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

than Cambuslang. The complainer alleged that he had recently become aware that the late Duke of Hamilton had, by lease in 1852, let to the Messrs Dunlop the coal in Morristoun, and in 30 acres of Cambuslang, and that, by minute of agreement in 1862, the lease had been made to comprehend the coal under Clydesmill; that the Messrs Dunlop were in the habit of carrying through the lands of Cambuslang coal raised from seams in lands not belonging to the complainer. This, the complainer contended, the respondents were not entitled to do, and he accordingly brought a declarator against them, and also presented this note of suspension and interdict.

The respondents, besides other defences, alleged that the complainer had known for some considerable time of the operations complained of, and was not entitled to this summary remedy. Interim interdict was granted by the Lord Ordinary before answer, but after answer his Lordship passed the note, but recalled the interim interdict, not being satisfied that when a superior, in feuing out land to different proprietors, has expressly reserved the minerals, he can be prevented from working them underground as one continuous field, and holding that he would not be warranted in continuing an interim interdict which might cause serious loss to the respondents from stoppage of their works during the trial of the question of right.

The complainer reclaimed, and asked the Court to continue the interim interdict. After some discussion, the complainer offered caution for any damage to be sustained by the respondents through the granting of interim interdict.

Young and Watson for complainer.

Clark, Thomson, and Keir for respondents.

At advising—

Lord President—This case is one of very considerable delicacy, much greater than usually attends the granting or refusing of interim interdict. I have had a strong impression throughout that it would not be altogether consistent with justice to adhere to this interlocutor of the Lord Ordinary as it stands, or to refuse this interdict without any condition at all.

There are several points to be considered on both sides. There is no doubt that it is very strongly alleged on the one side, and not contradicted on the other, that by imposing this interdict on the passage of coal through the complainer's mines, very considerable damage may be done, especially if that continues for any length of time through the question in the declarator being found to be difficult of solution, and the process depending for long. That there will be damage in the event of those works being stopped no one can doubt. On the other hand, the interest of the complainer is very peculiar, and is not to be secured by any ordinary caution for the consequences of the right of passage which the respondents allege through his waste. If they are allowed to exercise that right until they have worked out all the coal, all the complainer would have in the end would be a claim of damages for their having, without legal right, used this passage. Now, there may be no damage in any proper sense of the term. Indeed, it is pretty plain there will be none; and if the question of damages be submitted to a jury, the verdict would probably be *nil*. The value of the complainer's right, if he has it, is the means he has of compelling them to pay for the passage of the coal. The fear is that the right to demand payment for its passage through his mine may not be a legal right enforceable at law, and the only way is to refuse passage unless on payment, and that is what the complainer asks here. It rather appears that if this interdict is not immediately imposed the respondents will work out all the minerals which they require, and, when the main question comes to be determined, there will be no interest on either side. If this interdict were asked without caution, I should have had great difficulty in imposing it on any terms, or even attaching a condition to its refusal, for I should have seen that the imposition of it would inflict very considerable damage on the one side, and the non-imposition would not have caused much on the other side. If the complainer had not offered caution I should not have been disposed to listen to him. But his offer of caution changes the aspect of the question, and leads me to conclude that we cannot refuse interdict except on a condition. The condition I intend to suggest appears to me to be reasonable, and such as I think ought not to be objected to by the respondents. It is, that they should consent, not to admit any liability, but during the process of declarator to pay a certain way-leave, to be fixed by a man of skill; and in the event of their succeeding in the declarator, then they shall have right to repetition; and if they fail, and are found to have no right, then the payments shall remain and become absolute payments, and nothing more shall be demanded for the period when the case is being tried. Then, in the declarator the question will be tried, and after the conclusion of it the complainer, if successful, may make his own terms. If your Lordships agree with me, I propose to remit to a man of skill to fix what would be a reasonable way-leave, and to make that a condition of refusing the interdict.

Lord Curriehill concurred. He thought the superior would have great difficulty in showing that, when once he had excavated the whole minerals below the lands feued out, he had any right to enter these lands for any purpose whatever; but that question would be tried in the declarator, and in the meantime was kept open.

Lord Deas concurred on the whole with the Lord Ordinary.

Lord Ardmillan concurred with the majority. He thought the Lord Ordinary was right at the time when no caution had been offered by the complainer. The question now was, What was the best for the interests of all parties? and it rather seemed that the injury to result from stopping the works would be greater than from allowing them to go on. The caution which the complainer would have to offer, if his claim for interdict was sustained, would be very large. By the proposed arrangement the complainer would in the end get all he was entitled to.

Remit to Mr Landale, mining engineer, to fix way-leave.

Agents for Complainer—Graham & Johnston, W.S.

Agents for Duke of Hamilton—H. & A. Inglis, W.S.

Agents for Dunlop—G. & G. Dunlop, W.S.

Tuesday, June 30.

MURRAY'S TRUSTEES *v.* CAMPBELL AND OTHERS.

Trust—Residuary legatee—List of items of estate. A testator left a list of the items comprising a