Wednesday, July 27.

(Before Lord Chancellor Selborne, Lords Blackburn and Watson.)

M'BAIN *v.* WALLACE & COMPANY.

(*Ante*, p. 226, 8 R. 360).

Mercantile Law Amendment Act 1856 (19 *and* 20 *Vict. c.* 60, *sec.* 1)—*Sale—Ship—Delivery.*

Where by a regular contract of sale, unqualified by any back-letter or other written agreement, a ship which was in course of construction had been sold and the price paid, but the ship itself not delivered to the buyer, the validity of the sale is not affected, so as to entitle the trustee on the sequestrated estate of the seller to prevent the buyer from obtaining possession of the ship, by the circumstances that the sale was entered into for the purpose of securing to the buyer certain cash advances made by him to the seller, and that the buyer intended to sell the ship upon delivery and retain only so much of the price as should refund him his advances.

This case was reported of date January 7th 1881 in the Court of Session (*ante*, p. 226, 8 R. 360). The complainer Mr M'Bain, the trustee on the sequestrated estate of the shipbuilder Mr Roney, now appealed to the House of Lords in order to prevent the respondents from entering upon Roney's shipbuilding yard with a view to taking possession of the vessel, which, as they averred, had been sold to them by Roney. The Court of Session had refused the interdict sought by M'Bain, and that judgment was now affirmed by the House of Lords.

At delivering judgment—

LORD CHANCELLOR—My Lords, your Lordships have listened to lengthened arguments in this case, but it appears to me that there are really only two questions which are ultimately material to the judgment. The first is, Whether this is a contract of sale? Now, the appellants come into very great difficulties when they deny that it is a contract of sale, because upon the face of the instrument it is as carefully prepared and clearly expressed a contract of sale as anything can possibly be. And when we turn to the parole evidence, although no doubt on the one side and on the other there is a contrariety of statement, yet the actual condition of that parole evidence is that the purchasers (the respondents) most positively say that that which was expressed in the instrument is that which was intended, and that it was done no doubt with the motive of securing the money which the purchasers had at stake, but done deliberately as purchase, because that was the best and most effectual way of accomplishing the object which the parties had in view. In corroboration of that, if corroboration were necessary, we find that the preliminary heads of the agreement afterwards extended by this contract begin, "Memorandum for contract of sale and building contract," and if that could properly be looked to, the entries in the book of the law-agent show that it was that and nothing else. The statement on the other side is really absolutely inconsistent with what appears upon the face of the instrument, and there is no reduction of the instrument asked for. It is not an allegation of something inconsistent with the instrument; it is an allegation entirely destructive of it. Therefore, as it appears to me, my Lords, the first point must be decided in accordance with the instrument, that this was a sale, whatever may have been the motive, reason, and purpose which led to that sale, and its *bona fides* is really not in dispute.

My Lords, I think I may under those circumstances pass very lightly over what was afterwards written and what was afterwards done. There was a course of action upon this contract, showing, as I think, a clear intention to adhere to it, because certain cheques were from time to time drawn by the persons who under the contract are technically at all events purchasers for the whole amount of the agreed purchase-money, namely, £2500, and £50 further, which represents, as I understand, certain extra work done upon the ship. The fact that those were expressly and wholly payments under the contract, made as in payment of the purchase-money, is evidenced by a series of documents signed, as often as any of those payments were made, expressly stating that they were "to account of the purchase-price" payable by the purchasers for the ship in question; and these documents are all subscribed by Roney, who was on the face of it the seller. It is said that those payments are not to be regarded as real payments, because for not all of them, but for all except £720, there were acceptances given at the same time by Roney, who received the money. But, my Lords, it seems to me to be perfectly clear that the object of those acceptances was simply to keep the purchasers out of cash advances until the period of time at which, if these payments had not been made, the purchase-money would have been payable under the contract. Looking to this appropriation of payments made by the cheques, it appears to me to be an irresistible conclusion that as between Roney and the purchasers, the purchasers and not Roney were liable and bound to take up those bills, as in point of fact they did, although not as far as I know till after the sequestration. In that state of things, these bills having been taken up, the money has in fact been paid by the purchasers and to the full amount.

