his trust-estate when they attained the age of twenty-five. I do not think that the directions in the deed are repugnant to that construction, but I think they are inoperative unless the children agree to abide by them, because I remain of the opinion, which Mr Campbell said was an old-fashioned one, that if persons have an absolute right to property they are entitled to demand conveyance of it from their debtor.

The Court answered the question in the affirmative.

Counsel for the First Parties—Jameson—S. M. Penney. Agent—F. J. Martin, W.S.

Counsel for the Second Parties—W. Campbell. Agents—Fraser, Stodart, & Ballingall, W.S.

Friday, February 28.

FIRST DIVISION.

[Sheriff of Aberdeen.

WATT AND OTHERS (REID'S EXECUTORS) *v.* REID.

Succession—Agricultural Lease—Heir and Executor—Threshing-Mill—Dung—Heritable or Moveable.

In a question between the heir and executor of the tenant of agricultural subjects who died during the currency of the lease—*held* (*following Brand's Trustees*, 3 R., H. of L., 16) that a threshing-machine partly attached to the walls of the building in which it was erected, and partly suspended from the roof, was heritable, and passed with the subjects to the possession of the tenant's heir succeeding to the lease, who was also entitled to the dung made on the farm both during the lease and while the executors were in possession of the farm, because dung, although in its nature moveable, became heritable by being dedicated to the land.

Cumming (*Murray's Trustee*) v. *Graham*, July 19, 1889, 26 S.L.R. 762, *followed.*

William Reid, farmer, Longley, Kildrummy, Aberdeenshire, died on 28th December 1887 leaving a testament whereby he nominated certain parties as his executors. The testator's heir-at-law was his son William Reid. The lease of the farm was for nineteen years, and at the deceased's death there were nine years still to run. The executors of the deceased William Reid raised the present action in the Sheriff Court of Aberdeen against the heir-at-law, concluding, *inter alia*, for payment of the value of a threshing-machine taken possession of by the defender, and also for the value of the dung made on the farm, produced from the whole crop of 1887, and some straw from crop 1886. They pleaded that, in a question between heir and executor, the dung and threshing-mill being moveables they were entitled to payment therefor.

The defender claimed the threshing-mill and dung as heritable estate belonging to him as heir-at-law of his deceased father, and averred that they did not fall into executry.

The parties renounced probation.

The Sheriff-Substitute (BROWN) remitted to Mr Copland, auctioneer, Huntly, who reported as follows—"I have examined the threshing-mill on this farm. It is driven by water, with a start and alvh wheel. The two bushes of water-wheel shaft—one of them is supported upon a large stone built into the wall of the building, and fixed to it with two screw bolts; the other one is supported and fixed similar to a stone wall termed the outerhead outside the building. There are two large beams cross the house, and are built into the walls at each end for fixing and supporting the mill, which is done by the framing beams of the mill being tenoned and bolted to these beams with four sunk bolts—this is all the fixing and support of the mill. The two supports for the bushes of the roller pinions are fixed at one end to a cross piece fixed to mill framing and into stone wall. The other end of them are nailed to one of the large beams that support the mill. The fan below the mill stands upon the floor and is fixed to the mill.

"I consider the two large beams built into the walls part of the mill, as, owing to the construction of this mill it cannot be set up without them or similar beams built into the walls.

"*Note.*—This mill is quite different from the ordinary construction of these mills. Instead of being set on stones in the floor with posts down the whole height of the framing, it is hung on beams built into the walls exclusively for its support. Such mills, in my experience, sometimes belong to the proprietor, and are given over at dead inventory to the tenant. In other cases the mill belongs to the outgoing tenant; it entirely rests upon the conditions of lease whether the incoming tenant is bound to take the outgoing tenant's mill at valuation at all. In many cases in my experience as an auctioneer the outgoing tenant has had to expose his mill to be sold by public roup along with his other effects, the incoming tenant not being at all bound to relieve the outgoing tenant of the mill on the farm."

By interlocutor of 27th February 1889 the Sheriff-Substitute found that in a question between the executors and the heir of the deceased William Reid, the threshing-mill and dung were heritable estate, and fell to the defender as the heir and successor of the deceased in the estate of Longley.

