is to be a new trial. There are two things however in this case, the fact that this road, whether it was originally made as a road to that mansion-house or not, is now the road to the mansion-house, which always involves considerations of law, as well as of evidence—and the fact of the peculiar position of this pursuer, the right which he formerly claimed to the road, and the alleged permission given to him and those connected with his estate to use this road for a long period of years, which might naturally lead a jury to think that that was evidence of a public road. These considerations, as well as others, make it somewhat a peculiar case, and not one of those ordinary cases, in which the opinion of a jury can be just at once accepted.

Lord ARDMILLAN—I have nothing to add. I entirely concur with your Lordship's view of the case.

The rule for a new trial was therefore made absolute. Expenses reserved.

Agent for Pursuer—Jas. Webster, S.S.C.
Agent for Defender—Alex. Howe, W.S.

Friday, March 15.

FIRST DIVISION.

CAMPBELL *v.* M'KINNON AND OTHERS.

Lease—Constitution. Terms of documents, being the writings of the proprietor, which *held* to constitute a valid lease for 99 years.

Lease—Pertinents—1449, *c.* 18—*Singular Successors Held* that a tack for 99 years was binding on a singular successor of the lessor, not only as to the principal subjects, but also as to a right of pasturage, which was a pertinent thereof.

Charter — Subjects comprehended. Held that a vassal had no title to a right of pasturage which was not specified in his charter, although he had previously possessed the right as tenant, and had continued that possession for many years after getting the charter. *Question*—whether a person with a right as tenant to a lease and a right as vassal of the same subjects can ascribe his possession to either, and *Opinion* that he cannot.

This is an action at the instance of Mr Campbell of Aros, who is proprietor of the estate on which the village of Tobermory is built. It is brought against the parties who are in possession of all or the greater part of the land on which the village is built, and who are possessed of a privilege of pasturing cattle on the neighbouring hill ground called the "Muir Lawn;" and the summons concludes to have it declared that the pursuer has the sole and exclusive right of property in the subjects described therein "and that free of any servitude or other right in favour of the defenders, or either of them, to graze their cows, horses, or other bestial, on the foresaid lands of Aros and the several other lands and others before described, or any part thereof, and that the pursuer and his tenants and servants in the said lands are 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." There are also conclusions for decree of removing from the subjects against the defenders; but in the course of the discussion in the Inner House a minute was lodged for the pursuer withdrawing these conclusions in the meantime, under reservation of all questions relating thereto. The defence was that the defenders had acquired right to the subjects, with the privileges attached thereto, and that therefore they should be assoilzied. The defenders consisted of three classes—(1) rentallers without formal leases; (2) tenants with formal leases; and (3) feuars. These parties all derived their rights from a predecessor of the pursuer, and he pleaded that the leases were not binding on him as a singular successor.

The Lord Ordinary (Kinloch) found that the defenders had failed to establish in a legal and competent manner the right of grazing claimed by them, and therefore found and declared in terms of the summons. His view was that the legal character of the right claimed was a right of servitude which might be constituted either by grant or prescription, but must be in favour of a dominant over a servient tenement, and so constituted as to operate a real right before it can effectually pass against a singular successor. No such right can so pass which is constituted by a merely personal grant. He thought the claim of the feuars was unfounded because the charter contained no mention whatever of pasturage. And although the holders of formal leases had an express right of pasturage conferred on them by their leases, which was binding on the granters of the leases, his Lordship thought it could not be enforced against a singular successor. It was a mere personal contract. A lease is so also in legal character, but by statute it is made effectual against singular successors. But this statutory provision only applies to the leasing clauses, and not to a right of pasturage separately given in the deed and for a separate consideration. In regard to the others, the rentallers, the same considerations excluded their claim, assuming their leases to be valid.

The defenders reclaimed.

DEAN of FACULTY, F. W. CLARK, and BLACK, for them.

LORD ADVOCATE (Patton), FRASER, and GIFFORD, for the pursuer.

At advising,

Lord CURRIEHILL—It is of importance to attend to the shape of this action. It is not at the instance of the inhabitants to have the nature of their rights declared. The defenders are merely resisting the demand of the pursuer for a decree in this action. They are not calling upon the Court to ascertain the nature or extent of the right or title under which they are in possession. It is at the instance of the owner of the lands; and hence, unless it shall appear that the defenders have no right whatever to the pasturage claimed by them, the pursuer will not be entitled to decree in this action. All we have to do, therefore, is to inquire whether the defenders have vested in them any right whatever to this privilege of pasture. The defenders do not claim the right to pasturage as being a separate subject. They do not claim an exclusive right to any portion of the muir lawn. What they claim is that each of them, as lessee or feuar of a lot of building ground in the town of Tobermory, shall enjoy—only as a pertinent of that subject and connected therewith—a privilege in common with the other owners of the houses in the village of sending bestial to pasture on the muir lawn. What we have to ascertain, therefore, is, whether or not the defenders have an existing right to such lots of ground in the town of Tobermory? and if they have, whether or not such a pertinent is attached to each of their lots? In order to ascertain

