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Friday, March 2.

## FIRST DIVISION.

[Lord Curriehill, Ordinary.]

### WATT V. M'PHERSON'S TRUSTEES.

*Agent and Client—Contract of Sale—Reduction.*

An agent may purchase his client's property, but there is an *onus* on him to show that the transaction is fair, and that he has acted openly and without disguise, and has not taken advantage of his position; but if an agent ostensibly purchases for another, while in reality he does so for himself, the transaction will not stand.

Circumstances which were held (*diss.* Lord Shand, and *rev.* Lord Curriehill) insufficient to impress the character of agent upon one who had occasionally acted for a trust.

*Observed* (*per* Lord President and Lord Mure) that it is a legal impossibility that the same man should act as agent both for buyer and seller in a contract of sale.

*Observations contra per* Lord Shand.

Thomas Watt, M.D., brought an action of declarator and implement to have it declared that a contract of sale between him and the defenders Miss Ann and Miss Jessie Macpherson was entered into and concluded, and that the defenders were bound to implement that contract. The subjects of the alleged contract of sale were four houses in Aberdeen belonging to the trust-estate of the deceased John Macpherson, under whose trust-disposition the defenders were sole trustees. The contract of sale was alleged to have been constituted by the following missives:—(1) A letter written and addressed by John Watt jun., advocate in Aberdeen, the pursuer's brother, to Hugh James Macpherson, the defender's brother, dated November 9, 1875, running thus:—"Dear Sir,—I am authorised by my brother Dr Watt, Darlington, to offer the trustees of your late father the sum of One thousand nine hundred pounds sterling for the four half houses at Ann Place belonging to them, on the understanding that he shall bear the whole expense of transfers; the entry to the purchaser to be at Whitsunday next, when the price will be paid to the sellers, who will receive the Whitsunday rents, the rents falling due at Martinmas 1876 being payable to the purchaser. I shall feel obliged by your submitting the offer to the trustees, and letting me hear from you if it be accepted.—Yours truly, JOHN WATT JUN. H. J. Macpherson, Esq., Gilcomston Combworks, Aberdeen." (2) Another letter of the same date by John Watt jun. to H. J. Macpherson, in the following terms:—"Aberdeen, 9th Nov. 1875.—Dear Sir,—The offer for the houses at Ann Place is made on the understanding that the feu-duty for the whole is £20 sterling per annum, and that the subjects are liable to duplicate in feu-duty every 19 years, the first

duplicate being payable in 1877." And (3) a letter by the said Hugh Macpherson to the said John Watt jun., also dated 9th Nov. 1875, in the following terms, viz.:—"Dear Sir,—I am in receipt of your two letters of this day, and having duly submitted the offers for the 4 (four half) houses at Ann Place to my sisters, surviving trustees of my late father, they have authorised me to accept of the same on the conditions named—viz., One thousand nine hundred pounds, say £1900 cash, the purchaser paying all expenses connected with the transfer, a yearly duty of £20 with a duplicate every 19 years, first duplicate 1877. Purchase money payable and entry given at Whitsunday next, 4th June, for entry, the rents up to then being payable to the sellers.—Yours very truly, H. J. M'PHERSON. John Watt jun., Esq., advocate.

The defenders also brought a summons against Dr Watt and John Watt jun., for reduction of the three letters above quoted. The Lord Ordinary, on the motion of both parties, held their summons as repeated in the first action.

The defenders pleaded—“(1) The pursuer not being the true purchaser, and his name having been used in the letters constituting the alleged contract of sale merely for the purpose of concealing the fact that the defenders' law agent and adviser Mr John Watt jun., advocate, Aberdeen, was the purchaser, in whole or in part, and at an inadequate price, of the property thereby proposed to be sold, the pursuer is not entitled to require the defenders to implement the said alleged contract of sale, and the defenders are entitled to absolvitor. (2) The pursuer not being the true purchaser, and his name having been used in the letters constituting the alleged contract of sale, merely for the purpose of concealing the fact that the defenders' said law agent and adviser was the purchaser of two of the four houses, being houses Nos. 3 and 4 Ann Place, Aberdeen, thereby proposed to be sold, and that at an inadequate price, the pursuer is not entitled to require the defenders to implement the said contract for the purchase of the said two houses, and in regard thereto the defenders are entitled to absolvitor. (3) The said John Watt jun. being the law agent and adviser of the defenders, and being also a trustee under the trust-deed of settlement of the deceased Mrs Ann Thomson or M'Pherson, and a trustee under the marriage contract trust of Mrs Jane M'Pherson or Black, and as such interested in the trust-estate of the said John M'Pherson, was under a personal disqualification, disabling him from purchasing the trust-estate of which the defenders are the trustees, or at least he could not legally purchase from the defenders while the defenders were ignorant that he was interested in the contract, and while the relation of agent and client subsisted between the purchaser and the sellers.”

