the Court appealed from has been led astray by not giving adequate consideration to the cumulative force of two or three facts in this case, and not distinguishing its principle from the principle in *Wakelin's* case. Now, starting from the beginning, here you find a man driving two cows on the road at the very spot—because the evidence brings it to the very spot—where the accident occurs, and you find a man driving a tramcar round the corner at a lower speed, but coming up to where these are at a speed of nine miles an hour when he admits that he cannot see at the best more than seven yards ahead of him, and in fact did not see more than three yards ahead of him. Now that that is excessive speed under those conditions I think is clear, and it is a bad look-out, but whether one or the other, whether the accident was the result of omission to keep a good look-out, or of neglect in proceeding at a high speed, is of course equally immaterial.

Now into this group of three, a man and two cows, this driver runs—there is no doubt about that—and he strikes the leading member of the group a side blow. Instantly there is felt a bump. What caused the bump? There has not been a suggestion or particle of evidence to show what caused the bump. It immediately happened after the cow cleared. The man was found by the side of the car, and it is to be remembered that the driver admits that after the bump he forged ahead three yards, which would account perfectly well for the body of this unfortunate man being found near the extremity of the car. It would appear to me that the only rational conclusion that any human being can draw is that the man was struck by the tramcar at the same time or in a moment after the cow was struck, and that he was struck because the driver of the car did not keep a proper look-out for them and was coming at too high a speed.

A number of suggestions have been made to the effect that the pursuer may have been injured by walking up against this tramcar in the manner suggested in *Wakelin's* case. In order to establish any similarity between this case and *Wakelin's* case you must ignore the cow, you must ignore the bump, and if you find this man lying by the side of the tramcar and the tramcar there, then you would have an analogy between this case and *Wakelin's;* but as things stand the two facts I have mentioned—the fact that the cow was struck, and the fact that the bump was felt immediately and the body found after the bump was felt—absolutely distinguish this case from *Wakelin's.*

I have not the slightest doubt in my mind that the Lord Ordinary came to a right conclusion, and it was perfectly legitimate for him to come to that conclusion from the facts established in the evidence before him.

LORD SHAW—In the language of my noble and learned friend who has preceded me, I think the conclusion reached by the Lord Ordinary on a consideration of the facts, and reached also by the man at the time who was the chief actor in this unhappy event, namely the driver of the car, was the only rational conclusion, namely, that the car, recklessly driven, ran down this unfortunate farmer, who was on a public road in discharge of the duties of his occupation, and with a perfect right to be where he was. But I do not detain your Lordships on a clear case of this kind, and I should desire to express my entire concurrence with the judgment which has just been delivered to your Lordships' House by my noble and learned friend Lord Finlay.

Their Lordships reversed the interlocutor appealed from, with costs.

Counsel for the Appellant—Sandeman, K.C.—A. M. Mackay. Agents—Manson & Turner Macfarlane, W.S., Edinburgh—Theodore Goddard & Company, London.

Counsel for the Respondents—Lord Advocate and Dean of Faculty (Clyde, K.C.)—Gentles. Agents—Campbell & Smith, S.S.C., Edinburgh—Martin & Company, London.

COURT OF SESSION.

Thursday, December 19.

FIRST DIVISION.

[Lord Hunter, Ordinary.

CLADDAGH STEAMSHIP COMPANY LIMITED (OWNERS OF S.S. "CLADDAGH" AND S.S. "FACTOR") *v.* THOMAS C. STEVEN & COMPANY.

Contract — Sale — Ship — Delivery — Ship Requisitioned by Government before Delivery — Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71), *sec.* 28.

Contract — Interdependence of Contracts — Separate Written Contracts of Sale — Delivery Impossible in One Contract—Buyers' Right to Refuse Implement of Both Contracts.

A firm of shipowners agreed verbally to purchase from another firm which was giving up business their two ships, the "Claddagh" and the "Factor," of which the latter was under Government requisition, and was in the knowledge of the owners included by the purchasers in the transaction simply because the owners would not sell the "Claddagh" alone. A lump sum was accepted for both ships, but this was afterwards at the instance of the purchasers' brokers apportioned between the two ships, and two separate contracts were signed applicable to each ship. The agreement as to the "Claddagh" bore that the price was to be paid and delivery made on a legal bill of sale free from incumbrances within seven days after approval of bottom and parts under water, the ship being at purchasers' risk prior to payment. Before that date she was requisitioned by the Government and in consequence the purchasers refused to take delivery of either ship, contending that they were not bound to take the "Factor" unless they got the "Claddagh" free of

requisition. In conjoined actions of damages for breach of contract at the instance of the sellers, *held* (1) in the action with reference to the "Claddagh" that delivery under the contract meant actual, not merely constructive, delivery, and the sellers, being unable to give such delivery, were not entitled to decree; and (2) (*rev.* judgment of Lord Hunter, Ordinary), in the action with reference to the "Factor," that as neither contract made the purchase of the "Factor" contingent on the delivery of the "Claddagh" to the defenders, a free ship, the contracts could not be regarded as interdependent, and that the defenders were in breach of contract in refusing to take the "Factor."

The Claddagh Steamship Company, *pursuers*, brought an action against Thomas C. Steven & Company, shipowners, *defenders*, concluding for decree of implement by the defenders of their part of an alleged agreement of sale of the s.s. "Claddagh" and failing implement for £40,000 in name of damages.

The pursuers also brought an action against the defenders concluding for decree for £20,000 damages alleged to have been sustained by the pursuers owing to failure by the defenders to implement an agreement of sale of the s.s. "Factor."

