

Division, be reversed, first, in so far as they relate to or decern for expenses of process; and secondly, in so far as they fix or decern for the balance due by the appellant: That each of the parties shall bear the expenses of process hitherto incurred by them in the Court of Session, and that the respondent shall pay to the appellant her costs of this appeal: That the interlocutor appealed from, except in so far as hereby varied or reversed, be affirmed, and the cause remitted to the First Division of the Court.

Counsel for the Appellant—R. B. Haldane, Q.C.—Clyde. Agents—Martin & Leslie, for Keith R. Maitland, W.S.

Counsel for the Respondent—The Lord Advocate (Graham Murray, Q.C.)—Sol.-Gen. C. S. Dickson, Q.C.—Pitman. Agents—Grahames, Currey, & Spens, for J. & F. Anderson, W.S.

COURT OF SESSION.

Friday, September 11.

OUTER HOUSE.

[Bill Chamber.]

M'LAGAN, PETITIONER.

Entail—Process—Deed of Consent—Clause Imported by Reference—Destination—A.S. 18th November 1848—Titles to Land Consolidation (Scotland) Act 1868, secs. 3 and 9.

In a deed of consent by a next heir to a petition under the Entail Statutes, it is not necessary to set forth the destination under which the entail is held, provided the destination be referred to as set forth in the deed of entail duly recorded in the register of tailzies, or in any deed so recorded and forming part of the progress of titles to the lands.

Peter M'Lagan of Pumpherston presented, on 21st April 1879, a petition to the Sheriff of Linlithgow for authority to feu certain entailed lands in the parish of Uphall and County of Linlithgow. On 16th June 1879 the Sheriff granted authority as craved, and ordained the said feus to be executed in accordance with draft feu-charter approved by him. By the draft feu-charter it was provided that the feuar should be bound to erect buildings on the feu of the capital value of not less than double the feu-duty at four per cent.

Under the authority so obtained, the said Peter M'Lagan granted a feu-charter in favour of John M'Knight, quarryman, Uphall, dated 10th January, and recorded in the division of the General Register of Sasines applicable to the County of Linlithgow, 12th February 1880. In the feu-charter, though in other respects the draft charter approved by the Sheriff was followed, the sum to be expended on buildings was inadvertently stated at less than the minimum allowed by the Sheriff. The title of the

said John M'Knight having in consequence been objected to, after the feuing powers granted by the Sheriff had expired, the said Peter M'Lagan presented a petition to the Court of Session for authority to grant a deed of ratification of the said charter in terms of the Act 11 and 12 Vict. cap. 36, 16 and 17 cap. 24, 38 and 39 Vict. cap. 61, 45 and 46 Vict. cap. 53, and relative Acts of Sederunt.

The Lord Ordinary officiating on the Bills (KINNEAR) on 24th August 1896 remitted to Mr P. H. Don Wauchope, W.S., to inquire into the circumstances set forth in the petition, and the regularity of the procedure adopted. A deed of consent by the then nearest heir of entail was lodged in process.

Mr Don Wauchope presented a report, in which, after narrating the circumstances above set forth, and the regularity of the procedure in other respects he proceeded as follows:—"This deed (*i.e.*, the deed of consent) although otherwise in the form prescribed by the Act of Sederunt of 1848, does not contain the destination at length, which the reporter considers to be requisite. The petitioner's agents consider that it is unnecessary to insert the destination at length in view of the provisions of section 9 of the Titles to Land Consolidation (Scotland) Act 1868. The reporter is inclined to the view that this section does not apply to deeds of consent, and he does not think that such a deed is covered by the terms 'deed' and 'conveyance' which are defined by section 3 of this Act. The reporter therefore begs to leave this point for your Lordship's decision."

By Act of Sederunt of 18th November 1848, to regulate the forms of consent under the Act 11 and 12 Vict. cap. 36, it is provided—"That all consents required by the said Act to instruments of disentail, deeds of conveyance or security, leases, feus, or excambions of any entailed estate, or part thereof, or the disposal of any money, or of other property, real or personal, invested in trust for the purpose of purchasing land to be entailed, or of land directed to be entailed, or any other act or deed to which the statute requires consent, shall be in the form, or as nearly as may be in the form of the schedule hereto annexed."

By the schedule it is provided that the destination of the entail is to be inserted in the deed of consent.

