difficulty in reaching the same conclusion as your Lordship, my doubts are not so strong as to lead me to dissent from the judgment proposed.

LORD BLACKBURN—I agree in the answers proposed to be given to these questions. I think it is well settled that, short of an express or implied direction by a testator that an annuity is to be paid free of income tax, the tax has to be paid by the recipient of the annuity. Income tax itself is levied on and payable out of the "free" or "net" income of the trust estate by the persons entitled thereto, and in order to imply a direction that the annuity should be paid free of income tax I think one would require to find something more in the deed than a mere direction that it is to be paid out of the very subject which is liable to the tax. I can find no such additional direction in the deed under consideration, and accordingly I think the widow must pay the tax herself.

LORD SKERRINGTON and LORD CULLEN were absent.

The Court answered the first question in the negative and the second in the affirmative.

Counsel for the First and Third Parties—D. Jamieson. Agents — Webster, Will, & Co., W.S.

Counsel for the Second Party — Cooper. Agents—Macpherson & Mackay, W.S.

Thursday, February 20.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

PENNEY *v.* CLYDE SHIPBUILDING AND ENGINEERING COMPANY, LIMITED.

Contract — Sale — Ship — Contract to Build Ship — Passing of Property in Uncompleted Ship.

War—Trading with the Enemy—Contract —Executory Contract—Uncompleted Ship —Property Passed and Part Instalments Paid—Ship Requisitioned and Purchased by Admiralty — Right of Custodian to Equivalent of Instalments Paid—Counter-Claim—Trading with the Enemy Amendment Acts 1914 (5 *Geo. V, cap.* 12), 1915 (5 *and* 6 *Geo. V, cap.* 79), *and* 1916 (5 *and* 6 *Geo. V, cap.* 105).

A contract between a shipbuilding company and an Austrian firm for the construction of a steamer provided that "the steamer as she is constructed . . . shall immediately as the work proceeds become the property of the purchasers." The contract gave the purchaser a right of rejection after the ship was finally completed if she did not conform to the contract in certain respects. She was partially constructed at the date when war was declared. Of the price of £103,000, which was payable by instalments, instalments amounting to £79,732 16s. 4d. had been paid, but that did not represent the value of the vessel so far as constructed. The ship was requisitioned by the Admiralty, who paid the builders £86,000 for her, the difference between that sum and the instalments paid being for work which had not been covered by the instalments. The builders did not make any return to the Custodian for Scotland to the effect that they held any property of or for an alien enemy. The Custodian brought an action against the builders for £79,732, 16s. 4d. as property held by them on behalf of an alien enemy. The builders stated a counter-claim to the effect that they had suffered loss owing to the occupation of part of their yard by the vessel, upon which they had ceased to work on the outbreak of war. It was admitted that the effect of the war was to bring the contract for the construction of the ship to an end, but that the rights *hinc inde* which had at the outbreak of war accrued under the contract were unaffected. *Held* (1) that the right of property in the ship so far as she was completed had under the contract passed to the alien enemy at the outbreak of war; (2) that of the price paid by the Admiralty £79,732, 16s. 4d. was a *surrogatum* for the unfinished ship, and as such was held by the builders on behalf of the alien enemy, and that accordingly the Custodian was entitled to decree therefor; (3) that the counter-claim stated by the builders was irrelevant.

War — Trading with the Enemy—Moneys Due to Alien Enemy—Interest—Trading with the Enemy Amendment Acts 1914 (5 *Geo. V, cap.* 12), 1915 (5 *and* 6 *Geo. V. cap.* 79), *and* 1916 (5 *and* 6 *Geo. V, cap.* 105).

The Custodian for Scotland brought an action against a firm of shipbuilders for payment of certain sums of money as property held by them on behalf of an alien enemy, in which he concluded for interest from the date when the same was received by the defenders till payment. No right to interest had accrued to the alien enemy at the outbreak of war. *Held* that the Custodian was only entitled to interest as from the date of decree.

Joseph Campbell Penney (the Custodian for Scotland under the Trading with the Enemy Amendment Act 1914), *pursuer*, brought an action against the Clyde Shipbuilding and Engineering Company, Limited, *defenders*, concluding for decree for payment of £79,732, 16s. 4d., "being moneys owing to or held for or on behalf of or on account of the Royal Hungarian Sea Navigation Company 'Adria,' Limited, of Budapest, Hungary, in terms of an agreement between the defenders and them, dated 25th July 1913, with interest at the rate of 5 per cent. per annum from the date or dates on which the same was received by the defenders until payment."

The *agreement* between the defenders (therein called the builders) and the Royal Hungarian Sea Navigation Company "Adria," Limited, Budapest (therein called the purchasers), dated 25th July 1913, pro-

vided, *inter alia*—"1. The builders shall build, launch, and complete for the purchasers, of the best and most substantial materials and workmanship, and the purchasers shall accept from the builders and duly pay for, a steamer of the following dimensions, power, and class:— . . . *Speed* —13½ knots on eight hours' trial continuous steaming on river Clyde, with 2000 tons cargo and bunkers. Purchasers to provide cargo and load the vessel for this trial.

"2. The steamer shall be ready for delivery afloat (after trial trip) in a usual and convenient place on the river Clyde on the thirtieth day of September Nineteen hundred and fourteen, and in case of default for every day's delay beyond that date, except in case of any unavoidable delay which may be occasioned by strikes, weather, fires, or circumstances beyond the builders' control, or in case of any delay in the payment of an instalment by the purchasers the builders shall pay the purchasers the sum of £10 per working day as liquidated damages and not by way of penalty, which amount may at the option of the purchasers be deducted from the purchase money.

"In the event of the builders not proceeding with due despatch in the construction of the steamer, her machinery, or fittings, or making default in her delivery, it shall be competent for (but not incumbent upon) the purchasers to take possession of the steamer in her then state, and of all her engines, boilers, machinery, and fittings, and of all materials intended for her or them, and to complete the steamer, engines, boilers, machinery, and fittings, and for this purpose with power to enter into any contract with other builders and by themselves, their workmen, and servants to use the yard, workshops, machinery, tools, and plant of builders without making any payment or allowance for such use, and the costs incurred by the exercise of any of the powers of this clause shall be deducted from the purchase money then unpaid, if sufficient, or if not sufficient shall be made good and paid by the builders; any exercise of the powers of this clause shall be without prejudice to any claim for delay under the provisions of this agreement.

