

been displaced from the concern, or, that he had any absolute assurance that the deed was a mere form not to be acted upon except as against creditors. I therefore, my Lords, cannot do otherwise than concur in the course suggested by my noble and learned friend on the woolsack.

*Interlocutors affirmed, and appeal dismissed with costs.*

*Appellant's Agents*, A. Morison, S.S.C. ; Uptons, Johnson, and Upton, London.—*Respondents' Agents*, Campbell and Smith, S.S.C. ; Maitland and Lyon, W.S. ; Grahames and Wardlaw, Westminster.

APRIL 4, 1870.

FARQUHARD CAMPBELL, Esq. of Aros, *Appellant*, v. HECTOR M'LEAN and Others, *Respondents*.

Lease—Pasture on Moor—Pertinent—Stat. 1449, c. 18—Feu Charter—Verbal Lease—*A fishing company authorized by Statute invited persons to settle and form a village, and, subject to printed regulations, let to them houses and grounds for 99 years, with right "by their tack" to pasturage for a cow on the moor adjoining. The company afterwards sold the land and moor to C.*

HELD (affirming judgment), *That* (1.) *the leases bound C. as a singular successor, both as regards the houses and rights of pasturage, the latter being made a pertinent to the lease of the land; (2.) that certain tenants who entered into possession without written leases, but whose names, holdings, rental, and endurance of lease, were entered in the books of the lessors, held an implied lease, valid against singular successors.*<sup>1</sup>

This was an appeal from a decision of the First Division of the Court of Session. The appellant, in 1862, being heritable proprietor of the lands of Aros, in the island of Mull, raised an action against a great number of feuars and tenants, and inhabitants in the town of Tobermory, who claimed privileges of pasture over the moor or hill of Tobermory. He sought to have it declared, that he (the pursuer) had the sole title and exclusive right of property in the lands, free of any servitude in favour of the defenders, or either of them, to graze their cows, horses, or other beasts thereon. It appeared, that in 1786, a society, called the British Fishery Society, was incorporated by Statute for extending the fisheries and improving the sea coasts of this kingdom, the chief purpose being to raise funds to purchase lands and build free towns, villages, and fishing stations in the Highlands and Islands of Scotland. In 1788, the society purchased the lands of Tobermory, and proceeded to erect one of the free towns. They issued a set of regulations laying out the place of the allotments, and one article set forth, 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 muirland of the Society, on paying a sum not exceeding 7s. 6d. per annum for the above privileges. Many persons obtained lots of ground. At the date of 1832 there were 108 persons holding lots, having applied for leases on the terms stated in the regulations. So far as regarded this litigation, the tenants were divided into three classes. The first class consisted of persons who had formal deeds of tack from the Society, dated about 1800, being for 99 years, and containing mention of the privilege of cow's pasture. The second class consisted of rentallers who had no formal leases, but relied upon various entries of these holdings in the minutes and books of the Society. The third class consisted of persons who had obtained regular feu contracts. These were rentallers before they became feuars, but their feu disposition contained no mention of the right of pasturage, though in point of fact they had for thirty-nine years enjoyed the pasturage. The Lord Ordinary decided, that what the various tenants and feuars claimed was a servitude, but there was no sufficient evidence that such servitude was ever duly constituted; and, therefore, found, that the defenders had failed to establish in a legal and competent manner the right of grazing claimed by them. On reclaiming note, the First Division reversed the decision of the Lord Ordinary as to the two first classes of tenants, but adhered as to the third class. Thereupon the proprietor, Mr. Campbell, appealed.

The pursuer in his *printed case* gave the following reasons for reversing the interlocutors:—  
1. Because, assuming that the right claimed by the respondents was well constituted against the

<sup>1</sup> See previous report 5 Macph. 636 : 39 Sc. Jur. 328. S. C. 8 Macph. H. L. 40 ; 42 Sc. Jur. 392.

