Saturday, June 6.

OUTER HOUSE.

[Lord Kyllachy.

MOORE'S CARVING MACHINE COMPANY *v.* AUSTIN.

Retention—Lien—Right in Security—Retention in Security of Claim of Damages.

Where a subject is placed in the hands of a party under a contract, he has an implied lien or right of retention over it for all claims arising under and in virtue of the contract, and is therefore entitled to retain it for a claim of damages arising from the failure of the owner to carry out his part of the contract.

Circumstances in which *held* that there was no implied condition in a contract to act as agent for a company that it should only subsist so long as the company continued its business.

George Austin, timber merchant, Glasgow, entered into an agreement with Moore's Universal Carving Machine Company, Limited, by which he undertook to act as sole agent for the company for two years from 1st January 1894, for the sale of their carving machines in Scotland. The agreement further provided that "the company should sell their machines at the price of £110 each to the defender, who should be entitled to obtain the best price he can for them, and that the said company should at their own cost fit up a show machine, and that the defender should keep the same in proper repair and working order, and at all times exhibit it to persons desirous to see the same in full work, and explain the working thereof by practical demonstration."

In pursuance of this agreement a show machine was fitted up, and Austin expended £70, 17s. 1d. in connection with it. He also expended at least £30 in travelling and canvassing expenses.

The company fell into difficulties, and a receiver and manager was appointed by the Court of Chancery. In the course of realising the company's assets he sold the show machine which was standing in Austin's premises. Austin declined to deliver it until paid the above sums of £70, 17s. 1d. and £30, and the present action was brought to compel delivery.

The defender pleaded—"(6) In any event the defender is entitled to retain possession of the said machine (*a*) until he is reimbursed for all outlays and expenses incurred by him on behalf of the pursuers, and (*b*) as part compensation for the loss and damage he has suffered through the pursuers' breach of contract."

On 6th June 1896 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor:—"Finds that the pursuers are not entitled to delivery of the carving machines sued for except on payment to the defender of the sum of £100, 17s. 1d. due to the defender as set forth in the record; but finds that on payment of said sum the defender is bound to deliver to the pursuers the said machine, and also the gas-engine mentioned on record: With these findings assoilzies the defender from the conclusions of the action, and decerns," &c.

Opinion.—"The pursuer here is the receiver of an English company, and he sues for delivery of a certain machine which belongs to the company, but is in the possession of the defender under a certain contract. The defender's case is that under the same contract he has certain claims against the company, and that he is entitled to retain the machine until these claims are satisfied. The pursuer disputes the claims, and he also disputes the defender's right of retention. He at one time further maintained that the rights of parties under the contract and with respect to the security claims fell to be determined by the law of England, but that contention is not now pressed.

"The defender's claims or alleged claims against the company arise in this way. By the contract in question, which is No. 7 of process, he was appointed sole agent in Scotland for the sale of the company's machines for two years from 1st January 1894, and the terms of the arrangement were somewhat special. On the one hand the company became bound during the period of the contract to sell the machines to the defender at the price of £110 each, he being left to obtain the best price he could for the machines sold. On the other hand, the defender became bound to devote his best energy and attention to obtain orders, and he also became bound, with respect to a show machine which the company agreed to fit up in his premises, to keep the same in proper repair and working order, and at all times to exhibit the same to persons desiring to see the same in full work. The defender also became bound, *inter alia*, that on the termination of the agreement he should not within Scotland canvass for orders in the line of the company's business or deal or transact business in the way of the company's business or any business similar thereto.

"In admitted pursuance of this agreement the defender travelled over Scotland soliciting orders; and he also provided (as it is admitted he was bound to do) the necessary power for driving the show machine, which power was obtained from a gas engine which he, the defender, had to buy and fit up on a concrete seat in his premises. He also supplied gas for the engine while it worked, and according to his evidence, which I see no reason to doubt, his outlays in connection with the machine were £70, 17s. 1d., while he expended in travelling expenses at least £30.

"Now, it is not disputed that if the agreement had run its course the defender would have fallen to pay these outlays out of his own pocket. But what happened was this. The company having got into difficulties, a receiver and manager of its business was appointed by the Court of Chancery, and this functionary proceeded to ignore the contract with the defender, and in March 1895 sold the show machine to a customer in Scotland with whom the defender had been negotiating for the purchase of a

machine in ordinary course. This of course put an end to the defender's agency, and the result was his outlays—the outlays to which I have referred—were thrown away. He now claims repayment of those outlays as damages for breach of contract, and the first question is whether a breach of contract has been committed.

