

pursuer said was entirely consistent with what was to be expected, and, in the next place, the Lord Ordinary adopted it as the true view having seen the witness for himself. I agree with your Lordships in thinking that under the circumstances it is unwarrantable to reject that testimony.

As to the concluding passage of the judgment, in which it is said that "If he had got that steamer available, as he said, for loading between the 5th and 10th December it is not by any means proved that she could have been loaded before the end of that month," there again on the question of the construction of the contract we find that the Court proceeded on what appears to be an error. It was not necessary that it should be proved that it could have been loaded before the end of the month. It appears to me that it would have been quite sufficient if it had been proved that the vessel had been there before the end of December, although she might have been loaded earlier, and indeed I am not prepared to say that a vessel sent in the month of January would not have been within the terms of this contract, having regard to the elastic expressions which we find in it.

On these grounds, my Lords, concurring with all that has fallen from your Lordship, I agree in thinking that the judgment of the Inner House ought to be reversed.

LORD DAVEY—My Lords, I cannot agree with the judgment of the Inner House delivered by Lord Trayner, because I think it is founded upon an erroneous view of the evidence given in the case, and also upon an erroneous view of the construction of the documents. Lord Trayner says that the telegram upon which the defenders, the present appellants, rely does not say that "the defenders would give no more coals under the contract." My Lords, it does not say so in words, but I am of opinion that it does say so in substance, and that the true meaning and effect of that telegram is to say, you are not entitled to, and we will not give you, any more coals under the contract than those which are in the course of being loaded on the "Taikun" and the "Elizabeth." The judgment then says—"That vessel (that is the "Danmark") subsequently arrived and got a cargo of coals, but not under the contract, because through no fault of the defenders she could not be loaded in December." Under that statement lies the proposition that the defenders were not bound to load any coals under the contract after the expiration of the month of December. I cannot agree in that construction of the contract; I think it is erroneous.

And, lastly, it appears to me that the judgment is based upon a statement which has been already commented upon, that the pursuer's statement that he had got the offer of a steamer to carry 1150 tons, which he did not charter because of the defenders' telegram of the 29th of November, ought not to be accepted, and that there was no proof that it was true. My Lords, I cannot agree either in that view of the evidence.

My Lords, I entirely concur in what your Lordships have said as to the view taken

by the Lord Ordinary of this case. I do not think it necessary to add anything to the reasons which have already been given, nor indeed should I have thought it necessary to say anything at all in this case had we not been differing from the judgment of the Inner House delivered by Lord Trayner.

Ordered "that the judgment of the Lord Ordinary be restored, and that the respondents do pay to the appellants the costs both here and below, and that the money already paid in respect of the costs below be repaid."

Counsel for the Pursuer and Appellant—
J. B. Balfour, Q.C.—Glegg—Nield. Agents
—Armitage & Strouts, for Galloway &
Davidson, S.S.C.

Counsel for Defenders and Respondents
—Joseph Walton, Q.C.—Salvesen. Agents
—Thomas Cooper & Co., for Beveridge,
Sutherland, & Smith, S.S.C.

Tuesday, May 12.

(Before the Lord Chancellor (Halsbury),
Lord Watson, Lord Herschell, and
Lord Davey.)

J. & G. PATON v. CLYDESDALE BANK,
LIMITED.

. (*Ante*, vol. xxxiii. p. 22, and 23 R. p. 38.)

*Cautioner—Representations as to Credit—
Fraud—Mercantile Law Amendment Act
1856 (19 and 20 Vict. cap. 60), sec. 6.*

Representations, otherwise falling within sec. 6 of the Mercantile Law Amendment Act 1856, are not excluded from the operation of that section by the fact that the person making them does so fraudulently and with the ulterior purpose of benefit to himself.

