

tain that construction to show this. I am of opinion that the Lord Ordinary's interlocutor should be recalled.

**LORD ARDMILLAN**—Even if this question were entirely open, and now to be decided on principle, I should be of opinion that in a case of this kind, which is simply an action of reduction, where there is no petitory conclusion for payment of money arrestment on the dependence is not competent.

Arrestments in security on the dependence of an action is an extraordinary remedy,—an equitable and appropriate remedy,—but not, I think, to be extended beyond the limits which have been sanctioned by law, and recognised by practice.

I do not think the case turns on the statute of 1 and 2 Vict. The competency of using arrestments does not depend on that statute, though the procedure in arrestment was regulated. I agree with your Lordship in the chair in regard to this Act. I have no doubt that where there is a petitory conclusion for money, an arrestment on the dependence will be available to the pursuer to cover expenses.

When competently used as regards the leading petitory conclusion, it will be effectual to secure the expenses. This result is, I think, right on principle, the expenses as it were growing during the procedure, and attaching to the debt concluded for; and it is according to practice.

But on this summons there is no allegation of a present debt, no conclusion for a present payment, no ground for the extraordinary diligence of arrestment on the dependence.

The point has been decided in regard to inhibition in the case of *Dove v. Henderson*, 11th January 1865, and in the case of *Weir v. Otto*, 19th July 1870. Both judgments—one in each Division—were unanimous. In the first of these cases the opinion of Lord Curriehill, and in the last the opinion of Lord Justice-Clerk (Moncreiff), are conclusive; and the law has been so assumed in other cases, and so far as I have been able to ascertain, the use of either prohibition or arrestment to secure expenses only, where there is no petitory conclusion in the summons, is unknown in practice. No precedent for it has been adduced.

On principle, the able argument of Mr Balfour was to my mind quite satisfactory. In point of authority, the only decisions truly in point are adverse to the competency; for as regards this question, I am unable to perceive any sound distinction between inhibition and arrestment. And to sustain this arrestment would be against usage and without precedent, contrary, as I believe, to the understanding and practice of the legal profession.

**LORD MURE**—I am entirely of the same opinion. I entertained at first a little doubt as to the effect of the statute, but on considering the authorities I am satisfied that the words of the Act cannot be held to have operated an alteration of the law, but were merely intended to introduce a change on the previous practice and to allow the addition of a warrant of arrestment to a summons.

Counsel for Petitioners—Balfour—J. P. B. Robertson. Agent—Thomas White, S.S.C.

Counsel for Respondents—Dean of Faculty (Watson)—Asher. Agents—Hamilton, Kinnear, & Beatson, W.S.

Tuesday, November 23.

## SECOND DIVISION.

[Lord Rutherford Clark.]

TOWN COUNCIL OF LEITH v. LENNON.

*Process — Reclaiming Note—Leave to Reclaim — Administration of Justice and Appeals Act (48 Geo. IV. c. 151), § 16.*

Parties who had failed to reclaim against an interlocutor within the time allowed by statute, applied to the Lord Ordinary for leave to submit it to review under the 16th section of the Act 48 Geo. III. c. 151, which provides "that if the reclaiming or representing days against an interlocutor of a Lord Ordinary shall from mistake or inadvertency have expired, it shall be competent, with the leave of the Lord Ordinary, to submit the said interlocutor by petition to the review of the Division to which the said Lord Ordinary belongs."

The Lord Ordinary refused leave, and against this interlocutor a reclaiming note was presented to the Inner House. *Held*, without deciding whether in every application under this section of the statute it would be incompetent to bring the decision of the Lord Ordinary under review, that in the circumstances of this particular case, and as the right contended for was a mere possessory question of no great importance, the judgment of the Lord Ordinary should be adhered to.

*Opinion, per Lord Justice-Clerk*, that under said section the Lord Ordinary is the sole judge of the propriety of giving leave to reclaim.

The Provost, Magistrates, and Council of Leith raised in the Bill Chamber a note of suspension and interdict against Mrs Lennon, residing in Leith. Their statement of facts set forth that the respondent had, in violation of the complainers' rights, interfered with the structure of, and begun operations of a prejudicial nature upon, a boundary wall between their respective properties, but built wholly upon that of the complainers. This wall formed the south-west boundary of a public park in North Leith.

The complainers accordingly craved their Lordships to "suspend the proceedings complained of, and to interdict, prohibit, and discharge the respondent from using the wall forming the south-west boundary of the public park in North Leith in any way to the detriment thereof, and particularly from interfering with the present condition of the said wall, by lowering the same or adding to the height thereof, or from building or carrying on any building operation either on or against the said wall, or that may in any way affect the same; and to ordain the respondent to remove any stone, lime, or other building materials or erections she may have placed or caused to be placed on the said boundary wall, and to restore the same to the condition in which it was before

the said operations were begun or executed; or to do further or otherwise in the premises as to your Lordships shall seem proper."

