we are not required by the conclusions of this declarator to advert to that circumstance at all, it may be satisfactory to advert to it only for the purpose of observing that there is no case here brought before the House which proves that the property is incapable of yielding value, and therefore ought not to be rated; but, on the contrary, the facts show that the property is capable of yielding and actually does yield in a certain sense, value to the University that occupies that property.

I therefore, on these grounds, entirely concur in the motion of my noble and learned friend the Lord Chancellor, that the defender ought to be assoilzied from the conclusions of this summons, with expenses, extending also to the expenses of the interlocutor of the Lord Ordinary. The interlocutor of the Second Division will be reversed, and there will be an absolvitor from the conclusions of the summons. That I apprehend will be the proper form of order.

Lord Colonsay—My Lords, I concur in the judgment which has been suggested, and upon the grounds stated. I also concur in the reservation which has been made by my noble and learned friend who last spoke. Possibly a question may be raised as to the rateable value of this property. The summons of declarator that is before us is a summons which concluded for absolute non-liability. Now, to that I cannot give an assent. Therefore it is necessary that from that there should be an absolvitor. But other questions may be raised—other questions have been raised of a more limited kind. I do not think they are properly before us here, nor have we all the materials for disposing of them; and, therefore, while I would be for assoilzing the defender from the conclusions of this action, I would not be for precluding the pursuers in the action from raising any question as to the measure of liability which attaches to them when that question comes fairly to be raised.

The cases that were decided anterior to the *Mersey Dock* case and other recent cases, and the practice that prevailed anterior to those decisions, did, I think, give great countenance to the judgment pronounced in the Court below; and had it not been for these recent cases, I do not know that I should not have concurred in that judgment, taking those former cases to be correct exponents of the law. But the principle laid down in the *Mersey Dock* case, and some other cases almost concomitant with it, are, I think, sufficient to show that the buildings of the University of Edinburgh are not buildings of the kind which entitle the owners and occupants of them to exemption from liability for poor-rate.

Interlocutors appealed from reversed, and defender assoilzied from conclusion of summons, with expenses, before the Lord Ordinary and the Court of Session.

Agents for Appellant—G. &. H. Cairns, S.S.C., and Murdoch, Rodger & Gloag, Westminster.

Agents for Respondents—John Cook, W.S., and Loch & Maclaurin, Westminster.

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*Thursday, June* 15.

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CARRICK *v.* MILLER.

(*Ante*, iii, 350.)

*Entail—Montgomery Act—Lease—Irritancy—Statutory nullity—Powder Magazine—Nuisance—Equitable Jurisdiction. Held* that a tenant's failure to comply with the conditions in section 3d of the Act 10 Geo. III., c. 51, inferred a statutory nullity of the lease. *Question*, whether the Montgomery Act authorises the erection of a powder magazine?

The respondent, heir of entail in possession of Frankfield and Gartnaig, brought this action of reduction and declarator against the appellant, asking a reduction of—(1) a lease between the respondent's father and the appellant, dated January 1851; and (2) a back letter granted by the respondent's father to the appellant of same date. By the lease it was declared that the granter, in virtue of 10 Geo. III., c. 51 (the Montgomery Act), let to the appellant on a ninety-nine years' lease a portion of ground for the purpose of erecting thereon a powder magazine, and, in terms of the Act, it was conditioned that the lease should be void if one dwelling-house at least, not under the value of £10, should not be built within ten years from the date of the lease, for each half-acre of ground comprehended in the lease. By the back letter the granter declared that so long as there should be on the ground a gunpowder magazine of the value of £1000, it was not his intention to enforce the clause as to the erection of dwelling-houses, and so far as he could legally do so he dispensed with the necessity of building the dwelling houses.

The deed of entail prohibited the heirs who should succeed to the lands from granting tacks of more than twenty-five years' duration. The gunpowder magazine was erected in 1851. No dwelling-houses were erected. The granter of the lease and back letter died in 1864, on which event the respondent succeeded to the entailed estate.

The First Division of the Court pronounced an interlocutor on 29th March 1867, finding that the appellant, as tenant in the lease, 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 the lease, the lease was ineffectual, and not binding on the respondent as heir of entail succeeding to the granter.

