property. But it appears that 123 of the rollers which he claims were bought by the pursuer from Mitchell, Johnston, & Company, and were not delivered to him, but had been sent to the defenders in the ordinary course of business by the vendors before the sale to the pursuer, and are still in their possession. I agree with the Lord Ordinary that the right thus acquired by the defenders cannot be affected by a subsequent contract of sale. So far as regards these rollers the defenders should be assoilzied, and the pursuer should have decree for delivery of the remainder.

LORD ADAM concurred.

LORD M'LAREN—If there had been any difference of opinion among your Lordships I should have had no vote, as I was not present the last day on which the case was argued, but I heard an excellent argument in the two opening speeches, and I should like to say that I entirely concur in the principles of law laid down by Lord Kinnear, and their application to the facts of the case.

The LORD PRESIDENT concurred.

The Court recalled the interlocutor of the Lord Ordinary, and ordained the defenders to deliver to the pursuer the copper rollers mentioned in the summons, with the exception of the 123 rollers mentioned in the last paragraph of Lord Kinnear's opinion, and 5 rollers which were not admitted to be in the defenders' possession, and the pursuer's claim to the said 5 rollers was reserved.

Counsel for the Pursuer — Guthrie — M'Clure. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Defenders—C. S. Dickson —Salvesen. Agent—F. J. Martin, W.S.

Wednesday, March 7.

FIRST DIVISION.

[Sheriff of Lanarkshire.

M'BRIDE v. CALEDONIAN RAILWAY COMPANY.

(Sequel to case reported *ante*, vol. xxix, p. 208, and 19 R. 255.)

Title to Sue—Reparation—Damage to Property—Title to Sue of Owner who has Granted Conveyance ex facie Absolute, but really in Security.

In 1880 A conveyed a property of which he was owner to a bank by an *ex facie* absolute disposition. The bank reconveyed the property in 1893 by a disposition which proceeded on the narrative that the disposition of 1880, though *ex facie* absolute, had really been granted in security of an advance made to A by the bank, which had been repaid. *Held* that A's true right being instructed by the terms of the reconveyance, he had a good title to sue a railway company for damages which he alleged had been caused to the property in 1890 by their negligence.

Reparation—Damage to Property—Negligence—Issue.

An owner of house property sued a railway company for damage alleged to have been caused to his buildings owing to the negligent way in which the company had conducted certain operations for the construction of a sewer in the street where his property was situated. Form of issue *approved.*

By disposition dated 20th December 1880, John M'Bride disponed to and in favour of the Clydesdale Bank "for sundry good and onerous causes and considerations . . . heritably and irredeemably," certain subjects forming Nos. 39 to 55 M'Alpine Street, Glasgow. The disposition was unqualified in any way and was *ex facie* absolute.

By an agreement dated 25th January 1889 between the bank and M'Bride, the latter agreed to make payment to the bank of the sum of £500 by instalments of a certain amount, and the bank undertook that when the whole of the said sum of £500 should have been paid, they would reconvey and surrender their interest in the M'Alpine Street property to M'Bride.

By disposition and reconveyance dated 1st March 1893 the Clydesdale Bank, on the narrative that by the disposition of 1880 M'Bride had disponed to them the subjects therein mentioned, and, "considering that although said disposition was *ex facie* absolute, it was truly granted in security of an advancement of £2500 made by us to him, and now seeing that he has made payment to us of certain sums of money which we have agreed to accept in full satisfaction of said advance," disponed and reconveyed the said subjects to M'Bride with their whole right, title, and interest in the same.

In the end of 1889 the Caledonian Railway Company began to construct a sewer in M'Alpine Street under the provisions contained in sub-section L of section 41 of the Glasgow Central Railway Act 1888, whereby it was provided that where any of the works authorised by the Act should interfere with the sewers under the control of the corporation, the company should provide substituted works, the corporation being bound to communicate their powers so far as necessary.

In May 1893 M'Bride raised an action against the Caledonian Railway Company in the Sheriff Court at Glasgow for payment of £5500 as damages, averring that owing to the "reckless, negligent, and unskilful manner" in which the company had conducted their work in certain particulars, they had seriously damaged the buildings on his property.

The defender pleaded, *inter alia*—"(1) No title to sue."

On 13th September 1893 the Sheriff-Substitute (SPENS) allowed a proof.

The pursuer appealed for jury trial, and proposed as the issue for trial of the cause, whether the injury to his property had been caused "through the fault of the defenders in their operations" in M'Alpine Street?

