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.

The pursuer, the succeeding heir of entail, now contends that this lease is null, and not binding on him as successor in the entailed estates.

The Lord Ordinary (Kinloch) found that under the statute the lease was null and void, and could not afford to the defender any valid tenancy in the subjects in question. He observed in his note—

"1. It appears to the Lord Ordinary that the lease is not granted for an object contemplated, or permitted by the statute. The object of the statute is expressly stated to be 'the building of villages and houses upon entailed estates,' and a 'dwelling-house' of a certain defined value is provided for each half-acre of land. It may not be possible to fix, by any general description, the precise extent of the power here conferred. The Lord Ordinary would hesitate to hold that it does not embrace workshops or manufactories. But he thinks that the erection of a gunpowder magazine, with all its danger and disagreeableness, is a thing clearly beyond the purview of the statute, even in its most extended construction.

"2. Another ground of objection is, that whilst purporting to be a lease under the statute, the lease is in reality in the face of the statute. The back-letter must be held part of the lease; and in this combination, whilst the statute makes it an imperative condition that certain dwelling-houses should be erected, the lease is found dispensing with the condition; in other words, dispenses with a condition essential to its own validity.

"3. It is at any rate admitted that dwelling-houses were not erected in terms of the statute; and, by the express terms of the statute, the lease is, in that state of things, 'hereby declared void.' The statutory irritancy has taken effect; nor can this statutory irritancy be purged, as was contended, by the dwelling-houses being still erected. The purgation of an irritancy contemplated by the law is a proceeding taken 'at the bar;' that is, by prestation in Court, instantly afforded. What the defender offers is not purgation of an irritancy in any correct sense. It is the erection of the houses, if the Court by its judgment found him bound to erect them, which is a totally different thing.

"4. The main contention of the defender was that, supposing the lease struck at by the statute, it might be restricted by the Court to a period of twenty-five years—the period for which, under the entail, the heir in possession was entitled to let leases, whether for building purposes or others; and that this was the only result to follow on sustaining the pursuer's objection. The Lord Ordinary cannot concur in this view. If the lease were an act of *bona fide* administration, only objectionable in respect of a slight excess of years, it might possibly be so restricted; but, in the Lord Ordinary's view, it is a deliberate contravention of the entail. It is an alienation, under the name of a lease. It is the exercise of an extraordinary power, pretended to have been exercised under a statute, but not truly so exercised; on the contrary, statutorily invalid. In the Lord Ordinary's view, the lease is not merely objectionable *quoad excessa;* it is intrinsically and *funditus* null and void. It cannot therefore stand to any effect. The principles applicable on this point are substantially those expounded by the Court in the latter branch of the case of Mordaunt *v.* Innes, 9th March 1819, Fac. Coll., p. 703, the judgment in which was affirmed in the House of Lords, 5th July 1822, 1 Shaw's Appeals, 169. W. P."

The defender reclaimed.

WATSON and SHAND, for him, argued—This lease was valid when granted. The irritancy which has been incurred is purgeable, and the defender has offered to purge it. At all events the lease is good for twenty-five years, the granter having power under the deed of entail to grant leases of that duration. Or otherwise, it is good for thirty-one years under sections 1, 2, and 3 of the Montgomery Act. They cited Ivory's Ersk., p. 377, note; More's Notes, p. 81; Stewart *v.* Watson, 20th July 1864, 2 Macp. 1414; 1 Bell's Com. 70; 1 Hunter on Landlord and Tenant, 103; 1 Bell on Leases, 129, note; Agnew, 23d June 1813, F.C.; Earl of Hopetoun *v.* Hunter, 10th July 1863, 1 Macp., 1093; Duff's Feudal Conv., sec. 52; Stat. 1597, c. 250.

GIFFORD and DUNCAN, for the pursuer, replied—This transaction was a wilful violation of the Montgomery Act, and the lease is therefore null. At all events, the irritancy stipulated has been incurred, and it is not purgeable. Nor is the lease good for any shorter period. It is entered into under section 4 of the Montgomery Act, and under no other power.

