him for the rent applicable to the period subsequent to sequestration, on the ground that the lease was practically ended and the bankrupt had come under a new arrangement in consequence of his bankruptcy. I do not see how this can be. Bankruptcy does not bring a lease to an end. If the tenant has an existing lease, it belongs to his trustee, unless there is an express exclusion of assignees, legal and voluntary. This is the case of an ordinary urban subject, and whether the trustee here chose to take up the lease or not does not appear, but the bankrupt continued in possession of the house. Would he not be entitled under his lease, which began before bankruptcy, to continue in possession of it on condition of paying his rent and the other prestations exigible? I think he clearly would be, and the words of Professor Bell on this matter are well worth quoting. He says (1 Comm. 76, M'Laren's ed.)—"Bankruptcy does not of itself annul a lease. The tenant, though bankrupt, may still continue in the possession provided he pay the rent regularly and perform the other stipulations of the contract. All the landlord is entitled to do in case of his tenant's failure to pay the rent is to have recourse to the hypothec and the proceedings prescribed in the Act of Sederunt 1756." That is to say, the lease not being taken up by the trustee, vests in the bankrupt; he remains as tenant, and the landlord has the ordinary remedies at common law and under the Act of Sederunt. He may use his right of hypothec, or raise an action for his rent, or remove the tenant if he is in arrear with his rent, but nothing else. Now, what is the state of matters here? If the rent for the current year was a debt contracted before bankruptcy and sequestration, then it cannot be claimed against the bankrupt, but can only be made available by a claim in his sequestration. For future rents, of course, the bankrupt will be liable. But as regards every part of the rent for the period from Whitsunday 1879 to Whitsunday 1880 the landlord has no claim against the bankrupt tenant, for it was a debt contracted prior to his sequestration. On these grounds I am for sustaining this appeal and dismissing the action.

Lord Mure—I am of the same opinion. On this record I think it is clear that the judgments appealed against cannot stand. Those judgments repel the defence as irrelevant, that defence being simply a denial that the debt is due. The few facts stated by the pursuer are denied—there had been no proof, and *ex facie* of the averments the claim should have been made against the trustee, as the debt was undoubtedly contracted prior to the date of the bankrupt's sequestration. I see no ground on which the pursuer can have decree, and I think the proper course is to dismiss the action in default of any specific explanation. Had the amount it states been larger, I think it would have been advisable to allow the record to be opened up and give the pursuer an opportunity of showing any specialties which may be behind in this case to ground his claim as against the present defender. But as it is I am for dismissing the action.

Lord Shand—I agree in your Lordships' observations with regard to the record in this case. It is important to observe that the claim here made is for the rent due for part of the year which was current when the sequestration occurred, for I think a different principle might and would have applied if the circumstances had been different, and the rent claimed had been for a period beginning subsequent to sequestration. In that case there might have been room for holding that the fact of the bankrupt remaining as tenant implied a personal contract for payment of the rent. Keeping this distinction in view, it is to be observed, in the first place, that it is admitted that what is here asked is not merely decree of constitution, and, in the second place, that there is no averment of any special agreement as to this period; it is not said that any new bargain was made between the parties under which this rent is now sued for. Now, I think in a case of this sort, when the subject is an ordinary urban one, and when during the currency of the year's rent the tenant's bankruptcy occurs, and the trustee refuses to take up the lease, and the bankrupt stays on in the house, his obligation in return is for the year's rent, and that obligation was undertaken before the year began to run. There is no other contract in the matter. It was argued that the law will rear up an implied obligation, but I cannot think that is so. It is said the landlord might have brought an action of ejectment against the tenant; I doubt if such an action would have lain—I think it would not. The answer to it would have been—"I have got the occupancy of this house for the year under my obligation to pay the year's rent; that is a good obligation against my estate, and if my trustee does not take it up I shall remain on as tenant." But the case here is simply one where the bankrupt remains under an obligation for rent contracted before the year began, and I think his possession is to be attributed to that obligation which is good as against his estate, and not to any new or implied one.

Lord Deas was absent.

The Court recalled the interlocutor appealed against, sustained the appeal, dismissed the action, and decerned.

Counsel for Appellant (Defender)—Rhind—J. M. Gibson. Agent—W. Officer, S.S.C.

Counsel for Respondent (Pursuer)—Dickson. Agent—James Coutts, L.A.

Friday, January 7.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

M'BAIN *v.* WALLACE & COMPANY.

Contract—Sale—Ship on Stocks—Security.

R., who had incurred liabilities to W. & Co., entered into a contract with them by which he undertook to complete and deliver to them an unfinished vessel on the stocks in his building yard for a certain sum of money, power being given to W. & Co., in the event of R.'s failure to carry out his contract, to enter into possession of the yard and the vessel. R. became bankrupt, having received from W. & Co. advances equal to the consideration

stipulated in the contract. *Held*, in a competition between R.'s trustee and W. & Co., that under the contract, as a contract of sale, W. & Co. had right to the ship although it had not been delivered to them, and that this right could not be affected by proof that the character of a purchaser had been conferred on W. & Co. merely for the purpose of securing to them the repayment of their advances.

