8½d. an hour, which amounts to 38s. 3d. a-week—fifty per cent of which is 19s. 1½d.—so that the appellant's claim is founded not on his actual earnings at all but on what it was possible for him to have earned if he had worked full time on every day of the week.

I think this case is ruled by the *Niddrie and Benhar Coal Company* and the case of *Grewar*, which we have just decided, and I therefore think that the first question should be answered in the negative and the second in the affirmative, and the appeal dismissed.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

The Court answered the first question in the negative and the second question in the affirmative, and dismissed the appeal.

Counsel for the Appellant—Gunn. Agents—Mackay & Young, W.S.

Counsel for the Respondents—W. Campbell, K.C. — Younger. Agents — Morton, Smart, & Macdonald, W.S.

Tuesday, June 10.

FIRST DIVISION

[Lord Kyllachy, Ordinary.

EARL OF GALLOWAY *v.* DUKE OF BEDFORD.

Entail—Powers of Heir in Possession—Lease—Tack—Trout Fishing.

An heir of entail in possession cannot grant a lease of trout fishings as a separate right which will be effectual in a question with a succeeding heir of entail.

Entail—Powers of Heir in Possession—Lease — Tack — Salmon Fishings—Personal and Real — Possession — Offer to Renounce ultra vires Provision of Lease —Entail Powers Act 1836 (*Rosebery Act*) (6 *and* 7 *Will. IV. cap.* 42), *sec.* 1.

The Entail Powers Act 1836 (Rosebery Act) enacts, section 1—"It shall be lawful for the respective heirs of entail in possession to grant tacks of any parts of the lands, estates, or heritages contained in the entail for the fair rent of such lands or heritages at the period of letting, and for any period not exceeding twenty-one years."

An heir of entail in possession, without applying for the authority of the Court, entered into a lease with a salmon angling association, whereby he let to the association the salmon and trout fishings in the river C and certain tributaries thereof, which formed part of the entailed estate, for a period of twenty-one years. It was therein declared that the object of the association was to improve the fishings of the river C, that for this purpose it had been arranged that leases of the salmon-fishings in other parts of the river belonging to other proprietors should be granted to the association, and that the fishing during the currency of the lease should be by rod only. There was a provision whereby the lessor, and his successors in the entail, should after the conclusion of the first three fishing seasons under the lease have a right to one-seventh share of the fishings belonging to the association, on payment of one-seventh share of the expenses. The lease further provided that the right of the lessees as regards a portion of the fishings let should "cease and determine on the 31st of July in each year," and that "the lessor shall be entitled to enter into possession of, occupy, and use the said fishings, . . . or to let the same to one or more tenants for the remainder of such fishing season." It was further provided that with regard to one portion of the salmon fishings (which was then let to a third party) the right of the lessees should not come into operation for five years.

On the death of the lessor within a year of the granting of this lease the succeeding heir brought an action against the lessees concluding for the reduction of the lease.

Held that the lease fell to be reduced as a contravention of the fetters of the entail, and as not within the powers conferred by section 1 of the Entail Powers Act 1836 (Rosebery Act), in respect (1) that in view of the provision whereby the right of the lessees was to cease and determine on the 31st of July of each year, it was not a lease for twenty-one years, but an arrangement for a series of twenty-one leases, each for part of a year, and that these, in so far as applicable to the year now current and all future years, not having been made real by possession, were not binding on the succeeding heir; (2) that *ex facie* of the contract it appeared that the rent was not a fair one, since part of the return to the lessor was not rent, but the option of acquiring a right to one-seventh of the angling in the waters; (3) that a right of trout-fishing was a personal privilege which could not be leased by an heir of entail except for the period of his own possession; (4) that the lease *quoad* that part of the fishings of which the lessees were not to obtain possession until five years after the date of the lease was not effectual in a question with the succeeding heir, because it had not been made real by possession; and (5) that an offer by the lessees to hold these portions of the contract which purported to lease trout-fishings and that part of the fishings of which possession was not to be given for five years *pro non scripto*, was no answer to the action for reduction, inasmuch as to sustain the lease without these provisions would be to bind the succeeding heir by a contract which neither he nor his predecessor had made.

Entail — Powers of Heir in Possession — Lease — Tack—Salmon-Fishings—Entail Powers Act 1836 (*Rosebery Act*) (6 *and* 7 *Will. IV. c.* 42), *sec.* 1.

Opinions (*per* Lord Kyllachy, Ordinary, and Lord Kinnear) that an ordinary lease of salmon fishings is within the powers conferred by the Entail Powers Act 1836 (Rosebery Act) upon an heir of entail in possession.

In April 1900 Alan Plantagenet, Earl of Galloway, heir of entail in possession of the entailed estates of Galloway and others, including salmon fishings in the rivers Cree and Minnick, and in the Penkiln Burn and Burn of Trool, in Wigtown and Kirkcudbright, entered into a contract of lease with the Duke of Bedford and others, members of the Cree Salmon Angling Association. By this lease the Earl of Galloway, therein called the first party, in consideration of £350 per annum, leased to the members of the association, therein called the second parties, the whole of the salmon and trout-fishings, both net and rod, in the rivers Cree and Minnick, and in the burns of Trool and Penkiln, so far as forming part of the said entailed estate. The lease was to endure for a period of twenty-one years or fishing seasons, from 1900 to 1920 inclusive.

The provisions of the lease so far as material to the present report were as follows:—"And whereas, with the view of improving the fishings in said rivers and streams and increasing the stock of salmon and other fish therein, it has been arranged between him (the first party) and the said second parties hereto that he should let to them, for the period and on the terms after written, the fishings hereinafter described: And whereas, in furtherance of the objects above mentioned, the said first party has also negotiated leases from various other riparian proprietors on the said river Cree possessing rights of salmon and other fishing therein, and has arranged that the said leases should be granted to and in favour of the said second parties hereto, subject to the terms and conditions as to the manner in which the said rights of fishing therein are to be exercised which are contained in the said several leases: And whereas it is intended that the whole of the said fishings hereinbefore referred to should be possessed and worked together by the said second parties for the individual use and enjoyment of the members of the Cree Salmon Angling Association, of which association the said second parties are members, and that of their friends or guests, of and in the rod-fishings therein, and also in furtherance of the objects before mentioned, and that these presents should accordingly (subject to the special provisions, reservations, declarations, and conditions hereinafter written) be taken and read in conjunction with the said leases granted by the said other proprietors of fishings in the said river Cree, and negotiated by the said first party as aforesaid, as these are set forth in the schedule hereto annexed: Therefore the said first party has set, and in consideration of the yearly rent and other prestations after mentioned sets, and in tack and assedation lets, to the said" second parties . . . "All and whole the salmon and other fishings (both net and rod fishings) following, viz., in the first place, the salmon and trout-fishings in the river Cree, so far as belonging to the said first party, commencing at the south boundary of Barsalloch Farm, belonging to the said Earl, and extending upwards to the source of the said river in Loch Moan; but excepting and reserving always therefrom, during the first five years or fishing seasons of this lease, the portion of said river which has been let by the said first party to Mrs Elizabeth Ellen Stopford Blair or Heron Maxwell Blair of Penninghame, conform to minute of lease entered into between them, dated the 7th and 11th, both days of May, in the year 1895, and a copy of which lease is herewith delivered to the said" second parties; . . . "in the second place, the salmon and trout-fishings, so far as belonging to the said first party, in the river Minnick, from its confluence with the river Cree upwards to the march of the said stewartry of Kirkcudbright with the county of Ayr; in the third place, the salmon and trout-fishings in the stream or water known as the Burn of Trool, from its issuing from Loch Trool to its junction with the Minnick, together with the exclusive use and control of the dam and sluice at the foot of Loch Trool; in the fourth place, the salmon and trout-fishings in the stream or water known as the Penkiln Burn, forming a tributary of the said river Cree, so far as belonging to the said first party—all lying, the said several salmon and other fishings before described, in the said county of Wigtown and stewartry of Kirkcudbright; and in the fifth place, the right or privilege of fishing for sparlings in the said river Cree, in so far as belonging to the said first party, and that for the space of twenty-one years or fishing seasons, beginning with the present year or fishing season 1900 and ending with the year or fishing season 1920, both inclusive, as the duration of such fishing seasons is or may be fixed by Act of Parliament, or by any bye-laws made or to be made by any competent authority; with entry to the said several fishings hereby let (save and except as aforesaid, and to the extent hereinbefore excepted and reserved) as at the 11th day of February 1900 (notwithstanding the date hereof), being the commencement of the fishing season for that year, to be thenceforth peaceably occupied and possessed by the said second parties and their foresaids during the period above mentioned, but that subject always to the special reservations, declarations, and conditions following, which are hereby declared to be express burdens upon and affecting not only the lease and right of possession hereby granted, but also, of consent of the said second parties hereto (in so far as they are entitled to grant such consent, and *quoad* the tenants' rights and interests therein respectively), the several leases and rights of possession specified in the said schedule hereto, and which are to be held in conjunction herewith as afore-

