

men. But regard must, in such a question as the present, be especially had to the nature of the work. There are manufactures which cannot be carried on without a certain measure of risk, which those who take service in such an employment must be considered as voluntarily encountering. The manufacture of malleable iron necessarily involves a large production of sparks, not merely when the metal is under the forge-hammer, but also afterwards, when it is transferred to the rollers for the purpose of being rolled out into bars. There is a propriety in affording a certain measure of protection, by means of screens, to those who may be engaged in stationary employment, in the close vicinity of the forge-hammer; but it is out of the question to demand that the masters of such a work should guarantee every corner of the yard against a stray spark, and repair whatever damage such a spark may occasion in any part of the premises. This is just the risk the workmen run when engaging in such a service, and against which they must do the best they can for their own protection. The pursuer in the present case was not one of the stationary workmen employed in the manufacture of the iron. He was temporarily engaged in serving a bricklayer employed for a day or two in repairing a furnace, about 30 feet distant from the hammer, which for the time was blown out. It is proved that there was a screen on this side of the forge-hammer. The Lord Ordinary can find no ground for holding that any particular apparatus was in addition called for to protect the bricklayers in their temporary job. It was pretty manifestly a stray spark which inflicted the injury. It is not proved that the spark came from the forge-hammer, although the issue assumes this as an essential part of the question. It just as probably came from the roller. It might have lighted on the back of the pursuer, and done him little or no injury. By a contingency which may not happen once in many years, it lodged in one of his eyes, and deprived him of the sight of that eye. 'But this diversity of circumstances cannot prevail to alter the character or extent of the defenders' responsibility.'

ROBERTSON *v.* GRAHAM.

Sale—Periculum. In an action for the price of a horse which was sent to the purchaser by railway, and arrived in a damaged state, held that the risk was the purchaser's, and therefore verdict for the pursuer.

Counsel for the Pursuer—Mr Mair. Agent—Mr W. Officer, S.S.C.

Counsel for the Defender—Mr Lancaster. Agents—Messrs Wilson, Burn, & Gloag, W.S.

The pursuer in this action is Donald Robertson, dealer in horses, Edinburgh, and the defender is Mrs Susan Roope Schuyler or Graham, residing at Brooksby, Largs; and the issue sent to trial was as follows:—

"Whether, on or about the 7th day of April 1865, the pursuer sold and delivered to the defender a brown mare at the price of £40 sterling, and whether the defender is resting owing to the pursuer in the said sum of £40, with interest, from the said 7th April 1865?"

It appeared from the evidence that on the date in question the pursuer sold to the defender a brown mare at the price of £40, and on the same day the mare was, by the authority of the defender, sent off, addressed to her at Largs, by the Edinburgh and Glasgow Railway. At the time of delivering the mare to the railway company, the pursuer's son, Duncan Robertson, subscribed, as on the owner's behalf, the usual horse ticket required by the railway company, bearing that the carriage of the mare was to Glasgow, and that the owner undertook to bear all the risk of injury and loss which might arise during its transit upon their railway, and to free the company from all liability or claim therefor, except for such as might arise from injury occasioned by

their neglect or default. The mare having been carried by the railway company to Glasgow, was placed for that night in livery stables, and next day was handed over to a steamboat company for transmission to Largs by water. On its arrival at Largs the same evening the mare was given over to the defender, but in a greatly deteriorated state, from injuries sustained on the passage. The defender now pleads that the carriage of the mare to Largs was at the risk of the pursuer, and that she was not bound to take delivery of it unless it arrived there in good condition. His Lordship has, however, to-day decided in favour of the pursuer, finding that the delivery of the mare at Edinburgh to the Edinburgh and Glasgow Railway Company was delivery by the pursuer to the defender, and that no sufficient ground has been shown for holding the legal consequences of such delivery to have been obviated. With reference to subscription of the railway ticket by the pursuer's son, his Lordship observes in his note:—

