large extent of land in Argentina. By the laws of Argentina no trusts are recognised in respect of land, and accordingly on the death of the testator the children succeeded automatically to the possession of the land in equal shares, and the provisions of the will were of no effect since they involved the creation of a trust ownership of the lands. The inherent failure of the trust-dispositions of the will applies equally to the shares of the children of the testator and to the share of the children of Mrs Gregson, who, it has been decided, claim as independent legatees.

On the death of the testator Mrs Gregson elected to take legitim and thus debarred herself from taking any other interest under the will. But she became owner of her share of the land in Argentina by virtue of the Argentine law in the same way as the other seventh shares in that land passed automatically to the other children. The present claim is on behalf of the issue of Mrs Gregson (who is still alive), who claim that the other six children should surrender to the trusts of the will the shares which passed to them on the death of the testator under the Argentine law as a condition of taking their share of the residue of the property in Scotland. The Lord Ordinary found against this claim, but on appeal the Court of Session recalled his interlocutor and found in favour of the claim of the respondents.

It is evident that if this finding is supported the effect will be to render more unequal the division of the testator's property among his children. This, of course, is not conclusive, but it is not to be forgotten that the justification of the doctrine of election is that it is carrying out what it is supposed the testator (judging from the provisions in his will) would have intended to happen under the new state of things. I am convinced that he would not have so intended.

In the first place, it is evident that it is impossible for the appellants to surrender their shares of the Argentine land to the uses of the will. By the law of Argentina this is impossible. The way in which the Judges of the Court of Session proposed to effect it is by the children granting a conveyance of the land in favour of the trustee, the latter granting *unico contextu* the appropriate declaration of trust. To my mind such a proceeding would be an evasion of the Argentine law, and I cannot think that it is permissible to our Courts to lend themselves to a sham which would in reality place the Argentine lands in the hands of a nominal owner whose true position was only that of a trustee. It must be remembered that the refusal of Argentina to permit lands to be held by a trustee is based on grounds of public policy. They insist that the person in whose name the lands stand shall be the true owner. Our ideas of land tenure may not agree with theirs, but we are bound to accept and act loyally up to the laws as to land which obtain there. I am therefore of opinion that the proposed solution of the question is quite unacceptable.

Nor do I see any other way in which the lands could be made, effectively, subject to the trusts of the will. The terms of the will are such that it is clear to me that it was the intention of the testator that they should be capable of being held as lands until favourable conditions arose for converting them into money, and I can see no reason why these matters should be passed by in considering whether or not the lands could in substance or in form be put under the trust provisions of the will so as to carry out the intentions of the testator.

I therefore come to the conclusion that it is impossible for the appellants by any act of their own to render the lands subject to the trusts of the will. The lands have become theirs, not by their own act but automatically by the effect of the Argentine law, and as they cannot undo this in such a way as to allow the trusts of the will to operate upon them, the doctrine of election does not apply to them.

I am of opinion therefore that this appeal should be allowed, that the interlocutor of the Lord Ordinary should be restored, and that the respondents should pay the costs here and in the Court below.

Their Lordships, with expenses, reversed the interlocutor of the First Division and restored that of the Lord Ordinary.

Counsel for the Appellants—A. Moncrieff, K.C.—The Hon. W. Watson, K.C.—J. S. Leadbetter. Agents—Thurburn & Fleming, Keith; Macpherson & Mackay, Solicitors, Edinburgh; John Kennedy, Westminster.

Counsel for the Respondents—Wm. Chree, K.C.—T. Graham Robertson. Agents—Alex. Morison & Co., W.S., Edinburgh; Holmes, Son, & Pott, London.

Friday, May 7.

(Before Viscount Finlay, Viscount Cave, Lord Dunedin, Lord Atkinson, and Lord Moulton.)

SHANKLAND & COMPANY *v.* ROBINSON & COMPANY.

(In the Court of Session, July 18, 1919, 57 S.L.R. 9.)

Contract — Essential Error — Representations Made by Seller Rendered Untrue—Seller's Duty of Disclosure.

A prospective bidder for articles about to be sold at an auction sale saw the sellers as to whether there might be difficulty in obtaining possession of the articles owing to Government impressment, and he was informed that the Government had been satisfied and the sale was to be allowed. Subsequently a subordinate Government official intimated that he wanted the articles for the Government, but his action was repudiated on application to his superior officer. This incident was not disclosed to the prospective bidder, who attended the sale, when the articles were knocked down to him. After the sale the Government intervened to prevent removal, and shortly after impressed. *Held (rev.*

judgment of the Second Division) that the purchaser was not entitled to rescind the contract on the ground of essential error induced by the seller, and was liable for the price, the property in the articles having passed to him on the fall of the hammer.

This case is reported *ante ut supra.*

The pursuers, Shankland & Company, appealed to the House of Lords.

At delivering judgment—

VISCOUNT FINLAY—The pursuers in this case are merchants and contractors in Glasgow, and the defenders carry on business at Wigan as straw rope manufacturers. The pursuers, on the completion of certain contracts, advertised for sale by auction at Cupar-Fife a number of engines and other plant which had been in use on their contracts. At the auction on the 17th January 1917 the defenders purchased a traction engine at the price of £587, 10s. The Government Forage Department refused to allow the removal of the engine from the auction yard, and requisitioned it on the 30th January. The action is brought to recover the price. The defence is that the defenders entered into the contract of purchase under essential error induced by representations of the pursuers and their agent the auctioneer. These representations were, it is said, to the effect that arrangements had been made which secured the purchaser against any interference by the Government with the removal and use of the engine.

The Lord Ordinary (Ormidale) decided in favour of the defenders. The majority of the Second Division (Lord Justice-Clerk, Lord Dundas, and Lord Guthrie) affirmed his decision, but upon other grounds Lord Salvesen dissented, and was of opinion that the pursuers are entitled to recover.

