not be right to send a case for trial in which the ground of action is that the line was not fenced. But in article 4 the pursuer avers that the engine-driver saw the child; that he had time to pull up; and that through culpable negligence he failed to do so. The answer to that is that there was negligence on the part of the parents of the child in allowing the child to get upon the line, and this is said to be necessarily inferred from the pursuer's statement. But it is to no purpose to say that there was negligence on the part of the parents unless the defenders are prepared to go further and to say that that was contributory negligence—that is, negligence directly contributing to the accident. If it is true that the engine-driver saw the child, and had time to pull up, I believe it may be maintained that the real cause of the accident was the negligence of the engine-driver, and not that of the parents of the child. Negligence to be contributory must be proximate, and must have some relation to the other negligence with which it is to be compared. I do not say that the negligence of the engine-driver was the cause of the accident, but neither do I say that because a person is on the railway line, where he has no business to be, that he may be driven over with impunity, and that the mere fact of his being on the line casually is to exonerate the railway company from paying damages. I shall therefore send the case for trial, and the issue will be the one proposed, with the addition of the words "was struck by an engine and killed."

The following was the issue adjusted:—"Whether, on or about the 26th day of June 1883, and at or near Deantown, Inveresk, near Musselburgh, the pursuer's son John Archibald was struck by an engine and killed, through the fault of the defenders, to the pursuer's loss, injury, and damage?" Damages laid at £500.

Counsel for Pursuer—Rhind—Baxter. Agents—Brown & Patrick, Solicitors.

Counsel for Defenders—Jameson. Agents—Millar, Robson, & Innes, S.S.C.

Thursday, November 8.

SECOND DIVISION.

[Lord Fraser, Ordinary.

GORDON *v.* RAE.

Lease—Landlord and Tenant—Building Lease under Act 10 Geo. III. cap. 51 (Montgomery Act), secs. 4, 5, and 6—Trees—Partes Soli—*Tenant's Right to Cut Timber.*

Held that a tenant in a building lease for ninety-nine years, granted under the Montgomery Act by an heir of entail, is entitled, so far as is necessary for the reasonable enjoyment of the subject let, to cut timber growing thereon.

By lease dated in March and May 1827 the Hon. William Gordon, heir of entail in possession of the lands of Ellon, Aberdeenshire, let to John Cruickshank, his heirs, assignees, and sub-tenants, a piece of ground in the village of Ellon for ninety-nine years. By the lease Cruickshank undertook to pay for the ground (which was one half Scotch acre in extent) the sum of £5 yearly rent, and obliged himself, "within ten years after the commencement of the present lease, to build on the piece of ground hereby set a dwelling-house not under the value of £10 sterling at least, and to keep the said dwelling-house in sufficient tenantable repair during the currency of the lease." This lease was granted in virtue of the powers conferred by the Act of 10 Geo. III. cap. 51 (the Montgomery Act), which provides as follows:—Section IV. "And whereas the building of villages and houses upon entailed estates may in many cases be beneficial to the publick, and might often be undertaken and executed if heirs of entail were to be empowered to encourage the same by granting long leases of lands for the purpose of building, Be it therefore enacted by the authority aforesaid, that it shall be, and it is hereby declared to be, in the power of every proprietor of an entailed estate to grant leases of land for the purpose of building for any number of years not exceeding ninety-nine years." V. "Provided always that not more than five acres shall be granted to any one person, either in his own name or to any other person or persons in trust for him, and that every such lease shall contain a condition that the lease shall be void, and the same is hereby declared void, if one dwelling-house at least not under the value of ten pounds sterling shall not be built within the space of ten years from the date of the lease for each one half acre of ground comprehended in the lease; and that the said houses shall be kept in good tenantable and sufficient repair; and that the lease shall be void whenever there shall be a less number of dwelling-houses than one of the value aforesaid to each one half acre of ground, kept in such repair as aforesaid, standing upon the ground so leased." VI. "Provided also, that the power of leasing hereby given shall not in any case extend to, or be understood to comprehend, a power of leasing or setting in tack the manor-place, office, houses, gardens, orchards, or inclosures adjacent to the manor-place, which have usually been in the natural possession of the proprietor, or have not been usually let for a longer term than seven years when the heir in possession was of lawful age; and that no lease of lands shall be granted under the authority of this Act for the purpose of building villages or houses within three hundred yards of the manor-place in the natural possession of the proprietor."