this we must look a little into the origin and history of this village of Tobermory. In the year 1786 a society was incorporated by Parliament, by the statute 26 George III., c. 106, by the name and style of the "British Society for Extending the Fisheries and Improving the Sea Coasts of this Kingdom." The purposes for which the society was incorporated do not enter very deeply into this question, but it is proper to mention that these were to enable the partners "to subscribe a joint-stock, and therewith to purchase lands and build thereon free towns, villages, and fishing stations in the Highlands and Islands in that part of Great Britain called Scotland." The only thing of much importance to keep in view is that this society was a corporation which could only act through its office-bearers, whose acts within their limits were the acts of the society itself. It appears that in 1788 the society purchased the lands of Tobermory. The Act of Parliament authorised them to do so. It appears that they immediately set about making one of their stations at what is now the village. They then adopted steps with the view of forming a settlement at the place. These proceedings we find were gone about very deliberately. It appears from the minutes that on May 4, 1789, "Mr Dempster and Mr Malcolm reported, that in pursuance of their undertaking at the last meeting, they had prepared for the consideration of the other directors a set of regulations for lotting out the society's land, so as immediate access may be afforded to every person willing to settle there, on the terms to be proposed in the said regulations, which they then presented." Two days after this—namely, on 6th May 1789—the regulations proposed at the last meeting were approved of, additions having been made thereto. On 11th May 1789, a court of the society was held when the regulations were formally adopted, as well as a proposed advertisement relative thereto, and it was "resolved that the advertisement be printed in all the Scotch papers once a fortnight for six weeks, and that 200 copies of the regulations be printed and sent to the society's agents, to be by them dispersed for the information of the people of the county." These regulations are titled "Regulations for Building and Lotting Land at Tobermory in the Island of Mull." Some of them appear to me to be of importance in this case. The first is, "that the plan of the town of Tobermory, as laid down by Mr Maxwell in his plan marked No. 1, is approved of." The fourth is, that "the land shall be lotted out to all persons willing to build houses thereupon, at the rate of 1d. 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; but that the lots on Argyll Terrace shall be let at 2d. per running foot in front, as being the most eligible situation, and the most proper for the best houses." The fifth is, "that the said lots shall be granted of leases of 99 years, renewable for ever, on paying one year's additional rent." The seventh 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 five 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, of arable and also of uncultivated land, shall be subject to conditions of improvements to be settled with the society's agent at Tobermory." The eighth is, "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 for a cow 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, for 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." The ninth is, "that the rule for lotting shall be to give the preference to the person who first applies for a lot, and if more than one applies at the same time to decide the preference by lot." The twelfth is a long one, but it contains this—"That each lot shall have a dwelling-house or houses, shops or warehouses, built upon it along the whole line fronting the street." It was the 8th of these regulations which created the right of pasturage on the muir lawn. And it plainly did not provide that such rights of pasturage were to be allotted as separate subjects to persons who might not be allottees of building lots in the town. It was only each inhabitant—that is, each party taking a lot in the town—who was to be entitled to this privilege.

Now these regulations were established by the society at the outset, and it appears that they were published to the world in order to induce persons to come to the place and accept what was offered. By a minute of the society, of date 22d November 1792, it was "ordered that the agents do inform all future settlers at Tobermory and Lochbay, that if the muir ground 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 to the improvements to be made by them upon their lots of land at present uncultivated." And another minute, of date 30th November 1792, "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."

One peculiarity of these regulations, and also of these notices, was this, that they set forth that the first applicants would be entitled to choose their own lots, and to have cows' grass on the muir if there was not enough for all. It was an offer to all the world by the society to come forward, and the person who came first would get the lot he asked. The society put itself very much in the position of a person exposing his property to unreserved sale by auction. It appears that from time to time a number of persons came forward and closed with the society's offer, and that there were at least 108 lots disposed of. It also appears that for a considerable time no title was given to the allottees, but their names were entered in certain rentals kept by the society, of which a specimen for the year 1832-3 is printed. It is titled "Descriptive Rental and Rental of Account of the Estate of the British Society at their Settlement of Tobermory, from Whitsunday 1832 to Whitsunday 1833." This is a document of very considerable importance. It contains in a tabulated form the conditions on which possession was obtained. These, though very briefly stated, are very distinct. The first column has

the names of the lessees. Under another column there is the number of the lot, and that I understand corresponds with the number indicated on the plan referred to in the first regulation, so that the subject is thus completely identified. It is farther identified by the name of the street in which it is situated being mentioned, and also its dimensions in length and breadth. Another column states the "Date of original entry." This serves to specify the date of the commencement of each lease. Another column is headed "Length of lease," and this fixes the period of endurance. Another specifies the rent. Then, with regard to the privilege of pasture, there is a column titled "Cows' pasture—No. of cows and rent." There is another column which has no corresponding article in the regulations, and is headed "Horses' pasture." That is seemingly a condition which was made after the regulations were adopted. Under the heading "No. of horses," there occurs generally "½." That was explained to us to mean not pasture for half a horse, but half the pasture required for a horse. Then another column states the "Rent for digging peats;" and 2s. 6d. is the sum always entered under this head. There are other two columns appropriated to the arable land, which was to be leased for nineteen years, and the uncultivated land, which was to be leased for the life of the lessee or for thirty years, under article 7 of the regulations. Now, in point of fact, the persons who obtained these lots immediately entered into possession of them, and have ever since possessed them. Not only so, but each of them has performed the obligations imposed on him by the regulations by building houses, and the lessee or his successors has possessed the houses and the privileges of pasturage and raising peats, and has also paid the stipulated rents.

