With regard to the question of expenses raised under the Public Authorities Protection Act, I need only say, without going into details, that an examination of the Act has led me to the same conclusion as that expressed by Lord Stormonth Darling.

LORD ARDWALL — I concur entirely in the opinion of my brother Lord Low, which I have had the privilege of reading, and with which I entirely agree.

LORD JUSTICE-CLERK—I have very little to add. The case has seemed to me to be attended with considerable difficulty. But I have come to the view that the judgment should be as proposed. I cannot say that I think the giving of notice under the Act was given with that clearness and formality which would be expected where notice was given by a public authority proposing to interfere with a piece of property in which private proprietors had a substantial interest. I think that the procedure was loose, and not by any means a model for imitation by any public body. But it was treated by the pursuers as a notice without objection. Accordingly the work proceeded in the knowledge and under the observation of the pursuers. It seems to me that, knowing that important works were going on under the notice, the pursuers were not acting as they should have done in allowing these expensive works to be carried on and completed without taking steps to vindicate any rights they had which they saw were being encroached upon. Except upon the strongest grounds I could not hold that merely upon a question of notice, an objector could come forward and require that the works erected should be removed, thus making a work involving great cost abortive, and compelling the adoption of some new and probably more expensive expedient. I agree with Lord Low in thinking that if the pursuers had objected they could not have made good their objection to the works being executed under section 103 of the Public Health Act, and that that Act applied. But further, in this case I have formed a very decided opinion that the pursuers have failed to prove in any reasonable degree that the works which were executed could cause any damage to their interests.

I do not add anything upon the question of application of the statutes. I entirely agree in the opinion that the authority proposing to make the alterations were entitled to proceed under section 103 of the Public Health Act, and I agree with Lord Low in the views he has expressed as to the 217th section of the Act of 1892, in holding that the pursuers cannot found on it.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties in the pursuers' reclaiming note against the interlocutor of Lord Dundas, dated 6th July 1906, Recal the said interlocutor in so far as it finds the defenders entitled to expenses as between agent and client in terms of the Public Authorities Protection Act 1893 (56 and 57 Vict. c. 61), sec. 1 (*b*): *Quoad ultra* refuse the reclaiming note: Adhere to the said interlocutor reclaimed against, and decern: Refuse the defenders' motion for expenses as between agent and client in terms of the said Public Authorities Protection Act 1893: Find them entitled to expenses on the ordinary terms."

Counsel for the Reclaimers—Clyde, K.C. —Horne. Agent—T. S. Paterson, W.S.

Counsel for the Respondents—Dean of Faculty (Campbell, K.C.) — Malcolm. Agents—John C. Brodie & Sons, W.S.

HOUSE OF LORDS.

Monday, November 25.

(Before the Lord Chancellor (Loreburn), Earl of Halsbury, Lord Macnaghten, Lord James of Hereford, Lord Robertson, and Lord Atkinson.)

BARCLAY, CURLE, & COMPANY, LIMITED *v.* SIR JAMES LAING & SONS, LIMITED.

Sale—Ship—Arrestment—Property in Ship in Course of Construction—Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71).

A contracted to build and sell, and B to purchase, two ships, which were to be paid for by instalments and built under the supervision of B's inspector. C arrested the ships when approaching completion for an alleged debt of B's to him. A petitioned for recal of the arrestments.

Held that under the Sale of Goods Act 1893 the property in the ships depended upon the intention of the parties as expressed in the contract, and as there was nothing in the contract to show that the parties intended to transfer the property in the ships while in course of building, the property remained in A, the builder, who was therefore entitled to recal of the arrestments.

Arrestment—Process—Recal—Petition for Recal by Arrestee—Competency.

Per First Division—A petition for recal of arrestments at the instance of the arrestee (1) is not competent when it is an alleged debt, or sum due, which has been arrested; (2) nor is such petition competent when it is a corporeal moveable which has been arrested, and the arrestee (petitioner) admits that the ownership thereof is in the common debtor, but alleges claims upon it, such as a lien; (3) but such petition is competent in the case of a corporeal moveable where the arrestee (petitioner) makes no such admission, and in that case the question of recal first turns upon whether the arrester can, but as

between himself and the arrestee only, establish a *prima facie* case of ownership in the common debtor, the possession of the arrestee, unless a warehouseman, being *prima facie* evidence against him, and in the event of such *prima facie* ownership being established, it will then depend on the circumstances whether the question will be determined immediately or only after inquiry.

