LORD MACKENZIE—I agree with your Lordships. I do not think that we can say that anything that the Commissioners have done here is *ultra vires.*

LORD KINNEAR was absent.

The Court adhered.

Counsel for Reclaimers — Sandeman, K.C.—Hon. W. Watson. Agents—Alex. Morison & Company, W.S.

Counsel for Respondents — Solicitor-General (Anderson, K.C.)—T. G. Robertson. Agent—James Watt, W.S.

Tuesday, December 17, 1912.

EXTRA DIVISION.

[Lord Dewar, Ordinary.

NELSON *v.* WILLIAM CHALMERS & COMPANY.

Sale of Moveables — Contract — Breach — Transference of Property — Delivery — Right to Reject — Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71), *secs.* 11 (2), 17, 18, *and Rule* 5 (1), 35, *and* 53 (5) — *Ship Disconform to Contract.*

A contract for the building of a yacht provided, *inter alia,* (1) that the workmanship was to be of the highest order, all to designer's or owner's satisfaction, (2) that in course of construction it was to be superintended by the designer or his inspectors, and (3) that the property in the yacht was to pass on payment of the first instalment of the price. The purchaser paid the first instalment, but two months afterwards, after having complained on various occasions of the quality of the work being done, rejected the boat as disconform to contract.

Held that the property had passed on payment of the first instalment of the price, but subject to the condition that the completed work should turn out to be conform to contract; that the Sale of Goods Act 1893, while making it possible to transfer property without delivery, had not abrogated the common law right of rejection, and that in fact the yacht had been rejected timeously.

The Sale of Goods Act 1893 (56 and 57 Vict. cap. 71) enacts—Section 11 (2)—"In Scotland failure by the seller to perform any material part of a contract of sale is a breach of contract which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages." Section 17—"(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case." Section 18—"Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer." Rule 5 (1)—"Where there is a contract for the sale of an ascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made." Section 35—"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them." Section 53, which gives the remedy for breach of warranty, enacts—"(5) Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this Act."

On 7th November 1911 Ian Theodore Nelson of Glenetive, *pursuer*, brought an action against William Chalmers & Company, Limited, shipbuilders, Rutherglen, *defenders*, in which he craved the Court to ordain the defenders—"(First) to make payment to the pursuer of the sum of £131, 5s. sterling with interest thereon at the rate of 5 per centum per annum from the 24th day of August 1911 until payment; (second) to deliver to the pursuer within such short time as the Court may fix (*a*) the forty B.H.P. two-cylinder 'Bolinders' direct reversible crude oil marine engine with silencer and spares complete in packing case; (*b*) Manganese bronze shafting, steel half coupling, gun metal propeller, and brass stern tube; (*c*) bilge pump fitted on engine; (*d*) strainer for circulating water inlet; (*e*) galvanised iron tank; (*f*) No. 0 Wellcox quad. acting pump with copper pipe connections; (*g*) copper service tank fitted with gauge glass, two fuel cocks, and two hand pumps, all the property of the pursuer and presently in the possession or under the control of the defenders, and all as specified in the account produced herewith; and, in the event of the defenders failing so to deliver the said articles, to make payment to the pursuer of the sum of £526, 6s. 9d. sterling, with interest thereon at the rate of 5 per centum per annum from the 24th day of August 1911 until payment; and (third) to make payment to the pursuer of the sum of £150 sterling, with interest at the said rate from the date of citation to follow hereon until payment."

The following *narrative* is taken from

the opinion of Lord Mackenzie—"The question here is whether the pursuer is entitled to reject a motor yacht, built for him by the defenders, because of failure by the builder to perform a material part of his contract. The contract provided that the workmanship was to be of the highest class, hull, sheer, &c., to be perfectly fair, all to designer's or owner's satisfaction. Counsel for the defenders did not dispute that if the matter rested there the evidence in the case contained sufficient to warrant the owner in saying he was not satisfied with the boat tendered. The Lord Ordinary has dealt with the facts bearing on this point. There is enough evidence from experts who examined the boat to show the *bona fides* of the pursuer in saying he was not satisfied. There is, no doubt, evidence on the defenders' side which contradicts what the pursuers' experts say, but as the contract expressly provides that the work was to be to the owner's satisfaction, it is not necessary to go into the evidence upon this matter. The case was argued by the defenders as depending ultimately upon a question of law. The contract contains these provisions—'1. The contractors on the one hand agree to have built and equipped a motor yacht to the approximate dimensions given. The yacht to be built in first-class style to plans and specifications got out by the designer, a copy of the specification being appended and signed as relative hereto, and while in course of construction to be superintended by the said designer or his inspectors. The contractors agree to put right within the time stipulated for the construction of the yacht any part of the work considered unsuitable either in material or workmanship by the said designer. 6. The right of property in the yacht will pass from the contractors to the owner on payment of the first instalment of the price, subject to the contractor's lien for the balance of the price, and extras.' The specification provides, *inter alia*—'Payments will be made in four instalments: one-fourth when in frame, one-fourth when plated, one-fourth when decks laid and caulked, and one-fourth when vessel is handed over complete according to plans and specification. No 'extras' will be allowed unless ordered in writing by owner or designer.' The first instalment of the price was paid on 27th June 1911, when the boat was in frame, and the work thereafter proceeded until 16th August 1911, when the defenders say she was finished. The yacht was inspected on behalf of the pursuer on 16th August and again on 24th August. On the latter date she was rejected on the ground that the plating was defective."

