The Lords accordingly found that the shares of residue fell to be reckoned *per capita*, and answered the second question in the affirmative.

Counsel for First, Third, and Fourth Parties—Mackintosh — Jameson. Agents — Boyd, Macdonald, & Co., S.S.C.

Counsel for Second Parties — Robertson — Guthrie. Agents—Graham, Johnston, & Fleming, W.S.

Friday, January 27.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

STEWART *v.* BURN MURDOCH.

Entail—Entail Amendment Act 1868 (31 *and* 32 *Vict. c.* 84), *sec.* 5—*Feu-Charter where Buildings Erected prior to its Date is liable to Reduction.*

Held that a feu-contract bearing to be granted under the powers conferred by the said Act upon entailed proprietors, and conveying lands upon which buildings had already been erected of an annual value of more than double the amount of the feu-duty, was reducible, in respect that the 5th section of the statute requires these buildings to be erected after the execution of such a charter; and decree of reduction *pronounced* accordingly against a singular successor of the original feuar.

Entail Amendment Act 1868, *sec.* 3—*Valuable Consideration.*

Held (*per* Lord Rutherfurd Clark, Ordinary) that a back-letter granted by the feuar to his superior, stipulating as a condition of granting the charter that he (the superior) should be free to cut the oak trees which grew upon the subjects feued, was a valuable consideration in the sense of the 3d section of the Act, and that the transaction was therefore in contravention of the Act.

By building lease dated in March 1862 Sir William Drummond Stewart, then heir of entail in possession of the entailed estates of Murthly, Grandtully, and others, leased to Alexander Robertson, under the powers conferred on heirs of entail by the Act 10 Geo. IV. c. 51, a piece of ground forming part of said estates, extending to between one and two acres, for 99 years from Whitsunday 1859, for an annual rent, payable to the heir of entail in possession for the time, of £6, 12s. 5d. By the said lease the lessee was bound to erect, within two years from its date, on the said piece of ground, a dwelling-house of at least three storeys, in the form of a tower, and certain other buildings, to keep the same in thorough repair during the lease, and to leave them in like state on its expiry, the said buildings to become at the expiry of the lease the property of the heir of entail in possession at the time without any payment or consideration. Robertson accordingly erected the buildings in terms of the lease. By a second building lease of the same date, and between the same parties, another piece of ground, also part of the entailed estates, extending to between one and two acres, was let to Robertson for 98 years from Whitsunday 1860 for a rent of £9, 15s. 7d. By this lease the lessee was bound to execute at his own expense such repairs and additions to a dwelling-house then erected on the first piece of ground as would make it when completed worth £200 at least, and to maintain the first house during the lease, and leave it at the expiry thereof in good repair. No melioration was to be claimed by the lessee for these expenses, and the house was to become at the expiry of the lease the property of the heir of entail in possession for the time, without any payment or consideration therefor. Robertson accordingly executed the repairs and additions stipulated for. The total extent of the two pieces of ground thus leased was 2 acres 3 roods and 35¼ poles, and the total rent payable was £16, 8s.

In 1869 Robertson entered into an arrangement with Sir W. D. Stewart, by which he was to renounce these two leases, and instead obtain a feu-charter of the two pieces of ground and buildings thereon, and of certain additional ground adjoining thereto, extending in all to 13 acres and 726 decimal parts of an acre. The proposed arrangement was to be carried out under the "Entail Amendment (Scotland) Act 1868" (31 and 32 Vict. cap. 84), which provides, section 3—"It shall be lawful for any heir in possession of an entailed estate, notwithstanding any prohibitions or limitations in the deed of entail or in any Act of Parliament, in the manner and subject to the conditions hereinafter mentioned, to grant leases for the purpose of building for any number of years not exceeding 99 years, or feus of any part of such estate," reserving and excepting as therein mentioned—"Provided always that the feu-duty, rent, or ground-annual to be stipulated for shall not be less than the amount ascertained as hereinafter provided: Provided also that it shall not be lawful for such heir to take any grassum or fine or valuable consideration other than the feu-duty, rent, or ground-annual for granting any such charter, lease, or disposition; and in case any such grassum, fine, or consideration shall be taken, such charter, lease, or disposition shall be made void." . . . Section 5 is in these terms—"Provided always that every such feu-charter, lease, or disposition shall contain a condition that the same shall be void, and the same is hereby declared void, if buildings of the annual value of at the least double the feu-duty, rent, or ground-annual therein stipulated shall not be built within the space of five years from the date of such grant upon the ground comprehended therein; and that the said buildings shall be kept in good tenantable and sufficient repair; and that such grant shall be void whenever there shall not be buildings of the value foresaid standing upon the ground so feued, leased, or disponed."