Argued for the pursuer—His title was good, because (1) at the time when the damage was inflicted he was the holder of a beneficial right in the property. It was clear from the deeds that the conveyance to the bank was merely in security for a debt, and that the real right of property was in the pursuer. During the whole period he had the occupancy and care of the building. The bank could not have raised an action, for if they had done so they would have been met by the defence that the agreement of 1889 showed that they had not the beneficial right in the property—*Giles* v. *Lindsay*, February 27, 1844, 1 Ross' Cases (Land Rights), 479, showed that the substance and reality of the right of property must be considered. The sequestration cases of *Whyte* v. *Murray*, November 16, 1888, 16 R. p. 95; and *Geddes* v. *Quistorp*, December 21, 1889, 17 R. 278, were analogous, as showing that where a trustee had been discharged, but the bankrupt had not been reinvested, the latter had a title to sue as having the radical right in the estate—*Bell* v. *Gow*, December 19, 1862, 1 Macph. 183. The case of *The Heritable Reversionary Company* was really in the pursuer's favour, as it showed that the Court would look to the real rights of parties, and not merely to the form of the titles. (2) Alternatively, the disposition of 1893 gave him a title to sue. The bank by that disposition stated they were only security holders, and reconveyed the property to the pursuer with all their rights in the same. He had a good title to sue as their assignee.

Argued for the defenders—The bank had been *ex facie* owners of the property during the time in which the operations complained of were going on, and it had been reconveyed to the pursuer without any mention of this claim. The bank had been absolute owners, with a simple obligation to reconvey on the payment of a certain sum. This obligation in no way qualified their absolute ownership till the payment was made. Any claim for injury arising during that ownership was a personal one, not transmitting by mere reconveyance, but only by express assignation. Even if the agreement of 1889 were looked upon as a back-bond, the disponee under an absolute disposition such as that of 1880 had the sole right to sue, only transmissible by assignation. This transaction was outside the category of a trust, and within that of absolute ownership only qualified by contract. It differed from a bond of disposition and security, and did not therefore come within the category of "pledge"—*Caledonian Railway Company* v. *Watt*, July 9, 1875, 2 R. 917; *Heritable Reversionary Company* v. *Millar*, August 7, 1892, 19 R. (H. of L.) p. 43; *National Bank of Scotland* v. *Union Bank*, December 18, 1885, 13 R. 380; December 10, 1886, 14 R. (H. of L.) p. 1. *Form of Issue*—The issue should be so expressed as to keep the jury in mind that the ground of action was the alleged negligence of the defenders.

At advising—

Lord President—The defenders' plea to title was argued on the ground that at the time of the alleged injury the buildings were the property of the Clydesdale Bank, and not of the pursuer. I need not say that the defenders are right in maintaining that the mere fact that the pursuer is now the proprietor will not give him a title to sue for damages on account of injury done to the buildings if at the time of the injury they did not belong to him. The damage is of course sustained by the person or persons who at the time have interests in the property, the value of which interests are diminished.

In the present case the titles are before us, and, in my opinion, the terms of the disposition and reconveyance of 1st March 1893 put an end to the defenders' argument; for that deed, granted by the Clydesdale Bank, declares that the disposition of 1880 (upon which the defenders' argument rests) although *ex facie* absolute, was truly granted in security of an advance of £2500. The bank were therefore all along and at the time of the alleged injury nothing but security-holders. Now, it is quite plain that a man who has borrowed money on a house may in fact sustain loss if the house is injured, and the circumstance that the security title is put in the form of an absolute disposition does not in law prevent his recovering damages for such loss, the true rights of parties being duly instructed. Upon this point there is therefore no question to be put to the jury, and we can show this by describing the subjects in question in the issue as the pursuer's property.

As regards the form of the issue, I think there is force in the defenders' suggestion that it should be so framed as to keep the jury in mind that the mere fact that the defenders conducted operations which resulted in the houses being injured is not of itself a ground of liability. It is true that scientifically speaking the word "fault," which was proposed by the pursuer, is accurate enough as a description of the negligence and unskilfulness which constitute the ground of action alleged on record. But the jury will be less likely to miss the point if the question which they have to try is explicitly put before their eyes, and in the present instance this can be done without prolixity.

The issue which I propose is as follows—"Whether on or about the period from 1st January to 10th May 1890 the defenders carried on operations for the construction of a sewer in M'Alpine Street, Glasgow, opposite the pursuer's property there, in an unskilful and negligent manner, in consequence of which the pursuer's property was injured, to his loss, injury, and damage? Damage laid at £5500."

The record discloses that the damages claimed are in part for loss of business. It

was not suggested that any separate issue was required for this item of damage, of which adequate notice is given on record.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court approved of the issue quoted in the Lord President's opinion.