"*Note.*—The only matters raised in the record which have been under contention in the process are as to the threshing-mill and the dung, in regard to which both parties have renounced probation, being content to take a judgment on the statements and admissions contained in the documents referred to in the minute No. 7. I cannot gather from Mr Copland's report that the

mill is other than an ordinary agricultural mill, and it seems to me that the question in regard to it is concluded by authority. That it is a fixture, although capable of being severed without material injury from the subject to which it is annexed, is, I think, perfectly clear, on the principles which were laid down in *Fisher* v. *Dixon*, 5 D. 775, 4 Bell's App. 286, and as such it passes to the owner of the heritable estate to which it is annexed. Subjects held under lease, form by the law of Scotland, heritable estate, and the case of *Brand's Trustees*, 3 R. (H. of L.) 16, has conclusively decided that in this matter there is no difference between an owner in perpetuity and a limited owner, and that in a question between the heir and executor, fixtures or things that have become *partes soli* pass with the subjects to the possession of the tenant's heir succeeding to the lease. It may be that in a question between landlord and tenant the threshing-mill might be held to fall within the tenant's right of severance, which the law in the interests of trade recognises and gives effect to as an exception to the ordinary rule that fixtures belong to the owner of the heritable subject in which they inhere, but as succinctly observed by Lord Selborne in the case of *Brand*, so long as the estate held under lease continues, there is no more reason for regarding the lessee's interest in the fixtures as separate from his interest in the soil than if he were owner in fee simple, and before actual severance the lessee's right passes to his successor in the estate, which by the law of Scotland is the heir, and not the executor. The exception to the rule, therefore, is not *hujus loci*, and on the same ground it would be irrelevant to consider what might be the state of matters as between an outgoing and incoming tenant.

"A case, some years ago decided in this Court, which was referred to at the debate, seems to me to have no application, the question there arising under entirely different circumstances, and in particular not raising the principle as to the rights of parties in a subject made heritable by destination.

"I feel more difficulty in the point raised as to the dung. No direct authority was quoted as specially affecting it, but in the end I have come to be of opinion that it must be held to be governed by the general principle laid down in the cases above referred to. The parties have renounced probation without condescending in the statement of facts submitted as proof as to the provision in the lease regulating this matter, and have thus not put in evidence what I understand to be almost the universal rule that it must be consumed on the farm. But on the general principle that dung is by destination *pars soli*, and dedicated to the beneficial use of the heritable subject out of which it arises, I think the defender must prevail on this part of the case also *in toto*, for I see no reason for giving effect to the accidental circumstance that a portion of it had been actually carried to the ground with which it was to be immixed, while another portion was still left in the yard, or that a moiety was produced after the death of the deceased. The continuity of the inheritance has been preserved, and it seems to me, for the reasons above stated, that the heir must take every part of it which has not been realised and converted into executry estate. The defender having been successful in the only issue which has been contentious, I see no reason why the ordinary rule as to costs should not apply. In the negotiations before the parties came into Court the defender was less explicit in his position than he might have been, but an action was necessary to try the question which has been decided, and in that the defender has prevailed."

The pursuer appealed to the Sheriff (GUTHRIE SMITH), who on 11th April 1889 recalled the Sheriff-Substitute's interlocutor.

The defender appealed to the Court of Session, and argued—(1) The threshing-mill fell to the defender on the authority of *Brand's Trustees*, December 19, 1874, 2 R. 258, and 3 R. (H. of L.) 16. Though that was the case of a mineral lease, yet the principle of that decision applied. Here the mill-house was part of the farm buildings, and it was dedicated to the machinery of the mill. All that was attached to the soil, and the appurtenances of the fixed machinery, passed to the heir—Hunter on Landlord and Tenant, vol. i. 313. With regard to the dung, the case of *Murray's Trustees* v. *Graham*, July 19, 1889, 26 S.L.R. 762, applied conclusively. This farm was to be cultivated according to the rules of good husbandry, and by the common law dung made on the farm inured to the land. During the currency of the lease the landlord was protected by the common law, and at the end of the lease he protected himself by stipulations in the lease—*Pringle* v. *M'Murdo*, June 30, 1796, M. 6575. If the tenant could not have sold the dung and removed it from the land, it was clear that his executors could not have any higher right than their author. Dung was heritable *destinatione;* it was the best example of a thing moveable in itself made heritable by destination—2 Bell's Comm. 3; Bell's Prin. sec. 1375, 1261; *Carnegy* v. *Scott*, February 24, 1852, 14 D. 528; Stair, ii. 1, 2.