"In case the purchasers shall make default in the due payment of any instalment or instalments of the purchase-money, the builders shall be at liberty by notice in writing to require the purchasers within one calendar month after the date of such notice to make such payment, and if default shall be made in the payment in accordance with such notice then the builders shall be at liberty to sell the steamer either by public auction (in which case it shall be lawful for the builders or their agents to bid for or buy in the same) or by private contract, on such terms and conditions as they may in all respects think fit, without being answerable for any loss on such re-sale, such deficiency and all expenses attending such re-sale to be made good by the purchasers, and to be recoverable by the builders from the purchasers as liquidated damages, and any balance of the proceeds of such sale which may remain after satisfying all claims of the builders shall belong to and be paid to the purchasers.

"3. The purchasers shall pay to the builders as the purchase-money for the steamer a sum of £103,000 sterling (One hundred and three thousand pounds sterling) as provided for in last clause of this agreement. Instalments are to be paid to builders by purchasers during construction, etc., as follows—

£20,600	on the signing of this agreement;
20,600	when the vessel is framed;
20,600	when the vessel is plated;
20,600	when the vessel is launched; and
20,600	the remaining when the vessel is ready for delivery to the purchasers in accordance with the terms hereof and notice thereof is given to the purchasers.
£103,000	

"The builders' certificate and all certificates and documents that can be provided by the builders shall be provided by them at their expense, and handed to the purchasers in exchange for the final payment, while for all documents which take time to prepare, such as Lloyd's Certificate, the builders shall produce a receipt for the fees. The purchasers may make any payment, or any portion of any payment, before it is due, and the builders shall allow interest upon any sum so paid at the rate of five per cent. per annum, and any instalment or payment in arrear shall be charged with interest at the same rate, always provided that the sum or sums anticipated shall not amount to more than one half of the instalment next due.

"The steamer as she is constructed, and all her machinery and fittings, and all materials from time to time intended for her or them, whether in the building yard, workshop, river, or elsewhere shall immediately as the work proceeds become the property of the purchasers and shall thenceforth be and remain in the possession of the builders only as trustees of the purchasers for the sole purpose of completing the said steamer and delivering her when completed to the purchasers and shall not be within the ownership, control, or disposition of the builders, but the builders shall at any time have a lien thereon for their unpaid purchase-money.

"4. The steamer shall be at the risk in all respects of the builders until delivered to the purchasers, and until such delivery they shall at their own cost keep her insured at one or more first-class office or offices, to be approved by the purchasers, in a sufficient amount against fire, launching, and trial-trip risks, and assign stamped policies to the amount to the purchasers if required. In case the builders shall neglect to insure the said steamer as aforesaid, or keep such insurance on foot, the purchasers may effect and keep up such insurance and at their option deduct the expense thereof from the purchase-money, or recover the same from the builders, and in case the said steamer or its machinery, or any part thereof, shall be destroyed, or damaged by fire, launching, or trial-trip risks, the money received in

respect of the insurance or insurances thereon shall be applied in rebuilding or reinstating the same. . . .

"7. The vessel shall have an average speed of 13½ knots an hour, and if the vessel shall not at the trial trip attain this speed, the purchasers shall be at liberty to refuse to accept delivery thereof, or alternately the builders shall be required to pay a penalty of £500 for every quarter of an knot below 13½ knots. . . .

"9. If this vessel be not delivered on the thirtieth day of September Nineteen hundred and fourteen, the purchasers have the right, subject to the conditions in clause 2, to refuse acceptance of the same, in which case the builders shall repay to the purchasers the amount received on account of the said vessel, plus 5 per cent interest *pro rata temporis*. . . . .

"11. The vessel to be built at cost price of materials and labour, plus the fixed sum of 40 per cent. on total cost of labour for shipyard establishment charges, and plus the fixed sum of 64 per cent. on total cost of labour for engine and boiler works establishment charges, plus the sum of £4000 (four thousand pounds sterling) of profit, which if our estimates are correct will make the total cost of this duplicate ship £103,000 (one hundred and three thousand pounds sterling). In the event of the cost of the vessel ascertained as aforesaid turning out less than £103,000 (one hundred and three thousand pounds sterling) the purchasers are to have the advantage of this saving. On the other hand if the total cost should exceed £103,000 sterling (one hundred and three thousand pounds sterling) the purchasers are to pay to the builders all such excess up to the maximum contract price of £103,000 sterling (one hundred and three thousand pounds sterling) any such difference to be dealt with when paying the final instalment."

The parties averred—"(Cond. 3) When the war broke out the vessel was still on the stocks, and thus only three instalments, amounting to £61,800, had become due. At that time the 'Adria' Company had paid £82,400, less a *contra* account of £2667, 3s. 8d., making a total payment to account of the vessel of £79,732, 16s. 4d. (*Ans.* 3) Admitted that when the war broke out the vessel was still on the stocks, and that at that time the 'Adria' Company had made a net payment to account of the price of the vessel of £79,732, 16s. 4d. *Quoad ultra* denied, and explained that by consent of both parties the scheme of payment by instalments had been departed from, and instead the 'Adria' Company made sundry irregular payments to account from time to time. Explained further that by the 4th of August 1914 the defenders had executed work on the vessel to a greater value than the amount paid to account by the 'Adria' Company. (Cond. 4) In November 1914 the chairman of the defenders' company caused the vessel to be brought to the notice of the Admiralty, and on 17th February 1915 the vessel, which was still on the stocks, was requisitioned by the Admiralty. Some questions subsequently arose as to whether the Admiralty should get the benefit of the sum paid to account by the 'Adria' Company, but on the defenders' representation that the vessel was their own property the Admiralty transacted with them as absolute owners and paid them the whole purchase price agreed to be paid by the 'Adria' Company, less the value of work not executed, and with the addition of the cost of alterations required by the Admiralty, and obtained delivery of the vessel altered and completed to suit Admiralty requirements. (*Ans.* 4) Admitted that in November 1914 the chairman of the defenders brought the vessel under the special notice of the Admiralty, but explained that in the month of August 1914 the Customs officials at Port Glasgow had, on behalf of the Admiralty, inspected the vessel, and although the formal requisitioning by the Admiralty was not served until the 18th February 1915, the Admiralty officials had in the meantime been preparing plans for altering the vessel to suit their requirements. Admitted that questions arose between the Admiralty and the defenders as to whether the sum paid to account by the 'Adria' Company should or should not be credited to the Admiralty, and that ultimately the Admiralty paid them the whole purchase price agreed on with the Admiralty. *Quoad ultra* denied under reference to the defenders' statement of facts. (Cond. 5) The sum of £79,732, 16s. 4d. paid to the defenders by the 'Adria' Company belongs to, and is held by, the defenders for that company. The 'Adria' Company is an enemy, and an Order has been issued by the Board of Trade, in exercise of the powers conferred upon them by the Trading with the Enemy Amendment Act 1916, and all other powers enabling them in this behalf, vesting the said money and interest therein, and the right to receive, sue for, and recover the same, in the pursuer as custodian aforesaid. . . . . (*Ans.* 5) Admitted that the 'Adria' Company is an enemy. Reference is made to the Order issued by the Board of Trade dated 1st December 1917. *Quoad ultra* denied under reference to the defenders' statement of facts, and explained that the said sum of £79,732, 16s. 4d. was paid to the defenders on account of a current and uncomplete executry contract with an alien enemy, which was cancelled and rendered incapable of fulfilment by either party owing to the outbreak of war. Neither the said sum nor the right to recover the same vested in the pursuer."