The *memorandum of agreement* for the sale of the "Claddagh" was as follows:—"Glasgow, *November 6th*, 1917.—*Messrs Claddagh Steamship Company, Limited*, have this day sold and *Messrs. Thomas C. Steven & Company, Edinburgh*, have this day purchased the *British Steamship "Claddagh" classed* 100 *A1 at Lloyds* about 640 *gross*—280 *net* tons register, now *trading between U.K. & North French Ports*, with all stores belonging to her on board and on shore, for the sum of £40,000, say *forty thousand pounds* sterling, payment to be made by *cash* within *seven* days from *the time of approval of bottom and parts under water in dry-dock*. A deposit of 10 per cent to be *lodged* on account of the purchase money on signing of this contract *at the National Bank of Scotland, Glasgow, in the joint names of the Claddagh Steamship Company, Limited, and Thomas C. Steven & Company*, to be held by them pending completion of the contract. The *sellers shall* place the vessel in graving dock at their own risk and expense, *and draw tail shaft for examination*, and if she be then and there found damaged in the bottom *tail shaft, or parts under water*, the sellers to make same good *to Lloyd's surveyor's satisfaction* or cancel this contract, at their option. If the contract be so cancelled the sellers to pay all expenses in connection with the docking. *If the bottom, tail shaft, and parts under water are found in order the purchasers shall pay the cost of the docking*. On payment of the whole of the purchase money as above agreed, a legal bill of sale, free from incumbrances, shall be executed to the purchasers at their expense, and the ship and all belonging to her as above mentioned shall be delivered to them. The ship with her stores shall be taken with all faults and errors of description, without any allowance or abatement for deficiency, condition, or errors of description in advertisements, circulars, inventories, or otherwise. Should the whole of the purchase money not be paid as aforesaid, the vessel may, notwithstanding negotiations, and without notice, be re-sold by public or private sale, the deposit forfeited to the sellers, and all loss and expense arising from the re-sale, together with interest thereon, at the rate of £5 per cent per annum, shall be paid by the present purchasers, at whose risk and expense the vessel shall be from the *time of transfer*. If default shall be made by the sellers in the execution of a legal bill of sale, or in delivery of the ship and her stores in the manner and within the time herein specified, the deposit paid *shall be released to the purchasers*, and unless the default shall have arisen from events over which the sellers have no control, the sellers shall in addition make due compensation for disappointment and loss of time caused by the non-fulfilment of this contract. Brokerage as agreed *viz:—two per cent upon the purchase price* is due from the sellers to Messrs James Little & Company (Glasgow), Limited, upon the *completion* of this contract. *If any sea damage, ordinary wear and tear excepted, is sustained by the steamer before the time of delivery, the sellers shall at their expense make same good to Lloyd's satisfaction. Should the steamer be lost before the time of transfer this contract shall be null and void and the sellers shall forthwith release the deposit to the purchasers in full. . . .*"

The memorandum of agreement for the sale of the "Factor" was as follows:—"Glasgow, *November 6th*, 1917.—*Messrs Claddagh Steamship Company, Limited*, have this day sold and *Messrs Thomas C. Steven & Co., Edinburgh*, have this day purchased the *British steamship "Factor," classed* 100 *A1 Lloyd's* about 1178 *gross*—730 *net* tons register, and now *on a voyage to Bergen (Norway) and back to a U.K. Port*, with all stores belonging to her on board and on shore, for the sum of £60,000, say, *sixty thousand pounds* sterling; payment to be made by *cash* within *seven* days from *the time of approval of bottom and parts under water in dry-dock*. A deposit of 10 per cent. to be *lodged* on account of the purchase money on signing of this contract *at the National Bank of Scotland, Glasgow, in the joint names of the Claddagh Steamship Coy., Ltd., and Thomas C. Steven & Co.*, to be held by them pending completion of the contract. The *sellers shall* place the vessel in graving dock at their own risk and expense, *and draw tail shaft for examination*, and if she be then and there found damaged in the bottom, *tail shaft, or parts under water*, the sellers to make same good *to Lloyd's Surveyor's satisfaction* or cancel this contract at their option. If the contract be so cancelled the sellers to pay all expenses in connection with the docking. *If the bottom, tail shaft, and parts under water are found in order, the purchasers shall pay the cost of the docking*. On payment of the whole of the

purchase money as above agreed, a legal bill of sale, free from incumbrances, shall be executed to the purchasers at their expense, and the ship and all belonging to her as above mentioned shall be delivered to them. The ship with her stores shall be taken with all faults and errors of description, without any allowance or abatement for deficiency, condition, or errors of description in advertisements, circulars, inventories, or otherwise. Should the whole of the purchase money not be paid as aforesaid, the vessel may, notwithstanding negotiations and without notice, be re-sold by public or private sale, the deposit forfeited to the sellers, and all loss and expense arising from the re-sale, together with interest thereon, at the rate of £5 per cent. per annum, shall be paid by the present purchasers, at whose risk and expense the vessel shall be from the *time of transfer*. If default shall be made by the sellers in the execution of a legal bill of sale, or in delivery of the ship and her stores in the manner and within the time herein specified, the deposit paid *shall be released to the purchasers*, and unless the default shall have arisen from events over which the sellers have no control, the sellers shall in addition make due compensation for disappointment and loss of time caused by the non-fulfilment of this contract. Brokerage as agreed, *viz., two per cent. upon the purchase price*, is due from the sellers to Messrs James Little & Company (Glasgow), Limited, upon the *completion* of this contract. *If any sea damage, ordinary wear and tear excepted, is sustained by the steamer before the time of delivery, the sellers shall at their expense make same good to Lloyd's satisfaction. Should the steamer be lost before the time of transfer, this contract shall be null and void, and the sellers shall forthwith release the deposit to the purchasers in full. It is understood that the purchasers take over the steamer with her Government requisition, and that in the event of her loss the Government pay upon the basis of ascertained market value.*"

In the memoranda the parts printed in italics were typewritten in the originals, the rest being printed.

The two actions were conjoined.

In both actions the defenders pleaded—"2. The contract for the sale and purchase of the s.s. 'Claddagh' and 'Factor' being one and indivisible, the pursuers are not entitled to insist in the present action. 7. *Separatim*—The defenders being entitled in the circumstances condescended on, in answer to the relief provided by the Courts (Emergency Powers) Act 1917, the contract sued on if still binding should be annulled."

In the action with reference to the "Claddagh" the defenders also pleaded—"4. The pursuers having agreed to sell to the defenders the said vessels on the material condition that the s.s. 'Claddagh' would on delivery be free to take up the defenders' trade, and having been unable so to deliver the said vessel to the defenders they are not entitled to decree of implement as condescended for. (5) The defenders' obligation to accept delivery of the s.s. 'Claddagh' and to pay for the same being conditional on the said vessel being free of requisition at delivery, the pursuers are not entitled to decree. 6. The subject-matter of the sale being a vessel free of requisition, the defenders are not bound to take delivery of a requisitioned vessel."

In the action with reference to the "Factor" the defenders also pleaded—"4. The pursuers having undertaken as a condition of the contract for the sale and purchase of the 'Factor' and 'Claddagh' to deliver the latter free of requisition, and having failed to do so, the defenders are entitled to absolvitor. 5. The defenders' obligation to accept delivery of the s.s. 'Factor' and 'Claddagh,' and to pay for the same being conditional on the latter vessel being free of requisition at delivery, the pursuers are not entitled to decree. 6. The subject-matter of the sale of the two vessels being one of the vessels free of requisition the defenders are not bound to take delivery of two requisitioned vessels."

On 4th June 1918 the Lord Ordinary (HUNTER) after a proof pronounced the following interlocutor:—"(1) In the action at the instance of the Claddagh Steamship Company Limited against Thomas C. Steven & Company [with reference to the 'Claddagh'], assoilzies the defenders from the conclusions of the summons and decerns; (2) in the action at the instance of the pursuers against the defenders [with reference to the 'Factor'], assoilzies the defenders from the conclusions of the summons and decerns.

