are agreed in telling us that the value is less than £50. It rather looks to me as if each party had confidently hoped and expected to win in the Court below, and that both of them had meant to preclude an appeal to this Court. But however that may be, it seems to me plain that this appeal is incompetent, and should be dismissed.

LORD SALVESEN—I am of the same opinion. The point for our decision is whether this is a case which exceeds £50 in value. I agree with the argument of Mr Maclaren that in the case of an action for delivery of an article or *ad factum præstandum*, if there are no materials on the pleadings from which you can ascertain the value of the cause—that is to say, transmute the value of the article or of the obligation sought to be enforced into money, then the older decisions must prevail, and that you cannot hold that the jurisdiction of the Sheriff Court is privative. If, therefore, the pursuers of this action had refrained from stating what was the pecuniary value of the piano, I do not think it would have been competent for us to consider whether the cause was really of a less value than £50.

But for the purpose of ascertaining the value of the cause I think it is quite legitimate to look at the pleadings of parties. If the pursuer cannot refuse to take a given sum in full of his conclusions, that sum is the value of the cause, and it seems to me perfectly clear that if he sets forth in his pleadings that the value of the piano is £22, he cannot refuse to take that sum if it is tendered. It may be otherwise if he wants the article himself and does not provide any standard by which it can be transmuted into money—he may have even in the case of subjects of apparently trivial value an interest in obtaining possession of them quite apart from their pecuniary value. Here he cannot take up that position because the contract upon which he founds in his pleadings discloses that this was an ordinary mercantile transaction, and that upon payment of certain instalments amounting *in cumulo* to £22, 1s., the property in this piano would be transferred from the pursuers to the defender. That is a peculiarity of this case which was not present, so far as I know, in any other of the cases that have been cited to us, and I do not think we are trenching in any degree upon the authority of the older decisions in reaching the decision which your Lordship in the chair has indicated. I should be very slow to go outside the record in order to ascertain the value of a cause. Then one would be in the region of more or less *ex parte* statements or of partial proof, but where the parties are agreed on the pleadings that the pecuniary value of an article delivery of which is sought is less than £50, then I think the jurisdiction of this Court is excluded.

LORD GUTHRIE—Mr Maclaren frankly admitted that his case for appeal depended upon the Court confining its attention to the conclusion and ignoring the fact that in the condescendence and answers the parties are agreed that the value of the article is below the necessary sum. The question of appealability, he said, depends on the conclusions of the summons, and if the summons contains no pecuniary conclusions the judgment is appealable because the value may be more than £50. That was argued by him on the authority of certain cases in which not only was there no pecuniary conclusion in the summons but the parties' pleadings showed no agreement as to the value of the cause being less than the sum necessary to make the judgment in the Court below appealable. But in all these cases not only do the judges point out that the summons contains no pecuniary conclusion, but also that it is impossible without inquiry to hold that the sum involved may not be such as to make the cause appealable. I refer to such cases as *Purves* v. *Brock*, 5 Macph. 1003; *Henry* v. *Morrison*, 8 R. 692; *Dickson and Walker* v. *John Mitchell & Company*, 1910 S.C. 139; *Dickson* v. *Bryson*, 16 R. 673; and *North British Railway Company* v. *M'Arthur*, 17 R. 30; and with regard to the last case, if the test applied there is applied here—for what amount of money could the defender get rid of the action—then the case is not appealable.

The Court sustained the objection, dismissed the appeal, and remitted the cause to the Sheriff to proceed therein as accords.

Counsel for the Appellant—Maclaren. Agent—Lindsay C. Steele, Solicitor.

Counsel for the Respondents—Ingram—Garrett. Agents—Mackenzie & Fortune, S.S.C.

Wednesday, May 29.

SECOND DIVISION.

[Bill Chamber.

GREEN *v.* THE LORD ADVOCATE.

War—Process—Interdict—Competency—Military Service—Friendly Aliens—Liability for Military Service—Military Service Act 1916 (5 *and* 6 *Geo. V, cap.* 104), *sec.* 1—*Military Service* (*Conventions with Allied States*) *Act* 1917 (7 *and* 8 *Geo. V, cap.* 26), *secs.* 1 *and* 2 *and First Schedule*—*Army Act* 1881 (44 *and* 45 *Vict. cap.* 58), *sec.* 190 (31)—*Reserve Forces Act* 1882 (45 *and* 46 *Vict. cap.* 48), *sec.* 15.

Russian subjects resident in Scotland were in April 1918 called up for military service. They presented a note of suspension and interdict against the notices calling them up on the ground that, the Government of Russia having made peace with the Central Powers, the Agreement between Russia and Britain under which the Military Service (Convention with Allied States) Act 1917 had been applied to Russian subjects in Britain fell, and they were consequently no longer liable to military service. *Held* that the note of suspension and interdict was incompetent.

