

possession of the farm, and in January 1880, which was shortly after the arrangement between the Hains and the landlord, they granted the assignation. By this assignation the Hains, in consideration of an agreement to settle the arrears of rent at present due for the farm, and to guarantee the rents thereof for crops of 1878, 1879, and 1880, and "for further security and sure payment to them of the sums for which we now are or may hereafter become indebted to them, do hereby assign and dispose to the said Oliphant & Jamieson, and their successors and assignees, the whole crops, grain, cattle, horses, and bestial, stock and other produce, and the whole implements of husbandry and other effects of every description belonging to us on our said farm, and more particularly the horses, cattle, and crops described in the inventory taken in the sequestration at the landlord's instance against us, or such other crops, bestial, and effects as shall be on the said farm at any time at or prior to the term of Martinmas next, 1880." The subjects assigned were left upon the farm, the granters of the assignation continued in the possession of the farm, and as the right which was granted was only a right in security, they truly carried on the management for their own account—not that the defenders were uninterested in what might be upon the farm, or what it might produce, because as in a question with the Hains they had acquired right to the bestial and the stocking on the farm at the date of the assignation, or which might afterwards be upon the farm; but the interest, such as it was, was one that was taken through the tenants, and was incidental to the rights which the tenant might possess. In this situation the manure in question was ordered by the tenants; but the names of the defenders were not communicated, and the credit of the tenants was the only credit upon which the pursuers relied. What, in these circumstances, is the claim of the pursuers upon the defenders? Partnership is not alleged; the obligation of principal for the acts of an agent, in the ordinary use of these words, is not alleged either. Nor could it well be, inasmuch as the principal in the transaction obviously was the tenant. What is said, however, is that there is in the transaction evidence of an authority given by the defenders to purchase upon the account of the defenders, or, if not upon their account, upon common account, whatever might be required for the crops. There appears to me, however, to be no evidence by which this view of the relationship can be supported. On the contrary, the evidence points to the conclusion that the tenants were to act as for themselves, and were to be entitled only to act for or to bind the defenders when express authority was given by the defenders to enter into particular transactions.

On the whole matter, I think that the Lord Ordinary has arrived at a just conclusion; and accordingly that his interlocutor should be supported.

The Lords adhered to the Lord Ordinary's interlocutor.

Counsel for Pursuers and Reclaimers—Solicitor-General (Asher)—Jamieson. Agent—Millar, Robson, & Innes, S.S.C.

Counsel for Respondents—Guthrie Smith—Young. Agent—D. Todd Lees, S.S.C.

Thursday, May 29, 1879.

## SECOND DIVISION.

[Lord Adam, Ordinary.]

HARDIE v. CAMERON.

(Before the Lord Justice-Clerk, Lord Ormisdale, and Lord Gifford.)

*Agent and Principal—Implied Credit—Assignation—Right in Security.*

A tenant who had fallen into arrears with his rent, executed, with the consent of his landlord, in favour of a friend who came forward to help him, an assignation of his lease, farm, and stocking in security, till repayment of the advances made, when he was to receive a reconveyance of the subjects contained in the assignation. No change of possession took place, his friend merely giving advice and making advances from time to time to defray expenses incurred in the management of the farm. In an action raised at the instance of a seed merchant against the assignee to make him liable for goods furnished to the tenant for the cultivation of the farm, the Court held that the defender was, under the assignation, only a secured creditor, and therefore not liable as principal for the goods furnished.

James Johnston was tenant of the farm of Letham Mains, in Haddingtonshire, under a lease which began in the year 1857, and which ended at the separation of the crop of 1876 from the ground. A few years before his lease was out he became involved in pecuniary difficulties, and fell into arrear with the rent payable to his landlord Sir Thomas Buchan Hepburn, Bart., of Smeaton Hepburn. In this state of matters he applied for help to Duncan Cameron, a wholesale stationer in Edinburgh, his brother-in-law, who agreed to help him through his troubles on certain specified written conditions, amongst which he stipulated that James Johnston was to take his two sons John and Andrew Johnston to assist him in the management of the farm, while Mrs Johnston, his wife, was to manage the accounts, and that he was to assign his lease to him in security of these advances.

