

assets leads one to look carefully at the position of the debtor before granting his application. Here it is not favourable to the application that the debtor avowedly contemplates making no provision towards the payment of one creditor, while intending to pay other creditors in full. It would, in my opinion, be an abuse of the process of *cessio* to allow a debtor, who comes forward with a statement that he has in effect no assets, to make it a handle for defying a particular creditor, as the debtor here proposes."

Sproul appealed to the Second Division of the Court of Session.

Authorities—*Ross v. Hairstens*, November 16, 1885, 13 R. 207; *Reid v. M'Bain*, May 16, 1890, 17 R. 757; *Calderhead v. Freer & Dobbie*, July 9, 1890, 17 R. 1098.

At advising—

LORD JUSTICE-CLERK—The appellant has been hardly dealt with in this case. It is necessary to look into the circumstances in which the present respondent appealed to the Sheriff against the interlocutor of the Sheriff-Substitute granting *cessio*. This applicant for the benefit of *cessio* is a working joiner, earning when fully employed 34s. a-week. Unfortunately for him he went into business as a shopkeeper some time ago and was unsuccessful, and since then his circumstances have been bad. At the time of his failure in business he executed a trust-deed for creditors, and under this trust 3s. per pound were paid to the then existing creditors. Since then this creditor who is now opposing the *cessio* has got 2s. more per pound from him, or in all 5s., which would be sufficient dividend for the applicant to have paid if it had been paid to all the creditors, and if the question now were whether he could get a discharge under *cessio*. He has no other opponent, the other creditors being content to take the 3s. per pound and leave him alone.

These being the circumstances, I am of opinion that this applicant is entitled to decree of *cessio*.

The remaining question is as to the conditions upon which it is to be granted. The cases cited on that point are cases in which the debtor had a salary, and in these cases the applicant was obliged to assign part of it for his creditors' behoof as a condition of obtaining decree of *cessio*. But this man is not in receipt of such an income. He is a working man with weekly wages. I do not think that the case is appropriate for such a condition, all the more so as it is clear that when the appellant comes to apply for a discharge conditions applicable to his circumstances as then existing may be introduced into the discharge.

LORD YOUNG—I am of the same opinion. I am not disposed to agree with the Sheriff that there is good ground for refusing *cessio* in the fact that the appellant has expressed his intention of paying his creditors in full with the exception of the respondent. His intention to pay in full

is a laudable one, and whether he has good grounds for not including this particular creditor within that laudable intention, I have no means of knowing. He has somehow stirred up that creditor—his present opponent—to stand upon his utmost rights, for he has done diligence against him by arrestment and pinding, and in this way has recovered somewhat more than 3s. per pound.

It was explained that this *cessio*, in which all the creditors except this one concur, is prosecuted only to prevent the continuation of these proceedings on the part of the respondent in the future. I think we shall do justice by affirming the judgment of the Sheriff-Substitute.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

The Court recalled the Sheriff's interlocutor and remitted to the Sheriff to grant decree of *cessio*.

Counsel for the Pursuer and Appellant—Younger. Agent—W. B. Wilson, W.S.

Counsel for the Defender and Respondent—Chisholm. Agents—Smith & Mason, S.S.C.

Wednesday, May 18.

FIRST DIVISION.

[Lord Wellwood, Ordinary.]

LOUTTIT'S TRUSTEES v. HIGHLAND RAILWAY COMPANY.

Property—Sale—Servitude of Access—Implied Grant.

A piece of land was described in a disposition as being bounded on one side by a roadway. This roadway was the private property of the disponent; it was fenced off from the subjects sold, and at the date of the sale access to these subjects was obtained by a small gate, which opened on to the private road close to its junction with a public road.

Held that the disponent was only entitled to a continuance of the existing access, and had otherwise no right to use the private road as an access to the subjects sold to him.

Property—Sale—Warrantice—Latent Defect—Action of Damages.

Observations by Lord M'Laren as to when a purchaser, who discovers after the sale some defect in his title or in the subjects sold to him, has a right to claim damages from the seller while retaining possession of the subjects sold.

By disposition dated 30th March 1874 the Highland Railway Company acquired from James Henderson of Bilbster three roods of ground in the neighbourhood of the town of Wick, and abutting on the river of that name. The disposition contained

a restriction against building on the ground disposed.

