of the estate should be made available for her."

At the hearing counsel for the petitioners referred to Trusts (Scotland) Act 1867 (30 and 31 Vict. cap. 97), sec. 7; *Pattison and Others*, February 19, 1870, 8 Macph. 575, 7 S.L.R. 323; *Ross's Trustees*, July 14, 1894, 21 R. 995, 31 S.L.R. 812; *Normand's Trustees* v. *Normand*, March 9, 1900, 2 F. 726, 37 S.L.R. 517.

LORD JUSTICE-CLERK—I think this is a proper case in which to give power to the trustees to make payments out of the income of this young lady's prospective share of the funds held by them for her maintenance and education. My view is, however, that the whole free income of her share should not be paid over, but that £150 a-year will be enough.

LORD TRAYNER—I concur. It is always a delicate matter to deal with the capital or interest of a fund which has not vested, but the Court has power to do so in special circumstances. In this case we have not the duty of protecting contingent interests; we are dealing with the income of a fund which will fall into intestacy if this young lady does not attain the age of twenty-one. Further, the trustees do not oppose the petition. In these special circumstances I think we should authorise a payment of £150 per annum for the next five years. At the end of that time the petitioner will have attained majority.

LORD MONCREIFF—I am of the same opinion. There is no doubt we have power to grant the prayer of the petition, and I think it is a strong enough case for doing so. I agree as to the amount of the annual payment that we should allow.

LORD YOUNG was absent.

The Court authorised a payment of £150 per annum for five years.

Counsel for the Petitioners—C. H. Brown. Agent—F. J. Martin, W.S.

Friday, March 11.

FIRST DIVISION.

]Lord Low, Ordinary.

M'DOWEL *v.* M'DOWEL'S TRUSTEES.

Entail—Lease—Statutory Nullity—Montgomery Act (10 *Geo. III. cap.* 51), *secs.* 4 *and* 5.

By the Montgomery Act (sections 4 and 5) powers are conferred on heirs of entail in possession to grant building leases for a period not exceeding ninety-nine years, provided 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 ten pounds 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."

In 1877, in a lease purporting to be granted under the powers conferred by the Montgomery Act, an heir of entail in possession let a piece of ground about half an acre in extent on which there was already a cottage. The lease contained a clause declaring that it should be void "if one dwelling-house at least (not under the value of £10 sterling) has not been or shall not be built for each half acre of ground leased within the space of ten years." The cottage in question was subsequently enlarged at the expense of the lessor, but no buildings were erected by the lessee.

In an action of reduction brought by the succeeding heir of entail in possession in 1902, *held* that the lease was not a valid exercise of the power conferred by the statute, and decree of reduction *granted*.

Discharge—Terms of Discharge to Administratrix of Estate Held to Cover Arrears of Rent Due from Her as Tenant.

An heir of entail in possession of an entailed estate, being in financial difficulty, entered into an arrangement with his mother, who during his minority had administered his estate, and in pursuance thereof disentailed the estate and of new entailed it upon her, whom failing, upon himself and other heirs. He subsequently brought an action of reduction of all the deeds giving effect to the arrangement, and this action was settled by joint-minute whereby reduction was allowed. The joint-minute bore, "1 (*a*) that the parties had finally adjusted and approved of all accounts and all matters of administration and management between them, and all subjects of difference and dispute, and (*b*) that they admitted and acknowledged that all sums of money and balances under said accounting due to or by either party or their factors or agents had been fully accounted for and paid to the parties entitled thereto." In a later action brought by him, in which he sought reduction of a lease under which she held a certain part of the entailed estate, and sued for the past-due rents and for violent profits for the possession of other subjects possessed along with those held under the lease, *held* that the sums sued for were covered by the terms of the joint-minute.

