trees shall be touched without his permission? I do not think that that is within his right, because the granter of the lease of one half-acre, not limiting the description of the tenant's right to the place where the house is to be built or the way the ground is to be laid out, must be presumed to have given the tenant power to deal with the subject in a reasonable way—in a way which would have been quite reasonable at the time when the lease was granted. What I demur to is, that the landlord seeks to have a declarator of that right for which he contends; he says, in effect—"Though I granted this for building purposes, yet I remain owner of every tree, and however necessary the removal of a particular tree may be for the reasonable enjoyment of the subject, that tree shall not be removed unless you have my consent, or, in case of my refusal, you must have it determined by the decision of a judge that what is proposed is right and reasonable in the circumstances." I am of opinion that in every case of the kind the tenant is the best judge of what is best for him, and what is best for the property. If, indeed, it had been said that the thing was not necessary for the reasonable enjoyment of the property, but, on the contrary, was a mere act of wantonness to spite the landlord, then another result would probably have followed the establishing of such averments on proof, but a tenant is not entitled so to deal with his landlord's property, and it is only because nothing is alleged inconsistent with what is reasonable and necessary enjoyment of the subject of the lease that the tenant has such strong claims to prevail. It was on the assumption that such would be the case that the pursuer's predecessor exercised the privileges conferred by the Montgomery Act. This is said to be a test case. There may be other cases behind it, but I should think that, if the other cases are precisely similar in their circumstances, the landlord will never succeed, however many actions he may bring, in obtaining that declarator which he now seeks.

I concur in the judgment as well as in the reasons your Lordship has stated for it.

Lord Rutherfurd Clark—I am also of opinion that the interlocutor of the Lord Ordinary must be altered. The pursuer asks us to decide a very abstract question. He asks us to declare that the defender as tenant under a building lease is not entitled to cut timber growing upon the subject of the lease—that is to say, that he is not entitled to cut timber growing on that subject under any circumstances or for any purpose whatever I look upon that question as the only question which is raised in this case, and that being so, I am bound, I think, to decide against the landlord. For I might assume that the tenant required to cut down trees for the purpose of extending his building, or for the purpose of the reasonable enjoyment of the building which already stands on the subject. If we gave declarator, then of course he could not cut down trees even in those circumstances. I am very far from saying that the landlord has no powers of restraining a tenant. I am not in the least inclined to go this length, that a tenant would be entitled to cut down trees merely at his own pleasure as a proprietor, or wantonly to destroy a subject in any such way. But we have no case of that kind to discuss here. The landlord does not allege that the defender is acting in any way wrongfully, or doing any act except an act which is fairly using the subject in possession. The landlord asks us simply to decide the general abstract question to which I refer, and I think that question must be decided against him.

The Lord Justice-Clerk was absent.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defender.

Counsel for Pursuer—Trayner—W. Campbell. Agents—J. & J. Galletly, S.S.C.

Counsel for Defender—J. P. B. Robertson—Gillespie. Agents—Gordon, Pringle, Dallas, & Co., W.S.

Friday, November 9.

FIRST DIVISION.

[Lord Fraser, Ordinary.

DUFF *v.* EARL OF SEAFIELD.

Teinds—Tack of Teinds—Excambion of Tack Rights—Clause of Warrandice—Res judicata.

J was owner of the lands of Kempcairn. He had also right to the teinds of the neighbouring lands of Ordiquhill under a tack from the parson of that parish. In 1642 he conveyed the lands of Kempcairn to his brother A, and with regard to the teinds of Ordiquhill, he, as "principal tacksman, titular, and having good and undoubted right to the teind sheaves," set them to A for crop and year 1622, and for "all years thereafter in tyme cuming," in warrandice of his procuring him a right to the teinds of Kempcairn, to which he then had no right. Thereafter, by contract of excambion in 1648, A, on the narration of the above conveyance, sold and disponed to G, who owned the lands of Ordiquhill, and had a tack of the teinds of Kempcairn, his right to the teind of Ordiquhill, G, on the other hand, assigning him his right to the teind of Kempcairn, so that each party to the contract might possess the teind of his own lands; and A further bound himself and his successors to warrant G and his successors free of any further augmentation of minister's stipend of Ordiquhill, "in tyme cuming," over and above a fixed sum named. In 1771, and again in 1800, the Court of Session gave effect to this obligation in actions of relief at the instance of G's successors against those of A. In 1882 G's successors sought to enforce the obligation by the present action. *Held* (1) that J was not in 1642, and could not possibly have been, titular of the parsonage teinds of Ordiquhill, and that the right thereto conveyed by him to A was merely one of tack; (2) that the respective rights to their respective teinds, excambed by A and G in 1648, were no higher than terminable rights of tack, and (on the documentary evidence) that both tacks had long since expired; (3) that the tack in his favour having expired, G's successor could no longer found on the warrandice clause of relief; and (4) that in respect of the termination of

the tacks, the judgments of 1771 and 1800 could not found a plea of *res judicata*. Defender *assoilzied* accordingly.

Major Gordon Duff of Drummuir and Park in the county of Banff, brought this action against the Earl of Seafield, the main conclusion of the summons being for declarator that the defender was bound to free and relieve the pursuer of all stipend payable by him to the minister of the parish of Ordiquhill, in the county of Banff, for the said lands and estate of Park, over and above the sums of 200 merks Scots money, and £29, 3s. 4d. Scots money, amounting together to £13, 10s. 10d. sterling yearly, and that for crop and year 1882, and for all other crops and years thereafter and in all time coming, and that the pursuer was only liable for the stipend of the said parish to the extent of the said sum of £13, 10s. 10d. and no more, and that the defender was bound to free and relieve the pursuer of all further sums payable to the minister of said parish in name of stipend in all time coming. There was also a petitory conclusion for payment of £56, 3s. 4d., which was the balance of the stipend payable to the minister of Ordiquhill for crop and year 1881, which the pursuer had paid to the minister, and of which the defender refused to relieve him.

