

Ordinary on the Bills on 2d June 1885, and sequestration was awarded on that date.

On 12th June 1885 a meeting of creditors was held, when Mr D. H. Wilson, S.S.C., was duly elected trustee. Wilson having lodged the necessary bond of caution, was duly confirmed trustee on 23d June 1885.

This was a petition presented by the bankrupt without the consent of any creditor, in which he asked the Court to "supersede and recal the whole proceedings at and following upon the said meeting of creditors . . . and to appoint a new meeting of the creditors . . . to elect a trustee or trustees in succession upon the sequestrated estates of the said Andrew Ross Robertson, and do the other acts provided by the said statutes."

The petition was founded upon an averment that the statutory notice of the sequestration, and of the first meeting of creditors was not published in the *London Gazette* within the period fixed by section 48 of the Bankruptcy (Scotland) Act 1856. The notice appeared in the *London Gazette* seven days after the sequestration, whereas the period prescribed by sec. 48 is six days. All the other provisions of sec. 48 were complied with.

Answers were lodged for Mr D. H. Wilson, the trustee. The petitioner appeared in person, and referred to the case of *Garden and Others*, July 18, 1848, 10 D. 1509.

Argued for the respondent—It was admitted that the notice had been inserted in the *London Gazette* one day too late. That, however, was owing to a failure on the part of the bankrupt which he was not entitled to found upon—2 Bell's Com. (7th ed.) 297, (5th ed. 285); *Lang v. Glasgow Court-House Commissioners*, May 26, 1871, 9 Macph. 768; *Gray*, February 2, 1844, 6 D. 569; *Allan*, June 6, 1861, 23 D. 972. There had been no prejudice to any of the creditors of the bankrupt. Section 71, which provided that the judgment of the Sheriff declaring the election of the trustee should be final, accounted for the absence of any cases directly bearing on the point.

At advising—

LORD PRESIDENT—In this case sequestration of the petitioner's estates was awarded on 2nd June 1885, upon a petition by the bankrupt himself, with concurrence of a creditor of the required amount.

The first meeting of creditors was held on the 12th of June, and it is not disputed that the proceedings at that meeting were conducted in all respects in accordance with the provisions of the 67th section, and that it was held at the time prescribed by that section. The purpose of the present application is to set aside all that was done at that meeting, and all that has followed thereon—that is to say, the election of a trustee, the finding of caution, and the confirmation of the trustee's appointment.

The ground of the application is that there has been a failure to follow the provisions of section 48 with regard to the insertion of the statutory notice of sequestration in the *London Gazette*. The main provisions of section 48 in regard to the registration of the sequestration in the various registers have been here strictly complied with, but the last clause is in these terms—"the

party applying for sequestration shall, within four days from the date of the deliverance awarding the sequestration (if awarded in the Court of Session), or if it is awarded by the Sheriff, within four days after a copy of the said deliverance could be received in course of post in Edinburgh, insert a notice, in the form of Schedule B hereunto annexed, in the *Gazette*, and also one notice in the same terms within six days from the said date in the *London Gazette*."

It is admitted that the insertion of the notice in the *London Gazette* was one day beyond the six prescribed by the Act.

The petition now before us is presented by the bankrupt alone, without the concurrence of any of his creditors. Now, if an error of this kind were complained of by one of the creditors of the bankrupt, and if it were possible for him to show that he had in any way been prejudiced by the mistake, I should not be prepared to say that we could not entertain such a complaint. But I am very clear that we cannot entertain a petition by the bankrupt founding on his own neglect and omission.

LORD MURE, LORD SHAND, and LORD ADAM concurred.

The Court refused the petition.

Counsel for Petitioner—Party.

Counsel for Respondent—Lang. Agent—R. Broatch, L.A.

Saturday, July 4.

SECOND DIVISION.

[Lord McLaren, Ordinary.

FERGUSON AND OTHERS v. PAUL.

Lease—Landlord and Tenant—Fixtures—Greenhouses and Conservatories—Implied Agreement.

Circumstances in which a tenant of a house and garden was allowed to remove at the ish of his lease valuable greenhouses and conservatories erected by him of substantial nature, and bedded on stone and brick foundations.

