

At advising—

LORD PRESIDENT—I have not the least doubt of the soundness of the Lord Ordinary's decision in this case. I think the tenant's claim for damages was distinctly made for each year, and that being so, I think the law of *Broadwood v. Hunter* does not apply. In that case there was mere general grumbling and complaint. The valuations of the tenant may turn out to be of little worth; but all that we decide at present is, that he must have an opportunity of proving his case.

LORD DEAS—I was a party to the decision in *Broadwood v. Hunter*, and I think that we dealt with that tenant very strictly. I am not going to suggest any doubt of the soundness of the decision; but this is a very different sort of case. Looking at the correspondence, it would be out of the question to come to the conclusion that the tenant's claim is excluded.

LORD MURE concurred.

LORD SHAND—Here we have a case of a distinct claim duly given in—not mere general complaints. That makes the difference between this case and *Broadwood v. Hunter*.

The Court adhered.

Counsel for Defender (Reclaimer)—Balfour—Low. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Pursuer (Respondent)—Kinneair—J. A. Reid. Agents—J. & A. Peddie & Ivory, W.S.

Saturday, February 2.

SECOND DIVISION.

[Lord Adam, Ordinary.]

BRAND'S TRUSTEES v. BRAND AND OTHERS.

(*Ante*, vol. xii. p. 124, and vol. xiii. p. 744; 2 R. 258, and 3 R. (H. of L.) 16.)

Heritable and Moveable—Heir and Executor—Fixtures.

In a question between the heirs and executors of the tenant of a coal-mine, held (1), that steam-engines bolted to log-seats, which latter rested on brick foundations, and were not fastened by any mechanical means, but were merely held thereon by their own weight, were heritable; and (2), that an underground railway was also heritable, the description of it being that "the rails were nailed to the sleepers, and the sleepers nailed to the strata, a little packing being occasionally required under and around the sleepers."

The original question in this case was—Whether machinery erected by a tenant of minerals under an ordinary lease was heritable or moveable as regards the tenant's succession? On 19th December 1874, the Second Division of the Court of Session (*rev. Lord Shand, Ordinary*) held that the machinery belonged to the executor and not to the heir, and was therefore moveable—12 Scot. Law Rep. 124, and 2 R. 258. On appeal the House of Lords, on 16th March 1876

(13 Scot. Law Rep. 744, 3 R. (H. of L.) 16), altered and restored the judgment of the Lord Ordinary, holding that the machinery was heritable in a question as to the tenant's succession.

The facts of the case have already been fully reported in the previous reports.

On 13th May 1876, the Second Division pronounced an interlocutor applying the judgment of the House of Lords. By that interlocutor they found, *inter alia*,—"That the machinery and plant and those parts thereof are heritable, and belong 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 for 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." In terms of this interlocutor the Lord Ordinary (**SHAND**) remitted to Mr David Rankine, mining engineer, Glasgow, to report with reference to it—What part of the machinery was heritable and what moveable? Mr Rankine reported, and objections were lodged to his report, and the Lord Ordinary (**ADAM**), on 7th February 1877, of new remitted to Mr Rankine, and a second report was prepared, to which also objections were lodged. Mr Rankine's report (to which objections were lodged), so far as it is necessary to refer to it, was as follows:—

"Group No. 1.

"The engine No. 1 is bolted to the log-seat No. 2, the logs being bolted together and laid upon brick foundations.

"An exhaust pipe is led from the engine into the brick chimney-stalk of the boiler building, and in the course of its length it passes by an 'elbow' bent into and out of an iron cistern which is embedded in the ground; the cover of the cistern being bolted to the body of the cistern and the exhaust pipe is bolted to the covers.

"The wooden engine-house No. 3 partly rests upon the brick building of the boiler No. 4, and is partly nailed to the log-seat No. 2; it is also attached to the brick building of the boiler by means of a wooden dowel, which has been either built into the brick building or afterwards inserted into it; one of the upright timbers of the house being now nailed to the dowel.

"The horizontal engine, &c., No. 8, is bolted to the log-seat, the logs being bolted together and laid upon the strata, which has been levelled to receive them, and a space enlarged for the engine. The engine is directly connected to the boiler No. 4 by the steam-pipes No. 10, some of the pipes having flange joints similar to those described as connecting the engine No. 1 with the boiler No. 4.

"Group No. 2.

"The various articles in this group form the underground railways, the rails being nailed to the sleepers, and the sleepers laid upon the strata,

a little packing being occasionally required under and around the sleepers.

After various further procedure, the Lord Ordinary (ADAM) on 1st November 1877 pronounced the following interlocutor and note:—"The Lord Ordinary having heard counsel for the parties on Mr Rankine's report, No. 43 of process, finds that the whole of the instruments, engines, and machinery therein enumerated, excepting one of the three cages of No. 15 in group No. 1, and the cast-iron plates in No. 34 in group No. 4, are to be held and treated as heritable.