"The defender maintains that by subscribing this ticket the liability of the railway company was limited from that which lay on them at law as common carriers to a mere liability for the consequences of their neglect or default, and that as this materially affected the defender's right to recover damages for the injuries done to the pony on the journey, she was thereby liberated from all responsibility for the price. The Lord Ordinary has not, however, given effect to this plea. The Lord Ordinary is of opinion that the proceeding complained of was not such as in itself had the effect of liberating the purchaser from responsibility for the price. It is true that it somewhat limited the common law liability of a carrier, which, according to well-known authorities, extends to every damage whatever, except what arises from the act of God or of the Queen's enemies. But the ticket expressly maintained the company's liability for whatever damage might arise through their neglect or default. It is plain from the proof that this was the usual condition of carriage of horses by the railway. The ticket was a printed form. It is not clear that the railway company would have taken the pony on any other footing. At any rate they would have charged a higher sum for the enlarged risk. There is authority for conceiving that a vendor is not entitled without special authority from the vendee, to pay the extra cost of insurance against unlimited risk. Bell's Commentaries, ii. 444, *Cothay v. Tute*, 3 Campbell 129. The Lord Ordinary is of opinion that in this case the vendor did enough to bind the railway company, where no special instructions were received from the vendor to do more.

Thursday, March 22.

FIRST DIVISION.
EXTENDED SITTINGS.

SWANS *v.* WESTERN BANK.

Accretion—*Jus superveniens auctori*. A having conveyed certain heritable subjects in 1847 to B, and in 1849 to C, held (aff. Lord Barcaple) that a reconveyance by B to A in 1854 accreted to C.

Counsel for Suspenders—Mr Clark and Mr Donald Crawford. Agents—Mr John Martin, W.S.

Counsel for Respondent—Mr Patton and Mr A. B. Bannatyne. Agents—Messrs Hamilton & Kinnear, W.S.

This case involved a question as to the sufficiency of a title offered by the liquidator of the Western Bank to Messrs Swan, builders in Glasgow, to whom he had sold the lands of Mount Florida and Hangingshaw, near Glasgow. Messrs Swan being dissatisfied with the title offered, brought a suspension of a threatened charge for payment of the price of the lands.

It appeared that Mr William Dixon had acquired

the subjects in 1846, and that in 1849 and 1851 Mr Dixon granted a conveyance, and a supplementary conveyance, by which he disposed them to Mr William Johnston as his trustee, who in April 1854 conveyed them to Mr James Buntin, from whom they were acquired by the Western Bank. Before conveying to Mr Johnston, however, Mr Dixon in 1847, by an *ex facie* absolute disposition, had conveyed the subjects to the Commercial Bank, who were infert. In March 1854 the Commercial Bank granted a reconveyance to Mr Dixon, on which he was infert. In these circumstances the suspenders maintained that the trust-deeds in favour of Johnston, having been granted by Dixon when he had no title or right of any kind to the lands, the trust-deeds and Johnston's infertment thereon were therefore invalid, and incapable of being validated by the accretion of the right subsequently acquired by Dixon under the Commercial Bank's conveyance to him. The Lord Ordinary (Barcaple) repelled this plea, founding on Stair (3, 2, 1-2), Erskine (2, 7, 3-4), and Bankton (3, 2, 16).

The suspenders reclaimed; and cited Bell's Principles (sec. 882); Keith v. Grant, 14th Nov. 1792 (M. 2933); Munro v. Brodie (6 D. 1249); Glassford v. Scott (12 D. 893); Clark (12 D. 1047); and Dunlop v. Crawford (11 D. 1062, and 12. D. 518). The other side referred to Erskine and Stair *ut supra*, Menzies on Conveyancing (3d edition), p. 660, and Ross' Bell's Law Dictionary, *voce* "Accretion." The Court adhered.

The LORD PRESIDENT said—I cannot say I have so much doubt on this point as Professor Bell had. In 1847 Mr Dixon conveyed the subjects to the Commercial Bank, and in 1854 that bank reconveyed them to him. In the interval Mr Dixon had granted, in 1849 a trust-deed to Mr Johnston, and thereafter in 1851, a supplementary trust-deed. The question is whether, when Mr Dixon got the reconveyance in 1854, the right he then acquired accreted to Mr Johnston. There is no mid-impediment. It has been argued that the conveyance to the Commercial Bank was granted in security merely, and there is strong ground for so holding; but I take the argument on the assumption that it was an absolute conveyance, and am of opinion that the right created by the reconveyance did accrete to Mr Johnston. I think that is the fair meaning of all the institutional writers before Professor Bell. But we have his doubts, and also the opinions expressed by Lord Ivory in the case of Munro. I don't mention Lord Mackenzie, because I think any doubt expressed by him in Munro's case had disappeared before the subsequent case of Glassford occurred. He did not adhere to his doubt in that case. Professor Bell no doubt seems to have died possessed of his doubt. But it is only a doubt; and I cannot throw out of view the statement made by Mr Bell himself that the late Mr Robert Jamieson did not agree with him. Mr Jamieson was a man of high position and authority in questions of this kind, and although he was not professor of law in the University, I am inclined to place as much reliance on his opinion as if he had been.

