(2) that no possession has followed upon it; and (3) that as the contract of excambion confers no higher than a personal title to the lands in dispute, such a title cannot compete with the heritable title which the defenders hold to the same lands. The pursuer maintains in answer that the lands conveyed by the excambion to his predecessor are kirk lands and need no infeftment to perfect his right. I am not prepared at present to assent to that view. I am disposed to think that the title conferred by the contract of excambion was no higher or other title than would have been conferred had the parties to it been all laymen, and that it required registration to make the right conveyed perfect as a heritable right. But that is a question not free from difficulty, and I will assume that the conveyance to the incumbent of the parish did not require sasine to perfect it. But possession following upon the conveyance was certainly necessary to complete the right, and this I think the pursuer and his predecessor never had. I agree with the Lord Ordinary in thinking that the lands now in dispute, although conveyed by the contract of excambion to the pursuer's predecessor, continued to be possessed by the defenders and them only. As in the case of the designation of 1827, so again after the execution of the contract of excambion the incumbent of the parish was contented to take a money payment instead of taking possession of the land. The possession of the defenders was thus never interrupted, and for more than forty years after the excambion they exercised all the rights of ownership in said lands. The result therefore is this—the defenders have a good heritable title to the lands of Rathelpie, which include the lands now in question. Upon that title they have possessed since 1572, and certainly for more than forty years prior to the raising of this action. Their title is now indefeasible. The only title which the pursuer can show to the lands in question is at best a personal title, which cannot compete successfully with the defenders' heritable title, and therefore the Lord Ordinary was right in sustaining the defence and assoilzieing the defenders.

It was argued for the defenders that they were entitled to take advantage (if necessary) of the shorter period of prescription introduced by the Conveyancing Act of 1874. If it was necessary to decide the question I should not be prepared to sustain the defenders' contention. Whatever may have been the intention of the Act of 1874 its language is not ambiguous, and in terms it applies only to titles which have been recorded in the appropriate Register of Sasines, which cannot be said of the defenders' title. In this view, while affirming otherwise the interlocutor of the Lord Ordinary, I would suggest that we should delete the words "or at least for twenty years" which he has introduced.

The Court varied the interlocutor reclaimed against by deleting therefrom "or at least for twenty years," and with this variation refused the reclaiming-note and adhered.

Counsel for the Pursuer and Reclaimer—C. N. Johnston, K.C.—Hon. W. Watson. Agents—R. C. Bell & J. Scott, W.S.

Counsel for the Defenders and Respondents (the University Court of the University of St Andrews)—Shaw, K.C.—J. H. Millar. Agents—W. & J. Cook, W.S

Tuesday, July 12.

FIRST DIVISION.

[Lord Pearson, Ordinary.

PATRICK *v.* HARRIS'S TRUSTEES.

Lease—Sporting Lease—Obligation to Maintain Plantation Fences.

There is no implied obligation upon the landlord in a lease of shootings to maintain the plantation fences in a state to exclude live stock.

John Fullerton Patrick, residing at The Cairnies, Glenalmond, Perthshire, was the tenant of the mansion-house, shootings, and fishing in the river Almond, of The Cairnies, for a period of five years from Whitsunday 1900, at a rent of £105, under a lease granted in his favour by Colonel Thomas Marshall Harris, of Glenalmond, and Alexander Mackenzie, solicitor, Perth, the trustees of the deceased Colonel Henry William Harris of The Cairnies. The shooting right was described as "all rights and privileges of the shooting and sporting, and of killing, preserving, and taking game of every description (including hares and rabbits) upon the lands and estates of The Cairnies . . . but subject to the provisions of the Ground Game Act 1880."

On the 2nd March 1904 Patrick raised an action against Harris's trustees, in which he sought, *inter alia*, to have it declared that the fences round the plantations were ineffectual to exclude live stock, that his rights to the game were thereby seriously affected, and he was deprived of the undisturbed possession to which he was entitled, and to have the defenders ordained to have the fences repaired so as to exclude live-stock. Upon this point he made the following averments:—"(Cond. 8) The plantations referred to vary in size, but are all of importance to the value of the shooting over The Cairnies. Without the said plantations it would be much depreciated. It depends very greatly on the extent to which the said plantations remain undisturbed. They cover about one-third of the whole area of the said shooting. When the pursuer took the shooting, the lands adjoining the said plantations were let by the defenders as an arable farm, and the fences surrounding them were sufficient to keep out sheep and cattle. In November 1901 the said lands were let to a sheep farmer. The fences round the whole of the said plantations, with the exception of a strip to the north of

