I read these words as meaning that any right which is competent to the second party *qua* widow against the estate of her husband is to be departed from if she accepts the provision he has made for her. But I think we have here no case for election. The second party makes no claim against her husband's estate except for what he has provided to her. She retains the insurance money as her own estate. It was never part of her husband's estate.

LORD MONCREIFF—I agree with both your Lordships. I think there is no doubt that in terms of the policy as originally granted the wife was creditor. The policy was taken out originally as a provision for the wife, and it has all the qualities of an irrevocable provision. There had been no antenuptial marriage-contract. The provision was not to take effect till after the husband's death. The amount was reasonable. The husband was solvent at the date he took out the policy, he remained solvent during the remainder of his life, and lastly the policy was delivered to his wife and kept by her for some years. I think, therefore, that it was an irrevocable provision according to the rules which regulate these matters. But I am also disposed to agree with both your Lordships that even supposing it was revocable it was not revoked, because what took place was this — the husband required to borrow money, the wife lent him this document, and she was made a consenting party to the first loan, and her right was recognised. But then the husband paid up that debt, got back the policy, and apparently without her knowledge kept it, and afterwards received a second loan on it, and in that case without any mention of her at all. That loan also was repaid and the document delivered back to him, and therefore any subsequent manipulation of that policy must have been made presumably by Hay himself. The deletion of the memorandum might have had a serious effect on the wife's interest supposing that the husband had not remained solvent. The effect, if the deletion stood, would have been to throw this policy to the general body of his creditors. The wife evidently knew nothing about what had taken place, and I do not think that either the Insurance Company or the wife was affected or could be affected by what the husband chose to do. But supposing it was a gift, we find that the revocation —the so-called revocation of the gift which appears on the face of the document—is deleted, and I think the only reasonable inference is that the document never having been in the possession of the wife after the first loan the deletion which was made after making provision for the wife was made by the husband. The inference is, as your Lordship pointed out, that he repented of what he had done apparently in a fit of temper, and intended the provisions in the will to stand side by side with the separate provision under the policy.

On the question of election I agree with both your Lordships that what was meant by the clause in the will was that she was put to election in regard to any rights, legal or conventional, which she had against the husband. I do not think that this insurance policy was part of his estate. I think it was her estate.

On these grounds I concur that the questions should be answered as proposed.

The LORD JUSTICE-CLERK was absent.

The Court answered the first branch of the first question in the negative, the second branch of the first question in the affirmative, and the second question also in the affirmative.

Counsel for the First Parties — Dove Wilson. Agent—A. C. D. Vert, S.S.C.

Counsel for the Second Party—D. Anderson. Agent—J. A. B. Horn, S.S.C.

Thursday, July 14.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

WALLACE *v.* UNIVERSITY OF ST ANDREWS.

Church—Glebe — Designation—Excambion —Prescription—Possession.

In 1512 certain lands were conveyed to the University of St Andrews by a charter which was confirmed by the Crown in the same year and by Parliament in 1612. No infeftment followed on the charter, but it was followed by possession. In 1827, on the application of the minister of the parish of St Leonard, the Presbytery designed for him as a glebe a portion of the lands referred to. No possession followed on the designation, but from 1827 to 1854 the minister received from the University of St Andrews certain payments in money "for manse and glebe." In 1854 a contract of excambion was entered into between the minister of St Leonard's with the concurrence of the Presbytery, and the University, whereby, on the narrative of the designation of 1827, another part of the lands already referred to was conveyed to the minister as a glebe instead of the lands formerly designed. The contract of excambion was never recorded in the Register of Sasines, and the lands conveyed thereby remained in the occupation of the University. Annual payments were made to the minister by the University, and by other heritors "in lieu of manse and glebe" down to Martinmas 1902. In 1903 the minister of St Leonard's raised an action against the University of St Andrews, in which he sought to have it found and declared that the lands last referred to were the glebe of said parish, and to have the University ordained to remove there-

from. *Held* (*aff.* judgment of Lord Kincairney) that the action was excluded by the operation of the positive prescription, in respect that (*varying* judgment of Lord Kincairney) for forty years prior to its date the defenders had possessed the lands in question on a competent title.

This was an action at the instance of the Rev. Robert Wilfred Wallace, minister of the parish of St Leonard, in the Presbytery of St Andrews, against the University Court of the University of St Andrews (by whom alone defences were lodged), and others, the heritors of the parish of St Leonard. The summons concluded that "it ought and should be found and declared that two pieces of ground in the ecclesiastical parish of St Leonard, in the Presbytery of St Andrews, known respectively as the Cocks Haugh and the Toll Park, are the glebe of the said parish of St Leonard, and that the same pertain heritably to the pursuer and his successors in the cure of St Leonard's: And this being so found and declared, the defender, the said University Court of St Andrews, ought and should be decerned and ordained by decree foresaid immediately to cede to the pursuer possession of the said two pieces of ground above described, and to flit and remove themselves furth and from the same in order that the pursuer may enter thereto and possess and enjoy the same as the property of himself and his successors in the said cure in all time coming."

