here of such an improper use of the whistle on the occasion libelled.

LORD MONCREIFF—I am not prepared to differ from the Lord Ordinary.

The action, so far as we know, is unprecedented. That is enough to indicate the difficulty of formulating a relevant case upon such a ground. Much discomfort and even danger is caused by railway whistling, but, unless in exceptional circumstances, it must be endured. It does not follow that unnecessary or excessive whistling can never form the ground of an action of damages, but to support such an action the pursuer's averments must be more specific than here.

The pursuer does not say, and probably does not know, which engine (if it was only one) whistled, or why it whistled, or how long it whistled before the horse bolted, or what standard of shrillness or length of whistling is to be appealed to in deciding whether the whistle was too loud or too long. There is thus no distinct case for the defenders to meet, and I am of opinion that to sustain the relevancy of such averments would create a dangerous precedent.

The Court pronounced the following interlocutor:—

"Recal the interlocutor reclaimed against: Sustain the first plea-in-law for the defenders: Dismiss the action and decern: Find the defenders entitled to expenses," &c.

Counsel for the Pursuer — Salvesen — Munro. Agents — St Clair Swanson & Manson, W.S.

Counsel for the Defenders—Guthrie, Q.C. —A. S. D. Thomson. Agents—John C. Brodie & Sons, W.S.

Friday, February 18.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

PORTEOUS *v.* HENDERSON.

Sale — Sale of Heritage — Assignation of Writs — Whether Buyer's Right Limited to Writs Specified in Inventory — Accession — Buyer's Right to Writs as Accessories.

A purchaser of an estate received from the seller a disposition of the lands. The disposition contained a clause of assignation of writs according to inventory, and the purchaser received the writs which were specified in the inventory, and which formed a prescriptive progress of titles to the lands. Thereafter he brought an action against the seller and against the custodier of certain old titles relating to the estate, in which he demanded delivery of the same, on the ground that they belonged to him as accessory to the property which he had purchased. Defences were lodged by the custodier of the deeds.

The Court (*aff.* the judgment of the Lord Ordinary, *dub.* Lord Trayner) assoilzied the compearing defender, on the ground that the purchaser was only entitled to the writs specified in the inventory.

James Porteous of Turfhills, in the county of Kinross, raised an action against William Horn Henderson, solicitor, Linlithgow, and George Henderson, residing at Gellybank, Kinross, for any interest he might have in the premises. The action concluded to have the defender William Horn Henderson ordained to exhibit and produce "the whole writs, titles, and evidents of and relating to the lands of Turfhills, in the county of Kinross, in so far as these or any of them are in the possession or under the control of the defender, the said William Horn Henderson, all unvitiated and uncancelled, or at least in such condition as they were in when the said defender received the same; and the said defender ought and should be decerned and ordained, by decree foresaid, to deliver up the said writs to the pursuer, to be used and disposed of by him as his own proper writs and evidents in all time coming."

The pursuer averred that he was heritably infeft and seised in the lands of Turfhills by virtue of a disposition in his favour by the defender George Henderson, dated 10th and recorded 12th November 1892. He further averred—"(Cond. 2) In virtue of his said recorded disposition, the pursuer has good and undoubted right and interest in and to the whole writs, titles, and evidents of the said lands, and has good and sufficient title and interest to call for exhibition, production, and delivery thereof, in terms of the conclusions of the summons. (Cond. 3) The defender, the said William Horn Henderson, has in his possession certain writs and evidents of the said lands of Turfhills, which fall within the title of the pursuer. These writs and evidents are necessary to the pursuer, but the defender, the said William Horn Henderson, retains them, and although he has been repeatedly called upon to hand them over to the pursuer, he refuses, or at least delays to do so, and the present action has been rendered necessary."

William Horn Henderson lodged defences in which he admitted the title of the pursuer to the lands of Turfhills. He further, in answer to Condescendence 2 and 3, "admitted that the defender's firm has custody of certain very old documents relating to the lands of Turfhills. Explained that these documents belong to Mr John Henderson, W.S. They were presented as gifts to him by his uncle, the said George Henderson, before the said lands were disponed to the pursuer. By the aforesaid disposition the pursuer became entitled to receive, and did receive, conform to inventory, the whole writs necessary to complete the title to said lands. The said documents were not included in said inventory, but were excluded therefrom

because they were and are of no value to the pursuer as writs and evidents of his title, and they were and are of very considerable interest and value to the said John Henderson for private and family reasons, his ancestors having been proprietors of the said lands for many generations. It is further explained that while the said John Henderson claims the right to retain the said documents in respect of their intrinsic value to him, he does not and never has refused to exhibit them to the pursuer, and he is still willing to exhibit them."

