and sworn to; and that having been done, (2) *refused* to grant warrant for the citation of the doctors, on the ground that they were witnesses to matters of opinion and not to facts, but *quoad ultra* granted the prayer of the note.

Counsel for the Pursuer—Shaw. Agents—Curror, Cowper, & Curror, W.S.

Counsel for the Defenders—Macphail. Agents—J. K. & W. P. Lindsay, W.S.

Tuesday, December 20.

FIRST DIVISION.

[Lord Low, Ordinary.

BREWER & COMPANY *v.* DUNCAN & COMPANY, LIMITED.

Ship—Delivery—Risk—Agreement.

A ship was built under an agreement by which the price was to be paid in four instalments, the last being paid when the ship was delivered and the builders' certificate handed over. The vessel, as she was constructed, was to become the property of the purchasers; she was to be delivered ready for sea, and when delivered a model and certain certificates were to be furnished; but she was to remain at the builders' risk until handed over, and they were to keep her insured.

When the vessel was nearly but not quite completed, one of the purchasers, acting for the others, asked to have her moved to a particular berth, and upon the builders declining to take the risk of this being done, agreed to take delivery and have her removed at the purchasers' risk. The last instalment of the price was paid, the vessel was insured by the purchasers in their names, and the builders' certifiate was handed over to them, but the model, &c., were not supplied, and before the removal took place the ship was capsized by a sudden squall.

Held that delivery had been taken so as to transfer the risk to the purchasers, although the ship had not actually been moved, and was not ready for sea.

In December 1891 Charles Brewer & Company, shipowners, Boston, U.S.A., and Captain Newell, Ardgowan, Port Bannatyne, Bute, part owner of the ship aftermentioned, raised an action against Robert Duncan & Company, shipbuilders, Port-Glasgow, for the purpose, *inter alia*, of having it found and declared that "the ship or vessel called the 'Helen Brewer,' recently built and constructed, or in the course of construction by the defenders, and recently launched, and now or lately lying in or near the harbour of Port-Glasgow, was on the 13th day of October 1891," when she was blown from her moorings at Port-Glasgow and capsized, "undelivered by the defenders to the pursuers."

The pursuers pleaded—"The ship in question having been undelivered, and having been at the risk of the defenders at the date of the casualty, the pursuers are entitled to decree in terms of the declaratory conclusions of the summons."

The defenders pleaded—"(3) The defenders should be assoilzied, in respect that the vessed was at the time of the accident delivered to the pursuers; *et separatim*, was at their risk."

Upon 26th January 1892 the Lord Ordinary (Low) allowed a proof, which brought out the following facts:—The ship was built under an agreement between the defenders and Charles Brewer & Company, dated 13th March 1891, which contained the following articles:—"Secondly, The vessel shall be built under the superintendence of the purchasers and of any person for the time being appointed by them, and shall be delivered afloat in Port-Glasgow Harbour, in regular rotation with the other ships under construction. . . . Thirdly, The purchasers shall pay for the vessel the sum of £17,600, . . . payments to be made as follows:—£4400 in cash when the vessel is framed; £4400 in cash when the vessel is plated; £4400 in cash when the vessel is launched; and £4400 in cash when the vessel is delivered and builders' certificate handed over. Fourthly, The vessel, as she is constructed, and all materials from time to time intended for her or them, whether in the building-yard, workshop, river, or elsewhere, shall immediately, as the same proceeds, become the property of the purchasers, but the builders shall at all times have a lien thereon for their unpaid purchase money. . . . Sixthly, The vessel shall be at the risk of the builders until handed over to the purchasers, and until then the builders shall keep her insured in an amount exceeding by £500 the purchase money then paid. The policies for such insurance to be lodged with the purchasers." The specification further provided—"Builders to take all risk until delivered to owners. . . . 7. *Models, Plans, &c.*—Model with lines and body plan, rigging and sail plan, general arrangement and deck and cabin plan, profile plan, midship section plan, as submitted to Lloyds, with scantlings, &c., marked and displacement scale to approval of owner, and, except model, left with his surveyor before the work is begun. Approval of model by purchaser is not to relieve builders of their responsibility under the clauses referring to tonnage, carrying capacity and stability, nor is the supplying of ballast by purchaser to relieve builders of their responsibilities. Finished model showing houses, position of masts, mouldings, &c., testing certificate of chains and anchors, London Lloyds' certificate of classifications, also test certificates of steel hawsers, to be supplied to purchaser, when vessel is handed over, together with duplicate set in tracing cloth of the above-mentioned plans, of the vessel as completed with details shown and stability curves."

