

offer or not. The case was just the same as if each party had consulted their own medical man, and both doctors had agreed in saying that the workman would be fit for work in six weeks from the date of the accident. In that case both parties would have been under the same error as here, and would have entered into the contract on an erroneous assumption. But I cannot suppose that in such a case the error so induced would be held to be a sufficient ground for setting aside the contract. The fact is that in all such cases there is always an element of transaction or risk, however much the parties may be guided by the professional advice which they receive. There must be finality about such transactions, and it would never do if it could not be determined whether a discharge so granted was to hold good until it was seen whether the opinions upon which the parties acted were justified by experience or not.

If authority were required, it will be found in the case of *Wood* in the House of Lords, where the person injured was induced to accept compensation (which proved to be inadequate) on the faith of a report obtained by the railway company.

In short, I think that the error which undoubtedly existed here was not a fundamental error, although no doubt it influenced both parties in entering into the contract.

I will only add that the matter might be well tested by considering whether, if the respondent had proved to be fit for work in a day or two, the appellants could have recovered from him the excess of the compensation which they paid him. I think clearly not.

The Court answered the question of law in the negative, sustained the appeal, recalled the award of the arbitrator, and remitted to him to dismiss the claim.

Counsel for the Claimant and Respondent—Hunter—Munro. Agents—Sibbald & Mackenzie, W.S.

Counsel for the Respondents and Appellants—W. Campbell, Q.C.—Younger. Agents—Morton, Smart, & Macdonald, W.S.

Saturday, November 24.

## FIRST DIVISION.

[Sheriff Court at Edinburgh.]

### AITKEN & COMPANY v. PYPER.

*Obligation—Obligation to Pay Premiums on Policy “Effected”—Policy subsequently Effected—Cautionary or Primary—Obligation Granted to Employer of Agent—Endurance of Obligation—Cautioner.*

P. granted a written obligation to A. & Co. in the following terms—“Dear Sirs: I beg to state that I am willing and hereby agree to become security for the regular payment of the sum of

£4, 7s. st., being the annual premium on policy of assurance for £200, effected on T’s life.” . . . On the day after the granting of this obligation A. & Co. entered into an agreement with T., in which it was agreed that T. should act as agent for selling goods made by A. & Co., that he should give a bill and a life insurance policy with the premiums guaranteed as security, and that A. & Co. should advance him the sum of £200.

Thereafter a policy for £200 was taken out by T., and it was subsequently assigned by him to A. & Co. In an action at the instance of A. & Co. against P. for payment of sums disbursed by them in payment of premiums on this policy, the pursuers averred that on the faith of P.’s obligation they had advanced T. £200, that they had subsequently found it necessary to apply for sequestration of T.’s estate, and that they had paid premiums on the policy to the amount sued for. The defender maintained that the action was irrelevant, in respect (1) that the obligation referred to an existing policy, and that the policy in question had been effected subsequently to the date of the obligation; (2) that the obligation was *ex facie* of the document of a cautionary nature, and no breach of a primary obligation to pay the premiums had been averred; and (3) that the letter of obligation referred only to the contract of service between the pursuers and T., and was only good as long as he remained in their service, as a guarantee against misconduct. The defender did not aver that the pursuers’ interest in the policy had terminated.

*Held* that these objections were unfounded, and that the pursuers had stated a relevant case.

*Fraud—Misrepresentation—Duty to Disclose—Obligation Granted to Employer of Agent by Third Party—Misrepresentation by Agent—Concealment of State of Agent’s Account by Employer.*

In an action by the grantees against the granter of an obligation to pay the premiums on a policy of insurance effected on the life of an agent employed by the grantees, and assigned to them by their agent, *held* that it was not a relevant defence for the defender to aver (1) that he had been induced to grant the obligation by misrepresentations made by the third person “for himself and on behalf of the pursuers,” there being no averment that the misrepresentations alleged had been made by or with the authority or knowledge of the pursuers; or (2) that the pursuers had concealed from the defender the fact that the person for whom he gave the guarantee was in their debt at the time, there being no allegation that the pursuers had ever been questioned by the defender on this point, and no obligation upon

the pursuers to disclose the state of the account unless asked by the defender to do so.

Messrs James Aitken & Company, brewers, Falkirk, raised an action against John Pyper, builder, Edinburgh, concluding for payment of four sums of £4, 7s. each, being premiums payable in respect of a policy of assurance dated 20th July 1894 granted in favour of John Tagg, Peebles, by the Colonial Mutual Life Assurance Society, Limited, and assigned by John Tagg to the pursuers, with interest thereon at 5 per cent. from the due dates till payment.