On November 1st 1907 Barclay, Curle, & Company, Limited, shipbuilders, Clydeholm, Whiteinch, presented a petition for recal of arrestments whereby Sir James Laing & Sons, Limited, Deptford Yard, Sunderland, on the dependence of a summons at their instance against the Lloyd Sabaudo Societa Anonima Di Navigazione of Turin, had arrested (1) a vessel, No. 468, lying in the Graving Dock of the Clyde Navigation Trustees at Glasgow; (2) a vessel, No. 469, lying in the petitioners' yard; and (3) in the hands of the petitioners a sum of £221,000 stated to be due by the petitioners to the Lloyd Sabaudo, together with all goods, gear, &c., belonging to that company in their hands.

By minute of agreement dated 11th February 1907 Barclay, Curle, & Company, Limited, had agreed to build and sell, and the Lloyd Sabaudo to purchase, the two vessels No. 468 and No. 469. The minute of agreement, *inter alia*, provided—"4. The vessels to be built to special survey, . . . and completed ready for leaving Greenock after steam trials on or before the following dates respectively for the two steamers, viz., . . subject to the conditions as follows:—

"5. Should the builders not deliver each of the vessels afloat as aforesaid they undertake to pay the purchasers as liquidated damages . . .

"7. The vessels when completed to have steam trial or trials at sea off the port of Greenock and adjacent coast. The cost of such steam trial or trials shall be at the builders' expense, they finding crew for the safe navigation of the vessels and for the engine department, also coal and engine stores, but the purchasers shall provide any cargo which they consider necessary for the trial or trials, and shall pay any expenses incidental to loading same. Delivery to be considered completed after the satisfactory official trial provided for as follows:—After the steam trial off the coast of Greenock mentioned above, the boats are to again undergo the official trial off the Italian coast, but all the cost of transporting the ships from Greenock, the costs of the official trial, including insurance, coals, oils, stores, port and harbour dues, and any further expenses attached thereto, to be borne by the purchasers. The vessels will not be considered as delivered to and finally accepted by the purchasers until the said ships have passed the official trial trip in Genoa, have been approved in Genoa by the Italian Emigration Authorities, and all conditions of the contract have been fulfilled.

"8. On completion of each of the steamers at Greenock upon the terms and conditions aforesaid, the builders shall, in exchange for the purchase money due to them up to and including delivery instalment, and for a bank guarantee for the final instalment, hand over to the purchasers or their representative, the Builders' Certificate, British Lloyd's Certificate and Classification, Suez Canal Certificate, also Chain and Anchor, and other certificates as usual or necessary, or shall give an undertaking to hand over such certificates to the purchasers as soon as they are respectively received. . . .

"10. The purchasers are entitled to appoint an expert to superintend the construction of the vessels and the machinery, and it is hereby agreed that no alterations or extra work are to be made or done or charged for without the consent in writing of the said purchasers, *per* their representative, specifying the extra sum to be paid and the additional time agreed for such alteration or addition.

"This clause is subject to special clause of the specifications.

"11. The steamers shall be at the risk of the builders until they finally leave the port of Greenock, up to which date the builders shall keep them insured against fire and other risks to an amount equal to the purchase money paid in advance.

"12. The builders undertake to uphold and maintain at their own cost the engines and boilers on board the vessels against original defective material and bad workmanship for the period of six calendar months from the date of delivery of each of the vessels. . . . .

"*Statement of prices of steamers referred to in contract of this date.*

"First steamer, £——

"Second steamer, £——

"Payable in cash instalments as follows for each steamer:—

"1. —— on the signing of the contract.
"2. —— of balance when keel is laid.
"3. —— of balance when framed.
"4. —— of balance when plated.
"5. —— of balance when launched.
"6. —— of balance when handed over to owners after steam trials at Greenock.
"7. —— of balance, being the final instalment six months after delivery to owners at Genoa; this final instalment to bear interest from the date of delivery in Genoa until paid at the rate of 4 per cent. per annum.

"When the vessel is handed over to the owners at Greenock, the builders to give owners the builders' and other certificates in exchange for the sixth instalment and a bank guarantee from the Societa Bancaria Italiana or other bank of equal standing, to be mutually agreed upon for the payment of the seventh instalment when it falls due."

The petitioners, *inter alia*, averred—"The said ship No. 468 is due to leave the said graving dock not later than the morn-

ing of Wednesday the 6th November 1907, in order to undergo her trials off the port of Greenock, as provided for in article 7 of the agreement above set forth, and to leave the Clyde not later than Friday the 8th day of November 1907, so that after her official trial at Genoa she may be delivered to and accepted by the Lloyd Sabaudo Company at Genoa ready to proceed on voyage, after time for loading, &c., by the 25th of November 1907. The ship No. 469 will, the petitioners anticipate, be completed about the month of January next. In terms of the said agreement the said two ships are the property of the petitioners. The petitioners are not indebted in any sum to the said Lloyd Sabaudo Company, nor have they any goods, gear, &c., belonging to that company."