"*Note.*—From the description given in the report of the machines and other articles specified in group No. 1, they appear to the Lord Ordinary to fall within the description of articles which are to be treated as heritable, contained in the interlocutor of 4th August 1874. They seem to him also to be exactly similar to the articles which were held to be heritable in the case of *Fisher v. Dixon*, 5 D. 775. The Lord Ordinary has excepted one of the cages in this group, because it is stated by the reporter to be moveable.

"With reference to the railway and other articles specified in group No. 2, forming the underground railways of the works, they appear to the Lord Ordinary to fall within the class of articles which were held to be heritable in *Fisher v. Dixon* (p. 836), and not to be moveable (p. 834)," &c. . . .

Authorities—*Rex v. Otley*, 1830, 1 B. and Ad. 161; *Wiltshier v. Cottrell*, 5th Feb. 1853, 1 El. and Bl. 674; *Dowall v. Miln*, July 11, 1874, 1 R. 1180; *Duke of Beaufort v. Bates*, Jan. 11 and 13, 1862, 3 Dejev. F. & J. 381; *Dixon v. Fisher*, 6 Mar. 1843, 5 D. 775, H. of L. 2 Bell's App. 286.

At advising—

LORD GIFFORD—There are only two points or main questions raised by the reclaimers, the trustees of the late Robert Brand jun., under the present reclaiming note. The first question relates to the steam-engines—I think three in number—which rest upon log-seats, and which log-seats again rest upon brickwork, and as to these the reclaimers' contention is that they with their appurtenances must be held to be moveable as in a question between the heirs and executors of the tenant, because the log-seats are not bolted or attached by any mechanical means to the ground or to the brickwork, but merely rest thereon, and are kept in place by the weight of the seat and engine. The second question relates to certain underground railways—that is, railways in the underground roads or workings. The reclaimers concede that ordinary railways above ground for the conveyance of the minerals, and constructed in the same way as public railways, are heritable, but they contend that the underground railways, especially those leading to the working-faces, being necessarily temporary and frequently shifted from place to place, are in a different position, and must be regarded as moveable in the same way as the hutches or moveable tools.

I am of opinion that the judgment of the Lord Ordinary is right upon both these points, and there being no other question raised under the reclaiming note, I think the note should be refused.

The evidence as to the nature and description of the alleged fixtures now in question is contained in the reports, original and supplementary,

of Mr David Rankine, mining engineer, Glasgow. The reclaimers did not object to the descriptions given in these reports so far as they go, but they desired certain additional information in certain views, and they left it to the Court to make a further remit to Mr Rankine, if this should be thought necessary or desirable. For myself, I do not desire any further remit or report, but I think we have sufficient materials before us to enable us to dispose of the two questions raised.

First, as to the steam-engines. It is true that the log-seats on which these engines rest, and to which they are fastened, are not themselves—that is, the log-seats are not—fastened to the ground or to the brickwork by any bolts or direct attachment. They are sufficiently kept in place by their own weight and by the weight of the engines seated upon them. But I think that the want of bolts or physical attachments does not prevent the engines with their seats from being heritable. The engines with their seats are of enormous weight, and just as much built into or upon the ground as many buildings are. If the seats interposed between the brickwork and the engines had been of large stones, as they often are, instead of being of logs, it could hardly have been contended that the stone-seats to which the engines were bolted and the engines themselves were not affixed to the soil, although there was no proper mechanical fixture between the stones and the brickwork on which they rested. As well might it be said that the brickwork itself was not a fixture, the cohesion of the mortar being slight or easily overcome. In all such cases it is chiefly the weight of the structure that attaches it to the ground. I cannot draw any distinction between engines fastened to log-seats and engines fastened to stone-seats. Both seem to me to be parts of a building necessarily attached to the soil. The logs have greater coherence and toughness, and for that reason are preferred to stone, just as logs are sometimes for a similar reason embedded in the walls of some descriptions of houses.

But further, looking to the position and uses of these steam-engines, I think they are, in the proper sense of the word, fixtures in the soil. They are used for pumping and winding. They are connected necessarily with boilers which are built into brickwork, and with brick chimneys which lead off the smoke and steam. The log-seats of the engines are also connected with the foundation logs of the pithead frame, and that again is connected with the pithead house and the pithead scaffolding, and the engine is just a necessary and essential part of the structures used for working the shaft of the pit. I think these are all so attached to the ground as to be heritable in a question between heir and executor, although it would be otherwise in a question between landlord and tenant—that is, although the mineral tenant apart from stipulation would be entitled to remove them as trade fixtures at the end of his lease. With other fixtures therefore they must go to the tenant's heir, and not to his executors.