Counsel for Pursuer—Comrie Thomson—Deas. Agents—Clark & Macdonald, S.S.C.

Counsel for Defenders—Graham Murray, Q.C.—Ure—Clyde. Agents—Hope, Mann, & Kirk, W.S.

Wednesday, March 7.

SECOND DIVISION.

BELFRAGE AND OTHERS (TAIT'S TRUSTEES) v. MONTEITH.

Succession — Settlement — Construction — "Survivors" as equivalent to "Others."

A testator directed his trustees to hold the residue of his estate for the liferent use of his four sisters equally, and for their children respectively in fee, with the declaration "that in the event of the decease of one or more of my said sisters without children, her or their shares shall be held by my said trustees for the liferent use of the survivors and their children in liferent and fee aforesaid."

Held that upon the death of one of the testator's sisters without issue the share liferented by her fell to the sister then surviving and her children in liferent and fee respectively, the issue of a predeceasing sister being excluded—*Ward* v. *Lang*, July 13, 1893, 20 R. 949, *followed.*

Andrew Tait junior, baker in Edinburgh, died upon 6th February 1849.

By his trust-disposition and settlement, dated 30th January 1849, "for the love, favour, and affection which I have and bear to my relatives after mentioned," he gave, granted, and disponed his whole estate, heritable and moveable, to certain trustees named therein, for the following purposes, *inter alia*—(1) Payment of debts. (2) "That my said trustees, or the trustees acting for the time, may have and hold the residue of the means and estate hereby conveyed, or at their discretion convert the same into cash, and in either case take the destination of the means and estate or proceeds thereof to themselves for the liferent use of my sisters, Jane Tait or Belfrage, Christina Tait or Stenhouse, Ann Tait, and Margaret Tait, equally, and for their children respectively in fee: And declaring that in the event of the decease of one or more of my said sisters without children, her or their share shall be held by my said trustees for the liferent use of the survivors and their children in liferent and fee as aforesaid."

He was survived by his four sisters mentioned in the settlement. His estate when realised amounted to about £3200.

The truster's four sisters enjoyed the liferent of the trust-estate equally between them until Ann Tait died upon 24th March 1856 without leaving issue. Upon her death her share was liferented by her surviving sisters. Margaret Tait or Taylor or Monteith died on 18th February 1892 survived by three children, and the fee of the one-third share of the truster's estate liferented by her was divided among them. Mrs Christina Tait or Stenhouse died upon 18th March 1893 without leaving issue, and questions having then arisen as to the disposal of the share liferented by her, a special case was presented. The parties were (1) Andrew Tait junior's testamentary trustees; (2) Mrs Monteith's children; (3) Mrs Jane Tait or Belfrage, the truster's surviving sister; (4) The trustees of the deceased William Christie as assignees of Andrew James Belfrage, a son of Mrs Belfrage; and (5) Jane Belfrage, a daughter of Mrs Belfrage.

The questions for the consideration of the Court were—"1. (*a*) Does the liferent of the share formerly liferented by Mrs Stenhouse accresce and belong to Mrs Belfrage, the third party; or (*b*) does the liferent of one-half only of said share accresce and belong to her 2. If branch (*a*) of question 1 be answered in the affirmative, does one-half of the fee of the said share formerly liferented by Mrs Stenhouse vest in the second parties, the children of Mrs Monteith, and the other half vest in the fourth and fifth parties, as children (as in right of a child) of Mrs Belfrage, equally between them; or does the fee of the whole of the said share vest in the fourth and fifth parties? 3. If branch (*b*) of question 1 be answered in the affirmative, does one-half of the said share formerly liferented by Mrs Stenhouse fall at once to the second parties, and the fee of the other half, subject to a liferent to Mrs Belfrage, to the fourth and fifth parties, equally between them?"

Counsel for the third and fifth parties argued—The words "the liferent use of the survivors and their children," &c., must be taken in their ordinary signification, and that being so the whole share of the estate liferented by Mrs Stenhouse passed to her sister Mrs Belfrage in liferent, and on her death the fee went to her children, excluding Mrs Monteith's children. The case was really ruled by *Ward* v. *Lang*, July 13, 1893, 20 R. 949, which followed on the cases of *Forrest's Trustees* v. *Rae*, December 20, 1884, 12 R. 389; and *Hairsten's Judicial Factor* v. *Duncan*, July 14, 1891, 18 R. 1158.

Counsel for the fourth party concurred in the above argument.

The second parties, Mrs Monteith's children, argued—The truster began his deed by setting forth the love, favour, and affection he bore towards his relatives; that expression showed that he meant all to share equally in his estate. It was therefore absurd to suppose that his intention was that "the position of his descendants