The obligation of relief on which the pursuer's action was based was contained in a contract of excambion dated 3d January 1648. The parties thereto were (1) Alexander Ogilvie, a predecessor of the defender, who was proprietor of the lands of Kempcairn, in the parish of Keith and county of Banff, and had right to the teinds of the lands of Park, in the parish of Ordiquhill and said county; and (2) John Gordon, an ancestor of the pursuer, who was proprietor of the lands of Park, and had right to the teinds of Kempcairn. By the said excambion, Ogilvie, on the narrative of certain writs to be afterwards referred to, sold, assigned, transferred, and disponed to Gordon his right to the parsonage teinds of Ordiquhill for crop and year 1648, and in all time thereafter; and his obligation ended with the following clause—"And als ye said Alexr. Ogilvie obleiss him and his foresaidis to warrant ye saids parsonage teyndis to the said Johne Gordoun and his foresaids to be frie of any farther proportioun for augmentatioun for the ministeris stipend of Ordiquhill in tyme cuming, provyding the samyn excied the soume of twa hundreth merkis money foresaid, in the qlk. caise it is agriet upon betwixt the saidis pairties that if yr. sal be any modificatioun grantit to ye said minister more nor ye said soume of twa hundreth merkis money foresaid zeirlie out of ye personage teyndis of ye landis lyand within the said parochin of Ordiquhill, the said Johne Gordoun sal be astrictit and be yer pnts. binds and obleyss him and his airis, exers., and successors to make payment of the said soume of twa hundreth merkis zeirlie in all time cuming after the said modificatioun beis fund dew, and the said Alexr. Ogilvie obliess him and his foresaids to relieve the said Johne Gordoune and his foresaids of any furder modificatioun, and to make payment yrof. to the ministeris sua to be augmentit nor ye said soume of twa hundreth merkis in all time cuming." Gordon on his part sold, transferred, and assigned to Ogilvie his right to the parsonage teinds of Kempcairn.

By a subsequent contract, dated 20th August 1717, Gordon of Park became liable to contribute a sum of £29, 3s. 4d. Scots, in addition to the sum of 200 merks for which he was liable under the clause of relief in the said excambion, the two sums amounting together to £13, 10s. 10d. sterling, being the sum set forth in the summons as above quoted.

On the occasion of an augmentation of the stipend of the minister of Ordiquhill in 1766, Gordon of Park having been found liable for the augmentation, raised an action of relief in the Court of Session against the Earl of Findlater and Seafield, the successor of Alexander Ogilvie, for relief of the whole stipend over and above the said sums of 200 merks and 3s. 4d. Scots respectively in all time coming. Lord Seafield defended the action, and on November 16, 1771, the Court, affirming the judgment of Lord Monboddo, pronounced an interlocutor, by which they "repelled the objection to the pursuer's title, found that the contract anno 1648, entered into between Alexander Ogilvie and John Gordon, is binding upon the Earl of Findlater and upon the Earl of Fife, as deriving right under him, and in respect that the 200 merks which John Gordon was thereby bound to pay was exhausted, and that by the contract 1717 (narrated in interlocutor of the Lord Ordinary), Sir James Gordon became bound to pay to the minister of Ordiquhill the sum of £29, 3s. 4d. Scots over and above the said 200 merks, found that the pursuer and his successors are bound to continue the payment of the said sums; but found that the said defenders are bound to free and relieve the pursuer and his foresaids *quoad ultra* of the stipend payable to the minister of the said parish, and that from and after the term when the late augmentation to the minister of the said parish commenced, and decern and declare accordingly."

Again in 1798, a new augmentation having been imposed on Gordon of Park, he brought a declarator of relief against the Earl of Findlater and Seafield, the conclusions of which were similar to those in the earlier process. The action was defended only on the ground that as a part of the lands of Kempcairn belonged to Lord Fife, who had been called as defender in a supplementary and conjoined action at the instance of Lord Seafield, Lord Fife should be found liable *pro tanto* in any augmentation which was to be laid upon Lord Seafield. On 26th November 1800, Lord Craig, Ordinary, decerned in terms of the libel, reserving to the defendant his relief against the Earl of Fife. This interlocutor was allowed to become final.

On these judgments the pursuer now founded a plea of *res judicata*.

In subsequent augmentations Lord Seafield continued to relieve Gordon of Park of the stipend of the minister of Ordiquhill over and above the said two sums of money. In 1858, in a process of augmentation and locality raised in the previous year, the pursuer surrendered his teinds.

The defender having refused to relieve the pursuer of part of the stipend for crop and year 1881, the present action of declarator and payment was raised.

The defender averred that the rights which the parties to the contract of excambion of 1648 then had to their teinds were merely tack rights, and that the tack rights then exchanged having both terminated, the obligation of relief had likewise come to an end. The history of the

facts on which he founded these averments is fully traced in the opinion of the Lord President. The pursuer, on the other hand, stated that Alexander Ogilvie in 1648 gave to Gordon of Park a permanent right to the titularity of the Ordiquhill teinds.

Alexander Ogilvie acquired his right to the teinds of Ordiquhill, which he in 1648 transferred to Gordon, from his brother James under a deed of 1642, the terms of which, so far as material, are sufficiently set forth in the Lord President's opinion. His brother James therein styled himself "principal tacksman, titular, and having good and undoubted right to the teinds," and there were other phrases throughout the deed which indicated that he possessed, or professed to possess, some higher right to the teind of Ordiquhill than one merely in virtue of a tack. He conveyed them to his brother for crop and year 1622, and for "all years thereafter in tyme cuming," in warrandice of his procuring for Alexander a right to the teind of Kempcairn to which he had then no right.

The pursuer further averred that the tack of the Kempcairn teind had not expired, but would continue to run until 1906.

The defender pleaded—"On a sound construction of the said contract of excambion, and, *separatim*, having regard to the rights which were vested in the parties thereto, the mutual obligations thereby undertaken were not perpetual, but expired with the prorogated tacks held by the contracting parties respectively."