the road from the Tulchan March to the College Road, and another beside the College Avenue, are now in such a state of disrepair that they are entirely useless for keeping out sheep. In some places they are lying flat on the ground. Sheep, with which the farm is mainly stocked, are constantly in the plantations, and have to be driven out by the farmer's men with dogs. Sheep and cattle belonging to the occupiers of the lands, belonging to neighbouring proprietors also, stray in the plantations. The plantations form no part of the farmer's holding, and formed no part of that of the previous agricultural tenant. The dimensions of the two strips, the fences of which are in passable repair, are inconsiderable relatively to the remainder of the plantations. Sheep have found their way from the plantations into the policies, and grazed on the lawn in front of the mansion-house. (Cond. 9) The disturbance to the game caused by stock and by men and dogs, as condescended on in the preceding article, is very great. The value of the pursuer's shooting has been depreciated, and will continue to be so more and more every year while the plantation fences remain in their present state of disrepair. While they remain so the pursuer is deprived of the undisturbed possession of the right of shooting to which he is entitled under the lease."

Upon 29th June 1904 the Lord Ordinary (PEARSON) issued an interlocutor whereby he allowed a proof.

Opinion.— . . . "The second conclusion relates to the tenant's shooting rights, which are alleged to be seriously impaired through the plantation fences being in such a state of disrepair as to be insufficient to exclude live stock. The defenders challenge the relevancy of the pursuer's averments on this head, on the ground that the personal right of sporting does not carry with it any right to interfere in the proprietor's management of his estate; and reference was made to the case of *Gearns* v. *Baker*, 10 Ch. 355, by way of illustration. In my opinion no such general doctrine can be laid down. In order to ascertain whether the facts alleged amount to a breach of contract, it is necessary in each case to have regard to the contract as a whole, and to the surrounding circumstances, and applying this test, I hold that the pursuer has made averments on this head which are relevant to go to proof. In particular, I refer to the averments in Cond. 8—(1) that the value of the shootings depends greatly on the extent to which the plantations remain undisturbed; (2) that when the pursuer became tenant the fences in question were sufficient to keep out cattle and sheep from the plantations; (3) that the plantations did not then, and do not now, form any part of the farmer's holding; and (4) that the plantation fences are now in such disrepair as to be entirely useless for keeping out sheep, and that the defenders have refused to make them good. Accordingly I think there must be a proof on this part of the case."

The defenders reclaimed, and argued—The Lord Ordinary should have dismissed this portion of the case. There was no relevant averment of a right to have the plantation fences maintained, and no such right was implied in a lease of shootings. Admittedly the landlord could not derogate from the right given; but the right given was the exercise of the privilege of shooting, which was subject to the general administration of the estate—*Gearns* v. *Baker*, 1875, L.R., 10 Ch. 355. It was not said that anything had been done wilfully against the pursuer's rights, but only that in the course of ordinary management the fences had been allowed to fall into disrepair. And if in the ordinary administration it had been decided to pull up the fences and throw the plantations open for grazing, the pursuers would have had no ground of complaint.

The respondents argued—The Lord Ordinary was right in allowing a proof, for the question turned on the circumstances of the case. Ordinary administration differed in different circumstances—*Pattison* v. *Gilford*, 1874, L.R., 18 Eq. 259; *Aldin* v. *Latimer, Clark, Muirhead, & Co.* [1894], 2 Ch. 437; *Hall* v. *Ross*, 23rd June 1813, 5 Paton 729. And the shooting tenant was entitled to interfere where, as here, the landlord was derogating from the right he had given. The plantations here covered a third of the estate, and while the rent might be small, the loss entailed on the tenant through the expense of having a gamekeeper and rearing pheasants might be great.

LORD PRESIDENT—This raises a somewhat novel question—whether a lease of the shootings on a small residential estate carries with it an unexpressed obligation to repair the fences which surround the plantations, and whether the lessor is impliedly prohibited from grazing such plantations. The chief averments on this point are contained in condescendence 8. The question is really a very short one—whether the right to shoot in these plantations implies a right to have the fences enclosing them maintained in such condition that stock could not get in, and whether the fact that the fences were not so maintained constituted a breach of contract. I am not aware of any case of a lease of a mansion-house and grounds with shootings attached, in which such a doctrine has been laid down. If a tenant of such a place desires to have the plantations fenced in such manner as to be proof against the inroads of animals, he ought, in my judgment, to make this the subject of express stipulation in his lease. A person taking a shooting over such a small estate takes it as he finds it, and in the absence of express obligation I think it would not only be novel but also unreasonable to hold that the landlord was subject to such an *implied* obligation. I think, therefore, that in so far as the Lord Ordinary's interlocutor provides for proof in this matter it should be recalled, and that the action should be dismissed.