The auctioneer was Mr Shirlaw of Hamilton. Advertisements were issued in the newspapers on the 17th December 1917 and subsequent days announcing the sale to be held at Cupar-Fife on the 17th January 1918. Mr Robinson, a member of the defenders' firm, saw the advertisements, and being in want of an engine for use in his business went to Hamilton to ascertain whether he might rely on getting delivery of the engine if he bought it. At Hamilton on the 9th January 1918 he saw Mr Reid, the auctioneer's clerk, and Mr Shirlaw himself. On the 10th he went on to Cupar accompanied by Mr Somerville and saw Mr D. Shankland. Mr Somerville was called as a witness for the defenders, and I take his account of what passed on the 10th January as being substantially correct. What he said was this—"We met Mr Shankland at Cupar in the yard where the traction engines were stored. Mr Robinson, of course, went through and saw the engines and inspected them, and Mr Robinson then asked Mr Shankland if there was any fear of the military authorities wanting those engines. Mr Shankland said No, the military authorities had already got what they wanted, and the military authorities were finished. Mr Robinson asked if he required permits, and Mr Shankland said No, the military authorities had got what they wanted. Mr Shankland referred to a permit required in the case of some sleepers. There were a lot of sleepers there, and Mr Shankland said that was the only thing in the yard that they required a permit for. (Q) Besides the question of things requiring a special permit, was the chance of obtaining delivery separately referred to?—(A) Yes. Mr Robinson asked Mr Shankland if there was any fear of those engines being wanted by the military, or any chance of them, and Mr Shankland said No, their engines were free, and did not require a permit; that he was allowed to sell them. He did not intimate that a Government department had commandeered or had placed an impress upon certain of the articles."

As regards the interview on the 9th at Hamilton, Mr Reid and Mr Shirlaw gave accounts of the conversation substantially in accordance with what Mr Somerville stated took place at Cupar on the 12th. Mr Robinson gave evidence to the same effect, and added that he was informed that arrangements had been made with the authorities for the delivery of the goods, a statement which he also attributes to Mr D. Shankland on the 10th January at Cupar.

I think it is clear that Mr Reid and Mr Shirlaw on the 9th, and Mr D. Shankland on the 10th, informed Mr Robinson that there would be no difficulty about the delivery. I am not satisfied that they made the further statement alleged by Mr Robinson that arrangements had been made with the authorities for this purpose. It is admitted that they acted in perfect good faith and had every reason at the time for believing that the sale would not be interfered with.

None of the Judges in the Court of Session intimated that they regarded what passed on the 9th and 10th January as in itself conferring a right to rescind on the ground of essential error. They based their judgments on what took place afterwards, on the 15th and 16th January, and were of opinion that what took place on those days ought to have been disclosed to Mr Robinson, as it tended to show that the representations as to delivery which had been made on the 9th and 10th were mistaken. On this appeal, however, the counsel for the respondents has argued that the statement made on the 9th and 10th to the effect that an arrangement had been made with the Government was incorrect in point of fact, and while he admitted that it was in perfect good faith that this statement had been made, he contended that even if that statement had stood by itself it would have entitled the defenders to rescind, as it had induced the defenders to buy the engine under essential error. I am unable to agree with this contention even if it were established that the statements as to arrangements with the Government were made to Mr Robinson, and think that the Judges of the Second Division were right in not accepting the view that the conversations on the 9th and 10th by themselves afforded

any adequate ground for rescission. "Up to this time," as the Lord Justice-Clerk said, "the Government had not interfered in the matter." Neither Mr Reid, Mr Shirlaw, nor Mr Shankland had so far any reason to suppose that the Government would interfere. The real question raised was whether in view of what had passed on the 9th and 10th the pursuers and their auctioneer ought to have disclosed to the defenders what happened on the 15th and 16th.

On the 15th January Lieutenant Freeman, an officer attached to the Forage Department, came to Cupar and informed Mr D. Shankland, who was in the employment of the pursuers' firm as foreman, that the Government were going to impress some of the plant, including the engine afterwards purchased by the defenders. As soon as the pursuers were informed of this they arranged that Mr Shankland and Mr D. Shankland, together with Mr Rhind, representing their lawyers' firm, should have an interview with Colonel Gordon, the head of the Forage Department in Edinburgh. Colonel Gordon said that Lieutenant Freeman had no instructions to impress the plant, and adjourned the interview till the afternoon, when Lieutenant Freeman would be present. Colonel Gordon at the interview in the afternoon said the sale would be allowed to go on, but that he would meantime communicate with the War Office by telephone and obtain their instructions. It was stipulated that Mr Shankland should supply Colonel Gordon with the names and addresses of purchasers at the sale. In answer to a suggestion by Lieutenant Freeman, Colonel Gordon said that it would not be "cricket" to allow the sale to go on and then seize. On the evening of the same day a telephone message was sent from the Forage Department at Edinburgh, whether by Colonel Gordon himself does not clearly appear, and on the same evening Mr Rhind wrote to Colonel Gordon the letter of the 16th. That letter is of great importance, and runs as follows:—

"25 Albany Street,

"Edinburgh, 16*th January* 1918.

"Lieut. Col. Gordon,

"Forage Department, Carlton Hotel.

"Sir,—*Messrs Shankland & Company—Sale of Plant and Machinery at Cupar, Fifeshire.*—We confirm our meetings (two) with you, along with our clients, Messrs Shankland, to-day regarding the above matter, and also our telephone meeting with you later this evening, at the latter of which you informed us that, notwithstanding the impress placed by your Department upon certain of the articles (two steam engines, two threshing mills, one trusser, and three sleeping vans) included in the sale list, you had now obtained instructions from the War Office to allow the sale of the whole plant and machinery (including the articles mentioned) as advertised, to be proceeded with to-morrow (Thursday), and that the sale would accordingly not be interfered with by your Department. As arranged, we have informed our clients to this effect, and the sale will accordingly be carried through to-morrow.

"You mentioned that an official from your Department would be present at the sale.

"We much appreciate the trouble you have taken, and the consideration which you have shown for our clients in connection with the matter. "We are, Sir,

"Your obedient Servants,

"(Signed) WHIGHAM & MACLEOD."

This letter was posted on the night of the 16th and would be received by the first post on the 17th. No reply was sent to this letter, and the statements contained in it were never challenged. Mr Shankland naturally enough inferred that Colonel Gordon had received authority from the War Office in London to allow the sale of the engine to proceed, and that the proposed embargo by Lieutenant Freeman was at an end.

