I am of opinion, therefore, that the first question should be answered in the negative.

LORD M'LAREN and LORD KINNEAR concurred.

The Court answered the first question in the negative, and the second in the affirmative.

Counsel for First and Second Parties—Guthrie, Q.C.—Taylor Cameron. Agents—Menzies, Black, & Menzies. W.S.

Counsel for Third Parties—Rankine, Q.C.—Sym. Agents—Torry & Sym, W.S.

Tuesday, January 25.

FIRST DIVISION.

[Lord Low, Ordinary.

DUNN *v.* PRATT.

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

In an action raised against the purchaser of certain heritable subjects to have it declared that the missives of sale had been entered into by him on behalf and for behoof of the pursuer, and that he should be ordained to denude of the subjects, the pursuer averred an agreement between himself and the defender to the effect that the pursuer should purchase the subjects, but that the defender should conclude the purchase in his own name, and that the disposition should thereafter be taken in the pursuer's name. The defender, who was not a law-agent, pleaded that this averment could only be proved by his writ or oath.

Held (*aff.* judgment of Lord Low—*diss.* Lord Kinnear) that the defender's plea must be sustained, in respect (1) that the pursuer's averments disclosed a case of trust, not of mandate; and (2) that the missives of sale were "a deed of trust" in the sense of the Statute 1696, c. 25.

Duggan v. *Wight*, 3 Pat. App. 610, *followed.*

John Armstrong Dunn raised an action against Adam Pratt, clothier, Aberdeen, to have it declared that the missives of sale of the shops 15 and 17 Broad Street, Aberdeen, entered into between Alexander Blacklaw, solicitor, and the defender, whereby the latter purchased these subjects from the former, "were entered into and subscribed by the said Adam Pratt on behalf of the pursuer, and for behoof of the pursuer, his heirs and assignees, and the defender ought and should be decerned and ordained to denude of the said shops, . . . and of all right, title, or interest which he may have or pretend to have in the same, and to convey and make over the said shops . . . to the pursuer, and that by granting all deeds requisite and necessary with the writs and evidents thereof."

The pursuer averred that in January 1897 Mr Blacklaw was employed to sell the subjects in question, of which the premises occupied by the pursuer formed part. "(Cond. 3) Mr Blacklaw had been in communication with Messrs Esslemont & Macintosh, warehousemen, who occupy neighbouring premises, regarding a sale of the said property to them, when the defender, fearing lest he should have to remove from his shop in the event of Messrs Esslemont & Macintosh acquiring the property, on or about 22nd January 1897, and in the pursuer's shop, asked the pursuer to enter into a joint speculation for the purchase of the property. The pursuer declined this proposal, but as the property is almost contiguous to his own, the pursuer said he would not be averse to buy it himself. It was then agreed between the pursuer and the defender that the pursuer should buy the property on his own account, and should let to the defender the premises which he (the defender) occupies at a rent of £100. The pursuer thereupon sent the defender to Mr Blacklaw to ascertain the lowest figure the sellers would accept. The defender, after an interview with Mr Blacklaw, reported that nothing less than £3650 would be accepted, and that Mr Blacklaw was to let him know next day if such offer would be accepted from anyone other than Esslemont & Macintosh. (Cond. 4) Next day the defender visited the pursuer's shop several times regarding the proposed purchase, and at one of these interviews produced a letter from Mr Blacklaw stating that he was authorised to accept the first offer for £3650, and that a deposit of £500 would be required. The pursuer and defender thereupon confirmed the agreement to which they had come, that the pursuer would buy the said property, and lease the premises occupied by the defender to him at an advanced rent. The pursuer also consented to be responsible for the deposit of £500. The pursuer and defender, then, in the pursuer's back shop, drafted a letter of offer in the defender's name, and on the same being extended, the pursuer authorised the defender to go with it to Mr Blacklaw and to conclude the purchase of said property. It was agreed between the pursuer and the defender that the pursuer's name as purchaser was not to be divulged to Mr Blacklaw in the meantime, the view of both pursuer and defender being that the sellers would deal more favourably with the sitting tenant than with an outsider. (Cond. 5) The defender thereupon returned to Mr Blacklaw with the said offer, and asked Mr Blacklaw to accept the pursuer as cautioner for £500 instead of insisting on a deposit to that amount." Mr Blacklaw agreed to do so, missives of sale between him and the defender were signed, and the pursuer's signature as cautioner was obtained. "(Cond. 6) The pursuer gave the defender the said authority to conclude said bargain in his own name on the understanding and agreement that the disposition by the seller of said property would be granted and taken in the pursuer's name, and that the pursuer would, before the settlement of the transaction between the seller and the pursuer, grant the defender a lease of the said premises occupied by him."

