the child of the marriage, to the effect that he must be held to be legitimate by reason of the good faith of his parents, I do not think that it is desirable to say more than that, in my opinion, the averments upon which the plea is based are plainly irrelevant and insufficient.

At advising—

LORD JUSTICE-CLERK — The consulted Judges all agree with the opinion of the Lord Ordinary. I also concur in the Lord Ordinary's judgment.

LORD YOUNG — I concur in the result arrived at. I think that by the law of this country, and also upon the authorities, that the children of such a marriage as this are illegitimate.

LORD RUTHERFURD CLARK—I concur with the Lord Ordinary.

LORD TRAYNER—We are asked in this case by the claimant Purves to construe the Act 1567, cap. 15. I think that Act is not now open to construction. It has already been interpreted, as Lord Curriehill observed in the case of *Fenton* v. *Livingstone*, "by a practice of three centuries, by all the institutional writers, and by the Legislature itself." According to that interpretation the marriage now in question is illegal, as contracted by persons within the forbidden degrees. The law so long settled cannot now be altered by any decision of the Court; if it is to be altered at all it must be by the Legislature. I am also of opinion that there is no ground for holding that the claimant Purves is entitled to the *status* of a legitimate child on account of the alleged *bona fides* of his parents.

The Court adhered.

Counsel for the Claimant, the pupil child—R. V. Campbell—Macphail. Agents—Forrester & Davidson, W. S.

Counsel for the Claimants, Miss Fairley and others — Dundas — Orr — Christie. Agents—Simpson & Marwick, W.S.

Wednesday, March 13.

FIRST DIVISION.

[Lord Low, Ordinary.

MONTGOMERIE *v.* VERNON.

Entail—Lease—Lease of House and Grounds — Mansion-House — Possession under Lease—Adequacy of Rent—Trust—Lease to Party holding Fiduciary Relation to Heiress of Entail.

An heiress of entail brought an action for reduction of a twenty-one years' lease of a house and 63 acres of ground granted to the defender by the preceding heir of entail, on the grounds (1) that the house was the mansion-house of the entailed estate; (2) that the lease had never been made real by possession; (3) that the rent was inadequate; and (4) that the tenant was one of a body of trustees to whom she had conveyed her prospective rights in the entailed estate prior to the date of the lease. The evidence showed that the house in question had originally been built as a factor's house, but had been greatly improved and added to. It was the only good house on the estate, the old mansion-house having fallen into disrepair. The house and grounds had been occupied by the defender prior to the date of the lease, at a rent of £104. The lease was granted in view of a proposal by him to spend a considerable sum in improving the house, and after receiving it the defender had expended a sum of over £1100 in this way. The rent stipulated in the lease was £120, and it was provided that the tenant should keep up the house and grounds, but the heir of entail who granted it had not exacted more than the original rent of £104, and had allowed the estate workmen to assist in keeping the grounds. The ground let with the house, and which had previously been let with it, included 45 acres of old pasture. If this pasture had been let separately, it was probable that a larger rent might have been obtained for the whole subjects.

The Court (*aff.* judgment of Lord Low) *assoilzied* the defender, *holding* (1) that the house could not be regarded as the mansion-house of the estate, in respect that it had not been built and had never been used as such; (2) that after the date of the lease the tenant's possession could not be referred to any other title, although its conditions had not been rigorously enforced; (3) that the rent payable under the lease was a fair rent for the house, grounds, and pasture, if let together as previously, and that it was not the duty of the heir of entail who granted the lease to alter the existing state of possession; and (4) that the defender, having had no duty to perform in the character of trustee when the lease was granted, was not barred from accepting it.

Opinion reserved by Lord M'Laren as to whether the lease might have been validly objected to on the ground that an heir of entail was not entitled to let residential property for so long a period as 21 years.

By lease dated 30th October 1886 Archibald William Montgomerie, Earl of Eglinton, heir of entail in possession of the estates of Eglinton and Montgomerie, let to the Hon. Richard Greville Vernon, who was his brother-in-law and the commissioner on said entailed estates, "all and whole the mansion-house of Auchans with the pertinents thereof and land connected therewith conform to plan . . . and that for a period of twenty-one years from and after the term of Martinmas 1886." The granter bound himself and his successors to warrant the lease to the tenant at all hands. The tenant bound himself to pay a rent of

£120, to keep up the whole premises, including dykes, &c., and to insure the house and offices. The extent of ground let was 63 acres.

