the loss of the subject sold, while there remained enough to satisfy the buyer's demand. Such I take to be the clear doctrine of the authorities on this subject, to which reference has been made in the argument.

The facts established in this case by the proof are such as to prevent it falling within the operation of that principle, or even assuming it to be well founded. [*Here the writing of 14th June and 19th December* 1865, *and relative invoices, were referred to by his Lordship.*] Then "in store to your orders," what do these words mean? In themselves they can only imply that the very oil sold was to be stored and kept for the buyer. But that was not here done. I take the fact to be that the alleged storage of the oil by the sellers, and its remaining in their custody till the buyer should require it to be delivered, was in substance and effect a prolongation of the period of delivery of the quantity of oil undelivered. The demand for the oil when made was to be then satisfied out of a general stock of refined oil invoiced to the various customers of the sellers, and at the time in stock. It was not a demand which could be satisfied by delivery of oil left as at the date of the sale in the custody of the sellers,—whether entirely set apart or mixed with other oil belonging to them,—and which they had kept separately in store during the intervening period between the date of the sale or of the engagement to store from the date of the invoice and the date of the demand for delivery. The proved arrangement, as I regard it in this case, was for the mutual benefit of the parties. On the one hand, the sellers were enabled to deal with the undelivered oil as a part of their general stock in store to meet the demands of the several parties to whom the invoiced oil belonged; and, on the other hand, the buyer was secured from the loss by leakage, to be secured by the oil which they had bought being kept in the seller's tanks. In this situation the risk of the destroyed oil cannot be held to have attached to the buyers. There may be a general obligation implied in a contract of sale to deliver a quantity of sugar or of grain out of the general stock of the seller. In such cases, there being no specific subjects or thing set apart, no risk can attach to the buyer. Such I apprehend to be the character of this contract, and therefore, upon the whole, I am of opinion that the judgment of the Sheriff should be affirmed.

Lord Benholme—The general rule is *Periculum rei venditæ nondum traditæ est emptoris.* But to apply this maxim we must know what is the *res vendita.* Can there be such a complete sale as to transfer the risk when you can't identify the subject? I think not. There may be a contract—I think here there is a contract—to furnish, which is different from sale, though in common parlance it is called sale. One view suggested is that the oil sold was oil out of a particular tank. If that be correct the destruction of that tank would relieve the seller. But no such limitation was brought home to the knowledge of the purchasers. If this limitation can't be listened to, the only other is that the oil bought was oil within the stock of the sellers at the date of the purchase, which you could in some way ascertain, and it might be said that if the whole of that stock were gone the sellers were relieved. But that does not suit the case of the defenders; for here they say that their liability was limited to stock which was not there at the date of the sale, and which might never at any time be there. This is a much more vague limitation. The subject could never be said to be the same at the date of sale as at the date of delivery. Now, to a complete sale there must be a definite price and a definite subject. If the subject be not ascertained, there is no such contract of sale as to carry among other consequences that of risk. A very common contract is an engagement to furnish articles which may not be in existence, and there, until they are made and separated, or marked out, the risk does not pass. Identification of the subject is necessary to pass the risk. The observation of the Sheriff-Substitute is of importance, that there was no default on the part of the buyer in taking delivery, for it was matter of agreement between the parties that the oil should lie in the sellers' store, and so the American case quoted to us loses its whole force, for it turned on the admitted laches of the purchaser.

Lord Neaves agreed with the majority. There are two aspects of the case. The one is that it is a contract of sale up to the last moment; the other (the Lord Justice-Clerk's) is, that the contract of sale had ceased, and that the parties were acting under an engagement other than sale. If it be sale, there is no difficulty. The *periculum* in these contracts is settled on very clear grounds. The first principle is *Res perit domino*, but there is the exception to it, *Periculum rei venditæ nondum traditæ est emptoris.* But then the latter has its limitations, and one of these applies here and is stated by Vinnius (i. 24, 3), *Periculum rei venditæ. Id est certæ speciei. Aliud est si quis v. c. vendiderit decem boves in genere: nam genus perire non potest.* Now in this case down to Dec. 1865 that was the plain state of the facts. Then what took place? If it was a prorogation of the non-delivery and a postponement of the obligation to take delivery, then things remained as before; if it was not that, and a new contract was made, what was that contract? It turns on the use of these words, "in store to your order," in the invoice, and "to lay by us as before until you require it," in the relative letter. If the oil was to lie in store according to the natural meaning of the words, the sellers were to keep it in mere custody as depositories for the purchasers. But that implied the absence of the slightest power in the depositories to intromit with the oil, and if they did so, they were embezzlers or worse. If it be the contract of deposit, the depositors have broken the contract. If it be not deposit, what is it? If this property in this oil had past and been again delivered back to the sellers into their stores, with the power to them of disposing of it, but under an obligation to restore an equivalent quantity for what they take, that is a perfectly well-known contract; it is *Mutuum* of the Civil Law, and there undoubtedly the risk is with the holder of the fungible.

The judgment of the Sheriff was accordingly affirmed.

Agent for Appellants.—John Walls, S.S.C.
Agent for Respondents.—A. Kirk Mackie, S.S.C.

Wednesday, November 16.

FIRST DIVISION.

MUIR *v.* KERR AND OTHERS.

