pp. 487, 498).—'I may venture to say, that whatever may be the effect of the grant of a barony described to be on the sea-shore, there is no foundation in law for the position that a simple grant of a piece of land will pass the sea-shore by which it happens to be bounded.' Even in the case of a Crown grant and a barony, and a boundary *de facto* by the sea, the Court have hesitated to hold that the property of the sea-shore was thereby conferred. In *Lord Saltoun* v. *Park* the Court refused to insert in their judgment a finding that the shore was the pursuer's property, while they affirmed his right to the wreck and ware. The only other matter to advert to is an offer of proof made by the pursuer. He says that his authors have, from time immemorial, occupied and possessed the beach or shore down to low-water mark, *ex adverso* of the lands of Auchinleck, and that by all acts of proprietorship and possession of which the same were susceptible, and *inter alia*, by storing timber, gathering sea ware, taking gravel, and other acts of proprietorship. That, at least for the last seven years, the petitioner's authors had been in the possession and occupancy of the shore-ground in question without objection. Whatever value these allegations might be of, if established by proof, a proof of them is not competent, unless the party establishing them, and seeking the possessory judgment, be possessed of a title to the subject. Neither the petitioner nor his authors have produced such a title. Although the Sheriff-Substitute has noticed shortly the arguments on the merits that were pleaded to him, the grounds on which he has placed his decision are—That not having been able to show any title to the foreshores, the mode of obtaining one by proof that his lands are on the shores of the Clyde, and by inference from that fact that the foreshore must be included in his grant, is a proceeding so entirely of the nature of an action of declarator that it is quite incompetent in this process or Court; and that in so far as the allegations of possession are concerned, they cannot be proved, as no title is alleged."

The petitioner appealed to the Sheriff (FRASER), who dismissed the appeal, remarking in his note:—"At the debate in this cause it was suggested that a declarator should be brought, so as to clear up the rights of parties, and the Sheriff understood that such an action would be brought. But as this has not been done, the Sheriff must now dispose of the case as one for a possessory judgment. Now, to obtain a possessory judgment it is necessary that the party applying for it shall have a title (*Nelson* v. *Vallance*, 10th Dec. 1828, 7 Shaw and Dun, 182). This is as necessary as in an action of declarator; and the question comes to be, whether or not the petitioner has such a title? His author got a conveyance to certain lands, which are *de facto* said to be bounded by the river Clyde. These lands are not erected into a barony —they are not described as bounded by the river —but it is said that for the prescriptive period the petitioner's author has occupied the fore-shore, and that in this he has got a title to the shore. The petitioner's right, founding upon that of his author, is not rested simply upon his title, but upon his title combined with possession. Such a right can only be established by a declarator. The Sheriff has no power to enquire into this matter. The right must be established by a declarator, if it exists; and in all probability the Court will order the Clyde Trustees and the Crown to be called as parties to such an action. The case of *Hunter* v. *Maule*, 26th January 1827, 5 S. 238, is an authority to the effect that in order to obtain a possessory judgment there must be an *ex facie* title to the property claimed, and the Sheriff cannot find in the titles of the petitioner's author any right to the foreshore. Possession, no doubt, may give the petitioner that right, but that must be established in the proper action in the Supreme Court."

The petitioner appealed to the Court of Session.

TAYLOR INNES, for him, argued he had title to the foreshore as part and pertinent of his lands, so as to give a basis for a possessory judgment, Bell's Prin. 641; *Fullerton*, M. 12,524; *Innes* v. *Downie*, Hume 553, 1807; *Campbell* v. *Brown*, F.C., 18th Nov. 1813; *Officers of State* v. *Smith*, 8 D. 711; *Hunter* v. *Lord Advocate*, 7 Macph. 899.

MACDONALD in answer.

At advising—

LORD JUSTICE-CLERK—It is better that we should not say anything on the larger points. On the merits of the Sheriff's judgment I have no doubt. The party says he has the foreshore under his titles, or under his titles and possession. I do not think he has it under his titles alone. (1) As to possession, what is proposed to be done is to obstruct the public in the natural and primary use of the shore. How far a grant from the Crown would entitle a proprietor to do so is not *hujus loci*. But (2) looking to the respondent's peculiar interest in the matter, there is enough upon record to enable us to refuse the interdict.