said—that is to say (*First*) with the view of improving the fishings in the said rivers Cree and Minnick and their tributaries, and increasing the stock of fish therein, it is hereby declared that the said salmon and trout-fishings hereby let are so let for rod-fishing only, except to such extent as the said first party or his foresaids shall from time to time require the said second parties to fish the same or any parts thereof with net and coble, for the purpose of keeping up a right of net-fishing therein, but the said second parties shall be bound, if and when required by the said first party and his foresaids as aforesaid, to fish the said rivers (in so far as the first party's rights of fishing therein are hereby let), or any part or parts thereof, with net and coble, or in such other legal mode as he or they may specify, for such number of days (not exceeding six) in each year as shall be requisite in the opinion of the said first party or his foresaids to keep up the full rights of salmon-fishing vested in or belonging to the said entailed estates: provided always that at least one week's previous notice of such requisition shall be given in writing, by or on behalf of the first party to the second parties; (*Second*) It is a condition of the lease hereby granted that the second parties shall similarly restrict the exercise of the rights of salmon-fishing acquired by them under the said leases specified in the schedule hereto to rod-fishing only, except to such extent as the proprietors of the several fishings, or the said leases themselves, may require the second parties to exercise the right of fishing by net-and-coble or other mode than rod-fishing for the purpose of keeping up or preserving the titles of the said several proprietors, but to that extent only; (*Third*) the rights of fishing hereby granted to the said second parties shall as regards (1) the portion of the said river Cree lying above Minnigaff Kirkpool; (2) the river Minnick and Penkiln Burn; and (3) the said Burn of Trool and the dam and sluice at the foot of Loch Trool, cease and determine on the 31st day of July in each year or fishing season, and the said first party shall be entitled, either by himself or his foresaids, to enter into possession of, occupy and use the said fishings in the said portion of the said river Cree, the river Minnick and Penkiln Burn, and the Burn of Trool above mentioned, or to let the same to one or more tenants for the remainder of each fishing season, and that in the same manner and to the same effect as if this lease had not been granted; but that in each and every case for rod-fishing with artificial fly only or such other method as may be permitted by the rules of the said Association: Declaring that the right of the said first party or his foresaids, or of any tenants to whom any right of rod-fishing may be let as aforesaid as from and after the said 31st day of July in each year, shall cease and determine at the end of the fishing season of each year during this lease; (*Fourth*) The fishings hereby let, together with the fishings held under the other leases before referred to, shall (unless otherwise arranged between the said first party and the said second parties and their respective foresaids) be divided into not more than seven shares with relative alternative beats, the said beats being apportioned in rotation among the members of the said Cree Salmon Angling Association: Declaring that the said first party and his foresaids shall have right in any year or fishing season after the conclusion of the first three years or fishing seasons under this lease, to claim the uses and privileges attaching to one-seventh share of the whole fishing rights held under this and the said other leases with relative alternate beats, and such right is hereby reserved to him and them accordingly upon contributing one-seventh share or proportion of the rental of the said fishings, together with a corresponding share or proportion of the cost of management thereof (including therein watching taxes and public burdens), for the year or season in which such reserved right or privilege is exercised: Provided always that if the said first party or his foresaids shall desire to exercise such reserved right or privilege he or they shall give notice thereof to the said second parties not less than three months previous to the beginning of any fishing season in which he or they may desire to exercise the same of his or their intention so to do. . . . For which causes and on the other part the" second parties "bind and oblige themselves and their said respective heirs, executors, and representatives whomsoever, all conjunctly and severally, to pay to the said Earl of Galloway and his foresaids or to his or their factor for the time the sum of £350 sterling of yearly rent (subject to the deduction after mentioned) in respect of the said fishings hereby let, . . . but providing and declaring always that during the first five years or fishing seasons of this lease a deduction shall be allowed from the said rent hereby stipulated of the sum of £25 sterling per annum . . . in respect of the fishing in the said portion of the river Cree which has been let by the said first party to the said Mrs Elizabeth Ellen Stopford Blair or Heron Maxwell Blair of Penninghame as aforesaid." . . .

Alan Plantaganet, Earl of Galloway, died on 7th February 1901, and was succeeded by the Right Honourable Randolph Henry, the present Earl of Galloway, as heir of entail in possession of the said estate of Galloway and others.

The present Earl of Galloway brought this action against the Duke of Bedford and others, the members of the Cree Salmon Angling Association, concluding for reduction of the leases above mentioned. After narrating his title and the provisions of the lease he made the following averment:—"(Cond. 4) The pursuer's predecessor did not apply to the Court for authority to grant the said lease, and did not give notice to the pursuer as next heir of entail, or to any of the subsequent heirs of entail. The pursuer's consent was not asked, nor was he in any way consulted as to the granting of the said lease. He would, if asked, have refused his consent to it

being granted. The provisions and conditions of the said lease are unfair and prejudicial to the pursuer's rights and interests as heir of entail foresaid. The rent payable for the said fishings under the same is not a fair rent within the meaning of the Entail Acts. Prior to the granting of the said lease the late Earl received a rent of £200 for the net-fishings, and £75 for two small portions of the rod-fishings let respectively to the shooting tenant of Glentrool and to the proprietor of the estate of Penninghame, while he retained in his own hands the remainder of the rod-fishings, which were ample for the enjoyment of himself and his friends. The rod-fishings included in the lease are now partly sublet by the defenders, who are making, and will (if the said lease is not reduced), make a profit out of the said fishings. The effect of the said lease is to debar the pursuer from any use or enjoyment of the rod-fishings in question, to which he is entitled as heir of entail in possession of the said estates, except under conditions to which he does not feel bound or disposed to accede, and at a time of year when the said fishings are comparatively valueless. The defenders, or anyone having their permission, may under said lease fish within the private grounds and deer-park of Cumloden, where the pursuer usually resides, to the exclusion of himself and his friends residing with him at Cumloden."

The pursuer pleaded—"(1) In respect that the heir of entail in possession of the said entailed lands and estates, including, *inter alia*, entailed fishings, had no power without the authority of the Court to bind the succeeding heirs of entail by the lease libelled, the said lease should be reduced as craved. (2) The terms of the said lease being unfair and prejudicial to the rights and interests of the pursuer as heir of entail foresaid, decree should be pronounced in terms of the conclusions of the summons. (3) The said lease being a 'long lease,' within the meaning of the said Entail Acts, and having been granted without statutory procedure and the approbation of the Court, ought to be reduced as craved. (4) The rent stipulated by the said lease not being a fair rent within the meaning of the Entail Acts, the pursuer is entitled to decree of reduction as craved."

The defenders pleaded—"(1) The pursuer's averments being irrelevant, the defenders should be assoilzied from the conclusions thereof. (2) The lease in question having been validly granted by the late Earl of Galloway in the exercise of his powers as heir of entail, and in particular the power conferred upon him by the Act 6 and 7 Will. IV. c. 42, the defenders should be assoilzied. (3) The said lease having been granted for a full rent and for the benefit of the entailed estate, the defenders are entitled to absolvitor. (4) In any event *restitutio in integrum* being impossible or not being offered, the pursuer is not entitled to decree of reduction."

