ally I concur with Lord Low, although I do so, as I have said, with regret.

LORD KINNEAR — I am of the same opinion. I think there is no evidence of negligence or want of skill, and therefore that the verdict cannot stand.

LORD PRESIDENT — In expressing my entire concurrence with your Lordships' decision, I desire to add that our decision implies no light estimate of the high degree of responsibility attaching to companies exercising their statutory powers. The law requires that care and skill shall be applied to the execution of such works by a public body or company where risk to the property of others is necessarily involved. The amount of care and skill to be exacted must vary according to the degree of danger arising from the nature of the work. In the present case there does seem to have been a high degree of risk, and in any consideration of the case I hold the defenders bound to a correspondingly high degree of care. But then the evidence appears to me to show that this accident was not due to any negligence or unskilfulness, even on the most exacting estimate of the care and skill required. I take the same view of the evidence as does Lord Low, and I think it is impossible to allow the verdict to stand. We will therefore make the rule absolute, setting aside the verdict.

The Court granted a new trial.

Counsel for the Pursuers — Lorimer — M'Laren. Agents — Cowan & Dalmahoy, W.S.

Counsel for the Defenders — Clyde. Agents—Hope, Todd, & Kirk, W.S.

Saturday March 10.

SECOND DIVISION.

[Lord Low, Ordinary.

LIQUIDATOR OF PHOTOGLYPTIC COMPANY, LIMITED *v.* MUIRHEAD.

Landlord and Tenant—Trade Fixtures—Effect of Assignation of Trade Fixtures by Tenant to Landlord.

The tenant of heritable premises assigned to his landlord in security of certain debts certain trade fixtures which he had erected on the premises in terms of the lease.

Held that the assignation operated as a renunciation by the tenant of his right to sever the trade fixtures from the soil until the debts were paid.

On 17th December 1891 the Photoglyptic Company, Limited, was incorporated under the Companies Acts 1862 to 1890. The principal objects for which the company was formed were, *inter alia*, to carry on the business of art printers and publishers, photographic printers and engravers, and other businesses of a similar kind.

The company commenced business, and carried on the same until 21st August 1893, when its affairs having become embarrassed, an extraordinary resolution to wind up voluntarily was unanimously adopted.

By lease dated 14th April 1892 entered into between James Muirhead and the said Photoglyptic Company, Limited, Mr Muirhead let to the company as business premises for the purpose of carrying out the objects of the company certain ground and premises belonging to him situated in St Bernard's Row, Edinburgh. The term of entry was Whitsunday 1892, and the period of lease was ten years. It was stipulated by the lease that Mr Muirhead should not be liable for any repairs necessary on the premises further than in keeping them wind and water tight, the company being bound to perform all other necessary repairs at their own expense.

As it was anticipated that the company would require to make considerable alterations on the premises in order to adapt them for their business, and would require to introduce and fit up a number of trade fixtures, the said lease contained, *inter alia*, a special provision that the company should be entitled to make and execute at their own expense certain alterations and additions, but under the condition and provision that the company should at the termination of the lease restore the premises to the same order and condition in which they were at the date of the company's entry, and should remove and clear the ground of any additional buildings which they might have erected for the purposes of their business. Under this arrangement the company made various alterations on and additions to the premises, and fitted up on the subjects of lease trade fixtures of considerable value.

In order to enable the said Photoglyptic Company to conduct its business there was arranged a cash-credit with the Union Bank of Scotland, Limited, for the sum of £1000, and subsequently an additional cash-credit was arranged for the further sum of £500. Repayment of both these cash-credits was guaranteed to the bank by three members of the Photoglyptic Company, the said James Muirhead, the late Thomas Dalgleish, and Andrew Hamilton Baird. The amount due to the bank under the said cash-credits at the date of the commencement of the winding-up was £1525, 15s. 6d.

By bond of relief and assignation in security dated 23rd and 31st May the said Photoglyptic Company, Limited, on the narrative of the said cash-credits, bound themselves and their successors and representatives whomsoever, jointly and severally, and also their capital, stock, assets, and profits, to warrant, free, relieve, harmless and skaithless keep, the said James Muirhead, Thomas Dalgleish, and Andrew Hamilton Baird, and their respective heirs and executors and representatives whomsoever, of the guarantees undertaken by

them, and for that effect, when called upon by the said James Muirhead, Thomas Dalgleish, and Andrew Hamilton Baird, at any time after six months from the date thereof, the company bound themselves to make payment to the Union Bank of Scotland, Limited, of the sum of £1500, or of whatever other sum might be due at the time the same should be demanded.