The defenders lodged a *statement of facts* which set forth, *inter alia*—"(Stat. 4) In consequence of the stoppage of the work under the contract caused by the war, and the delay on the part of the Admiralty in giving notice to requisition until the 18th February 1915, the defenders were obliged to leave the unfinished vessel occupying one of the three berths in their yard for six and a-half months in excess of the time required under the contract, viz., from 12th August 1914 to 18th February 1915, and were thus prevented from earning the nominal oncost charges and profit therefrom. Their whole establishment charges were running on,

while one-third of their earning capacity was taken away during that period by the fact that the Admiralty would not give definite instructions as to what they wished done with the vessel. The oncost and establishment charges and profit on a fair estimate for that period amounted to £9211, which was the actual loss sustained by the defenders from the vessel occupying her berth in the yard."

The pursuer *pleaded*—"1. The sum sued for being enemy property duly vested in the pursuer under the Trading with the Enemy Amendment Act 1916, decree for payment thereof, with interest and expenses, should be pronounced as concluded for. 2. The defences are irrelevant and should be repelled, and decree pronounced as concluded for."

The defenders pleaded, *inter alia*—"1. No title to sue. 2. The pursuer's averments being irrelevant, the action ought to be dismissed. 3. The said contract having been unfinished at the outbreak of the war with Austria, became then incapable of being performed by either party to it, and was thereby dissolved. 4. The said vessel having been requisitioned by the Admiralty under the prerogative of the Crown and the Defence of the Realm Act, and having been converted by the Admiralty into a fleet repairing ship, the defenders were prevented, without their fault, from carrying out their contract with the 'Adria' Company, and that contract was thereby dissolved. 5. In respect (1) of the non-completion of the contract by the 'Adria' Company, and (2) of the dissolution of the said contract, the defenders are under no liability to account to the 'Adria' Company, and they ought therefore to be assoilzied from the conclusions of the summons. 6. The sum sued for not being enemy property vested in the pursuer under the Trading with the Enemy Amendment Act 1916, decree of absolvitor ought to be pronounced. 7. The effect of the war upon the said contract having caused the defenders loss to the extent of (1) the sum of £9211 in respect of the occupation of their berth, . . . they are entitled to deduct [that sum] from the sum sued for. 8. The defenders are not, in any event, liable for interest. 9. In any event the proceedings should be sisted until the termination of the war."

The *Vesting Order* of 1st December 1917 was in the following terms:—"In the matter of the Trading with the Enemy Amendment Act 1916, and in the matter of the Royal Hungarian Sea Navigation Company 'Adria,' Limited of Budapest, Hungary, an enemy within the Act: Whereas the monies specified in the schedule hereto are property belonging to or held or managed for or on behalf of the above-named the Royal Hungarian Sea Navigation Company 'Adria,' Limited of Budapest, Hungary, by the Clyde Shipbuilding and Engineering Company, Limited, Port-Glasgow, Scotland; and whereas the said the Royal Hungarian Sea Navigation Company 'Adria,' Limited, is an enemy within the above-mentioned Act; and whereas it appears to the Board of Trade that such Order as hereinafter appears should be made in respect of the said monies and that such powers in regard thereto as are hereinafter contained should be conferred upon the Custodian hereinafter mentioned: Now therefore the Board of Trade, in exercise of the powers conferred on them by the Trading with the Enemy Amendment Act 1916, and all other powers enabling them in this behalf, do hereby order:—1. That all the right, title, and interest of the said the Royal Hungarian Sea Navigation Company 'Adria,' Limited, to and in the monies specified in the schedule hereto, and the right to receive, sue for, and recover the same, do vest in the Accountant of Court in Scotland, His Majesty's New Register House, Edinburgh, the Custodian for Scotland appointed by the Board of Trade under the Trading with the Enemy Amendment Act 1914. 2. That the said Custodian do proceed to get in the said monies and take such proceedings for the recovery thereof as he may be advised. Dated this 1st day of December 1917.

"*Schedule.*

"Monies owing to or held for or on behalf of or on account of the said the Royal Hungarian Sea Navigation Company 'Adria,' Limited, by the said the Clyde Shipbuilding & Engineering Company Limited, and paid to the said Shipbuilding Company in terms of an agreement dated July 25th, 1913, viz., the sum of £79,732, 16s. 4d., with interest thereon from the date or dates on which the same was received by the said Shipbuilding Company. "By the Board of Trade,

"H. A. PAYNE,

authorised in that behalf by the President, Board of Trade."

On 10th December 1918 the Lord Ordinary (ORMIDALE) repelled the first and second pleas-in-law for the defenders, and decerned against them for payment to the pursuer of the sum of £79,732, 16s. 4d.

Opinion.—"By a contract between the Royal Hungarian Sea Navigation Company, 'Adria' Limited, of Budapest, Hungary (which I shall afterwards refer to as the Adria Company), and the Clyde Shipbuilding and Engineering Company Limited, the defenders in the present action, dated 25th July 1913, the latter undertook to construct a steamer of certain dimensions, speed, and class, to be ready for delivery to the Adria Company on 30th September 1914.

