came before the Court on the pursuer's account of expenses, the pursuer objected thereto, on the ground that the Auditor had reduced the fees of senior counsel from £21 to £13, 13s., and of junior counsel from £15, 15s. to £8, 8s.

He argued—A series of decisions fixed the proper fees to be paid to counsel for an ordinary jury trial, and the Auditor had no discretion in reducing them except in exceptional circumstances, which did not arise here. If the Auditor had affixed a note to the account stating on what ground he had reduced the fees, his position would have been more intelligible. He had not done so, but had arbitrarily reduced the fees without stating any ground. The Court ought to restore the fees as originally given—*Cooper & Wood* v. *North British Railway Company*, December 19, 1863, 2 Macph. 346; *Campbell* v. *Ord & Maddison*, November 5, 1873, 1 R. 149; *Black* v. *Mason*, March 18, 1881, 8 R. 666.

At advising—

LORD JUSTICE-CLERK — The Auditor is an officer of Court, and necessarily he has before him the decisions of the Court in cases of this kind, and having these decisions before him, he considers whether any particular fee ought to be charged in a particular case. I should have been surprised if any decision had laid down that it was part of the Auditor's duty to give any particular fee in any particular class of cases, because in each case he must consider the whole circumstances of the case. The Auditor has considered the circumstances of this case, and thought that these circumstances justified him in cutting down this fee. Unless in very strong and exceptional circumstances I should not be inclined to interfere with the Auditor's discretion as to what a particular fee ought to be in any particular case.

LORD YOUNG—I admit I am surprised at this objection. Since I have sat in this Division we have always refused to interfere with the discretion of the Auditor in taxing these accounts of expenses. Not on the ground that we could not interfere, but on the footing that under no ordinary circumstances would we interfere with his discretion. It may be possible to imagine some case in which we would, but I think it would be only a fancy case. It is obvious—and most of us know it from experience—that the fees sent to counsel vary in different cases and for different reasons. We have now got as Auditor a gentleman who has had longer experience in such matters as this than anyone else, and whose good sense we all know, and it would require a very strong and exceptional case to make me interfere with his decision in any particular case. Here we have no ground for interference stated at all except it be this, that the Court ought to lay down a general table of fees for the guidance of the Auditor, and that we ought to revise his decisions in each case. That is not the kind of work for which the Court is fitted. I think we ought to dismiss these objections.

LORD RUTHERFURD CLARK—I think we ought not to interfere with the discretion of the Auditor in this case.

The Court repelled the objections and approved of the Auditor's report.

Counsel for the Pursuer—Salvesen. Agent —W. B. Rainnie, S.S.C.

Counsel for the Defenders — Guthrie. Agents—Hope, Mann, & Kirk, W.S.

Tuesday, October 31.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

ELIOTT'S TRUSTEES *v.* ELIOTT.

Trust—Powers of Trustees—Lease—Construction—Reduction.

A testator by his trust-disposition and settlement empowered his trustees to let the mansion-house of W. from year to year, or, if they should think fit, to permit the heir of entail entitled to succeed to his lands under a deed of entail which he had executed, to possess the mansion-house rent free, but only for such space as they should think proper.

The trustees subsequently granted a "lease," whereby, on the narrative of the powers conferred upon them by the testator, they let the mansion-house to the heir of entail for the space of one year from the term of Whitsunday 1879, "but renewable from year to year as after mentioned." It was further provided that in the event of the said heir "not giving notice to the trustees six months before the term of Whitsunday" in any year "of his intention to remove from the subjects let at said term . . . this lease shall be held to be renewed for another year."

In an action at the instance of the trustees, the Court *held* (1) that by the terms of the "lease" the trustees divested themselves of all power to terminate the heir of entail's occupancy of the mansion-house; and (2) that in doing so they had exceeded the powers given them by the testator, and therefore reduced the lease, and *ordained* the heir of entail to remove.