Upon the south portion of the ground so acquired the railway company made a roadway from their neighbouring station at Bankhead to the bridge of Wick, which was crossed by a public road, and fenced this roadway off from the remaining part of the ground, access to the remaining part being obtained by a wicket-gate, 3 feet in width, which opened on to the roadway at a point close to the bridge of Wick.

By disposition dated 16th and 18th June 1883 the railway company sold the remaining part of the ground, which extended to one rood thirty poles, to James Louitt for £115. The subjects were described as being "bounded as follows, viz., on the north by the river of Wick, on the east by the bridge of Wick and partly by the roadway leading thereto, on the south by the roadway leading from the Wick railway station to said bridge, and on the west by ground belonging to us." The disposition contained a clause of absolute warrandice. The previous titles were not examined, and no search was made at the express desire of the railway company, whose agents wrote on 15th May 1883, "the warrandice of any of our North Companies is the best of titles." At the date of the disposition neither the railway company nor Mr Louitt were aware of the restriction in the title granted by Mr Henderson to the company.

In October 1883 intimation was made to James Louitt by Mr Henderson's trustees that the railway company's title contained a restriction against building, and a subsequent intimation was made to the railway company that Mr Henderson's trustees refused to relax the restriction. In June 1891, Mr Louitt being then deceased, his trustees raised an action against the railway company, concluding for decree of declarator that the defenders had sold Mr Louitt the piece of ground already mentioned free of any restrictions against building, and that they were bound to free and relieve the subjects of the restriction against building contained in Mr Henderson's disposition to the railway company. Alternatively, the pursuers claimed £2500 in name of damages.

The pursuers averred that Mr Louitt had always intended to use the ground for building purposes, and that if the defenders failed to get the restriction removed, they had suffered damage to the amount sued for.

The defenders denied that the pursuers had suffered loss to the amount claimed, and under reservation of their whole pleas, repeated an offer, which they had already made, "to cancel the sale, defray the whole expense of the transaction, and repay the pursuers the price, with interest at 5 per cent. thereon."

At the proof the loss suffered by the pursuers was estimated by their witnesses alternatively, (a) on the assumption that the pursuers had rights of access to any part of the roadway by which the ground sold to them was bounded on the south,

and (b) on the assumption that they were entitled to have the existing access enlarged to admit of carts and carriages.

The result of the evidence appears sufficiently from the opinions of the Judges.

On 28th January 1892 the Lord Ordinary (WELLWOOD) found that the pursuers were entitled under the petitory conclusion of the summons to reparation in respect of the restriction against building specified on record; assessed the damages due at £250, and decerned against the defenders for payment of that sum; assoilzied the defenders from the declaratory conclusions of the summons, &c.

"*Opinion.*—[After referring to the titles]—It is not disputed that at the date of the disposition in favour of James Louitt neither the railway company nor the purchaser were aware of the restriction in the company's title from Mr James Henderson. It is stated, and no doubt truly, that the company's agents confused between the Rosebank and the Bankhead properties, but I do not think that that affects the rights of the parties in the least. All that can be said is, that if Mr Louitt intended to build upon the ground, and saw his way to do so with profit, he made a very good bargain, as he got the ground merely at grazing value. I think that in all probability it did not occur to the railway company that, looking to the configuration of the ground, it could be profitably used for building, and their contention now is that it cannot. But I am of opinion that if the present pursuers can show that they have sustained damage in consequence of the restriction they will be entitled to such damages as they may instruct, because in that case they will have suffered eviction to the extent to which the restriction affects them.

"In order to instruct the damages which they claim, the pursuers have produced a feuing-plan, and have adduced witnesses of considerable standing and experience to speak to the return which might be expected if the ten lots shown on the plan were feued.

"If the feuing-plan could be carried out in its integrity, I am inclined to think that a fair return might be obtained. The pursuers' skilled witnesses speak with more information and authority than those adduced for the defenders. They put the average feuing value at 6s. the lineal foot of frontage, yielding about £90 of feu-duty annually, which, capitalised at twenty-two years' purchase, would give £1980. I think that this is somewhat a sanguine estimate, looking to the expense of the under building, but, on the whole, I am disposed to think that at least 4s. the lineal foot might have been obtained overhead for the feu shown in No. 20 of process.

