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 removeable.

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 brickwork, which gives an appearance of permanency, which in reality these things do not possess, for the brick-work is often taken down, and new retorts 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 Mure 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 truster 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 effeiring 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 truster's will, and the shares effeiring 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 £1375. 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

effects, and divide the free balance or proceeds thereof among my said children, share and share alike: Further, I direct my trustees, after the death of my wife, to divide the whole free revenue of my estates among my said children equally, and after the time of paying off the Bon-Accord Property Investment Company shall have expired, I authorise my trustees either to hold and manage my heritable estate and divide the revenue thereof as aforesaid or to sell the same, and that either in whole or in lots, and by public roup or private bargain as they may think proper; and, if sold, the price or prices to be divided among my children equally as aforesaid, or to convey the property, or any part thereof, to and among my said children equally as aforesaid; Declaring that if a majority of my children alive at the time request it, my trustees shall not sell the heritable property, but shall convey it to and among my children, or their issue as aforesaid: But declaring always, as it is hereby expressly provided and declared, that if any of my said children shall die without leaving lawful issue, the share which would have fallen to such one if alive shall revert to and be part of my estate, principal or revenue, divisible among the others; and that if any of my children shall die leaving lawful issue, such issue shall be entitled to, and shall receive at the hands of my trustees, the share or portion, both of principal and revenue, which the parent, my child so dying, would have received if alive; and if there shall be more than one of such issue, the same shall be divided among them equally, share and share alike."

In November 1879 John Seton died survived by four children. The widow died in December 1882. Jane Seton died in September 1883 unmarried and without issue. Mrs Margaret Seton or Sim died in October 1884 survived by one son and two daughters. All these children of the truster died intestate.

The trustees realised the moveable estate of the deceased truster and administered it under the direction of the settlement. By the term of Martinmas 1879 the trustees had, from the rents of the heritable property, completed the payment to the Bon-Accord Investment Company of the sums requisite for redeeming the said property from their security, as directed by the second purpose of the trust. Thereafter the free rents were, in terms of the third purpose of the trust, divided and paid, one-half to the widow during her survivance, and the other half equally among the truster's children (the children of John Seton taking his share after his death). After the widow's death the free rents were, in terms of the fourth purpose, divided equally among the children, the issue of those deceasing taking their parent's share; but the share of the truster's daughter Jane, who died unmarried, was set aside for payment of her debts, and for the person or persons who might be found entitled to succeed to her.

The beneficiaries not having desired that the heritable property should longer be retained in trust, or that it should be conveyed to them in terms of the option conferred on a majority of them by the fourth purpose of the trust, the trustees sold it by public roup at the price of £1375, which sum, after deducting the necessary expenses, formed the balance of the trust-estate for division in this Special Case, which was presented to the Court in order to settle questions which arose with regard to the legal rights in the shares of the said price effeiring to the truster's son John, and to his two daughters Jane Seton and Mrs Margaret Seton or Sim.

David Sheach, the sole surviving trustee, under the settlement was first party; (1) Isabella Seton or Green, (2) Ann Seton or Ewen, (3) the female children of Margaret Seton or Sim, and (4) the factor *loco tutoris* for John Seton's younger children were second parties; John Seton's eldest son, who was also heir-at-law both to him, John, and to Jane was (through his factor *loco tutoris*) third party; and Margaret's only son and heir-at-law was fourth party.

The parties of the second part maintained (1) that the share of the fee which fell to Jane reverted, under the fourth purpose of the trust, to and became part of the estate divisible among the other children and grandchildren of the truster; and (2) that the share of the liferent which was set free by Jane's death fell to be similarly dealt with under the third purpose of the trust; and (3) that each of the shares of John Seton and Margaret Seton or Sim fell to be divided equally among his and her issue respectively. They further maintained that, looking to the terms of the settlement, and to the fact that actual conversion of the estate into moveables had taken place, the succession thereto was to be regarded as moveable (irrespective of the term of vesting), and fell to be divided accordingly.

On the other hand, the parties of the third and fourth parts maintained (1) that the shares of said children Jane, John, and Margaret vested *a morte testatoris*, and that in any event the shares of Jane and Margaret vested in them at the death of the widow; (2) that the succession in question was heritable and not affected by the deed; and (3) that therefore they were entitled to succeed to the shares which would have fallen to John and Margaret respectively; the party of the third part, as eldest son of Jane's youngest brother, also succeeding to her share as her heir-at-law.

The questions of law for opinion of the Court were—"(1) Whether the share of succession effeiring to John vested *a morte testatoris?* (2) Whether the shares of succession effeiring to Jane and to Mrs Sim [Margaret] vested in them before their death? (3) Whether the foresaid succession falls to the heirs *in mobilibus*, or to the third and fourth parties as heirs-at-law of the said John and Jane Seton and Mrs Sim respectively?"

