objection taken at the bar to the report is not well founded. What the Lord President said with the concurrence of his brethren was, that interest was not due on the accounts rendered, during the course of the dealing, but as to whether it was claimable from the last rendering after the dealing was closed, he found it unnecessary to decide, in consequence of the defenders' admission of liability from the date of the last item. The opinion, however, which was here reserved may be inferred from what the First Division did. The same ground upon which the Court refused to allow interest from the date of rendering accounts during the course of dealing would lead to the same conclusion in reference to a claim for interest from the rendering of the account at the close of the dealing.

In these circumstances I am of opinion that the claim made in the present case for interest on the agents' account calculated on the sum brought out at each 31st of December cannot be admitted. The account was not rendered in the present case by Mr Blair at all. It was for the first time presented by his representatives when they lodged it in the present action. I am of opinion that interest can only be allowed on the sum-total of the account from the date at which it was lodged in this process, which was the period when the judicial demand was first made, unless there be some excuse for the delay. Now, it is said that the clients were poor, and that it was useless to demand payment from them in America. This is no excuse, if damages for non-payment in the shape of interest was intended to be claimed. It was further said that it was uncertain who the person in America was to whom the account should be sent, and by whom payment must be made. From the letters produced I infer the contrary, and that there was always a person in America who had a legal title to settle this matter with Mr Blair. Consequently upon the whole matter I think that while affirming the first instruction of the Lord Ordinary to the effect that credit must be allowed to Mr Blair for sums lodged with Kinnear, Smith, & Co., the latter part of the interlocutor should be altered, and the instruction should be given to the accountant to allow credit for the claim of interest on all cash advances from the date of each advance, and interest on the business-account only from the date of lodging these in this process.

The Lord Justice-Clerk and Lord Young were absent.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the reclaiming-note for Charles Edmond FitzHugh Payne and others against Lord Lee's interlocutor of 25th June last, Recal the said interlocutor: Find (1) that credit is to be allowed to Mr Blair for the sums lodged by him with Messrs Kinnear, Smith, & Co.; (2) that Mr Blair's representatives are entitled to credit annually at 31st December, as claimed by them, on the cash advances charged in their account-current; (3) that Mr Blair's representatives are entitled to take credit for their account so far as consisting of professional business only from the date of the production of the account in the present process: Remit the cause to the Lord Ordinary with instructions to give effect, or to remit to the Accountant to give effect, to the foregoing findings, and to proceed further as may be just: Find no expenses due by either party to the other since the date of the said interlocutor, reserving to the Lord Ordinary to dispose of the previous expenses in the case."

Counsel for Raisers (Blair's Representatives)—Goudy—Dickson. Agents—Scott, Bruce, & Glover, W.S.

Counsel for Objector—Pearson—Baxter. Agents—Boyd, Jameson, & Kelly, W.S.

Saturday, November 8.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

MOORE *v.* BELL AND OTHERS.

Succession—Heritable and Moveable—Heir and Executor—Machinery.

Held in a question between heir and executor (1) that cisterns not affixed to the ground, but by reason of their weight immoveable without being taken to pieces, and which had been brought into the works in which they stood for the purposes of enhancing their use as a pottery, were heritable; (2) that printing-presses used in the pottery in connection with steam heaters which were fixed to the walls, but which presses were complete in themselves, detached from the building, and capable of being used elsewhere, were moveable.

Succession — Sale of Business Premises with Machinery, Plant, and Goodwill—Goodwill—Question whether Heritable or Moveable.

Business premises were, on the death of the proprietor, sold with the whole machinery and whole plant and utensils which had been in use in them, as also the goodwill of the business, and the purchaser was taken bound at the same time to take over and pay for the whole stock-in-trade of whatever kind at a valuation. The next-of-kin of the deceased proprietor, in addition to the price of the moveable machinery and plant admittedly belonging to them, claimed a share of the price realised for the whole subjects at the sale, in respect of their right to the goodwill of the business. *Held* that the price of the moveable machinery had been enhanced by being sold along with the heritable subjects for the purpose of enabling the purchaser to continue the business, and that there was no separate element of goodwill not covered by that enhanced price to which in a question with the heir-at-law they could lay claim.

