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.

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.

Macintosh having become bankrupt Miss Colville's agent took out a small-debt sequestration summons against him with warrant thereon to inventory his effects, and on 22nd May 1893 inventoried the effects in 1 Castle Lane and left a citation there for Macintosh with copy inventory annexed. The sequestration proceedings were afterwards dismissed by the Sheriff-Substitute as incompetent, and no sale of the effects inventoried took place.

In June 1893 John Lippe and his wife raised an action of damages for wrongous sequestration against Miss Colville, in which they averred that before taking the two rooms in Macintosh's house Mrs Lippe's father had gone to the defender's agent and "inquired if the pursuers would not be held liable for the balance of the year's rent due by the said James Macintosh, and that the agent assured him that they would not, and in consequence of said assurance the said two rooms were subrented for the pursuers." They further averred that the sheriff officer "sequestrated, inventoried, and pretended to value the whole effects in said house 1 Castle Lane, belonging to the pursuers. He did not sequestrate any effects belonging to Macintosh, as there were none on the premises. The defender knew that in 1892 James Macintosh had left Banff for good and taken all his effects with him to Peterhead. Further, no demand whatever had been made on the pursuers for payment of the rent to be paid by them or by Macintosh, and no intimation whatever had been made of the intention of the defender to hold them responsible for Macintosh's rent."

They pleaded—"The pursuers' effects having been wrongfully, illegally, and oppressively sequestrated by the defender, the sum claimed in name of damages and solatium is fair and reasonable, and decree should be granted, with expenses."

The defender pleaded, *inter alia*—"(1) The pursuers' statements are irrelevant and insufficient to support the conclusions of the summons."

The Lord Ordinary approved the following issue:—"Whether on or about the 22nd day of May 1893 the defender wrongfully sequestrated the effects or a portion thereof, belonging to the pursuers, in two rooms in the house 1 Castle Lane, Banff, subrented by them from James Macintosh, slater, Peterhead, and occupied by them, in security of the rent of said house due by the said James Macintosh for the year from Whitsunday 1892 to Whitsunday 1893, to the loss, injury, and damage of the pursuers. Damages laid at £100."

The defender reclaimed, and argued—(1) All furniture subservient to the tenancy falls under the landlord's hypothec—Bell's Prin. 1237; Rankine on Leases (2nd ed.) 190; *Blane* v. *Morison*, Mor. 6232; *Magistrates of Edinburgh* v. *Provan*, Mor. 6235. The landlord may sequestrate everything in the house although he may not be able to sell everything. Here he might have sold, because there was no consent to the sub-let, but no sale took place. (2) Even if there had been consent on the landlord's part to the sub-let, he could have inventoried the effects. But here there was no consent. The averment as to consent was not relevant—no time and place when and where it was given were mentioned. (3) The citation was good, because this was the only place Macintosh could be cited. The pursuers were really caretakers for him. (4) No damage was sustained. An inventory existed for two days, that was all. Malice was necessary before an action of damages would lie—*Kinnes* v. *Adam & Sons*, March 8, 1882, 9 R. 698.

Argued for respondents—(1) Macintosh should have been cited at Peterhead. His citation and the sequestration proceeding upon it were therefore invalid. (2) The respondents should have been called upon to pay their rent before proceedings were taken. (3) The defender had acted wrongously and in breach of the undertaking given by her agent, which took away all her right of hypothec against the effects of the sub-tenants.

At advising—

LORD ADAM—This is an action of damages brought by the pursuers against the defender for wrongous use of sequestration.

The material facts averred by the pursuers are these—It is averred that the pursuer Lippe required a house in Banff, and employed his father-in-law Alexander Brodie to rent a house for him. It is said that Brodie looked at a house in Castle Street belonging to the defender which had been let to and occupied by a certain James Macintosh, and that Macintosh had become bankrupt and had removed to Peterhead, taking with him his furniture and effects.

It is further averred that Brodie, being aware of Macintosh's difficulties, called upon Mr Colville, the defender's agent, and informed him that he proposed to subrent two rooms in the house till Whitsunday 1893, provided the pursuers would not be held liable for Macintosh's rent. That he received an assurance to this effect from Mr Colville, and accordingly subrented the two rooms which they proceeded to occupy with their furniture. It is further averred that on 22nd May 1893 a sheriff's officer, on the instructions of the defender, sequestrated, inventoried, and valued the whole effects in the house belonging to the pursuers, and left in the house a small debt summons at the instance of the defender against Macintosh for £8 sterling, being the rent of the house possessed by him from Whitsunday 1892 to Whitsunday 1893, with a citation thereon for Macintosh and copy inventory of effects sequestrated.

