parish. He is entitled only to damage peculiar to these particular lands. As regards statutory intendment I think this contention sound. We have been familiar for eighty years with claims for compensation for lands taken or injuriously affected. Every conceivable form of claim has been propounded. But I have never heard of its being suggested that a proprietor part of whose lands are taken may obtain compensation because the public works proposed will increase the population and thereby lead to an increase of rates. No distinction can, I think, be drawn between education rates and other rates, such as the poor rate, which will in accordance with experience be eventually augmented by an increase of population. I do not think that it was the intention of the Legislature to introduce for the first time such a novel ground of compensation in the present statute. In view, however, of the literal words of the statute, to give effect to this argument would involve a breadth and boldness of construction for which some tribunal more authoritative than a single arbiter with the opinion of a single judge would be appropriate. I prefer to rest my own opinion upon the first ground.

I must now, however, notice the opinion returned by Lord Dundas in a similar case (*Gordon Cathcart* v. *Board of Agriculture*, 1914, 2 S.L.T. 379—the report of 1915 S.C. 166, 52 S.L.R. 108, where a reclaiming note in this case is held to be incompetent, does not contain his Lordship's note), in which he came to an opposite result to the one which I have reached. That case differs from the present only in so far as it is stated that Lady Gordon Cathcart was "practically" the only heritor in the parish. But although that gives a colour to the case which is here absent, it does not affect the grounds of my opinion. No reasons are attached to the opinion of Lord Dundas, which, as his Lordship explains, required to be pronounced at once in view of the imminent expiry of the arbitration. Otherwise he states he would have returned a considered opinion. This case occasions me much difficulty, both on account of my respect for his Lordship's opinion and my sense of the inconvenience of conflicting judicial pronouncements in a matter in which there is no appeal. The opinion is not binding upon me, but if I had been in doubt I should have followed it even though I had felt that without this precedent I would have come to a different conclusion. But as I have formed a clear opinion upon the matter I feel bound to give expression to it.

I answer the question stated by the arbiter in the negative.

His Lordship answered the question in the negative.

Counsel for the Board of Agriculture—Constable, K.C.—W. T. Watson. Agent—Sir Henry Cook, W.S.

Counsel for Sir Arthur Campbell Orde—J. A. Christie. Agents—E. A. & F. Hunter & Company, W.S.

Wednesday, October 16.

FIRST DIVISION.

[Lord Dewar, Ordinary.

DAVIS & PRIMROSE, LIMITED *v.* THE CLYDE SHIPBUILDING AND ENGINEERING COMPANY, LIMITED, AND OTHERS.

Contract—War—Sale—Goods to be Manufactured—Suspension or Dissolution of Contract through Buyers Becoming Alien Enemies.

Contract—Sale—Price Payable by Instalments—Contract Becoming Illegal before Completion of Goods—Arrestment of Instalments of Price Paid to Manufacturers.

A contract between a British firm and an Austrian firm, for the purchase by the latter of goods to be manufactured, provided for an extension of time for delivery if delay should occur owing to causes beyond the control of the sellers. The price was payable by instalments, of which £4620 was paid to account of the whole when war broke out and it became illegal to implement the contract. None of the goods had at that time been delivered. Thereafter the goods were completed and sold in Great Britain at an enhanced price. Third parties having obtained a decree against the purchasers of the goods arrested money in the hands of the sellers of the goods. Following *Ferguson* v. *Brown & Tawse*, 1918, 55 S.L.R. 437, the First Division of consent *sisted* the cause upon the arrestees finding caution.

Held, per Lord Dewar, Ordinary, (1) that the contract was dissolved, not merely suspended, by the outbreak of war; (2) that the sum paid to account of the price of the goods belonged to the buyers and was validly arrested in the hands of the sellers.

Davis & Primrose, Limited, Etna Iron Works, Leith, *pursuers*, brought an action of furthcoming against the Clyde Shipbuilding and Engineering Company, Limited, Port Glasgow, *arrestees*, and Stablimento Tecnico Triestino, Linz and Trieste, Austria, *principal debtors*, concluding for decree for payment by the arrestees of the sum of £300 or such other sum or sums as might be owing by them to the principal debtors and arrested in their hands upon 4th August 1916, and also upon 15th November 1916, at the instance of the pursuers, at least of such part thereof as should satisfy and pay the pursuers the principal sum of £266, 10s., with interest thereof from 7th August 1916 until payment, and £8, 17s. 6d., with 18s. as the dues of extract, all contained in a decree against the principal debtors dated 27th October 1916.

