such rare obstinacy as is not worth taking account of.

No point was made in the elaborate argument before us that the rent was separable, with a hypothec for only so much as effeired to the heritage, and I give no opinion on that point.

On the whole matter, I am of opinion—1st, That the pursuers are proprietors of the shipbuilding yard, together with the moveables therein as inventoried with reference to their disposition, and that the property is only redeemable according to the agreement which qualifies their title; and 2d, that their lease of it to the bankrupts is valid, and entitled to effect according to its terms, including the incident of hypothec for rent, in so far as applicable to leases of similar subjects and in similar terms, but unprejudiced by the relation of the parties as borrowers and lenders.

With respect to the question with the Dundalk Harbour Commissioners, I am of opinion that it has been rightly decided by the Sheriff. I think the dredge was delivered before the sequestration, and that the property of the fittings left behind to be subsequently put into the dredge had passed, and were not subject to the diligence of the builders' creditors or landlord.

The LORD JUSTICE-CLERK was absent.

The Court sustained the appeal and recalled the interlocutor of the Sheriff-Substitute in so far as it sequestrated Wingate & Company's estate.

Counsel for Appellants—Solicitor-General (Balfour, Q.C.)—Keir. Agents—Murray, Beith, & Murray, W.S.

Counsel for Respondents—Wingate & Co.—Asher—Mackintosh.

Counsel for Respondents—The Dundalk Harbour Commissioners—J. P. B. Robertson. Agents—Hamilton, Kinnear, & Beatson, W.S.

Thursday, July 8.

SECOND DIVISION.

[Lord Craighill, Ordinary.

CROPPER & COMPANY *v.* DONALDSON.

Sale or Hire—Agreement—Property to Pass when Price Paid—Bankruptcy.

C. & Co. agreed to let to W. a printing machine for nine months; the price (which was that usually given for the sale of such a machine) was to be paid in three instalments in a manner specially agreed on, and the machine was to be insured during the term of hire; if at the end of nine months the price stipulated were paid, the machine was to become the property of W. The machine was accordingly delivered to W., but before the full price had been paid it was poinded for a debt due by W., who had become insolvent. In an action raised by C. & Co. against the poinder to recover as damages the unpaid balance of W.'s debt due by them under the agreement—*held (diss.* Lord Young) that the form of the agreement, in so far as it had the colour of a contract of hiring, was a mere device resorted to for the purpose of evading the operation of the bankruptcy laws; that the contract was really one of sale; that the property had passed; and that therefore the poinding had been competently executed.

On the 21st November 1878 H. S. Cropper & Company, engineers and ironfounders in Nottingham, entered into the following agreement with Alexander Wood, a printer in Lanark—"1st, The owners shall let, and the hirer shall take on hire, for a period of nine calendar months from the date of this agreement, the crown folio 'Minerva' printing machine, No. 2634, belonging to the owners: 2d, The hirer shall pay for the use of the said machine during the said term, and by way of rent, the sum of fifty-eight pounds; and such payment shall be made as hereinafter mentioned—that is to say, the hirer shall, in the first instance, accept a bill at three months' date, to be drawn by and made payable to the order of the owners, and to bear even date with this agreement, for the sum of fifty-eight pounds, and when the bill falls due the hirer shall pay the same; but the owners shall, three days beforehand, advance to the hirer by way of loan the sum of thirty-eight pounds thirteen shillings and fourpence, to be applied towards payment of that bill, and thereupon the hirer shall accept a second bill at three months' date, to be drawn and made payable as aforesaid, and to be dated on the day when the first bill falls due for the amount of the said sum of thirty-eight pounds thirteen shillings and fourpence, plus interest thereon for three months at the local current rate per annum, and the value of the stamp and banker's commission on the second bill; and when the second bill falls due the hirer shall pay the same, but the owners shall, three days beforehand, advance to the hirer by way of loan the sum of nineteen pounds six shillings and eightpence, to be used towards payment of that bill, and thereupon the hirer shall accept a third bill at three months, to be drawn and made payable as aforesaid, and to be dated on the day when the second bill falls due for the sum advanced by the owners towards payment of the second bill, plus interest thereon for three months at the rate aforesaid, and the value of the stamp, &c. on the third bill; and when the bill falls due the hirer shall pay the same: 3d, During the said term of hiring, the hirer shall keep the owners truly informed of the place where the said machine may for the time being be set up, and shall not remove the same from one building to another without first informing the owners of such intended removal: 4th, During the said term of hiring, the hirer shall keep the said machine in proper order and working condition, and shall not cause or permit the brass plate fixed upon the tiebar, and bearing the inscription 'H. S. Cropper & Co.'s Patent, 2403, Nottingham, No. 2634,' to be removed, defaced, or concealed from view: 5th, During the said term of hiring, the hirer shall keep the said machine insured against damage by fire in the sum of fifty-eight pounds at least, with some office for fire insurance to be approved of by the owners; and if the said machine shall be injured or destroyed by fire during the said term, all moneys received on such insurance shall be paid to the owners, who shall, as the case may require, either make good the damage done or replace the said machine by another of the same description, to be hired for