The proprietrix of a house and garden let them for five years, at a rent of £45 a-year, to a tenant who was taken bound under the lease, *inter alia*, "not to remove away any of the fruit trees and others in the garden, except to replace the same by others of equal quality and value." The lease was subsequently renewed for two periods of five years. The tenant, who was a great lover of flowers, on entering on the subjects removed some trees in the garden, and built in their place greenhouses and conservatories, bedded on stone and brick foundations at a cost of between £800 and £900. He used to compete successfully for prizes at flower shows, given for tulips, hyacinths, and orchids, selling the bulbs to florists, and he kept three gardeners at a cost of over £150 a-year. At the ish of the lease he removed the greenhouses, &c. In an action at the instance of the successors of the

propriatrix for the value of the erections, the Court *assolized* the defender, being of opinion, on a consideration of the evidence led, that the pursuers' author knew of and acquiesced in the defender's intention to build the greenhouses, and that there was an implied agreement that he was to be at liberty to remove them at the ish of the lease on condition of planting other trees in place of those removed—*diss.* Lord Rutherford Clark, who was of opinion that no such agreement was to be implied either from the transactions and conduct of the parties or from the nature of the tenure.

Andrew Paul, brassfounder, Edinburgh, entered into a lease, dated 2d February 1871, with Mrs Flora Henderson by which she let to him for £45 a-year, for five years, a villa, with garden, &c., in Gilmore Place, Edinburgh. The lease contained this clause—"And the said Andrew Paul accepts of the premises hereby let as in good tenantable order and repair, and binds and obliges himself and his foresaids to maintain and keep the same in good tenantable order and repair, at his and their own expense, during the currency of this lease, and to leave them so at the termination thereof; and the said Andrew Paul binds and obliges himself and his foresaids not to remove away any of the fruit trees and others in the garden, except to replace the same by others of equal quality and value." By two separate agreements, dated 6th July 1871 and 29th June 1875, the lease was extended for two periods of five years.

Paul had a great love for the culture of flowers, and especially of hyacinths and orchids. He used to compete very successfully for prizes given at flower shows for hyacinths and orchids, drawing over £30 a-year for prizes. Many seedsmen purchased bulbs from him, and he spent from £150 to £200 a-year in wages to his gardeners, of whom he had three. Though occasionally selling plants he did not carry on gardening for profit. On entering possession under the lease he removed a number of fruit trees and bushes from the garden, and erected on the ground where they stood some flower-houses and conservatories at a cost of between £800 and £900; an orchid house alone, which formed part of the buildings, cost £240. The value of the house and garden was about £800, the rent being £45 a-year. The lease was to expire at Whitsunday 1886. Between May and September 1884 Paul caused the whole of the conservatories, &c., to be removed, and disposed of them for £110.

Thereupon this action was instituted against him by Mrs M. B. Henderson or Ferguson and others, the heirs of Mrs Henderson, who claimed the sum of £200 in compensation for their removal and as their value. They averred that the erections were chiefly of bricks with glass roofs and sides. The foundations were laid several feet deep into the ground. The whole erections were *partes soli*, and as such were their property. The defender replied that the proprietrix had made no objections to his removing the trees; that such removal was in the contemplation of both the parties to the lease; and that it was also quite understood and agreed upon between them that he should be allowed to erect the buildings if he pleased on the ground thus made available on condition that any such were to be re-

moved by him, and the trees and bushes replaced before the expiry of the lease. That he was quite willing at that date to replace any of the trees removed by him by others of equal value and quality. The erections were in no case so affixed to the ground as to become *partes soli*, and it was never intended by the parties to the lease that they should be permanently attached to the soil. They were not made for enhancing the beauty of the subjects, but entirely—as Mrs Henderson well knew—because of the personal and peculiar pleasure taken by the defender in the culture of flowers.

The defender averred—"The greenhouses were not ordinary adjuncts to the dwelling-house, but covered very nearly the entire garden ground, and were erected by the defender with a view to the cultivation of orchids and other expensive flowering plants and shrubs, and to the exhibition of these at national and international shows, and they were of no use to anyone except for the special purpose for which they were erected. They were entirely unconnected either with the dwelling-house or with the walls enclosing the said garden, and the most of them had no stone or brick foundation whatever, but consisted merely of glazed frames resting on the ground. The others rested wholly or partially on a slight brick foundation, from which they were easily removeable, and from which they were in fact removed without any injury to the brick substructure. The greenhouse or frame first erected by the defender was brought there prior to Whitsunday 1871, while the then proprietrix was still residing in the house, and was—as she was well aware—removed from another house, of which the defender was tenant at that time."

