Monday, March 8.

(Before Lord Halsbury, Lord Blackburn, Lord Watson, Lord Bramwell, and Lord Fitzgerald.)

SEATH & COMPANY *v.* MOORE (A. CAMPBELL & SON'S TRUSTEE).

(Reported in Court of Session 9th December 1884, *ante*, vol. XXII. p. 192, and 12 R. 260.)

Sale—Delivery—Payment by Instalments—Sale of Engines and Fittings for Ship—Mercantile Law Amendment Act 1856 (19 *and* 20 *Vict. c.* 60), *sec.* 1—Locatio operarum—*Bankruptcy.*

A shipbuilder entered into five contracts with an engineer whereby the latter agreed to supply and fit up engines, boilers, and other fittings in certain vessels which were being built or repaired by the former. In three of the contracts there were stipulations for payment by instalments at certain stages of the work, but in the others there was no such stipulation, and, in point of fact, the precise stipulations for payment by instalments were never conformed with, but in all the five contracts payments to account were made from time to time as the engineer required them, if the shipbuilder considered that sufficient work had been done to warrant such payment. Of the same date with the latest of the five contracts, the parties agreed, by a letter granted by the engineer and accepted by the shipbuilder, that with regard to all their contracts made or to be made, "on payment being made to account of any such contract, the portion of the subject thereof so far as constructed, and all materials laid down for constructing the same, shall become the absolute property" of the shipbuilder, subject only to lien for payment of the price or any balance thereof remaining due. The engineer was in labouring circumstances at the date of the letter, and this was known to the shipbuilder. He became bankrupt six months after its date, and his trustee claimed the unfinished engines, machinery, and materials lying in his yard at the date of sequestration, which constituted almost the whole of the assets in his possession. *Held*, in an action by the shipbuilder for declarator that he was proprietor of the engines, machinery, and materials in the engineers' yard, intended for the contracts (*aff.* judgment of Second Division) (1) that the articles in dispute, though intended for use in the contracts, were not in fact appropriated thereto, nor had they been accepted by the shipbuilder as in implement of the contract, and therefore not only had the property of them not passed to the shipbuilder by sale followed by a constructive delivery, but they had not even been the subjects of a personal contract of sale such as would be sufficient to pass the risk; (2) that the meaning of the letter of agreement (even assuming that it was not a fraudulent preference, and capable of receiving legal effect) was to give the shipowner the property of all materials brought to the engineers' yard for use in the contracts, and it could therefore receive no effect, because by the law of Scotland property does not pass by a sale *retente possessione*, and *separatim*, that even if it were regarded as a security, it was invalid as being a latent security over goods which remained in the bankrupt's possession. *Held*, therefore, that the trustee was entitled to the articles in dispute.

Observations, per Lord Watson, on *Simson* v. *Duncanson's Creditors*, August 2, 1786, M. 14,204.

This case is reported in the Court of Session, *ante*, vol. XXII. p. 192 (9th December 1884).

The pursuers, T. B. Seath & Company, appealed to the House of Lords.

At delivering judgment—

LORD BLACKBURN—My Lords, the pursuers Seath & Company are shipbuilders carrying on business at Glasgow and Rutherglen on the Clyde. The defender Moore is the trustee on the estate of A. Campbell & Son, who were sequestrated on 12th May 1883. A. Campbell & Son up to the date of their sequestration carried on also at Rutherglen the business of engineers. Seath & Company were not themselves engineers, and when either in order to complete a ship of their own, or in order to fulfil a contract which they had entered into with a third party, they required to have machinery made, they were in the habit of employing A. Campbell & Son to supply it.

There does not appear, at least in any of the transactions now in question, to have been any privity of contract between A. Campbell & Son and the third parties with whom Seath & Company had contracts. When it was known to both sides that Seath & Company wanted the machinery to implement a contract with another, that would be important in considering what agreement should be made between Seath & Company and A. Campbell & Son. But when the agreements were made they were between Seath & Company and A. Campbell & Son.