After a proof, the substance of which appears from his opinion, the Lord Ordinary (DEWAR) pronounced the following interlocutor:—"Decerns against the defenders (1) to make payment to the pursuer of the sum of £131, 5s. sterling, with interest thereon as concluded for; (2) to deliver to the pursuer within the next thirty days the following articles, viz.—(*a*) manganese bronze shafting, steel half coupling, gun-metal propeller and brass stern tube; (*b*) strainer for circulating water inlet; (*c*) galvanised iron tank; and (*d*) No. 0 Wellcox quad. acting pump, with copper pipe connections, all the property of the pursuer, and presently in the possession and under the control of the defenders, and failing their doing so decree will be pronounced for the value of the foresaid articles; and (3) to make payment to the pursuer of the sum of £75 sterling in full of the conclusion of the summons for damages."

Opinion.—"The question in this case is whether the defenders Messrs Chalmers & Company, Limited, shipbuilders, Glasgow, are in breach of a contract which they entered into to build and equip a motor yacht for the pursuer, Mr Nelson of Glenetive, Argyllshire, and are bound to pay the instalment of the purchase price paid by him, and to deliver the engines, fittings, and accessories which he supplied, and to pay damages for the loss incurred in respect of said breach.

"The contract, in which Mr Mylne, naval architect, Glasgow, acted on behalf of the pursuer, is dated 25th April 1911, and provides that the yacht shall be built in first-class style and completed to the satisfaction of the designer not later than twelve weeks from the receipt of the first building plans. The price was to be £525, payable in instalments, the pursuer to supply the engines, propeller, shafting, &c. The pursuer's case is that the building plans were delivered to the defenders on 27th April 1911, and in terms of the contract the yacht ought to have been delivered on 20th July; that it was not in point of fact ready on 24th August, when it was inspected and found disconform to contract, in respect that the shell plating was of very inferior workmanship and was not fair, but was uneven and faired up with cement to an extent which was quite inconsistent with good workmanship; that these defects had in course of construction been repeatedly pointed out to the defenders, and that they had promised to remedy them, but when the yacht was inspected in August it was discovered that these promises had not been fulfilled and were incapable of fulfilment, and that the pursuer accordingly was compelled to reject the vessel as disconform to contract. The pursuer paid the first instalment, amounting to £131, 5s., on 27th June, and he now sues for repayment of that sum, and for delivery of the engines and other accessories which he supplied, and for damages, which he estimates at £150.

"The defenders admit that the yacht was not completed within the time specified in the contract, but they maintain that they are not responsible for this, as it was due to the fault of Mr Mylne, the designer, who did not timeously supply the necessary plans, and they deny that the yacht was of inferior workmanship or disconform to contract in any way.

"Parties are thus at issue on two matters of fact—the cause of the delay and the quality of the work—but before examining

the evidence it is necessary to consider the precise terms of the contract.

"The first clause provides that the yacht shall be built in first-class style to plans and specifications got out by the designer, and a copy of the specification is appended and signed as relative thereto; the construction is to be superintended by the designer or his inspectors, and the defenders agree to put right 'within the time stipulated for the construction of the yacht any part of the work considered unsuitable either in material or workmanship by the said designer.' And the specification (page 4) provides 'workmanship to be of the highest class. Hull, shell, &c., to be perfectly fair, all to designer's or owner's satisfaction.' . . . By the fourth clause the defenders bind and oblige themselves to have the yacht completed in accordance with the specification, and to the satisfaction of the designer, not later than twelve weeks from the receipt of the first building plans, unless prevented by strikes or other causes outside their control, and they further agree to pay £1 per day of liquidate damages for every day's delay in delivery. Clause six provides that the right of property in the yacht will pass from the contractors to the owner on payment of the first instalment of the price, subject to the defenders' lien. And finally, on the eleventh page of the specification it is set forth that 'it is to be clearly understood the vessel is to be finished and ready for sea with everything complete and as fitted in first-class motor yachts, and all to the owner's satisfaction.'

"Parties appear to have had two questions prominently before them, viz., (1) What was to be the quality of the work? and (2) within what period was the yacht to be delivered? And they came to a definite agreement on both points. I think the true meaning of the contract is shortly this:—The defenders agreed to build the yacht in first-class style with workmanship of the highest class, and to deliver it within twelve weeks; and they further agreed that the question whether the workmanship was satisfactory or not should be finally decided by the pursuer or designer. And I think it follows that if the vessel was not delivered within the stipulated time, or if the pursuer or the designer were dissatisfied with the workmanship, the conditions of the contract have not been fulfilled, unless it can be shown that the delay in delivery was due to causes outside the control of the defenders, and that the decision as to the quality of the workmanship is corrupt.

"The portion of the workmanship to which the pursuer takes exception is the shell plating. The plates, it appears, in a yacht of this kind are very thin, and it is difficult and delicate work to rivet them in such a manner as to prevent bulging irregularities. Parties evidently had this in view when they entered into the contract, for it is specially referred to in the specification—'Hull shell, &c., to be perfectly fair, all to designer's or owner's satisfaction.' The difficulty in getting this perfect fairness began to appear at an early stage of the construction. When some of the plates had been rivetted, Mr Mylne on the 28th of June pointed out to the defenders that they were not fair, and he was informed by Mr Douglas Eadie that the irregularities would be faired out before the work was completed. Sometime afterwards Mr Mylne had occasion to leave Glasgow and did not return until the middle of August. In his absence Mr James—his principal assistant—superintended the work, and he also complained on several occasions of the unfairness of the plates, and he got the same answer as Mr Mylne. And Mr Nelson, who occasionally visited the yard during the construction, also mentioned the unfairness and was told that it would be put all right.