The estate of Gillespie and Craignarget in the county of Wigtown was entailed by deed of entail, dated in 1852 and recorded in 1872, whereby it was expressly provided that it should not be lawful for any heir of entail to set tacks of any part of the lands for a longer period than twenty-one years, or for a grassum or beneficial interest other than the rent, or under the highest rent that could be got for the time from a good tenant, or to grant tacks of the mansion-house for a longer period than the

lifetime of the heir in possession, subject always to the right of the heirs of entail to avail themselves of the powers conferred upon them by the Acts 10 Geo. III. cap. 51, and 5 Geo. IV. cap. 37.

In 1872 William Young M'Dowel succeeded to the estate, on which there was no mansion-house save a cottage built and used occasionally for shooting purposes by himself while heir-apparent. In 1877 he, purporting to be acting under the powers conferred by the Act 10 Geo. III. cap. 51, granted to his wife Mrs Mary Moore or Young M'Dowel, the defender in the present action, a lease of this ground, about half an acre in extent, on which this cottage stood, for ninety-nine years, at a rent of £3. The lease contained a clause that it should be void "if one dwelling-house at least (not under the value of £10 sterling) has not been or shall not be built for each half acre of ground leased within the space of ten years." In 1879 he entered into contracts for the improvement of the cottage, which was known as Craig Lodge. In 1880 he died, but the contracts were completed after that date, and the contractors were paid from his bank account.

William Richard O'Dowel Young M'Dowel, son of the last heir in possession, and the said Mrs Mary Young M'Dowel, succeeded to the estate, which during his minority was administered by his mother. On his attaining majority he granted her a discharge of her whole intromissions upon certain accounts submitted to him, and a subsequent action between them, in which he sought to reduce a transaction whereby he had disentailed the estate and of new entailed it upon her, whom failing, himself and other heirs, was on 20th July 1901 settled by a joint-minute, which, allowing the reduction, included the condition, "1 (*a*) that the parties had finally adjusted and approved of all accounts and all matters of administration and management between them, and all subjects of difference and dispute; and (*b*) that they admitted and acknowledged that all sums of money and balances under said accounting due to or by either party or their factors or agents had been fully accounted for and paid to the parties entitled thereto."

On 10th February 1902 the said William Richard O'Dowel Young M'Dowel and his marriage-contract trustees raised an action against the said Mrs Mary Young M'Dowel, in which they sought (1) reduction of the said lease; (2) decree of removing from the said subjects included in it, and certain other subjects which had come to be possessed with them; and (3) payment of the rent stipulated for under the lease which had never been paid, and for certain sums as violent profits of the other subjects. They pleaded, *inter alia*—(2) The lease sought to be reduced "not having been granted for a purpose within the scope and intendment of the Act 10 Geo. III. cap. 51, or under the powers thereby conferred, ought to be reduced as concluded for. (5) No dwelling-house having been erected by the defender on the said piece of ground which the said lease purports to let within the period of ten years from its date, the same, if originally valid, was thereby irritated, and then became, and was and is null and void."

(There were also pleas relative to an averment that the rent was inadequate and illusory, which it is not necessary to quote for the purposes of this report.)

In answer to the conclusions for payment the defender pleaded, *inter alia*—"(7) In respect of the discharge and joint-minute condescended on the defender is entitled to absolvitor from the pecuniary conclusions."

The Act 10 Geo. III. c. 51 (the Montgomery Act), sec. 4, provides—"And 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 lands for the purpose of building: Be it therefore enacted . . . that it shall be and it is hereby declared to be in the power of every proprietor of an entailed estate to grant leases of land for the purpose of building for any number of years not exceeding ninety-nine years: 5. Provided always that not more than five acres shall be granted to any one person, . . . 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 ten pounds 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, and that the said houses shall be kept in good tenantable and sufficient repair."

Proof was allowed and led.

On 12th November 1903 the Lord Ordinary (Low) granted decree of reduction of the lease, and decree of removing from the subjects therein included, and those possessed along with them, and assoilzied the defender from the pecuniary conclusions.