In an action of damages against a bank, and against S., the agent of the bank, the pursuers founded upon representations alleged to have been fraudulently made to them by S. for the purpose, and with the effect, of inducing them to sign bills for the accommodation of the firm of D., R., & Co. The pursuers alleged that these representations were made by S. in order to enable the bank to apply the bills so procured in reduction of an overdraft which was then due to it by the firm of D., R., & Co. The representations, which it was admitted were made verbally, were (1) that D., R., & Co. were in a sound condition financially and only required temporary accommodation; (2) that the sum due by them to the bank was very trifling; (3) that D., R., & Co. had made up the losses which they had previously sustained through the failure of a certain firm, by fortunate speculations; (4) that no portion of the proceeds of any acceptances by the pursuers would be

applied towards the extinction of the bank's debt or of any obligation to the bank.

Held (rev. judgment of the Second Division) that the action was irrelevant, in respect that the first, second, and third representations were not in writing or subscribed by the person making them, as required by the statute, and could not therefore be admitted to proof, and as regards the fourth representation, that there was no averment on record that the bank had in fact applied the proceeds of the bills in a manner inconsistent with that representation.

The case is reported *ante*, vol. xxxiii. p. 22, and 23 R. p. 38.

The defenders appealed.

In argument their Lordships indicated an opinion that the respondents had not sufficiently averred that the 4th representation alleged to have been made by the appellant Scott had not in fact, if made, been given effect to by the bank.

The respondents proposed to amend the record by adding the following averments, viz.—“In fact the object of procuring the pursuers to accept the bills . . . was to pay off with their proceeds existing debts due to the bank by Douglas, Reid, & Company on account-current contrary to the fourth assurance above set forth. Had it not been for the said assurance the pursuers would not have accepted any of the bills.” The acceptances “were applied in extinction *pro tanto* of the bank's debt contrary to the assurances given as aforesaid. If the said acceptances had not been granted and applied as aforesaid, the bank's ultimate loss would have been larger by the amount of the said bills, viz., £4000, with interest thereon. The result was that the bank obtained and the pursuers lost the said sum of £4000 and interest.”

At delivering judgment—

LORD CHANCELLOR—My Lords, it appears to me that whatever doubt might have been entertained upon the original argument of this case, no doubt can now be entertained as regards that which appeared at first sight perhaps to be an insufficient and inadequate statement of the causes of action, but which might possibly, upon a certain construction, show that there had been a cause of action sufficiently set forth upon the pleadings on the record. No doubt can now be entertained that the pleader, with the facts before him, and with a knowledge of the discussion which has taken place in this House pointing out that, taking the most favourable view for the pleader, the allegations were ambiguous, although time has been allowed for the purpose of amending that ambiguity—no doubt, I say, can now be entertained that the pleader has done all that he possibly could do, consistently with being able to prove the facts at the trial, to avoid stating in express terms what, if it were true, he could have stated, namely, the non-performance of the promise

by the bank to give additional credit to the firm which it was proposed to assist.

My Lords, the matter seems to me to be very clear, and to use the language of English pleading, facts are set out from which it would appear that there has been (I will assume in favour of that view) a combination to induce the respondents to advance a further sum of money under circumstances in which it was to the advantage of the bank and to the advantage of those who persuaded the respondents to allow the debtor, who was in some difficulties which might lead to his sudden bankruptcy, to continue carrying on his business. If the allegations with which I am about to deal had been to the effect that in pursuance of that combination the bills had been signed, and that the bank by that combination had managed to get their own debt paid, in pursuance, as I say, of that combination, and that the person who signed the bills had been induced to sign them by the false representation that it was intended to enable the debtor to carry on his business so as perhaps to recover himself, but that in lieu of that the bank had appropriated the whole of the new advances to pay off their own past debt, I am of opinion that there would have been a good cause of action shown upon the face of this record. But after the discussion which has taken place, and after what has been pointed out as to the ambiguous language used in the pleadings, it is manifest to me that no such thing can be averred; and it is perfectly consistent with every allegation on this record that the bank did what they were expected to do, and that on receiving these new advances they did apply them to the credit of the debtor. Although in a certain sense it may be that at the end the bank was less a loser than it would otherwise have been by reason of this advance, yet the only thing which makes it properly a cause of action is omitted from this condescendence. Therefore I am of opinion that the judgment of the Inner House ought to be reversed and the action remitted, and the defenders assailed.

