

though their purpose be to give security to one of them, a lender of money, which security can be given by that means and cannot be given by pledge. To have the effect desired it must be a contract of sale.

Now, I expressed my views upon that subject at some length in the case of *M'Bain v. Wallace*, and it still appears to me that it is lawful and in the interests of the community that it should be possible for the parties to carry out their desire by means of a sale. If the transaction be that the parties really constitute the relation of buyer and seller, there is no reason why we should frustrate their intention because in constituting the relation, with all its legal consequences, they intended that the party who is the buyer should have a security, and should not be at liberty to take advantage of the transaction to any other effect than to get payment of the debt.

The question occurred in the case of *M'Bain*, whether there was a collateral contract to the effect that the subject of the sale should only be held as security, and whether, if so, that would undo the effect of the transaction as a sale? I thought, and the other Judges here thought, that there was a collateral agreement to the effect that if the subject, a shop, realised a profit beyond the sum paid by the buyer, that should be communicated to the other party, the seller. Some of the Judges in the House of Lords held that not to be clear, but that there appeared rather to be an honourable understanding than a collateral agreement. But it was thought by them not to be really pertinent to the question. Such a contract, it was held, might exist along with the contract of sale.

It is, I repeat, expedient and according to law, and in the interests of the public, that a man should be able at a time when he is at liberty to enter into any transaction as to his furniture, to raise money upon it by means of a sale such as was arranged in the case before us. It is quite true that it is the general doctrine of Scots law that there cannot be a security over moveables *retente possessione*. But the law is advancing, and the maxim that there can be no security over anything that is in the debtor's possession has suffered considerably of late years. Thus, the doctrine of reputed ownership as formerly understood was that the furniture in a man's house or the goods in his shop were in the supposed interest of his general creditors regarded as his, and the real owner who had put him in possession of them by loan or hire was held to have given him the means of holding out that they were his, and was not allowed to defeat the claim of the man's creditors who pointed them or did other diligence against them. Many decisions proceeded upon that view. But now greater enlightenment has led to the view that it is not prejudicial to the community to hold that a man can safely hire out furniture or goods without running the risk of their being taken for the debts of the person to whom he hires them by his general creditors. That is another example of the direction in which the law has advanced.

I do not think that the case of *M'Bain* makes any great advance in the law, but it was an advance in what I hold to be the right direction.

I think that the judgment of the Sheriff ought to be affirmed.

LORD RUTHERFURD CLARK—I think that it is proved that there was a true sale, and therefore that the case of *M'Bain* applies.

LORD TRAYNER—I think that it is the law of Scotland that a security for lent money cannot be made effectual over moveables which remain in the possession of the debtor; and it does not, in my opinion, affect that principle or its application that the transaction under which the money is lent takes in mere expression of words the form of a sale. In this case I agree with the conclusion reached by the Sheriffs, on the ground that the evidence before us, both written and parole, establishes that the transaction in question was a sale—a sale intended and a sale completed—and not merely security for a loan.

LORD JUSTICE-CLERK—That is my opinion also.

The Court adhered.

Counsel for Claimant and Appellant—John M'Queen Barr—Dickson—Wilson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Claimants and Respondents, W. Warr & Company—Lees—Salvesen. Agents—Coutts & Palfrey, S.S.C.

Tuesday, July 18.

SECOND DIVISION.

[Lord Stormonth Darling
Ordinary.]

BRYSON v. MUNRO'S TRUSTEES.

Disposition—Construction of Destination—Fee or Liferent.

A husband conveyed certain heritable subjects to himself and his wife and the longest liver of them, in conjunct fee and liferent for their liferent alimentary use allenerly, and to his daughters *nominatim* in fee.

Held (Watherstone v. Rentons, November 25, 1801, M. 4297, being followed) that the fee was conveyed by the above destination to the daughters, and that the right of the disponent was limited to a liferent.

By disposition dated 10th January 1877, Hugh Munro, grocer and spirit dealer, Crossmyloof, disposed certain heritable subjects in the village of Crossmyloof "to and in favour of himself and Janet Watson or Munro, his wife, and the longest liver of them, in conjunct fee and liferent for their liferent alimentary use allenerly, and to and in favour of his daughters" Mrs Bryson, Mrs Orr, and Mrs Austin, "equally among them in fee, exclusive always of the *jus*

mariti and right of administration of their present husbands respectively, or any future husband they may marry, or failing any or all of his said daughters, to her or their respective heirs in fee." The disposition, with warrant of registration thereon, in terms of the dispositive clause here quoted, was duly recorded on 16th January 1877.

On 2nd May 1886 Mrs Janet Watson or Munro died.

On 7th November 1886 Mrs Austin died, survived by a son and by two daughters.

