properly regarded as part of the gross earnings of the working of the vessel as distinguished from profits, and accordingly I think that each of the three men in question, and in particular the deceased fireman, was remunerated by a share of the gross earnings of the working of the vessel. I do not think that in order to bring him within the section of the Act it is necessary that there should be an arithmetical proportion of the whole taken as the part to be paid to the workman; in my judgment it is enough to read the section in this sense that if any of the hands employed gets a share of the proceeds of a part of the catch—that share being so large as to give them a substantial sum—then they are brought within the scope of the exception. I am therefore for answering the question put to us by the arbitrator in the affirmative.

LORD SALVESEN—I agree. It seems to me that the question we are called upon to decide is whether the "scum," the meaning of which is explained by the Sheriff-Substitute, forms part of the gross earnings of the working of the steam-drifter "Petunia," on which the deceased was engaged as a fireman. I think finding No. 15 is practically conclusive on that subject. It is stated that in accordance with practice, and also with express agreement between the respondents and certain unions, the "scum" is divisible in equal proportions between the engineer, the fireman, and the cook, and that but for this right to the "scum" a higher fixed wage would require to be paid. In other words, if it were not for this agreement the "scum" would in law form part of the gross earnings of the working of the vessel, and would go to the owners of the vessel if their servants were all paid by wages.

That being so, the agreement is to the advantage of both parties, because a larger proportion of the "scum" is secured if the men whose duty and interest it is to secure it get the whole benefit. On the other hand, if that benefit is substantial it is reasonable to infer, what is found in fact, that it enters into the question of the rate of fixed wages which such men will accept. But I cannot doubt that the "scum," which is really part of the catch of the vessel—saved no doubt from loss by the exertions of the three men who get the value of it between them—is part of the gross earnings of the working of the vessel. I accordingly think that the appellant's husband was excluded from the benefits of the Workmen's Compensation Act.

LORD DUNDAS—I am of the same opinion. I think that we are quite in a position to decide this case as it stands, and that we ought not to entertain either of the alternative branches of the motion made to us for the appellant, to have the process transmitted here in order that we may look at the evidence, or to remit to the arbitrator in certain terms. That motion in both its branches, which we refused some days ago *in eo statu*, should be refused definitely now that we have heard the case opened, especially in view of the fair concession made by counsel for the respondents that certain words of the learned arbitrator should be taken not as findings in fact but rather as inferences, as to the legality of which we can judge for ourselves. As regards the merits of the case I have nothing to add to what your Lordship has said, except that I think we must hold that the Scottish case of *Colquhoun*, 1912 S.C. 1190, was definitely overruled by the House of Lords in the case of *Costello*, [1913] A.C. 407, and that the two English decisions referred to by the learned arbitrator seem to me to be not unhelpful in the consideration of this case. I am for answering the question as your Lordship has proposed, in the affirmative.

LORD GUTHRIE was not present.

The Court answered the question of law in the affirmative.

Counsel for the Appellant—Christie, K.C. —Gentles. Agents—W. & J. Burness, W.S.

Counsel for the Respondents—Anderson, K.C. — Scott. Agents — Alex. Morison & Co., W.S.

Tuesday, June 12.

FIRST DIVISION.

[Lord Cullen, Ordinary.

N. G. FERGUSSON & COMPANY, LIMITED *v.* BROWN & TAWSE.

(Reported *supra*, p. 309.)

War — Contract — Furthcoming — British Arresters Suing British Arrestees for Debt Due by the Latter to a German Firm — Debt Matured after the Outbreak of War, when Payment Illegal.

British subjects arrested in the hands of other British subjects a debt due by the latter to a German firm. The obligation of the latter was to pay the German firm in marks at Duisburg on 15th August 1914, by which time war had been declared and payment of the debt had become illegal. *Held* (*rev.* Lord Cullen) that an action of furthcoming by the arresters against the arrestees must be sisted for so long as the arrestees were not liable to make payment to the German firm.

N. G. Fergusson & Company, Limited, *pursuers*, brought an action of furthcoming against Brown & Tawse, *arrestees* and *defenders*, and Eisenwerk Kraft Aktiengesellschaft, Duisburg, Germany (against whom arrestments had been used *ad fundandam jurisdictionem*), *principal debtors*, for payment of sums arrested by the pursuers in hands of the arrestees and due by them to the principal debtors.

The defenders *pleaded, inter alia*—"1. The action is incompetent as laid (*a*) in respect that the proceedings founded on are inept; (*b*) in respect that the liability to pay the debt in question is suspended by war; and (*c*) in respect of the terms of the Trading with the Enemy Amendment Act 1914. 2.

The action is premature and should be dismissed."

