Auditor to tax the amount thereof and to report."

Counsel for Pursuer — Watson and M'Laren. Agents—Henry & Shiress, S.S.C.

Counsel for Trustees—Dean of Faculty (Clark), Q.C., and Balfour. Agents—Webster & Will, S.S.C.

Counsel for Misses Guthrie—Birnie. Agents—W. & J. Burness, W.S.

Friday, June 26.

FIRST DIVISION.

[Lord Young, Ordinary.

NELSON *v.* GORDON AND LOFTY.

Lis alibi pendens.

Held that an extrajudicial letter by the agent of the pursuer in an action was not sufficient to meet a plea of *lis alibi pendens.*

Property—Meliorations—Assignation in Security.

Held that a person holding under a disposition *ex facie* absolute, but in reality in security, is entitled to be reimbursed for any expenditure by which he can show that the owner was *lucratus*, and a proof allowed of such expenditure.

The pursuer, James Nelson, youngest brother and heir-at-law of the late William Nelson, brought this action for the purpose of obtaining reconveyance of a long lease assigned in 1855 by William Nelson to the late Robert Gordon, grocer, Cambusnethan, husband of the defender Mrs Gordon, in consideration of a loan of £50. The assignation was *ex facie* absolute, but at the same time there was executed a minute of agreement between Nelson and Gordon, whereby the latter agreed to reassign the lease to Nelson on payment of the £50 and interest, and "all reasonable and necessary expenses and disbursements that may have been incurred by the said Robert Gordon or his foresaids anent the premises." Nelson continued to reside on the premises until his death, which occurred about six weeks after the loan. After his death his widow, Maria Percy or Nelson, as liferentrix, continued to reside there until her marriage with Frank Lofty, father of the other defenders. On 20th December 1859 Lofty obtained from Gordon an assignation of the lease on payment of £50 and interest, under the conditions and with the rights and powers mentioned in the minute of agreement. After receiving this assignation in his favour, the said Francis Lofty appears to have allowed the subjects to remain in the same position in which he acquired them down to the year 1871, when he expended a sum of about £70 in making meliorations, additions, and alterations thereon, which materially increased the value of the property. A part of the subjects became dangerous through decay, and repairs and alterations thereon were necessary for their maintenance.

After the death of Francis Lofty and his wife, his daughters, the defenders, authorised the subjects to be exposed for sale by public roup on the 22d day of December last; and upon this being done, the whole of the defenders were served with an action at the instance of the pursuer, the summons being signeted on the 11th and executed on the 16th days of December last. On receiving the service copy of the summons in this action, the defender Mrs Gordon instructed her agents to communicate with the pursuer's agent, which they accordingly did. The pursuer's agent, however, not finding it convenient to meet the defender's agent, on the 20th of the same month intimated that the first action had been withdrawn, and a new one raised, containing letters of inhibition. The second summons was signeted the 19th, and executed on the 20th of December The first action had, however, never been judicially withdrawn, and was said to be still in dependence.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 17th March* 1874.—The Lord Ordinary having heard counsel for the parties, Repels the defenders' preliminary pleas; assoilzies the whole defenders from the reductive conclusions of the summons; dismisses the action so far as laid against the defender Mrs Marion Biggar or Gordon; finds the pursuer James Nelson entitled to an assignation by the defenders Jane Lofty or Gilfillan, John Gilfillan, Janet Lofty, and Elizabeth Lofty of the lease libelled in the summons, on payment to them of the sum of £50 sterling, with interest thereon from the date of the death of Mrs Maria Percy Nelson or Lofty, the pursuer's entry to the subjects contained in the said lease being as at the same date; and accordingly decerns and ordains the said defenders, on payment as aforesaid, to grant an assignation to the said effect: Finds the defenders, Jane Lofty or Gilfillan, John Gilfillan, Janet Lofty, and Elizabeth Lofty, liable to the pursuer in expenses, subject to modification; of consent, modifies the same to £20 sterling, for which decerns against the said defenders."

