[Heard 12*th* Judgment, 26*th June* 1845.]

Mrs. Daniel Fisher, and her husband for her interest, *Appellants.*

William Dixon, one of the general disponees and executors of William Dixon, deceased, *Respondent.*

Legitim.—Heritable and Moveable.—Held, that machinery erected by a proprietor of land upon the land, and attached directly or indirectly to it, for the purpose of working the minerals under the land, (including in the machinery loose articles not physically attached to the fixed engines but necessary for their working, and so constructed as to form parts of the particular machinery and not to be capable of being applied to any other engines,) was heritable in a question between the heir of the party who erected the machinery and his other children claiming their *legitim*, without regard to the circumstance of the fixed machinery being capable of being removed without material injury, or to the view which the deceased had taken of the machinery as being heritable or moveable, or to the circumstance of the land having been purchased by the deceased with the view mainly of working the minerals under it, and of the machinery forming part of his stock in trade as a coal and iron-master.

Legitim.—Heritable and Moveable.—Held, that the machinery in an iron foundry erected by the proprietor of the ground on which it was built, in performance of a covenant in that behalf contained in a lease granted by him to a company, of which he himself was a partner, was heritable in a question as to *legitim.*

Legitim—Heritable and Moveable.—Held, that machinery erected by a tenant and removeable by him at the termination of his lease, was moveable in a question as to *legitim.*

William Dixon, the father of the parties, died, leaving a will whereby he gave his whole estate, real and personal, to his two sons, (John Dixon, his eldest son and heir, and the

respondent William Dixon,) as his universal disponees and executors. At his death, he left these two sons and four daughters, of whom the appellant was one. The appellant repudiated the provision made for her by the will, and claimed her *legitim*. The sons brought an action of multiplepoinding against the daughters; and Mrs. Fisher, on the other hand, brought an action of count and reckoning against the sons. In these actions which were conjoined, a question arose in regard to what part of the testator's estate formed the fund of his personal estate, out of which the *legitim* should be taken; and the respondent in litigating this question, did so, not only as the son of his father and one of his general disponees and executors, but as standing in the place of his elder brother, John, the heir of their father, from whom he had acquired by purchase the whole of his rights in their father's estate, as heir or otherwise.

During the latter years of the testator's life, he had been engaged in extensive business as a coal and iron-master, his outset in life having been in the same business, but in subordinate capacities. At his death the testator was possessed of the following properties, of which the history is subjoined to each:—

I. CALDER COAL AND IRON WORKS.

This property consisted of a lease of the Calder colliery, and of a feu of twenty-five acres of land, part of the estate on which the colliery was situated. The feu had been obtained for the purpose of erecting steel and iron works. After these works had been erected, a firm of Creelman and Dixon, the testator being one of the partners, purchased the premises and feu right, and carried on extensive business in them as iron-masters. Ultimately the testator purchased the rights of Creelman in the premises, and continued the business on his own account, until the period of his death. At this time the whole feu was covered with buildings of one kind or another necessary for

the business, and in these buildings were blast furnaces, steam-engines, connecting railways, and much valuable machinery.

II. GOVAN COLLIERY.

This property consisted of an absolute right to the coal in the lands of Little Govan; a leasehold right to the surface of the lands, and an assignation to machinery and engines used for the purpose of a colliery. These different rights had originally been conveyed to a company of coal-masters, of which the testator was a partner, by a deed of disposition and assignation on which sasine was taken, and they were afterwards purchased from the company by the testator, who continued the business of a coal-master on the premises, until the period of his death, at which time there was also on these premises a variety of machinery, the testator having considerably added to what was upon them when he purchased from the company.

III. FASKINE.

This property consisted of an absolute right to the lands and Barony of Faskine, and of buildings, steam-engines, and machinery used for the purpose of a colliery in working the coals under the lands. The lands and the colliery had been originally purchased by a company of coal-masters, of whom the testator was one, and had been purchased from the company by the testator, who continued to work the colliery till his death.

IV. WILSONTOWN COAL AND IRON WORKS.

This property consisted of the absolute right to about 450 acres of very inferior land, and the buildings and machinery necessary for a coal and iron work. The works had been discontinued some time prior to the testator's purchase, and the working was not renewed by him in his lifetime.

V. LEGBRANNOCK COLLIERY.

The testator was tacksman of this colliery, under a lease

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which bound him to take the machinery at a valuation, and entitled him at its termination to receive back the value, and any increase which he might have given to it.

VI. BALGROCHAN COAL AND LIME WORKS.

The testator held a lease of these works as the solvent partner of a company, consisting of himself and another, under the firm of the Balgrochan Mineral Company. The testator carried on the business until the period of his death, and at that time there were engines, machinery, utensils, and railroads upon the premises.

VII. GLASGOW FOUNDRY.

This property consisted of a piece of ground which the testator held under a feu right, and upon which he had erected the buildings and machinery necessary for an iron foundry, under the stipulations of a lease, which he had granted to the Glasgow foundry company, consisting of himself and two other individuals, his interest in the concern being in the proportion of four-ninths. One of the conditions of the lease was, that the company should pay the testator interest on the cost of the works, and leave them in good order at the termination of the lease.

The appellants in a condescendence, stated the different items of which the testator's estate consisted, and founded upon entries in the testator's books, as showing his opinion of the nature of the different parts of his estate, whether as being real or personal, and they pleaded in law:—

I. The trade or employment of manufacturing iron or lime and of digging coals to be used in these manufactories or for sale, or in other words the trade of a coal-master, or iron-master, or lime-worker, is of a personal nature, and all instruments, engines and utensils, whether fixed or loose, which are necessary and subservient to such a trade, are legally to be held and treated as personal or moveable effects or personalty.

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II. Instruments, engines and utensils which, taken either in part or in gross, are moveable before they are placed in a particular spot, do not lose their moveable or personal character, though affixed to an heritable subject, unless they be so affixed *perpetui usus gratia* in contradistinction to trade, such as the windows of a mansion-house, &c.

III. The fund *in medio*, out of which legitim is payable, consists of the whole moveable or personal estate as before described, that belonged to the deceased Mr. Dixon.

The respondent on the other hand gave a very long and minute enumeration of the different articles of machinery, and utensils which were upon the several premises, and pleaded in law:—That the articles upon which the appellant had condescended, did not form part of the testator's executry funds, but formed part of his heritable estate by destination, or by accession, or by being otherwise *pars tenementi.*

The Lord Ordinary, (*Moncrieff*,) remitted to Mr. Smith, of the Deanston Works, to report generally, and particularly on the nature, character, construction, position and uses of the machinery, and other subjects specified in the condescendence, and specially,

"(1.) Whether the steam-engines are so fixed to the ground "or building that they cannot be removed without great destruc- "tion to the building, or without great destruction to the engines "themselves; and what is the practice at coal and iron works "similar to those of the deceased, as to the removal of such "engines and machinery?

"(2.) What is the comparative value of the engine, with all "its appurtenances, with reference to that of the building to "which it is attached?

"(3.) What would be the value of the engine removed, "supposing that it can be removed without destruction, com- "pared with the value of it as it stands in the premises, without "reckoning the building?

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"(4.) Supposing that the building would be deteriorated by "the removal, to what extent would such deterioration go, sup- "posing that another engine of the same size and dimensions "were immediately obtained?

"These heads will necessarily embrace the expense of any "such operation.

"(5.) What is the state of the other subjects not making "proper parts of the steam-engine in respect of the four par- "ticular points above enumerated, or in any other points "whereby they appear to be more or less fixed to the premises, "or to the engines?

"(6.) How far the articles condescended on, which may "appear to be actually moveable, as not being at all attached to "the premises or the engines, are all or any of them essential "to the going of the works; how far, if taken away, their place "could be readily supplied by other articles of the same nature "and description; and how far they may or may not be of more "value where they are, or were at Mr. Dixon's death, than if "they had been sold or taken to another work of the same "kind?

"(7.) What is the practice, as between landlord and tenant, "of coal-fields, collieries, or iron works, with regard to the "removal of steam-engines and machinery at the end of a lease, "when such engines are of the description that belonged to the "deceased? How far is the landlord, in practice, held entitled "to retain, or the tenant to remove such engines, implements "and machinery, where no positive agreement has been made "on the subject?

"(8.) How far the different subjects referred to in the "preceding articles could be removed without being taken "asunder?"

Mr. Smith made an elaborate report descriptive of the different articles forming the subject of dispute. From this report it appeared that there were different steam-engines on the

premises, viz., pumping-engines used for discharging the water from the mines—gig-engines used for raising the produce of the mines—blowing-engines for exciting combustion in the smelting furnaces—and tilt-engines for beating out bars of steel; that these engines were all more or less fixed to the soil, the necessary fulcrum or steam cylinder, the source of power, being obtained by its being either fixed with bolts and screws into large blocks of stone placed on the ground, or built into masses of stone or brick masonry; that there was a variety of machinery attached to these cylinders for accomplishing the objects desired; that the whole was enclosed with brick walls; that the building and mechanism formed *en masse* the engine or machine, each part being essential to the other or convenient for its due working; that pumping and blowing-engines were seldom moved, gig-engines frequently, but these engines might be moved without much inconvenience or destruction of their parts; that there was also a variety of unattached parts of the machinery, being duplicates of those which were attached to the engines, and a great variety of utensils used in the different operations not attached either to the soil or the machinery.

After giving minute description of the different articles to be reported on, Mr. Smith answered the special subjects of inquiry referred to him in the order in which they were put by the Lord Ordinary, and in these terms :—

"(1.) On this head the reporter has to state, that the whole "mechanism of the steam-engines can be removed without great "destruction to the buildings, and without great destruction to "the engines themselves.

"The expense of removal and re-erection has been already "stated in describing the different kinds of engines. On "reference to the preceding specific descriptions of steam-engines "given by the reporter, the Lord Ordinary will perceive that "the reporter considers the buildings to be essential parts of the "general structure of the engines. They are always erected

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"specially for such purpose, and they are seldom appropriated to
"any other purpose when the mechanism has been removed.

"The practice at coal and iron works similar to those of the
"deceased, is to remove the mechanism of the engines and other
"machinery from one part of the premises to another as occasion
"may require. The building or masonry is generally left, as in
"most cases it would be unprofitable to remove it, and of course
"it could not be removed without reducing it to the original
"materials, and with considerable waste or destruction.

"(2.) The reporter has already, in describing the different
"engines, stated the comparative values of the machinery and
"buildings, and the same proportions are applicable to engines
"of greater or less power than those specified.

"(3.) The value of the engine itself would not be materially
"affected by its removal, excepting in so far as the cost of taking
"down and re-erecting, which has been already estimated in
"reference to the three classes of engines.

"(4.) There would be no appreciable deterioration of the
"building, or of any of the occasional adjuncts, such as water-ponds
"and the like, in the case here supposed, and there would be
"no greater difficulty and expense in fitting another engine of
"the same size and dimensions into the buildings than in the
"erection of the original engine.

"(5.) Many of the other subjects referred to are distinctly
"in themselves moveable, whilst others are more or less fixed
"to the premises, the nature of which fixtures has been
"specially noticed, in referring to the different articles con-
"tained in the inventory.

"(6.) The articles condescended on, and already adverted to,
"which are moveable in themselves, are all of them more or
"less essential to the going of the different works. If taken
"away their places could readily be supplied by other articles
"of the same nature and description. It is usual to have spare
"articles of most of the classes described about well-regulated

"works. They would be equally valuable if taken to any other "work where they were wanted.

"(7.) The general practice at coal and iron works similar to "those of the deceased is, for the tenant, in the event of the "termination of his lease, to remove the whole of such engines "and machinery, if not previously belonging to the landlord, "or specially acquired to him by the terms of the lease. And "in the event of the exhaustion of the mineral field or any "permanent bar arising to the profitable working of the "minerals, the whole of the engines and machinery are removed "by the tenant or worker of the field, or by the proprietor, if "his property, and the general premises dismantled as far as it "may be profitable to do so.

"(8.) In describing the different articles falling under the "preceding heads of special report, the reporter has so far "specified what articles are removable without being taken "asunder, and how far the others require to be taken asunder "before removal. In reference to the steam-engines, the "reporter may further state under this general head—That it is "usual, in removal, to separate the various parts just so far as "circumstances may require; for instance, in the case of a "steam-engine, the cylinder may either be removed in connec-"tion with its basement or bottom piece, or they may be sepa-"rated by undoing the joint, which, although it may strictly be "said in most cases to have formed a chemical union when the "lute is of iron borings, is still separable by skill and care, "without material injury to the parts. In a similar manner, "the various classes of pipes connected with the engines, pumps, "&c., are frequently jointed together with a lute of iron borings, "or what is technically called '*rust joint*.' Still, such joinings "are usually separated when the pipes are to be removed; and "when the operation is performed with skill and care, there is "no material injury to the parts, and, except by accident, no "destruction of the pipes."

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The report was wound up by this general observation: "In "their general character, the whole of the subjects may be "classed as the stock in trade of the late William Dixon, as a "coal and iron-master. But an objection having been taken by "one of the parties, at a meeting held after the draft of this "report had been communicated to them, to the insertion of "any remark bearing on the question of stock in trade, the "reporter feels called upon to state, that he makes the above "observation, because he conceives it necessary to exhaust the "terms of the remit made to him, and at the same time to "record the objection taken to the competency of introducing "it."

The Lord Ordinary ordered cases by the parties and upon advising these papers made avizandum to the court. The Court directed the papers to be laid before the other Judges for their opinion. *Lord Cockburn*, one of the consulted Judges, prepared an opinion in these terms:

"The property of the deceased was left by him in different "situations, and this presents different cases for our considera- "tion. But there is one of these which very nearly supersedes "all the rest.

"This is the case in which the machinery was erected by "him upon land belonging absolutely to himself, and in his own "personal occupancy.

"The material facts as to all the premises in this situation "are these:—The deceased himself—a fee-simple proprietor— "erected the engines, the principal parts of which were fixed, "though not absolutely immoveably, to the land; and the soil "was not given as a mere *station* for machinery, with which it "was not connected otherwise. The engines were set up and "employed solely for the use, and the necessary use, of the "landed property, or feudal estate upon which they were placed. "There was no engine erected, except for the production and "manufacture of the minerals, which formed the most valu-

"able part of the property. And the present dispute has not "arisen between the proprietor of the machinery and strangers, "but between different members of his own family. The value "of the machinery is not lost to him, or to his friends, by the "case being decided either one way or other. It will continue "to form a part of his succession, according to any view that "may be taken of the present claims.

"Now, in reference to such a case, I am of opinion that "these machines, and these parts of machines, are heritable, "which are attached, either directly, or indirectly by being "joined to what is attached to the ground for the uses of the "minerals; though they may only be fixed 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; and "under this principle I include those loose articles, which, "though not physically attached to the fixed engines, are yet "necessary for their working, provided they be so constructed "and fitted as to form parts of this particular machinery, and "not to be equally capable of being applied, in their existing "state, to any other engines of the kind.