On 28th May 1894 the defender wrote to the pursuers a letter in the following terms—

“5 Roseneath Terrace,  
Edinburgh, 28 May 1894.

“Messrs James Aitken & Co.,  
brewers, Falkirk.

“Dear Sirs,—I beg to state that I am willing and hereby agree to become security for the regular payment of the sum of £4, 7s. st., being the annual premium on Mr John Tagg's policy of assurance for £200, effected on his life with the Colonial Mutual Assurance Society, Limited.—Yours truly, “JOHN PYPER, Builder.”

On 29th May 1894 the pursuers entered into an agreement with Tagg, who was then in business as an aerated water manufacturer and bottler of beer, which contained, *inter alia*, the following provisions—“(1) Mr Tagg to sell only our ales and stout in the districts he represents us in, in so far as we can supply all the qualities he requires, and to collect our accounts and see to the return of empties; (2) Mr T. to give a bill and a life insurance policy, with the premiums guaranteed, as security; (3) we are to advance Mr T. two hundred pounds stg., bearing interest at five per cent. per annum from date of this agreement, to be repaid in minimum sums of forty pounds stg. per six months.”

Thereafter Tagg obtained the policy dated 20th July referred to above, and by assignation dated 16th August 1894 assigned it to the pursuers.

The pursuers averred that they had agreed to make the advance to Tagg if he would insure his life and furnish a sufficient obligation for the payment of the premiums, and that on the faith of the defender's letter of obligation they had advanced £200 to Tagg; that at that time they believed Tagg to be in good circumstances, but that having found his affairs were in a bad state they had found it necessary to apply for sequestration of his estates in November 1894.

The pursuers further averred that the premium which fell due on 20th July 1895 had after some delay been paid by the defender, but that the premiums for the next four years—being those sued for—had been paid by them, and that they had not been repaid by him.

They pleaded—“(1) The defender having, by the said letter of obligation dated 28th May 1894, agreed to become security for the regular payment of the annual pre-

mium on the said certificate or policy of assurance, and the pursuers by his failure having had to pay the four premiums condescended on, the pursuers are entitled under said obligation to decree therefor, with interest and expenses, as concluded for. (2) No relevant defence.”

The defender made certain averments, which are quoted *in extenso* in the opinion of the Lord President *infra*.

The defender pleaded—“(1) No relevant case. (2) There having been at May 1894 no policy and no principal obligation to pay premiums, this action cannot be maintained. (3) The letter founded on is insufficient to ground the present action. As an alleged guarantee it is inoperative, illegal, and invalid in respect—First, it was procured from the defender by the fraud of Tagg, and by the pursuers having unduly concealed facts which, if known to the defender, would have prevented him from granting the same; Second, it was obtained from the defender by false and fraudulent representations made by Tagg acting for or in the interest of the pursuers; Third, it was signed by the defender under essential error induced by the pursuers' conduct and concealment. (4) In any event the said letter was granted only with reference to and as ancillary to a security for Tagg's intromissions in the pursuers' service, and ceased to be binding on the termination of his service with them.”

The Sheriff-Substitute (MACONOCHIE) on 11th December 1899 pronounced an interlocutor whereby he sustained the defender's first plea and dismissed the action.

The pursuers appealed to the Sheriff (RANKINE), who on 8th February 1900 pronounced the following interlocutor—“Recals the interlocutor of the Sheriff-Substitute of 11th December 1899: Repels the first plea-in-law for the defender: Sustains the second plea-in-law for the pursuers: Repels the defences, and decerns against the defender in terms of the libel.”

The defender appealed to the First Division, and argued—(1) The pursuers' averments were irrelevant. The letter *ex facie* contained a cautionary obligation depending on the existence of a primary obligation to pay the premiums. But it was not averred that the pursuers ever took any such obligation from Tagg, and accordingly as the primary obligation had never arisen, there was no liability on the defender, who if he were held liable, could have no right of relief against Tagg. Moreover, this was an obligation for payment of premiums on an already existing policy, and did not apply to one taken out subsequently. It was represented to the defender that Tagg was at the time in the pursuers' employment, and in possession of a policy, and it was to the policy which was stated to be in existence that the obligation applied, and it was to exist only during the period of Tagg's service. (2) The pursuers admitted that they were only security-holders, and accordingly it was their duty to aver and show that there was still a balance due to them by Tagg, which would entitle them to enforce the defender's obligation. (3) It

lay upon the pursuers primarily to connect the letter with the policy, and to do that it was necessary to look at the whole transaction. If that were done it would appear that the obligation had been granted by the defender in consequence of false representations made by Tagg on behalf of the pursuers. That was sufficient to entitle the defender to be released from the obligation—*French v. Cameron*, July 14, 1893, 20 R. 966. Accordingly, even if the pursuers' case were relevant, the defender had a good defence and was entitled to a proof of his averments.

