upon the ground stated by Lord Salvesen I should be prepared to agree with him, but I think that the ground stated by Lord Ardwall is sufficient, and on that ground I concur in the judgment proposed.

The Court dismissed the appeal.

Counsel for Pursuer (Appellant)—Sandeman, K.C.—A. A. Fraser. Agent—Henry Wakelin, Solicitor.

Counsel for Defender (Respondent)—The Solicitor-General (Hunter, K.C.)—C. H. Brown. Agents—Ronald & Ritchie, S.S.C.

Wednesday, November 2.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

M'ALLISTER *v.* M'GALLAGLEY.

Contract—Proof—Loan—Written Agreement—Construction—Writ or Oath—Term of Loan not Expressed in Written Contract—Promissory-Notes Granted for Amount of Loan Payable on Demand—Relevancy of Averments as to Duration of Loan.

An offer was made by letter for a pawnbroking business, on, *inter alia*, the conditions that the seller allowed her capital "to remain on loan" at an annual interest of 8 per cent. per annum, and that the seller accepted bills from the buyer. The interest was to be payable monthly, and the buyer undertook to take stock annually, and to give the seller a monthly statement of profit and loss. The offer was accepted. The purchaser was accepted by the landlord as tenant for the remainder of the lease, which had a currency of over nine years, entered into possession of the business, and granted promissory-notes for the purchase price. All of these notes were payable on demand. After several years, but before the expiry of the lease, the seller protested two of the promissory-notes and charged upon the extract protests. The purchaser brought suspensions, on the ground that the true bargain was that the loan should be allowed to remain till the end of the lease, and in the Outer House proof by writ or oath of the respondent was granted him.

The Court *refused* the suspensions, *holding* that the averments of the complainer as to the negotiations prior to the completed contract were irrelevant, inasmuch as they could not override the written contract, and could not be looked to to construe it on this point as the parties had by taking the bills in their terms already construed it.

M'Leod v. *Urquhart*, May 25, 1808, Hume's Decisions, 840, *distinguished*.

Francis Sanders M'Allister, pawnbroker, Glasgow, presented two notes of suspension of charges at the instance of Joanna M'Gallagley, Brown Street, Bridgeton, Glasgow. The charges were dated 6th December 1909 and 8th February 1910, and were respectively for the sums of £100 and £1000, with interest thereon, contained in promissory-notes both dated 28th January 1905 granted by the complainer to the respondent and payable on demand.

On 18th January 1905 the complainer wrote to the respondent the following letter:—"I herewith make offer for your pawnbroking business situated at number 4 Northburn Street, Cowcaddens, all as at present occupied by you, and that on the following conditions, viz.—*Firstly*, To pay you the amount lent on all pledges presently in stock which have been taken in pledge within the last thirteen months from the date of your acceptance, as the same shall be ascertained on delivery. *Secondly*, To pay you the sum of twenty per cent. as goodwill on all pledges taken in pawn and presently in stock within the last twelve months and seven days from the date of your acceptance. *Thirdly*, To pay you the sum of one hundred pounds sterling for all fittings, safe, books, and other utensils all necessary for the carrying on of the said business. *Fourthly*, This offer is made by me on the faith and understanding that you allow your capital to remain on loan to me at an annual interest of eight per centum per annum, and you accept bills from me. The said interest payable monthly by me. And further, I bind myself to take stock annually, to give you a copy of abstract, or produce stock-book if you desire it, and also to give you a monthly statement of my profit and loss, and also satisfactory stock balance, until the amount due to you by me is paid. *Fifthly*, To pay you a proportion on all rates, taxes, licence, insurance, and rent from date of entry. To pay one-half the cost of stocktaking, also to pay one-half the cost of assignation of lease. This offer is made subject to me being accepted by the landlord as tenant for the remainder of your lease at a rental of sixty-five pounds sterling per annum for the remaining period of the first five years from date of lease, and seventy pounds sterling per annum for last five years."

