judgments pronounced in the course of the proceedings are sometimes appealable, though I for my part am for limiting such appeals as much as possible. If the Sheriff should transgress some well-known rule, then we should be bound to interfere as we did in the case of *Wylie* v. *Kyd*. In the present case, however, nothing has been stated which in my opinion would warrant our interference with the discretion of the Sheriff.

Lord Adam concurred.

The Court refused the appeal.

Counsel for Appellant—D.-F. Mackintosh, Q.C. —Rhind. Agent—D. Howard Smith, Solicitor.

Counsel for Respondents—Pearson Guthrie. Agents—J. C. Brodie & Sons, W.S.

HOUSE OF LORDS.

Friday, December 10, 1886.

(Before Lord Chancellor Halsbury, Lord Blackburn, and Lord Watson.)

NATIONAL BANK OF SCOTLAND *v.* UNION BANK OF SCOTLAND.

(*Ante*, vol. xxiii. p. 242, December 18, 1885, and 13 R. 380).

Right in Security—Absolute Disposition with Back-Letter—Assignation by Debtor of Right to Reconveyance, intimated to Creditor — Retention.

A, in security of advances by the National Bank, disponed to that bank, by disposition *ex facie* absolute, duly recorded, certain heritable property belonging to her. By separate back-letter, never recorded, it was agreed that the National Bank should hold the disposition "in security and till payment of all sums now due, or which may hereafter become due," by A's firm and by A, and that on payment of all such sums the subjects should be reconveyed to A. Thereafter A, in security of advances by the Union Bank, assigned to the Union Bank her whole right in the heritable property under the right of reversion which arose out of the transaction with the National Bank. This assignation was intimated to the National Bank. After the intimation the National Bank continued as before to make advances to A, who eventually executed a trust for creditors, being largely indebted to both banks. The subjects were not sufficient to pay both. *Held (reversing* judgment of majority of whole Judges of Court of Session) that as the transaction was one of security only, the preference of the National Bank did not extend to its whole advances before and after the intimation of the assignation and down to the granting of the trust-deed, but was limited to the amount due to it at the date of the intimation of the assignation.

This case is reported *ante*, vol. xxiii. p. 242, December 18, 1885, and 13 R. 380.

The Union Bank appealed to the House of Lords.

At delivering judgment—

Lord Chancellor—My Lords, two propositions appear to be established beyond dispute in the discussions of the learned Judges on this question. One, that the National Bank held an absolute disposition of the lands in question dated 12th February 1879, and recorded some days later. Another, that the terms of a back-letter, the meaning and construction of which I will refer to presently, qualified the absolute disposition, and restricted the title to one in security.

The interesting historical retrospect of the Lord President of the mode in which this form of transaction came to be adopted by Scotch conveyancers in order to avoid the common law and the Statute of 1696 is, I think, very relevant to the question of what is the substantial nature of the transaction in question. It certainly bears a very close analogy to the English mortgage of land, which conveys in the most absolute form the estate to the mortgagee, but which nevertheless is only held as a security for money advanced.

In the language of the back-letter the National Bank were to "hold the said disposition in security, and until full and final payment of all sums of money now due or" (and these are the cardinal words) "which may hereafter become due." These words, it is contended, are enough in construing the personal contract to establish that by the contractual relations between the parties the National Bank were entitled to prevent Mrs M'Arthur borrowing, elsewhere than from themselves, anything upon the security of the lands in question.

The first observation that strikes one is, that no such express contract appears on the face of the instrument. It might be that Mrs M'Arthur would continue to borrow to the full extent of the security, and if she did so borrow from the National Bank, there is no doubt that the security would (as the language I have quoted obviously intended that it should) form a security for such further advances. But does it follow because the back-letter makes provision for what in that event would be a natural and proper course of dealing, that thereby Mrs M'Arthur entered into a contract not to deal with the reversionary interest with anyone else?