The second parties argued—(1) The terms of the deed were against the presumption of vesting *a morte testatoris*. Vesting was postponed till the date of the sale enjoined by the truster. (2) The shares fell to be regarded as moveable, and the succession to them transmitted to the heirs *in mobilibus* in respect of the direction to sell which operated conversion. The qualification entitling the children to get back the heritage if they decided by a majority to request it, was only what the law always allowed—*Paterson's Trustees* v. *Paterson*, Jan. 29, 1870, 8 Macph. 449; *Nairn's Trustees* v. *Melville*, Nov. 10, 1877, 5 R. 128; *Baird, &c.* v. *Watson*, Dec. 8, 1880, 8 R.

233; *Sheppard's Trustees* v. *Sheppard, &c.*, July 2, 1885, 12 R. 1193; *Mackenzie* v. *Mackenzie*, February 14, 1868, 6 Macph. 375. The clause had the effect of operating conversion, because the power of converting the property was made subject to the demand of the children, and the obvious intention was that unless the children asked for the estate *in forma specifica* there should be conversion — *Bryson's Trustees* v. *Clark, &c.*, Nov. 26, 1880, 8 R. 142; *Howat's Trustees* v. *Howat, &c.*, Dec. 17, 1869, 8 Macph. 337.

The third and fourth parties argued - (1) The shares vested from the date of the death of the widow; and (2) were heritable, and passed to them as heirs-at-law of the children. A mere discretionary power of sale in a trust-deed which had not been exercised could not operate conversion—*Sheppard's Trustees, supra.*

At advising—

Lord Young—Most cases of vesting and conversion are perplexing, and this is of that nature. The truster here was the proprietor of furniture which formed the whole of his personal estate, and in regard to it he in the 4th purpose of his trust-deed directs his trustees with respect to its disposal after the death of his wife, who is to have the liferent use of it, 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 effects, and divide the free balance or proceeds thereof among my said children, share and share alike." There afterwards occurs a clause directing that if any child die leaving lawful issue, such issue shall be entitled to the share which the parent would have received if alive. It is clear therefore with regard to his personal estate, that it is to vest in the children on the death of their liferenting mother, and in the event of any of the children dying thereafter and leaving issue their share is to pass to such issue. But with respect to heritage the conditions are more difficult. The truster was proprietor of house property in Aberdeen to the value of over £1300, and it was pledged to the Bon Accord Property Investment Co., and his trustees were directed to hold it till the company were paid off. There is also a direction with regard to the whole revenue, after the company is paid off, to pay the surplus to the wife during her life; and then comes the direction with respect to the wife's death—"Further, I direct my trustees, after the death of my wife, to divide the whole free revenue of my estates among my said children equally, and after the time of paying off the Bon Accord Property Investment Co. shall have expired, I authorise my trustees to hold and manage my heritable estate, and divide the revenue thereof as aforesaid, or to sell the same, and that either in whole or in lots, and by public roup or private bargain, as they may think proper; and if sold, the price or prices to be divided among my children equally as aforesaid, or to convey the property, or any part thereof, to and among my said children equally as aforesaid; declaring that if a majority of my children alive at the time request it, my trustees shall not sell the heritable property, but shall convey it to and among my children or their issue as aforesaid." I do not read at length the clause of survivorship. In it the shares of the children dying without issue are to be divided among the others. This means the survivors of the liferenting widow, and the predeceasing clause must be taken with reference to the predecease of the widow. Now it is doubtless peculiar. The trustees are authorised to sell and divide, or to convey the property to his children, but power is given to them, if required to do so by a majority of the children, not to sell but to divide the property among them. There was in point of fact only house property in Aberdeen, but the deed would have been quite applicable to large landed estate if the truster had possessed it. Now, on the question of vesting I must come to the conclusion, though I see some difficulty, that the fee vested on the death of the liferenting widow. It would have vested *a morte testatoris* but for the clause of survivorship; but with reference to it and the period referred to in it, I think vesting is not *a morte testatoris* but *a morte* of the widow. Then with respect to conversion. The estate which he leaves is real estate, and the succession to it of those who come to have right to it is to be taken as a succession to heritage. The question with reference to which conversion is interesting is the succession of his, the truster's, successors. A child of his who is his successor survived the widow and died, and the question is as regards the succession to that child, and it depends on whether the child died with a vested right to the heritable or personal estate. But it was heritage which the truster left, and whatever vested interest a child of his surviving the widow and afterwards dying had vested in him was a share of heritage, and that vested interest would pass to the child's heir in heritage. It might have been otherwise, for the heritage might have been converted by the truster into personal estate before his death, and then the right of the children succeeding him would have been a right to personal estate, and would have been passed on their deaths to their heirs *in mobilibus*. If there had been a sale this would have taken place. But as it happens it had never been converted into money, and might never have been. Therefore on the whole matter I come to the conclusion that there was no conversion here, and that the estate, small as it is, must with reference to the succession of Jane and Margaret, be taken as a vested interest in heritable property. That being so, it would pass to the heirs in heritage. I can make no distinction because the property is only house property. I therefore am of opinion that the vesting took place as from the death of the liferenting widow, and that there was no conversion, and consequently that the right and interest of the predeceasing child must be regarded as one in heritable estate passing to heirs in heritage.