The Lord Ordinary (FRASER) pronounced this interlocutor—"Finds that by contract of excambion, dated 3d January 1648, entered into between Alexander Ogilvie, proprietor of the lands of Kempcairn, in the parish of Keith, and having right as tacksman to the teinds of Park, in the parish of Ordiquhill, on the one part, and Sir John Gordon of Park, proprietor of the lands of Park, in the parish of Ordiquhill, and also tacksman of the teinds of the lands of Kempcairn, on the other part, the said Alexander Ogilvie disponed his right under his tack to the teinds of Park to the said Sir John Gordon, and the said Sir John Gordon, on the other hand, disponed his right to the teinds of Kempcairn to the said Alexander Ogilvie: Finds that by said contract the said Alexander Ogilvie obliged himself to warrant the teinds of Ordiquhill to the said John Gordon to be free of any further proportion for augmentation for the minister's stipend of Ordiquhill in time coming, provided that the augmentation exceed the sum of 200 merks; and if it should exceed the said sum of 200 merks, the said Alexander Ogilvie obliged himself to relieve the said John Gordon of such further modification: Finds that the tack of the teinds of Ordiquhill so disponed by Ogilvie to Gordon expired in 1845, and was renewed by tacit relocation, and continued operative until April 1882, when the defender, as patron and titular of the parish of Ordiquhill, raised an inhibition of teinds against the heritors of the said parish: Finds that the tack of the teinds of the lands of Kempcairn (which lands now belong to the defender and to the Earl of Fife) will not expire till the year 1906: Finds that in the year 1717 a contract was entered into between the Earl of Findlater and Seafield, patron of the parish of Ordiquhill, and Gordon of Park, sole heritor of the parish, on the one part, and the moderator of the Presbytery of Fordyce on the other part, whereby, *inter alia*, it was agreed that Gordon of Park should pay, in addition to the sum of 200 merks formerly paid by him to the minister of the parish, the sum of £29, 3s. 4d. Scots, said two sums of 200 merks and £29, 3s. 4d. Scots, amounting together to £13, 10s. 10d. sterling yearly: Finds that there have been augmentations to the minister of Ordiquhill, under which the pursuer, as the proprietor of the estate of Park, has been obliged to pay to the minister of the parish of Ordiquhill more than the said sum of £13, 10s. 10d.: Finds that the defender and his predecessors, the tacksmen of the teinds of Kempcairn, relieved the pursuer and his predecessors of all sums of stipend paid to the minister of Ordiquhill beyond the said sum of £13, 10s. 10d. down to the year 1881: Finds that the defender paid £150 to account of stipend of the said year, leaving unpaid a balance of £56, 3s. 4d., which has been paid to the minister of Ordiquhill by the pursuer: Finds that the obligation undertaken by Alexander Ogilvie in the contract of excambion of 1648 is binding upon the defender, and that he is therefore bound to pay to the pursuer the said sum of £56, 3s. 4d.; decerns therefor against the defender, with interest as concluded for: Farther finds and declares that the defender is bound to free and relieve the pursuer of all stipend payable by him to the minister of Ordiquhill for the said lands of Park over and above the sum of £13, 10s. 10d., and that for crop and year 1882, and for all other crops and years thereafter, and in all time coming, till the expiry of the tack of the teinds of Kempcairn in 1906, and that the pursuer is only liable for the stipend of said parish to the extent of the said sum of £13, 10s. 10d. down to the said year 1906; reserving to both parties all pleas as to their mutual rights and liabilities for any years subsequent to the said year 1906, and decerns."

His Lordship added a note in which he explained at length the ground of his judgment. The finding to the effect that the tack of the Kempcairn teinds would not expire till 1906 was based on certain passages in the pleadings in the former actions between the parties above referred to, and other documents, which appeared to show that the tack granted in 1601 had been finally prorogated for a period which would not expire till 1906—the decreet of prorogation of the tack not being then in process.

The defender reclaimed. After his reclaiming-note had been boxed, but before the hearing of the case before the Inner House, the decreet of prorogation of the tack of 1601 was discovered among some papers in Lord Seafield's repositories, and was put in process. It showed that the tack of the Kempcairn teinds expired in 1810.

The reclaimer argued — The discovery of the decreet of prorogation removed the only ground on which the Lord Ordinary had decided against the defender. The excambion of 1648 was one of tack-rights merely, and both tacks having come to an end, the obligation of relief, which was really one of warrandice, could not subsist. The expiry of the tacks was further fatal to the pursuer's plea of *res judicata*.

The pursuer replied — It was not clear that the decreet of prorogation now produced applied to the tack in question. Even assuming it did so,

the right given to Alexander Ogilvie by his brother James, and by Alexander to Gordon of Park, was more than one of tack; it was a permanent right of titularity in the Ordiquhill teinds. James called himself "titular." He was so *de facto*. In any view, he must now be assumed to have been so, as was held on a construction of similar words in *Dean of Chapel Royal* v. *Johnstone*, 5 Macph. 414--*aff.* March 18, 1869, 7 Macph. (H. of L.) 19. That case also showed that the words "in all time coming" must be literally and not relatively construed. Again, the right of titularity which James Ogilvie professed to give to Gordon was now undoubtedly in the person of Lord Seafield, who was titular *qua* patron of the parish of Ordiquhill. On the principle of accretion his right must enure to the pursuer as Gordon's successor. —*Arbuthnott* v. *Allardice*, M. 7751; *Swan* v. *Western Bank*, March 22, 1866, 4 Macph. 663. The plea of *res judicata* was well founded, as the former judgments had been pronounced with no limitation of time, though the fact of the existence of the tacks was before the Court in these actions as appeared from the pleadings therein.

At advising—

Lord President—The summons in this case concludes for payment of sums of money amounting to £56, 3s. 4d., and also for declarator that the defender is bound to free and relieve the pursuer of all stipend payable by him to the minister of Ordiquhill, in the county of Banff, for his lands and estate of Park, over and above the sum of £13, 10s. 10d., and that for crop and year 1882, and for all other crops and years thereafter and in all time coming. The principal defence stated against this claim is expressed in the defender's third plea-in-law, which is—"On a sound construction of the said contract of excambion, and *separatim*, having regard to the rights which were vested in the parties thereto, the mutual obligations thereby undertaken were not perpetual, but expired with the prorogated tacks held by the contracting parties respectively."

The case depends upon the effect of a contract of excambion executed in 1648, and particularly of certain clauses contained in that contract. The parties to the contract were, on the one side, Alexander Ogilvie, who was proprietor of the estate of Kempcairn in the parish of Keith, and who had right to the teinds of Ordiquhill. He had no right to the teinds of his own lands of Kempcairn, but he had right to the teinds of Ordiquhill, and Ordiquhill comprehended the lands and teinds belonging to the estate of Park. The other party to the contract was Gordon of Park, the owner of that estate, who had no right to the teinds of his lands, but had right to the teinds of Kempcairn. Alexander Ogilvie, the proprietor of Kempcairn, was the predecessor of the defender in this action, and Gordon of Park was the predecessor of the pursuer.

By the contract of excambion Ogilvie assigned all right he had to the teinds of Ordiquhill to Gordon of Park. The effect of that of course was that Gordon of Park thereby obtained right to the teinds of his own lands, which he had not before; and, on the other hand, Gordon of Park assigned all right that he had to the teinds of Kempcairn to Alexander Ogilvie, the predecessor of the defender, and in that way Ogilvie of Kempcairn obtained right to the teinds of his own lands. That arrangement was obviously a very expedient and desirable one for both parties in the peculiar position in which they stood.

The question arising upon the construction of the contract involves the consideration of, in the first place, what was the nature of the right to the teinds thereby assigned? It is said, on the one hand, by the defender, that they were teinds belonging to parsonages in both cases, and that the rights given by the contract on the one hand and on the other were rights to tacks of teinds, and nothing else. The pursuer, however, disputes that he and Ogilvie were tacksmen of the teinds, or that they belonged to parsonages, and he also maintains that the rights conveyed by the contract of excambion were not simply rights to tacks of teinds, but rights of a higher character, viz., rights to the titularity of the teinds.

