accident was not caused by a risk arising out of the employment; it was due to a risk which you voluntarily incurred yourself and which you were in no sense employed to incur." Well, there is not a particle of proof of anything of the kind. In fact the arbitrator himself finds—"It is impossible to say who opened the lamp and who attempted to re-light it. It was Gillespie who had control of the Glennie lamp, but the two men were working together." That is, they were on the same job, not that they were in intimate association generally.

Then he proceeds—"The onus was on the appellants to prove that so far as Barkey was concerned the accident arose out of his employment, and that they had failed to discharge this onus."

In my opinion that is entirely wrong. If the employer wants to show that the workman has incurred some added risk which does not arise out of his employment, and which he is not bound by his contract of service to encounter, then the employer must do that, and do that by satisfactory evidence. There is no evidence at all here to establish that in this case. It is quite as consistent—indeed it is more consistent—with Gillespie having uncovered this lamp than that Barkey did. Barkey is in no way brought into connection with it, and I think the learned arbitrator was entirely mistaken in the rule that he laid down, and that the judgment appealed from is absolutely right.

LORD SHAW—I agree with the views which have been delivered to the House by my noble and learned friend opposite.

LORD PARMOOR—I agree. I think that there is no evidence to connect the claimant with the breach of the statutory duty which caused the explosion, or to show that the claimant in any sense undertook a voluntary added peril outside the scope of his employment. In the absence of such evidence there is no room for such a presumption as that on which the learned arbitrator has acted.

Their Lordships ordered that the interlocutor appealed from be affirmed and the appeal dismissed with costs.

Counsel for Appellants—Morton, K.C.—Russell. Agents—W. & J. Burness, W.S., Edinburgh—Beveridge & Company, Westminster.

Counsel for Respondents—Wark, K.C.—Paton. Agents—R. D. C. M'Kechnie, Edinburgh—D. Graham Pole, S.S.C., London.

Wednesday, July 25.

(Before the Earl of Birkenhead, Viscount Finlay, Lord Dunedin, Lord Atkinson, and Lord Shaw.)

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

(In the Court of Session, July 20, 1922, S.C. 723, 59 S.L.R. 520.)

Contract — Termination — Impossibility of Performance — Contract Abrogated by War—Instalment Paid before Outbreak of War—Failure of Consideration—Right to Repetition on Declaration of Peace of Instalment Paid.

Prior to the outbreak of war in 1914 an engineering firm in Scotland entered into a contract with an Austrian shipbuilding company to make and deliver a set of marine engines By the terms of the contract the price was to be paid in instalments, the first instalment being due on the signing of the contract and the remaining ones as the work progressed. All the instalments were to be merely payments on account of the supply of the completed engines, and were not allocated to any particular stage or the completion of any particular part of the work. After the first instalment had been paid war broke out and further performance of the contract became illegal, the foreign company having become an alien enemy. At that date no part of the engines had been constructed. After peace had been declared the shipbuilding company, which had become Italian, brought an action for repetition of the instalment paid. *Held* (*rev.* the judgment of the First Division, *diss.* Lord Mackenzie) that as delivery of the subject of the contract had become impossible in consequence of the outbreak of war the consideration in respect of which payment was made had failed, and that accordingly the pursuers were entitled to repayment of the instalment in question, and appeal *sustained.*

At delivering judgment—

EARL OF BIRKENHEAD—The appellants are appealing against an interlocutor of the First Division of the Court of Session in Scotland, dated 20th July 1922, reversing the interlocutor pronounced by Lord Hunter, the judge who tried the action brought by the appellants as pursuers against the respondents as defenders.

The action was brought for a decree that a contract between the parties dated 4th May 1914 had been abrogated by the outbreak of war and that the appellants were entitled to repayment of a sum of £2310 paid by them to the respondents under the terms of that contract. On 7th July 1921 Lord Hunter found in favour of the appellants, but on appeal the Lords of the First Division recalled his interlocutor and assoilzied the respondents from the conclusions

of the action. The appellants now bring the matter before this House on appeal from the last-mentioned decision. The facts are shortly as follows:—On 4th May 1914 the appellant company, then an Austrian company carrying on a shipbuilding business at Trieste in the Empire of Austria, entered into a written contract whereby the respondents (a British company carrying on business at Port Glasgow) agreed to supply and deliver f.o.b. Port Glasgow, and the appellant company agreed to purchase, one set of triple expansion surface condensing screw engines. The contract made provision for the dimensions and other details and for the date of completion. Clause 7 declared that the whole of the work which from time to time might be in hand should become the property of the appellant company subject to any lien there might be for unpaid money. Clause 9 is in these words—"In consideration of the said contractors" (*i.e.*, the respondents) "supplying the engines and their appurtenances entirely in accordance with the terms of this agreement and the annexed specification, the purchasers" (*i.e.*, the appellant company) "shall pay the sum of £11,550 stg. (say, eleven thousand five hundred and fifty pounds sterling), which shall be paid in manner following," and the clause proceeds to require payment by stated instalments, the first being the sum of £2310 now in question which was made payable on the signing of the contract and was in fact paid on 20th May 1914.

Immediately after the signing of the contract the parties commenced the preliminary work of designing the engines and preparing plans, &c. It would seem that the respondents had obtained or placed orders for materials for the set of engines, which, however, was never made, as on 12th August 1914 the appellant company became alien enemies on the outbreak of war and the contract became thereupon impossible of fulfilment.

It is not necessary to consider the effect of the Treaty of St Germain-en-Laye or of the Treaties of Peace (Austria and Bulgaria) Act 1920 and the Orders in Council made under that Act, for the reason that the appellant company became an Italian company, and its rights are not affected by the Treaty.

In these circumstances your Lordships are called upon to determine the rights of the parties according to the law of Scotland.

Authorities have been cited in support of the proposition that according to the law of England the sum of £2310 so paid is not recoverable; and it has been argued that the law of England is the same as the law of Scotland in that respect. I do not propose to refer to those authorities. The question is as to the law of Scotland, and I desire to say nothing which may in any way fetter opinion if those authorities hereafter come to be reviewed by this House, for none of them are binding upon your Lordships.

