that I should have great difficulty in giving effect to the demand of the pursuer. On the question of expenses, I think that as Mr Lee has stated a technical plea in which he has been entirely unsuccessful, neither party should have any expenses.

The Court recalled the interlocutor of the Lord Ordinary, and dismissed the action as unnecessary.

Counsel for Pursuer—Nevay—Keir. Agent—James Barton, S.S.C.
Counsel for Defender—J. C. Smith. Agent—Party.

Tuesday, January 16.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

THE PANT MAWR SLATE AND SLAB QUARRY COMPANY (LIMITED) AND LIQUIDATORS *v.* FLEMING.

Trust—Declarator of Trust—Proof—Act 1696, *c.* 25—*Mandate.*

In an action of declarator of trust at the instance of a joint stock company against one of their directors, to have it declared that a lease of a quarry granted by the Crown to him and two other directors was in trust for the Company—*held* that the trust was proved by the writ of the defender.

Opinions that the Statute 1696, c. 25, did not apply, and that proof *prout de jure* would, had proof been necessary, have been competent, since there was no evidence to show that the company consented to the title to the lease being taken absolutely in the name of the directors, and the case alleged was one in which an agent had not fulfilled his mandate in the terms in which it was granted.

This was an action of declarator of trust and for denuding at the instance of The Pant Mawr Slate and Slab Quarry Company (Limited) and the Liquidators thereof against Alexander Gilruth Fleming, agent of the Scottish Banking Company (Limited), Dundee, and a director of the company, to have it found and declared that a lease of The Pant Mawr Quarry in Wales, granted by the Crown in favour of the defender and two of his co-directors, dated 3d May 1877, and commencing as at 10th October 1876, was a lease in trust for the company, and that the defender was bound to denude, or alternatively ought to be found liable in damages.

The following statement was made in the report by the directors to the first general meeting of the shareholders, dated 21st March 1877, and was founded on by the pursuers:—"The negotiations opened with the officers of the Crown for a lease direct from the Crown have resulted in such a lease being arranged for twenty-one years from 10th October 1876 on terms highly favourable for the company. As the Crown declines to deal direct with companies such as this, the lease was under arrangement agreed to be taken in name of three of your directors, *videlicet*, Messrs Nicoll, Blackadder, and Fleming. By a mutual deed to be executed by these trustees and the company, the trustees will declare that they hold the said lease in trust for the company, and the company will bind themselves to relieve the trustees of all personal obligations undertaken by them by the said lease."

The pursuers further founded upon the narration contained in a minute of agreement, dated 27th March 1877, between H. B. Roberts of Braich, of the first part, and The Pant Mawr Company, of the second part, relative to the formation of a certain tramway, and which was in these terms:—"Whereas the second party has (in name of trustees for its behoof) acquired from the Crown the lease of all that tract or parcel of land containing in the whole 207 acres or thereabouts, known as the Pant Mawr Quarry, situated on Moelwyn Mountain, in the parish of Llanfrothen, in the county of Merioneth." This minute of agreement was signed by the defender as a director of the company.

The pursuers also founded upon a letter dated 21st July 1880, addressed to the liquidators of the company by the defender and his co-lessees, which is quoted in the opinion of the Lord President, *infra.*

On 22d December 1882 the Lord Ordinary (M'Laren) allowed the pursuers a proof before answer and the defender a conjunct probation.

"*Opinion.*—I am satisfied that in this case a proof must be allowed. The rule of law is that where a trust is to be proved against a person who was originally *ex facie* absolute owner, that proof is limited to his writ or oath, because the owners of property are not to be deprived of their estates upon the statements of other parties which may be untrue, and against which they have no means of protecting themselves. But if an agent or director or other representative party takes property which he was authorised to buy or to hire for his constituent in his own name, then that is a subject of proof *prout de jure;* and I think that is the case alleged here. The company was formed first, and the report, signed by the directors, of whom the defender was one, says that a lease was taken or to be taken and a declaration was to be executed, and that has not been done. So there is a *prima facie* case of an unfulfilled obligation on the part of the directors to constitute a trust for behoof of the company. Whether that is so or not I cannot say, but I think that it is a case for investigation; so I shall allow a proof, on a day to be fixed now or afterwards, as the parties prefer. It will be a proof of all facts and circumstances tending to establish the pursuer's right or interest in the lease mentioned in the conclusions of the summons."

The defender reclaimed, and argued that this was a simple action of declarator of trust, and that by the Statute 1696, c. 25, the proof was limited to the writ or oath of the defender.

Authorities—*Home* v. *Morrison*, July 3, 1877, 4 R. 977; Dickson on Evidence, sec. 576; *Mackay* v. *Ambrose*, June 4, 1829, 7 S. 699; *Marshall* v. *Lyell*, Feb. 18, 1859, 21 D. 514.

