land to the rights of parties under the marriage settlement. This appears to me a hopeless contention in face of the express contract in the settlement that their rights are to be regulated according to the law of England, as if the spouses were domiciled in England. Under the alternative conclusions of the summons this Court is asked to exercise a discretionary jurisdiction that it does not possess. Nor is there any averment that in the circumstances there is any law or practice in England which gives the pursuer a claim for any specific amount. There is an averment that the Court in England has a discretionary power. That, however, can only be brought to the test by proceedings in England. It is not matter for proof in this Court, nor for a case for the opinion of the English Court, which can only be stated on a question of law.

I am therefore of opinion that the action must be dismissed.

LORD SKERRINGTON—I do not think that the parties could have used clearer language in order to express their intention that the meaning and effect of the marriage settlement should be determined according to the domestic rules of the law of England. In my judgment they excluded by anticipation the leading conclusions of the present action by which it is sought to subject the lady to a penalty peculiar to the law of Scotland and unknown to the law of England. Accordingly the defenders are entitled to absolvitor from these conclusions. I think it right, however, to note that the pursuer's counsel expressly admitted that the patrimonial forfeitures which the law of Scotland inflicts upon persons guilty of matrimonial misconduct leading to divorce may be effectually averted by antenuptial contract and that our judgment proceeds on that admission.

As regards the alternative conclusions, the pursuer has, in my opinion, failed to allege any matters of English law entitling him to have the law of England ascertained in this process either by a proof or by a remit. We shall do no injustice to the pursuer by dismissing these conclusions, because if there exists, according to English law, any remedy applicable to the circumstances of the case, he will certainly obtain it by applying to an English Court.

The Court assoilzied the defenders from the first three conclusions of the summons and dismissed the remaining conclusions.

Counsel for the Pursuer—Watson, K.C. (at the last hearing, Moncrieff, K.C.)—A. M. Mackay. Agents—John C. Brodie & Sons, W.S.

Counsel for the Defenders—Macphail, K.C.—R. C. Henderson. Agents—Tods, Murray, & Jamieson, W.S.

Friday, July 13.

SECOND DIVISION.

[Lord Hunter, Ordinary.

EDINBURGH PARISH COUNCIL *v.* SCHULZE.

Property — War — Valuation Roll — Rates and Assessments—Occupation of Premises by War Office—Defence of the Realm Regulations 1914, *Part I, sec.* 2 (*b*).

A factory was requisitioned by the War Office under the Defence of the Realm Regulations 1914, Part I, sec. 2 (*b*). The owner declined to pay rates and assessments in respect thereof, on the ground that he had not since the date of the requisition been in receipt of any rent or any benefit from the subjects, nor had he had any beneficial occupation. He further maintained that the letter whereby the authorities had notified their requisition constituted a contract of purchase of the property for a price to be afterwards fixed. His name still appeared in the valuation roll as owner. *Held* that as the letter could not be thus construed he was liable for payment of the owner's rates and assessments.

The Defence of the Realm Regulations 1914, sec. 2 (*b*), enacts—"2. It shall be lawful for the competent naval or military authority and any person duly authorised by him, where for the purpose of securing the public safety or the defence of the realm it is necessary so to do . ... (*b*) to take possession of any buildings or other property, including works for the supply of gas, electricity, or water, and of any sources of water supply. . . ."

The Parish Council of the City of Edinburgh, *pursuers*, brought an action against Charles William Schulze, Brunswickhill, Galashiels, *defender*, whereby they sought to recover from the defender the sum of £55, 4s. 5d., being the poor rates, school rates, and lunacy assessments for the years 1914-15 and 1915-16 levied by them upon the defender as owner of a factory at Portobello Road within their parish.

The *facts* were that the factory in question had been requisitioned by the War Office by letter dated 28th October 1914 in the following terms:—

"Coast Defences.

Secret. No. 28/10 Headquarters Scottish Coast Defences, Edinburgh, *28th October* 1914.