In my opinion the appellants are entitled to succeed. The payment was made in consideration of the supply of the set of engines contracted for. These engines were never made, and consequently never supplied, and the contract has been put an end to without the fault of either party. The result is that the appellant company has got nothing in return for the payment of this money. The consideration was entire, for the instalments were all to be merely payments on account of the supply of the completed engines, and were not allocated to any particular stage, or the completion of any particular part, of the work. It was admitted that the whole sum of £11,550, if it had been paid, would have stood on the same footing, and consequently if the respondents' contention were correct they would be entitled to retain the price of machinery which they had not supplied and never would supply.

In order to formulate the rule applicable to this case it is necessary to consider first the Roman law as a source of Scottish law, and secondly the Scottish authorities, which show how far the Roman law applicable to this topic has been received and applied in the law of Scotland.

First, as to the Roman law. This is treated in the Digest and other authoritative texts in connection with the procedure known as *condictio*. This process was available to recover money or things which had been parted with by the owner at such a time as he became entitled to reclaim them. The *condictio* was only a single form of action, but it was grouped or classified in various ways according to the kind of property or according to the *causa* which gave occasion for recourse to the *condictio*, but it is unnecessary to go into the origin and development of this remedy. As expounded in Justinian's Digest the law was as complete and logical as possible, having regard to the jurisprudence and customs of the times and the fact that that law was a long and gradual development. Justinian's legislation was partly formative and partly expressive of that part of the Roman law which in this connection was received into the Scottish system.

The underlying principle of the *condictio* was that a person had received from another some property and that by reason of circumstances existing at the time or arising afterwards it was or became contrary to honesty and fair dealing for the recipient to retain it. The particular case which is in point is the *condictio causa data causa non secuta*. This forms the subject-matter of the Digest, book xii, title 4. In the Code the corresponding title (book iv, title 6) bears the rubric *De condictione ob causam datorum*. The expression "*condictio causa data causa non secuta*" is apparently an invention of Justinian's jurists, for it is not to be found elsewhere, and an exact translation is not easy. The difficulties to which the phrase gives rise led the late Mr Roby to substitute in his Roman Private Law (vol. ii, p. 77) the expression "*condictio ob rem dati re non secuta.*" It is, however, sufficient for my present purposes to translate the expression by the words "action to recover something given for a consideration which has failed."

In the text of the title a number of instances is cited where the donor was entitled to this remedy if he changed his mind before it was too late. In such a case the *condictio* was available, and accordingly the matter is logically included, and the texts upon it have given rise to very difficult problems. Such instances arise in connection with donations. For a case such as the present they are not relevant, and I accordingly disregard them.

Apart from the last-mentioned instances where the donor was allowed a *locus pœnitentiæ*, the *condictio causa data* was competent where a person who had given something for a future lawful purpose which had not been realised sought to recover from the recipient what the latter had received. As a rule the pursuer in such a case had given a present consideration for a future performance, but the *condictio* was also available in other matters, such as the giving of a sum of money to form a dowry on the occasion of a marriage then in contemplation but afterwards broken off.

The rule may, I think, be fairly stated thus—A person who had given to another any money or other property for a purpose which had failed could recover what he had given, subject to exception in cases where there had been no fault on the recipient's part and he had not been enriched thereby.

If the recipient had been enriched, then he would, if the purpose failed and he retained the property, be acting unjustly, and consequently he was under an obligation to return it. It was open to him to show, not merely that he had not been enriched at all, but also if such were the fact that though enriched he had not benefited to the full value of the property. Such would be the case if the property had been lost or damaged without blame attaching to him. Such being the Roman law as embodied in the Corpus Juris Civilis, it now becomes necessary to examine the application of the rule in Scotland.

Lord Stair's Institutes (book i, tit. 7, par. 7, p. 71 of 4th edition by Brodie) states the rule in these terms:—"The duty of restitution extendeth to those things *quæ cadunt in non causam*, which, coming warrantably to our hands and without any paction of restitution, yet if the cause cease by which they become ours, there superveneth the obligation of restitution of them; whence are the condictions in law, *sine cuasa* and *causa data causa non secuta*, which have this natural ground and of which there are innumerable instances; as all things that become in the possession of either party in contemplation of marriage, the marriage, which is the cause, failing to be accomplished, the interest of either party ceaseth, and either must restore."

This statement is adopted by Bankton (book i, title 8, p. 215) and by Erskine. The latter, however, added a sentence (book iii, title 1, par. 10) which has caused much discussion and difficulty in this case. He wrote—"If it has become impossible that the cause of giving should exist by any accident not imputable to the receiver, no action lies against him, unless he hath put off performing it, when it was in his power to perform, before that accident happened."

He cited as authority Digest xii, tit. 4, l, 5, par. 4. I have had the advantage of reading Lord Shaw's explanation of this obscure sentence. It may well be that he is right, but I do not consider it incumbent upon this House to determine exactly what Erskine had in his mind, for it is beyond doubt that he could not have intended to controvert Lord Stair's statement of the law which he had wholly adopted in the sentences immediately preceding.

In Bell's Principles (sec. 530) the general rule is set out in agreement with the three earlier writers without the proviso or qualification which Erskine added. The law is laid down in these words—"One who by mistake has received anything (as from a carrier) is liable to restitution; and so one to whom a thing has been transferred, or an obligation undertaken and fulfilled, on a consideration which has failed, is also liable to restitution under the condiction *causa data, causa non secuta.*"

I do not find it necessary to discuss the earlier cases which have been cited in argument, for in *Watson* v. *Shankland* (10 Court of Sess. Cas. (3rd series), Macpherson 142) Lord President Inglis delivered a celebrated judgment which has since been regarded as an authoritative statement of the law. He said (at p. 152)—"The general principles of law applicable to the contract of affreightment are not essentially different from those applicable to other similar contracts, such as contracts of land carriage or building contracts, or any others in which one party agrees to pay a certain price as the return for materials furnished or work done or services rendered by the other party. No doubt maritime contracts are *juris gentium*," and he then deals with special meanings placed upon words and phrases by mercantile custom, and continues—"There is no rule of the civil law, as adopted into all modern municipal codes and systems, better understood than this, that if money is advanced by one party to a mutual contract on the condition and stipulation that something shall afterwards be paid or performed by the other party, and the latter party fails in performing his part of the contract, the former is entitled to repayment of his advance on the ground of failure of consideration. In the Roman system the demand for repayment took the form of a *condictio causa data, causa non secuta*, or a *condictio sine causa*, or a *condictio indebiti*, according to the particular circumstances. In our own practice these remedies are represented by the action of restitution and the action of repetition. And in all systems of jurisprudence there must be similar remedies, for the rule which they are intended to enforce is of universal application in mutual contracts. If a person contracts to build me a house and stipulates that I shall advance him a certain portion of the price before he begins to bring the

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

The judgment in that case was affirmed with variations—see L.R., 2 Sc. & Div. App, 304. Lord Dewar in a recent case similar to the present applied the doctrine in the same sense as Lord President Inglis — see *Davis* v. *Clyde Shipbuilding and Engineering Company*, (1917) 1 S.L.T. 297.