The *facts* of the case appear from the opinion of the Lord Ordinary (CULLEN), who on 20th April 1917 pronounced this interlocutor—"Finds that the debt due by the compearing defenders to the common debtors and arrested in their hands by the pursuers should in this action be made furthcoming in the currency of this realm, and that its value in such currency should be ascertained by taking, for the purposes of conversion, the value of the German mark at the average value which it had in exchange between this country and Germany during the period between 1st January 1914 and 30th June 1914: With this finding continues the cause and grants leave to reclaim."

Opinion.—"The debt arrested by the pursuers to which this action of furthcoming relates arises under a contract of sale between the common debtors, a firm in Germany, as sellers, and the defenders, as buyers, whereby the common debtors agreed to sell and deliver a certain quantity of steel ship plates at the price of 103·25 marks per ton. Under the contract the defenders obtained delivery of a certain quantity of the said goods prior to the outbreak of the present war, the price thereof being payable under the contract in Germany in marks, and due on 15th August 1914. The outbreak of the war prevented payment of the debt. It has been arrested by the pursuers and is now sought to be made furthcoming.

"The question now for decision is as to the money value to be put on the debt in this furthcoming. There is not at present, and there has not been since the war began, any rate of exchange between this country and Germany. The pursuers, however, are entitled to have the debt made furthcoming at present on some basis of value.

"The debt being payable in marks under the contract, the defenders contend that they are entitled to answer the demand for furthcoming by purchasing in some neutral country the required number of marks and paying over these foreign coins to the pursuers. This seems to me out of the question. Under the contract the debt was to be paid in Germany to the German sellers. As the matter stands, however, it is to be paid over to the pursuers under a decree of this Court, and British currency must rule whatever the standard of conversion to be adopted may be.

"On this footing two alternative modes of fixing the value of the debt to be made furthcoming were suggested at the hearing. One was by taking a pre-war rate of exchange between this country and Germany. The other was by taking the rate of exchange—either (*a*) at 15th August 1914, or (*b*) at the date of arrestment, or (*c*) now—between Germany and some neutral country through which, were it permissible, a remittance might be made, or might have been made, to Germany.

"I adopt the former proposed mode. It appears to me that the fair method of dealing with the matter is to take such rate of exchange as will presumably correspond best with the contemplation of the parties to the contract when they entered into it. They were respectively buying and selling in an ordinary way, and not merely gambling in exchanges. The contract was entered into a considerable time prior to the war. Presumably the price to be paid and received under it was fixed with reference to the conditions of exchange then prevailing. By this I do not mean the rate of exchange at the actual date of the contract, but am referring to the fact that prior to the war the fluctuations in the rate of exchange were, as I was told, slight, and in no way comparable with the degree of depreciation which the mark has undergone in neutral countries under the abnormal conditions created by the war. I do not know whether the mark had prior to the end of July 1914 become affected by the disturbed state of affairs and the prospect of war. I think that a fair way to deal with the matter would be to take the average value of the mark in exchange between this country and Germany during the period of six months between 1st January and 30th June 1914. If the parties should acquiesce in this view, I daresay they will be able to ascertain said value without a forma inquiry."

The defenders reclaimed, and argued—The obligation of the defenders was to pay in marks at Duisburg on 15th August 1914. To that obligation the pursuers had a right by judicial assignation, but they took the right *tantum et tale* as it stood in the hands of the arrestees—*Brower's Executor* v. *Ramsay's Trustees*, 1912 S.C. 1374, 49 S.L.R. 962. Further, there was no privity of contract between the pursuers and the defenders. Consequently the pursuers could not claim conversion into sterling money. The defenders were prepared to pay in marks. In any event the pursuers had in effect an assignment on behalf of an enemy and the defenders were not bound to pay—Trading with the Enemy Amendment Act 1914 (5 Geo. V, cap. 12), section 6. The pursuers had a remedy under section 4 by applying to have the enemy property paid into Court. If there was to be conversion, then as by section 6 payment could not be on 15th August 1914 (the date stipulated in the contract), the date for conversion must be the date of the decerniture for payment—*Cash* v. *Kennion*, 1804, 11 Vesey 314; *Manners* v. *Pearson & Son*, [1898] 1 Ch. 581; *Scott* v. *Bevan*, 1831, 2 B. & Ad. 78; *Suse* v. *Pompe*, 1860, 8 C.B. (N.S.) 538; *Bertram* v. *Duhamel*, 1838, 2 Moore's P. C. Reports, 212. The action should be dismissed or sisted, or if decree was to be given, it should be for the number of marks in question as if they were actual moveable property. If there was to be conversion, the marks must be valued at the present value.

