vate street, one would naturally expect to find, from the manner in which the expenses are to be defrayed, that they were to be comprehended under the assessment for private improvements; but certainly the 394th section, which relates to streets, relates to a limited class of operations not comprehending all that is directed to be performed under the 150th section. I cannot hold that the 394th section was the proper section under which to give notice. Where it is a matter in which several parties are interested I think the provisions of the 397th section are very important, in order that all parties, both owners and occupiers, might find out how far their interests were involved. But the 394th section, unless you do extreme violence to its words, appears to me to be applicable to public streets, and not to comprehend operations to be performed under the 150th section.

Resolved to declare,—

That it appears to this House that the notice to be given by the Commissioners in respect of the improvement contemplated by them ought to have been in conformity with the requisitions of the 397th section of the Act of 1862, but that the notice actually given by the respondents was not such a notice, and for this reason reverse the interlocutors of the Court of Session appealed from; but such reversal is not to be held to affirm the interlocutor of the Lord Ordinary, save so far as such interlocutor interdicts the respondents from acting upon or carrying into execution the resolutions of the respondents embodied in the minutes of the 11th of June and 17th July 1863. No expenses to either party, either in the Court of Session or in this appeal.

Agents for Appellant—J. A. Campbell & Lamond, C.S., and Wm. Robertson, Westminster.

Agents for Respondents—J. C. Irons, S.S.C., and Simson & Wakeford, Westminster.

Monday, April 4.

CAMPBELL *v.* MACLEAN AND OTHERS.

(*Ante*, vol. iii, p. 301.)

Lease—Grazing—Possession — Rentallers—Singular Successor—Implement. A society to encourage people to settle on its property offered building leases for ninety-nine years on certain conditions and regulations. The leases were to be renewable for ever on payment of a grassum of one year's rent, and the lessees were to receive a certain quantity of arable land on a lease of nineteen years, and of uncultivated land for a lifetime or thirty years. By a subsequent clause every "inhabitant" was allowed to dig peat and to have a summer's grazing for his cow for a small payment, and to dig and carry off stone and limestone gratis. *Held* (affirming judgment of the First Division), in a question with a singular successor in the society's property, that not only occupants who held under formal lease, but also the rentallers who had possessed under the society's offer and conditions and regulations, were entitled to a privilege of grazing during the ninety-nine years' lease.

Question, whether implement of the contract to make the leases perpetual could be enforced?

This action was raised by the appellant, Captain Farquhar Campbell of Aros, in the Island of Mull against the respondent, and about 120 other persons, the feuars and tenants, or, in other words, the inhabitants of Tobermory. The town of Tobermory was founded about the end of last century by the British Fishery Society. This Society was incorporated by the Act 26 Geo. III., cap. 106, by the name and style of "The British Society for extending the Fisheries and improving the Sea Coasts of the Kingdom." The objects of the Society were to purchase lands, and build thereon free towns and fishing stations in the Highlands. This Society accordingly acquired the estate of Tobermory, in the Island of Mull, upon which the town of Tobermory now stands. The public were invited by the Society to settle and build houses upon certain conditions, and with certain privileges; and, as an encouragement to do so, the regulations for letting issued by the Society provided that the settlers were to receive leases of their building lots for 99 years, renewable for ever on paying a grassum of one year's rent at each renewal. Along with the building lots, the regulations stated that "every inhabitant should have a right to dig peat for his own use in any of the Society's mosses, and also to a summer's grazing for a cow on the Muir Lawn (muir land) of the Society, on paying a sum not exceeding 7s. 6d. per annum for the above privileges."

In the year 1845 the Society (the town of Tobermory having in the meantime been erected) sold the property to Mr David Nairne, and in the conveyance to him the Society excepted from the warrandice "the whole feu rights and infeftments of property of said lands, as well as the whole current tacks or leases, or missives of tack, of any part of the said lands or other subjects before disponed, granted by us (the Society) to the different feuars, tenants, and vassals thereof." The property, after passing through the hands of various proprietors, was purchased by the appellant in 1856, and in the conveyance to him there was the following statement:—"Excepting always from this warrandice the current tacks and feu rights of the said lands and others granted in favour of the tenants and vassals of the same."

In 1862, after possessing the property for six years, Captain Campbell raised an action of declarator against the inhabitants of the town, by which he sought to have it found and declared that he had "the sole and exclusive right of property" in the estate upon which the town is built, and that free of any servitude of grazing in favour of the respondents; and that the respondents should be ordained "to flit and remove themselves from the said lands and from the occupation and possession of the same and every part thereof." He also sought to have it declared that he was "entitled to prevent and exclude the defenders from grazing or pasturing their cows, horses, or other bestial, on the said lands or any part thereof." This contention was intended to affect not only the right of grazing, but the building lots in the town; but when the case came to be heard before the First Division of the Court of Session Captain Campbell, by minute, limited his claim in the action to the cow grazing, stating that he "did not ask any decree of removing in the action against any of the defenders from the houses or yards respectively occupied by them, all questions relative thereto being reserved." Many of the inhabitants had not obtained regular leases from the Society, but merely built and possessed on the public intimations, advertisements, and rental rolls of the

Society, which, they pleaded, constituted good and valid leases. The defenders consisted of three classes—(1) rentallers without formal leases; (2) tenants with formal leases; and (3) feuars. The Court of Session held, with reference to the informal leaseholders who have also had possession, that their rights were good against Mr Campbell, their possession having the effect of sasine, and rendering their rights effectual against singular successors of the granter. It also decided in favour of the defenders holding formal leases, as holding a position even stronger still, inasmuch as their rights were confirmed by a formal deed. As to the third class of defenders, those possessing feu-rights, they were originally leaseholders, and afterwards acquired their feu-rights; but as the description of the subjects in these grants did not include the privilege of pasturing, the Court held the omission must have been intentional, and decided against their claim. Mr Campbell appealed against this decision, so far as unfavourable to him.