The pursuer in this action, a succeeding heir of entail to the granter of the lease, sought to have it declared that the defender, who acquired right to the lease by onerous assignation at Martinmas 1882, "was not entitled by himself, or by any person or persons having his authority or permission, to cut timber growing upon" the piece of ground contained in the lease. The summons further contained conclusions for interdict against the defender cutting the timber, or permitting it to be cut, and for £100 as damages for the cutting of several trees by the defender.

The pursuer stated that the defender had, without his permission, cut down four trees, the property of the pursuer, growing upon the ground, and maintained right to cut trees upon the ground without permission. He produced a letter written by the defender in answer to one from the factor on the property regarding the cutting down of

trees. In this action the defender stated that he considered himself "within his right in allowing trees near Rose Cottage to be cut down without asking any authority." The pursuer further averred that the defender had wrongfully appropriated to his own use the trees he had cut down, and that "the loss of the said trees has seriously and permanently injured the beauty and amenity of the cottage known as Rose Cottage, which is built upon the said piece of ground, and the beauty and amenity of the grounds surrounding and adjoining the said cottage, which are all the property of the pursuer. Fine old trees, such as those which the defender cut down, are rare in the neighbourhood of Ellon, and their beauty and shelter added a special value to the said piece of ground."

The defender admitted the cutting down of four trees, but averred that the removal of the trees was necessary for the preservation and sanitary condition of the house. He averred that two of the trees cut down were so close to the house that their branches overhung the roof, and caused it to rot in part from dampness, and that the others were injurious to the boundary wall, and in the way of a necessary system of drainage. He averred that the amenity of the house had been improved, and that the value of the timber cut down by them, after deducting expenses, was £2, 1s. 10d., which sum, under reservation of all his pleas, he offered to pay to the pursuer. He further explained that in order to render the house fully tenantable it might be necessary to cut down other trees on the ground.

The pursuer pleaded—"(1) In respect that the defender has no right or title to cut trees upon the said piece of ground, and that he illegally asserts and exercises such a right, the pursuer, as heritable proprietor of the said piece of ground, is entitled to decree of declarator and interdict in terms of the conclusions of the summons. (2) The defender having by himself, or by some person or persons having his authority or permission, wrongfully and unwarrantably cut down, or suffered to be cut down, the said trees, is liable to the pursuer, as heritable proprietor of the said piece of ground, for the injury thereby occasioned. (3) The defender, having wrongfully and illegally appropriated to his own uses the said trees, which were the property of the pursuer, is liable to the pursuer in the value thereof."

The defender pleaded—"(2) The pursuer having no interest to sue the present action, it should be dismissed. (3) In respect of the obligations contained in the lease, interdict should be refused. (4) The defender, being bound by his lease to maintain the dwelling-house upon the ground leased to him in good repair, was bound to do the acts complained of, and is therefore entitled to be assoilzied. (5) The defender having acted *bona fide* for the protection and due administration of the subjects leased, should be assoilzied."

A proof was led. It appeared that of the trees cut down, two—a large ash tree of great age, and a willow—grew very close to the house, and that their leaves and branches so overhung it as, in the opinion of the defender and of persons of skill adduced as witnesses by him, to injure the roof by keeping away the sunlight or air from it so much that the slates were partially covered with mould, and that the roof rotted from dampness, and dampness was observable within the house. There was evidence, however, to the effect that in the time of the previous assignees of the lease (the Misses Milne) the trees had been occasionally pruned whenever the pursuer or his author were requested to have it done, and that the house was dry and comfortable. The defender made a new boundary wall and introduced a new system of drainage. He led evidence to show that one of the trees he cut down had, by reason of its roots extending under the old wall, greatly shaken it and rendered it ruinous, and that the removal of that tree was necessary in order to a substantial substitute for the old wall being built. He also led evidence to show that the new system of drainage was essential to health, and that the roots of the various trees he cut down had choked and destroyed the old drain and required to be removed in order that the new system might be properly carried out with efficiency and safety.