Now, with regard to the teinds—whether these were parsonages or not—it is necessary to explain that prior to the Reformation the number of parsonages in existence was not very large. It had come to pass that most of the parish churches had come into the hands of bishops and archbishops, and other superior ecclesiastics, who served the cures of parish churches by means of vicars, to whom they made recompense by way of stipends, and the teinds were vested in these superior ecclesiastics themselves. There were, however, some parsonages at that time also that were chiefly in parishes where the patronages had got into the hands of laymen. The number of them is not very large, and they are to be found in Keith's List—that is, the list of parsonages existing at the time of the Reformation—but in that list the two parsonages here in question, viz., the parsonage of Keith and the parsonage of Fordyce, are not to be found, and that fact was appealed to in the course of the argument as affording strong presumption that they were not parsonages at all. That, however, is quite a fallacy, because there can be no doubt that many parsonages were created at the Reformation. This was chiefly done by Special Acts of Parliament, and it so happens that we have before us the Special Act of Parliament of 1592 creating the parish of Keith into a parsonage, so that as regards this particular parish there cannot be the smallest doubt that it was made a parsonage in the year 1592. It had belonged, like a great many other parish churches, to the bishoprick of Moray, and the bishop having died, and the benefice being in the hands of the Crown, King James VI., who was at that time much more on the side of the Reformers than he subsequently was, thought fit to erect this parish into a parsonage, which he did by a charter dated in 1590, which was confirmed by that Act of Parliament that I have just referred to, in 1592, chapter 191, which is to be found in the third volume of Thomson's Acts, p. 650.

Keith therefore being a parsonage, the next piece of evidence that we have before us is this, that in 1601 Thomas Annand, designing himself minister of Keith, granted a tack of the teinds to John Lord Saltoun for nineteen years for a teind-duty of 500 merks for parsonage teinds and £10 for vicarage. This tack was granted with consent of the patron Lord Spynie, but the only reason for obtaining that consent was that without the consent of the patron a tack for nineteen years by the parson would have been invalid under the

Act 1594, chapter 200. So that is simply a tack of the teinds by the parson of Keith within nine years after the parsonages was erected.

The next fact in the history of these teinds is that in 1609 an Act of Parliament was passed containing a ratification in favour of the same Lord Saltoun, the tacksman under parson Annand. That Act refers to the dissolution of the parish of the Keith from the bishoprick of Moray, and its erection into a parsonage among other churches which had in like manner been dissolved from that bishoprick and erected into parsonages, and then it proceeds—taking into consideration the great services of the Abernethies of Saltoun, and the sums that had been paid by them for patronages and tacks of teinds—to declare that the tacks of teinds and the rights of parsonages are to be good and sufficient lawful and valid rights for bruiking of the teind sheaves and other sheaves "during the lifetime and speas contained in the said tacks, and for bruiking the rights of patronage in all time coming." So that in 1609 we have it upon the authority of that Act of Parliament that Lord Saltoun's title in regard to patronages and to teinds were of this nature, that whereas his rights to patronages were absolute, and that he was to bruik them in all time coming, his rights to the teinds were entirely temporary, and were to be bruiked during the lifetime and space contained in the tacks, and no other title of any kind is recognised in that Act of Parliament as existing in the person of Lord Saltoun. The object of this Act of Parliament is perhaps not at once apparent, but the reason of it may easily be explained as intended to validate the tacks of teinds which he had got, which appear to have been for nineteen years, and which perhaps might have been invalid under the Act of 1594 but for this ratification.

Then three years later, in 1612, the tack which had been granted by Thomas Annand, the parson of Keith, was assigned by Lord Saltoun to Lord Ochiltree. This fact we find from the statement in the decree of prorogation to which I am hereafter to refer. And then in 1646 it appears that Lord Ochiltree granted a sub-tack of these teinds to Gordon of Park. Ochiltree's right was escheat, and Forbes of Craigievar, who was donator of the escheat, ratified the tack, and transferred and made over all Lord Ochiltree's right. It is expressed in these terms. He ratified the tack, and transferred his full right to the same and the decree of prorogation, in so far as concerned the teinds of the said lands of Kempcairn and those contained in the said first contract in the person of the said James Gordon of Park, for all the years and terms to run of the said tack and prorogation.

Now, that brings the title of the pursuer down to the year 1646, at which time it comes into the person of Gordon of Park, and the deed of excambion is just two years later, so that we thus trace the title of one of the parties to the contract of excambion step by step from the Act of 1592, when the parsonage was erected, down to two years before the creation of the contract of excambion.

But then there is mention made in these deeds of transference, or at least in this last one, not merely of an assignation, but of a prorogation of the tack. And the Lord Ordinary in dealing with his case was placed in a position of great difficulty certainly by reason of the absence of that prorogation, or of any means of ascertaining what the terms of the prorogation were, except generally that it was for the period of ten nineteen years. From what date, however, that period of ten nineteen years was to run he was not able to ascertain by any direct evidence, and he was therefore driven to indirect evidence, which he himself says he can place little reliance on, but being the best at his command he was obliged to make use of it. Very fortunately, however, since that interlocutor was pronounced, the decree of prorogation has been recovered, and is now before us, and it is dated in 1618. The proceeding upon which that decree followed was a proceeding under the Statute of 1617, chapter 3. This is a much earlier Act than the Acts creating the commission which we are more accustomed to deal with, and is an Act for the plantation of kirks, not for the valuation of teinds, nor for any other purpose for which more recent statutes were passed, but for the plantation of kirks only—that is to say, the Commissioners were to see that churches that had no ministers were provided with ministers, and that ministers who had no stipends were provided with stipends, and among other cases which came within their power was the case of the parish of Keith. There were two churches in the parish of Keith—one was the principal parish church of Keith itself, and the other was the kirk of Grange, and the Commissioners proceeded, in virtue of the statute by which the commission was created, to deal with the teinds of the parish of Keith in reference to both these churches—both the principal parish church and this subsidiary church, which was not a proper parish church. The way in which the Commissioners are directed to proceed is to call before them all parties who are interested in the teinds of the parish to be dealt with, and to desire them to produce their titles. These are the directions contained in the Act of 1617, and accordingly we shall find from the extract decree that all parties interested were called before them in the particular case with which we have to deal. For there appeared, in the first place, the Bishop of Aberdeen, who designed himself minister of the kirk of Keith; being himself Bishop of Aberdeen he was the minister of the kirk of Keith at that time—that is to say, he had the parsonage teinds. Keith was not in his own diocese, it was in the diocese of Moray, but he was nevertheless parson of Keith. The second party was the Bishop of Moray, and he appears, as the decree bears, in name and as procurator for Mr R. Watson, minister of Grange, and the two ecclesiastics declare "that albeit ye said chaple of Grange be nocht ane prinll. paroche kirk bot allenarlier ane pendicle of the paroche kirke of Keythe, yet the samen is and hes bene thir monie yeiris bygane plantit & provydit wt. ane severall minister quha serveit the cure yairat as ane severall paroche kirk be it self thir diuerse yeiris bygane ffor ye ease, weill, and instruction of the parochiners and inhabitants of yat pairt of the parochine of Keythe by and maist ewest and contigue to the said kirk or chapple of Grange, and yairfir and in respect of ye charge of ye cure and ye function of ye said haill parochine of Keythe abovewrittin, and yat ye samen cannot be sufficientlie dischargit be ye minister pnt. or to come at the said Kirk of Keythe, qlk. is the caus quhairfore thair is &

