true owners, but preferred that the case should be disposed upon the assumption that the complainer is proprietor of the subjects in question, and liable as such to be assessed, if any assessment is leviable.

"The only plea, therefore, which requires consideration is the first, viz.—that no assessment for roads is leviable in respect of empty houses for the year during which they are empty. It appears to be a sufficient answer that while in other statutes—as for example the Police Act of 1857—unoccupied and unfurnished houses are exempted from assessment by an express provision to that effect, there is no similar exemption in the Roads and Bridges Act. The assessment is imposed 'on all lands and heritages,' without exception. The complainer relies upon the provision that the assessment shall be paid, one-half by the proprietor and the other half by the tenant or occupier of the lands and heritages on which it is imposed. But it does not follow that no assessment can be imposed on unoccupied lands, or on lands occupied only by the proprietor. It is said that this may be inferred from the decision in *Galloway* v. *Nicholson*, 2 R. 650, with reference to assessments for relief of the poor. But all that is decided in that case was that by the method prescribed by the Poor Law Act of 1845, for dividing the assessment between owners and occupiers, one-half of the whole amount required to be raised must be laid upon the owners as a class, and the other half upon the tenants or occupants as a class. It is unnecessary to consider whether the same rule is to be followed in dividing the assessment in question, since no objection is taken to the method of division which has been adopted, nor indeed does it appear from the record in what manner the division may have been made. But whatever may be the rule for division the complainer's inference that unoccupied houses are not to be taxed appears to me to be in no way justified by the decision. On the contrary, the liability of the owner for unlet and unoccupied houses is referred to by the Lord President as suggesting a very good reason why the construction of the Act adopted by the judgment should have been intended by the Legislature."

The complainer reclaimed—The arguments appear from the opinion of the Lord Ordinary.

Authorities—Police Act (20 and 21 Vict. c. 72), sec. 29; County General Assessment Act (31 and 32 Vict. c. 82), sec. 4; Roads and Bridges Act (41 and 42 Vict. c. 51), sec. 52.

At advising—

LORD JUSTICE-CLERK—If the controversy here had been whether the proprietor of unlet houses was not to pay more than half of the assessment, I could have understood that the complainer might have had a case, but as his contention is that he is to pay nothing in respect of the houses being unlet, I think the Lord Ordinary was right in repelling the reasons of suspension.

LORDS YOUNG, CRAIGHILL, and RUTHERFURD CLARK concurred.

The Court adhered.

Counsel for Complainer—Darling. Agent—Alexander Morison, S.S.C.

Counsel for Respondents—Mackintosh—Graham Murray. Agents—Bruce & Kerr, W.S.

Tuesday, December 9.

SECOND DIVISION.

[Lord Adam, Ordinary.

T. B. SEATH & COMPANY *v.* MOORE.

Sale—Sale of Engines and Machinery for Ship on Stocks—Instalments—Delivery—Bankruptcy—Mercantile Law Amendment Act 1856 (19 *and* 20 *Vict. c.* 60), *sec.* 1.

A firm of shipbuilders entered into five contracts with a firm of engineers, whereby the latter agreed to supply the engines, boilers, and materials for various vessels to be constructed by the former at prices fixed with reference to each contract. In three of the contracts there were stipulations that the price was to be paid by instalments, but it appeared with reference to all of them that payments to account were in point of fact made from time to time according to a course of dealing between the parties. The engineers granted a letter to the shipbuilders which was to have reference to all contracts made or to be made between them, by and which the engineers agreed "that on payment being made to account of any such contract, the portions of the subject thereof so far as constructed, and all materials laid down for constructing the same, shall become the absolute property of the" shipbuilders. The engineers, who were in labouring circumstances at the date of this letter, became bankrupt, and the trustee on their sequestrated estate claimed as falling under the sequestration the engines, machinery, &c., for the unfinished contracts, which lay in the bankrupts' yards. The shipbuilders raised an action for declarator that they were proprietors, or at least entitled to delivery of, these engines, machinery, &c., on the grounds (1) that on a sound construction of the contracts and the agreement relative thereto, they became the purchasers of the materials in the yards so as to entitle them to protection against the trustee in the sequestration in virtue of sec. 1 of the Mercantile Law Amendment Act, and (2) that the payments by instalments to account operated delivery to the effect of vesting in them the property of the engines and machinery in the state in which they were as at each instalment.