The *contract* between the arrestees and the principal debtors, dated 4th May 1914, which was for the supply by the former to the latter of two sets of triple expansion

surface condensing screw marine engines, contained the following provisions:—". . . 7. The whole of the work which from time to time may be in hand under this agreement shall become the absolute property of the purchasers [principal debtors], subject only to the lien which the contractors [arrestees] shall have upon it for unpaid money. . . . 9. In consideration of the said contractors [arrestees] supplying the engines and their appurtenances entirely in accordance with the terms of this agreement, and the annexed specification, the purchasers [principal debtors] shall pay the sum of £11,550 sterling (say Eleven thousand five hundred and fifty pounds sterling) for each set which shall be paid in the manner following:—By cash in London—20 per cent on signing contract, 20 per cent. when the cylinders are cast and boiler plates are in contractors' premises. 20 per cent when the boilers are tested and engine assembled. 30 per cent. nett cash in London in exchange for signed bills of lading and policies to cover insurance. 10 per cent. after reception of engine and boilers and satisfactory trials. . . . 13. It is further agreed, should any delay occur in the completion and delivery of the engine referred to in this contract owing to strike, lock-outs, labour disputes, combination of workmen, fire, tempest, accidents, or any causes beyond the control of the contractors [arrestees], a period of time corresponding to that lost by all or any of the above causes shall be allowed to the contractors [arrestees] for the completion of their work, and the date of delivery and completion named in the contract shall be (if necessary) correspondingly deferred. It is understood that the contractors [arrestees] shall at once give notice to the purchasers [principal debtors] of any case of *force majeure* which may occur during construction of the machinery."

The pursuers *pleaded*—"1. The sums condescended on having been duly arrested in the hands of the arrestees, decree should be pronounced as craved. 2. The contract referred to on record not having been cancelled, but merely suspended by the outbreak of war, the defenders by selling the partly completed engines committed a breach of their contract with the said Stablimento Tecnico Triestino; and the latter having thereby suffered loss and damage as condescended on, and that greatly in excess of the sums due to the pursuers, the pursuers are entitled to decree in terms of the conclusions of the summons. 3. *Esto* that said contract was cancelled by the outbreak of war, the partly completed engines remained the property of the principal debtors, and the [arrestees] are under obligation to account to the principal debtors for said engines or the proceeds of the sale thereof; or otherwise, the [arrestees] were and are bound to return to the principal debtors the instalments paid, viz., £4620 in all."

The arrestees pleaded, *inter alia*—"1. The pursuers' averments being irrelevant the action should be dismissed. 2. The pursuers not being *in titulo* to propound or constitute a claim of damages in respect of alleged breach of the contract condescended on, the action should be dismissed. 3. The [arrestees] in respect of the dissolution of said contract being under no liability to account to the common debtor, they should be assoilzied from the conclusions of the action. 4. The pursuers not having attached any sum in the hands of the [arrestees] the action should be dismissed."

On 16th May 1917 the Lord Ordinary (DEWAR) repelled the first plea-in-law for the arrestees and decerned against them in terms of the conclusion of the summons.

Opinion, from which the *facts* of the case appear:—"The pursuers in this action of furthcoming are Messrs Davis & Primrose, Limited, Etna Iron Works, Leith. The defenders are the Clyde Shipbuilding and Engineering Company, Limited, as arrestees, and an Austrian firm—Stablimento Tecnico Triestino—are the common debtors.

"In August 1916 the pursuers raised an action in the Court of Session against the common debtors using arrestments to found jurisdiction, and in October 1916 they obtained decree for £266, 10s., with interest and expenses.

"Following on the said decree the pursuers arrested in the hands of the Clyde Shipbuilding and Engineering Company, Limited, the sum of £300 which they alleged to be due to the common debtors. The said firm declined to make payment on the ground that there was no property belonging to the common debtors in their hands.

"The pursuers have now brought this action to recover payment. The material facts are not in dispute. In May 1914 the defenders entered into a contract with the common debtors for the construction and delivery of two sets of engines, the first set to be delivered not later than 28th February and the second not later than March 1915. The price to be paid was £11,550 for each set, and it was stipulated that twenty per cent. of the purchase price should be paid in London when the contract was signed. The contract was signed on 4th May 1914, and two sums of £2310 each were paid to the defenders. The first set of engines was completed in December 1915, but as war had been declared in August 1914 and the common debtors are an enemy alien firm, it became impossible for the defenders to deliver the goods. They accordingly sold the first set of engines for £22,750 to a Glasgow firm. The second set was not completed, but the material was sold in January 1916 for £1250.

