I know it may be customary in Ayrshire to let country-houses for twenty-one years. I have, accordingly, though, as I have said, with some hesitation, come to agree with your Lordships that, as no objection was taken to the duration of the lease, and no proof offered on this head, we are not in a position to consider it; but I should desire to reserve my opinion upon it if the point should hereafter arise for decision.

On the point as to possession following on the lease I shall only say that, in my opinion, from the time the lease was granted the defender necessarily possessed upon the lease and on no other title. I think it is a mere fallacy to say that, because the full rent was not paid, possession was not had upon the lease. Provided the rent agreed on was a fair rent, it is of no consequence that Lord Eglinton did not exact it in full, because that only affected Lord Eglinton himself, and in no way concerns his successor, who will of course receive the agreed-on sum of £120 per annum. If it could have been proved that Lord Eglinton received more than £120 per annum, I need hardly say that the lease could not stand; but in the case supposed the lease would fall, not because the tenant did not possess upon it, but because it would not be a fair lease.

The last objection which I shall notice is that which is founded on the fact that the defender is a trustee under the contract of marriage between Mr Allenby and Lady Sophia under which the lady's interest in the entailed estate is conveyed. Now, under this contract of marriage, for the particulars of which I refer to the Lord Ordinary's judgment, it is plain that Mr Vernon's duty as a trustee would only commence on Lord Eglinton's death, or in the event of the disentail of the Montgomerie estate. At the time when he accepted this lease the defender had no duty to perform in the character of a trustee, and the lease was not in any real sense a lease of trust-estate. The rule against purchases of trust-estate by trustees has been, and will be, strictly applied by the Court, but I see no reason of convenience or justice for extending it to a case like the present, where the trustee has only a bare title to the estate, or rather to a contingent interest in it. In all the circumstances I am of opinion that the Lord Ordinary's judgment is well founded.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuer — Rankine — Dundas — Wilson. Agents — Dundas & Wilson, C.S.

Counsel for the Defender—C. S. Dickson —W. Campbell. Agents—Blair & Finlay, W.S.

Saturday, March 16.

SECOND DIVISION.

[Sheriff of Inverness.

FRASER *v.* CAMPBELL, &c.

Property—Mutual Gable—Acquiescence—Toleration.

A built a house in 1841 upon ground to which he had no title. He constructed the south gable with two fireplaces and vents and with band-stones on its external face. In 1863 B erected a house on the adjoining site, to which he had no title, and in doing so made use of the south wall of A's house. In 1878 B took possession of one of the fireplaces in this wall and boarded up the other. No objection was taken by A to his doing so. The sites of both houses belonged to the same proprietor. A acquired a title in 1878 to "that piece of ground on which" his house was built. B acquired a title in 1892, in which his house was described as bounded on the north by A's house. In 1894 A intimated to B that he proposed to use the fireplaces in the south wall of his house, whereupon B applied for interdict against his doing so.

Held (1) that the wall in question was built entirely in A's ground and was therefore not a mutual gable; (2) that A was not barred by acquiescence from asserting an exclusive right to its use.

This was an action in the Sheriff Court of Inverness, in which William Fraser, baker, Fort-William, sought to interdict Robert Campbell, plumber, as curator for his pupil children, proprietors of a house in Gordon Square, Fort-William, "from breaking into the south gable of said house, which is a common gable, and has been so used and possessed by the pursuer and his authors since 1864, *i.e.*, before defenders' authors acquired a feudal title to the same, and connecting fireplaces, which he has declared his intention of building therein, with vents drawing smoke from pursuer's fireplaces in that gable."

The defenders' house had been built by John Rankin, boatman, Fort-William, on the site of an old house which had been occupied by his grandfather. Rankin had no title to the ground on which the house stood, but on 3rd April 1878 his successor obtained a feu-charter from Mrs Campbell of Callart, the superior of Fort-William, in which the ground on which the house stood was conveyed to him. The subjects conveyed were described as "All and Whole that piece of ground on which is built a tenement of two storeys, lying on the west side of the square commonly called Priest's Square, situated in the west end of Fort-William, and bounded as follows, viz., . . . on the south by unfeued property sometime belonging to Kenneth Cameron, and now or lately to John Cameron, Doctor of Medicine, Arisaig, along which it extends 20 feet." . . . The property was bought by the pupil defenders' grandfather on May 10, 1878.

The house immediately to the south of the defenders' property was acquired by the pursuer in April 6, 1893, by disposition from John M'Callum, a builder in Fort-William, who had acquired a feudal title to that property by a feu-charter from Mrs Campbell, dated in 1892. In this charter the subjects were described as bounded on the north by the defenders' house.