The pursuer proceeded to aver that the defender shortly afterwards demanded a lease of the two shops for twenty-one years at a rent of £150, and correspondence ensued—"(Cond. 7) It is believed and averred that on or about said 24th January, and since said date the defender has received offers of one or more sums of money to make over any right he may have to said property. The defender now repudiates the agreement between the pursuer and him, and pretends and asserts that he is the sole purchaser of the said property, and he has offered it for sale on that footing. The present action has therefore become necessary."

The defender denied the understanding or agreement averred by the pursuer, and pleaded, *inter alia* — "(2) The pursuer's averments, so far as material, can only be proved by the writ or oath of the defender."

The Act 1696, c. 25, upon the preamble that the subscribing of bonds, assignations, and dispositions, and other deeds blank in the name of the person in whose favour they are granted, as also that the intrusting of persons without any declaration or backbond of trust in writing from the persons intrusted are occasions of fraud, as also of many pleas and contentions, enacts, *inter alia*, that "no action of declarator of trust shall be sustained as to any deed of trust made for hereafter except upon a declaration or backbond of trust lawfully subscribed by the person alleged to be the trustee, and against whom or his heirs or assignees the declarator shall be intended, or unless the same be referred to the oath of party *simpliciter*."

On 25th November 1897 the Lord Ordinary (Low) sustained the second plea-in-law for the defender, and allowed the pursuer a proof of his averments that the missives of sale mentioned on record were taken by the defender for the pursuer's behoof, by the writ of the defender.

Opinion.—"The defender concluded a contract in his own name for the purchase of the shops Nos. 15 and 17 Broad Street, Aberdeen, conform to offer and acceptance dated 23rd January 1897. The summons concludes for declarator that the missives of sale 'were entered into and executed by the said Adam Pratt on behalf of the pursuer, and for behoof of the pursuer, his heirs and assignees.'

"That appears to me to be a declarator of trust, because what is asked to be declared is that the right which was acquired by the defender in the subjects was acquired for behoof of the pursuer.

"Now, the pursuer admits in the condescendence that it was agreed between him and the defender that the purchase should be made in the name of the latter, their view being 'that the sellers would deal more favourably with the sitting tenant' (the position occupied by the defender) 'than with an outsider.'

"The missives consist of an offer by the sellers, and an acceptance of the offer by the defender. In the offer the sellers offer to sell to the defender the property at the price of £3650, upon certain conditions. One of the conditions was that the pursuer should become bound with the defender for implement of the sale. Accordingly the pursuer executed a cautionary obligation, which was annexed to the missives, binding himself as cautioner for and with the defender to pay the price and fulfil the whole conditions of the sale.

"In these circumstances, if the missives of sale can be regarded as a 'deed of trust' within the meaning of the Act 1696, c. 25, it is clear that that Act applies.

"Now, the missives did not constitute a title to the property, but they gave the defender right to demand a conveyance of the property either to himself or to his nominee. It is that right which the pursuer seeks to have it declared that the defender acquired for his behoof. The question of the application of the Act of 1696 to missives of sale has several times been before the Court, and although in each case it has been held that the Act did not apply, that has been because in none of the cases was the party in whose favour the missives were granted authorised to take them in his own name. It has never been suggested in these cases that the Act did not apply, because the missives were not a 'deed of trust' within the meaning of the statute.

"I shall only refer to the last case in which missives of sale were in question, the case, namely, of *Horne* v. *Morrison*, 4 R. 977. Horne averred that he and Morrison had entered into a joint-adventure for the purchase and re-sale of certain heritable property. Morrison was a law-agent, and was to act in that capacity for himself and Horne. He accordingly bought the property and took the missives in his own name. He then sold the property at a profit of £1700 to George Lamb. Horne then brought an action in the Sheriff Court against Morrison for payment of one-half of the profits of the transaction, on the ground that the purchase was made for joint behoof.

"The defender pleaded that under the statute the pursuer's averments could only be established by his (the defender's) writ or oath. The Sheriff allowed a proof, and the defender appealed to the Court of Session.

"In the original record the averment in regard to the purchase by Morrison was in the following terms:—'The said purchase was made, and the missive with the sellers entered into, by the defender as agent, and for behoof of the joint-adventure, or as one of the joint-adventurers, in his own name.' When the case came into the Court of Session the pursuer was allowed to amend his record by adding to the words which I have quoted the following statement:—'The defender had no authority or instructions from the pursuer to enter into the missive in his own name. On the contrary, the arrangement between the parties and the pursuer's instructions to the defender were, and the defender's duty was, to take the missive in the joint names of himself and the pursuer.'

