

sum expended for behoof of children under ten years of age, under the said 26th section, shall not exceed one-third of the whole amount to be expended for the purposes of the said section; but in computing the one-third to be applied for behoof of children under ten years of age the proportion of the two sums applied for behoof of such children must be taken into account; and decern."

Counsel for First Parties—Graham Murray—
C. N. Johnston. Agents—Webster, Will, &
Ritchie, S.S.C.

Counsel for Second Parties—M'Kechnie.
Agents—Rhind, Lindsay, & Wallace, W.S.

Friday, July 2.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

MARSHALL AND OTHERS v. THE TANNOCHE CHEMICAL COMPANY (LIMITED).

*Superior and Vassal—Casualty—Moveables—
Trade Fixtures—Mode of Estimating Casualty.*

In a question between superior and vassal as to the amount of a casualty, held that in determining the character as heritable or moveable of erections upon the feu of the nature of trade fixtures, the rule applicable to the relation of landlord and tenant, and not that applicable to heir and executor, fell to be applied.

This was an action of declarator and for payment of a casualty of one year's rent as due to Marshall's trustees, the superiors, from the Tannoch Chemical Company (Limited), Cumberland, Dumbartonshire, proprietors of a piece of ground measuring 1 acre and 28 falls, in consequence of the death of Stewart Smith, the last entered vassal, who died on 14th September 1884. The liability was not disputed, the question being whether the casualty ought, as pursuers contended, to be £100, the entry given as the rental in the valuation roll.

The defenders stated that the agricultural value was not more than £1 per acre, that the permanent erections were of small value, and that after deduction of feu-duty and landlord's proportion of taxes and burdens, the casualty properly due was less than £10. They stated further that "the feu is occupied by the defenders as business premises for the distillation of wood and recovery of the resulting products, and as a mill for grinding char. For use in this business there have been erected on the feu twelve iron retorts, with copper pipe connections, seven iron boilers, engine and boiler, six millstones, with gearing, and sundry other less valuable plant. The said machinery and plant possesses very considerable value compared with the heritable subjects, and this value may be stated at about £1600. None of the erections comprised in it go to enhance the permanent value of the feu. They are all temporary structures of the nature of 'trade fixtures,' which, if the subjects were let for similar business pur-

poses, would be supplied by the tenants and removed by them at the close of their tenancy. The duration of the retorts is only for six or eight years, while the boilers last but one or two years, and there is constant expense attending the upkeep and renewal of the machinery and plant, which exceeds on an average £85 per annum."

On 12th June 1885 the Lord Ordinary (KINNEAR) remitted to Mr Clinkskill, engineer, Glasgow, to "inspect the subjects mentioned in the record, and to report on the annual value or fair rent thereof, including the buildings, machinery, and plant thereon, and further to report as to the character and construction of the said machinery and plant, and of the different parts thereof, and how far and in what manner the same are attached to the ground or building, or used in connection with the same."

Mr Clinkskill valued the machinery, plant, and buildings at £1679 as a going work, and taking into consideration its position and want of good roads, was of opinion that 5 per cent. on that sum, being £83, was a fair rent, plus feu-duty and taxes.

He made a detailed inventory and valuation of the works, Nos. 1 to 5 of which inventory consisted of a brick house (used as office, weighing place, &c.), a cooling shed with flat roof and brick pillars, a "red liquor" house, a brick chimney and a "still" house. No. 6 was "Three cast iron stills, with heads, each convey the vapour into a series of copper tubes, which are in a timber cistern filled with water, and where the vapour is condensed and discharged into barrels outside. These stills rest on and are surrounded with brick work, have each a furnace below, but can be removed and replaced without disturbing the building of the house." No. 7 was thus described—"In this same still-house are two cast iron open boilers, and one small boiler of copper, each having furnaces below, and surrounded with brick work, all of which have no connection with the still-house building." "No. 8, Retort house, 8 C I ovens or retorts, 7 ft. long by 4 ft. diameter in operation, and four old ones unfit for use, 6 ft. by 3 ft. 6 diameter. The furnaces are so placed that one does for two retorts, the smoke flue is of brick carried by means of iron bars into the chimney. The products of these retorts passes through condensing pipes and is collected in barrels same as described for the stills. These retorts are often removed and replaced by others, without injury to the house property." No. 11 was thus described—"Outside in the open air—Two cast iron stills, these having timber cisterns with copper pipes, for condensing the products which are collected into barrels; there are also here two open boilers, and each of them along with the stills are surrounded with brick work, and each have furnaces below, and short brick chimneys." The reporter explained in his report—"The buildings containing the retorts and stills are of brick, and are founded on the ground in the usual manner, and one half are covered with open tiles (for the purpose, I suppose of ventilation) and the other half have the tiles pointed with lime. The brick buildings surrounding these retorts and stills, also the brick work of the furnaces, have no connection with the walls of the buildings, and in the course

