ledge—his perfect acquaintance, as deponed to by himself, with the fact of the deposit of the small excess of these earnings in the bank in her own name, and of her operation on it—his acquiescence in her purchase of a small property in her own name out of it—his dealing with her on the footing of her having the full right in the fund—and in particular, the fact of his repeated borrowing from his wife, and repayment to her from time to time, seem to me to justify the inference of an agreement on his part that these earnings should not be claimed by him, but should form an alimentary fund, which the wife alone should have. If so, and if the fund now in dispute consists, as it is in my opinion proved to do, of savings out of the earnings, there is an end of the question; for savings by a wife out of a proper alimentary fund are her own property, not claimable by the husband who created the fund as one to be peculiarly the wife's, and forming, in fact, part of her own proper estate. A husband who has agreed to a moderate aliment cannot, I think, seize upon any savings out of that alimentary fund which may be in the hands of the wife simply because they have not been all expended. He has, in agreeing to make it alimentary, parted with all prospective interest in it. Holding the facts to establish such an agreement here, I hold the small excess of the fund to have been at her disposal, and so to have competently passed to the defender by her act of transfer of the fund.

Lord COWAN—I am of the same opinion. The ground of action is not that this was a donation which the husband had a right to revoke. The pursuer says twice over in his evidence that he was aware of the existence of the fund, and he borrows from it and repays the loans, thus recognising it as his wife's property.

Lord BENHOLME—This is a very delicate case. I should be sorry to disturb the general rule, and I can support the Sheriff's judgment only on the ground that it is here proved that there was a special agreement that the wife's earnings should be her own. A husband may become his wife's debtor. The English case cited was a very strong one to that effect. It seems to me that this case stands very much on the same footing. The husband allows his wife for thirty years to keep her earnings and deal with them as her own property, and he borrows from her to some extent and several times, and he was always careful to repay. I think, therefore, that there was here an implied contract of thirty years' standing that the wife should have the uncontrolled enjoyment of this fund.

Lord NEAVES—I concur. I think this is an important case, for so far as I know this is the first time that this view has been taken. I can't say I am satisfied with the Sheriff's interlocutor, far less with his note. He says that "as the pursuer failed in his legal obligation of aliment towards his wife, he thereby deprived himself of his right to enforce his *jus mariti*." I cannot adopt that view, but I think there was here an agreement between the parties, a *consensus in idem placitum* that the wife's earnings were to be left at her disposal as an alimentary fund, and that that was a reasonable arrangement in the circumstances. If that is once made out, there is no difficulty, for we are all agreed that the savings of a wife out of an alimentary fund belong to herself. I think, therefore, our judgment should proceed expressly on the footing that there was an agreement; and I am not sure that it was a tacit agreement.

The following interlocutor was pronounced:—

"*Edinburgh, 28th March* 1867.—The Lords having heard counsel on the record, proof, and whole cause, advocate the cause: Find, in point of fact, that the advocator was married to the deceased Jean Tawse or Davidson in or about the year 1835: Find that for some years after the marriage the spouses cohabited and had two children: Find that thereafter the advocator left his wife and children, and went to reside elsewhere, making no provision for contributing to their support and maintenance: Find that the separation continued down to the death of the said Jean Tawse or Davidson, and that during that period the advocator did not make any payment for the support and maintenance of his wife, but that she was maintained from her own earnings: Find that out of the said earnings the sum in dispute was deposited in the bank by the said Jean Tawse or Davidson in her own name, with the knowledge and consent of her husband, the pursuer: Find that it was understood and agreed between the pursuer and his said spouse, that the earnings of the wife should be an alimentary fund out of which she should be supported and maintained during the separation, and that the said earnings were so dealt with during the marriage: Find that the provision so made for the wife's maintenance was reasonable and moderate: Therefore, find in point of law that the said deceased Jean Tawse or Davidson had power to dispose of the said fund, and that the same has been effectually transferred to the respondent, assoilzie the defender from the conclusions of the action, and find the pursuer liable in the expenses incurred, both in the inferior court, and this Court, and remit to the auditor to tax the same and to report." "GEORGE PATTON, *I.P.D.*"

Agent for Advocator—John Thomson, S.S.C.

Agents for Respondent—Macgregor & Barclay, S.S.C.

ABERDEIN *v.* STRATTON'S TRUSTEES, ETC.

Sale — Auction — Articles of Roup — Relevancy.