In 1512 the lands of Rathelpie, of which the lands in question formed part, were conveyed to the United College of St Leonard's, the predecessors of the University Court of the University of St Andrews, by charter granted by John Hepburn, Prior of the Metropolitan Church of St Andrews, which was confirmed by King James IV. in the same year. There was no evidence of infeftment following on this charter, but it was followed by possession, and the heritable rights of the grantees were confirmed by Parliament by the Act 1612, c. 38.

In 1827 Dr James Hunter, then minister of St Leonard's, applied to the Presbytery of St Andrews to have a glebe designed to him, and the Presbytery then decerned and designed a portion of the lands of Rathelpie as the arable glebe and site for manse of the parish of St Leonard.

Dr Hunter never entered into possession of the glebe designed, which remained in occupation of the United College of St Leonard's from 1827 to 1844 inclusive, by whom an annual payment was made to Dr Hunter, the payment being entered in the accounts of the factor of the United College as "for" manse and glebe, and receipts being granted by Dr Hunter in the same terms.

Dr Hunter died in 1844, and was succeeded in the cure of St Leonard's by Dr John Cook, who continued by annual agreement with the United College to receive money payments from them, and also from the other heritors in the parish. Such payments to the minister of St Leonard's continued until Martinmas 1901, the payment being latterly £100 per annum.

In 1854 a contract of excambion was executed between the United College of St Andrews and Dr Cook on the narrative of the designation of 1827, whereby the lands now in question were substituted for those formerly designed. This contract was entered into with the concurrence of the Presbytery.

The contract of excambion was not recorded in the Register of Sasines, and the lands conveyed remained in the occupation of tenants under leases granted by the United College, latterly by the University Court, down to the date of the present action.

The pursuers pleaded — "(1) The lands described in the summons being the glebe of the parish of St Leonard, pursuer as minister of the parish is entitled to decree of declarator and removing as concluded for, with expenses."

The defenders pleaded—"(3) No designation of a glebe having been legally or effectually completed or acted on or followed by possession, and an annual allowance having all along been paid to the successive ministers by the whole heritors in lieu of a glebe, these defenders should be assoilzied. (4) *Separatim*, the action is excluded by the operation both of the positive and of the negative prescription, in respect (*a*) that the whole lands alleged to have been originally designed, and the whole lands disponed in substitution thereof by the said contract of excambion, have all along, and therefore for upwards of twenty years before the date of the action, been possessed exclusively and without interruption by these defenders or their predecessors as proprietors thereof under their titles to the lands of Rathelpie, and (*b*) that neither the said decree of Presbytery nor the contract of excambion has been acted on or followed by possession had by the pursuer or his predecessors at any time, or for upwards of forty years before the date of this action."

Proof was led. The evidence adduced was mainly documentary, and a minute of admissions was lodged whereby parties admitted as follows:—"4. That the United College never received payment from the heritors of the said parish of St Leonard for the said portion of the lands of Rathelpie designed in 1827 as a glebe for the minister of said parish, nor for the lands excambed therefor in 1854. 5. That no manse was ever built or garden ever formed on the site of the designed glebe of 1827, or on the lands excambed therefor in 1854. 6. That from the passing of the Valuation of Lands Act 1854 (17 and 18 Vict. c. 91) down to the present time the said lands of Rathelpie are entered in the annual valuation rolls for the parish of St Leonard, in the county of Fife, as the property of the said United College, and that the said College has always paid the public assessments laid on them as such proprietor in respect of said lands. 7. That in the said valuation rolls for the said parish of

St Leonard since the passing of the said Valuation of Lands Act 1854 till the present time there is no entry of a glebe of St Leonard's, nor is the minister of St Leonard's entered as being a proprietor of a glebe in said parish. 8. That the rental of the said parish of St Leonard in 1838 was £1260, in 1845-6 £2531, in 1868 £2754, and is now £6000, and that the number of heritors largely increased between 1827 and 1854, and again between 1854 and the present time. 9. That the excerpts from the minute-books and factors' accounts of the United College, the records of the Presbytery of St Andrews, the minute-books of the heritors of St Leonard's, the minute-books of the University Court (being the documentary evidence referred to), are true and correct excerpts, and that the payments referred to in said accounts were duly made as stated, and that from 1864 to 1869 inclusive an annual sum of £80, and from 1869 to 1901 annual sums varying from £90 to £100, were paid by the heritors to the minister, who granted receipts therefor in terms generally similar to those granted by Dr Cook; that the heritors' minutes only commence on 19th April 1838 . . . 11. That the site of the designed glebe of 1827 was not feued till after the date of the excambion of 1854, but has since been largely feued, and that of the lands excambed therefor in 1854 the Toll Park was conditionally feued in 1903. The Cocks Haugh remains unfeued."

