Wednesday, February 21.

SECOND DIVISION.

[Lord Young, Ordinary.

M'CALLUM'S TRUSTEES *v.* M'NAB AND OTHERS.

Obligation—Assignation—Conveyance—Back-Letter.

A. and B. entered into a building speculation, A. erecting the houses and taking the title to the ground, B. advancing most of the funds. A. got into embarrassed circumstances, and ultimately the whole ground and buildings were disponed in absolute terms by him to B., who bound himself in a separate letter to grant to A. "at any time he may demand the same, a disposition of any one or more of the said lots or building stances" on A's. paying the past feu-duties and undertaking the vassals' obligations. A. stated that this disposition was granted in order to exclude his creditors. In an action brought by B's. trustees ten years after his death, to have it declared that this obligation was extinguished—*held* (1st) that the obligation was not extinguished by a reconveyance of one stance made to A. on demand before the death of B.; (2d) that the obligation was assignable and had been validly assigned by A. to his marriage-contract trustees; (3d) that B.'s trustees were still bound to reconvey the whole remaining subjects, if required, in terms of the original obligation, and on being indemnified for all beneficial expenditure on the subjects.

This was an action brought by Alexander Brodie Mackintosh of Ardenlee, Dunoon, and Alexander Bell Smith, LL.D., residing at Sun Bank, Perth, sole accepting trustees of the deceased Donald M'Callum, sometime residing in Barossa Place, Perth, under trust-disposition recorded 25th September 1866, against Peter M'Nab, builder, Oban, as an individual, and the said Peter M'Nab and others as the acting trustees under his antenuptial contract of marriage, dated 27th March 1865, for declarator (1) that M'Nab's right under a letter granted by M'Callum on 14th April 1862 was satisfied and extinguished, and that none of the defenders had any right or claim under it; (2) alternatively, that the defenders were not entitled under the said letter to a conveyance of the whole unbuilt-on lots of ground therein referred to, but only to such smaller number, not exceeding one-fourth, as the Court should determine, and that only (1st) on payment of the feu-duties paid to the superior by M'Callum and his trustees for such lots of ground, and of the sums expended by them in the construction of a bridge, roads, sea-wall, sewers, boundary walls, waterworks, and in levelling and preparing the unbuilt-on ground, with interest from the dates of expenditure; (2nd) on the defenders becoming bound to free and relieve the pursuers in future of a proportionate part of the feu-duties and of the expense of maintaining the works above mentioned; and (3d) under all the conditions contained in a feu-contract of the lands referred to entered into between Admiral M'Dougall and M'Nab as principals, and M'Callum as cautioner, dated 28th November and 17th December 1859.

The Lord Ordinary pronounced the following interlocutor, and the whole circumstances of the case will be found in his Lordship's note:—"The Lord Ordinary having heard counsel for the parties and considered the proof and whole cause, Assoilzies the defenders from the first conclusion of the summons, and *quoad ultra* dismisses the action, but without prejudice to the right of the pursuers to withhold implement of the obligation incumbent on them under the back-letter of 14th April 1862, referred to on record, until any debt due to them by the defender Peter M'Nab, including past feu-duties, and also any proper expenditure by them, or their deceased constituent the late Donald M'Callum, on or for the benefit of the ground therein referred to, has been paid, and decerns: Finds the pursuers liable in expenses, and remits the account thereof to the Auditor to tax and report.

