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

all challenges and reductions in Scotland *ex capite lecti:* Be it therefore enacted, 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.*"

On 6th November 1889 the Lord Ordinary (KYLLACHY) found that the pursuer had made no relevant averment in support of her second plea-in-law, and therefore repelled said plea. He also allowed the defenders a proof of their averments on another branch of the case to which reference is unnecessary.

The pursuer reclaimed, and argued—The Act founded on by the defenders only abolished the law of deathbed as to deeds, instruments, and writings, and otherwise the old law which prevented a father defeating the rights of his children upon deathbed remained in force—Fraser on Husband and Wife, vol. ii. p. 1006; Stair, iii. 4, 24; Ersk. Inst. iii. 9, 16; *Milroy* v. *Milroy*, May 31, 1803, Hume's Dec. 285; *Brown* v. *Thomson*, March 15, 1634, M. 3200; *Greig* v. *Greig*, October 19, 1872, 11 Macph. 20. The Lord Ordinary's interlocutor should therefore be recalled, and the pursuer should be allowed a proof of her averments in support of her second plea-in-law.

Argued for the defenders and respondents—It was only deeds of a testamentary nature and revocable deeds which had been prior to 1871 open to challenge as having been granted on deathbed in prejudice of the rights of children. The deed in question being an *inter vivos* deed, which irrevocably divested the granter of the sums thereby conveyed, would not therefore, even under the old law, have been open to challenge. Further, the payment of £3200 followed on the deed, and was part of the same transaction, and as the deed could not be challenged *ex capite lecti* owing to the provisions of the Act of 1871, neither could the transference of the money. It was also a reasonable view that the Act of 1871, when it abolished reductions of deeds *ex capite lecti*, removed the grounds of the old decisions as to cash deliveries on deathbed, and that objections to cash deliveries *ex capite lecti* could no longer be sustained.

At advising—

LORD PRESIDENT—The trust-deed of provision was executed by Mr Coutts on 28th April 1884, and he died on the 2nd of June following. It is impossible to view the deed as a disposition *mortis causa*, because it is not a deed under which any right could afterwards revive to the granter. It is an out-and-out settlement for behoof of the three children named in it, "to come into operation during my lifetime," and it conveys to certain trustees a sum of £6000 in all, to be managed and disposed of for the benefit of the said children. The £6000 consists partly of heritable bonds, and so far the pursuer does not seek to challenge the deed, because her title arises from her alleged right to legitim, and heritable bonds are not subject to claims of legitim. It is therefore the sum of £3200, which the truster says in the deed he has handed to the trustees in cash, that forms the subject of contention between the parties, and the plea repelled by the Lord Ordinary is the second plea for the pursuer, which is in these terms—"The said James Coutts having paid the sum of £3200 to the defenders while he was on deathbed, and within sixty days of his death, and while labouring under the disease of which he died, the pursuer is entitled to decree of declarator, count, and reckoning, and payment as craved." The Lord Ordinary has held that the pursuer has made no relevant averment in support of that plea, and I agree with him.

I think the question comes to be, whether the deed is open to challenge as a whole. If the £3200 had been handed over in bank-notes without anything more being done, it would have been a very different case, and would have looked like a fraud on the legitim. But that is not what was done at all. The sum in question was handed over by means of a cheque in pursuance of a general settlement in favour of the three children referred to in the deed, and the deed stands or falls as a whole; and I cannot find any ground in law for holding, after the passing of the Act 34 and 35 Vict. cap. 81, that a deed of this kind is reducible on the head of deathbed. It appears to me that the effect of the statute is to protect every deed or writing from challenge on that ground.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be adhered to.

LORD ADAM—I am of the same opinion. The object of the pursuer in seeking to separate the transaction into two parts is obvious, because if we could treat the payment of the £3200 as a separate transaction by itself there might or might not be a good deal to be said for the plea that that transaction did not fall within the scope of the statute by which the exception of deathbed is said to have been abolished. As has been said, the enacting clause of that statute mentions only "deeds, instruments, and writings," and it might be argued that the actual handing over of money could not be brought under it, and that the question was left open whether the Act was meant to apply to such a case.

I agree with your Lordship that it is impossible to separate the transaction into two parts, and that we must look upon the granting of the deed and the payment of the money as one transaction. If that is the true view of the matter, then it is beyond all question that the transaction falls within the terms of the statute.