"The estimated cost of the steamer was £103,000, but as defenders state in answer 2, 'Under the contract the price was not definitely fixed at £103,000, but was to be more or less than that sum as ascertained by the cost price of material and labour expended plus certain percentages thereon, plus £4000 of profit after completion, with right to the Adria Company to an audit.'

"The Adria Co. undertook to pay the price in five instalments of £20,600 each, the *first* on signing of the agreement, the *second* when the vessel was framed, the *third* when the vessel was plated, the *fourth* when the vessel was launched, and the remaining instalment when the vessel was ready for delivery.

"When war broke out between Great Britain and Austria on 12th August 1914 the vessel was still on the stocks, but monies

equivalent to four instalments had been paid to the defenders, amounting in all to £82,400, less a contra account of £2667, 3s. 8d., making a total net payment by the Adria Co. of £79,732, 16s. 4d.

"On the outbreak of war all work on the vessel was stopped. On 18th February 1915 she was requisitioned by the Admiralty. A price to be paid by the Admiralty, as the vessel then was, was agreed upon, viz, £86,000. It was at first proposed that the sum of £79,732, 16s. 4d. should be treated as already paid to account of the £86,000, the Admiralty undertaking to indemnify the defenders against any claims which might be made by the Adria Company in respect of that sum. Ultimately, however, the Admiralty paid the £86,000 in full, at the same time withdrawing their intended indemnity.

"On 10th August 1917 the £79,732, 16s. 4d. was claimed by the Custodian for Scotland as monies in the hands of the defenders belonging to the Adria Co. This was not admitted by the defenders, whereupon an order was pronounced by the Board of Trade vesting the money and the right to sue for it in the Custodian, and he raised the present action on 19th April 1918, concluding for payment of the £79,732, 16s. 4d, thus describing it in the conclusions of the summons, 'being monies owing to or held for or on behalf of or on account of the Adria Co. in terms of the agreement between the defenders and them dated 25th July 1913.'

"If that description of the fund be well founded, then I understood it was not disputed that the £79,732, 16s. 4d. was 'enemy property,' as being a debt due by the defenders for which the Adria Co. might sue them, and that it came under the provisions of the Trading with the Enemy Acts of 1914, '15, and '16, and fell to be vested in the pursuer as Custodian of enemy property.

"The pursuer on the other hand did not maintain that the vesting order must be reduced or set aside before the defences could be considered.

"The defenders maintain that the Adria Co. has no right to any part of the £79,732 16s. 4d. They say that on the outbreak of war the contract was abrogated or cancelled, with the result that it became illegal, and therefore impossible for them to complete the vessel for delivery, and that on the other hand any claim that the Adria Co. might have had for repayment of the instalments ceased to exist.

"The contention that on the outbreak of war this executory contract ceased to be operative is well founded—*Ertel Bieber & Company* v. *Rio Tinto Company*, [1918] A.C. 260. That is because to go on and to complete and deliver the vessel would have necessitated intercourse with an alien enemy. Each party to the contract was therefore absolved from further performance under it.

"The cases of *Appleby* v. *Myers*, 1867, L.R., 2 C.P. 651, and *Anglo-Egyptian Navigation Company* v. *Rennie*, 1875, L.R., 10 C. P. 271, are not directly in point, for in them the fulfilment of the contracts with which they are concerned became impossible because of the destruction or loss of the subject-matter of them. That was held to be 'a misfortune equally affecting both parties but giving a cause of action to neither.' A similar but more subtle doctrine was applied in what are known as the Coronation cases, of which *Krell* v. *Henry*, [1903] 2 K.B. 740, and *Chandler* v. *Webster*, [1904] 1 K.B. 493, may be taken as typical examples. 'The underlying ratio' of the principle, it has been said, 'is the failure of something which was at the basis of the contract in the mind and intention of the contracting parties' (Lord Shaw in *Horlock* v. *Beal*, [1916] 1 A.C. 486, at 512). Now in the present case the subject-matter of the contract, *i.e.*, the vessel, has not been destroyed. It remained a valuable asset in the hands of the defenders. Nor has there been the failure of anything which was at the basis of the contract in the mind and intention of the contracting parties, for I cannot hold that the discontinuance of peace answers that description. It may be, however, that the effect of the dissolution of the contract is the same. In *Chandler* v. *Webster*, Collins, M.R., says at p. 498, 'The fulfilment of the contract having become impossible through no fault of either party, the law leaves the parties where they were and relieves them both from further performance of the contract.'

"In my opinion that does generally describe the result which follows when a contract is abrogated on the outbreak of war, inasmuch as it involves trading with the enemy. It is, however, only the further performance of the executory contract which becomes impossible. The contract is not wiped out altogether, and if certain rights have accrued under it to either party prior to the outbreak of war I see no reason why these rights should not be given effect to, though the right of suing in respect of them may fall to be suspended.

"In the present case the £79,732, 16s. 4d. had, prior to the outbreak of war, been paid over to the defenders. Looking to the principle on which the purchase price of the vessel was to be ascertained and to the admitted facts of the actual cost of the vessel's construction up to the date of the outbreak of war, the whole of the monies so paid had been expended on the construction of the steamer. Further, under the contract by clause 3 'the steamer as she is constructed . . . shall immediately as the work proceeds become the property of the purchasers. . . .' It appears to me that as matters stood on the outbreak of war the property in the ship so far as then completed had by agreement of parties been transferred to the purchasers. I agree with the view that this was a bargain for a complete ship, and that if on final delivery she was not a complete ship conform to contract the purchasers were entitled to reject her. But an ultimate right of rejection, it was held, in *Nelson* v. *William Chalmers & Company, Limited*, 1913 S.C. 441, 50 S.L.R. 364, was not inconsistent with an intermediate right of property. In *Reid* v. *Macbeth & Gray*, [1904] A.C. 223, 6 F. (H.L.) 25, 41 S.L.R. 369, the question was whether materials earmarked for use in the construction of a

ship, but which had not yet become part of her structure, could be said to have passed to the purchasers of the ship as under a contract of sale. In *Sir James Laing & Sons, Limited* v. *Barclay, Curle, & Company*, [1908] A.C. 35, 1908 S.C. (H.L.) 1, 45 S.L.R. 87, the contract contains no such stipulation as is here that the property in the ship was to pass as she was constructed to the purchasers.

