

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 ORMDALE—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 intrusions. 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, the 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 Rutherford 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 subalterner 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, Large, and that the defender was the superior

thereof; (2d) that the original vassal, John Paterson, was duly vest and seized by sasine, recorded on 20th June 1834, in the fee of said subjects as vassal holding immediately of the defenders' authors under the conditions of the original feu-right; (3d) that the said John Paterson being still alive, the subjects were not in non-entry, and no casualties were due by the pursuer or his predecessors to the defender; (4th) that the pursuer and defender having failed to agree on terms for redemption of the casualties incident to the said feu, the pursuer was entitled to redeem the future casualties by paying the amount of the highest casualty estimated at the date of raising the action, with an addition of 50 per cent.

The subjects had been originally feued out by the defender's predecessors in favour of the said John Paterson, and the feu-disposition contained the following clause:—"Providing always, as it is therein expressly provided and declared, that it shall not be lawful for the said John Paterson or his fore-saids to sub-feu the said piece of ground, or any part thereof, or to dispoise the same, to be holden of themselves, but alienary of and under the said granters as their immediate lawful superiors thereof, and that on contravention in this point not only all such subaltern feu-rights, but also these presents, and all following hereon, shall be null and void." The subjects were subsequently transmitted through various parties to the pursuer, the conveyances containing a double manner of holding in the usual form, and thus creating, according to the pursuer's averment, no sub-fee or permanent base right. The conveyance immediately in favour of the pursuer was granted by John Aitchison, dated 3d and recorded 12th May 1876. In it the manner of holding was not specified. The pursuer being desirous to redeem the casualties payable in future for the said subjects, offered to redeem such casualties by paying the highest casualty exigible therefrom, with an addition of fifty per cent. The sum of £70 was agreed upon by the pursuer and defender as the clear rental of the subjects, and as the basis for fixing the casualty which might be exigible. The pursuer and defender were, however, unable to agree upon terms for the redemption of the casualties, and the present action was accordingly brought.

The main defence was that the object of the clause in the feu-right prohibiting and irritating subinfeudations was to ensure that a casualty should be paid, if the superior so desired, not merely on the death of the vassal, but on each transmission of the feu. The defender was willing, on payment of one composition, to give a valid title to the pursuer, and to allow him to redeem the casualties, not at the rate offered by the pursuer, but at two and a-half times the amount of the estimated casualty.

"By section 15 of the Act 37 and 38 Victoria, cap. 94, entitled 'The Conveyancing (Scotland) Act 1874,' it is, *inter alia*, enacted—"The casualties incident to any feu created prior to the commencement of this Act shall be redeemable on such terms as may be agreed on between the superior and the proprietor of the feu in respect of which they are payable: And failing agreement, all such casualties, except those which consist of a fixed amount stipulated and agreed to be paid in money or in fungibles at fixed periods or intervals, may be redeemed by the

proprietor of the feu in respect of which the same are payable on the following terms, viz.—In cases where casualties are exigible only on the death of the vassal, such casualties may be redeemed on payment to the superior of the amount of the highest casualty estimated as at the date of redemption, with an addition of fifty per cent, &c. By section 16 of the said Act it is, *inter alia*, enacted—"The superior, unless he shall elect to have the redemption money converted into an annual sum as hereinafter provided, shall, on payment or tender of such redemption money, be bound, at the expense of the party redeeming, to discharge all right to the casualties so redeemed, and such discharge, which may be in the form set forth in Schedule F hereto annexed, or in a similar form, being recorded in the appropriate Register of Sasines at the expense of the party redeeming, shall operate as a valid and effectual discharge of such casualties." By the 17th section of the said Act it is *inter alia*, enacted—"It shall be lawful for the superior to elect that the redemption money above provided shall be converted into an annual sum, equal to four per cent. upon the capital, and in that case a memorandum in the form set forth in Schedule G hereto annexed, or in a similar form, of the amount of such annual sum shall be signed by the parties or their respective agents, and recorded in the appropriate Register of Sasines at the expense of the party redeeming, whereupon such annual sum shall be deemed to be feu-duty, with all the legal qualities thereof, and shall form an addition to any existing feu-duty, and the superior's right to all casualties shall be held to be discharged." By the 18th section of the said Act it is, *inter alia*, enacted—"Casualties subject to the fetters of an entail may be redeemed as aforesaid notwithstanding such entail, the redemption money being consigned in one of the banks in Scotland, incorporated by Royal Charter or Act of Parliament, in name of the Accountant of the Court of Session, who shall be allowed a reasonable fee for his trouble out of such money."