Averments which held not relevant to support an action of reduction and declarator, concluding that the pursuer was entitled to a conveyance of certain heritable subjects sold by auction, on payment of the upset price or of the highest offer.

Certain house property in Montrose, belonging to Stratton's Trustees, was exposed for sale by public roup on 28th October 1864, at the upset price of £460. The pursuer's agent attended the sale, and offered the upset price. A competition ensued between the pursuer's agent and John Fairweather, one of the defenders. Fairweather offered up to £650; the pursuer's agent offered £655, and was declared the purchaser. The pursuer now averred that his agent, after making that offer, discovered that John Fairweather was not a *bona fide* offerer, but was acting in the interest of the exposers of the property. After the sale a minute of offer was written out, bearing that the pursuer's offer of £655 being the last offer, had been accepted. This minute, however, was not signed either by the pursuer or his agent, the minute bearing that the agent declined to subscribe. The pursuer afterwards formally protested his right to the property at the upset price. In November following the trustees conveyed the property to John Fairweather. The pursuer now sought reduction of this conveyance, and declarator that he had right to the property at the upset

price of £460, or at all events at the price of £655, the highest offer at the sale. The summons also contained a conclusion for damages. The defenders, Stratton's Trustees and John Fairweather, pleaded in defence that the pursuer had no title to sue, and that the action is irrelevant. He had failed, they said, to sign his offer and minute of sale when required to do so, in terms of the articles of roup, and the trustees were entitled to convey to the next highest offerer, as they had done, in the *bona fide* discharge of their duty as trustees. The pursuer, on the other hand, pleaded that none of the offers at the sale were valid except his first offer of £460; that as he had never been asked to sign that offer, the fact that he had not signed it could not be pleaded against him; and contended further that he was justified in not signing his offer of £655, because he meant to insist on his right to the property at £460.

The case came up before the Court on an issue of damages,

D. F. MONCREIFF and ASHER for the pursuer in support of the action.

GIFFORD and W. M. THOMSON for Stratton's Trustees.

SOLICITOR-GENERAL and WEBSTER for John Fairweather.

At advising,

LORD JUSTICE-CLERK — The case before your Lordships which is now before the Court, with a record completed upon the merits with preliminary pleas reserved, is raised by the pursuer, Mr Aberdein, for the purpose of enforcing an alleged obligation incurred by the defenders, Messrs David Fairweather and David Stratton, as trustees of the deceased David Stratton, to convey to him heritable property which belonged to the deceased. The action embraces several conclusions intended to affirm alternative views of the pursuer's rights as to the terms on which the property is to be conveyed; others to remove by reduction certain obstacles in the way of the conveyance demanded; and others to carry into operative effect the rights asserted. There is also a separate and alternative conclusion for damages.

The facts, according to the statement of the pursuer, are substantially these:—The defenders, the two trustees of the deceased proprietor of the subjects, resolved to expose the subjects for sale by public roup at an upset price, under written conditions of roup binding them to convey the subjects to the offerer of the upset price, or to the highest offerer, if there should be a bidding above that amount. His case is, that he bade the upset price, which was £460; and further, that he was induced to bid a sum considerably in advance of that sum, and was declared the purchaser at a price of £655. He says that, before signing his offer for the sum of £655, he discovered that the biddings above the upset price in competition with him were given illegally and unfairly by a party in collusion with the exposers, or one of them, and that consequently he is entitled to have the subjects conveyed to him either at the price at which they were knocked down to him, or at the upset price.

In so far as concerns the demand in the summons for a conveyance of the subjects at the price of £655, it seems to be clear that the pursuer has no case. He refused, contrary to the articles of roup, to subscribe a written offer for the amount, or to oblige himself to find caution. Failing to comply with the conditions which the conditions of sale made imperative, he cannot be found entitled to the subjects at that price. But the pursuer strenuously maintained his right to have the subjects conveyed to him at the upset price, and in support of that demand we have heard a very able argument. The subjects, the pursuer says, were offered by the exposers at an upset price, which he, by his bode at the roup, agreed to give; that there was no legal bidding above his, and consequently that he has right to the subject in virtue of the agreement that the offerer of the upset price, in the absence of higher offerers, should have the subject.

The defenders take two grounds. They say that the pursuer cannot claim implement of an alleged agreement as to heritage without writing; and, *separatim*, that the averments are irrelevant to support the conclusions. The first objection is based upon a well-known rule of the law of Scotland, that writing is necessary as a solemnity both on the part of the seller and of the alleged purchaser to constitute a completed contract of sale. Without instructing a contract so completed, the argument is—there can be no good demand for a conveyance of the subject; and if there be no good demand for a conveyance, there can be no interest to insist in the declaratory or reductive conclusions, and no claim for damages, because there can be no breach of an obligation not completed in a way which the law declares, and in reference to which the absence of writing was the pursuer's fault.