The pursuers pleaded—"The defender having wrongously and illegally removed the flower-houses, conservatories, and other erections as condescended on, and these being the property of the pursuers, and the pursuers having thereby suffered loss and damage to the extent condescended on, decree should be pronounced as concluded for."

The defender pleaded—" (3) The erections in question having been made by the defender for a temporary object, and not being *partes soli*, the defender was entitled to remove them at any time before the expiry of his lease. (4) *Separatim*, the defender having come under an obligation in said lease to replace all trees and others removed by him from the said garden, and it not being possible for him to fulfil this obligation without wholly removing said erections, he was bound, or at least entitled, to remove the said erections."

Proof was led, the import of which sufficiently appears from the above narrative of the facts, which were proved, and from the Lord Ordinary's note.

The Lord Ordinary (M'LAREN) pronounced this interlocutor:—"Finds that the deceased Mrs Henderson let the house and garden libelled to the defender, in the knowledge that the defender was to occupy the garden, or a considerable part thereof, with greenhouses, and in that knowledge stipulated that the ground should be restored at the expiration of the lease, and trees planted in place of such as might be removed: Finds that in these circumstances the defender was entitled

to take down the greenhouses: Finds that the greenhouses having been dis severed from the heritable estate in virtue of the obligations in the lease, the materials thereof are moveable and pertain to the defender: Therefore assolizies the defender from the conclusions of the libel, and decerns, &c.

“*Note.*—This is an action instituted by the proprietors of heritable subjects in Edinburgh against their tenant, claiming compensation in respect of the removal of greenhouses of considerable value which the tenant had erected for his own purposes, and which he claims as his property. The pursuers are the heirs of Mrs Flora Henderson, by whom the house and garden were let on lease to the defender. They have no personal knowledge of any understanding which may have existed between their author and the defender as to what was to be done with the greenhouses at the expiration of the lease, and they rely entirely on their legal right to the acquisition of whatever may be shown to be annexed to their heritable estate. It is unnecessary to point out that if the greenhouses had been erected by the proprietor of the house and garden they would have fallen to the heir and not to the executors. Where a proprietor of heritable estate makes a beneficial addition to the estate, the only question is, whether the thing annexed is in its nature moveable or immovable? In such a case I see no reason to doubt that greenhouses, whether built into the ground or less securely attached to it, would be treated as immovable subjects irrevocably annexed to the estate, and therefore destined to the heir.

“But in questions between landlord and tenant as to the removeability of fixtures other considerations enter into the decision. I do not think it is possible to lay down a rule which shall embrace all cases, but it is desirable at least to notice the elements for consideration and their relative importance.

“The points to be considered are—

“(1) The mode of attachment of the fixture to the soil or heritable subject.

“(2) The description of the fixture; whether it is susceptible of being taken to pieces and put together again, like an iron house or machine, or whether it is like a stone building, incapable of being removed without destruction of the subject.

“(3) The use of the fixture; whether beneficial to the heritable subject, or useful only to the tenant in his trade, occupation, or industry.

“(4) The relative values of the fixture and the heritable subject; and

“(5) The agreement (express or implied) between landlord and tenant as to the conditions on which the fixture was to be placed in or annexed to the estate.

“In the present case the first of these heads of inquiry must be answered in favour of the landlord. Under the other heads the weight of evidence and argument appears to me to be in favour of the tenant.