"Sir—I am to inform you that the building in the Portobello Road known as the Chocolate Factory, is required for defence purposes and occupation by troops. I am therefore to require you, under the Defence of the Realm Act 1914, Part I, paragraph 2 (*b*), to hand over this building to the officer appointed by me to take it over at 9 a.m. on 30th instant. Any claim for compensation will hereafter be considered by the War

Office.—I have the honour to be, Sir, your obedient servant,

"H. GARDINER, Major-General,
Commander Scottish Coast Defences.

"To the Proprietor,
The Chocolate Factory, Portobello."

The pursuers pleaded, *inter alia*—"2. In respect that the defender as owner of the factory in question, being lands and heritages within the said parish, is liable under the statutes referred to in the condescendence in payment of the owner's proportion of the poor and school rates and lunacy assessments and has refused to pay the same, the pursuers are entitled to decree as craved."

The defender pleaded, *inter alia*—"2. The present action is premature, and ought to be sisted to await the decision in the defender's claim against the War Office. 3. The pursuer's averments so far as material being unfounded in fact the defender is entitled to be assoilzied from the conclusions of the summons. 4. The defender not being the proprietor of the said factory, *et separatim* not being the person in receipt of the rents or in enjoyment of beneficial occupation thereof, is entitled to absolvitor."

On 7th June 1917 the Lord Ordinary (HUNTER) repelled the pleas-in-law for the defender and decerned in terms of the conclusions of the summons.

Opinion.—"The defender's name appears in the valuation roll for the year in question as owner of the factory. He alleges, however, that the factory was requisitioned by the War office on 28th October 1914, who by notice to treat on that date required it of the defender for defence purposes.

"The defence thus stated could not in any event be a good answer to the pursuers' claim for the rates and assessment for the year 1914-15. By the different Acts under which they act the pursuers are authorised to levy rates and assessments upon the owners and occupiers of land and heritages within the parish according to the valuation as appearing in the valuation roll. That roll is made up by the assessor prior to 8th September in each year, and appeals to the valuation authority are dealt with prior to 30th September. The roll so made up is in force as the valuation roll for the year commencing at the term of Whitsunday immediately preceding and ending at the term of Whitsunday immediately following (Valuation Act 1854, sections 8, 11, and 12). According to the defender's own statement he was rightly entered on the roll and liable for the rates and assessments levied upon the owner of the property for the year 1914-15.

"As regards the second year's rates, it was maintained for the pursuers that the defender was not entitled to raise the question of his liability to rates in the present action. They contended that he ought to have taken an appeal to the Magistrates of Edinburgh sitting as a Valuation Court against the entry in the valuation roll in respect of his being entered as proprietor, and that as he had not done so he was not entitled to resist payment. It may be that it would have been competent and perhaps proper procedure for the defender to have adopted that course. Failure to adopt it might in certain cases preclude such a defence as is here stated. At the same time an appeal to the Valuation Appeal Court on a question of civil right is not competent—*British Linen Company* v. *Assessor for Aberdeen*, 8 F. 508, 43 S.L.R. 442; *Assessor for Kincardineshire* v. *Heritors of St Cyrus*, 1915 S.C. 823, 52 S.L.R. 268. In the latter case Lord Johnston, at p. 827, said—'The valuation roll establishes nothing but the question of value as a preliminary to assessment for taxation. Such questions of civil right as are involved may be raised by declarator, or by the ordinary mode of resisting the enforcement of taxation.' I am not therefore prepared to sustain the pursuers' contention as to the competence of the defence.

"The question whether the defender has stated a relevant defence remains. He is on the valuation roll as owner, and is therefore *prima facie* liable to pay. To escape payment he must allege and prove facts establishing his defence. No motion, however, was made to me by the defender to be allowed to prove anything. He stated that he had lodged a claim against the War Office for the price of the subjects, and asked that the action should be sisted until the outcome of that proceeding. I do not think that that would be a proper course to adopt.