the residue of the subsisting term, and on the like conditions, including the provisions of this present article: 6th, If the hirer shall make default in paying or accepting any of the bills hereinbefore mentioned, or shall otherwise infringe any of the provisions of this agreement, the owners shall be at liberty at any time afterwards to retake possession of the said machine, and to enter on the premises wherever the said machine shall be and to recover the same, and by so doing or by a written notice to put an end to the hiring: 7th, If the hirer shall accept and pay all the said bills when presented for acceptance and payment respectively, and shall otherwise fulfil and abide by all the provisions of this agreement, then at the end of the said term of hiring the said machine, or any machine substituted for the same under the fifth article hereof, shall become the property of the hirer without payment for same."

In terms of this agreement the printing machine was sent to Wood, who having received from Cropper & Company a bill for £58 dated November 1878 for their acceptance, and payable three months after date, accepted and returned it to Cropper & Company. This bill was retired when it came to maturity, the acceptor paying £21 in cash and granting to Cropper & Company a bill dated 20th February 1879, and payable three months after date, which they had drawn upon him for £39, 5s. 8d., being the unpaid two-thirds of the £58 contained in the first bill, with the addition of interest, banker's and other charges. While the second of these bills was current, and on the 16th May 1879, John Donaldson, printers furnisher, Edinburgh, being a creditor of Wood in a sum of £79, 19s. 6d., executed a poinding of Wood's effects in order to secure his debt, and amongst the other moveables in Wood's possession was poinded the printing machine in question. Cropper & Company then raised an action against Donaldson for payment of the sum of £38, 13s. 4d., alleged to be the balance of the said sum of £58 due to them by Wood as at the date of the sale carried through aforesaid by the defender, and which they claim from him on the ground that to this extent they have suffered damage through the poinding and sale by the defender of the said printing machine.

They pleaded—"(1) The said machine having been held only on hire by the said Alexander Wood under the said agreement, the same remained the property of the pursuers until the whole conditions of the said agreement were implemented by the said Alexander Wood. (2) The said machine having been the property of the pursuers, the defender had no right or title to sell the same. (3) The defender having wrongfully and illegally sold the said machine, he is liable in damages to the pursuers. (4) The pursuers having, through the foresaid wrongful and illegal act, sustained loss and damage to the extent libelled, they are entitled to decree against the defender in terms of the conclusions of the summons with expenses."

The defender pleaded—"(1) The pursuers having sold and delivered to Wood the machine in question, the defender was entitled to do diligence against it as his property. (2) The said machine having been delivered by the pursuers to Wood, and having with their consent remained in his uncontrolled use and possession, it must be held to have belonged to Wood, and to have become liable to the diligence of his creditors. (3) The said Alexander Wood having been owner, or at least reputed owner, of the machine in question, and the possession thereof having raised a credit in his favour, his creditors are entitled to attach the same by diligence in payment of his debts."

The nature of the proof so far as bearing on the decision in the case sufficiently appears in the opinion of Lord Gifford.

The Lord Ordinary (CRAIGHILL) found "as matters of law—(1) That notwithstanding the language of the said agreement, the contract between the pursuers and the said Alexander Wood relative to the said printing machine was in reality a contract of sale, the consideration to be rendered to the pursuers for the subject of contract being truly the instalments of the price of the article; (2) that the property in the said article passed by delivery to the said Alexander Wood; (3) that said article consequently being open to attachment by Wood's creditors, the defender by reason of the diligence he used has not become liable in damages to the pursuers as concluded for in the summons: Therefore sustains the defences, assoilzies the defender from the conclusions of the summons, and decerns."

