LORD CULLEN—I agree with your Lordship in thinking that the question should be answered in the negative on the ground that under the statutes it is not made necessary to the success of a prosecution that the sample given to the vendor and the sample retained by the purchaser shall be capable of being analysed at the time when steps are taken for that end. Accordingly, the magistrate had before him, under section 21 of the Sale of Food and Drugs Act 1875, sufficient evidence of the facts necessary to prove the charge.

The Court answered the questions in the negative.

Counsel for the Appellant—Wark, K.C. —Keith. Agents — Campbell & Smith, S.S.C.

Counsel for the Respondent—Crawford. Agents—Erskine, Dods, & Rhind, S.S.C.

COURT OF SESSION.

Tuesday, November 30.

FIRST DIVISION.

[Sheriff Court at Selkirk.

LOWE AND ANOTHER *v.* GARDINER.

Process — Sheriff — Summary Ejection — Competency — Precarious Possession — Possession under Conditional Contract of Sale—Failure to Implement Condition.

In an action of summary ejection brought by the seller of a warehouse against the purchaser, to whom "legal entry" had been given on the condition, *inter alia*, that he should pay the balance of the price on a certain date in exchange for the formal conveyance, the pursuer averred that the defender had failed to pay the balance notwithstanding repeated indulgences, that ultimately he (the pursuer) intimated to him that the sale would be held as cancelled as from a certain date, and that thereafter the defender had refused to vacate the premises.

Held that as the defender's possession was neither vicious nor precarious the remedy by summary ejection was inapplicable, and action *dismissed* as irrelevant.

John Robert Lowe, Melrose, as attorney for Mrs Emma Christina Lowe or Thomson, Richmond, Natal, and Mrs Thomson for herself, brought an action of summary ejection and interdict against James Gardiner, Galashiels, in which they craved the Court to grant warrant to officers of Court summarily to eject the defender from certain warehouse premises in Galashiels belonging to Mrs Thomson, and to interdict the defender from entering thereon.

The pursuers made the following averments:—"(Cond. 3) . . . In the end of October and beginning of November 1918 the pursuer James Robert Lowe, as attorney for the pursuer Mrs Thomson, was desirous of selling the said warehouse. A bargain, which, if the defender had duly obtempered its conditions, would have resulted in an agreement of sale and ultimately in a transference by formal conveyance of the premises, was achieved on 5th November 1918 by virtue of (1) holograph missive offer by Messrs Pike & Chapman, solicitors, Galashiels, as agents for the said James R. Lowe, dated 4th November 1918; (2) holograph acceptance by the defender of said offer, dated 5th November 1918. . . . (Cond. 4) . . . Among the conditions of said offer also accepted by the defender were the following:—'It is a condition of this offer that you pay 10 per cent. of the price on acceptance hereof, and that the balance of the price be paid on 1st February 1919. You will get legal entry to the subjects on 1st January 1919, but a formal conveyance will not be delivered until payment of the balance of price on 1st February.' . . . (Cond. 5) Ten per cent. of the price as provided in the said offer was duly paid. . . . The defender did not pay or tender any further portion of the price at 1st February 1919 as was stipulated as a condition of the bargain, nor has he done so yet. . . . (Cond. 6) . . . On the faith of the obligation undertaken by the defender in said acceptance, the defender was admitted to entry of the subjects, and he has maintained that possession since his entry. Owing to his failure to meet the price which was a condition of the bargain . . . he has . . . no conveyance of and no right to demand a conveyance of the said warehouse. . . . From time to time during the summer and autumn of 1919 the pursuer Mr Lowe and his agents called upon the defender to pay the balance of the price, but they were put off by excuses and requests for delay on the defender's part. . . . On 25th November 1919 the pursuer's agents wrote, *inter alia*—'We therefore now beg to intimate that as Mr Gardiner (notwithstanding repeated opportunities) has failed to implement the missive of sale entered into by him on 4th November 1918, our client will hold the sale cancelled as on Monday 8th December next.' . . . (Cond. 7) The defender without any good cause or excuse has delayed or refused to vacate the premises."

In his answers the defender, *inter alia*, stated—". . . The said agreement of sale was entered into by the defender as agent for and on behalf of Mr Wilson Rudd who paid 10 per cent. of the purchase price to the pursuers. Mr Wilson Rudd has paid all the proprietor's rates and taxes for the year to whitsunday next, and has done so with the consent and concurrence of the pursuers."

The pursuers pleaded, *inter alia*—"1. The pursuer Mrs Emma Christina Lowe or Thomson as heritable proprietor of the subjects in question, and the pursuer the said James Robert Lowe as her attorney, are entitled to decree of ejection and interdict against the defender, who is maintaining possession contrary to law and without any title."