"*Note.*—The material facts of the case seem to be as follows:—In 1859 the defender Peter M'Nab, then a builder in Oban, acquired by feu-contract about 5 acres of the estate of Dunolly, on certain conditions usual in building feus, one being that buildings of a specified value should be erected thereon within a specified time. The stipulated feu-duty was considered to be the full value of the ground at the time, and so there was no other price. The late Mr Donald M'Callum of Perth was M'Nab's cautioner in the feu-contract, and by memorandum of agreement dated 28th November 1859 agreed to advance money for the building speculation to the amount and on the terms there specified. The ground was prepared for building, and to a small extent built on by M'Nab, wholly or chiefly with M'Callum's money, when in 1862 M'Nab fell into difficulties. In January of that year M'Nab executed in favour of M'Callum a redeemable disposition of the ground so far as built on, and this conveyance, which gives rise to no question here, need not be further noticed. On 9th April 1862 M'Nab conveyed to M'Callum the residue of the ground, being the part unbuilt-on, and the larger part. The disposition narrates that M'Callum had paid the past feu-duty, and that he undertook to pay it in future. No price or other cause of granting appears on the face of the deed, and M'Nab explains in his evidence that the purpose of it was to exclude his creditors, who might have been troublesome. The creditors having been privately settled with (apparently with the aid of M'Callum), and fourteen years having elapsed, and there being no complaint on the part of any creditor, this feature of the case, of which no point was made by either party, may, I think, be disregarded. This disposition of 9th April 1862 was qualified by the back-letter of date 14th April 1862, which, although a few days subsequent in date to the disposition, was a condition of it, and must, I think, clearly be so taken. It appears that M'Callum had made advances greatly in excess of the sum (£5000) mentioned in the memorandum of agreement of November 1859, and that the precautions regarding the expenditure and accounting which that agreement prescribes were not observed. It may, however, be assumed that in April 1862 M'Callum was M'Nab's creditor for a considerable although unascertained amount, and that he contemplated the probability of the debt increasing. It does not appear, and is not suggested, that M'Callum

paid anything for the disposition of 9th April 1862, or that in respect of it he discharged his debt against M'Nab in whole or in part; and, indeed, unless the ground disponed had then come to be of more value than the feu-duty, of which there is no satisfactory evidence, although the fact probably is so, he took no other benefit by the conveyance than a right to the prospective rise in value, whatever that might be. It is, however, to be observed that the dispositions of January and April 1862, taken together, made M'Callum the owner of the whole property on which his advances to M'Nab under the agreement of 1859, or in extension of it, had been expended. Advances beyond the scope of that agreement are alleged, but of these, and generally of the state of accounts between these two individuals in 1862 or subsequently, I cannot decide in this process. The accounting between them is the subject of another action now in dependence, which I shall subsequently notice. But apart from the details or the result of the accounting (which I cannot anticipate), I must, I think, regard the disposition and back-letter of April 1862 as a transaction between debtor and creditor, intended to give the creditor a certain security on the debtor's estate while it left the state of accounts between them quite open and unsettled. This looseness of procedure is a source of embarrassment now, which is increased by the terms of the back-letter, which are peculiar. The letter does not in terms declare the disposition to be a security merely, but it obliges the disponee to grant to the disponer, 'at any time he may demand the same, a disposition of any one or more of the said lots or building stances,' on his paying up the past feu-duty, and undertaking the whole obligations of vassal in the feu. This is the whole import of the obligatory part of the letter, although, reading it in connection with the introductory narrative, it must be limited to the stances which remained unbuilt-on at the time of the demand.

"In 1864 M'Nab demanded and obtained a reconveyance of one stance, and subsequent demands by him failed, not from any denial of his right, but because of the inability of the agents to adjust the conditions of the reconveyance, which it was assumed must be regulated by the terms of the back-letter, although the parties differed as to their meaning respecting liability for expenditure which had been made on the ground, and the maintenance of works.

"In October 1866 M'Nab, in pursuance of an obligation in his antenuptial marriage contract of the same date, assigned to his marriage trustees, for the purposes of the contract, all his right and interest under the back-letter to re-acquire the ground, and these trustees, who are called in this process, formally and in terms demand a conveyance of the whole ground, which is, as it happens, all still unbuilt on.

"In 1867 cross actions of count and reckoning were raised in this Court between M'Nab and M'Callum's trustees (M'Callum being dead), having for their purpose to adjust the long unsettled accounts. After seven years' litigation the minute of compromise quoted on page 14 of this record was arranged. It is a question between the parties whether this compromise was absolute or conditional on the consent of the marriage trustees, which M'Nab obliged himself to obtain, being actually given. The condition is certainly expressed in the ordinary language of condition in the introductory sentence of the minute, and there can, I think, be no doubt that it is operative in favour of M'Callum's trustees if they choose to stand on it, although, if they are content to waive it, it may be doubtful whether M'Nab can be allowed, so far as his interest is concerned, to plead it in the face of his express obligation to obtain the consent of the trustees. I think, however, that this is a question in the action of count and reckoning, and not in this process. I can determine whether or not the marriage trustees have an interest in the back-letter, but if they have an interest so that their consent is necessary to its being discharged, I have, I think, no jurisdiction to decide as to the effect of their refusal on the compromise adjusted in the count and reckoning processes which are still in dependence. If it shall be decided in this process that the back-letter was not effectually assigned to the marriage trustees, M'Callum's trustees will no doubt be ready to waive the condition of their consent to its discharge being obtained, and to stand on the discharge by M'Nab himself, the validity of which, in that view, I see no reason to doubt.