Observations per Lord Justice-Clerk and Lord Young on the cases of *Simpson* and *Leckie*.

In 1877 James Roney, a shipbuilder in Arbroath, was engaged in building amongst other vessels a barquentine or three-masted schooner of the burden of 297 tons or thereby. This vessel he entered in his books as No. 2, and for the purpose of survey he entered her at Lloyds'. Her hull with all her internal arrangements were all but completed and ready for launching. In the building of these vessels he had incurred considerable liabilities, and in particular was indebted to Messrs John Wallace & Company, iron merchants, Dundee, in the sum of £800 for iron and other goods.

On 17th and 25th January 1878 he entered into a contract with Wallace & Co. by which he as first party agreed, for the sum of £2500 sterling, to complete and sell to them as second parties the above three-masted schooner as it was on the stocks in his yard at Arbroath, and entered as No. 2 in his books. The *third* clause of the contract was in the following terms:—"It is hereby agreed and declared that when any sum shall be paid or appropriated by the second parties towards payment of the said price, the said vessel in her present unfinished state, and at the stage of her build at which she has reached, as shewn by the said specification, and all materials and articles of wood or iron or other metals of every description, furnished and unfurnished, and whether made up or not, but intended or destined to be used in the construction, fitting-up, and completion of the said vessel and her appurtenances, which shall be lying or situated in or about the vessel, where she is building, or elsewhere in or near the shipbuilding-yard or other premises occupied by the first party at Arbroath, shall thereupon *ipso facto* to all intents and purposes become and remain the property of the second parties, although they may be used by the first party as materials for the completion of the vessel or of her appurtenances; and it is further and in like manner agreed that all subsequent additions made to the vessel and her appurtenances as the work proceeds, and all additional materials and articles of any description that shall be brought to or belong or be situated as aforesaid, intended or destined to be used in the construction, fitting up, and completion of the vessel or her appurtenances, shall *ipso facto* of such intentioned destination or situation become and remain the property of the second parties, although, without prejudice to such right of property, they may be used by the first party as materials for completion of the vessel or her appurtenances as before mentioned; and generally, it is hereby agreed that the said vessel and her appurtenances, or any part thereof, or materials or articles intended or destined for the completion of the same as aforesaid, shall not be or become liable to any debts, contracts, or engagements of the first party, or be otherwise affected by or attachable for his acts or deeds, or be at his order and disposition, but shall, subject to the uses foresaid, be and remain the absolute property of the second parties: Declaring that the instalment of price applicable to the present stage of the vessel's build is agreed to be two thousand pounds sterling, and that the final instalment of price payable for the vessel and her appurtenances on complete fulfilment of this contract and said specification is five hundred pounds sterling, making together the foresaid price of two thousand five hundred pounds sterling, which respective instalments shall be payable on the completion of the said vessel and its appurtenances to the second parties' satisfaction, and after the vessel has been launched by the first party and full legal possession thereof received by the second parties, and also after delivery by the first party to the second parties in proper order of the certificates of the builder of the Board of Trade, and of Lloyds' surveyor, and any other documents requisite to instruct that the vessel has been completed in terms of said specification and this contract, and according to the requirements of the Board of Trade and Lloyds' registry. But it is hereby agreed that if the second parties shall elect to pay or appropriate any sum or sums for settlement of any part of the foresaid instalments sooner than the date fixed for payment thereof, then and in that event the sum or sums that may be so paid or appropriated shall bear interest from the date of advance or settlement at the rate of five pounds per centum, and the advance or advances and interest thereon shall be deducted from the foresaid price at final settlement." By the *fourth* clause of the contract it was provided that any extra work not in the original specification ordered by the second parties should be paid for by them over and above the original contract price. By the *fifth* clause the first party agreed to launch and deliver the vessel in three calendar months and to insure her at his own expense until such delivery. By the *sixth* clause it was provided as follows:—"In case the first party shall suspend the work on the vessel or her appurtenances, unless compelled to do so from the effects of fire or bad weather, or strike of workmen, to such an extent as to cause a suspension of work, or if he shall refuse or fail to carry out and complete this contract and said relative specification as hereinbefore agreed to, then and in any such case it shall be lawful for the second parties, by themselves or others employed by them, and without any judicial warrant, unless they may consider such expedient, but only after a previous notice to the first party of fourteen days by letter, put prepaid into the post-office at Dundee, to enter into and upon the first party's shipbuilding yard and premises at Arbroath, and take and retain possession thereof, and of the whole materials and articles intended and destined to be used for the purposes of this contract and said specification, and thereafter to sell the said vessel and her appurtenances, and the materials and articles before referred to, or any part thereof, in the condition in which they may then be, at valuations to be put thereon by the arbiter after mentioned, and failing such valuation, then by public sale, on such terms as the second parties may think proper, and to receive and discharge the prices thereof, and apply the free proceeds, after deduction of all