Opinion, from which the *facts* of the case appear—"In these conjoined actions the Claddagh Steamship Company, Limited sue the firm of Thomas C. Steven & Company for damages in respect of the defenders having failed to take delivery of and pay for two steamers conform to two contracts alleged to have been concluded between the parties on 6th November 1917.

"The defenders are shipowners in Edinburgh. They have the whole conveyance of benzol and solvent naphtha for the French Government. Until recently they had four steamers of their own and one on time charter engaged on the work. One of their four steamers was lost in April 1917, and the vessel they held on time charter was requisitioned by the British Government in July 1917. They were therefore anxious to purchase or acquire control of another vessel. Accordingly in October 1917 they communicated with James Little & Company, shipbrokers, Glasgow. That firm submitted one or two vessels for the defenders' consideration. One of these vessels was the 'Claddagh,' which belongs to the pursuers.

"On 20th October 1917 Messrs Little communicated with the pursuers asking if the 'Claddagh' was free of requisition, and if they were prepared to name a reasonable price. In reply the pursuers said that the 'Claddagh' was free of requisition, and that although they were not anxious to sell they might give consideration to a good substantial offer. Messrs Little informed the

defenders of the position. About the same time the defenders heard from another firm of brokers in Glasgow as to the sale of the shares in a limited company owning two ships. This company was the pursuers, and the ships were the 'Claddagh' and the 'Factor.'

"About 26th October 1917 the defenders through Messrs Little made a definite offer to purchase the 'Claddagh' from the pursuers. The pursuers, however, refused to entertain an offer to purchase the 'Claddagh,' but intimated their readiness to negotiate for the sale of both the 'Claddagh' and 'Factor.' Negotiations followed. Terms of purchase were arranged at a meeting in Glasgow between the parties. Those terms are set forth in a letter by the defenders to Messrs Little on 1st November 1917. From that letter it appears that the price of the two vessels was to be £110,000, and that the 'Claddagh' was to be released from her present coal charter and delivered free to take up the defenders' trade. The defenders were to approach the authorities in London with a view to getting the sale sanctioned.

"At the meeting when the above terms for the sale of the ships were arranged between the parties the defenders had made it clear that what they wanted was a vessel free from requisition and able to take up their trade. They also made it clear that they were only purchasing the 'Factor,' which was on requisition, because the pursuers would not sell the 'Claddagh' alone. The pursuers agreed to get the latter vessel released from a coal charter under which she was carrying coal to France.

"On 3rd November 1917 Mr R. B. Steven of the defenders' firm had a meeting with a Government representative of the Ministry of Shipping, when he ascertained that there was no prospect of the 'Factor' being released from requisition, and that the 'Claddagh' would not get a licence to come out of the French coal trade. Mr Steven considered that it might of be advantage to his firm if he could get the steamer to carry coals to France for a firm who act as the defenders' agents, and run on alternate voyages with benzol for the French Government. He understood that the Ministry of Shipping agreed to this. As he explained in his evidence the vessel if only licensed to run with cargoes of coal to France was of no use to the defenders for the purpose for which they were purchasing the 'Claddagh.' If, however, she could be employed in carrying benzol on intermediate voyages she would be useful, but not to the extent anticipated when the agreement for sale was concluded on 1st November 1917.

"On his return from London Mr Steven had an interview with Mr Davis of Messrs Little, when he explained that as the 'Claddagh' was to be employed running coal, and there was no prospect of the 'Factor' coming off requisition, the proposition was not worth £110,000. Messrs Little suggested that £100,000 might be offered for the proposition as it then stood. The defenders agreed to this. The offer was made to and accepted by the pursuers, to whom the firm of Messrs Little wrote on the 6th November 1917 enclosing two memoranda of agreement of sale for the two vessels. The pursuers seem to have signed these documents on the 6th and the defenders some two days later.

"Mr Steven asked Mr Davis of Messrs Little why there were two and not only one document, and was informed that owing to the different dates of delivery and to the fact that the 'Factor' was a requisitioned ship it was advisable that there should be two documents. The prices of £40,000 and £60,000 for the 'Claddagh' and 'Factor' respectively were put in without any communication with the pursuers.

"In the agreement as to the 'Factor' there is a typed condition along the side of the document in these terms—'It is understood that the purchasers take over the steamer with her Government requisition.' In the agreement as to the 'Claddagh' there is no such condition.

"On 9th November 1917 the Ministry of Shipping sent a telegram to the pursuers' London office that the 'Claddagh' was required for Government service on completion of the discharge of her present cargo.

"On 10th November Mr R. B. Steven deposited £10,000 with the National Bank of Scotland at Glasgow in his firm's name. He explained to Mr Robertson of the pursuers' company that he had not put the money in joint names because he had not received the Government licence. Mr Robertson made no reference to the requisition by the Government of the ship. On 16th November the defenders learned for the first time that the 'Claddagh' had been requisitioned. They at once communicated with Messrs Little that in the circumstances they were not bound to purchase the vessels. Subsequently they uplifted the deposit money. The pursuers maintained that they were bound, and have brought these two actions to recover damages.

"According to the pursuers' contention the agreements of sale evidence in writing two separate and distinct contracts to purchase the two ships, and as nothing is said in the documents about risk of requisition of the 'Claddagh,' it is incompetent for the defenders to establish by parole evidence that parties intended that she should be free of requisition at the date of delivery. They found upon a rule of law which is authoritatively recognised by the House of Lords in *Inglis* v. *Buttery*, 1878, 3 A.C. 552, 5 R. (H.L.) 87, 15 S.L.R. 462. At p. 577 of the report Lord Blackburn quotes with approval a passage from Lord Gifford that where parties have embodied 'their contract in a formal written deed, then in determining what the contract really was and really meant a court must look to the formal deed and to that deed alone.' His Lordship, however, goes on to explain that quite consistently with that rule you may look at the 'surrounding circumstances' and see what is the intention expressed in the words used as they were with regard to the particular circumstances and facts with regard to which they were used.