On 21st April 1873 James Johnston executed this deed of assignation, by which, on the narrative, *inter alia*, that he was in arrears of rent to a certain extent, and that he owed certain other debts which he was unable to pay, and that his brother-in-law Duncan Cameron had agreed to pay the said rents and debts in manner therein specified provided the assignation contained was granted, therefore the said James Johnston thereby assigned and conveyed to the said Duncan Cameron, in trust and security and relief for the purposes therein mentioned, the said lease of Letham Mains, *inter alia*, the said Duncan Cameron binding himself to pay the rents and discharge the other obligations incumbent on the tenant so long as the trust constituted by the said deed of assignation might subsist. By the said deed of assignation James Johnston also assigned to Duncan Cameron his whole crop, stocking, farm implements, and household furniture at Letham Mains, "with full power to him, either

by himself or by others to be appointed by him, to take the entire and exclusive management and disposal of the subjects thereby conveyed, in the same manner and to the same effect as if the same had been conveyed absolutely to him;" further, James Johnston obliged himself to reside on the farm during the subsistence of the trust, if asked by the said Duncan Cameron to do so, and, when requested, to assist as far as he might be able in the cultivation and management of the farm. On the other hand, it was provided that Duncan Cameron should, in manner specified in the deed, reconvey the said lease, *inter alia*, on his being repaid his advances and relieved of his obligation. By minute, dated 6th May 1873, Sir Thomas Buchan Hepburn, the landlord, assented to this deed, under reservation of his rights of hypothec, and his rights and claims against James Johnston. Thereafter James Johnston continued to reside on the farm, and was assisted in its management by his two sons. On the expiry of the lease a new lease was granted in favour of John Johnston and his aunt Miss Margaret Johnston, for nineteen years, on the separation of the crop 1876 from the ground.

The present action was raised against Duncan Cameron by John Hardie, ironmonger and seed merchant, Haddington, and its object was to have Cameron ordained to pay the amount of certain accounts for goods furnished to the Johnstons for the cultivation of the farm.

The pursuer (Cond. 4) averred that from the date of the assignation Duncan Cameron took possession of the farm, and continued to manage it through the Johnstons, and that he was liable as an individual for furnishings made for the cultivation of the farm from that date. Further, that this liability was continued under the new lease granted to John Johnston in 1877.

He pleaded that the furnishings having been made to the defender on his order, or on the order of those for whom he was responsible, and the accounts thereof being still resting-owing, he was entitled to decree against him.

In defence the defender averred that after the assignation no change whatever took place in the possession of the farm. The Johnstons still possessed and managed the farm together, and although they might have purchased the goods from the pursuer, they had not done so on the defender's order.

He pleaded—“(1) The averments of the pursuer were not relevant or sufficient to support the conclusions of the summons. (2) The furnishings in question (if made at all) not having been made to the defender Cameron, nor on his order or credit, he was not liable in payment of the price thereof. (3) The whole material averments of the pursuer, so far as they refer to the defender Cameron, being unfounded in fact, he ought to be assolvied with expenses.”

A proof was taken, the import of which will sufficiently appear from the Judges' opinions.

The Lord Ordinary (ADAM) sustained the defender's first plea-in-law, and assolvied him from the conclusions of the action. He added this note:—“The Lord Ordinary thinks that this case is ruled by the case of *Eaglesham v. Grant*, July 15, 1875, 2 R. 960. The furnishings sued for were not made on the credit of Cameron, and it is clear that the transaction embodied in the trust assignation of April 1873 was merely for

the purpose of securing the repayment to Cameron of the advances which he thereby undertook to make on behalf of Johnston.”

The pursuer reclaimed.

The defender relied on the case of *Eaglesham v. Grant*, July 15, 1875, 2 R. 960, arguing that the assignation merely invested him with the rights of a secured creditor, and did not in law make him bound as principal for the furnishings made to the Johnstons.