The Military Service Act 1916 (5 and 6 Geo. V, cap. 104) enacts—Section 1—"(1) Every male British subject who . . . (*satisfies certain conditions as to residence, age, &c.*) . . . shall . . . be deemed as from the appointed date to have been duly enlisted in His Majesty's Regular Forces for general service with the colours or in the Reserve for the period of the war, and to have been forthwith transferred to the Reserve. (2) The Army Act . . . and the Reserve Forces Acts 1882 to 1907, and any Orders and Regulations made thereunder shall apply accordingly to any man who is so deemed to have been enlisted and transferred to the Reserve. . . . Provided that (*a*) where the question whether a man is a man who under this section is deemed to have been enlisted and transferred to the Reserve or not, is raised on proceedings in respect of an offence alleged to have been committed by the man as a member of the Reserve while he was a member of the Reserve in pursuance of the transfer under this Act, or in respect of any alleged failure to comply with any order calling him up from the Reserve for permanent service, that question shall be decided only on proceedings before a civil court. . . ."

The Military Service (Conventions) Act 1917 (7 and 8 Geo. V, cap. 26) enacts—Section 1—"His Majesty may by Order in Council, signifying that a convention has been made with a foreign country, allied or otherwise, acting in naval or military co-operation with His Majesty in the present war (in this Act referred to as the contracting country), which imposes a mutual liability to military service on British subjects in that country and on subjects of that country in the United Kingdom, direct that this Act shall have effect with respect to the contracting country and the subjects of that country; and on any such Order in Council being made this Act shall have effect accordingly. . . ." Section 2—"Where this Act is so applied with respect to any country, subjects of that country shall . . . be liable to military service under the Military Service Acts 1916 in the same manner as British subjects; and these Acts shall apply accordingly subject to the following modifications —(*a*) The appointed date shall, as respects subjects of the contracting country who come within the operation of the Military Service Acts 1916 and 1917, on the application of this Act in respect of that country, be the thirtieth day after the date of the Order in Council applying the Act. . . ."

In April 1918 Jack Green, 35 Surrey Street, Glasgow, and others, *complainers*, presented a note of suspension and interdict against the Right Honourable James Avon Clyde, His Majesty's Advocate for Scotland, as representing the Crown and the Minister of National Service; and Major W. Ross, Assistant Director of Recruiting, Area Recruiting Office, 17 Sauchiehall Lane, Glasgow; and Colonel William Robertson, V.C., Assistant Director of Recruiting, Area Recruiting Office, Music Hall, 54 George Street, Edinburgh, *respondents*, whereby they craved the Court to grant suspension of certain notices calling up the complainers for military service in the British Army, and to interdict, prohibit, and discharge the respondents from taking steps to enforce the calling-up notices by having the complainers arrested or charged as absentees or otherwise.

The complainers averred—"(Stat. 1) The complainer Jack Green was born in Russia, of Russian parents, and he by nationality is a Russian subject. . . . The said complainers have not become naturalised British subjects. (Stat. 2) By the 14th Article of a Treaty of Commerce and Navigation entered into between Great Britain and Russia, dated 12th January 1859, it is provided that 'The subjects of either of the two high contracting parties in the dominions and possessions of the other shall be exempted from all compulsory military service whatever, whether in the Army, Navy, or National Guard or Militia.' (Stat. 3) On or about 24th October 1917 His Majesty's Ambassador at Petrograd received from the Russian Minister for Foreign Affairs a Note stating that economic conditions arising out of the war compelled the Russian Government to take into consideration the revision of their existing Treaties. The Note stated that the Treaty of 1859 would be terminated on 24th October 1918. The terms and conditions of the said Treaty are still binding on the British Government, and the pursuers are entitled to the benefit of the provisions of the said Treaty. (Stat. 4) On or about 16th July 1917 an Agreement was entered into between the British Government and the Russian Provisional Government 'relative to reciprocal liability to military service' of subjects of these countries respectively. By said Agreement it was, *inter alia*, provided that the contracting Governments would reciprocally bid their subjects inhabiting respectively Great Britain and Russia, 'and belonging to the categories called to the colours in their own country,' to proceed to their respective countries, and that such 'of these persons' as refused, after due notice given, to return to their own country shall be compelled to undertake military service in the country of their residence, the call 'of these persons' to arms to be effected by the competent authorities of the country of their residence, who for this purpose should apply the dispositions in force in their respective countries as regards absentees. It is claimed by the defender that the said Agreement was a convention within the meaning of the Military Service (Conventions with Allied States) Act 1917 (7 and 8 Geo. V, c. 26), which was passed on 10th July 1917 in order to enable His Majesty in Council to carry into effect Conventions which might be made with Allied and other States 'as to the mutual liability' of His Majesty's subjects and the subjects of the Allied and other States to military service. By section 2, sub-section 1, of the said Act it is provided that the subjects of any country to which the Act has been applied who have not made application to return to the contracting country of which they are subjects, or fail to avail themselves of an opportunity to do so, shall be liable to military service

