Friday, December 5.

FIRST DIVISION.

[Sheriff Court at Kilmarnock.

M'LAY *v.* HOWIE'S TRUSTEES.

Heritable and Moveable—Fixtures—Bondholder and Trustee for behoof of Creditors—Machinery—Lace Looms.

A firm of lace manufacturers granted, in security for loans, two bonds and dispositions in security. By the first of these they conveyed the land upon which their factory was built, "together also with the buildings erected on the said piece of ground, and also the engine, boiler, shafting, and connections therein." By the second they conveyed the same piece of land, "together also with the buildings erected on the said piece of ground, and also the engine, boiler, shafting, and connections, and whole fittings and fixtures of whatever nature or description therein." Thereafter they granted a trust-deed for behoof of creditors. The bondholders claimed as part of their security five lace looms, each of which "rested on the floor unfastened, but the upper part was tied by substantial iron stays to the roof-framing," and raised an action to have the trustee under the trust-deed interdicted from selling, removing, or in any way interfering with them. *Held* that as in a question between the bondholders and the trustee the looms were heritable, and interdict *granted*.

By bond and disposition in security, dated 30th May and recorded 5th June 1893, John Gebbie & Company, lace manufacturers, Kilmarnock, in security of a loan of £900, disponed and conveyed in favour of James Laughland junior, bonnet manufacturer, Kilmarnock, a piece of ground upon which their works were situated, "together also with the buildings erected on the said piece of ground, and also the engine, boiler, shafting, and connections therein." The pursuers in this case, Mrs Mary Paterson or Howie and others, the testamentary trustees of the deceased John Howie, coalmaster, Hurlford, acquired right to this bond and disposition in security conform to assignation by the said James Laughland in their favour, dated 16th and recorded 18th March 1898.

By bond and disposition in security dated 13th and recorded 16th March Gebbie & Company, in security for a loan of £1500, disponed and conveyed in favour of Howie's trustees the same piece of ground, "together also with the buildings erected on the said piece of ground, and also the engine, boiler, shafting, and connections, and whole fittings and fixtures of whatever nature or description therein."

James M'Lay, Chartered Accountant, Hope Street, Glasgow, the defender in this case, was trustee for behoof of the creditors of Gebbie & Company and the individual partners thereof, conform to a trust-deed granted by the said firm and partners thereof in his favour, dated 4th November 1901.

On 18th January 1902 John Howie's trustees raised an action against M'Lay, as trustee for Gebbie & Company's creditors, in the Sheriff Court of Ayrshire at Kilmarnock, in which they craved the Court "to interdict the defender, and all others acting for him or under his instructions, from selling, removing, or in any way interfering with the engine, shafting, pulleys, machinery, fixtures, fittings, &c., or any of them, in the said Ossington Lace Factory, and in particular from selling, removing, or in any way interfering with the articles, or any of them, detailed in the inventory annexed hereto; and to grant interim interdict, and to find the defender liable in expenses."

The pursuers averred—"(Cond. 4) The pursuers, by virtue of the powers contained in the said bonds and dispositions in security, have taken steps, by serving the usual schedules of intimation, requisition, and protest, to realise the subjects covered by their security, including the engine, shafting, pulleys, machinery, fixtures, fittings, &c., detailed in the inventory annexed hereto. The defender, as trustee foresaid, while admitting the pursuers' right to the buildings, with the sale of which he does not propose to interfere, refuses to recognise any right in the pursuers to the said engine, boiler, shafting, pulleys, machinery, fixtures, fittings, and others above specified, claims the same as belonging to the said trust estate, and threatens to detach, remove, or sell the same, and appropriate the proceeds without regard to the pursuers' security. The pursuers' rights under the said bonds and dispositions in security are thus in danger of being defeated. The whole of the said engine, boiler, shafting, pulleys, machinery, fixtures, fittings, &c., are either physically fixed and attached to the subjects in which they are situated, or which form part of the pursuers' security, or are constructively annexed to the said factory and other machinery therein, and are heritable."