"Accordingly it seems to me that on the outbreak of the war the defenders had in their possession certain property of the Adria Company, namely, the partially constructed steamer, which remained in their possession only as trustees for the Adria Company. The outbreak of the war made it impossible for the defenders to go on and complete the steamer, and they were relieved from further performance of their contract. It had not the effect, however, of giving them a right because at the time it merely happened to be in their possession—to what was the property of the Adria Company. Strictly it seems to me that, however inconvenient, the Custodian might have claimed the uncompleted ship as enemy property. But the ship, just as she was, was requisitioned by the Admiralty—was thereafter dealt with by the defenders as if she were their own property, and on terms as to her alteration and completion, sold by them to the Admiralty for £86,000. This is not the time at which, nor is it the process in which, finally to determine the precise measure of the Adria Company's right, but it appears to me that *prima facie* they have a right to demand the £79,732, 16s. 4d. as coming in room and place of their property, that sum having been applied by the defenders towards the cost of constructing the steamer before they sold her to the Admiralty. I see no principle in law or equity for holding that the £79,732 16s. 4d. should be forfeited to the defenders. The decision in *Hugh Stevenson & Sons, Limited* v. *Aktiengesellschaft für Cartonnagen Industrie*, [1918] A.C. 239, is to the contrary effect. That case dealt with the effect of the dissolution of a partnership between an English Company and a German Company operated by the outbreak of war, and it was held that the German Company was entitled to a share of the profits made after the dissolution by the carrying on of the business by the English Company with the aid of the German Company's share of the capital. Lord Dunedin at pp. 247-8 said—'The outbreak of war put an end to the partnership. . . . But the right of the partners was then to have the business realised and the proceeds divided. . . . The appellants (*i.e.*, the English Company) have at their own hand continued the business. The result in law is that they carry on the business as trustees for the partners until the winding-up is effected. No doubt the enemy partner cannot receive money during the war. But his property as such is not confiscated. Even if it were it would be confiscated to the King, not to his quondam partner.'

"The counter-claims set out by the defenders in their statement 11 are in my opinion irrelevant as an answer to any extent to the pursuer's claim. Their own statement of how the loss of £9211 was occasioned does not infer any liability therefore on the part of the Adria Co. It resulted from the contract being dissolved without fault on the part either of the Adria Co. or the defenders upon the outbreak of war.

"As regards the claim for interest by the defenders, again on their own statement, the Admiralty—if anyone is liable—is the party who ought to pay it.

"The pursuer seeks to recover interest on the sum of £79,732, 16s. 4d. I offer no opinion on the general question whether interest accrues during the continuance of war on a debt due to an enemy. The topic was discussed in the case of *Hugh Stevenson & Sons* (*cit.*), but I am of opinion that the Custodian is not entitled to payment of interest as concluded for, namely, as from the dates at which the £79,732, 16s. 4d. was received by the defenders. Up to the date of the outbreak of war no right to interest had accrued to the Adria Co. under the contract, and it is at least a debateable point whether what has occurred since has given that company any right to demand interest at all, and if it has, what interest. In my opinion an indefinite and undisputed claim to interest is not property belonging to the enemy. The provisions of the Trading with the Enemy Acts are concerned only with specific property which can be definitely pointed out. The Custodian does not in my judgment possess any right or title on behalf of the Adria Company to have the matter cleared up in the present process.

"I shall decern against the defenders to make payment to the pursuer of the sum of £79,732, 16s. 4d."

The defenders reclaimed, and argued—The property in the partially completed ship had either passed to the enemy firm or it had not. Certainly if the property had passed, the instalments paid by the enemy firm had become the property of the defenders, and the only thing to which the enemy firm had any right was the partially completed ship. That was now represented by the price paid by the Admiralty, and that alone the pursuer could claim. The terms of the contract, however, appeared to show that the property in the ship was not to pass until it had been completed and approved by the enemy firm—*Reid* v. *Macbeth & Gray*, 1901, 4 F. 345, 39 S.L.R. 188; 1904, 6 F. (H.L.) 25, *per* Lord Halsbury, L.C., at p. 29, 41 S.L.R. 369, [1904] A.C. 223; *Sir James Laing & Sons, Limited* v. *Barclay, Curle, & Company*, 1908, S.C. (H.L.) 1, *per* Lord Halsbury, L.C., at p. 2, 45 S.L.R. 87, [1908] A.C. 35; *Nelson* v. *Chalmers & Company*, 1913 S.C. 441, *per* Lord Kinnear at p. 449, 50 S.L.R. 364. But the question of the passing of the property was not properly raised in the present proceedings, and in any event it depended upon the facts as well as on the terms of the contract—*Seath & Company* v. *Moore*, 1886, 11 A.C. 350, *per* Lord Watson at p. 380, 13 R. (H.L.) 57, 23 S.L.R. 495; *Nelson's* case (*cit.*), *per* Lord Mackenzie at p. 454. But however the question of property stood it was certain that the instalments paid by the enemy firm did not belong to them—*Laing's*