costs and charges, towards repayment of any instalment or portion of any instalment of the price that may have been advanced or appropriated by the second parties as before mentioned, and any other payments or outlays that they may have made or incurred in the premises, with interest thereon from the date of advance at the rate foresaid; and after full payment and satisfaction to the second parties in the premises, and relief and reimbursement to them of all obligations, payments, and charges of every kind which they may have contracted or incurred in relation to this contract and the consequents thereof, and any other debts or obligations due and owing by the first party to the second parties on any other ground whatever, relating thereto or not, any free balance shall be paid to the first party; or the second parties may, if they see fit, instead of selling the vessel and her appurtenances, and the said materials and articles, or any part thereof as above mentioned, complete the vessel and her appurtenances in terms of the present contract and said relative specification, and for these purposes employ all necessary workmen, and use all the machinery, working tools, implements, stock, and material of every kind necessary for such purposes in and about or near the said premises of the first party situated at Arbroath; and in case the second parties shall expend any sums in so completing the vessel and her appurtenances, over and above the said contract price, the same, with all costs and outlays incurred by them, shall be recoverable by them from said first party." By the *seventh* clause it was provided, that in the event of the vessel on delivery being disconform to the stipulations in the contract and specification, the second parties might refuse to take delivery, and recover payment of the sums paid by them and all their outlays in relation to the contract; and further, they were to have a real specific and preferable right of lien, retention, and possession of, in, and over the said vessel and her appurtenances till full payment was made as aforesaid.

On 23d April 1880 a meeting of Roney's creditors took place at Arbroath, his estates were sequestrated, and James Matheson M'Bain, banker in Arbroath, was elected and confirmed his trustee in bankruptcy. Four days afterwards Wallace & Co., founding on the sixth clause of the contract, gave notice to Roney that they intended, in consequence of his having failed to complete the contract, to enter upon and take possession of his shipbuilding yard and premises and the whole materials destined to be used for the purposes of the said contract, and thereafter to sell them at valuation or by public sale, and generally to do everything competent to them in virtue of the contract. The present action was accordingly raised by M'Bain, as Roney's trustee in bankruptcy, for the purpose of interdicting, prohibiting, and discharging Wallace & Co. from so acting.

The complainer averred—That the vessel had not been finished within the stipulated three months, but was still allowed by the respondents to remain on the stocks; that no part of the pretended price had ever been paid, but that the respondents, who had already made advances to Roney, continued from time to time to make advances to him, for which they afterwards drew on him and discounted his acceptances at the Royal Bank in Dundee; and that the reality of the matter was simply, that in respect of certain sums of commission they lent their names to Roney, who obtained the proceeds arising from the discounting of his own acceptances. That the contract was simply entered into as a security for the debt already due by Roney to them, and for these accommodation bills to which they were to become parties for his behoof. That Roney had been left by them in the uncontrolled possession and ownership of the vessel, no possession, symbolical or otherwise, being taken by them, and that, indeed, he had entered into various negotiations in his own name and at his own expense with a view to her sale, there being no attempt on their part to control him or to indicate that they had any right or interest in law other than a right in security for the accommodation transactions before mentioned.

He pleaded—"(1) The vessel and others not having been sold to the respondents, and no price having been paid for the same, the respondents are not entitled to take possession of them. (2) There having been no delivery to the respondents of the vessel and others in question, interdict should be granted as prayed for. (3) The transaction between the respondents and the bankrupt being one by way of security only, and this fact being instructed *in gremio* of the contract, the respondents are not entitled, as in a question with the trustee on the bankrupt's sequestrated estate, to insist on delivery of the vessel and others, and for that purpose to take at their own hand possession of the bankrupt's shipbuilding yard, stock, and plant as intimated by them. (6) In any event, the respondents are not entitled to enforce delivery of the vessel and others until they have paid the price."

The respondents, on the other hand, denied that no part of the price had ever been paid; on the contrary, they averred that sums to the amount of £2250 (being an excess of £50 over the purchase price, to cover any extras) had at different dates been received by the bankrupt to account of the price of the vessel, conform to cheques in his favour granted by the respondents, and relative receipts granted by him. That the accommodation bills had been drawn by them for the purpose of keeping themselves as much as possible out of advance upon the vessel until she could be profitably employed or sold to profit, but that they were never intended to affect the payment of the price of the vessel, which had really been sold to them, according to the terms of the contract. Further, they denied that the contract had been kept latent and that possession was not taken by them. It was well known that the vessel had been acquired by them by contract of sale, and when Mr Roney was endeavouring to sell the vessel he was acting solely for their behoof and interest.

They pleaded—"(2) The contract being a contract of sale and reduced to writing, the allegation that it was truly a security cannot be proved otherwise than by writing. (3) When a ship is purchased on the stocks on the terms that it shall be finished and launched by the builder, and paid for by instalments, the property of the materials as they are put together, at all events after payment of the first instalment, belong to the purchaser, and not to the trustee in the builder's bankruptcy. (4) The right of a trustee

in a sequestration being *tantum et tale* as it stood in the person of the bankrupt, and the respondents having bought the vessel and paid the stipulated price, they are entitled to delivery and possession in terms of the contract. (5) Assuming that the transaction amounted to a security only, the transfer being *ex facie* absolute, the complainer is not entitled to possession except on payment of the sums received and due by the bankrupt to the respondents."