of working are frequently taken down, repaired, and rebuilt—the tear and wear of these retorts and stills being very great, from the fact that being large, and cast in one piece, they break from unequal expansion. The brick work of the furnaces of these retorts and stills are sunk in the floor, but the buildings do no more than carry the roof to protect them from the weather, and are rather of a temporary class, as all buildings about a chemical work generally are.” No. 13 was an “engine and boiler shed containing an upright steam boiler, 9 feet high by 6 feet diameter, with hanging tubes. A high pressure horizontal steam engine, 12 horse power.” As to this item the report stated—“There is no building connected with this boiler, and the smoke stalk is of iron on the top of the boiler. The engine is fixed to a building, and there are the usual connections of pipes between it and the boiler.” No. 14 was—“Grinding mill of three stories, containing four pairs of Kamehill mill-stones, has a small water-wheel at end, that when there is plenty of water some of the stones can be driven by it or by steam. There is also a tackle hoist for bags—no dependence can be put on water-power, as there is too small a dam and it soon runs off.”

The Lord Ordinary on 27th November 1885 pronounced this interlocutor:—“Finds that the pursuers are entitled to a casualty equivalent to a year’s rent for the subjects with the buildings thereon, after deducting the feu-duty and public burdens with reasonable annual repairs of houses and other perishable subjects: Finds that the articles Nos. 6, 7, 8, 11, and 13 of the report are moveable, and that the same ought not to be taken into account in ascertaining the amount of the said casualty.”

Thereafter (30th December 1885) he found in terms of the declaratory conclusions, and ordained the defender to pay the pursuers £10.

“*Note.*—The grounds of judgment are sufficiently explained in the interlocutor of the 27th November. Assuming that machinery which is affixed to the soil, so as to become part of the heritable subject, must be taken into account in estimating the amount of composition, there can be no ground for including the machinery which the reporter describes as being moveable, ‘without disturbing the buildings,’ and as having ‘no connection with the buildings’ in which it is placed. It might probably have been questioned whether the machinery of the grinding mill (No. 14) described in Mr Clinksill’s second report has not been so affixed to buildings on the soil as to render it heritable, since it does not appear from the report whether it can be removed without injury to itself or the building. If it had been necessary to decide the point, some further information might have been required, but the pursuers’ counsel considered that this machinery should be dealt with as indistinguishable in character from that found to be moveable in the interlocutor of 27th November, and asked for judgment upon that footing.”

The pursuers reclaimed, and argued—The articles in question must be held as forming part of the feu. They were fixed to the soil at the time the casualty fell due, and in these circumstances the superior was entitled to include them in estimating the amount of his casualty.—*Brand’s Trustees*, March 16, 1876, 3 R. (H. of

L.) 16; *Allan’s Trustees v. Hamilton*, Jan 12, 1878, 5 R. 510; *Fisher v. Dickson*, 4 Bell’s App. 286.

Replied for defenders—In a question between landlord and tenant these articles would be held as moveable, and the case of superior and vassal was analagous. See case of *Wake v. Hall*, 1883, 8 App. Cas. 195, and *Donald v. Miller*, 1 R. 1180; it was also more equitable—*Syme v. Harvey*, 24 D. 202, and *Ferguson v. Paul*, 12 R. 1222. A casualty was now a fine on the feu exigible from time to time, and it was a burden which the Court would not willingly increase. These erections were put up not to benefit the feu, but solely for trade purposes, and never became heritable at all—*Allan v. Hamilton*, January 12, 1878, 5 R. 510; *Sivright v. Stratton Estate Company*, July 8, 1879, 6 R. 1208; Rankine on Land Ownership, 105.

At advising—

LORD PRESIDENT—This is a question between superior and vassal. The Lord Ordinary finds that “the pursuers are entitled to a casualty equivalent to a year’s rent of the subjects with the buildings thereon, after deducting the feu-duty and public burdens, with reasonable annual repairs of houses and other perishable subjects.” About that finding there is no dispute, but a question is raised by the defenders as to whether various “trade fixtures,” as they are called for shortness, form part of the heritable subjects, a year’s rent of which is to be the amount of the casualty.

The feu is occupied by the defenders, as stated in their third answer, as “business premises for the distillation of wood and recovery of the resulting products, and as a mill for grinding char. For use in this business there have been erected on the feu 12 iron retorts with copper pipe connections, 7 iron boilers, engine and boiler, 6 mill-stones with gearing, and sundry other less valuable plant. The said machinery and plant possess very considerable value compared with the heritable subjects, and this value may be stated at about £1600. None of the erections comprised in it go to enhance the permanent value of the feu. They are all temporary structures of the nature of ‘trade fixtures.’”