"In these circumstances the defenders maintain that nothing was attached by the arrestments, as there were no goods or money in their hands belonging to the common debtors when the arrestments were laid on. They admit that they obtained for the engines from Scotch firms sums largely in excess of the amount stipulated for under the contract, and that the common debtors have received no equivalent for the £4620 they paid in terms of the contract. But they maintain that on the outbreak of war in August 1914 the contract was dissolved and all obligations arising thereunder were finally determined, and that the £4620

now belongs to them, and that they are under no obligation to account for it.

"The pursuers on the other hand contend (1) that the contract was not dissolved but only suspended, and (2), and in any event, the defenders have property belonging to the common debtors in their hands and are bound to account for it.

"It was not, I think, disputed that when a party to a contract becomes an alien enemy, if anything requires to be done beyond mere payment, the contract becomes illegal and is dissolved. But the pursuers founded on article 13 of the contract and argued that the effect of it was to suspend the operation of the contract during the continuance of the war, and that there was therefore no ground for its dissolution. Article 13 provides that should any delay occur in the completion and delivery of the engines owing to strike, lock-outs, labour disputes, combination of workmen, fire, tempest, accidents, 'or any causes beyond the control of the contractors,' they shall be allowed a period of time corresponding to that lost for the completion of the work, and the date of delivery (if necessary) shall be correspondingly deferred. And it is further provided that the contractors shall at once give notice of 'any case of *force majeure* which may occur during the construction of the machinery.'

"This clause does not appear to me to provide for the 'suspension' of the contract. On the contrary, it assumes the continued existence of the contract, and merely provides for an extension of time for delivery if delay should occur through any cause—such as strikes, lock-outs, &c.—which are beyond the control of the contractors. To suspend the contract is one thing, and to extend the time for delivery of the goods is another and quite different thing. Even if there were delay in delivery the contract was still to be in operation—thus by article 4 the purchasers have the right to send an inspector into the contractors' premises 'at all times.' And by article 15 the contractors agree to keep the machinery insured at all times and to forward the policies to the purchasers. And article 17 provides that if the contractors become bankrupt the purchasers have the right to use the contractors' premises, workshops, tools, and machinery free of cost. I think it is clear from those and other clauses that it was not the intention of parties to 'suspend' the contract—it was to remain in existence until the goods were delivered—although they might be delayed. Besides I do not think parties contemplated the outbreak of war or provided for such a contingency. If they had I should have expected some direct reference to it. The words *force majeure* are not apt words for war, and the contract shows that they were not used in that sense. I am of opinion that parties did not stipulate that the contract should be suspended during war. It was, I think, dissolved when war broke out. (See *Zinc Corporation (Limited)* v. *Hirsch and Others*, and *Distington Hematite Iron Company, Limited* v. *Possehl & Company*, 1916, 1 K.B. pp. 541 and 811.).

"If I am right in this view the next question is whether the defenders are right in their contention that they are not under obligation to account? I do not think so.

"The pursuers founded on article 7 of the contract, which provides that 'The whole of the work which from time to time may be in hand under this agreement shall become the absolute property of the purchasers subject only to the lien which the contractors may have upon it for unpaid money.' They argued that it was the intention of parties that the property should pass, and that such a stipulation was competent under the Sale of Goods Act, sections 17 and 18, Rule 5, and I was referred to the case of *Barclay, Curle, & Company*, 1908 S.C. 82, 45 S.L.R. 87. Alternatively they argued that even if in the circumstances the property cannot be said to have passed, still the defenders are under obligation to account for the instalments of the price which they received and for which they have given nothing in return.

"In the view I take of the case I do not require to consider the pursuers' first alternative argument, because I am of opinion that the second is well founded.

"It is, I think, an established rule of the law of Scotland that when one party to a mutual contract pays a sum of money to the other party on condition that something shall be paid or done in return for it, and that consideration fails, the money paid may be recovered. In the case of *Watson* v. *Shankland*, 1871, 10 Macph. 142, 9 S.L.R. 114. Lord President Inglis said—'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 to 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. . . . 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. . . .'

"That principle appears to me to rule this case. The defenders stipulated that the common debtors should advance a portion of the price. They did so, and have received nothing in return. The defenders do not say that they have earned the £4620 or any part of it. They do not state, so far as I could discover, any equitable claim to it. Their case is that the money vested in them absolutely by operation of a rule of law, to the exclusion of all other claims, when the contract was dissolved, and I was referred to two of the Coronation cases, *Krell* v. *Henry* (1903), 2 K.B. 740, and *Chandler* v. *Webster* (1904), 1 K.B. 493, and also to the *Anglo-Egyptian Navigation Company* v. *Rennie*, 10 C.P. 271. I doubt whether these cases support the defenders' contention.

Each case I observe was decided on the special terms of the contract, and none of them was quite like this. But if they do support the contention, then in my opinion they are inconsistent with *Watson* v. *Shankland*, and that is an authority which I am bound to follow.