LORD ADVOCATE, Sir ROUNDELL PALMER, Q.C., and SELLAR, for him, argued—The appellant being a singular successor is not bound by the acts of the Society and his immediate predecessors in possession, even although these may constitute good leases against the Society and the granters of them. It was unsound to say that as there was no obligation on the tenants to pay the yearly rent, and there was an obligation to renew the lease for ever, it was in effect a feu, and not protected by the Scotch statute 1449, c. 18. As a singular successor, the appellant is only bound to look at the records for any burdens or restrictions on his rights of property. The right of cow-grazing being of the nature of a servitude, cannot attach to property held on lease.

PEARSON, Q.C., and BLACK, for the respondents, replied—The acts of the Society constitute good leases not only against the granters thereof, but also against singular successors, in respect (1) That the regulations and rentals were the writ of the Society, and contained the whole essentials of a lease as required by the statute of 1449. (2) That the appellant had notice of the existence of such leases, not only from the titles of the property, which contained an express exception of these from the warrandice, but also from the fact that the records contain an intimation of the existence of such leases. Further, the rights claimed by the inhabitants are not of the nature of servitudes, but the right to the building lot is the proper subject of the lease, and the cow grazing and peat cutting are proper adjuncts and privileges thereof, on the faith of which the settlers contracted and built their houses. The appellant's argument must be considered in reference to the larger right of the building lots, which can never be of the nature of a servitude while the two rights are founded on the same writings. The appellant is now barred from objecting to the leases by the homologation and acquiescence both of himself and his predecessors, as well as by the express terms of his own titles.

At advising—

LORD CHANCELLOR—My Lords, in this case we are called upon to reverse a unanimous decision of the First Division of the Court of Session with respect to a claim made by a Mr Campbell, the pursuer, to hold a certain muir, or, as we should term it in England, common or waste land, in the Island of Mull, called the Hill of Tobermory, freed and discharged from the right of certain classes of tenants (who have been classed for the purpose of having this question duly raised) to a cow's graze or the grazing of a cow during a certain portion of the year.

The several tenants of houses in Tobermory, who are very numerous in the original proceedings, and who were the original dependants who claim this right of cow's graze, have ranged themselves in classes; and it was agreed that the rights of each person in each class should be determined by the position of one member under whom the remaining tenants in each class could range themselves as claiming precisely the same right as he did who represented them. But the classes with which we have to do now may be reduced in substance to two, namely, those who hold under a lease a house in Tobermory which they occupy, and those who hold without lease, but who are held by the Court below to have become tenants in effect, upon the terms of certain propositions which emanated from the Fishery Company, to form the settlement of Tobermory at the close of the last century, and who, as well as their predecessors in right, have been holding upon the terms of those conditions ever since, but have had no distinct lease granted to them. There was a third class who were placed in a different position. They had originally, it seems, acquired rights in the same manner as the second class to which I have referred, but having these rights, they had afterwards accepted feu-charters of the property which they so originally held in the same manner as those of the second class; and in those feu-charters there had been omitted the right to "a cow's graze," which is in question before us at the present moment. The Court in Scotland was of opinion that, regard being had to anterior decisions in Scotland, those who had thus accepted charters which omitted the privileges held formerly by lease, had lost any such right or benefit which they might have acquired as holding by lease, to such an extent at least as they had omitted to insist upon the same right or benefit by virtue of the charter.

That decision was come to by the Court below, and that decision has not been appealed from. Therefore, as I said before, we really have in substance only to deal with two questions. First, as to those who hold by actual grant of a lease. And secondly, as to those who hold as the Court below determined by virtue of propositions which emanated from the Fishery Company, and the *rei interventus*, the proceedings taken by the persons so holding under those propositions which had brought them into the condition which they occupied at the time of the hearing and determining of this proceeding.

Now, it is necessary to consider in the first instance (at least I prefer to do so) those who are in the latter position, rather than those who hold under an actual lease. I say so for this reason, that the title of those who do not hold under an actual lease commences at an earlier period than the title of the leaseholders, and therefore chronologically their position can best be considered first. And further, the remarks we may have to make upon the position of those holding by virtue of the documents which emanated from the Fishery Society, though of course these cannot govern or regulate anything that is contained in the lease, will at least make more intelligible to us, when we reach the lease, what the exact position of the parties was at the time of the lease being entered

into. And so far, and so far only, can it legitimately be said to have any bearing upon the construction of the lease itself. The following, we find, are the conditions which led to the formation of this settlement at Tobermory.

It seems that a company had been formed—constituted I think by Act of Parliament—for the purpose of establishing a fishing settlement in the Isle of Mull, and that company had purchased land of the then Duke of Argyll for the purpose of establishing that settlement in the Isle of Mull. The company established that which is now a considerable fishing town or village, the village of Tobermory, by virtue of the powers they possessed by Act of Parliament. They began by issuing in 1789 a scheme which they had formed, and which is headed "Regulations for building and letting land at Tobermory in the Island of Mull." They first of all approved of a plan, and then they approved of two streets, one to be called Argyll Terrace, the other to be called Breadalbane Street, and they desired that each of these streets should be immediately laid out. That is the third condition. They made provisions with reference to land which might be under crops for compensating the persons holding the crops if they immediately took possession of the land. Then the fourth condition is "that the land shall be lotted out to all persons willing to build houses thereupon, at the rate of one penny per running foot, in front of the street, by 80 or 90 feet deep, which, if 80 feet, will be at the rate of 54s. per acre, and if 90 feet, at the rate of 48s. per acre," with certain provisions as to special lots in Argyll Terrace.

Now, the first remark I make upon that is, that the establishment of this settlement seems to have been the first consideration which occupied the minds of the fishing company. The regulations are described as being "regulations for building and lotting land;" and the first subject matter they take in hand by the regulations is the approval of a plan for the building, and describing what shall be done in the lotting out of land for building.

