At advising—

LORD TRAYNER—In this case the claimant claims to be registered as a voter in Bute on the ground that he is the tenant and occupant of a dwelling-house at Glenrosa, Brodick. The objection stated is that he has not been an inhabitant-occupier of that house for the period of twelve calendar months preceding the 31st July. The Sheriff has stated the facts. They may be resumed thus:—The claimant has his principal residence in Glasgow, where he resides during eight or nine months of the year, but for several years he has been, and still is, tenant of a cottage in Brodick, to which he resorts in summer for two or three months. In the year 1890 he resided there three or four months in all. Now, to entitle the claimant to get upon the roll he must satisfy the Court that he is an inhabitant-occupier of that house. I am not prepared to offer any strict or exhaustive definition of that term, but I think it may be fairly said that it means an occupier who inhabits. The question is, has the claimant inhabited? I am of opinion that he has not. He resides in Glasgow, and his visits to Bute seem to me not to be in any proper sense a residence or inhabiting, but visits incidental to the residence which he has in Glasgow. It was said that he was the only occupier of this house; that if he was not there all the year, he had the power to go when he pleased; that when he left it he locked it up, and that it had never been sub-let. Now, if use of that kind for the period of three months would make him an inhabitant, the same principle would make him an inhabitant if he only went for three days. To put the case in that way shows that to admit this claim would be to avoid the object of the statute, which is to give every man who lives or resides in a locality an interest in the representation of that locality. The claimant in this case has not, it seems to me, complied with the statutory requirement, and therefore I agree with the Sheriff.

I desire to add that my opinion in this case is not to be held as at all expressing any view upon the more general question sometimes raised, whether a man may not inhabit two places at one time. Upon that question I reserve my opinion.

LORD KINCAIRNEY—I concur. I wish only to observe that in my view this case raises no question of constructive residence or constructive inhabitancy. There was no inhabitancy at all.

LORD KINNEAR concurred.

The Court dismissed the appeal and affirmed the judgment of the Sheriff.

Counsel for the Appellant—Maconochie. Agents—Cooper & Brodie, W.S.

Counsel for the Respondent — Young. Agent—Lachlan M'Intosh, S.S.C.

COURT OF SESSION.

Friday, December 12.

FIRST DIVISION.

[Lord Trayner, Ordinary.

CARTER (SPEEDIE'S FACTOR) *v.* LORNIE.

Sale of Heritage—Agreement to Accept Title subject to all Exceptions.

In an agreement for the sale of certain heritable subjects it was stipulated that the purchaser should accept the title "as it at present stands, and subject to all exceptions of any nature," and that the seller should "not be bound to grant warrandice except from his own proper facts and deeds only."

Held that the purchaser was only bound under that stipulation to accept a marketable title, or such a title as could be made marketable by some expenditure on his part, and was not bound to accept either a ninety-nine years lease under the Montgomery Entail Act (10 Geo. III. cap. 51), where the stipulation for the erection of dwelling-houses had not been complied with within the statutory time, or a long lease under the Rutherfurd Entail Act (11 and 12 Vict. cap. 36), which was granted partly for a consideration other than rent.

Entail — Long Lease Title — Stipulation to Build Dwelling-Houses—Montgomery Act (10 *Geo. III. cap.* 51), *sec.* 5.

The Montgomery Act gave power to heirs of entail to grant building leases for ninety-nine years, but provided by section 5 "That every such lease shall contain a condition that the lease shall be void, and the same is hereby declared void if one dwelling-house at least not under the value of £10 sterling shall not be built within the space of ten years from the date of the lease" for each half-acre of ground let.

Where a tenant in a ninety-nine years lease granted under the Act who had erected a factory but no dwelling-house on the ground let to him, sold the leasehold subjects more than ten years after the date of the lease, it was *held* that the lease was not a title which a purchaser was bound to accept, even though he had agreed to accept the title to the subjects as it stood and subject to all exceptions.

Entail — Consideration other than Rent — Rutherfurd Act (11 *and* 12 *Vict. cap.* 36), *sec.* 24.

Section 24 of the Rutherfurd Act provides that it shall not be lawful for any heir of entail, in granting a feu or long lease, to take any grassum or fine or valuable consideration other than rent for granting such feu or lease.

A lease for eighty-one and a-half years was granted by an heir of entail

in consideration of an annual payment of £36, 16s., payable to the extent of £26, 16s. by the tenant, and to the extent of £10 by an insurance company, under a bond of annuity in favour of the heir of entail and his successors in the entail.

Held that the lease was not such a title as a purchaser of the leasehold subjects was bound to accept, even though he had agreed to accept the title as it stood, and subject to all exceptions.

Sale of Heritage—Delay in giving Valid Title—Right to Resile—Process.

One party having agreed to sell to another two factories with the machinery therein, brought an action against the purchaser to compel him to implement his part of the agreement. After the opinions of the Court had been delivered to the effect that the titles offered by the seller in the case of one of the factories were not such as the purchaser was bound to accept, the seller offered to procure and give the purchaser a title to which no objection could be taken.

Held that the purchaser was bound to accept the title offered, as he had received possession of the factories in terms of his agreement with the seller, and had removed a large quantity of valuable machinery therefrom.