My Lords, I cannot but observe that whatever may have been the intention of the parties with regard to any ulterior arrangements or settlements between them, I find nothing to lead me to the conclusion that those intentions extended so far as in any event whatever to pay or repay the £2550 to the purchasers otherwise than by means of the realisation of the property purchased. Personal debt, independent of this contract, I do not find to have resulted from the transaction between the parties. What is alleged is this—and there is undoubtedly some evidence in support of it—that the parties contracted that the purchasers would realise this ship by sale, and they having originally gone into the transaction in a certain sense with a view to their own security, and evidently not having fixed the £2500 as a price in the ordinary way of bargain where the motive is to become possessed of and to retain the article purchased, what was contemplated appears to

have been this—that if when the article was sold it should fetch more than that money, and any interest, costs, and so on which might be due, the purchasers would not take advantage of the gain and profit which according to the letter of the contract they might be able to realise.

My Lords, I cannot say that I find in this evidence any very clear or satisfactory proof of a positive agreement having been at any time made for that purpose, although I do find something very like it sufficient to show that there was a sense of moral obligation, at all events on the part of the purchasers, so to act, and it was their apparent intention so to act. It may be that what happened between them may raise that beyond moral obligation into a legal or equitable obligation which the Courts would enforce, and that certainly I think it appears to have been the opinion of the learned Judges in the Court below. I will assume for the present purpose that there might be sufficient grounds for that conclusion, but at the most it came to nothing more than this,—that this being in intention expressly a contract of sale, there is a bye-agreement—a collateral agreement, not in the form of a regular back bond, but of that nature—by reason of which, when the property which is purchased is realised by a subsequent sale, something will be done between the parties to adjust the mutual rights or equities which they have consented to establish between them. That appears to me not only not to destroy the sale as a sale, but really to proceed upon the contract as its foundation and basis, and to be something growing out of that contract which the parties according to the hypothesis agreed to do. Therefore, my Lords, it appears to me that there is no ground whatever for treating this otherwise than a sale.

I postpone the consideration of the correspondence which passed with a view to the subsequent sale or re-sale of this property, because that seems to connect itself naturally with one of the arguments which related to reputed ownership. Postponing that, I have first very lightly to pass over the argument founded upon the Scotch law as laid down in the case of *Simpson* v. *Duncanson*, or supposed to be laid down in that case, independently of the Mercantile Law Amendment Act. My Lords, I frankly confess that unless *Duncanson's* case is to be explained, as it was put at the bar, upon the footing of a constructive delivery, I do not very distinctly or clearly understand what the law is which that case decided; it is admitted to be exceptional. Upon the face of the decision itself as reported by Lord Monboddo, it seems to me that what was decided was not that the property in the ship had vested, but that there was an obligation on the part of the trustee or assignee in bankruptcy taking the property to repay the money which had been laid out upon it, which is a very different thing. But put it as you will, the case of *Simpson* v. *Duncanson* does not appear to me to be a case on which it is so satisfactory to rest the decision of the case now before your Lordships as it is to rest it upon the terms of the Mercantile Law (Scotland) Amendment Act, which renders a consideration of the difficulties which might have arisen in regard to *Duncanson's* case now entirely immaterial.

By the general law of Scotland there must be tradition or delivery in order to give effect to a contract of sale, but by the Mercantile Law Amendment Act, for the express purpose of assimilating the law of Scotland on such points to the law of England, it is provided that where goods have been sold but have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller in effect, the creditors in bankruptcy of the seller shall not be able to defeat the sale. My Lords, I have already said that, in my opinion, whether in some sense security was the object or not, there was a sale in fact and intent. The statute does not say that, there being a sale, it is to be taken out of the operation of the statute because the parties may have some further contract or agreement or understanding *inter se* with regard to the subject of the sale. This is a case in which, if there was a sale at all, there was a sale unaccompanied with a delivery to the purchasers. The subject was allowed to remain in the custody of the seller. Every condition of this statute was fulfilled, and I cannot see any ground upon which your Lordships can qualify these conditions of the statute for the purpose of defeating a *bona fide* transaction which is otherwise lawful. It appears therefore to me, my Lords, that that clause of the statute removes all the difficulties, and the questions which might otherwise have arisen as to the doctrine of the decision in the case of *Simpson* v. *Duncanson*, and that having regard to that clause of the statute, the conclusion arrived at by the Court of Session is clearly correct, the only difficulty upon that point being that the Court of Session have not based their conclusion upon the statute as distinctly as I think your Lordships will be disposed to do.

