reasonable, and indeed is contrary to sound principles of international law.

In my opinion the German or Saxon sequestration did in this case embrace and attach all the personal property of these debtors. We are bound, on principles of international law, to recognise it, and to give it effect, and we are therefore bound to refuse to interpose by a second sequestration.

The opinion which we have from the learned German Jurist, Dr Endemann, is interesting, instructive, and important, and his exposition of the universality of the attachment by sequestration of the whole personal estate of the bankrupt, according to the principles of international law, is very valuable.

The opinion which your Lordship has now expressed is in entire accordance with the German law and the international law explained in the opinion of Professor Endemann, and is equally in accordance with the law authoritatively settled by the Scottish decisions to which I have already referred.

I concur so entirely in your Lordship's opinion and observations that I shall not add another word.

LORD MURE concurred.

The Court pronounced the following interlocutor:—

"The Lords having resumed consideration of the cause, and heard counsel on the Reclaiming Note for the Petitioners against Lord Shand's interlocutor, dated 4th February 1874, with the Minute of Objections for Aders, Preyer, & Company, and Answers thereto for the Petitioners, Nos. 15 and 16 of process, and also the case for the opinion of German counsel, and the opinion thereon by Professor Doctor Endemann, Nos. 18 and 21 of process—No. 19 of process being a translation of the said opinion,—Adhere to the said interlocutor; find the said Aders, Preyer, & Company entitled to expenses since the date of the Lord Ordinary's interlocutor reclaimed against; allow an account thereof to be given in, and remit the same, when lodged, to the Auditor to tax, and report."

Counsel for Petitioners—Solicitor-General (Watson) and Trayner. Agents—Ronald, Ritchie, & Ellis, W.S.

Counsel for Respondents—Dean of Faculty (Clark) and Balfour. Agents—Frasers, Stodart, & Mackenzie, W.S.

Saturday, December 19.

SECOND DIVISION.

[Lord Shand, Ordinary.

BRAND'S TRS. *v.* BRAND.

Succession—Heritable and Moveable—Lease of Minerals—Fixtures—Heir and Executor.

A tenant of minerals under a lease of nineteen years erected upon the land fixed machinery for working the minerals; during the currency of the lease the tenant died—*held*, in a question between the heir-at-law and the executor, that the machinery belonged to the executor and not to the heir.

Opinion per Lord Gifford—That even had the fixed machinery been held to be heritable in a question as to the tenant's intestate succession, yet, not being a subject heritable *sua natura*, but merely *destinatione*, it was effectually carried by the trust-disposition of a minor.

The pursuers, the trustees of Mr Brand senior, set forth in their condescendence the following facts:—Robert Brand, coal master, Wishaw, died on 26th January 1873, leaving a trust-disposition and settlement dated 7th January, by which he left his whole means and estate to the pursuers as trustees and executors in trust. The purposes of the trust were, in the first place, after payment of all the truster's just and lawful debts, sick bed and funeral expenses, and the expenses of executing the trust, to make payment to the defender Mrs Catherine M'Neil or Brand, his mother, of an annuity of £15 sterling, free from all deductions; as also to provide her during her life with a house of one apartment, and to pay the rent and taxes thereof; In the second place, to provide the defender Isabella Cross or Dunn with a house of one apartment, and pay the rent or taxes thereof during the whole of her life should she always remain a widow. The third purpose was to invest £2000 on heritable security or on such other security approved of by the pursuers, and to pay the interest to the defender Jessie Robertson or Brand, the truster's wife, in the event of her surviving him, for her own support, and also to allow her to occupy, free of rent, either of one of two dwelling-houses belonging to the truster. But declaring that, in the event of her entering into another marriage, the provision in her favour should immediately cease, and in place thereof the pursuers were to pay to her the sum of £500 sterling, either on the date of her other marriage, or within three months thereafter, as they might think most expedient. The fourth purpose was that the pursuers should manage and preserve the residue and remainder of the truster's estate, heritable and moveable, thereby conveyed, for the use and behoof of his only son Robert Brand, until he attained majority, and until that period the truster appointed the pursuers to pay and apply the rents, interests, and annual profits, or so much thereof as they might consider necessary for and towards his maintenance and education, when and so long as in the opinion of the pursuers might be deemed expedient. In the fifth place, the pursuers, after the second marriage or death of his wife, were to pay and apply the interest or other annual income to be derived from the sum of £2000 sterling, to be invested for the purpose of providing a yearly income for his wife, or from the portion of the £2000 which might remain after payment to his wife of the £500 before provided, or so much thereof as his trustees might consider necessary towards the maintenance and support of his son Robert; declaring that it should be in the power of the pursuers at any time during the minority of his son to make advances for placing him out in any profession or employment; and upon his son's attaining majority the truster directed the pursuers immediately to convey his heritable and moveable estate to his son Robert; but specially providing, that in case his son should die, leaving lawful issue, before he attained the age of twenty-one years complete, then such issue should be entitled to the residue of the truster's estate to which

their parent would have been entitled to succeed had he survived.

Robert Brand junior, son of the truster, was a minor at the date of his father's death. He only survived till 3d July 1873, when he died, being still a minor, and unmarried. After his death it was found that he had left a trust-disposition and settlement in favour of the defenders John Brand, John Ritchie, and John Macmillan Robertson, as trustees and executors, conveying to them in trust his whole estate and effects, including therein all means and estate to which he was entitled as the only child of his father, or over which he had power of disposal. The purposes of this trust were as follows:—*First*, For payment of all his just and lawful debts, and sick-bed and funeral expenses; *Second*, To make payment of the following legacies at the first term of Whitsunday or Martinmas occurring after his decease:—(1) To the defender John Brand senior the sum of £2000; (2) To the defender, the Reverend John Brand, minister of the Bell Street United Presbyterian Church, Dundee, the sum of £2000 sterling; (3) To the defender Robert Andrew, sometime in the employment of his father, and then in the employment of the pursuers, the sum of £100 sterling, in recognition of his faithful services; (4) To his stepmother, the defender Mrs Jessie Robertson or Brand, the sum of £2000 sterling; *Third*, He left to his stepmother the whole household furniture and plenishing of every description contained in Oakfield House, Wishaw, that should belong to him at the time of his death, and also his gold watch and albert; *Fourth*, He directed his trustees, at the said term of Whitsunday or Martinmas, to pay to the Senatus of the University of Glasgow the sum of £2000, the income of said sum to be applied in payment of three bursaries in Arts for the behoof of students in the University who should be studying with a view to the ministry of the United Presbyterian Church; *Lastly*, and with regard to the residue of his estate, he directed his trustees to hold and apply, pay and convey the same to and for behoof of his aunts and uncles (maternal as well as paternal) share and share alike, for their respective liferent alimentary uses only, and to and for behoof of their respective issue, in fee, payable and to be conveyed to such issue on their respectively attaining the age of twenty-one years. The defenders James Brand, Thomas Brand, John Brand junior, and Margaret Brand or Allan or Kelso, were the paternal uncles and aunts of Robert Brand junior, and the defenders Alexander Cross, Mrs Isabella Cross or Dunn, and Mrs Jane Cross or Mallace, were the maternal uncle and aunts of Robert Brand junior. There were also twenty-four other defenders, the issue of these uncles and aunts. The next of kin of Robert Brand senior were his surviving brothers and sisters and the children of such as were dead. The defender Mrs Jessie Robertson or Brand, widow of Robert Brand senior, intimated to the pursuers that she would not accept the provisions made for her by her deceased husband, but would claim her legal rights. The heir-at-law of Robert Brand senior was the defender James Brand, eldest son of the deceased Alexander Brand, the immediate younger brother of Robert Brand senior, who was also heir-at-law of Robert Brand junior. Part of the estate left by Robert Brand senior consisted of a colliery, the business of which the pursuers carried on after his death. Robert Brand senior was lessee of a mineral field on the estate of Coltness, in the parish of Cambusnethan, leased from Henry Houldsworth, Esquire, of Coltness, conform to lease, dated 9th and 28th November 1867, for the term of nineteen years from and after Martinmas 1865. The operations of the colliery were conducted upon this mineral field. Various questions arose among the parties interested or claiming to be interested in the trust-estate which belonged to Robert Brand junior, with respect to the right to and distribution of the same. *Inter alia*, the following questions were raised:—*First*, Whether the trust-disposition and settlement of Robert Brand junior is valid to any extent, and if so, to what extent? *Second*, Who is entitled to the proceeds of the colliery before referred to since the death of Robert Brand junior? *Third*, What portion of the plant, &c., of the said colliery are heritable and what moveable? *Fourth*, Over what subjects the legal rights of the widow of Robert Brand senior extend? Conflicting claims were also made upon the pursuers for payment and conveyance of the estate and funds in their hands. The total amount of Robert Brand's personal estate in Scotland, with interest, is £18,155, 10s. 2d.