Then, as to the underground railways, here the information is very meagre, and in particular it is difficult to gather from the reports any essential distinction between the underground railways and those above ground leading from the pithead to public railways or elsewhere.

If it had been shown that the underground railways—that is, the railways in the pit-roads, whether heading-roads or branch-roads—were of a different construction from ordinary railways above ground—for example, if it had been shown that the underground railways were mere detached and moveable tramplates simply laid on the ground longitudinally without structural fastenings, merely to afford a smooth surface for the wheels of the hutches, it might very well be that such moveable tramplates were in no proper sense of the word fixtures. But this is not the state of the case. On turning to the report, the articles in group No. 2 are described thus—“The various articles in this group form the underground railways, the rails being nailed to the sleepers, and the sleepers laid upon the strata, a little packing being occasionally required under and around the sleepers.”

This description is very short, but I think it indicates sufficient fixture to bring the underground railways really into the same category as those above ground. There are sleepers, and these sleepers are laid upon the strata just as ordinary sleepers are laid upon the permanent way. A little packing is required in and around the sleepers. This corresponds with and is indistinguishable from ordinary ballast in a public railway, the only difference being in degree. Then the rails are nailed to the sleepers. This implies even greater fixture than is usual in many public railways where the rails are set in chairs, and merely wedged tightly to the chair by a wooden wedge or key which the blow of a hammer would remove. But in many public railways—for example the Great Western—chairs are not used, but the flanged rail is directly nailed to the sleeper just as in the present case. That underground rails so constructed may be often shifted or removed is doubtless true, especially in branch roads or roads leading to the working-faces. But although easily removeable, while they remain laid and fixed they seem to be as heritable in character as many railways substantially constructed on the surface of the ground. A railway in a heading-road may often be as permanent as a railway leading from the pithead—that is, it will be used as long as the pit is wrought.

I think therefore the Lord Ordinary's interlocutor should be affirmed.

The LORD JUSTICE-CLERK and LORD ORMDALE concurred.

The Court adhered.

Counsel for Robert Brand jun.'s Trustees (Reclaimers)—Balfour—Readman. Agents—Mil Bonar, W.S.

Counsel for Alex. Brand's Trustees (Respondents)—Asher—Mackintosh. Agent—Alex. Morrison, S.S.C.

Saturday, February 2.

FIRST DIVISION.

[Sheriff of Banffshire.

FRASER V. LAING.

Master and Servant—Damages by a Servant against a Master for Ill-treatment during Service—Issue.

As a general rule, a servant is not entitled to remain in service for the stipulated period, and at the end to sue his master for damages on the ground that during the whole or part of the period of service the master, in breach of his obligation, failed to supply his servant properly and sufficiently with bed and board, and subjected him to cruel treatment, to his loss, injury, and damage.

Averments in such an action upon which an issue was allowed, and terms of the issue adjusted for the trial of the cause.

The pursuer in this action was engaged by the defender, a cattle-dealer and butcher in Keith, as a general domestic servant for the half-year from Martinmas (old style) 1875 to Whitsunday (old style) 1876. When she entered the defender's employment she was not sixteen years old. Her mother had been dead for several years, and her father was a farm-grieve resident at Dulsie Bridge, near Nairn. The defender was married, and had five children, who all, during the period of the pursuer's service, resided in family with him and his wife. The pursuer was the only domestic servant then in the house.

After leaving the defender's service the pursuer raised an action against him in the Sheriff Court of Banffshire, concluding for payment of £500 damages. She alleged that about two months after entering his service he and his wife commenced a systematic course of oppressing her, of outraging her feelings, and of treating her with the greatest cruelty, wanton maliciousness, and inhumanity; and that they continued these practices until she left. In particular, that they oppressed her with work, without allowing her sufficient intervals for sleep; that they did not supply her with the proper quantity or quality of food, but merely with crusts of bread, cold porridge, and other leavings of the family meals; and that during the last month of the period in question they deprived her of regular meals altogether; that they exposed her to cold, without fire, and without proper bedroom accommodation; that they struck her and kicked her, and used abusive language towards her; in short, that they reduced her to a state of unspeakable wretchedness and suffering, and that her life, except during sleep, became a grievous and sickening burden.

In consequence of this barbarous treatment the pursuer averred that her mental faculties as well as her bodily powers came to be affected. She became depressed, abject, feeble, and in a great measure helpless in mind. Her person became emaciated and prematurely decrepit. Her skin was discoloured and wrinkled. Her hands and feet were very much swollen, and covered with chilblains and sores. Unable as she was, thus reduced both physically and mentally, to pay proper attention to personal cleanliness, her person became dirty and covered with vermin, so