So far as I am able to form an opinion, neither the Roman law, nor before the recent war the Scottish law, had considered expressly how far the principles which I have examined apply to a contract which has been abrogated by the outbreak of war. In the present instance neither party was in fault, nor was there any object in existence in which the property could pass. The contract was not abrogated *ab initio* and consequently there can be no question of restitution *in integrum*. The only alternatives are either that the parties are left in the position in which they were at the outbreak of war, or that the party who paid and has received no benefit is entitled to some measure of relief. The remedy now sought is not an action on the contract, but is independent of such an action. On principle I cannot see any reason for holding that the outbreak of war leads to any result different from that which follows, as I have shown, from any other act or event beyond the control of the parties. There has been a payment on account of the supplying of the complete set of engines, not a payment of any particular part or stage, so that there was no allocation to any specific thing to be done or made. The set of engines has not been supplied, and for the failure to supply no one is to blame. There has been in fact a *causa non secuta*. Neither on principle nor on authority can I find any sound reason for holding that there is any exception to the general rule of such a nature as to avail the respondents. On the contrary, to apply the general rule to the circumstances of this case is in my opinion in accordance with the true principles of Scottish law, for any other result would leave the respondents with money paid to them for a purpose which has failed.

For these reasons I move that the interlocutor appealed against be recalled and the interlocutor of Lord Hunter restored, and that the respondents pay the costs.

VISCOUNT FINLAY — [*Read by the Earl of Birkenhead*] — The first appellant, an Austrian shipbuilding company, entered into a contract with the respondents, a Scottish engineering company, by which the respondents were to manufacture and supply a set of marine engines to be delivered f.o.b. at Port Glasgow within twelve months. The contract price was £11,550, to be paid as follows:—"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." The contract was made on the 4th May 1914. On the 12th August 1914 war broke out between Great Britain and Austria. At that time the respondents had received payment according to contract of the first instalment of the contract price amounting to £2310 due on the signing of the contract. By the outbreak of war the further prosecution of the contract became illegal and impossible. Before 12th August the respondents had done a good deal of preparatory work in making general and detailed plans and calculations and detailed specifications, in ordering material, and in making certain modifications and alterations desired by the appellants, but the construction of the boiler had not been begun.

On the 18th February 1921, after the conclusion of peace, the appellants brought an action against the respondents for the recovery of the £2310. The case came before Lord Hunter as Lord Ordinary, and he by an interlocutor of 7th July 1921 found that the contract was abrogated by the war, and that the appellants were entitled to repayment of the £2310 by way of restitution (subject to respondents' counter-claim for work done) on the principle of the *condictio causa data causa non secuta* of the Roman law. The case was taken on appeal before the First Division. The decision of the Lord Ordinary was reversed, the Lord President (Lord Clyde), Lord Skerrington, and Lord Cullen being of opinion that the Lord Ordinary's interlocutor should be recalled and the defenders assoilzied. Lord Mackenzie dissented, being of opinion that the judgment of the Lord Ordinary ought to be affirmed on the ground that there had been failure of the consideration upon which the money was paid.

Your Lordships have had the advantage of a very interesting and learned argument upon the law of Rome, as well as the laws of Scotland and of England. The appellants contend that they had a right by the law of Scotland to *restitutio*, the further performance of the contract having become impossible. They did not dispute that if the question fell to be decided by the law of England the respondents would have been entitled to keep the money, but challenged the doctrine of the English law on this point as being at variance with the Roman law, on which the law of Scotland is founded, and with the law of Scotland itself.

As regards the law of England the statement of principle to be found in the judgment of Collins, M.R., in *Chandler* v. *Webster* (1904, 1 K.B., at p. 499) was relied on by the respondents. He says — "That

where, from causes outside the volition of the parties, something which was the basis of or essential to the fulfilment of the contract has become impossible, so that from the time when the fact of that impossibility has been ascertained, the contract can no further be performed by either party, it remains a perfectly good contract up to that point, and everything previously done in pursuance of it must be treated as rightly done, but the parties are both discharged from further performance of it. If the effect were that the contract were wiped out altogether, no doubt the result would be that money paid under it would have to be repaid as on a failure of consideration. But that is not the effect of the doctrine; it only releases the parties from further performance of the contract. Therefore the doctrine of failure of consideration does not apply. The rule adopted by the courts in such cases is, I think, to some extent an arbitrary one, the reason for its adoption being that it is really impossible in such cases to work out with any certainty what the rights of the parties in the event which has happened should be. Time has elapsed and the position of both parties may have been more or less altered, and it is impossible to adjust or ascertain the rights of the parties with exactitude. That being so the law treats everything that has already been done in pursuance of the contract as validly done, but relieves the parties of further responsibility under it."

The point is very clearly put by Romer, L.J., at page 501 of the report from which I have just been citing. He says—"Where there is an agreement which is based on the assumption by both parties that a certain event will in the future take place, and that event is the foundation of the contract, and through no default by either party and owing to circumstances which were not in the contemplation of the parties when the agreement was made, it happens that before the time fixed for that event it is ascertained that it cannot take place, the parties thenceforth are both free from any subsequent obligation cast upon them by the agreement; but except in cases where the contract can be treated as rescinded *ab initio*, any payment previously made and any legal right previously accrued according to the terms of the agreement will not be disturbed."

The case of *Chandler* v. *Webster* was one of many cases which arose out of the postponement of the coronation of King Edward VII, and questions have been raised as to some of these cases into which it would be out of place at present to enter. The principle of English law was re-stated with great clearness by Lord Parmoor in the case of *French Marine* v. *Compagnie Napolitaine, &c.* (1921, 27 Commercial Cases, at p. 94). This statement forms no part of the judgment of the House of Lords in that case, but there is no doubt that the principle has been repeatedly acted on in the Court of Appeal.