It is certain that no obligation is imposed on the National Bank to advance any more money than they have already advanced, and the result would appear to be, that by Mrs M'Arthur's entering into a contract to allow her property to be security for all sums already due, and for all sums which upon terms to be afterwards settled between them the bank might advance to her, she thereby undertook that she would remain with that bank as a customer (to use the language of one of the learned Judges) until the value of her security was exhausted.

It appears to me that this is the real ground of difference upon which the learned Judges have been divided. It is not denied—indeed it is insisted—that upon payment of all sums due Mrs M'Arthur would be entitled to demand re-conveyance, and it cannot therefore be denied that if instead of fresh advances obtained from the National Bank Mrs M'Arthur had proceeded to some other bank,

which was in a position to advance the whole of the sums already due and make to Mrs M'Arthur a further advance, such a transaction would have been perfectly competent. But although that would seem to show that Mrs M'Arthur's interest in the unpledged value of the security was such as to enable her to get further money value for it, nevertheless, as long as the National Bank remained the absolute unqualified disponees she could not treat for, or dispose of in any effectual manner, her reversionary interest.

It would seem to be a strange result of what the Lord President has pointed out was a pure conveyancing expedient to avoid the operation of the common law and the statute law, that an admittedly valuable property is no longer at Mrs M'Arthur's disposition, but that on the personal contract, as distinguished from the feudal relation created by absolute disposition, she was not at liberty to seek for further advances elsewhere than from her original creditor. We are dealing here not with the rights of third parties, but with the rights of the immediate parties to the transaction, and I gather from the reasoning of some of the learned Judges that they think there is an implied term (for it certainly is not expressed) in the contract in question that she is not to seek elsewhere to borrow on the security of what is nevertheless admitted to be her own remaining interest.

My Lords, if I am right as to the true nature of the contract between the parties, each fresh advance must have been the subject of a fresh agreement, in this sense, that the bank must have consented to advance it, and upon that consent Mrs M'Arthur's previous contract would make such fresh advance a charge upon her interest in the reversionary right. But the question is whether Mrs M'Arthur, having bargained away and made an assignation of her reversionary right to the knowledge of the National Bank, could then obtain further advances upon the security of an interest which she had for valuable consideration already assigned to a third person. My Lords, it seems to me that such a proceeding is contrary to good faith, and the decision of your Lordships' House in *Hopkinson* v. *Rolt* [9 Clark's House of Lords Cases, 514] establishes the principle, and establishes it upon the broadest grounds of natural justice. My Lords, I am not impressed with the completeness of the feudal ownership created by the absolute disposition. No question arises here which diminishes that complete and absolute character. Whether what remains in Mrs M'Arthur be regarded in the light of a *pactum de retrovendendo*, or whatever be the character of her interest, the real question comes back, not to the form of the transaction but to its substance, and to what is the actual bargain between the disponer and the disponee, as evidenced by the back-letter. Doubtless each of the two parties may be said to have proceeded upon a *bona fide* belief in their respective rights, and to have acted in pursuance of them, but how it can be suggested that Mrs M'Arthur could in good faith affect to charge with further sums borrowed that which she had already purported to assign I am at a loss to understand, and it is to be observed that the National Bank made the advances for which they now claim priority with the knowledge that Mrs M'Arthur had done so.

My Lords, I think the principle upon which *Hopkinson* v. *Rolt* was decided is one which governs this case, that its application is not confined to the law of England, but is applicable to the law of Scotland also, and I should feel myself bound by that case even did I not agree with the principle upon which it was decided. For these reasons I move that the interlocutor be reversed, and that the respondents should pay to the appellants the costs both here and below.

Lord Watson—My Lords, this appeal raises a question of considerable importance to the law of Scotland. In disposing of it your Lordships have the great advantage of having before you the opinions of all the learned Judges of the Court of Session, which contain a clear statement of every reason that can be urged for or against the judgment appealed from.

