Tuesday, December 12.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

GILFILLAN *v.* CADELL & GRANT.

Contract — Breach of Contract — Sale of Heritage—Refusal to Supply Sufficient Title—Transaction Cancelled.

After a sale of a ground-annual had been arranged the seller found difficulty in supplying a valid title. A lengthy correspondence took place in which the purchasers expressed themselves willing to allow reasonable time, but finally the seller offered a title, afterwards admitted to be insufficient, saying he could do no more, and threatening the purchasers with an action if they declined to accept it. The purchasers thereupon cancelled the transaction.

In an action brought by the seller against the purchasers to have the contract implemented, he produced a valid title, which it had not been previously in his power to furnish.

Held (*rev.* Lord Wellwood) that the defenders were entitled to cancel the transaction, and accordingly fell to be *assoilzied*, the pursuer having stated an ultimatum which they were not bound to accept.

Thomas Gilfillan, writer, Glasgow, the proprietor of a ground-annual of £40, payable from a plot of ground in Greenock, offered it for sale in March 1893.

On 27th March 1893 Cadell & Grant, W.S., Edinburgh, offered £810 for it, "subject to the title being in order and the property answering the description in the valuation."

On examining the title the purchasers discovered two bonds in favour of a Mr Henry affecting the property, dated respectively 1819 and 1822, which were undischarged, and they insisted upon the ground-annual being cleared of these burdens. The seller explained that it was *per incuriam* that these burdens had not been removed, and that they did not now affect the property, having long ago prescribed, and enclosed a letter from the law-agent of the late Mr Henry's trustees to that effect.

Upon 3rd May 1893 the purchasers wrote to the agents for the seller—"We have again considered the sufficiency of the title, and the result is that we are confirmed in the position we have taken up, that the title is not one which we are bound to take unless the record is purged from the encumbrances affecting it. Our object in writing this letter, which we mean to found on, is to state clearly, once and for all, that we are willing to implement our contract if the title to the property is made good, and that if you agree to clear the record, we are further willing to allow you a reasonable time in which to do so. Though it is not our business to suggest how this might be done, we may state that we should be satisfied if you obtained and put on record a discharge by the late Mr Henry's representatives, they, of course, first making up a title to the bonds. Failing this we should be satisfied with the recording of a decree of declarator of payment and extinction, such as was suggested in various reported cases. Or we are willing to consider any other method you can suggest which will enter the record, and make us safe in questions with future purchasers. . . . We shall be glad to hear whether you are prepared to remedy the title in the respects to which we have called your attention, as failing your undertaking to do so within three days we must declare definitely that negotiations are at an end, and we shall find another investment for the money we had in view."

The agents replied on 5th May—"We duly received your letter of the 3rd inst. It is quite impossible for us to let you have an answer in the course of 'three days.' We shall endeavour to write you early next week."

The purchasers on 6th May wrote—"Unless we have a satisfactory obligation to rectify the points, which we hold are wrong, by the morning post of Wednesday 10th curt., the transaction is off."

The Edinburgh agents for the seller on 9th May replied—"Referring to your letters to Messrs Brown & Gilfillan of 3rd and 6th inst., they are not prepared to either give a discharge by Mr Henry's representatives or obtain a decree of declarator of payment and extinction. They are, however, prepared to give a holograph letter by Mr Gardiner, the agent for Mr Henry's reprs., on the same lines as his letter to Mr R. T. Neilson of 15th July last. Your letter might, if you so desire, go somewhat more fully into the details of the matter than Mr Neilson's did, but beyond that our correspondents are not prepared to go. Unless we hear from you agreeing to what we now propose between this and Thursday morning our instructions are to go on with the action of implement."

The purchasers on 10th May wrote to the seller—"We have to-day heard from Messrs Clark & Macdonald that you are not prepared either to give a discharge by Mr Henry's representatives or to obtain a decree of declarator of payment and extinction, and we regret that we cannot see our way to accept a holograph letter by Mr Gardiner, the agent for Mr Henry's representatives, such as you mention, as we do not consider that it would be sufficient evidence, either now or in the future, of the extinction of the burdens in question. We have accordingly, in terms of our letter of 3rd inst., no recourse but to cancel the transaction, and we return the whole titles which we received."

On May 11th they wrote a final letter, pointing out that there was a discrepancy between the valuation as stated and as appearing on the valuation roll of Greenock.