The pursuer averred—"(Cond. 15) In rebuilding (in 1841), defenders' author placed two fireplaces in the outer face of his southern gable, with projecting joints or bandstones at the southern ends of his front and back walls for use by the adjoining proprietor when he came to re-build. (Cond. 16) Accordingly, in or about the year 1863 pursuer's predecessor in title re-built and took advantage of the common gable to its full extent, including the fireplaces in its outer face and connecting vents, under agreement with defenders' author, or at least with his knowledge and consent; and the pursuer and his predecessors have by themselves and their tenants enjoyed the use of said common gable with the fireplaces and vents therein ever since."

The pursuer pleaded—"(3) Defenders' authors having built their southern gable with a fireplace and vent for the use of the adjoining proprietor about fifty-two years ago, and the pursuer's authors having for the last twenty years availed themselves of the accommodation thus offered under agreement, or at least with the knowledge and consent of the defenders' authors, the defenders are not now entitled to interfere with said gable so as injuriously to affect the use by the pursuer of the fireplaces and vents therein."

The defenders pleaded—"(3) The gables of the defenders' house being entirely built on their own property, they are entitled to the full use thereof, and of all fireplaces and vents therein. (4) The pursuers having no servitude or other right to entitle them to prevent the defenders making the alterations complained of, the action should be dismissed with expenses."

A proof was allowed, the result of which, so far as it is necessary to refer to it, was thus stated by the Sheriff-Substitute (BAILLIE)—"From the evidence it appears that there were originally three small cottages on this ground, the northern and centre ones touching one another, the southern one standing a little back from the others. In 1841 the centre house (defenders') was raised to its present height. The southern wall of this centre house was at this time built with two fireplaces and projecting band-stones in its external face. In 1863 the southern cottage was pulled down, and a two-storied building (pursuer's) consisting of stables and byre below and loft above was erected, and use was then made of the wall of the centre house and the projecting band-stones. In 1878 this building was converted into a store below and dwelling-house above, and one of the two fireplaces was then used for the first time, while the other, which opened into a passage, was boarded up."

Upon 1st February 1894 the Sheriff-Substitute, after findings in fact, pronounced this judgment—Finds in law . . . "(2) That the southern wall of the defenders' house is not a common gable with mutual rights in both parties, but that it belongs to the defenders without any burden of servitude in pursuer's favour; and (3) that the defenders are barred by *mora* and acquiescence from interfering with pursuer's use of one fireplace in the southern wall: Therefore sustains pleas Nos. 1 and 3 for the pursuers, repels the pleas for the defenders, and grants interdict as craved, except *quoad* the use of the boarded-up fireplace: Interdicts the defenders from taking possession of or interfering with vents connected with fireplaces in pursuer's houses, other than the boarded-up fireplace in pursuer's southern house."

Upon appeal the Sheriff (IVORY) pronounced this interlocutor—"Recals the interlocutor appealed against: Finds, with reference to the south gable of the defenders' house, (1) that the said gable is built wholly on the defenders' ground, and, along with the vents and fireplaces therein, belongs to them as their own exclusive property; (2) that the pursuer has failed to prove that he has either by long continued possession, or by agreement with the defenders or their authors, or by acquiescence, or in any other way, acquired any right in the said vents or fireplaces or any of them, or that he is entitled to use or to prevent the defenders using the same: Therefore to the above extent and effect refuses the prayer of the petition in so far as it refers to the said south gable, and decerns."

The pursuer appealed—The arguments of the parties appear sufficiently from Lord Rutherfurd Clark's opinion. Authorities cited—*Earl of Moray* v. *Aytoun*, November 30th, 1858, 21 D. 33; *Robertson* v. *Scott*, July 9th, 1886, 13 R. 1127; *Sanderson* v. *Geddes*, July 17th, 1874, 1 R. 1198; *Walker &c.* v. *Sherar*, February 4th, 1870, 8 Macph. 494; *Currie* v. *Campbell's Trustees*, December 18th, 1888, 16 R. 237.

At advising—

LORD RUTHERFURD CLARK—The only question which we are asked to decide is whether the south gable of the defender's house is his own exclusive property, or is a mutual gable.

The house was built by a person who had no title to the ground, and with the apparent intention of using the south gable as a mutual gable. For the gable had fireplaces and vents on the south side, and provision was made for enabling the next house to be connected with it. The defender avers that this was done because the person who built the house intended to acquire the ground to the south, but that he abandoned that intention.