After parties had been heard before the Lord Ordinary, the defenders on 3rd March lodged a minute whereby they stated "that in the event of the Lord Ordinary holding that the lease falls to be reduced *quoad* the trout-fishing, they were prepared to pay the full rent for the remainder of the subjects let, always reserving to the defenders their whole rights and claims against the pursuer and others as personal representatives of the late Earl of Galloway, the granter of the lease, in respect of eviction from part of the subjects let."

On 8th March 1902 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor:—Finds that the lease in question, so far as it is a lease of salmon-fishing, is within the powers of the Rosebery Act, 6 and 7 William IV. cap. 42, and is not therefore open to challenge except on the ground that the rent was not a fair rent in the sense of that Act: Finds, on the other hand, that so far as the said lease includes rights of fishing other than salmon-fishing, the same was *ultra vires* of the late heir of entail, and is therefore invalid: Finds, however, that the defenders have offered by the said minute to renounce the said rights of fishing other than salmon-fishing, and to hold that part of the lease *pro non scripto* in a question with the heirs of entail: Finds that, in these circumstances, the pursuer is not entitled to reduce the lease *in toto* in respect merely of the inclusion in the lease of the said rights offered to be renounced by said minute: Finds, however, that the pursuer is entitled to a proof of his averments that the rent in the lease was not a fair rent in the sense of the Rosebery Act: Therefore, before further answer, allows the pursuer a proof of his said averments, and the defenders a conjunct probation.

Opinion.—"The pursuer here is the present Earl of Galloway, who has lately succeeded as heir of entail to the estates of the Earldom. The defenders are certain persons who obtained in 1900 from the late Earl a lease for twenty-one years of the whole salmon and other fishings both net and rod, in certain rivers and burns within the entailed estate. The object of the action is to reduce the lease as *ultra vires* of the late heir of entail, and as therefore not binding on the pursuer.

"The grounds of reduction are (1) that the lease in question was not an act of ordinary administration, and was not authorised by the entail or by any of the Entail Statutes; (2) that the rent was not a fair rent, and that on that separate ground the lease was beyond the powers of the late Earl.

"The defence is (1) that a lease of salmon-fishing for twenty-one years is an act of ordinary administration, and that the right of trout-fishing may be supported as an accessory right; (2) that, in any view, this lease of salmon-fishing is within the powers of the 1st section of the Rosebery Act, 6 and 7 Will. IV., cap. 42; and (3) that the included right of trout-fishing is,—if beyond the powers of the Rosebery Act,—equally beyond the prohibitions of the entail.

"I am not prepared to affirm that a tack of salmon-fishing for twenty-one years is an act of ordinary administration. That has

not yet been decided, and I should at least doubt whether it is likely to be so. But having in view that salmon-fishing is a separate estate, capable of being separately entailed, and not a mere personal privilege incidental to the possession of land, I see no sufficient reason why the powers of the Rosebery Act should not apply. The words of the Act are,—'It shall be lawful for the respective heirs of entail in possession to grant tacks of any parts of the lands, estates, or heritages contained in the entail for the fair rent of such lands or heritages at the period of letting, and for any period not exceeding twenty-one years.' The words 'estates and heritages' are, I think, sufficiently wide to cover salmon-fishing, and there is nothing in the preamble or general scheme of the Act to import a contrary construction. The preamble of the Rosebery Act, it may be observed, is in marked contrast to that of the Montgomery Act (10 Geo. III. c. 51), which declares its object to be the removal of obstructions 'to the cultivation of land.'

"If, therefore, the tack in question had been confined to salmon-fishing, I should have simply, before further answer, allowed a proof to the pursuer on the question of fair rent. A difficulty, however, arises in respect of the inclusion in the tack of 'fishings' generally, by which it is not disputed is meant trout-fishings. The pursuer says that, in any view, that part of the tack is *ultra vires* and cannot stand, and that (the tack making no provision for separation) the Court cannot make a new contract for the parties.

"Now, I am not able to doubt that a lease of trout-fishing is *prima facie* a contravention of a strict entail. The question is, of course, altogether apart from that decided with respect to leases of shootings in *Pollock, Gilmour, & Company* v. *Harvey*, June 5, 1828, 6 S. 913, and *Birkbeck* v. *Ross*, December 22, 1865, 4 Macph. 272. What was there decided was that the Act of 1449 did not apply to such leases so as to make them good against singular successors. But apart from the fetters of the entail, leases either of shooting or of trout-fishing would, I apprehend, as personal contracts, be quite good against succeeding heirs of entail, who are not of course singular successors. The point therefore is as to the application of the fetters of the entail. It is, however, hardly, I think, disputable that the constitution, or attempted constitution, of a burden of the kind supposed as against the entailed estate, or the succeeding heirs of entail, would be an alienation of part of the entailed estate, or, if not in strictness an alienation, would be at least an attempt to create a debt which, affecting succeeding heirs, might be made to affect the entailed estate. All this was, I think, long ago settled in the series of cases as to melioratations, which cases are conveniently summarised in Lord Deas' opinion in the case of *Breadalbane* v. *Jamieson*, 4 R. 667.

"That leases, therefore, of trout-fishing or of shootings are *prima facie* contraventions of a strict entail is, I think, hardly disputable; and accordingly the only question is whether they come under the exception of acts of ordinary administration. Now, on that point all I need say is that leases of trout-fishing are certainly in no better position than leases of shootings, and as to these it has never, so far as I know, been suggested that a lease for twenty-one years could be supported as an act of ordinary administration. Such a lease would, as regards shootings, be unusual. As regards trout-fishings it would, I should think, be unheard of.

"The defenders, however, argue that the scope of the Rosebery Act is coincident with the scope of the Act of 1685, and that if shootings (or, as here, trout-fishings) are 'lands' or 'estates' in the sense of the latter Act, there is no reason for saying that a tack of such subjects is not a tack of 'lands' or 'heritages' in the sense of the Rosebery Act. And no doubt it is possible to raise a verbal argument to that effect. In a sense a licence or permission to fish for trout for a term of years and for a pecuniary consideration may be called a tack. But it is certainly not a tack in the ordinary sense. As has been held with respect to shootings, it is truly a mere delegation of a personal privilege, not capable of being made real, and not binding (even when followed by possession) upon singular successors. Similarly it is not (even when the right is exclusive) a tack of land, or of, in the ordinary sense, a heritage —that is to say, a heritage *ejusdem generis* with land. It is no more so than a right of walking, or a right of bathing, or a right of golfing. When the Rosebery Act passed, it was not, in Scotland at least, a subject which was in practice *intra commercium*. Accordingly it is not surprising that it has never hitherto been attempted to apply the Rosebery Act to such a right. In point of fact it has always been assumed—I suppose as too clear for argument—that the Rosebery Act does not apply to a lease of shootings, or even to a piece of land to be used for sporting purposes. The case of *Farquharson*, 9 Macph. 66, referred to at the discussion, illustrates this very significantly. It is impossible, as it seems to me, to suggest that the Rosebery Act was in that case overlooked—overlooked by the judges and counsel and all who took part in that case.

"It is further, however, suggested that if the Rosebery Act covers a lease of salmon-fishing, it may also cover a lease of trout-fishing when granted as an accessory of the salmon-fishing. But I am not able to assent to that proposition. Trout-fishing is not in any proper sense an accessory of salmon-fishing. It is an accessory of the ground from which it, the trout-fishing, is exercised. I could understand the argument that a lease for twenty-one years, say of a farm, was not excluded from the benefit of the Rosebery Act merely because the tenant obtained a joint or even an exclusive right of trout-fishing within the bounds of his farm. I could understand that argument though I should doubt its soundness. But I cannot, I own, understand how a grant of trout-fishing (ex-

clusive or non-exclusive) can for the purposes of the present question be made better or worse by reason of its being tacked on to a right of salmon-fishing.

"I am therefore of opinion that as regards the salmon-fishings the lease is good, but that as regards the trout-fishing it is bad.

"It remains to consider whether the result must be a reduction of the lease *in toto*.

"But for the minute No. 35 of process lodged by the defenders since the discussion, I should, I think, have been obliged so to hold. The Court could not make a new contract for the parties. In particular it could not apportion the stipulated rent between the salmon-fishing and the trout-fishing. But it is a different question whether it is not open to the defenders (on the assumption of my judgment being what it is) to offer as they now do to hold as *pro non scripto* the whole rights of trout-fishing conferred on them under the lease. Having considered that matter, I have come to be of opinion that there is no reason on principle why they should not do so and thus solve the difficulty. What they offer does not, it appears to me, involve a reforming of the contract. It involves merely a qualified and partial reduction, by which, so far as I can see, no interest is prejudiced."

