the deed that a *spes successionis* was intended to be included in the general conveyance of the estate "now belonging to" the truster that the Court gave effect to that contention. But the case is also an authority for the view that unless you find in other parts of the deed something to show that a *spes successionis* was intended to be carried, such conveyance will not include it. Now, I think, one searches the marriage contract here in vain for anything which would enlarge the natural meaning of the words used, and therefore I have come without hesitation to the conclusion that whatever the parties to the marriage contract had in their minds, Mrs Macdonald did not in fact include in the conveyance to the trustees the *spes successionis* which she had in regard to her mother's estate. That being so, I am of opinion that branch (*a*) of question 3 should be answered in the negative, and that it is unnecessary to answer branch (*b*) or question 4.

LORD ARDWALL—I entirely concur, and I think it is a very clear case.

LORD JUSTICE-CLERK—I also concur in the opinion which Lord Low has expressed so fully and so well, and I have nothing to add.

The Court answered the first question in the negative, the second in the affirmative, branch (*a*) of the third in the negative, and found it unnecessary to answer branch (*b*) or question four.

Counsel for the First Parties—Skinner. Agents—Erskine Dods & Rhind, S.S.C.

Counsel for the Second Parties—Hunter, K.C.—Wilton. Agents—Galloway, Davidson, & Mann, S.S.C.

Counsel for the Third Parties—Morrison, K.C.—Munro. Agents—Paterson & Salmon, Solicitors.

Tuesday, November 3.

EXTRA DIVISION.

[Lord Mackenzie, Ordinary.

HONG-KONG AND WHAMPOA DOCK COMPANY, LIMITED *v.* THE NETHERTON SHIPPING COMPANY, LIMITED.

Contract — Breach — Implied Condition — Impossibility of Performance.

A shipowner, who owned a vessel which had been damaged by fire and towed into Singapore, entered into a contract by correspondence with a firm in Hong-Kong for the repair of the vessel in Hong-Kong, "the vessel to be delivered at the port of repair" by the shipowner. The shipowner thereafter informed the repairers that the vessel was to be sold as she lay at Singapore. The repairers raised an action of damages for breach of contract against the shipowner. The defender averred that, both by the custom of the shipping and shipbuilding trade and by common law, it was a condition of the contract (which was within the contemplation of both parties when the correspondence took place) that it should be commercially possible; that the contract was also by the custom of trade and by common law subject to a condition that the defender should be able within a reasonable time to send the vessel to Hong-Kong; that after the conclusion of the contract the authorities at Singapore declined to allow the vessel to be towed even after certain contemplated repairs were made, and while not finally agreeing to her being towed on any terms, required that at all events repairs should be made which would have involved an unreasonable expenditure having regard to the value of the vessel, and would have taken such time that the ship when repaired could not have been towed to Hong-Kong owing to the dangers of the typhoon which would have been prevalent by the time the repairs were completed. *Held* that these averments were irrelevant, and that the defender was liable in damages.

This was an action by the Hong-Kong and Whampoa Dock Company, Limited, against the Netherton Shipping Company, Limited, Glasgow, for £2500 damages for breach of contract.

The following narrative of the facts is taken from the opinion of the Lord Ordinary (MACKENZIE):—"The defenders were the owners of the s.s. 'Netherton,' which in February 1907 was seriously damaged by fire, and was towed into Singapore in a damaged condition. Negotiations were entered into between the pursuers and the defenders with a view to the repair of the vessel, which resulted in the contract in question being concluded. The pursuers sent representatives to Singapore, received the conditions and specification of the damage repairs required, and a tender, dated 18th March 1907, was thereafter submitted by them.

"Its terms were as follows:—'I beg to submit tender for repairs to hull, engines, and boilers of the s.s. "Netherton" in accordance with the plans and specifications supplied by your good selves, as follows:—

Repairs to hull—Dollars, two hundred and thirty thousand eight hundred and sixty-nine only	$230,869.00
Repairs to engines and boilers—Dollars, ten thousand seven hundred and eight only . .	10,708.00
	$241,577.00

Time to complete repairs 170 days, one hundred and seventy days.' This amount is equal to about £24,157 sterling.

"The pursuers, in answer to a telegram that the price was prohibitive, replied by code telegram on 25th March that they would undertake the repairs for $206,000—equivalent to about £20,600—the vessel to be delivered at Hong-Kong at ship's expense and risk. On 27th March the pursuers

wrote confirming telegrams as follows:—'Our offer for the repairs to the s.s. "Netherton" now stands as follows:—To undertake the work as per specification furnished us, the vessel to be delivered at port of repair by owners, for the sum of $206,000.00 (Dollars two hundred and six thousand). Time required 170 days from time the vessel is placed in our hands.'

