

ing, it will lie upon the pursuer to prove the verity of the writing by the defender's oath. If there had been any authority over and above this opinion of Professor More in favour of giving to the Act in question what one may call a reasonable and equitable interpretation I should have been glad to follow it, but I do not think that more than 200 years after the Act of Parliament became law I can give for the first time effect to equitable considerations which ought to have been, and perhaps were, considered by the Legislature before passing the Act.

"I accordingly sustain the defender's second plea-in-law and continue the case. That will leave it open for the pursuer either to take this judgment to review or, if he acquiesce in it, to put in a minute of reference to the oath of his adversary. Thereafter the remaining questions can be disposed of without much difficulty."

The Lord Ordinary sustained the defender's plea-in-law that the I O U had prescribed, and continued the case.

Counsel for the Pursuer—Black. Agents—Macpherson & Mackay, W.S.

Counsel for the Defender—Paton. Agents—Inglis, Orr, & Bruce, S.S.C.

Saturday, November 5.

## SECOND DIVISION.

[Sheriff Court at Edinburgh.]

MARTIN (ROBERTSON'S TRUSTEE)  
v. RIDDELL.

*Proof—Admissibility of Parole Evidence to Explain Written Document—Ambiguity—Assignment in Security of Advances—Assignee Acting as Individual or as Agent.*

Robertson granted an assignment of two policies of insurance on his life in favour of "James Riddell, agent, Clydesdale Bank, Leith Walk, Edinburgh." The assignment was *ex facie* absolute, but it was accompanied by a letter addressed by Robertson to Riddell which bore that the assignment was granted in security of advances made or to be made by Riddell to Robertson. Robertson subsequently conveyed his estate to a trustee for behoof of his creditors. The trustee brought an action to have Riddell ordained to re-transfer the policies to him. Riddell averred that the assignment was granted to him as agent of the bank, and that advances had been made by him as agent to Robertson on the faith of the assignment, and he maintained that he was entitled to hold the policies until the debt due to the bank had been repaid.

The Court allowed a proof *pro ut de jure* (per the Lord Justice-Clerk, Lord Ardwall, and Lord Dundas—Lord

Salvesen reserving his opinion) on the ground that the assignation and back-letter were ambiguous, and that Riddell was entitled to prove the facts averred by him with a view to showing that the assignation was granted in his favour as agent of the bank, and (*per* Lord Salvesen) on the ground that Riddell was entitled to retain the policies until all advances made by him on the faith of the assignation were repaid, whether the advances were made by him out of his own funds or out of the funds of the bank.

In May 1910 William Martin, C.A., trustee for behoof of creditors of the estate of Alexander Robertson, dairyman, 37 Lorne Street, Leith, brought, in the Sheriff Court at Edinburgh, an action against James Riddell, The Clydesdale Bank, Ltd., Leith Walk, Edinburgh, to have him ordained to assign and deliver to the pursuer two policies of insurance conveyed by Robertson to Riddell by assignation dated 22nd December 1900.

The assignation was as follows:—"I, Alexander Robertson, . . . for certain good and onerous causes and considerations, do hereby assign unto James Riddell, agent, Clydesdale Bank, Limited, Leith Walk, Edinburgh, his executors, administrators, and assignees, the following policies of assurance on my life granted by the Norwich Union Life Insurance Society, videlicet:—(1) policy numbered 61854, dated the 18th day of September 1894, for £250 sterling, and (2) policy numbered 61855, dated the 18th day of September 1894, for £250 sterling: Together with the said assured sum of £500 sterling, and all bonus additions accrued or that may accrue thereon, and my whole right, title, and interest therein, with full power to the said James Riddell and his aforesaid to sell, assign, or surrender the same at pleasure, to uplift and recover the proceeds thereof, and generally to do everything in relation to the said policies of assurance and sums therein contained which I could have done before granting hereof . . ."

This assignation had been accompanied by the following letter:—

"Edinburgh, 22nd Dec. 1900.

"Sir,—I beg to hand you herewith:—

"(1) Policy of assurance on my life granted by the Norwich Union Life Insurance Society, numbered 61854, endowment insurance with profits, dated 18th September 1894, for £250 sterling.

"(2) Policy of assurance on my life granted by the Norwich Union Life Insurance Society, numbered 61855, endowment insurance with profits, dated 18th September 1894, for £250 sterling, together with assignments thereof in your favour, which please have intimated, and thereafter hold the said policies and assignments as a general security for any advances or obligations I, or any company or firm of which I am or may become a partner—however the same may for the time be constituted—may at present or at any future

time be under to you.—Your obedient servant,

“Alex. Robertson.

“Mr James Riddell, Agent,  
“The Clydesdale Bank, Ltd.,  
“Leith Walk, Edinburgh.”

6d.  
Stamp.