"In considering this subject, I entirely disregard the view "said to have been formed upon it by the deceased himself. "His opinion of the law is clearly immaterial; for no man can "make his property real or personal by merely thinking it so. "And I do not conceive this to be a question which depends "even upon his intention; and if it did, the fact of his inten-"tion, which is liable to be deduced from innumerable circum-"stances, is not put to us as a matter of evidence. If I were "obliged to give any opinion upon this merely from what is "now before the Court, I should say, that as the entries in his "books include subjects clearly heritable, (houses for instance,) "as part of his stock in trade, this shows either that he knew "nothing of the legal qualities of real, as distinguished from "those of personal, property; or that he had no idea that

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" whatever formed part of his mercantile stock, necessarily lost " its real character from that single circumstance. But his " views on these subjects are irrelevant and unimportant.

" The general legal rule is so rudimental,—being merely " that land and its immediate fixed adjuncts, is heritable,—that " it seems idle to seek for formal authority in support of it. " Nevertheless it is laid down, in a few simple maxims, with " great clearness and rare unanimity, by all our writers. Indeed " it is not so much on the general principle that even the parties " differ, as on some supposed modern modifications of it. I do " not see that even the executors impugn the general proposition, " that what is physically annexed to the soil for the soil's use, " is heritable. They cannot.

" *Solo inedificatum, solo cedit*, is the legal maxim ; and it " nearly solves the whole case. But Heinneccius brings it more " within the facts of this question, when he says that the civil " law declares those things to be heritable, '*quæ vel salvæ* " '*moveri nequeunt, vel, usus perpetui causa, junguntur immo-* " '*bilibus, aut horum usui destinantur.*' Lord Stair's descrip- " tion of heritables is, that they are those things 'which, " 'though they *may possibly* be moved, yet it is *not their use* to " 'be so.' And he adds, that 'positive law for common benefit " 'constituteth property by the *necessary conjunction in con-* " '*structure.*' And Erskine's statement is, that 'things by their " 'own nature moveable, may become immoveable by their be- " 'coming fixed or *united* to an immoveable subject, *for its per-* " '*petual use.*' These principles are adopted so unanimously, " and so nearly in the same words, by all our authorities that it " is needless to quote more of them. There is no adverse " doctrine in our law ; and Dirleton indicates his concurrence " by asking, 'whether the heir, who has right to a going coal, " 'will have right to buckets, chains, and other instruments as " 'being *accessione* and *destinatione*, addicted to the coal?" " Which Sir James Stewart answers by saying, 'the heir has

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" ' right to a going coal; and so the *buckets, chains, and all* " ' *other accessory instruments,* will belong to him, and not to " ' the executors.'

" We are not so rich in cases upon this subject as our " southern neighbours are. This is not so much owing, how- " ever, to our paucity of manufactories; for we have long had " quite enough of these to bring out such a question as this; " but apparently because the legal rule has either been more " clear, or more steadily adhered to. Indeed there are two or " three decisions which, though they have not the apparent im- " portance that attaches to questions involving great establish- " ments, are equally conclusive in law.

" There are three cases founded on by the heir, to which I " do not think that much, if any, weight can be attached. These " are Arkwright (3d December, 1819), Niven (6th March, 1823), " and Cox (1st June, 1833.) Arkwright's case was explained " by the Court, in the subsequent one of Niven, to have no " application to the principles now at issue. Niven's is equivocal; " partly because it related to what was covered by an heritable " security, which is generally understood to be taken on reliance " upon the actual state of the premises, and partly because the " Court went chiefly on the degree of injury that would be done " to the machinery by moving it; and it is not easy to appre- " ciate the different degrees of such injury in cases nearly " approaching. In the case of Cox, the purchaser of the real " property prevailed against the seller's creditors in a competi- " tion for the machinery; but then he had bought not merely " the land but the manufactory and its appurtenances. None " of these cases, moreover, occurred purely between heir and " executor.

" But in substance the case of Johnston (25th February, " 1783) did; and it was there found that certain materials, such " as doors and windows, were heritable; not because they had " been already incorporated with a house that was building, but

" merely because they had been laid upon the ground in order to " be so. Can it be said that these materials were more con- " nected with the real property, either in point of fact or of " destination, than the built and fixed machinery of a coal or " an iron work, wrought by the owner of the soil for the purpose " of extracting his own minerals?

" The case of Gordon, (2nd December, 1806,) is another " example. The plants in a *sale* nursery were there found to " be personal property, because they were intended to be " removed for the market. But Baron Hume states it as " having been laid down by the Court, that the very same " plants would have been heritable if they had only been meant " to be removed for the service of an estate, of which the " nursery formed a part. This discloses the operation of the " principle, that things otherwise personal become real by being " attached to land for its own use.

" So far was this carried, that, in the case of Bain (13th " November, 1821) it was found that the *bell* of a manufactory " was heritable.

" There is no contradictory Scotch case that I am aware of. " Indeed there are three elements, the combination of which is " conclusive on every such question. These are, *fixture, des-* " *tination, and convenience for the use of the land.* There may " be articles to which one, or possibly two, of these may apply, " without their losing their character of personalty. In the " case of a telescope, mere fixture to a building that contained " it, was found not sufficient to make it heritable, because it " was plain that the building was a mere accessory of the " instrument. But I know of nothing of which it can be said, " *first*, that it is fixed, directly or indirectly, to land; *secondly*, " that it is destined; and *lastly*, that it is necessary, or even " highly convenient, for the proper use of that land, of which " it must not be said that that thing is real. The whole three " are united here.

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" There can be no simpler or more conclusive example than " the ordinary case of a common agricultural mill. How such " an engine is to be disposed of in questions between creditors, " —or between landlord and tenant,—or in construing a will, " —or when it was erected and used by a mere trading miller " without any particular reference to the farm on which it " happens to be placed,—is not the question now before us, " where we are dealing between heir and executor, and merely " adjusting the succession of a landowner, who had set up " machinery for the use of his own estate. Nobody can doubt " that in such a case the fixed parts at least of an agricultural " mill will go to the heir. This was expressly decided in the " case of Hyslop (18th January, 1811); and though the " Lord Ordinary in that case had found that the unfixed " machinery was moveable, the Court had no opportunity of " giving its opinion upon this point; and I conceive it not now " to admit of doubt, that an heir, upon his succession, is " entitled to such a mill, and to all its appurtenances. Will it " be said, that though he succeeds to the well of the house, " he must take it without the pipe or handle, because these, " being physically removable, must go to the executor? Or " must the heir in a salmon fishery forego the poles that are " fixed at the mouth of a river for stake-nets, and the boxes, " sluices, and other apparatus necessary for cruives or yairs, " because these can be safely taken down by the same skill that " put them up? It humbly appears to me, that the simple case " of a common corn-mill, whether acting by steam, water, or " wind, as to the heritable character of which I cannot enter- " tain the slightest doubt, settles this case.

" Accordingly, the executors almost admit that the *general* " *principle* is against them; and their claim really rests on " certain circumstances or considerations, by which they say that " the correct legal rule has been relaxed.

" *First*, It is said that Mr. Smith's report proves that the

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" articles in question *can all be separated* from the land, without " much injury, and certainly without destruction.

" If the case were to depend upon the *degree* of force, or of " injury, implied in the removal, I would rather be inclined to " think that, as explained by the reporter, it was sufficiently " great to give the machinery in question more of a real than " of a personal character. But I cannot think that much turns " upon this. All that is wanted, is, to get them fixed to the " land. Not fixed indissolubly, but in such a manner as to " denote that they were meant to be connected with, and to " serve the uses of, the property. For I agree with Professor " Bell, that 'it is not mere *physical annexation* which alone " 'deserves to be considered in such questions. That sort of " 'annexation which depends on the principle of *accession* is " 'frequently as strong a bond of connection as the mortar or " 'iron by which a fixture is attached.' There is probably no " engine, however ponderous, which may not be so constructed " as to be capable of being moved without material injury. It is " more than probable that even a house, large enough to be " unquestionably heritable, may be so framed. The mere pos- " sibility, or even facility, of removal, certainly does not decide " the question. What are more removable than the doors and " windows of a house? Still there is fixture enough to let the " other principles of destination, and of convenience for the " enjoyment of land, operate. It appears to me, that the con- " servatory in a proprietor's garden, though it could be taken " away and put down elsewhere, with the most perfect ease, " in a couple of days; or even a garden seat, sunk a foot in " the earth;—a wooden bridge laid across a brook,—a wooden " porch over the door, though only attached by a single nail,— " or a verandah hanging from a hook outside of a window,— " though all capable of being lifted up and taken away, without " the slightest injury, almost by a single hand, all descend to " the heir.

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" *Second.* It is stated, and I think truly, that the machines " in question formed part of what is called Mr. Dixon's *stock* " *in trade;* and this single fact seems to be considered as " decisive of their being personalty.

" In the ordinary case, the rights and substances of which " we see the stock of a person's trade composed, are not only " personal in law, but actually moveable; and hence, as soon " as we hear the phrase *stock in trade*, the idea of such articles " occurs to us. But we must not be misled by the sound of " these words, or by the habit of understanding them to denote " a limited class of objects. There is nothing in law to prevent " *real* property from forming part of a stock in trade. Nothing " is more certain than that it often does so. The deceased " plainly, and justly, held not only certain houses, but the " whole coal and other minerals in his lands, to be part of his " mercantile stock; and he probably considered heritable " bonds, and many other unquestionably real subjects, in the " same light. If the case could be made to depend upon the " mere understanding or wish of the deceased, and the fact of " his putting the *ipsum corpus* of his landed estate into trade, " were to be used only as evidence of his intention, this would " form a different ground of argument altogether. But it is " one which it is needless for me to consider; because I hold it " to be clear, that the legal character of property cannot be " made to depend upon the mere opinion or wishes of the " owner. If the deceased believed or desired, that, in arranging " his succession, everything he had in trade should go to his " executors, he ought to have known that this effect could not " follow from his mere understanding. If it did, the same " effect must follow in all other cases; and what would be the " result, if it were announced, that all the heritable property " that is now traded with in Scotland, is henceforth to be con- " sidered as personal? Few companies or families could stand " it. Family estates, where their principal value happened to

" consist of minerals, which the last proprietor chose to use for " the purposes of trade, (a very common case,) would disappear " by a division among executors.

" It is most important, however, to remark, that the notion " that all stock in trade is personal, is correct only with regard " to the stock of *trading companies*, and to the rules accord- " ing to which the interest of deceasing partners in such stock " shall go to their successors. Where the company continues " notwithstanding such decease, the interest of the representa- " tives of the dead partner resolves into a *personal claim* upon " the company for the value of his share or interest in the " concern, and this of course belongs to his executors; " although part of the company's stock may consist of coal, " buildings, landed estate, or any other subject unquestion- " ably heritable in its own nature. But the principle of this " rule has no application whatever to the case of a single in- " dividual making use of his own coal, iron-stone, building, " machinery, for the purposes of trade; and ought to have as " little effect on his succession.

" *Third.* A great deal is urged about the *favour that is due* " *to trade.* This indeed is the main foundation of the executors' " claim: and its essence resolves into this, that, in reference " to commerce, the strict rule of law has become inconvenient " and must be changed.

" I agree with Lord Ellenborough, who is reported to have " said, in the case of Elwes *v.* Maw, (when speaking of the " alleged danger of a legal doctrine,) that the 'danger or pro- " 'bable mischief *is not properly a consideration for a Court of* " *'law*, as whether the adoption of such a doctrine would be an " 'innovation at all.' If a clear legal rule has become inex- " pedient, it is the business of the legislature to alter it; and " a Court is not entitled to supersede Parliament by a succes- " sion of gradually encroaching judgments. But where is the " necessity for this favour, in such a case as the present?

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"This is a case touching the *succession of a landlord* who "chose to trade with the materials of *his own estate.* The only "erections for which peculiar protection can be sought, as is "exemplified by the whole of the English decisions referred to, "are those in which, without this protection, the value of the "outlay might otherwise be lost to the party who made it. "*Tenants* must be encouraged to improve their agricultural "establishments, by being assured that these establishments do "not necessarily accrue to the landlord at the end of their leases. "*Mere manufacturers* may require to be protected in investing "their capital in machinery, by being allowed to remove it "though it has been fixed for a time on another man's land. "Persons who, though proprietors of estates, hold them "only by a *limited title*, may require to be secured in "their outlay by its produce not being taken away from "them, or from their families, by distant and stranger heirs. "And *creditors* who have lent money upon the faith of "what they were entitled to believe heritable, may some-"times ask the rigid rule, which might impair their security, "to be softened.

"*We have no such case here.* Nobody is proposing to take "anything from the deceased or from his succession. He is to "get the full benefit of every sixpence of his outlay. The only "question is, whether part of what he laid out his money upon, "is to go to one of his children or to others? He might have "settled this as he chose. But if a proprietor will not settle "such a matter, is there any public policy that recommends "the mitigation of a legal rule merely to accomplish that "division among his family which he himself was not at the "trouble to arrange? And, besides, can it be laid down, with "sufficient generality to be the foundation of a judicial innova-"tion, that *de facto* it would be favourable to trade that its "machinery should go to executors rather than to heirs? Or "can it be said that the rule is to be adhered to, or to be

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" departed from, according to the accident of a defunct pro-
" prietor having been in trade, or not having been in it?

" Take a case. If a gentleman with an estate chooses to
" raise and manufacture his own minerals, on his own ground,
" by his own machinery, and trades in their disposal, it is sup-
" posed that, on public grounds, he requires to be encouraged
" to do all this; and that the encouragement should consist in
" machinery, provided it be physically removable, descending
" after his death to his executors. Now, let it be supposed
" that the same individual, instead of doing all this himself,
" merely erects the machinery, and then lets it and the minerals
" to a tenant, and that he himself never trades at all. There
" is no pretence of any favour to him in this last case, because
" he is in no respect a manufacturer or a merchant. If en-
" couragement be sought for him, merely *as the layer out of the*
" *money* by which the machinery was produced, that is not the
" point under consideration. What the executors urge, and
" what the English cases they refer to seem to sanction, is a
" peculiar protection necessary *for trade*. Now I know no
" ground whatever, on which it can be maintained, that the rule
" as to real or personal can, in a question of succession, be
" different in these two cases. But according to the executors
" it must. Whenever a person is in trade, their argument
" treats him as a trader *merely*. Whereas, according to my
" notion of the law, when this person happens also to be a
" landowner, and trades by selling the produce of his own
" estate, he is to be considered exactly as an owner would be
" who trades in the cattle, the clay, the corn, or anything else
" that is upon the surface.

