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

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

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

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

The Court pronounced this interlocutor:—

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

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

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

Tuesday, January 14.

SECOND DIVISION.

[Lord Sands, Ordinary.

BLAIR *v.* KERR'S TRUSTEES.

Process—Declarator—Competency—Action Premature.

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

action of declarator in which she concluded, *inter alia*, that she had power to confer the liferent on her present or any future husband. *Held* that the action *qua* this conclusion was premature, there being possible contradictors who were not represented.

Mrs Catherine Kerr or Blair, Greenock, *pursuer*, brought an action against the trustees acting under the mutual trust-disposition and settlement of her parents, the late Mr and Mrs John Kerr, *defenders*, for declarator "that a one-sixth share of the residuary estate of the said John Kerr and Mrs Catherine Scott or Kerr, the father and mother of the pursuer, vested in the pursuer absolutely in fee upon the death of her father and now belongs to her absolutely in fee, or otherwise that the said share vested in her upon the said death subject to defeasance in the event of her dying survived by a child or children or the issue of such child or children, and that subject to the said contingency she is entitled to dispose of the said share by testamentary writing in any way whatsoever as she may see fit, or otherwise and in any event that she has full power to confer upon the said Archibald Blair, her husband, or upon any husband she may hereafter marry, a liferent of the said share in the event of his surviving her."

Mrs Kerr died on 4th March 1908, and John Kerr on 1st December 1915. He was survived, in addition to the pursuer, by three sons and by the issue of two sons who predeceased him, who were called as defenders, in addition to the trustees acting under the mutual settlement, and who were, along with the pursuer, the whole beneficiaries and parties interested in the trust estate.

By his trust-disposition and settlement, which was executed on 5th January 1891, the late Mr John Kerr directed his trustees "in the seventh place," on his death in the event of his wife predeceasing him, and on the youngest of his children attaining twenty-five years complete, "to hold, pay, convey, and divide the whole rest, residue, and remainder of my said means and estate into as many shares as there are children and lawful issue *per stirpes* of predeceasers surviving the period of division, as follows, viz. . . . (*Secundo*) with regard to the share of residue falling to my daughter I direct my trustees to retain the same in their own hands during all the days and years of her lifetime (except in the event of her marriage as after mentioned) and pay and apply the free annual income and produce thereof to and for behoof of my daughter, and that at such terms and in such proportion as my trustees may think fit, as a liferent alimentary provision for her, not assignable by her and exclusive of her husband's rights of every kind: And I confer on my trustees powers of encroachment for her comfortable maintenance to such extent as they may consider proper: And I hereby authorise and empower my trustees on being requested by my daughter to do so to pay over and convey to trustees to be named by her in any antenuptial contract of marriage she may enter into, the said share of the residue of my estate held for her alimentary liferent, said share to be held by said marriage-contract trustees for her in liferent for her alimentary liferent use allenarly exclusive of her husband's rights and for her children in fee: With power to my daughter by said marriage-contract to confer upon her husband a liferent of said share of residue in the event of his surviving her, and to test upon the capital of said share among all or any of my sons and their children in such shares as she may direct (but to none others) in the event of her leaving no issue, my trustees having, however, no concern with the purposes of said marriage-contract nor the powers of the trustees therein named, but being sufficiently exonered and discharged by the discharge of said trustees with my daughter's concurrence: And I confer on my daughter full power to test on the fee of the share held for her among all or any of my sons and their children in such shares as she may direct (but to none others) by any writing under her hand in the event of her dying unmarried, my trustees being bound to dispose of the said share as said writing may direct, and being sufficiently exonered and discharged by the discharge of those who are named in said writing."

The pursuer averred—"(Cond. 6) The pursuer was married to Archibald Blair, grain merchant in Greenock, on 23rd August 1899. No antenuptial contract of marriage was entered into between her and her husband, and this fact was well known to both her father and mother. There are no children of the marriage. With reference to the explanation in answer it is admitted that the pursuer is now 48 years of age. . . . (Cond. 7) After the death of the said Mrs Kerr the said John Kerr, in terms of a provision to that effect contained in the said mutual settlement, enjoyed the liferent of her estate, and during her father's lifetime the pursuer was not made aware of the terms of the said settlement. After her father's death the agents for the said trustees submitted to her a scheme of division of her parents' estates for her approval, under which it was proposed to set aside a one-sixth share for her behoof, which, it was explained to her, the trustees intended to hold and pay her the income thereof during her life, her sole interest in the fee thereof being in their view a right to test thereon among her brothers and their children in the event of her leaving no issue. To this limitation of her rights the pursuer declined to agree, and through her agents called upon the said trustees to concur in submitting a special case for the opinion of the Court of Session upon the true construction of the said settlement. The said trustees declined to do so, and it has therefore become necessary for the pursuer to raise the present action for the ascertainment of her rights under the said settlement.

