Friday, February 5.

FIRST DIVISION.

[Lord Dundas, Ordinary.

HAY *v.* MAGISTRATES OF ABERDEEN.

Property—Disposition—Title—"Right and Interest in Land"—Form of Conveyance.

A agreed to sell to B "all his right and interest" in certain lands. *Held* that A was bound to execute in favour of B a disposition of the lands themselves, but with warrandice from fact and deed only.

Question whether a conveyance of "right, title, and interest" was a valid feudal title.

Scott v. *Magistrates of Dundee*, November 30, 1886, 14 R. 191, 24 S.L.R. 120, *commented on.*

On 5th February 1908 Malcolm Vivian Hay of Seaton, Aberdeenshire, brought an action against the Lord Provost, Magistrates, and Town Council of Aberdeen for declarator, *inter alia*, that the defenders were bound to accept a disposition or conveyance of "(*a*) All and whole the pursuer's right and interest in the links known as the Seaton or Old Town Links, including his rights in the foreshore of the sea and also on the south bank and foreshore of the river Don from the sea to the Bridge of Don, with a clause of warrandice by the pursuer from fact and deed only. . . ."

The following narrative is taken from the opinion (*infra*) of the Lord President—"The Town Council of Aberdeen proposed to take certain lands known generally as the Old Town Links under compulsory powers, and for that purpose promoted a Provisional Order. The proprietor of these lands, Mr Hay of Seaton, opposed the Provisional Order, and as often happens in the course of the progress of a Provisional Order, parties came to terms upon an agreement in respect of which Mr Hay of Seaton's opposition was withdrawn. That agreement was reduced to writing, and Mr Hay agreed to sell and the Town Council agreed to purchase '(*a*) All his right or interest in the Links known as the Seaton or Old Town Links, including his rights in the foreshore of the sea, and also on the south bank and foreshore of the river Don from the sea to the Bridge of Don; (*b*) the land lying to the west of the Seaton or Old Town Links, and to the south of the south bank of the river Don, including the feuduties payable for the houses on the east side of King Street immediately south of the Bridge of Don—All as the said subjects are shown on sheets Nos. 4 and 5 of the plans deposited with reference to the Aberdeen Corporation Provisional Order, and included within the limits shown upon the plan—such limits being titled "Limit of deviation of the land to be acquired," and "boundary line of ground to be taken and limit of deviation for work."'

"Then the price and term of payment and entry and the question of the expenses of the disposition are settled in other articles. And the agreement goes on—'The disposition to contain a clause of warrandice by the said Malcolm Vivian Hay from fact and deed only as regards the lands (*a*), and a clause of absolute warrandice as regards the lands (*b*).'

"When the parties came to adjust the disposition they unfortunately did not find themselves at one. As regards the land second specified there was no question, but as regards the lands first specified the purchaser, as is usual, tendered the draft of the disposition, and the draft of the disposition bore—'I, Malcolm Vivian Hay, Esquire of Seaton, in the county of Aberdeen, heritable proprietor of the lands and other hereinafter disponed . . . . dispone . . . . All and whole the portions belonging to me of the lands and others distinguished on the plans, sections, and book of reference referred to in the last-mentioned Act by the following numbers . . . . that is to say, the parts of the lands and estate of Seaton . . . . namely: In the first place—All and whole the tract of land known as the Seaton or Old Town Links,' and so on.

"When that draft was submitted for revisal to the advisers of Mr Hay, they proposed to insert after the numbers referred to, and after the words 'that is to say,' the words 'all my right and interest in the parts of the lands and estates'; and also to insert after the words 'in the first place' the words 'all my right and interest in' all and whole the tract of land; and as that would not suit the purchasers, the case has been brought before your Lordships. We are told that that is really the only question between the parties. Had there been anything else the ordinary course would have been for the Lord Ordinary to have remitted the adjustment of the disposition to a conveyancer, and then any objections upon the dispositions so adjusted by the conveyancer could have been heard by the Court."

The defenders pleaded, *inter alia*—"(2) The disposition tendered by the pursuer not being in full implement of his obligations under the minute of agreement, the defenders are entitled to absolvitor."

On 7th July 1908 the Lord Ordinary (DUNDAS) pronounced the following interlocutor—"Finds that upon a sound construction of the minute of agreement between the parties, set forth on record *quoad* the subjects described in article 1 (A) thereof, the pursuer agreed to sell to the defenders, and they agreed to purchase from him, all his right and interest in the Links as therein set forth, and no more, and that the disposition must be framed upon that footing."

