" in respect of the undecided questions," to deposit £1500 out of the purchase-money, in the joint name of exposer and purchaser, until they were decided. He was, in the words of the articles of roup, " to take all necessary proceedings for effectuating the claims of relief under the original feu-contract and titles of the lands." But there was no provision that he should take any proceedings for making the Duke *personally* liable under any special contract which existed between him and the Duke. The lands were sold to Mr M'Callum for £37,000, and the sum of £1500 was deposited in terms of the articles of roup. Sir William then, with the concurrence of Mr M'Callum, the purchaser, prosecuted an action against the Duke of Montrose, and obtained a judgment in the Court of Session and the House of Lords, by which it was decided that the Duke was liable to continue this payment as superior of the lands of Braco. Mr M'Callum, the purchaser, however, contends that Sir William is bound to take proceedings against the Duke, with a view of making him personally liable to free him (Mr M'Callum) of this payment of stipends, and accordingly he objected to give his sanction to the uplifting of the £1500 till this is done. He contends that the Duke or his successors might possibly be unable to fulfil his obligations, and therefore demands this security. But this is no argument, because where personal liability is intended, it is always a subject of express stipulation. There is no such stipulation in the original feu-contract of 1705, and therefore Sir William Stewart has fulfilled the terms of his contract under the articles of roup, and exacted from the Duke all the obligations which his ancestor came under by that deed. I therefore advise your Lordships to affirm these judgments, with costs.

Lord Chelmsford concurred. The real meaning of the clause in the articles of roup was that Sir William Stewart was to take care that the Duke should do what his ancestor had bound himself to do under the original feu-contract. That contract bound the Marquis and his heirs and successors only as proprietors of the *dominium directum* of the lands of Braco. It is an obligation which belongs specially to the owner of the superiority, and to him in the capacity of superior. It would, therefore, be unjust to demand that Sir William Stewart should be held bound under his articles of roup to procure for the purchaser of the lands a personal obligation which was not contained in the titles, for this would be nothing less than asking him to procure a new and a wider title.

Lord Westbury concurred.

Lord Colonsay said, that as the obligation as to relief occurred in a feu-contract, it could be continued only as between superior and vassal, and between each of these in his capacity of superior and vassal. It was clear, therefore, that no such personal obligation as had been contended for could exist in such a contract unless specially provided for.

Agents for Appellant—Gillespie & Bell, W.S., and Grahames & Wardlaw, Westminster.

Agents for Respondent—Dundas & Wilson, C.S., and Loch & Maclaurin, Westminster.

COURT OF SESSION.

Thursday, February 17.

FIRST DIVISION.

WYLIE & LOCHEAD *v.* MONCREIFF MITCHELL.

Common Property — Accession — Bankruptcy — Contract. Hutton contracted to construct a hearse for W. & Co. at a price of £95, according to specifications to be furnished by them; and the mouldings, carvings, &c., and part of the workmanship, to a value greater than the hearse, were also to be supplied by them. Before the hearse was completed Hutton became bankrupt, and the trustee refused to deliver it to W. & Co. on their tendering payment of the balance due on the current account, according to the alleged custom of the parties. *Held* the hearse was common property, in which each had right according to the value of the materials contributed; and that W. & Co. were entitled to the hearse on payment of the £95.

By missive letters, in August 1867, Robert Hutton, coachbuilder in Glasgow, agreed to construct a hearse for the appellants at a price of £95. The hearse was to be made according to certain specifications, and the appellants were to supply certain portions of the material. According to Hutton's statement, the parties had dealings with one another, and the debtor on the current account between them paid the balance at the settling of their accounts every six months. Before the hearse was completed Hutton's estates were sequestrated, on 21st August 1868, and Mr Moncreiff Mitchell, accountant in Glasgow, was elected trustee. The appellants asserted that they had paid £75, 16s. 6½d. to account of the hearse, and they tendered payment of the balance, £19, 3s. 5½d., and demanded delivery of the hearse. The trustee refused to deliver the hearse on payment of this alleged balance. Eventually the sum of £95 was consigned in the joint names of the parties, and the hearse delivered to the appellants. The action, therefore, turned on who was entitled to uplift the deposit of £95. The Sheriff-Substitute (Galbraith) gave decree in favour of the respondent; and, on 13th July 1869, the Sheriff (Glassford Bell) adhered.

Wylie & Lochead appealed.

Solicitor-General and Shand for them.

Moncrieff and Balfour in answer.

At advising—

Lord President—In the month of August 1867 the appellants and Robert Hutton, coachbuilder, Glasgow, made a contract, embodied in three letters, dated respectively the 13th, 26th, and 29th of that month, by which Hutton undertook to construct a hearse for the appellants according to a design furnished by them. Hutton was to provide the materials for the body, under carriage and wheels, to paint and varnish the outside, to furnish the inside with glue and canvass, and cover the top outside with moleskin. The appellants were to furnish all the carvings, turnings, and working mouldings, to supply the wood for such carvings, turnings, and mouldings as are " planted on," and to saw all the shaped work except the under rail of the frame. Hutton was to prepare the wood for the carvers, and dress the wood for shaped work. The hearse was to be delivered complete on or before

the 1st April 1868. The price to be paid by the appellants to Hutton on delivery was £95.