Robert Brand senior at his death was proprietor of properties in the town of Wishaw and neighbourhood with an annual rental of £400 or thereby. The profits of the coalfield between 26th January 1873, the date of Robert Brand senior's death, and 3d July 1873, the date of Robert Brand junior's death, amount to £7000, and the rents of the heritage for the same period to £120 or thereby; but from these sums fall to be deducted the proportion of repairs, feu-duty, and others for the period in question, and all sums paid from these rents and profits to Robert Brand junior. The profits of the colliery from 3d July 1873 till 31st December 1873, being the date at which the last balance was struck, amount to £5000, and the rents drawn for the same period amount to £120 or thereby. The debts due by the deceased amount, so far as ascertained, to £4097, 3s. 7d.

The representatives of the heir-at-law to Robert Brand senior and to Robert Brand junior averred that Robert Brand junior having died a minor his trust-disposition and settlement was ineffectual to convey heritage, and his uncle Alexander Brand, who was the brother of Robert Brand senior, succeeded Robert Brand senior, and also Robert Brand junior, as heir-at-law, and completed his title in that character by service. Alexander Brand died on 5th November 1873, leaving a trust-disposition and settlement, dated 25th July 1873, whereby he conveyed his whole means and estate, heritable and moveable, to trustees, now his representatives, for the purposes therein mentioned. In connection with the colliery, Robert Brand senior had the usual plant, which, in so far as it was heritage, was claimed by these trustees as belonging to their author, and now to them, such plant, machinery, and equipment being of the nature of fixtures, and part and parcel of the colliery. Since the action came into Court a minute of agreement and reference, dated 16th and 19th January 1874, was adjusted between the trustees of Robert Brand senior, of the first part, the trustees of Alexander Brand, of the second part, and the trustees of Robert Brand junior, of the third part, by which the points in dispute were considerably reduced in

number. By the first article of this agreement it is agreed that the heritable property, including the lease of Greenhead Colliery, shall be made over to Alexander Brand's trustees. The second article allows Robert Brand junior's trustees (1) the household furniture of the house at Oakfield, Wishaw; (2) the sum of £8500 out of the free residue of the moveable estate; and (3) the balance of the said residue, after payment of all claims against Robert Brand senior that may be payable out of his moveable estate so soon as the true balance can be ascertained. By the third article it is agreed that the rents of the heritage, and the profits of the colliery, from the death of Robert Brand senior until the death of Robert Brand junior, shall be consigned in bank, until it be determined by the Court who is entitled thereto. By the fifth article it is left to the Court to determine whether the plant and whole equipment used at and in connection with the said colliery, or any part thereof, is moveable and belongs to the present claimants; or heritable and belongs to Alexander Brand's trustees. Alexander Brand's trustees agree to pay to Robert Brand junior's trustees the price of any of the said plant which the Court may decide to be moveable. To ascertain the value of this plant it was agreed that a valuation should be made by two arbiters named therein, or by an oversman to be appointed by them.

The claims put in for Alexander Brand's trustees were as follows:—"(1) The claimants claim to be ranked and preferred to the whole rents and profits derived from the heritable subjects, and the colliery, from the date of the said Robert Brand senior's death to the death of the said Robert Brand junior. (2) In the event of the claimants not being found entitled to the whole of said rents and profits, they claim the whole with the exception of such part thereof as may have been specially paid to or set apart for the said Robert Brand junior by his father's trustees. (3) The claimants claim to be ranked and preferred to the whole of the rents and profits from the heritable estate and colliery subsequent to the death of the said Robert Brand junior. (4) The claimants claim to be ranked and preferred to the whole heritable estate left by the said Robert Brand senior or Robert Brand junior, including the colliery plant, machinery, and equipment, except in so far as the said plant, machinery, or equipment, may be held as being moveable."

Alexander Brand's trustees pleaded "that being the trustees of Alexander Brand, who was the heir-at-law of both Robert Brand senior and Robert Brand junior, they were entitled to be ranked and preferred to the whole heritable estate left by Robert Brand senior and Robert Brand junior, and the funds accruing therefrom."

The claim for Mrs Catherine M'Neil or Brand and Isabella Cross or Dunn was as follows:—"(1) The claimant, the said Mrs Catherine M'Neil or Brand, claims to be ranked and preferred on the fund *in medio* to the extent of the provisions in her favour contained in the trust-disposition and settlement of the said Robert Brand senior, viz., an annuity of £15 sterling (per annum), free from all deductions, duties, and taxes, as also that she shall be provided during all the days of her life with a house of one apartment, of which the rent and taxes shall be paid out of the means and estate of the said Robert Brand senior, being the fund *in medio* in this process. (2) The claimant the said Isabella Cross or Dunn claims to be ranked and preferred on the fund *in medio* to the extent of the provisions in her favour contained in the trust-disposition and settlement of the said Robert Brand senior, viz., a house of one apartment, with the rent and taxes thereof paid, and that during the whole period of her life while she remains a widow;" and the claim for Robert Brand junior's trustees was as follows:—"(1) The claimants claim to be ranked and preferred to the whole rents and profits derived from the heritable subjects and the colliery from the date of the said Robert Brand senior's death to the death of the said Robert Brand junior, viz., from 26th January to 3d July 1873, under deduction of any part thereof which may have been paid to or set apart for the said Robert Brand junior by his father's trustees. (2) The claimants claim to be ranked and preferred to the whole free residue of the moveable estate of the said Robert Brand senior that remains after satisfying all claims which may be found to be payable out of said moveable estate, including in said moveable estate the colliery plant, machinery, and equipment, except in so far as the said plant, machinery, or equipment may be held to be heritable."