The Lord Ordinary (FRASER) pronounced this interlocutor—"Finds that the defender is tenant of the pursuer of a piece of ground in the village of Ellon upon which a cottage has been built: Finds that upon said ground there were in January 1883 a number of old trees which belonged to the pursuer: Finds that the defender, without authority from the pursuer, did in that month cut down four of these trees and sell the timber, and has retained the price obtained therefor, to the amount of £5: Finds that the said act of the defender was illegal, and that he is liable in damages therefor, which assesses at the sum of £5: Finds that the defender has intimated his intention, and asserts his right, to cut down other trees on the said piece of ground belonging to the pursuer when he considers this to be necessary for the comfortable occupation of said cottage: Finds in law that the defender has no right so to do without the consent of the proprietor, or without the sanction of a court of law: Therefore prohibits and interdicts the defender from cutting timber growing upon the said piece of ground without the authority of the proprietor: Reserving always to the defender, in the event of such authority not being granted, right to apply to a competent court for authority to cut down any trees upon the said piece of ground that may interfere with the tenantable condition of said cottage, and to the pursuer his defences to the said application, and decerns.

"*Opinion.*—[*After narrating the lease, and the fact that the defender had cut down four trees as mentioned above*] — They [the trees in question] were planted for ornament, and when so planted they became *partes soli*, and became the property of the owner of the soil. 'Trees,' says Erskine, 'planted in one's ground, though not by the proprietor, are deemed an accessory of the ground in which they were planted, after they have taken root in and drawn nourishment from it, and so belong as an accessory of the ground to the owner of it' (ii. 1, 15). A liferenter who plants trees has been held not entitled to cut them—*Gray* v. *Seton*, Mor. 8250. Nor can a tenant of a farm do so—*Bogue* v. *Wright*, Mor. App., *vide* Planting and Inclosing, No. 2. That an agricultural tenant cannot cut down any trees upon his farm has long been settled law (See Erskine, ii. 6, 22). 'This' says Mr Bell in his Treatise on Leases, vol. ii. p. 348, 'was decided long ago. A tenant who held a

lease for five times nineteen years, in which the lands were let to him, with "woods, glens, pasturage," &c., was found not to be entitled to sell or dispose of the wood, but only to use it for the purpose of repairing the houses on the farm, or for building new ones—*Touch* v. *Ferguson*, June 16, 1664, Gilmour No. 103.' This was the case of a long lease, and while such a lease gives certain privileges as regards subsetting and the right of being enrolled as proprietor for parliamentary elections (in virtue of statute), it confers no higher powers on the tenant than an ordinary lease for nineteen years, as is well illustrated by the case of *Wellwood* v. *Husband*, February 11, 1874, 1 R. 507.

"Is the law so settled in regard to farms held for agricultural occupation not to be applied to a case like the present where we have half an acre of ground leased out, partly occupied with a dwelling-house and a garden, while the remainder is devoted to rearing potatoes, or any other crops for which it is fitted? It is not easy to see why the same rule should not be applied to both cases. In letting the ground to the defender, the pursuer did not convey any of his rights which the law reserved to him that were not necessary to the full enjoyment by the tenant of the subject leased. Among others, he did not convey to him the property in the trees any more than the property in the soil. Accordingly, when the case came into Court, the position taken up by the defender of his absolute right to cut down the trees without authority from the proprietor, was kept in the background, and a new position was taken up, in support of which there has been led a considerable amount of evidence.

"The defender says it was necessary to cut the four trees, which he did cut down, in order to improve the sanitary condition of the house, which it was said was injuriously affected in consequence of the trees preventing a free circulation of air around it, of creating damp, and preventing sunshine. The defender, without ever testing the capabilities of the house by living in it himself, came to the conclusion that a great number of improvements must be made. A new system of drainage was in his opinion necessary. A new boundary wall must be built, and damp, which he said affected a part of the house, must be removed by the removal of its supposed cause — the trees. Now, undoubtedly, it may be granted to the defender that he was right to resort to all proper means of making the house, which he is bound to keep in a tenantable condition, tenantable. But this does not entitle him, without any intimation to the proprietor, to cut down trees on another man's property and pocket the price, upon theories of sanitary improvement cogitated by himself. If he had preferred a request to the pursuer for authority to cut down trees, as being necessary for his own comfort, and desirable with a view of improving the amenity of the place, the pursuer says that he would at once have consented, upon reasonable grounds being offered to him of the necessity or expediency of the thing proposed. If the pursuer had refused any such reasonable request, the course was open to the defender of applying to the Sheriff, craving inspection of the premises, and praying for authority to do the needful acts—needful, because without them there could be no comfortable occupation. But this was not the course adopted by the defender. He took the law into his own hand, and proceeded to carry out his own views of sanitary improvement, and after the whole scheme had been accomplished he justifies this proceeding by bringing forward evidence of persons who say that in their opinion what was done improved the property.