"But unfortunately the feuing-plan relied on by the pursuers is open to this very serious objection, that it is prepared on the assumption that the road to the station would be available throughout its entire length as a frontage and access to the houses to be erected. I do not think that under their title to the piece of ground

the pursuers have any such right of access. The ground conveyed to them was described as being bounded on the south by the roadway leading from the Wick railway station to the bridge of Wick. No part of the roadway was conveyed to them, and no right of servitude over it was conferred by the disposition. Although *ex facie* of the disposition the pursuers may have all the rights of property over the ground conveyed, including that of building on it, the conveyance was not framed with a view to the erection of buildings, and accordingly does not contain any stipulations on that subject. In this respect the case differs widely from the case of the *Argyllshire Commissioners of Supply v. Campbell*, 12 R. 1255, and other cases relied on by the pursuers.

"It is not disputed by the defenders that they are bound to give the pursuers an access to the ground. But they maintain that they are not bound to do more than continue and preserve the access which existed at the date of the sale, viz., the gateway near the bridge of Wick. They further point out that it may be necessary for them in the management of the railway to shut up the access in question or construct a line upon it. I so far agree with them that I think that their obligation as to access will be sufficiently satisfied if the pursuers obtain access at the point where the present gate stands. At the same time I must not be understood as holding that the access at that point must be limited to the width of the gate. I think that taking a reasonable view the entry must be such as to admit of the entry of carts and carriages.

"If, as I hold, the defenders are right upon this point, the value of the feuing-plan and the evidence depending upon it is seriously impaired, because the result is that the pursuers if they feu the ground will be obliged to form a roadway and foot-path on the ground itself, thus taking off a strip of about 23 feet. The question is whether after this is done any margin of profit remains. The pursuers' witnesses admit that the value of the feus would be reduced by more than a half; the defenders' witnesses say there would be no profit left at all. I am not prepared to say that the ground has absolutely no value for building purposes, but having regard to the diminution in value consequent on the station road not being available as an access and the great expense of under building, I cannot on the evidence put a higher value upon it than about 1s. the lineal foot. After taking everything into consideration, I assess the damages due to the pursuers in respect of the restriction at £250. But as this sum is only one-tenth of the sum sued for, and as the pursuers' claim, as laid, was in my opinion framed upon an erroneous basis, I shall make a substantial reduction from the pursuers' expenses."

The pursuers reclaimed, and argued—the pursuers' claim of damage was based on the contention that they were entitled to access to any part of the road which formed the south boundary of the property

sold to them, and this contention could be supported on any of the following grounds—(a) Where land was described as bounded by a roadway or a stream, there was a presumption that the adjoining proprietors' rights of property extended *quoad medium filum* of the roadway or stream—*Rankine on Land Ownership* (2nd ed.), p. 363; *Wishart v. Wyllie*, April 14, 1853, 1 Macph. 389; *Wilson v. Laing*, November 16, 1844, 7 D. 113. (b) Where land was described in a disposition as being bounded by a road, the disponee had a right of access to the road forming the boundary—*Argyllshire Commissioners of Supply v. Campbell*, July 10, 1885, 12 R. 1255. (c) A disponee had an implied right to such access as he could show was necessary to the enjoyment of the ground sold to him—*Ewart v. Cochrane*, March 22, 1861, 4 Macph. 117. Assuming that it were not necessary for the proper enjoyment of the subjects sold that the pursuers should have unlimited access to the roadway on the south, it was at all events necessary that the existing access should be enlarged to admit carts and carriages. If the pursuers were entitled to the larger right of access which they claimed, the Lord Ordinary's award of damages was far too small, and even in the event of their being found entitled only to the smaller access which they claimed, that award should be substantially increased.

Argued for the defenders—The defenders had joined issue with the pursuers on the question of the amount of damage, and they were content to abide by the award of the Lord Ordinary. If, however, the pursuers refused to accept that award, the defenders objected that it was incompetent for them to claim damages while retaining possession of the subjects sold—*Urquhart v. Haldane*, June 2, 1855, 13 S. 844. Further, the ground on which the pursuers claimed a larger sum was bad in law, for there was nothing in their title which gave them the right of unlimited access to the roadway on the south, or even entitled them to have the existing access enlarged. The fact that the ground was described as being bounded by the roadway did not of itself help the pursuers—*per Lord Shand in Argyllshire Commissioners of Supply*. In that case the subjects feued were given off expressly for the purpose of a court-house being built upon them according to a design to be approved by the superior; the plans which were approved by the superior showed that the subjects feued had an access to the lane by which they were bounded, and the superior subsequently took a title in which he recognised the existence of that access. The decision proceeded upon these special circumstances, and was no authority for the proposition which the pursuers founded upon it. Again, the proposition which the pursuers sought to found on—*Ewart v. Cochrane*,—was far too broad. The doctrine of implied grant had been considered in a series of subsequent cases, and the result of the decisions was that a disponee was held to have an implied right to such easements

