same interest shall, if legally possible, be made available to his creditors. In the case of *Elliot* v. *Elliot*, 1698, M. 4130, 9782, the Court had to consider a case where a person who had died insolvent possessed a reserved faculty to burden an estate which he had conveyed away when he was solvent to a person whom the Court ultimately held not to be liable as heir of provision. The decision (p. 4131) was "that the creditors of a father having a faculty to burden have the benefit of that faculty, *eo ipso* that they are lawful creditors, unless another estate can be condescended upon which may effectually operate their payment."

For these reasons I concur in the judgment about to be pronounced. I cannot, however, agree with some of their Lordships in thinking that it derives any support from the statement of Erskine (iii, 9, 25) to the effect that "a widow cannot be compelled to collate legacies or donations given to her by her husband and thereby to increase the legitim." The learned writer is here dealing with the question whether a widow who claims *jus relictæ* can be compelled at the instance of the children to collate moveable property which she has received either by bequest or by gift from her husband. In the case of *Trotter*, 1677, M. 2375, cited by Erskine, the converse contention had been unsuccessfully put forward by a widow, viz., that if the only child of the deceased refused to collate the widow would be entitled to one-half instead of one-third of the goods in communion. In the passage above quoted Erskine is not considering the question whether the widow who is lawfully in possession of moveable property gifted or specially bequeathed to her by her husband can be compelled to give an account of it (whether she does or does not claim *jus relictæ*) in order that its value may be taken into account in ascertaining the legitim, and in order that decree may issue against her for any balance that may remain due to the children after the general moveable estate in the hands of the executor, which, of course, is primarily liable for the legitim, has been exhausted. Obviously no question of collation can arise in regard to property the value of which the widow is bound to pay to the children because the general moveable estate in the hands of the executor is insufficient to meet their claim in full. If Erskine in the passage cited had been considering any question of contribution as distinguished from collation, the fact that he couples together legacies and donations would have been practically conclusive in favour of the second parties, as the inference would have been that in his opinion donations like special legacies must enter the legitim account and must if necessary contribute to satisfy the claim of the legitim creditors. As, however, the passage in question deals solely with collation, it will continue to be an accurate statement of the law even if the House of Lords should hereafter decide that moveable property received by a wife by *inter vivos* gift from her husband is in all questions as to legitim from her husband's estate in exactly the same position as if she had received it by donation *mortis causa* or by special legacy.

The Court answered the first question in the negative.

Counsel for the First and Third Parties—Blackburn, K.C.—R. C. Henderson. Agents—R. R. Simpson & Lawson, W.S.

Counsel for the Second Parties—Chree, K.C.—T. S. Robertson. Agents—Gordon, Falconer, & Fairweather, W.S.

Tuesday, July 4.

SECOND DIVISION.

DAMPSKIBSAKTIESELSKAPET AURDAL *v.* COMPANIA DE NAVEGACION LA ESTRELLA.

Contract—Ship—Sale—War—Royal Decree of Foreign Power Prohibiting Transfer of Ship by Sellers in Contract of Sale.

Spaniards, the owners of a ship, contracted to sell her to Norwegians. Subsequent to the contract, but before the transfer was effected, a Spanish royal decree prohibited the sale to foreigners of all Spanish-owned ships. The buyers brought an action for implement. They tendered a Spanish transferee. *Held* that, on the sale to the transferee being proved the pursuers were entitled to a finding that the defenders were bound to execute a legal bill of sale.

The Dampskibsaktieselskapet Aurdal, of Fjosanger, Norway, and others, *pursuers*, brought an action against the Compania de Navegacion la Estrella, Bilbao, *defenders*, to have the defenders ordained (1) to implement a contract for the sale to the pursuers of the s.s. "Elorrio" by delivering, in exchange for the purchase price of £54,000, (*a*) to them a legal bill of sale so that they could procure themselves registered as owners of the said ship, or (*b*) to Blas de Otero, San Sebastian, Spain, a legal bill of sale so that he could procure himself registered as owner of said ship, and to pay the pursuers £30,000, or alternatively to pay the pursuers £65,000.

The pursuers *pleaded*—1. The defenders having contracted and agreed to sell the steamer in question to the pursuers, are bound to implement their contract, and decree should be pronounced in terms of the conclusion of the summons for implement and damages. 2. Failing implement, the pursuers are entitled to decree in terms of the alternative conclusion of the summons. 3. The averments of the defenders as to the impossibility of implementing the contract on account of the terms of the royal decree referred to being irrelevant, ought not to be remitted to probation."