case (*cit.*) At the outbreak of the war the mutual rights and obligations were (*a*) on the part of the enemy firm to take the ship and pay the balance of the price; (*b*) on the part of the defenders to complete the ship and deliver it. The enemy firm's sole right to recover the instalments arose if the defenders were in fault, which was not the case. Upon that *status quo* the war intervened. The defenders could not thereafter complete and deliver the ship, but through no fault of theirs. The result of war upon such a *status quo* was to abrogate the contract, leaving the vested rights *hinc inde* standing—*Ertel Bieber & Company* v. *Rio Tinto Company*, [1918] A.C. 260, *per* Lord Dunedin at pp. 268, 269, and 274; *Naylor, Benzor, & Company, Limited* v. *Krainische Industrie Gesellschaft*, [1918] 1 K.B. 331, and [1918] 2 K.B. 486. Those cases were a special application of the general doctrine of supervening impossibility of performance, which was illustrated in *Appleby* v. *Myers*, 1867, L.R., 2 C.P. 651, *per* Blackburn, J., at p. 659; *Anglo-Egyptian Navigation Company* v. *Rennie*, 1875, L.R., 10 C.P. 271, *per* Denman, J., at p. 284; *Krell* v. *Henry*, [1903] 2 K.B. 740, *per* Vaughan Williams, L.J., at p. 751; *Chandler v. Webster*, [1904] 1 K.B. 493, *per* Collins, M.R., at p. 499, and Romer, L.J., at p. 501; *Civil Service Co-operative Society, Limited* v. *General Steam Navigation Company*, [1903] 2 K.B. 756. There was no suspension of the contract during the war—*Metropolitan Water Board* v. *Dick, Kerr, & Company, Limited*, 1918 A.C. 119, *per* Lord Dunedin at p. 128, 55 S.L.R. 537. The result was that the defenders were released from their obligation to complete and deliver the ship, while the alien firm was released from its obligation to take the ship and pay the balance of the price. The defenders had a vested right in the instalments paid, and the enemy firm could not sue them to recover these instalments. If so, the pursuer had no title to sue. If he had any title to sue, it was to raise an action against the price paid by the Admiralty, which represented the ship. Such an action would be by way of accounting, and in it alone the defenders' counter claim could be properly dealt with. Further, the pursuer's case was based upon the vesting order, which was quite inept. Vesting orders made by the Board of Trade, as was the case here, were limited in application to property—Trading with the Enemy Amendment Act 1916 (5 and 6 Geo. V, cap. 105), section 4 (1). Debts and property were carefully distinguished in the Trading with the Enemy Acts or Trading with the Enemy Amendment Act 1914 (5 Geo. V, cap. 12), sections 2 and 3. If the right of the alien enemy to the instalments of the price paid was a debt, the Trading with the Enemy Acts only applied to it if it was a debt now due to the alien enemy, or which would have been due had not a state of war existed—Trading with the Enemy Amendment Act 1915 (5 and 6 Geo. V, cap. 79), section 2 (1). That could not be said of the instalments paid. The Custodian derived his titles from those Acts—Act of 1914, section 1—and as those Acts did not apply to the money in question he had no title to sue.

Argued for the pursuer (respondent)—The pursuer's title under the Trading with the Enemy Acts was unexceptionable. Under those Acts he was entitled to any property, real or personal, belonging to enemy subjects, and personal property, at least in Scotland, included debts. The effect of the war was to leave accrued rights under the contract unaffected. But the terms of the contract showed that all material as it was incorporated in the ship became the property of the alien enemy, and the ultimate right of rejection was immaterial as regards that—*Seath & Company* v. *Moore* (*cit.*); *Reid* v. *Macbeth & Gray* (*cit.*) Consequently on the outbreak of war the unfinished ship belonged to the alien enemy, and thereafter the defenders held her for them as trustees or stakeholders with a lien over her for what was still due for her. The requisition left those rights quite unaffected; it was by way of compulsory purchase under the Naval Billeting, &c., Act 1914 (4 and 5 Geo. V, cap. 70), section 2 (*b*), referring to the Army Act 1881 (44 and 45 Vict. cap. 58), section 115, and resulted in a price being paid for the ship to the defender and the transference of property in the ship to the Admiralty. The sole result was to leave in the defenders' hands a sum of money which was a *surrogatum* for the ship they formerly held. Their rights and those of the Adria Company were unaffected otherwise—*F. A. Tamplin Steamship Company, Limited* v. *Anglo-Mexican Petroleum Products Company, Limited*, [1916] 2 A.C. 397, 54 S.L.R. 433; *New Zealand Shipping Company, Limited* v. *Société des Ateliers et Chantiers de France*, 1918, 34 T.L.R. 400. If, then, the defenders held the partially finished ship for the Adria Company they ought to have made a return to the Custodian under the Act of 1914, sections 3 and 4. Similarly they were under obligation to make a return as to the money which represented the ship. The record did not indicate that the sum sued for was the instalments of the price paid, but if it could be so read, that was merely a misdescription of what was obviously sued for. The Admiralty price included the £79,000, the contract price for the work done under the contract. The remainder of the Admiralty price represented the cost of the work done to the orders of the Admiralty. No doubt the alien enemy could not sue for the price of the unfinished ship, but that did not prevent the pursuer from so doing—*Hugh Stevenson & Sons, Limited* v. *Aktiengesellschaft für Cartonnagen-Industrie*, [1918] A.C. 239; *Blackburn Bobbin Company, Limited* v. *T. W. Allen & Sons, Limited*, [1918] 1 K.B. 540; *Holt* v. *A. E. G. Electric Company, Limited*, 1917, 34 T.L.R. 136, was referred to upon the object of the Trading with the Enemy Acts. The defenders' counter claim could not be dealt with in the present process as the pursuer was not their proper adversary. The pursuer was entitled to the sum sued for, leaving it open to the defenders to state any claims to it that might be competent. In any event the defenders could not validly claim for the occupation of their yards; they themselves ought to have completed the ship and

launched her. Consequently the obstruction of their yard was due to their own fault.

