and that therefore it is admissible in evidence.

The genuineness of the writing does not admit of doubt; and I would only say that I am unable to take as charitable a view of Day's denial of his writing as the Sheriff-Substitute does.

The Court recalled the Sheriff's interlocutor of 6th March 1900, and decerned in terms of the Sheriff-Substitute's interlocutor of 11th November 1899.

Counsel for the Appellant—Deas. Agent—Charles George, S.S.C.

Counsel for the Respondent — J. D. Robertson. Agents—Dove, Lockhart, & Smart, S.S.C.

Wednesday, June 6.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

BRUCE *v.* STEWART.

Sale—Sale of Heritage—Title—Objections to Title—Contract of Excambion Entered into by Trustees without Power to Excamb — Trust—Administration—Power to Excamb—Power to Sell Heritage.

The sellers of a heritable property tendered as one of the links in the title a contract of excambion entered into between two sets of trustees. No power to excamb was conferred upon either set of trustees by the deeds under which they acted, and neither had obtained power to excamb from the Court, but both had a power to sell heritage, and the trustees who under the contract had acquired the ground now in question had also power to buy. *Held* that a power to excamb could not be inferred from a power to sell heritage; that the title was not marketable; and that consequently the purchaser was not bound to accept it.

Sale—Sale of Heritage—Title—Objection to Title—Decree of Declarator of Irritancy Obtained in Absence.

The seller of a heritable property tendered as necessary links in the title two decrees of declarator of irritancy and removing pronounced respectively in 1891 and 1893. These decrees had been obtained in absence, and were consequently reducible at any time within twenty years. *Opinions* that the title was not marketable.

This was an action at the instance of John William Bruce, property agent, 161 Hope Street, Glasgow, against Andrew Stewart, writer, 116 West Regent Street, Glasgow, in which the pursuer concluded for decree ordaining the defender to implement his part of a certain missive of sale of two tenements with courts attached and offices thereon, forming Nos. 73 to 83 inclusive of Hopehill Road, Glasgow, or alternatively for payment of damages for breach of contract.

The pursuer averred that by missive of sale dated 14th February 1899 entered into between the pursuer and the defender, the defender agreed to buy and the pursuer agreed to sell the two tenements in question for the sum of £3300, and that although desired and required to implement his part of these missives the defender refused or delayed to do so.

The defender pleaded, *inter alia*—"(2) The pursuer never having tendered a valid marketable title to the subjects, the defender is entitled to absolvitor."

In support of this plea the defender averred that the title submitted to him by the pursuer for examination was radically defective in various respects. In particular, he objected (1) to a certain contract of excambion, under which the pursuer's author acquired 109⅝ square yards of the subjects contained in the missives; (2) to an extract decree of declarator of irritancy and removing part of the title to 839½ square yards of said subjects; and (3) to an extract-decree of declarator of irritancy part of the title to 109⅝ square yards of said subjects.

The objection stated to the contract of excambion, which was dated and recorded in 1894, was that it was entered into between the testamentary trustees of John Anderson Mathieson and the testamentary trustees of Miss Henrietta Scott, and that neither of these sets of trustees had power to excamb conferred upon them by the settlements under which they acted, or had obtained power to excamb from the Court.

The extract-decree first above mentioned was obtained under a contract of ground-annual at the instance of John Anderson Mathieson against Charles Simson Romanes, C.A., Edinburgh, trustee on the sequestrated estates of William Sillars and John Sillars, dated and extracted in December 1891, and recorded in January 1892. The objection to it was based, *inter alia*, upon the facts (1) that service upon the said William Sillars and John Sillars was made edictally, while *ex facie* of the decree itself their addresses were stated to be unknown, with the result that if they were within the jurisdiction of the Court the service was invalid; and (2) that the decree was pronounced in absence, and could be reduced or set aside at any time within twenty years of its date, there having been no appearance entered to defend the action.

The extract-decree second above mentioned was obtained under a contract of ground-annual at the instance of the trustees of Miss Henrietta Scott against Thomas Jackson, C.A., Glasgow, trustee on the sequestrated estates therein mentioned, and was dated May and extracted and recorded June 1893. This decree was objected to, *inter alia*, upon similar grounds to those stated above with regard to the decree first above mentioned.

