No appearance was made for the defender; but the decree was pronounced *causa cognita* both as regarded jurisdiction and on the merits. On obtaining decree of divorce the pursuer raised the present action for the purpose of vindicating the rights of terce and *jus relictæ* which accrued to her in consequence of the decree of divorce. The defender has appeared and opposes this demand on the ground (first) that the decree of divorce is invalid, and (secondly) that it would not be recognised in the Isle of Man (in which he says he is domiciled) as valid to any effect, or at all events as regards the rights of parties as to property. He does not plead "no jurisdiction," or "*forum non conveniens.*" The question arises with the defender himself, and not with executors or trustees resident in another country.

In my opinion the Lord Ordinary has rightly repelled this defence. My view, shortly stated, is this—The Lord Ordinary has granted divorce, we must assume rightly, on the footing that he had jurisdiction to entertain the action. We must also assume that he did so on the footing that the defender's complete domicile was in Scotland.

According to the judicial opinions in the cases of *Pitt* v. *Pitt*, 4 Macq. 627, *Stavert* v. *Stavert*, 9 R. 519, and *Low v. Low*, 19 R. 115, and *Le Mesurier*, L.R. App. Ca. 1895, p. 517, in order to establish jurisdiction in Scotland against a husband, defender in an action concluding for divorce *a vinculo*, his complete domicile for the purposes, *inter alia*, of succession, must be shown to be in the country in which divorce is sought.

Decree of divorce having been competently pronounced, the pursuer's right to terce and *jus relictæ* immediately emerged; and in my opinion the Court which pronounced the decree of divorce was entitled and bound to follow it up by imposing on the defender the penalties due according to the law of Scotland. The decree having been pronounced in absence, the defender might (if he was not too late) have taken steps to have it set aside. But he has not done so, and does not propose to do so, and therefore in this action, in which no more is asked than that the legal and necessary consequences of divorce obtained on the footing that he is a domiciled Scotsman should be enforced against him, the defender is precluded from maintaining, at least in this Court, that he was not at the date of the decree, and is not now, a domiciled Scotsman.

It is said that the decree if granted will not be enforced in the Isle of Man. I do not think that we are concerned with that question at present. It is the less material because as regards the pursuer's claim for terce the defender has heritable estate in Scotland, and the pursuer's claim admittedly must be decided by the *lex loci rei sitæ;* and even as regards the claim for *jus relictæ* we are informed that it will not be necessary for the pursuer to appeal to the legal authorities in the Isle of Man, as the defender has sufficient real property in this country to satisfy her demand.

I would only further observe in regard to the question of jurisdiction that in the action of divorce there was really no difficulty in sustaining the jurisdiction of the Court, because some of the acts of adultery libelled, and which were held proved by the Lord Ordinary, were committed in Scotland at a time when the defender was undoubtedly a domiciled Scotsman. Now, according to our law a husband cannot after committing adultery in Scotland deprive the wife of her remedy of divorce and her patrimonial rights consequent upon it by changing his domicile as I assume the defender sought to do in this case, by going to the Isle of Man and residing there with his paramour. See *Pitt* v. *Pitt*, *per* Lord Westbury, 4 Macq. 640; *Jack* v. *Jack*, 24 D. *per* Lord Neaves, p, 476, per Lord Ardmillan, p 477; *Reading* v. *Reading*, *per* Lord M'Laren, 15 R. 1102, and *per* Brett, L.-J., in *Niboyet*, L.R., 4 P.D.|14.

What the defender apparently desires is that the decree of divorce should stand, and that while in consequence of the decree of divorce he would escape all liability to aliment his wife in the future according to the law of Scotland, he should at the same time escape liability for those compensatory consequences, and rights in her favour, which according to the same law should accompany a decree of divorce.

If the defender desired to escape the consequences of the decree of divorce his course was, if it was not too late, to reduce the decree in absence pronounced against him. As he has not thought fit to do so, I think we are bound to affirm the Lord Ordinary's interlocutor.

The Court adhered.

Counsel for the Pursuer — Lorimer. Agents—Bell & Bannerman, W.S.

Counsel for the Defender—A. S. D. Thomson. Agents—Finlay & Wilson, S.S.C.

Friday, February 3.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

M'EWAN *v.* CORPORATION OF GLASGOW.

Church — Manse — Assessment — Heritor Real Rent.

A municipal corporation was infeft in a wayleave through certain lands for the purpose of forming a conduit for conveying water to a town. *Held* (*rev.* judgment of Lord Stormonth Darling) that it was liable to assessment for the upkeep and repair of the church and manse of the parish in which these lands were situated, in respect of the conduits, water-pipes, &c., which it had constructed, and that its proportion of the assessment fell to be calculated upon the real rental thereof as instructed by the valuation roll.

This was an action raised by John Jamieson M'Ewan, clerk and collector to the heritors of the parish of Strathblane, against the Corporation of Glasgow, concluding for declarator that the defenders were heritors of the said parish, and were liable to be assessed for the maintenance and upkeep of the church and manse thereof. There was also a conclusion for payment of certain sums amounting in all to £102, 2s. 6d., being the defenders' share of certain assessments imposed at different dates by the heritors for the upkeep of the manse.