"That amendment was, of course, made for the purpose of making it clear that the missive was not taken in the defender's name by the pursuer's authority, and there would have been no need to make the amendment if the missive could not be regarded as a 'deed of trust' within the meaning of the Act.

"The Court held that the case did not fall within the Act, because, as the Lord President put it—'The statute only applies where one man alleges that he has trusted another to take the title in his own name.'

"None of the Judges suggested that a missive of sale could not be a deed of trust. The Lord President said—'In the original condescendence it was not made quite clear that in taking the title in his own name he had gone beyond his mandate. An amendment had been made which makes it quite clear that the defender had no authority to take the title in his own name.' The title there referred to was the missive of sale, and the Act was held not to apply, because the averment was that the missive had been taken in the defender's name, contrary to his mandate. If it had been admitted, as it is admitted in this case, that the agreement was that the missive should be taken in the defender's name for behoof of the pursuer, I apprehend that the result would have been different.

"I am therefore of opinion that the case falls within the statute.

The pursuer reclaimed, and argued—The Lord Ordinary was wrong. The case disclosed upon record here was one of mandate or agency, not of trust, and therefore the statute did not apply. The distinction between mandate and trust as regards proof was well recognised, and had formed the ground of decision in *Horne* v. *Morrison*, July 3, 1877, 4 R. 977, and *Pant Mawr Quarry Company* v. *Fleming*, January 16, 1883, 10 R. 457. The pursuer's averments amounted to this, that the defender had gone beyond his mandate, and such averments might be proved *pro ut de jure*—*Boswell* v. *Selkrig*, 1811, Hume, 350; *Corbet* v. *Douglas & Jarvie*, 1808, Hume, 346. The Act 1696 applied only where the true owner had consented to an absolute title being taken in the trustee's name (*per* Lord President Inglis in *Pant Mawr Quarry Company, ut sup.*, at p. 459). Here the conveyance had not been completed at all. There were only missives. Even assuming, then, that the averments disclosed a case of trust, there was no such deed declaring in absolute terms a right of property in the defender, as was required before the proof would be limited—*Alison* v. *Forbes*, M. 12,760; *Laird & Company* v. *Laird & Rutherfurd*, December 9, 1884, 12 R. 294. It made no difference that the defender was not a law-agent. In any event, there was so much ambiguity about the case that a proof before answer should be allowed—*Tweedie* v. *Loch*, 5 Br. Supp. 630; *Maxwell* v. *Maxwell, ibid; Mudie* v. *Ouchterlonie*, M. 12,403; and *Gilmour* v. *Arbuthnot*, M. 12,758, also referred to.

Argued for the defender—The Lord Ordinary was right. The Act 1696 was directly applicable, and had been consistently applied to all such cases since *Duggan* v. *Wight*, M. 12,761, *aff.* 3 Pat. App. 610; see Bell's Comm. i. 32. The crucial test was, has the right been taken as the parties intended it to be, or has the defender taken a right in the name of a different party from the one intended? That was the test proposed by Lord Glenlee in *Mackay* v. *Ambrose*, June 4, 1829, 7 S. 699, and accepted since. *Horne* v. *Morrison, ut sup.*, was conclusive in favour of the defender's contention. It could therefore make no difference that no formal title had yet been taken to the subjects: articles of roup had been held a deed of trust in the sense of the Act—*Mackay, ut sup.* When the averments of the pursuer were scrutinised it became quite clear that the case was one of trust, not of mandate. It was in the forefront of the pursuer's case that the purchase was agreed to be made in the defender's name. It had on the pursuer's own showing been made in the defender's name, and the mandate, if one had been given, was literally fulfilled. The whole object of the action was to show that the missives were held by the defender on trust. If the averment had been that it was agreed that the defender should purchase for the pursuer, and that that agreement should be expressed in the minute, a proof *pro ut de jure* must have been allowed. But the averment was quite to the contrary effect.

At advising—

LORD PRESIDENT—The summons in this action is, in form, a declarator of trust, and upon a careful examination of the condescendence I consider the averments to be in accordance with the summons, and to disclose a case of trust in the sense of the Act 1696, cap. 25. The pursuer's case, shortly stated, is this—he resolved to buy two shops in Aberdeen, and thought he could get them cheaper if it were supposed that not he but the defender was the purchaser. It was accordingly agreed that the defender should be the ostensible buyer, and should take the missives constituting the contract in his own name as purchaser, it being understood and agreed that when a disposition came to be granted it should be in favour of the purchaser.