In pursuance of this arrangement Sir W. D. Stewart presented a petition to the Sheriff of Perthshire, in terms of the statute, and after a remit to and report by a man of skill the Sheriff-Substitute on 20th September 1869 interponed the authority of the Court as craved. Sir W. D. Stewart then executed a feu-charter, dated 23d September 1869, disponing the said 13·726 acres to Robertson for a feu-duty of £27. By a duly

tested back-letter, dated 24th September 1869, Robertson acknowledged with reference to this feu-charter that it had been granted under the condition that Sir W. D. Stewart was to be entitled at any time during his life to resume possession, for building or other purposes, of a certain part, therein described, of the land feued; and in the event of such resumption Robertson bound himself to execute and deliver any disposition or reconveyance that might be necessary for vesting Sir William therein. He further acknowledged that the whole oaks on part of the said piece of ground were reserved to Sir William, with full power to cut and remove the same at his pleasure.

The said feu-charter, *inter alia*, declared "that these presents are granted with and under the real burdens, restrictions, reservations, declarations, and qualifications and others following, viz. —*First*, The said Alexander Robertson having erected upon part of the ground hereby feued a dwelling-house and others with suitable offices and conveniences attached thereto, which buildings and others in actual erection cost at least the sum of £900, conform to plans, elevations, and specifications previously submitted to and approved of by me, the said Alexander Robertson and his foresaids shall in all time coming be bound and obliged to uphold and maintain at their own expense the whole buildings and others so erected, or which may hereafter be erected, upon the said piece of ground in good and sufficient repair; and it is hereby provided and declared that no additional or new buildings shall be hereafter put up or erected on said piece of ground unless a ground plan and elevation and specifications thereof shall in the first instance be submitted to and approved of by me or the heir of entail in possession for the time of the said entailed estate, without which approval no such buildings shall be erected. . . . *Thirdly*, As it is intended that certain trees now growing on the piece of ground hereby feued shall not be cut down, but shall be left as standard trees for ornament, the said Alexander Robertson binds and obliges himself and his foresaids to preserve and protect any trees so left, and not cut or remove any of them without first obtaining the consent of me, the said Sir William Drummond Stewart, or the heir of entail in possession as aforesaid, and at the sight of the factor or land steward. Moreover, in the event of any of the said standard trees being hereafter of consent aforesaid cut down and removed, the said Alexander Robertson and his foresaids shall be bound and obliged to plant others in lieu thereof to the extent and in the manner to be then fixed. . . . *Sixthly*, The said Alexander Robertson having erected upon part of the said piece of ground buildings of the annual value of more than double the feu-duty herein stipulated, it is hereby provided and declared, in terms of the aforesaid Act, that these presents shall be void, and the same is hereby declared void, whenever there shall not be buildings of the value foresaid in good tenantable and sufficient repair as required by the said Act standing upon the piece of ground hereby feued."

On the same date as the said back-letter (24th September 1869) Robertson granted a deed of renunciation in favour of Sir William, by which he renounced the two pieces of ground let to him by the two building leases above mentioned, and whole buildings and erections thereon, and all claim, interest, or advantage he could have or pretend thereon.