The Lord Ordinary *assoilzied* the defender, on the ground (1) That a consideration of the proof disclosed that the agreement was one merely to give the pursuers a preferable security for their advances, and it could not be sustained in the interests of the sequestration, but assuming it to be valid, neither under it nor under the contracts was there in point of law such a completed contract of sale as would entitle them to plead the protection of the Mercantile Law Amendment Act 1856; and (2) that there was no exception in favour of engines and boilers to be supplied for a ship, where the price was payable by instalments, from the general rule of law that property in moveables does not pass without delivery. The shipbuilders reclaimed. The Court *adhered* on the same grounds.

For a number of years prior to 1881 the pursuers of this action—T. B. Seath & Co., shipbuilders, Glasgow and Rutherglen—had dealings with the firm of A. Campbell & Son, engineers, Glasgow, under which the latter firm executed engineering work for ships which the former were building.

In September 1881 A. Campbell & Son undertook to furnish the pursuers with certain "tandem" machinery, consisting of cylinder boilers, &c., for a vessel they were building, the price (£1800) to be paid on the work being completed and the machinery fitted.

In March 1882, the pursuers having at the time a contract with a steamboat company to build a steamer called the "Brighton," made a contract with A. Campbell & Son to supply the engines and machinery for £6300, payable by four instalments, the first when the cylinders, sole-plates, and condensers were cast, the second when the machinery should be tooled and ready for riveting, the third when the machinery was ready to be put on board, and the fourth when the whole work was ready for delivery to the purchasers of the steamer.

Payments were afterwards made under this contract, not according to the instalments arranged, but at intervals according to a system which prevailed between the firms as afterwards explained.

In August 1882 A. Campbell & Son undertook to the pursuers to put a new boiler into and to execute alterations thereby rendered necessary on the steamer "Satanella" belonging to a Mr Latham; for that they were to be paid £600 by one bill at four months when the boiler was on board, the balance by another at four months when the work was completed.

In September 1882 A. Campbell & Son agreed to make and fit for pursuers on board a new tender for the Trinity Board certain engines for the sum of £2110. No instalments were stipulated.

In December 1882 A. Campbell & Son agreed with pursuers to execute for them certain alterations on the boilers and engines of the "Bonnie Princess." The pursuers were to receive from the owners payment of £1500 by three instalments, and it was agreed that A. Campbell & Son should receive payment from the pursuers of this whole sum, the pursuers having however a lien on it for any sum A. Campbell & Son might be due to them.

Various payments were from time to time made under these contracts to A. Campbell & Son, but the agreements for instalments in the cases in which these had been stipulated were not attended to, A. Campbell & Son, who were in difficulties during the whole time the contracts were current, receiving payment from time to time.

On 1st December 1882 A. Campbell & Son granted to the pursuers (without prejudice to the pursuers' other rights at law, and so far as not inconsistent with the terms of any special agreement) a letter by which they agreed that "the following general conditions shall have effect with reference to all contracts or agreements, verbal or written, already made and current, or which may be hereafter made," between the pursuers and them for the supplying and fitting up engines and machinery in vessels constructed and to be constructed by the pursuers. "*Second*, That upon a payment being made on account of any such 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 our (A. Campbell & Son's) lien for payment of the price or any balance thereof that may remain due to us." "*Third*, In the event of our (A. Campbell & Son) becoming bankrupt or insolvent, or failing from any cause whatsoever to proceed with due diligence in the execution of the work of any such contract, the said T. B. Seath & Company shall have power and be entitled, not only to take possession of the portion executed, and of all materials laid down and maintained by us for the construction thereof, but shall also be entitled, if deemed proper by them, with a view to the completion of the work of such contract, to enter upon, use, and occupy our premises, and thereto and thereat use our plant, tools, machinery, and other implements for the purpose of so completing the work of such contract, and to cause the necessary work to be executed and completed by any person or persons whom they may see fit to employ, and to pay to such person or persons such reasonable sum or sums as he or they shall think proper, which shall form a claim against us, and which we shall pay forthwith, or allow to be deducted from the price of the work of such contract, if any be due."

In May 1883, none of the contracts being entirely finished, A. Campbell & Son became bankrupt, and their estates were sequestrated. The defender Alex. Moore, C.A., was confirmed trustee thereon.

Mr Moore declined to take up the contracts mentioned above, which were the only contracts the bankrupts had, and maintained that he as trustee was proprietor of the engines, boilers, and machines which were in their yard, and had been intended by them for the purposes of the contracts. He averred, and the pursuers denied, that they were suitable for any such work, and not specifically appropriated to the pursuers' contract.

