[15*th August* 1834.]

JAMES COX, Trustee upon the sequestrated Estate of Stead and Paterson, and JOHN PATERSON, the surviving Partner, Appellants. No. 27.

MAGDALENE and MARY STEAD, Respondents.

Partnership—Lease.—One of the two partners of a company let to the company a mill, with the large machinery fixed therein, and assigned the small machinery to the company, the value being to be placed at his credit in their books; he thereafter died in debt to the company; the mill with its appurtenances was sold; and the full rent stipulated in the lease for the buildings and machinery was paid by the surviving partner, who by the lease was allowed to continue lessee, and take the small machinery; and this partner became bankrupt: — Held (affirming the judgment of the Court of Session) that the trustee on his sequestrated estate was not entitled to appropriate the large machinery as company estate, and to obtain repetition of the rent paid since the death of the other partner, in so far as might effeir to this machinery.

2D DIVISION.
Ld. Mackenzie.

THE late David Stead, card manufacturer in Leith Walk, Edinburgh, executed, on the 27th December 1792, a trust disposition and deed of settlement, by which he disponed to trustees his heritable and moveable property, with powers of sale; and directed that after payment of his debts the residue should be divided amongst his surviving children.

The trustees, in 1807, sold the heritable property, consisting chiefly of a card manufactory, to John, the

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eldest son, subject to the real burden of provisions amounting to about 5,200*l.* to the respondents, his two sisters, and to his brother Patrick of about 800*l.*; for which sums he also granted personal bonds, and he was duly infeft.

John made considerable alterations on the buildings, having pulled down the former card manufactory, and erected a new one, containing a steam-engine and large gearing or mill machinery, for the purposes of the business, which were built into and incorporated with the building, so as to be incapable of separation without being destroyed.

On the 19th of April 1817 he entered into a contract of partnership with John Paterson, as card manufacturers, under the firm of Stead and Paterson, from the 1st of that month till 30th June 1838, subject to breaks at particular periods. At the same time a lease was granted by Stead to the company of the premises for a period corresponding with the contract of partnership. By that lease he conveyed to the company "all and whole the mill, house, anneeling-"house, timber-shed, card factory, buildings, mill, "machinery, or large gearing, and steam-engine erected "thereon, being the whole mill, buildings or manufac-"tory, as lately occupied by the said John Stead, and "David Stead and Son, as a card manufactory, built "on part of the three acres of the lands of Pilrig, "originally feued out by Mr. James Balfour, advocate, "to David Cairns and his spouse, and which now "belong to the said John Stead." The rent payable under the lease was to be 360*l.* per annum; and, by a subsequent clause, it was provided, "that in the event "of the death of one of the partners of that company,

" the remaining partner might take the benefit of that " lease, during the whole space of twenty-one years, or " such part thereof as may be then to run, on payment " of the rent, and implement of the other prestations " therein contained, and shall in every respect come " into the place of the said company of Stead and " Paterson."

By the contract of partnership it was stipulated, " that the said business shall be carried on in the " range of buildings, and on the ground situated at the " foot of Leith Walk, belonging to the said John Stead, " and nowhere else, of which buildings and ground he " has granted a lease to the said copartnery, of even " date herewith, during the subsistence of this con- " tract. That the whole stock of cards and wire, and " the implements and machinery of the card factory, " presently belonging to the said John Stead, shall be " taken over by the said copartnery in manner following, " viz. the stock of cards and wire on hand " on certain specified terms, " and the implements of the card " factory at the valuation to be put thereon by trades- " men mutually agreed on by the parties, and likewise " to be inserted in the said journal-book of the com- " pany; and the machinery of the mill, at the valuation " to be put thereon by Mr. James Scott, millwright in " Cupar-Fife, as soon after the date of these presents " as convenient. That the value of the said stock, so " to be taken over by the company from the said John " Stead, shall not be paid over to him at the time, but " shall be placed to his credit with the copartnery, and " remain there during the subsistence of this contract, " and he shall be declared a creditor to the company " therefor, as well as for the legal interest thereof,