At advising—

LORD JUSTICE-CLERK—This case is one which has certainly run to some length, and has latterly involved some complicated questions of fact, but I have come to be of opinion that the case of Hardie, the pursuer, is not well founded in fact or in law, and that there is in the proof which has been led a good deal of evidence which is not worthy of reliance. The state of matters is simply this:—James Johnston, the tenant of the farm of Leatham Mains, became involved in pecuniary difficulties, and he and his family applied to Cameron (who is his brother-in-law) to help him through their trouble. Cameron has no confidence in Johnston, but he agrees to come forward and relieve him of his debts on specified conditions contained in a written document, which he seems never to have departed from for a single moment. This was before the date of the assignation. James Johnston, the father, was to take his two sons to assist in the management of the farm, and his wife (Mrs Johnston) to assist in the management of the money. This was the bargain, and it meant that Johnston was not to interfere too much, and also that Cameron's sole share in the matter was to see that his stipulations were carried out. The assignation was carried out in April 1873 on this footing. Cameron proceeds to grant bills to Hardie, amongst others, for the amount of his debt. Now, if this were the entire footing of the matter, and the sole object of the arrangement were to pay James Johnston's creditors, I am clearly of opinion, on the authority of *Eaglesham's* case, and others, that no liability would attach to Cameron beyond that which I have described. But, then, it is said that it was stipulated that Cameron should manage the farm, and that he really did so. And here I must express my regret at the ungrateful, and I might add the untrue, evidence of the two young Johnstons, when they say that they were appointed managers by Cameron, and that he was bound to be liable for the future debts of the farm, and when they pretend that Hardie was in full knowledge of the existence of the assignation. I give no weight to their evidence, and I greatly regret its character. Mrs Johnston's evidence is more to her credit. She is a woman seemingly in a hard position, in which on the whole she seems to have borne herself well. I am clearly of opinion that the arrangement originally made rendered Cameron in no way responsible for the future management of the farm, and I think the legal relation remains subsequently unaltered. The difficulty is whether the two young men were managing for Cameron or for their father. I am satisfied that Cameron might fairly say to Johnston—“You may do as you like, but if I am to pay your debts for you, you must be under your sons' management;” but this does not alter the legal relation of the parties

On the first branch of the case, and looking to the whole course of dealing, I hold that Cameron never interfered except by way of advice, and if he insisted on sales, and so forth, from time to time, it was merely to see that his stipulations should be duly carried out.

There remains the question of specific obligation to Hardie. I do not credit the account of the two sons, nor is Hardie's own account accurate. It is clearly true that Cameron waited upon Hardie, and got him to go on supplying furnishings, but it is equally clear that it is not the case that he called on Hardie and undertook to be liable. The visit really paid and the debt alluded to was nothing but the obligation to pay the debts already contracted at the date of the assignation.

On the whole matter I am quite clearly of opinion that the pursuer has failed in his case, and I therefore decide against him.

LORD ORMDALE—I agree with your Lordship in the conclusion at which you have arrived, and in the views which your Lordship has taken of the evidence which has been led, but I have no difficulty in confessing that at times I have had some doubts about the matter.

On the first point—as to Cameron's general liability in respect that of his being the true possessor of the farm, and having practically ousted James Johnston—it is important to keep in view the obligation in the assignation on the part of Johnston—"With full power to him, either by himself or by others to be appointed by him, to take the entire and exclusive management and disposal of the subjects hereby conveyed, in the same manner and to the same effect as if the same had been conveyed absolutely to him." The pursuer himself was well aware of the importance of that part of the assignation, for he says in condescendence 4—"On the said deed of assignation and minute being executed, the said Duncan Cameron, by virtue thereof, took possession of the said farm and others assigned as aforesaid, and continued in the said possession, and traded on and managed the said farm thereafter until the expiry of the lease." And had this been so the pursuer would have had a clear case. But in fact Cameron never did take such full possession, and the various details of evidence are quite reconcilable with this view. Had he intended to take such full possession, he would have done so distinctly and at once, which he did not do. James Johnston continued to reside on the farm, and his wife and sons continued there, as before; Cameron was there occasionally, but it was only occasionally, and he did not reside. He was in no way the manager, but he merely interfered from time to time with advice in the capacity of a friend. This is the case, and no more, and so far from the pursuer's averment on record being true in fact, we find that Hardie was not aware of the existence of the assignation at all. This is very significant, and not easy to reconcile with the so-called "fact" of Cameron being in full possession of the farm.