The defenders reclaimed, and pleaded —"(1) *Lis alibi pendens.* (2) The pursuer has no title to sue the present action, in respect he has not been served heir-at-law to the late William Nelson. (3) At least process should be sisted till the pursuer produces an extract decree of service. (4) The averments of the pursuer are irrelevant, and insufficient to support the conclusions of the summons. (5) The defender Mrs Gordon is entitled to absolvitor, with expenses, in respect her late husband was entitled to assign, and did assign, the lease in question by a deed *inter vivos*, so that no right thereto or interest therein was conveyed to her by his *mortis causa* settlement. (6) On a sound construction of the minute of agreement, the other defenders are entitled to retain the said subjects until they have received payment of the said sum of £62, 10s., with interest, and also the expenses of the meliorations, alterations, and additions made by them or their predecessors on the property. (7) The said expenses having been disbursed *in bona fide*, the said defenders are entitled to reimbursement thereof. (8) The late Robert Gordon having validly and without fraud transferred the lease to the late Francis Lofty, the defenders are entitled to be assoilzied from the reductive conclusion of the summons."

Authorities—*M'Aulay* v. *Cowe*, Dec. 13, 1873, 1 Ret. 307; *Campbell's Trs.* v. *Campbell*, July 3, 1863, 1 Macph. 1016; *Aitken* v. *Dick*, July 7, 1863, 1 Macph. 1038; Court of Session Act, 1868, sec. 29 *Sinclair* v. *Campbell*, June 21, 1832, 4 Jur. 520

Waters v. *Cormack*, June 25, 1846, 8 D. 849; Bell's Prin. 538; *Barbour* v. *Halliday*, July 8, 1840, 2 D. 1279; *Morison* v. *Lord Lothian*, July 22, 1626, M. 13,402; *Rutherford* v. *Ranken*, Feb. 28, 1782, M. 13,422; *Binning* v. *Brotherstones*, Jan. 18, 1676, M. 13,401; *Clarke* v. *Brodie*, Nov. 28, 1801, Hume, 548; *Mackay* v. *Brodie*, Nov. 28, 1801, Hume, 549; *Douglas* v. *Douglas' Trs.*, July 20, 1864, 2 Macph. 1379; *Irvine* v. *Robertson*, Jan. 19, 1871; Pothier Droit de Propriété, §§ 343–353; Bell's Prin. 1063, and cases quoted; *Jack* v. *Pollock*, Feb. 23, 1665, M. 13,412; Bell's Com. i. 724, (M'Laren's ed.).

The pursuer pleaded—"(1) The assignation by William Nelson to Robert Gordon of the said subjects, although *ex facie* absolute, having been in reality only in security of the said sum of £50 advanced by him to William Nelson, the pursuer is entitled to decree in terms of the declaratory conclusions of the summons, on payment of the said sum of £50. (2) The said Frank Lofty having obtained the assignation by Robert Gordon in his favour in the full knowledge that the right of Robert Gordon in or to the said subjects was only a right in security, the assignation in favour of the said Frank Lofty, and all writs following thereon, ought to be reduced, and the defenders ordained to relinquish possession of the said lease on payment of the said sum of £50. (3) The alterations or improvements made by the said Frank Lofty not having been made *in bona fide*, and the expenses thereby incurred not having been reasonable and necessary, the defenders are not entitled to reimbursement of the same. (4) On payment of the sum originally advanced, the subjects should be declared to be disburdened of the said sum of £50, and the same declared to be the property of the pursuer. (5) Generally, under the circumstances condescended on, the pursuer is entitled to decree with expenses."

At advising—

Lord President—I cannot agree with the Lord Ordinary's judgment in so far as it repels the preliminary defences. I think the plea of *lis alibi pendens* is well founded, and that we must give effect to it unless the objection is obviated. The only way in which that has as yet been attempted is by an extrajudicial letter by the pursuer's agent. Now, I think it has been held more than once that such an extrajudicial communication is not enough to put an end to a depending action, so that unless the pursuer is now prepared to make a judicial abandonment of the first action by minute, we must sustain the preliminary defence.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel on the reclaiming note for Mrs Marion Biggar or Gordon and others against Lord Young's interlocutor of 17th March 1874,—Recal the said interlocutor in so far as it repels the preliminary pleas: Find that the plea of *lis alibi pendens* is not obviated by the letter of the pursuer's agent, founded on by the pursuer; but before further procedure, allow the pursuer, on payment of £5, 5s. of expenses, to lodge a minute, if so advised, judicially abandoning the former action."

[Counsel for the pursuer here put in a minute abandoning the first action.]

