in use is to be paid, for the purchase of the undertaking of which it is part.

The defenders have relied on the *Kirkleatham* case. It seems to me to form a complete contrast to the present case. In *Kirkleatham* there was no sale of the undertaking, for the best of reasons—the local authority did not require it. The only things directed to be sold were the mains, pipes, and fittings; and what had got to be paid was their own value. This being so, the structure of the section construed in the *Kirkleatham* case was as different from that now under consideration as were the things transferred and the theory of transference.

My opinion on the section before us is in accordance with the judgment of the Divisional Court of the High Court of Justice in England. As I differ from your Lordships, I have thought it proper to write this opinion. I should otherwise have been content to express my general concurrence in the views of Mr Justice Matthew and Mr Justice Henn Collins.

The Court adhered.

Counsel for the Pursuers — Graham Murray, Q.C. — Vary Campbell — Clyde. Agents—Drummond & Reid, S.S.C.

Counsel for the Defenders—Ure—Cooper. Agents—W. White Millar, S.S.C.

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*Tuesday, March* 20.

## FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

## WELSH *v.* RUSSELL.

*Property—Sale—Servitude—Warrandice.*

W purchased an urban property, consisting of a house and back garden, from R for £600. The subjects were conveyed free of all burdens, and the disposition contained a clause of absolute warrandice. Shortly after the sale S intimated to W that he claimed a servitude of passage through the garden, and raised an action of interdict against W to establish his right. The dependence of this action was intimated to R, who declined to interfere, and decree was allowed to pass in absence. W then brought an action against R to have him ordained to free the subjects sold of the servitude, and failing his doing so, for payment of £750 as the present value of the subjects.

*Held* that under the clause of warrandice the pursuer was only entitled to be indemnified for the diminution in the value of the property caused by the existence of the servitude, and that as he had neither averred nor proved partial damage, the action fell to be *dismissed* as incompetent.

In June 1890 William Welsh purchased a house and back garden in the town of Selkirk from James Russell for £600. The disposition contained a clause of absolute warrandice, and the subjects were conveyed free of all burdens.

In December 1892 Welsh brought an action against Russell in order to have the latter ordained to free and relieve (1) the house and (2) the garden of, in the first place, a servitude right possessed by Thomas Scott of free ish and entry through the house to subjects belonging to him at the back thereof; and, in the second place, of a servitude right also possessed by Scott of passage through the garden, and failing the defender procuring from Scott a conveyance or renunciation of these servitude rights, for decree ordaining him to pay the pursuer the sum of £750, "being the present value of the subjects."

The pursuer averred—"(Cond. 3) In or about the month of June 1892 Mr Thomas Scott, tailor, High Street, Selkirk, claimed servitude rights of way through the house and also through the garden conveyed to the pursuer in said disposition, and by letter dated 3rd June 1892 the pursuer's agents intimated this claim to the defender. (Cond. 4) In order to vindicate his rights to the said right-of-way through the pursuer's garden, the said Thomas Scott raised a petition for interdict against the pursuer in the Sheriff Court at Selkirk, which was served upon the pursuer on 15th August 1892. In the condescendence annexed to the said petition the petitioner reserved his right to pass through the pursuer's house, which he stated had not hitherto been challenged, and was not therefore included in the said petition. (Cond. 5) The pursuer's agents on 17th August 1892 intimated the said petition to the defender. Thereafter, on inquiry into the claims of the said Thomas Scott, they advised the pursuer that the same were valid in law, and by letter dated 22nd August 1892 they intimated this to the defender, and that the action was not to be defended so far as the pursuer was concerned. The defender, although he denied the existence of the said servitude rights, refused to give the pursuer any information or assistance to enable him to state competent defences to the said petition, if the same could be stated. The said Thomas Scott thereafter on 7th October 1892 obtained interdict in terms of the prayer of his petition. (Cond. 6) The said servitude rights specified in the summons are legal burdens over the subjects in question, and they have existed the pursuer believes and avers from time immemorial. The said Thomas Scott and his predecessors in the subjects have fully and completely possessed and used the same since their constitution to the present time. . . . (Cond. 7) The said servitude rights were not disclosed to the pursuer at the time of the sale. They are of a very burdensome nature, and materially depreciate the value of the subjects, and the pursuer would not have purchased the subjects at any price had he known of their existence. By and through the existence and exercise of the servitudes described in the summons, and

the said decree of interdict, the pursuer has been evicted from the peaceable enjoyment and possession of the subjects. (Cond. 8) . . . The present value of the subjects (which have been greatly improved by the pursuer at an expenditure of £150 or thereby), free of the said servitudes, the pursuer estimates at £750, and he is willing to reconvey them to the defender on payment of the sums now sued for."