By section 9 of the Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. c. 101) it is provided as follows:—"It shall not be necessary in any conveyance or deed of or relating to lands held under a deed of entail, or of or relating to lands obtained by excambion in exchange for lands held under any deed of entail," "to insert the destination of heirs, or the conditions, provisions, and prohibitory, irritant, and resolutive clauses, or clause authorising registration, in the register of tailzies, contained in any such deed of entail, provided the same shall in such conveyance or deed be specially referred to, as set forth at full length in such deed of entail recorded in the register of tailzies, if the same shall have

been so recorded, or as set forth at full length in any conveyance or deed recorded in the appropriate register of sasines, and forming part of the progress of the deeds of the said lands held under such deed of entail," &c.

By section 3 of the said Act the meaning of the words "deed" and "conveyance" is declared to be as follows:—"The word 'deed' and the word 'conveyance' shall each extend to and include all charters, writs, dispositions, whether containing a warrant or precept of sasine or not, and whether *inter vivos* or *mortis causa*, and whether absolute or in trust, feu-contracts, contracts of ground-annual, heritable securities, reversions, assignations, instruments, decrees of constitution relating to land to be afterwards adjudged, decrees of adjudication for debt, and of adjudication in implement, and of constitution and adjudication combined, whether for debt or implement, decrees of declarator and adjudication, decrees of sale, and decrees of warrant and of special service, whether such decrees contain warrant to infest or precept of sasine or not, and the summonses, petitions, or warrants on which any such decrees proceed, warrants to judicial factors, trustees, or beneficiaries of a lapsed trust, to make up titles to lands, and the petitions, on which such warrants proceed, writs of acknowledgment, contracts of exchange, deeds of entail, procuratories of resignation *ad remanentiam*, and all deeds, decrees, and writings by which lands or rights to lands are constituted or completed or conveyed or discharged, whether dated, granted, or obtained before or after the passing of this Act, and official extracts of all deeds or conveyances."

The attention of the Lord Ordinary (TRAYNER) was called to the difficulty suggested by the reporter.

On 11th September 1896 the Lord Ordinary pronounced the following interlocutor:—

"The Lord Ordinary officiating on the Bills having considered the petition and proceedings with the report by Mr P. H. Don Wauchope, W.S., Finds that the procedure has been regular and proper, and in conformity with the provisions of the statutes and relative Acts of Sederunt: Approves of the draft deed of ratification: Authorises and empowers the petitioner to grant, with the consent of the trustee and commissioners on his sequestrated estate, in favour of John M'Knight, quarryman, Uphall, his heirs or assignees whomsoever, a deed of ratification of the feu-charter in accordance with the said draft, and decerns."

Counsel for the Petitioner—Lyon Macenzie. Agents—Davidson & Syme, W.S.

Thursday, October 15.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

DRYBURGH v. A. & A. S. GORDON.

Sale—Title—Inhibitions—Obligation to Disencumber Record.

By disposition dated and recorded 28th February 1895, A disposed *ex facie* absolutely certain heritable subjects to B, his law agent.

By disposition dated 6th and 7th December 1895 A, as "proprietor of the subjects after disposed," with consent of B, for all interest competent to him in virtue of the former disposition, disposed to C a part of the subjects included in the former disposition. The sale was carried out by the firm of law-agents of whom B was a partner, and they undertook "to produce searches showing a clear record as at 10th December 1895." The searches produced showed two inhibitions against A recorded on 22nd May 1895.

In an action by the purchaser against the law-agents the defenders maintained that the inhibitions, not having been recorded until A's title was divested, were inoperative. Held that the defenders were bound to clear the record of the inhibitions, it being immaterial whether they were valid or not.

Opinion (by Lord Kincairney) that an inhibition may effect a heritable right in the person of one who does not hold it by feudalised title.

By disposition dated and recorded 28th February 1895, William Shaw, builder, Edinburgh, "heritable proprietor" of certain subjects in Gorgie Road, Edinburgh, disposed these subjects, "for certain good and onerous causes and considerations, not exceeding in all the sum of £600 sterling," to Alexander Gordon, S.S.C., and his heirs and assignees whomsoever, heritably and irredeemably.

By disposition dated 6th and 7th December 1895 William Shaw, "proprietor" of the subjects after disposed, with consent and concurrence of Alexander Gordon, and Alexander Gordon for all right and interest competent to him in the subjects in virtue of the disposition in his favour of 28th February, and both with joint consent and assent, in consideration of the sum of £979, 13s. 9d. instantly paid to William Shaw as the price, disposed to Alexander Dryburgh, grocer, Edinburgh, two shops, 205 and 207 Gorgie Road. These shops were a part of the heritable subjects mentioned in Shaw's disposition to Gordon of 28th February. Shaw granted absolute warrandice from his facts and deeds only. Among the writs assigned were certified copies personal searches against Gordon and Shaw.

By letter dated 7th December 1895 addressed to Alexander Dryburgh, A. & A. S. Gordon, W.S., Edinburgh, who were the