Opinion.—"This action is raised by Mr Hay, proprietor of the estate of Seaton, which lies partly within the city of Aberdeen and partly contiguous to it, against the Corporation of that city. In 1906 the Corporation were promoting a Provisional Order by which they desired, *inter alia*, to acquire compulsorily certain parts of Seaton lying to the east of the Bridge of Don,

south of the river Don, and west of the sea. In the course of the inquiry held before Parliamentary Commissioners with regard to the said Order, the parties entered into a minute of agreement, in consequence of which Mr Hay withdrew his opposition to the Order. The agreement is printed in full in article 5 of the condescendence. The questions now raised are as to its true meaning and construction; what was it that the pursuer thereby agreed to sell, and the defenders to buy; and what is it that must be included in the disposition to be granted? No difficulty arises except with regard to the part of the ground, referred to in the agreement, which is known as the Seaton or Old Town Links. The pursuer says that he only agreed to sell 'all his right and interest in the Links'; but the defenders contend that he is bound to dispone to them the *solum* of the Links, subject only to an insertion in the warrandice clause that *quoad* that part of the lands sold the pursuer grants warrandice from fact and deed only. There is, or may be, a material difference between the positions respectively insisted in. If the pursuer is right, he has excluded from the bargain any part of the property which does not belong to him or in which he has no interest. If the defenders are right, they will obtain an *ex facie* absolute title habile for prescription. If they possessed upon that title for the necessary period, they would be safe from all challenge; but if someone should thereafter come forward claiming and establishing a right or interest in the land, the pursuer might be liable to him in damages. I cannot speculate as to the probability, or the reverse, of such an event occurring; I have only to determine what is the proper meaning and construction of the agreement, and in what form the disposition which is to carry it into effect ought to be expressed. In my opinion, the position taken up by the pursuer is correct, and that assumed by the defenders is erroneous. If one reads the first three articles of the agreement together, one finds, in my judgment, all the necessary ingredients of a valid contract of sale, viz., the parties to the contract, the subject-matter of it, the price, and the term of entry. A very significant distinction is drawn in the first article as to what the pursuer sells and the defenders purchase; for under head (A) the words used are 'all his right and interest in the Links . . .' while under head (B) the subject is described as 'the land lying to the west of the Seaton or Old Town Links. . . .' The only other clauses of the agreement which are at all material to the present case are articles 4 and 5; and these are ancillary to and executory of what has gone before. The fourth article is not, I think, in any way inconsistent with the pursuer's construction, which seems to me to be the natural and proper one, of article 1 (A). It provides that the disposition shall contain a clause of warrandice by the pursuer 'from fact and deed only as regards the lands (A), and a clause of absolute warrandice as regards the lands (B).' I can see nothing in that to affect or enlarge the carefully-worded description in article 1 (A) of what the pursuer thereby agreed to sell and the defenders to purchase. Article 5 provides that the disposition is to be granted under burden of the existing leases relating to the said subjects,—a proper and necessary stipulation, as there are existing leases of parts of the Links as well as of the other lands. The defenders complain that if the disposition is framed in precise conformity with the language of article 1 (A) of the agreement, it will not, as regards the Links, afford them a title habile for prescription, or indeed one upon which infeftment could properly follow. But, assuming this to be the result, as it appears to be, I think the answer to the complaint is that the pursuer did not undertake, and is not bound, to give the defenders a title to the Links on which they could prescribe. If my construction of the agreement is correct, I see no ground for making the pursuer go beyond the terms of his bargain, with results which might be prejudical to the position he carefully reserved to himself when he made it."

The defenders reclaimed, and argued—The reclaimers were entitled to a proper feudal disposition, *i.e.*, to a disposition of the lands with warrandice from fact and deed only. Such a disposition alone could give effect to the agreement above referred to. The respondent was infeft in the subjects in which he claimed only a right and interest, and the reclaimers were entitled to be infeft therein. In the disposition tendered by the respondent there was no proper warrant for infeftment under the old law, and such a warrant was essential. The respondent would be amply protected by the warrandice being from fact and deed only. Reference was made to *Craig* v. *Hopkin* (1732), M. 16,623.

Argued for respondent—What the respondent sold was not the lands but his right and interest therein, and the disposition tendered was the appropriate conveyance. A "right and interest" in property was an entity known to the law and could be separately conveyed. The disposition tendered was a habile title, on which to prescribe an indisputable right to the subjects, and if so that was sufficient. The respondent could not be called upon to convey what he had not sold, and what he himself had not got. A conveyance of "my right and interest" in land was a valid and effectual form of conveyance — *Scott* v. *Magistrates of Dundee*, December 7, 1886, 14 R. 191, 24 S.L.R. 120; *Nelson* v. *Assets Company, Limited*, July 3, 1889, 16 R. 898, 26 S.L.R. 613.