The defender pleaded, *inter alia*—"1. The action being incompetent, should be dismissed. 2. The pursuers' averments being

irrelevant, the action should be dismissed."

On 25th May 1920 the Sheriff-Substitute (SMITH) granted warrant to eject and interdict.

On appeal the Sheriff (CHISHOLM) on 18th June 1920 adhered.

The defender appealed, and argued—The respondents had adopted the wrong form of action. Summary ejection was competent only in the case of possession *vi clam aut precario*—*Campbell's Trustees* v. *O'Neill*, 1911 S.C. 188, 48 S.L.R. 115; *Robb* v. *Brearton*, 1895, 22 R. 885, 32 S.L.R. 671. There was no relevant averment of such possession. Possession here commenced on a legal title and could not become *vi clam aut precario*—*Halley* v. *Lang*, 1867, 5 M. 951; *Walker* v. *Ker*, 1917 S.C. 102, 54 S.L.R. 103; Ersk. Inst. ii, 6, 49. The contract had not been rescinded, and appellant's possession was still attributable to it. By declaring it cancelled the respondents had merely elected their remedy. The rights of parties still remained to be decided, and this could not be done in a process of summary ejection.

Argued for the respondents—The appellant's objection to the form of action was merely technical. The distinction between an action of summary ejection and one of removing was very small—*Walker* v. *Kerr*, *supra*; Wallace, Sheriff Court Practice, p. 516. The contract was a conditional sale with a suspensory condition as to payment of the balance of the price. The appellant admitted that the condition had not been implemented, and that he had no right to ownership. He had an opportunity to state his defence summarily, which was all a person in this position was entitled to. The action was both competent and relevant. Appellant's failure to implement the condition made his possession precarious, and tolerance ceased with the cancellation of the contract. The appellant's right to possession was thus competently terminated, and summary ejection was the proper process—Dove Wilson, Sheriff Court Practice, p. 485; *Gibson & Son* v. *Gibson*, 1899, 36 S.L.R. 522; *White* v. *Schoolboard of Haddington*, 1874, 21 R. 1124, 11 S.L.R. 662; Rankine, "Law of Leases." p. 593. *Campbell's Trustees* v. *O'Neill* and *Robb* v. *Brearton* were cases relating to tenants and did not apply. There was no relevant defence. The questions as to the rights of parties could not delay recission of the contract. The ten per cent. was a forfeited deposit—*Collins* v. *Stimson*, 1833, 11 Q.B.D. 142; *Wallis* v. *Smith*, 1882, 21 Ch. Div. p. 242; *Howe* v. *Smith*, 1884, 27 Ch. Div. 39; *Roberts & Cooper* v. *Salvesen & Company*, 1918 S.C. 794, 55 S.L.R. 721.

At advising—

LORD PRESIDENT—The prayer in this case is "to grant warrant to officers of court summarily to eject the defender, his dependants or persons pretending to have or derive right through him, and his whole effects, from the warehouse premises at present occupied by him or in his pretended right." The action is therefore one of ejection as distinguished from an action of removing. Indeed, the present appeal would be otherwise incompetent, because the only mode of review competent in a removing is by way of suspension.

The pursuers' case is that the defender is in possession of the warehouse, which is the property of the pursuer Mrs Thomson, without legal title or right thereto. It appears from the pursuers' averments that the pursuer Mr Lowe, as attorney for Mrs Thomson, agreed to sell the warehouse to the defender in November 1918, and that possession was given to the latter on payment by him of 10 per cent. of the price in terms of the following stipulations in the missives:—"It is a condition of this offer that you pay 10 per cent. of the price on acceptance hereof, and that the balance of the price be paid on 1st February 1919. You will get legal entry to the subjects on 1st January 1919, but a formal conveyance will not be delivered until payment of the balance of price on 1st Ferbuary." The defender has never paid the balance of 90 per cent. notwithstanding repeated indulgences during the year 1919, and ultimately, on 25th November of that year, Mr Lowe intimated in writing that in respect of the defender's failure to pay the 90 per cent. he would "hold the sale cancelled as on Monday 8th December next." In these circumstances the pursuers claim the remedy of ejection. The action of ejection is competent only to terminate possession which is either violent, fraudulent, or precarious, and the question is whether the pursuers' averments disclose a case of precarious possession.

It is clear that prior to 8th December 1919 the defender's possession was not, on the pursuers' own showing, precarious. It was founded on the "legal entry" given to him under the contract of sale, and that title of possession was maintained by the successive indulgences given to the defender during 1919. For the pursuers continued to be entitled throughout that time to exact from the defender payment of the balance of the price against tender of a good title, and cannot therefore be heard to say that the missives and the "legal entry" given under them were not in vigour and effect during the whole of that period.