"When Mr Mylne returned to Glasgow in the middle of August he was informed by Mr James that the work was not in a satisfactory condition, so he telegraphed to the pursuer, and on the 16th of August they went to inspect the yacht. Mr Mylne states that he found the plating on the whole hull was so unfair that he was exceedingly doubtful whether the plating was watertight, and he at once advised the pursuer not to take delivery of the vessel. He states—'I communicated to Mr Douglas Eadie my view as to the unfairness of the plating. I said it was a shocking job. He said he did not think it was so bad. I walked round with Mr Eadie and the pursuer and said pretty well what I thought about it—that it was really so very bad that we could not think of taking delivery of the boat.' Mr Nelson does not pretend to have expert knowledge, but he agrees that the plates were unfair; he states—'I was very much disappointed with it; it was exceedingly bad. I do not think it was so good as it had been on the former occasion when I complained about it. In my view Mr Eadie had not implemented the promise he had made that it would be put all right.' Now the defenders specially agreed that this particular piece of work must satisfy the owner or designer, and both are very much dissatisfied. That appears to me to be conclusive. It is not suggested that they are actuated by any corrupt motive; it is admitted that both are honestly of opinion that the work is unsatisfactory, and it is further admitted that Mr Mylne is an experienced and competent naval architect. The defenders' case is that the designer's and pursuer's opinions are not well founded. I do not think that is a good defence in view of the terms of the contract, but in any case I am satisfied on the evidence that the plating was not in a satisfactory condition, and that the pursuer was justified in refusing to take delivery.

"After the pursuer had formed his own opinion and got the advice of Mr Mylne on 16th August he called upon Mr Barnett, senior partner of Messrs G. L. Watson & Company, a naval architect of acknowledged standing, and asked him to inspect the yacht, and Mr Barnett did so on the

afternoon of the same day. Mr Barnett is asked—'(Q) What opinion did you have with regard to the state of the hull?—(A) It was shocking. The plating of the hull was such as I have never seen before. The unfairness was not such as you would usually call unfair—it was beyond that. There was a coating of stuff on the plating and that prevented one seeing the exact rivetting of the seams, but the seams looked all right. They may have been sound enough so far as the water-tightness was concerned, but they were so uneven that I could not pass the job—the plating of the hull generally on no account could I accept.' And Mr Peck, also a naval architect, made an inspection and says—'The impression I formed regarding the outside of the plating of the hull was that it was a very inferior job. I should say that applied to the hull all over. Some parts were worse than others. (Q) Had you ever in your experience seen so inferior a job before?—(A) I do not think I ever did; I cannot call to recollection anything so bad.' It is clear from this evidence that the opinion which the pursuer and Mr Mylne formed was neither capricious nor unreasonable.

"But the defenders also brought a number of expert witnesses who gave evidence to a contrary effect and spoke to the excellence of the workmanship, but none of them, I think, went the length of saying that the hull was 'perfectly fair.' Mr Douglas is asked—'(Q) Would you describe the plating above and below the water line at the present time as perfectly fair?—(A) No, with the qualification I have given. The plating cannot be made fair; the outside surface can be made fair by pigment. Above the water line, in my opinion, there is not enough rivet composition. (Q) Too much below and too little above?—(A) Yes.' Mr M'Guffie, however, does not agree with this view. He thought the rivet composition was just right both above and below the water line, and he explains that any unfairness he saw was due to the thinness of the plates. While Mr Miller does not appear to agree with either; he says—'Any little unfairness I saw was caused, so far as my knowledge goes, by the rivets being too large in diameter;' and far from thinking that there was too much composition below the water line, he says 'that he found none at all.'

"I think it was probably just to avoid the difficulties created by such diversity of opinion amongst experts that the contract provided that the workmanship must be to the satisfaction of the pursuer or designer.

"But the defenders maintain that even if the plating were not conform to contract on the 24th of August the pursuer was not entitled to reject the yacht, because it was the duty of the designer to superintend the construction and point out defects as the work proceeded, and if the plating was not to Mr Mylne's satisfaction he ought to have insisted on its removal at an earlier stage. But, as I have said, I think it is proved that the defects were pointed out, and the defenders gave the assurance that they would be put right. I am aware that Mr Douglas Eadie denies this, but I was not favourably impressed with the manner in which he gave his evidence, and I regret that I cannot put any reliance upon what he says. If the vessel was disconform to contract on 24th August—and I am of opinion that it was—I do not think that the pursuer was bound to give the defenders further opportunity of putting it right; indeed they never asked him to do so. They knew that it was required for the shooting season, and that time was an essential element in the contract. They admit that they received the contract because they agreed to deliver within twelve weeks. It is true that pursuer was prepared to accept delivery on 24th August if the workmanship had been satisfactory, but he was not bound to wait indefinitely. He had, I think, been very reasonable throughout—he gave them every opportunity, and they failed to give satisfaction, and I formed the impression that the real cause of their failure was that they had not sufficient experience for delicate work of this kind.

"The defenders further founded on clause 6 of the contract, which provides that the right of property in the yacht will pass from the contractors to the owner on 'payment of the first instalment of the price,' and argued that, as the first instalment had been paid, the yacht was now the property of the pursuer, and he was not entitled to refuse delivery and sue for repayment of the instalment. This appears to me to be an argument on relevancy, and if the defenders intended to insist on it they ought to have taken it at an earlier stage. They gave no indication of it until the proof was closed and pursuer's counsel had been heard on the evidence. But in the view I take of the contract the argument is unsound. The contract is for a completed yacht to be built in terms of a specification to the satisfaction of the pursuer. Clause 6 is intended merely as a security. Under such a contract I do not think that the pursuer is bound to accept delivery unless the vessel is completed conform to the contract. The defenders contracted to make and deliver a specified article within a definite time. They have not done so, and I see no reason why the pursuer should not be entitled to demand repayment of the instalment of the price he paid in advance for an article he has not received.

