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-

stances of the case were as follows:—Mr and Mrs Henry conveyed their whole estate to the pursuer and other trustees by deed dated 23d December 1842. This deed provided *inter alia* that after the death of the longest liver of the spouses the trustees should pay the rents, interest, and annual produce of the trust-estates to Jean Stewart Henry and Rachel Barclay Henry, their daughters, "equally, share and share alike, if in a mental capacity to receive and discharge the same, and if not," it was provided that the said trustees should "expend the said annual produce, or such part thereof as may be necessary for their board and clothing, suitable to their rank in life during their lives;" declaring that it should be "in the power of the said trustees, and at their discretion, notwithstanding the liferent above declared, to apply and dispose of the fee of the trust-estates for the boarding and clothing" of the testators' said daughters, "if the same should be found to be necessary, commencing the first half-yearly payment to their said daughters at the first term of Martinmas or Whitsunday which should first happen after the death of the survivor;" declaring that in case of the death of either of said daughters without leaving lawful issue, her share of the annual produce of said estates should be payable to or expended in manner foresaid for behoof of the survivor of them.

Further, the deed contained a clause declaring that "notwithstanding the liferents and provisions above made, it shall be in the power of the said Jean Stewart Henry and Rachel Barclay Henry to test upon or convey the interest or annual produce of the one-half of the estates they or either of them may liferent themselves under this our deed of settlement to any husband they may marry during the lifetime of such husbands, but for his liferent use allenarly; and farther, that although the child or children of our daughters are hereby declared to be fiars, it shall be in the power of our said daughters, both or either of them, to limit the succession to their children to the liferent alone." It was also provided that if both daughters died without issue, the whole residue and remainder of the estate should be divided between the nephews and neices of Mr Henry and the relations of Mrs Henry.

Mrs Henry died in March 1843, and her husband in June 1846, survived by both their daughters, of whom Jean Stewart Henry was an inmate of Gartnavel Lunatic Asylum, where she remained until her death in 1872. She died intestate, and there stood at her credit in the trust accounts at her death the sum of £2731, 4s. 11d. Her sister Rachel Barclay Henry was of facile disposition. She received a monthly allowance from the trustees, her house-rent and servants' wages being paid by them. At her death, which occurred in October 1872, there stood at her credit in the trust accounts £361, 13s. She left a testament conveying her whole estate to Mrs Howie, who lived with her, but this deed was set aside at the instance of her representatives.

The question now before the Court was whether the sum of £2731, 4s. 11d. went to the next-of-kin of Rachael Barclay Henry or fell into the residue of her father's estate.

The next-of-kin pleaded *inter alia*—"(1) On a sound construction of the mutual trust-disposition and settlement of the deceased James Henry and Christian M'Arthur or Henry, the sums of money forming the fund *in medio* must be held to have vested in the persons of Jean Stewart Henry and Rachel Barclay Henry respectively. (2) On the death of the said Jean Stewart Henry all sums of money belonging to her passed to her sister, the said Rachel Barclay Henry, as her heir *in mobilibus*."

The legatees pleaded—"(1) The liferents provided by the said trust-disposition and settlement to the truster's two daughters being provided subject to the condition that they should be "in a mental capacity to receive and discharge the same," and said condition not having been purified in the case of either of said daughters, the annual proceeds of the estate, so far as not expended for their maintenance, fell into residue, and the claimants, as the representatives of Mrs Henry, are entitled to be ranked and preferred in terms of their claim."

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh*, 18*th October* 1875.—Finds that, on a sound construction of the provision of the mutual trust-disposition and settlement of Mr and Mrs Henry, the late Jean Stewart Henry, their daughter, acquired no right to any part of the income or proceeds of the trust-estate beyond the amount actually expended by the trustees in payment of her board, maintenance, and clothing, and that the sum of £2731, 4s. 11d. standing in her name in the trust accounts at her death, with accruing interest, forms part of the residue of the trust-estate disposed of by the sixth purpose of the trust-deed.

