strange parish would be to antagonise the very object of the institution, and nullify altogether its beneficial operation. To the parties it would be a hardship to be obliged to resort to a church other than that in which the marriage is to be celebrated; and to the public it would be a mischief, by depriving the subsequent celebration of the security and lawfulness which it would have derived from full local notice of the proposed contract, such as has been wisely contemplated by various denominations of the Christian Church.

My Lords, on these grounds I am clearly of opinion that the appeal should be dismissed.

Appeal dismissed and judgment affirmed.

Counsel for Appellants — Lord Advocate (Gordon)—Cotton, Q.C. Agents—Grahames & Wardlaw, Westminster—Ronald, Ritchie, & Ellis, W.S.

Counsel for Respondents—Fitzjames Stephen, Q.C. — Gloag. Agents — William Robertson, Westminster—W. & J. Burness, W.S.

Thursday, March 16.

BRAND'S TRS. *v.* BRAND'S TRS.

(*Ante*, vol. xii, p. 124.)

Heritable and Moveable—Lease—Heir and Executor—Fixtures.

Held (*rev.* judgment of Second Division, and *rest.* judgment of Lord Shand) that when the tenant of minerals, under a lease of ordinary duration, erected upon the land fixed machinery for the purpose of working the minerals, and died during the currency of the lease, the machinery was heritable in a question as to the tenant's succession.

Robert Brand senior was the lessee during his life of a colliery in Cambusnethan, which he held on a lease for nineteen years from 1867. He died in January 1873, leaving a trust-disposition under which all his heritable and moveable property went to Robert Brand the younger, his son. Robert Brand the younger died in July 1873, unmarried, and without having attained majority. He also left a trust-disposition, disposing of his whole means and estate to trustees. The heir-at-law of Robert Brand junior was his uncle Alexander Brand, who died in November 1873, also leaving a trust-disposition of his whole estate in favour of trustees.

The trustees of Robert Brand senior raised this action of multiplepoinding, to have the questions relating to the succession of Robert Brand senior settled, and the trustees of Robert Brand junior and of Alexander Brand lodged claims.

While the action was still pending the three sets of trustees entered into an agreement whereby it was contracted and agreed (1) that the whole heritable property, including the mineral lease, should be made over to Alexander Brand's trustees; (2) That the residue of the moveable estate should be made over to Robert Brand junior's trustees; . . . (5) That the whole plant and machinery of the colliery be made over to Alexander Brand's trustees, on condition that if it should be found in the multiplepoinding that any portion thereof was moveable, and as such belonged to Robert Brand junior's trustees, the value thereof should be paid to them by Alexander Brand's trustees, according to a valuation by certain valuators therein appointed.

The machinery here referred to was of a description necessary for working the colliery, and was of the class ordinarily termed trade fixtures.

On 4th August 1874 the Lord Ordinary (Shand) pronounced an interlocutor containing the following finding:—"In regard to the machinery and plant, including rails, which belonged to the deceased Robert Brand senior, and were used by him at or in connection with the colliery held on lease by him from Mr Houldsworth, finds that the machinery and plant, and those parts thereof, are heritable and belong to the trustees of the late Alexander Brand, which were attached either directly or indirectly, by being joined to what is attached to the ground for use in connection with the working and carrying away of the minerals, though they may have been fixed only in such a manner as to be capable of being removed, either in their entire state or after being taken to pieces, without material injury, including those loose articles which, though not physically attached to the fixed machinery and plant, are yet necessary for the working thereof, provided they be constructed and fitted so as to form parts of the particular machinery, and not to be equally capable of being applied in their existing state to other machinery of the kind."

On a reclaiming note the Second Division, on 19th December 1874, recalled the above finding, and in lieu thereof found "that all the machinery therein referred to is to be considered as moveable in a question as to the tenant's succession."

Alexander Brand's trustees appealed.

On delivering judgment—

Lord Chancellor—My Lords, your Lordships have now to dispose of this appeal, which was argued before your Lordships a few days since with very great ability; and I will in the first instance take the liberty of reminding your Lordships exactly how the question which has to be considered arises.

Robert Brand the elder was the lessee during his life of a colliery in Cambusnethan; he held it on a lease for nineteen years, beginning in 1867. When I say it was a lease of a colliery, it was in point of fact a lease of certain seams of coal, with a right of the ordinary description to occupy such portions of the surface as from time to time he might find necessary for the purpose of working the colliery; and then as he occupied portions of the surface, they were to be taken into account and rent paid for them at so much an acre. My Lords, Robert Brand, the lessee, died in 1873, and he made a trust-disposition under which all his heritable and moveable property went to Robert Brand the younger, his son, and the lease being, as your Lordships are aware, by the law of Scotland a heritable subject, would pass under the category of property which was heritable. Now, this Robert Brand the younger in his turn died, and he died under the age of twenty-one years. He made a disposition which, according to the law of Scotland, it has been assumed would carry his moveable property, but would not carry the heritable subjects. The appellants represent the heir of this Robert Brand

the younger, who has also since died; the respondents, on the other hand, represent the trustees of the disposition to which I have referred.