The ship was launched on 17th September 1891, and her further construction was proceeded with first at the crane berth in the

East Harbour, and afterwards at the West Quay. Captain Newell, who was to be master of the ship, superintended her building. The first three instalments of the price were paid respectively upon 3rd June, 1st July, and 17th September 1891. Upon 7th or 8th October 1891 Captain Newell expressed a wish to have the ship retransferred to the crane berth, and upon the builders stating their unwillingness to incur the risk of another move, an arrangement was come to with Captain Newell for the purpose of having the ship delivered to him and the removal made at the risk of her owners. The following witnesses spoke to the terms of that arrangement:—

Robert Duncan, manager of the defenders' company, deponed—"On the 7th or 8th of October Captain Newell said he wanted to shift the vessel to the crane berth on Saturday the 10th, at two o'clock, as he had made arrangements for ballasting her there. He also told me that he had arranged with Mr Livingstone, and had cabled for the last instalment in order that he might take delivery of the vessel before shifting. On Friday, 9th October, he told me he had arranged with the Clyde Shipping Company to shift the ship, and he asked me to provide the men—the runners. He had also arranged for a pilot. . . . One day, about a fortnight or three weeks prior to 10th October, when I was in Mr Livingstone's room, Captain Newell came in and walked round to Mr Livingstone and said, 'Have you got the certificate?' Mr Livingstone asked what certificate? And Captain Newell said, 'The builders' certificate.' Mr Livingstone said, 'You don't get that, Captain Newell, until the last instalment is paid; the builders' certificate is then handed over on delivery.'. . . On the morning of Saturday the 10th Mr Livingstone told me when I went down to the office that the final instalment had come, and I signed the builders' certificate in order that the captain might take over the vessel before he shifted her."

John Livingstone, secretary of the defenders' company, deponed—"I remember, on the morning of 10th October 1891, or about that time, having a conversation with Mr Robert Duncan about the builders' certificate of the 'Helen Brewer.' I had it prepared and gave it him to sign as a director of the company, and I signed as secretary. Captain Newell had arranged with me before that to cable for the last instalment, and it was after it had come that Mr Duncan and I signed the certificate. . . . Before the ballast was put on board Captain Newell told me he had arranged with the Clyde Shipping Company about towing the vessel round to the steam crane. That was the result of a conversation he had with me, that he would take the vessel over before shifting her. I am not sure on what date the conversation took place, but it would probably be on the Tuesday, Wednesday, or Thursday prior to 10th October, when he received the telegram from his owners with instructions where to go to. . . . It was on the receipt of the cable, 'Proceed to Philadelphia,' that he arranged to take over the ship on Saturday, 10th October. It was in order to take in ballast for the voyage that he wanted the vessel taken to the crane berth. . . . I said I considered the vessel should be his if she was shifted again, and Captain Newell quite agreed with that. He said he would take delivery on Saturday. The £3950 that was cabled for was to meet the last instalment less the credits we had to allow to the owners. Captain Newell said the money was sure to be here on the Saturday morning. I prepared the builders' certificate in view of that. . . . In view of the arrangement with Captain Newell which I have mentioned, we made provision for having the ship delivered on the Saturday; it was arranged that she should be pretty well completed by that time. . . . The question of insurance was mentioned on Friday the 9th, and Captain Newell said—'I will very soon make that all right;' and he asked for a piece of paper and wrote on it 'Insure ship—Marine. Cable when covered.' That cable was sent to the Messrs Brewer in America. No. 47 of process is the note Captain Newell made. On the Monday or Tuesday he told me he had received a cable from America 'Marine risk covered to Japan.' On the morning of Saturday the 10th we received a cheque for £3950, and I wrote the letter acknowledging receipt. . . . It was then that I prepared the builders' certificate and got Mr Duncan to sign it. When it was signed I handed it over with the certificate of British tonnage, which is prepared by the Board of Trade, to Mr Archibald Duncan, to put in an envelope for the captain as soon as he arrived. I saw Mr Duncan put it in the envelope, which he addressed to Captain Newell, and placed on the end of his desk. Captain Newell had been in this country from the previous March, and his business letters were addressed to us. All the letters that we received for him were placed on the end of Mr Archibald Duncan's desk, and the envelope containing the builders' certificate was put in the same place. Captain Newell came into the office on the morning of Saturday, 10th October, as usual, about a quarter past eleven. I told him the instalment had arrived, and Mr Archibald Duncan, who was at his desk, said—'This is it Captain.' He then said—'And this is the builders' certificate;' and the captain took the envelope and made as if to put it in his pocket; and then, I suppose changing his mind, he walked round the end of the desk, and asked me to put it in the safe, as he was not going to the Hawaiian Consul that day, but the following day. The ship was to be registered with the Hawaiian Consul because she was to sail under the Hawaiian flag. I took the envelope from the captain, and put it along with his other papers in the safe."...

