cases of dissolved partnerships a party may have a right to have a factor appointed, I do not think this is such a case.

The Court adhered.

Counsel for Petitioner — Fraser — Campbell. Agent—William Archibald, S.S.C.

Counsel for Respondent — Balfour — Lang. Agent—James Moncreiff, W.S.

Wednesday, June 13.

FIRST DIVISION.

[Sheriff of Lanarkshire.

HORNE *v.* MORRISON.

Proof—Trust—Act 1696, *c.* 25—*Writ or Oath—Mandate.*

Where it was averred that instructions had been given to an agent to purchase in the joint names and for the joint behoof of himself and his principal, and that he had wrongously taken the title in his own name, and had not communicated any share of the profits to the principal, *held* that that was not an averment of trust, and that the proof was not therefore restricted to the writ or oath of the agent.

Process — Appeal for Jury Trial — Preliminary Plea.

It is competent for a party who has appealed a cause to the Court of Session for jury trial to insist in and argue a plea to the effect that proof must be limited to writ or oath.

This was an action in the Sheriff Court of Glasgow, brought by David Horne, builder, against Archibald Maclean Morrison, writer, concluding for payment of £850, being one-half of the profits of the sale of certain subjects in Glasgow. The pursuer's averments were as follows:—"(Cond. 1) In or about the end of March or beginning of April 1876 the defender and pursuer agreed to be joint-adventurers in the purchase of ground at Firpark, Dennistoun, Glasgow. (Cond. 2) The interest of the parties in said joint-adventure was to be equal. (Cond. 3) The defender was to act as the law agent of and for the joint-adventurers. (Cond. 4) By way of carrying out the joint-adventure, said ground was, in or about the beginning of April 1876, purchased from William Wilson, builder, and John Herbertson, joiner, both in Glasgow, at the price of £1190. (Cond. 5) The said purchase was made, and the missive with the said Wilson and Herbertson entered into, by the defender as agent and for behoof of the joint-adventure, or as one of the joint-adventurers in his own name. The defender had no authority or instructions from the pursuer to enter into the missive in his own name. On the contrary, the arrangement between the parties and the pursuer's instructions were, and the defender's duty was, to take the missive in the joint names of himself and the pursuer. (Cond. 6) Shortly after said purchase the defender, acting as aforesaid, sold said ground at a profit of £1700 or thereby. . . . (Cond. 9) The defender has never made payment of the pursuer's half as joint-adventurer foresaid of said profit." Article 5 of the condescendence had been amended.

The pursuer pleaded—"(1) The pursuer and defender having been joint-adventurers in said purchase and sale, and equally interested therein, as such the defender is bound to pay the pursuer the sum sued for, being one-half of the profit made, less one-half of charges or expenses in carrying out the same. (2) The defender having acted as the law agent and for behoof of the joint-adventurers, and as such having taken the missive in his own name, is bound to communicate the benefit thereof to his co-adventurer. (3) Or otherwise, being one of the joint-adventurers and having made the purchase, as such he was and is bound to communicate the benefit arising therefrom to his co-adventurer."

The defender pleaded, *inter alia*—"(1) The pursuer's averments, at all events so far as material, can be established only by the defender's writ or oath." The defender subsequently added the following plea—"(4) The action is not relevant, in so far as it is averred that the missive of sale was taken in the defender's name contrary to instructions without an allegation that this was done fraudulently."

The Sheriff-Substitute allowed a proof, and the defender appealed to the First Division for jury trial.

It was objected to the defender's proposal to argue the questions raised by his first plea that that question could not be raised under an appeal for jury trial.

Lord President—It is perfectly certain that when a party comes here for jury trial he is entitled to take objection to there being a trial at all.

The defender then argued that under the Act 1696, c. 25, there could be no further proof of such averments as the pursuer's than the defender's writ or oath—*Alison* v. *Forbes*, July 21, 1771, M. 12,760; *Duggan* v. *Wight*, March 2, 1797, M. 12,761; *Mackay* v. *Ambrose*, June 4, 1829, 7 Shaw 699; *Marshall* v. *Lyell*, February 18, 1859, 21 D. 514; *Tennant* v. *Fyfe*, February 13, 1874, 11 Scot. Law Rep. 418. This was no question of partnership or mandate to be proved by witnesses, but a pure question of trust.

The pursuer argued—In order to bring the case under the Act 1696, c. 25, the agent must have been instructed to take the title in his own name, and here we aver the opposite — *The General Assembly of the General Baptist Churches* v. *Taylor*, June 17, 1841, 3 D. 1030; *Forrester* v. *Robson's Trustees*, June 5, 1875, 2 R. 755; Dickson on Evidence, 576; *Boswell* v. *Selkrig*, March 9, 1811, Hume's Decisions 350. An averment of fraud is not necessary. There was not necessarily fraud in so taking the title. The fraud is in defending this action.