In fulfilment of this contract, the parties proceeded to make the furnishings, and to perform the work undertaken by them respectively, but the hearse was not delivered within the time stipulated. The estates of Hutton were sequestrated on 21st August 1868, and the hearse still remained undelivered. It stood in the premises of the bankrupt Hutton, and was not quite finished; some varnishing still required to be done, and some of the ornamental work to be completed. The cost of the work still to be performed by the bankrupt was estimated at from £8 to £10. All the materials and workmanship undertaken by the appellants had been, before the sequestration, supplied and performed by them. The value or cost of the materials and workmanship contributed by the appellants was £112, and the contract price of what Hutton undertook and performed being, as already stated, £95, the total cost of the hearse was £207. What was necessary to complete the hearse was done after sequestration, at the expense of the sequestrated estate.

In these circumstances, the appellants presented a petition to the Sheriff, praying for delivery of the hearse as their property, and tendering payment of the price of £95, but under deduction of £75, 16s. 6½d., being the price of goods supplied to the bankrupt during the currency of the contract, in the ordinary course of business unconnected with the contract. The position of the appellants therefore was, that the hearse was their property, and deliverable to them on payment or satisfaction of the contract price, and that they were entitled to set off, *pro tanto*, against the contract price the debt due to them by the bankrupt on a separate account.

On the other hand, the respondent, as trustee for Hutton's creditors, maintained that the act and warrant of confirmation in his favour vested the property of the hearse in him, for behoof of Hutton's creditors. But he intimated, at the same time, that he was willing to deliver it to the appellants on payment of the price of £95 in cash. This sum has been consigned in the joint names of the parties, and the hearse has been delivered to the appellants, so that the only practical question to be determined is, which of the two parties is entitled to uplift the sum of £95, or, to speak more accurately, whether the respondent is entitled to the full sum of £95, or whether it is divisible between the parties in the proportions of £75, 16s. 6½d. and £19, 3s. 5½d., as contended by the appellants.

But though the sum in dispute is so trifling in amount, and though the question has at first sight an appearance of simplicity, it involves considerations, in point of law, of delicacy and novelty.

If the appellants be well founded in their contention, that the hearse was their absolute property at and prior to the sequestration of Hutton, they may be entitled to recover possession of it *rei vindicatione*, and to leave the respondent's claim for the price stipulated to be paid to the bankrupt, and their own account against the bankrupt for furnishings, to be disposed of according to the ordinary rules of settling accounts in bankruptcy.

But if, on the contrary, the respondent can establish, in point of law, that the hearse, at and prior to the sequestration, was the property of the bankrupt, it follows that it passed to the respondent by force of his confirmation as trustee, and that he is entitled to the uncontrolled disposal of it for behoof of the bankrupt's creditors, leaving the appellants to rank on the sequestrated estate for the cost or value (£112) of the materials and workmanship contributed by them, under contract with the bankrupt, to the construction of the hearse. The respondent does not press his claim so far as this, and contents himself with demanding payment of £95, as the condition of delivering the hearse. But his claim, though thus limited, is rested entirely on the ground that the hearse was the property of the bankrupt, and the necessary legal consequence of that position is, that the respondent's right is a real right of property, and the claim of the appellants a mere personal pecuniary claim of debt.

It thus becomes necessary to determine whether the plea of the appellants, or that of the respondent, is more consonant to legal principle and authority; or, whether the solution of the question is to be found in the application of some principle of equity or rule of law, differing, it may be, from those relied on by either party.

The object and end of the contract between the appellants and Hutton was the creation of a new piece of moveable property, or (as the civilians express it) a new *species*, by the combination of materials and workmanship. But this is not the ordinary case of an order for a specific article given by a customer to a manufacturer, where the latter provides all the materials and workmanship, and the former has only to receive delivery of the manufactured article when complete, and pay the contract price. That is a class of contracts which gives rise to no such difficulty as the present. Neither is it the production of a new subject of property by art and industry, where the materials belong to one party, and the skilled labour is supplied by the other, which is *specificatio*, and in which the law determines the question of property in the manufactured article, according to certain rules, which avoid the extreme doctrines both of the Sabinians and the Proculeians. Just as little can this case be represented as falling under the precise rule which determines the rights of property remaining or arising after the confusion of liquids, or the commixtion of solids which, by the commixtion, are rendered incapable of separation. Nor is any aid in the solution of the present question to be derived, in my opinion, from the application of the maxim *accessorium sequitur principale*, which only serves to enhance the difficulty of the case, or rather, perhaps, to create fresh difficulties not necessarily inherent in the case. Least of all can any light be obtained from the ordinary rules of the law of sale and delivery, as applicable to the property of goods sold and undelivered, either with or without the element of bankruptcy.

The distinctive and important circumstances of the present case are—(1) that the appellants and Hutton were bound by the stipulations of a mutual contract to create a new *species* or subject of property by the combination of materials and skilled workmanship; (2) that the materials were to be contributed partly by the one and partly by the other of the contracting parties; (3) that the skilled workmanship was, in like manner, to be contributed by both parties, though in what proportions does not appear; (4) that at the date of Hutton's bankruptcy the whole contributions, both of materials and work undertaken by the appellants, had been fully made; (5) that the hearse, though not then complete, was nearly so, and the remaining work to be done by the bankrupt was afterwards executed at the expense of

the sequestrated estate; (6) that in the completed hearse, the materials supplied by both parties, though worked up and combined so as to form a new *species*, were still physically separable, and capable of being distinguished and identified; and (7) that they could not be separated without such injury as greatly to impair, if not destroy, their value as materials for the construction of a hearse, while such separation would not only extinguish for ever the value of the labour and skill contributed by both parties, but would also put an end to the hearse as a subject of property, and rescind the contract, which the trustee, as representing the creditors of Hutton, had voluntarily completed at their expense, so far as unfulfilled by the bankrupt himself.