By disposition dated in June, and recorded July 1872, the trustee on Robertson's sequestrated estate disponed to the Rev. J. M. Burn-Murdoch the whole subjects contained in the said feu-charter, which had been exposed to sale by public auction and purchased by him. By the articles of roup under which the subjects were sold it was conditioned (article 5th) that they were to be exposed without reference to any statement or understanding as to, *inter alia*, "the terms or conditions of the feu-right or back-letter or other documents, or any other particulars which might be supposed to affect the value thereof, as to all which the whole offerers are understood to have satisfied themselves before offering." By the eighth article the said property was to be conveyed "with and under all burdens, conditions, reservations, declarations, and others contained in a back-letter granted by the said Alexander Robertson in favour of the deceased Sir W. D. Stewart, in so far as the same are now exigible,"—which letter was thereafter quoted *in extenso* in said articles.

By a duly tested letter, dated 17th June 1872, Mr Burn Murdoch bound himself to free and relieve Robertson's trustee in sequestration, and the sequestrated estate under his charge, "of the said back-letter, and the whole burdens, conditions, and reservations contained therein, so far as now exigible." A copy of the back-letter was among the writs assigned to Mr Burn Murdoch by the said disposition in his favour.

The present action was raised by Sir Archibald D. Stewart, Sir William's successor, as heir of entail in possession of the estates of Murthly and Grandtully, against Mr Burn Murdoch, for reduction of (1) the Sheriff-Substitute's interlocutor of 20th September 1869; (2) the feu-charter of 23d September 1869; and (3) the disposition by Robertson's trustee in favour of the defender dated in 1872.

The pursuer averred in his condescendence that the arrangement made between Sir William and Robertson in 1869 was of a collusive nature, and prejudicial to the interests of the entailed estate; and that Sir William was induced to enter into it only by his fraudulently receiving, in terms of Robertson's back-letter, valuable considerations other than the proposed feu-duty, which was grossly inadequate. He further averred that the petition to the Sheriff fraudulently omitted to state the amount of rent then arising from the subjects, which was thereby concealed from the pursuer, who was then next heir of entail; that the reporter to whom the remit was made was a prejudiced and partial person, and unduly influenced in making his report; that he was, moreover, in ignorance of the valuable considerations to be received by Sir William in respect of the transaction; and that the feu-duty approved by him and authorised by the Sheriff was, in point of fact, grossly inadequate. It was further averred that the Sheriff-Substitute's interlocutor was pronounced under essential ignorance of the facts induced by fraudulent concealment on the part of Sir William, and by collusion between him and the reporter; and that the said interlocutor was therefore outwith the statute and wholly invalid.

The pursuer pleaded—"(1) The pursuer is entitled to decree reducing the interlocutor of Sheriff Barclay, dated 20th September 1869, in respect that it was pronounced under essential error induced by the fraudulent concealment by Sir William Drummond Stewart of essential facts in the proceedings under the petition for authority to feu the piece of ground described in the conclusions of the summons. (2) The pursuer is entitled to decree reducing the said interlocutor, in respect that it is disconform to the provisions of the Act 31 and 32 Vict. cap. 84, and unauthorised thereby. (3) The proceedings under the petitions in the Sheriff Court of Perthshire having been wholly outwith and in fraud of the provisions of the said Act, neither the said interlocutor nor the said feu-charter are protected by the finality clause of the Act. (4) Whether the said interlocutor is reduced or not, the pursuer is entitled to decree reducing the said feu-charter and disposition following thereon, in respect that Sir William Drummond Stewart, the granter of the feu-charter, obtained certain valuable considerations in his own favour other than the feu-duty contained in the said feu-charter. (4) The pursuer is entitled to decree reducing the said feu-charter and disposition following thereon, in respect that the feu-charter does not contain the statutory condition required by sec. 5 of the Act 31 and 32 Vict. cap. 84, as to the erection of buildings within five years from its date, and that in point of fact no such buildings were erected."