The pursuer averred that the defenders or their predecessors, the Glasgow Corporation Waterworks Commissioners, had acquired certain lands and heritages situated in Strathblane for the purpose of erecting buildings in connection with their undertaking of supplying Glasgow with water, and had also acquired certain heritable rights whereby they became entitled to construct pipes, culverts, aqueducts, and other works of a corporeal nature beneath the surface of the ground for the transmission of water through the said parish.

After setting forth the several conveyances by which the said lands and heritable rights were conveyed to the defenders or their predecessors the pursuer proceeded—"(Cond. 5) The said defenders or their predecessors, the said Waterworks Commissioners, have exercised the rights set forth in the above conveyances, and have constructed, and the defenders are now proprietors of, aqueducts, pipes, conduits, drains, cuts, sluices, culverts, tunnels, and other works of a corporeal nature in, on, or through land specified in the said conveyances and situated in the said parish. The said aqueducts, pipes, conduits, and other works above specified, are substantially built of stone, iron, cement, and other materials of a like nature. The said subjects are heritable, and the defenders have right to maintain, and intend to maintain, the same in their present positions in perpetuity. They are corporeal subjects of a heritable nature possessed under heritable title, and the pursuer avers that in respect thereof the defenders are proprietors of lands and heritages in and are heritors of the said parish, and liable to be assessed for the maintenance and upkeep of the parish church and manse. (Cond. 6) The said subjects belonging to the defenders are lands and heritages within the meaning and for the purposes of the Lands Valuation Act 1854 (17 and 18 Vict. cap. 91), and ever since the defenders or their predecessors, the said Waterworks Commissioners, acquired the said subjects they have been entered in the said valuation roll for the said parish as the owners and proprietors thereof. No objection has ever been made by the defenders or their predecessors, the said Waterworks Commissioners, to the inclusion of the said subjects in the said valuation roll, and no appeal has ever been taken by them against the said valuation appearing therein."

The pursuer concluded by narrating the imposition of the various assessments, and by averring that they were in each case calculated on the amount of the real rent of the lands and heritages in the parish, including the lands and heritages belonging to the defenders, as instructed by the valuation roll.

The defenders admitted liability in respect of the lands and buildings absolutely owned by them. "But they deny that they are heritors or are liable as heritors in respect of the lands through which they have acquired mere servitudes or way-leaves."

They further explained "that the defenders are not heritors in the parish of Strathblane in respect of their pipes and conduits which run across a portion of the said parish, and are not made liable for heritors' assessment by the entries in the valuation roll before referred to, and that in any view, even if the defenders are heritors, the mode of assessing the defenders' property in making up the said roll is inapplicable to their position as heritors. The proper mode of assessment for the lands in the said parish, being a landward parish, is according to the valued rent, or at all events according to the real rent of the land as such, and apart from the returns of the defenders' undertaking. Explained further that it has never been the practice, either in the said parish or elsewhere in Scotland, to assess waterworks for heritors' assessment in respect of pipes and conduits belonging to them."

The pursuer pleaded—"(1) The defenders having acquired the heritable rights condescended on in land situated in the parish of Strathblane, and they or their predecessors, the Glasgow Waterworks Commissioners, having in virtue of the said heritable rights constructed the corporeal subjects and works condescended on in on or through the said land, and the defenders being now the owners of the said corporeal subjects and works, are proprietors or owners of lands and heritages, and are heritors in the said parish in respect thereof. (2) The defenders being heritors, proprietors, and owners of lands and heritages in the said parish, and the heritors of the said parish having lawfully and without objection imposed an assessment upon all heritors, proprietors, and owners of lands and heritages in the said parish, estimated on the real rent of all lands and heritages within the said parish, and the sums sued for being the true proportion of the said assessment that falls to be borne by the defenders in respect of the real rent value of their said lands and heritages, the pursuer is entitled to decree as craved."

The defenders pleaded—"(2) The defenders not being heritors in the said parish in respect of their interests in the said pipes and conduits are entitled to absolvitor. (4) In any view, the defenders, even if heritors of the said parish as in right of said pipes and conduits, are not liable to be assessed as such according to the entries in the valuation roll, and should be assoilzied from the conclusions of the summons."

Both parties agreed to take as an example of the terms in which the servitude or way-leave had been conveyed to them a conveyance by Sir Archibald

Edmonstone of Duntreath in the year 1858, whereby he conveyed to the Waterworks Commissioners, in the first place, 100 square yards of land, and, in the second place, "All and whole the heritable and irredeemable servitude right, privilege, and tolerance of a wayleave through that portion of my said lands coloured blue on the said plan, of the width of eight yards, and distinguished further by the letter F on the foresaid plan, and extending in whole to 2461 square yards and one-third of a square yard or thereby. . . . Declaring that the said servitude-right, privilege, and tolerance of wayleave through the said portion of land is hereby conveyed to my said disponees 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: Declaring always, as it is hereby provided and declared, that my said disponees shall be bound and obliged, after forming and constructing the said culvert or conduit, to restore satisfactorily the surface of the land, but they shall have liberty of access thereto on all necessary occasions in all time coming hereafter for inspecting, repairing, maintaining, or altering the said culvert or conduit, or any of the works connected therewith or adjacent thereto." Infeftment was taken upon this conveyance as well as upon the others.

