premises owned by the person carrying on the concern, assessable under Rules 1, 2, or 3 of No. III of the rules applicable to Schedule A, are not necessarily identical with the whole heritable subjects embraced in the concern. The appellants, however, argued that in the case of a concern called a gas-works there must in fact be this identity. I am unable to see how we can affirm that general proposition. Nor do I see how we can, on the case as stated, affirm the particular proposition that the appellant's concern is wholly made up of mills or factories or similar premises. All we are told about it by the case is that it consists of "lands, buildings, plant, machinery, pipes, &c." The first question in the Case as stated is hypothetical, because we are not in a position to decide or know whether there is in fact room for distinguishing a part or parts of the concern from the remainder.

The second question is also hypothetical. As at present advised I am inclined to think that if the appellants' concern consists in part and in part only of a mill or factory, the annual value of that part for the purpose of the allowable deduction would fall to be estimated according to the general rule of Schedule A. I desire, however, to express no view as to the method of valuation on the alternative footing of the whole concern falling to be regarded as embracing nothing but mills or factories or similar premises.

LORD MACKENZIE did not hear the case.

The Court found that on the Case as stated they were unable to answer the two questions of law therein, and dismissed the appeal.

Counsel for Appellants—Wark, K.C.—Keith. Agents—J. Miller Thomson & Company, W.S.

Counsel for Respondent—The Solicitor-General (Constable, K.C.)—Skelton. Agent—Stair A. Gillon, Solicitor of Inland Revenue.

Thursday, July 20.

FIRST DIVISION.

[Lord Hunter, Ordinary.

CANTIERE SAN ROCCO, S.A. (SHIPBUILDING COMPANY) *v.* CLYDE SHIPBUILDING AND ENGINEERING COMPANY.

Contract — Impossibility of Performance — Restitution — Executory Contract Abrogated by War—Payment of Instalment on Signature—Right to Repetition.

A shipbuilding company in Scotland entered into a contract to make and deliver to a foreign shipbuilding company certain marine engines. By the terms of the contract the price was to be paid in instalments, the first instalment being due on the signing of the contract and the remaining ones as the work progressed, and it was stipulated that the whole of the work which from time to time might be in hand should become the absolute property of the foreign company. The contract was signed and the first instalment paid shortly before the outbreak of war in 1914. The foreign company became on the outbreak of war an alien enemy. *Held* (*rev.* judgment of Lord Hunter, *diss.* Lord Mackenzie) that while the outbreak of war had discharged the parties from further performance of the obligations it did not affect rights which had already accrued, and that the foreign firm were not entitled to repayment of the instalment.

The Cantiere San Rocco, S.A. (Shipbuilding Company) at Trieste, and E. Radonicich, shipowner, Glasgow, their mandatory, *pursuers*, brought an action against the Clyde Shipbuilding and Engineering Company, Limited, *defenders*, in which the conclusions were for declarator that a contract entered into between the parties, dated 4th May 1914, was abrogated and avoided and dissolved by the existence of a state of war between Great Britain and Austria on 12th August 1914, that the pursuers were entitled to payment of the sum of £2310 paid by the pursuers to the defenders under the said contract, and for decree for payment of the said sum.

The following narrative of the *facts* of the case is taken from the opinion of Lord Hunter (Ordinary)—"The pursuers in this action are a shipbuilding company carrying on business at Trieste, formerly in Austria, now in Italy. The defenders are a company carrying on the business of shipbuilders and engineers at Port-Glasgow. [*His Lordship then narrated the conclusions of the action.*] By a contract embodied in an agreement and specification, dated 4th May 1914, entered into between the defenders of the one part and the pursuers the Cantiere San Rocco, S.A., of the other part, the defenders agreed to supply and deliver f.o.b. Port-Glasgow, and the said pursuers agreed to purchase, one set of triple expansion surface condensing screw marine engines with cylinders 26 in., 42 in., and 70 in. diameter by 48 in. stroke. In terms of the said contract (article 9) the price payable by the pursuers the Cantiere San Rocco, S.A., to the defenders for the said engines was £11,550, and was to be paid as follows:—20 per cent. thereof in London on the signing of the contract, 20 per cent. when the cylinders were cast and the boiler plates were in the defenders' premises, 20 per cent. when the boilers were tested and the engines assembled, 30 per cent. net cash in London in exchange for signed bills of lading and policies to cover insurance, and the balance of 10 per cent. after the reception of the engine and boilers and satisfactory trials. The engines were to be completed and delivered at Port-Glasgow by 4th May 1915. By article 7 of the contract it was provided that the whole of the work which from time to time might be in hand under the contract should become the absolute property of the pursuers, subject only to the lien which the defenders might have upon it for unpaid money. On 20th

May 1914 the pursuers paid to the defenders in terms of the contract the sum of £2310. Between the date of the contract and the declaration of war it appears that the defenders carried out a certain amount of preparatory work required by the contract. On 12th August 1914 Great Britain declared war against Austria, and it is admitted that the pursuers then became alien enemies, and that the contract became *eo ipso* abrogated and avoided and dissolved on that date."

The pursuers pleaded—"1. The said contract having been abrogated and avoided and dissolved as condescended on, and the pursuers the Cantiere San Rocco, S.A., being no longer alien enemies, decree should be pronounced in terms of the conclusions of the summons. 2. The said contract having become incapable of fulfilment as condescended on, the pursuers are entitled to repetition of the instalment paid by them in terms thereof, and decree should be pronounced in terms of the petitory conclusions of the summons. 3. The defenders having been unable to complete and deliver the said engines in terms of the contract as condescended on, they are bound to pay the pursuers the Cantiere San Rocco, S.A., the sum sued for, and decree should be pronounced in terms of the petitory conclusions of the summons. 4. The defenders not having rendered to the pursuers any services in return for the sum paid by the pursuers, the pursuers are entitled to decree in terms of the petitory conclusions of the summons."

The defenders pleaded, *inter alia*—"3. The pursuers' averments being irrelevant, the action should be dismissed. 4. The defenders not being due and resting-owing to the pursuers the sum sued for or any sum, they should be assoilzied. 6. The said contract having been dissolved solely by the declaration of war between Great Britain and Austria-Hungary, the defenders should be assoilzied. 7. The sum sued for having been paid by the pursuers to the defenders in terms of the contract between the parties, the defenders should be assoilzied. 8. The defenders having duly proceeded with the work required by the contract between its date and that of the outbreak of war, and/or the pursuers having received and accepted the services of the defenders in terms of the said contract, and *restitutio in integrum* being impossible, the defenders should be assoilzied."