These witnesses were held both by the Lord Ordinary and by the Inner House to have given a correct account of what occurred.

A crane broke upon the 10th October, and in consequence the ship was not moved upon 13th October. She was capsized by

an extraordinary squall. At that time she was still moored by ropes belonging to the builders, the watchman appointed by them was still on board, and numerous fittings, as well as the model, &c., stipulated for had not yet been supplied. Upon that day Captain Newell wired to America for instructions, and the next day entered his protest in common form anent the capsizing of the ship, and entered into an agreement for the hire of salvage plant with the British Marine Salvage Company, Limited. Subsequently Captain Newell took legal advice, and thereafter assumed the position of not having taken delivery of the vessel.

Upon 26th May 1892 the Lord Ordinary (Low) pronounced the following interlocutor:—"Having considered the cause, Finds that on the 13th October 1891 the ship 'Helen Brewer,' mentioned on record, was undelivered by the defenders to the pursuers, and was still at the risk of the defenders: Appoints the cause to be enrolled for further procedure; grants leave to reclaim, and reserves all questions of expenses.

"*Opinion.*—In terms of an agreement dated 13th March 1891, the defenders built the ship 'Helen Brewer' for the pursuers Charles Brewer & Company. On the 13th October 1891 the ship, while lying at the West Quay at Port-Glasgow, was blown from her mooring and capsized.

"The main question raised in this case is, whether at the time of the accident the ship was at the risk of the builders or of the owners, and the leading conclusion of the summons is for declarator that the ship was 'undelivered by the defenders to the pursuers, and was still at the risk of the defenders.'

"It was provided by the third article of the agreement of 13th March 1891 that the price (£17,600) should be paid in four instalments; the first when the vessel was framed, the second when she was plated, the third when she was launched, and the last 'when the vessel is delivered and builders' certificate handed over.'

"By the fourth article it was agreed that the vessel as she was constructed should immediately become the property of the purchasers, subject to a lien in favour of the builders for unpaid purchase money, and by the sixth article it was provided that 'the vessel should be at the risk of the builders until handed over to the purchasers.'

"In the specification referred to in the agreement there are also certain provisions of some importance in regard to the present question. Under the head of 'Delivery' it is, *inter alia*, provided—'The vessel to be delivered at her loading berth in the harbour of Port-Glasgow, and to be completed ready for sea with her sails bent.' Under the head 'Insurance' it is provided that the vessel is to be insured by the builders at their expense 'until delivered over to the owners,' and under the head, 'Models, Plans, &c.,' it is provided that a model, testing certificate of chains, anchors, and hawsers, and Lloyd's certificate of classications should be supplied to the purchasers 'when vessel is handed over.'

"The vessel after being launched was first at the crane berth in the East Harbour, where her lower masts were put in. It was then necessary that she should be moved from the crane berth in order to make room for other vessels, and she was taken to the West Quay. I think that it is proved that the vessel was taken to the West Quay at the suggestion of the pursuer Captain Newell, who was superintending the building of the ship on the owners' behalf, and was to be the master when she was completed. It was intended that the ship, when ready, should sail from Port-Glasgow in ballast, and as ballast could be loaded at the West Quay, Captain Newell preferred it, as the ship would be always afloat there, and would not run the same risk of having the paint on her hull injured by grounding or contact with other vessels as she would run in the East Harbour.

"About the 7th or 8th of October, however, Captain Newell expressed to the defenders his wish to have the vessel shifted again to the crane berth in the East Harbour, as he had arranged for a particular kind of ballast which could be more conveniently loaded there. The defenders pointed out the vessel had been taken to the West Quay as her loading berth, where she fell to be delivered, and they objected to move the vessel again, as the operation was attended with some risk. Captain Newell agreed that the vessel should be moved at his risk, and in my opinion it is proved that the understanding was that Captain Newell was to take delivery of the vessel when he moved her. He proposed to move her on Saturday the 10th October, and made the necessary arrangements for having her taken to the East Harbour on that day. At the time of which I am speaking the vessel was nearly completed, and apparently it was expected that the builders' work would be practically finished on the 10th October.