The pursuers then raised this action to have it found and declared that they were proprietors of the articles lying in the bankrupts' yard and connected with each of the contracts respectively, or otherwise that they were entitled to the possession, custody, and delivery of them, and that defender was bound to deliver them up. They averred—"The pursuers, in their various contracts with the said A. Campbell & Son, agreed to buy from them the engines, boilers, and machinery which they required, and which Messrs A. Campbell & Son were to sell to the pursuers, and to construct and fit on board the vessels being built by the pursuers. Such contracts as these above referred to between the pursuers and A. Campbell & Son are very frequent on the Clyde. In accordance with the custom of trade observed by shipbuilders and engineers on the Clyde in such matters, the prices of such engines and boilers are payable by instalments as the work progresses, and the engines, boilers, and machinery, so far as constructed, and the materials provided for carrying it on from time to time, by or from the commencement of the work, or at least after payment of an instalment on account of the price thereof, become the property of the shipbuilders, the purchasers thereof, though undelivered or lying in the works of the engineers, subject only to the sellers' lien for the price, or

such part thereof as might remain due. This custom of trade was well known to, and recognised and acted on by the pursuers and the said A. Campbell & Son in the various contracts entered into between them." They alleged that the whole five contracts were contracts of sale.

The defender denied that the contracts were contracts of sale, and also denied that where there was no agreement for instalments there was any custom that they were payable, or that the employer of an engineer was entitled to the property of the work till it was finished and delivered.

The pursuers also founded on the agreement of 1st December 1882 above narrated. The defender took exception thereto as having been granted by the bankrupts and accepted by the pursuers when the former, as the latter knew, were insolvent. More particularly, he took exception to the letter of agreement having any effect on advances prior to its date. He stated that he represented creditors who became such both before and after the letter of 1st December 1882, and averred that the pursuers had for their own objects kept the bankrupts in the appearance of credit after both parties knew they could not go on, on the speculation that they (pursuers) would get the benefit of the unused materials which the bankrupts were buying from other persons whom they never paid for them. He averred that the pursuers' advances both before and after the date of the letter were mere general advances intended to keep the bankrupts from failing at a time when their failure would have caused the pursuers a heavy loss, and that those advances ceased when the pursuers were no longer so anxious that the bankrupts should continue in credit, the result being that the liabilities of the bankrupts at the time of their failure were much greater than they would otherwise have been.

The pursuers pleaded—"(1) The pursuers being the owners or custodiers, and entitled to the possession of the said articles, materials, and others, they are entitled to decree as concluded for. (2) Neither the defender nor the said A. Campbell & Son being the owners, or entitled to the possession of the said articles, materials, and others, or any part thereof, the pursuers are entitled to decree as concluded for. (3) The contracts in question being contracts of sale, the pursuers are entitled to decree as concluded for. (8) The said letter having been granted and received *bona fide*, and for valuable consideration, *et separatim* having been acted on, and it being now impossible to give restitution, or at least restitution not being offered by the bankrupts or the defender, the defender's pleas should be repelled."

The defender pleaded, *inter alia*—"(2) The contracts founded on by the pursuers not being contracts of sale, the pursuers are not entitled to delivery as against the creditors in the sequestration. (4) The letter of 1st December 1882 having been granted and taken in fraud, and to the hurt and prejudice of the creditors represented by the defender, the same is of no effect, *ope exceptionis*."

A proof was led. The import of the proof and the precise terms of the contracts appear fully in the opinion of the Lord Ordinary.

The Lord Ordinary (LORD ADAM) assoilzied the defenders.

"*Note.*—In this case the pursuers, who are shipbuilders, seek to have it found and declared that they are, or were, proprietors of various engines, boilers, machines, and other materials connected with the fulfilment of five several contracts entered into between them and A. Campbell & Son, engineers, at the date of the sequestration of that firm on 12th May 1883, and which at that date were lying in the yard or other premises of the firm, and to have the defender, who is the trustee on their sequestrated estate, ordained to deliver them to the pursuers.

"The value of the articles in question has been fixed, by arrangement between the parties, at the sum of £4250.

"The first of the contracts in question is contained in an offer, dated 2d September 1881, addressed by A. Campbell & Son to the pursuers, and accepted by them. It is in the following terms:—

"'We hereby offer to furnish you with Tandem machinery, consisting of high-pressure cylinder 18″ × 20″, low-pressure cylinder 36″ × 20″, all fitted same as in engine of 176; boiler 9′ 6″ diameter, furnace 1½ larger diameter, and 14 more tubes than in 176, working pressure 75 lbs. per square inch, for the sum of One thousand eight hundred pounds stg. (£1800), net cash, in terms of your letter of 1st September.'

