The observations of Lord Cairns in *Slattery's* case are therefore to be distinguished. In that case there was such obstruction to the view of the line and the speed was so great that, as Lord Cairns pointed out, it was possible to take the view that there was no negligence involved in being on the line, and that the question should be left to the jury. Here there are no facts which could support the verdict without at the same time affirming contributory negligence. The men must have seen the train in time if they had been looking, and in no view can they escape the imputation of negligence.

With reference to *Radley's* case, I cannot help thinking that there is some misapprehension abroad as to the limits of the doctrine. The negligence of the defender there referred to must be a second negligence following upon the pursuer's contributory negligence; it cannot be the original act of negligence, or there would never be such a plea as contributory negligence at all. In order to bring a case under the rule in *Radley* there must be (1) negligence, (2) contributory negligence, (3) an ensuing act of negligence without which the accident would not have happened. If the whole matter were open, the doctrine might have been expressed in the question—"What is the *causa proxima* of the accident?" Here, for instance, at the eleventh hour these men were seen on the line by the witness Moir, who then and there signalled to the engine-driver to stop. If it had been proved that the engine-driver went on, and could by stopping have avoided the men, then the doctrine in *Radley's* case would have been applicable.

I think the doctrine has no application here, and I am for allowing a new trial.

LORD M'LAREN—I concur.

LORD KINNEAR—I agree with your Lordship, and especially with the last remark which your Lordship has just made. The question really is, Was the accident caused by someone else's negligence or by his own?

LORD PEARSON—I agree.

LORD GUTHRIE—I concur. It seemed to me at the time of the trial that the question of fault on the defenders' part was for the jury, but in regard to the question of contributory negligence I told the jury that it would be very difficult to avoid the conclusion that contributory negligence was present.

The Court set aside the verdicts and granted new trials.

Counsel for the Pursuers — Anderson, K.C.—D. P. Fleming. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders—Clyde, K.C.—King. Agents—Hope, Todd, & Kirk, W.S.

Wednesday, February 24.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

EARL OF LOUDOUN *v.* MORTON.

Superior and Vassal — Casualty — Proof of Superior's Title—Identity of Description—Onus of Proof.

A brought an action for payment of a casualty against B in respect of certain lands in which B was infeft in 1906. B, who was a singular successor of the last-entered vassal, had acquired the lands from her by a disposition in which they were described as part of the lands of H, sometime possessed by William M'Kay, tenant therein, and as particularly described in an instrument of sasine of date 1830. To the superiority of the lands so described A had a valid prescriptive title.

Held that as B had failed to show that the lands in question were not part of the lands of H as above described, or that they were other lands of H held by him of another superior, he was liable in payment of the casualty sued for.

Earl of Breadalbane v. *Macdougall*, November 4, 1880, 8 R. 42, 18 S.L.R. 40, *followed.*

On 6th December 1907 the Earl of Loudon brought an action against Alexander Morton, Gowanbank, Darvel, for declarator that in consequence of the death of Miss Martha Brown of Langfine and Waterhaughs, in the parish of Galston and county of Ayr, the vassal last vest and seised in the subjects therein mentioned, a casualty, being one year's rent of the said subjects, became due to him as superior thereof. A pecuniary conclusion followed.

The defender pleaded, *inter alia*,—"(4) The pursuer not being the superior of the lands described in the summons, the defender should be assoilzied.

On 7th July 1908 the Lord Ordinary (MACKENZIE) held that, on an examination of the titles, the subjects described in the summons now possessed by the defender were within the lands over which the pursuer had by prescription the right of superiority, and granted decree as craved.

The defender reclaimed, and argued that the lands in question were not part of the lands of Hillhead described in the sasine of 1830, assuming that the pursuer was superior thereof, but were other lands held of another superior.

Counsel for the respondent were not called on.

LORD PRESIDENT—This is an action of declarator and for payment of a casualty instituted at the instance of the Earl of Loudoun against Mr Morton, who is proprietor of some lands now known under the modern name of Gowanbank, which he acquired by disposition from Miss Brown, the disposition being dated 11th August

1879. The disposition is of the eastmost field of the farm of Hillhead as delineated and coloured on a plan and described as being of certain measurement. The boundaries are then given, and the disposition goes on—"Which piece of land above disponed is a part and portion of all and haill the lands and farm of Hillhead, sometime possessed by William M'Kay, tenant therein, and lying in the parish of Loudoun and shire of Ayr, as particularly described in the instrument of sasine in favour of the deceased Thomas Broun, Esquire, of Waterhaughs, dated 30th and 31st July, and recorded in the New General Register of Sasines, Reversions, &c., at Edinburgh, the 10th day of August, all in the year 1830."