The language of an English pleader would be, that whatever was the contract intended to be entered into, and entered into in fact, there was no breach upon the face of this record properly assigned. There is nothing which shows that the thing that was to be done by the bank was not done and done perfectly *bond fide*, and with the intention of helping the person who was in difficulties as he was helped, and that he was helped accordingly. That, as I have said, might have been a slip on the part of the pleader originally, and I myself should have been reluctant to have given judgment against the pursuer in this case upon that view if it had rested upon what might be only the ambiguous language of pleading. But after more than a week's delay, and seeing the amendments which are now proposed, it seems to me that with great astuteness and skill in the use of language the pleader has repeated exactly the same thing in different words, and has expressly avoided doing that

which would, as I say, have set out a complete cause of action. Under these circumstances it appears to me that all your Lordships can do is to allow the appeal and remit the action to the Court below to assize the defenders, and find the respondents liable in expenses.

My Lords, the only difficulty I have had has been in looking through the different pleadings and seeing what has been sufficiently averred; and as we have from time to time made international reflections as to our different systems of pleading, I cannot help saying, and I say it with regret, that had this occurred in an English action, and had a statement of claim been the subject of controversy instead of these Scotch pleadings, I believe it would have been impossible for your Lordships to disentangle the allegations made, and to pronounce the judgment we are now proposing to pronounce, and to prevent the possibility of a considerable amount of costs being wantonly thrown away. By the precision of the Scotch pleading there is still a necessity to set out the real cause of action, which is capable of definite and precise statement, which I regret to say is no longer the case in English pleadings. I therefore speak with some degree of envy when I say that at all events the Scotch jurisprudence has preserved something like a system in which a definite and precise allegation of the cause of action is required to be set out before a litigant is allowed to incur considerable expense in proving what may after all turn out to be no cause of action at all.

For these reasons I move your Lordships that the judgment be reversed.

LORD WATSON — My Lords, the main question involved in this appeal is new to the law of Scotland, although it arises upon the terms of a statute which was passed in 1856. Section 6 of the Mercantile Law Amendment (Scotland) Act of that year enacts that "all representations and assurances as to the character, conduct, credit, ability, trade, or dealings of any person, made or granted to the effect or for the purpose of enabling such person to obtain credit, money, goods, or postponement of payment of debt or of any other obligation demandable from him, shall be in writing, and shall be subscribed by the person making such representations and assurances, or by some person duly authorised by him, otherwise the same shall have no effect." These enactments are in substance the same as the provisions of section 6 of 9 Geo. IV. cap. 14, commonly known as Lord Tenterden's Act, which applies to England and Ireland. There is this difference of expression between the two clauses, that in the earlier statute it is declared, not that the representations and assurances shall be of no effect, but that no action shall be maintainable upon them when they are not contained in a writing duly subscribed.

This is an action of damages brought by the respondents founded upon representations alleged to have been falsely and

fraudulently made to them by the appellant Scott, who was agent in Dundee for the appellant's bank, for the purpose and with the effect of inducing them to sign bills of exchange to the amount of £4000 for the accommodation of the firm of Douglas, Reid, & Company. It is also alleged that the main object which Scott had in view in making these representations, was to enable the bank to apply the bills so procured in reduction of a large over-draft which was then due to it by the firm accommodated. It is not asserted that the directors, or any official of the bank other than Scott, were in the knowledge of his fraudulent proceedings, but it is averred that the representations made by him were within the scope of his employment as agent, and there are also averments which are said to mean that the bank did in fact receive the proceeds of the bills and apply the same in extinction of the debt due to it from Douglas, Reid, & Company.