"Now, it will be observed that this is not a contract of sale of any existing article. It is a contract to furnish and fit up an engine and boilers, of certain specified dimensions, in a vessel then being built by the pursuers, for the sum of £1800.

"The contract contains no reference to payment by instalments. But what followed upon the contract was, that the pursuers did—prior to the agreement of 1st December 1882, entered into between them and Messrs A. Campbell & Son, which will be particularly referred to hereafter—make payments of instalments from time to time. The pursuers had had many previous contracts with A. Campbell & Son, and had been in use to make such payments, not at any fixed or specified periods, but just as A. Campbell & Son required them, on being satisfied that work to an amount which they considered sufficient to warrant the payments had been executed, and they followed that practice in this case. Before 1st December 1882 there would appear to have been four several instalments paid, amounting to £1250.

"So far as the pursuers' case depends upon the terms of this contract alone, the Lord Ordinary cannot see that it made them proprietors of the materials provided by A. Campbell & Son for the execution of the contract, and lying undelivered in their premises at the date of their sequestration. The contract was not a contract of sale habile to convey a *jus ad rem* as regards any of the articles. There was no price fixed for the engines and machinery. The £1800 was to be paid for furnishing and fitting up the engines and machinery. The fitting up is a material element of the contract, and, it is stated, would in this case have cost from £300 to £400, and there is no price fixed for the engines and machinery apart from the fitting up. The distinction between such a contract and a contract of sale is thus stated by Mr Benjamin in his book on Sale (p. 102)—'Where a contract is made for fur-

nishing a machine, or a moveable thing of any kind, and fixing it to the freehold, it is not a contract for the sale of goods. In such contracts the intention plainly is not to make a sale of moveables, but to make improvements on the real property, and the consideration to be paid to the workman is not for a transfer of chattels, but for work and labour done, and materials furnished, in adding something to the land. And the same rule applies when the substance of the contract is to make improvements to a chattel already in existence, *e.g.*, to make and fix boilers to a ship (*Anglo-Egyptian Navigation Company* v. *Rennie*, L. R., 19 C.P. 271).' The Lord Ordinary was referred to the recent case of *M'Bain* v. *Wallace*, 8 R. 106, but he does not think it applies to this case. In that case there was a completed contract of sale of a specific article for an agreed-on price, of which the buyer was entitled to enforce delivery, and which therefore fell within the first section of the Mercantile Amendment Act.

"Further, there was in the contract now in question no obligation by the pursuers to pay by instalments, and no stipulation that on an instalment being paid the property should pass to the pursuers.

"It is said, however, that by the custom of trade in the locality, when a contract for the construction of engines and machinery is silent, as in this case, as to instalments, it is understood that payment shall be made by instalments, and that on the payment of an instalment the property passes to the buyer.

"But the Lord Ordinary is of opinion that it has not been proved that there is any uniform usage to that effect such as the Court can recognise; and he further thinks that even if the existence of an understanding that such a payment would pass the property was proved, it would be irrelevant if the law was otherwise. It would just amount to a mistaken notion of the law (*Anderson* v. *M'Call*, June 1, 1866, 4 Macph. 765); and the Lord Ordinary did not admit the evidence for any such purpose, but as bearing on the state of Mr Seath's mind, in reference to the question of fraud raised in the case.

"The second contract, which is called the 'Brighton' contract, is contained in an agreement entered into between the pursuers and A. Campbell & Son, of date 14th March 1882.

"It appears that the pursuers had entered into a contract, dated 7th and 8th March 1882, with the Port-Jackson Steam-Ship Company, to build for that company a paddle-wheel steamer of 160 horse power, according to specifications and plan, and that the agreement with A. Campbell & Son was a sub-contract by which the latter were to supply the engines and machinery.

"The agreement, accordingly, after referring to the principal agreement, provided first, that A. Campbell & Son shall supply and fit up the engines, boilers, and other machinery and appurtenances for the said vessel as per specification thereof; and second, that the sub-contract was made subject to the whole conditions imposed upon the pursuers as builders by the principal agreement, so far as applicable to the supplying and fitting up of the machinery and engines; and in the third place, that the pursuers should pay A. Campbell & Son the sum of £6300 for the engines and machinery, by four equal instalments, the first when cylinders, sole-plates, and condensers were cast, the second when the machinery tooled and ready for riveting, the third when the engine-boilers and machinery were ready alongside for fitting on board, and the fourth when all was completed and tried to the satisfaction of the owners and ready for delivery.