The Earl of Eglinton died on 30th August 1892, and the estates of Montgomerie, of which the subjects in the lease were a part, passed to Lady Sophia Constance Montgomerie. The bond of entail of the estates contained a clause declaring that it shall not be lawful for the heirs of entail to alienate the entailed estate or any part of it, nor to "grant tacks or rentals thereof for longer space than the granter's lifetime, at least not to set any tacks or rentals thereof in diminution of the rental directly or indirectly longer than the said space." By antenuptial contract of marriage dated 14th and 15th January 1885, Lady Sophia had conveyed her prospective interests in the entailed estates to certain trustees, of whom the Hon. Greville Richard Vernon was one.

On 15th July 1893 Lady Sophia Montgomerie raised an action, with the concurrence of her husband, Samuel Hynman Allenby, against the Hon. Greville Richard Vernon, concluding for the reduction of the lease of 30th October 1886. The objections stated by the pursuer to the validity of the lease were as follows—(1) That Auchans House was the mansion-house of the estate of Montgomerie, and could not therefore be let by any heir of entail for a longer period than his own life; (2) that the lease had never been acted upon or recognised during the life of the granter; (3) that the lease was inadequate; and (4) that the defender, being at the date of the lease one of the marriage-contract trustees to whom she had conveyed all her prospective rights and interests in the Montgomerie estate, was not entitled to take a lease of any part of the estate, at all events for a period after the late Earl's death.

On 1st March 1894 the Lord Ordinary (Low), before answer, allowed the parties a proof of their averments. The result of the proof bearing upon the four objections stated to the validity of the lease was as follows:—(1) It was shown that the lease originated in a proposal by the defender to lay out a large sum of money in the improvement of the house, and that he did in fact expend £1129, 17s. 3d. on that purpose. He spoke to Lord Eglinton on the subject, who told him that he ought not to spend so much unless he had the security of a lease. The lease in question was then executed. The defender had been occupying the subjects for some years previously at a rent of £104, and he continued—by grace of Lord Eglinton—to pay the same rent, and also had the assistance of the estate foresters in keeping the grounds. He carried out the stipulations of the lease with regard to upkeep and insurance. (2) When the Montgomerie estate came into the Eglinton family there was a mansion-house on it known as old Auchans House. It had fallen into disrepair about 100 years before the date of this action, and it would have required the expenditure of a very large sum of money (estimated at from £5000 to £7000) to make it habitable "as a mansion-house." Some rooms in it were occupied by old servants of the family. The existing house had been built in 1820 as a residence for the factor. For some years afterwards it had been occupied by the tenants of the adjoining farm upon the estate, and after being let for a period had been occupied by the successive commissioners on the estate till 1868, when the defender came as commissioner, and he had occupied it from that date. Prior to the year 1889 the Earl of Eglinton had expended £2494 in improvements on the house; of this sum £1900 had been paid out of entailed money belonging to the estate. The defender had in addition expended £1130, and the character of the house had thus been greatly changed by the successive additions and improvements. It had never been occupied by the proprietor of the estate. (3) There was a conflict of evidence as to the adequacy of the rent, it being proved on the one hand that the value of the pasture, of which there were at least 45 acres, was £2 an acre, and that therefore there was only a very small balance left for the rent of the house and garden. On the other hand, it was shown that the defender spent about £70 a-year in the upkeep of the house, without counting the interest on his outlays in improvements. It was also shown that it was not easy to get a large rent for a place of the kind without any sporting rights. (4) It was admitted by the pursuer that he had in 1884 consented to act as a marriage-contract trustee, and that he had received a copy of a deed executed by the pursuer in 1886, appointing an additional annuity to her husband in the event of her death.

The terms of the marriage-contract are sufficiently indicated in the Lord Ordinary's note.

On 6th September 1894 the Lord Ordinary assoilzied the defender from the conclusions of the summons.

"*Opinion.*—In this case Lady Sophia Montgomerie, as heiress of entail in possession of the estates of Montgomerie, seeks reduction of a lease of the house of Auchans and certain grass lands, which was granted to the defender in 1886 by the Earl of Eglinton, the pursuer's father and the then heir in possession of the estates.

"There are four grounds upon which the pursuer contends that she is entitled to reduction.

"1st. That the lease was never acted upon, and is not effectual as a title of possession in a question with her.

"2nd. That Auchans House is the mansion-house of the Montgomerie estate, and that accordingly the late Earl could not grant an effectual lease of it for a longer period than his own life.

"3rd. That the rent stipulated in the lease was inadequate and unfair: and

"4th. That at the date of the lease the defender was one of the trustees under the pursuer's antenuptial contract of marriage, by which she conveyed to the trustees all

her prospective rights and interests in the Montgomerie estate, and the defender was therefore disabled from becoming a tenant of any part of the estate, at all events for any longer period than the life of the Earl of Eglinton.

