I desire respectfully to adopt the judgment pronounced in the Court below by Lord Cullen, every word of which aptly expresses the view which I entertain.

Their Lordships dismissed the appeal but without expenses.

Counsel for the Appellant—Blackburn, K.C.—J. S. Leadbetter. Agents—Russell & Dunlop, W.S., Edinburgh—Kekewich, Smith, & Kaye, London.

Counsel for the Respondents—Sol.-Gen. for Scotland (Morison, K.C.)—R. C. Henderson. Agents—Sir P. J. Hamilton Grierson, Solicitor of Inland Revenue, Edinburgh—H. Bertram Cox, C.B., Solicitor of Inland Revenue, London.

Thursday, May 9.

(Before the Lord Chancellor (Finlay), Viscount Haldane, Lord Dunedin, Lord Shaw, and Lord Parmoor.)

N. G. FERGUSSON & COMPANY, LIMITED *v.* BROWN & TAWSE.

(In the Court of Session, June 12, 1917, 54 S.L.R. 485, and 1917 S.C. 570.)

Process—Furthcoming—War—Sist.

A British firm having arrested in the hands of another British firm a debt due by the latter to an alien enemy, which was not payable until twelve days after the outbreak of war, and an action of furthcoming having been brought against the arrestees, the House of Lords, on the ground that a question of importance was raised on which it was not desirable to express an opinion, *continued a sist* till the end of the war, and *dismissed without expenses* an appeal against an interlocutor sisting the action.

This case is reported *ante ut supra.*

The pursuers, N. G. Fergusson & Company, Limited, appealed to the House of Lords.

After the adjournment, counsel for the respondents being in possession—

LORD CHANCELLOR—Mr Gore Browne, their Lordships have been considering this case, and what they are prepared to do is to continue the sist with no costs of the appeal, the arrestees to find caution to pay the appellants the same sum as may be found to be due, the House to continue the sist until the end of the war merely on the ground of convenience, and expressing no opinion as to any of the grounds given for the sist in the Court of Session.

Mr GORE BROWNE—My Lord, I should assent with great reluctance to that judgment.

LORD CHANCELLOR—I do not ask you to assent to it. That would not be fair. We will hear with pleasure anything you have to say.

The learned counsel is heard to conclude his argument.

LORD CHANCELLOR—A question of great importance has been raised in this appeal, on which I do not think it is desirable that any opinion should at present be expressed. The course I suggest should be taken is this—That the sist should be continued; no costs of this appeal, the arrestees to find caution for payment to the appellants of such sum as may hereafter be found to be due. This House continues the sist till the end of the war merely on the ground of convenience, and expresses no opinion as to any of the grounds given for the sist in the Court of Session.

VISCOUNT HALDANE—I concur.

LORD DUNEDIN—I concur. I have no doubt that although as a rule a person is entitled to have the process of the Court made good to him on his claims there is always in the Scotch Court—and we are sitting as the Supreme Scottish Court—a right to sist a cause for any good reason.

LORD SHAW—I agree.

LORD PARMOOR—I concur.

Their Lordships continued the sist and dismissed the appeal, without expenses.

Counsel for the Appellants—Gore Browne, K.C.—Scott. Agents—Gardiner & Macfie, S.S.C., Edinburgh—Roney & Company, London.

Counsel for the Respondents—Macphail, K.C.—Ingram. Agents—Shield & Kyd, Dundee—J. K. & W. P. Lindsay, W.S., Edinburgh—Beveridge & Company, Westminster.

COURT OF SESSION.

Saturday, March 16.

SECOND DIVISION.

[Sheriff Court at Banff.

M'CONNACHIE *v.* GEDDES.

Ship—Sale—Proof—Evidence—Merchant Shipping Act 1894 (*57 and 58 Vict. cap. 60*), *sec.* 24 (1).

The Merchant Shipping Act 1894, section 24 (1), enacts—"A registered ship or a share therein (when disposed of to a person qualified to own a British ship) shall be transferred by bill of sale."

Held that a contract for the sale of shares in a ship need not, notwithstanding the above enactment, be in writing, and could be proved by parole evidence.

Sale—Trust—Agent and Principal—Mandate—Act 1696, *cap.* 25.