The first title was granted in 1878, being a feu-charter from Mrs Cameron Campbell, and it was recorded in the register of Sasines on 26th July of that year. It conveyed "that piece of ground on which is built a tenement of two "storeys." It is plain therefore that the ground on which the south gable stands is included within

the conveyance, even apart from the measurements by which the subject is defined.

It is not said that the conveyance was beyond the powers of the granter. On the contrary it is admitted that at its date the ground to the south of it was the property of Mrs Cameron Campbell.

It was not until 1892 that a title was given to the stance claimed by the pursuer. It was a feu-charter granted by Mrs Campbell, and the subject which was conveyed is described as bounded on the north by the defender's house. It follows that no part of that house or of the ground on which it stands is within the pursuer's feu.

I am, therefore, of opinion that the south gable is built entirely on the defender's property, and that it is not a mutual gable. The meaning of the titles is to my mind absolutely clear, and it is, therefore, I think, inadmissible to control them by any inference to be drawn from the manner in which the gable was built, or in which it was used by the pursuer.

It appears that in 1864 the pursuer's house was to a certain extent united with the south gable, and that in 1878 he commenced to use the fireplaces and vents, or at least one of them. I have said that these facts cannot affect the construction of the titles; but the pursuer founds on them as establishing that the defender has acquiesced in these uses of the gable and must therefore continue to submit to them. It is to be observed that the pursuer had no title till 1892, and his actings must be ascribed to the title of Mrs Campbell through whom he was in possession. The question therefore comes to be whether she acquired any right limiting the right which she conferred on the defender by the charter of 1878.

It is I think plain that that title could not be limited by any use prior to its date. It was granted by an absolute owner, and therefore must confer on the disponee the right of that owner. No reservation is expressed, and none I think can be implied. Being at the date of the charter the absolute owner, the defender could have pulled down the house if he was so minded, and as a necessary consequence he could have prevented Mrs Campbell, or anyone deriving right from her, from making any use of the south gable.

The use continued after the charter, and was in part enlarged. But it was a use beyond the right of the granter of the charter, and I do not see how it can derogate from the title of the defender. It cannot make the gable a mutual gable, when on the face of the title it is the defender's exclusive property. It cannot give the pursuer a right to use the defender's property, for the use is too short to create any such right, even if it were possible that it might be created by a longer use. It is said that the defender acquiesced in the use. He submitted to it at a time when it is probable it did him no harm. But I see no evidence of any agreement or consent on his part to surrender any legal right, and I think that a use which had no justification in title must be ascribed to tolerance. It is only in rare cases that a limitation on title can be created by acquiescence. It can never happen unless it be clear that there was agreement or consent to that effect, of which in this case there is no evidence. No such agreement or consent will be inferred when there is another reasonable explanation.

LORD JUSTICE-CLERK—That is the opinion of the Court.

The Court found in terms of the Sheriff's interlocutor.

Counsel for the Pursuer — C. K. Mackenzie — Hunter. Agent — James Ross Smith, S.S.C.

Counsel for the Defenders — Rankine — Macphail. Agents—Forrester & Davidson, W.S.

HOUSE OF LORDS.

Monday, April 8.

(Before the Lord Chancellor (Herschell), Lord Watson, Lord Ashbourne, Lord Macnaghten, and Lord Morris).

METCALFE AND OTHERS *v.* COX AND OTHERS (COUNCIL OF UNIVERSITY COLLEGE, DUNDEE).

(*Supra*, p. 182).

Act of Parliament—Construction—University—Powers of University Commissioners—Affiliation of Dundee College to St Andrews University—The Universities (Scotland) Act 1889 (52 *and* 53 *Vict. cap.* 55), *secs.* 15, 16, 19, and 20.

Section 15 of the Universities (Scotland) Act 1889 provides that the Universities Commissioners appointed under the Act may "make ordinances" to extend any of the universities by affiliating new colleges to them, subject, *inter alia*, to the condition that the University Court of the College shall be consenting parties.

Section 16 provides that, "without prejudice to any of the powers hereinbefore conferred, the Commissioners shall, with respect to the University of St Andrews and the University College of Dundee, have power (1) to affiliate the said University College to, and make it form part of, the said University with the consent of the University Court of St Andrews and also of the said college, with the object, *inter alia*, of establishing a fully equipped, conjoint university school of medicine, having due regard to existing interests, and to the aims and constitution of the said college as set forth in its deed of endowment and trust."

By section 19 it is provided that the draft of any "ordinance" prepared by the Commissioners must be submitted to the University Court, the Senatus