Argued for the respondents—The case was not ruled by *Brand's Trustees*, because the question there was one relating to a mineral lease, and it had no application to a lease of agricultural subjects. This threshing-mill was just an instrument of husbandry like a turnip-cutter—*Hyslop*, F.C., 143. The machine or mill being partly heritable and partly moveable, should go to the executor. The farm could be worked perfectly well without it, as steam travelling machines were now universally in use—*Dunn* v. *Johnstone*, January 28, 1818, Hume, p. 451. With regard to the dung, though moveable in itself, it was said that it should be regarded as heritable by destination, but it was more accurate to say that it was moveable property restricted in its use to the farm, and if so, the heir should give the value thereof

to the executors as he, at the end of the lease, would be recouped—*Dryesdale* v. *Wemyss*, January 27, 1848, 10 D. 467, and 6 Bell's App. 455. At any rate, the dung made on the farm after the death of the tenant was moveable and belonged to the executors. Its amount could easily be ascertained.

At advising—

LORD PRESIDENT — This is a question between the heir and the executor of a deceased tenant of an agricultural farm. The lease extended for nineteen years, and at the date of the tenant's death there were still nine years to run. Two questions are raised in the present appeal—the first is as to the executor's claim for the value on the property of a threshing-mill, while the other relates to his right or claim to the dung on the farm at the date of the heir's entry. Now, these two questions, it appears to me, fall to be disposed of on different considerations.

As regards the threshing-mill, there does not appear to me to be any room for doubt. The description of the mill given by the reporter is sufficient to show that it was attached to the heritable subject, and accordingly I think the rule of the civil law *prima facie* applies in *ædificatum solo cedit solo.* I do not say in the present case that the maxim is to be received in its most literal acceptation, and that nothing is to be held to be a fixture unless there has been actual contact between the subject and the soil. For instance, if the subject is attached to what is part of a heritable subject, as the windows or doors of a house, then these are heritable by accession. The description of the threshing-mill is that it is not fixed in the ground but is hung on beams built into the walls exclusively for its support. I do not think that there can be any doubt that that is a subject which has become heritable by accession. There might have been some doubts as to whether this rule applied to subjects under lease when the lease was only for a temporary purpose, but any doubts upon this matter are set aside by the judgment of the House of Lords in the case of *Brand's Trustees.*

Lord Selborne there, in the course of his opinion says—"The lessee has right during the term of the lease to the whole heritable subject including those things which have become accessions to that subject by being affixed thereto. So long as his estate under the lease continues, there is no more reason for regarding his interest in the fixtures as separate from his interest in the soil than if he were owner in fee-simple." And the Lord Chancellor says—"There is no doubt *ex hypothesi* a right to remove these fixtures, as against the landlord, but who is the person to exercise that right? It is not a right in gross; it is not a right collateral to the ownership of the subject; it is a right which must of necessity be annexed to the ownership of the subject, and must be exercised by him who is the owner of the subject." Now, his Lordship is there speaking of the tenant of the lands, and in a question between heir and executor he calls the heir of the tenant the owner of the subject, that is to say, owner during the currency of the lease. He is as much the owner as if he were infeft. After the decision in *Brand's Trustees* any argument in favour of the threshing-machine going to the executor of the tenant is hopeless.

As regards the dung, that I think is in a somewhat different position. There is a rule of common law applicable to agricultural leases founded largely on common sense, and that is, that according to the laws of good husbandry the dung which is produced upon the farm should not be removed from it, but should be used in its cultivation.

In order to enforce this rule no express stipulation in the lease is necessary and every tenant in possession of an ordinary agricultural subject is liable to that rule. Now the tenant here, died in December 1887, in what may be termed the middle of the year, that is to say, after the crop had been reaped, and while the fodder grown upon the lands was in the course of being consumed and so converted into manure.

The fodder clearly could not be removed; it had to be incorporated into the heritable subject, and had to be mixed with the soil. I therefore think the dung must be viewed as heritable *destinatione*, and that the tenant was bound to apply every ounce of it to the land. Though moveable in its nature it became heritable by being dedicated to the land. In this respect it resembled the case where parts of a building such as doors, windows, etc., are brought on to the ground for the purpose of being incorporated into a building, only the case of the dung is stronger, because the owner of the building might sell or take away any portions of the woodwork not incorporated into it and supply the place thereof with other material, whereas the tenant in the case of dung is not entitled to sell it and supply its place with other dung. The case of *Carnegy*, in 14 D., establishes that the removing by the tenant of dung made on the farm is an illegal act, and it may be brought back to the land by a summary application to the Sheriff at the instance of the landlord.

Therefore it seems to me that the dung and the threshing-mill are as regards the case upon the same footing, and that they pass to the heir of the late tenant and not to his executor.

