statute stipulates. Although not necessary to the decision of the case, I may say that, in my opinion, the plea of incompetency urged by the defenders is not well founded. *Hogg* [June 22, 1880], 7 R. 986."

The pursuers reclaimed, and argued—The question was, whether the true position of the defenders was not that of occupants? There was something more here than mere running powers. This was shown (1) by the objects for which the line was made as shown by the clause in the Act; and (2) the fact that the defenders had had exclusive use of the line so made. The position of the defenders was that of occupant, and they should be taxed as such—*Simpson* v. *Dennison*, 10 Hare's Chan. Rep. 51.

Counsel for the defenders were not called upon.

At advising—

Lord President—The proposition upon which the case of the pursuers depends is that the defenders are and have since 1866 been the occupiers of the line of railway laid down by the pursuers in terms of and pursuant to the provisions of sec. 30 of the Strathspey Extension Act 1865.

Now, this question depends entirely upon the construction of the 30th section of this Act, which in the first place provides for the use by the defenders of a piece of railway which was to be constructed by the pursuers, and also for the use by the defenders of the station premises at Boat of Garten. It is accordingly stipulated at the beginning of the section that the pursuers were, upon application made to them by the defenders, to lay down an additional line of railway upon so much of their line as would be situated between the authorised line and the Boat of Garten Station, and to erect all such works as were necessary for the use of the said additional line. The provision for payment for all this is thus expressed—"The company (*i.e.*, the defenders) . . . shall pay to the Highland Company £7 per centum per annum upon the outlay incurred by that company up to that date in constructing the necessary works for and in laying down such additional rails." . . Now, this is clearly a stipulation for the payment of a permanent annuity for the use of this additional piece of railway which is to be laid down by the Highland Company.

But the clause goes on to provide—"The company shall pay to the Highland Company, in respect of the use of that company's Boat of Garten station, and the works and conveniences connected therewith, such rent and such proportion of the salaries of the officers and servants required to work the traffic of that station, and of the cost of maintaining the station buildings, as failing agreement shall be settled by arbitration in manner hereinafter provided. The said additional line of rails and other works shall be the exclusive property of the Highland Company, and may be used by them for the general purposes of their undertaking, provided always that it shall be lawful for the company, but subject always to the bye-laws and regulations of the Highland Company, to run over and to use with their engines, carriages, and servants, and for the purposes of their traffic of all kinds, the said additional line of rails and the conveniences connected therewith at the said Boat of Garten station upon payment of the sums of money hereinbefore expressed, and the company shall be entitled to charge and receive tolls for and in respect of all traffic passing over the said additional line of rails."

Then follow certain provisions relative to the accommodation to be provided by the Highland Company at the Boat of Garten station, after which the clause proceeds as follows—"If and when the Highland Company shall double its line of railway between the said Boat of Garten station and Grantown, such an alteration shall be made in the terms of payment on which so much of the said railway as is situate between the point of junction therewith of the railway hereby authorised and the Boat of Garten station shall be used by the company, as shall be agreed between the companies, or as failing agreement shall be determined by arbitration in the manner hereinafter provided."

Now, taken together, the clauses just come to this, that in respect of this piece of line laid by the Highland Company the defenders are to have running powers over it, but subject to the regulations of the Highland Company, while as regards the station at Boat of Garten, the right of the defenders to it is a right of occupancy in respect of which rent is to be paid. That being the view I take of the case, I think the Lord Ordinary is right, and that the section can bear no other construction than the one he has put on it. There is in the one case a right of occupancy, and in the other a right of running powers with the extra right to charge tolls on the portion of the line on which they (the defenders) have these running powers.

On these grounds I think the judgment of the Lord Ordinary is right.

Lords Mure, Shand, and Adam concurred.

The Court adhered.

Counsel for Pursuers—Strachan—Low. Agent—J. K. Lindsay, S.S.C.

Counsel for Defenders—Comrie Thomson—Ferguson. Agents—Gordon, Pringle, & Dallas, W.S.

Thursday, July 1.

FIRST DIVISION.

THE GLASGOW GENERAL EDUCATIONAL ENDOWMENTS BOARD *v.* THE MINISTER AND MANAGERS OF ST COLUMBA GAELIC CHURCH AND OTHERS.

