HOUSE OF LORDS.

Friday, March 4.

(Before the Lord Chancellor (Halsbury), Lords Macnaghten, Davey, Robertson, and Lindley.)

MACBETH & GRAY *v.* REID (CARMICHAEL, MACLEAN, & COMPANY'S TRUSTEE).

Sale—Ship—Ship to be Constructed—Bankruptcy of Shipbuilder—Right to Materials Intended for Ship—Effect of Inspection by Lloyd's Surveyor—Security over Moveables.

A contract for the building of a ship contained a clause declaring that "the vessel, as she is constructed, and all her engines, boilers, and machinery, and all materials from time to time intended for her or them, whether in the building yard, workshop, river, or elsewhere, shall, immediately as the same proceeds, become the property of the purchasers, and shall not be within the ownership, control, or disposition of the builders." A further clause declared that in the event of the shipbuilders making default in the construction of the ship, the purchasers should be entitled "to take possession" of the ship in her then state and of all materials intended for her.

Before the ship was completed the shipbuilders became bankrupt. At the time of the bankruptcy there were a number of iron plates lying at a railway station which had been ordered by the shipbuilders. These plates were marked with a number by which this particular ship was known in the yard. They had been passed by Lloyd's surveyor, but had not been inspected by the surveyors for the purchasers. They were so constructed as to be available for use in the building of a similar ship.

In a competition between the purchasers and the trustee in the shipbuilders' bankruptcy, each claiming the property in these plates, *held* (*rev.* judgment of the First Division of the Court of Session) that the contract was for a sale of a ship and not for the sale of the materials, that the property in these materials had not passed to the purchasers of the ship, and that they therefore fell under the bankruptcy of the shipbuilder.

Observed that the fact that iron plates had been passed by Lloyd's surveyor did not amount to acceptance of these plates by the purchaser of the ship.

Seath & Company v. *Moore*, March 8, 1886, 13 R. (H.L.) 57, 23 S.L.R. 495, 11 App. Cas. 350, *followed*.

By contract dated 27th October 1898 Messrs Macbeth & Gray, shipowners, Glasgow, ordered from Messrs Carmichael, Maclean, & Company, shipbuilders, Greenock, a ship, to be built according to specification and plans signed by the parties, to be classed Lloyds 100 A1, and to be delivered on 19th August 1899.

The contract, after providing for the dimensions of the ship and the amount of the price (£34,200), contained the following clauses:—

"(4.) The vessel a she is constructed, and all her engines, boilers, and machinery, and all materials from time to time intended for her or them, whether in the building yard, workshop, river, or elsewhere, shall immediately as the same proceeds become the property of the purchasers, and shall not be within the ownership, control, or disposition of the builders; but the builders shall at all times have a lien thereon for their unpaid purchase money.

"(5) In the event of the builders making default in the prosecution of the construction of the vessel, engines, boilers, and machinery, or making default in delivery by the date stipulated, it shall be competent for (but not incumbent upon) the purchasers to take possession of the vessel in her then state, and of all her engines, boilers, and machinery, and all materials intended for her or them, as before mentioned, and to complete the vessel, engines, boilers, and machinery, and for this purpose with power to enter into any contract with other builders, and to use the yard, workshop, machinery, and tools of the builders, and the cost incurred by the exercise of any of the powers of this clause shall be deducted from the purchase money then unpaid, if sufficient, and if not sufficient shall be made good by the builders."

By clause 6 it was provided that the vessel should be at the risk of the builders until handed over to the purchasers; and by clause 9 (after providing for trial trips) it was provided—"No delivery to be considered complete until after a trial satisfactory to the buyer's surveyor."

With a view to the execution of the contract Carmichael, Maclean, & Company entered into various contracts for ironwork to be used in the construction of the ship with Messrs Young & Alexander, iron merchants, Glasgow, by whom goods were forwarded to Greenock from time to time as the work of construction proceeded.

On 14th September 1899 Messrs Carmichael, Maclean, & Company granted a trust-deed for the benefit of their creditors in favour of Patrick Rattray, C.A., Glasgow. At that date the keel of the ship ordered by Macbeth & Gray was laid, and there was a large quantity of ironwork lying partly in the shipbuilders' yard and partly in the goods' stations in Greenock of the Caledonian and Glasgow and South-Western Railway Companies.