On 20th January 1905 the respondent replied—"Your offer has been accepted for pawnbroking office at 4 Northburn Street, Cowcaddens."

In both notes the complainer, after setting forth the above offer and acceptance, averred—"Explained that the negotiations started in the middle of December 1904, and the complainer had several meetings with the respondent's brother Cornelius M'Gallagley, who was acting on behalf of the respondent, but whose business it is believed and averred it truly was, and who was anxious to be relieved of the obligations under the lease of the premises, which did not expire until Whitsunday 1914. The said Cornelius M'Gallagley was very anxious to dispose of the business and lease, and on approaching the complainer to become a purchaser and take over the lease, he, the complainer, explained that he would only

do so if the capital representing the purchase price was allowed to remain on loan until the expiry of the lease. These meetings all took place at 80 Brown Street, Bridgeton, Glasgow, at which the respondent and her said brother resided. Finally, on or about 10th January 1905 a meeting took place at said house between the complainer and Mr M'Gallagley, at which terms for the purchase of the business were agreed upon. At that meeting the complainer made it a condition of the transaction that payment of the purchase price, apart from the fittings, should be postponed until the expiry of the lease. This condition was agreed to by Mr M'Gallagley on behalf of the respondent, Mr M'Gallagley as the counterpart of this arrangement stipulating that the complainer should relieve the respondent of all her obligations under the lease, to which the complainer agreed. The missive offer of 18th January 1905 was sent by the complainer to the respondent, and was accepted by the respondent on the footing that the complainer should relieve the respondent of her obligations under her lease, and that the respondent should allow the purchase price of the business (which did not include the price of the fittings, &c.) to remain on loan until the expiry of the lease. The said lease was duly assigned to the complainer, and the respondent was relieved of her obligations thereunder."

The complainer pleaded, *inter alia*—"(1) The respondent having agreed to allow the sum contained in the said promissory-note to remain with the complainer at interest as condescended on, is not entitled to do diligence thereon, and the complainer is entitled to suspension of the charge complained of."

The respondent pleaded, *inter alia*—"(2) The complainer's statements are irrelevant and insufficient to support his pleas."

The notes were passed and interim sists of execution granted, and on 16th June 1910 the Lord Ordinary (SKERRINGTON) allowed the pursuer to amend his record (the amendment is embodied in the averment above quoted), of new closed the record, and repelled the second plea-in-law for the respondent; found that the alleged agreement mentioned on record could only be proved by the respondent's writ or oath, and continued the cause for further procedure. On 21st June he, on the motion of counsel for the complainer, granted leave to reclaim against the interlocutor of 16th June.

☞ *Opinion.*—"In the first of these actions the complainer asks for suspension of a charge for £100 contained in a promissory-note granted by him to the respondent; in the second action he asks for suspension of a charge on a similar promissory-note for £1000. In each case the promissory note was dated 28th January 1905, was payable on demand at a bank in Glasgow, and formed part of the price payable by the complainer to the respondent for the purchase of a pawnbroking business. The agreement between the parties was embodied in the complainer's offer of 18th January 1905 and in the respondent's acceptance of 20th January. In the fourth head of his offer the complainer stipulated that the respondent should allow her 'capital to remain on loan to me at an annual interest of 8 per centum per annum and you accept bills from me.' The period of the loan and the currency of the bills were not specified, and the complainer's counsel admitted that on a sound construction of the written agreement the price of the business was payable immediately seeing that there was no effective agreement to allow the price to remain on loan for a definite period. [*This admission was withdrawn in the Inner House.*] In point of fact, the complainer gave and the respondent accepted six promissory-notes payable on demand, and amounting in all to the sum of £1750, including the promissory-notes for £100 and £1000 which form the subject of the present litigations.