There is no doubt that the pursuer did not subscribe his offer of the upset price, or any other offer. I think it is equally certain that there is no proper case of *rei interventus*. There was nothing done in implement of the alleged finished contract. The allegation of completed contract must rest upon the effect of the verbal offer, or, as it may be represented, the verbal acceptance of the pursuer's offer, to be made out, of course, by parole proof or by admission. A verbal offer, or a verbal acceptance of an offer, whether written or verbal, is admittedly incapable of binding parties in ordinary cases of sales of heritage. Is there any peculiarity in sales by auction? I cannot conceive that there should be any distinction. The law is laid down in peremptory and absolute terms, and there seems to be no reason why there should be any distinction between a verbal offer or verbal acceptance in an auction-room, and a verbal offer or verbal acceptance in the chambers of a legal practitioner. Accordingly the supposed peculiarity is rather rested upon the clause in the conditions of roup, by which it is provided (p. 8, App.) that offerers, *if required*, are to sign their offers. This is said to amount to a dispensation from the ordinary law, and to intimate that the exposers will be bound, if a verbal offer should be made and no writing asked. I do not so interpret this clause. The view which I take of it is this—the rule of law being that a verbal offer does not bind the offerer, the exposers stipulate that the verbal offerer at the roup should be, if required, obliged to bind himself legally—that is, in writing. In other words, the exposers may test the sincerity of any one who bids by making his offer binding. It is a stipulation for the benefit of the exposers, not against them—not declaratory that they should be bound in a way unknown to the common law, but putting themselves in the position to fix down a verbal offerer by making his bode effectual. That this is the true meaning, is clear from the provision of the articles of the conditions of roup, which says—(App., p. 11, F.) This seems to confirm the general rule, and certainly it seems to me to be a

novelty to view verbal offers as binding at sales of heritable subjects without writing. If we turn to the Juridical Styles, or Bell on Deeds, or Mr Ross's edition of Bell's Dictionary, we find the practice stated. A test was suggested in the course of the argument which seems to me conclusive. Suppose action brought by the exposers against a party who gave at the roup a verbal bidding of the upset price, could action be sustained? Another competing offerer had been preferred, but turned out a man of straw. Could the exposers, on proof of a verbal offer, have enforced implement of a contract of sale? If not, then both parties were not bound; and if so, there could be no completed contract, because both must be bound or none. What case would the exposers have had against the pursuer had it been necessary for them to have sued him upon any bode given at the roup? What as to intermediate offers? It seems to me that there would be no action.

The Lord Ordinary seems to think that there is an exception to the ordinary rule in this case, because the non-subscription of the pursuer may be thought to be attributable to the fault of the trustees. I fail to see this. No signature was tendered; had the signature been tendered and declined, the case might have been different. An attempt was made to make out written proof of the pursuer's offer from the statement in the minutes that offers were made. It seems to be a sufficient answer to this to say, that the name of the pursuer is not alluded to at all in the minutes.

Separatim, I think the allegations irrelevant to form a legal ground for the conclusions. I shall not say more in reference to this part of the case, which will probably be more fully dealt with by some of your Lordships than this. I find no such statement of collusive proceedings on the part of the trustees as appear to me to be sufficient to make the illegal biddings acts of the trustees. The statements where the exposers are mentioned as entering into an illegal collusion, are not precise and definite, but qualified by an alternative, and that simply involving one of the trustees. I think that the act of one out of a body of trustees in employing a party to bid for him cannot have the legal effect of depriving the trust-estate of the benefit of an advantageous sale, or lead to the conclusion that another and much lower offerer shall have the estate at what is manifestly an undervalue.

As to damages, the ground pointed at in the issue proposed was a supposed prevention on the part of the exposers of the pursuer from making a written offer. I have already expressed my view upon that point. Further, if my view be right, that the absence of a written offer or acceptance is fatal to the pursuer's claim, he is himself to blame for failing to tender it. I am on the whole for sustaining the defences.

