LORD MONCREIFF—I am of the same opinion. If the defence had depended on the plea of "no title to sue" I should have had difficulty. But the real question is whether the defenders were justified in paying to the pursuer's father and getting his receipt. Now, it was admitted that if they had called at the shop and paid cash the payment would have been good; and I think the result would have been the same if on calling they had given the father a crossed cheque in favour of James Gemmell junior, and the father had asked them for a cheque payable to bearer instead. It would have been different if there had been anything to rouse their suspicion and put them on their guard—if, for example, they had known that the reason why the pursuer was in prison was that he had quarrelled with his father and assaulted him. In such a case they might have been interpelled from paying. But there is no evidence that they knew this.

The LORD JUSTICE-CLERK concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the parties on the pursuer's appeal against the interlocutor of the Sheriff-Substitute of the Lothians dated 5th January 1899, Recal the said interlocutor: Find in fact (1) that prior to 1892 James Gemmell senior, the pursuer's father, was the owner or part-owner of the business carried on at 69 Cowgate, Edinburgh; (2) that the pursuer has failed to prove that any material change in the ownership and conduct of the business took place in 1892 or thereafter, or that the pursuer then became sole owner; (3) that James Gemmell senior, the pursuer's father, was at the time that the rags condescended on were purchased *præpositus negotiis*, and as such entitled to receive payment of debts due to the firm, and to grant discharges therefor; (4) that the defenders did pay to James Gemmell senior the price of the rags condescended on, and received from them the receipts Nos. of process: Find in law that the said receipts are good and valid discharges, and that the pursuer is not entitled to payment from the defenders of the sums sued for, these having been paid and discharged: Therefore assoilzie the defenders from the conclusions of the action, and decern: Find the pursuer liable in expenses in this and in the Inferior Court, and remit," &c.

Counsel for the Pursuer—M'Lennan—Findlay. Agent—C. Garrow, Law Agent.

Counsel for the Defenders—Dundas, Q.C.—P. J. Blair. Agents—Strathern & Blair, W.S.

Tuesday, May 23.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

MACKAY *v.* MACARTHUR.

Agent and Client—Constitution of Relation of Agent and Client—Purchase of Client's Property by Agent.

A husband and wife executed an assignation (absolute in its terms) of a policy of insurance payable to the survivor of them in favour of a bank-agent who was also a law-agent, and in order to obtain funds for the husband. In an action by the wife after the death of her husband for reduction of the assignation the Court found in fact (1) that the bank-agent did not act in the transaction as law-agent for the pursuer; (2) that he did not make any misrepresentation as to the nature of the contract; and (3) that consequently there was no ground of reduction.

Opinion that even if he had acted as law-agent for the pursuer it would not have been a valid ground of reduction that, beyond reading over the deed to her, he had taken no steps to ascertain that the pursuer understood the real nature of the transaction or its effect in cancelling her rights under the policy without any pecuniary advantage to herself.

This was an action at the instance of Mrs Margaret Stewart Macpherson or Mackay, widow of the late Alexander Mackay, chemist in Oban, executor-dative *qua* relict of the said Alexander Mackay, as such executrix and as an individual, against Alexander Macarthur, solicitor, Oban, and also agent for the Commercial Bank there, in which the pursuer concluded for reduction (1) of an assignation in the defender's favour of a policy of insurance on her late husband's life for £100; and (2) of an assignation in the defender's favour of a policy of insurance for £500 payable to the survivor of her late husband and herself. The pursuer sued for reduction of the first assignation as executrix of her husband, and of the second in her own right. There was no petitory conclusion. Restitution was offered of the sum paid by the defender for the assignations with interest, and of the premiums paid by him on the policies.

The following statement of the pursuer's pleas and of the facts is taken from the opinion of the Lord Ordinary (KINCAIRNEY):—"In support of the conclusions of reduction of both assignations the pursuer pleads—(1) Fraud and circumvention, and undue influence on the part of the defender, the law-agent of the granters. (2) Essential error, *et separatim*, essential error induced by the misrepresentations of the defender. (3) That the assignations had been executed by the granters in ignorance of their contents, and in favour of their law-agent, and without independent advice.

"With regard to the assignation of the joint policy for £500, the pursuer pleads

besides—'(4) The assignation of the policy for £500 having been granted by the pursuer without consideration in favour of her law-agent is null, *aut separatim*, is voidable. (5) The said assignation by the pursuer being a donation *inter virum et uxorem* is revocable.