At advising—

LORD PRESIDENT—I agree with the conclusion arrived at by the Lord Ordinary in this case and in the main with the reasoning on which it rests. The action relates to an executory contract made with an alien enemy before the outbreak of war. Parties were agreed that the effect of the declaration of war between Great Britain and Austria on 12th August 1914 was to dissolve the contract, but rights which prior to that date had accrued were not destroyed, although not during the continuance of a state of war enforceable. The question for our decision is, What rights under the contract before us had accrued in favour of the alien enemy when war was declared? I resume the facts of the case only in so far as necessary to explain my view of the legal question involved. On the 25th of July 1913 an Austrian shipping company contracted with the Clyde Shipbuilding and Engineering Company, Limited, for the construction of a ship at the price of £103,000. She was to be delivered on 30th September 1914, but before that date arrived, on 12th August 1914, war broke out between Great Britain and Austria. The ship was still on the stocks, although almost ready for launching, but the Austrian company had paid to account of the price £79,732, 16s. 4d. The Shipbuilding Company had, however, "executed work on the vessel to a greater value than the amount paid to account" by the Austrian company. That is their own statement. In terms of the contract between the parties, which is expressed in writing, it seems to me that the partly constructed vessel was at the date of the outbreak of war the property of the Austrian company. For the contract expressly provides that "the steamer as she is constructed . . . shall immediately as the work proceeds become the property of the purchasers." But war having broken out, the Austrian company could not demand that the ship be completed and delivered to them. She ought in her incomplete state as the moveable property of an alien enemy to have been taken possession of by the Custodian. This, however, became impossible, because on the 17th of February 1915 she was requisitioned by and handed over to the Admiralty in return for payment of the whole purchase price stipulated in the original contract, less the value of work not executed. Had the vessel not been so requisitioned and sold she would have remained in the hands of the builders as custodiers for the Austrian company, whose property the builders had expressly agreed she was. But instead of the unfinished ship the builders held in their hands her value as paid for by the Austrian company —£79,732 odds—the sum sued for in this action. In other words, that sum of money represented and was a *surrogatum* for the unfinished ship. And it is that sum which is by the order dated 1st December 1917 vested in the pursuer. I can find no good reason why we should deny him a decree for payment thereof as Custodian of Enemy Property for Scotland. The Lord Advocate perilled his case on the contention that the clause in the contract to which I have referred—"the steamer as she is constructed . . . shall immediately as the work proceeds become the property of the purchasers"—must receive effect according to its terms. The soundness of this contention was challenged by counsel for the reclaimers. A decision of this controversy concludes the main topic of discussion in the case. Neither party avers any facts which would lead to the inference that the contract ought not to take effect according to its terms. The builders expressly state on record that when war broke out they had executed work on the vessel to a greater value than the sum of £79,732 odds. And although only three instalments of the price were due, four had been actually paid. Clearly, then, in terms of the contract, finished work to the value of at least £79,732 had become the property of the Austrian company. For so the contract provided. As Lord Watson observed in *Seath & Company* v. *Moore* (1886, 11 A.C. 350, at p. 380, 13 R. (H.L.) 57, at p. 65, 23 S.L.R. 495)—". . . Where it appears to be the intention, or in other words the agreement, of the parties to a contract for building a ship that at a particular stage of its construction the vessel so far as then finished shall be appropriated to the contract of sale, the property of the vessel as soon as it has reached that stage of completion will pass to the purchaser, and subsequent additions made to the chattel thus vested in the purchaser will, *accessione*, become his property." Lord Watson then proceeds to state certain facts from which such an agreement as to the passing of the property to the purchaser may be inferred. In the case before us we have no extrinsic facts from which to infer an intention that the property should pass to the purchaser. But we have (1) the explicit agreement of the parties, and (2) the work admittedly executed and paid for under that agreement. Nothing more is required. In the case of *Reid* v. *Macbeth & Gray*, ([1904] A.C. 223, 6 F. (H.L.) 25, 41 S.L.R. 369), Lord Davey (at p. 231, p. 29, and p. 372 respectively), commenting on a clause in a shipbuilding contract expressed in almost identical terms with the clause on which the controversy here turns, says—". . . It is clear, whatever else may be obscure in this fourth clause, that the goods in question are only to become the property of the purchaser from time to time as progress is made in the construction of the ship . . . according to the true construction of the clause it was only when the chattels in question were applied for the use of the ship, and became part of the structure of the ship, that it was intended that those words vesting the property should operate." So it is in the case before us, for, as the Lord President (Dunedin) observed in *Barclay, Curle, & Company, Limited* v. *Sir James Laing & Sons, Limited* (1908 S.C. 82, at p. 89, 45 S.L.R. 87)—"There is not the slightest difficulty in so framing a contract, if it is wished, as be-

tween a shipbuilder and the person who is buying the ship, that the property in a gradually constructed ship shall be held to pass at certain stages, but if so, I think it must be clearly said." Well, here it has been clearly said. Why should we deny effect to it? I have considered the case as it has been presented to us in argument, and have placed my judgment on the only ground on which I think it can securely rest. I treat the £79,732 sued for, not as moneys paid by the Austrian company to the Scottish shipbuilders and to be paid back because of the inability of the latter to deliver the vessel, but as *surrogatum* for a piece of work the property in which had by agreement passed to the Austrian company. In so doing I conceive I am sustaining the first plea-in-law for the pursuer, which speaks of the sum in question as being enemy property vested in the pursuer as custodian. That I think it clearly was. I cannot say that the averments on record, and in particular the opening sentence of the fifth article of the condescendence, are aptly expressed to describe the true legal position of the £79,732. The same observation may be made about the phraseology used in the schedule of the vesting order. But I do not think this is more than a misdescription of a sum of money which is otherwise quite well ascertained, and hence an amendment of the pleadings is unnecessary.

There remains for consideration the shipbuilders' claim for £9211 of damages. The averments on which the claim rests are to be found in the fourth statement of facts for the defenders. They amount to a charge of deliberate fault on the part of the Admiralty, and are, I agree with the Lord Ordinary in thinking, irrelevant to infer liability on the part of the Austrian company. I am by no means deciding that there may not be claims on the £79,732, at the instance of the shipbuilders, as custodiers of the ship, against the Austrian company. But these if they exist can all be made good when the ultimate disposal of the money comes to be determined. All that we now decide is that *prima facie* there is a sum of £79,732, representing ship property, belonging to an alien enemy now in the hands of the defenders which ought to be placed in the in the hands of the Custodian. I am therefore for adhering.

LORD MACKENZIE—The claim of the pursuer as Custodian for Scotland under the Trading with the Enemy Acts arises out of an executory contract uncompleted at the outbreak of war. The contract was for the building of a ship by a firm of shipbuilders in Scotland, the purchasers being an Austrian firm, an alien enemy.

The effect of the outbreak of war on the contract is not doubtful in view of recent decisions. Its performance necessitated intercourse between subjects of the King and an alien enemy. A state of war between this country and Austria therefore abrogated and put an end to its performance. The rights accrued under it were, however, not affected, though the right to sue in respect thereof was suspended. Although the contract could not be executed, it still subsisted for the purpose of winding up. An alien enemy cannot sue for or receive during the war any property belonging to him in this country, but his property as such is not confiscated. It is for the purpose of winding up that the aid of the Custodian is invoked. I am unable to follow the argument advanced on behalf of the defenders here that the Custodian has no title to sue. That argument was based on a critical construction of the terms of the vesting Order made by the Board of Trade. It is not in my opinion necessary for the Custodian to obtain such an order in order to furnish him with a title to bring such an action as the present. He brings the action to establish his right, and if he is successful the decree vests in him the property claimed.

