tration, Mr Hall appears to me to have continued in the same mind not to receive the timber. I think that this is fairly to be held rejection of the goods by the buyer, and that on this ground Messrs Booker were entitled, on the 22d December, to take possession of the timber, and to obtain judicial aid and authority to enable them to do so.

The difficulty in the way of adopting this view mainly lies in the fact that Mr Hall did not accompany his rejection by intimation to the sellers, which is a usual element in the case of rejection. But although intimation to the seller must at one period or another be made, I do not think it essential that it should be made before the rejection can be held complete. The authorities, I think, point the other way. I cannot doubt of the competency of the purchaser putting the goods into neutral custody, and thereby in law rejecting them; and in such a case his bankruptcy, before intimation reached the seller, would not, I think, invalidate the rejection. It has been found that the buyer could even take the goods into his own premises *custodiæ causa*, and yet his rejection be valid. The seller may often be at such a distance that to require intimation reaching him before the rejection was complete might be altogether to frustrate this wholesome rule of law. After all, intimation to the seller is mainly important as affording evidence of rejection which is clear and unambiguous. In the present case, I think the other evidence sufficiently establishes the rejection.

But the difficulty may be overcome on another ground, which is to my mind satisfactory and conclusive. I entirely subscribe to the doctrine—which has high authority in our law to support it—that after a buyer has become insolvent and resolved to stop payment, he is not only entitled to reject goods purchased and not yet delivered, but it is his bounden duty to do so. It seems to me the doctrine at once of reason and equity that, after an insolvent trader has resolved *cedere foro*, no act whatever should be done by him altering the state of matters then existing, and having the effect of changing an incomplete into a complete, a personal into a real right. In consistency with this view, I am of opinion that on the 22d December, when sequestration was resolved on, Mr Hall was not only entitled to reject the timber; he was bound to reject it, and could not legally take possession of it. If this opinion be a sound one, all difficulty in the case is removed. Messrs Booker were entitled to enforce this obligation by application to the Sheriff for interdict, and warrant for custody; and the Sheriff's judgment to that effect remains unimpeachable.

Appeal dismissed.

Agents for Appellants—Morton, Whitehead, & Greig, W.S.

Agents for Respondents—Henry & Shiress, S.S.C.

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*Thursday, December* 15.

## SECOND DIVISION.

### CAIRNS *v.* COCKBURN'S EXECUTORS.

*Warrandice—Eviction—Intermediate Profits.* Certain subjects were sold by a bondholder in virtue of a power contained in a bond and disposition in security, and a disposition containing a clause of warrandice was granted by the bondholdor to the purchaser, who possessed the subjects for a number of years. The sale was afterwards reduced by the heir-at-law of the granter of the bond. *Held* that, under an arrangement as to defending the action at the instance of the heir-at-law, the purchaser was entitled to repayment of the price he had paid for the subject, after accounting for the surplus rents during his possession.

*Opinion* that warrandice in sales of land implies an obligation to restore the price on eviction, and all loss over and above.

This was an action at the instance of John Fuller Cairns against Charles Howden, as acting executor of the late Mrs Cockburn, concluding for repayment of £800, being the price of certain subjects in Eyemouth.

The following narrative is taken from the opinion of the Lord Justice-Clerk :—

Mrs Cockburn, the defenders' predecessor, held a bond for £300 over this property, dated in 1831, of which Nisbet was the proprietor. Purves held a disposition to the same property, dated posterior to Mrs Cockburn's bond, *ex facie* absolute in its terms, but in reality a security for a debt of £160. He was infeft in 1841. In 1845 Mrs Cockburn sold the property under her bond by public roup, and Cairns, the pursuer, bought it for £800, and received the disposition which contains the clause of warrandice founded on, and an assignation *inter alia* to the bond held by Mrs Cockburn. And he afterwards acquired right to Purves' absolute disposition. Cairns possessed the property from 1845; but in 1859 the heir-at-law of Nisbet, the proprietor of the subjects and debtor in the bond, brought a reduction of the sale to Cairns, on the ground that the notices given previously to the sale were insufficient, and ultimately, in 1864, the sale was reduced on this ground. By this time the whole price had been applied in paying debts due by Nisbet, including that of Mrs Cockburn. Then came the question, On what terms the heir-at-law was entitled to resume possession of these subjects? And it appears very clearly from the correspondence that it was agreed between Cockburn, the seller, and Cairns, the purchaser, that the latter should contest this question with the heir-at-law for their mutual interest, leaving their claims *inter se* to be afterwards adjusted. In the course of the subsequent litigation with the heir at law a question arose as to the amount for which Cairns was entitled to credit, after debiting himself with the whole of the surplus rents, and taking credit for the price, with interest, which had gone to pay the debts of Nisbet, the owner. Counter statements were given in by the parties, and the Court ultimately found that the sum, on payment of which the heir-at-law was entitled to possession, was £803, with interest from the 1st of June 1867. In this way, as in a question with the heir-at-law, Cairns has entirely accounted for the surplus rents during his possession; and is still entitled to receive from him, as a condition of his ceding possession, £803.

The Lord Ordinary (MURE) repelled all the defenders' pleas, except the 9th, which was—"In any view, and even assuming eviction to have taken place, and the defender to be bound to repeat, he is liable only for the value of the subjects as at the date of eviction, and that is greatly less than the sum claimed in this action."