In no one of the five contracts now before the House were Seath & Company to do any work to the machinery in A. Campbell & Son's yard. Their part was to pay money, and so far as concerned fitting the machinery into the ships, to have the ships ready at the required time. Seath & Company advanced money in respect of the work in progress, and A. Campbell & Son did much work on machinery. On the sequestration the trustee took possession of a large number of articles which (if A. Campbell & Son had continued *sui juris*, and both parties carried out what they contemplated doing, Seath & Company making the further payments they were to make, and A. Campbell & Son finishing the further work they were to execute) would have been delivered on the ships, and then ceased to be in any respect the property of A. Campbell & Son. The pursuers Seath & Company claimed to have these articles delivered to them.

I think there is a separate question as to each article, that being what on the proof appears to have been the contract as respects that article, and also how far what was to be done to that article had been carried.

As the transactions all took place in Scotland, the effect of the contracts and the acting of the parties (when it is ascertained what they were) on the rights of Seath & Company and A. Campbell

& Son in respect of any particular article must depend on the Scottish law.

If a firm of shipbuilders and a firm of engineers had carried on business on the Tyne instead of on the Clyde, and entered into precisely similar arrangements, and done exactly similar things, so that the proof was exactly the same, I think the questions, what was the contract, and how far they had acted with respect to any particular article, would be identical with those in the present case. But what the effect would be on the rights of the two firms as to the property in that article would be a question of English law. The law of England does differ from the civil law, and those laws founded on it, including the Scottish law, as to what is sufficient to pass the property in a moveable chattel. A contract for a valuable consideration, by which it is agreed that the property in a specific ascertained article shall pass from one to another, is effectual according to the law of England to change the property. It may be that the party who has sold the article is entitled to retain possession till the price is paid, if that was by the contract to precede delivery, but still the property is changed.

It is essential that the article should be specific and ascertained in a manner binding on both parties, for unless that be so, it cannot be construed as a contract to pass the property in that article. And in general, if there are things remaining to be done by the seller to the article before it is in the state in which it is to be finally delivered to the purchaser, the contract will not be construed to be one to pass the property till those things are done.

But it is competent to parties to agree for valuable consideration that a specific article shall be sold and become the property of the purchaser as soon as it has attained a certain stage, and though if it is part of the bargain that more work shall be done on the article after it has reached that stage, it affords a strong *prima facie* presumption against its being the intention of the parties that the property should then pass. I do not examine the various English authorities cited during the argument. It is, I think, a question of the construction of the contract in each case at what stage the property shall pass, and a question of fact in each case whether that stage has been reached.

As I understand the civil law, the property is not transferred without delivery, and consequently, unless there was an actual—or perhaps a constructive—delivery, the property remained the property of the seller, and his creditors might seize it. But though this was so, yet when things had gone so far as that, according to the true construction of the contract in each case there was *perfecta emptio*, there was a *jus ad rem* transferred to the purchaser, though as between the purchaser and the creditors of the vendor a complete property remained in the vendor; there was a property, though not a complete one, transferred to the purchaser, such that the risk of loss and the chance of gain were both transferred to the purchaser, so that the property remaining in the vendor was as between him and the purchaser not a complete property.

The Scottish law, as I understand it, followed the civil law; though there was a perfect sale transferring the risk of loss and the chance of gain, and giving the purchaser an interest in the thing so as to enable him as against the vendor to enforce delivery, yet unless there was a delivery, actual or perhaps conventional, the creditors of the vendor might seize the thing. An alteration was made in the law in this respect by the Mercantile Law Amendment Act 1856—"Where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditors of such seller after the date of such sale to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or other in his right from enforcing delivery of the same." I do not think this enactment has the effect of saying that the property shall pass, but when a sale has proceeded so far that the purchaser has a right to enforce the delivery, it renders the distinction between the right of the purchaser and that of one to whom under the law of England the property had passed merely a nominal distinction not affecting the substantial rights.

The Lord Ordinary in this case having heard all the proof has come to the conclusion that the pursuers have failed as to all the articles; he therefore assoilzied the defender. As to some, by a minute agreed to by the parties they have been given up, and so far there has been an alteration made in his interlocutor. There is no appeal as to that alteration, and we need not inquire what were the motives which led the parties to agree to that minute. Subject to that alteration the interlocutor of the Lord Ordinary is adhered to. And it is against that interlocutor that this appeal is brought.

I have come to the conclusion that the interlocutor is right, and that the appeal should be dismissed with costs.

I agree with the Lord Ordinary that no custom of trade is proved which could affect the construction of the five contracts.