"The questions for decision here are—1st, Whether or not the obligation in the back-letter was assignable, and was validly assigned to the marriage trustees; and if it shall be held to have been validly assigned, then 2d, On what terms the assignees may demand implement from the pursuers, so far as this can be determined under the conclusions of the summons.

"I. On the first question two points are made by the pursuers, viz.—1st, That the obligation in the back-letter was exhausted by the disposition of a stance which was granted to M'Nab in 1864; and 2d, That the obligation was personal in favour of M'Nab, and intransmissible. On both points my opinion is against the pursuers. 1st, I think the only limit to the obligation to reconvey is that the ground of which a reconveyance might be demanded should be unbuilt-on when the demand was made. The exhaustion of it by compliance with one demand, applicable to a small portion of the ground, is so unlikely to have been contemplated that I cannot impute that intention to the parties in the absence of any expression which clearly indicates it. I think parties having an intention so unlikely to suggest itself to others would have expressed it. In the correspondence such a view is not hinted at. 2d, The right under the back-letter was or might be, and in the result (as I assume from the controversy about it) proved to be, valuable. It was a right to obtain from the proprietor building ground without price, other than the feu-duty on it, so long as it remained vacant. There is nothing that I can see in the nature of the right to except it from the ordinary rule of alienability, nor do I think that the circumstances which here attended its creation are such as to warrant its being exceptionally regarded in this respect.

"II. As to the conditions on which the marriage trustees may demand implement, I should think it clear on general principles that the pursuers are not bound to convey under the back-letter except on payment of M'Nab's debt to them as that may be ascertained in the proper process; and second, of any beneficial or other-

wise proper expenditure on the ground subsequent to the disposition of April 1862, and a proportional part of any expenditure on adjacent ground by which it benefits, and for which, on the customary division and allocation of such expenditure for building purposes, the ground demanded is liable. While I thus express my opinion, I do not at present see how I can pronounce any judgment on this head under the conclusions of the summons.

"So far as I can see, the attempted compromise of the actions of count and reckoning has failed for want of the consent of the marriage trustees—assuming my opinion, which favours their right. If, therefore, these cases shall not be otherwise arranged, they must proceed to judgment at last, and it is time, for they have been in Court for nearly ten years. When this end has been reached, the rights of the marriage trustees under this judgment will not be hard to explicate and adjust. They will have the full benefit of any rise in the value of the ground, and nothing more, while M'Callum's trustees will have such indemnity as the property can afford for the debt due to them, and the obligations prestable in their favour.

"The opinion which I have expressed leads to the absolvitor of the defenders from the primary conclusion of the summons. With respect to the alternative conclusion, I think I must dismiss the action, for that conclusion is based on the proposition that the Court may in its discretion limit the extent of ground to be reconveyed on demand within the limit specified in the back-letter (viz., so far as unbuilt-on), which I am unable to sustain. But it will be understood from what I have said that I should not order a reconveyance except on the terms which I have specified, and that the judgment which I now pronounce does not import a right on the part of the defenders to a reconveyance without satisfying M'Nab's debt to the pursuers as that may be established in the count and reckoning, and also of any proper expenditure on or for the benefit of the property by them or their deceased constituent which may not be included in that debt."

Against this interlocutor the pursuers reclaimed, and argued—The agreement under the document called a back-letter was not to convert M'Callum's title into a security title. There was no machinery for repayment of debt. The election given to M'Nab was personal without mention of heirs or successors, although those of the debtor in the obligation were mentioned. The doctrine of Stair (ii. 10, 7, and iii. 1, 16) and Erskine in his Principles (Guthrie's ed. p. 205), is that rights of reversion, although from favour to diligence adjudgable, are *stricti juris*, and do not go to assignees of the reverser unless they be expressed. Stair extends this to heirs, distinguishing the case of a reversion from that of a disposition where heirs are implied, although Erskine, on the authority of *Murray* v. *Grant* (Mor. 10,322, *anno.* 1662), says that such rights go to heirs unless the intention appear to exclude them. *Cochran* v. *Gourlay*, July 20, 1611, Mor. 10,365 and *Neill* v. *Andrews*, June 28, 1748, Mor. 10,465. The right here is not reserved, but constituted voluntarily and gratuitously.