The defender pleaded that in a question with him the pursuer had no title to sue; that he had produced no title to the subject; that under the feu-disposition he was not entitled to redeem on the terms proposed by him, and that the redemption money tendered was insufficient.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 6th November 1876.*—The Lord Ordinary having considered the cause, Finds that the pursuer is entitled to redeem the casualties incident to the feu libelled by payment of the highest casualty, estimated as at the date of redemption, with an addition of 50 per cent.: Finds that the parties have agreed that the casualty is to be estimated at £70: Finds, therefore, that the pursuer is entitled to redeem the said casualties by paying to the defender the sum of £15: Finds the pursuer entitled to the expenses hitherto incurred: Further, appoints the case to be put to the roll for further procedure."

"*Note.*—The purpose of this action is to have it declared that the pursuer, as the proprietor of a feu created prior to the Act of 1874, is entitled to redeem the casualties incident to the feu on payment of the highest casualty, with an addition

of 50 per cent. It is founded on the 15th section of the Act.

"The feu was created by a feu-disposition granted in November 1833 by the authors of the defender to John Paterson, who is still alive. Paterson was duly infeft, and under the former law the fee would be full by the infeftment in his person. Since the feu-disposition was granted no other person has entered with the superiors except by the implied entry introduced by the Act of 1874.

"The feu-disposition contains an express prohibition against subinfeudation, with a declaration that on contravention 'not only all such subaltern rights, but also these presents, and all following hereon, shall be null and void.'

"Since its creation the feu has been transmitted to several persons by conveyances containing a double manner of holding. The last transmission is in favour of the pursuer. It is dated 3d, and recorded in the Register of Sasines 12th May 1876. The disposition does not express any manner of holding, and as the title contains a prohibition against subinfeudation, it must be read as a disposition of lands to be held *a me* only.— See 31 and 32 Vct. cap. 101, sect. 6. Some prior dispositions may be in the same position, but it does not seem material to inquire into them.

"The defender pleaded that the pursuer had no title to sue, in respect that a casualty had become due, and must be paid before the pursuer could take the benefit of the 15th section. The Lord Ordinary is of opinion that this plea is not well founded. The only casualty alleged to be due is the casualty of non-entry. But under the old law none could be due so long as the fee remained full in the person of Paterson, and it is declared by the Act of 1874 (sub-sect. 3 of section 4) that an implied entry shall not entitle the superior to demand any casualty sooner than he could demand it under the former law.

"But the defender further contended that the pursuer is bound to pay a composition before he can take benefit by his implied entry. The Lord Ordinary thinks that he is not. The right to redeem the casualties is introduced by the Act, and it is given to the proprietor of the feu, subject only to the condition that, before exercising it he shall pay any casualty which has become due. The pursuer is the proprietor of the feu, and he is entitled to enforce his statutory rights under the statutory conditions. These conditions, it is thought, do not require him to pay any casualty which has not become due under the old law.