This combination of circumstances presents a case which I believe to be entirely new; on what principles then ought its determination to depend? It would, I apprehend, be most unsafe to resort to analogies of the law. There are certain rules fixed in the law of industrial accession which it would be unwise to disturb. But it would be equally unwise to extend any one of them to new cases on the ground of fancied resemblance. For it may well be doubted whether these rules, or some of them, as fixed in the Roman law and adopted into our own, are really based on natural equity, or whether they can always be reconciled with one another. Such doubts have been frequently expressed by philosophical jurists. Thus, Grotius, in speaking of industrial accession, expresses himself, "Vix autem ulla est tractatio juris in qua tot discrepantes sunt jurisconsultorum sententiæ et errores. Nam quis concedat, si æs et aurum mixtum fuerit, alterum ab altero diduci non posse, quod scripsit Ulpianus, aut ferruminatione confusionem fieri, quod Paulus; aut aliam esse scripturæ, aliam picturæ rationem, ut huic tabula cedat, illa tabulae;" 2 Grot. 8. 21. To these examples of incongruity in the Roman Law of industrial accession, may be added a very striking case of unintelligible and illogical distinction stated by Pothier, on the authority of a text in the Digest (*Apud* Dig. vi. 1. 5). Where the materials furnished by two different persons are, in the process of manufacture by one of the two, destroyed so that they can never regain their former shape and nature, the property of the combined whole belongs to the manufacturer; but if the materials are not entirely destroyed, but only so blended together that they cannot, without much difficulty and consequent loss be separated, the combined matter belongs to both in common property—"Si pour faire cette chose il a détruit sa matière et la mienne, de manière qu'elles ne puissent plus reprendre leur première forme, la chose qu'il a faite de ces matières lui appartient entièrement; mais si ma matière et la sienne, qu'il a employées pour faire la chose qu'il a faite, ne sont pas entièrement détruites, quand même elles seraient tellement mêlées ensemble, qu'on aurait de la peine à les séparer, la chose doit appartenir en commun à lui et à moi, a proportion de la matière que nous y avons chacun: (Traité du Droit de Propriété, No. 187).

I may observe in passing, that this distinction would be favourable to the application of the principle of common property to the present case, where, as has been stated, the materials in combination are physically separable but practically inseparable.

But if the present be a new case in our law, as I think it must be admitted to be, I am not disposed to rest my judgment on so narrow and fanciful a distinction, but rather to abandon as unsafe and delusive all attempts to walk by positive rule or by analogies of the law. In this view we have no resource but to call in aid the principles of natural equity, and enquire what natural equity would teach, as to the relative rights and obligation of parties, whose separate properties have become united, and except at great sacrifice inseparable, in the manner above stated.

Now, there is one principle which the greatest publicists and writers on natural law concur in holding specially applicable to all cases, where a new subject of property is created by the combination of materials and industry contributed by different parties, and that is the principle of *communion*. It must be conceded, I apprehend, that such combination of materials and workmanship as makes one indivisible whole, necessarily creates a *joint interest* in the contributors; and, though positive laws and municipal codes may otherwise ordain in particular cases, *common property* seems, as a general rule, a just and natural development, in the form of ascertained legal right, of the more vague and indefinite idea of joint-interest.

The principle then is, that the two or more persons who have each contributed to the production of the new subject, either materials, or skill and labour, or both, should hold it in common property, in such shares as correspond to the value of their several contributions. The doctrine is thus expounded by Grotius:—"Si naturalem veritatem respicimus, sicut confusis materiis communionem induci pro rata ejus quod quisque habeat, Romanis quoque jurisconsultis placuit, quia res alium exitum reperire non poterat; ita cum res constat materia et specie tanquam suis partibus, si alterius sit materia, alterius species, sequitur naturaliter rem communem fieri pro rata ejus quanti unum quodque est; species enim pars est substantiæ non substantia tota; quod Ulpianus vidit, cum dixit, mutata forma *prope* interemtam substantiam;" 2 Grot. 8. 19.

We are not entitled to follow this philosophical doctrine to all its just results, and to hold that the same rights of common property will arise from *specificatio* as from *confusio*, because we are restrained by the rules of law fixed as applicable to these particular categories. But when we are called upon to adjudicate in a case which cannot be brought within any ordinary and known category, we are, I apprehend, at liberty to adopt that principle of equity which will be most just in its results, without inquiring too curiously or balancing too nicely to which of several categories the new case has most general resemblance.

The doctrine of Grotius has met with general acceptance. It is very learnedly and instructively expounded by his two most distinguished commentators, Barbeyrac and Vander Muelen, the latter of whom, in particular, has illustrated the equity of the doctrine by striking examples of the results flowing from its adoption as a rule of practice, as compared with the results of some of the particular rules of the Roman law of industrial accession, and he concludes the declaration of his preference for the principle of *communion* in these words:—"Ejusmodi communio equaliter servat proportionem, qua nihil magis æquitati et rationis dictamini convenit."—Edit. Ultraject. 1700, vol. ii, p. 319.

