

At advising—

LORD PRESIDENT—I am disposed in this case to agree with the pursuers, and hold that they are entitled to immediate declarator of trust.

I think it is doubtful whether the statute applies, for to let it in the truster—the owner of the property who alleges that the property is held in trust—must have consented to an absolute title being taken in the trustee's name; then proof *prout de jure* is excluded. Now, here the only evidence that the absolute title was taken with consent of the truster—the owner—is to be found in the minutes of the company, who are the pursuers, and the pursuers being a company cannot speak through anything but their minutes. Now, there is nothing to say that these three directors are to have the lease in absolute terms, either in the deed or in any other writing. It is clear on the minutes that the lease was to be taken in names of these three directors, because the Crown would not give a lease to a company, and it is further stipulated that there should be a mutual deed by the lessees declaring the trust. The shareholders never accepted the lease on any other terms, and that arrangement is set forth in a report which was approved of by the shareholders.

But even if the statute applies there is abundant evidence to show that the arrangement was binding on this gentleman, and that under his own hand. I do not refer so much to the minutes and reports, because in one sense they may be said not to be under his hand, but to the agreement dated 27th March 1877, which sets forth as distinctly as possible that the Pant Mawr Slate and Slab Quarry Company (Limited) has, in the name of trustees for its behoof, acquired from the Crown the lease of all that tract or parcel of land, containing in the whole 207 acres or thereabouts, known as the Pant Mawr Quarry. Now, that is a probative instrument, tested as required in terms of the statute, and executed by the defender as a director. It is said that it is not executed by him as an individual, but that does not matter, as the authority was to take the lease as a director. Then we have another document, three years later, in the form of a letter to the liquidators of the company, signed by Mr Fleming among others, in these terms:—"We, the undersigned, are desirous that you should call a meeting (as early as possible) of the shareholders of the Pant M. S. & S. Quarry Company, Limited, to discuss the position of the company generally, and more especially to resolve whether or not the lease of the quarry should be renounced." What the shareholders had to do with renouncing or not renouncing the lease it is impossible to say if they were not the lessees.

Further, this supposed lessee was never in possession of the quarry, whereas the Company has been working it, was constituted apparently to work it, and derives its name from it. I do not know that any evidence could be better in a declarator of trust, and I am therefore for decerning in terms of the conclusions of the summons.

LORD DEAS—Putting the case in the most favourable light for the defender, and assuming that the case falls under the Statute 1696, c. 25, I am of opinion with your Lordship that there is ample proof to satisfy the requirements of that statute. That being so, I do not speculate as to

whether the statute applies or not—a question which is sometimes complicated enough; on the simplest ground I am satisfied that the evidence is sufficient.

LORD SHAND—I am of the same opinion. I think that there is sufficient proof of trust in the two documents founded on by the pursuer—first, the agreement of 1877, which bears that the lease was taken in trust for behoof of the pursuers; and second, the letter of 1880, which bears that the company were to resolve whether the lease was to be renounced; that could only be if Fleming was a trustee.

While I am of that opinion, I concur with your Lordship that the pursuer would not have been confined to a proof by writ or oath. This is one of a class of cases in which an agent is authorised to take a deed in one capacity and takes it in another, without preserving evidence of the trust. Mr Fleming was just such an agent, and therefore I think the pursuers would have been entitled to a proof of their averments.

I am of opinion that the case has been clearly made out on the writs, and that we should decern accordingly.

LORD MURE was absent on Circuit.

The Court recalled the interlocutor of the Lord Ordinary, and decerned in terms of the declaratory conclusions of the summons.

Counsel for Pursuers—J. P. B. Robertson—Hay. Agents—Rhind, Lindsay, & Wallace, W.S.

Counsel for Defender—Rhind—Watt. Agent—Alexander Sutherland, Solicitor.

Thursday, January 18.

FIRST DIVISION.

[Lord Kinnear, Ordinary.]

STEWART AND OTHERS (MARTIN'S TRUSTEES) v. RAE AND OTHERS.

Property—Disposition—Liferent and Fee—Infertment in Liferent—Revocation.

