ings taken together. If these result in a contract, and the contract reached is not resiled from, the parties remain bound and are answerable in fulfilment or in damages.

The Courts below have differed, the Lord Ordinary holding that two of the contracts have been established, and awarding damages upon that footing, the Division holding that all the five contracts have been established and increasing the damages accordingly. In my opinion your Lordships are able to settle this difference by an express reference to that part of the correspondence which unquestionably refers to all the five contracts. They are enumerated by number and date in the letter of the respondents to the appellants on date 8th December 1916, and the material passage is as follows;—"With regard to the above orders, we confirm the conversation with your Mr M'Lean to-day, in the course of which he suggested that we should supply against these orders sheets 30 inches wide instead of 3 feet wide, which would enable you to complete your contract and ship the sheets during January and February." As was not unusual with M'Lean he took no notice of this. In a week the respondents sent him a protest—"Why don't you acknowledge receipt of our letter?" And on the 19th he on behalf of the appellants wrote—"We certainly received your letter of the 8th December confirming the writer's interview with you, but as it was clearly a definite statement of the case we hardly thought it called for any reply."

In my opinion no legal terminology required to be added to this in order to enable it to stand as the acknowledgment of a complete and binding contract to which the Courts must give effect.

As to damages I can give no countenance to the views expressed by Lord Salvesen on that subject. If the learned Judge merely referred to the fact that the pursuers had condescended on market price as an apparent datum for their calculations, I should not willingly agree that they were thereby foreclosed from obtaining damages on a more general footing. But if the learned Lord's judgment was meant to cover the general case, and to lay down or imply that failing a market the right to damages is destroyed, I could not agree to any such doctrine. To prevent damages falling due because the party to be indemnified cannot postulate or prove an actual market at the material date, viz., the date of breach, would appear to me tc empty of all reality, in very many cases easily supposed and often occurring, the general remedial provisions not only of the ordinary law of sale, but even those special provisions of the Sale of Goods Act to which the noble and learned Viscount opposite referred. "Where," says the Act, section 50 (3), "there is an available market, then the measure of damages is *prima facie* to be ascertained" in such and such a manner. But where there is not an available market, shall there then be no damages given? Not at all. This only leaves the situation exactly where (2) had put it, namely, that "the measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract."

I agree to the motion proposed from the Woolsack.

VISCOUNT FINLAY—I am authorised to say that my noble and learned friend Lord Wrenbury concurs in this judgment.

Their Lordships affirmed the judgment appealed from and dismissed the appeal, with expenses.

Counsel for the Appellants—Sandeman, K.C.—Macquisten—Beveridge. Agents—J. & H. Pattullo & Donald, Dundee—Alex. Morison & Company, W.S., Edinburgh—Beveridge & Company, Westminster.

Counsel for the Respondents—Moncrieff, K.C.—Hamilton—F. C. Thomson. Agents—Donald Currie, Glasgow—Kessen & Smith, W.S., Edinburgh—Cannon, Brookes, & Odgers, London.

Friday, August 1.

(Before Viscount Finlay, Viscount Cave, and Lords Dunedin, Shaw, and Wrenbury.)

CLADDAGH STEAMSHIP COMPANY, LIMITED *v.* THOMAS C. STEVEN & COMPANY.

(In the Court of Session, December 19, 1918, 56 S.L.R. 195.)

Contract—Writ—Proof—Admission of Evidence to Show Apparent Final Written Contract not the Real Contract of Parties but merely Machinery for Carrying out Real Contract.

Contract—Sale—Ship—Fulfilment of Contract—Intervention, through Requisition, by Government.