Frederick W. Carter, C.A., judicial factor on the sequestrated estates of Robert Speedie & Sons, linen manufacturers, Sinclairtown, Kirkcaldy, entered into an agreement with John G. Lornie, Kirkcaldy, for the sale to the latter of two powerloom factories forming part of the sequestrated estate. The minute of agreement was dated 22nd and 23rd March 1888, and was in these terms:—

"Minute of agreement between Frederick Walter Carter, judicial factor on the estate of Robert Speedie & Sons—first party; and John Guthrie Lornie, Kirkcaldy—second party.

"The first party agrees to sell to the second party, and the second party agrees to purchase from the first party, the two large linen powerloom factories situated in Sinclairtown, and belonging to the first party as judicial factor foresaid, with the whole steam-engines and machinery therein, as per inventory thereof, on the terms underwritten—

"*First.* The price of the said factory shall be £2000 for the old factory and machinery therein, and £2000 for the new factory and machinery therein.

"*Second.* The price of the new factory shall be payable within six weeks from the date hereof, the second party, however, to get possession earlier on payment of the price, and the price of the old factory shall be payable at Martinmas 1888.

"*Third.* The second party shall accept the title to the said subjects as it at present stands, and subject to all exceptions of any nature, and the first party shall not be bound to grant warrandice except from his own proper facts and deeds only.

"*Fourth.* This agreement shall be subject to the sanction of the Court of Session being obtained thereto.—In witness thereof." . . .

On 11th April 1888 the approval of the Court was obtained to the proposed sale, and on 5th May Lornie paid £2000 to Carter as the price of the new factory, and thereafter entered into possession of the said new factory and removed therefrom all the looms. When the time came for paying the price of the old factory Lornie refused to accept a disposition of it on the ground that the title tendered to him for the new factory was bad. The title objected to consisted of a lease, dated in January 1874, granted by the Earl of Rosslyn as heir of entail in possession of the entailed estate of Ravenscraig to the trustees of Robert Speedie & Sons. The extent of ground included under the lease was 2 roods 6 poles, and the rent was £26, 16s. per annum. The lease bore to be for a period of ninety-nine years from Martinmas 1871, and was granted under the powers conferred upon heirs of entail by the Montgomery Act (10 Geo. III. cap. 51.) It contained, *inter alia*, a stipulation that the tenants "shall be bound within three years from the said term of entry to build a dwelling-house or houses of stone, and slated, of the value of at least £50, and to keep and uphold said houses, and all other buildings which may be erected on the said piece of ground, in good tenantable and sufficient repair during the currency hereof, and to leave them in such repair at the expiry hereof; and in case the said tenants shall fail to build the said houses within the said space of three years, or in case they shall fail to keep the said houses and buildings which may be erected on the said piece of ground in good tenantable and sufficient repair, then this tack shall *ipso facto* be void and null, without any declarator or process of law for that effect."

The new factory was the only building which had been erected on the ground comprehended under the lease.

After raising this objection to the title offered him for the new factory, Lornie in January 1889 entered into possession of the old factory without paying the price, and removed therefrom more than 100 of the looms.

The present action was raised by Carter against Lornie to compel the latter to implement his part of the agreement of 22nd and 23rd March, so far as not implemented, by accepting a valid disposition of the "old factory," and paying the stipulated price for it, or alternatively for £2000 in name of damages. [With this action there was afterwards conjoined an action of damages by Lornie against Carter for not implementing his part of the agreement, but further reference to this second action is unnecessary.]

The pursuer pleaded, *inter alia*—"(3) The defender having, in knowledge of the objections now raised by him to the title to the new factory, entered into possession of the old factory, he is bound to accept the

conveyance thereof tendered to him by the pursuer, and to pay the price of the said old factory, the price of the new factory having already been settled. (4) The pursuer having tendered to the defender a valid conveyance of the old factory, the defender is bound to accept the same and to pay the price of the said old factory. (5) The defender having taken possession of both factories, and the machinery therein, and dealt with the same as his own, and still continuing to do so, he is not entitled to refuse to pay the price of the said subjects, or any part thereof. (7) *Separatim*—The defender's objections to the title to the new factory are unfounded, in respect, 1st, that on a sound construction of the Montgomery Act it is competent for an heir of entail to grant a lease of land under the said Act for the purpose of building a manufactory thereon; 2nd, that the special provisions of the lease in question, founded on by the defender, having been inserted for the benefit of the landlord, and having been waived or departed from by him, the non-fulfilment thereof does not invalidate the said lease."

The defender offered to replace the machinery which he had removed from the factories, and pleaded—"(2) The pursuer not being able to give the defender a valid conveyance of the subjects contained in the said minute of sale, he is not entitled to sue for implement of the said minute."

The record was closed on 26th February 1889, and on 17th June the pursuer lodged a minute stating that Lord Rosslyn had agreed to grant him a lease of the new factory under the Acts 11 and 12 Vict. cap. 36, and 16 and 17 Vict. cap. 94, and that his Lordship was taking the necessary steps to obtain the sanction of the Court thereto, and he moved the Lord Ordinary to sist the process to enable him to obtain this new lease.

