of the entail; it then changes the phrase, or "who shall break or innovate," &c.; or do any act or deed by which the estate may be evicted or affected, &c.

"It may seem odd to make it a question, Whether selling an estate be an act by which it is evicted or affected; yet, in terms of the decided cases, which I have alluded to, and even according to the grammatical construction of the present instrument, the question must be answered in the negative. The prohibitive clause here treats the words, *breaking* the entail, and affecting the estates as different and distinct from selling and disponing it. When these words, break and affect, occur again in the resolutive clause, we must take them in the same way as in the prohibitive clause.

"But the matter does not rest here. According to the decided cases, you cannot express or include a sale by these words. We are therefore reduced to this, that while we have a full conviction in our mind, that the granter of the deed meant to prevent a sale, yet we cannot act upon this; because the Court of Session has, with your consent, perhaps with your Lordships' directions, decided many cases another way. And the security of real estates in Scotland would be cut down, if you were now to refuse to adopt the doctrine, that a resolutive clause is not good on such general words.

"Therefore, when I move your Lordships to affirm the interlocutors complained of, I shall give my vote as *not content*, protesting that, as a judge, I never could have concurred in the former decisions originally when they were pronounced.

It was accordingly

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellants, *R. Dundas, W. Grant.*
For Respondents, *W. Adam, John Clerk, Wm. Clark.*

COLIN MACDONALD of Boisdale, . . *Appellant;*

RANALD GEORGE MACDONALD of Clanranald, Esq., and his Tutors and Curators, and his Tenant in Kilphedar, . . . } *Respondents.*

House of Lords, 22d June 1801.

SERVITUDE OF SEA-WARE—IMMEMORIAL USAGE—PRESCRIPTIVE TITLE.—An action of declarator having been raised, to have it found that the appellant had acquired a servitude of taking sea-ware from a neighbouring farm, the lands of which extended to the sea shore, on which the sea-ware was cast, and being claimed

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not as a contiguous proprietor, but as a tenant of the farm in use to exercise this right.—Held, that the appellant had no title to prescribe a right of servitude, and that the lands from which the sea-ware was taken, were not liable to the servitude claimed.

The farms of Kilphedar and Boisdale, situated in the island of South Uist, belonged in property to the respond-

1730. ent's grandfather, and were both let in lease by him to the appellant's father. The lease was to endure for fifty-eight years. The farms were situated along the sea-shore, and, from their situation, sea-ware, upon which they relied as the only manure for the land, was cast on shore in great abundance. As the tenants in the farm of Boisdale had been previously in the practice and use of taking sea-ware from the shores of Kilphedar, so the appellant's father continued to exercise this right of taking sea-ware when he became lessee of both farms. It was alleged also, that the practice throughout the island was, that as the sea-ware was cast on the shore in greater abundance than was requisite for any one farm; that all the adjoining tenants and feuars were in use to come and take a part away. Under the present lease, accordingly, the appellant's father had been in use in carting away the sea-ware found on Kilphedar farm to Boisdale farm.

1758. In the year 1758, and while there were many years of the lease to run, the respondent's father sold the farm of Boisdale to the appellant's father, "with the hail parts, pendicles, and "pertinents of the lands, so restricted, as they are presently "set, and such other farms as may happen to be erected "upon the aforesaid bounds, together with the fishings, "rock, sea-ware cast and growing upon the said lands dis-"poned, with liberty of manufacturing the same into kelp, "as the same are possessed by Alexander Macdonald and "his sub-tenants."

From the date of this charter, the appellant's father possessed the farm of North Boisdale as proprietor, and that of Kilphedar as tenant, and he continued, as formerly, the practice of taking sea-ware to manure the lands of North Boisdale from the shores of Kilphedar, till his death in 1768; and his son, the appellant, continued the same practice until the expiry of the lease of Kilphedar in 1788; and for three years thereafter, when the farm having been let to another tenant, a suspension and interdict was brought by the respondents, to have the appellant prohibited from taking the sea-ware from the lands of Kilphedar, as he had been in use to do,