For Mrs Catherine M'Neil or Brand and Isabella Cross or Dunn it was pleaded that—"(1) The claimants being beneficiaries under the trust-disposition and settlement of Robert Brand senior, were entitled to be ranked and preferred in terms of their claim;" and for Robert Brand junior's trustees it was pleaded:—"(1) That being the trustees of Robert Brand junior, only child of Robert Brand senior, they were entitled to be ranked and preferred to the whole free residue of the moveable estate of Robert Brand senior. (2) That, as trustees foresaid, they were entitled to be ranked and preferred to the whole rents and profits derived from the heritable subjects and the colliery, from 26th January to 3d July 1873, under deduction of any part thereof already paid or set apart for Robert Brand junior."

After the record had been closed certain other claims were put, viz., a claim for Mrs Brand, widow of Robert Brand senior, for one-third of the moveable estate of her husband, and for terce out of the heritage. In her condescendence she set forth that "by Robert Brand senior's trust-disposition and settlement certain provisions were conceived in her favour, which were declared to be in lieu of her legal rights as his widow upon his estate, but she intimated to the pursuers in writing that she elected to take her legal rights as widow of Robert Brand senior, and they, recognising her right to do so, made her a payment of £4200 to account. The third of Robert Brand senior's moveable estate exceeds, with the interest due thereon, the sum so paid."

There was also a claim for James Brand and others, brothers and sister of Robert Brand senior, who set forth that they had and have certain rights of succession of a valuable order at law, and by destination, in and to the estates of Robert Brand senior and Robert Brand junior. Article IX. of their condescendence was as follows:—"By minute of agreement, dated 7th and 8th July 1873, entered into between the said Alexander Brand, miner at Wishaw, and the present claimants, his brothers and sister, and her husband,

the said parties, in consideration of the trust-settlements of the said Robert Brand senior and Robert Brand junior, and that the latter had died before attaining majority, came to an agreement narrating that the said Robert Brand junior having died before attaining majority, the said Alexander Brand was the heir at law of the said Robert Brand senior (as well as of the said Robert Brand junior), and as such entitled to succeed to the whole of the said heritable property, but after full explanations of his legal rights thereto, and of his whole rights in the premises given to him by William Brown, solicitor, Hamilton, the said Alexander Brand declared, as he thereby declared, his intention to collate his right to the heritage, and to share the same along with the claimants, his brothers and sisters, equally; therefore the whole parties thereto thereby agreed and bound themselves to divide their respective rights of succession-at law, or by destination in and to the estate of the deceased Robert Brand senior and Robert Brand junior, equally amongst each other, share and share alike, whatever these might be, and that either by selling the whole heritable property and dividing the proceeds, or, in the event of any one of the parties wishing to be proprietor of any of the houses, by putting a valuation by a competent person upon the same, and attributing that *pro tanto* to his or her share, or respective shares. The said Alexander Brand also thereby bound and obliged himself, his heirs and successors whomsoever, to grant all necessary conveyances in order to carry out the terms of said agreement. In terms of this agreement, the trustees of the said Alexander Brand will fall to collate with the present claimants the heritable estate of the said Robert Brand senior and Robert Brand junior, to which the said Alexander Brand was entitled, and they, on the other hand, will collate the moveable estate to which they may be found entitled at law or by destination out of the estates of the said Robert Brand senior and Robert Brand junior." Before lodging their claim the claimants applied to the trustees of Alexander Brand to know whether they were to assert the rights of Alexander Brand as heir-at-law of the deceased Robert Brand senior and Robert Brand junior, and hold the estate and funds recovered by them in this process subject to the terms and conditions of this minute of agreement but the trustees have not agreed to do so.

The claim of James Brand and his brothers and sister were as follows:—"The claimants claim to be ranked and preferred equally with the trustees of the deceased Alexander Brand to the heritable estate and rents and profits thereof, so far as embraced in this process, of the deceased Robert Brand senior and Robert Brand junior, to which the said Alexander Brand succeeded or was entitled to succeed as their heir-at law, that is to say, the claimants to be ranked and preferred to four-fifths of the said estate, the said trustees being ranked and preferred to the remainder thereof."

The Lord Ordinary (SHAND) pronounced the following interlocutor—

"*Edinburgh, 4th August* 1874—Having considered the cause,—(*First*), Finds that the claimants, the trustees of the late Robert Brand junior, have right to the profits of the colliery business which belonged to the late Robert Brand senior, and which was carried on by his trustees after his death and have also right to the rents of the heritable property which belonged to the late Robert Brand senior; all for the period during which the said Robert Brand junior survived his father, the said Robert Brand senior, viz., from 26th January to 3d July, both in the year 1873: (*Second*), In regard to the machinery and plant, including rails, which belonged to the deceased Robert Brand senior, and were used by him at or in connection with the colliery held on lease by him from Mr Houldsworth, Finds that the machinery and plant, and those parts thereof, are heritable, and belongs to the trustees of the late Alexander Brand, which were attached, either directly or indirectly, by being joined to what is attached to the ground for use in connection with the working and carrying away of the minerals, though they may have been fixed only in such a manner as to be capable of being removed, either in their entire state or after being taken to pieces, without material injury, including those loose articles which, though not physically attached to the fixed machinery and plant, are yet necessary for the working thereof, provided they be constructed and fitted so as to form parts of the particular machinery, and not to be equally capable of being applied in their existing state to other machinery of the kind, and appoints the case to be enrolled for further procedure; meantime, reserves all questions of expenses, and grants leave to the trustees of the said Robert Brand junior, and also to the trustees of the said Alexander Brand, to reclaim against this judgment.

"*Note*—The parties mainly interested in the estate of the late Robert Brand, coalmaster in Wishaw, being on the one hand the trustees and executors of his only son Robert Brand junior, who survived him for about six months, and on the other the trustees and executors of Alexander Brand, by a minute of agreement and reference, entered into in January 1874, have settled the various questions which arose between them, with the exception of two, which form the subject of the present judgment.

"Robert Brand senior died on 26th January 1873 possessed of considerable estate, heritable and moveable, the details of which are contained in the condescendence of the fund *in medio*. He was lessee of the coal and fire-clay in part of the estate of Coltness, belonging to Mr Houldsworth, under a lease for nineteen years from Martinmas 1865, and was proprietor of a considerable amount of plant and machinery used at the colliery, including the rails laid down for the conveyance of the minerals. He was also proprietor of a number of houses and properties, producing an annual rent of about £400.

"Mr Robert Brand senior was survived by his only child, Robert Brand junior, who died, however, on 3d July 1873, little more than five months after his father, and shortly before attaining majority. Robert Brand junior left a trust-disposition and settlement, by which he conveyed his whole estate, heritable and moveable, to trustees for certain purposes therein mentioned.

"Alexander Brand, miner in Wishaw, a brother of Robert Brand senior, became the heir-at-law of his brother, and also of his nephew Robert Brand junior, who died without serving himself as heir of his father. Alexander completed a title by service as heir-at-law both to Robert Brand senior and Robert Brand junior, and died on 5th November 1873, leaving a trust-disposition and settlement of

his whole estate in favour of trustees for the purposes therein mentioned.