" And is there no favour due to landowners who are not
" traders? The doctrine of the executors implies that, whenever
" a proprietor dies, his property is to be plucked bare by his
" personal heirs, who are entitled to remove every article that
" is removable without material injury. His agricultural machi-

" nery, in particular, must be torn from the ground. At least " I cannot see upon what principle a grinding or thrashing-mill " can be saved, if it be true that a coal-engine must be sacri- " ficed. They are both equally for the use of the owner's own " land. A water-wheel for draining a meadow must share the " same fate. It is used solely for behoof of the land; but " because it is only suspended by an axle across an insignificant " bit of wall, and is easily removable without being taken to " pieces or injured, it must be lifted and sold on the accession " of every new heir. The same thing must happen to various " other engines and apparatus usual and necessary for the uses " of real property. Some estates are of no value, except by " working out their actual substance, for which fixed machinery " is as indispensable as ploughs are to an arable farm. What " is a property, consisting of lime, or stone, or clay, or fish, " without the appropriate engines? To favour executors, by " letting them take these away at every death, is just to favour " them by giving them the estate; or at least by such a sacrifice " of the heir's interests, that no heir in possession could risk " his capital in such works.

" *Fourth*, A good deal is founded upon the alleged *usage* of " the country as to removing such engines.

" Now, in the *first* place, the fact of there being any such " usage, *as applicable to the case now before us*, is not proved. " The reporter says, 'that the practice at coal and iron works, " ' similar to those of the deceased, is to remove the mechanism " ' of the engine and other machinery *from one part of the* " ' *premises to another*, as occasion may require.' And he after- " wards states, that the practice is 'for the *tenant*, in the event " ' of the termination of his lease, to remove the whole of such " ' engines and machinery, if not previously belonging to the " ' landlord.' And then he mentions, (which was almost need- " less,) 'that, in the event of the exhaustion of the mineral field, " ' or any permanent bar arising from the profitable working of

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" ' the minerals, the whole of the engines aad machinery are " ' removed by the *tenant or worker* of the field, *or by the* " ' *proprietor*, if his property, and the general premises disman- " ' tled, as far as it may be profitable to do so.' This is all " very likely, and very sensible; but it does not touch the " present case. The question here arises from a claim by exe- " cutors to dismantle a coal or iron work which they did *not* " erect; of which they *never* were the tenants; where there is " no lease at all; and where the minerals, for which the engines " were put up, is *not* exhausted, but on the contrary, is wished " to be wrought still farther by the heir. The report establishes " the fact, that the machinery is removable, and is frequently " removed; and I concede this. But the executors seem to " refer to usage for a different purpose, namely, to show that, " in practice, these structures are taken down and disposed of, " not only on the minerals being exhausted, or on the termina- " tion of leases, but at *the termination of landlords' lives*, in " order that executors may get their value. It is this that is " not proved.

" Indeed, except for the sake of showing the practicability " of removing such things, I do not see the relevancy of usage " in this discussion. It might be an evidence of probable " intention, if the case turned upon intention. But though it " could be shown that all merchants were in the practice of " dealing with heritable bonds very much as if they were personal, " this would not alter the legal character of these instruments " in a question of succession.

" I conceive, therefore, that all these considerations are " irrelevant or immaterial, and that the ordinary legal rule must " be given effect to, so long as the legislature permits it to last.

" The executors have made their strongest appeal to the " law of England. But were it not that they have so urged " that law upon us, that we might seem not to have done justice " to their case unless we considered it, I should not venture to

" say a word about it. Not because it is the law of a foreign " country, and not because we must hesitate before we recog- " nize judgments, by which Mr. Amos, in what the Chief- " Justice on Bankruptcy describes as 'his able Treatise on " 'Fixtures,' states, that the *Courts* have 'from time to time " 'introduced exceptions of so extensive a nature as almost to " 'have *subverted* the general rule;' but because those not " trained to the practice of a foreign system can never be sure " that they understand either its principles or its terms. I " venture to speak of the English cases, therefore, with the " utmost respect and the utmost diffidence; and permit myself " to do so, only because I have scarcely more than a single " remark to hazard upon such of them as have been pressed " upon us.

" This remark is, that, with one exception, not one of them " applies, except in some incidental observations by the Court, " to the particular case now before us.

" Thus, Elwes *v.* Maw was a case about the right of *an* " *agricultural tenant* to remove buildings which he had erected " upon the farm.

" It is immaterial here how such a claim was disposed of, " because it is inapplicable to the matter before us. But I am " struck with the observation of Lord Ellenborough, who, in " delivering judgment, classifies the cases; and after describing " one of them as arising 'between *different descriptions of re-* " '*presentatives of the same owner of the inheritance*, viz., " 'between his heir and executor,' states, that 'in the first case, " '*i. e., between heir and executor, the rule obtains with the* " '*utmost rigour in favour of the whole inheritance*, and against " 'the right to disannex therefrom, and to consider as personal " 'chattle, anything which has been affixed thereto.'

" In Lawton *v.* Lawton the point was, whether a fire-engine " set up for the benefit of a colliery by *a tenant for life* should " go to his executors, or to a *remainder-man*. This is not the

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" case here. Something like it, so far as I understand the " English terms, may possibly occur when a claim shall arise " between the executors of a taillied proprietor and the next " heir of entail, a stranger to the family of his predecessor, who " erected the machinery. But here also, as I read the report, " the case now before us is expressly saved.' Lord Hardwick " distinctly states, that 'this is *not* a case *between an ancestor* " '*and an heir*.' 'Tenants for life would be discouraged in " 'erecting their machines, if they must go from *their repre-* " '*sentatives to a remote remainder-man*.'

" Lord Dudley *v.* Lord Ward was the very same case as the " last, except that the erections were made by a tenant in tail, " instead of a tenant for life. But Lord Hardwick states this " was immaterial,—'In the reason of the thing there is no " 'material difference; the determinations have been from con- " 'sideration of the benefit of trade.' And the extent of the " benefit given is thus described,—'Suppose a man of indifferent " 'health, he would not erect such an engine at a vast expense " 'unless it would *go to his family*.' There is no preference of " one part of the family to another.

" The point in Trappes *v.* Fielding's assignees is thus stated " by Lord Lyndhurst,—'The question was, whether the ma- " 'chinery, the subject of the present action, passed to the *mort-* " '*gagee by a mortgage deed* granted by the bankrupts before " 'their bankruptcy, or whether it became the property of the " 'assignees under the commission?' This being the question, " it is needless to say more about it in reference to the present " case. It was full of specialties; it in particular was not " between heir and executor; and it depended very much upon " the terms and meaning of a deed. The result was, that " 'under all these circumstances, it appears to us that there is " 'sufficient to satisfy *the terms of the mortgage deed*, without " 'including the machinery in question, and that it neither " 'passes, nor was *intended* to pass by that deed.'

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" It is in disposing of this case that his Lordship uses words " which have been supposed to indicate an opinion, that in Eng- " land the present case, though between heir and executor, would " be viewed favourably for the latter. But I do not think this " is what is meant. He says, 'these authorities lead us to the " 'conclusion, that where utensils and machinery are erected " 'by the owner *for the purpose of trade only*, in a neighbour- " 'hood where such utensils and machinery as these *would com-* " '*monly have been removed*, and when this can be done *without* " '*injury to the inheritance*, they form an exception to the " 'general rule, and are not to be taken as a part of the inhe- " 'ritance, but as personal estate.' As I understand this pas- " sage, his Lordship is not speaking of the case of a landlord " erecting machinery *for the necessary use of the estate.* He is " speaking of erections made, though by an owner on his own " land, '*for the purpose of trade merely*,' *i. e.*, of trade not con- " nected with the land; of trade for the use of which a portion " of his land is given for a mere *site.* Hence the removal " must be *without injury to the inheritance.* Can an inhe- " ritance, consisting of coal or ironstone, fail to be injured by the " removal of the machinery without which its produce cannot " be obtained?

" In Loyd *v.* Wallmslay the point seems to have been, " whether a company which had erected machinery *as tenants* " had a right to remove it. This being the nature of the case, " the result for our present purpose is immaterial. But it is " remarkable that the same feeling in favour of the heir, and the " same reservation of any case between him and an executor, " that occurs in all the other cases, is disclosed by the Chief- " Justice in Bankruptcy,—'Where any fixture is annexed *by* " '*the tenant*, it does not necessarily become a part of the free- " 'hold, but its character as realty or personalty depends on the " 'nature of the fixture, and the purpose for which it was " 'annexed.' But 'where the annexation is made by the owner

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" ' of the freehold, the fixtures become, without reference to the " ' nature of the fixtures, or the purpose for which they were " ' annexed, a part of the freehold itself, and as such descend to " ' the heir.'

" In Lawton *v.* Salmon the question did arise between exe- " cutor and heir, and it is the only one of these cases in which " it did so arise. It was an action brought by an executor " against an heir, or which was the same thing, against the " tenant of an heir, to recover the value of certain salt-pans used " in a salt-work. The facts were, ' that these pans were made " ' of hammered iron, and rivetted together; that they were " ' brought in pieces, and might again be removed in pieces; " ' that they were not joined to the walls, but were fixed with " ' mortar to a brick floor.' It was decided that these vessels " belonged to the heir. Lord Mansfield, in delivering judg- " ment, mentions the favour that had sometimes been shown to " tenants for life or in tail as against remainder men, and then " says, ' *but I cannot find that between heir and executor there* " ' *has been any relaxation* of the sort, except in the case of the " ' cider-mill, which is not printed at large. The present case " ' is very strong. A salt spring is a valuable inheritance; but " ' *no profit arises from it unless there is a salt-work*, which con- " ' sists of a building for the purpose of containing the pans, " ' &c., *which are fixed to the ground. The inheritance cannot* " ' *be enjoyed without them.* They are accessories necessary for " ' the enjoyment and use of the principal.' It is not easy to " add weight to the authority of Lord Mansfield; but these " words are quoted with approbation by Lord Lyndhurst in " deciding the case of Trappes. So that, notwithstanding " modern relaxations, the rule, as between heir and executor, has " descended unimpaired from Lord Mansfield's time to the " present day.

" I therefore see nothing in these English authorities that " ought to make us hesitate in applying what I conceive to be

" the clear rule of our own law. And I have already stated, " that I conceive that this rule not only assigns to the heir the " larger and the fixed machines; but such smaller articles, as " though not physically attached to these greater machines, or " capable from their use of being so, *form parts of the general* " *apparatus*, provided they be so fitted and constructed as to " belong specially to this particular machinery, and not to be " equally suited for any other. I can give no catalogue of the " precise articles which this principle reaches; because neither " as to these, nor even as to the heavier parts, does the very " distinct report by Mr. Smith instruct my ignorance of these " matters, as to the nature and uses of all that he describes; I " can only very humbly attempt to suggest the rule. But I may " explain what I mean by a homely example. A kitchen grate " or any other grate built into the wall of a house is a fixture. " But the poker and the tongs are not, because they are not " only naturally moveable, but, (except in taste,) will suit any " other grates, as these grates may be equally well supplied by " other tongs and other pokers. The key of a door, on the " other hand, though moveable *sua natura*, is a fixture, because " it alone is fitted for the use of the particular lock.

" It is scarcely necessary to notice the other positions of the " deceased's property.

" One of them was, that he was the owner of a piece of " ground, on which he first erected a foundry, and then let the " ground and foundry together to a tenant upon a lease current " at his death. In principle this is the same with the last case. " He attached the foundry to the soil for the necessary use of " the land; and the machinery is heritable, whether he himself " traded with it, or merely took a rent and let his tenant trade.

" A third situation was, where he himself was only the " tenant, and had the use of machinery belonging to his land- " lord. Since the machinery was not his, I do not see how the " case comes into the present question as to his succession at all.

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" If the lease goes to his heir, of course so, in such a case, does " the right to use the machinery.

" The last case is, where the deceased, though only tenant, " had erected the machinery. We are scarcely in a situation to " determine the result of this, because we do not know whether " his agreement with his landlord entitled him to remove the " machinery at the end of the lease or not. If it did, then, as " the purpose for which it was erected will be served, and its " connection with the land will be ended with the lease, so far " as I can at present see, that machinery will ultimately belong " to his executors."

This opinion was concurred in generally by all the consulted Judges except as to the law indicated in the last paragraph. In regard to this two of the Judges, the *Lord President Boyle* and *Lord Murray*, expressed doubts, while *Lords Cuninghame, Gillies*, and *Fullerton* expressly dissented, holding that in the case put the machinery would belong to the heir and not to the executor of the tenant.

When the cause came to be advised upon the opinions of the consulted Judges, *Lords Meadowbank* and *Medwyn* concurred in these opinions, while *Lord Moncrieff* and the *Lord Justice Clerk* dissented.

Lord Moncrieff delivered his opinion in these terms:—

" I had occasion to give a great deal of attention to this " case, in the preparation of it, and had the advantage of hear- " ing it very fully argued *viva voce* before me. I considered it " as a case of very great importance, and one in which a great " deal of discrimination was necessary. I still regard it in the " same light; although I must confess, that, if the leading " views adopted by the consulted Judges, by which the cause " must be decided, and by which, as I understand the opinions, " *all*, or very nearly *all*, the subjects embraced in the conde- " scendence, are to be accounted heritable, (a result which " certainly did not enter into my comtemplation,) are sanc-

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" tioned by principle and authority, all the anxious investigation " which has taken place must appear to have been in a great mea- " sure unnecessary. For, if the mere fact of the material, engines " and apparatus, in all or any of the establishments alike, being " in any manner attached to the land on which they were " placed, or connected with it, were regarded as sufficient to " solve the whole case, I should have thought the facts admitted " on the record might probably have been sufficient for leading " to that result, without any inquiry whatever. I considered " the case in a different light; and I should probably have sent " it to a jury, if it had not occurred, that, with the consent of the " parties, a more satisfactory adjustment of the facts might be " obtained by the report of a person of skill, to stand as a " *special case* for the trial of the questions of law, according " to the course followed in the latest English case on the same " subject. The report of Mr. Smith has appeared to me to be " distinguished by great clearness and precision, marking it " as the work of a man thoroughly master of the subject, on " whose statements the Court may entirely rely. It was ac- " quiesced in by the parties, and finally approved of by judg- " ment of the Lord Ordinary, June 26, 1839. I hold it, " therefore, to be conclusive between these parties on all the " matters of fact on which the case depends, whether relating " to the nature, construction and purposes of all the parts of " the subjects and machinery in question, or to the practice " of the trade in regard to them, or to the scientific or prac- " tical inferences to be deduced as matter of fact; in everything, " that is, which a jury could have decided; and I must take " the liberty of rejecting all reasonings which do not rest " on the basis of the facts ascertained by it, or admitted on " the record.