"If I am right in thinking that the workmanship was not conform to contract, I do not think that it is necessary to examine in detail the question as to the cause of the delay; but I think the defenders have failed on this part of the case also. On record (answer 5) they aver that the delay in delivery was due to three causes—(1) Mr Mylne's failure to furnish the plans; (2) the dilatoriness of the engineers; and (3) a strike of ironworkers in defenders' yard. At the proof there was no evidence that any delay was caused by a strike, and the averments as to this

were formally withdrawn. There was very little evidence regarding the alleged delay on the part of the engineers, and counsel for the defender did not even refer to it in his speech, and I understood that this averment was also abandoned—in any event it was not substantiated. There was, however, a good deal of evidence led on behalf of the defenders regarding the alleged delay on the part of Mr Mylne, but I am of opinion that the defenders failed to substantiate this averment also. The chief witness was Mr Douglas Eadie. He went into the matter at length, but his statements in the witness-box were quite inconsistent with the whole tenor of the correspondence. For example, on 7th July Mr Mylne wrote to the defenders in the following terms:—'Mr Nelson is much disappointed with the stage the building of his launch is at. I could hardly believe you had made so little progress when he told me. Can nothing be done to hurry up matters? Can you not put some overtime into it? Mr Nelson has been the gentleman throughout, and I think you might on your part put forward some special effort. You will remember there is a penalty attached to the contract, and the delay is so considerable that the penalty will be enforced to the full. It is now five weeks since the plating started, and from all accounts there seems little of it completed.'

"If it had been true, as the defenders now allege, that Mr Mylne was himself the cause of the delay about which he is here complaining, I should have expected the defenders to reply to this letter and tell him so. But they sent no reply at all, and the only explanation which Mr Douglas Eadie offers is that as this was the first order he had received from Mr Mylne, he was anxious—with a view to obtaining other orders in the future—to keep on good terms with him. That is to say, he not only accepted—without protest—responsibility for Mr Mylne's fault, but he was prepared to sacrifice Mr Nelson's interest in the hope that he might ultimately advance his own. Such an explanation does not appear to me to be either convincing or satisfactory, and I do not believe that it is true. I think the real truth is that the long delay was caused partly by the defender's inexperience, and partly because they did not employ a sufficient number of men. In any event I am satisfied on the evidence that they have failed to prove that it was due to any of the causes which they allege on record.

"On the question of damages the defenders did not, I think, dispute that if there was a breach of contract some damages were due. I have carefully considered the evidence, and I think the pursuer's loss may be fairly estimated at £75.

"On the whole matter, I am of opinion that the defenders are in breach of their contract, and that the pursuer is entitled to decree in terms of the first and second conclusions, and to decree for £75 in terms of the third conclusion of the summons, with expenses."

The defenders reclaimed, and argued—The intention of the owner was that the property should pass after the payment of the first instalment, and that thereafter each bit should be inspected before it was adopted, with the idea of getting a good boat by a definite time. The boat became the pursuer's by sections, and as he had never objected, for example, to the frame, the frame had become his property and he could not now reject it. The property had passed irrevocably and had been accepted, and this distinguished the present case from all those founded on by the pursuer, for in them the property was not accepted—*Barclay, Curle, & Company* v. *Sir James Laing & Sons, Limited*, 1908 S.C. 82, and (H.L.) 1, 45 S.L.R. 87. Therefore rejection was now barred and the pursuer had mistaken his remedy. A contract which provided for the passing of the property after the payment of the first instalment was not a contract for a completed article, but a contract to do work on the owner's property—*M'Bain* v. *Wallace & Company*, January 7, 1881, 8 R. 360, and July 27, 1881, 8 R. (H.L.) 106, 18 S.L.R. 226 and 734; *Seath & Company* v. *Moore*, March 8, 1886, 13 R. (H.L.) 57, 23 S.L.R. 495. Under the Sale of Goods Act 1893 (56 and 57 Vict. cap. 71) the Scottish law had become absolutely the same as the English. The result was that while the purchaser could insist on each new part as it was put on being made conform to contract, he could not reject it, for it became his property, *accessione*, as it was put on. The meaning of the contract was that the purchaser had agreed to take the incomplete article as his property, and so could not ever afterwards reject it—Sale of Goods Act (*cit.*), secs. 17 and 18, rule 5 (1). In regard to the machinery which had been supplied by the pursuer, it had now been built into the yacht, and consequently the defenders had a lien over it for the unpaid portion of the price of the yacht—*Meikle & Wilson* v. *Pollard*, November 6, 1880, 8 R. 69, 18 S.L.R. 56; *Moore's Carving Machine Company* v. *Austin*, June 6, 1896, 33 S.L.R. 613; *Glendinning* v. *Hope*, 1911 S.C. (H.L.) 73, 48 S.L.R. 775.