"Although there was an obligation to pay instalments at four specified periods, the pursuers in point of fact did not adhere to this, but in accordance with their usual course of dealing with A. Campbell & Son, advanced money to them when they required it. They seem to have advanced prior to 1st December 1882 a sum of £3750 in eight separate instalments, and subsequent to that date a further sum of £2000 in four instalments.

"If the Lord Ordinary is right in the views he has expressed as to the first contract, they appear to apply equally to this contract.

"The contract is to supply and fit up engines, boilers, and machinery—that is a *locatio operarum*, and not a contract of sale. It does not appear to the Lord Ordinary that the fact that payments to account of the contract price were from time to time made can have the effect of converting this contract into a contract of sale of the articles then in A. Campbell & Son's yard for the purposes of the contract, so as to entitle the pursuers to demand immediate delivery thereof.

"The third contract which is called the, 'Satanella' contract, is contained in an offer by A. Campbell & Son to the pursuers, of date 16th August 1882, and is in the following terms—'With reference to conversation regarding alteration proposed to be made on Mr Latham's steamer "Satanella," we hereby offer to remove present boiler, construct and fit on board a new boiler of sufficient capacity to supply steam at a regular working pressure of 60 lbs. per square inch, making all requisite alterations and connections in engine-room, converting machinery to work as surface condensing, fitting a complete set of air and circulating pumps and condenser, with brass tubes to each engine, making them to work independently, but it is understood we are to work in all the suitable boiler and engine mountings, donkeys, cocks, pipes, or valves, and if we require to furnish new mountings, &c., as above, the old to become our property, making all complete and sufficient to secure B. of T. passenger certificate, same as now granted—to be for the slump sum of Six hundred pounds stg., £600 net; payments to be made as follows—one-third by bill at 4 m/s., when boiler is on board, balance by 4 m/s. bill when completed. Bills to be renewed if desired; int. at the rate of 5 per cent. per annum, in lieu of discount, being payable by granters.'

"Two instalments of the price, amounting to £400, appear to have been paid on January 13th and March 2d respectively. It is stated by Mr Seath, that in the execution of the work some articles had to be taken out of the 'Satanella,' and that these were to be used in doing the work under the contract. The Lord Ordinary thinks that the boiler and other articles removed from the 'Satanella' to A. Campbell & Son's premises under the contract became their property.

"It appears to the Lord Ordinary that this

contract is, if possible, more clearly not a contract of sale than the two preceding ones.

"The fourth contract is contained in an offer dated 13th September 1882, addressed by A. Campbell & Son to the pursuers, and accepted by them on 15th September 1882. By it A. Campbell & Son offer to make for them, and fit on board new tender for Trinity Board, two tandem engines on twin principle, with high-pressure cylinder, twelve low-pressure cylinder, twenty-four with eighteen stroke, single crank, large balance fly-wheels, and all as set forth in specification shown to them, for the sum of £2110, net cash, exclusive of stern brackets. Two instalments of the price were paid, amounting to £700, on February 10th and March 10th 1883 respectively.

"This contract is very similar in terms to the first contract, and the Lord Ordinary does not think it necessary to add anything to what he has already said.

"With reference to the fifth and last contract, it appears that the pursuers had built for and delivered to the Liverpool, Llandudno, and Welsh Coast Steamboat Company a steam vessel called the 'Bonnie Princess,' the engines of which had been furnished by A. Campbell & Son under a sub-contract with the pursuers, and the company were dissatisfied with the vessel, and claimed that the builders should take back the steamer and repay the contract price, besides paying damages for breach of contract. This dispute was settled with the Liverpool Company in terms of an agreement entered into between them and the pursuers of date 20th October 1882. By this agreement it was agreed that the pursuers should remove the boilers then in the ship, and replace them with two upright tubular boilers, in accordance with the requirements of the Board of Trade, and should thoroughly overhaul and alter the necessary details of the main engines and the pumping engines and condensers; that the company should pay as their proportion of the cost of said boilers and alterations £1500, by three equal instalments, by bills at two, three, and four months, after receiving a report that the machinery was working satisfactorily as therein stated.