Argued for respondents—The whole of the deeds must be read in the light of the circumstances of the parties who granted them. M'Nab's right was assignable. Erskine in his Institutes (iii. 8, 5-8) repudiates the doctrine of Craig, Hope, Mackenzie, and Stair, that reversions are *stricti juris*, as inconsistent with known rules of law and practice; and discards the distinction taken by the Court between right and faculties, a faculty proper being not descendible to heirs. Bell (Comm. i. 793) states that reversions are transferable by assignation—In *Ross* v. *M'Finlay*, May 23, 1807, (Hume's Dec. 832) it was held that a clause of break reserved by a lease to the landlord was transferable to a purchaser.

At advising—

Lord Justice-Clerk—There are three questions in this case—(1) Whether the obligation to reconvey contained in this so called back-letter was assignable? (2) Whether, if it was so, it was exhausted by the reconveyance of one lot to the creditor in it? and (3) Whether the creditor in the obligation is entitled to demand as many lots as he pleases?

These three questions depend on the construction of the documents of which a print is before us. The whole transaction was commenced by a memorandum of agreement dated 28th November 1859. The position of M'Nab at this time was that he had agreed to feu a certain piece of ground from Admiral M'Dougall with a view to erecting houses thereon to the value of £5000, and M'Callum became his cautioner and also agreed to advance the £5000 required to enable him to fulfil his obligation. M'Nab was therefore in right of the feu, and M'Callum was both his cautioner and his creditor for the money he might advance, It is then provided that "the said Donald M'Callum shall have it in his power to purchase any or all of the dwelling houses so to be erected, either at their cost price or, in the option of the said Donald M'Callum, by valuation of skilled persons mutually chosen; and in the event of the said Donald M'Callum purchasing at cost price, there shall be included therein a reasonable charge for Mr M'Nab's erecting the building." That provision really comes to this—if M'Callum chose to take over the houses, M'Nab was to be merely an agent or overseer.

The feu-contract which was then entered into between Admiral M'Dougall and M'Nab is of no consequence except in so far as it vests the ground in M'Nab, and it is therefore unnecessary to go into its provisions in detail. There now come the two dispositions by M'Nab and M'Callum, the first dated 22d January 1862, and the second 9th April of the same year, and the document marked as back-letter. All this cannot be called a lucid piece of conveyancing—the deeds are full of errors. The truth is that M'Nab was in difficulties in consequence of his connection with a person called Henderson, and these deeds were drawn for the purpose of excluding his creditors, and so far as possible saving for him some interest in the speculation. The first disposition illustrates very strongly what I have now said. It is a disposition of the eight houses which had then been erected on six of the building lots, and it proceeds on the narrative that M'Callum had supplied M'Nab with the whole funds, that the houses had been erected on M'Callum's account, and that M'Nab had really no interest in the subjects disponed. The language of the dispositive clause, "heritably and redeemably," is inconsistent with the narrative, which discloses a prior obligation to grant; but it is plain enough that