Then we come to the fifth condition—"That the said lots shall be granted on leases of ninety-nine years, renewable for ever on paying one year's additional rent." So that the primary object of the whole settlement seems to be the establishing of lots for building purposes, making provisions which would induce people to build thereupon, letting out the land at what appear obviously to be low and reasonable rents, with the view of encouraging building, with a proviso that those who take the land and are willing so to build shall not only have a lease for ninety-nine years *in præsenti*, but shall have a covenant allowing them to renew for ever, on payment of a very moderate fine, amounting to half-a-crown, or a very small sum, whatever it means, as one year's additional rent. I need not refer to the 6th condition, it is a special provision as to the low ground near the quay.

The 7th provision is undoubtedly of great importance. It is, "that those who take a lot in the town shall be entitled to a part of the arable land lying contiguous thereto, not exceeding the sixth part of an acre, for garden and potato ground, on a lease of nineteen years, and also to a quantity of uncultivated land not exceeding 5 acres, without a special order by the directors, upon a lease for the life of the lessee, or for thirty years if he should not live so long, which leases, if arable, and also of uncultivated land, shall be subject to conditions of improvements to be settled with the Society's agent at Tobermory."

Now, the Lord Advocate has called to our particular attention this circumstance, that this lease does not grant a portion of land for garden, nor does it grant a portion of uncultivated land for cultivation; but it holds out simply an offer to those who, taking lots in the town and building thereon, might be willing to accept and might think it desirable themselves that they should accept a portion of land for garden, and a portion of uncultivated land, to be by them cultivated. That is perfectly true; but the conclusion I should draw from that is somewhat different from that from which the Lord Advocate would arrive at; because I think it a very strong indication, as indeed the whole frame and form of the regulation is, that the one point which is mainly occupying the minds of those who hold out those regulations was, that they desired that the town or village should be as speedily as possible built, and that inducement, therefore, should be held out for the building of it; and all the particulars relating to those who are to be concerned in building are carefully marked out; the quantity of land and the amount of rent per acre, all that is carefully set out; but with regard to the gardens, and with regard also to the uncultivated land which they are to have the privilege of taking, if they think fit, nothing is said specifically about their being obliged to take it; nor is there anything said about the rent which they are to give for the land, nor about the terms which the Society's agents may afterwards fix and determine. All that tends in my mind to show that the principal object is the letting of land, which is to be let upon definite terms; and that these other matters are adjunct benefits to be conferred upon those who take the land, being additional inducements to them, if so minded, to take possession of it.

The next clause is certainly not very happily worded with regard to one word, and that is the third word. It says "that every inhabitant shall have a right to dig peat for his own use in any of the Society's mosses, and also to a summer's grazing on the muir lawn of the Society, on paying a sum not exceeding 7s. 6d. per annum for the above privileges; and may also dig and carry away, for their own use, stone and limestone gratis, or the use of any other inhabitant, from any of the Society's quarries, subject to such restrictions as may prevent injury to the quarries and mosses."

Now, I think from the whole of the terms included in this article, as well as the whole course of proceeding upon it, both as regards those who take leases and those who are to be found in the rentals, which I shall afterwards have to refer to; and regard being had also to the memoranda of the 22d and 30th of November 1792, which followed some years after this memorandum of 1789, in which the word "inhabitants" is again used in a manner which I shall have to notice more particularly presently. I say from all these considerations, I come to the conclusion that the real and true meaning of the word "inhabitant" here must be that of a person taking an allotment and engaging to construct a house; because, if you put any other sense to the word, this might happen—that if a man living in a house which he had taken from the Society had six or seven grown up sons, who were engaged with him in the fishery, every one of those six or seven sons would have a right to a "cow's grazing," if we took the word "inha-

bitant" in its full sense as meaning inhabiting the town of Tobermory at 7s. 6d. per annum, together with the privilege of digging peat and digging stone for their own use,—which would appear to me, I confess, with reference to all the documents in the case, an utterly unreasonable, and by no means sensible conclusion. I think, therefore, that this word "inhabitant" must be simply read in the same way in which you would read it in reference to the other privileges, namely, as meaning some person who, taking a lot in the town, chose to build a house upon it (which you will observe is the phrase in paragraph 7), which thereby made him an inhabitant. It means that every person so choosing to build a house, shall not only have the privilege of a garden, but shall have the right to dig peat, shall have the right to a "cow's grazing," and shall have the right to dig and carry away stone for the purpose of building a house.

Then the 9th paragraph for lotting is not of any importance, and therefore I need not read it to your Lordships—nor the 10th, the 11th, and 12th. In truth, the important articles may be said to terminate at the 8th article. That being so, we find that the documents which it is important now to consider with reference to those that have not got leases, are the rentals which were in evidence in the Court below, with regard to the possession of those tenants. They are printed at length in the appendix to the case of Mr M'Kinnon, who represents one class of these tenants. It stands thus—you find a rental called "a descriptive rental and rental of account of the estate of the British Society at their settlement of Tobermory from Whitsunday 1832 to Whitsunday 1833." Others are in similar form "let conform to the printed regulations of that settlement."

Now, finding these documents which are in evidence before us, with reference to the rentals which are of a later date, I will take first the document of 1792 which deals partly with one of the regulations in 1789 which is of importance in this case, namely, with respect to the summer's grazing and the digging of peat. It is "ordered that the agents do inform all future settlers at Tobermory and Lochbay that if the muir grounds shall become reduced either by improvements or by the number of tenants, so as not to afford cows' grass for all the new tenants, the last settlers shall in their order be first deprived of cows' grass on the muir, and must thereafter be confined for pasture till the improvements to be made by them upon their lots of land at present uncultivated." Secondly, it is ordered that the joint privileges of peat for fuel and summer's grazing for a cow appertaining to the inhabitants of Tobermory, for which 7s. 6d. is to be paid annually by the printed regulations, be separated, and that 2s. 6d. per annum be charged for the privilege of peat for fuel, and 5s. per annum of the summer's grazing of a cow.

