against liability as a contributory. It is not open to doubt, I think, that the shares held by Mr Law are not fully paid up—free from all further liability. Whatever these shares might be held to be in a question with the company if it was solvent, they cannot be regarded as fully paid up in the liquidation. The amount of the shares has not been paid in cash, and Mr Law has failed to take that step pointed out by statute whereby he could have given these shares the character and privileges of paid-up shares. If—not being paid-up shares—Mr Law is still a creditor for the price of his property, he may have a claim against the company's estate, but to hold him entitled now to set off that claim against his liability as a shareholder would be to give him a preference over the other creditors of the company. Further, compensation or set-off against liability as a contributory cannot be pleaded in a liquidation.

I have said that in my opinion the agreement made in March 1886 is that which must be taken as regulating the rights of parties. Would the result in this case be different if that agreement was set aside and the agreement of January substituted? I think not. Under it there was no obligation on the company to pay Mr Law any money. The company did, however, thereby undertake to relieve him of certain money obligations. It is pleaded that part of the shares allotted to Mr Law were allotted that he might fulfil the company's obligation of relief, and that being so allotted against an existing money obligation, no claim can now be made in respect of these shares on the principle of the decided cases I have already referred to. Without either expressing assent to or dissent from this view, I am of opinion that Mr Law cannot take any benefit from it. He has not shown—and cannot show—that the shares now held by him are shares which were issued by the company under their obligation to relieve rather than under their obligation to deliver shares.

I agree with the Lord Ordinary in thinking this a hard case for Mr Law. He has parted with his property for no valuable consideration, and the consideration which he did get has only, as it turns out, imposed upon him an additional liability. The shares allotted to him might have proved very valuable, and he doubtless thought they would. But it would be incorrect, in my view, to say that Mr Law got nothing for his property. He got exactly what he bargained for, and all that can be said is that, as matters have turned out, he made a bad bargain. He could have protected himself by a simple enough measure pointed out by the statute, and having failed to do so, must now contribute to the payment of those creditors whose debts might never have been incurred had they known that the greater part—or at all events a great part—of the capital of the company was represented by paid-up shares held by one of the shareholders.

The Court adhered.

Counsel for Liquidators—D.-F. Balfour, Q.C.—Burnet. Agents—Carmichael & Millar, W.S.

Counsel for Respondent—Asher, Q.C.—Strachan. Agents—Campbell & Smith, S.S.C.

Friday, July 10.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

COCHRANE *v.* STEVENSON.

Heritable and Moveable—Seller and Purchaser—Fixtures—Pictures Attached to the Wall.

In a dining-room in a mansion-house whose general design was wainscot panelling, there were three pictures all painted upon canvas on stretcher frames, and fastened to the wall by means of small plates and screw-nails concealed by dust mouldings. Two of the pictures were in ordinary gilders' frames, and behind them the wall was apparently roughly panelled. The third picture was in a mirror frame, which formed part of the architectural decorations of the room, but out of which it could be taken without injury to itself or the frame. Behind this picture there was a bare stone and lime wall.

Held that none of the pictures were fixtures, and that they did not pass to the purchaser of the mansion-house.

In December 1886 William Stevenson, Esq. of Househill, purchased the mansion-house of Hawkhead, in the county of Renfrew, from the trustees of the late Earl of Glasgow. In 1888 the Hon. Lady Gertrude Julia Georgina Boyle or Cochrane, daughter of Lord Glasgow, purchased the furniture in Hawkhead, and took possession of the same after Lord Glasgow's death, on 23d April 1890, had brought a lease of Hawkhead furnished to an end. Lady Gertrude requested Mr Stevenson to deliver up three pictures in the dining-room of Hawkhead as being part of the furniture of the house. Two of the pictures were portraits of Lord and Lady Wharton respectively, and the third was a portrait of Charles II. This Mr Stevenson declined to do on the ground that the pictures were fixtures, and had passed to him as part of the heritage. Thereupon Lady Gertrude and her husband, the Hon. Thomas Horatio Arthur Ernest Cochrane, brought an action against Mr Stevenson for delivery of the pictures, in which they pleaded, *inter alia*—"(1) The defender never having purchased the said pictures, has no right to retain possession of them. (3) The pictures are moveable, and are therefore the property of the pursuers."

The defender pleaded, *inter alia*—"(3) The defender should be assoilzied in respect—1st, The pictures in question form part of the structure of the house; 2nd, They are heritable; 3rd, They were conveyed to the defender by the disposition in his favour."