"It appears from the condescendence that the essential error referred to in these pleas was this, that whereas the assignations are absolute, the pursuer and her husband erroneously believed that they were only in security for repayment of the sums advanced.

"The facts are not complicated but some of them are disputed. So far as not open to dispute they are as follows :—

"The pursuer and the deceased were married on 28th June 1889, and they resided in Oban, where he carried on the business of a chemist, and she a licensed grocery business. Their businesses were carried on separately, and they had separate bank accounts at the defender's bank. The deceased had effected the policy for £100 several years before the marriage, and the joint policy for £500 was taken out on 11th October 1889. It appears that at that time Mackay's health was fairly good, and his habits tolerably temperate, but it appears that some years afterwards his habits became dissipated, and his health to some extent affected. There is, however, considerable variance in the evidence as to the degree of his intemperance and the effect to which his health was affected. There are receipts in process showing that on two occasions the premiums on the policy for £500 were paid by the pursuer.

"In January 1894 Mackay fell into financial difficulties, and having to meet the demand of a creditor when his bank account was overdrawn, he applied to the defender for leave to overdraw further or for assistance. As he could not be allowed to overdraw, and could not get anyone to accept a bill for him, he consulted the defender as to the practicability of raising money on his policies, and the defender at his request ascertained their surrender values. Mackay and the defender also consulted as to exposing the policies for sale, but Mackay objected to that on account of the publicity, and it was found to be impracticable. The defender says that on the pressing solicitation of Mackay he advanced £60 for the policies. He says that he did so very reluctantly, and that he told Mackay that if he could get anyone else to advance the money he would hand over the policies. This part of the case depends necessarily on the evidence of the defender and of his assistant Mr Coats, but I see no reason to doubt it. At all events, the assignations were granted on 22nd January 1894, and the £60 was advanced by the defender, and was paid into Mackay's bank account. It does not appear that any part of it was paid to the pursuer. The assignations are in absolute terms. The consideration for the assignation of the policy for £500 is said to be £36 as its ascertained value, and both the granters acknowledge receipt of it. The consideration for the other assignation is £24, as the ascertained value of the policy for £100. The surrender value of the one was £31, 16s. 3d., and of the other £21s. 15s. The sum of £60 paid by the defender was thus between £6 and £7 above the sum of the surrender values. The one assignation is signed by Mackay and the pursuer, and the other by Mackay only.

"Mackay paid the first premiums which thereafter fell due; but the defender repaid him and paid the premiums afterwards. I think it proved that Mackay asked repayment of the premiums which he paid.

"About October 1896 Mackay took out a policy of insurance for a small amount with the Prudential Assurance Company, Limited. He did so on the solicitation of the resident agent of the company. The materiality of this fact is that it seems to show that so late as October 1896, neither Mackay's habits nor his health were such as to deter an insurance agent from insuring his life.

"Mackay, however, died on 20th December 1896, and the sums in the policies (with bonus additions), amounting to £644, 0s. 2d. were paid to the defender. On the day after Mackay's death the pursuer sent a message to the accountant of the Commercial Bank to the effect that there were several accounts which she desired to pay by cheques on her bank account, and that the insurances on her husband's life would provide the money. The accountant communicated this message to the defender as bank agent, who at once stated that he had bought the policies, and that the pursuer was not entitled to any part of the sums insured. The defender afterwards placed £50 to the pursuer's credit with the bank. He says in a letter to her, dated 22nd March 1897, that this sum was allowed to her 'as a grant from the proceeds of the life policy which fell due on Mr Mackay's death, and it is possible,' the defender added, 'I may be able to make a further payment to you again.' The defender said in evidence that the £50 was paid, and that he had in view to pay her more out of consideration for her position. But when she advanced her claim for the whole amount in the policies, under deduction of what the defender had paid, this sum was repaid on the defender's demand.

"These are the main facts, about which there is no dispute, or room for dispute. There are, however, one or two important matters of fact which are in dispute.

"First, with regard to the execution of the assignations, I consider it amply proved that they were signed by Mr and Mrs Mackay at the same time and in the defender's office. I am satisfied that the pursuer was in error in deponing that she signed the assignation of the policy for £500 in her shop, and not at the same time as her husband.

"I am also of opinion that the deeds were read in presence of Mr and Mrs Mackay before they signed them. This is not quite so well proved. The defender and his assistant Mr Coats are the only witnesses who depone to it. The instrumentary witness, M'Calman, did not actu-

ally hear the deeds read; but, sitting in an adjoining room he heard something being read in the room in which Mackay and his wife and the defender and Coats were, but could not distinguish the words. I do not, however, doubt that the deeds were so read, and I think that proved. I think the pursuer's evidence to the contrary is disproved.

