Friday, January 10.

FIRST DIVISION.

[Lord Low, Ordinary.

KINDNESS *v.* BRUCE.

Destination — Disposition of Heritage — Mother in Liferent Allenarly and Children in Fee—Property Bought by Husband with Money Paid on Behalf of Wife —Liferent and Fee—Infeftment in Liferent Only—Revocation by Wife.

In 1839 a heritable property was purchased with a sum of money paid by a husband "on behalf of" his wife, and the disposition was taken to the wife in liferent for her liferent use allenarly (the husband's *jus mariti*, right of courtesy, or other right or title whatsoever being excluded) and to their children in fee. The wife took infeftment in the liferent. No infeftment was taken in the fee. In 1846 the wife conveyed the property to a disponee, *ex facie* absolutely but really in security, and infeftment was taken by this disponee. In 1873 the property was reconveyed to the wife, who did not take infeftment but possessed it till her death in 1884. She was predeceased by her husband and survived by the four children of the marriage. By her settlement and codicil she gave the subjects to one of the children with provisions in favour of two others, but excluding the fourth from all benefit. *Held* that from the terms of the disposition of 1839 it was to be understood that the wife was the purchaser of the property in question; that the destination was consequently gratuitous so far as the children were concerned; that no infeftment in favour of the children in fee having been taken under the disposition of 1839, no indefeasible right was acquired by them under that deed; and that the destination therein was revocable by the wife alone, and had been validly revoked.

Stewart v. *Rae*, 10 R. 463, 20 S.L.R. 308, *followed.*

By disposition and assignation dated 12th September 1839 John Watt, merchant in Banff, in consideration of the sum of £100 paid by Robert Bruce senior "on behalf of" his wife Isabella Wood or Bruce, disponed "to the said Isabella Wood or Bruce, in liferent for her liferent use allenarly (the said Robert Bruce her husband's *jus mariti*, right of courtesy, or other right or title whatsoever being hereby expressly excluded), and to the children procreated or to be procreated betwixt" said spouses "equally and share and share alike, their heirs and assignees whomsoever, heritably and irredeemably in fee," certain heritable subjects in the village of Gardenstown, in the parish of Gamrie and shire of Banff. Upon this disposition and assignation (which contained a clause binding the granter to infeft the said Isabella Wood or Bruce and the children procreated and to be procreated between her and her husband and their foresaids for their respective rights and interests as above expressed) and a prior disposition in her author's favour, the said Mrs Isabella Wood or Bruce expede an instrument of sasine which was recorded in the Particular Register of Sasines for the shire of Banff on 14th October 1839, whereby she was infeft in the said subjects in liferent only. No infeftment was taken in the fee.

By disposition dated 26th November 1846 Mrs Bruce, with consent of her husband, disponed the said subjects to Robert Adam, who was then agent at Macduff of the North of Scotland Banking Company, who expede an instrument of sasine thereon, which was duly recorded on 4th December 1846. This disposition was *ex facie* absolute. By a disposition dated 27th May and recorded in the appropriate Register of Sasines on 19th July 1859 Mr Adam conveyed the subjects to the directors of the North of Scotland Bank. By disposition dated 26th and 27th June 1873 the directors of the bank, upon the narrative that they held the subjects in security for advances made to the said Robert Bruce, and that these had been repaid, disponed the said subjects to Mrs Bruce "and her heirs or assignees, heritably and irredeemably." Mrs Bruce possessed the subjects till her death on 28th July 1884, but did not record this disposition.

By special disposition thereof contained in her trust-disposition and settlement dated 5th March 1874 Mrs Bruce disponed the subjects in question to her husband for his liferent use allenarly and their daughter Helen Bruce in fee under the real burden of payment by her to each of her brother and sisters, Robert Bruce, seaman, Macduff, Margaret Bruce or Kindness, and Catherine Bruce or Fowlie, and their respective heirs and successors, of one-fifth part of the value of the said subjects. By a codicil dated 24th December 1881 she revoked the bequest of the one-fifth part given in the settlement to Margaret Bruce or Kindness and gave this fifth to Helen Bruce. Mrs Bruce was predeceased by her husband, the said Robert Bruce senior, who died on 28th May 1884, and survived by the four children of the marriage, namely, Robert Bruce, Margaret Bruce or Kindness, Catherine Bruce, and Helen Bruce.