A proof was allowed, from which it appeared that the dining-room was originally the drawing-room, and that the general design of the room was wainscot panelling in white and gold; that all three pictures were painted upon canvas stretched upon wooden stretchers in the ordinary way; that none of the pictures were hung, but were fastened to the wall by means of small plates and screw-nails; that each of them had a dust moulding which concealed the fastening; that the Wharton pictures were enclosed in ordinary gilders' frames; that behind these pictures there was apparently some kind of panelling, but in a more or less rough condition; that between them there had been a mirror which had been allowed to be removed as part of the furniture; that the King's picture was fastened to a different wall, and was placed above the mantelpiece; that it could be and had in 1874 been taken out of its frame and removed for the purpose of cleaning by removal of the dust moulding; that its outer frame was of the nature of a mirror-frame, which formed part of the mouldings of the room, and harmonised with its general architectural design, and that behind the picture there was nothing but a stone and lime wall.

Thereafter the Lord Ordinary (KYLLACHY) pronounced decree in terms of the conclusions of the summons.

"*Opinion.*—The question in this case arises between the seller and purchaser of the estate of Hawkhead, and relates to three pictures in the dining-room of the mansion-house, which are claimed by the purchaser as forming part of the house, and as therefore conveyed to him under the general terms of his disposition. These terms, I may say, are in no way exceptional, the conveyance being of the lands as described by boundaries, and all houses and buildings thereon.

"The pictures in question are full length portraits—two of them of Lord and Lady Wharton, and the third of King Charles II. The two first are by an unknown artist, supposed, however, to be one Raleigh, a pupil of Sir Peter Lely. The other—that of the King—is said to be by Sir Peter Lely himself, and to be a replica of a picture the original of which is in Windsor Castle. Mr Dowell values it at 250 guineas, and is satisfied of its authenticity. Mr W. C. Angus, on the other side, considers it only a copy, and values it at 100 guineas. The other two pictures are valued by Mr Dowell at 50 guineas each, and by Mr W. C. Angus at about 10 guineas each.

"All three pictures are painted on canvas stretched on wooden stretching-frames in the usual way, and each picture is enclosed in a frame in which it could be moved about and hung upon or attached to any suitable wall. The frames of the Wharton portraits are ordinary gilt frames prepared by a gilder. The frame of the King's picture, again, is a mirror frame, the glass of the mirror having apparently at some time been removed, and the picture—stretched on its stretching-frame—inserted in its place. The three pictures as thus framed are attached to the walls by plates at the top and along the sides, similar to the plate shown on the model, and there is in each case round the outside of the frame a moulding known as a dust moulding, which is fastened to the frame and wall by sprigs, and which serves to conceal the plates, and also to prevent dust from getting into the space behind the picture. The walls of the rooms are panelled in painted wood as shown in the photographs, and the frames of the pictures are in each case fastened to the panelling as above described. But there is some uncertainty (which I think might have been avoided, and for which the defender seems responsible) as to what lies behind the Wharton pictures. The pursuers' witnesses say that behind those pictures the panelling of the wall is continued, the pictures being simply placed on the finished though perhaps unpainted panel. The defender's witnesses—while not disputing that behind the pictures there is wood-work flush with the rest of the panelling—say that the wood-work is rough and unfinished, and that they can find no trace of mouldings such as they would expect if the panelling was continuous. With respect to the King's picture, both parties are agreed that at that place the panelling has been either cut out or left unfinished—the space behind the picture (which is over the fireplace) being apparently a stone and lime wall.

"I am disposed on the question as to what is behind the Wharton pictures to prefer the evidence of the pursuers. The probability, I think, is that the panelling extends under the pictures, but at the same time, that in view of pictures being placed over it, the panelling there has not been painted, and perhaps not fully dressed. So far as continuance of the moulding is of importance, I do not see that the examination made by either party was fitted to ascertain the state of the fact. As regards all the pictures, my impression of the history of the matter is that when the room was being decorated there were certain places where it was contemplated to place mirrors or pictures; that where mirrors were to be placed the panelling was either omitted or cut away to prevent the mirrors projecting too much; and that where pictures were to be placed, the panelling was not finished so highly as over the rest of the room. I think, further, it may be taken as more than probable that when the room was converted (as it was) from a drawing-room into a dining-room, the mirror above the fireplace was taken out from its frame and the picture of the King substituted as more suitable for a dining-room.