The receipts granted by Dr Cook referred to in the minute of admissions were in the following terms:—

"*St Andrews, Nov. 11th* 1863.

"Received from the heritors of St Leonards, by the hands of Mr William Trotter, thirty pounds, being allowance in lieu of manse and glebe for last half-year."

The earliest excerpt from the St Leonard's heritors' minutes referred to was as follows—"At St Andrews, the 19th day of April 1838 years, which day, according to the citation from the pulpit, a meeting of the heritors and feuars of St Leonard's parish was held here, for the purpose of considering as to the payment of the sum granted to Dr Hunter, the minister of the parish, in lieu of manse and glebe, and also as to the state of the poor funds. Present — . . . Dr James Hunter, minister. . . . The meeting then unanimously agreed that a contribution at the rate of 9d. per pound on the rent, according to said rental before mentioned, should be levied without delay on the heritors and feuars of the parish for the purpose of paying the sum of £50 allowed to the minister in lieu of manse and glebe for crop 1837." . . . Then followed an abstract of the rental of the parish of St Leonard, from which it appeared that the lands of the United College accounted for about half the total rental.

The annual payments by the heritors were met out of assessments laid on at meetings of the heritors held every year after edictal citation from the pulpit, in such terms as the following—"Notice is hereby given that a meeting of the heritors of this parish will be held on Saturday, the 17th day of February next, in the vestry of the College Church, at twelve o'clock noon, for the purpose of taking steps to provide manse, offices, and glebe to the minister of this parish, or laying on an assessment for paying him an allowance in lieu of the same for the year from 11th November 1865 to 11th November 1866." The same form of citation was employed annually, and was read from the pulpit by the pursuer down to 1902.

In relation to the negotiations for the completion of the contract of excambion referred to a letter was addressed by Dr Cook to the agents of the United College on 28th August 1854 in the following terms—"In case of any misapprehension in regard to the matter which I requested you to bring before the College respecting the glebe, I may mention that what I wish is to be informed, if convenient, what the College are disposed to do in the matter, with a view to my guidance on the occasion of the next annual agreement in November about the amount of allowance to me in lieu of manse and glebe. Beyond that I have no request to make to the College, and no wish that they should do otherwise than as they are entirely disposed. The simplest course for me, as you are aware, will be to take possession in November, as I shall be entitled to do, of the lands which have now at the desire of the College been designed as glebe. As my taking possession of these lands, however, may be attended with inconvenience to others, I think it right first to communicate with the College on the subject."

From 1854 until Martinmas 1863, the last term before Dr Cook's death, the accounts of the factor of the United College showed an annual payment of £5 to Dr Cook in addition to the annual allowance "for manse and glebe" already referred to, which allowance varied slightly according to assessment.

The contract of excambion, after referring to the designation of 1854, proceeded on the narrative "that from the date of said designation till now said glebe, or an equivalent for the same, has continued to be enjoyed by the minister of said parish, and that recently an overture was made by said first parties (the United College) to the second party (Dr Cook) to excamb said glebe for another part of said lands of Rathelpie belonging to them, which excambion appeared to them to be for mutual advantage, and that the said second party having entertained said proposal referred the same for consideration to said Presbytery of St Andrews."

The nature of the proof is further disclosed in the opinion of the Lord Ordinary *infra*.

On 31st March 1904 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Finds that for forty years prior to the date of this action, or at least for twenty years, the defenders, the University Court of the University of St Andrews, and their predecessors, have possessed the portions of lands specified in

the conclusions of the summons on a competent title: Therefore sustains the fourth plea-in-law for the defenders, so far as it relates to the positive prescription; assoilzies the defenders from the conclusions of the summons; and decerns."

Opinion.—"The question in this case is whether two pieces of ground called the Cocks Haugh and Toll Park, forming part of the lands of Rathelpie, belonging to the defenders, the University Court of the University of St Andrews, and situated in the ecclesiastical parish of St Leonard, do or do not form the glebe of that parish. The action has been raised by the minister of the parish, and the principal defender is the University Court. The other heritors of the parish have not lodged defences. The University Court have pleaded, *inter alia*, 'the action is excluded by the operation both of the positive and of the negative prescription in respect (*a*) that the "lands in question" have all along, and therefore for upwards of twenty years before the date of the action, been possessed' . . . by the defenders 'under their titles to the lands of Rathelpie; and (*b*) that neither the decree of the Presbytery nor the contract of excambion has been acted on or followed by possession' . . . 'for upwards of forty years before the date of' the action. The questions raised are difficult, but are, I think, susceptible of being stated shortly.