" Though I shall feel it to be my duty to deliver very fully " my own opinion on the merits of this case, which I cannot " but regard as of very vital importance both to the law and to

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"the trade of this country, I am aware that the opinions of the "consulted Judges must rule the judgment to be pronounced. "But before going farther, I beg leave, with all deference, to "observe, that I do not see very clearly the definite result to "which those opinions lead, and that I apprehend this Court "will find itself under very considerable embarrassment in "attempting to frame a precise interlocutor in respect of them. "For myself, I must say, that though I have tried to fix it, I "really do not at present know what the interlocutor ought to "be, to satisfy the opinions of the majority of the Judges. "The leading opinion is, in the whole general reasoning, "directed to one *single state* of the case, viz., that of machin- "ery placed on land, the exclusive property of Mr. Dixon, for "the *necessary use* of the *feudal estate*, and where 'there was "'no *engine erected, except for the production and manufac-* "'*ture of the minerals which formed the most valuable part* "'*of the property.*'" "This is applied with one only excep- "tion, which is slightly noticed in the end of the opinion, and "to which I must afterwards advert, to all the subjects held in "property indiscriminately. But it proceeds on a mistake, in "*fact*, in regard to the *Iron Works*, both at *Calder* and *Wilson-* "*town*, as well as the *Glasgow Foundry*,—into which the Judges "have been led by an incorrect statement in the case of Mr. "Dixon, though it was corrected in the case for the claimant. "And that the fact was otherwise, is clear upon the record. "Very possibly, this might not alter the opinion of the Judges; "but it is taken as an important element in the question, and "a very great part of the reasoning is built on the assumption "of it.

"Again, I do not know whether or to what extent the very "numerous articles condescended on, which, according to the "report, are *simply* or '*distinctly*' *moveable*—not being at all "attached to any part of an heritable subject—are to be held "heritable in the present question. Sometimes it is so said in

" the opinion, but in other places a distinction is pointed. But " there is no attempt to apply any discriminating principle to " the specific articles reported on by Mr. Smith.

" There is, farther, an important difference of opinion on " the last point stated in Lord Cockburn's opinion. It is, I " believe, necessary to decide it; and I consider it as so impor- " tant, that, if Lord Cuninghame's opinion were to be adopted, " while it would in a great measure nullify the distinction by " which the force of the English cases is sought to be avoided, " it would, in my opinion, in effect, alter our own *undoubted* " law, in regard to the succession of the heir and next of kin " of every tenant of Scotland. I shall think it necessary to " request very particular attention to that point. But having " suggested these difficulties, in regard to the practical disposal " of the cause, I now turn to the consideration of the merits " of it.

" Throughout the case for the respondent, Mr. Dixon, and " in all the opinions, it is taken for granted, that the question " arises simply between the *heir* and the *executors* of the late " Mr. Dixon; an assumption which is found exceedingly useful " to the argument with reference to some of the judgments in " the English Courts. But the assumption is not correct; and " the indefinite use of the terms '*executors*' and '*executry*,' " leads to an important error in the foundations of the discus- " sion. The claim of Mrs. Fisher is not a claim as an *executor* " of her father, nor a claim on his *executry estate*, in the proper " sense. If it were, it would be excluded by his will, without " inquiry as to the nature of the subjects of property. Her " claim is for her *legitim* as a *creditor against* her father and his " *executors*,—a right which he had no power to disappoint by " any conveyance of personal estate either to his *heir* or to his " *executors*; and the *fund* of *legitim* is *not* part of the *executry*, " but perfectly distinct from it.

" This is not a mere distinction of *words*. There is deep

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" reality in it with reference to the present question. For that " question is not, whether the machinery and other articles in " controversy are to belong to the *heir* or to the *executor* of " *Mr. Dixon*, but whether, *in this special* case of a claim by a " child of the house for *legitim* as a *debt* ,those subjects are to " be held in law to be heritable or *moveable*. And when we see " that the ancient principle of *fixture*, on which the plea for " *heritable* is mainly rested, has so extensively yielded to the " more practical views of modern society, that, in questions " between *landlord* and *tenant*,—between the *executors* of a *life-* " *renter* and the *fiar*,—between the *executors* of a *proprietor* " *under entail* and the *heir of entail*, — between a *mortgagee*, " or holder of an heritable security, and the *assignees* or *credi-* " *tors* of a bankrupt,—between the *crown*, by writ of extent, " and its debtor or his other creditors,—it is held, and all but " conceded, that the very same articles, or a large proportion of " them, would be deemed to be *moveable* or *personal* estate; " and that almost the single case struggled for is the *simple* case " of *heir and executor ?*

" I am not here saying, that, if it *were* a question between " *heir and executor*, the articles, or any particular class of them, " must, in *all* such cases, be held to be heritable. I cannot " think so; and I believe I have the distinct authority of Lord " Lyndhurst for at least entertaining the greatest doubt of it. " But, attending to the distinctions under which the question " has been discussed, both here and in England, and to the way " in which it is treated in the present case, I think it of very " great importance, that the true character of that case should " be kept steadily in view.

" Proceeding on the idea of its being a question between " *heir* and *executor*, strong representations are made of possible " inconvenient results, if, on the death of a proprietor, his ex- " ecutors could always carry off the machinery and utensils " necessary for carrying on works established on the lands *for*

" *securing the produce of it.* One answer to this is, that it " assumes, as a principle of law, that whatever is essential to the " cultivation and profitable enjoyment of an heritable estate, " must necessarily be *heritable* in succession,—a principle no- " where recognized that I am aware of. What is the whole " *stocking* of a common farm? The carts, wagons, ploughs, " harrows, fanners, horses, cows, spades, pick-axes, rollers, " hammers, saws, the utensils of a great dairy, and innumer- " able other articles, are all indispensable to the working of the " land, whether by a tenant or by the proprietor himself, and " often constitute a very large portion of his estate at his death. " But is not such a stock, are not such articles personal or " moveable in succession, which, if not otherwise regulated by " deed or agreement, must fall to his *executors* or next of kin, " and may be all carried off or sold? And was it ever before " supposed, that because of the *inconvenience* which this might " occasion to the heir, in the necessity of replacing them by " other articles of the same kind, they must be held to be heri- " table, though truly *moveable* in their own nature? I believe " that such a proposition never was maintained; though the " undoubted law on the subject seems to have been lost sight " of in some of the opinions on the case of a tenant dying during " a lease. It is evident that the question must be brought to a " very different test from this.

" But, before looking for such a test, can no strong case be " stated the other way,—no case both of inconvenience and " plain injustice resulting from the opposite principle? It will " come nearer the point, and afford a surer test of the fairness, " as well as the soundness of that principle, to suppose that a " man possessed of extensive real property held burgage, and " of large personal funds, chooses to invest the *whole* of those " personal funds in the purchase of machinery and other articles " in their nature moveable, placed in some part of the heritable " subjects, for the purpose of carrying on a great trade there, as

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" in a cotton-mill, iron-work, or other such establishment, in " the expectation of realizing a large capital by the profits; and " that, while the work or the trade are going on, and all the " property so invested is reckoned by himself, and recorded in " his books, as his personal estate, he dies suddenly or unex- " pectedly, *intestate*, never having dreamt of the result which it " it is said the law has made for him, leaving a widow, one son, " and a numerous family of daughters. Or, though he had " personal funds reserved, his *personal debts*, contracted *in the* " *trade*, may be found to exhaust them all. Are we prepared to " hold, in reference to such a case, that the *whole* property, " whether by *fixture* to the ground or house, or by what is called " *destination*, even where there is no attachment, is heritable; " and that there is *no personal estate at all?* The widow can " get no *terce*, because the property is *burgage;* she can have no " *jus relictæ*, all being heritable; the daughters can have no " *legitim*, there being no *personalty* against which to make the " claim; and there can be no dead's part, or executry; the son " must take all as heritage, and the rest of the family must be " left to starve, or to the charity of their friends.

" If the argument of the respondent for the unbending rule " maintained be sound, such a result would be inevitable; and, " according to that argument, it would take place equally in " regard to *creditors*, like the widow and children for their *jus* " *relictæ* and *legitim*, as in the case of *gratuitous* next of kin. " It is the necessary effect of the moveable subjects having been " made heritable in the way alleged. And it is said, in order to " relieve the apparent evil of such results, that a man is bound " to know the law; that his understanding of it is irrelevant to " the question, and cannot alter it; and that if he has neglected " to provide against it, there is no help for the consequence. " This may be all true, *once it is settled what the law in the* " *special case is.* But in trying the question, *what the law is*, it " does not follow that the natural belief, or still more, the actual

" understanding of the party who so placed things in themselves " moveable, more especially of a party as *a debtor* for *jus relictæ* " and *legitim*, concerning the nature of such property, may not " be a most legitimate and relevant element in the inquiry. It " was so held in the English cases, and accords with sound prin- " ciple. And it is farther apparent, that the absurd and unjust " results to which the respondent's doctrine would lead, are at " least as relevant to the question as the possible inconveniences " attributed to the opposite principle.

" Having it in view, then, that this is the case of a *creditor* " claimant, and that such a result as I have represented must " be comprehended in the question, I come now to consider the " case on the facts ascertained, and the law as I understand it.

" All the articles specified in the condescendence and report, " on which any question arises, are in their *original nature and* " *character moveable subjects*, manufactured, prepared, and pur- " chased as such, at a distance from the heritable property on " which they were found placed at Mr. Dixon's death. The " question is, whether all or any of them, or what part of them, " had been *converted* from their condition of *moveable* or *personal* " estate into that of *real* or *heritable*. The respondent must " show this.

" The plea for rendering all, or nearly all, of these heritable " in law, is derived from two principles, either taken separately " or in combination, viz.,—1. *Fixture*, or *physical attachment*, " either to land itself, or to a house or building actually and " legally forming a part of such land as an heritable estate; and, " 2. *Destination*, as I understand it, by the act of the proprietor, " in placing it in a particular situation in connection with his " operations in the locality of his heritable estate.

" I cannot help thinking that there is a great looseness in " the manner in which those two principles are here almost " indiscriminately applied. And, with regard to the *last*, in " particular, while it is evidently dependent, in regard to a great

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" many articles, on the primary effect to be given to the *first* " concerning *other* articles, I own I do not well understand what " is meant by *destination*, if the *purpose*, *intent*, or *understanding* " of the party, is altogether *irrelevant* to the question. I am of " opinion, that there *is* a principle of *destination* of very great " importance in the matter; but it is of a very different nature " from that founded on by the respondent; I mean the purpose " or object for which the machinery is placed on the land at all, " as being simply for trade, and the purpose for which any house " or building is placed there, as being simply in subserviency " to the use of the machinery. To this I shall presently return. " But, in the meantime, the view taken by the respondent " requires to be reduced to its elements before such a principle " of destination can be applied with any precision.

" In the argument, and in the opinions, the principle of " *fixture* is treated as the leading and conclusive point. It " necessarily must be so, in order to make out a case of herit- " able estate. For, if there were *no annexation at all* of *any-* " *thing* to the freehold, I should think that neither on principle " nor on authority would it be possible to allege that the pro- " perty was heritable. And yet, throughout the argument, " there is an anxious endeavour to mix the idea of destination " with that of fixture,—which is aided by the assumption of a " fact as indiscriminately applicable, which does not at all apply " to nearly one-half of the property.

" I. But, before I consider at all the effect of *such fixture* " as that which is reported in the present case, I wish to direct " attention to the very numerous and valuable articles here " condescended on, as to which it is ascertained by the report " or special case that *they*, in themselves, are *not all attached* " either to the land, or to any house, or any machinery that is " so attached. As to them, there is *no case of fixture* at all; " and they are expressly reported to be simply moveable " subjects.

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" Here is a large collection of articles at the different works " distinctly reported to be *in themselves moveable—not attached* " *to any fixed subjects*,—which can be removed without *any* de- " terioration, and a great proportion of them simply *unattached* " *implements of trade*. I ask whether *all* these are, notwith- " standing, to be held heritable subjects? The report cannot " be impeached *upon the facts;* and upon one and all of them " the *fact* reported, whatever the *law* may be, is that they are " actually in themselves moveable.

" If it be said that *some* of them may be in law moveable, " and others heritable, the consulted Judges have not instructed " us how we are to make the distinction. If I follow my " own views, I cannot distinguish one class from another, " except perhaps in one instance, and that depending on a " condition yet to be considered. And anything like a prin- " ciple indicated in the opinions is so exceedingly loose and " indefinite, that I should be in the greatest difficulty how to " apply it.

" But on what ground is it that things *moveable* in them- " selves, and which have *never changed their proper moveable* " *state*, are to be held heritable in a question like the present? " I understand the ground taken to be *destination*, because the " articles are necessary to the going of the *works* or the *trade*. " It is to be observed, however, that, though many of them are " stated to be essential to the working of the fixed machinery, a " large proportion are not of this description, but *only necessary* " *to the trade; e. g.* article 8 of condescendence.

" But when was it decided that mere *implements of trade* " are to be held heritable, simply because they are destined to " the purposes of a trade to be carried on in, or on, a particular " heritable subject? This cannot be held, even if the trade is " to arise from produce to be extracted from the soil. The " known case of *farm stocking* is a palpable example of the re- " verse. The carts and ploughs, &c., are as essential to the

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" raising and bringing to market of corn, and grass, and cattle,
" and as directly destined or appropriated to that object when
" placed on a farm, as the *moveable* apparatus and *implements of*
" *trade* here in question can be said to be for the manufacture of
" iron, or even the raising it from the earth. And yet these
" were ever held to be personal estate, whether of a proprietor
" or a tenant.

" It seems to me to be a misunderstanding of the principle,
" by which things in themselves moveable may be rendered
" heritable *destinatione*, to apply it to such a case. Moveable
" rights or subjects may be made heritable *destinatione*, when
" they are provided to the *heir* by marriage-contract, or other
" deed within the granter's power. The same principle applies
" also to bonds with a clause of *infeftment*, and bonds *secluding*
" *executors*, though other considerations may also affect these
" cases. And it seems also to have entered into the judgments
" in some of the cases of *securities constituted by deeds* over
" machinery. The case, however, which is pressed as affording
" a direct analogy, is that which occurred in Johnston, February
" 25, 1783,—of a house in *progress* of *building*, and certain
" window sashes or window frames, *prepared* and *on the ground*,
" but not yet put up. The court refused to find that these
" articles were parts of the building, and thereby heritable.
" But they found that, being destined for the house, they fell to
" the heir. That decision was pronounced with difficulty; and
" it may well be doubted whether it would have been pro-
" nounced in a case of *legitim*. But it appears to me, that
" there is no principle involved in it which can have the least
" application to the moveable articles here in question. The
" distinction is to my mind plain and palpable. The window
" frames were prepared and destined for a specific purpose of
" being *incorporated* into a known heritable subject, a house in
" progress of construction for permanency. If they had reached
" the *end* of their destination, there would have been no ques-

" tion. But, being so decidedly destined for that end, it was " held that the heir must take them to fulfil it. The moveables " in question are very differently situated; they have *already* " reached their *final destination;* and they have *not been incor-* " *porated* in any heritable subject. They *never were destined* " to be *incorporated with* or *affixed* to any subject already in an " heritable state. They are there simply as *moveable* articles, or " *implements of trade*, destined to *remain in the same state*, unless " removed, whatever may have been the purposes which they " were fitted to serve. The case in this point forms a perfect " contrast to that of Johnston.

