I think that at the time that the offence is said to have been committed the car in question was being used as a hire car and was not a motor cab, and accordingly that the ground of the Sheriff-Substitute's judgment falls, with the result that on the facts admitted the appellant did not commit the offence, and therefore the question put to us should be answered in the negative.

LORD DUNDAS—I am of the same opinion, though not without hesitation. I rather think that the word "therefore" marks something like a *non sequitur* in the learned Sheriff's logic where he states the grounds of his decision. My hesitation arises from an uneasy consciousness that I do not fully understand the meaning and intention of this Order as a whole.

LORD SALVESEN—I agree with your Lordship in the chair. This Order evidently contemplates three kinds of vehicles, or rather the use of a motor vehicle for three different purposes. One purpose is for use within a certain radius, and there it is quite irrelevant to inquire what it is being used for. Another purpose is for conveying passengers from one town to another, or from one part of a town to another, where each passenger contributes towards the cost of the journey by paying for his ticket. That is the usual object which an omnibus serves. Then there is the third class, which is the hire car, and a hire car may be used for very limited purposes indeed. For practical purposes so far as I can see the chief use that can be made of it is to take people to the nearest railway station, or to enable them to perform public duties or private duties, such as visiting the sick or attending funerals. These are very limited purposes, and do not represent the purposes for which hire cars or motor vehicles are generally used; but then I think section (2) of E contemplates that a hire car may be also used as a motor cab, provided it is used in a place where no licence is required, or if it is used in a town where a licence is required provided it has that licence, because the section expressly contemplates the keeping of a record of all lettings, with the names and addresses of the hirers and the particulars of the journey, except where the letting took place when the car was standing or plying for hire in the street.

Now here a contract was made at the garage and not in the street for the conveyance of this soldier to the nearest railway station. It is not said that if the car was being used as a hire car the purpose for which it was being used was not a perfectly legitimate one. But it is said that because it had a licence as a motor cab, and might on other days be picking up passengers as a motor cab and plying within a limited radius, therefore it could never ply as a hire car. That would mean that if the unfortunate owner had taken out a licence for six months for his motor cab and found that no business was to be done at all he could not utilise it as a hire car because he had stamped upon it indelibly, at all events for the period of the licence, the name "motor cab." I do not think that it is reasonable to suppose that a Government department enacted any such fantastic legislation. I prefer to assume that there is some intelligent meaning in this Order, and that the desire is to restrict the use of petrol as much as possible except for purposes within limited areas where the use is unrestricted, and to secure that where the distances are considerable the journey should be for a limited and definite purpose, of which a record should be kept. Here I think this appellant complied with the law and that the conviction cannot stand.

The Court answered the question of law in the negative.

Counsel for the Appellant — Sandeman, K.C.—Maclaren. Agents—Laing & Motherwell, W.S.

Counsel for the Respondent—Blackburn, K.C., A.-D.—Mitchell, A.-D. Agent—W. J. Dundas, W.S., Crown Agent.

COURT OF SESSION.

Saturday, July 13.

FIRST DIVISION.

[Lord Hunter, Ordinary.

BROWN *v.* WILLOCK, REID, & COMPANY, LIMITED, AND OTHERS.

Process—War—Furthcoming—Sist—Trading with the Enemy Amendment Act 1914 (5 *Geo. V, cap.* 12).

A debt due by a British firm to an Austrian firm was arrested by a British subject in the hands of the debtors, against whom an action of furthcoming was brought. The debt was due and payable before the outbreak of war. The Court, following *Fergusson & Company* v. *Brown & Tawse, supra, p.* 437, on the arrestees finding caution, *sisted* procedure until the first sederunt day of the ensuing Winter Session and appointed the proceedings to be laid before the Custodian under the trading with the Enemy Amendment Act 1914 in order that he might, if so advised, compear therein.

Alfred Brown, *pursuer*, brought an action of furthcoming against Willock, Reid, & Company, Limited, arrestees, and the Skoda Works, Pilsen, Limited, Pilsen, Austria, against whom arrestments *ad fundandam jurisdictionem* had been used, *defenders*, concluding for decree for £1042, being the amount of a debt due by the arrestees to the defenders and arrested in their hands both on the dependence and in execution.

Answers were lodged by the arrestees, who pleaded, *inter alia*—"1. The action is incompetent (*a*) in respect that the liability to pay the debt in question is superseded by war, and (*b*) in respect of the terms of the Trading with the Enemy Amendment Act 1914."

On 29th January 1918 the Lord Ordinary

(HUNTER) repelled the first plea-in-law for the arrestees and continued the cause, and granted leave to reclaim.