Now, such being the facts of the case, two questions have arisen. The first is, how far the society who granted these lots were bound by their own regulations and minutes. I am of opinion that they are binding on the society, though no formal leases were granted. It might be that they imposed only an obligation on the society to grant leases; but having been followed by *rei interventus* and by possession—that was equivalent to a lease. Now, these documents contain all the essentials of a lease—the parties—an identification of the subjects—the rent—the commencement and endurance of the lease; and, according to all the authorities, such a document, followed by possession, constitutes a valid lease as between the parties. The documents are the writings of the corporation. A question has been raised whether or not such a lease requires an ish. The leases are granted for a specific period of ninety-nine years, but the regulations contain an option to the lessee to demand a renewal at the end of that time for ever on paying one year's additional rent. I don't think it is necessary to inquire whether such a clause in a lease is binding on a proprietor. That question does not now arise, for the period of 99 years is still current. The next question is—Are these leases binding on the pursuer, who is a singular successor of the society? It appears that the society sold all their rights to Mr Nairne of Drumkilbo, and that Mr Nairne sold the subjects to a Mr Crawford, who sold them to the pursuer. In these transferences there are clauses of warrandice which may become of importance at the end of 99 years, if a tenant should then demand a renewal. I am not going to express any opinion on that question. It is not necessary, because, as I have already stated, it is quite sufficient to ascertain whether at present any right belongs to the defenders. The question is—Are the leases binding on the pursuer during the 99 years? I am quite clearly of opinion that they are, at all events, as to the principal lots themselves. The minute of restriction saves us from deciding the conclusion for removing; but the question is reserved whether the pursuer is entitled to remove every inhabitant of Tobermory from his dwelling-house. It was argued to us that he is, and I think we must consider that, because, unless there is a valid title to the principal lots, there is none to the accessory right of pasturage. In regard to the leases standing on the rentals, I think they are binding on the pursuer. They have all been followed by possession and the building of dwelling-houses. Now a right of lease that has an ish is rendered a real right binding on singular successors, whether purchasers or adjudging creditors, by possession, in the same way as sasine operates in regard to a right of feu farm. It is the equivalent of infeftment. The leases are therefore binding on the pursuer for 99 years. But he says they are not binding on him as to the pasturage. I am of opinion that that contention also is groundless. The right was a part of the lease. It was so declared in express terms by one of the articles of the regulations, before any of the leases were granted. Each tenant was to have a right of pasturage, and accordingly that privilege has been possessed from the commencement till the present hour, and the rents stipulated therefor have been paid. I therefore hold that this right is a part of the subjects, and that, as such, its endurance is commensurate with the endurance of the rest. On these grounds I think that as to all the defenders whose rights stand on the original regulations and rentals, they are entitled to the exercise of this right, and that therefore the decree sought ought not to be granted.

There is a second class of defenders who have obtained formal leases. At all events their position cannot be worse than the class I have been speaking of. Their rights, I think, are just the same.

There remains a third class of persons as to whom there is more difficulty. There are a few who were originally in possession under the regulations and rentals, who, instead of obtaining formal leases got feu charters, and their title consists of these charters and the infeftments upon them. That gives them an unqualified right as owners to all the subjects specified in the charter; and their right never comes to an end, and it is not in their option to relinquish it. But then in the feu charters there are articulate clauses, and there is no privilege of pasture specified. I think it was omitted intentionally, because the privileges of taking peats and of quarrying stones are not omitted. I am therefore quite clear that they have not the right of pasture in virtue of their charters. The intention is made clear by this that the *reddendo* does not include the annual payment of 5s. for the pasturage. But the question remains — Did these tenants when they obtained the feu right lose their former right under the leases? There is no express renunciation of it. But did the taking of the feu imply a relinquishment of the right vested in them before? That question was not argued to us. I have great difficulty in seeing any incompatibility in a tenant who acquires the higher title of a feu right still continuing to hold his former right. He may possess on both titles,

and use the one most convenient for himself. This is common enough. The *dominium utile* and *dominium directum* are in many cases held by the same individual. A superior may be his own vassal. Higher and lower rights may be held by the same individual. It has been decided that a tacksman of teinds may acquire the titularity, and that the one right does not extinguish the other, but he may possess on both (Earl of Fife *v.* Innes, 25th Jan. 1809, Hume's Dec., p. 468). On principle, therefore, I have very great difficulty in holding that these tenants by obtaining charters lost the rights previously vested in them and not renounced; but I think the authorities go the other way. Craig, Stair, and Erskine all say that a tenant by acquiring a right of property virtually relinquishes his lease; and such being the state of the authorities, I feel myself bound to follow them, and to hold that the defenders who have feu charters are not entitled to the privilege of pasture.

Lord DEAS—I shall not resume the circumstances of this case farther than seems necessary to the understanding of what I have to say. It appears that in 1786 certain parties obtained an Act of Parliament incorporating them under the name of the British Society for Extending the Fisheries and Improving the Sea-Coasts of this Kingdom. Section 2 conferred on them full power to buy and sell lands or other heritable subjects. The object was to purchase lands in Argyllshire on the coast, and to erect a harbour and establish a fishing village. The reasons were, as stated in the preamble, that "whereas the building of free towns, villages, harbours, quays, piers, and fishing stations in the Highlands and Islands of North Britain will greatly contribute to the improvement of fisheries, agriculture, manufactures, and other useful objects of industry in that part of the kingdom, in which the dispersed situation of the inhabitants hath hitherto proved a great impediment to their active exertions; and their being collected into fishing towns and villages would be the means of forming a nursery of hardy seamen for his Majesty's navy and the defence of the kingdom; and whereas the finding immediate employment at home for great numbers of people would be the means of putting a stop to the dangerous spirit of emigration now prevailing, and likely to prevail, in a great degree, to the depopulation of that part of his Majesty's dominions, and loss to the kingdom of many of his Majesty's useful subjects." The society about 1788 acquired from the Duke of Argyll four portions of the twenty-four merk five shilling land of Aros, in Mull, including Baliscate and Tobermory. In 1789 they made with great solemnity certain regulations, the fifth of which bears that "lots shall be granted of leases for 99 years, renewable for ever on payment of one year's additional rent." Then there are resolutions to advertise these regulations. The consequence of all this was the erection of the town of Tobermory. A great number of people came forward and took these lots, erected houses at considerable expense, and have possessed them with the relative privileges ever since. One of the privileges was that every allottee was to have a privilege of grazing and a right to peats, paying therefor annually 5s. and 2s. 6d. respectively. In 1845 the society sold to Mr Nairne the two portions of the estate of Aros, which go under the names of Baliscate and Tobermory. In 1850 Mr Nairne sold them to Mr Crawford, and in 1856 he sold them to the pursuer. The society retained the quay and the pier and the rest of the lands. Then in February 1862 the pursuer raised this action. The declarator is asked against the defenders whether they be feuars, tenants, or mere rentallers. The conclusions are limited to the particular right or privilege of pasturage; but it was not concealed that this is an assault on the outworks in order ultimately to get rid of the inhabitants of Tobermory altogether. That was avowed, and we had a very able argument to prove that the leases are nullities, at all events in a question with singular successors in respect they have no ish. There are three sets of defenders—(1) those with formal leases; (2) rentallers; and (3) feuars.

