present case that the Sheriff-Substitute has proceeded upon an erroneous view of the law in dealing with the facts before him. I am therefore in favour of "reversing" the judgment of the Sheriff-Substitute, which is, I think, the proper term under the Summary Prosecutions Appeals Act. 1875.

The Court reversed the judgment of the Sheriff-Substitute, and found the appellant entitled to £7, 7s. of expenses.

Counsel for Appellant—Lord Advocate (Watson)—Lang. Agents—Wright & Johnston, Solicitors.

Counsel for Respondent—Balfour—Robertson. Agents—Smith & Campbell, S.S.C.

HOUSE OF LORDS.

Monday, December 3.

WATT *v.* M'PHERSON'S TRUSTEES.

(Lord Chancellor, Lord O'Hagan, Lord Blackburn, and Lord Gordon.)

(*Ante*, March 2, 1877, vol. xiv., 392; 4 R. 601.)

Agent and Client—Sale—Reduction on ground that Agent was purchaser.

Where a sale took place between a client and his agent, as seller and purchaser, which was fair and reasonable and otherwise free from objection, but for the ingredient that the client had not been made aware that the real purchaser was the agent, the purchase being made in the name of another.—*Held* that the sale fell to be reduced, although the non-disclosure did not arise from fraud.

Circumstances where (*revg.* the Court of Session) a sale by a client to an agent was reduced, on the ground that there had been no disclosure of the fact that the purchase was in part made for the latter himself.

Circumstances which were *held* (*revg.* the Court of Session) sufficient to impress the character of agent upon one who had occasionally acted for a trust.

This was an action to set aside the sale of four houses in Aberdeen to one of the respondents, Dr Watt, for £1900. The appellants were Miss Ann and Miss Jesse M'Pherson, trustees of the testamentary property of their father, which included the houses in question. In 1875 Hugh M'Pherson, brother of the appellants, and who acted in the executory business of the trust, having on other occasions obtained legal advice from the respondent John Watt jun., advocate in Aberdeen, spoke to him about the sale of the houses. Watt jun. asked him not to advertise, and a few days afterwards presented his brother Dr Watt as a purchaser. The trustees, believing Dr Watt to be the only and true purchaser, accepted the offer of £1900 for the houses. But before the sale John Watt jun. arranged with Dr Watt to buy for himself two of the houses, which he subsequently resold at an enhanced price. The M'Phersons brought a reduction of the sale, and there was a counter action for implement of it. There was no implication of fraud. The other circumstances of the case are sufficiently detailed in the report of the proceedings in the Court of Session, *ante*, March 2, 1877, vol. xiv. 392, and 4 R. 601.

The First Division of Court of Session confirmed the sale, reversing (*diss.* Lord Shand) the interlocutor of the Lord Ordinary (Curriehill).

The Misses M'Pherson appealed to the House of Lords.

Their Lordships did not require a reply from the appellants' counsel.

On delivering judgment—

Lord Chancellor—My Lords, in this case two separate proceedings appear to have originated in the Court of Session in Scotland. One of these was a proceeding for the purpose of implementing, or, as we should say in this country, of obtaining the specific performance of, a contract for the sale by the appellants to the respondent Dr Watt of four houses in Aberdeen. The other proceedings commenced with a summons for reducing the documents and letters which constitute the contract for the sale of those houses. In those two proceedings, taken together, an interlocutor was pronounced by the Lord Ordinary which in substance assoilzied the defenders from the proceeding for obtaining specific performance, and reduced the contract for the sale. Against that interlocutor there was a reclaiming note to the First Division of the Court of Session, and there was a difference of opinion between the Judges. Lord Shand was of opinion with the Lord Ordinary (Curriehill) that the contract should be set aside. On the other hand, the Lord President, with Lord Deas and Lord Mure, held that an interlocutor should be pronounced in accordance with the conclusions of the summons for the implementing of the contract, and against that interlocutor, so pronounced by the Court of Session, the present appeal is brought before your Lordships.

My Lords, there is happily no serious controversy with regard to the facts of the case, and as I understand the judgments of the learned Judges below, there is no controversy between them as regards the general principles of law which should be applied. The only question is a question which arises unfortunately in many cases, namely, how these principles should be applied to the facts of the particular case? Now, my Lords, the facts of the case, so far as it is necessary to refer to them, appear to me to be these:—The appellants are two ladies in Aberdeen, who are the trustees of the testamentary property of their father. Included in that testamentary property were the four houses in question, and it was right, according to the provisions of the trust, that these four houses should be sold. These ladies appear in the management of their executry business to have acted principally through their brother Mr Hugh M'Pherson, who himself had some interest in his father's property. He appears to have been a manufacturer at Aberdeen, and a man of shrewdness and intelligence in his general business affairs; it was natural therefore that the sisters should act to a great extent through him. The respondent Mr John Watt jun. is an "advocate in Aberdeen," a term which your Lordships understand to represent what would be

called a writer in some other parts of Scotland, and would be called in this country an attorney or a solicitor.

The great question of fact in the case is what was the precise relationship in which Mr John Watt jun., the respondent, stood toward the appellants, both generally and also in the particular matter of the sale of these houses; because it appears that in the sale, which was made nominally to Dr Watt of Darlington of the whole of the four houses, Mr John Watt jun. was interested to the extent of two of them. He, as to two of the houses, and not Dr Watt, was the real purchaser, and it is also not a matter in controversy that this fact (the fact that John Watt jun. was the real purchaser of two of the houses) was not known at the time of the contract either to the two appellants the Misses M'Pherson or to their brother Mr Hugh M'Pherson. The question therefore to a great extent depends, as I have said, upon the real position which was filled by John Watt jun., because the learned Judges in the Court below, although, as I have said, they differ in their conclusions, agree about this, that if John Watt jun. had been the general lawyer, writer, or advocate for the trust, he could not, under the circumstances that I have described, maintain a purchase made of two of the houses for himself; and the learned Judges also appear to me not to differ upon this, that if the fact were established that John Watt jun. had been the law agent entrusted with the sale of these particular houses, neither in that case could he have maintained a purchase made by himself of two of the houses without the knowledge of his principals.