The sale took place on the 17th. It was attended by a military officer in uniform on behalf of the Government. At the close of the sale Lieutenant Freeman was informed that the list of purchases was not ready and could not be prepared before the train left as the auctioneer's clerk was settling accounts with purchasers, but that it would be sent next day. Mr Shirlaw informed him that no goods would be permitted to leave the premises until the list of purchasers had been supplied. The list was handed over the next day to the Forage Department, but the officers representing that Department refused to allow the removal of the engine, and it remained on the premises until the 30th January, when an "impressment order" was served. On the 19th January the respondents sent a cheque for the price of the engine, asking for delivery. The appellants replied, as was the fact, that the goods could not be delivered without a military permit. The respondents then stopped their cheque, and the present action was brought on the 12th February 1918.

It appears to me that when this engine was knocked down at the auction to the purchasers, the respondents, it became their property. There was an unconditional contract for the sale of specific goods. The goods were in a deliverable state. There was no impressment order or *nexus* of any kind then in existence. In such a case, under the Sale of Goods Act 1893, unless a different intention appears the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed. There is in the present case nothing to show that the parties intended that the property should not pass according to rule 1 in section 18 of the Act. The property passed accordingly. By section 20 of the Act when the property is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not. Under these circumstances, in my opinion, the detention and ultimate requisitioning of the goods must be borne by the purchaser, and the action of the Department does not relieve the purchaser from the duty of paying the price to the seller. No contention to the contrary was put forward in your Lordships' House until the close of the argument for the respon-

dent. We are informed that the point had been raised in the Court of Session, but it is not noticed in any of the judgments. In my view the goods were at the risk of the purchaser from the time when they were knocked down to him. If they had been destroyed by fire the loss would have fallen on him, and the same holds with regard to the detention and ultimate requisition.

The only question therefore is, whether the respondents were entitled to rescind on the ground of essential error induced by the appellants. If the goods had been at the time of the sale already subject to an arrestment by the Government which made delivery impossible, it was conceded by the counsel for the appellants that it would be a case of essential error if the purchaser was unaware of this fact. The goods would not be free but tied, and essentially different from what he bought. The evidence altogether fails to establish that the goods were when sold subject to any such *nexus*. Lieutenant Freeman had indeed declared his intention of seizing the engine for the Government, but no seizure had in fact been made, and the evidence shows that Lieutenant Freeman had not at that time any authority to seize. His superior officer Colonel Gordon treated what Lieutenant Freeman had said as without authority. Lieutenant Freeman was obviously deeply impressed with the desirability of acquiring this engine for the Department. His view of the situation appears ultimately to have prevailed with the War Office over that of Colonel Gordon, and the engine was so acquired after the sale to the respondents, but the engine when it was sold was free from any Government requisition and the pursuers had every reason to believe that none would be made.

On the 9th and 10th the appellants had informed the respondents that there was nothing to prevent their getting delivery, and there was nothing. It is now said that when Lieutenant Freeman on the 15th announced his intention of acquiring the engine the pursuers should have informed the respondents of this fact. It appears to me that this suggestion is disposed of by the fact that as the result of their inquiries the pursuers had good ground for believing and did believe that nothing was to be feared from Lieutenant Freeman's attitude, but that, on the contrary, instructions had been sent that the sale was not to be interfered with. The letter of the 16th from the pursuers' lawyers to Colonel Gordon, the head of the Forage Department in Edinburgh, explicitly states this, and it was never contradicted. The only result of the inquiries made was to confirm the impression under which the pursuers had made to the respondents the statement on the 9th and 10th January as to the goods being safe from interference.

The fact that during the war the Government were in the habit of requisitioning any goods of this description which they might want was a matter of common knowledge with all parties. It was this knowledge that induced Mr Robinson to make his inquiries on the 9th and 10th. I do not think that the mere existence of a probability that the Government would exercise the power of requisition with regard to any particular goods would be a ground on which an allegation of essential error could be supported, although if this had been known to the seller and fraudulently concealed from the buyer the latter would have been entitled to relief on the ground of fraud. All charges of fraud are expressly disclaimed, and the defenders' claim to relief is based entirely on the ground of essential error induced by alleged mis-statements of the pursuers, erroneously though innocently made.

In my opinion the case for the defenders has not been established. I agree with the conclusion arrived at in the dissenting judgment of Lord Salvesen, and am of opinion that the appellants are entitled to judgment for the amount claimed, with costs here and below.

VISCOUNT CAVE—The respondents have been relieved by the decision of the Court of Session from their contract to purchase a traction engine on the ground that the contract was entered into under an essential error induced by an improper though innocent concealment by the appellants of material facts. The facts of the case are not really in dispute, and the only question is whether they support the decision. In my opinion they do not.

The traction engine in question was advertised with other property for sale by public auction. On the 9th January Mr Robinson, a member of the respondent firm, saw the agent of the sellers and explained to them that he was proposing to bid for the engine, and that he attached importance to delivery being given immediately after the sale without any interference on the part of the Government. The agents for the sellers informed him that arrangements had been already made to remove any risk of Government interference, and that he could rely on getting delivery without delay or difficulty after the sale of any articles which he might buy. On the 10th January this statement was confirmed by Mr Shankland, a member of the appellant firm. The statement was founded on certain correspondence which had passed between the appellants and an officer of the Ministry of Munitions. So far as it contained a statement of fact it was true; and so far as it embodied matter of opinion it represented the honest and reasonable opinion of the sellers.

On the 15th January Lieutenant Freeman, an officer employed in the Forage Department of the Army Service Corps at Edinburgh, saw the appellants at Cupar and intimated to them that he wanted to secure the engine for the Government. This statement was of such a nature as seriously to affect the opinion previously expressed by the appellants and their agents as to the risk of Government interference, and accordingly it would have been the duty of the appellants, if the impression thereby caused had not been removed, to inform the respondents of the facts. If authority for

this proposition is required it will be found in *Stewart* v. *Kennedy*, 1890, L.R., 15 A.C. 108, 17 R. (H.L.) 25, 27 S.L.R. 469, and *Blakiston* v. *London and Scottish, &c., Corporation*, 1894, 21 R. 417, 31 S.L.R. 342. But in fact the appellants at once recognised the position, and I am satisfied that but for the events next mentioned they would have withdrawn their assurance.