In security of the obligations undertaken by Mr Muirhead and the other gentlemen above named, the said company by the said bond of relief and assignation in security assigned to Mr Muirhead certain machinery and plant, patent rights, and other rights and interests held by the company. The assignation, so far as relating to the machinery and plant, was in the following terms—"For the further security of the said James Muirhead, Thomas Dalgleish, and Andrew Hamilton Baird, we, the said Photoglyptic Company, Limited, do hereby assign, transfer, convey, and make over to and in favour of the said James Muirhead, and his heirs, executors, and assignees (in the first place), All and whole the whole machinery and plant specified and enumerated in the inventory annexed and signed as relative hereto, and presently in the premises belonging to the said James Muirhead at St Bernard's Row, Edinburgh."

With reference to the application of the proceeds of the said machinery and plant, and the other subjects assigned by the said bond of relief and assignation in security, the deed contained a special provision, declaring that James Muirhead held the subjects and patents assigned for behoof of himself and the said Thomas Dalgleish and Andrew Hamilton Baird, and should be bound to hold just count and reckoning with the company and the said Thomas Dalgleish and Andrew Hamilton Baird for his intromissions therewith, and to impute *pro tanto* whatever sum or sums he might recover in virtue of the assignation in extinction of sums due under the cash-credit, and to pay the balance to the company.

Subsequent to the granting of the said bond of relief and assignation in security the Photoglyptic Company continued to carry on its business in the said premises, wherein the machinery and plant assigned to Mr Muirhead as aforesaid were situated, until the passing of the extraordinary resolution for winding-up on 21st August 1893, and during that period the company had the use of the said plant and machinery for business purposes. The said plant and machinery consisted to a very considerable extent of proper trade fixtures—that is, of fixtures which had been attached to the heritable subjects for the purposes of trade, and which in a question with his landlord a tenant would have a right to sever from the heritable subjects, and to remove at or prior to the expiry of his tenancy, but which would in a question between heir and executor be held to be sufficiently affixed to the heritable subjects to render them heritable *quoad* succession.

On 13th September 1893 the Lord Ordinary officiating on the Bills ordained that the voluntary winding-up should be continued subject to the supervision of the Court.

Thereafter a question arose between Hugh Miller, the liquidator of the company, and the said James Muirhead, with reference to the extent and effect of the security (if any) created in Mr Muirhead's favour over said machinery and plant by the said bond of relief and assignation in security. The liquidator maintained that the said assignation was a conveyance of moveables in security which had not been followed by delivery of possession to the assignee, and that consequently it was not effectual to any extent, and that he, as liquidator, was entitled to the whole machinery and plant for behoof of the general body of creditors in the liquidation. Mr Muirhead, on the other hand, contended that he was entitled to all the machinery and plant so far as consisting of trade fixtures, because these had been affixed to the heritable subjects belonging to him, and by the said assignation in security the company had abandoned in his favour the right of severing said articles from the heritable subjects which they would otherwise have possessed.

For the determination of the disputed point the liquidator and the said James Muirhead presented an application to the Court in terms of the Companies Acts 1862 to 1890, and in particular sections 147, 151, and 138 of the Act 25 and 26 Vict. c. 89.

The question for the determination of the Court was—In the circumstances stated, has the said James Muirhead obtained a valid and effectual right to such portions of the machinery and plant assigned to him by the said bond of relief and assignation in security as consist of proper trade fixtures?

Parties agreed to hold the value of the plant and machinery so far as consisting of proper trade fixtures to be £450.

By interlocutor dated 3rd February 1894 the Lord Ordinary (Low) answered the questions in the negative.

"*Opinion.*—I am of opinion that the liquidator is entitled to have the question submitted to the Court in this special case answered in his favour. . . .

"There are included in the assignation certain machines which are of the nature of trade fixtures, and it was contended for Mr Muirhead that he had, at all events, a good security over these machines, because, being affixed to the heritage, they became part of it, subject only to the company's right as tenants to remove them, and that the effect of the assignation was truly to operate a renunciation on the part of the company in favour of Mr Muirhead of their right to remove the trade fixtures.