My Lords, the precise issue which arises in the present suit between these two parties is stated in certain articles of agreement which they entered into upon the various subjects which were in litigation between them. Your Lordships find at page 84 that it was agreed for a settlement of questions which had arisen between them—"First, that the whole heritable property, including the foresaid lease of the Green-Head Colliery, shall be assigned, conveyed, and made over by the first parties as trustees foresaid to the second parties as trustees foresaid,"—that is, it was agreed to assign and make over to the appellants the whole heritable property. My Lords, in deciding under this agreement what is the heritable property, the question arose as to certain fixed machinery which had been set up by Robert Brand the elder, the original lessee. It was machinery of a description necessary for working the colliery, and it may be described for the present purpose, without going into further particulars, by saying that it was of the class ordinarily termed trade fixtures.

My Lords, the Lord Ordinary, Lord Shand, before whom the case first came, held that this machinery, which he described in a way to which I shall refer, passed along with the heritable subject, namely the lease, to Robert Brand the younger as heritable, and therefore could not be alienated by him during his minority, and that in consequence it now belongs to the appellants. The manner in which Lord Shand described this machinery your Lordships will find in his interlocutor, which is printed at page 30—"In regard to the machinery and plant, including rails, which belonged to the deceased Robert Brand senior, and were used by him at or in connection with the colliery held on lease by him from Mr Houldsworth—Finds that the machinery and plant, and those parts thereof, are heritable, and belong to the trustees of the late Alexander Brand, which were attached either directly, or indirectly by being joined to what is attached to the ground for use in connection with the working and carrying away of the minerals, though they may have been fixed only in such a manner as to be capable of being removed, either in their entire state or after being taken to pieces, without material injury, including those loose articles which, though not physically attached to the fixed machinery and plant, are yet necessary for the working thereof, provided they be constructed and fitted so as to form parts of the particular machinery, and not to be equally capable of being applied in their existing state to other machinery of the kind." My Lords, these words are in fact taken from an order of your Lordships' House, made some time since in a case which came by appeal from Scotland, namely, *Fisher* v. *Dixon*, and it may be assumed that they are words which correctly describe the character of fixed machinery, if the appellants are entitled to machinery of that kind.

My Lords, from the decision of Lord Shand there was a reclaiming note, and the Second Division of the Court of Session recalled the interlocutor of the Lord Ordinary, and held in substance that this machinery did not belong to the appellants, but belonged to the respondents as trustees of the deed executed by the minor, upon the footing of the machinery being personalty or moveables. Your Lordships will find that interlocutor at page 43. The Lords of Session having heard counsel, "recal the second finding of the said interlocutor, and in lieu thereof find that all the machinery therein referred to is to be considered as moveable in a question as to the tenant's succession;" that is to say, in the question as between the representatives of the tenant, the heir on the one hand and the executor on the other.

My Lords, it is between those two different views that your Lordships have now to decide, and the agument before your Lordship has divided itself naturally into two points. In the first place, there is the question whether this matter is not already covered by decision? and secondly, if not covered by decision, what upon principle ought to be the view taken of it by your Lordships?

My Lords, with regard to decision, it was contested at your Lordships' bar, and it appears to have been the opinion of the Court of Session, that the case I have already mentioned, the case of *Fisher* v. *Dixon*, decided the question. Now, I have looked very carefully into that case, and I am certainly of opinion that it cannot be accepted as a decision upon this point. With regard to the issue in that case, and the decision upon it in the Court of Session, the question stands thus—There was a very large claim made as between the heir and the executor of a certain person who owned very large property, upon which he had put up fixed machinery for the purpose of trade. No doubt the great question in the case was that which I have thus described, whether the heir of that person should have the machinery, or whether the executor should have it? But there was a further question, which appears in point of magnitude and the value of what was involved to have been comparatively a very minute one, as to what should be said of machinery upon certain property which the deceased had not been the owner of but had taken upon lease; and with regard to the machinery upon the property which was taken on lease, there is no doubt that the decision of the Court of Session was in form, that it formed part of his executry, that is, it did not go to the heir.

But when your Lordships examine the circumstances under which that decision was arrived at in the Court of Session, your Lordships will find this remarkable fact. There was very great difference of opinion expressed upon the subject by the learned judges. It did form the staple and the principal part of their judgments, but the matter was referred to in a subsidiary part of the opinions which they expressed, and upon it, as I have said, there was very considerable difference of opinion. The finding of the Court of Session was in these terms—"With regard to the 7th class of the said report" (which was the class of machinery upon the leasehold property) "Erections made on subjects held under leases by the late Mr Dixon, and which have been removed by the respondents at the termination of the said leases:—Find that these are moveable and subject to the claim of legitim on the part of the claimants." It appears therefore from this interlocutor that the machinery had actually been removed by the respondents, the executors, at the

termination of the leases, and at the time of the litigation it would seem to have been in their possession. Still, no doubt that finding would appear to have decided that the machinery was lawfully their property. But when your Lordships examine the case a little further, you find in the opinions of the consulted judges this important statement. The opinion contains this passage—"And further, in so far as regards such subjects under lease, on which the late Mr Dixon, being the tenant only, made erections which he was entitled to remove at the end of the lease, which the respondent also admits may be included in the executry," we are of opinion that that machinery belonged to those who represented the executor.