On the 16th January the appellants had an interview with Colonel Gordon, Lieutenant Freeman's superior officer, who was in charge of the Forage Department at Edinburgh, and explained the position to him. As the result of this conversation Colonel Gordon made it clear that he himself had no desire to take the engine on behalf of the Government, and that so far as he was concerned the sale would be allowed to go through. But he added that he must communicate with the War Office in London and obtain their instructions, and that he would let the appellants know during the afternoon or evening the result of such application. On the same evening an officer of the Forage Department (I think the evidence shows that it was Colonel Gordon himself) rang up the agent of the appellants on the telephone and informed them "that it was all right about the sale on the following morning, that it could take place, and would not be interfered with." The appellants naturally understood this to mean that Colonel Gordon had received a reply from London and that the War Office confirmed his view. This conversation appears to me to have completely removed any doubt induced in the minds of the appellants by the statement of Lieutenant Freeman, and to have restored the previous position. The decision in *Brownlie* v. *Miller*, 1880, L.R., 5 A.C. 925, 7 R. (H.L.) 66, 17 S.L.R. 805, completely covers this point.

The learned Judges of the Court of Session appear to have been impressed by the fact that Colonel Gordon at the interview above referred to informed the appellants that an official from the Department would be present at the sale, and would require to have the names and addresses of the purchasers, so that if the War Office should afterwards require the property sold they would know where to find it, and they considered that this circumstance rendered it incumbent on the appellants to inform the respondents of the facts. I do not think that it had that effect. At the interview with Colonel Gordon it had been suggested by Lieutenant Freeman that the sale should be allowed to go on, but that after the sale he should impress in the hands of the purchasers whatever articles the Department required, but Colonel Gordon had indignantly repudiated the suggestion, saying that it would not be "cricket" and that he would not be a party to any such action. After this statement the appellants understood, and naturally understood, that the official would be present not for the purpose of impressing the articles after the sale, but merely for the purpose of knowing where to look for them in case they should afterwards be required.

The plea of essential error induced by misrepresentation or improper concealment therefore fails.

A supplementary point was made on behalf of the respondents. It was said that the respondents had contracted to buy the article for immediate delivery after the sale, and that in consequence of the embargo put upon the engine by the Government after the sale delivery could not be given; and the decision of this House in the *Claddagh Steamship Company* v. *Steven*, 1919 S.C. 184, 56 S.L.R. 619, was referred to. The two cases are clearly distinguishable. In the *Claddagh* case the ship in question had been seized before the date fixed for delivery and before the property had passed to the purchasers. In the present case the property passed to the purchasers on the fall of the hammer, and it was an express condition of the contract that each lot should be at the risk of the purchaser so soon as called down by the auctioneer. One of the risks so undertaken by the purchasers was the possibility of seizure by the Government, and accordingly the consequences of the seizure must fall upon them.

In my opinion this appeal should be allowed.

LORD DUNEDIN—[*Read by Lord Atkinson*]—I find myself in such complete agreement with the opinion of Lord Salvesen in this case, both as to substance and as to expression, that I need add very little. I shall briefly summarise my view of the facts on which the determination of the point of law depends.

On the 9th of January 1918 I think that Messrs Shirlaw & Company, the auctioneers, did on behalf of the pursuers represent to the defenders that arrangements had been made with the Government and that there would be no trouble in removing articles bought at the sale. I think this was a true statement according to Messrs Shirlaw's knowledge, borne out and justified by the correspondence which had taken place with the Ministry of Munitions. But it was not, and could not be a guarantee against all possible future action by the Government. Up to this time there had been no hint either to the pursuers or to the auctioneers that the sale of the engine would be in any way interfered with. Then came the interposition of Lieutenant Freeman and the immediate recourse to his superior at Edinburgh. I think that when the message by telephone was received by the pursuers' law agents it conveyed the impression quite clearly, in view of what had passed at the interview with Colonel Gordon, that a message had been received from the War Office and that they were not to interfere. That such was the impression of the recipients at the time is shown beyond all doubt by the terms of the letter of 16th January 1918 from the pursuers to Colonel Gordon, a letter the terms of which were never taken exception to by Colonel Gordon's Department.

Accordingly, at the date of the opening of the sale the situation was this—a representation made by the pursuers to the

defenders that the War Office authorities had no intention of interfering with the sale, but no guarantee against future action if the Government changed its mind. There had, it is true, been a note of alarm sounded by the action of Lieutenant Freeman, but this alarm had been removed by the interview with Colonel Gordon and the telephonic message.

Now we are here dealing with a contract of sale, which is a contract made at arm's length, not a contract *uberrimæ fidei* such as insurance. There is, therefore, no general duty of disclosure of all surrounding circumstances. I do not doubt that once the representation made, if anything had happened to alter the pursuers' view of the truth of that representation, they would have been bound to disclose what had happened, for the representation was a continuing representation. But so far from the pursuers' view having been altered by what had happened it had only been confirmed, and the eventual impressment order was as much a surprise to them as it was to the defenders.

I am therefore of opinion that there are here no facts set forth relevant to support reduction of the sale on the ground of concealment inducing essential error *in substantialibus*.

The property in the subject passed at the fall of the hammer. This was so found by the Lord Ordinary and has not since been contested. From that moment the defenders had right to take delivery. Delivery at the moment was stopped by the action of Lieutenant Freeman. But the property is still in the defenders, and is in the defenders now, the sale being unreduced. They are therefore liable to the pursuers for the price. I am of opinion that the appeal should be allowed. The ground of judgment of the Lord Ordinary was not approved by the Lower House, and was not pled before your Lordships. The case must therefore go back to the Court of Session that decree may be pronounced in terms of the conclusions of the summons, the pursuers and appellants getting their expenses in the Courts below and their costs in your Lordships' House.

LORD ATKINSON—The main facts of this case have already been stated. The case of the respondents, who were the defendants in the action out of which the appeal arises, is twofold. First, as I understand, they alleged that they were induced to purchase the engine for the price of which they are sued through essential error; and second, that this engine was never delivered to them, but was on the very day of its purchase impressed or requisitioned by the Crown acting through the Ministry of Munitions, that they had been since wholly deprived of the use of it, and are therefore not liable to pay its price.