Lord COWAN—I am of opinion that the action ought to be dismissed on the grounds I shall now shortly explain. A question as to the pursuer's title to insist in the action to any effect is stated in the record, and was largely dwelt on by the defender. The sale by auction at which the pursuer appeared as an offerer was of an heritable subject, and the minutes of roup do not bear that he offered the upset price of £460, but only that after sundry offers, John Fairweather made offer of the sum of £650, and which offer he subscribed; and that Adam Burness made offer of the sum of £655; that being the last offer which Burness declared to have been for behoof of the pursuer, the judge of the roup preferred him to the purchase, but the minutes add that, on being called on to enact himself purchaser in terms of the articles of roup and to subscribe his offer, the said Adam Burness declined so to do. On the face of the minutes of roup, therefore, there is no written adoption of the purchase, nor even written offer for the subjects on the part of the pursuer by Burness or by the pursuer himself. This is contended to be fatal to any action at the pursuer's instance based on an alleged purchase of the subjects, no sale of heritage being in law effectual otherwise than by writing.

There is certainly much force in this objection, and as regards one branch of the pursuer's demand, it scarcely admits of any satisfactory answer. Even in relation to the whole conclusions of the summons, the objection, when viewed apart from the special circumstances averred in the record, might well be held to be fatal to the action. For the original offer of the upset price is not set forth to have been made by Burness as acting for the pursuer; and the whole proceedings at the sale to have been conducted without regard to the forms usual in public sales of heritable subjects. Still, reasons are alleged in the record for the want of writing which, if otherwise relevant, go far to meet the objection to the pursuer's title on this ground, while the minutes of roup subscribed by the judge thereof, and the relative notarial protest taken by Burness on the part of the pursuer, and served on the parties on the day of sale, might justly, in the special circumstances, have been contended to be sufficient written evidence of the alleged sale. I do not, however, consider it necessary to prosecute this inquiry further, having arrived at the conclusion that there is no relevancy in the pursuer's statements to support the conclusions of the summons, even if his title were not open to objection.

As regards the claim of the pursuer stated alternatively to have the subjects held as purchased by him as the last and highest offerer at the price of £655, this is quite untenable, on the clear ground of refusal to comply with the articles of roup when required. It is to this branch of the pursuer's case that the objection to his title is peculiarly applicable; for it necessarily assumes that the proceedings at the sale were unobjectionable, and that as the last and highest offerer the pursuer became purchaser. But if so, then, as he did not subscribe the minutes, the consequence was that the purchase devolved on the next immediate offerer, Fairweather; and thus the whole case resolves into the relevancy of the statements to support the pursuer's claim to have the subjects declared to have been sold to him at the upset price of £460.

Now, as to this, the remedy sought by the pursuer by the conclusions of the action is for partial reduction of the minutes of sale "in so far as they embrace, contain, or give effect to any offers or offer" by John Fairweather, and in so far as they contain and give effect "to any offer by the pursuer above £460"—that is, the remedy sought is by partial reduction of the proceedings at the sale, and not total reduction of them, the object being to lay the basis for the declaratory conclusion that follows—viz., that the pursuer did become the purchaser of the subjects at the upset price of £460.

The legal principles applicable to such a case are stated in the case of Gray *v.* Stewart and others (1753), D. 9560; and in Elchies *v.* Sale, No. 10. And they were fully considered and clearly enunciated in the opinion of this Division of the Court delivered by Lord Wood, in the

case of Faulds *v.* Corbet referred to by the Lord Ordinary; and it is for examination whether this record presents a case for judgment which can be held to fall within the operation of these principles. I apprehend it does not.

The sixth article of the condescendence contains the averment on which the pursuer's case rests. It states that the pursuer's agent, Burness, after making the offer of £655, at which price the subjects were entered in the minutes as sold to him being the highest offerer, discovered, and it is alleged to be the fact, "that the said John Fairweather (the competing offerer with the pursuer) attended the sale and made the offers he did, not as a fair and *bona fide* offerer, or for himself and on his own behalf, but as acting on the instructions and on behalf of and in the interests of the said trustees, the exposers, or of David Fairweather, one of the exposers, or otherwise in collusion with the said exposers, or at least with the said David Fairweather." And the allegation which follows of fraudulent device and concert is in like manner stated as having been arranged between John Fairweather "and the said exposers, or at least between him and the said David Fairweather." This is the averment on which the pursuer relies to support his action.

But in the first place, that John Fairweather appeared for David Fairweather with a view to the latter as an individual becoming purchaser of the subjects cannot be relevant to set aside a sale, in which the trust-estate and beneficiaries were alone interested. David Fairweather was not the exposer of the subjects, nor was it for any interest of his as beneficiary that the sale was carried through. The averment so far has no relevancy. But will it be less irrelevant that, as one of the trustees, he was one of the exposers? This is the primary question to be solved.

