sufficiently clear. At first sight it might appear as if a more limited right were conferred on the assignee if the words "in satisfaction of his claim" be read as relating to and qualifying the "power to use" the decree. But when the scope of a power of this kind is tested, it becomes plain that it enables the assignee to appropriate the decree if he pleases, so only he holds the debt as satisfied. Accordingly, it is of little moment whether the Lord Ordinary's mode of construing the deed, by treating the words "in satisfaction of his claim" as if they directly followed the words of assignation, be adopted in preference to the alternative construction, which would apply the words "in satisfaction" solely to those which immediately precede.

The next question to be considered is one of fact, whether, assuming the construction I have given to be the right one, the deed was granted under error of both the parties, or of the pursuer induced by misrepresentation on the part of the defender or Mr Waugh. The pursuer completely fails in this part of his case, and the Lord Ordinary pointedly sums up the matter by saying—"His own letter to Mr Paterson excludes, I think, the suggestion that he was under any mistake as to the legal import of the deed. But apart from that, there is certainly no proof of error on the defender's part, or of any representation by him or by Mr Waugh by which the pursuer was misled." No passage of the evidence quoted shows that the defender was in error as to the import of the deed. Again, as regards misrepresentation, some clear and definite evidence is to be sought, but we find nothing of the sort.

I have some difficulty in following the pursuer in the last part of his argument, but consider that the Lord Ordinary has done it full justice in saying that if there were any "understanding," that when the defender's debt was paid he should reconvey the decree to the pursuer, that understanding amounted to a trust, and could therefore only be proved by writ or oath. But here, when in search of some writing, formal or informal, clearly showing a trust, we are referred to one letter neither clear nor unambiguous, when read with reference to the whole facts of the case.

I am therefore of opinion that the Lord Ordinary's interlocutor is right.

LORD ADAM—I agree as to the construction of the assignation, and confess that I have no real doubt that the Lord Ordinary is right. The decree was assigned to the defender with certain powers, and was said to be "in satisfaction of his claim." There is no ambiguity about these words; they are equivalent to "in extinction," "in discharge," in payment," as the case may be; and, accordingly, when the defender took this decree, he took it in satisfaction of his debt, which was thereby extinguished. He was not entitled to use it merely towards payment of his debt, but took it in full payment. If this be so, what difference is made by the insertion in the document of the words, "with full power . . . at any time to use the said decree in any manner of way whatever, in the same way as I could have done before granting thereof?" These words in no way modify the construction of the document, which is an *ex facie* absolute assignation.

If this be so, it can only be shown not to be absolute by writ or oath of the so-called trustee. On the whole evidence I agree with the Lord Ordinary.

LORD M'LAREN and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuer — M'Lennan — Hunter. Agent—Thomas Liddle, S.S.C.

Counsel for the Defender—A. J. Young —Gunn. Agent—John Scott, Solicitor.

Tuesday, November 13.

FIRST DIVISION.

[Lord Low, Ordinary.

HENDERSON *v.* STUBBS, LIMITED.

Reparation — Slander — Trade Protection Agency—Sale of Business—Agreement—Jus quæsitum tertio—Liability of Purchaser for Alleged Slander by Seller.

In an agreement for the sale of the business of a trade protection agency the purchasers undertook to pay and discharge all present and future liabilities of the sellers in connection with the business. A third party, founding on this agreement, brought an action of damages against the purchasers for alleged slanders contained in reports issued by the sellers prior to the sale.

Held (*rev.* judgment of Lord Low) that, although the purchasers were bound to relieve the sellers of their liabilities, they had not come under any obligation to the creditors of the sellers, and that the pursuer, being no party to the agreement, and having no *jus quæsitum* conferred upon him thereby, had no right of action against the purchasers.

Heddle's Executrix v. *Marwick and Hourston's Trustee*, June 1, 1888, 15 R. 698, *commented* upon.

Stubbs, Limited, 42 Gresham Street, London, and 72 Princes Street, Edinburgh, were incorporated under the Companies Acts 1862 to 1890 on 30th November 1893, and began business as mercantile agents, carrying on the business of a trade protection agency, upon 1st June 1894.