"By the minute of agreement and reference already mentioned, entered into in January 1874 between the trustees of Robert Brand senior, on the first part, the trustees of Alexander Brand on the second part, and the trustees of Robert Brand junior, on the third part, on the narrative that the parties of the second and third parts had agreed to hold as a basis for the settlement of the questions which had arisen between them as to the means and estate of Robert Brand senior, that Robert Brand junior had a vested interest in his father's heritable and moveable estate, which he was entitled to test upon, except in so far as regarded heritage, the parties agreed that the heritable estate of the late Robert Brand senior should belong to the trustees of Alexander Brand, and that the moveable estate should belong to the trustees of Robert Brand junior. The questions reserved for the decision of the Court are dealt with in the third and fifth heads of the agreement, by the former of which it is provided that the rents of the heritage, and the profits arising from the working of the colliery, from the death of Robert Brand senior to the death of Robert Brand junior, should be consigned in bank till it should be seen who was entitled thereto, and by the latter that the plant, machinery, and whole other equipments used at and in connection with the colliery should be made over to the trustees of Alexander Brand, but on the condition that, should it be decided that the same or any part thereof was moveable, and belonged to the trustees of Robert Brand junior the price thereof should be paid to them by the trustees of Alexander Brand; and in order to fix the amount which might be so payable, the parties made a reference to a man of skill to make up an inventory and valuation of the whole plant and machinery in detail. The profits realized by the colliery during the period of Robert Brand junior's survivance of his father are stated to be about £7000, and the rents of Robert Brand senior's properties for the same period amounted to about £120. The value of the whole machinery ascertained by the inventory and valuation just mentioned is £4801, 8s. 1d.

"1. The first question for decision relates to the profits of the colliery business carried on after the death of Robert Brand senior by his trustees, and the rents of his heritable properties for the period from 26th January to 3d July 1873. If the right to these profits and rents vested in Robert Brand junior, it was conveyed by his trust deed in favour of his trustees. If it did not vest, and the testator Robert Brand senior died intestate so far as regards these profits and rents in consequence of his son having died before attaining majority, then Alexander Brand, by his service to his brother, took up the right.

"The trust deed of Robert Brand senior conveyed his whole estate, heritable and moveable, to his trustees, and the rents and profits of that estate belonged to the trustees for the purposes of the trust. The basis of the agreement between the parties already referred to is, 'that the said deceased Robert Brand junior had a vested interest in his father's heritable and moveable estate,' and the sole ground on which the parties nevertheless settled their rights on the footing that Alexander Brand's trustees should have right to the heritage, was not that the heritable estate did not vest in Robert Brand junior in the same way as the moveable estate did, but that, having died in minority, his settlement was ineffectual as regarded heritable estate belonging to him.

"The argument now maintained for Alexander Brand's trustees is, that the right to the heritable estate did not vest in Robert Brand junior. If this argument be sound, it follows that the moveable estate did not vest either, for there is no distinction in the trust-deed of Robert Brand senior between the conveyance of his heritable and moveable property, and the trust purposes apply to both equally. The argument submitted for Alexander Brand's trustees therefore strikes at the basis of the agreement entered into. If it be well founded, Robert Brand junior's trustees had no right to the moveable estate which admittedly belongs to them.

"I am of opinion that, according to the true spirit of the agreement, and on a sound construction of its terms, the trustees of Alexander Brand are precluded from maintaining in the present question that the estates of Robert Brand senior did not vest in his son Robert Brand junior. The declared basis of the agreement is the admission of a vested right, and the giving over of the moveable estate accordingly as having been carried by Robert Brand junior's settlement. It appears to me that the questions which the parties agreed to reserve for the determination of the Court were to be raised and decided on the footing that vesting had taken place, and that Alexander Brand's trustees, in order to succeed, must show that notwithstanding such vesting, the subjects to which the reserved questions relate belong to them. On this branch of the case it is sufficient to say that no argument was submitted by them on this footing. It did not appear to be now disputed that if Robert Brand senior's trustees held the estates, heritable and moveable, conveyed to them in trust for the granter's son, and he had acquired a valid right in them, the fruits of the two estates, whether profits of the business or rents of the heritable properties, must also have vested in him as part of his personal estate. I cannot think that it was the intention of the parties that a vested right in the estates, heritable and moveable, should be the basis for settlement of the important questions as to how the large estates, heritable and moveable, should be divided, and that the existence of that right should be questioned and denied in the determination of the questions as to the comparatively small interests to be now settled by the Court. On this ground alone, therefore, I think Robert Brand junior's trustees are entitled to succeed in this part of the case.

"But even if the question of the vesting of a right in Robert Brand junior to the estates, heritable and moveable, of his father be open under the agreement, I am of opinion that the concession made in the agreement is in accordance with the true rights of Robert Brand junior's trustees, and that Robert Brand junior on his survivance of his father acquired a vested right in his estates. The whole provisions of the settlement lead directly to that result, with the exception of one clause only in favour of issue of Robert Brand junior. It appears to me, taking the intention of the testator to be gathered from the provisions of his settlement as a whole as the determining element, that although there was a postponement of the date of payment and conveyance of the trust estate until Robert Brand junior should reach majority, yet

there was immediate vesting and not a conditional or contingent right only conferred with intestacy as a result in the circumstances which have occurred.

"Robert Brand junior was an only child, and, with slight exceptions, was the beneficiary for whom the whole estate was destined. There is every presumption, in such a case, in favour of vesting. Again, the trustees are directed to manage and preserve the estate, heritable and moveable, for the use and behoof of the truster's son until he attains majority, when it is to be 'handed over' to him as thereinafter provided. This provision, unless controlled by something to a clearly contrary effect, implies a presently vested right, although the payment and conveyance, or handing over the estate, is for a time to be deferred. Again, there are directions to apply the rents and profits of the estate, or so much thereof as the trustees may consider necessary, for the maintenance and education of Robert Brand junior, with no direction to accumulate such rents or profits. A subsequent clause further provides that the trustees, at their discretion, may make advances 'for placing him out in any profession or employment,' followed by a direction to denude of the whole estate in his favour on his attaining majority. Further, there is no destination over in favour of any stranger, or any other existing relative. The single clause which is founded on as suspensive of vesting, and as making Robert Brand junior's right to his father's estate contingent on his attaining majority, is a provision in favour of any issue he might have. It is difficult to understand how this clause could be expected, in any view, to have come into operation, for I understand Mr Robert Brand junior was close on majority, and unmarried at the date of his father's deed. I cannot, however, read it as having the important effect attributed to it, and as overcoming all the other considerations already adverted to. It appears to me to be more reasonable to read the clause as giving expression to the unlimited extent of the right intended to be conferred on Robert Brand junior, as being intended for him and his children, or designed probably without any clear view as to the effect of his right having vested or not, to meet the case (for which indeed the law provided whether vesting had or had not taken place) of Robert Brand junior having died before majority, and without any marriage-contract or settlement, or other deed disposing of his estate. If I am right in holding that there was a vested right in Robert Brand junior in the heritable and moveable estate of his father, it seems to follow that the rents and profits became part of his personal means.

"2. The next question for decision relates to the plant, machinery, and equipments which belonged to Mr Brand, and had been used by him at the colliery held in lease from Mr Houldsworth. It is maintained by the trustees of Alexander Brand that this machinery, or at least an important part of it, attached to the leasehold property, or specially fitted for the use of the colliery, was heritable, and in a question between heir and executor descended, with the right to the lease, to Alexander Brand, as having been served heir of his brother, or rather as heir of his nephew, whose deed of settlement was ineffectual in regard to heritage. The trustees of Robert Brand junior, in any view, claim the loose unattached implements, tools, and plant unattached to the leasehold property not specially destined and fitted for its use, and which might be readily removed and used at other works. To this extent their claim is not disputed, and an inventory of a number of such articles has been lodged, and is No. 31 of process.