I think that upon this, coupled with the regulations themselves, it is very important to observe that in the first regulations the privileges of peat and of cows' grazing were united; and they were united also with the privilege of digging and carrying away for their own use stone and limestone gratis. And you find also that the 7th condition or regulation, which is contained in the original articles of 1789, spoke of a lot in the town carrying with it the privilege, if the party thought fit to use it, of a piece of arable land for a garden, but confined to a term of nineteen years, and also of a portion of uncultivated land for cultivation, but confined to thirty years. And then you have this paragraph about every inhabitant of the town—which I read as meaning every one taking a building lot of the Company—having a right to dig peat, and to have a cow grazing at a fixed rent of 7s. 6d. per annum, and coupled with these is the gratuitous right of digging of stone and limestone. From all this I think it is at once clear that these three privileges are privileges which are specially attached to a town building lot. Because the privilege of digging peat was no doubt for fuel, for those residing in the houses. The privilege of having a summer's cow grazing was in order that persons possessing houses in the town should be able to have the advantage of possessing one cow to sustain a family. And as the privilege of digging peat and the privilege of cow grazing are put on one common rent, it appears to me to be impossible to say that, upon these regulations so set out, it was not the intention that these privileges should belong to those who took building lots, and undertook the building of houses in the town, and became the inhabitants of Tobermory by means of the houses they so built in the town of Tobermory.

Now, the separation in 1792 of the peat and the cows' grass arose in this way. It did not arise from any desire to keep the peat and cows' grass separate subjects altogether, whereas before they had been conjoined as being things which should be occupied together by the inhabitants of houses, but it had been foreseen before 1792 that, with regard to the benefit of cows' grass, if the town became prosperous, as probably those who built it speculated that it would become, their muir might be found insufficient for the purpose of affording a cow's grass to all the new occupiers of building lots. And therefore they say that if the muir ground shall be insufficient to afford cows' grass for all the new tenants, the last settlers shall, in their order, be first deprived of cows' grass on the muir. But they say, as we do not intend to deprive these small tenants of the peat for fuel, we must take care to divide the rent which now covers both the cows' grass and the peat, and in future we must take a separate rent for each,—they being two things which are entirely separable as regards the interests of the inhabitants. Why is this done? Because the one was probably thought by those who formed the regulation to be more rapidly exhaustible than the other, and therefore they say, as it has to be put under a separate head, we must take care so to arrange it that there shall be a separate rent for each of them.

Now, returning to the rental (which is the rental to be of a property let conform to the printed regulations of that settlement), what do we find in the rental? We find first this heading, "Houses and ground let for building lots." Then you find the names of the tenants, date of original entry, length of lease. In regard to the particular case before us, that lease is stated as being ninety-nine years. Then follows name of the street, number of lot upon the plan, its measurement in feet and inches, rate per foot of front, and rent. As regards the building lots, therefore, everything is plain and specific. The rent is determined, the extent of the property is determined, the length of the term is determined, and the name of the proprietor is determined. Then you have the next head, "Arable land contiguous to the town." And as has been said, and no doubt very cogently said by the Lord Advocate, everybody was obliged to take arable land contiguous to the town. Arable land

contiguous to the town was to be let only for a limited number of years; but with regard to those cases which we have to deal with the term is mentioned, though it is not important upon this head; and where you find the term you find the date of the original entry, the length of lease, where there is a lease, the number of the lot, the quantity, the rate per acre, and the rent, all distinctly enumerated. Then in the next heading comes "Lots of uncultivated land." And there again you find the same headings, date of original entry, length of lease (in some cases being specified, and in others not specified). And then there is the number of the lot, the quantity, the rate per acre, and the rent.

Having got so far, of course the important entries are as to the particular subject matter now in question. The next heading is "Cows' pasture," and you find the number of cows, and with the exception of one person it runs one, one, one, the whole way down. That is, that each tenant had only one cow's pasture so far as he had any cow at all. Then you find the rent pursuant to the regulations; and then you find a separate entry of "Horses' pasture." The number of horses is somewhat whimsically put at half, which I suppose means the right of grazing a horse for half a year, or the right of grazing a horse for one year out of two. The rent is put against that.

Then what we arrive at is this, according to the judgment of the Court below,—which I think in principle has hardly been disputed,—you are entitled by the law of Scotland, when you have all the terms and conditions of a letting made manifest in writing, and they are all clear and distinct, and you find that there has been also besides those writings, but not signed by the parties who are either to have the benefit of or to be burdened by the conditions which those writings would import, —if, I say, you find besides those writings the *rei interventus*, that is to say, an entry by the man who is to have the benefit of the lease, and action on his part in conformity with that tenure, you are entitled to hold that that lease is a good lease, and that the person has a good leasehold, protected by the statute like that of any other leaseholder holding under a lease.

That being so, there can be no doubt whatever, when you find a reference here to the terms of the printed regulations, which were the regulations of 1789, modified as they were in 1792, that the persons now holding are successors to those who did enter upon the property, and did build the houses which are there existing, and did occupy the property which was so intrusted to them.

As regards the lands contiguous to each holding which is to be held for nineteen years, and the portion of uncultivated land which is to be held for thirty years, this term of course might or might not run out pursuant to the regulations. The only question for consideration is, how far, according to the true construction of the regulations, coupled with these entries which we here find of the rent taken for a cow's pasture, they are to be considered as conferring a right upon those entitled to a town lot for ninety-nine years, to holding also a cow's pasture together with that town lot? That is the only question that we have to decide.

It appears to me, having read the regulations as I have, and made the observations I have made upon them, that it was intended from the first that the right to a cow's pasture, the right of digging peat, the right of quarrying stone gratis (paying for the cow's pasture and for the digging of peat 7s. 6d. in the first instance, and afterwards the separate rentals of 2s. 6d. and 5s.), intended to be attached to the persons who took the lots for the purpose of building thereon, and that the persons who took the lots for the purpose of building thereon, were entitled to have the lands for ninety-nine years, on the terms and conditions of its being renewable for ever.