"It is true that the defender urged a plea of a broader kind. He maintained that the pursuer had no implied entry, because the precept on which he is infeft is contained in a disposition having an *a me* holding only, and could not be a warrant for an infeftment. He contended, therefore, that the pursuer could not have the benefit of the statutory entry, inasmuch as he is not 'duly infeft in the lands.' But the statute, it will be observed, declares that proprietors duly infeft shall be held to be duly entered to the same effect as if the superior had granted a charter of confirmation. It seems to follow, therefore, that the infeftment to which the statute refers includes an infeftment capable of confirmation, and this is all the more clear seeing that the statute not only declares that it shall not be necessary for

the vassal to obtain any charter or writ of confirmation, but that it shall not be competent to the superior to grant any such deed.

"The next question is, whether the pursuer is entitled to redeem on payment of one casualty and a-half, or of casualties and a-half. The Lord Ordinary is in favour of the former alternative. The disposition contains no clause by which any casualty is exigible on occasion of each sale or transfer of the property. It is true that the prohibition against subinfeudation might have the effect of inducing purchasers to enter in order to the security of their title. But the entry is voluntary on their part. The superior could not compel it, nor exact any casualty if they declined to enter. The Lord Ordinary is therefore of opinion that this is not a case where casualties are 'exigible on occasion of each sale or transfer of the property.'

Against this interlocutor the defender re-claimed.

Argued for him—(1) This case is distinguished from that of *Colquhoun v. Walker*, May 17, 1867, 5 Macph. 773, where the Lord President says—"It would have been otherwise had the prohibition been fenced with an irritancy." Hence the pursuer has no good title to sue, or to the lands. Nor is he a proprietor duly infeft in lands in terms of sec. 4, sub-sec. 2, of the Conveyancing Act 1874, and therefore entitled to implied entry. The infeftment *a me* is of no value till confirmed by the superior. Here the pursuer is using his implied entry as an active title to redeem, and we are entitled to state all objections and pleas competent to the superior before the passing of the Act. (2) As regards the terms of redemption, we are entitled to a composition in respect of the transmission of the feu. The object of the prohibition in the feu-right is to preserve the superior's casualty (Bell's Prin., sec. 866). Sec. 4, sub-sec. 3, declares that implied entry is not to affect the right of the superior to casualties which may be due or exigible.

The pursuer was not called upon.

At advising—

LORD JUSTICE-CLERK—The question in this case depends on the construction of the 15th section of the recent Conveyancing Statute [*reads 15th sec.*]. Now, the defender contends that the pursuer is not a proprietor in the sense of the Act, because he is not in terms of section 4, sub-sec. 2, "duly infeft" in the lands, being infeft on a disposition which does not express the manner of holding, which is therefore to be read as an *a me* holding. The statute, however, does not require a feudally completed infeftment, for the interpretation clause defines infeftment as including "every title to an estate in land requiring and admitting of infeftment which is duly recorded in the appropriate Register of Sasines." I am therefore of opinion that the pursuer is placed by the statute in the position of having already received a writ of confirmation. With regard to the amount of casualty, it is clear that under the law prior to the passing of the statute no casualty would at this moment have been due, for Paterson, the last-entered vassal, is still alive. But the 3rd subsection of sec. 4 provides that the implied entry operated by the statute is not to entitle any superior to demand any casualty sooner than he could according to

the former law; and therefore there is no casualty exigible in terms of the 15th section of the statute. No doubt the clause in the original feu-right prohibiting subinfeudation and irritant-rights granted in contravention, is intended to secure the superior in the more rapid payment of casualties, but whatever remedies may be competent to the superior now or at a future time, it is impossible to say that at present a casualty is exigible.

LORD ORMDALE—I concur. It was, I think, almost conceded by the defender that the pursuer is duly infeft under the statute, and the pursuer is willing, as the condition of redemption, to pay all the casualties already due and exigible, of which there seem to be none. With regard to the argument which has been submitted on the provision of the feu-disposition, I must say I entertain great doubt whether a declarator of irritancy would be competent. The contract between superior and vassal contains no special provision applicable to the case of singular successors. But it is not necessary to express any opinion on that point.