Parties also agreed to admit that the tunnel or aqueduct constructed by the defenders consisted in part of a simple bore through the rock, in part of a bore lined with brickwork or masonry, and in part of cast-iron pipes laid under ground. The defenders' whole reservoir, pipes, &c., were entered in the valuation roll at the yearly rent or value of £8376.

The Act 1572, cap. 54, ratifies an Act of the Privy Council, 1563, whereby two-thirds of the expense of the upkeep of churches were thrown on the "parochinars," and one-third on the parson.

The Act 1663, cap. 21, where competent manses are already built, ordains "the heretors of the paroch to relieve the minister and his executors of all cost, charges, and expenses, for repairing of the aforesaid manses."

On 19th March 1898 the Lord Ordinary (STORMONTH DARLING) found that the defenders were not heritors of the parish of Strathblane, nor liable to be assessed for the maintenance and upkeep of the church and manse of the said parish, except in respect of their being proprietors in fee of certain lands in the said parish; to that extent found, decerned, and declared in terms of the declaratory conclusions of the summons, and *quoad ultra* assoilzied the defenders.

Opinion.—"This question relates to the liability of the defenders as proprietors of the Loch Katrine Water-works to be assessed as heritors of the parish of Strathblane, through which the water-works pass, for repairing the manse of that parish.

"The defenders are owners in fee of over 13 acres in the parish, acquired for the purpose of erecting buildings and other structures connected with their works. They do not dispute that in respect of these 13 acres they are 'heritors' of the parish in the sense of the Act 1663, c. 21. But they are also vested by conveyances from Sir Archibald Edmonston and other proprietors in certain heritable rights which have enabled them to cut tunnels through the rock, and lay pipes in the soil. In the typical instance selected for the purpose of this case the subject conveyed is described as 'all and whole the heritable and irredeemable servitude right, privilege, and tolerance of a wayleave through that portion of my said lands coloured blue on the said plan,' and then follows a declaration that the said servitude right is granted to the disponees 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,' that they are afterwards to restore satisfactorily the surface of the land, and that they shall have liberty of access thereto on all necessary occasions for inspecting, repairing, or altering the works. The defenders maintain that they are not heritors of the parish in respect of these wayleaves, or of the works constructed by virtue of them.

"Now, if the question were whether the defenders, in respect of their pipes and conduits, were owners and occupiers of lands and heritages within the meaning of the Poor Law Act, and liable as such to poor-rates, the case would be governed against the defenders' argument by the judgment of this Court and the House of Lords in *Hay* v. *Edinburgh Water Company*, 12 D. 1240, and 1 Macq. 682. In that case the Water Company had no conveyance of any right of property in the soil, but merely a statutory right to lay their pipes under the streets of the city; yet they were held to be, in the sense of the Act, both owners and occupiers of the ground in which their pipes were laid, all necessity for a critical examination of the nature of their right being avoided by the statutory interpretation of the word "owner" as including all persons "in the actual receipt of the rents and profits of lands and heritages." In *Craig* v. *Edinburgh Tramways Company*, 1 R. 947, this principle was extended to the liability of a tramway company for poor-rates in respect of the portions of the streets occupied by their rails; and in *Barony Parish Road Trustees* v. *Glasgow Water-Works Commissioners*, 7 Macph. 106, the predecessors of the defenders were held liable, on the same principle, for statute-labour assessment in respect of their subterranean water-pipes.

"But the question here is not the same as in these cases. A man may be owner of lands and heritages within the meaning of the Poor-Law Act, or the Statute-Labour Act, without being a 'heritor' in the sense of the Act 1663, c. 21. That term has been the subject of many judicial decisions, which have excluded from its application a

number of substantial heritable rights. First, it was questioned whether a superior was within the term, and in *Dundas* (1778), M. 8511, the Court, after an inquiry into the general practice over Scotland, held that he was not, and that 'by heritors in the Statute 1663 proprietors are to be understood.' Then in the case of *Bell* (1805), M. *voce* 'Kirk,' App. No. 3, it was held that a coalowner was not liable in the expense of building or repairing a church, apparently on the principle that as his profit was casual he should not be made to bear a permanent burden, although it was right that he should bear his share of annual burdens like assessments for the maintenance of the poor. Then in the case of *Anstruther* (1823), 2 S. 306, it was held, on the same principle, that a liferenter was not liable even in the expense of repairing a church. Finally, in the case of *M'Laren* v. *Clyde Trustees*, 4 Macph. 58, *aff.* 6 Macph. (H.L.) 81, it was held that a long leaseholder, though appearing in the valuation roll as proprietor by virtue of the Valuation Act of 1854, was not liable in the expenses of rebuilding a parish church, because section 41 of that Act provides that 'nothing contained in this Act shall exempt from or render liable to assessment any person or property not previously exempt from or liable to assessment.' Lord Neaves in deciding the case pointed out that if the assessment had been imposed according to the valued rent, no question could have arisen, and that the fact of the heritors choosing to assess according to the real rent, though it might alter the details of the assessment, could not alter the class of persons who were liable. His Lordship then said, 'The original enactments on this subject laid the liability upon the "parishioners"; but from the earliest period this phrase has been construed to mean the heritors or proper owners of lands and heritages within the parish. It has been decided that superiors are not liable, for they have not the *dominium utile*, and that liferenters are not liable, for they have not the perpetual or permanent right.'