"I. The first of these grounds of reduction is founded upon the facts that during Lord Eglinton's life the defender did not pay the rent stipulated in the lease, but the smaller rent which he had previously paid; that no alteration was made upon the entry in the valuation roll applicable to the subjects; that the principal lease remained, at all events for some time, in the defender's possession; and that, although by the lease the defender was taken bound to maintain the whole premises at his own expense, Lord Eglinton's work-people continued, as formerly, to do a considerable part of the maintenance without any charge being made against the defender.

"In order to see what weight is to be given to these facts it is necessary to consider the circumstances under which the lease was granted. The defender had spent a good deal of money upon Auchans, and had greatly improved it, and at the time when the lease was granted he contemplated making very considerable alterations upon and additions to the house, at the cost of from £1000 to £1200. The defender spoke to Lord Eglinton upon the subject, and the latter told the defender that he ought not to spend so large a sum upon the house unless he had the security which a lease would give him that he would get the benefit of the expenditure. A lease for twenty-one years was accordingly granted, and the defender made the proposed additions and alterations at the cost of over £1100.

"In these circumstances I do not think that the facts upon which the pursuer relies are of importance. The lease was granted for the defender's security, and it was not unnatural that Lord Eglinton, who was having his house greatly improved, should be content with the rent which he had formerly received from the defender, and should allow the estate servants to assist in keeping the place in order as formerly. It is further to be remembered that the defender was Lord Eglinton's commissioner, and also a relative and an intimate personal friend. In regard to the entry in the valuation roll the amount entered was larger than the rent in the lease, which was fixed upon the footing that the defender was to make a large expenditure upon the house, and bear the whole expense of maintenance. It accordingly did not appear to have occurred to the factor that any alteration upon the valuation roll was necessary. In regard to the lease remaining with the defender I am unable quite to appreciate what is founded upon the fact. The defender was the commissioner upon the estate, and was a proper enough person to have the lease, and when the factor required the lease for estate purposes, he obtained it from the defender.

"In maintaining that the defender never possessed under the lease, the pursuer makes a very serious charge against him. Her case is that the defender did not want a lease, but to please Lord Eglinton he went through the form of executing a lease. The defender, however, according to the pursuer, had no intention of accepting or acting upon the lease, and did not as matter of fact act upon it or possess under it, and it was only upon Lord Eglinton's death that the defender produced the lease and tried to set it up against the pursuer.

"Now, at the time when it was granted, there was no concealment whatever about the lease. Everybody interested was aware that the defender had got a lease, and he himself said in the witness-box that since its date he had possessed under the lease and had expended £1100 upon the house upon the faith of the lease. There is no doubt whatever of the defender's veracity, and if his evidence is true, there is no foundation for the pursuer's argument that the lease was not made real by possession.

"II. The pursuer's argument that Auchans House is the mansion-house of the entailed estate is founded entirely upon the fact that it is described in the lease as the 'mansion-house of Auchans.' But the question whether Auchans was the mansion-house of the Montgomerie estate does not depend upon how it was described in the defender's lease, but upon whether as matter of fact it was then the mansion-house of the estate. Upon that question of fact it seems to me that the evidence leaves no ground for doubt. Auchans has never been the mansion-house of the estate. Originally it was built as a factor's house, and except for a short period, when apparently it was occupied by one of the agricultural tenants upon the estate, it has all along been occupied either by the factor or the commissioner of the Earl of Eglinton.

"III. The question whether the rent stipulated in the lease was fair and adequate is attended with more difficulty. Auchans House, even before the additions recently made by the defender, was a good and commodious house, the garden and pleasure grounds were ample, the stable accommodation was good, and at least forty-five acres of old pasture were let with the house.

"The pasture land is admittedly worth £2 an acre, and therefore a rent of £120 for for the whole subjects is *prima facie* very low. Accordingly a number of men of skill who gave evidence for the pursuer said that the rent was altogether inadequate and unfair, that the house could have been readily let, and that a rent of £250 could have been obtained for the house and ground.

"The defender's witnesses, on the other hand, deponed that Auchans was not a subject that could be easily let, that the rent in the lease compared favourably with that which had been obtained for similar residences in the same part of the country, and that, looking to the expenditure which the defender was to make upon the house, and to his obligation to maintain the whole subjects at his own expense, the rent was full and fair.

"It appears to me that the weight of the

evidence is in favour of the defender's contention that the rent was a fair one.

"Auchans House has not any rights of fishing or shooting attached to it, and it is not disputed that large houses in the country without any sporting rights are often difficult to let. It was, however, said that Auchans is in the centre of a good hunting country, and would therefore attract tenants. The answer to that is that the defender, in 1882, having to go abroad for his health, tried to let Auchans either for a year or part of a year at a rent which would only clear his expenses in keeping up the place, but he was unable to obtain a single offer.