while he held these lands in lease under him. The bill was passed to try the question. Whereupon the appellant brought a declarator, to have it declared, that the tenants and inhabitants of the lands of North Boisdale, belonging to the pursuer, had been in the immemorial practice of exercising the right of "servitude, of gathering and collecting "for manure to their possessions, the sea-weed and wreck "cast on shore on the lands of Kilphedar and others, be- "longing to Clanranald, and of using and away carrying "the same at pleasure, and that the pursuer and his succes- "sors have a right to exercise the said servitude in time to "come, according to use and wont." A counter summons of declarator was raised by the respondents, of immunity from such servitude. These actions being conjoined, the appellant maintained that the custom of the tenants on the farm previous to the lease had been to take sea-ware from Kilphedar to manure Boisdale farm, and that, in pursuance of that custom, he had exercised such right from the date of his lease 1730 till the time he purchased these lands in 1758. And, at this period, they were conveyed to him in property, "*as the same are possessed by the said Alexander Macdonald* "*and his sub-tenants.*" Of same date, he got a lease of the lands of Kilphedar, with the sea-ware, and part and pertinents, as the same are possessed as above. And the right thus confirmed continued to be possessed from the date of the charter downwards without interruption to the year 1791, which was sufficient to give him a right of servitude. In answer to this, it was maintained that no farm could claim sea-ware from the shores of another farm, without claiming also the arable lands contiguous to such shores; because the sea-ware was always attached to the lands on the bounds of which it was cast. Prior to the sale of Boisdale, it was in the respondent's grandfather's power, when both farms belonged to him, to regulate them in any way, but when these came to belong to different proprietors, each was limited to the extent and nature of his own right. That the appellant had no right or title to the sea-ware on the respondent's farm of Kilphedar, nor had he acquired any servitude of such; and his possession could only be attributable to the lease, or at most to mere sufferance. That possession under the lease could not constitute a servitude, because that would be to make a proprietor prescribe a servitude against himself.

The immemorial custom and use in taking such sea-ware,

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the Lord Ordinary would not even allow to be proved, in order to constitute such a servitude, and therefore pronounced this interlocutor:—"Having particularly considered "the clause in the feu-right respecting sea-ware in the "declarator of servitude, at the instance of Boisdale against "Clanranald, assoilzies the defender, and decerns; and in "that of immunity at the instance of Clanranald against "Boisdale, decerns in terms of the libel, except as to ex-"penses; and in the suspension, alters the interlocutor re-"presented against, which recalled the interdict, and con-"tinues it *in futurum*, and finds no expenses of process due "to either party."

Nov. 22, 1796. Dec. 6, 1796. Jan. 17, 1797. Two several representations were presented against this interlocutor, and ultimately a reclaiming petition to the Court, but it was adhered to.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded by the Appellant.—The custom on which the right in question is founded, is prevalent throughout the island of South Uist, as well as in other parts of Scotland, and the appellant ought to have been allowed a proof of it, and of the other facts which he averred and offered to prove; because, if established, it followed that the servitude in question was constituted by the feu-charter granted by the respondent's grandfather in the year 1758.

Pleaded by the Respondents.—Whatever may have been the rights of the appellant's father under the lease of Kilphedar and Boisdale, to take sea-ware from the former, to manure the lands of the latter, yet when this lease terminated by a purchase of Boisdale by the lessee, or whenever the lease of Kilphedar terminated, it did not follow that the same right of collecting sea-ware on the lands of Kilphedar, for the use of the lands of Boisdale, was to be continued. There may have been a usage and practice of so doing under the lease; but such usage could not establish a servitude. The title was precarious, and the possession had was by mere sufferance only. Then, with reference to the right under the feu charter 1758, the appellant's father, and his heirs male, had right to the lands of Boisdale, "with the "rock and sea ware cast and growing upon the lands dis-"poned, with liberty of manufacturing the same into kelp." This title, therefore, only gives right to collect sea-ware on the "*lands disponed*," that is, on Boisdale farm; but it does not convey any right of servitude of collecting sea-ware

on the lands of Kilphedar. And the lease of same date, of the latter farm, corroborates this view, because it gives the lands of Kilphedar with "right to the sea-ware growing "upon the shore of the said lands, or thrown in upon the "same, with full liberty of manufacturing the same into "kelp." Had any right of servitude of collecting sea-ware on Kilphedar been conveyed in this charter, it would have at once appeared, either from the charter itself, or from the lease of even date with it; but, so far from that being the case, that lease expressly conveys the whole sea-ware of Kilphedar as a part and pertinent of the farm, so that this latter lease supersedes all doubts on the subject. Having, therefore, no right conveyed to him, and the possession had been solely attributable to the lease, no right of servitude can attach. The possession of the lease of Kilphedar was, in the contemplation of law, the possession of the lessor; and the question must be viewed as if the respondent and his predecessors had, *in propria persona*, enjoyed the whole rights and privileges mentioned in the lease, and particularly the sole privilege of using ware for kelp, manure, or otherwise. If the possession had been upon the charter from the beginning, this, with forty years' possession of collecting sea-ware on another's lands, might have constituted a servitude, but that is not the nature of the appellant's right or title. Here there is no *termini habiles* for prescription; the only title upon which a claim of property could rest, is the feu-right in 1758; and the present dispute having originated in the year 1791, it is clear that the essential requisite of such a title is awanting, namely, forty years' uninterrupted possession.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For Appellant, *J. Mitford, James Mackintosh.*

For Respondents, *R. Dundas, W. Grant, W. Adam.*

NOTE —Unreported in the Court of Session.