A trading company were anxious to purchase a ship for their business, and got in touch with a ship company which owned two ships, one free, one under requisition, and was willing to sell. The ship company, however, refused to sell the free ship alone, and after negotiations the trading company agreed to purchase both ships at £100,000. The brokers made out a separate written contract for each ship, dividing the £100,000 without consulting the sellers, which contracts were duly executed. Before the ships were delivered the Government put the free ship under requisition. The trading company refused to go further, and the ship company took action against them. *Held* (1) that it was competent for the trading company to prove by extrinsic evidence that the written contracts were not the real contracts of parties, but were merely the machinery for carrying out the real contract, which was for the sale of both the ships together; (2) that the purchase by the trading company of the one ship was of a free ship for their own trade, and the ship company could not insist on the purchase when the ship was no longer free; and (3) that the ship company

being thus unable to fulfil the contract so far as the one ship was concerned could not insist on fulfilment in the case of the other.

This case is reported *ante ut supra.*

The defenders, Messrs Thomas C. Steven & Company, appealed to the House of Lords against the judgment of the Court of Session in respect to the "Factor." The pursuers, the Claddagh Steamship Company, Limited, took a cross appeal in respect to the "Claddagh."

At delivering judgment—

VISCOUNT FINLAY—Two actions were brought by the Claddagh Steamship Company against Messrs Steven for not taking delivery of the "Claddagh" steamship and of the "Factor" steamship, which were alleged to have been purchased under two agreements from the Claddagh Steamship Company. The Lord Ordinary decided in favour of Messrs Steven in both actions. On appeal the First Division, while affirming his decision as to the "Claddagh," held Messrs Steven liable as regards the "Factor" steamship. Messrs Steven now appeal to your Lordships' House asking that the decision of the Lord Ordinary as regards the "Factor" should be restored, and the Claddagh Steamship Company have brought a cross appeal asking that the decision as regards the "Claddagh" steamship should be reversed, and that judgment should be entered in their favour.

The Claddagh Steamship Company had two ships, the "Claddagh" and the "Factor." Messrs Steven were desirous of buying the "Claddagh" for use in their trade. The Claddagh Steamship Company refused to sell the "Claddagh" unless the "Factor" were also bought. After some negotiations the parties met on the 1st November 1917, and an arrangement was made as stated in a letter of that date from Messrs Steven to Messrs Little & Company, the firm of brokers acting for both parties, for the sale of the two steamers "Claddagh" and "Factor" for £110,000.

On the 6th November the price for the two boats was altered to £100,000. Mr Davis, a member of the brokers' firm, who had made this new arrangement with the representatives of the Claddagh Company, Mr Robertson and Mr Lauder, found a difficulty in putting the agreement for the two vessels into one contract. On the 6th he mentioned to Mr Robertson that it was "rather necessary" to have the documents in two forms, but no arrangement was made with him as to how the price was to be divided. Mr Steven suggested that £60,000 should be put in for the "Factor" and £40,000 for the "Claddagh," and this was done without any communication with the sellers. Two forms of contract were accordingly drawn up, and the letter of 6th November 1917 was sent by Little & Company to the Claddagh Steamship Company. This letter is of some importance, and it is as follows:—"'*Factor*' *and* '*Claddagh*'—Referring to our interview of date and the telephonic conversation with Messrs Steven, when it was agreed between you that this sale was in order at £100,000 for the two steamers, less 2 per cent. commission to us, subject to details of contract, we have now drawn up the enclosed contracts, details of which we trust you will find in order. We are sending duplicates to Messrs Steven to-night for their approval, as they wish to promptly submit them, with the forms of application they have to fill in, to the Shipping Controller. Irrespective of the conditions in the contract, it is understood, as already agreed, that the sellers undertake to release the s.s. 'Claddagh' from the present coal contract, and in this respect we understand from Messrs Steven that the Ministry of Shipping are agreeable. It is further understood that the existing marine policies of insurance for the steamers shall be cancelled by the sellers, and that the return premiums granted under same are for purchasers' account."

The two contracts were signed by both parties, and are the documents on which these actions are brought. They are both dated 6th November 1917, and with the differences of name and price are very nearly in the same terms.