It is admitted by the respondents that all the representations upon which they rely were made by Scott verbally. These representations were—(1) That Douglas, Reid, & Company were in a sound condition financially, and only required temporary accommodation; (2) that the sum due by them to the bank was very trifling; (3) that Douglas, Reid, & Company had made up the losses which they had previously sustained through the failure of the firm of Lipman & Company by fortunate speculations in jute; and (4) that no portion of the proceeds of any acceptance by the respondents would be applied towards extinction of the bank's debt, or of any obligation to the bank.

In their defences the appellants pleaded that these representations, being neither in writing nor subscribed as the Act of 1856 requires, were of no effect, and could not be admitted to proof. The plea was overruled by the Lord Ordinary (Low), who allowed the parties, before answer, a proof of their respective averments. It appears to have escaped his Lordship's notice that there are statements in the condescendence with respect to the appellant Scott's relations to one Hassberger, which are simply irrelevant and scandalous, and ought to have been deleted before the record was closed. The Second Division of the Court recalled the interlocutor of the Lord Ordinary, and instead of a proof before answer, appointed issues to be lodged for the trial of the cause.

All the learned Judges in the Courts below were of opinion that the circumstances of the case, as disclosed in the condescendence, took these representations out of the statute of 1856. The Lord Justice-Clerk held it to be sufficient for that purpose that the representations were made in pursuance of a fraudulent scheme, by means of which the bills were obtained, on the assurances of its agent, for the purposes of the bank. The same view was more clearly indicated by Lords Young and Trayner, who were of opinion with the Lord Ordinary that the representations would have been within the statute if they

had been made for the sole purpose of inducing the respondents to accept the bills, but that they were excluded from its operation because they were made for an ulterior purpose which is not mentioned in the statute, namely, in order that the bank might be enabled to obtain payment of its claims against Douglas, Reid, & Company.

The fourth representation does not appear to me to involve the construction of the statute. It differs from those which precede it in this respect, that it does not contain any assurance relating to Douglas, Reid, & Company, or to their credit, ability, or trade. In my opinion it does not possess the character of a representation to which the statute applies. In the view of the law which was adopted by the Courts below, the distinction between the fourth and the first three of the representations libelled on was immaterial.

The provisions of section 6 are expressed in terms as comprehensive as they are imperative. They enact that no verbal representations, being of the character, and made for the purpose and with the intent specified in the clause, shall be of any legal effect, as giving a remedy to the person who may be misled by them to his detriment. They in substance provide that no person to whom such verbal representations are made for such a purpose shall have any right to rely upon them, and that if he does choose to act upon them, he must bear the consequences of his own credulity. It is also, in my opinion, obvious that these provisions were not intended to meet the case of truthful and honest representations, and that they necessarily include all representations of the character, and made with the purpose specified, however false and however fraudulent.

In the present case it has hardly been controverted, and it does not appear to me to admit of serious dispute, that the first three of the representations upon which the action is laid answer precisely both in character and in their immediate object to the description contained in section 6. But it has been argued (and the argument found favour with the learned Judges of the Court of Session) that the first three of these representations are not within the incidence of section 6, because they are alleged to have been made, not merely with the immediate purpose of inducing the respondents to sign accommodation bills, but with the further and fraudulent purpose of enabling the bank to appropriate the bills, when granted, to the payment of its debt. I do not think that the argument has any solid foundation in fact. The main, if not the only cause of action disclosed by the condescence is the fraudulent procuring of the respondent's acceptance of the bills in question by means of these representations. But I am of opinion, that even if it be warranted by the facts, the argument is without foundation in law. It seeks to limit the generality of the enactments of section 6 by introducing a proviso to the effect that they shall not apply in cases where the person making the representations has in view

some ulterior and illegitimate purpose, beyond inducing the person to whom they are made to give credit or money to a third party. There is no warrant for such a limitation to be found in the words of the clause, which, in my opinion, declare explicitly that any verbal representation to which they apply shall be absolutely inefficacious, no matter what may be the further and fraudulent design of the person who made it.