under the Military Service Acts 1916 in the same manner as British subjects, subject to certain modifications therein set forth. (Stat. 5) The said Treaty of 1859 is not referred to, and was not abrogated by the said Agreement of 1917, and it was not revoked by the Military Service (Convention with Allied States) Act 1917. Since the making of the said Convention and the passing of the said Act, the Government professing to have power to act in the name of Russia has withdrawn from the duties of its alliance with Great Britain against the Central Powers, has repudiated any obligation to continue at war with the Central European Powers in conjunction with this country and her other Allies, and has concluded peace with Germany. In these circumstances the Convention is no longer operative to regulate 'mutual liability' of subjects of the high contracting parties. The pursuers do not belong to any category which is now being called to the colours in their own country, and so do not fall within the class of persons affected by the provisions of sections 1, 2, and 3 of the said Agreement. Moreover, in respect of the cessation of a state of war between Russia and the Central European Powers and the conclusion of peace between Russia and them, the condition to which the Military Service (Convention with Allied States) Act applies does not exist in regard to Russian subjects, and the Treaty of 1859 still stands and is binding on the British Government."

The respondents averred — "(Ans. 2) Explained that by Agreement of 16th July 1917 between His Majesty's Government and the Provisional Government of Russia the said Treaty of 1859 was modified in so far as it exempted the subjects of each of the high contracting parties from compulsory military service in the dominions and possessions of the other. . . . (Ans. 4) The said Agreement and the Military Service (Convention with Allied States) Act 1917 (7 and 8 Geo. V, cap. 26) are referred to for their terms. *Quoad ultra* denied. By section 1 of said Act His Majesty was empowered by Order in Council signifying that a convention had been made with a foreign country, allied or otherwise acting in naval or military co-operation with His Majesty in the present war, which imposes a mutual liability to military service on British subjects in that country and on subjects of that country in the United Kingdom, to direct that the Act should have effect with respect to the contracting country and the subjects of that country, and it was enacted that on any such Order in Council being made the said Act should have effect accordingly. Upon 22nd August 1917 an Order in Council was promulgated signifying that such an Agreement had been made with Russia, and directing that the said Act should have effect with respect to Russia and to Russian subjects. The complainers other than Wincentas Sandarga or Thomson belonged to categories called to the colours in Russia, and did not elect to return to Russia as they were entitled to do. Said complainers were accordingly, by virtue of said Order and said Act of Parliament and the Military Service Acts, deemed to have been enlisted as from the thirtieth day after the date of the Order, viz., 21st September 1917, in His Majesty's Regular Forces for general service with the colours or in the Reserve, and to have been forthwith transferred to the Reserve. The complainer Wincentas Sandarga or Thomson also belonged to a category called to the colours in Russia, but applied to return to Russia. He refused, however, to avail himself of an opportunity to do so on 29th September 1917, and he was accordingly deemed to be enlisted as from that date in His Majesty's Regular Forces for general service with the colours or in the Reserve, and to have been forthwith transferred to the Reserve."

The complainers *pleaded*—"1. The complainers being Russian subjects are exempt, under the Treaty of 1859 and in the present circumstances, from conscription for military service under the British Crown, and are entitled to suspension and interdict as craved. . . . 3. Russia having withdrawn from her alliance with Great Britain and her allies, and having concluded a separate peace with Britain's enemies, Russian subjects resident in Great Britain are not legally liable to conscription for service in the British army, and suspension and interdict should be granted as craved. 4. In any event, the liability of persons in the position of the complainers to serve with the British colours can be decided in the pending action in a court of competent jurisdiction, and suspension and interdict should be granted pending the decision of the said action."

The respondents pleaded—"1. The note of suspension and interdict is incompetent in respect the complainers are subject to the provisions of the Military Service Acts, *et separatim*, in respect that the Acts complained of are administrative Acts of the Crown. 2. The complainers' statements are irrelevant and insufficient to support the prayer of the note. 3. The complainers having been duly transferred to the Reserve by virtue of the Acts founded on, the note should be refused. 4. The complainers having duly become members of the Reserve, and having as such members under the Military Service Acts a competent remedy against being illegally compelled to undergo active service, the note should be refused. 5. The proceedings complained of being lawful and regular, and in accordance with the provisions of the Military Service Acts, the note should be refused."

