with stating my concurrence in the opinion of Lord Dundas, in which he shows the grounds on which it must be held that the charterers cannot excuse themselves, seeing they did not do what they might have done to secure that their contract to supply the full cargo might be fulfilled. They failed sufficiently to secure that the Collieries Company should deliver in time.

I may add that my concurrence extends to the opinion just delivered by Lord Guthrie.

LORD SALVESEN was absent.

The Court adhered.

Counsel for the Reclaimers (Defenders)—Sandeman, K.C.—C. H. Brown. Agents—J. & J. Ross, W.S.

Counsel for the Respondents (Pursuers)—M'Clure, K.C.—W. T. Watson. Agents—Beveridge, Sutherland, & Smith, W.S.

Friday, July 11.

SECOND DIVISION.

[Lord Skerrington, Ordinary.

DAVIDSON *v.* CAIRNS.

Trust — Proof — Deposit-Receipt — Deed of Trust—Act 1696, *cap.* 25.

A, with the consent of his brother B, raised an action against C for declarator that A had sole right to a deposit-receipt taken in the joint-names of B and C. A averred that the whole of the money contained in the deposit-receipt was his own property, which he had handed to C to deposit in the joint-names of B and C, the deposit-receipt to be retained by C on behalf of A. C averred that the money only partly belonged to A, part of it being his own.

Held that the pursuer's averments could be proved *prout de jure*, the limitation of proof enacted by the Act 1696, cap. 25, not being applicable, on the grounds that (1) the deposit-receipt was not a deed of trust within the meaning of the Act; (2) B, one of the alleged trustees, admitted the pursuer's claim; and (3) (*per* Lord Guthrie, *diss.* Lord Salvesen), *following Grant* v. *Mackenzie*, June 7, 1899, 1 F. 889, 36 S.L.R. 671, the defender admitted that the deposit-receipt did not express the rights of parties.

Dunn v. *Pratt*, January 25, 1898, 25 R. 461, 35 S.L.R. 365, *dub.* (*per* Lord Salvesen).

The Act 1696, cap. 25, enacts—". . . That no action of declarator of trust shall be sustained as to any deed of trust made for hereafter except upon a declarator or back-bond 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*. . . ."

Hugh Cairns, miner, Hamilton, *pursuer*, with consent of Robert Cairns, miner, formerly residing in Hamilton, then residing in the United States of America, brought an action against William Davidson, miner, Larkhall, and the Clydesdale Bank, Limited, Glasgow, *defenders*, concluding, *inter alia*, for decree of declarator "that the pursuer has the sole right, title, and interest in and to a deposit-receipt for the sum of £260 sterling, dated 4th May 1912, granted by the Hamilton branch of the defenders, the Clydesdale Bank, Limited, in favour of the defender William Davidson and the said Robert Cairns, and that the said sum of £260 sterling, thereby acknowledged to have been received by the defenders, the Clydesdale Bank, Limited, truly belongs in property to the pursuer." [The Clydesdale Bank did not appear.]

The defender pleaded, *inter alia*—"(1) The action is incompetent. (2) The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons the action should be dismissed. (3) The pursuer's averments, so far as material, are provable only by writ or oath."

The *averments* are summarised in the opinion (*infra*) of the Lord Ordinary (SKERRINGTON), who on 29th May pronounced an interlocutor in which he repelled the first, second, and third pleas-in-law for the compearing defender and allowed a proof.