only as were necessary to the reasonable enjoyment of the property sold to him, and which had been prior to and at the time of the grant used by the owner of the entirety for the benefit of the part granted—*Wheeldon v. Burrows*, 1879, 12 Ch. Div. 31, per L.J. Thesiger, 49. There must always be circumstances to warrant the presumption that a servitude of access was granted—*M'Laren v. City of Glasgow Union Railway Company*, July 10, 1878, 5 R. 1042, per Lord Justice-Clerk, 1047; *Gow's Trustees v. Mealls*, May 28, 1875, 2 R. 729, per Lord Justice-Clerk, 735. The result of the authorities was that the pursuers were only entitled to the access which existed at the date of the sale. It followed from this that their claim of damages failed altogether, as they had failed to prove that they could have profitably used the ground for building in the event of their being restricted to that access.

At advising—

LORD PRESIDENT—In 1883 the pursuer of this action bought from the Highland Railway Company a strip of ground lying alongside of the river Wick, paying for it the sum of £115. The strip lies between the river on one side and a road which leads from the highway to the railway station on the other. At that time the ground was in grass, and had been used for the purpose of pasturing sheep, and previously for miscellaneous purposes, such as a building-yard and the temporary accommodation of tombstones. Shortly after the purchase the buyer discovered that the title of the railway company contained a clause prohibiting building on the ground in question. This was a discovery both to the disponent and the disponentee, and was fortunately made soon after the conclusion of the transaction, and before any change on the subjects had taken place. The railway company promptly and unreservedly acknowledged responsibility for their mistake, and offered to relieve the disponentee of the bargain he had entered into under this material misconception. The offer was not accepted, and a counter proposal was made that the railway company should obtain a relaxation of the prohibition contained in the title. This the railway company tried to do without success, and therefore the title was acknowledged by both parties to the contract as one which must be held to contain a restriction against building, and accordingly the offer of the railway company to release the disponentee was renewed. The offer was not accepted, the correspondence closed, and nothing was done until 1890, when the pursuers, founding on the state of the title, made a claim against the railway company, which they ultimately brought into Court in the action which is before us.

The action calls on the railway company, in the first place, to clear away the restriction in the title, which they cannot do, and, in the second place, to pay the sum of £2500 as damages on account of the restricted state of the titles, the pursuers

at the same time retaining the property in question. The parties have gone to trial and to proof on the record in the case, and the Lord Ordinary has given decree to the pursuers for the sum of £250, as the difference in value between the subjects as they are and as they would have been without the restriction which the title contains.

The first observation which I have to make on the state of the record is, that this is a very singular action, because it is not, according to the admissions of Mr Guthrie, of a kind known to the books that a person should retain possession of a heritable subject sold to him and at the same time claim damages for the difference in value between a clear and a restricted title, those damages amounting to far more than the price paid. We are not, however, called upon to decide on the validity or indeed the legal possibility of such a claim, because the defenders do not plead that such a claim is inadmissible, and that the only remedy was what was offered to the pursuers, namely, the rescission of the bargain. They have stated that they are content to abide by the decision of the Lord Ordinary, even on the footing that the subjects should be retained by the disponentees. Under these circumstances we are not called upon to do more than remark on the singularity of the action, and put on record the fact that our judgment is not asked on the question of law which might have been raised.

The Lord Ordinary has given decree for a sum of £250, and the pursuers have reclaimed, on the ground that that award is insufficient. Their claim for ten times that amount is rested on a theory requiring careful examination. Mr Louttit bought the strip of ground in 1883 for £115, but his trustees say that the property if well laid out would undoubtedly be very valuable as feuing ground, and would yield a very large return to the disponentee. Their case entirely depends upon their having a legal right to ten separate accesses to the roadway which runs from the bridge of Wick to the railway station, and their claim to have ten separate accesses requires to be contrasted with what was the existing access at the date of the sale. At that time the ground in question was not landlocked, but had an access near the bridge—a small access, it is true, just as the piece of ground itself was small—indeed it appears to have been only three feet in width—but it is necessary to notice that that which was and is the sole existing access is entirely disregarded by the pursuers in their claim. Their right to claim damages on the footing of their present claim depends on their establishing that under the title they have such rights of access as I have mentioned to the roadway leading to the railway station.

