consideration of the general question. This is a mere possessory question, and the Lord Ordinary has thought fit to terminate the litigation in its present form, leaving the parties to their ordinary rights, which they may exercise by means of declarator or otherwise. But the reclaiming-note in this possessory question was not lodged in time, and the reclaimers came to the Lord Ordinary for leave to reclaim. The remedy which they seek is an extraordinary one, and lies in the discretion of the Court. The very fact that the leave of the Lord Ordinary is required shows that it is a matter for the discretion of the Court. I have no hesitation in concurring in the view of the Lord Ordinary.

LORD JUSTICE-CLERK—There are two questions here—1st, Is the Lord Ordinary the sole judge of the propriety of giving leave to reclaim? and 2d, If he is not, did he in this case act rightly? I am of opinion that he is the sole judge, but as the authorities seem to differ, we perhaps should not place our judgment upon that ground. But as to the second question, I am quite clear. Nothing has been stated to bring this case under the Act of 1808. An equitable remedy must stand upon equitable grounds. I do not say that if an important right was about to be lost I should be disposed to refuse the remedy. Here there was simply negligence in a mere possessory question—one in which the Town Council of Leith have really no substantial interest at all, and they can still try their right by way of declarator.

LORD NEAVES was absent.

The Court adhered.

Counsel for Complainers — Kinnear — Harper. Agent—W. H. Couper, L.A.

Counsel for Respondents — Brown. Agent—William Paterson, L.A.

Tuesday, November 23.

SECOND DIVISION.

[Lord Young.

MARTIN *v.* DUNCANSON.

Disposition—Back-Letter—Right of Reversion.

A granted an *ex facie* absolute disposition of certain subjects to B. The deed set forth as the consideration for granting it that the disponee had made advances to the disponer and undertaken to relieve him of burdens affecting the property, together amounting to £130, with which the latter declared himself satisfied as the price and value of said subjects. Upon the same day B granted a back-letter, by which it was agreed that upon repayment of the advances, and upon being relieved of the burdens, he should be bound to reconvey the property at any period within seven years. If not so redeemed, the property was to be at his entire disposal.

Nearly forty years after the date of these deeds the representative of A raised an action of declarator and removing against the representative of B, on the ground that this disposition had been granted only in security, and he offered to prove that the price set forth was quite inadequate.

Held that the transaction between A and B was one of sale, with a right of redemption within a limited period, and as that right had not been exercised, the pursuer was now barred from recovering the property, or after such a lapse a time from entering into a proof of the inadequacy of the price.

This was an action of declarator and removing at the instance of Peter Martin, blacksmith at Crombie, Torryburn, as assignee of David Martin, now residing in America, against the Rev. Peter C. Duncanson, United Presbyterian minister at Hamilton.

On 1st July 1835 David Martin granted a disposition to Andrew Duncanson, smith at Crombie (now represented by the defender), of certain heritable subjects in Dunfermline. This disposition contained the following narrative:—"Considering that by arrangement with Andrew Duncanson, smith at Crombie, he has agreed to free and relieve me of a debt of £45 sterling secured over said subjects in favour of Ann Martin, Janet Martin, Peter Martin, Robert Martin, Andrew Martin, and Amelia Martin, my brothers and sisters, secured to them by disposition and deed of settlement executed by the now deceased David Martin, sometime merchant in Dunfermline, my grandfather, bearing date the 9th of February 1830, and interest due thereon from the term of Whitsunday said year, when the same was payable in consequence of my grandfather's predecease; and that he has further agreed to free and relieve me of a bond and disposition in security, granted by me over said subjects to Captain George Macdonald, residing at Callander, for the principal sum of £55 sterling, bearing date the 28th day of March 1833; and he has now and formerly made payment to me of the sum of £19 sterling, the receipt whereof I hereby acknowledge, renouncing all exceptions to the contrary, the present advances, and said incumbrances, amounting to £130, as the agreed on price and value of said subjects, with which I declare myself fully satisfied." Upon the same day Duncanson granted to Martin a back-letter in the following terms:—"Sir, Although you have of this date granted me a disposition of your subjects in Gibb's Square for an advance of £19, and under the burden of the debts due to your brothers and sisters and Captain George Macdonald, secured over said subjects, yet it is agreed that in repaying me the advance of £19, and a separate advance of £25, 15s., by bill of this date, at one day's date, and relieving me of said debts affecting the property, presently amounting with interest to £111, I shall be bound to reconvey said property to you when required, at your charges, at any period within seven years from the date hereof. The rents to be retained by me in lieu of interest, and I am at liberty to enforce payment of said bill at pleasure. If not redeemed within said period, the property to be at my entire disposal. Should I require to place a wooden floor in the present shop for the accommodation of the tenants, it is agreed that I shall receive reimbursement of the expense thereof before reconveying the property to you." The pursuer averred that the considerations set

forth in the disposition were quite inadequate as the price of the subjects conveyed, and that the right of Duncanson over them was only a right in security. The summons accordingly sought to have it found and declared that the disposition, although *ex facie* absolute, was truly granted only in security for the more sure payment of the sums advanced and the burdens undertaken by the disponee, and that upon the defender being repaid the loans and relieved of the debts the subjects should be redeemable from him. The summons further contained conclusions for count and reckoning with the pursuer for intromissions with the rents, failing which it should be found and declared that the whole debt had been satisfied, and claim extinguished, and for the removal of the defender from the premises.