Argued for respondents—(1) The obligation was not a cautionary one, but a separate and distinct undertaking to pay the premiums the moment the policy came into existence. It was in no sense a guarantee for Tagg's good conduct, nor on the other hand was it necessary for the pursuers to show that the advance made by them to Tagg had not been repaid by him. (2) There were no averments of misrepresentation on the part of the pursuers, or that there had been any communings between them and the defender. The averments as to Tagg's misrepresentations were quite irrelevant, the defender not being able to connect them in any way with the pursuers, and accordingly the defender had not stated any relevant defence. There was no duty of disclosure on the part of the pursuers, as in the case of a guarantee for good conduct—*Wallace's Factor v. McKissock*, February 23, 1893, 25 R. 642; *Young v. Clydesdale Bank*, December 6, 1889, 17 R. 231.

LORD PRESIDENT—The petitioner asks for decree for payment of four sums, of £4, 7s. each, which we know from the concordance are premiums on a policy of insurance. The last of them became due on 20th August 1899, and the question is, whether, when the action was raised, the pursuers had right to recover these sums from the defender. The action is founded on a letter dated 28th May 1894, addressed by the defender to the pursuers. Tagg is not a party to it—[*His Lordship read the letter*]. The first objection stated by the defender was, that the policy was not in existence at the date of the letters and was not taken out until 20th July. We are not, however, informed when the application for a policy was made to the Insurance Company, or when the proposal passed the Board, and we have no means of knowing the date at which the Company became bound to issue a policy. But that is not material, for it appears to me to be a sufficient answer to the objection that the word "effected" does not, as used in the letter, necessarily mean "then existent." It might mean either "to be effected" or "which has been effected;" in other words, John Tagg's £200 policy. There may be cases in which it is very material that the policy should be in existence at a particular time—for example, that a marine policy should have been taken out before the voyage and the risk had termi-

nated. But with regard to such a policy as that to which the present question relates, it does not appear to me to be material whether it was in existence at the date of the letter, provided that it was taken out before, or shortly after, the advance to Tagg was made.

The next question is, whether and to what extent we are to import into the letter as conditions a number of things which do not appear in it at all? The object for which the policy was to be effected is not stated in the letter, though it appears to have been intended to secure repayment of the advance of £200 to be made by the pursuers to Tagg, and possibly also to insure his fidelity.

When there is such a stipulation that security shall be given for payment of the premiums upon a policy in which the addressee of the letter is not the creditor, the person giving the letter must be taken to admit that the person to whom it is addressed has some interest in the policy, and we now know what that interest was. Under the circumstances now known to have existed, there would, *prima facie*, be a good action for the premiums. The policy was taken out, an interest is in effect admitted, and it is not alleged that the interest has terminated or been satisfied. Unfavourable statements have been made by the defender in regard to Tagg, but assuming them to be true, the things stated would form just the kind of risks which such a policy is intended to insure against. The defender avers as follows:—"Explained that Tagg, with whom the defender was only slightly acquainted, represented to him that he (Tagg) had obtained a situation as traveller with the pursuers, on condition that he found security for his intrusions as such, and that they were willing to accept as sufficient a policy which he then had on his life, if he gave them a satisfactory guarantee for the payment of the future payments. He represented himself as solvent and about to enter on said situation, and he concealed from the defender the facts that he was really much indebted to the pursuers at the time, and that they had been pressing him for money." What is here stated may have been very wrong on Tagg's part; but the pursuers were not parties to it; Tagg was not their emissary. What he wanted was to get into their employment upon the security offered by the defender in his letter of 28th May 1894. If that security was obtained from the defender on false representations made by Tagg, the pursuers cannot be affected by this. The defender also avers as follows:—"By these representations which were made by Tagg for himself, and on behalf of the pursuers, the defender was induced to copy and sign a draft of said letter which Tagg presented to him. It was unstamped. The said draft was prepared by or on behalf of the pursuers. The said representations were, as the defender has since learned, entirely false. Tagg had obtained no such situation as traveller. He was insolvent. No policy then existed, and no proposal for one had then been