It will be observed that the representation alleged to have been made to Mr Robinson does not refer to any quality of, or interest in, or claimed upon the subject matter of the sale, but merely to an intention of the Crown not to exercise through one of the departments of the State the powers with which the emergency legislation, the law of the land, undoubtedly invested it. The mode in which it was contemplated the Crown might interfere was by impressing or requisitioning the articles to be sold. No permit was necessary for the sale of any of them or some of them. If the Crown did not interfere in this way the auction would doubtless have gone forward in the usual way, and the articles sold would have been delivered to the purchaser on payment of their price.

It is not pretended that the appellants ever warranted that the Crown would not through its officers impress or requisition any of the goods offered for sale either before the sale or after it if the necessities of the State so required, or that the Crown had bound itself not to do so. The word "arrangement" has been dealt with in arguments as if it were a most solemn serious thing attended with imposing formalities. In this connection it simply means, I think, that an understanding had been arrived at between the appellants and the officers of the Crown that the latter had not at the time when the understanding was arrived at any intention to impress or requisition any of these goods.

In my view the assurance given on behalf of the appellants was in this, its proper sense, accurate in fact. The authorised officers of the Crown had come to an understanding of the nature indicated with the appellants, and had faithfully observed it until the property in the engine purchased by the respondents had become vested in them.

A correspondence beginning with a letter of the 31st of December 1917 took place between the auctioneers of the appellants and the Deputy Director General of the Railway Material Licences, which in my view makes it impossible to believe that a high official such as this Deputy Director was would have written as he did if he had then formed any intention to interfere with the contemplated sale, or to requisition or impress any of the property to be auctioned. The just and natural conclusion anyone would, I think, draw from this correspondence is that this officer had consented to the auction being conducted without any interference from the Department for which he was entitled to speak. That evidently was the conclusion which the appellants honestly drew from it. In my opinion it was the right conclusion.

The conclusion which the appellants naturally drew from what took place at their interview with Colonel Gordon was that Lieutenant Freeman's authority to act as he did having been denied and disowned by his superior, any interference with the sale or impressment of the articles to be auctioned depended no longer upon him, his inclinations, or opinions, but upon the decision of and instructions from the War Office. And yet the non-disclosure by the appellants to the respondents of Lieutenant Freeman's action so quickly baffled and ended was relied upon in argument as such a breach by the appellants of the duty they

owed to the respondents to disclose this incident as to entitle the latter to refuse to pay for the goods they had purchased. I cannot agree that any such duty existed, or that even if it did exist the breach of it would have such a consequence,

Mr Rhind expecting that a telephone message would be sent as promised by Colonel Gordon, announcing the decision of the War Office, with which body he had said the decision rested, made arrangements with Miss Whigham for the reception of this message. A message such as was expected came. It was received by her. She says she remembers the purport, and states on oath what it was, namely, that it was to the effect that it was all right about the sale on the morrow, that it might take place, that it would not be interfered with, and that one of their representatives would be present. Thereupon Mr Rhind wrote and himself posted to Colonel Gordon the letter setting forth in substance everything which he contended had taken place.

Mr Rhind proved that this letter, posted by him, as it was, on the evening of the 16th would arrive in Edinburgh by the early post next morning. The sale was advertised to commence at 12 o'clock on the 17th. There was therefore ample time to answer the letter. No reply to it was ever received; no intimation given that the appellants were under a false impression as to the consent to the sale; no hint that the question as to the Government's non-interference with the sale was still *sub judice* at the War Office. Not a single employee in the War Office or in the office of Colonel Gordon was examined to deny that the instruction mentioned in this letter had not been received from the War Office, nor that the telephone message (styled the telephone meeting) had not been sent. It is inconceivable, I think, that this letter would have been so treated if the statements it contained were inaccurate or unfounded. My confident opinion is that these statements were not unfounded but were accurate and true for this amongst other reasons, that the sale was allowed to proceed. Colonel Gordon sent Lieutenant Freeman to attend it as his representative (an unhappy choice), not to prohibit the sale or interfere with it, but, as he himself distinctly and positively stated, simply to get the names and addresses of the purchasers at the sale so that in the event of the Government subsequently determining to impress any of the articles purchased they would know where to find them. This the Colonel states was all his representative had authority to do. But this presupposes that a sale would take place, and it appears to me impossible to believe that any arrangement such as this would have been made if the War Office had either prohibited the sale or if the question of prohibiting or interfering with it was still *sub judice*. Nothing but the decision of the War Office that the sale might proceed would have justified the action actually taken. Colonel Gordon himself when examined on the point at the trial gave very doubtful and unsatisfactory answers to the questions put to him, not, I am quite certain, from any desire not to tell the whole truth, but because his memory played him false. After stating that he had made it perfectly clear to the gentlemen who had interviewed him on behalf of the appellants that he took in hand to do nothing himself, but that the matter had been reported and that the final action was in the hands of those in London, he was asked—"Did you ever receive from the War Office instruction to allow the sale to proceed?"; and his reply was that he had no recollection of that. He was then asked—"Did you ever suggest either by telephone or otherwise that you had received instructions from the War Office to allow the sale to proceed?" His answer was—"I don't think so." But the pertinent question—"Then how did it come about that the sale was allowed to proceed?" was never put to him, nor was the question put to him why he sent a representative to ascertain the names and addresses of the purchasers at the sale if the War Office had not decided that it might be permitted.

On the facts of this case I am clearly of opinion that the appellants never made or caused to be made to the respondents any representation touching this sale and the possible interference of the Government with it which was not only innocent and made in good faith but was not in addition true in fact. I am equally of opinion that the appellants did not fail to disclose to the respondents any fact touching the sale or the probable interference of the Crown with it which it was their duty to disclose. This whole litigation has been brought about, as I shall presently show, by the arrogant insubordination of a rather aggressive lieutenant whose action was such as nobody could have anticipated a great department of the State would have tolerated.