With regard to reputed ownership, I really think it is very far from necessary to say much, because beyond all question the proposition cited from what Lord Justice Turner said in the case of *Holderness* v. *Ranken* is true, that the fact of an unfinished ship being in a shipbuilder's yard is not in itself a fact which involves the reputation of ownership on the part of the shipbuilder. I see nothing to distinguish this particular case from the ordinary one. If in point of fact this ship was not after the sale the property of the shipbuilders, the fact of its remaining in their yard unfinished could not create the reputation of its being so, and whether or not it was left at their order and disposition for the purpose of creating a reputation of ownership, and to enable them to deal with it in a way which would bring it within the scope of the bankruptcy law, is a question of fact no doubt, but I can see no evidence whatever in support of it.

All that is referred to in support of it is a correspondence shewing plainly enough that communications passed from time to time between the shipbuilder in whose yard this vessel was and those whom I have called the purchasers, and also the brokers, and latterly with one intending purchaser. That correspondence, taken as a whole—and every part of it is consistent with the rest—shows plainly that it was intended and desired to find a purchaser for this unfinished

vessel. References were made in the correspondence to the builder, but there was only that which would happen in the ordinary course of things if the person to whom the vessel belonged desired that it should be sold, whether it belonged to the builder, and whether it could be sold without his concurrence or not. Nothing was done or said from which I should infer there was any authority which would have enabled him to deal with it without the concurrence and consent of the purchasers. Their interest is several times referred to, and referred to in a manner which appears to me to be perfectly consistent with the absence of any reputation of ownership or any intention to create it. No doubt, my Lords, in those letters the ship is frequently spoken of as the builder's ship, but the letters are not written to persons who are induced by their means to deal with the ship upon the footing of its being the property of the builder. They are not published to the world. Nothing appears to have happened with regard to these letters out of which a reputation of ownership could consistently with truth grow. Therefore, my Lords, it appears to me that there is nothing in that argument.

The last point that was mentioned about the notice extending to the use of the building-yard may be said now to be at rest. It is admitted on all hands that such use as is necessary to enable the ship to be taken away is proper, and is not in dispute. On the other hand, any indefinite use of the building yard your Lordships, I think, do not understand to be claimed, and certainly if it were claimed it would receive no countenance from anything which your Lordships are likely to say.

There remains only the question whether any addition should be made to the interlocutor refusing the interdict. Now, the interdict is simply sought for to prevent those things being done according to the notice which are authorised by the contract and necessary to enable possession to be taken of the ship and the ship to be sold, and such use, as I have already said, to be made of the building-yard as is absolutely necessary and indispensable. The interdict seeks to prevent that, and the question is, Is it according to contract or not? If the contract is good, as I think your Lordships will hold it to be, those things appear to me to be authorised by the contract, and to refuse an interdict which would prohibit them appears to me to be a necessary consequence. If your Lordships are of that opinion, it appears to me that to go further, and to enter into the question of the ulterior rights of the parties under any collateral agreement which may exist between them would not only not be necessary to protect any rights which may exist under such an agreement, but in the present state of the evidence I think your Lordships have not the materials upon which it would be possible or satisfactory to make any such declaration or right to attempt it.

On the whole, my opinion is that the judgment under appeal is right, and I move your Lordships that the interlocutor be affirmed and the appeal dismissed with costs.

Lord Blackburn—My Lords, I am entirely of the same opinion.

It seems to me that it will be most convenient to consider first the true effect and construction of the Mercantile Law (Scotland) Amendment Act, the 19th and 20th Vict. cap. 60, sec. 1. Now, there is a preamble to that Act explaining what the object of it is, and there is a similar preamble explaining the object of another Act, for there was one passed for England and one for Scotland in the same year. The object of the two Acts was this—They were passed because there was a difference between the mercantile law of England and the mercantile law of Scotland which was found inconvenient in practice, and therefore it was desired to assimilate them in certain respects—in some respects doubtless by making the English law similar to the Scotch, and in other respects by making the Scotch law similar to the English. It is therefore almost as important in construing that Act to know what was the English law as to know what was the Scotch law, and I believe that upon neither is there any real dispute.