Carrick then presented this appeal, stating these reasons:—"1. Because the lease in question has not become ineffectual in consequence of the appellant having failed to build dwelling-houses on the ground, as provided by the 5th section of the Statute 10 Geo. III., c. 51, the appellant having been ready to build such houses as soon as the respondent's demand was intimated, and being still ready to do so; and (2) because the lease in question is valid and effectual for a period of twenty-five years from its date, in virtue of the powers which Mr Miller possessed as proprietor of the estate, and which he exercised in granting the lease."

The respondent stated these reasons in support of the judgment:—"1. Because the Act 10 Geo. III., c. 51, in virtue and in terms of which the lease by the respondent's father bears to have been executed, did not confer on him power to grant, and does not authorise the granting, of a lease for such a purpose as that for which the lease in question was granted. 2. Because, even assuming that the Act 10 Geo. III., c. 51, authorises the leasing of portions of entailed estates for the erection thereon of such buildings as gunpowder magazines, the lease granted by the respondent's father for this purpose was not granted in terms of that

Act, but in violation thereof, and was *ab initio* void. 3. Because, even if the lease were not void *ab initio*, it became void at or immediately after 7th January 1861, in respect of the appellant's failure to erect within ten years from its date one dwelling-house, not under the value of £10 sterling, for each of the two half acres of the ground leased."

Dean of Faculty (Moncreiff), and Cotton, Q.C., for appellant.

Sir Roundell Palmer, Q.C., and J. M. Duncan, for respondent.

At advising—

Lord Cranworth—My Lords, after the full argument which my noble and learned friend and myself have heard in this case, neither of us entertain the least doubt that the decision in the Court below was perfectly right.

The question arises upon a lease under what is called the Montgomery Act, which was passed about a century ago, in the year 1770, and which is set out at page 17 of the respondent's case. It enacted, among other things, this, "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 purpose of building: Be it therefore enacted that it shall 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. "That not more than five acres shall be granted to any one person, either in his own name or to any other person or persons in trust for him; and that every such lease shall contain a condition that the lease shall be void, and the same is hereby declared void, if one dwelling-house at least, not under the value of ten pounds sterling, shall not be built within the space of ten years from the date of the lease, for each one-half acre of ground comprehended in the lease," &c.

Now, my Lords, the gentleman who granted the lease in question, Mr Miller, was tenant in tail of an estate under a deed of entail which contained these provisos, "Fourthly, that it shall not be lawful to the said George Miller, my nephew" (the father of the present respondent) "or any of the heirs of tailzie and heirs whatsoever who shall succeed to the said lands and estate, to sett tacks or rentals thereof for any longer space than twenty-five years, and without diminution of the rental, or for the lifetime of the setter, in case of any diminution of the rental; declaring hereby that all such tacks as shall be granted contrary to this condition shall be void and null."

Therefore, when Mr Miller came into possession of the estate as tenant in tail, he might have granted a lease for twenty-five years only. And we may assume also, for the purpose of argument, that he might have granted a lease for the purpose of erecting on the land a powder magazine. But of course it is obvious that a building of that expense would not be erected by any person who had only twenty-five years wherein to enjoy it. And therefore Mr Miller had recourse, not to his powers as tenant in tail, by virtue of the authority given to him as the fee simple proprietor restricted by the entail, but he availed himself of the powers of the Montgomery Act to grant a lease for ninety-nine years.

The lease is set out at page sixty of the respondent's case, and it is this, "It is contracted, agreed, and ended betwixt George Miller, Esquire of Frankfield, in the county of Lanark, heritable proprietor of the piece of ground after let, on the one part, and John Carrick, architect in Glasgow, &c., on the other part, in manner following, that is to say, the said George Miller, acting in terms and by virtue of an Act of Parliament, passed in the tenth year of the reign of His Majesty King George the Third, entituled" so and so (setting out the title of the Montgomery Act) "has set, and does hereby, in consideration of the payment by the tenant of the tack-duty after stipulated, and with and under the reservations, provisions, declarations, conditions, and prestations, after-mentioned" set and let in tack a certain piece of ground therein described, for the space of ninety-nine years from and after the term of Martinmas in the year 1850, "providing and declaring, notwithstanding the endurance of this tack is fixed for the space of ninety-nine years, that the said George Miller and his successors in the said piece of ground shall have full power and liberty, at the expiry of fifty years from and after the term of Martinmas 1850, if they shall think proper, to break and put an end to this lease."