The execution and recording of an absolute disposition of heritage, qualified by a personal contract in the form of an unrecorded back-letter, for the purpose of creating a security, has the effect of vesting the full feudal estate in the disponee, and the disponer's interest is thereby reduced to a personal right to have the estate, or the proceeds of its sale, as the case may be, reconveyed or paid to him, on payment or under deduction of the secured debts. As regards third parties who transact with him on the faith of the public records, the powers of the disponee are not affected by the private contract, and he can sell or burden the estate, and can give a valid title to the purchaser or encumbrancer, although the creation of these rights should be in direct violation of the terms of the back-letter. But in a question with the disponer himself, or with persons who through him have acquired an interest in the estate or in the personal contract, the disponee is affected by the back-letter, and is treated as the holder of a mere security. In all such cases the rights of parties must be determined, not according to the form of the disponee's title, but according to the substance of the transaction.

In *Robertson* v. *Duff* (2 D. p. 79) it was held, in the case of a security constituted by a disposition *ex facie* absolute, that the terms of the arrangement for securing debt, in pursuance of which the conveyance was made, might, as between the disponer and disponee, be instructed by the same kind of evidence which would be competent and sufficient to prove a trust in a question with an absolute disponee. Lord Fullerton and the other Judges who took part in the decision spoke of the case as one of trust, but the fact that they so described it does not affect the grounds of their judgment. I agree with the Lord President in thinking that the transaction with which we have to deal in this case is not within the category of proper trusts, but I do not think that it is in substance or in form a *pactum de retrovendendo*. The conveyance does not bear to be granted in implement of a contract of sale, and it was never contemplated by the parties that the National Bank should stand as purchasers with an obligation to re-sell; what they did contemplate was, that the bank should hold the subjects as a security for debt with power of sale, and under an obligation to reconvey (before sale) on receiving payment of the debt, or to account for the price under deduction of the debt. The effect of the unre-

corded back-letter is to make the right of the respondents a mere security as between them on the one hand, and Mrs M'Arthur and all deriving right from her on the other. If the letter had been recorded in the Register of Sasines their right would have become a mere security in a question with the public, who would no longer have been entitled to deal with the respondents on the footing that they were the absolute proprietors of the estate.

In some of the judgments in the Court below there is a great deal of learned discussion as to the nature of the disponer's right under an unrecorded back-letter, but I do not think there is any real difference of opinion upon that point. In form it is a personal right consisting *in obligatione*, and it has been frequently described with perfect accuracy as a *jus actionis*. The right of a beneficiary under a proper trust constituted by an *ex facie* absolute disposition—the disponee acknowledging by a separate writing which does not enter the records the trust purposes for which he holds—is a right of precisely the same quality. It is not, strictly speaking, a radical right, that being an expression which in the language of the feudal law is used to denote the right of a proprietor, who, without divesting himself of his feudal estate, creates an incumbrance upon it, *e.g.*, by means of a trust conveyance bearing to be granted for payment of debt. But I am of opinion that the relations of the parties to this case do not depend upon feudal principles, and consequently that Lord Rutherfurd Clark was justified in saying that "the radical right to the subjects which had been conveyed to them (*i.e.*, to the respondents) remained in Mrs M'Arthur." Apart from considerations of feudal law Mrs M'Arthur had the radical right, in this sense, that according to the reality of the transaction she was the only person who had a proprietary interest in the subjects of the security, and that each successive advance, whilst it enlarged the bank's right of retention, imposed an additional burden upon her proprietary interest.