By the English law, when there was what civilians would call *emptio perfecta*, and what English lawyers call a bargain and sale—a contract for goods and valuable consideration to pass the property in particular chattels—as soon as that was ascertained the property did pass, and the purchaser, although he might not be entitled to delivery—for there might be a vendor's lien or something else to prevent delivery—was entitled, nevertheless, to the property in the goods—to the *jus in re* as well as the *jus ad rem*. That made a very considerable practical difference between the law of England and the law of Scotland; for the law of Scotland was like the civil law upon which it was founded, the maxim of the civil law being —*Traditionibus et usucapionibus, non nudis pactis, dominia rerum transferuntur.* When there was not an actual delivery, however complete the contract might be, although it was *emptio perfecta* to the fullest extent, amounting to all that in the great chapter of the digest upon that subject has been considered to be *emptio perfecta*, and although every farthing of the price was paid, yet the *dominium rei*—the *jus in re*—did not pass to the purchaser. Although he had the *jus ad rem*, and could compel the vendor to deliver to him the goods, as long as the vendor was *sui juris* he had not the *jus in re*. The practical result of that was, that if a creditor in Scotland issued diligence and seized the goods, still they were the goods of the vendor—that is to say, of the person who had sold them, although every farthing of the price had been paid, and further than that, if a sequestration had taken place, the vendor having become a bankrupt, the property passed to the sequestrators, and they were entitled to hold it, leaving the man who had perhaps paid every farthing of the price to prove against the estate. That was the state of the law in Scotland, and it is obvious that there was a very considerable difference in the practical working of the English law and the Scotch. If a man purchased a quantity of goods, one-half of which lay at Greenock and the other half at Liverpool, the creditors of the vendor might seize the goods in Greenock, but no creditor could touch the goods in Liverpool. In case of a sequestration in Scotland, the sequestrator could take the goods in Greenock, but in case of a bankruptcy in England the assignees in bankruptcy could not touch the goods in Liverpool. Those were the differences between the laws of the two countries.

Then comes the Act of Parliament for the pur-

pose of assimilating the two laws, and it says this—"Where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditors of such seller, after the date of such sale, to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing delivery of the same." Now, I quite agree that that does not say that a contract of sale—*perfecta emptio*—in Scotland shall pass the property—shall pass the *jus in re*—and so far it does not assimilate it to the English law at all. The only practical difference between the *jus in re* remaining in the vendor and the *jus ad rem* going to the purchaser, was that his creditors by poinding and by sequestration could take the goods. There is a nominal difference now between the law of England and the law of Scotland as regards this. But for all practical purposes the law of Scotland where there has been a contract of sale is made identical with the law of England in the actual result.

Now, my Lords, an argument has been based upon the words of the Act "where goods have not been delivered to the purchaser and have been allowed to remain in the custody of the seller"—an attempt has been made to give a meaning to those words in which I cannot agree. I think that when you take the existing laws of England and Scotland, as I have mentioned, and see what was the object of the Legislature in using these words, it is plain that they could not have intended by such words as these, "been allowed to remain in the custody of the seller," to introduce a new and complicated difference between the law of England and the law of Scotland. It is perfectly true, I think, as regards the law of Scotland, and it is to some extent true also as regards the law of England, that independent of bankruptcy, and before there is bankruptcy at all, where one person has allowed another to have possession of goods under such circumstances and in such a way as to accredit that other person and entitle him to sell them or to acquire credit upon them, if the true owner has allowed this to take place in such a way that he should be responsible for the consequences, it would be unjust for him to take away the goods to the damage of those who may in consequence of his having accredited the other person have acquired a right over them, that is, before there has been bankruptcy. In England, when there has been bankruptcy, this principle has been now for a very very long time carried out by force of a statute which we need not now consider, because it is not under the English statute of bankruptcy at all that the question now arises. In Scotland I understand that something very similar to the principle I have mentioned exists, but it is not by statute made applicable to sequestration or to a case where the party has failed, but it rests upon the grounds of common law. A simple creditor who issues process and poinds the goods may poind them as against the person who has sold the goods, if that person has retained the *jus in re* though he has lost the *jus ad rem*—notwithstanding the statute he may poind them in his position as a creditor, where the possession of the vendor (to borrow the phrase used by Lord Justice-Clerk Inglis in the case of *Sim* v. *Grant*) has been allowed by the purchaser to be such as is quite inconsistent with his having the *jus ad rem* by virtue of his personal contract of sale. It is very true that inasmuch as the vendor had by the common law of Scotland before this law was passed, got the legal right to the property, you could not say that he was "the reputed owner" of goods of which he was the actual owner himself. But the same principle which would have made a third person become the reputed owner so as to give a creditor a right to seize them in his possession, because the true owner had allowed them to be in his possession, appears to me to apply when you are applying the statute. If you can show that the man who had acquired the *jus ad rem* has allowed the vendor to keep possession of the goods in such a way as is quite inconsistent with the *jus ad rem*, it seems very reasonable indeed to say that that shall be considered as a case of reputed ownership, and that being so, the Mercantile Law (Scotland) Amendment Act does not take the goods out of it. It says that delivery shall be good to make a contract of sale pass the entire property, but it does not say that without delivery the property shall pass where, if there had been delivery and the goods had been left in this particular way with the vendor, afterwards they would have been made liable to the diligence of his creditors. So far I think the argument is quite right, but it is inapplicable to the present case. If this had been a case of present delivery, the effect of the contract of sale upon the goods with reference to the diligence of creditors is made exactly the same as it would be under the English law.