The contract with regard to the "Claddagh" gives the price as £40,000, and provides that on payment of purchase money a legal bill of sale should be executed and the ship delivered to the purchasers. There was a deposit of 10 per cent. of the purchase money, and provision was made for forfeiture of the deposit on default of payment by the purchasers and for its return in default by the sellers or loss of the vessel before the time of transfer. A marginal addition expressed that the vessel was sold subject to the sanction of the British Government. The agreement for the "Factor" was in the same terms *mutatis mutandis.* The price was £60,000, and there was a note that the purchasers took over the vessel with her Government requisition.

On the 9th of November the "Claddagh" was requisitioned by the Admiralty, and it became impossible for the vendors to put the vessel at the disposal of Messrs Steven for use in their trade. Messrs Steven refused to take delivery of the vessel subject to the Admiralty requisition, and also refused to take delivery of the "Factor" on the ground that they had bought the two vessels together, and that the "Factor" without the "Claddagh" was of no use to them.

Lord Hunter in the action for non-acceptance of the "Claddagh" held that the requisition by the Admiralty prevented the vessel from being deliverable within the meaning of the contract. "The vessel," he says, "was no longer a subject that at the date of the 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." For this reason he decided as regards the "Claddagh" in favour of Messrs Steven, and his decision was affirmed in the Court on appeal. In my opinion the Lord Ordinary and the Inner House were right on this point, and the cross appeal as regards the "Claddagh" should be dismissed.

It was urged for the Claddagh Company

that delivery might be made notwithstanding the requisition, and that Messrs Steven could take the vessel subject to the requisition. In my opinion this would not be the delivery to which the purchasers were entitled. Any such delivery would be purely ceremonial. The vessel would not be at the disposal of Messrs Steven, and they could not use her in their trade as the vessel was at the disposal of the Admiralty and had to be used as the Admiralty directed. The "Claddagh" had been sold as a free vessel not subject to any requisition. It is quite true that "possession" might in a sense be handed over to Messrs Steven by the sellers, but possession subject to the employment of the vessel in the Admiralty service is nothing to a business man who buys the vessel meaning to use her. As Messrs Steven were entitled to delivery in the ordinary business sense of the term, they were justified in refusing to take the "Claddagh" subject to Admiralty requisition. In my opinion no conclusion on this part of the case was possible other than that arrived at by the First Division in confirming the Lord Ordinary's judgment.

The question remains whether the fact that delivery could not be made of the "Claddagh" entitled Messrs Steven to refuse to take the "Factor." Lord Hunter, the Lord Ordinary, decided on this point in favour of Messrs Steven. The Claddagh Company contended that the two contracts were separate and distinct and not in any way depending upon one another, and that Messrs Steven were bound to take the "Factor" at the price of £60,000 by itself. The Claddagh Company contended that as there was nothing in the written agreements themselves to make them interdependent, the surrounding circumstances could not be looked at for this purpose. Lord Hunter, however, said—"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 contracts, 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. . . . 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."

Lord Hunter was reversed as regards the "Factor" by the First Division. The reasons given in the First Division varied. The Lord President was of opinion that the absence of any such provision in the written contract was fatal to Messrs Steven's contention upon this point. Lord Mackenzie said—"There is not enough in the circumstances known to both parties to make the two transactions interdependent." Lord Skerrington said—"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." Lord Cullen said—"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."