On 7th July 1921 the Lord Ordinary (HUNTER), after hearing counsel in the procedure roll, found and declared that the contract entered into between the parties prior to the war was abrogated and avoided and dissolved by the existence of a state of war between Great Britain and Austria on 12th August 1914, and that the pursuers were entitled to payment of the sum of £2310 paid by the pursuers to the defenders subject to such counter-claim as might be afterwards established, and *quoad ultra* continued the cause.

Opinion.—[*After the foregoing narrative*]—"The pursuers maintain that in consequence of the contract having become incapable of fulfilment they are entitled to recover the money paid by them to the defenders in terms of said contract. The defenders, however, contend that rights acquired under the contract cannot be disturbed by the termination of the contract owing to a cause for which neither is responsible, and that they are therefore entitled to retain the payment made to them. A point of law of interest and importance the solution of which is attended with difficulty is thus raised between the parties.

"In support of their contention the defenders rely upon a number of English cases. In *Anglo-Egyptian Navigation Company* v. *Rennie and Another* (L.R., 1875, 10 C.P. 271) a firm of shipbuilders had contracted to repair a ship with materials partly new and partly old. The price of the work was to be £5800, to be paid in three instalments as the work progressed. The ship was lost after one of the instalments had been paid and after the new machinery contracted for was ready to be fixed on board. A second instalment was subsequently paid. The plaintiffs in the action claimed delivery of the machinery, and as this was refused brought an action for the detention of the same or for recovery of the £4000 which they had paid. It was held that the contract was an entire and indivisible one for work to be done upon the plaintiffs' ship for a certain price, from further performance of which both parties were released by the loss of the ship, that the property in the articles manufactured was not intended to pass until they were fixed on board the ship, and that consequently the plaintiffs were not entitled to the boilers and machinery, nor to recover the £4000 paid as upon a failure of consideration.

"The doctrine upon which the defenders rely is more clearly illustrated in the series of cases which may be described as the Coronation cases. Contracts were entered into under which high prices were agreed to be paid for the temporary use of premises from which the Coronation procession might be seen. On the postponement of the Coronation owing to the King's illness a number of legal questions arising out of these contracts came before the English Courts for decision. It was held that the taking place of the processions on the date originally fixed along the proclaimed route was regarded by both contracting parties as the foundation of the contract, and that the non-existence of this state of things going to the root of the matter and essential to the performance of the contract excused both parties from further fulfilment of the contract.

"Where, however, money had been paid prior to the postponement of the Coronation it was held that it could not be recovered back. In *Blakeley* v. *Muller & Company*, decided by a Divisional Court in England, and reported in a foot-note at page 760 of L.R., 1903, 2 K.B., Mr J. Channell, said —'All that can be said is that when the procession was abandoned the contract was off, not that anything done under the contract was void. The loss must remain where it was at the time of the abandon-

ment. It is like the case of a charter-party where the freight is payable in advance and the voyage is not completed, and the freight therefore not earned. Where the non-completion arose through impossibility of performance the freight could not be recovered back.'

"In *Chandler* v. *Webster* (1904, 1 K.B. 493, at p. 501) Romer, L.J., stated the law in general terms—'Where there is an agreement which is based on the assumption by both parties that a certain event will in the future take place, and that event is the foundation of the contract, and through no fault by either party, and owing to circumstances which were not in the contemplation of the parties when the agreement was made, it happens that before the time fixed for that event it is ascertained that it cannot take place, the parties thenceforth are both free from any subsequent obligation cast upon them by the agreement; but except in cases where the contract can be treated as rescinded *ab initio* any payment previously made, and any legal right previously accrued according to the terms of the agreement, will not be disturbed.'

"In my opinion the reasoning in the cases to which I have referred goes far to support the defenders' contention, although the circumstances of the present case are different from those in any of the cited cases. The same result, however, would not necessarily have been reached in Scotland, where a claim for restitution on account of failure of consideration would probably have been maintainable. In Ersk. iii, 1, 10, there is this passage—'From this duty of restitution it ariseth that things given in the special view of a certain event, *ex gr.*, in the contemplation of marriage, must, if the event in the view of which they were given shall not afterwards exist, be restored by the grantee, who may be sued for restitution by personal action, styled in the Roman law *condictio causa data, causa non secuta.*' In the present case the contract was for marine engines, and the payment was made upon the footing that the engines would subsequently be delivered. Delivery having become impossible in consequence of the outbreak of war the consideration in respect of which payment was made failed, and a claim for repetition of the money paid would appear to arise giving the defenders, it may be, a right to a deduction in respect of work done or outlays incurred by them.

"In *Watson & Company* v. *Shankland and Others* (1871, 10 Macph. 142) Lord President Inglis said (p. 152)—'There is no rule of the civil law, as adopted into all modern municipal codes and systems, better understood than this, that if money is advanced by one party to a mutual contract, on the condition and stipulation that something shall be afterwards paid or performed by the other party, and the latter party fails in performing his part of the contract, the former is entitled to repayment of his advance on the ground of failure of consideration. In the Roman system the demand for repayment took the form of a *condictio causa data, causa non secuta*, or a *condictio sine causa*, or a *condictio indebiti* according to the particular circumstances. In our own practice these remedies are represented by the action of restitution and the action of repetition; and in all systems of jurisprudence there must be similar remedies, for the rule which they are intended to enforce is of universal application in mutual contracts.

"If a person contract to build me a house, and stipulate that I shall advance him a certain portion of the price before he begins to bring his materials to the ground or to perform any part of the work, the money so advanced may certainly be recovered back if he never performs any part or any available part of his contract. No doubt, if he perform a part and then fail in completing the contract, I shall be bound in equity to allow him credit to the extent to which I am *lucratus* by his materials and labour but no further; and if I am not *lucratus* at all I shall be entitled to repetition of the whole advance, however great his expenditure and consequent loss may have been.'

"The question in that case was whether an advance by charterers to account of freight could be recovered where the vessel and cargo were lost. In the particular circumstances of the case it was held by a majority of seven judges that it could not be recovered, but the view was expressed by the Court, as stated in the rubric, 'that an advance by the charterers of a ship to account of freight is, on the loss of ship and cargo, recoverable from the shipowners, where the charter-party contains no stipulation to the contrary, express or clearly implied, the law of Scotland upon this point, although contrary to that of England, being in conformity with the law merchant of every other trading community.' The decision reached by the Court of Session was approved by the House of Lords, 11 Macph. (H.L.) 51, though the Lord Chancellor and the other judges in that tribunal did not consider it necessary to express a view upon the Lord President's statement of the general law upon the subject. I do not, however, find that any doubt was expressed about the soundness of the Lord President's statement as to the right of restitution or repetition where the consideration in respect of which a payment of money has been made has failed. That statement appears to me to be in accordance with the rule of law as stated by Erskine. In Stair, i, 7, 7, occurs this passage—'The duty of restitution extendeth to those things, *quæ cadunt in non causam*, which coming warrantably to our hands, and without any paction of restitution, yet if the cause cease by which they become ours, there superveneth the obligation of restitution of them. Whence are the condictions in law, *sine causa*, and *causa data, causa non secuta*, which have this natural ground, and of which there are innumerable instances.'