Relevancy — Fraud — Knowledge of Purchaser in

Sequestration. Averments of fraud and knowledge thereof which were not held relevant or sufficient in law to sustain an action of reduction of a sequestration (the proceedings in which were *ex facie* regular), and of assignations granted by the trustee in the sequestration, and following on a purchase made at a public sale duly advertised, and for a full price.

This was an action brought for the reduction, on the head of fraud, of the proceedings in the sequestration of the defender Kerr, and also for the reduction of certain assignations by the trustee under the sequestration to another defender, Kyle, of several tack rights, the property of Kerr, which had been sold under the sequestration to Kyle at a public sale, after due advertisement, and for a full price. The fraud was alleged to consist in the title of the concurring creditor in the sequestration having been concocted by Kerr in order to obtain his consent. The other defenders to the action are the trustee and the commissioners in the sequestration, but all the creditors under the sequestration are not called. The pursuer alleged that he was in possession of prior assignations to the tack rights, which he had procured from the defender Kerr previous to his sequestration, and for value received, but these assignations were unintimated, and the trustee stated that they were granted with a view to defraud the other creditors of the bankrupt, being in favour of the pursuer, who is brother-in-law to the bankrupt and a conjunct and confident person with him; and that, moreover, the price was illusory and never really paid to the bankrupt. The pursuer averred in his condescendence a general knowledge of the fraudulent nature of the transaction by which the sequestration was obtained on the part of all the defenders, and also that they were warned against proceeding with the sale. The sale took place in May 1868, and the pursuer, in one of his answers to the defenders' statement, stated that he was ignorant of the fraudulent nature of the proceedings until February 1869. The defenders pleaded that the pursuer had failed to make out a relevant case against them. The Lord Ordinary (MURE), after giving the pursuer an opportunity of making a more specific averment of knowledge on the part of the defender Kyle of the nature of the transaction, which the pursuer declined to avail himself of, dismissed the action, on the ground that the pursuer's statement was irrelevant and not sufficient in law to support the conclusions of the summons, the proceedings in the sequestration being *ex facie* regular. The pursuer reclaimed.

MILLAR, Q.C., and RHIND, for him, argued that there was a sufficiently specific averment of knowledge on the part of Kyle, and also that this action of reduction was competent, in so far as the pursuer had been in ignorance of the fraudulent nature of the sequestration until the period allowed by statute for applying for the recal of the sequestration had elapsed.

BALFOUR, for the defenders, was not called upon.

At advising—

LORD PRESIDENT—I do not suppose that there is any doubt in your Lordships' minds that the Lord Ordinary is right. The grounds for this reduction are quite inadequate. There would, moreover, be very great difficulty in setting aside the sequestration proceedings. There is no allegation of fraud against the defender Kyle, nor is there even an attempt at it. He purchased these tack rights at a public sale duly advertised, and for a full price. If the pursuer had been in a position to make a specific averment of fraud or knowledge against Kyle, he had an opportunity given him by the Lord Ordinary to do so; but he refused to take advantage of it, and did not amend his record. I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

The other judges concurred.

The Lord Ordinary's interlocutor was accordingly unanimously adhered to.

Agent for Pursuer — William Officer, S.S.C.
Agent for Defenders—A. Kirk Mackie, S.S.C.

Thursday, November 17.

HARVIE *v.* STEWART.

Interdict—Res Judicata — *Property — Servitude—Charter by Progress, effect of Alterations on—Extinction of Right.* A was superior of the lands of Brownlee; B was vassal in certain parts thereof, called Townhead and Townfoot; and C was a co-vassal of B, under the same superior, holding certain other parts of Brownlee, called Coblehaugh and Peelhouse. In the original grant to C's predecessor, Hamilton of Garion, dated 1530, there was inserted a right to take as many coals from the lands of Brownlee as were necessary for the vassal's domestic uses. This right was gradually extended in various charters of progress till, in 1605, it became a right to coal out of the lands of Brownlee, for domestic uses, and to sell or give away at pleasure. The grant to B's authors, on the other hand, contained the coal in their lands, but reserving Hamilton of Garion's right, as contained in the ancient infeftments of the same. A, the superior, and C, the co-vassal, both claimed to be in right of Hamilton of Garion, and to have a right over the coal of B's lands. B disputed the claim of both. B and C, having come to an amicable arrangement, began to work the coal, and A therefore sought interdict against them, not as superior, but as in right of Hamilton of Garion. C claimed as in right of certain apprisings of Hamilton of Garion's lands, including, as he contended, this right of coal. A claimed on the ground that the right had remained in him by resignation from C, after he had acquired Hamilton of Garion's lands, and had not been given out again by him to C in subsequent charters. A had in 1794 inserted a clause in B's investiture stating that he, A, was now in right of the reservation in favour of Hamilton of Garion, and in an action of reduction in 1810 it was found that B had, under the circumstances, no title to object to that insertion, and obtain its deletion from his titles. It was admitted that there had been no working of the coal by any of the parties, which could be founded on in the action.

Interdict refused (*dissenting* Lord Kinloch) on the grounds, (1) That A, the superior, had failed to instruct that he was now in right of Hamilton of Garion; (2) and that, even if he were so, he had failed to show that Hamilton of Garion's reserved right was one of property in the coal, which would entitle him to interdict