On 16th May 1893 Thomas Gilfillan raised an action against Cadell & Grant to have them ordained to implement the contract of sale, and for payment of damages upon their failing to do so.

He pleaded—"(1) A valid and effectual

contract of sale having been constituted as condescended on, and the defenders having refused to fulfil their part thereof, the pursuer is entitled to decree of implement as concluded for with expenses."

The defenders pleaded—"(1) No title to sue. (2) The pursuer having refused to purge the record as stated, and the defenders having thereupon rescinded the contract, the defenders should be assoilzied. (3) The pursuer having failed to produce a good title and to purge the record from encumbrances affecting it, the defenders are (*a*) at common law and (*b*) in terms of their offer entitled to resile from the contract sued on. (4) The description of the property in question supplied to and relied on by the defenders as regards rental condition and value being material to the contract between pursuer and defenders, and being false and essentially misleading, at all events as applicable to the property when the defenders' offer was made, the defenders are (*a*) at common law and (*b*) in terms of their offer entitled to withdraw from the contract. (5) The defenders having been induced to make the offer in question by the fraudulent misrepresentations of the pursuer, are entitled to rescind the contract sued on."

After the summons was signeted, and before the record was closed, the pursuer having discovered the existence of the late trustee of Mr Henry, brought an action of declarator of payment and extinction of the said two bonds against him, and obtained decree therein upon 30th June 1893, an extract of which was produced.

The Lord Ordinary (WELLWOOD) upon 7th November 1893 repelled the 1st, 2nd, 3rd, and 5th pleas for the defenders, and before answer allowed the defenders a proof of their averments in support of their 4th plea.

"*Opinion.*—The first plea-in-law for the defenders has been obviated. The second and third pleas-in-law for the defenders are based on the ground that the defenders were entitled to rescind the contract, because before this action was raised the pursuer refused to purge the record of two bonds for £200 and £150 respectively granted in 1819 and 1822. The position at first taken up by the pursuer in regard to these bonds was that they were extinguished by a later bond for £550 granted in 1825, that no interest had been paid upon them since that time, and that they were prescribed. The pursuer was in this difficulty, that he was unable to discover the representatives of a Mr Henry, who was once in right of the bonds, and so was unable to obtain a decree of declarator of payment and extinction. Relying on the soundness of his view as to the extinction of the bond, he raised the present action of implement, but shortly after it was raised he discovered the representatives of Mr Henry, and obtained decree of declarator of payment and extinction of the said two bonds, an extract of which is now produced. The decree was dated 30th June 1893, and I understand it is admitted that it will effectually clear the record.

"I am of opinion that the defenders are not entitled to resile simply because the pursuer took up what I assume to be an erroneous position at the outset. He lost no time in presenting the matter for determination by the Court, and finding himself in a position to remove all difficulty, at once tendered the defenders the decree of declarator of payment and extinction, and this within four months of the date of the contract.

"If time had been of the essence of the contract the defenders might have been entitled to resile if a clear title had not been tendered within the time specified, but here no time was stipulated for, and the transaction was for investment only. I am therefore of opinion that this is not a ground upon which the defenders are entitled to resile from the contract. The cases of *Raeburn* v. *Baird*, July 5, 1832, 10 S. 761, *per* Lord Balgay, 765; and *Carter* v. *Lornie*, December 20, 1890, 18 R. 353, *per* Lord Adam, 364, and Lord M'Laren, 365, substantiate, I think, the view which I take of this case. It is true that in the latter case there was an element (which is not here) upon which the Lord President proceeded to a certain extent, namely, that possession of the subjects had been taken by the purchaser, but this was not I think essential to the judgment, as appears from the opinions of Lord Adam and Lord M'Laren."

The defenders reclaimed, and argued—The pursuer's actings made it immaterial whether time was or was not of the essence of the contract, for he had taken up a final, definite, and indefensible position upon 9th May when he had refused to give any title other than that one which the defenders were plainly not bound to accept. They had then declared the contract at an end, and it was too late afterwards for the pursuer to change his mind and offer a valid title.