Sir James Laing & Sons, Limited, lodged answers in which they, *inter alia*, averred —"By the agreement between the petitioners and the said Lloyd Sabaudo Company it is provided that the purchase price of the said vessels, Nos. 468 and 469, should be payable and paid by cash instalments at successive stages of their construction, all as therein set forth. It was further provided that the vessels should be constructed under the inspection and superintendence of a representative to be appointed by the purchasers. The above provisions of the contract have been duly carried out, and in particular the purchasers have made payment to the petitioners of the stated instalments as these became due. The amount of said instalments so received by the petitioners, viz., £221,000 or thereby, is presently in the hands of the petitioners. The respondents aver that under said agreement between the petitioners and the Lloyd Sabaudo Company it was the intention of parties and it was agreed that the property of the vessels under construction should vest in the purchasers during the progress of their construction, and that the property in said vessels so far as constructed is presently vested in the Lloyd Sabaudo Company. . . . In these circumstances the respondents submit that the petition is incompetent and ill founded, and should be dismissed. In any event the respondents maintain that the arrestments should be recalled or loosed only on caution being found or consignation made to the full extent of the respondents' claims against the said Lloyd Sabaudo Company."

On the petition being called counsel for the respondents objected to the competency, and argued—The petition was incompetent, for the petitioners' averments that the steamers belonged to them could not be instantly verified. The question at issue really was whether the arrestments were valid or not, and that question fell to be tried in the furthcoming and not in a petition for recall—*Duffus & Lawson* v. *Mackay and Others*, February 13, 1857, 19 D. 430; *Bildstein* v. *Bock & Company*, June 15, 1872, 9 S.L.R. 512; *Vincent* v. *Chalmers & Company's Trustee*, November 2, 1877, 5 R. 43, 15 S.L.R. 27; *Brand* v. *Kent*, November 12, 1892, 20 R. 29, 30 S.L.R. 70. Under the contract (*vide* clause 8) the property passed as the instalments were paid. At all events the property passed so far as the work had been done, inspected, and paid for—Bell's Com. i, 178; *Simpson* v. *Duncanson's Creditors*, August 2, 1786, M. 14,204; *Orr's Trustee* v. *Tullis*, July 2, 1870, 8 Macph. 936, at 950, 7 S.L.R. 625; *Spencer & Company* v. *Dobie & Company*, December 17, 1879, 7 R. 396, 17 S.L.R. 370; *M'Bain* v. *Wallace & Company*, July 27, 1881, 8 R. (H.L.) 106, at p. 109-116, 18 S.L.R. 734; *Seath & Company* v. *Moore*, March 8, 1886, 13 R. (H.L.) 57, at pp. 64-67, 23 S.L.R. 495; *Reid* v. *Macbeth & Gray*, March 4, 1904, 6 F. (H.L.) 25, 41 S.L.R. 369. Under the Mercantile Law Amendment Act 1856 (19 and 20 Vict. cap. 60), where a contract gave a *jus ad rem* the property passed. The petition ought therefore to be refused.

Argued for petitioners—The arrestment should be recalled *simpliciter*. No property in the vessels had passed. That depended on the consent of the parties to the contract, and such consent was wanting here. As to when the property in an incompleted ship would be held to pass, reference was made to the Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), sections 5 (1), 16, 17, 18, and 62 (1). Under the contract the property did not pass until the steamers were ready for use and had passed the official trials at Genoa. This was really a sale of "*future*" goods in the sense of section 5 of the Sale of Goods Act. Prior to *Seath's* case (*cit. supra*) ships were supposed—in virtue of the law laid down in *Simpson* v. *Duncanson*, *vide* report in 1 Bell's Com. 189, *note*—to be in a special category, but that view had been displaced by the observations made both in *Seath's* case and in that of *M'Bain* (*cit. supra*). Reference was also made to *Wylie & Lochhead* v. *Mitchell*, February 17, 1870, 8 Macph. 552, 7 S.L.R. 310.