Now, my Lords, what was the real position of John Watt jun. So far as the evidence goes, his only connection with any members of the M'Pherson family—his only intercourse with them which can be traced in the evidence—was as a legal adviser in particular matters. Putting aside the transaction which is the subject of this suit, the particular matters in which he acted as the law adviser to the M'Pherson family are summed up by Lord Shand in his judgment, and with one or two qualifications that summing up may be accepted, as it seems to me, as a correct exposition of the evidence in the case. Lord Shand says—"The proof shows that an intimate business relation subsisted between Watt and the various members of the family who had the beneficial interest in the houses. He was law agent for every member of this family personally." [These words appear to me to be too large. The family appear to have been very numerous, for the testator was married twice, and had children by each marriage. They amounted to seven or eight, and he certainly, so far as we see, does not appear to have been the law agent for every member of the family]. "His relation to them individually is, I think, of importance in ascertaining his relation towards the trust under which they were either trustees or beneficiaries, and enters materially into the question as to the position he assumed when Mr M'Pherson first spoke to him with reference to the sale of these properties. He was law agent for the two ladies, who as trustees are the defenders here" (that is, the appellants), "in their personal business. In his evidence he explains that he was consulted in connection with Mrs M'Pherson's executry" (that is, the mother of the appellants); "that he acted for Miss M'Pherson" (the elder of the appellants) "in preparing the transfer in her favour of two small properties—one at Woodside, and the other in James Street, Aberdeen; and that he continued to draw the rents of these properties for her. So recently as the spring of 1875, a few months before the transaction here challenged, on the employment of the two ladies, given through their brother, he carried through a service in their favour as heirs of their brother George, and had them also decerned as executrices to the moveable estate. He acted for Mrs Black, another sister, in preparing her marriage-contract" (and I may add that he was a trustee of that marriage-contract). "He was Mr Hugh James M'Pherson's ordinary and only law agent, and advised him as to his contract of copartnery and contract of marriage."

Now, my Lords, upon that statement of fact I wish to say distinctly this, in order that it may be kept separate from the other observations that I have to make, that if the matter had rested upon these facts which I have thus stated in the words of Lord Shand—if there had been nothing more in the position of Mr Watt—I, for my part, should have been of opinion that there was not in these separate and distinct, and what I may term collateral, employments of Watt as law agent sufficient to have placed him in the matter of this particular sale in a fiduciary position, and to have brought him within the rules of law applying to persons who occupy a fiduciary position and who buy for themselves. But, my Lords, these facts are of importance as giving us a description of the circumstances under which Mr Watt came to be familiar and intimate with the M'Pherson family, and they enable us the more readily to understand the position he assumed with regard to this particular transaction, when we come to look at the evidence of that transaction.

I now invite your Lordships to consider the evidence with regard to this particular transaction. There are two witnesses whose evidence we must look to—the one being John Watt jun. himself, and the other Hugh M'Pherson; and I am bound to say that for all material purposes I find little or no discrepancy between the evidence of the two. Mr Watt begins his evidence by insisting upon a matter, which I notice merely because it has been put in the fore-front of his evidence, namely, the statement that on several occasions before this particular contract was entered into he had been appealed to by Hugh M'Pherson to buy some or all of these houses himself, and had refused to do so. I observe that that is contradicted by Hugh M'Pherson. I do not think it of much consequence whether it is true or not—that is to say, whether the memory of Mr Watt is better than that of M'Pherson. If it is the case that he had been appealed to to buy them, and had refused to buy them (if that could be taken as true, and if it could have any bearing at all upon the matter) it seems to me, my Lords, that the bearing would be this—it would amount to a statement which he had made to M'Pherson that he did not wish and did not intend to become the purchaser, and therefore would not only not lead M'Pherson to suspect that he was buying for himself, but would confirm him in the certainty that he did not intend to buy for his own purposes.

But, my Lords, passing from that, Mr Watt's

evidence is—"when I declined to make the purchase, Mr M'Pherson asked me to see if I could get any other person to buy the houses. That was at the same time as he proposed to raise the rents, and when I declined to buy for myself. Prior to that my brother in Darlington had employed me to buy some property at Yeal's Lane, Aberdeen. He wanted some further investment, and it occurred to me then to write him on the subject. I wrote my brother accordingly." Then lower down he says—"Before the sum of £1900 was agreed upon, Mr M'Pherson and I had various communings; I offered him £1850. He said he had seen Mr Robb the builder the other day, and that he had told him he should get now for the houses £2000 or £2100. I said that was a good deal more than their value, but that my brother might be inclined to give £1900. Mr M'Pherson asked £1950, and ultimately he said he would sell them for £1900, on condition that all expenses of the transfer were paid by the purchaser, and that he would advise his sister to accept of such an offer. When we were haggling about the price in that way, reference was made to the former attempt to sell the houses. I said they had been formerly exposed at £1800 and had not sold. All that took place about the 9th or 10th November."

Now, Mr M'Pherson makes this statement—"(Q) In the autumn of 1875 was there a sum of £2000 of your marriage-contract funds to be invested?—(A) Yes. (Q.) Did you speak to Mr Watt about finding an investment for it?—(A) Yes. (Q) In the course of conversation on that subject was there anything said about selling the property in Ann Place?—(A) Nothing whatever. (Q) How did you first come to speak to Mr Watt about the sale of that property?—(A) He could not find an investment for the £2000; he said that investments were very scarce indeed, and that he had a lot of money lying in his hands to invest for clients, but could not get properties over which to lend it, as they were going so very high in the market. He just casually mentioned that. As things were going so high, and as we had to sell the Ann Street property in 1877, I said I should think of advertising it for sale. (Q) Did you do so?—(A) I did not; he asked me not to do so as he thought he would be able to find a purchaser."

My Lords, I pause here for the purpose of saying that this conversation—the suggestion of advertising for sale made by M'Pherson, and the persuasion on the part of Watt not to do so—was noticed in the statement of facts for the appellants, and therefore Mr Watt was aware that this was part of the allegation on behalf of the appellants, and as I find in his evidence no contradiction whatever of this, I think I am entitled to take it as being a part of the conversation between himself and M'Pherson which he is not prepared to deny.