Opinion—"The leading conclusion of the summons in this action is for reduction of a lease dated 1st February 1877 of part of the entailed estate of Gillespie for a period of ninety-nine years, granted in favour of the defender by her husband, the late Captain M'Dowel, who was then heir of entail in possession.

"The lease purports to be granted in pursuance of the power conferred upon heirs of entail by the Montgomery Act to grant leases of land for the purpose of building. It was not, however, a building lease in the proper sense of the term. Captain M'Dowel had built a house upon the piece of ground which was described in the lease, and he was anxious to secure it to his wife as a residence in the event of his death. It was with that object that he granted the lease. The lease itself narrates that Mrs M'Dowel, 'with the assistance of' Captain M'Dowel, 'has erected a dwelling-house or houses known as Craig Lodge and office-houses on a portion of the estate of Gillespie after mentioned, and that the

said' Captain M'Dowel 'is desirous of taking advantage of the foresaid provisions of the before-recited Act' (the Montgomery Act) 'for granting a long lease of said houses and ground attached.' Upon that narrative Captain M'Dowel let to the defender the enclosed ground upon which the house was built, and which extended to about half-an-acre, 'together with all the foresaid buildings or houses erected thereon.'

"So far therefore the lease was not a building lease at all, but a lease of a house already built. Further, the narrative which I have quoted was not in accordance with fact. The house had been built entirely by Captain M'Dowel, and I can imagine no reason for it being stated in the lease that the house had been built by Mrs M'Dowel with the assistance of her husband, unless it was to give the lease more the appearance of a *bona fide* building lease.

"No obligation was laid upon Mrs M'Dowel to build upon the ground, but it was declared that 'this lease shall be void if one dwelling-house at least (not under the value of £10 sterling) has not been or shall not be built for each half-acre of ground leased within the space of ten years.' That clause is not in conformity with the condition which the statute (section 5) requires to be inserted in a building-lease — the condition, namely, that the lease shall be void if one dwelling-house at least not under the value of £10 sterling shall not be built within the space of ten years. The words 'has not been' were therefore not warranted by the statute, and were evidently inserted because the lease was not a lease for the purpose of building, but a lease of a house already built. The natural meaning of the clause in the lease which I have quoted appears to me to be that the lease shall not be void if at its date a dwelling-house not under the value of £10 had been built, even although no other house should be built within ten years thereafter.

"The position of matters therefore is this — The statute, upon the narrative that 'the building of villages and houses upon entailed estates may in many cases be beneficial to the public,' empowered heirs-of-entail 'to grant leases of land for the purpose of building for any number of years not exceeding ninety-nine years.' The lease in question, however, is not, and does not bear to be, a lease for the purpose of building, but expressly states that its object is to give a long lease to Mrs M'Dowel of houses already built, with the ground attached. In the next place, as I have just pointed out, although the condition made imperative by the statute, that the lease shall be null if houses are not built of the nature and within the time specified, is inserted, it is qualified by an alternative for which the statute contains no warrant.

"Now, the Montgomery Act is an enabling statute which falls to be strictly construed and strictly followed, and I do not think that a lease which is disconform to the statutory provisions in the essential particulars which I have pointed out, can be sustained as a good and valid exercise of the power conferred by the Act. . . .

"The pursuer further claims payment of £63, being the rent stipulated in the lease for the period during which the defender occupied the house under the lease. It is not disputed that the rent has never been paid, but it is said that the claim has been discharged.

"The defender founds, in the first place, upon a formal discharge granted to her by the pursuer in 1895, whereby he discharged her of her whole intromissions with his estate as tutor, guardian, and curator during his minority. I confess that the discharge does not appear to me to be entitled to much weight. The pursuer's estates under the defender's management during his minority were of considerable extent, he had no independent advice when he granted the discharge, and there was no independent audit of the defender's accounts. The pursuer says that he never saw the accounts, and although I think that he must be mistaken on that point, I have no doubt that he did not examine them. Even if he had examined them, probably he would not have understood them, as he had no business training whatever, and it is not easy for a young man of twenty-one in that position to check estate accounts extending over a period of fifteen years.

