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 assoilzieing 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 the 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 principles laid down in the *Mersey Dock case*, and some other cases almost concurrent with it, are I think sufficient to shew, that the buildings of the University of Edinburgh are not buildings of the kind which entitles the owners and occupants of them to exemption from liability for poor rates.

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

Appellant's Solicitors, Alexander Greig, S.S.C.; Murdoch, Rodger, and Gloag, Westminster. —*Respondents' Solicitors*, W. and J. Cook, W.S.; Loch and Maclaurin, Westminster.

JUNE 15, 1868.

JOHN CARRICK, Architect, Glasgow, *Appellant, v.* GEORGE JOHN MILLER of Frankfield, *Respondent.*

Entail—Montgomery Act—Building Lease—Powder Magazine—Waiving Statutory Condition—*By the Statute* 10 *Geo.* III. *c.* 51, *heirs of entail may grant building leases for certain purposes for* 99 *years, but these are to be void if a dwelling house is not built within ten years.*

HELD (affirming judgment), *That notwithstanding the heir dispenses with this latter condition, the lease becomes absolutely void at the end of ten years, if the dwelling house is not built.*

QUESTION, *whether a lease for erecting a powder magazine can be granted by an heir of entail under the Montgomery Act?*[1]

This was an appeal from a judgment of the First Division. The heir of entail of the estate of Frankfield raised an action of reduction to set aside a building lease for 99 years, granted by his father in 1851, when heir in possession of the said estate. The deed of entail prohibited heirs of entail from granting tacks for more than 99 years. The Montgomery Act, 10 Geo. III., c. 51, enables heirs of entail to grant building leases for 99 years under certain conditions, one of which is, that within ten years after the lease one dwelling-house at least, not under £10 in value, shall be built for each half acre, otherwise the lease to be void. In 1851, the pursuer's father, as heir of entail, granted a lease for 99 years of ground for the purpose of a powder magazine to be erected, but by a back letter, the lessor agreed not to enforce the statutory condition if a powder magazine worth £1000 should be kept in good repair. No dwelling houses accordingly had been built pursuant to the Statute.

The Lord Ordinary (Kinloch), on 22d June 1866, held the lease void, and the First Division (Lord Curriehill dissenting) recalled the interlocutor, holding the lease was not void, but had only become so by reason of the condition as to erecting dwelling houses within the ten years not being fulfilled.

The defenders appealed.

Dean of Faculty (Moncreiff), and *Cotton* Q.C., for the appellant.—The lease was not void until the heir in possession had required the dwelling houses to be built, and which the appellant was ready to do. It was an irritancy which might be purged—Stair, iv. 18, 3; i. 17, 16; Ersk. ii. 5, 25; ii. 8, 14; 1 Bell, Com. 70; 1 Bell, Leases, 129; *Stewart* v. *Watson*, 2 Macph. 1419. Moreover, the lease was at all events good for 25 years, under the proviso in the deed of entail.

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[1] See previous report 5 Macph. 715: 39 Sc. Jur. 368. S.C. L. R. 1 Sc. Ap. 356: 40 Sc. Jur. 530: 6 Macph. H. L. 101.

Sir R. Palmer Q.C., and *J. M. Duncan*, for the respondent.—The Montgomery Act gave no power to an heir of entail to grant a lease for such a purpose as a powder magazine, the objects of the Statute being confined to those specified, and this is not within those descriptions of buildings. But even if this building lease were within the powers of the heir, the powers were granted only on conditions, and these conditions have been violated. It was a violation of the Statute which no heir, with or without the consent of a third party, can commit effectually. The lease, therefore, became *ipso facto* void, when the ten years expired without the dwelling houses being built—*Gordon* M. Tack, App., No. 11; *Moncrieff* v. *Hay*, 5 D. 249.

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 case under what is called the Montgomery Act, which was passed about a century ago in the year 1770. 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 land 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 any number of years not exceeding 99 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 £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," etc.

Now the gentleman who granted the lease in question, Mr. Miller, was tenant in tail of an estate under the deed of entail, which contained these provisions—"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 larger 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 25 years only. And we may assume also, for the purpose of the 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 25 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 fee simple proprietor restricted by the entail, but he availed himself of the powers of the Montgomery Act to grant a lease for 99 years.