"The dispute draws back to 1827, when there was no glebe attached to the parish of St Leonard. The Rev. Dr Hunter, then minister of the parish, applied to the Teind Court for an allowance in lieu of manse and glebe; but afterwards, on 26th April 1827, he applied to the Presbytery to have a glebe designed, and on 10th May a portion of the lands of Rathelpie, belonging to the United College of St Andrews, now represented by the defenders, was designed. I do not know whether there was any written designation. But at all events it is admitted, by minute of admissions, that that portion of land was duly designed and formed into a glebe. The College brought a suspension of the decree of the Presbytery; but it was decided that the minister was entitled to a glebe, and the decree of the Presbytery was confirmed. The case is reported uner the name of *Nicoll* v. *Hunter*, 27th February 1829, 7 S. 479, and the report explains the decision of the case.

"In 1851 it was thought desirable to excamb the lands so designed for other portions of lands which also formed part of the lands of Rathelpie, and belonged to the College. The reason was that it was thought that the lands designed were favourably suited for feuing, while at that time the minister and Presbytery had no power to feu. Accordingly a contract of excambion, which is dated 31st May and 24th August 1854, was executed, whereby—on the narrative that an arable glebe, and site for manse, offices, and garden therein described, had been designed to the minister of the parish, and that since the date of the designation the glebe, 'or an equivalent for it,' had been enjoyed by the minister, and that proposal had been made to excamb the glebe for another part of the lands of Rathelpie, which had been considered and sanctioned by the Presbytery—the members of the United College disponed to Dr John Cook, minister of the parish, and his successors, as an arable glebe and site for manse, offices, and garden, the two pieces of ground called Cocks Haugh and Toll Park above mentioned; and on the other hand Dr Cook, as minister of the parish, and as having the authority of the Presbytery, disponed to the members of the United College the lands which had been designed as a glebe in 1827. The parties to this excambion were the United College and the minister of the parish. The Presbytery are not parties to the deed, as they probably should have been, but the deed bears to be granted with the approval of the Presbytery; and from the minutes of the Presbytery it appears that the Presbytery did consider, approve, and sanction the excambion. The heritors of the parish are not parties to the excambion, but it has been decided that the consent of the heritors is not essential to a valid excambion—*Bain* v. *Lady Seafield*, 15th July 1887, 14 R. 939, 24 S.L.R. 662. So that I think there is really no flaw about the designation, or about the excambion; and it seems to me quite impossible to dispute that at the date of the deed of excambion the lands excambed, being the lands described in the summons, became and then were the glebe of the parish. The United College says so in so many words in the deed of excambion; and I understood the defenders to give up that point. There is, I think, no evidence that any of the ministers of the parish ever expressly abandoned their claim to this glebe.

"Although this be so, yet from the documents produced, and evidence led, it appears as matter of fact that the ministers of the parish from the date of the designation to the date of the action never for an hour possessed the lands excambed; and although the United College cannot, in face of the excambion, maintain that the lands designed had not formed immediately prior to its date the parish glebe, still it appears to be open to them to maintain, as they are maintaining, that the lands excambed had lost the character of a glebe by force of the positive prescription or of the negative prescription, or, it may be, by a combination of the two; although I confess to thinking that this case raises a question of the positive prescription, and not a question of the negative prescription.

"As regards the facts, the case appears to be simple, because I cannot discover that the ministers have done any act which can be called possession. There was no personal occupation of any kind. There exists no lease by any minister, or by the Presbytery, of the lands in favour of the College or of any one; and, in short, I cannot find that either the designation or the excambion was ever acted on.

"On the other hand I think there is evidence that the College granted leases of the lands designed, and of the lands excambed, and tacks have been produced

dating from 1854 downwards which afford, I apprehend, proof of complete possession for forty years.

"Various annual payments have during that time been made by the College to the minister, and I understand the minister to maintain the payments are to be regarded as rents for the excambed portions of ground possessed by the College as tenants of the minister. If that were the true nature of these payments, the action would certainly fall to be decided in favour of the minister, for such payments to the minister would be equivalent to possession by him, and the occupation by the College could not be attributed to their heritable title, but to the sanction of the minister. But although there is some little obscurity on this part of the case, still I think it has been sufficiently explained, and I take it as proved, that these payments were not made on that footing at all, but that they represented an assessment laid on all the heritors in order to produce a sum for a payment or allowance to the minister instead of manse and glebe.

"The College is the principal heritor in the parish, and it appears, was assessed along with the other heritors of the parish. It paid through its agent or factor, who was agent or factor for other heritors, and although the accounts seem to have been kept sufficiently distinctly, there may have been occasions where payment made by or on behalf of other heritors may have seemed as if they were made for the College. I do not know that there are such cases; and I think it proved that, whether there are or not, the College paid nothing out of the lands excambed except the ordinary heritor's assessment, and the minister got nothing out of these lands except that assessment. The result is, I think, that since 1827 the minister did not possess the lands first designed or the lands excambed, and that the College did possess them. Indeed I am, on careful consideration, unable to see why it should not be held that the College has never ceased to possess since their original title in 1512.