The defender admitted that he claimed the machinery so far as not consisting of the engine, boiler, and great gearing and shafting, with which he did not propose to interfere. He averred that the machinery, so far as claimed by him, was not essential or even material to the use of the heritable subjects, and could be equally well used in any other building; that the pursuers had never entered into possession of the security subjects, and that they had no possession, actual or constructive, of the articles claimed by them.

On 22nd January 1902 the Sheriff-Substitute (D. J. MACKENZIE) of consent appointed an inspection of the engine, machinery, &c., to be made in his presence, and further appointed Thomas Kennedy, hydraulic engineer, Kilmarnock, to report as to the attachment to the building or otherwise of said machinery, &c.

By joint-minute, dated 19th February 1902, the parties agreed to accept the report by Mr Thomas Kennedy and the red ink

notes of the Clerk of Court made at the inspection of the premises upon the inventory as determining the facts of the attachment to the building or otherwise of the machinery, &c., in question, and concurred in renouncing further probation.

In the Court of Session the only question argued and decided was with regard to five lace looms. These looms were thus described in Mr Kennedy's report—"25 Item. 5 lace looms. These rested on the floor unfastened, but the upper part was tied by substantial iron stays to the roof framing." The red ink note made by the Clerk of Court at the inspection was as follows, "Lace looms bolted to long iron sole-plate, standing by its own weight on floor, and held by stays secured to roof beams."

By interlocutor, dated 12th March 1902, the Sheriff-Substitute found, *inter alia*, that these five lace looms were so attached to the building as to be heritable in a question between the parties, interdicted the defender and all others acting for him or under his instructions from selling, removing, or in any way interfering with them, and found no expenses due to or by either party.

The defender appealed to the Court of Session.

Argued for the appellant—The looms in question were moveable as between the bondholders and the truster—*Dowall* v. *Miln*, July 11, 1874, 1 R. 1180, 11 S.L.R. 673; *Assessor of Dundee* v. *Carmichael & Company, Limited*, 39 S.L.R. 573; *Cochrane* v. *Stevenson*, July 18, 1891, 18 R. 1208, 28 S.L.R. 848; *Nisbett* v. *Mitchell Innes*, February 20, 1880, 7 R. 575, 17 S.L.R. 438; *Hellawell* v. *Eastwood* (1850), 6 Ex. 295, 20 L.J. (Ex.) 154. The law of England as laid down in *Holland* v. *Hodgson* (1872), L.R., 7 C.P. 328, was different from the law of Scotland. Lord Justice-Clerk Moncreiff referred to that case in *Dowall* v. *Miln*, but preferred the decision in *Hellawell* v. *Eastwood*, The Bills of Sale Act 1878 (41 and 42 Vict. cap. 38) made trade machinery moveable in England.

Argued for the respondent—The looms were heritable. The question was settled by a long series of decisions in Scotland—*Arkwright* v. *Billinge*, December 3, 1819, F.C.; *Niven* v. *Pitcairn*, March 6, 1823, 2 S. 270; *Dixon* v. *Fisher*, March 6, 1843, 5 D. 775; 4 Bell's App. 286; *Brand's Trustees*, v. *Brand's Trustees*, March 16, 1876, 3 R. (H.L.) 16, 13 S.L.R. 744; *Reid's Executors* v. *Reid*, February 28, 1890, 17 R. 519, 27 S.L.R. 416; *Miller* v. *Muirhead*, March 10, 1894, 21 R. 658, 31 S.L.R. 569; *Cowan & Sons, Limited* v. *Assessor of Midlothian*, May 25, 1894, 21 R. 812, 31 S.L.R. 733. The law of England was to the same effect, and it was expressly stated by Lord Chelmsford in *Brand's Trustees* v. *Brand's Trustees*, that the law as to fixtures is the same in Scotland as in England—*Holland* v. *Hodgson*, L.R., 7 C.P. 328; *Mather v. Fraser*, 25 L.J. Ch. 361; *Climie* v. *Wood*, L.R., 4 Ex. 328; *Haley* v. *Hammersley*, 30 L.J. Ch. 771; *Norton* v. *Dashwood* [1896], 2 Ch. 497. The machinery in question in *Hellawell* v. *Eastwood*, was of a different kind, and was not attached to the building.

