Gallagher died on 6th February, 1905, and on his death plaintiffs became entitled to an estate in fee simple in the lands; that John Oliver and R. A. Gallagher had no power to make a lease of the lands for a longer term than the life of R. A. Gallagher; that the lease was not made in pursuance of or in conformity with the requirements of the Settled Estates Act, in that the lease was not an ordinary lease, as contemplated by that Act, but was in effect a building lease, and in that the lease was made without impeachment of waste, and in that the rent reserved by the lease was not the best rent that could have been reasonably obtained therefor, but was an inadequate and insufficient rental; that, even if the lease had been made in conformity with the provisions of the Settled Estates Act, it was not binding upon or good as against plaintiffs; that defendant was in possession of the lands, and had excluded plaintiffs therefrom; that, upon the death of the life tenant, plaintiffs repudiated the lease and demanded possession from defendant, but defendant had neglected and refused to deliver possession.

The prayer was for a declaration that the lease was void and not binding upon plaintiffs; for a declaration that defendant had excluded plaintiffs from possession; for mesne profits or damages; for possession, costs, and other relief.

W. E. Raney, for plaintiffs.

C. A. Moss and Featherston Aylesworth, for defendant.

BOYD, C.:—In leases for years under the Settled Estates Act, 1895, 58 Vict. ch. 20 (O.), sec. 42, it is essential that they be not made "without impeachment of waste." In other words, the terms of the lease must be such as not to affect or vary the common law liability of the lessee for waste. The tenant must not be relieved from any duty the omission of which would constitute waste. It has been held that, if the covenant to repair be qualified by the words "fair wear and tear and damage by tempest excepted," that would be a fatal defect in the execution of the power as against an objecting and repudiating reversioner: Davies v. Davies, 38 Ch. D. 499. This decision has been unfavourably criticized by many writers of competent skill, and, while it has not been formally overruled, it is one that should not be implicitly followed. Upon the terms of the instrument, it is, I think, with difficulty distinguishable from the lease now in question, and, assuming that it cannot be so distinguished, and having to