"It must be noticed that the College never received any reimbursement or return in any shape for the lands designed or the lands excambed.

"These are the main facts, and they come to this, that while the pursuer has an undoubted title to the lands as a glebe, the defenders have for more than forty years since the date of the excambion been in the exclusive possession of the lands; and the question is whether the defenders' possession, by aid of the Act, will prevail against the pursuers' title.

"It is, however, necessary to keep strictly in view the precise limits of the question, because, while it is, as has been said, whether the two pieces of ground which have been mentioned do now form the glebe, it is not whether the minister is entitled to a glebe, nor is it to what glebe he is entitled, which latter is not a matter for this Court to decide. No question of that kind is raised on this record, nor can be decided in this case. The parties, doubtless, are well advised and appreciate their own interest; but I have not been informed, and I do not know, what these interests are; but I presume they have interest which warrant this litigation, although the limits of it are so narrow. I can, however, but decide the precise questions brought before me on the record.

"The consideration of the question must begin by the concession by the defenders that in 1854 the lands in question were constituted the glebe of the parish. At least I do not see any ground on which that can be questioned. The question therefore is, Have the defenders since that acquired the property of the glebe by prescriptive possession? I am disposed to think that they have.

"I have already said that they have had the requisite possession, and I think there is no doubt they have had that possession for the requisite time. I suppose that possession for twenty years would have been enough, but it seems to me to be proved that they have had possession for forty years since 1854, and indeed to be inferable that they have been in unbroken possession since 1512. I do not find in the process that anybody else has been in possession.

"I think further that their possession has always been on a habile title—that is, on their original heritable title, namely, the charter by Prior Hepburn, dated and confirmed by Crown charter on 12th February 1512. These charters have not been produced nor much referred to. But I understood that it was objected by the pursuer that although they formed a habile title to possess they do not form a title which could support a plea of prescription under the Positive Prescription Act 1617, c. 12, because it was maintained under the Act, and also under the 34th section of the Conveyancing Act 1874 (37 and 38 Vict. c. 94), by which the period of prescription is reduced to twenty years, it is indispensable that the party pleading prescription shall be infeft, and it was said that no infeftment followed on the charter of 1512, and that there had been no occasion to renew the investiture. There is no averment or plea about that on record, and possibly I may have misunderstood the argument. But I consider that in this particular case, where the title goes so far back, before a Register of Sasines was established, and where the disponee is a college, and where there could be no renewal of the investiture, and where there has been a Crown charter of confirmation, there is sufficient authority for holding that sasine is not absolutely essential for the constitution of a prescriptive title — *Stirling* v. *Urthill*, 1625, M. 6621; *Peebles* v. *Halton*, 1628, M. 6885; *Crawfurd* v. *Maxwell*, 1724, M. 10,819; *Presbytery of Selkirk* v. *Duke of Buccleuch*, November 9, 1869, 8 Macph. 121, 7 S.L.R. 65; and particularly *Aytoun* v. *Kirkaldy*, June 4, 1833, 11 S. 676, to which this case may, I think, be assimilated.

"The pursuer maintains that he cannot be deprived of his title by force of the negative prescription, and I am disposed to assent to that proposition. I think it is generally true that a feudal right cannot be lost by negative prescription. But, as I have observed, I think no question of negative prescription necessarily arises. The defenders found on their own possession and on the right thence arising by the law of positive prescription.

"While their plea is not against their own title, it is in derogation, or, if successful, in destruction of their grant to the pursuer's predecessors. But the terms of the Act are so absolute that this consequence, though startling, must, I think, be admitted. The provision of the Act in substance is that if the party have a title, and have possessed under it for forty years, no further question can be asked, and there can be no inquiry about motives or understanding. Thus it has been decided that a superior may by possession prescribe a right against his own vassal, that is to say, against the feudal title which he has granted—*Aytoun* v. *Kirkaldy*, *supra*; *Ferguson* v. *Gracie*, January 17, 1832, 3 Ross' Leading Cases, 370.

"It might further be questioned whether a right to land which has been designed as a glebe may be acquired by a layman by possession for the prescriptive period on a sufficient title. But that question has been answered in the affirmative by the case of *The Presbytery of Selkirk* v. *The Duke of Buccleuch*, November 9, 1869, 8 Macph. 121–128, *per* Lord President; also by *Crawfurd* v. *Maxwell*, June 10, 1724, M. 10,819.

"On the whole I am forced to the conclusion that the defenders have established beyond reasonable doubt that they have possessed the portions of land in question for forty years from the date of the contract of excambion, leaving out of view their possession since 1512; that their possession has been on a good title; and that there is no sufficient reason why the provisions of the Act 1617, c. 12, should not be applied."