The defenders pleaded, *inter alia*—"1. The action being premature and unnecessary should be dismissed."

On 5th July 1918 the Lord Ordinary (SANDS) sustained the first plea-in-law for

the defenders, found the action premature as laid, and continued the cause to allow the pursuer an opportunity of amending the summons.

Opinion.—"The first matter that arises in this case is under defenders' first plea-in-law, viz., that the action is premature.

"It is well settled that the Court may give a declarator of right even although nothing operative can meantime follow upon it. On the other hand the Court will not give a mere opinion, and accordingly the Court will not give a declarator of right where parties who may be contradictors are not convened or are not at present convenable, for in that case the decree would not be *res judicata* against them and would be mere opinion. In the present case the heirs-at-law of the truster who are possible contradictors are convened. It is said, however, that the future issue of Mrs Blair are possible contradictors and cannot be convened. Now, apart from one provision of the will which I shall notice presently, I do not think the proposition is stateable that there is no vested interest in Mrs Blair, but that there is a vested interest in her children or a vested interest in Mrs Blair defeasible in the event of her leaving issue. Apart from that special clause there is no provision, express or by implication, in the deed in favour of the issue. As I did not hear senior counsel for the defenders I would not proceed upon this ground without giving him an opportunity of referring me to any authority for the proposition that where there is a gift which *primo loco* takes the form of an alimentary liferent in a beneficiary there may be a fee in that beneficiary's issue preferable to that beneficiary himself although such issue are not referred to.

"I now proceed to consider the special clause in the trust settlement to which I have referred. Under this clause Mrs Blair has power by antenuptial contract of marriage to settle the fee upon her children and to give a liferent to her husband. Mrs Blair is forty-eight, her husband is alive, she has been married for nineteen years, and there are no children. There was no settlement by antenuptial contract. The only possible interest therefore under this clause appears to be that of the children or husband of a future marriage. The rule under which actions of this kind are disallowed as premature was authoritatively stated in *Smith* v. *M'Coll's Trustees*, 1910 S.C. 1121, 47 S.L.R. 291, and is to the effect that where no operative decree can follow the Court will not give a decree merely in order that the pursuer may have a marketable title if there are possible contradictors who are not or cannot be parties to the process.

"This rule is not designed so much for the protection of rights which might otherwise be prejudiced (for any decision is not *res judicata* against unrepresented interests) as for the protection of the Court against being inveigled into giving mere opinions or to adopt constructions without adequate argument. Accordingly I do not think that it is necessary in all circumstances to enforce it with the absolute strictness that is observed where an immediately operative decree is sought. It would not perhaps be reasonable to apply the rule where the contingent interest was merely theoretical and divorced from the practicalities of human experience, as, for example, where the only unrepresented interest was the possible issue of a childless lady of over sixty. On the other hand, where the chance of the emergence of a contingent interest is appreciable and not merely theoretical, I do not think that in determining whether an action is premature the Court can be influenced by a mere weighing of probabilities. Such a relaxation would occasion great uncertainty and inconvenience and deprive the rule of its value.

"If the only unrepresented contingent interest were the children of a possible second marriage I confess I should be tempted, if possible, to treat the contingency (upon which an actuary advising a reversionary company would probably put no value) as negligible. I am not, however, required in the view which I take to determine this matter. Mrs Blair had also power to settle the liferent of the fund upon a husband by antenuptial contract. This contingency, though it may not be probable, is certainly not negligible, and accordingly there appears to be a possible party who may be interested in the disposal of the fund who is not and cannot be here.

"It may be answered, however, that the power conferred by the trust-settlement is exerciseable equally whether Mrs Blair has or has not a vested interest in the fee of the fund, and that accordingly this problematical person can never have an interest in this question. But this answer is not satisfactory. I shall assume that Mrs Blair alienates her interest in this fund other than her own alimentary liferent. Thereafter she enters into a second marriage, and being advised that she has power so to do she confers a liferent upon her future husband. On her death the purchaser of her interest claims the fund; the husband claims the liferent. The purchaser maintains that in alienating her interest she renounced the right to give a liferent to the husband, or that she is barred from doing so. The husband replies that she could alienate only that which she possessed, and that as the fee of the fund did not belong to her, her deed in favour of the purchaser carried nothing, and the deed in favour of him as her husband did not therefore prejudice the purchaser. The validity of this reply by the husband would depend upon whether the fee is or is not vested in Mrs Blair—the very question which the Court is now invited to determine. It appears to me therefore that there is a possible person not here represented who on the death of Mrs Blair may have a direct interest in the determination of the present question, and that accordingly the rule in *Smith* v. *M'Coll's Trustees* applies.