"I should add, that on the same wall as the Wharton pictures there was a mirror—as shown in the photograph—having an ordinary mirror-frame, and fastened to the wall in the same way as the pictures, but having behind it no panelling, but only lath and plaster; and perhaps it is not without importance that this mirror was treated by both parties as moveable, and

removed by the pursuers after the sale without objection.

"I think these are all the important facts, except perhaps this, that the frame of the King's picture—originally, as I have said, a mirror-frame—while not bearing any relation to the cornice or panelling of the room, does appear to bear a relation to the pilasters and other decorations around the mantelpiece. That is to say, it (the frame) and the pilasters appear to have been introduced at the same time, and in style to harmonise with one another. There is no such relation between the frames of the Wharton pictures and the other mouldings on the wall.

"Upon these facts it seems clear enough that all three pictures would be moveable as between landlord and tenant—that is to say, they could all be easily removed without injury to themselves or to the walls of the house. But the defender says that they would be heritable as between heir and executor, and that the law as between seller and purchaser is the same as between heir and executor.

"I am not at all satisfied that the law on this subject as between heir and executor necessarily rules as between seller and purchaser. As between the latter the question must always be, what is the meaning of the contract? and in such cases there may be elements of construction available which may altogether supersede the legal presumptions. I shall consider presently whether there are not some such elements here, but in the meantime this seems at least certain, that the inferences and presumptions deducible from the nature of the article may be much more important and to the point as between buyer and seller than as between heir and executor. For example, supposing the question had here been as to family portraits—say of near relations of the seller; or supposing the pictures had been, say Raphaels or Murillos, worth as much perhaps as the fee-simple of the estate, that circumstance might, as between heir and executor, have been of little moment, but as between purchaser and seller it must have been almost conclusive. And although it is true that the pictures in question are not (as it now appears) family portraits, or at least portraits of near relatives, and only one of them is of special value, yet they are all works of art, having a value otherwise than as mere decorations, and certainly not a kind of article which generally goes with a house when a house is sold.

"Accordingly, I do not think that it is a satisfactory way of viewing the question to take it simply as if it had arisen between Lord Glasgow's heirs and Lord Glasgow's executors. At all events, in considering the authorities, I confess I prefer, at least in the first instance, to consider those cases which have occurred like the present, between buyer and seller, And here, as it happens, the authorities appear to be uniform.

"The leading case in England on the subject, and the only case in which—so far as I can discover—a question as to pictures, mirrors, and such like articles of ornament has been decided as between buyer and seller, is the case of *Beck* v. *Rebow*, 1 P.W. 94. In that case the Lord Keeper of the day held that hangings and looking-glasses fixed to the walls of a house by nails and screws, although put up in lieu of wainscot and having no wainscot underneath, were only matters of ornament and furniture, and did not pass to a purchaser as part of the house or freehold. And according to Amos & Ferrard on Fixtures, this decision has been frequently cited and approved by the English Courts. It appears also that the case of *Harvey* v. *Harvey*, which followed upon it (although itself a case between heir and executor) is expressely recognised as law by Mr Justice Buller in his treatise on law of *nisi prius*—Buller's N.P. (7th ed.) 34.

"The only Scotch case of the kind as between buyer and seller is that of *Nisbet* v. *Mitchell-Innes*, February 20th, 1880, 7 R. 575, where it was held by the Lord Ordinary and the Court, that while tile hearths passed with a house sold in general terms, the purchaser was not entitled to built-in grates, lustres, gas brackets, picture rods, or a mirror used as sliding shutter.

"I am not aware of any decision relating to ornamental articles, and arising between buyer and seller, other than those two. It may be noticed, however, that Lord Hardwick in *ex parte Quincy*, 1750, 1 Atk. 477, appears to have held that the fixed utensils of a brewhouse would not pass with a conveyance of the brewhouse with its accompaniments; although, on the other hand, in *Colegrave* v. *Dias Santos*, 1823, 2 Barn. & Cress. 76, the Court of Queen's Bench appears to have held that upon a contract for the sale of a house, wash tubs, grates, closets, shelves, &c., passed with the house to the purchaser.

"Following, therefore, the only cases which appear strictly in point, I am prepared in this case to find for the pursuers. . . . I might also perhaps refer to what I have already mentioned, viz., the removal by the pursuers without objection of the mirror at the side of the room, which was certainly as much a fixture as any of the pictures in dispute.

"As, however, the case may go further, and the question may be elsewhere viewed as if it arose between heir and executor, I think it right to say that I should have reached the same conclusion although the question fell to be decided on the law applicable as between heir and executor.