Now, it may well be contended that it was wrong for him to appear as an offerer at the sale, whether personally or by an agent, seeing that in his trust capacity he may be presumed to have some knowledge affecting the value of the subjects of which the public were ignorant. And it may be admitted that the beneficiaries, were it for their interest to do so, could set aside the purchase by one thus situated. But when those interested in the trust are satisfied with the sale, and the price obtained, on what legal ground is it that the competing offerer can complain and insist for partial reduction of the proceedings, to the effect of his being preferred to the subjects because of his having offered the upset price? It is not the trustees who appear as offerers as acting for behoof of the trust-estate and of the beneficiaries. They were exposers of the subjects in that capacity; but David Fairweather, in appearing by John Fairweather, is not alleged to have acted for behoof of the trust-estate and for the interests of the beneficiaries. There is therefore no room for the application of the principle which prevailed in the case of Faulds. In the view of the Court there was, in that case, but one *bona fide* offer and but one *bona fide* offerer, the only competitor being the party for whose behoof the subjects were exposed. Hence effect was given to the offer of the upset price, and all that followed was reduced as having been fraudulently and illegally gone about and induced. The partial reduction to which the Court gave effect in such circumstances has no application to a case where the only allegation is that one of a body of trustees, by whom the subjects were exposed, did, not as representing the trust, but as an individual, appear and offer at the sale, and became the purchaser. It would be unjust to the parties interested beneficially in the trust-estate to hold on that ground that the competitor who offered the upset price was entitled to have the subjects declared to be his, although the biddings at the sale had brought up that price 50 per cent. An attempt to set aside the whole proceedings at the sale to the effect of having the subjects exposed *de novo* would be intelligible. Even then the trust beneficiaries and the trustees might well contend that an act to which they were not parties ought not to prejudice them, the sale being altogether to their satisfaction. But it is not necessary to consider whether the pursuer could state a relevant case for reduction of the sale *in toto*. The action in which he alone insists is for partial reduction, to the effect of having the subjects declared to be his at the upset price. To support this demand it appears to me quite insufficient and irrelevant to allege that the competing offerer was one of a body of trustees by whom the subjects were exposed to sale.

The averment, however, is made alternatively, and John Fairweather is alleged to have acted on the instructions, and on behalf "of the said trustees, the exposers, or of David Fairweather, one of the exposers; or otherwise in collusion with the said exposers, or at least with the said David Fairweather;" and the alternative thus set forth is maintained to be a sufficient statement that the competing offers at the sale which prevented the pursuer getting the subject at the upset price were made for behoof of the trust-estate and of the beneficiaries, and that the remedy which the Court afforded in the case of Faulds is no less applicable to the present case thus viewed.

There can be no question that a person holding a situation of trust is legally debarred from being himself the purchaser of subjects vested in him as trustee. Those interested in the trust will be entitled to have the sale set aside that the true value of the subjects may be realised for their behoof at a sale of the subjects to *bona fide* purchasers. And therefore those trustees who exposed the subjects in this case could not become joint-purchasers as individuals without the risk of their purchase being set aside by the parties interested in the trust. It is a different question whether their act in authorising a third party to bid at the auction for them entitles a competing offerer to the remedy given in the case of Faulds, on the footing of the offerers in this view being in the same position as the trust beneficiary himself. Assuming that the purchase was for their joint behoof as individuals, the case must fail for the same reasons as have been stated against the relevancy of the statement that only one of their number was the offerer. To give even the semblance of relevancy to the case, the identity of the trust-estate and the trust-beneficiaries with the trustees in this act of theirs which is to have such effect, must be made matter of clear and unequivocal averment. Now, (1) not only is the fact of the exposers having anything to do with the appearance of John Fairweather and his doings at the sale, always put alternatively "the said exposers, or at least the said David Fairweather one of the exposers," which in itself is objectionable in such a case as this; but (2) there is not throughout the record any averment to the effect that the trustees did instruct John Fairweather to act as he did at the sale, as trustees, and as acting for the trust beneficiaries, whose interests were so deeply involved in the proceedings at the sale being regular and lawful. And while the statement in the

6th article alleges that the fraudulent device concerted with John Fairweather had for its object "to enhance the price of the said subjects," it is immediately added, "or to obtain the same for the said David Fairweather," and again, "or otherwise to prevent the subjects from being fairly sold to *bona fide* third parties." Nothing more vague and uncertain and unsatisfactory in the way of averment can well be imagined in a case which has for its foundation fraudulent device and concert and unjustifiable dereliction of duty on the part of these trustees. Without therefore entering on the question how far, on the assumption of trustees having acted as alleged, the fact could support a summons with conclusions such as the present, or with conclusions for total reduction of the sale, I think it clear that the statements in this record are not such as to permit of the issues being allowed which the pursuer has proposed in relation to the reductive and declaratory conclusions of the summons.