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" which shall be placed to his credit annually. That " the parties shall make up just and exact inventories " of the whole stock given over as above mentioned, " and the same shall be signed by both parties, and a " copy thereof delivered to each party, or the same " shall be entered in the books of the company; which " stock and materials, for the manufacturing thereof, " contained in such inventories, together with what " farther cards and wire shall be manufactured by the " company from said materials, or other materials to " be afterwards purchased by the company, are to be " sold and disposed of for the benefit and advantage of " the partners, and the profit arising therefrom shall " be divided equally between them," &c. " That upon " the dissolution of the said copartnership, &c., the " said John Stead hereby obliges himself, in that event, " to take over from the said company, the whole stock " of cards, wire, and materials that may then be on " hand, as well as those that may be in process of " manufacture, and the implements of the card manu- " factory, on the same terms as the company have " agreed to take the same from the said John Stead, as " at said 1st of April 1817, as particularly above men- " tioned, and likewise the machinery of the said mill, " at the valuation to be put thereon by two millwrights " to be mutually named, one by each partner; and " upon his so taking over the goods, materials, and " machinery, he shall be bound to pay, or give good " security for the payment, to the said John Paterson, " of the free balance falling due to him, and that within " twelve months from the date of the said dissolution." And it was declared, " that in the event of the said John " Stead being the surviving partner, he shall be bound,

" and he hereby obliges himself, to take the whole stock
" of goods, materials, and machinery, which shall be
" upon hand, belonging to the company at the time, on
" the same terms as he the said John Stead obliges
" himself as aforesaid to take the same, in the event of
" the dissolution of the company by mutual consent.
" And in the event of the said John Paterson being the
" surviving partner, he shall have it in his power to take
" and keep the whole stock of goods, materials, and
" machinery, on the same terms; declaring always, that
" if the said John Paterson, in the event above specified,
" shall continue lessee of the card factory," then a certain optional power should be withdrawn, and he should be bound to take the stock of goods, materials, and machinery on specified terms: " And in case the said
" John Paterson shall happen to be the surviving
" partner, and shall not incline to continue to carry on
" the business, and to take the goods of the company at
" the rate foresaid, then the representatives of the said
" John Stead shall be bound to take over the said goods,
" materials, and machinery, on the same terms as the
" said John Stead is bound to do on the dissolution of
" the company by mutual consent, or by the death of
" the said John Paterson; and on the representatives
" of the said John Stead so taking the goods, materials,
" and machinery, they shall be bound to pay or give
" good security to the said John Paterson for his pro-
" portion of the proceeds thereof, in the same manner
" as the surviving partner is bound to do in the event
" of his taking the goods, materials, and machinery as
" aforesaid."

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23d of November 1819, when John Stead died in insolvent circumstances.

Thereafter the respondents and their brother Patrick, as heritable creditors, having executed poindings of the ground, and other creditors threatening similar proceedings, the subjects were judicially sequestrated in November 1820, and a factor appointed to collect the rents, and accordingly Paterson paid to him the full rent of 360*l.*

The respondents afterwards obtained a decree of adjudication against the heir of John Stead, and in July 1821 they brought a process of ranking and sale, in which Paterson was examined as a witness in the preparatory proof of the value, and he deponed, "that, "as surviving partner of the said concern of Stead "and Paterson, he holds a lease of the said manu- "factory, buildings, machinery, steam-engine, and "whole other buildings therein described, commencing "the 1st day of April 1817 years, and terminating "the 30th day of June 1838;" and, "that for the "whole subjects contained in the said lease in favour "of Stead and Paterson the deponent pays the yearly "rent of 360*l.*" The value was fixed according to this rental, by two valuators, at 8,785*l.*

A warrant of sale was granted, and an advertisement published, which described the subjects as, "All "and whole that part of the lands of Pilrig called "Stead's Place, with the extensive card factory erected "thereon, and appurtenances;" and in the articles of roup, prepared by the clerk to the process, the description was in these terms: "All and whole these three "acres of ground of the lands of Pilrig, thereof formerly

" feued out, &c., together with the dwelling-house, offices,
" and buildings erected on part of the said lands, and
" particularly the card manufactory, appurtenances, and
" whole pertinents of the same, as presently possessed
" and held in lease by John Paterson, card manufac-
" turer in Leith, as surviving partner of Stead and
" Paterson, conform to the lease entered into between
" the said deceased John Stead and the said Stead and
" Paterson dated the 19th day of April 1817."