1. As to the formal leaseholders. A specimen lease has been printed. It lets "all and whole 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 thirty feet in front to the street, by eighty feet in depth, and that for the whole space and term of ninety-nine years complete from and after the term of Whitsunday in the year 1791, which, notwithstanding the date hereof, is hereby declared to have been the term of entry of the said John M'Lachlan to the said lot of ground; together with the right and privilege of digging, winning and carrying away peat for fuel to his said house, but not for sale, and 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 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 by the said society from time to time, which regulations and restrictions the said John M'Lachlan and his foresaids oblige themselves to observe; it being expressly agreed by the said society that this lease of ninety-nine years shall be renewable for ever to the said John M'Lachlan and his foresaids, at their cost and expense, upon payment to the said society, or their assignees, of the sum of 2s. 6d. sterling money, at the end and expiry of every ninety-nine years, in name of grassum only, but the rent to continue at the aftermentioned rate of 2s. 6d. sterling yearly for ever, upon the conditions herein before and after mentioned, and such other conditions and regulations as are expressed in a writing, engrossed in a register kept by the agent of the said society, and a copy whereof is signed by the said John M'Lachlan, the whole houses already built, or to be built on the said lot of ground, being understood always as parts and pertinents of the said lot: And further, the said society by these presents lets to the said John M'Lachlan and his foresaids twenty-eight 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 from and after the term of Whitsunday 1791, and also 5 acres, 1 rood, and 12 perches or thereby, of the uncultivated land on the said estate of Tobermory, lying adjacent to land in the occupation of Hector Gillies, indweller, and marked No. in the plan made by George Langlands, surveyor, during the life of the said John M'Lachlan, or for thirty years if he should not live so long, from and after the said term of Whitsunday 1792, which is likewise declared to be the said John M'Lachlan his entry thereto, notwithstanding the date hereof, which lots of arable and uncultivated land shall be subject to conditions of

improvement to be settled by the society's agent, and delivered in writing to the said John M'Lachlan, or his foresaids, all lying within the parish of Tobermory and county of Argyll: Moreover, the said John M'Lachlan and his foresaids shall have a right by his tack to pasture one cow during the summer season—viz., from the 12th day of May to the 11th day of November inclusive yearly—on such parts of the said society's muir lands 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's pasturage for cows in the events therein mentioned; which tack of the said lot of ground, renewable as above, the said society hereby bind themselves and their successors to warrand to the said John M'Lachlan and his foresaids, at all hands mortal, upon their performing the conditions herein before and after expressed."

Now, the first question that arises is one of construction—whether this right to a cow's grass is attached to the building lot or to the arable and uncultivated ground which were only let for nineteen and thirty years respectively. It was argued that it was attached to the latter only. The Lord Ordinary is of opinion that it is attached to the building lot, and I agree with him. It is true that the right is not mentioned in the lease till after the arable ground; but then it says that the lessee is to have the right "by his tack." And the matter becomes clearer when you read on—"which tack renewable as above" the society warrant. The only tack renewable was the tack of the building ground. I have therefore no difficulty as to that. But the Lord Ordinary holds that this right of pasturage is not good as against a singular successor, apparently because he thinks this right is not land in the sense of the statute 1449, cap. 18, and a great part of the argument we had was in support of that view. The words of that statute are:—

"It is ordanit for the sauftie and favour of the puir pepil that labouris the grunde that thai and all utheris that has takyn or sal tak landis in tym to cum frae lordis, and has termes and zieres thereof, that, suppose the lordis sel or analy thai landis, that the takers sall remayn with thare tackis on to the ische of thare termes, quhais handis at ever thai landis cum to, for siklik male as thai tuk thaim of befoir."

A great deal was said about the statute being limited to poor people. On the face of the statute that wont do. The words are poor people and all others. Then it was said it only applied to land, but in the case of Waddel, 10th Dec. 1794, M. 10,309, the question was raised whether it applied to the lease of an urban tenement, and it was determined that it did. I am of opinion that "land" in the statute includes all kinds of heritable subjects which are capable of that possession, which enables a singular successor to ascertain, if he inquires, that the right exists. Take the case of a lease of a stone quarry, or a slate quarry, or minerals, involving it may be on the part of the lessee an expenditure of thousands of pounds. Is that not binding on a singular successor because it is not land? It may be, however, that a cow's grass is not a subject of which by itself a lease could be granted so as to bind a singular successor, and that seems to be the Lord Ordinary's view. His view is, that the agreement to give a cow's grass was a mere personal contract with the society, not constituted so as to bind a singular successor. I take leave to differ from that view. I think the obligation is good against a singular successor, when it is mentioned in a lease such as this as a pertinent of the principal subject. It is not necessary it should be considered as a servitude, for that is a permanent thing when properly constituted. It appears to me contrary to common sense to hold that the pursuer could challenge the right to take peats for fuel to the house, and stone, limestone, and sand for the use of the land, and yet hold to the lease. Is the lessee to keep up the house and not get stone and lime to do so? That seems to me extravagant. A house is let with a right to a well and a road to it; or a mill is let with the privilege of a mill-dam. Is the singular successor to take away the dam and leave the mill? Or if a farmer has in his lease a right to take seaware, can a singular successor take away the right to manure and make the tenant keep the farm? The pertinents go along with the subjects, whether they can be made the subjects of lease themselves or not. It is true there is here a separate rent stipulated for the grass and for the peats; but that is just so much added to the rent in respect of the pertinents. Then it was said the grass was a thing the tenant might avail himself of or not as he pleased. It appears to me that under the lease he must pay the 5s. and 2s. 6d. annually whether he uses the privileges or not. But suppose it were otherwise, that would not affect the result. On these grounds I am of opinion that this right of pasture is good so long as the lease may last. It was contended, however, that the lease itself was not good as against singular successors. I am of opinion that it is good against them, at all events for 99 years. At the end of that time a question may arise which we may leave to be disposed of by our singular successors. It is a question of law. Liferent leases are good against singular successors, and yet in them the ish is in a sense indefinite.