"On the 8th October Captain Newell telegraphed to Messrs Brewer to cable the defenders £3950, a sum which was agreed upon between Captain Newell and the defenders as being sufficient to cover the last instalment of the price. On the 9th October Captain Newell telegraphed to Messrs Brewer—'Insure ship Marine. Cable when covered.' I have no doubt that Captain Newell telegraphed for the last instalment of the price, although the ship was not quite completed, and asked Messrs Brewer to insure her, with the intention of taking delivery, and moving her to the East Harbour on the 10th. On the morning of the 10th October the defenders received from Messrs Brewer a cheque for £3950, being the last instalment of the price, and they at once made out the builders' certificate required by the 40th section of the Merchant Shipping Act for the registry of a British built ship. The certificate was enclosed in an envelope, addressed to Captain Newell, and laid upon a desk in the defenders' office, where letters addressed to him were always put.

"Captain Newell came to the defenders' office between ten and eleven on the morning of the 10th October, and had an interview with Mr Livingstone, the secretary, and Mr Archibald Duncan, one of the directors of the defenders' company. Captain Newell's evidence as to what passed is as follows—'I saw on the corner of the desk a long blue official-looking envelope, with, perhaps, one or two letters for myself, mixed up with some other correspondence. I took up the envelope and said, "Hilloa! what's this?" Mr Archibald Duncan said, "That is the thing you want, Captain." I said, "I don't want this, I'm not ready for it yet," and threw it down on the desk and went out of the office. I supposed the envelope contained the builders' certificate. I did not open it, and did not see what was in it.' He afterwards says that his reason for not taking the certificate was that the ship was not completed in terms of the specification.

"Mr Archibald Duncan and Mr Livingstone give a different account of what occurred upon this occasion. They say that Mr Archibald Duncan showed Captain Newell the cheque for the last instalment, and pointing to the envelope said that it was the builders' certificate; that Captain Newell took up the envelope and made as if to put it in his pocket, but instead of doing so he handed it to Mr Livingstone, and asked him to put it in the safe among his (Captain Newell's) other papers, as he could not go that day to the Consul to register the ship. Mr Livingstone accordingly took the envelope—which was never opened—and put it in the safe along with certain other papers belonging to Captain Newell.

"In my opinion the evidence of Mr Archibald Duncan and Livingstone must be accepted as giving a correct version of what occurred at the interview in question. They give precisely the same account of the matter, and if it is not true they must have deliberately invented a false story for the purposes of this case, although apparently they have no pecuniary interest in the matter. Further, both Mr Duncan and Mr Livingstone gave their evidence very frankly and fairly, and I do not think that they are contradicted in any particular except by Captain Newell.

"The latter witness, on the other hand, is at variance in regard to many matters, not only with Mr Archibald Duncan and Mr Livingstone, but with other witnesses whose honesty I see no reason to doubt. I therefore hold it to be proved that on the morning of the 10th October the defenders tendered the builders' certificate to Captain Newell, and that he asked them to put it in their safe with his other papers, and to hold it for him.

"I have dealt in some detail with the evidence as to what occurred in the defenders' office on the morning of the 10th October, because the defenders maintain that the ship was there and then delivered to the pursuers, and was therefore at the pursuers' risk.

"After leaving the defenders' office, or at all events the room in which he had seen Mr Duncan and Mr Livingstone, Captain Newell found that the crane had broken, and that he would not be able to load ballast at the East Harbour for some days. He informed Mr Duncan and Mr Livingstone of this, and gave up the idea of moving the ship until the crane was again in working order.

"Accordingly, no change in the possession of the ship took place on 10th October, or at any time prior to the accident.

"She continued moored at the West Quay by means of ropes belonging to the defenders; their watchman continued in charge of the vessel, and their workmen proceeded with the completion of the vessel, while Captain Newell continued to supervise the work as he had formerly done.

"On the afternoon of Tuesday the 13th October a gale of extraordinary violence was experienced, and the tides rose to an unusual height.

"The defenders accordingly sent their men to put out extra moorings. They appear to have done this as a matter of course, and without any instructions from or communications with Captain Newell. Ropes belonging to the ship were, however, used for some of the extra moorings, and this fact is founded on by the defenders as showing that the ship was then in Captain Newell's possession. The circumstances, however, in which these ropes were used entirely exclude any such inference. Mr M'Nab, the harbour-master, says that he suggested to the defenders' foreman that they should get the use of the ship's ropes, and that the foreman said that the captain would not give them. Mr M'Nab then went on board and saw Captain Newell, who at first objected to giving the ship's ropes on the ground that the ship had not been handed over, but ultimately allowed the ropes to be used on Mr M'Nab representing that the ship was in danger, and saying that the defenders would replace the ropes if they were damaged.