Mr M'Pherson's evidence continues thus—(Q) About what time would this be?—(A) About the end of October, so far as I recollect. (Q) When did you next hear from him on the subject?—(A) Very soon afterwards. (Q) Where was this?—(A) In my place of business. (Q) Did he call upon you?—(A) Yes. (Q) What did he say?—(A) He asked what price I wanted for the houses, and I said I thought each double tenement would bring £1000 or £1200, but that I did not know the real value of them; I then said I would take £2000. (Q) What did he say?—(A) He would not hear of it; he told me that property of that description ought to return about 7½ per cent., and he made a calculation showing me that even if we got £1900 we would be a great deal better off. (Q) Did he give you to understand that he had a purchaser in view?—(A) He told me that he had his brother. (Q) What did he say about his brother?—(A) He said that his brother had money to invest, and wanted an investment in heritable property. He had told me that before, and that his brother had told him to look out for an investment for him, but he did not say to what amount. He said he would buy the property for his brother. (Q) Was that at £1900?—(A) There was no price mentioned" (that is, on the first occasion). "(Q) At the time you had this conversation with him, when you said you would take £2000 and he said he would not hear of it, but that £1900 might be given, did he say that he had communicated with his brother?—(A) Yes, and he seemed to be able to close with the transaction. I said that if he would give me a written offer on behalf of his brother, at that sum, I would recommend the trustees to accept it. (Q) Did that close the conversation on that occasion?—(A) Yes. (Q) Can you give me the date of that conversation?—(A) It was in November, but I cannot say what day. (Q) Early in November?—(A) I think it was the day before the first letter."

My Lords, before I observe upon that, I will add here that in a letter written by Watt to his brother, which I shall have to refer to for another purpose, there occurs this sentence, "I said to Mr M'Pherson I would put these houses in your view."

My Lords, what is the inference which I draw from the testimony I have read? Mr Watt was a law agent employed by the appellants, and employed by Mr M'Pherson in other matters. It is to be considered how far he was employed by them, that is to say, how far he intervened for the purpose of giving them advice in the particular transaction now under consideration. There can be no question how he intervened or to what extent he intervened, for both he and Mr M'Pherson are agreed upon the matter. The extent to which he intervened was this—When Hugh M'Pherson was disposed to advertise the property for auction, John Watt dissuaded him; he advised him (that is to say, he gave him advice which was not the advice of a stranger, but the advice of one who had been the law agent of the family in many other matters) not to put up the property for sale by auction, although the value could thus have been obtained by a process that could have left nothing to be challenged as regarded what the value really was.

But the matter did not stop there. Mr Hugh M'Pherson, communing with Mr Watt, who was calling upon him on business with regard to the investment of a sum of £2000 of his own money, told Mr Watt that he did not himself know what was the real value of these houses, or what was the sum which he should get for them; but speaking in the same way—that is, in what I can call nothing but a confidential manner with him who was his law adviser, if you please, in other matters—he gave it as his opinion that he ought to receive for the houses the sum of £2000 or £2100, and Mr Watt, again communing with him

in this confidential manner, tells him that that was an extravagant sum, that he ought not in his own mind to think that the houses were worth that sum, and he makes a calculation based upon the return which house property of this kind should give, and advises him (for I can call it nothing else) that he would be well off and ought to be satisfied if he could get £1900 for the houses. Now, my Lords, I care not whether this was done as a piece of business for which Mr Watt might have charged as a law agent and sent in a bill of costs or not. It was done by him in that confidence which existed between him and the M'Pherson family, which made the M'Pherson family resort to him, which made in particular Mr Hugh M'Pherson resort to him upon this occasion and consult him as to the disposal of the property.

And not only is there the advice about not putting up the property for sale by auction, and as to the price which ought to be obtained for it, but there is finally the commission entrusted by Hugh M'Pherson to Watt, to obtain, if he could, a purchaser upon the terms which he had told M'Pherson he ought to be satisfied with.

In writing to his brother, the respondent admits that this was the case, and says that he had received from M'Pherson the commission of putting these houses on these terms before his notice, with a view to a purchase.

Now, my Lords, I own that after this I am somewhat at a loss to perceive the applicability of a number of cases cited at your Lordships' bar, in which a question has arisen whether an attorney has or has not been the adviser of a vendor, to use the frequent expression, *in hac re.* Your Lordships have here a narrative which makes it clear to my mind beyond a possibility of doubt that whether Watt was a gratuitous adviser or a paid adviser of M'Pherson, he was not only an adviser, but the only adviser of M'Pherson with regard to the sale of these houses, and although M'Pherson may have been a man of shrewdness and intelligence in his business, he did not profess to be a man acquainted with the value of house property, or able himself to form an opinion as to the best mode of disposing of it.

Now, my Lords, in this state of things I must say again, that although I cannot but recognise the position of Watt as the adviser of M'Pherson, still, considering that he was dealing with a man of shrewdness and business habits as M'Pherson was, if there had not occurred that unfortunate circumstance which did occur, the concealment of the fact—I use the term "concealment" in no offensive way—perhaps I had better say the non-disclosure of the fact—that Watt was himself the purchaser of two of the houses—if there had not been that element in the transaction—I, speaking for myself alone, should have been very loth upon all the other facts of the case to have held that this might not have been a transaction capable of being supported as between Watt and M'Pherson. But when added to what I have said—added to the fact that there was this confidential intercourse and advice—this which I cannot call otherwise than a fiduciary relationship subsisting between M'Pherson and Watt—when I find, in addition, the circumstances that Watt while purchasing in part for himself did not disclose that fact to M'Pherson—then, my Lords, I am obliged to come to the conclusion that the fact of that non-disclosure prevents, in the eye of any Court administering equity, a transaction which otherwise might have been valid from being supported.

My Lords, it is here that the pointed observations made by Lord St Leonards in this House in the case of *Lewis* v. *Hillman*, March 25, 1852, 3 Clark 607, become so very material. They were not observations laying down any new rule of law, for the same principles had already been applied in numerous cases; but what Lord St Leonards said in that case was this—I am not now referring to the facts of the particular case, but speaking generally—Lord St Leonards, recognising the possibility that a sale might be supposed as between a legal adviser and his client, said that in the case of a sale of any kind, which is so fair, so reasonable as to price, so entirely free from anything else that is obnoxious, as to be capable of being supported, yet if there has entered into that sale this ingredient, that the client has not been made aware that the real purchaser is his law agent—if the purchase has been made in the name of some other person for that law agent—that is a sale which cannot be supported. My Lords, so say I here; assume, if you please, that in every respect—as to price and as to all other things connected with it—this was a sale which might have been supported had the M'Pherson family been told that Watt was the purchaser, in my opinion it cannot be supported, from the circumstance that that fact was not disclosed to them.