My Lords, looking on the one hand to the great divergence of opinion expressed by the judges, and on the other to the final result of their deliberations as expressed in the opinion of the consulted judges to which I have referred, I am quite unable to accept this as a deliberate decision of the Court of Session, that under the circumstances of the case the machinery upon the leasehold property belonging to the deceased would belong to the executor and not to the heir. It appears, I repeat, to have been a subsidiary and a minute point in the case, and the machinery upon the leasehold property appears ultimately to have been admitted by the heir to be properly included in the executry. So much, my Lords, for the decision of the Court of Session.

When the case came to this House by way of appeal, the appellants were persons representing the executry and not the heir. Of course it was not for them to raise, and they did not raise, any question upon this point which had verbally been given by admission in their favour in the Court below. The respondents, who had presented no cross appeal, could not raise the question, and therefore the question did not fall in any way to be decided by your Lordships. Some expressions of opinion, not very distinct in the report which we have of them, appear to have fallen from Lord Brougham and Lord Campbell, and to some extent from Lord Cottenham. I think it is unnecessary to put any precise construction upon those expressions, because, I repeat, the matter did not fall to be decided; but as far as I can gather from those expressions of opinion, there certainly appears to have been an impression upon the mind of those noble and learned Lords that there might have been a question raised on the part of the respondent, which they rather commended him for not having raised by means of a cross appeal.

My Lords, the case therefore being in my opinion uncovered by any decision which has settled the law upon the subject, I have to proceed to look at it in point of principle. Looking at it in that way, I would remind your Lordships that there are with regard to matters of this kind, which are included under the comprehensive term of "fixtures," two general rules, a correct appreciation of which will, as it seems to me, go far to solve the whole difficulty in this case. My Lords, one of those rules is the general well-known rule that whatever is fixed to the freehold of land becomes part of the freehold or the inheritance. The other is quite a different and a separate rule. Whatever once becomes part of the inheritance cannot be severed by a limited owner, whether he be owner for life or for years, without the commission of that which in the law of England is called waste, and which according to the law both of England and Scotland is undoubtedly an offence which can be restrained. Those, my Lords, are two rules—not one by way of exception to the other, but two rules standing consistently together. My Lords, an exception indeed, and a very important exception, has been made, not to the first of these rules but to the second. To the first rule which I have stated to your Lordships there is, so far as I am aware, no exception whatever. That which is fixed to the inheritance becomes a part of the inheritance at the present day as much as it did in the earliest times. But to the second rule, namely, the irremovability of things fixed to the inheritance, there is undoubtedly ground for a very important exception. That exception has been established in favour of the fixtures which have been attached to the inheritance for the purpose of trade, and perhaps in a minor degree for the purpose of agriculture. But, I repeat, the exception is not to the first of these rules, but the exception is to the second. Under that exception a tenant who has fixed to the inheritance things for the purpose of trade has a certain power of severance and removal during the tenancy. What extent of removal the executor of one who is not a tenant, but is a complete owner of the inheritance, may have as against the heir, whether in point of fact he has any right of removal at all, or any right to take more than that which really and properly considered was never fixed to the inheritance, in a definite way, I need not stop to consider, because the case of *Fisher* v. *Dixon* has clearly decided by the authority of your Lordships that fixtures of the kind now before your Lordships cannot be removed by the executor of one who is complete owner of the inheritances.

Therefore your Lordships have, upon the one hand the rule as laid down in the case of *Fisher* v. *Dixon*, that fixtures of the present kind cannot be removed by the executor as against the heir of the complete owner of the inheritance; and you have, on the other hand, the exception to which I have referred, that fixtures of this kind can be removed by the executor of a tenant or by the tenant himself as against the landlord during the course of the tenancy. But your Lordships have here to consider an intermediate case between those two. You have not to consider the case of the person who represents the entire inheritance, but you have to consider the case, not of the whole inheritance, but of a heritable subject, namely, a lease which is heritable according to Scotch law, upon the ground included in which fixtures of the kind I have referred to have been erected; and you have to determine whether, the tenant having died and the lease still continuing, and the lease having passed to the heir, the executor has as against that heir a right to remove those fixtures. My Lords, there is certainly no authority for saying that the executor can remove these fixtures as against the heir. In my opinion there is no principle in the rules which I have endeavoured to express which can warrant that right of removal. These things which I have termed fixtures are *ex hypothesi* annexed to the inheritance at the time of the death of the tenant. Thereupon the heritable subject, namely the lease, at once passes to his heir.