The note which his Lordship appended to his interlocutor was as follows:—

"*Note.*—The agreement between the pursuers and Wood, so far as mere language is concerned, might be taken to be a contract under which the machine in question was hired and not sold; but the Lord Ordinary has been unable to overcome the effect which has been produced on his mind by the consideration that the three payments of what is called 'rent,' are nothing in reality but payments of the instalments by which the price was to be discharged. If words in place of realities are to be accepted, then the contention maintained by the pursuers may be sustained; but it is plain, not merely from the obvious inferences deducible from the agreement, but from what is explained by the pursuer Mr Cropper in his evidence, that the sole purpose for which the terms of this contract were devised was to accomplish the results of a sale without the risk of losing the price, which an avowal of the true character of the transaction would have incurred. He explained that what is called the system of hiring is resorted to where the customer is of doubtful credit, the purpose being to secure protection against the ordinary consequences of delivery; and the Lord Ordinary thinks that all recognised rules of law on the subject of sale and delivery will be evaded should what is founded on as a contract of hiring on the present occasion be regarded as anything else than truly a contract of sale.

"The views of the Lord Ordinary as to the true character of the contract are strengthened by the nature of the claim which has been made the subject of suit by the pursuers. They do not sue for the value of the machine, which, if the transaction had been truly one of location, would have been their property at the time of the sale carried through by the defender, but only the *cumulo* amount of the two instalments of 'rent' which remained unpaid when the machine was sold by the defender. There is in this an implication, if not a confession, that the article was not theirs,

though they claimed to have rights in it, by which the sum now sued for was secured.

"Had the present case been similar in its circumstances to the case of *Marston*, 6 R. 898, the Lord Ordinary would not have presumed to act upon the opinion which he has formed, but the circumstances of the two cases are different in one most important particular. In that case there had been a hiring of the article the property of which was in dispute, but the payment of the stipulated 'rents' was not to result in the transformation of a contract of location into a contract of sale. On the contrary, while there was an option to purchase, the price which was to be paid was different from the aggregate amount of all the 'rents,' and the time within which that option could be exercised was within the period for which the hiring was to endure.

"The pursuers, however, say that even if their contract with Wood were to be regarded as a contract of sale, it was still a sale, delivery upon which did not pass the property, because the payment of three instalments of the price was a *suspensive* condition. That there may be sales with suspensive conditions cannot be disputed. Lord Stair (book i., t. 14, secs. 4 and 5), Mr Erskine (book iii., t. 3, sec. 11), and Professor Bell (Commentaries, 7th edition, vol. i., 257, and Principles, par. 109) so lay down the law. But the Lord Ordinary cannot think that any statement of theirs can be made applicable to a case like the present, and he feels warranted in arriving at this conclusion from the examples of suspensive conditions given by Professor Bell in the paragraph of his Principles which has just been cited. There are decisions, however, two of which appear to be, and one of which is certainly, adverse to the view of the law entertained by the Lord Ordinary. These are *Cowan*, May 21, 1824, 3 S. and D. 42; *Wight*, December 10, 1828, 7 S. and D. 175; and *Macartney*, November 26, 1799; Morrison, *voce* Sale, App. No. 1. The two first of these decisions, however, the Lord Ordinary thinks may reasonably be held to have proceeded on the view that the original owners had not been divested, the parties with whom they transacted being their tenants, and so possessing for them. But such an explanation is not available in the case of *Macartney*. As to it, however, Professor More says (Notes to Stair, lxxxviii)—'It is very doubtful how far this case can be relied on as a precedent, and if it could, a conventional hypothec for the payment of the price might always take place. It would appear to have been held in the case now mentioned that the condition by virtue of which the vendor was entitled to claim his goods from the creditors of the purchaser, in consequence of the price not having been paid, suspended the contract of sale, which it seems to have been supposed was not to take effect in case the price should not be paid at the stipulated term, but it is extremely difficult to distinguish this from a resolutive condition, whereby after the property had been completely transferred to the purchaser it might by something like a conventional hypothec be attachable by the vendor for the price due to him. At all events, this case and the doctrine involved in it would deserve to be reconsidered. Very different is the case of a proper conditional sale, as, for example, where goods are sent on sale or return—that is, where the party to whom they are sent having the power of rejecting them, the sale is merely conditional, and does not take effect till the party should conclude the contract by declaring his option of retaining the goods at the stipulated price; or, where household furniture or other articles having been lent on hire, with a power on the part of the hirer of retaining them as purchaser after a certain period at a stipulated price, there is no concluded contract of sale till the period shall arrive at which the purchase is to take effect, or till the option reserved by the party shall be declared by him. Till then the furniture or other articles may be reclaimed in the event of the bankruptcy of the party, as being still the property of the original owner, there having been no concluded contract of sale, or at least the articles not being held by the other party on the footing of any such contract.'