Upon the said trust-disposition and settlement and codicil thereto Robert Bruce, Helen Bruce, and Catherine Bruce or Fowlie expede a notarial instrument recorded on 10th February 1890 in order to complete their title to their *pro indiviso* shares. By disposition and discharge dated 9th and recorded 20th June 1890 they disponed the property to Helen Bruce; and Robert Bruce and Mrs Fowlie discharged Helen Bruce of the provisions in their favour contained in the trust-disposition and settlement.

Helen Bruce died unmarried and intestate in possession of the subjects on 9th January 1895. Thereafter Robert Bruce, by an extract-decree of special service recorded 17th September 1895 served himself as her heir-at-law. He also expede a nota-

rial instrument recorded on 28th March 1896, which proceeded upon (1) the disposition by the North of Scotland Banking Company dated 26th and 27th June 1873; (2) the extract registered trust-disposition and settlement and codicil of Mrs Bruce; (3) the disposition and discharge in favour of Helen Bruce; (4) the notarial instrument recorded 10th February 1890; and (5) the decree of special service.

Mrs Margaret Bruce or Kindness, the daughter whose share in the subjects had been revoked by Mrs Bruce in the codicil to her trust-disposition and settlement, died on 27th April 1890.

Thereafter Robert Bruce Kindness, who claimed to be her eldest son and heir-at-law, raised the present action, in which he concluded (1) for declarator (*a*) that he was heir-at-law of his mother Mrs Margaret Bruce or Kindness; (*b*) that his mother was at the date of her death under the disposition of 1839 *pro indiviso* fiar of one-fourth share of the subjects in question; (*c*) that the pursuer as her heir-at-law had now right to said *pro indiviso* share of said property; and (2) for reduction of all the deeds subsequent to the original disposition granted by John Watt in 1839.

The pursuer called as defenders Robert Bruce, Mrs Catherine Bruce or Fowlie, and her husband, the sole surviving trustees of Robert Adam, and the North of Scotland Bank, Limited.

Defences were lodged for the defender Robert Bruce.

The pursuer pleaded—"(1) The pursuer, the said Robert Bruce Kindness, being the heir-at-law of his mother, the said Margaret Bruce or Kindness, who was at the date of her death the *pro indiviso* proprietrix of one-fourth share of the said heritable property under the disposition and assignation executed by the said John Watt as libelled, he is entitled to decree in terms of the declaratory conclusions of the summons. (2) The deeds libelled in the summons, in so far as they purport to dispone, burden, or affect the pursuer's or his mother's said one-fourth *pro indiviso* share of said property, having been granted and executed by parties who were not the real owners of said share of said property, ought to be reduced as concluded for."

The defender Robert Bruce pleaded, *inter alia*—"(4) In respect the destination of the fee of the property to the children of the marriage in the disposition and assignation of 1839 was gratuitous, and that there was no delivery or infeftment to or in favour of said children, the said destination was revocable by Mrs Bruce. (5) The said destination having in the circumstances set forth been revocable, and having been validly revoked, the defender is entitled to absolvitor." He also pleaded prescription, but this question was not considered by the Court.

The Lord Ordinary (Low), on 19th June 1901, repelled the reasons for reduction, assoilzied the defenders, and found them entitled to expenses.

Opinion.—"The pursuer's grandmother Mrs Bruce obtained in 1839 a disposition of certain subjects in Gardenstown from John Watt in favour of her in liferent for 'her liferent use allenarly (the said Robert Bruce her husband's *jus mariti*, right of courtesy, or other right or title whatsoever being hereby excluded) and to the children procreated or to be procreated betwixt them, the said spouses, equally, share and share alike, their heirs and assignees whomsoever, heritably and irredeemably in fee.'