Separate questions were raised as to the rights of Messrs Macbeth & Gray and of Mr Rattray, as trustee, with regard (1) to the ironwork lying in the shipbuilding yard, and (2) to that lying at the goods' stations. The latter was also claimed by Messrs Young & Alexander, on the ground

that they had stopped the goods *in transitu*. The questions with regard to the ownership of the ironwork in the yard was tried in an action which was ultimately decided by the Second Division of the Court in favour of Messrs Macbeth & Gray. (See *Macbeth & Gray* v. *Carmichael, Maclean & Company's Trustee*, December 6, 1901, 4 F. 345, 39 S.L.R. 188).

With regard to the ironwork at the goods station, it was agreed that Macbeth & Gray should obtain possession of it on condition of consigning in bank the sum of £1439, 2s. 7d., being the value thereof, subject to such rights as the parties might be found to have. A deposit-receipt was taken from the Bank of Scotland in joint names.

On 31st January 1900 the estates of Messrs Carmichael, Maclean, & Co. were sequestrated, and Robert Reid, C.A., Glasgow, was appointed trustee. Thereafter on 21st March 1900 the deposit-recipt was uplifted and a new receipt taken in the joint names of Robert Reid, Macbeth & Gray, and a party acting for Young and Alexander.

Thereafter the present action of multiplepoinding was raised by Reid in the name of the Bank of Scotland as nominal raisers, in which the fund *in medio* was the sum under the deposit-receipt. Claims were lodged for Reid, for Macbeth & Gray, and for Young and Alexander, each claiming the whole fund *in medio*.

Messrs Macbeth & Gray pleaded, *inter alia*—(1) The property in the said iron having passed to the claimants under the said agreement, they are entitled to be ranked and preferred in terms of their claim.

Proof was allowed and led. The import of the proof with regard to the ironwork in question was to the following effect:—The ironwork consisted of plates and angles, which had been forwarded by Messrs Young & Alexander for use in Messrs Carmichael, Maclean, & Company's yard. The various ships in course of construction there were known by separate numbers, and it was the practice of the manufacturer of the iron plates to mark them with the number of the ship for which they were intended. The ship ordered by Macbeth & Sons was known in the yard as No. 29, and the iron plates and angles lying in the stations were all marked with the number 29, together with certain other marks designed to indicate the particular position on the ship which the plates and angles were intended to occupy. These plates were of such a size and construction as to be capable of being used for other vessels. Before they left Messrs Young & Alexander's works they were examined and passed by Lloyd's surveyors, in accordance with the invariable custom in the shipbuilding trade. They had not been examined by the surveyor for Macbeth & Gray, or tried by him in accordance with the provisions of clause 9 of the contract (quoted *supra*).

On 22nd November 1901 and 3rd December 1901 the Lord Ordinary (Low) pronounced interlocutors by which he repelled the claim for Macbeth & Gray (as well as the claim for Young & Alexander) and sustained the claim for Reid, as trustee on the sequestrated estate of Carmichael, Maclean, & Co.

In his opinion the Lord Ordinary, after stating the facts above narrated, and dealing with the claim for Young & Alexander, proceeded as follows—"Macbeth & Gray are also claimants, on the ground that the goods were appropriated to the ship which Carmichael, Maclean, & Company were building for them, and were therefore, in terms of the contract with Carmichael, Maclean, & Company, their property. It is admitted that this question will be ruled by the ultimate decision in a case which was before me some time ago in regard to materials which had actually been taken to the shipbuilding yard, and accordingly it is unnecessary for me to deal with it here."

Macbeth & Gray reclaimed. Before the case was heard in the First Division, the judgment of the Second Division in the other case above referred to had been pronounced. See *Macbeth & Gray* v. *Carmichael, Maclean, & Company's Trustee*, 4 F. 345, 39 S.L.R. 188.

On 19th July 1902 the First Division pronounced an interlocutor by which they recalled the interlocutor of the Lord Ordinary, and ranked and preferred the claimants Macbeth & Gray to the whole fund *in medio*.

The following opinions were delivered—

LORD PRESIDENT—The question in this case is whether Robert Reid, trustee on the sequestrated estate of Carmichael, Maclean, & Company, shipbuilders, Greenock, or Macbeth & Gray, shipowners, Glasgow, are entitled to a sum of £1939, 19s. 1d., being the value of certain materials purchased by Carmichael, Maclean, & Company from Young & Alexander, iron merchants, Glasgow, to be used in the construction of a steamship which Carmichael, Maclean, & Company had contracted to build for Macbeth & Gray. Young & Alexander also claimed the sum in question on the ground that the materials, of which the price had not been paid, had been stopped by them *in transitu*, but that claim was repelled by the Lord Ordinary, and it is not now insisted in. The sole question therefore now is whether the trustee on the sequestrated estate of the builders, or the shipowners for whom the ship was being built, have right to the sum in question.