My Lords, it has been endeavoured to be argued that if there was here by the side of the contract of sale a collateral agreement that the ship should be only held as security, that would prevent the contract of sale operating under the Mercantile Law Amendment Act so as to require no delivery but to prevent any diligence or sequestration. I cannot agree with that argument at all. I do not think that the point exactly arises here. I listened to the observations of the noble and learned Lord on the woolsack, and I agreed in the reasons which he gave. It seems to me that in this case the contract of sale was agreed upon probably with the motive and intention that the party should thereby be able safely to make advances and have the security of the goods that had been sold to him, but whatever the motive and intention might be, it was as clear a contract of sale as anything could possibly be in its inception. I think that is perfectly plain. The evidence also leaves no doubt upon my mind that there was in this case a feeling of moral obligation on the part of Messrs Wallace that if this ship should turn out to be worth much more than the £2500 they would not keep the surplus. I think that that is repeatedly recognised in the different letters which passed. My present idea would be, that although there was that moral obligation or honorary obligation, it never was reduced to a contract at all. The appellant asks if there was such a contract, when was it made, where was it made? from which he concludes that it must have been *ab initio*. I say, on the contrary, that it never was at all. That would be my impression certainly if I were

going to decide it, but that was not the impression of the Court below, and as it is not necessary to decide it I say nothing about it. But supposing there was this completed collateral contract, not only an honorary contract, which I have no doubt that there was, but a binding, legal, and enforcible contract that this should be a security, I do not see the slightest ground for saying that that undoes the effect of the Mercantile Law Amendment Act, which says that goods having been sold as these were, although with a motive no doubt to produce this effect, still as far as regards the right of creditors of the vendor to take the goods either by sequestration or poinding they shall have none, but the matter shall stand as it would under the English law. That, I think, is the point that will be decided here.

Upon the rest of the case, my Lords, I think I need hardly say anything more. Supposing it to be the fact that there was a collateral contract of that sort, doubtless in the possible event of the ship proving to be worth more than the advances which have been made, it may be that it will come into operation. I expect, however, and I fear for the sake of both parties, that it will turn out that it never will come into operation, because the ship will never sell for as much as has been advanced in respect of it. But that we have nothing to do with. As to all the rest of the case, I think the interdict here is asked for against their fulfilling the very terms of the contract which they have made. The interdict would have the effect of preventing the purchaser from enforcing the delivery of the ship. That is exactly what the Mercantile Law Amendment Act says shall not be done by the creditors of the seller by any process of law, including sequestration. It seems to me, therefore, that the interdict should be refused ; and I do not see the slightest occasion for doing anything further—indeed, I think mischief would probably be done by declaring any rights or doing anything at all further. I quite agree in thinking that when there is a ship standing in a dockyard unfinished, as this was, the purchaser, if he had a right to the ship, must necessarily have a right to do what is necessary and proper for taking the ship out of that dockyard, and it is impossible to suppose that sequestration would prevent his doing it. I also agree that the parties neither claimed nor intended to claim any right to let the ship remain for two years in the dock, and occupy the dock whilst it was being built. I do not think they claimed anything so unreasonable, and consequently I do not think it is necessary to say anything at all against their having such a claim. It seems to me that if they do make such a claim, it must be left to the sequestrator, or the trustee, or the landlord of the dock (for I understand it is a leasehold), to take proper steps to eject them. It is not necessary now to say anything at all about it.

