the present case. If the consequence be that the trust cannot go on because Mr Wyse is the sole trustee, and he does not desire to act because some of the parties connected with the trust have no confidence in him, the only remedy seems to be the appointment of a judicial factor. It is said that such an appointment would be a heavy burden on the trust. That burden may be avoided if the parties can agree among themselves. But failing their agreement I fear there is no other course.

The Lords pronounced this interlocutor:—

"Find that the respondents have not been validly assumed as trustees under the trust-disposition and settlement of the deceased Mrs E. Cranfield or Abbott; nominate and appoint Mr Robert Cameron Cowan, C.A., to be judicial factor on the estate of the said deceased Mrs E. Cranfield or Abbott, with the usual powers, he finding caution before extract; and decern," &c.

Counsel for Petitioner—Robertson—Darling. Agents—H. B. & F. J. Dewar, W.S.

Counsel for Respondents—Jameson. Agent—J. H. Jameson, W.S.

Tuesday, November 15.

SECOND DIVISION.

THE NEWCASTLE CHEMICAL MANURE COMPANY *v.* OLIPHANT & JAMIESON.

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

A firm of solicitors having discharged certain arrears of rent due by the tenant of a farm to his landlord, received from him, with his landlord's consent, an assignation of the lease in security of the debt till repaid, together with a power to possess and sell the subjects at their discretion. The tenant thereafter continued in the possession and management of the farm, but subject to their directions, they from time to time making disbursements to enable him to pay accounts connected with the management of the farm. In an action raised against them for the price of goods furnished to the order of the tenant for the farm, the Court *held* that the defenders were merely secured creditors, and therefore not liable for the price of the goods supplied to the order of the tenant.

Messrs Andrew and James Ashton Hain were tenants of the farm of Carnbee, near Pittenweem, Fifeshire. In the end of the year 1879, having fallen into arrear with payment of their rents, their landlord presented an application to the Sheriff of Fife for sequestration of the crop, stock, and bestial on the said farm in security and for payment of the said rents. An arrangement was ultimately made, under which the landlord agreed to accept a renunciation of the lease in 1880 on certain conditions, amongst which was one that the tenants should find security for the rents that had still to fall due. To enable them to do this they entered into an agreement with Messrs Oliphant & Jamieson, solicitors, Anstruther, whereby it was stipulated that the latter should pay the said arrears of rents, and guarantee payment of the rents for the crops of 1879 and 1880, on condition that the former should grant in their favour the following assignation, which was dated 19th January 1880:—"We, Andrew Hain and James Ashton Hain, tenants of the farm of Carnbee, considering that Messrs Oliphant & Jamieson, solicitors, Anstruther have agreed to settle the arrears of rent at present due by us for said farm, and have agreed to guarantee the rents thereof for crops 1879 and 1880; and seeing that it is expedient in the circumstances that the presents underwritten should be granted: Therefore we, for further security and more sure payment to them of the sums for which we now are or may hereafter become indebted to them, do hereby assign and dispone 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: Declaring that we hold the said crops, bestial, and effects in trust for the said Oliphant & Jamieson till they be paid the sums of money above referred to, with interest on their advances and disbursements during the non-payment; and if we sell any part of the said crops, bestial, and effects, we hereby bind and oblige ourselves to account to them for the same; with full power to the said Oliphant & Jamieson to intermeddle with, take possession, sell, and dispose of said subjects when they may consider same necessary without any other warrant than this conveyance, they being bound to hold just count and reckoning with us or our foresaids for their intromissions therewith, and to impute, *pro tanto*, in extinction of the sums before referred to, and interest thereon as aforesaid, whatever sum or sums they may recover in virtue of this assignation, and to pay to us or our successors any balance thereof which shall remain after deducting the said sums and interest, and all necessary charges and expenses incurred or to be incurred by or to them, as the same shall be ascertained, and in that case, or upon us or our foresaids making payment to them of the said sums of principal, interest, charges, and expenses as aforesaid, to retrocess us at our expense in our right of the said whole effects hereby assigned in so far as unsold or not disposed of."

