[Heard, 6*th May*, 1841.—Judgment, 8*th March*, 1842.]

The SCOTTISH UNION INSURANCE COMPANY, Appellants.

JOHN, MARQUIS and EARL of QUEENSBERRY, and others, Trustees and Executors of Charles, Marquis of Queensberry, deceased, Respondents.

Proof.—It is competent for a Court exercising equitable powers, to receive evidence to shew that a written contract, purporting to be an absolute conveyance, was intended as a security only, and to deal with it accordingly.

Sale.—*Security.*—Contract held to amount to a security only, and not to a sale out and out.

EARLY in the year 1829, Charles, Marquis of Queensberry, submitted to the Scottish Union Insurance Company a proposal, which, after shewing the encumbrances already affecting his lordship's estates, continued thus:—"After thus disposing of "the preferable heritable debt, there will remain to be provided "for, the existing annuities upon personal bond, which, exclu- "sive of L.300, payable to the Marquis's three sisters, amount "to L.1018; and likewise the sum of L.30,000, now to be "borrowed, for paying off the postponed debts. In the suppo- "sition that the annuitants, holding the personal bonds, will "accept of such a personal guarantee as the Marquis may be "able to procure, his lordship now offers to grant an heritable "bond of annuity over the barony of Kinmount, in security of "the premium and interest on the sum of L.30,000, now to be "borrowed. The existing policies of insurance, which were "effected some years ago, amount to L.26,000; the annual

" premium of which is L.1100. These policies will be assigned " in security of the loan, if it amounts to L.26,000; and if to " L.30,000, additional insurances, to the value of L.4000, will " be effected with the Scottish Union Company. If L.26,000 " only shall be given in one sum, it will be understood that the " remaining L.4000 will rank *pari passu* with it. This pro- " posal is made to the Committee of the Scottish Union Insu- " rance Company, with a request that they will take it into " consideration, and state, as soon as convenient, whether or " not they will accept of it. Lord Queensberry has been " informed that one of the first insurance companies in London " has come to the resolution of appropriating a large sum to be " lent on heritable security in Scotland; and that they are to " give money on annuity at five, and by way of ordinary loan on " good landed security, at three and a half per cent. Lord " Queensberry is desirous to know at what rate the Scottish " Union Insurance Company will transact with him."

On the 23d February, 1829, Messrs Deuchar and Knox, the solicitors of the Company, wrote Mr Stewart, the law agent of the Marquis, in these terms:—

" Dear Sir,—As we formerly intimated to you, the Scottish " Union Insurance Company have agreed to advance the " Marquis of Queensberry L.30,000 on annuity, on the " security of the barony of Kininmonth, as stated in your last " proposal.

" The rate will be six per cent, which is the lowest at which " any transactions of this nature have been entered into for " some time past; and, in addition to the security afforded by " the lands, it will be necessary that Mr Paul grant an obliga- " tion for the regular payment of the annuity while he continues " trustee for Lord Queensberry.

" As mentioned by Mr Paul, it will also be necessary, that, in " the event of a committee of the principal heritable creditors

" being appointed to advise with the trustee, that one on behalf " of the Scottish Union be included in this number."

Mr Stewart, on the 25th February, 1829, answered this letter as follows: — " Dear Sirs, — I am favoured with your letter of the " 23d inst. intimating that the Scottish Union Insurance Com- " pany have agreed to advance to the Marquis of Queensberry " L.30,000 on annuity, on the security of the barony of " Kinmount. I have now to say, in reply, that Lord Queens- " berry accepts the proposal. Should his Lordship hereafter " find that the money can be obtained at a lower rate than six " per cent, he trusts that the company will give a corresponding " abatement, and save him the expense of an assignation to the " bond."