"In *Davis & Primrose Limited* v. *The Clyde Shipbuilding and Engineering Company, Limited and Others*, 1917, 1 S.L.T. 297, Lord Dewar gave effect to Lord President Inglis's expression of the law as to the obligation of restitution in a case similar to

the present, and his interlocutor does not appear to have been reclaimed against.

"In *Penney* v. *The Clyde Shipbuilding and Engineering Company, Limited*, 1919, S.C. 363; 1920, S.C. (H.L.) 68, the Clyde Shipbuilding and Engineering Company (who are also defenders in the present action) had contracted to build a ship for Austrian shipowners. At the outbreak of war a number of instalments, amounting to £79,732, had been paid in respect of the vessel which was nearing completion. The Admiralty requisitioned the vessel on 17th February 1915, as she then stood at the price of £86,000, but this price was not paid until 30th July 1917, and it was then paid without interest. On 1st December 1917 the Board of Trade pronounced an Order vesting the £79,732 with interest from the date of receipt of the instalments in the Custodian for Scotland under the Trading with the Enemy Amendment Act 1914. The Custodian brought an action against the builders, who resisted payment on the ground that in the event which had occurred the ship had been forfeited to them. Alternatively the builders stated two counter claims against the fund. In the Court of Session the pursuer got decree for the amount sued for, reserving all the counter claims of the defenders. In the House of Lords the judgment in favour of the pursuer was affirmed, but decree was given under deduction of such sum, if any, as the defenders could prove to represent loss sustained by them under their first counter claim, *i.e.* loss caused by the ship occupying a berth in the defenders' yard after the stipulated date of delivery.

"The case of *Penney* is distinguishable from the present inasmuch as the property in the vessel was held under the contract to have passed to the purchasers, but if I am right in the view which I have expressed, the right to repetition equally exists in the present case. The defenders may, however, wish to alter their averments as to their claim, which do not appear to me to be precise. Meantime I shall pronounce an interlocutor in terms of the declaratory conclusions of the summons, continue the cause, and grant leave to reclaim."

The defenders reclaimed, and argued—It was agreed that the contract was abrogated by the outbreak of war, but this did not mean that the pursuers were entitled to obtain repayment of the instalment. They could only succeed in doing so if the contract had been rendered null *ab initio* and restitution was possible. The abrogation, however, had merely made performance legally impossible and discharged the parties from further performance. All rights vested or accrued prior to the outbreak of war were valid. The defenders therefore were entitled to retain the instalment, It had been paid on the signing of the contract and partly as a consideration therefor, and the right to it had then vested in defenders —*Anglo-Egyptian Navigation Company* v. *Rennie*, (1875) L.R. 10 C.P. 271; *Blakeley* v. *Muller & Company*, [1903] 2 K.B. 760, note; *Civil Service Co-operative Society, Limited* v. *General Steam Navigation Company*, [1903] 2 K.B. 756; *Krell* v. *Henry*, [1903] 2 K.B. 740; *Chandler* v. *Webster*, [1904] 1 K.B. 493; *Elliott* v. *Crutchley*, [1904] 1 K.B. 565, [1906] A.C. 7; *Ertel Bieber & Company* v. *Rio Tinto Company, Limited*, [1918] A.C. 260, 55 S.L.R. 784; *Penney* v. *Clyde Shipbuilding and Engineering Company, Limited*, 1919 S.C. 363, 56 S.L.R. 258, 1920 S.C. (H.L.) 68, 57 S.L.R. 342. This contention was also supported by Ersk. iii, 1, 10, dealing with the case where the impossibility would not be imputed to the receiver, and by Bell's Dictionary, *s.v. condictio causa data causa non secuta*. The present case was like *Leitch* v. *Wilson*, 1868, 7 Macph. 150, 6 S.L.R. 138. If the instalment here had not been paid the defenders could have sued for it. *Leitch* v. *Wilson* was approved in principle and distinguished in *Watson* v. *Shankland*, 1871, 10 Macph. 142, 9 S.L.R. 114, *per* Lord President at 10 Macph. 152, 153, 9 S.L.R. 118, 119. *Davis & Primrose, Limited* v. *The Clyde Shipbuilding and Engineering Company, Limited*, 1917, 1 S.L.T. (O.H.) 297, was not an authority in the present case, and the circumstances in *Allison* v. *The Bristol Marine Insurance Company, Limited*, (1876) 1 App. Cas. 209, relied on by pursuers, were special. The dictum in Stair, i, 7, 7, upon which the pursuers' case was based, could not be accepted without qualification. It was contrary to the rule *periculum rei venditæ nondum traditæ est emptoris* — Stair, i, 14, 7, under which, if the loss of the article sold was due to unavoidable accident, the purchaser had to pay the price—Bell's Comm., vol. i, p. 179; Bell's Prin., sec. 87, but the engagement to deliver was discharged. This was contrary to the pursuers' argument. Detached passages from the digest did not help the pursuers; nor did the cases on apprenticeship. This was a very different class of contract and the decisions were not all one way—*Shepherd* v. *Innes*, 1760, M. 589; *Rule* v. *Reid's Representatives*, 1707, M. 6364. Further, the pursuers could not succeed unless they could show that there was no consideration. On this matter the defenders had been allowed a proof.