The defender pleaded—"(2) The pursuer's averments are not relevant or sufficient to support the conclusions of the summons. (3) Acquiescence and homologation. (4) In virtue of the foresaid building leases the defender has a title to exclude the present action of reduction at the instance of the pursuer. (5) The defender and his author, or at all events the defender, having acted *bona fide* on the faith of the interlocutor of, 20th September 1869, the disposition in the defender's favour is not subject to reduction. (6) In respect the interlocutor of 20th September 1869 was pronounced in the full knowledge, on the part of the Sheriff, of all facts and matters properly affecting the question before him in the said petition, reduction on the ground of essential error and fraud is excluded. (7) The said interlocutor, feu-charter, and disposition are not reducible under any of the provisions of the Act 31 and 32 Victoria, cap. 84, in respect that the whole provisions of the Act were duly observed, or must now be held to have been duly observed."

The Lord Ordinary (Rutherfurd Clark) reduced, decerned, and declared in terms of the conclusions of the libel.

His Lordship added the following opinion:—"The pursuer is heir of entail of the estate of Murthly, and by this action he seeks to set aside a feu-right granted by his predecessor Sir William Stewart in favour of Alexander Robertson, of which the defender is now the owner. The feu-right professes to be granted under the powers conferred by the 31st and 32d Vict. cap. 84.

"The pursuer maintains that the feu-right was granted fraudulently in pursuance of a scheme contrived between Sir William Stewart and Robertson. I doubt whether the case is relevant against the defender, who is a singular successor, and who purchased on the faith of the records. But I do not think it is necessary to decide this question, inasmuch as the feu-right is challenged on another ground, which in my opinion is well founded.

"The 3d section of the Act provides that 'it shall not be lawful for such heir to take any grassum, or fine, or valuable consideration other than the feu-duty, rent, or ground-annual for granting any such charter, lease, or disposition; and in case any such grassum, fine, or consideration shall be taken, such charter, lease, or disposition shall be null and void.'

"The feu-charter is dated 23d September 1869, and on the day after Robertson granted a back-letter, obviously in implement of certain arrangements which have been made between him and Sir William Stewart in reference to the feu-charter. By this letter he acknowledged that the feu-charter had been granted on the condition that Sir William was to be entitled at any time during his lifetime to resume possession of a certain part of the feu, and bound himself to execute the necessary deeds for vesting Sir William therein. But it was also conditioned that if any part was resumed, the feu-duty should be proportionately reduced. Further, he acknowledged that the whole oaks on a part of the feu were reserved to Sir William, with full power to cut the same at his pleasure.

"The pursuer contends that this back-letter is a 'valuable consideration other than the feu-duty' within the meaning of the Act, and that in consequence the feu-charter is null and void.

"The defender urged that the power to resume, though limited to the lifetime of Sir William Stewart, could only be exercised by him for the benefit of the heirs of entail, and that it was not a 'valuable consideration' taken by Sir William in contravention of the Act, inasmuch as he could take no benefit under it except as heir of entail. I am inclined to adopt that view. The power is to resume, or in other words, to replace, such land as might be resumed under the entail with a proportionate diminution of the feu-duty. I do not think that it was contemplated that Sir William by the exercise of the power of resumption was to create a separate fee-simple estate in himself.

"But the other stipulation is in a different position. The defender might possibly have pleaded that the power to cut the oaks was reserved, not to Sir William personally, but to the heirs of entail, on the ground that he is to be held as stipulating, not for himself alone, but for them. No such plea was urged, probably because it could not be successfully maintained. The case of the defender was that the oaks were mature, and therefore that Sir William was merely reserving what belonged to himself. And the better construction of the back-letter seems to be, that in this case Sir William was reserving to himself a personal benefit. If so, it seems to me that the back-letter is a contravention of the Act, and consequently that the feu-charter is null and void. The Court cannot, I think, be required to enter into the inquiry whether the trees might have been cut before the feu. It is sufficient that the personal right is reserved as a valuable consideration other than the feu-duty.

"The defender cannot plead ignorance of the back-letter, even if such a plea would avail him, for he knew of it before he made his purchase."