Lord President—We now come to consider the merits of the case. The object of the action is to obtain reconveyance of a long lease which was assigned by the late William Nelson, brother of the pursuer, by an assignation *ex facie* absolute, but in reality, as is alleged, in security for an advance of £50 made to William Nelson by the late Robert Gordon, the husband of the defender Mrs Marion Biggar or Gordon, in the year 1855. Now, the pursuer offers to pay the £50 with interest on condition of getting a reconveyance of the lease; but the defenders maintain that they are not bound to reconvey without being reimbursed for certain meliorations, additions, and alterations—amounting to the sum of £70. The Lord Ordinary has assoilzied the defenders from the reductive conclusions of the summons, whereby the assignation of the lease is sought to be reduced; and I think he was right in so doing. Then he has dismissed the action as against Mrs Gordon, who reclaims, but, as I understand, merely with a view to obtaining her expenses; and I think it must have been by some oversight that the Lord Ordinary has not given her her expenses. She has no longer any interest in the matter, and I think ought never to have been called. The Lord Ordinary next finds the pursuer James Nelson entitled to get an assignation of the lease from the other defenders on payment of £50, "with interest thereon from the death of Mrs Maria Percy Nelson or Lofty, the pursuer's entry to the subjects contained in the said lease being as at the same date; and accordingly decerns and ordains the said defenders, on payment as aforesaid, to grant an assignation to the said effect." This, in effect, finds that the pursuer is entitled to a reconveyance of the lease along with the meliorations. Now, it is necessary to keep in mind the nature of the action. William Nelson, the pursuer's brother, acquired right to this long lease in 1853, and about two years after that he borrowed £50 from Robert Gordon, husband of the defender Mrs Marion Gordon, and granted an *ex facie* absolute assignation of the lease to him. It is said, however, that there was a minute of agreement entered into by the parties about a month afterwards; and though that has been lost, there exists a copy of it which, by agreement of the parties, is held to be equivalent to the original. Now, this agreement states the terms on which the assignation *ex facie* absolute was granted, and these are—"That although the assignation of the said lease was *ex facie* absolute, it was in reality only in security, and that upon payment of the said sum of £50, and interest due thereon, the said Robert Gordon would re-assign the said lease to the said William Nelson." Now, William Nelson, the original borrower, remained in possession of the subjects until his death, and drew the rents; but after his death, in 1855, his widow, Mrs Mary Nelson, was liferentrix of the subjects, and drew the rents in right of her liferent. In 1856 she married Frank Lofty, the father of the defenders, and thereafter they lived in the house which was the subject of the long lease. In 1859 Frank Lofty, the husband of the liferentrix, acquired a right to the lease by assignation from Gordon on payment to him of £50 and arrears of interest, and the tack was accordingly assigned under the conditions contained in the minute of agreement, so that Lofty was thus put in the same position as Gordon had occupied. Now, in that state of things, Lofty had two titles,—first, as husband of the liferentrix; and, secondly, as coming in Gordon's

place as assignee. While he was in this position, in 1871, as the defenders aver, he spent a sum of £70 on "meliorations, additions, and alterations, which have materially increased the value of the property. A part of the subjects became dangerous through decay, and repairs and alterations thereon were necessary for their maintenance." No doubt it is alleged by the pursuers that "any alterations or improvements made on the said subjects by the said Frank Lofty were made without necessity, in the knowledge that the property belonged to the pursuer, and after being informed by the agent for the pursuer that an action of reduction of the assignation in favour of the said Frank Lofty was about to be raised." Now the Lord Ordinary has disregarded the averment of expenditure by the defender, and has decided the case without any proof. I cannot say that I agree with him. No doubt the case is a small one in regard to the amount in question, and it may have been undesirable that the expense of a proof should be incurred, but still I cannot disregard the averments which have been made. The case is one involving an important principle of law, and we should be going against a long series of authorities if we were to adhere to the Lord Ordinary's judgment. If a party holding a disposition *ex facie* absolute, but qualified as this was by the minute of agreement, spends money on the improvement of the property, he is entitled to re-imbursement if he can show that the owner of the property was thereby *lucratus*, and the averments on record quite comes up to one that the owner is *lucratus*. Again, Frank Lofty was in possession as the husband of the liferentrix, and there is authority for holding that money spent by a liferenter, if it enhances the value of the property, must be repaid by the fiar; but the ground on which I rest my judgment is, that a person holding under a disposition *ex facie* absolute, but really in security, is entitled to be re-imbursed for any expenditure by which he can show that the owner was *lucratus;* and further, it is important to observe the express terms of the minute of agreement, which provides for the repayment of "all reasonable and necessary expenses and disbursements that may have been laid out or incurred by the said Robert Gordon or his foresaids anent the premises." I think, therefore, that the judgment of the Lord Ordinary ought to be recalled, and the defenders allowed a proof of statement 9 of their condescendence.