"It is not said that this inventory is exhaustive of the class of articles just referred to, but the parties state that, on the legal principle which is to determine their rights being settled by the Court, they may be able to arrange subordinate questions as to particular articles, and failing arrangement, a remit to a man of skill may yet be necessary. In the meantime, the report of Mr Geddes, No. 24 of process, may be referred to as showing the general nature of the machinery and plant at the colliery. The more important articles are the steam-engines, gear, and appurtenances used for raising the minerals, and pumping water, boilers in connection with the engines, the weighing steelyards, pumps and pump-rods, and the railways and tram-road which were laid down by the late Mr Brand for the conveyance of the minerals from the pithead, which alone are valued at £991.

"It is maintained by the trustees of Robert Brand junior that as the whole plant and machinery just referred to was provided by the late Mr Robert Brand senior for the temporary use merely in his business carried on at the colliery, and was moveable in a question between him and the landlord, it is also moveable as between heir and executor, and therefore belongs to them as part of Mr Brand senior's personal estate.

"The only special provisions of the mineral lease which have a bearing on the question between the parties are, in the first place, the clause providing that although the endurance of the lease should be for nineteen years from 1865, that is until 1884, yet the tenant should have breaks at Martinmas 1870, Martinmas 1875, and Martinmas 1880, provided six months' notice were given at any of these terms; and (secondly), that by article 26 of the general conditions of lease imported into the agreement between the parties, it is provided that the proprietor shall have right, if he thinks proper, 'to take the whole engines, machinery, and apparatus connected with all or any of the pits or mines according as the value may be ascertained' by reference, but subject to the proviso that the landlord shall not take a part merely of the machinery at any one pit.

"The claimants, the trustees of Robert Brand junior, maintain that the question raised in regard to the plant and machinery has been already decided in favour of the view contended for by them, that is, that machinery in such circumstances is moveable in a question of succession by the leading case of *Fisher* v. *Dixon*, 6th March 1843, 5 D. 775, House of Lords, 26th June 1845, 4 Bell's App. 286.

"After giving my best consideration to the opinions of the Judges in the case of *Fisher* v. *Dixon*, and to the argument submitted for the parties, I have come to the conclusion that the question now raised has not been decided as the claimants, the trustees of Robert Brand junior, maintain, and that the weight of opinion in the case of *Fisher* v. *Dixon*, both in the Court of Session and in the House of Lords, was in favour of the view that plant and machinery of the kind here in question, attached or specially dedicated to the use of the leasehold property, is heritable, and goes with the lease in a question of succession between heir and executor

and I am further of opinion, holding the question to be still open for decision, that this is the sound view, and that the trustees of Alexander Brand have right to the machinery claimed by them.

"It is evident from a perusal of the reports of the case *Fisher* v. *Dixon*, in this Court and in the House of Lords, that the really important question between the parties related to the plant and machinery which, for the purposes of the trade or business of the collieries, Mr Dixon had put up and provided on heritable properties belonging to himself. It was a subordinate and comparatively unimportant question in its pecuniary results which arose in regard to the plant and machinery put up and provided at collieries of which he was the lessee only. Referring to the report of the case in the House of Lords, the 5th and 6th only of the properties therein enumerated (Bell's App. 288 and 289), viz., Legbrannock and Balgrochan Coal Works, were held in lease by Mr Dixon; and the lease of the former contained a somewhat peculiar stipulation in regard to the machinery.

"The trustees of Robert Brand junior found specially on the seventh head of the judgment of of the Court as expressly deciding that machinery attached to the leasehold subjects was held to be moveable in a question of succession. The finding is in these terms:—'And with regard to the seventh class in the said report, erections made on subjects held under leases by the late Mr Dixon, and which have been removed by the respondents at the termination of the said leases, finds that these are moveable, and subject to the claim of *legitim* on the part of the claimants.' This finding unquestionably appears to decide the question as maintained by the claimants just mentioned, but I have become satisfied, from an examination of the report, in the first place, that the finding is directly contrary to the judgment of the majority of the judges who gave opinions applicable to that branch of the case; (and secondly), that the true explanation of the finding is that it proceeded on the admission made by the defender, and mentioned thus in the Report of the concluding opinions of the whole consulted Judges (5 D. 839), 'and further, in so far as regards such subjects under lease, on which the late Mr Dixon, being the tenant only, made erections which he was entitled to remove at the end of the lease, which the respondent also admits may be included in the executry, we are of opinion," &c. This admission, which must have been the ground of the judgment when the expressed opinions of the majority of the judges are kept in view, may probably be accounted for by the fact that the machinery to which it referred was of small value in comparison with the other machinery, which was the subject of dispute in the general question raised, and that the parties had thus apparently acted on the view that the machinery was moveable before the dispute between them had arisen, and the matter had been fully considered; for it appears from the seventh finding of the judgment of the Court that the machinery referred to had actually been removed by the representatives of Mr Dixon at the termination of the leases, and apparently without question.

"An examination of the report shows that five of the consulted Judges expressly stated their opinion to be that the machinery on the leasehold subjects was heritable, and went to the heir with the leases, viz., Lords Cunningham, Gillies, Jeffrey, Fullerton, and Ivory. Four of the Judges, viz., Lords Cockburn, Mackenzie, and Moncreiff, and the Lord Justice-Clerk, seem to have expressed a different view. The opinions of the four last-mentioned learned judges suggest observations which I think are of considerable weight as affecting the weight to be given to their opinions in the present question.

"In the first place, the concluding paragraph of the joint opinion of Lords Cockburn and Mackenzie, which deals with the question under consideration, does not profess to give a final decision on the point. The expression used is, 'We are scarcely in a situation to determine the result of this,' *i.e.*, the erection of the machinery by Mr Dixon in the position of a tenant.

"Again, the conclusion on a certain assumption as to the terms of the agreement with the landlord is, 'So far as I can at present see, that machinery will ultimately belong to his executors.' The expression, 'will *ultimately* belong,' evidently conveys the meaning that the heir had right to the use, at least, of the machinery, and that even the right of property was not *yet* vested in the executors. If this be what is meant, it appears to me that an anomalous right, unlike any other legal right recognised by the law, must be held to exist in reference to the succession to fixed machinery erected by a tenant. I am unable, with much respect for those learned Judges, to recognise the existence of this peculiar right, and I think the special terms of the opinion are sufficient to show that they had not formed a final judgment on the point, and were not prepared to affirm that the executors of Mr Dixon had an unconditional right of property in the machinery.

"In regard to the opinions of the two other learned Judges above-mentioned, viz., the Lord Justice-Clerk and Lord Moncreiff, it is to be observed that they proceed throughout entirely on the view that the machinery, whether erected on Mr Dixon's own property or on property leased by him, was alike moveable, because it had been put up for trade purposes only, and as that view was negatived as a reason or ground of judgment both by the Court of Session and by the House of Lords, the opinions of these Judges on the point now in question are deprived of the weight which otherwise they would have. It does not appear that they would necessarily have held that machinery erected on leasehold property was moveable, and did not devolve on the heir along with the lease, provided it had been previously decided that such machinery, erected by the proprietor on his own ground, was not moveable.