“1. The tenant (defender in the action) is an amateur florist, occupying a small house in Gilmore Place, Edinburgh, for which he pays a rent of £45 per annum. It is only necessary to look at the plans of the property to see that the structures which the defender erected have no relation to the value of his dwelling-house as a residence. The greenhouses were not put up by the

defender for the improvement of his house and garden as a residence, but for the purpose of enabling him to carry on the pursuit of floriculture, to which he devoted his leisure time and a large part of his savings from his business. He occasionally sold plants to nurserymen and to private purchasers. But this was only a mode of lessening the cost of the establishment incidental to his pursuit, which, as I have said, was not carried on with a view to profit. It is no part of the defender's case that his greenhouses were of a slight or temporary character. They were of the best construction, and furnished with the most substantial and approved apparatus for heating. Without going into all the particulars on this subject, which will be found in great detail in the report of the evidence, I may say that the greenhouses were substantially built, that they were bedded on stone or brick foundations, and that, so far as physical attachment to the soil is an element, I have no doubt that the greenhouses were solidly attached to the ground, and that the attachment was as complete as is possible in the case of glass structures resting on brick or stone.

“2. It is, however, a fact in the case that the greenhouses were successfully removed and put together again without much loss of material. It is also in evidence that it is not only possible, but even customary, to remove greenhouses—by taking them to pieces—from one situation to another; although some witnesses have expressed doubts whether the ordinary class of glasshouses will bear the cost of such removal. In this sense I must hold that the greenhouses were moveable, although they could only be moved by a process of cutting down, attended with some loss of material. This, I think, is all that need be said under the second head of inquiry.

“3. On the third head of inquiry, the nature of the uses to which the fixture is to be put, I think the evidence is all one way.

“Viewed as an annexation to the tenement, the greenhouses were of no manner of use. They were on a scale altogether disproportionate to the size and value of the small house in Gilmore Place in which the defender resided, and it is most unlikely that any future tenant of that house would desire to make use of the greenhouses, or would be able to maintain them. Indeed, if the defender had offered to make a present of his property to the pursuers, the only thing the pursuers could have done with the houses would be to sell them for the purpose of having them taken down and removed.

“The use of the greenhouses was entirely special to the defender's pursuits, as much as if he had been a nurseryman. Any presumption that the greenhouses were put up for the benefit of the freehold is therefore displaced by the fact that the structures were of no use to the freehold, and were only useful to the defender, or to some one with the like tastes and pursuits.

“4. I do not think that we have the materials for an accurate statement of the relative values of the house and greenhouses. But the defender states that the greenhouses cost him about £700, which I suppose is not much short of the value of the dwelling-house without the ground. I should suppose that the cost of keeping up the greenhouses exceeded the defender's household expenditure.

"If the question of the removeability of the greenhouses were to be decided upon the external facts of the case, irrespective of agreement, the considerations are, on the one hand, that the structures are physically attached to the tenement, and on the other, that they were so attached for purposes which have no relation to the ordinary use of the tenement, and that they are capable of being removed.

"5. On the question of the alleged agreement, that the greenhouses should be removeable, it is a fact of some importance that the defender's lease contained an obligation not to remove any of the fruit trees in the garden, except on condition of replacing them by others of equal value. Now, the defender, when examined as to the reason for the insertion of this clause, stated that before he entered into possession he had informed Mrs Henderson of his intention to remove his greenhouse to her garden and to put in others, and had requested her permission to remove the trees that stood in the way. She replied that she had no objection to the defender removing the trees, provided he replaced them, as afterwards expressed in the lease. The examination was not carried beyond this point, because I saw objection to proving a verbal agreement by way of addition to the lease.

"The same objection did not in my opinion, apply to the reception of evidence bearing on the subject of the proprietor's knowledge of the uses to which the property was intended to be put.

"I think there can be no doubt that Mrs Henderson was aware of the defender's intention of occupying a considerable part of the garden with greenhouses, and that she assented to their erection on condition that the ground should be restored, and that such fruit trees as were displaced by greenhouses should be replaced by trees of equal value.

"The conversation referred to took place in the course of the negotiations which preceded the lease, and a clause was inserted in the lease for the purpose of securing the performance of what had been verbally arranged.

"That being so, it appears to me that, so far as regards the taking down the greenhouses, the restoration of the ground, and the replacement of the trees (I do not know whether they have been actually replaced), the defender has acted in strict conformity to his obligations as tenant. There remains the question, whether the materials of these structures are landlord's property or tenant's property? It appears to me that as the landlord's title to fixtures is based on the fact of physical annexation, his consent to the severance of the fixtures carries with it the abandonment of any claim of property in the fixtures otherwise competent to him. The materials then either revert to the tenant who brought them to the ground, or they may be held to have remained vested in the tenant from the beginning, in consequence of the agreement that he should remove them.