"In the next place, the leading witnesses for the defender, and in particular Messrs Davidson, Smith, and Turner, gave examples of the rent actually obtained for similar places, several of them being in the same part of the country. These examples show that the rent of Auchans does not compare unfavourably with that at which proprietors of similar places are compelled to let them.

"Then there are certain considerations which appear to me to be of importance, and which the pursuer's witnesses leave out of view.

"There is no doubt that the lease was granted upon the understanding that the defender was to expend £1000 to £1200 upon improvements for which he had already obtained plans. The defender, it is true, was not taken bound by the lease to make that expenditure, but that was simply because Lord Eglinton had perfect confidence in him, and it is clear that the object for which the lease was granted was to secure to the defender the benefit of the proposed expenditure. Now, the alterations which were proposed, and actually carried out, greatly improved the house. The staircase was prior to the alterations the narrow winding staircase of the original small factor's house, and was quite unsuitable to the considerable residence which by various additions Auchans had become. The defender proposed to make, and did make, a new and suitable staircase. Then the public rooms were extremely small, and the defender proposed to enlarge them and make them of a size more in keeping with the place and with the rest of the house. That proposal was also carried out. The defender's witnesses say, and I think rightly, that the defender's operations have altogether altered the character of the house. Now, it seems to me to be obvious that when the tenant was to make expenditure of that sort, it was only fair and according to ordinary practice to take it into consideration in fixing the rent.

Again, the defender had proved himself to be an extremely good tenant, who would not allow the house or place to fall into disrepair. That of course is a very important consideration in letting a subject of the kind in question. And the fact of the lease being for twenty-one years secured the landlord against the place standing empty, and against the expenditure which is almost inevitable in the event of a change of tenant.

Now, in considering whether or not a lease granted by an heir of entail is reducible on the ground of inadequate rent, I do not think that it is the function of the Court to enter into nice calculations as to whether a somewhat higher rent might not have been obtained. To set the lease aside, it must, I apprehend, be shown that the rent was obviously inadequate and unfair. In the present case, looking to the evidence, it seems to me to be impossible to say that the rent was obviously inadequate or unfair. Indeed, having regard to the whole circumstances, I rather think that the granting of the lease was a perfectly proper and prudent piece of estate management.

"IV. The fourth ground of reduction appears to me to raise the most serious question in the case. The pursuer's argument was, first, that as one of the trustees under her marriage-contract, to whom her interest in the entailed estates was conveyed, the defender was incapacitated from taking a lease of any part of the estate, because his interest as tenant might come to conflict with his duty as a trustee. The lease was therefore null and void and reducible *ab initio*. In the second place, the pursuer argued that at all events upon the death of the Earl of Eglinton the defender must be regarded as holding the lease, not for his own benefit, but in trust for the pursuer as beneficiary under the marriage-contract.

"The marriage-contract was executed in 1885, and the lease was granted in 1886. The defender had been asked to be, and had consented to be, one of the trustees under the contract. Prior to the date of the lease there was sent to the defender, as one of the marriage trustees, a copy of a deed whereby the pursuer provided an additional annuity to her husband in the event of her death. It does not appear that prior to the date of the lease the defender had acted in any other way as a trustee. It is not disputed, however, that the defender agreed to be a trustee, and has all along regarded himself, and been regarded, as a trustee. I therefore think that the case must be taken on the footing that he was a trustee at the date of the lease.

"It is therefore necessary to see what was conveyed to the trustees by the marriage-contract, and what were the purposes of the trust.

"The marriage-contract narrated that the pursuer was heir-presumptive to the Montgomerie estate under the entail, and that in the event of the succession opening to her she would be entitled to disentail the lands and acquire the same in fee-simple; and that in the event of her father, Lord Eglinton, disentailing the estate, she would be entitled to receive the value in money of her expectancy or interest.

"The pursuer then disponed to her trustees 'All and whole her prospective rights and interests whatsoever in and to the foresaid . . . Montgomerie estate, in the event of the succession thereto opening to her as aforesaid, including in the said conveyance whatever sum or sums of money she may be entitled to receive as the value of her expectancy or interest in the said estate in

the event of the disentail thereof by the present heir in possession as aforesaid; together with the rents, income, and annual proceeds thereof, and generally her whole right, title, and interest therein.'

"The trustees were directed to hold the trust-estate, 1st, for payment of the free income to the pursuer during her life; 2nd, for payment of the annuity provided to her husband; 3rd, for payment of a certain sum to the younger children of the marriage; and lastly, for the conveyance of the fee of the estate to the heirs-male of the pursuer's body, whom failing as therein directed.

