it is of the nature of those which are to be comprehended under the term "Private Improvement Assessment." Now, unless it comes under private improvement assessment, it must be (as it was said below) a district assessment. Now what is a district assessment? The interpretation clause of the Act says, that the expression "'district assessment' shall comprehend" so and so. The expression "district assessment" does not occur anywhere with reference to operations to be performed under the 150th section of the Act. Where are these words to be found? They are to be found in certain clauses applicable to sewerage, and some matters of that kind. It is difficult to find, where a district has been pointed out and arranged and defined, how it is to be denominated. We find that in another part of the Act, at a great distance, in the 185th section. But what does that say? It says the districts are to be formed, with a reference to what? With reference to a very small class of matters—with reference to drainage alone. They are called drainage districts. I do not find the expression "district assessment" anywhere in the Statute applicable to improvements to be performed under the 150th section. Therefore I think "district assessment" is out of the question.

Then comes the question whether this ought to be a notice under the 397th section, or under the 394th section, or whether there need be any notice at all. It is very difficult to suppose, that such proceedings as these were intended to be authorized without any notice at all. Where such proceedings are of the nature of improvements of a private street, one would naturally expect to find, from the manner in which the expenses are to be defrayed, that they were to be comprehended under the assessment for private improvements; but certainly the 394th section, which relates to streets, relates to a limited class of operations not comprehending all that is directed to be performed under the 150th section. I cannot hold, that the 394th section was a proper section under which to give notice. Where it is a matter in which several parties are interested, I think the provisions of the 397th section are very important, in order that all parties, both owners and occupiers, might find out how far their interests were involved. But the 394th section, unless you do extreme violence to its words, appears to me to be applicable to public streets, and not to comprehend operations to be performed under the 150th section.

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

Appellant's Agents, Campbell and Lamond, C.S., W. Robertson, Westminster—*Respondents' Agents*, J. C. Irons, S.S.C.; Simson and Wakeford, Westminster.

MARCH 14, 1870.

GILBERT RAINY TENNENT, *Appellant*, *v.* PATRICK TENNENT and Others, *Respondents*.

Partnership—Fraud—Undue Influence—Reduction of Deed—*G., a partner with his brother C. in a business which the father gave them, and in which he retained a large interest, became involved in debt, whereupon the father made an agreement with the sons, agreeing to pay G.'s debts, and G. to cease to be a partner on receiving certain sums, but a power being reserved to the father to replace G. in the business after two years. G. was never replaced in the business, and afterwards raised an action to reduce the agreement on the ground of inadequacy of consideration and fraudulent representations.*

HELD (affirming judgment), *That no sufficient facts were proved to warrant the reduction of the agreement.*

SEMBLE, *When a deed is sought to be reduced for inadequacy of consideration, the inadequacy must be such as to involve the conclusion, that the party either did not understand what he was about, or was the victim of some imposition.*

Proof, Parole—Writ or Oath—Fraud—Trust—Statute 1696, c. 25—*Where a Trust deed is entered into, which is alleged to be a sham, and made for a particular purpose, it is competent to prove this allegation by parole evidence; per* LORDS WESTBURY *and* COLONSAY.

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[1] See previous report 6 Macph. 840; 40 Sc. Jur. 408. S. C. L. R. 2 Sc. Ap. 6; 8 Macph. H. L. 10: 42 Sc. Jur. 408.

This was an appeal from an interlocutor of the First Division of the Court of Session in two actions of reduction of a certain agreement on the ground of fraud, and a declarator, that the appellant was sole surviving partner of a firm of brewers at Wellpark, near Glasgow. The question involved was the right to one half of the past and present profits of a brewery business which had latterly produced a clear income of £60,000 a year. The appellant, Gilbert Tennent, was in partnership with his brother Charles, the father having transferred to them the business, then valued at £214,000, on the agreement of their paying to him certain sums. After being in business two years, Gilbert became involved in debt. The father and brother, after consultations and arrangement, entered into an agreement with Gilbert, whereby his father was to pay Gilbert's debts, and Gilbert surrendered his interest in the business, subject to the payment of the difference between the amount of his debts and the sum of £35,000. There was a power to replace Gilbert in the business on certain conditions; but in the result Gilbert was not replaced in the business. Gilbert now insisted that his brother had betrayed confidence, and fraudulently deceived him in getting the agreement executed; and the actions were to reduce the agreement, and to have it declared, that now, since both the father and brother were dead, Gilbert was the sole surviving partner in the business. The First Division held, that the agreement sought to be reduced was binding on the appellant, and dismissed the action, three Judges being in favour of the respondents, and Lord Ardmillan dissenting. The present appeal was then brought.