After the auction had terminated Lieutenant Freeman demanded from the auctioneer a list of the names and addresses of the numerous and scattered purchasers. Mr J. R. Shankland told him that, according to the arrangements made with the Department, the list of the names and addresses of the purchasers would be duly furnished, but that it could not possibly be made up that evening as they had only 20 minutes to catch the train to bring them home, that the clerks of the auctioneers were busily engaged settling accounts with buyers from all over Scotland, that the list would be furnished to the Forage Department next day, and assured him that no goods purchased would be allowed to pass outside the gates of the premises on which the auction had been held till the list had been furnished as promised. This evidence is practically uncontradicted. It is to be borne in mind that no time was fixed by the arrangements within which this list was to be furnished. That being so, the appellants would have by the law a reasonable time to furnish it. They did furnish it next day at about 3 o'clock. It has not been found that that was an unreasonable time to take to do so. It is plain that Lieutenant Freeman at once determined to take advantage of the omission to deliver to

him the list on the evening of the auction, to carry out the scheme he had previously suggested for adoption to Colonel Gordon, to which that gentleman refused to be a party; for, in disregard of Mr Shankland's promise and assurance he, on his own responsibility, as he admitted in reply to the Judge Ordinary, wired apparently on that very evening to the War Office to send down impressment forms, and from what transpired next day, apparently on the evening of the sale, put an embargo on the goods sold. Mr Shankland in fulfilment of his promise went to the office of the Forage Department next day. He saw Lieutenant Freeman and a Captain Mitchell. He delivered to them the completed list of the names and addresses of the purchasers and endeavoured to persuade them to release the goods upon which they had put the embargo. They did release all but a mill, two engines (including the one purchased by Mr Robinson), and a living van. These they refused to release. Mr Shankland on this occasion did not succeed in seeing Colonel Gordon, but that officer when examined at the trial in reference to this incident said that when Lieutenant Freeman reported to him what had occurred he thought he had acted rightly in refusing to let the goods pass out till he had got the information he demanded, but that when he had got the information the day after he was satisfied with it. It would be interesting to know what were the contents of the telegram sent by Lieutenant Freeman to the War Office, but they were not disclosed, nor was any reason given why impressment orders were sent for after the list demanded had been supplied, or whether the authorities by whom the impressment orders were subsequently sent, and on the 30th of January served, had been kept in ignorance of the fact that the list had been supplied. If these orders had been sent, not for any reasons of state necessity but by Lieutenant Freeman's procurement in order to carry into effect his suggested plan, it was a flagrant breach by those authorities of the arrangement which had been made with the appellants for which these latter, as they were not guarantors, would not be in any way responsible. In *Stewart* v. *Kennedy* (1890, Appeal Cases 108, 17 R. (H.L.) 25, 27 S.L.R. 469), Lord Watson, p. 121, deals with the law as to essential error. He said—"I concur with all their Lordships as to the accuracy of the general doctrine laid down by Professor Bell (Bell's Prin., sec. 11) to the effect that error in substantials such as will invalidate consent given to a contract or obligation must be in relation to either (1) its subject-matter, (2) the persons undertaking or to whom it is undertaken, (3) the price or consideration, (4) the quality of the thing engaged for if expressly or tacitly essential, (5) or the nature of the contract or engagement supposed to be entered into. I believe all these five categories will be found to embrace all forms of essential error which either *per se* or when induced by the other party to the contract give the party labouring under such error a right to rescind it." The case of *Adam* v. *Newbigging* (13 A.C. 308) is a good example of head 4 or 5 or perhaps both, where one party by the innocent representation of the other was induced to become partner in a business which either belonged to these latter or in which they were partners, which business owing to its inherent vice afterwards entirely failed. There is no pretence in the present case that it was ever alleged or believed that there was any contract entered into by the Crown that it would not by its officers interfere with the sale by auction. Neither was there any suggestion that the appellants had warranted that the Crown would not so interfere, or that any goods purchased would not be impressed either before or after they were delivered. There was nothing represented or contracted for about the quality of the engine offered for sale or its price. Even, therefore, if I had not formed the opinion on the facts which I have expressed I would still be of the opinion that according to the tests laid down in Lord Watson's judgment the appellants should succeed on this part of their case in point of law. The second point relied upon by the respondents, though not dealt with in the judgment appealed from, was, as your Lordships were assured, argued before the Second Division. It is this, that as the engine purchased by the respondents was impressed by the Crown before it was delivered the respondents are not liable for the price of it. The action brought against them, however, was for goods bargained and sold, not goods sold and delivered. Delivery was prevented by *force majeure*. Before impressment had taken place the property in the engine, the goods bought, had become vested in the respondents. This is clearly so from the conditions of sale printed on the back of the catalogue advertised.

This fact distinguishes this case from that of the "*Claddagh*" (1919 S.C. 184, 56 S.L.R. 619), where the ship was impressed before the property in her had become vested in the purchaser. The law applicable to the case therefore is precisely the same as where goods bargained and sold have, after the property has become vested in a consignee or purchaser, but before actual delivery, been destroyed by fire or shipwreck or such accidents. In *Alexander* v. *Gardner* (1 Bing. N.C. 671) the plaintiffs in London sold to the defendants a quantity of butter, which they expected to arrive from Sligo; the quantity and price were specified in the contract. The butter was to be shipped for London in October, and to be paid for by bill at two months from the date of landing. It was not shipped till November, but the defendants waived the objection and accepted the invoice and bill of lading. The butter was lost by shipwreck. It was held that the plaintiff might recover the price from the defendant for goods bargained and sold. Tindal, C.J., in delivering judgment said (p. 676)—"I think the contract was to pay for goods bargained and sold, and that the declaration to that effect is in the proper form. And I agree that the plaintiff must show that the property in

the goods passed to the defendant by the contract, for unless it did the goods were not bargained and sold to them." He cites and relies upon the case *Rhode* v. *Thwaites* (6 B. & C. 388), where the vendor having in his warehouse a quantity of sugar in bulk agreed to sell twenty hogsheads of it. Four hogsheads were delivered, and the vendor filled up and appropriated to the vendee sixteen other hogsheads, informed him they were ready, and desired him to take them away. The vendee said he would take them away as soon as he could, and it was held that the appropriation having been made by the vendor and assented to by the vendee, the property in the sixteen hogsheads thereby passed to the latter, and that their value might be recovered by the vendor under account for goods bargained and sold. These cases were followed in the Exchequer Chamber in the case of *Castle* v. *Playford* (L.R., 7 Ex. 98), Lord Blackburn at p. 100 saying—"Now here the ship and the cargo have gone to the bottom of the sea, but in the case of *Alexander* v. *Gardner* and *Fragano* v. *Long* (4 B. & C. 219) it was held that if the property did perish before the time for payment came, the time being dependent upon delivery, and if the delivery was prevented by the destruction of the property, the purchaser was to pay an equivalent sum."

