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 disponer acknowledges the price, and goes on thus—"Therefore I the said John Barrie have sold and disponed, as I do hereby . . . sell, alienate, dispone, 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 allenarly, 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 disponed 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 infeftment, and the fact that they took infeftment 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 infeftment following on it, gave the fee to her children. Any liferenter is entitled to take infeftment in liferent whatever the rest of the deed may be. But unless that infeftment 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 allenarly, 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 reclaimer, that if there had been no infeftment 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 infeftment, 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 infeftment. But infeftment was necessary in order to secure the liferent allenarly of the parents, and the infeftment taken was carefully limited. I do not think that the sasine can be taken for anything more than to infeft the parents in their liferent allenarly. Accordingly the infeftment has no bearing upon the case, and the fee remained in Mrs Rae; the feudal fee has been well disponed 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 disponed 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.

James Hay, sometime mason in Aberdeen, who died in 1823, by his deed of settlement gave, granted, and disponed to and in favour of James Hay, his nephew, "but always under the express condition of his continuing to profess the Roman Catholic religion, and failing the said James Hay 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," certain heritable subjects in Aberdeen.

On the testator's death James Hay, his nephew, took the subjects. He died intestate on 27th July 1839 survived by one child Ann. After his death his widow Margaret Smith or Hay continued in the possession of the subjects. She entered into a second marriage with James Nicol. Mr and Mrs Nicol then managed the property until Ann Hay's marriage in 1881 to William M'Combie Brown, mason in Aberdeen. Thereafter she and her husband possessed the subjects. Mrs Brown expede a general service as nearest and lawful heir to her father, dated 18th and recorded in Chancery 20th March 1874, and on 22d April 1874 disponed and assigned the said subjects to Edward Fiddes and J. A. Sinclair, as trustees for behoof of the Aberdeen Heritable Securities Investment Company (Limited), in security of an advance made to her, and infeftment was taken by the trustees for the company. This action was raised in the Sheriff Court of Aberdeen by Isabella and Helen Hay, both residing in Bain Square, Dundee, grandnieces of James Hay the elder, being two surviving children of the deceased Alexander Hay, a brother of James Hay, the nephew, against Ann Hay or Brown and her husband, the Aberdeen Heritable Securities Investment Company (Limited), and Edward Fiddes and J. A. Sinclair as trustees for the company, to have it found and declared that, upon a sound construction of James Hay's settlement, they, as nearest heirs of the testator professing the Roman Catholic religion, had right to the subjects therein disponed, to have the defenders ordained to remove, and to have them interdicted from selling the subjects. It was admitted that Mrs Brown always had professed the Protestant form of religion.

The Sheriff-Substitute (Comrie Thomson) pronounced this interlocutor:—"Finds that on a sound construction of the disposition and deed of settlement of James Hay the elder, the condition of continuing to profess the Roman Catholic religion is personal to his disponee James Hay: That an absolute fee of the subjects in question was created in the person of James Hay the younger, and that his heirs and assignees whomsoever were entitled to the succession: That the defender Ann Hay or Brown is heir of the said James Hay: Therefore sustains the defences, assoilzies the defenders from the conclusions of the action: Finds them entitled to expenses," &c.

"*Note.*— . . . The pursuers profess the Roman Catholic religion. The defender has been brought up and continues a Protestant. The former maintain that by this circumstance the defender is disqualified from succeeding to the property, in respect of the terms of the dispositive clause of the disposition and deed of settlement of James Hay the elder. The construction of that clause appears to be the only question in the case, and if the view which I have adopted of its true meaning be sound, the pursuers' construction cannot prevail.

"The clause is in these terms — [*Quotes the clause given above*].

"I am of opinion that the true meaning of the clause is that the failure of James Hay by death before the granter of the deed, or by abandoning the Roman Catholic faith, was a condition necessary to be fulfilled before the succession opened to the granter's nearest heirs professing the Roman Catholic religion. That 'failure' did not occur. In short, these nearest heirs must be held to be *conditional institutes*, and *not heirs-substitute*. James Hay, the nephew, obtained a vested right as institute under the deed, so that the granter's nearest heirs professing, &c., could never attain the character of institute under it.

"This construction seems to be favoured by the views expressed by the majority of the Judges of the Court of Session consulted under a remit from the House of Lords in the well-known case of *Fogo* v. *Fogo*, 25th Feb. 1840, 2 D. 651, and 4 D. 1063. There the destination was to A and the heirs of his body, whom failing to B, &c. A predeceased the testator without leaving heirs of his body. On the death of the testator the succession opened to B. The majority of the Court held that B was not an heir-substitute, but a conditional institute, and that the destination was to be read as if it had run, 'In case of the failure of A and the heirs of his body before me, then I dispone to B.' Again, in a later case, *Hutchison* v. *Hutchison*, 20th December 1872, 11 Macph. 229, the granter of a *mortis causa* settlement disponed to 'the heirs of my own body, whom failing to A, B, C, and D, and their respective heirs in fee.' The granter died without leaving heirs of his body, and it was held that A, B, C, and D were conditional institutes and not substitutes, and had right to the property as disponees without service.

"The result in the present case is, that as the conditions under which alone there was any conveyance of the estate to the testator's nearest heirs professing the Roman Catholic faith never existed, the property passed to the heir of the direct and immediate disponee, and that heir's succession is not by the terms of the deed fettered by any limitation as to the religious profession.

"The object of the testator seems to have been, so far as can be gathered from the whole scope of the settlement, to secure that the person who should succeed next after himself should be a Roman Catholic, but beyond that immediate successor he imposed no trammels.