Argued for the pursuer—If the purchaser did not get what he contracted for, he was entitled to reject, and in this case the yacht admittedly did not conform to contract, in that it did not satisfy either the owner or the designer. The defects had been pointed out to the builders, but had not been put right within the contract time. Under the Sale of Goods Act (*cit.*) the buyer's remedy was clearly, by section 11 (2), "either to treat the contract as repudiated or to retain the goods and claim damages"—see also section 53 (5). The right of rejection was carefully preserved all through this Act. The property under the contract could only pass subject to the condition that it was up to contract standard. When a buyer has taken delivery he may possibly be barred afterwards from rejecting, but only if he has dealt with it as his own—*Spencer & Company* v. *Dobie & Company*, December 17, 1879, 7 R. 396, 17

S.L.R. 370; *Aird & Coghill* v. *Pullan & Adams*, December 14, 1904, 7 F. 258, 42 S.L.R. 292; *Vigers Brothers* v. *Sanderson Brothers*, [1901] 1 Q.B. 608. Here, as the builders had not delivered to the pursuer the full *dominium* over a completed yacht which was conform to contract, they were in breach. The defenders' argument came very near to saying that this was a contract *locatio operis*, and not sale, but such a contract implied that the materials must be furnished by the employer—Bell's Com. (7th ed.) i, 275. The whole question here was whether what had been done was equivalent to acceptance, and this it obviously could not be held to be. Reference was also made to Bell's Com. (7th ed.) i, pp. 176 and 485, and to *Orr's Trustees* v. *Tullis*, July 2, 1870, 8 Macph. 936, 7 S.L.R. 625.

At advising—

LORD KINNEAR—I have some difficulty in construing the contract in this case, in which we have to consider the scope and operation of an unfamiliar legal conception introduced into our system for the first time by the Sale of Goods Act 1893. Nevertheless I think the vital question between the parties is one of fact, and upon the facts I not only agree with the Lord Ordinary, but I may add that inasmuch as the controversy turns upon a balance of conflicting testimony, I should be prepared to accept as final the decision of the Judge who saw the witnesses and heard their evidence.

The question is whether the pursuer is entitled to reject a motor yacht built for him by the defenders as disconform to contract, and to recover damages. The contract was made between A. Mylne, Glasgow, the designer of the yacht, acting on behalf of the owner, and Chalmers & Company, the defenders; and the material terms are that the defenders engage to build and equip for the pursuer a motor yacht of given dimensions, to be built in first-class style to plans and specifications got out by the designer, and while in course of construction to be superintended by the designer or his inspectors; that the contractors agree to put right within the time stipulated for the construction any part of the work considered unsuitable either in material or workmanship by the designer; that the price is to be paid by instalments; and that the right of property is to pass from the contractors to the owner on payment of the first instalment. It is further stipulated in the specification which is embodied in the contract that the workmanship is to be of the highest class, hull, shell, &c., to be perfectly fair, all to designer's or owner's satisfaction, and all details not particularly specified to be at least equal in quality to any other first-class yacht.

The first instalment of the price was paid on the 27th of June, when the boat was in frame, and the defenders say she was finished on the 16th of August 1911. On the last-mentioned day she was inspected by the pursuer and Mr Mylne, a naval architect who had designed the yacht, and who is referred to in the contract as the designer. Mr Mylne advised the pursuer not to take delivery. The yacht was inspected again by Mr Mylne and a second naval architect on the 24th August, and was then definitely rejected on the ground that the plating of the whole hull was defective. I agree with the Lord Ordinary that their objection was well founded on fact. It was stipulated that the workmanship should be of the highest class, "to the designer's or owner's satisfaction." They were both dissatisfied, and there is no good ground for suggesting that their dissatisfaction was capricious or unreasonable. If we accept the evidence for the pursuer as the Lord Ordinary does—and I see no reason to differ from him—the workmanship was so bad that no naval architect could have passed it. The boat as tendered was not the yacht for which the pursuer had bargained, and was indeed unfit for the purpose for which he had bought it.

In these circumstances I do not think it doubtful that according to the former law the pursuer would have been entitled to reject the vessel, rescind the contract, and claim damages. But it is said that this right of rejection rested upon the rule that no right of property could pass without delivery, actual or constructive, and that a buyer can have no such remedy in a case where, under the new law, the property is transferred by the contract itself. This was argued in the first place on the ground—although I do not think this first point was very confidently maintained—that for a purchaser to reject what has actually become his own is a legal impossibility or contradiction in terms. I cannot say that the Lord Ordinary's answer seems to me satisfactory when he says that the clause as to the transference of the property was intended merely as a security. How far a right in security may be effectually created under colour of a sale it is unnecessary in this case to inquire. I do not think it doubtful that the transaction in question was a true sale intended to pass to the purchaser the absolute ownership of the yacht. But the alteration of the laws as to the transference of property seems to me to make no difference in the buyer's right to reject goods that are not conform to contract. He is not bound to accept something different from what he bargained for. The property of the yacht to be built in terms of the contract passes by force of the contract, but if the vessel tendered is not the yacht for which the pursuer bargained, it is not the yacht of which the property is transferred. On that hypothesis there was no purchase or sale of the vessel tendered and no property passed. The case is exactly in the same position as if under the former law the vessel had been delivered and then rejected without undue delay. The property would have been effectually transferred if she were conform to contract, but not otherwise. Accordingly the cases are numerous in which goods delivered in the alleged performance of a contract of purchase and sale have been rejected after

delivery, and the question considered in such cases has not been whether rejection is barred by delivery, but whether the goods have been accepted either expressly or by the failure of the purchaser to intimate his dissatisfaction in due time, and the right to reject in such circumstances is expressly confirmed by section 11, sub-section (2), of the Act, and is further supported by the provisions of section 35.