A sist having been granted, the pursuer on 26th November lodged a minute, in which, under reservation of all his pleas, he stated that Lord Rosslyn had obtained the authority of the Court, and had granted the pursuer a new lease of the new factory; that the new lease had been duly executed in terms of a draft lease approved by the Court on 30th October 1889, and he tendered the said lease to the defender as a valid title to the new factory and in implement of the minute of agreement of sale.

The duration of the new lease was to be for eighty-one and a-half years—from Whitsunday 1889 to Martinmas 1970—being the unexpired portion of the former lease, and it was set forth that the consideration for the lease was an annual payment of £36, 16s., payable to the extent of £26, 16s. by the tenants for the time of the subjects leased, and to the extent of £10, secured by way of annuity, payable by the North British and Mercantile Insurance Company during the duration of the lease to the Earl of Rosslyn and the heirs of entail succeeding him in the entailed estate of Ravenscraig, &c., under a bond of annuity which the pursuer had purchased from the insurance company, and delivered to the Earl of Rosslyn in pursuance of the arrangement under which the lease was granted, "which yearly sum of £26, 16s., together with the said yearly sum of £10 contained in and secured by the bond of annuity before referred to, together make up the yearly sum of £36, 16s., being the whole amount of the annual rent or tack-duty for the said subjects as stipulated and arranged between the parties hereto, and set forth in the petition before-mentioned: Declaring, as it is hereby expressly provided and declared, that if at any time the tenants shall allow two years' payment of the before-mentioned yearly rent or tack-duty of £26, 16s. to run on into the third unpaid, they shall *ipso facto* lose and forfeit this tack."

On 18th December the defender was allowed to amend his defences by adding the following pleas—"(4) The defender should be assoilzied, on the ground that even if the title which the pursuer has obtained from Lord Rosslyn is good, the same was not obtained till November 1889, and was not timeously offered to the defender, and that the delay in procuring and offering a title has been so great as entirely to defeat the purpose for which the defender originally made the purchase. (5) The pursuer not having been able timeously to implement his contract, the defender should be assoilzied."

Proof was led on 19th March 1890, when the following additional facts appeared—The defender was a stockbroker, but he had some years before acquired the Pathhead Spinning Mill and Weaving Factory, Kirkcaldy. His object in purchasing Speedie's old and new factories was in order to use their machinery in fitting out the Pathhead mill entirely as a factory, as he expected to be able to find a purchaser for it when so altered. The machinery in the old and new factories was of about the same value as the heritable subjects sold under the agreement of 22nd and 23rd April 1888.

The Montgomery Act (10 Geo. III. c. 51), which empowered heirs of entail to grant building leases for ninety-years, provided in section 5 as follows—"Provided always, that not more than five acres shall be granted to any one person either in his own name or to any other person in trust for him, and that every such lease shall contain a condition that the lease shall be void, and the same is hereby declared void, if one dwelling-house at least not under the value of ten pounds sterling shall not be built within the space of ten years from the date of the lease, and that the said houses shall be kept in good, tenantable, and sufficient repair, and that the lease shall be void whenever there shall be a less number of dwelling-houses than one of the value aforesaid to each one-half acre of ground kept in such repair as aforesaid standing upon the ground so leased."

Section 24 of the Rutherfurd Act (11 and 12 Vict. c. 36) provided that notwithstanding any prohibitory or irritant clauses contained in a tailzie dated prior to 1st August 1848, it should be lawful for an heir of entail in possession, upon notice to the

next heir, with the approbation of the Court, to grant feus or long leases of part of the entailed estate; "provided always, that it shall not be lawful for such heir to take any grassum or fine or valuable consideration other than the tack-duty or rent for granting any such feu or lease." . . .

On 23rd May 1890 the Lord Ordinary (TRAYNER) pronounced this interlocutor:—"Finds that the defender John Guthrie Lornie is bound to implement and fulfil his part of the minute of agreement mentioned on record, and that by accepting from the pursuer Frederick Walter Carter a valid disposition containing all usual and necessary clauses of the subjects described in the conclusions of the summons at the instance of the said pursuer against the said defender; the said disposition to be adjusted (if necessary) at the sight of Mr H. B. Dewar, S.S.C., and by making payment to the pursuer of the sum of £2000 sterling, with interest thereon from 11th November 1888 till this date at the bank rates current during that period on deposit accounts, and at the rate of 5 per cent. from this date till paid, and decerns, &c.

"*Opinion.*—The leading question is, whether the defender Mr Lornie is bound to implement a contract or agreement entered into between him and the pursuer Mr Carter on the 22nd March 1888, the terms of which are quoted on record? By that contract or agreement the defender agreed to purchase from the pursuer two factories situated in Sinclairtown, with the engines and machinery therein, at a certain price payable at certain specified dates. It was, *inter alia*, a condition of the agreement that the defender should accept 'the title to the said subjects as it at present stands, and subject to all exceptions of any nature.' The defender refuses to implement the contract on various grounds. He maintains (1) that while the title to the 'old factory' is unobjectionable, the title to the 'new factory' offered to him originally (that is, the title to the new factory as it stood at the date of the contract) is null; that the title now offered to him is also null, or at all events defective; that even if the title now offered is held to be a good title he is not bound to accept it, as it has not been timeously offered; and that if he is not bound to implement the contract as regards the 'new factory,' he is not bound to implement any part of it, as the contract was one and inseparable for the purchase of the two factories.