Thereafter, the draft of an assignation by Paul, who was trustee for the creditors of the Marquis of Queensberry, was prepared by the solicitors of the Insurance Company, and sent to Mr Stewart. That draft set forth a variety of existing policies of insurance on the life of the Marquis, for sums amounting to L.26,000, granted by different insurance companies to Selkrig, as trustee for his Lordship's creditors; and that Selkrig had assigned these policies to Paul, and then proceeded in these terms: — " And seeing that the said several policies are " presently in force, the premiums of insurance having been " paid up to the several dates at which the same are due, during " the present year, and that Francis Howden, James Spittal, " James Hotchkis, and Francis Brodie, Esquires, all residing in " Edinburgh, and Thomas Kinnear, Esquire, residing in London, " trustees for, and in name and behalf of, the whole partners " for the time being of the Scottish Union Insurance Company, " have instantly made payment to me of the sum of one pound " sterling, for, and as the consideration of, my granting the " assignation underwritten: Therefore I, the said William " Paul, as acting trustee aforesaid, with the consent of the said

" Charles Marquis of Queensberry, and I, the said Charles " Marquis of Queensberry, for all right and interest I have in " and to the policies of insurance above mentioned, do, by these " presents, fully and absolutely assign, convey, and make over " to and in favour of the said Francis Howden, James Spittal, " James Hotchkis, Francis Brodie, and Thomas Kinnear, as " trustees for the use, benefit, and behoof of the whole partners " of the said Scottish Union Insurance Company, present and " future, without regard to any change that shall or may take " place in the persons composing the said Company, and to the " survivors or survivor of the said trustees, and their or his " assignees or assignee, and to the succesors in office of the said " trustees, and the survivors and survivor of them, or their or his " assignees or assignee, excluding all the heirs and other repre- " sentatives of the said trustees, and declaring, that any two of " the said trustees acting for the time, shall be a quorum, while " two or more of them are alive, and that the survivor shall be " entitled to act in case of the decease of all the rest, as well the " said certificates or policies of insurance themselves, as all right " and interest which I, as acting trustee aforesaid, have in and " to the same, or in or to any claim, advantage, or benefit, " which may arise thereby, in any manner of way, with full " power to the said trustees before named, and their foresaids, to " receive the whole sums which may become due by or under " the said certificates or policies of insurance, and to discharge " and convey the same in the same manner, and as fully and " freely in all respects as I could have done before granting " hereof: Which assignation, I, as acting trustee, and with con- " sent foresaid, bind and oblige myself and my foresaids, to " warrant to all concerned, from all facts and deeds done or to " be done by me in prejudice hereof, and having herewith " delivered up to the said trustees the foresaid certificates or " policies of insurance, with the assignation by the said Charles

" Selkrig in favour of the said John Douglas and me, to be used " by them as their own proper writs and evidents, I, as acting " trustee, and with consent foresaid, consent," &c.

On the 18th November, 1829, Mr Stewart returned this draft to the solicitors of the company with a letter in these terms: —

" Dear Sir, — I return the draft-assignation by Mr Paul, re- " vised. It seems to me to be right. But there is a condition which " must be expressed either in it or in the bond of annuity, *i. e.* that " the Scottish Union shall be bound to re-convey the policies in " the event of the annuity being redeemed. This, of course, is " fair and reasonable, and consistent with our understanding."

In January, 1830, the Scottish Insurance Company paid over to Paul L.29,980. They received in exchange the foregoing assignation, and an assignation to another policy for L.3000. They effected insurance upon the Marquis's life for L.1000, and they also obtained from the Marquis an heritable bond for an annuity of L.3090.

At the time of settling the transaction, the following state was prepared by the Scottish Union Company, and the subjoined receipt was granted by them for the amount of the deductions in the state: —

State relative to the Loan by the Scottish Union Insurance Company to the Marquis of Queensberry, shewing the sum repaid to them when the advance was made on 13th January, 1830.

Interest on L.30,000, at 5 per cent. from 1st August, 1829, to 13th January, 1830, or 165 days, ...	L.678	1 7
Deduct Bank Interest on L.29,000; at two and a half per cent. from 1st August, 1829, to 27th November, 1829, or 118 days,	L.234	7 8
Bank Interest on L.18,700, at two and a half per cent. from 27th		
Carried forward,	L.678	1 7