"The three remaining Judges who gave opinions in the case,—the Lord President (Boyle), Lord Murray, and Lord Wood (who was consulted only at the later stages),—reserved their opinions on the point now under consideration, while Lord Meadowbank and Lord Medwyn merely concurred with the consulted Judges. This concurrence cannot be readily understood, seeing that there was a distinct difference of opinion amongst these judges on the matter now in question. It can, I think, only be explained in the view that the really important question between the parties related to the machinery which Mr Dixon had put up on his own property, or otherwise that the concurrence was with the majority of the consulted judges, in which case these opinions were given in favour of the view that the machinery on the leasehold property was heritable.

"The result of this examination of the case, as reported, is that at least five of the judges held the machinery on the leasehold property to be heritable; that while four took a different view, they were not agreed in holding that the executor's right was one of unqualified property, and the grounds of the opinions of two of their number—at least the main grounds of their opinions—were finally held to be unsound; that three of the judges reserved their opinions, and that the remaining two, Lords Meadowbank and Medwyn, may be taken either to have concurred with the majority or not to have expressed any opinion on the point.

"It is difficult to gather from the report of the case in the House of Lords whether the question was directly raised in regard to the machinery on the leasehold property, and how far it was discussed. The opinions of Lord Campbell and Lord Brougham, who alone referred to this matter, seem to have been entirely in accordance with the views of the majority of the Judges in the Court of Session, as above explained, for (Report, p. 366), Lord Campbell observed, 'a distinction was attempted to be made between leasehold and freehold, but when we bear in mind that by the law of Scotland the leasehold is realty, and that it goes to the heir, the distinction entirely fails,' and Lord Brougham concurred in this view.

"It thus appears that the terms of the judgment in the case of *Fisher* v. *Dixon* are to be explained by the admission made by one of the parties, and that the weight of judicial opinion is strongly in favour of the view that no sound distinction can be drawn between the case of machinery erected by a person on ground belonging to himself, and machinery erected on ground merely leased by him.

"In the case of *Syme* v. *Harvey*, 14th December 1861, 24 D. 202, Lord Ivory and Lord Curriehill referred to the seventh finding of the interlocutor in the case of *Fisher* v. *Dixon* as if it had embodied the judgment of the Court on the principle which that finding involved, but I am satisfied from my examination of the reports, and on the grounds I have stated, that this view is incorrect.

"And when the question has now arisen for decision, I am of opinion that machinery of the kind now in question, erected by a tenant on property held under lease, is heritable in a question of succession. The ground on which it has been decided that machinery erected by a proprietor on his own estate is heritable and descends to his heir, is that he has attached the machinery to the ground, or acquired machinery specially suitable for the perpetual and continual use of the particular property, and that, the property being heritable, the machinery as an accessory partakes of the same character. The same principle applies to machinery erected on leasehold subjects. The principal subject, viz., the lease, is heritable, although it be of temporary duration, and the machinery, being an accessory to this principal subject, becomes heritable also. It seems to me to be of no consequence that the machinery is put up for a temporary purpose only. It is placed there for the full term of the endurance of the heritable right as well as for the use and benefit of the subject of that right. The crop and stocking on a farm held under a lease is in a totally different position, for it is necessarily of a fluctuating character, not only moveable in its nature, but intended to be disposed of and changed from time to time. Such subjects as crop and stocking partake more of the character of those loose articles like tools, furniture, and the like, which have no special attachment to a particular property, either by being fixed to it or by destination. Engines, pumps, railways, and other plant and machinery which are specially fixed or destined for the use of the particular leasehold property, are rather to be compared with such a subject as an agricultural mill or other fixed erection put up by the tenant of a farm attached to the ground for the use of the subject, and which, though moveable in a question with the landlord, I should regard as heritable, descending to the heir, and not like the crop and stocking of a farm going to the executor.

"The specialties in the lease of the colliery held by Mr Brand, already noticed, do not appear to me to introduce any element which takes the case out of the general rule. Although there are breaks in the lease in favour of the tenant, the lease nevertheless remains heritable as long as it endures, and the accessories must have the same character. The fact that the landlord has a right to purchase the machinery at the end of the lease, and that if he fails to do so the tenant may sell it, appears to me to be also immaterial. If the landlord should exercise the option in the lease terminating in the tenant's lifetime, no doubt the proceeds would be an addition to the tenant's personal estate. Indeed, as between landlord and tenant, there is no doubt that the machinery is moveable, subject to the landlord's right of purchase, but as between heir and executor, the machinery being an accessory of the lease, the landlord's right to purchase cannot, I think, affect the question between heir and executor. The person from whom he must purchase after the tenant's death must be the heir.

"The case of a long lease having only, it may be, a single year to run, has been put as an illustration of the hardship that executors may suffer where machinery has been put up by the lessee at great expense, and the proceeds would soon have fallen into the personal estate of the deceased; but the same principle must be applied in all cases, and it would be extremely hard on the heir-at-law, in taking up a nineteen years' lease in its first year, that the executor should have the power of dismantling the whole colliery, provided the landlord had no right by contract to retain it, or did not insist on the right he had. The right to exercise this power appears to be the only alternative to the view that the machinery descends to the heir; for, although equitable considerations might point to a middle course by which the heir should have the use of the machinery for a recompense, while it belongs in property to the executors, as being most expedient and reasonable; and while legislation to that effect might be proper and beneficial, there is, I think, no sound principle for holding that an arrangement to this effect can be compelled in the existing state of the law. It may be observed that the hardship to those who are interested in the moveable estate of the tenant is limited to the case in which the tenant has been the sole person carrying on the colliery business; for, in the case of a company, which occurs most frequently—in fact, the lease and machinery as part of the company's stock in trade, or the value of these, would form part of the personal estate of the partners of the company.

"The law of England does not afford any assistance in the decision of the present question, for

leasehold property is in England moveable estate in a question of succession—a distinction between the law of the two countries noticed by Lord Campbell in the passage of his opinion in the case of *Fisher* v. *Dixon*, already noticed."

The trustees of Robert Brand junior reclaimed.

There was no question raised as to the first finding in the Lord Ordinary's interlocutor.

At advising—

LORD GIFFORD—In this case two separate questions have been decided by the Lord Ordinary in the interlocutor now under review. The first question relates to the profits of the colliery business which belonged to the late Robert Brand senior, accruing for the period between the death of Robert Brand senior and the death of his son Robert Brand junior, and to the rents of heritable property applicable to the same period. On this question the Lord Ordinary has found that these profits and rents belong to the trustees of Robert Brand junior.

On this first question no argument has been submitted to us for the reclaimers. They virtually admitted that the judgment of the Lord Ordinary could not be impugned, and tacitly intimated their acquiescence therein. Nor do I wonder at this, for I see no answer to the reasons given by the Lord Ordinary in support of his first finding. They seem to me quite conclusive. In regard to the first finding, therefore, the Lord Ordinary's interlocutor must be affirmed.

The second question decided by the Lord Ordinary, however, was the subject of a very able and instructive argument at the bar. It raises a point of very great interest and importance, and on this we are now called upon to give judgment.