The defenders pleaded, *inter alia*—"2. The fulfilment of the contract with the pursuers having become impossible by reason of a supervening law of Spain which the defenders are bound to obey, the defenders should be assoilzied from the conclusions of

the summons. 3. The carrying out of the said contract having become impossible without the fault of the defenders they are entitled to absolvitor. 4. The pursuers not having suffered any damage through the fault of the defenders, the defenders should be assoilzied from the conclusions of the summons for damages."

The following *averment* is referred to in the opinions—"(Cond. 3) . . . Since this action was raised the pursuers have re-sold the 'Elorrio' to Blas de Otero, shipowner, San Sebastian, Spain, for £83,000. The said Blas de Otero is a Spanish subject. The pursuers have called on the defenders to execute a bill of sale of the 'Elorrio' in favour of the said Blas de Otero. The said decree would in no way prevent the defenders executing such a bill of sale, but they decline to do so."

The *facts* are given in the opinion of the Lord Ordinary (DEWAR), who on 21st June 1916 pronounced this interlocutor—"Sustains the third plea-in-law for the pursuers, and decerns against the defenders in terms of the alternative conclusion (*b*) of the summons; *quoad ultra* allows to the pursuers a proof of the averments of damages. . . ."

Opinion.—"The pursuers are shipowners in Norway, and they bring this action against the defenders—a firm of Spanish shipowners—for delivery of the s.s. 'Elorrio,' and for damages for failure to deliver in terms of a contract entered into between parties on 17th November 1915. The defenders admit the contract, but they say that the fulfilment of it has been rendered impossible by a supervening law of Spain, which prohibited the sale of Spanish vessels to foreigners, and that they are accordingly discharged from their obligation to deliver, and are not liable in damages.

"The material *facts* are as follows—The contract was made in London on 17th November 1915. It provides that defenders' vessel 'Elorrio,' which was then on a voyage to Naples, should be brought back from Naples to the United Kingdom when she had discharged her cargo, for docking and delivery to the pursuers. The purchase price was £54,000, to be paid in cash in London within seven days of the date when the steamer was ready for delivery in exchange for documents in London, The pursuers agreed to deposit, and did deposit, 10 per cent. of the purchase price in joint names when the contract was signed. After discharging her cargo at Naples the 'Elorrio' arrived at Troon on 26th January 1916. She was docked and surveyed by Lloyds' surveyors and deemed ready for delivery. The pursuers then deposited the whole balance of the price, and asked the defenders to execute a bill of sale in their favour in terms of the contract. The defenders professed to be anxious to do so, but explained that on 7th January 1916 His Majesty the King of Spain had issued a royal decree prohibiting the sale of Spanish vessels to foreigners. They said that they were bound to obey this decree, and asked the pursuers to relieve them from their contract. The pursuers declined. They explained that on the faith of the contract they had chartered the vessel to a firm of Glasgow coal exporters, and, besides, the 'Elorrio' had enormously increased in value since the date of the contract, and to cancel the bargain would involve them in very serious loss. The defenders did not dispute that the vessel had largely increased in value, but they adhered to their contention that they were bound to obey the royal decree, and they declined to deliver. The pursuers then raised this action to have the question determined, and used arrestments to found jurisdiction. Originally the summons concluded only for delivery of the 'Elorrio' to the pursuers, and for damages. But to meet the difficulty which the defenders had raised about transferring to a foreigner, the pursuers endeavoured to find a Spanish purchaser, and they succeeded. On they re-sold the 'Elorrio' to Blas de Otero, shipowner, San Sebastian, Spain, for the sum of £83,000. As he is a Spanish subject carrying on business in Spain, and the royal decree does not forbid the sale of a vessel to a Spanish subject, the pursuers asked the defenders to transfer the vessel to him, but they declined. The pursuers then, on 23rd May 1916, asked and obtained the leave of the Court to amend their summons by adding an alternative conclusion (*b*) to the effect that the defenders were bound to deliver to the said Blas de Otero a legal bill of sale duly executed by them in exchange for the said deposited purchase price, and they now ask for decree in terms of this conclusion, and for a proof of their averments of damages for failure to deliver in terms of the contract.

"I have considered the arguments presented on behalf of both parties, and I am of opinion that the pursuers' contention is well founded and that their motion ought to be granted.