On 2nd May 1918 the Lord Ordinary (ANDERSON) passed the note and refused to grant interim interdict.

Opinion.—"This note of suspension and interdict raises a question of prime importance. The British Government has apparently resolved to incorporate in the British army all male Russian subjects who are resident in this country and are of the appropriate military age. A number of those Russian subjects have brought these proceedings against those who are responsible for recruiting in this country, and they ask the Court to prohibit and discharge the respondents from taking steps to enforce

certain calling-up notices which the complainers have received and to grant interim interdict.

"It is common ground that all the complainers are Russian subjects by nationality, and that none of them has become a naturalised British subject. The respondents submitted a general argument to the effect that in respect that the complainers are aliens they are debarred from appealing to the courts of this country, and in support of that view I was referred to a decision of Lord Kyllachy (*Poll* v. *Lord Advocate and Others*) where this general proposition is laid down —'An alien is not entitled to question in the courts of this country the administrative acts of the Crown.'

"I am satisfied that in this case what was decided in the case of *Poll* is not applicable, because it seems to me that both in respect of the provisions of a Treaty of Commerce entered into between Great Britain and Russia in the year 1859 and of an Agreement entered into between the British and Russian Governments in 1917 Russians who may be resident in this country are given by implication a right of appeal to the courts of this country with reference to any matters of dispute which may arise in connection with either that Treaty or that Agreement. Therefore I have no difficulty in rejecting the first contention of the respondents to the effect I have stated, and which was made the basis of a claim to have the suspension disposed of at this stage.

"The next contention which was urged by the respondents was that this was a matter of military administration, and that therefore the jurisdiction of the courts of law was excluded. I have already dealt with this argument in the case of *Beattie*, which I have just advised, and I merely repeat that in my judgment it is the right of a subject to appeal to a court of law, where the matter of complaint is that an administrative body has erred in law, or has deviated from correct procedure to the prejudice of the party complaining.

"The case in my judgment raises questions of law of interest and importance, to wit, these two — first, whether the provisions of the Treaty of 1859 bearing upon military service are still operative inasmuch as they have never been specifically abrogated, and second, whether, assuming those provisions to have been modified by the Agreement of 1917 to which I have alluded, that Agreement is still operative. These are the questions which it seems to me the pleadings raise, and they are questions of law, and therefore are appropriate to a court of law.

"There is at the present time pending before Lord Ormidale an action in which the record has been closed between two Russian subjects in the same position as the complainers in this case against the military authorities who are responsible for recruiting. The action is in the form of a declarator, but the pleadings in it raise exactly the same questions of law which I have alluded to. The respondents do not take the plea of *lis alibi pendens*. At all events up to the present time that plea has not been taken, although it may very well be when the matter comes to be dealt with in the Court of Session on an adjusted record that plea may be propounded.

"I think the respondents were right in not proponing that plea at this stage, because I do not think it could be given effect to at this stage.

"The process of suspension and interdict raises exactly the same questions as are raised in the declarator, although the parties are not the same; but the process in my judgment has for its main object the maintenance of the *status quo*, and therefore may be regarded as in a sense supplementary to or ancillary to the declaratory action which has been raised in so far as Balkin, one of the parties to both actions, is concerned, and therefore I do not think that if that plea had been stated it could have been given effect to at this stage to the effect of getting rid altogether of the suspension and interdict.

"Now the basis of the complainers' case is the Treaty of Commerce and Navigation of 1859 to which I have alluded. The complainers maintain that the 14th Article of that Treaty, which provides that the subjects of Great Britain and Russia living in the dominions of each other shall be exempted from all compulsory military service whatever is still in operation, and it is contended that none of the complainers, nor indeed any Russian subject living in this country, is liable to military service in the British Army. The respondents on the other hand maintain that that Article of that Treaty was impliedly repealed although it has not been specifically abrogated by the Agreement of 1917 to which I have referred, and that that Agreement is still in force.

"The view I have taken of the question is this—that in respect there is an action pending in the Court at the present time raising these questions, I propose to pass the note in this case for the trial of the questions which it raises although they are the same, but on a *prima facie* consideration of the pleadings and the arguments to which I have listened, my own impression is that the complainers are wrong in their contentions and that the respondents are right. I shall give effect to this impression which I have formed by refusing interim interdict.

"The reasons which, on a *prima facie* consideration, have induced me to take that view are these—In the year 1917 the Military Service (Conventions with Allied States) Act was passed (7 and 8 Geo. V, cap. 26), which provided by the first section that the King by Order in Council might approve of a Convention which had been entered into between any of the Allies engaged on the Entente side in this War.

