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

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

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

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

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

Appeal *dismissed* with costs.

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

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

Friday, November 24.

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

STEWART *v.* MACLAINE.

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

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

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

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

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

from maintaining that these regulations as regards the taking over of sheep stock at the termination of the lease formed, on a true construction of the missives, part of the contract between him and the landlord.

Custom—Proof of Custom—Lease—Modification of Lease by Custom of District.

Opinion (by Lord Shand) that if the tenant were able to prove a universal and clear custom in regard to the stock to be taken over by the landlord at the termination of the lease, such custom might be read into missives containing no express provision on the subject as part of the lease. *Evidence held* insufficient to prove any such custom.

This case is reported *ante, ut supra.*

Peter Stewart appealed against the judgment of the Second Division.

At delivering judgment—

LORD CHANCELLOR—In this case I think I may say that I agree in almost every word of the judgment of the Lord Ordinary. The only doubt I have with reference to the judgment which has been delivered by the other learned Judges is this: I think, as we shall have to be guided, as I propose to point out presently, by the signed document, the rights conferred by the parties reciprocally on each other by that written document are rights which neither of them without the consent of the other could either add to or take from. It may be that I misunderstand the learned Judges, but in the judgment of some of their Lordships there are words which seem to indicate that one of the parties, without the consent or concurrence of the other, could either estop himself or alter the nature of the rights which were already conferred by the bargain that had been signed by both. What those rights were was a question for the Court to determine, and neither of the parties could estop himself, and, it is needless to say, he could not add anything or take away anything from the rights which were to be ascertained—it is for the Court to determine what those rights were.

Then being remitted, as I think we are, to the written document which the parties have signed, I proceed to consider what those rights were. I do not omit to consider that the parties were already in the relation of landlord and tenant, and the bargain is undoubtedly to be looked at in some respects in the light of that circumstance—but the bargain is this: "I hereby offer to take the farms of Rossal and Dernacullen as at presen tpossessed by me, on the following terms, viz., Lease, five years. Rossal, rent £100 per annum; Dernacullen, rent, £40 per annum. Right of fishing in the Coleader river for two rods; a porch to be erected at kitchen door of Rossal house. Your acceptance of the above will oblige." That offer was accepted. That is the whole of the bargain between the parties, and it is by that instrument, as it appears to me, that we must decide what the rights of the parties were. There is one observation of Mr Haldane's with which I entirely concur, that the question practically which we have to decide is exactly the same question as would have had to be decided if the day after, or some short time after, that document had been executed, the parties had applied to the Court that effect should be given to the bargain between them.

But then, what is the bargain? It appears to me that the clue which we must follow in order to arrive at an answer to that question is this: Does that document, or does it not, import anything more than a lease qualified, as undoubtedly the words must be, by what is usual in a lease, as a lease in that place, with—to borrow a phrase which I think was used by one of my noble and learned friends—"the usual and proper covenants" in a lease. It appears to me that the whole point turns upon that question. This stipulation which is now in issue between the parties is not a usual or proper part of a lease. I do not mean to say that in the country where this lease was being negotiated it was not usual and proper for parties to enter into another bargain; it was desirable for the benefit of both that they should enter into another bargain, but that is collateral to the lease itself. The question now to be determined is, whether or not by saying "I accept the lease," prescribing the terms, you by implication accept a particular form of contract which, although usual and proper and ordinary for persons to enter into, is not in truth a part of a lease in the proper sense of that word. When I look at it I find that that which would constitute a lease, that which would satisfy the bargain between the parties, could be executed and could be enforced upon them without reference to such a stipulation. And I have not heard it controverted by Mr Haldane, who certainly is not likely to leave anything to the advantage of his clients unsaid, that the Lord Ordinary was perfectly right in pointing out as the result of the evidence that these stipulations vary very much—they are not always the same. And with reference to one observation that has been suggested, that the particular stipulation is to be ascertained by its being an implied term that the terms already existing between the landlord and tenant were to be continued, I would observe in the first place, they are not to be continued—they are varied; and when we examine the instrument (and it is at the instrument that we must look) there is nothing in it which imports that the same terms that existed before are to continue.