The question, however, in the present case is as to the law not of England but of Scotland. The appellants contend that the doctrine of *restitutio* forms part of the law of Scotland, and that the principles of the civil law on this subject are by the law of Scotland applicable to the present case. They maintain that on the one hand the instalment paid must be accounted for to the appellants, as the contract was frustrated, while on the other hand, the respondents are entitled to retain so much of it as is adequate to compensate them for the expense they incurred and the work they did in preparing for the construction of the boiler. Though there was no *lucratio* accruing to the appellants thereby, the doctrine of *restitutio* involves, it may be said, that the respondents should not be out of pocket by their part performance of the contract.

During the argument the appellants appealed to the *locus classicus* in Lord Stair's Institutions, book i., tit. 7—"VII. *Sixthly*, The duty of restitution extendeth to those things *quæ cadunt in non causam* which coming warrantably to our hands, and without any paction of restitution, yet if the cause cease by which they become ours there superveneth the obligation of restitution of them; whence are the condictions in law *sine causa* and *causa data causa non secuta*, which have this natural ground, and of which there are innumerable instances. . . ."

The appellants also referred to Ersk. Inst. iii, 1, 10, where it is laid down that things given in the special view of a certain event must, if the event in the view of which they were given should not afterwards exist, be restored. Mr Erskine adds—"If it has become impossible that the cause of giving should exist by any accident not imputable to the receiver no action lies against him unless he had put off performing it when it was in his power to perform before that accident happened." The authority cited for this proposition is Digest xii., tit. 4, 1, 5, s. 4. The appellants appear to have felt some apprehensions as to the effect of this sentence in Erskine. They suggest that it must be read by the light of the authority cited for it, and the other passages in the Digest, book xii, tit. 4, but it seems to me difficult to find a satisfactory explanation of the language of this sentence. There was some discussion at the Bar as to what was meant by the references in the Digest, under this title, to a *jus pœnitentiæ*. I find that the nature of this right, now obsolete, is fully explained in Mackeldey's Systema Juris Romani Hodie Usitati, ed. 1847, s. 409, and in M. Ortolan's Explication Historique des Instituts, ed. 1863, vol. iii, pp. 337-8, par. 1600.

The appellants also cited Bell's Prins. s. 530, as to the liability to restitution where a thing had been transferred on a consideration which failed and to the general statement of the doctrine of restitution in Bankton, p. 215.

A good many passages from the Digest, book xii. tit. 4, and tit. 7, were cited in the course of the appellants' argument, and are set out in the appellants' case.

Similar questions have often arisen as to prepayment of freight. Our attention was particularly drawn to the case of *Leitch* v. *Wilson* (1868, 7 Macph. 150) and to the case

of *Watson* v. *Shankland* (1871, 10 Macph. 142 in the Court of Session, and in the House of Lords 11 Macph. (H. of L.) 51, and Law Reports, 2 Scotch Appeals, 304), and especially to the judgment of the Lord President in the latter case and to the singularly lucid judgments of Lord Neaves in both of them. There is a difference between the law of Scotland and that of England as to the right to have prepaid freight returned in the absence of expressions in the instrument from which the intentions of the parties on this subject may be inferred.

I do not think it would serve any useful purpose to discuss such cases as *Cutler* v. *Littleton* (1711, M. 583), the circumstances of which are very remote from the present.

In my opinion the result of the authorities is that the doctrine of English law on this subject as expounded in the judgments of the Court of Appeal in England is at variance with the law of Scotland. It may be said that the English view provides a rule which, while perhaps rough and ready, is very convenient in practice and works fairly where the money is paid by instalments as the work progresses. But on the other hand the Scottish doctrine of *restitutio* ascertains more accurately the rights of the parties respectively and the results of the English view might be startling if the whole contract price had been paid in advance. The question, however, is not as to the comparative advantages of the two rules of jurisprudence. The only point we have to determine is which of them is in accordance with the law of Scotland. I cannot find that the English doctrine has ever been incorporated with the law of Scotland. It would be unfortunate that in matters of this kind, which may, as here, affect foreigners, the result should be different in the two parts of Great Britain. But we must apply the law of Scotland in a Scottish case, and in my opinion the conclusion arrived at by the Lord Ordinary and by Lord Mackenzie was in conformity with the law of Scotland.

I think the decision of the Inner House should be recalled and that of the Lord Ordinary restored.

LORD ATKINSON—I concur in the judgments that have been already delivered, and I am about to read a judgment prepared by Lord Dunedin (who is unable to be present) with which I also concur.

LORD DUNEDIN—[*Read by Lord Atkinson*]—Before preparing the opinion I am about to deliver I had the great advantage of perusing the opinion just delivered by Viscount Finlay and that prepared by Lord Shaw. These opinions, with which in the result I agree, absolve me from delaying your Lordships by repetition of what has been well said by others. Viscount Finlay has given the facts and I need not recapitulate them. Lord Shaw has traced with great precision and accuracy, if I may respectfully say so, the origin of the doctrine in the Roman law to which the appellants appeal. After all, however, the Roman law though interesting is only of service as showing the foundation on which the Scotch law rests. The real question must always be what is the law of Scotland. Let me therefore first say a word on the Scottish authorities. The *locus classicus* is the citation from Stair set out by Viscount Finlay. Keeping chronological order we next have Bankton, who is to the same effect. Then comes Erskine, who states the general proposition in terms almost identical with the words of Stair, but appends a qualification on which the respondents not unnaturally found—"If it has become impossible that the cause of giving should exist by any accident not imputable to the receiver no action lies against him unless he hath put off performing it when it was in his power to perform before that accident happened." As authority he cites a passage of the Digest. We were favoured with a learned argument by Mr Normand which in effect came to this, that if you look narrowly at the passage of the Digest cited you will come to the conclusion that Erskine thinking of particular and indeed peculiar instances expressed a qualification appropriate to them in terms too general. Lord Shaw has hazarded another explanation of his own, ingenious indeed, but which I am bound to confess, though it gives me the key to the mind of my noble and learned friend, leaves me in doubt as to that of Erskine. I therefore reluctantly remain in doubt as to what Erskine exactly meant when he penned that sentence. But I permit myself two remarks. The first is that when he wrote his Principles he expressed the general doctrine as put by Stair without any qualification, Prin. iii, 1, 5. The second is that I am clearly of opinion that the qualification must be taken in some limited sense or it is erroneous. For if taken literally according to its full meaning it would really for practical purposes annihilate the general doctrine. Take the very first instance which both Stair and Erskine put in the forefront of example—a sum given in contemplation of marriage. Suppose a friend gives to an intending bridegroom a sum of money for the purpose of settlement on the marriage. The lady dies or jilts him. For neither these events is he responsible. Can it be supposed that he is to keep the money unless it were possible to turn the tables on him by showing that he had been guilty of undue procrastination in the calling of his banns?