"That Act came into operation on 10th July 1917. The next thing was that on 16th July 1917 a Convention or Agreement was entered into between the Government of this country and the Provisional Government which was then regulating the affairs of Russia, and that Convention or Agreement was approved of by an Order in Council passed on 22nd August 1917.

"The effect of that Agreement and that Order in Council was this—That all Russians of military age resident in this country became impliedly incorporated in the British Army as from the appointed day, and the appointed day was 25th September 1917 in the ordinary case.

"Remedies were given to Russian subjects in this country who wished to avoid the operation of these enactments. By the second section of the Military Service (Conventions with Allied States) Act, any Russian subject to whom the Convention applied might apply to the appropriate authority for leave to quit this country and return to Russia, and if that leave was granted an opportunity had to be provided to enable the Russian so desiring to quit this country to get to Russia.

"Now in the case of all the complainers except one no application was made for leave to go to Russia. In the case of one of the complainers an application was made and provision for his transportation to Russia was made, but he at the last moment declined to go to Russia. Accordingly every one of the complainers, by the operation of the said Act and the Order in Council and the Agreement I have alluded to, became British soldiers as from the month of September 1917. This seems to be a conclusive answer to the prayer of the note, because whatever be the state of matters now as between Russia and Germany, these countries were undoubtedly at war in September 1917 (see the case of *ex parte Kutchinsky*, dated 22nd March 1918).

"But if the question fell to be determined on a consideration of present circumstances I am unable to hold that the contentions of the complainers are sound. They maintain that as Russia and Germany are now at peace the contemplated circumstances of the Agreement have failed, and that it has *ipso facto* come to an end. Can it be affirmed that the relations at present subsisting between Russia and Germany are those of peace? It is true that there has been published a Treaty, made at Brest Litovsk between parties representing Germany and Russia, purporting to establish peace between these countries. But on the other hand it is matter of common knowledge that at the present moment German forces are in Russia and interfering with Russians in various parts of Russia, and have penetrated as far as the Crimea, and Russia according to what is contained in public prints is in course of raising further armies to continue the contest against Germany.

"The only safe basis of judgment seems to me to be this—that the Agreement has not been recalled by any Russian Government, and that by its fifth article it is to cease to have force from the date of the conclusion of the present war. This means not from the time Russia ceases to fight, but from the time when Germany stops fighting. On those considerations I have reached the conclusion that while the note falls to be passed for the trial of the questions raised in the Court of Session, I am not going to tie the hands of the military authorities in any way by granting the interim interdict which is craved."

The respondents reclaimed, and argued—The note was incompetent. The Military Service Act 1916 (5 and 6 Geo. V, cap. 104), section 1, provided that all British subjects between certain age limits were deemed to have enlisted in the army and to have been forthwith passed into the reserve. This Act was held to apply by the Military Service (Conventions with Allied States) Act 1917 (7 and 8 Geo. V, cap. 26), secs. 1 and 2, to those Russians of military age who elected to remain in this country rather than to return to Russia. Under the Reserve Forces Act 1882 (45 and 46 Vict. cap. 48) a man in the Reserve received a notice calling him up for service with the colours, which if neglected rendered him liable to prosecution as a deserter. Under the Reserve Forces Act 1882, section 15, he was tried by court-martial, but under the Military Service Act 1916 he might be brought before the Sheriff if the question was whether he was in the army or not. Such a summary prosecution fell under the Summary Jurisdiction (Scotland) Act 1908 (8 Edw. VII, cap. 65), which excluded all appeals other than an appeal to the High Court of Justiciary. Accordingly the complainers ought to have objected to enlistment in the army in the proper quarter conform to the special statutory procedure provided for them. They had not done so, and it was incompetent for them to come before the Court of Session and try to obtain an interdict. Otherwise anyone could by prolonged legal proceedings negative the working of the Military Service Acts, in which an expeditious procedure was essential. The complainers were enlisted soldiers, and nothing had occurred to discharge them from the army. The Court of Session certainly had no authority to discharge them from the army, nor could it interdict the proper military authority from giving an order to a soldier in the army. Only he who had enlisted them could discharge them, and that was the King acting through his ministers. The agreement with the Russian Government under which they had been enlisted in the British army, and which had been made prior to the peace concluded between Russia and Germany, had never been abrogated, and until this had been done through the ordinary diplomatic channels they continued to be soldiers in the British army. Counsel referred to *Lawrence* v. *The Comptroller-General of Patents*, 1910 S.C. 683, *per* Lord Dundas, 47 S.L.R. 524; *Pasmore* v. *Oswaldtwistle Urban Council*, [1898] A.C. 387, *per* Lord Halsbury, L.C., at p. 394; *Tay District Fishery Board* v. *Robertson*, (1887) 15 R. 40, 25 S.L.R. 54.