made. Tagg was much in the pursuers' debt, and they had been pressing him for money." Here again the defender is careful not to allege that the representations were made with the knowledge or authority of the pursuers. All that is said is, that the representations were made "on behalf of" the pursuers; it is not stated that they were made with their knowledge or authority. There is, therefore, in my opinion, no averment relevant to fix responsibility upon the pursuers for the false statements of Tagg. The defender goes on—"The pursuers knew these facts, and knew that the defender was ignorant of them, and would not have granted the letter founded on had he been aware of them. They concealed them from the defender, though it was their duty to disclose them to him. They knew further that the defender granted the letter in the belief that Tagg had contracted with them, and was about to enter on their service as a solvent and responsible traveller, and that such was not the fact, and they concealed this from him to his prejudice." These are averments which, in a different context, might have been material, for they purport to connect the pursuers with the false representations of Tagg; and if the pursuers had been brought into such connection with the defender as laid a duty upon them to speak, they would have been very material. But it seems to me that they are not relevant, because no duty to disclose the state of accounts between Tagg and the pursuers is well alleged—at least no duty in respect of the failure in which the pursuers can be made liable. Reference was made to the case of *Young v. The Clydesdale Bank* (17 R. 231), in which it was maintained that it was the duty of a bank to disclose to a cautioner the state of the customer's account, but the answer which prevailed was that the state of his account was the very reason why the bank wished security, and that there was no obligation on them to disclose it unless they were asked to do so. If the cautioner had requested information, and a false answer had been given, the position would have been very different. The averments here do not amount to an allegation that any false statements were made by the pursuers. On the whole matter, I think that the view of the Sheriff is sound, and that his interlocutor should be adhered to.

LORD ADAM—This action is for payment of four sums of £4, 7s. each, being the premiums on a policy of insurance taken on the life of Tagg which were paid by the pursuers. The action is founded on a letter which the defender addressed to the pursuers, in the following terms:—[*His Lordship read the letter*]. Now, it is to be observed that it does not appear *ex facie* of the letter to what policy it is applicable, and accordingly that question is open to inquiry, and I think looking to the facts there can be no doubt that the reference was to the policy which was to be effected and afterwards was effected on Tagg's life.

The next question is, In security of what was the policy taken? We are not left in doubt, because we have the agreement between Tagg and the pursuers, and we find the second article of it is in these terms:—[*His Lordship read the second article*]. Now, looking to that I should have said that the policy was granted with reference to the bill alone, for I find no reference to a fidelity policy. Article 3 shows what the bill is, viz., one for £200. Accordingly, I see nothing to suggest that the policy has reference to anything but the bill, or that if after the £200 had been paid Tagg had proved unfaithful, the pursuers could have proceeded to recover on the ground that the defender had guaranteed his fidelity. It was said by Mr Campbell that this was not a principal obligation but a security, and that there must be a principal obligation to pay the premiums before the cautionary obligation can come into existence. I do not understand that argument looking to the facts. It is said that Tagg took out the policy and assigned it, but did not in express terms undertake to keep the policy in existence by paying the premiums, and that therefore he was under no obligation to keep up the policy, and that accordingly the defender is free. But I think that when Tagg assigned the policy his liability to keep it up continued and was in no way affected.

If that be so, there is not much left in the case. It is not a relevant defence to say that the pursuers do not state on record that the bill has not been paid, I should rather have expected an averment by the defender to the effect that it had been paid, but no such averment is to be found, and the pursuers are in no way bound to aver the contrary. The remaining points made by the defender are quite outwith the case, relating as they do to statements which were not made by the pursuers to the defender, while there is no averment of any communications between them. I agree with your Lordship that there is no relevant defence.

LORD M'LAREN—This case comes before us in a somewhat critical form. The Sheriff-Substitute has held that there is no relevant case against the defenders, while the Sheriff has held that there is a relevant case, and no relevant defence.

The action is founded on a written obligation granted by the defender to the pursuers in the following terms—[*His Lordship read the letter*].