Macintosh's lease has been produced in process, and it contains the condition that Macintosh was not to sublet the house to anyone without the consent in writing of Mr Colville, the defender's agent. It is not averred by the pursuers that they had Mr Colville's consent in writing to their subtenancy. They are not therefore in a position to say that the landlord has authorised or assented to their sub-lease,

and in that case the law is clear, as stated by Mr Bell in his Principles, sec. 1237, that the effects of the subtenant are liable to hypothec for the principal tenant's rent.

The defender therefore was entitled and did nothing wrongful in sequestrating the pursuers' effects.

It is in respect of these sequestration proceedings that the present action of damages has been brought, and the Lord Ordinary has adjusted an issue in these terms—[*read issue given above*].

Now, it appears to me that this issue would not in any view have been an appropriate issue for the trial of the cause, because the proceedings are alleged to have been wrongful on two different and quite distinct grounds—the first in respect of the alleged assurance by the defender's agent that the pursuers would not be held liable for Macintosh's rent, and the second, that apart from any such assurance the sequestration was wrongful in point of law.

With reference to the latter of these grounds, the defender, as I have said, was entitled to sequestrate the pursuers' effects for Macintosh's rent. This was all that she did. Prior to doing so she was not bound to cite Macintosh or to give any notice or intimation to the pursuers, and apart, therefore, from the alleged assurance given by Mr Colville, I think the pursuers have no ground of action against the defenders.

With reference to this alleged assurance the pursuers were allowed to amend their record in order to make their averments specific in this respect, but all they now say is that in course of a conversation, and in answer to Mr Brodie, Mr Colville assured him that the pursuers would not be held liable for the balance of rent due by Macintosh, but when, where, or in what terms their assurance, upon which everything depends, was given, is not averred. It appears to me that such an averment is much too vague and indefinite to be allowed to go to proof, and I am therefore of opinion that the defender should be assoilzied.

LORD PRESIDENT and LORD M'LAREN concurred.

LORD KINNEAR — I am of the same opinion. There can be no question that the landlord's right is as strong over effects of the sub-tenants as of the principal tenant himself unless he has abandoned the power of exercising that right in some competent form. *Prima facie* this landlord was undoubtedly entitled to sequestrate the furniture in the house. It might be that part of the furniture inventoried was not liable in sequestration. A sub-tenant might say that some part of the furniture ought not to be carried off and might be able to establish that it was not liable in hypothec. All that was done here was that in course of sequestration an inventory was drawn up, and even if the inventory had been erroneous, which has not been averred, I should think there was no wrong done, and I agree with Lord Adam in thinking that there is no tenable ground of action in this case in law—not even the shadow of a ground.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defender.

Counsel for Pursuers and Respondents—Jameson—Galloway. Agent—John Elder, S.S.C.

Counsel for Defender and Reclaimer—Comrie Thomson — Salvesen. Agent — Alexander Morison, S.S.C.

Tuesday, March 20.

FIRST DIVISION.

[Lord Low, Ordinary.

LENY AND ANOTHER *v.* MAGISTRATES OF DUNFERMLINE.

Process—Summons, Amendment of—Court of Session Act 1868 (31 *and* 32 *Vict. c.* 100), *sec.* 29.

The Court of Session Act 1868 by section 29 allows all such amendments to be made on the record "as may be necessary for the purpose of determining in the existing action the real question in controversy between the parties . . . provided always that it shall not be competent by amendment of the record to subject to the adjudication of the Court any . . . other fund or property than such as are specified in the summons or other original pleading." The pursuers in an action of declarator sought by amendment of the summons, without practically altering the condescendence, to substitute a claim to the exclusive right of property in the minerals under a portion of the *solum* of a loch, for their original claim to a joint right with the defenders in the minerals under the whole of the *solum*. *Held* (*rev.* Lord Low) that the amendment proposed was incompetent, and *observed* that it was not sufficient to warrant an amendment under the Act that the property in question was the same if the right claimed with respect to it was different.

The Court of Session Act 1868 (30 and 31 Vict. cap. 100) by sec. 29 provides that "The Court or Lord Ordinary may at any time amend any error or defect in the record or issues in any action or proceeding in the Court of Session . . . and all such amendments as may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties shall be made: Provided always, that it shall not be competent, by amendment of the record or issues under this Act, to subject to the adjudication of the Court, any larger sum or any other fund or property than such as are specified in the summons or other