Brought forward,				L.678	1 7
November, 1829, to 13th January, 1830, or 47 days,		60	7 2		
				294	14 10
Balance of Interest,				L.383	6 9
Proportion of Premium on Scottish Union Policy paying L.131 per annum, from 17th February, 1830, to 13th January, 1831, or 340 days,				122	0 6
Proportion of Premium on Eagle Policy, paying L.92, 6s. 8d. per annum, from 10th June, 1830, to 13th January, 1831, or 217 days,				54	17 10
Do. on Hope Policy, paying L.184, 3s. 4d. per annum, from 24th June, 1830, to 13th January, 1831, or 203 days,				102	8 6
Do. on Imperial Policy, paying L.136 per annum, from 24th July, 1830, to 13th January, 1831, or 173 days,				64	9 2
Do. on Scottish Widows' Fund Policy, paying L.44, 2s. 6d per annum, from 24th July, 1830, to 13th January ,1831, or 173 days,				20	18 3
Do. on Albion Policy, paying L.226, 13s. 4d. per annum, from 16th August, 1830, to 13th January, 1831, or 150 days,				93	3 0
Proportion on Rock Policy, paying L.226, 13s. 4d. per annum, from 31st August, 1830, to 30th January, 1831, or 135 days,				83	16 8
Do. of Premium on Pelican Policy, paying L.200, 8s. 4d. per annum, from 3d September, to 13th January, 1830, or 132 days,				72	9 6
Do. on Palladium Policy, (to be effected) for L.1000, paying L. 49, 15s. 10d. per annum, with L.3 stamp,				52	15 10
				L.1050	6 0

SCOTTISH UNION INSURANCE CO. *v.* MAR. OF QUEENSBERRY.—8th Mar. 1842.

SCOTTISH UNION OFFICE,

Edinburgh, 19*th January*, 1830.

Received from William Paul, Esq. One Thousand and Fifty Pounds, Six Shillings, being Life Premiums and Interest, as per annexed Statement of the Marquis of Queensberry's annuity.

(Signed) SUTHD. MACKENZIE, *Manager*.

The heritable bond of annuity bore to be in consideration of the Company having "instantly advanced and paid to me, the "said William Paul, as trustee foresaid for the said Marquis, "and for the special purposes of the said trust, the principal sum "of twenty-nine thousand nine hundred and eighty pounds ster-"ling;" and after specifying the terms of payment of the annuity, continued thus: — "And also that I, the said Marquis, shall not "at any time, so long as the said annuity shall continue payable, "go on the seas, or into parts beyond, and shall not enter into "the army or navy, without giving to the said trustees or their "foresaids, one month's notice thereof; and in case they, the "said trustees or their foresaids, shall have previously insured, or "shall insure any sum or sums of money, not exceeding twenty-"nine thousand nine hundred and eighty pounds sterling, on "the life of me, the said Marquis, or shall have acquired right "to any policies of insurance on my life, not exceeding said "amount, and shall pay any additional premium or premiums of "insurance, on account of my going on the seas, or into parts "beyond, or on account of my entering into the army or navy, "as aforesaid, then I, the said Marquis, and I, the said William "Paul, as trustee aforesaid, hereby bind and oblige ourselves, "and our respective foresaids, that we shall well and truly pay "to the said trustees, or their foresaids, the amount of such addi-"tional premium or premiums of insurance, as they shall from "time to time pay, in consequence of me, the said Marquis, "going on the sea, or into parts beyond, or of entering into the

" army or navy, as aforesaid, to any office or offices, or under-
" writer or underwriters, in case of their insuring with such, or
" as shall be due to the said trustees, in case of their taking the
" insurance upon themselves, or which they would be entitled to
" demand from any other person or persons insuring my life with
" them according to their rates of insurance in similar cases, by
" the practice of their office for the time being; and I, the said
" Marquis, and I, the said William Paul, as trustee aforesaid,
" do hereby, for ourselves and our respective foresaids, covenant,
" promise, and agree, and bind and oblige ourselves and our
" foresaids, that if I, the said Marquis, shall at any time or
" times, while the said annuity or yearly sum, or any part thereof,
" shall continue payable, go on the seas, or into parts beyond, or
" enter into the army or navy, without giving notice, as afore-
" said, to the said trustees, or their foresaids, and in conse-
" quence thereof, or of any other act or deed to be made, done,
" or committed, executed, omitted, permitted, or suffered by
" me, the insurance or insurances effected, or to be effected by
" the said trustees, or their foresaids, on my life, or any policies
" of insurance to which they have acquired, or shall acquire
" right to the extent foresaid, shall become void and null, or
" shall in any manner of way be prejudiced or affected, then,
" and in that case, I, the said Marquis, and I, the said William
" Paul, as trustee aforesaid, do hereby bind and oblige ourselves,
" and our respective foresaids, on demand, well and truly to pay
" to the said trustees, or their foresaids, all the sums of money,
" losses, damages, costs, charges, and expenses, which they, the
" said trustees, or their foresaids, shall sustain, suffer, or incur, by
" reason of me, the said Marquis so going abroad, or entering
" into the army or navy, or doing, or omitting, or permitting,
" any such other deed as is herein before-mentioned, with the
" lawful interest for the money which shall be so paid, and of
" the amount of the losses, damages, costs, charges, and expenses