LORD M'LAREN—The legal question which was argued by Mr Miller is no doubt an interesting point if the circumstances of the case admitted of such a question being raised, because, whether by design or by inadvertence, it is certain that the statute of 34 and 35 Vict. does not in its enacting words contemplate the case of a gift made without writing, and reducible on the head

of deathbed. Should such a case arise for consideration, we shall have to consider whether the enacting words can receive aid from the preamble, or whether they must be taken as they stand. No such case is raised here, because under the deed of settlement produced and printed the trustees of Mr Coutts have received by deed of gift, assignation, and disposition the sum of £6000 sterling, whereof it is stated the testator handed to them £3200 in cash. That deed of gift is a good title to the money, and may be pleaded in answer to a demand upon the trustees to account. Under the old law the effect of the deed might be taken away by reduction *ex capite lecti*. But here the statute comes in to fortify the title by taking away the right of challenge *ex capite lecti*, and therefore the case of the pursuer under the second plea-in-law entirely fails.

LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuer — Galbraith Miller. Agents—J. B. Douglas & Mitchell, W.S.

Counsel for the Defenders—H. Johnston. Agent—Andrew Wallace, Solicitor.

Tuesday, December 16.

FIRST DIVISION.

HASTINGS AND OTHERS *v.* CHALMERS.

Public Service — Evidence — Diligence for Recovery of Documents—Report by Police Officer to Procurator-Fiscal—Confidential Communications — Reparation — Illegal Arrest.

A sergeant of police having arrested certain persons, thereafter made two separate reports to the procurator-fiscal relative to the circumstances of the arrest. In an action of damages against the sergeant for illegal arrest an application was made for the recovery of the reports that they might be used in evidence. Motion *refused*.

This was a motion in the Single Bills incidental to an action of damages raised by the pursuers against the defender, who was at the time of the alleged illegal apprehension complained of a sergeant in the Linlithgowshire police. The pursuers had been arrested by the defender upon 4th June 1889, the defender acting at the demand of James Charles, master of the s.s. "Tay," in which vessel the defenders were seamen; and the defender thereafter made two separate reports to the procurator-fiscal relating to the circumstances of the arrest. The motion was for the recovery of these reports, that they might be used in evidence before the jury which was summoned to try the action of damages.

The pursuers in supporting the motion relied upon the authority of *Henderson* v. *Robertson*, 15 D. 292; Dickson on Evidence, sec. 1655 (vol. ii. 907); *Boag* v. *Gillies*, 5 Deas & And. 434.

The defender was willing that the motion should be granted, but appearance was made for the Lord Advocate, who stated that while no harm to the public service was to be apprehended from the recovery of the reports referred to in this instance, yet that he objected upon general grounds to such confidential communications being recovered.

At advising—

LORD PRESIDENT—We refuse this motion on the ground that the reports sought to be recovered are confidential communications by one officer in the public service to his superior officer in the same department.

LORDS ADAM, M'LAREN, and KINNEAR concurred.

Counsel for the Pursuers—W. C. Smith. Agent—W. B. Rainnie, S.S.C.

Counsel for the Lord Advocate—Wallace, A.D. Agent—Crown Agent.

Thursday, December 18.

SECOND DIVISION.

[Lord Trayner, Ordinary.

HAY *v.* TWEDDLE AND OTHERS.

Succession — Vesting — Conditio si sine liberis decesserit.

By *inter vivos* deed two sisters disponed to themselves and another sister in liferent, and to their three nieces *nominatim*, "and the survivors or survivor of them in fee," certain heritable property which only formed a part of the estate of the granters. The deed bore to be granted "for the love, favour, and affection" which the granters had for each other, for their sister, and for their nieces. Infeftment followed in terms of the deed. Thereafter one of the three nieces died intestate without having altered the destination in the deed. She was survived by a son. *Held* that he did not succeed to his mother's share of the fee, as there was no room for the application of the *conditio si sine liberis decesserit*.

By *inter vivos* deed dated 3rd March 1859 two sisters—Mrs Dickie and Miss Crichton—disponed to and in favour of themselves and another sister in liferent, and to their nieces, Julia (Mrs Tweddle), Dorothea (Mrs Howat), and Katherine (Mrs Costine), "and the survivors or survivor of them in fee," certain heritable property in Castle Street, Dumfries. The deed bore to be granted "for the love, favour, and affection" which the granters had for each other, for their sister, and for their nieces. Sasine was duly expede in terms of the said deed, and infeftment taken thereupon on 7th April 1859.