"With reference to this agreement with the Liverpool Company, the pursuers entered into an agreement with A. Campbell & Son, of date 1st December 1882, by which it was arranged, first, that A. Campbell & Son should execute the work and undertake and implement the whole obligations undertaken by and imposed upon the pursuers by the foresaid agreement in all respects, excepting only the requisite alterations to the bunkers and others coming within the shipbuilders' department, and that the pursuers should be entitled to enforce implement of the said agreement against A. Campbell & Son; and second, that A. Campbell & Son should receive payment of the whole sum stipulated to be paid by the company under said agreement, on the conditions therein stated, but that the pursuers should have a lien thereon for any sum which might be due by A. Campbell & Son to them.

"Under this contract the pursuers advanced £1375, in three instalments, of date 30th December 1882 and 27th January and 24th March 1883 respectively.

"It appears to the Lord Ordinary that under this contract, the pursuers have no claim to the articles falling under it. It is clearly not a contract of sale of these articles.

"The pursuers and A. Campbell & Son on 1st December 1882 entered into an agreement by which they agreed that certain general conditions therein specified should have effect with reference to all contracts and agreements, verbal or written, made or current, or which should thereafter be made between them, for the supplying and fitting up of engines, boilers, and other machinery for and in any steam vessel constructed and to be constructed, so far as not inconsistent with special stipulations in any such contract or agreement.

"The second article of this agreement is the most material, and is chiefly relied on by the pursuers as entitling them to the property of the articles in question. It is in these terms:—'That upon a payment being made on account of any such 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 our lien for payment of the price on any balance thereof that may remain due to us.'

"The agreement is challenged by the defender; but assuming it to be valid and binding, the first question is, Whether the meaning of the agreement was, that the pursuers by making a payment to account of a contract became purchasers of the materials provided for the contract, then in the yard, so as to admit of the application of the first section of the Mercantile Amendment Act; or whether the true meaning and intention of the agreement was not merely to give the pursuers security for their advances over the materials in A. Campbell & Son's yard? The section of the Act appears to the Lord Ordinary to apply to the case where there is a completed contract for the purchase of a completed article or articles, or at least where the purchaser has acquired a *jus ad rem specificam* but has not got delivery—*M'Meekin* v. *Ross*, 4 R. 154. According to this agreement, however, the payment, which is to operate as a transference of the property of the articles, need bear no relation whatever to the value of the articles; nor is the payment meant to be the price, because the agreement goes on to say that the articles are to be held subject to A. Campbell & Son's lien for payment of the price.

"It appears to the Lord Ordinary to be impossible to say in this case that it was the intention of parties under the agreement that the pursuers, upon making a payment of any amount, however small, to account of a contract, should be forthwith entitled to enforce delivery of the portions of the subjects thereof so far as constructed, and all materials laid down for the purpose of constructing the same. Yet if the articles had been sold, but only not delivered in the sense of the Mercantile Amendment Act, that would have been the pursuers' right. No doubt A. Campbell & Son had a lien over them for the price, but as no price was ever fixed for the materials, but only for the completed job, the Lord Ordinary does not see, in the pursuers' view of the case, how that difficulty is to be met.

"But the question remains, whether, apart from the Mercantile Amendment Act, the pur-

suers are entitled to the property of the articles in question? and the Lord Ordinary was referred to the cases of *Simson* v. *Duncanson*, Dict. 14,204, and *M'Bain*. But again there is the difficulty that there is no contract of sale in this case; but assuming that the articles are to be considered as having been sold to the pursuers, but not delivered, then by the law of Scotland the property in moveables does not pass without delivery. It is said that the case of *Simson* shows that in the case of a ship in a shipbuilding yard, where the price is payable by instalments, the property passes to the buyer, and it is said that the same principle ought to be extended to engines and machinery. But the case is undoubtedly exceptional. It has never been extended beyond the case of a ship on the stocks, and the Lord Ordinary sees no reason why it should be extended to the case of engines and machinery.

"On the whole matter, it appears to the Lord Ordinary that the object of the agreement of 1st December 1882 was to endeavour to obtain security for advances to be made by the pursuers over moveable articles, the property and in the possession of A. Campbell & Son. But that is contrary to the law of Scotland, and a mere agreement between the parties that the property should be held as transferred cannot affect the rights of third parties.