The appellant in his *printed case* gave the following reasons for reversing the interlocutor:—1. Because if a person being in difficulties (as the appellant was) applies to another (as the appellant did to Charles) for advice and for assistance in opening a negotiation designed to extricate him from his position, and the person so applied to accepts the character and office of an adviser and negotiator, and throughout the negotiation assumes to represent the person who has consulted him, then, and in that case, equity requires that no advantage whatever shall be taken of the confidence reposed, and above all things, that the negotiator and adviser shall not make any profit for himself at the expense of the person who relies on his assistance and confides in his honour: And the case is stronger and the equity higher, where, as in the present instance, the antecedent relation between the parties presupposes the utmost loyalty and the most scrupulous observance of good faith, and where the negotiator and adviser himself invites the confidence which he ends in betraying. 2. Because the agreement of 1858 was not, at the time of its execution, intended by the appellant or Hugh Tennent, or by Charles, according to his professed intentions, to be used for the purpose of permanently excluding the appellant from the partnership, but only for his temporary retirement therefrom, until his debts mentioned in the agreement were paid; and the appellant executed the agreement on the faith of its being only so used; and in fact it was so treated by all the parties thereto until long after the time mentioned in the agreement for the reponing of the appellant. And the subsequent use of the agreement for the purpose of excluding him from the partnership was a fraud on the appellant. 3. Because even if no confidential relation had subsisted between the parties, and if the agreement of 1858 had been intended as between the parties to it to operate according to its tenor, the advantages acquired by Charles could not be retained, seeing they were procured by him without consideration—by the influence of parental authority exerted at his instance—from a person involved in difficulties, suffering from great distress of mind, and denied independent advice—and under an instrument which proceeds on false recitals, and the effect of which was grossly misrepresented by the legal adviser who prepared it. 4. Because the reasons of reduction referred to in the interlocutor appealed from, and the appellant's pleas in law, were sufficient, and ought to have been sustained.

The respondents in their *printed case* gave the following reasons for affirming the interlocutors:—1. Because the agreement of 1858 bars the appellant's claim under the petitory and declaratory conclusion of the summonses. 2. Because the appellant has neither set forth nor established any relevant ground for the reduction of the agreement of 1858. 3. Because the agreement of 1858 was deliberately entered into by the appellant in the full knowledge of its nature and effect, and without any fraud having been practised on him—*M'Kirdy* v. *Anstruther*, 1 D. 863; *Bellamy* v. *Sabine*, 2 Phillips Ch. R. 438; *Hoghton* v. *Hoghton*, 15 Beav. 300; *Hartopp* v. *Hartopp*, 21 Beav. 259; *Dimsdale* v. *Dimsdale*, 3 Drewr. 556. 4. Because the agreement of 1858 was intended to receive effect according to its terms, and was so acted on by all parties. 5. Because the special purpose for which alone the appellant now maintains that the agreement of 1858 was entered into (namely, the exclusion of the appellant's creditors) is illegal, and the appellant is not entitled to plead the same, especially against the *ex facie* legal terms of the deed; and further, because the alleged limited purpose of the deed created a latent trust, in proving which the appellant is, under the Act 1696, c. 25, confined to the writ or oath of Hugh or Charles Tennent, the alleged trustees, and this kind of proof the appellant has not offered. 6. Because the appellant, in terms of the agreement of 1858, ceased to be a partner, and Hugh Tennent did not, on the expiration of two years from 31st December 1857, exercise the option conferred upon him of reponing the appellant, and he was not subsequently reponed either by the express act of parties, or by facts and circumstances.

Sir R. Baggallay Q.C., *Dickinson* Q.C., *A. B. Shand*, and *Macnaghten*, for the appellant.