It was maintained for the respondents that the competency of proving these representations by parole has been established by section 100 of the Bills of Exchange Act 1882, which provides that "In any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory-note, which is relevant to any question of liability, may be proved by parole evidence." It may well be doubted whether the present action does raise any question of liability upon the respondents' accommodation bills, but it is an obvious answer to the argument that in the present and similar cases such verbal representations have since the Act of 1856 ceased to be relevant facts.

It is possible that the fourth representation might be founded on, either as being a fraudulent inducement to sign bills for the accommodation of Douglas, Reid, & Company or as constituting a promise or agreement binding the bank to abstain from imputing any part of the proceeds of these bills towards payment of its debt. But in neither of these aspects do I find any relevant allegation in the condescence. It is not averred that the bank has failed to fulfil the representation said to have been made by its agent. The only averment upon this point, which occurs in the 8th article of the condescence, is that the respondents' acceptances "were all placed to the credit of the said Douglas, Reid, & Company's overdrawn account-current with the Clydesdale Bank at the several dates when the pursuers' said acceptances were obtained as aforesaid. The defenders, the Clydesdale Bank, were thus *lucrati* to the extent of the said acceptances." These allegations are quite consistent with the possibility that the whole of the sums so credited were drawn out by Douglas, Reid, & Company, and by them applied to their own purposes, and are therefore irrelevant.

Your Lordships delayed the consideration of this appeal in order that the respondents might have an opportunity of submitting any amendment showing that the bank had applied the proceeds of these acceptances in reduction of the balance due to it by Douglas, Reid, & Company. The respondents have proposed to add two new averments, the first being that the acceptances were "applied in extinction *pro tanto* of the bank's debt," and the second, that, "If the said acceptances had not been granted and applied as aforesaid the bank's ultimate loss would have been larger by the amount of the said bills, viz., £4000 and interest thereon." I see no reason to doubt that these amendments have been very

properly framed with a strict regard to the kinds of truth, but, in my opinion, they come far short of relevancy. So far from negating they appear to me rather to suggest that the appellants' bank not only allowed to Douglas, Reid, & Company the free use of the proceeds of the respondents' acceptances, but made new advances to that firm out of its own funds.

I have only to observe further, that if the fourth representation were relied on as a promise which the bank had failed to fulfil, the respondents would have no title to raise the question. The only person having a title to complain of a breach of that promise would in that case be the trustee in Douglas, Reid, & Company's sequestration.

For these reasons I am of opinion that the interlocutors appealed from must be reversed, with costs; and that the action ought to be remitted to the Second Division of the Court of Session, with directions to assolzie the appellants from its conclusions, with expenses in both Courts below.

My noble and learned friend Lord Morris, who is judicially engaged elsewhere to-day, has requested me to state that he concurs in the opinion I have just read.

LORD HERSCHELL—My Lords, the action is founded upon four matters, the statement of which is contained in the fifth condescendence. It cannot be doubted that the first three complaints referred to statements made, and are founded upon statements made by the appellants' agent with reference to the "character, conduct, credit, ability, trade, or dealings" of Douglas, Reid, & Company. Apart from the provisions of the Mercantile Law Amendment Act of 1856 no doubt can be entertained that the condescendence discloses relevant facts establishing a cause of action against the appellants. The objection taken on their behalf to the relevancy of the condescendence is founded upon the provisions of that enactment. The respondents seek to avoid the operation of the statute so far as they are concerned in the present case, and have succeeded in obtaining judgment in their favour on the ground that the representations made were part of a scheme fraudulently devised by the appellants and Douglas, Reid, & Company for the purpose of benefitting the bank at the expense of the respondents. In my opinion the operation of the statute cannot be so avoided. Assuming that the respondents could establish that the representations were made for the purpose of giving effect to such a fraudulent scheme, I am of opinion that the enactment positively forbids any effect being given to those representations. It is impossible to conceive of an enactment in more general or unambiguous terms, "all representations and assurances" of the nature described, unless in writing, are to have no effect. The action of the respondents, if it is to be maintained, requires as its foundation that effect should be given to those representations which the statute has said shall have no effect. I do not see how it is open to