And then last comes George Joseph Bell, who unhesitatingly adopts the dictum of Stair without qualification. These citations exhaust the institutional writers. When we come to judicial exposition we have the well-known passage of Lord President Inglis' judgment in *Watson* against *Shankland*. This has been universally looked upon since its date as expressing the law of Scotland—"There is no rule of the civil law, as adopted into all modern municipal codes and systems, better understood than this—that if money is advanced by one party to a mutual contract, on the condition and stipulation that something shall be afterwards paid or performed by the other party, and the latter party fails in performing his part of the contract, the former is entitled to repayment of his

advance on the ground of failure of consideration. In the Roman system the demand for repayment took the form of a *condictio causa data causa non secuta*, or a *condictio sine causa*, or a *condictio indebiti*, according to the particular circumstances. In our own practice these remedies are represented by the action of restitution and the action of repetition. And in all systems of jurisprudence there must be similar remedies, for the rule which they are intended to enforce is of universal application in mutual contracts. If a person contract to build me a house and stipulate that I should advance him a certain portion of the price before he begins to bring his materials to the ground or to perform any part of the work, the money so advanced may certainly be recovered back if he never performs any part or any available part of his contract. No doubt if he performs a part and then fail in completing the contract I shall be bound in equity to allow him credit to the extent to which I am *lucratus* by his materials and labour but no further, and if I am not *lucratus* at all I shall be entitled to repetition of the whole advance, however great his expenditure and consequent loss may have been."

It follows from this that if there is anything well settled in the law of Scotland it is that one of the forms of the action of repetition is *condictio causa data causa non secuta*. I forbear to criticise the Latinity as the meaning is plain enough. And it is equally plain that this doctrine is applied to contracts as well as to prestations which have their origin in donation and not in contract. The application to the facts of the present case seems equally clear. The appellants paid £2310 in order to get engines. They did not get the engines, therefore they ask for the £2310 back. It is not breach of contract. If it were they would be entitled not only to the £2310 but to damages as well. It is a claim which arises in connection with the contract but it is not founded upon the contract.

What then is the argument on the other side? It is twofold. First, it may be summarised as the law of the Coronation cases. Secondly, it is based upon what has been decided by your Lordships' House, that when a contract has been rendered impossible of performance owing to the party to it becoming an alien enemy, then the contract itself is not avoided—it only becomes incapable of future performance but accrued rights remain.

First, as to the Coronation cases. None of these cases reached your Lordships' House, and it has been mooted that some at least of them were wrongly decided. I do not propose to consider any such question. Perhaps some day I may have to do so, but for the moment, sitting as a judge of Scottish law alone, I assume they were rightly decided. I can, however, confidently affirm that some of them at least would have been decided otherwise in Scotland. Let me take as an example *Chandler* v. *Webster*. The facts are simple. A house owner let a window for seats to view the Coronation procession. £141 was contracted to be paid before the date of the procession. The procession did not take place. £100 had been paid, leaving £41 still unpaid. The parties mutually sued—the house owner to get the £41, the taker of the seats to get repayment of the £100 and dismissal of the suit for the £41. The house owner was successful on both points. Now, of course, that result might be reached if the contract had been construed as a contract to take a window for seats on a certain day, the taker trusting to his own information to satisfy himself that if he had these seats on a certain day he would see a Coronation procession. But that was not the view of the contract taken by the Court. The Court held that the contract was for seats to view the procession. If that were so, then according to Scottish law the £100 ought to have been returned and the £41 found not to be due.

I cannot help thinking that the angle of view, if I may so phrase it, from which an English or a Scotch judge would look at such a question is different, and that the cause is to be sought in the reluctance of the English law to order the repayment of money once paid. I do not enlarge on the topic, for I am not at all concerned to criticise English law. But if anyone will take the trouble to peruse the very able and exhaustive opinion delivered by Lord Sumner in the *Birkbeck Bank* case (*Sinclair* v. *Brougham*, [1914] App. Cas. 398) on the limits of the action for money had and received, and will also, if I may venture to say it, read my own opinion in the same case as to how the same problem is attacked in systems founded on the Roman law, they will understand what I mean. For the purpose of this case it is sufficient to say, as I unhesitatingly do, that *Chandler* v. *Webster*, if it had been tried in Scotland, would have been decided the other way.

The other argument is, at first sight, more formidable, for it is founded on what has been said in your Lordships' House. There is undoubtedly ample scope for this proposition that when owing to the war the further continuance of a contract became impossible, the result was not to sweep the contract out of existence, but simply to prevent further performance, while at the same time accrued rights remain. But then comes the question, what is an accrued right—or, to put it otherwise, does that proposition at all prevent the application of the remedy given not under the contract, or because of breach of the contract inferring damages, but in respect of the equitable (of course I am not using the word in the technical English sense) doctrine of *condictio causa data causa non secuta?* I think it does not, nor do I think that the true sense of accrued means simply all that may have happened. And that brings me to the very short point on which in my view the whole case turns. Was the £2310 paid in respect of the signing of the contract? If it were, then it cannot be said that there was a *causa non secuta*. In other words, if the £2310 had been conditioned to be paid *for* signing the contract,

my opinion would have been different. But it is not so. It is to be paid *on* signing the contract. It had, indeed, nó separate existence. It is only an instalment of the total price which is the consideration for the total engine. There is no splitting of the consideration.

Two other remarks I should make before I conclude. There was no passing of the property at certain stages—indeed, there never was in existence a property to pass. So that all cases which turn on *rei interitus* are beside the mark.

Mr Macmillan seemed much troubled with the idea that there was no restitution *in integrum*. But restitution *in integrum* does not enter into the question. That is the price for being allowed to set aside a contract. Here, as I have already said more than once, the contract is left standing; the doctrine of repetition works independently of it.

LORD SHAW—[*Read by the Earl of Birkenhead*]—In the course of the judicial pronouncements in this case there have been repeated citations made from the contract between these parties, and the facts have been enumerated more than once. I am very unwilling to add anything which I can avoid to these particulars, none of which stand in question. My narrative of these can be short accordingly. But the important citations as to the legal principles involved may have to be given or even repeated with more fulness.