At advising—

LORD PRESIDENT—The question in this case is whether the holders of two heritable securities over a lace factory in Kilmarnock, which belonged to John Gebbie & Company, lace manufacturers there, or the trustee for the general creditors of that firm, have right to five lace looms in the factory.

By bond and disposition in security, dated 30th May and recorded 5th June 1893, John Gebbie & Company granted them to have borrowed and received from James Laughland junior the sum of £900, and in security of repayment of that sum they disponed and conveyed to him a piece of ground and the lace factory thereon, "together also with the buildings erected on the said piece of ground, and also the engine, boiler, shafting, and connections therein."

By bond and disposition in security, dated 13th and recorded 16th March 1896, John Gebbie & Company granted them to have borrowed and received from the pursuers the sum of £1500, and in security of repayment they conveyed and disponed to the pursuers the site of the factory and the buildings thereon, "and also the engine, boiler, shafting, and connections, and whole fittings and fixtures of whatever nature or description therein." The pursuers acquired right to the heritable security first above menoioned, and the sums of money due under it, by assignation from James Laughland in their favour dated 16th and recorded 18th March 1898.

The pursuers have taken the proper steps for realising the subjects covered by the two heritable securities above mentioned, including the engines, boilers, shafting, pulleys, machinery, fixtures, fittings, and others therein, and they claim that the five lace looms above mentioned are comprehended in their security, and that they are entitled to sell them and to apply the price in payment of the debts due to them by John Gebbie & Company. Their right to do so is disputed by the trustee for the creditors of that firm, and the bondholders have presented this petition for interdict with a view to obtaining a decision upon the question.

The five lace looms in question are bolted to an iron sole-plate which stands by its own weight on the floor of the factory, but the upper part of the looms is tied by substantial iron stays to the roof framing of the factory.

Questions as to whether machinery more or less fixed to the ground, or to a building, thereby becomes *pars soli*, and in legal estimation heritable, or whether it remains a chattel, and therefore moveable, as also in regard to the right to sever and remove it where it has become a fixture, may arise under several conditions, *e.g.*, (1) as between landlord and tenant, (2) as between heir and executor, (3) as between fiar and the representatives of a liferenter, and (4) as between mortgagor and mortgagee, and it is with the last of these conditions alone that we have to deal in this case.

The first point to be considered is, what

is the meaning of the term "fixture" in questions of this kind. The term was thus defined by Lord Chelmsford in the Scotch case of *Brand's Trustees* v. *Brand*, 1876, 3 R. (H.L.), at p. 23, a decision of very high authority, in which the general law was fully stated by the noble and learned Lords —"The meaning of the word is anything annexed to the freehold—that is, fastened to or connected with it, not in mere juxtaposition to 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 *quidquid plantatur solo, solo cedit*," or, as it is more commonly expressed in Scotland *inædificatum solo, solo cedit*. The rule thus expressed is fully recognised as part of the law of Scotland by the text-writers and in the decisions. This being so, two questions usually arise in such cases—(1) whether the thing has been so annexed to the soil or building as to become a fixture, and (2) whether, assuming that it has been so annexed, the person claiming right to remove it is entitled to do so in a question with the owner of the soil or building to which it is attached. Whether the question arises between landlord and tenant, heir and executor, the fiar and the representatives of a liferenter, or mortgagor and mortgagee, the thing may be equally a fixture in fact, and any difference between the rules applicable to different cases arises from the relation of the respective parties to the soil or building and the fixtures as affecting their respective rights to sever the fixtures from the soil or building and remove them or to prevent such severance and removal—*vide Miller* v. *Muirhead*, 1894, 21 R. 658.