"In the circumstances I have not found it necessary to consider what are the limits of the rule according to which buildings of this class erected for purposes of trade are considered to be removeable. I may say, however, that in my opinion no well-founded distinction can be drawn between trade fixtures and such cases as the present, where the structure, while not subser-

vient to commercial uses, is not an adjunct of the dwelling-house or ground on which it is put up. In the result, I assoilzie the defender, and find him entitled to expenses."

The pursuers reclaimed, and argued—(1) The Lord Ordinary had proceeded on a narrow ground of judgment apart altogether from legal considerations of the law of fixtures. The clause in the case on which he had based that judgment meant that the trees were to be replaced by other or better trees. It contained not a word about greenhouses replacing the trees. (2) Taking the case on a consideration of the law of fixtures, the maxim *inadificatum solo, solo cedit* applied, and the greenhouses became then the property of the pursuers. They were erections of a substantial kind, and firmly and permanently fixed in the ground—1 Bell's Com., note (M'Laren's ed.), p. 789; Hunter's Landlord and Tenant, vol. i. 8th ed., p. 300. It was quite true that there was a relaxation of the law in favour of tenants—*Syme v. Harvey*, December 14, 1861, 24 D. 202; *Burns v. Fleming*, December 7, 1880, 8 R. 236; *Duke of Buccleuch v. Ford's Trustees*, July 18, 1871, 9 Macph. 1014—and as regards trade fixtures; but this was not a trade fixture, and the relaxation in favour of tenants proceeded on implied intention. There was here no evidence of any implied intention that the defender should be permitted to remove the greenhouses, to be found either in the transactions or conduct of the parties, or in the nature of the tenure. In England the law was adverse to the defender's contention—*Jenkins v. Gething*, June 2, 1862, 2 Johnson and Kennedy's Reports, 520; *Buckland v. Butterfield and Another*, May 15, 1820, 2 Broderip's and Bingham's Reports, 54.

The defender replied—I. This was a special case not to be decided on a consideration of the maxim *inadificatum solo, solo cedit*. For (1) the lease was conclusive. The clause binding the defender not to remove any of the trees except on condition of replacing them by others of equal value, gave him a right to remove trees which he availed himself of when he erected the greenhouses, but the right was conditional on his replacing the trees by others of equal value before the end of the lease, and it was impossible for him to implement this condition except by again removing the greenhouses, &c. (2) Apart from the clause in the lease it was clearly proved that the pursuer's author was well aware of the intention of the defender to occupy a considerable portion of the garden ground with greenhouses, &c., and no objection was made to this on condition that he restored the ground to its original condition. II. On a consideration of the law of fixtures, the maxim did not apply here; the tendency of the law had been for a long time to relax in favour of tenants. Trade fixtures were always excepted, and the present case might be assimilated to them rather than to cases where the structures were merely ordinary adjuncts of the heritable subjects. In addition to the favour shown to trade, the considerations which had led to trade fixtures being excepted were the intention of the parties, and the relative values of the heritable subject and of the structures placed upon it. The defender's intention to build and remove were undoubted, and the pursuer's author acquiesced in it. The value of the house and garden

was about £800, the rent being £45 a-year. The cost of the greenhouses, &c., was between £800 and £900. They were not an ordinary adjunct of the dwelling-house, and were put up merely with the view that the defender might indulge in his peculiar "hobby." They were actually removed and re-erected on new ground. In the English cases they were merely adjuncts of the freehold, and could not be removed or separated from it without doing damage to or lessening the value of the heritable subject to which they were attached.

At advising—

LORD CRAIGHILL—I concur in the result at which the Lord Ordinary has arrived. The question between the parties seems to be settled by the terms of the lease as interpreted by their conduct immediately after the lease was signed, which was on the 2d February, 1871. The defender is not bound to remove any of the trees, but he acquired the right to do so on one condition, which was "to replace the same by others equal in quality and value." The pursuers now say that the import of this part of the contract has been misapprehended by the Lord Ordinary, and that the true import was that there should be no removal unless every tree removed was immediately or almost *simul ac semel* replaced by another. But this construction of the provision is contradicted by the conduct of parties immediately after the contract was concluded. Trees were then removed in sight of the lessor. She saw this, and she also saw, for she was living in the house at the time, that new trees were not planted, and more than that, that new trees could not be planted for a time, because the ground which had been occupied by those removed was straightway covered by a conservatory brought from the place which the defender was about to leave.