"*Note.*—The next-of-kin of Miss Rachel Barclay Henry contend that by the mutual trust-disposition and settlement of Mr and Mrs Barclay Henry an absolute right of liferent of the whole trust-estate was conferred on the two daughters of the trusters, and on the survivor of them. It is maintained that this is the sound view of the provisions of the settlement, because the term 'residue and remainder of our whole said estates above conveyed' refers to the capital only, and not to the income or any part of the income of the trust-estate, and the absence of any direction to accumulate income is strongly founded on in support of the argument.

"I am of opinion that this contention is unsound, and that the portion of the income which was not required and applied for the maintenance of Miss Jean Stewart Henry, but which stood in her name in the trust accounts at her death, did not belong to her, but forms part of the residue of the trust-estate, divisible in terms of the sixth purpose of the trust. Miss Jean Stewart Henry was at the date of the settlement 'imbecile in mind,' and the trustees were therefore appointed by the deed to be her curators. She was under treatment as a patient in Gartnavel Asylum when her father died in 1846, and continued there till her own death in 1872. She was therefore never in the state of mental capacity to receive payment of a share of the income of the estate and grant a discharge. In these circumstances a part of the fifth purpose of the trust which became operative was that which provided, with reference to the two daughters of the trusters, that the trustees should 'expend the said annual produce, or such part thereof as may be necessary for her or their

board and clothing suitable to their rank in life, during their lives.' This provision appears to me to give no right to the daughters, in the event of their incapacity to receive and discharge income, to anything beyond the sum necessary for proper and suitable maintenance, to which indeed even the fee of the estate was made liable. The daughters' right, in that event, was in any view limited in the same way as if an annuity had been provided of an amount fixed at such a sum as the parents thought suitable to provide a comfortable maintenance. Excepting in the event—which did not occur at least in the case of Miss Jean—of her recovery from a state of mental incapacity, no right was conferred to anything beyond what was required for a suitable maintenance.

"This being so, the absence of any direction to accumulate the surplus of income beyond what was required to fulfil the truster's special directions could not by force of the deed give the daughters right to that surplus. There is no provision to that effect, and it would, I think, be contrary to the expressed will and intention of the testators to construe the deed as having that result.

"Nor is the case one of intestacy as regards such surplus income, for the words 'residue and remainder of our said estates above conveyed' include such income of the trust-estate as is not required for the fulfilment of the special directions contained in the trust-deed.

"In the words of Lord Westbury, 'It comprises the whole *corpus* and income of the estate not exhausted by any antecedent direction.'—*Sturgis* v. *Meiklam's Trustees*, June 13, 1865, 3 Macph. House of Lords, p. 71.

"The preceding judgment has dealt only with the larger sum in dispute, as both parties concurred in stating that an arrangement would probably be made in regard to the other sum of £361, 13s."

Against this interlocutor the next-of-kin reclaimed.

At advising—

Lord Justice-Clerk—In this case the deed which has given rise to the litigation presents certain ambiguities, such as might reasonably lead to some difficulty. [*His Lordship narrated the terms of the settlement.*] The question which has arisen relates solely to the accumulations of the unexpended annual income of Miss Jean Stewart Henry's share. The trustees under her father's settlement did not expend upon her annually more than half of the liferent to which she was entitled, and hence the fund *in medio* arose. I agree with the Lord Ordinary in the view at which he has arrived, namely, that the portion of Miss Jean Henry's income not expended on her maintenance did not vest in her, but forms a portion of the residue of the trust-estate. There are in the deed no words beyond the mere direction to the trustees to pay. There is nothing vesting the liferent in the liferentrix, and it follows, I think, that if the trustees paid all they had to pay for this lady's maintenance, the rest of the unexhausted income falls into residue. The measure of the amount of the fund given to the beneficiaries under the trust is simply the measure of what the trustees were bound to pay.