These judgments can be supported only if the parties have substituted two separate contracts, each for one ship only, for the one contract for the two ships. It is obvious upon the evidence that Mr Steven never had any such intention, and Mr Davis, who as broker acted for both parties, entirely corroborates him. The Claddagh Steamship Company abstained from calling either Mr Robertson or Mr Lauder, who had represented them in the transaction, so that the evidence for Messrs Steven is not contradicted. The Claddagh Company are indeed entitled to say that effect must be given to the rules of law with regard to written documents, and to contend that the evidence does not establish that these documents were interdependent. But the mere existence of two documents for the sale each of one ship is not sufficient to establish the contention of the Claddagh Company. It is always open to inquiry whether such documents were executed and delivered by the parties as containing the real bargain between them. If the result of the evidence is that the two ships were to be sold together for £100,000, and that the two documents were executed merely as pieces of machinery for carrying out such a sale, and not to replace it by a new arrangement which would vitally alter the rights of the two parties, the contention of the Claddagh Steamship Company must fail. It is a very remarkable circumstance proved by the broker Mr Davis, that the prices of £60,000 and £40,000, together making up £100,000, were attributed to the "Factor" and the "Claddagh" respectively without communication with the sellers. They were suggested by Mr Steven in answer to Mr Davis's question—"What separate prices might be put in so as to bring them together?" It is impossible to suppose that either party when signing these documents regarded them as new contracts for sales of separate ships at separate prices, and not depending upon one another. The letter of the 6th November 1917, which I *have above* set out, was written at the time by the broker to Messrs Robertson & Company for the Claddagh Company, and it seems almost conclusive that these instruments were drawn up and signed by the parties not to supersede but to carry out the agree-

ment for the sale of the two ships together. That agreement is said to have been "subject to details of contract." It appears to me that it is not for the present purpose very material whether the agreement of £100,000 was binding or whether it was open to either party to break it off on a difference about the details. It seems obvious that both parties intended to carry out that agreement by the machinery of the two contracts, one for each ship, and that the details that appear on the two documents with regard to each ship are those that would have appeared in a single document relating to both. The letter goes on to refer to the understanding which had been arrived at as to the release of the "Claddagh" from the present coal contract, and the return premiums on marine policies, and provides for this holding quite irrespective of the conditions in the contract. The Claddagh Steamship Company wired to the brokers on the 7th November —"Received contracts from Glasgow which appear in order, and returning same duly signed to-night." On the 8th they wired that they confirmed the understanding contained in the letter of the 6th November, which I have set out above, and they repeated this by letter of the same date.

The question is really a question of fact. The evidence on behalf of Messrs Steven, and the absence of any contradiction on the part of the Claddagh Company, are in my opinion decisive to show that the two "contracts" were executed and delivered only for the purpose of carrying out the arrangement for the sale of the two ships together, and that they are therefore interdependent.

I think that the decision of the First Division on this point should be set aside, and the interlocutor of the Lord Ordinary restored.

I am therefore of opinion that the appeal of Messrs Steven should be allowed, with costs here and below, and that the cross appeal should be dismissed, with costs.

VISCOUNT CAVE—I agree, and desire only to add a few observations as to the principal appeal, that relating to the steamship "Factor."

The general rule is clear that where the terms of a contract have been embodied in a formal document then in determining what the contract is a court must look to the formal document and to that alone. This is the "wholesome salutary rule" which was enforced in *Inglis* v. *Buttery*, L.R., 3 A.C. 552, 5 R. (H.L.) 87, 15 S.L.R. 462. But nevertheless it is open to a party to prove, if it be the fact, that the actual contract between the parties was not embodied or intended to be embodied in the formal document, but that the latter was (to use the words of Lord Selborne in *Jarvis* v. *Berridge*, L.R., 8 Ch. 351, at p. 359) a "mere piece of machinery obtained . . . as subsidiary to and for the purposes of the verbal and only real agreement." I have no doubt that the burden of proof lies heavily upon a litigant who seeks to establish such a case, but if it is established effect is given to it in the courts.

In the present case the evidence is all one way. The evidence of Mr Steven and Mr Davis, which was supported by the correspondence and was not contradicted by the respondents in any way, appears to me to prove that there was throughout one contract for the sale of the two vessels at one price of £100,000; and that the formal contracts for the sale of one vessel for £40,000 and of the other for £60,000 were not intended to supersede the main agreement, but were only machinery adopted for the sake of convenience in carrying the agreement into effect. Indeed so little did this separation of the two vessels represent the real agreement of the parties that the sellers were not even consulted before the apportioned prices were fixed and inserted in the contracts. It is noticeable also that according to the admission of both parties there were other terms which formed part of the agreement between them but were not embodied in the formal contracts, and it cannot therefore be said that the formal contracts contain the whole agreement. In these circumstances it appears to me that the case falls exactly within the words used by Lord Selborne in *Jarvis* v. *Berridge*, and that it would be wrong to compel the appellants to perform a part only of their agreement and to purchase a ship which they never wanted when through no fault of their own they cannot obtain the ship which they have always desired to have, and the purchase of which was the real basis of the whole transaction.