Opinion.—"Under his first and leading conclusion the pursuer asks for declarator that he has the sole right, title, and interest in and to a deposit-receipt for the sum of £260 sterling, dated 4th May 1912, and granted by the Clydesdale Bank, Limited, in favour of the defender William Davidson and the pursuer's brother Robert Cairns, and he also asks declarator that the said sum of £260 belongs in property to him. The pursuer's brother, the said Robert Cairns, is a consenter and concurrer to the action, and the only compearing defender is William Davidson. The bank, who have no interest except to get a valid discharge, have not lodged defences. It appears from the averments that the deposit-receipt in question is a partial renewal of an original receipt for £360 which was taken in favour of the same persons. The pursuer alleges that this sum was his own property, and that on 18th October 1909 he handed it to the defender Davidson, who 'agreed and undertook to deposit the said sum in bank in the joint names of himself and of the pursuer's brother, and he agreed with the pursuer that the deposit-receipt when obtained should be retained by him for safe custody as agent or mandatory or custodier for the pursuer, and against the instructions of the pursuer as to the further application of the sum so deposited.' The pursuer's counsel explained that the latter clause meant that the contents of the deposit-receipt were to be held subject to the instructions of the pursuer. In his answer the defender admits that the pursuer handed to him a sum of money on the occasion in question, but he states that the sum was £250 and not £360. He admits

that the smaller sum was handed to him in order that he and the pursuer's brother Robert Cairns should take care of it for the pursuer during his absence in America. The defender subsequently states that on the advice of Robert Cairns he deposited this £250 in the name of himself and Robert Cairns in the Clydesdale Bank, but he goes on to explain that being inexperienced in business he deposited along with the £250 a further sum of £110 which was his own property. The defender does not claim that he is entitled to any part of the contents of the existing receipt for £260 except the sum of £110 which he says was his own property.

"These averments seem to me to raise a very simple issue of fact, but the defender's counsel argued that the action was entirely incompetent. He said that he construed the pursuer's pleadings as averring a contract of improper deposit, and that the pursuer's sole remedy, if he had one, was to bring an ordinary petitory action upon the footing that the defender was his debtor. He argued that in such a contract the property in the money passed and could not be vindicated by the depositor who had a mere claim of debt. I am inclined to agree with counsel in law, but I do not think that it has any application to the contract which the pursuer alleges. The averment which I have quoted seems to me to be an averment either of trust or of agency, namely, that the defender Davidson was to deposit the pursuer's money in bank in joint names of himself and Robert Cairns, and that they were to hold that deposit-receipt either as trustees for him or as his agents. Upon the question of proof it may be of vital importance whether the case is one of trust or of agency, but I have no hesitation in repelling the defender's first plea that the action is incompetent. I am equally clear that a perfectly relevant case has been stated by the pursuer, and that therefore the defender's second plea also falls to be repelled.

"The defender's third plea raises the question whether the pursuer is restricted in his proof to writ or oath, and the defender's counsel founded upon the Statute 1696, cap. 25, which requires that trust shall be proved only by writ or oath. I do not think it necessary to form a decided opinion upon the question whether the pursuer's averments do or do not amount to trust, or whether he has made a relevant averment of agency as distinguished from trust. My present impression is that his real case is trust. But then any difficulty as to the mode of proof is obviated by the fact that the defender does not stand upon the terms of the deposit-receipt as truly expressing his legal right to the contents thereof. The apparent creditors in the deposit-receipt are the defender Davidson and Robert Cairns, and accordingly if we are to look at nothing but the deposit-receipt the result would be that each of the gentlemen would be the owner of £130. But that is not the defender's case at all. He says that he is owner only of £110, and he further admits that the pursuer is owner of £150 and that Robert Cairns is not entitled to one halfpenny of the money. In these circumstances, even if the case be one of trust, the well-known principle which was applied in the case of *Grant* v. *Mackenzie*, 1899, 1 F. 889, comes in, and as both parties are agreed that the title does not accurately express their legal rights, no alternative remains but to allow a general parole proof.

"The defender's counsel offered an alternative argument to the effect that the contract averred was really one of loan. If that were so, proof would have to be limited, but it seems to me that the contract averred was something entirely different. I shall accordingly repel the third plea-in-law and allow parties a proof in ordinary form. . . ."