The lands were purchased at the sale by the respondent, Mary Stead, for herself and her sister, and a decree of sale was afterwards pronounced. A state of the fund for division, (which consisted of the price and interest, and rents uplifted by the judicial factor,) was next made up, and a scheme of division prepared by the common agent. On payment of the price to the preferred creditors, agreeable to that scheme, the respondent Mary Stead received from each of them discharges and conveyances of their grounds of debt and diligences. She had thus two titles to the subjects: one as purchaser under the decree of sale, the other as an heritable creditor in her own right, and assignee to the rights of the other heritable creditors, whose debts exceeded, by more than 1,200*l.*, the whole price.

The date of her entry was declared to be at Whitsunday 1823, and she accordingly then entered to the possession of the subjects, by drawing, half yearly, from Paterson, for seven years, the full rent of 360*l.* No claim had been made by Paterson that the steam-engine and mill machinery ought not to be sold as Stead's property, or that he held any other right to them than as tenant under the lease.

On the 18th of May 1831 the estates of the com-

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pany, and of Paterson as an individual, were sequestrated, under the bankrupt act, and the appellant Mr. Cox was chosen trustee. He then instituted before the Court of Session a summons of declarator, count, reckoning, and payment, against the respondents and others, concluding to have it found and declared, "Primo, that the machinery, or large gearing, stock "in trade, and utensils, belonging to the said deceased "John Stead, were valued and placed to the credit "of his account with the company of Stead and "Paterson, in terms of their contract of copartnery; "that the whole value thereof was thereafter over-"exhausted, by payments made to and drawings by "the said John Stead, stated to his debit in his said "account, leaving a balance due by him to the extent "of 1,150*l.* 8*s.* 6*d.*; and that therefore the said machi-"nery, or large gearing and utensils, thus became the "absolute property of the said company at the period "of the said John Stead's death, and were no longer "comprehended under the foresaid lease granted by "the said John Stead to the company, and no rent was "legally exigible therefor: Secundo, that the said "company of Stead and Paterson, or John Paterson, "the surviving partner thereof, was entitled, at the "period of the dissolution of the copartnery, to place "the value of the steam-engine mentioned in the lease, "and then in their possession, to account of the afore-"said balance of 1,150*l.* 8*s.* 6*d.*, due to the company "by the said John Stead; and that therefore no rent "was afterwards exigible for the said steam-engine, "from the company of Stead and Paterson, or John "Paterson, the surviving partner thereof, by the said "John Stead's representatives, creditors, or assignees:

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" Tertio, that although the defenders exacted from the " said John Paterson, or Stead and Paterson, the full " amount of the gross rental of 360*l.*, provided for in " the lease, as payable for the use and possession of the " buildings, steam-engine, and machinery, the said " John Paterson, or Stead and Paterson, were legally " entitled to deduction or retention from the said rent, " of a sum corresponding to the value of the steam- " engine and machinery, on comparison with the value " of the buildings which, at John Stead's death, became " the property of his heirs or heritable creditors; and " that the defenders having exacted, drawn, and taken " payment of the full rental, such was illegal and un- " authorized in the circumstances of the case. And it " being so found and declared, our said Lords ought to " remit to qualified persons, in order to ascertain the " respective values and rentals effeiring to each of the " different subjects contained in the said lease, and to " report thereon; and to ascertain what proportion of " the foresaid gross rental of 360*l.* sterling, contained " in the lease, is attachable to the steam-engine and " machinery, or large gearing, and what proportion is " attachable to the buildings; and the respective rents " being so ascertained," then the respondents should count and reckon for the rents overdrawn by them, with interest; and that it should also be declared, " that the " said steam-engine and machinery, or large gearing, " are the property of the sequestrated estate of Stead " and Paterson, and John Paterson, and belong to the " pursuer, as trustee foresaid; and that the said de- " fenders have no right to interfere with or interrupt the " pursuer in the management and disposal thereof."