By article 4 of the agreement for the building of the ship, entered into between Carmichael, Maclean, & Company and Macbeth & Gray, dated 27th October 1898, it is provided that—[*His Lordship quoted articles* 4 *and* 5 *ut supra*].

To enable them to build the steamship in question, Carmichael, Maclean, & Company entered into a contract with Young & Alexander for the requisite quantities of iron or steel materials. By this contract the place of delivery was stated to be "free on trucks, Greenock," and the materials were sent to Greenock by railway, intima-

tion of their arrival being made to Carmichael, Maclean, & Company, whose storekeeper went to the station and selected the portions which were immediately required. These were sent on to the shipbuilding yard, and the remainder were allowed to remain in the station yard until they were needed. The superintendent engineer in the employment of Macbeth & Gray visited Carmichael, Maclean, & Company's yard and saw the materials there. It was his custom to go round the yard from time to time for this purpose. He stated that when he was shown the materials he saw that No. 29—the number of the steamship—was painted or otherwise marked upon them, and that the places which they were to occupy in the ship were also so marked, and that he also saw the materials which were lying at the station. It further appears that the materials were examined and passed by Lloyd's surveyor before they came to the shipbuilder's yard or the station, having been tested by him at the mills at which they were made before being sent out.

In his judgment of 22nd November 1901, upon the question whether the materials had been stopped by the sellers *in transitu*, the Lord Ordinary said that it was admitted that the question raised under the present reclaiming-note would be ruled by the ultimate decision in another case then pending, in which the question was whether the property in the materials which had been taken into the shipbuilding yard had passed to Macbeth & Gray under the same contract as that under which the present question arises, and this question was decided in the affirmative by the Second Division of this Court on 6th December 1901—4 F. 345, 39 S.L.R. 188. I agree with the Lord Ordinary in thinking that the present question is ruled by the decision in that case, and that consequently the Lord Ordinary's interlocutor should be recalled, and that a similar decision should be pronounced in this case.

LORD ADAM—I think it is impossible to distinguish between the case of goods lying in the yard and goods of exactly the same kind lying in a railway station. I cannot but think that this case is ruled by the judgment of the Second Division in the case previously decided between the same parties.

LORD M'LAREN—I agree that this case is indistinguishable in principle from the case between the same parties which was a subject of decision in the other Division of the Court. I may add that as we had an argument on this question in the law of sale, and as the parties desired our opinion upon it, I have considered the reasons of the decision in order to see whether there was likely to be such difference of opinion as might induce us to give an independent judgment, or it might be to consult the other Division with a view to coming to an agreement. The result of my consideration is that I see no reason to doubt the soundness of the decision of the other Division of the Inner House, and therefore, whether I look at the question on principle or whether I look to the decision as a precedent, I, in either view, concur in the judgment proposed.

LORD KINNEAR—I agree on the ground stated by your Lordship and Lord Adam, that this question is decided between the same parties upon the same contract by the other Division of the Court, and I think we cannot reopen the question or give any other decision than that which has already been given.

Mr Reid, as trustee on the sequestrated estate of Carmichael, Maclean, & Company, appealed to the House of Lords. In the appeal the proof and opinions in the Second Division case were printed as an appendix, as well as those of the First Division quoted above.

The following reasons of appeal were submitted:—

For the appellant—Because the materials claimed by the respondent were the property of the shipbuilders at 14th September 1899, and the appellant is accordingly entitled to the money deposited as trustee for their creditors.

For the respondent—(1) Because, in terms of the contract between the respondents and the appellant's authors, the property in the said materials which were intended for the respondents' ship passed to and was in them prior to the bankruptcy of Carmichael, Maclean, & Company. (2) Because the said materials were ascertained goods within the meaning of the Sale of Goods Act, section 17, and the property therein was transferred to the respondents as purchasers under a contract of sale as at the time when the parties thereto intended the same to be transferred, being a date prior to the vesting of Carmichael, Maclean, & Company's estate in the appellant.

LORD CHANCELLOR—In this case I think I might say the question is covered by authority, for a reason which I will give in a moment, but looking at it as if it were *res integra*, I think the difficulty in the way of the Lord Advocate is that in my view in this contract there is no sale at all except the sale of a complete ship. I think the observations made by the learned counsel for the appellant in his last address to your Lordships are very cogent, that those sections upon which reliance has been placed, namely sections 4 and 5, lack every element of sale of these things. What they do I will say a word upon in a moment, but there is no sale of these things. It is an abuse of language to speak of these sections as a sale of the things to which they refer. My own view of those sections is that they were intended by the parties to form a security. I dare say it was an ineffectual attempt by the parties to form a security, but that which is sold is a complete ship. The whole foundation of the judgment which I invite your Lordships to arrive at is that there is no sale of those things at all—the only thing sold is the ship.