At advising,

The LORD PRESIDENT—This is an action raised for the purpose of reducing, or declaring void a lease entered into by the late Mr Miller of Frankfield, and the defender Mr Carrick. It is a lease professing to be made under the Montgomery Act, and in all its parts, both in its endurance and in the purposes for which it was granted, it professes to conform to that Act of Parliament. There can be no doubt that Mr Miller as heir of entail in possession was in a position to grant the lease, and that Mr Carrick was in a position to accept it. On the face of the lease I don't find anything in it inconsistent with the Act of Parliament. It lets an acre of land for ninety-nine years from Martinmas 1850, and the term of endurance is subject to a condition that the landlord shall have power to put an end to the lease at the expiry of fifty years. On the other hand the tenant undertakes to pay a sum of £50 of rent, and it is declared that the lease is granted for the purpose of erecting on the ground a powder magazine and certain dwelling-houses, and that the ground shall not be used for any other purpose. The tenant farther obliges himself to erect a powder magazine of the value of £1000 at least, and to maintain it, and to surround the ground with a wall; and it is farther conditioned, in addition to the above obligations, and with special reference to the terms of the statute, "that this lease shall be void, and the same is hereby declared void, if one dwelling-house at least, not under the value of £10, shall not be built within ten years from the date of the lease for each half-acre of ground comprehended in the lease." Now, if the lease had stipulated only for the erection of a gunpowder magazine on the ground, and if the clause of the lease which provides that the ground is not to be used for any other purpose had not also referred to dwelling-houses, and if the lease had not contained the clause as to the erection of dwelling-houses within ten years, as required by the Act of Parliament, I would say there would have been a fatal flaw in the lease itself making it reducible. But it seems to me that it was not subject to any such objection at the time of its being granted, and if the tenant had erected dwelling-houses within ten years, I think it would not be now challengeable, for I see no incompetency in erecting buildings on the ground other than dwelling-houses or in erecting a powder magazine. The next thing for consideration is the document called a back-letter, which is not quite accurately so described. It is

a writing by the landlord dispensing with the performance of a certain condition in the lease, and it is very important to attend to its terms and effect. It bears the same date as the lease, and is obviously a part of the arrangement of the parties at the time. But although it is part of the arrangement, I cannot see that it made the lease illegal at the time. I think that would be a very rash conclusion; for what would have been the effect of the tenant complying with the condition of the lease? I cannot doubt that in that case the lease would have been good for the whole ninety-nine years. This letter would not have prevented that. It is further to be observed, that the letter does not nullify the condition. Mr Miller only says that he does not mean to enforce it. But this was a matter personal to him, and not binding on his successor. What would have been the effect of his dying within the ten years? Would it not have been competent for the tenant to purify the condition within the ten years? I think it would. I therefore attach very little importance to this letter. It shows certainly an intention to violate the Act of Parliament from the beginning, and that the violation was therefore not a piece of negligence, but was intentional and wilful, but it shows nothing more. Whether that is of importance in this case is another question. Now, the term of entry in the lease being Martinmas 1850, the ten years expired at Martinmas 1860, and when that time arrived there were no houses erected. Mr George Miller was still alive, but he died in 1864, and then matters were in the same position. The present heir then brings this action, and the only question is, whether the failure of the tenant to build houses nullifies the lease as in a question betwixt him and the tenant? That question involves considerations of difficulty and importance. If I could look upon this as an ordinary legal irritancy, I should say that it would be still open to purgation; but I have great difficulty in doing so. I don't think this is a legal irritancy involving a penal consequence, or even a conventional irritancy involving a penal consequence, which might lead to the same result. The granter was an heir of entail, the prohibitory and other fetters of the entail being perfect and complete. He was thus disqualified from granting a lease of this kind, and that disqualification was the consequence not merely of a deed of entail, but of an Act of Parliament. He was disqualified by the Act of 1685 from granting it. That disqualification was removed under certain conditions by the Act 10 Geo. III., c. 51, which was thus purely an enabling Act. In fact, its operation was very much the same as that of clauses in railway Acts which enable heirs of entail to treat with railway companies for the sale of portions of the entailed estate, and it proceeds on the very same consideration, namely, the public interest. For the Act 10 Geo. III., c. 51, in all its branches sets forth as the inducing cause of its enactment a consideration of the public good. For encouraging the building of villages and dwelling-houses, it proceeds to dispense to a certain extent with the operation of the statute 1685, but then it does that under very important and stringently expressed conditions. It appears to me to be a rule of construction applicable to all such enabling statutes, that if the person seeking to avail himself of the power conferred neglects any of the conditions under which it is given him, his exercise of it must be void. This general principle is particularly applicable to the case of the Act of Parliament with which we have now to do. Section 4 contains the power, and then follow sections 5, 6, and 7, which are in the nature of provisos on section 4, and contain an expression of the conditions under which the power may be lawfully exercised. Now, there is a very remarkable distinction betwixt the first part of section 5 and the second. As regards the building of dwelling-houses within ten years, it is declared that the lease shall be void if that is not done, and it is thereby declared void. Again, with regard to the maintenance and keeping in repair of the houses, it is enacted only that the lease shall be void whenever there are not houses "kept in such repair as aforesaid;" but there is not the provision that in that event the lease is declared void. And I think there is reason for the distinction. A house may be in a state of partial disrepair, so as to make it a matter of doubt whether it is of the value of £10, and therefore the statute does not imperatively say that the moment the value drops below that sum the lease shall be declared void; but it does so in the other case. Now, looking on that clause as a condition of the exercise of the heir's power, and considering the stringent terms in which it is expressed, I conclude that we must construe the statute strictly, and so construing it, I am of opinion that the moment the ten years expire without houses having been erected, the lease becomes void, and nothing can save it.