LORD PRESIDENT—[*After narrating the facts*]—Now I am bound to say that I have not been able to see any difficulty in this case. As in every question of conveyancing, the true test is to go back past the days of abbreviated conveyancing and consider how the case would have stood if it had arisen under the old law, because it is trite to say—and yet I think again and again one seems to need to remind the

conveyancer of modern times—that all the series of conveyancing statutes merely introduced shorthand means of expressing what formerly was stated at length, but made no difference in the import of the clauses or the true principles upon which our feudal system is based. Now if the question had arisen under the old law, I take it that the seller must have given, in order to fulfil his bargain, such a disposition to the purchaser as would have contained a warrant either by procuratory or precept which would eventually enable the purchaser to get a sasine in the lands delivered by a notary.

Well, during the debate I asked several times, and I asked in vain, what a notary would do if there was presented to him a warrant which only bore that it was to infeft the person in right, title, and interest. There is no such infeftment known in the law of Scotland. You may have an infeftment in liferent, but you cannot infeft in right, title, and interest, and for a very good reason. Surely the very idea of our records is that the whole of the lieges may go there and find out from the records what property people have. But if you say "right, title, and interest," the records do not make this clear, for you would have to go behind the records and find out what the person's right, title, and interest is.

Accordingly, I do not imagine that there can be any doubt that upon a bargain like this there must be a disposition of the lands. Of course it is specially stipulated for in the agreement that it is not to carry the ordinary result, namely, an obligation to give absolute warrandice, but that the seller is to grant warrandice merely from fact and deed. If he does so, it seems to me that he is absolutely safe against all possibility of a claim against him on the ground of having conveyed more than he had himself.

I am bound to say that I cannot understand what the Lord Ordinary meant when he said that there might be a possibility that the seller, if he was bound to give a conveyance in the terms required by the purchasers, might be liable to an action of damages in the future. The case that his Lordship puts is that if he gave a conveyance in such terms the recipient of that conveyance could then by possession proceed to make an absolutely indisputable title by prescription. Of course he could. And then the Lord Ordinary says, supposing he has done so, might there not be an action of damages against the disponer at the instance of somebody else who, of course, *ex hypothesi*, has, by the action of prescription, been deprived of what otherwise would have been his own property. It is one of the A B C's of the Scottish system that a conveyance *a non domino* in terms which will include the subject prescribed—that is to say, do not exclude it by a reference to boundaries or otherwise—is a perfectly good charter when fortified by prescription. But the idea of an action of damages at the instance of what I might call the true proprietor against the *non dominus* who granted the conveyance is a most startling proposition, and one for which I do not think we shall find warrant in any book. Accordingly, I think this so-called danger is perfectly illusory.

Of course, if the limitation of the seller's interest—using "interest" not in a legal but in a popular sense, and in such a bargain it might be used in a popular sense—arose from the fact that he was not a fee-simple proprietor but merely a liferenter, or an entailed proprietor, who might convey for his own life, although not strictly a liferenter, we could not then have compelled a conveyance in the terms demanded by the purchasers. But why not? The reason is that a conveyance in liferent is a thing which, under the old law, would have given a perfectly good warrant to the notary to give sasine, and so also is a warrant to infeft under the fetters of an entail. But the point here is that I cannot imagine that if the disposition were phrased as the seller proposes that it would be possible for a notary to execute the warrant when required to do so.

Accordingly, I think that here there should be a finding that the pursuer is bound to grant a conveyance of the land, but that the warrandice clause is to be limited to warrandice from fact and deed. The very fact that there is a special stipulation from fact and deed seems to point all the one way. For what is the meaning of warrandice from fact and deed? Besides being an obligation on which the disponee can sue, it is an asseveration on the part of the disponer that "I, for my part, will do all I can to put you in the position in which I am." But here in the conveyance offered the disponer does not propose to put the disponee in the same position at all. Nobody says that Mr Hay is not at present infeft in the lands. The description with which the conveyance begins—and to which the seller does not object—"heritable proprietor of the lands," surely means that he is infeft in the lands; and no doubt if we inquired we should find that he is infeft by virtue of recorded disposition; and according to the conveyance which he proffers that infeftment is not evacuated. I am bound to say I think the matter is too clear for words.

I do not wish to decide the case brought to our notice by Mr Macphail—the case of *Scott* v. *The Magistrates of Dundee*—but I am bound to say that a conveyance of right, title, and interest in the foreshore is very bad conveyancing. If, however, the Crown do not choose to give anything more, they cannot be compelled to do so. I do not wish to decide that point; and I do not say that a conveyance of right, title, and interest might not be held, if necessary, to be a good feudal conveyance. All I say is that it is not a proper conveyance. There is a perfectly good illustration of the same thing in some of the other cases. It was long ago decided that a conveyance of superiorities was a good conveyance; but while the Court decided that, they also laid down in most strict terms that a conveyance in which the subject was described as a superiority was not the proper way to convey a superiority, but that the proper way to

convey it was by a conveyance of the lands, with the exception from the warrandice of the feu rights.