As regards the question of there being a contract for the lease renewable for ever, one of the points suggested during the course of this argument was, whether or not such a condition is one of those matters which bind singular successors under the statute of 1449? I confess I prefer resting my decision upon the view which the learned Judges in Scotland took upon that point; that is to say, if we come to the conclusion that it is a ninety-nine years' lease, the question whether there is a contract for renewal at the end of the term now existing is a matter which must be left to be settled by a future generation, as to whether or not that condition for renewing the lease will bind those who come afterwards as singular successors. At present it appears to us plain that the persons who are the present respondents in this case are entitled to their holdings for the period that may remain of their ninety-nine years' term; and that the cow's grass, which is put here against their respective holdings, is a right attached to that particular holding, and which will follow that holding so long as they continue to hold under that particular tenure. It was indeed said by the Lord Advocate that we are not binding them down to continue to hold the cow's grass and to pay this rent. But I apprehend that that might be said of any contract whatsoever until the persons have homologated the contract by taking possession and acting according to all the terms thereof. No doubt, until these persons had homologated the contract, those entries would have had no effect had there not been that *rei interventus* of which I have spoken; but when that takes place the contract is homologated, and becomes binding upon the parties; and those who seek to claim the advantages to be derived from the contract would be subject to all the burdens they are exposed to under it, including the payment of rent.

One very just remark was made upon this line of reasoning, that "half a horse" ought to be held to be included in the same contract. I think the answer to that is, that the half horse is not in the printed regulations of the settlement; and this purports, and was held by the Judges in the Court below, and I think justly held, to be a contract which is evidenced by these rentals referring back to the printed regulations. And the printed regulations and the rentals together, coupled with the *rei interventus*, are held to complete the evidence of that contract which the Court holds to exist between the parties. Now, these rentals are "let in conformity with the printed regulations," and the printed regulations say nothing whatever about the half horse. Therefore, the half horse not being in the printed regulations, there is nothing upon which the Court can found as leading to the conclusion that the arrangement about the half horse was a portion of the original arrangement as to which the parties can be considered to be bound by the evidence produced — viz., the evidence of the rentals.

Before passing on from the case of those who are not holding by actual lease, I should observe

that I have been proceeding on the supposition that there were four classes before us; but I believe one class was made up in this way—some entered before 1792, and some after 1792, and there was no difference whatever between these two classes of persons. I consider that the conclusion arrived at by the Court below is correct with reference to those persons holding without any actual lease, but whose holdings are evidenced by the terms of the rental.

Now, the question arises as to the terms of the lease itself with reference to the case of those holding upon actual lease. No doubt those who contest the right of the lessee to a privilege which he claims are entitled to rely upon the construction of the lease, wholly independently of the articles of 1789; because they are entitled to say that a man must be taken to hold upon the terms of the instrument which he has procured for his own benefit to be granted to him, and that he cannot import into the lease any articles any further or otherwise than they may be imported by the lease itself, which is the case which has happened as regards the memorandum of 1792, because the memorandum of the 22d of November 1792 is imported into the lease itself. Now that lease, which is dated the 21st March 1800, purports to be a lease from the Society to John M'Lachlan and his heirs and assignees of "that lot of ground in the new village of Tobermory, marked in the plan of the said village, lying in the street named Breadalbane Street, and consisting of 30 feet in front to the street by 80 feet in depth, and that for the whole space and term of ninety-nine years complete, from and after the term of Whitsunday in 1791, which, notwithstanding the date hereof, is hereby declared to have been the term of entry of the said John M'Lachlan." He entered at a very early period no doubt. Then follow these words—"together with the right and privilege of digging, winning, and carrying away peat for fuel to his said house, but not for sale, stone, limestone, and shelly sand, if to be found, for the use of the land to be occupied under the said Society by the said John M'Lachlan and his foresaid, from any of the Society's mosses, quarries, or ground at Tobermory, subject, nevertheless, to such general regulations and restrictions for preventing injuries to the said mosses, quarries, and ground as shall be settled and fixed," and so on, "it being expressly agreed by the said Society that this lease of ninety-nine years shall be renewable for ever" on the payment of 2s. 6d. fine, and the rent is to be 2s. 6d. per annum.

Now, stopping here, it is admitted that this lease is a lease which would be binding upon the present appellant, who claims as a singular successor,—that is to say, who claims under a series of purchases made from the Fishery Society, completely bringing the property down to Mr Campbell,—and who does not claim as general or universal successor, subject to the burdens as well as to the privileges of the succession. He is entitled to say that, except by the statute of 1449, he could not be bound by the mere contract which had been entered into for the lease. But that statute, it is admitted, gives the lessee a full right as against Mr Campbell, as singular successor, in respect of the town lot. And that being so, the question arises, in the first place, whether or not this privilege of the tenant digging peat for fuel for his house, which peat has to be taken, not from his own land but from the land of the lessor, and those other privileges here mentioned, will also bind singular successors? I apprehend that if that would be so, the question with reference to the cow pasture must be governed by the same conclusions as we come to with respect to the peat. What has been said is this: You cannot grant a right which is not a right in the land itself,—that is to say, you cannot grant a privilege to be exercised over land which you retain in your own possession. You cannot grant that right to another so as to burden one who comes in by way of singular succession with that mere contract. You can, under the statute of 1449, bind him with a lease of the land itself, but with reference to these privileges to be exercised you cannot so bind him. I apprehend that, upon the authorities, it cannot be disputed, and that it is not disputed, that a mere right or privilege—such as that of killing game upon the land or the like—would not be a right binding upon the singular successor by virtue of that statute, or, as far as I have seen at present, by virtue of any other law of Scotland.