"There is no doubt of the right of the company to remove the machines in question, not only under the common law in regard to trade fixtures, but under their lease, by which they are taken bound at the termination of the lease to restore the premises to the same condition as they

were in at the date of the company's entry.

"The machines were therefore, during the currency of the lease, the moveable property of the company, and they so dealt with them in the assignation. The effect of the assignation appears to me simply to have been to make over to Mr Muirhead whatever right the company had in the machines, and to put him in their room and place as regards the machines, in so far as that could be done without delivery. But I think that it is impossible to construe the assignation as a renunciation by the company of their right to remove the machines, or as an agreement between them and Mr Muirhead that the machines should no longer be regarded as moveables belonging to the company, but as part of the heritage belonging to Mr Muirhead.

"I am therefore of opinion that, not having obtained possession, Mr Muirhead has not got a valid security over the trade fixtures."

The said James Muirhead reclaimed, and argued—Until the tenant removed a trade fixture it formed part of the inheritance, and was the property of the landlord—*Brand's Trustees* v. *Brand's Trustee*, March 16, 1876, 3 R. (H. L.) 16. Until the tenant paid his debts to the landlord the latter could object to the trade fixtures being removed by the tenant—*Smith* v. *Hutcheon*, December 22, 1893, 31 S.L.R. 245. The Lord Ordinary's judgment was therefore unsound.

Argued for the liquidator—The judgment of the Lord Ordinary was right. The assignation of the property did not operate as a renunciation by the company of their right to remove the machines.

At advising—

LORD RUTHERFURD CLARK—The only question before us relates to the trade fixtures. They were specially assigned so that it is not disputed that they were comprehended in the assignation.

The law with respect to trade fixtures was very authoritatively settled by the House of Lords in the case of *Brand*. Though the case was between heir and executor only, the noble Lords who took part in the judgment were at pains to state the general law.

In his opinion Lord Gifford had said that a fixture never becomes attached to the inheritance so as to be capable of being called a part of the inheritance. Commenting upon it the Lord Chancellor says —"It appears to me that this is an error; it does become attached to the inheritance; it does form part of the inheritance; it does not remain a moveable *quoad omnia;* there does exist on the part of the tenant a right to remove that which has been thus fixed, but if he does not exercise that right it continues to be that which it became when it was first fixed—namely, a part of the inheritance." Again, Lord Chelmsford speaks thus—"When the tenant brings any chattel to be used in his trade and annexes it to the ground, it becomes a part of the freehold, but with a power as between himself and his landlord of bringing it back to the state of a chattel again by severing it from the soil. As the personal character of the chattel ceases when it is fixed to the freehold, it can never be revived as long as it continues so annexed."

No language could be clearer. The trade fixture by being attached to the ground becomes "a part of the inheritance"—"a part of the freehold." So long as it is so attached it must belong to the owner of the soil; for he is necessarily owner of everything which is part of it. The tenant possesses it as a part of the subject of the lease; but in no other character. He has a right to make it his own by severing it from the soil, but until that right is exercised he can have no right of property.

In this case the tenant assigned to his landlord the trade fixtures in security of certain debts. At the date of the assignation he could not assign any existing right of property. For the fixtures being still attached to the soil were the property of the landlord. The Lord Ordinary says that during the currency of the loan the fixtures were "the moveable property" of the tenant. This cannot be if they were part of the soil. They could not be at same time part of the heritable estate of one man and the moveable property of another. But the assignation necessarily carried all the right which was vested in the tenant, and therefore, in my opinion, operated as a renunciation of the right of severance until the debts were paid.

The Lord Ordinary says that "it is impossible to construe the assignation as a renunciation by the company of a right to remove the machines." It seems to me to be impossible not to put that construction on the assignation. If I assign a thing which is not mine, I assign all the rights I have to make it mine. If I assign a thing which I have bought, but which remains in the possession of the seller, I assign what is not my property, but I also assign the right to obtain delivery. The law implies that a cedent confers on his assignee everything which is necessary to make the assignation effectual.

If, therefore, these fixtures had been assigned to a stranger, I cannot doubt that the assignation must be construed to comprehend the tenant's right to remove them. For under no other right could he reduce them into his possession. When the assignation is in favour of the landlord it must be equally comprehensive. Inasmuch as the things assigned are the property of the landlord, there is no necessity to vest him with a right to remove. But as the tenant could not remove the fixtures without defeating the assignation, he must be held to renounce that right, and the assignation operates as a renunciation of it. When the assignation is in security only it will operate as a renunciation till the debt is paid. If the landlord bought the fixtures he would get a good title by an assignation, though it could be nothing more than a renunciation of the right to remove. An assignation in security must

have the same force though it is qualified by a condition.