The Act 1696, cap. 25, enacts—". . . 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 intented, or unless the same be referred to the oath of party *simpliciter.*"

Shares in a ship had been transferred to the name of a purchaser who as was averred had been instructed to acquire the shares for another. In an action to have the purchaser ordained to execute a valid transfer in favour of that other, *held* that the Act 1696, cap. 25, did not apply, as the contract between the parties was one of mandate, which could be proved verbally, not one of trust.

Dunn v. *Pratt*, (1898) 25 R. 461, 35 S.L.R. 365, *distinguished* and *questioned*.

Mrs Jean Allardyce Dickson or M'Connachie, residing at Sinsharnie, Cairney, widow of the deceased George M'Connachie, *pursuer*, raised an action in the Sheriff Court at Banff against William Geddes, shipbuilder, Port Gordon, *defender*, whereby she sought to have the defender ordained on tender to him of £500 "to execute a valid transfer in favour of the pursuer of 16/64ths shares in the steamship sometimes known as 'Commonwealth,' thereafter known as 'Tynet,' No. 125813, port of registry Banff."

The pursuer averred—"(Cond. 2) The said deceased George M'Connachie at the date of his death possessed 16/64ths shares in the steamship sometime known as 'Commonwealth,' thereafter known as 'Tynet,' official No. 125813, and port of registry Banff, and the defender was one of the joint owners of the said steamship with the said deceased George M'Connachie. On or about 5th May 1916 defender agreed to purchase on behalf of the pursuer from the executor of the said deceased George M'Connachie the said 16/64ths shares of said ship standing in the deceased's name at the price of £500 sterling. On 12th June 1916 the defender purchased said shares at said price, and had same transferred to his own name. Pursuer has offered to pay to the defender the sum paid by him for said shares, and has called upon him to transfer the shares to her, but defender refuses to do so. . . . Defender had no authority from pursuer to register said shares in his own name, and she was not aware that he had done so till 2nd October 1916. Explained that the pursuer was aware that the executor of the said George M'Connachie had not given up in the original inventory the value of said shares, and she believed that certain formalities would have to be gone through by the executor before he could transfer her husband's shares to her. In point of fact pursuer's agent had been urging the said executor during the months of June, July, and August to proceed with the winding-up of the estate, and he was not aware that any step had been taken in that direction till about the month of September 1916."

The defender pleaded, *inter alia*—"2. The pursuer's averments can be proved only by the writ or oath of the defender, in respect (*a*) that they are averments of trust; (*b*) that the alleged agreement between the parties is an innominate contract of an extraordinary kind; (*c*) that they are averments of the making of an agreement for the purchase of shares of a ship."

Proof before answer having been allowed and led, the Sheriff-Substitute (DUDLEY STUART) on 4th August 1917 pronounced the following interlocutor:—"*Finds in fact*—(1) that the pursuer is the widow of the deceased George M'Connachie, who died on 6th April 1914; (2) that the said George M'Connachie was at the date of his death the owner of 16/64 shares of the steamship 'Tynet' of Banff; (3) that the defender was also a part owner of said vessel; (4) that in April 1916 the deceased's estate had been realised by his executor with the exception of the shares in said vessel; (5) that the pursuer was desirous of purchasing her deceased husband's shares in said vessel, and was advised to seek the assistance of the defender, who as a co-owner of the boat had a right of pre-emption under the agreement between the owners; (6) that the pursuer informed the defender of her desire to acquire her husband's shares, and requested his assistance in the matter; (7) that the defender agreed to forward her wishes, and at her request called with her at the office of her agent Mr John Stuart, in Huntly, on 5th May 1916; (8) that the defender and Mr Stuart discussed the advisability of the pursuer purchasing the shares, and the price which should be offered for them; (9) that the defender at said meeting undertook to purchase said shares on behalf of the pursuer if the same could be obtained for £500; (10) that the defender on 9th June 1916 purchased said shares from the deceased's executor for the sum of £500 and had them transferred to his own name; (11) that the defender refuses to make over said shares to the pursuer in implement of his said obligation to purchase them on her behalf; (12) *Finds in law* that the defender is bound—(1) on payment or tender to him by the pursuer of the sum of £500 to execute a valid transfer of said 16/64 shares in said steamship 'Tynet.' . . . Therefore repels the defences."

Note—"The issue in this case is a very simple one. It is, whether the defender at the pursuer's request undertook to purchase for her certain shares in a vessel which formed part of her husband's executry estate. The defender did in fact purchase the shares, and the question is whether he is bound to transfer them to the pursuer as having been merely her agent or mandatory in the transaction.