hes bene ane seuerall minister plantit and provydit to ye said chaple of Grange," and accordingly they ask the Commissioners to deal with these two churches, and to provide sufficient stipends for both ministers. But there appeared another most important party, James Lord Stewart of Ochiltree, in whose person the right of the patronage of the kirk and parish of Keith, and tack of the teinds thereof, then stood, and he produced before the said Commissioners a tack and assedation made and granted by Thomas Annand, the minister, parson, and vicar of the kirk and parish of Keith, with the consent of Lord Spynie patron thereof for the time, to the late John Lord Saltoun, his heirs, assignees, and subtenants, of all and haill the parsonage and vicarage of the said parish of Keith, with all and sundry teind sheaves and other teinds, fruits, rents, emoluments, and duties whatsoever pertaining and belonging to the said parsonage and vicarage of Keith during the space of nineteen years next after the date under written of the said tack for the yearly payment of the sum of 500 merks money for the said parsonage teinds, and the sum of ten pounds for the said vicarage teinds, at two terms in the year (St Serf and Alhallowmas), by equal portions, as the said tack, duly signed and subscribed by the granters thereof and consenters thereto, dated 2d day of June 1601, bears, together with a disposition and heritable alienation made by the said John Lord Saltoun to Lord Ochiltree, then styled Sir James Stewart of Killeithe, anent the alienation to him of the haill lands, lordships, and so forth, mentioned and contained in the said bond of alienation, with the advocation, donation, and right of patronage and so forth, that is, the alienation of the tack which I mentioned before as having taken place in 1612. Now, there is a title produced by Lord Ochiltree at that time, one of the predecessors of the pursuer of this action, and the only title which he alleges he has to the teinds of Keith is the tack granted by Thomas Annand, and the assignation of it in 1612. These writings having been produced, the patron, Lord Ochiltree, proceeds to state what he is prepared to do, and in the first place he renounces his right as tacksman of the vicarage benefice, and in respect of that renunciation he asks the Commissioners to grant him a prorogation of his tack. Now, the Commissioners, dealing with these parties and their statements of their titles, proceed to do this. They settle that there shall be two ministers as before, one at Keith and one at Grange, and then they divide the parish, as we should say in modern times, into *quoad sacra* parishes, between these two ministers, and then having done that with great deliberation and in a very minute way, they proceed to assign stipends to these ministers, and in regard to the minister of Keith they give him the vicarage teinds to a certain extent, which had been renounced by the tacksman, estimated at 400 merks; and they give him besides that, what had apparently not been offered by the tacksman, 700 merks out of the parsonage teinds. To the minister of Grange they give the vicarage teinds estimated to amount to 300 merks, and they give him 300 merks out of the parsonage teinds. The result of this so far as the tacksman is concerned was that he renounced his vicarage teinds, and apparently with his consent the Commissioners, in the exercise of their undoubted statutory power, made him liable during the remainder of the currency of his tack to pay 1000 merks to these ministers out of the parsonage teinds. His tack-duty was 500 merks, so that the result of it was that his tack-duty was doubled, and he renounced the vicarage teinds besides. This of course was a very considerable sacrifice upon the part of the tacksman, but as the tack was about to expire the sacrifice would not be of very great duration. But the way in which the tacksman was recompensed for the sacrifice, whatever it was, was that the Commissioners granted him a prorogation of his tack, and that prorogation is for ten nineteen years after the termination of the tack that was prorogated. The prorogation is thus expressed—"Beginand the entrie of this pnt. eikit tak imediatlie after the ische and expyring of ye space and yeiris abovewritten yet to run of ye pnt. tak, producit quhan the samen sall happen, and fra thyne furth to endure and continew ay and qll. the saidis ten nyntene yeiris abovewritten be fullie and compleitlie outrun, after the expyring of ye said pnt. tak." Now, keeping in mind that the tack was dated in 1601, the expiry of it would be in 1620 and 190 (ten nineteen) years added to that brings it down to 1810, at which time the tack granted by Thomas Annand, the parson of Keith in 1601, came finally to an end. The great difficulty that occurred in the case when it was before the Lord Ordinary was to ascertain whether this prorogation of 190 years was to run from 1620, because there was another tack mentioned in the same titles which was for a period of two nineteen years from 1601, but that tack certainly never was prorogated. Whatever may have been the state of the facts, we cannot precisely tell, but so far as we can see, the only other tack that was prorogated in favour of a predecessor of the pursuer was that prorogated in 1601 for nineteen years,

This brings the history of the right to the teinds of one of the parties to the contract of excambion to a very clear result. It seems to me to be impossible in the face of these facts to hold that Gordon of Park, a predecessor of one of the parties to this action, and himself a party to the contract of 1648, could at that time by any possibility have any other right in the teinds of the parish of Keith except Thomas Annand's tack prorogated by the decree of 1618, and therefore as far as that party's rights are concerned it will not admit of any doubt. I apprehend, in the first place, that he had never any higher right than the tack from the parson of Keith, and, in the second place, that that right came finally to an end in the year 1810.

On the other hand we have corresponding evidence of precisely the same kind of title as regards the teinds of Ordiquhill. These are the teinds which belonged to the proprietor of Kempcairn, and which he by the contract of excambion conveyed to Gordon of Park. The tack by the parson of Fordyce, who was then owner of the teinds of Ordiquhill, was dated in 1604. The name of the parson of the parish was Patrick Darg, and he by that tack let the teinds to James Ogilvie for 800 merks of tack-duty for a period of 38 years. In 1622, Lord Deskford, who was then proprietor of Kempcairn, entered into an arrangement with James Ogilvie, the tacksman of the teinds, who was his eldest son, by which he (Lord Deskford) conveyed his whole estate to his eldest son except the lands of Kempcairn, and he re-

served these to himself intending them to form a provision for his second son. This deed of 1622 narrates that as Lord Deskford had no right to the teinds of Kempcairn, James Ogilvie should become bound to acquire right to these teinds, and to convey them to his father or any person to whom the lands of Kempcairn might be conveyed by his father; and in security and real warrandice of the teinds of Kempcairn so to be acquired by James Ogilvie and conveyed to his father, James Ogilvie conveyed to his father the teinds of Ordiquhill, and it was agreed that if James Ogilvie did not acquire the teinds of Kempcairn so as to give his father right to them, then he should be obliged to deliver to him sufficient rights, tacks, and securities of the teinds of Ordiquhill, which should remain good to Lord Deskford and his disponee of the lands of Kempcairn until James Ogilvie acquired and gave right to the teinds of Kempcairn, and then James Ogilvie set to his father the teinds of Ordiquhill from the year 1622, and "sicklike of all years thereafter and in time coming." Now, this is a little complicated, but it comes out quite clear after a moment's consideration. James Ogilvie is the original tacksman under the parson, Patrick Darg, by the tack of 1604, and he conveys the teinds of Ordiquhill to his father Lord Deskford—he sets them to his father—which can mean nothing else than he granted him a sub-tack that was only in warrandice in the first instance, because the teinds that Lord Deskford wanted to acquire were the teinds of Kempcairn, but they were not to be had, and therefore he gets the teinds of Ordiquhill in warrandice, and so the teinds of Ordiquhill remained in the person of Lord Deskford at his death.