My Lords, it does not happen in this case—it is a somewhat singular thing that it does not, for generally there is no evidence of the kind—that the objection founded on the absence of this element—that is to say, founded on the non-disclosure—does not appear to have been an afterthought. It might be so in many cases. It is very easy after the sale is transacted, and after the matter is concluded and closed, to say that if the vendor had known that the person really buying was his law agent he would have hesitated before he sold; but it does so happen that it was said here before the matter was concluded, for your Lordships have it in evidence that when Hugh M'Pherson went with the offer of £1900 to consult his sisters, and to ask them whether they would accept it, one of them said—Is this offer made to you for Mr Watt the advocate himself; and her brother said—No, it is for Dr Watt of Darlington; for (she said) if it was for himself we should require some independent advice, and that before the offer was accepted. Finding it was an offer made, as she understood, on behalf of Dr Watt, she said that she and her sister were willing to accept the offer.

My Lords, some question was raised in this case as to whether at the time of the contract the respondent John Watt was really buying in part for himself, or whether the transaction was not rather this, that the purchase was made in the first instance by Dr Watt, and that there was afterwards a resale to John Watt of two of the houses. My Lords, there is in evidence, not a complete letter, but a part of a letter between John Watt and his brother Dr Watt—the letter I have already referred to. It has been so lately under your Lordships' notice

that I will not read it again. It is sufficient to say that I am unable to read that letter and to entertain the slightest doubt that the nature of this transaction was this:—That before any contract was made—before any assent was given by Dr Watt to the proposal to buy any of the property—the proposal made to Dr Watt by his brother was this:—There are four houses to be sold; if you will buy two, I will buy the other two, and we will get them at such and such a price—so much for your two, and so much for my two. My Lords, it seems to me that in principle the case is exactly the same—neither better nor worse—than it would have been if, in place of Dr Watt being beneficially interested in two of the houses, he had not been interested in any one of them, and the person really interested in the whole had been John Watt.

The only further observation I have to make is, that even as to the two houses in which Dr Watt is interested, it seems to me impossible that the sale can be supported, for the sale as between the vendor and purchaser was one complete and entire sale, and even if you were to separate it into parts, and to look at it as a sale first of two houses to John Watt, and then of two to Dr Watt, the principle upon which, as between John Watt and his brother, the price was arrived at was this—that John Watt should have his two houses at one-half of the total price, and every mischief therefore which would exist, and which would render it impossible that an agent or a person in John Watt's position should purchase for his own benefit, would apply to the mode in which the price was fixed for the houses of which Dr Watt was the purchaser.

My Lords, the result is, that I am obliged, with great respect for the three learned Judges of the Court below who were of a different opinion, to advise your Lordships that the sounder conclusion was that arrived at by Lord Curriehill and Lord Shand, and to propose to your Lordships that the interlocutor of the Court of Session should be reversed, and that, on the other hand, there should now be an interlocutor or order reducing, decerning, and declaring in terms of the conclusions of the summons for reduction, and in the original action assoilzieing the defenders M'Pherson's trustees from the whole conclusions of the summons, and decerning and finding Thomas Watt and John Watt junior liable for expenses in both actions, and also for the expenses of this appeal; and there should also be an order to repay any costs which may have been paid under the interlocutor of the Court of Session, and that with this the cause should be remitted to the Court of Session.

Lord O'Hagan—My Lords, after some hesitation I have arrived at the same conclusion, and I should be content to rest it on the reasons so amply given by my noble and learned friend, but that my sincere respect for the opinions of the learned Judges in the Court below, from which I feel constrained to differ, induces me to state briefly the grounds on which I think myself justified in holding that this appeal should be allowed.

On the law of the case there has been no real controversy, either in Scotland or at your Lordships' bar. An attorney is not affected by the absolute disability to purchase which attaches to a trustee, but, for manifest reasons, if he becomes the buyer of his client's property, he does so at his peril. He must be prepared to show that he has acted with the most complete faithfulness and fairness; that his advice has been free from all taint of self-interest; that he has not misrepresented anything or concealed anything; that he has given an adequate price, and that his client has had the advantage of the best professional assistance which, if he had been engaged in a transaction with a third party, he could possibly have afforded; and although all these conditions have been fulfilled, though there has been the fullest information, the most disinterested counsel, and the fairest price, if the purchase be made covertly in the name of another without communication of the fact to the vendor, the law condemns and invalidates it utterly. There must be *uberrima fides* between the attorney and the client, and no conflict of duty and interest can be allowed to exist.

The law being clear, there is not much contradiction in the evidence. So far as there is any, it arises between Mr Watt and Mr M'Pherson; and the Lord Ordinary has said in the note to his interlocutor—"Having seen and heard both of the witnesses, I am inclined to adopt the version given by Mr M'Pherson." The impression made upon the Judge who has heard *viva voce* evidence, and noted the demeanour of those who have given it, is rarely to be disregarded by an appellate tribunal. In my view, however, there is enough in the facts, which are not disputed, to decide the issue in favour of the appellants.

There are only two questions in the case—Was Mr Watt the agent of the appellants for the purposes of the sale? And if he was, did he conceal the fact that to a large extent the purchase was for himself, though nominally made for his brother? If these questions be answered in the affirmative, as I think they ought to be, the transaction cannot be maintained.

As to the agency, your Lordships have heard much statement and argument with reference to the relations of Mr Watt to the trust-estate before the sale of the houses, and there can be no doubt that on some occasions he acted as law agent to the trustees. But those occasions were not numerous or important, and if there had been nothing more to be considered, the occurrences antecedent to this purchase could scarcely have been held sufficient to make it void. They are, however, of some importance, as showing that when Mr M'Pherson came to communicate about the houses with Mr Watt he did not meet with a stranger, but with one who had had professional relations with him as to the subject-matters of the trust, by whom the trustees had been advised, and in whom they had confided. In this way they may throw some light on the probable understanding of the parties in entering on the business of the contract.