It cannot be doubted that in the circumstances of the case, as now before your Lordships, a difficulty arises from this argument, that by the provisions of the deed the income of the whole share of that daughter who predeceases is to devolve upon her surviving sister, and accordingly that for the future, at least after the death of the first sister, the share of the survivor must extend to the whole liferent enjoyed by the deceased. But, for the reasons I have already given, I do not regard this as a sound construction, and the clause of the deed is very carefully worded on this point:—"Declaring that in case of the death of either of our said daughters without leaving lawful issue, her share of the annual produce of our said estates shall be payable to or expended in manner foresaid for behoof of the survivor of them." There are also some provisions further on in the deed which appear important, but they do not, I think, alter the position of matters. I refer to the following clause:—"Declaring, as it is hereby expressly provided and declared, that notwithstanding the liferents and provisions above made, it shall be in the power of the said Jean Stewart Henry and Rachel Barclay Henry to test upon or convey the interest and annual produce of the one-half of the estates they or either of them may liferent themselves under this our deed of settlement to any husband they may marry, during the lifetime of such husbands, but for his liferent use allenarly."

The only other observation which occurs to me has reference to the terms "fee and residue" as used in the deed. As between a liferenter and a fiar, that which is not liferent is "fee or residue." Accordingly, I am for adhering to the interlocutor of the Lord Ordinary.

Lord Ormidale—The question to be determined in this case appears to me to be one of some nicety and difficulty. It relates to the construction and effect of certain provisions in the mutual trust-disposition and settlement of Mr and Mrs Henry, who died—the one, Mrs Henry, in 1843, and the other, Mr Henry, in 1846. They had two daughters, by both of whom they were survived.

By mutual deed Mr and Mrs Henry conveyed their whole estate, heritable and moveable, to trustees for certain purposes.

According to the fifth purpose, their trustees are directed to pay their two daughters the rents, interest, and annual produce of the trust-estate "equally share and share alike if in a mental capacity to receive and discharge the same;" and if not, it was provided that the trustees should "expend the said annual produce, or such part thereof as may be necessary, for her or their board and clothing suitable to their rank in life during their lives." Miss Jean Stewart Henry, one of the daughters, died in June 1872, survived by her sister, Miss Rachel, who died in October 1872. Neither left any lawful children.

The parties are agreed that Miss Jean was from mental imbecility incapable down to her death of receiving and discharging her provision. The trustees accordingly, as directed by her parents in their trust-deed, expended such part of it as was necessary for her maintenance, the result being that on her death there remained a balance unexpended of £2734, 4s. 11d., and this is the fund which forms the subject of dispute between the

representatives of the surviving sister Miss Rachel, on the one hand, and the residuary legatees of the trusters on the other. The Lord Ordinary has found that the fund has fallen into residue, and must be so disposed of.

The claim of her sister Miss Rachel Henry's representatives has been maintained on the ground, *first*, that it had vested in the predeceasing sister Jean, although incapable of receiving or discharging it, and therefore, as being *in bonis* of Jean at her death, fell to her surviving sister Rachel as her next-of-kin, and on her death to her next-of-kin, who are claimants for it in the present process of multiplepoinding; or on the ground, *secondly*, that by the express destination of the trusters the fund in question had, in the circumstances which have occurred, devolved upon and become vested in the surviving sister Miss Rachel, and now belongs to her next-of-kin, claimants in the process.

In regard to the first of these grounds, I am of opinion that it is ill-founded; and so far I concur with the Lord Ordinary and his Lordship who has just delivered his opinion. It appears to me that the daughter, Miss Jean never; had, or was intended to have, in the event which happened, of her incapacity, any more than was actually expended in her maintenance; or, in other words, that the provision to any further extent in her favour never took effect, as it was dependent on a condition which never was purified. This I think very clearly appears from the terms of the provision itself, and were it necessary, which I do not think it is, other clauses of the trust-disposition and settlement might be referred to as confirmatory of the same view.