Argued for the complainers—The Lord Ordinary, having considered that there was here a substantial question to try, had acted rightly in passing the note. The complainers in the present case being in the same position as subjects of a neutral state resident in this country had been wrongly called-up for military service. Although the Russian and the British Governments

had made an agreement as to the military service of their respective subjects, that agreement ceased to operate as soon as peace had been concluded between Russia and Germany. Otherwise Russian subjects fighting in the British army might, if taken prisoners, be treated as *franc tireurs* by the German authorities and shot accordingly, being subjects of a country at the time in a state of peace with Germany. The *onus* to show that they had a right to resort to the Court of Session did not lie on the complainers. It was incumbent on those who denied them this right to show cause why. The Military Service Act 1916 provided for persons appealing against enlistment having recourse to a civil court, and this meant any civil court and not merely the sheriff. The civil court mentioned in section 1 (2) of that Act was referred to as distinguished from a military court, and did not necessarily mean the same civil court as that referred to in the Reserve Forces Act 1882. Liberty was not to be taken away because the word "court" was interpreted by the Crown authorities according to the meaning of the Army Acts. The words in the Military Service Act 1916 were "a civil court" and not "the civil court provided by the Reserve Forces Act." The complainers in the present case, not being liable to be called up for military service, were not guilty of having committed any offence at all. Exclusion of the right to come before the Court of Session in defence of their liberty was not to be implied, but had to be expressly stated in the Act. The following cases were cited—*Walker* v. *Baird*, [1892] A.C. 491, and *Institute of Patent Agents* v. *Lockwood*, (1894), 21 R. (H.L.) 61, 31 S.L.R. 942.

At advising—

LORD JUSTICE-CLERK—The complainers in this case were born Russian subjects, and though resident in this country they have not been naturalised. They seek to interdict the military authorities and the Lord Advocate, as representing the Crown, from following up notices calling on the complainers to report for military service and to suspend the calling-up notices. The question on the merits was not completely argued before us, the Crown desiring to have a judgment on the competency of the note of suspension and interdict.

In their statements the complainers recite the provisions of a Treaty of 1859 between Great Britain and Russia under which Russian subjects were not liable to compulsory military service in this country, and no doubt any failure to observe the terms of that Treaty would give occasion for diplomatic representations by the Russian Government. The complainers did not contest either on record or in the argument before us that at one time they fell within the scope of the Military Service Act of 1916 by virtue of the Convention and the Statute and Order in Council subsequent thereto. In their statement of facts they go on to state that that Treaty, though denounced by the Russian Ministry as from 24th October 1918, was still in force. But they also aver that on 16th July 1917 an Agreement was made between the Russian and British Governments by which in certain events, which apply here, Russian subjects resident in this country should be liable to be called up by the British Government for military service in this country. The complainers say—"It is claimed by the defenders that the said Agreement was a convention within the meaning of the Statute of 1917" (7 and 8 Geo. V, cap. 96), under which persons in the position of the complainers were liable "to military service under the Military Acts 1916 in the same manner as British subjects," subject to certain modifications therein set forth. The complainers do not aver that that claim is not well founded, apart from certain averments they make to the effect that the convention is "no longer operative," having ceased to be so because of supervening acts of "the Government professing to have power to act in the name of Russia," including its having "concluded peace with Germany."

It appears to me that the Agreement falls within the scope of the Act of 1917, and it was dealt with on this footing and professed to be made effective in this country by an Order in Council of 22nd August 1917. In my opinion the complainers are not entitled to challenge before us the validity or effectiveness of this Order in Council according to its terms, and indeed no argument was addressed to us on this point. I think that the contention of the Crown that the complainers were deemed to have been enlisted as from 21st September 1917 is well founded. In that event any such question as the complainers seek to raise in this process falls, I think, to be determined, if and when properly raised, by a "civil court" in the sense of the Army Act 1881, with an appeal on questions of law to the High Court of Justiciary.

In my opinion the note should be dismissed as incompetent. If a person resident in Great Britain is deemed to be enlisted in the British Army, I do not think any actings or conduct of a foreign Government can, without the consent of the British Government, release him from the obligation to serve. Moreover, there is a series of statutes regulating the legal rights and position of those who are members of the army—whether active or reserve. Under these statutes provision is made for questions of fact and law being disposed of in cases like the present by a "civil court," which is interpreted by the Army Act 1881 as meaning a court of ordinary criminal jurisdiction, including a court of summary jurisdiction. From the judgment of such a court there is an appeal to the Justiciary Court by way of a Stated Case. The Legislature has thus provided a special code for dealing expeditiously with cases relating to liability to military service and the sufficiency and legality of any order calling a man up to the colours. The effect of that code is, I think, to confer a privative jurisdiction on the "civil court" defined as above in such matters, and to oust the jurisdiction of the ordinary law courts in questions dealing with failure to comply

with a requirement to serve as a soldier under a calling-up order.