"As I read the record the defender has made no case that necessitates inquiry. He alleges that the War Office on 28th October 1914 gave notice to treat. On 16th March 1917 Lord Cullen granted a diligence for recovery of documents, including the alleged notice. No such document has been produced. The action taken by the War Office was under section 2 (*b*) of the Defence of the Realm Regulations 1914, which provides—'. . . [*quotes, v. sup.*] . . .'

"No proceedings to acquire the property have been taken under the Defence of the Realm (Acquisition of Land) Act 1916.

"I do not think that the circumstance that the Crown has taken temporary possession of the factory for war purposes relieves the defender of his liability as owner to pay the rates and assessments for which he is sued. I therefore repel the defences and grant decree as craved."

The defender reclaimed, and argued—This was not a case of temporary occupation by the War Office; on the contrary there had been dispossession since October 1914. The defender having thus been dispossessed and having no beneficial ownership, he could not be regarded as an assessable owner. All proprietary occupation by the Crown for military purposes exempted from assessment, and therefore the premises in question were not subject to the usual rates and assessments—*Advocate-General* v. *Oliver*, (1857) 14 D. 356; *Greig* v. *University of Edinburgh*, (1868) 6 Macph. (H.L.) 97, *per* Lord Chancellor Cairns at p. 98, 5 S.L.R. 620; *M'Isaac* v. *M'Kenzie*, (1869) 7 Macph. 598, Lord Deas at p. 600, 6 S.L.R. 402; Militia (Scotland) Act 1854 (17 and 18 Vict. cap. 106), sec. 36 (end); *Parish Council of*

Kells v. *Garmony*, (1903) 19 Scottish Law Review 180; *Glasgow Court-Houses Commissioners* v. *Glasgow Parish Council*, 1913 S.C. 194, 50 S.L.R. 97. An alien not being bound to make the same sacrifice as a subject had a higher right than a British subject. It was unnecessary to proceed by way of appeal to the magistrates—*Kincardineshire Assessor* v. *St Cyrus Heritors*, 1915 S.C. 823, 52 S.L.R. 268. The defender was not relevantly averred to be the owner. A bare feudal proprietor who was not at the same time a beneficial occupier was not liable to assessment—*M'Bain* v. *Gordon*, 1917 S.C. 185, 54 S.L.R. 196. *Lanarkshire County Council* v. *Millar*, 1917 S.C. 35, 54 S.L.R. 45, did not apply here. An owner might have beneficial and not feudal ownership, as in the case of *Glasgow and Barrhead Railway* v. *Caledonian Railway* (1855), 17 D. 1148. The change of ownership in the present case took place in the month of October, whereas the rates were imposed for the year from November to November. The action ought to be dismissed. Counsel also referred to Armour, pp. 84 and 212.

The respondents argued—The assessment for the year 1914-15 was undoubtedly properly imposed—Valuation of Lands (Scotland) Act 1854 (17 and 18 Vict. cap. 91), secs. 5 and 8; Valuation of Lands (Scotland) Amendment Act 1879 (42 and 43 Vict. cap. 42), sec. 6. It would be no answer for the defender to say that his property had been burnt and that his only remaining interest in it was a precarious claim for insurance money. *Lanarkshire County Council* v. *Millar* (*cit.*) decided against the theory that the assessed person must also be the beneficial owner. All the War Office wanted to do was to take possession, not ownership. Counsel also cited *City of Edinburgh Assessor* v. *Scottish Land and Building Company*, (1884) 11 R. 568, 21 S.L.R. 403; *Glasgow and Barrhead Railway* v. *Caledonian Railway* (*cit.*); Poor Law (Scotland) Act (1845) (8 and 9 Vict. cap. 83), secs. 33 and 38; Armour on Rating, p. 216.