In that business, if Mr M'Pherson is to be relied on, he dealt with Mr Watt as an agent through it all; he had "no doubt" of the agency, and before the Lord Ordinary he swore that he looked upon Mr Watt as "commissioned for the trustees." He gives at length an account of two interviews, from which I shall read a few words of the first interview. He says—"As things were going so high, and as we had to sell the Ann Street property in 1877, I said I should think of

advertising it for sale. (Q) Did you do so?—(A) I did not; he asked me not to do so, as he thought he would be able to find a purchaser." And of the second—"(Q) What did he say?—(A) He asked what price I wanted for the houses, and I said I thought each double tenement would bring £1000 or £1200, but that I did not know the real value of them. I then said I would take £2000. (Q) What did he say?—(A) He would not hear of it; he told me that property of that description ought to return about 7½ per cent., and he made a calculation showing me that even if we got £1900 we would be a great deal better off."

What is the statement on the other side? Mr Watt's account of one of the interviews appears to me more fatal to his case than that of Mr M'Pherson. He says that the latter had repeatedly urged him to buy the houses, and that he had declined. On this point there is some dispute between them. In my opinion it is not very material. But there is a sentence which appears of much significance—"He" (M'Pherson) "then said that if I heard of anyone wanting such a property I might let them know." And again—"When I declined to make the purchase, Mr M'Pherson asked me to see if I could get any other person to buy the houses." If Mr Watt be right in saying that he had been pressed to purchase for himself, we have him in this position—He had advised Mr M'Pherson not to advertise the sale. He had given the best reason for believing that he had no notion of being himself the purchaser, and *uno flatu* with his refusal he accepts what Mr M'Pherson, seemingly with some reason, calls a "commission" to see, in his own words, "if he could get any other person to buy the houses." Then we have his evidence that he actively proceeded to execute the commission, and that he passed between his brother and Mr M'Pherson, with whom he had "various communings," in which the value of the property was discussed, and the price was ultimately agreed on, after much "haggling," for the purpose on his part of reducing it.

Certainly it is notable that in labouring for the reduction Mr Watt was labouring for himself without the knowledge of Mr M'Pherson, for it would seem that at that time he had not only contemplated but arranged furtively with his brother for a resale to himself of half of the premises which he had so cheapened, and which by his advice had not been offered to public competition. It is scarcely matter of surprise that when his true position was discovered, and it was found that he had made substantial profit by the transaction, the trustees were not disposed to allow it to pass unchallenged.

Then we have the evidence of his activity in the mutilated letter to his brother, to which the Lord Chancellor referred. But I will dwell no more on this branch of the case. It seems to me that, on the evidence of Mr Watt himself, and the undisputed circumstances, he must be considered to have acted as an agent, with all the responsibilities and disabilities attaching to that position. We have heard much ingenious reasoning as to the necessity of establishing agency, not in a general way, but *in hac re*. I can only say that if Mr Watt was an agent at all, he was an agent *in hac re* in the matter of the sale which he was "commissioned" to undertake and undertook accordingly.

If the first question be rightly answered in the affirmative there can be no doubt about the answer to the second. There was admitted concealment, or, if you will, non-disclosure, of the fact that Mr Watt was really purchasing in part for himself, and I concur with my noble and learned friend—indeed, Mr Davey did not controvert it—that if Mr Watt can be held to support a purchase, so covertly accomplished, of two of the houses, he must have been equally entitled to maintain under like circumstances a covert purchase of the four.

As to the proof of concealment, I content myself with taking one question and answer, which establish beyond doubt that at the time of the sale the re-sale had been agreed on—"(Q) Can you tell us as nearly as possible the exact date when your brother agreed to re-sell two of the houses to you?—(A) It was before I closed the bargain with Mr M'Pherson. Upon the 9th November I considered that my brother had bought the four houses for himself. It was before that that he had agreed to re-sell the two to me. He wrote me to that effect." If Mr Watt was agent when that re-sale took place, he cannot possibly take the profit of his bargain.

I shall add nothing more. It is not necessary to discuss the question as to the inadequacy of price or any other question, or to investigate the motives which may have actuated Mr Watt. He may not have had any fraudulent design; he may have conceived himself warranted in acting as he did; he may not have apprehended the duties imposed by his fiduciary relations. But it is not the less clear that the law must be enforced and the purchase nullified.

I do not think it necessary to add anything to the observations of the Lord Chancellor. As to the difficulty which seems to have pressed some of the learned Judges with reference to the dual agency, I concur with Lord Shand that a single agent may well advise, and often does advise, a buyer and a seller, although the duty is one of difficulty and delicacy, and I do not see that in discharging it he is relieved from the obligations as to each which confessedly he would owe to one of them if acting for one only.

On the whole, I am of opinion that the judgment of the Court below should be reversed and the appeal allowed, with costs.

Lord Blackburn—My Lords, I am also of the same opinion.

I think that in this case there is not any real dispute as to what the law should be, for although there may have been a little difference perhaps in the manner in which it has been enunciated at different times, I think both in England and in Scotland the real substantial law is agreed upon. I think also that when one looks at the evidence in this case there is not any real conflict of testimony as to what the facts are. But there is a very great conflict of opinion in the Courts below as to what the proper inference to be drawn from those facts is, and there have been three of the learned Judges in the Courts below taking one view, while two have taken the other. I myself, in common I believe with all your Lordships, have come to the same conclusion as the minority in the Court below. I need hardly say that it was with me a matter of very considerable doubt, and requiring much considera-

tion, to see whether the proper inference was the one to which I have ultimately come, and for some considerable time I hesitated about that a good deal.

Now, I will begin with some things about which I take it that in this case there is no doubt. Mr John Watt junior is an "advocate in Aberdeen" that is the same thing as what would be called in other parts of Scotland a writer, and is almost, though not quite, identical with what we should call in England an attorney or a solicitor; as such he not only pursued the branch of the profession which relates to the conducting of law suits, but also acted as a conveyancer, and what used in old times to be called a "money scrivener," in making and procuring loans, and he also acted to some extent as a broker in the purchase and sale of estates. All those branches of the profession are pursued by writers in Scotland, and by attorneys and solicitors in England, and they all necessarily involve this, that the writer or the attorney must stand towards his client in a position in which there has been, or rather in which there is, confidence more or less reposed in the attorney by his client. It has often been said that that circumstance does not render it impossible for an attorney to purchase property from his client, and that the mere fact of his being an attorney purchasing would cast upon him no more duty than would be cast upon a person in any other profession. If he purchases from his client in a matter totally unconnected with what he was employed in before, no doubt an attorney may purchase from one who has been his client, just as any stranger may do, honestly telling the truth and without any concealment, but being in no respect bound to do more than any other purchaser would do. But when he is purchasing from one with whom the confidential relation has existed or exists, it becomes very frequently indeed very wrong of him to purchase without doing a great deal more than would be expected from a stranger. In some cases it may turn upon this, that the attorney having been the general agent of the seller, has acquired an intimate knowledge of the condition of the property, and not only learned as much as the seller himself knows, but perhaps a good deal more; in these cases he has acquired the knowledge as being the general agent of the vendor, and he has an unfair advantage in consequence, and there must not be an abuse of the knowledge which he has so acquired. In other cases the general agent has acquired an influence over his client—I may say an undue influence—and there have been many more cases of a similar character, all of which Mr Davey referred to in his able argument at your Lordships' bar, but I think not one of them really bears upon the question we have to consider.