Sir R. Palmer Q.C., *Mellish* Q.C., and *Wickens*, for one respondent; *Lord Advocate* (Young), and *J. C. Lorimer*, for the other respondents.

The arguments turned entirely on the facts and circumstances of the case.

Cur. adv. vult.

The LORD CHANCELLOR HATHERLEY, in giving judgment, stated the facts at great length, and moved the dismissal of the appeal with costs.

LOLD CHELMSFORD concurred.

LORD WESTBURY.—My Lords, I am sorry to say, that, after many efforts to arrive at an opposite conclusion, I am reluctantly compelled to assent to the opinion of my noble and learned friends. I may sympathize very much with the appellant in his complaint of the bitterness of his father and want of brotherly love and liberality on the part of his brother, but these are not within my province. These are feelings, as to which his father and brother have already gone to their account. But I am obliged to say, that I find nothing in their actions to render them amenable to the justice of any human tribunal. It would be unpardonable if I went into the facts of this case in any detail, but it may be desirable to make a few observations upon the salient points of the argument on the part of the appellant.

I regret that the case of the appellant has been brought forward in the form of two inconsistent propositions. To contend that the deed was unreal, and not that which *ex facie* it expresses itself to be, and at the same time to contend, that the deed was obtained by undue pressure, by unfair advantage, and in circumstances where the appellant had not the aid of proper advice—these two propositions are irreconcilable with one another.

If I found anything in the history of the transaction to warrant the conclusion, that the deed was not intended to be that which it bears to be, that it was framed with the view only of being a shield to the father and the brother against the creditors of the appellant in consequence of his existing and possible embarrassment, I should not be deterred by any argument derived from the Scotch Statute of 1696 from arriving at this conclusion, that it was competent to the Court, on the evidence before it, to declare that the deed was not a reality, and was not intended to have binding effect; that it had now ceased to be operative, and that the appellant should be remitted to his former position. But I am convinced that there is no foundation for that representation. The history of the whole conduct of the matter, the history which the appellant gives of his own mind and impressions, and the conclusions which he himself arrived at, forbid any other hypothesis than this, that the father required this to be done, that the brother also thought it necessary to be done, and that the appellant himself acquiesced in the necessity.

Then the transaction being thus regarded as a real one, it is impugned by the appellant, on the ground that he parted with the valuable property for a most inadequate consideration. My Lords, it is true that there is an equity which may be founded upon gross inadequacy of consideration. But it can only be, where the inadequacy is such as to involve the conclusion, that the party either did not understand what he was about, or was the victim of some imposition. It is impossible to say, that the inadequacy of consideration in this case amounts to anything like proof to warrant either of those conclusions.

In making a few remarks upon this subject of inadequacy of consideration, I would first make the obvious one, that we must deal with the transaction as matters stood at the end of the year 1857, and that it would be ridiculous to regard the value of the subject in a dealing of this kind by the light derived from subsequent events. Now the father had called the appellant to take part in this business in the year 1855. I wish it had occurred to the father to consider, that the appellant, at his request and for his benefit, and that he might enjoy the repose that was needed by him at his age, gave up his business as a writer, that he might take an active part in the management and administration of that great concern in which the whole bulk of the father's property was embarked. But the father made a disposition which I think affords evidence that he was an affectionate father so far as the arrangement of his property for his children was concerned, and it must be recollected, in looking at that deed of 1855, that in truth the father remained the *dominus* of the whole concern. It was still his substantially. He parts with a portion of it to his sons, but he retains the control and management of it. The partnership was in fact at will only. The father could at any time interfere and require payment of the debt due to him, and thereby put an end to the whole of the property in the business, which his sons had received from his bounty. The father not only had that, but he retained a peculiar power to himself by means of one of the clauses in this deed, (I think the 6th or 7th,) of charging the property with legacies to be given by his will to other persons or for other purposes, not including legacies to his children, who were provided for before by the disposition of the property made by the deed. The situation of the appellant, therefore, with regard to this business, was an extremely precarious one. Though the father had given, the father had the power to take away.