In consequence of this arrangement the process of sequestration instituted by the landlord was not prosecuted. Subsequently to the date of this assignation the farm was managed by the brothers Hain, who ordered such seeds, manures, and other articles as were necessary for its proper cultivation and management. The crops of 1879 and 1880 were sold by Messrs Oliphant & Jamieson, who received payment therefor, and made the various disbursements necessary for carrying on the farm, in particular paying fire insurance premiums, assessments, &c. On the 20th February and 26th April 1880 James Ashton Hain ordered from the Newcastle Chemical Manure Company certain

quantities of superphosphate, nitrate of soda, dissolved bones, and top-dressing to be used in the cultivation of the farm. These goods were duly furnished, and the account for them amounted to the sum of £230, 9s. 11d., from which sum fell to be deducted £2, 3s. 9d. as the carriage of a portion of the said goods. Thereafter unsuccessful applications were made to Messrs Oliphant & Jamieson for payment of the balance of said account, amounting to £228, 6s. 2d., and the result was the present action against the latter, which sought to have them ordained to pay the balance of the account due for the manures furnished. It appeared that this was the only account unpaid, and that the defenders, as creditors in the assignation, wound up the whole financial affairs after cropping, reaping, and rouping the crop, the result being that after crediting commissions on the account there was still a balance due to them of £21. As ground of action the pursuers averred that the defenders originally acted as agents for the brothers Hain; subsequent to the assignation the brothers Hain managed the farm on the defenders' behalf and in their interest; and that therefore the defenders were liable for the disbursements necessary in the management of the farm, of which this account was one.

They pleaded—"(1) The pursuers having sold, furnished, and delivered to the defenders, or those acting for them and on their behalf, the goods specified in the account sued for, and the said account being justly due and resting-owing by them, decree ought to be pronounced in terms of the conclusions of the summons. (2) The goods specified in the account sued for having been ordered by the defenders, or those acting for them or on their behalf, and the defenders having received the benefit of the said goods, were liable in the value thereof to the pursuers."

The defenders, on the other hand, denied that they had acted as agents to the Hains prior to the assignation, or that subsequent thereto they had entered on any such possession or management of the farm as could make them liable for the accounts incurred by the Hains.

They pleaded—"(1) The averments of the pursuers were not relevant or sufficient to support the conclusions of the summons. (2) The goods in question (if supplied at all) not having been supplied to the defenders, nor to their order or credit, they were not liable in payment of the price thereof. (3) The whole material averments of the pursuers being unfounded in fact, the defenders were entitled to be assoilzied with expenses."

The Lord Ordinary (RUTHERFURD CLARK), after evidence led, assoilzied the defenders from the conclusions of the summons and decerned. He delivered the following opinion, from which and from the opinions of the Judges the import of the proof will sufficiently appear:—"In this case the ground of action is, that although the goods were ordered by James Ashton Hain—the goods being quantities of superphosphate, nitrate of soda, dissolved bones, and top-dressing, the contract for which is said to have been entered into about 20th February and 26th April 1880, and which were to be used in the cultivation of the farm of Carnbee, of which the Hains were in occupation—I say the ground of action is, that although these goods were ordered by James Hain, in doing so he really acted as agent for the defenders, in whose favour he and his co-tenant Andrew Hain executed an assignation of the whole stocking of the farm on 19th January 1880.

"The other facts in the case are not doubtful. It is quite certain, I think, that James Hain ordered the goods without any communication with the defenders at all. They did not know he was to send to the pursuers and contract with them for the supply of those manurial stuffs; and in the contract which was concluded between the parties the only persons whom the pursuers regarded as responsible were the Hains. Nevertheless, it might be quite a possible thing that although James Hain apparently bound himself he might have been acting for the defenders or other third parties. But I do not think that is the state of the facts here.