But, on the other hand, it was almost conceded by the Lord Advocate (though we had some difficulty in getting him to concede so much as that) that where an accessory is simply an accessory which is not necessary but one having a considerable connection (I do not know exactly how he would wish to qualify it) with the actual enjoyment of the property leased, that right would pass so as to bind the singular successor as connected with the property. He put the case of a right of way. He said, if there were two rights of way, I do not contend that if for a certain convenience the two rights of way should be desirable they would bind the singular successor. Nor would he dispute that the right to draw water from a well would bind him. I cannot distinguish between the right to draw water from a well and the right to cut peat to be used for fuel for the house, and the right to a cow's grass for those persons who have been tempted to build houses there by the inducement of having pasture for a single cow for the support of the family granted to them as attached to the house. It is the same thing in principle, provided the words of the lease will authorise us in coming to the conclusion that these privileges ought to be so attached to the lease.

Now the contest has been this,—the cow's pasture is not introduced immediately after the peat, nor together with the peat, but the lease goes on to say—"And further, the said Society by these presents lets to the said John M'Lauchlan and his foresaids 28 perches or thereby of the arable ground which lies contiguous to the said village, lying adjacent to land in the occupation of Dugald Campbell, indweller for the half space of nineteen years." It further lets him the uncultivated lands for the purpose of cultivation for his life, or for thirty years if he should not live so long, and then comes this clause,—"Moreover the said John M'Lauchlan and his foresaids shall have a right by his tack to pasture one cow during the summer season, namely, from the 12th day of May to the 11th day of November inclusive yearly, on such parts of the Society's said muir land as shall not be set off in lots for cultivation or inclosed and improved from time to time, subject to the power reserved by the Society in their minute of the 22d day of November 1792, for inclosing and improving the muir ground, and taking away the privilege of summer's pasturage for cows in the events therein mentioned."

Now the words are "moreover John M'Lauchlan shall have a right by his tack." That means by the instrument which we are now reading. By this instrument he is to have this right. He is not to have it therefore as a simple and individual thing, separate and apart altogether from the subject matter previously spoken of, but he is to have a right to it by his tack of the lot of ground—which is a renewable tack—for the Society bind themselves to renew it. I do not think the Judges in the Court below leant entirely upon the word "tack" being used in one part with reference to the house, and the word "lease" being used in another part with reference to land—though something has been said indicating such a view, I think it is hardly justified. The way in which I read this lease is this,—a lease is to be granted of the house which is to have this long duration of ninety-nine years, with a power of continual renewal, and a lease is to be granted of the 28 perches of land which is to be distinctly, as he is told, for nineteen years only. Then a lease is to be granted of uncultivated land which is to be for thirty years only. Then comes the "moreover" clause which gives him a right which he is to hold by his tack, without anything defined as to time,—without saying that it is to cease in nineteen years, or that it is to cease in thirty years; and immediately following thereupon are these words —"which tack of the said lot of ground, renewable as above, the said Society hereby bind themselves and their successors to warrant to the said John M'Lauchlan and his foresaids upon their performing the conditions herein before and after expressed." If then you ask, How long is the cow's grass to last? The answer is, As long as the lease itself will last. And that will last for different times for different things,—one of which is the garden for nineteen years; and the other the uncultivated land for thirty years; and when those two subject matters drop off, the lease will still remain a good valid subsisting instrument for what remained in it, namely, for the lots of land for the ninety-nine years. He would have the benefit of this lease so long as the lease existed, which would be in effect for ninety-nine years for this lot of land, and he would have the benefit of the cow's grass for that purpose. It seems to me that that construction of the lease makes it thoroughly consistent with all that we know of the position of the parties at the time when the lease was entered into. For that is the legitimate thing to look at—the position of the parties when they came to frame this lease. Nothing can be found making it improbable that it should have that effect. Nor is there anything inconsistent with any previous agreement which the parties had come to between themselves. On the contrary, the decision which the Court below have come to, and to which I adhere, is perfectly consistent with all that we know of the previous objects and scope of this Society. And I think it is also consistent with the true explanation of the words in the lease. Therefore I recommend your Lordships to affirm the decision of the Court below.

Lord Chelmsford—My Lords, I entirely agree with my noble and learned friend, and I shall add very little to what he has said. With regard to the first class of respondents which Mr M'Lachlan represents, their claim depends entirely upon the construction of the lease, and we cannot look at the regulations or anything else out of the lease. Now that is a lease, first, of building land for ninety-nine years, renewable for ever, with liberty of taking peat for fuel, and stone, limestone and shelly sand. Secondly, of arable ground for nineteen years; and thirdly, of uncultivated land during life, or for thirty years; and then comes the clause in question with reference to the cow's pasture which begins with "moreover"—"Moreover the said John M'Lauchlan and his foresaids shall have a right by his tack to pasture one cow during the summer season" under certain circumstances.

And then comes the clause of warrandice which applies entirely to the lot of building land, because they bind themselves to warrant the tack "of the said lot of ground, renewable as above, the said Society hereby bind themselves and their successors." The reason why that warrandice is confined to the lot of building land was explained by the Lord Advocate, who said that a clause of warrandice of this kind is not applicable to the case of leases for nineteen or thirty years, but only to leases for ninety-nine years, renewable for ever.

Now the Lord Advocate admitted that although if this were an independent lease of a cow's pasture it would not be good under the Act of 1449, yet if the pasturage is annexed to the lease of the land it would be good. It appears to me perfectly clear that the pasture is annexed to the tack of the land. He is to have "a right by his tack to pasture one cow during the summer season." Now what is the tack? The tack is an instrument consisting of a lease of various subjects for different terms. And the lease of parts of the subjects, namely, the arable and the uncultivated land, is of limited deviation—and will expire by effluction of time—but the tack of the building land is perpetual.