Well, in the year 1851 the father feels it incumbent on him to exercise that power. We are undoubtedly struck very much with the small amount of the appellant's debts which threw the

father into so great a terror at that time. But we should carry back our recollection to what the feelings of men were at that particular period, and we shall see, that there might be legitimate apprehensions existing at that time in the minds of parties, the foundation of which we are at this day somewhat unable to appreciate. For the father in that position in effect says to the son, "I require you to retire for a time from the business." It appears that he originally contemplated, that a period would certainly arrive when he would restore the son to his position. He departed from that conclusion. He felt it necessary that he should have an uncontrolled discretionary power of restitution. Now, can we sit in judgment on that and say the father was not warranted in the conclusion at which he arrived? Certainly not. Well, but if so, was that conclusion carried out in a way of which the son has a right now to complain? If I found it carried out with one speck of imposition on the son, if anything was told or represented to him which ought not to have been told or represented, if anything was withheld from him which ought not to have been concealed, if he was placed in the hands of an adviser who leant more to the father and to the brother than to him, I should have thought that this family agreement with respect to which it is required that there should be on all sides *uberrima fides*, ought not to have been upheld. But I find nothing of the kind, nor does the appellant complain of anything of the kind.

You have but one inquiry to make—Was this discretionary power placed by the appellant in the hand of his father, freely, willingly, without constraint, without falsehood, and without any imposition? All these are questions which are to be answered out of the account which the appellant himself gives of the transaction. He says that there was but one point of difference: Shall there be a compulsory power, an absolute power of restoration of myself to the partnership: shall it be left to the discretion of my father? He tried long and earnestly to prevail on his father to consent to an absolute power. The father on his part was resolute also, and the appellant submitting clothed his father with that discretionary power of restoration.

If that be so, there is nothing whatever, that in a Court of Justice can be complained of by the appellant, unless, indeed, we find, that fraudulent and unjust influences were used with regard to the father by the brother Charles to induce him not to exercise this power, or unless we find that the power really was substantially afterwards exercised by the father in favour of the appellant.

I am really happy to say, that upon an examination of the evidence in the case I am myself unable to find anything that would fix on the brother Charles any iniquitous dealing so as to poison the mind of the father, and prevent the father from exercising that power.

On the contrary, I think it appears from letters of the father written from the Mediterranean, that he himself (I trust rather in the moment of passion than anything else) suggested to his son Charles the absolute necessity of being quit of his brother. There is nothing, therefore, that would warrant one judicially in saying, that it was the artifice of Charles, or the wicked suggestion of Charles, that deprived the brother of the benefit which he would have derived from the exercise of this power by the father, which the father would certainly have exercised if it had not been for the malicious suggestions of the brother, I find nothing of that kind.

But then we are told, that he was substantially restored, and that the power, therefore, was in reality in fact exercised, although not in form. Upon the examination of that matter I find no warrant whatever for any such conclusion. There is not a trace in all the subsequent accounts, or in any private communication between the appellant and his father and his brother, of his being treated as a person entitled to participate in any of the profits of the concern. From first to last, with the exception of some trifling matters which are consistent with the purpose of all the parties that he should still appear in some transactions as a partner, and which was indeed desirable so long as that power of discretionary restoration remained with the father, there is nothing to warrant the conclusion, that the deed of January 1858 was not a deed truly acted on and carried out to its full limits and extent so far as it conclusively put an end, subject only to that power of reponing, to the interest of the appellant in the partnership.

On all these grounds, therefore, although I could have wished that a very different conclusion could have been arrived at, particularly when I see, that it took only five short years from the date of this agreement to enable the brother to pay off to the father the whole of that debt of £214,000, and to realize for his own benefit sums amounting to very near £300,000—although I could have wished, that natural affection had suggested a different mode of action, yet, that is, as I have already observed, not within our province, and we are not called on to express any opinion upon it.

This is a proceeding in which numerous imputations have been made upon the memory of the brother who is gone, and also upon the memory of the father who is gone also, and I am most unwillingly compelled to agree, that, consistently with our established rules, this appeal must be dismissed with costs.

LORD COLONSAY.—My Lords, I do not consider it at all necessary to resume the statement of the facts of this case. They have been very fully stated, and that statement has comprehended

everything which I think important to the view which I take of the case. I shall therefore only state briefly the grounds upon which my judgment rests.