The pursuer reclaimed, and argued—The facts showed that the payments made from 1827 to 1854, first by the College, and after 1845 by the heritors, were in the nature of a return for the glebe, at least analogous to rent, and this was made clear by the narrative of the contract of excambion by which the defenders were bound. The payments after 1854 by the heritors, which were of varying amount, were to be presumed to be, and were, on the same footing as those prior to 1854. But, in addition, the payment of £5 by the United College alone from 1855 till Martinmas 1863 was clearly because of the larger rental of the new glebe, referred to in Dr Cook's letter of 28th August 1854 as the basis of his demand. The contract of excambion entered into with the sanction of the Presbytery was a valid conveyance and fully vested the new glebe in the minister and his successors—Duncan's Parochial Law, 467; Erskine, i. 2 (2) and ii. 3, 8; Menzies' Lectures (Sturrock) 516; *Bain* v. *Lady Seafield*, July 15, 1887, 14 R. 939, 24 S.L.R. 662; *Dalhousie's Tutors* v. *Minister of Lochlee*, June 27, 1890, 17 R. 1060, and June 19, 1891, 18 R. (H.L.) 72, 27 S.L.R. 819; *Presbytery of Selkirk* v. *Duke of Buccleuch*, November 9, 1869, 8 Macph. 121, 7 S.L.R. 65; *Reay* v. *Falconer*, 1781, M. 5151. The positive prescription did not avail the defenders (1) under the Act 1617, c. 12, as they produced no sasine following on their charter of 1512, and they did not come under any exceptions recognised in the law — Stair, ii. 3, 16; Erskine, ii. 3, 40; *Paton* v. *Drysdale*, 1725, M. 10,709; *Crawford* v. *M'Michen*, 1729, 2 Ross' L.C., Land Rights, 112; *Ouchterlony* v. *Officers of State*, 1825, 1 W. & S. 533; *Findowry* v. *Brechin*, 1682, M. 6887; Napier's Prescription, 105; Bell's Lectures i. 648, 649; Bell's Principles, 2009. The cases of *Stirling Town* v. *Urthill*, *Peebles v. Halton*, *Crawford* v. *Maxwell*, *Selkirk* v. *Buccleuch*, and *Aytoun* v. *Kirkaldy*, *cit. sup.*, referred to by the Lord Ordinary, were distinguishable; and (2) under the 1874 Act (37 and 38 Vict. c. 94), sec. 34, as they had no "title recorded in the appropriate Register of Sasines"—Rankine's Landownership, 31; Bell's Prin., sec. 2008; *Buchanan and Geils* v. *Lord Advocate*, July 20, 1882, 9 R. 1218, 19 S.L.R. 842; *Hinton* v. *Connell's Trustees*, July 6, 1883, 10 R. 1110, 20 S.L.R. 731; (3) as their possession was not unequivocally referable to their charter of 1512—*Lord Advocate* v. *Hunt*, February 11, 1867, 5 M. (H.L.) 1; *Earl of Fife's Trustees* v. *Cumming*, January 25, 1831, 9 S. 336; *Duke of Roxburghe* v. *Scott*, June 22, 1871, 8 Macph. 8. The prescription pleaded being against the defenders' own grant the presumption was against them. The occupation by the defenders was explained by the payment to the minister—*Liston* v. *Smythe*, June 20, 1816, Hume 475; *Scot* v. *Ramsay*, February 15, 1827, 5 S. 367; *Selkirk* v. *Buccleuch*, *cit. sup.* The negative prescription could not affect the pursuer's title—Rankine's Landownership, 27; *Macdonell* v. *Duke of Gordon*, February 26, 1828, 6 S. 600, Bell's Prin. 2016; and the facts did not support this plea, because the defenders were not the only heritors, and their actings did not affect the question with the heritors generally. It would be impossible for the pursuer to have a new glebe designed, the heritors would justly reply to an application by the minister that he had a glebe already—*M'Kenzie* v. *Fraser*, March 9, 1822, 1 S. 394. The arrangement whereby additional annual payments were adjusted in connection with the contract of excambion were acted on in accordance therewith until 1863, and so interrupted the prescription even if it was otherwise well founded. The payments for manse and glebe were necessarily a matter of annual arrangement, because the minister could only arrange for the period of his own incumbency, and could do nothing to the detriment of his successors. There was no necessity for sasine following on the designation of a glebe.

