sponsibility. They were in contract with him for the work they did and the wages they received, and with no one else. This is made even more plain by the special arrangement at the close of the contract, providing that neither party should interfere with the other's workmen. Now, the question really comes to be, under this contract, whether the persons deceased were the servants of Mr Boyd or of the company. Upon that question the jury could have no doubt. It was left to them by the presiding Judge to say whether they were satisfied that the deceased were, when they were killed, acting in the employment of Mr Boyd. It was left to them to be satisfied of this before they gave effect to the Judge's direction in point of law, that if the deceased were so acting, it could not be held that they met their death through the fault of the defenders the Oil Co. I can only say that if the contractor began to work the pit in terms of this contract, and engaged men to work the shale, they were his servants and nobody else's. He was their master, and the law admits of no doubt that an action for damages under circumstances such as these must be raised against the person who is master. The Shaws' master was Mr Boyd, and he is the only person who can be liable for the accident that happened to them. None of the cases quoted have any bearing upon the present question. Some of them indeed have at first sight rather a misleading effect. The cases of *Maclean*, and those like it, are cases which turn upon a rule of law which has nothing to do with the relations of masters and servants, but depend upon the duty of a proprietor to conterminous proprietors. The only difficulty that can there exist is, really, whether the proprietor is carrying on the operation himself, or whether it has been handed over to an independent party who is liable to conterminous proprietors for his own negligence. Another case referred to was that of *Nisbet*, where a landlord sought to recover against his tenant the expense of extinguishing a fire caused by carelessly calcining ironstone in the neighbourhood of a coal pit. It was clearly no answer for the tenant to make to his landlord that the operation of calcining was carried on by a contractor for whom he was not liable. Besides, in the contract which the tenant had made, he had a direct control of the calcining, and was entitled to fix where it was to go on. It was only through its being carried on in an improper way and at an improper place that the fire broke out. Similarly, the other cases do not bear at all upon the subject. I think, then, this is a very clear case, and that the difficulties raised have no weight in them when properly examined. I am therefore for disallowing this bill of exceptions.

The rest of the Judges concurred.

Agents for the Pursuers—Menzies & Cameron, S.S.C.

Agents for the Defenders—J. & R. D. Ross, W.S.

Tuesday, January 30.

SECOND DIVISION.

TOD'S TRS. *v.* FINLAY.

Marriage-contract—Clause.

Terms of a clause in a marriage-contract which *held* not to convey certain green-houses, iron fences, and an observatory containing a large telescope.

Heritable and Moveable.

Opinion that the greenhouse and fences were heritable, and the telescope moveable.

The questions raised by this note of suspension and interdict are fully stated by the Lord Ordinary (MACKENZIE) in a Note to his interlocutor granting the interdict:—"By the marriage-contract between the deceased Mr William Tod of Ayton, in Perthshire, and his wife Mrs Isabella Benny, Mr Tod conveyed to her 'absolutely the whole household furniture, bed and table linen, silver plate, books, pictures, prints, and other plenishing and effects, including heirship moveables, carriage and carriage-horses, and other effects, now belonging to, or that may hereafter be acquired by him, in so far as the same may form part of, or be situated or used at, in, or in any way connected with his ordinary or principal residence or establishment.'

"Mr Tod acquired the estate of Ayton in 1860, and he afterwards erected thereon, 1st, a large conservatory or greenhouse, two forcing-houses, and a vinery, with the necessary hot-water heating apparatus and other fittings; 2d, extensive iron fences in the policy grounds attached to Ayton House; and, 3d, an observatory containing a large and expensive telescope. Mr Tod died in 1867, survived by his said wife, and she married the respondent, Mr Finlay, in 1870. In virtue of the before-recited clause in the marriage-contract, Mr Finlay, as in right of his wife, maintains that he is entitled to the property of the foresaid subjects. Having advertised these subjects for sale, Mr Tod's testamentary trustees raised the present note of suspension and interdict, to prevent him from selling or in any way interfering with them.