The pursuer pleaded, *inter alia*—"(1) The pursuer having purchased the subjects from the defender under a disposition containing absolute warrandice, and having been evicted therefrom as condescended on, he is entitled to have the records purged of the said servitude rights as concluded for. (2) In the event of the defender failing to purge the records as concluded for, the pursuer is entitled to decree in terms of the alternative conclusion of the summons, with expenses."

The defender denied the existence of the alleged servitude rights, and pleaded, *inter alia*—"(1) The action is incompetent as laid."

Proof was allowed, but it is unnecessary to refer to the evidence, as it was conceded in the Inner House that the question of the existence of the alleged servitudes could not be competently decided in an action to which Scott, the alleged possessor of the rights, was not a party.

On 10th November 1893 the Lord Ordinary (STORMONTH DARLING) pronounced this interlocutor:—"Finds that the subjects *secundo* described in the summons are burdened with a servitude right now possessed by and belonging to Thomas Scott, tailor in Selkirk, of a road or passage leading through the said subjects from the subjects fronting the High Street of Selkirk, belonging to the said Thomas Scott, and that the defender is bound to free and relieve the said subjects of the said servitude right, or else to make payment to the pursuer of the present value of the said subjects, and of the subjects *primo* described in the summons, on obtaining a reconveyance thereof from the pursuer: And further, to make payment to the pursuer of the expenses incurred by him in connection with a decree of interdict, dated 7th October 1892, obtained in the Sheriff Court at Selkirk at the instance of the said Thomas Scott against him: Finds that the subjects *primo* described in the summons are not burdened with the servitude mentioned in the summons as affecting the said subjects: Continues the cause in order that the defender may have an opportunity of disburdening the subjects *secundo* described in the summons, if so advised: Grants leave to reclaim.

"*Opinion.*—This action is laid on the warrandice clause of a disposition of a house and back garden in Selkirk, granted by the defender to the pursuer in June 1890, and its conclusions are that the defender should relieve the subjects of two servitude rights of way, one through the house, and the other through the garden; and failing his doing so, that he should pay to the pursuer the present value of the subjects on obtaining a reconveyance.

"The first question is, whether the alleged servitudes subsist? [*His Lordship then examined the evidence, and stated his conclusions to be* (1) *that there was no existing servitude of ish and entry through the pursuer's house, and* (2) *that there was a subsisting servitude of passage through the pursuer's garden.*]

"The question remains, whether he is entitled to the remedy which he asks.

"Warrandice indemnifies against loss from defective right. Although the existence of an undisclosed and unsuspected servitude does not mean want of title, it constitutes a material limitation on the full right of property which the purchaser had reason to think he was acquiring. Accordingly, in *Urquhart* v. *Halden*, 13 S. 844, the discovery of a negative servitude over the ground acquired was held to give the purchaser a right either to have the burden removed or to be relieved of his bargain. It is said by the defender that this rule applies to servitudes only where they are of a very burdensome description, or, to use the words of Erskine, are 'uncommonly heavy'—Ersk. ii. 3, 31. I cannot say that this seems to me a satisfactory distinction, for it lays upon the Court the duty of determining a question of degree, which must depend to some extent on the use which the purchaser intended to make of his property. I do not find that it has ever received effect except in three old cases, two of which were cases of thirlage, and the third a case of peat-casting—*Sandilands*, 1672, M. 16,599; *Symington*, 1780, M. 16,637; *Gordonston*, 1682, M. 16,606. In the first and last of these, great stress seems to have been laid upon the fact of the servitudes being of a kind 'notourly knowd,' but here all argument to that effect is excluded by the circumstance that the defender repudiates all knowledge on his own part, and cannot therefore impute knowledge to the pursuer. It is impossible to describe the servitude in this case as a very serious one, and I cannot help thinking that a very moderate amount of neighbourly forbearance on the part of Scott and the pursuer would have reduced it to a minimum. But, as a question of law, I am not prepared to affirm that a right of passage at all times through a small urban subject is not a material burden on the full right of property, and therefore I think the defender was wrong in taking up the uncompromising attitude which he did. It follows that the pursuer is entitled to his remedy, and I shall adopt the course which was followed in *Urquhart's* case, by allowing the defender time to endeavour to have the servitude removed. I may add that if the case should result in decree having to be pronounced for rescission of the bargain and payment of the value of the subjects, I am by no means satisfied that the pursuer has proved the full value which he claims."