Argued for the pursuers—The principle upon which the defenders founded had never been applied in a contract of sale. Here the contract was an agreement to sell specific future goods in terms of the Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), secs. 1 (3), 5 (3), 10 (1), 20, and 62 (1). The underlying principle of sale was the exchange of price for the goods. Every part of the price was part of the purchase price, and no part of the price paid beforehand could be retained if the goods were destroyed before the property had passed to the purchaser. Conditions as to time of payment and delivery were subordinate and could not be presumed to give the seller a right to the price unless he performed his part of the contract. This, however, was what the defenders were claiming. The goods had perished, in respect that they had never been produced, before the property had passed. The pursuers' contention was in accordance with the civil law, which had been closely followed in Scotland. Under that system the con-

tract here was an *emptio rei speratæ*, which was conditional on the thing coming into existence. If it did not there was no right to retain any part of a price paid beforehand —Macintosh, "Roman Law of Sale" pp. 24, 44, and 74; Digest, *de contrahenda emptione*, xviii, 1, 8, 20, and 35; *de periculo et commodo rei venditæ*, xviii, 6, 8; *locati conducti*, xix, 2, 36, 37, 39, and 59; *de condictione sine causa*, xii, 7, 1, 2, and 4; *de condictione causa data causa non secuta*, xii, 4, 3, 4, and 5; Pothier Pandectes, vol. 5, 356. The passage in Ersk. iii, 1, 10, relied on by defenders was founded on Roman law which did not apply to a contract such as the present. The law in Scotland as to the passing of property and risk in instalment contracts was illustrated in *Seath & Company* v. *Moore*, 1886, 13 R. (H.L.) 57, 23 S.L.R. 495; *Reid* v. *Macbeth & Gray*, 1904, 6 F. (H.L.) 25, 41 S.L.R. 369; *Barclay, Curle, & Company v. Laing & Sons*, 1908 S.C. 82, 45 S.L.R. 87. If the subject perished accidentally before the property had passed, there was an obligation of restitution, in respect of advances, based upon failure of consideration—Stair, i, 7, 7; Bell's Prin., sec. 530; Gloag "Contract," 70, 71. What had accrued was subject to the condition of the contract being performed. Similarly in the contract of *locatio conductio operis* the maxim *res perit domino* applied, and so far as the property had passed before the subject perished the contractor would be entitled to payment—Gloag "Contract," pp. 638, 639; *M'Intyre* v. *Clow*, 1875, 2 R. 278, 12 S.L.R. 196; *Richardson* v. *Dumfriesshire Road Trustees*, 1890, 17 R. 805, 27 S.L.R. 650. So in the case of freight advances could be recovered if the loss of the vessel was due to excepted risks —*Watson & Company* v. *Shankland*, 1871, 10 Macph. 142, 1873, 11 Macph. (H.L.) 51, 9 S.L.R. 114, 10 S.L.R. 450. In England a different rule had developed based on an implied condition that impossibility of performance due to *rei interitus* excused parties from further performance—*Taylor* v. *Caldwell*, 1863, 3 B. & S. 826; *Appleby* v. *Myers*, 1867 L.R., 2 C.P. 651; *Anglo-Egyptian Navigation Company* v. *Rennie*, 1875 L.R., 10 C.P. 271; *Harrison* v. *Holland*, [1922] 1 K.B. 211; *Krell* v. *Henry*, [1903] 2 K.B. 740; *Howell* v. *Coupland*, 1876, 1 Q.B.D. 258; *Civil Service Co-operative Society, Limited* v. *General Steam Navigation Company*, [1903] 2 K.B. 756; *Blakeley* v. *Muller & Company, ibid.*, note, p. 760; *Ertel Bieber & Company* v. *Rio Tinto Company, Limited*, [1918] A.C. 260, 55 S.L.R. 784. The contract was good up to the time when the impossibility occurred, and the parties could not go back on what had been previously done or accrued in pursuance of it. This was an arbitrary rule—*Chander* v. *Webster*, [1904] 1 K.B. 493, *per* Collins, M.R., at p. 499—and was subject to exceptions depending on the circumstances of each case—*F. A. Tamplin Steamship Company, Limited* v. *Anglo-Mexican Petroleum Products Company, Limited*, [1916] 2 A.C. 397, 54 S.L.R. 433; Leake on Contracts, 7th ed., p. 518. The earlier English case of *Rugg* v. *Minett*, 1809, 11 East 209, in which it was held that past payments could only be retained where the property had passed was in accordance with our law. The difference in the laws in the two countries on this point was also illustrated in cases relating to apprenticeship—*Cutler v. Littleton*, 1711 M. 583; *Ogilvy* v. *Hume*, 1683, 2 Brown's Supplement 34; *Ferns* v. *Carr*, 1885, 28 Ch. D. 409. The case of *Penney* v. *Clyde Shipbuilding and Engineering Company, Limited*, 1919 S.C. 363, 56 S.L.R. 258, was decided on the ground that the money was a *surrogatum* in the hands of the sellers for the goods, the property in which had passed, and never raised the point of the present case. The English decisions upon which the defenders relied were not in accordance with the law in Scotland and could not be followed. On the Scotch authorities whatever had accrued had done so subject to the condition that the contract was performed, and the pursuers were therefore entitled to repayment of the instalment as they would have been if the contract had been annulled *ab initio*. The following cases were also referred to—*Duke of Hamilton's Trustees* v. *Fleming*, 1870, 9 Macph. 329; *Bayne* v. *Walker*, 1815, 3 Dow 233; *Stevenson & Sons, Limited* v. *Aktiengesellschaft für Cartonnagen-Industrie*, [1918] A.C. 239; *Allison* v. *Bristol Marine Insurance Company, Limited*, 1876, 1 App. Cas. 209.

At advising—

LORD PRESIDENT—The contract in this case was by a Scottish engineering company to make and deliver to an Austrian company a set of marine engines—as regards certain parts on or before 15th February 1915, and as regards the remaining parts on or before 30th April 1915. The contract was completed by the signature of the parties on 4th May 1914, and immediately passed into the stage of performance. The contract price was £11,550, but of this amount a first instalment of 20 per cent. was payable by cash in London on signing the contract. Accordingly the Austrian buyers on 20th May 1914 paid a sum of £2310 to the makers. The contract also contained a number of detailed provisions—to be carried out immediately on the contract being signed—with regard to the submission on the part of the makers, and the adjustment by the Austrian company, of drawings, plans, and details necessary for regulating the construction of the ship suitably for the reception of the engines when delivered. These provisions were duly implemented by the makers before 12th August 1914, when war was declared between this country and Austria; but no part of the engines had been made or put together by that date, with the result that no property in the engines or in any part of them had passed to the Austrian company (in terms of article 7 of the contract).

The effect of the outbreak of war between the countries of which the makers and the buyers were respectively nationals—while the contract was in course of performance—was to render further performance of it illegal as involving intercourse with the King's enemies and as being detrimental to the interests of the makers' country, and so

to exonerate or discharge the parties from their respective obligations for such further performance; but whatever rights had accrued under the contract before the outbreak of war remained unaffected, except that the right to sue in respect thereof was suspended during the war. While the contract is discharged as regards further performance it is not wholly annulled. This was accepted as the law applicable to the case of supervening war conditions in this Court in the case of *Penney* v. *Clyde Shipbuilding Company* (1919 S.C. 363), and is in accordance with the decisions and opinions in a number of cases in the English Courts and in the House of Lords, of which it is enough to mention *Zinc Corporation* v. *Hirsch* ([1915], 1 K.B. 541) and *Ertel Bieber* v. *Rio Tinto Company* ([1918] A.C. 260).