By the agreement made between the parties on 4th May 1914 the respondents agreed to supply and deliver f.o.b. Port Glasgow, and the appellants agreed to purchase, a set of engines. By Article 7 of the contract the whole of the work which from time to time might be in hand was to become the absolute property of the purchasers, subject only to the lien for unpaid money in favour of the contractors. Article 9 already quoted is, of course, the important clause in the contract. By it the price to be paid was fixed at £11,550 sterling. This price was to be paid in five different instalments, beginning with the signing of the contract and ending with the satisfactory trials of the engines and boilers after reception.

It is the first of these instalments which alone is in question, namely, the sum of £2310, being 20 per cent. on the £11,550. The contract was dated on the 4th May, on which date the 20 per cent. was paid.

The parties had had previous business relations, and it appears that the engines contracted for were substantially a repetition of a former order. It was necessary, however, to have some drawings made and certain preparatory work done, and correspondence ensued. There are items of cost naturally arising from the doing of this and they are relatively small. But when that is said, then the whole operations performed by the contractors have been described.

The important fact of the case is that the engines were never made, either in whole or in part, and therefore no *res* came into existence. The reason for this was that on 12th August 1914 war was declared between Great Britain and Austria, and the case has been treated before your Lordships' House, as in the Courts below, on the view that the appellants on that date became alien enemies, and that, as Lord Hunter put it, "the contract became *eo ipso* abrogated, and avoided, and dissolved."

The question in the case is, what is to become of the £2310? which was given for something but for which nothing was got in return. Is it to remain in the pockets of the builders who built nothing, or is it to be given back to the purchasers who got nothing?

I cannot avoid feeling that any Scotch judge would have decided this case in favour of the appellants on principles well known to the Roman law, and also for at least over two centuries embodied in the law of Scotland, had it not been for the intrusion of ideas derived from English law and from principles which are neither Scotch nor Roman, and which, as I shall show, are viewed with uncertainty even in England itself.

I think the law of Rome was accurately stated to the House by Mr Normand. But before I deal with the Roman texts I desire to make it clear that in my opinion this is not a case in which any argument is possible as to whether the Roman and Scotch law should apply to it on account of some specialty in the case itself. On the contrary this is a plain and typical case of restitution. The thing which was to spring into being never existed, and it was that thing in respect of which alone the part payment of the price was made. The language of section 9 of the contract is perfectly general—"In consideration of the said contractors supplying the engines and their appurtenances entirely in accordance with the terms of this agreement the purchasers shall pay the price of £11,550, which shall be paid in the manner following:—By cash in London, 20 per cent. on signing contract," the other percentages following as already described. There is no splitting up of consideration. The price is to be paid "in consideration of the engines being supplied," and the 20 per cent. on signing the contract is one of the items impressed within that general expression. The consideration as a whole stands with reference to the price and every part of the price.

It is an admitted fact in the case that that consideration has entirely failed. Therefore this, as I say, would be a typical case of restitution under the Roman law and one for the application of the maxim *causa data causa non secuta*. The *condictio* under that head would have been in my humble opinion plainly applicable. If not applicable to this and to similar cases of outstanding simplicity, then the whole chapter of the Roman law devoted to that *condictio* need never have been written.

I observe from the judgments in the Court below that some comment is made upon the language employed for the title, and so far as words go it is admitted by scholars not to be entirely apt. I am happy

to cite in connection with this topic the views of that great scholar and Latinist Mr Roby. He deals in his observations in the fifth chapter of his "Roman Private Law," book v, chapter 3, on *Condictiones* with this one, which he thus names—he calls it the "*Condictio ob rem dati, re non secuta*," and he explains that the name which he has given is taken from Celsus and Paul. He identifies it, however, of course with the rubric of Digest xii, 4, of which he says—"In the rubric of D. xii, 4, this is called '*Condictio causa data causa non secuta*'—a phrase he says not elsewhere found and difficult to explain." In Cod. Iv, 6, the rubric "*De condictio ob causam datorum*" points to the meaning that the action is for recovery of what has been given for a purpose which has failed.

And upon the substance of the matter I desire to quote the quite remarkable exposition of the condiction which Mr Roby gives —remarkable because it expresses not only the true foundation but almost the precise limits and extent of the principle involved, and it does so in language which is according to my view entirely consistent with the development of the doctrine in the law of Scotland. His language is as follows:—"1. *Condictio ob rem dati, re non secuta, i.e.*, a condiction for something handed over for a purpose which has failed, *e.g.*, for the emancipation of a son, or manumission of a slave, or for securing a dowry, or settlement of a law suit, or as the condition of acceptance of a legacy or inheritance. If the son or slave is not freed, or the marriage does not take place, or the suit is pressed on, or the inheritance is not accepted, or the will is upset, the money or other property passed can be recovered as a rule subject to exception in cases where there is no fault on the recipient's part and he has not in fact been enriched by the transfer."

The last clause is also in my view of the principle of the law of Scotland correct. Unjust enrichment, *i.e.*, enrichment by reason of the thing being received and the consideration and return failing—the principle of preventing that underlies as a reason the doctrine of restitution.

The actual text in which this condiction—"to recover a thing given for a consideration where the consideration fails"—is treated with much analytical elaboration and citation of illustrative cases in Digest xii, title 4. Among the illustrations occur cases where the considerations were given purely as donations which not having been implemented could be recalled. They have not been followed out to the stage of performance, such as money supplied for the enfranchisement of a favoured slave but still unexpended. And in such cases the money can be claimed back on the double ground of—(1) the consideration (enfranchisement) not having been carried through (the slave may have meantime died), or (2) the donor may have seen cause to change his mind and his penitentia, intimated to the donee to whom the money had been given to procure the manumission—operates with the same result—again the cause is *non secuta*. This latter case, I incline to think, has caused most of the discussion in the books, as at first sight *locus penitentiæ* seems foreign to the topic. But so far as the first ground is concerned that is fundamental, and no question or doubt of it can be raised in Roman law.