"The case which was presented on behalf of the defenders was that they were anxious to implement their obligation under the contract, but unfortunately the royal decree prevented them doing so. They did not deny that this would result in a serious loss to the pursuers and a corresponding gain to themselves. But they said that they had asked the Spanish Ministry for authority to transfer the vessel to the pursuers and authority had been refused. Accordingly, as loyal subjects of the King of Spain they must obey the royal decree, and it was suggested that the consequences might be serious if, in the face of the decree, they transferred the vessel to a foreigner.

"But they are not asked to transfer to a foreigner. They were asked to transfer to a Spanish subject resident in Spain. They do not say that they ever asked the permission of the Spanish Ministry to transfer to Blas de Otero. Permission, indeed, does not appear to be necessary. The royal decree does not forbid such a transference. It was designed to prevent the loss of the services of Spanish vessels to the Spanish nation at a time when tonnage is scarce and valuable. By the transference which the pursuers ask the services of the 'Elorrio' will in fact be retained to Spain. There is therefore no conflict between the defenders' duty to the pursuers and loyalty to their

own law. They can implement their obligation with perfect loyalty, and I think they ought to do so without delay. A transference to Blas de Otero will place her services at the disposal of the Spanish nation. If the defenders are really anxious to obey the royal decree, an immediate transference will show obedience to its spirit and will be strictly in accordance with the letter. It will also show that they are prepared to recognise the pursuers' rights under the contract. The 'Elorrio' is admittedly worth £29,000 more than at the date of the sale. That sum really belongs to the pursuers. The defenders do not offer to pay it. On the contrary they propose by retaining the vessel to keep it to themselves. I cannot sanction such a proposal. It appears to me to be fundamentally unjust.

"I am accordingly of opinion that the pursuers are entitled to decree in terms of the alternative conclusion (*b*) of the summons.

"I am also of opinion that they are entitled to proof of their averments of damages. In my view the defenders should have transferred the vessel to the pursuers when she was surveyed and ready for delivery. I do not think that their plea that the contract became impossible of fulfilment by reason of a supervening law of Spain is well founded. So far as I can see there was no supervening law of Spain which affected the contract in any way.

"The royal decree was issued on 7th January 1916. By the first article it provides that 'the sale is prohibited to all foreigners of whatever description they may be of all merchant vessels . . . ' &c. That is to say, it prohibits the sale of vessels from and after the date of issue, viz.—7th January 1916. But by that time the 'Elorrio' had already been sold, and the royal decree did not cancel the sale. It clearly could not do so without grave injustice to the purchasers. Every legislature must be presumed to intend to regulate the rights of its own subjects and not to affect or interfere with the rights of foreigners. Hence the royal decree prohibited Spanish citizens from selling vessels from and after a specified date. It did not profess or intend to prevent delivery of vessels already sold. To do so would have been to deprive foreigners of rights which they had lawfully acquired. If it be true, as the defenders say, that the Spanish Minister of Public Works refused to sanction the transfer, it must have been because the true position of matters was not fully explained to him. In any event it is for this Court to determine the true meaning of the contract, and whether it was rendered impossible of fulfilment by reason of a supervening law. I am clearly of opinion that it was not.

"I am therefore of opinion that the 'Elorrio' ought to have been transferred when she had been surveyed and was ready for delivery, and that the pursuers are entitled to recover damages for any loss they can prove they have sustained through failure to deliver in terms of the contract.

"If I am right in this view it is sufficient for the disposal of the case. But even if it were held that the royal decree did prevent performance I do not think that would excuse the defenders. It appears to be settled that when the performance of a positive contract becomes impracticable by reason of its being forbidden by a foreign law, it is deemed to become impossible not in law but in fact, and the contractor is not excused but must perform his obligation or pay damages—*Barker* v. *Hodgson*, 3 M. & S. 267; *Sjoerd* v. *Luscombe*, 16 East 201; *Jacobs*, L.R., 12 Q.B.D. 589; *Spence* v. *Chodwick*, 10 Q.B. 517. The defenders referred me to *Taylor* v. *Caldwell*, 1862, 2 B. & S. 886; *Krell* v. *Henry*, [1903] 2 K.B. 740; *The 'August*,' [1891] P. 328; *The 'Teutonia*,' 4 P.C. 171. I have read all these cases, but they do not appear to me to bear on the present question, and I do not therefore think it necessary to examine them in detail.

