs. At these meetings, and also by letters to Mr Gunn, the said Agostino Viani pointed out how necessary it was for him that the company should continue business, so that he might ultimately get payment of the large sums due to him by the company, and said that in the event of the company being unable to pay him it meant ruin to him. (Stat. 3) In December 1902 Mr Gunn was in Italy, and had various meetings with Agostino Viani as to the position of the company's affairs. At this time Mr Chicherio, the company's manager on the quarries and works, became very dissatisfied with his position, and was constantly threatening to resign. Both he Agostino Viani told Mr Gunn that he had absolutely no money to go on with for his own private uses, and Agostino Viani told Mr Gunn that the credit of the company was such that no more money could be raised in Italy, and begged Mr Gunn to help Chicherio personally. Mr Gunn was present at a meeting between Agostino Viani and Chicherio, when the former in a very excited manner pressed the latter not to resign. This took place on or about the 20th of December 1902, when the bill in question was granted. It was at Agostino Viani's urgent request that Mr Gunn consented to sign the bill, which was to be for only £40, and he signed the bill blank, believing that the stamp did not carry more than £40. (Stat. 4) The translation of the printed notice on the face of the bill is as follows—'Complete price 2·50 lira, for bills and other commercial drafts from 1000 lira to 2000 lira, with currency up to six months, or from 600 lira to 1000 lira, currency over six months.' It was agreed between Mr Gunn and Agostino Viani that the currency of the bill in question was to be for more than six months, so that the stamp would not carry more than 1000 lira, which is equal to £40. Upon signing the bill Mr Gunn handed it to Chicherio, and the arrangement was, that in the event of the latter discounting the bill—which was purely an accommodation bill—he would retire it himself on its coming to maturity. Agostino Viani was aware of this arrangement, and agreed that in the event of the bill being either in his own hands or in the hands of Chicherio at maturity, the defenders would not be called upon to retire it. (Stat. 5) The bill was, as matter of fact, an accommodation to Agostino Viani. The arrangement was that the bill was to be drawn by Chicherio on the defenders' firm, and not, as has been done, by the Della Casa Granite Quarries of Italy, Limited. Agostino Viani was aware of this, and acquiesced in it. (Stat. 6) In or about the month of September last year Mr Gunn was in correspondence with Agostino Viani, when he represented to Mr Gunn that arrangements were in course of being made in Italy for the formation of a new company to take over the property of the Della Casa Granite Quarries of Italy, Limited, and to purchase various other quarries in the neighbourhood, and that the result of this arrangement would be that the creditors of the late company would be fully paid. Agostino Viani employed Mr Gunn to go to Italy, and to meet him there for the purpose of giving certain information which he possessed, and which was necessary for the formation of the new company. Mr Gunn consented to go to Italy, and went on the understanding that he would only be required for a few days. When Mr Gunn got to Italy he found that the position of matters had been entirely misrepresented to him by Agostino Viani, and Mr Gunn was kept in Italy for fifteen weeks without any company being formed. Instead of assisting in the formation of a company, Agostino Viani, while Mr Gunn was in Italy, applied to the Italian Courts and succeeded in getting a liquidation order against the company, and although meeting Mr Gunn while in Italy, he never

mentioned that he was sending instructions to England to proceed against defenders in respect of the said bill. The bill was mentioned by Agostino Viani to Mr Gunn, and the former requested the latter to renew the bill on the same footing as that on which the former bill was granted. The bill was not then shown to Mr Gunn, and it was not until his return from Italy, and after the present action had been raised, that Mr Gunn ever saw the bill as completed."

In answer to the defenders' statements the pursuers explained "that on or about 3rd January 1903 the bill was discounted by the drawers, the Della Casa Granite Quarries of Italy, Limited, with the pursuers, and that the drawers received payment from the pursuers of the sum of £39, 18s., being the full value of the bill, viz., £45, less £5, 2s., the expenses of discounting and collection. The pursuers believed the bill to be an ordinary bill of exchange, and in discounting it they were acting in good faith and in the usual course of their business as bankers, and relied upon the acceptance of the defenders. Neither the pursuers nor Mr Agostino Viani had any share in or knowledge of the creation of the bill, nor were they present when it was signed. Further, neither the pursuers nor Mr Agostino Viani were parties to, nor were they aware at the time when the bill was discounted, nor are they now aware of, any qualifications or arrangements in connection with the bill such as are alleged by the defenders. The pursuers also deny that any such arrangements were ever made."