"The defender stated certain preliminary pleas, but the only point which he maintained in argument was that the pursuer's case being founded on an averment of trust, proof must be limited to writ or oath. I think that plea is ill-founded. The pursuer's case is summarised in the following sentences—(Cond. 2) 'On or about 5th May 1916 defender agreed to purchase on behalf of the pursuer from the executor of the said deceased George M'Connachie the said 16/64 shares of said ship standing in the deceased's name at the price of £500 sterling. . . . Defender had no authority from pursuer to register said shares in his own name, and she was not aware that he had done so till 2nd October 1916.'

"In my opinion the case averred is not one of trust but of mandate, and mandate may be proved by parole. I turn therefore to the evidence. . . ."

The defender appealed to the Sheriff (LORIMER), who on 20th December 1917 adhered.

Note.—". . . The defender raises a preliminary plea that under the Act 1696, cap. 25, proof is confined to writ or oath, which the Sheriff-Substitute repelled, and I agree with him. His ruling is supported by several cases. I note only three—*Mackay v. Ambrose*, 1829, 7 S. 699, where Lord Glenlee said—'When 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 titles in the name of another, that is a totally different case, and no doubt proof *pro ut de jure* might be allowed.' In *Boswell* v. *Selkrig*, 1811, Baron Hume's Decisions 350, he had in an expository report ruled to the same effect, and took the illustration of one buying a house at another's request and taking the title in his own name without authority, which is just the present case as averred on record. Then I was referred by the defender to an utterance by Lord President Inglis in *Pant Mawr* v. *Fleming*, 1883, 10 R. 457, 20 S.L.R. 307, where he says that 'it is indispensable that the true owner of the property should have consented to an absolute title being taken in the trustee's names in order to exclude proof except by writ or oath.'—Dickson on Evidence, section 580; Menzies on Trustees, ch. 2, section 30. I do not see how that can help the defender where the pursuer avers that she gave no authority to the defender to take the shares in his own name. Accordingly this, which is a proof before answer, has been allowed *pro ut de jure*. . . ."

The defender appealed, and argued—The subject of the present litigation was some shares in a ship. The sale and transfer of the shares in a ship must be in writing—Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60), section 24 (1)—and no notice of trusts could be received (section 56), but trusts might exist (section 57). Such trusts must be proved according to trust law, and that brought in the Act 1696, cap. 25. (1) If an article were purchased in the buyer's name but really in trust for another, that other person lay under an obligation to prove that the article in question was bought in trust for himself. There was in the present case no evidence of mandate or of breach of mandate to buy shares for the pursuer. The arrangement was that the purchase was to be made in the name of the defender, and there was no engagement on his part that he would hold the shares on behalf of the pursuer. Without such an engagement a mere promise was not binding—Bell's Prin., section 8. The defender acquired an absolute right to the shares by the missives, and the pursuer had not proved any facts sufficient to qualify that right. Although proof had been led the defender could still maintain that the pursuer could only challenge his right by writ or oath, and the pursuer having been examined as a witness a reference to oath was no longer open—*Mackay* v. *Campbell*, (1876) 3 R. 999, 13 S.L.R. 649. The cases of *Simpson* v. *Stewart*, (1875) 2 R. 673, and *Thomson* v. *Fraser*, (1868) 7 Macph. 39, were not in point. The letter in which the defender offered to purchase the shares as for himself must be held to have constituted a trust, and the Act 1696, cap. 25, applied. The operation of the Act was not limited to cases where the law required the title to be in writing—Dickson on Evidence, sections 579-80—but undoubtedly if the parties chose that the title should be completed, and that in writing, the Act applied—Bell's Prin., section 1995; *Duggan* v. *Wight*, (1797) 3 Pat. App. 610, M. 12,761; *Mackay* v. *Ambrose*, (1829) 7 S. 699, *per* Lord Glenlee; *Montgomery's Executors*, February 7, 1811, F.C. The case of *Forrester* v. *Robson's Trustees*, (1875) 2 R. 755, 12 S.L.R. 464, was a partnership case, and in *Lindsay* v. *Barmcotte*, (1851) 13 D. 718, the question was not raised. The present case was similar to and was governed by the case of *Dunn* v. *Pratt*, (1898) 25 R. 461, 35 S.L.R. 365. (2) The common law was and had always been that transactions regarding ships had to be carried through in writing—Bell's Com., vol. i, pp. 147 and 155. But even if the contrary view were held, viz., that writing was not necessary in contracts concerning ships, yet in the present case the parties must be held to have chosen to put their agreement in writing, as they had contemplated that the defender might acquire the shares by writing. Counsel also referred to Menzies on Trustees (2nd ed.), section 30; *Marshall* v. *Lyell*, (1859) 21 D. 514, *per* Lord Justice-Clerk Inglis at p. 523; *Anderson* v. *Yorston*, (1906) 14 S.L.T. 54; *Pant Mawr Quarry Company* v. *Fleming*, (1883) 10 R. 457, 20 S.L.R. 307.