"This branch of the law has recently been considered in the House of Lords in the case of *Horlock* v. *Beal*, [1916] A.C. 486, and the principle which underlies all the authorities was stated by Lord Wrenbury at page 525 thus:—'When a contract has been entered into, and by a supervening cause beyond the control of either party its performance becomes impossible, I take the law to be as follows:—If a party has expressly contracted to do a lawful act come what will—if in other words he has taken upon himself the risk of a supervening cause—he is liable if it occurs, because by the very hypothesis he has contracted to be liable. But if he has not expressly so contracted, and from the nature of the contract it appears that the parties from the first must have known that its fulfilment would become impossible if such a supervening cause occurred, then upon such a cause occurring both parties are excused from performance. In that case a condition is implied that if performance becomes impossible the contract shall not remain binding.'

"It is not always easy to apply that principle and to determine on which side a particular case ought to fall. But I do not think that there is difficulty in this case. This is a British contract. It was made in London and was to be performed in this country. The vessel was taken to British waters to be surveyed and delivered, and the contract price was deposited in London. In these circumstances parties must be presumed to have intended that their rights and obligations under the contract were to be regulated by the laws of this country. I do not think that it can be said that they must have known that its fulfilment would become impossible if a Spanish royal decree were issued. They presumably agreed that the law of this country should govern the contract just to avoid any difficulty which might arise under their own laws. They looked to British law alone for the regulation of their rights, and if any other law were applied it would give a meaning to the contract which parties did not intend.

"On the whole matter I am of opinion that the pursuers are right on all points. I

accordingly sustain their third plea-in-law; grant decree in terms of the alternative conclusion of the summons (*b*); and *quoad ultra* allow a proof of their averments of damage."

The defenders reclaimed, and argued—The defenders had no contract with Otero; and the pursuers had no right which they could transfer to him, and accordingly Otero had none. For the defenders had only to transfer the ship according to the contract, and if A sold to B he was not bound to transfer to C. Otero, further, was not a party to this action. A legal bill of sale was a condition-precedent to the pursuers' transferring, so was delivery and payment of the price. The contract here was merely personal, as in the case of *Granfeldt*, 1 R. 782, 11 S.L.R. 337, *per* Lord Ardmillan. According to the Spanish decree also no legal bill of sale could be granted by the pursuers. But the contract was dissolved through supervening impossibility of performance—*Horlock* v. *Beal*, [1916] 1 A.C. 486, *per* Lord Shaw at 503; *Krell* v. *Henry*, [1903] 2 K.B. 740; Pollock on Contracts, p. 442. The ship was on the Spanish register, and could not be taken off that register without a bill of sale—*vide* Lord Ardmillan in *Granfeldt* at p. 786—and a foreign ship would not be registered in the British Register unless the entry in the foreign register had been cancelled. A legal bill of sale was one effective under the law of the country whence it emanated—*i.e.*, in this case Spain. By the Spanish decree a legal bill of sale could not be issued. There was no contract to deliver to Otero, and if the pursuers could not demand specific implement to themselves owing to the Spanish decree they could not transmit such a right to Otero. If they did have something to give to Otero, then it was for Otero to sue. The defenders in any event were entitled to have proof of a sale by the pursuers to Otero. The mere fact of the contract having become exceedingly onerous had nothing to do with the matter. Legislation did not take away foreigners' existing rights, but it could interfere with acquired rights unless the statute excepted them. The Spanish decree could not be construed except as interfering with such rights. The plea of impossibility covered different kinds of impossibility. Impossibility was one of the modes of discharging a contract. There were certain forms of impossibility not in a contract which neither party may reasonably have contemplated—*Caledonian Railway Company* v. *Mathieson*, (1901) 3 F. 865, 38 S.L.R. 691; *Bailey*, (1869) L.R., 4 Q.B. 180. In all cases where personal services were the subject of contract death or illness discharged the contract. There was a third class of cases—that of change of circumstances. They had to be such as could not have reasonably entered into consideration at the time of the contract—Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), sec. 11; *Taylor* v. *Caldwell*, 1862, 3 B. & S. 826. This contract could not be construed apart from Spanish law any more than a contract as to land in Spain could be so construed. A ship was different from other moveables. It carried the national flag, and an attack on a Spanish ship was different from an invasion of rights *quoad* moveables. There were two theories—(*a*) the ship was part of Spain, or (*b*) it was assumed that Spain's jurisdiction still continued over the ship, otherwise there would be no jurisdiction. *Quoad* rights and protection, a ship had, unlike other moveables, the flavour of nationality—*Granfeldt* (*cit.*); *Hooper* v. *Gumm*, (1867) L.R., 2 Chancery Appeals 282, at pp. 289 and 290, *per* L.J. Turner; *The "Copenhagen,"* (1799) 1 Robinson 289; *The "Sisters,"* (1804) 5 Robinson 155; *Schultz* v. *Robinson*, (1861) 24 D. 120. The bill of sale had to be granted by the owner in Spain, and he was subject to the laws of his country. As the ship and owner were Spanish it did not matter that the contract was English. This case was essentially one where the obligation was not absolute. *The "Teutonia,"* (1872) 4 P.C. 171; *Gillespie* v. *Howden*, 1885 12 R. 800, 22 S.L.R. 527; *Thom*, (1876) L.R., 1 A.C. 120; Brown on Sale of Goods, in introduction on difference between sale and contract of sale; Anson on Contract, p. 353, were referred to.