In my opinion these authorities show that this second point is a bad one.

On the whole, therefore, I am of opinion that the judgments appealed from were erroneous and should be reversed, and that this appeal should be allowed, with costs here and below.

LORD MOULTON—The pursuers in this case are a firm of contractors who in December 1917 determined to sell by auction a quantity of plant for which they had no further use, including a certain traction engine. They put the sale into the hands of Messrs Shirlaw, Allan, & Company, of Hamilton, whose duty it was to make all necessary arrangements for carrying it out. The sale was fixed to take place at Cupar-Fife on January 17th, 1918.

At that time Government permits were required for the sale of railway material, but not otherwise. As some railway sleepers were included in the sale, the auctioneers communicated the fact of the proposed sale to the proper authorities by letter of December 31st, 1917, and asked for the requisite permission. This letter states, among other things, that traction engines are also included in the sale. By a letter dated January 3rd, 1918, the authorities gave due permission to the auctioneers to sell the sleepers. No reference is made in this letter to the other articles included in the sale, because no permission was needed for their sale.

The defenders are a firm of straw-rope makers, who were at that time desirous of purchasing a traction engine similar to one included in the sale, and having learnt of it from the advertisements of the auctioneers, they sent Mr John Robinson, a partner in the firm, to inspect it and make all necessary inquiries about it. He first saw the auctioneers at Hamilton, and afterwards went to Cupar to inspect the engine, and there saw Mr Duncan Shankland, the pursuer's manager. For the purposes of the case it is not necessary to distinguish what passed between the parties at the two interviews. The accounts given by the witnesses show that in all material respects the conversations were to the same effect.

It is not denied by the pursuers that Mr Robinson was anxious to get immediate possession of the engine if he bought it, and that he asked particularly as to whether there would be any difficulties raised by the Government as to his doing so. He was told that the only articles in the sale for which Government permission was required were the railway sleepers, and that the necessary permits had been obtained for them. I think that it is probable also that he asked Mr Shirlaw whether there would be any difficulty in his obtaining delivery of the articles, and that Mr Shirlaw reassured him on that point. In so doing he was giving his honest belief, for which he had good grounds. I am quite clear that this statement was, and was regarded by Mr Robinson as being, only an expression of Mr Shirlaw's belief, and not as partaking of the nature of a guarantee. Indeed, Mr Robinson expressly admits this. In cross-examination he is asked by the pursuer's counsel—"(Q) Assuming from me that this sale had been duly intimated to the military authorities, and that they had taken no exception to it, and that there was no regulation against such a sale, wouldn't you think that Mr Shirlaw was quite warranted in saying what he said to you? —(A) Yes, he would be." I have dealt with this point in detail, because it is the basis of the defenders' case. It is true that at one point of the argument the defenders' counsel, seeing the impossibility of maintaining that the statements amounted to a guarantee that the delivery should not be interfered with by the authorities, sought to make it out to be a representation that the pursuers had obtained a binding undertaking from the Government that they would not interfere with delivery. Such a suggestion is not supported by the evidence, and it is in itself absurd. No one would imagine that such an undertaking would ever be given by Government during the war in respect of such a matter. It could only be given (if at all) by those entitled to decide finally as to the exercise of the statutory and prerogative powers of the Crown, and that the defenders could have supposed that they should have done this in respect of an ordinary sale by auction is simply ridiculous. I am satisfied that all that the pursuers or their agents represented to the defenders was that all necessary steps had been taken to legalise the sale, and that there was no ground for expecting that any difficulties would arise. So far as those representations were as to matters of fact they were true, and so far as they were as to opinion that opinion was entertained by the pursuers and their agents honestly and on reasonable grounds.

On January 15th—two days before the date fixed for the sale—the sale ground was visited by a certain Lieutenant Freeman, who appears to have been a subordinate officer employed by the Government in negotiating hiring contracts of machinery. He saw the engines on the ground and went up to Mr Duncan Shankland and told him that he wanted some more engines and had come to take those included in the sale and was going to do so. Mr Duncan Shankland remonstrated at this action being taken on the eve of the sale, seeing that the military authorities must have known of it for a long time previously and had taken no steps to interfere with it. Lieutenant Freeman, however, persisted, and accordingly Mr Shankland reported the matter to his principal, Mr J. R. Shankland (who was the sole partner in the pursuer's firm) and it was arranged that they should go to Edinburgh the next day and interview Lieutenant Colonel Gordon, who was Lieutenant Freeman's Commanding Officer, and Area Administrative Officer for that part of Scotland.

The first interview took place on the morning of January 16th. They then learnt from Colonel Gorden that Lieutenant Freeman had no authority to commandeer anything either by way of hire, impressment, or purchase. He had only authority to examine and report. A second interview was arranged for the afternoon of the same day that Lieutenant Freeman might be present. It is clear that at this interview he tried to persuade Colonel Gordon to authorise the taking of the engines but did not succeed. In the result Colonel Gordon stated that he was personally in favour of allowing the sale to go on without interference, but that he would like to consult London and obtain instructions on the matter, and that he would let Mr Rhind, the agent of the pursuer in Edinburgh (who was also present at the interview), know the result later in the day. About seven o'clock a telephone message came from Colonel Gordon's Department to the effect that it was all right about the sale on the morrow. It could take place and would not be interfered with. Colonel Gordon remembers the "telephone conservation," though he is not positive as to the actual words, but he does not contradict the substantial accuracy of the evidence as to its contents. He thinks that although he had communicated with London he had received no answer. I am of opinion on the evidence taken as a whole that he is mistaken in this. It had been arranged at the afternoon interview that the telephone message should be sent after he had received a reply from London and his spontaneously telephoning to the pursuer's law agent points to that having been the case. But the strongest evidence on this point is that the pursuer's agent at once sent a confirming letter to him which states that in this telephone message Colonel Gordon informed them that he had now obtained instructions from the War Office to allow the sale of the whole plant and machinery (including the engines) as advertised, and that the sale would accordingly not be interfered with by his Department. No exception was taken at the time to the very explicit statements contained in this letter and as it is a contemporaneous document passing between the parties I attach greater weight to it than to the evidence given at the trial from memory.