" which shall be sustained and incurred as aforesaid. Declaring " always, as it is hereby specially provided, declared, and agreed " upon, that the said annuity or yearly sum is, and shall be re- " deemable and subject to re-purchase by me, the said Marquis, " or by me, the said William Paul, as trustee aforesaid, or those " deriving right from us, in the manner, at the time, and by pay- " ment of the money as hereinafter specified." (*Here followed an obligation to infeft in lands specified in security of the annuity.* " And with and under this other provision and declaration, as it " is hereby expressly provided and declared, that the said annuity, " or clear yearly sum of three thousand and ninety pounds ster- " ling, and the lands and others out of which the same is pay- " able, are, and shall be redeemable and subject to repurchase " from the said trustees or their foresaids, by me, the said Mar- " quis, and me, the said William Paul, as trustee aforesaid, or " those in our right, at the term of Candlemas, 1831, or at " any term of Candlemas thereafter, (upon lawful premonition " sixty days at least previous to the said term of Candlemas, at " which the same is to be redeemed,) by making payment to the " said trustees or their foresaids, of the said principal sum of " twenty-nine thousand nine hundred and eighty pounds ster- " ling, and whole arrears of the said annuity, which shall be due " and owing at the time, and interest thereof, and corresponding " liquidate penalty, if, and in so far as, the same shall be incurred, " together with all necessary costs and charges legally and rea- " sonably incurred, and due at the time, in recovering the said " annuity when in arrear, or in any way in relation thereto; " such notice of redemption to be given to the said trustees or " their foresaids, at the Head Office of the said Scottish Union " Insurance Company, in the city of Edinburgh; or if the said " annuity shall be assigned, then, by giving intimation to the per- " son or persons in right thereof for the time, in the usual form " in writing, before a notary public and witnesses, * * * *

" * * and upon making such payment and redemption, the " person or persons in right of the said annuity at the time of " redemption or repurchase, shall be bound, in due form of law " to renounce or convey the said annuity or yearly sum for the " time subsequent, together with the security for the same; and " the said trustees agree, and bind and oblige themselves and " their foresaids, to discharge or convey the same accordingly."

The annuity given by this bond was understood to be in payment of interest on the money advanced by the Insurance Company, after discharge of the premiums on the different policies.

The addition suggested in Mr Stewart's letter of 18th November, 1829, was not made to the assignation; but on the 10th June, 1830, the solicitors of the Scottish Union Insurance wrote a letter to Paul in these terms, — " SIR, — As in entering into " the annuity transaction betwixt the Scottish Union Insurance " Company, and the Marquis of Queensberry, and you, as his " trustee, it was stipulated, that the Policies of Insurance should " on redemption of the annuity, be reconveyed to the Marquis, " or to any party named by him or you, — We, as acting for " the Scottish Union Company, hereby declare this to have been " the understanding, and bind the Company to assign the Poli- " cies of Insurance held by them at the date of redemption of " the annuity. — We are," &c.

On the 15th May, 1832, Paul wrote to Mr Mackenzie, the secretary of the Scottish Union Company, in these terms, — " I " beg leave to mention to you, that I have an offer of a loan on " account of the Marquis of Queensberry, on a transfer to the " security held by you, and an assignation to the policies of in- " surance, at five and a half per cent. I am unwilling to enter- " tain the offer, provided you will agree to a reduction of the " rate of annuity to that extent; for although the changing of " the creditor will be attended with some expense, yet the saving " on the long run will be considerable to his Lordship; and if

" you find that you cannot lower the rate of annuity, I shall be " obliged to accept the proposal that has been made to me. I " shall feel obliged by your informing me, so soon as conve- " nient, whether you can comply with my wishes." On the 23d of May, Mr Mackenzie answered, — " DEAR SIR, — In reply " to your letter of the 15th instant, I have to acquaint you, that " at the term of Candlemas next, this Company will make an " abatement of one half per cent. on the rate of annuity then " payable by the Marquis of Queensberry, provided the rate of " interest in the money market remains nearly in its present " state; and the same abatement shall be continued at each " succeeding term of Lammas and Candlemas, so long as no " advance in the market rate of interest takes place. I trust " this will be satisfactory to you; but I have to remind you that " the annuity by the bond is redeemable only at a term of " Candlemas, upon sixty days' premonition. — I remain," &c.