Therefore, my Lords, I quite agree that the interlocutor of the Court below is right, and that the appeal should be dismissed.

LORD WATSON—My Lords, I entirely concur in the view that your Lordships take upon this case.

I cannot doubt that the contract between these parties is in terms a contract of sale and nothing else. It is a binding contract reduced to writing, and I think it must, so far as it is not legitimately controlled by the terms of some other contract, take effect between the two parties to it in terms as a contract for sale. I must confess that I very greatly doubt the competency of importing into the construction of that written contract a very great deal of the evidence that was taken in this case. It appears to me that a great deal of it consists of antecedent communings, which according to the law of Scotland can have no effect whatever in indicating what is to be the true construction of the concluded contract in which the parties embody their stipulations in writing. The very purpose of reducing them to writing is to get rid of all the doubt and perplexity that would arise as to the terms of the contract if it should be left to stand upon the antecedent negotiations which have taken place, whether orally or by letter. But, my Lords, there is evidence as to the actings of the parties under the contract—as to their writings when the contract was in course, I may say, of execution, and those might, according to my view of the law of evidence in Scotland, be legitimately referred to as clearing up any point which might be doubtful. I cannot say that I find anything doubtful in this contract requiring elucidation from those sources, and upon looking to the correspondence and to the oral evidence I can find nothing there which in the least degree conflicts with the construction which the contract, according to its own terms, ought in my opinion to receive.

Now, the contention of the appellant was twofold. He first maintained upon the evidence that he controlled the contract and imported a new meaning into the contract by the evidence which he had led. The Lord Ordinary seems to have given effect to that view, and to have held that the contract did not set forth the true agreement between the parties—that their agreement in reality was one for a loan upon security and not for a sale and purchase, and if that view were well founded the judgment of the Lord Ordinary undoubtedly is equally so. But, my Lords, I find it impossible to accept that view, and I therefore turn to the alternative view which was presented in argument at the bar. It was to this effect, that although in form this might be a contract of sale, it was in substance intended thereby to give a security only ; that really resolves itself into an allegation that the motive of the parties in making the contract was to effect that which might more directly, had the circumstances of the case rendered it advisable, have been effected by a loan on the security of the vessel. But, my Lords, I cannot conceive that the contract is not to take effect according to its legal terms and legal meaning simply because it was intended thereby to give to the seller the benefits which they found so impracticable with safety to the purchaser to give him as a loan.

My Lords, the question raised in this case which I come to next (and I take it in this order because it seems to be sufficient for the disposal of the case) is the question of the effect of the Mercantile Law (Scotland) Amendment Act of 1856. Now, my Lords, being of opinion that this is a pure contract of sale, I think it necessarily follows that according to the law of Scotland as it stands, and as it stood, irrespective of the provisions of the Mercantile Law Amendment

Act, it would have been valid as against the trustee in bankruptcy if it had been followed by actual tradition or delivery of the ship. I say nothing at present of constructive delivery as equivalent to actual in a question with the trustee. That being so, what is the effect of the Act? It is necessary to consider for a moment, in determining that question, how the law stood at the date of the passing of that statute. At that time, by the law of Scotland, a purchaser who had merely a personal contract for sale could not demand delivery from a trustee in a sequestration of the seller. It was in the option of the trustee to proceed against him by enforcement of the contract for delivery of the vessel and suing for the price. But the purchaser, on the other hand, who had not got delivery, had no right to compel implement in a question with the trustee. Now the statute was passed for the purpose of assimilating the law of Scotland to that of England. As I understand the law of England, a concluded contract of sale—what in Scotland is termed a concluded personal contract of sale—has the effect of passing the property or interest in the property of the goods sold to the purchaser. In Scotland it undoubtedly had not that effect, and in order to place a purchaser in Scotland in the same position as a purchaser in England in questions with the creditors of a bankrupt or the assignees or trustee in sequestration of a bankrupt, the Legislature did not enact that in Scotland the completion of a personal contract should pass the property or have the effect of delivery, but it did enact by the first section of the statute of 1856, that as in a question with the creditors of the seller, or with the trustee in a sequestration of the seller, the purchaser under a personal contract of sale should have precisely the same right to enforce delivery of the goods sold as he would have had against the bankrupt had he remained solvent. That statute appears to me my Lords, to supply all that is wanting to the completeness and efficacy of the contract in this case. Practically the effect of that section of the statute is to dispense with the necessity for delivery in the case of a purchaser who has a personal contract of sale. You have here a personal contract of sale, and you have here a statute dispensing with the necessity of actual delivery under it. That being so, I think we have, as your Lordships have already indicated, a satisfactory ground for deciding this case apart from all questions as to what the law of Scotland was before the Act was passed.