I turn first to the title itself, because the pursuers have founded their rights of access upon the terms of the title. The words on which they found their claim are contained in the description of the subjects, which are described as "all and whole that strip of ground extending to one rood thirty-two

poles or thereby imperial measure, bounded as follows, viz., . . . on the south by the roadway leading from the Wick Railway Station to said bridge;" and the question is, do these words in the description of the boundaries of the property confer a right to ten accesses to the roadway mentioned? We are first entitled to inquire for purposes of identification what is the nature of this roadway, and it is not disputed that it is one belonging to the railway company. It is not said that it is a highway or a public right-of-way, and I take it that the railway company are entitled to alter their access to the station, and, if they choose, to shut up the roadway or convert it to their own uses. Does the fact, then, that the railway company in their disposition of the property describe the subjects as bounded by this roadway bind them to dedicate it always to the purposes of a roadway? When a roadway is mentioned as the boundary of a subject, it is, I think, in contradistinction to the subject granted, and therefore, *prima facie*, I should say that the roadway was not included in the grant. But it is said to be the import of the authorities that when a subject is described as being bounded by a roadway, it is implied that such roadway shall remain in the condition of affording access to the grantee to the subjects disposed to him. Only one case was cited—*Argyllshire Commissioners of Supply v. Campbell*—but it is not an authority for that proposition. In that case the elements and circumstances were different and stronger than we have here. The subjects of the sale were no doubt described as bounded by a lane, but the question raised was, whether the lane was to remain as an access to the subjects conveyed. The ground so described was sold under the condition that it was to be used for the purpose of erecting upon it a court-house. That is one point of difference. In the second place, the court-house was to be erected according to a design to be approved by the superior. The plans which were prepared made the court-house open on to the lane, and not only were they approved by the superior, but in the third place the superior, after approving of the plans, and after the lane had *de facto* served as an access to the court-house for years, made up a title to his own property in which there was an express reservation to the adjoining feuars of their right of access by the lanes "which they at present possess." I have gone into the particulars of that case, because it appears to me to be quite erroneous to cite it as an authority for the view that if only mention is made of a roadway as the boundary of subjects disposed, the roadway must be maintained as an access to the subjects in all time coming. Accordingly, I do not hold that there is a servitude created in favour of the donee by the words in the title founded on by the pursuers.

A second argument has been advanced which is not merely based upon the state of the title. It is said that the case of

Ewart v. Cochrane, and the doctrine contained in that case, afford countenance to the notion that a disponent must give such accesses to the ground conveyed as are found necessary by the donee. Here again one fortunately finds that the familiar doctrine of *Cochrane v. Ewart* has been discussed with reference to the question of the accesses to be given to the donee in cases where there has been an access of some sort in existence at the date of the sale. I should like to refer to one of the subsequent cases, namely, the case of *Walton Brothers v. Magistrates of Glasgow*, July 20, 1876, 3 R. 1130, where the Lord President says this (p. 1133)—"When a man sells a portion of his ground which has an access through the other portion which he reserves, there is an implied grant of that access. That is the principle of the case of *Cochrane v. Ewart*, and a number of other decisions, and it is consistent with equity and legal principle. Nothing is better settled than that the conveyance of a piece of property implies a right of access to it. No one can possess a piece of ground without having a right of ingress and entry, and the way that is to be obtained if the conveyance is silent is just the existing way. Now, applying that to the present case, all that *Cochrane v. Ewart* laid down was that if a donee retains the right of access existing at the date of the disposition his right is satisfied.

I am therefore not prepared to accept the suggestion of the Lord Ordinary, which indeed does not underlie his decision, that there is some elasticity in the rights of the donee entitling him to more ample access than existed at the date of the disposition. It is true that in the present case that access is not extremely ample, but it was adapted to the uses of the property at the time of the sale, and the donee purchased the property at the price he did on the footing that he was to have that and no other access. This is not the case of a land-locked property, and the law is that a disposition of a subject having an existing access implies no more than a continuance of the existing access. If this statement of the law is sound, it is impossible to calculate the damages due to the pursuers on the footing that they are entitled to ten new accesses to the roadway.