Argued for the respondents—It was not enough to plead impossibility of carrying out of contract to absolve one therefrom; one had to plead cancellation of contract. This was clearly an English contract. There might have been half-a-dozen bills of sale between the respondents and Otero, and yet the registration would not have been changed until the final bill of sale had been executed. Registration was a matter entirely for the purchaser. A contract might become dissolved on supervening impossibility (*a*) if it did so in fact, and (*b*) if it were such an impossibility as to dissolve the contract in the eye of the law. There was no physical impossibility in this case. If it was one's own law which forbade a thing the Court here would not allow one to do that thing, but when it was a foreign law then the contract must be implemented or damages paid. In the latter case the contract was not dissolved. The Spanish courts might have held so, but the British ones would not—Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60), secs. 4 and 8 to 11; section 24 *et seq.* dealing with transfers; *Barker* v. *Hodgson*, 1814, 3 M. & S. 267, *per* Lord Ellenborough at p. 207; *Sjoerds* v. *Luscombe*, 1812, 16 East 201; *Jacobs*, (1884) L.R., 12 Q.B.D. 589; *Taylor* v. *Caldwell* (*cit.*); *Krell* v. *Henry* (*cit.*); *The "August,"* [1891] P. 328; *Horlock* v. *Beal* (*cit.*), *per* Lord Loreburn at p. 492 and p. 501, Lord Shaw at p. 512, Lord Parmoor (*diss.*) at p. 519, Lord Wrenbury at p. 525 and 526 and 528. The Lord Ordinary was right in construing the Spanish decree as not being restrospective. It was maintained that (1) the Spanish decree did not *de facto* prevent the defenders from signing the bill of sale. (2) Even if it did do so, it did not prevent them signing it in favour of the pursuers' nominee Otero. (3) Even if the Spanish decree prevented them from signing the bill of sale either in favour of the pursuers or their nominee they had to pay damages. The sale was absolute. The deposit was

made. The United Kingdom was the *locus* of the contract. The money was deposited there, the ship was to be delivered there, the purchase price was to be paid there, and any dispute would be arbitrated there. A legal bill of sale was a bill of sale good by the law of the place of sale, *i.e.*, in this case English law—*The "Teutonia"* (*cit.*), *per* L.J. Mellish; Sir Frederick Pollock on Contract (8th ed.), pp. 419-420, as to contracts void for impossibility, not void merely because impossible in fact, and p. 431 as to impossibility by intervention of foreign law. They asked for a finding instead of the Lord Ordinary's decree, and also for a limited proof as to the following three points—(*a*) the sub-sale to Otero, (*b*) Otero's nationality, (*c*) the Spanish decree.

At advising—

LORD JUSTICE-CLERK—[*After stating the facts originally averred*]—After the action was raised the pursuers (by amendment) averred that they had re-sold the ship to one Otero, a Spanish subject carrying on business in Spain, and they are willing to pay the contract price to the defenders in exchange for a bill of sale in favour of Otero, which by the amended conclusion they ask from the defenders. The Lord Ordinary has granted decree for specific implement to this effect, and has allowed a proof on the question of damages. Before us it was explained for the defenders that by their pleadings they intended to deny the sub-sale and Otero's alleged Spanish nationality. These points do not seem to have been pressed before the Lord Ordinary, and at any rate his Lordship does not deal with them.