The other ground of claim relied upon by Miss Rachael Henry's representatives depends mainly, as it appears to me, upon the effect to be given to that clause in the trust-disposition of Mr and Mrs Henry by which it is declared "that, in case of the death of either of our said daughters without leaving lawful issue, her share of the annual produce of our said estates shall be payable to or expended in manner foresaid for behoof of the survivor of them." What is the meaning of the expression "her share" in the declaration? Does it mean the whole income of that half of the trust-estate destined to Jean if she had been capable of receiving and discharging it, or must it be restricted to that portion of it merely which should arise after her death? Upon very careful consideration, I must own my inability to adopt the latter view, against the soundness of which there are various reasons. And in particular (1) The adoption of it would result in the surplus income accruing during Jean's life, and not expended in her maintenance, amounting, as it has turned out, to £2731, 4s. 11d., being either left undisposed of as intestate succession, a result against which presumption is very strong, or to its falling into residue, and thereby going to parties much less likely to have been favoured by the testators than their own children. I could not therefore entertain a view leading to such results unless the terms of the testators' deed left me no alternative. But the expression "her share" does not appear to me to have necessarily any such effect. It not only admits of a more enlarged meaning, but must, I think, in fair and reasonable construction, be held to comprehend not only the income of the half of the annual proceeds of the trust-estate which was intended for the daughter Jean arising after her death, but likewise the surplus of what had arisen prior to her death. I can see no good reason for rejecting this view, while, as already stated, there are, as it appears to me, reasons of some weight for adopting it.

Assuming on the grounds now stated that the testator's surviving daughter Rachel was entitled to the £2731, 4s. 11d., I think it necessarily follows that it must be held to have vested in her, although not actually expended by her or for her use during her life. It is not said that she was incapable of receiving and discharging her provisions. It is merely said that she was weak and facile, but a weak and facile person is not incapacitated from acting in and transacting her affairs.

In the circumstances, I have come to the conclusion that the £2731, 4s. 11d. in question devolved to and became vested in Miss Rachel Henry by her survivance of her sister, and that the claim to it in the present process by her next-of-kin ought to be sustained.

Lord Gifford—This is a very narrow case, and it is a matter of great difficulty to ascertain from the terms of Mr and Mrs Henry's trust-disposition and settlement what were their real intentions in reference to the income of their estate destined to their daughters, and what was the exact right which they intended to confer upon their daughters in reference to that income. In particular, it is very difficult indeed to gather from the deed whether the trusters intended their daughters, or either of them, to take a vested right in the whole income, in the special case of the daughters, or either of them, not being in a state of mental capacity to receive and discharge the same. It is also left very doubtful how far and to what extent the surviving daughter is substituted to the predeceasing daughter in any income or arrears of income which may not have been vested in the predeceasing daughter herself.

On the whole, and not without some fluctuation of opinion, especially on this last point, I have come to think that the Lord Ordinary's interlocutor is well-founded, and should be adhered to.

The trust-deed does not contain any separate gift of the income in favour of the daughters apart from the direction to pay. The direction to pay is the only gift, and nothing more seems to be given to the daughters than the amount which the testator directs his trustees to pay to them, or to expend for their behoof in the circumstances provided for in the deed. Now, in reference to the first-mentioned daughter, Jean Stewart Henry—and her case alone is dealt with by the Lord Ordinary—the direction is to pay to her and her sister equally "the rents, interest, and annual produce of our said estates;" but this only "if she be in a mental capacity to receive and discharge the same; and if not, our said trustees shall expend the said annual produce, or such part thereof as may be necessary, upon her board and clothing, suitable to her rank in life, during her life." Now Jean Stewart Henry never was in a mental capacity to receive and discharge her share of the income, and she died in this condition, and the question is, Did the surplus income,

not necessary and not expended on her board and maintenance, ever vest in her? I think it did not. The direction to "pay" the income to Jean Stewart Henry never took effect, because it was only a conditional direction, and the condition never was purified. In the event which actually happened, and which was contemplated by the trusters, all that was given to her by the deed was what was necessary for her maintenance and support, and this she received. I think neither Jean Stewart Henry nor her executors can claim anything more—nothing more ever vested in Jean Stewart Henry herself.