"This latter proposition I am prepared to adopt, and I think it was not seriously contested by the pursuer. The main question therefore regards the title to the new factory offered to the defender.

"The title to that factory at the date of the contract in question consisted of a long lease granted under the provisions of the Montgomery Act by the Earl of Rosslyn to Speedie & Sons, dated 12th and 20th January 1874. The lease itself is conform to the statutory provisions, and no objection is stated against its validity. It provides that the tenant shall be bound, within three years of their term of entry (declared to be the term of Martinmas 1871), 'to build a dwelling-house or houses of stone, and slated, of the value of at least £50,' &c. In fact no dwelling-house was ever erected on the ground, although a spinning factory of very much greater value than £50 was, and the defender maintains that the fact that no 'dwelling-house' was erected on the ground nullifies the lease under the express provision of the 5th section of the Montgomery Act. The pursuer's answer to this contention is that the Montgomery Act was an enabling Act, and is to be liberally construed, and that looking to the purpose for which the Act was passed (as expressed in section 4), the erection of a factory may be regarded as compliance with the requirements of the statute as one of the things which might conduce to the formation of a 'village.' In support of this view I was referred to the opinion of Lord Kinloch in *Miller* v. *Carrick*, 5 Macph. 718. With the greatest deference to that opinion, I am unable to hold that the building of a factory is a compliance with the statutory requirement, which in definite and precise terms exacts the erection of a dwelling-house. No doubt the existence of a factory might lead to the construction of dwelling-houses, and the consequent formation of a village, and the erection of factories is not forbidden. But what the statute requires as a condition of the validity of a lease granted under its provisions is the erection of a dwelling-house, and that has not been complied with. The statutory nullity has therefore, in my opinion, been incurred; by no liberality of construction can I read 'factory' or 'spinning mill' for 'dwelling-house.' It follows from what I have said that the defender was not bound to accept such a title to the 'new factory.' The clause in his contract binding him to accept the pursuer's title as it stood subject to all exceptions does not affect the defender's right to reject the title offered to him. That clause merely binds the defender to accept a title, defective it may be, and as it stands not marketable, but a title which can be made good. It does not bind him to accept what is not a title at all. The pursuer, however, does not now insist on the defender accepting the title as it originally stood. He has secured at his own expense a title to the subject sold from the Earl of Rosslyn, which appears to me to be open to no objection, and this he offers to the defender. That title, as a valid title to the new factory, I think the defender is now bound to accept. I repel the defender's plea that he is not bound to accept that title because not timeously offered. That plea was only put upon record after the new title had been tendered to the defender. But he had been in actual possession of the factory and its machinery from the date of entry stipulated in his contract, and had treated the machinery therein as his own after he knew of the objection to the original title. No one has ever interfered with his possession or challenged his title.

"This case I regard as one not only distinguishable from but in contrast to the case of *Kelman*, 5 R. 816, to which I was

referred by the defender. The views expressed by Lord Gifford in that case regarding the right in the general case to rescind a bargain where a title has not been timeously offered are, I think, applicable to this case." . . .

The defender reclaimed, and argued—The titles tendered for the new factory were invalid, and were not such as the defender was bound to accept under his agreement with the pursuer. Clause 3 of the agreement had reference to the expense of curing the defects in a title which could be made good, and did not bind the defender to accept what was no title at all—*Carruthers* v. *Stott*, May 26, 1825, 4 S. 34. The lease first tendered for the new factory—the Montgomery lease—was clearly invalid, as no dwelling-house had been erected in terms of the lease, and as required by the Act 10 Geo. III. c. 51, sec. 5. The second lease offered was also invalid under the Entail Acts, as it was granted in part for a consideration other than rent. The tenant's goods could not be distrained for non-payment of the sum due by the Insurance Company under their bond of annuity—Rutherfurd Act (11 and 12 Vict. c. 36), sec. 24. The agreement was not separable into two contracts, but was an agreement for sale of both factories. The defender was therefore quite entitled to withhold the price of the old factory, and decline to accept a disposition of that factory on the ground that he was not offered a valid title to the new factory, and he had done nothing to forfeit that right. He should accordingly be assoilzied.

Argued for the pursuer and respondent—The agreement, it was admitted, was not separable into two contracts, but the defender was bound by its terms to accept one or other of the titles tendered to him for the new factory—*Waddell* v. *Pollock*, June 19, 1828, 6 S. 999; *Rowands* v. *Cochrane*, November 24, 1769, M. 14,178. The validity of the titles offered was not open to serious objection. As to the Montgomery lease, the stipulation contained therein for the erection of dwelling-house and the terms of the Act had been substantially complied with by the erection of the factory, and the lease was quite a good title to the new factory—*Stewart* v. *Murdoch*, January 27, 1882, 9 R. 458; *Miller* v. *Carrick*, March 29, 1867, 5 Macph. 715, June 15, 1868, 6 Macph. (H.L) 101. With regard to the second lease, it was not invalid under sec. 24 of the Rutherfurd Act. What that clause struck at was the taking by an heir of entail of a grassum in place of rent, or considerations *ejusdem generis*, which would defeat the rights of succeeding heirs of entail. The annuity payable by the insurance company was not a consideration of that kind. It was only payable to heirs of entail, and the bond of annuity, which was a perfectly safe and good bond, could only be discharged by the heirs of entail as a body. That lease also had been granted under the authority of the Court, and the interlocutor approving of it had become final. If, therefore, the defender wished to object to the validity of the lease he must first bring a reduction of that interlocutor—Act 16 and 17 Vict. c. 94, sec. 24. Further, the defender was barred from now objecting to the title offered him, as his actings amounted to an acceptance of that title, for he had entered into possession of the old factory, and removed part of the machinery in the knowledge that the title to the new factory was open to question.