It is urged, however, that this lease may be sustained for a shorter period, and (1) it is said it may be a good lease for thirty-one years under sections 1, 2, and 3 of the Montgomery Act. It seems to me impossible to sustain this lease as one granted under these sections, because it appears to me to be clear that these thirty-one years' leases are to be granted for agricultural purposes only, and that the building of a powder magazine is not of that nature. But it is said (2) that the lease may be good for twenty-five years as a lease under the deed of entail itself, which provides that the heirs of tailzie shall not let the lands "for any longer space than twenty-five years." Now, of course, we must consider this question as if the Montgomery Act had never been passed, and determine whether this is a lease within the meaning of this clause in the deed of entail, and I don't think it is. It is quite plain that that clause applies to leases granted in the ordinary administration of the estate. But this lease is granted for a long period, and that for the very purpose of enabling the lessee to do an extraordinary thing—that is to say, to erect a large building on a very small piece of ground. Therefore, the conclusion I have come to is substantially the same as that of the Lord Ordinary, though I do not reach it on quite the same grounds—that this lease is now void and null under the statute, under which alone it could be granted by the heir of entail or accepted by the tenant.

Lord CURRIEHILL—I cannot say I concur in all the observations of your Lordship upon the Montgomery Act, especially as to its being an enabling statute; but I do not think it necessary to express any opinion upon them. I think the case does not depend on that principle, and upon the point on which I think the case does depend I have come to a different conclusion from your Lordship.

The conclusions of the summons are numerous. The first three are alternative. The first is that the lease and the document called the back-letter were null and void from the beginning, and should be rescinded. The second is a declaratory conclusion that it should now be declared void from the beginning. The third is that it should be found