question that the representations were of a kind within the words of the statute, because the statute applies to all such representations made or granted to the effect or "for the purpose of enabling such person to obtain credit, money, goods," &c. Now, the very framework of the respondents' case is that the representations had the effect of rendering them liable upon certain bills of exchange, which resulted in money being paid to the bank for the accommodation of Douglas, Reid, & Company. How then it can be said that they were not made or granted to the effect of enabling those persons to obtain credit or money it is difficult to see, but if the statute in terms applies, how is it possible to avoid its operation by proving that the design of the bank and of Douglas, Reid, & Company in making the representations and so procuring the credit was an ulterior benefit to the bank?

My Lords, the respondents also maintain that the hundredth section of the Bills of Exchange Act of 1882 dispenses in such a case as this, inasmuch as obligations on bills of exchange come in question, with the necessity of the writing which is required by the Mercantile Law Amendment Act. I think it is an argument which it is difficult to treat seriously. It is impossible to conceive that the hundredth section of the Bills of Exchange Act can have repealed *pro tanto* the Mercantile Law Amendment Act whenever obligations upon bills of exchange have been obtained by representations as to conduct, credit, or character. That disposes of the case so far as regards the first three of the allegations contained in the condescendence. The fourth allegation is quite independent of the statute; it is "that no portion of the proceeds of any acceptance by the pursuers would be applied in extinction of the bank's debt." I think that allegation is only relevant if it can be maintained as a representation made by the bank to the respondents, upon which they acted, being a false and fraudulent representation. If it is a promise only it would not be relevant, because the respondents would have no title to sue in respect of its breach. But no doubt that which is in form a promise may be in another aspect a representation, and I think that the fourth averment of the fifth condescendence may be treated as relating to a representation by the bank which is alleged to be false and fraudulent.

My Lords, taking it to be so, I do not think that, when you take the whole of the condescendences together, it is shown that the bank did make a false and fraudulent representation of an intention which they never intended to carry out, because that is of course what it must amount to. So far as appears, the bank, if they indicated an intention that it should not be used in extinction of the debt, carried out that intention. There is no allegation that they did not give full effect to that which they alleged to be the intention. It was open perhaps to some argument, as the case stood, whether the allegations in the subsequent condescendences had not been from

want of care so framed as to be consistent with that intention either being carried out or not being carried out. Accordingly an opportunity was given to the respondents to suggest any amendment which they would desire to make with a view of clearing up the doubt which might be said to exist. Having had ample opportunity of considering what averments they could add, they have failed to suggest to your Lordships any averments as capable of proof by them which would show that the bank did not intend that the money should not be applied in extinction of their debt, looking at the substance of the matter and not at the form, and that the alleged intention was not given effect to.

For these reasons I think that the action altogether fails, and I entirely concur in the judgment which has been proposed.

LORD DAVEY—My Lords, I also concur in the judgment which your Lordships propose to give in this appeal, and also in the reasons which have been assigned for that judgment.

My Lords, it is worthy of observation that the fifth article of the condescence which contains the representations alleged to have been made by or on behalf of the bank, commences with the averment that those representations were made on the occasion of Douglas, Reid, & Company requiring temporary accommodation. It then avers that Mr Paton, one of the pursuers, saw Mr Scott, the manager of the bank, who made the four representations relied upon; those have been read, and I will not repeat them. We have it then that those representations were made upon the occasion of Douglas, Reid, & Company requiring temporary accommodation from the pursuer's firm, and the pursuer accordingly seeing the manager of the bank.