"There seems to run through all these decisions, extending over nearly a century, an equitable endeavour to make the burden of assessment coincident with the benefit presumably to be derived from the ecclesiastical apparatus of the parish. But whatever may have been their ruling idea, they must, I think, be accepted as having stamped the phrase 'heritors,' in its relation to ecclesiastical assessments, with a limited signification, which demands, as *sine qua non*, the ownership in fee of the *dominium utile* of lands.

"It was urged by counsel for the pursuers that the question did not turn on the nature of the right under which the defenders had constructed their works, but on the nature of the works themselves, and that if these were corporeal and heritable, and belonged to the defenders in perpetuity, it was enough to make the defenders liable as heritors. But I think, under the decisions, that I am bound to examine the defenders' title, and if I find that it falls short of land ownership, and confers merely the right to make a certain use, though it may be a perpetual use, of lands belonging to another, then I cannot declare the holder of such a right to be a 'heritor.' The familiar and cognate servitude of aqueduct carries with it the right permanently to occupy the land of the servient tenement with artificial works, and there is an interesting discussion of the nature of that right in *Highland Distillery Company* v. *Reed*, 4 R. 1118. But if the servient tenement were situated in parish A, and the dominant tenement in parish B, nobody would suggest that the holder of the servitude ought, by virtue merely of that right, to be classed as a heritor in parish A."

The pursuer reclaimed, and argued — Whatever might be the terms of the Act 1572, cap. 54, it was long since settled that parochinars must be taken to mean what the Act 1663, cap. 21, called heritors, *i.e.*, those only having immoveable property in the parish—*Boswell* v. *Duke of Portland*, December 9, 1884, 13 S. 150, at 153. This restricted interpretation showed that the Lord Ordinary was wrong in attempting to make the capability of receiving benefit from the ecclesiastical apparatus of the parish a test of liability to assessment as a heritor. The assessment was imposed upon real estate, not on persons, though the phraseology of the statute rather pointed to persons, and it was immaterial whether the owner of real estate could avail himself of the benefit of the church or not. What was proposed to be assessed here was corporeal immoveable property. The right of the Corporation might be called a servitude, but that phrase was inaccurate. There was no dominant tenement. The right could not be extinguished. It entitled the Glasgow Corporation to precisely the same kind of beneficial enjoyment as if there had been a formal conveyance of lands. In the case of *Hay* v. *Edinburgh Water Company*, July 13, 1850, 12 D. 1240, and February 13, 1854, 1 Macq. 682, it was held that the defenders were owners or occupiers of heritages, although their right was no more than a wayleave; and although the Poor Law Amendment Act 1845 was to some extent the foundation of that decision, the judgment of the House of Lords proceeded upon the broader ground. Certain classes of persons had indeed been held exempt from assessment by decision. But all of these, excepting superiors, had this feature in common, that their interest in the lands was not of a permanent nature. As for superiors, their exemption must be attributed to the principle that no heritage was to be subjected to a double assessment. The list of exemptions was not to be added to lightly. The fact that the defenders were a public body and had acquired their rights under powers conferred by statute was immaterial. Canals and railways were both liable to assessment — *Anderson* v. *Union Canal Company*, March 7, 1839, 1 D. 648; *Macfarlane* v. *Monklands Railway Company*, January 29, 1864, 2 Macph. 519; *Scottish North-Eastern Railway Company*

v. *Gardiner*, January 29, 1864, 2 Macph. 537; *Highland Railway Company* v. *Heritors of Kinclaven*, June 15, 1870, 8 Macph. 858. If the defenders were liable to the assessment, the cases of the *Scottish North-Eastern Railway Company*, *ut sup.*, and the *Highland Railway Company*, *ut sup.*, left no doubt that the real rental, as it appeared in the valuation roll, was the true basis for calculating the assessment.

Argued for the defenders — The word "heritor" was practically convertible with landholder—Ersk. Inst. ii., 10, 56, 57, 63; *cf.* ii, 6, 11. But in considering the main question here, viz., who is a heritor? it must be borne in mind that decisions of the Court had materially qualified that broad proposition, and that with reference to the Acts anent the repairing of the churches and manses, the term heritor was confined to a limited selection from those who owned or had to do with lands. Thus, a superior was not a heritor—*Dundas* v. *Nicolson*, 1778, M. 8511; no more was a liferenter—*Minister of Morham* v. *The Laird and Lady Binston*, 1679, M. 8499; *Anstruther* v. *Anstruther's Tutors*, May 14, 1823, 2 S. 269; nor a titular—*Swinton* v. *Laird of Wedderburn*, 1663, M. 8499; nor a coal owner—*Bell* v. *Earl of Wemyss*, 1805, M. *voce* Kirk, App. No. 3; nor a long leaseholder—*M'Laren* v. *Clyde Trustees*, May 28, 1868, 6 Macph. (H.L.) 81. The principle running through all these cases seemed to be that no one was liable to assessment unless (1) he were able to avail himself of the benefit of the church, and (2) were "the feudal proprietor of the *dominium utile*"—*Traquair's Trustees* v. *Heritors of Innerleithen*, December 9, 1870, 9 Macph. 234, *per* Lord President Inglis, 250. If that test were applied here the defenders must escape. The Corporation of Glasgow could not avail themselves of Strathblane Parish Church, and they were not the feudal proprietors of the *dominium utile* of the land in which their pipes were placed. The most they had was a wayleave—a "servitude" as the conveyance itself described it — (see also *Scottish Highland Distillery Company* v. *Reid*, July 17, 1877, 4 R. 1118) — and as such not subject to assessment. Assessment for repair of church and manse was essentially a real burden — *Douglas* v. *Heritors of Manor*, 1695, M. 8501. The case of railway companies was not analogous, for they had a full right of property in their lands, subject to no qualification, though the superior of those lands could not enforce the feudal remedies against them. The words construed in *Hay*, *ut sup.*, and in the *Barony Parish Road Trustees* v. *Glasgow Waterworks Commissioners*, November 13, 1868, 7 Macph. 106, were "owners and occupiers," not "heritors." On the question of the method of valuing waterworks, the defenders referred to *Dundee Water Commissioners* v. *Dundee Road Trustees*, December 21, 1883, 11 R. 392, and *Magistrates of Glasgow, &c.*, October 3, 1884, 12 R. 3, and argued that these cases indicated the proper mode of discovering the basis upon which an assessment should be made.