and declared "that the defender has failed to build a dwelling-house not under the value of £10 within the period of ten years from the date of the foresaid tack or lease for each half-acre of ground comprehended therein, and has thereby incurred the irritancy stipulated in the said tack or lease, and in the Act of Parliament 10 Geo. III., c. 51, or one or other of them, and that the defender has thereby forfeited all right and title to the said tack, and to the possession or occupancy of the ground thereby let, and of the building or gunpowder magazine erected thereon as after-mentioned; and that the said tack or lease is extinct, and has become void and null, and of no force or effect in time coming in the same manner as if it had never been granted." These are followed by conclusions for immediate removal of the defender from the subjects, and for what may be called violent profits. The title of the pursuer is a deed of entail of the estate, which has not been laid before us, but I assume that it contains all the fettering clauses, and that it does not impose a forfeiture on the heirs of the body of contravening heirs. Now at common law, and according to the fair construction of the Act 1685, an heir of entail is entitled to grant leases of ordinary endurance, but there is an express condition in this entail reserving the right of the heir in possession to grant leases for twenty-five years. The effect of that clause is this—that it reserves leases granted for a period of twenty-five years under the common law power of the granter. They are excepted from the prohibitory clauses, and such leases are binding on the substitute heirs of entail as representing him. Now, on 6th January 1851, the lease in question was granted. Had that lease been for twenty-five years only, I could have had no doubt of its validity, and of its binding effect on all the heirs of entail. We were told that because it was granted for the erection of a powder magazine it was illegal. I know of no authority for that, and it is not sought to be declared illegal on that ground. The lease bears to be granted by Mr Miller, as proprietor of the estate. As such, his right was limited to twenty-five years, but he wished to extend it to ninety-nine years, and he was entitled to do so under the Montgomery Act, provided its conditions were complied with. The lease is precisely in terms of the statute. There is no violation of the statute in it. It is not necessary that the houses should be of a greater value than £10. The erection of hovels would have been sufficient. Nor is it necessary that there should be a house on each half-acre. What is required is one house for each half-acre let. But this lease required that the tenant should, within a year, expend £1000 in building a magazine, and erect an expensive stone wall, and, in addition to all that, build the dwelling-houses. Within the year the £1000 was laid out, and the wall was erected; and therefore there was an enormous expenditure in conformity with the conditions of the lease. This being so, I am clear that the first two conclusions are groundless. The question arises under the third, whether or not, at the end of ten years, this lease, which had been perfectly effectual for ten years, became *ipso facto* null and void on the morning of 12th November 1860? Now, in considering that question, I must advert to the document called a back-letter. The lease itself was in the terms I have mentioned, but of the same date the transaction is explained by this document. Now, had Mr Miller not power to dispense with the building of these dwelling-houses? That depends on this question, whether, by narrating the statute in the lease, he abandoned his common law rights? In my opinion, he did not. He was entitled to grant a lease for twenty-five years. I don't think he abandoned that right in favour of the substitute heirs of entail. I think that when the landlord granted this writing, renouncing, "so far as I can legally do so," the right to insist on the building of these dwelling-houses, he was stating that at all events he had power to do so for twenty-five years, and he thereby exercised that power. That being so, I don't think Mr Miller himself could, in 1861, have instituted such an action as the present, or that any subsequent heir of entail could do so. If it was a contravention of the entail, Mr Miller's own right might have been resolved. Suppose such an action had been brought by the pursuer in 1861, could he not have said—I don't insist on a lease for ninety-nine years; that is a *beneficium* conferred on me by the law, but I am at liberty to dispense with it and do so. I don't think that in November 1860 this lease had become null and void. I think Mr Miller and the tenant might have gone on for twenty-five years, and that the lease is binding on him and his heirs also for that period. If that be so, it is conclusive of the present action, which is for immediate decree of removal. That conclusion is in my opinion groundless. The other questions your Lordship has been dealing with will arise in 1875, and I will not anticipate them. I will only say that I feel them to be attended with great difficulty. I think the opinion that this is an enabling statute requires great consideration, but at present I think it is not well founded. The forfeiture here asked is a highly penal one. If the houses were to be built now, the pursuer, as heir of entail, would be placed in as good a position as the Act of Parliament intended him to occupy; and I think this is just such a case as those in which our law allows irritancies to be purged. The principle of the law is that effect is not to be given to penalties beyond the actual loss sustained, and we have an equitable jurisdiction to give effect to that principle. The principle pervades our law in regard to bonds for borrowed money, tacks, &c. It is exemplified more particularly by the irritancies created under deeds of entail. These are inflicted both for acts of omission and of commission, such as selling the estate, borrowing money, or allowing adjudication to be led against it. But these may be purged even after action of declarator has been brought. In the same way, if anything has been omitted, it may be done after the action is brought. If, for instance, an heir has not used the arms prescribed by the entail, it is quite enough that he should begin to do so after action is brought. A distinction is taken between conventional and legal irritancies. By legal irritancies, I presume, are meant statutory ones, for I know of no other, except, perhaps, the irritancy of leases introduced by Act of Sederunt. Now conventional irritancies are penal and not penal; and whenever penal they are purgeable even after action is brought. There is one class in feu-rights, non-payment of feu-duty, that may be purged. And so, generally speaking, irritancies in deeds of entail may be purged. It is said, however, that here there is an irritancy imposed by statute, but are these not subject to the same law? I know of no authority for saying that they are not. The only authority I know of points the other way. In feu-rights there is a statutory irritancy created by the Act 1597. That is purgeable. But farther, all the irritancies declared by the Act 1685 are statutory. Well, if an heir of