Now, my Lords, it cannot be disputed, I think, that the three first of these representations contained in the fifth article of the condescence are "representations and assurances as to the character, conduct, credit, ability, trade or dealings" of the firm of Douglas, Reid, & Company, and it is scarcely denied—at least the Lord Ordinary says, and to my mind it is perfectly obvious—that they were made for the purpose of enabling the firm of Douglas, Reid, & Company to obtain credit or money from the pursuers. If so, they would seem *prima facie* to fall within the 6th section of the Mercantile Law Amendment (Scotland) Act 1856.

But it is said, that although they were made for that purpose, there was an ulterior purpose or motive for obtaining the credit for Douglas, Reid, & Company from the pursuers, which was of a fraudulent character, and takes the case out of the statute. Now, my Lords, I entirely concur in the observation that has been made, that if it was intended to except representations made with a fraudulent motive, or representations of a fraudulent character, from that statute, the exception to that effect would have been introduced into the statute. Indeed, it appears to me that if you introduce such an

exception into the Scotch statute or into the English statute which has been referred to and is known by the name of Lord Tenterden's Act, you will to a large extent, I should say almost entirely, nullify the beneficial operation of that statute, because what are the cases in which the statute comes into play? In England, and I believe also in Scotland, you cannot maintain an action upon a representation unless that representation is made fraudulently. An innocent representation, that is to say, a representation made by a man who believes what he is saying, is not actionable in England, and I believe it is not actionable in Scotland. At any rate the class of representation in which the question which was intended to be dealt with by those two statutes occurs are usually and for the most part fraudulent representations, or it is sufficient to say that they may be, and if you excluded representations of a fraudulent character, or representations made fraudulently or with a fraudulent purpose from those statutes, you would, in my opinion, do away with at least half the beneficial operation.

Therefore, my Lords, I think it is no answer to the plea of the defenders that the case falls within the words of the 6th section of the Mercantile Law Amendment Act, to reply that these representations were made with a fraudulent motive or were of a fraudulent character; consequently I am of opinion that, having regard to the language of the 6th section of the Act, the present action is not maintainable upon these three first averments of representations by the defenders.

My Lords, with regard to the fourth representation, I will assume that it may be read as a representation of a fact. I have myself considerable doubt whether in the form in which it is alleged, being an allegation of an intention and not of a fact, it is not giving too benevolent a construction to the pleadings so to read it, but for the present purpose I will assume that it is an allegation of a fact, and that it is a representation of the purpose for which the acceptances were required from the pursuers. But treating it so, it would not, I agree, be within the 6th section of the Mercantile Law Amendment Act; it would be outside that statute. But then, in order to make it actionable you would require allegations, not only that that representation was made fraudulently, which you have, but also that it was acted upon, and that the defenders suffered damage by such acting. Now, my Lords, it was agreed on all hands by your Lordships that the allegation in the condescence as it stands (I think it is the 11th article of the condescence) was wholly insufficient to allege any such damage, because it merely alleged that the £4000 were paid to the overdrawn account of Douglas, Reid, & Company with the Clydesdale Bank, and that "the Clydesdale Bank were thus *lucrati* to the extent of the proceeds of the said acceptances," leaving it perfectly open and perfectly uncertain whether the Clydesdale Bank, although they immediately got the benefit