The present action is brought by the Austrian buyers—now an Italian company—for repetition of the instalment of price paid on 20th May 1914. I think this claim is admissible only if it is in accordance with the accrued rights of parties under the contract—interpreted by the law of Scotland—as those rights stood prior to 12th August 1914.

The pursuers contended in the first place that whereas the whole price was the counterpart of the makers' obligation to make and deliver the engines in accordance with the terms of the contract (see article 9) the makers' accrued right to the first instalment was conditional on the engines being so made and delivered to the pursuers. This is right so far, for if the non-delivery occurred through refusal or breach on the part of the makers the buyers had the right to treat them as repudiating their obligations, and having rescinded the contract to demand repetition of the price. But the condition of such repetition is that the contract has been rescinded, that is, wholly annulled. It is nothing to the point that in the ordinary case of breach of a condition material to the contract entitling rescission, the remedy of repetition of the price is sunk or concealed in an action for the recovery of compensation in damages. Using Lord Stair s language in his Institutes with reference to the doctrine of restitution (i, 7, 7) such an instalment as was paid in the present case would, on rescission of the contract, become one of "those things *quæ cadunt in non causam*, which coming warrantably to our hands and without any paction of restitution, yet if the cause cease by which they became ours, there superveneth the obligation of restitution of them." If this dictum be expressed in terms of the *condictio causa data causa non secuta* (Dig. xii, 4) to which Lord Stair refers and which was expounded to us with so much ability by Mr Normand, the obligation to make and deliver would be *causa data* (the consideration given for the money which passed), but when that obligation disappeared (in consequence of the maker's repudiation, followed by the rescission of the contract) it would be *causa non secuta*, and the way to *condictio* or repetition would be open. But the condition of the argument in the present case is that the contract, though its obligations as regards performance after the outbreak of war are discharged, is neither rescinded nor annulled, but on the contrary stands good as regards rights accrued under it before the outbreak of war. "If," says Mr Erskine in his Institutes (iii, 1, 10)—in reference to the doctrine of restitution—"it has become impossible that the cause of giving should exist by any accident not imputable to the receiver, no action lies against him unless he hath put off performing it when it was in his power to perform before that accident happened." In the present case the cause of giving the first instalment was the makers' obligation to make and deliver the engines. That obligation ceased to exist by virtue of supervening war conditions which erected a legal bar against performance of it; and it is not suggested that complete performance failed for want of timeous compliance—before the ontbreak of war—on the part of the maker with any obligation incumbent on him. A supervening legal prohibition or impossibility is not the same thing as an "accident not imputable to him," but it seems to me to present a case of at least equal strength with such an accident. The remedies of repetition and restitution apply to cases in which property or money have got into the possession or power of someone either on no title or on a title which turns out to be bad—Stair, Inst., i, 7, 1-9; Ersk. Inst., iii, 1, 10; Bell's Prin., sections 526, 531. But in this case the £2310 came into the hands of the pursuers on what was then a good title, and still remains good so far as the right to the £2310 is concerned.

The pursuers appealed in the second place to the principle on which the cases of *M'Intyre* v. *Clow* (1878, 2 R. 278) and of *Richardson* v. *Dumfriesshire Road Trustees* (1890, 17 R. 805) were decided. These were cases in which building contracts were in course of performance on the employers' property, and the work (so far duly performed in terms of the contract) was destroyed by storm or accident. The question was on whom the loss fell; and an answer was found by applying the maxim *res perit domino*, and by construing the contract as one which did not merely provide a slump price for a completed job, but afforded a *pro rata* standard of remuneration. But I do not know how these decisions are to be applied to a case in which performance had never reached the stage of producing a *res* to which risks could attach or the property of which could pass.

The pursuers finally contended that the contract should be construed as containing by implication a condition that in the event of a supervening legal impossibility preventing complete performance the accrued rights of parties should be regulated in the same way as their rights would be regulated by the law of Scotland in the event of the contract having been rescinded or wholly annulled. I find it difficult to understand the grounds of this contention. It was said that by the law of Scotland it was illegal to keep money, paid in consideration of something being done, if that thing be not done.

But this seems to be no more than a restatement of the first argument dealt with above. There is, I apprehend, no doubt that payments under a contract may be made on a resolutive condition in accordance with which the money may become repayable in the event of *damnum fatale*, or even supervening legal impossibility (apart from any failure of duty on the part of the contractor) which prevents complete performance. But a stipulation for payment of a first instalment on signing the contract—which must occur before even the making of the goods has begun—is not favourable to the implication of such a condition. *Leitch* v. *Wilson* (1868, 7 Macph. 150) is an example of the payment of a consideration, namely freight—stipulated to be made before performance of the voyage—which was held to stand good, although completion of performance was prevented by act of God, just because the stipulation was inconsistent with the general rule that freight, as the consideration for carriage by sea, is payable only on performance of the voyage. In *Watson* v. *Shankland* (1871, 10 Macph. 142, affirmed 1873, 11 Macph. (H.L.) 51) Lord President Inglis pointed out (p. 152) that "a stipulation for payment of freight at the port of loading, or at a time necessarily antecedent to the completion of the voyage and the earning of the freight, may be easily construed into an agreement to dispense with the rule of maritime law that no freight is due unless earned by the right delivery of the cargo," and referred to *Leitch* v. *Wilson* as an illustration. He then drew the distinction which the law of Scotland (differing apparently from the law of England) recognises between a stipulated prepayment of the consideration and an advance made against the consideration; and pointed out (in a passage quoted in the Lord Ordinary's opinion) that an advance against the consideration (as distinguished from a stipulated prepayment) is—if made conditionally on subsequent performance—subject to restitution if fulfilment of the condition does not follow, on the principle of the *condictio causa data causa non secuta*. His Lordship (p. 153) described such an advance as one "made on the faith of the masters and owners performing their contract, and in consideration of their subsequent performance." He then goes on to contrast such a conditional advance against the consideration, with a loan on the one hand, and with a stipulated prepayment of the consideration on the other hand, in the following sentence—"If it were a separate and independent loan, it could be recovered from the owners immediately, and the charterers would be entitled contemporaneously with the advance to draw on the owners for the amount; if it were a payment of freight made in terms of the contract at the port of loading, it could never be recovered back at all." The eventuality which had occurred in that case was the loss of the vessel by the perils of the sea; but a supervening legal impossibility, preventing performance of the obligation to make and deliver under an executory contract of sale, seems to me to present a case at least equally strong for dispensing with the general mercantile rule that no price is due unless earned by proper delivery of the goods.