"After the accident Captain Newell appears to me to have at first, and until he took legal advice on the 15th or 16th of October, acted on the supposition that he had taken delivery of the ship, and that she was at the owners' risk. He telegraphed to the Messrs Brewer asking their instructions; he noted a protest as master of the ship, and told Mr Orkney, the notary, that the vessel had been delivered over to the owners, and that the loss would fall upon them; he spoke in similar terms to various other persons, and he made arrangements for the salving of the ship. Captain Newell now says that all he did was matter of precaution in case it should be held that in law the ship was at the owners' risk. My impression, however, is that he believed at the time that the ship was at the owners' risk.

"In these circumstances the question whether the vessel was or was not delivered appears to me to be one of difficulty. As I have already said, I have no doubt that

Captain Newell intended to take delivery on the 10th October. He could not have been forced to take delivery on that day because the ship was not completely finished, but as she was very nearly finished he apparently thought that it would be advisable to take delivery in order that the loading might at once be proceeded with at the crane berth. If the crane had not broken Captain Newell would in all probability have taken possession of the ship upon that day, and the present question never would have arisen. As it happened, however, he never took actual possession of the ship, and if there was delivery at all it was by the builders' certificate being given to Captain Newell. Now, no authority was cited to me, and I know of none, for the proposition that the handing over of the builder's certificate is constructive delivery of a ship. The builders' certificate is simply a document stating certain particulars as to the denomination and tonnage of the ship, and the place and time of building, which the statute requires the owner to produce in order that the ship may be registerd. The delivery of the builders' certificate might be a very important matter if the question was one of property in the ship, or a question of risk apart from agreement. But here the question is not one of property, but of delivery or handing over (as it is sometimes termed in the agreement) of the ship. The property of the vessel is regulated by the fourth article of the agreement, which provides that the vessel as she is constructed, and all materials intended for her, shall immediately become the property of the purchaser, subject to the builders' lien for unpaid purchase money. There is no doubt, therefore, that the property of the ship was in the pursuers, and if the view which I have taken of the evidence, in regard to what occurred on the 10th October, is sound, they were also in a position to put her on the register. But was she at their risk? The contract provides that the vessel shall be at the risk of the builders until handed over to the purchasers; and the specification provides that the vessel shall be insured by the builders until delivered over to the owners. Now the handing or delivering over here referred to has nothing to do with the property of the ship, and must therefore, in my opinion, mean giving the possession or control of the ship to the purchasers. But Captain Newell never got possession or control of the ship. She remained in the possession and under the control of the defenders. Their watchman looked after her, their ropes moored her; and it was they who at once recognised the duty of providing for her safety when the storm arose. I am therefore of opinion that the vessel was never delivered or handed over to the pursuers within the meaning of the agreement, and that therefore she remained at the risk of the defenders.

"But it was maintained that the question is truly one of the intention of the parties, and that the actings of both parties show that their intention was to deliver the ship, or rather to hold the ship as delivered, within the meaning of the contract, on the morning of the 10th October. I have already referred to the actings of Captain Newell after the accident. I think that he believed, and acted on the belief, that the risk was with the owners. The defenders took the same view and telegraphed to their underwriters to that effect. It is curious, however, that prior to the accident both parties appear to have acted upon the assumption that the vessel had not been handed over. Captain Newell demurred to the ship's ropes being used on the ground that the ship had not been handed over; and on the other hand, when the ship was in danger from the gale, the defenders took the measures which appeared to them best fitted to secure her safety without taking orders from the captain or even consulting him. In my opinion, however, this case does not turn upon the actings of the parties. After the accident, when the certificate was handed to Captain Newell, it was expected that the ship would that day be taken possession of by him and moved to the East Harbour, and I do not believe that anyone present considered at the time what would be the legal effect of handing over the certificate if the ship was not moved. It therefore appears to me that the actings of parties after the accident must be attributed to the view which they then took of the effect in law of what had been done on the 10th, and not to any intention which was present in their mind upon the morning of the 10th, to hold the handing over of the certificate as equivalent to delivery of the ship under the contract. . . .

"I shall therefore appoint the cause to be enrolled for further procedure, but as I have given my opinion upon the main question at issue, I shall grant leave to reclaim."