The law of Scotland, as the learned annotator of the Sale of Goods Act justly remarks, does not accept the English distinction between conditions and warranties which forms the subject of the first part of the 11th section, and accordingly the right of rejection has been much larger in Scotland than in England. It thus became necessary in passing the Act either to abrogate or maintain this distinction between the two laws, and to this end the statutory rules as to warranties are confined to England, and the Scottish right of rejection as it was before the Act is expressly preserved by the Act. I am therefore unable to doubt that unless the pursuer can be shown to have accepted the yacht as tendered or to be barred from now insisting in his right to object, he is exactly in the position contemplated by the 11th section, and by reason of the seller's failure to perform a material part of the contract he is entitled to reject the boat and to repudiate the contract.

But assuming that rejection may not be in general irreconcilable with a previous transference of the right of property by contract, the defender's counsel presented a much more formidable argument on the particular terms of the contract in question. They maintained that the effect of the 6th clause is to pass the property in the frame at the time of payment of the first instalment of the price, and that the actual payment of that instalment imports acceptance of the work so far as then completed. Therefore the contract was completely executed so far as regards that part of the boat by transference of the property and payment of the price, and it follows that all subsequent work was work done on a boat which was really the property of the purchaser and not of the shipbuilder, and so became part of that property by accession. I have some difficulty in taking that view of the contract, because what the pursuer bargained for was a complete yacht and not a part only, and the property which the contract purports to pass is of the whole and not of successive parts. But the argument was very forcibly urged on the authority of Lord Watson's judgment in *Scott* v. *Moore*. The learned Lord says that when it is the agreement of the parties to a contract for the construction of 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. He adds that an agreement to this effect is to be inferred from a provision 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. This makes it evident that an agreement to the effect described is perfectly possible in law, but it leaves the question in each case to depend on the true construction of the particular contract. I am not satisfied that the pursuer agreed to accept work already executed except as part of the completed subject which was to be delivered to him when the work was finished, and I do not see that he is prohibited from saying when the completed ship is tendered to him that as a whole it is disconform to contract, unless it can be said that he has already accepted it in each and all of its successive stages of completion. But the point which seems to me to create the most real difficulty is not so much dependent upon the particular moment at which the property passes as upon the special stipulations for inspection on behalf of the purchaser. If the yacht had been already accepted, the pursuer had lost his remedy at the time when he intimated his final rejection. It is said with undeniable force that the whole contract must be taken together. The stipulations as to the transfer of the property on the one hand and as to the inspection of the work on the other are interdependent. It is just because the property passes by the contract that it is of importance for the purchaser to stipulate that while in course of construction the vessel shall be superintended by the designer or his inspectors, and further that the contractors agree to put right any part of the work which the designer considers unsuitable either in material or workmanship. I do not doubt that these stipulations impose a duty upon the purchaser. According to all the authorities it is for the purchaser of goods to satisfy himself whether the contract has been fulfilled, and to reject the goods unreservedly if they are not conform to contract.

Now the pursuer not only had sufficient opportunity to satisfy himself that the contract was being fulfilled, but by an express stipulation he undertook to do so. If he had neglected this duty, or if on inspection he was satisfied, or had concealed his dissatisfaction, so as to allow the contractors to go on with the work on the understanding that so far as already seen it was sufficient, he would in my opinion have lost his right to object to the vessel on the ground of disconformity to contract. But this duty was in fact performed by his designer or his inspector, and the work which is now challenged as deficient was not passed by the designer. On the contrary, it is proved that Mr Mylne and his inspector complained in due time of the plating of the hull, and if they did not insist on the plates being replaced it was because the defenders undertook

that the unfairness should be put right before the completion of the work. It follows that on the defenders' own argument they are in breach of contract, because the stipulation for inspection could serve no purpose if, notwithstanding their failure to do what they undertook to do in order to obviate the inspector's objection, they are still entitled to say that the contract has been duly performed. I do not think they improve their position by alleging that their promise to put things right could not in fact be performed. It was nevertheless the condition on which they were allowed to complete the work, and if they failed to perform it they cannot turn the pursuer's incautious belief in their promise—if so be that it was incautious—into an acceptance of bad workmanship which his designer had required and they had undertaken to put right. The condition which Lord Watson considers is material to determine the acceptance of the work at subsequent stages has not been satisfied, because none of the stipulated instalments except the first have been satisfied, and the pursuer declined to pay the balance in August on the ground that he had rescinded the contract and rejected the yacht.

In this view of the case the question whether the yacht was completed in time does not arise. On the whole matter I agree with the Lord Ordinary, and am for adhering to his interlocutor.