A husband and wife purchased in 1835 certain heritable subjects, and took the disposition to themselves and the longest liver of them in liferent, for their liferent use alienarily, and to the children of the marriage in fee, whom failing to the wife's nearest heirs whomsoever. The spouses were infert in liferent for their liferent use alienarily, but no infertment was taken in the fee. There were no children of the marriage at the date of infertment, but four were born subsequently. In 1855, after the birth of the children, the spouses revoked the destination of the fee, sold the subjects, and, along with the original sellers, granted a disposition conveying the fee away from their children, reserving their own liferent. *Held* that no indefeasible right had been vested in the children by the disposition of 1835, which was therefore revocable.

By disposition, dated 5th October 1835, John

Barrie, portioner in Kirkintilloch, heir-at-law of the deceased John Barrie, and John Henderson, trustee and executor of the deceased John Barrie, in consideration of the sum of £200 paid to John Henderson, as trustee and executor, by Margaret Barrie, wife of James Rae, weaver in Kirkintilloch, conveyed to James Rae and Margaret Barrie, his wife, and the "longest liver of them, in life-rent, for their life-rent use allanarly, and to the lawful children of the marriage between the said James Rae and Margaret Barrie, his wife, share and share alike, whom failing to the nearest lawful heirs of the said Margaret Barrie whomsoever, heritably and irredeemably, in fee," certain heritable property in Kirkintilloch. The purchase was made with funds belonging to Mrs Rae.

The spouses took infertment in life-rent for their life-rent use allanarly by instrument of sasine, dated 5th October and recorded in the appropriate register of sasines on 2d December 1835, but no infertment was taken in the fee. There were four children of the marriage, all of whom were born after 1835.

By disposition, dated 24th November and 1st December 1855, on the narrative that the purchase money, in consideration of which the disposition of 5th October 1835 was granted, had been paid from funds belonging to the spouses, and that they, in the exercise of their right of ownership of the subjects, had revoked the destination of the fee, and had sold the subjects to John Martin, Kirkintilloch, and required John Barrie and John Henderson, as trustee, to unite with them in conveying the same, and in consideration of the sum of £200 paid to them (the spouses) by Martin, the spouses and John Barrie as heir foresaid, and John Henderson as trustee foresaid disposed the subjects to Martin, his heirs and assignees, heritably and irredeemably, but reserving to the spouses and the survivor the life-rent use of the dwelling-house forming part of the subjects which they then occupied.

John Martin was infert by instrument of sasine recorded on 17th December 1855, and entered into possession of the subjects at Martinmas 1855, and continued to possess down to the date of his death, after which his testamentary trustees continued the possession.

James Rae, who survived his wife, died in 1881, when the reserved right of life-rent of the dwelling-house came to an end. Thereupon his son James Rae entered into possession of it, and asserted a right thereto under the disposition of 5th October 1835.

This was an action at the instance of John Martin's testamentary trustees against James Rae, the son, Mrs Ann Rae or Cunningham, Robert Rae, and John Rae, the children of the marriage between James Rae and Margaret Barrie, to have it found and declared that the pursuers as trustees were absolute proprietors of the subjects, and to have the defender James Rae ordained to remove.

The defenders pleaded—“(1) The defenders' father James Rae, or he and the said Margaret Barrie or Rae, their mother, having had only a fiduciary right in the fee of the subjects in question, neither he nor the said Margaret Barrie or Rae were entitled to evacuate or revoke the destination of the fee of the said subjects to the children of the marriage contained in the said disposition of 1835, and this was not validly or

effectually done by the disposition in favour of the pursuers' author.”

The Lord Ordinary (KINNEAR) found, declared, and decerned in terms of the conclusions of the summons.

“*Opinion.*—The parents of the defenders James Rae and Margaret Barrie or Rae, his wife, acquired the subjects in dispute by purchase, and took the disposition, which is dated the 5th of October 1835, to themselves and the longest liver in life-rent for their life-rent use allanarly, and to the children of the marriage, whom failing to the nearest heirs whomsoever of the wife in fee. They took infertment in the life-rent by instrument of sasine upon the precept contained in this disposition, but no infertment was taken in the fee. There were no children of the marriage in existence at the date when the conveyance was executed, and it is not disputed that the purchase money belonged absolutely to the spouses, or one of them, free from any obligation in favour of children to be born.