"It is said that the deeds were fully explained, but it is not clear what the explanations were. The deeds no doubt contain the ordinary amount of useless tautology, which seems persistent in all lawyer-made deeds; otherwise they are short and simple, and did not need explanations. It is clear, however, that the pursuer never saw the deeds, or any draft of them, before she signed the assignation of the £500 policy, and that she had no professional advice. In particular, the defender did not advise her.

"Another question of fact is, whether the price paid by the defender was in the circumstances adequate. The pursuer endeavoured to show that Mackay's life was bad and precarious on account of his intemperate habits and poor constitution, that the defender was aware of this, and that £60 was therefore inadequate. But I think that nothing of that kind is proved. Mackay lived almost three years after the assignations were executed; and other insurance agents endeavoured to get him to take out new policies a considerable time afterwards. It does not appear that the defender was intimate with him, or knew of his habits, or had reason to think, or did think, that his life was under average; neither do I think it proved that it was under average. It is, I think, the clear result of the proof that the defender overpaid Mackay, and that so much as £60 could not have been got otherwise. No attempt is made by the pursuer to prove inadequacy of price, except by the suggestion that Mackay's life was under average. I think it impossible to say that the defender over-reached Mackay by inducing him to sell his policies for less than what they were worth. So far as regarded Mackay, the bargain was a fair one. The defender's purchase of these policies may not have been prudent or expedient, but it is due to him to say that, in my judgment, it was not dishonest.

"The next question of fact is this: Was the transaction a sale or a loan? In other words—Were the assignations absolute or only in security? This question admits of only one answer. The assignations are absolute, and if the pursuer's case had been that they were truly in security, proof of that case would have been confined to the defender's writ or oath. But that is not the pursuer's case. There is no plea to that effect. Her case is not security, but essential error.

"That being the state of the pleadings, it is perhaps unnecessary to observe that the transaction was manifestly of the nature of an absolute sale, and that it is hardly possible that the defender could have regarded the assignations as merely securities. £60 was a very full price for a purchase, and very much more than any reasonable man would have advanced as a loan, even if it had been agreed that the borrower was to pay the premiums and interest. No interest was paid or offered, and the defender paid the premiums. There was no mention of repayment of the loan, and the defender cannot be presumed without proof to have been so improvident as to have advanced his money as a loan under the circumstances. The fact that each policy was assigned by a separate deed, and for a distinct consideration, seems also against the idea of loan.

"But the pursuer says that she and her husband were in error, and thought the transaction was a loan, and the assignations securities. The evidence is not overabundant. I am satisfied that Mackay was under no such error. The unambiguous language of the deeds, the conditions under which the transaction took place, the previous consultations with the defender, the fact that he paid neither interest nor premiums, conclusively show that Mackay was not and could not have been under that mistake. The only evidence to the contrary is that of the pursuer, who says that her husband spoke to her of the transaction as a loan. The pursuer's evidence is not to be accepted without some scrutiny; and her impression on that point cannot be held to meet the counter evidence.

"The case is different with regard to the pursuer on this point. Knowledge of the exact nature of the transaction is not brought home to her except by the fact that she heard the deeds read, and, as the defender says, explained. They are, it is true, not obscure or ambiguous; still it is possible that from want of attention she may have misapprehended them. Yet it cannot be the pursuer's case that she misunderstood the deeds, because she depones that she never read them or heard them read. What she does say is that her husband told her that the transaction was to be a loan. It is possible that she may have been misled by him, and it is proved that whenever her husband died she acted as if she were in that belief. She is, however, the sole witness on this point. She is an interested witness, and not always correct, and I cannot hold it proved that she misunderstood the deeds. At the same time, it is not very well proved that she did understand them.

"The last question of fact is, whether this erroneous belief on the part of the pursuer, supposing it to have existed, was induced by the representations of the defender. To that question I have no hesitation in returning a negative answer. There is nothing like proof of any such misleading representations. The pursuer suggests that the form of the draft assignation, with the marking on it about the value of the stamp intended to be affixed, shows that at that time a deed in security was intended, and not absolute deeds. I do not think it necessary to examine the evidence on that point. It is enough to say that I cannot draw that inference. Further, the pursuer referred to

two letters, dated 7th and 12th June 1894, from the defender to the pursuer, and argued that these letters were calculated to induce the idea that the defender had acquired the policies only in loan. But as to these letters, I think the defender has given a sufficient explanation." . . .