Sir William Francis Eliott of Stobs and Wells died on 3rd September 1864, leaving a trust-disposition dated 14th October 1863, whereby on the narrative that he had executed an entail of Wells on the same date, and that it was his purpose that his debts should be paid out of the rents of his lands as they accrued, and out of his moveable estate, and that when the heirs of entail should be put in possession of his said lands they should be so free of any burden or obligation in respect of his debts, he conveyed and made over to trustees the lands and estate of Wells, and his whole other estate, heritable and moveable. By

this settlement the trustees were given power "to let from year to year the mansion-house of Wells, with the office houses, yards, orchards, enclosures, plantings, woods, and policy thereto belonging, and likewise any part of the ground adjoining not exceeding in whole (in addition to the woods and plantations) two hundred and fifty acres Scots measure, and to set tacks of the remainder of the said lands, baronies, and others thereby disponed for any period not exceeding nineteen years," and it was further provided . . . that during the subsistence of the trust it should be in the power of the said trustees, if they should think fit, to permit the institute or heir of entail entitled to succeed to his lands, baronies, and others in terms of the deed of entail before mentioned, to possess the mansion-house of Wells, with the office houses, yards, orchards, enclosures, plantings, woods, and policy thereto belonging, and likewise any part of the ground adjoining, not exceeding in the whole (in addition to the woods and plantations) two hundred and fifty acres, Scotch measure, and that rent free, but only for such space as the said trustees should think proper, and upon condition that the said institute or heirs should severally be bound during their respective possessions to keep and preserve the whole premises in constant, good and sufficient order, condition, and repair."

In 1879 part only of the truster's debt having then been paid off, an instrument called a lease was entered into between the trustees under the above trust-disposition and settlement, and Sir William Francis Augustus Eliott, the heir of entail, under the said trust-disposition and relative deed of entail. This "lease," after narrating that by the trust-disposition and settlement the trustees were empowered to let from year to year the mansion-house of Wells, with the garden, offices, and policy belonging to it, and that they were further empowered to give Sir William Francis Augustus Eliott possession of the mansion-house and policies "free of rent if they think fit," went on to let to Sir William Francis Augustus Eliott, but excluding assignees, legal or conventional, and subtenants, the mansion-house of Wells, with the garden, offices, and policies thereof, also the exclusive right of fishing in the river Rule and its tributaries, so far as they ran through the estate, also the exclusive right of shooting on the estate, "and that for the space of one year from and after the term of Whitsunday 1879, which is hereby declared to be the term of his entry thereto under this tack, but renewable from year to year as after mentioned." After containing certain obligations by Sir William Francis Augustus Eliott regulating his rights of possession, the "lease" proceeded—"And it is hereby provided and declared that in the event of the said Sir William Francis Augustus Eliott not giving notice to the said trustees six months before the term of Whitsunday next, or before any subsequent Whitsunday, of his intention to remove from the subjects let at said term of Whitsunday, this lease shall be held to be renewed between the parties hereto for another year, on the same terms and conditions as are before provided."

In virtue of the above deed Sir William Eliott entered into possession of the subjects thereby "let" to him, and he subsequently refused to remove therefrom, though the trustees gave him notice of their intention to bring the lease to an end.

In October 1872 Mrs Wood and others, the trustees under the above trust-disposition and settlement, brought an action against Sir William Eliott, concluding for declarator that the foresaid lease might be brought to an end by them on giving six months' notice to the defender, and that the defender was bound to remove from the mansion-house of Wells and other subjects let to him on receiving such notice, or alternatively for reduction of the pretended lease, and for decree ordaining the defender to remove.

The pursuers pleaded, *inter alia*—"(1) The said lease being valid only for the period of one year unless renewed, the pursuers are entitled, after giving due notice to the defender, to bring it to an end at the end of any year of its currency, and particularly at the term of Whitsunday 1893. (3) Alternatively, the pursuers are entitled to decree of reduction as craved, in respect (1st) that it was *ultra vires* of the trustees of the late Sir William Eliott to grant the said lease, and (2nd) that the said lease having no definite ish, is itself inept and bad."

The defender pleaded, *inter alia*—"(3) The said lease on a sound construction thereof is terminable only on the defender giving six months' notice prior to Whitsunday of any year, and he having given no such notice, he is entitled to absolvitor from the declaratory and removing conclusions of the summons, with expenses. (5) The reasons of reduction of the said lease are irrelevant."

On 17th February 1893 the Lord Ordinary (STORMONTH DARLING) sustained the third plea-in-law for the defender, found that there were no relevant reasons averred by the pursuer for reducing the lease libelled, and therefore assoilzied the defender from the conclusions of the summons.