It appears to me that the key to the difference of opinion in the Court below is to be found in the widely different constructions which were put by the majority and minority of the learned Judges respectively upon Mrs M'Arthur's letter of the 12th February 1879, which contains the terms upon which the respondents agree to hold the disposition in their favour. In the opinion of the majority that letter gives the bank not only power to retain the property till they are relieved of advances made by them whilst Mrs M'Arthur continues to be owner of the reversionary interest, but an absolute right to retain it for advances made to her or her firm after she has, with the full knowledge of the bank, transferred her whole rights as reversioner to an onerous assignee having no interest on those advances, and being under no obligation to secure them. At your Lordships' bar counsel for the respondents not only admitted but maintained that as a necessary consequence of that construction the bank had the right to lend to Mrs M'Arthur on the security of the property and to the full extent of the value, although she had sold the reversion as it stood, and had expressly undertaken not to borrow, and the sale and the terms of that undertaking had been intimated to the bank before any advance was made. According to the view taken by the minority, the only debts falling within the arrangement embodied in the letter are advances made by the bank upon the credit of Mrs M'Arthur, and affecting her beneficial interest in the estate which was feudally vested in them, and therefore the bank had no right to make advances affecting that beneficial interest after they became aware that she had been divested of her interest by an assignation to the appellants.

I cannot say that I have had any difficulty in preferring the construction of the personal contract between Mrs M'Arthur and the respondents which was adopted by the minority of the Judges, and seeing that I have been influenced by the very same reasons which have already been fully stated by their Lordships I shall not repeat them. It is a necessary consequence of that construction that the preferable claim of the respondents upon the subjects vested in them must, in a question with the appellants, be limited to the debt due to them from Mrs M'Arthur and her firm at the time when the appellants' assignation was intimated, the appellants having priority for advances made after that date. Upon the terms of the back-letter I should have come to the conclusion quite independently of the decision of this House in *Hopkinson* v. *Rolt* (9 H. of L. Cases 514). The principle of that decision, of which I entirely approve, does not rest upon any rule or practice of English conveyancing, but upon principles of natural justice. The circumstances of the two cases are in many respects very analogous, but it is in my opinion quite sufficient for the decision of this case that the terms of their personal contract with Mrs M'Arthur precluded the respondents from making advances to her upon the security of property which was known by them to belong, in reality not to her, but to the appellants as her onerous assignees.

Notwithstanding the importance of the present case I have confined myself to these somewhat desultory observations, because I entirely concur in and can add nothing to the reasoning of the five learned Judges who constituted the minority in the Court below.

I am of opinion that the interlocutor appealed from ought to be reversed with costs, and that your Lordships ought to answer the second question in the Special Case in the affirmative.

Lord Blackburn—My Lords, I have read with attention the different judgments delivered in this case below.

I have also had the advantage of reading in print the opinion of my noble and learned friend Lord Watson.

I do not think any benefit would be gained by my saying more than that I agree with the judgment proposed.

Interlocutor appealed from reversed, with costs both on appeal and in Court of Session.

Thereafter a petition having been presented to the First Division to apply the judgment of the House of Lords, the Court answered the *first* question in the Special Case, "Is the security of the first parties [National Bank] over the said subjects preferable to the security of the second parties [Union Bank] to the extent of the whole sum due

to the first parties by the firm of William M'Arthur & Company at the date of the trust-deed?" in the *negative;* and the *second* question, "Is the first parties' preference limited, in a question with the second parties, to the amount due by the said firm to the first parties on 18th August 1879, the date of the intimation of the said assignation?" in the *affirmative.*

Counsel for Union Bank (Appellants)—Horace Davey, Q.C.—Macnaghton, Q.C.—Low. Agents—Murray, Hutchins, & Co., for J. & F. Anderson. W.S.

Counsel for National Bank (Respondents)—J. B. Balfour, Q.C. — Graham Murray — J. F. Hamilton. Agents—Andrew Beveridge for Dove & Lockhart, S.S.C.

COURT OF SESSION.

Tuesday, December 14.

OUTER HOUSE.

[Lord Trayner.

MACKENZIES *v.* BANKS AND OTHERS.

Husband and Wife—Postnuptial Contract—Revocation of Postnuptial Contract—Protection of Interest of Wife and Children.