Argued for the pursuers (respondents)—War suspended the operation of contracts but it did not prevent the recovery of debts from an enemy. Thus a German debtor could be sequestrated in Scotland. A German debtor could not pay a British creditor, for German law forbade that, but our

courts would not consider the German law. Here if payment was made to the pursuers the arrestees would be prevented from paying a German firm. The goods were delivered before the outbreak of war, and payment became due on 15th August 1914. Consequently there was no reason for withholding decree. The war could not be said to give the defenders a right of retention they did not possess at common law. In their return to the accountant the defenders had stated that they were due the principal debtors sterling money. But for the war they would have had to pay sterling money to purchase marks. Consequently they ought to pay sterling money now. As to the date for conversion, there was no authority in point but it was a matter of equity on which the Lord Ordinary had reached a reasonable conclusion. The authorities cited did not apply, for they related to circumstances in which there was a current and living exchange for money.

At advising—

LORD PRESIDENT—I cannot help thinking that some misunderstanding must have arisen with regard to this case in the debate in the Outer House, because the opinion of the Lord Ordinary is silent upon a plea which it appears to me is fatal to this action proceeding further in the meanwhile. On the contrary his Lordship in his opinion says—"The question now for decision is as to the money value to be put on the debt in this furthcoming."

Now that in my opinion is not the question at all which is now raised. The question to be determined arises upon the defenders' first plea-in-law, which runs thus —"The action is incompetent as laid, (*a*) in respect that the proceedings founded on are inept, (*b*) in respect that the liability to pay the debt in question is suspended by the war." Substantially I am of opinion that defence is well founded.

On the 23rd May 1916 the pursuers laid on arrestments in the hands of the defenders to the extent of £6700 due by the arrestees to a German company. The arrestees were due, it appears, the German company a sum of 33,739 marks for steel ship plates delivered to them by the German company. In terms of the written contract of sale between the parties the marks were payable in Germany on 15th August 1914, that is to say, twelve days after war was declared. And accordingly it is common ground that the German company could not have recovered payment of that sum in terms of their contract, and that consequently the arrestees were not and are not liable in payment of that sum.

If so it is impossible, I think, to grant decree of furthcoming in the present instance, because whatever objections are open to the arrestees as against the common debtor the same objections are open, in my opinion, as against the arrester. As Erskine says (Book iii, title vi, par. 16, page 842)—"As the arrester affects by his diligence the subject arrested *tantum et tale* as it stood in his debtor, with all its burdens, therefore if the arrestee, whose condition ought not to be made worse by the diligence of creditors, has any just defence against the debt, whether of payment, composition, &c., which would be relevant against a common debtor, the same defence ought to stand good against the arrester." And it has been decided, as long ago as 11 Dunlop, in the case of *Houston* v. *Aberdeen Town and County Banking Company*, 11 D. 1490, that "All objections or defences which would have been competent to the arrestee as against the common debtor, are competent against the arrester pursuing a furthcoming."

Now the arrestee here would certainly have had a very good defence against the claim for payment of 33,739 marks by the German company. That money is not, confessedly, payable; they are not liable to pay; they are not entitled, because they are not liable, to pay; and that being so we cannot allow decree of furthcoming to pass. We ought to recal the interlocutor of the Lord Ordinary and sist the action meanwhile.

In taking that course, I am not to be held as expressing any opinion upon the question which the Lord Ordinary has decided relative to the money value of the debt, and the amount which is to go into the decree, if and when the decree of furthcoming comes to be pronounced. My present impression is that the method adopted by the Lord Ordinary is wrong, because it is contrary to the terms of the contract made by the parties. But still it will be time enough to fix the sum to appear in the decree when we reach the stage when decree of furthcoming comes to be pronounced.

LORD JOHNSTON—By sale-notes in January 1914 Brown & Tawse of Dundee, the arrestees, purchased from a German firm, the Eisenwerk Manufacturing Company of Duisburg-Hochfeld, the common debtors, 1000 tons of steel ship plates at the price of mks. 103·25 per 1000 kilos, to be delivered in about equal monthly quantities at the seller's works at Duisburg, and to be paid net cash on the 15th of the month following delivery.

Delivery began in July, and in that month admittedly 265 tons were delivered (there was a question about a further 47 tons), and the price, mks. 27,453, was admittedly due on 15th August. But by 4th August 1914 war had been declared between Britain and Germany, consequently the buyers withheld payment when it became due of the above sum of mks. 27,453, and no further delivery of plates by the sellers was made.

In these circumstances N. G. Fergusson & Company of London, who were creditors of the Duisburg firm for a large sum, having founded jurisdiction against them by arresting in the hands of Brown & Tawse, thereafter obtained decree in absence against the Duisburg firm, and arrested in execution in the hands of Brown & Tawse. They now seek to make forthcoming the sum arrested.