Puffendorf, too, adds the weight of his authority in express approval of the text of Grotius above quoted:—"In universum verum est, quod tradit

Grotius, cum res constent materia et specie tanquam suis partibus, si alterius sit materia, alterius species, sequitur naturaliter, rem communem fieri pro rata ejus, quanti unumquodque est. Quemadmodum et totum id corpus, quod ex confusione aut commixtione duarum materiarum ejusdem generis resultat, utrique commune est. Enim vero, ubi neque communiter res haberi potest, nec dividi, ex æquitati utique aut legibus positivis definiendum est, quisnam alteri, recepta partis suæ estimatione, rem integram debeat concedere;" Puffendorf, 4. 7. 10.

Applying the principle so clearly expounded by these high authorities to the present case, it will be found to work out the equitable result which might be anticipated. The two parties who, under contract, combined in producing the hearse, by each contributing a portion of the materials and workmanship, became joint proprietors of the subject so produced, in exact proportion to the value of their contributions, that is to say, the appellants in the proportion of £112 as compared with the proportion of £95 belonging to the respondents. Such being their joint interest in a subject which is not capable of division, they must either bring it to sale and divide the proceeds in the above proportion, or the one must buy off the other by paying him the value of his proportion. In the circumstances which have actually occurred the appellants have got delivery of the hearse as their property, and it only remains that they should pay to the respondent the value of his share of the subject. This may be taken to be fairly represented by the deposited sum of £95.

The result is strictly equitable. The appellants on the one hand are prevented from carrying off the hearse without paying the full contract price, as, according to one view of the law of industrial accession they would have been entitled to do. On the other hand, they receive their fair share of the common property, or, in other words, they obtain the specific performance of the bankrupt's contract, and are not left as, according to another rule of that law, they might have been, merely to a ranking on the bankrupt estate for the value of the materials and labour which they have expended in producing the subject.

The Sheriff-Substitute and the Sheriff have both arrived at the right result, although they have failed to apprehend the true question raised by the facts of the case. Our judgment, therefore, in my opinion, will be to refuse the appeal.

Lord Deas was absent when the case was argued.

Lord Ardmillan—The immediate question raised in this case is not of very great importance to the parties; but the able and ample argument addressed to us has been properly directed to wider questions of great difficulty and of great importance to the law. I do not enter on any detail of the facts, as I feel that to be quite unnecessary after your Lordship's clear and full explanation.

The transaction which we are considering appears to me to be a contract for purchase and sale; and the petitioners, though arguing that this is a case of *locatio operarum*, expressly state in their petition that Hutton "sold to them a hearse." It was, however, a sale of a hearse not in existence at the date of the sale, but to be made or built by Hutton, the purchasers furnishing mountings of the nature of carvings mouldings, &c., the hearse to be delivered finished on or before 1st April 1868.

The sum of £95 has, by arrangement, been now consigned, and the question is, Whether the hearse did at the date of Hutton's sequestration belong to Wylie & Lochhead as the purchasers, or to Hutton, and consequently to his creditors?

The hearse has also, by arrangement, been now delivered to the pursuers. The trustee for Hutton does not claim the value of the mountings and carvings: and accordingly the £95, being the slump price of the hearse, forms the subject for competition.

The Sheriff-Substitute decided in favour of the defender, and the Sheriff adhered to his judgment. I am of opinion that their decision was right.

I have no doubt that this is a case of sale. It is so termed by the pursuers, and it is so in fact and in law. It is the sale of an article not in existence at the date of the sale, but to be constructed and delivered at a price stipulated, and on or before a day fixed. Apart from the peculiarity created by the furnishing of the mountings by the pursuers, to which I shall afterwards advert, I am of opinion that the hearse remaining unfinished, undelivered, and unpaid for, in the premises of Hutton at the date of his sequestration, formed part of his sequestrated estate. Till the hearse was finished the purchasers could not demand delivery, and had no right to the specific article. If the maker had sold to another the hearse which he was in the course of building for the pursuers, he would have given to that other a good title to the hearse. This is distinctly laid down as law by Mr Justice Heath in the case of *Mucklow* v. *Mangles;* by Chief-Justice Best in *Carruthers* v. *Payne;* by Chief-Justice Tindal in *Grafton* v. *Armytage;* and by Mr Broome in his most instructive commentaries on the common law of England; and the same law is stated by Professor Bell in his Commentaries, vol. 1, p. 177. A contract intended to transfer for a price, when finished, an article in which the purchaser had no previous property, is, as I understand, held by the law of England to be a contract for sale and delivery. But however that may be, I am of opinion that such a contract is by the law of Scotland a contract of sale. The case of the purchase of a ship, to be built for the purchaser, has been strongly founded on, and particularly the decision in the case of *Simson* v. *Duncanson's Creditors* in 1786; Fac. Coll., and 1 Bell's Com., p. 177; but I think that there are peculiarities in regard to a ship, and also specialties in the case of *Simson* v. *Duncanson's Creditors*, which cannot be overlooked and are very important. The shipbuilder was to supply and build the hull; the purchaser or employer was to furnish the masts and certain other articles. The price was to be paid in three sums; one at laying the keel, one when the ship was planked to the gunwale, and the last when the ship was launched. Now, the laying the keel of a ship for the purchaser, as an act giving right to demand payment of the first instalment, is a marked step full of meaning, and forming an important specialty. The keel of a ship is considered in law and in maritime and mercantile practice as figuratively denoting the whole ship. In short the keel represents the ship, *navis sequitur carinam.* Therefore the act of laying the keel of a ship, as an act entitling to payment of part of the price, has the character of an *actus legitimus*, and is naturally and properly considered as involving, when accompanied or followed by part payment, the con-