At advising—

Lord President—The question which we have to decide is, whether in respect of their aqueducts and pipes, constructed and laid by virtue of rights of aqueduct, the defenders are heritors in the parish of Strathblane in the sense of the Act 1663, c. 21.

In order to the determination of this question it is desirable first to consider whether the defenders are in fact in the occupation of land. Now that question is concluded by the case of *Hay*. The House of Lords there laid down that a water company occupies land by its pipes laid down under rights of wayleave. The Lord Chancellor unambiguously rests the judgment on the word "lands" as distinguished from the word "heritages." The Lords went on to hold that the company were also owners of the land so occupied, but although this latter decision is highly relevant to the present question, I do not in the meantime found on it as conclusive, for it may be said that the decision as to ownership is rested to some extent on the definition of owner in the Poor Law Act. This latter point does not however in the least abate the importance of the decision on the matter for which I at present refer to it — viz., the doctrine that the right is a right to the occupation of land. All arguments therefore about servitude and wayleave are concluded by the case of *Hay*—the right is a right of occupation of land.

The next step in the argument is that the occupation to which the defenders have right is (1) exclusive and (2) perpetual. About this there can be no dispute.

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?

Now, while the decision of *Hay* as regards ownership could quite well be supported on the ground of the very comprehensive sense given to the word owner by the interpretation clause of the Poor Law Act, yet the opinion of the Lord Chancellor, read as a whole, does not seem to rest the decision on that alone. A perpetual right of exclusive occupation of land seems to comprehend the most essential elements of property, in so far as concerns the enjoyment of the subject; and I do not think that the absence of the power to dispose of the subject by sale bears vitally on a question of assessment. Again, the fact that the statutes as well as the physical conditions limit the use of the land to certain purposes does not present any obstacle to the right being one of property. Supposing the land in question had been disponed to the company in a feu-contract, with the statutory limitations on the use and disposition of land required for aqueducts all set forth at length as conditions of the contract, the active and beneficial rights of the company would have been no greater than they are now. Those rights are quite capable of being expressed in feudal form, as one of *dominium utile* qualified by limitations as to use and disposition, without the company

gaining, or the proprietor of the other strata losing, a scintilla of right. It seems to me, therefore, that in substance the company are, in respect of the rights now in question, proprietors of land.

The next question is, are they "heritors" in the sense of the Act 1663, c. 21?

Now, apart from decisions, and considering the question merely on its merits, I suppose the word heritor means owner of land. It is an old-fashioned word, but there is no special mystery about it, and we must of course rid our minds of the idea that it is limited to the owners of valued lands, for under this very Act it has been held that the real rent may be made the principle of assessment and must be in all cases where the valued rent does not afford an equitable basis of assessment. Indeed, it is well to bear in mind that although this Act is of course expressed as laying the burden of providing manses on persons, to wit heritors, yet in regard to manses, as in regard to all local rates, the assessment is made for the lands, and is intended to fall on all lands.

The Lord Ordinary has decided this case upon a set of decisions which he holds to have affixed to the word "heritors" in this Act of 1663 a more limited sense than it might otherwise have borne. He says they have stamped the phrase heritors in its relation to ecclesiastical assessments with a limited signification, which demands as a *sine qua non* the ownership in fee of the *dominium utile* of lands. Now, if the technical language here used were employed by the Lord Ordinary merely to describe, as by the type of a regular and ordinary title, the perpetual right to the beneficial enjoyment of land, I should have no great objection to this definition, whether it is deducible from the cases cited or not. But then the Lord Ordinary goes on to point out that the technicality of his definition is of its essence, and excludes anyone who has not a legal fee of the lands, for he describes the lands in question as belonging "to another." This must mean that in the case of the specimen title which we have before us Sir Archibald Edmonstone is the owner of the lands occupied by the Water Company. The Lord Ordinary does not follow this out by telling us whether in his view Sir Archibald ought to be assessed in respect of these "lands," by which of course I mean the stratum occupied by the pipes, and yet I do not see how he can avoid so holding. The lands are assessable—so the House of Lords held in *Hay*; they are a different subject from that for which Sir Archibald is at present assessed—so again the House of Lords held in *Hay* (in treating of the Ranger and St James' Park, at p. 686 of 1 Macq.); the assessment falls on owners; and according to the Lord Ordinary Sir Archibald Edmonstone is the owner. Yet whether the defenders or Sir Archibald is truly the owner hardly admits of debate, if the question is one of substance and not of conveyancing; and it is difficult to see why conveyancing should determine questions of assessment, especially when it is not the primary but the ultimate liability that is in issue.