In defence the respondents pleaded, 1, that neither

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Paterson nor the company had any right to the steam-engine and great gearing, as they had never been conveyed to them by John Stead; 2, that the respondents, as purchasers at the judicial sale of the subjects, with their appurtenances and pertinents, had right to the steam-engine and great gearing, not merely as being fundo annexa, but as included in the property sold; and, 3, that neither had Paterson any claim of retention; and besides, the distinct acknowledgments of Paterson, that the steam-engine and great gearing belonged to the respondents, and that he was liable to them for the full rent stipulated in his lease, barred the claim made by the appellant.

Lord Mackenzie assoilzied the respondents simpliciter, with expenses, and the Court, on the 1st June 1834, adhered.*

Cox and Paterson appealed.

Appellant.—By the contract of copartnery it was stipulated that the whole "implements and machinery" should be taken over by the copartnery, as they stood upon the 1st of April 1817; and it is therefore clear that, subsequent to this date, the copartnery, and not John Stead, was the proprietor of the implements and machinery. That contract also provided that John Stead should be the creditor of the copartnery for the value of what was to be taken over, and that he was to receive interest upon the price. It necessarily followed from this provision that if John Stead should draw from the copartnery a larger sum than the value

* 11 S. & D. 672.

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of what was so placed to his credit, he could have no claim to the ipsa corpora of the articles assigned over, and that the exclusive right to these articles would belong to the partner who had not overdrawn his share, and who was the creditor of John Stead to the extent of his overdrafts.

The respondents, no doubt, found on the terms of the lease, which was made out inaccurately, for it embraces part of the subject confessedly included in the contract, inasmuch as it specifies the entire manufactory, or in other words, all that was necessary for the manufactory; whereas the contract of copartnery provided that the implements of the card factory should be valued by tradesmen mutually chosen, and the mill machinery should be valued by Mr. James Scott, millwright in Cupar-Fife, and that these valuations should be inserted in the books of the copartnery. According to this stipulation, a most anxious enumeration of all the articles was made in the books of the company, in which the leading article is the large machinery, valued at 2,351*l.*, and which is placed in contradistinction to the cards, which were valued at 2,319*l.* 17*s.* 4*d.*, and the stock of utensils, which were valued at 932*l.* 7*s.* 3*d.*

For these sums, amounting to 5,603*l.*, Mr. Stead received credit in the books of the copartnery; and as he died indebted to the company in a balance of 1,150*l.*, after getting credit for the full price, the large machinery became the absolute property of the company, and they were farther entitled to retain the steam-engine in liquidation of that balance.

No doubt the respondents attempt to maintain that the large machinery was not intended to be conveyed,

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and they have referred in aid of this view to the conduct of Paterson in paying rent without any deduction on account of the machinery, and that when examined as a witness in the ranking and sale he did not pretend that it was conveyed to the company. But Paterson was not examined in relation to the question at issue here,—he was so merely as to the rent payable for the premises, and the statement made by him under these circumstances cannot be founded on in a question with his creditors. Equally irrelevant is the circumstance of paying the full rent. He was bound to do so by the lease, and could not therefore resist payment; but this leaves the point untouched, whether the machinery was embraced in the lease.

The respondents have also founded on the charter of sale, and maintain that the terms "appurtenances "and pertinents," include the steam-engine and great gearing, as fundo annexa. But this is 'begging the whole question; for the question is, whether or not these are part of the fundus? The appellant's plea is, that a steam-engine and mill machinery, being moveable property, cannot be sold or acquired under a ranking and sale in a question with personal and real creditors. It is no doubt true that the general rule of law is that things fundo annexa become part of the freehold. This was the law of Rome, and it seems to be the law of modern Europe. All the doctrines in regard to fixtures are founded upon that law. Objects in their own nature moveable, change or lose their character by being incorporated with immoveable subjects. In questions of succession this is settled. But if these objects admit of severance from the freehold, and can be adapted to any other freehold, still more, if they can

be used per se, and if, moreover, these objects are valuable for the purposes of trade, then their temporary connexion with any proper freehold will not change their original character, and make that heritable which was originally moveable or personal property.