At advising—

Lord Adam—This action is brought by Mr Carter, the judicial factor on the sequestrated estates of Robert Speedie & Sons, to have Mr Lornie, the defender, decerned and ordained to implement and fulfil his part of a certain minute of agreement of sale of two power-loom factories belonging to the first party, as judicial factor foresaid, with the whole machinery therein, entered into between the defender and pursuer of date 22nd and 23rd March 1888. The answer to the pursuer's claim made by the defender is, that he is not bound to implement his part of the agreement because the pursuer cannot give him full implement of his part.

By the agreement in question Mr Carter, the pursuer, agreed to sell, and Mr Lornie, the defender, to purchase, two large power-loom factories in Sinclairtown, with the steam-engines and machinery therein, on the following terms—The price was to be £2000 for each factory, and the machinery therein, the price of the new factory being payable within six weeks from the date of the agreement, and the price of the old factory at Martinmas 1888. The third clause of the agreement contains a condition of which we have heard a good deal. It is in these terms—"*Third.* The second party shall accept the title to the said subjects as it at present stands, and subject to all exceptions of any nature, and the first party shall not be bound to grant warrandice except from his own proper facts and deeds only." Now, it is to be observed that it is not disputed, and could not be I suppose, that the purchase of the two factories is all one contract, the price being £4000. Not long after the date of the agreement the defender paid £2000 as the price of the new factory, and got possession of both factories, and what is now sought as the fulfilment of the agreement between the parties is that the defenders should pay £2000 for the old factory and accept a disposition of the old factory. The defender, however, although he has no objection to the title to the old factory, answers, and rightly in my opinion, that the contract is one contract for the sale of both the factories, and that the pursuer cannot give him a good title—that is, a title he is bound to accept—to the new factory. The question whether the pursuer is entitled to insist on the agreement being implemented turns on whether the pursuer is or is not in a position to give the defender a title which he is bound to accept.

The pursuer puts his case in two ways. He says, in the first place—"I offered you,

and still offer you, an existing lease, which is a good lease, and constitutes a good title to the new factory;" and as an alternative the pursuer offers the defender a second lease, which he says is a good title to the subjects, at least in this sense, that it is a title which the defender is bound to accept. The question whether the leases tendered are or are not titles of that kind depends on the construction of the third head of the agreement. The pursuer contends, having regard to that clause, that they are, and the defender that they are not.

The clause is not of an unfamiliar kind, and I have always understood that such clauses applied to and covered defects in the progress of titles or other defects of that kind which could be remedied, but that it did not apply where it could be shown that no good title could be given. I think the meaning of such a clause is, as Lord Kinnear put it in the course of the discussion, that the purchaser is bound to take a marketable title and nothing else.

The question then comes to be, whether the leases in this case are such titles as the purchaser is bound to accept? The first lease, which was originally tendered to the defender, bears to be entered into between the Earl of Rosslyn and the trustees of John Speedie, and is dated in January 1874. It is granted by the Earl of Rosslyn as an heir of entail, and though on the face of the lease there is no reference to the Montgomery Act, it is admitted that only under that Act could such a lease have been granted. It contains consequently in terms of that Act this stipulation—"Declaring that the said James Speedie, Thomas Speedie, and John Speedie, as trustees foresaid, and the said firm of Robert Speedie & Sons, shall be bound, within three years from the said term of entry . . . to build a dwelling-house or houses of stone, and slated, of the value of at least £50." Now, it is admitted that the building erected is and always has been a factory, and that no dwelling-house has been erected, and therefore the objection to the lease is, that in terms of the Act it is null and void. I do not know that we are bound in this case to decide whether it is an absolutely bad title as regards a question with an heir of entail. It is enough to say that having on its face so patent an objection it is not a marketable title, or such a title as a purchaser is bound to take.

The question under the second lease is different. It is rather a curious document. As the reporter says in his report to the Lord Ordinary, it is a novel kind of lease. The Earl of Rosslyn agrees to accept an annual payment of £36, 16s. in respect of the lease, but that consideration is made up in a curious way. In addition to the rent of £26, 16s. stipulated for from the tenant, the lease narrates that the pursuer has purchased from the North British and Mercantile Insurance Company an annuity of £10, payable to the Earl of Rosslyn and his successors in the entail for the period of the lease, and that he has handed over to the Earl the bond under which the annuity is payable, in pursuance of the arrangement under which the lease is granted. These two sums of £26, 16s. and £10, it is said, "together make up the yearly sum of £36, 16s., being the whole amount of the annual rent or tack-duty for the said subjects, as stipulated and arranged between the parties hereto, and set forth in the petition before mentioned." Then follows a clause declaring, "that if at any time the tenants shall allow two years' payment of the before-mentioned yearly rent or tack-duty of £26, 16s. to run on into the third unpaid, they shall *ipso facto* lose and forfeit this tack."