LORD COWAN—There can be no doubt that the operations contemplated were works of such a kind as necessarily excluded all access to walkers and to the public generally. That being so, respondent *brevi manu* removed these palisades. Then this interdict is asked for the very purpose of making this erection.

Had there been a clear grant of shore to this party, this might have entitled him to an interdict against interruption; or had there been exclusive possession for more than seven years, the possessory argument might have been good.

LORD BENHOLME concurred, but doubted whether they should disturb the Sheriff's interlocutor. He thought there was no title to the sea-shore sufficient to exclude the public. A title to lands adjoining sea-shore had been never held to be a title to the *dominium* of the sea-shore.

LORD NEAVES concurred, but was not prepared to say that, even if there had been an express grant of sea-shore, the party, so long as it was a shore, could exclude the public.

Appeal dismissed.

Agent for Appellant—Thos. Landale, S.S.C.

Agent for Respondent—Adam Shiel, S.S.C.

Tuesday, November 15.

WILLIAM WALLS & CO. *v.* ANDERSON AND CROMPTON.

Sale — Fungible — Specific Appropriation — Risk — Deposit—Mutuum—*Damages.* 750 gallons of oil having been sold by W. & Co. to A. & C. at so much per gallon, to be delivered when re-

quired within six months, and having on the expiry of the six months been invoiced to A. & C., and the invoice intimated to them, with the words added, "In store to your order," and with a letter from W. & Co. to A. & C. containing the words, "We presume you intend the oil to lay beside us as before until you require it," and the price having thereafter been paid, and 37 gallons delivered, but no separation or appropriation to A. & C. of the rest of the oil having been made, and a fire having consumed the whole of W. & Co.'s stock.—*Held* (*diss.* Lord Justice-Clerk), that the risk of the undelivered oil had not passed to A. & C.

Prior to 1863 the appellants, Walls & Company, who are oil merchants in Glasgow, had transactions with the respondents, Anderson & Crompton, who are cotton-spinners at Ashton, near Preston, in the sale of oil to the latter. On 30th July 1864 the appellants sold to the respondents "1260 gallons of sperm oil at 6s. 8d. per gallon, to be delivered when required before the end of March next, conform to sale note, which contained the following clause—"In the event of any fall in price, we agree to charge the oil at the current market rate at date of invoice." On 15th December 1864 a contract in similar terms was entered into between the parties for 500 gallons "at 6s. per gallon, to be delivered when required within six months from this date." And on 14th June 1865 another contract in similar terms was entered into for 750 gallons "at 7s. 10d. per gallon, to be delivered when required within six months from this date." The two latter contracts contained a similar clause as to any fall in the market price. The 1000 gallons remaining undelivered under the first contract, were invoiced in the appellants' books to the respondents on 24th January 1865, as arranged between the parties, because an advance in the price of the oil was expected. The 500 gallons under the second contract were invoiced on 19th June 1865, and the 750 gallons under the third contract were invoiced on 18th December 1865. Invoices were in each case sent to the respondents, showing the amount due and the terms of payment, and bearing at the foot the words "In store to your order." The appellants wrote on 19th December 1865, with the third invoice, in the following terms—"The time having now expired for you taking delivery of the sperm oil as per contract of June last, we beg to enclose invoice of it, we presume you intend the oil to lay beside us as before until you require it."

Prior to 13th July 1866 the whole oil purchased had been paid for, and the whole oil contained in the first and second contracts, and 37 gallons of the third, had been delivered. On that day a fire took place, and consumed the whole sperm oil in the appellants' stores in Glasgow. The respondents demanded delivery of 713 gallons, the remaining portion of the last order. The appellants refused, but offered to deliver half the quantity. This offer was refused by the respondents (pursuers in the Sheriff-court), who raised an action against the appellants there, concluding (1) for delivery of 713 gallons; and (2) for payment of £300 as damages for delay in delivery; or otherwise, (3) failing delivery, for payment of £600 as damages for such failure.