The defender reclaimed, and argued—(1) The

proceedings complained of had been carried through regularly and in conformity with the statute, and there was no evidence whatever of collusive evasion of its provisions. But, in any view, this objection would be bad as against the defender, who was a *bona fide* singular successor purchasing on the faith of the records—*Mackenzie* v. *Catton's Trustees*, December 14, 1877, 5 R. 313; *Fincastle* v. *Dunmore*, January 14, 1876, 3 R. 345. (2) Neither the power of resumption nor the right to cut the oak trees was a "grassum, fine, or valuable consideration," so as to contravene section 3 of the statute. Sir William, as heir of entail in possession, got nothing by the back-letter except that to which he had right before. An heir of entail in possession had right to cut the timber on the estate, if ripe for cutting and at a proper distance from the mansion-house—*Boyd* v. *Boyd*, March 2, 1870, 8 Macph. 637. It belonged to him, not to the estate—*Duke of Hamilton, Petitioner*, June 16, 1858, 20 D. 1134; *Oswald, Petitioner*, July 13, 1875, 2 R. 931. (3) The clause in the feu-charter was a sufficient compliance with section 5 of the Act. The object of that provision was to secure the feu-duty, and the houses already on the land were sufficient in value for that purpose. A case might be figured where land was already so fully built upon that it would be impossible for the feuar to comply literally with the provisions of section 5.

The pursuer replied—(1) The proceedings in the Sheriff Court could not stand, as there had been collusive arrangement, and both the reporter and the Sheriff were in essential ignorance of the facts induced by said fraud and collusion. (2) Section 3 of the Act had been contravened by Sir William's acceptance of the oak trees, which formed a "valuable consideration other than the feu-duty" in respect of which he granted the feu-charter. (3) The object of section 5 was to encourage building, not merely to secure the feu-duty. Its spirit as well as its language was clearly not complied with by the clause in this feu-charter—*Carrick* v. *Miller*, March 29, 1867, 5 Macph. 715, and June 15, 1868, 6 Macph. (H. of L.) 101, was a strong authority, the subject of construction there being the analogous section of the Montgomery Act.

At advising—

Lord President—This action was brought by Sir Archibald Douglas Stewart, heir of entail in possession of the entailed estates of Murthly and Grandtully, for the purpose of reducing a certain feu-charter which professes to have been granted under the Statute 31 and 32 Vict. cap. 84. There are three grounds of reduction set forth by the pursuer:—First, it is alleged that the whole proceedings which took place prior to the granting of this feu-charter, in a petition to the Sheriff of Perthshire, were carried through fraudulently, that the Sheriff was misled and was under essential error, and that the proceedings are disconform to the statute; second, that Sir William, the heir of entail who granted this charter, took a valuable consideration in his own favour from the feuar, in addition to the feu-duty, contrary to the provisions of the 3d section of the statute; and the third ground is, that the charter does not contain the statutory condition as to buildings of a certain value being erected on the subjects feued within five years' time from the date of the grant, and that no such buildings having in point of fact been erected thereon within the said period, the feu-charter is void and null, in terms of the 5th section of the statute.

The Lord Ordinary has expressed doubts whether the first of these grounds of reduction is pleadable against the defender, who is a singular successor, and who purchased on the faith of the records. In that doubt I participate, and am not disposed to entertain that ground of reduction.

The Lord Ordinary has based his judgment on the second ground, viz., that this heir of entail took a valuable consideration from the feuar apart from the feu-duty stipulated. I must say, I think, that is a question of very considerable difficulty, and I am not disposed to place my judgment on this ground, but rather on the third ground, which is expressed in the fifth plea-in-law for the pursuer, and which seems to me to be a much more formidable and clear objection, and one which, for the reasons I am about to state, I think ought to be sustained.