At advising,—

LORD PRESIDENT—Sir James Laing & Sons, Limited, an English registered company, having an alleged claim against an Italian company called the Lloyd Sabaudo Societa Anonima di Navigazione of Turin, arrested two ships which were being built for that company by Barclay, Curle, & Company, Limited, a Scottish company, the said ships being in their yard in the Clyde; and the present petition is a petition at the instance of Barclay, Curle, & Company for the recal of the said arrestments, Barclay, Curle, & Company averring that the ships at this present moment are theirs, and do not as yet belong to the Italian company, although they are admittedly being constructed upon the orders of that company. So far as one of the ships is concerned, it is very near delivery—all that it still requires is to pass its trial in the Clyde, and afterwards to pass a trial at Genoa.

The authorities upon this matter are not very numerous, but I think it is well that we should on this occasion lay down, with perhaps somewhat more precision than has hitherto been employed, the rules which I

opine must obtain as to the recal of arrestments. Two cases were quoted to us in somewhat recent times—the case of *Vincent* v. *Chalmers*, 5 R. 43, and the case of *Brand* v. *Kent*, 20 R. 29. Those were both cases where the petition for recal was presented by a third party—and by a third party I mean one who was neither the arrestee nor the common debtor—and it was laid down in these cases—and I have no doubt whatsoever laid down perfectly rightly—that such questions as he wished to raise could not be raised and determined in a petition for the recal of arrestments. If a creditor, whom we will call A, arrests in the hands of the arrestee B, in respect of the debt of the common debtor C, it may very well be that the thing or the debt arrested is not really due to C, but is due to somebody else, and if that somebody else, D, wishes to raise the question, he cannot raise it by a petition for the recal of the arrestment, he must raise it by some other appropriate form of process. As to that law I do not think there is any doubt. There is as little doubt that the common debtor may always petition for the recal of the arrestments upon the ground that they are nimious and oppressive, and that these arrestments may be recalled, in some cases *simpliciter*, but much more generally on caution.

But there remains the case with which we are going to deal—the case of where the person who wishes to get rid of the arrestment is the arrestee. There have been cases where the arrestments were recalled at the instance of the arrestee, and in particular we had cited to us the case of *Duffus*, in 19 Dunlop, p. 430. The facts in *Duffus*' case were these—A ship was arrested as belonging to B. At the moment of the arrestment the ship was registered in the name of A, and A petitioned for the recal of the arrestment. It was argued for the arrester that the ship really belonged to B. Historically it had belonged to B, because it had been registered in B's name before it came to be registered in A's name. Their Lordships held, and I think quite rightly, that that question could not be tried in that process; that they were bound to take the register as it stood as being the proper evidence of title to a ship; and that, consequently, as the ship, according to the register, belonged to A it could not be arrested as if it had belonged to B. But I am bound to say, with great respect, although I think the judgment is perfectly right, I do not think that the criterion as laid down by the Lord Justice-Clerk in that case can, on further consideration, be supported. His Lordship there makes a distinction between moveables to which there is no written or statutory title, and moveables to which there is a written title, and he says—"In the ordinary case of moveables, to which there is no written or statutory title, it is no objection to the competency of an arrestment that the arrestee says he has no funds of the common debtor, or that the same thing belongs to himself by virtue of preference, compensation, or otherwise. For in a furthcoming he can appear and assert and make good his right; and if he is confident of his right to the money, may use it in the meantime." But then he says that when there is an actual written title "no arrestment can competently be used, according to rules applicable to such diligence, in direct contradiction to that title."

I am afraid that distinction will not do, and for this reason. So long as the thing arrested is a claim for money or a debt, it is quite true, as his Lordship says, that in a furthcoming the arrestee can appear and make good his right and in the meantime no prejudice is created. The arrestee cannot be made to pay the alleged debt till the furthcoming, and in the meantime his general funds are laid under no embargo. It is quite obvious that that is not so in the case of a corporeal moveable, and for this very good reason, that if a corporeal moveable is arrested and the arrestee wishes to say that it is his own, the arrestee has no power of either starting himself or getting others to start a furthcoming, and, accordingly, if he had not some other way of getting rid of the arrestment, he would be in this uncomfortable position, that a *nexus* would be upon the subject, which would put him in danger to deal with it, and at the same time he would have no possible means of starting a furthcoming in which he could appear to vindicate his right. It seems to me that the true distinction is between the arrestment of debts or sums due, and the arrestment of corporeal moveables. In the case of the arrestment of debts or sums due I think that the rule as laid down by Lord Justice-Clerk Hope holds perfectly good. There is no reason why a question of whether a sum is due or is not due should be taken up in the inconvenient form of a petition for the recal of arrestment, and for the very simple reason that the arrestee is not in any way hurt or damnified by waiting until a furthcoming is raised. An arrestment in the hands of A of all moneys due by him to B does not put a *nexus* upon any particular money in A's hands; it does not prevent A from going on with his business and using any money that he has got; it only attaches such sum as A is due to B, and it leaves A perfectly free in the furthcoming that is directed against him to say that he is due no sum to B. As your Lordships will remember, a furthcoming really first of all defines the sum that is due by the one to the other, and then it transfers it for the benefit of the creditor, who has made the arrestment, by way of adjudication. Accordingly as long as it is a debt there can be no expediency in trying to unravel these questions in a petition for recal, and there can be no harm in allowing them to stand over until a furthcoming is raised, if it is ever raised.