"There were further communications between Mr Tilston, acting on behalf of the defenders, and the pursuers, and on 10th April he sent a code telegram to the pursuers to the following effect:—'I will accept tender, subject to all replaced material being annealed to the satisfaction of Lloyds and owners' surveyors or renewed.' To this the pursuers replied by code telegram of same date as follows:—'We agree to the conditions named as per your telegram of 10th April. Please confirm acceptance.'

"On 11th April Mr Tilston wrote accepting the pursuers amended offer, stating it was distinctly understood that they were to carry out the repairs fully in accordance with the specification on which they tendered. The letter contained this passage—'In order to place the vessel at Hong-Kong certain repairs are being effected here, and as a portion of these will partake of the nature of permanent repairs, and are included in the above specification, I have no doubt you will see your way to allow a fair sum as credit for same against your price. A list of this will be handed you on my arrival.' In replying to this the pursuers wrote—'We note that in order to place the vessel at Hong-Kong certain repairs are being effected at Singapore, a portion of which will partake of the nature of permanent repairs, and are included in the specification referred to above. These will receive our fairest consideration in due course. Awaiting the arrival of the vessel.'

"On the 6th of May a code telegram was sent on behalf of the defenders to the pursuers, that the position was changed with regard to the s.s. 'Netherton,' and that she was to be sold as she then lay for account of the underwriters. This was confirmed by letter."

The pursuers averred that by the correspondence a contract had been duly completed, whereby the defenders were bound to deliver the s.s. 'Netherton' at Hong-Kong, and place it at the disposal of the pursuers that they might execute repairs thereon in terms of the contract; that the s.s. 'Netherton' was advertised for sale and sold by or on behalf of the defenders in breach of their contract with the pursuers.

The defenders averred—"(Ans. 5, 6, and 7) . . . . Explained that it was a condition of the correspondence, understood by both parties at the time, that the 'Netherton' should be fit for repair, and that, as she turned out not to be in this state, any contract fell. Explained that any contract between the parties was subject, both by the custom of the shipping and shipbuilding trade, and common law, to a condition (which was within the contemplation both of the pursuers and defenders when the correspondence took place) that any contract should be commercially possible, and that, on a fair construction of the correspondence the defenders did not warrant delivery of the ship at Hong-Kong, and particularly did not do so in the events which have happened. Explained further, that by custom and common law as aforesaid, any contract was subject to a condition that the defenders should be able within a reasonable time after its date to send the 'Netherton' to Hong-Kong. Explained that it was found after the date of said contract that through no fault of the defenders the ship was not reasonably fit to be taken to Hong-Kong within a reasonable date of said contract, and any contract between the parties accordingly fell. (Ans. 8) . . . Explained that it was discovered after the said correspondence that the 'Netherton' was a constructive total loss and incapable of being repaired. Explained further that after 30th April 1907 the authorities at Singapore declined to allow the 'Netherton' to be towed, even after the repairs contemplated were made, and while not finally agreeing to her being towed on any terms required, that at all events repairs should be made which would have involved an unreasonable expenditure, having regard to the value of the vessel, and would have taken such time that the ship when repaired could not have been towed to Hong-Kong, owing to the dangers of the typhoon which would have been prevalent by the time the repairs were completed."

The pursuers pleaded—"(1) The defenders having failed to carry out the contract concluded between them and the pursuers as condescended on, are bound to compensate the pursuers for all loss and damage thereby occasioned to them, and the pursuers having sustained such loss and damage to the extent condescended on, are entitled to decree in terms of the conclusions of the summons. (3) The defences are irrelevant, and should be repelled."

The defenders pleaded—"(3) Any contract between the parties being subject to the condition (contemplated by them both when carrying on the correspondence) that the ship was reasonably capable of being repaired within a reasonable time, and this condition not having been purified, any contract falls, and the defender should be assoilzied. (4) *Separatim*—It being a condition of the contract that the vessel should be capable of being delivered by the defenders to the pursuers within a reasonable time for the purpose of being repaired, and this condition having in the event become impossible of purification, through no fault of the defenders, any contract falls, and the defenders should be assoilzied. (5) *Separatim*—The defenders, having all along been able and willing to perform their part of the contract, and having only been prevented from so doing by the action of the Singapore authorities, fall to be assoilzied. (8) The pursuers' averments, so far as material, being unfounded in fact,

the defenders fall to be assoilzied. (9) In any event the damages claimed are excessive."

On 11th June 1908 the Lord Ordinary repelled the defenders' pleas-in-law other than the 8th and 9th, and allowed a proof on the question of damages.