Turning now to the cases relied on by the Lord Ordinary, I take first the case of the superior, because the Lord Ordinary mentions it first, and it is, as I think, the plainest of all. Once it is steadily kept in view that this assessment is on land, it becomes plain that the land can only pay once, and that the fact that it is charged with a feu-duty can never make any difference in its value or create a separate value. The person to pay the assessment on the value of the lands is of course the true beneficial owner of the land; and a superior, although an owner of heritage, is not an owner of land in the physical and corporeal sense of that term. I pause on this decision about the superior to remark that it seems to me not only a sound but an instructive case. It shows (1) that the law looks not to the formal title, according to which of course the superior is infeft in the lands; (2) that it recognises that land and not rights heritable is assessed; and (3) it shows where the Lord Ordinary gets for his definition the idea of the estate of *dominium utile*, and that is in a case contrasting an estate of superiority with an estate of actual beneficial ownership of land.

The case of the liferenter is related in principle to that of the superior. Both are cases of different persons having different interests in the same land, the assumption being that the land must pay, and the question being, through whom? Plainly both persons could not be liable—the question is, which? The Court held that of the two the fiar and not the liferenter ought to bear a burden laid on for a purpose which had more of the element of permanent benefit than characterises the concerns of a liferenter. This seems very reasonable, but I cannot see how it bears on the case of water-works. What it yields to the Lord Ordinary's theory, however, is that the heritor must hold the lands in fee, *i.e.*, not in liferent.

The case of the long leaseholder seems again a sufficiently plain one. Here also the question was, which of the persons is the owner, the tenant or the landlord? Apart from the provisions of the Valuation Act the question would hardly have been argued. It is difficult to call a leaseholder for ninety-nine years a heritor if a leaseholder for nineteen years is not, and it would be impossible to hold a nineteen years' lease to make a man owner of the land let to him. Between both cases on the one hand and perpetuity on the other the difference is of kind and not of degree.

There remains the case of coal. Now, I fail to observe that this decision makes any contribution to the Lord Ordinary's generalisation, and I think it does stand in a separate position. Lord Wemyss was certainly the owner in fee of the *dominium utile* of land, unless coal is not land. But then the ratio of the decision was that the profit was casual and exhaustible, and it was therefore wrong that coal should bear permanent burdens although right that it

should bear annual burdens. Whether this be a sound principle of exemption or not, it is enough for the present purpose that the ratio does not apply to the lands of the Water Company, for the ground of judgment is not that the lands were subterranean, but that the profits were casual, which is not the case of water-works.

These are all the cases on which the Lord Ordinary bases his conclusion that they have assigned to the word "heritor" a limited signification. What I deduce from them, so far as they yield one common principle, is that the Court has steadily sought to discover in each case who is the true and actual owner of the lands who ought to be liable for permanent improvements. I think that, so far from attending to formal title, they have rather disregarded it. I think that 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. And, inasmuch as these lands have unquestionably an annual value, it would be entirely contrary to the whole system of assessing land that, from any scruple about title, these lands would escape assessment altogether.

On these grounds I am for recalling the Lord Ordinary's interlocutor and granting the decree of declarator sought. As the assessment is laid according to real rent, the valuation roll is conclusive as to value. If there are any other matters in dispute, the action can go back to the Outer House for the settlement of the pecuniary decree; otherwise we can give decree now.

Lord Adam—I concur.

Lord M'Laren—I concur in the Lord President's opinion. and I shall only add two observations. First, I think that the decision of the House of Lords in the case of *Hay* may be taken as establishing the principle that where local taxation is laid upon owners of land, the owner of a valuable interest in land in perpetuity will not escape taxation because his interest is not in the technical sense an estate in fee.

Lord Chancellor Cranworth founds his opinion to some extent on English authorities. Now, if the question were, what constitutes land-ownership in the technical sense, these authorities would have no bearing on the question, but they are cited by the Lord Chancellor because in his judgment every substantial interest in perpetuity is ownership in the sense of a taxing statute.

Where an estate in land is split up into different interests, as in the case of superiority and *dominium utile*, and in the case of property held in liferent and fee, the property is not subject to double assessment; but a substantial interest in land when undivided, as in the present case, is a proper subject of local taxation.