LORD GIFFORD—This case is no doubt an important one as it affects the operation of the Conveyancing Act of 1874; but I have no doubt whatever that the Lord Ordinary is right. First, as regards the title to redeem, it is said that no one but a vassal can redeem, but it is clear that an unentered proprietor can redeem, for every proprietor who is infeft can redeem, and infeftment is defined by the Act to consist in registration. I assume that the pursuer's infeftment was an *a me* one. He is nevertheless infeft, and in title to sue an action of redemption, provided the feu-right was granted before the statute. Second, The mere fact of the pursuer raising an action of redemption does not of course make any casualty exigible which was previously not exigible. No declarator of non-entry is competent, for the fee is full; and for the same reason no action for payment of casualty is competent. Third, What are the terms on which the pursuer is entitled to redeem? There are two cases provided for by the statute. The first is where casualties are exigible only on the death of the vassal, whether consisting of relief or of composition. That provision applies to the present case, and the pursuer, being a singular successor, is therefore entitled to redeem on paying the amount of the highest composition, estimated as at the date of redemption, with an addition of 50 per cent. The second case is where casualties are exigible on the occasion of each sale or transfer of the property, as is often made matter of express contract—for instance, in all the south-side feus on the Grange estate and elsewhere. The rate is then 2½ times the casualty, estimated as aforesaid. But that provision clearly does not apply to the present case.

The Court adhered.

Counsel for Defenders—Asher—Jameson.
Agent—John Carment, S.S.C.

Counsel for Pursuer—M'Kechnie. Agents—
J. & A. Hastie, S.S.C.

Thursday, February 22.

SECOND DIVISION.

[Sheriff of Renfrew and Bute.

POLICE COMMISSIONERS OF KINNING PARK
v. THOMSON & COMPANY.

Burgh—Street—Property—The General Police and Improvement (Scotland) Act 1862, (25 and 26 Vict. cap. 101).

Circumstances in which held that a street in a burgh which had adopted the General Police and Improvement (Scotland) Act 1862, was a "private street," and that the owners thereof were entitled to put up posts and a chain across the street so as to prevent through traffic by carts and carriages.

This was an appeal in a petition for interdict at the instance of William Lucas, clerk to and as representing the Police Commissioners of the burgh of Kinning Park, constituted under the General Police and Improvement (Scotland) Act 1862, and representing them also in their capacity of local authority under the Public Health Act 1867, against William Thomson & Company, engineers, Kinning Park, near Glasgow, who represented the whole feuars in Smith Street, Kinning Park.

The petition set forth that prior to the erection of the district into a burgh in 1871 Smith Street had for many years been laid off and used as a street, and it had since been used for cart and other traffic, and that the Commissioners had caused it to be paved, causewayed, and flagged. The respondents, however, had, by placing posts and a chain across one end of the street, caused an obstruction which prevented free ingress and egress, especially of cart traffic, and was prejudicial to the rights of the Commissioners and dangerous to the lieges. These obstructions had been removed by the Commissioners, but had again been erected, and interdict was therefore craved. The defence was that Smith Street was a private street, the property of and formed for the convenience of the proprietors on either side, and that the posts and chain had been put up with the consent of the superior and of all the feuars interested.

A proof was taken, and it appeared that the street had been paved, &c., to the satisfaction of the Commissioners by the owners of the premises fronting the street, and that thereafter the respondents called upon the Commissioners to declare the street to be a public street, but they declined to do so.

The Sheriff-Substitute (Cowan) granted perpetual interdict as craved, but on appeal the Sheriff recalled the interlocutor, and issued the following judgment, the findings of fact in which were not disputed by the appellants:—

"*Edinburgh, 11th October 1876.*—The Sheriff having considered this process, sustains the appeal for the respondents: Recals the interlocutor appealed against: Finds in fact that Smith Street is a street within the burgh of Kinning Park, originally laid out at the expense of Alexander and William Smith, who obtained right to the ground through which it runs by the disposition, No. 17 of process, dated 15th and 17th November