On the 13th of July, Paul wrote Mackenzie thus, — " In re- " ference to your letter to me of 23d May, relative to the rate " of interest on the loan from the Scottish Union Insurance " Company to the Marquis of Queensberry, I beg leave to say, " that as acting trustee for his Lordship, I accept of your offer " for the lender, of one half per cent on the rate of annuity " payable at Candlemas next, and of the same abatement at the " succeeding Lammas; but I am of opinion, that the rule by " which the rate of interest is to be regulated, must be more " definite than what you state; for to make it depend generally " on 'the rate of interest in the money market,' seems to me to " be too vague a criterion, as opinions may differ as to what that " rate is. I would propose, in place of this, that the half per " cent abatement should be allowed, provided the Bank of Scot- " land, Royal Bank, and British Linen Company are, at the " date of 60 days before Candlemas, discounting at four per cent. " Let me know if your Board agree to this. — I am," &c.

Communications, similar to the preceding, occurred in the course of the years 1835 and 1836.

The Marquis of Queensberry died on 3d December, 1837.

The policies which had been assigned by Paul to the Scottish Union Insurance Company, had been granted some of them by proprietary offices with a subscribed capital, which took to the company the whole benefit of the premiums, while others had been granted by mutual assurance companies without any subscribed capital, but which accumulated the premiums as a fund for division at specified periods, between the company and the assured. Upon these latter policies the *bonus*, or share of this divisible fund which the holders were entitled to receive, amounted to about L.1200. On the other hand, the moneys payable under the policies were not payable as to some of them until three months after the death of the Marquis, and as to others, not until six months after that event.

The Scottish Union Insurance Company claimed to take the whole moneys payable under the policies, and likewise the *bonuses* which have been mentioned. In consequence, the executors and trustees of the Marquis brought an action to have the Scottish Union Company ordained to account with them for the moneys received, or which might be received, under the policies, whether as *bonus* or otherwise, over L.29,980. A record was made up, and thereafter the Lord Ordinary (Cockburn) ordered cases, upon advising which he pronounced the following interlocutor, on 6th March, 1839: —

"The Lord Ordinary reports these cases to the Court, partly "because he considers the question as attended with considerable "difficulty, but chiefly on account of its novelty, both parties "being agreed that no such case has ever occurred here before."

On the 10th July, 1839, the Court pronounced the following interlocutor:—"The Lords having advised this cause, with the cases "for the parties, and heard counsel, Find, that the defenders are

" bound to account for, and make payment to the pursuers of the " *bonus*, or profits claimed, in terms of the conclusions of the " libel, and remit to the Lord Ordinary to ascertain the amount " thereof; but find no expenses due."

Against this interlocutor the appeal was taken.

Lord Advocate and Mr Pemberton, for appellants. — The transaction between the parties was simply a purchase of an annuity terminable with the life of the Marquis. With his life, the annuity ceased, and then there was nothing capable of redemption. To protect themselves against the loss which the appellants would have sustained by this event, they might have effected insurance on the life of the Marquis; but there being policies already existing it was part of the transaction, that they should have the benefit of these, the premiums payable upon them being lower than those upon which a new policy could have been effected. They accordingly took an assignation to the policies in question; but that assignation was absolute in its terms, and did not impose upon them any obligation; although forming part of the transaction, it no way altered its nature. There was no stipulation of any annual payments as interest upon money advanced, or any thing to give the transaction any other character than that of a purchase. It was in the option of the appellants, either to have kept up the policies, or to have let them drop, and become their own insurers. If they did keep them up, they did so for their own benefit, and at their own risk. Had any of the insurance companies been unable to pay, or had they refused to do so under any of the provisoes in the policy, the loss would have fallen on the appellants, without any recourse against the respondents. As they must have borne any loss that might have arisen, so must they be entitled to the profit which has accrued. Courtney *v.* Ferrers; 1 *Sim.* 137. And this profit will do little more than reimburse the appellants for

the loss of interest sustained by the interval between the death of the Marquis and the time at which the policies were payable.

