Latent Defect in Heritable Property

Does this give a purchaser the right to resile?

Judging by the practice of conveyancers and the opinions of those whom the writer has consulted on the subject, a purchaser is generally held to have no right to resile from a contract for the sale of heritage on the ground of latent defect. A fairly thorough, but not exhaustive, search of the authorities revealed no suggestion that such a right exists. On the other hand, no positive authority was found for the contrary proposition. It is therefore a matter of inference as to what the law may be on the subject.

The first aim of this article is to show that there is no reason in principle why a purchaser should not be entitled to resile on discovering a latent defect. The second aim is to indicate the limits of such a right and then to show that the right, if it exists, may be of little value to the purchaser under the normal form of contract for the sale of heritage.

For reasons which will appear later it would be unsatisfactory to attempt a definition of the term "latent defect" at this stage. But it is important to emphasise that a "latent defect", properly so called, is a defect, latent quoad both parties—seller and purchaser. In a case where the purchaser discovered, after completion of the contract, a defect which the seller had purposely concealed, there would be an element of fraud, which might entitle the purchaser to resile on other grounds. This article is concerned with the type of defect of which both parties were unaware, and of which neither had any reason to be aware, at the time when the contract was made.

A. What is the principle?

M.P. Brown’s "Treatise on the Law of Sale", published in 1821, is perhaps the best discussion of the principles underlying the Scots law of sale before the Mercantile Law Amendment (Scotland) Act, 1856, which, inter alia, changed the law relating to the sale of moveables. The law relating to the sale of heritage was not affected by this Act, and the principles stated by Brown ought, therefore, to remain operative in this field.

Under "Obligations of the Vendor", Brown deals with the "Obligation of Warrandice" (Part III, Ch. I, Sec. 2):—"The vendor is bound not only to deliver
the thing sold to the vendee; he continues bound, after delivery, by the
obligation of warrandice. Under this obligation, the vendor is bound, in the first
place, to warrant the vendee against eviction of the thing sold; and, in the
second place, to warrant it as being free from certain faults” (p. 240).

Warrandice against eviction is discussed first, with many examples taken from
decided cases. Almost all these cases are concerned with heritable property,
but there is no suggestion that this is the only type of warrandice appropriate
to heritage.

Turning to warrandice against faults (p. 285), Brown begins by discussing the
differences between Roman, Scots and English Law, showing that Scots Law
stood in a compromise position between Roman and English Law. Roman Law
was most favourable to the purchaser who discovered a latent defect, and offered
such a purchaser two alternative remedies, depending on the circumstances:
first, in cases where the defect was such as to render the thing sold unfit for the
purpose for which it was intended, the purchaser could sue for repayment of the
whole price paid (actio redhibitoria); second, where the defect did not render
the thing wholly unfit for its purpose, but did affect its real value, the purchaser
could recover the balance between the price paid and the real value of the thing
sold (actio quanti minoris).

On the other hand, English Law gave no remedy to the purchaser who discovered
a latent defect, unless the seller had granted an express warranty against such
defects.

Scots Law took the middle course, by adopting the first Roman remedy, but
not the second, so that the purchaser had to make the straight choice between
retaining the thing sold with all its defects, on the one hand, and returning the
thing altogether in exchange for the price he had paid, on the other.

(Lord Kames, among others, explains the Scottish rejection of the actio quanti
minoris on the grounds that such a remedy would be hurtful to the interests of
commerce. Indeed he went further, saying that any action open to the purchaser
after delivery on account of an insufficiency only discovered after delivery was
contrary to equity. It is interesting in this connection to notice that modern
conveyancers in Scotland do in practice apply the principle of the actio quanti
minoris in cases where there has been a misstatement in the missives of the precise
rateable value, feu duty, etc.)

Having stated the broad principle of Scots Law, Brown goes on to show how it
works out in detail, setting out the circumstances in which to resile on the ground
of latent defect would be justified. At this stage it is unnecessary to examine
this question (but see infra). What may be important are the examples which
Brown gives to illustrate the propositions he states. All the cases cited concern
latent defects discovered in moveables.
Now, if one disregards the examples given both in the section dealing with warrandice against eviction and that dealing with warrandice against latent defects, there would be no reason to infer from what Brown says that a seller only grants warrandice against latent defects in the case of moveables. The distinction between heritage and moveables really does not appear to be thought relevant.