The defender reclaimed, and argued—The relationship between the respondent and the reclaimer was one of trust, and the action was really an action of declarator of trust. The reclaimer was not bound to return the actual coin to the respondent, but merely to perform the trust purpose for which the respondent had given him the money. The deposit-receipt, although it contained the elements both of mandate and deposit, was a trust deed—M'Laren, Wills and Succession, 3rd ed., sec. 1509; *Dunn* v. *Pratt*, January 25, 1898, 25 R. 461, 35 S.L.R. 365; *Govan New Bowling-Green Club* v. *Geddes*, January 25, 1898, 25 R. 485, *per* Lord M'Laren at 492, 35 S.L.R. 391, at 395; *Croskery* v. *Gilmour's Trustees*, March 18, 1890, 17 R. 697, *per* Lord President (Inglis) at 700, 27 S.L.R. 490, at 492; *General Assembly of General Baptist Churches* v. *Taylor*, June 17, 1841, 3 D. 1030. By the Act 1696, cap. 25, a trust could only be proved by writ or oath—*Dunn* v. *Pratt*, *cit.*; *Leckie* v. *Leckie*, November 21, 1854, 17 D. 77, *per* Lord President (M'Neill) at 80; *Chalmers* v. *Chalmers*, June 13, 1845, 7 D. 865, *per* Lord Fullerton at 870. *Grant* v. *Mackenzie*, June 7, 1899, 1 F. 889, 36 S.L.R. 671; *Grant's Trustees* v. *Morison*, January 26, 1875, 2 R. 377, 12 S.L.R. 292; and *Hotson* v. *Paul*, June 7, 1831, 9 S. 685, were different. They were merely cases of an action brought to enforce a contract where the parties did not stand on the documents, and where therefore parole evidence was necessary. They were not cases like the present where there was a trust. The contract embodied in the deposit-receipt was a contract between the bank and the reclaimer, not between the bank and the respondent—*Anderson* v. *North of Scotland Bank*, October 31, 1901, 4 F. 49, *per* Lord Kincairney (Ordinary) at 52, 39 S.L.R. 75, at 78. The circumstances of the present case did not prevent a reference to oath—*Farquhar* v. *Farquhar*, February 23, 1886, 13 R. 596, 23 S.L.R. 407; *Bertram & Company* v. *Stewart's Trustees*, December 19, 1874, 2 R. 255, 12 S.L.R. 156; *Duncan, &c.* v. *Forbes*, March 4, 1831, 9 S. 540.

Argued for the respondent—In order to establish that there was a trust it would have been necessary for the reclaimer to

have brought an action of declarator of trust—*Dunn* v. *Pratt*, *cit.* But there was no trust here. Even if there were a trust the reclaimer's admission that part of the contents of the deposit-receipt belonged to the respondent would take the case outside the Act 1696, cap. 25—Dickson on Evidence, sec. 586. Where there was a trust there was an absolute title, but the present case was simply one of agency or mandate, to which the Act did not apply, and which could be proved by parole evidence—Dickson on Evidence, secs. 570 and 577; *Taylor* v. *Nisbet*, November 8, 1901, 4 F. 79, 39 S.L.R. 83; *Gardiner* v. *Cowie*, January 20, 1897, 4 S.L.T. 256. The deposit-receipt merely instructed a contract between the bank and the depositor—*Anderson* v. *North of Scotland Bank*, *cit.*, *per* Lord President (Kinross), 4 F. at 53, 39 S.L.R., at 78; *Dinwoodie's Executrix* v. *Carruthers' Executor*, December 6, 1895, 23 R. 234, *per* Lord Young at 239, 33 S.L.R. 184, at 187. It was different from such a document as a title to land. The respondent was entitled to vindicate the money—*Jopp* v. *Johnston's Trustees*, July 15, 1904, 6 F. 1028, *per* Lord Moncreiff at 1036, 41 S.L.R. 829, at 833.