It is said that that is so clearly a valid lease that the defender is bound to take it. It is certainly novel to make part of the rent payable in the form of an annuity by an insurance company. Suppose, improbable as it may appear, that the North British and Mercantile Insurance Company failed, what would be the position of an heir of entail under the lease? He could recover £26, 16s., and that only from the tenant. How could anyone maintain that in that case the lease was not to the prejudice of the heir of entail and reducible? It is in my opinion impossible to make an obligation by an insurance company, or other obligation of that kind, part of the consideration for a lease. If such an obligation was to be accepted, why not a guarantee by a private individual? In my view the rent of land is payable out of the fruits of the land, and on that ground it appears to me that this lease is not such a title as the purchaser is bound to accept, because it discloses on its face that it is not marketable.

The pursuer then being, in my opinion, not able to implement his part of the agreement by tendering to the defender a marketable title, that would be an end of the case were it not that the pursuer maintains alternatively that the defender is barred by his conduct and actings from insisting in any such plea as that the title tendered him is not marketable. As I understand it, the ground of the contention is that the defender knew that the first lease was bad, and that notwithstanding this knowledge he entered into possession of the subjects. I am not able to follow that argument. So far as I can see, the defender took up the position that the contract entitled him to have a valid title, and that he entered into possession under the agreement for such a title, and was quite entitled to act as owner of the property purchased by him. I do not think it is proved that he knew the lease to be a bad lease, and indeed the pursuer does not yet admit that to be the case. I cannot see anything in the defender's actings which disentitles him to stand on his right to have a good marketable title given him, and I am therefore of opinion that the interlocutor of the Lord Ordinary must be recalled.

Lord M'Laren concurred.

Lord Kinnear—I agree entirely with the opinion of Lord Adam, and should only like to add—what I presume his Lordship will have no difficulty in accepting—that

although the title tendered to the defender was not marketable, he would be bound to accept it if it could be made marketable by some expenditure which he could incur, and that by his acceptance of the stipulation in the third clause of the agreement. But the objection he states is not one that could be amended by anything he could do, or apparently by anything the pursuer could do either.

LORD ADAM—I quite agree with the observation made by Lord Kinnear, that the defender would have been bound to accept the title if it could have been made marketable by some expenditure on his part. I thought that I had indicated that in what I said as to defects in the progress of titles, and other defects of a similar kind which can be remedied.

LORD PRESIDENT—I am of the same opinion as Lord Adam, but I also concur with the observations made by Lord Kinnear. If the objection to the title was bad as it stands, and if it were capable of being made a good title, the dispute would then resolve itself into the question, who was to bear the expense of making the title good? and that would depend on the terms of the agreement. I agree that if the title was in the position that it could be made good, there would be strong ground for the contention that the defender should bear the expense of making it good. But the case is not of that kind.

I would add in conclusion that the only difference of opinion between the Lord Ordinary and ourselves is as regards the second lease tendered to the defender, because the Lord Ordinary is clearly of opinion that the first lease, granted under the Montgomery Act, is not a good title. The part of his opinion to which we take exception is the following—"The pursuer, however, does not now insist on the defender accepting the title as it originally stood. He has procured at his own expense a new lease from the Earl of Rosslyn which appears to me to be open to no objection, and this he offers to the defender. That title, as a valid title to the new factory, I think, the defender is now bound to accept." That is really the only point of difference between the Lord Ordinary and ourselves, and as regards that point I entirely agree with Lord Adam.

After the Court had advised the case, counsel for the pursuer stated that Lord Rosslyn, who had granted the two leases which had been the subject of discussion, had died, and that his successor, having been born since 1st August 1848, could disentail, sell, or lease the entailed estate without consents, and the pursuer had reason to believe that the present Lord Rosslyn would grant him a lease of the new factory for the unexpired portion of the former lease, in which case he would be in a position to offer the defender a title which would be beyond all challenge.

The Court recalled the interlocutor of the Lord Ordinary, and appointed parties to be further heard.

On 11th December counsel for the pursuer stated that a letter had been received from Lord Rosslyn intimating his willingness to grant a lease of the new factory for the unexpired portion of the previous lease, and to apply to the Court for that purpose, and that the pursuer undertook to obtain such a lease, to be adjusted at the sight of the Court, and to tender it to the defender in fulfilment of the agreement.

It was then agreed that the discussion should proceed on the footing that there was now tendered to the defender a title which was open to no objection, the question for the consideration of the Court being whether the defender was now bound to accept it as a fulfilment of the pursuer's obligation under the agreement?