It would obviously be most inconvenient and prejudicial to the public interest if every man called up to serve could litigate the question through the ordinary civil courts. I think the law does not allow of that being done, but requires any question such as is stated in the present case to be disposed of by the "civil court" defined as above, with an appeal on a question of law to the Court of Justiciary. Even if the matter were one of discretion, I think the interdict should be refused so as to enable the question to be decided by the summary and more expeditious procedure which the Legislature has, in my opinion, authorised.

LORD DUNDAS—In this case the Lord Ordinary has passed the note. I think he was wrong in doing so, and that he ought to have refused it as incompetent. A good deal of what the Lord Ordinary says in his opinion seems to me to point to a judgment in that sense, and I am not sure that I fully appreciate why he thought fit to pass the note.

The complainers are admittedly of Russian nationality. They object to being called up for military service, because they say that at the date of their calling-up notices they were not in the reserve forces of the British Army. I think the complainers are wrong. They set forth on their record an Agreement between the British Government and the Russian Provisional Government, dated 16th July 1917, and duly approved by Order in Council on 22nd August 1917, in terms of the Act 7 and 8 Geo. V, cap. 26. Clause 3 of the Agreement or Convention thus ratified provided that such Russian subjects of military age resident in Great Britain as refused after due notice given to return to their own country "will be compelled to undertake military service in the country of their residence." The complainers were of military age, resident in Great Britain, and they refused or failed to return to their own country. They allege that "since the making of the said Convention and the passing of the said Act the Government professing to have power to act in the name of Russia has withdrawn from the duties of its alliance with Great Britain against the Central Powers, has repudiated any obligation to continue at war with the Central European Powers in conjunction with this country and her other allies, and has concluded peace with Germany." All this appears to me to be quite irrelevant. The complainers do not even aver that the Government "professing to have power to act in the name of Russia" has repudiated, or endeavoured to repudiate, the Agreement of 1917. But even that averment would have been irrelevant; such a situation, if it came about, might have given rise to diplomatic complications, but could not, in my judgment, any more than that which is actually averred, have altered in any way the legal effect of the Convention upon the complainers as regards their liability to serve in the British Army. I agree with the Lord Ordinary when he says that "every one of the complainers, by the operation of the said Act, and the Order in Council, and the Agreement I have alluded to, became British soldiers as and from the month of September 1917. This seems to be a conclusive answer to the prayer of the note." But the present application is in my judgment not only irrelevant but radically incompetent. The complainers' objections to being called up must, for what they may be worth, be stated not in this Court, but in the Court of Summary Jurisdiction which the Legislature has appointed for the decision of such matters. On this point I agree with, and do not seek to amplify, what has been said by the Lord Justice-Clerk. I am therefore for recalling the interlocutor and refusing the note as incompetent.

LORD SALVESEN—In this case the Lord Ordinary has passed the note for the trial of the cause, at the same time expressing an opinion on the merits unfavourable to the complainers. This reclaiming note has been presented by the Lord Advocate in order to obtain a decision on the question whether the proceedings are competent in the Court of Session.

The complainers are Russians by nationality although resident in this country. By Agreement between the British Government and the Russian Provisional Government, dated 16th July 1917, the subjects of Russia who did not elect to return to their own country were rendered liable to military service in the country of their residence. This Agreement was a convention within the meaning of the Military Service Act 1917. On 22nd August 1917 an Order in Council was promulgated setting forth the Agreement that had been made with Russia, and directing that the Act should have effect in respect of Russian subjects. On the 30th day after the Order, namely, 21st September 1917, the complainers not having elected to return to Russia although afforded an opportunity of doing so, were deemed to have enlisted in His Majesty's Regular Forces for general service in the regular army or in the Reserve, and to have been forthwith transferred to the Reserve.

The complainers received calling-up notices, dated in April 1918, and the prayer of their note is that this Court should suspend the calling-up notices served upon them, and interdict the respondents from taking steps to enforce them by having the complainers arrested or charged as absentees or otherwise. In other words, they demand that this Court shall intervene so as in effect to have men who are at present in the Reserve of the British Army discharged from service therein.