British Fishery Society, it has not been legally transmitted against the appellant as their singular successor in the lands—Ersk. ii. 3, 49, 57; Stair, 2, 3, 54; Hume's Dec. (Personal and Real) 443; *Lovat v. Lovat*, Robertson's Ap. 355; *Ferguson v. M'Cubbin*, 3 Ross, L. C. 110; *Young v. Dewar*, 17th November, 1814, F. C.; *Gordon v. New Club*, 6 Dow, 87; *Tailors of Aberdeen v. Coutts*, 3 Ross, L. C. 269; *Stewart v. Walker's Trustees*, 3 Ross, L. C. 139; *Heron v. Stewart*, 3 Ross, L. C. 243; *Calder v. Stewart*, Hume's Dec. 440; 3 Ross, L. C. 248. The rights in question were not constituted by a lease binding on singular successors—1449, c. 18; Ersk. ii. 6, 2, 3, 27; *Gordon v. Forbes*, M. 15,221; *Pollock v. Harvey*, 6 S. 913. 2. Because, so far as regards the grazing in question, the endurance of the leases founded on by the respondents was for a fixed term of years, which has long since expired. 3. Because the leases in respect of which the right of pasturage is claimed, being perpetual and without an ish, are not binding on the appellant as a singular successor of the grantors—1449, c. 18; Stair, ii. 9, 27; Ersk. ii. 6, 26; 1 Bell's Com. 68; Bell's Prin. § 1194; *Dobie*, M. 1283; *Ley*, M. 7195; *Hill v. Wright*, M. 16,477; 15,191; 15,194; *Kerr v. Waugh*, M. 15,685; *Wight v. Hopetoun*, M. 10,461; *Scott v. Straiton*, 3 Paton, 666. 4. Because the documents founded on by the respondents John M'Kinnon and others are insufficient to prove the constitution of a lease, or at all events are insufficient to prove the right of pasture which they claim—Hunter, L. & T. 410 (2d ed.); *Grant v. Sinclair*, 23 D. 796; Bell's Prin. § 1187; *Queensberry case, D. Hamilton v. Scott*, 1 Dow, 400; 1 Bell's Com. 69 (5th ed.); *D. Queensberry v. E. Wemyss*, 2 Dow, 90. 5. Because the claim of the respondent John M'Kinnon is excluded by the title upon which he founds. 6. Because if the right of pasture in question is not validly constituted as against the appellant by the leases founded on, it is not established by prescription or homologation—Ersk. iii. 7, 3; iii. 3, 48; Stair, i. 10, 11; Bell's Prin. § 27.

The respondents in their *printed case* gave the following reasons for affirming the interlocutors:—1. Because the rights of lease claimed by the respondents are valid as in a question with the British Fishery Society. Cases cited—Hunter, L. & T. 415, 423, 427, 432. 2. Because the rights of lease claimed are valid as in a question with singular successors of the British Fishery Society—Stair, ii. 9, 47; ii. 9, 29; Ersk. ii. 6, 24; 1 Hunter, L. & T. 429; M. 15,206; M. 14,513-7; M. 15,199; 2 Paton, 66; M. 10,883; *Breadalbane v. M'Gregor*, 9 D. 210. 3. Because, even if the respondents' leases, formal and informal, including the pastures, conferring the pertinent rights now claimed, were leases of a kind not *sua naturâ* binding upon a singular successor of the grantors, the appellant is barred by the British Fisheries Society's Act, by the state of his title, and by the homologation and acquiescence of himself and his predecessors, from pleading that the leases with the pertinent rights are not binding upon him.

*The Lord Advocate* (Young), *Sir R. Palmer* Q.C., and *Sellar*, for the appellant.

*Pearson* Q.C., and *J. Black*, for the respondents.

LORD CHANCELLOR HATHERLEY.—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 proceeding, and the original defendants, who claim the right of a cow's graze, have arranged 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 such 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, viz. 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 the predecessors in right, have been holding upon the terms of these 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 had 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*.

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 it 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.

[His Lordship then recited the facts which he said shewed, that the first consideration was the building of the town, and that inducements were held out to people to settle there, and proceeded thus]—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, when, 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 land contiguous to each holding which is to be held for 99 years, and the portion of uncultivated land which is to be held for 30 years, the 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 99 years to hold 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.,) were intended to be attached to the person 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 99 years on terms and on condition of its being renewable for ever.

As regards the question of there being a contract for the lease being 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 99 years' lease, the question whether there is a contract of 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 99 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, these 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; 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 that one class was made up in this way: Some entered before 1792, and some after 1792, and there was no difference whatever between those two classes of persons. I considered that the conclusion arrived at by the Court below is correct, with reference to those persons holding without any actual lease, but those holdings are evidenced by the terms of the rentals.