Now, it is said for the reclaimer that this is a case of mandate and not of trust. In a sense every case of trust is a case of mandate; and we have to consider how far any mandate is alleged in the present case except that of trust. The pursuer in argument assimilates this to the case of an agent employed to carry out a purchase. Now, I can quite understand, if a law-agent were employed to carry through the purchase of a house by his employer and were told to buy in his own name and then expede the title in his client's name, that if he were to fulfil half the mandate and to take the missive in his own name, and then stop and refuse to go on to complete the title in his client's name, this might be held to be a case not falling within the

Act. But then, as I read this condescendence, the defender had no overt duty to perform beyond taking the missive in his own name. He was not a lawyer but a clothier, and he had, on the averments, no duty to concern himself whether a formal title was granted or not. Suppose the pursuer had been in no hurry to get a conveyance, and had waited months or a year without a title, the defender, to my thinking, would be, when called on to denude, a trustee in the sense of the Act 1696, cap. 25, and his position does not seem to me to be different at the beginning of his tenure under the missives. His duty was performed and he was passive. Of course, in one sense he had this further duty, that he was bound to convey (or concur in conveying) to the pursuer when called on; but then this further duty devolves on the defender in the most plainsailing case of trust in the sense of the Act 1696, cap. 25. It is the hypothesis of every action of declarator of trust that the trustee is bound to denude when called on.

Accordingly, it seems to me that the present case can only be saved from the application of the Act if it could be held that missives do not constitute a deed of trust in the sense of the Act. This seems to me untenable. Missives are in law equivalent to a minute of agreement of sale—that is to say, they vest in the purchaser a personal right to a conveyance of the subject of sale. Now, I do not think it can be held that the words "deed of trust" in the statute do not apply to a conveyance of a personal right to land, in whatever form that conveyance be found. The statute, it will be remembered, has been held to apply to an assignation of right to moveables. The Act is therefore not limited to feudal conveyances. On the other hand, the leading case of *Duggan* v. *Wight* shows that, where land is bought for the alleged truster with his money, but the conveyance taken (in accordance with instructions) in name of the alleged trustee, this is a case under the Act. It seems to me that we do not extend the statute, but apply what has already been ascertained to be its effect, when we sustain the Lord Ordinary's interlocutor.

LORD ADAM—By missives dated 23rd January 1897 Mr Blacklaw offered to sell to the defender Adam Pratt certain premises in Aberdeen at the price of £3650, with entry at the term of Whitsunday 1897. This offer was of the same date duly accepted by the defender. *Ex facie*, therefore, of this offer and acceptance, the defender became the purchaser of the premises, with the right to obtain a disposition in his favour or to adjudge the same if necessary.

The object of this action is to have it found and declared that these missives "were entered into by the said Adam Pratt on behalf of the pursuer, and for behoof of the pursuer, his heirs and assignees," and that the defender ought and should be decerned to denude thereof in his favour.

The Lord Ordinary has sustained the defender's second plea-in-law to the effect that the pursuer's averments in support of these conclusions can only be proved by the writ or oath of the defender, and the question is whether that interlocutor is well founded, or, in other words, whether the Act 1696, c. 25, applies to this case.

Now, it will be observed that the missives were executed exactly in the terms the parties intended. The missive offer provided that the pursuer should become bound conjunctly and severally with the defender for implement of the sale, and he signed the missive as cautioner accordingly—thereby approving thereof—and he further avers that he gave the defender authority to conclude the bargain in his own name.

It appears to me, therefore, that we have not to deal with that class of case where a person authorises his agent or other person to purchase a property for him and that person takes the rights and titles in his own name. In that case there is a clear breach of mandate which may be proved *pro ut de jure*. In the case of *Mackay* v. *Ambrose*, 7 Sh. 699, Lord Glenlee said—"Where it is agreed that rights have been taken as the parties intended, but it is averred that this was done in trust, the Act applies. But when it is alleged that the defender was employed to buy for one party and took the titles in name of another, that is a totally different case, and no doubt proof *pro ut de jure* might be allowed." I think that that expresses the distinction which has been given effect to in all the cases in this branch of the law.

In this case there is no question that the rights of the property purchased—that is, the missives of sale—were taken as the parties intended. The pursuer avers that they were so taken "on the understanding and agreement that the disposition by the seller would be granted and taken in the pursuer's name"—that is to say, that the pursuer agreed that the defender should appear *ex facie* of the missives as the purchaser of the property, and therefore the person in right to demand from the seller a disposition to the property either in his own name or in that of any other person—because the pursuer trusted that, when desired, the defender would direct a disposition to be executed in his the pursuer's favour. That is just saying that the defender, who appeared *ex facie* of the rights to be the purchaser of the property, truly held it in trust for the pursuer.