But, in the next place, I think it is not in the mouth of the pursuer to urge this plea. This action is maintained on the footing that in regard to the building lots themselves the lease is binding on him, and accordingly no plea in law is stated to the effect that it is not. I hold therefore that this question cannot be raised by the pursuer.

The conclusion I arrive at is that these formal leaseholders are entitled to absolvitor.

2. As to the rentallers. In regard to them I have very little to say. I agree with Lord Curriehill that they are just in the same position as the tenants with formal leases. All the essentials of a lease are embodied in the documents relied on, and when you have that followed by possession you have enough to constitute a valid lease. I hold that all these parties are entitled to demand leases, and also that the landlord may compel them to enter into them. They are therefore also entitled to absolvitor.

There is another ground on which I come to the same result, and I think it is important. It is founded on the clauses of warrandice in the different transferences of this property. In the disposition by the society to Nairne in 1845 the clause of warrandice is in these terms:—"Which lands, and others above written, with the pertinents above disponed, and this present right and disposition of the same, we bind and oblige ourselves to warrant to the said David Nairne and his foresaids at all hands and against all deadly, as law will, excepting always from this 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 to the different feuars, vassals, and tenants thereof, without prejudice to the said David Nairne to quarrel or impugn the same upon any ground in law not inferring warrandice against us, the said society." Now, the whole leases were granted by this society. There can be no doubt at all that they would be binding on the society out and out though they were perpetual. This was decided in the case of Carruthers *v.* Irvine M. 15195, where the endurance of the lease was "as long as grass grows and water runs;" and in the case of Fraser, 8th June 1770, 2 Paton, 66, a lease for 1140 years was held by the House of Lords reversing the judgment of this Court to be good against a singular successor. There can be no doubt therefore that the challenging of these leases infers no claim under the warrandice against the society. If Nairne had challenged them he could not have operated the clause of warrandice against the society. This is ruled by the case of Wight *v.* the Earl of Hopetoun, 17th Nov. 1763, M. 10461. I rather think that decision was the foundation of some recent cases as to the Hopetoun leases, but no doubt was ever thrown upon it. The question therefore arises—Does it make any difference that there were two subsequent transmissions in one of which there is no exception of tacks from the warrandice? In the other, the conveyance to the pursuer has a similar clause of warrandice to the one in the conveyance by the society to Nairne. The disposition by Nairne to Crawford is in the new and short form recently authorised, and the clause of warrandice is quite general. A question might arise which I have not considered—Whether that imported the exception in the previous conveyance; and that seems a question of some importance. But these deeds do not touch the question whether the pursuer was not bound to look at all the tacks and see what they were and whether the clause in the disposition to Nairne is not equally binding on him. Nairne got the subjects on that condition, and he handed them down on the same condition. The pursuer is no more entitled to remove these tenants than Nairne was. I therefore think that on that separate ground the pursuer cannot challenge these leases any more than the society could.

There is still another ground worthy of consideration—namely, whether there has not been sufficient acquiescence on the part of the pursuer by drawing rents to bar him from challenging the leases. In the case of Scott *v.* Straiton, 19th Feb. 1771, M. 15200, where there was a lease from 19 to 19 years for ever, this plea was sustained. It was not doubted that the lease was good against the granter, but the question was whether it was so against a singular successor; and it was held good against him, because he and his predecessors had for 99 years acquiesced in it and drawn the rents under it. It is true there has not been acquiescence here for so long a time, but there is not so great a difference betwixt 99 years as compared with perpetuity, and 6 or 7 years as compared with perpetuity.

3. As to the feuars, it seems very hard that the men with the most formal rights of all should be the only ones not to get the privilege in question. I agree with Lord Curriehill so far that it is a formidable plea that the one right may be held to coexist with the other. There is a great deal in that, and if there had been formal leases and feu charters coupled with the exercise of the privilege from 1823, the date of the charter, to 1854, it would have been difficult to get over it. If the use of the grass had gone on for forty years, it would have been I think impossible. But the great difficulty is that none of these feuars had formal leases. They took their choice of feu rights instead of tacks; and when these embraced all but the pasturage, it is very difficult to get quit of the rule, that when a negotiation ends in a formal deed, you must look at it alone for the terms of the bargain. There is another ground than that suggested by Lord Curriehill which I think might be more easily entertained. The original regulations say that *every inhabitant* is to have the use of the grass, and there is considerable reason for saying that the feuars were not giving up this right when they took their charters. If your Lordships had seen your way to give effect to this view, I should have been disposed to concur, but I am not prepared to dissent from the judgment that is proposed.

Lord ARDMILLAN—In this action of declarator and removing, brought by Mr Campbell of Aros against a great number of defenders living in Tobermory, a very judicious arrangement has been made under which the interests of these defenders are divided into four classes, and are held as represented by the four parties whose names are mentioned in the interlocutor of the Lord Ordinary. The case is one of some importance to the law, and of the deepest importance to these defenders, who may be truly said to be contending, if not *pro aris* at least *pro focis*.

I shall not again repeat the narration of the facts. These have been already adverted to, and they are fully explained in the Lord Ordinary's note.