What right has the executor, or how is that right founded, to come upon the heritable subject which has passed to the heir, and to strip it of those things which have become fixed to it? There is no doubt *ex hypothesi* a right to remove these fixtures as against the landlord, but who is the person to exercise that right? It is not a right in gross; it is not a right collateral to the ownership of the subject; it is a right which of necessity must be annexed to the ownership of the subject, and must be exercised by him who is the owner of the subject. But the owner of the subject is not the executor. The owner of the subject is the heir, and therefore, as it seems to me, your Lordships are obliged to consider the persons to whom the subject itself has passed, and to hold the right which is annexed to that subject to be exercisable by that person and by that person only.

My Lords, looking at it in another way, it is decided already by the case I have so frequently mentioned, *Fisher* v. *Dixon*, that the executor cannot remove these fixtures as against the owner of the whole of the heritable subject. Upon what principle therefore is it that he could remove the fixtures as against him who is the owner of a part of the heritable subject? My Lords, every reason which was advanced in the case of *Fisher* v. *Dixon* showing how strained, how impossible, how inconvenient it would be that there should be a right to strip the inheritance of fixtures of this kind, put up for the better use of the inheritance, can equally be advanced against the inconvenience of stripping that which continues a heritable and enduring subject, and which is in the possession of the heir, of those things which are necessary for the convenient use of that subject.

Therefore my Lords, without pursuing the subject further, I submit to your Lordships that upon principle it is impossible to justify the right of the executors in this case.

My Lords, when I look at the grounds of the decision in the Court of Session I find them expressed in the opinion of Lord Gifford. Those grounds are two. In the first place, Lord Gifford considers the subject to be already decided by the case of *Fisher* v. *Dixon*. I have ventured to express to your Lordships a contrary opinion upon that point. Then, on principle, Lord Gifford gives reasons for arriving at the same conclusion in these words, which your Lordships will find at page 97—"I take it to be perfectly fixed law, and it was not disputed on either side of the bar, that in leases of ordinary duration, where the tenant erects fixtures solely for the purpose of his trade, these trade-fixtures remain his property, and cannot be claimed by the landlord as *partes soli*, as it is said they are moveable in a question between landlord and tenant. *Syme* v. *Harvey* and other cases are illustrations of the application of this principle. Now it humbly appears to me that if trade-fixtures do not go to the landlord, they must of necessity remain the moveable property of the tenant, and must remain moveable *quoad omnia.*"

My Lords, this is the basis of the decision of Lord Gifford, and if this statement were correct I possibly should arrive at the same conclusion at which he has arrived. But, my Lords, there is, as it appears to me, a complete fallacy in this mode of stating the facts. Lord Gifford appears to assume that you are to determine at the moment the fixture is placed in the soil what is to be its destiny during the whole of the lease, and he asserts that it never becomes attached to the inheritance so as to be capable of being called a part of the inheritance—that it remains *quoad omnia* moveable, and amongst the moveables of the tenant. My Lords, it appears to me that that is an error; it does become attached to the inheritance; it does become part of the inheritance; it does not remain a moveable *quoad omnia;* there does exist on the part of the tenant a right to remove that which has been thus fixed; but if he does not exercise that right it continues to be that which it became when it was first fixed, a part of the inheritance.

My Lords, that disposes of the whole case, with the exception of an argument which was raised, but which I think your Lordships will not consider, namely, whether there might not be a question of destruction here as regards some of the articles brought upon the ground under the lease? My Lords, it appears to me that no such question arises. The interlocutor of the Lord Ordinary raises no question of that kind. It follows the wording of the order of this House in the case of *Fisher* v. *Dixon*, and it speaks of those things which are either attached to the inheritance or attached to what is attached to the inheritance. My Lords, it is only upon things of that kind that any order now made by your Lordships will operate, and no order that I shall propose to your Lordships will operate by treating any of this machinery as machinery destined to be attached to the inheritance.

My Lords, upon the whole I would propose to your Lordships to restore the interlocutor of the Lord Ordinary, and to give the appellants what they should have had in the Court of Session, the expenses of the reclaiming note, and with that direction to remit the case to the Court of Session.

Lord Chelmsford—My Lords, the question to be determined upon this appeal is, whether certain machinery used upon a colliery held under lease is moveable or heritable, belonging if moveable to the respondents as trustees and executors of Robert Brand junior, and if heritable to the appellants as trustees of Alexander Brand, the heir of Robert Brand junior, and of his father Robert Brand senior?

The machinery in question was erected by Robert Brand senior for the purpose of working the colliery which he held under a lease for nineteen years. When the lease had eleven years to run Robert Brand senior died, having made a trust-disposition of all his estates, heritable and moveable, under which it is admitted that his only son, then a minor, took a vested interest in the lease and machinery. Robert Brand junior survived his father for a few months, and died before attaining majority. He left a settlement which proposed to dispose of all his estates, heritable and moveable. Being a minor at the time of the settlement, it could not operate upon such parts of the estate as were heritable. A leasehold by the law of Scotland being really the lease of the colliery fell to the heir of the settler. Whether the machinery went also to the heir with the lease, or passed under the trust-disposition of Robert Brand junior, depends upon whether

in a case of succession it is in its nature heritable or moveable.