But when it comes to a corporeal moveable then the position seems to me quite different. When a corporeal moveable is arrested in the hands of A as truly belonging to B, and A wishes to say that it is his own and not B's at all, then I think he has

an immediate interest to get that question decided. What would then happen I think depends upon circumstances. It may be that A, the arrestee, admits that the article in question belongs truly to B, but at the same time says that he has certain claims over it. Take, for instance, the case of a person who has had a corporeal moveable entrusted to his care for the purpose of performing some operation upon it, and has a good lien upon it for his charges—in such a case as that the question of how much he is entitled to by way of lien could perfectly well be tried in the furthcoming. There you have practically the admission of the arrestee that the subject does belong to somebody else, and is therefore well arrested, subject only to the fact that he has certain claims upon it. But where he makes no admission of the sort it seems to me that the general position is that the possession of a moveable is *prima facie* evidence that it is his property—that is to say, it is *prima facie* evidence except with regard to a certain class of people, such as warehousemen and so on, whose business it is to have in their possession the property of others. Accordingly, it seems to me that if a person arrests a corporeal moveable in the hands of somebody else, alleging it to belong to a third person, he has got at least to make a *prima facie* case for saying so, and if he cannot make a *prima facie* case then it seems to me that the arrestee who has had the corporeal moveable in his hands arrested is entitled to say—"No *prima facie* case has been made out, therefore I am entitled to have the arrestment recalled." But when a *prima facie* case is made out, then I hesitate to give any general definition, because I think each case will depend upon circumstances; it will depend upon circumstances in each case whether there should be an immediate determination of the question, or whether there might not require to be an inquiry—I mean, that although I think a petition for recal of arrestments is always, so far as may be, a summary process, yet I can imagine a case in which it would be right to have an inquiry.

Now, applying these doctrines to the present case, what I find is this—an uncompleted ship—that is to say, a ship that has not come into the position of being registered—when, of course, the proper title is the title of registration—but is still in the builder's yard. *Prima facie* it seems to me that ship belongs to the builders. Accordingly if anyone arrests the ship upon the ground that it does not belong to the builder, but that it belongs to somebody else, I think he is bound to give a *prima facie* reason for that assertion. In this case the respondents table what they say fulfils my desire. They table the contract under which, admittedly, the ship is being built; and accordingly this case is one of those cases where it is possible to give a judgment without further inquiry. We have here, admittedly, the document on which, and on which alone, the transference of the ship from the builders, who created it, to the third party to whom it is now said to belong, depends.

Accordingly, the question of whether this ship should be allowed to be arrested as it has been, or whether the arrestment should be recalled, seems to me to turn upon the interpretation of the contract. I think the *onus*, so to speak, rests upon the person who wishes to show that the ship belongs, not to the builder to whom it would what I call naturally belong, but to someone else. We have the contract before us, and that brings one to the consideration of that branch of the law which has been much discussed in recent years—I mean the branch of the law which was illustrated in the case of *Simpson* v. *Duncanson*, M. 14,204. I do not think it is necessary for your Lordships to try to add anything more to the elucidation of what was really originally decided in *Simpson* v. *Duncanson*. Probably a sufficient word, if not the last word, has been said about it in the judgment of Lord Watson in *Seath* v. *Moore*, 13 R. (H.L.) 57. One cannot help feeling that probably the doctrine of *Simpson* v. *Duncanson* had its origin in an endeavour to secure an equitable result in the teeth of what at that time was the very strict Scottish doctrine of the transfer of property, because there is no doubt that at the time of *Simpson* v. *Duncanson* you might contract in what terms you pleased—you might contract that property should pass—and yet it was impossible to make the property really pass without delivery—I mean delivery in the fullest sense of the word—including all forms of what may be called constructive delivery. But all that has now been altered. It was altered to a large extent by the Mercantile Law Amendment Act (19 and 20 Vict. c. 60), although, as has been often pointed out, that Act did not really alter the true conception of where the property was, but merely interfered with the right which sellers and purchasers in old times would have had. But the whole matter has been really altered by the Sale of Goods Act (56 and 57 Vict. cap. 71), and now it is quite clear that by the law of Scotland if people choose so to contract they can pass the property of a thing which is being sold without delivery. That being so, it seems to me clear, and I think it should be clearly laid down, that if people want these consequences to happen they must really say so. There is not the slightest difficulty in so framing a contract, if it is wished, as between a shipbuilder and the person who is buying the ship, that the property in a gradually constructed ship shall be held to pass at certain stages; but if so I think it must be clearly said.