Apart from the references to the decree and its effect there are no averments of difference between the law of Scotland and the law of England or the law of Spain, and neither party raised any contention on the arbitration clause in the contract to the effect that the dispute fell to be decided by arbitration.

I am of opinion that the contract of November 1915 did not constitute a "sale" of the ship. It was merely an agreement to sell and did not transfer the property—that being left to be carried out by a bill of sale and other auxiliary proceedings. Difficult questions might have been raised if we had been asked to dispose of the conclusion 1 (*a*), but the Lord Ordinary at the instance of the pursuers granted decree in terms of conclusion 1 (*b*), and we were not asked to give decree in terms of 1 (*a*).

Now in the circumstances I do not think that in any event we ought to grant decree for specific implement in terms of either 1 (*a*) or 1 (*b*). In my opinion, having regard to the conclusions of the summons and the pleadings, we are entitled, and ought, to refuse to pronounce such a decree on the ground explained in *Moore* v. *Paterson*, 9 R. 337, and referred to in *Stewart* v. *Kennedy* (1890), 17 R. (H.L.) 1, by Lord Watson. Moreover, I do not see how this Court could effectively carry out a decree *ad factum præstandum*.

But if a sub-sale to Otero has taken place, and if he is a Spanish subject I think we ought to give a finding to the effect that the defenders, in exchange for the price, are bound to grant a bill of sale in his favour within a specific time, and failing their doing so to find that they would be liable in damages in lieu of specific implement owing to their failure to deliver the vessel under the contract of November 1915. According to our law "whoever is in the right of any subject, though it should not bear to assignees, may at pleasure convey it to another except where he is barred either by the nature of the subject or by immemorial custom"—Erskine iii, vol. 2. Erskine then enumerates "the chief of these exceptions," one of which is rights personal owing to *delectus personæ*. I think this rule applies even where, as here, we have only an agreement to sell, and I am further of opinion that under this principle a sub-purchaser is entitled to obtain a bill of sale from the defenders and delivery of the vessel where the original buyer consents thereto and is ready and willing to pay the price in terms of the agreement. There is in my opinion no *delectus personæ*—Bell's Prin. sec. 1459; *Cole* v. *Handasyde*, 1910 S.C. 68.

Further, in my opinion the contract of November 1915 could have been performed, so far as the sellers' obligations were concerned, in at any rate either of two ways, viz., either by the defenders delivering a bill of sale to and in favour of the pursuers, or by delivering at the request of the pursuers a bill of sale to and in favour of the nominee of the pursuers, viz., to Otero. Assuming, as I do for the moment, that the former alternative became illegal by virtue of the Spanish decree, the second alternative still remained legal. The contract therefore was not dissolved or avoided by said decree, but remained valid and capable of performance in terms of the second alternative—"*Teutonia*," L.R., 3 A. & E. 314, and L.R., 4 P.C. 171.

As the case now stands, therefore, I think we should allow the pursuers the proof they ask, viz., a proof of the averments in the last four sentences in condescendence 3, which will include any evidence necessary as to the correctness of the translation of the Spanish decree.

LORD DUNDAS—I am of the same opinion. The pursuers elect to seek their remedy under head (*b*) of the principal conclusion of the summons. It seems to me therefore to be unnecessary to discuss the wide and difficult questions which were argued to us arising under head (*a*). Some of these, it is true, may have a bearing upon the extent of the damages which the pursuers might have right to claim. That question may require to be considered if and when a proof of damages is allowed, but that stage of the case has not yet been reached. I may add one remark in regard to head (*a*) of the summons, viz., that I should not for my own part have been disposed in any event in the circumstances of this case to pronounce decree *ad factum præstandum* under it. This Court has inherent power

and discretion to refuse the legal remedy of specific implement upon equitable grounds when the circumstances would make it inconvenient and unjust to enforce that remedy—*Stewart* v. *Kennedy*, 17 R. (H.L.) 1, *per* Lord Watson at p. 10; *Moore* v. *Paterson*, 9 R. 337.