Argued for the pursuer—Proof of trust by writ or oath could be amplified by parole evidence—Dickson on Evidence, sec. 587; *Livingstone* v. *Allans* (1901), 3 F. 233, *per* Lord President Kinross at p. 237, 38 S.L.R. 241; *National Bank of Scotland* v. *Mackie's Trustees* (1905), 13 S.L.T. 383, *per* Lord Ardwall at p. 386. In the present case the writ showed that the defender had not an unqualified right of property in the shares, and it sufficed to allow the Court to take into consideration the parole evidence. Counsel referred to Bell's Com., vol. i, p. 153; Dickson on Evidence, sec. 558; Stair, i, xiii, 7; Bell's Prin., sec. 19, 91; *Croskery* v. *Gilmour's Trustees*, (1890) 17 R. 697, *per* Lord President Inglis at p. 700, 27 S.L.R. 490; *Cairns* v. *Davidson*, 1913 S.C. 1054, 50 S.L.R. 850; *Corbet*, 1808, Hume 346; *Boswell* v. *Selkrig*, 1811, Hume 350; Maxwell, (1771) 5 Br. Supp. 630; *Strathnaver* v. *M'Beath*, (1731) M. 12,757. Although only writ or oath constituted proper proof of a fact, yet if proof at large had been allowed that proof fell to be considered by the Court. In the present case no appeal was taken against the interlocutor allowing proof. The doctrine expressed in the Act 1696, cap. 25, ought not to be extended to an ordinary case of sale embodied in a letter of offer and acceptance. There was here no evidence that missives had been agreed upon. That Act did not apply to contracts from which merely a right of action arose—*Marshall* v. *Lyell* (*cit.*)—nor did it apply to cases of mandate such as the present one was. Although

by statute the property in a ship could only be transferred by writing, at common law the contract of sale of a ship required no writing—*Cathcart* v. *Holland*, (1681) M. 8471. Counsel further referred to *Home* v. *Morrison*, (1877) 4 R. 977, 14 S.L.R. 584; *Simpson* v. *Stewart* (*cit.*); *Thomson* v. *Fraser* (*cit.*); *Mackay* v. *Campbell* (*cit.*); *Dunn* v. *Pratt* (*cit.*); *General Baptist Churches* v. *Taylor*, (1846) 3 D. 1030; *Lindsay* v. *Barmcotte* (*cit.*); *Forrester* v. *Robson's Trustees* (*cit.*); *Laird & Company* v. *Laird & Rutherford*, (1884) 12 R. 294, 22 S.L.R. 200; *Anderson* v. *Forston* (*cit.*); Merchant Shipping Act, 1894 (57 and 58 Vict. cap. 60), secs. 24, 56, 57; Stair, iii, 2, 7; Brodie's Stair, 947; Ersk., iii, 3, 1; iv, 2, 20; Bell's Com., vol. i, pp. 147, 153, 159.

At advising—

LORD DUNDAS—In my opinion this appeal must fail. The grounds upon which my conclusion is based are short and simple, but (if correct) sufficient for the disposal of the case. The decision depends, in my judgment, upon the proved facts; and I do not think that certain interesting questions of law which were ably argued at our bar arise for determination. The pursuer avers on record, and the defender denies, that the defender agreed to purchase the shares of the ship from the executor of the pursuer's deceased husband on her behalf and for her behoof, at the price of £500, and that he had no authority from her to register the shares in his own name. These are simple questions of fact depending on the testimony and credibility of the witnesses. The Sheriff-Substitute, who presided at the proof, believed the pursuer and her law agent, and preferred their evidence to that of the defender. The Sheriff on appeal affirmed the judgment of his Substitute. I think the Sheriffs were right and that their conclusion is amply supported by the proof.