"I do not think that the rule of law which excludes parole evidence to qualify a written contract precludes a party from showing

that two separate documents drawn up and signed at the same time are in effect two parts of the same contract—or to put this in a different way, that there is such an interdependence of the two contracts that fulfilment of the one cannot be insisted on where the party seeking to enforce the one contract is, it may be by no fault of his own, unable to make implement of the other. It appears to be recognised in English law that parole proof is admissible to prove such an interdependence of two contracts that they fall to be treated as one (see *Holliday* v. *Lockwood*, [1917] 2 Ch. 47, and the authorities referred to in the opinion of Mr Justice Astbury). In the present case the defenders only made an offer to purchase the 'Factor,' because they were unable otherwise to purchase the 'Claddagh.' This was known to the pursuers, and it appears to me in the circumstances as disclosed in the evidence that it is impossible for them now to claim damages against the defenders because the latter failed to take delivery of the 'Factor if they themselves are unable to implement the contract so far as the 'Claddagh' is concerned. The two contracts fall to be treated as one.

"The real question in the case is whether the pursuers could call upon the defenders to take delivery of the 'Claddagh' although she was not free from requisition at the date of delivery. Mr Davis, the partner of the brokers who acted for both parties, says that in preparing the memorandum of agreement of this vessel he intended by omiting the clause as to requisition in the agreement about the 'Factor' to give effect to what he knew had been agreed upon by both parties. The pursuers led no evidence, but relied entirely upon what they maintained was the law governing the contract. Looking to some of the letters which the pursuers sent to their French clients, who had a charter of the vessel which they had undertaken to get cancelled, I am not surprised at their adopting this course. It is difficult to suppose that the letter dated 13th November 1917 from the pursuers was written in the belief that they had effected a binding contract of sale with the defenders.

"I do not think that the parole evidence that the 'Claddagh' was bought subject to her being free from requisition at the date of delivery contradicts the written agreement of sale. It explains but does not contradict the document. In terms of the contract the risk of the vessel being lost was with the sellers until delivery. Nothing is said in the agreement as to the sellers releasing the s.s. 'Claddagh' from the coal charter under which she was running. Messrs Little by letter to the pursuers dated 6th November make it clear that the sellers are to undertake this obligation. They refer to this as 'already agreed,' the allusion being to what was agreed on 1st November. The pursuers confirm this understanding. The object of this condition was to allow the ship to be free to undertake the defenders' work on their getting delivery. The subject of the contract as appears from writings passing between the parties with reference to the written agreement was to be a ship free in that sense at the date of delivery. Requisition by the Government altered the character of the subject about which the parties were contracting. The vessel was no longer a subject that at date of delivery could be employed in the defenders' trade, and the defenders were entitled in my opinion to maintain that the agreement was not binding upon them."

The pursuers reclaimed, and argued—The Lord Ordinary was wrong in both actions and his interlocutors should be recalled. If the requisition did not prevent the pursuers from fulfilling their contract with regard to the "Claddagh," then they were entitled to succeed in both actions, for the sole defence in the action relative to the "Factor" was that the sale of that ship was conditional upon due implement of the sale of the "Claddagh," *i.e.*, that the contract for both ships was one, or if there were two contracts they were so interdependent that both must be fulfilled or both were voided. But further, if the pursuers were wrong as to the "Claddagh" the sale of the "Factor" was an independent contract, implement of which was not conditional in any way upon implement of the contract with reference to the "Claddagh." As regards the "Claddagh" there was nothing in the terms of the contract to show that it was not fully implemented by delivery of the ship subject to requisition. The parties were both contracting in the knowlege that the "Claddagh" might be requisitioned at any time, but their contract contained no clause that the ship was to be free of requisition. Without such a clause the risk of requisition was upon the buyers after the contract was made. The requisition merely prevented the transfer of actual corporal possession, but the contract of sale was fully implemented by transfer of the property in the ship. Property in the ship was transferred by the execution and delivery of the bill of sale—Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60), sec. 24. At the date of sale the "Claddagh" was free from requisition and the pursuers were ready and willing to fulfil their contract. A requisition did not necessarily dissolve a contract of sale, and damages for breach of contract could not be obtained—Courts (Emergency Powers) Act 1917 (7 and 8 Geo. V, cap. 25), sec. 3; *F. A. Tamplin Steamship Company, Limited* v. *Anglo-Mexican Petroleum Products Company, Limited*, [1916] 2 A.C. 397, 54 S.L.R. 433. The contract was held still to be in force in spite of a requisition. The fact of requisition was not incompatible with delivery; for the "Factor" contract, which related to a ship under requisition, spoke of delivery, and the "Claddagh" contract used the same words. Accordingly the requisition did not prevent the pursuers from implementing any part of their contract. There was no interdependence between the two contracts. To hold that the contracts were interdependent would be to read into the "Factor" contract a clause to the effect that if the "Claddagh" was not available the "Factor" contract was to fly off. There was no proper averment of such

a contract and no plea to raise the point. Further, there was no proof of such a contract, and in any event such a term could not be added to a written contract by parole evidence—*Inglis* v. *Buttery*, 1878, 3 A.C. 552, 5 R. (H.L.) 87, 15 S.L.R. 462. In any event the facts did not support the defenders. In nature and in subject-matter the two contracts were distinct; the ships were unconnected except for the fact that the pursuers owned them both; one was requisitioned, the other was not. The "Factor" was sailing, the "Claddagh" was returning to port. The prices were different; no doubt the pursuers without consideration accepted the apportionment of prices suggested by the defenders, but the pursuers were only interested in the total of the prices and not in the apportionment of the total. The truth was that the pursuers, who were going out of business, wished to sell both ships. That was all they had in mind; they were indifferent as to whether the ships were bought by one purchaser or two, and when the purchaser happened to be one they were equally indifferent as to the purpose of the purchaser though they were aware of it. There was nothing whatever to show that the pursuers undertook in selling to secure that the defenders would have one free ship for their benzol trade. There was no question of frustration of a joint-adventure; the sale was on the footing that the pursuers had no concern with the motives actuating the defenders in buying; if so the pursuers were entitled to succeed—*Chandler* v. *Webster*, [1904] 1 K.B. 493, *per* Collins, M.R., at p. 499; *Blackburn Bobbin Company* v. *T. W. Allen & Sons*, [1918] 2 K.B. 467, *per* Pickford, L.J., at p. 469, and [1918] 1 K.B. 540, *per* M'Cardie, J. Complexity or interdependence meant interdependence in subject-matter, *e.g.*, farm and shooting—*Holliday* v. *Lockwood*, [1917] 2 Ch. 47, *per* Astbury, J., at pp. 53, 56, and 57; *Dykes* v. *Blake*, 1838, 4 Bingham, N.C., 463, at p. 467. *Jamieson* v. *Welsh*, 1900, 3 F. 176, 38 S.L.R. 96, did not support the proposition that two contracts were to be regarded as interdependent merely because the buyer disclosed to the seller a motive in purchasing which showed that the proposed uses of the subject sold were interdependent. *Jacobs* v. *Scott & Company*, 1899, 2 F. (H.L.) 70, 36 S.L.R. 611, was distinguishable, as it was upon a different section of the Sale of Goods Act 1893 (56 and 57 Vict. cap. 71). In those circumstances the only defence in the "Factor" action was unsound and the pursuers were at least entitled to succeed in that action.