At advising—

LORD SALVESEN—In this case I have come to agree with the Lord Ordinary in the result at which he arrives, although I prefer to put my judgment upon different grounds. The argument for the defender was that the deposit-receipt for £260 in the joint names of himself and Robert Cairns, having been so taken by the instructions of the pursuer, is a deed of trust within the meaning of the Act 1696, cap. 25. If this proposition is well founded it is difficult to see how a proof at large can be competent, even although there is an admission that to the extent of £150 the money contained in the deposit-receipt is the property of the pursuer. Mr Keith in his able argument went far to satisfy my mind that the case of *Grant* v. *Mackenzie* (1899, 1 F. 889) has no application to a case to which the Act 1696, cap. 25, applies. In *Chalmers* v. *Chalmers* (7 D. 865) it was held not a sufficient ground for admitting parole evidence to prove a trust alleged to be constituted by an *ex facie* absolute conveyance of heritage, that it admittedly proceeded on a false narrative of a price paid, and I cannot see that the admission by the defender here that part of the contents of this deposit-receipt belonged to the pursuer is not quite consistent with his defence that the remainder belonged to himself and was included in the same deposit-receipt for his own convenience. The case of *Grant* merely decided that when a written contract relating to heritage is admitted by both parties to it not to express the true agreement between them parole evidence is admissible to prove what the true contract was. The exclusion of such evidence where parties have embodied their contract in a formal writing rests upon a different principle and has no statutory sanction. Assuming, therefore, that the deposit-receipt here constituted a deed of trust within the meaning of the statute, I should hesitate to hold that parole evidence could be allowed because of the defender's qualified admission.

It is not, however, necessary to decide this point, for I have come to be of opinion that a deposit-receipt is not a deed of trust within the meaning of the Act 1696, cap. 25. Such a receipt no doubt gives the holder in whose name the money has been deposited a right of action against the bank who issued it. So far as the bank is concerned the only person who can demand payment is the holder in whose name it is made out, and to whom they have bound themselves to make payment. Unless they have been interpelled from making payment they have no answer to his demand, and his endorsation is a good discharge. But the deposit-receipt is not conclusive evidence of the ownership of the money deposited. As Lord M'Laren said in the case of *Anderson* (4 F. 49, at p. 54) the receipt "may prove nothing more than this, that the true owner has deposited money under an arrangement with some one, by which that party, it may be the wife or child or agent of the depositor, is empowered to uplift the money." One is familiar with the case of a fund which is the subject of a litigation being deposited by arrangement between parties in the joint names of the solicitors who act for them. It would be rather startling if in such a case the solicitors could not be called upon to denude without proof by writing under their hands that the money truly belonged to the parties or one of them. The truth is that the Act primarily applies where (as the editor of Bell's Principles, sec. 1995 (1), expresses it) "for some reason of convenience and by agreement of parties the documents of title to some property have been taken in the name of the trustee though the beneficial right is really in the other party to the arrangement." Now a deposit-receipt is not a document of title in this sense. It is true that in one case—*Dunn* v. *Pratt* (25 R. 461)—it was held that the Act applied to missives of sale, and that as the alleged trustee was authorised to complete the purchase in his own name the averment of trust could only be proved by his writ or oath. It is to be noticed, however, that there was a vigorous dissent by Lord Kinnear, and I should not be surprised if the decision in that case required at some future date to be reconsidered. At all events I do not think that the decision covers such a document as a deposit-receipt. It was conceded that if the money had been simply deposited with the defender his liability to account for it could be established by parole evidence. It follows that if after having so received it he had deposited it in bank without special authority the Act would not apply. But it was said that a different result must be reached where the money is handed to him with an instruction to deposit it in his own name for behoof of the true owner. The distinction is a subtle one and does not carry conviction to my mind. Once it is assumed that deposit-receipts are

often used to enable the agent of the true owner to deal with the money for his behoof, the principle upon which the Act 1696, cap. 25, is based has no application. Where a title to land or to scrip is taken in the name of any person the presumption is that it is so taken because he has the ownership of the property thus absolutely transferred to him. The same thing does not apply to a deposit-receipt except as in a question between the bank and the payee named in it. There is no authority which favours such a contention, and the consequences of so holding might operate great injustice in many cases.