entail omits to insert the fettering clauses of the entail in the deeds renewing the investiture, he incurs an irritancy under that statute. But in the case of Abernethie *v.* Gordon, 20th June 1837, 15 S. 1167, it was decided, after great consideration, that that irritancy could be purged; and accordingly the heir did so by reducing the titles he had made up and making up others. Now that was a very strong case, for there was no saying what deeds the heir might have granted when possessing under a bad title. I have great difficulty therefore in assuming that, because here the irritancy is statutory, the common privilege of purgation is not open. But these are matters of speculation. My opinion goes upon this, that at present this lease is valid, and is so for twenty-five years from its date. I think that the fact that the lease is for ninety-nine years makes it illegal only for the excess. This is a principle clearly laid down by Lord Glenlee in the case of Mordaunt *v.* Innes, referred to by the Lord Ordinary. It is also stated by Professor Bell, and in the cases as to the Queensberry Leases it was recognised. The same principle exists in entail law as to provisions to wives and children. If granted for too great an amount they are good except as to the excess.

Lord DEAS—The piece of ground in question is part of an estate admittedly held under the fetters of a strict entail. The deed of entail, however, contains a dispensing clause authorising leases to be granted for twenty-five years. The statute 10 Geo. III., c. 51, authorises leases to be granted for building purposes for ninety-nine years, provided they are granted on certain conditions. This lease bears to be granted in terms of and under the powers and for the purposes, *inter alia*, of that statute. One of these conditions is, that within ten years a house should be erected of a certain value for every half-acre of the ground let. This lease was granted by an heir in possession, who survived for the whole period of ten years, and afterwards died, and was succeeded by the present heir, who brings this challenge. Two defences are offered to the action. The first is, that the right insisted on is of the nature of an irritancy, and is purgeable; the second, that supposing that not to be so, the lease is good at least for twenty-five years. These two pleas are quite separate and distinct, and indeed the one is stated alternatively to the other. If this be an irritancy which is purgeable, I don't think it is a sufficient objection to say that it can't be literally done at the bar. If it is purgeable, I think a reasonable time should be allowed for the purpose. I concur with your Lordships in opinion that this lease was not null *ab initio*. I think it was a good lease when it was granted, and I don't think the back-letter had the effect of preventing it being good if it was so otherwise. That letter was an undertaking by the heir then in possession that so far as he was individually concerned he would not take advantage of the statutory irritancy. I think it was binding on him before the lapse of ten years, but if a question had arisen with him after that, he might have run some risk by not enforcing the irritancy. The next heir might have insisted on his doing so. But however that might be, the back-letter did not render the lease null. It did not profess to bind the succeeding heirs of entail. The very fact of rent being payable and paid, and the stipulations on both sides being all enforced, makes it very clear that the lease was perfectly good. The condition was of an irritant or resolutive nature. It was not suspensive. I don't question the law that statutory or legal irritancies are generally purgeable. I don't recollect any instance of such an irritancy to which that remark does not apply. Conventional irritancies, however, are certainly not always purgeable; and, on the other hand, they may be purgeable although conventional. All conventional irritancies are penal; but if one is what is called highly penal, it may be interfered with in the equitable discretion of the Court, so as to give an opportunity to purge it. But I look upon this question as very special and peculiar, in so far as it arises not merely under a statute which contains a certain resolutive condition, but under a deed of entail which preceded that statute, and is modified by it. Under the deed of entail this lease could not have been granted. The statute enables the heir in possession to do a thing which he could not do before. It not only gives him a power he did not previously possess, but it also relieves him of a highly penal consequence of his doing it. But it does so under certain express conditions. The leading one is that the lessee shall be bound within ten years to erect a dwelling-house for every half-acre of ground let. Admittedly that condition has not been complied with in this case. What the effect of that would have been in a question with the granter of the lease I don't inquire. I don't think it necessary to hold that the very moment the ten years expired the lease became void. That may be, but I don't think it necessary to hold that. When we consider whether an irritancy is reasonable or not, we must also consider whether it is reasonable to enforce it in the circumstances. This is an action at the instance of a succeeding heir, who does not represent the last heir, and who is bound to enforce the conditions of the entail. The point is, whether in a question with him the irritancy is reasonable and the lease void? The statute declares it void. The pursuer was no party to the lease, and he is entitled to take his stand on the statute. I was very much struck with the difference of phraseology in the two parts of the section of the statute which has been pointed out by your Lordship. In the second part the words "is hereby declared void" are carefully omitted. This is very important, especially when we can see good reason for the difference. The question is, whether the statute did not in effect mean that in the one case the irritancy should be purgeable, and in the other that it should not? I think that was what was meant.