The pursuer and her agent Mr Stuart are positive in their assertion that the agreement was that the defender should buy the shares for and on behalf of the pursuer. It must be kept in view that, looking to the right of pre-emption reserved to the co-owners of the vessel by their agreement, the pursuer could not acquire the shares directly but only through the agency of one of the owners, *e.g.*, the defender, with whom she was on friendly terms.

[*His Lordship referred to the evidence given by the pursuer and Mr Stuart, and continued*]—It is also, in my judgment, sufficiently clear upon the proof that no authority was at any time given to the defender by or on behalf of the pursuer to enter into written missives for the purchase of the shares, or to have them registered in his own name. Thus the pursuer says—"Mr Stuart told me when he got the agreement that he thought if I went and asked Mr Geddes to buy my share for me in my name we might manage that way." Later she states—"Mr Geddes said to Mr Stuart, 'I will buy the share and do the best for you, and I will send you word.' He said that as I was going along the street with him. (Q) Did you give him any authority to take the share in his own name?—(A) I never thought of that, because I always wished to retain it myself. (Q) No authority was given him to take it in his own name?—(A) No." Mr Stuart's evidence is—"(Q) Did the pursuer give him any authority to buy the shares in his own name?—(A) The question of name was never discussed. . . . He could have bought the shares and told us he had done so, and got the share transferred to our name. The bargain for the sale was to be made by the defender on behalf of the pursuer. The pursuer's name was not to appear at that stage, but as soon as the bargain was a binding one he should tell me and transfer it to her own name. . . . . By the Court—(Q) No further arrangement was made as to detail as to whether he was to take it in his own name or allow Mrs M'Connachie to come forward. That was not discussed?—(A) That is so." I need not dwell upon the correspondence produced, which tends to confirm the pursuer's case, nor upon the somewhat unsatisfactory evidence given by the defender; these matters are fully dealt with by the Sheriff-Substitute in the long and careful note appended to his interlocutor.

The pursuer has, in my judgment, proved the case she set out to establish—a simple one of mandate to the defender to buy the shares on her behalf. There is no question on the record or on the proof of a deed of trust or of the Act 1696, cap. 25. The case of *Dunn* v. *Pratt*, 25 R. 461, which does not seem to have been referred to in the Courts below, was founded on very strongly by the defender's counsel. It is in my opinion easily distinguished from that now before us. It seems sufficient to point out that in *Dunn* v. *Pratt* the action was in form a declarator of trust, and that it was of the essence of the decision that the parties had agreed that the missives should be (as in fact they were) taken in the defender's name. Missives were there essential, the subject of sale being heritage, whereas here there was neither necessity—the shares being moveable, and there being in my judgment no specialty as regards a bargain for the sale of such shares—nor agreement for written missives being entered into. The terms of the written offer and acceptance are therefore in my view unimportant. As the decision in *Dunn* v. *Pratt* is in my judgment plainly distinguishable from this case, it is unnecessary to express any opinion as to whether or not *Dunn* v. *Pratt* was correctly decided. I prefer to reserve that point for consideration if and when a precisely similar case may arise.

I am for refusing the appeal and affirming the interlocutors appealed against.

LORD SALVESEN—On 26th May 1916 the defender sent a written offer to the executor of the pursuer's husband to purchase the 16/64 shares in the steam-drifter "Tynet," which had belonged to the late Mr M'Connachie and formed part of the assets of his estate. On 9th June the offer was accepted by the executor, the acceptance being written

on the same paper as contained the offer. The price was paid by the defender as per receipt of 9th June, and the defender thereafter obtained a transfer in his own name from the executor of the said shares, and he got himself put on the register as owner of the same. The issue of fact is whether in making the said purchase and obtaining the relative transfer the defender acted for his own behoof or, as the pursuer avers, as her mandatory. Both Sheriffs have decided in favour of the pursuer, and I am so well satisfied with the findings of the Sheriff-Substitute (which have been affirmed by the Sheriff) and with the reasons he assigns in his note that I think it unnecessary to say anything further.

In the debate before us, however, a question of law was raised which seems to have been but faintly argued in the Sheriff Court. In the first place, it is said that in order to the valid sale of a ship or shares in a ship the contract must be in writing, and, on this assumption, that the offer and acceptance to which I have already referred are equivalent to the missives of sale of heritage. Assuming these premises to be sound, the defender maintained that the decision in *Dunn* v. *Pratt*, 25 R. 461, rules the present case—that the offer and acceptance constitute a deed of trust within the meaning of the Act 1696, cap. 25, and that accordingly parole proof is inadmissible to qualify the trust title.