In 1888 Hugh Munro married again, but his second wife predeceased him.

By trust-disposition and settlement dated 15th October 1888, and bearing expressly to be granted for the purpose of defeating the destination in the disposition of 1877, Hugh Munro conveyed his whole estate to Jessie Watson (a niece of his first wife), John Shand, and John Borland. The combined effect of this deed, and a codicil thereto dated 10th September 1890, was to leave £800 and the furniture of the trust to Miss Watson, and the residue to the children of his daughters Mrs Orr and Mrs Austin, there being no provision for his daughter Mrs Bryson or her children.

In 1892 Hugh Munro died.

Thereafter Mrs Bryson and Mrs Orr raised an action against the trustees under Hugh Munro's trust-settlement, Miss Watson as an individual, the children of Mrs Bryson, and the children of Mrs Orr, to have it found and declared that the pursuers and the late Mrs Austin were duly vest and seised as of fee in the heritable subjects disposed by the disposition of 1877, and to have the trustees ordained to deliver up to the pursuers the title-deeds of the said subjects, and interdicted from making up titles to or selling the said subjects.

The pursuers pleaded—" (1) The pursuers having been validly infeft as of fee along with Mrs Austin in the said heritable subjects, in virtue of the said disposition of 1877, dated and recorded as aforesaid, are entitled to decree of declarator as concluded for. (2) The pursuers being so infeft are also entitled to decree for delivery of the title-deeds of their said property, and to interdict against the defenders, the testamentary trustees of Mr Munro, as concluded for."

Defences were lodged by Mr Munro's trustees and by Miss Watson. The latter pleaded, *inter alia*—" (4) At the date of the said disposition the fee of the subjects conveyed having belonged to the said Hugh Munro, on a sound construction of the deed he retained the right of fee and had power to alter the destination therein, and having altered it by the trust-disposition and settlement, declarator and interdict ought to be refused with expenses. (5) On a sound construction of the said disposition the said Hugh Munro had a power to test on the subjects conveyed, and having done so, the pursuers are not entitled to declarator and interdict as concluded for, and the same ought to be refused with expenses. (6) The pursuers not being the proprietors of the subjects labelled, are not entitled to delivery of the title-deeds thereof."

On 10th March the Lord Ordinary (STORMONTH DARLING) pronounced the following interlocutor:—"Sustains the first and second pleas-in-law for the pursuers: Repels the defences so far as directed against the conclusions of the summons for declarator, delivery, and interdict: Decerns in terms of the said conclusions, &c.

"Note.—[After setting forth the destination in the disposition of 1877]—On the face of it this destination is self-contradictory. The conveyance by the granter to himself and his wife in conjunct fee is repugnant to the conveyance to them in liferent for their liferent alimentary use allanarly, particularly when coupled with a gift of the fee to his daughters *nominatim*. The framer of the deed cannot have understood the legal effect of the words he was using. In order to arrive at any intelligible result something must be read out of the deed, and the question is, what?

"It is unfortunate that a phrase so loose and slovenly as 'conjunct fee and liferent' should ever have crept into the vocabulary of conveyancers, but it is sanctioned by long usage, and has been interpreted by numerous decisions. If, therefore, the destination as regards Hugh Munro and his wife had stopped there, I apprehend that the fee would have vested in him notwithstanding the subsequent words conferring a fee on his daughters *nominatim*. Even the addition of words cutting down the conjunct fee to a liferent allanarly, if it had been distinctly limited to the wife, would have made no difference in the right of Hugh Munro himself. That is the result of the judgments in *Livingston v. Lord Napier*, Bell's 8vo cases, 184, and *Wilson v. Glen*, December 14, 1819, Fac. Coll., both of which are commented on by the late Lord President in *Forrest v. Forrest*, 1 Macph. 806; but the peculiarity here is that the words 'for our liferent alimentary use allanarly' are applicable to the husband as well as to the wife. It was urged for the defenders that the word 'our' may have been a mistake for 'her,' and that the obvious inconsistencies of the destination may be explained in that way. But I must take the deed as I find it. The result seems to be that though a fee is in words conferred on Hugh Munro, it is cut down to a liferent by the taxative words which immediately follow, and that the only pure fee conferred by the deed is that in favour of the daughters *nominatim*. The fee given to James Livingston in the *Westquarter* case and to Thomas Cunningham (as one of the marriage) in *Wilson v. Glen* was in each case treated as a mere substitution, because there was a previous fee, undiminished by words restricting it to a liferent, conferred on the wife in the one case and on the husband in the other. But here it seems to me that the fee given to the daughters cannot be so treated, for if so, there would either be no immediate fee in anybody or else a right anxiously declared to mean nothing more than a liferent must be held to be a fee. I do not know of any case where a declaration so express as the qualification of a liferent by the word