The defender reclaimed, and moved that the action should be dismissed as incompetent. In the event of his argument on

the competency not being successful, he moved that the action should be sisted, in order that he might have opportunity of reducing the decree in absence obtained by Scott, and establishing that the property sold to the pursuer was affected by no servitude.

Argued for the defender—The alleged servitude of passage through the pursuer's garden was not of so burdensome a nature as to bring the objection of warrandice into effect—Stair, ii. 3, 46; More's Notes to Stair, pp. 92 and 93; Ersk. Inst., ii. 3, 31-32; Menzies' Conveyancing (3rd ed.), 555; Bell's Lectures on Conveyancing, i. 218; Bell's Prin. secs. 895, *et seq.; Sandilands* v. *Earl of Haddington*, 1672, M. 16,599; *Symington* v. *Cranston*, 1780, M. 16,637; *Gordonston, &c.* v. *Paton*, 1682, M. 16,606. In *Urquhart* v. *Halden*, June 2, 1835, 13 S. 844, the servitude in question was a negative servitude affecting the whole property, and it was held that the seller had been in bad faith not to disclose its existence. The case of a minor servitude such as was in question here was quite different. At anyrate, the remedy asked was too great. The pursuer was not entitled to the total present value of the subjects, but only to be compensated for the diminished value of his property. The action, however, was not one for damages, and the case stated affords no *media concludendi* enabling the Court to arrive at the sum due to the pursuer. The action was therefore incompetent, and should be dismissed.

Argued for the pursuer—The action was quite competent. The pursuer had not got what he bargained for, and he therefore offered to return the property and demanded repayment of the price. That was the proper course in the circumstances. The rule applied in the case of moveables was equally applicable here. If the alleged servitude of way through the house existed there would be total eviction, as the use of the subject would be totally destroyed, and in that case the competency of the action would be undoubted. The pursuer was not bound to await judicial eviction before raising his action of relief, when the obligation of relief was not admitted—*Lord Melville* v. *Wemyss*, January 14, 1842, 4 D. 385. At all events, there had been judicial eviction in the case of the servitude of way through the garden, and that servitude was of itself sufficiently burdensome to bring the obligation of warrandice into effect. Stair and Erskine, in the passages referred to, were writing about rural servitudes, but there was all the difference in the world between a rural servitude of way and a right of passage through an urban subject. The latter was a servitude of a most burdensome kind, and the pursuer was therefore entitled to the remedy craved.

At advising—

LORD M'LAREN — This is an action founded on breach of warranty of a sale of heritable property in the town of Selkirk. The warranty is contained in a warrandice clause in the usual form, and the breach complained of consists in the successful assertion of a servitude of way or passage through the pursuer's garden by the owner of an adjoining tenement. An action was brought in the Sheriff Court to constitute the servitude, and the present pursuer, after intimating the claim to the vendor, the present defender (who declined to interfere), allowed decree to pass in absence, and instituted this action with a view to indemnification. The Lord Ordinary allowed a proof, and on a consideration of the title-deeds, and explanatory parole evidence, found that the servitude was proved.

Before examining the case on the merits, it is desirable to consider what are the rights of a creditor in the obligation called warrandice, because unless the relief claimed in this action be consistent with the pursuer's rights under the obligation, it is useless to proceed further.

The obligation of warrandice differs from all other obligations in this respect, that it is not intended that it should be performed immediately or within a definite time, or even within what the law describes as a reasonable time. It remains latent until the conditions come into existence that give it force and effect, and it continues to affect the granter and his heirs until the possibility of adverse claims has been extinguished by the long prescription.

The obligation has also this peculiarity in common with other obligations of indemnity, that its extent is measured by the extent of the injury which the creditor in the obligation may sustain, because such obligations are designed to indemnify the purchaser not only against the consequences of complete eviction, but against the loss of the most inconsiderable fraction of the estate, or its diminution in value by reason of the establishment of a burden of any kind.