"It is unnecessary, if I am right in these views, to deal with the plea founded on the terms of the deed of retrocession pleaded on record."

On appeal the Sheriff (Guthrie Smith) adhered.

The pursuers then appealed to the Court of Session, and argued that the terms of the deed imported a substitution and not a conditional institution.—*Smith* v. *Stewart*, December 14, 1830, 6 S. 180, Bell's Lect., ii. 848.

At advising—

Lord President—I confess I entertain no doubt whatever as to the construction to be put upon this settlement, and I entirely agree with the view adopted by the Sheriffs. The conveyance is to the testator's nephew James Hay, and in the

formal part of the deed he dispones his heritage to him, but always under the express condition of his continuing to profess the Roman Catholic religion, and so far it applies to James Hay only; but the deed goes on thus—"and failing the said James Hay by death or by abandoning his said religion, then to my own nearest heirs professing the Roman Catholic religion." Now, if the dispositive clause had stopped there a different question would have arisen, but there is this addition—"and to the heirs and assignees whomsoever of my said disponees." And it is said that the disponees are James Hay in the first place, and the nearest heirs of the testator who profess the Roman Catholic religion in the second place, who are to take on the failure of James Hay. The way in which I read the deed is this—"I convey to James Hay, under the express condition of his continuing to profess the Roman Catholic religion, and to his heirs and assignees whomsoever," and there can be no doubt that this condition is personal to James Hay; the fee vested in him on the death of the testator, and unless he committed an irritancy by becoming a Protestant the fee goes to his heirs or assignees on his death. That is exactly the case which has occurred here, and it is impossible to say that the destination to the nearest heirs professing the Roman Catholic religion is to take effect, because James Hay's heirs are preferred to them.

The Sheriff and the Sheriff-Substitute say that the nearest heirs professing this religion must be held to be conditional institutes, and that must be so if I have read the prior part of the deed right. The case of *Smith* which has been cited to us was a very difficult one, and led to considerable difference of opinion. There there was a proper substitution "to and in favour of William Stewart, my nephew . . . and the heirs of his body, whom failing before me, then to Adam Stewart . . . and the heirs of his body," and after exhausting the other heirs *seriatim* called, "whom all failing, then to my own nearest heirs and assignees whomsoever." The difficulty occurred on account of the expression "before me" which is inserted before each branch of the destination, and seems to indicate a conditional institution. The Court, however, on considering the whole terms of the deed, held that there was a substitution, which they certainly could not have done had the destination been to "my nephew William, and his heirs whomsoever," which would have excluded the idea of substitution.

Lord Glenlee in his opinion touches the real point of the case when he says,—"It is scarcely possible to attend to the whole deed and provisions and to doubt that the real purpose was that the nephews and their heirs should take *seriatim;* and I cannot possibly go into Lord Cringletie's view that the heir of conquest should be preferred. Suppose Adam" (that is to say, the party opposing) "out of the way: Though William were fully vested, yet he must, before he could serve heir of provision by conquest, show that heirs of conquest are substituted; while, on the contrary, the property stands destined to heirs whatsoever of the granter, and the only destination to the heirs of William is to heirs of his body." I think that clearly shows that the case has no application here, and I am accordingly for affirming the judgment of the Sheriff.

Lord Deas—I agree with your Lordship and with the Sheriff and the Sheriff-Substitute as to the construction to be put upon this settlement. There is no conveyance to the Roman Catholic heirs unless either of two things happens—unless the nephew dies in the testator's lifetime, or unless he abandons the Roman Catholic religion. The testator conveys direct to James Hay and his heirs and assignees whomsoever, unless one of these two things happens.

Lord Shand—I concur. I think this is a simple question, and I have no doubt about it. The disposition is to and in favour of James Hay, his heirs and assignees, under a certain condition which is limited to him, and does not attach to his heirs and assignees; and I cannot read the words "by death" as referring to anything but his death before the granter and not after.

Lord Mure was absent on Circuit.

The Court dismissed the appeal and affirmed the judgment.

Counsel for Appellants—Strachan. Agent—William Officer, S.S.C.

Counsel for Respondents—M'Kechnie—D. J. Mackenzie. Agent—John Macpherson, W.S.

Friday, January 19.

FIRST DIVISION

[Sheriff of Dumfries and Galloway.

M'KEAND OR KING *v.* THOMPSON & COMPANY.

Process—Appeal—Competency—Expenses—Court of Session Act 1868, *sec.* 67.

An interlocutor by a Sheriff-Substitute disposing of the whole merits of a case and awarding expenses was adhered to by the Sheriff on 27th June 1881. The process then fell asleep and was wakened on 19th October 1882. On 26th October the Sheriff-Substitute decerned for the amount of expenses found due, and allowed decree to go out in the name of the agent-disburser. On 24th November the Sheriff altered this interlocutor, to the effect of finding that the agent-disburser had discharged his claim. On 2d January 1883 the defender appealed to the Court of Session. *Appeal dismissed as incompetent*, on the ground (1) that under the 67th section of the Court of Session Act 1868 the interlocutor of the 27th June had become final by the lapse of six months from its date without appeal being taken; and (2) that the interlocutor of 24th November merely decerning for expenses was not subject to appeal—*Cf. Tennents* v. *Romanes*, 8 R. 824, 18 Scot. Law Rep. 583.

In an action in the Sheriff Court of Dumfries and Galloway, at the instance of J. & R. Thompson & Co., manufacturers, Glasgow, against Mrs Hannah