"In connection with the first purpose there was this declaration—'Declaring that it shall be competent to the said trustees, if required to do so by the said Lady Sophia Constance Montgomerie, to allow the said rents and income of the trust-estate to be collected, and the said estate generally to be managed by a factor to be named and appointed by the said Lady Sophia Constance Montgomerie, who shall be bound to account for his intromissions and management to her alone, and for whom the said trustees shall be in no way responsible.'

"It is therefore clear that no estate actually came into the possession of the trustees at the date of the contract, and that no estate could come into their possession until either the Earl of Eglinton died or disentailed the estate. Further, in the event of the pursuer succeeding to the estate—the event which I imagine was most likely to happen, and which has happened—the trustees were merely to hold the estate during her lifetime, she being entitled under the declaration which I have just quoted to the management of the property. The trust therefore was one which (unless in the event of a disentail being carried through) could not come into active operation until Lord Eglinton's death, and even then its object was to protect the estate, and to prevent its being alienated or dilapidated, the management being left to the pursuer if she chose to exercise it.

"Such being the nature of the trust, it is not unimportant to observe what were the circumstances under which the lease was granted. Lord Eglinton was at the date of the lease some forty-four years of age, and therefore the probability was that the lease would expire during his lifetime. Further, it was quite possible that the pursuer might never succeed to the estate. She might predecease her father, or he might have a son. Therefore not only had the trust not come into active operation when the lease was granted, but the chances that it would come into operation during the currency of the lease were remote.

"In these circumstances the first question is, was it contrary to the defender's duty as a trustee to accept the lease so as to entitle the pursuer to have it reduced as null and void from the beginning?

"In my opinion that question must be answered in the negative. Of course in a question with Lord Eglinton the lease was unchallengeable. Further, so long as Lord Eglinton lived I do not think that the pursuer could have challenged the lease, because unless and until the succession opened to her I do not see how there could be any conflict between the defender's individual interests and his duty as a trustee; and I do not think that the mere possibility that the succession might open to the pursuer during the currency of the lease rendered it a breach of duty on the defender's part to take the lease. It therefore appears to me to be impossible to hold that the lease was *ab initio* null and void.

"But then the pursuer contended that when the succession opened to her a conflict between the defender's interests as an individual and his duty as a trustee at once arose. The defender therefore could not be allowed to continue to hold the lease for his own benefit, but must be regarded as holding it in trust for the pursuer as *cestui que* trust. The argument is a formidable one, but it appears to me that no such case is presented upon record. The leading conclusions of the summons are for reduction of the lease as null and void *ab initio*, and the conclusion for removing is merely ancillary to the reductive conclusions. Then the only plea-in-law in regard to the fiduciary position of the defender is that 'the lease ought to be reduced in respect that the defender was at the date thereof, and still is, one of the trustees vested in the said subjects for the benefit of the said pursuer.' That is not, in my opinion, a record under which the question whether the defender ought now to be regarded as now holding the lease in trust for the pursuer is or can be raised. And accordingly Mr Dickson, the defender's counsel, did not argue that question at all. His position was—and I think it was one which he was entitled to take up—that there was no notice of any such question in the record, and no conclusions or pleas for determining such a question.

"In these circumstances I express no opinion upon the question of a resulting trust. All that I hold is that the pursuer is not entitled to have the lease reduced as having been bad from the beginning by reason of the fiduciary position held by the defender.

"Upon the whole matter therefore I shall assoilzie the defender, with expenses."

The pursuer reclaimed, and argued—(1) The lease had not actually been made real by possession under and referable to it, which alone would make it good against a singular successor. The defender had simply continued on under his yearly tenancy, paying the same rent, and not that stipulated for in the lease. In the case of *Downie* v. *Campbell*, January 31, 1815, F.C., it was held that, if the granter of a lease died before it had been implemented by the arrival of the term of entry under it, it was not binding on a singular successor; so in this case the lease did not bind the next heirs of entail—In *Kerr* v. *Redhead*, February 5, 1794, 3 Paton, 309, similar principles were expressed; Bell's Prin. secs. 1209-10. (2) Auchans house was the mansion-house of the Montgomerie estate, and accordingly could not be let by