It is curious to remember that in the procedure in this case a proof might perhaps not have been allowed at all, had it not been for the question of the issue, whether or not Cameron became absolutely bound for certain goods furnished?

The judicious course, without doubt, was to allow a proof, as was in fact done.

I have now said enough upon this first branch of the case. One circumstance gave me some trouble almost to the last, viz., the landlord having adopted Cameron into the lease as tenant; but the terms of the landlord's minute mean to show that he merely gave his consent to the arrangements. Looking at this minute, and at the whole facts of the case, there is really no difference created between this and the case of *Englesham* and the rest. Cameron gave advances (as to his expectation of repayment is no question of ours) and friendly advice, as a friend might do, the old tenant continuing to live on all the time.

I now come to another branch of the case, viz., the liability of Cameron directly as the party who ordered the goods independently of the Johnstons. Hardie's evidence is here equivocal; but it is remarkable that you can hardly spell out of the record this question of liability; there is certainly no detailed statement of it upon record. Hardie acknowledges that till the whole furnishings had been made, and Cameron had ordered all the goods, he never knew Cameron's real footing in the matter. But see what Hardie says—"I saw Mr Cameron, I should say, half-a-dozen of times during 1873, 1874, 1875, and on to 1877. On every occasion that I saw him reference was made to Letham Mains, and he would speak about the Johnstons generally. I have heard him say at a time that he was dissatisfied with the management of the farm, but that was only about 1875 or 1876. He said, too, that I was still to go on supplying goods to Letham Mains, because I had been so kind to the Johnston family before; and on that account I supplied them. Afterwards he spoke to me about Letham Mains in very much the same way. (Q) On any of these occasions did he say he would see you paid your account?—(A) Almost on every occasion." On his own showing, in any conversation that took place Cameron said no more than that he would see him ultimately paid his whole debt. This is confirmed by Hardie—"Mr Cameron never ordered from me personally any of the goods mentioned in the account sued for. He told me to give the goods to the Letham Mains people, and as he had full control of the place he would see me paid for them." What is this but a cautionary obligation for the Letham Mains people? Again—"He said, when making the arrangement for 1873, that as I had been so kind to the Johnstons, he would see that the orders for Letham Mains were sent to me, and that so long as he had control of the farm he would pay for them." These passages show clearly that Cameron never intended to or did represent himself as sole debtor for these goods to Hardie. It was a cautionary obligation only. In that case it is incompetent to prove it by parole.

I have only to say, in conclusion, that even if my difficulty in the case had been greater, I should probably have been satisfied upon the grounds which I have stated, and upon this extra one, that Lord Adam heard and saw the witnesses give their evidence, and I should therefore have been inclined to agree with the view of his Lordship.

LORD GIFFORD—I have arrived at the same

conclusion, and upon the same grounds, although we have latterly been involved in some rather complicated questions of fact. The first question which arises is, Who was the real trader—the farmer—Who was liable for the furnishings? And it is impossible not to see that when a farmer or a shopkeeper acts under an assignation in security there is always room for saying that it is not the true man who is put forward. It is also obvious how hard it is, without differences and disputes, for one man to help another. It is hard to help a family who will not help themselves. Cameron's motives were of the best, yet he has become involved in somewhat difficult questions. He agreed to help the Johnston family, and he thought Johnston's difficulties were due partly to himself, and that he would do well to take his wife and sons to council. And he was quite entitled to insist upon this without becoming responsible as the real tenant. He said—"You are in debt and in arrears; I'll pay the whole £300; and I'll pay your landlord so long as your lease subsists, having power to renounce the lease at any time. But if I do all this, and at no profit to myself, I stipulate that you shall work harmoniously and well, and not by yourself." All this is not illegal; and old Johnston does not cease to be the real tenant.

