decern in terms of the conclusions of the summons."

Counsel for Pursuer--Salvesen--W. Thomson. Agent—Thomas M'Naught, S.S.C.

Counsel for Defender—H. Johnston—P. J. Blair. Agents — Skene, Edwards, & Garson, W.S.

Tuesday, November 13.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

PURNELL *v.* SHANNON.

Assignation, Absolute or in Security—Construction—Proof—Parole.

A debtor assigned to his creditor an extract-decree which he held against a third person. By the terms of the assignation he assigned, conveyed, and made over to and in favour of his creditor "all my right, title, and interest in the extract-decree, . . . with full power . . . at any time to use said decree in any manner of way whatever, in the same way as I could have done before granting thereof, in satisfaction of his claim against me." The assignation was intimated to the third party, and the monthly instalments due by him under the decree were paid by him to the assignee till the amount due to the latter by the assignor had been paid.

Held (1) that the assignation was absolute, and not merely in security of the debt due by the assignor to the assignee, and (2) that an alleged understanding modifying its terms could not be proved by parole.

Henry Amor Purnell, being indebted to John Shannon, assigned to him an extract-decree which he held against Robert Reid for payment of £337, 10s. in monthly instalments of £4. The terms of the assignation were as follows—"I, Henry Amor Purnell, engineer, of Glasgow and Edinburgh, presently residing at 105 Hill Street, Garnethill, Glasgow, in consideration that I am due my workman at Edinburgh, named John Shannon, residing at 43 Deanhaugh Street, Edinburgh, (1) the sum of £20, 10s. sterling as wages, as at 25th April last, and (2) £19, 13s. 9½d. sterling, as money lent to me by him to pay bills and accounts due by me to creditors prior to November 30th 1891, Do hereby assign, convey, and make over to and in favour of the said John Shannon all my right, title, and interest in the extract-decree obtained at my instance in the Sheriff Court at Glasgow against Robert Reid, bank clerk, residing at No. 11 Huntly Terrace, Kelvinside, Glasgow, with full power to the said John Shannon at any time to use said decree in any manner of way whatever, in the same way as I could have done before granting thereof, in satisfaction of his claim against me, and I have delivered up to the said John Shannon the extract-decree above referred to. Written and signed by me at Glasgow upon the 23rd day of May 1892."

Intimation of the assignation was duly made by Purnell to Reid, and thereafter Reid continued to pay the instalments due by him under the decree to Shannon until the amount due to the latter by Purnell had been paid.

Purnell then applied to Shannon for a reconveyance of the assignation, and, on Shannon refusing to comply with the application, he raised the present action against him on 14th August 1893. The summons concluded for declarator that the document was "merely an assignation by the pursuer to the defender of the said extract-decree in security for the said sums of money, and that the said sums of money having been paid to the defender, with interest thereon," the defender should be ordained to denude of the extract-decree and reconvey it to the pursuer. A further conclusion for reduction of the assignation on the ground of essential error was subsequently added by way of amendment.

The pursuer averred, *inter alia*, that it was distinctly understood between him and the defender that the document merely constituted a security.

The defender denied that the assignation was merely one in security, and pleaded—"(2) The said assignation cannot be explained or modified by parole proof."

On 14th March 1894 a proof *habili modo* was allowed by the Lord Ordinary. The pursuer failed to prove that when he granted the assignation he was under any error as to its legal import. Evidence was led to show that there was an understanding between the parties that when the assignee's debt had been satisfied he should execute a reconveyance, but this evidence was held inadmissible, since it did not amount to the writ or oath of the defender.

On 2nd June 1894 the Lord Ordinary assoilzied the defender.

"*Opinion.*—There are several questions in this case, questions both of fact and of law, and for the reasons explained in my previous judgment I thought it best after hearing parties in the procedure roll to allow a proof to both parties *habili modo*. That proof has now been led, and I have to decide the case as a whole.

"The first question is as to the construction of the document. Does it import an absolute assignation of the decree to which it refers, or is it only an assignation in security, or what comes to the same thing, an assignation for a limited purpose to enable the defender, the assignee, to recover under it certain sums due to him by the pursuer?