Right in Security—Bond and Disposition in Security of Cash-Credit with Bank—Intention of Ancestor—Heir-at-Law and Next-of-Kin—Act 1696, *c.* 5—31 *and* 32 *Vict. c.* 101 (*Titles to Land Consolidation (Scotland) Act* 1868), *sec.* 117.

A proprietor of business premises, who had granted a bond and disposition in security

over the premises for a cash-credit with a bank in connection with his business, died leaving a balance of the accounts secured by the bond unpaid. In a question between the heir-at-law and next-of-kin — *held* that the bond was intended to create a heritable debt, and that although it was moveable *quoad* the succession of the creditor, it remained heritable in so far as regards the liability of the debtor and his successors.

John Bell died intestate at Glasgow on 24th March 1880, without issue, and leaving large estates, both heritable and moveable. He carried on business at the Glasgow Pottery under the name of J. & M. P. Bell & Company, and was also sole partner in the Govan Tube-Works, and his liabilities at the time of his death were considerable. He was proprietor of the premises in which these works were carried on, and of a house in Glasgow, North Park House. There was at the time of his death a doubt as to who were his representatives, and a number of persons claimed to be decerned executors. They were all in humble circumstances, and unable to find caution, and certain creditors obtained sequestration of the estates. Alexander Moore, C.A., was, on 2nd April 1880, on the presenting of the petition for sequestration, appointed judicial factor on the estates, and on 8th October 1880 he was confirmed trustee on the sequestrated estates, and proceeded to realise and manage them in terms of the Bankruptcy (Scotland) Act 1856.

The pottery premises, with the whole machinery, fixed and unfixed, and the whole plant and utensils of every kind in use by the firm of J. & M. P. Bell & Company, as also the goodwill of the business, were in January 1881 exposed by the trustee (Mr Moore) for sale by public roup, and the purchaser was taken bound at the same time to take over and pay for the whole stock-in-trade of whatever kind, whether in a raw state, in process of manufacture, or manufactured, at a valuation which had been made by the firm's cashier. The result was that the lot comprising the works, machinery, plant, and goodwill of the pottery business was sold for £65,200, and the stock-in-trade for £12,350, the sum at which it was valued. A bond for £25,000 was paid up by the trustee. Before the sale the works had been valued at £50,878, and the machinery at £7580, with plant at £723, 8s. 6d. The valuator who did so stated that the valuation would not have been so high by £23,000 if the business had not been a prosperous one which was to be continued. The price was thus largely enhanced by the goodwill.

The Govan Tube-Works were for some time carried on by the trustee to avoid loss on contracts entered into by Mr Bell, and to ensure the better realisation of the works. Ultimately, however, he sold the works for £5350, the moveable plant and stock-in-trade being sold separately. There was a bond for £10,000 over the Govan Tube-Works granted in favour of the Union Bank. By the said bond the Tube Company and John Bell bound themselves and their respective heirs, executors, and representatives, and their successors, and the whole stock, funds, and effects of the company, all jointly and severally, without the necessity of discussing them in their order, to repay the sum due under the bond, and in security of the personal obligation Bell disponed to the bank the ground on which the Govan Tube-Works were situated, and the whole engines, shafts, boilers, machinery, and whole other plant and utensils, heritable and moveable, fixed and unfixed, situated on or connected with the said portion of the ground or the buildings and others erected thereon. The bank deducted from their claim under this bond certain sums which stood at Bell's credit on other accounts, but their claim was greater than the sum of £5350 obtained for the works.

The processes before the Court in the present proceedings were two actions of multiplepoinding and exoneration, of which one was raised in November 1882, and the other in January 1883. Both were raised in name of Mr Moore, the trustee in the sequestration of Bell's estate, as pursuer and nominal raiser. Of the former the real raisers were a number of the next-of-kin of Bell who had been decerned executors-dative in that capacity, and they called as defenders, besides the nominal raiser, a number of the other next-of-kin and of persons claiming to be such, and of assignees of next-of-kin, and also the trustees of Bell's heir-at-law, who had recently died. Of the other the real raisers were the trustees of the heir-at-law. The processes were conjoined. In the first-mentioned of them the fund *in medio* was the moveable estate. The raisers alleged that a large sum was ready for distribution among the next-of-kin, and that the trustee ought to be enabled judicially to divide it; further, that all questions as to what was heritable or moveable could be settled in discussing the fund *in medio* in it and in the other process at the instance of the heir's trustees. In the other action the fund *in medio* was the heritable part of the estate, and the raisers alleged that much of what was claimed as moveable by the next-of-kin was truly heritable estate in a question of succession.