For the reasons given I am unable to follow the Lord Ordinary in his application of the principles of repetition and restitution, and I am at a loss to find any ground on which I could be entitled to imply a condition in the contract requiring the rights of parties—as accrued prior to the outbreak of war—to be regulated on the artificial hypothesis that the contract had been wholly rescinded or annulled from the beginning.

There is, however, one case on our books which does seem to lend a certain support to the pursuers' contention. That is the case of *Cutler* v. *Lyttleton*, 1711, M. 583. The master of an apprentice indentured for four years died after only two years of the apprenticeship had run, and the apprentice was found entitled to recompense, not *pro rata temporis*, but to the extent of one-third of the apprentice fee paid on the indenture. Oddly enough, a precisely contrary decision was pronounced fifty years later in the converse case of the death of the apprentice—in *Shepherd* v. *Innes*, 1760, M. 589. The rules applicable to contracts of service are marked by considerable specialties. One of them is that if the master dies a servant who is entitled to maintenance at bed and board in the master's family—and such was the condition of the apprentice—is entitled both to his wages and to maintenance up to the termination of the agreed term of his service—Ersk. Inst., iii, 3, 16; see also *Hoey* v. *MacEwan and Auld*, 1867, 5 Macph. 813. The contract being one partly of service on the part of the apprentice, and partly of maintenance and instruction on the part of the master—both during a specified term—it may be that the Court in *Cutler* v. *Lyttleton* found the solution of a difficult problem by treating the indenture as annulled by the master's death. This is the only explanation that occurs to me of the application of the doctrine of recompense (see Bell's Prin., section 538) to the case. *Cutler* v. *Lyttleton* is, however, without any sequel in the subsequent development of the law of Scotland, and while Mr Erskine in the section above referred to cites *Shepherd* v. *Innes* as an authority applicable to the case of the death of the apprentice, he makes no reference anywhere to *Cutler* v. *Lyttleton*. I am unable in these circumstances to regard that case as an authority which should influence the decision of this dispute, or as affording ground for doubt as to the application of the more general principles upon which I think judgment must be based.

I am therefore for recalling the Lord Ordinary's interlocutor and assoilzieing the defenders.

LORD MACKENZIE—The judgment of the Lord Ordinary ought in my opinion to be affirmed, because there has been failure of the consideration upon which the pursuers paid the defenders the sum of £2310.

The contract was one of sale. The contractors agreed to supply and deliver to the purchasers one set of marine engines.

Article 9 of the contract provides—"In consideration of the said contractors supplying the engines and their appurtenances" the purchasers shall pay the sum of £11,550. The article then provides for the manner in which the price should be paid—"By cash in London—20 per cent. on signing contract." The date of the contract was 4th May 1914. The engines were to be completed and delivered by 4th May 1915.

On 20th May 1914 the pursuers paid the first 20 per cent. of the price—£2310. On 12th August 1914 the purchasers, an Austrian firm (now the pursuers), became alien enemies on the declaration of war, and the contract was dissolved on that date. At that date there was no work in hand under the agreement the property of which, as provided by the seventh article of the contract, was to pass to the purchasers. A certain amount of preparatory work, it is alleged, had been done by the defenders, but the position taken up by them is entirely independent of this. They do not found on it. They maintain that the £2310 was paid to them for the obligation undertaken by them and for nothing else. Now the contract was one for the purchase of goods which in the event that happened never came into existence. The pursuers sue for repetition of the part of the price which they paid. Their case involves construction of the contract, more particularly article 9, but it is not an action on the contract. It is a claim for restitution, and unless the contract contains express terms to the contrary the law of Scotland will give the remedy asked.

The authority for this proposition is to be found in the opinion of the Lord President (Inglis) in *Watson & Company* v. *Shankland* (1871, 10 Macph. 142 at p. 152, *affd.* 11 Macph. (H.L.) 51)—"There is no rule of the civil law as adopted into all modern municipal codes and systems better understood than this—that if money is advanced by one party to a mutual contract on the condition and stipulation that something shall be afterwards paid or performed by the other party, and the latter party fails in performing his part of the contract, the former is entitled to repayment of his advance on the ground of failure of consideration. In the Roman system the demand for repayment took the form of a *condictio causa data causa non secuta*, or a *condictio sine causa*, or a *condictio indebiti*, according to the particular circumstances. In our own practice these remedies are represented by the action of restitution and the action of repetition. And in all systems of jurisprudence there must be similar remedies, for the rule which they are intended to enforce is of universal application in mutual contracts. It appears to me that the requisites are satisfied here. There is no question that this is a mutual contract, nor that money has been advanced by the pursuers on the condition and stipulation that something would be performed by the defenders. There is equally little doubt that the defenders have not performed any part of the contract in the sense they have not produced goods which ever existed *in forma specifica*. The pursuers are therefore entitled to repayment on the ground of failure of consideration if it can be predicated that the defenders failed in performing their part of the contract. As I understand the argument for the defenders they maintain that as they were forbidden to execute the contract it cannot be said there was failure on their part to perform. It appears to me that as in a question with the pursuers there was no less a failure to perform because that failure was due to something dehors the contract. The case of *Ertel Bieber & Company* decided that the contract was ended by the declaration of war, but that rights accrued as at the date when the contract was dissolved are not affected. It is suggested that unless it can be shown that the contract was avoided *ab initio*, and the title upon which the defenders hold the money thus destroyed, the pursuers cannot succeed. But an accrued right may be subject to an implied condition, implied not because the parties are to be held to have contracted with the possibility of war in contemplation, but implied by the common law of Scotland as set out by Stair (i, 7, 7)—"The duty of restitution extendeth to those things, *quæ cadunt in non causam*, which coming warrantably to our hands and without any paction of restitution, yet if the cause cease by which they become ours there superveneth the obligation of restitution of them; whence are the condictions in law *sine causa* and *causa data causa non secuta*." As the Lord President (Inglis) points out, in our practice these remedies are represented by the action of restitution and the action of repetition. The case of *Watson* dealt with an advance against freight which on the loss of the ship was held recoverable from the shipowners as the charter-party contained no stipulation to the contrary. The ground of judgment as expressed by the Lord President was that "the maritime law does not attach a meaning and effect to an advance of freight different from that which, according to ordinary legal principles, is the true meaning and effect of a stipulation for an advance of a portion of the contract price in any ordinary contract of *locatio operarum*." The payment of £2310 in the present case I regard as an advance of a portion of the contract price. An example of a charter-party which did contain a stipulation to the contrary is afforded by the case of *Leitch*. In the present case the 20 per cent. which was to be paid was paid "in consideration of the said contractors' supplying." This differs from the contract in *Leitch*, which was construed to mean "I shall pay the sum on a fixed day whether the vessel arrives or no." The argument for the defenders in the present case involves this, that whenever the ink was dry on the contract there accrued to them an indefeasible right to a payment of £2310. Their argument admittedly implies that even if the payment had not been made before the declaration of war they would have had an accrued right to sue the purchasers for this sum on the declaration of peace, though by the dissolution of the contract they were

discharged from all further performance of the contract. In my humble judgment this is not the effect of the contract.