The question, which is one of very general application, may be stated thus:—When the tenant of minerals under a lease of ordinary duration (in the present case 19 years) erects upon the land fixed machinery for the purpose of working and winning the minerals, and then dies during the currency of the lease, does the fixed machinery belong to the tenant's heir or to his executor? I purposely put the question in its most general form, for although in the present case there are one or two specialties—to one of which I will by and bye advert,—I think the general question is fairly and necessarily raised for decision.

The Lord Ordinary has decided this question in favour of the heir and against the executor—holding that the trade fixtures erected by the late Robert Brand senior for working and winning the coal let to him by Mr Houldsworth, although undoubtedly moveable in a question between him and the landlord, are yet heritable in a question of the tenant's succession, and descend to the tenant's heir and not to his executor. This judgment the Lord Ordinary has supported in an exceedingly able and ingenious Note, in which he contends, first, that the question has not been decided by any previous case, and, in particular, that it was not decided in the leading case of *Fisher* v. *Dixon*, either in this Court or in the House of Lords, and second, that assuming the question to be open, the weight of authority, as well as sound reason and analogy, favor the pleas of the heir and negative those of the executor.

After giving the question the fullest and best consideration in my power, I have found myself compelled, with the utmost deference to the Lord Ordinary, and not insensible to the force and cogency of the arguments he has used, to come to the opposite opinion from that at which he has arrived, and I have come to think, and latterly without much difficulty, that the tenant's trade fixtures at the colliery in question, moveable in a question with the landlord, are also moveable as to the tenant's succession, that is, in a question between his heir and executor.

I need not detain your Lordships with stating the facts and circumstances in which the question arises. As to these there is no dispute whatever between the parties, and they are quite accurately summarized in the first part of the Lord Ordinary's Note. Omitting then for the present all specialties, I proceed to state very shortly the grounds upon which I am of opinion that the trade fixtures erected by the late Robert Brand senior in connection with the coal leased to him were moveable in his person, moveable in the persons of his testamentary trustees, and of Robert Brand junior, his son and the beneficiary under the trust, and as moveable were carried by the trust deed of Robert Brand junior, and now belong to the claimants, his trustees.

(1) First, I am of opinion that the point was really decided *in terminis* by the judgment in the case of *Fisher* v. *Dixon*, 5 D. 775, 4 Bell's App., H. L. 286—if not in the House of Lords, where perhaps it could only have been raised by a cross appeal, at all events in the Court of Session by a majority of the whole Court.

It is quite true that the principal subjects in dispute in *Fisher* v. *Dixon* were fixtures which had been placed by Mr Dixon for mineral purposes on lands belonging to himself in absolute property, and the fixtures placed by him on subjects of which he was only tenant seem to have been of much smaller value. Still the question as to whether tenant's trade fixtures—trade fixtures placed by Mr Dixon on subjects of which he was only mineral tenant—was distinctly raised as well as the more important one. These "tenant's fixtures" form the subject of what is called the 7th class in Mr Smith's report, and they are separately dealt with both in the opinions of the Judges and in the final judgment. The final interlocutor in the Court of Session, which bears to be pronounced "in conformity with the opinion of the majority of the whole Judges," is, in so far as relates to fixtures on leasehold subjects, in these terms:—"And with regard to the 7th class in the said report, erections made on subjects under leases by the late Mr Dixon, and which (might) have been removed by the representatives at the termination of the said leases: Find that these are moveable and subject to the claim of legitim on the part of the claimants, and decern." These are the words of the final interlocutor, and it seems impossible to dispute that they precisely and pointedly dispose of the question as to fixtures—trade fixtures—erected by a tenant for trade purposes on subjects to which he had only a leasehold right.

Accordingly, in the subsequent case of *Syme* v. *Harvey*, 24 Dunlop 202, the judgment is so dealt with. Lord Ivory, who was one of the consulted Judges in *Fisher* v. *Dixon*, says (p. 211)—"It is evident upon looking at the report of *Fisher* v. *Dixon* in the House of Lords, that that case was decided not upon the principles which regulate the law of landlord and tenant, but upon those which

regulate the law of heir and executor. This is abundantly evident from the opinions of Lords Brougham and Cottenham. There was, however, one small branch of this case where the property was held by Mr Dixon on lease, and there effect was given to the interests of the tenant, and a distinction drawn between the principles which were to regulate it and those which were to regulate the case generally." And this view is concurred in and further explained by Lord Curriehill. If I mistake not, *Fisher* v. *Dixon* has been often used as an express authority upon the very point now in question.

But the Lord Ordinary very ingeniously argues that although the words of the judgment in *Fisher* v. *Dixon* appear to decide the question at issue, it does not really do so, for he has satisfied himself that "the finding is directly contrary to the judgment of the majority of the Judges who gave opinions applicable to that branch of the case," and he thinks that the explanation of the finding is that it proceeded on an admission of the defender. Now, with great submission to the Lord Ordinary, I think he is in error on both points. First, I think a close scrutiny of the opinions of all the Judges show that a majority were of opinion that the tenant's trade fixtures were moveable in a question with the landlord, and were also moveable in a question relating to the tenant's succession. I count the Judges there—Lords Cockburn, Mackenzie, Jeffrey, Ivory, Meadowbank, Medwyn, Moncreiff, and Justice-Clerk Hope—eight Judges, held that the tenant's trade fixtures were moveable in a claim of legitim against the tenant's estate. Lords Cunninghame, Gillies, and Fullerton—three Judges—held these fixtures heritable, while Lord President Boyle and Lord Murray held the point doubtful and gave no opinion. The Lord Ordinary is in error in thinking that Lords Jeffrey and Ivory held the fixtures on the leasehold subject heritable, on the contrary they both "concur entirely in the opinion of Lord Cockburn," except as to a special point relating to the favor due to trade. They make no exception as to the tenant's trade fixtures on his leasehold subjects. It is true that Lord Cockburn, concurred in by Lord Mackenzie, speaks of these fixtures as being "*ultimately*" the property of the executors, as if there was some interim right in the heir during the lease—but this question did not arise, and I concur with the Lord Ordinary that there is no ground for such an anomalous right in the heir as a right temporarily to possess a part of the executry. Then as to Lords Meadowbank and Medwyn, it is true they only concur with the consulted Judges without expressly noticing this question, but this must mean that they concur with the majority of the consulted Judges on the point, and, counting Lords Ivory and Jeffrey, the majority of the consulted Judges were for the moveable character of the tenant's trade fixtures.

Then as to the supposed admission by the defender in *Fisher* v. *Dixon*, I can find no trace of such admission, and looking to the character of the litigation it seems very unlikely that any such admission was given. But even if there had been an admission, it must have been an admission in point of law, for there was no dispute about any facts regarding the leases, and an admission in point of law can only have been made at the bar when it was found impossible to maintain the contrary proposition. But in actually deciding a point of law the Court never do so on mere admissions of counsel at the bar, and accordingly the judgment bears to proceed not on admission but in conformity with the opinions of the whole Judges, and this seems to me to have been the fact.

This judgment was affirmed in the House of Lords; but it is perfectly true that the decision on the point in question, having been in favour of the appellant, could not be reviewed without a cross appeal. The observation of Lord Campbell, that in Scotland leasehold property is reality, seems certainly to suggest that he was putting fixtures on leasehold subjects in the same category with fixtures on freehold subjects, but most certainly this question was not before the house.