If the question were now raised for the first time, how a warranty of title should be enforced, everyone would admit that the remedies of restitution or repayment of the price are singularly inappropriate to such a case. To put a case which is quite pertinent to the inquiry, we may suppose that thirty-nine years after the sale of an estate a cottage or an acre of moorland, which had been included in a description of subjects, was found to belong to another proprietor. In such a case we do not immediately recognise that it is consistent with legal principle or with justice that the heirs of the seller should be required to repay the price or should be obliged to take back the estate diminished by the evicted acre. If the seller or his heirs should be in a position to purchase the evicted subject, and should offer reinstatement, this would seem to be a very satisfactory way of performing their obligation. But, again, it is impossible to entertain the proposition that the seller is bound to purchase the evicted subject because the law does not give him the power of compulsory purchase from the true owner, and the law will not require any man to perform speci-

fically something that is not within his power. It is indeed evident from the nature of the obligation of warrandice that it must in the general case, and probably in all cases, resolve into a claim of pecuniary indemnification for the loss of the subject of sale or its diminution in value through the existence of real securities, real burdens, servitudes, or other real rights affecting the estate.

Passing to the question of authority, there can be no better authority on such a subject than Erskine, who in book iii. tit. 3, treats of warrandice at considerable length, and in section 30 makes it quite clear that in his opinion the remedy is not restitution but indemnification. He says there—"It is incontested that absolute warrandice, after the subject is evicted, founds the grantee in an action of recourse against the granter for making up to him the full damage he has suffered, either through contravention of the warrandice or any defect in the right. An offer by him who warrants a right, therefore, to put the grantee in his own place by making him full payment of the price he paid for it, with the interest from the time of eviction, is not sufficient. For though this would indemnify the grantee, so that he would be no loser by the bargain, yet the obligation to warrant is not intended barely for indemnifying the purchaser, but for securing him against all the consequences of contravention, and of course for making payment to him in case of eviction of the full value of the subject at that period, together with the loss he has sustained through the want of it from that time." If, as Erskine points out, there are cases where an offer of repayment of the price with interest would not be a sufficient fulfilment of the warranty, it is perfectly clear that there are cases where repayment of the price would be very much in excess of the true measure of the obligation, and if illustration were needed, I could not desire a better one than the present claim. In the 31st section Erskine considers the case of servitudes, and says (speaking with obvious reference to considerable estates) that "warrandice is not incurred by every light servitude that the granter or his authors may have imposed upon the lands conveyed, such as lands are usually charged with, *e.g*, aqueducts, passages, or even a moderate thirlage. But if the servitude be uncommonly heavy, the granter who makes over the estate *tanquam optimum maximum* incurs the warrandice." The liability thus incurred is of course the liability to make pecuniary compensation, which is the only kind of liability recognised by the author.

It may be that in some cases of total eviction, or cases treated as such, the decree obtained has been in form a decree for repayment of the price with or without interest, according as the purchaser had or had not got benefit by the possession of the lands for the period subsequent to the sale. But this would only be because in the particular case the value of the property was unchanged, and the price originally paid was considered to be a fair measure of the loss consequent on eviction.

It is proper to point out that repayment in the case supposed is really indemnification, not restitution. Restitution supposes that the purchaser reconveys the estate in exchange for repayment of the price. But in the case supposed reconveyance is impossible, because the estate has been evicted, and such cases lend no support to the theory that on the discovery of a servitude or burden whose existence was unknown to the parties at the time of the sale, the purchaser is entitled to return the subjects to the seller, and to demand repayment of the price. If he has such a right, it can only be made good by a reduction on the ground of fraud or error, and not by an action on the warranty.

If I have rightly stated the limits of the liability undertaken by the seller, the present action must fail, because it is neither in form nor in substance an action of damages. The first conclusion is that the defender should free and relieve the subjects described of two servitudes of passage by procuring a renunciation of these rights. I think that in fair construction this conclusion is only expressed in such terms as to give the defender the option of discharging the servitude, and when so interpreted, the conclusion is unobjectionable.

But the alternative conclusion is that failing the defender producing such renunciation, he shall be decerned "to make payment of the sum of £750, being the present value of the subjects and others before described." If the condescendence had contained any specific statement of damage corresponding to the existence of a limited right in the proprietor of a dominant tenement, it might have been possible to treat the second conclusion as a conclusion for an arbitrary sum of damages. But the theory of the condescendence is that the pursuer is entitled to be indemnified as for a total eviction, and it is not made clear whether he is also to keep the subjects or to restore them. There is neither averment nor proof of partial damage, and my opinion is that the claim for repayment of price or value is inadmissible and contrary to law, and that the action ought to be dismissed.

LORD ADAM concurred.

LORD KINNEAR—I am of the same opinion. The Lord Ordinary was invited by both parties to determine the question, whether these subjects are or are not affected by a servitude on the merits, and he has decided it in favour of the pursuer. It is now admitted that that question of the existence of the servitude is not competently raised in this action, and cannot possibly be decided. For the party really interested in maintaining the existence of the servitude is not a party to the action. It is manifest that if there be any question whether the subjects are burdened by a servitude, the true interest of the proprietor is not to maintain the claim, but to defeat it; and it is equally clear that no judgment between him on the one hand,

and the defender on the other, could be binding on the owner or alleged owner of the dominant tenement. It came to be conceded, however, I think, at the bar that that question was not now before us.