It would be contrary to every consideration of public policy, or equity betwixt particular individuals, to hold that a manufacturer who carries with him a large and valuable stock of implements into premises which he has occasion to occupy for a short time, and which can only be used by being fixed in the premises, makes them a part of the freehold by the temporary annexation, and thereby deprives himself of the right of removing them, and subjects them to such process as may be competent to the real creditors of the freehold. There are many manufactures in which a complete stock of machinery admits of being removed from place to place, and in point of fact, is daily so removed. In many cases, the machinery is really more valuable than the freehold; and it would not be worse policy to make the freehold follow the fortune of the machinery, than to make the machinery the inevitable accompaniment of the freehold. If it be wise that there should be two species of property, subject to different species of diligence and different courses of succession, the distinction must always be kept up betwixt the two species of property, and this distinction is conformable with all the usages and conveniences of trade. In the earlier stages of the Scottish practice, the inclination of the courts and of the country was, as much as possible, to give every species of property the character of heritable estate. The heir was always considered as the persona dignior in every question as to the character of property.

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Things which were purely moveable became heritable by destination for the use of the heir: hence the class of subjects which were denominated heirship moveables. In remote times the law had very little regard for merely personal estate; and in fact personal property was of very little account, and existed only to a very limited extent. These notions gradually relaxed with the extension of personal estate; and now it admits of no question that the subject does not become heritable merely by its destination or appropriation, unless, by having been so destined or appropriated, it cannot be separated from the freehold without being destroyed.*

All the Scotch authorities refer to this as a question of general law, upon which the decisions of other countries are entitled to great consideration, and in particular reference is invariably made to the authorities in England, and that law is favourable to the plea of the appellant.† Neither on this nor on any other point of the case did the Lord Ordinary express any specific opinion, and the Court adhered super totam materiam. The decision, as it now stands, establishes the principle that a steam-engine is heritable in a question with creditors, although it might be removed, and might be as valuable in any other place as that in which it is attached. The same result ensues in regard to the large machinery. From a review of the proceedings in the ranking and sale it is seen that these articles were not

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* Hunter's Law of Landlord and Tenant, pp. 240, 256; Heineccius, p. 1. sec. 194; Digest, lib. xix. tit. 117. sec. 7.; Sanford on Heritable Succession, vol. ii. p. 218; Bell's Com., vol. i. p. 753; Hyslop v. Hyslop, 18th Jan. 1811, Fac. Coll.; Arkwright v. Billinge, 3d Dec. 1819, Fac. Coll.; Niven v. Pitcairn's Trustees, 6th March 1823; 2 S. & D. 269, new ed. 239; Stair's Institute, by Mr. More, p. 144.

† Amos and Ferard's Law of Fixtures, Introduction, pp, 20, 43.

actually included in the title which the respondents have obtained; and even although these articles had been so included, the parties have now joined issue in a proper declaratory process for the purpose of determining whether they were truly of a proper moveable or heritable character; and for having it found, that if they were moveable they belonged to Paterson, either absolutely in property, or in lien for the security of the debt which was due to him.

Respondents.—The basis on which the appellant's case rests is, 1st, that Stead was indebted to the copartnery of Stead and Paterson in a sum of 1,150*l.*; 2d, that the mill machinery formed part of the company funds, which Paterson was entitled to hold in satisfaction pro tanto of the debt; and that although the steam-engine never belonged to the company, he was entitled to retain it till full payment of the debt due by Stead to him, as the surviving representative of the company. But the allegation of the pretended debt is unfounded, and no evidence in support of it has been produced. Even if any such did appear, still it remains to be seen how that would give any right to the subject in question to the appellant. The lease specified in express terms, as part of the subject let, the "mill machinery, or large gearing, and steam-engine;" and the rent payable for the whole was 360*l.* It could not be the meaning of the contract of copartnery that the very subjects which were let by Stead to the company should be at the same time sold and conveyed to it; and it is admitted by the appellant that the steam-engine never was conveyed to the company. But the mill machinery, or great gearing, is as clearly made part of the lease as the steam-engine, and both therefore re-