structive delivery of the ship itself. In the case of *Simson* v. *Duncanson's Creditors* the purchaser or employer of the shipbuilder had actually paid the first instalment of the price when the keel of the ship was laid. The Court decided, and Professor Bell approves of the decision, that under the special circumstances the ship, though remaining unfinished in the shipbuilder's premises at the date of the sequestration, belonged to the purchaser, having passed by constructive delivery at the laying of the keel and the payment of the first instalment of the price.

In the present case nothing was done which can be held as amounting to acceptance, or to constructive delivery of the hearse. It was not only undelivered, but it was undeliverable. It was not in a state fit for delivery. Perhaps it did not require much to finish it, but in point of fact it was not finished. The purchasers were not bound to take delivery, and did not. The bankruptcy occurred while it was unfinished, undelivered, and unpaid for.

But we must now deal with the peculiar specialty created by the fact that the mountings and carvings, the value of which exceeded the value of the body or fabric of the hearse, were furnished by the pursuers.

To that extent, at least, it is maintained by the petitioners, that the contract was not so much a contract of sale as of *locatio operarum;* and it was contended that the property of the hearse, composed of fabric and mountings, had passed to the purchasers. The illustration mentioned by Professor Bell, at page 178 of the 1st vol. of his Commentaries, of the purchase of a vase standing in a goldsmith's shop, has been anxiously analysed and founded on by the counsel on both sides. In my view of that illustration, the distinction between the two cases put by Mr Bell,—viz., the case of ordering a vase to be made, in which case no right is transferred till it is delivered, and the case of the purchase of an existing and specific vase which the goldsmith is ordered to proceed to finish—lies in this, that in the first case the goldsmith was at liberty to dispose of any vase he was making, and to give a good title to another purchaser, provided he ultimately made and delivered to the first purchaser a vase according to his orders. There was no specification, and there was no existing article of purchase. While, in the second case, the article purchased was in existence, and was specified, and was not to be constructed or created, but only to be finished; and also, as Mr Bell expressly says, the vase in the second place was paid for when ordered. This specification of the article, and this payment of the price of the selected vase, forms the distinction between the two cases. There was no such specification and no such payment in the case in which Mr Bell states that the right to the vase remained with the goldsmith till delivery. There was such specification and such payment in the case in which Mr Bell states that the right was transferred before delivery.

In the present case there was no selection of a specific article,—there was no purchase of an existing article,—there was no payment of the price, or of any part of it. The hearse was ordered to be constructed; its construction was not completed; it was not to be delivered or paid for till finished; and it was unfinished at the date of sequestration.

It does, however, appear that the mountings, of which the value exceeds the value of the fabric, had been put on the hearse before the bankruptcy of Hutton, though the hearse remained unfinished.

If, in considering the question of combination or industrial accession which thus arises, the rule "*accessorium sequitur principale*" be held applicable, then I am of opinion that the mountings, being intended and used "to adorn or complete" the fabric of the hearse, are accessory to the hearse, and that, subject to the equitable principle of indemnification for the value of the mountings, the property of the hearse draws after it the property of the accessory mountings, and was in Hutton at the date of his sequestration.

Accordingly, the trustee only claims the agreed on price of the fabric, viz., £95. This is in accordance with the opinion of Professor Bell (Prin. 1298), and seems a just and equitable result.

But I do not rest my opinion on the application of the law of accession, for I agree in your Lordship's views on that point. I feel that there are great difficulties in treating this case as one of accessorial adjunction,—difficulties arising from the peculiar nature of the subject itself, of which the appropriate ornamentation seems scarcely less important or less intrinsic than the fabric; and arising, also, from the character of the claim to pecuniary indemnification emerging to the party supplying the mountings, and pleadable against the bankrupt estate.

I am disposed to think that a ground for our decision, more clear and safe, is to be found in the principle of common property created by consensual contribution and specification. When two parties contribute, equally or unequally, the materials used in the construction of a manufactured article, and these materials mixed or built, or wrought together, are inseparable, so that they cannot be restored to the parties respectively furnishing them, then I think that a right of common property in the subject arises to each of the parties commensurate to the proportional value of the materials which they have respectively furnished.

In this case, if, without destroying the fabric, the materials were still separable, the body or fabric of the hearse would remain with Hutton, and the mountings and carvings would be restored to Wylie & Lochhead. Not being now so separable, but forming together the composite article—the hearse—in question, the result is, that a common property in the hearse has arisen, of which the measure of each party's interest is as £112 to £95. In other words, Wylie & Lochhead take the hearse, paying £95 to the trustee for Hutton's creditors.

In thus viewing the question, we are led at once into the midst of the celebrated controversy between the Procaleians and the Sabinians—suppressed, yet scarcely settled, by what is called the "*media sententia*" of Justinian. I cannot venture to enter on that alarming field of juridical conflict. I shrink from even treading on the edge of "the great Serbonian bog, betwixt Damiata and Mount Casius old, where armies whole have sunk."