I am unable to accept any of the premises on which the defender founds this ingenious but somewhat belated argument. In the first place, it is to be noted that while the defender pleaded that the pursuer's averments could be proved only by the writ or oath of the defender, he did not appeal against the allowance of proof *pro ut de jure* appointed by the Sheriff-Substitute on 7th March 1917. On the pursuer's averments I do not think his appeal would have been successful, for I agree with the Sheriff-Substitute that these disclosed not a case of trust but of mandate, and that mandate may be proved by parole. On the other hand, there is authority to the effect (*Simpson* v. *Stewart*, 2 R. 673) that if averments that can only be proved by writ or oath are nevertheless made the subject of evidence *pro ut de jure* the Court cannot disregard the evidence so led but must consider it. That case, however, is not on all fours with the present, for no plea was there stated that the averments could only be proved by writ or oath, and besides on the averments as made I do not see that the Sheriff-Substitute could have adopted any other course than he did. The defender's whole case was not based on his second plea-in-law, for on the assumption that the case was one of mandate he denied that any mandate had been accepted by him to purchase the shares as agent for the pursuer. He could not have taken the course of refusing to lead evidence without imperilling this defence. I do not think, therefore, that the defender is precluded by the procedure in the Sheriff Court from maintaining that the facts as they have come out in the evidence disclose a case of trust to which the Act 1696, cap. 25, applies. It may be, if the plea were sustained, that the pursuer would be deprived of her right to refer the whole case to the defender's oath, for he was adduced as a witness on his own behalf and was cross-examined by her, but this is a risk which I am afraid she ran if she made a case on record which was capable of being proved by parole evidence and failed to establish it. I hold myself, therefore, free to consider the defender's argument, which I have previously summarised on the completed case which we have now before us.

On the first question of law, namely, as to whether a contract for the sale and purchase of shipping property can be constituted only by writing, I confess that I have no difficulty at all. Such property is personal or moveable, and it is the universal rule of our common law that contracts relating to the sale of moveable subjects may be proved by parole. That is so laid down by Stair, iii, 2, 7, and was the subject of express decision in the case of *Cathcart*, M. 8471. There was a time when this rule was superseded, so far as shipping property was concerned, by the Statute 34 Geo. III, cap. 68, section 14, but this statute was repealed by 6 Geo. IV, cap. 110, and the corresponding enactment which is now in force is contained in the Merchant Shipping Act 1894, section 24. This section, however, relates merely to the transfer of ships or shares in ships and provides that this must be by bill of sale. It contains no provision with regard to contracts for the sale or purchase of such property. The law therefore remains as stated by Stair, iii, 2, 7, and Erskine, Inst. iv, 2, 20, and other authorities which it is unnecessary to cite. The only form of property the sale and purchase of which, so far as I know, must be constituted by writing is heritage. The law therefore laid down in *Dunn* v. *Pratt* does not directly apply to a contract such as we have here which could have been as effectually constituted by word of mouth, although it happens to have been committed to writing.

There is another distinction between the facts in *Dunn's* case and those of the present which, in my judgment, makes that decision inapplicable here. In *Dunn's* case the action was one of declarator that certain missives of sale of a heritable subject were entered into by the defender on behalf of the pursuer, and the pursuer averred that it was agreed between them that the defender was to conclude the bargain in his own name on the understanding and agreement that the disposition by the seller would be granted and taken in the pursuer's name. There is no similar averment in the present case, but the defender maintained that he has proved that the contract of sale embodied in the letter of offer and acceptance was to be made in his own name. I am unable to hold that this has been established by the parole evidence. The pursuer and her agent Mr Stuart do not admit that any such agreement was made. So far as the pursuer is concerned the matter was never discussed with her, and the import of her agent's evidence appears to me to be

this, that while the pursuer's name was not to appear during the negotiations for the purchase, as soon as a binding bargain had been made between the defender, acting as her agent, and the executor, the defender was at once to notify the fact so that the pursuer's name might then be disclosed and the transfer taken in her name. Nothing was said on the subject of the offer and acceptance being in writing, and although it is a business-like thing, with the view of avoiding disputes, to make an offer in writing and to have it accepted in writing, provided a binding bargain was made the pursuer's object would be equally served though it had been entirely by word of mouth. It is said with some force that it was brought to the pursuer's knowledge that the offer had in fact been made in writing and her consent was asked by the executor to his accepting it; but that did not imply that the acceptance would be made in writing, nor was it a material matter whether it was so or not, for unlike a bargain as to heritage the bargain here would have been completed if the offer had been verbally accepted by the executor. This appears to me to be quite sufficient to distinguish the present case from that of *Dunn* v. *Pratt*, and to make the decision in that case quite inapplicable.