The Court below has held the transaction to amount to a loan, and a resulting trust to be in the appellants, for the benefit of the respondents. They admit, however, that the deeds do not shew this; but they reform the deeds, and in so doing, they taint with usury, and make illegal, a contract which was otherwise perfectly legal. If the transaction were a loan, there was no risk which could authorize the taking of more than the legal rate of interest; but the deeds negative this, and shew the transaction was merely the purchase of a redeemable annuity, and not a loan; Graham *v.* Child, 1 *Bro.* 93. If the appellants had allowed the policies to fall, and the Marquis had lived such a length of time, as that the excess of the annuity over the legal rate of interest, which was attributable to the premium of insurance, had amounted to a greater sum than the L.29,980, could the respondents, or the Marquis, in his lifetime, have required the appellants to pay themselves only the L.29,980 and interest, and account for the balance? If they could not, it is difficult to see on what principle the respondents can have any interest in the policies, which have been kept up with the fund out of which such accumulation would have arisen.

The contract between the parties was, that so soon as the annuity should be redeemed, the appellants should reassign; but in that case the annuity must have been paid up to the actual day of redemption. The claim of the respondents, however, is, to have a re-assignment, without any redemption having taken place, or being now capable of taking place, and that without paying any part of the annuity during the three or six months, as to which the appellants received neither annuity nor interest.

Mr K. Bruce, and Mr John Stuart for respondents, — We admit, that in form the transaction in question was the purchase of an annuity, but in substance it was neither more nor less than

a loan upon security. This is shewn by the original proposal, and the subsequent correspondence in regard to reduction, in the rate of the annuity. The premiums of insurance remained a fixed burden on the Marquis's estate; but that part of the annuity which exceeded the amount of the premiums, was negotiated for as interest, and like interest, was made to fluctuate according to the price of money in the market.

The proposal was, that the policies should be "assigned in "security of the loan," and Stewart's letter of 18th November, 1829, and the letter from the solicitors of the respondents of 10th June, 1830, recognized this, and formed a contract by the appellants, to reassign the policies on redemption of the annuity. Coupling this with the fact that part of the annuity was plainly applicable to keeping up the policies, the policies were in truth to be maintained out of the estate of the Marquis, and it was not optional with the appellants to let them drop or keep them up. Had they let them drop, and the Marquis at a much later period had redeemed the annuity, how could they, in such a case, have reassigned the policies according to their agreement? and if they could not have reassigned, would they not have been liable to make good the loss which would have accrued to the Marquis, by the increased rate of premium he would have had to pay on opening fresh policies?

To make out that the appellants had a discretion as to the policies, they must establish an absolute purchase; but the whole transaction negatives such a position. In addition to the evidence already adverted to, as shewing that the policies were merely assigned as a security, there is the fact shewn upon the face of the assignation, that only one pound was paid as the consideration; while it is evident, that the policies, on which several years had already run, must even at that time have been of considerable value, and, with the *bonuses* then due, exceeding the amount of the sum advanced by the appellants. As to any risk in regard to the

dropping of the policies, through any act of the Marquis, that was provided for by the bond of annuity, in stipulations which plainly contemplated the keeping up of the policies. Upon the whole, there is a resulting trust for the respondents, upon the assignation as given for a nominal consideration, and the Court below has done right in holding that the appellants must account for the surplus after reimbursing themselves their advances.

LORD COTTENHAM. — My Lords, this is stated to be a case of novelty in Scotland. The principles applicable to it are very familiar in the Courts of Equity in this country, and fully support the interlocutor of the Court of Session. If it were not competent for a Court of Equity to give effect to a transaction different from what the deeds executed represented to be the character of it, one of the most important branches of its jurisdiction would be cut off, and a security would be afforded to frauds which are now easily detected and defeated. Of the instances in which equity exercises this jurisdiction, there is none better established than the practice, upon proper proof of the intention of the parties, of treating an absolute conveyance as a security only, and attaching, to what appears upon the face of the deeds to be an absolute sale, the liability to redemption. The only question is, the intention of the parties, and of that, in the present case, I cannot find any room for doubt.