The Lord Ordinary allowed a proof, appointing the defenders to lead. The result of the proof is fully given in the note appended to the following interlocutor, which was pronounced by the Lord Ordinary:—

“Edinburgh, 4th July 1876.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record, proof, and whole productions in the reduction at the instance of the defenders, M'Pherson's trustees, against Thomas

Watt, the pursuer of the original action of declarator, implement, and damages, and against John Watt junior, advocate in Aberdeen, which has been held as repeated in this process—Reduces, decerns, and declares in terms of the conclusions of the summons, and in the said original action assoliszes the defenders, M'Pherson's trustees, from the whole conclusions of the summons, and decerns: Finds the said Thomas Watt and John Watt junior liable in expenses in both actions; appoints an account thereof to be lodged; and remits the same to the Auditor to tax and to report.

“*Note.*—In the action of declarator and implement with which the present proceedings commenced, Thomas Watt, doctor of medicine in Darlington, asks to have it found and declared that on or about 9th November 1875 a contract of sale was entered into and concluded between the defenders Ann M'Pherson and Jessie M'Pherson, sole surviving trustees acting under the trust-disposition and settlement of their father, the now deceased John M'Pherson, comb manufacturer in Aberdeen, through Hugh James M'Pherson, their brother, and the pursuer through John Watt junior, advocate in Aberdeen, his brother, ‘whereby the defenders, as trustees foresaid, through the said Hugh James M'Pherson, agreed to sell, and sold to the pursuers, through the said John Watt junior, and the pursuers through the said John Watt junior agreed to purchase, and purchased from the defenders, as trustees foresaid, through the said Hugh James M'Pherson, the dwelling-houses, Nos. 3, 4, 5, and 6 Ann Place, Aberdeen, with the pertinents thereof, and that on the following conditions, viz., the price to be £1900, the pursuers paying the whole expense of transfer; the property to be conveyed under a yearly feu-duty of £20, with a duplicand every 19 years; the price to be payable and entry given at 4th June 1876, the rents up till then being payable to the sellers.’ The summonses contain conclusions for implement in the usual way, with an alternative conclusion for damages.

“The terms of these missives establish four points which have a material bearing upon the present question, viz.—(1) that John Watt junior, the writer of the offer, represents to H. J. M'Pherson that the party desiring to purchase the property is not himself, but his brother Dr Thomas Watt, of Darlington, the pursuer; (2) that the offer is made to H. J. M'Pherson, not as a party having authority to accept the offer, but merely in order that he might submit it to his father's trustees and inform the writer if it was accepted; (3) that the acceptance bears expressly that the offer had been duly submitted by H. J. M'Pherson to his sisters, as surviving trustees of his father, and that they had authorised him to accept the offer as made; and (4) that John Watt junior, the party making the offer, must have known that no material alteration of the contract could take place without the full knowledge and consent of the trustees themselves.

“The defenders, the trustees of John M'Pherson, have refused to implement the sale; hence the present action. The main grounds of refusal are contained in article 8 of the revised defences, which is as follows:—‘The purchase of the said four houses at Ann Place, Aberdeen, by Mr John Watt junior, although made ostensibly for and on

behalf of his brother, the pursuer, was really made for his own account, the name of the pursuer being used to conceal from the defenders the fact that they were dealing with their law agent and adviser. The defenders, if they had known that Mr John Watt junior was purchasing for his own account, would not have sold to him without the intervention of a neutral solicitor. The price stipulated was not a fair and adequate price.’ The defenders were allowed to repeat in this process a reduction of the missives of sale, the record was closed upon revised condescendence and defences, and a proof before answer was allowed, the defenders being directed to lead in the proof. That proof has now been taken, and I shall shortly state the facts which appear to me to be thereby established. These are as follows:—

“1. The late John M'Pherson, comb-maker in Aberdeen, died in 1867, survived by his widow and a family of seven children by her, as well as by a family of several children by a former marriage. He left a trust-deed, under which the defenders Ann and Jessie M'Pherson, two of his daughters by the first marriage, are the sole surviving trustees.

“2. John M'Pherson at his death possessed considerable heritable property, comprising, *inter alia*, the estate of Springhill, in the county of Aberdeen, of the value of about £16,000, and some feuing ground in the town of Aberdeen, on which six houses of a street, Ann Street, had been erected by the truster in his lifetime.

“3. The estate of Springhill was sold by the trustees to George M'Pherson, a son of the truster. The Ann Place subjects were exposed by the trustees to sale by public roup in 1871, but no offers were made, and in the same year they sold to a Mr Brown by private bargain part of these subjects, consisting of two of the houses and a part of the ground still unbuilt upon. The other four houses remained, unsold and in the hands of the trustees, and were let by them to tenants.

“4. During the lifetime of John M'Pherson his law agent was the late James Edmond, advocate, Aberdeen, who, and his subsequent firm of J. & A. Edmond, continued to be the law agents of the trustees until 1871, in which year the trustees closed their accounts with Messrs Edmond, and received up the trust papers. John Watt junior appears at that time, and until the present questions arose, to have been the law agent and adviser of the several members of the family of John M'Pherson, and particularly of his daughter Mrs Black, and of his son H. J. M'Pherson, and of Jessie M'Pherson and Ann M'Pherson, the defenders.