The pursuer pleaded—"(1) The pursuer being *in titulo*, and having a good interest to demand the said writs, is entitled to their exhibition and delivery, with expenses, as concluded for. (2) No relevant defence."

The defender pleaded—"(1) No title to sue. (2) The action is irrelevant. (3) The defender having offered to exhibit any of said documents which the pursuer may desire to see, the conclusion for exhibition should be refused. (4) The said documents being the property of the said Mr John Henderson, and the pursuer having neither title nor interest to demand delivery of them, the action should be dismissed. (5) The said documents being of no value to the pursuer as writs and evidents of his title, and being of value to the defender, the defender should be assoilzied, with expenses."

The Lord Ordinary (KYLLACHY) appointed an inventory of the old documents mentioned by the defender to be lodged. This was done, the inventory showing that the writs called for were 114 in number, the earliest being dated in 1699 and the latest in 1800.

Thereafter the Lord Ordinary, by interlocutor dated 19th August 1897, appointed the pursuer to state in a minute the particular writs of which he desired delivery or exhibition for any purpose connected with his title to the estate, and also to state the purpose for which he required such delivery or exhibition.

A minute was lodged for the pursuer stating "(1) that the pursuer claimed exhibition and delivery of all the writs enumerated in the inventory, No. 10 of process; (2) that he claimed exhibition and delivery of the whole of the said writs, in respect that, as accessories of the lands, they became his property by virtue of the conveyance in his favour, dated 10th, and recorded in the Division of the General Register of Sasines applicable to the county of Kinross the 12th, both days of November 1892; that in respect of the pursuer's right of property in the said lands, he might require possession of the said writs at any time, but that as the Lord Ordinary had asked the immediate purpose for which he required the writs, he stated that having sold certain multures to Mr James Charles Calder of Ledlanet, Kinross-shire, Mr Calder's agent had called upon him (pursuer) to send the titles of said multures to prepare the disposition thereof in favour of Mr Calder. These titles pursuer never had, and therefore possession of the said writs had become necessary to throw light on the subject, and if possible to establish the pursuer's right to the multures in question; that pursuer was unable to specify the particular writs referable to the said question from a perusal of a bare inventory, and that till he had an opportunity of examining the writs themselves he was unable to be more specific."

The disposition which formed the pursuer's title to the lands of Turfhills contained the following clause:—"I assign the writs, and have herewith delivered the same, conform to inventory thereof hereto annexed and subscribed by me as relative hereto;" and it was admitted that he had received from the disponer all the deeds contained in the inventory annexed to the disposition.

On 26th November the Lord Ordinary assoilzied the compearing defender.

Note.—"The pursuer in this case demands delivery from the defender of a number of documents which he says are titles of his (the pursuer's) estate of Turfhills, and of which he alleges that the defender is in possession. The defender admits that he possesses a box of old documents relating to the estate in question, which he says he received from his uncle, a former proprietor. But he denies that the same are in the proper sense titles of the estate, and claims to retain them as documents which have now only a family interest.

"When I heard the case in the procedure roll I thought it necessary, in the first place, to ascertain exactly what the documents in question were; and I accordingly appointed an inventory of them to be lodged; and this having been done, I allowed the inventory to be seen, and gave the pursuer an opportunity of stating any claim he might have to particular documents as necessary or useful towards the security of his title. He has now lodged a minute, in which he in effect declines to make any selection, claiming the whole documents as being accessory to his estate, and therefore his property. He at the same time states that he expects to find the documents useful in connection with some claim for multures; but he does not explain how all or any of them bear, or are thought to bear, upon that question.

"I regret that there has been some delay since the lodging of this minute, there apparently having been some misapprehension about further procedure. I am now, however, in a position (the parties stating that they do not propose further argument) to decide the case; and I have to do so on the footing that the pursuer rests on the general proposition that all documents which have at any period formed part of the title to a landed estate, or any part of it, belong in property to the owner of the estate, and cannot belong to anyone else.