But though these things were so, the condition as to replacing trees which had been removed was still part of the contract, and as this obligation could not be fulfilled without the removal of the greenhouses, there is by necessary implication the recognition of a right in the defender to take away the buildings, as otherwise this could not be accomplished. The explanation of all seems easy. The defender had a passion for flowers and rare plants. This was well known to all who knew him, and the greenhouses in question were put up that this taste might be more lavishly gratified, and not for the purpose of benefiting or with any intention to benefit at any time the property of which he was in the occupation. This plainly was the understanding of parties when the lease was entered into, and though a provision on this subject more clear and distinct than the clause referred to could easily have been framed, that clause appears to me to be sufficient to secure the right of the defender in what he erected solely for his own use while tenant of the premises.

This substantially is the Lord Ordinary's ground of judgment, and I think his interlocutor ought to be sustained. This being my view, and the decision of other questions not being required. I refrain from entering on the considerations of these or expressing an opinion upon them.

LORD RUTHERFURD CLARK—I do not sympa-

thize with the claim of the pursuers, but I see no legal answer to it.

The greenhouses seem to me to have been constructed in as permanent a manner as their nature admitted. They could be removed, of course, without injury to the heritable subject, but only at the cost of their own destruction. In fact, when they were removed by the defender, they were sold as old materials. The right of the defender to remove the houses must, I think, depend either on express agreement or on an agreement to be implied either from the nature of the tenure or from the transactions or conduct of the parties. Express agreement there was none, and that point may be dismissed at once.

The lease was the lease of a house and garden. Its duration was originally for five years, but by two separate agreements it was extended for two periods of five years, giving it a duration of fifteen years in all.

I see nothing in the nature of the tenure from which a right to remove buildings erected on the ground can be implied. Such a right may be inferred in a lease for the purposes of trade, so as to give the tenant a right to remove what are called trade fixtures. I know of no other lease from which such an inference can be drawn. I need not say that the lease with which we have to deal is in no sense a lease for the purposes of trade. The lease itself gives no aid to the pursuers. It contains a clause by which a tenant is bound "not to remove the fruit trees and others in the gardens, except to replace them by others of equal quality and value." But if this power was exercised, it seems to me to follow, that the trees and others which were removed must have been at once replaced. I cannot hold that it would have been sufficient implement of the obligation to plant trees just as the lease was about to expire. I do not think that trees of equal value could be supplied by such a method. The landlord would be deprived of all benefit from their growth.

But be this as it may, I can see no reason for holding that the clause which I have quoted can be construed as giving a right to the tenant to remove buildings. It has no relation to buildings, and by no construction which I can adopt can it have any such relation. Nor can I see how it can be inferred from his failure to enforce it according to its terms that the landlord agreed that the tenant should have right to remove the buildings. I would rather conclude that he was contented to forego the benefit of the obligation from the advantage he used to obtain from the buildings themselves.

But it is said that the landlord let the subjects in the knowledge that the tenant was to occupy the garden with greenhouses. I see no evidence of this fact except the testimony of the defender, which is absolutely uncorroborated, and I do not think that we can take that to be fact of which there is no legal proof.

But putting this consideration aside, if the knowledge was prior to the execution of the lease I do not see what inference we can draw in favour of the defender. If it was intended that he should have a right to remove the buildings, he should have stipulated for it in the lease. The fact that the lease is silent on the subject would lead to the conclusion that the landlord refused

to accord any such right. At anyrate I see no ground for implying it, and in my opinion it is a circumstance very adverse to the defender that though the lease was extended by two separate agreements there is no reference in either to any right on his part to remove the buildings. If the knowledge was subsequent to the lease it cannot be material. The parties were then left to their legal rights.

Again, it is urged that the buildings were unsuitable to the subject, and an injury to it rather than a benefit. It may be so. The only conclusion that I can draw from that circumstance is, that the landlord might have a right to compel the defender to remove the buildings. But an obligation to remove, if required by the landlord, does not in my opinion carry with it the implication that the tenant has a right to remove.