An attempt was made to distinguish dung made on the farm during the lifetime of the tenant from that made after his death and while his executors were in possession of the land, but I see no ground for any such distinction. After the death of the tenant the executor entered for a short time into the possession and management of the farm, but that was merely as a matter of convenience and because the crop on the farm belonged to them and they were entitled to see after their interests. But the only real tenant is the heir; it is he who is subject to the various obligations as tenant, and he is obliged, under the rule I have already referred to, to put all the dung of the preceding year on to the farm

at whatever period it may have been made. Upon that ground it seems to me to be impossible to divide into two the dung made upon the farm, seeing that for the reasons I have mentioned it is all to be expended on the land.

It appears to me that the Sheriff-Substitute took the right view in this case and that we ought accordingly to revert to his judgment.

LORD ADAM—I also am of the opinion that the view of the Sheriff-Substitute in this case is the right one. The case of *Brand's Trustees* settles the question of the threshing-mill, while the case of *Murray's Trustees* settles the question of the dung.

As to the threshing-mill, there can be no doubt that it is attached to the building or house in which it is erected. Now, the case of *Brand's Trustees* was decided with reference to the physical attachment of the various subjects to the *solum*, and that being so, it covers the present case. It also settled this further point that the principle of the decision applied in cases where the tenant died during the currency of the lease.

As regards the dung, I hold it to be settled by *Murray's Trustees*. Besides, there is an implied common law obligation, which is binding on the tenant, namely, that he shall incorporate into the land all dung made on the farm during the year. Thus in a question between heir and executor this dung is *destinatione* heritable.

I further think with your Lordship that it is impossible to draw any distinction between dung made on the farm prior and subsequent to the death of the tenant, and upon the whole matter I agree with the view taken by the Sheriff-Substitute and think that we ought to revert to his interlocutor.

LORD M'LAREN—When we examine the decision of the House of Lords in the case of *Brand's Trustees*, and especially when we look at Lord Cairns' opinion, we see that it is largely founded upon the principle that whatever is physically attached to the soil is part of the inheritance. His Lordship adopts in the most absolute form the principles of the civil law in regard to accession to heritable estate.

In treating of the rule of modern law by which fixtures which have been attached for the purpose of trade, and in a lesser degree fixtures which have been attached to an agricultural subject, are immoveable, his Lordship shows that this is not a part of the law of succession and it in no way interferes with it. Machinery from the time of its erection and its physical attachment to the soil becomes a part of the inheritance, but in view of an implied contract to that effect the tenant may exercise his right to remove it at the end of the lease.

That was settled by decision before the case of *Brand's Trustees*. The point which was settled in that case was, that the rule as to accession governs the rights of the owners of a limited estate as much as those of the owners of the fee.

Accordingly, in a question between the heir and executor of a deceased tenant the heir was held to be the owner of the machinery because he was the owner of the soil. There is no doubt a contract right in such a case on the part of the tenant to remove these fixtures, but as the Lord Chancellor says in the case of *Brand's Trustees* it must be exercised by the owner for the time being, a position which cannot be predicated of the executor at the time of the tenant's death. The principles of the decision in *Brand's* case are as applicable to the case of agricultural subjects as they are to minerals. I also agree that the Sheriff-Substitute has come to a right result with reference to the dung.

In regard to what was produced during the lease, there is no doubt that in accordance with one of the recognised rules of agriculture, it was appropriated to the uses of the farm, and so became heritable *destinatione*. As regards what was produced afterwards, I cannot hold it to be the property of the executors. In the course of production it was annexed to the soil and became the property of the landlord. Upon these grounds I fail to see that any distinction can be drawn between the dung made on the farm prior to the death of the tenant and subsequently.

Upon these grounds I concur with your Lordships in thinking that we should revert to the interlocutor of the Sheriff-Substitute.

The Court recalled the interlocutor of the Sheriff and reverted to that of the Sheriff-Substitute.

Counsel for the Pursuers—Low—Watt. Agent—Andrew Urquhart, S.S.C.

Counsel for the Defender—Asher, Q.C.—Ure. Agents—Ronald & Ritchie, S.S.C.

Friday, February 28.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

MORE (LIQUIDATOR OF THE FLORIDA MORTGAGE AND INVESTMENT COMPANY, LIMITED) *v.* BAYLEY.

Public Company—Liquidation—Liability for Calls—Transfer to Person without Means.

A land mortgage company purchased an estate from a syndicate. Bayley, a member of the syndicate, consented to accept the value of his shares in cash, debentures, or fully paid-up shares. A share certificate was issued in Bayley's name, who when he discovered that there was a call of £4 a share on his allotment, refused to accept the shares. It was finally arranged with the secretary of the company that Bayley should transfer his shares to Doyle, his servant, whom the secretary knew to be without means. The transfers (one of which was prepared by the secretary of the company), though in fact gratuitous, bore to be for a valuable consideration, and