"As regards the two Wharton pictures, I confess I should have so held without much difficulty. For they are, in my view of the evidence, simply ordinary pictures, fixed in ordinary frames, and placed in front of the panelling of the room, with only this peculiarity, if it is a peculiarity, that being of large size they are not suspended by cords, but fastened by plates in the manner usual with large pictures; the plates being concealed by the dust moulding before referred to. In their case, therefore, all the elements generally regarded

appear to concur—the nature and character of the articles, the degree of their attachment, and the purpose of that attachment; all these, I think, concur in stamping these pictures as moveable.

"With regard to the King's picture, the case is no doubt different, and also more difficult; because undoubtedly there is here room for the argument that the frame forms a part of the decoration of that end of the room, and that the portrait of the King has been fitted into the frame as into a panel. It is also a circumstance that behind this picture there is now at least nothing but stone and lime. I am, however, moved by this—that the picture and the frame together form an independent moveable chattel, which may be removed without injury to itself and without injury to the wall; that the picture, moreover, is a work of art and not a mere decorated panel; that it was placed in its present position presumably in connection with the occupation of the house by the Glasgow family; and that the degree of attachment between the frame and the wall is no greater than is reasonably necessary for holding the picture in position. These considerations outweigh, as it seems to me, the fact that the frame seems to have been chosen so as to suit its surroundings, and that in order to prevent the original mirror from projecting too far over the mantelpiece the panelling behind it has been either left out or been cut away. It is not after all an unexampled circumstance that a room, although structurally complete, should be left with spaces adapted for particular articles of use or ornament, wanting which it may be said to be in a sense incomplete. Fireplaces for grates, unpapered recesses for bookcases, unfurnished spaces for gas-brackets, and such like, are not uncommon; and in the same way I think it may be held that this room has been finished on the footing of leaving a space above the fireplace suitable and convenient for a large mirror or large picture, such large mirror or picture being however to be provided by the occupant, and being part of the furniture of the room. I have to add, that if I had held that the frame was to be taken as part of the walls, I should have had seriously to consider whether the picture being so simply inserted in the frame, and being so slightly attached to it, the pursuers were not in any case entitled to remove the canvas in the same manner as they removed the glass whose place it took. In the view, however, I take of the case it is not necessary to decide that point.

"I have also to explain that in reaching the above result I have not overlooked the decision of the late Lord Romilly in the case of *D'Eyncourt* relied on by the defender. Although the decision of a single judge, and not therefore of the highest authority, I have considered that decision with all the respect which it deserves; but in the first place, it was a case between tenant in tail and remainder man. In the next place, it related to pictures, mirrors, and tapestries which were inserted in panels, and were held to be in the same position as wall papers; and lastly, if the decision should be held to cover such articles as the pictures here in question, I should not be able to agree with it.

"On the whole matter, therefore, I shall grant the pursuers decree in terms of their summons, with expenses."

The defender reclaimed, and argued—None of the pictures were family portraits or of great value, therefore those two elements were out of the question. There was annexation in all these cases. Further, annexation was a matter of degree, and intention must also be considered. With regard to the King's picture, it and its frame must be taken together. It could be taken out to be cleaned, but the frame could not be removed without damaging the structure of the walls. The frame was clearly not merely a decorative ornament, but had been made a part of the architectural design of the room. The Lord Ordinary's idea that the picture had replaced a mirror was founded merely upon the suggestion of one of the witnesses. It was admitted that there was bare wall behind it. It therefore took the place of wainscot which was part of the house—*Cave* v. *Cave*, 1705, 2 Vernon's Chan. 508. Pictures in panels, as those here were, were fixtures—*D'Eyncourt* v. *Gregory*, 1866, L.R., 3 Eq. 382; see also *Fisher* v. *Dixon*, March 6, 1843, 5 D. 775, and June 26, 1845, 4 B. App. 286. The Lord Ordinary had founded upon the defender's not claiming the mirror; that was not done from a mistaken belief that there was panelling behind. The claim to the Wharton pictures might not have been so strong if they had been alone, but along with the King's picture they formed part of the design of the room. It was not clear that there was panelling behind them. Even if there was, pictures could be painted upon or so attached to the panelling as to become fixtures.