Argued for the defenders (respondents)—As regards the "Claddagh" contract, the risk of requisition was upon the pursuers until there was actual physical delivery of that ship. The passing of property in a *res vendita* depended upon the intention of the parties, which was to be gathered from the terms of the contract, the conduct of the parties, and the circumstances of the case. At the date of the contract the "Claddagh" was on private charter to a French merchant. The defenders, however, had a French Government coal contract upon which the "Claddagh" was to be employed. Therefore once the vessel was in the defenders' hands they were in a better position than the pursuers to escape requisition, or if a requisition was laid on to negotiate for its removal. Hence it was to be inferred that until the property passed to them the pursuers should bear the risk of requisition. Prior thereto the pursuers controlled the ship, and their actings with her might, and did in this case, lead to a requisition. Further, if it had been intended that the defenders were to take the risk of requisition before delivery it would have been essential for them to receive all information as to the requisition at once so as to put them in a position to get the vessel freed. Further, the terms of the contract showed that the property in the ship, and therefore the risk of requisition, was not to pass until there was actual corporeal delivery of her. That implied that the risk was with the pursuers till the time of transfer, *i.e.*, the passing of the bill of sale and actual physical delivery. No doubt "delivery" was used in the "Factor" contract to mean delivery subject to requisition, but it was used in the "Claddagh" contract in its ordinary sense, for the parties were dealing with a ship capable of actual physical delivery. Further, payment of the price was to be made after the approval of the underwater parts, and the requisition was laid on before that. The pursuer had not proved that they ever tendered actual physical delivery of the ship. Further, the pursuers were under obligation to warrant that the defenders should have quiet possession of the *res vendita*, and that it should be free of incumbrances—Sale of Goods Act, section 12 (2) and (3). At the date of transfer they could not implement either of those obligations. Further, the pursuers had failed to free the ship from her French coal charter, which they had undertaken to do. The vessel was not in a deliverable state until after the requisition was laid on, for it had not been approved after inspection—Sale of Goods Act, section 62 (4). Further, payment and delivery were concurrent terms—section 28—and the pursuer could not have demanded payment because they could not tender the bill of sale and actual delivery. The requisition was laid on when the discharge of the cargo was completed. It was under the Defence of the Realm Proclamation, No. 39 B B B, and Royal Proclamation of 3rd August 1914. As the result of a requisition the shipping controller took the actual ship but not the personnel—*China Mutual Steam Navigation Company* v. *MacLay*, [1918] 1 K.B. 33. The requisition excluded delivery and quiet possession, and the result was that both parties were released from the contract—*Blackburn Bobbin Company* v. *T. W. Allen & Sons* (*cit.*), *per* M'Cardie, J.; *In re Shipton, Anderson, & Company and Harrison Brothers & Company*, [1915] 3 K.B. 676, *per* Lord Reading, C.J., at 681; *Nickoll & Knight* v. *Ashton, Edridge, & Company*, [1901] 2 K.B. 126; *Baily* v. *De Crespigny*, 1869, L.R., 4 Q.B. 180; *Taylor* v. *Caldwell*, 1863, 3 B. & S. 826. [Lord Skerrington referred to *Clark* v. *Glasgow*

Assurance Company, 1854, 1 Macq. 668, *per* Lord Cranworth, L.C., at p. 677]. The effect of a requisition upon charterers' rights was shown and illustrated in *Modern Transport Company, Limited* v. *Duneric s.s. Company*, [1917] 1 K.B. 370, and the *Tamplin* case *cit.* If the defenders were right with reference to the "Claddagh," they were entitled to refuse to take delivery of the "Factor." Although embodied in two documents, the sale of the two ships was one transaction, or at least if there were two contracts the two contracts were mutually interdependent, and both or either must be implemented. The defenders made it clear that they were willing to buy the requisitioned "Factor" only because without taking her they could not get the unrequisitioned "Claddagh." The price was for both ships, and there was no negotiation of the apportionment upon each ship; if the question had arisen before the written documents were executed it would have been clear that there was only one transaction. The documents made no difference. The buyers' object in purchasing had been disclosed to the seller, and was accepted as a condition by both parties. The interdependence of contracts was to be implied from the whole circumstances of the case, and if there was interdependence, and one contract was not implemented, the other could not be enforced—*Casamajor* v. *Strode*, 1833, 2 My. & K. 706, *per* Lord Brougham at pp. 722 and 724. The law of Scotland was to the same effect—*Hamilton* v. *Hart*, 1830, 8 S. 596; *Allan* v. *Gilchrist*, 1875, 2 R. 587, at p. 594, *et seq.*, 12 S.L.R. 380; *Jamieson* v. *Welsh* (*cit.*), *per* Lord M'Laren at p. 181. Parole evidence was competent; the documents in question whether setting out one contract or two were mercantile documents drawn in a particular form by a broker. They did not set out the whole or the real bargain, and did not exhaust its terms. That was admitted on record. In such circumstances it was competent to prove by parole what the real bargain was—*Jacobs* v. *Scott & Company* (*cit.*), *per* Lord Watson at p. 78.

At advising—

LORD PRESIDENT—We have before us here two separate and distinct actions of damages raised at different times although subsequently conjoined. Each action rests on a complete and self-contained contract of sale expressed in a formal instrument. The most attentive perusal of one contract reveals no relation to the other. There is indeed no interdependence between the two contracts disclosed in either. The contracting parties are the same in both, but the subject-matter is different, and the terms of the contracts are in material respects different. The sellers are in a position to fulfil one of the contracts. They are unable to fulfil the other. It is apparently true, but as I think irrelevant, that the buyers would never have entered into the contract founded on in the second action unless the sellers had entered into the contract founded on in the first action. It is equally true and equally irrelevant that had the sellers chosen to embody both contracts in one instrument the buyers would have raised no objection. But when I have said all this I think I have said everything that was urged in support of the plea stated by the defenders in each action—that the two contracts being in law one and indivisible neither action could be insisted in. I proceed, therefore, to consider each action separately, and as if it stood alone.