Trust—Endowment—Educational Endowments (Scotland) Act 1882—*Scheme for Educational Endowments—Powers of Governing Body Constituted by Scheme.*

A scheme framed by the Commissioners under the Educational Endowment Act 1882 for the management of sundry educational endowments in Glasgow provided that the governing body "shall apply" a certain part of income in paying the fees at elementary schools of "children whose parents or guardians, not being in receipt of parochial

relief, are in such circumstances as to require aid in providing elementary education, and are persons who in the opinion of the governors ought not to be required to apply to the parochial board for such aid." An endowment under a will which provided for the elementary education of the children of poor Highlanders residing in or near Glasgow was one of the endowments included under the scheme, which went on to provide that in selecting beneficiaries the governing body "may expend £150 of the annual sum to be spent under this section specially for behoof of the children of poor Highlanders, and in selecting them shall have regard to the recommendation of the minister and managers of St Columba Gaelic Church." *Held* that this latter provision was not compulsory on the governing body, but that the spending £150 on the children of poor Highlanders was in their option and discretion only, and further, on a construction of the scheme, that they were not prohibited from applying more than one-third of said sum for behoof of children under a specified age.

Under the Educational Endowments (Scotland) Act 1882 a scheme relating to certain endowments in Glasgow, and approved by Her Majesty in Council, was promulgated by the Commissioners appointed under the Act, including MacLachlan's School and Graham's School, mentioned *infra*. The scheme, *inter alia*, constituted a new governing body called the Glasgow General Educational Endowments Board.

This was a Special Case, to which this governing body were the parties of the first part, asking the opinion and judgment of the Court upon certain difficulties raised by the construction of section 26 of the scheme.

Prior to the framing of the scheme the trustees of a Mr MacLachlan had carried on a MacLachlan Free School for the children of poor Highlanders under the will of Mr MacLachlan, who died in 1822, and who provided by his will for providing an English education for the sons and daughters of poor Highlanders residing in and near Glasgow.

Another body, the Graham trustees, had carried out the trust of Mrs J. Graham or Lindsay (who left money for the endowment of a free school in Glasgow for the benefit of poor children of members of a certain congregation) by paying the fees of the children they selected for the benefit of it at the more suitable public schools.

The 26th section of the scheme was:—"The governors shall apply a yearly sum, not exceeding one-third of the free income of the board, in paying, in whole or in part as they may think fit, the fees of scholars, with books and stationery, at public or State-aided schools in Glasgow for elementary education as defined in the Educational Endowments (Scotland) Act 1882. The free scholars shall be children whose parents or guardians, not being in receipt of parochial relief, are in such circumstances as to require aid for providing elementary education, and are persons who in the opinion of the governors ought not to be required to apply to the parochial board for such aid. In the case of children under ten years of age, the selection of free scholars shall be made with due regard to merit as ascertained by such examination, suited to the age of the candidates, as the governors may from time to time prescribe; or in the case of children for whom some such examination is unsuitable, by evidence that the children possess such qualifications as to justify their selection; and in the case of children who have been in attendance at school during one or more school years, the governors shall, in making their selection, give special weight to good conduct, attendance, and progress at school during the previous year. The fees in respect of children under ten years of age shall not be paid for more than one school year without re-appointment, and the amount to be expended in paying fees for such children shall not exceed one-third of the amount to be applied under this section. In the case of children of ten years of age and upwards, the free scholars shall be selected by competitive examinations, which shall be open to all of the same age who are eligible in terms hereof, whether they have or have not previously been beneficiaries; and for such children the school fees may continue to be paid for such period not exceeding three years as the governors may determine. If any scholar gain a school bursary his school fees shall no longer be paid under this section. The governors, at the end of every school year, shall obtain from the teacher or teachers a special report as to the conduct, regularity of attendance, and progress of all scholars whose school fees are paid in whole or in part under this section, and the fees of no scholar shall continue to be paid in regard to whom such report is not satisfactory. In making their selection of beneficiaries under this section the governors may expend £150 of the annual sum to be spent under this section specially for behoof of the children of poor Highlanders, and in selecting them shall have regard to the recommendation of the minister and managers of St Columba's Gaelic Church. They shall also have regard to the recommendation of children by the directors of the Graham Charitable Society, and by the minister or ministers of the Sydney Place United Presbyterian Church, and may expend a yearly sum of £150 of the annual sum to be spent under this section specially for behoof of such children."

The minister and managers of St Columba Gaelic Church, Glasgow, who were interested in the MacLachlan Free School, and the directors of the Graham Charitable Institution, and the ministerof Sydney Place U.P. Church, Glasgow, who were interested in the Graham School, were the parties of the second part.

The first parties maintained that the provisions of the last paragraph of section 26 were permissive merely, and not compulsory; and that there was no obligation on them, unless they thought fit, to spend the two sums of £150 for behoof of children recommended by the second parties. They further maintained that if they did expend such sums, or any part thereof, for behoof of such children (and that whether their former contention were right or not), they were not entitled to apply more than one-third of the sums so expended for behoof of children under ten years of age, in respect of the proviso at the end of the second paragraph of section 26.