These appear to be quite relevant averments, but they are averments of trust, and if the Act 1696, c. 25, applies to missives of sale, can only be proved by the writ or oath of the defender.

Upon the question whether the Act applies to missives of sale, I agree with the Lord Ordinary and your Lordships, and have nothing to add.

LORD M'LAREN—I agree with your Lordship that this is not a case in which the operation of the Act 1696, c. 25, is excluded. The statute embraces trust transactions of

every description, whether the subject of the trust be heritable or moveable, and whether in the former case the right be feudalised or stand on a personal title. Where one person is employed to buy for another in his own name, and the transaction can be referred to any known category of agency, then I should hold that to be a case outside the statute, because agency being a consensual contract is outside the statute, and the proof is not limited to writ or oath.

But the case on this record does not appear to me to have any of the proper marks of agency. The alleged agent is not within the class of persons usually employed as agents in the purchase of lands. He is not a lawyer or a land agent. If this is not enough, then there is this further note, which I think marks the case as one of trust. If it were a case of agency, the duty of the agent would be, while concealing the name of the purchaser in the first instance to disclose it as soon as the purchase was effected. In the case of sales by auction this is always done, and the name of the true purchaser is entered in the minutes of the roup. But there is no averment that any such duty was undertaken. On the contrary, as I read the record, it is stated that the defender was employed to make the purchase in his own name, and that eventually the title was to be made up in the pursuer's name. The averment therefore amounts to this, that the defender was to make the purchase in his own name, and that the property was to remain for an indefinite time in that position. That appears to me to amount to trust, and nothing but trust. Accordingly I am of opinion that the interlocutor of the Lord Ordinary is right.

LORD KINNEAR—I regret that I am unable to concur in the judgment which is to be pronounced. I agree that this action very much resembles a declarator of trust, but I think that the manner in which the summons is framed, although it creates a serious difficulty, does not create an insuperable difficulty in the pursuer's way, and that the substance of his demand, as disclosed in the condescendence, does not rest upon any alleged trust qualifying an absolute title, but upon a relevant averment of mandate. I take it to be perfectly well settled, to use the language of the late Lord President, that "wherever there is a deed declaring in absolute terms that a right of property exists in one party, which right is claimed by another as being held in trust for him, the statute comes in to limit the mode of proof of qualification of the written title." But I think there is no deed of trust in the sense of the statute or in the sense of the judgment I have just quoted in the present case, not only because there is nothing that can with propriety be called a deed, *i.e.*, a formal legal instrument of any kind, but because the document on which the defender relies is not a title vesting him in any right of property in absolute terms, but a merely personal contract, expressed in correspondence, which gives no right of property available against all the world, but only a personal action against the present owner of the subjects in dispute for delivery of a conveyance, which may, no doubt, so far as the contract goes, be a conveyance in favour of the defender himself, but may also be a conveyance in favour of the pursuer as the defender's nominee. It follows that the pursuer does not propose to cut down or qualify a written title in any manner of way. All that he demands is that he should have the benefit of a certain contract, which he says was made by the defender for him on his employment. And the question is whether he makes a relevant averment in support of that demand.

Now, his allegation is that it was "agreed between the pursuer and the defender that the pursuer should buy the property on his own account," and that he should let a certain part of it to the defender at a stipulated rent. "Thereupon the pursuer sent the defender to Mr Blacklaw [*i.e.*, the seller] to ascertain the lowest figure the sellers would accept." There is a very distinct averment of mandate so far as that goes; and then the condescendence goes on to say that after the price had been ascertained "the pursuer and defender thereupon confirmed the agreement to which they had come, that the pursuer would buy the said property and lease the premises occupied by the defender to him at an advanced rent." And then he goes on to state that "it was agreed between the pursuer and the defender that the pursuer's name as purchaser was not to be divulged to Mr Blacklaw in the meantime." Now, if that stood alone, I should have thought it enough as a distinct averment that the pursuer had employed the defender to buy this property for him, but, for the reasons upon which the parties were agreed, had authorised him to buy it in his own name and not in the name of his employer. But then the condescendence goes on to make it perfectly clear, because in the 6th article it is said that "the pursuer gave the defender the said authority to conclude said bargain in his own name, on the understanding and agreement that the disposition by the seller of said property would be granted and taken in the pursuer's name, and that the pursuer would before the settlement of the transaction between the seller and the pursuer grant the defender a lease of the said premises occupied by him." I think the first of those two "woulds" ought to be "should," because it is an averment of what the parties had contracted. It is a statement of a stipulation as to something to be done. At all events, it seems to me to be clear enough when fairly read that that is a perfectly distinct statement that it was an express condition of the authority given by the pursuer to the defender to buy this property, that the title when it came to be made out should be taken, not in the defender's name, but in the pursuer's name.