On the other hand, if one takes the examples into account, one might well get the impression that warrandice against eviction applies to heritage, while warrandice against latent defects applies to moveables. In the section on warrandice against eviction, however, there is at least one example of its application to moveables, and, in any event, it is hardly conceivable that in any mature system of law the purchaser, whose enjoyment of his purchase is disturbed because of the right which some third party has to it, should be without a remedy against the seller in the absence of express warranty. One can safely infer that warrandice against eviction applied in the sale of moveables.

As far as the present writer can see, the corresponding inference as regards heritage is, either that Brown was wrong or confused, or that, in Brown's day at least, the seller of heritage granted the purchaser an implied warrandice against latent defects. (The former alternative seems improbable in view of the lucidity and detail with which Brown deals with the matter).

There is some support for this conclusion in the lectures of Professor More, published in 1864, (Vol. I. pp. 153-5) :

"It is a rule, in regard to warrandice in contracts of sale, that the vendor must warrant the article to be fit for the use for which he sells it and such as he describes it to be. Where there is a visible fault or defect in the article sold, the purchaser is presumed to have bought it with the knowledge of this, and to have had this in view when he arranged as to the price; but if the fault or defect be latent, the presumption formerly was that it was concealed by the vendor, and on the implied warrandice of the contract. The rule formerly was, that a full price implied warrandice against all latent defects. But this rule of law as to latent defects has been altered by the statute of 1856 [the Mercantile Law Amendment Act referred to above] . . . "

"When the vendor is unable to fulfil his contract, or refuses to do so at the stipulated time, his warrandice is held to be incurred, and the purchaser is entitled to be free of his engagement. And where the property which has been sold happens to be burdened with a servitude, which the vendor knows would render it unfit for the purpose for which the purchase had been made, the warrandice will be incurred equally as if the property had been evicted from the buyer".

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A straightforward reading of the first paragraph quoted above suggests that Professor More was talking about moveables only, and that the principle of warrandice against latent defects had been rendered obsolete by the 1856 Act. On the other hand, it is nowhere said in terms that the rule “that a full price implied warrandice against all latent defects” applied only to moveables, and did not apply to heritage. Moreover, the next paragraph takes an example from the sphere of heritable property, using the words “render it unfit for the purpose for which the purchase had been made”, which must apply to the warrandice against faults and not the warrandice against eviction. This is made clear by the last words of the quotation. (It is conceivable that More regards warrandice against latent servitude as a type of warrandice against eviction extended by analogy. But this is not the most obvious reading of the sentence).

Neither Brown nor More have the authority of institutional writers, and therefore a conclusion based upon mere inference from what they say is of comparatively little positive value. Nevertheless, the rule that a full price implies warrandice against all latent defects—that a purchaser is entitled to get what he has paid for—is an equitable rule such as one would expect to find in a system of law based upon principle rather than precedent. And it is difficult to see why, in such a system, the principle should operate in favour of the purchaser of moveables, but not the purchaser of heritage. The second part of this article may throw some light on this question.

B. The limits and application of the principle:—

Assuming that the above conclusions are correct, it still remains to be seen what their practical application might be to contracts for the sale of heritage. Much weight would have to be attached to the limits which Brown himself puts upon his principle, if it is upon Brown that one is to rely in order to show that the principle exists. There are really two questions to be answered: (1) to what “latent defects” did the principle apply; and (2) if it did apply, what were the respective rights of seller and purchaser?

We have already seen that it makes no difference in principle whether the seller was aware of the defect or not. If he did happen to be aware of it, wider remedies might be open to the purchaser; but he could choose to proceed simply on the principle that a full price implies warrandice against latent defects.

(It may be that some difficulty might arise because of something that More says: that “the presumption formerly was that” a latent defect “was concealed by the vendor”. It is not clear whether this presumption could be overcome if the seller could prove that he did not in fact know of the defect. This, however, appears not to have been the case).
According to Brown, the defect, in order to qualify as a latent defect justifying resiling must be of such a nature as to render the thing sold unfit for the purchaser’s purpose. It must not be of a slight or partial kind, but such as renders the subject unfit for its proper use. Thus, it is not enough that part of the thing sold is of bad quality; and where it is fit for several purposes, the purchaser is not entitled to return it on account of its not being fit for one particular use. (The exception is where the seller knew the purpose for which the purchaser was buying the subject, much as in the Sale of Goods Act, 1893). Moreover, the purchaser must show that the defect existed at the time of the sale, and that it could not then have been discovered in the course of reasonable inspection. And the seller can expressly exclude warrantice against particular defects in the terms of the contract provided that he does so honestly. It does not appear that the seller could make an omnibus exclusion of warrantice for all latent defects of any sort.