"The way in which the pursuers seek to make the defenders responsible is this:—The defenders were asked by James and Andrew Hain to give them certain assistance in connection with the farm of Carnbee, of which, as I have said, they were tenants. They had got into certain difficulties with their landlord; and to make the assistance which the defenders advanced more secure the defenders took the assignation I have already referred to, and which is founded on in this case. By this assignation, for 'further security and more sure payment to the defenders of the sum for which they were then or might thereafter become indebted to the defenders,' the Hains assigned and disponed to the defenders and their successors 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 them on their said farm, and more particularly the horses, cattle, and crops described in the inventory taken in the said sequestration,' and so on.

"I do not think that any change took place, at all events in the ostensible state of possession, after that assignation was granted. The Hains continued in the farm, or if not both, the younger Hain continued in it. They have continued in it with the power of administering it just as before. They were subject to no control—no control except in the sense that they had assigned everything to the defenders, and the defenders expected to be consulted in any sale of the stock and crop, as indeed had been agreed upon, for nothing could be done by the Hains to impair the right which the defenders had acquired. But I do not see how this made any change in the possession. I do not think it made any such change. The defenders had full power to take possession when they found their security endangered; but I have the greatest possible doubt whether anything which in law might amount to possession did take place until a period considerably later.

"These are the circumstances, however, in which it is said that in giving the order to the pursuers the Hains acted for the defenders. I do not think he even says he did so act, or thinks he acted for the defenders. I do not think Hain had any authority from the defenders to give this order. I do not think the defenders can be held even indirectly to be liable for the order, or for the prices of these goods, in respect that they had possession of the farm of Carnbee. I am of opinion that at the time the order was given and implemented they were not in possession. That the defenders might obtain

benefit from it afterwards is not, I think, a ground of liability.

"Therefore, following what I think is the principle of the decisions in the case of *Eaglesham* and other cases, I have come to the conclusion that the defenders must be assoilzied, and of course with expenses."

The pursuers reclaimed, and argued — The defenders were liable for the amount of the account sued on, inasmuch as they were, in virtue of the assignation, the Hains' principals. The farm was merely managed by the Hains, and on behalf of the defenders.

The defenders replied—Under the assignation they were nothing more than creditors of the Hains in respect of the arrears paid on their behalf. Subsequent thereto there had been no change in the possession of the farm. The Hains managed it, and had no good claim against those who were mere creditors holding an assignation of the crops, &c., in security of a debt.

Authorities—*Eaglesham & Company* v. *Grant*, July 15, 1875, 2 R. 960; *Miller* v. *Downie*, March 4, 1876, 3 R. 548; *Hardie* v. *Cameron*.*

Their Lordships made avizandum after hearing counsel.

At advising—

Lord Justice-Clerk—The Lord Ordinary has decided this case against the claim that was made by the pursuers against the defenders; and although the case had in its first aspect, and indeed throughout the discussion, some appearance of hardship as far as these manufacturing chemists are concerned, I am quite satisfied, after the discussion we have had, and after reading over the proof and the whole documents, that there is no good ground upon which the case can be distinguished from those that have already been decided by this Court in this branch of the law. I am satisfied that the defenders were in no respect debtors to the pursuers on this account.