" But, it may be asked, how is the case of the moveable " articles in the *Wilsontown* inventory to be solved on this " principle? There was no ironstone mine there. The claimant " averred, that when Mr. Dixon purchased the premises and " machinery there, it was his purpose to dismantle the works " and remove all the articles. This *purpose* was denied. But " it is expressly *admitted* that '*he had never set the works agoing.*' " So, at his death, no machinery had ever been worked there in " his possession. And how then had *he*, by an act of his own, " *destined* the *moveable* implements there lying to form part of " the heritable subjects? Destination to be removed and used " in *another* place, if not sold, would just prove them to be in " every sense moveable; and *non constat* that he ever meant " them to be used at all in that locality.

" Or the case may be put of a *mine exhausted*,—a colliery " where the coal is *worked out*, and the machinery and imple- " ments *remaining on the spot*. It is a case for testing the prin- " ciple on the *whole* question. But how would the *actual* " unattached *moveables* then stand? How would *they* be herit- " able *destinatione?*

" It is the more remarkable, that the claim to this part of " the property as personal estate should be resisted, because, in " the very latest case in this Court, Cox *v.* Stead, &c., June 1,

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" 1833, the whole of the *small* machinery and utensils was held " to be personal estate; and the judgment of Lord Lyndhurst " in the case of *Trappes* is a direct decision to the same effect, " whatever may be the effect of it otherwise.

" *Finally*, If we are to go on *destination alone* as to these " articles, I do not see how the Court can refuse to look at the " actual meaning and understanding of the party, as it is proved " by the deeds of conveyance, and the distinct entries in his " own books. Most clear it is that *he* treated all the articles of " property in question *expressly* as constituting part of his *move-* " *able* estate. But, as this goes deep into the more important " question still to be considered, concerning the *fixed machinery*, " I shall not at present go into the particular facts. The *desti-* " *nation*, however, is clearly to *the trade*. *Query*.—What is the " situation of the engines and carriages on a *railway?* Are " *they* heritable *destinatione?* They are very *emphatically* " moveable; but yet they are for no use but as attached to the " fixed railway. Part of the very things here in question are " the same.

" But I am of opinion that, with the exception of one class " of articles which I have specified, all the articles in a simply " moveable state, as reported, must be held to be *personal* pro- " perty in the present question.

" 2. The more important and interesting question is that " which relates to the steam-engines and larger machinery, or, " in general, that part of the articles condescended on which " are in one way or another affixed to the ground, or to stone " buildings erected on the ground.

" As far as I may be a competent judge, it does not appear " to me that this question has ever been fairly brought to trial, " either in England or Scotland, till the present moment. And, " although I am very sensible of the difficulties attending it, " I cannot, with all deference, help thinking, that it is far " too narrow a view of the subject, to hold it as at once resolved

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" by the old notions about *fixtures*, having reference to things " of a totally different nature, or to quote such cases as that of " the bell of a manufactory, or any similar article, as furnishing " anything like a safe principle of judgment. The steam-engine " is entirely a modern invention; and, in the progressive history " of it, it has been gradually becoming more and more refined " and disseverable in its construction, and easily removable in " its character; while, on the other hand, it has grown into the " most important and almost universal implement of trade " brought into operation in these later days. I hold, that there " is not one case in our books which affords any authority for " the decision of the question as it here arises. The case of " Arkwright *v.* Billinge is given up as either erroneously decided, " or standing on the specialities of a contract which excluded " every question of principle. The case of Niven did not relate " to machinery of this description, but to articles of an entirely " different sort, and scarcely indeed to machinery at all, and " was besides involved in other important specialties. The case " of Stead also depended on the real intention of the parties in " a specific contract. It was a question whether the large " machinery had passed to Paterson at all. But it was *per* " *expressum* a part of the subject let by the lease, from the rent " stipulated, in which it was sought to be deducted.

" I may here, however, advert to the case of the *threshing* " *mill.* I should think it hard, certainly, to decide so important " a point as the present by what was done in a small matter " like that. But such as it is, it is direct and decidedly against " the respondent. In Hyslop *v.* Hyslop, Jan. 18, 1811, Lord " Armadale (a very good lawyer) held and decided that, though " the stone part of such a structure was heritable, the *machinery* " *was moveable;* stating expressly in his interlocutor that, in so " finding, he followed *a previous judgment of the Court.* The " party against whom that and other points were found, reclaimed " against the interlocutor; and though it is true that the report

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" does not shew that that point was argued, and the Court did " not actually decide it, the presumption is, that it was known " to have been previously decided, and felt to be too clear for " argument,—I had understood the law to be so settled ever " since, though it was understood that there was no actual judg- " ment on the point; and it was a question between *heir* and " *executor*. A possible doubt was indeed raised on the point, " under the impression of the case of Arkwright, before the real " nature of that case had been explained in the case of Niven. " Yet I own I read with surprise an assumption in the " opinions before us, that it can now *admit of no doubt* that " such machinery goes to the heir. I can only say, that I not " merely doubt it, but should have believed that it must be " decided the other way. Surely it would be so between land- " lord and tenant; and, in that of *heir* and *executor*, it just " comes to this, that the heir must pay for it as for other farm " stock, if not otherwise arranged. The decision as to Short's " *great telescope* was to the same effect, and is really a very " strong precedent.—Bell, I., 753.

" But I beg leave more generally to observe, that I con- " sider the progress and tendency of the law to have been " altogether in the opposite direction;—that is, to *relax*, and " not to *tighten*, the old principle of fixture. It is impossible " to read the passage in Mr. Bell's work (Com. i., pp. 753–4,) " without seeing that he was very strongly under that impres- " sion, even while struggling with the cases of Billinge, &c. " See particularly a strong passage in p. 754. After some " general reasoning on the effect of the employment of stock " in trade and manufactures, and reference to English cases, " he adds:—'These are distinctions which equity and public " 'expediency, as well as mercantile understanding ought " 'perhaps to recommend to adoption, *even in the case of suc-* " '*cession ab intestato*; and they do not seem to be inconsis- " 'tent with the common law of Scotland, in regulating the

" ' interests of the parties to a contract of temporary posses-
" ' sion.'

" It appears to me, therefore, that the present question
" ought to be considered on broad general principles, with
" reference to the distinctive nature of the subjects to which it
" relates, the particular mode of affixture, the purpose and
" design for which they were placed in the situation where
" they were found at Mr. Dixon's death, and his own under-
" standing concerning the character thereby impressed on
" them, or retained, according to their original state, as a part
" of his general property.

" Before a correct judgment can be formed on this part of
" the subject, the precise *facts* must be attended to.

" 1. The articles of machinery in question are all, in their
" own original nature, moveable subjects, made and completed
" *as works of mechanism*, and constantly bought and sold as
" *moveables*, without reference to any particular building or
" locality.

" 2. When such an engine is to be applied to use, sometimes
" it is placed on the ground, without being attached to any
" house or stone-building, though it is fixed in a certain way
" for stability; but more generally a building is erected for
" securing and protecting it. But it is clear on the report, that
" when this takes place, the *building* is made *for the machinery*,
" and adapted to the purpose of receiving and covering it,—
" not the *machinery for the building*. The machine is the *prin-*
" *cipal*, the building but an *adjunct*,—' the *skeleton* or *frame-*
" ' *work* of the general structure,'—and the *value* of the machine
" is more than five times that of the building.

" 3. The mode of placing and securing such a machine for
" use is arbitrary and various.

" 4. But, after an engine is so fixed or attached, it is done
" in such a manner, that in general it can be easily removed,
" without any great injury to itself or to the building. There

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" are, no doubt, some differences in this respect in the different " articles described, and there are some, (such as the *blast* " *furnaces*,) to which this does not apply at all. But I now " speak of the ordinary steam-engines, pumps, and other articles " similarly described. Blast-engine, tilt-engine," and so on, enumerating various articles. " All the rest, except the *blast* " *furnaces*, and the coke oven mounting, are simply moveable. " The *expense* of *removing* them is less than *one-eighth* of the " value.

" 5. It is a matter of constant practice to remove them.

" It might seem a very elementary remark, that in the " question whether a particular article or subject is in *law* move- " able, it cannot be an immaterial consideration that it is in " *fact* moveable, *easily removable*, *practically removed*, sold, &c., " every day; that it may be made with ease to follow the person, " whenever the *locality* of his trade is shifted. Yet the argu- " ment for making such subjects heritable is derived from a " maxim which supposed a very different state of the fact. " *Quod solo inædificatur solo cedit* supposes the erection of a " house, or other *permanent* structure, which cannot be removed; " and it means that the property of the soil gives a right to the " house. *Cujus est solum ejus est usque ad cœlum.* But the " question still remains what *inædificatio* imports; and it does " not follow that it includes a mere implement of trade tem- " porarily fixed on the premises, which is easily removable, and " would be equally valuable when moved to another site.

" If the mere fact of an *affixtion* thus characterised must " still have the effect of rendering such articles legally heritable " subjects, it should do so, in correct reasoning, in all cases " alike. But if it is and must be granted that it does not, and " that, in a variety of cases, the very same subjects are to be " accounted in law moveable or personal estate, it must be " open to the Court to consider whether, in the circumstances " of this case, it has such an effect; whether, the engines and

" other articles being easily removable, though fixed in a certain " manner and degree, there are not other considerations com- " bining with this to control the effect of such junction.

" It appears to me that the second ground of judgment " urged, and largely relied on in the opinions, viz., that these " subjects of property are made heritable *destinatione*, not only " is fallacious in the inference deduced under it, but, as a prin- " ciple, ought to lead to the opposite conclusion.

" Here it is necessary to remember what the true state of " the question is. It is not a question between heir and exe- " cutor. Where it is so, and the party has any special inten- " tion as to the destination of such subjects, he can always give " effect to such his intention by very simple deeds; and this is " an answer to all the apprehension of inconvenient conse- " quences from the principle of holding them to be still " moveable *in that case*.

" But a man cannot disappoint the *legitim* by any direct " deed of destination. He cannot make that to go to the heir " which is in itself moveable, to the prejudice of the *legitim*, even " by a direct declaration of a purpose to that effect. And, " therefore, the principle of destination, to have any effect in " this question, must be applied in a very different manner " from a mere presumption of a wish to prefer his heir to his " younger children, as the creditors for their *legitim*. There " can be no such presumption in law. The presumption is the " reverse—that, as administrator of the goods in communion, " he has no intention, by indirect acts, to alter the state of the " rights and interests of his children at his death, but rather " intends to preserve them entire.

" It is very true that the father may relieve himself from " the claims of his younger children, in regard to his property, " in several ways. He may transact with them, when of age, " for a discharge of their *legitim*. He may settle all by deed, " in such a manner as to satisfy them all, without inquiry

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" as to the heritable or moveable state of the property. But " wherever the claim of *legitim* does arise, there is but one way " in which that which was a *moveable* subject or fund in itself, " can be effectually withdrawn from that its legal condition, in " a question between the heir and the younger children who " have not discharged their *legitim.* No doubt this may be " done. If the father, in his lifetime, in the discretionary " management of his affairs, *bona fide* changes the actual or " legal state of his property from moveable to heritable, he has " perfect power to do so. If he applies money to the purchase " of a land estate or a house—if he lends money on heritable " bonds,—or if, in any other manner, he turns what is *personal* " into any *known* form of heritable property; in any such case, " the fund of *legitim*, as well as of executry, will be thereby " diminished at his death; not certainly on any supposition of " a *destination*, or purpose to defeat the *legitim*—but simply " because the *legitim* applies only to the personal estate, as it " stands at the father's death, and rather on the assumption " that there was no such purpose, and that the result is brought " about in the course of fair and natural administration.

" But when a man lays out his money in the purchase of " goods which are in their own nature moveable, and at his " death the question arises, whether, in the state and situation " in which they are then found, they are parts of his herit- " able estate, or of his personal estate, in that question there " can be no presumption of favour to the heir, or that by acts " having no reference to succession, he has conferred a benefit " on him, and impaired the rights of the younger children. It " may be found so in the result of the question. But in that " question the presumption is the reverse—that the rights of " succession, more especially onerous rights, are not altered " by equivocal acts in the ordinary use of subjects of property.

" How then does the principle of destination really apply " in the present case? To what were the various articles con-

" descended on destined? The assumption in the argument " of the pursuer is, that they were destined to make part of " the heritable estate for the benefit of the heir—or destined " by incorporation therein (independent of mere affixtion), to " make part thereof in succession.

" To me it appears that the proposition set against this, as " affirming a matter of fact, more than an inference of law, is " sound and true—that they were destined solely to the purpose " of the trade to which they were subservient. Is not this the " truth to be deduced from all the facts in the record and the " report? Though there were not the most direct evidence " that it is so, I should think that the very nature of the case " proved it. Here is a man engaged extensively in a particular " species of trade and manufacture, who, having realised large " personal funds by means of it, employs those funds in pro- " secuting the same trade still more extensively. In doing so, " he may have acquired certain property, so decidedly of an " heritable nature, that, remaining in his own exclusive pos- " session, it must be accounted heritable in all questions. Yet, " even in this point, there is this peculiarity, that even in such " acquisitions, there was a single view to the promotion of his " trade, and no view to the creation of a great heritable estate " in his heir. The various subjects were detached parcels of " land, evidently, and indeed expressly, purchased for the sole " purpose of being made subservient to his views as a trader in " coal or iron. It is not even the common case of a man who, " having a landed estate, and discovering a mine in it, makes " arrangements for working it to profit. Here it is all a matter " of trade—sometimes with the minerals to be wrought upon " found within the ground purchased, and sometimes the site " selected for a work merely for the sake of its locality, the " materials being drawn from other places.

" When, in such circumstances, the trading speculator pur- " chases moveable articles necessary for his trade—articles of

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" manufacture, to be formed in one place and transported to " another—while that which he acquires is itself a moveable " subject, it is manifest that the only destination connected with " it is a destination for the purposes of his trade. If some " degree of fixture is necessary for stability in taking the use " of it, that is but the means of using it as an implement of " trade, and still the only destination of it is for the trade. " Lord Lyndhurst has put the case of a stocking-frame, which is " usually fixed to the floor for stability; and yet, being easily " removeable, and destined only for trade, he holds to be un- " doubtedly personal. And so of other small machinery, such " as was found to be moveable in the case of Stead. There " may be a difference in size and degree between the steam- " engine of a colliery or iron-work and a stocking-frame; but " there is none in principle, if it be ascertained that the one as " well as the other is easily removeable, and in use to be moved " from place to place: And still there is no destination, and no " ground for presuming destination of it, for anything but the " trade.

" But in the present case it is quite certain that Mr. Dixon " himself had no idea that he had, by destination, or by " anything done, rendered those moveable articles part of " his heritable subjects. It is said that his opinion in point of " law could not render them moveable if they were truly herit- " able. That is very true, once it were found that they were " heritable; and if the whole point in controversy might be " at once assumed, the observation would be very just. But, " *in the question whether they were heritable or not*, and when " it is maintained that Mr. Dixon made them heritable, and " that *destinatione*, surely his own view of the effect of what he " did cannot but be of importance.