At advising—

Lord President—The plea which stood originally on this record was this—"The pursuer's averments, at all events so far as material, can be established only by the defender's writ or oath." The plea was founded on the Statute 1696, and I think the Sheriff was right in re-

pelling that plea. I am clearly of opinion that the statute has no application to the facts averred here. The averment of the pursuer is that he entered into a joint-adventure with the defender on the footing that the joint-adventurers were to have equal shares in the adventure, and that the defender was authorised to make the purchase for behoof of the joint-adventure. In the original condescendence it was not made quite clear that in taking the title in his own name he had gone beyond his mandate. An amendment has been made in the fifth article of the condescendence which makes the statement quite clear that the defender had no authority to take the title in his own name—"on the contrary, the arrangement between the parties and the pursuer's instructions to the defender were, and the defender's duty was, to take the missive in the joint names of himself and the pursuer." Notwithstanding that, the defender took the missive in his own name, and he now says that the pursuer is barred by the Statute of 1696 from proving that the purchase was made for the joint-adventure. The statute only applies when one man trusts another to take a title in his own name. It is indispensable that the one should be acting for the other. Otherwise the statute has no application. I think the Sheriff was right in repelling the defender's plea. In regard to the defender's new plea—[*reads plea*]. I think that neither of these pleas can be sustained. The missive does not require to be taken out of the way. The taking it out of the way would have no effect unless what has followed could also be taken out of the way. But the disposition to a *bona fide* third party which followed the missive cannot be set aside. The missive is therefore binding in a question *inter socios*. As to the necessity for alleging fraud, I do not see that fraud is required. The missive might have been taken carelessly, foolishly, in good faith, and yet there might be a relevant allegation that it was taken in the agent's name instead of in the joint name of the pursuer and defender. Having taken the disposition in his own name, the fraud would consist in the defence of this action. I do not think there is any objection to the pursuer's case, and as the parties are agreed to go to a jury I think we ought to order issues.

Lords Deas, Mure, and Shand concurred, on the ground that the question was one of mandate and not of trust.

The following interlocutor was pronounced:—

"Adhere to the interlocutor of the Sheriff-Substitute, by which he repels the first plea stated for the defender in the Inferior Court: Repel also the first and second pleas for him, added to the record in this Court: Appoint the pursuer to lodge such issues as he proposes for the trial of the cause in six days: Find the pursuer entitled to the expenses of this discussion, which modify to the sum of £12, 12s. sterling, and for which sum decern against the defender for payment to the pursuer."

Counsel for Pursuer—Balfour—Asher. Agents—J. & A. Hastie, S.S.C.

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

Wednesday, June 20.

SECOND DIVISION.

SPECIAL CASE—TRAILL AND OTHERS (CAITHNESS TRUSTEES).

Succession—Trust-Disposition—Husband and Wife—Legal and Conventional Provisions—Election—Powers of Trustees.

A testator by trust-disposition and settlement gave his widow a liferent of his whole estate, and empowered his trustees to make advances out of capital to the beneficiaries to whom the fee of the estate was destined. *Held*, on a construction of the trust-deed, that the truster's widow was not entitled to the liferent and also to her legal rights, but must elect between the two; and (2) that the trustees were entitled without the widow's consent to make advances to the beneficiaries out of capital.

This was a Special Case presented by (1) John Traill, surgeon in Arbroath, and others, trustees under the settlement of the late William Caithness, corn merchant, Arbroath; (2) Mrs Caithness, the widow of the said William Caithness; and (3) her pupil grandchildren, beneficiaries under the settlement.

Mr Caithness died on 11th February 1874, leaving a trust-disposition and settlement, dated 2d May 1872. He was survived by his wife. There was no issue of the marriage. The amount of his estate, after payment of all debts and expenses, was about £1200. Mrs Caithness had a daughter, Mary Ann Gordon, by a previous marriage, who married David Wilson, and had at the date of this case two children, William Caithness Wilson and Margaret Nicoll Wilson.

The settlement of Mr Caithness contained no express declaration that the provisions in favour of the widow should be accepted of by her as in full of her legal claims. By the third purpose of the deed the widow was to have the liferent of the truster's household furniture; and under the fourth purpose she was entitled to the liferent of the residue of the whole means which belonged to him at the time of his death, the trustees being empowered and required to advance from capital, if the income of the residue should not amount to £40 yearly, so as to make up the amount to £40; it being provided, "nevertheless, that in case the said free yearly revenue shall exceed the said sum of £40 sterling, my said wife shall be entitled to receive the whole free revenue, my intention in said restriction being to prevent undue encroachment on the stock." Mrs Caithness did not accept the provision in her favour contained in the settlement. She maintained that she had right to the provisions over and above her legal claims. The trustees maintained that she must elect to take either the provisions in her favour under her husband's settlement or her legal rights. By the fifth, sixth, and seventh heads of the trust-disposition and settlement, discretionary powers were conferred on the trustees to advance or expend part of the capital of the trust-funds for certain purposes, viz., (1) under the fifth, for educating and training in business William Caithness Wilson; (2) under the sixth, for enabling him on attaining