We must now see whether Cameron really became the farmer to the extent of being liable for all the furnishings. He certainly might have done so. Had he brought his own grievance, for instance, or even had he kept old Johnston as his grievance, he might have incurred this liability. The pursuer's case on record becomes thus intelligible enough. The proof is a long and contradictory one, but I have come to concur entirely with your Lordship in the chair; and I may say, too, that I feel a want of trust in the evidence of the Johnstons and of Hardie, and I am reluctant to decide the case upon that evidence. The pursuer has, I think, utterly failed to prove that Cameron was the real farmer. He was only a friend of the family who gave advice, urged economy, and so forth. It is true that he got states sent him weekly or termly, but it was all as a friend, and he might have done so had there been no assignation at all. It is hardly to be taken off Hardie's hands that he never knew of the assignation at all. Hardie never dealt with Cameron as his debtor; Cameron's name never came into his books, nor were the things sent to him or to his house. When he did change the name it was with reference to a suspicion of his own as to who was the new tenant. I do not see how Hardie can say that Cameron was his sole debtor; yet if he fails in that his ground of action falls from him. This case differs somewhat from *Eaglesham's*, but is more favourable for Cameron, for there the trader had actually been drawing the proceeds, whereas Cameron's was a case of advance and increasing advance throughout. I therefore concur with your Lordships on this branch of the case.

Coming now to the next question, how does it stand? If Cameron is not the farmer, what other category save that of cautioner for the farmer can he come under? Now, it is impossible to make out that he was cautioner except by writing. This used to be the common law, but the 6th section of the Mercantile Law Amendment Act 1856 (19 and 20 Vict. c. 60) makes

it quite clear. If you give credit to A on the faith of B, you must have B's writing. Hence the eagerness of the pursuer to denounce the idea of a cautionary obligation; but what else is it? The statute very clearly comes in here. As to the words used, I may remark that to "see a thing paid" is just the good old Scottish way of expressing "to stand cautioner." As to the effect of the expression used by the pursuer's counsel, to stand "paysmaster" to a person, I cannot say, but it is not necessary to decide upon it.

On the whole matter I agree entirely with your Lordships.

The Lords adhered to the interlocutor of the Lord Ordinary.

Counsel for Pursuer—D. F. Fraser—Black. Agent—D. Howard Smith, Solicitor.

Counsel for Defender—C. J. Guthrie. Agents—Lindsay, Paterson, & Co., W.S.

Wednesday, November 16.

## FIRST DIVISION.

[Lord Curriehill, Ordinary.]

CITY OF GLASGOW BANK AND LIQUIDATORS  
v. MOORE (BELL'S TRUSTEE).

*Partnership—Bill of Exchange—Separate Debt of Partner—Fraud.*

A creditor taking a security for a debt due to him by a partner of a firm as an individual, granted in name of the firm, must, in order to bind the firm, have the express authority of the other partners.

Bell was a partner of Wright & Co. of London, of which firm Wright and Scott were the remaining partners. Wright and Scott were also the sole partners of another firm, Wright & Co. of Glasgow. The last-mentioned firm was largely indebted to the City of Glasgow Bank, and in security of this debt gave the bank bills, which were drawn and endorsed by Scott as representing the Glasgow firm, and were accepted by Wright on behalf of the London firm. The bills were dishonoured, Wright & Co. of Glasgow and its partners having been sequestrated. The bank thereupon called on Bell to pay as representing the acceptors, the London firm. It appeared that Bell was a sleeping partner of the London firm; that he knew nothing about the bills in question, which were never passed through the books of his firm until after they had been dishonoured; and that though they bore to be for value received, that was not in fact the case. It appeared, further, that the bills, which were for nine and twelve months, were not passed through the bank books in the ordinary course of business, but were treated as security bills, and that the manager of the bank was fully aware that the London and Glasgow firms were separate concerns, and that Bell was a sleeping partner of the former, and not a member of the latter. In an action by the bank against Bell—*held* that