'allenerly' has been thus disregarded. If that word is sufficient to cut down a constructive fee to a liferent it is no great extension of the rule to hold that the same result must follow where the fee is express. Mr Bell in his Principles (§ 1956) states the rule in very general terms—"If a settlement which conceived in simple terms would give a fee to the husband, conveys to him the subjects for his 'liferent alimentary' or 'liferent allenerly,' and the fee to the heirs and children *nascituri*, there arises by legal necessity a fiduciary fee in the father, the real fee being in the children.' Here of course there is no feudal necessity for setting up a fiduciary fee because of the children being named, but the principle applies equally that what would otherwise be a fee cannot be so regarded if it is expressly restricted to a liferent.

"There is one case (*Wilson v. Reid*, 6 S. 198) in which a wife who granted a post-nuptial disposition was held to have a fee although the destination was, as here, to herself and her husband and to the longest liver in conjunct fee and liferent for their liferent use allenerly. But the essential difference was, that instead of a fee to children *nominatim*, the ulterior destination was to the heirs of the marriage, whom failing to the heirs whatsoever of the wife to the extent of one-half, and the heirs whatsoever of the husband to the extent of the other half. There were no heirs of the marriage, and the question arose between the wife and the heirs whatsoever. The case was decided on the plain ground that the fee could not be taken out of the wife except by vesting it in somebody else. A distinction was drawn by Lord Balgray, in delivering the leading opinion, between the heirs of the marriage and the heirs whatsoever, thus—"So far as regarded the heirs of the marriage this was an onerous deed and bestowed upon them a *jus crediti*, but so far as regards the heirs whatsoever it is merely a *mortis causa* deed not vesting in them any right whatever, but merely giving them a *spes successionis* which could never vest the fee in them. It follows therefore that the fee remains in the person of the pursuer.' If the question had arisen, not with heirs whatsoever but with heirs of the marriage, I take it that the decision would have been substantially the same as in *Watherstone v. Renton*, 1801, M. 4297, and that if the same judges had had to decide the present case they would have decided it in favour of the daughters.

"I assent to the defenders' argument that as Hugh Munro was the original fiar of the property he must be clearly shown to have divested himself of the fee before the pursuers can succeed. But I do not know that there was anything unnatural or improbable in a father divesting himself of a fee in favour of his grown-up family, under reservation of his own and his wife's liferent. It was urged that the intention of the granter must rule, and that he showed his intention to have been testamentary and revocable by his subsequent deed. But

intention can only be gathered from the words of the deed itself, and where a granter uses words of technical meaning, and puts his deed on record, he cannot alter its effect by subsequently explaining that he used the words in a different sense.

"I have therefore come to the conclusion that the pursuers are entitled to decree of declarator, delivery, and interdict."

The defenders reclaimed, and argued—The Lord Ordinary's construction of the destination in the disposition of 1877 was erroneous. The words "in conjunct fee" could not be read out of the disposition. There were certain legal presumptions, one of which was that the granter of a gratuitous disposition like the present was not giving up the fee. The case of *Watherstone v. Rentons*, November 25, 1801, M. 4297, was distinguished from the present, as in that case the conveyance was from a father to his daughter and her husband, while here the disposition was by a husband of his own property to himself and his wife.

Argued for pursuers—The case of *Watherstone v. Rentons* was on all fours with the present, and the decision in that case was supported by *Rollo v. Ramsay*, November 28, 1832, 11 S. 132. The judgment of the Lord Ordinary was sound.

At advising—

LORD RUTHERFURD CLARK—By disposition dated 16th January 1877 Hugh Munro conveyed certain subjects to himself and his wife in conjunct fee and liferent, for their liferent alimentary use allenerly, and to his daughters *nominatim* in fee. The question is, whether Hugh Munro took a right of fee, or whether the fee was conveyed to his daughters?

It is obvious that the disposition is blundered. Under a conveyance of his own property to himself and his wife in conjunct fee and liferent Munro would take a fee. But in the case before us it is stated that the conjunct fee and liferent is given to the spouses for their liferent allenerly. If this latter clause is to be taken as explanatory of the conveyance, the right of Munro must be limited to a liferent.

It is fortunate for us that a hundred years ago a disposition was similarly blundered and that the Court was called upon to interpret it. I refer to the case of *Watherstone*, M. 4297. *Watherstone* disposed certain lands to his daughter and her husband in conjunct fee and liferent "for their liferent use allenerly and to the children of the marriage in fee." The question was whether the deed conveyed to the immediate disponents an absolute or a fiduciary fee. The Court held that the "point was already fixed" by the decision of the House of Lords in the case of *Newlands*, and that the immediate disponees took a fiduciary fee only.