Now, my Lords, I do not think it necessary to say much upon the question of what the law of Scotland formerly was, because seeing that the Act of 1856 is held by your Lordships to apply to this case, any question of what the law was before that statute was passed really possesses little more than an antiquarian interest. I think the question raised is a very difficult and a very doubtful one. I rather think there are authorities in the law of Scotland which come nearer to the case presented by the respondent here than the case of which we have heard so much, namely *Simpson* v. *Duncanson*. Many cases might have been found which would have supported the argument on the part of the respondents with regard to the purchase of an article nearly completed, with instalments of the price paid up to a certain date, the article left in the hands of the vendor for the purpose of completion, there remaining another instalment which would have to be paid for work at that time undone. I dismiss that, however, because it appears to me to be unnecessary for the purposes of this case to determine anything in regard to it.

But it was said that the respondents in this case cannot have the benefit of the provisions of the Mercantile Law (Scotland) Amendment Act, because they have permitted Mr Roney, the bankrupt, to deal with this vessel as if he were the owner of it (I dismiss the word "reputed" as not being very applicable to the case of a person in whom the legal estate is vested), and so to raise credit upon the faith of his being the true owner. Now, my Lords, without examining the doctrine of the law of Scotland, which certainly has rested and was introduced upon principles of equity, I think it is sufficiently clear that where a purchaser permits the seller to retain the goods and to deal with them as if they were his own, and as if no sale of them had actually taken place, he cannot have any claim to have those goods delivered to him, not as in a question with the seller of the goods, but as in a question with onerous creditors of the seller. But in this case, whilst I admit that the principle contended for exists—and I believe it to be a sound principle—I cannot find the slightest ground of fact for holding that there has been any such holding out of himself as owner on the part of Mr Roney in the present case, whether consented to by the respondents or not. I entirely concur with the observations that were made upon this part of the evidence by the noble and learned Lord on the woolsack.

My Lords, the learned Judges in the Court below have indicated that in this case it is their view that a collateral contract was constituted of a nature which undoubtedly may co-exist with the contract of sale in question. I forbear to offer any opinion upon that point, because I cannot find any such case raised upon this record, and I do not think it desirable to indicate any opinion either for or against the appellant upon that point. But if the appellant has any such right—if he can instruct any such contract—I do not think his interest will be prejudiced by the form of the judgment pronounced in the Court below. No doubt the appellant came into Court complaining of the whole terms of the notice which had been served upon him by the respondents, but the mere fact of his complaining of the whole notice and putting it all in his note of suspension and interdict does not entitle him to object in this process to that notice upon all and every ground which he may discover. The very object of having a record is to limit the complainer (and especially in a summary proceeding like this) to those grounds of objection which are set forth upon the record. And here there is no allegation, so far as I can find, of any collateral contract, nor is there any allegation that he desires to have any reservation of his rights. He neither alleges that he has a right under a collateral contract, nor does he allege that that right has been invaded. It humbly appears to me, my Lords, that even under the notice it is quite possible for the respondents in this case to proceed without doing anything to prejudice that collateral contract, if it exists, and the form of the record is such as not to prevent the appellant, if he has good cause

of complaint, from making that complaint and obtaining his appropriate remedy in a new and separate proceeding.

I therefore think that the judgment in the terms in which it was pronounced by the Lords of the Second Division ought to stand, as your Lordships have already proposed, as the judgment of this House.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Counsel for Complainer and Appellant—Balfour, S.-G.—Benjamin, Q.C. Agents—A. Beveridge—William Officer, S.S.C.