Opinion.—[*After the narrative above quoted*]—"The question is whether the defence is relevant. In my opinion it is not. The construction of the contract is not open to doubt. The defenders came under an absolute obligation to deliver the vessel at Hong-Kong at their expense and risk. The obligation upon the pursuers was to execute the repairs specified upon the vessel when delivered, and they were to have 170 days to complete them. The defenders are unable to point to any supervening event rendering performance impossible. Nor do their averments amount to a statement that performance was impossible. There is a positive contract to do a thing, not in itself unlawful, and the contractor must perform it or pay damages—*Taylor* v. *Caldwell*, 3 B. & Sm. 826; *Clark* v. *Glasgow Assurance Company*, 1 Macq. 668; *Gillespie & Company* v. *Howden & Company*, 12 R. 800. This would be so even although in consequence of unforeseen accidents the performance of the contract had become unexpectedly burdensome or even impossible. The contract in *Taylor* v. *Caldwell* was to give the use of a music hall on certain days for certain purposes. The music hall was destroyed by fire, and it was held that the parties were excused, because before breach performance had become impossible from the perishing of the thing without default of the contractors. This principle was extended in the case of *Krell* v. *Henry*, 1903, 2 K.B. 740, which was strongly founded on by the defenders here. That was one of the cases relating to the letting of seats for days in June 1902, on which it had been announced that the Coronation processions would take place. As the processions did not take place, the defendant refused to pay the balance of rent. The plaintiff was held not entitled to recover. The view taken was that it was not essential to the application of the principle of *Taylor* v. *Caldwell* that the direct subject of the contract should perish, and that it was sufficient if a state of things or condition perishes or fails to be in existence at the time of performance, if in the contemplation of both parties it was the foundation of the contract, though not expressly mentioned in the contract itself. Even if the view taken in *Krell's* case be sound, it would not support the defenders' case. Their averments only come to this, that by the custom of trade the contract was subject to the condition that it should be commercially possible. What this means is shown by the averments in Ans. 8, to the effect that the Singapore authorities required, before allowing the 'Netherton' to be towed, that repairs should be made which would have involved an unreasonable expenditure having regard to the value of the vessel. This, as I read it, is a statement that it would have cost them more than they reckoned on to repair and tow the vessel from Singapore to Hong-Kong. This only means they made a bad bargain, and that could, in no view, excuse performance of the contract.

"It is said that the 'Netherton' was a constructive total loss. This may be so as in a question between the owners and the underwriters. Though the vessel may have been a constructive total loss as between them, this does not mean that she had ceased to be a ship (*Barr* v. *Gibson*, 3 M. & W. 390, *per* Baron Parke).

"The defenders further say that their contract was subject to the condition that they should be able within a reasonable time after its date to send the 'Netherton' to Hong-Kong and that after the date of the contract it was found the ship was not reasonably fit to be taken there within a reasonable date. I am unable to take the view that time was here of the essence of the contract. The case of *Nicholl & Knight* v. *Ashton, Eldridge, & Company*, 1901, 2 K.B. 126, which was founded upon in this connection, was different. There a vessel was stranded through perils of the sea without default on the defendants' part, and was so much damaged as to render it impossible for her to arrive at the port of loading in time to load a particular cargo during a particular month. It was held there was an implied condition that if the vessel, without fault on the defendants' part, should have ceased to exist as a ship fit for the purpose of shipping cargo, then the contract should be treated as at an end. There was in the present case no condition, either express or implied, that the 'Netherton' should be delivered at Hong-Kong by any particular date.

"Nothing supervened after the date the contract was entered into to render it impossible of performance. The vessel was not exposed to the sea. She had been brought into port. The defenders had furnished the pursuers with the conditions and specification of the damage repairs required, before the contract was made. They then knew, or were in a position to know, the whole circumstances. By the 6th of May, when they sent the telegram that the position was changed with regard to the vessel, nothing fresh had happened. The fact, as disclosed on their averments, is that the 'Netherton' was in the same position then as when they made the contract.

"I am therefore of opinion that the defence is not tenable. The defenders' pleas, other than the 8th and 9th, will be repelled, and a proof allowed upon the question of damages."