“5. After 1871 comparatively little law agency was required in connection with the trust. H. J. M'Pherson, who had, along with his sisters Ann and Jessie M'Pherson (the trustees), succeeded his father in his business as comb-maker, seems to have managed the trust property by letting the houses, levying the rents, and drawing the interest of money lent. When the services of a law agent, however, were required, John Watt junior was the person employed, and, in particular, about the year 1872, some railway stock to the amount of between £2000 and £3000 having been sold, the said John Watt junior, on the employment of the trustees, invested the proceeds in bonds heritably secured over the property

of other two clients of his own, named respectively 'Shearer' and 'M'Gregor.' The instructions to procure the investment were given by H. J. M'Pherson to John Watt junior, who, although acting as agent for the borrowers in the transaction, yet acted equally as agent for the lenders, M'Pherson's trustees.

"6. In the year 1874 J. Watt junior became tenant of one of the houses in Ann Place (No. 4), which he has continued to occupy ever since, at all events until Whitsunday last, 1876.

"7. Under the settlement of John M'Pherson the whole of his heritable property was directed to be sold at or prior to Whitsunday 1877. The greater part was sold in and before 1871, and by a family agreement made in that year it was arranged that the unsold houses in Ann Place should be held by the trustees for behoof of the trusters' second family, two of whom are H. J. M'Pherson and his sister Mrs Black.

"8. In the end of October 1875 H. J. M'Pherson had a meeting with John Watt junior, as his law agent, in reference to the investment of £2000 belonging to the trustees under his own marriage-contract, in the course of which Watt stated that good investments were not easily got, as house property was rising in value, whereupon H. J. M'Pherson said that he was thinking of advertising the Ann Place trust property for sale. So far the accounts of the interview given by Watt and by M'Pherson do not materially differ; but they do materially differ in other respects. John Watt junior says that not only at this meeting, but long before its date, M'Pherson had urged him (Watt) to buy the houses, as he was now tenant of one of them, and that he declined to do so, whereupon M'Pherson asked him, if he knew any one likely to buy, to tell them about the houses. This story of Watt is not, in my opinion, a very probable one; and having seen and heard both of the witnesses, I am inclined to adopt the version of the transaction given by M'Pherson, who says that Watt requested him not to advertise because he thought he could find a purchaser. Both witnesses, however, concur in saying that M'Pherson requested Watt to look out for a purchaser, and M'Pherson expressly says:—'I commissioned him to find a purchaser.' It is thus, as I think, proved that John Watt junior was employed or instructed on behalf of the trustees by H. J. M'Pherson, a beneficiary in the trust, and himself a client of Watt, to sell, or at least to procure a purchaser for the trust property.

"9. A day or two after this, Watt called for M'Pherson, and asked at what price the houses would be sold. M'Pherson said that he thought each block of two houses should fetch from £1100 to £1200, but that he would take £2000 for the whole four. Watt objected to that price as excessive, but said that £1900 would be a fair price; and Watt then said that he had communicated on the subject with his brother, who had money to invest on heritable property, and would be prepared to give the price. M'Pherson then said to Watt if he would give a written offer on behalf of his brother he would advise the trustees to accept, and the offer and acceptance of 9th November 1875 were accordingly written out and exchanged.

"It happened that just as M'Pherson had received the offer, his sisters (the defenders) called

upon him at his place of business. He showed them the offer, and they, before authorising their brother to accept of it, asked him whether the offer was truly for Dr Watt (the pursuer), and not for John Watt junior, saying that if it was John Watt junior who was buying for himself, they must have the advice of a neutral agent. M'Pherson, who believed that the offer was truly for Dr Watt, gave his sisters the required assurance, and the offer as made was then by their authority accepted.

"11. Although the correspondence which passed between John Watt junior, in Aberdeen, and his brother, Dr Thomas Watt, in Darlington, with reference to the purchase, has all been destroyed, with the exception of a fragment in one letter, being the second which John Watt junior wrote to his brother on the subject, it is clearly proved by that fragment, and by the admission both of Dr Watt and of John Watt junior in the witness-box, that before the offer of 9th November was written and sent to M'Pherson, it had been proposed by John Watt junior, and agreed to by the pursuer, that two of the houses should be passed on by the pursuer to his brother, at the price of £950, being half of £1900, the price of the whole four houses. The offer, therefore, for the whole houses which was made by John Watt junior, as in name of his brother, was truly, so far as regards two of the houses, an offer for behoof of himself, John Watt junior. This fact was concealed from, or at least was not communicated to, Mr M'Pherson, or to the defenders until some time after the acceptance.

"12. The pursuer Dr Watt intended to purchase and retain two of the houses as an investment, but within a day or two of receiving the acceptance from M'Pherson, John Watt junior began to negotiate with third parties for a re-sale of the two houses which were to be passed on to him by his brother, and the result was that before the end of November he had sold the houses to a person of the name of Robson for the price of £1125, being an advance of £175 upon the price which he himself was to pay. Robson again, within a day or two, sold one of the houses to Cruickshank, the tenant thereof, for £600, being a further advance of £40. The price of £950, therefore, for half of the subjects, and of £1900 for the whole, was plainly greatly below the true value of the property.

"13. These circumstances were communicated by John Watt junior to Mr M'Pherson about or shortly after 19th November, and by M'Pherson (after some attempts at compromise) to his sisters, the defenders, and although M'Pherson, who seems to have been in ignorance as to the law of the case, was disposed at first to advise his sisters to submit to what undoubtedly was a bad bargain, these ladies themselves, on becoming aware of the facts, insisted upon the bargain being given up altogether, or at all events upon the difference in price obtained by John Watt junior being paid to them. Both proposals were declined.