The pursuer in my opinion has succeeded in showing that there was at the outbreak of war property held by the defenders for or on behalf of an alien enemy. It was the defenders' duty to have communicated the fact to the Custodian under 5 Geo. V, cap. 12, section 3 (1), who was by section 4 empowered to apply to the Court for a vesting order. The property held was the ship so far as constructed. This had passed to the Austrian company as provided by article 3 of the contract. That article provides for the payment of the purchase price by instalments during construction. The sum sued for is £79,732, 16s. 4d. That amount had been paid by the Austrian company to the defenders at the outbreak of war. Article 3 expressly provides that the steamer as she is constructed shall immediately as the work proceeds become the property of the purchasers. It was contended that the right of property in the ship could not pass until the Austrian company had accepted the ship, and *Seath & Company* v. *Moore*, 13 R. (H.L.) 57, 23 S.L.R. 495, was cited as supporting this view, especially a passage in Lord Watson's opinion at p. 64. It is sufficient to say that the Sale of Goods Act 1893, which embodies the propositions contained in Lord Watson's judgment in *Seath* v. *Moore*, shows that if parties so contract property may pass under an executory contract without delivery. As Lord Dunedin said (in the Court of Session) in *Sir James Laing & Sons, Limited* v. *Barclay, Curle, & Company*, ([1908] A.C. at p. 40, 1908 S.C. 82, 45 S.L.R. 87)—"There is not the slightest difficulty in so framing a contract, if it is wished, as between a shipbuilder and the person who is buying the ship, that the property in a gradually constructed ship shall be held to pass at certain stages, but if so, I think it must be clearly said." In my opinion it is clearly said by the contract here. The position of matters on the outbreak of war was that the defenders, the Clyde Shipbuilding Company, held for behoof of the Austrian company property belonging to them, to wit, the partially constructed ship, which was value for more than £79,732, 16s. 4d. This property was in their hands as trustee or stakeholder subject to their lien for the unpaid purchase money. They should have communicated this fact to the Custodian, whose right, strictly speak-

ing, then would have been to apply for an order vesting in him the uncompleted ship. Information was not given. The Admiralty requisitioned the ship, which was completed to suit their requirements. The price paid by the Admiralty was £86,000. This sum, as was explained at the Bar, represents £79,732, 16s. 4d., the sum sued for plus a sum to make up the value of the work done at the date of requisition under the original contract. This sum was £6267, 3s. 8d., the balance unpaid. Subject to adjustment the original contract price was to be £103,000. The difference between £103,000 and £86,000 being £17,000 was deducted, as the Admiralty did not require certain fittings contracted for. The settlement of the cost of completing the ship according to Admiralty requirements so far as exceeding the £86,000 was matter of separate arrangement.

The result of this is that the Clyde Shipbuilding Company at present have in their possession two sums of £79,732, 16s. 4d. as the price paid to them for the same work, *i.e.*, for the ship so far as built at the outbreak of war.

The defence put forward by them to the claim of the Custodian is that the sum of £79,732, 16s. 4d. which he asks for in the action as laid is the identical sum which was paid to them by the Austrian company and became their property. According to them the action is a *rei vindicatio* — an attempt to get back the same sovereigns or their equivalent. This the defenders say is a position the pursuer cannot successfully maintain, although I did not understand them to dispute that they would be liable if an action was brought against them for an accounting. This is too narrow a view to take of the matter. The true view is that so long as the ship was in the hands of the builders she was the property to the extent of £79,732, 16s. 4d. of the Austrian company, who had paid that amount. When the Clyde Shipbuilding Company received this sum over again (as part of the £86,000) it came into their hands as a *surrogatum* for the ship to that extent, and they were bound to hold it subject to the same conditions. They held property belonging to the Austrian company of the value of £79,732, 16s. 4d.: they parted with it, and thereafter held the amount of £79,732, 16s. 4d. instead, which is personal property of the Austrian company. This is the amount the Custodian sues for in this action. In my opinion he is entitled to decree.

As regards the counter-claim for £9200, I take the same view as the Lord Ordinary. I do not think there is any relevant statement.

I am of opinion that the interlocutor should be affirmed.

LORD CULLEN—I concur, though I have had considerable doubt whether the defenders' counter-claim should not be dealt with in the present process rather than reserved, the claim being one for costs which the defenders say were necessarily incurred in earning the price of the unfinished ship which is now being treated as *surrogatum*.

LORD SKERRINGTON was absent.

The Court adhered and found the defenders liable to the pursuer in interest at the rate of 5 per cent. per annum from 20th February 1919 on the sum of £79,732 16s. 4d. decerned for, reserving all the counter-claims of the defenders and also all further questions of interest on the said sum.

Counsel for the Pursuer (Respondent)—Lord Advocate (Clyde, K.C.)—Pitman. Agents—Thomas Carmichael, S.S.C.

Counsel for Defenders—Sandeman, K.C.—C. H. Brown. Agents—Webster, Will, & Company, W.S.

Friday, February 21.

FIRST DIVISION.

[Sheriff Court at Kilmarnock.

FYFE AND OTHERS *v.* THOMSON AND OTHERS.

Church — Ann — Glebe — Revenue Derived from Sum Representing Proceeds of Minerals under Glebe—Act 1672, *cap.* 13.

The minerals under a glebe were leased for a grassum of £2100, and a grassum of £600, and a nominal rent. Those sums were invested in a bond and disposition in security in favour of the minister, the standing committee of heritors, and the presbytery, as trustees for behoof of the incumbent for the time being of the benefice. The minerals were wrought from pits in adjoining lands. An incumbent having died, his widow and children claimed ann out of the interest on the bond. *Held* that the interest on the bond formed part of the "rent of the benefice or stipend" in the sense of the Act 1672, cap. 13, and as such was subject to ann.

The Act 1672, cap. 13, enacts "that in all cases hereafter the ann shall be an half-year's rent of the benefice or stipend over and above what is due to the defunct for his incumbency, which is now settled to be thus, viz.—If the incumbent survive Whitsunday, there shall belong to them for their incumbency the half of that year's stipend or benefice, and for the ann the other half; and if the incumbent survive Michaelmas, he shall have right to that whole year's rent for his incumbency; and for his ann shall have the half-year's rent of the following year, and that the executors shall have right thereto, without necessity or expenses of a confirmation."

Margaret Patrick or Fyfe, widow of the Reverend James Lamont Fyfe, sometime minister of the parish of Dalry, as an individual and as tutrix and administratrix-in-law of her pupil children, and James Gabriel Fyfe, her minor son, *pursuers*, brought an action in the Sheriff Court at Kilmarnock against the Reverend Andrew Bald Thomson, B.D., the present minister of the parish of Dalry, and others represent-