At advising—

LORD JUSTICE-CLERK—In this case the pursuers sue the defender for certain sums alleged to be due for poor rates, school rates, and lunacy assessment, for the years from Whitsunday 1914 to Whitsunday 1915, and from Whitsunday 1915 to Whitsunday 1916, in respect of a factory which is said to have belonged to the defender. The military authorities took possession of the factory in terms of their letter of 28th October 1914, aud have been in possession ever since. The owner's rates and assessment alone are sued for, and no distinction was taken in the argument before us between the lunacy assessment and the poor or school rates. The reclaimer argued that the letter to which I have referred. constituted a contract of purchase of the property for a price to be fixed somehow or other—how was not explained. In my opinion no such transaction took place. What the Government did was to take possession of the building under section 2 (*b*) of the Defence of the Realm Regulations quoted by the Lord Ordinary. The defender therefore still remained and remains the owner or proprietor of the subjects.

The Crown is not liable for rates, but it is necessary to advert to the ground upon which that exemption from liability rests. That was very fairly stated in the case of *Greig* v. *The University of Edinburgh*, 6 Macph. (H.L.) 97, where Lord Chancellor Cairns said this—"The general principle which regulates the decision of questions of this kind has been well settled in your Lordships' House. I refer to the cases of the *Mersey Docks*, 3 Macph. (H.L.) 102, note, and *Adamson* v. *Clyde Trustees*, 3 Macph. (H.L.) 100, and the *Commissioners of Leith Harbour*, 4 Macph. (H.L.) 14. The general principle, as I understand it, approved by your Lordships in these cases is this, that the Crown not being named in the English or Scottish statutes on the subject of assessment, and not being bound by statute when not expressly named, any property which is in the occupation of the Crown, or of persons using it exclusively in and for the service of the Crown, is not rateable for the relief of the poor." That expression, which was accepted by the House of Lords as correctly expressing the legal position, is binding upon us, and quite manifestly, when one looks at the cases on which it bears to proceed, is well founded in reason and in law as well.

In the present case the Crown is not named in any of the statutes under which the rates and assessment in question are levied. The Crown is not the owner of the subjects; the defender is. He is so entered in the valuation roll, and as a consequence would also be so entered in the assessment roll. In my opinion he is, both in fact and in law, therefore, the owner, and is liable for owner's rates. The fact that the Crown occupies the subjects seems to me irrelevant.

It is possible, of course, that the subjects might be exempted altogether from liability both for owner's and occupier's assessments, as, for example, happened in the case of *M'Isaac*, 7 Macph. 598. But the exemption there was expressly and necessarily put upon the particular terms of the Act of Parliament there referred to. The rubric is —"*Held* (*diss.* Lord Kinloch, *abs.* Lord President) that under the 36th section of the Militia Act, which enacts that 'no place provided for the keeping of militia stores, &c., shall be liable to be valued or assessed to any county, burgh, parochial, or other local assessments,' the proprietor of buildings let to the Commissioners of Supply for keeping militia stores is exempted from payment of poor rates in respect of such buildings and premises." But the Court pointed out quite distinctly that in so finding they proceeded entirely upon the absolute terms of the statute.

We have no such provision here, and I think the judgment in the case of the *Glasgow Court-Houses Commissioners*, 1913 S.C. 194, leads to this result, that when you have premises, such as court-houses, which, though primarily built for Government purposes, are in part let out to tenants, the Court-Houses Commissioners, though holding as

representatives of the Crown for certain purposes, are, so far as the parts let are concerned, just dealt with as ordinary owners, and are therefore liable to the assessment.

We cannot tell in this case whether the defender will receive any revenue or return from the subjects. That will depend upon the amount of compensation which he is to receive from the War Office in respect of their having taken possession of the property. But in the meantime, in my judgment, he remains the proprietor of the subjects. He is not the Crown and does not represent the Crown, but is the proprietor who is liable for the assessments sued for. I need only point out that the Statute of 1916, which gave the Crown special powers not only to take possession but to acquire subjects in such circumstances as those with which we are dealing, has no application to what was done here, which took place in 1914. In my opinion the Lord Ordinary's judgment is right, and I concur with the reasons which the Lord Ordinary has stated in his note.