Now, what happened was this. The lease was granted for the purpose of erecting a powder magazine. The powder magazine was erected, but the conditions of the Montgomery Act were not performed. For it was a condition of the Montgomery Act (as I have already stated) that not less than one house of a certain small value for every half acre should be erected within the term of ten years; and that, if such houses were not erected, the lease should be absolutely void. Now, that this lease was granted under the Montgomery Act is plain, because it purports to be so granted; and it is obvious that, except for length of term allowed by the Montgomery Act, no person would have taken a lease to erect an expensive building like a powder magazine upon the land. Then, the condition not having been performed, there can be no doubt the lease under the Montgomery Act becomes absolutely void.

A question is now raised, whether it was not void in another sense, that is to say, that although the Montgomery Act authorised the granting of building leases for 99 years, it never contemplated such a thing as a lease for erecting a powder magazine; that the very object of the Act was to induce the erection of other buildings in the neighbourhood; and that the building of a powder magazine, so far from contributing to that object, would put a stop to it, for nobody in his senses would take a house in the neighbourhood of a powder magazine if he could get one anywhere else. I confess I think there is considerable force in that objection, looking at the context in the Act of Parliament, which shows that it was intended to guard against the possibility of the new building interfering with the enjoyment of the mansion by the owner, who was supposed to be the tenant in tail. The Lord Ordinary, taking that view, declared the lease upon that ground void *ab initio*. The Inner-House did not take the same view. They did not think that the Montgomery Act prohibited such a building as a powder magazine—or rather I should say, they they did not take the view that it did not authorise such a building. It does not appear to me very material which view we take of that question; but I wish it to be understood that, in the observations which I am about to make to your Lordships, I shall proceed upon the validity of what has been done by the Inner-House on other grounds, leaving it, as it may well be left, undecided whether or not,

if there were nothing else objectionable, the proper building required by the Montgomery Act had been erected, the erection of a powder magazine would or would not have taken the lease out of the operation of the Act. That the lease became void in consequence of the requisite buildings not being erected in the course of ten years is plain.

It was, however, argued very strongly on the part of the appellant that there is here merely what is called in the Scotch law a legal irritancy, that is, a legal nullity; and that that legal irritancy or legal nullity may be purged; and that now the Court, in the exercise of its equitable jurisdiction, can grant, and ought to grant, to the present appellant leave to put himself right, as it were, by now building that which he ought to have built within ten years of his lease. My Lords, I am clearly of opinion that, even if it were competent, it would be a most unwise exercise of equitable jurisdiction to take such a step in the present case; because, whether or not a lease of a piece of ground for the purpose of building a powder magazine is, or is not absolutely void, as the Lord Ordinary thought, under the provisions of the Montgomery Act, it appears to me that to give any facility or help to a person who has put up such a nuisance as that in a neighbourhood, would be a most unwise exercise of discretion. And for this purpose I must refer to a decision which took place in the English Courts, but which proceeded on principles that must be german to both countries. Lord Eldon having brought before him a case relating to the erection of a powder magazine, he did not quite decide that it was a nuisance, but he directed inquiries to be made. He said it was the business of the Attorney-General to put an end to a nuisance; and that he would grant an injunction to prevent the nuisance being continued, if the result of certain inquiries, which he directed, should be to establish what was then contended.

Now, what is done by this lease is this. It is not merely that there is to be a powder magazine erected, and nothing but a powder magazine, but it is expressly declared in part of the terms of the lease that it is granted for that purpose exclusively. The tenant is specially debarred and restricted from carrying on upon the ground any manufacture or public work, and from erecting any steam-engine or machinery for manufactures; and from carrying on any trade or business of any description whatever, the occupation of the ground being strictly limited to the purposes of a powder magazine.