The Lord Ordinary also found that as regards this transaction the defender stood in the relation of law-agent to Alexander Mackay and to the pursuer, but this finding was ultimately recalled by the Second Division.

The facts with reference to this matter were as follows:—Prior to the date of the assignations three small and isolated pieces of law-business had been done in the defender's office for Mackay. Prior to that date no law business had been transacted by the defender for Mrs Mackay. When the defender at Mackay's request wrote to ascertain the surrender value of the policies, he said in these letters—"He (*i.e.* Mackay) is my client," and "They (*i.e.* Mr and Mrs Mackay) are my clients." With reference to this the defender explained that he used that language merely in order to show that he had a right to ask for the information. At that time it had not been suggested that he should take the policies.

A scroll draft assignation in blank was prepared on the directions of Mr Coats, who had charge of the defender's law business, so that an assignation could be prepared whenever it was arranged. If an outside person had been found willing to take the policies the expense of this draft would have been paid by him. No account for law business done was ever rendered by the defender to either Mackay or the pursuer.

The defender did not suggest that Mrs Mackay should consult another law-agent. He did not explain the deed to her outwith the presence of her husband, nor did he press upon her attention the absolute nature of the assignation, nor did he point out to her that the deed was not a wise one for her to grant considering the matter purely from the point of view of her own private and personal interests.

The facts with reference to the history of the transaction were as follows:—Mackay came to the defender originally for the purpose of getting a loan. This was upon 18th January 1894. On the same day the defender wrote inquiring what was the surrender value of the policies. He got the answer on 20th January. Meantime the scroll draft had been prepared. In this draft no price was mentioned, the consideration being only "certain good and onerous considerations." The stamp-duty marked upon the draft was ten shillings, which was the duty applicable to an assignation-in-security, absolute in form, but in fact in security only. The form used by the clerk who prepared the draft, was a form which had been used for a security transaction, and was the usual form for a security transaction, but the assignation was *ex facie* absolute. The stamp duty on the sale of the policies at the price of £60 would have been seven shillings and sixpence. The clerk explained that he copied the form used by him throughout, and that it was from it that he took the amount of the stamp.

On Monday 22nd January, for the first time it was suggested that the policies should be assigned to the defender. Immediately after the defender had agreed to this the assignations were made out, and they were signed by Mr and Mrs Mackay on that same day. The reason given for the transaction being carried through so quickly was that Mackay had in fact meantime issued a cheque, which would have been dishonoured if the money had not been put to his credit by the time it was sent to the bank for payment.

The total amount paid by Mr and Mrs Mackay in premiums on the policies with interest was £171, 9s. 4d., which, less the £60 received from the defender, made £111, 9s. 4d. The total sum paid by the defender as the price of policies and premiums with interest was £147, 0s. 7d.

When Mackay paid the first premiums which fell due on the £500 policy the defender wrote to him as follows:—"*7th June* 1894.—Dear Sir—If you will please send me the insurance premium receipt you recently paid, I shall place the amount thereof to your credit in bank. I think it is better that I should keep the matter going in the meantime, and that it remain as originally arranged." On 12th June the defender again wrote to Mackay in the following terms:—"Dear Sir—I send you herewith paid-in slip for £10, 12s. 1d. to-day put to the credit of your bank account, and which is the amount of the premium of ince. paid by you on the policy for self and spouse, and which receipt you have handed to me. I will in future pay the premiums direct, and so keep the transaction in proper shape."

The defender explained that by "keeping the matter going in the meantime" he meant until the Mackays could get another purchaser, and that he was willing to "suspend the purchase" until they did so, as he wished to get rid of the transaction.

On 30th October 1894 the defender wrote to the Insurance Office—"I enclose my cheque for £10, 12s. 1d. in payment of Mr Alexander Mackay's life insurance premium." The relative entry in the defender's ledger was under the name of Alexander Mackay—"Writing Mr Archibald Campbell with cheque for £10, 12s. 1d. for premium on your life policy," The defender explained that he never saw the letter, that the expression used was merely to identify the policy; that the entry in the books was taken by a clerk from the letter-book merely for purposes of reference and was erroneous, that Mackay was not charged anything, and that he was not debited with the premium.

The defender several times told Mackay after the transaction was completed that if he could get anyone else to take the policies he (the defender) would be willing to give up the purchase, and he deponed at the proof that up till Mackay's death he would have been willing to give up the policies upon payment of £60, with the amount of the

premiums paid by him added. The defender explained that he thought he had been very foolish in advancing the money he gave, that he wished to get rid of the transaction, and that this was the reason why he was willing to give up the policies if repaid his disbursements, although he had purchased them outright from the Mackays and acquired full right to them.