The transaction itself is one of very frequent occurrence in this country, and is known by the somewhat inconsistent term of borrowing upon annuity, a plan sometimes resorted to for the purpose of giving to the lender a larger interest than he could otherwise receive, but more frequently, as the only means by which a tenant for life can secure to the lender a return of the money lent. To attain this object, the tenant for life, in addition to the amount of interest agreed to be paid upon the money advanced, pays such farther sum as is equal to the premium of a

policy for the life of the borrower, of the same amount as the money advanced, the whole being reserved and secured in the form of an annuity. If the transaction end here, the party who advances the money may either effect a policy to the amount of the money advanced, or he may become his own insurer, by merely receiving the excess of the annual payment beyond the interest agreed upon. In that case, the party to whom the advance is made has nothing to do with the policy, if effected. It is exclusively the property of the person who advances the money, and effects the policy, and pays the premium. But if it be part of the contract, that the party receiving the money shall assign to the party advancing it existing policies upon his life, which, being of some standing, must be of some value, and an absolute assignment takes place accordingly, a question may arise, whether such assignment was intended to inure for all purposes for the benefit of the assignee, or whether it was intended only as a means of restoring to him a return of the principal money advanced. And in ascertaining such intention, it is competent for the Court to form its judgment upon the whole of the transaction, and upon evidence *deliors* the deed; such evidence being used, not for the purpose of putting a construction upon the deed, but of superadding an equity, controlling the estate and interest given by the deed. If the Court find grounds for concluding, that the assignment was made only for the purpose of securing a return of the money advanced, then, as in all other cases, the property assigned will, in equity, be considered as belonging to the assignor, subject to the assignee's title to be repaid the sum intended to be secured.

In this case, the instruments themselves go far to prove that the assignment was only as a security. The assignment is indeed absolute in form, but it shews that the policies were of some value. The first policy, indeed, was of more than ten years' standing; but the assignment is for a nominal consideration, and

the bond provides for payment of an additional annual sum, to meet the additional premium which might become payable, and provides, that the annuity and the security for the same shall be subject to redemption.

The evidence *dehors* the deeds leaves no doubt upon this subject. The proposal offers, that the existing policies, effected some years ago, should be assigned in security for the loan, and the Scottish Union Insurance Company, by their letter of the 23d of February, 1829, agreed to advance the L.30,000 on annuity, as stated in the proposal, and by their letter of the 10th of June, 1830, bind themselves to reassign the policies upon the redemption of the annuity. The receipt for the annual payment is specified to be for life premium and interest. These policies, therefore, being assigned as security only for the release of the money advanced, remained, in equity, the property of the assignor, subject only to such liability to repay the money advanced. They have, in fact, produced more; and whether that excess be little or great, can make no difference. Whatever be its amount, it is the property of the assignor, and so the Court of Session have decided.

The appellants, however, contend, that even upon this view of the transaction, the interlocutor appealed from has not given all that they are entitled to, for that as the annuity ceased upon the death of Lord Queensberry, and the sums insured were not payable till three months, and, in one instance, not till six months after that event, the interlocutor does not provide for payment to them of interest upon the money advanced during these periods. There is some plausibility in this claim, but upon examination, it cannot be supported. When the appellants advanced the L.30,000, and took in return the annuity determinable upon Lord Queensberry's death, and the assignment of the policies for the same sum of L.30,000, not payable until a certain time after that event, it must have been foreseen that they would receive no

interest upon their money for those periods. If the policies had not increased in value, it must have been so. There is, therefore, no contract for interest, and the nature of the security excludes any supposition of there having been an intention that any should be received. The consideration for the advance of the money was, the annuity during the life of Lord Queensberry, and a return of the principal by means of the policies, and by these means only, and, therefore, at such times only as those policies were payable.

I am, therefore, of opinion, that the interlocutor is altogether right, and I think the case so clear, that the appeal ought to be dismissed with costs, although one of the Judges below dissented from the judgment appealed from.

Ordered and Adjudged, that the petition and appeal be dismissed this House, and that the interlocutor therein complained of be affirmed, with costs.

OLIVERSON, DENBY, and LAVIÉ — RICHARDSON and CONNELL, Agents.