"Even, however, if the discharge was an instrument of a much more binding character than it appears to me to be, I do not think that it would bar the claim with which I am dealing. I assume that the failure of the defender to pay or account for the rent was an oversight on her part, and therefore I do not think that the discharge bars the present claim any more than it would bar the correction of an arithmetical error.

"A more formidable defence to the claim, however, arises from the terms of settlement of an action which was brought by the pursuer against the defender in 1900. It appears that in 1899 the pursuer was in money difficulties, and he entered into an agreement with the defender to the effect that she was to pay him an annuity of £300 a-year, and he was to make over to her the estate of Gillespie for her life. The pursuer accordingly carried through a disentail of the estate, borrowed £850 upon the security thereof, and then executed a new entail of the estate in favour of the defender, whom failing, of himself and the heirs of his body, whom failing, of a son of Mr Matthews, the defender's law-agent, and who was also a cousin of the defender. In return the defender granted to the pursuer a bond for payment of £300 a-year during his life or during her life if she should predecease him.

"In 1900 the pursuer brought an action to have the transaction set aside and the entail reduced. He averred that he had been induced to enter into the transaction by fraud and misrepresentation on the part of the defender and Mr Matthews.

"The action, however, was settled in terms of a joint-minute, whereby the pursuer withdrew all allegations against the character and conduct of Mr Matthews (who was called as a defender), and the parties agree that decree of reduction should be pronounced. The minute also stated:—'(*a*) That the parties had finally adjusted and approved of all accounts and of all matters of administration and management between them, and all subjects of difference and dispute; and (*b*) that they admitted and acknowledged that all sums of money and balances under said accounting due to or by either party or their factors or agents had been fully accounted for and paid to the parties entitled thereto.'

"These are very wide words, and the question is, what do they cover? Mr Matthews on the one hand, and the pursuer's agent Mr Guild on the other, gave evidence as to what they understood the scope of the settlement to be. I think that that was not competent evidence. The Court must determine what is the meaning and scope of the joint-minute upon a construction of the language actually used when read in the light of the circumstances in which the settlement was made. It appears from Mr Guild's evidence that certain accounts had been produced relating to the short period during which the defender had been in possession of the estate under the deed of entail which was under reduction, and it was contended that the settlement referred only to these accounts and that period. If so, I think that the language in which the terms of settlement were expressed were very badly chosen, because the natural inference from it seems to me to be that the parties intended to secure as far as possible that there should be no further disputes or litigation between mother and son; and it is plain that the circumstances were such that questions and disputes between them might be apprehended as likely to arise. The pursuer's affairs had been entirely in the hands of his mother during a long minority, and even after he came of age, and there had never been any proper accounting between them. Further, one would have expected, looking to the value of the pursuer's estate, that accumulations of income would have taken place during the pursuer's minority, but instead of that being the case the discharge of 1895, to which I have already referred, shows that a very considerable sum was brought out as being due to the defender on account of her intromissions. Such a position of matters gave ample material for differences and disputes, and was in view of the pursuer's advisers (although they may not then have ascertained the details) when the reduction of the entail was brought, as appears from the averments in the second article of the condescendence in that case. It was there averred that the pursuer 'was allowed no share of control or management, and was kept in ignorance of the particulars of the estate, its rental, its value, and even of the nature and extent of his and his mother's rights in it,' and that 'he was thus not only ignorant of his affairs, but was kept in absolute dependence on his mother, who with Mr Matthews took exclusive charge of his estate.'