the heir of entail in possession beyond his lifetime—Montgomery Act (10 Geo. III. cap. 51), sec. 6. The evidence showed that there was certainly no other mansion-house on the estate, the original one having fallen into ruin 100 years ago. The letting of this house was alienation of the entailed estate, and not an ordinary act of administration, therefore it was invalid—Sandford on Entails, p. 280 (*note*); *Stirling* v. *Dalrymple*, December 14, 1814, F.C; *Marquis of Ailsa*, June 21, 1853, 15 D. 309. (3) The evidence showed that the rent was quite inadequate. The question was—"At the date of granting the lease, was it an adequate rent, and was the granting of the lease, therefore, an act of ordinary administration?" The Court could not consider the verbal arrangements of the parties as to the rent, but must look at it as it appeared in the lease, and as at the time of granting the lease—*Gray* v. *Skinner*, June 10, 1864, 16 D. 923; *Stewart* v. *Burn-Murdoch*, January 27, 1882, 9 R. 458. (4) The defender was at the time of receiving the lease one of the pursuer's marriage-contract trustees, and the lease was therefore either void *ab initio* or became so on the trust coming into operation. The rules against a trustee being *auctor in rem suam* with regard to the trust-estate were most stringent, and the Court would not even allow an inquiry into the question whether the terms of a bargain were fair or not, but would reduce it at once—*Hamilton* v. *Wright*, March 8, 1839, 1 D. 668, *rev.* August 2, 1842, 1 Bell's App. 574; *Aberdeen Railway Company* v. *Blackie*, July 20, 1853, 1 Macq. 461; *Perston* v. *Perston's Trustees*, January 9, 1863, 1 Macph. 245.

Argued for the defender—(1) He had no title of possession except under the lease. The evidence showed that it was granted him as a guarantee that the money he was to expend and had expended on improvements would not be forfeited by his being turned out at six months' notice. He carried out his obligations of upkeep in conformity with it. The cases quoted against him did not apply, as they only concerned leases which had not come into operation before the granter's death, and this had. (2) He had altered the character of the house by his operations in 1886; it had not been built as a mansion-house, and had never been occupied by the proprietor. It had been built as a factor's house, and had been subsequently let to various tenants. The 6th section of the Montgomery Act regarded the mansion-house as having been "usually in the natural possession of the proprietor," while the 27th section spoke of it as suitable to the estates, and fit for the accommodation of the "heirs of entail." Auchans House did not fulfil either of these requisites. The fact that it had been improved into a good house by the tenants did not make it a mansion-house in the sense of the Act. Moreover, the old mansion-house still existed, was still used to a certain extent, and could be easily made into a suitable residence. The case of *The Marquis of Ailsa* showed that a house which had been originally built for a factor was not a mansion-house—*Cathcart* v. *Schaw*, January 31, 1755, M. 15,399, March 19, 1756, 1 Paton 618; *Queensberry Leases*, July 2, 1819, 1 Bligh. 339, at 519; *Montgomery* v. *Wemyss*, December 17, 1813, 2 Dow, 90; Hunter on Landlord and Tenant, i. 123. (3) The consideration was said to be inadequate, but it would have to be grossly so, or the lease would stand. The evidence showed that the rent was not the only consideration, but that the defender had large outlays in the way of upkeep and improvements. The pursuer had not shown that the result of the lease had been to diminish the rent directly or indirectly. The granting of the lease had been an act of fair administration. (4) There had been no breach of trust. It was not a case of a trustee being *auctor in rem suam*. The trust had not come into operation at the time of the granting of the lease, and might never have done so. All that was conveyed to the marriage-contract trustees was a *spes successionis*, and the defender had acquired his lease from a third person, quite independently of the trust.

At advising—

LORD M'LAREN—This case comes before us on a reclaiming-note by Lady Sophia Constance Montgomerie against an interlocutor of the Lord Ordinary assoilzieing the defender from an action at her instance seeking reduction of a lease granted by her father, the late Earl of Eglinton. On the death of the late Earl the pursuer succeeded to the Montgomerie estate as heiress of entail, the Eglinton estate being destined to heirs-male. The defender was Lord Eglinton's commissioner, and for many years occupied Auchans House, on the Montgomerie estate, as a residence, for which he paid a rent of £104, 5s. 3d. per annum; but in October 1886 he obtained a lease of this residence for twenty-one years at the stipulated rent of £120, and this lease is alleged to be in excess of the powers of Lord Eglinton as heir of entail in possession.