Lord Deas—I am not able to concur in the oracular judgment of the Lord Ordinary. I think it goes against important principles of law, which we must presume to have been known to his Lordship, but for passing by which he has not favoured us with any reason. I can discover no reason. The assignation which makes over the long lease is quite absolute in its terms. [*His Lordship quoted the terms of the assignation.*] It appears, however, that the deed was qualified by the back letter printed on pp. 11 and 12 of the record. Now, supposing there had been nothing in the terms of the back letter to indicate any right on the part of Gordon or his successors to retain anything but the £50, the common law would have been enough to entitle them to do so, but as your Lordship has shown, there are expressions in the back letter amounting to a compact that Gordon should be entitled to retain a sufficient sum to cover any necessary outlay which he might make on the property by way of repairs or improvements. The fair meaning of the letter includes disbursements anent the premises. I agree that, apart from that altogether, if it be true that Lofty spent £70 or any other sum in that way, he was entitled to hold the titles until repaid. Whether he really did so or not we do not at present know, but a proof must be held of that. While he possessed he had a double title, first in right of his wife, who was liferentrix, and afterwards as absolute proprietor, for I may fairly call him so, and in either capacity he was entitled to make meliorations on the property. I think the Lord Ordinary has gone wrong. If his Lordship had not overlooked the authorities I should have said no more, but as he has done so I must just glance at them. [*His Lordship referred to and commented on the following authorities:—Riddell* v. *Crs. of Niblie*, Feb. 11, 1782, M. 1154; *Keith* v. *Maxwell*, July 8, 1790, Bell's Fol. Cases, 234; *Maitland* v. *Cockerell and Traill*, Nov. 23, 1827, 6 S. 109 (Lord Balgray's opinion); *Russell* v. *Lord Breadalbane*, June 18, 1829, 7 S. 767 (Lord Justice-Clerk's opinion), aff. April 4, 1831, 5 W. & S. 256 (Lord Lyndhurst's opinion); *James* v. *Downie*, November 15, 1836, 15 S. 12 (Lord Moncreiff's opinion); *Robertson* v. *Duff*, Jan. 14, 1840, 2 D. 279]. I can see no difficulty in applying the doctrine here laid down, both to cases arising under the general law and those arising, as this does, under the back bond, and that being so, I think we ought to allow a proof as to the outlay. I am not at all prepared to say that the allegation on record of intimation said to have been made to Lofty of a threatened reduction of the assignation has anything to do with the case at all. He was entitled to look upon his position as this, that he was never to be relieved of the property and the expense of maintaining it at all, and how can it be said, in that view of the case, that he was not entitled to keep it up and improve it?

Lord Ardmillan—This seems to me to be rather a simple case, and the view which I take of it is, that we need not go farther than the documents before us—(*His Lordship recapitulated the facts of the case*). Now, I think that so far as ordinary repairs are concerned Lofty was not entitled to take credit for them, his wife being bound as liferentrix to keep the premises in repair. The Lord Ordinary has omitted to observe that, beyond repairs, permanent meliorations are averred. I think that, both on the general principle of law applicable to an *ex facie* absolute disposition, qualified by a back letter, and on the terms of the present agreement, the charge for meliorations is quite reasonable, and must be paid. At the same time, I think the pursuers are entitled to investigate whether the outlay was made *in bona fide* as well as for the benefit of the property, and if they can show that it was not, that will form an important element in their case. I think the Lord Ordinary has been hasty in his judgment.

Lord Jerviswoode—I do not think it necessary to add anything to the opinions of your Lordships, with which in the main I concur. At the same time, I do not wish to be held as indicating any opinion as to the relevancy of the last inquiry referred to by Lord Ardmillan.

Lord Deas—I concur in that last observation of your Lordship.

The Court pronounced the following interlocutor:—

"The Lords, in respect of the minute for pursuer, No. 20 of process, now lodged, Hold the plea of *lis alibi pendens* to be obviated; and having resumed consideration of the reclaiming note, Of new repel the preliminary pleas: Recall the Lord Ordinary's interlocutor of 17th March 1874 reclaimed against, so far as not already recalled; of new, dismiss the action, so far as laid against the defender Mrs Marion Gordon, and decern; and find the said Mrs Marion Gordon entitled to expenses, of which, allow an account to be given in: Remit the said account to the Auditor to tax the same and report; of new assoilzie the other defenders from the reductive conditions of the summons, and decern: Allow these other defenders a proof of the averments contained in the 9th article of their statement of facts, and to the pursuer a conjunct probation, the proof to be taken before Lord Jerviswoode on a day to be fixed by his Lordship: Find the said defenders entitled to expenses since the date of the said interlocutor reclaimed against; and remit to the Auditor to tax the amount thereof and report, reserving all other questions of expenses."