Argued for respondents—The Lord Ordinary was right, for these pictures could be removed without injury to themselves or to the building; they were not essential to the enjoyment of the heritage, and they had not been dedicated to the heritage, because being heavy they were attached to the wall by screws, and not hung. The only case against them then was that of *D'Eyncourt*. That was the opinion of a single judge in England, in a case where the contending parties were not seller and purchaser, and where the pictures were fixed into panels. The great weight of authority was with them—*Beck* v. *Rebow*, 1706, 1 Peere Williams, 92; *Birch* v. *Dawson*, 1834, 2 Ad. & Ellis, 37; *Dowall* v. *Miln*, July 11, 1874, 1 R. 1180; *Nisbet* v. *Mitchell-Innes*, February 20, 1880, 7 R. 575; *ex parte Baroness Willoughby de Eresby in re Thomas*, 1881, 29 Weekly Reporter, 527.

At advising—

LORD PRESIDENT—The defender Mr Stevenson in December 1886 purchased the mansion-house of Hawkhead and certain lands along with it from the trustees of the late Earl of Glasgow. There was an

arrangement about the then subsisting lease, but I do not intend to go into the terms of that now, the question being whether the conveyance of the mansion-house carried with it a right to certain pictures in the dining room. Now, upon that question I concur with the Lord Ordinary, and I think I shall be able to state shortly the considerations which have led me to that result. There are three pictures in all, two of them being pictures of the Wharton family, and another is a picture of Charles II. The value of these pictures does not seem to me to enter into this question at all. The value of such pictures is a matter of speculation to a great extent about which connoisseurs constantly differ; but this is not a case in which the paintings in question are paintings upon the plaster of the room, or in other words, they are not frescoes, neither are they paintings on the panel, which constitute a part of the wall of the room itself. If they had been in that position a great deal might be said in favour of the defender's contention, because in that case it is presumable that the painted panels could not be removed without actually dismantling the room and interfering with the wall fittings. But in the present case you have pictures which are painted on canvas, and that canvas is stretched upon the ordinary stretcher frame upon which all paintings on canvas must be stretched, and which requires adjustment from time to time. The purpose of the stretcher is to give an opportunity of re-adjusting the canvas in such a way as to keep it flat and smooth. Now, in order to accomplish that object it is indispensable that the owner or the occupier of a house, as the case may be, should have it in his power from time to time to move these canvasses with the stretchers for the purpose, not only of correcting the state of the canvas by using the machinery, if I may so call it, of the stretcher, but also for the purpose of cleaning. That is one consideration which I think shows that the pictures are not only *de facto* moveable but that they require to be periodically or from time to time removed for the purpose of preserving the pictures. That is one very serious consideration in favour of the pursuer's contention, and the other is this, that the removal of the pictures upon their stretchers can be effected at any time without interfering in any way with the integrity either of the subject removed or the subject from which it is detached for the time for the purpose of removal. The heritable subject remains uninjured and unaffected in any way by the sort of removal to which I have referred, and the picture itself of course on its stretcher suffers no loss in consequence of removal. It has been represented by the defender that in regard to one at least of the pictures, the only background which it has is a stone and lime wall. Well, that is very unfavourable to the picture no doubt, but it only shows the greater necessity for having a mode of easily removing the picture in order to counteract the effect of any damp which the picture may have to encounter by its proximity to the stone and lime wall. In short, it appears to me that whether you regard the nature of the subject that is proposed to be removed or the integrity—the separate integrity of the two things, the heritable and the moveable—this is a case in which the pictures undoubtedly fall under the head of moveables.

I am therefore for affirming the interlocutor.

Lord Adam—In the month of June 1887 the defender Mr Stevenson obtained from Lord Glasgow's trustees a conveyance of the lands of Hawkhead with the whole houses and buildings on said lands. Now, the houses and buildings on said lands include the mansion-house of the estate, and in the mansion-house of the estate were the three pictures which are now the subject of this case. The question is, whether in the absence of any express mention in the disposition these three pictures passed to the purchaser with the houses upon the property, and as accessory to or as part of them. Now, I suppose there is no dispute that as a general rule articles of furniture do not pass with such a grant or with the buildings in such circumstances, and that although for their proper and ordinary use and enjoyment, such articles may be attached to the heritable subject. We have examples of that, for instance, in the case of *Nisbet* v. *Mitchell-Innes*, where in a case between the seller and purchaser it was held that built-in grates, lustres, gas brackets, and a mirror did not go with the building, although in all of these cases these articles were necessarily for their use, and in point of fact, were attached more or less to the heritable subject. Now, all of these articles could be removed, just as these pictures can, without injury to themselves, but not, I think, without injury in some small or slight degree to the heritable subject to which they are attached. Accordingly, the question appears to me in this case to be, whether there is anything in the attachment of these paintings to the building which would make them go with the building as an accessory to that building. I think that is the real question in this case. Now, there are three of these pictures, and two of them, which are called Wharton pictures, seem to be in exactly the same position except that there was some evidence that the wall or panelling of the room behind one of them was a little rougher than behind the other; I think that is the only difference. Now, as your Lordship has pointed out, these pictures are painted on canvas and are on ordinary stretching frames, these stretching frames being put within another outer frame—an ordinary gilder's frame. I think that appears from the proof. Now, I think it also appears from the proof that these pictures, being pictures of some size, are not hung as pictures generally are, from rods or nails or otherwise fastened to the walls, but they are secured to the walls simply by what are called plates,