It seems to me a rather extraordinary, and I think I may say an incomprehensible,

view that the inspection by Lloyds of the materials is an acceptance by the buyer of the ship of those particular things which are to form portions of the ship when sold. There is no such provision in the contract; there is nothing in the relation of the parties which to my mind suggests the agency of Lloyds as taking the place of the person who is to act on behalf of the purchaser. It is said that simply because Lloyds in the management of their business think it right to say that they will not give a certificate that this ship is A 1 at Lloyds without themselves having an opportunity of inspecting and passing materials of which the ship is to consist—the person who contracts that he will supply a ship A 1 at Lloyds thereby places Lloyds in the position of a person who is entitled to act on their behalf as the inspector and ascertainer, if I may so describe him, of those goods which are to form the ship in the ultimate result. It appears to me that that is a most monstrous proposition, and if there were nothing more I should say it was a proposition for which there was no real authority to be found. But further than that, in the very contract in which the ship being A1 at Lloyds is the thing sold by the one party and accepted by the other, in that very contract other persons representing the purchaser are to have rights inconsistent with the idea that Lloyds' certificate of these different plates would be a conclusive acceptance on the part of the purchaser of the ship of the goodness of the quality of the material.

I think that of itself would be sufficient to dispose of this case, but as I said just now I think the matter is really concluded by authority, because your Lordships' House has had before it, in the case of *Seath* v. *Moore*, a contract which it would be in vain to attempt to distinguish from the present one. The only distinction, as I understand which is insisted upon is this, that that which was there in five contracts is here in one. It is said that a different view would have been taken by their Lordships who decided that case if instead of being in five different contracts it had been on the same piece of paper. I cannot find the least foundation for that in any part of the judgments delivered by their Lordships in that case. And what seems to me to be absolutely conclusive in this case, and, as I have said, to cover the case now before your Lordships by authority, is what Lord Watson says in that case of *Seath* v. *Moore*, 11 App. Cas. 381, viz.—"There is another principle which appears to me to be deducible from these authorities and to be in itself sound, and that is that materials provided by the builder, and portions of the fabric, whether wholly or partially finished, although intended to be used in the execution of the contract, cannot be regarded as appropriated to the contract or as 'sold' unless they have been affixed to or in a reasonable sense made part of the *corpus*." It seems to me, considering that the noble and learned Lord was there dealing with a contract substantially the same as that upon which we are engaged, it would be an extraordinary thing if your Lordships were to depart from the principles there laid down.

Accordingly, as I am of opinion that there was no sale here at all of these materials as distinguished from a contract of sale of the ship, and that there was no acceptance of these materials in any sense which can be relied upon, except in a sense which, as I have said, is inapplicable for the purpose, namely, the certificate of Lloyds as to the goodness of the materials, it seems to me, with all respect to the learned Judges who have decided the case in the Court below, that their decision was wrong and ought to be reversed, and I move your Lordships accordingly.

LORD MACNAGHTEN—I am of the same opinion. I think the case is governed by the decision in *Seath* v. *Moore*, and so far as it may not be governed by that case, I entirely agree with the reasons which have been given by my noble and learned friend on the woolsack.

LORD DAVEY—I put the same construction upon the contract before your Lordships which my noble and learned friend on the woolsack has put upon it, and I need not repeat what he has said upon that head.

I will only add this to what he has said with regard to section 4, as to the expression about which we heard so much in the course of the argument—"as the same proceeds." I think the same must mean either as the ship proceeds, or it must mean as the *construction of the ship* proceeds; but whether you put the one or the other of these meanings upon the words, it is clear that whatever else may be obscure in this 4th section, the goods in question are not to become the property of the purchaser except as the construction of the ship proceeds. From that I should certainly understand, as I think was the view of the Lord Ordinary, that according to the true construction of the section it was only when the chattels in question were applied for the use of the ship and became part of the structure of the ship that it was intended that those words vesting the property should operate.