Counsel for Pursuer—J. A. Crichton and D. Crichton. Agent—William Livingstone, S.S.C.

Counsel for Defenders—Asher and Bell. Agents—Morton, Neilson & Smart, W.S.

Friday, June 26.

SECOND DIVISION.

[Sheriff of Perthshire.

CARMICHAEL *v.* PENNY.

Lease—Parole Evidence—Rights of Pasturage.

A tenant under a written lease of a house, garden, and pendicle, claimed certain rights of pasturage in the adjoining woods, which he alleged had been pointed out to him along with the subjects. *Held* that the written lease could not be overruled by parole evidence.

This case came up by appeal against an interlocutor pronounced by the Sheriff of Perthshire (TAIT), on 20th January 1874, in a petition at the instance of the Rev. George Heywood Carmichael and others against James Penny, contractor, Scones, Lethendy. The petitioners set forth that they were proprietors in trust of the estate of Scones, Lethendy, in the parish of Scone and county of Perth, and that the respondent became tenant of the house, garden, and pendicle at Lethendy, now occupied by him, for sixteen and a-half years from Whitsunday 1869, at the yearly rent of £9, conform to lease.

There were certain woods, plantations, and dens on the estate, and the shootings over the estate, including these woods, plantations, and dens, were let under lease, and frequent complaints had been made against the respondent pasturing cattle, &c., in the plantation adjoining his pendicle, whereby the game was disturbed, the trees injured, and damage otherwise sustained, and recently complaints had also been made against the respondent for cutting and carrying away grass from the dens.

The respondent had no right or authority of any kind to enter or pasture cattle, &c., on any part of the estate other than the lands embraced in his lease, yet, notwithstanding frequent remonstrances against his unwarrantable conduct, and written intimations that interdict would be applied for, he threatened to continue the trespass, and accordingly the petitioners prayed for interdict against Penny. In their condescendence the petitioners stated that the respondent became tenant of the house, garden, and pendicle in question conform to lease of date 11th May and 4th June 1869. The original offer for the subjects, dated 23d February 1869, was also produced. This offer was made out after the respondent had been shown the subjects, and it refers only to the house and pendicle.

The woods, plantations, and dens on the estate, and the shootings over the estate, were let under lease prior to the respondent becoming an offerer for the subjects embraced in his lease, and they form no part of the subjects let to the respondent.

The respondent asserted right to the plantation to the west of his pendicle shortly after his entry in 1869, which was resisted by the petitioners, and the access to the plantation built up under the superintendence of Mr Marshall. In consequence of this, the respondent raised an action in June 1870 against the pursuers for loss and damage in consequence of his having been deprived of the use and enjoyment of the plantation, which action was dismissed.

David Gall for a long period of years held the appointment of ground officer on Lethendy, and in addition to the house and pendicle which he possessed rent free, and an annual salary, or money payment, he had some privileges, and among others the pasture of the plantation and dens claimed by the respondent, but these privileges were not let or intended to be let to the respondent, and he was distinctly told before executing the lease that he had only right to the house, garden, and pendicle. Gall had no lease of the pendicle, &c.

The respondent in answer set forth that before he entered into the lease the subjects to be embraced in the lease were pointed out to him on the ground by James Marshall, road surveyor, Dovecotland, himself one of the Lethendy trustees, and authorised to act for the others, and the pasture in the woods and dens were then specially pointed out to him as forming part thereof, and James Marshall at the same time told him that he was to have the same privileges in reference thereto as David Gall had.

The petitioners denied these statements, and averred that any possession had by the respondent was contrary to the terms of his lease.

The pursuers pleaded—"(1) The said plantation or dens never having been let to the respondent, but, on the contrary, it having been expressly understood and explained to the respondent, before offering for the pendicle, that no right to any of the subjects claimed were granted, his alleged right is unfounded. (2) In the circumstances condescended on, the petitioners are entitled to have the interdict declared perpetual, and to decree against the respondent for expenses."

"The defender pleaded—The pasture in the said dens and wood or plantation being a part of the subjects which were let to the defender by the pursuers, he is entitled to occupy and possess the same, and the interim interdict ought therefore to