LORD ADAM—The Lord Ordinary has allowed a proof. We are asked by the defender to take the case on the footing that it is the case that at the pursuer's entry the fences round the plantations were sufficient to keep out sheep, that they are not so now, and that in consequence sheep get into the plantations and have to be driven out by men and dogs. On these admissions we are asked to deal with the case without a proof. I think the case does raise a question of law which can be decided without proof. That question is whether the defender is under an obligation to the pursuer to keep up the fences round the plantations. It is not alleged that the landlord has done anything, but only that he has let the fences fall into disrepair. The question is, whether in a case like this, where a mansion-house is let along with the right to shoot over the estate, there is an obligation upon the landlord to keep up the fences all round the plantations. It is maintained by the pursuer that the tenant is entitled to look to the condition of the fences at his entry and to have them kept up in the same state throughout his tenancy. If he wants to have that done I think he must have a special obligation to that effect inserted in the lease. I cannot hold that an obligation of that kind is implied in a let of shootings along with a mansion-house. It is just like cutting wood. No doubt if the landlord cuts down wood in the plantations and drags it away that may injure the shooting. But he will be entitled to do that apart from special stipulation to the contrary. All these things should be made matter of arrangement. I decline to hold that there was any implied obligation on the landlord to keep up the fences in the condition they were in at the date of entry.

LORD M'LAREN—I agree that we cannot infer an obligation on the landlord to maintain the fences enclosing the plantations for the benefit of the sporting tenant. The tenant no doubt considers the state of the ground when he enters into the lease, and therefore if it is the case that the plantations are an important part of the shooting, that would probably imply an obligation on the landlord not to cut them down—in fact, not to do anything which would derogate from his grant by destroying or injuring the subject let. But I am unable to take the further step that the landlord warranted the tenant against failure of the fences through decay. The pursuer has the benefit of a clause giving him the right to preserve the game. That might include the right to repair the fences at his own expense; but we do not need to consider that question.

LORD KINNEAR—I am unable to see that there is any implied obligation on the landlord to maintain the fences round the plantations. If the lessee thought it was of importance that these fences should be maintained, it lay upon him to get an express stipulation to that effect introduced into the lease. We cannot be certain that if he had demanded such a clause it would have been conceded. The landlord would have had to consider whether it was worth while, looking to the value of the subjects leased, to let the shooting subject to such an obligation. But at all events it was a matter for agreement. No authority and no principle has been adduced for adding to the written lease an obligation of this kind by implication of law.

The Court recalled the interlocutor of the Lord Ordinary in so far as it allowed parties a proof of their averments relative to this conclusion of the summons, found that the pursuer had not set forth averments relevant or sufficient to support such conclusion, and assoilzied the defenders from it.

Counsel for the Defenders and Reclaimers—The Solicitor-General (Dundas K.C.)—Sandeman. Agent—F. J. Martin, W.S.

Counsel for the Pursuer and Respondent—Mackenzie, K.C.—Boswell. Agent—George P. Normand, W.S.

Thursday, July 14.

SECOND DIVISION.

[Lord Pearson, Ordinary.

VIANI & COMPANY *v.* GUNN & COMPANY.

Bill of Exchange—Proof—Parole—Competency of Parole Proof not to Exact Payment on Bill Maturing—Bills of Exchange Act 1882 (45 *and* 46 *Vict. cap.* 61), *sec.* 100.

In defence to an action brought by the indorsee of a bill of exchange against the acceptor for payment, the defender averred that the bill was an accommodation bill, and that the indorsee had agreed at the time it was granted that in the event of the bill being in his hands till maturity the defender would not be called upon to retire it.

Held (*diss.* Lord Young) that under section 100 of the Bills of Exchange Act 1882 the defender was entitled to a proof by parole of the alleged agreement.

Section 100 of the Bills of Exchange Act 1882 enacts—"In any judicial proceeding in Scotland any fact relating to a bill of exchange, bank cheque, or promissory-note, which is relevant to any question of liability thereon, may be proved by parole evidence." . . .

In February 1904 Messrs Viani & Company, bankers, Pallanza, Italy, raised an action against Messrs Gunn & Company, marble merchants, 130 George Street, Edinburgh, for payment of £45, being the amount contained in a bill of exchange dated 20th December 1902 and due on 20th May 1903, drawn by the Della Casa Granite Quarries of Italy, Limited, and accepted by the defenders, with the interest thereof at