"The pursuer argues that it was an implied condition of the contract of agency that it should hold good only so long as the company continued its business, and he assimilates the case to that of *Patmore* v. *Cannon*, 19 R. 1004, and the *s.s.* "*State of California*" v. *Moore*, 22 R. 562, following the case of *Rhodes*, 1 App. Cases 256.

"I am of opinion that these cases are inapplicable for two reasons. In the first place, I do not think it can be affirmed that the company at the date of the breach had ceased to carry on its business. The contrary, I think, appears from the record and correspondence. But, in the next place, it does not appear to me that the contract in this case can be really assimilated to the contracts under construction in the cases referred to. The somewhat onerous obligations undertaken by the defender as the *quid pro quo* for an appointment conferred on him for a definite period, make, I think, a sufficient distinction. But it is also, I think, a circumstance that the agency here takes the shape of an obligation by the company in absolute terms to sell their machines to the defender during the period of the contract at a definite price.

"The defender is therefore in my opinion entitled to damages, and subject to his handing over to the pursuer, as he offers to do, the gas-engine which has been thrown on his hands, I do not think his claim of damage is overstated.

"The pursuer, however, contends further that assuming the defender to be a creditor of the company for the outlays in question, he has no right of retention either general or special in respect of which he is entitled to refuse delivery of the company's property.

"I do not think it necessary to decide whether the defender, as the pursuer's agent or otherwise, has a lien over the machine in question for a general balance. But I think that he has a lien (implied under the contract by which he obtained possession of the machine) for all claims arising to him under and in virtue of that contract. To that extent the case of *Meikle* v. *Wilson & Pollard*, 8 R. 69, and *Robertson* v. *Ross*, 15 R. 67, are authorities in the defender's favour, and authorities which can be supported on general principles. As expressed by Lord Young in the former of those cases, the law implies a right of retention, *inter alia*, in all cases where property comes into possession of another than the proprietor under a contract which creates rights *hinc inde*. I think this is a case of that description, and I am therefore of opinion that on this point also the defender is entitled to succeed.

"The result, on the whole, is that I shall make a finding to the effect that the pursuer is not entitled to delivery of the machine sued for except on making payment to the defender of the sum of £100, 17s. 1d. due to the defender as set forth on record, the defender being always bound upon payment of said sum to deliver to the pursuer the said machine and the said gas-engine, and in respect of that finding I shall assoilzie the defender with expenses."

Counsel for the Pursuer—Brodie - Innes. Agents — Fraser, Stodart, & Ballingall, W.S.

Counsel for the Defender—Abel. Agent —R. Cunningham, S.S.C.

Tuesday, June 9.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

SHIRREFS *v.* SHIRREFS.

Husband and Wife—Aliment—Process—Consistorial Causes—Aliment pending Action.

A wife brought an action of separation and aliment against her husband in which an interim award of aliment was made. She subsequently brought an action of divorce and no further procedure was taken in the action of separation. Decree of divorce in her favour was issued in vacation, but no award of aliment was made in the action of divorce. On the first day of the ensuing session the pursuer moved in the action of separation for a further award of aliment. *Held* that the motion was incompetent, on the ground that the parties being no longer married persons, the pursuer was not entitled to a decree for aliment in an action which assumed as the condition of its competency that she was the defender's wife.

On 29th November 1895 Mrs Elizabeth Taylor Cree or Shirrefs brought the present action, which was for separation and aliment, against John Gordon Lumsden Shirrefs, her husband. On 7th January the Lord Ordinary (KINCAIRNEY) decerned against the defender for payment of £20 in name of aliment, and also for payment of £20 to account of her expenses. Thereafter the pursuer discovered that she had grounds for an action of divorce. Accordingly she brought an action of divorce, and on 27th February 1896 the diet of proof in the present action was discharged. Proof was led in the action of divorce shortly before the close of the Winter Session, and decree of divorce in pursuer's favour was issued on 24th March 1896, during the Spring vacation. No decree for aliment was granted in the course of the action of divorce.

On 12th May, being the first Court day after the decree of divorce was pronounced, the pursuer moved in the action of separation and aliment, in which there had been no further procedure since the discharge of the diet of proof, for decree for payment of an additional sum in name of aliment.