Accordingly I do not mean to occupy the time of the Court by attempting an analysis of the conflicting authorities on this subject. I have carefully considered these authorities; and the result is, that I am satisfied that, amid the refined and subtile speculations of opposing controversialists, the great equitable principle comes out, that where materials belonging to different persons are by mutual consent mixed up, or wrought up together, so as to become inseparable, the mutual consent to such contribution creates a common property in the

whole mixture or fabric proportionate to the shares of the consenting and contributing parties respectively. I may refer particularly to Instit., lib. 2, tit. 1, sec. 25, 26, 28, and 34; Vinnius, lib. 2, tit. 1, sec. 25; Voeut, lib. 41, tit. 1, sec. 23; Grotius, *de jur bel*, lib. 2, cap. 8, sec. 18, 19. The law is stated to the same effect by Pothier (*Traite du droit du domaine de Propriété*), parag., 187 and 191, 192. In these last passages Pothier most clearly distinguishes between the two cases—(1) the case of mixture or confusion of materials without consent of parties; in which case, while they can possibly be separated there is no common property, but if separation be impossible there is common property; and (2) the case of mixture or confusion created intentionally by consent of the parties contributing the material, in which case, whether these materials are physically or possibly separable or not, Pothier is of opinion that, in respect of the consent, there is common property in proportion to the contributions.

In like manner, we find that in this case, as in most cases, when we are searching for the philosophy of legal and equitable principle, it is nowhere more clearly stated than in the great works of Lord Stair and Erskine in our own law. In his Book III, tit. 1, sec. 36, Stair states that in confusion of liquids which are "not separable" the property belongs to the several owners "*pro indiviso*, according to the proportion of the value of their shares;" and in commixture of materials "not easily separable," or of "materials wrought into one mass work or artifice, if not separable, they induce a communion proportional to the value of the several ingredients." Mr Erskine states the law very much in accordance with Pothier. (Ersk. B. II, tit. 1, sec. 17). He says "where commixtion or confusion is made with consent of the proprietors, such consent of itself makes the whole a common property according to the shares that each owner had formerly in the several subjects, whether the subjects mixed do or do not admit of separation." I understand Erskine's opinion to be, that where by consent there has been commixture of materials, the mere physical possibility of separation does not prevent the communion of property; but if separation is practically impossible without destroying the subject, then the property is clearly common. Then he adds, "the common right continues till the subject be divided either by consent of the proprietors or in consequence of a judicial sentence." In his Principles Erskine explains the law in the same manner; and the statements by Prof. Bell, vol. 1 of Com. p. 278, and in his Principles, par. 1298, are to the same effect.

I do not say that there is entire concurrence and consistency in all these opinions, ancient or modern. The subject is so susceptible of refined and subtile speculation that some degree of variety—some delicate shades of colouring—in opinion, are to be expected. But I think that, in all the clearest and best opinions, the principle of the creation of common property in a composite fabric of mixed materials, by consensual contribution of such materials, is involved; and that the value of the shares in the common property is in proportion to the value of the materials respectively contributed.

I am prepared to apply that principle in the present case in the manner which your Lordship has suggested: and the parties have by their arrangement rendered the application of it easy as wel as equitable.

Lord Kinloch—There are several points in this case which I think it expedient should be considered and disposed of before reaching the question on which its determination hinges.

The litigation between the parties has arisen out of a contract by which Robert Hutton, coachbuilder in Glasgow, undertook to construct a hearse for the petitioners, Wylie and Lochhead. The contract is contained in letters bearing date in August 1867. The true import of these letters is to be drawn from a consideration of their whole terms, not by any inference from isolated expressions.

By these letters Hutton became bound to build a hearse for the petitioners for the slump sum of £95. But the letters expressly bear that, to the hearse which was thus in prospect, very important contributions were to be made by the petitioners themselves. They were to supply and saw part of the wood: and more especially they were to supply "all carvings, turnings, and working mouldings." From the nature of the subject these constituted a large part, if not the whole, of the external ornamentations. Such were to be furnished by the petitioners, and, as the contract bears, to be "planted on" by Hutton. The importance of the contribution which was thus made by the petitioners is established by the fact, proved in evidence, that the value of what was supplied by them was £112, 11s., being £17, 11s. more than the sum which was to be paid to Hutton for the body and wheels of the vehicle.

Hutton became bankrupt and had his estates sequestrated before the hearse was finished. It was very near to completion; and had all its ornaments "planted on." Still it required something to be done before it was ready for delivery: and in the legal question must, I think, be considered to have been an unfinished article.

Except for the peculiarity created by the contributions of the petitioners, there could be no difficulty found in determining the legal position of the parties on the bankruptcy of Hutton. Supposing that this was the case of a hearse built to order, without any contribution to the article on the part of the person giving the order, the case would be simply one of purchase by the one party and sale by the other. The purchase was of the finished article; and although, as always happens, its manufacture involved a considerable expenditure of labour, this did not interfere with the position of the contract in the legal category of sale. The case was different from what might emerge if a half-finished article was bought at its price in that condition, and then was left by the purchaser with the manufacturer for the purpose of having additional work put on it for behoof of the purchaser. In such a case the original contract might be that of sale; the superinduced contract that of *locatio operarum*. But abstractedly from the ornaments, the case of the hearse was just that of any carriage intended for use *inter vivos*, built by a coachmaker to order. The contract in such a case is just the common one of sale and purchase, and bears the common incidents of such a contract.