After discussion the Lord Ordinary officiating on the Bills pronounced the following interlocutor:—

"*Edinburgh, 26th October 1875.*— . . . In respect that the respondent states in the minute No. 10 of process that the operations sought to be interdicted were completed before the note was presented, and that she has no intention of interfering further with the wall in question, and now judicially undertakes in said minute that she will make no alteration on the said wall without judicial authority or the consent of the complainers—Refuses the note; finds the complainers liable in expenses; modifies the same to £8, 8s. sterling, for which, besides the dues of extract, decerns against the complainers."

The complainers allowed the time for reclaiming to expire without lodging a reclaiming-note, but they afterwards applied to the Lord Ordinary for leave to submit the interlocutor to the review of the Inner House, under the 16th section of the Administration of Justice and Appeals Act, 1808 (48 Geo. III. c. 151). That section provides "that if the reclaiming or representing days against an interlocutor of a Lord Ordinary shall from mistake or inadvertency have expired, it shall be competent, with the leave of the Lord Ordinary, to submit the said interlocutor by petition to the review of the Division to which the said Lord Ordinary belongs."

On 13th November the Lord Ordinary issued the following interlocutor:—"Having heard parties' procurators on the motion by the reclaimers for leave to reclaim against Lord Curriehill's interlocutor of 26th October 1875—Refuses the same; finds the complainers liable in expenses; modifies the same to £2, 2s. sterling, for which, besides the dues of extract, decerns against the complainers."

The complainers now reclaimed against this interlocutor. The circumstances under which they had failed timeously to reclaim against the interlocutor of 26th October were stated in a minute lodged by them. It appeared from this minute that the resolution to reclaim against the interlocutor of 26th October had been come to by the Town Council upon their election at the beginning of November. The papers in the case had, on the 6th of that month, been put into the printer's hands, who had despatched proofs upon the 8th, but by mistake they were sent to the Police Office instead of the Town Clerk's office in Leith, and were not discovered until the afternoon of the 9th, the day upon which the time for reclaiming expired. It was further stated verbally at the bar that the claimer's agent had miscalculated the time allowed for reclaiming.

Argued for reclaimers—This reclaiming-note was competent as bringing an interlocutor which was final under review. Review was always competent unless expressly excluded by statute. The circumstances under which the failure to lodge the reclaiming-note arose were just those to which the 16th section of the Act applied. There was "mistake or inadvertency," and the Lord Ordinary ought to have granted what was asked. This was not a case of *crassa negligentia*.

Argued for respondents—This reclaiming-note was incompetent by the statute requiring the leave of the Lord Ordinary, and the reclaimers were reclaiming without his leave. They had lost their right in consequence of their own negligence.

Authorities—*Officers of State v. Alexander*, June 29, 1864, 2 Macph. 1296; *Forbes and Others v. Traill and Others*, June 17, 1843, 5 D. 1212; *Mills v. Hamilton*, June 6, 1829, 7 Shaw 716; *Williams v. Macnee*, June 12, 1841, 3 D. 1014; *Babington v. Newall and Others*, Feb. 20, 1841, 2 D. 611; 48 Geo. III. 151, § 16; 6 Geo. IV. 120, § 18.

At advising—

LORD ORMDALE—This reclaiming-note belongs to a class which seldom comes before us, which says a great deal for the diligence and carefulness of the practitioners in the Court. It suggests considerations of the greatest importance. One statute prescribes periods within which reclaiming-notes and appeals are to be presented, and parties are not on loose grounds to get over the barrier thus imposed. But there is an extraordinary remedy provided for extraordinary cases, under the Act of 48 Geo. III. c. 151. That remedy is applicable only in cases of inadvertence or mistake, and on condition that the leave of the Lord Ordinary has been obtained. Had the question been a new one, I should have had no doubt that the leave of the Lord Ordinary was intended to be essentially necessary; but there have occurred cases in which the Court have assumed that they were entitled to review the Lord Ordinary's decision. In the present case we have allowed the parties to be heard upon the propriety of sustaining the note, and we are in possession of the circumstances. I go upon those stated in the minute alone. It is obvious, from what is there stated, that the reclaimers had this matter of reclaiming fully under their consideration at the time when the interlocutor was pronounced, and afterwards at the date of the election, and when the interlocutor was submitted to the Council. The papers were sent to the printer on the 6th of November, and proofs despatched by him on the 8th, although by mistake not received by the agent until the afternoon of the 9th. The agent even then might have resorted to the expedient of sending them to the clerk's house, where they would have been received. But that was not done. Now, I am not prepared to say that a mere statement of mistake by the party would justify the Court in allowing the reclaiming note. For how long a period would such a statement serve? The statute fixes no limit. In the circumstances of this case I agree with the Lord Ordinary.

LORD GIFFORD—I come to the same conclusion, but not quite on the same ground. If we had here the general question whether a party would lose his rights by an interlocutor becoming final, and that through the carelessness of an agent or his clerk, I would be unwilling to hold that these rights were lost to him. The intention of the statute was to give a remedy to the client, and whenever a client can say, 'I have done every thing that I could,' it would require a strong case to exclude him from his remedy. But I think that the specialities of this case relieve us from a

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 disponent had made advances to the disponent 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