"The other question remains, whether the agreement of 1st December 1882 is valid, and can receive effect in a question with the creditors of A. Campbell & Son? In the view which the Lord Ordinary takes of the case it is unnecessary to determine this, because he does not think that they were prejudiced thereby. But if he is wrong in this view, and if the agreement is to be held to give the pursuers a right to the articles in question which they would not otherwise have, it may be right that he should shortly state his views as to the validity of the agreement.

"It appears to the Lord Ordinary that the evidence clearly shows that A. Campbell & Son were insolvent at the date of the agreement—not only in the sense that they could not meet their liabilities then coming due, but also that they could not have paid 20s. in the pound if their whole assets had been realised; and he thinks further, that as far as could be foreseen, there was no reasonable probability that they would improve their position if they continued to carry on their business.

"As regards the pursuers' knowledge of their position, the Lord Ordinary thinks the evidence clearly shows that they knew that A. Campbell & Son could not go on unless they got immediate assistance from them, and that they were, in fact, entirely dependent on them.

"The pursuers had before them the state of the firm's affairs which had been furnished to them, and which no doubt showed a surplus of assets of £18; but they had also before them the statement contained in A. Campbell & Son's letter of 24th November, which showed that there was at least a liability of £375 for wages, which had to be paid on 2d December, not included in the state of affairs, and they could not help seeing that there was included as an asset a sum of £500, being a balance of contract 'Bonnie Princess,' which the pursuers were themselves claiming a right to retain.

"Moreover, Mr Seath at least knew perfectly well the state of A. Campbell & Son's business. He knew that the only contracts which they had of any moment were the unfinished contracts with his own firm. He knew that these contracts would result in a large loss; and it seems to me that he must have known that A. Campbell & Son could not, so far as could be seen, retrieve their position.

"The Lord Ordinary does not think that in these circumstances the pursuers were entitled to deal with A. Campbell & Son as if they were solvent; and he thinks that they were not entitled to take from them for their own benefit this agreement, to the prejudice of the other creditors (2 Bell's Com. 226; *Thomas*, 5 Macph. 198).

"The history of the agreement appears to be this, that, as Mr Seath himself says, the pursuers were under obligation to their contractors to deliver the work which was being executed by A. Campbell & Son in a specified time, failing which very heavy claims would be made for demurrage.

"It was, therefore, of the greatest importance to the pursuers to get the work finished with as little delay as possible. But great delay was certain if A. Campbell & Son stopped business. The pursuers therefore resolved to keep them going, and to make such advances as might be necessary for that purpose. They continued to make advances until the 'Brighton' contract, which was the most important one, was practically finished. They then ceased to make further advances, and the necessary result followed, viz., the immediate bankruptcy of A. Campbell & Son. When the pursuers resolved for their own purposes to keep A. Campbell & Son going, they took from them the agreement in question, in the hope that they might thereby obtain security for their advances.

"But, as the Lord Ordinary has already said, the form of security which they proposed to take is one which the law of Scotland, in the interest of third parties, will not sanction.

"The result of the pursuers' proceedings is that persons continued to deal with A. Campbell & Son as a solvent firm—and the materials supplied by them, and which are unpaid for, were worked up in the pursuers' contracts; and if the pursuers are right in their present contention, they will carry off nearly the whole materials in A. Campbell & Son's yard, although those who supplied have not been paid."

The pursuers reclaimed, and argued—(1) It was clear from a consideration of the proof that during the many years during which the parties had dealt with one another, the pursuers always were accustomed to pay A. Campbell & Son by instalments for the work as it proceeded, and not necessarily at fixed stages. When the latter wanted money they got it, though there was no bargain on the subject, as near as possible to the value of their work. Therefore it did not matter that all the contracts did not expressly bear that payments by instalments were to be made. It was the fact that such payments were continually made in the business transactions between the parties. That being so, as soon as the first instalment was paid, the property must be held to have been transferred, on the principle that actual delivery not being possible,