From the evidence it appeared that the oil invoiced, but not delivered, was kept in three tanks on the appellants' premises, which also contained undelivered oil of other customers, as well as some of the appellants' own oil, the latter taking care to have enough in these tanks to meet all the invoices. The respondents knew nothing about where the oil was kept further than that it was invoiced to their order. It also appeared that the substance of the oil was constantly changing, the oil drawn off to supply other customers, or for the appellants' own purposes, being afterwards replaced in the tanks. The object of having the oil stored in the appellants' tanks, after invoice, was to save leakage, as oil in the best casks and stores leaks at the rate of 2½ per cent. per an.; and the appellants agreed to let it remain in store for the respondents till delivery was asked. No storage rent was paid. The appellants had no other sperm oil of the kind sold, in Glasgow or elsewhere, besides what was consumed by the fire. The appellants' stock-book (which was made up at 30th June in each year) showed for the year 1866 the total amount of the appellants' oil in stock at 40,501, under deduction of "Invoiced, but not delivered, as under 7859," one item of the latter sum being "Anderson & Crompton, 713."

The pursuers (appellants) pleaded that under the contract they were entitled to delivery, and that the sums of damages alternately claimed were reasonable. The defenders (respondents) pleaded that the time for delivery being long past, and the defenders having been ready to deliver, the risk had past. That the pursuers having been *in mora* in not demanding delivery earlier, the defenders were not responsible for the loss. That after the date fixed for delivery the defenders held as the pursuers' depositories, and the oil having perished without fault, they were not liable.

The Sheriff-Substitute (GALBRAITH) *inter alia* "found that the oil not having been separated and set apart for the pursuers (respondents) in the defenders' (appellants') premises, the risk of the property did not at any time pass to the pursuers," and he sent the case to his roll for further procedure.

The Sheriff-Depute (GLASSFORD BELL) adhered, and dismissed the appeal.

The defenders appealed.

DEAN OF FACULTY (GORDON) and SCOTT, for them, maintained that the contract imported delivery within the six months, and consequently the respondents were *in mora* in not taking delivery by that time; and it afterwards remained in the appellants' premises not under the contract, but either on sufferance,—the risk having past to the respondents,—or in virtue of a new arrangement, under which the appellants became the gratuitous depositories of the respondents, and not liable for accidental destruction. In support of the former alternative they quoted 1 Parsons on Contracts, 5th edition note (*z*), p. 532; and the American (Carolina) case of *Wellard* v. *Perkins*, 1 Busbee's Law Reports. The want of specific appropriation of the oil in the three tanks should not prevent the transfer of the risk. It was the same in principle as the alternative sale of one of two articles, where in the Roman law the destruction of both liberated the seller from his obligation to deliver, while the buyer remained bound for the price. D. lib. 18, tit. 1. 34, § 6; Domat, 1, 2, 5, 12; 1 Bell's Com. (M'Laren's edition), 461, note.

SOLICITOR-GENERAL (CLARK) and BRAND, for respondents, in reply, maintained that the oil was stored in virtue of the contract, not by favour of the appellants,—that there was no *mora* in taking

delivery, that even though there were *mora*, mere delay could not change the risk where no specific oil was mentioned in the contract, and none had since been separated or appropriated to the respondents, which it was necessary should be done with the respondents' consent. The contract of deposit equally required the appropriation of the subject.

At advising—

THE LORD JUSTICE-CLERK said—This is an action by the pursuers (respondents) to vindicate delivery of oil purchased by them from the defenders (appellants), and which the defenders bound themselves to retain till required by the pursuers, and there are conclusions for damages. The defence is that the oil has been consumed by fire, *damnum fatale*, and that the risk lay with the pursuers.

The contract under which this demand is made is stated in an invoice, dated 18th December 1865, to the effect that the respondents bought of the appellants,—"Terms, cash in a month less 2½ *o/o* discount. Contract for sperm oil, dated 17th June. In store to your order, 750 gallons, at 7s. 10d., £293, 15s.;" and in the letter of 19th December 1865 from the appellants to the respondents, which accompanied the invoice, in these terms (*quotes ut supra*). The question relates to the liabilities of the two parties under the arrangement embraced in the invoice and letter.