"Such being the state of the facts proved, the question is, whether the purchase can be sustained to any and, if so, to what extent? Now, although it was ostensibly in the name of Thomas Watt, it was truly to the extent of one-half a purchase by his brother John Watt junior, who was not only the law agent of the trustees and

beneficiaries as individuals, but was on his own suggestion entrusted as law agent of the trustees with the duty of finding a purchaser for the property. But the important fact that Watt was thus buying for himself was, as I have said, not communicated to the sellers. It may be conceded to the pursuer that a purchase by an agent is not illegal in the sense in which a purchase of trust-property by a trustee is illegal. But it is a transaction which the law regards—and rightly regards—with jealousy, and in order to justify such a purchase, when challenged, an agent who has bought the property of his client—at all events, when he has been employed to sell that property—must come into Court with clean hands, and must show that his client was acting with full information upon every material matter, and that the price was adequate. The rule of law was very clearly stated by Lord Eldon in the House of Lords in the leading case of *Cave v. Allen* (2 Dow's App. 289)—“If one not employed before as an attorney was employed for the sale of an estate, and advised his employer to sell it to himself (the attorney), the Courts of Equity would say, ‘The nature of your employment was such as rendered it incumbent on you to give the best advice to your employer;’ and unless he withdrew from that connection, or put himself completely at arm's length, he must show, in case the contract be questioned, that he had given the same disinterested advice that he naturally would have given if the contract had been made with another party.” Now, it is clear that John Watt junior, the true purchaser of at least half of the property, has failed to show that the transaction comes within the rule laid down by Lord Eldon. He did not close the confidential relation between him and his clients, or hold his clients at arm's length, and he did not give them disinterested advice. On the contrary, he dissuaded them from advertising the property for sale by public auction, thereby preventing fair and open competition for the property. He suggested that he himself should look out for a purchaser, at a price considerably lower than that which his clients thought should be asked; and he, moreover, concealed from them the important fact that he was the real, though his brother was the ostensible, purchaser. By means of this concealment he threw his clients off their guard, and induced them to believe that he was protecting their interests as their agent; and it is certain that if they had known the fact which Watt thus concealed they would have called in the services of a neutral agent. And further, the price is greatly less than the true value, because if within a week or two of the contract Watt, without trouble, and, as he says, without much desiring to resell, disposed of the property privately, at a profit of upwards of 20 per cent., the presumption is that at a public sale by the trustees a still larger price would have been realised. It is in vain to say, as the pursuer does, that the property was valued in 1871 at £1860; that a purchaser could not be found for it in that year at £1900; and that a solitary surveyor from Aberdeen is of opinion that £1900 is the fair price now. The onus of proving adequacy of price at the date of sale rests with the pursuer, and he has not discharged that onus. ‘The valuation of 1871 forms no sound test of the value in 1876, and the profit made by John Watt junior in this very transaction is real evidence that the price at which

he purchased was inadequate. I think that the presumption is very strong that had the defenders known that he was the purchaser, and employed, as they would then have done, a neutral agent to attend to their interest, a very much larger price would have been obtained. The sale, therefore—at all events in so far as John Watt junior was personally interested therein—cannot be sustained. But apart from these considerations, I think that the mere concealment of the fact that J. Watt junior was himself a purchaser is of itself sufficient to vitiate and annul the sale, at all events so far as regards the houses purchased for himself. This doctrine is implied, if not expressed, in the opinions of the Judges in *Gourlay's Trustees v. Kerr* (6th June 1857, 19 D. 789), and it has repeatedly been made matter of decision in England—see *Woodhouse v. Meredith*, 1st March 1820, 1 Jacob and Walker 204; *Charter v. Trevelin*, 5th September 1844, 11 Clark and Findlay, 714, where such concealment was held sufficient to set aside a purchase by an agent after the lapse of 37 years; and in *Lewis v. Wilman*, 25th March 1852, 3 Clark, 607, when the Lord Chancellor (St Leonards) said—“I should lay it down as a rule, my Lords, that ought never to be departed from, that if an attorney or agent can show he is entitled to purchase, yet, if instead of openly purchasing, he purchases in the name of a trustee or agent without disclosing the fact, no such purchase as that can stand for a single moment. Such a transaction to stand must be open and fair and free from all objection. And if a man purchases, as these appellants purchased, by putting forward a clerk of his own, not as a clerk, not as an agent, but as an actual *bona fide* purchaser upon an absolute and independent contract, he does that which, the moment it is stated, renders the deed powerless for the purpose for which it was framed and executed, and the Court will hold the parties responsible for everything that results from it. If, therefore, a bill had been filed, and this contract had been attempted to be set up, and it had come before your Lordships, I cannot hesitate to say that you would have rescinded that contract, and thrown the whole costs of the proceedings upon the parties who had entered into it.”