"The question raised is, as regards one of the subjects, attended with difficulty. But having regard to the fact that the whole subjects were erected upon and annexed to his estate by Mr Tod, a fee-simple proprietor, for the more beneficial use, occupation, and enjoyment of that estate, the Lord Ordinary is of opinion that they are pertinents or accessories of the estate, and as such heritable, and therefore that they do not fall under the conveyance of moveable effects in favour of his wife, contained in her marriage-contract.

"1. As regards the large conservatory or greenhouse erected within the garden and against the garden wall, and the two forcing-houses and vinery erected outside the garden, and forming one separate and independent structure;—the Lord Ordinary has no doubt that, as in a question between the present parties, they fall under the legal maxim, *Solo inœdificatum solo cedit.*

"These erections are of the most substantial description. The conservatory or greenhouse has a polished freestone wall, about two feet high; and the other houses have brick walls varying from one foot to five feet in height, resting on stone foundations. On these walls, sides and sloping roofs of the usual construction, with the requisite glass sashes, rest. One furnace, with a close boiler, in a building situated at a short distance from the houses, heats the whole of them by means of hot-water iron pipes conducted under ground to each of them. Such houses are the ordinary pertinents of a mansion-house; and a fee-simple proprietor, erecting them in or adjacent to his garden for the cultivation of flowers, plants, and fruit requiring care and heat, makes and intends these houses to become, the Lord Ordinary thinks, as completely

pertinents of his estate as the fruit trees, bushes, and shrubs which he plants in his garden. The three elements of fixture, destination, and convenience for the use of the land, seem to him to be conclusive in favour of the complainer's right to those subjects.

"2. The Lord Ordinary is of the same opinion in regard to the iron fences. They are all of a permanent character, and necessary for the beneficial use and occupation of the policy ground surrounding the mansion-house. One set of these iron fences (coloured blue on Mr Heiton's plan) is upwards of 3000 yards in length, and separates the three avenues leading to the mansion-house from the adjoining fields. They are four feet high, with iron standard stays and straining posts, fastened by means of lead to blocks of stone, inserted below the level of the ground. Another of these iron fences (coloured red on the plan) is about 70 yards in length, and separates part of the avenue near the mansion-house from the adjoining field. It is of an ornamental character, and admits of being taken to pieces, as it is constructed in lengths of 6½ feet, which are fastened to each other with bolts and screws, and attached to the ground by double prongs 12 inches long at the end of the standards. A similar fence, but without the ornamental trellis-work of the last fence (coloured red on the plan), encloses the observatory, with the footpath leading to it and its small shrubbery, from the adjoining field. It is about 165 yards long. Some of its standards are fastened to blocks of wood, and others to blocks of stone, by means of lead. There is also another description of iron fence about 150 yards long (coloured yellow on plan) enclosing part of the policies in the immediate vicinity of the mansion-house. This is a very substantial fence, which is fastened to the ground by double prongs at the end of the iron standards, and by the sole plates of the cast-iron corner posts being secured by spikes to wooden platforms.

"The whole of these fences appear to the Lord Ordinary to be of a permanent character, and to have been erected, and to be necessary, for the beneficial use and occupation of the policies surrounding the mansion-house. If any portion of them were removed, another fence would require to be erected in its place. No doubt they could be taken down and put up elsewhere. But that may be said of an ordinary wire fence with wooden standards and straining posts driven into the ground, or of an ordinary wooden paling, or of a dry stone dyke built on the surface of the ground, or of a gate in a fence, and of many other articles which are undoubtedly heritable.

"3. The question with regard to the large telescope in the observatory is attended with difficulty. After repeated consideration, the Lord Ordinary is of opinion that it forms no part of the moveable effects of Mr Tod, but that it forms part of his estate of Ayton. The building of the observatory is undoubtedly *pars tenementi*. But the mere building does not of itself constitute an observatory. The large telescope is the most essential and expensive part of the erection. Its size required that it should be securely placed on the ground by means of a large and solid foundation of masonry, and of an iron base and base plate in one piece, of great size and weight, part of which is below the floor, and of a heavy iron pedestal, strongly bolted to the base, the whole being of the most permanent and substantial character.