It appears that the oil was purchased on 14th June 1865, and the sale-note bears (*quotes ut supra*); and then there is an undertaking by which the purchasers were to get the benefit of any fall in price during six months from that date, and the purchasers were bound to take delivery by that time. But when the six months had expired, and the purchasers had become bound to take delivery, an offer was made to them that the sellers would hold it on still in their store, and the purchasers preferred this course, and there is no doubt that it was done for the accommodation of the purchasers. The Solicitor-General suggested that the sellers had the benefit of the purchasers' stock lying in their stores, but I cannot see that, because they were bound to replace every gallon they took away, and to be ready to deliver the whole at any moment. The reason is explained in the evidence by Mr Bishop—"It was to be stored in tanks to save leakage. Even with careful watching, oil in the best casks and stores leaks 2½ per cent per annum. It was entirely to oblige pursuers that I agreed to store the oil. . . . It was an inconvenience to us to keep the oil for pursuers." And there is nothing in the other evidence against that, and therefore it was the arrangement of parties that the oil should be left in the store to save leakage. The sellers undertook to store it in their tanks. It is in vain, therefore, to say that it should have been stored as a separate *corpus*, the meaning of the arrangement being that it should be stored in the large tanks to prevent part being lost. The Solicitor-General asked if that engagement was fairly implemented, but that is, I think, not doubtful, for, apart from the fact that one tank was kept for purchasers' oil, the nature of the arrangement implied that oil of that kind was to be kept for the purchasers for delivery from time to time as required, and that was done. The sellers had it to the purchasers' order when they required it. But a fire took place in July 1866 and consumed all the oil of that kind which the sellers had in their stores in Glasgow or anywhere, and therefore if the contract of storage was implemented, the oil which was stored perished. The consequences of this, the purchasers say, is that the sellers are bound to replace the oil. But I can find no such obligation in the contract. This case does not depend upon the general law of sale and purchase. The time for delivery had arrived, and the sellers might have put the oil into casks, and so made it specific, whereby the risk would pass to the purchasers. But they undertook to deliver to order, and it was a peculiarity of that undertaking that the oil should be mixed with other oil, but this was from the necessity of the case, and for the benefit of the purchasers. It was not the less, however, a delivery to order. I don't think it can be said with any justice that the sellers, while they passed from the power of specifying and setting apart the oil, and allowed the purchasers the gratuitous use of their stores, also kept up against themselves the liability for the loss of the purchasers' oil by a *damnum fatale*. By that occurrence the contract became imprestable. There was no obligation to buy other oil, and if the sellers stopped manufacturing, as they were entitled to do, they had none to supply. It is not a question as to alteration of the species. It makes no difficulty that the *ipsum corpus* was not the same when delivery was demanded as when it was put into the tank. We must take it substantially as delivery tendered and declined, and a new arrangement made for its remaining in the store.

LORD COWAN—There is no dispute between the parties as regards the principles in the law of sale which have to be kept in view in the decision of this case. By the law of Scotland the property of moveables can only be transferred by delivery, or what is equivalent to it. But although not delivered, the risk of the goods bought, still remaining in the custody of the seller, is with the buyer, so that in the event of their being lost or destroyed without any fault on the part of the seller, the loss accrues to the buyer; he is bound to pay the price, unless already paid, on the one hand, while, on the other, the seller's obligation to make delivery can no longer be enforced. There can be no doubt of the application of these principles where the subject of the sale is specific, and no duty remains on the part of the seller to do all that may be necessary to prepare the goods for delivery, or to designate and set them apart as such. It is where the goods have not been so individualised and set apart as to mark them out to be the very things sold, but where they still remain, to some extent at least, mixed with the seller's own goods, that the difficulty arises with regard to the application of the principles now stated.

Supposing the oil which is here the subject of the contract had been set apart by the seller for the buyer, there could have been no doubt that the risk attached to the latter; but no such case here exists as matter of fact.

Again, supposing that the oil had been left in the hands of the seller, and, by arrangement with the buyer, kept in a tank along with other oil belonging to the seller—it might have been contended to be sufficient individualising of the article sold, to have, in the event of the whole being destroyed by fire through accident, the loss apportioned between the parties. It would not be so were only a portion of the oil thus kept in store destroyed;—for the seller could not throw on the buyer

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