In both actions the nominal raiser (the trustee) lodged defences objecting that a multiplepoinding would, no doubt, be necessary when he was found entitled to his discharge; but that it was premature; that though a large sum belonging to the estate lay in bank it was not ready for distribution.

The objections to competency were ultimately repelled by the Lord Ordinary, and an order for claims was pronounced.

The leading questions discussed in the multiplepoinding between the heir's trustees and the next-of-kin related in the first place to the machinery in the Govan Tube Works and the Glasgow Pottery. Inventories of the machinery in these respective works having been made, the Lord Ordinary remitted to Professor Fleeming Jenkin "to consider the articles mentioned therein, and to take all proper means, by inspection or otherwise, to satisfy himself as to the precise nature, character, and construction of the different parts of the machinery and other subjects referred to in the said inventory, and how far and in what manner the same are attached to the ground or buildings; with instructions to the said" reporter "to hear parties if he shall think necessary, and to report all facts and circumstances which may appear to him to be material for ascertaining and determining the character of the different subjects set forth in the said inventories as heritable and moveable in a question between the heir-at-law and the next-of-kin." Mr Jenkin, after visiting

both the Pottery and the Tube Works, made a report in which he entered the various subjects examined under different classes. Under a class called by him Class A he included, *inter alia*, (1) massive iron rings resting on a granite floor, the stone floor and rings constituting a tube, and the rings (which were in segments bolted together) being firmly bolted to the floor; (2) cisterns of great size and weight placed on the floor, the other above that on the floor, and surrounded by the planking of the next storey. Class B contained machinery completely built into the structure of the factory. Class C contained shafting and gearing, the shafts revolving in bearings supported by brackets firmly secured to the wall. Class D contained machines complete in themselves but permanently attached to the walls or foundation-stones of the building. Class E contained machines not complete in themselves but the several parts of which were firmly secured to foundation-stones or to parts of the building. Class F contained machines wholly detached from the building and complete in themselves. Mr Jenkin marked as 45 and 46 D F certain printing presses, which were machines in themselves used in connection with steam heaters but not attached to them in any way. They simply rest on the floor, but holes exist in the feet by which they might have been bolted down. The steam heaters were not bolted down, but were permanently connected with steam pipes which were secured to the building.

The second question of legal importance which was raised in the actions was whether the next-of-kin were entitled, in respect of their right to the goodwill of the business, to any part of the price of £65,000 which was paid for the Pottery, including the machinery, plant, and goodwill, except to such part as might be applicable to the moveable machinery and plant. The third question was whether the unpaid balance of the amounts intended to be secured by the bond and disposition in security over the Govan Tube Works to the Union Bank of Scotland formed a proper charge upon the heritable succession. The next-of-kin claimed as moveable estate, or otherwise as falling to be distributed among them, "the proceeds of the pottery subjects and business, including not merely the sum of £923, 8s. 6d., the price of certain moveable utensils, but also the whole other proceeds, including the price of goodwill and the price of machinery and others, in so far as the same was (as it in fact to a large extent was) moveable, as between heir and executor, and excepting only so much of the price obtained as represents the value of the heritable subjects properly so called." They further claimed that the heritable debt due to the bank having been paid out of the moveable estate, they were, in a question with the heir-at-law, to be creditors in the first instance for the difference between the amount of the sum drawn by the bank from the moveable assets and the proceeds of the sale of the property so far as the proceeds represented heritage.

The trustees of the heir-at-law maintained:—"There was no realisable goodwill connected with the pottery subjects to which the next-of-kin are entitled. The whole price realised represents the value of the heritable subjects, except the sum of £923, 8s. 6d. Explained that by the articles of roup of the pottery subjects the purchaser was bound to take over the stock at the valuation therein mentioned, and in this way a far larger price was obtained for said stock than it was really worth, and this to the prejudice of those entitled to the prices of the heritage by burdening the purchaser of the heritable subjects with this condition as to taking the stock." As regards the bond, they replied that it never constituted a valid heritable security, and could not be dealt with as such; or otherwise, in any event, after exhausting the heritable objects specially conveyed by the said bond, the balance of the debt due to the bank fell to be paid by the moveable estate.