The Lord Ordinary (RUTHERFURD CLARK), after a proof, sustained the reasons of suspension, and interdicted, prohibited, and discharged the respondents in terms of the prayer of the note of suspension and interdict.

The import of the proof appears sufficiently in the opinions of the Judges, and in the following opinion which the Lord Ordinary annexed to his interlocutor:—"The complainer's case is that the ship was his. The answer to this is twofold—that the ship was sold and the property transferred, or at least that they have a security which they are entitled to enforce. There is no doubt that the contract which is founded on is one of sale. I do not doubt that Mr Thomson believed there was no other contract but this one, and I am disposed to assume that was also the idea of Mr Wallace. He seems not to have paid so much attention to the matter as Stewart, between whom and the bankrupt the chief communications were. But though the contract does express a contract of sale, that may not be an expression of the true contract which the parties made with one another, although they may have concealed from the law-agent what was the true contract. But does this writing express the true contract? I do not think it does; and I think I can rely more on the evidence of Roney than Stewart's, because Roney's is consistent with all that passed subsequently, and Stewart's not at all, while Stewart on pressure told the real truth. The contract is for immediate execution. The ship remains in the hands of the bankrupt. Payments are made and receipts given, but Roney gives his name to furnish accommodation. The correspondence is, to my mind, in favour of my view. Mr Stewart's evidence also tended to show he did not believe he had bought the vessel, because he said he had a moral obligation to return excess of the price obtained, and he said he would not give Roney a back-letter because he thought it would vitiate the contract. As to the security, I think the constitution of that security must be ascertained. It is hardly contended that any possession was changed; and therefore the security is unavailing by reason of want of possession."

The respondents reclaimed, and argued—The contract was really one of sale, under which the unqualified and absolute right of property in the ship was transferred to them as purchasers.

Authorities—*Simpson* v. *Duncanson*, M. 14,204, and Bell's Com., i. 189: *Holderness* v. *Rankin*, Aug. 3, 1860, 29 L.J. Chan. 753; *Swainston* v. *Clay*, Jan. 24, 1862, 32 L.J. Chan. 388; *Sutherland* v. *Montrose Shipping Company, &c.*, Feb. 3, 1860, 22 D. 665; *M'Meekin* v. *Ross*, Nov. 22, 1876, 4 R. 154; *Orr's Trustees* v. *Tullis*, July 2, 1870, 8 Macph. 936; *Scottish Heritable Securities Company* v. *Allan Campbell & Co.*, Jan. 14, 1876, 3 R. 333; *Hamilton* v. *Western Bank of Scotland*, Dec. 13, 1856, 19 D. 152; *National Bank of Scotland* v. *Forbes, &c.*, Dec. 3, 1858, 21 D. 79; *Miller's Trustee* v. *Shield*, Mar. 19, 1862, 24 D. 821; *Union Bank of London* v. *Lenanton*, Feb. 6, 1876, L.R., 3 Com. Pleas Div. 243; *Ward* v. *Beet*, 32 L.J. Com. Pleas, 113; *Leckie* v. *Leckie*, Nov. 21, 1854, 17 D. 77.

The complainer argued—(1) In point of law the contract could not be looked on as one of sale, because there had been no delivery of the ship—*traditio* being as essential in the case of ships as in the case of any other moveable in order to constitute a legal sale. The decision in the case of *Duncanson*, founded on as establishing a conceded exception in favour of ships from the otherwise requisite *traditio*, was very doubtful (*vide* Brodie's Stair, i. 900), and had not been recognised by subsequent decision (*vide Clarke* v. *Spence*, 1836, 2 Adolphus and Ellis 466). The English cases cited did not apply, because in England delivery is not an essential, the property following on the contract. Moreover, to hold the contract one of sale would be to support a fictitious device to cheat the sequestration and enable the respondents to compete with the other creditors on unfair grounds—*Heritable Securities Investment Association (Limited)* v. *Wingate & Co.'s Trustee*, July 8, 1880, 7 R. 1094; *Cropper & Co.* v. *Donaldson*, July 8, 1880, 7 R. 1108; *ex parte Williams*, Nov. 29, 1877, L.R. 7. Chan. Div. 138. (2) In point of fact, the contract was one of security merely, made on the footing of debtor and creditor. This was clearly proved (1st) by the parole evidence of Roney and Stewart; (2d) by the evidence as to the mode of transacting business adopted by the parties; (3d) by the lettters which passed between the parties.

At advising—

LORD JUSTICE-CLERK—We have heard this case elaborately argued, and it is one that embraces some points of considerable importance, particularly the question that had reference to the case of *Duncanson*. I fairly own I did not expect to find the main question depending on so narrow a position, as it rather has appeared in the argument and proof. I may at once say that I have formed an opinion inconsistent with the interlocutor of the Lord Ordinary, in so far as he finds that this cannot have effect as a security. I agree with him in thinking that in so far as any claim can be made by the Messrs Wallace & Company for the surplus of the price over the sums advanced, the nature of the transactions hardly entitles them to go that length.