The lease 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, etc., 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 10th year of the reign of his Majesty King George the Third, intituled" 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 99 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 99 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 the length of term allowed by the Montgomery Act, no person would have taken a lease to erect 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 was raised, whether it was not void in another sense, that is to say, that although the Montgomery Act authorized 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 shews, 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 did not take the view that it did not authorize 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, and 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 the grant of his lease. I am clearly of opinion, that even were it 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 the purpose, I must refer to a decision which took place in the English Courts, but which proceeded on principles that must be germane to both countries. Lord Eldon having a case brought before him 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 manufactories, and from carrying on any trade or business of any description whatever, the occupation of the ground being strictly limited to the purpose 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, that 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 his 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 lease. 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.

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 interlocutor 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 in 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 professes 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 of 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 have 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 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 25 years from the date of the lease, because Mr. Miller, under his power 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 authorize 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 99 years granted under the authority of that Statute, under which alone a lease for 99 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 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 25 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 purposely as a lease authorized 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 alternative but 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.

Appellant's Solicitors, Campbell and Smith; Grahames and Wardlaw, Westminster.—*Respondent's Solicitors*, Robert Pringle, W.S.; Connell and Hope, Westminster.

JUNE 25, 1868.

CARRON COMPANY, *Appellants*, *v.* WILLIAM HUNTER, Esq., and Others, *Respondents*.

Company—Sale of Shares—Right to Concealed Profits—Title to Sue—*C. being holder of ten shares in a company from* 1824 *to* 1847, *received the usual dividends, but owing to the fraud of the manager, large profits all that time were concealed, and not paid over to the shareholders. C. by will, gave the shares to L., and died in* 1847, *and L. then, being ignorant of the concealed profits, sold the shares to the company for what the company offered him. Afterwards L., discovering the fraud, raised an action to reduce the sale for fraud, and the company compromised his action by paying a large sum. Then C.'s representative also raised an action to recover concealed profits, in respect of ownership of the shares between* 1824 *and* 1847.

HELD (reversing judgment), *That there was no right of action in C.'s representative, for whatever right to concealed profits existed up to* 1847 *passed as an accessory with the transfer of the shares to L. in* 1847, *and L. alone could recover from the company on this ground.*[1]

This was an action at the instance of the representatives of the late Mrs. Hunter, or Caldwell, or Lothian, against the Carron Company, its manager, and certain partners, and also against Mrs. Macfie or Lothian, widow of John Lothian, S.S.C. In 1824, Mrs. Hunter or Caldwell, widow of Mr. Caldwell, acquired ten shares in the Carron Company on the death of her husband, and held them till her own death in 1847, being all that time registered as proprietrix in the company's books. She had married Mr. Lothian in 1828, and the shares were included in a marriage settlement then executed, which also reserved to her a power of disposing of the same in the event of her death. In 1837 she executed a deed of settlement by which she directed her trustees after her death to pay half of her trust estate to Mr. Lothian. Afterwards, in 1843, she made the following codicil:—"In the third place, as my said husband thinks highly of the stock of the Carron Company, whereof I hold ten shares, my title to which was completed by confirmation expede by me before the commissaries of Edinburgh, of date the 29th day of November 1824, I do hereby direct and appoint my said trustees, or survivor, to allow my husband the option of taking, if he pleases, said ten shares as part of his provisions under said marriage contract, such ten shares to be estimated to him as not exceeding in value the sum of £6000 sterling, and my said trustees being at the whole expense of completing his title to the same. And in order that the title of the said trustees, nominated in said marriage contract, survivors or survivor, may be complete, I do hereby assign and convey said ten shares over to them, in trust, for the ends, uses, and purposes specified in said marriage contract and in these presents, declaring that in the event of the said Carron Company insisting on their right to have the first offer of these shares, any increased price which may be got by said trustees therefor beyond said sum of £6000, shall belong as a gift to my said husband, and that whether he takes said shares or not,

[1] See previous reports 4 Macph. 216: 38 Sc. Jur. 118. S. C. L. R. 1 Sc. Ap. 362: 6 Macph. H. L. 106: 40 Sc. Jur. 546.