The first question then in such cases is, whether the thing has become a fixture, and this may depend upon, *inter alia*, the character and degree of its attachment to the soil or building, upon whether the attachment is of a permanent or *quasi*-permanent character, upon whether the building to which it is attached is specially adapted for it, or it is especially adapted for the building, the intention of the person who attached it, and how far the soil or building would be affected by its removal.

It was said in the House of Lords by Lord Chelmsford, in the case of *Brand's Trustees* v. *Brand* already referred to, that the law as to fixtures is the same in England and in Scotland, and consequently it is admissible to refer to the decisions of the Courts in England, as well as to those of the Scotch Courts, in the present question. One of the oldest Scotch cases on the subject is *Arkwright* v. *Billinge* in 1819 (F.C.), in which it was held that the machinery of a cotton mill was comprehended under a mortgage of the mill, and that consequently the mortgagee had right to it. So in the English case of *Holland* v. *Hodgson*, 1872, L.R., C.P. 328, it was held, in a question between mortgagor and mortgagee, that looms attached to the floor of a mill by means of nails driven through holes in the feet of the looms, in some cases into beams which had been built into the stone, and in other cases with plugs of wood driven into holes drilled in the stone, were covered by the mortgage. Although the attachment of the looms, to which that case related to the building was not exactly the same as the attachment in the present case, it appears to have been very similar, and the attachment does not seem to have been greater there than it is here. In that case Lord Blackburn said—"Perhaps the true rule is that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land, even slightly, is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel."

The appellant strongly relied on the decision in *Dowall* v. *Miln*, 1874, 1 R. 1180, in which an important judgment was delivered by Lord Justice-Clerk Moncreiff, but that case arose between the heir and executor, not between mortgagor and mortgagee, and although the claim of the executor was preferred, it does not follow that if the question had been, as here, between a security-holder and a trustee for general creditors, the claim of the latter would have been sustained. I may add that that case was prior to the decision of the House of Lords in the case of *Brand* v. *Brand's Trustees*, and it may be a question whether some of the views expressed in it are consistent with the law as laid down in that case.

In the case of *Brand* v. *Brand's Trustees* it was held, reversing the judgment of the Second Division of this Court, that when the tenant of minerals under a lease of ordinary duration erects upon the land fixed machinery for the purpose of working the minerals, such fixtures become *partes soli*, and pass with the subjects to the possession of the tenant's heir during the lease, as also that the power of severance is vested in him during his tenancy, and much of the reasoning in that case applies to the present case, which appears to me to be *a fortiori* of it. That case illustrates what I have already pointed out, that there are usually two questions in such cases, viz., (1) whether the thing is a fixture, and (2) whether, assuming it to be so, the person claiming right to sever and remove it is entitled to do so.

In the English case of *Hobson* v. *Gorringe*, 1897, 1 Ch. 182, a gas-engine was let out on the hire and purchase system, under an agreement in writing which provided that it should not become the property of the hirer until payment of all the instalments, and should be removeable by the owner on the failure of the hirer to pay any instalment. The engine was affixed

to freehold land of the hirer by bolts and screws to prevent it from rocking, and it was used by him for the purposes of his trade. Default having been made in payment of the instalments, the engine was claimed by the owner, and also by a mortgagee of the land, who took his mortgage after the hiring agreement and without notice of it, and had entered into possession while the engine was still on the land. It was held that the engine was sufficiently annexed to the land to become a fixture; that any intention to be inferred from the terms of the hiring agreement that it should remain a chattel did not prevent it from becoming a fixture, and that consequently it passed to the mortgagee as part of the freehold. It was held further that even if a licence to remove the engine could be implied from the mortgagee leaving the mortgagor in possession, the entry of the mortgagee into possession terminates that licence.