The real difficulties in this branch of the law, both before and after the Mercantile Law Amendment Act, 1856, have arisen in finding the answer to the questions: “What is the purpose of the purchaser?” or “What is the subject’s proper use?” In the field of moveable property, it may be hard to say what the “proper use” of a horse is, or what the purchaser was entitled to get when he bought a “hunter”. The one question may raise extraordinary metaphysical speculations, and the other gives rise, in the case of moveables, to difficulties of proof as to whether the purchaser really bought a “hunter” or a “horse”.

In the case of heritage, however, the difficulty would be slightly different. The question of how the purchaser described his purchase could be resolved by looking at the written contract which must exist in order to prove the sale; (it would be very difficult to persuade a Court to admit extrinsic evidence to show the purpose for which the purchaser bought the subject of sale). It will appear from the missives whether the subject was an “area of ground”, a “garden” or a “pleasure-ground”, a “building”, a “house” or a “dwelling-house”. And, because conveyancing terms are somewhat stereotyped, it would really be a matter of common sense to differentiate between, for instance a “house” and a “dwelling-house”—one is working with a fairly limited and familiar vocabulary.

What would really be difficult, in connection with heritable subjects of sale, would be to find any defect of such a type as to render the subjects totally unfit for use as, say, a “dwelling-house”, but which was undiscoverable on reasonable inspection at the time of sale. Although it may be simple enough to say that a “dwelling-house” is a building for human beings to dwell in, it is not so easy to say when it ceases to be fit for that purpose. Would the Ritz cease to be a “hotel” if a latent defect were to render it unfit for use as more than a model lodging house?

One can imagine that, if conveyancers were to make a practice of appealing to the principle that a purchaser is entitled to resile on discovering a latent defect, they would soon find themselves in an elaborate sort of game. Sellers’
agents would try to be as non-committal as possible about what they were selling, and purchasers' agents to embellish as far as possible their descriptions of what they were buying. Presumably the result would be stalemate, as the offer would never meet the acceptance on a vital point.

On that view, it becomes fairly obvious why there are no cases dealing with latent defects in connection with the sale of heritage—the principle cannot be applied in any practical fashion. On the other hand, one should not lose sight of the fact that the principle was originally based upon the consideration that a purchaser is entitled to get what he has paid for. It is inequitable that someone should pay £5,000 for an apparently desirable house in a middle-class residential district, only to find that a latent defect has caused it to become worthless slum property. But, again, this is an extreme example, and the Court might still say "You bought a 'house' and you have got a 'house', although you did in fact pay far too much for it".

Perhaps in a case where the seller's agent has been too eager to "write up" the house or land which he has been selling, the purchaser's agent might find that his client has a remedy before the disposition supersedes the missives; but it is rare to find "fancy" descriptions of heritable subjects in dispositions. Once the disposition has become the test of what the purchaser has bought, it is probable that in 99% of cases the principle as to latent defects could have no application at all. (And it is worth, perhaps, pointing out that dry rot would probably not qualify as a "latent defect" justifying resiling, since, if it was sufficiently bad to render the subjects unfit for their proper use, it would have been discoverable on reasonable inspection; if it were not discoverable on reasonable inspection, it would take far too long to render the subjects unfit for their proper use).

Lastly, we can turn to the respective remedies of seller and purchaser, as stated by Brown: The seller is entitled to recover the thing sold together with its fruits and, if the subject has deteriorated through the fault of the purchaser, the seller is entitled to have that deterioration made good.

The purchaser is entitled to restitution of the purchase price (together with interest at the judge's discretion) and to reimbursement of the expenses of the contract and charges necessarily incurred. The principle is that the purchaser is entitled to be indemnified by the seller for his loss. Only if the seller has been guilty of fraud is the purchaser entitled to damages, with one exception: where the subject was sold by the seller in the exercise of his trade, the purchaser is entitled to rely on the seller's judgment, and may be entitled to damages. (This last principle is based on the doctrine spondet peritiam artis; it has the support of one decided case, Dickson & Co. v. Kincaid, F.C. 15th Dec., 1808; and it might have repercussions against surveyors, solicitors or estate agents selling their own property!)

The writer is exceedingly pessimistic about the chances of the principle discussed in this article proving useful today: but one never knows.