"*Opinion.*—The pursuers, who are the trustees of the late Sir William Eliot of Stobs, under his trust-disposition and settlement, and also under a private Act of Parliament obtained in 1865, ask for declarator that a lease of the mansion-house of Wells with the shootings and fishings, which they granted to the defender, the present baronet, in 1879, may be brought to an end by them at any term of Whitsunday on six months' notice; and alternatively they ask for reduction of the lease as having been granted *ultra vires*. There are thus two questions raised on this record. The first is, what is the true construction of the lease; and that depends upon the words which are quoted in condescendence 6 and condescendence 7. I am clearly of opinion that the true construction of the lease is that it is a lease for one year, but renew-

able by the defender from year to year as long as he lives, by simply abstaining from giving notice of his intention to remove; or, in other words, that it cannot be brought to an end by the trustees during the defender's life, but it may be brought to an end by Sir William himself, on giving notice to them six months before any term of Whitsunday. Now, that is not precisely a liferent lease, although it partakes of the character of it, because Sir William is not bound for the whole period of his life. On the other hand it cannot extend beyond his life. It would have been a very odd and one-sided kind of arrangement to make with a stranger, but it is not at all surprising when the grantee is the institute of entail. I would only observe with regard to the question of construction, that if any other were adopted, I am at a loss altogether to account for the presence of the clause quoted in condescendence 7, because if the intention had been to give either party the right to terminate the lease, it would have been very easy to say so in distinct words, or else to say nothing at all, and to leave the question of renewal to the operation of tacit relocation. Therefore I can only account for the existence of this clause by supposing that it was intended to give Sir William Eliott the power to renew it, and to prevent the trustees having the power to put an end to it.

"Then arises the second question, whether, if that be the true construction of the lease, it ought to be reduced as being either *ultra vires*, or as being bad in itself for want of a definite ish. Both of these grounds are pleaded by the trustees in their third plea-in-law. I do not think that there is any relevant averment which would support either view. With regard to the lease having no definite ish, I think it is a sufficient answer to say that it is a lease from year to year, although renewable by Sir William Eliott so long as he lives. With regard to the other ground, of its being *ultra vires*, I could have understood that plea if it could be shown that the trustees had given this right of renewal to Sir William Eliott for a period which might outlast the subsistence of the trust; but that is not so. The trust must subsist so long as Sir William Eliott lives, and the powers of the trustees with reference to this matter are, at any time during the subsistence of the trust, to permit the institute or heir of entail entitled to succeed to the estate of Wells to possess the mansion-house, free of rent, for such space as the trustees might think proper. I see nothing beyond their powers, or in excess of their duty, in making an arrangement of this kind.

"It is suggested that, even if that is a sufficient answer as regards the house, they had at all events no right to let the shootings in this way. All I can say about that is that the trust-deed and the Act of Parliament are silent about the shootings. There is no limitation on the power of the trustees with regard to the shootings, and therefore I do not think they can be heard to say that they were acting beyond their powers in letting the shootings to the institute of entail without exacting a rent. The shootings are after all a mere accessory of the enjoyment of the mansion-house, and the express powers of the trustees, although they do not actually include the shootings, are exceedingly wide, because they extend not only to the offices and orchards, woods and policy, but even, if they think fit, to 250 acres of ground, all of which they are entitled to allow the heir of entail to occupy rent free. They have not, as I understand, executed their power as regards the 250 acres of ground, but that, I think, affords some indication of the intention of the truster, and I think it would be fantastic to hold that the mere fact of their letting the shootings along with the house, rent free, is sufficient to warrant the Court now, at their instance, in reducing this lease. I shall therefore sustain the defenders' third plea-in-law, find that there are no relevant reasons averred on record for reducing the lease, and assoilzie, with expenses."

The pursuers reclaimed, and argued—*On the construction of the "lease"*—The narrative of the powers under which they acted showed that the trustees never intended to part with the control of the mansion-house except from year to year. The fact that the lease contained a provision to the effect that the defender must give notice of his intention to remove did not imply that the trustees were not to have power to bring the lease to an end, for the provision in question was conceived in the trustees' favour. If that was not the true construction of the so-called lease, then the trustees had gone beyond their powers. They were only entitled to allow the defender to occupy the mansion-house so long as they thought fit, and it was *ultra vires* for them to put the exercise of their discretion out of their power. The pursuers also had no power to give the defender the shootings rent free. Further, the so-called lease was bad as a lease, for it contained no definite ish—*Dunlop* v. *Steel Company of Scotland*, November 27, 1879, 7 R. 283.

Argued for the defender — The Lord Ordinary was right in his decision, and in the reasons he assigned for it.

At advising—

LORD PRESIDENT — In considering the validity of the writ brought under reduction in this action it is necessary to ascertain, first, what right it purports to confer, and second, whether it was in the power of the trustees to grant a deed of such import.