The pursuer reclaimed.

MILLAR, Q.C., and BALFOUR for him.

The SOLICITOR-GENERAL (CLARK) and ORPHOOT for respondent.

At advising—

LORD JUSTICE-CLERK—One question of considerable interest was very learnedly argued at the bar, namely, when the subject of a sale is evicted from the purchaser, and its value is less at the date of eviction than at the date of the sale, whether the purchaser's claim against the seller under his warrandice is to be measured by the value at the date of eviction, or by the price which was paid?

This seems to have been an old, and, indeed, an unsettled controversy among the civilians, Pothier and the more modern commentators supporting the purchaser's claim for the price, while Domat, following the older writers, limits his demand to the value of the property at the date of eviction.

I do not find that the point has ever been directly decided in our own law; but the tendency of all the authority we have points to the opinion of Pothier as the better; and I have found no case in which less than the price has been awarded on eviction. Amid the conflicting texts in the Roman law, that on which our jurists have mainly relied is to be found in the 19th Book of the Digest, t. 1, law 11, § 18, which lays down the principle thus: "Neque enim bonæ fidie contractus hac patitur conventione, ut emptor rem amitteret, et pretium venditor retineret." So that even when there was an agreement that nothing was to be due on eviction, that was construed not to extend to the price, but to extend only to profits and damage. Craig refers to this authority, B. 2, T. 4, ẓ 9, in regard to such stipulations. He says: "In hac facti specie acquitas naturalis prevalet, ut qui alienam pecuniam recepenit eam, fundo evicto, restituere cogatur, non obstante pacto convento;" and he quotes a case between Lord Leven and Wood of Largo, in which he says the point was raised, although not decided. But whether it is received among us or not, he professes himself ignorant.

Stair, Erskine, and Bell all deal with this matter, and their views substantially coincide. "Warrandice," says Lord Stair (2, 3, 46), "hath no farther effect than what the party warranted truly paid for the right, whereby he was, or might be, distressed, though less than the value of the right warranted." He continues: "This will not hold in warrandice of lands;" and he explains what he means by saying that in land "the buyer is not obliged to take the price he gave." The passage will not bear the construction the defender tried to put on it, that the purchaser took the risk of a fall in value; although some words, without the context, may seem to point in that direction. It plainly means that warrandice in sales of land implies an obligation to restore the price on eviction, and all loss over and above.

The passage in Erskine bears out this view, although his words also are ambiguous (*quotes* Ersk. 2, 3, 30).

Mr Bell in his Principles says, "The purchaser is entitled to demand the whole worth of the subject at the date of eviction, and not *merely* the sum which he has paid."

In all these passages the price paid is assumed as the rule in bargains as to moveables, and, as I read them, in bargains about land the price and all damage over and above; and that on the principle that in no case can a seller be permitted to retain the price of that which he had no power to sell. I may refer to the cases of *Thomson*, reported in Broun's Sup., 5, 569; and *Houston*, M. 16,619, as rather assuming than deciding the law in this sense; and to a very important opinion of Lord Moncreiff in the case of *Galloway*, reported in 1 D. 74; in which, under a clause of warrandice limited to the price paid, he refused to impute the rents drawn prior to eviction to extinguish any part of the obligation.

I am unable, therefore, in any view, to concur with the finding of the Lord Ordinary, that the value at the date of eviction, though less than the price, is the true measure of the seller's obligation under his warrandice. If the question lay between assuming the price as an arbitrary liquidation of the damage, or simply finding the purchaser entitled to recover such loss as he could establish, I should have more difficulty. But the inclination of my opinion is, that warrandice in the contract of sale implies an obligation in the case of eviction to render back the price for which no equivalent was given, whatever farther claims it may confer upon the purchaser.

I do not know, however, that it is necessary for us to decide this abstract point. The circumstances of the case are very special, and were, I think, too little attended to in the debate. When rightly considered, I think they afford a solution of this question quite satisfactorily.

[His Lordship having given the narrative quoted *supra*, proceeded]—

I am of opinion, in this state of the fact, that the defender is bound, under the warrandice, to take back the subjects on the terms which in that event he will be entitled to demand from the heir-at-law, as a condition of ceding possession; and that on re-conveying the subjects, and the several rights over them, and assigning his rights under the judgment in question, the pursuer is entitled to decree in terms of the conclusions of his summons. The restitution will thus be substantially complete, and the pursuer will be kept, as he is entitled to be, *indemnis*.

Agents for Pursuer—Adam & Sang, S.S.C.

Agents for Defender—Adamson & Gulland, W.S.

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## *Tuesday, December* 20.

### MAGISTRATES OF EDINBURGH *v.* CROALL.

*Feu-Charter—Condition—Record—Singular Successor.* The superiors of a piece of ground in the city, in the original feu charter bound the feuar to erect houses thereon, conform to certain conditions which appeared in the articles of roup, under which the ground had been sold, and imposed certain other burdens and conditions. The precept and instrument of sasine contained mention of these express conditions, but no reference to the articles of roup or any conditions about the building of the houses contained in them. *Held* that the conditions in question, which bound the original feuar to erect houses conform to a certain plan, contained in the articles of roup, not having entered the record, were not binding upon singular successors.

This was an appeal from a decision of the Dean of Guild in an application made to the Dean of Guild Court by Messrs J. & R. Croall, proprietors of 21