This appears over and over again as the basis of the doctrine. That basis is simply honesty. Good illustrations of this occur in title "*De Condictione sine Causa*" of the same book xii. I cite in particular two passages, one from Ulpian and one from Africanus. Says Ulpian, section 2—"*Sive ab initio sine causa promissum est, sive fuit causa promittendi, quæ finita est, vel secuta non est, dicendum est, condictioni locum fore.*" Section 3—"*Constat, id demum posse condici alicui quod vel non ex justa causa ad eum pervenit vel redit ad non justam causam.*" Whether, in short, says the law, the thing was not honestly got or is not honestly kept, in either case it must be restored.

Africanus, in title 4 of the same book, is quite as clear and comprehensive—"*Nihil refert, utrumne ab initio sine causa quid datum sit, an causa propter quam datam sit secuta non sit.*" In short, if the consideration given has failed, it is just the same as if the thing was given *sine causa* altogether, and restitution must take place.

But even should my interpretation of these texts be wrong, I wish to say that it is plainly the interpretation which the law of Scotland has adopted for centuries. Stair mentions the doctrine thus—(i, 7, 1) —"The duty of restitution extendeth to those things *quæ cadunt in non causam* which coming warrantably to our hands and without any paction of restitution, yet if the cause cease by which they become ours, there superveneth the obligation of restitution of them; whence are the condictions in law *sine causa* and *causa data, causa non secuta*, which have this natural ground, and of which there are innumerable instances; as all things that become in the possession of either party in contemplation of marriage, the marriage, which is the cause, failing to be accomplished, the interest of either party ceaseth, and either must restore."

Bankton in one sentence echoes this, and the last clause, which I cite, is observable—"Where the cause of the delivery ceases the thing must be restored to the giver; hence were introduced by the law the several condictions *sine causa, causa data non secuta*, &c., as things given in contemplation of marriage which does not follow; a bond given in hopes of getting the money which is not delivered, and *every deed or grant that depends upon mutual consideration, not given or performed, must be restored to the granters.*"

Erskine iii, 1, 10, treats the topic thus—"Under this class may also be reckoned those obligations which arise from the natural duty of restitution. In consequence of this, whatever comes into our power or possession which belongs to another, without an intention in the owner of making a present of it, ought to be re-

stored to him. . . From this duty of restitution it ariseth that things given in the special view of a certain event, *ex. gr.*, in the contemplation of marriage, must, if the event in the view of which they were given shall not afterwards exist, be restored by the grantee, who may be sued for restitution by personal action, styled in the Roman law *Condictio causa data, causa non secuta*—L. 3, 2, &c., *De cond. caus. dat.*"

Then a sentence follows which has caused difficulty in the Courts below, and which is not very clear. It is—"If it has become impossible that the cause of giving should exist by any accident not imputable to the receiver, no action lies against him, unless he hath put off performing it when it was in his power to perform, before that accident happened—L. 5, 4, cod. tit."

I cannot myself see that it negatives the adoption either of the law of Rome as sketched or of the interpretation thereof by Stair and Bankton as given. My conjecture is that Erskine in the sentence under review was dealing with the situation not of giving the thing but of giving it back, and that his view was that if there was an impediment to giving it back on account of its having disappeared in the meantime, without any fault upon the part of the receiver, then a different principle might have to apply, because one might have to take into account that the reason for giving it back could not be accomplished because it itself had been withdrawn from the province of restoration by some supervening accident for which the holder, so to speak, for the time being could not be charged with responsibility. The general doctrine as stated in the major passage in Erskine is, of course, however, in entire accord with that of Stair and Bankton.

And then Bell in his usual concise and compendious fashion puts the law plainly thus in his Principles (sec. 530)—"Goods got by mistake, &c. One who by mistake has received anything (as from a carrier) is liable to restitution; and so one to whom a thing has been transferred, or an obligation undertaken and fulfilled on a consideration which has failed, is also liable to restitution under the condition *causa data, causa non secuta*" (*a*). So far for the institutional writers.

Upon the decisions the old and curious apprenticeship case may be noted as recognising in somewhat complex circumstances the true principle of the doctrine of restitution. The law of Scotland, as indeed the law of Rome, anxiously endeavoured to disentangle a complex situation so as to make restitution exactly fit the case, and restore both parties as nearly as possible to the position which they would have occupied before the unexpected interruption or calamity occurred. This principle has been long established by decided cases.

I cite, without giving the quaint details mentioned in other reports, *Ogilvy* v. *Hume* (decided in February 1683) as set out in 2 Brown's Supplement, p. 34. It appears thus—"In a pursuit at the instance of the representatives of an apothecary for payment of a bond for apprentice fee, granted to the defunct by his apprentice, it was alleged that the apprentice having been bound for five years his master died after he had served three years, a proportion of the fee ought to be retained as *causa data non secuta*. Answered for the pursuers that after three years, in which time the apprentice had sufficiently learned his trade, the want of his future service was only prejudicial to the master. The Lords allowed retention of a proportion, which was modified." But I am unwilling to labour these cases because the law of Scotland may be said for over half-a-century to have stood expounded with unquestioned authority by Lord President Inglis in *Watson & Company* against *Shankland*. I am sorry to make repetition, but I think it necessary to cite to the House again the text of that powerful exposition on the question. Until this case occurred the principle laid down by that most distinguished judge has never been doubted if it has been doubted now. I observe that Lord Dewar in a comparatively recent case of *Davis and Primrose* v. *The Clyde Shipbuilding Company* (1917, 1 S.L.T. 297) had to apply the doctrine, which he did exactly in the sense used by the great Lord President.

As reported in 10 Macpherson, p. 152, he explained that although the particular question arose under a charter-party, its settlement depended on principles with a much wider range—"The general principles of law applicable to the contract of affreightment are not essentially different from those applicable to other similar contracts, such as contracts of land carriage, or building contracts, or any others in which one party agrees to pay a certain price as the return for materials furnished or work done or services rendered by the other party. No doubt maritime contracts are *juris gentium*, and if the custom of the mercantile community of nations has impressed on certain words or phrases in a contract of affreightment a special meaning and effect different from what they would bear if construed according to the ordinary legal rules of construction, the consuetudinary rule of the maritime law must prevail. But to establish such a rule of maritime law there must be the general consent of the maritime nations of the world expressed in the prevailing practice and understanding of the traders of these nations. There is no rule of the civil law, as adopted into all modern municipal codes and systems, better understood than this—that if money is advanced by one party to a mutual contract on the condition and stipulation that something shall be afterwards paid or performed by the other party, and the latter party fails in performing his part of the contract, the former is entitled to repayment of his advance on the ground of failure of consideration. In the Roman system the demand for repayment took the form of a *condictio causa data, causa non secuta*, or a *condictio sine causa* or a *condictio indebiti*, according to the particular circumstances. In our own practice these remedies are represented by the action of restitution

and the action of repetition. And in all systems of jurisprudence there must be similar remedies, for the rule which they are intended to enforce is of universal application in mutual contracts." It is true that since that judgment was pronounced a good deal has happened in England to make or to widen the breach between the English practice from that of Scotland and other nations. The particular instance of divergence in regard to this principle was as to advance of freight. On which subject the Lord President referred to the practice of "all the nations of the trading world with the exception of England."