[*His Lordship here dealt with alleged irregularities in the protests, on which the case is not reported.*]

"In each case the complainer alleges that there was a verbal agreement between him and the respondent that the latter should not demand payment of the price of the business until Whitsunday 1914. These averments as originally framed were wanting in specification, but this defect has now been remedied. The respondent's counsel argued that this alleged agreement was irrelevant. Obviously it would be absurd to stipulate that payment of a bill payable on demand should not be demanded until the bill itself had prescribed. It is, however, a sufficient answer to point out that under his offer of 18th January 1905 the complainer was bound either to pay the price of the business to the respondent or to give her good bills, and that the respondent would not have been bound to remain content with bills which had suffered prescription. I accordingly in each case repel the respondent's second plea-in-law to the effect that the complainer's statements are irrelevant. On the other hand, I am of opinion that the alleged agreement can be proved only by writ or oath. The complainer's counsel argued that he was entitled to a proof by parole, in respect that he did not propose to contradict the written agreement, but merely to prove a term of the agreement which had not been committed to writing. I am of opinion that this contention is unsound and that the present case is governed by that of *Stagg & Robson* v. *Stirling*, 1908 S.C. 675. I accordingly find that the alleged agreement can be proved only by the respondent's writ or oath. It follows that the notes of suspension will fall to be refused unless the complainer can recover evidence by writ or is willing to refer the cases to the oath of his adversary."

The complainer reclaimed, and argued—On a fair reading of the agreement itself, payment was not to be exigible until the expiry of the lease—*Galbraith & Moorhead* v. *Arethusa Ship Company, Limited*, July 9, 1896, 23 R. 1011, 33 S.L.R. 724. In any case

parole proof was allowable to supply the term of duration of the contract, when that was omitted or in doubt—*M'Leod* v. *Urquhart*, 1808, Hume's Decisions, 840; *M'Rorie* v. *M'Whirter*, 18th December 1810, F.C.; *Renison* v. *Bryce*, February 4, 1898, 25 R. 521, 35 S.L.R. 445; *Merrow & Fell* v. *Hutchison & Brown*, March 12, 1873, 45 Sc.J. 334.

Argued for the respondent—The loans were repayable on demand as shown by the promissory-notes. The notes were not inconsistent with the agreement. The agreement meant that the loans were repayable on demand; the bills were granted in implement of this agreement, and the terms could not be modified by parole evidence — *Stagg & Robson, Limited* v. *Stirling*, 1908 S.C. 675, 45 S.L.R. 488; if it did not mean this, then it was too indeterminate to receive effect — there was no completed agreement. Where there was a completed contract in writing it was not competent to look at prior communings between the parties—Bell's Principles, sec. 524; *Inglis* v. *Buttery & Company*, March 12, 1878, 5 R. (H.L.) 87, 15 S.L.R. 462; *Lee* v. *Alexander*, August 3, 1883, 10 R. (H.L.) 91, 20 S.L.R. 877. The Bills of Exchange Act 1882 (45 and 46 Vict. cap. 61), sec. 100, did not make it competent to contradict by parole evidence the liability appearing on the face of a bill — *National Bank of Australasia* v. *Turnbull & Company*, March 5, 1891, 18 R. 629, 28 S.L.R 500; *Gibson's Trustees* v. *Gallaway*, January 22, 1896, 23 R. 414, Lord M'Laren at 416, 33 S.L.R. 322; *Robertson* v. *Thomson*, October 19, 1900, 3 F. 5, 38 S.L.R. 3; *Manchester & Liverpool District Banking Company, Limited* v. *Ferguson & Company*, June 28, 1905, 7 F. 865, 42 S.L.R. 649.

At advising—

LORD PRESIDENT—These two cases are suspensions of charges upon two promissory-notes which were granted by the complainer to the respondent. The transaction out of which the granting of these promissory-notes arose was that in January 1905 the respondent sold to the complainer a pawnbroking business in Glasgow. The conditions of sale were contained in an offer and acceptance. The offer was dated 18th January 1905, and on 20th January there was a simple acceptance saying "Your offer has been accepted."

