leave anything unsaid or unsearched for, has not been able to produce a single case in which any such question as that which he is now suggesting has ever been raised. I think it is true enough, as he has said, that in some of the cases he has referred to facts have existed which prevented such a point being raised, because in those cases the person who had opened the mines was the settlor himself; yet I think that is insufficient to establish a new point. No such question has ever been glanced at so far as I know, and certainly it would be an odd thing at this time of day if for the first time you were to put in such a limitation and to alter the law—I think it would be altering the law—and to say it is not sufficient to introduce into the language of such an instrument by construction the words "open mines," but that you must add "mines opened by the settlor or testator."

I am unable therefore to follow the reasoning of the Court below. It seems to me that that reasoning has been to some extent induced by their view of the form of the conveyance. Whatever the reason for it is I am unable to agree with the judgment, and I move your Lordships that this interlocutor be reversed.

LORD MACNAGHTEN—I entirely agree. I think the Lord Advocate was perfectly justified in saying that the learned Judges in Scotland had been misled by the form of this conveyance. The conveyance is really in the common form. I will just refer to a note by Mr Davidson in his book on Settlements. He says — "Whenever land is intended for division among the children of a marriage, by far the most eligible mode of settlement is the creation of a trust for sale and declaration of trusts of the proceeds." Here the land was intended ultimately to be divided; at anyrate it was contemplated that it might be divided between the children of the marriage, and accordingly the settlement is in that form.

When once that difficulty is removed the case seems to me to be of the plainest possible kind. Here was a lady who was absolutely entitled to property which contained open mines. She settled it upon herself for life reserving the income of the property. Surely that included the income to be derived from these open quarries. Apparently they were worked up to the year 1878, and there was only a short interval between that time and the time of the lady attaining the age of twenty-one. Six months after she attained the age of twenty-one she married and made this settlement. It seems to me that she is clearly entitled to the proceeds of these quarries.

LORD MORRIS—I am of the same opinion.

LORD SHAND—I also concur. The distinction apparently sought to be drawn by the respondents' counsel is that the provision of the deed of agreement or settlement shall not apply so as to give to a liferenter the full benefit of the profits or income of her own property unless the mines were opened or worked by herself. I think there is no authority that can go that length. The case we have *de facto* before us is apparently this, that mines which have been worked for a very considerable time in the hands of different people—worked, as the Lord Advocate put it, "off and on during a century"—were for a short period of four years only unworked. To hold, as the result of this, that because these mines for some special reason were what Mr Guthrie described as "dormant" for a temporary period, however short a period—not abandoned mines, or mines which had not been worked for a very long period of time, and which therefore might be taken as abandoned—if the settlement was made during that period, the proceeds of these mines are to go in a different way from what they would if the mines were working then, is, I think, unreasonable.

I am of opinion with your Lordships that these mines, although in a sense dormant mines, by which I mean mines the working of which had been for a time suspended—it may be because of a diminished price to be got for the mineral or some other temporary cause—must be regarded as open mines in the sense which the law has always attached to those words in questions like the present.

LORD BRAMPTON—I am of the same opinion.

Judgment of the First Division *reversed.*

Counsel for the Appellant—The Lord Advocate (Graham Murray, Q.C.)—A. S. D. Thomson—E. J. Elgood. Agents—C. A. Elgood, for Pairman, Easson, & Miller, S.S.C.

Counsel for the Respondent Miss Greville-Nugent—Guthrie, Q.C.—Taylor Cameron. Agents—Bloxam, Ellison, & Co., for Menzies Black, & Menzies, W.S.

Counsel for the Respondents the Trustees—Methold. Agents—Bloxam, Ellison, & Co., for Menzies, Black, & Menzies, W.S.

Thursday, November 23.

(Before the Lord Chancellor (Halsbury), and Lords Macnaghten, Shand, and Brampton.)

CORPORATION OF GLASGOW *v.* M'EWAN.

(*Ante*, 3rd February 1899, vol. xxxvi. p. 437, and 1 F. 523.)

Church — Manse — Heritor — Assessment — Waterworks — Servitude — Way-leave — Act 1663, *c.* 21.

The Glasgow Waterworks Commissioners were infeft in a servitude, exclusive and perpetual, of way-leave through certain lands for the purpose of constructing and maintaining a conduit. *Held* (*aff.* judgment of the First Division) that the Commissioners were liable for assessment as heritors for the

upkeep of the manse of the parish through which the conduit passed.