Now the Lord Ordinary has held, upon an inquiry into the titles, that there is no doubt in his Lordship's opinion that the pursuer has made out that the lands of Hillhead are part of the £5 lands of Newmilns, in which he finds that the pursuer has been infeft for the prescriptive period. And we have had all that could be said put before us by Mr Hunter against that judgment; and I have not been able to find any flaw in the Lord Ordinary's reasoning and I entirely agree with him. But I think it right to say that I consider that there is really a shorter cut to the result at which the Lord Ordinary has arrived, and therefore I think it right to indicate what that is.

The instrument of sasine, referred to in the disposition which I have read, is an instrument which describes various portions of lands and ends up thus—"All which lands of Sheeplees, High Shott, Shotlands, and parts of the Muir of Astonpaffle, last above described, are now known by the name of Hillhead, and were sometime possessed by William M'Kay, tenant therein." That instrument of sasine proceeds upon an extract registered disposition and deed of entail by Nicol Brown in 1827 and a retour of the general service of Thomas Brown as nearest and lawful heir of tailzie in general to the said Nicol, his cousin-german. Of course, if we could see that disposition and deed of entail I take it that it would probably contain a clause which would show us the name of the superior. But, at any rate, that is a small matter, as we have also got before us a charter of confirmation of 1832, which confirms that particular sasine, and that charter of confirmation is granted by the Marquis of Hastings, who, admittedly, was the predecessor of the present Earl of Loudoun, and, *inter alia*, it confirms the sasine of these very lands, ending up with the same description—"now known by the name of Hillhead, and possessed by William M'Kay, tenant therein." We have also before us the fact that even that was not the first of it—that the same lands were confirmed, not by the same actual superior but by his predecessor in the titles, as long ago as 1814. But, at any rate, the later confirmation will quite do, because the prescriptive period will then end in 1872.

Now what is the effect of all that in law? Let us first take the position of Miss Brown. It is quite evident that Miss Brown never could have said against the superior that he was not the superior of these lands known as Hillhead, and possessed by William M'Kay. That really, I think, is the A B C of the law, and if authority was needed, ample authority would be found in the *Earl of Breadalbane* v. *Macdougall*, 8 R. p. 42. That being so, it being quite impossible for Miss Brown to have said that the lands possessed by M'Kay were not held from the Earl of Loudoun, what happens? Miss Brown gives a disposition of a piece of land which she describes as "a part and portion of all and haill the lands and farm of Hillhead sometime possessed by William M'Kay, tenant therein." Now, therefore, there is identity of description. No doubt it goes on with a reference to the sasine, but I do not think that that reference to the sasine matters one way or the other—that is to say, that the pursuer's case does not depend upon the instrument of sasine. It does him no harm, but he does not depend upon it—he has got identity of description.

Accordingly, *prima facie*, anybody who takes upon that title is simply of course in the same position as Miss Brown was with regard to the lands of Hillhead sometime possessed by William M'Kay, and there is no question about it that she could not have contradicted her own superior's title.

What, then, is really the argument on the other side? The argument on the other side is that there may have been other lands of Hillhead which were held of another superior, and the way in which that argument is sought to be assisted is that by a critical examination of the various parcels of land described in the sasine of 1830, and an adding up of all those parcels and an attempt at situating them locally, the defender says that he has shown that the lands of Hillhead there mentioned cannot be the same lands of Hillhead as now possessed by him. Over all that sort of thing there is a certain obscurity. There always is a certain obscurity when you have to identify in modern titles descriptions which, when written, referred to a state of matters that has long passed away. Your Lordships are familiar with very many old titles in which the three merkland of so-and-so and the five merkland of so-and-so are all described, and not a single name used is a name that can in modern times be identified on the map. I do not doubt that the defender has been so far successful in this that he has thrown a sort of mist of obscurity over the precise identification of these lands. He has created a doubt as to whether these particular parts and portions of land enumerated *specifice* exactly correspond and are identified with the lands now known as the lands of Hillhead, and modernly as the lands of Gowanbank. But that will not avail him unless he can show a little more. Miss Brown never could have said so, and although I think Mr Hunter was right in his point when he said that if he could show that

the lands of Hillhead as now possessed by him were a different set of lands of Hillhead from the lands of Hillhead of which Miss Brown had acknowledged the superiority to be the superiority of the Earl of Loudoun, he was entitled to succeed, yet the *onus* was upon him to do so; and inasmuch as he has frankly admitted that he is not in a position to show that there were any other lands of Hillhead which were held from another superior, then I am afraid if he cannot do that the pursuer has made out his case upon undoubted identity of description.