“Such being the rule of law applicable to cases like the present, it is clear the sale must be reduced—at all events so far as regards the houses purchased by or for John Watt junior, and that to that extent the pursuer Thomas Watt cannot demand implement of the contract. The question remains, whether the sale can stand as regards the two houses retained by himself, or can be enforced by him to that extent. That question is not free from difficulty, but I have felt myself constrained to hold that the contract cannot be enforced to any extent. The offer which was accepted was an offer by, or rather in name of, Dr Thomas Watt, for the purchase of four houses at a slump sum. It was accepted by the defenders on the footing that he, and he alone, was the purchaser. But as the contract turns out to be vitiated in an important respect by the concealment of a fact of which the pursuer himself was aware before the offer was written and presented, and which he ought to have inserted or caused to be inserted in the offer, he must take the consequences of his own want of care. He must be

responsible for the improper concealment on the part of his brother, especially as it cannot be doubted that, if on the 9th November 1875 the defenders had ever suspected that John Watt junior was personally interested in the purchase, the offer would not have been accepted. The result of the whole case, therefore, is—that in the reduction which the defenders have been allowed to repeat in this process, decree setting aside the missives must be pronounced; and in the original action of declarator and implement, the defenders, M'Pherson's trustees, must be assoltized, with expenses."

Thomas Watt reclaimed, and the argument chiefly turned on the questions—Whether (1) John Watt junior was the ordinary law agent of the trust; or (2) was employed for this particular purchase by M'Pherson. From the statement given above of the Lord Ordinary's view of the facts of the case, and from the opposite view expressed by the Lord President, it will be seen what the grounds were on which either party sought to establish their contentions as to John Watt's position in reference to the trustees.

At advising—

LORD PRESIDENT—(After narrating the circumstances under which the action arose)—The defence maintained by the ladies as trustees is that while the contract of sale was ostensibly concluded between them and Dr Watt, it was in reality a contract under which not Dr Watt but his brother became the purchaser of these houses. This brother was the agent of the seller, and the fact of his being purchaser to the extent of one-half of the subject is said to be a reason for reducing the contract. For the purpose of making this defence effectual we have now to see whether, in the circumstances, reduction of this contract was competent.

As to the law applicable to the case, I apprehend there can be very little doubt. It is not unlawful for a law agent to buy from his client if he buys such property openly and without disguise. But he is under the necessity of showing that the transaction is perfectly fair, that the price is adequate, and the conditions of sale such as a law agent would advise a client to enter into. If that is established, the sale is good, but if he fails to show that that is so, the transaction is liable to be set aside. There is, I apprehend, another rule of law equally well established, and it is this:—If a law agent puts forward another person as the buyer, concealing from his client the fact that he is the true buyer himself, that is a piece of deception, and we could not allow such a transaction to stand. Now, if the allegations made here are true, the case is of that latter description. The case turns entirely on the question of fact, whether John Watt junior was or was not the law agent of the seller? Now, that may have a double meaning; it may either mean that he was the person on whom the trustees usually relied for advice in the management of the trust-estate, or that he was employed by them to carry through this particular piece of business. Either of these positions is sufficient to let in the rule of law I have laid down.

Now, I am clearly of opinion that this gentleman never was the law agent of the trust, although in some trifling matters he was employed as such. On Nov. 20th 1871 we have an entry in his books by

which John M'Pherson's trustees are debited with the cost of drawing a discharge by marriage-contract trustees to them. In that matter it is clear that he was acting as law-agent of the trust; and the other matter is in June 1872, when the trustees were about to lend money on an heritable security, and the borrowers were clients of Mr Watt, the trustees paid the money into Mr Watt's hands, he paid it to the borrowers, and continued down to 1873 to pay the interest on the loan to the trustees. Now, no doubt he advanced the money to the borrowers, and he did so for the trustees, but that is all, for the payment of interest is done for the borrowers, and not for the trustees at all. These two occasions, then, are the sole occasions on which he acted as agent for the trustees, and I do not think that that makes him the law agent of the trust, or puts him in an equivalent position in a question of this kind. No doubt the beneficiaries under the trust were in the use to rely upon receiving his legal advice each in the management of his own affairs. To make him the agent of the sellers in a sense in which he must be made agent here, apart from special employment, he must be in the position of legal adviser, and they must be entitled to assume that he would act for them in this matter, and of that I find no evidence. Then the next question comes to be—Was Mr Watt agent of the sellers in this particular transaction? Was he so employed, or did he take on himself the character of law agent in this transaction? The allegation on this point made by the defenders is in their third statement—"In the course of the year 1875 Mr John Watt junior mentioned to Mr Hugh James M'Pherson that he had money belonging to a client on hand for investment in house property, and had great difficulty in finding suitable subjects to purchase. In reply, Mr M'Pherson mentioned that the Ann Place houses would have to be sold in 1877, and said that he had been thinking of recommending that they should be advertised for sale. Mr Watt asked that advertisements should be delayed till he ascertained whether any of his clients would take them. In consequence of this, and acting upon the advice of Mr John Watt junior, and being guided by his calculations as to the price and other details of the transaction, the defenders were induced to decide to sell these houses, and to do so at the price of £1900. Thereupon the letters quoted in the 4th article of the pursuer's condescendence were on Nov. 9, 1875 passed between the said John Watt junior and the said Mr Hugh James M'Pherson, as representing the defenders. In this transaction Mr M'Pherson and the defenders understood that Mr John Watt junior was acting as agent for the sellers as well as the purchaser, as he was in fact acting."