The case is reported *ante, ut supra.*

The Corporation of Glasgow, as Waterworks Commissioners, appealed.

At delivering judgment—

LORD CHANCELLOR—In this case I believe that the question is a very short one, and unless it is clouded with words which are supposed to bear a technical signification it is to my mind a very plain one. The whole question turns, in the first instance, upon what is the meaning of the word "heritor" in the old Act of Parliament. Whatever may be the technical phraseology, and however it may be cut down by some archæological considerations of Scottish law, it is admitted at the bar on behalf of the appellants that, at all events, what we call proprietorship will bring the person who is the proprietor within the category of "heritors" under the ancient Act. That is the starting-point upon which I found my judgment. I get rid therefore of technical phrases, and I want to know who is the proprietor of this piece of land. I say this piece of land, because it is now agreed that the hollow tube, filled with water when it is actually full, but capable of being emptied from time to time, is at present just as much part of the land as the adjoining soil. That also has been admitted, and now that being admitted, the question becomes whether the person who is the proprietor of that is Sir Archibald Edmonstone, who is the owner of all the adjoining land, or whether it is this legal creature, the company which is incorporated for the purpose of supplying Glasgow with water.

I entertain no doubt whatever as to who is the person who is the proprietor of it. If I am asked to say, what is a proprietor? the definition may perhaps, like all definitions, be dangerous, because the person who is called upon to define is sometimes dealing with matters which are incapable of exact logical definition; but for all practical purposes one can see what a proprietor is by considering the incidents, and I must say that nothing appears to me to be more consonant with good sense than what the learned Lord President says in the course of his judgment, which indeed I read to one of the learned counsel at the bar in order that he might comment upon it:—"I think the judges who decided these cases, if told by the House of Lords that a water company was an occupier of the lands in which its aqueduct was laid, would have looked round for the heritor of these lands, and having to choose between Sir Archibald Edmonstone, who is perpetually excluded from their enjoyment, and the defenders, who have the perpetual enjoyment of them, would certainly have chosen the defenders."

I cannot help thinking that proprietorship, if you are to attempt to define it, must necessarily include the right of possession, the right of user, not limited in point of time, and not in itself limited in point of use. I will deal in one moment with what is suggested to be the restriction upon the use, but speaking generally I should say that a person who is entitled to exclude everybody else, and who is himself entitled to possess and enjoy a thing, must be, in any ordinary sense of the term, the proprietor. I should have regarded the hypothesis put by the Lord President as an outrage upon common sense,—to suppose that the proprietor can be a person who has no right to the possession, who cannot use the thing, and that the person who is entitled to enjoy, and is entitled to use it for all time, is not the proprietor. I regard those two propositions, correlative as they are, as exhausting really the subject-matter in debate.

But it is said, you have not this incident of proprietorship, you have not the right to sell, you have not the right to dispose of the thing you have got to anybody else. But why not? It is not that there is any qualification or reservation to the original proprietor of it which entitles him to have it back again if you do not use it—it is simply because the nature of the creature who by statute is permitted to have it and to keep it renders him incapable of using it for any other purpose than that for which the Legislature has incorporated that legal creature. That is no qualification of the right of proprietorship—it is a qualification of the mode in which the proprietor may dispose of it or may use it, but it is no qualification in favour of the person to whom it originally belonged.

I may say the substance of the argument has been rested upon the exact form of the conveyance. It has been said that it looks as if the persons conveying it had some notion that they were not conveying the absolute land but were merely conveying some easement. For the purpose of this statute I do not care what was in the minds of the persons who drew the conveyance. The statute has made this part of the property of a legal creature, and the statute gives no right of reverter to the original proprietor. In some cases, as we know, in Railway Acts, the statute provides that if the land is not used within a certain time for the purpose of the statute, there shall be a right to the adjoining proprietors to re-possess it. That is a right given by statute, but there is no such reservation here. There is no such qualification of the undoubted proprietory right of the Water Company to have that for which they have paid. Under these circumstances it appears to me that the statute itself has made this thing the property of the Water Company for all time, and has for all time deprived the original proprietor of this thing.

Then, seeing what the nature of that proprietorship is, it is suggested that nevertheless the owner of it is not a "heritor" under the statute. As I have said, the learned counsel at the bar, who are familiar with such questions, have admitted that if there is real and substantial proprietorship in this thing, whatever it is, that makes those who have that proprietorship "heritors" within the ancient statute. I entertain no doubt that the appellants are

in this case the real proprietors of this thing, and therefore they are "heritors" under the Act. I therefore move your Lordships that this appeal be dismissed, with costs.