The defenders reclaimed, and argued—It was a question here whether the maxim *periculum rei venditæ nondum traditæ est emptoris* or the maxim *traditionibus et usucapionibus non nudis pactis feruntur rerum dominia* should be applied. The Lord Ordinary had applied the latter. But the matter here really was regulated by a special agreement to that effect, that the vessel as she was constructed should become the property of the pursuers, but that the risk should remain with the defenders until delivery. By a subsequent agreement with Captain Newell, delivery, and with it the risk, were to be taken sooner than the defenders could have insisted upon under the original contract. The defenders contended (1) that delivery had taken place, and that therefore the risk had been transferred under the agreement; or (2) even if delivery had not taken place, the risk had been transferred under the new arrangement with Captain Newell. It was transfer of the risk, not delivery of the ship, except incidentally, in which they were interested. Upon 10th October Newell had done everything necessary for taking delivery of the ship. He had paid the last instalment, had got it insured in the owners' names,

and had received the builders' certificate—never handed over, as he was told, before delivery—with which he could get it registered. After that day it was completely under his control, and an action of declarator of ownership by him would have been unanswerable. After the accident Newell had acted throughout as having to provide against loss—Bell's Prin., secs. 87, 88, and 152; *Simpson* v. *Duncanson's Creditors*, August 2, 1786, M. 14,204; *Hansen* v. *Craig & Rose*, February 4, 1859, 21 D. 432; *M'Bain* v. *Wallace & Company*, January 7, 1881, 8 R. 360—*aff.* July 27, 1881, 8 R. (H. of L.) 106; *Seath & Company* v. *Moore*, December 4, 1884, 12 R. 260—*aff.* March 8, 1885, 13 R. (H. of L.) 57.

Argued for the pursuers and respondents—Under the contract here it was specially provided, contrary to the maxim *periculum rei venditæ*, that although the property passed with the payment of each instalment, the risk remained with the builders until delivery had actually taken place, and the ship had been handed over. Whatever the arrangement with Captain Newell, it was certain the ship had not been handed over. Except for the breaking of the crane it might have been, but the Lord Ordinary was right in holding that the risk could only be transferred by the actual moving of the vessel. It had been attempted to make the handing over of the builders' certificate equivalent to delivery. It was doubtful for whom the certificate was really held, but even if for Newell, it was not a document of title, but only a paper of details, which under section 40 of the 1854 Act (17 and 18 Vict. c. 104) had to be produced before the ship could be registered. The ropes used in mooring belonged to the reclaimers, and the watchman had been appointed by them. Even if Newell thought he had taken delivery, and acted accordingly, that could not affect the legal rights of parties. In *Cooper* v. *Barr & Shearer*, June 6, 1873, 11 Macph. 651—*rev.* February 26, 1875, 2 R. (H. of L.) 14, which was the converse of this, it was held that the shipbuilders had not lost their right of lien although the ship had been moved. Bell's Prin., sec. 88, which gave exceptions to the ordinary law of risk, was in their favour.

At advising—

LORD ADAM—The ship "Helen Brewer, while lying at the West Quay, Port-Glasgow, was blown from her moorings and capsized on Tuesday the 13th October 1891.

The question at issue between the parties is, whether the ship was at the time she was so capsized at the risk of the pursuers, who were the purchasers or owners of the ship, or at that of the defenders, who were the builders? The solution of the question depends on whether or not the ship had been delivered or handed over by the latter to the former on Saturday the 10th of October preceding.

Neither of the nominal parties to the case appear to have any pecuniary interest in the result, the loss falling in any case on certain insurance companies with whom the parties respectively had insured the ship.

The ship was built under an agreement between the pursuers and defenders and relative specifications and modifications dated 13th March 1891.

By the second article of this agreement it was provided that the ship should be delivered afloat in Port-Glasgow Harbour, and by the third article that the purchasers should pay the price of the vessel—£17,600—by four equal instalments of £4400 each, the last being payable when the vessel was delivered and builders' certificate handed over. The fourth article provided that the vessel, as she was constructed, should become the property of the purchasers, but that the builders should at all times have a lien thereon for their unpaid purchase money. The sixth article was in these terms—"The vessel shall be at the risk of the builders until handed over to the purchasers, and until then the builders shall keep her insured in an amount exceeding by £500 the purchase money then paid. The policies for such insurances to be lodged with the purchasers."

I do not think that any other provision of the agreement requires to be noticed.

By the relative specification the provision was repeated, that the builders were to take all risk until the vessel was delivered to the owners. It was also provided that she was to be delivered at her loading berth in the harbour of Port-Glasgow, and to be completed ready for sea, with sails bent, and that any extra towage in the harbour, inward towage dues, pilotage, or hauling expenses, were to be paid by the builders. It was further provided that a finished model, showing houses, &c., testing certificate of chains and anchors, Lloyds' certificate of classification, also testing certificate of steel hawsers, were to be supplied to the purchasers when the vessel was handed over, together with duplicate set or in tracing-paper of the plans of the vessel as completed, with details shown, and stability curves.

The pursuer Captain Newell superintended the building of the ship on the part of the purchasers.