Reference may also be made to the case of *Reynolds* v. *William Ashby & Sons*, November 24, 1902 [1903], 1 K.B. 87, in the Court of Appeal in England, which appears to me to be in entire accordance with the views now expressed.

I may add that cases such as *Cochrane* v. *Stevenson*, 18 R. 1208, relative to a picture painted on canvas, and inserted as a panel above the fireplace of a dining-room; and *Ward* v. *Taylor*, 1901, 1 Ch. 523 (in the House of Lords under the name of *Leigh* v. *Taylor*, 1902, A.C. 157), which related to tapestry, have no bearing on the present case.

It appears to me that both upon principle and authority the five lace looms in question became parts of the heritable estate—the factory and its site; that the appellant had no right to sever and remove the looms so long as the debts due by John Gebbie & Company to the respondents remainun paid; and that consequently the respondents are entitled to realise them as part of the subjects held by them under their securities.

For these reasons I am of opinion that the judgment of the Sheriff-Substitute should be affirmed.

LORD M'LAREN—This is one of the cases in which it is convenient to distinguish between what is finally settled and what is open to consideration.

In the case of *Brand's Trustees* v. *Brand*, 3 R. (H.L.) 16, Lord Cairns formulated two general rules—(1) Whatever is fixed to the freehold of land becomes part of the freehold or inheritance; (2) 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 of England and Scotland is an offence which can be restrained. To the first rule Lord Cairns said there is no exception, but to the second rule, as to the irremovability of things fixed to the inheritance, an exception had been established in favour of the fixtures which had been attached to the inheritance for the purposes of trade, and perhaps in a minor degree for the purposes of agriculture.

In the present case we are not concerned with the exception, but only with the rules, because if the machinery in question has been affixed to the heritable estate it is of course a part of the subject conveyed by the bond and disposition in security granted to the respondents.

But the judgment of the House of Lords, important and instructive as it is, does not go very far to solve this case, because it leaves open the question what is attachment within the meaning of the rule that whatever is affixed or attached becomes a part of the heritable estate.

On the best consideration I have been able to give to the decisions on this subject, my impression is that the law is not as yet sufficiently advanced to justify the attempt to lay down general rules as to what constitutes attachment to the estate; this only is clear, that it is necessary to pay attention to the species of property which is in question, because, for example, decisions as to the fixtures in a mansion or residence are not of much use in determining the analogous but specifically different question of what constitutes attachment in the case of machinery. In the case of residential property the presumption is, as I gather from the decisions, that articles which have a value independent of the value of the heritable estate, are not considered to be fixtures if the attachment is only for support, and is of such a character that the articles can be displaced without injury to the building. On this ground we held in *Cochrane* v. *Stevenson* (18 R. 1208), in a question between seller and purchaser, that pictures which were let into the panelling of a room did not pass to the purchaser. I may here observe that the decision would not necessarily be the same if the pictures had been merely decorative, but in this case the pictures had a certain artistic and historical value which was independent of their position in the mansion-house. For reasons which are consistent with our decision, it has since been held in the House of Lords that tapestries which were attached *sub modo* to the walls of a room were removeable in a question between heir and executor.

When we pass to the consideration of fixtures in buildings appropriated to industrial purposes the conditions of the question are obviously very different. In the case of machinery it cannot be of great importance to consider the degree or manner of attachment, because this is determined not at all by the *animus* to make or not to make an addition to the heritable subject, but by the nature of the machine itself as requiring a greater or less degree of support to fit it for use in its habitation. In the case of a steam-engine it may be necessary that the boiler should be built into solid masonry. Again, the great planing machines and lathes which are used in iron and steel works are not physically attached because they remain fixed by their own weight, provided they are placed

on a carefully prepared and perfectly level concrete bed. In either case the machine is affixed by being adapted to its environment, and I cannot see that it is of the least importance whether the adaptation consists in building up or in levelling down, in steadying by bolts and nuts, or in making use of the weight of the machine itself where weight is sufficient to secure the requisite stability.