Now the conditions of the sale were contained in five heads. They were—To pay the amount lent on all pledges in stock, to pay 20 per cent. premium as goodwill, to pay the sum of £100 for fittings, and then comes the stipulation on which the case may be said to turn—"*Fourthly*," it runs "this offer is made by me on the faith and understanding that you allow your capital to remain on loan to me at an annual interest of eight per centum per annum and you accept bills from me. The said interest payable monthly by me. And further, I bind myself to take stock annually, to give you a copy of abstract, or produce stock book if you desire it, and also to give you a monthly statement of my profit and loss, and also satisfactory stock balance, until the amount due to you by me is paid." Then there is another provision about rates and taxes which does not affect the question we have to consider, and then the whole offer is made subject to the purchaser being accepted by the landlord as tenant for the remainder of the lease, the lease having still a currency of something over five years to run. The landlord did accept the purchaser as tenant, and therefore no question arises under that stipulation.

The purchaser entered into possession of the business, and, after the sum which had been brought out under the first three heads was fixed, granted a set of promissory-notes for that sum, all of them payable on demand. Matters then went on until the present time, that is to say, for a period of about five years. Shortly before the raising of this action, the respondent, wishing her money and averring (I merely mention that historically, because I do not put anything upon it) that she considered that the stock of the business was being depleted, charged upon two of the promissory-notes. A suspension was then raised on each of the charges, and these are the two actions before your Lordships.

Now the grounds of suspension were twofold. First of all, certain technical objections were made to the execution of the charges. I do not propose to say a word about these objections, because they are merely technical, and they are, to my mind, dealt with quite satisfactorily by the Lord Ordinary. I have nothing to add to what his Lordship says. The result is that these technical objections fall.

But the other ground of suspension raises a much more serious question. The complainer says it is against the faith of the bargain that he should be charged upon the promissory-note at all, the true stipulation being, as he says, that the loan should be a loan which should be allowed to remain for the whole period of the lease, and it is agreed that the end of the lease has not yet come.

Now the Lord Ordinary has held that the averment upon this matter by the complainer is relevant to sustain the suspension, but can only be proved by the writ or oath of the respondent, and accordingly he has allowed a proof *habili modo*. Against that judgment a reclaiming note has been taken, and both parties have availed themselves of the reclaiming note, the complainer urging that his averment should be allowed to be proved *pro ut de jure*, and the respondent urging that the averment as it stands in the circumstances of the case is irrelevant, and that she ought to have the suspension refused *de plano*.

It is probably necessary first of all, then, to see exactly what is the averment of which the Lord Ordinary has allowed proof. Originally, as his Lordship says in his note, there was a want of specification, but he allowed amendment which, according to him, gives specification now. Now the averment is this—It refers to the offer

and acceptance which I have already gone through. Then it goes on—[*His Lordship here read the averment quoted above.*]

I think it is perfectly clear that nearly the whole of that averment deals entirely with what I may call preliminary communications. It is a statement of the negotiations which led up to the final meeting on 10th January 1905 at which the terms of the bargain were agreed upon. But inasmuch as after that final meeting the terms were embodied in a written offer and acceptance, I do not think we can now go back to the preliminary negotiations. I think it is settled beyond all doubt, by many cases both in this Court and in the House of Lords, that you cannot go back upon the preliminary negotiations, but that the bargain as contained in the offer and acceptance must be the bargain and cannot be altered by parole evidence as to what various negotiations there were which led up to the bargain, or upon what footing that bargain was gone into. And therefore I really do not think that the averment of which the Lord Ordinary has allowed a proof—that is to say, the averment directed to something outside the written contract—is relevant.