Prior to that date an undertaking of a similar nature was carried on by a limited company called the Trade Auxiliary Company, Limited, having its registered office in London. On 30th December

1893 an agreement was entered into between the said Trade Auxiliary Company, Limited, and them, whereby the former agreed to sell to the latter certain heritable and leasehold subjects, the copyright of certain periodicals, the Trade Auxiliary Company's interest in a contract with the Trade Association of Ireland, and "all the rights, title, and interest in and to the business heretofore carried on by the vendors (the Trade Auxiliary Company) under the names of Stubbs, Stubbs & Company, Stubbs' Mercantile Offices, Stubbs' Agency and Stockbrokers' Protection Agency, and the book-debts and bank balances and cash in hand belonging to and owing to the same, as the same shall appear in the balance-sheet of the year 1893, to be made out and audited in the usual and customary manner (but less the sum which, on such balance-sheet being duly audited may be shown to be the net profits of such business for the year ending 31st December 1893), together with the goodwill of the said business, and the right to use" certain trading names, at the price of £113,955, 10s. 4d.

The fourth head of the agreement was as follows:—"The purchasers shall and will pay and discharge all the present and future liabilities of the vendors in connection with the said business hereby agreed to be sold, and in respect of the said agreement of the 20th October 1893 (*i.e.*, with the Trade Association of Ireland), or otherwise howsoever arising, and will indemnify the vendors from all liability in respect of the same or in respect of all or any contracts entered into by the vendors in respect of such business, and from all liability in respect of rent, and in respect of the breach, non-observance, or non-performance of any contracts, covenants, agreements, or conditions entered into by them, or any of them, or which they shall be liable to pay, observe, and perform in respect of all or any the hereditaments and premises hereby contracted to be sold."

In March 1894 Lawrence Henderson brought an action of damages against Stubbs, Limited, in consequence of reports issued by the Trade Auxiliary Company on 23rd November 1893 and 13th December 1893 respectively, which he alleged were libellous and had seriously affected his trade credit. He set forth the agreement above mentioned, and pleaded, *inter alia*—"(5) The defenders having by s. 4 of the agreement libelled undertaken all the liabilities of the late firm of Stubbs & Company or of the Trade Auxiliary Company, Limited, trading under the said firm name, are liable for the reports issued by said Stubbs & Company or the Trade Auxiliary Company."

The defenders pleaded, *inter alia*—"(1) The pursuer's averments are irrelevant, and are not sufficiently specific to be remitted to probation. (2) The action is excluded by the terms of the documents founded on by the pursuer, and in particular by the terms of the reports founded on by the pursuer, *ex facie* of which neither of the said reports was furnished by the defenders, who were not in business at the dates thereof."

Issues having been lodged, the Lord Ordinary (Low) on 15th June 1894 repelled the 2nd plea-in-law for the defenders, appointed parties to resume the discussion on the adjustment of issues, and granted leave to reclaim.

"*Opinion.* — The defending company maintains that the action should be thrown out, because the first of the alleged slanderous reports was admittedly published before the defenders were incorporated; and the second report was admittedly published before they commenced business, and before the date of the agreement upon which the pursuers rely as transferring liability for the reports to the defenders. The defenders further argued that the pursuer, not having been a party to the agreement, could not found upon it to any effect.

"It appears from the agreement to which I have referred, and which is incorporated into the record by reference, that there was a company called the Trade Auxiliary Company, Limited, which had right to and carried on a business known as 'Stubbs' and 'Stubbs & Co.' The defenders' company was formed and registered for the purpose, *inter alia*, of acquiring and carrying on the said business of 'Stubbs' or 'Stubbs & Coy.' The agreement referred to is between the Trade Auxiliary Company and the defenders' company for the purchase by the latter of the premises in which the business of Stubbs had been conducted, of the copyright of certain publications connected with the business, of a contract made between Stubbs and the Trade Association of Ireland, and of 'all the right, title, and interest in and to the business heretofore carried on by the vendors under the name of Stubbs, and the book debts and bank balances and cash in hand belonging to and owing to the same.' It was provided that the purchase should take effect as from the 31st December 1893, the defenders' company having been registered upon the 30th November in that year.

"The fourth article of the agreement provided that 'The purchaser shall and will pay and discharge all the present and future liabilities of the vendors in connection with the said business hereby agreed to be sold, and in respect of the said agreement with the Irish Association, or otherwise, however arising.'

"By virtue of the agreement therefore the whole business formerly carried on under the name of Stubbs or Stubbs & Company, and the assets of the business, were acquired by the defenders, and the latter undertook, in the most comprehensive terms, all the liabilities of Stubbs or Stubbs & Company, present and future.