I think that the principal appeal should succeed and the cross appeal should be dismissed, and I agree with the order proposed.

LORD DUNEDIN—[*Read by Lord Shaw*]—Logically the question raised by the cross appeal comes first. As to this I have never felt any doubt as to the judgment of all the learned Judges in the Court of Session being right, and I have nothing to add to what has been said by my noble and learned friends who have preceded me.

It being then fixed that the appellants were not bound to pay for the "Claddagh," can they be forced to pay for the "Factor"?

It is in my view of prime importance to come to a determination as to whether there was a concluded parole agreement on 6th November 1917 for the sale of both vessels at a slump price of £100,000. I think that parole agreement is proved. It was sworn to distinctly by Davis, the broker through whose mediation the bargain was made. His view is confirmed by the terms of his letter written on the same date to Messrs Robertson, who were representing the respondents, which says under the heading of "Factor" and "Claddagh"—"Referring to our interview of date and the telephonic conversation with Messrs Steven, when it was agreed between you that the sale was in order at £100,000 for both steamers, subject to details of contract, we herewith enclose contracts. . . ."

This letter was in no way repudiated as to its statement of there having been a concluded bargain. On the contrary, on the very next day a letter was sent by Messrs

Robertson saying that the contracts seemed in order and had been signed. On the same date Davis' firm sent a letter to the appellants referring to his interview with Mr Robertson, and saying "we agreed to pay even money, *i.e.*, £100,000, for the two boats, all other terms as previously arranged."

Now that being the contract, *i.e.*, for two vessels, I cannot assent to the view that that contract was superseded by the two signed forms of contract which dealt separately with each vessel. These signed contracts were merely the machinery to carry out the bargain already concluded. In my opinion, therefore, we are not here within the range of the law dealt with in *Inglis* v. *Buttery* (L,R., 3 A.C. 552, 5 R. (H.L.) 87, 15 S.L.R. 462), which decides that negotiations preceding a contract cannot be allowed to control the true construction of a formal contract concluded. The contract here was the verbal bargain—there was nothing left to settle but the ordinary details of how that contract was to be carried into effect by means of an instrument of transfer.

Accordingly I think that when it became impossible to deliver the "Claddagh," the appellants were not bound to accept the "Factor."

That this is in accordance with the good faith of the situation there can be little doubt, for it was only the "Claddagh" that the appellants wanted, and the purchase of the "Factor" was really forced upon them by the respondents.

This view precludes the necessity of considering the doctrine of what is termed "interdependency" of separate contracts. I wish to reserve my opinion on such a case till it arises. I feel it necessary to say this because I think that the Lord Ordinary in citing the case of *Holliday* v. *Lockwood* ([1917] 2 Ch. 47) has scarcely adverted to the fact that the decision in that case would not fit in with the doctrines of Scottish law, depending as it does on the denial of recission at law, and the refusal in equity to give specific performance.

I think the appeal should be allowed, and the judgment of the Lord Ordinary restored—the cross appeal dismissed.