The second parties maintained that the provisions of the last paragraph of section 26 were compulsory, and that the governors must expend

£150 annually for behoof of the children of poor Highlanders, provided a sufficient number comes forward duly recommended, in terms of this section. The second parties further maintained that the governors must expend £150 annually for behoof of children recommended by the directors of the Graham Charitable Society, and by the minister or ministers of the Sydney Place United Presbyterian Church, provided a sufficient number comes forward duly recommended. The second parties further maintained that these sums fell to be paid out of the first of the fund under section 26, and to be expended irrespective altogether of the provision at the end of the second paragraph of section 26; and they also maintained that no part of each several sum of £150 annually should be applied to any other purpose than as in this article contended for, unless it should happen that the number of recommended children was not sufficient to exhaust the said respective sums or either of them.

The sum which the first parties calculated would be available for the total purposes of the 26th section amounted to about £833, 6s. 6d. yearly.

The following questions were submitted to the Court:—"(1) Are the first parties bound to spend two sums of £150 each on the children to be designated by the second parties; or is it in the option and discretion of the first parties whether to spend these sums or any part of them? (2) In the event of any sum being expended for behoof of children recommended by the second parties, are the first parties prohibited from applying more than one-third of such sum for behoof of children under ten years of age? (3) If the second question is answered in the negative, then are the sums so applied for behoof of the nominated children under ten to be paid out of the first of the fund under section 26, and not to be reckoned in computing the third, to which the total expenditure for children under ten is limited under the section?"

At advising—

Lord President—I cannot say that I have any doubt whatever as to the construction of this 26th section. Its leading provision is that the board is not to spend more than one-third of their free income, viz., £833, 6s. 6d.—I think that is the exact sum—in free elementary education, and of this amount not more than one-third is to be devoted to children under ten years of age. This direction is imperative, and the children who are to be thus benefited are those answering the description in paragraph 1 of this section—namely, "children whose parents or guardians, not being in receipt of parochial relief, are in such circumstances as to require aid for providing elementary education, and are persons who in the opinion of the governors ought not to be required to apply to the parochial board for such aid."

Now, whether the children who are to receive aid are to be under the age of ten or not, yet they must all answer to the description which I have just read.

Children under ten are not to be obliged to undergo any competitive examination, while those over ten are to be thus tested, and the most successful are to be selected; but the important provisions as to both classes is that they must comply with the requirements in the first paragraph of this section.

I next turn to the clause under construction, which provides that "In making their selection of beneficiaries (under this section) the governors may expend £150 of the annual sum to be spent under this section specially for behoof of the children of poor Highlanders, and in selecting them shall have regard to the recommendation of the minister and managers of St Columba's Gaelic Church."

But the children of poor Highlanders are not in any way exempted from the qualification in the first paragraph of this section, for the £150 which the governors are empowered to expend is just a part of the £833. There is no preference in favour of poor Highlanders; all that is provided here is that the governors may listen to suggestions from the minister and managers of St Columba's Gaelic Church. And the same remark applies to the Graham bequest with which the remainder of this paragraph is taken up.

Now, there are three questions put in this Special Case, the first of which comes to this, whether the governors are bound to spend the whole £150 if a sufficient number of poor Highlanders are recommended to exhaust the whole sum, or whether the matter is left to the discretion of the governors? Now, it is to be observed that the provisions of this clause of the 26th section are permissive merely, and they are to be carried out only if they are deemed to be wise in the administration of this charity. It would, indeed, be an extraordinary thing if the governors were to be held to be tied down to take the children of poor Highlanders whether they were otherwise qualified or not. As to the first question, then, I am for answering it in the negative.

Now the second is in these terms—[*His Lordship here read the question*]—that is to say, are the governors to be prohibited from applying more than one-third of such sum for behoof of children under ten?

I can see no such prohibition; the only prohibition is that one-third of the £833 is to be so applied, and in selecting the children of poor Highlanders, if more than one-third be selected then a fewer number of the children of the same age must be taken.

The third question is, I think, a kind of puzzle—[*His Lordship here read it*]. I take it to mean this—May you have such a number of children under ten years of age, selected under the provisions of the last paragraph, as will along with other children under ten amount to more than one-third? To that question I answer decidedly, No.

Lords Mure, Adam, and Shand concurred.

The Court pronounced this interlocutor:—

"Find and declare that the first parties may in their discretion expend the two sums of £150 in the 26th section of the scheme mentioned, or any part thereof, on the recommendation of the second parties, but that they are under no obligation to do so: Find and declare that the first parties are not prohibited from applying more than one-third of the said sums for behoof of children under ten years of age, provided that the

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 TANNOCH 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), Cumbernauld, 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 purposes, 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