The Lord Ordinary (KINNEAR) allowed a proof to the parties (under reservation of all questions as to accounting) of their averments as to the distribution of the estate of the late John Bell as between heir and executor, and the incident of debts and charges thereon, including (*a*) the question as to the proceeds of the sale of the pottery subjects, amounting to £65,200 or thereby; (*b*) the question as to the proceeds of the Govan Tube-Works and the liability for the debt due to the Union Bank of Scotland mentioned on record; and (*c*) the claim against the estate for rents for use made by the trustee of (1) the pottery subjects so far as heritable, (2) North Park House, and (3) the Govan Tube-Works so far as heritable.

Thereafter he found, on the proof led—"*First*, that the articles marked F in the inventory of the machinery and plant of the Govan Tube-Works are moveable, and that the other articles in said inventory are heritable: *Second*, that the printing presses mentioned in the items marked 45 and 46 D.F. in the said inventory of the machinery and plant of the Glasgow Pottery are moveable; that the steam-heating chests and connecting pipes mentioned in the said items are heritable, and that all the other articles in the said inventory are heritable: *Third*, that in the distribution as between heir and executor of the proceeds of sale of the Govan Tube-Works the sum of £150, 10s. 4d. must be held to be the price of moveable machinery and plant, and belongs to the executors, and that the sum of £5199, 9s. 3d. must be held to be the price of the heritable subjects, and belongs to the heir-at-law: *Fourth*, that in the distribution as between heir and executor of the proceeds of sale of the Glasgow Pottery subjects the sum of £989, 8s. 6d. must be held to be the price of moveable machinery and plant, and belongs to the executors, and that the sum of £64,210, 11s. 6d. must be held to be the price of the heritable subjects, and belongs to the heir-at-law: *Fifth*, that the sum of £12,350, being the proceeds of the stock-in-trade sold along with the pottery subjects is moveable, and belongs to the executors: *Sixth*, that in addition to the said sums of £989, 8s. 6d. and £12,350 the executors are not entitled to any further share of the proceeds of sale of the Glasgow Pottery with the machinery and plant in respect of the goodwill of the business . . . . . *Ninth*, that the debt to the Union Bank of £8468 3s. 3d., referred to in the discharge, being the balance of principal and interest due under and in virtue of the bond and disposition in security, is, in a question between heir and executor, to be regarded as an heritable debt which falls to be charged upon the share of the estate falling to the heir-at-law," and appoints the case to be put

to the roll for further procedure; grants leave to reclaim.

"*Opinion.*—The most important questions discussed arise out of the sale of the pottery with the plant and stock. The pottery premises, with the whole machinery fixed and unfixed, and the whole plant and utensils of every kind in use by the firm of Bell & Co., as also the goodwill of the business, were exposed for sale by public roup, and the purchaser was taken bound at the same time to take over and pay for the whole stock-in-trade of whatever kind, whether in a raw state, in process of manufacture, or manufactured, at a valuation which had been made by the firm's cashier. There can be no question that this was by far the most advantageous mode of sale which could be adopted in the interests of the representatives of the deceased. The result was that the pottery and plant were purchased for £65,200, and the stock for the valuation price of £12,350; and the prices so obtained fall to be divided between the heir-at-law or his representatives and the next-of-kin, in accordance with their respective interests in the various subjects of sale.