Secondly, I think that the older decisions are partly explained by the practice, which at one time was very general, of imposing the assessment according to the valued rent, because where the valued rent roll was the basis of assessment, only those heritors whose names appeared on the valued rent roll were chargeable. But after it was decided in the *Peterhead* case (4 Paton 365) that ecclesiastical assessments might be levied according to the real rent, this difficulty disappeared, except as to those parishes in which by immemorial custom the valued rental was the criterion of liability. I also think that the object of the Valuation Act (17 and 18 Vict. c. 91) was to establish a valuation roll which should be the basis of all local assessments on lands and heritages where no other basis of assessment was or should be specified in the taxing statute. The Valuation Act is only conclusive on the question of value; it does not render anyone liable as owner who would not otherwise be liable, but for the reasons stated I see no reason for treating ecclesiastical assessments exceptionally. Accordingly, from the time when the Valuation Acts came into force I think that all interests in land separately entered on that roll are *prima facie* assessable for ecclesiastical rates, the case of leaseholds being an exception established by decision.

Lord Kinnear—I agree with your Lordship in the chair, and I have very little to add.

A minister's right to have his manse provided by assessment on the heritors rests upon the Statute 1663, cap. 21, which lays the burden of building and repairing manses on the heritors of the parish. The statute does not define the word "heritor," and it certainly does not, in terms of implication, restrict the burden to any particular class of heritors. In these circumstances I should be disposed to think that if no more restricted interpretation has been established by practice or decision, the word must be construed in its ordinary sense to mean the owners of lands and heritages in the parish. I am therefore prepared to accept the definition which was laid down very distinctly, and of course with great authority, by Lord Moncreiff in the most recent case upon the subject, the case of *Downie* v. *M'Lean* (11 R. 47) where his Lordship, construing this statute, says—"Heritor means an owner of lands and hereditaments, and the measure of liability on the part of an heritor is the annual value however ascertained of the property held by him." "The burden," he goes on to say, "is thus a tax on real property according to its annual value."

Now, if that be the true definition, the question is whether the aqueducts, pipes, tunnels, and other structures belonging to the defenders, and used by them for the purpose of their water-works, are to be included among the lands and heritages in respect of which the owners are liable to be assessed as heritors; and for the reasons already given by your Lordship I think they are. The defenders are not feudally

infeft in certain of these works, but the works themselves are still heritable, and the defenders have exclusive and perpetual right in the structures and works and the lands occupied by them. On this point I agree with your Lordship in thinking that the case of *Hay* v. *The Edinburgh Water Company* is a decision of great importance. It is true that it was a decision on the construction of a different statute, but still the question was in reality the same we are now considering, viz., What is the true meaning of the words "owners of lands and heritages?" It was held that the defenders were liable to be assessed as the owners and occupants of lands in respect of lands in the streets of a city through which their pipes were carried, and I think the bearing of that decision on the present question is very clearly brought out by the exceedingly powerful argument of Lord Moncreiff, who dissented from the judgment mainly on the ground that the defenders were not proprietors of the land but had a mere servitude for a use. But then Lord Cranworth answers in the House of Lords, and as your Lordship has pointed out he supports the decision in the first place, not upon the meaning of the word "heritor," but upon the meaning of the word "lands." And he says also—"Even if this be an easement it is a heritage which I understand to mean a matter of property capable of inheritance. 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." And in another passage in his Lordship's decision he says—"It would be very dangerous for us to be refining upon a matter of such everyday necessity. I think that what we understand to be the law should be acted upon as being the law. The construction of the statute being in conformity with perfect justice, viz., the equal rating of all persons who have a beneficial interest in the works in question for the relief of the poor." I think that both of these observations are equally applicable to the present case.

Another decision to the same effect is *Anderson* v. *The Union Canal*, where it was held that a canal was assessable for poor rates under the Statute 1663, cap. 16, not according to the annual worth of the lands occupied but according to the annual value of the canal in its actual condition. The case is in point because the statute laid the assessment upon the heritors. The question was what that meant, and it was held that the owners were liable because a canal was a valuable heritable property. The Court refused to sustain the argument that the land occupied by the canal was property, and that the right to use the water, although a valuable heritable right, was not property in respect of which those vested in it were said to be heritors. It was suggested that before the Valuation Act of 1854 the subject in question would not have entered the valued rent. Neither would the Union Canal. But that only means that the assessments made up under the statute of 1667 took no account of modes of occupation which had not come into use at the time this statute was passed. But it appears to me that the considerations arising from the system of valued rent are altogether irrelevant to the present question. If the question be one of the mere construction of the particular statute, it could have no reference to the authorised valued rent, for the reason pointed out by the Lord Justice-Clerk in the case which I have already mentioned. His Lordship says that "the burden is a tax on real property according to its annual value. The statute says nothing as to how it is to be ascertained, and certainly the rent appearing from the valuation, called valued rent, authorised by the Convention, did not enter into the obligation imposed by the statute of 1663; indeed it could not have done so, as it did not receive sanction for four years afterwards."