Lord Shaw—On 6th November 1917 the representative of the appellants, the buyers of two steamships, wrote to the pursuers a letter, the material part of which is as follows—"Referring to our interview of date, and the telephonic conversation with Messrs Steven, when it was agreed between you that this sale was in order at £100,000 for the two steamers, less 2 per cent. commission to us, subject to details of contract—we have now drawn up the enclosed contracts, details of which we trust you will find in order. We are sending duplicates to Messrs Steven to-night for their approval, as they wish to promptly submit them, with the forms of application they have to fill in, to the Shipping Controller." On the same date the appellants replied as follows:—"Your favour of yesterday's date to hand enclosing copy letter sent owners of above steamers. We confirm telephone conversations to-day, when we advised you that we have definitely been promised the licence to purchase these steamers after the necessary forms are lodged provided the 'Factor' remains on requisition and the 'Claddagh' on the French coal trade as at present. We did not consider, however, that the proposition as it now stands was worth the figure of £110,000 as first mentioned, but we agreed at later conversation to pay even money, *i.e.*, £100,000, for the two boats, all other terms as previously arranged. We await copy of contract in the morning, as we will require to send this on to the Ministry of Shipping to get confirmation of the licence." Had the matter stood there, there having been no difference between the parties on the point of the details, I should have had no doubt that there was one complete contract for sale of these two ships.

When there is such a slump contract it is, of course, always a question of circumstances whether individual contracts when entered into in writing are meant to be executry of the overhead contract or to be in substitution therefor. The same principle is applicable to this class of case as to the ordinary case in which contracts for separate articles may be held to be so inter-linked as to enable a repudiation of one contract to operate as a release from the whole bargain. On this subject I think it right to quote the judgment of Mr Justice Astbury in the recent case of *Holliday* v. *Lockwood* ([1917] 2 Ch. 47). The learned Judge quotes at some length, and follows, the decision of Lord Brougham in *Casamajor* v. *Strode* (1833, 2 My. & K. 706), and he deals with what case law there is upon the point. I venture repectfully to agree with the learned Judge's views, which are thus expressed (p. 52)—"It may therefore be concluded that in determining whether a purchaser who fails to obtain a good title to one lot shall be let off from his contract for another, the whole circumstances may be examined in order to prove that the two contracts are one, by showing that the two parcels are complicated together, and that upon the whole transaction the Court will determine as a jury would the question, did or did not the party purchase the one with reference to the other; would he or would he not have taken the one had he not reckoned upon also having the other?"

This being the principle to be applied, and it being essentially sound, I do not doubt that under proper Scotch procedure effect would be given to it. But it is not necessary to deal with that. In the present case there are no procedure obstacles. And I entertain no doubt, after a careful perusal of the evidence and correspondence that the Lord Ordinary has rightly interpreted the situation to be that the overhead contract for £100,000 for the two steamers was never abandoned, but that upon the contrary the contracts for each of the two steamers respectively were entered into not for the purpose of supplanting but for the purpose of giving effect to the overhead contract referred to.

Three facts appear to me clear—1. That the appellants, who are shipowners and had con-

tracted with the French Government for the conveyance of benzol and solvent naphtha, were in urgent necessity, not for two steamers but for one, and for a steamer which was free from Government requisition and therefore fit for immediate employment in their own business. 2. That their efforts to purchase such a single steamer, *i.e.*, the "Claddagh," for £55,000 towards the end of October 1917 were frustrated by the demands made by the respondents that the "Factor," another vessel belonging to them, must be also—although she was actually under requisition—taken off their hands, and that it was for the interests and convenience of both parties that a slump contract for the two steamers was accordingly made. 3. That the reason for putting the details of the bargain into two contracts was simply that the stipulations with regard to the one vessel were different from those with regard to the other, although not by way of variation from the bargain made, and that these differences might produce inconvenience and confusion if one contract of sale embodied the respective stipulations. While on the other hand, in so far as the Register of Shipping was concerned, and the apportionment of insurance falling to be allocated, the same dictates of convenience led to the formal expression of the contract in two documents instead of one.

It is agreed upon all hands that if either the one party or the other had been confronted with the possibility that the one vessel was to be sold separately and apart from the other, both parties would have surmounted all obstacles and any inconvenience so as to prevent a result which was contrary to the will both of the buyers and the sellers. In short, the sellers said—"Take both vessels or neither, for you cannot get one alone." Whereas the buyers said—"Then be it so; we will take both since we are not allowed to take the one without the other." I cannot see any ground for the suggestion in fact that the written contracts either were meant to or did annul or vary this bargain.