"The first question is, whether any, and if so what, part of the machinery described in Professor Fleeming Jenkin's report is moveable. The general rule for determining this question, as it is expressed by the Lord Chancellor in *Brand* v. *Brand*, 3 R. (H. of L.) 20, who says that it is a rule to which there is no exception whatever, is that 'whatever is fixed to the freehold of land becomes part of the freehold or the inheritance.' But the difficulty is to determine what is and what is not to be considered as in fact part of the freehold; and for solving that question the most authoritative rule is probably to be found in the interlocutor which was approved of by the House of Lords in the same case, and which was taken from the order of the House in the previous case of *Fisher* v. *Dixon*. By that interlocutor fixed machinery in the sense of the rule was found to include 'All the machinery and plant and those parts thereof . . . 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.' The interlocutor is not applicable in terms to the circumstances of the present case, because the machinery in question in *Fisher* v. *Dixon* was used in connection with the working of minerals. But the principle there laid down has regulated the decision of a variety of cases with reference to machinery fixed more or less firmly to buildings for the purpose of carrying on a manufacture, and particularly in *Holland* v. *Hodgson*, L.R., 7 C.P. 328, in which the previous decisions are examined by Lord Blackburn. It is decided in these cases that where an article is fixed to the building, though only by screws and bolts, it is to be considered as part of the land; at all events, when the object of setting up the article is to enhance the value of the premises to which it is annexed for the purpose to which they are applied. In the application of that rule there can be no question about the machinery in classes B, C, D, and E; and, on the other hand, there is just as little about the machinery in F. The only real difficulty is with reference to class A, and in that class there can be no doubt with reference to the machinery which is described as being fixed to the building by screw-bolts of the kind which, according to the report, are intended for the purpose of making a permanent connection. There may be more difficulty as to the cisterns 9 and 13, which are only fixed by their own weight, but they are in fact immoveable if they are not taken to pieces, and they were plainly brought into the building to enhance its utility as a pottery, and not merely for the mere convenient use of the cisterns as moveable articles. On the whole, it appears to me, after consideration of Professor Jenkin's detailed description, that there is nothing in the list of the machinery in the pottery to which the rules as laid down are inapplicable except the printing presses marked 45 and 46 D, F. With regard to these, it appears to me that as the steam-heaters are permanently connected with steam-pipes secured to the building they must be considered as heritable, but that as the printing presses are not in any way attached to the steam-heaters, and are not bolted down, but are machines that are complete in themselves and wholly detached from the building, they must be considered as moveable. In the inventory of the Govan Tube-Works all the articles marked F are in my opinion moveable, and the rest heritable.

"II. The second question is, whether the next-of-kin are entitled, in respect of their right to the goodwill of the business, to any part of the price of £65,200 which was paid for the pottery, including the machinery, plant, and goodwill, except to such part as may be applicable to the moveable machinery and plant. I am of opinion that they are not so entitled, because no part of the price in question can be shown in fact to have been paid in consideration for any right which had vested as a moveable right in the next-of-kin. There can be no question that what is called the goodwill greatly enhanced the value of the whole of the subjects exposed for sale, and it was for that reason that they were exposed together, and that the purchaser was required at the same time to take over the stock at the price of £12,350. In other words, the premises, plant, and stock, when sold together, brought a higher price, because they were bought for carrying on a going business with all the advantages which a purchaser could have for obtaining the benefit of its established reputation and connection. These advantages, in so far as they are marketable, are the elements which go to make up the value of goodwill, and the question is, which of these can be shown to have been purchased from the next-of-kin, and which from the heir-at-law. Upon the evidence I do not think there can be any doubt as to what in fact were the various elements which went to enhance the value of the subjects to the actual purchasers. The most important probably was the pottery itself, with the fixed machinery and plant, because the trustee is of opinion that, apart from the premises, the goodwill was not a marketable commodity, and in connection with their

purchase of the heritable subjects they had an incidental advantage of great value from the fact of Mr Murdoch, the late Mr Bell's manager, being one of the number, because he had been practically the sole manager of the business for many years, was known as such to the customers, and was enabled to secure the services of the old staff. There was undoubtedly a great advantage also in the possession of the moveable plant and stock, because without these the purchasers could not have carried on the business as they did uninterruptedly. But I do not think it necessary to consider a question as to which there was a great deal of controversy both in evidence and in argument, viz., Whether, if the property of the moveable and heritable subjects had been separated the heir would have had a greater difficulty in carrying on the business without the moveable plant and stock, or the next-of-kin without the premises and fixed machinery? That appears to me a perfectly immaterial consideration, because they were not in fact separated, but sold together for the purpose of enabling the purchaser to carry on the business without interruption. The material consideration is, that all these moveable articles which are said to have been essential to a continuance of the business, were in fact sold and purchased along with the heritage; and that not only was the price which admittedly belongs to the next-of-kin very greatly enhanced by that method of disposing of the moveable subjects, but that a large sum was obtained for great part of the stock in process of manufacture, which if it had been sold in the market would have fetched little or nothing. It appears to me that when the purchasers had bought the premises and fixed machinery and plant, the moveable plant and the stock, and when they had obtained the services of the former manager, Mr Murdoch and his staff, there remained no other appreciable element of goodwill for which the next-of-kin could have expected to obtain a price. It is said that Mr Bell's patterns and the trade name were of value, but the patterns were bought and paid for in the purchase of the moveable machinery and stock, and the next-of-kin will have the price. As to the name the purchasers have adopted, they had acquired all the necessary means for carrying on the business independently of the name; and it is very doubtful whether, if goodwill had not been mentioned in the articles of roup, the next-of-kin would have had a title or interest after the sale to object to the name adopted by the purchasers, seeing that they were not in a position to carry on the business for themselves. But if it should be held that they had a marketable right in the trade name, which was carried by the sale of their interest in the goodwill, it appears to me that they have obtained the full value of that right in the enhanced price of their plant and stock. It must be kept in view that the stock belonging to them was sold for upwards of £12,000, upon the footing of its being purchased as the stock of a going business, along with the premises and plant. It would have been out of the question for them to maintain, after a sale upon these terms, that the purchaser was not entitled to represent himself as Mr Bell's successor in business, whether goodwill had been specially mentioned or not.