Now, I think the law applicable to this state of facts seems to be settled by decision. In *Corbet* v. *Jarvie & Douglas*, as

reported by Baron Hume, it appeared that after Jarvie & Douglas had exchanged missives for the sale of certain tenements by Jarvie to Douglas at a certain price, Douglas transacted on this occasion "for the behoof of the pursuer Corbet in consequence of previous instructions and an agreement to that effect betwixt the said pursuer and the said Douglas;" that the Sheriff before whom the case came to depend in the first instance found by interlocutor "that the present process is not of the nature of a declarator of trust of an heritable subject, but is an action for implement of a mandate or commission to purchase an heritable subject whereof the disposition and titles never were agreed or intended to be in the name of the defender Douglas, the mandatory, but in the name of the pursuer, the mandant, who in these circumstances was not called on to take a written obligation from his own mandatory anterior to the purchase which might never be made." Therefore he repelled the objection founded on the Act 1696, cap. 25, and allowed the pursuer a proof of his allegations *prout de jure*. The Lord Ordinary refused an advocation, and the Court adhered to his judgment, rejecting an argument that the statute applies alike whether the agreement, has been that the title to the subject in question shall or shall not be made up in the person of the trustee.

Now, I confess I am unable to see any solid distinction between the averments of the pursuer in that case and the averments we are now considering. It is not said that the defender in that case was a law-agent, and I assume that if it may have been the case Baron Hume did not think it material. At all events, it does not appear whether he was or not. I think the Sheriff's findings are exactly applicable, when he says that the titles and disposition never were agreed or intended to be in the name of the mandatory, but of the pursuer himself.

A similar decision was given in the case of *Boswell* v. *Selkrig*. Baron Hume, in reporting it, says that the case was argued in the papers as a question of trust, and it was pleaded for the defender that the Act had been so far relaxed as to admit of an inference of trust from facts and circumstances if pregnant and conclusive; but the Court, and especially the Lord President (Blair), took up the case as not being at all a question of trust, or one that fell to be regulated by the Act, but as a case of evidence of mandate or agency. And accordingly in his own statement of the law, Baron Hume says that the Act was obviously meant for those cases where, for some reason of convenience, and in pursuance of an agreement of parties, the documents or investitures of some right—for instance, the title-deeds of a house, the tack of a farm, the bond for a sum of money—have been taken in the name of one of the parties as if for himself, though truly in trust for the other party to whom the beneficial interest in the subject really belonged. But "the Act is not applicable in another set of cases, though sometimes confounded with the former, which are truly questions of mandate or agency, and where the complainers' object is to enforce the obligation of that contract and character." The law is very clearly stated to the same effect by Lord Glenlee in *Mackay* v. *Ambrose*, and it has not been shown to us that there has been any decision to the contrary. I think the case of *Horne* v. *Morrison*, cited by the Lord Ordinary, is rather against than in favour of the judgment. His Lordship's conjecture that but for the amendment allowed in the Court of Session the statute would have been held to be applicable appears to me to be without foundation. Lord Deas at least, with the apparent concurrence of the Lord President, says exactly the reverse, for he says —"I am of opinion with your Lordship that this case, as stated in the inferior Court, and still more clearly as now stated in this Court, does not raise a question of trust, but an ordinary question of mandate, just as if a law-agent were verbally authorised to go to a public sale and purchase an estate for a client, and nothing was said as to the name in which the purchase should be made. The agent might in such a case purchase the estate in his own name, and afterwards become a consenting party to a disposition being granted to his client. That is a very common mode of acting. But if the agent should take it into his head to say that he has made the purchase for himself, that would raise a nice question of verbal mandate. The Sheriff was right even as the record stood before him." That is an explicit statement of the law, which I think governs the present case, and Lord Shand's opinion is entirely consistent with it. I am aware that Professor Bell in his Principles says that the rule explained by Baron Hume had been abandoned. But then he refers to no case which shows the abandonment which he states. He only refers to the cases of *Allison* v. *Allison* and *Duggan* v. *Wight*, and in both of these cases it was alleged that the title of the lands purchased had been taken by agreement in the name of the person who had been employed to make the purchase, and that was the ground of judgment. Therefore it seems to me clear enough that the cases to which that learned writer refers as indicating an abandonment of the previous settled rule do not support his view to that effect. On the contrary, they are, both of them, excellent illustrations of the first class of cases of which Baron Hume speaks—that is to say, cases where a title and investiture has been taken, and are not at all illustrations of the second class where there is only a personal contract which is to lead up to the execution of a title, as in the cases of *Corbet* v. *Douglas & Jarvie* and *Boswell* v. *Selkrig*.