I am aware of the principle to which effect has been given by their Lordships in the Second Division (for a reason which I entirely respect), *i.e.*, that when a written contract or contracts have passed between parties it is incompetent to refer to anterior conversations or correspondence for the purpose of qualifying or altering that written contract. I am aware also of the grave misuse that is so frequently made of the observation of Lord Blackburn in *Inglis* v. *Buttery* (L.R., 3 A.C. 552, 5 R. (H.L.) 87, 15 S.L.R. 462), that contracts are to be read in the light of surrounding circumstances. But there is no qualification to be admitted here. The whole three contracts, the one for each ship and the overhead contract, are not inconsistent, they stand together. It is no part of the contract for a single ship to have, as Lord Mackenzie appears to require, a stipulation that it was nullified unless there was the fulfilment of a contract with regard to the other ship. Once the overhead contract is established and not abandoned, each contract separately stated deals with the item with which it is alone concerned and forms a part of that general bargain which in my humble judgment must here be affirmed as having been unquestionably made and never abandoned.

I respectfully agree.

LORD WRENBURY—[*Read by Viscount Cave*]—I take the cross appeal first, for I can express my judgment upon it in very few words. "It is certain," said the Lord President, "that the pursuers were bound to hand over the 'Claddagh' to the defenders for immediate use in their business as shipowners." I agree. The original stipulation of the 1st November, "'Claddagh' to be released from present coal charter and to be delivered free to take up our trade," was never departed from. In the written contract of November 6th the words "free to take up our trade" were, it is true, not inserted, but the written obligation was on payment of the purchase money to deliver the ship free from all incumbrances, and if default was made in delivery "in the manner specified" the deposit was to be released. The letter of the 6th November states quite accurately that "as already agreed" the sellers undertook to release the "Claddagh" from the coal contract, and the telegrams exchanged on the 8th November confirm the "understanding regarding coal contract." It would be an idle thing to stipulate as essential that the ship should be released from one subsisting engagement which would prevent her employment at once in the purchasers' trade if delivery of a vessel which the Government had on the 9th November requisitioned was a good delivery in satisfaction of the sellers' obligation to deliver. The sellers can have no relief by way of enforcement of a contract for sale, when they were unable to perform one of its essential obligations. The cross appeal must be dismissed with costs.

The appeal has to do with the other vessel the "Factor." Here the pursuers seek to enforce the written obligation of the 6th November relating to this ship upon the footing that that contract stands alone.

I am not of that opinion. I find no difficulty arising from *Inglis* v. *Buttery* (1878, L.R., 3 A.C. 552, 5 R. (H.L.) 87, 15 S.L.R. 462) and other well-known authorities, which support the proposition that where the parties have expressed their contract in a formal written instrument the Court in determining what the contract is must look to the written document and to that alone. The defenders here have no occasion to control, modify, or vary the two written contracts of the 6th November in any particular. Their case is that those two contracts are but part of a larger contract—an overhead contract—of which those two contracts unmodified and unaltered form part. That contract was a contract for the sale of two ships for £100,000 upon the terms of the two written contracts of the 6th November as regarded the ships respectively, and further upon the terms (*a*) "that the sellers undertake to release the s.s. 'Claddagh' from the present coal contract," and (*b*) "that the existing marine policies of insur-

ance for the steamer shall be cancelled by the sellers and that the return premiums granted under same are for purchasers' account." These two terms are found in the letter of the 6th November. The former (*a*) was reproduced from the previous letter of the 1st November. Both are repeated in the telegrams exchanged on the 8th November. The contract was one which could be performed only by performance of the terms stipulated as regards each ship by the written contract relating to it and by performance also of the further terms which I have above marked (*a*) and (*b*). The sellers made default in performance as regards the "Claddagh." Their action therefore fails as regards the "Factor." The appeal in my judgment succeeds.

Their Lordships, with expenses, sustained the appeal, restoring the judgment of the Lord Ordinary, and dismissed the cross appeal.