Here I am not going to decide that a disposition of right, title, and interest could never carry anything. It may be that if another case were to arise we should have to decide, taking all the circumstances, that that is a good title, but it is not an appropriate and proper title. And accordingly I think we should make that finding. If parties are satisfied with the judgment, nothing more need be done; but if there are any other questions between the parties, then we must remit to a conveyancer in order to adjust the terms of the disposition.

LORD M'LAREN—This is a question as to the form of the conveyance which is to follow on an agreement for a sale by Mr Hay to the Corporation of Aberdeen of all his right and interest in certain lands. Now right and interest are obviously not here used in the technical sense of conveyancers, because a conveyance of the granter's right and interest is only an auxiliary clause, and is interpreted by all the writers of authority as meaning that it covers such collateral rights as tend to fortify the grantee's title to the lands. But what is meant in this agreement is "right" in the absolute sense. Whatever be the legal nature of the right which the seller has to the estate, that is what he undertakes to make good to the purchaser, protecting himself at the same time by a clause which exposes him to no risk, because he only warrants the grant against his own past and future acts. This principle would apply to any transfer of the seller's right and interest in property, whether heritable or moveable, because it might be that the holder of moveable estate did not remember exactly how much stock he held or what was the amount of his interest, but agreed to sell his interest whatever it was.

The first subject of inquiry when a conveyance is being negotiated would be, What is the right and interest which the seller has, because he must make that good, and the purchaser cannot call upon him to do anything more. In the case of a sale of heritable property that question may be solved by looking to the seller's charter-chest. He would be bound to exhibit his titles. Then I think it would be the right of the purchaser to say—"We see from your titles that you profess to be the absolute disponee of these lands. It may be that there are objections to your title, and you are not asked to warrant it, but we claim that you should convey the fee of the estate to us just as you purchased it or inherited it, as the case may be." I see no good answer to such a claim under the agreement. The seller is protected by warrandice, and I think that upon a fair reading of the contract, when he sells all his right and interest he means that he is to give the very best title that he can—the best title that his own instruments and title-deeds enable him to give. That is what is asked in the present case. It may be that it is found on inquiry that the seller has only a limited interest. Of course under an agreement of this kind we should not compel an heir of entail or limited fiar to incur an irritancy by granting an absolute disposition. It is the substantial interest that we must look to, and he would be bound to give all the right which a limited fiar has during his tenure of the estate, that being the measure of the right and interest he possesses.

I therefore agree with your Lordship that the Lord Ordinary has fallen into error in conjuring up the ghost of some future and imaginary pursuer of an action of damages in this case. I think there is no real apprehension of such an action, and that there is no good answer to the demand of the Town Council to get the best title that Mr Hay can give them.

LORD KINNEAR—I am entirely of the same opinion.

LORD PEARSON—I also agree.

The Court recalled the Lord Ordinary's interlocutor, and found that in implement of the minute of agreement the pursuer was bound to grant a disposition of the subjects described in article 1 thereof, and in the said disposition to dispone the lands therein specified, with warrandice from fact and deed only so far as regards the lands described in article 1 (*a*).

Counsel for Pursuer (Respondent)—Wilson, K.C.—Macphail. Agents—Robertson & M'Lean, W.S.

Counsel for Defenders (Reclaimers)—Constable, K.C. — Moncrieff. Agents—Gordon, Falconer, & Fairweather, W.S.

Friday, January 15.

FIRST DIVISION.

[Lord Dundas, Ordinary.

DUNDONALD PARISH COUNCIL AND OTHERS *v.* CUNNINGHAME COMBINATION POORHOUSE HOUSE COMMITTEE.

Poor Law—Medical Officer of Poorhouse—Dismissal of Medical Officer—Sanction of Local Government Board—Poor Law Amendment (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 83), *sec.* 66.

Opinion per curiam that the medical officer of a poorhouse cannot be dismissed without the sanction of the Local Government Board, anymore than can the inspector of poor.

Opinions to the latter effect of Lord President M'Neill in *Board of Supervision* v. *Parish of Dull*, June 9, 1855, 17 D. 827; of Lord Shand in *Clark* v. *Board of Supervision*, December 10, 1873, 1 R. 261, 11 S.L.R. 121; of Lord President Inglis in *Board of Super-*