Upon these facts the pursuer maintained that a loan was originally contemplated, that up till the forenoon of 22nd January nothing else was contemplated by anyone, and that in consequence of the defender's having frequently expressed his willingness to return the policies if he was repaid his disbursements, Mackay and his wife both considered and were justified in considering that the transaction was for a security in fact whatever it might be in form.

The defender explained that after Mackay's death he was willing to share the profit made on the transaction with Mrs Mackay, and that he was prepared to have given her in all £250 by instalments of £50, but that when she took up the position which she maintained in this action, and when accusations of fraud and other improper conduct in reference to the part he took in the transaction began to circulate, he declined to give her anything, and was compelled to defend this action for the sake of his professional reputation.

On 14th December the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Finds (1) That on 22nd January 1894 the deceased Alexander Mackay executed an absolute assignation to the defender of a policy of insurance for £100 on his life, and that of the same date the said Alexander Mackay and the pursuer his wife executed an absolute assignation to the defender of a policy of insurance for £500, payable to the survivor of them: (2) That the defender then stood in the relation of law-agent to the said Alexander Mackay and to the pursuer: (3) That the defender paid a full price for each of the said assignations: (4) That the said deeds were not procured by the fraud or misrepresentation or undue influence of the defender: (5) That the said Alexander Mackay was under no error in regard to the said assignations: (6) That the pursuer has not proved her averments to the effect that she was under the erroneous belief that the said assignations were not absolute, but were granted in security for repayment of the sums advanced: (7) That she was not induced to form said erroneous belief by any representation made or act done by the defender: (8) That the defender did not fail to use reasonable precautions as her agent to secure her understanding of the said assignations: Finds, therefore, that no ground has been established for reduction of either of the said assignations: Repels the pleas-in-law for the pursuer, and assoilzies the defender from the conclusions of the summons and decerns: Finds the defender entitled to expenses," &c.

[*In the course of his note the Lord Ordinary, after signifying his opinion that the other pleas-in-law of the pursuer were unfounded, proceeded*]—"There remain the third and fourth pleas, which taken together and applied to the assignation of the joint-policy, only come to this, that the assignation, so far as granted by the pursuer, should be reduced because she got no consideration for it, it being in favour of her law-agent, by whom she was not sufficiently informed or advised as to its true nature.

"I have found this to be a point of great difficulty, and it is not without much hesitation that I have formed an opinion in favour of the defender. No authorities on the point were quoted. A sale by two persons to their law-agent of property in which both were interested would not be bad merely because it afterwards appeared that the price had been paid to one of them only. That would be a matter with which the buyer would have no concern, either as buyer or law-agent; and I do not think it would signify although it were known to the buyer beforehand (as in this case) that the whole price would go to one of the parties, and I do not see that it makes any difference that the parties are husband and wife, especially since it is clear that the wife knew that no part of the price was to go to her.

"But the question is, whether the defender was careful enough to make it certain that the pursuer fully understood the transaction. It is not said in this case that the pursuer was ignorant as to the nature of her interest in the policy, or that she did not know that she was giving up her interest to a certain extent, or that the money to be paid in return was to be paid not to herself but to her husband. Her case is that she was not aware of the extent to which she relinquished her interest. She was, she says, in error on that point, and it is clear that, if she was led into that error, it was her husband and no one else who misled her. But it is not easy to see that the right of the defender can be thereby affected.

"The real and narrow point seems to be, whether the defender used all the care and precaution which it was his duty as law-agent to use in order to guard the pursuer against that mistake. I hold—contrary to the pursuer's evidence—that he read the deed to her, and that he gave what explanation he thought required. It is, as I have said, a simple deed. The pursuer asked no questions, and gave no indication that she misunderstood it. Was it his duty to do more? The pursuer had, she says, been informed by her husband that the deed which he was to sign was to be a security, but the defender did not know that, and was not bound to suspect it. No doubt the defender might have done more. He might have insisted that she should employ another agent, or he might have fully explained the deed to her outwith the presence of her husband, or he might have pressed on her attention the absolute character of the assignation, or he might have strenuously advised her not to grant the deed at all. Was it his duty to do all or any of these things, and is this deed reducible because he did not do them? I am not able to answer these questions affirmatively. I

think the defender was perhaps a little slack, and not quite alive to the delicacy of the transaction. It would have been better had he been more particular. But I incline to the view that he did all that he was bound in law to do.