I have already said or implied that in the question whether an article in its nature moveable is attached to the heritable estate, the law can only, as I think, establish presumptions. The actual decision must depend on the facts of the case, and I think it results from the decisions that the presumption for attachment to the inheritance is stronger in the case of machinery used for industrial purposes than in the case of articles of domestic utility or ornament which are usually carried by the owner from one residence to another. One reason for the distinction may be found in the fact that a building which is to contain machinery is generally designed to carry the special machinery that is to be put into it. In any case the size and proportions of the building, the strength of its walls and girders, and the light and heat required, are elements which depend on the nature of the work to be done in the building, and the mechanism by which that work is to be carried on. I need hardly say that the degree of mutual adaptation of building and machinery will vary in different trades, and therefore there can be no absolute rule as to machinery in general, but only a presumption. In the present case the more valuable articles in dispute are lace looms, placed in a weaving-shed of suitable construction, and so proportioned to the dimensions of the looms that the uppermost part of the frame (I think it was called the Jacquard frame) admits of being bolted to the frame of the roof of the building. I think this is sufficient adaptation of the machine to the building to satisfy the notion of fixation or attachment to the inheritance.

I do not propose to enter on a review of the decisions, but I desire to express my concurrence in the recent judgment of the High Court in England under which textile machinery was held to pass with the freehold. I may also notice that this decision accords with the earliest considered judgment of our Court—I mean the case of *Arkwright* v. *Billinge*, reported in the Faculty Collection, 1819, where the machinery of a cotton-mill was held to be included in a heritable security over a mill. Although the validity of this decision is questioned by Bell, whose opinion on such a matter will always receive most respectful consideration, I am not aware that in principle this case has been overruled by a decision of this Court.

The law of Scotland does not enable the owner of moveables to give a creditor a security over them without possession, but where they have been incorporated with the heritable estate the aggregate subject may of course be conveyed to a creditor by bond and disposition in security. It is not disputed that the words of conveyance are sufficient to carry the machinery if the machinery has been made heritable by being affixed in the legal sense of the term. I see nothing to regret in this result—I mean there is no reason of public policy that I can see against a millowner being allowed to use as a fund of credit the machinery which he has fitted to buildings adapted to receive it. I agree that the judgment of the Sheriff Court is right, and that the appeal should be dismissed.

LORD ADAM and LORD KINNEAR concurred.

The Court affirmed the interlocutor of the Sheriff-Substitute.

Counsel for the Appellant—Campbell, K.C.—Younger. Agents—Campbell & Smith, S.S.C.

Counsel for the Respondents—Clyde, K.C.—M'Clure. Agents—Macpherson & Mackay, S.S.C.

Friday, December 5.

FIRST DIVISION.

[Sheriff Court at Glasgow.

HARPER *v.* JAMES DUNLOP & COMPANY (1900), LIMITED.

Reparation—Negligence—Master and Servant—Common Law — Unloading Rails from Bogie—Wrong System of Unloading—Too Few Men Employed at Particular Job—Process—Jury Trial—Issue at Common Law and under Employers Liability Act—Issue at Common Law Refused.

A platelayer in the employment of a limited liability company, carrying on business as iron and coalmasters, was engaged in laying a new single line of railway at their works, under the direction of a foreman platelayer, and was injured while pulling a rail off a bogie. In an action at his instance against his masters for damages for personal injuries at common law and also under the Employers Liability Act 1880, he averred, *inter alia*, that the accident was caused by the fault of the defenders, their manager, assistant manager, and foreman—(1) through a wrong system of removing the rail being employed, and (2) through too small a number of men being engaged at the work, three of the eight men forming the squad having been previously sent away to other work. He further averred that the wrong system was only adopted or permitted to be adopted by the defenders, their manager, assistant-manager, and foreman, owing to the reduced number of men, and that they should, and easily could have, obtained a greater number of workmen by recalling the three sent away or calling in others of their workmen. *Held* that no relevant case at common law had been stated, and issue at common law *refused*.