The case of the defenders is, that the position of Mr John Watt junior was that of agent for both parties, and for both parties in making a personal contract of sale, not in carrying through a piece of conveyancing, or doing anything requiring special legal knowledge. Now, I have considerable difficulty in seeing how one man can be agent for both parties in such a matter. Parties have to adjust a price, and to hand over an article. There may, of course, be conditions that have to be adjusted, and indeed there are such conditions here, to which I shall presently allude, but the essence of the contract is the adjustment

of the price and the delivery of the article. Now how can one man act as agent for both parties in adjusting the price? I can understand that he may settle the price as an arbiter where there is a dispute as to it. I can understand, too, that one man may act both for lender and borrower in negotiating a loan, for there it is settled before he is called into the field what it is that is to be done; and it is a matter of every-day occurrence that agents do so act. But in the case of a contract of sale it is impossible for one man acting as agent to say how much the one party is to give and the other to take; that is not agency at all. Therefore Mr Watt's alleged character seems to me to be a sort of legal impossibility, but I further think that no such character was ever impressed on him. Mr M'Pherson managed the whole affairs of the trust—the old ladies left it entirely to him. He goes to Mr Watt, with whom he was evidently very intimate, and tells him that these houses may have to be sold. What does Mr Watt say? "Don't advertise them; I think I shall be able to find you a purchaser." A client of Mr Watt's being produced as purchaser, according to M'Pherson and Watt, these two set about adjusting the price. They were making a bargain, and to that there must be two parties. These were the two parties, and between them the price is fixed and missives of sale are exchanged. Now, what are we to say of these missives? To them there were again two parties. How it can be said that Watt is acting for both parties passes my understanding. The sale was completed by these two agents, acting for different parties. It turns out now that Mr Watt was buying partly for himself and partly for a brother, but there is no illegality in that *per se*, so that unless it can be made out that Mr Watt was the regular agent of the trustees, or was acting for them in this particular matter, the defence must fail, and I am therefore of opinion, since neither of these characters has been shown to belong to Mr Watt, that the Lord Ordinary's interlocutor should be reversed, the reasons of reduction repelled, and decree of declarator pronounced according to the conclusions of the first summons.

**LORD DEAS**—When I first read the Lord Ordinary's note I was carried with it, but the more I have looked into the matter, the less satisfied have I been with it. A law agent stands in a peculiar position; he is not disqualified from purchasing his client's property, but there is a presumption that he must overcome by showing that the transaction was fair, and that no advantage was taken by him of his position. That presumption does not apply to any one but the law agent, and accordingly the first thing to do is to show clearly that that was the position of Mr Watt. Now, I am of opinion that no evidence has been adduced to show that Mr Watt was in that or any equivalent position. The truster died in 1867. Mr Edmond was agent at that time, and continued to be so, as long as it was thought necessary to have one. The only trustees under the deed were two unmarried sisters. Mr M'Pherson was a manufacturer in Aberdeen, very well acquainted with matters of this kind, and quite fit to carry on the affairs of the trust after Mr Edmond gave them up. There was then no law agent, and the only law business done in connec-

tion with the trust are the two items which your Lordship has noticed, which do not constitute anything like agency. The next question is, Whether Mr Watt was employed as law agent for the particular purpose of selling these four houses. That depends on the evidence of M'Pherson and Watt, and on looking at the proof I cannot say I have more confidence in M'Pherson than in Watt. Now, I agree with your Lordship that Mr Watt's interference in suggesting that he might find a purchaser for the property is not an employment of him by the trustees to sell for them. No man was better able than M'Pherson to say what the price should be, and he says it should be £2000; between that and the price actually paid, viz. £1900, there is very little difference. In that transaction I agree with your Lordship in thinking that Watt was not employed as agent for the trustees.

If, then, he was not the general law agent of the trustees, nor employed to sell this particular property, he was merely in the position of any third party, and in that position the law requires evidence of fraud, which is not required in the case of a law agent in order to set aside the transaction. I am not prepared to say that a fraud was practised at all on Mr M'Pherson. There were one or two things which were not quite satisfactory on the part of Watt; he did not say he was to take two of the houses himself; but that is quite inadequate as an allegation of fraud, and that is all that is in the matter. What was M'Pherson's position with regard to this trust? He was just as if he had been selling his own property. These two ladies never interfered with him. If he had been selling his own property, could he have said that there had been practised on him a successful fraud? No jury would have listened to that. These houses were resold for a small profit, but I am quite satisfied that when Watt agreed to take two of them he had no intention of reselling; he was tenant of one himself. The first thing he does is to tell M'Pherson that he has got this offer, and is advised by him not to take it, because it might create dissatisfaction in the mind of his sisters. A considerable time elapses before he makes any allegation of illegality in the purchase, and he makes the objection not because he had obtained any legal advice on the subject; he had no more legal knowledge than before; and it seems to me that he raised this objection with the object of squeezing a penalty out of Watt to allow him to give up his bargain.

