provides that "the Dean of Guild shall not grant a warrant to erect or alter any building unless and until he is satisfied" on certain points. So that the distinction between "erection" and "alteration" (including, of course, "addition") is consistently maintained throughout, and section 366 applies only to "erection" and not to "alteration."

It does not precisely appear when the different buildings which the respondent now proposes to alter were originally erected, but the Ordnance plan of 1871 (founded on a survey of 1857) shows that the two-storey building, which still remains, and the old one adjoining it on the west, were then already erected. The disposition in favour of the respondent's author dated 13th October 1868, and plan annexed, also prove that at all events the two-storey block and the building to the west were then on the ground, and probably also the wall fronting North Woodside Road, although the one-storey buildings behind that wall seem to have been erected at a subsequent date.

It appears to me, however, that the important question is not whether the buildings were or were not erected at the date when the Act of 1866 passed, but whether they have existed and been used without challenge for a number of years prior to the time at which it is proposed to make the alterations upon them. The effect to which the section is pleaded by the appellant would place an embargo upon the alterations and improvement of urban property, which it appears to me should not be done unless it is authorised in the clearest terms. The General Statute-Labour Act 1845 (8 and 9 Vict. c. 45) contains no proper restriction of the height of buildings at the sides of statute-labour roads, nor does it appear that any such restriction existed in any local statutory labour Acts applicable to North Woodside Road while it was under the charge of the Statute-Labour Trustees of the Barony Parish. Under these circumstances it appears to me that the Act of 1866 should be construed in accordance with the rules applicable to private Acts, in the case of which the benefit of any doubt is given to those who might be prejudiced by the exercise of exceptional restrictions. There are other provisions in the Glasgow local Acts for securing light and air by which proprietors are restrained from building beyond a height having a certain relation to the width of the street, but no question as to any of these arises in the present case.

The Dean of Guild in his judgment refers to the case of *Macdonald* v. *Commissioners of Fort-William*, 22 R. 551, which is in any view *a fortiori* of the present case in favour of the views now expressed. The question there arose under section 91 of the Turnpike Roads Act 1831, which corresponds to section 366 of the Glasgow Police Act of 1866, although the language is not identical, and the Court held that it did not apply to a building proposed to be erected on the site of a house which had been demolished thirty years before. In that case the circumstance that the ground had been unbuilt on for thirty years was not held sufficient to let in the application of the Act. If this view is correct it appears to me that still less should such a restrictive condition be applied to alterations upon existing buildings.

I may add that although many Scotch local Turnpike Road Acts contained not unfrequently provisions similar to those of the General Turnpike Roads Act of 1831, I am not aware of any case in which any such provisions have been held to apply to additions to or alterations upon existing buildings above the statutory height.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR, who was present at the hearing, was absent at the advising.

The Court refused the appeal.

Counsel for the Appellant—Shaw, Q.C.—Lees. Agents—Campbell & Smith, S.S.C.

Counsel for the Respondent — Young—M. P. Fraser. Agent—T. Mackintosh, W.S.

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## HOUSE OF LORDS.

*Monday, November* 20, 1899.

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

### GREVILLE-NUGENT *v.* GREVILLE-NUGENT'S TRUSTEES.

(*Ante* January 25th 1898, S.L.R. vol. xxxv. p. 361, 25 R. 475.)

*Fee and Liferent — Minerals — "Open Mines."*

In a question under a settlement between the fiar and liferenter, the rents derived from mines open at the date of the settlement belong to the liferenter, and it is immaterial whether the mines were opened by the settlor or by his predecessors in the estate.

A wife, by antenuptial marriage-contract in English form conveyed certain lands belonging to her to trustees, who were directed to sell the lands on the request of the spouses or the survivor of them, or after the death of the survivor, at their own discretion. The trustees were to hold the proceeds arising from the sale, and pay the "annual income" to the wife during her life, and after her death, on certain conditions, to her husband. After the death of the husband and wife the trustees were to hold the trust estate and annual income thereof for the children of the marriage as the parents should appoint.

It was further provided, that until the estate should be sold the trustees should have power "in the meantime to lease the unsold parts . . . for the best rent that can reasonably be gotten,

and to hold the net proceeds of such sale, and the net rents and profits of the said estate until sale" to the persons, and for the purposes to which the annual income of the money arising from the sale of the estate would be paid under the trust, "with such powers of leasing the lands and hereditaments, and other powers necessary and expedient in the execution of the trust." There was one child of the marriage.