There remains the question whether it was necessary to do more in order to make the assignation effectual as against the liquidator. I do not think that it was. The tenant had nothing more than a right to remove, though the act of removal vests him with the property of the thing removed. If he renounces that right absolutely, it is gone by the mere force of the renunciation. If he renounces it until he shall pay a certain debt, he cannot exercise it until he fulfils that condition. We are not dealing with the property of the tenant, but with his right to do an act by which property may be acquired. To extinguish or modify that right nothing more is required than a completed agreement between the person who may do the act and the person who must suffer it to be done.

In the case of a stranger I think that the assignation would be completed by intimation to the landlord, and that thereafter neither the tenant nor a trustee in bankruptcy could exercise the right to remove. And if the landlord is to be regarded as being merely an assignee, the assignation will be effectual without intimation. For the landlord would not require to make intimation to himself. But I think that the landlord is in a better position than a stranger, for the assignation does not convey to him any property. It is no more than a renunciation or discharge of a claim competent to the tenant, and as such is completed by mere agreement.

I am therefore of opinion that the trade fixtures are at present the property of Mr Muirhead, and that he can prevent the liquidator from removing them till his debt is paid.

The LORD JUSTICE-CLERK and LORD TRAYNER concurred.

LORD YOUNG was absent.

The Court recalled the interlocutor of the Lord Ordinary, and answered the question in the affirmative.

Counsel for the Liquidator—Grainger Stewart. Agents—Dalgleish, Gray, & Dobbie, W.S.

Counsel for James Muirhead—Maclennan. Agents—Dalgleish, Gray, & Dobbie, W.S.

Thursday, March 15.

FIRST DIVISION.

SIMPSON *v.* ALLAN.

Process—Caution for Expenses—Pursuer in Receipt of Parochial Relief—Delay in Application.

Application to have a pursuer who was in receipt of parochial relief, ordained to find caution, *refused* as made too late.

Simpson brought an action of damages against Allan, a medical man, on the ground that he had been negligent in treating an injury from which the pursuer was suffering. The case was put down for jury trial at the Spring Sittings. On 15th March the defender moved the Court to ordain the pursuer to find caution within four days. He stated that the pursuer was in receipt of parochial relief, and could have sued *in forma pauperis*—*Hunter* v. *Clark*, July 10, 1874, 1 R. 1154. The pursuer submitted that no relevant ground had been alleged in support of the application. Pauperism was not a sufficient reason for requiring caution—*Macdonald* v. *Simpsons*, March 7, 1882, 9 R. 696. Further, the defender had long been aware that the pursuer was in receipt of parochial relief, for he stated in his answers that he had heard in January 1892 that the pursuer had applied for relief. The application that he should be ordained to find caution was now made for the first time on the eve of trial, and should be refused as too late.

LORD PRESIDENT—The application should have been made earlier. It is now within a few days of the trial, and, as the pursuer's counsel points out, the defender's information is of long standing.

LORDS ADAM and KINNEAR concurred.

The Court refused the application.

Counsel for the Pursuer—T. B. Morison. Agents—Matthewson & Easson, S.S.C.

Counsel for the Defender—J. W. Forbes. Agent—Thomas Sturrock, S.S.C.

Friday, March 16.

SECOND DIVISION.

[Sheriff-Substitute at Airdrie.

ADAM *v.* ADAM'S TRUSTEE.

Bankruptcy—Husband and Wife—Wife's Furniture in Husband's House not subject to Claims of his Creditors—Married Women's Property (Scotland) Act 1881 (44 *and* 45 *Vict. cap.* 21), *sec.* 1, *sub-sec.* 4.

Certain articles of furniture in a husband's house belonged to his wife, who had purchased them before marriage with money received from her father.

Held that they had not been lent or entrusted to the husband or immixed with his funds in the sense of the Married Women's Property (Scotland) Act 1881, sec. 1, sub-sec. 4, and were not liable to the claims of his creditors.

By the Married Women's Property (Scotland) Act 1881 (44 and 45 Victoria, chapter 21), it is enacted, sec. 1—(1) Where a marriage is contracted after the passing of this Act, and the husband shall at the time of the marriage have his domicile in Scotland, the