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mained the individual property of John Stead; so the appellant, even supposing him to be a personal creditor of John Stead, had no better right to these than Stead's other creditors. He could not, at his own hand, have retained them in payment of Stead's debt. The title under which the company held them was one of temporary possession under a contract, and he could no more have made it absolute than a banker could retain, in payment of a general balance, a sum which had been put into his hands under a special contract, and destined for a particular purpose. He could only proceed by constituting his debt against Stead, and then completing a preference over the subjects by the usual process of law. Had he attempted this, the attention of the other creditors of John Stead would have been called to the subject, and the pretended claim investigated, and the unfounded nature of it exposed. Accordingly all the acts of Paterson are inconsistent with the pretensions now made by the appellant.

On Mr. Stead's death, in 1819, Paterson called a meeting of the creditors of the company, and laid before them a state of affairs, offering a composition of about 10*s.* in the pound, which they accepted; and in the state none of the subjects in question were included. He paid, without objection, to the judicial factor the full rent down to the judicial sale in 1823. And, although fully aware of the dependence of the ranking and sale, in which he was examined as a witness, he not only made no claim to the subjects which he saw advertised for sale, but he stated on oath his only title of possession to be the lease to Stead and Paterson, and no alleged right of property in the subjects. Farther, for seven years after the subjects were sold, he

regularly paid the full rent to the respondents. These facts are clearly demonstrative of his understanding, and amount to an admission that he had no right to the subjects now claimed by the appellant. In the face of these facts, neither he nor the appellant can be permitted to say, that he did all along consider himself as proprietor, and intended, at some time or other, to found on and establish his preference. Such concealment of his intentions would, on principles of equity, be a complete bar to his claim.*

But, independent of these pleas, the appellant cannot, so long as the decree and charter of sale is unreduced, make any claim to the subjects in question. He attempts to elude this objection by alleging that the steam-engine and great gearing must be regarded as moveable, and so not carried by the transfer of the building. But, in the first place, although the decree of sale, following the terms of the old titles, simply conveys the three acres of ground as possessed by Stead and Paterson, without even specially enumerating the manufactory at all, yet this general reference was enough, for Stead and Paterson possessed the whole subjects included in the lease, and consequently both the steam-engine and large gearing. But the terms of the decree are farther to be explained by those of the advertisement and articles of roup, and both of these distinctly specify the appurtenances and pertinents of the card manufactory, as well as the building itself. It is impossible to doubt that the price paid was materially affected by the consideration that these were included.

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* Lea against Landale, 16th Jan. 1828, 6 Shaw and Dunlop, 350; Munro against Hogg, 14th December 1830, 9 Shaw and Dunlop, 171.

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In the second place, the steam-engine and large gearing, or mill machinery, were in their own nature heritable, and so fell under the operation of the prior heritable securities belonging to the respondents in their own right, or as assignees of the other heritable creditors, and of the decree of sale. No steam-engine once incorporated with a manufactory building can be regarded in any other light than as a fixture, since, whatever may be the value of the building, the connexion between the two cannot be separated without ruining the building, if not materially damaging the steam-engine itself. Equally close is the connexion between the steam-engine and the large machinery of the card manufactory, which from its unwieldy size could not be separated without injury or ruin to itself or the building to which it is attached, as to all machinery or utensils in that situation; and no one can doubt that they are all to be regarded as proper fixtures, and accessories of the solum or building with which they are incorporated. The decisions in the cases of Arkwright against Billinge, and Niven against Pitcairn, must be considered as fixing the law on this point. It has no doubt been maintained, that the decision in the case of Arkwright did not proceed so much on the idea of the subjects being in themselves heritable, as on the fact that the terms of the bond in favour of the creditor were wide enough to cover them, whether heritable or moveable, and that possession had followed. Even if this had been the ground on which, in Arkwright's case, the judgment proceeded, the present case comes within that principle. For here the security of the respondents being generally over John Stead's whole estate, and civil possession (i. e. the only possession pos-

sible) having followed, by drawing the rents payable for these subjects, they must be held as effectually transferred to them, even if their original character of heritable subjects were liable to doubt. The truth is, however, that in Arkwright's case the point was never disputed as to the steam-engine and large machinery. As to these it was taken for granted that the heritable security applied. The question was, as to its application to the smaller machinery only, and there it was found to apply in respect of the possession.