LORD MACNAGHTEN—I am of the same opinion, and I must say I think the case is a very plain one.

Mr Haldane asked your Lordships to confine your attention to the conveyance from Sir Archibald Edmonstone, and to construe it as a grant of a servitude merely. I do not think that is the true construction of the conveyance, and I think you are bound to keep in view the Act of Parliament as well as the conveyance. The conveyance begins by reciting the Glasgow Waterworks Act. Then it conveys to the Magistrates and Council of the City of Glasgow, according to the true intent and meaning of the Act, first, certain lands, "And, in the second place, all and whole the heritable and irredeemable servitude, right, privilege, and tolerance of a way-leave." But what was that granted for? That is not a grant of an abstract right to carry this water, but this way-leave is granted to them "for the purpose of their opening up the surface of the land, and forming, constructing, and maintaining therein a culvert or conduit for conveying water to the City of Glasgow, and executing all necessary works in connection therewith." Now, when they have broken up the surface of the land, and when they have constructed therein these works which they are authorised to construct by this Act of Parliament, the Act of Parliament, it seems to me makes this conduit, and this space within the conduit their absolute property. Being their absolute property they are the proprietors of it, and as the proprietors, it appears to me, they come within the category of heritors, and are liable to contribute, according to the Act of Parliament, towards the repairs of the manse.

LORD SHAND—I am of opinion with your Lordships that the decision of the First Division of the Court of Session in this case ought to be affirmed.

"The heritors" under the Statute of 1663, may, I think, be taken to mean the proprietors or owners of lands within the parish. The question raised in this case seems to me to be a special and a somewhat narrow one, namely, whether these appellants are not such owners, *i.e.*, owners of lands or heritable property for purposes of rating within the meaning of the statute. If they are owners or heritable proprietors then they are liable; and the question, I take it, is whether they are not owners within the meaning of the statute, coming under the appellation of "heritors."

I agree with the learned Judges of the First Division in thinking that the important elements for the settlement of this question, which I regard as a rating question only, are these. In the first place, the appellants have acquired such rights as they possess by a heritable title; that title contains a clause consenting to registration in the Register of Sasines in Scotland, and by being so registered, as I have no doubt it was, it is a heritable title which has been feudalised. In the next place, it followed upon that title that they have a right to occupy the ground, which they have filled in to a very large extent with bricks and masonry, culverts and pipes, and other subjects, which became permanently built in or attached to the *solum*, and not only have they that right of occupation, but they have it as a perpetual right. This case is quite out of the class of cases which has been cited, in which temporary rights are given of a kind which plainly are not rights of heritable proprietors but of tenants, liferenters, and the like, because of their temporary nature. In the next place, the possession is not only perpetual; it is, as the Lord Chancellor has forcibly observed they are, exclusive of the proprietor himself in his use of the ground—interfering with the proprietor in so far as the comprehensive rights conferred upon the appellants give them powers over these lands.

In that state of matters I cannot help saying that I entirely agree with the learned Judges of the First Division when they say that in substance these appellants are the beneficial owners of the land.

The argument submitted to your Lordships on behalf of the appellants when it is examined comes to this—Whatever we may be in substance, if you look particularly into the nature of our title you will see we are not really proprietors; we are only owners of a servitude. That may be, but I think, for the purposes of rating, owners of what may be rightly called a servitude only though they may be, yet with all the additional qualities of their right, which I have referred to, they are in substance, for rating purposes, the owners of the land. I am not prepared to say that in title these appellants, according to the law of Scotland, are "owners." My opinion as a Scotch lawyer is that they are not so. They hold only a servitude, but it is a servitude which, with all that accompanies it, appears to me to be practically ownership in a question of rating. None of the learned Judges in the Court of Session have said that the appellants' right would not be properly described as a servitude of aqueduct, and while the title proceeds "for the purpose" of building culverts and tunnels, it seems to me that these words are merely the giving of powers of building and maintaining erections usual in grants of such a servitude. The question whether practical beneficial ownership is not given admits of illustration very shortly. It is put very clearly in the opinion of the Lord President (Lord Robertson). He put it in this way—Suppose that this property that is given in form as a servitude had been given by a conveyance of all the same particular ground in property, but in property so hampered and tied down by conditions that every one of these conditions which are now imposed upon the appellants had been imposed upon them by their title—that would have been substantially the same thing. They would have had a right of