The ship was launched on the 17th September 1891, and was thereafter taken to the crane berth in the East Harbour, where her masts were put in. This berth being required for other vessels, she was then taken at the expense of the defenders to the West Quay. I agree with the Lord Ordinary that she was taken to the West Quay for the convenience and at the request of Captain Newell. I also think that it was arranged by the parties that this was to be the berth at which she was to be delivered to the pursuers under the agreement. While the ship was lying there Captain Newell received instructions from the pursuers that she was to sail in ballast for Philadelphia. Captain Newell had arranged that the necessary ballast should be put on board at the crane berth, and he wished to have the ship again shifted to that berth for the purpose. He accordingly

applied to the defenders to do so. What then took place is thus stated—and I have no doubt quite correctly stated—by Mr Livingstone, the defenders' secretary—"When Captain Newell," he says, "said he wanted the ship shifted to the crane berth, I said we had shifted her to the West Quay as her loading berth as arranged after the launching, and he admitted that, and said he would look after the ordering of the tugs and the engaging of pilot. I said we did not care about running the risk of another shift, as the shift to the West Quay was the last we had intended to make. I said I considered the vessel should be his if she was shifted again, and Captain Newell quite agreed with that. He said he would take delivery on Saturday." The Lord Ordinary says that in his opinion it is proved that the understanding was that Captain Newell was to take delivery of the vessel when he moved her. I do not agree with the Lord Ordinary. I think the understanding was that Captain Newell was to take delivery of the vessel not when he moved her, but before moving her. That that was Mr Livingstone's understanding is clear, because he tells us that the result of the conversation he had with Captain Newell was that he would take the vessel over before shifting her, and Mr Robert Duncan, the defenders' managing director, tells us that "on 7th or 8th October Captain Newell said he wanted to shift the vessel to the crane berth on Saturday the 10th at two o'clock, as he had made arrangements for ballasting her there. He also told me that he had made arrangements with Mr Livingstone, and had called for the last instalment in order that he might take delivery of the vessel before shifting." I think, accordingly, that the understanding was that Captain Newell was to take delivery of the ship on the Saturday in order that having done so he might thereafter shift the ship as and when he pleased.

In order to put himself in a position to take delivery of the ship on the Saturday, Captain Newell telegraphed on 8th October to the pursuers to transmit the last instalment of the price of the vessel, the amount of which had been provisionally settled by him and Mr Livingstone, and on the following day he telegraphed to them to insure the ship on their account.

The last instalment of the price was sent direct by the pursuers to the defenders, and was received by them on Saturday morning. On receipt of the money they immediately prepared the builders' certificate for delivery to Captain Newell on his arrival at their office that morning as usual.

The Lord Ordinary has detailed and commented on the evidence given of what then occurred by Captain Newall and by the other persons present. I do not go over the matter again, because I concur both in his Lordship's comments thereon and in the result at which he arrives, viz., that it is proved that the defenders then tendered the builders' certificate to Captain Newell, and that he asked them to put it in the safe with his other papers, and to hold it for him.

I do not doubt that when the defenders, who had received payment in full for the vessel, then handed over the builders' certificate to Captain Newell, they did so on the footing and understanding that thereafter she was to be subject to his control, and that the risk was transferred to the pursuers.

It appears to me that under the third clause of the contract the payment of the last instalment of the price on the one hand, and the delivery of the vessel and of the builders' certificate on the other, were intended to be the counterparts of each other. Captain Newell had been previously informed by the defenders that the builders' certificate was never delivered to the purchasers until the vessel was taken over by them, and that they would not give him delivery of it until he took over the vessel. I think, accordingly, that when Captain Newell took delivery of the builders' certificate, he knew that the ship was being handed over to him so as to transfer the risk, in terms of the sixth article of the contract, and that he accepted it on that footing. In short, that he took delivery of the vessel under the contract.

That Captain Newell intended to take delivery on that day is certain from the arrangements which he had made for shifting the vessel. His repeated statements to various persons that he had taken over the vessel, his actings in noting a protest as master of the ship, and calling a survey, and in taking exclusive control of the arrangements for salving the vessel, show very clearly that he understood and believed that the vessel had been handed over to him, and was at the risk of the pursuers at the time of the accident.