In the contract of excambion the 109⅝ square yards referred to were disponed by Miss Henrietta Scott's testamentary trustees to John Anderson Mathieson's testamentary trustees. In terms of Miss Scott's settlement her testamentary trustees had

power to sell the heritable property belonging to the estate, and that either by public roup or private bargain. They were not given power to purchase heritable property. In terms of John Anderson Mathieson's settlement his testamentary trustees had power (1) to sell heritable property by private bargain or public roup, and (2) to invest the trust funds in the purchase of heritable property in Great Britain.

The Trusts (Scotland) Act 1867 (30 and 31 Vict. c. 97), sec. 3, enacts as follows:—"It shall be competent to the Court of Session, on the petition of the trustees under any trust-deed, to grant authority to the trustees to do any of the following acts, on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof . . . 1. To sell the trust-estate or any part of it. 2. To grant feus or long leases of the heritable estate or any part of it. 3. To borrow money on the security of the trust-estate or any part of it. 4. To excamb any part of the trust-estate which is heritable." . . .

On 11th January 1900 the Lord Ordinary (KYLLACHY), after hearing counsel in the procedure roll, assoilzied the defender from the conclusions of the action, and found him entitled to expenses.

The pursuer reclaimed, and argued—A power conferred upon trustees to sell heritage included by implication a power to excamb. Excambing was simply selling for land instead of for cash. Trustees who had power to sell were not necessarily restricted to selling for cash. It was true that in the Trusts (Scotland) Act 1867, section 3, power to sell and power to excamb were mentioned separately, but the statute only contemplated the case of trustees who had neither power to sell nor power to excamb. These provisions did not apply to the case of trustees who had power to sell. Mathieson's trustees had power to sell and power to buy. It was clear that they would have been entitled to sell one piece of land and to buy another piece of the same value. That was in substance and effect what they did here. By excambing instead of selling and buying they only adopted a shorthand method of attaining the same result. If this view were sound then the title to the piece of ground now in question was unexceptionable. It was in effect bought by Mathieson's trustees, who had power to buy, from Scott's trustees, who had power sell. No objection could be taken to what was in effect the sale by Mathieson's trustees of the piece of ground conveyed in exchange to Scott's trustees, because Mathieson's trustees had power to sell. The fact that Scott's trustees had no power to buy could not affect the validity of the transaction in so far as Mathieson's trustees' title to the piece of ground now in question was concerned. The objection to the title based upon the alleged invalidity of the contract of excambion was not an objection to the *ex facie* validity of a deed. It proceeded upon the ground that the contract was *ultra vires*. Such an objection should not be sustained where it appeared that the granters could have attained exactly the same result quite competently by transacting in a slightly different form. But even if the title was objectionable upon this ground as it stood, it could be remedied by Scott's trustees granting a disposition as upon a sale for a price and a discharge for the sum stated as such price. (2) As regards the decrees of irritancy all that was possible was done. All persons were personally served whose whereabouts were known. In each case the trustee had been personally served, and service upon the trustee was all that was required. In practice almost all such decrees were obtained in absence, and if the fact that the decree might still be reduced rendered the title unmarketable, then practically every title which contained a decree of declarator of irritancy and removing was bad. If this contention were upheld by the Court doubt would be cast upon a great number of titles in all parts of the country which had been hitherto regarded as perfectly good.

Argued for the defender—The defender was entitled to a marketable title, and the title tendered was not marketable. (1) The excambion was invalid, because neither of the sets of trustees who were parties to it had power to excamb. A power of sale did not include a power to excamb. The Trusts (Scotland) Act 1867, section 3, made a clear distinction between power to sell, power to feu, and power to excamb. It was idle to say that Mathieson's trustees had power to sell and to buy. What took place here was not sale or purchase. The title could not be cured by obtaining deeds designed not to record the real nature of the transaction between the parties, but to conceal it by means of pretended sales and discharges which never in fact took place. Even if the cross sale theory was sound the title was not good, for one of the parties had no power to buy. (2) The decrees of irritancy were essential links in the title, and they were objectionable. Even assuming that there had been sufficient personal service, the decrees being decrees of declarator, and therefore decrees in which a charge was not competent, were reducible at any time within twenty years—a period which had not yet elapsed in either case—Court of Session (Scotland) Act 1868 (31 and 32 Vict. cap. 100), sec. 24. A title which contained such decrees as necessary links in the progress was not marketable.