“While the title still stood in this position, nothing having been done to divest the seller of the fee, the purchasers, conceiving that the destination in favour of their children was revocable, sold the subjects to the pursuers' author for the same price as they had themselves originally paid for them, but under reservation of their life-rent use and enjoyment of a dwelling-house, and gave their purchaser a title by conveyance from the persons from whom they had themselves purchased. By this disposition, dated the 24th November and 1st December 1855, narrating that the purchase-money mentioned and acknowledged in said disposition of 5th October 1835 was paid from funds belonging to them the said James Rae and Margaret Barrie, and that they, in the exercise of their right of ownership of said subjects, had revoked the destination of the fee of said subjects, and had sold the same to John Martin, grocer in Kirkintilloch, and required the said John Barrie and John Henderson, as trustees foresaid (the granters of the foresaid disposition of 2d December 1835), to unite with them in the conveyance, and in consideration of £200 sterling instantly advanced and paid to them, the said James Rae and Margaret Barrie, by the said John Martin, as the agreed-on price and value of said subjects, the receipt of which is thereby acknowledged, the said James Rae and Margaret Barrie, and the said John Barrie as heir foresaid, and the said John Henderson as trustee foresaid, and they all with joint consent, sold, alienated, and disposed of the subjects in question to the said John Martin, his heirs and assignees, with entry at the term of Martinmas 1855, but reserving to the said James Rae and Margaret Barrie the life-rent use and enjoyment by them, and the survivor of them, of the dwelling-house then occupied by them in the said subjects, but for their own life-rent use and enjoyment of the same allanarly.

“The disponee was infert by instrument of sasine recorded on the 17th December 1855, and entered upon possession of the subjects at the term of Martinmas 1855, and he and his trustees, the present pursuers, have continued to possess and to draw the rents, subject to the reserved life-rent in favour of the spouses, until the death of the survivor in 1881.

“The defenders, however, who are the child-

ren of the marriage between James Rae and Margaret Barrie, maintain that the conveyance in favour of the pursuers' author is invalid and ineffectual, on the ground that their parents were fiduciary fiars for them, and that they had no power to evacuate or revoke the destination of the fee as expressed in the conveyance of 1835. I am of opinion that this contention is not well founded.

"In the present question the disposition of 1835 must be regarded as the deed of the spouses, although in form it is a conveyance in their favour, and it follows that until it should be delivered to or for behoof of their children it remained subject to their control, and might be cancelled or recalled at pleasure, since it is not, in my opinion, a tenable proposition that the mere execution of a gratuitous deed in favour of the children of the granter binds the parent so as to exclude revocation—*Hill*, M. 11,580; *M'Intosh*, January 28, 1812, F.C., per Lord Meadowbank; *Balcaird*, December 5, 1816, F.C. There is nothing, however, which can be founded on as constituting delivery so as to bar revocation, except the fact the parents were infett. But that is not in my opinion sufficient. The infettment taken by the parents was insufficient to vest the fiduciary fee, since it is settled law that under conveyances to parents in liferent allenary and children in fee the fee passes to no one by infettment in the liferent, but remains upon the old investiture—*Falconer v. Wright*, January 22, 1824; *Houlditch v. Spalding*, June 9, 1847. The parents, if they had thought fit, might have vested a fiduciary fee in themselves by taking infettment in the precise terms of the destination, and if they abstained from doing so it does not appear to me reasonable to infer, from their taking sasine in the liferent, that they thereby intended to put the destination of the fee to their children beyond their power. Now, the effect in law of the mode of infettment which they adopted was to leave the fee in the seller, so that if they kept the disposition in their own hands they could go back to him and obtain a new conveyance of the fee in a different form. It appears to me that their act in taking sasine in the liferent merely is perfectly consistent with an intention to keep the disposition in their own hands, and subject to their own control, and there is nothing else from which an intention to deliver it, or to treat it as a delivered writ for behoof of their children, can be inferred.