which seem to be small iron bands which are first fastened to the frame of the painting and then to the wall with a nail, or maybe a couple of nails or screws. That is the ordinary attachment of these two pictures to the walls in this case, and the only other exceptional thing about them that I see is a little beading round the outside of the outer frame which is evidently, as the witnesses say, to keep the dust from getting behind the picture. Now, that is the attachment of these pictures to the wall, and it does not appear to me that that sort of attachment is such as to render a presumably moveable subject like a picture part of the heritable subject in this case, and to go with it. I suppose, and it appears from the proof, that the way in which these pictures are secured to the wall is just the same way as a mirror, for example, or a heavy article of that sort would be secured, and not in any unusual way; there will be no injury done to the pictures themselves, and it humbly appears to me that there would be no more injury done by the removal of such as these pictures to the heritable subject to which they may happen to be attached, than there would be by the removal of a mirror. All that would be done in each case would be the withdrawing of a few nails and screws, and that being so, I can see no exceptional circumstances and no reason why these pictures should not be treated as moveable subjects, and not to pass with the heritable subject.

The picture of Charles II. is, I think, in a somewhat different position. It is, like the other two, put upon a stretching frame, and can be taken out, as the evidence clearly shows, without injury either to the picture itself or to the heritable subject, by removing the beading which is put round the outside of the picture to keep it in its place. Not only is it possible to do that, but we know in point of fact that it has been done, for we have evidence that in the year 1874 or 1875, when some repairs or improvements seem to have been made at Hawkhead, this picture was so removed from the position in which it is now and repaired to some extent or improved—I do not know what you call it—and then restored to its place, the beading being put round it again. So that by the removal of a few tacks which fastened the beading to the outer frame—so to speak—of the picture, the picture can be removed without the slightest difficulty or injury either to the picture itself or the heritable subject. Now, that being so, I do not see why this picture should follow any other rule than the others. The only specialty I see in the matter is that upon its being removed, no doubt there would be disclosed the bare wall behind the place where it is; that is quite true, but whether that bare wall arises from the fact of the panelling having been removed—if there ever was panelling there—to allow the picture to be inserted, or whether the panelling of the room was ever completed, the evidence does not appear to show. But however that may be, I do not think it makes the least difference, and for this reason, that the removal of the picture is not the cause of that state of the building. The removal of the picture from its place merely allows the eye to see, but the removal is not the cause of the apparent dilapidation or injury to the building, and accordingly if the space be filled—as there seems to be some evidence that it once was—with a mirror or another picture, it would just be restored to the state it is in now. I cannot therefore see that that specialty—that an unsightly part of the wall would be disclosed if the picture was removed—should make any difference, and upon that ground I say that this picture is in the same position. I may say that if I thought it was necessary to remove what may be called the outer frame of this picture, I might have some doubt on the matter, because it rather appears to me that that is part of the architectural design of the building, and if the picture could not be removed without at the same time removing what I call the outer frame, there might be some difficulty, but in my view it is not necessary to go into that, and upon the whole matter I concur with your Lordship.

LORD M'LAREN—This case has been very fully and anxiously argued as involving a question of principle, and while I assent generally to your Lordships' exposition of the law applicable to the case, it may be desirable that I should state the considerations which influence my judgment as they present themselves to my own mind. I may begin by observing that the question of what will pass under a sale of a heritable subject is not necessarily and under all circumstances the same question as what will pass to the heir in competition with the executor. The identification of a subject of sale may be and often is a question of evidence; and in the case of a sale of a house containing pictures or sculptures of great value, attached to the building but capable of being separated from it, it would appear to me to be a legitimate subject of inquiry, whether according to the understanding of the parties to the contract of sale such works of art were really sold, or were not truly excepted from the conveyance of the heritable subjects.