The question is therefore reduced to this—Did the pursuers' intimation of cancelment or rescission as at 8th December 1919 have the effect of reducing the defender's possession to a merely precarious possession—that is, to a possession simply at the will of the pursuers? I am disposed to agree with the pursuers' argument that the principles upon which action by way of removing would alone be competent in the case of a lease on the expiry of the ish or on the incurring of an irritancy are not necessarily applicable to the present case. Possession in the present case was given to the defender, not under any contract of location, but in virtue of a contract of sale. The defender got possession and retained it during the year 1919 not as tenant but as purchaser. Further, as the contract of sale was conditional on the payment of the balance of the price, I think it follows that the defender's title to possession was similarly qualified. But all that the pursuers did or

could do by the intimation that they cancelled or rescinded the contract at at 8th December was to elect *for themselves* the remedy of damages for breach of contract, in preference to the remedy of implement by action for payment of the price against tender of a good title. This act of election binds no one, unless it be the pursuers themselves. It does not disable the defender from maintaining on any competent grounds which may be available to him that he is still entitled to implement the contract of sale even at this late hour, any more than it disables him from contending that the cancelment or rescission was bad because it was unaccompanied by any conditions regarding the adjustment of the rights of parties in regard to the 10 per cent. already paid, or in regard to the owner's rates and taxes paid by the defender during his possession. I am expressing no opinion upon the validity of such contentions as these. The point is that the pursuers' averred cancelment or rescission has *per se* no effect in excluding such contentions, because it does not *per se* destroy or annihilate the contract of sale to which the defender remains entitled on his part to attribute his possession. In short, the pursuers are confronted with a case of possession which is not precarious, and their competent remedy is by way of action of removing and not by way of action of ejection.

In this position of matters there is in my opinion no alternative except to recal the interlocutors appealed from, to sustain the defender's second plea-in-law, and to dismiss the action.

I confess that I have been driven to arrive at this result with the greatest reluctance, for I am as little favourably impressed by the statements made in defence on the merits of this dispute as the learned Sheriff and his Substitute appear to have been. The distinction between ejection and removing is deeply rooted both in the principles and in the history of the law of Scotland, but the fact that these remedies, appropriate as they respectively are to circumstances essentially different but by no means always readily distinguishable, must be sought by separate forms of process—instead of being alternatives capable of being combined as such in one form of process—is under the conditions of modern times productive of misunderstanding and even of miscarriage. Unhappily this occurs in a department of the law where simplicity and certainty of procedure are urgently desirable, and would not be difficult of attainment if the attention of the Legislature were called to it.

LORD MACKENZIE—This case illustrates the unfortunate position in which the law of Scotland has been left by the distinction between actions of ejection and actions of removing. It is settled that the former process is only applicable when the occupancy is *vi clam aut precario*. Unless the case falls within one of these categories, then a process of removing is necessary, and that although, but for the technicality, the question at issue between the parties might be quite as well litigated in the one process as in the other.

It is not in my opinion possible to say in the present case that the defender's possession is vicious or precarious. There was here a valid contract of sale, with a prescribed term for legal entry, under which possession was taken, and the purchaser's side of the bargain in part fulfilled by payment of 10 per cent. of the price. Before it can be said that the purchaser's possession is by tolerance of the seller the contract must be validly rescinded. It is disputed that this has been done, or can be done without tendering, at the least, repayment of what has been already paid. This shows that there is a question to try, but according to our law it cannot be tried in this process. Until the matter is put right by legislation persons in the position of the pursuers must just be penalised if their advisers select a wrong remedy.

LORD SKERRINGTON—The form of process selected by the pursuers is one which was in the circumstances peculiarly inconvenient. Sales of heritable property do not, generally speaking, fall within the category of agreements where time is of the essence of the bargain. Accordingly, practice has sanctioned as convenient an action of implement with alternative conclusions appropriate to the case of the purchaser being unable or unwilling to pay the price. In such cases the seller does not take upon himself to fix the period which is to be allowed the defender for implementing his contract. He asks the Court to fix a reasonable time for payment of the price, failing which the pursuer asks that he should be entitled to proceed upon the footing that the bargain is at an end and to claim damages.

Some such procedure would have been specially convenient in a case like the present, where it was a term of the bargain that the purchaser should get possession before he had paid the whole of the price, and where the date for payment of the balance was prorogated of consent, with the result that the purchaser was in possession for nearly a year before the sellers purported to rescind the contract, as they did by writing a letter to the defender informing him that the contract would be cancelled unless the price was paid within fourteen days.

There can, I think, be no doubt that the defender had a lawful and sufficient title of possession up to 8th December 1919. The question whether that title was properly brought to an end by the letter to which I have referred, and if so what effect such recission had upon the defender's possession, cannot competently, according to the authorities, be decided in a summary action of ejection.