property, and so a right to enter upon and use the lands, but to use them for a limited purpose only,—for precisely the same purposes for which they have power to use them now, and under the same restrictions. It would not have been possible to contest that in that case having a feudal title, though limited exactly in the same way as regards the right of occupation and use as it is now, that feudal title would make them proprietors; and therefore I say, as I have said in the course of the discussion, it appears to me that really the appellants' argument is founded on a technicality,—the technicality being, "We have what by law is called a servitude," to which the reply is, that in substance there is proprietorship, because the appellants have the same advantage that they would have if the property had been conveyed to them in property under the same conditions. The form of the title in most cases may be the determining element, but though the title may in strict legal language be that of servitude, the substance of the right given may be beneficial ownership.

I have been struck with an observation made by Lord Cranworth in the case of *Hay* v. *The Edinburgh Water Company*—that it really becomes dangerous to be refining in matters of rating as to mere questions of the form of title. I think what we have got to look at is the substance of the rights which the parties have, and I agree with what the Lord President says at the close of the first part of his opinion. After enumerating the different points, which I began myself by reciting, his Lordship concluded by saying—"The remaining question seems to me to be whether the perpetual and exclusive right to occupy land makes the holder of it in substance proprietor of that land, and if it does, then why not a heritor?" I agree with the view taken by Lord M'Laren that a question of rating is in a totally different category from some of those questions which may arise between a proprietor and another to whom he has given a servitude. And I agree also with the view which Lord Kinnear has stated in reference to the case of *Hay* in the passage in which he quotes the observation of Lord Cranworth (Lord Chancellor) to this effect:—"Even if this be an easement" (that is the footing upon which I decide this case so far as I am concerned) "it is a heritage which I understand to mean a matter of property capable of inheritance, and there can be no doubt in the world that if I grant to another and his heirs the right for ever of conveying water from my lands that is an heritage." I entirely adopt the language which Lord Cranworth used as becoming applicable to this case, making this difference only, that for the word "heritage" I substitute "heritable subject" or property, which is sufficient for the decision of this case.

I shall only add, that the tunnels, culverts, and pipes, built and fixed to the soil by the appellants are certainly rateable subjects. If the appellants are not liable to be rated for these, the proprietor of the estate must be so, though he has no beneficial ownership. He gave the appellants the rights they have for a capital sum of £50; and I confess it is a satisfaction to me that the decision which is now to be affirmed will avoid the injustice of rating on him an annual sum which might greatly exceed the sum which he got from the appellants for the heritable rights he conferred on them.

On the grounds I have stated I agree with your Lordships in thinking that the decision of the First Division of the Court of Session should be affirmed.

LORD BRAMPTON—I am so satisfied that I could not add one single word with utility to that which has fallen from the Lord Chancellor, that I prefer simply to say that I concur absolutely with the judgment that he has proposed.

Appeal *dismissed* with costs.

Counsel for the Appellant — Haldane, Q.C.—Ure, Q.C. Agents—Martin & Leslie, for Simpson & Marwick, W.S.

Counsel for the Respondents—The Lord Advocate (Graham Murray, Q.C.)—R. L. Blackburn. Agents—Grahames, Currey, & Spens, for Dundas & Wilson, C.S.

Friday, November 24.

(Before the Lord Chancellor (Halsbury), Lord Macnaghten, Lord Shand, Lord Brampton, and Lord Robertson.)

STEWART *v.* MACLAINE.

(*Ante* Dec. 16, 1898, vol. xxxvi. p. 233.)

Lease—Missives of Lease—Implied Conditions—Estate Regulations in Agricultural Lease—Waygoing—Obligation to Take over Stock.

A tenant who had possessed a sheep-farm under a formal lease embodying certain estate regulations applied for a renewal of his lease by letter in the following terms:—"I hereby offer to take the farms of Rossal and Dernacullen as at present possessed by me on the following terms, viz., Lease, five years, Rossal, rent £100 per annum; Dernacullen, rent, £40 per annum. Right of fishing in the Coleader river for two rods; a porch to be erected at kitchen door of Rossal house. Your acceptance of the above will oblige." That offer was accpted.

Held (*aff.* the judgment of the Second Division) that the estate regulations could not be treated as incorporated in the missives, either by reference to the former lease or as provisions usual and proper in such leases, and which must have been in contemplation of the parties on entering into the contract.

Observed, that the fact that the tenant had in the negotiations subsequent to the exchange of the missives repudiated any intention to be bound by the missives, did not prevent him