" Now, 1*st*, All the articles in the condescendence consti- " tuted part of Mr. Dixon's *stock in trade*, and were so reckoned " by himself in his books.

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" I must think the respondent's mode of pleading in this " point very incorrect.

" In the Lord Ordinary's note, he stated that the fact " might perhaps be taken as admitted. He added, that if " this should be objected to, it might be put in the remit, or " ascertained in some other way. When this was so stated, if " the respondent did not hold it to be admitted, he was bound " to say so, that the Lord Ordinary might judge whether to " express it in the remit or not. As he did not do so, I held " it as admitted—and for that reason only did not make it a " special point of inquiry. Probably there are general clauses in " the remit, sufficient to have warranted what Mr. Smith has " reported on the subject.

" But the respondent, after letting the remit go, without " interposing one word of objection against the Lord Ordinary's " supposition, that the fact might be taken as admitted, objected " to Mr. Smith stating it in his report. And he then let it " pass, without even yet making any denial of it, or requiring " any other investigation. In such circumstances, I hold it as " an admitted fact in the case.

" But, whether it be admitted or not, I think that it clearly " appears upon the facts and documents reported, independent " of Mr. Smith's report of the inference. The accounts en- " tered in Mr. Dixon's books distinctly shew this; and though " it is very true, that, in stating the whole stock of which he " was possessed, he also puts down his proper heritable pro- " perty connected with the various works, these subjects are so " pointedly separated and distinguished from the machinery " and other articles which he esteemed moveable, as only to " strengthen the inference that all of these latter were taken " by him as constituting his personal stock in trade. In one " instance, indeed, that of the Calder Coal and Iron-Works, " in which the land occupied was merely occupied as the " site of those works, both the coal and iron being brought from

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" a distance, Mr. Dixon seems to have had so strong an impres-
" sion that all that was placed there was merely stock in trade,
" that, in the inventories made up, he has included even the
" houses and buildings with the machinery, &c. If this be
" thought in any respect to weaken the inference as to the actual
" view which Mr. Dixon entertained, it shews, at all events, how
" strongly he took the articles of property in question as being
" merely his stock in trade; and though such a fact may not be
" sufficient to render subjects which are clearly heritable in their
" nature, and his own exclusive property, personal estate in him
" at his death, it does not follow that the fact is not still very
" material, with regard to all the articles which do not bear any
" such distinctive character.

" But, *2nd*, There is direct proof that Mr. Dixon considered
" and treated all the machinery in question as still moveable
" effects in his possession. I shall not go into the detail of par-
" ticulars, which might be necessary, if my view of the principles
" of judgment were not excluded by the opinions of the con-
" sulted Judges. But just look at the state of the matter in the
" case of the great work of the Govan Colliery. First of all,
" the heritable, clearly defined, is conveyed by one deed of dis-
" position, which bears no allusion to any part of the machinery;
" and then, separately, an *assignation* is taken of the personal
" property, consisting expressly of the steam-engines, machinery,
" utensils, &c. Then there is an inventory and valuation of the
" whole entered in the books,—the first part of which is,—' In-
" ' ventory and valuation of the *moveable* property belonging to the
" ' Govan Colliery, viz., *steam-engines*, machinery, and utensils,'
" &c., &c., in which not one article of a proper heritable nature
" is included. And this is followed by a separate inventory and
" valuation of the 'heritable property, viz., lease of colliery,
" ' farm,' &c. When, again, Mr. Dixon acquired the sole pro-
" perty of the Govan Colliery, and all belonging to it, separate
" conveyances were again employed, the engines, &c., being all

" assigned *by bill of sale as moveable subjects*, while the heritable " property was conveyed by *disposition*. And then there are " separate inventories and valuations again entered in the books, " which are all *holograph of Mr. Dixon himself*, by which, after " setting down with remarkable accuracy and discrimination, " under nine heads, everything which he treated and meant to " be taken as heritable property, he goes on, 'the *moveable* pro- " 'perty *consists* of the *steam-engines*, gins, wagons,' &c., &c. " The inventory itself runs thus, accordingly,—'Inventory of " '*moveable* property, machinery, and utensils, £2172; *seven* " '*steam-engines*, £4010,' &c., &c.

" I take this as an example of what, in one form or another, " though not always so simply, appears in regard to all the " similar articles of property condescended on. And I must " regard it as of very great importance in the question. For, " 1. it confirms in the strongest manner Mr. Smith's report " as to the practice and understanding of the trade as to the " moveable nature of those subjects. In any similar investiga- " tion, Mr. Dixon's testimony would, from his great knowledge " and experience, have been the very best possible after Mr. " Smith's own. But, independent of any testimony or opinion, " the things done bear real evidence of the decided under- " standing. For, if the steam-engines were, either by affixtion " or destination, or both together, effectually rendered incor- " porate parts of the land or building, so as to pass with them, " whether by a disposition silent regarding them, or by suc- " cession *ab intestato*, of what use would it be to include them in " a separate personal deed of assignation as moveable effects? " It never could have been thought of. Even if it had been " intended to make them pass with the heritable subjects, it " would have been enough to specify them in the one deed of " disposition, as held in the case of Arkwright. But the pointed " nature of the proceedings in this case demonstrates the reality " of the impression, that they constituted property of a very

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" different order and character from the heritable subjects on " which they were placed.

" But, 2, Is Mr. Dixon's own belief, and understanding and " dealing, of no moment, when it is said that these moveable " articles of trade were made heritable in his estate *destinatione?* " Mr. Dixon lived and died in the full belief that they were parts " of his moveable estate; and no man can doubt that, if he had " died *intestate*, as might have happened, he would have died in " the belief that they would be so taken at his death. That he " made a special settlement does not alter the state of the pro- " perty, or his belief regarding it,—though I fear it has too " much practical influence in the question.

" But the manner in which the party has himself dealt with " the subjects has always been held to be a legitimate element " in the question. It was so in Arkwright and in Stead; and " it was very pointedly so regarded by Lord Lyndhurst in the " case of Trappes.

" It must always be remembered, however, that it is not on " this fact alone that any opinion for holding the subjects to " be moveable is rested. It must be combined with all the " other facts,—particularly that they are easily removed, and " constantly in use to be so,—that they are of equal value when " removed,—that they are placed there for trade only,—and " that they may be so on a very temporary possession of the " ground, and where that ground is merely the site of the trade " carried on.

" It is asked, how it is for the benefit of trade that such " subjects should be held to be moveable in succession? I " answer, that it always must be for the benefit of trade that " the course of succession to a man's property at his death " should not be altered by what he does for the purposes of " trade only, unless he has decidedly changed the nature of it " to all effects whatsoever, to the evident perception of himself " and all mankind. It will not do to assume that the things

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" ARE made heritable by affixtion, and then, on that assumption, " to say that he is bound to know it. The question is, whether " they are heritable or not? And it is nearly granted that they " are not heritable to all effects. But a stronger case of injury " to trade can hardly be figured than that which here occurs, " if it be considered apart from Mr. Dixon's settlements,— " where a man has put his whole capital into trade, and dis- " tinctly recorded in his books the purpose and belief, that " articles of great value, purchased as moveables, are still to be " taken as part of his moveable estate, notwithstanding the " situation in which they are placed,—and, at his death, the " rights of his wife and children are found to be completely " inverted or taken away by a constructive change of their " legal character.

" I shall not enlarge further. It appears to me, in general, " that all the articles in the condescendence, as reported, with " the exception of the blast-furnaces, and a very few other " articles, which it appears are practically not removable, ought " to be held to be moveable in the present question.

" I have adverted to the Scotch cases, none of which, I " apprehend, can be held to have settled the point. But I " must still take notice of the English authorities quoted; " though I can only speak of them with great diffidence.

" It appears that there was in England a strict rule con- " cerning fixture, even more rigid than that in Scotland. But " it is equally clear that it has been gradually relaxed. The " grounds of relaxation are precisely those I have been con- " sidering,—the purpose of the annexation as being for trade,— " the facility of removal,—the practice of removing,—the " building being only for protection,—their being only partial " annexation,—the subjects being treated as moveable in the " accounts of stock.

" I shall not attempt to go minutely through the cases, " which appear to be well explained in the papers, and more

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" surely in Lord Lyndhurst's speech in the case of Trappes.
" But it is remarkable that the very earliest case of which there
" is any notice, that of the cider mill, decided by C. B. Comyn,
" was a case between heir and executor; and, in deciding
" Lawton *v.* Lawton, Lord Hardwicke noticed the very case of
" a fire-engine, holding that, even between heir and executor,
" ' it would be hard that in every case it should go to the
" ' heir.' What would he have said if the case of *legitim* could
" have been in his view?

" I do not pretend to form a judgment how far all the cases
" can be reconciled. Lord Lyndhurst seems to think they
" may. But the rules are stricter in the Common Law Courts
" than in the Equity Courts. The result is clear, that between
" landlord and tenant—between tenant for life and remainder
" man—between mortgagor and mortgagee—such machinery,
" and specially a fire or steam-engine, has been held personal
" estate. It is said by Lord Hardwicke not to be *so fre-*
" *quently* so held between heir and executor; and there is one
" judgment of Lord Mansfield (in the Common Law Court),
" in the very special case of salt-pans, attached to a salt-
" spring, holding them to be *real;* of which, however, an
" explanation, thought to be satisfactory, is given by the
" English lawyers.

" But I come at once to the case of Trappes, decided very
" solemnly by Lord Lyndhurst. It was a question between the
" assignees of a bankrupt and the holder of a mortgage. The
" mortgage deed conveyed expressly, with the ' lands and
" ' buildings, the steam-engine, mill, gearing, heavy gear to
" ' millwright work, fixed machinery, *and other matters and*
" ' *things erected and then standing.*' The assignees did not
" claim the steam-engines and water-wheels, holding these
" to be given by the mortgage deed, just as in the cases of
" Arkwright and Stead, although there is this very important
" difference, that a debt secured by mortgage is believed to be

" still personal estate. But they claimed all the other machi-
" nery, as not carried by the general terms of that deed; and it
" was held that it did not so pass, and was not intended to
" pass; and that, 'if it did not so pass, it is to be looked upon
" 'as PERSONAL estate.'

" But *why* was it held not to pass, or not to have been
" intended to pass? 'In *taking the stock*, it appears that the
" 'land and buildings were constantly placed under one head,
" 'and the machinery under another. It also appears that
" 'machinery of this description is, in that part of the country,
" '*constantly bought and sold* without reference to the freehold.'
" The conclusion of Lord Lyndhurst is direct to the point.
" 'We are of opinion, therefore, that, with respect to machinery
" 'of this description, erected by the bankrupts *for the purposes*
" '*of trade*, it would have passed to the *executor*, and not to the
" '*heir*, and that it was the partnership estate of the bankrupts.'
" This is the doctrine held upon a review of all the cases.

" Now, 1. It is decisive as to all the small machinery in the
" present case, for all the same facts are here combined for ren-
" dering it personal estate.

" 2. As to the steam-engines, &c., there is here no deed under
" which they can be held to pass as heritable, or in connexion
" with heritage.

" 3. There is direct proof that they were intended to stand
" as personal estate, being so placed in all the accounts of stock.

" 4. The opinion is direct that such machinery, so treated and
" dealt with, must be accounted personal, even between heir and
" executor, adopting the dictum of Lord Hardwicke, with special
" reference to a fire-engine.

" And, 5. The present case is *a fortiori* of any case of heir
" and executor.

" I have only now to advert in a few words to two points.

" 1. In regard to the *Glasgow Foundry*. The ground being
" Mr. Dixon's property, he let it to a company, but *of which*

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" *he was himself a partner* for four-ninths, and under an obliga-
" tion in the lease he erected machinery. Now the consulted
" Judges may be right in saying, that, so far as the machinery was
" his property, it is the same case with that of most of the other
" works. But here it is overlooked, that the assumption so
" largely gone upon before, that the machinery was erected *solely*
" *for the purpose of realizing the produce of the ground, entirely*
" *fails.* The whole materials wrought at the foundry were brought
" from the *Calder Coal* and *Iron*-works. The ground of the
" foundry was the mere *site of a trade.*

" It is also overlooked that, besides the machinery erected by
" Mr. Dixon, there were tools, implements, &c., which belonged
" to the company. Certainly his *shares of these* were *personal*
" estate.—Kirkpatrick *v.* Syme.

" 2. The other point is that referred to in the last paragraph
" of Lord Cockburn's opinion, from which Lord Cuninghame
" and others have dissented.

" It is a very important point. There can be no doubt that
" the machinery erected by Mr. Dixon, as a *tenant*, was his pro-
" perty, and that, according to *all* the authorities, he had a right
" to remove it as *personal* property. This is the very point con-
" ceded on all hands, that, in a question between *landlord* and
" *tenant*, such property erected by the *tenant* is personal estate
" and belongs to him.

" Being *personal* estate, and on that ground alone vested in
" the tenant, it might seem a very elementary proposition, that
" it *must* be part of his *moveable* estate at his death. And so
" Lord Cockburn holds.

" But even this will not be granted to the child asking *legi-*
" *tim.* And why not? Because the articles were placed on the
" ground for the purposes of the lease, and the heir cannot con-
" tinue to trade under it without them.

" This is really driving the doctrine into a very strange posi-
" tion. *Fixture* is out of the case, for that would make them

" belong to the *landlord*, as part of the freehold. But, against " that principle, they are held to be *personalty* in the *tenant*; " and on *that ground* he may *remove* them when he pleases. At " his death they are his *personal* effects, for he had no other title " to them. They are so just as much as the carts and horses " on a common farm. True, it may be inconvenient for the " heir in the lease that the stock in trade, or the farm-stocking " on a farm, or the furniture of a house, should be sold or " carried off. But I never yet heard that that was any reason " why in any such case what is personal estate in the tenant " should not be so reckoned. I suspect the collectors of the " *legacy duty* would hold a very different doctrine. It is a posi- " tion which would alter the course of succession to every tenant " in Scotland. There is no more difficulty here than in any " other case. In all of them, the things or similar things are " *necessary* to the use or working of the subject; and the heir " must either transact with the younger children or executors, " or supply himself otherwise, which, it is proved, he may as " easily do in this case as in any other.

" And see what strange results it might bring it to. The " lease may be within *half-a-year* of *expiring*. What would the " machinery be then? It would come to this, that being cer- " tainly *moveable* in his person, they would be *personal estate* in " his succession if he died the day after the lease expired, and " *heritable* if he died a day before the term.

" In short, we are required to hold that this property, un- " doubtedly *personal* in the *tenant*, is yet, without any change " on it, *heritable* estate in his succession. I apprehend that this " proceeds on an entire mistake as to the meaning of the prin- " ciple by which things may be made heritable *destinatione*. But, " in short, I cannot assent to a proposition which appears to " me to involve such inconsistent results, and to lead to the " greatest confusion in the succession of all tenants in Scotland."