The defenders reclaimed, and argued—The averments in defence were relevant, and proof should be allowed of the whole case. It was averred that by the custom of trade and the understanding of parties the contract was qualified by an *implied* condition that the repairs required to enable the vessel to proceed to Hong-Kong could be effected at a cost which was reasonable in proportion to her value, and

that that condition had not been purified. If the defenders succeeded in establishing that averment, then the contract was at end—*Nicholl & Knight* v. *Ashton, Eldridge, & Company*, 1901, 2 K.B. 126. Further, a party was relieved of his contract whenever performance was rendered practically or commercially impossible by supervening circumstances — *Taylor* v. *Caldwell*, 1863, 3 B. and Sm. 826; *Krell* v. *Henry*, 1903, 2 K.B. 740. It had been held that even if the supervening impossibility was due to a subsequent Act of Parliament, still the contract was at an end—*Baily* v. *De Crespigny*, 1869, L.R., 4 Q.B. 180. Here, even on the assumption that the defenders were unconditionally bound to deliver the vessel at Hong-Kong within a reasonable time, that had been rendered impossible by the action of the authorities at Singapore. The case of *Gillespie & Company* v. *Howden & Company*, March 7, 1885, 12 R. 800, 22 S.L.R. 527, was distinguishable, because there the contract was *ab initio* impossible. In any event proof ought to be allowed on the whole case, for an inquiry into the question of damages would involve the whole facts on record.

Argued for the respondents—There was no necessity for a proof on the question whether there was liability in damages. The contract was unambiguous, and the defenders were admittedly in breach. Their averments as to implied condition amounted to this, that the contract was conditional on its turning out a good bargain for the defenders. The obligation to deliver at Hong-Kong was therefore absolute, and there was no averment of facts relevant to excuse non-performance. The defenders were unable to point to any change in circumstances affecting the contract on which they could rely in excuse for their breach. The state of the vessel was the same at the making as at the breaking of the contract, and the defenders had at both times the same means of knowledge as to the repairs necessary to enable the ship to be delivered at Hong-Kong. The "impossibility," therefore, was not a supervening one, and this distinguished the case from *Taylor* v. *Caldwell*, *Krell* v. *Henry*, and *Nicholl & Knight* v. *Ashton, Eldridge, & Company*, *cit.*, and brought it within the ratio of *Gillespie & Company* v. *Howden & Company*, *cit.*, and *Clark* v. *Glasgow Assurance Company*, 1854, 1 Macq. 668, whereby a party undertaking the impossible was bound to perform or pay damages.

At advising—

LORD M'LAREN—My opinion in this case is in complete agreement with that of the Lord Ordinary, and it is therefore not necessary that I should enter very fully into the facts of the case. It is common ground that the steamship "Netherton" was seriously damaged by fire, and after reaching Singapore was unable without extensive repairs to continue her voyage. There was at the time no dock at Singapore available for executing the necessary repairs, and the owners entered into a contract with the pursuers, the Hong-Kong and Whampoa Dock Company, Limited, to have the necessary repairs executed by the pursuers at a price which was eventually reduced to $206,000. Nothing is said in the letters constituting the contract on the subject of the temporary repairs that would be necessary to put the ship into a sufficiently seaworthy state for being towed from Singapore to Hong-Kong; but it must have been within the knowledge and contemplation of both parties that such repairs were necessary. Accordingly in a letter subsequent to the completion of the contract, the defenders' agents wrote—"In order to place the vessel at Hong-Kong, certain repairs are being executed here (at Singapore), and as a portion of these will partake of the nature of permanent repairs, and are included in the above specification, I have no doubt you will see your way to allow a fair sum as credit for same against your price." To this proposal the pursuers gave a qualified assent in their letter of 30th April 1907.

I refer to this sequel to the contract for the purpose of observing that it cannot be contended that there was not *consensus in idem* as to the terms and conditions of this repairing contract. The parties, as is shown by the letters, were agreed in principle that repairs made at Singapore for enabling the ship to proceed to Hong-Kong should, so far as permanent in character, be put to the credit of the shipowners. Beyond this admission in principle the pursuers could not be expected to go until they should see the vessel and be able to judge how far the repairs made or to be made at Singapore would diminish the cost of the repairing work which they were to execute at Hong-Kong.

A week later (8th May 1907) Messrs Syme & Company, who I understand represented the underwriters, wrote to the pursuers that "the position had been altered," and that the vessel would be sold in her damaged state for account of underwriters. The owners say nothing to the contrary. In this process they in fact uphold the action of the underwriters.

The circumstances as stated amount in my opinion to a clear case of breach of contract, and make it unnecessary that a proof should be allowed to the pursuer for the purpose of establishing such breach.