The case comes to be as simple as this. Miss Brown, holding the lands of Hillhead as possessed by William M'Kay, acknowledges in 1832 or 1814 that they are held from the Earl of Loudoun, and the prescriptive period goes on and finishes under that condition; then Miss Brown dispones a part and portion of the lands of Hillhead as possessed by the same M'Kay. That is identity unless you can show something else, and the only way in which it seems to me the defender could have prevailed in this case would have been to have shown us affirmatively that there were other lands of Hillhead which were held *de facto* from another superior. Then the question would have been, Were the lands in question the lands of Hillhead held from the Earl of Loudoun, or were they the lands of Hillhead held from the other superior. But when all he can do is to suggest that there may have been other lands which were held from another superior, and to fortify that suggestion by a more or less critical examination of the parcels of land which were supposed to make up the lands of Hillhead, he does not seem to me to do enough.

The thing can be tested in another way. I do not say this solves the case, but I ask myself, supposing that disposition had been in the old form instead of the abbreviated form allowed by the Act of 1874, and supposing the holding therein specified to have been an *a me* holding, to whom would the disponee have gone? I see no trace that he could have gone to anybody except the Earl of Loudoun, and he certainly could have got a perfectly good charter from him. It is not really suggested that there is anyone else he could have got a charter from. I think that is really the position at this present moment, and therefore I think, entirely concurring as I do with the Lord Ordinary in his reasons, that I find myself able to get at the same result by a somewhat shorter road.

LORD KINNEAR—I agree both in the Lord Ordinary's judgment and also in the additional grounds for reaching the same result which your Lordship has explained.

LORD PEARSON—I also agree.

LORD M'LAREN was absent.

The Court adhered.

Counsel for Pursuer (Respondent)—M'Clure, K.C.—Constable, K.C.—Maitland. Agents—Blair & Cadell, W.S.

Counsel for Defender (Reclaimer)—Hunter, K.C.—Munro. Agents—Macpherson & Mackay, S.S.C.

Thursday, March 18.

SECOND DIVISION.

[Lord Johnston, Ordinary.

MACDONALD (CHALMERS' TRUSTEE) *v.* MILNE (DICK'S TRUSTEE).

Lease—Lease of Farm—Clause Providing that Lease shall become Null on Tenant's Bankruptcy—Sequestration of Tenant—Right to Crop Sown by Tenant.

The lease of a farm for nineteen years from Martinmas 1906 provided as follows:—"And further, it is hereby provided and agreed that in case the tenant shall during the currency of this lease become bankrupt . . . this tack shall, in the option of the proprietors, become absolutely void and null, and that without any declarator or other proceeding at law whatever, and it shall not be in the tenant's power, without the proprietor's consent, to continue any longer in possession of or carry on and manage the said farm and others for his own or his creditors' behoof, and the proprietors shall be entitled to re-enter and resume possession of the said farm, or to re-let the same in like manner as if this lease had come to its natural termination." The tenant was sequestrated on 28th April 1908, and the landlord, founding on the above clause, obtained decree of removal on 24th April 1908.

Held, in an action of suspension and interdict by the landlord against the tenant's trustee, that the tenant's common law right to the crop sown by him was excluded by the terms of the lease, and that he was not entitled to any part of the corn and grass crop of 1908, though it had been sown before his bankruptcy.

William Kid Macdonald, sole acting trustee under the trust-disposition and settlement of the late John Inglis Chalmers of Aldbar, Forfarshire, raised an action of suspension and interdict against John Milne, trustee on the sequestrated estate of Stewart Dick, farmer, Broomknowe, near Brechin.

The following narrative is taken from the opinion (*infra*) of the Lord Ordinary (JOHNSTON)—"In 1906 the trustees of the late John Inglis Chalmers, of Aldbar, let to Stewart Dick the farm of Broomknowe for nineteen years, from Martinmas 1906, at a rent of £235, payable at Lammas 1907 and Candlemas 1908, for crop and year 1907, and so forth thereafter, except that the last term's rent was payable at the Martinmas of removal.

"The parts of the lease which are material are—The farm was to be cultivated upon the most approved rules of good husbandry on a seven-year shift; the whole straw and