But quite independently of that question, supposing the construction contended for by the Lord Advocate and his learned junior were correct, I still think it would be impossible to uphold the judgment. I entirely agree with what my noble and learned friend has said as to the decision in *Seath* v. *Moore*, and upon that I would merely add that the only suggestion which I heard by which it was attempted in any way to get rid of the authority of that case was that at that time the Sale of Goods Act 1893 had not been passed. I am unable to see that that is any solid ground for distinguishing the cases. At that time, as was pointed out in the judgments, although a contract of sale until delivery created only a *jus ad rem* according to the law of Scotland against the goods, still having regard to the provisions of the Mercantile Law Amendment Act, which was then in

force, the distinction was really only a question of words and not of substance. But I turn to the Sale of Goods Act and I find that the material sections are those referred to by the learned Judges of the Second Division, namely, sections 16, 17, and 18. I will read only section 16, which seems to me the material one—"Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained;" and then in rule 5, section 18, it says—"Where there is a contract for the sale of unascertained or future goods by description," and so forth, the property in the goods passes to the buyer on ascertainment by the buyer and the seller. It appears to me that those sections have no application whatever to the case before your Lordships, for the simple reason, which was mentioned by my noble and learned friend on the woolsack, that here there was no contract for a purchase of these materials. The learned counsel and also the learned Judges in the Court below seem to me to have proceeded on the supposition or hypothesis that this contract contained not only a contract for the purchase of the ship but a separate contract for the purchase of the materials also; and that seems to me to be a complete fallacy. There is only one contract—a contract for the purchase of the ship. There is no contract for the sale or purchase of these materials, and unless you can find a contract for the sale of these chattels within the meaning of the Sale of Goods Act, it appears to me that the sections of that Act have no application whatever to the case.

I think therefore that the case is exactly covered by the decision given by your Lordships' House in the case of *Seath* v. *Moore*, and I will only express my entire concurrence in the judgments in that case of those very learned Lords, Lord Blackburn and Lord Watson.

LORD ROBERTSON—I have only to add in a single word that I cannot find, any more than your Lordships do, in this contract any contract to buy materials, or to buy anything except a completed ship.

Article 4 seems to me exactly to fall within sub-section 4 of section 61, that is to say it "is intended to operate by way of mortgage, pledge, charge, or other security." The circumstance that it is inserted in what is a sale of a completed ship will not avail to make it a sale in the sense of the Sale of Goods Act—in fact the 4th article does not even purport to express a sale—it merely asserts to be the property of the purchaser of the ship what has no more relation to it than that it is intended by the builder for the ship. This as it stands is impossibly wide, and I agree with your Lordships that the respondent's attempt to make those materials "specific" in the sense of the Sale of Goods Act, by saying that they had been passed by Lloyds' surveyors, is not warranted by the terms of the contract. The reference to Lloyds in the first article cannot be strained to this effect. The truth is that the 4th article is simply a bold attempt to sweep into the net the whole of the materials required for the ship. The judgments of this House in *Seath* v. *Moore* negative the possibility of that being legally done.

LORD LINDLEY—I am of the same opinion, and I cannot usefully add anything.

Interlocutor appealed against reversed.

Counsel for the Appellant—Ure, K.C.—Lochins. Agents—Drummond & Reid, W.S., and M'Kenna & Company, London.

Counsel for the Respondents—The Lord Advocate (Dickson, K.C.)—Muir Mackenzie. Agents—J. & J. Ross, W.S., and Thomas Cooper & Company, London.

Thursday, March 3.

(Before the Lord Chancellor (Halsbury), and Lords Macnaghten, Davey, Robertson, and Lindley.)

STEWART *v.* MARQUIS OF BREADALBANE.

(*Ante*, January 14, 1903, 40 S.L.R. 259, and 5 F. 359.)

Lease—Termination—Conventional Irritancy—Awaygoing—Obligation to Take over Sheep Stock.

In an offer to take a ten years' lease of a sheep farm the tenant stipulated that the landlord should take over the sheep stock "at my awaygoing." The offer also referred to and incorporated the articles of lease in use on the estate, by which it was provided that the landlord might irritate the lease in the event of the rent being unpaid.

During the currency of the lease the tenant fell into arrears with his rent, and the landlord exercised his right to irritate the lease.

Held (*rev.* judgment of the Second Division) that the landlord was not bound to take over the sheep stock, in respect that the phrase "at my awaygoing" meant at the expiry of the lease through the effluxion of time.

Pendreigh's Trustees v. *Dewar*, July 19, 1871, 9 Macph. 1037, 8 S.L.R. 671, *commented on.*

The case is reported *ante ut supra.*

The Marquis of Breadalbane appealed.

At delivering judgment—

LORD CHANCELLOR—This case raises undoubtedly a very short point, and I think it may be dealt with very shortly. I am of opinion that the judgment ought to be reversed.

It seems to me that the contemplation of the tenant when he described his "awaygoing" was contemplating that awaygoing in pursuance of the arrangements in respect of the period during which he was to occupy as tenant, and certainly was not