Spouses (with the approval of the Court, interponed in an action relative to the wife's funds) executed a postnuptial contract under which the funds of the wife, the husband having none, were conveyed to trustees for the wife's liferent alimentary use (a certain liferent interest being also conferred on the husband if the survivor), and for payment of the fee to the children of the marriage and the children of the wife by any subsequent marriage. There was a child of the marriage at the date of the postnuptial contract, and another was born subsequently. The postnuptial contract was delivered to the trustees under it, and thereafter was acted upon for a number of years. *Held,* in an action by the spouses to have it found that the contract was revocable, at least in so far as not an onerous reasonable provision for the children of the marriage, that they were not entitled to revoke it, the wife having by the execution and delivery of the deed effectually protected herself against the actings of herself and her husband, which protection must be continued even against her own wish.

Miss Mary Shepherd attained majority in January 1874, and early in the year 1876 certain sums from the estates of her deceased father and brother were paid to her, amounting together to £21,145, 19s, 11d. After attaining majority she lived beyond her income. In consequence, on the advice of her law-agent, she executed a trust-deed in favour of him and her brother, Mr T. A. Shepherd, which she signed on 5th September 1876 and duly delivered. A schedule of trust-funds annexed to the deed showed that they amounted, as at its date, to £17,300. The objects of the trust were, *inter alia,* payment of her debts, payment of the balance of the annual income of the trust-funds for her alimentary use; in the event of her marriage, payment of an outfit out of the capital, payment of the fee on her death to any children that might be born to her in such shares as she should appoint, or, on her death without issue, payment to such persons as she might by will direct. On 13th of the same month, without the knowledge of her advisers and near relatives, she married John A. C. Mackenzie. At the date of the marriage Mr Mackenzie was not of age. He had no means of his own, and he was thereafter supported entirely by his wife's funds. Charles Cochrane Sheridan Murray Mackenzie, born 5th October 1877, and John Arthur Kerr Mackenzie, born 18th April 1879, were at the date of this process the only children of the marriage.

Thereafter the spouses in October 1877 raised an action of declarator in the Court of Session against the trustees under the deed of 5th September 1876, to have it found and declared that the trust-deed was revocable by Mrs Mackenzie, or at least that she was entitled to make a reasonable postnuptial contract or settlement, *inter alia,* conferring a liferent interest in the estate on her husband, or in such part thereof as she might think proper, and containing a power to her to advance from her estate a sum not exceeding £3000, as she might think proper, for the purpose of enabling her husband to engage in business. The summons in that action further concluded that "if necessary such deed of revocation or alteration should be prepared and adjusted at the sight of our said Lords in the process to follow thereon." The trustees defended the action, and a record was made up and closed therein on 28th November 1877. In that action the Lord Ordinary (Lord Young) found that "notwithstanding of the deed of trust referred to in the conclusions of the summons, the pursuer Mrs Mackenzie is entitled along with her husband to make and execute, subject to the approbation of this Court, a reasonable postnuptial contract or settlement comprehending her fortune, being the property held in trust under said deed of trust, and to that effect to revoke the said deed of trust: Allows the draft of the proposed contract or settlement to be lodged in process, and continues the cause." The draft of a postnuptial contract was accordingly prepared by the agent for the spouses, and having been revised by a London solicitor who advised them, it was lodged in process. Thereafter the trustees under the trust-deed reclaimed to the Second Division, and the case having been heard, their Lordships appointed Mr Donald Crawford, advocate, curator *ad litem* to Mrs Mackenzie, and he reported to the Court that he had examined the proceedings in the case, and that in his opinion the provisions of the postnuptial contract were reasonable and proper in the peculiar circumstances of the case, and not prejudicial to the interest of Mrs Mackenzie, and that in his opinion it was for her interest, with the view to the permanent settlement of her affairs, that the deed should be executed without delay.

The draft having been extended, Mr and Mrs Mackenzie on 26th June 1878 signed the deed, and it was thereupon lodged in process, and avizandum made. Their Lordships of the Second Division pronounced this interlocutor [July 10, 1878, 5 R. 1027]—"The Lords having heard counsel on the reclaiming-note for the defenders against Lord Young's interlocutor of 21st December 1877,