The second question is, whether the lease is not good for twenty-five years? The thirty-one years theory was not much pressed, and could not well be, for that part of the statute applies only to agricultural subjects. I am humbly of opinion that if the resolutive clause comes into effect, the lease cannot be maintained for twenty-five years any more than for ninety-nine. There are cases where leases granted by an heir of entail for a longer period than he had power to grant them, have been equitably sustained for the lesser period; but in none of these cases was it necessary, in order to do so, to make a new bargain betwixt the parties. That would be the case here if we sustained the lease for twenty-five years. In an agricultural lease the conditions are the same, whatever the endurance, but if this lease is to subsist for twenty-five years it must so subsist for the purposes of the statute. The granter is no doubt designed in the lease as proprietor of the subjects, but he grants it as "acting in terms and by virtue of the Act of Parliament." I see no ground for concluding that he would have granted it for other

purposes and under different powers. Again, what would be the effect of allowing this lease to subsist for twenty-five years? Would it not be to set at defiance the condition of the statute as to building houses? It would just be extending the ten years to twenty-five. Then a condition of the lease was the building of a powder magazine at an expense of £1000, and where is the ground for holding that the tenant would have entered into it and built the magazine if it was to last for only twenty-five years? It may be his interest, now that it is built, to maintain the lease for that period, but suppose he wanted to be free of the bargain, and the question had arisen in the first year, before the magazine was built. In short it is making a totally new bargain on both sides; so that I can't say I have any difficulty on this part of the case. Indeed I have more difficulty on the other, but I agree with the opinion of your Lordship in the chair in regard to it. There are conclusions for violent profits also, but the Lord Ordinary has decided nothing as to that, and I don't give any opinion on the subject at present.

Lord ARDMILLAN—I have felt this case to be attended with difficulty, but I have formed the opinion that the judgment of the Lord Ordinary is right. The action is to set aside a lease by an heir of entail for building a powder magazine. If the statute 10 Geo. III., c. 51, had not been passed, or had not been resorted to, this lease for 99 years would have been null and void under the entail. Nor is it protected by the other clauses of this Act, since it is not a lease for agricultural purposes. The defender requires to found on the statute, and does found on the statute, to support a lease otherwise void. He must show that the lease, which cannot stand without the statute, is effectual, because of the statute. The Act of Parliament is his defence against an action to set aside a lease which, unless well defended on the statute, is void.

Now, the first thing that occurs to one is—though it is not the foundation of my opinion—that the lease is not granted for a purpose contemplated by the Montgomery Act. That Act was an enabling Act, and the object of it is stated to be, to enable heirs of entail to let leases of land for the purpose of building, the preamble bearing that "the building of villages and houses upon entailed estates may be beneficial to the public." Nothing can be less calculated to promote the building of villages and dwelling-houses than the erection of a powder magazine on a piece of ground not exceeding one acre. I do not require to take the extreme position of holding a lease for a manufactory, or even, in some situations, for a powder magazine, to be void in respect of its purpose. It may not be so. I do not say that it is. But it is not a lease calculated or intended to promote the ends set forth as the ends of this enabling statute; and in the question whether it is protected by the statute, I cannot say that the defender's pleas are entitled to a favourable consideration. But can the lease be brought at all within the protection of the statute? I think not. After the enabling words the Act proceeds to set forth the conditions affecting and qualifying the statutory power to grant a lease.—[Reads.]