LORD JUSTICE-CLERK—This is a narrow case in any aspect, but the strong inclination of my opinion is with the Lord Ordinary and with Lord Craighill, and I agree in everything that Lord Craighill has said. There is no doubt as to the law of the case. The question is, whether the case is ruled by specific or implied agreement. I come to the conclusion that it is so ruled both on the terms of the lease and by the actings of parties. The first thing which strikes one is that these buildings were not erected for the benefit of the subjects of the lease. This tenant had a mania for hothouse flowers. Horticulture was his ordinary recreation, and these houses were put up with a view to give effect to his passion for flowers. It is true that the lease makes little regulation as to the use to be made of the ground. But it contains a clause which is very significant. By this clause the tenant may cut down trees on condition of supplying their place with others of equal value. The object of cutting down the trees was to build the houses, and the insertion of this clause shows that the houses should be removed.

I cannot say that I have much sympathy with this claim. It is said that the tenant had spent £700, and I am glad that we have been able to come to the conclusion at which we have arrived.

LORD YOUNG was absent.

The Court adhered.

Counsel for Reclaimers—Mackintosh—J. A. Reid. Agent—J. Smith Clark, S.S.C.

Counsel for Respondent—Comrie Thomson—Macfarlane. Agent—William Finlay, S.S.C.

Saturday, July 4.

SECOND DIVISION.

[Lord Fraser, Ordinary.]

MACKIE v. GLOAG'S TRUSTEES.

Marriage-Contract—Exercise of Power of Appointment—General Settlement.

A widow with a family executed on the occasion of her second marriage a marriage-contract by which she conveyed to trustees her heritable and moveable estate to be

held for behoof of herself in liferent and for her children procreated and to be procreated, "in such proportions and on such conditions as she might appoint by any writing under her hand." She subsequently executed a trust-disposition and settlement in which she stated her intention to exercise this power of appointment, but in which she massed the marriage-contract funds with her general estate without making any special distribution of those funds. *Held* that she had validly exercised the power of appointment.

Power of Appointment in Marriage-Contract—Appointment to Persons not Objects of Power—Consent of Objects of Power.

A widow who had a power of appointment over her marriage-contract estate, the objects of the power being her own children, exercised it in a trust-disposition and settlement in which she left one-fourth of the residue of her estate to her son's son, and the rest of it to her daughter in liferent and her daughter's children in fee. *Held* that the appointment was valid as regards the latter, inasmuch as it was made with the consent of their mother, who was an object of the power, but that it was invalid as regards the former, in respect his father, who was also an object of the power, had withheld his consent, and that therefore the fourth share of the residue remained unappointed, and fell to be equally divided between the appointer's son and daughter—the two objects of the power.

Apportionment Act (37 and 38 Vict. c. 37)—Appointment under Powers Act 1874.

Held that this Act applies to Scotland.

Power of Appointment—Omission in Deed of Appointment of Representatives of One of Objects of Power who Died without Issue.

A widow who had a power of appointment over her marriage-contract estate, the objects of the power being her children, exercised the power in a deed which omitted from the appointment the representatives of one of the children of her first marriage who had survived the execution of the contract, and had had a vested interest in the marriage-contract funds, but who had predeceased his mother without issue. *Held* that having regard to the provisions of the Apportionment Act (37 and 38 Vict. c. 37), the omission was not fatal to the validity of the deed of appointment.

Deed of Appointment—Illusory—11 Geo. IV. and 1 Will. IV., cap. 46.

Opinion reserved by Lord Fraser whether this Act applies to Scotland, but *observed* that in Scotland no such statute is necessary.

The first stage of this case was disposed of in the Court of Session on 9th March 1883, and was reversed on appeal by the House of Lords on 6th March 1884, and reference is made to the report of these proceedings, *ante* vol. xx., p. 486, 10 R. 746, and vol. xxi., p. 465, 11 R. (H. of L.) 10.

In the present stage of the case the following pleas-in-law for the pursuer fell to be disposed of—“(1) The pursuer's mother Mrs Mackie or Gloag did not validly execute the power of appointment under the said antenuptial contract of marriage by the foresaid trust-settlements