Accordingly, I concur in the judgment which it is proposed to pronounce.

LORD CULLEN—I do not think that the rule of law is doubtful as to the kinds of possession to which a process of ejection is applicable. A clear statement of it is to be found in the opinion of Lord President

Inglis in the case of the *Scottish Property Investment Company Building Society* v. *Horne*, 8 R. 737. His Lordship said—"Now the question is, Is this a case for summary ejection? To warrant that the possession must either be vicious possession, that is, obtained by fraud or force, or precarious possession, *i.e.*, without a title. In this case there is neither. There is no question of vicious possession. A precarious possession is a possession by tolerance merely. . . . The law on this is very clearly settled, and I need only refer to *Halley* v. *Lang*, 5 Macph. 951, the rubric of which is—'A petition for summary ejection which contained no allegation of vicious or precarious possession without title held incompetent.' I need not quote more than the opinion of Lord Deas, who says—'The first ground on which we must dismiss this petition is that there is not set forth here any such ground of action as, according to the forms of process in the Sheriff Court, will warrant an ejection. An ejection is only competent when a party is either a vicious possessor or a precarious possessor, in the sense of having no title at all, and the party asking ejection must set forth something *ex facie* to support his application.'"

We have here no case of possession had *vi aut clam*. The possession is said by the pursuers to be precarious, and the judgments of the Sheriff-Substitute and the Sheriff adopt that view. I am unable to agree with these judgments. To make out a case of precarious possession it is not enough to set forth facts inferring that a party sought to be ejected has no longer any valid legal right to continue in possession, so that it has become a matter of free-will on the part of the pursuer either to allow him to remain or to take legal proceedings for having him put out of possession. If that were enough it would apply to a tenant under a lease after it has been duly terminated by warning or legal notice. It is necessary to look at the footing on which the possession has been had. It must have been had *precario* in the sense above explained. Now the defender's possession of the premises was not one had merely by tolerance of the pursuers. He entered into possession by virtue of a contract of sale which gave to the purchaser in exchange for payment of part of the price "entry" to the subjects, he being under obligation to pay the balance one month thereafter in exchange for a conveyance. The entry so given to the purchaser was not qualified or limited in any way by the terms of the contract either as to time or as to his powers of dealing with the subjects after the date of entry. The balance of the price was not duly paid, and has never been paid, but the possession had under the entry given by the contract has continued, with pressure on the part of the pursuers for payment of the balance of the price. It is unnecessary to consider all the legal questions to which such a state of matters is capable of giving rise. One thing is clear, that the defender's possession was not obtained *vi clam aut precario*, but was obtained by virtue of the onerous contract above-mentioned; and it continued down to the initiation of the present proceedings on no other footing, no species of novation having taken place. It appears to me to follow that *esto* the pursuers were entitled to rescind the contract of sale, and that they had effectually done so prior to raising this process, the possession of the defender which they desired to have brought to an end was not a species of possession to which summary ejection was applicable.

I concur in the judgment which your Lordships propose.

The Court recalled the interlocutors of the Sheriff and Sheriff-Substitute, sustained the second plea-in-law for the defender, and dismissed the action.

Counsel for the Appellant—J. Stevenson. Agent—John Baird, Solicitor.

Counsel for Respondents—Mackay, K.C.—Henderson. Agents—Wishart & Sanderson, W.S.

Saturday, December 18.

FIRST DIVISION.

[Lord Sands, Ordinary.

CATHCART *v.* BAXTER'S TRUSTEES.

Trust—Investment—Liability of Trustees—Ultra vires—Duty to Realise—Negligence — Investment in Debenture Stock of Mexican Company.

Under a deed of trust for behoof of a beneficiary in liferent and his children in fee trustees had power to invest "in good heritable moveable or personal security in the Government or parliamentary funds in the stock of any chartered or incorporated bank or on debentures or mortgages by railway or other joint-stock companies or trusts or corporations of a public nature. . . ." The investments made by the trustees included £1000 4 per cent. A debenture stock of the Mexican Central Railway Securities Company, Limited—a company registered in London. The stock subsequently declined in value, and no interest was paid for several years upon the investment. In an action at the beneficiary's instance against the trustees in respect of loss of income owing to their alleged unwarrantable investment of the trust funds and failure to realise, *held* that the trustees had acted within their powers and without negligence, and defenders *assoilzied.*

Alan Taylor Cathcart, Weem, Aberfeldy, brought an action of count, reckoning, and payment against Edward Armitstead Baxter of Kincaldrum and another as trustees acting under deed of declaration of trust for the pursuer in liferent and his children in fee, dated 3rd and 5th November, and registered in the Books of Council and Session 15th December 1914, and as individuals, in which he concluded for decree of accounting by the defenders of