"The defender has proved that the drains were out of order. When he got right to the lease these drains were carried round the east side of the house, and he considered it expedient also to bring a drain round the west side, and in so doing he says that it was necessary to go through the roots of a mountain ash and of a willow. Thinking that when he cut the roots the trees would be insecure or would die he felled them. The lime tree on the east side which he cut down was so done because it was too near the house. The old ash, which was on the ground before the lease was granted, was not in any way near his drainage, or in any way near his house, and it therefore was cut away because in the defender's view it would improve the amenity.

"The drainage scheme may have been a very proper thing to carry through; and the pursuer deponed that to a proper scheme of this sort he never would have objected, although it necessitated the cutting down of some of the trees, such as the mountain ash and the willow on the west side of the house. The question is not, however, as to the propriety of this scheme of drainage, but as to the defender's right to carry all this through at his own hand. He further complains of damp in the house in consequence of the trees dropping moisture, and of a green mould on the roof in consequence of seeds and leaves falling from them. As to the latter complaint, the Lord Ordinary thinks that it is groundless. The former tenants (the Misses Milne), when they found any inconvenience from the natural growth of the trees, applied to the proprietor, and his forester regularly pruned them—at least he did so three times; and the only complaint of these ladies was that he had pruned away too much, for they thought that the trees were an ornament, and not, as the defender thinks, an eyesore. There has been no pruning for ten years; and therefore one can understand that the branches darkened the windows, and the raindrops fell upon the roof. The remedy against this was not to cut down the trees but to prune them.

"The whole matter resolves, however, into a question as to how the rights of parties are to be regulated in the future. The defender claims a right and states his intention to cut down more trees than he has already done, and he thus compels the pursuer to vindicate his rights if he possesses them; and it was stated to the Lord Ordinary that this was a test case that would govern pretensions to the same effect made by other tenants holding upon long leases. The village of Ellon is said to be a very choice spot, embosomed in trees, and the pursuer is adverse to have this sylvan character of his property extinguished. His tenants are entitled to houses where they may live comfortably; and if he refuses to agree to such dealings with his trees as is necessary for that purpose, the courts of law, as already indicated, are open to anyone aggrieved. But from the accommodating temper shewn by the pursuer, it is not to be doubted that any reasonable request to him to be allowed to cut down

trees that stood in the way of comfort or of amenity would be at once listened to and granted The proceeding of the defender was on the other hand of a very high-handed description, justified by no reluctance on the part of the proprietor to meet him, for he was never asked; and justified by no necessity, if one considers the history of this cottage when in the possession of the Misses Milne. When the trees needed pruning these ladies got it done by the proprietor, and neither they nor any inmate that was in their house ever complained of damp when such prunings were timeously effected. The condition of things as described by the defender's father was in the opinion of the Lord Ordinary greatly exaggerated. He seems to have lent too willing an ear to the architect whom he employed to build a back-kitchen—Mr Marr—whose leading idea, like that of many other ignorant people, is that trees around a house are not a beauty but a nuisance.

"The pursuer has not instituted this action for the purpose of obtaining damages. He stated that his only object was to prevent the wholesale disfigurement of a pretty village by the felling of trees which constitute its chief ornament and give a character to the place. Therefore it is unnecessary to do more in the shape of awarding damages than to give a mere nominal sum of £5. The defender must refund the £3, 10s. 10d., being the price of the timber sold; and the 10s., being, as his father admits, the value of the branches that were kept, and another £1 must be added as the value of the mountain ash, the timber of which the defender gave over to the U.P. minister in order to conciliate him. This will make a sum of £10 in all.

"With regard to interdict, the interlocutor is guarded so as to entitle the defender, if he thinks fit, to apply to a court of law should the pursuer or succeeding heirs of entail prevent him from removing trees obnoxious to health and comfort, and he will in consequence not be tempted to act in the manner he has done in the present case, of destroying another man's property without his consent, and without warrant of a court of law."