The first of the contracts, that of the 2d September, was to furnish and to fit up in a vessel to be built by the pursuers an engine and boilers for a lump sum of £1800, and I am not sure how far the Lord Ordinary when he says that "the contract was not a contract of sale habile to convey a *jus ad rem*," means to express an opinion that because the contract was to complete and deliver the engine and boilers on board the vessel of the pursuers, and then to fit them up there, which fitting up I think would be aptly described as work and labour, the furnishing of the boilers and engine could not under any circumstances be a sale of them. I should pause before I agreed to that, but I think it quite sufficient to say that *prima facie* there was no sale at least till the boilers and engine were so far completed as to be fit for delivery on the vessel, where they were to be fitted up by A. Campbell & Son, and that there is nothing in the contract to indicate any intention that they should be held as sold at any earlier stage, whilst the fact that there was to be one lump price for the whole engine, boilers, and fitting up is strongly against that construction.

The second contract, that relating to the "Brighton" does contain a stipulation that "the first parties shall pay to the second parties the sum of £6300 for the said engines, boilers,

machinery, and appurtenances, and that by four equal instalments, as follows, viz., "the first when cylinders, sole-plates, and condensers are cast; the second when the machinery tooled and boilers ready for riveting; the third when the engines, boilers, and machinery are all ready alongside for lifting on board; and the fourth when all completed and tried to the satisfaction of the owners and ready for delivery."

I do not think it necessary to inquire whether, if the question had arisen as to the rights of the pursuers after the first three instalments had been earned and paid, this would or would not be sufficient to establish that the engines and boilers so far completed were then sold; for as I understand the case the boilers and engines were before the sequestration, as far as completed, completely delivered, and all that the defender seized were some loose articles in the yard of the sequestrated trader, which probably were intended to be part of the boilers and engines but never had become so.

The third contract does stipulate for a payment of one-third of the price "when the boiler is on board," but it never reached the state when it could be put on board.

The fourth contracts contains no stipulation as to an instalment at all. I agree with the Lord Ordinary that if the reasoning as to the first contract is right it applies also to these contracts.

The fifth and last contract—that relating to the "Bonnie Princess"—was rather peculiar. The Liverpool and Welsh Coast Company had agreed to pay Seath & Company £1500 after "receiving a report by two competent engineers stating that the machinery is working satisfactory." The agreement between Seath & Company and A. Campbell & Son was—"First, that the second party," A. Campbell & Son, "shall execute the work, and undertake and implement the whole obligations undertaken by and imposed upon the first party," T. B. Seath & Company, "by the said agreement in all respects, excepting only the requisite alterations to the bunkers and others coming within the shipbuilders' department (which the first party shall execute at their own expense), and the first party shall be entitled to enforce implement of the said agreement against the said second party. Second, that the second party shall receive payment of the whole sum stipulated to be paid by the company under said agreement, on the conditions therein stated, but the first party shall have a lien thereon for any sum which may be due by the second party to them. Third, that the second party shall free and relieve the first party of all claims which may arise or be made against them by the said company in respect of alleged breach of the said agreement, as well as of the original contract, so far as the same has been or may be occasioned by their default."

The articles in question never were put on board the steamer, and still less were the conditions on which alone the Liverpool and Llandudno Company were to pay the £1500 fulfilled. It seems impossible to construe this contract as amounting to a sale of any of the articles under this contract.

I am much inclined to think that where a contract made in Scotland was such, and had been so far executed, that if a precisely similar contract made and so far executed between two firms on the Tyne would have been construed to amount to a sale passing the property, that contract in Scotland ought to be construed as giving a *jus ad rem* against that article. Perhaps that may not be always so. But I am of opinion that if the whole of these transactions had been English there would not in respect of any one of the articles have been established a contract such as under the circumstances to pass the property.

As for the agreement of 1st December 1882, I think it is not an agreement for a sale at all, but an attempt to bargain for a pledge or security. A pledge or security without delivery of possession is, I think, not good. And though in England a bill of sale under seal having that effect may be made, this is not a bill of sale.