And the view I take of it can be stated in a few sentences. The circumstances out of which the claim has arisen were simply these:—The Messrs Hain had got into difficulties with their landlord in the conduct of this farm of Carnbee, in Fife, at the end of the year 1879, and they came under an obligation to the landlord and entered into an agreement with him, under which, on certain conditions, the landlord was to accept a written renunciation of the lease in 1880. One of the conditions was that the tenant should find security, and there were other stipulations mentioned in the lease. The tenant, in order to enable himself do all that was required, entered into negotiations with Messrs Oliphant & Jamieson, under which these gentlemen, who are solicitors at Anstruther, came forward and offered to guarantee the rent to the landlord, and to enable the tenant for that year to fulfil the prestations that he had undertaken, on condition of obtaining from Hain, the tenant, an assignation to the whole of his stock and cropping. That assignation is an assignation, on the face of it, in security of advances to be made under the guarantee which had been given. It was for "further security and more sure payment to the defenders of the sum for which they, *i.e.*, the tenants, were then or might thereafter become indebted to the defenders;" and in that way they disponed to the defenders "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 them on their said farm, and more particularly the horses, cattle, and crops described in the inventory taken in the said sequestration"—referring to the sequestration which had been taken out by the landlord. We need not go further into the terms of the assignation, for there is nothing in the precise terms of it on which this question turns. It is simply an assignation in favour of these parties in respect of the obligation undertaken to guarantee the rent, and any advances that might be made. There was no change of possession. The tenant remained in ostensible possession of his farm, and the result was, that armed with that assignation, which was good against the tenant, although it would not have been good against a creditor doing diligence, these solicitors, the defenders here, took Mr Hain into their own hand, and required him to conform to their directions in the management of the farm and of the cropping for 1880. Accordingly Mr Hain, subject to their directions, managed the farm and sowed the crop, and amongst the other accounts which he incurred is this one to these chemical manure manufacturers. In the meantime, however, most of the furnishings were paid for with ready-money. Messrs Jamieson & Oliphant furnished the money to Hain, who paid the accounts out of the money he thus received. In other words, he received money from his own creditors; and it was the making of this assignation which enabled him to put himself in funds to meet these outgoings. Under these circumstances it appears that all the accounts were paid excepting that in question, and that the whole pecuniary or financial affairs were wound up by the creditors in the assignation, who cropped, reaped, and rouped the crop, and sold it, and sold off everything—the result being, that after crediting the commissions which the defenders charged against the tenant throughout the account, there was still a balance of £21 due to them.

Then comes this case. And it is said that the tenant was truly nothing but an agent—the agent of Oliphant & Jamieson—during the whole course of this transaction; that he had authority to incur debts; and that consequently the debt that he so incurred for behoof of Oliphant & Jamieson is what they are bound to pay. The plain answer to that—and after turning it over and over in every direction it is impossible to escape the result—is this, that Oliphant & Jamieson were creditors and nothing more, and that they never held themselves out as anything else. Hain was not their agent in any possible sense. By paying up the balance he could have divested Oliphant & Jamieson of their power over him whenever he pleased. They were not the principals of Hain in the sense that they were bound to make advances to Hain notwithstanding the assignation, unless they found it their interest to do so. They were bound to account, and that was all, and if they did account their obligation was at an end.

And probably that is the best test of the value of the argument we have heard on their supposed connection as principal and agent. If they had funds of the tenant in their hand, they were

* This case was decided on May 29, 1879, and is reported *infra*, p. 83.

bound to expend them on the farm. When they ceased to have funds belonging to the tenant in their hand, they were under no further obligation.

Now, if that be the true state of matters, there is an end of this case, because in the case of *Eaglesham* v. *Grant*, and the cases which have occurred subsequently, it was conclusively decided that the mere fact of a creditor having either an assignation *ex facie* in security, or even an assignation *ex facie* absolute, if he is really only a creditor, does not make him liable for the conduct of a going business, although he might have that interest which consists in obtaining full payment of his money.

Therefore I am of opinion that the pursuer has vainly endeavoured to escape from the principle on which these cases were decided; and although the Lord Ordinary might perhaps have given a little more weight to the amount of authority, as between tenant and creditor, that Hain possessed in regard to those purchases, still that, I think, is of no moment in the end, because that was a question between the debtor and creditor, and a question in which the furnishing creditor, who knew nobody but the tenant with whom he dealt, had no concern.