I shall state very shortly the grounds that have led me to the conclusion I have come to. In the first place, I think there is a fallacy lying under the view of the Lord Ordinary, and it is one that has been repeated constantly in the course of the argument—the fallacy, namely, that this never was from the beginning, and is not now, anything but a mere security. That is a strong proposition to hold, surely, in the face of the deliberately concluded and completed transaction which we have before us in this case—a transaction approved by a regular written instrument drawn up in the most formal terms—a written instrument which at all events professes to say that Messrs Wallace & Company are the purchasers, and that Roney, is the seller of the vessel in question—an uncompleted vessel—as it stood on the stocks. That is what the instrument professes to say. It is, no doubt, said that there are some things in that contract which are inconsistent with the

notion that it was a sale, and undoubtedly I was impressed at first with the fact that some of the specific clauses in this contract might have, as indicating the nature of the right, an effect adverse to the reclaimers and respondents' contention. But I am quite satisfied that there is nothing in the instrument itself that taken by itself could possibly lead to that conclusion, though there is one clause—the sixth clause in the contract—which seems to favour the view, and which was referred to as establishing that proposition. On mature deliberation, however, the import of that clause will be found to bear upon an entirely different thing. That clause says that the second parties may, if the first party fails or refuses to carry out and complete the contract and specification, enter the shipbuilding yard and retain possession of the vessel, and sell the vessel and her appurtenances, and "receive and discharge the prices thereof, and apply the free proceeds, after deduction of all costs and charges, towards payment of any instalment of the price that may have been advanced or appropriated by the second parties as before mentioned, and any other payments or outlays that they may have made or incurred in the premises, with interest thereon from the date of advance at the rate aforesaid; and after full payment and satisfaction to the second parties in the premises, and relief and reimbursement to them of all obligations, payments, and charges of every kind which they may have contracted or incurred in relation to this contract and the consequents thereof, and any other debts and obligations due and owing by the first party to the second parties on any other ground whatever, relating thereto or not, any free balance shall be paid to the first party." Then there is a right to the second parties, if they think fit, and if the first party should have failed to complete the contract to take the vessel and build it themselves, "to take all the necessary steps for the purpose of having it completed."

Now, it must be observed that that obligation to account is not an obligation to account in the position of creditors at all. If they availed themselves of the provisions in that sixth article, the effect was not to deprive the shipbuilder of his profit on the transaction. All that it means is that they are to come—Wallace & Company are to come—in place of the shipbuilder, and expend their own money in doing what he was to do or what he was bound to do. It is not intended that they should get the whole benefit of the transaction. They were to give the shipbuilder the profit which would have accrued to them if the ship had been sold in the market. I think that is quite a reasonable view, and it is confined entirely to the event anticipated in that sixth article—namely, the event of the vessel not being finished by the shipbuilder. Therefore, putting that aside, I think this contract on the face of it discloses a transaction and sale and nothing else, and indeed that point is eventually not disputed on the part of Roney's trustee.

But then it is said there are limitations to the conclusions for which the reclaimers contended. The respondent and complainer says that this vessel has not been delivered, and that the sale of a moveable article is only completed on its delivery.

Now, I must say the question to which this has reference has not been solved so satisfactorily in former decisions as could be wished. I have considered the case of *Duncanson* as establishing a general proposition in regard to this particular and important article of commerce—an article which from its very nature cannot be delivered unless it is completed, but which in many instances cannot be completed unless the purchase-money is to a certain extent advanced. I thought the case of *Duncanson* (and apparently the opinions in that case are corroborated by opinions of the Judges in other cases) established the proposition that if there was a price payable by instalments, and one instalment was paid, that then the portion of the vessel furnished became the property, although without delivery, of the person by whom the payment was made, on the principle of specification; and that thereafter the shipbuilder was truly in the position, not of proprietor of the vessel, but as holding the vessel for the time as owner or purchaser in order to complete the vessel. It was mentioned, and it is the fact, that in Abbott on Shipping Lord Tenterden refers to that judgment as having settled that matter in conformity with the opinions of English lawyers. My opinion on this part of the case has been formed with some hesitation, and it is right to say that there has been no precise judgment since the case of *Duncanson* that I can find giving effect to that view. Nevertheless, I think the case of *Duncanson* has been truly acted upon in practice in this important branch of trade ever since the judgment itself was pronounced, and looking to the nature of the case I am of opinion that under this contract of sale, if the price had been payable by instalments, that case cannot but have applied.

It is said, however, that the price was not payable, and was not paid by instalments. I do not think that we need go into that, because if the case of *Duncanson* was well decided, payment of the whole price is of course payment of the different parts of it, and it must be remembered that before the bankruptcy here the whole price in point of fact had been paid, if ever it had been paid at all.