"As the defenders admitted at the Bar that the subjects arrested exceeded in value the amount of the pursuers' claim, I am of opinion that the pursuers are entitled to decree as concluded for."

The arrestees reclaimed.

At the calling of the case counsel for the arrestees moved that the case be sisted following the decision in *Ferguson & Company* v. *Brown & Tawse*, 1918, 55 S.L.R. 437, and stated that his clients were prepared to find caution. No objection was taken for the pursuers (respondents).

The Court sisted the cause upon caution being found by the arrestees.

Counsel for the Pursuers—Constable, K.C. —J. H. Millar. Agents—Wallace & Pennell, S.S.C.

Counsel for the Arrestees—Moncrieff, K.C. —W. T. Watson. Agents—Webster, Will, & Co., W.S.

COURT OF TEINDS.

Tuesday, November 5.

[Lord Anderson, Ordinary.

DAVIDSON *v.* STUART.

Teinds—Process—Surrender—Competency —Final Decree of Locality—Surrender of Valued Teinds where No Free Teind in Parish—Vesting of Stipend Quantum Valeat.

A heritor obtained a decree of valuation of his teinds on 23rd November 1916. On 19th February 1917 he wrote a letter to the minister intimating that he surrendered his teinds, but did not refer to the valuation or mention the amount of the valued teinds surrendered. On 12th March 1917 he executed a deed of surrender of his teinds, which referred to both of those matters. There was no free teind in the parish, but a final decree of locality was in force. *Held* that (1) the heritor could competently surrender his valued teind without reducing the final decree of locality; (2) that the teinds had been validly surrendered by the deed of surrender, which specified the amount of the valued teind surrendered; and (3) that while the stipend for crop and year 1916 vested in the minister at Michaelmas 1916, its amount was not fixed until the fiars' prices for 1916 were struck in 1917, by which time the surrender had taken effect and the stipend for 1916 fell to be paid as modified by the surrender.

Opinion per Lord Cullen, concurred in by the Lord President, that the document of surrender should state the amount of the valued teind.

John Davidson, heritable proprietor of the lands of Adderstone and Adderstoneshiels and of the teinds thereof, *pursuer*, brought an action against the Reverend John Stuart, minister of the parish of Kirkton, in which the said lands were situated, *defender*, concluding in the second place for decree of declarator and interdict to the effect that "the pursuer has validly surrendered to the defender and his successors in office as ministers of the said parish of Kirkton the teinds, both parsonage and vicarage, of the said lands and others belonging to the pursuer and hereinbefore described, and that at the said sum of £96 sterling per annum, being the just, constant, and true value of the teinds, parsonage and vicarage, of the said lands and parts, pendicles, and pertinents thereof, and that as at the 19th day of February 1917, or at such other date as may be found by our said Lords in the course of this process to be the date of said surrender, and that the pursuer is bound only to make payment to the defender and his successors in office of the sum of £96 sterling per annum in full of all stipend exigible by them from the pursuer or his successors in the said lands and others, and that from and after the said date; and the defender and his successors in office ought and should be interdicted, prohibited, and discharged from charging the pursuer or his successors in the said lands upon a decree of locality of the Court of Teinds, dated 30th October 1903, of the stipend of said parish of Kirkton, or upon any future decree of locality of the stipend of said parish, for any sum in excess of the sum of £96 sterling, or from otherwise seeking to recover from the pursuer or his successors in the said lands any sum in excess of the said sum of £96 sterling per annum as stipend due by him or them in respect of the said lands."

The pursuer *pleaded, inter alia*—"1. The pursuer's teinds amounting to the sum of £96, the defender is not entitled to any sum in respect of stipend over and above said amount. (2) *Separatim*, the pursuer having validly and effectively surrendered the teinds of his said lands is not bound to pay to the defender any sum in excess of the valued amount of said teinds, and decree of declarator and interdict should be pronounced as craved."

The defender pleaded, *inter alia*—"4. The pursuer cannot be heard to propone the conclusions second written unless and until he has first (*a*) reduced the existing decreet of locality of the stipend of Kirkton, and (*b*) provided the defender at the pursuer's expense in a new process of locality wherein the due and full stipend modified to the cure may be fully allocated on and against the existing free teinds of the parish. 5. The pretended surrender being inept in form, *et separatim* of no force, avail, or effect till the authority of the Court of Teinds is interponed in a proper process, the first part of the second conclusion should be dismissed."

On 19th March 1918 the Lord Ordinary (ANDERSON) sustained the pursuer's second plea-in-law, and granted decree in his favour in terms of the second or alternative conclusion of the summons, with interdict corresponding thereto.