The defender averred—“(Ans. 4) . . . On 13th December 1900, after being . . . requested by said Alexander Robertson, the defender intimated to the said Alexander Robertson that he was prepared to allow him to overdraw his account to the extent of £45, on the said Alexander Robertson assigning his two life policies with the Norwich Union Life Insurance Society to him *qua* agent of the bank in security of the said advances, or any future sum or sums which might be due to the bank, which he agreed to do . . . The defender accordingly holds the said policies of assurance in trust for the said Clydesdale Bank, Limited. (Ans. 6) . . . Explained that at 4th February 1910 the said Alexander Robertson was indebted to the defender as agent of the said Clydesdale Bank, Limited, for the sum of £120, 1s. 7d., exclusive of interest.”

The defender pleaded—“(4) The pursuer, as trustee foresaid, taking the estate *tantum et tale* as it stood in the said Alexander Robertson, as at 4th February 1910, he has no right to said policies until the debt due to the bank is paid.”

On 6th July 1910 the Sheriff-Substitute (ORR) allowed a proof.

*Note.*—“ . . . The documents describe the defender as agent of the Clydesdale Bank at Leith Walk, but they do not disclose that the policies were assigned to him as agent of or in trust for the Clydesdale Bank. Pursuer's case is that the assignation was granted to defender as an individual.

“Defender's case, on the other hand, is that the Clydesdale Bank agreed at Robertson's request in December 1900 to allow him to overdraw his account in the Leith Walk branch to the extent of £45 on his assigning the two life policies to defender *qua* agent of the bank in security of said advances or any future sum or sums which might be due to the bank. Defender states that he ‘accordingly holds the said policies of assurance in trust for the said Clydesdale Bank, Limited.’ He further explains that on 4th February 1910 Robertson was indebted to the defender as agent of the bank in the sum of £120, 1s. 7d. and interest.

“Pursuer maintains that the assignation and back letter can alone be looked at in this question; defender asks a proof *pro ut de jure* of his averments.

“No question arises in my opinion under the Act of 1696. This is not an action directed against a person alleged to be a trustee; it is not a question between truster and trustee. It is a case where the defender alleges that an *ex facie* absolute right in his favour is truly a trust. That, I think, can be proved *pro ut de jure*—Dickson on Evidence, sec. 582; *Murdoch v. Wylie*, 1832, 10 S. 445; *Hastie v. Steel*, 13 R. 843 (opinion of Lord Craighill).

“The defender argued a point . . . to the effect that the assignation in his favour rendered the present action incompetent. But if the assignation of the policies be truly in favour of defender as an individual, the pursuer is entitled, if nothing be due now to the defender, to demand that they be assigned to him as pursuer's trustee. . . .”

On 19th July 1910 the Sheriff (MACONOCHE) adhered.

*Note*—“The sole question at present before me is whether, looking to the terms of the assignation and a letter which Mr Robertson sent to the defender when he lodged the life policies with him, the defender can prove *pro ut de jure* that the policies were assigned to him, not as an individual, but as agent for the Clydesdale Bank, Limited, in security of advances made or to be made by the bank to Robertson? The two documents are not happily expressed, as in neither of them is there a clear statement as to the understanding under which the assignation was granted or the advances made. The assignation bears to be granted in favour of Mr Riddell, ‘Agent, Clydesdale Bank, Limited, his executors, administrators, and assignees’ for certain good and onerous causes.’ It was maintained that the words ‘his executors,’ &c., showed distinctly that the assignation was to Mr Riddell as an individual, and that it was incompetent for him to go behind the document. I do not think that that view can be maintained, looking to the decision in *Forrester v. Robson's Trustees*, 2 R. 755. It was further maintained that the letter (which can hardly properly be termed a ‘back letter,’ seeing that it was written by the debtor) also clearly showed that Robertson was dealing with Mr Riddell as an individual, as it bore that the policies were assigned to him in security for ‘any advances or obligations I . . . may at present or at any future time be under to you.’ That letter is addressed to Mr Riddell, ‘Agent, The Clydesdale Bank, Limited.’ I do not think that the pursuer can read anything more in his favour from that document than can be found in the assignation. The ‘advances’ seem to me to refer to the same thing as the ‘good and onerous causes’ mentioned in the assignation, and the two deeds raise in the same way the same question, Can Mr Riddell competently prove as a defence to the action that the assignation to him ‘agent for’ the bank, and the words ‘advances I may be under to you’ mean respectively ‘assignation to him as agent’ and ‘advances made by him as agent.’ I am of opinion that he can, on the authority of the cases cited by the Sheriff-Substitute (*Murdoch v. Wylie*, 10 S. 445, and *Hastie v. Steel*, 13 R. 843, and particularly Lord Craighill's opinion there at page 851).”