The object of the action is to set aside a deed or agreement of 1858. If that agreement was to receive effect according to its terms, the results would be substantially these—*Firstly*, that from and after January 1858 this appellant ceased to be a partner in the concern, or to have any of the rights which had been given to him by the deed of 1855. *Secondly*, that at the end of two years his father, if he thought proper to do so, might repone him on conditions which he might think proper to attach. *Thirdly*, that if his father did not repone him, he was to receive the estimated value of his interest in one sixth of the brewery, to wit, £35,000. *Fourthly*, that although reponed by Hugh, Charles might displace, and that in that case Gilbert was to be entitled not to £35,000 but to £40,000.

This agreement involved a surrender by Gilbert of rights which under the deed of 1858 might be, and as matters turned out, would have been, of very great value indeed. The father did not repone him, and now he has brought the present action for the purpose of reducing that deed of 1858, and for the purpose of having it found, that he is to be reponed into the position in which he would have stood under the deed of 1855, if the deed of 1858 had never been executed, or if the circumstances which led to the execution of that deed had never occurred.

Then what are the grounds on which he makes this demand? In the first place, there are various grounds stated in the original record, such as that the deed had not been delivered, and some other grounds of that kind which are not now insisted on, and I think there are now substantially two grounds insisted upon. In the first place, that his consent was obtained when he was in a state of great distress and difficulty, by Hugh and Charles taking advantage of that state, and exercising undue pressure, and that the deed so obtained was obtained for grossly inadequate consideration. I may state, that in this case I do not see any facts, that bring it within the rule or operation of the Statute of 1696 with regard to trusts. Nor do I see any ground, from the fact on record here, for the plea which was to a certain extent urged before us, that this agreement was a *pactum illicitum* in order to exclude the rights of creditors.

Now, upon the question whether there was undue pressure used and advantage taken of the difficulties and distress of Gilbert Tennent at that time, I think the evidence goes to shew, in the first place, that he was in a state of great embarrassment as to his affairs; that bankruptcy was impending; that he did not know how to relieve himself from his difficulties, and that therefore he went into this transaction. But were those circumstances such as can be regarded as a ground for reducing and setting aside the deed? I cannot understand that they were so.

In the first place, what was the surrender that he made? He surrendered the rights which he had under the deed of 1855, but what was the value of those rights? It was very difficult at that time to say what it was. In the first place, as to the money value of this surrender I think it would have been next to impossible to have stated it at that time with any accuracy at all. It was to be measured according to the views of the parties, and the subsequent change of matters. It was dependent on various considerations. The money value of the partnership was dependent, in the first place, on the large sum which was still to be paid to the father. Then again there was imminent danger to the concern through the interference of the creditors of Gilbert in the event of his not coming to this arrangement. These were very important elements, which rendered it very difficult to say what in his estimation, or in the estimation of others, might be the money value of the surrender which he made.

On the other hand, what were the benefits that were derived by him? What were the advantages which he expected to receive from it? I think it may be summed up thus: In the first place, and most obviously, he was to be relieved from the pressure of his debts and from impending bankruptcy, which he could not otherwise escape. Now the value of that consideration I think is not to be estimated merely by the money amount of the debts that were impending over him, but by the importance to him of sustaining his character and credit, and getting out of the position in which he would have been placed if he had been put among the class of bankrupts at that period of commercial embarrassment.

Again, it had this advantage to him, as well as to the other parties in the concern, namely, of preventing the interference of his creditors, which might have had the effect of greatly damaging the concern, and thereby diminishing the value of that one sixth of the partnership on which he rested his expectations, and which interference of the creditors might have the further effect of destroying the chance or the hope which he had under the deed of being restored to a prosperous and lucrative concern which by the interference of his creditors might have been rendered otherwise.

Then again he had this advantage, that the sum of £35,000 or £40,000 was to be made secure to him, for his father and brother came under an obligation to make it good to him, and that obligation which he held was a security to him for that £35,000 or £40,000 as the case might be, which security for what money he would have had rested upon his claim of legitim, nor could he have had the security if the concern had become less prosperous, and its profits had diminished.