of the £4000, did not afterwards allow Douglas, Reid, & Company to draw to that extent for the purposes of their business, so that the £4000 really and in substance would go in the manner in which it was averred it was intended to go. Now, your Lordships have given the respondents an opportunity of amending their condescence, in case what I conceive to be the obvious meaning of it was only a slip. Possibly if the amendment which they propose had been in the condescence in the first instance, it might have been considered sufficient; but I am bound to say that after the respondents had heard what had been said by your Lordships, and had known exactly where the shoe pinched, and where the averment was insufficient, if they had been able to aver that Messrs Douglas, Reid, & Company were not allowed to draw £4000 after the bills had been paid into the bank for the purposes of their business, I cannot conceive that the respondents would not have said so. Instead of that, they propose to insert an allegation which is to my mind perfectly consistent with the fact that Douglas, Reid, & Company were allowed to draw and did in fact draw out £4000 after having placed it to their credit with the bank, because what they say is, that "the bank's ultimate loss would have been larger by the amount of the said bills, namely, £4000 and interest thereon." My Lords, that is perfectly susceptible of the construction, and I am bound to say I think it is the true construction, that it means the ultimate loss of the bank having regard to further advances made against the £4000. No doubt if they allowed Douglas, Reid, & Company to draw out the £4000 there would have been £4000 added to Douglas, Reid, & Company's debts if you did not give the bank the benefit of the £4000. That I believe to be the true construction of the amendment, but it is sufficient to say that, in my opinion, it wholly fails to meet the requirements which it was pointed out to the respondents by your Lordships should be met in any amendment which they proposed to make of their pleadings.

Under these circumstances I think it would be a wilful and wanton waste of expense to allow the defenders to go to trial upon the fourth representation contained in the fifth article of the condescence.

LORD CHANCELLOR—My Lords, before putting the question I should wish to say that my noble and learned friends Lord Macnaghten and Lord Morris concur in the judgment which your Lordships are delivering. And for myself I wish to add that if I only dealt with the fourth allegation in the condescence in the opinion which I have just expressed to your Lordships, it was because I really, with all respect to those learned persons who have looked into the matter, thought that the question with regard to the statute was too plain for argument. But as my silence upon that question might be supposed to indicate some difference of opinion, I wish

to say that I entirely concur in the construction of the statute which has been placed upon it by my noble and learned friends.

Ordered, "that the judgment appealed from be reversed, and that the action be remitted to the Court below to pronounce judgment of assoltzie, and that the respondent be found liable in expenses."

Counsel for the Appellants—Sol. Gen. Murray, Q.C.—Ure—King. Agents—Murray, Hutchins, Stirling, & Murray, for Ronald & Ritchie, S.S.C.

Counsel for the Respondents—J. B. Balfour, Q.C.—Sir R. Reid, Q.C.—Edmund Robertson, Q.C. Agent—Wm. Robertson & Co., for J. Smith Clark, S.S.C.

Friday, May 15.

(Before the Lord Chancellor (Halsbury), Lord Watson, Lord Herschell, Lord Shand, and Lord Davey.)

ASSETS COMPANY LIMITED v.
BLAIR AND OTHERS.

Agent and Client—Negligence and Want of Professional Skill—Failure to Take Account of Stipulation in Testing Clause—Whether Stipulation in Testing Clause Effectual.

Stipulations in the testing clause of a deed are ineffectual to contradict or modify the agreement executed by the parties in the previous part of the deed. *Smith v. Chambers' Trustees*, 5 R. 97, approved; *Johnstone v. Coldstream*, 5 D. 1297, and *Dunlop v. Greenlees' Trustees*, 2 Macph. 1, 3 Macph. (H. of L.) 46, distinguished.

In an action of damages against a firm of law agents on the ground of negligence and want of professional skill, the pursuer founded upon the alleged failure of the defenders to read the testing clause of a deed, or to advise that such a stipulation contained in it was effectual.

Held (in conformity with the above rule, and restoring the judgment of the Lord Ordinary) that the action was irrelevant.

The facts of the case appear from the following note of the Lord Ordinary (KINCARNEY) subjoined to an interlocutor of 18th June 1895.

Note.—"In this action the Assets Company conclude against the partners, as in 1878 and 1879, of the now dissolved firm of Davidson & Syme, W.S., for payment of £7500, which is said to be the amount of loss incurred by the City of Glasgow Bank and its liquidators through the failure in duty or want of reasonable skill of Messrs Davidson & Syme as law agents employed by the liquidators. Two points have been debated—the title of the pursuers and the relevancy of the action. The plea of *mora* was also adverted to, but it seems clear that that