Now, the way that the Lord Ordinary has disposed of the question here raised is, that he finds that the articles 6, 7, 8, 11, and 13 of the report are moveable, and that the same ought not to be taken into account in ascertaining the amount of the said casualty. Now, these articles are described at length in the report—[His Lordship here quoted the description as given *supra*]. There is further a statement in the report, where the reporter says as to No. 13 (the boiler)—“There is no building connected with this boiler, and the smoke stalk is of iron on top of boiler. The engine is fixed to a building, and there are the usual connection of pipes between it and the boiler;” . . . and as to the retorts and stills—“The brick buildings surrounding these retorts and stills, also the brick work of the furnaces, have no connection with the walls of the buildings, and in the course of working are frequently taken down, repaired, and rebuilt—the tear and wear on these retorts and stills being very great from the fact that being large, and cast in one piece, they break from unequal expansion.”

Taking all these explanations of the nature of these articles into consideration, I am prepared to agree with the Lord Ordinary.

This is not a case between landlord and tenant, and therefore the cases as regards that relation are not strictly applicable. They proceed on the principle that allowance shall be made for everything falling under the denomination of trade fixtures, which, though they may be fixed in the soil, have no material connection with it, and have been brought there for the particular purpose of carrying on some trade.

Now, these articles here in question are as clearly "trade fixtures" as they could possibly be, for if they had not been brought there for the purpose of this particular trade they would never have been there at all, and had the question been one between landlord and tenant, they would undoubtedly have been removable.

The question, then, is, can we apply the same principle to the case of superior and vassal as we do to that of landlord and tenant? Now, if I knew of any other principle which it would be possible for us to apply, I should be happy to adopt it. But I know of no other principle which could be applied, and in the absence of such I am compelled to fall back on the same ground in equity on which such questions are settled between landlord and tenant; so far from being *partes soli*, these articles here in question are constantly being removed and replaced. They are perishable, but owing to their perishable nature they require to be surrounded by brick-work, which gives an appearance of permanency, which in reality these things do not possess, for the brick-work is often taken down, and new re-torts having been put in, rebuilt. In my opinion, fixtures of that kind cannot, in a question between superior and vassal, be equitably held to be *partes soli*. On that ground I am prepared to concur with the Lord Ordinary.

LORD MURRE concurred.

LORD SHAND—The point for decision in this case really comes to be this in a question between superior and vassal as to articles such as we have here to deal with, whether we are to apply the rules in relation to landlord and tenant or those applicable to heir and executor?

These articles are undoubtedly trade fixtures, and they have been put up by the tenant for the uses of his trade, and for temporary purposes only. In that state of matters the rule applicable to heir and executor which is based on intention can have no application, for it is not seriously said that in this case there was any intention on the part of the defenders to make these erections permanencies.

I am therefore of the opinion expressed by your Lordship.

LORD ADAM concurred in the opinion of the Lord President.

The Court adhered.

Counsel for Pursuers—M'Kechnie—P. Smith.
Agent—W. R. Patrick, Solicitor.

Counsel for Defenders—Low—M'Lennan.
Agent—W. J. Cullen, W.S.

Friday, July 2.

SECOND DIVISION.

SETON'S TRUSTEE *v.* SETON AND OTHERS.

Succession—Vesting—Heritable and Moveable—Conversion.

A trustor directed his trustees with regard to his heritable estate (which consisted of house property), after the death of his wife to hold it, or to sell it and divide the proceeds among his children equally, declaring that on the request of a majority of them they should not sell but convey it to them equally, and further declaring that if any of the children died without lawful issue their shares should revert to the others, and if any died leaving issue such issue should receive their parent's share. He was survived by his widow and children. The widow died predeceased by one of the children, who left issue, and after her another child died leaving issue, and another without issue. The trustees sold the heritage. *Held*, in regard to the rights to the shares of the price effecting to these children, (1) that the shares vested at the date of the death of the widow, and that therefore the share which would have fallen to the child who predeceased the widow had he survived her passed to his children equally, under the trustor's will, and the shares effecting to those who survived her had vested in them as having survived her; (2) (Lord Craighill *dissenting*) that the shares of these latter children vested in them as heritage, and passed to their heirs in heritage, the power of sale in the deed being merely discretionary, and not operating conversion.

James Seton, spirit-dealer in Aberdeen, died on 11th November 1873 possessed of moveable estate of trifling value consisting of household furniture, and heritable estate consisting of house property in Aberdeen to the value of about £1875. The latter was the subject of a security in favour of the Bon-Accord Investment Company.

He was survived by his wife and six children, James Seton, Mrs Isabella Seton or Green, Jane Seton, Mrs Ann Seton or Ewen, Mrs Margaret Seton or Sim, and John Seton. He left a trust-disposition and settlement in which he directed his trustees from the rents of his heritable property to pay up to the Investment Company the sums requisite to redeem it from the company's security; in the third purpose to hold and manage his estate during the lifetime of his wife, and divide the free yearly income after providing for the payments to the Investment Company, half to his wife while she survived, and half among his children, Margaret Seton or Sim, Isabella Seton or Pike, James, Jane, Ann, and John Seton and the survivors equally, share and share alike—the lawful children of a child dying to have the parent's share. His wife was also to have the use of his household furniture and effects. In the fourth purpose he directed his trustees as follows:—"Upon the death of my said wife taking place I direct my trustees to sell and convert into money my moveable estate and