I therefore reject the contention of the pursuer for a high scale of damages, holding as I do that the legal basis for it is unsound. I am afraid I must add that I think the law goes further, because I doubt whether an award of £250 could have been sustained. But we are not required to enter upon a consideration of this question, because the defenders do not object to the sum awarded by the Lord Ordinary. I said that I rejected the higher scale of damages claimed by the pursuers, but it is maintained that, even supposing the views of the Lord Ordinary as to their right of access are accepted, his decision is not satisfactory in respect that the sum which he has awarded is too little. The evidence, as is usual in such cases, is more or less speculative, and this

is necessarily more or less a jury question, and if I were at one with the Lord Ordinary as to the measure of the pursuers' rights I would not be disposed to disturb his estimate of the damages due.

LORD ADAM—This is an action, as pointed out by your Lordship, at the instance of the late Mr Loutitt's trustees concluding in the first place for decree ordaining the defenders to clear their title of a restriction which it contains against building, and alternatively for damages. It is not in the power of the defenders to comply with the first conclusion, as their author refuses to relax the restriction against building, and consequently the alternative conclusion is the one insisted in. I concur with your Lordship in having great doubts whether the form in which the action is brought is competent. The pursuers claim damages, but at the same time keep the subject of sale, and it is, I think, very doubtful whether that is a competent form of action. If the pursuers were dissatisfied with the bargain they ought to have given up the subjects and claimed damages for breach of contract, but they have not taken this position, and as no objection is taken by the defenders, we have to deal with the action on the footing that the claim for damages is competent.

The claim is for £2500, and it is obvious from the facts of the case that the amount of damages depends on the pursuers' rights in law arising upon a construction of the title. The ground disposed is bounded on one side by a roadway leading from the bridge over the Wick to the railway station, and the pursuers' claim is, in the first place, that they have a right of access, not only at ten separate places, but at every part of the roadway. Alternatively they claim, in the event of their failing to make good the larger right, that they are entitled to have an access for carts and carriages at the point where a more limited access at present exists. The measure of the damages due to them will of course be greater in the event of their succeeding in their first claim than under the alternative claim, but in the latter case it will still be considerable. If, however, they have no right to any other than the existing access by a wicket gate three feet wide, Mr Guthrie himself admitted that they had suffered no damage.

Mr Guthrie stated two propositions which are quite untenable, and which I was surprised to hear stated by him. The first was that if a subject of sale is described as being bounded by a roadway, the disponee's title extends to the *medium filum* of the road. In the second place he said that the proper construction of the title is that the "roadway" does not include the path running alongside of it, but only the cart and carriageway. I know no authority for these propositions. The description in the title seems to me itself to exclude the roadway from the subjects disposed, because if in a disposition the subjects are described as being bounded by a roadway, it seems to me that every part of the road-

way is excluded from the grant. I know no reason why less respect should be paid to a private road than to a field or private avenue. I therefore think that the pursuer has no right of access to the private roadway, which the railway company may, when they choose, shut up or convert to other uses.

The next question is, if no such unlimited right of access belongs to the pursuers, have they a right to an enlarged access at the place where an access already exists. My opinion is that they have not. The presumption is, that when parties enter into a transaction for the purchase of a piece of ground, they see with their own eyes the advantages and disadvantages which the ground possesses, and if the disposition is silent on the matter of access, and says nothing about increased access, I think the presumption is almost irresistible that the land is sold with the existing access. That is the principle of the case of *Cochrane v. Ewart*, and I think it applies with great force to the present case. If the existing access was not sufficient for the purpose to which the disponee intended to put the ground, he could have stipulated for additional accesses. I am far from saying that there may not be circumstances arising out of the transaction and appearing on the face of the title to show that it was not the intention of the parties that the disponee should be restricted to such access as existed at the date of the transaction. When ground is actually landlocked there is an irresistible presumption that the parties must have intended that the disponee should have an access to the ground sold to him. *Res ipsa loquitur*. And in the same way, when land is feued out for building, as in the Glasgow case *M'Laren v. Glasgow Union Railway Company*, 5 R. 1042, there is a presumption that parties really meant that the disponee should have the access necessary to make that purpose effectual. But we have no case of that kind here. The presumption seems to me all the other way. The piece of ground for the time immediately preceding the sale had been used for pasturing sheep or for storing tombstones. No one thought of building on it. The price was small. Everything pointed to the idea that the use which was to be made of it was the use it had already been put to, for which the existing access was amply sufficient, and I think there is no reason for holding the pursuers entitled to the additional access claimed. I am therefore of opinion that the measure of damage to which the pursuers are entitled must be calculated on the footing that they have right to no other access than that which existed when the ground was sold, and as they are not proved on that supposition to have sustained any damage, it would be my opinion if that question were open, that they were entitled to none. But the Lord Ordinary assessing the damage as a jury has awarded £250, and the defenders do not seek to disturb that award, and that being the position of the case, I must of course concur in