"It must be admitted that the deed is peculiarly expressed. It was drawn, it appears, by the witness Mr Waugh, an accountant's clerk in Edinburgh, and perhaps its legal effect may admit of argument. On the whole, however, I do not see my way to construe it otherwise than an absolute deed. It purports to assign the decree to which it refers to the defender John Shannon 'in satisfaction of his claim against me,' or (including what I rather take to be a parenthesis) it assigns the

decree in the defender's favour, 'with power to the said John Shannon at any time to use the said decree in any manner of way whatever, in the same way as I could have done before granting hereof in satisfaction of his claim against me.' Now, satisfaction is not security. The two things are rather in contrast, Satisfaction means discharge. Nor is it, I am afraid, possible to read the words 'in satisfaction' as meaning 'until satisfaction. But unless these or similar liberties are taken with the language, the deed imports in effect an exchange of the decree for a discharge of the debt. I thought at one time that the construction might be aided by evidence as to the actings of the parties under the deed, but as to this it is enough to say that nothing was, in my opinion, proved which could operate in that way.

"The next question is, whether the pursuer has proved his averment that if the deed imports an absolute assignation, it was otherwise intended by both parties, and was signed by both under mutual error, or, at all events, was signed by the pursuer under error induced by the defender as to its import and effect? On this question I think the proof is against the pursuer. His own letter to Mr Paterson excludes, I think, the suggestion that he was under any mistake as to the legal import of the deed. But apart from that there is certainly no proof of error on the defender's part, or of any representation by him or by Mr Waugh by which the pursuer was misled.

"It remains, however, to consider—and this is the last question in the case—whether the assignation operating and being, as I think, intended to operate absolutely, there was yet behind it an understanding that on payment of the defender's debt the pursuer should be retrocessed? If I had been at liberty to decide this question on my impressions derived from the general proof, I should, I think, have been in favour of the pursuer. I am not sure that I should say so, but I have a strong impression that it was understood between the parties that when the defender's debt was paid he should reconvey the decree to the pursuer. But such an understanding really amounts to a trust, and can only be proved by writ or oath. And, moreover, the writ founded on must establish the trust directly and unequivocally, and not merely by inference and as matter of probability. Now, I do not find in the proof any written acknowledgment under the defender's hand, or contained in any document which is his writ, that he holds the assignation subject to any qualification of the right which it purports to confer. And therefore the result of the whole matter is that, I confess with some reluctance, I decide this point also in the defender's favour, and grant him absolvitor with expenses."

The pursuer reclaimed, and argued—(1) The deed itself was *ex facie* merely an assignation in security. It had none of the characteristics of an absolute assignation as given in the style books. There was here no assignation of the document itself, no discharge of the assignor, or extinction of the debt, except in so far as it should be paid out of the decree; while all these were essential to an absolute assignation, the words "in satisfaction" qualified the use of the decree, and did not refer to the words of assignation. (2) Alternatively the deed was ambiguous in its terms. It was between two unskilled persons, and extrinsic parole evidence might be used to show the true intention of the parties—*Queensberry* v. *Scottish Union Insurance Company*, July 10, 1839, 1 D. 1283, *aff.* 8th March 1842; 1 Bell's App. 183; Stair iv. 42, 21; *Gemmell* v. *M'Alister*, February 3, 1863, 1 Macph. (H. of L.) 1. A series of documents, none of which were conclusive, might be read together as constituting a trust—*Thomson* v *Lindsay*, October 28, 1873, 1 R. 65; *Seth* v. *Hain*, July 14, 1855, 17 D. 1117; M'Laren (new ed.), p. 1062; *Lindsay* v. *Barmcotte*, February 19, 1851, 13 D. 718; *Wylie & Lochhead* v. *Hornsby*, July 3, 1889, 16 R. 907. (3) Assuming the document to be an *ex facie* absolute assignation, there was essential error as to its import by both the parties. They had contemplated an assignation in security, and assumed that this document covered it. This was shown by the evidence both written and oral. In any case the pursuer was under error, induced by the defender. It was not necessary for the purpose of reducing the deed to show that there was active misrepresentation on the part of the defender—*Steuart's Trustees* v *Hart*, December 2, 1875, 3 R. 192.

Argued for defender—The assignation was *ex facie* absolute, and though not identical was quite in accordance with the form of absolute assignations in the style-book. "In satisfaction" simply meant "in payment," or "in extinction" of the debt. There was no ambiguity in it, so no parole evidence should be admitted. By the Act of 1696, cap. 25, such a trust as the pursuers sought to set up could only be established by writ or oath of the alleged trustee himself. There was no such evidence here, and it was no good to bring in the writ of the defender's agent Mr Waugh—*Laird & Company* v. *Laird & Rutherfurd*, December 9, 1884, 12 R. 294, at 297; *Marshall* v. *Lyell*, February 18, 1859, 21 D. 514. The case of *Seth* v. *Hain* did not admit holograph entries giving merely a ground for inference of the existence of a trust, but capable of some other explanation. In any case there was no evidence here as to essential error on the part of either of the parties.