Argued for the respondents—It was only when clothed with possession that designa-

tion constituted a good title to a glebe—*Crawford* v. *Maxwell*, and *Selkirk* v. *Duke of Buccleuch*, *cit. sup.* The case was to be considered as if the original designation was founded on. The defenders had remained in possession of the lands designed all along. Annual payments "in lieu of" manse and glebe, which were adjusted at meetings of the heritors, could not be regarded as rent paid by the defenders. The pursuer had adopted the actings of his predecessors with regard to the calling of these meetings. The £5 payments to Dr Cook were a mere personal acknowledgment in respect of his having agreed to the excambion. The case was to be contrasted with *Ramsay* v. *Scott*, February 15, 1827, 5 S. (N.E.) 340; there it was not proved that the lands in question fell under a barony title; here it was not doubtful that the lands in question fell under the defenders' charter. There was nothing to prevent the defenders as disponers under the original designation from prescribing against their disponee — *Ferguson* v. *Gracie*, *cit. sup.* Twenty years' possession was sufficient to confer a prescriptive title on the defenders, even without the titles specified in section 34 of the Act of 1874; that Act was to be construed liberally as the Act of 1617 was. The pursuers had a habile title, which by possession for the prescriptive period had become indefeasible—*Panmure* v. *Halkett*, July 3, 1860, 22 D. 1357. The lands conveyed by the charter of 1512 were church lands, and therefore required no infeftment—*Treasurer of Edinburgh* v. *The Comptroller*, 1581, M. 6885; *Liston* v. *Smythe*, *cit. sup.* Sasines had no doubt been introduced about 1430, but even if church lands required infeftment, the passages in Stair and Craig which had been relied on did not bear the full meaning ascribed to them by the pursuer. Publicity was the object of sasine, and that was attained in the case of the lands in question by the Act 1612, c. 38, the general ratification in which embraced the lands of Rathelpie—Thomson's Acts, iv. p. 496, by which Parliament confirmed the prior charter. It was, however, beyond dispute that no sasine was necessary — *Stirling* v. *Urthill*, and *Aytoun* v. *Magistrates of Edinburgh*, *cit. sup.*, to which latter case the present was, as the Lord Ordinary held, to be assimilated. The excambion conferred on the pursuer a mere personal right, which required, in order to give it an allodial character, an operative decree of the presbytery. Without such a decree the bare conveyance gave the pursuer no title—*Lockerby* v. *Stirling*, June 25, 1835, 13 S. 978; *Dalrymple* v. *Callander*, July 11, 1827, 5 S. (N.E.) 935; *Bain* v. *Seafield*, and *Dalhousie's Tutors* v. *Minister of Lochlee*, *cit. sup.* Though no feudalised right could be lost *non utendo*, that did not apply to a personal right such as had been conferred on the pursuer—*Paterson* v. *Wilson*, January 25, 1859, 21 D. 322. The pursuer's right had been lost by the negative prescription.

At advising—

LORD TRAYNER—In this case we had an able argument from both sides of the bar. On due consideration of that argument and of the whole proof before us, written and parole, I have come to be of opinion that the result arrived at by the Lord Ordinary is well founded and ought to be affirmed. In dealing with this case it is right to keep prominently in view what the Lord Ordinary has pointed out, namely, that we are not here called upon to decide whether the pursuer is entitled to a glebe, or what that glebe should be. The pursuer's claim on the heritors for a manse and glebe can be in no way prejudiced by anything decided in this case. The case before us seems to me to be one in which there are competing claims to certain lands, and the determination as to which of the competing claimants is entitled to be preferred depends upon the title on which their respective claims are based.

The pursuer asks declarator that the lands known as the Cocks Haugh and Toll Park are the glebe of the parish of St Leonard and belong heritably to him and his successors in the cure. The defenders maintain that said lands belong heritably to them, and that the pursuer has no title thereto. It is most convenient to consider first the title on which the defenders rely. By charter dated February 1512 the Prior of St Andrews conveyed to the defenders' authors, *inter alia*, the lands of Rathelpie, of which the lands referred to in the summons form a small part. That charter was confirmed by the Crown on 12th February 1572, and a century afterwards (1612-18) the whole heritable rights of the defenders were ratified and confirmed by Parliament. So far as is known no infeftment followed on said charter, but actual possession did. In these circumstances the defenders plead that their charter, followed by possession for more than forty years, gives them an indefeasible title to the lands of Rathelpie, and by consequence to the lands now in question. The answer to this by the pursuer is (1) that the defenders' title was never perfected by sasine, and is ineffectual to confer on the defenders a heritable title to the lands. They further say (2) that the defenders cannot plead the prescription introduced by the Act of 1617, c. 12, because the privilege thereby introduced is confined to the cases where charter and sasine, or at all events sasines, for forty years preceding the date of any challenge, shall be produced, and that the defenders have not, or have not produced, any sasine; and (3) that the defenders divested themselves of the lands in question in favour of the pursuer's authors by a conveyance contained in a contract of excambion executed in 1854. None of these answers in my opinion can be sustained. The date when giving sasine—that is, possession of land—by symbolical delivery began is variously given by different writers. Stair (ii, 3, 16), on the authority of Craig (ii, 7, 2), says that the "solemnity of sasines by the instrument of a notary" began about the year 1430, but that long thereafter, even near to his time