The pursuers moved for instant decree, on the ground that the documents produced formed the writ of the defender establishing the trust. Alternatively they supported the interlocutor of the Lord Ordinary.

At advising—

LORD PRESIDENT—I am disposed in this case to agree with the pursuers, and hold that they are entitled to immediate declarator of trust.

I think it is doubtful whether the statute applies, for to let it in the truster—the owner of the property who alleges that the property is held in trust—must have consented to an absolute title being taken in the trustee's name; then proof *prout de jure* is excluded. Now, here the only evidence that the absolute title was taken with consent of the truster—the owner—is to be found in the minutes of the company, who are the pursuers, and the pursuers being a company cannot speak through anything but their minutes. Now, there is nothing to say that these three directors are to have the lease in absolute terms, either in the deed or in any other writing. It is clear on the minutes that the lease was to be taken in names of these three directors, because the Crown would not give a lease to a company, and it is further stipulated that there should be a mutual deed by the lessees declaring the trust. The shareholders never accepted the lease on any other terms, and that arrangement is set forth in a report which was approved of by the shareholders.

But even if the statute applies there is abundant evidence to show that the arrangement was binding on this gentleman, and that under his own hand. I do not refer so much to the minutes and reports, because in one sense they may be said not to be under his hand, but to the agreement dated 27th March 1877, which sets forth as distinctly as possible that the Pant Mawr Slate and Slab Quarry Company (Limited) has, in the name of trustees for its behoof, acquired from the Crown the lease of all that tract or parcel of land, containing in the whole 207 acres or thereabouts, known as the Pant Mawr Quarry. Now, that is a probative instrument, tested as required in terms of the statute, and executed by the defender as a director. It is said that it is not executed by him as an individual, but that does not matter, as the authority was to take the lease as a director. Then we have another document, three years later, in the form of a letter to the liquidators of the company, signed by Mr Fleming among others, in these terms:—"We, the undersigned, are desirous that you should call a meeting (as early as possible) of the shareholders of the Pant M. S. & S. Quarry Company, Limited, to discuss the position of the company generally, and more especially to resolve whether or not the lease of the quarry should be renounced." What the shareholders had to do with renouncing or not renouncing the lease it is impossible to say if they were not the lessees.

Further, this supposed lessee was never in possession of the quarry, whereas the Company has been working it, was constituted apparently to work it, and derives its name from it. I do not know that any evidence could be better in a declarator of trust, and I am therefore for decerning in terms of the conclusions of the summons.

LORD DEAS—Putting the case in the most favourable light for the defender, and assuming that the case falls under the Statute 1696, c. 25, I am of opinion with your Lordship that there is ample proof to satisfy the requirements of that statute. That being so, I do not speculate as to whether the statute applies or not—a question which is sometimes complicated enough; on the simplest ground I am satisfied that the evidence is sufficient.

LORD SHAND—I am of the same opinion. I think that there is sufficient proof of trust in the two documents founded on by the pursuer—first, the agreement of 1877, which bears that the lease was taken in trust for behoof of the pursuers; and second, the letter of 1880, which bears that the company were to resolve whether the lease was to be renounced; that could only be if Fleming was a trustee.

While I am of that opinion, I concur with your Lordship that the pursuer would not have been confined to a proof by writ or oath. This is one of a class of cases in which an agent is authorised to take a deed in one capacity and takes it in another, without preserving evidence of the trust. Mr Fleming was just such an agent, and therefore I think the pursuers would have been entitled to a proof of their averments.

I am of opinion that the case has been clearly made out on the writs, and that we should decern accordingly.

LORD MURE was absent on Circuit.

The Court recalled the interlocutor of the Lord Ordinary, and decerned in terms of the declaratory conclusions of the summons.

Counsel for Pursuers—J. P. B. Robertson—Hay. Agents—Rhind, Lindsay, & Wallace, W.S.

Counsel for Defender—Rhind—Watt. Agent—Alexander Sutherland, Solicitor.

Thursday, January 18.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

STEWART AND OTHERS (MARTIN'S TRUSTEES) *v.* RAE AND OTHERS.

Property—Disposition—Liferent and Fee—Infeftment in Liferent—Revocation.

A husband and wife purchased in 1835 certain heritable subjects, and took the disposition to themselves and the longest liver of them in liferent, for their liferent use allenarly, and to the children of the marriage in fee, whom failing to the wife's nearest heirs whomsoever. The spouses were infeft in liferent for their liferent use allenarly, but no infeftment was taken in the fee. There were no children of the marriage at the date of infeftment, but four were born subsequently. In 1855, after the birth of the children, the spouses revoked the destination of the fee, sold the subjects, and, along with the original sellers, granted a disposition conveying the fee away from their children, reserving their own liferent. *Held* that no indefeasible right had been vested in the children by the disposition of 1835, which was therefore revocable.

By disposition, dated 5th October 1835, John