The property settled contained opened stone quarries which had been worked at intervals for over a hundred years, but none of which had been worked for a period of four years prior to the execution of the settlement. The trustees did not sell the property, but leased certain of the above quarries during the lifetime of the spouses.

*Held* that the rents and royalties paid under the lease fell to the life-renter as income, and were not to be accumulated as capital for the benefit of the fiars.

This case is reported *ante, ut supra.*

Mrs Greville-Nugent appealed against the interlocutor of the First Division.

At delivering judgment—

LORD CHANCELLOR—With the greatest respect to the learned Judges who have decided this case in the Court below, I have not been able to follow the reasoning by which they have arrived at their conclusion. I rather conjecture that what the Lord Advocate has suggested has been the foundation of the judgment—indeed it was stated by the Lord President to have been the foundation of his judgment—and that the form of English conveyancing has somewhat misled the learned Judge as to what was the main purpose of the settlement. The machinery by which in the event of there being children the property should be equally divided between them, being provided for by a power of sale so as to turn realty into personalty—because that is the substance of it—is a device familiar in the ordinary form to the English conveyancer; and I think the learned Judge has been misled by that into assuming what he has more than once in the course of his judgment said, that the main purpose of the settlement was a sale, and all the other provisions were intended to be temporary. That has now been explained, and I observe that Mr Guthrie has not dealt with that part of the argument at all, but has allowed it to pass without observation. Therefore I think we may dismiss that as being decisive of this case, one way or the other, and we must look to see what has been the intention of the parties to this settlement apart from any such considerations as arise from the power of sale.

Now, as to that proposition, which is the one which your Lordships are called upon to decide, it appears to me that it is covered by authority. There is given what includes both the mineral estate and the other estate whatever there may be; and the question is what those words convey. Well, now, whatever might have been the case originally—and I am not prepared to defend the logic of some of the reasons given in the earlier decisions—at all events for obvious reasons—and I think if the Courts had the power by law to do it they were most useful and cogent reasons—they have treated the produce of the soil as including that which is in truth what Lord Cairns has described as the substance of the soil itself. In speaking of coal, for instance, we talk constantly about the "rent" and "royalty" of coal. The phrases are figurative; you pay rent in one sense it is true, but rent generally has been understood to be a return from the soil and not to be a consumption or taking away of the soil, whereas of course where the soil consists of coal and other mineral you are actually taking it away. But whatever may have been the original view of such questions, the matter has now become so perfectly well ascertained by a long course of decisions that wherever those general words are used, and the question is whether the tenant for life is entitled to what, in one sense, is called the usufruct, but I suppose in more strict language would be called part of the soil itself, where you are dealing with minerals it has always been held, so far as I know, without doubt or question for centuries, that the proceeds of open mines form part of that which may go to the tenant for life, and that he is entitled to take them as part of the proceeds of the soil. As I have said, I am not quite certain that if this matter were *res integra*, and if we were sent back 200 or 300 years one would be quite able absolutely to follow all the reasoning by which that result is arrived at, but it is immaterial to do so now, because that point has been ascertained and adjudicated upon over and over again, and finally in this House.

That being the state of the law, now for the first time, so far as I am aware, a new limitation is sought to be placed on that principle, and the proposition comes somewhat in this form. In dealing with a settlement or a will of this sort the Courts have said that you must put in the words "open mines," as being part of what is settled or bequeathed; by construction you are to put in those words; whether the words occur or not they are imported into it by the construction which the law has placed on instruments of that kind. Now, for the first time it is suggested that the words "open mines" are not sufficient to convey what the law assumes to be the state of things, and you must add to them "mines opened by the settlor or testator." The learned counsel for the appellants has given us a case in Peere Williams (*Clavering* v. *Clavering*, 2 P. Wm. 3876), which goes a good deal further, but I was prepared without that case to say that the suggestion is absolutely a novelty. In all the cases—and there have been a great number of them discussed—the question has always been, what is the thing bequeathed or settled, and if there are open mines the consequence follows. The diligence and learning of Mr Guthrie, which is certainly not likely to

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.

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*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