"The case differs materially from that of *Gilpin v. Martin*, 7 Macph. 807, upon which the defenders relied. In that case the purchaser of a piece of land took the disposition to himself for behoof of three of his children *nominatim*, and to their heirs. The deed remained with him until his death, when it was found that he had executed a *mortis causa* conveyance in favour of a nephew. This conveyance was found to be ineffectual, the granter not being *in titulo* to convey the property. But the only title the granter had was a conveyance to him, not in his own right, but for behoof of his children. On the face of the deed, therefore, he was a mere trustee for his children, and there was nothing to show that the price of the trust-estate had not been paid out of their funds. There was no ground therefore for treating the conveyance as his deed in a question between him and his child-

ren, and if it were not his deed it had received all the delivery of which it was susceptible by delivery to him as trustee. In the present case delivery to the parents is not delivery as between them and the children, because it is apparent on the face of the deed that the price belonged to the parents, and that the conveyance of the fee to the children was a gratuitous benefit."

The defenders reclaimed, and argued—The infettment following on the disposition of 1835 vested an indefeasible right in the children, and consequently the disposition of 1855 was *ultra vires* of the granters.

Authorities—*Cumstie v. Cumstie's Trustees*, June 30, 1876, 3 R. 921; *Houlditch v. Spalding*, June 9, 1847, 9 D. 1204; *Falconer v. Wright*, January 22, 1824, 2 S. 633, 3 S. 317; *Smitton v. Tod*, December 12, 1839, 2 D. 225; *Hill v. Hill*, M. 11,580; *Balcaird v. Latimer*, December 5, 1816, F.C.; *M'Intosh v. Sprout*, January 28, 1812, F.C.; *Gilpin v. Martin*, May 25, 1869, 7 Macph. 807; *Riddell v. Inglis*, M. 11,577; *Leckie v. Leckies*, M. Appx. Presumption, No. 1.

At advising—

LORD PRESIDENT—We have had in this case an able and ingenious speech from Mr M'Lennan, but I cannot say that it has made any permanent impression upon my mind, and I am of opinion that the case has been decided by the Lord Ordinary precisely upon the right grounds.

The disposition of 1835 bears that the money paid as the price was advanced by Mrs Rae, the spouse of James Rae, and that the seller conveyed the subjects to James Rae and Mrs Rae, "and the longest liver of them, in liferent, for their liferent use allenary, and to the lawful children of the marriage between the said James Rae and Margaret Barrie, share and share alike, whom failing to the nearest lawful heirs of the said Margaret Barrie whomsoever, heritably and irredeemably, in fee."

On this disposition infettment was taken by the spouses, but that infettment was limited to their liferent right allenary, and the question to be decided is, What is the effect of that conveyance and infettment in so far as it regards the children in whose favour there was a disposition of the fee in the conveyance? The infettment was not for their behoof in any sense; it might have been, but as it stands it is in liferent allenary, and the deed remains in the hands of the spouses down to 1855. The spouses could revoke that deed so far as the children's interest was concerned, for it was gratuitous, there were no trustees, and no infettment followed in the children's favour. Therefore upon all the authorities the right of the children could be ended by the parents, and the question is whether they put an end to it.

The feudal fee remained in the seller, and the spouses could go back to him and take a conveyance, with their own concurrence, in favour of the buyer, reserving their liferent, and when the buyer was infett he would have a good title to the fee. This is just what was done, and the buyer has the only right to the fee.

It is quite unnecessary to review the cases, because what I have stated rests on propositions that are so perfectly clear that no cases are required. It is only worth while to refer to the case of *Gilpin v. Martin* in order to point out

that it is essentially different in every particular. There the conveyance was to the father as trustee for three children who were alive, and it did not appear that the price was paid by him; on the contrary, the presumption was that the money was not his. The only title, then, that he ever had was that of trustee for his three children; but so standing that deed, he, by *mortis causa* conveyance, committed what *ex facie* of the titles was undoubtedly a breach of trust, for he gave the trust subjects to a person who was not a beneficiary. But if he intended to do this, he should in his lifetime have cleared the way. As Lord Deas said—If he had brought a declarator that the purchase had been made with his own money, at his own hand—if he had so cleared his title before making his *mortis causa* settlement—the case would have been different. As the matter stood, however, having nothing but a trust right, he made a gratuitous settlement. There are no circumstances to make the two cases similar, they rather stand contrasted in every particular. I am therefore for adhering to the interlocutor of the Lord Ordinary.