The contravention of warrandice, of which the pursuer is entitled to complain, is not the existence of the servitude, but a decree in absence obtained by Mr Scott in the Sheriff Court, by which the pursuer's right of property is so burdened as to restrict his use and enjoyment of the subjects purchased. Now, that decree may or may not be well founded. But it cannot be reviewed on its merits in this process. The seller of the subjects—the granter of the warrandice—having had notice of the Sheriff Court proceedings, declined to appear, and accordingly the purchaser brings this action on the warrandice clause, and I think he would be quite entitled to say that whether that Sheriff Court decree is well founded or not—so long as it stands it is an encroachment on his right and a contravention of the warrandice, and therefore that if it is invalid it must be set aside, or if it is well founded he must be indemnified. But I agree with what has been said by Lord M'Laren that that being the position of his right he has chosen a wrong and inapposite remedy, because the only operative conclusion of the summons which he has brought, after allowing the defender an opportunity of clearing the subjects of the burden, is that the defender should make payment to him of the present value of the subjects described in the summons. Now, that is the ordinary and perfectly appropriate conclusion of a summons upon a warrandice where there has been a total eviction of the subjects from the purchaser, for then the measure of the indemnity which he is asking, and to which he is entitled, is the present value of the whole subjects of which he has been deprived. In such an action the conclusion is not for repayment of the price as Lord M'Laren has explained, but a conclusion for the present value of the subjects. In the ordinary case of course there is no corresponding conclusion for restitution of the subjects, for the assumption of such an action is that they have been carried away.

But such a conclusion is clearly inappropriate to a case where the purchaser remains in possession of the subjects, and complains merely that his use of them is diminished by reason of a servitude right-of-way. It is impossible that a purchaser of land should recover the entire value of the land from the seller except on condition of his restoring the land, and in circumstances which will entitle him to do so. It is said that although there is no provision for restoration to be found in the conclusion of the summons, an offer to restore is contained in the condescendence. But however that may be, it is not appropriate to an action for breach of warrandice. That is an action on the contract; and the pursuer of an action founded upon the contract cannot at the same time claim to recover the price and give back the lands and so to set aside the contract. The pursuer does not maintain that he is entitled to reduce the contract. But if he did, he could not have decree of reduction in an action founded upon the warrandice clause. The remedy to which he is entitled under the clause of warrandice is not reduction but indemnification. In case of a total eviction he is entitled to demand the whole value of the subjects. In case of a partial eviction he cannot be entitled to the whole value, but only to the value of what he has lost. The action on the warrandice, therefore, where the pursuer is left in possession of the subject, and complains merely of a burden by which its value is diminished, is in effect an action of damages. But if the pursuer has a good claim for damages, there is no conclusion in the summons which will enable us to estimate or give effect to such a claim.

I concur, therefore, in the opinion of Lord M'Laren.

The Lord President concurred.

The Court recalled the interlocutor of the Lord Ordinary and dismissed the action.

Counsel for the Pursuer—Ure—Clyde. Agents—Dove & Lockhart, S.S.C.

Counsel for the Defender—H. Johnston—Salvesen. Agents—E. A. & F. Hunter & Company, W.S.

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*Tuesday, March 20.*

## FIRST DIVISION.

[Lord Low, Ordinary.

## LIPPE v. COLVILLE.

*Reparation—Wrongous Use of Diligence—Relevancy.*

Persons who had subrented two rooms from a tenant bound under his lease not to sublet without the landlord's written consent, brought an action against the landlord for wrongously inventorying their effects under sequestration proceedings taken against the principal tenant. They averred that all the effects inventoried belonged to them, and that the landlord's agent had before their entry given an assurance that they would not be liable for the rent of the tenant.

*Held* (*rev.* Lord Low) that the action was irrelevant, the landlord being within his rights unless his consent to a sub-let had been obtained, and that the averment with regard to such consent was much too vague and indefinite to go to proof.

Miss Anne Colville was proprietrix of the house 1 Castle Lane, Banff, and James Macintosh was her tenant from Whitsunday 1892 to Whitsunday 1893. He was bound not to sublet the house without the written consent of the proprietrix, but in January 1893 without such consent he sublet two rooms to Mr and Mrs John Lippe.