what seems to me to be the extremely handsome award of the Lord Ordinary.

LORD M'LAREN—I concur in the opinion of your Lordship in the chair on the merits of the action, and if I add anything it is only to explain my views as to the nature of the remedy which the law allows to persons in the position of the pursuers.

If the subject comes to be examined in a subsequent case, it will, I think, be found that there is no essential difference in the remedies which the law affords to purchasers for non-fulfilment of contract in the two cases of sales of personal and heritable property. We are more familiar with the subject in its application to personal property, because the cases are more frequent, arising out of the seller's inability to provide goods of the quality he has undertaken to provide. So far as I know, there are only two remedies open to a purchaser which are known to jurisprudence. He has, in the first place, a right to rescind the contract conditional on his rejecting the goods or heritable property, and to claim damages proportioned to the inconvenience to which he has been put by the non-fulfilment of the contract. His other remedy is the *actio quanti minoris*, the proper application of which is to the case of a latent infirmity, either in the title or the quality of the subjects sold, discovered when matters are no longer entire. At one time it was doubted whether we had this form of action in relation to sales of moveable property, but it was never doubted that under the clause of warrandice such a right did belong to the purchaser of heritable estate, who discovered that some part of the subject of sale had not been conveyed to him. Now, however, it is quite settled, and has been explained in the valuable expositions of the law of sale given by the late Lord President, that in such cases as sales of ships and fixed machinery, which cannot be returned after they have been in use, if it is discovered after they are in use that the extent or quality of the subjects sold is disconform to contract, the purchaser's remedy takes the shape of an *actio quanti minoris*. Under this form of action the pursuer may recover such sum as will enable him to put the subject in proper repair, or compensate him for loss of profit, where the subject is of less value than he originally bargained for. I must say I see no reason in principle or on authority why the remedies in the cases of personal and heritable property should not be of the same kind. There certainly is authority for the proposition that when a purchaser of lands or houses finds some defect in his title, or in the subjects conveyed to him, if matters are entire, it is his duty to reject the subject of sale, and to claim damages. That is quite settled in England, and the Court of Chancery never gives the purchaser in such a case damages beyond the expense to which he has been put in investigating the title. But if after buildings have been erected on the ground sold, or outlay has been incurred, the

purchaser discovers that there is a servitude affecting the property, or part of the property is carried away from him, that is a proper case for making effectual the protection secured to him under the clause of warrandice—that is to say, his remedy is just the second form of action which has been referred to, the *actio quanti minoris*.

With regard to the damages to be given to the purchaser, the very name of the action suggests a limitation of the amount, and I know of no case in which damages exceeding the value of the subjects have been given. Without laying down any absolute rule, I think it would be a very peculiar case in which more was given by way of compensation than what the parties thought the fair value of the property at the time of the sale, because part of the subjects had not been made over to the purchaser or an easement was discovered which prevented the purchaser obtaining the full enjoyment of the estate. I can understand as matter of policy the attitude adopted by the railway company in not objecting to the award of the Lord Ordinary, but I do not wish to countenance the view that the amount of damage which may be awarded is whatever the witnesses say is the profit which would have resulted from a speculative use of the property.

The claim made by the pursuers is framed on the theory that they have right to ten accesses to the roadway which bounds the property on the south. That theory is ill-founded, and I may add, that supposing the pursuers were to open gates in the railway company's road, they could make no use of it except by the tolerance of the railway company, because the railway company is entitled to shut up the road, or while maintaining its use as an access to the railway station, to interdict the pursuers from using it as an access to their houses. The grounds, therefore, on which the pursuers' claim is founded are altogether unsubstantial, and on the whole matter I agree that the judgment of the Lord Ordinary should be affirmed.

LORD KINNEAR was absent.

The Court adhered.

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