There was an earlier system of valued rent introduced by the Statute of 1642, and again in 1655, but these statutes had been rescinded by the Recissory Act on the Restoration. Accordingly in the interval between the Restoration and 1667 there was no valued rent at all except the "old extent," to which of course the Act of 1663 could have no reference, because the old extents were applicable to farmers and freeholders, and not to heritors. Therefore if the question were whether the statute must be held to have referred to this system of valued rent it seems to me to be as clear as possible that it could not have done so. But then it may very well be that notwithstanding this interpretation there might have been some uniform practice or precedent to make the valued rent rule just as effectual as if it had been expressly mentioned and referred to by implication in the Act itself. But no such practice in fact has obtained. It is quite true that for a very long time there was at all events a general custom of heritors in landward parishes in apportioning this burden and the analogous burden of the cost of building and repairing churches among themselves, to follow the rule of the valued rent, and that for obvious reasons of convenience. It was the only thing approaching to a public valuation or a general valuation of lands in the parish at all, although not the only means of ascertaining their respective portions of the burden. But then that was nothing but a convenient method chosen by the heritors themselves of distributing their own liability. But the moment that other rights came under consideration, which were not to be found in the assessments levied on the valued rent, it was found that the valued rent afforded no just or workable criterion at all, because it was entirely unsuitable to the condition of the country when the question occurred. Accordingly these methods were abandoned. There was no doubt for some time a notion, which I think has perhaps supported a great deal of argument on part of the Lord Ordinary's interlocutor, that valued rent heritors were a special class of heritors who were, primarily at all events, exclusively liable for assessments of this

kind. But then that notion was entirely changed and put an end to by the *Peterhead* case. The Court, both in that case and in the previous case of *Keith*, had given it some countenance by deciding that the cost of building and repairing churches, so far as necessary for the landward part of the parish, should be defrayed by the landward heritors according to their respective valued rents, and that the remaining part of the expense should be defrayed by the feuars according to their real rents. But that doctrine was rejected by the House of Lords as unsound, and the true rule was laid down by Lord Eldon in terms which I think afford the best possible guide to the decision of this case, because his Lordship said—"The true rule is that a parochial burden on lands in the parish must be levied upon all owners according to their real rent."

Now, that is entirely in accordance and in harmony with the view afterwards expressed by Lord Cranworth in the case of *Hay*, and which humbly appears to me to be in accordance with the justice of the case in determining a question of this kind.

I do not think it necessary to consider again in detail the decisions upon which the Lord Ordinary has proceeded, because I entirely agree with your Lordship's observations on these cases. I think none of them is directly applicable to the question we have to consider. If it were held that any of them may have established exemptions which are not altogether in accordance with the views which I have expressed—I do not say that any of them have—but if it were so, the only consequence would be that exemptions from the statute ought to have been provided for in it, and that new cases must be decided according to the just construction of the statute which we are considering.

I only add that throughout the argument, and in the course of the observations which I have made, no distinction was taken between the obligation for the burden of building and repairing churches and those with which we are now concerned—the repairing of manses. I think these burdens rest upon different statutory foundations altogether. I think that the argument in the abstract was rightly conducted, because the practice since 1572 is entirely in harmony with that following on the Act of 1663. Both burdens are laid upon the heritors in the sense which I have explained. I therefore agree with your Lordship.

The Court recalled the interlocutor of the Lord Ordinary, found and declared in terms of the declaratory conclusions of the summons, and granted decree for the sum sued for.

Counsel for the Pursuer—Balfour, Q.C.—Blackburn. Agents—Dundas & Wilson, C.S.

Counsel for the Defenders—Ure, Q.C.—Clyde. Agents—Simpson & Marwick, W.S.

Saturday, February 25.

SECOND DIVISION.

FERRIER'S TRUSTEES *v.* FERRIER.

Succession—Testament—Inchoate Intention—Residuary Clause—Intestacy—Extrinsic Evidence.

A domiciled Canadian left a will by which he gave his second wife the liferent of a piece of ground in Canada and his household furniture and effects absolutely. The will then stated that whereas by the will of his first wife the testator was the owner of certain heritable property in Scotland, and had received 4000 dollars of personal estate, in order to carry out his first wife's wishes, "I do hereby declare that I intend to execute a will in accordance with the law of Scotland, devising said real estate in Scotland to Ferrier Pace of Kirkliston, Scotland, farmer, his heirs and assigns, and have hereinafter devised a sum of 4000 dollars" to certain relations of his wife; "I give and devise all my estate, both real and personal, not hereinbefore specifically devised" to his trustees for certain trust purposes, which included the payment of the 4000 dollars to his wife's relations.

The testator never executed any will leaving the heritable property in Scotland to Ferrier Pace, although a *mortis causa* disposition doing so had been prepared and sent to him for execution five years before his death.

Held (1) that the heritable property in Scotland was not carried by the will to Ferrier Pace, and (2) that it did not fall into intestacy, but passed to the trustees in terms of the residuary clause.

William Ferrier, who was a domiciled Canadian, died on 16th February 1897, in Canada. He stood infeft at the time of his death in certain heritable property in Kirkliston, Linlithgowshire, Scotland, which he had acquired on the death of his first wife Mrs Julia Ferrier. The said property had been in the Ferrier family for sixty or seventy years, part of it having been purchased in 1826, and the remainder in 1832 by Mrs Ferrier's father Robert Ferrier, and he and his family were successively the proprietors thereof until Mrs Ferrier's death in 1889.

William Ferrier left a will whereby he gave and devised to his second wife Mary Rogerson Ferrier the liferent of a lot of ground in the town of Barrie aforesaid, and gave and bequeathed also to her for her sole use absolutely all the household furniture and effects of which he should die possessed. The will then proceeds to state—"And whereas by the will of my late wife Julia Ferrier I am the owner of certain freehold property in Scotland, and also received about the sum of four thousand dollars of personal estate after payment of all expenses in connection therewith: And whereas, although absolutely entitled to