In the contract under discussion not only is that not clearly said, but I think the other thing is said. I think that the only sale that is found in this contract is the sale of a completed ship. It seems to me to resemble in that respect the contract in *Reid* v. *Macbeth*, 6 F. (H.L.) 25. Accordingly I am of opinion, upon the construction of this contract, that the property of the ship was not passed from Barclay, Curle, & Company—to whom undoubtedly it originally belonged—to the purchaser bit by bit as it came into existence. That question we cannot decide in this process,

as in a question between Barclay, Curle, & Company and the Italian purchaser, but we can decide it to the effect of saying whether the arrester has made out a *prima facie* case. I hold, accordingly, that the arresters here have not made out any case for the ship being the property of the common debtor, and that the arrestments fall to be recalled.

LORD M'LAREN—I have followed with much interest the exposition of this branch of the law given by your Lordship in the chair. I shall not attempt to go over the ground again, because I feel quite sure the various points of the case could not be put more clearly. But having regard to the large sum of money involved in this case, it may be right that I should state my opinion upon the point in which the parties to this dispute are chiefly interested. First, I think that a distinction—a clear distinction—may be drawn between the arrestment of a sea-going ship, under maritime law and such an arrestment as we are here dealing with. In the ordinary case of the arrestment of a ship within the jurisdiction—it may be in a harbour afloat—there is no arrestee. The ship is simply arrested by description for a debt of the owners, and this particular form of arrestment was, I think, originally confined to the Admiralty Courts, who exercised jurisdiction *in rem*. But this is a case of an arrestment of a ship which although finished—because I think she was to make her trial trip yesterday or to-day—is still in the hands of the builders, physically undelivered. In such a case—and it may be in the case of other corporeal moveables—if the builder of the vessel admits that it is not his property, if he admits that according to his contract it has passed to the purchaser, he would not be in a position to raise any objection to the arrestment, and we should not have the case that is now before us. But if he says that this ship is his property I see no reason why he should not be allowed to determine that question in a petition for the recal of arrestments, because I do not see how it can be determined in any other process, and even if it could he is put to the inconvenience of having his property meantime under an embargo until the issue of a case which it is supposed will determine the question of right. Accordingly, where the person in whose hands the ship is arrested—in this case the builder—claims that the ship is his own property, then, agreeing with your Lordship, I should hold that his possession—physical possession—raises a certain presumption in favour of his claim, and that it lies with the arresting creditor to show by the contract or documents of title that the true ownership is vested in the common debtor.

In this case, when we examine the contract of sale under which this ship was built, and apply to it the principles of the Sale of Goods Act (56 and 57 Vict. cap. 71), under which this particular principle of the law of England was practically extended to Scotland, that property may or may not pass to the purchaser according to the wishes of the parties, I say that when we apply that principle to this case, then, as a matter of intention, I see no reason to doubt that it was the wish of both the seller and the purchaser that the ship should remain the property of the seller until payment of the penultimate instalment of the price and the completion of the trials. If it had been intended that there should be partial transfers of the property at the successive stages of payment of the instalments, it would have been easy to express that in the contract of sale. As it was not expressed, I presume that the parties did not desire that the property should pass in stages, but that, on the contrary, the Italian company being perfectly convinced of the ability and willingness of the builders to fulfil their obligations, were content to wait until the ship was ready for use before claiming or desiring delivery. For these reasons I agree that these arrestments should be recalled; and I only add that this is not a case where they should be recalled upon caution. That is one reason why it has been necessary to consider the matter as one of contract right, because the idea of finding a cautioner for £200,000 is altogether absurd.