If this and nothing more had been the case with the hearse, there could be no doubt that on Hutton's bankruptcy the property of the hearse remained with Hutton's creditors. It was *res vendita, nondum tradita*. The real right remained with the seller; and passed to the seller's creditors. Any partial payments made by the purchaser would only give

him a right to rank in the sequestration. If he desired to obtain the hearse, he must purchase it from the creditors at the price they might be pleased to put on it.

And no variance would, as I think, be produced on the case by the terms of the Mercantile Law Amendment Act. For although, by the first section of that Act it is provided that all claim by the creditors of the seller shall be excluded "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," this enactment applies only to the case where the article has been ready for delivery and left with the seller for mere custody; and is inapplicable to the case of an unfinished article remaining with the seller for the purpose of being completed.

There then emerges the peculiarity of the furnishing of the ornaments by the petitioners; and the question arises, what shall be the effect of this furnishing. Here again, I should have had little doubt as to how the case was to be decided, if the carvings and mouldings had at the date of Hutton's bankruptcy not been "planted on," but had been lying in Hutton's premises for the purpose of being affixed to the completed frame of the hearse. In that case I would have considered that the property of these still remained with the petitioners: and that Hutton's creditors would have been under the obligation of re-delivering them to the petitioners. It could not have been rightly maintained that these formed the subject of sale and delivery by the petitioners to Hutton. They were the property of the petitioners, sent for the purpose of being affixed to the vehicle bought by them from Hutton. As regarded the affixing of the ornaments, the contract was properly that of *locatio operarum*. The articles remained the property of the petitioners, and were liable to be reclaimed by them on Hutton's bankruptcy, if still existing in a state of separation.

The true question in the case is raised by the fact that at the bankruptcy the ornaments had been fixed on the hearse; and in a practical sense were fixed inseparably; that is to say were so fixed that they could not be separated without injury to the general fabric. It is the practical inseparability of the hearse and its ornamentations which creates the unusual and somewhat knotty point which is now to be decided by the Court.

In determining this point we are thrown back into a very ancient controversy; and might be almost said to have had brought before our view lists dressed for a great tournament, with hosts of armed civilians on either side, eager and vociferous for the fray. Proculus on one side, Sabinus on the other, lead their enthusiastic followers. The whole body of the commentators is broken into rival factions. We are placed in this peculiar position, that whilst no topic of the law has been the subject of more frequent annotations, or more eager disputes, or more dogmatic contradictions, it has been left almost entirely to the domain of philosophic discussion, and has scarcely, if at all, had the light of judicial decision thrown on it. I know of no precedent in our own law directly bearing on the point, for the case of the ship, stipulated to be paid for by instalments at different points of her construction, affords no sound analogy. We are left to form our judgment the best way we can by application of what seem to us the sound principles of law and equity.

When the commentators consider the case of an article produced by contributions of work and materials from two different persons, the way in which the question almost invariably presents itself to their mind is, that the property must be given either to the one or the other. And then the difficult point is to ascertain whether it is to be awarded to the one or to the other. Hence has arisen the well-known controversy, Whether the material is to overcome the work, so as to give the article to the owner of the material; or the work is to overcome the material, so as to produce the opposite result. And cases are figured in which, according to circumstances, sometimes the one consequence and sometimes the other is to follow. I cannot apply this principle so as to lead to any satisfactory conclusion in the present case. I perceive no sufficient ground on which to hold that the creditors of Hutton are not only to get the hearse which Hutton built, but also to get the whole ornaments contributed to the work by the petitioners, so as to put into their pocket a sum of £112, 11s. at the cost of the petitioners. Considering the excess of value of the ornaments above the frame, and the nature of the article as one to which these ornaments give its characteristic aspect and worth, I think that neither the maxim of the accessory following the principal, nor any other maxim of the law, can with justice be applied to give Hutton's creditors the right to carry off as their own the hearse, ornaments, and all; thereby getting an article worth £207, where the cost to Hutton cannot be presumed to have been above £95, if so much. On the other hand, I can perceive no ground on which the contribution of the ornaments by the petitioners could rightly be held to give the whole hearse to the petitioners as their property.

In this state of matters, it has been with some satisfaction that I have found a principle suggested by some authorities of great name (though, as always happens with eclectics, few in comparison with the crowd running to extremes on either side) —the principle, to wit, that in such a case the property should be held common to both parties, *pro rata* of their respective contributions. This is not, in my view, to hold it common property in its origin and downwards; it is merely to introduce the equitable mode of dealing with it in the supervening circumstances. The principle approves itself to my mind as that which in fair dealing and equity is properly applicable to the case with which we now have to deal. The frame and wheels of the hearse were the property of Hutton at his bankruptcy. The carvings and mouldings affixed to the hearse had been the property of the petitioners on Hutton's premises; and on Hutton's bankruptcy fell to be re-delivered to the petitioners if still unaffixed to the hearse, or even if separable from it without injury to the general fabric. When such separation has become practically impossible, the fair and equitable course is simply to hold the property common to both, *pro rata* of the value of the frame and wheels, which were worth £95, and of the carvings, mouldings, and the like, which were worth £112.