The defender reclaimed, and argued—This was a question of contract. Under the lease the tenant was entitled to use the whole subjects let to him in any manner necessary for their reasonable enjoyment unless the lease contained express stipulations to the contrary—*Rogers* v. *Price*, 1849, C.B. Rep. 894. The ordinary rule of the common law, that the trees in a subject let may not be cut down by the tenant, did not apply. The very purpose of this lease, and of any lease under the Montgomery Entail Act, was building. Was the landlord then entitled to step in arbitrarily and defeat what was only a compliance with that very purpose? Not unless he could show that the tenant was acting in *mala fide* or wantonly in cutting the timber. In the present case the landlord made no such suggestions, and the trees must just be looked upon as the victims of the purpose of the lease. *Grahame* v. *M'Kenzie*, February 23, 1810, Hume's Dec. 641, was in point. He offered to pay the pursuer £5 as the value of the timber cut down.

The pursuer replied—This action had been raised as a test case to try the abstract question as to the right of an heir of entail, who had granted long building leases under the Montgomery Act, to prevent his tenants from wantonly ruining the sylvan character of the village of Ellon. If the defender was successful here, then it would be in the power of other tenants during the last years of their lease to cut down the trees, and destroy the amenity of the place. The lease did not confer any right of property in the trees, because they belonged to the landlord when cut down as they did when standing. He was entitled to interfere when he saw that the removal of the trees was going to destroy the beauty of the village. If the tenant was unwilling to preserve the timber, he must go and build somewhere else. An agricultural tenant was not entitled to cut down trees on his farm—Ersk. Inst. ii. 1, 15; *Touch* v. *Ferguson*, June 16, 1664, Gilmour, No. 103. The tenant was in no better position in a long lease than in a short one—*Welwood* v. *Husband*, February 11, 1874, 1 R. 507.

At advising—

Lord Young—This case has been fully argued to us, and ably argued, and we are told that it is a test case in order to ascertain whether tenants under similar leases are or are not to be permitted to cut down trees.

There is no doubt whatever of the rule of law that trees are the property of the landlord, and that when the land is let the tenant is not at liberty to cut them down, and that rule of law is not questioned here. But this is a building lease granted by an heir of entail in possession under the authority of the 4th and 5th clauses of the Montgomery Act, which Act was passed for the purpose of authorising heirs of entail to let for a long period ground for the building of houses and villages upon it. The preamble of clause 4 is of importance—"Whereas the building of villages and houses upon entailed estates may in many cases be beneficial to the publick, and might often be undertaken and executed if heirs of entail were empowered to encourage the same by granting long leases of lands for the purpose of building, Be it therefore enacted by the authority aforesaid, that it shall be, and it is hereby declared to be, in the power of every proprietor of an entailed estate to grant leases of land for the purpose of building, for any number of years not exceeding ninety-nine years." Clause 5 provides—". . . that not more than five acres shall be granted to any one person, either in his own name or to any other person or persons in trust for him; and that every such lease shall contain a condition that the lease shall be void, and the same is declared void, if one dwelling-house at the least, not under the value of ten pounds sterling, shall not be built, within the space of ten years from the date of the lease, for each one half acre comprehended in the lease." Clause 6 contains a provision for the amenity of the mansion-house—". . . that the power of leasing hereby given shall not in any case extend to, or be understood to comprehend, a power of leasing, or setting in tack, the manor-place, office-houses, gardens, orchards, or inclosures adjacent to the manor-place, which have usually been in the natural possession of the proprietor, or have not been usually let for a longer term than seven years, when the heir in possession was of lawful age; and that no lease of lands shall be granted under

the authority of this Act for the purpose of building villages or houses within three hundred yards of the manor-place in the natural possession of the proprietor."