LORD DEAS—In *Gilpin's* case I had occasion to review all the authorities on this subject, and I do not mean to refer to any of them. That case was quite different from the present. Here the disposition of 1835 bears to be a disposition in consideration of the sum of £200 advanced by Margaret Barrie, daughter of the said deceased Robert Barrie, and wife of James Rae, as the agreed-on price of the subjects, and the disponent acknowledges the price, and goes on thus—“Therefore I the said John Barrie have sold and disposed, as I do hereby . . . sell, alienate, dispose, convey, and make over from us, our heirs and successors, to and in favour of the said James Rae and Margaret Barrie, and the longest liver of them, in liferent, for their liferent use allanarly, and to the lawful children of the marriage between the said James Rae and Margaret Barrie, share and share alike, whom failing to the nearest lawful heirs of the said Margaret Barrie whomsoever,” heritably and irredeemably, in fee all and whole the subjects specified therein. On the terms of the disposition there can be no doubt, having regard to the authorities, that Mrs Rae was the *fiar* on the face of it. She advanced the money, and it was disposed to her in the terms I have read, and it is quite clear that she was the *fiar*.

Well, then, the only question is, whether Mrs Rae gave the fee to her children; she certainly had the power; did she do so? It is not said that she did it in any other way than by the terms of the infestment, and the fact that they took infestment in liferent only is the only ground for saying that they parted with the fee. I do not know any authority for saying that she by that conveyance, and the infestment following on it, gave the fee to her children. Any liferenter is entitled to take infestment in liferent whatever the rest of the deed may be. But unless that infestment gave the fee to the children—and I am clear that it did not—the fee remained where it was, and the children had no right to it. I think that the conclusion the Lord Ordinary has come to is quite incontestable.

LORD SHAND—It is clear from the terms of the disposition of 1835 that the price was advanced and paid by Mrs Rae out of her own funds, and any right that there could be in the children was through her, and by a gratuitous gift from her. I am clear there was none. By the terms of the conveyance it is a disposition to the husband and wife in liferent allanarly, and the fee to the children. It appears to me that the right to the fee was either in Mrs Rae or else she was entitled to go to the granter and insist on the granter giving her the fee. That might be accomplished either by a new deed or by an adjudication. I do not think that this has been disputed by the reclamer, that if there had been no infestment in favour of Mrs Rae she would have had power over the fee of the property. I cannot distinguish this case, so long as there was no infestment, from the case I put in the course of the argument, of a personal bond for money advanced by the mother, and which declared on the face of it that it belonged to her and her husband, in which case the fee of the money would remain in the parents.

Accordingly the argument rested on the infestment. But infestment was necessary in order to secure the liferent allanarly of the parents, and the infestment taken was carefully limited. I do not think that the *sasine* can be taken for anything more than to infest the parents in their liferent allanarly. Accordingly the infestment has no bearing upon the case, and the fee remained in Mrs Rae; the feudal fee has been well disposed by her, and taken out of the original seller by the disposition with her consent.

LORD MURE was absent on Circuit.

The Court adhered.

Counsel for Pursuers — Mackintosh — Ure.
Agents—Webster, Will, & Ritchie, S.S.C.
Counsel for Defenders—Strachan—MacLennan.
Agents—Liddle & Lawson, S.S.C.

Thursday, January 18.

FIRST DIVISION.

[Sheriff of Aberdeenshire.

HAY AND ANOTHER *v.* HAY OR BROWN AND OTHERS.

Succession — Destination — Substitute or Conditional Institute.

A testator by *mortis causa* deed disposed certain heritable property to his nephew H, “but always under the express condition of his continuing to profess the Roman Catholic religion, and failing the said H by death or abandoning his said religion, then to my own nearest heirs professing the Roman Catholic religion, and to the heirs and assignees whomsoever of my said disponees.” H survived the testator. Held that the testator’s “own nearest heirs professing the Roman Catholic religion” were conditional institutes, and not substitutes, and therefore that on the death of H his heir took unfettered by the condition.