Opinion, from which the *facts* of the case appear:—"The pursuer in this action of furthcoming, a merchant in England, seeks to recover payment from Glasgow merchants of a debt due by them to an Austrian firm. Both these firms are parties to the action, but the former firm alone have lodged defences.

"Prior to the outbreak of war with Austria, both the pursuer and the arrestees had business dealings with the Austrian firm. It is said that when business relations between the two countries ceased owing to the war, the Austrian firm were owing to the pursuer the sum of £1366, 3s. 4d. On the other hand, the Glasgow firm are said to have been due to the Austrian firm for goods supplied to them before the war the sum of £1042.

"The pursuer having founded jurisdiction in the Court of Session against the Austrian firm, by arrestment in the hands of the Glasgow firm, obtained a decree in absence against the former firm for the sum of £1366, 3s. 4d., with interest at five per cent. per annum from 18th July 1917 until payment, and expenses as taxed.

"On 19th July 1917 the pursuer used an arrestment on the dependence of his action against the Austrian firm, in the hands of the Glasgow firm, to the extent of £1042. He now seeks payment of this sum, which is admittedly less than the amount for which he holds a decree against the Austrian firm.

"The plea upon which I mainly heard argument was the defenders' first plea, which is in these terms—'The action is incompetent (*a*) in respect that the liability to pay the debt in question is superseded by war, and (*b*) in respect of the terms of the Trading with the Enemy Amendment Act 1914.' This plea was only insisted in to the effect that the action should be sisted until the termination of the war. It was maintained that the case of *Fergusson & Company* v. *Brown & Tawse*, 1917 S.C. 570, 54 S.L.R. 485, recently decided by the First Division of the Court, was an authority for this course being followed. According to the rubric of the report of that case, it was held that as the arrestee was not liable to make payment to the enemy alien during the continuance of the war, and as he could put forward against the arrester all defences competent against the common debtor, the action fell to be sisted. If the decision was necessarily an authority for the general proposition contained in the rubric, I think that the case would be in favour of the defenders' contention. Consideration however of the opinions delivered, and of the decision, leads me to the conclusion that the question was not settled but is still open.

"In the case of *Fergusson & Company* the debt which the arrestee was liable to pay to the German firm was not payable until twelve days after the outbreak of war. The price was payable in marks, and at the date of payment there was therefore no rate of exchange between this country and Germany. All the judges, in the opinions delivered, found upon the circumstance that the date of payment to the German firm was after the war. Both Lord Johnston and Lord Skerrington seem to indicate that but for this circumstance they would have been in favour of the pursuers obtaining decree. I think that the case merely decided that in view of the special circumstances referred to in the opinions delivered the action should be sisted.

"Under war legislation a British debtor is not liable or entitled to make payment to an enemy alien of a debt due to him. The defenders maintain that they are entitled in a furthcoming to plead this disability against a British creditor arresting in their hands in respect of their indebtedness to an enemy alien, in virtue of the rule stated in Erskine, iii, 6, 16, where the following passage occurs:—'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, compensation, &c., which would be relevant against the common debtor, the same defence ought to stand good against the arrester, who has no claim but in the common debtors' right.' It does not appear to me that this passage supports the defender's contention. The disability imposed upon the arrestee to make payment to the enemy creditor does not affect the debt, but only prevents the creditor from personally receiving payment during the period of hostilities. The rule laid down in Erskine is intended to prevent the arrestee from suffering prejudice by having to pay his creditor's creditor, where he himself has an unsatisfied claim. No such suggestion of prejudice is made or can be made in the present case. The pursuer is merely completing and making effectual a step of diligence which he had lawfully taken against an enemy alien who is his debtor. Section 1, sub-section 7, of the Courts (Emergency Powers) Act 1914 (4 and 5 Geo. V, cap. 78), which empowers the Court to defer execution in certain cases, provides that 'Nothing in this Act shall . . . give any power to stay execution or defer the operation of any remedies of a creditor in the case of a sum of money payable by or recoverable from the subject of a Sovereign or State at war with His Majesty.' I propose therefore to repel the first plea-in-law for the defenders."

The arrestees reclaimed, and argued—The case should be sisted—*Fergusson & Company* v. *Brown & Tawse*, 1918, 55 S.L.R. 437. That was the only reasonable course, for it was known that enemy countries were appropriating the funds of British subjects in their dominions to pay debts due to their subjects by British subjects, and the debt due by the arrestees to the defenders might therefore have been paid. If that was correct the ultimate balancing of accounts could only take place at the end of the war. That displaced the reasoning of the Lord Ordinary, and so did the reasoning in *Fergusson's* case (*cit.*).