The pursuer reclaimed, and argued—(1) The lease here as a whole was beyond the powers of an heir of entail. Prior to the Rosebery Act a lease was, strictly speaking, a contravention of the fetters of an entail, and the validity of any lease in a question with succeeding heirs depended upon whether it could be regarded as an act of ordinary administration — *Montgomery* v. *Earl of Wemyss* (Queensberry Leases Case), 1819, 1 Bligh 339. The provisions of the Rosebery Act only applied to leases of agricultural or mineral subjects or others *ejusdem generis*—to leases of corporeal subjects, not of incorporeal rights such as salmon-fishing. This is stated in Duff on Entail, p. 60, and shown by the fact that a special petition for power to grant a lease of shootings was found necessary in *Farquharson* v. *Farquharson*, November 3, 1870, 9 Macph. 66, 8 S.L.R. 61. That case was anxiously debated, and it was never suggested that the proposed lease was within the powers conferred by the Rosebery Act. A lease of salmon-fishings was only a personal contract, not a real right, and therefore not binding on a singular successor or succeeding heir of entail. It lacked one essential element of a lease — the right of hypothec. This right had been held to be essential in order to give a real right under a lease—*Catterns* v. *Tennent*, May 12, 1835, 1 S. & M'L. 694. Even if an ordinary lease of salmon-fishings might be held to fall under the powers conferred by the Rosebery Act, this was in all respects an extraordinary and exceptional contract. It was not really a lease for twenty-one years, but a series of leases, each of which determined on the 31st July of each year. In this view it could not be effectual against the succeeding heir, because the tenants' rights were not completed by possession. Without possession a lease was not binding except as a personal contract between the parties—*Kerr* v. *Redhead*, February 5, 1794, 3 Paton 309. (2) Even if the lease as a lease of salmon-fishings, of which immediate possession was given, might be binding on the succeeding heir, the lease *quoad* the right of trout-fishing was not binding. On this point the Lord Ordinary's judgment was not reclaimed against. The lease was *ultra vires quoad* the parts of the river let to Mrs Heron Maxwell Blair, of which the defenders were not to obtain possession until five years after the date of the lease. It was clear that an heir of entail had no right to bind his successor by contracts to come into force in the future; clear also that this part of the lease had not been clothed with possession, and therefore was not a real right—*Kerr* v. *Redhead, cit. sup.* If this lease was *ultra vires* in these respects it was reducible. It was not enough to offer to hold these portions of the lease *pro non scripto;* that was proposing to bind the present heir by a contract which the preceding heir had never made, and to which he himself was not a party. A similar proposal had been rejected in *Hislop* v. *Duke of Buccleuch*, July 2, 1821, 1 Shaw's App. 64; and *Miller* v. *Carrick*, March 29, 1867, 5 Macph. 715, 3 S.L.R. 350. *Bain* v. *Lady Seafield*, July 15, 1887, 14 R. 939, 24 S.L.R. 662, relied on by the other side, was a special case in which a party was attempting to reduce his own contract.

Argued for the respondents—The lease as a lease of salmon-fishings was binding on the succeeding heir of entail. Salmon fishing was a separate heritable subject, not like shootings or other fishings a personal privilege—*Pollock, Gilmour, & Company* v. *Harvey*, June 5, 1828, 6 S. 913; *Leith* v. *Leith*, June 10, 1862, 24 D. 1059, at p. 1065. The right of salmon-fishing therefore was included in the words "lands, estates, or heritages" in section 1 of the Rosebery Act (quoted in rubric); Ersk. ii. 6, 27. If, then, an ordinary lease of salmon fishings for commercial purposes would be within the powers of an heir of entail, the fact that the object of the lease here was rather sporting than commercial made no difference. It did not matter what the motives of the lessee were, all that the heir of entail was concerned with was that the rent should be fair. That was a question of proof. On a fair reading of the lease it was a lease for twenty-one years, not a series of leases. (2) Admitting that the trout-fishing was not within the expression "lands, estates, or heritages" in the Rosebery Act, it was also not within the term "lands and estates" in the Act 1685, c. 22, by which entails were established. If so, a lease of trout-fishings was not a contravention of the fetters of the entail. What right then had the pursuer to challenge it? A singular successor might not be bound by such a lease, but an heir of entail was not a singular successor; he represented his predecessor in everything not covered by the prohibitions of the entail—*Earl of*

Fife's Trustees v. *Wilson*, December 14, 1859, 22 D. 191, at p. 197-8, *per* Lord Ardmillan, Ordinary. (3) Taking the case on the assumption that the lease was *ultra vires* so far as it let trout-fishings, the respondents were prepared to renounce any claim in this respect. To allow this was not to make a new contract; it was merely a renunciation on the part of the lessees of a portion of their rights under the contract. It could not make a lease invalid that the lessees did not choose to insist on all the rights which it conferred upon them. If a lease was granted for more than the period allowed by the Rosebery Act, it would be good for the period allowed by that Act—*Mordaunt* v. *Innes*, March 9, 1819, F.C., *per* Lord Glenlee (*affd.* 1 Shaw's App. 169); *Vans Agnew* v. *Macniven*, June 23, 1813, F.C. The principle that a lease by an heir of entail which was partly *ultra vires* might be good so far as *intra vires*, had been recognised in *Bain* v. *Lady Seafield*, July 15, 1887, 14 R. 939, 24 S.L.R. 662, which was a direct authority in the present case. The same reasoning applied to the position of the salmon-fishings let to Mrs Blair. If that was *ultra vires* the respondents were entitled to renounce that part of the lease.

While the case was at avizandum the defenders and respondents tendered a minute, by which they renounced their right to the trout-fishing without any reservation of a right of relief, and also renounced their rights to the portion of the salmon-fishings let to Mrs Blair. The pursuer objected to this minute being received, and the Court refused to receive it.

At advising—

Lord President—The question in this case is whether a lease of salmon and trout fishings in the rivers Cree and Minnick, and also in the streams or burns of Penkiln and Trool, and of the right of fishing for sparlings in the river Cree, the last date of which is 12th April 1900, entered into between the late Earl of Galloway when he was heir of entail in possession of the estates of which these rights form part, and the defenders, is invalid and reducible in whole or in part at the instance of the pursuer, the present Earl of Galloway, who is now the heir of entail in possession of these estates. The late Earl of Galloway died on 7th February 1901, and the pursuer then succeeded to him in these estates, under a strict entail.

By the lease in question the late Earl, upon the narrative, *inter alia*, that with the view of improving the fishings in the said rivers and streams, and increasing the stock of salmon and other fish therein, it had been arranged between him and the defenders that he should let to them the fishings above mentioned for the period and on the terms therein written, and upon the narrative that in furtherance of these objects the late Earl had also negotiated leases from various other riparian proprietors on the river Cree, and that it was intended that the whole fishings should be possessed and worked together by the defenders for the individual use and enjoyment of the members of the Cree Salmon Angling Association, of which the defenders are members, and that of their friends and guests, of and in the rod fishings therein, and that the lease should be taken and read in conjunction with the leases granted by the other proprietors of fishings in the river Cree let to the defenders all and whole the salmon and other fishings therein particularly described.

The lease, however, bears to have been granted subject to the exception and reservation therefrom, during the first five years or fishing seasons of it, of the portion of the river Cree which had been let by the late Earl to Mrs Heron Maxwell Blair of Penninghame, conform to minute of lease entered into between them, dated 7th and 11th May 1895; and it was further declared and provided by the lease that during the first five years or fishing seasons of it a deduction should be allowed from the rent thereby stipulated of £25 sterling per annum in respect of the fishing in the portion of the river Cree which had been let by the late Earl to Mrs Heron Maxwell Blair as above mentioned. The entry to the several fishings was declared to be on the 11th day of February 1900, "save and except as aforesaid and to the extent hereinbefore excepted and reserved"—words which, in my judgment, refer to, *inter alia*, the fishing in the portion of the river Cree let to Mrs Heron Maxwell Blair as above mentioned, so that as regards that part of the fishing the lease will not begin to run until the expiry of five years from its commencement as regards the other rights let by it.