The sale took place on the next day, January 17th 1918. Colonel Gordon had informed the pursuers that a representative of the Department would attend the sale, and this was done, but beyond being present he took no part in it. The defenders purchased the engine and it is for the price of it that this action is brought. It is agreed that the property passed to them at the fall of the hammer. In my opinion the effect of all that had passed since the original communications with the defenders respecting the sale had not altered the position of matters, except to give stronger grounds to the pursuers to believe that there was no reason to fear that there would be any difficulty as to the defenders obtaining delivery of the engine without any interference from the Government. Indeed the events which ultimately brought about the interference of the Government occurred subsequently to the critical moment, *i.e.*, when the purchase was effected at the fall of the hammer.

Colonel Gordon at one of the interviews on January 16th had asked to be supplied with a list of the names and addresses of the purchasers at the sale and the prices of the various lots, and the pursuers had engaged to give it to him. At the conclusion of the sale Lieutenant Freeman went to the auctioneers and demanded this list. It was explained that there was not time to make it out that evening but that it should be given to Colonel Gordon on the following day. For some reason or other he took umbrage at the way he was treated and refused to let the plant be removed on the following day, and maintained the embargo till orders came from London that it should be impressed. The evidence is far from clear as to how the authorities were brought to the conclusion that this should be done, but on the whole I am satisfied that it was through the efforts of Lieutenant Freeman which followed the difficulty that arose in connection with the delivery of the lists. It seems to have been very unreasonable to require instant delivery of those lists under the circumstances of the case, and Colonel Gordon was quite satisfied with their being delivered on the following day. But it is not worth while to discuss extraneous matters such as these seeing that they cannot have any bearing on the rights of the parties.

The main contention of the defenders' counsel was, that admitting that the representation of the pursuers to the effect that no interference on the part of Government was probable, was an expression of an opinion honestly held by the pursuers at the time of the interview before the sale, the commandeering of the engine by Lieutenant Freeman on January 15th was a circumstance which changed the grounds upon

which that opinion rested, and as such ought to have been communicated to the defenders. If this commandeering had been legal and effectual, or if it had changed the opinion on the subject held by the pursuers at the time of the sale, I should have held this contention correct. But the pursuers promptly made inquiries of Lieutenant Freeman's commanding officer, from whom any authority he might have in the matter must be derived, and learnt that his action was a gratuitous interference on his part wholly beyond any authority which he possessed, and therefore was a nullity. Moreover, they received information from his superior which was sufficient to convince them, and did convince them, that their original opinion was well founded. Under these circumstances no duty existed to communicate to the pursuers any of the matters which happened between the original interviews between the parties and the sale.

I hold therefore that the sale to the defenders was a good one, and that the property in the engine passed to them before the impressment, so that when the impressment took place it was an engine belonging to the defenders that was impressed. The loss due to such impressment must fall upon the defenders just as a loss by fire (if it had occurred) would have fallen on them. It constitutes no defence to the claim of the pursuers for the purchase-price.

As a last resort the defenders' counsel tried to contend that the pursuers had failed to give delivery and therefore had not fulfilled their obligations as vendors. This is based upon a complete misconception of the contract. So soon as the hammer fell the property passed, and it was for the buyer to remove the goods from the auctioneers' premises. Delivery so far as any was necessary to complete the contract of sale took place there and at that moment. If the auctioneers or their principals had refused to permit the purchaser to come on the ground to take away the goods they would have been liable to an action which in the English Courts is known as an action of detinue, or even under certain circumstances to an action of conversion. But these actions would have rested upon the hypothesis of the ownership being in the defenders and on a wrongful act having been done by the pursuers to their goods, and thus they would have implied that the purchase had been effected and therefore the purchase price had become due. No circumstances, however, exist in this case which would give any ground for any action of this type, and no such claim has been made before us.

I am of opinion therefore that this appeal should be allowed, with costs here and in the Courts below.

Their Lordships reversed, with expenses, the interlocutor appealed from and remitted to the Court of Session to pronounce a decree in terms of the conclusions of the summons.

Counsel for the Appellants — Moncrieff, K.C.—W. T. Watson. Agents—John E. Wilson & Foulis, Glasgow—Whigham & Macleod, S.S.C., Edinburgh—Ince, Colt, Ince, & Roscoe, London.

Counsel for the Respondents—J. Roberton Christie, K.C.—D. M. Wilson—Siney. Agents—Baucher & Vincent, Wigan—Turnbull & Findlay, Glasgow—Fraser, Davidson, & Whyte, W.S., Edinburgh—William A. Crump & Son, London.

Tuesday, May 11.

(Before Viscount Finlay, Viscount Cave, Lord Dunedin, Lord Atkinson, and Lord Moulton.)

DOBBIE *v.* COLTNESS IRON COMPANY, LIMITED.

(In the Court of Session, December 21, 1918, 56 S.L.R. 144, and 1919 S.C. 257.)

Mines — Wages — Payment depending on Amount of Mineral Gotten—"Mineral Contracted to be Gotten"—Ascertainment of Deductions from Mineral Gotten—Coal Mines Regulation Act 1887 (50 *and* 51 *Vict. cap.* 58), *sec.* 12 (1).

The Coal Mines Regulation Act 1887, section 12 (1), enacts:—"Where the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them, those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten, and the mineral gotten by them shall be truly weighed at a place as near to the pit mouth as is reasonably practicable: Provided that nothing in this section shall preclude the owner, agent, or manager of the mine from agreeing with the persons employed in the mine that deductions shall be made in respect of stones or substances other than the mineral contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten, or in respect of any tubs, baskets, or hutches being improperly filled in those cases where they are filled by the getter of the mineral or his drawer or by the person immediately employed by him; such deductions being determined in such special mode as may be agreed upon between the owner, agent, or manager of the mine on the one hand and the persons employed in the mine on the other, or by some person appointed in that behalf by the owner, agent, or manager, or (if any checkweigher is stationed for this purpose as hereinafter mentioned) by such person and such checkweigher, or in case of difference by a third person to be mutually agreed on by the owner, agent, or manager of the mine on the one hand and the persons employed in the mine on the other, or in default of agreement appointed by a chairman of a Court of Quarter Sessions within the jurisdiction of which any shaft of the mine is situate."

Miners in a coal mine agreed that