The next question is, whether the price was paid? and here I have been unable to elicit any ground of hesitation. It was said the price was advanced in cheques, and that against these cheques corresponding bills, or bills of similar amount, were constantly negotiated, drawn by Wallace & Company and accepted by the shipbuilder, and that in that way money was raised either to finish the ship or for other purposes; but it is not denied that the result of these transactions was to put in the pocket of Roney, and take out of the pocket of Wallace & Company, more than was sufficient to pay the price, and therefore if Roney had remained solvent the price was paid *in omnibus*. I am not prepared to go into the subtle and ingenious argument raised by the respondents and complainers' counsel, that there was no application of this money to the building of the ship. The money ran over the whole period during which the ship was being constructed, and I do not think a distinction of that kind influences the question what was done with the cheques when drawn, and when Roney got the proceeds was the amount expended on the labour stipulated for? If there were any question otherwise than one on the terms of this

contract of sale, I should certainly have held that Wallace & Company were the purchasers, that they were themselves under the obligation contained in the contract, and that they were entitled to enforce the other obligations against Roney.

That being my impression, apart altogether from the question of security, there remains behind a matter of very great interest and importance, and by no means without a certain amount of difficulty, because our authorities on the matter are somewhat scanty. But be that as it may, this contract did not disclose the whole agreement of the parties. On the contrary, there has been spelt out of the correspondence, and out of the evidence, a certain modification of the contract on which the judgment of the Lord Ordinary proceeds. I was under the impression from the first, and that impression gained strength as the discussion proceeded, that the grounds on which this limitation of the original contract was founded were after all of the scantiest. There is no back-letter; there is no evidence that there was any stipulation for a back-letter. There is evidence, no doubt, which will be found in the correspondence, that these parties could not have considered themselves justified in taking any excess of the price if the vessel had sold for a larger amount than the amount of their advances; but whether that ever assumed the shape of a legal limitation of this contract of sale, while I do not say it is a very doubtful question—for I am inclined to give effect to it,—is, I certainly think, a much narrower question than the way the Lord Ordinary has put it. I think it doubtful whether evidence of that kind in the ordinary case ought to control a regular written and carefully prepared document like this. But when it is said that this limitation, spelt out most ambiguously and doubtfully from the correspondence, is to be the contract, and that this elaborate and deliberate transaction expressed in that written instrument goes for nothing, I think that this is entirely and wholly out of the question, and that there is not the least foundation for any such result being arrived at. My opinion is that the contract as executed was what the parties meant to execute, and that it is quite clear from the evidence that they meant nothing else. That, I think, is quite clear from the evidence of Roney himself, given in unreserved terms, when he states that the deliberate intention was to make an absolute sale, and that nothing else had been spoken of at the meeting at which that resolution was come to. And that is the truth. There was no other contract intended. It was a sale-contract which the parties meant. It was an absolute sale; but then it was quite in the power of the party holding that absolute right to put what limitations he pleased upon it in that separate contract with the party who was indebted to him. If Wallace & Co. chose so to limit their absolute right as to say—"We shall only hold it until we are repaid our advances, and after that you are welcome to the difference of any price you can obtain"—Does that make the only contract between the parties? Quite the reverse. The absolute title stands for all facts consistent with that subordinate, incidental, and ancillary agreement which has been made.

Now, there is something which (on the second branch of the case, namely, whether it is to be a security or not) gives less colour to the case against Wallace. And it is this—What I should have desiderated here would have been an obligation on Wallace & Co.'s part to reconvey the subject on payment of their advances. That is what is necessary to qualify this absolute agreement, and until that is done, so far as the title is concerned, it is absolute, and if there are any elements limiting its operation, or the effect to be given to it in its practical application, these must receive effect only according to the limitations and conditions on which they are granted.

Now, I do not dispute that one may spell out of that correspondence an intention or purpose amounting to an obligation not to enforce that absolute right further than the amount of the price stipulated in the contract. But what then? That does not amount to an obligation to allow it to stand only as security that the money is not paid. Quite the reverse.

But I do not think it necessary to go into the general doctrine of absolute rights limited by back-letters—formal conveyances limited by personal obligations—because the law on that matter is as clear, both in heritable and moveable rights, as it can be. If a man stipulates with his debtor, or with a party with whom he transacts, that he shall be put in the place and have all the rights of a proprietor against him, there is nothing to prevent him doing so, and if that formal title is conveyed it is of no moment whatever that in certain circumstances he is willing to restrict the operation of it. It is simply a matter of contract. He shall be bound to fulfil that contract as far as it goes. But even to the very fulfilment of that contract the rights and power and title which he obtains by the absolute disposition shall be effectual. They shall inure to the subordinate right to which he is willing to reduce the original conveyance. The notion that a back-letter derogates from the original grant is out of the question, and is contradicted by all the opinions in the case of *Leckie* v. *Leckie*. In that case the opinion of Lord Colonsay is of the greatest weight, and proves the proposition I have laid down beyond all question. Therefore, for the reasons I have mentioned, this is nothing but an absolute sale, which on the assumption I have mentioned would have been effectual, and which as there was a collateral agreement, but conditional upon payment of the amount of the advances made by the vendee, I imagine is not in this question with Roney's trustee at all available to the effect—a most unjust and iniquitous effect it would be—of making these parties, who advanced the money on a security agreed upon on both sides, and which they were advised by law-agents was the right security to take, be put in the position in which they are, not only not to be entitled—and I do not think they are—to take the whole property of this vessel, but obliged to lose the amount they advanced in so friendly and kindly a way.