A great part of the note of the Lord Ordinary, and of the judgment of the Court of Session, is employed in considering whether the question at issue between the parties had or had not been decided in the case of *Fisher* v. *Dixon*, first in the Court of Session, and afterwards upon appeal to this House. With respect to the decision of the House, the question of the right to fixtures erected for the purposes of trade upon a leasehold was not before it, there being no appeal against the interlocutor of the Court of Session upon that point.

I will not enter into an examination of the difference between the Lord Ordinary and the Court of Session, as to how the opinion of the Judges in *Fisher* v. *Dixon* upon the question are to be reckoned. Assuming that a majority of them were in favour of the judgment that the tenants' fixtures were moveable, there were circumstances connected with this finding which deprive it of much of its authority. The fixtures were of trifling value, and were therefore probably not much considered in the argument. This probability is greatly increased by the respondent having admitted, as stated by the consulted Judges (Bell's Appeal Cases, p. 343), that the fixtures in question must be included in the executry. It is quite true, as stated by Lord Gifford, that "in actually deciding a point of law the Court never do so upon mere admissions by counsel;" but where an admission is made, a Court is not likely to examine the point so closely as when it is contested and fully argued. It is necessary to advert to the conflicting opinions of the Lord Ordinary and the Judges of the Court of Session as to the application of *Fisher* v. *Dixon* to this case, because Lord Gifford at the close of his judgment says he prefers to rest it mainly upon general doctrine, which he thinks is fixed by *Fisher* v. *Dixon*, "that a mere tenant's trade fixtures in an ordinary case are moveable *quoad* succession, and descend to the executors."

The law as to fixtures is the same in Scotland as in England. The meaning of the word is anything annexed to the freehold, that is, fastened to or connected with it, not in mere juxta-position with the soil. Whatever is so annexed becomes part of the realty, and the person who was the owner of it when it was a chattel loses his property in it, which immediately vests in the owner of the soil, according to the maxim "*Quicquid plantatur solo, solo cedit.*"

Such is the general law. But an exception has been long established in favour of a tenant erecting fixtures for the purposes of trade, allowing him the privilege of removing them during the continuance of the term. When he brings any chattel to be used in his trade and annexes it to the ground, it becomes a part of the freehold, but with a power as between himself and his landlord of bringing it back to the state of a chattel again by severing it from the soil. As the personal character of the chattel ceases when it is fixed to the freehold, it can never be revived as long as it continues so annexed.

A question between landlord and tenant as to fixtures can rarely arise except with regard to the description of those which the tenant claims the right to remove. But the present question is between heir and executor, and depends upon the character of the fixtures whether they are part of the realty or not. The lease itself is admittedly realty. The fixtures were annexed to the soil by the owner of that realty. If he had been owner in perpetuity there would have been no doubt that the fixtures would have been part of the inheritance. Can it make any difference that he was owner for a limited period? He was as absolute owner of the realty during that period as if he had had it for ever. The fixtures were annexed to the ground for use during the whole term of enjoyment of the heritable subject. There is nothing in the terminable character of the lease at different periods that can affect the question, for as long as it continues it preserves its heritable character. So, the power reserved to the landlord to purchase the machinery at the end of the lease, though it might interfere with the right of removal as against the landlord, cannot have the effect of changing the heritable character of the fixtures.

Lord Gifford says, "The only thing that can make the fixtures heritable is their annexation to the soil, but that would carry them to the landlord, to whom alone the soil belongs." But this is not quite accurate. The question arises at a time when the portion of the soil included in the lease of the colliery belongs to the lessee as owner of the realty as long as the term endures, and the landlord's right to the fixtures does not arise till the termination of the lease. Adverting also to an argument stated by him to have been used to prove the heritable character of the fixtures—that they were fixed to the lease so as to go with it to the tenant's heir, Lord Gifford observes,—"A lease is an incorporeal right, and it is difficult to follow what is meant by a fixture to a lease." If the argument was as represented, it was certainly incorrect, for the machinery was not fixed to the lease, but to the subject of it, the colliery; nor do I comprehend what is meant by a lease being an incorporeal right. Leases may be of incorporeal as well as of corporeal hereditaments, but a lease itself is neither corporeal nor incorporeal.

The conclusion at which I have arrived is, that the lease of the colliery being realty, the annexation of machinery to the soil for the purpose of working it became an accessory to the principal subject, and partook of its character; that Robert Brand junior might if he pleased have separated the fixtures from the soil, and so made them part of his personal estate. But not having done so, they, remaining attached to the ground, went as part of the realty to the trustees of Alexander Brand, the heir of Robert Brand junior.

I agree with my noble and learned friend that the interlocutor appealed from ought to be reversed.