The feuar had previously held two pieces of ground under two contracts of lease executed under the statute 10 Geo. III. cap. 51, but he became desirous of obtaining an addition, so as to make his ground larger, and also of getting a feu-right instead of his long leases, and so he entered into an arrangement with Sir William Stewart to carry these purposes into effect. A renunciation was executed of the two leases, and an application was made to the Sheriff in terms of the statute to enable Sir William to grant a feu-charter of the subjects. It is not necessary, in the view which I take, to examine the proceedings which took place before the Sheriff, and I go at once to the feu-charter itself. The dispositive clause of that deed feued out "All and whole that piece of ground lying in the Rumbling Bridge or Tomgarrow Wood, and on the south side of the Strathbraan Turnpike Road, being part of the lands of Tomgarrow, which are part of the lands and barony of Strathbraan, extending to 13 acres and 726 decimal parts of an acre or thereby imperial standard measure, and bounded as follows;" and then follow the boundaries of the subjects. The charter proceeds to declare "that these presents are granted with and under the real burdens, restrictions, reservations, declarations, and qualifications and others following, viz.—*First*, The said Alexander Robertson having erected upon part of the ground hereby feued a dwelling-house and others with suitable offices and conveniences attached thereto, which buildings and others in actual erection cost at least the sum of £900, conform to plans, elevations, and specifications previously submitted to and approved of by me, the said Alexander Robertson and his foresaids shall in all time coming be bound and obliged to uphold and maintain at their own expense the whole buildings and others so erected, or which may hereafter be erected, upon the said piece of ground in good and sufficient repair; and it is hereby provided and declared that no additional or new buildings shall be hereafter put up or erected on said piece of ground unless a ground plan and elevation and specifications thereof shall in the first instance be submitted to and approved of by me or heir of entail in possession for the time of the said entailed estate, without which approval no such buildings shall be erected." And then, pas-

sing over the second head, it declares—*Thirdly*, As it is intended that certain trees now growing on the piece of ground hereby feued shall not be cut down, but shall be left as standard trees for ornament, the said Alexander Robertson binds and obliges himself and his foresaids to preserve and protect any trees so left, and not cut or remove any of them without first obtaining the consent of me, the said Sir William Drummond Stewart, or the heir of entail in possession as aforesaid, and at the sight of the factor or land steward. Moreover, in the event of any of the said standard trees being hereafter of consent aforesaid cut down and removed, the said Alexander Robertson and his foresaids shall be bound and obliged to plant others in lieu thereof to the extent and in the manner to be then fixed." And then, passing over some further heads, we come to "*Sixthly*, The said Alexander Robertson having erected upon part of the said piece of ground buildings of the annual value of more than double the feu-duty herein stipulated, it is hereby provided and declared, in terms of the aforesaid Act, that these presents shall be void, and the same is hereby declared void, whenever there shall not be buildings of the value foresaid in good tenantable and sufficient repair as required by the said Act standing upon the piece of ground hereby feued."

Now, it is maintained for the pursuer that these clauses are quite insufficient to comply with the requirements of section 5 of the statute. That section is expressed in the following terms:—"That every such feu-charter, lease, or disposition shall contain a condition that the same shall be void, and the same is hereby declared void, if buildings of the annual value of at the least double the feu-duty, rent, or ground-annual therein stipulated shall not be built within the space of five years from the date of such grant, upon the ground comprehended therein, and that the said buildings shall be kept in good tenantable and sufficient repair, and that such grant shall be void whenever there shall not be buildings of the value foresaid, kept in such repair as aforesaid, standing upon the ground so feued, leased, or disponed."