It was maintained to us that the vessel had not been delivered under the contract because she was not completed according to specification, and because the model, plans, and certificates mentioned in the article of the specification, which were to be supplied to the purchaser when the vessel was handed over, were not so supplied. It is true that the vessel was not entirely completed according to specification, but she was practically completed, and the work which remained to be done could easily have been done in two or three days at the crane berth when she was taking in ballast. It is true that the pursuers would not have been bound to take delivery of the vessel, but if for their own purposes the pursuers desired to have immediate delivery and control of the vessel, I know nothing to prevent them from taking her over in the state in which she was. So also as regards the plans, certificates, &c., which were to be supplied to the purchasers when the vessel was delivered. Nobody in fact seems to have thought or said anything about them. It is clear that their absence formed no obstacle to the delivery of the vessel, because it is not doubtful that but for the breaking of the chain of the crane Captain Newell would have shifted the vessel that day in the state in which she was, and without having been supplied with the

articles in question. But it is not disputed that he could not have done that without having taken delivery of the vessel. On the whole matter, therefore, I am of opinion that on Saturday the 10th of October the defenders gave delivery, and that the pursuers took delivery of the vessel under the contract, and that nothing more was required or necessary to be done to transfer the risk.

The Lord Ordinary, however, while agreeing that this was the intention of the parties, has come to a different conclusion. The grounds on which he does so are these. He says—"The contract provides that the vessel shall be at the risk of the builders until handed over to the purchasers, and the specification provides that the vessel shall be insured by the builders until delivered over to the owners. Now, the delivery or handing over here referred to has nothing to do with the property of the ship, and must therefore, in my opinion, mean giving the possession or control of the ship to the purchasers. But Captain Newell never got possession or control of the ship. She remained in the possession and under the control of the defenders. Their watchman looked after her, their ropes moored her, and it was they who at once recognised the duty of providing for her safety when the storm arose. I am therefore of opinion," he says, "that the vessel was never delivered or handed over to the pursuers within the meaning of the agreement, and that therefore she remained at the risk of the defenders."

I agree with the Lord Ordinary that handing over or delivering the ship means giving the control to the purchasers, but I differ from his Lordship in thinking that the effect of what took place on Saturday morning was not to give the control of the ship to the purchasers.

I think it is doubtful on the evidence whether Captain Newell had not taken actual possession of the vessel, but however that may be, Captain Newell might, after the meeting on Saturday, have taken immediate possession of her if and when he pleased. He might have shifted her at any time and to any place, or exercised any other act of ownership without reference to the defenders. That Captain Newell might not have thought it necessary to make any change of the existing arrangements with reference to the position or security of the vessel, does not alter the fact that with him lay the power of doing so. The control of the vessel being, as I think, with the pursuers, so also was the risk.

On these grounds I think that the Lord Ordinary's interlocutor should be altered.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

The Court altered the Lord Ordinary's interlocutor, assoilzied the defenders from the conclusions of the action, and found the pursuers liable in expenses.

Counsel for the Pursuers and Respondents —Jameson—Aitken. Agents—Forrester & Davidson, W.S.

Counsel for the Defenders and Reclaimers —Sol.-Gen. Asher, Q.C.—Dickson. Agents —J. & J. Ross, W.S.

Wednesday, December 7.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

TURNBULL *v.* OLIPHANT.

Succession — Settlement — Construction — Vesting—Title to Sue.

A testator by a general disposition and deed of settlement left his whole estate, heritable and moveable, to his wife, whom he appointed his executrix, with full power to her to sell and dispose or burden the heritable estate, and generally to "act and perform in respect to the whole premises hereby conveyed as fully and freely as I could myself before granting hereof, my express wish and intention being that my said wife, in the event of her survivance, shall possess and occupy and enjoy my said estate and effects all the days of her life, but expressly prohibiting any gratuitous alienation of any part or portion of my estate, heritable or moveable, either during her lifetime or to take effect after her decease." On her death "any residue" of his estate was to be divided in certain proportions between his two brothers and the children of a deceased brother.

His wife survived him. After her death, upon the petition of the residuary legatees, a judicial factor was appointed upon the testator's estate. The judicial factor sued a niece of the testator's widow for the sums contained in two deposit-receipts given to the defender by the widow.

Held that under the testator's settlement his widow took the fee of his whole estate, and that as the pursuer had failed to prove that the sums sued for were the property of the testator, he had no title to sue.

Robert Mickel, Linlithgow, died on 13th April 1880, leaving a general disposition and settlement dated 8th February 1875, whereby he granted and disponed, "under the burdens, provisions, and reservations after mentioned, in favour of Mrs Isabella Oliphant or Mickel, my wife, in case she shall survive me," his whole estate, heritable and moveable, and he appointed her his sole executrix. The deed, after describing the heritable subjects, proceeded—"All these, as well as my personal estate, I give and bequeath to my said wife Mrs Isabella Oliphant or Mickel, with full power to her to sell and dispose of all or any part of the said heritable subjects,