LORD O'HAGAN—My Lords, this case has been argued on authority and on principle. For the respondents it was contended, and the contention is sustained by the judgment of Lord Gifford, speaking for himself and his colleagues in the Court of Session, that the point in it was decided by that Court in *Fisher* v. *Dixon*, 5 Dunlop, 775, in a final interlocutor, which was the subject of appeal to and affirmation by your Lordships' House. On the other hand, the appellant insists that the interlocutor in question is not decisive, as being in terms inconsistent with the reported

opinions of the learned Judges who pronounced it, and to be accounted for only on the supposition that, in the single matter which affects the controversy before us, it was pronounced upon consent that in that matter it was not presented for decision here by the appeal, and was not in fact dealt with at all by the judgment of this House, and that, the question thus remaining open, it should have been on principle ruled against the respondents.

Certainly the proceedings of the Court of Session in *Fisher* v. *Dixon* are affected with much obscurity, and difficult to be clearly understood. A great part of the conflicting judgments of the Lord Ordinary and Lord Gifford is occupied with an enumeration of the Judges who discussed and decided that case, and an elaborate detail of their individual opinions, with a view of showing that the majority favoured the appellants and the respondents respectively. The Lord Ordinary comes to the conclusion that the greater number sustained the contention of the appellants. Lord Gifford reaches the very opposite conclusion, and declares his opinion to be that "the question has been decided" (the other way) "as authoritatively as any question can possibly be decided in Scotland by a majority of the whole Court." It is odd that able men deliberately considering a series of judgments could have so entirely differed as to their import and effect; and it is hard to judge with confidence between them. But this I may say, inclining rather to the adoption of the view of the Lord Ordinary, that the irreconcileable antagonism of such eminent persons may perhaps justify your Lordships in refusing to acknowledge the conclusiveness of the judgments one way or the other, either in the Court of Session or in this House, as to the matter before you, and looking beyond them to the principles on which your own independent decision should be based. For myself I am content with this result, and I decline to criticise the numbers or to weigh judicial opinions which are open to such diversity of skilled construction.

Then, as to the interlocutor relied on by the respondents, it is no doubt unequivocal in its phraseology, and would be authoritative if the judgments which preceded it did not cast serious doubt upon it. But when this is so, and when, besides, we have clear proof that the respondent in *Fisher* v. *Dixon* admitted that the erections which he was entitled to remove at the end of the lease might be "included in the executry," being, as has been shown, of small appreciable value, we may, I think, concur with the Lord Ordinary even without holding, as he did, that the finding is directly contrary to the judgment of the majority of the Judges, that it proceeded upon admission and does not increase the authority of the case. As to the appeal to the House of Lords, it is enough to say that the present question was not really raised by it. For the purpose of raising that question there should have been a cross appeal. As there was not, the House could not deal with it; and it will be seen on reference to its ruling that it carefully and expressly abstained from adjudicating on any point which it was not required to decide. So far as there is any indication of opinion by the learned Lords who heard the appeal, it is given in favour of the appellant here by Lord Campbell, when he repudiates the distinction "attempted to be made between leasehold and freehold," which he holds entirely to fail "when we bear in mind that by the law of Scotland the leasehold is realty and it goes to the heir."

I have satisfied myself, although I had some doubt on the matter at one stage of the argument, that the question in this case is open and unconcluded by authority, and although I cannot accept the appellant's representation that the judgments in *Fisher* v. *Dixon* are decisive in his favour, I think that on principle he is entitled to succeed, and that the machinery, dealt with by the Lord Ordinary in a very careful and guarded manner, goes to the heir and not to the executors. I can add little to the reasons which your Lordships have already heard in support of this opinion, but the case is important, and I shall add a few words.

There has been no dispute about the law, which is the same in England as in Scotland, and has been so from very early times, giving to the heir machinery fixed and attached to the soil. If the property had been in this case freehold, there could have been no controversy as to the application of the rule. The executor could not have been heard to contest the claim of the heir. But the property is leasehold, and no doubt in England that rule would not have been applicable in the circumstances of this case. In Scotland, however, the heir takes the lease as he takes the feu, and the incidental right to fixtures which the latter would have given him, in my opinion, attaches to the former. The cases have not been distinguished in principle, and I know no authority shewing that they should be differently dealt with in this regard. The Scotch heir has property in the lease which is identical in kind with his property in the freehold, although they vary in duration and degree. It was urged, I think, in the very able and learned argument of Mr Bryce, following Lord Gifford's very able argument, that the leasehold gives him only an incorporeal hereditament, whilst the freehold clothes him with permanent ownership of the land. But surely in both cases the soil goes to him equally, in the one case by inheritance or assignment, in the other by demise; but in both he has the soil, and has it completely, for a time or for ever, according to the nature of his interest, and any fixtures attached to it have precisely the same connection with it, and are equally a part of it, so long as his ownership endures. As between heir and executor, there seems to be no cause for holding that their destination should be different, or that the same old rule should not be applied indifferently to both. Settled exceptions exist in the interest of trade, and from the exigencies of social life, as between tenants for life or entail and remainder men, and as between landlords and tenants. But there is no ground for such a relaxation of the strict law, and there has been no such relaxation, in fact, which can avail the respondents in their attempt to abridge the rights of the heir when he succeeds to the leasehold as well as to the feu.