The case of *Penney* v. *Clyde Shipbuilding and Engineering Company, Limited*, referred to by the Lord Ordinary, differed from the present, for there property had passed and the sum of £79,732 was ultimately in the course of the case regarded as a *surrogatum* for the value of the ship.

The cases cited, which dealt with *rei interitus* and were decided upon the principle *res perit domino*, do not apply here. There was no *res* and could be no *interitus*. It is in this connection that I desire to refer to the passage in Ersk. iii, 1, 10, where it is said, dealing with *condictio causa data causa non secuta*—"If it has become impossible that the cause of giving should exist by any accident not imputable to the receiver, no action lies against him." This applies directly to the case of a *res* of which there has been *interitus*. My opinion is, however, based on this, that *condictio causa data causa non secuta* is but a particular example of the general rule of equity, that no one should be enriched without sufficient consideration. The Coronation cases do not afford assistance.

One case, decided in Scotland, is quite inconsistent with the contention of the defenders here, and that is, *Cutler* v. *Lyttleton*, M. 583. There it was held that the master having died at the end of two years of a four years' apprenticeship, the apprentice was entitled to recompense for the time which had not expired, to the extent of one-third of the apprentice fee. If the argument of the defenders in the present case is sound, such a result would have been impossible, because the contract not having been voided *ab initio* the apprentice could have got back nothing. The point appears to have been fully argued, which cannot be said of the report in *Shepherd* v. *Innes* (M. 589), where it was held the whole apprentice fee was exigible, though the apprentice died before the expiry of the indenture.

The interlocutor reclaimed against makes provision for the pursuers allowing the defenders credit to the extent to which they are *lucrati* but no further. This is in conformity with the later part of Lord President Inglis' opinion quoted by the Lord Ordinary.

I think that the judgment of the Lord Ordinary is right. No question was raised by the pursuers on the reclaiming note as regards their claim for interest.

LORD SKERRINGTON—The declaration of war with Austria on the 12th August 1914 made it illegal for the parties to this action to do anything further after that date towards carrying out their executory contract for the manufacture and sale by the defenders to the pursuers of a set of marine engines to be delivered f.o.b. at Port Glasgow within twelve months from the date of signing the contract on 4th May 1914. The object of this action is to obtain repayment of the sum of £2310, being the first instalment of the price which was paid by the pursuers to the defenders on the signing of the contract in compliance with an express stipulation to that effect (article 9). The Lord Ordinary gave effect to the pursuers' demand, and his judgment is now submitted by the defenders for review. The pursuer's counsel admitted that it was not open to them upon the authorities to argue that the declaration of war rescinded the contract as from its date. On the contrary, their argument proceeded upon the footing that as regards the period from 4th May to 12th August 1914 the contract was and still remains valid and binding, and that any rights which accrued under it prior to the latter date continued and continue effectual although they could not have been enforced during the duration of the war. The pursuers' counsel further admitted that upon the facts of the case it was not open to them to argue that the defenders did not duly fulfil their contractual obligations up to the time when further performance became illegal. Obviously very different considerations would have applied to the pursuers' demand for repayment of the first instalment of the price if it could have been said that the defenders' inability to perform the contract in its entirety was in part at least attributable to their own breach of contract. In that case it might have been held that prior to 12th August 1914 the pursuers had acquired a vested right to rescind the contract and that they were now entitled to have that right enforced and given effect to. The Lord Ordinary's judgment is open to the criticism that it awards to the pursuers exactly the same remedy which would have been appropriate if the contract had been rescinded *ab initio*, in which case the pursuers would have been entitled to restitution of what they had paid under the contract, but subject to any counter-claim which the defenders could establish on the principle of recompense. The judgment is subject to the further criticism that in a question between two contracting parties both equally innocent and both sufferers from an act of state which was silent as to compensation, it in substance attempts to apportion the loss equitably between them instead of allowing the loss to remain where it fell. Lastly, the judgment reclaimed against seems to contravene the general policy of the law, which is that the rights of the contracting parties should remain so far as possible as they stood immediately before the declaration of war, whereas the Lord Ordinary has put the party who reside in the enemy country in a favourable position of having his indeterminate rights under an executory contract converted by the declaration of war into a liquid claim for repayment of the money which he had invested in the contract—a claim which, though not exigible until the end of the war would have been readily marketable during its continuance. The pursuers carry the matter a stage further by claiming interest at 5 per cent. per annum from 12th August 1914. This demand seems logical, but the Lord Ordinary has apparently negatived it for some reason which he does not explain.

The pursuers' counsel were unable to

adduce any direct authority for the proposition that a declaration of war gives rise to a right to demand restitution of money properly and necessarily paid before the war in discharge of a debt constituted by a written obligation which was not annulled by the war, but which, on the contrary, subsists and remains in force at the date of the action of repetition. The authorities which they cited had to do for the most part with the effect of *rei interitus* upon various classes of contracts, and in particular contracts for the sale of specific goods. They also laid great stress upon the contention that delivery on the one hand and payment of the price on the other hand are of the nature of mutual conditions, and that a seller cannot retain the price or any part of it if he is unable to deliver the goods. It seemed to me that the pursuers' counsel did not sufficiently recognise that the principle upon which they relied was not one of universal application, especially if performance had become impossible without fault on the part of either of the contractors. Thus in the case of a contract for the sale of specific goods which subsequently perished through no fault of the seller, it was thought just both by the civil law and also by the common law of Scotland that the buyer must pay the price although he received nothing in return for it. Even according to the law as it now stands under the Sale of Goods Act 1893, the buyer may have to pay for goods which can never be delivered to him. What may be called the generalities of the law of sale seem to me to be of little importance compared with the specialities of the particular contract with which we are concerned. When these specialities are considered I see nothing contrary to the intention of the parties in allowing the defenders to retain the first instalment of the price although it so happened that none of the work had become the property of the pursuers during the period between 4th May and 12th August 1914. Further, I see no satisfactory reason for supposing that the several instalments of the price mentioned in article 9 of the contract were stipulated for as mere advances of money which would fall to be repaid if the sellers should for any reason be disabled from supplying the engines. The pursuers' counsel pointed to the first sentence of article 9, but I do not find any special significance in its language, which means no more than that the price of the engines, &c., was to be £11,550, payable at the times and in the amounts there stated. According to the scheme of the contract as I understand it, the sellers were to receive payment of part of the price and the buyers were to become the owners of part of the work very much earlier than would have happened if their rights had been left to be settled by implication of law instead of by express agreement. The parties did not, however, attempt the impossible task of making the instalments of the price exactly balance the value of the property transferred to the buyers. If the outbreak of war had been postponed for a few months the value of the work vested in the buyers would have grown from day to day until in time it exceeded the amount of the instalments paid. I think that the Lord Ordinary made a mistake when he departed from the rough and ready lines upon which the contract was framed, and when he tried to adjust the rights of the parties with greater precision and equity than they themselves considered to be necessary. The theory which underlies his judgment suffered a *reductio ad absurdum* when the pursuers' counsel found themselves compelled to argue that if some of the work had become the property of their clients before the outbreak of the war it would still have been necessary to make up an account in order to ascertain whether the sellers had been overpaid and ought to repay a portion of the price to the purchasers. Again, it is fallacious to assert that the buyers received no consideration in return for the first instalment of the price. They acquired an immediate right to the services mentioned in article 6 of the contract and a contingent right to the property of any part of the work which the sellers might from time to time have in hand. Before leaving the contract I may point out that the parties had in view and provided for the risk of the work being destroyed by fire or other accidents before it had been delivered to the buyers (articles 13, 15, and 8 *ad finem*). It is, however, clear enough that they did not contemplate, and that they did not attempt to provide for, the event of a war between the United Kingdom and Austria. The clauses to which I have referred cannot be applied to that contingency.