Now, it clearly appears on the face of that clause that to comply with the requirements of the statute, and to avoid the effect of the penalty, it is absolutely necessary that the buildings should be erected on the ground feued after the contract has been executed, and within five years from its date. The statute requires that they shall be made as a valuable addition by the feuar to the subject feued, no matter what buildings were previously erected there. The policy of the Act is, that when the feuar has got his feu, he is to make this substantial addition to the value of the subject. Now, it is said that this was for the purpose of securing the feu-duty, and no doubt that is one object of the provision, but I think it is not the only one. On the contrary, I think one of the objects was to encourage buildings of a substantial character, which should increase the value of the lands forming the subject of the transaction. Now, what has been done here? The heir of entail says—"You have already erected a building or buildings on a part of this ground which was formerly let to you; I will take that as an equivalent for the buildings required by the statute; it is of the annual value of more than double the feu-duty we are stipulating for, and if you will maintain and keep it, as I shall take you bound under your charter to keep it, always up to the required value of double of the annual amount of that feu-duty, I will hold that you have sufficiently complied with the requirements of the statute as to buildings." I think that arrangement was quite illegal. The heir of entail had no power to make such an agreement. The words of the statute are too clear to admit of construction, and I think it is not possible for the defender to escape from the effect of them. It was ingeniously maintained for him that a piece of ground feued in terms of this Act might be so covered already with buildings as to make it inexpedient, or even impossible, to add to their number. I can only say, if that were so, I think the subject would be a most unfit one so to be conveyed, for the object of the statute was to encourage building where there has been none before; therefore that case forms no suitable illustration, and furnishes no argument under this clause of the statute. The words of the analogous section of the previous Act of Parliament (the Montgomery Act) were the subject of construction in the case of *Carrick* v. *Miller*, March 29, 1867, 5 Macph. 715, and June 15, 1868, 6 Macph. (H.L.), 101, and the opinion which I am now pronouncing is, I think, quite in conformity with the opinions delivered in that case. I have no hesitation in saying that this transaction is a complete evasion of the 5th section of the Act. I am therefore for adhering to the Lord Ordinary's interlocutor.

Lord Deas—I confess it is with much regret that I find myself compelled to concur in the decision which your Lordship has pronounced, for I am of opinion that the transaction between Sir William Stewart and Mr Robertson, and likewise that with Mr Burn Murdoch, were perfectly straightforward, fair, and equitable transactions. The difficulty however rests, as your Lordship has pointed out, on the clause of this statute which you have interpreted as making it necessary that the buildings should be new buildings erected after the granting of the feu, and that buildings already on the ground could not be taken into account as complying with the statutory provision. I have all along been of opinion that the substantial reason of that provision is to secure the feu-duty, and if your Lordships could have thought that its requirements had been substantially complied with in this case by these buildings which were already on the ground, I should certainly not have differed from that view. On the other hand, the words of this section of the statute are so much in favour of the construction which your Lordship has put upon them, that I cannot feel myself at liberty to differ from the judgment of the Court. I confess I should gladly have concurred in a different judgment if I had been supported by your Lordships, but I cannot read the words of the section in so clearly different a light as to entitle me to differ from your Lordships. I therefore, though with great doubt and difficulty, feel compelled to concur in the judgment now to be pronounced.

Lord Mure—There are three grounds on which reduction of this deed is sought by the pursuer. In regard to the first of these, I concur with Lord Deas in thinking that there is nothing to show

that the heir of entail acted fraudulently in this transaction, or with the view of injuring in any way the interests of subsequent heirs of entail. I think there was an entire failure to show any such element in his conduct at the time, or in that of Mr Robertson, the feuar. I should be prepared to state that opinion more fully if it were necessary, and if this objection were not sufficiently disposed of on the ground that it is bad as against the defender here, who is a *bona fide* singular successor of the original feuar. As to the question under the third section of the statute, I entertain great doubts of the soundness of the Lord Ordinary's view, and should be disposed to hold that the objection is not well founded.

But as to the objection under section 5 of the Act, I think it is impossible to come to any other conclusion than that which your Lordship has expressed. The section provides—[*His Lordship read the section*]. Now, in this deed we have no such clause as is here required, and I think, on the authority of the case of *Carrick* v. *Miller*, the omission is a fatal one. I therefore think that effect must be given to this third objection.