It was further declared by the lease that the rights of fishing thereby granted to the defenders should, as regards (1) the portion of the river Cree lying above Minnigaff Kirkpool, (2) the river Minnick and Penkiln Burn, and (3) the Burn of Trool and the dam and sluice at the foot of Loch Trool, cease and determine on the 31st day of July in each year or fishing season, and that the late Earl should be entitled, either by himself or his foresaids, to enter into possession, or occupy and use the said fishings in the said portion of the river Cree, the Minnick, and Penkiln Burn, and the Burn of Trool above mentioned, or to let the same to one or more tenants for the remainder of each fishing season, and that in the same manner and to the same effect as if the lease had not been granted.

The first important question appears to me to be, what is the effect of the exception and reservation during the first five years or fishing seasons of the lease of the portion of the fishings let to Mrs Heron Maxwell Blair, and I consider that, upon a sound construction of the lease the term of entry of the defenders to that portion of the fishings was postponed until the expiry of these five years. And if this be so, it, in my judgment, follows that this portion of the lease, at all events, is invalid in a question with the pursuer, because it was not clothed with possession during the lifetime of the late Earl, the lessor. It is settled that, without possession, a lease is

not a real right falling within the scope of the Act 1449, cap. 17, and consequently that it is not effectual against an heir taking only under an entail (*Kerr* v. *Redhead*, 3 Pat. 309; *Downie* v. *Campbell*, January 31, 1815, F.C. 182). There have been two relaxations by statute of the rule that an heir of entail cannot effectually grant a lease to commence after his death. The first relaxation of the rule related to Montgomery leases, with respect to which it is provided by the Montgomery Act (11 Geo. III. cap. 51, sec. 7) that they may be granted at any time within one year of the determination of an old lease, and the second was introduced by the Entail (Scotland) Act 1882 (45 and 46 Vict. cap. 53), by sec. 9 of which it is declared that it shall be lawful for the heir in possession of an entailed estate, where any portion of the estate is held by a tenant under a current lease for not less than seven years, "at any time within two years previous to the expiration of such lease to grant a new lease at a fair rent to commence at such expiration, and if such heir in possession shall die before the commencement of the new lease it shall be as valid as if he were still alive," subject to the sanction of nullity if the rent shall be less than a fair rent, or if a grassum or other consideration than the rent be taken. Neither of these provisions, however, applies to the present case.

For this reason, I am of opinion that the lease is invalid and reducible at the instance of the pursuer, at all events as regards the portion of the rights purporting to be let by it which is at present under lease to Mrs Heron Maxwell Blair.

The next question is, what is the effect of the stipulation in the lease that the rights of fishing thereby granted to the defenders shall as regards (1) the portion of the river Cree lying above Minnigaff Kirkpool, (2) the river Minnick and Penkiln Burn, and (3) the Burn of Trool, and the dam and sluice at the foot of Loch Trool, cease and determine on the 31st day of July in each year or fishing season, and that the lessor shall be entitled, either by himself or his foresaids, to enter into possession of, occupy and use the fishings in these places, or to let the same to one or more tenants for the remainder of each fishing season. The effect of this declaration is, in my judgment, that the defenders are not tenants of the fishings in these places during the periods specified, but that during these periods the fishings are in the hands of the lessor and his successors in the ownership of the estates by virtue of his and their proprietary title. In other words, as regards these portions of the fishings there are twenty-one leases, each for nine months of the year, not one lease for the whole twenty-one years. I understand that the annual close time applicable to the Cree (and I suppose to the other rivers or streams above mentioned) is from 27th August to 10th February, with an extension of power to fish by rod from 27th August to 31st October, so that in respect of the declaration just mentioned the lessor and his successors in the ownership of the estates would, by virtue of their title of ownership, have right to fish for salmon by rod during the months of August, September, and October, a relatively large part of the fishing season. But if I be right in thinking that as regards these portions of the fishings there are truly twenty-one leases, each for a part only of the fishing season, it, in my judgment, follows that the part of the lease for the year now current was not, and that the parts applicable to all future years were not, clothed with possession during the lifetime of the late Earl, and consequently that, for the reasons already given, these leases for a part of each year are not binding upon the pursuer. In order to be effectual against a subsequent heir of entail an agreement must, in the language of Lord Thurlow in *Kerr* v. *Redhead* (3 Paton 316), be a lease *de presenti*, not a lease in reversion, and the nine months' leases applicable to periods subsequent to the death of the late Earl are in my view leases in reversion within the meaning of this dictum.

The next question is, what is the effect, if any, of the lease, in so far as it purports to let the right of trout fishing in the rivers specified? The right of trout-fishing is not like that of salmon-fishing a feudal estate; and consequently what is called a lease of trout-fishing is truly only a grant of the personal privilege of entering upon lands and angling for trout therefrom. It is, like the right of shooting, merely a delegation of a personal privilege not capable of being made real, and not binding, even when followed by possession, upon a singular successor, nor in my judgment upon a succeeding heir of entail. I agree with the Lord Ordinary in thinking that a lease of trout-fishings for so long a period as twenty-one years, or twenty-one successive leases for nine months each, are unheard of in practice, and that the granting of such a lease or such a series of leases as exists in the present case could not be supported as an act of ordinary administration. I also concur in the view expressed by the Lord Ordinary that the Rosebery Act does not apply to a right of trout-fishing, which is merely an incident of the ownership of property, although it may extend to the right of salmon-fishing, which is a feudal estate.

If I be right in thinking that the lease is ineffectual against the pursuer as a succeeding heir of entail, (1) as regards the right of fishing in the portion of the river Cree let to Mrs Heron Maxwell Blair, (2) as regards the right of fishing in the portion of the river Cree above Minnigaff Kirkpool, the river Minnick, and Penkiln Burn, and the Burn of Trool, and the dam and sluice at the foot of Loch Trool, and (3) as regards the right of trout-fishing, it in my judgment follows that it must be reduced *in toto*, as no means exist of breaking up the *cumulo* rent and allocating it upon or between the portions of the rights let in regard to which it may be valid, and the portions in regard to which it is in my judgment invalid. In saying this I am not

leaving out of view the stipulation in the lease that during the first five years or fishing seasons of it a deduction shall be allowed from the stipulated rent of £25 sterling per annum in respect of the fishing in the portion of the river Cree let to Mrs Heron Maxwell Blair. This may suggest that £25 is the amount of the said rent applicable to that portion of the fishing, but looking to the various and complicated stipulations which the lease contains, I do not think it can be assumed that that sum is the annual value or the sole annual consideration stipulated for that portion of the fishing. To do what the defenders propose would be to make for the parties a bargain which they never made for themselves. I concur with the Lord Ordinary in thinking that the Court cannot make a new contract for the parties, and in particular that we cannot apportion the stipulated rent between the salmon and the trout-fishings, and I consider for the same reasons that we cannot allocate that rent between the portions of the salmon-fishing rights, as regards which I think, for the reasons already stated, that the lease is invalid, and the parts, if any, which are not open to the objections which I have just considered. His Lordship, however, says that it is a different question, whether it is not open to the defenders to offer, as they now do, to hold as *pro non scripto* the rights of trout-fishing conferred on them under the lease, and he arrives at the conclusion that this does not involve a reforming of the contract, but merely a qualified and partial reduction of it, by which, so far as he can see, no interest is prejudiced. I am, however, unable to concur in this view. The defenders by their minute offered to pay the full rent for the remainder of the subjects let, in the event of its being held that the lease falls to be reduced *quoad* the trout-fishing, but the pursuer declines this offer. It appears to me that he is entitled to do so, and that the Court cannot force acceptance of the offer upon him, or in other words, that they cannot insist upon making for the parties a contract which they never made for themselves. But even if the Court could compel the acceptance by the pursuer of the defenders' offer, this would not meet the other two separate and independent grounds upon which I have stated that the greater part of the lease appears to me to be invalid, and I consider that the lease should be reduced *in toto*. If I be correct in this view, it is unnecessary to have an inquiry as to whether the rent stipulated by the lease is or is not a fair rent.