On the whole matter I am of opinion that the Lord Ordinary's interlocutor should be altered to the effect of holding that this transaction is good to give a preferable right under the contract of sale to Wallace & Co. for £2500 for the vessel in question.

Lord Young—I am of the same opinion. The material and leading question in the case regards the validity and effect of the contract of January 1878 between James Roney and John Wallace

& Co. By that contract, which is prepared by a conveyancer, and is in formal shape, the bankrupt Roney sold to the respondents Wallace & Co. the vessel in his shipbuildiug yard, which was then approaching completion, for the price of £2500, the bankrupt undertaking to complete the ship and deliver it to Wallace & Co., who on their part undertook to pay £2500 either before or on delivery of the vessel. I think that is the import of the contract. Now, I know no reason in the world why such a contract should not be valid, between the parties, and when I put it to the Dean of Faculty I do not think he disputed that it would be valid, and enforceible according to its terms on either side — that is to say, that Roney, the bankrupt, on his part could compel payment. Whether the payments were to be considered as an advance or payment of the price I shall consider immediately, but Roney, on his part, if remaining solvent, could have compelled payment of the £2500. Wallace & Co. on their part could upon such payment being completed compel delivery of the ship—compel complete execution of it—under the contract. Having regard to its terms, it is a legal contract, valid and enforcible between the parties, they being solvent.

But then it is said it is not good against creditors, because it is the rule of the law of Scotland that a mere contract will not pass the property of a vessel, and that if the party to the contract having possession of the subject of the contract becomes bankrupt, then the claim for delivery is a mere personal claim, which is not good against those creditors except to the extent of obtaining a dividend upon a claim for damages for non-delivery. I am not of that opinion.

With respect to a contract for the sale—assuming this to be such a contract—of a ship in course of building, I think it was determined upon quite intelligible grounds, not fully or perhaps quite accurately expressed, but nevertheless quite intelligible, and often referred to since in the case of *Duncanson*, that a contract for the purchase of a ship in the course of building, with payment of the price by instalments, is a good contract against creditors, entitling the buyer who has paid to delivery of the article—that exception to the general rule of the law that property in moveables does not pass without delivery being for the general convenience of trade. If you assume, therefore, that this contract was in truth what it bears to be, and nothing else, namely, a contract for the purchase and sale of a ship in the course of building, I should then be of opinion, on the authority of the case of *Duncanson*—a case which I entirely approve, although it is, and is stated by our most authoritative text-writer on the matter to be, an exception to the general rule of law, well decided and introduced upon just considerations, and acted upon, so far as I know, up to this time—I say I am prepared on the authority of that case to hold that if this contract be what it bears to be on the face of it—a contract of purchase and sale —it is good against the creditors, entitling the buyer to delivery if he has paid the contracted price.

Now, it is admitted here that an amount was paid equal to more than the contract price—2500 and odd pounds. Receipts, moreover, were granted upon the occasion of each successive payment, and those receipts bore that the payment was made to account of the contract price. These instalments were paid between the 18th January 1878 and 7th October 1879. The form of the receipt is as follows:—"Received by me from Messrs John Wallace & Company, iron merchants, Dundee, the sum of five hundred pounds sterling to account of the purchase price payable by them for the three-masted schooner, No. 2, presently building by me for them in my yard at Arbroath under contract between me and them. Subscribed by me of this date." And the subsequent payments, twelve in number, with their various dates down to October 1879, are stated after that form, which is also one of the receipts. These payments are stated, accurately I assume, to have been granted upon similar receipts, and the whole sum to which they amount is £2550.

Now, assuming the contract to be in truth what it appears to be—a contract of sale—and that these payments were granted for what they bear to have been granted—payments to account of the price of the whole contract—I am of opinion that the property of the ship passed to the buyer, and that he is entitled to delivery of it against the creditors of the bankrupt.

But then it is said it appears from the correspondence and the parole evidence that the real meaning of the parties was that the buyer should advance the agreed-on prices alone, and that he should take a contract of sale containing *in gremio* an obligation to complete the building of the ship, not for the purpose of making him really, but only for the purpose of giving him the rights of a buyer, in order to secure repayment of the loans of money which he had made under the names of prices. There is no dishonesty in this, assuming it to be so. It is the most common thing in the world for a party to lend money to another under the name of the price of the article, either real or personal—I mean either land or moveable property—taking title to that land or moveable property in the form of a conveyance, to put him in the position of purchaser, having a proprietor's title, although he is in truth only a lender of money, and intending not to speculate in the purchase of the article, but merely to have such satisfactory security as the proprietor's title in the subject will afford. Lord Ivory refers to that in quaint but intelligible language in the case of *Leckie* v. *Leckie*, which, by the way, is only one of the many cases we have every session illustrative of loans of money under such circumstances as I have referred to, and altogether sanctioned by the Court. *Leckie's* was a case where, as may be gathered from the rubric, a party disponed certain heritable subjects to another by a disposition *ex facie* absolute, and "although the conveyance bore that the price had been paid, yet the only consideration was the disponee becoming the disponer's cautioner in a cash-credit bond under which he eventually paid a considerable sum, and the disponee having offered to reconvey on being repaid his advances with interest and expenses which he had incurred," it was held that the disponer was not entitled to succeed in a declarator of trust which concluded also that he had a right to the subjects himself subject to the disponee's security for his advances. Lord Ivory in that case referred to this passage in the judgment of the Lord President—"It is said that an absolute deed such as this is an ordinary mode of constituting