We had a learned, able, and interesting argument from the pursuers' junior counsel, but I think it unnecessary to follow him in his review of a long series of authorities which have only a remote bearing upon the present case. The authority upon which he placed most reliance was probably the opinion of Lord President Inglis in *Watson & Company* v. *Shankland* (1871, 10 Macph. 142, *affd.* 11 Macph. (H.L.) 51). The passages from the Lord President's opinion quoted by the Lord Ordinary are at first sight favourable to the pursuers, but on a second and more careful reading of the opinion as a whole it will be seen that the contract to which the Lord President referred was very different in its nature from that with which we are concerned. It was a contract for an advance of money to be repaid from a particular source, viz., freight. In every contract of that kind the Court would require to decide whether the reference to the source from which repayment was to be made was merely demonstrative or whether it constituted a condition of the right to demand repayment. The question discussed by the Lord President, though interesting on account of a supposed difference between English and Scots law, has no bearing one way or the other on the question which we have to decide. Accordingly I do not think that it would be fair to lay too much stress on an *obiter dictum* of the Lord President (10 Macph. p. 153, at foot) which seems to be

in point and at the same time fatal to the pursuers' claim.

In my judgment the Lord Ordinary's interlocutor should be recalled and the defenders should be assoilzied.

LORD CULLEN—I concur in the view taken by the majority of your Lordships.

The sum of £2310 claimed by the pursuers was paid by them under an obligation which became due under the contract while it was still operative, and on its payment there emerged counter obligations on the part of the defenders which continued prestable against them until the emergence of the war made unlawful further performance of the contract. It may be allowed that these counter obligations in so far as they were so prestable were not the equivalent of the £2310, but this seems to me to be the misfortune of the pursuers. The effect of such a termination of contracts as the war brought with it must often be to leave the interests of the contracting parties unequally balanced, so that it enures more to the advantage of one party than of the other. Suppose that when the war emerged the second instalment of 20 per cent. had been paid, and that the engines were under construction, could the pursuers have maintained that the value of the partly constructed engines whereof the property had passed to them being less than the 40 per cent. already paid by them, they were entitled to demand repayment of the difference? I think not. The affirmative was, indeed, maintained by the pursuers. Their view appeared to be that while further performance of the contract was forbidden, all that might have been done under it, *hinc inde*, while it was operative fell on the termination of the war to be opened up and an account taken and a balance struck in order to avoid loss by either party through the premature termination of performance under the contract. This, however, seems to me to be similar in effect to demanding *restitutio in integrum* on the footing of the contract having been voided *ab initio*.

The Court recalled the interlocutor reclaimed against and assoilzied the defenders.

Counsel for the Defenders and Reclaimers—Chree, K.C.—MacRobert, K.C.—Macfarlane. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Pursuers and Respondents—Dean of Faculty (Sandeman, K.C.)—Normand. Agents—J. & J. Ross, W.S.

Tuesday, July 11.

FIRST DIVISION.

[Lord Hunter, Ordinary.

DANISH DAIRY COMPANY, LIMITED, *v.* GILLESPIE.

Landlord and Tenant — Lease—Renewal—Informal Agreement — Homologation — Receipt of Money by Landlord's Agent from Tenant's Agent.

Landlord and Tenant — Lease—Renewal—Informal Agreement—Rei interventus—Tenant Refraining from Seeking other Accommodation.

The terms for renewal of a lease arranged by exchange of improbative documents between the respective agents of the landlord and the tenant, included a condition that all expenses be paid by the tenant. The lease was thereafter extended by the landlord's agent and sent to the tenant's agent, who returned it, signed by his client, together with a cheque in settlement of the expenses, which was duly acknowledged and cashed by the landlord's agent. Relying on the agreement for renewal of the lease the tenant abstained from seeking other premises throughout the remainder of the letting season. *Held* (*rev.* judgment of Lord Hunter, Ordinary) (1) that the landlord not having authorised his agent to complete a formal lease, the latter's actings and acceptance of the expenses did not constitute homologation of the informal agreement, and that the landlord was accordingly entitled to resile therefrom; (2) that the fact that the tenant had (in reliance on the informal agreement) refrained from seeking other premises had not been brought to the landlord's knowledge, and therefore did not amount to *rei interventus*.

The Danish Dairy Company, Limited, Edinburgh, *pursuers*, brought an action against James Gillespie, Motherwell, *defender*, for payment of £250 as damages in respect of the breach of an alleged contract of lease of a shop entered into between the pursuers and the defender. The lease in question was constituted by informal writings passing between the agents of the parties. The pursuers averred that these writings had been rendered valid by the fact that the landlord's agent had, in accordance with one of the stipulated conditions of the lease, accepted a cheque from the pursuers' agent in payment of his account of expenses; and also by the fact that in reliance on the informal agreement the pursuers had, in the defender's knowledge, abstained from taking steps to procure another shop. By amendment made at another stage they added an averment that the defender, on or before 1st December 1919, when the informal negotiations terminated, had authorised his law agent to complete the contract on his behalf in whatever shape, formal or other, he thought expedient, and that the law agent had acted in pursuance of that authority when he cashed the cheque.