LORD KINNEAR—I agree entirely with all your Lordship has said, and I have only a few words to add. I think it is very material to observe in the outset that the arrestment we are asked to recal is a real diligence—that is to say, it is a diligence affecting two vessels specifically described in the petition by numbers and description, and has the effect of laying an embargo upon these ships, so that, whatever the interests in the property of the ships may be, they cannot be removed from the dock and shipbuilding yard in which they are at present. That this is a totally different thing from the arrestment of a debt, and that the true owner of the ship has a perfectly good interest and a good title to say that the arrestments should be recalled, so that he may deal with his own property in the ordinary course of his business, is, I think, for the reasons your Lordship has already given, perfectly clear. I do not think that we can in this process decide any question of right as between the petitioners and the firm for whom they were building the ships, so as to form a *res judicata* as between these two parties, and for this plain reason that the competing interest or competing right, if there be any such right or interest, is not really represented by any of the parties to this process. If the ships do not belong to Barclay, Curle, & Company, and do belong to the Italian Society, the Italian Society is not here, and therefore we cannot decide the question of property. But I think we can decide whether the ship can be effectually arrested as the property of the Italian company, and if it cannot then the arrestments must be recalled.

My reason for deciding that question in the way your Lordship has explained is

put, I think, briefly, and also very clearly and decisively, by Lord President M'Neill in the case of *Duffus*, 19 D. at p. 442. His Lordship's opinion does not proceed upon the distinction taken in the opinion of the Lord Justice-Clerk upon which your Lordship has commented. The Lord President says—"The case of a ship is a peculiar one. It is peculiar as affects the nature of the property itself, and peculiar also as regards the nature of the title to that property. It is peculiar as to the manner in which the arrestments once laid on are to be followed up. Therefore it is a case in which we are not to be led into the ordinary course of *in dubio* requiring caution. We must see our way more clearly in regard to the arrestment of a ship than in the ordinary case of arrestment,"—and then he says that in such a case persons outside the jurisdiction ought not to be required to pay caution. The doctrine with which he starts is that in reference to this very peculiar arrestment we must see clearly that the thing arrested is really subject to the diligence. Then he goes on to consider the question of title, and he says that upon the face of the title the ship is not the property of the common debtor for whose debts it is proposed to arrest it, and that the Court ought not to enter into an inquiry for the purpose of subverting the inference from the *prima facie* condition of the title. He says—"If we were to enter into an inquiry as to the nature of the right in this ship, and to have proof of the facts adduced from Halifax, and then to inquire as to the law of that country, and its effect upon this transaction, we would in effect expose these petitioners to all the evils which could arise from this vessel being detained till an ordinary action should dispose of this question." Therefore he declined to enter into that question for the purpose of setting up a right to use diligence against the *prima facie* fact of the title of property in the ship.

Now, although we have here a ship that has not yet arrived at the stage at which we can have the same kind of *prima facie* title as in the case of a registered ship, yet the principle upon which the Lord President proceeds appears to me to be perfectly applicable, because we have in this case clear *prima facie* evidence of property in the petitioner and not in the common debtor. I agree with your Lordship that if it had not been for the Sale of Goods Act (56 and 57 Vict. c. 71) we might have had some difficulty in considering how far the question of property in a ship might or might not be affected by the decision of the case of *Simpson* v. *Duncanson*, M. 14,264, and of subsequent cases. The authority of *Simpson* v. *Duncanson* has been very much shaken, if not completely destroyed, by the observations that have been made upon it in the House of Lords, and it is extremely difficult to ascertain from the state of the record what was really decided. But the conclusive consideration to my mind upon that branch of the argument is that the law affecting the completion of rights of property by a contract of purchase and sale has been entirely altered by the Sale of Goods Act. At the date of that decision the law was that property could not pass without delivery, and the Court had to consider whether there had been, or had not been, something equivalent to delivery in a case where it was plain upon the face of the facts that no actual delivery had taken place. Now that is not the law. We have to seek the law as to the transference of property upon a contract of purchase and sale from the provisions of the Sale of Goods Act, and that makes it clear that the question is one of intention upon the contract. What is the intention of the contract? The particular rule of the Sale of Goods Act which is said to apply, besides the general provision that the intention of parties as to the time at which the property of the goods is to pass to the buyer is to be determined by the contract, is Rule 2 of section 18, that unless a different intention appears from the terms of the contract, "where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done and the buyer has notice thereof." Now, it appears to me that the operation of that clause in the particular question in hand is this, that where a contract has been made for the sale of a ship which is still in the course of construction, though the ship may be so specifically identified as to fix it as the subject of the particular contract, still no property passes until it is in a deliverable state, or, in other words, until it is either delivered in a finished state, or is so completed as to be ready for delivery, and is approved of by the buyer upon notice to him. Applying that rule to the terms of the particular contract in hand, I agree with your Lordship that upon the face of the contract there was no intention of delivery until the ship should be completed and sent to Genoa. Therefore there is under the contract no delivery, and the property still remains in the hands of the shipbuilder.