The decisions therefore seem to me to be to leave the law stated by Baron Hume quite unimpaired, and we have not been referred by counsel to, and I am not myself aware of, any decision which is inconsistent with it. I venture to think, therefore, that the Lord Ordinary is in error when he says that "the question of the application of the

Act to missives of sale has been several times before the Court, and although in each case it has been held that the Act did not apply, that has been because in none of the cases was the party in whose favour the missives were granted authorised to take them in his own name." I cannot help thinking that his Lordship has failed to observe the distinction between an authority to take missives—that is, to make a personal contract in the name of the agent—and an authority to take a title to land in name of the agent. At all events, it is quite certain that his Lordship is erroneous in saying that in none of those cases which had come before the Court was the party in whose favour the missives were granted authorised to take them in his own name, because that was the case both in *Corbet* and in *Bothwell*.

I think we ought to follow these two cases, both because they are the only decisions directly in point, and because they are supported by the very high authority of Baron Hume and of Lord President Blair. But I venture to say further that they appear to me to be entirely in accordance with the right construction of the statute. The fullest exposition of its purpose and effect is probably to be found in the opinion of the late Lord President in *Marshall* v. *Lyell* (21 D. 514). Now, there his Lordship says that there are certain specialties which are to be found in all the cases where the Act does not apply—"either that the form of proceeding was not a declarator of trust, or that there was no trust-deed or conveyance, or that the question did not occur between the trustee and truster, or persons in their right, or that there was fraud in the original constitution of the title as a title absolute, or fraud in the destruction of the back-bond or declarator of trust. Any one of those specialties is enough to exclude the application of the statute." And then his Lordship goes on to quote the language of the Act; and in a later part of his opinion he says, in explanation of the history and scope of the statute, "I have only further to say that I think it would be most unfortunate if any loose construction of that Act were recognised or encouraged. It was passed for the very purpose, not of altering the common law, but of restoring it against corrupt practices which had crept in from feelings of compassion and considerations of equity in hard cases; for our law before the statute did not, when rightly administered, permit the title to an estate to be cut down by parole evidence, whether directed to proving a trust or any other fact, which should have the effect of destroying the title, unless the objection lay to the original constitution of the title as founded on fraud or the like."

Now, if that be sound, it seems to me impossible to hold that the statute has any application to cases where it is alleged that an agent was employed to purchase for a principal on condition that the title should be taken in the name of the principal and not in his own name; and it seems to me quite immaterial whether the contract so made is made in the name of the agent alone, with or without the consent, express or implied, of the principal. There is nothing in such a case, whether the principal has consented or not to the manner in which the contract is made, that requires to be cut down or qualified in the slightest degree, because it is perfectly consistent with such a contract that after it is completed the agent should disclose the name of his principal and require the conveyance to be made to him. It is a matter of everyday experience that agents buy lands or buy commodities on behalf of their principals, and I know of no authority for saying that the principal cannot disclose himself and sue upon the contract unless he has taken the precaution of procuring a back-bond from his agent. I admit that a trust arises out of mandate just as a trust arises out of many other unperformed obligations. Accordingly Lord Westbury says in the case of *Fleeming* v. *Howden* (6 M., H.L. 113)—"Every obligation to perform any act with reference to property creates a trust." But then the statute does not provide in general terms that trust shall never be proved except by writ or oath, but that no declarator of trust shall be sustained as to any deed of trust except on certain conditions.

Now, a trust which attaches by law to a situation created by any contract when proved by parole cannot, with great propriety of language, be said to be established by a deed of trust. It is really a resulting trust, and the subject of proof is not the creation of a trust at all, but a contract of mandate to the performance of which, if it is to be honestly performed, a trust attaches—a trust resulting from the situation of the parties by force of law without the interposition of any deed whatever. All this is quite consistent with the law laid down by the late Lord President again in the case of the *Pant Mawr Quarry Company*, where his Lordship says—"It is indispensable that the true owner of the property should have consented to an absolute title being taken in the trustee's name in order to exclude proof except by writ or oath." I do not see that there is any peculiarity in the present case to affect the application of this principle. It does not appear to me to be at all material to the question that the defender is a tradesman and not a law-agent, whose profession it is to buy and sell lands for his clients. There may be a presumed or implied inference of fact to be drawn from that consideration, and I think probably there is, but that is a question upon the proof, and not upon the law applicable to the contract in question. It seems in my opinion to be the same whether a qualified or an unqualified person is employed to purchase. Nor can I agree in the view that the transaction as between the parties in this case was at an end when the missives were exchanged, or that there was no mandate to take a title. When persons agree to purchase lands, they agree to purchase and take delivery, and the only method of taking delivery of land is to obtain and record a conveyance. It was certainly not intended that the subject to be purchased

should remain in the hands of the seller, because when an intention of taking anything comes to be imputed to persons desiring to purchase, they can have no wish that the subjects to which they have acquired right should remain in the hands of the person from whom they have bought, so that he might be enabled to make the subjects over by gift or sale to somebody else and exclude their right.