On the whole matter I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

Lord Young—I am of the same opinion, and generally on the same grounds. The case when understood does not appear to me to be attended with any doubt or difficulty. The pursuers contracted with the Hains—James Hain himself and his brother—and they had no notion whatever that they were contracting with anybody else. But they say as the ground of this action—not exactly upon the record, but in argument—that they discovered that the party with whom they were transacting as principal was really only an agent acting for an undisclosed principal. And if that had been according to the fact, then undoubtedly they would have had a good claim against an undisclosed principal; but it turns out upon inquiry that the undisclosed principal—according to the idea on which this view is stated—is truly the agent of the party with whom they contracted. And that is stated very prominently on the record by the pursuers themselves. In the second article of the condescendence they say—"The defenders acted as agents for Messrs Andrew Hain and James Ashton Hain, lately tenants of the farm of Carnbee, near Pittenweem." So that the parties who are represented as the undisclosed principals for whom the Hains were truly acting are stated by the pursuers themselves, who in argument make this their ground of action, to have been the agents of the Hains. And they were so undoubtedly. But like other agents—and always under such circumstances as occurred here—they advanced money to their clients, and came under an obligation for them, in return for which they stipulated for some sort of security—security, I should have thought, of a very unsatisfactory kind, though of course that was for themselves to judge of. But in doing all this they were simply in the position of agents accommodating their clients by coming under obligations for them. It was desirable that they should carry on the business of the farm to the conclusion of the cropping. That was desirable in the interests of their client, and also in their own interests, for they were under obligations for them. But how that made them principals it is very hard to see. It is said they paid other debts. So they did—I suppose some of them directly, and others in a more or less obvious manner, by advancing money to their client to enable him to pay. And if they had paid this debt as they paid other debts, that would simply have been paying a client's debt. That would have been acting as agents making an advance to a client, but having a claim against the client for repetition. That would surely be a queer position for an undisclosed principal to be in.

For these reasons they were not principals.

But they might be liable upon another ground. If they had so acted as to pledge their credit, they would have been substantially sureties or cautioners, but it is not suggested that they did that. Again, they could have made themselves responsible had they made any representations—untrue representations—which induced credit to be given to their clients which would not otherwise have been given. But nothing of that kind is suggested; and therefore the contract not having been made with them or for them—that is to say, they not being principals in the contract, not having interposed their credit in any way, or made a single statement to induce credit to be given—every imaginable ground of liability fails.

I therefore concur in your Lordship's view, that the interlocutor of the Lord Ordinary should be adhered to.

Lord Craighill—I am of the same opinion. I have looked into the proof and the documents in the case, and the conclusion I have come to is the same as that which has been reached by your Lordships.

This case appears to me to be ruled by the decision in *Eaglesham & Co.* v. *Grant*, 2 R. 960, referred to by the Lord Ordinary, and also by the case of *Miller* v. *Downie*, 3 R. 548. The facts in the three cases are not the same of course, but they are so similar that the legal principles recognised and applied in the two which have been quoted as precedents must regulate the decision upon the present occasion, for they conclusively established that the mere interest of a creditor in the administration of the estate of another does not render the creditor liable for the debts which have been incurred in the carrying on the business in hand.

But, apart from authority, I am of opinion that the decision of the Lord Ordinary ought to be supported. Hain, by whom the order for the manure was given, was with his brother the tenant of this farm of Carnbee. The tenants became embarrassed in their circumstances, and the consequence was that sequestration having been used by the landlord, an arrangement was made, under which there was a provision for the payment of arrears of rent, and for security for the rent becoming due for crop 1880. The defenders intervened in order that the obligations undertaken by the Hains in this agreement might be fulfilled. They paid the arrears, they interposed their obligation for the rent becoming due, and the consequence was that the process of sequestration which had been instituted by the landlord was not prosecuted. The Hains continued in the

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 dispone 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)—Jameson. 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 Ormidale, 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