Then it is argued that the parties are agreed that they should continue on the same estate terms as existed before. That is ridiculously in conflict with the whole controversy that took place between them. They never were upon this subject *ad idem* at all. What is asked is, that your Lordships are to enforce upon the parties that which each of them has in turn absolutely denied to be part of the contract into which they entered. That argument would be material if your Lordships could see that there was any evidence that they were *ad*

idem, but there is no such evidence. In fact a conflict appears to have raged between them from beginning to end. What they appear to have done when the conflict came to be so very acute between them was that they said, We will not negotiate any longer; it is idle to suppose that we can agree; we will abide by the missives as they stand.

That brings us to the question which I think is the only question in the cause: What do the missives bind the parties to? I have already indicated what I think the missives bind the parties to, of which this collateral bargain forms no part. Under those circumstances it is impossible for the Court to import into the bargain something upon which the parties have not themselves agreed. That is the short ground on which I think that the judgment of the Court below is perfectly right; and I therefore move your Lordships that the appeal be dismissed with costs.

LORD MACNAGHTEN—I agree.

LORD SHAND—I also am of opinion that the appeal in this case ought be dismissed. The Lord Ordinary and the Inner House, however, in dealing with the case seem to me to have proceeded on a ground which I should have the utmost difficulty in accepting as a ground of judgment.

The parties in entering into their arrangement unfortunately made the writing which was to constitute the lease, or agreement for a lease, in very brief terms; and from that circumstance this litigation has really arisen. After the missives had passed between the parties they attempted to adjust a detailed lease, and they very soon found that they were in conflict with each other. The tenant in the negotiations which followed maintained that the articles or conditions usually inserted in leases of sheep farms on this estate were not in their complete terms part of his bargain; the landlord on the other hand maintained that they were. A dispute went on for a considerable time on that subject, with the result that the parties had to abandon the attempt to adjust a lease. I see that the tenant's agent on 22nd February 1892, in his letter to the agents of the landlord, says: "If your client cannot agree to these" (that is, the conditions for which he was stipulating) "my client is willing to allow the tenancy to stand on the missive alone." Then again at a subsequent date he says in his letter, dated the 20th of October 1892: "If no arrangement can be come to I will regret it, as I have done my utmost to bring the parties together. The lease of course stands on the missives."

It appears to me that however unreasonable the tenant might be (if he was so) in taking up that position, the result of it was that he stood upon this—Our rights must stand or fall by the missives, and if there is to be a lease with detailed stipulations it must be worked out upon these missives; you may be right or I may be right, but I stand upon the missives, and it will be for the Court, if and when appealed to, to determine whether the estate conditions shall be embodied in the lease, and what is the true construction of these conditions as to the stock of sheep which the landlord is bound to take over at the end of the lease. I think that there was nothing in his taking up that position which would amount to a bar in a question of this kind, when we are now asked to decide what is the true meaning of these missives, what detailed stipulations, if any, shall be held to form part of the lease, and what is the legal meaning and effect of these stipulations. The Lord Ordinary in his judgment dealing with this matter, towards the conclusion of his judgment, says this—"I find it impossible to read into this lease any implied condition founded on custom. I find it equally impossible to hold that the printed conditions applied in face of the tenant's distinct repudiation of them during the whole period of his possession, and of the landlord's acquiescence in that repudiation." Accordingly, it seems to come to this, that his Lordship holds that the tenant was barred by his own conduct from now raising any question as to importing the conditions and as to their effect, and I think the same view was taken in the Second Division of the Court. Lord Trayner observes—"I think he cannot be allowed now to change his ground"—that is, to maintain a position different from what he did throughout the correspondence; and Lord Moncreiff says—"I think it is quite sufficient for the landlord's case to hold that the tenant is now barred from going back on his construction of the contract."

I think there is nothing in the conduct of the tenant that can bar him from obtaining a judgment from the Court as to the true legal force and effect of the missives. Indeed, the landlord himself is now to succeed in his present contention that the conditions were not made part of the bargain, a contention which according to the judgment he should be barred from maintaining, for he formerly insisted that the estate conditions did form part of the lease. I quite accede to what was said by the Lord Advocate, that if the landlord could show that in consequence of the tenant's unwarranted action in the negotiations following on the missives, he had been prejudiced in any way with regard to his actings as to the later re-letting of the farm—with reference to this matter of sheep stock or anything else—the tenant's unwarranted attitude which obliged the landlord to take a course of conduct which resulted in prejudice to him might make all the difference. But in the absence of any such prejudice to the landlord I think the plea of bar could not be sustained.