In the present case I cannot say that the element of intention enters deeply, if at all, into the decision of the question. The pictures are not of great commercial value, and for anything that appears to the contrary it might very well be that the sellers were willing that the pictures should go with the house. From correspondence subsequent to the sale we see that the pursuers claimed to be entitled to remove the pictures, and that the defender claimed to have purchased them as a part of the heritable subject; but it appears to me that the declarations of the parties to the contract made at a time subsequent to the completion of the bargain ought not to have any influence on the decision of the case.

In all such cases the form of the question

is of course whether the subject in dispute is or is not incorporated with the tenement; but it must be admitted that the law recognises certain qualifications of the rule that what is physically attached to a building becomes part of the heritable subject. By the custom of the country certain fittings are removable by an executor in a question with the heir, or by a vendor in a question with the purchaser of the buildings. I am not sure that where the right of removal depends on custom we can assume that the customary rights are the same in Scotland as in England. In Scotland we know that certain house-furnishings, such as window-blinds and cornices, gasfittings, chandeliers, mirrors, and grates (even when these are built into the fireplace) are removable. I rather think that in England grates are not considered to be removable fixtures; but this is a mere difference of detail. It seems to me that all such things as I have mentioned (and no doubt there are others *ejusdem generis*) are things which may be described as part of the furnishing of a house, and which are not included in the notion of an unfurnished house as that is commonly understood. They are therefore considered to be attached to the walls temporarily for purposes of convenience or security, and not with the view of annexing them to the tenements. From the nature of the case the attachment of such things is generally slight, so that they can be removed with little damage to the heritable subject. But I do not think that the kind of attachment is material to the question of removability. A mirror or a picture, for example, is screwed to the wall, and is most easily removed; a carpet is secured by studs, which have to be displaced by the use of a hammer or chisel.

A gas-bracket has its pipe soldered to the supply-pipe, and has to be cut; if the thing be removable, the attachment, whatever that may be, has to be severed, leaving in most cases some trace of injury. Such slight injury is an inconvenience to which the heir or purchaser must submit as an unavoidable incident of the separation of what does not belong to him from the property which he has acquired by inheritance or purchase. If the article cannot be removed without doing appreciable damage to the structure, I should say that it is then in fact annexed to the tenement, because I think that the question in such cases is really one of fact, whether the attachment is such as amounts to an incorporation of the moveable subject with the tenement.

In the present case I should hesitate to say that the pictures are removable by custom, because the case is probably not of such frequent occurrence as to have fallen directly under the influence of a customary rule. But the customary rule whereby mirrors and ornamental furnishings are removable has, as I think, a very material bearing on this case, because, as your Lordship has pointed out, pictures painted on canvas are not in any true sense part of the structure of the house, and because the principle underlying the custom of removing domestic fixtures is, that things which are not part of the structure are removable notwithstanding their temporary attachment to the walls or floors provided they can be removed without material injury to the apartment. If they cannot be removed without causing structural damage they must be taken to be incorporated. Keeping this distinction in view I have formed a clear opinion that the portraits of Lord and Lady Wharton retain their moveable character.

It seems to me that questions of this kind are always and necessarily circumstantial questions, and that no definite rule can be laid down as to what will amount in fact to an incorporation with or building into the heritable subject. Unless we are prepared to upset all the recognised social conventions on this subject, and to hold that nothing through which a nail has been driven can be claimed as a moveable, each case must be considered with reference to its special circumstances, regard being had to the nature of the thing attached, to nature of the attachment, to the purposes of the attachment, and (in questions between seller and purchaser) the intention of the contracting parties. With respect to the picture of King Charles II., if it had been the only picture in question I should probably have held that it was incorporated with the tenement, because according to the evidence this picture is not fixed over the panelling of the room, but in a manner takes the place of a panel, there being nothing between it and the stone wall. But when it is considered that the three pictures, together with a mirror (which is admitted to be removable), are all fitted to panels in the same apartment, and that three of the four articles are in our judgment clearly the pursuer's property, I think that the distinction which I have mentioned in the case of the King's portrait is insufficient to place it in a class by itself. I think that the three pictures ought to be considered as a set or assemblage of things which are either inseparately united to the heritable subject or are merely attached to it temporarily for purposes of convenience; and looking at them collectively I agree with the Lord Ordinary and with your Lordships that these pictures retain their moveable character notwithstanding their attachment to the walls of the apartment, and that the conclusions of the action are well founded.