Argued for the pursuer—*Fergusson's* case (*cit.*) was distinguished, for here the debt was mature before the outbreak of war. Further, the reason for the sist in that case was that there were a number of questions, *e.g.*, of exchange, which had not been dealt with in the Court of Session, and that had led to the sist. The debt in question had to be returned to the Custodian as enemy property, and the Court could have ordered it to be vested in the Custodian—Trading with the Enemy Amendment Act 1914 (5 Geo. V, cap. 12), sections 3 and 4. Upon the order of the Court such money vested in the Custodian and could be made available to satisfy the claims of British subjects against enemy subjects (section 5 (2)). The debt here had not been vested in the Custodian, but it was unreasonable to hold that the pursuer's right to get payment of it was any the less because of that. The only impediment to recovery was that leave to proceed to execution must be obtained—Courts (Emergency Powers) Act (4 and 5 Geo. V, cap. 78), section 1—and there was nothing to prevent British subjects from recovering from enemy subjects (section 1 (7)). The Trading with the Enemy Proclamation, No. 2, dated September 9, 1914, Article 5, was referred to (Manual of Emergency Legislation, vol. i, p. 378) as showing what was forbidden. There was no suggestion of a defence available against the defenders, so that Ersk. Inst. iii, 6, 16, did not apply.

At advising—

LORD PRESIDENT—Had it not been for the decision of the House of Lords in the case of *Fergusson & Company* v. *Brown & Tawse*, 1918, 55 S.L.R. 437, I should have been prepared in this case to follow the course taken by the Lord Ordinary, for I freely allow that there are material points of difference between the two cases which would have led probably to that result. But in affirming our judgment in the case of *Fergusson & Company* their Lordships proceeded upon general grounds of public convenience, and expressly refrained from offering any opinion upon the grounds of judgment upon which we in this Court proceeded. What these grounds of general public convenience were their Lordships did not say, but I think that in the case before us we are bound to assume that they are clearly applicable.

Under these circumstances I think we ought to follow the course taken by the House of Lords in the case of *Fergusson & Company*, and sist procedure in this case on the arrestees finding caution. But it would be well, I think, to limit the sist to the first sederunt day in the coming Winter Session, and meantime appoint the proceedings to be laid before the Custodian under the Trading with the Enemy (Amendment) Act 1914 in order that he may, if so advised, compear.

LORD MACKENZIE—I think that this is a case in which it would be advisable to sist procedure until the first sederunt day in October, and that intimation be made as proposed to the Public Custodian of the dependence of these proceedings.

LORD SKERRINGTON—I concur in the course which your Lordships suggest.

LORD JOHNSTON was absent.

The Court on the arrestees finding caution sisted procedure until the first sederunt day of the ensuing Winter Session; meantime appointed the proceedings to be laid before the Custodian under the Trading with the Enemy Amendment Act 1914 in order that he might, if so advised, compear therein.

Counsel for the Arrestees—Macphail, K.C. —C. H. Brown. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Pursuer—Moncrieff, K.C. —Scott. Agents—Crawford & Crawford, S.S.C.

Wednesday, July 17.

FIRST DIVISION.

[Scottish Land Court.

FORDYCE *v.* TAYLOR.

Landlord and Tenant—Small Holdings—Holding—Tenant Carrying on Business under Beer-House Licence or Public-House Certificate in House on Holding—Crofters Holdings (Scotland) Act 1886 (49 *and* 50 *Vict. cap.* 29), *sec.* 33—*Agricultural Holdings (Scotland) Act* 1908 (8 *Edw. VII, cap.* 64), *sec.* 35 (1)—*Small Landholders (Scotland) Act* 1911 (1 *and* 2 *Geo. V, cap.* 49), *secs.* 26 (7) *and* 33 (2).

The tenant of a small holding sold porter and ale to occasional customers under a beer-house licence, and he held a public-house certificate applying to the house on the holding as at 1st April 1912. He was otherwise qualified as a small landholder. *Held* (1) that the tenant was not an innkeeper in the sense of the Crofters Holdings Act 1886, section 33, and (2) that the holding was a small holding in the sense of the Small Landholders Act 1911.

Opinion per the Lord President that in section 33 of the Crofters Holdings Act 1886 the words "placed in the district by the landlord for the benefit of the neighbourhood" applied to innkeepers as well as tradesmen.

The Crofters Holdings (Scotland) Act 1886 (49 and 50 Vict. cap. 29) enacts—Section 1—"A crofter shall not be removed from the holding of which he is tenant except in consequence of the breach of one or more of the conditions following (in this Act referred to as statutory conditions). . . . (8) The crofter shall not on his holding, without the consent of his landlord, open any house for the sale of intoxicating liquors." Section 33—"Nothing in this Act shall apply to . . . any innkeeper or tradesman placed in the district by the landlord for the benefit of the neighbourhood."

The Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64) enacts—Section 35 (1)—"In this Act, unless the context otherwise requires, . . . 'Holding' means