"The Lord Ordinary has pronounced the foregoing interlocutor after anxious consideration, but with considerable hesitation. The language of agreement and the blush of authority appear to be adverse to his opinion; but coming to the conclusion at which he has arrived, he had no course to follow but to act upon the judgment which he had formed on the question submitted for decision."

The pursuer reclaimed, and argued—(1) The whole language of the agreement showed it was a contract of hire only, under which the property was to pass after all its provisions had been accomplished. Such a contract was quite legal. (2) In any case, it was a sale with a suspensive condition, the property only to pass on the fulfilment of that condition. This too was quite a legal contract. The poinding was executed before the property had finally passed, and was therefore incompetent.

Authorities—*Marston* v. *Keir's Trustees*, May 13, 1879, 6 R. 898; *Orr's Trustees* v. *Tullis*, July 2, 1870, 8 Macph 936; Bell's Comm. 7th ed., i., 257; *Cowan* v. *Spence*, May 21, 1824, 3 S. 42; *Wight* v. *Forman*, Dec. 10, 1828, 7 S. 175; *Macartney*, Nov. 26, 1799, Morrison, *voce* Sale, App. No. 1.

Argued for the defender—This agreement was only a device to gain a hypothec after the subject was sold. It was an attempt to gain additional security for a debt in case the debtor should become insolvent before the price was paid. It was a collusive contract of sale under which the property had actually passed to the buyer, and therefore the poinding in the hands of the latter was competent.

Authorities—Bell's Prin. 1315-1316; *Williams*, Nov. 29, 1877, 7 Chan. Div. 138; *ex parte Jackson in re Bowes*, June 25, 1880 (not yet reported); *in re Stockton Iron Furnace Co.*, Jan. 29, 1879, 10 Chan. Div. 335.

At advising—

Lord Ormidale—This case, although differing in its circumstances from that of the *Heritable Securities Investment Co.* v. *Wingate & Co.* just decided by us, has, I think, this feature in common with it, viz., that the contract or transaction giving rise to the dispute is in reality different from what it is called. And if so, I can see no sufficient reason for holding that in the present any more than in the other case the decision of the Court ought not to be in conformity with the

real and not the simulate character of the transaction.

The reclaimers (pursuers of the action) state that the printing machine in question was agreed to be let by them to Alexander Wood, and to be taken by him on hire for nine months, the hire being £58. On the other hand, it is pleaded by the defender, who acquired right to the machine as purchaser of it at a sale of Wood's effects, that it had been sold and delivered, and not merely given over on hire, by the pursuers to Wood, and that accordingly it was sold as the property of that individual.

If the machine is to be held to have come into the possession of Wood under a contract of hire merely, it could not have been acquired by the defender in the manner he did acquire it, for on that assumption it could not have been sold as Wood's property, and no better right could be given with it to the purchaser than Wood had himself. But merely to call the contract between the pursuers and Wood one of hire is not enough, and is indeed of no importance at all, if in reality it was not one of hire but of sale; and if it was one of sale, and if the machine was not only sold but also delivered by the pursuers to Wood, it must have become his property, and in law now belongs to the defender. Whether Wood might not have been barred *personali exceptione* from maintaining this view had the question occurred between the pursuers and him I need not inquire, because the question has not occurred with Wood, but with a *bona fide* purchaser from and creditor of him, against whom no personal exception can be taken. Between the present parties, therefore, the inquiry is and must be, Under what contract —hire or sale—did Wood acquire the machine from the pursuers? And, as I have already said, it is not, in my opinion, enough that the contract is called one of hire if in truth it was a sale. The reality and substance of the contract, and not merely some words of the writing whereby it is said to have been constituted, must be attended to.