The pursuers pleaded—"(1) The defenders being due and resting owing to the pursuers the sum sued for decree ought to be pronounced therefor, with expenses, as concluded for. (2) No relevant defence."

The defenders pleaded—"(1) No title to sue. (2) The defenders not being due and resting owing to the pursuers in the sum sued for, decree of absolvitor should be granted with expenses. (3) The pursuers not being holders in due course of said bill the defenders are entitled to absolvitor with expenses. (4) The said bill having been granted for the accommodation of the pursuers, and the pursuers having agreed with the defenders to retire it at maturity, the defenders are entitled to absolvitor."

Mandataries for the pursuers were sisted before the record was closed.

On 11th June 1904 the Lord Ordinary (PEARSON) allowed the parties a proof before answers of their averments, the defenders to lead in the proof.

Note.—"The question is, whether the pursuers, as holders of the bill, are now entitled to decree, or whether the defenders have made averments regarding their liability on the bill which are relevant to be remitted to proof. I think that is a narrow question. The defenders' averments are neither very precise, nor very consistent. But it being averred that Mr Viani is the sole partner of the pursuers' firm, my opinion is that the defenders' averments, and particularly his averments in statement 4, disclose a case for inquiry. I therefore allow the parties a proof before answer of their averments, the defenders to lead in the proof."

The pursuers reclaimed, and argued—In this case the pursuers were on the face of the bill the creditors, and the defenders the debtors under the bill, and what the defenders proposed to do was to prove by parole that they were not liable at all under the bill and to set aside the bill altogether. To hold that such a course was permissible under section 100 of the Bills of Exchange Act 1882 was to go further than the Court had ever gone, even in the case of *Dryborough & Company, Limited* v. *Roy*, March 17, 1903, 5 F. 665, 40 S.L.R. 594, and was opposed to the decisions in *National Bank of Australasia* v. *Turnbull & Company*, March 5, 1891, 18 R. 629, 28 S.L.R. 500; opinions of Lord President Inglis, 634 and 504, and of Lord M'Laren, 638 and 506; *Gibson's Trustees* v. *Galloway*, January 22, 1896, 23 R. 414, 33 S.L.R. 322; opinion of Lord M'Laren, 416 and 323; and *Robertson* v. *Thomson*, October 19, 1900, 3 F. 5, 38 S.L.R. 3. The case of *Semple* v *Kyle*, January 14, 1900, 4 F. 421, 39 S.L.R. 304, did not apply, as in that case the pursuer was admittedly not a holder in due course. In the present case the pursuers were the bankers who had discounted the bill and thus become the indorsees and holders of the bill for value. Further, the averments of the defenders was irrelevant, because indefinite and wanting in precision.

Counsel for the defenders and respondents was not called upon.

LORD JUSTICE-CLERK—The opinion which I have formed upon the interpretation of section 100 of the Bills of Exchange Act is in accordance with the decision in the case of *Dryborough*. I think that the question here is one of liability upon the bill, and I think that the defender is entitled to a proof of his averments.

LORD YOUNG—I understand that all your Lordships agree in the judgment reclaimed against. It would therefore be useless for me to express the grounds on which I more than hesitate to concur in the views which your Lordships take.

LORD TRAYNER—I adhere to the opinion which I expressed in the case of *Dryborough*, and for the reasons there given I think that the Lord Ordinary's interlocutor now reclaimed against is right.

LORD MONCREIFF—I am of the same opinion. I have already in the cases cited expressed at some length my views on the construction of the 100th section of the Bills of Exchange Act 1882. It is therefore unnecessary to repeat them. I think that the defenders have here stated facts relevant for inquiry, and that proof before answer is the proper course to be followed.

The Court adhered, and remitted to the Lord Ordinary to proceed.

Counsel for the Pursuers and Reclaimers—G. C. Steuart. Agents—Mackenzie & Kermack, W.S.

Counsel for the Defenders and Respondents—Orr Deas. Agent—James Reid, W.S.

Friday, July 15.

SECOND DIVISION.

[Sheriff Court, Peterhead.

LAMB *v.* WOOD.