While therefore it is unnecessary to consider in this case whether the decision in *Dunn* v. *Pratt* was well founded, I take leave to say, that having heard a very full argument on the subject I am unable to accept the opinions of the majority, and that accordingly in any subsequent case which raised the same issue I should be in favour of having it remitted to a larger bench for the purpose of having it reconsidered. That decision impliedly overruled without referring to them various authorities by which in my judgment the law had been fixed. I am utterly unable to comprehend how a contract for the purchase of land or moveables, which if in writing is generally constituted by two separate documents, can be treated as a deed of trust. It is repugnant to my view of the law that when you employ an agent to purchase a subject on your behalf in his own name you should first be bound to take the precaution of getting a written acknowledgment of agency from him in case he succeeds in effecting the purchase. If one could not trust an agent to carry out his mandate he would presumably not be employed at all, and I protest against a view of the law which would be at once subversive of all mercantile dealings through agents and would put a premium on the agent's dishonesty. It is a totally different matter if the agent is trusted to take the title in his own name. When the bargain is complete the principal has for the first time an opportunity of coming forward, and if he then consents to the title being taken in the name of the agent he is in a sense constituting him as his trustee. So where a person who is the owner of property (and I think this is the kind of case to which the Act was intended primarily to apply) dispones it to another who he intends shall hold it for his —the disponer's—own behoof, it is a matter of simple precaution that the disponer should not do so until he has obtained a back bond in his own favour to that effect. The disposition by an owner of property to another may be explained on various grounds, *e.g.*, purchase, gift, or trust, of which *prima facie* the last is the least likely. Where therefore such an unusual transaction is entered into by which a man divests himself of his property in favour of another it is right that there should be a contemporaneous record in writing of the special circumstances under which the disposition has been executed, more especially in cases where the original disponer has died or there has been a considerable lapse of time. Authorities have extended the application of the Act of 1696 to the case where an agent has been instructed to buy property and also to take the title in his own name although truly for behoof of another. In such a case there is the same element of trust, for the principal in the transaction thereby constitutes his agent a trustee to hold the property for him and consents to his being *ex facie* the absolute owner. Where he does not consent, but where the agent notwithstanding has taken the title in his own name, it has been decided that the agent's breach of trust may be proved by parole, and that notwithstanding that the contract had been made in the agent's name. I should therefore have been in entire accord with Lord Kinnear in the learned dissent which he recorded in *Dunn* v. *Pratt*. The fallacy into which the majority fell, as I humbly think, was that they confused the two entirely separate notions of right and title. Where the title is taken with consent of the alleged proprietor in the trustee's name it matters not whether the property is heritable or moveable, but if the decision in *Dunn* v. *Pratt* were applied to moveable subjects—as the defender in this case maintained—so as to involve the application of the Act 1696, cap. 25, the known methods of commerce would have to be entirely revised, and the security for fair dealing as between principal and agent would be seriously imperilled.

LORD GUTHRIE concurred.

LORD JUSTICE-CLERK—I have had more difficulty than your Lordships with regard to the import of the evidence as to the mandate which was given to the defender authorising him to purchase the shares in question. This however is a pure question of fact, and my difficulty is not so serious as to compel me to differ from the result at which your Lordships have arrived, especially as the consequence of the view your Lordships take is to affirm the judgment of both the Sheriff and the Sheriff-Substitute on this question of fact.

That is all that is necessary for the decision of the case. But two larger questions of law were argued before us. First, whether writing is necessary to constitute a contract for the sale of shares in a ship. I think some of the statements by the institutional writers on this point depend on the terms of statutes dealing with the sale

and transfer of ships then in force which differed materially from those of the Merchant Shipping Act which now governs the matter, and under which it seems to me writing is not necessary for such a contract. The sale of ship shares is distinguished from what is required for the transfer of the property in ships.