"Now if, as is averred, Stubbs & Company, in the course of the business which they carried on, published a slanderous written statement in regard to the pursuer, for which he has a good claim for reparation, that appears to me to be a liability of Stubbs & Company which the defenders have taken over. But the defenders argued that although that might be the case in a question between Stubbs &

Company, the pursuer could not found to any effect upon the agreement, because he was neither a party to it nor did he acquire any *jus quæsitum* under it. That argument would, I think, have been sound if the defenders had only undertaken to relieve Stubbs & Company of any claims which might be constituted against them. But here the defenders have undertaken direct liability for all debts, present or future, of Stubbs & Company. By the agreement, and the possession which they have had thereon, the defenders have simply stepped into the place of Stubbs & Company, receiving the benefits of all the assets and rights of that company, and becoming liable for all their debts and obligations. In such circumstances I do not think that the defenders could dispute direct liability for a trade debt of Stubbs & Company. And as regards responsibility I do not see any distinction between a claim for a trade debt and a claim for reparation. Because a claim for reparation is a claim for a civil debt, and I do not think that there is any difference in that respect between reparation for slander and reparation for other injuries, such as injuries to the person.

"In regard to the argument that although in a question between them and Stubbs & Company the defenders may be liable, yet the pursuer is not entitled to sue them directly, I do not think that it is well founded. If a new firm, which is formed to take over the business of an old firm, agrees, either by express contract or by implication, to adopt and become liable for the debts of the old firm, it is settled that the creditors of the old firm are entitled to be ranked upon the estates of the new firm in the event of their sequestration—See *Heddle's Executrix* v. *Marwick and Hourston's Trustee*, 15 R. 698, and cases there cited.

"I do not think that the fact that the new firm here is a company registered under the Companies Act makes any difference, at all events when it is seen that the obligation to become bound for the debts of the old company is constituted by express agreement entered into after incorporation.

"I am therefore of opinion that the second plea-in-law for the defenders falls to be repelled."

The defenders reclaimed, and argued—(1) Liability for slander was not a liability in connection with the business in the sense of the contract. Such a liability might have been transferred had apt words been used, but there were none such here, and the presumption was strongly against the transference of an illiquid claim or of the obligation to answer for a defamation which was a *quasi*-delict. The case of *Heddle* relied on by the other side was not in point. (2) The pursuer had had no *jus quæsitum* conferred upon him. He was not a party to the contract, and was not in the contemplation of the parties to the contract, who had made it solely in their own interests and could cancel it at any time without consulting him. He could sue those by whom he thought he had been wronged, but had no direct right of action against the defenders; whether they would have to indemnify those from whom they had bought the business if found liable in damages was immaterial—*Peddie* v. *Brown & Company*, 1857, 3 Macq. 65; *Finnie* v. *Glasgow and South-Western Railway Company*, 1857, 3 Macq. 75; *Smith* v. *Edinburgh and Glasgow Railway Company*, 1866, 4 Macph. 362; *Blumer* v. *Scott & Sons*, January 16, 1874, 1 R. 379; *Empress Engineering Company*, 1880, L.R., 16 Ch. Div. 125; *Gandy* v. *Gandy*, 1884, L.R., 30 Ch. Div. 57, Lord Justice Bowen, p. 69; *Stephen's Trustee* v. *Macdougall & Company's Trustee*, June 14, 1889, 16 R. 779.

Argued for respondent—A claim like the present was assignable—*Auld* v. *Shairp*, December 16, 1874, 2 R. 191; *Evans* v. *Stool*, July 15, 1885, 12 R. 1295. This claim would have been a trade debt of the old firm, the report having been issued in the ordinary course of business, and as such was transferred. That it was illiquid was immaterial. All possible liabilities past and future were transferred in the most absolute terms. The contract contemplated the two cases of the new firm being sued directly, and of its relieving the old firm should an action have been successfully brought against it. The case of *Heddle's Executrix* v. *Marwick and Hourston's Trustee*, June 1, 1888, 15 R. 698, was directly in point—*cf.* also *M'Keand* v. *Laird*, 1860, 23 D. 846, and *Miller* v. *Thorburn*, 1861, 23 D. 359.

At advising—

Lord Adam—This is an action of damages brought by the pursuer against the defenders in respect of certain alleged libels contained in two reports issued or published by the Trade Auxiliary Company, Limited, the first on 23rd November 1893 and the second on 13th December 1893.

At the first of these dates the defenders Stubbs, Limited, were not in existence, not having been incorporated as a company until 30th November 1893, and they had not commenced business at the date of the second. They say that they had nothing to do with the issuing or publishing of the libels in question. That does not appear to be disputed, but it is maintained by the pursuer that the defenders are nevertheless liable for the consequences of these libels, because they are liable for the debts and obligations of the Trade Auxiliary Company, by whom the libels were published, in respect of the terms and conditions under which they acquired the assets and business of that company. These are to be found in an agreement entered into between the two companies, of date 30th December 1893.