Lord Watson—My Lords, the respondent Alexander Moore is trustee for the creditors of A. Campbell junior, who carried on business as a manufacturing engineer in Glasgow, under the firm name of A. Campbell & Son, until his estates were sequestrated on the 12th May 1883. For many years prior to his sequestration the bankrupt was largely employed by the appellants, who are shipbuilders at Glasgow and Rutherglen, to make and fit up engines and machinery in vessels constructed by them either under contract or on speculation, and that employment constituted the main part of the bankrupt's trade, his other business consisting chiefly of job-work and repairs.

At the date of his sequestration the bankrupt was in course of executing five different contracts with the appellants—the first of these, dated September 1881, for furnishing tandem machinery to the "Elms;" the second, dated March 1882, for supplying and fitting engines for the "Brighton;" the third, dated August 1882, for constructing and fitting a new boiler on board the "Satanella;" the fourth, dated September 1882, for making and fitting two tandem-engines on board a barge belonging to the Trinity Board; and the fifth, for removing her boilers from the steamer "Bonnie Princess," and replacing them with two upright boilers, and making certain alterations in the details of her machinery and engines. Of these five vessels, one only, the "Elms," was built by the appellants on their own account, whilst the "Brighton," the "Satanella," and the Trinity barge were built for customers. The "Bonnie Princess" had been delivered to the purchaser with her hull and engines completed, but she did not attain the guaranteed speed, and was returned to the appellants in order that her machinery, which had been supplied by the bankrupt, should be altered and repaired. The bankrupt on the 1st December 1882 undertook to make these alterations and repairs "to the satisfaction of an engineer to be appointed by the shipowners."

In the contract for the "Brighton's" engines it was expressly stipulated that the price (£6300) was to be payable to the bankrupt by four equal instalments at specified stages, but none of the other four contracts contained a written stipulation to the effect that any part of the price was to be paid before his contract obligations had been fully performed by the bankrupt.

It is a fact established by the evidence that the appellants throughout the whole course of

their dealings with the bankrupt were in use to make advances to him from time to time to account of the contract price, even in cases where there was no stipulation as to instalments. These advances were not made in virtue of any legal obligation, and their amount was determined by the appellants with reference to their general knowledge of the progress which the bankrupt had made towards completion of the contract work, or in the preparation of materials for it, and without inspection or express acceptance of any part of the work as conform to contract.

In the month of November 1882 the bankrupt became seriously embarrassed for want of ready-money. The contracts which he had then on hand related to the first four of the vessels already mentioned, and he was aware, and informed the appellants, that he would be obliged to stop his works and suspend payment unless he received pecuniary assistance from them. The appellants agreed verbally to make him advances from time to time to account of the contract prices (the amount of such advances being left to their discretion) in respect of his granting to them a letter of agreement or obligation, which bears date the 1st day of December 1882. The only consideration expressed in that writing is, that he had entered into contracts with the appellants "in some cases without certain stipulations being expressed with reference thereto." The *first* article of the writing provides that the appellants shall at all times have free access to the bankrupt's premises for the purpose of inspection, and that the "whole work and material of any such contract shall be subject to the approval of the said T. B. Seath & Company, or of their representatives." The *second* article is to the effect that on a payment being made on account of any contract, "the portions of the subject thereof, so far as constructed, and all materials laid down for the purpose of constructing the same, shall become and be held as being the absolute property of the said T. B. Seath & Company," subject only to the bankrupt's lien for so much of the price as might be unpaid. By the *third* article the appellants are empowered, upon the insolvency of the bankrupt, or his failure to proceed with due diligence in the execution of the work, not only to take possession of the completed work, and "all materials laid down or obtained for the construction thereof," but to enter, if they shall think proper, into possession of his premises and use his plant, tools, and machinery for the completion of the work. By the *fourth* article the bankrupt undertakes the risk of all contract work until completed and delivered, and also undertakes to effect adequate insurances against loss by fire in name of the appellants. These conditions are declared to be applicable to all contracts or agreements then current, or which might thereafter be made between the parties. The only contract subsequently made was that relating to alterations and repairs in the machinery of the "Bonnie Princess."

At the date of the sequestration none of the five contracts in question had been completed, and no machinery had been placed on board ship except in the case of the "Brighton." The fitting of her engines was nearly completed, but certain parts of the machinery, some of them unfinished, had not been put on board or fitted. The trustee took possession, for behoof of the general body of creditors, of the uncompleted work and materials which he found on the bankrupt's premises, which had either been used or were intended to be used in the execution of these contracts. The appellants on the 30th June 1883 instituted the action in which this appeal is taken, concluding for delivery to them of the whole of such work and materials. The articles claimed, which I shall afterwards have to refer to more particularly, are enumerated in the conclusions of the summons, and also in certain inventories forming No. 24 of process, and they are generally described in the summons as being "connected with the fulfilment" of one or other of the five contracts already referred to.