But in now disposing of the appeal I entirely agree with the view stated by my noble and learned friend the Lord Chancellor as to the agreement itself. Unhappily, as I have already said, for both parties, the agreement was expressed in too brief terms. It contained what I may call the essentials of a lease; it contained stipulations as to the period of the lease — five years, — as to the rent to be given for the subjects—

£100 and £40,—and as to the subjects themselves, which are described as "the farms of Rossal and Dernacullen as at present possessed by me," which I think is meant really to refer to the identification of the subjects, and not in any way to conditions in previous leases. There is not a word added in regard to what are to be the special conditions of this lease, and I agree with your Lordships that it is impossible for this Court now to add, as a term of this agreement, what I daresay the parties really meant should be a term of it, that the conditions usual on the estate should form part of the lease. The correspondence, indeed, which followed seems to me to show that both parties had that in their view. But when we come to the question of the strict legal interpretation of a contract of that kind, although it does appear from the correspondence that the parties respectively had certain conditions in their minds, I do not think that a court of law, with missives entirely silent as to any conditions, can proceed to investigate what each of the parties meant, and so by an addition to the lease, it may be, to add stipulations as to which they were never agreed.

In regard to another question, as to whether a custom might not be made part of a lease by a missive of this kind if the tenant had been able to prove an extensive universal and clear custom in regard to the matter of the stock to be taken over and maintained and afterwards given over at the end of the lease, I should think that if such a custom were proved, the Court in adjusting the lease would give effect to that custom, and would have inserted clauses which would give effect to it. But I find in this case that the Lord Ordinary and the Court of Appeal are both agreed that upon the proof the facts are against the tenant. It has been held by these concurrent judgments on this matter of fact that no such custom has been proved; that the only custom that is shown is that it is usual to make stipulations in regard to the stock to be taken up and given over at the end of a lease, but that those stipulations vary according to different circumstances, and cannot be said to be universally the same. And I did not understand that the appellants' counsel could displace this finding of fact. It is therefore out of the case that such a custom should be imported as part of the contract under these missives.

On these grounds, distinguishing from the ground of judgment in the Court of Session, I am of opinion with your Lordships that this appeal must be dismissed.

LORD BRAMPTON — I agree that this appeal ought to be dismissed with costs, and for the reasons that have been so very clearly stated by the Lord Chancellor, and I have nothing further to say.

LORD ROBERTSON—I also concur.

Appeal *dismissed* with costs.

Counsel for the Appellant — Haldane, Q.C.—A. S. D. Thomson. Agents—Flux, Thomson, & Flux, for Gill & Pringle, W.S.

Counsel for the Respondents—The Lord Advocate (Graham Murray, Q.C.) — Macphail. Agents — Grahames, Currey, & Spens, for Tods, Murray, & Jamieson, W.S.

Tuesday, November 28.

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

WEIR *v.* GRACE.

(*Ante*, Dec. 13, 1898, vol. xxxvi. p. 200, and 1 F. 253.)

Fraud — Undue Influence — Agent and Client.

Opinion (by the Lord Chancellor and Lord Robertson) that where a will is made in favour of a law-agent by a client, but is prepared and carried through by an independent law-agent, then in the absence of collusion between the two law-agents the onus of proving that the will was obtained by undue influence on the part of the agent benefited by it rests, as in the ordinary case, upon the persons challenging the will.

Evidence upon which *held* (*aff.* the judgment of Second Division) that even assuming the onus in such a case to lie upon the law-agent, he had proved sufficiently that the making of the will in his favour was the free and deliberate act of his client.

This case is reported *ante, ut supra.*

The pursuers appealed against the judgment of the Second Division.

At delivering judgment—

LORD CHANCELLOR—I have not been able to entertain any doubt in this case that the judgment of the Lord Ordinary was correct. It appears to me that one of the difficulties under which the very learned and able counsel who has been arguing this case before your Lordships on the part of the appellants has laboured is that he has not been able to propound the simple proposition upon which he asks your Lordships to reverse the judgment of the Court below. Although I have invited him to do so once or twice, I observe that he has always repeated his proposition in language which confuses two totally different issues, namely, first, Was this in fact the will of a sane and capable testatrix; was it executed by her? That is one issue. The second issue, and, as I say, a totally different one, was, Is it or is it not induced by the person by whom it was practically made as it is alleged (of course I do not concur in that view), so that although it was the act of a sane and capable testatrix, it was unduly influenced by the person for whose benefit it was made. These are two totally different issues, and they ought not to be confused together; they must be treated differently.