So dealing with the contract, we find that the amount of the so-called hire for nine months is £58, which is confessedly the full value or price of the machine—the value or price at which the pursuer Henry Smith Cropper himself admits in the course of his evidence he is in the practice of selling it. How then can it be taken from him that he should get that sum for the use merely of the machine for nine months? As well might he say that he had hired it, and not sold it, at £58 for nine weeks or nine days. The truth is that the contract between the pursuers and Wood was that of sale and not hiring. And it does not appear to me to detract from the evidence in the case importing a sale and not a mere hiring of the machine, that Wood in place of at once paying the £58 in cash granted an acceptance at three months for that sum, and that his acceptance was afterwards twice renewed for lesser sums.

In short, without entering into further particulars, it appears to me to be sufficiently clear that the transaction in question was of the nature of a sale and not hiring, and that the form and terms of the agreement, so far as it has the colour or appearance of a contract of hiring, was a mere device resorted to for the purpose of evading the operation of the bankruptcy laws in the event of Wood becoming insolvent, as he did, before he fully paid up the price of the machine. It is, indeed, stated by the pursuer in his evidence that it was owing to his apprehension of Wood's insolvency that he made the agreement with him in the terms he did in place of plainly and unequivocably in the terms of a sale. But such a device cannot be given effect to in law.—See the cases of *Williams in re Thomson*, and *ex parte Jackson in re Bowes*, referred to in the immediately preceding case of *The Heritable Securities Investment Company* v. *Wingate & Company and Others*.

I am of opinion, therefore, that the interlocutor of the Lord Ordinary reclaimed against is well founded and ought to be adhered to. And I may add that the cases referred to in the Lord Ordinary's note are so different in their circumstances from the present as not, in my view of them, to conflict with his judgment in the present.

Lord Gifford—I am of the same opinion as your Lordship and the Lord Ordinary.

This is a case which certainly does involve somewhat of the same principles as the case we have just decided of the *Heritable Securities Company* v. *Wingate & Company*, but I have not had so much difficulty in dealing with it. The contract here was, in my opinion, one of sale, under which a printing-machine was delivered and became the property of the purchaser, and therefore liable to the diligence of his creditors. The pursuer is just attempting to secure a hypothec over the printing machine on the ground that the price has not been paid. This the law of Scotland does not recognise. After delivery the property passes, and only a personal claim remains. The pursuer's own evidence in effect is—"The selling price of the machine as per our printed list, from which we never vary, was £58. Sometimes we take three instalments at nine months. When our customer is undoubted we make it a common sale. If we suspect the credit of a purchaser we make it hire, and use the printed form of transaction. By form of words we say—'We hire the machine on condition of one-third of the price being paid every three months, and then if the whole price is paid at the end of the three months we give it to the customer in a present.'" This is plainly an attempt to stipulate that the vendor shall have security over a subject so far as not paid. It is plain that a vendor cannot so stipulate after the machine is delivered, because it is not competent by the law of Scotland. Can it be done by a pretended hire? The statement of the pursuer that this is only resorted to when the credit is doubtful gives the key to the nature of the transaction. We clearly cannot give effect to a contract like this. It is a stipulation which the law does not allow. It may be put in another form—"You shall have the gratuitous use of the machine for nine months, and then if you pay me in full at that date it shall be yours." So that the terms of the contract denote that it is a sale. The machine has been delivered, the property has passed, and therefore poinding has been legitimately resorted to.

Lord Young—It is admitted and clear that the printing press in question was delivered to and possessed by the common debtor under the agreement. Prior to the agreement it

was undoubtedly the property of the pursuer, and the question therefore seems to be, whether the property passed by delivery under the agreement? I say by delivery under it, because I think it clear that if the delivery was not sufficient for that purpose nothing that subsequently occurred was so. The agreement is in terms a contract of hire for nine months, although of a peculiar and in our experience unprecedented character, and as the case turns on the peculiarity it is necessary to notice it carefully. The press was worth £58, or assumed to be so, and that sum was the covenanted hire of it for nine months. For this sum the hirer agreed to grant, and in fact did grant, his bill at three months to the owner, such provision being made for its renewal, and also for the renewal of its successor, as to come in substance to this, that the £58 should be paid in three equal instalments, the owner always holding the hirer's bill for the amount due, which, had the agreement been exactly followed, would at the end of the nine months have been one-third of £58. On payment of this, *i.e.*, on fulfilment of the agreement by the hirer, it was agreed that the machine "shall become the property of the hirer without payment for the same." The hirer was to insure the machine for £58 against fire, the amount, if recovered, to be paid to the owner, who in that case undertook to replace it.