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Lord Chancellor.—My Lords, I have been very much impressed in the course of the argument of the respondents by the considerations founded upon one part of the case, which I have not found to be displaced by the argument on the part of the appellant, either in the opening of the case or in the reply. I allude to the circumstances of the conduct of the bankrupt, of whose estate and effects the present appellant is assignee; by whose acts done before bankruptcy he is bound, and by whose homologation and affirmance he is bound, by whatever mode that affirmance is made, it not being supposed it was done fraudulently or to defraud the creditors, but giving the assignee a right of standing aloof from them. But, my Lords, though I certainly feel pressed by the argument that it is such as to make it impossible for me to get over it even if the rest of the case of the appellant was sufficient; nevertheless I should like to take a day or two to consider the point raised in the case, and if at that time, or on or before the last day of your Lordship's sitting, I should not alter the opinion I have, I should recommend your Lordships to affirm the judgment upon that ground as well as upon one or two others that I shall

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state, and I shall be disposed to recommend it should be affirmed with costs; for according to the view I have, it has been a very needless and useless proceeding.

I totally deny the doctrine attempted to be urged here, that because no reasons are given in the judgment of the Learned Judges, that there is therefore ground for appeal. It is a convenient course, certainly, for judges to assign the reasons of their judgment, and not to let it rest upon their own authority; but that it forms any thing like a ground of appeal, that a judge should affirm an order below or reverse an order below, though upon a reversal reasons generally are given and assigned, or that a judge should have refused the prayer of a petition without more, or have granted the prayer without assigning reasons, I deny. I am exceedingly baffled by that new doctrine; it is one extremely prejudicial to the conduct of judicial business; the consequence would be to throw impediments in the way of the despatch of business. I could name one Court, where a great deal of business is done as well as possible, and in which the reasons given would go into a very small compass indeed; I say that without any disparagement, but the practice there is not to argue the case at great length in giving the judgment. But if you will look into the judgment of many of the most learned judges who ever sat, and who have given judgment upon points arising before them in equity,—Lord Thurlow among others,—in the cases that came before him, your Lordships will search in vain through the volumes of Brown for any great length of argument in giving his judgment. The same may be said of Lord Loughborough; you will search in vain through the records of his decisions for any argument; he never omitted any part of the

question; but as to saying he assigned the reasons of his judgments, it was not the habit of that learned judge; it was not the habit of his eloquence, or in his judicial proceedings; but no man ever said that those judgments were not satisfactory, or did not meet the feelings and the views of the profession. It is in vain to say that a judge gives a reason because the reporter gives you half a page of print as falling from that judge;—that is not the reason. The appellant's counsel adverted to the reasons assigned specifically in writing by the judges, sometimes embodied in the interlocutor, sometimes given and appended by way of note to the interlocutor of the Lord Ordinary,—that is more commonly the case; sometimes the Lord Ordinary appends his reasons most attentively drawn; they are for the party to carry the case elsewhere to a court of appeal; that is the kind of reason; not the sentence thrown out by Lord Thurlow in these reports, nor those decisions where you will not find a distinct statement of the reasons, so that you can say the case was argued; you have something to show the ground of the decision, but not the argument of the Court. I have said so much to show I dissent from the proposition, that the absence of reasons forms any ground of appeal, and the want of those reasons shall form no reason for my not giving the costs of appeal against the appellant if I am right in the opinion I have formed upon the merits of the case; but I will consider it further before I dispose of it.

His Lordship on this day moved, and—

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House,

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and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the sum of two hundred pounds, for their costs in respect of the said appeal.

JOHN M'QUEEN — THOMAS DEANS, Solicitors.