The pursuer is the purchaser of the lands to which all the questions now raised relate. He is, I think, in the position of a singular successor, for I cannot adopt the view contended for by the Dean of Faculty, that, looking to the constitution of the British Fisheries Society as a public statutory company established for public purposes, the pursuer is bound by their contracts to any further extent than singular successors are in the ordinary case. I consider the pursuer to be no further or otherwise bound than as a singular successor is bound according to law. Not that the statutory nature and purposes of the society are to be put aside as of no importance. These are, I think, important, not as depriving Mr Campbell of any right or plea competent to him as a singular successor, but as explaining and qualifying the character of the long-continued and open possession in accordance with the provisions and purposes of the statute which has followed on the contracts entered into by the society with these defenders.

The object of the society was to induce parties at and round Tobermory to take lots of ground and erect houses thereon, so as to form a town, village, or fishing station. In order to promote this object, the society framed and published the regulations which have been referred to. I look on these regulations, not as bye-laws, but as the public proclamation of the conditions on which the society was willing to dispose of the land held in terms of the incorporating Act. The leading regulation is, that the proposed town should be laid out in lots to be granted on leases of 99 years, renewable for ever on paying one year's additional rent. Other regulations followed, on which I need not dwell; but among these is the most attractive announcement that every inhabitant should have right to dig peats for his own use in the society's mosses, and right to a summer's

grazing for a cow on the muir-lawn of the society, on payment of a sum not exceeding 7s. 6d. per annum for these privileges. After issuing these regulations in 1789, the society, by minute dated 1792, intimated to "all future settlers at Tobermory" that this sum of 7s. 6d. should be divided into 5s. for the cow's pasture, and 2s. 6d. for the privilege of peat for fuel. It is not disputed that houses were built by the defenders on the lots of ground allotted in terms of these regulations, and it is quite plain that there has been long-continued possession and payment of rent both for the houses and the ground, the cow's pasture and the peats.

The defenders are now compelled to contend for their possessions against this action of declarator and removing.

In 1845 the British Fisheries Society sold to Mr Nairne with absolute warrandice, but "excepting from the warrandice the whole feu-rights, and 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 to the different feuars, tenants, and vassals thereof." In 1850, Mr Nairne, holding the property under a disposition with this exception from the warrandice, conveyed the lands and subjects to Mr Alexander Crawford with a clause of warrandice containing no such exception. In 1856 Mr Crawford's heir and trustees conveyed the property to the present pursuer, with warrandice from fact and deed of the heir so disponing, and absolute warrandice against the estate of Alexander Crawford, but "excepting always from this warrandice the current tacks and feu-rights of the said lands and others granted in favour of tenants and vassals of the same." This exception from the warrandice in the first and the last of these three conveyances is a specialty of some importance in this case. So far as it applies, it is unfavourable to the pursuer. But I do not feel so clear on this point as to rest my opinion on it. I think I have safer grounds for the judgment.

The pursuer, whose rights as proprietor are built on this series of titles, and qualified by this exception from the warrandice, has brought the present action of declarator and removing. His immediate purpose is stated to be limited to the right or privilege of pasturage exercised by the defenders; but the grounds and pleas on which the pursuer's claim has been urged are not limited to the question of pasturage only, but necessarily raise the most serious questions in regard to the whole possessions of the inhabitants of Tobermory. Indeed, in the minute of restriction, the wider claims of the pursuer are reserved.

There are three classes of defenders, and the first class to which I advert is the class of leaseholders—those who are in possession under tacks for 99 years from the British Fisheries Society. The tack No. 74 of process is presented and accepted as a specimen tack, and the class of which I am now speaking are admitted to possess under such a tack. This document, to the regularity of which no objection is taken, is dated in 1800, but the term of entry is at Whitsunday 1791. It is a lease for 99 years, from that date, but renewable for ever at the expiry of that term, and of each term of 99 years on payment of a year's rent. The leading purpose and provision of the lease is that the British Fisheries Society "set and in tack and assedation let" to John M'Lachlan and his heirs, executors, and assignees a lot of ground in Tobermory, lying in Breadalbane Street, marked on a plan and according to a specified measurement, with the right and privilege of digging and carrying away peat for fuel to his said house, at a certain rent and under certain conditions and regulations. There is a further lease of a small portion of arable ground for 19 years from the same term, and also of above five acres of uncultivated land for the life of the tenant, or for thirty years after 1792 if he should live so long. These leases for shorter periods than 99 years are in the same writing as the long tack, but are not renewable; the only subject set of which the tack is renewable, or in regard to which the word "tack" is expressly employed is the first lot of ground—namely, the building ground in Breadalbane Street. Then follows this further declaration—"Moreover the said John M'Lachlan and his foresaids shall have a right by his tack to pasture one cow during the summer season," &c., subject to a certain reserved power in regard to the enclosing and improving of land which is not now in question. I agree with the Lord Ordinary that the "tack" to which this privilege of pasture is attached by the lease, is the tack of the building ground for 99 years, as above explained. I should have no doubt of this being the sound construction of the lease with reference to its preceding provisions, because neither the lease for 19 years of one subject, nor the lease for 30 years of another subject, is termed a "tack," while the lease or set of the lot of building ground is expressly stated to be "in tack." But this point is made still more clear, and is indeed put beyond doubt by referring to the immediately following expression, "which tack of the said lot of ground renewable as above," the society binds itself to warrant, &c. There is no tack "renewable as above" except the tack for 99 years, and therefore to that tack for 99 years the right or privilege of pasturage is attached by the lease.