I may add that it appears to me that there are strong grounds for contending that the lease is invalid against the pursuer as a succeeding heir of entail upon another ground, viz., that it was granted in part for considerations other than the stipulated rent, although it is unnecessary, if the views above expressed are correct, to form a final opinion on this question. The lease, or rather the leases, of the fishings belonging to different proprietors form parts of a highly complex agreement for the management and development of the fishings comprised in them, and the stipulations relative to the possession and management of the various fishings are counterparts of each other. This would seem, *prima facie*, to involve the view that the lease or leases in question were granted for considerations other than the stipulated rent, and that they are therefore invalid against the pursuer. No means exist of estimating the money value of these considerations, or of forming an opinion as to whether they are or are not fair counterparts of each other. I may add that, in defence of a lease of such unusual if not unprecedented length as twenty-one years, the defenders suggested that it was truly an improving lease, and that the tenants under it required a long period to recoup themselves in the outlay which they incur in the earlier years. If this were so, it would form an additional argument in support of the view that the granting of the lease was not an act of ordinary administration which would be effectual against a succeeding heir of entail.

After the argument had been concluded and the case had been for some time at avizandum, the defenders craved leave to withdraw the minute lodged by them on 3rd March 1902, and stated that they thereby renounced all right under the lease No. 31 of process to the fishings other than the salmon-fishings, and to the salmon-fishings so far as at present let to Mrs Heron Maxwell Blair, and were prepared and thereby undertook to pay the stipulated rent in terms of the lease for the remainder of the subjects let. The pursuer did not consent to the reception of this minute: and in the absence of consent it did not appear to us that we could admit it at that stage. I may, however, say that even if it had been admitted, it would not have met or obviated objections which I think exist to the validity of the lease.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR—I have come to the same conclusion. It is necessary to bear in mind the true legal position of an heir of entail in possession with reference to the power of granting leases. It has long been settled by a familiar series of decisions in the House of Lords that every lease, long or short, is an alienation, which, so far as it extends beyond the period of the granter's own possession, is struck at by the fettering clauses, and it follows that apart from statute no lease whatever could have been sustained against a succeeding heir were it not for a compensating principle which has been held to qualify that stated, viz., that inasmuch as the entailer must be supposed to have intended that his heirs should have in succession a rational enjoyment of the estate, a power of binding succeeding heirs by such leases as were indispensable and were not too long for that purpose must be allowed of necessity to the heir in possession. The doctrine is thus stated by Lord Eldon in the case of the March Entails (*Montgomery* v. *Earl of Wemyss* (Queensberry Leases), 1819, 1 Bligh 339, at p.

461)—"It seems to me that every lease must be an alienation; but that it has been so long settled, and it is so necessary for the purposes of landed enjoyment that short leases should be endured, that it is impossible to disturb short leases though you disturb the long leases." The same view is developed at greater length by Lord Redesdale (1 Bligh 503), who adds that "a power thus yielded to necessity, and yielded *only* to necessity, ought to be bounded by the necessity which compels it, that is, by that which is compatible with future as well as present enjoyment of the estate," by which I understand his Lordship to mean the enjoyment of the next heir as well as that of the granter of the lease. So stating the principle, Lord Redesdale goes on to observe that if it be asked what is to be the limitation of a lease under such circumstances, he finds it extremely difficult to draw the line precisely, and his conclusion is that you must consider the question in every lease according to its own circumstances, and determine whether what has been done is administration or alienation. That is precisely the difficulty which the Rosebery Act was intended to obviate, and a lease which in respect of duration falls within the power of rational administration must therefore now be taken to be a lease which does not exceed twenty-one years. But an enactment of this kind must be read with exact reference to established principles, and while it enables every heir of entail to grant leases for twenty-one years, it does not appear to me that subject to that right it displaces in any way the general rule of law that the heir in possession, although he is not limited by the right of his successors in so far as regards his powers during his own lifetime, must yet administer so as not to encroach upon the right of property conveyed to the heirs substituted to him. Nor does it in any way alter the conditions upon which particular contracts may be ranked in the category of leases, nor the conditions upon which contracts recognised as leases may be made effectual against other persons than the actual parties to the contract.

The question therefore comes to be, whether the pursuer is entitled to set aside the lease under reduction on other grounds than its period of duration; and that must depend upon the operation of the contract as a whole. Now, on turning to the lease for the purpose of seeing how it is to affect the owner of the estate for the time being, I think the first thing that strikes one is that it is certainly very unlike any ordinary fishing lease one has ever seen. It is an anomalous and very complicated arrangement. The general design, as disclosed in the recitals, is to bring together a variety of fishings in different streams and rivers belonging to different proprietors, and to put them under one system of management for two defined purposes, the first of which is the improvement of the fishings and the increase of the stock of salmon, and the second is the enjoyment of certain sportsmen who are said to be members of an association called the Cree Salmon Angling Association. The defenders' counsel say, and perhaps rightly, that this is a laudable object, and they maintain that a lease for such a purpose ought to be binding upon heirs of entail, because it is a lease for the benefit of the estate. I am not satisfied that this is a consideration which tells in favour of their case. A fee-simple proprietor may take long views, and may sacrifice his own interests and those of his immediate heirs for the benefit of future generations, but the proprietor of an entailed estate must restrict his administration to his own period of possession, and is not entitled to engage in far-reaching schemes at the expense of the heir who is to come after him. We must therefore examine the specific conditions of the contract and see whether they are such as can be made to affect the estate in the hands of an heir of entail.

For this purpose the first question to ask is, what is the subject-matter of the contract; and it is to be observed that the lessor in the outset sets forth that he is proprietor of extensive salmon and other fishing rights in the river Cree and in certain other streams, that he has negotiated leases from other proprietors of salmon fishings in the Cree which are to be granted to his own intended lessees, and that it is intended that the whole of these fishings should be possessed and worked together, "and that these presents should accordingly be taken and read in conjunction with the leases granted by the other proprietors." I do not know on what principle it is supposed that an heir of entail can be compelled by his predecessor's contract to read the leases of other proprietors as part of his own, and to subject the management of his own estate to the conditions on which they manage theirs. But it is more material to consider what right in or over the entailed estate itself the contract purports to confer. It embraces all the fishings, both salmon and trout-fishing, belonging to the lessor in the streams mentioned. I do not think it is disputed that an heir of entail may grant a lease of salmon fishing which will be good against the next heir; and I agree with the Lord Ordinary that a right of salmon fishing is within the words of the Rosebery Act, because it is in law a separate tenement or "heritage" which may be the subject of a real right. In so far, therefore, as it applies to the salmon fishings, the lease in question might probably be supported if the special conditions on which it is granted do not infringe on the pursuer's right as heir of entail, and if it be assumed that a right of fishing for salmon in a number of different streams, to be exercised only by the rod, is capable of such continuous and obvious possession as is required to convert a contract into a real right. But a lease of trout-fishing is a very different matter.

I agree with the Lord Ordinary that whatever may be thought as to a lease of land with the privilege of trout-fishing as a pertinent of the lands, a lease of trout-fishing as a separate right apart from a grant