"Mr Tod erected the building, base plate, base pedestal, and telescope, as a whole, for permanent use as a pertinent of his estate. The building and its contents together constitute an observatory. The telescope and pedestal could not be removed without injury to the building, except by being taken separate. Mr Heiton reports that the base plate 'could not be removed without destroying some parts of the building,' and that 'the observatory could not without very great alterations be applied to any other purpose.' The telescope was necessary and intended to adapt and complete the building for the purpose for which it was erected, and it was annexed to the soil, and destined to that purpose. It is therefore, the Lord Ordinary thinks, in a question with Mr Tod's widow, real and not personal estate.

"The Lord Ordinary has called the attention of the parties to the case, with reference to the large telescope in Short's Observatory on the Calton Hill, referred to by Professor Bell (Com. I. 753, note 2), but not reported, which was held subject to poinding. But Short can only have been tenant, under the Town Council, of the ground on the Calton Hill on which he erected his observatory, as a place of public amusement, for the purposes of profit; and if so, the telescope was truly one of the tools of his trade, and remained his property, and it did not pass to the proprietors of the soil, and was therefore moveable. That case does not, it is thought, rule the present.

"The Lord Ordinary is quite aware that the clause in the marriage-contract must receive a liberal construction; but the claim of the respondent is founded upon the general conveyance in the marriage-contract of the effects situated or used at, in, or in any way connected with Mr Tod's principal residence or establishment. These vague and general terms must, it is thought, receive, at all events to some extent, their construction from the preceding words in the clause,—household furniture, bed and table linen, silver plate, books, pictures, prints, and other plenishing, including heirship moveables, carriages and carriage horses—and if so, it is difficult to hold that Mr Tod's widow could, under such a conveyance of moveable effects, acquire right to the observatory, forcing-houses, vinery, fences, and large telescope in the observatory, constructed, fixed, and destined as they were by Mr Tod, who, during the marriage, was entitled to lay out his funds and manage his estate as he thought proper."

The respondents reclaimed.

JOHN M'LAREN for them.

GLOAG for the respondents.

At advising—

LORD JUSTICE-CLERK—I concur with the result at which the Lord Ordinary has arrived—and with most but not all of the views expressed in his note, if it were necessary to found our judgment upon them. No doubt, if these subjects are heritable in their nature, they cannot be included in the provision in the marriage-contract, which entirely relates to moveable property. But I am inclined to think that their character as heritable or moveable is immaterial, as they are not within the category of the provision. The clause in the contract of marriage is not a general assignation of moveables, but a special assignation of a limited character, and for a limited purpose. The widow is not assignee to the moveable estate, but, on the contrary, the complainers hold that character. The widow must make good her claim both against the heir and the executor, as the trustees represent both; and I am

of opinion, on the construction of this contract, that the respondent, in her right, has failed to do so.

I think the provision related solely to effects intended for domestic use and enjoyment, whether in the way of utility or of ornament, which should be attached to the principal residence of Mr Tod, and which were provided for the ease and comfort of his widow after his decease. Their proximity in point of situation was clearly not the test of the class of moveable property conveyed. If Mr Tod prospered—was the owner at his death of a landed estate—it might have been otherwise. If his house had been close to his foundry, or within 100 yards of his mill, the clause would hardly have covered the machinery in either. Nor do I think that, in the case which has occurred, it covered agricultural implements — thrashing-mill, reaping machine, or even the farm horses or dairy cows. None of the articles now in question are within the category. They are not, as moveables, articles intended for domestic use. The greenhouse and the iron fences are of use as fixtures, not as moveables. The telescope is no more a part of the establishment at Ayton than the foundry or the mill would have been. Its proximity is an accident, not an essential of its character, nor does it alter its nature that it was used for recreation by the owner, and not for profit.