I am of opinion, therefore, that the question I am now considering has been decided as authoritatively as any question can possibly be decided in Scotland by a majority of the whole Court.

(2) Second—But even if the question were quite open and undecided, I am of opinion that the fixtures in dispute were in law moveable in the succession of the tenant Robert Brand senior and of his son Robert Brand junior.

I take it to be perfectly fixed law, and it was not disputed on either side of the bar, that in leases of ordinary duration, where the tenant erects fixtures solely for the purposes of his trade, these trade fixtures remain his property and cannot be claimed by the landlord as *partes soli*, as it is said they are moveable iu a question between landlord and tenant. *Syme* v. *Harvey* and other cases are illustrations of the application of this principle.

Now, it humbly appears to me that if trade fixtures do not go to the landlord, they must of necessity remain the moveable property of the tenant, and must remain moveable *quoad omnia*. The only thing that can make them heritable is their fixture—their annexation to the soil—but that would carry them to the landlord, to whom alone the soil belongs. If the fixtures have not this effect, and this is conceded, it is difficult to see how it can make them heritable to any effect at all. The tenant could remove them at pleasure. He could convey them by assignation and without dispositive words, which until recently were necessary in the conveyance of heritage. The tenant could bequeath them by will or testament separate from the mineral lease. I think also that they could be sequestrated under the landlord's hypothec, or poinded by the tenant's creditors. Adjudication would not be the habile diligence to attach a tenant's trade fixtures of which he had the absolute power of disposal and over which the landlord had no right.

Now, if the fixtures in dispute are moveable in all these respects, why should they be considered heritable in a question as to the tenant's succession? The answer relied on seems to be, that although not fixed to the soil so as to go with it to the landlord, they are fixed to the lease, so as to go with it to the tenant's heir. But a lease is an incorporeal right, and it is difficult to follow what is meant by fixture to a lease—fixture to the subject of a lease is not the same as fixture to or incorporation with the lease itself. The fixture may be for the most temporary purpose and without the least reference to the duration of the lease or to its destination.

The idea seems to be that fixture to the subject of the lease indicates an intention that the machinery shall go with the lease, and so it is suggested that the machinery, though not heritable

sua natura, has become heritable destination because of its dedication by the tenant.

Now, this view is plausible, and the argument has some force. If a proprietor by annexing machinery to his own heritable property sends it with that property to his heir—so may not a tenant by annexing machinery to his lease, or to the subject of his lease, send such machinery with the lease to his heir? But I think there are conclusive answers. In the first place, if the destination or dedication by the tenant is all that can be relied on—and on this branch of the argument there can be nothing more—then the tenant's destination would be equally applicable to unfixed machinery as to the fixed. There would be no room for destination—the waggons and rolling stock are as much dedicated to the colliery as the rails are—and a locomotive may be as necessary for the successful working as a fixed engine. But no one presses destination this length, and yet if it is worth anything it must logically reach the whole plant.

Precisely the same argument would carry a whole farm stocking and implements to the heir along with the lease of an ordinary farm. But I need not say that such a claim has never been dreamt of.

The truth is that the destination of the tenant has really nothing whatever to do with the present case. And there is no room in the present case for the application of the principle, that a proprietor of moveable subjects may in a question as to his own succession make them heritable destination.

And this leads me to notice one of the specialties of the present case—that there is here no intestacy, no question of intestate succession, or of presumed will or implied destination by the deceased. Both Robert Brand senior and Robert Brand junior died *testate*. Robert Brand senior expressly conveyed every thing he had, heritable and moveable, to his trustees for behoof of his son, and his son Robert Brand junior expressly conveyed everything he had or could give to his trustees. The competing claimant Alexander Brand and his trustees can only claim as heir-at-law what was not carried by Rober Brand junior's deed. Implied destination must always yield to expressed will, and a thing heritable at *sua natura*, but merely *destinatione*, will not go to the heir if the absolute proprietor expressly says it shall not go to his heir but to his trustees. Now this is the case here. The destination or implied wills of Robert Brand senior or of Robert Brand junior are out of the question, for we have the express will of both of them, and both exclude the competing claimant Alexander Brand. Accordingly, if the element of destination must be laid out of view, as I think it must, and if the machinery in question is not heritable *sua natura*, then it must be held as moveable *quoad omnia*, and the property of the trustees of Robert Brand junior.

Still farther, and upon the same specialty which I have now pointed out, I am of opinion that, even if it should be held that the fixed machinery was heritable on a question as to the tenant's intestate succession, still it was effectually carried by the trust-deed of Robert Brand junior.

No doubt Robert Brand junior died in minority, and a minor cannot *mortis causa* convey his heritable estate; but this only applies to proper heritage, that is, to subjects heritable *sua natura*. It does not extend to what is heritable merely *destinatione*; for example, to take a well-known case—loose stones intended for a building in progress, and brought to and laid down on the ground beside it, but not yet built into it, are heritable *destinatione* if the proprietor dies while his building lies unfinished. But this is a mere presumption, and if the proprietor had expressly bequeathed the loose stones to his executor or to a third party, his heir-at-law could not claim them—presumption must yield to fact.

Robert Brand junior, though a minor, might have separated the fixed machinery in question and sold it or carried it elsewhere, (I mean apart from the provision of his father's trust) and if so, I think he could bequeath it by testament. He has actually done so to the claimants his trustees. If this last view is sound, it would by itself suffice for the determination of the case. But while I go upon both grounds, I prefer to rest my judgment mainly upon general doctrine, which I think is fixed by *Fisher* v. *Dixon*, that a mere tenant's trade fixtures in an ordinary case are moveable *quoad* succession and descend to his executors.

I am of opinion, therefore, that the second finding of the Lord Ordinary should be recalled, and that the whole machinery in use at the colliery, whether fixed or unfixed, should be held to be moveable, and belong to the trustees of the late Robert Brand junior.

As under the agreement between the claimants the machinery is to be taken by Alexander Brand's trustees and only its value paid to Robert Brand junior's trustees, if the parties are agreed as to the value and as to the amount of profits and of rents the case may now be exhausted.

The other Judges concurred.

The Court recalled the second finding of Lord Shand's interlocutor, and held that all the machinery therein referred to was moveable in a question as to the tenant's succession; *quoad ultra*, they adhered, finding Alexander Brand's trustees liable in expenses.

Counsel for the Trustees of Robert Brand junior—Dean of Faculty (Clark), Q.C., and Readman. Agent—E. Mill, S.S.C.

Counsel for Alexander Brand's Trustees—Solicitor-General (Watson), Q.C,, and Mackintosh. Agent—A. Morrison, S.S.C.

[*R.*, Clerk.

Thursday, December 3.

SECOND DIVISION.

[Lord Gifford, Ordinary.

MATHIESON *v.* GIBSON, *et e contra.*

Property—Servitude—Possession.

A raised an action of declarator against B, the next proprietor, to have it found that a certain strip of ground between two walls where the properties adjoined was his exclusively by title and prescriptive possession, and that it was unburdened by servitude. The defenders for upwards of 40 years enjoyed an eavesdrop, and their buildings also had a row of windows looking into the said strip.

Held that the defenders had failed in the circumstances to prove any exclusive title or exclusive possession.

Observed that the eavesdrop formed a strong item of evidence of property in the defenders in absence of other proof.