(*i.e.*, Craig's time) the bailie's seal upon the superior's disposition, charter, or precept, was sufficient to instruct delivery of possession." Craig's work—the *Jus Feudale*—from which Stair quotes, was completed in the year 1603 (five years before the author's death), although not published until 1655. According, therefore, to this authority, the instrument of sasine, or the solemnity of which that instrument was the record and attestation, did not come into common observance or use for nearly a century after the date of the charter on which the defenders found. But if actual possession was had by the disponee or vassal, in virtue of his conveyance or charter, nothing more was then needed to perfect his "right"—(Stair, *sup. cit.*). It is not suggested in this case that the possession by the defenders and their authors of the lands now in question was other than continuous and uninterrupted from 1572 down to, at all events, 1854. I say the lands now in question, because I am keeping quite in view what was done in 1827 with another part of the lands of Rathelpie, and shall advert to that immediately, to see whether that has any bearing upon the question before us. Accordingly the defenders' title stands thus: A charter dated in 1572, confirmed by the Crown same year, and confirmed and ratified by Parliament in 1612, with actual possession following on the charter for more than forty years. In these circumstances, I agree with the Lord Ordinary in holding that the defenders have a competent and habile title which includes the lands in question, and which, by possession for more than the prescriptive period, has been rendered indefeasible. I shall here notice the transaction of 1827, just alluded to, because that transaction bulked somewhat considerably in the debate before us, although in my opinion it has no bearing—certainly no direct bearing—upon the question raised in this case. In 1827, on an application by the then incumbent of St Leonard's parish, the Presbytery designed for him a glebe of about 4½ Scots acres. But on that designation no possession followed, either actual or civil. It is not pretended that the incumbent ever took or had natural possession of the land so designed for a glebe; but it is said that he took and had civil possession thereof through the defenders' authors, who were the tenants of the land under the incumbent, and paid rent to him as such. I think the proof shows that this was not so—there is no trace of the relationship of landlord and tenant between the incumbent and the College. What is proved is that from 1827 down to 1854 the incumbent (for the time being) received a certain payment in money, not as rent for the land, but "in lieu" of the land—and received that money, not from the College as tenant, but from the heritors who were bound to supply the glebe, or pay something in place of it. There appears to me to be nothing obscure about this transaction. The glebe had been designed, and the incumbent of the parish could have taken possession of it had he pleased. But he preferred a money payment from the heritors in place of the glebe, and of the glebe he never took possession. Had he taken possession under the decree of the Presbytery designing the glebe, it would, for himself and his successors in the cure, have become heritably theirs. But the designing of the glebe, without possession following, gave the incumbent and his successors no heritable title to it; it did not operate as a divestiture of the then vested proprietor. But even had this been otherwise—had the incumbent taken possession of the designed glebe—it would not have availed the present pursuer, at least in this action. He is not asking to have it declared that he is entitled to the glebe so designed, but to a different piece of land altogether, so that whether there was or was not an effectual designation in 1827 is immaterial to the only question raised in the present process.

If, then, the defenders have a good heritable title to the lands in question, as I think they have, what title has the pursuer to these lands on which to base the declarator he asks the Court to pronounce. His only title is the contract of excambion executed in 1854 between the defenders on the one part and Dr Cook, the then incumbent of the parish of St Leonard's, "acting in concurrence with and under approval of the Presbytery," on the other part. This deed narrates the designation of 1827—that from that date "till now, said glebe, or an equivalent for the same, has continued to be enjoyed by the minister of said parish"—that an arrangement had been made whereby the said glebe should be excambed for another part of the lands of Rathelpie, of which the Presbytery had approved, and that in order to carry out this arrangement the parties had "agreed to grant these presents in manner underwritten." Therefore the defenders disponed to the said Dr Cook and his successors in the incumbency of said parish, "as an arable glebe and site for manse, offices, and garden," the pieces of land known as Cocks Haugh and Toll Park—the lands referred to in the conclusions of the summons. In return or exchange Dr Cook, under authority of the Presbytery, disponed from him and his successors in the cure of the parish, to and in favour of the defenders, the 4½ acres Scots designed as a glebe in 1827. This contract of excambion has never been recorded in the Register of Sasines. The effect of this deed, in so far as it purports to convey the old glebe of 1827 (I call it so for convenience) in favour of the defenders, does not need here to be considered. Nothing that can be done within the conclusions of this action can affect the defenders' title to that 4½ Scots acres one way or another. But the important question arising upon the terms of this contract of excambion is, what title does it confer on the pursuer as the incumbent of St Leonard's in the lands known as Cocks Haugh and Toll Park. The defenders maintain that it confers no heritable title on the pursuer, because (1) no infeftment has followed upon it, the deed never having been recorded in the Register of Sasines;

(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