My Lords, I think it but fair at once to state that there is no pretence here for saying that Mr Watt was the general agent of the M'Phersons in such a sense as to have acquired a particular knowledge about these houses, and so did what would have been very wrong in purchasing them himself. Nor do I think that there is any ground for supposing that there was any undue influence exercised by him. I agree with what was said by the noble and learned Lord on the woolsack, namely, that if there had been a disclosure of himself as purchaser—if he had said what was the fact, my brother Dr Watt and I are going to buy these houses between us—and had then gone on with the purchase, I now say, as at present advised, and speaking for myself alone, I should have thought that there was nothing to prevent the transaction standing.

But then there is one branch of the relation between attorneys and clients which does bear upon this. In a case which was referred to and cited at your Lordships' bar—*Holme* v. *Seacome*, 1853, 4 De Gex, Macnaughten, and Gordon, 528, Lord Justice Turner mentions among the instances in which an attorney cannot be allowed to deal with his client without divesting himself of his character, all cases in which the circumstances are such as to make it his duty to give advice to his client. When that is the case he cannot make a bargain without putting himself, as it has been commonly phrased, at "arm's length" from his client. From the very nature of things, where the duty exists that he should give his client advice, he cannot properly give that advice when he is purchasing himself without telling him that he is purchasing. The mere fact therefore that he does not disclose that he is a purchaser, or that he is interested in the purchase, in cases where the client might say it is your duty to give me such advice, gives the client a right, upon discovering the fact that the purchaser was in whole or in part the attorney whose duty it was to give him advice, to say, I have an option either to set the purchase aside, if I please, or to let it stand, if I prefer to do so. The client is entitled to say—this may be a very fair and proper bargain, but I do not choose to let it stand. I think the law both in England and in Scotland is that in such cases we do not inquire whether it was a good bargain or a bad bargain or anything else before we set it aside. The mere fact that the agent was in circumstances which made it his duty to give his client advice, puts him in such a position that, being the purchaser himself, he cannot give disinterested advice—his own interests coming in conflict with his client's—that mere fact authorises his client to set aside the contract, if he chooses so to do.

Now, my Lords, the real question which has arisen here has been, I think, What position Mr John Watt junior in fact stood in to M'Pherson's trustees? The two ladies were the trustees, but Mr Hugh M'Pherson, their brother, of whom so much mention has been made, was also one of the beneficiaries, and I think we may fairly treat the case as if he had been one of the trustees. He had to go to his sisters and consult them and get their consent; but for practical purposes I do not think there is much difference between the case as it stands now, Hugh M'Pherson being the man who made the bargain as the agent of the trustees, and what it would have been if he had himself been one of them. When we come to look at the position of Mr John Watt junior, what were the circumstances? I think Mr Edmond had been the regular agent for the trust-estate as long as there was any considerable estate to administer, or as long as there was much to be done, but before this time he had dropped out of it. I do not think it had been formally said that he should be no longer agent, but he had ceased to do much or anything. There had recently been only two or three small things which had to be done by the trustees, and these two or three small things

were all done by Mr John Watt junior. I do not think there was enough in that to enable any one to say that he was the regular agent in such a manner as to acquire a knowledge of the condition of the property and so forth, but he had been employed as the attorney of the trustees in two or three small transactions. He was also the attorney for Mr Hugh M'Pherson himself; he had acted for him in various things, and was acting for him in the very thing out of which this negotiation originated. He had also been law-agent for one or two members of the family, and also for the two trustees, in what little they had to do in their own private affairs as distinguished from the affairs of the trust. I quite agree that no one of these things makes him the agent *in hac re* of the trustees, but it is impossible not to see that these facts have an important bearing upon this point, namely, whether, in the transaction which did follow, the trustees had a right to expect that Mr John Watt junior would give them advice?

What actually took place was this—Mr Hugh M'Pherson sent to Mr Watt when Mr Watt became the tenant of one of these houses at Whitsuntide (that was in May) 1874, and asked him if he would buy. He said he would not. Mr Hugh M'Pherson says, I think, that he did not do that. I think it is most likely that Mr Watt's memory may be right about it, and that he did do it at that time. Mr John Watt uses some phrases in his evidence as if this offer had been renewed, and renewed much nearer to October 1875, but Mr Hugh M'Pherson denies that, and I do not myself think that it is very material whether that was the case or not. But what did take place, at some time near to October, is this —Mr Hugh M'Pherson consulted Mr Watt as his attorney (for it is clear that he did so consult him) about getting an investment for £2000 under his marriage-settlement. Mr Watt told him, what I daresay was quite true, that money was very plentiful, and said that he had a great deal of money in his hands seeking employment, which he could not get for it, and that, in short, Mr M'Pherson would have some difficulty in finding an investment whereby he could lend his £2000 upon house property. Upon this—and here, I think, the evidence of both agrees—Mr M'Pherson said—If that is so, I think it will be a good time to sell the four houses, or the two sets of houses, belonging to the trust; and then there comes a slight difference in the words, but I think none in the substance. Mr M'Pherson said—I think I will advertise them. Mr Watt's account of the conversation here varies a little from Mr M'Pherson's, but both agree in this—that he said, I can get a purchaser for them in a client of mine. My brother Dr Watt is seeking to invest money, and I think I could get him to invest it in these houses.