I shall consider the objections to the lease in a somewhat different order from that followed in the Lord Ordinary's judgment, beginning with what I take to be the chief objection,—that Auchans House is the mansion-house of the Montgomerie estate. It is of course a settled rule of entail law that an heir of entail can only let the mansion-house for a period limited to his lifetime. It may be that where an entailed estate consists of lands acquired by different titles but limited to the same heirs, the heir would not be precluded from granting a lease for a fixed term of years of a residence which was originally a mansion-house, but which had ceased to be used as such in consequence of the absorption of the lesser estate in the principal domain. But however that may be, it is perfectly clear that if there are two estates, the one descendible to heirs-male and the other to heirs-female, and especially at a time when the presumptive heirs are different persons, the heir in possession is not entitled by letting the mansion-house of the estate destined to heirs-female to deprive his daughter of the

use of the family residence on the estate to which she thereafter succeeds. Accordingly, the first question for consideration is, whether it has been established that Auchans House is the mansion-house of the Montgomerie estate?

It appears from the evidence taken before the Lord Ordinary that before Montgomerie came into the possession of the Eglinton family there was a mansion-house on the property, now known as Old Auchans House. But after the estates were united, this residence ceased to be occupied, and gradually fell into disrepair, and there is evidence to the effect that an expenditure estimated at about £7000 would be necessary to make the house habitable. It is also proved that the residence now called Auchans House was built for use as a factor's house; that from time to time it has been enlarged and embellished, and that it is now of a character suitable for a proprietor's residence; but that as matter of fact it never has been occupied by the proprietors. The question, what is a mansion-house in the sense of the rule to which I have referred, is not a question of law but of fact, to be determined by common sense. It is certainly a case of hardship that an heir of entail on succeeding to the estate should find that the only suitable residence upon it is let on a lease which has still thirteen years to run, and it would be satisfactory if we could find legal grounds which would put the pursuer in the position of being able to reside on her estate, and to discharge the duties of a resident proprietor. But I have come to be of opinion, in common I believe with all your Lordships, that a residence cannot be regarded as a mansion-house unless it has been appropriated to the uses of a mansion-house, either by having been built for that purpose, or having been used as such; and that, as Auchans House was neither originally designed for a mansion-house, nor ever used as such, Lord Eglinton was entitled to treat it as a commercial subject, and to let it for a fair rent, and for the ordinary term for which such a house would be let by a proprietor in fee-simple.

The next question is, whether this was a fair lease for an adequate rent, and whether it was possessed by the defender in terms of the lease. According to the evidence given by the defender himself, which the Lord Ordinary accepts, and the correctness of which is not impugned, the lease originated in the proposal of the defender to lay out a considerable sum of money in the improvement of the house. Lord Eglinton then said that, if Mr Vernon was going to expend money on improvements, it was only just that he should have a lease, and offered him a lease for twenty-one years at a rental of £120, which Mr Vernon accepted. It is probable that Lord Eglinton, whose expectation of life would exceed that term, looked upon this as a transaction that only concerned his own interest as an heir-of-entail. But it is just as clear that he must have contemplated the possibility that the lease might subsist beyond his own lifetime, because the object of granting the lease was to secure Mr Vernon in the possession of the house for the full period. I think it must also be taken that in fixing the rent at the figure of £120 Lord Eglinton considered that he was fixing a fair rent. That is to my mind an important consideration, because Lord Eglinton would necessarily have some knowledge of the value of his own property, and while his Lordship was doubtless very friendly to Mr Vernon, he was not professing in this matter to confer a favour, but only to put the relations between himself and his tenant on a proper business footing according to his own notion of what was right and fair. Mr Vernon was then holding as an annual tenant at a low rent, probably because he was Lord Eglinton's commissioner, and the rent was raised from £104 to £120, a substantial increase of rent.

Now, there is evidence to the effect that the old pasture which was let with Auchans House was worth at least £90, and it is therefore probable that, if the subject had been broken up and the pasture let separately, a larger sum than £30 could have been got for the house. But then an heir of entail is not bound to alter the existing state and mode of possession in order to secure the largest possible return to himself and his successors. He is entitled to continue the past system of administration. He may not let the property with diminution of the rental if the old rent can be obtained. But if in the present case Lord Eglinton was entitled to let Auchans House on lease, then he fulfilled his obligation to his successors if he stipulated for as good a rent for the house and pasture together as could have been got from a tenant if the place had been put up to competition. The evidence is conflicting as to the rent which might have been obtained, but I agree with the Lord Ordinary, who has examined the evidence very carefully, that it has not been made clear that more than £120 could have been got for the place as an unfurnished residence, and it is notorious that country houses to which no sporting privilege is attached always let for much less than their intrinsic value.