And then we have, just twenty years afterwards, in 1642, another contract, the parties to which are James Ogilvie, the original tacksman under Patrick Darg, and his brother Alexander Ogilvie, to whom the lands of Kempcairn had been given by his father Lord Deskford. Now, this deed of 1642, proceeding on the narrative of the contract of 1622, in so far as James Ogilvie is concerned (he having become Earl Findlater, and being so called in the deed), confirms what had been done in the contract of 1622, and binds him to acquire right to the teinds of Kempcairn, and to convey them to his brother Alexander, and in the meantime he makes over the teinds of Ordiquhill to be enjoyed by his brother until the teinds of Kempcairn should be acquired. It is important to observe the terms in which that right to the teinds of Ordiquhill is granted. The Earl of Findlater (James Ogilvie), the tacksman under Patrick Darg, calls himself tacksman and titular. He has not the slightest appearance of any other title in his person in regard to these teinds except the tack of Patrick Darg, but he nevertheless calls himself tacksman and titular, and he makes his obligation or conveyance in this way—"Moreover, the said noble Earl being willing to establish the full right of the teind shaves of the lands underwritten in their person in favour of the said Alexander Ogilvie, his brother, conform to that part of the said contract, true meaning thereof, and assignation foresaid made by the said umqle. noble Lord to them thereupon, therefore for fulfilling the said clause of the said contract and for renewing and re-establishing the said tack of the same teind shaves in the person and favour of the said Alexander Ogilvie, *et accumulando jura juribus*, the said noble Earl, James, Earl of Findlater, principall tacksman, titular, and having good and undoubted title and right to the teind shaves underwritten, has sett and in tack and assedation lett, and by the tenor hereof setts, and in tack and assedation for the maill and dutie underwritten letts, to the said Alexander Ogilvie of Kempcairn, his heirs and assigneys, whatsomever, all and sundry the teind shaves of the said haill parochin of Ordiquhill, with the parts, pertinents, and pendicles of the said cropt and year of God 1622 years, which is declared by the said contract to have been the said umqle. noble Lord, Walter Lord Deskford, his entry thereto, and consequently is due and belongs to the said Alexander Ogilvie, his said cessioner and assignie, and sicklike of all years thereafter and in time coming, not only ay and while the said noble Earl, James Earl of Findlater, purchase and acquire and obtain to and in favours of the said Alexander Ogilvie of Kempcairn and his foresaids sufficient tack, rights, and security of his particular towns and lands" (that is, the lands of Kempcairn) "above exprest in manner and form and during the space above mentioned." Then there is a consideration paid on the other side by Alexander Ogilvie for that tack. But it is quite apparent upon the face of these deeds, in the first place, that the sole title of the Earl of Findlater at that time to the teinds was the tack already mentioned, and, in the second place, that even if the Earl of Findlater had had no better title to the teinds of Ordiquhill than he had under that tack, what he does in effect give to his brother Alexander Ogilvie is nothing but a sub-tack of these teinds. The words which I have read will bear no other meaning, and therefore Alexander Ogilvie becomes simply the subtacksman of his brother Lord Findlater under Parson Darg's original tack of 1604.

Now, then, Alexander Ogilvie is the other party to the contract of excambion of 1648, and, so far as I can see, there is not to be found in that contract of excambion or in the words of the conveyance or assignation of that contract of excambion anything to support the idea that the parties supposed that they were conveying to one another, or intended to convey to one another anything but the rights which they held respectively as tacksmen or sub-tacksmen of teinds of the parsonage of Keith and Fordyce respectively.

Now, that being so, it is only necessary to mention further, that as regards the tack to the teinds of Ordiquhill granted by the parson of Fordyce, that was prorogated like the other for the period of 203 years, and it is not disputed that the prorogated tack came to an end in the year 1845, so that we have it thus established, I think, beyond the possibility of a doubt, in the first place, that the titles by which the parties to the contract of excambion held their teinds respectively were tack rights, and, in the second place, that both of these tack rights have expired, the one in 1810 and the other in 1845. And the question comes to be, whether in these circumstances it is possible to enforce the obligation upon which this action is founded—an obligation undertaken by Alexander Ogilvie, the predecessor of the defender, in favour of Gordon of Park, the predecessor of the pursuer?

I think it quite unnecessary to examine the

various deeds that have been gone over at length for the purpose of commenting upon certain expressions used in them seeming to import that the parties, or some of them, in the long history of these teinds assumed to themselves characters and rights which did not belong to them. There is no doubt that there are particular expressions contained in some of them which would lead one to suppose at first sight that there were rights of titularity upon the one side or upon the other. But the history of the teinds of both estates when it comes to be fully understood renders the existence of such rights of titularity a legal impossibility so long as the parsonages of Fordyce and Keith remained. It is quite impossible that there was any titular except the parson. He was the titular and the only titular. No doubt, soon after this contract of excambion, there was an Act of Parliament passed which had the effect of transferring the teinds of parsonages to the patrons—the Act of 1649, which was rescinded at the restoration but repeated in 1690. That Act deprives patrons of their right of presenting ministers, and, in compensation for the loss of that right, it gave them right to the teinds of the parsonages to which they were formerly in use to present ministers. That was given, however, saving all existing tack rights. And although there might be conveyed by the operation of the statute to the patrons of these parsonages the right to these parsonage teinds, nevertheless the right which the parties we have been dealing with acquired under the tacks by the parsons in 1601 and 1604 remain exactly in the same position as if that statute had not been passed.