The Lord Ordinary (Adam) rejected the appellants' claim, and by interlocutor dated the 8th of April 1884 assoilzied the respondent, with expenses. The appellants reclaimed to the Second Division of the Court, but before judgment the parties lodged a joint-minute setting forth that the respondent Moore consented to its being found and declared that, as in a question with him or the bankrupt, the appellants were entitled to possession of the last three items of the first inventory, and also of the articles forming branch II. of the third, and branch II. of the fifth inventory. By interlocutor dated 9th December 1884 their Lordships found and declared in terms of the minute, and to that extent altered the judgment of the Lord Ordinary, but *quoad ultra* refused the reclaiming-note, adhered to the interlocutor reclaimed against, and found the respondent entitled to additional expenses.

The appellants maintained that by the law of Scotland the work executed under each contract, so far as then completed, vested in them, and became their property whenever they made payment of an instalment or an advance to account of the price such as they considered fairly proportionate to its value. That proposition was founded upon the case of *Simson* v. *Creditors of Duncanson*, 2d August 1786, Morison's Dictionary, p. 14,204. The decision in that case does not, in any view of it, go so far as to support the claim preferred by the appellants to the property of articles, finished or unfinished, merely intended for use in the construction of a vessel, but not yet made part of the thing sold. Nor, in my opinion, can it be held as authority for the general proposition that in the circumstances narrated in the report the property of that part of an unfinished ship which has actually been constructed passes to the purchaser without delivery. The report of the case as collected by Morison, and supplemented by Professor Bell (Commentaries, 5th edition, vol. i, p. 157) is exceedingly meagre, and there may have been circumstances before the Court sufficient to warrant the inference that delivery had been made, which had not been noticed by the reporter.

At the time when *Simson* v. *Creditors of Duncanson* was decided, and for many years afterwards, the purchaser of a vessel, or of any other corporeal moveable, had, before delivery was made to him and its property vested in him, no right to the thing sold as against creditors of the seller who had used diligence, or against the

trustee in his sequestration. Until possession was given to the purchaser the trustee had the option either of enforcing the contract against him, or of taking the the thing sold, leaving the purchaser to rank for a dividend upon the amount of loss he sustained by non-fulfilment of the contract. By the law of England the appropriation of a specific chattel by the vendor, and the agreement of the vendee to take that specific chattel and pay the stipulated price, have the effect of vesting the property of the chattel in the vendee. In Scotland the effect of such an appropriation and acceptance by the contracting parties is to perfect the contract of sale, and to give the purchaser a personal right to demand delivery of the specific chattel from the seller. When the contract is thus perfected the risk is transferred to the purchaser, according to the maxim of the civil law, *periculum rei venditæ nondum traditæ est emptoris*, but the property of the chattel does not pass to him until he has obtained delivery under the contract.

In the year 1856 the Mercantile Law Amendment (Scotland) Act was passed for the purpose of remedying the inconvenience arising from certain differences between the laws of England and the sister country. Section 1 of that Act provides that "where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller, after the date of such sale, to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing delivery of the same, and the right of the purchaser to demand delivery of such goods shall from and after the date of such sale be attachable by or transferable to the creditors of the purchaser."

These enactments involve no alteration of the principles previously applicable to the contract of sale itself. Their sole effect is to deprive the creditors of the seller or the trustee in his bankruptcy of the right, which they previously had, to defeat the purchaser's right to demand delivery of the goods sold to him. In construing the first section of the Act it has all along been held, and in my opinion rightly held, in the Courts of Scotland that it imposes no limitation upon the right of the seller's creditors or trustee until the contract of sale has been perfected in the sense which I have already indicated—in other words, that goods are not "sold" within the meaning of the section unless the contract has been so far completed as to confer a proper *jus ad rem* upon the purchaser.