Argued for the defender—The tender of this new title was too late (1) as a matter of process, and (2) as a matter of contract—(1) When the record was closed the pursuer took his stand on the view that he had implemented his part of the contract by tendering the defender the Montgomery lease as a title to the new factory. He subsequently amended his case, and offered the second lease as an alternative title, and in the action as so amended judgment had been given both in the Outer and Inner House. It was therefore too late for the pursuer to present a new case by offering the defender a third lease of a totally different character from those previously tendered—*Whitworth Brothers* v. *Shepperd*, December 2, 1884, 12 R. 204; *Stewart* v. *Jelot*, July 19, 1871, 9 Macph. 1057; *Mackenzie* v. *Munro*, March 17, 1869, 7 Macph. 676. (2) If the defender had had no possession of the subjects he would certainly have been entitled to refuse the title now tendered as a fulfilment of the contract—*Hunter* v. *Carswell*, January 17, 1822, 1 S. 271; *Tilley* v. *Thomas*, November 11, 1867, 3 Chan. App. 61; *Kelman* v. *Barr's Trustee*, May 21, 1878, 5 R. 816. The defender's possession of the subjects had been unfruitful, and did not make his position different from what it would have been if he had had no possession at all.

Argued for the pursuer—The defender had got possession of the factories at the stipulated dates, and had removed all the looms from the new factory, and a number from the old factory, to stock another mill belonging to him. The machinery being almost as valuable as the heritable part of the subjects sold, it was absurd to say that his possession had been unfruitful. In the circumstances the tender now made was not too late either as a matter of process or of contract, and the defender should not be allowed to repudiate his contract—*Dick* v. *Cuthbertson*, November 30, 1830, 9 S. 93; *Carruthers* v. *Stott*, May 26, 1825, 4 S. 35; *Fleming* v. *Hazley's Trustees*, June 6, 1823, 2 S. 374; *Raeburn* v. *Baird*, July 5, 1832, 10 S. 761.

At advising—

LORD PRESIDENT—According to the view which I take of this case, it can be disposed of on a very simple ground. Referring

back to what was decided in November last, it appears to me that the important fact upon which everything hinges here is the fact that the purchaser of the new factory, which was a leasehold subject, took possession upon his title as purchaser, and upon no other title. The possession taken embraced not only a heritable subject but a great deal of machinery. That machinery the defender has proceeded to dispose of or use for his own purposes as the proprietor thereof. That being so, it appears to me that the defender's mouth is entirely shut against maintaining the plea that this bargain of sale has come to an end through lapse of time or through failure on either side to fulfil the contract, because the contract has been to a certain extent fulfilled and taken advantage of by himself. The parties cannot be restored against what has been done, because the possession taken by the defender has innovated the whole matter, and converted the machinery in the factory into machinery for his own factory at Pathhead. I can therefore pay no attention to the plea that this contract may now be regarded as having come to an end. Now, that being the state of matters, it seems to follow almost of necessity that the bargain being still an undissolved bargain, if it be capable of being carried out must be carried out, and the defender cannot refuse to do so. He is now offered what appears and what we assume at present to be a good title to the new factory premises, and he is bound to take that title.

LORD ADAM—The pursuer now tenders, in order to get implement of his contract with the defender, a lease which we must assume for the purposes of this argument to be a good lease. The answer made by the defender is that this lease is tendered too late, for two reasons—in the first place, in respect of the period of the process at which the tender is made, and in the second place, in respect of certain facts and circumstances apart from the matter of process.

With regard to the first of these objections, I think Mr Johnston advanced a proposition for which there is no authority at all, because his contention practically came to this, that wherever a party selling a property produces a doubtful title he is not entitled to have the opinion of the Court on the question whether it is a marketable title or not, except on the penalty, if the opinion of the Court is against him on that matter, of losing all right to insist on implement of his contract. I think there is no foundation for such a proposition either in authority or practice. So far as I know the practice of the Court, it is the other way, for the necessity of tendering a new title only arises when the Court has pronounced an opinion adverse to the quality of the title first offered. The objection to a title may be on various grounds. It may be stated that there are objectionable clauses in the title, or that the progress is defective, or that the title is not a good title at all. But as soon as the pursuer can cure the defect in the progress of titles, if that is the defect complained of, or can produce a good title in place of a defective title, he is entitled to offer that title to the defender and insist on implement of the contract of sale.

Now, what is the difference between such a case and the present? The only difference is that the pursuer in this case could not till recently cure the defect in the title he offered to the defender, but to my mind that makes no difference, because he now makes a tender of a good title, and it does not matter now whether six months ago it was not in his power to make such a tender. That disposes of the defender's objection on the matter of process.

The next objection is that the new lease is tendered too late, because two years and a-half have elapsed since the date of the agreement between the parties. I think there might be a great deal in that objection if matters had remained entire, and the defender had not entered into possession of the subjects when he was entitled to under the agreement, as was stated to be the case in some of the authorities quoted to us, or had even declined to enter into possession on the ground that the title tendered to him was defective. He might or might not in these circumstances have had a good plea for repudiating the contract, but there is no place for such a plea here, because the pursuer put the defender in possession of the subjects even before the date at which he was entitled to possession under the agreement, and the defender has since continued in possession of them, and has intromitted with and carried away a great part of the moveable subjects, which are of equal value to the heritable subjects, to another place. That being the state of the case, the defender now comes forward and says—"I admit that the pursuer now offers me a good title, and that I have had possession, but the offer is made too late." That is a contention to which we cannot listen for a moment, and I think therefore that the pursuer's tender of a new lease is not too late on either of the grounds maintained by the defender.