At advising—

LORD JUSTICE-CLERK — The practical question in this case is, whether the defender, who has agreed to purchase a property from the pursuer, is bound to accept the title tendered to him and to pay the price; or whether he is entitled to resist a decree in respect that the title tendered to him is not a marketable title. There is no reason to suppose that the defender desires to escape from the bargain he has made, but he takes exception to the title offered to him on various grounds. It does not seem to me to be necessary to consider more than two of these, as in my view either of them is sufficient for the defence. The first is that one of the titles produced is a con-

tract of excambion between a Mr Mathieson's trustees and a Miss Scott's trustees. It is objected that the parties to that contract had no power to excamb, and did not obtain any authority from the Court to carry out an excambion. That objection seems to me to be a valid one. A right to sell does not necessarily imply a right to excamb. Here one set of trustees had authority both to sell and to buy heritage, the other set had power to sell only. But neither had the power given to them to excamb, and I am unable to hold that they had any implied power to do so. Sale is for a price. In the case of excambion there is no price, but a barter, which is by no means the same thing. I cannot hold that this objection to the title is unsubstantial, and I think it affords the defender a sufficient ground of objection to the title tendered to him. It may be that the objection might be overcome by some procedure invoking the assistance of the Court, but that cannot be done in this process.

The other objection is to a decree of declarator of irritancy which was obtained under a contract of ground-annual. It is objected to on several grounds, and among others on the ground that there was no personal service on certain of the defenders, of whom it was merely averred that they were believed to be abroad, and that the decree pronounced was a decree in absence only, and therefore open to the rest of the parties against whom the decree in absence was pronounced being reponed against it at any time during the running of the years of prescription. The objections to this branch of the title tendered seem also to be insuperable. It was maintained by the pursuer that in proceeding as they had they had done all that they could. But although this may be so, it is still the case that this blot in the title tendered exists, and if they cannot overcome it they are unable to give the defender that good and marketable title which he has a right to demand before parting with the price agreed on.

I am therefore of opinion that the judgment of the Lord Ordinary is right and ought to be adhered to.

LORD YOUNG—I concur, and have nothing to add except that I think the defender was entitled to get a marketable title, and that I do not think he has got one.

LORD TRAYNER—The defender in this action purchased some property from the pursuer, but he refuses now to carry through the transaction or pay the price on the ground that the title the pursuer offers is open to serious objection, and one which he (the defender) is not bound to accept. It is not disputed by the pursuer that he is bound to give the defender a marketable title, and the question is, whether the title which has been offered is of that character. The pursuer's title to part of the subjects sold to the defender depends upon a contract of excambion entered into between two bodies of testamentary trustees. Neither body had or has any power to excamb conferred upon them by the terms of the settlements under which they were and are respectively acting. But they had both powers of sale conferred on them, and one of them had also power to purchase heritage. In these circumstances it is maintained by the pursuer that the power to excamb is included in, or may be inferred from, the power to sell. The Lord Ordinary, as we were informed, was of opinion that this view maintained by the pursuer is not sound, and accordingly has given judgment for the defender without considering any of the other objections to the title which the defender has stated. I think the Lord Ordinary is right. There is no authority for the proposition that a power to sell includes a power to excamb. The things are different—the one is sale and the other is barter. Now, a truster may very well leave it in the discretion of his trustees to sell heritage belonging to the trust estate for a price, and not entrust them with a power to exchange the trust lands for other lands. The power to sell is generally conferred in order to facilitate the realisation and distribution of the trust estate—an excambion has not that tendency. On the contrary, an excambion is more likely to obstruct the distribution of the trust estate because of the real warrandice with which it burdens the exchanged properties—a burden which, during the prescriptive period, a purchaser would probably not willingly encounter. That a power to excamb cannot be inferred from a power to sell seems to me the necessary conclusion to be drawn from the terms of the Trust Act 1867. By that Act (section 3) the Court is empowered on the application of trustees to do certain things (for which no power is given by the trust-deed) provided they are expedient for the execution of the trust, and are not inconsistent with its intention. Among the things which the Court may authorise are these three—(1) to sell the trust estate or any part of it, (2) to grant feu-rights, and (3) to excamb. If the power to excamb had been included, or could have been inferred from a power to sell, then the provision which specially and in terms authorises excambion was superfluous. But this cannot readily be said of any express enactment. It could more easily be inferred that a power of sale included a power to feu, for both are sales in a sense—one of them for a price down, the other for an annual payment. In both there is a cash price—in excambion there is none. But even feuing is dealt with in the statute as different from and not included in the power to sell.

On the ground alone with which I have been dealing I think the defender is justified in refusing to accept the title which the pursuer offers.