The complainers founded, as I understood their argument, mainly on proviso (*a*) of section 1 (2) of 5 and 6 Geo. V, cap. 104. Under this proviso "where the question whether a man is a man who under this section is deemed to have been enlisted and transferred to the Reserve or not, is raised in proceedings in respect of an offence alleged to have been committed by the man as a member of the Reserve whilst he was a

member of the Reserve in pursuance of the transfer under this Act, or in respect of any alleged failure to comply with any order calling him up from the Reserve for permanent service, that question shall be decided only on proceedings before a civil court." The Lord Advocate contended that this proviso does not apply to the case of the complainers, in respect that there is no question on their averments that as at 21st September 1917 they were deemed to have been enlisted and transferred to the Reserve, the only question raised being whether in respect of the subsequent action of the Government of Russia in concluding peace with Germany the convention has ceased to be operative. I am prepared to sustain this objection. The typical case to which the proviso would apply is the case of a neutral who is served with a calling-up order, and who claims that he has not been enlisted or transferred to the Reserve because of his nationality. But even on the assumption that it applies to the complainers I think the term civil court is used in contradistinction to court-martial, and that the Court pointed to is a civil court which can exercise jurisdiction to try offences, and not the Court of Session, which has no criminal jurisdiction. The Court pointed to, I think, is the Sheriff acting under the Summary Jurisdiction Acts. From his decision there would, of course, be a limited right of appeal to the High Court of Justiciary, including an appeal on a question of law such as the complainers seek to raise. It is not conceivable, I think, that Parliament intended the civil court in this proviso to be a civil criminal court (as it must be) in proceedings in respect of an offence alleged to have been committed by a man as a member of the Reserve, and the Court of Session in proceedings in respect of any alleged failure to comply with the calling-up order. The alternative would be if the complainers' argument were accepted that every person who objected to a calling-up order on any ground of fact or law would be entitled to initiate proceedings in the Court of Session to prevent the authorities from following up the calling-up order. This view was rejected by Neville, J., in *Flint* v. *Attorney-General*, [1918] 1 Ch. 216. In that case it was decided that an action in the High Court for a declaration that the calling-up notice was *ultra vires* did not lie, the High Court not being a civil court within the statutory definition contained in section 190 of the Army Act 1881.

The sequel of that case is instructive, for the Crown took proceedings in a court of summary jurisdiction where a judgment was obtained, and in view of this the Appeal Court declined to entertain an appeal from the judgment of Neville, J. I think in this case the Lord Advocate might very well have followed the same course, which according to the concession made in *Flint's* case would have been a perfectly competent one, and we should then not have been troubled with the present case. The Lord Ordinary's judgment in refusing interdict gave the Crown an opportunity to take such proceedings, and I think they might well have acted on the hint so given. I have therefore come to the conclusion that this action of suspension and interdict is incompetent in the Court of Session, and that it should be refused accordingly.

LORD GUTHRIE was not present.

The Court recalled the interlocutor reclaimed against and refused the note.

Counsel for the Complainers—Christie, K.C.—Stuart. Agent—J. Ferguson Reekie, S.S.C.

Counsel for the Respondents—Lord Advocate (Clyde, K.C.) — Solicitor-General (Morison, K.C.)—Pitman. Agents—Inglis, Orr, & Bruce, W.S.

Tuesday, June 18.

FIRST DIVISION.

[Exchequer Cause.

INLAND REVENUE *v.* SCOTT'S TRUSTEES.

Revenue—Estate Duty—Property Passing on Death—"Interest Purchased or Provided by the Deceased"—Finance Act 1894 (57 *and* 58 *Vict. cap.* 30), *sections* 1 *and* 2 (1) *d.*

Policies of insurance upon the life of the insured, together with other funds, were assigned by him by *inter vivos* deed to trustees, who were directed to pay the premiums and other sums necessary to keep the policies in force. The trustees had, however, full power to sell, assign, or surrender the policies. The trust funds, including the proceeds of the policies, were to be held by the trustees for the daughters of the insured in liferent and their issue in fee. The trustees paid the premiums and kept up the policies till the insured's death. The Crown then claimed estate duty upon (1) the proceeds of the policies, and (2) the portion of the trust estate the income of which had been set free through its no longer having to be expended in paying the premiums. *Held* (*dub.* Lord Sands) that the proceeds of the policies were an interest provided by the deceased arising on his death, and that the portion of the trust estate the income of which had been expended upon the premiums was also an interest provided by the insured accruing on his death, in respect that it ceased at that date to be required for paying the premiums and became available then for the beneficiaries.

The Finance Act 1894 (57 and 58 Vict. cap. 30) enacts—Section 1—"In the case of every person dying after the commencement of this Act there shall . . . be levied and paid upon the principal value ascertained, as hereinafter provided, of all property, real and personal, settled or not settled, which passes on the death of such person, a duty called estate duty. . . ." Sec-