LORD M'LAREN—The argument for the defender was maintained under two branches—a question of process and a question of contract. I confess I have not been able to see any clear distinction between these two grounds. It seems to me that the whole argument resolves into this, that the purchaser claims to be entitled to be freed from his contract because he says that the fulfilment of the contract on the part of the seller has come too late. There are cases, no doubt, where one party to a contract of sale may resile. The strongest case probably is that of disconformity between the subject offered and the subject professed to be sold. Even there the rule is not absolute, because while in the case of sales of goods we generally hold that any disconformity entitles the purchaser to reject the goods, that is not so in contracts relating to buildings or machinery. It is

then a question of degree, and for slight disconformity we do not hold that the purchaser may put an end to the contract. Then there is the objection that possession has not been given in due time, and looking to the cases cited, I think that wherever it can be shown that immediate possession was of the essence of the contract, we should apply the same rule to sales of heritage as we do in the case of sales of moveables deliverable at noted times. On the other hand, if the purchase is merely for investment, and there is nothing to suggest that in the intention of either of the parties time was of any great moment, I should not hold that delay in giving possession necessarily infers a discharge or rescission of the contract. But certainly the weakest of all cases for rescission is the case here offered, where the seller is in a position to give immediate possession—where possession has in fact been given—where the only default which has arisen is in the title originally offered, and the seller has been doing his best to cure the infirmity in the title to the property. Mr Johnston did not show that the purchaser had suffered any damage except the cost of investigating the title in the courts of law, and for this he is no doubt entitled to be indemnified. I therefore agree with your Lordship that there is no substance in the defence now stated, and that if a good title is now offered by the seller, the purchaser may be compelled to take it and to pay the price.

LORD KINNEAR concurred.

The Court repelled the fifth plea-in-law for the defender, allowed the minute for the pursuer to be received, and continued the cause.

Counsel for the Pursuer—Jameson—G. W. Burnet. Agents—Mitchell & Baxter, W.S.

Counsel for the Defender—H. Johnston—Campbell. Agents—Watt & Anderson, S.S.C.

Tuesday, December 16.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

HAY *v.* STEWART AND OTHERS.

Succession — Legitim — Deathbed — Cash Payment—Act 34 *and* 35 *Vict. c.* 81.

The Act 34 and 35 Vict. c. 81, on the preamble that "it is expedient to abolish all challenges and reductions in Scotland *ex capite lecti*," enacts "That no deed, instrument, or writing made by any person who shall die after the passing of this Act shall be liable to challenge or reduction *ex capite lecti*."

A father granted a deed to take effect during his lifetime, by which he conveyed to certain trustees, for behoof of three of his children, a sum of £3200 in cash, besides some heritable bonds. A cheque for the sum of £3200 was handed to the trustees at the same time as the deed was delivered.

A child not mentioned in the deed brought an action against the trustees for payment of legitim out of the £3200, on the plea that the sum had been paid to them by her father when he was on deathbed. *Held* that the payment of the money was part of the same transaction as the granting of the deed, and that the deed not being open to challenge *ex capite lecti*, the pursuer's plea failed.

Question—Whether the Act 34 and 35 Vict. c. 81, would apply to cash payments made on deathbed?

Upon 28th April 1884 James Coutts executed a trust-deed of provision to take effect during his lifetime, whereby he conveyed and made over to John Stewart, James Macnaughton, and Andrew Wallace, as trustees for behoof of his three youngest children, "the sum of £6000 (three thousand two hundred pounds sterling of which I have handed to them in cash, and the remainder being contained in five several bonds and dispositions in security which I have assigned to them by separate assignations of the said bonds and dispositions in security executed by me of even date herewith).

The deed was delivered immediately after execution, and the funds thereby settled were paid or conveyed over at the same time, £3200 by cheque on the Royal Bank, payable to Andrew Wallace or bearer, and £2800 in heritable bonds.

James Coutts died on 2nd June 1884 leaving a trust-disposition and settlement dated 29th April 1884 in favour of the same trustees, by which he disposed of the *universitas* of his estate not otherwise disposed of.

The present action was brought by Jane Amelia Coutts or Hay, eldest of the ten children of the deceased James Coutts who survived him, against John Stewart, James Macnaughton, and Andrew Wallace, as trustees under the two deeds above mentioned, to have it declared (1) that the pursuer was entitled to one-tenth of one-half of the moveable estate left by the deceased James Coutts, her father, in name of legitim; (2) that the sum of £3200 was paid and transferred to the defenders, as trustees under the trust-deed of provision by James Coutts, without any just or onerous cause while he was on deathbed within sixty days of his death, and while labouring under the disease of which he died, to the prejudice of the pursuer; and (3) that she was entitled to one-tenth of one-half of said sum as part of her legitim payable therefrom. There were also conclusions for count, reckoning, and payment.

The defenders pleaded, *inter alia*—"(5) Said deed is not subject to challenge on the head of deathbed, in respect that the exception of deathbed was abolished by the Statute 34 and 35 Vict. c. 81."

By the said Act it was provided as follows—"Whereas it is expedient to abolish