The respondent argued—In the present case time was not of the essence of the bargain. Different considerations applied where, as in the case of a lease or purchase of a house for personal occupation, with entry at a definite date, time was of the essence of the bargain. The respondent was precisely in the same position as the pursuer in *Carter* v. *Lornie*, where "twice our judgment was given on the validity of the title tendered, twice over the pursuer was held in the wrong in insisting upon acceptance of the title which he offered, and even after final judgment was allowed, on an accidental emerging circumstance putting it in his power to do so, to tender what the Court held to be necessary to the validity of his conveyance." The pursuer was exactly *in pari casu*. His agents took up the position on 9th May that they would only do, in the way of completing the title, what it must be admitted was technically insufficient, though technically only, because the bonds which still stood on record were not represented to be practical encumbrances upon the property. But, like Mr Carter in *Carter* v. *Lornie*, they were tendering all at the time

they could offer, and in *bona fide* believed that they were tendering sufficient to satisfy the pursuer's obligation. The pursuer was entitled to have judgment on whether such tender was sufficient or not, and at once raised his action. In place of waiting a judgment, when he found that by an accidental emerging circumstance he was in a position to avoid the necessity of going to judgment, he at once did what Mr Carter was allowed to do after two judgments against him, and within a few weeks of the stipulated date of entry tendered all that even the defenders asked. The defenders were not damnified by the delay. The loss, which was one of interest, fell upon the pursuer. The defenders got their investment and its return from the stipulated day. In these circumstances, the pursuer being entitled to take a judgment on the question at issue, the defenders were not entitled any more than Mr Lornie to cancel the bargain because of these disputes as to title, they not showing that time was of the essence of their bargain. The letter of the pursuer's agent of 9th May was no more an ultimatum justifying rejection and rescinding the contract than the position taken up by any plea as to the title he was bound to give. On the contrary, it was a direct appeal to the Court to decide between the pursuer and defenders.

At advising—

LORD PRESIDENT—In the view which I take of this case the second plea-in-law for the defenders states the legal question which we have to decide.

The contract of sale could have been fulfilled by the tender by the seller within a reasonable time of a good title, the adjustment of a title being often, as we know, a matter of negotiation. The Dean of Faculty admitted that in this contract of sale it did not look as if time were of the essence of the contract, and the seller was entitled to a reasonable allowance of time within which to give a good title. But then the question is, whether a definite and sharp issue having been raised, the pursuer did not by his own choice take up a position which amounts to a definite refusal to implement the contract.

A long correspondence took place between the parties, but comparatively early in that correspondence Messrs Cadell & Grant put their finger on the fact that two bonds on the property were undischarged, and with much pungency drew the attention of the pursuer's agents to their existence. Upon 3rd May they used very definite language. They state clearly, once for all, that they are willing to implement the contract if the title is made good, and further, that if the seller agrees to clear the record they are willing to allow him a reasonable time for doing so. They then go on to say that although it is not their business to suggest how the difficulty might be got over, they would be satisfied with a discharge from the representatives of the holder of the bonds, and they conclude by stating that they will be glad to hear the seller is prepared to remedy the title, but failing an undertaking to do so being given within three days, they declare the negotiations definitely at an end. The pursuer's agents demur to giving an answer within three days but promise to endeavour to write within a week. Next day Cadell & Grant repeat that failing a satisfactory obligation to rectify the title being received in four days "the transaction is off."

I pause here to observe that disclosed on the face of the correspondence is a perfectly definite and intelligible objection to the title, and one thoroughly understood by the seller's agents, who, however, are most reasonably offered time if they will undertake to remove the objection.

Their answer is dated 9th May, and in that letter they say that they are not prepared to give a discharge by Mr Henry's representatives, or obtain a decree of payment and extinction, but that they are prepared to give a holograph letter by the agent of Mr Henry's representatives. They go on to say that unless they hear from the purchaser agreeing to what they propose they will at once raise an action of implement. To that letter the purchasers reply in very definite terms that they cannot see their way to accept what is offered, and that they accordingly cancel the transaction and return the titles.

Following upon that letter there is no offer to re-open the matter, and in these circumstances I must say I think the second plea-in-law for the defenders is made out. It is quite plain that rightly or wrongly the seller's agents decided that they could do no more, and informed the defenders that more was not to be looked for. Issue having been joined by the parties, and the seller's agents having said they were not prepared to do more, the question of whether time was of the essence of the contract or not goes by the board. The question really is, was the position of the seller's agents sound and defensible or not? They thought it was, and accordingly brought this action. They make no suggestion when they come into Court that they will reconsider their position; they wish it declared to have been a proper one. The defenders say they cancelled the contract, and adhere to that position.