Now, it only becomes necessary to consider what is the nature of the obligation undertaken by Alexander Ogilvie, the predecessor of the defender, in the contract of excambion, and whether it can possibly be held to be subsisting and operative at this date so as to found this action. After conveying his teinds (the teinds of Ordiquhill) to the other party, Gordon of Park, he obliges himself and his foresaids "to warrant the said parsonage teinds to the said John Gordon and his foresaids to be free of any farther proportion for augmentation for the minister's stipend of Ordiquhill in time coming, providing the same exceed the sum of twa hundred merks money foresaid, in the whilk case it is agreed upon betwixt the said parties that if there shall be any modification granted to the said minister more nor the said sum of twa hundred merks money foresaid yearly out of the parsonage teinds of the lands lying within the said parochin of Ordiquhill, the said John Gordon shall be astricted, and by their presents binds and obliges himself, his heirs, executors, and successors, to make payment of the said sum of twa hundred merks yearly in all time coming after the said modification is found due; and the said Alexander Ogilvie obliges himself and his foresaids to relieve the said John Gordon and his foresaids of any further modification, and to make payment thereof to the ministers so to be augmented, nor the said sum of twa hundred merks in all time coming." Now, the obligation here is in reality what it calls itself, an obligation of warrandice, just warranting the teinds against augmentation of stipend, and that necessarily implies and carries with it a right of relief from stipend on the part of the person to whom the warrandice was granted. The two rights are correlative. Now, when you warrant an estate, whether it be of land or of teinds, in favour of a particular person, it seems to be too clear to admit of argument that the warrandice subsists in favour of that person only so long as he possesses the estate warranted. And as the pursuer has now not the shadow of a right to the teinds of the lands of Ordiquhill, it does not appear very clear how he can possibly have any right to found upon the obligation of warrandice of that property. For let it be understood that teinds are property just as much as lands are. If a man lets his land on a long lease, it may be for 900 years, and grants warrandice, his warrandice will certainly not subsist after the expiration of that long tack. And just as much so in the case of teinds. Some confusion in argument is always introduced by looking upon teinds as a burden upon lands. Teinds are not a burden upon lands. They are a separate estate, and that separate estate,—the teind of Ordiquhill,—was given possession of by the contract of excambion, by Ogilvie to Gordon of Park. But it was given for a limited period, the period for which Ogilvie himself was entitled to have it, viz., during the currency or subsistence of the prorogated tack, and as soon as that prorogated tack came to an end, neither Ogilvie nor his assignee Gordon had any longer any right to the teinds at all. They were just in the same position as if they had never possessed those teinds, and that being so the warrandice of the teinds necessarily comes to an end. And so, if the warrandice comes to an end, there can be no subsisting warrandice to relieve of stipend. The minister is not to be paid out of the lands, but out of the teinds of the estate that no longer belongs to the party having the teinds. The clause of warrandice and relief of stipend becomes no longer operative upon him, but upon the party to whom the teinds now belong. And therefore it appears to me that from the nature of the right constituted by the contract of excambion on one side, and on the other, the warrandice clause must have the same right and extent as the tack. Such general expressions in the deeds as "in all time coming" must be read with reference to the nature of the right. It was a right of long endurance, and therefore to say that the warrandice shall subsist in time coming, or in all time coming, can mean nothing more than that it shall subsist for the same length of period as the principal right itself. That appears to me to be the result, and the only true construction of that clause. And if I understand the judgment of the Lord Ordinary aright, he too is of that opinion, and would have given effect to that opinion if he had not been under the impression that one of the two tacks was unexpired, and would not expire until the year 1906.

That seems to me to dispose of the principal issue between the parties, and it is only necessary to say in a word that the plea of *res judicata* maintained on the part of the pursuer seems to me to have no foundation whatever. The facts of the case no doubt shew that these clauses of warrandice were given effect to in two separate actions, both in the last century. But then at that time both of the tacks were subsisting, and the rights to the teinds conveyed by the contract of excambion were in operation at that time. Gordon of Park was entitled under that contract to the

teinds of his own lands, conveyed to him by Alexander Ogilvie, and Alexander Ogilvie on the other hand was entitled to the teinds of his lands which had been conveyed to him by Gordon of Park. The judgment enforcing that clause of warrandice and relief while the tack still subsisted can surely never be maintained as *res judicata* after the tacks have come to an end. The question to be decided in this case is, whether these obligations subsist after the tacks have expired—a question which could not possibly have occurred in the last century, and which therefore could not then be decided.

Upon the whole matter, therefore, I come to the conclusion that the defender is entitled to absolvitor.

Lord Deas—This case has been very ably and elaborately pleaded upon both sides, and great diligence has been shown before us in the recovery of documents which were amissing when the case was before the Lord Ordinary,

It depends very much, as your Lordship has pointed out, on the construction to be given to the contract of excambion of 1648, particularly the clause of relief in that contract. I agree entirely with your Lordship in the construction which you have put upon that contract, and upon that clause. Knowing well the great experience and familiarity of your Lordship with that class of cases, I would think it bold and very unnecessary in me to attempt to argue or augment what has been so well and clearly expressed by your Lordship, and therefore I have only to say, that according to the best opinion I can form in my own mind, I agree entirely with the views which your Lordship has so well and ably expressed.

Lord Mure—I concur with your Lordship and the Lord Ordinary as to the nature of the rights on which the parties here respectively found as at the date of the excambion. I think that they were rights of tack, and so temporary in their nature; and that the main questions which were in these circumstances to be ascertained were the dates of the expiry of the respective tacks. In dealing with these questions, the Lord Ordinary, although not without hesitation, having regard to the conflict of evidence, came to the conclusion that one of the tacks at all events was still subsisting, and would not expire till 1906; and on that ground decided the case in favour of the pursuer of the present action.

Since the date of the Lord Ordinary's interlocutor, however, there has been recovered and laid before us a document, viz., the extract decree of prorogation of July 1618, from which it is, in my opinion, made very clear that the conclusion the Lord Ordinary had arrived at in the absence of that document, and in the otherwise confused state of the evidence he had to deal with, was incorrect; and that the tack which was supposed to be still in existence and was not to expire till 1906 had some time ago, viz., in the year 1810, come to an end.

I therefore agree with your Lordship that the judgment of the Lord Ordinary will, on that ground, now require to be altered.

Lord Shand—I also concur in the judgment which is now to be pronounced, and after the very full and exhaustive statement of the facts, and reasons of judgment, which your Lordship has made, I shall only add a very few words.

During the argument we have had before us a a print of the extract of the decree of the Commissioners of Kirks which has been discovered since the case was before the Lord Ordinary, and on which a point was started before us which was not before his Lordship when he pronounced the interlocutor now under review, and one which is quite different from that on which his Lordship decided the case.