The lease without the condition is void, and if the condition is inserted but not fulfilled, the lease is void at the end of ten years, that time being allowed to fulfil the condition. The parties to the lease are George Miller and John Carrick. Is this condition really within this lease, as between these parties, and during George Miller's life? In words, it is in the lease. But of the same date as the lease (6th January 1851) a back-letter is granted dispensing with the condition, so far as the granter can. This back-letter, of even date with the lease (6th January 1851), must be read as part of the lease, and it appears to me to dispense for the life of the granter, with the condition essential by force of statute to the validity of the lease. While that back-letter was effectual—and it was so till the death of George Miller—it seems to me impossible to hold that the condition which he dispensed with subsisted. But George Miller survived till 26th April 1864, and by that time more than ten years had elapsed from the date of the lease. So that during the whole ten years the condition, which was essential to the validity of the lease under the statute, was not only unfulfilled but was excluded by mutual agreement. But, as it is necessary to the defender's case that he bring the lease within the statute, the fact that the lease was for these ten years destitute of that which the statute directed as a *sine qua non*, is a very serious objection to his plea.

But it is said that the defender is now entitled to purge this irritancy, as it is called, after the lapse of the ten years by building dwelling-houses close to the gunpowder magazine. That these should be actually dwelling-houses cannot be expected. But the question is—Can the condition in the lease (if it is in the lease) be now fulfilled, the statutory period for fulfilment having elapsed? I think it cannot be now fulfilled, to the effect of saving a lease void under the entail, and void now under the express words of the statute, and of the lease itself. To my mind there are not *termini habiles* here for what is called purging an irritancy—that is, for extending the period allowed by the statute, and the lease for fulfilling the condition. I agree with the Lord President that the true legal aspect of this case is not that of a proper penal irritancy, legal or conventional; but what is the effect of an enabling statute urged in protection of a lease otherwise void. If the defender has not obeyed the statute, he cannot plead the protection of the statute. But I am also of opinion, though the subject is very delicate and I speak with much diffidence, that the period within which the condition may be fulfilled, must be viewed as prior to the legal commencement of the statutory lease for 99 years, that prior period being a sort of tentative possession to give time for fulfilling a condition necessary to make it a statutory lease. In this view the condition is precedent to the statutory lease, precedent to all possession on a tenure for 99 years, though not precedent to the tentative possession. If this condition precedent is not fulfilled, there is no statutory lease. The tentative possession ceased in 1860, when the ten years expired. The lease, as statutory, was then void, not in respect of an irritancy, not in respect of forfeiture as a penalty, but in respect of the failure to perform a condition necessary to its statutory character and precedent to its statutory existence. There is no proper irritancy, and it is too late to fulfil the condition.

The defence founded on the statute is not sufficient, for the defender has not brought the lease within the Act.

The following interlocutor was pronounced:—

"*Edinburgh, 29th March* 1867.—The Lords having advised the reclaiming note for John Carrick, No. 71 of process, and heard counsel for the parties, recal the interlocutor of the Lord Ordi-

nary reclaimed against, of date 22d June 1866: Find that the defender, as tenant in the lease libelled, having failed to fulfil the condition of building dwelling-houses on the ground (as provided by the 5th section of the statute 10 Geo. III., c. 51), subject to which condition only the parties could lawfully contract in terms of said lease, the said lease is ineffectual and not binding on the pursuer as heir of entail succeeding to the granter: Find the pursuer entitled to expenses since the date of the Lord Ordinary's interlocutor reclaimed against: Allow an account thereof to be given in, and remit the same when lodged to the auditor to tax and report: Appoint the report to be made to the Lord Ordinary; and remit to the Lord Ordinary to proceed with the cause as shall be just and consistent with the above finding; with power to decern for the expenses now found due. Five words delete.

"JOHN INGLIS, *I.P.D.*"

Agents for Pursuer—Hay & Pringle, W.S.
Agents for Defender—Campbell & Smith, S.S.C.

Saturday, March 30.

SECOND DIVISION.

WALKER *v.* MARTIN.

Reparation—Culpa—Unfenced Machinery. In an action of damages by a young girl for personal injury caused by unfenced machinery, £30 awarded.