Now, I will not go into the question whether it would be possible for the Court to have dispensed with the condition of the erection of the houses within the time required by the lease; but I say clearly, to have done that in such a case as this would have been a most unwise exercise of equitable jurisdiction. But I must further observe, that I must not be considered as assenting at once to the proposition that this is a case in which the Court could so interpose, because this provision in the lease is not, strictly speaking, one declaring the thing void,—it is one of the terms and conditions upon which alone the lease is granted; and when that condition has not been fulfilled it seems to me that it would be a most strange thing to say that the Court may, by the exercise of its equitable jurisdiction, set it right and make it as if the condition had been performed.

The only other point that has been relied upon on behalf of the appellant is this; that inasmuch as Mr Miller, the granter of this lease, had a power as tenant in tail, by virtue of this fee simple ownership, of granting a lease, limited only by the terms of the entail to the duration of 25 years, this lease may be considered as a lease granted under those powers, and therefore a lease good to the extent of the power which he had of granting such a lease, namely, for the term of 25 years. Now, it would have been very difficult, even if there had been here no reference to the Montgomery Act, so to construe this case, because it was obviously out of the question to erect such a building as this under a 25 years' lease. It required a very great length of time to warrant such a large outlay; and, independently of the argument adduced by Sir Roundell Palmer—that even with regard to such a lease there would be the same conventional irritancy which was introduced by the Statute as a statutory irritancy in the case of the Montgomery lease—it appears to me quite chimerical to attempt to treat those 25 years as a part of the 99 years which were granted by the lease.

My Lords, on all these grounds it appears to me that the Court has come to a correct conclusion in this case, and that the only result must be that this appeal should be dismissed, and the interlocutors appealed against affirmed, with costs.

Lord Colonsay—My Lords, I am of the opinion which has been expressed by my noble and learned friend. Mr Miller held this estate under an entail which prohibited the granting of leases for more than 25 years. The lease in question is for 99 years. It is professedly granted on the terms and by virtue of the Act of 10 Geo. III. No such lease could have been granted by Mr Miller, except for the purposes and subject to the provisions and conditions of that Statute; and accordingly, the lease in question purposes to have been granted for those objects, and subject to those conditions.

One of the provisions of the Statute is that which has been referred to, "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." I do not stop to inquire as to the validity or the cogency of the argument that was submitted to us upon the theory that this Act is not an enabling or empowering Act. It appears to me that it is an empowering Act, because, as the law of entail stood under the authority of the Act 1685, Mr Miller had no power or ability to grant such a lease. Therefore this Statute, trenching upon the then condition of the law, was a statute which enabled Mr Miller to grant this lease, and in no other way was he enabled to grant it.

Now the lease itself contains a condition to the same effect with the Statute. The ten years' lease elapsed, the houses have not been built; and Mr Miller, the granter of the lease, having died, the new proprietor of the estate, the present heir of entail, says, that under the express terms of the Statute, and also under the express terms of the lease itself, it is now void, for the lease contains a clause declaring the lease to be void if the houses are not built within ten years. He further maintains that it was incompetent to grant a lease of this kind at all for the purpose of erecting a powder magazine, that not being within the scope of the Statute. The tenant, on the other hand, maintains that there was power to grant a lease for this endurance,

for the purpose of erecting a powder magazine along with the other buildings required by the other conditions of the Statute. He contends that, although he did not build the houses within ten years, he is now at liberty to build them—to do what he has hitherto failed to do; that is, on the principle of purging the irritancy. And he further contends that, even if that be not sound, he is at least entitled to sustain his possession until the lapse of twenty-five years from the date of the lease; because Mr Miller, under his powers as proprietor, irrespectively of the Statute, had authority to grant a lease which would endure for that length of time.