The first question which arises with reference to this lease is—Whether it is valid against a singular successor according to the statute 1449, cap. 18. I am of opinion that it is a good lease effectual in terms of that statute. The pursuer is not in this action at present seeking to remove the defenders from their dwelling-houses, but he claims the right to do so. He denies that the lease has conferred a valid right, and he has maintained in argument that he, as a purchaser, can remove all the tenants from all their possessions in respect that the leases are not effectual under the Act 1449. It is therefore necessary to dispose of that argument, and I am of opinion that it is not well founded. I need not again refer to the authorities which have been mentioned. I consider this not a perpetual lease, nor a lease of indefinite duration. It is a lease for the definite period of 99 years from Whitsunday 1791—a period which has not yet expired, with a power to the tenant of thereafter claiming renewal on certain conditions. After the cases of Wight *v.* Lord Hopetoun, Scott *v.* Straiton, and others, I think we must hold it settled that such a lease followed by possession is within the scope of the Act 1449, cap. 18, and is effectual against a singular successor.

But the right of pasturage here in question, and from which the pursuer seeks to remove the defenders is within the body of this lease, and attached to the tack of the building ground for 99 years. It is a mistake to suppose that the defenders holding these tacks are claiming a real right of servitude separable from their possession as tenants. They are claiming only as tenants, and

claiming no more than what the lease expressly confers.

The right of pasturage possessed by the defenders is a pertinent or adjunct to the tack of the building ground. The privilege was one of the attendant advantages held out to the public by the statutory corporation of the British Fisheries Company to induce parties to take leases and build houses. The privilege formed a portion of the subjects let; it was within the contract of lease, and was one of its inducing causes. It is as clearly a pertinent of the tack as is the right to take peats; and accordingly the pursuer did not in his argument attempt to separate them. He treated the right to peats as resting on the same foundation, and though not claiming in this action to withdraw the privilege of fuel he maintained that he had a right to do so.

I have already said that the lease itself is in my opinion effectual in a question with the pursuer. To remove each of these tenants with his family from his possession, from the hearth he has laid and the dwelling he has reared, would in my opinion be an act not only harsh, but illegal. But if this privilege of pasture and this privilege of peats are, as I think they are, pertinents, accessories, or adjuncts to the subject of the tack on the faith of which the tenant entered into the contract, and built the house, and paid the rent for many years, then the pertinential privilege, the accessorial right, must be just as valid as the tack; and as it would be illegal to remove the tenant from his house, so it is just as illegal to deprive the tenant of this pertinent or adjunct, by withdrawing from the hearth the fuel, and from the homestead the privilege of pasture, which are the simple, yet most precious comforts of his humble lot. Where the tack is valid, the pertinents of the tack, enjoyed under the tack, are equally valid; and here the tenants' right, alike to the house and the ground on the building lot, to the peats and the pasture attached to it, has been fortified by the possession of nearly eighty years. That the possession has been open and manifest, according to a written lease, according to the published regulations, and the well-known statutory objects of the society, must render it the more important, and strengthen the defence which it presents against an action of removing.

I have accordingly arrived at the conclusion that those defenders who hold tacks in the terms of the specimen tack in process are entitled to absolvitor from the conclusions of this action.

The class of defenders whose case I next consider, and which really includes two of the four classes, is that of the tenants who have been in possession for a great number of years, far beyond the prescriptive period, but without a regular written lease. They rest their defence on the regulations of 1789, on the entries in the rentals of the British Fisheries Society, on their open and long continued possession of their lots of ground and their privilege of pasturing, and on their payment of rent for the same.

After careful consideration of the authorities applicable to possession on the footing of a lease of this informal character, I am of opinion, as I am glad to find your Lordships are, that these tenants also have a valid right of lease effectual under the Act 1449, and that they are also entitled to be protected against removal from the privilege of pasturage and of peat cutting which is pertinent to the lease.

It does not admit of dispute that there is ample proof of a contract of lease effectual against the party whose rentals contain the entries now before us. In any view there is a valid obligation to grant a lease in terms of these rentals, and such an obligation has been expressly sustained against a singular successor. There is no missive of tack here. But there has been *rei interventus*, and there has been long possession on the rentals, and I think it is quite settled, first, that such entries in a rental-book, or rental states regularly kept, are the writ of the landlord; and secondly, that, if they contain with sufficient clearness the essential elements of a proper lease, they are considered as equivalent to a lease, and, when followed by possession, as effectual under the statute against a singular successor. Now, here we have all these elements, and we have them explained and corroborated by the regulations published by the landlord, by the plans referred to giving the number of the lots, and by the long possession stated on record to have been with reference to these regulations and plans. We have no difficulty in ascertaining from these rentals, the landlord, the tenant, the subjects, their measurement, their situation, the term of entry, the endurance, the privileges, and the rents. With all these particulars appearing from the entries in the rentals, and confirmed by the regulations and the plan, and with an acknowledged possession for nearly eighty years, I am really unable to see any sufficient ground for distinguishing these tenants from those in the first class who hold regular written tacks. In regard to both classes I am of opinion that they are entitled to absolvitor.

The third class of defenders consists of those who hold feu-charters from the British Fisheries Society, and who are, by the arrangement which I have mentioned, held to be represented by John M'Callum. This defender is in a position which at first sight might appear more favourable than that of the leaseholders. But on consideration of the title on which he stands, I concur in the opinion that his defence against the action of removing from the pasturage is not conclusive. It appears that the father of the defender obtained two of the lots of ground mentioned in the regulations, and his name appears in the rentals in the same manner as the others. But there was no prescriptive possession prior to 1823; and in 1823 he obtained a regular feu-charter, in terms of which the British Fisheries Society disponed to him the whole subjects in the allotments, with the liberty, in common with the other feuars, to cut peat for fuel, and to quarry stones, &c., but without any mention of the right of pasture. Whatever might have been the right of Mr M'Callum prior to the date of this feu-charter, I feel compelled to arrive at the conclusion that, after the date of the charter, he has had no right as a feuar to the privilege of pasture which has been omitted therefrom. It is not without regret that I find myself under the necessity of coming to this conclusion; but I am of opinion that, according to settled rules of law, the result must be that the feu-charter is the measure of the defender's right. I need not again refer to the authorities which have been mentioned on the subject of consolidation of rights. They are the highest authorities on a question of feudal title, and there are no decisions which I have been able to discover which can affect their weight. There has been no prescriptive possession—none on the allotments prior to the charter, and none on the feu-charter, which is only dated in 1823. The annual sums which appear to have been paid by

the defender for pasturage after the date of the charter cannot be viewed as connected with the charter, which neither conveys the privilege nor provides for the exaction of the rent.