"In these circumstances it seems to me that the natural meaning of the joint-minute was that the pursuer was to rest content with recovering his estate, and was not to raise any questions in regard to his mother's administration and management of his affairs. That such should have been the terms of settlement of a very painful case between mother and son seems to me in the circumstances not to have been unnatural. If that be a sound construction of the joint-minute, then I think that it bars the pursuer from claiming payment of the arrears of rent due under the long lease for the period during which the defender was in the management of his estate. In regard to the few years between the pursuer's attainment of majority and the date of the settlement (20th July 1901), I think that the claim falls within the acknowledgment in the joint-minute that all sums of money and balances due to or by either party had been fully accounted for and paid.

"The next petitory conclusion of the summons is for payment of the sum of £130 as violent profits for the defender's possession of about half an acre of ground, which, along with the piece of ground in the long lease, forms the enclosed ground upon which Craig Lodge is situated. The circumstances in which that ground came to be taken in were these. Shortly before his death Captain M'Dowel commenced to build an addition to Craig Lodge, which was finished by the defender after his death. It was in view of the addition, and for the purpose of giving a suitable access to the enlarged house, that the piece of ground in question was taken in by—I understand — Captain M'Dowel. It is therefore not a case of the defender having herself annexed a part of the pursuer's estate, and I see no reason to suppose that she did not possess the ground in good faith, or that it ever occurred to her that it was her duty, as her son's guardian and curator, to pay the value of the ground to him. In these circumstances I think that this claim also fairly falls within the scope of the settlement of the action of reduction of the entail.

"The summons next concludes for payment of £50 in respect of a small piece of ground—apparently about one-twentieth part of an acre—upon which in 1890 the defender erected an iron house, which was occupied by her gardener. This claim is one to which I am not disposed to give effect. When the house was put up the pursuer was about seventeen years of age, and Craig Lodge was his home. He must have known of the erection of the house, and that it was put up because there was no place at Craig Lodge where a gardener could be accommodated. Further, the house appears to have been put upon a piece of waste ground which was practically of no value.

"Finally, the pursuer claims payment of £15 in respect of a paddock which it is said the defender occupied for three years. The facts appear to be these. The pursuer took into his own hands a small grass field which formed part of the farm of Gillespie. His reason for doing so was that he intended to breed horses, and he erected some loose boxes in the field. He, however, soon afterwards sold his horses and went from home without making any arrangement as to what was to be done with the paddock. The defender says that one year, after consulting her son, she let the grazing of the paddock for £5, and another year she had the grass cut and made into hay in order to prevent it being wasted. She was not asked what price she got for the hay, nor whether she paid the £5 of rent which she received to the pursuer, but I suppose that she did not do so. If, however, the defender is due money to the pursuer in respect of the paddock, it is because she acted as his agent in the matter, and not because she took possession of the paddock for her own purposes. Now, what is claimed in the summons in this action is violent profits for illegal possession of the paddock, and even assuming that under that conclusion decree could be given for a sum actually received by the defender as the pursuer's agent, it seems to me that such a claim is excluded by the terms of the settlement in the entail action.

"I shall therefore grant decree of reduction of the long lease, and also decree of removing from the additional ground at Craig Lodge, and from the ground upon which the gardener's house stands; and, for the reasons which I have given, I shall assoilzie the defender from the remaining conclusions."

The defender reclaimed, and argued—(1) The lease was good, for it was quite a valid exercise of the power conferred by the statute. There was nothing to prevent the heir of entail in possession leasing ground because there were already buildings on it, and although in doing so the old buildings had been used, still the requirement of the statute, viz., that since the date of the lease and within ten years thereof a dwelling-house of over £10 in value should be erected, had been fulfilled. The interjected words in the lease "has not been or" were to be held *pro non scripto*, and were quite unnecessary. Without them the lease was in statutory form, and the rent stipulated for was, considering the situation, adequate. (2) The pecuniary conclusions the Lord Ordinary was right in holding as covered expressly by the words of the joint-minute settling the former action.