In this view it is unnecessary, and indeed might be improper, to decide absolutely on the character of these articles, for that question may arise between heir and executor in this case. In regard to the greenhouse and the iron fencing, the inclination of my opinion would be with that of the Lord Ordinary, on the simple ground that they were intended for the permanent benefit of the real estate to which they were attached, and were so attached by the owner of the land; and when this element concurs with sufficient physical attachment to keep the articles permanently in their place, they become accessories to the land—*solo cedunt.* The telescope is a much more difficult question, for there the building was the accessory, and the fixture was for the better use of the moveable article so affixed. If this question had occurred purely between heir and executor by devolution of law, there might be grounds for holding that the telescope's character as moveable property was not changed by its temporary resting-place.

The other Judges concurred.

Agents for Complainers — Ronald & Ritchie, S.S.C.

Agents for Respondent — Andrew & Wilson, W.S.

Saturday, January 27.

SPECIAL CASE—SCOTT *v.* GORDON.

Trust—Entail—Fee—Mansion-house.

A truster directed his trustees, in the event of the marriage of his son, to entail certain lands in favour of the heirs of his son, &c. He further directed that his widow should have the right to occupy the mansion-house of the estate ordered to be entailed "so long as my said son continues unmarried." The son died without being married, and a substitute heir of entail succeeded to the estate, and became entitled to have it entailed in his favour, under the truster's destination. *Held,* in a question with the succeeding heir and the truster's widow, that the intention of the truster was that the widow's right to the mansion-house should terminate when the fee of the estate was full, and that the death of the son evacuated her right.

This was a question between Mrs Scott of Gala and Mrs Gordon, widow of the late Mr Francis Gordon of Kincardine Lodge, and came before the Court in the form of a Special Case. Mr Gordon died in 1857, leaving a trust-disposition and settlement, dated in 1851, to which there were six subsequent codicils annexed. By this deed he provided that his trustees should entail the lands of Kincardine in favour of the eldest son of his son, and his heirs in the event of the son marrying and having a family. There were a number of substitutions in the event of the son failing, and, among others, Mrs Scott of Gala, who is a granddaughter of the truster, was called to the succession. By the sixth purpose of the deed Mr Gordon left his widow his house in Golden Square, Aberdeen, and by one of the codicils he gave her a liferent of the furniture of the house in Kincardine Lodge. The deed further provided as follows:—"It is my will and desire that my dear wife should occupy the house, offices, and garden at Kincardine Lodge, with such farm as my trustees may deem proper, *and that so long as my said son continues unmarried;* but if at any time it should appear a desirable arrangement that my said son, though unmarried, should reside at Kincardine Lodge, it is my wish, but only if my spouse approves of such arrangement, that she and my son should occupy together the said house, offices, and garden; if my said son should marry with approbation, as aforesaid, he shall then be entitled to the sole possession of the said house, offices, and garden at Kincardine Lodge." The question put in the Special Case turns on the construction of this clause.

Mr Gordon was survived by his widow, a daughter, who married, but who is now dead, and a son, who died last year, unmarried. The event has thus occurred which required the trustees to entail the lands of Kincardine in favour of Mrs Scott of Gala, the eldest daughter of the truster's daughter, and she raised the question whether she is not entitled to succeed to the mansion-house, offices, and garden, &c., as well as to the lands directed to be entailed.

For Mrs Scott it was contended that the truster only intended to give his widow a limited right to the mansion-house, viz., "so long as my said son continues *unmarried;*" and that event being no longer possible, the widow's right was now defeated. The provision of the trust-deed, that the trustees should entail the lands when the son married and succeeded, evidently showed the truster's intention that the person succeeding under the destination should have the lands and the mansion-house, &c., together.

On the other hand, it was argued by Mrs Gordon that the conveyance to the widow of the mansion-house was truly a liferent, and that the truster intended to defeat her right only in the event of his son marrying. That event could not now occur, and therefore the widow had a right of occupation, which was only defeasible on her death. If the truster had intended that his granddaughter when succeeding to the lands should deprive the widow of the mansion-house, as well as the son, he would have expressly provided so. There was no authority in the deed for equipareting the death of the son to his marriage.