It was contended by the defender, and has been decided by the Lord Ordinary, that this is in truth a contract of sale under the guise of a contract of hiring, and that delivery under it passed the property. Whether this is so is the question we have to consider.

It was admitted, and is clear, that the parties intended that the property of the machine should pass to Wood (the ostensible hirer) in case he fulfilled his part of the contract, and that otherwise it should not pass to him, but remain with the pursuer notwithstanding the delivery. But it is contended that this intention was legally incapable of accomplishment, or at least that the parties did not hit on the right way of accomplishing it, but contrary to their intention made a contract of sale, delivery under which passed the property without their meaning it.

That a contract of hire by the terms of which the property hired will, on fulfilment of the contract by payment of the hire, pass to the hirer is a legal and effectual, and yet not virtually a contract of sale (*i.e.*, as good as a contract of sale), so that delivery under it will pass the property, was decided in *Cowan*, May 21, 1824, and *Wight*, December 10, 1828, both referred to by the Lord Ordinary. I cannot distinguish between these cases and this; for in them, as in this, the hire for the covenanted period was the agreed-on value of the property, on complete payment of which (as of hire) the property was to pass to the hirer without further payment. In these cases the term was years, and in this it is only months, but I cannot in this circumstance find ground for a legal distinction. The Lord Ordinary thinks the case of *Macartney* is a more distinct authority against the view he has taken, although he rejects it in deference to the doubt of it expressed by Mr Schank More. I think it is less direct as an authority, although very valuable on the general and important proposition that a man's creditors must take his property exactly as he has it, and with reference to the contracts on which he holds it, there being no fraud or collusion to deceive them; and with reference to Mr More's doubt, expressed half a century ago, venture to refer to the fact that the decision has not during a period now approaching a century been overruled.

I must assume the contract here in question to have been honest and intended to effect exactly what it expresses, and I profess myself unable to see any reason for refusing it effect according to its terms. It was indeed admitted that Wood could not claim the property or maintain his possession as proprietor if he failed to fulfil the contract under which alone he had any right at all. But it was said that he had a reputed ownership whereby his creditors might acquire a right that he never had himself. I think this is an error. There was nothing beyond or besides mere possession, which would have been in all respects the same had the possessor been a hirer on the most ordinary and familiar contract of location, or a borrower, or a thief. Mr Bell says—"Possession alone is not a ground on which moveables shall be made to answer for the debt of the possessor, or on which creditors shall be entitled to rely."—Prin., sec. 1315. Again, the same author says, sec. 1316—"Collusive possession is where the appearance of ownership is carried beyond the purpose and occasion of a legitimate contract, and powers of disposal are ostensibly given or allowed to be assumed." And again, sec. 1317—"Collusive possession proceeds on the appearance of uncontrolled possession and power of disposal, or acquiescence by the true owner in something beyond the possession requisite to a fair contract."

The pursuer very properly asks no more than fulfilment of his contract by payment of the unpaid balance due to him under it, and does not insist upon a forfeiture according to the letter of it, which indeed the Court in the exercise of its equitable jurisdiction would probably have relieved against on such payment, although beyond the time specified. Such relief is familiar in analogous cases. I only notice this subject to express my surprise that this proper and becoming limitation of the demand should be used as an argument to show that the contract is bad—the argument being that had it been good the pursuer would probably have sought to enforce it to the letter however inequitable in the actual circumstances.

I am of opinion that the interlocutor of the Lord Ordinary is erroneous, and that the pursuer is entitled to our judgment.

The Lord Justice-Clerk was absent.

The Court adhered.

Counsel for Pursuers (Reclaimers)—Solicitor-General (Balfour, Q.C.)—Strachan. Agent—David Milne, S.S.C.

Counsel for Defender (Respondent)—Asher—Mackintosh. Agents—Millar, Robson, & Innes, S.S.C.