Argued for the respondents—This was not a valid exercise of the power conferred by the statute. The preamble showed that it was labourers' cottages which were intended, not a dower-house. Then what was leased was not land for building but a house, and it was idle to contend that an alteration was sufficient, for then some trifling addition would be enough to keep the heir of entail out of possibly the to him most valuable part of his estate. The statute must be strictly observed and could not cover this lease, which was also bad on the ground of the inadequacy of the rent—*Carrick* v. *Miller*, June 15, 1868, 6 Macph. (H.L.) 101, 5 S.L.R. 623; *Stewart* v. *Burn Murdoch*, June 27, 1882, 9 R. 458, 19 S.L.R. 366; *Gray* v. *Skinner*, June 10, 1854, 16 D. 923. (2) The Lord Ordinary had erred in holding that the joint-minute in the previous action barred the pecuniary conclusions in this one. It no doubt covered all known acts of administration, but this was a question of which the respondent had and could have no knowledge. It was indeed not a question of administration but a question between landlord and tenant for the recovery of rent. That could only be known after possession of an estate and an inquiry as to what was included in it and how the different subjects were held. This lease was unknown to the respondent M'Dowel at the time of the minute—*Greenock Bank Company* v. *Smith*, July 17, 1844, 6 D. 1340; *Dickson* v. *Halbert*, February 17, 1854, 16 D. 586; *Purdon* v. *Rowat's Trustees*, December 19, 1856, 19 D. 206; *Smith Cunninghame* v. *Anstruther's Trustees*, March 18, 1869, 7 Macph. 689, 6 S.L.R. 446; *Dalmellington Iron Company* v. *Glasgow and South-Western Railway Company*, February 26, 1889, 16 R. 523, 26 S.L.R. 373.

At advising—

LORD PRESIDENT—The main question in this case is whether the Lord Ordinary is right in giving decree of reduction of a lease, dated 1st February 1877, of a portion of the entailed estate of Gillespie for ninety-nine years, granted by the late Captain M'Dowel, who was then the heir of entail in possession of that estate, in favour of the defender, who was then his wife.

While the lease now in question bears to have been granted in exercise of the powers conferred upon heirs of entail by the Montgomery Act, it was not a lease for the purpose of building within the meaning of that Act. Captain M'Dowel had already prior to the granting of the lease built a dwelling-house upon the piece of ground which purports to have been let by the lease, and he was desirous that this house should be secured as a residence for his wife, the defender, in the event of his predeceasing her. The lease proceeds upon the narrative that the defender, with the assistance of Captain M'Dowel, "has erected a dwelling-house or houses known as Craig Lodge, and office houses, on a portion of the estate of Gillespie after mentioned," and that he "is desirous of taking advantage of the provisions of the Montgomery Act" for granting a long lease of the said houses and ground attached. Upon this recital Captain M'Dowel granted to the defender the lease of the ground (extending to about half an acre) upon which the house had already been built, "together with all the foresaid buildings or houses erected thereon.

I am, however, of opinion that the lease was not a building lease in the sense of

the Montgomery Act—that is to say, a ease of ground unbuilt on with a view to buildings being erected upon it, but a lease of a house which had been already built, not in exercise of the powers conferred by, and without reference or regard to, the provisions of the Act. It further appears that the house had not been built by or at the cost of Mrs M'Dowel, but exclusively at the cost of Captain M'Dowel.

No obligation was imposed by the lease upon Mrs M'Dowel to build upon the ground, as would have been done in a building lease granted in exercise of the powers conferred by the Montgomery Act, and it contains the somewhat singular declaration "that this lease shall be void if one dwelling-house at least, not under the value of £10 sterling, has not been, or shall not be, built for each half acre of ground leased within the space of ten years." There is no warrant in the Montgomery Act for such a declaration as this, the ground for a voidance of the lease under the Act being, if one dwelling-house at least not under the value of £10 sterling shall not be built within the space of ten years. In other words, the statute relates to and provides for houses to be built after the granting of the lease, not to or for houses already built at its date. It appears to me that in order to a lease receiving the protection of the Act, it must have been granted, *modo et forma*, in exercise of the powers conferred by the Act, and the Act contains no warrant for the enfranchisement of buildings erected on the ground prior to the date of a lease granted under it. For these reasons I concur with the Lord Ordinary in thinking that the lease cannot be sustained as being a valid and effectual exercise of the powers conferred by the Act.