LORD KINNEAR—I have come to the same conclusion. The only question which we have to consider appears to me to be whether the pictures in dispute are in fact a part of the lands of Hawkhead or not. There are no stipulations in the contract between the parties which would enable the seller upon the one hand to withhold any part of the lands from the purchaser, or the purchaser on the other hand to claim delivery of corporeal moveables which are separate from the land, or to claim a right to retain any such moveables which he may have found upon the land. The contract accordingly has been carried into

effect by the execution and delivery of a conveyance in ordinary terms, and I do not understand that the defender has any fault to find with the terms of his conveyance. Therefore if the pictures form part of the subjects conveyed, they belong to the defender, and if they do not form part of these subjects, they remain the property of Lord Glasgow's representatives, to whom they belonged before the sale. The question, therefore, would appear to be a question of fact—whether the pictures form part of the lands of Hawkhead and of the houses and buildings thereon, because that is the subject which has been conveyed to the defender, and that depends entirely upon whether they have been so fastened to the houses of Hawkhead as to become an integral part of the houses.

Now, it appears to me that in considering that question we have not to take into account distinctions which may sometimes be of importance in regulating the conflicting interests of landlord and tenant or possibly of successive heirs of entail, because I think we must take the law as it has been laid down in the House of Lords in the case of *Bain* v. *Brand*, where the Lord Chancellor lays down the doctrine of law in this way. His Lordship says there are two general rules. One of them is the well-known rule that whatever is fixed to the freehold of the land becomes part of the freehold. The other is quite a different and separate one, that whatever has once become part of the freehold cannot be severed by a limited owner whether he be owner for life or owner for years. Then his Lordship goes on to say that to the first of these rules there is no exception whatever—whatever is fixed to the land is part of the land. Then he says that to the second there are various important exceptions, and all the questions as to the difference and distinctions between the rights of landlord and tenant and of successive owners which have been raised in the case appear to me, according to his Lordship's exposition of the law, to depend upon this second rule to which there is that exception — that under certain circumstances things that have been fixed may be removed. But it is very clear that these are considerations with which we have nothing to do, because they do not apply, and cannot apply, to a case between disponer and disponee. Lord Glasgow might, of course, have detached the pictures from the walls of the house before he effected the sale, but after the conclusion of the sale it is quite clear that he could do nothing; and therefore the question appears to me to be, as your Lordships have considered it to be, a mere question of fact—whether the pictures in dispute are so permanently fixed to the buildings and houses of Hawkhead as to make them an integral part of those houses. It is in accordance with all our authorities to say that in considering that question the method of attachment is not the only point to which attention should be directed, because it is common for articles in themselves removable to be temporarily attached to the walls of a house for use or ornament, or to the floors of a house, as in the case of things which might be nailed to the floor without being so permanently fixed as to become in consequence of their attachment integral parts of the house itself. But still the real question, as it seems to me, must always be, whether in fact the subject which is said to be moveable has been so permanently fixed as to become a part of the house, or whether the attachment is of such a kind as to make the subject, which in itself was moveable, easily removable or removable without injury to the subject itself or to the building. Now, upon that question of fact I entirely agree with what has been said by your Lordships, and therefore I think it quite unnecessary to dwell upon the grounds upon which it seems to me that these three pictures have not been made permanent parts of the building but are removable and are not carried by the conveyance.

In common with your Lordship it has seemed to me that the question with regard to the picture of King Charles II. is somewhat different from the question with regard to the portraits of Lord and Lady Wharton. I agree with what was said by Lord Adam, that if it had been proved that in order to remove that picture it was necessary to remove also the entire structure of the frame in which it is fixed, the question would have been one of much greater difficulty than it actually is, but I also agree with what his Lordship said, that the evidence shows that that is not necessary, but that the picture may be removed like the others for any purpose for which it is desirable to get it down either temporarily or permanently.

I therefore agree with your Lordships in the result at which you have arrived.

The Court adhered.

Counsel for the Pursuers (Respondents)—Ure—Pitman. Agents—J. & F. J. Anderson, W.S.

Counsel for the Defender (Reclaimer)—Guthrie—Burnet. Agent—F. J. Martin, W.S.

Friday, July 10.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

PATERSON AND ANOTHER (WYLLIE'S TRUSTEES).

Marriage-Contract—Assignation of "Property now belonging to" the Husband—Spes successionis—Vesting.

A person died in 1872 leaving a trust-disposition and settlement under which a share of his estate would vest in his eldest son upon his youngest child attaining twenty-four years of age, which happened on 30th April 1890. In 1874 his son by antenuptial contract of