The arrestees have objected to the competency of the application, founding upon the Trading with the Enemy Act of 1914. They should have rather founded on the

Trading with the Enemy Proclamation No. 2 of 9th September 1914—Manual of Emergency Legislation 1914, p. 378—and the case has been argued on that assumption. The Lord Ordinary, in giving judgment on the incidental points, brought before this Division in March last, incidentally gave his opinion on this question, and he has rather assumed that he then disposed of it, for in the judgment pronounced when the case was sent back to him, and now under review, he does not again refer to it, but simply finds that the debt due by the arrestees to the common debtors should in this action be made forthcoming to the arresters in the currency of this country, on a basis of exchange which he has fixed, on what must be admitted is a novel and somewhat empirical basis, though, if other considerations did not prevail, having much in equity to recommend it.

The Proclamation in question, art. 5 (1), prohibits any person carrying on business in the King's Dominions from paying any sum of money to or for the benefit of an enemy. But this is subject to the proviso, art. 7, that it should not be deemed to prohibit payments by or on account of enemies to persons in the King's Dominions, "if such payments arise out of transactions entered into before the outbreak of war." But for certain considerations to be immediately mentioned I should agree with the conclusion which the Lord Ordinary set forth in his former opinion, to the effect that the above prohibition would not strike at the transfer, by legal diligence in execution followed by forthcoming, to his creditor in this country, of funds due to an enemy by his debtor in this country. But there are two considerations which, at present at least, may make it impossible that we should accede to the arresters' demand, and which cannot therefore be ignored.

In the first place the money was not payable prior to the outbreak of war, and it was payable in German money and not in sterling of this realm. By the time that the money was due there was no exchange between the two countries and no means of converting the mks. 27,453 into sterling money except by inventing a mode of striking the exchange to meet the situation. That I do not think that we can do without adding a term to the contract. This I am not altogether satisfied that equity does not require that we should do in the extraordinary circumstances, particularly having regard to the manifest intention of the proviso of art. 7. Whether we should adopt the method of the Lord Ordinary I do not find it necessary to consider.

For, in the second place, I think that the arrestees have an interest or countervailing equity to plead against such course. They are due, it is true, mks. 27,453. But the common debtor has, through the intervention of a state of war, failed to deliver to the arrestees timeously three-fourths of the quantity of plates contracted for. The arrestees' loss is unquestionable, looking to the urgent demand for the article in this country since the outbreak of war. What their remedy, if any, may be when normal business relations are resumed between this country and that of the common debtor it is not for us now to decide. But the arrestees are, I think, entitled in the meantime to hold on to the sum due by them to the common debtor, and cannot at present be called upon to part with it to the creditor of the common debtor.

I do not find that this ground of judgment is taken in the defences, but fortunately the arrestees have a plea which covers it, viz., that the action is premature, and though we cannot therefore dismiss it as we are asked to do, we ought, I think, to sist it for the duration of the war, so as to protect the arrestees, but at the same time give the arresters all the benefit they may in the end of the day take from their completed diligence.

LORD SKERRINGTON—I am of opinion that this action ought to be sisted for the reasons explained by your Lordship in the chair. The defenders plead that their liability to pay the debt in question is suspended by the war. I should rather say that in consequence of the war the debt never matured and became payable. If the debt had matured and become payable prior to the outbreak of the war the question would have been essentially different from that which we now decide.

LORD MACKENZIE was absent.

The Court recalled the interlocutor of the Lord Ordinary and sisted the action.

Counsel for the Arrestees (Reclaimers)—Macphail, K.C.—Ingram. Agents—J. K. & W. P. Lindsay, W.S.

Counsel for the Pursuers (Respondents)—Chree, K.C.—Scott. Agents—Gardiner & Macfie, S.S.C.

Wednesday, June 13.

FIRST DIVISION.

LUMSDEN'S TRUSTEES *v.* LUMSDEN.

Succession—Entail—Entail (Scotland) Act 1914 (4 *and* 5 *Geo. V, cap.* 43), *sec.* 2—*Effect of Entail Act* 1914 *upon Directions to Trustees to Execute a Strict Entail of Heritable Subjects.*

A testator, who died subsequent to the Entail (Scotland) Act 1914 coming into force, directed his trustees to convey his landed estates to his eldest son and a series of heirs-substitute by deed of strict entail. *Held* that the trustees were bound to execute a conveyance in favour of the testator's eldest son and the series of heirs, and containing all the provisions and burdens set forth in the settlement other than the provisions rendered null and void by section 2 of the Act.

The Entail (Scotland) Act 1914 (4 and 5 Geo. V, cap. 43), which came into operation on 10th August 1914, enacts—Section 2—"The