Now, Mr Johnston, with deliberation, admitted that he could not ask us to hold that the position taken up by the seller's agents was sound, and virtually conceded that the defenders were right in what they required regarding the title. He only argued that if we thought the production, *post litem motam*, of the decree of declarator of payment and extinction, sufficient to dislodge the defenders from their position of holding the contract to have been broken, we should declare the bargain to be binding on the defenders. But I am of opinion that the defenders were entitled to hold the pursuer's letter of 9th May as an ultimatum, and that they were entitled to intimate, as they did, that the contract having been broken by the pursuer was no longer binding on them.

I think we should recal the Lord Ordi-

nary's interlocutor and assoilzie the defenders.

LORD ADAM—I am of the same opinion. The pursuer and defenders entered into a contract for the purchase of a certain ground annual. When the titles came to be examined an objection appeared on the face of them. It was not incurable, but still it was an objection. Now, parties being willing to complete such a contract may come into Court to have it decided whether the title offered by the seller is a good one or not, with the view of having something further done should it be found insufficient, but that is not the position of parties here. The pursuer, when the objection was pointed out to him, might have come forward and said, "I propose to do so and so, but if the Court find that it is not sufficient, I will do what may be found necessary." The pursuer's position was quite different. He was not in a position to rectify the title, because the heir was amissing. He said what he was prepared to do, and that that was the only thing he would do, and then matters came to an issue. The purchasers pointed out the mistake and what would satisfy them, but they said that failing this being done they would cancel the bargain. This was on 3rd May. The seller's agents replied on 9th May that they would not do what was asked, and that the only thing they would do was to give a letter from the agent of Mr Henry's representatives, but that beyond that they could not go.

The parties accordingly came to an issue upon whether the position taken up by the seller was or was not defensible, and upon nothing else. The correspondence shows that the seller had stated an ultimatum, and I think the purchaser was right in refusing that final offer, and was entitled to resile from the bargain.

LORD KINNEAR—I am of the same opinion. I think that there is no question in this case as to whether time was of the essence of the contract or not, or whether the pursuer had lost his bargain by delay in performance of his part of the contract. That is not the true nature of the question between the parties.

When a contract of purchase and sale is to be carried into effect, if the purchaser objects to the title as defective, and it turns out that although defective it may be made good at some expense of time and money, then it may be that any delay in performing the contract which may be caused by the controversy will not dissolve the contract or deprive the seller of his bargain.

But that is not the nature of the objection. The objection, although it has since turned out to be curable, was not known to the seller to be curable when the time for performance of the contract arrived, and therefore he raised no question as to the expense of making good the title. He intimated to the purchaser in perfectly plain and peremptory language that he proposed to enforce the contract although the title was defective; he intimated that the only thing he would do towards clearing it would be to give the purchaser a letter on certain terms. There can be no question that the title so offered was insufficient. But at the same time it is clear that the position of the seller's agents was not adopted from an unreasonable or erroneous view of their client's obligation, but simply because they could not do more. They did not then know of the existence of the representative of Mr Henry, and accordingly declined to bring an action against him. But then it was candidly admitted by Mr Johnston that he could not maintain that the offer in the seller's letter of 9th May was an offer which the buyer was bound to accept. That being so, there was plain intimation by the seller that he was not ready or able to perform the contract. By his own writing he put himself in breach of his contract, and gave the buyer a right to say, "If that is all you will do, I cannot accept your terms and the contract is off."

I am of opinion that the bargain was at an end, and that it is too late to set up an answer to the purchasers' objection that the seller has now discovered that the defect may be remedied.

LORD M'LAREN was absent.

The Court recalled the Lord Ordinary's interlocutor, sustained the second plea for the defenders, and assoilzied them from the conclusions of the summons.

Counsel for the Pursuer and Respondent—H. Johnston—G. W. Burnet. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders and Reclaimers—Dean of Faculty, Sir Charles Pearson, Q.C.—Constable. Agents—Party.

Tuesday, December 12.

FIRST DIVISION.

[Court of Exchequer.

SCOTTISH INVESTMENT TRUST COMPANY, LIMITED *v.* INLAND REVENUE.

Revenue—Income-Tax—Profits—Capital and Income—Profits on Realisation of Investments applied to Write Down Depreciation in Book Value of Capital.

An investment company, one of whose objects was "to vary the investments of the company," wrote a sum, being "net profits on sales of securities during the year," against depreciation in the book value of their other investments, and claimed that this sum was not liable to assessment for income-tax as being truly capital. They maintained that varying their investments was incidental to but not one of the real objects of the company, and that any profit derived therefrom was not divisible among the shareholders, but