It was maintained for the respondent that when the right to the teinds of Ordiquhill was conveyed by the contract of excambion, the right that was thereby conveyed was one of a permanent and not of a temporary character, and that the granter of that right was titular of the teinds. There are no doubt throughout the documents expressions in connection with these teinds, and clauses in reference to these teinds, in which we find the expression titular used. In previous cases that have occurred in this Court I think it has been made clear that that term has been repeatedly found to be used in a very loose sense, and I think that is the explanation of the use of the term where we find it in any of these deeds. I am satisfied, with your Lordship, that there was no right of titularity in these teinds, and that the granters of that deed of excambion had temporary rights under tacks only, and I think that is the proper result, in the first place, of the historical examination which your Lordship has made of the position of the teinds of these parishes, apart from the particular clauses of the deeds now before us, and is also the result of a careful examination of these deeds. For I think that the language of the contract of excambion, and of the previous deeds relating to these teinds, has relation to tacks or temporary rights and not to permanent rights at all. That being so, it appears to me that there must be an end to this claim of relief, for, as your Lordship has pointed out, the tacks of both the rights to teinds that were the subject of the contract of excambion have come to an end.

But I think it right to add, that even if it had not been so, and that the tack of teinds which is referred to in the document which has now been discovered had not come to an end, I should still be of opinion that the respondent was not entitled to enforce this clause of warrandice. That clause of warrandice relates to the teinds of Ordiquhill, and it is conceded that the tack of the teinds of Ordiquhill came to an end in 1845. That being so, it appears to me that as the person seeking to enforce the clause of warrandice has since 1845 had no right to the teinds of Ordiquhill, the clause of warrandice, which related to that tack, was no longer operative. The warrandice undertaken applied to that tack of the teinds of Ordiquhill, and it appears to me that as the tack was temporary, so the clause of warrandice was temporary also, and that it expired with the tack itself. If the lessee or his representatives had no longer right to the teinds after 1845, he had no longer right to enforce the clause of warrandice which related to that tack only. It is said that the conveyance of the teinds, which was the counterpart of the conveyance of the right to the teinds of Ordiquhill, still subsisted, but I do not think that makes any difference in the legal aspect of the question. The considera-

tion for the tack of the teinds of Ordiquhill might have been a sum of money paid down. If it had been so, I suppose that there could be no doubt that as soon as the tack of the teinds of Ordiquhill expired any right under the clause of warrandice would expire also. The consideration was not a sum of money down, but was a right to other teinds no doubt for a longer period. But the mere circumstance that the consideration was a tack of teinds for a longer period does not, I think, alter the question. It was a consideration only, and upon that ground it appears to me that, even supposing the document your Lordship has referred to had not been discovered, seeing that the tack of the teinds of the other lands had expired, I should have been disposed to hold that the interlocutor of the Lord Ordinary should not be adhered to.

The Court pronounced this interlocutor:—

"The Lords having considered the cause and heard counsel for the parties on the reclaiming-note for the Earl of Seafield against the interlocutor of Lord Fraser of 25th November 1882, Recal the said interlocutor: Find that by contract of excambion dated 3d January 1648, entered into between Alexander Ogilvie, proprietor of the lands of Kempcairn in the parish of Keith, and having right as tacksman to the teinds of Park in the parish of Ordiquhill, on the one part, and Sir John Gordon of Park, proprietor of the lands of Park in the parish of Ordiquhill, and also tacksman of the teinds of the lands of Kempcairn, on the other part, the said Alexander Ogilvie disponed his right under his tack to the teinds of Park to the said Sir John Gordon, and the said Sir John Gordon, on the other hand, disponed his right to the teinds of Kempcairn to the said Alexander Ogilvie: Find that by said contract the said Alexander Ogilvie obliged himself to warrant the teinds of Ordiquhill to the said Sir John Gordon to be free of any further proportion of augmentation for the minister's stipend of Ordiquhill in time coming, provided that the augmentation exceed the sum of 200 merks; and if it should exceed the said sum of 200 merks, the said Alexander Ogilvie obliged himself to relieve the said Sir John Gordon of such further modification: Find that the tack of the teinds of Ordiquhill so disponed by Ogilvie to Gordon expired in 1845: Find that the tack of the teinds of the lands of Kempcairn (which lands now belong to the defender and to the Earl of Fife) expired in the year 1810, and that the rights conveyed *hinc inde* by the parties to the contract of excambion of 1648 having come to an end, and neither of these parties having any longer a right to the teinds of his lands, the obligations of warrandice and relief contained in the said contract are no longer binding: Therefore sustain the third plea-in-law for the defender: Repel the pursuer's plea of *res judicata:* Assoilzie the defender from the conclusions of the action, and decern: Find no expenses due to or by either party in the Outer House: Find the reclaimer entitled to expenses since the date of the Lord Ordinary's interlocutor, allow an account thereof to be lodged, and remit the same to the Auditor to tax and to report."

Counsel for Pursuer—J. P. B. Robertson—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for Defender—Lord Advocate (Balfour, Q.C.)—Mackintosh—Pearson. Agents—Mackenzie, Innes, & Logan, W.S.

Friday, November 9.

FIRST DIVISION.

[Lord Fraser, Ordinary.

LAMB AND OTHERS (LAMB'S TRUSTEES) *v.* REID.

Sale of Heritage—Objection to Title—Voluntary Trust for Creditors — Objection that Non-Acceding Creditors might Challenge Title derived through Voluntary Trustee.

A husband gratuitously disponed certain heritable subjects to his wife, who conveyed them to trustees to be held for behoof of their children. The husband subsequently granted a trust-deed for creditors, the trustee under which was vested with all the powers of reducing and setting aside alienations which he would have had in a sequestration under the Bankruptcy Statutes. This trust was not set aside by sequestration used by any creditor, and the trustee raised an action against the wife's trustees to reduce the conveyance to her as a donation *inter virum et uxorem* and revocable, which action was compromised by his accepting a sum of money, in consideration for which he consented to decree of absolvitor, and granted to the wife's trustees a conveyance of the subjects. These trustees having thereafter entered into a contract of sale of the subjects, the purchaser objected to the title they offered, on the ground that the compromise and reconveyance by the trustee was not binding upon non-acceding creditors of the husband. *Held* that the non-acceding creditors not having reduced the trust for creditors by sequestration within sixty days of its date, they were bound by the actings of the trustee, and that no such challenge by them would be well founded, and therefore that the title offered by the wife's trustees was valid and unobjectionable.

This was an action of declarator and implement of a contract for the sale of certain heritable property. The action was at the instance of the trustees of Mrs Mary Macdonald or Lamb, wife of William Lindsay Lamb, a joiner in Greenock, against James Reid, worsted spinner there. The circumstances of the case and the nature of the defender's objection to complete the contract are fully detailed in the following narrative, which is taken from the opinion of the Lord Ordinary:—

"William Lindsay Lamb, a joiner in Greenock, was the owner of heritable property in Finnart Street, Greenock; and in the year 1874 he conveyed by disposition this property to his wife, with entry as at the date of the disposition. No price was paid by the disponee, who was infeft on 10th July 1874. In the year 1878 Mrs Lamb, the disponee, conveyed over to trustees the subjects to be held by them, in trust for behoof of her children. The annual produce was directed to be applied for their maintenance and educa-