of land does not fall within the Rosebery Act. I cannot, however, concur unreservedly in all that the Lord Ordinary has said upon this point, and I do not think the question depends entirely upon the terms of the Rosebery Act. I consider that a lease of trout-fishing as a personal privilege is not binding upon heirs of entail, for the same reason that makes it ineffectual against other singular successors; and that is, that disjoined from the ownership of land it is not recognised by the law as a separate tenement which can be constituted as a real right either by infeftment or by tack. The general rule may be stated in the language of Lord Westbury in *Campbell* v. *M'Lean*, 1870, 8 Macph. (H.L.) 40, at p. 46 (although in that case his Lordship was discussing a privilege of a different kind)—"I am anxious to state," says Lord Westbury, "that there is no difficulty about the law of Scotland. The question is whether this grant is valid as against the singular successor. . . . Now to make it so it must be brought within the operation of the Statute of 1449, that is, it must be shown to be a real right. A lease by the law of Scotland is a personal contract; and the entry of the intended tenant upon the property contracted to be demised is equivalent to sasine, and the right thenceforth becomes a real right. The grant of a . . . privilege can only be made available if it be made part and pertinent of the tenement contracted to be granted by the lease, which lease becomes a real right by virtue of the statute." If this principle be applicable, a lease of trout fishing as a personal privilege disjoined from land cannot be good against an heir of entail or against any other singular successors, because it cannot be constituted a real right which can stand by itself, apart from a right in the land through which or by which the streams may flow. This is decided by *Patrick* v. *Napier*, 1867, 5 Macph. 683, where the nature of the right or privilege of fishing for trout is explained by Lord President Inglis—"It is a mere incident of property. . . . It is a thing that naturally and necessarily belongs to the proprietor through whose ground the stream of water flows. . . . Therefore anyone not being the proprietor of the estate through or by which the stream flows, who proposes to exercise the privilege of an angler in the stream, must do it by the licence and permission of the proprietor. The moment, therefore, that it comes in an ordinary state of things and natural course of events to be exercised by any person but the proprietor of the estate, it is the most purely personal privilege that one can imagine." It follows that in so far as trout fishing is concerned the right which the lease in question purports to confer upon the defender rests upon personal contract only. And, as the Lord President says, I do not think it doubtful that this liberty and privilege of angling may be the subject of a good personal contract, but then the pursuer as heir of entail is not bound by the personal contracts of his predecessor. It must be remembered that there are two distinct rules of entail law which are perfectly consistent with one another, but which will avail for the protection of the heir's rights in different circumstances. The one is that the heir in possession cannot alienate any part of the entailed estate, the other is that the succeeding heir who takes the estate by the grant of the entailer alone is not bound by the personal obligations of the preceding heir, from whom he takes nothing. It appears to me that a good deal of obscurity has been introduced into the discussion in some of the reported cases by a confusion between these two rules, because in the application of the second the question between an alienation and an act of ordinary administration, which is so material in the application of the first, has no relevancy. If a contract of lease has been made real by possession, the question is whether it amounts to an alienation. If the contract has not been or cannot be made real, the only question is whether the heir is bound by personal contracts, however excellent they may be as matter of administration. I rather think the same confusion is involved in an ingenious argument which the Lord Ordinary has rejected, but which was repeated with some urgency in this Court. It is said that if a right of trout-fishing is not included in the "lands and heritages" falling within the Rosebery Act, it is not covered by the Act of 1685, because the scope of the two statutes is coincident, and therefore that it cannot be an alienation contrary to the prohibitions of the entail. This might have been a fair enough point if the question depended entirely on the meaning of the words cited from the Rosebery Act. But it goes a great deal deeper. Nobody ever supposed that a privilege of angling disjoined from land could be made the subject of a strict entail. It cannot be entailed because it cannot be feudalised. But it is an incident of property in land, and if the land which forms the subject of an entail includes trout streams, the right of angling in them passes of necessity to the successive heirs as an incident of their right of property in the estate, just as it would pass to successive owners by conveyances on sale, if the estate were not entailed. It follows that every heir in succession may exercise the right by himself or by giving liberty to others as he pleases; and, as I have said, I have no doubt he may give that liberty on terms that will impose a binding obligation upon him. But then he cannot do so by creating a real right which will be valid in a question with singular successors. If he could, the attempt to do so would be an alienation, but since it is not possible in law to constitute such a right, the only question is whether his personal obligation, which is all that he can give to his grantee, is binding upon succeeding heirs. This is a question which does not in my judgment depend upon the duration of the right or upon any consideration which may be thought to distinguish necessary and reasonable from unreasonable or extraordinary acts of administration.

The Lord Ordinary, however, observes

that an heir of entail is not a singular successor. This is probably a question of terminology, as to which I should hesitate to differ from the Lord Ordinary. The term is no doubt very commonly used as denoting a disponee under a conveyance *inter vivos*. But that is not an exhaustive definition. The true distinction is stated by Mr Erskine. A singular successor is one who takes by a singular title, as distinguished from one who takes by a title of universal representation. There can be no question in which of these two legal categories an heir of entail ought to be ranked. An heir under a strict entail does not represent his predecessor, not being the entailer, universally, and therefore he takes the estate, which comes to him from the entailer subject to all adverse rights which have been validly made to affect the land, but free from the personal contracts of his predecessor. In this respect he is in precisely the same position as other singular successors. I think this has been settled by a series of decisions. It is the ground of judgment as I read the case in *Dillon* v. *Campbell*, 1780, M. 15,432, which Lord Deas, in the opinion to which the Lord Ordinary refers, treats as the leading case of the series on which he founds his judgment. The question was, whether a succeeding heir was liable for the value of buildings erected by a tenant during the currency of a lease granted by a preceding heir by which it was stipulated that the tenant should be paid for his buildings at the end of the lease. The report bears that the Court was moved by the equitable nature of the demand, but the successful defence was that no debt could be made to affect the succeeding heir of entail which could not also be made to affect the estate, and the judgment of Lord Braxfield, to which the Court ultimately adhered, assoilzied the defender "in respect that it was not alleged that he represented the late Blythswood in any other manner than as heir of entail in the estate of Blythswood, which entail contains the usual prohibitory, irritant, and resolutive clauses." Lord Deas says that the principle thus sanctioned by the high authority of Lord Braxfield was carried out to its legitimate consequence in a series of later cases to which he refers in some detail, including *Tod* v. *Skene*, 1825, 1 W. & S. 217, in the House of Lords. It formed the ground of judgment also in several cases, of which *Cathcart* v. *Schaw*, 1755, M. 15,399, is a good example, where the question was whether a sale of the growing timber on an entailed estate could be made effectual to the purchaser from an heir in possession in so far as regards timber still uncut at the time of the vendor's death. There was no question that the whole was covered by the contract, but it was held that the proprietor had right only to the wood that had been cut during the actual possession of the vendor, since the wood that was still standing had become the property of the next heir, who was not bound by his predecessor's contract. But a case which is more directly in point, and which seems to me to be conclusive, is *Kerr* v. *Redhead*, 1794, 3 Paton 309, to which the Lord President has referred. The question was, whether an obligation to grant a lease contained in an informal document, which was undoubtedly binding upon the heir in possession who granted it, was legally effectual in a question with a succeeding heir. The Court, on what seemed to be strong considerations of equity, found the tenant entitled to have his lease, but this judgment was reversed in the House of Lords, and Lord Thurlow, after considering the question whether the tenant had in equity under the circumstances of the case a right to that to which by law he had no right, states the ground of law on which the tenant's right must be decided in this way—"The agreement with Alexander Kerr, had he outlived 1791, would have been effectual against him, but as he died before 1791 it will not apply to his successor. For Kerr was authorised to grant leases for nineteen years only, not for a longer period. In the year 1788 he executed the contract for nineteen years to commence in three years afterwards. That was disposing of a farm for twenty-two years, and therefore exceeding the term to which he was limited. Had he lived, however, he must have fulfilled his agreement, but as he did not live it cannot be transferred against his singular successor, which is precisely the character of an heir of entail." That appears to me to be conclusive of a question as to which there had certainly been some fluctuation of opinion in the Court of Session, and the law laid down by Lord Thurlow was necessarily accepted and followed by this Court in *Downie* v. *Campbell*, January 31, 1815, F.C. I take it to be clearly established by these decisions that, subject to the qualification already explained, the administration of an heir of entail is determined by the period of his actual possession, and that the heir who succeeds him is not bound by his personal contracts any more than any other singular successor. From the necessity of the case the heir in possesion is allowed to grant such leases as are necessary for the reasonable enjoyment of the estate both by himself and his successors, even although they may extend beyond his own life and so fall within his successor's period of ownership, and the Rosebery Act allows such leases to endure for twenty-one years. But it does not appear to me that that enactment confers any different kind of power upon heirs of entail in general than is given to heirs of particular estates by the clause authorising leases which is frequently to be found in the deed of entail itself. I think the power which is contained in the statute "to grant tacks of any part of the lands, estates, or heritages contained in the entail" means exactly the same thing as the power which we occasionally find in such clauses "to set tacks of the said lands and estate or any part thereof." I cannot see any reason for supposing that the statute transfers the personal obligation of one heir to another, or that it intends anything by the word

"tacks" but such tacks as would by law be valid and effectual were it not for their duration.