"III. The claim for rent for the use of North Park House appears to me untenable. It is not suggested that the heir-at-law was in any way prejudiced by the trustee's delay in removing the moveable property which was left in the house by the deceased, or that his administration in this respect was other than reasonable. It is not said that the house ought to have been let, or that any opportunity for letting it was lost in consequence of the furniture and pictures not having been removed. I see no ground in law upon which the claim can be supported. Nor do I think that the heir has any claim for rent for the Govan Tube Works during the period between Mr Bell's death and the sale, since the next-of-kin take no benefit from the occupation of the works during that time. On the other hand, it is not disputed that the profits which after Mr Bell's death were earned at the pottery by the joint use of the heritable and moveable estate, must be divided between heir and executor according to their several interests. The sum fixed in the interlocutor appears to me to represent the share to which, according to the evidence, the heir is entitled.

"IV. It was maintained for the heir that the bond over Govan Tube Work was not a good security to the Union Bank for the unpaid balance of their account, since it is not framed in proper form as a security for a cash-credit, and was therefore ineffectual under the Act 1696, cap. 5, as a security for future debts. It is unnecessary to consider whether it might not be supported as a valid security in a competition between creditors by the provisions of the Acts 19 and 20 Vict. cap. 91, 20 and 21 Vict. cap. 19, and the Titles to Land Act 1868, section 134, because the question between heir and executor does not depend upon the bond being found to create an effectual preference in a competition, but—according to all the authorities—upon the intention of the ancestors to create a heritable or a movable debt. There can be no question that the bond was intended to create a heritable debt; and under the Act of 1868 such a debt remains heritable in so far as regards the liability of the debtor and his successors, although it is now moveable *quoad* the succession of the creditor. It appears to me, therefore, that the unpaid balance of the accounts secured, or intended to be secured by the bond in question, forms a proper charge upon the heritable succession.

"I am not in a position to fix the amounts which will fall to the heir and the next-of-kin respectively as the value of their respective interests in the machinery and plant. But the parties will have no difficulty in adjusting the amounts in conformity with the opinion which has been expressed."

The next-of-kin reclaimed, and argued—They had a substantial interest in and right to the goodwill of the business, which was a fair subject of division between the heir and next-of-kin as being just the value which the purchaser paid for the chance of securing a profitable business. The business was long established and of good reputation, and was a wholesale business conducted by correspondence, and not depending like a retail one on resort, and further, two-thirds of it were foreign, the materials used in it being imported from France, and not obtained on the spot. On a sale of an established business its goodwill had a material value, whether in the case of a

professional man or other person. The patterns and trade-mark were important items in the goodwill, and without them the business would not have been a profitable one. It was clearly settled that they were assets of a firm saleable on dissolution like any other asset. The goodwill, then, of this business formed an item in the assets of the firm separate and separable from the heritage, and in which the next-of-kin had a distinct and substantial interest.

Authorities—*Churton* v. *Douglas*, March 1859, Johnston's Eq. 174 (opinion of Vice-Chancellor Page Wood, p. 180); Lindley on Partnership, vol. 2, pp. 859 and 863; *Bain* v. *Munro*, January 10, 1878, 5 R. 416.