As regards head (*b*), the Lord Ordinary seems to me to have proceeded too fast. He has pronounced his decree upon relevancy, without apparently noticing (it does not indeed seem to have been brought to his notice) that the averments in the concluding sentences of condescendence 3 are covered by the formal words in the answer "*quoad ultra* denied." As the defenders' counsel insisted at our bar on their denial of these averments, there must I think be a proof of them *ante omnia*. We ought now, in my judgment, to recal the interlocutor, repel the defenders' first plea-in-law, and allow this limited proof; and it would be proper, as Mr Mackenzie suggested, that it should also be directed to establishing that the text of the Spanish royal decree is correctly represented by the translation if there is any dispute about that matter.

But if the proof should result in accordance with the pursuers' averments I do not at present see why they should not substantially succeed as regards head (*b*) of the summons. I say substantially, because I am not prepared to affirm that we should in that event proceed to pronounce decree in terms thereof for specific performance. The defenders are a foreign company, and forcible objections to such a decree might be stated. But we should, so far as I can see, be in a position to find that the defenders are bound to deliver, within some reasonable time to be fixed, to Blas de Otero, in exchange for the price, a bill of sale, as concluded for. The Lord Ordinary is not quite accurate in saying that before the date of the royal decree "the 'Elorrio' had already been sold." The contract does not truly embody an accomplished sale, by which the property of the vessel passed, but rather an agreement to sell. I do not, however, think that this makes any substantial difference as regards the merits of the dispute. The defenders' counsel urged that they have no contract with Otero, and that the pursuers could not transfer to him a right which they themselves upon the passing of the decree did not possess. The latter proposition appears to me to involve a fallacy. Assuming that the pursuers, being foreigners to Spain, could not after the decree was issued demand a bill of sale to themselves, it does not follow that they may not seek implement of the contract by means of the delivery of a bill of sale to their subvendee, a Spanish subject. The defenders' argument postulates that the effect of the decree was to dissolve the contract entirely. I do not think the assumption is just. I do not see why the contract may not lawfully be implemented and the personal disability of the pursuers avoided by the substitution of their transferee for themselves in the bill of sale. I think that the words of Mellish, L.J., who delivered the judgment of the Privy Council in the "*Teutonia*," L.R., 4 P.C., at p. 182, are apposite, and that we "ought not to hold that the contract between the parties has become impossible of performance, and is therefore to be treated as dissolved if by any reasonable construction it can be treated as still capable in substance of being performed." The defenders admittedly run no risk, as they will receive payment of the price before parting with the vessel, and they appear to me to have no legitimate interest at all to object to such substitution. I do not see that in these circumstances they have right or title to do so.

Lord Salvesen—The main argument for the defenders was that the contract was dissolved by the publication of the Spanish royal decree whereby they say it was rendered impossible of performance according to its terms. The effect of the decree, however, is not to prevent a sale of a Spanish ship, but only to prevent its being disposed of to a person who is not a Spanish subject Its object was obviously to prevent a diminution in the tonnage available for carrying Spanish cargoes under the Spanish flag. This object is not in any way affected if there is a mere transfer of a Spanish vessel from one Spanish owner to another. I can see no reason why if the contract may be fulfilled in a manner which exposes the defenders to no penalty the pursuers should not be entitled to demand such fulfilment. There is no element of *delectus personæ* involved in the sale or purchase of a ship. Had there been no royal decree I cannot see any ground upon which the defenders could have successfully maintained that they were not bound to execute a bill of sale in favour of the pursuers' transferee or nominee; and as the pursuers have selected a transferee who is not struck at by the decree in question I am unable to see any good reason why the defenders should not be found liable to execute the bill of sale in his favour. They have no legitimate interest to insist that they are only bound to execute a bill of sale in favour of the pursuers themselves under the contract which they made. That contract admittedly did not pass the property of the ship, but it imposed obligations on the defenders in favour of the pursuers, the implement of which the pursuers are entitled to demand in the manner that they find most convenient in their own interests, without prejudice to their remaining bound in payment of the purchase price and other prestations exigible under the contract. The pursuers are willing to perform these in exchange for a legal bill of sale executed in favour of Otero, and the defenders will thus receive all that they bargained for before they part with the property in the ship. As, however, the defenders dispute that Otero is a Spanish subject, or that there was any re-sale to him by the pursuers (and the latter themselves ask us to

adopt this course) it is perhaps better to have the facts ascertained before any operative finding or decree is pronounced.

LORD GUTHRIE concurred.

The Court recalled the interlocutor of the Lord Ordinary, repelled the defenders' first plea-in-law, and allowed the limited proof as craved by the defenders.