[*His Lordship then dealt with the question of the inadequacy of the rent.*]

For these reasons I am of opinion that the Lord Ordinary is right in holding that the lease is reducible at the instance of the pursuer.

The pursuer further demands payment of £63, being the rent stipulated in the lease for the period throughout which the defender occupied the premises let under it. The defender does not allege that the stipulated rent was paid, but she contends that the claim for it has been acquitted by a discharge granted to her by the pursuer in 1895, under which she was discharged of her whole intromissions with his estate as tutor, guardian, or curator during his minority. This plea is not put forward under favourable circumstances, as the pursuer had no independent advice while the estates were under the defender's management during his minority, and it appears that there was no independent audit of her accounts. The Lord Ordinary takes the view most favourable to the defender by assuming that her failure to pay the rent was an oversight, and I agree with him in thinking that, looking to the circumstances under which the discharge was granted, it might still be competent to correct her curatory accounts by debiting her with the sums not yet paid. I find no evidence going to show that any equivalent was given for these sums, or that any agreement was entered into that they should not be paid, and I concur with the Lord Ordinary in thinking that it would not be safe to hold that the present claim was excluded by any discharge.

The defender further pleads in answer to this claim that it is excluded by the terms upon which an action raised by the pursuer against the defender in 1900 was settled. In 1899 the pursuer being pecuniarily embarrassed, agreed with the defender that she should pay to him an annuity of £300, and that he should make over to her for her life the estate of Gillespie. He accordingly disentailed that estate, borrowed £850 on the security of it, and afterwards executed a new entail in favour of the defender, whom failing of himself and the heirs of his body, whom failing another person, and in consideration for this the defender granted to him a bond for £300 a-year during his life or during her life if he survived her.

The pursuer in 1900 raised an action of reduction of this transaction, and of the entail, and it was agreed that decree of reduction should be pronounced. The joint-minute between the parties also bore that they had finally adjusted and approved of all accounts, and of all matters of administration and management between them, and all subjects of difference and dispute, and that they admitted and acknowledged that all sums of money and balances under the accounting, due to or by either party, or their factors or agents, had been fully accounted for and paid to the parties entitled thereto. The Lord Ordinary states in his note the circumstances under which this discharge was granted, and it is unnecessary to repeat them here. In the result he arrives at the conclusion that the natural meaning of the joint-minute was that the pursuer should rest content with recovering his estate, and should not raise any question as to the defender's administration and management of that estate, and that it bars the pursuer from claiming the arrears of rent due for the period throughout which the defender managed the estate. With respect to the period between the pursuer's attaining majority and the date of the settlement (20th July 1901), the Lord Ordinary expresses the view that the claim falls within the acknowledgment of the joint-minute that all sums of money or balances, due by or to either party, had been fully accounted for and paid, and I concur with him in this view. It is plainly desirable in the interest of both parties that the litigation between them, which has already gone on too long, should come to an end.

The pursuer's claim for £130 as violent profits for the defender's possession of about half-an-acre of ground also appears to the Lord Ordinary to fall within the scope of the settlement of the action of reduction just mentioned, and I am of opinion that in so holding he is right. I also think that the claim for £50 in

respect of a small piece of ground upon which the defender in 1890 erected an iron house for the occupation of a gardener fails, and that the pursuer's claim of £15 in respect of a paddock which the defender occupied for three years also fails, for the reasons given by the Lord Ordinary.

Upon the whole matter I am of opinion that the Lord Ordinary's judgment of 12th November 1903 should be adhered to.