But that does not entirely end the matter, because there still remains the question, what is the true construction of the bargain between the parties? Now certainly one term of the bargain is, this offer is made by me on the faith and understanding that you allow your capital to remain on loan to me at an annual interest of 8 per cent. and that you accept bills from me. Now although I do not, for the reasons I have already stated, look upon the averment as made as a relevant averment of anything outside and separate from the offer and acceptance, the bargain as made, still I am perfectly content to treat it as a good averment that the proper construction of the bargain as made is that the "remaining on loan" means remaining on loan till the end of the lease. In point of fact I might go further; I think it might be treated as a perfectly good averment that there was one term of the bargain which was left so far as the writing was concerned unsettled, and that the settling of that term might be arranged verbally. The case was argued, *inter alia*, on that footing, and the complainer particularly appealed to the case of *M'Leod* v. *Urquhart* (25th May 1808, Hume 840) in support of his proposition. Now I am quite certain that *M'Leod* v. *Urquhart* is good law, but let us observe what the circumstances there were. The circumstances were that Urquhart was indubitably a tenant in the farm—he had been possessing for over seven years—and when M'Leod proposed to turn him out he said "No, I cannot be turned out, because I am a tenant under a tack for nineteen years.' He did not pretend that there was any formal tack which had been executed, but he produced a writing under which M'Leod had promised that if Urquhart would take service in the Sutherland Fencibles, a regiment which M'Leod was raising, he, M'Leod, would give him a tack. Now the writing stopped short; it did not say for how many years the tack was to be. But *rei interventus* of a double character followed. In the first place, there was *rei interventus* in that admittedly Urquhart had taken service and performed his part of the agreement; and secondly, there was *rei interventus* in that Urquhart had been admitted into the farm and had been allowed to stay there and work it for over seven years. Now what the Court held there was this, that it was perfectly clear upon the document and upon the *rei interventus* that had happened that Urquhart had been accepted by M'Leod as a tenant and as a tenant with a lease, that is to say, not as a tenant simply possessing from year to year, because the *rei interventus* of what had happened in the farm was inconsistent with a year to year tenancy; and the Court said, "If that is so, we are at liberty to find out *aliunde* what was the true ish of the tack to which undoubtedly Urquhart was admitted by M'Leod."

Now I do not doubt that that is good law, but then the position here is not the same. Supposing this question had been raised at first, before anything was done, and that the parties had been in dispute regarding the duration of the loan, then I suppose the bargain would have been off, because they would not have come together upon a complete bargain. But, on the other hand, it is quite evident that that question could have been settled one way or another if it had been raised at once when the bills were granted. If no bills had been granted at all—that is to say, if the terms upon which the money was lent had not been in any way settled by the bills, and if, notwithstanding that, the complainer had been allowed to take up the business and to conduct it for some years—then he would have had a parallel to the case of *M'Leod* v. *Urquhart*, because then there would have been a *rei interventus*, which destroyed the idea of there having been no concluded bargain, that is to say, prevented the respondent from saying—as she might have said at the very beginning of the time, when things were still intact—"Well, here is one vital stipulation as to which we are not at one." In such circumstances, in order to expiscate the matter, the Court would have been driven, as they were in *M'Leod* v. *Urquhart*, to find out *aliunde* what the term of the loan was to be.

But that is not the position here. The position is that the bills were granted, and that they were granted in such a way as to allow the holder of them to call them up at any time. Now I think that when that was done, and done without objection—because the complainer need not have signed the promissory-notes unless he wished—it is too late for him to raise a question which he might quite properly have raised if he had wished at the beginning of the time; that is the time when it properly ought to have been raised. If the true bargain between the parties had been