"Now, I should be sorry to suggest any doubt of the soundness of the doctrine which was fully explained by Lord Benholme in the case of *Ruxton*, 24 D. 1182—that doctrine being that the proper titles of

a landed estate are accessories of the estate, and cannot be made the subject of any right of property or of pledge in the person of anybody who does not own the estate. But it appears to me, upon the best consideration I have been able to give to the matter, that the doctrine in question has no application to documents in the position of those in the defender's inventory. These documents are not, in my opinion, among the proper titles of the estate of Turfhills. They are not part of the prescriptive progress, nor, so far as appears, are any of them required for the protection of the pursuer's title. They may once, no doubt, have had a different character, but they are now, I apprehend, simply ancient documents having no function or value as titles to land, and possessing only a sentimental or antiquarian interest. I am not therefore prepared to entertain the pursuer's demand; and being of that opinion, it is not necessary to inquire how far, in any view, it would have been possible for the pursuer to claim delivery of those of the documents which relate partly to lands other than the estate of Turfhills—lands belonging to persons other than the pursuer. I need hardly say, however, that the existence of this specialty presents some additional difficulty in the pursuer's way. On the whole, while I regret that a litigation should have been necessary in a matter so very academical, I must assoilzie the defender, with expenses."

The pursuer reclaimed, and argued—Title-deeds were accessory to heritable rights. They were *extra commercium*. A person entitled to the land had a right to all the title-deeds affecting it, and a person having such title-deeds could not refuse to give them up—*Renny & Webster* v. *Miles*, February 8, 1847, 9 D. 619, opinion of Lord Fullerton, 627; *Christie* v. *Ruxton*, June 27, 1862, 24 D. 1182, opinion of Lord Benholme, 1185; *Smith* v. *Wallace*, November 26, 1869, 8 Macph. 204, opinions of Lord Deas and Lord Ardmillan, 215; Sugden on Vendors and Purchasers, 14th ed., p. 433. It was not merely a sentimental but an essential matter that he should get possession of the old titles outside the prescriptive period. An old title might define a servitude or contain an obligation of relief—Bell's Lectures on Conveyancing, ii. 708—and the Lord Ordinary was not entitled to say that under no circumstances could these old writs be of any use to the pursuer. He had never waived his title to demand all the writs. The phrase in the deed "I assign the writs" meant the whole writs, and the pursuer was not bound merely to accept those contained in the inventory annexed to the deed. The inventory specified the writs delivered, not those assigned. The inventory contained the deeds that the seller considered essential to make up a good title, but did not contain all that the buyer was entitled to demand—Titles to Land Act 1868, sec. 8. The short clause of assignation introduced by that Act was to be as operative as if it had been in the old form (sec. 5), and the old form of assignation assigned the whole writs, titles, and securities granted to the disponer and his predecessors or authors—Juridical Styles, 3rd ed., i. 100. In any event, the pursuer was entitled to all the writs in the possession of the disponer at the date of the sale, and he denied that the disponer had given the writs in question to John Henderson, before the date of the sale.

Argued for defender William Horn Henderson—The argument of the other side amounted to this, that a purchaser of lands was entitled to demand any titles connected with the land, however old these titles might be, and notwithstanding they might have been sold by the proprietor in the last century. This was absurd. All the titles connected with an estate were not accessory to the lands. The only titles accessory to the lands were a prescriptive progress of titles, enabling a purchaser to vindicate his right to the lands against the challenge of outsiders. Lord Benholme, in *Ruxton*, when he spoke of titles being accessory to an estate, was speaking merely of those title-deeds which formed a good prescriptive progress, and which the seller was bound to hand over to the purchaser in order that the latter might have a good title. All the authorities quoted by Lord Benholme spoke of such title-deeds, the documents specified in the inventory attached to the disposition. It was plain from section 8 of, and Schedule B, forms 1 and 2, attached to, the Titles to Lands Act, that the only writs which a purchaser of lands, whose disposition contained an assignation of writs according to inventory, was entitled to demand from the seller, were those mentioned in the inventory. That was the bargain contained in the deed, and the obligation of the seller was to deliver the writs specified in the inventory and no others.

At advising—

LORD JUSTICE-CLERK — The pursuer purchased an estate called Turfhills from the defender George Henderson in the year 1892 under a disposition in which there was the usual assignation of writs. He received the writs necessary to complete his title conform to inventory. He now sues Mr William Horn Henderson for delivery of certain older writs of title of these lands, and Mr George Henderson for any interest he may have, on the allegation and plea that all writs which at any time formed part of the titles to the lands are his property, being assigned to him by the assignation of writs. The defenders maintain that these writs do not belong to them or either of them, having been made a gift, as documents of historical interest only, to another member of the family at a time antecedent to the sale to the pursuer.