Then, as regards the conclusions for damages, I do not see any relevant ground on which the proposed issue can be granted. In so far as regards the defenders, the exposers, it is clear that no ground for damages is within this record, if I am right in the view of it I have taken. And as to the defenders, the two Fairweathers, individual liability by them, or either of them, to the pursuer must rest upon some wrong or injury done or suffered through their act. But I do not find any such specific wrong or injury stated against the Fairweathers, or either of them, to support the pursuer's claim. I can imagine a claim of loss and damage, supposing a relevant action for total reduction of the sale being successfully maintained by the pursuer, being competent at his instance against these defenders. And were the sale totally set aside, the trust-beneficiaries might have a claim for loss caused by their wrongous act. But for the claim made in this summons I see no good relevant ground.

On the whole, I think this action should be dismissed.

The other Judges concurred.

The action was accordingly dismissed.

Agent for Pursuer—James Webster, S.S.C.

Agent for Stratton's Trustees—W. Burness, S.S.C.

Agent for John Fairweather—J. Henry, S.S.C.

Friday, March 29.

FIRST DIVISION.

MILLER *v.* CARRICK.

*Entail—Lease—*10 *Geo. III., c.* 51*—Irritancy—Purgation.* An heir of entail granted a lease of a part of the entailed estate for 99 years, under the powers conferred by section 4 of the Montgomery Act. No dwelling-houses were erected on the ground within 10 years of the commencement of the lease, as required by the Act. In an action raised by a succeeding heir of entail after the lapse of 10 years, *held* (diss. Lord Curriehill) that the statutory irritancy had been incurred, and that it could not be purged.

This is an action of reduction, declarator, and removing, at the instance of Mr George John Miller, heir of entail in possession of the lands of Frankfield and Gartcraig. The object of it is to reduce a lease granted by the pursuer's father in 1851 to the defender, who is Master of Works in Glasgow, whereby an acre of ground, part of the entailed estate, was let for ninety-nine years for the erection thereon of a powder magazine; or otherwise to have it declared that the defender has failed within ten years from the date of the lease to build dwelling-houses on the ground, and has thereby incurred the irritancy stipulated by the lease, and by the Montgomery Act, 10 Geo. III., cap. 51. There are also conclusions for removing and for payment of rent for the occupancy of the ground and buildings at the rate of £300 per annum from Whitsunday 1864, and thereafter until the defender's removal. The powder magazine erected on the ground cost upwards of £1000.

The lease purports to be granted by virtue of the statute 10 George III., cap. 51. This statute declares—"And whereas the building of villages and houses upon entailed estates may in many cases be beneficial to the public, 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 purposes 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; provided always, that not more than five acres shall be granted to any one person, either in his own name, or to any 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 the least, not under the value of £10 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."

The lease in question is a lease for ninety-nine years, with a break in favour of the landlord at the end of fifty years. The stipulated rent is £50 per annum; and it is declared to be granted "for the purpose of a gunpowder magazine being erected by the said second party, or his assignees or sub-tenants, on the piece of ground hereby let; and that the said piece of ground shall not, except the express consent in writing of the said first party or his foresaids be first had and obtained thereto, be used for any other purpose whatever than for the erection of the building or buildings necessary for the construction of a magazine for the storing or keeping of gunpowder, and the erection of dwelling-houses for the parties employed in managing and superintending the same."

With special reference to the statute, which is cited in the lease as the authority for its being granted, a clause is introduced, declaring, in terms of the statute, that the lease shall be null and void if dwelling-houses be not erected in terms of the statutory provision. But, by a back letter, signed of even date with the lease, Mr Miller declared that "so long as there shall be upon the said piece of ground a gunpowder magazine of the value of £1000 sterling, it is not my intention to enforce said clause as to the erection of said dwelling-houses in addition thereto; and so far as I legally can do so, I hereby dispense with the necessity of your building such dwelling-houses." No dwelling-houses have been erected on the ground.