"What the pursuer seeks to do is to substitute for the authorised issue, whether she granted the assignation under essential error induced by the defender, a novel issue to this effect, whether she granted the assignation under essential error from which she was not protected by the defender. That is an issue for which there is no precedent, and which does not seem consistent with the principles of the judgment in *Stewart* v. *Kennedy*. On the whole it seems to me that the pursuer's case fails on this point also, and that the defender should therefore be assoilzied."

The pursuer reclaimed, and argued—The defender was the pursuer's agent in relation to this transaction, or at least he was in such a relation towards her as to impose upon him an obligation to act as if he had been her agent. If so, then he was bound to prove that she understood the nature of the transaction, and it was not sufficient to find as the Lord Ordinary had done that she had failed to prove that she did not understand it. The onus was upon the defender, and he had not discharged it. It certainly did not clearly appear that the pursuer did understand the transaction, and the defender was bound at his peril to make sure that she did. So far from doing so, by the undue haste with which he hurried through the transaction, notwithstanding the fact that up till almost the end a loan only was contemplated, by his failure to advise the pursuer, and by his offers to give up the policies upon repayment of his disbursements, he had led the pursuer to believe that what was intended was a security transaction only. Apart from this, however, the defender was bound either to insist on the pursuer having independent legal advice or to see that she was as well advised by him as she could have been by an independent law-agent, and if he failed to do one or other of these things the assignation in his favour should be reduced. Admittedly the defender did not advise the pursuer to go to another law-agent, and, as he did not regard himself as being her law-agent, he could hardly maintain that he had advised her as well as a law-agent consulted by her would have done. In fact he did not do so. He ought to have pressed upon her the absolute nature of the assignation, and the facts (1) that she was giving up the only provision made by her husband for her in the event of his death, and (2) that she was getting nothing for doing so. An independent law-agent would have pointed out all these things, and especially in view of her husband's health and habits would have endeavoured to dissuade her from signing the assignation at all, or at least from signing unless the price was increased, and some of the price given to her.—Authorities referred to—Begg on Law-Agents, pp. 295 to 297; *M'Pherson's Trustees* v. *Watt*, December 3, 1877, 5 R. (H.L.) 9, *per* Lord O'Hagan at p. 17; *Cleland* v. *Morrison*, November 9, 1878, 6 R. 156; *Weir* v. *Grace*, March 10, 1898, 25 R. 739, and December 13, 1898, 1 F. 253. The case of *Montesquieu* v. *Sandys* (1811), 18 Vesey 301, was decided when the law upon this subject was not so strict as it was now.

Argued for the defender—(1) Neither the pursuer's husband nor the pursuer herself were clients of the defender. There certainly was no evidence whatever that the pursuer was the defender's client. The original reason why the pursuer's husband went to the defender was that the defender was his banker, and he wanted to get money. The relation between the parties throughout the transaction was that of banker and customer. No law charges were made against the pursuer or her husband. The draft assignation could not have been prepared on the employment of Mackay, because it is the purchaser's or lender's agent who prepares the assignation. It was merely prepared so as to be ready, the pursuer's husband being in a hurry to get the money as soon as possible. If the transaction had been carried through with a third party the third party would have been the person on whose instructions the draft would have been made, if it had been used at all; (2) Even if the relation between the parties was that of agent and client there was nothing to show that in the circumstances of this case the defender failed to do anything which was incumbent upon him. He paid a full price. The pursuer's husband wanted money. This was the only way in which he could get it, and the pursuer was willing to assist him. The nature of the defender's argument on this part of the case fully appears from the opinion of the Lord Ordinary.—Authority referred to—*Montesquieu* v. *Sandys*, *cit.*

Lord Justice-Clerk—In this case, if it were necessary to consider the question whether there was agency or not on the part of the party who took this assignation, I would hold on the evidence that in the case of Mrs Mackay, who was a woman carrying on a business in her own right, there was no trace of there being any agency as regards her. Even as regards Mr Mackay himself I should be inclined to hold upon the evidence that there was not agency in the true sense at all. But taking the case as the Lord Ordinary has put it, that there was agency, I am unable to come to the conclusion upon the evidence that there was anything that the defender here, Mr Macarthur, failed to disclose which he ought to have disclosed, or anything that he did that he ought not to have done in the whole of this transaction, assuming that he was acting as an agent. I think that from the outset it must be kept in view that this is not a case of parties being overreached and getting less for a policy than they could have got from anybody else. The evidence to my mind conveys this, that they actually got more for this policy than they could have got if they had gone to what may be called

the insurance policy market and endeavoured to sell it.