The question really is, whether if a disponer sells lands, and, in fulfilment of the assignation of writs, delivers over the writs necessary to give the disponee a complete and valid title to the lands, consisting of all the title-deeds in his possession, the disponee can follow other titles, unnecessary for the validity of his own, wherever

he may find them, and demand that they may be delivered up to him. It was admitted in debate that such a demand was absolutely unprecedented, and I can see no sound ground for giving effect to it. The pursuer here has got the writs necessary to give him a complete and good title. That was what he had a right to demand, and if his disponer gave him such a title, the true purpose of the assignation of writs was fulfilled. Can he demand of his disponer delivery of writs which that disponer does not possess, he having parted with them before the time of the transaction. I can see no legal reason why he should have such a claim in law. I do not enter into the question whether the assignation of writs necessarily covers all writs in the possession of the disponer at the time, although I doubt whether it would do so. But no such question arises here. The pursuer has got all such writs. His claim relates only to writs which were not in the possession of the disponer. He declines to indicate how any of the writs in question are necessary to him, and, on the other hand, the present owner of these ancient writs is willing to exhibit any of them for any legitimate purpose. In these circumstances I concur in the result at which the Lord Ordinary has arrived.

LORD YOUNG—I am of opinion—and, I confess, without doubt or difficulty—that the action is altogether unfounded. The facts are simple. George Henderson was owner of the small property of Turfhills before he granted a disposition of it to the present pursuer, and he was of course the owner of the titles before he divested himself of the lands. We are told that George Henderson, sometime before he sold the lands to the pursuer, divested himself of some of the titles. The defender avers that they now belong to Mr John Henderson, W.S., because "they were presented as gifts to him by his uncle the said George Henderson before the said lands were disponed to the pursuer. . . . They were and are of very considerable interest and value to the said John Henderson for private and family reasons." That means that at the time he sold the estate of Turfhills to the pursuer the seller had still in his hands certain titles, being those in the inventory referred to in the disposition, but the other and earlier titles he had parted with, and John Henderson was the owner of them. I think the donee was proprietor of the titles given to him, the owner of those titles and of the property having given them to him and having been at perfect liberty to dispose of them as he pleased. Of course the owner of a property who parts with all the titles may place himself in a position of more or less difficulty. He would certainly have trouble in getting a purchaser for the estate. But my opinion as to the law of the matter is that when land is sold it is for the intending purchaser (or his agent) to satisfy himself about two things—(first) that the *prima facie* owner, the seller, is the proprietor of the lands on a safe and marketable title, and (second) that the disposition he tenders is sufficient to transfer that good and safe title to the purchaser. It is a matter of daily ocurrence. The purchaser's agent requires the seller to exhibit titles which will satisfy him that he, the seller, has a good title, and if the purchaser's agent is satisfied as to that, the sale is concluded and a disposition is executed with an assignation of the titles so exhibited as specified in the inventory. That was done here. The disposition contains the usual clause, "I assign the writs and have herewith delivered the same, conform to inventory thereof hereto annexed and subscribed by me as relative hereto." My construction of these words is that the writs assigned are the writs which are specified in the inventory, and which the buyer satisfied himself were sufficient to establish a good title, and that he has no right to anything else. I am further of opinion that the seller, before he entered into the bargain, was perfectly entitled to deal with the titles as he pleased.

I think that the language used by one Judge at least in one of the cases quoted to us is quite inapplicable—I mean the statement that titles are *extra commercium*. I think that the owner of titles is entitled to do as he likes with his own—he may destroy them, and if he can find a purchaser willing to buy an old title of historic interest or bearing a historic signature, he may sell it. Applying these observations to the present case, I am of opinion that George Henderson, before the sale, was proprietor of those titles, and was entitled to retain them after the sale. It is said that he should have put a clause into his disposition excepting those old titles from being conveyed to the purchaser of the lands. Suppose this had been done, would it have been contended that these titles were *extra commercium*, and had passed with the lands? I think it was not necessary on the seller's part to put in a clause specially excepting these titles; he was entitled to keep all such titles as were not specified in the inventory attached to the deed.

It is hardly necessary to observe that we are not dealing with any question as to the familiar law and practice by which such titles can be recovered for the purpose of obtaining evidence in a suit. Assistance is given by the Court to allow access to be got to such titles without reference to the question of property in the documents. Books in a public library, or letters, may be recovered in the same way. But no such law and practice would enable us to prevent the owner of documents selling or destroying them on the ground that some day they might be useful in a suit. The defender here, with the greatest propriety, says to the pursuer, "I will shew you all these old titles. If you think any of them of use, by all means you shall have the use of it when you desire." But the pursuer says, "I do not require to say I need them for any purpose; they are mine; and I insist on having them without

stating any reason at all." I think that such a demand is not according to law or precedent or good sense, and that the defender should be assoilzied.