the object of the deed was to protect the rights of M'Nab against his creditors. It is not necessary to speculate on the force of the word "redeemably" in these circumstances, and I pass to the second disposition of 9th April 1862, which on the narrative of the feu-contract, and of the first disposition (but without reference to its redeemable character), and that M'Callum had paid the feu-duty and had agreed to relieve M'Nab of the obligations under the feu-contract, gives to M'Callum an absolute irredeemable right to the whole subjects, both the built-on and the unbuilt-on lots. The result of these deeds is, that whereas the ground belonged to M'Nab, M'Callum, who spent the money on the subjects, took them over at cost price. Then follows the document called a back-letter, dated 14th April 1862, which, on a recital of M'Nab's desire to have it in his power to obtain possession of any of the lots unbuilt-on at the time of his election to build on them, binds M'Callum to grant M'Nab, at any time he may demand the same, a disposition of any one or more of the unbuilt-on lots. Then we find that by a feu-contract of 2d and 5th May 1862, sopiting the dispositions I have mentioned, the whole subjects are directly vested in M'Callum under Admiral M'Dougall, the superior. In this state of matters, I doubt very much whether any real right was left in the person of M'Nab, although the parties seem to have afterwards acted on the supposition that there was. I think that what M'Nab enjoyed under the back-letter was not in any sense a security or reversion, but a personal obligation voluntarily granted by the absolute proprietor of the subjects to which it relates, and in its own nature assignable. The back-letter is no limitation on M'Callum's real right; he may build over the subjects or sell them, but if he has not done so when the creditor in this obligation makes his demand, then he is bound to reconvey on payment of the past feu-duties, and subject to the conditions of the feu-contract. The *dicta* of Stair, Craig, and Mr Erskine in his Principles, which have been referred to, all relate, I think, to the case of a proper wadset or sale subject only to the right of reversion. But assuming the obligation to be assignable, it is said that it has been exhausted by the first demand made in 1864. I see no ground for that contention. It is obvious that in 1862 M'Callum regarded these subjects rather as a burden, and was willing to be relieved of them from time to time, and was willing also to keep for M'Nab some interest in the speculation. There is not the slightest foundation for the alternative conclusion in the summons limiting the right of M'Nab or the assignees to one-fourth of the subjects not built on. The only point, therefore, on which I differ from the Lord Ordinary is, that I cannot regard the back-letter as converting the right of M'Callum into a mere security-title.

Lord Ormidale—I agree that the right under the back-letter was not a right of reversion, but an independent obligation in consideration of the reconveyance, M'Nab, who had been the builder, feuar, and speculator, being at that time unable to pay the feu-duty or repay the advances. It could hardly be a security transaction, for there was no amount specified, and no terms of redemption stated. Probably, therefore, there would be no liability for intromissions. I further agree that the obligation to reconvey was assignable and had not been exhausted in 1864, there being nothing in the language used or in the circumstances or conduct of the parties to suggest such a limited construction. I, however, doubt whether, as the Lord Ordinary says, tha pursuers are entitled to withhold reconveyance on payment of past feu-duties until their claims for beneficial expenditure should be settled.

Lord Gifford concurred.

The Court pronounced this interlocutor:—

"The Lords having heard counsel on the reclaiming note for the trustees of D. M'Callum against Lord Young's interlocutor of 27th October 1876, with the following addition thereto:—"And reserving to the defenders their answer to said claims"—Adhere to the interlocutor of the Lord Ordinary, with additional expenses, and remit to the Auditor to tax the same and to report, and decern."

Counsel for Pursuers — M'Laren — Balfour—Innes. Agents—W & J. Burness, W.S.

Counsel for Defenders — Hall—G. Watson. Agents—Morton, Neilson, & Smart, W.S.

Wednesday, February 21.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

MORRIS *v.* BRISBANE.

Superior and Vassal—Property—Feu—Casualty—The Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. c.* 94) *sec.* 4, *sub-sec.* 2, *and sec.* 15.

A feu was created by feu-disposition which prohibited subinfeudation, and declared that on contravention of the prohibition "not only all such subaltern rights, but also these presents, shall be null and void." The feu was transmitted to several persons by conveyances containing a double manner of holding, and the last transmission was in favour of M. by disposition dated 3d and recorded in the Register of Sasines 12th May 1876. This disposition did not express any manner of holding, and the disponee in the original feu-disposition was still alive. *Held* (1) that M. was proprietor duly infeft in the subjects in terms of sec. 4, sub-sec. 2, of the Conveyancing (Scotland) Act 1874; (2) that the clause in the original feu-charter in reference to subinfeudation did not render a casualty exigible on each sale or transfer of the property; and (3) that M. was therefore entitled to redeem the casualties incident to the feu on payment of the highest casualty with an addition of 50 per cent., in terms of the 15th section of the Act.

This was an action at the instance of John Morris, accountant in Glasgow, against Charles Thomas Brisbane, heir of entail in possession of the estate of Brisbane, Ayrshire, for declarator (1st) that the pursuer was duly vest and seised in the *dominium utile* of certain subjects in Nelson Street, Largs, and that the defender was the superior