That it is only one tack of several subjects, and one rent distributed among those different subjects, appears to me clear from the clause of forfeiture. By that clause M'Lauchlan binds and obliges himself within eighteen months in the line of street called Breadalbane Street to build and to keep in repair one substantial dwelling-house on the said lot of ground, or otherwise this tack shall be void (which is the entire tack), and the said lot may be let to another tenant, "the said John M'Lauchlan being, notwithstanding, liable to pay the rent" (not the *rents*), "the rent hereinafter specified, until the said lot is so let to a new tenant," and then the rent is described to be "the following sums by way of tack duty or yearly rent, namely, for the said building lot of ground 2s. 6d. sterling yearly; for the 28 perches of arable ground 3s. sterling yearly," and so on—"yearly and termly during the different periods of his lease." It appears to me therefore to be perfectly clear that by the word "tack" where it is said "he shall have a right by his tack" to it, means the whole of these different subjects included in the instrument, and therefore that the cow's pasture is annexed to the building lot.

With regard to the case of M'Lean, it is quite clear that he is in a position with reference to the corporation in which he has in fact virtually a valid contract of lease, and he is brought therefore precisely into the same position as M'Lauchlan, and therefore the same observations must apply to his case.

Lord Westbury—My Lords, as it is necessary for your Lordships to rise punctually at four

o'clock, I have but a very short time indeed in which to explain my view of this case.

I am anxious to state that there is no difficulty about the law of Scotland. We recognise it entirely as it was stated in the Court below. The question is, Whether the grant of this cow's pasturage is valid by the law of Scotland as against the appellant as a singular successor of the company which originally granted the right? Now to make it so it must be brought within the operation of the statute of 1449—that is, it must be shown to be a real right. A lease by the law of Scotland is a personal contract; and the entry of the intended tenant upon the property contracted to be demised is equivalent to seisin, and the right thenceforth becomes a real right. Now, the grant of a servitude or privilege like this cow's pasturage can only be made available if it be made part and pertinent of the tenement contracted to be granted by the lease, which lease becomes a real right by virtue of the statute.

The question, therefore, is reduced merely to one of construction. The Lord Ordinary says this is a separate grant. It is not the grant of a thing incident to and to be taken and enjoyed as part and pertinent of the *rem*, the thing, the town lot granted. It is not to be deemed to be granted merely as an accessory of that, but it is a separate grant; and in confirmation of his conclusion, he refers to the act, that there is a separate *reddendo* or consideration for this grant. Now, the question is simply, Whether the Lord Ordinary is right in that rendering? If he be right in that rendering—*cadit questio*, the thing is not good as against the appellant; but if it be plain and clear that the right granted is in effect granted as an accessory, and as a part and pertinent of the town lot, then it becomes in truth an incident to the enjoyment of that, and a servitude connected with it—it becomes a real right.

My noble and learned friends who have preceded me have pointed out the parcels, as we should say in England. I am taking the case of M'Lachlan; and they have pointed out that, upon the construction of these parcels, it is impossible to come to any other conclusion than this—that the thing granted, in respect to the grazing of a cow, is *ejusdem generis* with the right of cutting peat and the other rights which are made incident to the enjoyment of the tenement, which is the principal subject of the demise, and which therefore may be called the dominant tenements. That has been so clearly pointed out that it is unnecessary for me to state it again. It is impossible to come to any other conclusion; because the words are that the tenant M'Lachlan and his foresaids, to whom the first grant was made of the principal tenement, shall, by virtue of this tack, hold and enjoy the cow's pasture. Then, undoubtedly, if they do enjoy it by virtue of the lease, it is part of the lease itself. It is a thing made incident to that which is granted by the lease. Common sense would be outraged if we did not hold that it is substantially part and pertinent of the principal thing granted, and made an accessory to the thing so granted; and if so, it becomes a servitude. It goes with the principal thing so granted, which, with reference to the servitude, is to be considered the dominant tenement.

Now this, as I have stated already, is a mere question of construction. There is no question of law in the case at all. The law is plain and undisputed, and the construction, I think, can hardly be denied. The Lord Advocate contended that you were to refer to the antecedent subjects granted. But it is impossible to do that, because you are obliged to come to the conclusion that the cow's pasturage is to endure through the tack, because the tenant is to have the benefit of it by virtue of his tack. That is, of course, during the tack. The antecedent subjects are granted only to take effect for short periods of years. The dominant tenement is let for ninety-nine years, and then the words to which I have referred are immediately succeeded by the clause of warrandice by which the company warrants the tack—that is the thing which had been previously granted for ninety-nine years—renewable for ever. It is, therefore, abundantly proved that the cow's pasturage was granted for the longer period of time. It is granted to accompany the tack, and is a part of the tack.

Now, with regard to the other matters, it is unnecessary to enter into them. Because, when you take the regulations and the entries in the books of the Society, you find that it was the very principle of the case which was then being constituted without a written agreement, merely by entries in the books of the lessors, that every inhabitant—that is, every holder of a town lot—should be entitled by virtue of that lot to a cow's pasturage on the moor. And accordingly, starting with that, you have plainly expressed in the regulations the right in respect of which the holder of a town lot was to enjoy the cow's pasturage, just as if it had been contained in the instrument—the language being "together with the right of grazing a cow during the summer season." The two things therefore are identical; they are governed by the same considerations; and I think therefore that both of them are valid as against the present appellant; and that the conclusion of the Court below must be affirmed, and the appeal dismissed with costs.

Lord Colonsay—My Lords, as I rise at four o'clock I can say little else than that I concur in the opinions expressed in the First Division of the Court below. I think that the argument that was maintained for a time, that this lease as a whole was away from and foreign to the protection of the statute of 1449, is untenable. It is a lease for ninety-nine years, and the condition of its being renewable is one which may or may not be hereafter discussed. This is a building lease granted for ninety-nine years for the formation of a town of this kind, and it is impossible to say that it is incompetent to attach to that lease the right of cutting peat, or the right of grazing a cow. I see no difficulty whatever in attaching this right of grazing as an adjunct to it, especially looking to the object which the Society had in view in granting these tacks. Then it comes to be a question of construction, whether the clause as to a cow's grazing is here intended to be a sort of adjunct to the building lease, or an adjunct to those other things which immediately precede it? You cannot attach it to them. They are separate and independent things, each having its own period of endurance. If you were to cut these things out of the lease, or to strike the pen through them, and to read the lease continuously, it is quite clear that this "moreover" clause must apply to the building lease. I have therefore no hesitation in thinking that the conclusion of the Court below is quite right.