In the first action the pursuers seek implement by the defenders of a contract for the sale of the s.s. "Claddagh," or, failing implement, payment of £40,000. The contract of sale is expressed in an agreement dated the 6th of November 1917. The purchase price of the ship, which was at the time trading between the United Kingdom and North French ports, was £40,000. Payment was to be made in cash "within seven days from the time of approval of bottom and parts under water in dry dock." To enable the requisite examination to be made the pursuers were to place the vessel in graving dock at their own risk and expense. And then the contract proceeds thus:—"On payment of the whole of the purchase money as above agreed, a legal bill of sale, free from incumbrances, shall be executed to the purchasers at their expense, and the ship and all belonging to her, as above-mentioned, shall be delivered to them." From the time of transfer "the risk and expense" of the ship was to be with the defenders. The natural inference is that prior to transfer the risk was with the pursuers. If any sea damage was sustained by the ship prior to the time of delivery the pursuers were to make it good. If she was lost before the time of transfer the contract of sale was to be null and void. Now it is clear that under this contract no property in the "Claddagh" could pass to the defenders until payment of the price in terms of the contract—that is to say, until seven days after "approval of bottom and parts under water in dry dock." But some days before the vessel entered the dry-dock at Swansea she was requisitioned "for use on urgent Government service." When, therefore, the time for delivery and payment of the price arrived the pursuers were confessedly unable to give possession of the ship to the defenders in exchange for the price (section 28 of the Sale of Goods Act 1893). How in these circumstances the pursuers, who cannot give possession, are entitled to have payment of the price I am wholly at a loss to understand. It was said that delivery in this contract might possibly mean constructive delivery—that is to say (in this case), no delivery at all. But no argument was advanced in support of this contention, which is plainly untenable. In return for payment of the purchase price it is certain that the pursuers were bound to hand over the "Claddagh" to the defenders free for immediate use in their business as shipowners. At the date of the requisition, 9th November 1917, the "Claddagh" was undeniably still the property of the pursuers. The risk of her being requisitioned was theirs until the property passed in terms of

the contract to the defenders. And at the date when the property in the ship passed the pursuers were bound to put the defenders in possession of a subject of which they could "have and enjoy quiet possession" (section 12 (2) of the Sale of Goods Act 1893), and which was free "from any . . . incumbrance in favour of any third party" (section 12 (3)). This confessedly the pursuers could not do, for before the ship left the dry dock (which she did on 21st November 1917) she had passed out of the pursuers' control and was in the hands of the Government to be used for Government purposes. I am therefore for affirming the Lord Ordinary's interlocutor in the first action.

I turn now to the second action, in which the pursuers seek to recover from the defenders £20,000 of damages for breach of contract of the sale by the former to the latter of the s.s. "Factor." It is not disputed that the defenders have broken their contract and are liahle in damages unless there can be read into the contract a clause to the effect that it becomes null and void if the "Claddagh" is not handed over by the pursuers to the defenders free from requisition. No such clause is to be found in the contract. Nor can such a condition be implied from any terms used in the contract relative to either of the ships. It is contended that the two contracts are one and indivisible. I have already indicated my opinion to a contrary effect. But even if the two contracts were amalgamated and thrown into one instrument, unless their terms were altered in material respects I should retain my opinion that the defence to this action fails. It fails, not because the two bargains are expressed in two separate and distinct instruments, but because neither instrument makes the purchase of the "Factor" contingent on the "Claddagh" being delivered to the defenders a free ship. The reasons given for expressing the contracts in two separate instruments are simple and obvious. The defenders said, according to the evidence—"Why are you making two contracts of it?" and the pursuers explained the reason —"that the terms were all different for each boat, that one was on requisition and the other was free, that the details were all different, that one boat was to be delivered at a certain time and the other boat delivered later; and he (pursuers) explained to me (defenders) that there must be separate contracts." And the defenders acquiesced. Why not? What did it signify? Two instruments or one, it was never suggested as a condition of the "Factor" contract that the "Claddagh" must be placed in the hands of the defenders ready for business. It is clear enough on the evidence that the defenders had no wish to buy a vessel under requisition as the "Factor" was, and that their anxiety to secure the "Claddagh," a free ship, was their sole motive for purchasing the "Factor." The pursuers apparently refused to sell the "Claddagh" alone. But all this is immaterial in the absence of a clause to the effect I have indicated. It is idle to plead the motive which induced the buyer to purchase as a condition of the contract of sale when the condition is conspicuously absent. I am, therefore, in the second action for finding that the defenders have broken their contract and are liable in damages. And in the event of the parties failing to agree on the amount we must remit to the Lord Ordinary to assess it.

LORD MACKENZIE—The questions raised in these conjoined actions relate to the obligation of the defenders to take delivery under two contracts of sale of the s.s. "Claddagh" and s.s. "Factor" respectively. The defenders refused to take delivery, and the pursuers claim damages for breach of contract. The defence in the case of the "Claddagh" is that subsequent to the contract of sale, but before the time fixed by the contract for delivery, the ship was requisitioned by the Government, that under the contract what the buyers were entitled to get was physical possession of the corporeal subject, that after the requisition the sellers could not give delivery in terms of the contract, and that therefore the contract was at an end.

The defence in the case of the s.s. "Factor" is that the two contracts were interdependent, that the defenders are not bound to take the "Factor" (which was bought while under requisition) unless they got the "Claddagh" free of requisition, and that if the defenders succeed in the case of the "Claddagh" they are not bound to take delivery of the "Factor."

My opinion is that the defenders are entitled to succeed as regards the "Claddagh," and that the pursuers are entitled to succeed as regards the "Factor."

The vital points in the memorandum of agreement for the sale of the "Claddagh," dated 6th November 1917, are these—The price, £40,000, was to be paid by "cash within seven days from the time of approval of bottom and parts under water in dry dock. On payment of the whole of the purchase-money as above agreed a legal bill of sale, free from incumbrances, shall be executed to the purchasers at their expense, and the ship and all belonging to her, as above mentioned, shall be delivered to them." This complies with the provisions of section 24 of the Merchant Shipping Act 1894. There is then an express declaration that the vessel shall be at the risk and expense of the purchaser from the time of transfer. From this the inference is plain that the risk was to remain with the sellers until the date of transfer. A subsequent clause bears this out, by which it was provided that should the steamer be lost before the time of transfer the contract was to be null and void, and that the deposit should be released to the purchasers. The agreement contained no express clause that the "Claddagh" was to be free of requisition. The memorandum of agreement thus imposed upon the sellers an obligation similar to that contained in section 28 of the Sale of Goods Act 1893, and they were bound "to give possession of the goods to the buyer in exchange for the price." The question—and the only question—in regard to the "Claddagh" is this—Were the buyers