I do not desire to express any opinion on the question of whether it was competent to authorise the erecting of a powder magazine under a lease granted in conformity with the Statute of 10 Geo. III., under and for the purpose of that Statute. I would rather avoid expressing any opinion on that subject, because I think there is enough in this case to decide it without expressing any opinion upon that question. I am of opinion that the lease professes to have been granted as a lease under the Statute of 10 Geo. III. It meets all the purposes of that Statute, and it contains all the provisions which that Statute requires; and, from the beginning to the end, it professes to be a lease for ninety-nine years, granted under the authority of that Statute, under which alone a lease for ninety-nine years could be granted. I am further of opinion, that while there is in it an obligation to erect the buildings which the Statute requires, the back letter which was granted by Mr Miller, dispensing with that condition so far as he was concerned, is not one which can affect the subsequent heirs of entail. In fact, if it were allowed to do so, it would be an attempt to compel the subsequent heir of entail to concur in the contravention of his entail, which is quite out of the question. Then I think that the buildings not having been erected, and the period having expired, the lease is, both by the terms of the Statute and by the terms of the lease itself, now void. I do not say null from the beginning. I do not raise that question, for if it was competent to comprehend a powder magazine within it when it was granted—if at the commencement of the lease—there would have been no ground for setting it aside and saying it was null—it ran on until it was seen that the party had contravened it by not erecting buildings within the statutory and the prescribed period.

Then what are the reasons urged for not declaring the lease void? It is said the tenant has power to purge the irritancy. I do not understand it so. The words of the Statute are very peculiar. Not only do they declare that the non-fulfilment of this condition shall be a ground for setting aside the lease, but the Statute itself declares that the lease shall be void at the expiry of the ten years, if the houses have not been built. Then again, the lease says the same. It is therefore a conventional irritancy. It is a condition of the lease, it is a contract between the parties, that if the buildings are not erected within the ten years the lease shall be void. The expression extends to the whole lease, it makes no distinction between one subject and another. It says, if these things be not done within ten years the lease shall be void.

It is said the party ought to have time yet to do these things. That I think is quite out of the question. If a landlord stipulates that a certain course of operations shall be carried on upon the subjects that he lets, and shall be completed within ten years, otherwise the lease shall be null and void, and if at the end of the ten years the party has not even commenced the operations which he had undertaken to complete, it seems to me that it would be contrary to all equity, as well as law, to hold that he is now at liberty to begin to perform these things which he ought to have completed. It would be making a different contract between the parties.

Then as to the lease continuing for twenty-five years—I think it is clear, on the face of this lease, that it is not a lease granted in reference to the powers of the proprietor under the conditions of the entail; but that it is granted plainly and purportly as a lease authorised by the Statute of 10 Geo. III., and of no other character; and that, having come into the predicament in which that Statute declares, and the lease itself declares it shall be void, we have no other alternative than to declare that it is so. I therefore entirely concur in the judgment proposed by my noble and learned friend.

Interlocutors affirmed and appeal dismissed, with costs.

Agents for Appellant—Campbell & Smith, S.S.C., and Grahames & Wardlaw, Westminster.

Agents for Respondent—Hope & Mackay, W.S., and Connell & Hope, Westminster.

# COURT OF SESSION.

*Tuesday, June* 30.

## FIRST DIVISION.

### GRAHAM *v.* DUKE OF HAMILTON AND OTHERS.

*Property—Superior—Reserved minerals—Mineral tenant—Way-leave—Interdict.* A feuar, under whose ground the minerals were reserved to the superior, asked interdict against the superior and his mineral tenant using his land or the passages beneath for passage of minerals excavated in adjoining ground. Respondents ordained to pay a sum of way-leave, to be fixed by man of skill, pending discussion of the question of right in a declarator raised by the feuar.

Mr J. G. Barns Graham is proprietor of Cambuslang. The Duke of Hamilton is superior of that estate, and has right by reservation to the coal and limestone in a portion of the estate, the clause of reservation declaring it to be lawful to the superior "to sett down coal-pits, shanks, and sinks, and rise coal and limestone within the bounds of the said land, or any part thereof, and to make all engines and casements necessary for carrying on the said coal and limestone work, and free ish and entry thereto for making sale thereof, and away taking the same," on compensation for damage. The Duke of Hamilton is also proprietor of the coal in the adjoining lands of Morristoun and Clydesmill, adjoining Cambuslang. The complainer presented this note of suspension and interdict against the Duke of Hamilton, and against J. & C. R. Dunlop, of the Clyde Ironworks, asking to have the respondents interdicted from using any roads or passages, whether above or below ground, in or through the estate of Cambuslang, for the purpose of carrying coal or other minerals from the lands of Morristoun or Clydesmill, or from any other lands