Agents for Appellant—James Dalgleish, W.S., and Wm. Robertson, London.

Agents for Respondents—David Curror, S.S.C., and James Y. Pullar, S.S.C., and R. M. Gloag, London.

Friday, April 29.

HAMILTON *v.* HAMILTON.

(*Ante*, vol. vi, p. 111.)

Entail—Prohibitory, Irritant and Resolutive Clauses, —11 *and* 12 *Vict.*, c. 36, § 43. *Held,*—affirming the judgment of the First Division,—that, as the irritant and resolutive clauses in a deed of entail, whose fettering clauses were framed upon the principle of enumeration, did not prohibit alteration in the order of succession, the entail was invalid under the 43d section of the Rutherfurd Act, and that even in a question *inter hæredes.*

In this action the Duke of Hamilton, heir in possession of the Hamilton estates and others, sought declarator that the various deeds of entail under which he held these lands were invalid and ineffectual in so far as regarded all the prohibitions and irritant and resolutive clauses therein contained or referred to, and that he was entitled to dispose of the lands at pleasure.

The Lord Ordinary (BARCAPLE) gave judgment in favour of the pursuer, adding this note:—"The Lord Ordinary thinks there is no room for question that the irritant and resolutive clauses do not apply to the prohibition against altering the order of succession. They are clearly framed on the principle of enumeration; and, on the strict principle of construction applicable to the fettering clauses of an entail, it must be held that alteration of the order of succession is not included among the acts of contravention enumerated.

"The defender contends that, assuming the prohibition against altering the order of succession not to be fenced by the irritant and resolutive clauses, the pursuer is not entitled to the declarator of freedom from the whole fetters of the entail which he asks, on the ground of the provision contained in the 43d section of the Rutherfurd Act. The Lord Ordinary must hold that this is not an open question, but that it is settled by a series of judgments both in this Court and in the House of Lords. The defender chiefly relies upon the well established principle that, before the passing of the Rutherfurd Act, the prohibition as to altering the order of succession was effectual at common law *inter hæredes*, though not fenced in terms of the Act 1685. On this ground, he contends that it cannot be held that the entails of the Hamilton estates are to all effects invalid as regards the prohibition against altering the order of succession, and that therefore the condition necessary to the application of the 43d section of the Act does not exist, but the cases of *Dick Cunyngham*, 14 D. 636; *Dewar*, 14 D. 1062; and *Ferguson*, 15 D. 19, are express authorities against that construction of the Statute. It has been authoritatively determined in these and other cases that the terms of the clause are too clear and imperative to admit of any doubt as to the effect which it must receive wherever any one of the three cardinal provisions is not valid in terms of the Act 1685, by compliance with the provisions of that Statute. This is nowhere more distinctly pressed than in the case of *Dempster* in the House of Lords, 3 Macq. 62."

The defender reclaimed to the First Division, but the Court adhered.

The defender appealed.

DEAN OF FACULTY and MELLISH, Q.C., for them LORD ADVOCATE and PEARSON, Q.C., in answer

At advising—

LORD CHELMSFORD—My Lords, two questions arise upon this appeal—first, Whether the irritant and resolutive clauses in the entail of 1693 (with which all the other entails agree) apply to the prohibition against altering the order of succession? and, secondly, if not, Whether the respondent—the pursuer in the action—is entitled to a declarator of freedom from the whole of the entail under the 43d section of the Rutherfurd Act against the appellant, one of the heirs of entail?

It is clear that the irritant and resolutive clauses do not apply in terms to the prohibition against altering the order of succession. But it is said that this prohibition may be treated as superfluous, because there are other words in the prohibitory clause which include it, and to which the irritant and resolutive clauses are applicable. I do not think, however, that this argument is well founded. There are three prohibitions, which have been called the cardinal prohibitions in entails, and which are quite distinct from each other, viz., against alienation, against contracting debts, and against altering the order of succession. I think that the prohibition against altering the order of succession ought to be specific; and that, even if it would be included in a prohibition against alienation (which it does not appear to me that it would), the distinct and separate mention of it shows that it was not intended to be so included in this entail.

The alteration of the order of succession being specifically prohibited, it is not covered by the irritant and resolutive clauses, which are framed upon the principle of enumeration, *i.e.*, of repeating all the specific acts forbidden by the prohibitory clause.

With regard to the second question, as to the effect of the Rutherfurd Act upon an entail, where the prohibition against altering the order of succession is not fenced with irritant and resolutive clauses, it was argued for the appellant that, before the passing of the Rutherfurd Act, the prohibition as to altering the order of succession was effectual at common law though not fenced in terms of the Act of 1685; and that, therefore, the condition necessary to the application of the Act of 1685 does not exist. This argument was addressed both to the Lord Ordinary and to the Court of Session, but was not allowed to prevail.

By the Act of 1685 persons are empowered "to tailzie their lands and estates, and to substitute heirs in their tailzies with such provisions and conditions as they shall think fit; and to affect the said tailzies with irritant and resolutive clauses, whereby it shall not be lawful to the heirs of tailzie" (amongst other things) "to do any deed whereby the samen (the lands) may be apprised, adjudged, or evicted from the other substitute in the tailzie, or the succession frustrate or interrupted, declaring all such deeds to be in themselves null and void."

Then, by the 43d section of the Rutherfurd Act, it is provided "that where any tailzie shall not be valid and effectual in terms of the said recited Act of the Scottish Parliament passed in the year 1685, in regard to the prohibitions against alienation and contraction of debt, and alteration of the order of succession, in consequence of defects, either of the original deed of entail or of the investiture follow-