The appellants maintain that under these provisions of the Mercantile Law Amendment Act they are entitled to demand delivery from the trustees of all the articles enumerated in their summons. In order to establish that right with regard to all or any of the articles in dispute it must be shown that these had before the sequestration been "sold" to them by the bankrupt within the meaning of the Act. The authorities which appear to me to have the most material bearing upon this part of the case are *Woods* v. *Russell*, 5 Barnewall and Alderson, 942; *Clarke* v. *Spence*, 4 Adolphus and Ellis, 448; and *Wood* v. *Bell*, 5 Ellis and Blackburn, 772; 6 Ellis and Blackburn, 355. It is true that these are English decisions relating to ships in course of construction, and that in the present case none of the machinery or articles in dispute had been attached to the vessels of which they were severally intended to form part. But I see no reason why the principles applicable to the sale of part of a ship should not equally apply to the sale of part of a marine engine, or other *corpus manufactum* in course of construction. And so far as I understand the laws of the two countries, the same circumstances and considerations which in England sustain the inference that a chattel has been "sold" to the effect of passing its property to the vendee, will in Scotland generally be sufficient to sustain the inference that it has been "sold" to the effect of transferring the risk to the purchaser, and giving him a *jus ad rem* enforceable against creditors of the seller under the Act of 1856.

The English decisions to which I have referred appear to me to establish the principle that where it appears to be the intention, or in other words the agreement, of the parties to a contract for building a ship, that at a particular stage of its construction the vessel, so far as then finished, shall be appropriated to the contract of sale, the property of the vessel as soon as it has reached that stage of completion will pass to the purchaser, and subsequent additions made to the chattel thus vested in the purchaser will, *accessione*, become his property. It also appears to me to be the result of these decisions that such an intention or agreement ought (in the absence of any circumstances pointing to a different conclusion) to be inferred from a provision in the contract to the effect that an instalment of the price shall be paid at a particular stage, coupled with the fact that the instalment has been duly paid, and that until the vessel reached that stage the execution of the work was regularly inspected by the purchaser or someone on his behalf. I do not think it is indispensable in order to sustain that inference that there shall be a stipulation for payment of an instalment in the original contract, or that the stipulated instalment shall have been actually paid. The absence of these considerations, which are in themselves of great importance, might in my opinion be supplied by other circumstances. At all events, whenever during the currency of a contract which contains no such stipulation, the parties in good faith agree that the purchaser shall pay a sum to account of the price, and that the vessel so far as constructed at the date of that payment shall be appropriated to the contract, I see no reason to doubt that the new covenant so made ought to have the same effect as if it had been a term of the original contract. I am, however, of opinion that by the law of England, in order to pass the property as sold, there must always be facts proved or admitted sufficient to warrant the inference that the purchaser has agreed to accept the *corpus* so far as completed as in part implement of the contract of sale.

There is another principle which appears to me to be deducible from these authorities, and to be in itself sound, and that is, that materials provided by the builder, and portions of the fabric, whether wholly or partially finished, although intended to be used in the execution of the con-

tract, cannot be regarded as appropriated to the contract or as "sold" unless they have been affixed to or in a reasonable sense made part of the *corpus*. That appears to me to have been matter of direct decision by the Court of Exchequer Chamber in *Wood* v. *Bell*. In *Woods* v. *Russell*, 5 Barnewall and Alderson, 942, the property of a rudder and some cordage which the builder had bought for the ship was held to have passed in property to the purchaser as an accessory of the vessel, but that decision was questioned by Lord Chief-Justice Jervis delivering the judgment of the Court in *Wood* v. *Bell*, who stated the real question to be, "what is the ship, not what is meant for the ship," and that only those things can pass with the ship "which have been fitted to the ship, and have once formed part of her, although afterwards removed for convenience." I assent to that rule, which appears to me to be in accordance with the decision of the Court of Exchequer in *Tripp* v. *Armitage*, 4 Meeson and Welsby, 687.