"Mrs Bruce took infeftment in liferent by instrument of sasine, but no infeftment was taken in the fee.

"The consideration stated in the disposition was 'the sum of £100 advanced and paid to me by Robert Bruce, merchant in Gardenstown, on behalf of Mrs Isabella Wood or Bruce, his spouse.'

"In 1846 Mrs Bruce, with consent of her husband, and he for his interest, disponed the subjects to Robert Adam, agent at Macduff of the North of Scotland Banking Company, in consideration of the sum of £90 paid to Mrs Bruce by Adam.

"The disposition to Adam although *ex facie* absolute was truly a security to the Bank.

"Adam was duly infeft upon the disposition in his favour, conform to instrument of sasine, and in 1859 he disponed the subjects to the directors of the bank, and the disposition in their favour was duly registered in the Register of Sasines.

"In 1873 the directors, upon the narrative that the disposition to Adam had been in security of payment to the bank of certain sums of money by Robert Bruce, and that the said sums had been repaid, disponed the subjects to Mrs Bruce and her heirs and assignees, heritably and irredeemably. That disposition does not appear to have been recorded, but Mrs Bruce possessed the subjects until her death in July 1884. Her husband had died in May of the same year.

"Mrs Bruce was survived by four children, namely, Robert Bruce, Margaret Bruce or Kindness (the pursuer's mother), Catherine Bruce, and Helen Bruce.

"By her settlement Mrs Bruce disponed the subjects to her daughter, Helen Bruce, under burden of payment to each of her brother and sisters of one-fifth of the value of the subjects. By codicil, however, Mrs Bruce revoked the bequest of one-fifth of the value to the pursuer's mother.

"The pursuer now seeks to have it found that his mother (whose heir-at-law he is) had right to the fee of one-fourth of the subjects under the original disposition to Mrs Bruce in 1839. His argument is that by that disposition Mrs Bruce became fiduciary fiar, holding for her children, that the disposition to Adam was *ultra vires* of her, and that the effect of the disposition to her by the bank in 1873 was to reinvest her in the subjects for herself in liferent and her children in fee.

"Now, the disposition to Mrs Bruce of 1839 narrates that the price was paid by Mr Bruce 'on behalf of his spouse.' The money may, therefore, have originally belonged to the husband, but I do not think that it makes any difference whether it was

taken from his funds or from the separate estate of the wife. What is important is that there is nothing to suggest that the children of the marriage had any right to the money. Then the disposition is not in any way conceived in terms which involve a trust, and I think that it is plain that so far as the children were concerned the deed was gratuitous. The destination to the children could therefore be revoked, unless the disposition was in some way delivered to them or for their behoof. If Mrs Bruce had taken infeftment in precise terms of the destination I think that that would have been equivalent to delivery, and that Mrs Bruce would have held as fiduciary liar for her children. But she did not do so, because her infeftment was limited to her right of liferent. The effect of that infeftment was to leave the fee still in the seller, and Mrs Bruce might have gone back to him and obtained a disposition of the fee in different terms from those which she had originally taken.

"So far it seems to me that the judgment in *Stewart* v. *Rae*, 10 R. 462, is directly applicable, but there is this peculiarity in the present case, that so far as I can see the fee has never been taken out of the seller. But that cannot aid the pursuer unless he can show that he is now entitled to demand a conveyance of the fee. The only ground upon which he can claim such a right is the destination in the original disposition, but that destination was, in my opinion, evacuated and revoked. I do not think that it matters that the fee was apparently never taken out of the original seller. The result of that may have been that the title which the bank got from Mrs Bruce was defective. But whatever right the bank got was reconveyed to Mrs Bruce, and at her death she was the only person who was entitled to demand a conveyance of the fee. She had therefore a personal right to the fee, and it seems to me that that right was effectually carried to her daughter Helen by the disposition of the subjects contained in her settlement.