LORD DUNDAS—I am of the same opinion. The defenders found upon clause 6 of the contract, which provides that "the right of property in the yacht will pass from the contractors to the owner on payment of the first instalment of the price, subject to the contractors' lien for the balance of the price and extras." One must consider at the outset the meaning and effect of this clause. Since the passing of the Sale of Goods Act 1893 it appears to be, in the words of Lord Dunedin (*Barclay, Curle, & Company Limited*, 1908 S.C. at p. 89), 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 . . . . There is not the slightest difficulty in so framing a contract, if it is wished, . . . that the property in a gradually constructed ship shall be held to pass at certain stages." The Lord Ordinary observes that "clause 6 is intended merely as a security." This is an inaccurate mode of expression; but I do not consider that (as the defenders argued) it necessarily indicates any confusion of thought or erroneous view in law on the part of his Lordship. I should think he would agree in holding—as I should hold, and as I understood both parties to concede—that the object of clause 6 was to enable the pursuer, in the event of the defenders' sequestration, to vindicate his right to the yacht, though unfinished, in a question with their trustee. The clause is not happily framed, for the right of property in "the yacht," which *prima facie* should mean the completed vessel, could not, in the nature of things, pass at a time when *ex concessis* its construction was only at an early stage. But I rather think the defenders are so far right that the intention of clause 6 was to pass to the pursuer the property of the vessel as she stood when the first instalment was paid. The defenders' counsel urged that if that be conceded they must win the case. The pursuer cannot, they said, be entitled to the *commodum* of the clause and yet immune from its *incommodum;* and he is plainly debarred from rejecting the yacht at any time after payment of the first instalment of the price, because she then became irrevocably his property, all subsequent work upon her following by way of accessory to the thing as it stood at the date of that payment; and no man can reject his own property. I observe in passing that the Lord Ordinary points out that this view is not specifically raised upon the record, as it ought to have been—for it is truly a preliminary plea to the competency of the action as laid—but was only advanced in the speech of the defenders' counsel after the proof and after his opponent had concluded his address. But the argument has been presented, and must be dealt with on its merits, whatever bearing the lateness of its appearance might have upon expenses. It is *prima facie* rather a formidable contention; but I have come to the conclusion that it is fallacious. I think it confuses passing of property with acceptance on delivery. Now a buyer's right at common law to reject goods on the ground of disconformity to contract at any time before he has duly accepted delivery does not seem to have been altered or impaired by the provisions of the Sale of Goods Act (see sections 11 (2), 35, and 53 (5)). Section 11 (2) affirms in terms that "in Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract which entitles the buyer . . . within a reasonable time after delivery to reject the goods and treat the contract as repudiated. . . ." In this case there has been no delivery to the pursuer or "voluntary transfer of possession" (section 62 (1)) of the yacht or any part of it. Assuming, therefore, that the parties intended and agreed that the property of the yacht—"property" in the sense of section 62 (1) of the Act, *plenum dominium*—should pass to the pursuer as the defenders contend, and that it did so pass, it does not, in my judgment, follow that his right to reject the vessel at a subsequent stage, when she was tendered for delivery, was thereby cut off, if he had otherwise good grounds for rejection. There is nothing, I think, necessarily incongruous in the idea that property may pass consistently with the existence of a right of subsequent rejection before acceptance following on delivery. Such a position may, it seems to me, well arise where property in the as yet uncompleted subject of a contract of a sale has passed to the buyer. He is the owner, but his right of property may be defeasible at his option. This seems to be

assumed in the decision of *The Colonial Insurance Company of New Zealand* (1886, 12 A.C. 128, see p. 140). An instance by way of illustration has been suggested. If a purchaser shall subscribe for a complete book to be published in separate parts, to be paid for as delivered, the property in the parts delivered would pass to him, but it seems reasonably clear in principle that he might nevertheless, under given circumstances, be entitled to return them and recover their price if the seller made default in completing the book, or if the book, when it professed to be completed, was materially disconform to the contract. I think the Lord Ordinary is substantially correct in saying that "the contract is for a completed yacht to be built in terms of a specification to the satisfaction of the pursuer . . . . Under such a contract, I do not think that the pursuer is bound to accept delivery unless the vessel is completed conform to the contract."

If the views I have expressed are sound, the matter is reduced to questions of fact—whether or not, upon the evidence, the work was so completed; and if not, whether the vessel was accepted by the pursuer as conform to contract and to his satisfaction. On both these points the Lord Ordinary's decision is adverse to the defenders. I do not propose to analyse or comment upon the evidence. The case, so far as dependent on fact, seems to me to be one peculiarly within the scope of many recent observations in the House of Lords (*e.g.*, *Kinloch* v. *Young*, 1911 S.C. (H.L.) 1) as to the exceptional value of the opinion of the judge of first instance, who hears and observes the witnesses; and the less favourable position of appellate judges, who have only printed evidence before them, in deciding matters of oral testimony, especially where, as here, credibility is involved. I am not, however, in the least inclined to differ from the Lord Ordinary's view of the facts. On the contrary, I agree with it, and I should have reached the conclusion he has arrived at upon my consideration of the printed proof. I am therefore of opinion that the interlocutor reclaimed against ought in substance to be adhered to.

LORD MACKENZIE—[*After the narrative above quoted*]—The argument for the defenders is that when the first instalment was paid the property in the yacht, so far as the work had proceeded, then passed by force of the contract to the pursuer; that all the subsequent work was accessory to that property which had passed to and been accepted by the pursuer; and that accordingly, whatever his right might be to recover damages, he never could reject, because if he did he would be rejecting his own property, which would be a contradiction in terms. According to the defenders' view of the contract, what the pursuer desired was to be protected against the builder's creditors by obtaining, upon payment being made of the first instalment, the full *dominium* over the yacht so far as constructed. This, they say, was made possible without delivery by the Sale of Goods Act 1893. The Mercantile Law Amendment Act had given security to the buyer against the sellers' creditors without passing the property. The Sale of Goods Act made it possible to pass the property without delivery, as is pointed out by the Lord President in *Barclay, Curle, & Company* v. *Laing* (1908 S.C. 82). The defenders say the effect of article 6 of this contract was to pass, not a "special property," as that term is used in the law of England, but the "general property" as defined in section 62 of the Sale of Goods Act. The defenders further point to article 1 as supplementary to article 6, and as giving the buyer complete protection. The yacht was to be built under the superintendence of the pursuer's designer, and by the last clause the builders undertook to put right within the time stipulated for the construction of the yacht any work considered unsuitable. It was admitted that not only must the property of the article sold have passed, but that it must have been accepted before it could be said that the buyer was barred from rejecting. The contention, however, was that it was not open to the defenders to deny they accepted the frame when they paid the first instalment due in respect of it.