There is another element in the case which has caused some hesitation in my mind—I mean the duration of the lease. An heir of entail is only entitled, in the exercise of his powers of administration, to let the subject on a lease of ordinary duration. If this had been a case of a farm I should not have considered the difference between nineteen and twenty-one years material. But, if I may use my own knowledge on such a question, I should say that twenty-one years is a very exceptional period for the letting of residential property. The circumstance that this was a house which the next heir would very likely desire to occupy is, I think, a reason for looking somewhat strictly at this objection, and I should have thought that a period of from seven to ten years would be more in accordance with custom than twenty-one years. But no objection was taken to the lease on this ground either in the pleadings or at the bar, when, of course, counsel might have proposed a new plea, and for anything

I know it may be customary in Ayrshire to let country-houses for twenty-one years. I have, accordingly, though, as I have said, with some hesitation, come to agree with your Lordships that, as no objection was taken to the duration of the lease, and no proof offered on this head, we are not in a position to consider it; but I should desire to reserve my opinion upon it if the point should hereafter arise for decision.

On the point as to possession following on the lease I shall only say that, in my opinion, from the time the lease was granted the defender necessarily possessed upon the lease and on no other title. I think it is a mere fallacy to say that, because the full rent was not paid, possession was not had upon the lease. Provided the rent agreed on was a fair rent, it is of no consequence that Lord Eglinton did not exact it in full, because that only affected Lord Eglinton himself, and in no way concerns his successor, who will of course receive the agreed-on sum of £120 per annum. If it could have been proved that Lord Eglinton received more than £120 per annum, I need hardly say that the lease could not stand; but in the case supposed the lease would fall, not because the tenant did not possess upon it, but because it would not be a fair lease.

The last objection which I shall notice is that which is founded on the fact that the defender is a trustee under the contract of marriage between Mr Allenby and Lady Sophia under which the lady's interest in the entailed estate is conveyed. Now, under this contract of marriage, for the particulars of which I refer to the Lord Ordinary's judgment, it is plain that Mr Vernon's duty as a trustee would only commence on Lord Eglinton's death, or in the event of the disentail of the Montgomerie estate. At the time when he accepted this lease the defender had no duty to perform in the character of a trustee, and the lease was not in any real sense a lease of trust-estate. The rule against purchases of trust-estate by trustees has been, and will be, strictly applied by the Court, but I see no reason of convenience or justice for extending it to a case like the present, where the trustee has only a bare title to the estate, or rather to a contingent interest in it. In all the circumstances I am of opinion that the Lord Ordinary's judgment is well founded.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuer — Rankine — Dundas — Wilson. Agents — Dundas & Wilson, C.S.

Counsel for the Defender—C. S. Dickson —W. Campbell. Agents—Blair & Finlay, W.S.

Saturday, March 16.

SECOND DIVISION.

[Sheriff of Inverness.

FRASER *v.* CAMPBELL, &c.

Property—Mutual Gable—Acquiescence—Toleration.

A built a house in 1841 upon ground to which he had no title. He constructed the south gable with two fireplaces and vents and with band-stones on its external face. In 1863 B erected a house on the adjoining site, to which he had no title, and in doing so made use of the south wall of A's house. In 1878 B took possession of one of the fireplaces in this wall and boarded up the other. No objection was taken by A to his doing so. The sites of both houses belonged to the same proprietor. A acquired a title in 1878 to "that piece of ground on which" his house was built. B acquired a title in 1892, in which his house was described as bounded on the north by A's house. In 1894 A intimated to B that he proposed to use the fireplaces in the south wall of his house, whereupon B applied for interdict against his doing so.

Held (1) that the wall in question was built entirely in A's ground and was therefore not a mutual gable; (2) that A was not barred by acquiescence from asserting an exclusive right to its use.

This was an action in the Sheriff Court of Inverness, in which William Fraser, baker, Fort-William, sought to interdict Robert Campbell, plumber, as curator for his pupil children, proprietors of a house in Gordon Square, Fort-William, "from breaking into the south gable of said house, which is a common gable, and has been so used and possessed by the pursuer and his authors since 1864, *i.e.*, before defenders' authors acquired a feudal title to the same, and connecting fireplaces, which he has declared his intention of building therein, with vents drawing smoke from pursuer's fireplaces in that gable."

The defenders' house had been built by John Rankin, boatman, Fort-William, on the site of an old house which had been occupied by his grandfather. Rankin had no title to the ground on which the house stood, but on 3rd April 1878 his successor obtained a feu-charter from Mrs Campbell of Callart, the superior of Fort-William, in which the ground on which the house stood was conveyed to him. The subjects conveyed were described as "All and Whole that piece of ground on which is built a tenement of two storeys, lying on the west side of the square commonly called Priest's Square, situated in the west end of Fort-William, and bounded as follows, viz., . . . on the south by unfeued property sometime belonging to Kenneth Cameron, and now or lately to John Cameron, Doctor of Medicine, Arisaig, along which it extends 20 feet." . . . The property was bought by the pupil defenders' grandfather on May 10, 1878.