in a position to give possession of the goods at the time fixed for delivery? The written contract for the sale of the "Claddagh" was signed on the 6th and 8th November 1917 by the sellers and buyers respectively. The whole case proceeds on the footing that what the buyers were to get was physical delivery of the ship. On 9th November 1917 there was a telegram from the Ministry of Shipping requisitioning the "Claddagh." The formal requisition followed by letter dated 14th November. The effect of a requisition is to be found in Regulation 39BBB of the Defence of the Realm Regulations, printed in *China Mutual Steam Navigation Company* v. *MacLay*, [1918] 1 K.B. 33, at p. 41. It is certainly remarkable that though the pursuers after they knew of the requisition had a meeting with the defenders' representative they told him nothing about it. The defenders did not learn of the requisition until the 17th of November, when they got the information from the requisition department. They at once wrote to the intermediary broker that the whole business had better drop. At this date the "Claddagh" was not clear of the dry dock at Swansea, into which she had been put. She did not get out until after the 20th of November. The position therefore was that at the date when delivery ought to have been made the sellers had not got the ship to deliver. In these circumstances, as the pursuers were not in a position to fulfil their part of the contract, they cannot in my opinion successfully claim damages from the defenders for failure to perform theirs. This is sufficient for judgment, and it is unnecessary to consider the effect of the additional obligation imposed on the pursuers by the letter of 6th November to release the "Claddagh" from the existing coal contract. It does not appear to me that the defenders require to found on cases such as those cited to us, which deal with frustration of the adventure. Certain of the cases would no doubt provide a conclusive answer to any claim by the defenders against the pursuers for damages for failure to deliver if they were not protected by the term of the contract itself.

The next question is whether the defenders, assuming them to be right as I do in regard to the "Claddagh," were bound to take the s.s. "Factor." Their case is that the two contracts were interdependent, and that they were not bound to take the one vessel without the other. I do not think it necessary to consider the terms of the agreement made on 1st November, for these were in my opinion superseded and were not carried forward. The way in which the matter was put in argument by the defenders was that they had an admission on record that on 6th November they offered through Little & Company, the brokers, £100,000 for the "Claddagh" and the "Factor," and that the pursuers accepted their offer, that it was the broker who thereafter suggested there should be two contracts, that the lump sum was split into £40,000 for the "Claddagh" and £60,000 for the "Factor" by the defenders without any negotiation with the pursuers, that the sellers were well aware it was the "Claddagh" the defenders wanted, and the "Claddagh" alone, for the purposes of their benzol trade with the French Government, and that they only agreed to take the "Factor" because the sellers would not come to terms except for the two vessels. The defenders argued (1) that the contract was not exhausted by the two subsequent agreements, and (2) that the circumstances known and understood by both parties at the time of sale were such that the inference ought to be drawn that the two contracts were interdependent. To this the pursuers' answer is in my opinion conclusive. The defenders are really trying to introduce into the contract for the sale of the "Factor" a clause which not only is not in the written document, but which the defenders do not aver or prove was part of the verbal agreement to buy. If reduced to writing the clause would run thus—"In the event of the s.s. 'Claddagh' not being delivered to us on the due date, free of requisition, and released from the existing coal charter, the contract for the sale to us of the s.s. 'Factor' shall cease to be binding." Mr Steven, who is a partner of the defenders' firm, does not say that there was any arrangement between the buyers and sellers to this effect. The pursuers insisted on selling both the vessels, but it was immaterial, so far as they were concerned, to whom they sold them. The motive the defenders had in buying the "Factor" was that this was necessary to enable them to get the "Claddagh." There is not enough in the circumstances known to both parties to make the two transactions interdependent. The case referred to by the Lord Ordinary of *Holliday* v. *Lockwood*, [1917], 2 Ch. 47, was different. That related to two lots of property sold by auction. The judgment negatives the view that it is enough to make two contracts one that the particular purchaser in his own mind resolves to purchase two lots because he thinks he can conveniently occupy them together. There must be sufficient in the circumstances known to both parties to make the two transactions interdependent. The mere inclination or motive of one party to acquire both lots or neither will not be enough. In the present case, as Mr Steven explains, the reason given by Mr Davis, the broker, for having two contracts was that the terms were different for each boat, that one was on requisition and the other free, that the details were all different, that one boat was to be delivered at a certain time and the other boat delivered later. When the terms of the contracts entered into are examined it is seen that the adjustment of clauses to meet what the defenders say was intended would have been a matter requiring considerable care. There was no reference in the negotiations to any such clause being required, nor is it legitimate, in my opinion, to infer that such were intended by the parties to be inserted. The defenders founded on *Jacobs* v. *Scott & Company*, 2 F. (H.L.) 70, 36 S.L.R. 611. This seems to have been a decision under section 14 of the Sale of Goods Act, and if so does not apply to the present case.

On the whole matter I am unable to take

the view that the defenders had sufficient grounds for refusing to take delivery of the "Factor."

LORD SKERRINGTON — The s.s. "Claddagh" was requisitioned by the Admiralty by letter dated 14th November 1917, which intimated to the pursuers that it had been found necessary to requisition her under the Royal Proclamation of 3rd August 1914, for use on urgent Government service under the conditions of the *pro forma* charter-party therewith enclosed. The Proclamation in question authorised the Admiralty to requisition and take up for the service of His Majesty any British ship for such period of time as might be necessary on condition that the owners of the ship so requisitioned should receive payment for its use and for services rendered during their employment in the Government service, and compensation for loss or damage thereby occasioned, according to terms to be arranged as soon as possible after the ship had been taken up, either by mutual agreement or by arbitration.

Prima facie the "owners" of the "Claddagh," within the meaning of the Proclamation, were the registered owners, viz., the pursuers, and also a French merchant to whom the ship had been chartered for the conveyance of coal to France. *Prima facie* these were the persons whose interests in the ship were affected by the requisitioning letter, and these were the persons upon whom the Proclamation conferred certain pecuniary rights in a question with the Admiralty. The pursuers, however, found upon the fact that prior to her being requisitioned the ship had been sold to the defenders. I could have understood their position if they had averred that the contract of sale had been so far executed that although the formal title to the ship remained with the sellers the risk had passed to the purchasers. If that could have been established the defenders might perhaps have been the owners within the meaning of the Proclamation. But when one examines the terms of the contract of sale and applies them to the admitted facts, it becomes apparent that the ship was still at the risk of the sellers at the date when she was requisitioned.

In that state of the facts I have never been able to understand upon what theory the pursuers thought that they could enforce the contract for the sale of this ship when they were themselves unable to perform one of its essential obligations. By the express terms of the contract the pursuers were not merely bound to transfer the property of the ship by a legal bill of sale, but they were also bound at the same time to deliver her to the purchasers. The fact that the ship was under charter within the knowledge of both parties might have created a difficulty as to the meaning and effect of the clause but for the fact that, by a letter of the same date as the formal contract it appears that it was a term of the bargain that the pursuers should procure the release of the ship from the French charter-party, thus enabling themselves to deliver her to the purchasers.