The fallacy in this argument, as it appears to me, lies in the effect which is sought to be given to the terms of article 6. As I construe the contract, what the pursuer bought was a yacht completed according to contract. The goods sold were not ascertained in the sense of section 16 of the Act when the first instalment was paid. Until the buyer saw and inspected the finished whole he could not tell whether the yacht was according to contract or not, and accordingly could not either accept or reject her. As Lord Watson points out in *Seath & Company* v. *Moore* (13 R. (H.L.) at p. 66), by the law of England (to which that of Scotland is now assimilated by the Sale of Goods Act), "in order to pass this 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." The defenders' view of the meaning of the contract involves this, that after paying the first instalment the buyer was bound to take, and could not reject, the frame of the yacht even though, owing to causes for which the builder was solely responsible, no further work was done to the yacht. This does not seem to me a reasonable construction to put upon article 6. No doubt it might be that during the course of construction the buyer, or those representing him, might act in such a manner as to bar him rejecting the yacht. The contract provides that nothing is to be incorporated in the yacht that the designer does not consider good enough. If the designer or his subordinate had stood by and said nothing during the progress of the work, the buyer might have been barred from saying at the

end of the day he was not satisfied. I am unable to regard the evidence as sufficient to make a case of that kind here. During the plating of the yacht there were complaints by the pursuer Mr Nelson, by his naval architect Mr Mylne, and by his representative Mr James. These were made to Mr Gordon Eadie, of the defenders' firm, and the point sought to be made against the pursuer is that Mr James, who saw the plating in progress, did not insist on plates which he as an expert must have known could never be straightened by hammering, being taken out and replaced by others. The defenders' counsel urged that there are certain plates that an expert should have known could never be put right, and others that could be faired out, and that it was the duty of Mr James to see that new plates were put in where necessary, as the defenders' undertaking only extended to fairing out. The answer to this, however, is that Mr Eadie continually promised, during the time the plates were being riveted, including a considerable period after 8th July, that the unevenness could and would be put right by hammering. The result of this was that it was only when the plating was completed in the middle of August that the badness of the work became fully apparent. To turn this point against Mr James now is to say that he should never have given the defenders the opportunity they asked to put their work right. Such a case as that cannot be made upon the evidence here. It was admitted that the defenders had not asked for an opportunity to put matters right after the yacht was rejected on 24th August.

Upon the question of law, therefore, I am against the contention of the defenders. None of the cases cited appear to me to lead necessarily to an opposite conclusion. If a buyer has accepted goods as his own in fulfilment of a contract he will be barred thereafter from rejecting them. The question whether he has accepted them is a question of fact, and it is upon this question of fact that the defenders' contention fails.

In this view of the case the question of who was to blame for the delay after 20th July does not arise. The record as regards the main cause of delay alleged, viz., that Mr Mylne did not furnish the defenders with the line of keelson and height of floors till 12th May, is quite at variance with the point sought to be made on the evidence and the entry in the diary under date 29th May.

No objection was taken to the amount of damages, £75, allowed by the Lord Ordinary.

I am of opinion that the interlocutor reclaimed against should be affirmed.

The Court pronounced this interlocutor—

"Adhere to said interlocutor in so far as it (heads 1 and 3 thereof) decerns against the defenders for payment of the sums of £131, 5s. and £75 respectively, with interest thereon as concluded for in the summons, and to this extent refuse the reclaiming note and decern: Recal the second head of said interlocutor, and in place thereof ordain the defenders to deliver to the pursuer within thirty days from this date the articles specified in said second head, and decern; with certification that if the defenders fail to deliver said articles as aforesaid, decree will be pronounced against them for the value thereof, with interest as concluded for in the summons," &c.

Counsel for Pursuer and Respondent—Blackburn, K.C.—Black. Agents—W. & F. Haldane, W.S.

Counsel for Defenders and Reclaimers—Sandeman, K.C.—Hon. W. Watson. Agents—Carmichael & Miller, W.S.

Tuesday, December 17.

EXTRA DIVISION.

[Lord Guthrie, Ordinary.

MEACHER *v.* BLAIR-OLIPHANT.

Property — Loch—Title — Parts and Pertinents—Marches—Common Proprietors—Evidence—Grant with Parts and Pertinents Opposed to Subsequent Express Grant.

A brought an action against B to have it declared that she was the sole owner of a loch (*a*) in virtue of her titles, or (*b*) in virtue of her titles followed by exclusive possession. The pursuer and defender were respectively proprietors of lands abutting on the loch. Ancient deeds were produced by both sides, with which, however, they were unable to connect themselves. The earliest title produced by the defender with which he connected himself was a charter, dated 1674, granting lands abutting on the loch "with parts and pertinents." The earliest title with which the pursuer connected herself was a charter, dated 1764, granting lands abutting on the loch "*nec non tres lacus.*" One of the said three lochs was the loch in question.

Held that the defender's title gave him a joint right in the loch with the other riparian proprietors; and that the pursuer's title was *a non domino*, and could not prejudice or prevail against the defender's unless she could show continuous, exclusive, and adverse possession of the whole loch for the prescriptive period; that to establish her claims the pursuer must show that she had excluded the defender and his authors from the common uses of the surface of the water, on the ground that they belonged exclusively to herself, or that she had encroached upon what would otherwise have been the defender's separate property in the *solum*, and that she had failed to prove this.

Observed (*per* Lord Kinnear) that the only titles at which the Court are