The defender maintained that "the consideration given was more than an adequate price for the subjects in July 1835, and so far from any reduction having being made on it by the defenders or his ancestors' possession of the subjects and intromissions with the rents, the reverse was the case. That they had besides expended considerable sums in improving and adding to the property. This they did in the *bona fide* belief that the property had become their own, as it was not redeemed within the seven years mentioned in the letter of 1st July 1835."

Upon 2d June 1875 the Lord Ordinary pronounced the following interlocutor:—

"2*d June* 1875.—The Lord Ordinary having heard counsel for the pursuers, and considered the record and process, sustains the defences, and assoilzies the defender from the conclusions of the summons, and decerns: Finds the pursuer liable in expenses to the date of closing the record, and remits the account when lodged to the Auditor to tax and report.

"*Note.*—(After a short narrative of the facts of the case, the note proceeded):—I think the action cannot be sustained. The time limited for redemption by the only obligation that qualifies the defender's right under his title expired upwards of thirty years ago, and although the Court might I think equitably extend the time, or grant relief after its expiry in circumstances which appeared to warrant such an exercise of the Court's equitable jurisdiction to modify the terms of the bargain which the parties had made, I am of opinion that no such circumstances are here alleged. I may say that even within the time limited I should have given effect to the agreement of the parties, that the rents should be retained in lieu of interest. Such an agreement is quite lawful and binding in the absence of any fraud or unfairness practised, or unconscionable advantage taken by either party over the other. The conclusions for accounting are therefore, I think, untenable, and the pursuer's counsel did not maintain them. With respect to the reconveyance demanded, the pursuer's cedent did not lose the opportunity he bargained for by any calamity or accident or even by allowing the time to expire through oversight, and altogether I can find no ground for the equitable interference of the Court in favour of the pursuer as his assignee. It was argued that the back-letter must by rule of law continue to qualify the right until cleared off by declarator. I am not of that opinion. The *title* is quite clear, and the back-letter is a mere personal obligation, to to be taken with respect to endurance and everything else according to its terms. Such an obligation does not require declarator to determine it by any rule of law with which I am acquainted.

"The equitable jurisdiction of the Court to interpose for the reasonable protection of a party who is suffering hardship from any unconscionable advantage taken, even of his thoughtlessness and imprudence, is another matter, but, as I have said, there is no case here made sufficient to call for the exercise of that jurisdiction."

The pursuer reclaimed.

Argued for him—The disposition of 1st July, read in the light of the back-letter, shows that nothing but a security was intended to be granted. We have all the elements of a security here,—an advance set forth, a stipulation for payment of interest, an obligation to reconvey upon redemption. The creditor not having obtained a declarator of irritancy, the debtor is in equity entitled to redeem the subjects. If the nature of the transaction is not clear from the documents themselves, the pursuer is entitled to a proof by writ or oath as to meaning of parties, and *prout de jure* as to the inadequacy of the price.

Argued for defender—The deeds themselves clearly establish that this was a true transaction of sale with a limited right of redemption which has not been taken advantage of. The averment as to inadequacy of price is quite insufficient to entitle the pursuer to a proof thereof, and further, he is barred by the delay which has taken place from any such investigation. Even although there had been nothing here originally but a security granted, it lies entirely within the equitable jurisdiction of the Court to grant an extension of the time during which the debtor may redeem, and no case has been made out for any such extension.

Authorities—Stair ii. 10, 6; More's Notes, 262; Kames' Principles of Equity i. 70; *Macdonald* v. *Stewart*, Nov. 26, 1760, M. 7286; *Nicol* v. *Park*, March 1767, M. 16,537; *Boyd* v. *Steel*, March 7, 1771, M. 7221; *Cuttler* v *Malcolm*, Nov. 4, 1788, M. 7215.

At advising—

Lord Justice-Clerk—This case has been ably argued, and presents rather an unusual question. That question is whether the contract constituted by the two documents—the disposition and the back-letter—is a contract of sale with a right of reversion, or a mere security. I have come to the conclusion, on the terms of these documents, that there is no reason for refusing to give effect to the words of the disposition, which bears to be a sale.

We are familiar with the form of an *ex facie* absolute disposition and back-bond. But in this case the peculiarity is that a variety of sums are stated in the disposition, showing not only that the transaction took the form of an absolute disposition, but that by the statement of the purchase-price in detail it was meant to take the form of a sale.