"I am therefore of opinion that the pursuer is not entitled to decree."

The pursuer reclaimed, and argued—By the disposition by Watt to Mrs Bruce in 1839 her children acquired an interest in the fee which could not be set aside by her, because she was only given a mere liferent, and because the fee to the children was not gratuitous on her part and revocable at her pleasure, as the purchase money was the husband's. She was, besides, not even *in titulo* to revoke the destination—*Gilpin* v. *Martin*, 7 Macph. 807, 6 S.L.R. 518. The case here was distinguished from *Stewart* v. *Rae*, 10 R. 463, 20 S.L.R. 308, because there the purchase money had admittedly belonged to the parties granting the deed challenged, the original seller was a party to that deed, and the granters were clearly *in titulo*.

The defender relied on *Stewart* v. *Rae* (*cit. sup.*) as an authority in his favour.

Lord President—We have had a very good argument in this case but it appears to me that in the result the Lord Ordinary's judgment is correct. The circumstances are shortly but very clearly set out by his Lordship. The pursuer's grandmother Mrs Bruce in 1839 obtained a disposition of certain subjects in Gardenstown in favour of herself in liferent for her liferent use allenarly (her husband's *jus mariti*, right of courtesy, or other right or title whatsoever being expressly excluded), and to the children procreated or to be procreated betwixt her and her husband equally, and share and share alike, their heirs and assignees in fee; and the pursuer maintains that under this conveyance his mother, who was one of the children of the marriage, acquired right to a share of the property which has passed to him as her heir *ab intestato*. Mrs Bruce took infeftment under the disposition in liferent allenarly, but no infeftment was taken in the fee, and accordingly the feudal fee remained where it was, that is, in the seller. It appears from the disposition that the purchase price of £100 was paid by Mr Bruce "on behalf of Mrs Isabella Wood or Bruce, his spouse." This statement appears to me upon any reasonable construction to negative the idea that Mr Bruce was the purchaser. The natural meaning of the words is that in paying the purchase price he was acting as agent for his wife in paying the price, whether he was accommodating her with it or not. Mrs Bruce then was the purchaser of the subjects, not so far as appears subject to any obligation in favour of her children, and entitled to revoke the conveyance of the fee in their favour contained in the disposition. There was no delivery of the right of fee to them either by infeftment or otherwise. Thereafter she, with the consent of her husband, conveyed the subjects to the bank in security of a loan, and in 1873 they were reconveyed to her by the bank and she possessed them until her death in 1884. The question comes to be, what is the effect of the disposition granted in 1839, and as no infeftment was taken in the fee it in a feudal sense remained in the seller, and the beneficial right in it belonged to Mrs Bruce without any right or claim being given to her children. I therefore think that the Lord Ordinary's judgment is well founded, and although this case is not identical with that of *Stewart* v. *Rae*, it is the same in all essential features, the principles which received effect there being equally applicable here. For these reasons I am of opinion that the Lord Ordinary's interlocutor should be affirmed. The Lord Ordinary has not dealt with the question of prescription, and I do not think that we require to give any decision upon it.

Lord Adam—I am of the same opinion. I think the case turns on this—Whose money was it which was paid as the price for this property? Was the money the husband's, or had he any interest in it; or was the money the wife's, or must it be presumed to have been the wife's? If the husband had had the right to it, or some interest in it, the result might have been different—apart of course from his having

subsequently been a party to any deed of revocation—and that for this very good reason, viz., that the deed would not then have been a gratuitous one, and the wife would have had no right to revoke it. Accordingly the pursuer tried to make out that the money came from the husband, and that on the ground that the words "on behalf of" are equivalent to "for behoof of." But the *prima facie* meaning of the words is that one who pays on behalf of another is acting not for himself but for the person "on behalf of" whom he is said to have been acting. I quite agree to what fell from Mr Cullen that if the words were equivalent to "for behoof of" then the clause should have run not as here "for behoof of" Mrs Bruce but "for behoof of Mrs Bruce and the children." But in my opinion the only presumption to be drawn from the deed is that the money was paid by Mr Bruce on behalf of (that is, as agent of) Mrs Bruce—in other words, that the money belonged not to him but to Mrs Bruce, and that he paid it to Mr Watt in order that the wife might get a disposition.