Process — Sheriff — Poinding — Whether Poinding a Process—Objector Appearing by Minute—Sheriff Court Act 1876 (39 *and* 40 *Vict. c.* 70), *sec.* 6.

Held that a poinding having been executed, there was a depending process in the Sheriff Court, in which it was competent for an objector to appear by minute of compearance with note of objections annexed.

On 27th April 1904 a poinding of the goods of George B. Davidson, fishcurer, Peterhead, was executed at the instance of Robert Lamb junior, sawmiller, Logiegreen Works, Beaverhall, Edinburgh. The poinding proceeded on a warrant of the Sheriff of Aberdeen, Kincardine, and Banff.

Among the goods poinded were certain articles which had been purchased from Davidson on 27th April by Alexander Wood, fishcurer, Peterhead, as Wood alleged.

Wood lodged with the Sheriff-Clerk at Peterhead a minute of compearance and note of objections in process of poinding at the instance of Lamb against Davidson, and craved the "Court to recal" the poinding *quoad* the articles in question.

On 13th May 1904 the Sheriff-Substitute (HENDERSON BEGG) appointed the poinding creditor "to lodge answers to the foregoing note of objections."

Lamb lodged answers to the note of objections, and a statement of facts which was answered by Wood.

Wood pleaded—"The goods having been sold and purchased in good faith prior to alleged poinding, the same is invalid to attach them, and *separatim* the minuter having acquired the ownership of the goods in ordinary course of business and paid for same is entitled to have the poinding recalled."

Lamb pleaded—"(1) The minute being incompetent, the prayer ought to be refused with expenses."

On 20th May 1904 the Sheriff-Substitute pronounced the following interlocutor:—Sustains the objections for Alexander Wood, and prefers him to the goods mentioned in the minute of compearance and note of objections for the said Alexander Wood."

Lamb appealed to the Court of Session, and argued—There was no pending process in which the objector could lodge a minute; that which was lodged was therefore inept. The procedure was ruled by *M'Dermott* v. *Ramsay*, December 9, 1876, 4 R. 217, 14 S.L.R. 153. The appropriate remedy was by presentation of a petition in which a record could be made up and the question of property tried on a condescendence and note of pleas-in-law — *Crozier* v. *Macfarlane*, June 15, 1878, 5 R. 936, 15 S.L.R. 630; Sheriff Courts (Scotland) Act 1876 (39 and 40 Vict. c. 70), sec. 6; *Hunter* v. *Anderson*, January 19, 1831, 9 S. 289. The practice relied on by the respondent could not prevail against the statutory provisions. The Court would remit to the Sheriff to make up a record.

Argued for the respondent—Though not in accordance with the Act of 1876 the procedure was proper according to practice—Bell's Prin., 2287, note (*f*); Dove Wilson's Sheriff Court Practice (4th ed.), 340. The case of *M'Dermott* v. *Ramsay*, *cit. sup.*, only decided that a separate action was competent notwithstanding an alternative remedy. There was already a record, and there was no need to remit back to the Sheriff.

At advising—

LORD JUSTICE-CLERK—The main dispute in the debate before us in this case was as to the competency of the procedure, the appellant maintaining that it was imperative that such proceedings must be by petition and answers, as in the case of an ordinary action. The contention was that poinding was not a process, and that therefore there was no depending process. The contention on the other side is that this is not an initial writ but a minute of compearance. I am satisfied that the Sheriff can dispense with the formalities in such a summary application as this, in which appearance is made where exceptional despatch is required, and that what was done by the respondent was only a step in proceedings already existing and not the raising of a new cause. Having considered the matter I adopt the latter contention as tenable, being satisfied that it is according to accepted and general practice. Mr Dove Wilson and Mr Graham Stewart all lay it down as well understood practice. It is quite evident that it is in the highest degree convenient that it should be so, and therefore as no case is made on the merits, which turn upon law only, no relevant facts being stated and no proof asked for, I would propose to your Lordships to adhere to the interlocutor of the Sheriff-Substitute.

LORD YOUNG concurred.

LORD MONCREIFF—The appellant maintains that this process is incompetent in respect that it is not framed in conformity with the provisions of the Sheriff Court Act 1876, which require every action brought in the ordinary Sheriff Court to be commenced by a petition containing a prayer, and having annexed an articulate condescendence and note of pleas-in-law.

If this were or intended to be a petition for interdict, the appellant's criticism