LORD CURRIEHILL—The question is whether Mr Johnstone had power in 1854 to convey to Mr Buntin. His title consisted of two trust conveyances by Mr Dixon in which he had a power of sale. The objection taken is that Mr Dixon had divested himself in favour of the Commercial Bank before he conveyed to his trustee. I have no doubt that the conveyance to the bank was in security merely, but as there is no evidence of that *ex facie* of the deed, I assume that it was absolute. Now, was the power of sale effectual, Mr Dixon having previously divested himself? The reply is that in March 1854, a month before the power of sale was exercised the subjects had been reconveyed to Mr Dixon. There was no mid-impediment. The party who had granted the power of sale was reinvested before it was executed. I have no doubt that that right accreted to Mr Johnston. I concur entirely as to the retrospective effect of a conveyance granted

to a person who had previously been vested and as to its accreting to his disponent if there be no mid-impediment. I look upon this as an elementary principle of our law. And it is not inconsistent in any way with the rules of feudal law. On the contrary, the effect of a charter of confirmation is, by the common feudal law, irrespective of statute, retrospective to the date of the last entry, and it extinguishes all mid-superiorities created in the interval. The feudal law is therefore not repugnant to the doctrine of accretion.

LORD DEAS—I take the case on the same footing, and assume that the conveyance by Mr Dixon was an absolute one, and that the Commercial Bank was infert as absolute proprietor. When so denuded Mr Dixon granted this deed to Mr Johnston, and having been thereafter reinvested, the question is, whether that reconveyance accretes to his disponent. It is Mr Bell's doubt alone that gives importance to this case; but the doubt is expressed by no one else. The doubt expressed by Lord Ivory and Lord Mackenzie is of a different nature altogether. Their opinion was that if the grantor had a mere missive of sale there could be no accretion. It humbly appears to me that that view is unsound. Their objection would equally apply to a disposition with neither procuratory nor precept of sasine, or to a disposition in all respects formal, but having a flaw in the precept, and therefore incapable of being followed by valid infertment. If Lord Ivory was right there never could be accretion in such cases; but our law recognises bargains as to heritable subjects, although the seller has no right at the time; and it is the doctrine of accretion that meets such a case. The case of Keith v. Grant, which was referred to, differs from the present, because the question there arose with the grantor's heir.

LORD ARDMILLAN arrived at the same result. He thought that the doctrine of accretion had its root in equity. It was a remedy for a wrong, not repugnant to feudal rules and taking feudal effect, whereby, wherever there was a conveyance by a person having no title or an imperfect one, his disponent acquired right to any title or monument of title subsequently acquired by him, and of which good faith forbade that he should be deprived. The maxim *jus superveniens auctori accrescit successori* was not a feudal maxim. It is not put by Lord Stair as one, and it applies more strongly in a case where there is no title, than in one where the title is only inchoate just because the wrong is all the greater.

Friday, March 23.

RENNIE v. SMITH'S TRUSTEES.

Cautionary Obligation—Construction. A principal debtor having bound himself to pay six specified instalments of the cost of erecting three houses, and to pay the balance when the work was completed, and a cautioner having bound himself to see the creditor paid "the above instalments," held (alt. Lord Jarviswoode) that (the instalments having been paid) the cautioner was not responsible for the balance.

Counsel for Pursuer—Mr Gifford and Mr Alexander Moncrieff. Agents—Messrs J. & R. Macandrew, W.S.

Counsel for Defenders—Mr Clark and Mr Gloag, Agents—Messrs A. G. R. & W. Ellis, W.S.

The pursuer, a builder in Glasgow, contracted in 1862 with John Steven Harkness, a joiner there, to execute the mason, brick, and digger work of three houses which Harkness intended to erect in Anderson of Glasgow. By letter dated 18th July 1862, Harkness bound himself to pay to Rennie certain specified instalments of the contract price (amounting together to £600 for each house), "and the balance when the work is completed." The late Mr James Smith, architect in Glasgow, appended to the said letter the following obligation:—"Mr John