LORD TRAYNER—I do not dissent from the judgment which the Lord Ordinary has pronounced in the circumstances of this particular case. But at present I express no opinion on the question which may perhaps be incidentally involved here, viz., whether the only writs and evidents of a landed estate which are accessories of the estate, and go to a purchaser thereof, are the writs necessary to make up a prescriptive progress.

LORD MONCREIFF—In 1892 the pursuer obtained from George Henderson a disposition in his favour of the lands of Turfhills, and along with the disposition he received writs conform to inventory which it is admitted formed a prescriptive progress of titles to the lands.

He now, however, raises the present action in which he demands, not from the seller but from the defender William Horn Henderson, brother of George Henderson, who alleges that he holds them for John Henderson, who obtained them by gift from George Henderson prior to the sale to the pursuer, not merely exhibition, but delivery of the "whole writs, titles, and evidents of and relating to the lands of Turfhills" in so far as in possession of William Henderson. The pursuer claims those writs "as his own proper writs and evidents in all time coming as accessories to his property and lands of Turfhills."

It appears from the inventory of writs that the writs called for are 114 in number, none of them being later in date than the beginning of the present century, and the oldest being dated in 1699. The pursuer has been asked to point out which of those writs he wishes to inspect, but in the minute lodged for him he repeats his demand for exhibition and delivery of all the writs enumerated in the inventory.

The question therefore which we have to decide is, whether the pursuer is entitled not merely to exhibition (as to which there is no difficulty) but to delivery as his own property of all the deeds contained in the inventory. I am of opinion that he is not. We may take the case as if the question had arisen with the seller.

I am of opinion in the first place (and this is enough for the decision of this case) that the pursuer is precluded by the terms of the conveyance which he accepted from George Henderson from claiming delivery (for the purpose of permanently retaining them) of any other writs than those of which he has already obtained possession. The purpose of assigning the writs and evidents on a transfer of land is to enable the purchaser to maintain and enforce his rights as proprietor of the lands conveyed. It is a matter of arrangement what titles shall or shall not be delivered or made forthcoming. No purchaser will be content with less than a prescriptive progress; but that is sufficient, and even if he were entitled to more, there is no reason why he should not be willing to accept a prescriptive progress in implement of the seller's obligations. That is what was done in the present case. In the disposition in favour of the pursuer the clause runs thus—"And I assign the writs and have delivered the same conform to inventory thereof hereto annexed and subscribed by me as relative hereto." It has been suggested that the inventory simply serves to specify those writs which have been delivered, but I think it plays a more important part; it is the measure of the writs which the seller binds himself to deliver and the purchaser is content to accept. And in practice, even where the writs are not all delivered, those which the seller undertakes to make forthcoming in order to maintain the purchaser's right are also enumerated in an inventory.

But even if the clause had only run "I assign the writs," I am by no means satisfied that the pursuer's claim could have been sustained. He is, in my opinion, only entitled to delivery of such writs and evidents as are required to establish or enforce his rights as proprietor of the lands. He has not as yet pointed out any one of the deeds in the inventory which is requisite for that purpose. Now, I am not prepared to say that the deeds, perhaps centuries old, which are not required to establish and maintain the purchaser's right, fall to be handed over *per aversionem* to the purchaser as accessories in the absence of express stipulation.

Such deeds may fairly be held to have ceased to be, for practical and conveyancing purposes, the writs and evidents of the lands, while they may have a peculiar value for the seller as family records, and may even possess a market value quite irrespective of the lands.

The Court adhered.

Counsel for Pursuer — W. Campbell — Sandeman. Agents—Mack & Grant, S.S.C.

Counsel for Defender W. Horn Henderson — Ure, Q.C. — Dewar. Agents — Tods, Murray, & Jamieson, W.S.

Friday, February 18.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

GORDON *v.* KERRS.

Bill of Exchange—Promissory-Note—Sum Payable in Instalments—Presentment—Bills of Exchange Act 1882 (45 *and* 46 *Vict. cap.* 61), *secs.* 52 (2), 89 (1).

The granter of a promissory-note dated 30th October 1895 promised therein to pay to X at a specified address in Glasgow the sum of £500 for value received, by monthly instalments of £50 each, commencing on 28th December 1895, and the like sum each and every succeeding 28th day of every month