My impression upon the whole evidence is that Mr Macarthur's whole intention in the matter was to do a kindness to these people. They were in great straits at the time, and it was necessary to obtain ready money—I suppose to avert some financial catastrophy—and that he acted as a friend, and being interested in them, not only was willing to give them a fair price for this policy if they thought proper to sell it, but to do a generous thing in giving a very full price for it.

I do not go into the evidence in detail but state merely the impression that has been conveyed to my mind upon perusing the evidence and hearing the arguments. I think the conclusion at which the Lord Ordinary has arrived is right, and that the interlocutor ought to stand.

Lord Young—I am of the same opinion, but I do not hesitate to express my opinion—I think it proper to express my opinion—that the averment which is at the foundation of the pursuer's case has not been established, and indeed is not true in point of fact, namely, that there was such a relation between the pursuer and her husband on the one hand and the present defender upon the other, as to produce trust and confidence on their part towards him, which he abused. That he abused that trust and confidence is the foundation of the action, but the foundation of that is that there was such a relation. Now, I am of opinion that there was not. Such a relation may exist without the party in whom the trust and confidence is reposed being a professional man. There are other relations which may subsist and induce trust and confidence, which may be abused by the party in whom the confidence is reposed, and lead to the transaction being set aside; but I am very clearly of opinion that no such relation existed between this bank agent, although he happened to be a man of business and a professional man, and Mr Mackay and his wife, or between him and either of them. He was only a bank agent, and they resorted to him because he was the agent of the bank with which they dealt. Both the husband and the wife were trades-people. each of them having a shop and a banking account, and they resorted to that bank. That I think was the only relation between both or either of them and the defender. It so happened that at that particular period Mr Mackay required £60, and the bank agent was very naturally informed of that, because the first party to whom resort would be had in such a difficulty would be the bank agent. They tell him that there are two policies of insurance, and that they have really nothing else to give as security for a loan of £60, and nothing except those two policies that they can dispose of which will yield them £60. Now, I do not know that there is anything requiring the aid of a man of business in selling policies of insurance or in raising money upon the security of them, except that they have got to be assigned in that latter case to the party lending the money, and upon fair and reasonable terms. Now, the bank agent here, after asking whether they had nothing else upon which they could get £60 except those policies, is assured that they have not. He says he will make inquiry to see whether the £60 can be raised upon them, and he does make that inquiry, as would be expected from any respectable bank agent who was civil to his customers, and he tells them what can be got as the surrender value. He also informs them that a little more than the surrendər value might be got by assigning them to a third party, but he informs them, and truly, that it would be quite impossible to raise £60 upon them on loan. Now, that is just information which any bank agent would give to any customer. Then he is asked—"Will you buy them yourself?" and he agrees to that, and to give what is admittedly a fair price. That does not constitute the relation of agent and client, or any relation of trust and confidence such as requires to be established in order to support an action of this kind—not one whit more than if they had brought to him a rare book or a picture and said—"Now, this is the only thing we have; we are informed that this is a valuable picture, and that it should bring more than £60." There are a great many pictures which those in the trade or those in the way of buying pictures call speculation pictures. If the picture turns out to be a genuine Rubens, or a Vandyke, or whatever it is, it is worth £5000 or £6000 or more, but as a speculation for anybody buying it it may bring a hundred pounds or a couple of hundred pounds—you take the chance of its turning out to be a Vandyke or a Rubens or some other great artist's for whose pictures the mere name brings a large price. But there is no relation of trust and confidence if you go to a man, although he happen to be a bank agent or a man of business, and say, "Will you buy this picture," and he is under no obligation whatever to give you any assistance in the matter. He may say, "Go and consult a picture-dealer or anybody else, but if you are willing to sell the picture to me for £60 or £65 I will give you that for it—that is the money you need."

Now, the relation of agent and client, or any relation inducing trust and confidence not existing here—and I am of opinion that it never did exist—there is no foundation for what remains of the case necessary to be established in order to support the action. But suppose that the defender had been the family agent, although it is ridiculous to say that these two shopkeepers had a family agent or a man of business, —they had nothing of the kind. If they asked him to buy a policy, or he proposed to buy a policy, saying, "I will give you so and so for it," what obligation does the law impose on him, or what trust and confidence is imposed in him? Does it oblige him to inquire into the state of the man's health and to see what are his prospects of life. I think Mr Macarthur is telling the truth here—it would not occur to me to doubt it, his con-

duct being so entirely reasonable—when he says that he never made any inquiry about Mr Mackay's life at all. He saw him when he came to the bank, and saw him in the street, and it did not occur to him that there was anything the matter with him. But the idea of trust and confidence on the part of Mr Mackay and his wife, and of a consequent obligation upon the defender to inquire into the state of Mr Mackay's health and see what the policies were worth as a speculation, is also, in my opinion, entirely out of the question, and not sensible or reasonable in any view.