The remaining question however is, Whether, on Jean Stewart Henry's death without issue, the exhausted surplus of the one-half of the income of the trust-estate not required for her maintenance and support did not, in virtue of the substitution in the deed, accrue to Rachel Barclay Henry, her surviving sister, and I have felt this question to be more difficult than the former. The words of the deed are that "in case of the death of either of our said daughters without leaving lawful issue, her share of the annual produce of our said estates shall be payable to or expended in manner foresaid for behoof of the survivor of them." The question is, What did the testators mean by the expression "her share of the annual produce?" With hesitation I have come to think that this expression means the half of the income accruing after the death of the predeceasing daughter, and this does not include the accumulated surplus not required for the board and maintenance of the predeceaser. The result is that this accumulated surplus must form part of the residue of the general trust-estate.

Lord Neaves was absent.

The Court adhered to the interlocutor of the Lord Ordinary, and allowed the expenses since the date of that interlocutor out of the fund.

Counsel for the Trustee—Trayner—Cunninghame. Agents—M'Ewen & Carment, S.S.C.

Counsel for Next-of-Kin—Jameson. Agent—John Martin, W.S.

Counsel for Legatees — Asher — MacArthur. Agents—Webster & Will, S.S.C,

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Wednesday, November 24.

SECOND DIVISION.

[Lord Craighill.

ALEXANDER *v.* BUTCHART.

Servitude — Property — Implied grant — Part and Pertinent.

The upper stories of a tenement were sold to A, while about the same date the lower was sold to B, who had previously occupied it as a shop in the capacity of tenant. B acquired his property "as presently occupied" by him, "with the pertinents." For some time previous to his purchase he had exhibited a sign covering a panel over the window and door, part of which was above the boundary-line dividing the lower from the upper tenement, and this he continued to do. *Held*, in an action of declarator and interdict at the instance of A, that there was no implied right in the grant to B which could entitle him so to use the panel, and that as such a use was not necessary for the comfortable enjoyment of his property it was not carried as part and pertinent.

Opinion—per Lord Gifford—that if a burden is to be created without entering the titles, it must be referable to some one or other of the known servitudes.

This was an action of declarator and interdict at the instance of William Alexander, architect, Dundee, against Alexander Butchart, grocer in Dundee. The pursuer sought to have it found and declared (1) that the centre of the joists is the boundary line dividing the shop No 57 Overgate, Dundee, belonging to the defender, from the tenement above said shop belonging to pursuer, and which is situated at the corner of Overgate and Barrack Streets, Dundee, and that the defender is not entitled to paint or place his sign or other inscription on the panels above the window and door of said shop, or on any part thereof which is above said boundary line, and (2) to have the defender ordained forthwith to remove the sign now exhibited upon said panels; and that he should be interdicted, prohibited and discharged from painting or placing any name or other inscription thereon in time to come, or from otherwise invading or encroaching upon the pursuer's said property.

The tenement in question was at one time the property of William Sime, stationer in Dundee, from whose trustees the pursuer in 1870 acquired by disposition the whole of it, with the exception of the ground or shop storey. This storey had shortly before been acquired by the defender, who in the capacity of tenant had already occupied it as a shop. The defender's disposition was dated and recorded 13th and 16th May, and the pursuer's 8th and 11th July 1870.

This disposition by Sime's trustees to the defender conveyed "all and whole that shop and back shop, No. 57 Overgate, Dundee, as presently occupied by the said Alexander Butchart, together with the cellar below the said shop, . . . together with the pertinents of the said subjects hereby disponed, and our whole right, title and interest, present and future, therein."

The defender admitted that the panels upon which his sign was placed were partly above the *medium filum* of the joists which divided his shop from the property of the pursuer, but he pleaded that as the right to use the said sign as he had formerly used it when a tenant was conveyed to him as part and pertinent of his property, the pursuer had no right to interfere. It appeared that former tenants had occupied the shop with their sign placed in a similar position.

The defender had taken proceedings against the pursuer in the Sheriff Court, in order to have him interdicted from taking down this sign, and had obtained interdict. Probation was renounced, and upon 17th June 1875 the Lord Ordinary issued the following interlocutor:—"The Lord Ordinary having heard parties' procurators on the closed record and productions, and considered the debate and whole process—Repels the defences, and decerns and declares; as also decerns and ordains, and interdicts, prohibits, and discharges, in terms of the conclusions of the summons: Finds the defender liable in expenses, of which allows an account to be given in, and