Counsel for Respondents—Charles, Q.C.—R. V. Campbell. Agents—Thomson, Son, & Brooks—William Archibald, S.S.C.

Wednesday, August 3.

(Before Lord Chancellor Selborne, Lord Blackburn, and Lord Watson.)

ROBINSON *v.* MURDOCH AND OTHERS (FRASER'S TRUSTEES.)

(*Ante*, vol. xvii. p. 524, 7 R. 694.)

Trust—Powers and Duties of Trustees—Bank Stock.

A truster directed her trustees to pay the interest of two sums of £2000 to each of two legatees, and thereafter to divide the residue among certain persons. She empowered her trustees to continue to hold any or all of such shares or stocks as should belong to her estate, "with power to lend out on such security or securities, heritable or moveable, as they shall consider advantageous, the foresaid legacies of £2000 and £2000 respectively." *Held* (1) that the terms of the deed authorised the retention of certain bank stock as part of the capital, to be set apart for payment of one of the said legacies, and that the trustees, although of opinion that such an investment was not suitable for trust funds, did not act in breach of duty by continuing to hold the bank stock after consulting with the beneficiary and obtaining her approval; but (2) (*rev.* judgment of the Court of Session) that the trustees having allocated and appropriated certain investments to each of the two capital funds from which the legacies were to be paid, and having held the funds as separate and distinct, were not entitled to recoup themselves for calls paid by them upon the bank stock belonging to one of these funds out of the other capital fund.

This case was reported of date March 10, 1880, 7 R. 694, in the Court of Session. Application was made to that Court by Mrs Robinson to prevent the trustees under her mother's trust-settlement from operating relief to themselves out of the fund of £2000, to the interest of which she was entitled, in respect of losses incurred by them in payment of calls in the liquidation of the City of Glasgow Bank on account of stock held by them under the same trust-settlement. The Court of Session refused the remedy asked, and Mrs Robinson now appealed to the House of Lords. The House of Lords granted interdict as craved.

At delivering judgment—

LORD CHANCELLOR—My Lords, the two first questions to be determined in this case are, Whether the authority given by the trust-disposition and settlement of Mrs Fraser to her trustees to continue to hold any of her shares in public or other companies enabled them to set apart and appropriate, for the second and third purposes respectively of that settlement, the bank shares and other securities which they did in fact retain for those purposes? and whether, if they had that authority, it was duly exercised?

Upon the first point it was argued that because the power of the trustees "to continue to hold" the shares, &c., should they consider it advisable or expedient to do so," is followed in the settlement by a power also "to lend or place out" the two legacies of £2000 each "on such security or securities, heritable or moveable, as they shall consider advantageous," the former power could not properly be used for the investments contemplated by the latter, but must be construed as merely authorising some delay, which might not otherwise have been proper, in the conversion of the truster's shares, &c., in public companies before the distribution of her residuary estate. I think that this is not a necessary, and that it would not be a reasonable, construction of the settlement. A power to "continue to hold" particular investments made by the truster herself (without more) must, I think, be taken *prima facie* to refer to those trusts which were to continue, and the only continuing trusts in this case were those expressed in the second and third purposes of the settlement.

Upon the second point I cannot concur in the view which seems to have been taken by some of the learned Judges in the Court of Session, that because the trustees on the 20th November 1876 stated it to be their view that bank stock was not a suitable class of stock for trustees to hold, their subsequent decision to hold £200 City of Glasgow Bank stock for the investment of part of the legacy of £2000 given to Mrs Sinclair and her children ought to be regarded as an abdication of their duty of judgment, and for that reason a breach of trust. When the truster had expressly authorised the retention, for the purposes of the trust which she created, of these investments made by herself, of which some were to her knowledge of a character not free from risk, and were at the same time productive of a variable amount of income, those facts alone could not make it a breach of trust for the trustees to act upon that authority, although their own preference might have been for securities unattended with any risk. The truster did not, indeed, direct them to take into consideration the wishes or the opinions of the liferenters, but I think it was proper and reasonable for them to do so as long as they did not unduly favour the liferenters at the expense of their children, or either set of legatees at the expense of the other. In this case I find no indication of any improper purpose. It is true that some risk was necessarily incident to every such investment in bank stock, but there was no special reason for believing (and it is plain