The ground of the Sheriff-Substitute's judgment is that he held this to be a cautionary obligation, and that there is no averment of the creditor having sustained loss. In my opinion it is not a cautionary obligation, but an independent undertaking to pay the premiums. In the constitution of a joint obligation or several obligations to a creditor for the same debt, nothing is better settled than that where a party binds himself as an independent obligee with reference to the execution of the obligation, he must be held to have bound

himself in the character which he professes in the obligatory document. I think there is here a perfectly clear obligation by the defender to pay the premiums, and that it is unnecessary for the pursuers to set out that the debt intended to be secured has not been paid.

It is also said that the three documents, viz., the letter, the contract between Tagg and the pursuers, and the policy, do not follow the natural order of execution, but, in my opinion, when documents are intended to be contemporaneous and have a relation to each other, there is no materiality in any variation of dates. It would be impossible for persons at a distance from each other to carry on business if it were necessary that all documents should be signed on the day of settlement. It is therefore immaterial, if the documents are identified as those referred to, which of them was signed first and which last. So much for the pursuers' case, which I think is quite a relevant one.

The defence is that the defender was induced to grant the obligation by false representations made to him by Tagg "for himself and on behalf of the pursuers." I think that on a fair construction the averment only means that this was Tagg's motive in making the representations. I cannot read it as an averment that the pursuers knew that certain representations were to be made and authorised them. No doubt there exists in our law a right of rescission of a contract on extrinsic grounds, such as error or fraud, but that right we know is strictly limited and defined, and any extension of those limits would tend to impair the validity and efficacy of contracts. I think there are good reasons for strictly construing the relevancy of averments in cases such as this, because the hypothesis on which relief is granted is that the party has subsequently found out facts which had he known them would have prevented him from entering into the contract. It follows that he who seeks for equitable relief must disclose the circumstances under which his claim of relief arises. I see here no statement which satisfies that condition on which alone equitable relief can be given.

I therefore agree with your Lordships that the judgment of the Sheriff is correct.

LORD KINNEAR concurred.

The Court affirmed the interlocutor of the Sheriff dated 5th February 1900, and refused the appeal.

Counsel for the Pursuers—Salvesen, Q.C.—Younger. Agent—G. A. Munro, S.S.C.

Counsel for the Defender—W. Campbell, Q.C.—Hunter. Agent—D. Hill Murray, S.S.C.

Saturday, November 24.

## SECOND DIVISION.

[Sheriff of Caithness.

**DUNBAR'S TRUSTEES v. BRUCE.**

*Lease—Tenant or Servant—Subjects Held as Part Remuneration for Services—Termination—Removing—Summary Ejection—Warning—Notice to Quit Part of Subjects only.*

The proprietors of an estate engaged a gardener to keep in order the policy grounds, his remuneration being £15 of yearly wages, the occupation of the garden for his own use and profit, and the occupation of a cottage situated in the garden which was proved to be necessary to the occupation of the garden as a market garden. To enable him to work the garden as a market garden he took over at a valuation a horse and van, certain garden tools, and flower-pots. In certain advertisements relative to the estate the proprietors described the gardener as tenant of the cottage; he was also entered in the valuation roll by their factor as tenant of the garden, and paid the rates effecting thereto. On 25th August the proprietors gave him notice of dismissal as at the ensuing term of Martinmas, and intimated that he "would require to remove without further notice from the gardener's cottage." On his refusal to do so they raised an action for summary ejection.

*Held (diss. Lord Moncreiff)* that warrant for summary ejection must be refused, in respect (1) that the defender's tenure of the garden and cottage was that of a tenant, and not a condition of his service as gardener; and that as the cottage and garden were occupied by him as a single subject, notice to quit the cottage only was ineffectual; and also (2), *per* Lord Trayner, that the pursuers in any view had failed to show a *prima facie* case of occupation by the defender without any right or title.

Mrs Jane Louisa Duff Dunbar and others, the trustees of the late Garden Duff Dunbar, proprietors of the estate of Hemp-riggs, Caithness, raised an action against Donald Bruce, gardener, Ackergill, Wick, in the Sheriff Court at Wick, in which they prayed the Court summarily to eject the defender "from the gardener's cottage at Ackergill, occupied by him as part of the consideration for his services as gardener foresaid."

The pursuers pleaded—"(1) The service of the defender to the pursuers having terminated at Martinmas 1899 (28th November), and his right to occupy the subjects above specified having thereupon ceased, and he now being in vitious and precarious possession, and having refused to remove therefrom, the pursuers are entitled to warrant and decree as craved."

The defender pleaded—"(1) The defender being tenant of the subjects in question, and having received no legal notice of the