Lord Shand—It is with great regret that I find myself constrained to concur in the judgment which your Lordships have proposed. I see from Mr Burn Murdoch's title that in 1872, when he purchased this property, he paid a sum of £2550 to the trustee on the estate of the original feuar, and since he gave so large a price I regret that an objection now taken to the validity of his title should prove fatal to it. But I feel your Lordship's reasoning founded on the Entail Statute is too strong to enable me to resist the conclusion that this feu-charter must be reduced. As your Lordship has explained, there are three grounds on which reduction is asked by the pursuer. First, there is the ground of alleged fraud in the proceedings between Sir William Stewart and Alexander Robertson. I agree on that matter with your Lordship. It is said there was collusion in the arrangements made for the original giving off of the feu, but it appears to me that the pursuer has failed to state a relevant case on that matter. I think the reporter applied his mind fairly to that subject, and that the pursuer's statements are not such as to warrant us in setting aside those proceedings. But in addition to that, I think a singular successor, who found Robertson, the proprietor of this ground, duly infeft by deeds which were on the public records, was entitled to deal with him on the footing that the deeds were effectual, and on this part of the case I think the decision in *Mackenzie* v. *Catton's Trustees*, 5 R. 313, is conclusive.

But secondly, the Lord Ordinary has proceeded on the matter of the oak trees. I must say I should not have proceeded on that ground. It is said by the defender that the trees were ripe for cutting and of small value, and if that were established as true upon inquiry, I should be of opinion that the pursuer's objection on that ground to the validity of the feu-contract was a bad one, for if Sir William had power to cut the trees the objection falls, and if they were of trifling value it would be difficult to hold that this stipulation was a "valuable consideration" which induced Sir William to enter into the contract.

But there remains a third ground—that on which the judgments of your Lordships have been founded, and it is to be observed, that as the facts with regard to it appear on the face of the titles which the purchaser took, he was directly put upon his inquiry, through his man of business, to inquire what were the provisions of the statute under which the feu-contract was granted, and whether these provisions had been complied with. Now, in place of the statutory stipulation for the erection, on pain of nullity, of such and such buildings upon the subjects feued, this feu-contract bore on its face that certain buildings already on the ground were to be taken as substituted for those required by the statute. I am not prepared to say that a case might not occur where buildings put up immediately before the date of the feu-contract, provided they were so put up in reference to the arrangement then in course of transaction between the parties, might be held as a compliance with the requirements of the 5th section of the statute. For instance, where an heir of entail is willing to make such an arrangement, and proceedings are accordingly instituted in the Sheriff Court, and the feuar proceeds on the faith of all this to build before the actual execution of the feu-contract, and goes on and completes his buildings within the statutory time, I think that might be held to be substantially an erection of buildings in reference to the contract then in hand. But unfortunately the case here is quite different. The buildings which it is said will satisfy the statutory requirements had been already on the ground for a number of years; they had been erected under the terms of these building leases, as security for the rents due under them, and were permanent erections and a part of the entailed estates. They were put up as security to that estate in respect of a piece of ground which did not exceed in all four acres—that was the size of the subject for which they were security. But in renouncing the leases and granting the feu-contract the parties treated the buildings as new, to become security for payment of the feu-duty, not of the four acres only, but of a much larger subject of about fourteen acres, —that is to say, an addition of about ten acres was made to the property, these being directly alienated from the estate, and no additional buildings are stipulated for in the contract. The buildings were already a part of the entailed estate, and they were necessarily conveyed by a heritable title by the heir of entail to the feuar. They were on the ground by virtue of a previous contract entered into between the same parties as lessor and lessee, and I am unable to see how they can be accepted as a compliance with the provisions of section 5 of the Entail Act, under which these proceedings were carried through. And so, while one sees that the pursuer of this action and the succeeding heirs of entail will get a large pecuniary advantage without giving any additional consideration in respect of it, I regret that I feel compelled to concur in the judgment now to be pronounced.

The Lords adhered.

Counsel for Pursuer—Solicitor-General (Asher, Q.C.)—Mackay. Agents—Dundas & Wilson, C.S.

Counsel for Defender — Pearson — Mitchell. Agents—Hagart & Burn-Murdoch, W.S.