The principle which underlies the rule of law has been properly said to be, that machinery attached to the land follows it as its accessory in the case of the land—the land is heritable and so are the fixtures; and why, having a like attachment, should not the machinery going with

a leasehold which is heritable become accessorially heritable also? I see no sufficient reason in the absence of authority for holding it moveable in the one case and heritable in another.

I do not go into the argument which has been founded on policy, or into the illustrative cases which were discussed in the Court of Session. It suffices for me to say that the presumptions arising as to the purpose of the tenant from his use of the fixtures on a property in which he has a limited and terminable interest, and the considerations as to the benefit of trade which have secured to him the exceptional privilege of removing those fixtures before the close of his tenancy, do not arise or apply as between executor and heir. They do not apply in reference to fixtures attached to the freehold, and as soon as we ascertain that a Scotch leasehold is heritable, they have as little application to it against the heir.

The law as to trade-fixtures is well stated (as to cases of mortgage) by my learned friends Lord Hatherley and Lord Selborne, on an appeal before your Lordships during the past year, and the observations are of force with reference to the principle by which our judgment should be governed. "The law," said Lord Hatherley, "has held that trade-fixtures may be at any time during the limited interest which the owner of the lease may have, removed by him; yet, if he do remove them during the lease, he is held to have allowed them to pass to the owner of the reversion, because, and only because, they are attached to his reversion; and if they are not removed as the law would have enabled the person to remove them during the lease, they must be considered to have returned at once and finally to the owner of the reversion. The doctrine therefore was that they were a part of the land during the time they remained attached, but that for the benefit of trade they might, during the interest of that person who had only a partial interest in the land, be removed so long as he had that interest, although there was no power whatever given to them for the purpose of removal if he chose to allow the time to pass during which he might have removed them, and so far severed them from the property" (*Meuse* v. *Jacobs*, Law Reports, 7 Appeal Series, p. 490).

No doubt, as Mr Cotton argued, cases of mortgage, to which Lord Hatherley particularly referred, are not identical with that before the House, but these remarks are of general application in this country; and I do not, with great respect for the Lord Ordinary, concur with him that "the law of England does not afford any assistance in the decision of the present question, because leasehold property is in England moveable estate in a question of succession." On the contrary, it seems to me that the leasehold in Scotland being heritable, as the freehold is in England, the heir, who is put for the purposes of succession in the same relation to both, should have as to both identical rights so far as the nature of the estate permits, and that therefore all the reasons on which the English law is based, and the conclusions which they warrant, are of force to secure to him those rights, the executor in Scotland being deprived of the interest in chattels real which he enjoys in this country.

On the whole, I concur with the noble and learned Lords who have preceded me, that the interlocutor of the Lord Ordinary should be sustained. I shall only add a word as to the terms of it, which have been the subject of a little controversy. It designates the machinery which it pronounces heritable, not by pointing to any catalogue of the parts of which it is composed, such as we have had before us, but by describing it as "attached, either directly or indirectly, by being joined to what is attached to the ground," for the use and in the manner which it indicates. And by that accurate description it anticipates and answers the argument which has been founded on the details of the catalogue and the report of Mr Geddes. Your Lordships were asked to amend the interlocutor by putting the word "physically" before the word "attached," but I think any such amendment unnecessary. Attachment "to the ground" must mean "physical" attachment; and if the preceding part of the sentence could have admitted of any doubt in this respect, the subsequent words pronouncing as also heritable loose articles which, "though not physically attached" to the fixed machinery, are necessary for its working, put the meaning, as I conceive, by contrast, beyond all dispute.

Upon the whole, my Lords, I entirely concur in the proposition which has been submitted to your Lordships by my noble and learned friend the Lord Chancellor.

Lord Selborne—My Lords, I agree with the opinions your Lordships have delivered.

The lessee has right during the term of the lease to the whole heritable subject, including those things which have become accessions to that subject by being affixed thereto. So long as his estate under the lease continues, there is no more reason for regarding his interest in the fixtures as separate from his interest in the soil than if he were owner in fee-simple.

Nor can it make any difference that, as against the landlord, who is the owner in fee-simple subject to the lease, the lessee, who has during the term placed upon the subject fixtures severable without damage to the landlord, has the same right of severing and removing those fixtures which an owner in fee-simple during his lifetime would have had. This is a right which, on the death of the lessee before any severance has taken place, passes to his successor in the estate; in England to his executor, because there his executor succeeds to the lease; in Scotland to his heir, because a lease for years is heritable in Scotland.

The authorities, except *Fisher* v. *Dixon* in the Court of Session (which, for reasons stated by my noble and learned friends who have preceded me, is an authority of no real weight to the contrary), are all consistent with this view. It is unnecessary to consider any distinction which the law has introduced in favour of creditors, because there is no question with creditors in this case.

Appeal sustained; interlocutor appealed from reversed; interlocutor of Lord Ordinary of 4th August 1874 restored; and cause remitted.

Counsel for Appellants — Pearson, Q.C.—Mackintosh. Agents—Holmes, Anton, Greig & White, London—Alex. Morison, S.S.C.