"It may be suggested that this problematical person is a creature of the pursuer whom she need never create, and therefore he cannot be allowed to stand in her way. But I do not think that Mrs Blair can enter into a bargain with the Court that she will not exercise the power she possesses under her father's will. Nor do I think it unargu-

able that the power is one of which Mrs Blair cannot under her father's will effectually divest herself *ab ante*.

"I am accordingly of opinion that I must sustain the defenders' first plea-in-law.

"I should perhaps notice the third alternative conclusion, viz., that Mrs Blair may exercise by postnuptial deed the power given by the settlement to create a liferent in favour of a husband by antenuptial contract. As regards a provision to her present husband, the possible second husband is not a possible contradictor. No argument, however, was presented to me in support of this conclusion, and it hardly appears to me to be maintainable. The words of the settlement are explicit and unambiguous. Moreover, it is quite intelligible that a testator might deem it proper to withhold from postnuptial disposal in favour of a husband a benefit which his daughter had refrained from conferring in her antenuptial condition of freedom.

"The interlocutor I propose to pronounce is to find the action is premature as laid, to continue the cause to allow the pursuer an opportunity of considering whether she will amend her summons, and to grant leave to reclaim.

"My reason for adopting this form is because I think that conceivably the pursuer might make a competent conclusion that subject to any right which she may create by the exercise of the powers conferred by the clause to which I have referred the fee is vested in her. I express no opinion meantime as to the competency of such a conclusion."

The pursuer having declined to amend the summons, the Lord Ordinary on 20th November 1918 dismissed the action.

The pursuer reclaimed.

At advising—

LORD JUSTICE-CLERK—[*After dealing with questions which are not reported*]—With regard to the conclusion that the pursuer has full power to confer upon her husband or upon any husband she may hereafter marry a liferent of her share, I think the proper course, in accordance with what I understand to be the opinion of your Lordships, is that we should treat that conclusion as being prematurely raised, leaving it to the husband, either present or prospective, if so advised, to raise the question when it comes to be a practical one. Therefore I move your Lordships that we should assoilzie the defenders from the conclusion as to the pursuer's right of fee, and that as to the conclusion regarding the husband's interest we should dismiss the action.

LORD DUNDAS—[*After dealing with questions which are not reported*]—As regards the third and last conclusion, I have no hesitation in agreeing that it is premature, and that we ought not to give any answer to it. The lady may never have a second husband, and the husband she now has may die before her, and it is quite uncertain whether any question will ever arise about the matter. I do not think she is entitled to ask us now whether she could validly exercise the privilege when she desired to do so; there are no circumstances here present demanding a decision on that question at the moment. For my own part I agree with the observation of Lord Medwyn just about eighty years ago in the well-known case of the *Earl of Galloway* (1838, 16 S. 1212), where his lordship said—"I do not admire these consultations coming upon us *ab ante*. . . . Valuable as the action of declarator is, I do not think this is a proper use of it. . . . I am against telling a party beforehand that he will be right if he do this, and wrong if he do that." I think some of these expressions underlay Lord Dunedin's decision in the case of *Smith*.

LORD SALVESEN—[*After dealing with questions which are not reported*]—As regards the third conclusion, I think, for the reasons stated by Lord Dundas, that the demand of the pursuer is premature. We are not in the habit of deciding questions which may never arise, and, so far as I can see, this particular question may be merely academic.

LORD GUTHRIE—I agree.

The Court recalled the interlocutor of the Lord Ordinary and dismissed the third conclusion of the action.

Counsel for Pursuer and Reclaimer—Wilson, K.C.—Mitchell. Agents—Cadell & Morton, W.S.

Counsel for Defenders and Respondents—Chree, K.C.—R. C. Henderson. Agents—R. Addison Smith & Co., W.S.

Friday, January 17.

FIRST DIVISION.

(SINGLE BILLS.)

CRANSTON'S TEA ROOMS, LIMITED (AND REDUCED), PETITIONERS.

Company—Capital—Reduction of Capital—Procedure—Form of Prayer of Petition when Creditors' Rights not Affected—Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 69), *sec.* 49.

In a petition for confirmation of reduction of capital, where creditors' rights were not affected and there were no specialties to be dealt with, *held* that it was superfluous and inappropriate to insert a crave to give effect to the provisions of section 49 of the Companies Act 1908 in so far as they applied to creditors and to the list of creditors to be made up.

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69) enacts—Section 49—"(1) Where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, and in any other case if the Court so directs, every creditor of the company who at the date fixed by the Court is entitled to any debt or claim which if that date were the commencement of the winding up of