I shall now advert to the character of the articles claimed by the appellants, as these are enumerated in the summons, and more fully described in the inventories, which I have carefully examined. The result of that examination has been to satisfy me that with the exception of one item (a tandem engine said to be almost complete) in the inventory relating to the "Elms," two items in that relating to the "Satanella," three items in that relating to the "Trinity," and of two items in that relating to the "Bonnie Princess," all the articles claimed, though meant to be used in the execution of the five contracts current at the date of the sequestration, are mere *disjecta membra* more or less finished, which have never been attached to or become part of any specific *corpus*. It appears to me to be impossible to hold that any of these articles were specially appropriated to the several contracts for which they were provided, or, in other words, that they were "sold" in such sense as to give the appellants a *jus ad rem*, unless your Lordships shall be of opinion that the decisions of the Court of Exchequer in *Tripp* v. *Armitage*, and of the Exchequer Chamber in *Wood* v. *Bell*, are contrary to law. With regard to the excepted items, the descriptions given of them are not so minute as to enable me to determine whether all that is comprehended in each item, and in some instances whether any part of the item, can be reasonably considered as a *corpus* in the same sense as the framework or hull of a ship in course of construction.

Before dealing with the question, whether assuming them to be of a character which admitted of their being appropriated to the purchasers, these excepted items were actually "sold" to the appellants to the effect of giving them a *jus ad rem*, I think it will be convenient to consider the legal effect of the letter of agreement by the bankrupt dated 1st December 1882. Although the letter professes to embody certain stipulations which had been omitted in framing his contracts with the appellants, the leading conditions to which the bankrupt thereby submits are in my opinion entirely collateral to the contract of sale. The plainly expressed purpose of the letter was to vest the appellants with the absolute property, not only of the subject of each contract so far as actually constructed, but of all materials brought to the bankrupt's premises in order to be used in its construction, probably with the view of giving the appellants security for advances made by them to account of price.

I need hardly say that by the law of Scotland the property of corporeal moveables cannot be passed without delivery of possession, and a stipulation in a contract of sale that the thing sold shall become the property of the purchaser without delivery is as invalid against the creditors of the seller as it would be in any other contract. In *Anderson* v. *M'Call*, 4 Sess. Cas. (3d Series) 771, Lord Neaves said—"The law of Scotland is clear that no property in moveables can be passed without delivery, and that no security can be constituted over moveables *retenta possessione*. A written instrument of possession will not pass the property of moveables. . . . The fundamental principle is that the right of property in moveables does not pass by consensual contract." The appellants' counsel hardly disputed that such is the law of Scotland, and that there was no delivery to the appellants of any of the articles claimed by them, but they argued that the letter indicated the intention of the parties that upon an advance being made on account of any contract, the articles constructed and provided for its execution should be "sold" under the contract. I am unable to infer that intention from the tenour of the writing. On the contrary, its terms appear to me clearly to indicate that their intention was to give the appellants a right of property in all materials collected, and all parts of machinery finished or unfinished with a view to the contract, as well as the machinery so far as set up and connected, and that quite irrespective of any obligation on the part of the bankrupt to use such materials in the execution of the contract, or of any obligation on the part of the appellants to accept the property to be thus vested in them, or any portion of it, as in implement of the contract.

It was urged for the respondent at your Lordships' bar as well as in the Court below, that in the circumstances disclosed in evidence the letter of 1st December 1882 was void in law, in respect that it conferred upon the appellants an undue preference over the general creditors of the bankrupt. Had the law of Scotland permitted the document to receive effect according to its terms it might have been necessary to decide that point, but if the views which I have expressed in regard to its import and legal effect meet with your Lordships' approval it becomes unnecessary to dispose of it.

It only remains for consideration whether the excepted items already referred to, connected with the "Elms," "Satanella," Trinity barge, and "Bonnie Princess" contracts were sold to the appellants within the meaning of the Mercantile Law Amendment (Scotland) Act. I assume that each of these items was in reality a specific *corpus* capable of being appropriated to the contract, in part implement of which it had been constructed at the time when an instalment or advance to account of the contract price was actually paid. In the case of each of these contracts one or more of such payments had been made before the date of the sequestration, and although they were not originally stipulated, I should nevertheless be of opinion that the appellants had acquired a personal right to insist for delivery if it appeared

that either at the time when such payments were made in respect of a particular contract, or at the time when they were appropriated by mutual consent to that contract, the parties intended and agreed that the contract work so far as then completed and existing *in forma specifica* should be "sold" to the purchaser. But in order to constitute an agreement to that effect it must appear that the purchaser consented to accept of the subject in the same condition in which it then was as part of the completed subject, which was to be subsequently delivered to him by the seller under the contract of sale.