Counsel for Respondents — Cotton, Q.C.—Bryce. Agents—Wm. Robertson, Westminster—E. Mill, S.S.C.

Monday, May 22.

BLAIR *v.* RAMSAY AND THE ALLOA COAL COMPANY.

(*Ante*, p. 10.)

Property—Coal—Disposition—Reserved Right.

Held that a reservation in a disposition of lands of the coal, with power to work, win, and carry away the same, does not entitle the person in right of the reserved power to use a mine underneath the said lands for the purpose of working coal outwith the boundaries thereof, unless the said mine runs altogether in the coal strata or in the wastes caused by the working out of the coal.

Mr Blair of Tillicoultry, the pursuer in this action, was proprietor of certain lands which were entirely surrounded by the property of the defender Mr Wardlaw Ramsay. Mr Blair had acquired his property from the predecessors of Mr Ramsay by grants dated respectively 1825, 1827, and 1851. The first of those grants, in 1825, contained the following clause:—"Reserving always to me, my heirs and successors, the coals and coal heughs all of the said haill lands, to be won and disposed upon by me and my foresaids at our pleasure." In the grant of 1827 the clause of reservation was to the following effect:—"Reserving always to the said Robert Wardlaw Ramsay, and his heirs and successors, the whole coal, stone quarries, and all other metals and minerals within the said three acres of the lands of Westquarter hereby disponed, with power to search for, work, and carry away the same—they always paying the said James Blair and his foresaids all damages."

The grant of 1851 contained this reservation—"Excepting always the coal within the said several subjects above disponed to the said James Blair, which coal is hereby expressly reserved to the said Robert Balfour Wardlaw Ramsay, with full power to him to dig for, work, win, and carry away the same, on paying the surface damages which the ground may thereby sustain."

The defenders, the Alloa Coal Company, were lessees from Mrs Ramsay of the coal field under her lands and also under the lands of the pursuer. The said coal company had run a mine underneath the pursuer's lands, passing partly through the strata of coal, but principally through other strata, and they used the mine for the working of the coal in lands beyond the boundaries of the pursuer's land.

The present action was brought for declarator that the defenders had no right to use the said mine for the purpose of working coal and other minerals outwith the boundaries of the pursuer's lands, and for damages for injuries "sustained" through their having done so.

The Lord Ordinary (MACKENZIE) pronounced decree of declarator in favour of the pursuer, and the Second Division upon a reclaiming note adhered to his judgment.

The defenders appealed.

At giving judgment—

LORD CHELMSFORD—My Lords, it seems to me, as I believe it seems to your Lordships, that there is no difficulty whatever in this case, and that there is no necessity to hear the counsel for the respondent.

The simple question arises upon three grants, with reservations made by the appellant Mr Ramsay of Whitehill. These grants were made in 1825, 1827, and 1851. The first of the grants, which is dated the 13th of July 1825, contained this proviso,—"Reserving always to me, my heirs and successors, the coals and coal heughs all of the said haill lands, to be won and disposed upon by me and my foresaids at our pleasure." The grant of 1851 is said to be practically in the said terms; the reservation is—"Excepting always the coal within the said several subjects above disponed to the said James Blair, which coal is hereby expressly reserved to the said Robert Balfour Wardlaw Ramsay, with full power to him to dig for, work, win, and carry away the same on paying the surface damages which the ground may thereby sustain." With regard to those grants there can be no doubt at all that the only reservation is of the coal under the surface, and the granter would have no power whatever to carry under those lands any coals or minerals won and worked from any other lands.

The reservation in the grant of 1827 is more extensive. It is, "Reserving always to the said Robert Wardlaw Ramsay, and his heirs and successors, the whole coal, stone quarries, and all other metals and minerals within the said three acres of the lands of West Quarter hereby disponed, with power to search for, work, and carry away the same, they always paying to the said James Blair and his foresaids all damages." Undoubtedly under that grant the whole of the land under the surface, all the coals, and all the metals and minerals, were reserved to the granter, and it gave him a right of course, as upon his own property, to make any way for any coals or other minerals that he might have in any other part of his lands. But in this case he could not use that power because there were barriers on either side which prevented access to that underground.

My Lords, the Judges of the Court of Session have been unanimous on this subject, and are of opinion that Mr Ramsay had no power whatever to use the underground of the lands reserved for the purpose of carrying away coals or minerals from any other lands which were not granted. I cannot help observing that I think that Lord Ormidale in giving judgment in this case has stated that which is not perfectly correct, because he says that the reserved right to work and carry away the coal was not of the nature of a proprietary right, but rather of the nature of a "privilege, servitude, or easement." Now, it appears to me that being upon a grant or reservation of minerals *prima facie*, it must be presumed that the minerals are to be enjoyed, and therefore that a power to get them must also be granted or reserved as a necessary incident. As was said by Lord Wensleydale in the case of *Rowbotham* v. *Wilson*, in 8th House of Lords Reports—"It is one of the cases put by Shepherd Touchstone in illustration of the maxim, *Quando aliquid conceditur conceditur etiam et id sine quo res ipsa esse non potuit*—