Counsel for Defenders and Reclaimers—The Dean of Faculty (Clyde, K.C., M.P.)—Horne, K.C.—C. H. Brown. Agents—Beveridge, Sutherland & Smith, W.S.

Counsel for Pursuers and Respondents—A. O. M. Mackenzie, K.C.—Hon. William Watson, K.C., M.P.—C. E. Lippe. Agents—Macpherson & Mackay, S.S.C.

Wednesday, July 12.

COURT OF SEVEN JUDGES.

[Scottish Land Court.

MARQUIS OF ABERDEEN AND OTHERS *v.* SMITH.

Landlord and Tenant—Small Holding—Improvement—Proof to the Satisfaction of the Land Court—Discharge of Claim to Compensation Dated Prior to 1911—*Small Landholders (Scotland) Act* 1911 (1 *and* 2 *Geo. V, cap.* 49), *secs.* 1 *and* 2 (*iii*) (*a*)—*Crofters Holdings (Scotland) Act* 1886 (49 *and* 50 *Vict. cap.* 29), *sec.* 8.

In 1861 began the occupation of a piece of ground which the occupier, sitting rent free, reclaimed and on which he erected buildings. In 1875 he became tenant under general conditions of let which provided—"All claims for past meliorations are held to be extinguished, and the tenants are to have no claim on the landlord either previous to or at their removal in respect of any improvements which they make after the commencement of the bargain." In 1894 the tenancy was renewed for nineteen years. The original tenant died in 1910 and his son completed the lease and thereafter continued sitting from year to year down to Whitsunday 1915, when he renounced the tenancy and claimed compensation for improvements. He—and he was the only witness—deponed, speaking from his own knowledge and from what his father had told him, that with the exception of some contributions in material from the estate, admitted in cross-examination, all the improvements had been executed by his father and himself. The estate led no evidence, and did not allege that it, save as admitted by the tenant, had executed any of the improvements. An inspection of the holding was made by the Land Court.

Held, in a Special Case (*dub.* Lord Johnston), (1) that the Land Court could competently find it "proved" to their satisfaction that the greater part of the permanent improvements had been executed by the tenant and his predecessor in the same family without receiving payment or fair consideration therefor from the proprietors; and (2) that the conditions of let of 1875 did not preclude the Land Court from giving consideration to and assessing compensation for improvements executed prior to 1894 or prior to 1875.

The Crofters Holdings (Scotland) Act 1886 (49 and 50 Vict. cap. 29) enacts, section 8—"When a crofter renounces his tenancy or is removed from his holding, he shall be entitled to compensation for any permanent improvements, provided that—(*a*) The improvements are suitable to the holding. (*b*) The improvements have been executed or paid for by the crofter or his predecessors in the same family. (*c*) The improvements have not been executed in virtue of any specific agreement in writing under which the crofter was bound to execute such improvements."

The Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49) enacts—Section 1—"From and after the commencement of this Act and subject to the provisions thereof, the Crofters Acts shall be read and construed as if the expression 'landholder' were substituted for the expression 'crofter' occurring therein, and shall have effect throughout Scotland." Section 2—"In the Crofters Acts and in this Act . . . the word 'holding' means and includes . . . (iii) As from the termination of the lease, and subject as hereinafter provided, every holding which at the commencement of this Act is held under a lease for a term longer than one year by a tenant who resides on or within two miles from the holding, and by himself or his family cultivates the holding with or without hired labour (such tenant or his heir or successor, as the case may be, holding under the lease at the termination thereof being hereinafter referred to as a qualified leaseholder): Provided that such . . . leaseholder (*a*) shall . . . be held . . . a qualified leaseholder within the meaning of this section in every case where it is . . . in the event of dispute proved to the satisfaction of the Land Court that such tenant or leaseholder or his predecessor in the same family has provided or paid for the whole or the greater part of the buildings or other permanent improvements on the holding without receiving from the landlord or any predecessor in title payment or fair consideration therefor."

The Marquis of Aberdeen and others, proprietors of the holding after mentioned, *appellants*, being dissatisfied with an order of the Scottish Land Court in an application by George Smith, tenant of a holding at Hillhead, Tarland, Aberdeenshire, *respondent*, for an order fixing the amount of compensation to which he was entitled in respect of the improvements executed or paid for by him and his predecessor in the same family on and suitable to the said holding, presented a Special Case for the opinion of the Court of Session.

The respondent's father first began occupation of the holding about the year 1861, and,