Now, my Lords, if the first part of that had stood alone simply and solely, and without mention of the fact that his own client was likely to be the purchaser, if he had said, I think I can find you a purchaser, and if Mr M'Pherson had said, try and get an offer to purchase if you can when I shall submit your offer to the trustees—I think it would be impossible to doubt that Mr John Watt junior would in that case have undertaken the duty which an attorney employed in the ordinary way to look out for a purchaser of a house would have taken upon himself—to advise the seller, and to get the best possible price for him; but this is not quite all that was said. I think the fact of his having been the law adviser and acted as the business man of so many of the family would be material in coming to that conclusion, it would be rather an inference of fact than anything else, but I think as an inference of fact it would be irresistible.

But then he does say, I will try and get a purchase from a client of mine, and not only get a purchase from a client of mine, but I will try and get my own brother, mentioning his name, to purchase; and it is upon that, I think, that there has arisen in the mind of the Lord President the principal difficulty in the case. For myself, I quite agree, and concede at once, that whenever an attorney says, If you are wanting to sell your property which I am managing for you, I have got a client of my own wanting to purchase, shall I mention it to him? the attorney does not then promise that he will screw up his client—the fact that it is his own client that he is to go to would negative that. I agree with the Lord President to this extent, that in settling the price he could not be the agent for both parties. But with the greatest deference to the Lord President, I cannot follow his reasoning beyond that—I cannot see that he cannot be an agent with the duty to give any advice at all if he acts as agent for both; it seems to me to be the contrary. It seems to me, as Lord Shand puts it, it is every day's practice, or a common thing, for a man to act as the agent for both sides, and to give both sides disinterested advice up to a certain point.

I think that Mr John Watt shows pretty well here what might have been done by an agent for both sides. He writes to his brother whilst the transaction is pending, and says that it is at Mr M'Pherson's request that he brings the matter before his view; and when he says he will himself buy two of the houses, and proceeds to advise and to argue that it would be a good offer for him (the brother) to make, he points out that the rent is so and so, the feu-duty so and so, mentions other particulars, and that the price is so and so, and in all respects he says (that is the meaning, I think), you will be well advised if you make this offer; it will be a good thing for you. That was giving his brother advice, and I do not think that that was in the slightest degree inconsistent with his duty to the M'Pherson trustees. They had told him, You may offer it to your brother, and make him the purchaser, and in doing so they had impliedly said, you may advise him if you like whether he shall enter into the bargain or not; do not betray our secrets, but give him what advice you please. But, on the other hand, although the M'Phersons had done that, they were, I think, his clients, and they were entitled to have the advice, and the *bona fide* advice, of Mr John Watt junior as to what they should do. He was perfectly entitled to come to them and say—My client is willing to give you £950 for two houses, or £1900 for the four houses, and I advise you to take it; he was entitled to give them any reason or arguments that he thought proper, but they were all to be *bona fide* reasons or arguments. He was advising them, but although he was doing that, he was quite in a different position from a man who was a stranger bargaining for himself. Such a man might argue with

them and say—Your house is not a good one; he might say it was valueless (" It is nought, it is nought, saith the buyer," is a proverb 3000 or 4000 years old), and you had better sell it a great deal cheaper and take a smaller price for it. He might argue it in that way. When a vendor is dealing with a purchaser in that way the purchaser is not to tell him any lies, but the purchaser may argue as he likes, and the vendor has no right to say I expect and believe that you will give me disinterested advice. On the other hand, when an attorney is acting for both sides, it is otherwise. Then the vendor has a right to expect that there shall be disinterested and true advice given to him, and I do not see the practical difficulty of giving it.

My Lords, I need not enter further on the subject, for the view on the one side was put by the Lord President, and was concurred in by Lord Deas and Lord Mure, and the view on the other side was put by Lord Shand in his opinion to which your Lordships' attention has been already called by the noble and learned Lord on the woolsack; and in the printed case for the appellants prepared in Scotland, the same view is extremely well argued, and upon the same footing. It all comes round to the same point, as it seems to me, and that is, What is the proper inference of fact upon the facts before us? It is that at that time Mr John Watt junior was the agent of the M'Phersons to this extent, that he ought to have given them advice, and if so, his buying the property for himself without their knowing it entitled them upon discovering that fact to set the contract aside.

There remains only one thing further to be observed. Every attorney dealing at all for himself will certainly be wise and prudent, if it is not known to the vendor that he is dealing for himself, to disclose that fact to any persons who may be his clients; it will save him the risk of having his contract set aside; but further than that I do not, as at present advised, think it is shown that there was anything morally wrong in the conduct of Mr John Watt junior, and Dr Watt is free from blame altogether, as far as I can perceive, except so far as he was aware that his brother was very likely to make the contract with people who might trust him—certainly not further than that. Then came the question, Notwithstanding that, is the contract to be set aside in the case of Dr Watt as well as in the case of John Watt junior? My Lords, I have come to the conclusion (I am sorry for it, because I think it presses hardly upon Dr Watt) that the contract is one entire contract for all the four houses as a lump thing, and if we were to say that one part of it should be set aside and the other part enforced, we should really be making two contracts of it. It follows that if we say that it ought to be set aside in the case of John Watt junior, it must be set aside altogether, and consequently the appeal must be allowed *in toto*.

I agree entirely with the practical result which the Lord Chancellor mentioned as being the judgment which the House ought to pronounce, and I have nothing further to say upon the case.

Lord Gordon—My Lords, in this case there has been considerable difference of opinion in the Courts below, and therefore the case as submitted to us has presented some difficulties. These difficulties arise, however, chiefly from the inferences to be deduced from the facts which have been in controversy in the case. So far as regards the law, I think there is really very little, if any, difference between the views of the majority of the learned judges in the Court below and the views of your Lordships as founded on the law of England. In fact the law of Scotland has to a great extent been founded on English decisions.

The question of fact was the first point that created any difficulty, and I may say it was the only difficulty in the Court below. That question was, Whether Mr John Watt junior acted as agent for the M'Pherson trustees? Now, I am of opinion, with Lord Shand and Lord Curriehill, that substantially there is proof that Mr Watt acted as agent for the M'Pherson trustees in many matters, but not certainly to such an extent as to make him possessed of any confidential information with reference to the sale of these houses. But then we have also to consider (and this the point chiefly urged by the respondent) whether there is evidence that Mr Watt really was acting as agent *in hac re* for the trustees with reference to the sale of these houses. Now, upon that part of the case I must say that, looking to what has been proved, I am inclined to think that he must be regarded as having acted as their agent *in hac re*. He did in point of fact act as agent for the trustees in reference to trust matters, but still it was only to a limited extent, and I do not hold that that was sufficient to inculpate Mr Watt so far as regarded the issue raised in the present case. But I think it is proved that after Mr Edmond ceased to carry on active business, or after his death, what business had to be performed for the trustees, although perhaps it might not always be in trust matters, was performed by Mr Watt. The trust business, however, was very limited in amount after Mr Edmond's death.