Counsel for the Appellants—Hon. Wm. Watson, K.C. — Wright, K.C. — Carmont — Wylie (in Cross Appeal). Agents — Beveridge, Sutherland, & Smith, W.S., Leith —Thomas Cooper & Company, London.

Counsel for the Respondents—Sir John Simon, K.C. — Condie Sandeman, K.C. Agents—Maclay, Murray, & Spens, Glasgow —J. & J. Ross, W.S., Edinburgh—B. A. Woolf & Company, London.

Thursday, July 3.

(Before Viscount Finlay, Viscount Cave, and Lords Dunedin, Shaw, and Wrenbury.)

HINDLE *v.* JOHN COTTON LIMITED AND OTHERS.

Company—Directors' Powers—Articles of Association—Dismissal from Company of Managing Director—Appropriation of Dismissed Managing Director's Shares—Bona Fides—Averments—Proof.

In exercise of powers conferred by the articles of association of a company, the directors dismissed the managing director, resolved that he should cease to be a member of the company, and appropriated at the paid-up figure his shares, said to be worth a large premium. *Averments* as to want of *bona fides* on the part of the directors *held* (*rev.* decision of the First Division) sufficient to entitle to a proof.

On May 3rd 1918 Robert Hindle, *pursuer*, brought an action against John Cotton Limited, a company incorporated under the Companies Acts 1862-1900, and against C. R. W. Cotton, James Aikman Smith, and others, *defenders*, in which he sought to have reduced "(1) a pretended resolution of the board of directors" of the company, "dated 21st March 1918, resolving that the pursuer should cease to be a member of the company, and (2) a pretended appropriation of the pursuer's shares in the company, dated on or about 17th April 1918."

The pursuer pleaded—"(1) The pretended resolution by the directors of the company, dated 21st March 1918, and the pretended appropriation of the pursuer's shares following thereon, are incompetent, *ultra vires*, and illegal, and should be reduced in respect —(*a*) that article 36 of the articles of association, which is the alleged warrant for these actings, is contrary to public policy and illegal; (*b*) that the pursuer was not an employee whose membership of the company the directors could competently determine under the said article; (*c*) that the pursuer having previously given a valid notice for the transfer of his shares, under article 27 of the articles of association, it was incompetent for the directors to put in operation the provisions of article 36; (*d*) that the said resolution was passed, and the provisions of article 36 put in operation, by the directors at the instigation of the defender Mr Aikman Smith in bad faith, for the purpose and with the result of oppressing and defrauding the pursuer and appropriating to themselves the large surplus value of his shares."

The defenders pleaded—"(1) The averments of the pursuer so far as material being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed."

The *articles of association* of John Cotton Limited, *inter alia*, contained — Art. 27 — "Any member (other than the said George Cotton, or his legal personal representatives acting as such) who is desirous of transferring his ordinary shares, shall send by post to the company at the office a notice in writing specifying the number of shares he desires to transfer and naming the price which he asks for them." . . . Art. 36 — "Whenever a member of the company shall become bankrupt, or being an employee of the company (other than the said George Cotton) shall leave the company's service and be employed by any other person or persons or company carrying on the businesses or any of them authorised to be carried on by the company, or whenever a member is dismissed from the employment of the company for breach of faith, misconduct, or other offence which the directors deem prejudicial to the interests of the company, or from any other cause whatever, they may, at any time after such employee shall have left or been dismissed the company's service from whatever cause, resolve that he shall cease to be a member of the company; and thereupon he shall be deemed to have served the company with notice pursuant to article 27 hereof, and to have specified therein the amount paid up, or deemed to be paid up, on his shares as the proper price. Notice of the passing of any such resolution shall be given to the member affected thereby, and no employee of the company shall be interested as a partner or otherwise in any other firm, or shall hold shares in any other company carrying on the businesses authorised to be carried on by the company or similar businesses." . . . Art. 97 — "The office of director shall be vacated—(*a*) If he cease to hold the qualification of a director. (*b*) If he becomes bankrupt, or insolvent, or