The opinions of *Lord Cockburn* and *Lord Moncrieff* were

adopted by the House on the hearing of the appeal, as representing the two opposed opinions, the reporter has therefore given them in full, so far as applicable to the general question of law, which alone he has thought it necessary to embrace by this report. In doing this he has necessarily excluded those parts which bear only upon whether any particular article was moveable or heritable. The reader desirous of inquiring what articles were held to be heritable, and what personal, will find the information in the inventory and description in Mr. Smith's report, and the remarks of the Judges upon that inventory noticed below, (which will be found in 5 *B. M. D.* and *Y.* 829,) coupled with the final interlocutor of the Court, given below.

The Judges concurring, as well as those dissenting from the opinions of the consulted Judges, agreed in directing the papers to be again laid before these Judges, for the purpose of their stating what portions of the machinery they considered to be moveable in conformity with their opinions. This was done by the word "heritable" or "moveable," as the case might be, being marked on the inventory and description in Mr. Smith's report by the consulted Judges, who made this addition to their opinions: "As to the engines and other machinery for working
" the collieries of which the late Mr. Dixon was not the owner,
" but only the tenant, and which belonged to the landlord,—in
" respect it is admitted by Mr. Dixon, and not disputed by the
" claimants, that they never belonged in property to the defunct
" during his life, and so were not *in bonis* at his death; and fur-
" ther, 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 must be included in the executry,
" we are of opinion that the Judges of the Second Division may
" now dispose of the two articles in the appendix to Mr. Smith's
" report, articles 6 and 7, having regard to our former opinion,
" without further opinion from us."

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Thereafter the Court, on the 7th March, 1843, pronounced the following interlocutor, which was the one appealed from:—

"The Lords having resumed consideration of the revised "cases for the parties, dated 4th November, 1839, with the "closed record, Mr. Smith's report, and other proceedings "therein referred to, and the opinions of the consulted Judges, "dated 14th January, 1842, and the additional opinions of the "consulted Judges, dated 28th February last, in respect of these "opinions of a majority of the Judges, and in conformity there-"with, find, that the instruments, engines and machinery de-"scribed and referred to in Mr. Smith's report, which, in the "circumstances of this case, fall to be held and treated as *herit-*"*able*, and those which fall to be held as *moveable* property in "the succession of the late Mr. Dixon, are respectively as fol-"lows, viz.,

"First,—That of the instruments, engines and machinery "specified in article 4 of the revised condescendence for Messrs. "Dixon, No. of process, the following are to be held and treated "as heritable:—(1). The blast-engines for blowing the furnaces "at Calder Iron-Works, Nos. 1, 2 and 3, with blowing apparatus "complete, as also the blast-furnaces themselves. (2). Tilt-"engine (8-horses power), in very bad order; clay-mill and "great going gear from steam-engine for drawing it, and turning-"lathe, tilting-apparatus, two hammers and shears, all out of "order—all at the Calder Iron-works. (3). Engines for thrash-"ing and corn-mills at Calder, eight-horses power, with pipes "from engine to canal (in best order); thrashing-mill (worked "by steam-engine; corn-mill (one pair stones for shealing, and "one pair for grinding) with the sack-tackle, kiln-head. (4). "Faskine pumping engine, 40 fathoms eight-inch pump, in two "lifts, with shear-poles, capstan and ropes (in bad order); No. 5, "gig-engine, with winding apparatus, pit-head frame and ropes "(in bad order); No. 4, winding machine and winding appara-"tus, conical drum, and pit-head frame and round ropes, wooden

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" beam, iron mounted and plumber blocks, cast-iron cistern. " (5). Blowing-engine at the Wilsontown Iron-works, with " blowing apparatus, and water-pressure and two boilers. (6). " Rolling-mill engine at Wilsontown, with rolling apparatus and " two boilers; two steam-engines for working forge-hammers, " with two boilers and machinery for working four hammers, " with two cranes. (7). The following engines and articles at " Govan Colliery:—old water-engine, 50-inch cylinder, with two " boilers, and three lifts of 12½-inch pipes, capstan and ropes, " including tools and implements for working engine (engine " and boilers in bad order); water-engine at Polmadie engine- " pit, 44-inch cylinder; one boiler, with 28 fathoms nine-inch " pipes and rods, including capstans, ropes, tools and implements " for working engine, in so far as such tools and implements are " attached or fitted to this particular engine: gig-engine at Pol- " madie engine-pit, with winding apparatus and ropes; Neil- " son's Pit water-engine, 33-inch cylinder, with 24 fathom nine- " inch, and 9½ fathom 6¼-inch pumps, and winding apparatus, " capstan, ropes and tools used for working engine, in so far as " such tools, &c., are attached or fitted to this particular engine; " engine at Gateside-pit, with winding apparatus and ropes; en- " gine at Firs Pit, with two boilers, and winding apparatus and " ropes (engine and one of the boilers in very bad order); old " materials of Quarry Pit gig and water-engine, with 54 fathoms " 6¼-inch pipes and pump rods; one boiler useless; remains of " corner pit gig, pumps and rods in Polmadie Pit. (8). The " Glasgow Foundry steam-engine, 14-horse power, with one " boiler and engine tools, in so far as such tools are attached or " fitted to this particular engine, and condensing and water-pipes " to and from the canal; blowing apparatus, with air-chests and " pipes to cupola, including second walking-beam, connecting " rods, &c.; great going gear from steam-engine for driving clay- " mill, turning-lathes, and part erected for boring-mill, including " clay-mill; three cranes in foundry, with gearing and blocks;

" crane in smithy; small crane in boring-mill; smaller one; pair " long wooden shears for turning-lathes, with three sets turning- " lathes heads; and that the other tools, implements and articles " specified in article 4 of said revised condescendence for Messrs. " Dixon, viz., all spare and duplicate articles for working the " blowing-engine and apparatus, and the rolling-mill engine and " rolling apparatus at Wilsontown, the unattached tools and im- " plements used for working the water-engines at Govan Col- " liery, and the engine-tools of the Glasgow Foundry steam-en- " gine, in so far as not fitted to that particular engine, are to be " held and treated as *moveable*.

" Second,—That of the instruments, engines and machinery " enumerated in article fifth of said revised condescendence for " Messrs. Dixon, the following are to be held and treated as " *heritable*,—(1.) Fineries at Wilsontown, viz., a large cistern " 8 feet × 3 × 2; finery water-boxes and air-chest, one water " trough. (2). Two standards in stone there. (3.) Two cir- " cular plates for crane foot; one crane beam, mounted; two " wooden ditto there. (4). Gin at Middle Moor Pit; gin with " old ropes, (Wilsontown). (5). Greenwall water-engine, with " capstan; 16½ fathoms 9-inch pump, timber beam and framing. " (6). One horse gin, with pit-head frame and pulleys at Govan " Colliery. (7). Railway at Port-Eglinton, consisting of 2864 " rails, four feet long, 1449 sleepers, one coup rail, two turn " plates, 17 crosses and forks for offsets, 1008 heavy slabs for " crossing roads, three crosses and forks for offsets (bad casts), " and couping machine at Port-Eglinton. And that the other " articles and implements enumerated in article 5 of said " revised condescendence for Messrs. Dixon, being (1) Smith's " hearth-plate, timp in cast-house, ball for breaking heavy " goods, 225 coke-yard rails, 89 oven covers, 17 turning-lathes " in coke yard, screw stalk in smith's shop, two smith's sweys " at Wilsontown. (2). Fourteen water boxes, two breaking " racks, two plumber blocks, four pit-head wheels, one cast

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" one wrought-iron scale for a weighing-beam, eight dampers,
" mounted plates, and barrow runs on floor; one crane-step
" at Wilsontown. (3). Tongs, hooks, wrestlers, ringers for
" cutters, bolts and wedges; 19 pair cutters, teeth and other
" plates for it; 50 spanners, six pinions, two rests for straight
" edge, seven crates and one plate, one centre-point standard,
" two standards, seven rests, two large standards, two spur
" pinions, seven crabs, 20 coupling boxes, seven shafts, four
" top-riders, one large and one small cistern, two moveable
" benches, wooden ditto, hoop shears wrought by engine, cast-
" iron plates on mill-floor, 17 pair rollers at Wilsontown. (4).
" 4356 flat rails above and below ground, 92 corves, 43 colliers'
" whirlies, 156 bench plates (cast-iron), four stone mills, two
" hearth-plates on pit-heads, one fire-lamp, 44 corf-carriages,
" two weights on bridge (cast-iron); two weighing machines and
" weights, eight riddels, two weighing hutches, one redd ditto,
" eight wheelbarrows, two wagons for loading char at Faskine.
" (5). Five corf-carriages, four slipe hutches at Faskine. (6).
" 2688 rails, 224 ditto double, five offsets complete, 140
" circular rails, 34 coke yard rails, 12 limestone waggons, six
" coal ditto, 199 flat and 27 circular rails, one iron measure for
" lime, 12 hutches, part of an old gig-engine, 12 hutches, two
" windlasses, and two waterbarrels at Wilsontown. (7). Four
" weighing machines for carts, never bolted to the building,
" three small weighing machines for colliers' hutches, two jack
" rolls (12 feet long) with stools, sixty-one corf-carriages, eight
" hill ditto, 88 hill ditto, 88 whirlies, 10 slipe hutches, 59
" corfs, four small sinking kettles, one ditto ditto (bad), three
" large and three small water buckets (strong), four small wind-
" lasses ditto, eight wheelbarrows, one large hanging scaffold
" (with slings), one pair pump-slings, one ditto, two corf-
" carriage frames, two hill ditto, two slipe ditto, two whirlie
" frames, two ditto clad with wood, one water whirlie, air
" pumping machine (with 202 yards white-iron pipe), 5¼-inch

" diameter, one cleek for pit bottom, four fire-lamps, one ditto " lamp, six old gin trees, three sinking pails, six new wagon " frames, shape of pit (malleable iron), net for slinging horses " (very old), hude for carrying lime, three pair drawing ropes " (old), materials of an old weighing machine, boring rods, 15 " sets blasting tools, 30 sinking picks, 19 coal ditto, 12 wedges, " useful old iron plain work, ditto screwed work, new wrought- " iron plain work, colliery implements of wrought-iron, useful " articles of brass, 3029 rails (horse road), 1430 sleepers, 683 " snugs, 34 offset sleepers, five pattern sleepers, 45 crosses and " forks for offsets, four turnplates for carriage roads, 402 rails " (old horse road,) 201 sleepers, seven hinge rails (whirlie road), " 914 yards rails (laid in pit), 36 common ledge rails, 602 yards " ditto in pits, old cast-iron broken rails, colliery implements " (various), wrights' ditto, 14 pulley-wheels for round ropes, " four ditto for flat ditto, one pattern rope, 116 carriage wheels, " with 58 axles, nine small carriage wheels, five old small " pipes, two pipes (9½-inch diameter), one working barrel (12 " inches), 33 wagon rods with brasses, 28 bushes for whirlie " wheels, sleepers and cods for corf-carriages, cods for ditto, 19 " furnace bars, one old working barrel, one old basket door " piece, one drum-shift, one hand-pump, one suction piece, " cistern for horses at stables, 164 fathoms new flat rope, small " round rope, old rope, one damper frame and cover at Govan " Colliery. (8). Four spare wagon wheels, 31 wagons, and " two stone carriages, connected with Port-Eglinton railway, " are to be held and treated as *moveable*.

" Third,—That the coke oven mounting mentioned in " article 6 of the said revised condescendence for Messrs. " Dixon is to be held and treated as *heritable*, and the 20 " hearth-stones, 500 feet, mentioned in the said article, are to " be held as *moveable*.

" Fourth,—That the blowing-engine for No. 4 furnace at " Calder, secondhand, with blowing apparatus, partly erected

" only, and in many parts awanting, with two secondhand " boilers and regulating cylinder, mentioned in article 7 of " the said revised condescendence for Messrs. Dixon, are to be " held and treated as *heritable*.

" Fifth,—That the articles and implements enumerated " in article 8 of said revised condescendence for Messrs. " Dixon, viz.:—(1). Bars, hooks and courses, seven throwing- " off and three clay shovels, 22 pig and three sow patterns, " breaking down bar. (2). Engine fire irons. (3). Fifteen " steel yards and boxes, weights, eight mine grapes, three " rakes, four mine boxes, six coke barrows, three coke grapes, " one limestone grape. (4). Six setters and coke shovels, six " grapes for ironstone, three pinches, two iron stone carriages, " four coke drawing grapes. (5). Beam and scales for pig-iron, " weights for ditto, pig-iron barrow. (6). Three rabbles, one " cast-iron anvil, two bearers and chains, one wooden tress, all " at Calder. (7). Two weighing beams and scales, one weighing " machine, one ditto ditto for blooms, two old iron barrows, " two wheel trucks, one old coke barrow, one old pig-iron ditto, " two ironstone carriages, four-wheeled carriage, old weighing " machine at Wilsontown, are all to be held and treated as " *moveable* property.

" Further,—Find as to the articles under the sixth head of " Mr. Smith's report, which belong to the proprietors of the " subjects in which the late Mr. Dixon was tenant, as they did " not belong to him at the time of his death, there can be no " claim over them as the subject of *legitim*, reserving however " any claim which may arise for meliorations claimable from " the landlords, in terms of the leases entered into between " them: *And* with regard to the seventh class in the said " report, erections made on subjects under leases by the late " Mr. Dixon, and which have been removed by the respondents " at the termination of the leases, find that these are *moveable*, " and subject to the claim of *legitim* on the part of the

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"claimants, and *decern*, and find no expenses due to either "party in this branch of the cause."

Mr. Turner and *Mr. Sandford* for the Appellants, relied upon M'Knight *v.* Irving, *Hume*, 412,—Hislop *v.* Hislop, 16 *F. C.* 143,—Elwes *v.* Maw, 3 *East*, 38,—Lawton *v.* Lawton, 3 *Atk.* 13,—Dudley *v.* Ward, *Amb.* 113,—Lawton's Exrs. *v.* Salmon, 1 *H. Blac.* 259,—Trappes *v.* Harter, 2 *Cro.* & *Mee.* 153,—Davis *v.* Jones, 2 *Bar.* & *Ald.* 165.

The *Lord Advocate*, *Mr. Kelly*, and *Mr. Anderson*, for the Respondent, referred to *Stair* II., 1, 2, & 15, II., 2, 2,—*Ersk.* II., 2, 4,—Mags, of Musselburgh, *Mor.* 10585,—Barr, 25 Feb. 1783, *Hailes*, 919,—Gordon, *Hume's Cases*, 189,—~~Erivon~~ *v.* Pitcairn's, Trs. 21, *F. C.* 204,—Cox *v.* Stead, 11 *S.* & *D.* 672,—Thresher *v.* East London Water Works, 2 *Bar.* & *Cr.* 608,—Farrant *v.* Thomson, 5 *Bar.* & *Ald.* 826,—2 *Smith's leading Cases*, 114, Lawton *v.* Salmon, *ut supra*,—Elwes *v.* Maw, *ut supra*. Niven.