constructive delivery should be held to have passed, and to be sufficient. — 1 Bell's Com. 7th ed. 189; *Simson* v. *Duncanson*, 1786, M. 14,204; *Wylie & Lochead* v. *Mitchell*, Feb. 17, 1870, 8 Macph. 552; *Orr's Trustees* v. *Tullis*, July 2, 1870, 8 Macph. 936 (Lord Neaves' opinion, 950); *Woods* v. *Russell*, June 26, 1822, 5 Barnewell and Alderson, 942; Addison on Contracts, 8th ed., 929, 930; *Spencer & Company* v. *Dobie & Company*, December 17, 1879, 7 R. 396 (Lord Gifford, 409); *Wood* v. *Bell*, January 1856, 25 L.J. 148, and (in Ex. Ch.) 321; Benjamin on Sale, 102, 321; Bell on Sale, 17; Bell's Prin. sec. 91; Brown on Sale, 576. In *M'Bain* v. *Wallace & Company*, cited *infra*, the House of Lords decided the question on the Mercantile Law Amendment Act, and left the case of *Simson* v. *Duncanson* untouched. (2) On a sound construction of the contracts and agreement there was a contract of sale of the materials of the vessels in dispute, and they were entitled to have the benefit of section 1 of the Mercantile Law Amendment Act 1856, which protected a purchaser's right to enforce delivery from the seller against the subsequent diligence of the seller's creditors—*M'Bain* v. *Wallace & Company*, Jan. 7, 1881, 8 R. 360; and July 27, 1881, H. of L. 166. Section 1 of the Mercantile Law (Scotland) Amendment Act (19 and 20 Vict. cap. 60), provides: — "From and after the passing of this Act, 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." (3) The sale was an executory sale—a sale of a thing to be constructed for a particular ship. It was not a deferred sale but a present one. The pursuers had, then, a claim for specific delivery in the sense that there would have been breach of contract on A. Campbell & Son's part if they had delivered a different engine. The case of *M'Meekin* v. *Ross* (*infra cit.*), relied on on the other side, was not an executory contract, because there was nothing to deliver. (4) There was nothing fraudulent in the agreement relative to the contracts.

The defender replied—(1) Only the 2d and 3d contracts contained provisions for payments by instalments, and there was no custom of trade proved to the effect that such payments were usual where the contracts were silent on the matter. But even assuming such payments were actually made in all of them, there was no case where the principle of *Simson* v. *Duncanson* had been extended to the case of engines for a ship. Such payments were not important, except in the case of a ship on the stocks, as passing the property. —*Lawler* v. *Bralinson*, 2 Meeson and Welsby, 602. There could be no property passed till delivery—*Mucklow* v. *Mangles*, 1 Taunton 218; Benjamin on Sale, pp. 280-294. But (2) the contracts were not such as could be brought within the provisions of the Mercantile Law Amendment Act. That Act only applied to the case where an article has been ready for delivery and left with the seller for construction, and was inapplicable to the case of an unfinished article remaining with the seller for the purpose of being completed. There was no immediate obligation here to deliver a specific *corpus*. It was not a case where the purchaser had acquired a *jus ad rem specificam* but had not got delivery.—*M'Meekin* v. *Ross*, November 22, 1876, 4 R. 154 (Lord President, 159); *Wylie & Lochhead* v. *Mitchell*, February 17, 1870, 8 Macph. 563. The pursuers, then, were not in a position to found upon the case of *M'Bain* v. *Wallace*. (3) It was clear from the proof that the object of the agreement was to give the pursuers security for their advances, and this was not an agreement which in law could be sustained in the interest of third parties.

At advising—

Lord Young delivered the judgment of the Court, as follows:—We have, as your Lordships know, considered this case carefully, and have conferred with respect to it more than once, with the result that upon the whole we concur in the judgment of the Lord Ordinary. I desire to say for myself, and I believe also for your Lordships, that we regard the case as a very special one upon the particular facts on which it is presented, and one very far from being unattended with difficulty; and that we decide no question more general than that which is raised by the very special facts of the case before us. Upon these special facts we adhere to the interlocutor of the Lord Ordinary.

The Lord Justice-Clerk was absent.

The Court adhered.

Counsel for Pursuers — Pearson—Dickson. Agent—J. Young Guthrie, S.S.C.

Counsel for Defender—Trayner—R. V. Campbell. Agents—Maitland & Lyon, W.S.

Tuesday, December 9.

FIRST DIVISION.

[Lord Fraser, Ordinary.

DICKSON *v.* ORR.

Process—Failure to Lodge Prints of Record—Reponing—A.S., 2d November 1872.

The pursuer of an action neglected within four days from the closing of the record to lodge two copies of the print of the record as adjusted and closed, as required by the A.S. 2d November 1872. On the 17th day after the closing of the record the case was put out in the Procedure Roll. Neither party having within 21 days from the closing of the record lodged the print, the Lord Ordinary, as required by the A.S., dismissed the action, finding no expenses due to either party. The defender reclaimed, and craved to be reponed. The Court, in the circumstances, *holding* that the defender was justified in believing that prints had been lodged before the case appeared in the Procedure Roll, *reponed* the defender.