But, my Lords, I think that the facts tend to show—at least the inference to be drawn from the facts establishes—that the appellant was the agent for the trustees with reference to the sale of the houses in question. He was advising Mr M'Pherson, who represented his sisters, the substantial beneficiaries under the trust, as to the sale of the houses. He (Mr Watt) recommended that the properties should not be advertised for sale, and said that he would try to find a purchaser for them. That brings him into very immediate contact with Mr M'Pherson upon a most important matter. He says—" Do not advertise the subjects for sale. I will endeavour to find a purchaser." I think this shows that he was an agent in the matter for the trustees. It was for the benefit of the trustees that he tried to find a purchaser; he professedly and openly had no personal interest in the matter to find a purchaser. He could not make a charge against any person except the trustees for the trouble he took, and if he found a purchaser he would be paid for his trouble by means of the fees which he would receive as agent for the trustees. With reference to the disposition which would be granted by the trustees to the purchaser, I may refer your Lordships to part of the missive of sale, in which Mr M'Pherson writes on the 9th November—" I am in receipt of your two letters of this day, and having duly submitted the offers for the four (four half) houses at Ann's Place to my sisters, surviving trustees

of my late father, they have authorised me to accept of the same on the conditions, namely, One thousand nine hundred pounds, say £1900 cash, the purchaser paying all expenses connected with the transfer." Now, if there had been a transfer executed carrying out these missives, it would naturally have fallen to Mr Watt to prepare that transfer, and Dr Watt's agent, or Mr Watt himself, under the employment which he had accepted from Mr M'Pherson to find a purchaser, would have been entitled to charge for the fees connected with that transfer.

I think, therefore, that Mr John Watt junior was not merely the agent generally for the trustees (that went only to a limited extent, I admit, and perhaps not to the extent of making him subject to all the liabilities of a law agent, and all the penalties of it), but that he was also their agent specially for the sale of the houses in question. That being so, I think there can be no doubt of the law to be applied to the case. It has been so fully stated by the noble and learned Lord on the woolsack that it is unnecessary for me to do more than to say that I quite concur in the views which have been expressed.

Interlocutor of Court of Session appealed against reversed; order made to reduce, decern, and declare in terms of the conclusions of the summons for reduction; and in the original action to assoilzie the appellants M'Pherson's Trustees from the whole conclusions of the summons; and to decern and find Thomas Watt and John Watt junior liable in expenses in both actions and of this appeal, and that any costs paid under the interlocutor of the Court of Session be repaid; and cause remitted to the Court of Session.

Counsel for Watt (Pursuer and Respondent)—Davey, Q.C.—Rhind. Agent—R. M. Gloag, Solicitor.

Counsel for M'Pherson's Trustees (Defenders and Appellants)—Kay, Q.C.—Herschell, Q.C. Agents—Simson, Wakeford, & Simson, Solicitors.

Thursday, November 29.

HUNTINGTON COPPER AND SULPHUR COMPANY (LIMITED) *v.* HENDERSON.

(Before the Lord Chancellor, Lord O'Hagan, Lord Blackburn, and Lord Gordon.)

(*Ante*, January 12, 1877, vol. xiv. 219, 4 Ret. 294.)

Public Company—Director—Trustee—Promotion-Money.

A mining company sued one of their directors for £10,000, which they averred he had received from the persons from whom the company had purchased their mines, out of the price paid therefor, as an inducement to him to become a director, and to promote the formation of the company and the consequent purchase of the mines. The defender admitted that he had received £10,000 from the vendors, but averred that this sum was paid to him in terms of an agreement between him and the vendors, whereby he undertook to render various services to the company, when formed, outwith his duties as a director. These services he claimed to have actually rendered. There was no mention of any such agreement in the prospectus; none of the other directors were made aware of any such agreement; nor did they understand that the defender rendered any services to the company except in his capacity of director.—*Held* (affirming judgment of Court of Session) that the defender was bound to repay the £10,000 to the company.

In 1871 a project was set on foot to create a company for the purchase of certain copper mines in Canada. Before the company was formed William Henderson, chemical manufacturer in Glasgow and Irvine, agreed to become a director on condition that he received £10,000 out of the purchase money to be paid by the proposed company to the vendors. This sum was paid, but no mention was made of it in the prospectus or in the memorandum of association, &c., of the Company. This was an action by the Company against Henderson for repetition of the money. He resisted the demand, on the ground that the money had been paid for a variety of services which he had rendered to the Company or was afterwards to render to them outwith his ordinary duties as director. The other circumstances of the case are detailed in the report of the proceedings in the Court of Session, *ante*, January 12, 1877, vol. xiv. 219, 4 Rettie 294.

The First Division of the Court of Session, adhering to the interlocutor of the Lord Ordinary (Young), held that Henderson was bound to repay the £10,000, with interest.

Henderson appealed to the House of Lords.

Their Lordships did not hear counsel for the respondents.

On delivering judgment—

Lord Chancellor—My Lords, I am somewhat at a loss to understand why it has been thought desirable to bring this case under the review of your Lordships, for I must say that looking to the well-known principles upon which the Courts have now become accustomed to deal with transactions such as that which your Lordships have before you, I should have been of opinion that the case was entirely free from any kind of doubt.

My Lords, I will state very shortly the way in which the case presents itself to my mind, and for that purpose it will be desirable to look at it, first, from the point of view from which the outside public would look at the circumstances under which this Company originated. They of course would be aware of the prospectus which was issued with regard to the Company, and those who were taking shares would be aware of the memorandum of association. Now, the prospectus of the Company announced the names of the directors, and the leading, and apparently the most important, name held out to the public was that of the appellant, who was described as "William Henderson, of Buchanan Street, Glasgow, patentee of Henderson's metal extracting process." The memorandum of association of the Company, of which he is one of the directors, states that the objects for which the Company was established were in the first place—"To adopt and carry out a contract dated the 25th and 26th March 1872,