The pursuer appealed, and argued—It was not competent to lead parole evidence to contradict or modify a written document, unless the document was ambiguous—*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; *M'Leod v. Urquhart*, May 25, 1808, Hume 840; *Laird & Company v. Laird & Rutherford*, December 9, 1884, 12 R. 204, 22 S.L.R. 200; *M'Allister v. M'Gallagley*, November 2, 1910, reported *infra*. In the present case there was no ambiguity—it was clear from the terms of the back letter that the assignation was granted to secure advances made by the defender as an individual. The word used was “you,” which necessarily meant the defender personally, and could not be construed as meaning the Clydesdale Bank. The words “Agent, the Clydesdale Bank” were merely descriptive—*Graham v. Macfarlane & Company*, March 11, 1869, 7 Macph. 640. The cases of *Forrester v. Robson's Trustees*, June 5, 1875, 2 R. 755, 12 S.L.R. 464, and *Hastie v. Steel*, March 19, 1886, 13 R. 843, 23 S.L.R. 559, were distinguishable. In *Forrester, cit.*, the question was whether a policy of insurance standing in name of a partner belonged to the partner or to his firm. It might have had some bearing if the present question had arisen between the defender and his bank. *Hastie v. Steel, cit.*, turned on a doctrine of the law of trust and did not touch the present case.

Argued for the defender—It was clear from the terms of the assignation and the back letter that the assignation was granted in favour of the defender *qua* agent of the bank. If that was not clear then the documents were ambiguous and it was competent to prove by parole any facts which would aid the construction. The defender averred that the advances secured were made by him as agent for his bank. If that were proved, the inference would be irresistible that the assignation was granted to the defender *qua* agent. *Forrester v. Robson's Trustees, cit.*, and *Hastie v. Steel, cit.*, were in point and ruled the present case in the defender's favour. Even if the assignation were granted in favour of the defender personally he was entitled to retain the policies until all advances made on the faith of the assignation were repaid. It was immaterial whether the advances were made out of his own funds or not.

LORD ARDWALL—In this case I have come to the conclusion that the Sheriffs have acted properly in allowing a proof *pro ut de jure*. I do so on the general ground that, although we have writings here, they are ambiguous in their terms, the ambiguity being caused by the fact that it is not clear whether the assignation which is granted in favour of “James Riddell, agent, Clydesdale Bank, Limited, Leith Walk, Edinburgh,” is granted in his favour as an individual or as agent of the bank—in other words, whether we are to read the words “Agent of the Clydesdale Bank” as a mere description or as a designation of the character in which he received the policies. That ambiguity, which appears on the face of the assignation, is made still more patent by the document which has been described as a back letter, because the letter is addressed to “Mr James Riddell, Agent, Clydesdale Bank,

Limited,” and, after enumerating the policies, says that they are to be held “as a general security for any advances or obligations I, or any company or firm of which I am or may become a partner . . . may at present or at any future time be under to you.” There again there is ambiguity as to whether the word “you” refers to Riddell as an individual or as agent of the Clydesdale Bank, and that ambiguity is rendered still more apparent by the fact that the matter dealt with is advances. Now it is not the ordinary business of a bank agent as an individual to make advances, whereas it is natural and usual for a bank to do so. In these circumstances I think a proof *pro ut de jure* should be allowed, because it would help to clear up the matter if, *e.g.*, it were shown whether the advances were made to Robertson by Riddell personally or by the bank, and there are a number of other circumstances which the Court are entitled to have before them in order to enable them to put themselves into the position of the parties at the time when the assignation and the back letter were granted. On these grounds I think that the judgments of the Sheriffs were right and should be affirmed.

LORD DUNDAS—I concur, and I do not think that in deciding as we do we are impinging in the least on the doctrine of the cases of *Lee v. Alexander*, 1883, 10 R. (H.L.) 91, and *Inglis v. Buttery & Company*, 1878, 5 R. (H.L.) 67, which were quoted to us by Mr Sandeman.

LORD SALVESEN—I concur in the result at which your Lordships have arrived, but I prefer to put my judgment on a somewhat different ground. The defender holds the policies of insurance under an *ex facie* absolute assignation in his favour. He is asked by the trustee of the cedent to re-assign them, and the question is whether he is bound to re-assign until any advances which he may have made on the faith of this assignation have been repaid. It is said that while he is entitled to prove *pro ut de jure* advances made by himself personally, he is not entitled to prove advances made by him as agent of the bank for which he acts. In my opinion that is not a sound proposition. The defender having an absolute title to these policies has, I think, the right to retain them for any advances which he has made on the faith of the assignation. The bankrupt could scarcely maintain that because the advances were not made from the defender's own funds the defender was bound to denude of the security on which he relied when making them, and I do not see how the trustee can be in any better position. Accordingly, while not dissenting from the ground on which Lord Ardwall has based his judgment, but reserving my opinion on that question, I think that the Sheriffs have acted rightly in allowing a proof.

LORD JUSTICE-CLERK—If it had been necessary for the decision of the case to go

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