If that is so, then, so far as the wife is concerned the deed was gratuitous, and she was entitled to take it in any terms she liked, and so long as the deed was undelivered she was in a position to revoke at any time she pleased. Was there here any delivery to anyone on behalf of the children? She took infeftment in liferent allenarly, and although she did not take infeftment in fee it is said that this is equivalent to delivery. If it had not been for the case founded on by the Lord Ordinary there might have been some foundation for this argument—that she had thus adopted and recorded the deed for the benefit of all concerned. But that argument is entirely and conclusively met by the case of *Stewart* v. *Rae*.

If that is so, the question comes to be—the deed being an entirely gratuitous deed and not delivered by her to anyone on behalf of the children, why could she not revoke it? In my opinion she could revoke it, and I think she has done so, not only by her last settlement, but also at the time when she granted the absolute disposition to the bank for an advance of money to her husband.

On the whole matter, I think the Lord Ordinary's interlocutor is right. That is enough for the decision of the case, and accordingly I do not go into the question of prescription, seeing that it has not been dealt with by the Lord Ordinary.

LORD KINNEAR—I agree with your Lordships, and for the reasons given by your Lordships that the interlocutor of the Lord Ordinary is right. I think the case is ruled by the case of *Stewart* v. *Rae*. On the question of prescription, that was not dealt with by the Lord Ordinary, and I do not think that it is desirable that we should decide a point which the Lord Ordinary has not considered or disposed of.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer—T. B. Morison. Agents—P. Morison & Son, S.S.C.

Counsel for the Defender and Respondent—Cullen. Agents—Alex. Morison & Company, W.S.

Tuesday, January 14

SECOND DIVISION.

[Sheriff-Substitute at Glasgow.

STEWART *v.* THE DARNGAVIL COAL COMPANY, LIMITED.

Reparation—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *secs.* 4 *and* 7 (2) *—Factory and Workshop Act* 1895 (58 *and* 59 *Vict. c.* 37), *sec.* 23 (1)—"*Factory*"—"*Quay*"—*Occupiers of Quay—Use of Quay by Coalmasters for Shipment of Coal.*

A company of coalmasters, who had a contract to supply coal to the vessels of a steam packet company, employed a coal porter to put the coal from their carts on to the quay breast at a certain berth in Glasgow Harbour, and thence to load the vessels with the coal. A labourer employed by the coal porter, who had brought a quantity of coal from the carts and laid it on the quay ready to be shipped, was awaiting the arrival of a vessel which was coming up the river, when he fell off the quay and was drowned.

In a claim at the instance of his widow against the coalmasters under the Workmen's Compensation Act 1897, *held* (1) that, even assuming the quay to be a factory, the respondents were not the occupiers of the quay within the meaning of section 23 (1) of the Factory and Workshop Act 1895; and therefore (2) that they were not undertakers within the meaning of section 7 (2) of the Workmen's Compensation Act 1897.

Opinion (*per* Lord Trayner) that a quay is not *per se* a factory.

This was an appeal in an arbitration under the Workmen's Compensation Act 1897 before the Sheriff-Substitute at Glasgow (GUTHRIE), between Agnes Stewart, widow of the deceased Robert Stewart, coal porter, claimant and appellant, and The Darngavil Coal Company, Limited, Glasgow, respondents.

The facts stated by the Sheriff-Substitute as admitted or proved were as follows:—"1. That the appellant's husband, Robert Stewart, was on 23rd July 1901 a labourer employed by John M'Keown, who was himself a coal porter, contracting with the respondents to load bunker coal from the quay breast at berth 38 of Glasgow Harbour into the steamers of the Dublin and Glasgow Steam Packet Company at certain rates per ton. 2. That M'Keown contracted with other owners of steamships and the