These matters had all to be balanced by Gilbert Tennent. On the other hand, the reasons which induced the other partners to press upon him the matter of retirement from the business were obvious. In the first place, there was the immediate risk, if he became insolvent, of the interference of his creditors ; that, I apprehend, was the leading motive with Hugh Tennent in undertaking to pay the debts. Then there was this consideration, that they found he had been insolvent more largely than they had supposed him to have been in speculations at a time when he was not a mercantile man at all, and beyond that, and more important, was this consideration, that after he had become a partner in the concern, and had come under the obligation not to contract any cautionary liability, he had violated that obligation to his partners, and had thereby greatly forfeited their confidence. These were reasons why they might insist on his going out of the concern for a time at least, and I think they were reasons which had great weight in them.

The apprehended interference of his creditors is a matter which I think has been rather confusedly dealt with. No doubt the apprehension of the interference of his creditors was the reason for Hugh Tennent interposing to relieve him from the immediate pressure of his debts, but that was not a reason for the deed, because if that had been the only motive, that was removed and set aside entirely by that interposition of Hugh Tennent, who had satisfied these creditors, so that there were no longer any persons in a situation to interfere with him. There were also prospective considerations. Other creditors might come in. If Gilbert Tennent persevered in his speculations, if he again violated the agreement as he had already done, then there would have been a fresh interference on the part of creditors, and it was to avoid the risk of all those matters, that this deed was considered necessary by the father and brother, in order to exclude him from the power of doing those things whereby the affairs of the partnership might have become liable to be investigated by the creditors.

That being so, it may be, that the conditions that were imposed upon him were somewhat hard, but if they were so, he was perfectly aware what those conditions were. He had a perfect knowledge of the import of the deed, and the only point to which he objected in the deed, so far as I can discover upon the evidence before us, was, that he wished to have an absolute right to return to the partnership. It is quite clear, that if that had been introduced, it would have defeated the object for which the other parties wished the deed to be executed. It was necessary that he should be totally out of the concern, that he should have no partnership rights which would enable his creditors to come forward and interfere, and out of which difficulties might arise.

Therefore, there were considerations obviously on both sides. There was perfect knowledge on his part of that which he was asked to do, and he did it with his eyes open. He says, that his better judgment went against it, but he felt, under the circumstances, that he had no alternative but to sign the deed. Why had he no alternative but to sign the deed? He had no alternative, because the pressure of his debts put him in such a position, that great evils would result, if he did not sign it, and not only momentary and present evils, but he could not tell to what extent the interference of his creditors might injure his future prospects, and further forego the advantage of the security for £35,000.

I therefore cannot fall into the notion, that there was here any such pressure, or any such improper proceeding on the part of his father or brother, as would form the ground for the reduction of this agreement. There is no fraud alleged ; there is no trace of such a thing in the evidence. There was no deceit that I can discover. The appellant's case in this respect is merely this : he says, that too harsh terms were imposed on him in the circumstances in which he was placed, and that, feeling his difficulties, he accepted them.

That admission on his part necessarily excludes all relevant grounds for a reduction.

Then the other ground on which he seeks to set aside this deed is, that he says it was not intended to be acted upon except in the event of his creditors interfering—that the object of it was to protect the partnership against the interference of creditors. Now, in the first place, that implies that this deed must have been one that excluded him from the concern ; in the second place, it must have been one that did not give him any absolute right to return to that concern. But what evidence is there that the deed was not to be acted upon? I find no evidence of that kind, except his own representation, and that is mixed up with a confusion as to what is meant by the interference of creditors. But further than that, it appears that the deed was acted upon in a most material way. It was acted upon, in the first place, by the appellant's never after that accepting or endorsing any bills, by his not signing as one of the firm, and by the transfer of the profits to the account of Charles.

In short, it was acted upon in the most important ways in which it could be acted upon. It is in vain, therefore, to say, that it was not to be acted upon except under certain circumstances.

The other grounds on which it is attempted to be made out, that really his father reponed him or never intended to exclude him entirely, have been already dealt with by my noble and learned friends who have spoken before, and therefore I shall not go over them again. They are quite inadequate, and they are quite explainable, apart from any idea, that either he had not

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.*[1]

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

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[1] See previous report 5 Macph. 636: 39 Sc. Jur. 328. S. C. 8 Macph. H. L. 40; 42 Sc. Jur. 392.