LORD BROUGHAM.—My Lords, this case was heard before your Lordships at great length on both sides, and your Lordships considered that, on account of the length of the case, as well as the importance of the subject-matter involved in point of value, and also in respect of some of the principles which were mooted, and some indeed which were disputed, in point of law, bearing not merely upon questions of the same nature, namely, of *legitim*, but bearing upon the cognate question, which must depend upon the same principles, of the relation between landlord and tenant at the expiration of the term, your Lordships considered that it was fit that time should be taken for considering the case before finally pronouncing judgment. That consideration has been given to it, and I am now prepared to move your Lordships to give the judgment which it appears to me, under the circumstances of this case, it is right to pronounce.

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I begin by laying out of view entirely what was very much relied upon, as it appeared to me, below, and much relied upon in the argument here for the appellant, viz., a distinction taken between this case and a case of inheritance, a case arising between executor and heir. In this case of *legitim*, as I understood them to argue, it is not a mere question between executor and heir, but it is a question between two kinds of heirs. Now that is a sort of argument, I must say, with all respect for those who urge the distinction upon our attention, than which nothing can be more groundless. It is not a question between two kinds of heirs. In what way can you differ this case between heir and executor from the common case, as the argument endeavours to distinguish it? The executor is heir *in mobilibus*. That is the common expression of the Scotch law. The *legitim* here is due to those who are not heirs as to real property—it is that which is due out of what is called in Scotland the Executory Fund, that is to say, that which goes not to the heir, but which goes to the executor. It is then in his capacity of heir *in mobilibus* that the *legitim* goes to the child, that the bairn's part of gear goes to the bairn, because the bairn is heir *in mobilibus*, and, therefore, I cannot, for the life of me, discover how the argument gains at all, I do not say that it loses, but it neither gains nor loses by the distinction—it is left precisely in the same state in which it was before the distinction. It is because it is executry and not heritage, that the *legitim* attaches. After payment of the debts, the surplus fund is divided into three parts, according to the Scotch law, which was originally, indeed, the old Saxon law of England, and which is now the law of Scotland.

That being the case, having relieved it from the embarrassment of this argument, I have not much to urge to your Lordships upon this case, because, upon the fullest consideration which I have been able to give, both to the English law authorities which were cited, and to the Scotch authorities, by which

it was sought on the one side to turn aside, and on the other side rather to enforce the application of the English law cases, I entirely agree with the Court below, and I should have arrived at the self-same conclusion as that at which the great majority of their Lordships have arrived. There is no doubt a most respectable minority of their Lordships, including the Lord President, and the learned chief of the other Court, and Lord Moncrieff, (to whose authority no person is disposed, generally speaking, to yield more entire and implicit respect than myself,) the most able and elaborate judgment which he has given upon this point thoroughly exhausting the whole case, not only upon principles, but upon its details. But I must say that my mind goes not with his lordship's judgment, but with the equally elaborate and equally able judgment of my Lord Cockburn, who also goes into the principles and into the details of the case. I think Lord Cockburn has really left me little or nothing to add, and I am bound to say that in my view he and the other judges joined with him have come to a right and sound conclusion.

Great reliance was of course placed upon the case before Lord Hardwicke, in our Court of Chancery here, and a similar case which occurred more recently in the Court of Exchequer, I think in Lord Lyndhurst's time. But there was an attempt made to distinguish this case in principle from that, and to show that there was another inconsistent decision in the Cider Mill case, in one of the cider counties, Worcestershire or Herefordshire. Now, it is a remarkable circumstance, that of that case we have the most indistinct and unsatisfactory report; we have really nothing that can be called a record of that case. It was cited in the case before Lord Hardwicke; and I must also say that if that case, the Cider Mill case, is to be taken as it is represented to us as regards the substance of the case, and in its result, my mind goes not at all with that decision. It is contrary, undeniably, to the general principles of our law upon the subject, and

if the same question were to arise to-morrow, with the circumstances which are represented to have attended that case, it would not, in my very clear opinion, lead to the same result. Therefore I lay it out of view. As my noble and learned friend reminds me, we have a most imperfect account of the circumstances, and, above all, the most material circumstance, of how it was affixed to the soil. For if a cider mill be fixed to the soil, though it is a manufactory, and erected for the purpose of a manufactory, if it is *solo infixum*, it is perfectly immaterial whether it is for the purpose of a manufactory, or a granary, or a barn, or any thing else, it is a fixture on the soil, and it becomes part of the soil.

Can any man say that one of the great brewhouses would belong to the executor because it is erected for the purpose of manufacture, and wholly unconnected with the land? for a brewhouse is as much unconnected with any crops upon the land upon which it is situated, as a cider mill can be said to be—it is for the purpose of brewing beer out of malt, which may have been grown in Russia or in Africa. It has nothing to do with the land, as may be seen by those who will take the trouble of looking at any of the brewhouses in London, which are established in places where it would be very difficult to find a blade of grass, much less a crop of barley to make malt of. But although it is a manufactory, nobody says it belongs to the executor, nor is it what the Scotch generally call an Executry Fund—it would go unquestionably to the heir.

The Scotch law appears to me only to differ from the English law in carrying the principles of our law, as laid down in the cases, a little farther, rather than falling short of them. Upon the whole, therefore, I agree with Lord Cockburn; I do not differ from his argument any more than I do from the conclusions to which they lead.

Then, my Lords, I come to the application of these principles in detail, and I must say in the outset, as to that detail,

of the very little that I have to add, that I should be most unwilling to come to any conclusion which should lead to upsetting or altering in any particular this elaborate judgment thoroughly considered below upon the ground of my differing in opinion, as to the application of this clear principle to any of the details of this machinery. There are one or two articles which I do not quite think have been consistently or rightly disposed of by the Court below. I do not deny that, but I have carefully looked to see whether I could put my finger upon any part which had been wrongly disposed of in favour of the respondent, and against the appellant, in the Court below. If I had found that, I might have been more obstructed in coming to the conclusion at which I have arrived. But my objection is to some of those articles being given to the appellant, not to the respondent; and if there had been a cross appeal I protest that I should have found some difficulty in resisting the argument, that there ought to have been a reversal or alteration in respect of some of those particulars. There are one or two that in looking over I made a query against, of the most trivial nature, upon which I should never advise your Lordships to reverse or alter the judgment below in any respect. I cannot even say that I have a clear opinion as to them. I queried them as having a doubt. There are several articles which the Court below have given to the appellant which it rather appeared to us ought to have been given to the respondent. They have brought within the scope of the executry, and consequently of the *legitim*, particulars which I think might very safely have been given to the heir as real property.

Upon these grounds, therefore, I really have no hesitation whatever, as little as I ever had in any case, in recommending your Lordships to affirm the judgment of the Court below in all its parts.

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LORD COTTENHAM.—My Lords, I concur in opinion with my noble and learned friend, that this interlocutor ought to be affirmed; and when we separate and distinguish the real case from some of the points which have been endeavoured to be introduced into it by way of argument, it does appear to me to be free from all doubt.

The point which has been already alluded to, namely, that this is not a case between the real and personal representative, but that it is a case between heirs, appears to me to be totally destitute of foundation. *Legitim* can only be claimed by means of showing the estate to be personal. The preliminary question is, therefore,—Is this personal estate, or is it property attachable to the freehold, and therefore descendible to the heir? The moment we see that the *legitim* can only be claimed in consequence of the property being part of the personal estate, the question of course assumes its natural shape. Is it personal estate or not? That preliminary question therefore being decided, it entirely disposes of the ground on which this has been attempted to be distinguished from the other cases which have arisen with respect to the claims of heirs and those who are interested in the personalty.

The principal stress of the argument on the side of the appellant has been, that this is to be protected, because it is necessary for the encouragement of trade that this property should be considered as not belonging to the real estate, but as belonging to the personal estate. My Lords, the principle upon which a departure has been made from the old rule of law in favour of trade, appears to me to have no application to the present case. The individual who erected the machinery was the owner of the land, and of the personal property which he erected and employed in carrying on the works. He might have done what he liked with it; he might have disposed of the land; he might have disposed of the machinery; he might have separated them over again. It was therefore not at all

necessary in order to encourage him to erect those new works, which are supposed to be beneficial to the public, that any rule of that kind should be established, because he was master of himself, and he might make a rule for himself. It was quite unnecessary, therefore, to establish any such rule in favour of trade, the whole being entirely under the control of the person who erected the machinery.

If, therefore, this be clearly a question of real or personal estate, and if the rule which in some cases has been acted upon of making a departure from the established principles in favour of trade has no application to the present case, what does it come to? Of course we throw out of consideration all the cases which have arisen between landlord and tenant, and between tenant for life and remainder man—because the departure which has taken place in these cases has no application to the present case. Then the case being simply this, the absolute owner of the land, for the purpose of better using the land, having erected upon and affixed to the freehold, and used for the purpose of the beneficial enjoyment of the real property, certain machinery, the question is—"Is there any authority for "saying that under these circumstances the personal repre- "sentative has a right to step in and to lay bare the land, and "to take away all the machinery necessary for the enjoyment "of the land?"

Let us consider for a moment, if that be the principle, to what extent it is to go. It is put by Lord Cockburn, (and a very strong illustration it is,) if the owner of the land dig a well and erect machinery for the purpose of using that well, is it competent to the personal representative to come and take away that machinery, and leave the well useless? Yet where is the distinction? Here is machinery capable of being taken away with very little if any damage to the land. Therefore, although machinery is in its nature generally personal property, yet with regard to machinery or a manufactory, if erected upon

the freehold for the enjoyment of the freehold, nobody can suppose that that can be the rule of law. Again, and so with respect to other erections upon land. It is not necessary to go beyond the present case, which is, machinery erected for the better enjoyment of the land itself. The principle probably would go a great deal further, but it is more advisable to confine the observations I have to make to the particular circumstances of this case.

There is no case whatever which has been cited in which that doctrine has been recognised except the one which has been referred to, the Cider Mill case, as to which we really know nothing, except that at the Worcester assizes, a good many years ago, a Cider Mill was held to belong to the personal estate. Why it was so held, under what circumstances, and whether it was a Cider Mill fixed to the freehold or not, we do not know. We know nothing except that this machine, called a Cider Mill, was decided to go to the personal representative. It is impossible to extract a rule of law from a case of which we know so little as that. And, with that exception, there is a uniform course of decisions, wherever the matter has been discussed, in favour of the right of the heir to machinery erected under the circumstances in the present case; and if the *corpus* of the machinery is to be held to belong to the heir, it is hardly necessary to say that we must hold that all that belongs to that machinery, although more or less capable of being detached from it, and more or less capable of being used in a detached state from it—still if it belong to the machinery and belong to the *corpus*, the article, whatever it may be, must necessarily follow the principal and remain attached to the freehold.

My Lords, I do not go into the detail of the particular items which have been objected to. I have looked them through, and quite concur with my noble and learned friend, that if any exception were to be taken with respect to particular articles, as to whether they ought to be adjudged to one or to

the other, it would have been for the respondent and not for the appellant to take such exception.

LORD CAMPBELL.—My Lords, I have very little to add to what has been said by my noble and learned friends who have preceded me, except that I entirely concur in the view which they have taken of this case. I own I was a good deal surprised that the point was so much pressed at the Bar—that this was a case of *legitim*, and that it was not the whole question of what descends to the heir and what goes to the executor. My Lords, we all know that *legitim* is a portion of the personal property, and you must first ascertain what is the personal property before the claim to *legitim* can arise. There can be no doubt, therefore, that it is in fact the whole question, whether the property in dispute goes to the heir or to the executor.

My Lords, I have no doubt in the world that it should go to the heir, both upon reason and upon precedent. As my noble and learned friend, who last addressed your Lordships, has stated, none of the arguments respecting the benefit of trade, at all apply to a question as between heir and executor, because the owner of the fee being the absolute owner of the land, and of the machinery erected upon it, the whole of it is in him, and he may dispose of it as he thinks fit for the benefit of his family.

Then, my Lords, with reference to the authorities by which we are bound, whatever speculative notions we might entertain with respect to propriety and expediency, if we entertained a different opinion upon that subject, all the cases are quite uniform, both in England and in Scotland, to show that such property shall go to the heir. The only case the other way which has been referred to, is that of the Cider Mill, and there the essential circumstance is left entirely in doubt, whether the mill was affixed to the freehold or not. My Lords, we know

that there may be a cider-mill that is not affixed to the freehold, for I read in the "Vicar of Wakefield," that when there was a match proposed between one of the Miss Primroses and young farmer Plumstead, Moses said, "I hope that, if my sister "marries young farmer Plumstead, he will lend us his cider-"mill." I take it that the cider-mill there was moveable and was not affixed to the freehold, but might have been carried from the farm of farmer Plumstead to the Vicarage of the Primroses.

Now, my Lords, this was felt to be so strong on the part of the learned and able counsel who argued for the appellants, that they were almost driven to admit that in this case, if the freehold had belonged by hereditary descent to Mr. Dixon, the machinery would have gone to his heir; but they said the land was purchased by him for the purposes of trade, and therefore this introduced a new distinction. It was assumed, that if a great proprietor, such as Lord Londonderry in the county of Durham, were to erect machinery in his coal works, that would go to the heir, and not to the executor; but if a person buys a piece of land for the purposes of a colliery, and erects machinery upon it, that will make a distinction. My Lords, there is not the slightest authority for any such distinction, and it would be most mischievous if we were at all to sanction the introduction of any such distinction. It would lead to great mischief, and indefinite litigation. There are cases, where, as between partners, when land is used as part of the partnership stock, it is considered as personalty, but in those cases the land itself, the soil, is part of the personalty as well as any machinery erected upon it, and the arguments that were urged in this case by the appellant would lead to the conclusion that all the land that was purchased in fee simple by Mr. Dixon, and belonged to him as long as grass grows and water runs, that all that should be personalty just as much as the machinery that was erected upon it.

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My Lords, for these reasons I have no doubt at all that the principle of the decision was perfectly correct.

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.

I am of opinion, therefore, that the interlocutor must be affirmed. I am very glad, and I think it is creditable to the other side, that they did not for any minute pot-lid or miserable chattel bring a cross appeal; because that would only have involved the case in fresh difficulty and caused unnecessary expense. I therefore entirely agree in the motion of my noble and learned friend, that this interlocutor should be affirmed.

LORD BROUGHAM.—My Lords, I omitted to consider the matter last mentioned by my noble and learned friend from pure inadvertence, namely, as to the leasehold; and also what my noble and learned friend near me adverted to, as to the rule being departed from for the benefit of trade, to which he has given a complete answer. It does not apply to this case in the slightest degree. The argument before Lord Hardwicke was of a totally different description. I only mention this to show that there is no difference of opinion. I omitted it from inadvertence.

Interlocutor affirmed, with costs.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutor or judgment, in so far as therein complained of, be affirmed, with costs.

SPOTTISWOODE and ROBERTSON—GRAHAME, MONCRIEFF and WEEMS, Agents.