LORD M'LAREN—I concur, and I may say that as regards the question raised by the reductive conclusions I should prefer to rest my judgment upon the first of the two grounds treated by the Lord Ordinary, that is to say, that while the Montgomery Act authorises an improvement lease upon the condition that a house of a certain value shall be built upon the ground, this lease makes it a condition that a house of that value has been or shall be erected on the ground. Now, that is not a lease in terms of the statute, because the condition of the lease would be completely fulfilled if the tenant had done nothing at all to the existing house on the ground. I should not wish to say or imply that under no circumstances could a Montgomery lease be sustained if there was already a building on the ground, because I think it would be a question of circumstances. On the one hand, I think it would be very difficult to say that if a lease were granted of, say, a jointure house, or anything equivalent to a good residence, upon condition that building to the value of £10 should be added—that is to say, you might add a coal cellar to a mansion-house—that would be within a good Montgomery lease; and on the other hand, if the lease was a lease of land with a ruinous cottage upon it, which the tenant desired to pull down with the view of erecting buildings of a more substantial kind, I should not see any reason why that should be excluded from the power of the heir of entail in possession under the Montgomery Act. It seems to me that once you have in a lease the condition of the statute binding the tenant to put up buildings to the statutory amount it must then be a question of circumstances whether the land proposed to be given under these conditions is or is not such property as the Act of Parliament contemplated. But we avoid that question in the present case, because we are all of opinion that a lease which does not have the condition prescribed by this statute is a lease for which the heir of entail cannot claim the benefit of the statute—that it is, on the contrary, a contravention of the provisions of it. With regard to the pecuniary conclusions, I adopt the view of your Lordship and the Lord Ordinary.

LORD KINNEAR—I concur with your Lordships and for the same reasons; and I would only add that I agree with Lord M'Laren that there is no necessity for laying down any general rule that a lease can never be sustained as valid under the Montgomery Act if a building has been already erected on the subject let; and for myself I am not prepared to lay down any such general rule. I think with Lord M'Laren that the question we have to determine is, whether the particular lease before us, considered with reference to the circumstances and the condition of the entailed estate at the time it was granted, is or is not a good lease under the Montgomery Act. Now the Montgomery Act authorises a long lease for the purpose of building cottages and villages for the improvement of the entailed estate. I think upon consideration of the terms of the lease with reference to the evidence it is clear that the lease under reduction was not granted in the fair exercise of the powers of that statute or for the purposes of the statute. It was really intended as a provision by the heir of entail in possession for his wife. That was no doubt a very laudable purpose; and the provision itself may be a very proper one for aught I know, but it is not authorised by the deed of entail or by any provision of the entail statutes; and, what is more to the point in this particular case, it is not authorised by the Montgomery Act. For the reasons given in detail by your Lordship in the chair, I think that that proposition is clearly made out; and therefore that we must adhere to the Lord Ordinary's judgment. As to the pecuniary conclusions, on these also I agree with your Lordships that the Lord Ordinary's interlocutor should be affirmed.

LORD PRESIDENT—Lord Adam, who heard the case, and is hearing a proof to-day, asked me to say he entirely concurs in the judgment proposed.

The Court adhered to the judgment of the Lord Ordinary.

Counsel for the Appellant—H. Johnston, K.C.—Graham Stewart. Agents—Mylne & Campbell, W.S.

Counsel for the Respondents—Salvesen, K.C.—W. Mitchell. Agents—Guild & Guild, W.S.

Friday March 11.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

TAIT *v.* MUIR AND OTHERS.

Judicial Factor—Title to Sue—Action of Reduction at Instance of Judicial Factor.

It being necessary to ascertain the state of the funds of an incorporation with a view to adjusting a scheme for the application of those funds, *held* (*aff.* judgment of Lord Stormonth Darling) that a judicial factor on the estate of the incorporation had a title to sue an action of reduction of certain of its resolutions carried prior to his appointment against a party upon whom an expectant interest was conferred by the resolutions under reduction.

Sequel to *Tait* v. *Muir*, December 19, 1902, 5 F. 288, 40 S.L.R. 242.