The divergence of law may be said to have culminated in what are known as the Coronation cases to which your Lordships have referred. No doubt the occasion will arise when that chapter of English law will have to be considered in this House, and in this Scotch case I do not feel it any part of my task to make a definite pronouncement upon that chapter. But I may venture by a simple illustration to make the divergence clear.

Upon the facts of this case only 20 per cent. of the purchase price was paid as part of the consideration for delivery of the engines to be supplied. But suppose the whole purchase price £11,550 had been paid at the signing of the contract, then the war breaks out, and the engines are neither supplied nor even begun to be made. In that situation, as the able counsel for the respondent admitted, taking his stand on the English cases, the very same result should and would follow. The builder would retain as his own the whole price of an article which he never supplied and would never supply. Counsel were right, the "something for nothing" doctrine goes the whole length. This result under other systems of jurisprudence might be viewed as monstrous, but in England, it was contended, this is the law and the principle is worthy of acceptance in Scotland—such is the argument.

I am not surprised that there is in high legal quarters a feeling both of uneasiness and of disrelish as to the English rule and that that feeling has found expression. I cite, for instance, the language of Sir Frederick Pollock in his work on Contracts (p. 440), in which, summing up the English decisions, he observes—"The contract is not avoided when the failure of the condition assumed as its foundation is ascertained, but all outstanding obligations under it, and those only, are discharged—that is, payments already made cannot be recovered back, and any payment actually accrued due is still recoverable (*y*). Only the House of Lords can review these decisions, but they are not universally approved in the profession (*z*)." In *Chandler* v. *Webster* (1904, 1 K.B. 499) Collins (M.R.) made a clear exposition, which may be considered rather in the nature of an explanation than a reason for the English position, in the following words—"Where, from causes outside the volition of the parties, something which was the basis of, or essential to the fulfilment of, the contract has become impossible, so that from the time when the fact of that impossibility has been ascertained the contract can no further be performed by either party, it remains a perfectly good contract up to that point, and everything previously done in pursuance of it must be treated as rightly done, but the parties are both discharged from further performance of it. If the effect were that the contract were wiped out altogether, no doubt the result would be that money paid under it would have to be repaid as on a failure of consideration. But that is not the effect of the doctrine; it only releases the parties from further performance of the contract. Therefore the doctrine of failure of consideration does not apply. The rule adopted by the Courts in such cases is, I think, to some extent an arbitrary one, the reason for its adoption being that it is really impossible in such cases to work out with any certainty what the rights of the parties in the event which has happened should be. Time has elapsed and the position of both parties may have been more or less altered and it is impossible to adjust or maintain the rights of the parties with exactitude. That being so, the law treats everything that has already been done in pursuance of the contract as validly done, but relieves the parties of further responsibility under it." Thus the rule admitted to be arbitrary is adopted because of the difficulty, nay the apparent impossibility, of reaching a solution of perfection. Therefore leave things alone—*potior est conditio possidentis.* That maxim works well enough among persons engaged in transactions which are criminal or *contra bonos mores;* let it be applied to circumstances of supervenient mishap arising from causes outside the volition of parties—under this application innocent loss may and must be endured by the one party, and unearned aggrandisement may and must be secured at his expense to the other party. That is part of the law of England.

I am not able to affirm that this is any part, or ever was any part, of the law of Scotland.

No doubt the adjustment of rights after the occurrence of disturbances, interruptions or calamities is in many cases a difficult task. But the law of Scotland does not throw up its hands in despair in consequence and leave the task alone. The maxim just quoted and any application of it under the law of Scotland found no place except in quite another connection, namely, where there is a *turpis causa.* Under that law restitution against calamity or mischance which produces a failure of consideration is one thing that the law must and will do its best to accomplish. But restitution *ob turpem causam* that the law will not make. The mischief makers' appeal is vain; the answer to them is the maxim *potior est conditio possidentis.*

I need not labour the distinction. It is quite clear in the Roman texts. The law of Rome knew that maxim just cited well, but it applied it not to an innocent but to a guilty case. When money had been received *ob turpem causam* then the law could not

be invoked to have restitution. The possessor was left with his gain and the other with his loss—in an evil cause the law could not interpose. And Stair in a passage not often quoted (i, 7, 2) puts the matter in a nutshell—"But in things received *ex turpi causa*, if both parties be in *culpa, potior est conditio possidentis*, so there is not restitution." But restitution there ought to be here simply and shortly because there is no *turpis causa*. In such a case the innocent must be restored against loss and the unearned aggrandisement must be yielded up.

To apply these principles to the case in hand there can be no doubt that the person who received £2310 in part payment of engines which were to be built and supplied must restore money in the event of the engines not having been supplied and not even having been built. Both the law of Rome and the law of Scotland, not to speak of the equity of the situation, would have been clear on the subject.

I have not adverted to the puzzle that was attempted in argument as to whether the remedy of restoration sought was under the contract or not under the contract, and that for the simple reason which is thus put unanswerably by Lord Mackenzie—"The pursuers sue for repetition of the part of the price which they paid. Their case involves construction of the contract, more particularly article 9, but it is not an action on the contract. It is a claim for restitution, and unless the contract contains express terms to the contrary the law of Scotland will give the remedy asked." To which I venture to add this further remark, that suppose this contract of sale referred to is entirely out of the case there is another contract so simple and elementary as *do ut des* enrolled by the civil law in its list of innominate contracts, and that would amply justify in itself, and even on the ground of contract and its recognised consequences the restitution sought.

I agree with the judgments of the Lord Ordinary and of Lord Mackenzie. I think that this House should reverse the judgment of the First Division and restore that of Lord Hunter.

Their Lordships ordered that the interlocutor appealed from be reversed, that the interlocutor of Lord Hunter be restored, and that the respondents do pay to the appellants the costs of this appeal.

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