But if there had been no averment at all in this case that a title was to be taken, I should have thought that implied in the statement that the land was to be purchased. But then it is distinctly averred that it was a condition of the agreement that a title should be taken, and it could not be taken in any other way except by the defender recording it, or else by the pursuer coming in as principal and suing upon the contract. It is also perfectly true that no mandate was given to the defender to frame a conveyance, but that is a totally different thing from taking a title, because when a purchaser intimates to a seller that he requires a conveyance to be granted in his own name or in the name of somebody else, then he "takes a title" in the sense in which I have been using that expression now, and in the only sense in which it is necessary to be considered with reference to the application of this doctrine of mandate. I authorise a man to buy for me and to take a title in my name. I do not entrust him to draft the conveyance—that is not his province—but I do instruct him to demand from the seller the execution and delivery of a conveyance which will be good to me and not to him.

On the whole matter, therefore, I have come to the conclusion that there is here a perfectly relevant averment (1) that the pursuer employed the defender to make a contract of purchase and sale for his behoof, and (2) that he authorised the defender to make that contract in his own name, but with a condition that when it came to be executed the conveyance was to be granted to the pursuer himself and not to the defender.

Now, if the pursuer had postponed his interference a little longer and the defender had demanded and obtained a conveyance in his own name, which of course he could easily have done, because the seller knew nothing of the pursuer, then I can entertain no doubt whatever that that would have been a conveyance which the pursuer would have been entitled to reduce upon the averments in this action.

That is exactly the case which the late Lord President figures in *Marshall* v. *Lyell.* Where the fraud or wrong that is done to the person having truly the beneficial interest consists in the constitution of the absolute title, it is perfectly settled law that the statute does not apply in such cases. The averment being that the absolute title in your favour was taken by you by fraud, and without my consent, the pursuer is entitled to have that allegation proved by parole evidence. Does it, then, make any difference that, instead of waiting until the wrong which he apprehends has been completed, the pursuer comes in at an earlier stage and endeavours to prevent the title being taken in a wrongful way at all? I think not. I must confess that I do have considerable difficulty, arising from the form of the action, at this stage of the argument which I am now considering, because it seems to me that the natural and simple action in these circumstances would be an action against the defender in which the seller was called as a party, to have both of these parties decerned and ordained to execute a conveyance in favour of the pursuer. But, as I said at the beginning, I do not think the difficulty is created by the form of the action here. In so far as the declaratory conclusion goes, that is applicable enough to a case of mandate or agency as well as to a case of trust. But then when the pursuer goes on to the operative conclusion, and demands that the defender shall be decerned to denude, I must own that that does seem very like an assumption that the defender is a party vested with a right which it is necessary he should be denuded of. That would be a proper operative conclusion attaching to a declarator of trust. But then there are certain matters following upon that which I think would enable the pursuer to get a judgment, because although he did not take the simplest form to effectuate his right by asking a decree that he was entitled to a conveyance, he may effectuate it also by impugning the defender's right to demand a conveyance. If there were, however, any substantial difficulty in working out the matter in accordance with the actual conclusions of the summons, I think that that might be easily met by an amendment.

On the whole matter, therefore, I am unable to concur in the judgment which your Lordships propose, and I think that a proof ought to have been allowed to the pursuer.

The Court adhered.

Counsel for the Pursuer—Ure, Q.C.—J. C. Watt. Agent—Alex. Ross, S.S.C.

Counsel for the Defender—Guthrie, Q.C.—Craigie. Agents—J. & A. F. Adam, W.S.

Tuesday, January 18.

SECOND DIVISION.

[Bill Chamber.

MESS *v.* SIME'S TRUSTEE.

Bankruptcy—Voluntary Trust-Deed—Constitution of Trust—Possession.

A granted a deed in favour of B, a chartered accountant, "as trustee and in trust and as my commissioner," containing a general disposition of his whole estate, and wide powers of management, *inter alia*, for the purpose of paying his debts. B, when acting under this deed, made certain advances and outlays, and, on A's estates being subsequently sequestrated, he