I am not disposed to regard the objection stated in the defender's second statement, in respect of insufficient citation to a summons of declarator of irritancy, as a serious one. The persons against whom the summons is said not to have been sufficiently executed were bankrupt. But their trustee was duly cited, and was by

virtue of his abbreviate of adjudication at the time the vested owner of the subjects. The same, however, cannot be said of the objection to the decree of irritancy referred to in statement three, where the trustee was not cited. And indeed, until the years of prescription have run, neither of those decrees can be regarded as final, being both decrees in absence, for they may be recalled and the defenders reponed. It is not, however, necessary to decide upon any question raised by the defender other than the one I first noticed. I think the reclaiming-note should be refused.

LORD MONCREIFF—The question put to us is whether the purchaser, the defender, is bound to accept the title offered to him by the pursuer as it stands. I am of opinion that he is not bound to do so, although if he still desires to hold to his bargain the objections may admit of being obviated of consent. As a strict matter of right the pursuer must give the defender a marketable title which will not expose him to the risk of challenge; and the title offered is somewhat ragged and open to more than one stateable defect which might lead to such a challenge being made.

The first objection is that while 109 square yards of the ground purchased were acquired by excambion, neither the sellers nor the purchasers under the contract of excambion (who were both trustees) had power under their trust-deeds to excamb. Both sets of trustees had power to sell, but while power to sell may be a wider power than power to excamb, sale is not the same thing as excambion. Excambion is a peculiar transaction and is attended with some consequences which do not accompany an out-and-out sale. For instance, mutual rights of real warrandice attach to excambed lands; and although there may be no probability of eviction of the lands in exchange for which the 109 square yards were acquired, the burden of real warrandice would still remain.

Although this question is highly technical I think it is sufficiently serious to warrant the purchaser's objection.

Then as regards the declarator of irritancy and removing—while I think that there is little reason to anticipate challenge, it is a comparatively recent decree in absence and can be opened up, and as it affects 838 square yards of the ground purchased, I do not think that the defender is bound to be satisfied with it.

It is not necessary that I should notice the other objections taken, which I do not regard as serious.

The Court adhered.

Counsel for the Pursuer—Dundas, Q.C.—M. P. Fraser. Agents—Emslie & Guthrie, S.S.C.

Counsel for the Defender—H. Johnston, Q.C.—Cook. Agents—Macandrew, Wright, & Murray, W.S.

Thursday, June 7.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

MENZIES *v.* CALEDONIAN CANAL COMMISSIONERS.

Superior and Vassal—Special Stipulations in Feus—Restriction—Restriction against Public-Houses or Inns—Interest of Superior to Enforce Restriction against Singular Successor—Onus.

A feu-disposition granted in 1871 by the Commissioners of the Caledonian Canal of ground situated on the side of the canal at Banavie Locks contained a restriction to the effect that it should not be in the power of the vassal or his heirs and assignees "to erect any building on the said piece of ground for a public-house or inn, or for the sale of exciseable or other liquors." The condition was fenced by a clause of forfeiture. In 1896 the superiors withdrew all objections competent to them to the erection of a temperance hotel on the subjects. Since the date of the feu-disposition the tourist traffic had greatly increased. The superiors were the owners of certain adjacent ground. A small part of it was unfeued, and on part of it there were ten cottages which were occupied by their employees. There was a licensed hotel which was situated about 100 yards from it.

In an action at the instance of a singular successor in the feu against the superiors for declarator that he was entitled to erect a public-house or inn upon the subjects without the consent of the superiors, the pursuer maintained that there had been a change of circumstances since the restriction was originally imposed, and that the defenders had no legitimate interest to enforce the restriction. The superiors, in addition to founding upon their patrimonial interest as owners of adjacent ground, explained that in their opinion the proposed hotel might be detrimental to the proper management of their canal and the behaviour of their servants, and that it might prove a source of danger to the public, and that accordingly they had an interest to enforce the restriction.

Held (1) that the onus of showing that the superiors had no legitimate interest to enforce the restriction was upon the vassal; (2) that there had been no such change of circumstances as to disentitle the superiors to enforce it; (3) that whether the superiors had any substantial patrimonial interest to enforce the restrictions or not, they had a sufficient and legitimate interest to do so in respect that in their judgment as managers of the canal—reasonably and honestly arrived at, whether well founded or not—its enforcement was essential, or at least advantageous for