I do not depart from the observation with which I began that we cannot decide the question of property as between the shipbuilders and the company with whom they had the contract, but we can decide, and I think we ought to decide, that there is a *prima facie* right of property in the shipbuilders, and that they ought not to be subjected to the extreme hardship and inconvenience of having their ship stopped in dock at the instance of a creditor of the firm for whom they are building, who cannot instantly verify a preferable title to the ship. I agree especially with the observation made by Lord M'Laren that to make it a condition of recalling the arrestments in this case that the shipbuilders should find caution would be altogether unjust and unreasonable. Therefore I agree that the arrestments should be recalled so far as regards the ship *simpliciter*.

LORD PEARSON was absent.

The Court, on November 1, 1907, recalled the arrestments *simpliciter*.

The respondents appealed to the House of Lords.

At the conclusion of the argument for the appellants—

The LORD CHANCELLOR—It is not necessary to trouble the learned counsel for the respondents in this case, because the question is whether the property passed, and whether the parties intended by the contract that it should pass. I must say I do not know that any conclusive use can be made of a comparison with other contracts and the language that is used in regard to those other contracts in judgments. Speaking for myself I always have some misgiving when presumptions of fact—that is to say—presumptions in regard to the interpretation that is to be put upon particular words in a contract apart from their natural significance, are put forward. It may be a very useful guide to a certain degree, but after all the question is what the contract shows the parties intended to contract for. The facts referred to by Mr Clyde and Mr Smith, namely, that the ship was to be paid for by instalments, and that there was power of inspection on the part of the purchasers, may be marks or badges pointing to the property passing, but it is not conclusive and the question still remains as to what they meant.

I think the contract was one for a completed ship and the risk lay upon the builders until delivery, and there was no intention to make delivery or to part with the property until the vessel was completed. Under these circumstances I think the appeal ought to be dismissed.

EARL OF HALSBURY—I am of the same opinion. There is no doubt that a contract might be so framed as to give the purchaser power to claim the property in those parts which when they are put together make the complete ship, but in each case the question must be whether or not the contract has been such, and I think this has not been so made.

I confess I follow the judgment of the learned Judge in Scotland with one little exception. I think the phrase that he has used about the presumption being in favour of the builders perhaps was not sufficiently considered by him—perhaps he did not think it necessary, but if he had used a different phrase—if as a matter of proof the wood, the iron, the nails, and so forth, which constituted the ship ultimately, are once the builder's and are proved to be the builder's, it does become necessary to show that there is some contract transferring that property under the circumstances to the purchaser; and if, instead of saying there was a presumption that it belonged to the builder, and, proceeding upon the presumption, he had said that the proof was that it was the builder's property, and it became necessary to show that the builder had divested himself of the property, and to show that by the words of the contract it had become the property of somebody else—if he had said that, I should have entirely agreed. From the reasoning of the rest of the judgment I really do think that is what the learned Judge meant. It was not a considered judgment I understand, and the phrase that there was a presumption that it belonged to the builder was one used in the course of the argument, and in the sense in which I have explained it I should concur with it; otherwise I should differ that there was any presumption one way or the other. The question is, what is the contract, and by that contract to whom does the property belong?

LORD MACNAGHTEN—I am of the same opinion.

LORD JAMES OF HEREFORD—I concur.

LORD ROBERTSON—The question in the present appeal seems to me to be governed by the Sale of Goods Act, and by that statute to be determinable by the intention of the instrument under which the ship is built. In aid and supplement of construction the statute supplies certain rules, but these may or may not come into operation according as the contract requires it. In the present case I find the contract to require no aid or supplement from the statutory rules, for it seems to me to provide from beginning for completion of this ship by the shipbuilders with their materials, and transfers it to the purchasers only as a finished ship and at a stage not in fact yet reached. This is a simple view of the matter, but in my judgment it is the sound one. It treats the Sale of Goods Act as superseding the previous law, and if in some instance it may be found necessary to revive and reconstruct the old common law for purposes of illustration, I can only say that that occasion has not yet come.

I therefore concur in the conclusion of the Court of Session, which rests on the contract. It seems right, however, to say that this does not imply my concurrence in all that is said by way of statement of doctrine in the judgments of the learned Lords. Some of them seem open to exception, or at least criticism, but the judgments of the learned Judges do not seem to have been at least minutely considered. Among matters of omission I think the fifth head of the 18th section of the Act is so directly applicable that it required perhaps more attention than it has received. But I do not require to enter on those disputable matters, as the ground of judgment which your Lordships adopt is common to us and to their Lordships of the First Division.

LORD ATKINSON—I concur.

Their Lordships dismissed the appeal with costs.

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