I have come to the conclusion that the appellants' claim to the excepted items must fail, because I cannot find in the case of any one of them the least trace of an agreement or of an intention on their part to accept of it as in implement of the contract of sale. Had they inspected the work and material as the purchasers had done in *Clark* v. *Spence* and *Wood* v. *Bell*, there would have been room for the inference that they had accepted as in terms of the contract the work so far as completed and inspected, and that the bankrupt had no longer the right to alter or reconstruct any part of it, thereby necessitating a second inspection. Mr Seath, one of the partners of the appellant company, was from time to time in the bankrupt's premises, and had a general knowledge of the progress made in the work of each contract and in preparing materials for its execution, but it is not pretended that there was inspection either by him or any other person representing the appellants. There is in fact not a single circumstance, either admitted or established in evidence, sufficient to support the inference that they meant to accept or did accept the work executed as in implement *pro tanto* of the contract, whilst there are many circumstances which lead to an opposite conclusion.

I am accordingly of opinion that the interlocutors appealed from ought to be affirmed and the appeal dismissed with costs.

Lord Bramwell—My Lords, I agree in the conclusions of my noble and learned friends, and in the reasons which have led them to those conclusions. All I wish to say is that our opinions do not in any way impugn the principle of *Russell* v. *Woods* except as to the two chattels there mentioned—the rudder, and I think some rope; and I may repeat what Lord-Justice Mellish said, that I should be very sorry if anything we said did so or seemed to do so. Nor do our opinions in any way impugn the reasons given in that case for that decision. I also agree that the same reasoning would apply to any other chattel as to which the parties should agree that the property should pass while the chattel was in an incomplete state.

Lord Fitzgerald—My Lords, I have read and carefully considered the judgments which have been delivered by my noble and learned friends opposite, and I entirely concur in them. Those judgments render it unnecessary for me to express any opinion upon the question at all.

Lord Halsbury—My Lords, I have also had an opportunity of reading the judgments of the two noble and learned Lords, and I desire to express my concurrence.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Counsel for Pursuers (Appellants)—Solicitor-General Davey, Q.C.—Dickson—Greig. Agents—Holms, Greig, & Greig, Westminster, for J. Young Guthrie, S.S.C.

Counsel for Defender (Respondent)—Attorney-General Russel, Q.C.—R. V. Campbell—M'Clymont. Morton, Cuther, & Co., London, for Maitland & Lyon, W.S.

Thursday, February 18.

(Before Lord Chancellor Herschell, Lords Watson, Fitzgerald, and Halsbury.)

BLACKIE AND OTHERS (COMMITTEE OF MARKET GARDENERS) *v.* MAGISTRATES OF EDINBURGH.

(*Ante*, February 5, 1884, vol. xxi. p. 352, and (under date March 20, 1884) 11 R. 783).

Burgh—Magistrates—Administration of Burgh Affairs—Market—Power to Allow Market-place to be Used for other Purposes than those of a Market.

Prior to 1823 the Fruit and Vegetable Market of Edinburgh was in use to be held by the Magistrates, in virtue of their exclusive right to hold fairs and markets, conferred by royal grant and legislation following thereon, in public streets of the city, at places varying from time to time. In 1823 a market-place was set apart and enclosed. In 1860 this site was acquired by a railway company under an Act providing that they should be bound to construct and make over to the Magistrates another market-place, not in the open street, but enclosed, and of not less accommodation than that then existing, and the company subsequently agreed with the Magistrates to provide such a market-place, and constructed and gave over to the Magistrates in implement of the obligation a new market-place. In 1874 an Act was passed, of which section 8 provided that "the Corporation may cover in in a suitable and convenient manner the Fruit and Vegetable Market-place, and improve and better adapt the same for the purposes of such market, and for the accommodation of parties using the same, and of the public, and may make such internal and other arrangements and divisions in regard to stands, stalls, and shops as to them may seem suitable; provided always that the ground floor only of such market-place shall be used for such Fruit and Vegetable Market, and that all vacant portions of such market-place, whether on the ground floor or above the same, and all vacant and unlet stands, stalls, or shops in or on such market-place, may be let or used by the Corporation for such purposes, and for such rents or rates as to them shall seem proper." Increased dues were levied by the Magistrates for the market gardeners' stances in respect of these improvements. The market-place, under the