Then it just comes to this, that he bought such a common article of sale as two policies of insurance at what is admitted to be the full value of them if sold, and that he did not advise them, after inquiring into the state of Mr Mackay's health, that they had better go without the £60 and take the consequences, than sell the policies at their value as subjects of sale.

My opinion therefore is with the Lord Ordinary on the assumption, which I cannot make, that there was a relation producing trust and confidence here, the view of the Lord Ordinary being that there was no trust and confidence induced which was abused. I repeat it is part of the case of both parties, and is too clear to be disputed, that the £60 could not have been raised as a loan upon those policies upon any arrangement that it would not have been ridiculous for anybody, a man of business or not, to suggest and recommend. My opinion upon the whole matter therefore is, that this is a clear case, and that the action is unfounded, and that the defender is entitled to absolvitor with expenses.

Lord Trayner—I concur. The only point in the Lord Ordinary's interlocutor with which I am unable to agree is the second finding in fact that the defender stood in the relation of law-agent to Alexander Mackay and to the pursuer. I think that is not proved. I am also of opinion (assuming that the defender was the agent of the pursuer) that there was no failure on the part of Mr Macarthur in any duty which the position of law-agent to these parties imposed on him, and I would like to add that in my opinion Mr Macarthur's conduct is not in any respect open to censure.

Lord Moncreiff—I am of the same opinion. I think the Lord Ordinary has rightly disposed of this case, and that even assuming Mr Macarthur stood in the position of confidentiality to the pursuer and her husband, I do not think it is proved he did anything he should not have done in that relation, or that he omitted to give them any advice which he ought to have done. Having examined the whole of the evidence, I think he acted entirely in *bona fides*, and that he rather reluctantly bought these policies, and paid more for them than could have been got in the market.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the parties on the reclaiming-note for the pursuer against the interlocutor of Lord Kincairney dated 14th December 1898, Recal the second finding in the said interlocutor: *Quoad ultra* adhere to the said interlocutor reclaimed against, and decern: Find the defender entitled to additional expenses, and remit," &c.

Counsel for the Pursuer and Reclaimer—Balfour, Q.C.—G. Watt. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Defender and Respondent—W. Campbell, Q.C.—Graham Stewart. Agents—Gill & Pringle, W.S.

Friday, May 26.

FIRST DIVISION.

HOGAN AND OTHERS (M'CROSSAN'S TRUSTEES) *v.* M'CROSSAN.

Minor and Pupil—Tutor-Nominate—Custody of Ward.

Averments by the near relations of a pupil which *held* insufficient to override the decision of her tutors, nominated by her father's settlement, as to her custody and residence, the Court being satisfied that that decision was based upon adequate grounds.

Expenses—Minor and Pupil—Petition for Custody of Pupil Children.

Circumstances in which the respondents in a petition for the custody of pupil children *held*, though unsuccessful, entitled to their expenses out of the estate of the children's deceased father.

This was a petition presented by the Rev. Richard Hogan and others, the testamentary trustees of the late Thomas M'Crossan, for the custody of the said Thomas M'Crossan's two pupil daughters, aged seven and five respectively.

The petitioners averred that the testator, who died on 28th March 1898, had appointed them trustees for the execution of the purposes of his settlement, and had also nominated and appointed them to be tutors and curators to such of his children as at and after his decease might be in pupilarity or minority.

The petitioners further averred that after Thomas M'Crossan's death his pupil daughters, who up till that time had resided with him in Paisley, went to live with two paternal aunts in Londonderry, and that for some weeks the trustees paid board for the children to these ladies. The petitioners continued—"On 1st July 1898 the petitioners, as trustees and tutors foresaid, considered carefully what course should be adopted in the interest of said children with regard to their custody and education. They arrived at the conclusion that it was not judicious to leave the children in the custody of the Misses M'Crossan, and that it was better they should be brought to Scotland, where their education and welfare generally could be properly supervised by the petitioners. They ascertained that a Mrs Hogan, who resides in Stirling, and