that the loan should be allowed to continue to the end of the lease, then it seems to me that the present complainer was bound to have objected at once when he was asked to sign the promissory-notes on demand. He ought to have said "No, I am bound to give you a bill, but that is a bill with regard to the money which is to remain on loan; and as the money is to remain on loan until the end of the lease the currency of the bill must be the same"; because I need scarcely remind your Lordships that though it is an unusual thing commercially to have a bill for a long period, there is nothing in law to prevent the stated term of a bill being for any period. The limitation or prescription statute does not prevent this, because the period of prescription only begins to run after the term of payment comes. If the complainer did not do that, but accepted the situation and granted a promissory-note payable on demand, I think it was simply because he was content to put himself in the lender's hands. After all, one can easily see why that may be a perfectly natural position. It was just in order to give the lender of the money a weapon which might be used if she thought the circumstances required it. As a matter of fact the position had gone on, more or less comfortably, for several years. Then the respondent, for certain reasons—I do not inquire whether the reasons are good ones or bad ones, but for reasons which I suppose seem good to her—wants her money back, and accordingly charges upon the promissory-notes, and that I think she is entitled to do. I do not myself see any necessary inconsistency in the idea of a loan which is to a certain extent intended to continue, being so constituted as to present to the lender a weapon which would enable her at any moment to call that loan up. The provisions which I have already read, at the end of the fourth head, as to taking stock annually and giving the respondent a monthly statement of profit and loss, all seem to me to point the same way, because it seems to me the lender here wanted to keep a close eye upon the business in order to get her money back if she thought the business was in any way going to the bad. If I thought that the mere fact of the bills being payable on demand was inconsistent with the nature of a continuing loan, I should not come to this conclusion; but I do not think it is. I think they are merely a way, as I said, of putting a very prompt weapon into the hands of the lender.

I think therefore that, inasmuch as the parties have shown by their own actings how they carried out the bargain as made, there is nothing here left to inquire into, and upon the whole matter therefore I come to the conclusion that the Lord Ordinary's interlocutor ought to be recalled and that the suspension should be refused.

LORD KINNEAR—I have come to the same conclusion and for the same reason. I think the whole difficulty in this case arises, not so much from any ambiguity as from the silence of the contract as to the term of currency of the bills to which the action relates. The offerer stipulates that the capital to be lent to him shall remain on loan, and that the lender shall accept bills, but at what date and at what currency the contract does not say. I do not think that we are at liberty to fill up the *lacuna* in the writings by any speculation of our own as to the probabilities of the case, because we are not to make a contract for the parties, but have to find out, if we can, what contract they actually made; and if the contract be formed now upon any speculation as to its probabilities, the gap might be equally well filled up in half-a-dozen different ways, which, however inconsistent with one another, would not be directly contradictory of the contract. And therefore I think with your Lordship that if the question had arisen upon the execution of the contract, and when the money came to be advanced the parties were in dispute as to whether bills were to be granted of one kind or another, it must have been held that there was no complete contract, because I think upon that material point nothing was settled. If the offerer had said, "My bills are to become payable at the termination of the lease and no sooner," and the acceptor of the offer had said, "I agreed to the loan on the understanding that I should have a bill which should enable me to compel performance of the other terms of the contract, and therefore a bill which was enforceable on demand," there would have been no *consensus in idem*, and therefore no contract at all. If, on the other hand, it had then been alleged by the other party that they agreed together that the bill should be for a particular currency, then the question would have arisen (which does not require to be decided now) whether that alleged agreement might not be proved by parole as being an agreement upon a point which the contract itself showed the parties did not intend to commit to writing.

But then that is a question which must have arisen, if it were to be raised at all, at the time when the question of how the contract was to be carried out arose between the parties themselves. The position of matters now is that the contract has been carried out. The contract is that money should be loaned and bills given for it. The money was lent and the bills were given in terms, which are perfectly clear and definite in themselves, in return for the money. What we are inquiring into now is an executed contract. I think the parties solved for themselves the only question which could have been raised. We might speculate now as to what form of bill would be more or less appropriate to the particular contract, but the parties knew what form of bill they meant to insist upon on the one hand and grant upon the other, and it must be presumed that they carried out their own intention when the bills were granted in the form in which they now stand. I think it is too late to raise any question as to the nature or extent of the obligation which has been already performed by the granting

of the bills, the terms of which raise no question of construction, no dispute whatever.

I therefore agree with your Lordship that the ground of complaint is not relevant, and that the charges have been orderly proceeded with.

LORD JOHNSTON—In January 1905 the complainer purchased from the respondent her pawnbroking business in terms of the offer and acceptance. And the necessary valuations having been made and the price having been adjusted, on 28th January 1905 the complainer granted to the respondent sundry promissory-notes payable *on demand* at her bankers the Bridgeton Cross Branch in Glasgow of the British Linen Company. Interest was paid and no proceedings to enforce payment of the promissory-notes were taken until 24th November 1909, on which day they were presented, dishonoured, noted, and protested for non-payment. A charge having been given, the complainer as obligant on the promissory-notes suspends on grounds affecting, first, the regularity of the protest, and, second, the right of the respondent to enforce the promissory-notes.