**LORD MURE**—The only question in this case is the question of fact, whether Watt was the general law-agent of the trust or employed by the trustees to carry through this particular transaction, the purchase of these four houses? If he were so, the sale would not be a valid sale, because he did not reveal that two of the houses were purchased for himself; as to the other two, there are no grounds of law by which Dr Watt could be forced to give up the two houses he purchased. Now, I think it is quite plain that Watt was not the general agent of the trust, although he was now and again employed to do trust business, the whole management of matters was in the hands of Mr M'Pherson; even in the 3d statement of facts for the defenders, quoted by your Lordship, M'Pherson is said to have

represented the defenders. Indeed, I do not see how one person can act as agent for both parties in a matter of this kind. On the evidence I think he is not employed even in this business for the trustees.

LORD SHAND—I am of opinion that the Lord Ordinary is right in holding that John Watt junior cannot take the benefit of this contract. I think it is proved that Watt in procuring a purchaser did act as the law-agent of the trust. In the first place, I think there is no doubt that it is proved that he acted as law-agent for each member of the family—for all the beneficiaries under the trust—and that, I think, is a very material consideration. It is stated in the second article of the statement for the defenders—“Until the year 1871 the late James Edmond, advocate in Aberdeen, acted as the agent of the defenders. Since that year they, as trustees foresaid, have been in use to employ Mr John Watt junior, advocate in Aberdeen, as their legal adviser and agent in connection with the management of the affairs of the trust-estate. No formal meeting of the trustees has been held since 1871, but, acting as their agent, Mr John Watt junior has negotiated for them the investment of the funds of the trust, and in all such transactions they have been guided by his advice. Mr Watt has also acted as their agent and adviser in their own private and personal business matters. Mr Watt was also one of the trustees, and also the law-agent of the trustees acting under the trust-deed of settlement of the deceased Mrs Ann Thomson or M'Pherson, widow of the said John M'Pherson, and one of the trustees, and the law agent of the trustees under the marriage-contract trust of Mrs Jane M'Pherson or Black, a daughter of the said John M'Pherson, both of which trust-estates have an interest in the said property in Ann Place. Communications on all such business matters between the defenders and Mr Watt have frequently passed through the defender's brother Mr Hugh James M'Pherson, for whom Mr Watt also acted as law agent and adviser.” And in the answer it is admitted “that the late James Edmond, advocate, acted as the agent of the defenders, and that Mr John Watt junior has occasionally acted for them in their individual capacity. Admitted that he is one of the trustees acting under Mr M'Pherson's deed of settlement, and is law agent in her trust. Admitted that he is one of the trustees acting under Mrs M'Pherson's deed of settlement, and is law agent in her trust. Admitted that she was John M'Pherson's widow. Admitted that the said John Watt junior is one of the trustees under Mrs Black's marriage-contract, and is law agent in the marriage-contract trust. Admitted that Mrs Black is a daughter of the said John M'Pherson.” We have it admitted there that Watt was a trustee under the marriage-contract of Mrs Black, and also a trustee under Mrs M'Pherson's trust-deed. The interest of all these parties plainly is to get the highest price possible for these houses. These are elements to show the intimate tie that existed between these parties as clients and law agent; besides that, I find that down to the spring of last year Watt is law agent of these ladies, doing all the business they had to do, and thus you have him acting as law agent for every member of the family. From 1871 I gather from Mr Edmond's

evidence that all such business as there was passed through Mr Watt's hands. Now, what was M'Pherson's position? I cannot think he took up any position that would exclude his need of a law-agent. I find him saying at one part of his evidence—“I acted for my mother and sisters in regard to business matters. (Q) Were you their agent or simply acting as a member of the family?—(A) Just as a member of the family.” I take M'Pherson's position as this, that this brother is asked as a brother to act in communication with the law-agent, but he is not employed in any sense as their law-agent. M'Pherson is, if you will, practically trustee, but he is nothing more. This was not the case of a friend or a stranger looking out for a purchaser, or of a law agent agreeing to get a client of his own to become purchaser. M'Pherson therefore, I think, assumed, and was entitled to assume, that he was dealing with the trustees' law agent, and that he would have the benefit of his disinterested advice. As to the law of the case, there is no dispute; it is as your Lordship has stated it. Some of your Lordships have difficulty in conceiving an agent acting both for the buyer and the seller. I have none. The first answer is that it is done every day. Then I can see no difference between this case and the case of a borrower and a lender; both parties are entitled to rely upon their agent, and so all I say is that the position is a difficult one. The agent has to give assistance to both, and he must throughout the whole transaction show complete candour. Here the agent has arranged with his brother that he was to hand over to him two of the houses. For what purpose was that done? The object was this—he wanted to conceal the fact that he had become the purchaser, for if it had not been concealed M'Pherson might have consulted another agent, and the price might have been raised. We have it on record that it was the opinion of the person who was bound to give disinterested advice that M'Pherson was wrong in putting up the houses together. I am therefore of opinion that as he was *de facto* purchasing houses for himself, while professing to do so for another, the transaction cannot stand in law, and I am of opinion that the Lord Ordinary is right and that Mr Watt is not entitled to take the benefit of the enhanced price. I entertain considerable doubt whether the pursuers are entitled to set aside the transaction as far as regards Dr Watt. He, it must be assumed, was ignorant of the character in which his brother was acting.