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 happened as regards the memorandum of 1792, because the memorandum of the 22nd 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 of 80 feet in depth, and that for the whole space and term of 99 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 shelley 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 foresaids, 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 99 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 the privileges of the succession. He is entitled to say, that, except by the Statute of 1449, he would 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's pasture must be governed by the same conclusion 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 not bind the singular successors.' 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 authorize 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'Lachlan 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 haill 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'Lachlan 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 muirland as shall not be set off in lots for cultivation, or enclosed 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 enclosing and improving the muir ground, and taking away the privilege of summer pasturage for cows in the events therein mentioned."

Now, the words are, "Moreover, John M'Lachlan shall have a right by his tack." That means by the 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 relied 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 99 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 19 years only. Then a lease is to be granted of uncultivated land, which is to be for 30 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 19 years, or that it is to cease in 30 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'Lachlan and his foresaids, upon their performing the conditions hereinbefore 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 19 years, and the other the uncultivated land for 30 years; and when those two subject matters drop off, the lease will still remain a good, valid, subsisting instrument for what remained in it, viz. for the lots of land for the 99 years. He would have the benefit of the lease so long as the lease existed, which would be in effect for 99 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 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 object 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 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 99 years renewable for ever, with liberty of taking peat for fuel and stone, limestone, and shelly sand. Secondly, of arable ground for 19 years. And thirdly, of uncultivated land during life, or for 30 years. And then comes the clause in question with reference to the cow's pasture, which begins with "Moreover"—"Moreover, the said John M'Lachlan 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 19 or for 30 years, but only to leases for 99 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 duration, and will expire by effluxion 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'Lachlan 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'Lachlan 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 rents, 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 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 the 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'Lachlan, and therefore the same observations must apply to his case.

LORD WESTBURY.—My Lords, I am anxious to state, that there is no difficulty about the law of Scotland. We recognize 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 shewn 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 *res*—the thing, the town lot granted. It is not to be deemed to be granted merely as an accessory of that; and in confirmation of this conclusion he refers to the fact, that there is a separate *reddimus* or consideration for the grant. Now the question is simply, whether the Lord Ordinary is right in that rendering. If he is right in that rendering,—*cadit questio*; the thing is not good as against the appellants. 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 demise, and which, therefore, may be called the dominant tenement. That has been so clearly pointed out, that it is unnecessary for me to state it again. It is impossible for me 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 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 things so granted. 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 subject granted. But it is impossible to do that, because you are obliged to come to the conclusion, that the cow's pasturage is to enure 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 99 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 things which had been previously granted for 99 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 lease 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 consideration, 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, I concur in the opinion 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 99 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 99 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.

*Interlocutors of the Court of Session affirmed, and appeal dismissed with costs.*

*Appellant's Agents, James Dalgleish, W.S. ; William Robertson, Westminster.—Respondents' Agents, D. Curror, S.S.C. ; J. Y. Puller, S.S.C. ; R. M. Gloag, Westminster.*

APRIL 29, 1870.

LORD CHARLES G. A. HAMILTON, *Appellant*, v. DUKE OF HAMILTON, *Respondent*.

Entail—Prohibition—Irritant and Resolutive Clause—Rutherford Act, § 43—*A deed of entail contained the three usual prohibitions, but in the irritant and resolutive clauses there was no express clause covering the prohibition against altering the succession.*

HELD (affirming judgment), *That the deed of entail was annulled by the Rutherford Act, § 43, for the Rutherford Act, in questions inter hæredes, as well as between strangers, annuls a deed of entail which prohibits altering the order of succession, if there is no irritant and resolutive clause applicable; and such a prohibition was ineffectual at common law against onerous deeds of the heir in possession.*

SEMBLE, *The prohibition against alienating does not include a prohibition against altering the order of succession, which latter prohibition must be specific.*<sup>1</sup>

<sup>1</sup> See previous report 7 Macph. 139 : 41 Sc. Jur. 77. S. C. L. R. 2 Sc. Ap. 12 : 8 Macph. H. L. 48 ; 42 Sc. Jur. 396.