By this agreement the Trade Auxiliary Company agree to sell to the defenders certain household buildings and hereditaments therein specified, the copyright of certain publications also therein specified, and all right, title, and interest in and to the business theretofore carried on

by the trade names of Stubbs & Company and certain other names, and the book debts and bank balances and cash in hand belonging to them as the same should appear in the balance-sheet of 1893, together with the goodwill of the business and the right to use the trading names, all at the price of £113,955, 10s. 4d., payable as therein mentioned.

The purchase was to take effect as from 31st December 1893, and the profit up to that date was to belong to the vendors.

By the 4th article of the agreement the defenders undertook to pay and discharge all present and future liabilities of the Trade Auxiliary Company in connection with the business agreed to be sold, and to indemnify them from all liability in respect of the same.

It appears, accordingly, that the defenders, who are in no way identified with the Trade Auxiliary Company, purchased and presumably paid a full price for the business and assets of that company. I know no authority or principle for saying that, where one firm purchases the business and assets of another firm, they by doing so become liable for the debts of the firm from whom they purchased. The creditors are in no way injured by the transaction, because they can have recourse for payment of their debts to the price, which presumably is in the hands of their debtors.

The case of *Heddle's Executrix* and the cases there cited, which are referred to by the Lord Ordinary, do not appear to me to have any bearing on this case, the facts on which they proceeded being quite different. Lord Shand in the subsequent case of *Macdougall & Co's Trustee*, 16 R. 779, correctly notes the grounds on which these cases were decided. "The judgments," he says, "proceeded on the view that there had been no real change in the copartnery beyond the assumption of a partner, who obtained a small share of a going business without putting in new capital, and where the new firm went on to trade with the stock and assets of the old firm, taking these over without any arrangement for the winding-up of the old company's affairs, or for an accounting with the old firm or its partners, but taking liability for all the old company's debts and obligations."

It appears to me, therefore, that the defenders' liability must depend upon the effect which is to be given to the fourth article of the agreement, and whether they thereby became bound to the pursuer and the other creditors of the old firm to pay their debts. No doubt the defenders undertook to pay and discharge all present and future liabilities of the vendors in connection with the business sold, and to indemnify them for all liability in respect of the same, and no doubt they are bound to do so in a question with the Trade Auxiliary Company. But the pursuer is no party to this contract. He is not named or designed in it. The stipulation in question was not entered into in his interest or for his benefit, but in the interest of the contracting parties. They could alter or revoke it at any time if so advised, and I do not see that there was any *jus quæsitum* to the pursuer under it.

That being so, it appears to me that the pursuer has not set forth any relevant case against the defenders, and that they ought to be assoilzied.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

The Court recalled the Lord Ordinary's interlocutor and assoilzied the defenders.

Counsel for the Pursuer—Ure—Cooper. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Defenders—N. J. D. Kennedy — M'Lennan. Agent — Robert Broatch, Solicitor.

Friday, November 16.

FIRST DIVISION.

[Sheriff of Lanark.

M'DOUGALL *v.* LAIRD & SONS.

Arbitration—Arbiter Judge in his Own Cause—Disqualification.

By the "conditions of sale," under which certain subjects were sold by public auction, the purchaser was taken bound to deposit a specified sum with the auctioneers as security that he would duly implement his obligations. The "conditions" also provided that, in the event of any difference arising as to the implement thereof, the same should be referred to the decision of J. L., one of the auctioneers' firm.

The purchaser having brought an action against the auctioneers for recovery of the deposit money, the latter lodged defences, wherein they denied that the purchaser had implemented the "conditions of sale," and pleaded that the action was excluded by the clause of reference.

Held that, as the auctioneers had taken upon themselves the defence of the action, J. L., being a partner of their firm, was barred from acting as arbiter in regard to the questions in dispute.

On 4th December 1893, Peter Glass bought at a public auction, conducted by Messrs James Laird & Son, auctioneers, certain building materials. These, which consisted of old houses in Princes Street and Saltmarket, Glasgow, were sold on behalf of the City of Glasgow Improvement Trust under certain "conditions of sale." It was prescribed by these conditions that the purchasers of each tenement should make a deposit of £10 with the auctioneers, as security for the due removal of the materials within the time allowed under the conditions. In case of the non-fulfilment of this obligation by the purchaser, the work was to be done by the exposers of the tenements, and the expense was to be paid out of the deposit money. The conditions also contained the following clause of reference:—(7) "The build-