Now, this lease was, as I have stated, granted under the authority of these provisions. It bears to be so, and otherwise, the landlord being an heir of entail, it would be illegal. That being so, we are asked by the landlord to affirm against a tenant who took land for building purposes—for which indeed it was let—that he is "not entitled, by himself, or by any person or persons having his authority or permission," to cut down timber growing upon that piece of ground. It is now sought to be modified by representing that he is not entitled to cut timber except what is exactly necessary for the purpose of the building which he is going to erect, or the continuance of the building erected, if it is already erected. Even that modification is not within the conclusions of the summons. But it does seem extravagant, on the face of it, that a landlord who has granted a lease for ninety-years for building purposes, and so conditioned that if one house at least is not built and maintained on the ground the lease shall be null and void, should bring a declarator that the tenant has no right to cut timber on that ground. Upon the record it is stated "that the loss of the trees has injured the beauty and amenity of the cottage known as Rose Cottage, which is built upon the said piece of ground, and the beauty and amenity of the grounds surrounding and adjoining the said cottage, which are all the property of the pursuer. Fine old trees, such as those which the defender cut down, are rare in the neighbourhood of Ellon." But is it the suggestion that the proprietor of an entailed estate has selected as the ground to be let by him on a building lease for ninety-nine years in order to encourage the erection of houses and villages, a piece of ground where there is such timber as is necessary for the amenity of the estate? Mr Trayner put it to us in this way—If on the ground there is a clump of ornamental trees which it would be very injurious to the body of the estate to take down, and the building can be erected without the destruction of the clump, is the landlord not entitled, as the proprietor of the trees, to interfere to prevent their being taken down? Well, I think the best advice to the landlord would be not to let for building purposes—in order to encourage the erection of houses and villages—ground upon which there is ornamental timber necessary for the maintenance of the amenity of the estate. My opinion of the right of the tenant under such a lease is that he is entitled to build on every bit of the ground unless the landlord's right restrains him. I do not say that restrictions as to the building may not be introduced into the lease restraining him to one house, or the height of the house, or the plan or style of the house. It is very possible—indeed it is probable—that provisions in the lease to that effect would be sustained. But there are no such provisions here. The subject is simply a piece of ground let for building purposes for ninety-nine years, with the condition, which is express, that a house shall be built upon it. To be sure there is only half an acre in this, and there is a reference to only one house, as expressing the tenant's obligation, but there is no limit to the right expressed. Take what would be a model case under the statute—A proprietor lets five acres of ground (which is the maximum extent he can let to any person) to A B, with this condition, that he shall erect one house at least on every half acre, would it be said for a moment that he was not entitled to erect as many houses as the ground would carry, or that he must erect only so many as he can erect without interfering with any timber which happens to be there? I should think it clear that he is entitled to erect, and that at any period throughout the currency of the lease, so long as he satisfies the obligation he has undertaken, as many houses as the ground will carry—the erection of houses and villages being the very purpose for which the lease was granted, and which the statute authorised the proprietor to grant. I do not mean to say—although we are not called upon to consider, certainly not to decide, that here—that the landlord might not apply to the Judge Ordinary to restrain the tenant from doing anything mischievous or wanton under the pretence of following out his own rights as tenant. No such case as that is presented here, but an absolute proposition in point of law that the tenant is not entitled to cut down timber on the building ground let to him, assigning as the only reason that that timber is of beauty, and necessary to the amenity of the estate. If it be of such beauty and amenity, then the ground on which it grows should not have been let for a period of ninety-nine years for building a village or houses upon.

I am therefore of opinion that the interlocutor should be recalled, and decree of absolvitor pronounced.

Lord Craighill—I also think that decree of declarator as concluded for cannot be pronounced in this case, and consequently that the interlocutor must be recalled. The law which has been laid down by the Lord Ordinary is applicable to ordinary agricultural leases, but I think it is inapplicable in the present case, because, as I conceive, he has not adverted sufficiently, nor given sufficient weight, to the consideration that the lease in question is one that was granted exclusively for building purposes. It is a lease granted under the authority of the Montgomery Act, and the sole consideration which entitles an heir of entail to grant such a lease is that the ground to be let shall be dedicated to building purposes. That being so, it appears to me that the ordinary rule of law applicable to the cutting of trees by a tenant does not in the least apply to the case we are now deciding. There is no dispute between the parties as to this proposition, that however long the lease is, the landlord remains the proprietor of the ground, and also proprietor of the trees, which are *partes soli*, portions of the estate, and when the proprietor grants an ordinary lease it is assumed that the trees are to remain part and parcel of the ground. But when we come to a case like the present we find it is quite different. The landlord cannot reserve or preserve the right which would belong to him in the case of an agricultural lease, inasmuch as the fulfilment of the condition in the lease for the erection of a building is absolutely inconsistent with a right to prevent the tenant doing that which the fulfilment of the condition imposes on him. A house having been built upon the ground, is the landlord entitled to declarator that not one of the

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