In the second place, an argument was submitted as to the soundness of the decision in *Dunn* v. *Pratt*, 25 R. 461. Your Lordships' view as to the import of the evidence takes the present case out of the purview of *Dunn* v. *Pratt*. But I think it right to say that as at present advised I see no sufficient reason to doubt the soundness of that decision.

The Court dismissed the appeal.

Counsel for Defender and Appellant—Hon. W. Watson—Macquisten. Agents—Alex. Morison & Company, W.S.

Counsel for Pursuer and Respondent—Watt, K.C.—J. A. Christie. Agent—William Geddes, Solicitor.

HOUSE OF LORDS.

Friday, April 26.

(Before the Lord Chancellor (Finlay), Viscount Haldane, Lord Shaw, and Lord Parmoor.)

TAYLOR *v.* DUMBARTON BURGH AND COUNTY TRAMWAYS COMPANY, LIMITED.

Reparation — Negligence — Tramway — Duties towards the Public — Children — Possibility of Injury.

Reparation — Negligence — Contributory Negligence — Conduct Forming Part of History of Case.

A repairing car of a tramway company stopped in a village to deal with a defective standard. Children collected about it. Having effected the repair one of the employees on the car looked along the north side on which the children apparently were, and seeing all clear gave the signal to move. He did not look along the south side of the car, and a small child who happened to be there was run over and injured.

Held (*rev.* judgment of the Second Division) that the company was liable in reparation because of negligence on the part of its servant.

Held that supposing it were negligence to allow a small child to play on the road unattended, such negligence was not contributory to the accident—*Davies* v. *Mann*, 10 Meeson & Welsby 546; *H.M.S. "Sans Pareil,"* [1900] P. 267; *Radley* v. *London and North-Western Railway Company*, (1876) L.R., 1 A.C. 754, *applied*. *Question* if in the circumstances it were negligence?

On February 24, 1916, Stewart Taylor, Old Kilpatrick, Dumbartonshire, as tutor and administrator-in-law for his pupil son James Taylor, *pursuer*, brought an action against the Dumbarton Burgh and County Tramways Company, Limited, *defenders*, to recover £500 as damages for personal injury suffered by the said James Taylor.

He *averred*—"(Cond. 4) On the afternoon of said 27th January 1916 a tramway car belonging to defenders arrived at Old Kilpatrick. This car contained material and plant for the purpose of repairing the electric lights belonging to the defenders, which are placed on alternate tramway standards or poles on the north side of the said Dumbarton Road. Two employees of the defenders, an apprentice electrician named Walter Campbell and a car conductor named John O'Donnell, were in said car. It was Campbell's duty to drive the car and also to repair the said lights. While the work of repair was going on, the said car remained stationary on the tramway rails at the electric standard the light of which was under repair. About 3 p.m. on said date, while the defenders' said employees were engaged in repairing one of said electric lights, the said car stood on the car rails in Dumbarton Road, nearly opposite Gavinburn Place, for some time. It attracted a number of children, amongst whom were the said James Taylor and his brother and sister. Some of the children were standing near the car and others were playing round it. The defenders' servants saw the said children. The car was suddenly and unexpectedly put in motion down the gradient by O'Donnell, and it ran into and knocked down the said James Taylor. The front off-wheel of the car passed over his right hand. In consequence he was seriously injured as after mentioned. The said John O'Donnell gave no warning that he was about to start the said car. The defenders' explanations and averments are denied. (Cond. 5) The said injuries sustained by the said James Taylor were solely due to the fault of the said John O'Donnell, for whom the defenders are responsible. At the time of the occurrence the said car was suddenly and unexpectedly put in motion and driven onward by him in a reckless and negligent manner, although he knew that there were a number of children quite close to and in front of the said car. He gave no warning that the car was about to be started, and he did not keep a proper look-out to ascertain if any of them was at or near the front of the car or about to cross in front thereof and in a position of danger, and he did not maintain proper control over the car so as to enable it to be stopped when necessary. He set said car in motion without any regard for the safety of the children playing about the car and of the said James Taylor, who had no knowledge of any danger or that he ran any risk. It was the duty of the said John O'Donnell in the circumstances condescended on to give warning that the car was about to be started, to keep a proper look-out, to make certain that none of the children whom he saw were at or near the front of the car or about to cross in front thereof before putting the car in motion, and to maintain proper control over the car so as to be able to stop