It does indeed appear anomalous, as well as unfortunate, that the parties who have the most regular title, and the only title of perpetual endurance, to the building lots, should be found to have the weakest defence against the conclusion for removal from their possession of the privilege of pasturage. But so it is. The title on which they rest is in its terms exclusive of the privilege which they seek to defend, while the leaseholders enjoy it under the express words of their leases.

Accordingly, the result of my opinion is that, except in regard to the feuars represented by M'Callum, the Lord Ordinary's interlocutor should be altered; that both classes of tenants—those holding long leases and those standing on entries in the rentals—should be assoilzied; but that the pursuer is entitled to decree in terms of the conclusions of the action, as restricted, against John M'Callum and those whom he is held to represent.

The Lord President was not in office when the case was argued.

In adjusting the interlocutor, a question arose as to whether the defenders were entitled to claim the privilege of grass for horses; but they put in a minute giving it up, and the following interlocutor was pronounced:—

"*Edinburgh, 20th March* 1867.—The Lords having advised the reclaiming note for John M'Callum and others, No. 385 of process, with the minute for the pursuer, No. 387 of process, and minutes for John M'Callum and others, defenders, Nos. 388 and 389 of process, and heard counsel for the parties, Recal the interlocutor of the Lord Ordinary submitted to review: Find that the conclusions for removing the defenders from the lands and others libelled have been departed from by the pursuer: Find that none of the defenders make any claim to horse grazing on the lands libelled or any part thereof, either permanently or for a term of years, and therefore Find and Declare in terms of the declaratory conclusions of the summons so far as horse grazing is concerned: Find that the following defenders, who hold or are interested in feu-rights of certain portions of the lands libelled, have not established any right, either permanent or for a term of years, to graze their cows upon the lands libelled, or any part thereof—viz., the defenders John M'Callum, Malcolm M'Kinnon, the Rev. Duncan M'Farlane (so far as regards the lot of ground described in statement five of the revised defences, No. 176 of process), Archibald M'Neill, Donald M'Donald, Duncan M'Call, Lachlan M'Callum, Hugh M'Millan, (whose revised defences are included in No. 176 of process), and Margaret M'Lean or Wilson, John Wilson, Alex. M'Lean, Hector Campbell, and John M'Lean, whose revised defences are No. 331 of process, and therefore to that extent and effect Find and Declare, so far as these particular defenders are concerned, in terms of the declaratory conclusions of the libel, and to the extent and effect to which decree of declarator has been pronounced as aforesaid, prohibit, interdict, and discharge the defenders as concluded for in the libel; and as regards the whole other defenders, Find that they have established the right claimed by them to a cow's grass on the Muir Lawn referred to in the record forming part of the lands libelled, subject to the effect of the orders or regulations of 22d and 30th November 1792, founded on by the pursuer, so far as regards those of the defenders whose rights were obtained subsequent to these dates, and assoilzie the said whole other defenders from the conclusions of the libel except as regards the horse grazing herein otherwise above disposed of, and decern: Find the defenders who are assoilzied as aforesaid entitled to expenses, and remit the account thereof, when lodged, to the Auditor of Court to tax the same and report, and *quoad ultra* Find no expenses due to either party, and decern.

"JOHN INGLIS, *I.P.D.*"

Agent for Pursuer—James Dalgleish, W.S.

Agents for Defenders—David Curror, S.S.C., and J. Y. Pullar, S.S.C.

BROATCH *v.* JENKINS (*ante*, p. 121).

Fraudulent Misrepresentation—New Trial. New trial granted, on the ground that a verdict was not supported by evidence.

This case was tried on the 18th and 19th December last, before Lord Barcaple and a jury, under the following issue, viz.:—

"Whether the defender, David Jenkins, by fraudulent misrepresentation as to the number and extent of the accounts, and amount of the balance, claimed by him from the defender, James Rankine, induced the pursuer to become a party to the minute of reference No. 29 of process as cautioner for the said James Rankine?"

The jury, by a majority of 9 to 3, found for the pursuer.

BURNET, for the defender, moved for a rule, which was granted.

MACDONALD, for the pursuer, showed cause.

PATTISON replied.

The Court (Lord Deas dissenting) made the rule absolute, on condition of the defender paying the expenses of the first trial. The majority were of opinion that, assuming every word of the pursuer's testimony, it did not establish what he had undertaken to prove. There was therefore no evidence to support the verdict.

Agent for Pursuer—Robert Johnston.

Agent for Defender—James Somerville, S.S.C.

Friday, March 15.

FIRST DIVISION.

COLVIN *v.* DIXON.

Reparation—Breach of Contract—Unilateral Obligation—Iron Warrant—Master and Servant—Usage—Relevancy. An action of damages for non-implement of an obligation to deliver iron granted by the manager of an ironmaster for his employer, dismissed as irrelevant, in respect—(1) the record did not exclude the possibility of the obligation being gratuitous; (2) it did not contain any averment that the manager had any authority to bind his employer in a gratuitous obligation, which he could not do without special authority or usage, which in this case was not averred with sufficient specification; (3) it did not aver any contract betwixt the pursuer and defenders of which the obligation was executorial; and (4) it did not aver delivery of the obligation by the defenders to the pursuer, and did not specify the character in which the pursuer sued upon it.

This is an action at the instance of William Colvin, iron merchant in Glasgow, against the