In the mode in which I understand the case to have terminated in the Court below, this principle has been in substance given effect to. The hearse has been made over to the petitioners on the payment of £95 to Hutton's creditors, thereby giving to these latter the full value of that part of it which Hutton undertook to make, and which remained his

property on his bankruptcy. On the other hand, the petitioners, in having the hearse made over to them without further payment, have received back the carvings and mouldings, without paying anything for them. But though this has been done of consent, it does not follow that this is in all circumstances to be the mode of adjustment. There may be no apparent reason why the purchaser should obtain the article more than the seller, or *vice versa*. When parties are not agreed, the practical rules for disposing of common property held *pro rata* must be applied.

I would only, in conclusion, advert in a few words to the question of compensation raised and elaborately argued before us. It was contended by the petitioners that the sum of £95 agreed to be paid for the hearse was already paid (except to the extent of about £19) by furnishings made by them to Hutton, on the price of which, as due by Hutton, they were entitled to plead compensation. According to the view which I take of the case, this question does not arise. It would only arise in the case of the petitioners being entitled to claim the property of the hearse, when they would be entitled to prove that they had already paid its price to Hutton, and that no retention could be claimed on account of non-payment of the price. In that case, so far as I can form an opinion, the plea of compensation would have availed them to the extent of the counter-furnishings. But according to the view already stated, the property of the hearse, so far as stipulated to be built by Hutton, had passed to Hutton's creditors; and if the petitioners desired the hearse, they were obliged to purchase it from these creditors, and to pay to them its price. Against the creditors, as owners of the hearse, compensation would clearly not hold on the furnishings made to Hutton. There was no *concursus debiti et crediti*.

The practical conclusion is, that the judgment of the Sheriff should be affirmed so far as it found the defence against the petition for delivery of the hearse well founded, and assoilzied the defender. The preliminary findings of the Sheriff will, however, require alteration.

Agents for Pursuers—J. & R. D. Ross, W.S.

Agents for Defender—Millar, Allardice, & Robson, W.S.

Thursday, February 17.

SECOND DIVISION.

DICKSON *v.* GRANT AND OTHERS.

Reference — Arbiter — Witness — Disqualification — Employment—Quantum meruit. Parties who had entered into a contract as to certain alterations to be executed on a church, agreed to refer disputes to the architect of the building. They afterwards disagreed; and the pursuer, who had contracted for the joiner and carpenter work, brought an action of reduction of the reference upon various grounds, with which he conjoined petitory conclusions for the value of the work done by him. In this action a proof was allowed, and the arbiter was examined as a witness for the defenders. The defenders maintained that the action was excluded by the reference, and the Lord Ordinary ultimately assoilzied the defenders. *Held* that, although originally the architect of the building was not excluded as such from being arbiter between the parties, he had become disqualified from acting in that capacity by reason of his examination as a witness, and that it devolved upon the Court to pronounce judgment on the merits.

Pursuer entitled to remuneration for his work, on the principle of *quantum meruit*.

John Dickson, joiner, Junction Street, Leith, sued the Rev. Peter Grant, Roman Catholic clergyman, Dundee, and certain other parties, the surviving proprietors in trust of St Patrick's Roman Catholic Church, Edinburgh, for £167 odds, alleged to be the balance under a contract undertaken by the pursuer for carrying out certain alterations on the said church. The defenders offered £80 odds, and pleaded that under the contract Mr Coyne, the architect of the building, should decide differences between them. The pursuer then brought an action of reduction of the reference on various grounds, and repeated in his action his petitory conclusions. He concluded that the reference should be reduced in respect—"(1) that the alleged arbiter is legally incapacitated from adjudicating upon the questions at issue between the parties by personal interest, and by having already given his opinion thereon; and (2) that it is neither holograph nor tested, wants the names and subscriptions of witnesses, and is otherwise deficient in the solemnities required by law." He further pleaded that the reference should be reduced in respect—"(1) that the pursuer in subscribing the same did not agree to refer the sums payable to him under the contract to an arbiter; (2) that he did not agree to refer the question of quantities, these being determinable by the measurement of competent persons (which Mr Coyne is not), and not being matters of opinion fitted to be left to the judgment of an arbiter who can or cannot measure; and (3) that if the pursuer subscribed such a minute or clause of reference, he did so under essential error as to its true meaning and effect, induced through the misrepresentation of the defenders or of those for whom they are responsible." There were other grounds of reduction. On the merits, he claimed for the fair value of his work, he having been employed by the defenders.

In that action the Lord Ordinary (JERVISWOODE) allowed parties a proof of their averments—under which Mr Coyne was examined as a witness by the defenders—and ultimately repelled the reductive conclusions, appointing the case to be enrolled for further procedure as to the other conclusions. His Lordship ultimately pronounced the following interlocutor:—"The Lord Ordinary having, of new, heard counsel, and considered the debate, with the proof, productions, and whole process, finds that the several heads of the claim here made on the part of the pursuer under the petitory conclusions of the summons are embraced by and fall within the clause of the reference to the architect which is contained in the specifications, and is referred to in the fifth head of the condescendence for the pursuer, with the exception of the items which are referred to in the seventh head of the said condescendence: Finds that the sum of £150, which is referred to in the tenth head of the condescendence as having been paid on the part of the defenders to the pursuer, was and is sufficient to meet and to satisfy the claims of the pursuer, in so far as the same are ascertained, and do not form the subject of existing dispute or question between the parties: *Quod ultra*, with reference to the preceding findings, and without prejudice to any pro-