The contract is in writing, and in this record the defenders admit that they do not intend to put the "Netherton" into the pursuers' hands for the purposes of repair. By their statements in the record the defenders must be taken to have admitted the breach of contract, unless they have a relevant defence on the ground which they put forward, that the damage to the ship amounted to a constructive total loss, and that repair was "commercially impossible." I am not sure that I fully undertand what is meant by the phrase "commercially impossible," but the best interpretation I can put on the words is that the defenders have discovered that it will be more profitable to sell the ship in its damaged condition than to repair it. It seems to me that this is just another

way of saying that it will be more profitable to the defenders to pay damages than to go on with their contract, and I think the defenders would have been well advised to follow out their proposition to its logical consequence, and to come to an arrangement as to damages. But as they have not done so, I agree with the Lord Ordinary that a proof limited to the question of the amount of damage will be necessary.

LORD PEARSON—I am of the same opinion. The defenders undertook, as part of the original contract, to deliver the ship at the port of repair. The damage she had sustained was so serious that the owners knew from the first that extensive repairs were necessary in order to enable her to be towed round to Hong-Kong. Before the final contract was concluded, it was known to both parties that such repairs were necessary, and further that a portion of them would be of the nature of permanent repairs; and this being so, it was arranged between the parties that, in so far as the repairs at Singapore were of that description, the question of allowing credit for them as against the price would be fairly considered by the pursuers. The original proposal was thus varied by a clause in the defenders' favour, regarding the very matter of the repairs necessary before she could be taken round to the port of repair and delivered to the pursuers. It was known to both parties from the first that she was unseaworthy as she stood. All that happened was that the port authorities demanded more costly repairs than were anticipated, before they would allow her to leave the port; and the owners, or the underwriters, made up their minds that the expense would be prohibitive, and resolved to sell the ship as she stood. The defenders now say that it was an implied condition of the contract that in such circumstances it was not to be enforced. The difficulty which meets the defenders is well illustrated by the language in which they state their case, namely, that they are not bound to what is commercially impossible. That is a very far-reaching doctrine, and its application would lead to startling results. This was not a contract of sale; but if the defenders' proposition is sound, I see no reason why a seller of goods should not be entitled to say to the purchaser, "It was an implied condition of your contract that its fulfilment should be commercially possible; and really prices have risen so much that I must take advantage of the implied condition, and declare the bargain off." I hold with the Lord Ordinary and your Lordships that there are no relevant averments here as to custom of trade, or as to implied condition; and that the proof must be limited to the conclusion for damages.

LORD DUNDAS—I agree with your Lordships. I think the Lord Ordinary has rightly held that the defences, so far as they are directed against alleged breach of contract by the defenders, are irrelevant. His Lordship appears to me to summarise correctly the gist of the matter when he says—"The construction of the contract is not open to doubt. The defenders came under an absolute obligation to deliver the vessel at Hong-Kong at their expense and risk. The obligation upon the pursuers was to execute the repairs specified upon the vessel when delivered, and they were to have 170 days to complete them. The defenders are unable to point to any supervening event rendering performance impossible. Nor do their averments amount to a statement that performance was impossible. . . . Their averments only come to this, that by the custom of trade the contract was subject to the condition that it should be commercially possible. What this means is shown by the averments in Ans. 8 to the effect that the Singapore authorities required, before allowing the 'Netherton' to be towed, that repairs should be made which would have involved an unreasonable amount of expenditure, having regard to the value of the vessel. This, as I read it, is a statement that it would have cost them more than they reckoned on to repair and tow the vessel from Singapore to Hong-Kong. This only mean they made a bad bargain, and that could in no view excuse performance of the contract." I adopt this statement from the Lord Ordinary's opinion as concisely expressing my own view of the matter. The defences are fertile in phrases which, though ingeniously conceived, appear to me to indicate the essential invalidity of the defenders' position. Of these, the phrase "commercially possible"—a novelty, so far as I am aware, in legal pleading—is perhaps the most remarkable; but one finds also such expressions as "not reasonably fit," "incapable of being repaired," "unreasonable expenditure having regard to the value of the vessel," and so forth. For my own part I am disposed to apply to such language the words of Lord Bramwell in a well-known Scotch case, where his Lordship animadverted upon the use (or misuse), in the region of arbitration law, of the phrase "constructive corruption." Lord Bramwell said (*Adams* v. *Great North of Scotland Railway Co.*, 1890, 18 R. (H.L.) at p. 10)—"I think that that and similar expressions are only used by persons who have a desire to bring about a certain result, and do not know how to do so by the use of ordinary and intelligible expressions."

The Court adhered, and remitted to the Lord Ordinary.

Counsel for Pursuers (Respondents)—Graham Stewart, K.C.—Hon. W. Watson. Agents—Scott Moncrieff & Traill, W.S.

Counsel for Defenders (Reclaimers)—Dean of Faculty (Dickson, K.C.)—Macmillan. Agents—J. & J. Ross, W.S.