It would appear that his grandfather had burdened the property to the extent of £45 in favour of the disponer's brothers and sisters, that there was also a bond for £55 over the property for money borrowed by himself. He is relieved of both burdens by Andrew Duncanson, who in

addition makes payment to him of the sum of 19, which it was suggested brought up the amount to the value of the subjects disponed. The deed sets forth "the present advances and said incumbrances, amounting to £130, as the agreed-on price and value of said subjects, with which I declare myself fully satisfied." Now, here we have all the characteristics of a sale. It does not matter that the seller took over as part of the price certain burdens. The material point is that there was no antecedent debt owing to him for which the property might have been given as a security. Taking this deed as it stands, I find that it indicates a transaction of sale, and I can find nothing in the back-letter inconsistent with what that deed itself sets forth. It commences "although you have of this date granted me a disposition of your subjects," and it proceeds, not to acknowledge a debt for which this property is given in security, but in these terms:—"yet it is agreed that in repaying me the advance of £19, and a separate advance of £25, 15s., by bill of this date at one day's date, and relieving me of said debts affecting the property, presently amounting with interest to £111, I shall be bound to reconvey said property to you when required, at your charges, at any period within seven years from the date hereof. The rents to be retained by me in lieu of interest; and I am at liberty to enforce payment of said bill at pleasure." This is a right of reversion in its terms, if it were annexed to a security—an ordinary clause—but here it is annexed to a deed which is one of sale.

The provision, with regard to interest, points to a security no doubt, but standing by itself it does not seem conclusive, and is really a natural provision in the event of the seller exercising the right of redemption. There is everything here to indicate that this was a *bona fide* transaction of sale, with a right reserved to the seller to recover within a certain time. But if it be a sale, the law is well-fixed. The right of reversion requires no declarator to bar it; the mere expiry of the time fixed is sufficient.

As to the offer of proof that the price given for this subject was inadequate—I doubt much whether we have here a relevant statement of inadequacy to go to proof. It is not stated what the value of the subject really was; and I am not now disposed to allow an inquiry after the lapse of thirty-nine years, when it might be impossible to obtain the necessary information. I am therefore for adhering to the interlocutor of the Lord Ordinary.

Lord Ormidale—I am of the same opinion. The law upon this subject cannot be challenged. The cases are too numerous to admit of challenge at this time of day, and indeed such a challenge was not attempted. The only question is one of facts arising out of the deeds before us. In the first place, we have this disposition in favour of Duncanson. It is a sale. The consideration is not in the ordinary form, but still not unusual. A certain sum is paid and the purchaser takes over the burdens upon the property to make up the price. It has been justly said, however, that this disposition is not conclusive. We have absolute dispositions with back-letters, and this is the case here. I turn to the back letter. Does it take away the impression to which the disposition gives rise? I would ask, why, if this were really a transaction in security, this was not stated in the back-letter? I believe that in the cases referred to the real nature of the transaction was always stated in the back letter. Here the back letter gives us nothing of the kind.

The only other point is the offer of proof of inadequacy of consideration. I concur with your Lordship in the view expressed, and would only in addition say that I think there is *prima facie* evidence that the considerations were sufficiently adequate. The lapse of time is also too great to admit of proof.

Lord Gifford—I quite concur in the opinion expressed by your Lordships. These two deeds must be read together. The object of the back letter is to qualify, and if it does not, then the statement in the principal deed is the statement of the parties. There is no qualification here. From a consideration of these two deeds I am bound to gather that this transaction was a sale and not a loan. The different principle applicable to clauses of redemption in the case of loans from that applied to cases of sale, arises from the fact that in a loan the subject is often more valuable than the sum advanced, which has introduced the equitable rule that in the case of a loan the borrower is not barred by the mere expiry of the time from his right of reversion.

The offer of proof in this case proceeds upon the assumption that the deeds were ambiguous. But if I am right, this is not the case. After the interval of thirty-nine years it will hardly do for one to say, 'I will prove that the sum advanced, which I said was adequate, was not adequate.' The effect of proof is too vague, and comes too late.

Lord Neaves was absent.

The Court adhered.

Counsel for Pursuer — M'Laren — Young. Agents — Millar, Allardice, Robson, & Innes, W.S.

Counsel for the Defender— Asher—Pearson. Agents—Dewar & Deas, W.S.

Tuesday, November 23.

SECOND DIVISION.

[Lord Shand.

SIMM (HENRY'S TRUSTEE) *v.* SIMM.

Succession—Fee and Liferent—Accumulations—Vesting—Residue.

Terms of a trust-disposition *held* to import that the accumulations of unexpended liferent did not vest in the liferentrix, but at her death passed into residue.

This was an action of multiplepoinding and exoneration brought by William Simm, only surviving and accepting trustee under the trust-disposition of the deceased James Henry, calenderer, Paisley, and his wife, against the beneficiaries under the said deed as defenders. The circum-