I have hitherto dealt with the matter on the assumption that the defender's name was the only one mentioned in the deposit-receipt. The case is, however, much less favourable for him. The deposit-receipt is payable only on the joint signature of Robert Cairns and the defender. Robert Cairns makes no claim to the money, and is a consenting party to the action being raised. It has never yet actually been decided whether in a proper deed of trust in favour of two trustees, where one admits the existence of the trust and the other denies it, the latter shall still have the benefit of the limitation of proof enacted by the Act 1696. In my opinion, however, it cannot be so, for one of two joint payees can qualify no right, as in a question with the bank, to any particular part of the deposit-receipt. The security that the true owner has where a deposit-receipt is so made is that he cannot be defrauded except by both of the payees acting in concert. If, therefore, proof by writ was not forthcoming against the defender, and his oath were negative of the reference, there would be a resulting *impasse*, for the money would still be retained by the bank until Robert Cairns authorised payment, and in an action against him by the defender to compel him to concur in a discharge to the bank it would be perfectly open to him to plead that the money truly belonged to the pursuer.

On the above grounds I have come to be of opinion that we must allow the parties a proof of their averments on record. It will be just as easy for the defender, if he has an honest case, to prove that part of the contents of the deposit-receipt in question belonged to him as it will be for the pursuer to establish that it is all his money.

LORD GUTHRIE—It is sufficient for the decision of this case to hold, as Lord Salvesen has done, that the deposit-receipt is not a deed of trust in the sense of the Statute of 1696, chapter 25. But I am not prepared to differ from the Lord Ordinary where he says, "Even if the case be one of trust, the well-known principle which was applied in the case of *Grant* v. *Mackenzie*, 1899, 1 F. 889, comes in, and as both parties are agreed that the title does not accurately express their legal rights, no alternative remains but to allow general parole proof."

I concur also in the separate ground not founded on by the Lord Ordinary on which Lord Salvesen has proceeded, namely, the specialty in this case that the deposit-receipt was in favour not only of the defender William Davidson but of Robert Cairns, the pursuer's brother, who not only adopts a different attitude in regard to the nature and reality of the transaction from the defender but is a consenting party to the action.

LORD DUNDAS—I concur, but I reserve my opinion on the matters on which Lord Salvesen has expressed doubts.

The LORD JUSTICE-CLERK was not present.

The Court adhered.

Counsel for the Reclaimer (Defender)—Keith. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent (Pursuer)—Wilton. Agents—Henderson & Munro, W.S.

Friday, July 11.

SECOND DIVISION.

[Sheriff Court at Glasgow.

MICKEL *v.* M'COARD.

(*Reported ante*, 50 S.L.R. 682.)

Expenses—Sheriff—Taxation—Higher or Lower Scale of Taxation—Power of Court to Determine Scale—Timeous Application—C.A.S., M, ii, 1 and 2 (3).

The Codifying Act of Sederunt provides—"M, ii, 1—In the ordinary Sheriff Court, except as after stated, there shall be two scales of taxation, viz., *first*, for causes where the amount of principal concluded for does not exceed £50; and *second*, for causes exceeding that amount. . . . . 2. (3) In actions of damages the scale for taxation of the account between party and party shall for the pursuer's agent be regulated by the sum decerned for, unless the Sheriff shall otherwise direct."

In an action of damages brought in the Sheriff Court the Sheriff-Substitute awarded the pursuer £100 damages. On appeal the Court reduced the damages to £50, and found the defender liable in expenses. The Auditor taxed the account of expenses in the Sheriff Court on the lower scale. On a note of objections to the Auditor's report the Court *held* that the Auditor had rightly taxed the account on the lower scale, having received no contrary instructions from the Court, and although the Court had power to determine the scale, it was too late for the pursuer to raise the question after the remit to the Auditor had been made.

Robert Mickel, timber merchant and property owner, Glasgow, *pursuer*, brought an action in the Sheriff Court at Glasgow against Mrs Sarah M'Coard, Kilcreggan,