LORD DUNDAS—I agree with your Lordship and with the Lord Ordinary. I think there is no relevant defence stated to this action. It seems to me plain that there is no case here of a sale to or acquisition by the Crown of the property in question. The letter of 31st October (read along with and as correcting the language of the earlier letter of 28th October) makes it quite clear that the order for taking over the factory was under paragraph 2 (*b*) of the Defence of the Realm Regulations 1914, and that provision is one which makes it lawful for a competent authority to take possession of buildings. The defender's averment therefore in answer 2 that "the factory became on that date, and is now, the property of the Crown" is wrong on the face of the document upon which it purports to proceed.

This I think vitiates the whole case of the defender. His case appears to me to be quite hopeless as regards the first year's assessments and bad as regards the remainder. The defender is on the valuation roll as proprietor of the property, and he is the proprietor, and therefore in a question with the rating authority I think he must pay. Whether he will ultimately receive any compensation or what compensation or in what form I do not know. All this is, I think, very well expounded by the Lord Ordinary in the opinion annexed to his interlocutor, and I have really nothing to add to it. One point, indeed, there is to which the Lord Ordinary did not expressly direct his attention, although I have no doubt he had it fully in view when it was argued to him, as I understand it was. That point is whether or not there was here exemption from rating altogether, but it has been fully dealt with by your Lordship, and I have nothing to add to what your Lordship has said. I am for adhering.

LORD SALVESEN—I also am of the same opinion. The entries in the valuation roll are *prima facie* evidence of the defender's liability for the owner's assessments. The valuation roll is not conclusive as to the fact of ownership, and the defender was quite entitled to challenge it in the defence to this action, but the challenge is in my opinion quite irrelevant. It does not indicate that there has been any mistake in entering him as the owner. He was the owner at the date when the first entry was made. There is no dispute about that. He says that he has ceased to be the owner in respect of a requisition by the authorities under the Defence of the Realm Act 1914, but I think it is perfectly clear that the authorities only entered into temporary possession of his premises, and that they did so under the paragraph in respect of which the notice was given. He therefore remains the owner, and although it may at first sight seem hard that he should pay rates when he is getting no present return from his property, and may so far as I know never receive any, he is in no different position from the owner of subjects who is unable to find a tenant. Indeed, he is in a better position, for he does not require to pay occupier's rates as well as owner's, and if the premises had been unlet he would himself have had to disburse these rates notwithstanding that he did not receive a penny in return from the subjects.

I agree with your Lordship in the chair on the other ground of defence, of which the Lord Ordinary does not take any detailed notice, namely, that because the Crown are in occupation of the subjects that occupation frees the owner from liability to assessment. I cannot think that that is the law in a question with a private owner, who may or may not receive consideration for the occupation by the Crown of his subjects. If he receives a rent for the subjects, obviously it is not a hardship that he should contribute to the rates out of the rent. If he does not, it must be on the footing that the subjects could not have found a tenant who would have been able to carry on the business. The only ground upon which we could relieve this gentleman from assessment is that he is *de facto* not the owner, and that upon his own statement is obviously not the case.

LORD GUTHRIE—I agree. The defender's case depends on an averment of fact and an inference in law, both of which, upon the defender's own statements, are manifestly unfounded. The averment of fact is that the letter to him from the War Office, dated 28th October 1914, was an offer to treat, and the inference in law is that the factory became on that date and is now the property of the Crown. I agree with your Lordship in the chair that these contentions of the defender are certainly unfounded. The alternative plea, that he is not the person in receipt of the rents, has been dealt with by your Lordships, and I have nothing to add.

The Court adhered.

Counsel for the Pursuers and Respondents—Anderson, K.C.—M'Laren. Agents—R. Addison Smith & Company, W.S.

Counsel for the Defender and Reclaimer—Mackay. Agents—Dove, Lockhart, & Smart, S.S.C.