Lord Craighill—I find great difficulty here, because according to my view it was the truster's intention that if the estate was sold by the trustees that the whole proceeds should be distributed among his children, and in that view it was moveable succession. It appears to me that the testator did not intend that a part of his family who might happen to predecease the period of sale, was to get a different kind of estate from another part of his family who might happen to survive it. All were to get the same, whether heritable or moveable. It is almost impossible, I think, to

conceive that the testator intended anything but this. The trustees sold the estate, and therefore the result is what the truster intended, that the whole proceeds should be equally divided among his children, and that there was conversion. There was a power of sale that there might be a distribution for the benefit of his children. I know of no case countenancing the idea of distribution of heritage to some of the children and moveable to others. No doubt Lord Neaves and Lord Benholme in the case of *Mackenzie* v. *Mackenzie* made it a ground of judgment that conversion only took place at the actual time of sale, but as yet there has been no decision countenancing such a result as I have just indicated, and I must therefore hold that there was conversion.

Lord Rutherfurd Clark—I agree with Lord Young. I think the first question to be determined is when vesting took place. I am of opinion that the shares vested on the death of the widow. There is a plausible argument that vesting was postponed till the date of the distribution of the estate. But that is a date of vesting which is assigned only in exceptional circumstances, and I think we have here nothing to postpone vesting.

Then comes the question, What kind of share vested in each of the children? Was it a heritable or was it a moveable *jus crediti*. We must consider whether the trust-deed by itself operated conversion. After the decision in the case of *Sheppard's Trustees* v. *Sheppard*, which was decided to prevent questions of this kind arising in the future, I cannot doubt but that the trust-deed containing a mere power to sell did not operate conversion. But conversion might be effected by a sale, and then I think conversion will occur at the date of the sale. I concur in the views stated by Lord Neaves and Lord Benholme in the case of *Mackenzie* v. *Mackenzie*. I do not see how the term of conversion can be drawn back to an earlier date than the sale. I am of opinion that when Jane and Margaret died, they died vested in a heritable *jus crediti*, which transmitted to their heirs in heritage.

Lord Justice-Clerk—I am constrained to agree with Lord Young, for I see no other extrication of this difficult question. As a general rule it has always seemed to me that conversion is not to be presumed in the sale of property like this. It could hardly happen that where the truster clearly intended his children should share equally in his fortune, that he should intend that his heir in heritage, *i.e.*, his eldest son, should succeed to his parent's share to the exclusion of the others. I do not know any case in which it is not obvious that the intention of the testator was exactly the reverse, and that he did not make it quite clear that his view and expectation was that there was to be an equal division. But the law has said that where a mixed succession is left to the trustees with a power of sale, that unless that sale be indispensable to the execution of the trust, the heritable estate will remain heritable and not be held to be converted. Therefore if in the ordinary case there is a provision that in the event of one of the beneficiaries dying his children shall succeed, the children so succeeding succeed to heritable property, and therefore the eldest son, who is heir in heritage, excludes all the rest. That has been the course of decision. As I have said in the discussion, there were several judgments in this Division in which we held that the notion of the division *in forma specifica* of tenements in a town could not have entered into the head of the testator, nor could be assumed to have been his intention. But decision has run on the other groove, and now *Sheppard's Trustees* has decided that where the exercise of a discretionary power of sale conferred on the trustees is not indispensable to the execution of the trust, and has not been executed, there is no conversion. This is a very special case. The trustees had power to hold the estate *in forma specifica*, and only sold it when the children did not by a majority request a conveyance of it, as contemplated by the truster. The truster did undoubtedly contemplate the possibility of its being sold. The question is, was there conversion and when? I am of opinion that there was no conversion before the estate was sold, and I agree, as I have said, with the result at which Lord Young has arrived.

The Court found "(1) with reference to the first of the questions, that no right to a share of the heritable estate of the testator vested in any of his children till the death of his widow, and that the share that would have fallen to his son John if he had survived her, passed to his children equally in terms of the fourth purpose of the testator's settlement; (2) with reference to the second question, they are of opinion that the share of said succession effeiring to Jane Seton and Mrs Sim vested in them as having survived their mother; and (3) that their shares of said succession fell to their heirs-at-law respectively."

Counsel for Second Parties—M'Lennan. Agents—Philip, Laing, & Trail, S.S.C.

Counsel for Third and Fourth Parties—Shaw. Agent—R. C. Gray, S.S.C.

Saturday, July 3.

FIRST DIVISION.

STEWART *v.* STEWART.

Husband and Wife—Aliment—Restriction of Aliment—Remit to Accountant to Inquire into Petitioner's Circumstances.

In an application by a husband to restrict the amount of aliment found due to his wife under a decree of separation *a mensâ et thoro* and for aliment, the Court, on the petitioner's averment that he had become unable to pay the sum decerned for, *remitted* to an accountant to inquire into the petitioner's circumstances.

On 8th January 1884 Mrs Jane M'Cubbin or Stewart raised an action against her husband, Thomas Stewart, hatter in Glasgow, concluding for decree of separation *a mensâ et thoro*, and for payment of a yearly aliment of £300.

Decree of separation *a mensâ et thoro* was subsequently pronounced by the Lord Ordinary, whose judgment was affirmed by the Second Division, the amount of aliment being by