At advising—

LORD PRESIDENT — We have had a full and, in some respects, a discursive argument on this case, but I am satisfied that the Lord Ordinary's opinion is right. In the first place, on the question of the construction of the document, it certainly does not follow exactly any of the styles to be found in the Style Book, but on examination its import is

sufficiently clear. At first sight it might appear as if a more limited right were conferred on the assignee if the words "in satisfaction of his claim" be read as relating to and qualifying the "power to use" the decree. But when the scope of a power of this kind is tested, it becomes plain that it enables the assignee to appropriate the decree if he pleases, so only he holds the debt as satisfied. Accordingly, it is of little moment whether the Lord Ordinary's mode of construing the deed, by treating the words "in satisfaction of his claim" as if they directly followed the words of assignation, be adopted in preference to the alternative construction, which would apply the words "in satisfaction" solely to those which immediately precede.

The next question to be considered is one of fact, whether, assuming the construction I have given to be the right one, the deed was granted under error of both the parties, or of the pursuer induced by misrepresentation on the part of the defender or Mr Waugh. The pursuer completely fails in this part of his case, and the Lord Ordinary pointedly sums up the matter by saying—"His own letter to Mr Paterson excludes, I think, the suggestion that he was under any mistake as to the legal import of the deed. But apart from that, there is certainly no proof of error on the defender's part, or of any representation by him or by Mr Waugh by which the pursuer was misled." No passage of the evidence quoted shows that the defender was in error as to the import of the deed. Again, as regards misrepresentation, some clear and definite evidence is to be sought, but we find nothing of the sort.

I have some difficulty in following the pursuer in the last part of his argument, but consider that the Lord Ordinary has done it full justice in saying that if there were any "understanding," that when the defender's debt was paid he should reconvey the decree to the pursuer, that understanding amounted to a trust, and could therefore only be proved by writ or oath. But here, when in search of some writing, formal or informal, clearly showing a trust, we are referred to one letter neither clear nor unambiguous, when read with reference to the whole facts of the case.

I am therefore of opinion that the Lord Ordinary's interlocutor is right.

LORD ADAM—I agree as to the construction of the assignation, and confess that I have no real doubt that the Lord Ordinary is right. The decree was assigned to the defender with certain powers, and was said to be "in satisfaction of his claim." There is no ambiguity about these words; they are equivalent to "in extinction," "in discharge," in payment," as the case may be; and, accordingly, when the defender took this decree, he took it in satisfaction of his debt, which was thereby extinguished. He was not entitled to use it merely towards payment of his debt, but took it in full payment. If this be so, what difference is made by the insertion in the document of the words, "with full power . . . at any time to use the said decree in any manner of way whatever, in the same way as I could have done before granting thereof?" These words in no way modify the construction of the document, which is an *ex facie* absolute assignation.

If this be so, it can only be shown not to be absolute by writ or oath of the so-called trustee. On the whole evidence I agree with the Lord Ordinary.

LORD M'LAREN and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuer — M'Lennan — Hunter. Agent—Thomas Liddle, S.S.C.

Counsel for the Defender—A. J. Young —Gunn. Agent—John Scott, Solicitor.

Tuesday, November 13.

FIRST DIVISION.

[Lord Low, Ordinary.

HENDERSON *v.* STUBBS, LIMITED.

Reparation — Slander — Trade Protection Agency—Sale of Business—Agreement—Jus quæsitum tertio—Liability of Purchaser for Alleged Slander by Seller.

In an agreement for the sale of the business of a trade protection agency the purchasers undertook to pay and discharge all present and future liabilities of the sellers in connection with the business. A third party, founding on this agreement, brought an action of damages against the purchasers for alleged slanders contained in reports issued by the sellers prior to the sale.

Held (*rev.* judgment of Lord Low) that, although the purchasers were bound to relieve the sellers of their liabilities, they had not come under any obligation to the creditors of the sellers, and that the pursuer, being no party to the agreement, and having no *jus quæsitum* conferred upon him thereby, had no right of action against the purchasers.

Heddle's Executrix v. *Marwick and Hourston's Trustee*, June 1, 1888, 15 R. 698, *commented* upon.

Stubbs, Limited, 42 Gresham Street, London, and 72 Princes Street, Edinburgh, were incorporated under the Companies Acts 1862 to 1890 on 30th November 1893, and began business as mercantile agents, carrying on the business of a trade protection agency, upon 1st June 1894.

Prior to that date an undertaking of a similar nature was carried on by a limited company called the Trade Auxiliary Company, Limited, having its registered office in London. On 30th December