On the first matter raised as ground of suspension I agree with the Lord Ordinary and with your Lordships, and I would add nothing to what the Lord Ordinary has said, but that one consideration in this respect affects in my own view the second question raised.

I agree with the Lord Ordinary that the making a bill or note payable at a banker's, whether or not that banker be the banker of the drawee or granter, by implication makes that banker the drawee's or granter's agent in all matters relating to payment, and requires the acceptor or grantee to provide cash or credit with that banker so that on presentation at the due date dishonour for non-payment may be avoided. What is important in relation to the second question is that these notes being on the face of them payable on demand, if there was nothing behind relevant and competent to be considered, the granter of them was from their date under the necessity of having continuously cash or credit at the said branch of the British Linen Company to meet these notes on presentation for payment whenever that might be made.

This obligation, while it would clearly follow from the terms of the notes, appears to me to be inconsistent with the terms of the initial agreement under which the notes were granted.

In the second place, the complainer alleges that it was made a condition of the transaction of January 1905 that payment of the purchase price under the agreement would, notwithstanding the granting of the notes, be postponed until the expiry of the lease of the premises, which was to be taken on by the complainer, who would thus relieve the respondent of all her obligations under it. In fact the complainer's offer bore to be made "subject to me being accepted by the landlord for the remainder of your lease at a rental of £65 sterling per annum for the remaining period of the first five years from date of lease, and £70 per annum for last five years." The lease ran to Whitsunday 1914, and the complainer was duly accepted as tenant.

I concur with your Lordships that on this point the Lord Ordinary's judgment as it stands must be recalled. For if proof is to be allowed, it would, I think, fall to be a proof at large, and not under the limitation which his Lordship has imposed. But it is with considerable hesitation that I concur further with your Lordships' proposed disposal of the case. I agree that it is no question on the promissory-notes, and that the Bills of Exchange Act of 1882, section 100, does not apply. It is, I think, a question upon the initial agreement in virtue of which the promissory-notes were granted. Had I been sitting alone in the case I should have been prepared to hold that that agreement was ambiguous in itself, and that the terms of the promissory-notes are inconsistent with all the indications which it gives of the true intention of parties. It is, to my mind, no question of controlling an agreement by evidences of prior communings. It is no question of contradicting an agreement or of modifying an agreement. It is, I think, one of explaining an ambiguous agreement, and supplying a necessary term which is awanting. In such cases there is not, as I understand the rules of evidence, any restriction in the matter of proof. While, then, I agree with the Lord Ordinary that the complainer has stated a relevant case, I should have been for allowing him a proof at large and not limited, as the Lord Ordinary has found, to writ or oath.

But I readily admit that the matter is one largely of impression, and I recognise the full force of what I understand to be your Lordships' view, viz., that the granting of promissory-notes on demand which I have thought inconsistent with the agreement, may also, and I assume with still greater reason, be held to supply a clue to the interpretation of the agreement. I therefore, without going into further detail, unqualifiedly accept your Lordships' view and concur in your Lordships' judgment.

LORD SALVESEN was sitting in the Second Division, and LORD MACKENZIE had not yet taken his seat in the Inner House.

The Court adhered to the interlocutor of Lord Skerrington, dated 18th June 1910, in so far as it referred to the amendment of record: *Quoad ultra* recalled said interlocutor, repelled the second plea-in-law for the complainer, sustained the second plea-in-law for the respondent, repelled the reasons for suspension, found the charge complained of orderly proceeded, recalled the sist, and decerned.

Counsel for the Complainer and Reclaimer —Sandeman, K.C.—J. M. King. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Respondent — Wilson, K.C. — Fenton. Agents — Weir & Macgregor, S.S.C.