Now, the instrument in question is a lease; it professes to be a lease; it is so considered by the Lord Ordinary; and I shall so treat it. What, then, is the right conferred on the tenant by the trustees, so far as the vital matter of duration goes? It is unquestionably the right to possess the mansion-house of the estate, and what for shortness I shall call the adjuncts of the mansion-house, for his lifetime. It is true that he has the additional privilege of

being entitled, if he pleases, to terminate his possession and its reciprocal obligations by giving six months' notice. But this does not imply any corresponding right on the part of the trustees, and, standing this lease, they could not remove Sir William during his lifetime.

The Lord Ordinary calls this a lease for one year, renewable by the defender from year to year, by simply abstaining from giving notice of his intention to remove; and if it be borne in mind, as the Lord Ordinary goes on to say, that the lease cannot be brought to an end by the trustees during the defender's life, this description need not be challenged. On the other hand, it would be equally accurate, as I am sure the Lord Ordinary would agree, to say that it is a liferent lease, with a power to the tenant to terminate it on six months' notice.

And now, without going further into the conditions of this writ, I come to what I proposed as the second question, Was it within the powers of the trustees to grant such a lease? Now, the trust-disposition is the trustees' title; definite instructions are given to them by their truster about letting; and these must be the measure of their powers and of the validity of their acts in this region of administration. The provisions in question are set out in condescendence 2. The truster distinguishes between the mansion-house and its adjuncts on the one hand, and the rest of the estate on the other hand. As regards the latter, they may be let for any period not exceeding nineteen years; but as regards the mansion-house and its adjuncts, the power is to let them from year to year. Now, it seems to me to be clear that acting under this deed the trustees have no power to grant a lease of the mansion-house for more than a year, or, in other words, to give to anyone a lease entitling him to retain possession of the estate for more than a year. For the reasons already stated, it is to me equally clear that by the lease now in question they have done something different from and more than letting from year to year in the sense of this power.

It was attempted alternatively to support the defender's lease by the power conferred on the trustees to permit the institute or heir of entail (who is the defender) to possess the mansion-house and its adjuncts rent free, but only for such space as the trustees should think proper. I read this power as standing in contradistinction to the power of letting which immediately precedes it in the trust-disposition. It seems to me that any heir of entail in whose favour this power is exercised is to be a precarious possessor. The discretion of the trustees is to be a continuing discretion, and I find it impossible to hold that it is competently exercised by the trustees, once for all, and so far as they are concerned, irrevocably placing the heir of entail in possession of the mansion-house for his lifetime rent free.

I am of opinion that the interlocutor of the Lord Ordinary should be recalled, and decree of reduction and removing granted.

Lord M'Laren—I approached the consideration of this case with every desire, if possible, to find grounds for supporting the claims of the heir of entail, for it seemed to me hard that he should be kept out of possession of the mansion-house, which appeared to be the only right in the estate which could be available to him in his lifetime. It was sought to support his tenure on two grounds—First, that the so-called lease was a legitimate exercise of the power given to the trustees to let the mansion-house from year to year; or second, that it was a legitimate exercise of their power to give the heir the occupation of the mansion-house during such time as they might think proper. On the question of the construction of the trust-disposition, I am of opinion that the power to let the mansion-house was not given to the trustees for the benefit of the heir of entail, but was a power to let generally to anyone, and therefore that it must be construed as if the occupant were someone who held a right for which he had paid. But under a power to let from year to year of course it is implied that it is to be open to the trustees to terminate the contract of lease on giving due notice to the tenant, while under the instrument granted to the heir of entail the trustees have no such power, because by the terms of the deed power to terminate the contract is given only to the heir of entail. It therefore appears to me to be impossible to enforce the contract of lease, if it be a lease, as a valid exercise of the power to let given to the trustees. The contract also appears to me to be equally inconsistent with the provision that the trustees should have power to give the heir of entail possession of the mansion-house during such time as they should think proper. I can put no other construction on that provision except that the trustees were to have power to continue or terminate the occupancy according as they should think proper in the interests of the estate.

Lord Kinnear concurred.

Lord President—I am authorised by Lord Adam to say that he concurs in the judgment we have delivered.

The Court recalled the interlocutor of the Lord Ordinary, opened up the record, and production having been satisfied at the bar, of consent held the preliminary defences to be the defences on the merits; of new closed the record, sustained the reasons for reduction, reduced, decerned, and declared conform to the reductive conclusions of the summons, and also decerned and ordained in terms of the conclusions for removing.

Counsel for the Pursuers — Dundas — Howden. Agents — Mackenzie & Black, W.S.

Counsel for the Defender—Watt—A. M. Anderson. Agents—W. & J. L. Officer, W.S.