This is an advocation from the Sheriff Court of Lanarkshire of an action in which Martin sued the advocator for damages in respect of injuries sustained by her while in his service in his bleachfield at Castlebank, Partick. The pursuer was injured at one of the windows in the wall of one of the rooms at the work, in which there is a series of wheels called dash or cog wheels, into which the cloth for bleaching is put, with a shaft and gearing to drive the wheels between them and the wall. While standing there the dash wheel caught her dress, and drew her into the machinery, by which she was seriously injured, having had the flesh on her thighs and back lacerated. The defence was that at the time the accident happened the pursuer was not engaged at her usual employment, but had left it prior to the usual hour of ceasing to work, and was idling away her time; that her duty in the defender's works never required her to be in that part of the works at which she was injured; that she had no right to be there; and that the accident was caused through her own fault.

The Sheriff-Substitute (Murray) assoilzied the defender.

The Sheriff (Alison) altered, and modified the damage to £30.

The defender advocated.

To-day the Court adhered to the judgment of the Sheriff.

Counsel for Advocator—Mr Shand and Mr Brand. Agents—Ronald & Ritchie, S.S.C.

Counsel for Respondent—Mr Pringle. Agent—J. D. Bruce, S.S.C.

SMEATON *v.* ST ANDREWS POLICE COMMISSIONERS.

Police—Public Commissioners—Drainage—25 & 26 Vict., c. 101*—Agreement.* Held (1) that Police Commissioners, in carrying through a system of drainage operations for the public benefit, are entitled to follow what course they may consider most expedient, but *suo periculo*, and *interim* interdict granted to a party complaining that his lands were to be used for the purpose recalled. (2) Circumstances in which proof of an alleged agreement with the Commissioners allowed, and to that extent a plea that it was *ultra vires* of the Commissioners to enter into such an agreement after a line of operations had been resolved upon and sanctioned by the Sheriff, repelled.

The pursuer is proprietor of the lands of Abbey Park, in the burgh of St Andrews, and conducts a large boarding-school for boys there. In 1863 the defenders, acting under the Act 25 and 26 Vict., cap. 101, proceeded to construct a system of drainage in St Andrews, and gave the requisite notices. The main sewer was to go through the pursuer's lands. The pursuer took several objections to the procedure of the Commissioners, but the Sheriff of Fifeshire, whose decision in such cases is final, in October 1865, confirmed the order of the defenders. The pursuer then intimated a claim for compensation. After several communings, with the view of avoiding litigation, the defenders agreed, on 12th February 1866, by a majority of one, to come to an amicable arrangement with the pursuer on the basis of a memorandum of agreement proposed by him. Thereafter the Commissioners, on 3d March 1866, resolved to proceed with the line of drainage sanctioned by the Sheriff. Smeaton then brought an action against the Commissioners to have them ordained to carry out the plan contained in the agreement. The Commissioners defended, contending that the memorandum founded on by the pursuer was not a final and binding agreement, and that it would be illegal and *ultra vires* for them to deviate from the line sanctioned by the Sheriff. In December 1866 the Lord Ordinary pronounced a judgment assoilzieing the Commissioners, on the ground of the finality of the Sheriff's judgment. Smeaton reclaimed. In February 1867, before the reclaiming note for Smeaton was heard, the Commissioners passed a resolution to proceed with the execution of the line sanctioned by the Sheriff. Smeaton thereupon brought a suspension and interdict against the Commissioners to have them prevented from carrying out their resolution. The Lord Ordinary on the bills granted interim interdict, and reported the case to the Court. The Court recalled the interdict, holding that it was for the Commissioners to proceed or not with the works as they chose, *suo periculo*. The case was then heard on the defenders' plea that it was *ultra vires* of the Commissioners to make any agreement such as that alleged by the pursuer.

YOUNG and BALFOUR, for the pursuer.

COOK and CAMPBELL SMITH, in answer.

At advising,

Lord COWAN—When this cause was formerly advised, we were all of opinion that the Lord Ordinary had gone wrong in dismissing the action on the ground he did, namely, upon the finality of the judgment of the Sheriff in relation to the objections stated by the pursuer to the contemplated operations of the commissioners. The interlocutor was consequently recalled, and the cause ought then to have returned to the Lord Ordinary to proceed further on the merits, but it was pressed on the point that there were pleas stated by the defenders which might, if sustained, lead to the same result, and the cause was again heard on the question whether there were grounds for thus