a security, and that it is a matter of inquiry whether it is a security or not. I think that is wrong. An *ex facie* disposition is not a security. The right conveyed by an absolute disposition is an absolute right of property. But whether it is security or not, I think it is not a security in the technical mode of constituting securities. It may be reduced to that level by being qualified in various ways, but as a matter of conveyance—as a matter of law—it is not a security. It may in the end be no better than a security, but it is a perversion of terms to call it so." Now, Lord Ivory referred to what the Lord President said with approval. He says—"Your Lordship has well observed that it is inconsistent to say that an absolute disposition is a mere form of security. Why is an absolute disposition resorted to. The intention was to get rid of the very puzzles which a creditor would have been subjected by the ordinary forms of securities when the debt due to him is of a fluctuating character. The law did not allow securities for after debts, and so this shape was taken. A special statute was passed to establish securities for cash-credits. It was a statute which *per expressum* authorised this nature of the transaction by which contingent and variable balances should be made the subject of such security. But here we have an absolute disposition, and nothing by which it is affected can be qualified. There may have been an understanding that on repayment of the advance the subject was to be reconveyed. But is not every substantial interest of the party who says 'I am debtor in this subject' answered by the offer to grant a reconveyance when payment is made. But he cannot ask for a reconveyance until payment is made. It is impossible to lend countenance to a declarator by which a party seeks to cripple one whom he has already kept so long out of his right. I think the interlocutor ought to be adhered to on the ground taken by your Lordship, namely, the absolute right acquired by him under the disposition." Lord Robertson in the opinion he gave expressed the same views—"I never saw a pursuer so entirely in the wrong. He does not seem to be in a condition to avail himself of the remedy he seeks, for he does not appear to be in the situation to repay this advance. He wants it to be declared that the defender held the subject in security, and is bound to reconvey when he (the pursuer) is ready to pay, which he is not. That is most unreasonable. We must examine, however strictly, whether he is entitled to this remedy, which he admits he is not in a position to avail himself of. But there is no proof that the defender ever held in security."

Now, then, assume that this £2500, which according to the form of the transaction parties entered into was the price of this vessel on the stocks, was a loan of so much money, what was it that the lender stipulated for, and which the borrower agreed to give under the terms of the contract of sale, legal and enforcible. Under that contract, if the case of *Duncanson* is good, he could have got delivery of the ship. I am of opinion that the case of *Duncanson* is well decided, and that under the formal contract which was agreed upon between the parties the respondents are entitled to delivery of the ship. How far equity will interfere in restraining the use of it when they get it is another matter. I think it probable, perhaps certain, upon the grounds which your Lordship has indicated, although it is unnecessary for us to determine that question, that Wallace & Company would be ordered to retransfer the ship upon payment of £2550, with interest; but we do not need to determine that here, any more than the Court had to determine it in the case of *Leckie*—for the money is offered. Wallace & Company say—"Give us what the contract which was agreed upon between us confers upon us. Execute that contract. Give us the ship. Assume that we advance the money on the security of having that. Give us that. It was a valid contract between the parties. Equity may restrain us from speculating as the owners of the ship, that is, by profiting by any advance of price upon a re-sale. We meet you there, and avoid all litigation about that matter. We wanted to secure the money we have paid." I think that which the Court held to be reasonable in the case of *Leckie* is reasonable here. The cases are very much on all fours; and we cannot permit a trustee in bankruptcy to interfere to prevent an *ex facie* lawful and enforcible contract of the parties.

I therefore entirely concur with your Lordship, and think this interlocutor ought to be recalled, and the reasons of suspension disallowed.

Lord Craighill—I concur in the result at which both your Lordships have arrived; and as the grounds of Lord Young's opinion are precisely the grounds on which I rest my judgment, I need scarcely say anything in explanation of the views by which I am influenced.

The Court recalled the interlocutor of the Lord Ordinary, repelled the reasons of suspension, and refused the note of suspension and interdict.

Counsel for Reclaimers and Respondents—Guthrie Smith—V. Campbell. Agent—William Archibald, S.S.C.

Counsel for Respondent and Complainer—Dean of Faculty (Fraser, Q.C.)—Rhind. Agent—William Officer, S.S.C.

Thursday, January 13.

SECOND DIVISION.

[Lord Adam, Ordinary.

RALSTON *v.* RALSTON.

Husband and Wife — Divorce — Condonation—Whether Condonation can be Proved by Letter, and the Knowledge of the Adultery without Cohabitation.

A husband, who was aware of one act of adultery on the part of his wife, but not of a prior act of which she had also been guilty, wrote to her during his absence from the country several affectionate letters expressing his desire to meet her again, in one of which he assured her of his "full forgiveness for what had happened." *Held* that assuming the adultery of which he was aware