The Court pronounced the following interlocutor:—

“The Lords having heard counsel on the reclaiming note for Dr Thomas Watt and John Watt junior, against Lord Curriehill's interlocutor dated 4th July 1876, Recal the said interlocutor: Repel the reasons of reduction: Assolzie the defenders Thomas Watt and John Watt junior from the conclusions of the summons of reduction, and decern: In the declarator find, declare, and decern against the defenders Ann M'Pherson and Jessie or Janet M'Pherson, as trustees, in terms of the declaratory conclusions of the summons: Find the pursuer and defenders Thomas Watt and John Watt junior entitled to expenses in both actions hitherto incurred:



allow accounts thereof to be given in; and remit the same when lodged to the Auditor to tax and report."

Counsel for Pursuers—Fraser—Rhind. Agent  
—William Officer, S.S.C.

Counsel for Defenders—M'Laren—Mitchell.  
Agents—Hagart & Burn Murdoch, W.S.

Tuesday, March 6.

## SECOND DIVISION.

### PETITION—CHRISTIE.

*Trust—Nobile officium—Provisions to Children.*

A husband bound himself in his marriage-contract to pay his widow an annuity of £100, with a liferent of furniture, &c., and to aliment, entertain, clothe, and educate the children of the marriage suitably to their position in life, until payment of a provision of £2000 to them, payable on majority of sons and on majority or marriage of daughters. By his settlement he gave his wife an annuity of £400 (subsequently increased by "an additional sum of £100 yearly for the upbringing of the family"), together with a liferent of house and furniture; and on a recital of his obligation to aliment his children, he declared that the liferent provisions for his wife were intended for her behoof and of the surviving children, it being his wish that the children should remain in family with their mother, and be maintained and educated out of the said annuity. The whole residue of the estate was to be held for division among the children, and the trustees were empowered to accumulate the surplus income, or to apply it in establishing sons in professions or the daughters in marriage. The trust-estate amounted to £50,000. After her husband's death the widow petitioned the Court to ordain the trustees to pay her £420 in addition to a sum of £500, which she had, for keeping up her house and maintaining and educating her children. They were seven in number, the eldest being fourteen years of age. The Court authorised the trustees to make increased allowances out of the surplus income for the education and support of the children, where special circumstances requiring such occurred, the advances being always made under the declarations of the trust-deed.

This was a petition at the instance of Mrs Jessie Thomson Tod or Christie, residing at Forth Bank, Stirling, widow of John Christie, brick and tile maker, Stirling, to which there were called as parties the trustees acting under her husband's trust-disposition, and the tutors and curators nominated under it to her children, and the next-of-kin of her children. She asked the Court to find that she was entitled to an additional allowance for education and the maintenance out of the income of the trust-estate, and to fix such additional allowance at £420 per annum.

Mr Christie died on 30th April 1876. The petitioner was married to him on 10th September

1861, and there were seven children, three sons and four daughters, of the marriage, all surviving, the eldest being fourteen, and the youngest three years of age. They all resided with the petitioner except George Norman, who was at a boarding-school. At the time of his death Mr Christie was possessed of property and means of the value of at least £50,000, the free annual income whereof exceeded £1700. During his lifetime his annual expenditure for household expenses, and for the clothing, maintenance, and education of himself, the petitioner, and their family, including the education of the family, considerably exceeded £1000 per annum. By antenuptial contract entered into between the petitioner and Mr Christie, dated 5th September 1861, the latter bound himself to pay to the petitioner, if she should survive him, and while she remained his widow, a free alimentary annuity of £100 sterling. He also assigned to the petitioner, in the like event of her surviving him, the liferent use, while she remained his widow, of his whole household furniture, &c., that should belong to him at the time of his decease, and he thereby bound and obliged himself to aliment, entertain, clothe, and educate the child or children of the marriage suitably to their station in life, until the term of payment of the provision thereby made for them, or until they should be otherwise provided for. The provision made for the children was a sum of £1000 in the event of there being only one child, and £2000 in the event of there being two or more children, and each child was entitled to receive payment on attaining majority, or, in the case of daughters, majority or marriage, at which date the share of each child vested. It was however provided that the interest or annual produce of the presumptive or expectant shares of the children should be payable during the suspense of vesting of such shares, after the death of Mr Christie, for the maintenance, benefit, and education of said children, in such manner as the guardians or tutors and curators of the children, whom failing the trustees acting under the trust created by the said antenuptial contract, should deem most expedient. Mr Christie, by said antenuptial contract, also nominated and appointed the petitioner and five gentlemen to be tutors and curators to such of the children to be born of the then intended marriage as should be in pupillarity or minority at the time of his decease. The provisions so made by Mr Christie in favour of the petitioner were thereby accepted by her in full of all legal rights, save what he might choose to add of his own good will only, and the foresaid provision for children was declared to be in full satisfaction of their legal rights, except what the parents might think fit to bestow, and what the children might succeed to as their heirs and executors, in so far as they should not otherwise dispose of their estate.

By trust-disposition and settlement, dated 8th February 1867, Mr Christie conveyed and made over his whole estate to and in favour of the petitioner and four gentlemen, all residing in Stirling, and the acceptors and survivors as trustees for certain purposes. After giving the usual direction for payment of debts, and directing the performance of the whole stipulations and provisions in favour of the petitioner and the children in the antenuptial contract, Mr Christie, by the third purpose of his settlement, directed and ap-