I am therefore of opinion that the lease in question is not valid against the pursuer in so far as it purports to be a lease of trout-fishings.

The second covenant, which cannot, in my opinion, bind the pursuer, is that for a lease of one of the fishings, to come into operation on the termination of an existing lease to Mrs Heron Maxwell Blair. I think it clear, for the reasons already given, that an heir of entail in possession cannot anticipate the administration of his successor in this way. The rule that to be good against heirs of entail a lease must be clothed with possession has been relaxed, as the Lord President has explained, by the Montgomery Act, and by the Entail Act of 1882. But neither of these enactments has any bearing upon the present question, and if they are inapplicable the general rule remains in full force. Now, the lease to the defenders of the fishing now held by Mrs Heron Maxwell Blair will not come into operation for five years after the late Lord Galloway's death. It follows that it is nothing more than a contract to grant a lease at a future date, and that cannot bind an heir of entail.

A third objection arises from the somewhat singular stipulation that the rights of fishing granted to the lessees shall as regards certain streams or parts of streams "cease and determine on the 31st of July in each year," and "the lessor shall be entitled to enter into possession of, occupy, and use the said fishings . . . or to let the same for the remainder of each fishing season, and that in the same manner and to the same effect as if this lease had not been granted." This seems open to the same objection as the covenants already considered—that a lease conceived in these terms cannot be effectually clothed with possession. When the first year's lease comes to an end on the 31st July, an heir of entail to whom the succession then opens enters into possession and enjoyment of the salmon-fishings as a part of his estate which is not under lease, by virtue of his right of ownership and on no other title; and when the fishing season comes to an end the former lessees have no title upon which they can put him out of possession and come in themselves, except a contract made by his predecessor, which, if it is no more than a contract, is not binding upon him. It could hardly be maintained in the case supposed that they were still in possession under a continuing title, because *ex hypothesi* their possession had been interrupted and their title had ceased and determined. This is perhaps technical. But there is a more substantial objection in the stipulation that when the lessor comes into possession he is to use the fishings or let them as if this lease had not been granted, but that in each and every case for rod-fishing with the artificial fly only, or such method as may be permitted by the rules of the Cree Salmon Angling Association. This is an obligation which cannot bind anybody but the person who undertakes it as a party to the contract. It is altogether beyond the range of the administration of an entailed estate, and indeed it is not in any sense a covenant proper to a lease, but a stipulation for restricting and regulating the exercise of a landowner's right of use and enjoyment of his own estate while it is in his own exclusive occupation. It is, however, a material term of the contract. It seems to have been thought essential for the attainment of the main object of the contract that no kind of fishing should be allowed in the streams in question except angling with the rod. It was therefore necessary not only that the right of the lessees should be limited to angling during their occupation, but that the lessor also should bind himself not to fish otherwise than with the rod during the part of the fishing season when he should be in the occupation of his own estate. That may be a very effective arrangement for the purpose. But it is out of the question to hold that an heir of entail in possession can by a personal obligation bind his successors in the estate to forego their right of fishing for salmon by the legal and ordinary method of net-and-coble.

A further ground for holding that the contract is not binding upon the pursuer is, that it lets to tenants a part of his estate on terms which do not yield him a fixed rent in money or kind. It is provided that the fishings let together with the fishings held under the other leases above mentioned are to be divided into seven shares with relative alternate beats; and the lessor stipulated that he and his foresaids, which means "his successors in the entailed lands and estate of Galloway and others," shall have right, in any year or fishing season after the conclusion of the first three years or fishing seasons under this lease, to claim the uses and privileges attaching to one-seventh share of the whole of these fishing rights. This is a privilege for which the lessor stipulates as of value to him, and it is therefore a part of the return which he is to receive for the rights granted to his lessees. But it is a return which may be of value to one heir and not to another, and it is a privilege which cannot be turned into money. It follows that the heir of entail is not bound to accept it as part of his rent. But if it is not taken into account, the money rent fixed by the lease is not a fair rent, because it is not the full rent for which the parties themselves have agreed that the subjects should be let. I cannot assent to the respondents' argument that this raises a question to be determined after evidence as to the fairness of the rent stipulated, because it is an objection which arises upon the face of the contract, and because no evidence as to the money value of a privilege which cannot be turned into money could be of any avail. The notion that an heir of entail can be compelled by his predecessor's contract to become one of several joint lessees of his neighbour's estates in order to obtain a full return for a lease of part of his own

estate, appears to me to be altogether untenable.

There are thus four capital blots which, in my opinion, make it impossible to regard this contract as a lease within the powers of an heir of entail. It includes rights which cannot be made the subject of an effective lease; and as regards the other rights which it purports to set in tack, it is in reality a complex contract by which lessor and lessees enter into a kind of association for the furtherance of a common design, which imposes upon the lessor obligations altogether outside the purposes of a lease of lands and heritages, and alien to the relation of lessor and lessees.

The defenders, however, maintained that as they had given up the right of trout-fishing on the assumption of its invalidity, the contract, after that part of it had been struck out, might stand without it as a good lease of salmon fishings; and the Lord Ordinary has given effect to that argument. I doubt whether his Lordship would have taken that view, if his attention had been called to any other objection to the contract, except that a lease of trout-fishing does not fall within the Rosebery Act. But the position of the case has been altered since it was before the Lord Ordinary. The defenders have now put in a minute renouncing the right of trout-fishing, but with a qualification which shows that they were not prepared to hold that part of the contract *pro non scripto*, while the assumption that they might do so formed the ground of the Lord Ordinary's judgment. After the argument in this Division had been heard out, and while the case was at avizandum, the defenders proposed to alter their position again by withdrawing the minute they had put in and putting another in its place, renouncing the lease unconditionally both as regards the trout-fishings and the subjects now let to Mrs Heron Maxwell. It was too late at this stage to allow the record to be altered, but as we were asked to take note that the proposal had been made, it may be proper to advert to it. It appears to me that to give effect to these proposals or either of them would be to make a new contract for the parties; and I think the explanation given by counsel of their delay in making the second amounts to a frank concession that they were proposing a new agreement. They said that they could not make such a proposal without obtaining the consent of their clients. But if their consent was required it was just because a new bargain was being proposed for them, materially different from that which they had made for themselves. If counsel thought that the lease, in so far as regards the subjects now in Mrs Heron Maxwell's possession, could not be supported, they required no authority from their clients to give up an untenable point and yet to maintain that the contract as a whole was not thereby invalidated. But then they could not take that position, because the defenders cannot be compelled without their own consent to accept a lease of a part only of the subjects they had agreed to take if another material part is withdrawn. It seems to me to be clear enough that both the rights which it is proposed to give up are material. It is manifest on the face of the contract that the parties thought it important for their purpose that the lessees should have the entire control and management of the whole streams and rivers within the description. It was explained, and I think we might have inferred if we had not been told, that the defenders stipulated that trout fishing should be included in the lease, not from any value they attached to that right in itself, but in order that they might secure their exercise of the right of salmon fishing from disturbance by persons who might choose to angle in the same waters under pretence or with the design of fishing for trout. But that only shows how material they thought it that they should have the entire control of all the fishing in all the streams, and therefore that to propose to them a lease which should exclude certain of the streams, and withdraw the right of trout fishing altogether, is to propose a totally different contract from that to which they agreed. But even if there were any authority for so re-forming a contract as between the parties to it, as to alter its material terms, that would not justify the Court in enforcing against the pursuer, with or without modifications, a contract to which he is not a party. The condition of the argument is that the pursuer is under no obligation whatever to the defenders. It is decided in *Kerr* v. *Redhead* that there is no equity for enforcing against an heir of entail obligations of his predecessor which are not binding upon him in law. And if the pursuer is under no obligation in law or equity to perform the late Lord Galloway's contract, there is no basis for a proposal to re-form its terms. What the defenders desire is to make a contract for the pursuer, who has made none for himself, and the only ground on which their claim to do so is rested is that he is not bound by a contract made for him by his predecessor. I know of no principle and no authority to support such a demand.

The Court recalled the interlocutor of the Lord Ordinary, and decerned in terms of the conclusions of the summons.

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