In the case of *Newlands* it was decided that under a conveyance to a parent in liferent for his liferent use allenerly and to his children in fee a mere fiduciary fee vested in the parent. In holding that the point was fixed by that case the Court must have

been satisfied that by the decree before them nothing more was conveyed to the spouses than a *lifereit allenary*. I think that we should follow that decision. We are not deciding any point of general importance. We are only called on to interpret a blundered deed. It is, I think, sufficient for us that it has been already interpreted by judicial decision.

LORD JUSTICE-CLERK—That is the opinion of the Court.

The Court adhered.

Counsel for Pursuers—Rankine—Guthrie.
Agent—F. J. Martin, W.S.

Counsel for Defenders—Lees—Guy.
Agents—Macandrew, Wright, & Murray,
W.S.

Wednesday, July 19.

SECOND DIVISION.

STRAIN'S TRUSTEES v. STRAIN.

Succession—Trust—Construction—“Free Annual Income and Produce.”

A coalmaster in his trust-disposition and settlement directed his trustees to pay to his wife during her lifetime “the whole free annual income and produce of the residue” of his estate. He authorised his trustees, in the event of his sons not purchasing his colliery works, machinery, and plant from them, to sell the same, and he further authorised his trustees to carry on the works for such period as they might think proper.

When the truster died in 1891 he was tenant of certain leases of valuable coalfields which were being worked by him at that date. The last of these leases expired in 1906. The truster's sons did not purchase the works and they were carried on by the trustees.

Held—by a majority of Seven Judges (the Lord Justice-Clerk, Lord Young, Lord Adam, Lord McLaren, Lord Kinneir, and Lord Trayner—*diss.* Lord Rutherford Clark, who thought the case ruled by *Ferguson v. Ferguson's Trustees*, February 23, 1877, 4 R. 532)—that the net proceeds of the collieries, derived from the collieries as worked by the trustees, formed a part “of the free annual income and produce of the residue” of the truster's estate, and fell to be paid to the truster's widow.

Hugh Strain, coalmaster, Glasgow, died at his residence, Grahamshill, Airdrie, on 26th January 1891, survived by his widow Mrs Mary Woodhouse or Strain, and twelve children. By trust-disposition and settlement, dated 12th September 1887, and recorded 7th February 1891, Hugh Strain assigned and disposed to trustees, in trust for the ends, uses, and purposes therein specified, his whole means and estate, heritable and moveable. He appointed his trustees to be his executors.

By the fourth purpose of the trust the truster directed his trustees, in the event of his wife surviving him, “to make payment to her during all the days and years of her life of the whole free annual income and produce of the residue of my means and estate for her *lifereit alimentary use allenary*, payable at such time or times as my trustees may find most convenient and expedient, but burdened always with the maintenance of such of my daughters as may be unmarried and reside in family with her; declaring always that in the event of the free annual income and proceeds of said residue not amounting to £400 per annum or falling short in any year of the said sum of £400, I authorise and direct my trustees to encroach on and take from the capital of said residue such sum as is necessary to make up an annuity of £400 to my said wife, my intention being that the minimum annual allowance to be received by my said wife for the support of herself and such of my daughters as may remain unmarried and reside in family with her shall be the said sum of £400.”

In the last place, the truster directed his trustees, “within three months after my decease, to make offer to my said sons John, Hugh, and James, or such of them as may wish to purchase the same, of my whole colliery works and whole machinery, plant, leases of minerals, and houses, office fittings, and coal depots of every description connected therewith, as a going concern, and that at such price or prices as may be mutually agreed on between my trustees and them, which failing, at such price as may be fixed by two arbiters to be mutually chosen, and whom my trustees and my said sons shall be bound to name . . . declaring that in the event of my said sons declining to purchase said works, or failing to pay the said price or any instalment thereof as it falls due, then my trustees may, without prejudice to the powers hereinafter contained in their favour, sell the same either by public auction or private bargain, in whole or in lots . . . with power to them to carry on and continue under the superintendence of themselves, or of any party they may appoint for that purpose, for such period and in such manner as they think proper, any or all of the businesses in which I may be engaged as sole partner at the time of my death, and to extend or contract the same, or let, or lease, or sell the same, and that at such valuations or prices, and on such terms and conditions, as my trustees in their sole discretion shall deem proper.”

The trust-estate was a mixed one, consisting of heritable and moveable property including going collieries held under six mineral leases, in which the truster was tenant, which terminated at various periods, the last expiring in the year 1906. The capital value of the residue of the whole estate was about £31,000. Apart from the profits from these collieries the residue of the estate as at the date of the truster's death yielded an income of from £400 to £450 annually, but as part of that income was derived from miners' houses