In these circumstances the position was a simple one. The pursuers were unable to perform an essential term of their contract, and yet they claimed to enforce it against the defenders. I should have been prepared to negative that claim upon general principles. In the present case, however, the event which happened was provided for by a clause in the contract of sale as follows:— "If default shall be made by the sellers in the execution of a legal bill of sale, or in delivery of the ship and her stores in the manner and within the time herein specified, the deposit paid shall be released to the purchasers, and unless the default shall have arisen from events over which the sellers have no control, the sellers shall in addition make due compensation for disappointment and loss of time caused by the non-fulfilment of this contract." There was default on the part of the sellers as they were unable to deliver the ship. Accordingly, it became their duty to release the deposit, and necessarily they also lost right to the balance of the price. On the other hand, as the sellers' default was due to circumstances over which they had no control, they were not liable to the purchasers for damages for breach of contract. The action might properly, I think, have been dismissed as irrelevant. Though the pursuers alleged that they had offered to deliver the vessel to the defenders, it behoved them to explain how they proposed to do this in view of the admitted fact that the ship had been requisitioned.

The action with reference to the sale of the s.s. "Factor" raises a different question. Upon 6th November 1917 the pursuers and the defenders made a contract for the sale and purchase of two steamers, the "Claddagh" and the "Factor," for the slump price of £100,000. That contract was effected by telephone through the brokers who acted for both parties. If they had allowed the contract to remain in its original shape the purchasers would probably have been held entitled to refuse to accept a transfer of the "Factor," seeing that both ships were sold together, and that the sellers were unable to perform a material part of the contract owing to one of the ships, the "Claddagh," having been requisitioned. But the parties did not allow matters to stand upon the original verbal contract. The brokers suggested to the defenders that two contracts should be prepared, one for each ship. I gather that what primarily weighed with the brokers was the difficulty of embodying a complex contract about two ships in a skeleton contract upon which there were printed the conditions of sale appropriate to a single ship. Even, however, if the broker had been a skilled conveyancer he would, I think, have found it difficult to frame a slump contract for the sale of the two ships which would have pleased both parties. It was a matter of importance to the defenders to get early possession of the "Claddagh," and yet if the sale of the two ships was to be treated as one and indivisible, the defenders could not have got delivery of the "Claddagh" until the "Factor" had arrived safely in this country, and until

she had been examined in dry dock and had received all necessary repairs. I doubt whether the defenders would have consented to a contract upon these lines. It is, however, sufficient for the decision of this case that both parties accepted the brokers' suggestion, and that they signed a separate contract for each ship—each contract containing terms and conditions inconsistent with the notion that each of the contracts was conditional upon the due performance of the other. In the result each party gave up rights which he had under the original contract, but, on the other hand, each acquired rights which did not belong to him under that contract. In these circumstances it would be contrary to principle, and indeed to good faith, that the defenders having had the advantage of two separate and independent contracts, should now be allowed to revert to the original agreement for a single sale of the two ships at a slump price.

For these reasons I agree with your Lordships that the pursuers' case fails as regards the "Claddagh," but that they are entitled to succeed as regards the "Factor."

LORD CULLEN—[*Whose opinion, in his Lordship's absence, was read by the Lord President*]—In the case relating to the "Claddagh" I am of opinion that the judgment of the Lord Ordinary is right, on the ground that the requisitioning of the vessel disabled the sellers from giving delivery of it to the buyers according to the contract of sale. In the absence of special agreement the buyers' right was to receive "possession of the goods" in exchange for the price (Sale of Goods Act, section 28)—that is to say, direct and natural possession; and there is nothing in the "Claddagh" contract as I read it binding the buyers to be content to pay the price without receiving such possession, or to submit to an indefinite postponement of the time for completion of the transaction. In the "Factor" contract the obligation to deliver is expressly qualified by an acceptance by the buyers of the effects of the existing requisition of that vessel. But I am unable to see any ground for reading into the "Claddagh" contract a similar acceptance in the event of a requisition intervening before delivery.

In the case relating to the "Factor" I am constrained to differ from the Lord Ordinary. The buyers desired to acquire the "Claddagh" only, but in order to do so thought it worth while to agree to the sellers' condition that the two vessels should go together. An agreement for sale of both was made verbally on 1st November 1917 at a lump price of £100,000. It is allowed that at this stage there was one indivisible contract. But matters did not rest on this footing. There followed the two separate contracts of sale of 6th November 1917 now under consideration, whereby the respective vessels were sold at separate prices. The making of two contracts at separate prices proceeded on the initiative of the intermediary brokers. It was a natural procedure to adopt, seeing that the two vessels could not in the circumstances be expected to be delivered simultaneously, so that provision fell to be made for payment of a separate price against each vessel as delivered. In the framing of the two contracts the mode of apportionment of the £100,000 into two separate prices—£60,000 and £40,000—was that suggested by the buyers. They apparently did not give any anxious consideration to the matter, the reason probably being that they took it for granted that both sales would go through. The contracts containing the apportioned prices were submitted to the sellers, who were satisfied with and accepted them. As a result the lump price, as such, disappeared, and I am unable to see how it can now be appealed to as unifying two contracts at separate prices in which it has no place. These contracts, had the parties so intended, might have been so conditioned as to create the species of interdependence between them which the buyers now seek to maintain. But they are void of any such condition, and I am unable to see any ground on which it can be read into them. I am accordingly of opinion that in the case of the "Factor" the buyers have incurred liability for breach of contract.

The Court pronounced this interlocutor:—

"Recal [the] interlocutor [of the Lord Ordinary] and (1) in the action [with reference to the 'Claddagh'] of new assoilzie the defenders from the conclusions of the summons, and decern; (2) in the action [with reference to the 'Factor'], find that the defenders have committed a breach of contract condescended on and are therefore liable to the pursuers in damages, and remit to the Lord Ordinary to proceed as accords. . . ."

Counsel for the Pursuers (Reclaimers)—Sandeman, K.C.—C. H. Brown. Agents—J. & J. Ross, W.S.

Counsel for the Defenders (Respondents)—Constable, K.C.—Watson, K.C.—W. B. Menzies. Agents—Beveridge, Sutherland, & Smith W.S.

Tuesday, January 14.

SECOND DIVISION.

[Lord Sands, Ordinary.

BLAIR *v.* KERR'S TRUSTEES.

Process—Declarator—Competency—Action Premature.

A testator in a trust-disposition and settlement directed his trustees to hold a fund for A in alimentary liferent, with power upon A's request to convey to any trustees named by A in any antenuptial marriage-contract she might enter into. These marriage-contract trustees were to hold for A in alimentary liferent and her children in fee, with power to A by such marriage-contract to confer the liferent upon her husband in the event of his survival. A, who had married without an antenuptial marriage-contract, brought an