The respondents replied—Goodwill was not a saleable commodity by itself or separable from the heritage here—*Chersuin* v. *Dewes*, July 1828, 5 Russell's Rep., p. 29, Ch. Cas.; *Pile* v. *Pile*, May 1876, L.R., 3 Ch. Div., p. 36; *ex parte Punnet in re Kitchin*, November 1880, L.R., 16 Ch. Div., p. 226. It did not belong ordinarily to the executor but effeired to the premises in which the trade was carried on. But granting that it was marketable by itself, the moveables and heritage had in point of fact been sold together, and it was obvious that the price awarded to the next-of-kin in name of moveables was very greatly enhanced by this fact, and a much larger price obtained than would have been the case if they had been each sold separately. If everything, *i.e.*, all the stock, patterns, &c., except this imaginary goodwill, were sold, the next-of-kin could not prevent the purchaser selling the articles he manufactured under the former firm name. The Lord Ordinary's judgment, then, was right. (2) But he had decided erroneously in holding that the unpaid balance of the accounts secured by the bond and disposition in security in favour of the Union Bank formed a proper charge on the heritable succession. The burden of the debts of the ancestor attached to the real and personal estates according to their respective qualities, and in a question between the real and personal representatives the heir who pays a moveable debt, or the executor who pays an heritable debt, has relief against that part of the succession which is primarily liable—Erskine, iii. 9, 48; Bell's Prin., 1936; M'Laren on Wills and Succession, vol. ii. p. 476.

The next-of-kin replied, on this second point, that it was clear that the bond was intended by the ancestor here to create a heritable debt, and therefore the Lord Ordinary was right in charging it on the heritage. They cited the cases of—*Macleod's Trustees et al*, June 28, 1871, 9 Macph. 903; *Duncan, &c.*, June 22, 1883, 10 R. 1040.

At advising—

The Lord Justice-Clerk delivered the opinion of the Court as follows:—In the winding-up of the estate complicated and important questions have been argued before us, and after full consideration of the case I have come to be of the same opinion as the Lord Ordinary, although I have felt considerable difficulty on the question raised as to the sale of the goodwill of the business. On this point he says—The second question is, whether the next-of-kin are entitled, in respect of their right to the goodwill of the business, to any part of the price of £65,200 which was paid for the pottery, including the machinery, plant, and goodwill, except to such part as may be applicable to the moveable machinery and plant. Then he goes on to say that there can be no "question that what is called the goodwill greatly enhanced the value of the whole of the subjects exposed for sale," and at some length explains in detail his views on the matter, whether there is a separate or separable element of goodwill not covered by the enhanced price given for the other articles. I have come to be of the same opinion arrived at by him, and on the same grounds stated by him, that there is no such separate element of goodwill.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties on the reclaiming-note for James Bell and Others against Lord Kinnear's interlocutor of 26th March last, Refuse the reclaiming-note, and adhere to the interlocutor reclaimed against: Find the reclaimers and the respondents entitled to payment out of the sequestrated estate, of the expenses incurred by them since the date of the said interlocutor: Remit to the Auditor to tax the same and to report, and remit the cause to the Lord Ordinary to proceed therein as accords, with power to decern for the amount of the expenses now found due, when taxed."

Counsel for Reclaimers—Pearson—W. Campbell. Agents—J. B. M'Intosh, S.S.C.—J. & J. Galletly, S.S.C.

Counsel for Respondents—Mackintosh—Dickson. Agents—William Finlay, S.S.C.—C. & A. S. Douglas, W.S.

Tuesday, November 4.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

M'WHIRTER *v.* CAIRD AND ANOTHER.

Right in Security—Transmission of Personal Obligation against Singular Successor—Renunciation.

A, who was possessed of heritable property of the value of £40,000, burdened with heritable bonds to the amount of £37,000, entered into an agreement with B and C whereby they undertook to become cautioners for a composition to his creditors, while A on his part undertook to convey to them his whole estate heritable and moveable. The agreement contained a provision that B and C should have the absolute power of management of the whole subjects conveyed "with power to renounce any of the separate subjects, and give the same up to the heritable creditors for their separate heritable debts, according to their rights therein," and with power to sell and dispose of the subjects or any of them for their own benefit. A was to give his skill and attention in the management of the properties at a fixed weekly wage. The whole profit or loss was to be divided equally between B. and C. The agreement was implemented by A by a